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Adopting the Principle of Equitable Relief in Clean Water Act Challenges

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Adopting the Principle of Equitable Relief in Clean Water Act Challenges

Archita Taylor[†]

TABLE OF CONTENTS

I. Introduction	222
II. History and Background of the Clean Water Act (CWA)	224
III. Citizen Suits and the CWA.....	225
A. Citizen Suits Brought Under the CWA	225
B. Government Agency Action Under the CWA.....	228
C. Interpreting the Language of <i>Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.</i>	229
IV. Circuit Split	231
A. The First Circuit’s Broad Read of the Civil Penalty Bar	231
B. <i>Coalition for a Liveable West Side, Inc. v. New York City Department of Environmental Protection</i>	232
C. The Eighth Circuit’s Reinforcement of <i>N. & S. Rivers</i>	233
D. The Tenth Circuit’s Interpretation—What this Could Mean for the Future of Citizen Suits	234
V. Permitting Equitable Relief in Citizen Suits	235
A. <i>California Sportfishing Protection Alliance v. Chico Scrap Metal, Inc.</i>	235
B. The Importance of Equitable Relief in Citizen Suits Under the CWA	236
C. The Need for Supreme Court Action.....	239
VI. Conclusion.....	239

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I. INTRODUCTION

Citizen groups have historically had a huge impact in affecting legislation and pushing for just interpretations of the law.¹ They have been key players in the realm of environmental law, and they will continue to play a key role as we move forward into an uncertain future with scarce resources and greater threats posed to our environment.² However, absent citizen suits, environmentally concerned citizens cannot effectively enforce issues concerning environmental and natural resources.³

Specifically, citizen groups have played a critical role in bringing challenges against various entities, including corporations and private businesses, under the Clean Water Act (CWA). In 1987, Congress amended the original legislation and significantly expanded the limitations on citizen suits with the passage of the Water Quality Act of 1987.⁴ Section 309(g)—the citizen suit portion of the CWA—was added in 1987 upon the passage of the Water Quality Act.⁵ Section 309(g)(6)(A) of the CWA limits citizen action against violators when an administrative enforcement action by the government has already commenced and is being diligently prosecuted by the government to require compliance by the polluters.⁶ Nonetheless, the question remains whether this civil penalty bar includes a ban on equitable relief for claims brought under the CWA. Equitable relief granted under the citizen suit provision of the CWA would allow private citizens to act as enforcers, and through the judicial system, receive not just monetary relief, but also equitable relief such as injunctions and specific performance.⁷

There is a circuit split on this very question with the First and Eighth Circuits deciding that there is a ban on equitable relief, and the Tenth Circuit holding that a civil penalty ban does not also include a ban on equitable relief.⁸ Since the Tenth Circuit's decision in *Paper Allied-Industrial, Chemical and Energy Workers International Union v. Continental Carbon Co.* in 2005, the landscape for environmental legislation has changed significantly and environmental concerns have

1. Peter H. Lehner, *The Efficiency of Citizens Suits*, 2 ALB. L. ENVT. OUTLOOK 4, 4 (1995).

2. *Id.*

3. *Id.*

4. Lisa Donovan, *Power to the People: The Tenth Circuit and the Right of Citizens to Sue for Equitable Relief Under Section 309(G)(6)(A) of the Clean Water Act*, 34 B.C. ENVT. AFF. L. REV. 143, 149 (2007).

5. *Id.*

6. *Id.* at 149–150.

7. Donovan, *supra* note 4, at 148; James R. May, *Now More than Ever: Trends in Environmental Citizen Suits at 30*, 10 WIDENER L. REV. 1, 19–20 (2003).

8. Donovan, *supra* note 4, at 152.

come to the forefront of the national agenda.⁹ Growing concerns about our limited natural resources have brought environmental issues to the attention of many policymakers and government officials. The most recent case to address this issue was decided in a District Court in California in July of 2011. The Ninth Circuit, however, has yet to decide whether equitable relief is included in the civil penalty bar under the CWA.¹⁰

In this article, I argue that equitable relief should be allowed under Section 309(g) of the CWA, which as written, bars civil penalties. Specifically, I will analyze a case, *California Sportfishing Prot. Alliance v. Chico Scrap Metal, Inc.*, that arose in the Eastern District of California, which was decided on a different issue, but discussed the issue of the equitable relief ban.¹¹ I argue that if *California Sportfishing*, or any similar case, comes to court again under the civil penalty bar issue the citizen group should not be barred from bringing a claim for equitable relief. Rather than requiring monetary compensation under the CWA, an injunction would allow a court to require the Chico Scrap Metal Company to lower the amount of pollutants it releases into California waters.

In this case, an injunction would be particularly effective because it would address the root of the problem. In comparison, a monetary penalty would not directly stop the emission of pollutants by Chico into nearby water systems. While a monetary penalty could certainly serve as a deterrent, there is no guarantee that it would prove to be an effective deterrent. Moreover, until the Supreme Court resolves the issue of whether the civil penalty bar includes claims for equitable relief, these types of cases will remain either unresolved or indeterminate. A Supreme Court decision on this issue would not only bring finality, but it would also clearly display the government's commitment to addressing growing environmental concerns. Additionally, a Supreme Court decision in favor of allowing equitable relief under the civil penalty ban would preserve the critical role that citizen groups have played in recent history in enforcing environmental legislation, particularly the CWA.

9. Paper, *Allied-Indus., Chem. & Energy Workers Int'l Union v. Cont'l Carbon Co.*, 428 F.3d 1285 (10th Cir. 2005).

10. *California Sportfishing Prot. Alliance v. Chico Scrap Metal, Inc.*, No. 2:10-cv-01207-GEB-GGH, 2011 U.S. Dist. LEXIS 77731 (E.D. Cal., July 15, 2011) (holding that the § 1365(b)(1)(B) bar prevents the federal court from having jurisdiction in this federal lawsuit, even though some of the defendants were not on state probation in the state criminal cases).

11. *Id.*

In general, citizen groups have historically played a major role in addressing environmental issues.¹² Thus, a Supreme Court decision in favor of allowing equitable relief would ensure that citizen groups continue to play a major role in addressing environmental concerns in the future.

II. HISTORY AND BACKGROUND OF THE CLEAN WATER ACT (CWA)

The Federal Water Pollution Control Act of 1948 was the first major U.S. law to address water pollution.¹³ As a result of growing public awareness and concern for controlling water pollution, major amendments to the law were passed in 1972, including the addition of the National Pollutant Discharge Elimination System (NPDES).¹⁴ After additional amendments in 1977, the Act came to be known by the name we recognize today—the Clean Water Act (CWA).¹⁵

The 1977 amendments to the CWA were critical because they transformed the law to its present-day form.¹⁶ The key provisions to the amendments included: 1) the establishment of the basic structure for regulating pollutants discharged into U.S. waters; 2) giving the EPA authority to implement pollution control programs such as setting wastewater standards for industry; and 3) making it unlawful for any person to discharge any pollutant from a point source into navigable waters, unless a permit was obtained under its provisions.¹⁷

Further amendments were made to the law in 1987.¹⁸ The most important amendments of 1987 include: 1) the requirement that states develop strategies for toxic cleanup in waters where the application of “Best Available Technology” discharge standards is not sufficient to meet State water quality standards and support public health; 2) the increase in the penalties for violations of Section 404 permits; and 3) the requirement that the EPA study and monitor the water quality effects attributable to the impoundment of water by dams.¹⁹

12. Lehner, *supra* note 1, at 4.

13. *History of the Clean Water Act*, U.S. ENVTL. PROT. AGENCY, <http://www2.epa.gov/laws-regulations/history-clean-water-act> (last visited Apr. 22, 2013).

14. *National Pollutant Discharge Elimination System, Clean Water Act*, U.S. ENVTL. PROT. AGENCY, http://cfpub.epa.gov/npdes/cwa.cfm?program_id=6 (last visited Apr. 22, 2013).

15. *History of the Clean Water Act*, *supra* note 13.

16. *Id.*

17. *Id.*

18. *Federal Water Pollution Control Act (Clean Water Act)*, *Digest of Federal Resource Laws of Interest to the U.S. Fish and Wildlife Service*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/laws/lawsdigest/FWATRPO.HTML> (last visited Apr. 17, 2013).

19. *Id.*

As an enforcement mechanism, Congress provided for government or agency action, as well as citizen suits.²⁰ Section 1319 provides for government and agency action, while Section 1365 provides for citizen suits.²¹ Since its inception, the citizen suit provision of the CWA has been critical to addressing enforcement problems.²²

There are some who argue that citizen suits are only permitted when the government has not acted because allowing suit for injunctive relief, despite a state's diligent efforts at administrative enforcement, could lead to undue interference with the state agency's legitimate efforts.²³ On the other hand, there are also valid arguments for why citizen suits should be vigorously safeguarded. Because of limited government resources, only extensive use of citizen suits by private attorneys can generally safeguard the enforcement system from collapse. Extensive use of citizen suits can also prevent states from using lax environmental enforcement regulations as economic development tools to attract or retain businesses in their respective states.²⁴

III. CITIZEN SUITS AND THE CWA

A. Citizen Suits Brought Under the CWA

Perhaps one of the most crucial enforcement provisions provided in the Clean Water Act is the citizen suit provision in Section 1365(a), which states:

[A]ny citizen may commence a civil action on his own behalf - (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator. The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an

20. David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority Is Shared by the United States, the States, and Their Citizens?*, 54 MD. L. REV. 1553, 1560-61 (1995).

21. Donovan, *supra* note 4, at 148-50.

22. Hodas, *supra* note 20, at 1561.

23. Ark. Wildlife Fed'n v. ICI Ams., Inc., 29 F.3d 376 (8th Cir. 1994).

24. Hodas, *supra* note 20, at 1561.

order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.²⁵

The citizen suit provision of the CWA allows citizens to act as enforcers against violators of the CWA. Vigorous enforcement is central to achieving improved water quality.²⁶ Wastewater facilities will also have to operate within their permit limitations if federal agencies and states seriously pursue compliance.²⁷ However, when the Environmental Protection Agency (EPA) and the states take ineffective enforcement actions by reducing proposed fines to inconsequential amounts, the companies and local governments that comply with water laws are penalized, rather than the CWA violators.²⁸

Government resources are becoming increasingly limited. Additionally, the number of violations often overwhelms the enforcement capacity of both the federal and state governments.²⁹ With fewer government resources to handle growing environmental concerns, citizen enforcers are becoming an increasingly critical tool for enforcement of environmental legislation, such as the CWA.³⁰

Like the CWA, most major environmental legislation is federal. However, even though the federal government sets minimum national standards, states are left to do the permitting and enforcing for the federal government.³¹ Not only do state environmental agencies have a better concept of local environmental concerns and problem areas, they are also able to respond more rapidly to local pollution problems than the federal government.³² However, because of shrinking state budgets and increasing interstate competitive pressures, state enforcement activity has dropped drastically and federal enforcement has failed to fill the gap in the enforcement of environmental legislation.³³ This is where the citizen suits prove to be immensely useful.

25. 33 U.S.C. § 1365 (2012).

26. See Hodas, *supra* note 20, at 1555.

27. *Water Pollution Prevention and Control Act of 1991: Hearing on S. 1081 Before the Subcomm. on Environmental Protection of the Senate Comm. on Environment and Public Works*, 102d Cong., 1st Sess. 688 (1991).

28. *Id.*

29. Hodas, *supra* note 20, at 1560.

30. *Id.* at 1562.

31. *Id.* at 1571.

32. *Id.*

33. CLIFFORD RECHTSCHAFFEN, CTR. FOR PROGRESSIVE REGULATION, ENFORCING THE CLEAN WATER ACT IN THE TWENTY-FIRST CENTURY: HARNESSING THE POWER OF THE PUBLIC SPOTLIGHT (2004), available at http://www.progressiveregulation.org/articles/Enforcement_WP_Oct_2004.pdf.

The regulated community has been extremely concerned about citizen suits.³⁴ Thus far, citizen suits have been effective at increasing voluntary compliance among polluters. Among the many ways in which citizen suits have proven effective is their success in limiting the defenses that polluters can assert, as well as persuading courts to reject other defenses as a matter of law.³⁵

Citizen suits are also valuable for many other reasons. First, a citizen suit in federal court exposes a violator to a greater risk of civil penalties than the violator would be exposed to in state courts, EPA administrative actions, or other agency actions.³⁶ Second, because citizen groups are outsiders to these deals, citizen groups, unlike state governments, are not reluctant to seek modifications permitting deals between the regulated community and state governments.³⁷ Third, citizen suits are not subject to the political pressures that might hinder state enforcement.³⁸ Fourth, for similar political reasons, citizens groups are more willing and better able to enforce the CWA against municipalities and state facilities than the state.³⁹ Fifth, without citizen suits, regulators would pursue few, if any, actions against non-major violators.⁴⁰ Sixth, citizen groups may serve as better vigilantes than state inspectors to discover unpermitted discharges.⁴¹ Finally, citizen groups may be able to better focus on local violations of the CWA, than the EPA or EPA-approved state agencies would, given the regulators' limited resources and the fact that they focus on national and state-wide violations.⁴²

The numerous positive attributes of citizen suits have contributed to their popularity.⁴³ Between 1995 and 2003, citizens submitted over 4,500 notices of intent to sue; these included more than 500 against agencies and over 4,000 against members of the regulated community.⁴⁴ As a result of their immense popularity, combined with weaker federal and state government enforcement, citizen suits are more important now than ever before.⁴⁵

34. Hodas, *supra* note 20, at 1651.

35. *Id.* at 1652.

36. *Id.*

37. *Id.* at 1653.

38. *Id.*

39. *Id.*

40. *Id.* at 1654.

41. *Id.*

42. *Id.* at 1654–55.

43. May, *supra* note 7, at 1, 4.

44. *Id.*

45. *Id.*

B. Government Agency Action Under the CWA

Under Section 1319 of the CWA, a government agency has the authority to institute a civil action against an alleged violator and pursue civil penalties or equitable relief against such alleged violators. The pertinent subsections of the government agency action provision of the CWA are Section 1319(b), (d), and (g)(6)(A)(ii). Specifically, the language of the government agency action portion of the CWA separates civil actions from equitable relief, whereas the citizen suit portion of the CWA does not. This indicates to some, including those who agree with the First and Eighth Circuits, that Congress intended for equitable relief to be banned under the civil penalty bar within the CWA.⁴⁶ Section 1319(b) authorizes a government agency to pursue actions for equitable relief against violators.⁴⁷ The provision states:

The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.⁴⁸

Section 1319(d) grants authority to government agencies to pursue civil penalties against violators.⁴⁹ This subsection also outlines the factors to consider in determining the amount to charge violators.⁵⁰

Furthermore, Congress enacted Section 1319(g)(6)(A)(ii) to specify the limitations on actions under other sections, including the citizen suit section.⁵¹ This subsection says in pertinent part that:

Action taken by the Administrator or the Secretary, as the case may be, under this subsection shall not affect or limit the Administrator's or Secretary's authority to enforce any provision of this chapter; except that any violation—(ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection shall not be the subject of a civil pen-

46. 33 U.S.C. § 1319 (2012).

47. *Id.*

48. *Id.*

49. *Id.*

50. DANIEL RIESEL, SIVE PAGET & RIESEL, P.C., RESPONDING TO CLEAN WATER ACT ENFORCEMENT ACTIONS 3 (2005), available at http://www.sprlaw.com/pdf/spr_clean_water_act.pdf.

51. 33 USC § 1319.

alty action under subsection (d) of this section or section 1321(b) of this title or section 1365 of this title.⁵²

The First and Eighth Circuits have held that Congress intended to exclude equitable remedies in enacting Section 1319(g)(6)(A)(ii).⁵³ The Tenth Circuit, in *Continental Carbon Co.*, however, did not read the statute broadly to include equitable relief.⁵⁴

C. Interpreting the Language of Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.

Citizen groups are able to provide the patrolling capacity that government agencies otherwise lack. This patrolling capacity could be the critical difference in the enforcement of environmental legislation in the coming years.⁵⁵ Banning these suits, particularly banning equitable relief under these suits, could ultimately disable the patrolling and enforcement abilities within environmental legislation.⁵⁶

The Supreme Court in *Gwaltney* held that the citizen suit provision suggests a mere connection between injunctive relief and civil penalties that is absent from the provision authorizing agency enforcement in the CWA.⁵⁷ Unlike what opposing interpretations might suggest, the language of the *Gwaltney* decision does not actually suggest an inextricable link between equitable relief and civil penalties.⁵⁸ The First Circuit in *North & South Rivers Watershed Association, Inc. v. Town of Scituate*, interpreted *Gwaltney* according to the opposing interpretation, stating that:

The statutory language suggesting a link between civilian penalty and injunctive actions, considered in light of the *Gwaltney* opinion's language outlining the supplemental role the citizen's suit is intended to play in enforcement actions, leads us to believe that the section 309(g) bar extends to *all* citizen actions brought under section 505, not merely civil penalties.⁵⁹

52. *Id.*

53. Paper, Allied-Indus., Chem. & Energy Workers Int'l Union v. Cont'l Carbon Co., 428 F.3d 1285, 1299 (10th Cir. 2005).

54. *Id.*

55. Hodas, *supra* note 20, at 1657.

56. *Id.*

57. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 58 (1987).

58. *Cont'l Carbon Co.*, 428 F.3d at 1285, 1299.

59. *N. & S. Rivers Watershed Ass'n, Inc. v. Town of Scituate*, 949 F.2d 552, 558 (1st Cir. 1991).

In *North & South Rivers*, the First Circuit gave a broad reading of the statutory language of Section 1365(a) of the CWA, citing *Gwaltney* as the basis for including equitable relief within the meaning of civil penalties.⁶⁰

Those groups that believe and the courts that have held that the civil penalty bar in the CWA also precludes actions for equitable relief cite the language of *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*⁶¹ These groups argue that the government agency action portion of the CWA, Section 1319, separately provides for civil penalties and injunctive relief. However, the citizen suit portion of the CWA, Section 1365, does not; thus, they argue that the citizen suit portion intended for equitable relief to be included within the meaning of civil penalties.⁶² Indeed, the government action provision within the CWA cites civil penalties and equitable relief in two separate subsections; Section 1319(b) provides for injunctive relief, while Section 1319(d) provides only for civil penalties.⁶³ Meanwhile, the citizen suit provision does not authorize civil penalties separately from injunctive relief; rather the two are referred to in the same subsection, Section 1365(a), and even in the same sentence.⁶⁴

However, not all of the circuit courts and lower courts that have cited to *Gwaltney* agree in their interpretation of the Supreme Court's holding in the case. The Tenth Circuit in *Continental Carbon Co.*, noted that the language of the statute is strong evidence that Congress did not intend to exclude equitable remedies when it enacted Section 1319(g)(6)(A)(ii).⁶⁵ In contrast, the Tenth Circuit found that the effect of Section 1365(b)(1)(B) is to prohibit any citizen suit, not just civil penalty suits, if the state has commenced judicial proceedings in any court.⁶⁶ Moreover, in *Continental Carbon Co.* the Tenth Circuit held that the Supreme Court in *Gwaltney* did not hold that civil penalties and injunctive relief are inextricably linked.⁶⁷ Rather, the Tenth Circuit found that the Supreme Court in *Gwaltney* held that a civil penalty could only

60. *Id.*

61. *Gwaltney*, 484 U.S. 49 (holding that (1) the provision of the CWA authorizing citizen suits for injunctive relief or civil penalties against persons allegedly in violation of conditions on NPDES permits did not confer federal jurisdiction over citizen suits for wholly past violations, and (2) that the provision conferred citizen suit jurisdiction based on good faith allegations of continuous or intermittent violations).

62. *Id.* at 58.

63. *Id.*

64. *Id.*

65. Paper, *Allied-Indus., Chem. & Energy Workers Int'l Union v. Cont'l Carbon Co.*, 428 F.3d 1285, 1299 (10th Cir. 2005).

66. *Id.*

67. Donovan, *supra* note 4, at 153-54.

be sought when the citizen is also seeking injunctive relief.⁶⁸ The issue we are faced with is essentially a mirror image of the issue at hand: whether a suit seeking injunctive relief can be maintained when the plaintiff cannot seek civil penalties.⁶⁹

IV. CIRCUIT SPLIT

A. The First Circuit's Broad Read of the Civil Penalty Bar

The first circuit court decision regarding the exclusion of equitable relief in the civil penalty bar under the CWA was in 1991 by the First Circuit in *North & South Rivers Watershed Association, Inc. v. Town of Scituate*.⁷⁰ In *North & South Rivers*, a public interest group brought a claim against the town of Scituate, MA, claiming the town violated the CWA by operating a sewage treatment facility that discharged pollutants into a coastal estuary without a federal discharge permit.⁷¹ The public interest group sought civil penalties as well as declaratory and injunctive relief, arguing that even if the Section 1319(g) bar applied to its suit against the town, it only extended to civil penalty actions and not to the injunctive and declaratory relief sought.⁷² It further argued that the literal language of Section 1319(g) speaks only to civil penalties and that the ban on civilian actions only extends to civil penalty actions.⁷³

The First Circuit disagreed with the public interest group, holding that Section 1319(g)(6)(A) bars civil penalty actions brought under Section 1365 where the State is diligently enforcing a comparable enforcement action and that Section 1365 does not differentiate civilian penalty actions from other civilian actions, including those seeking injunctive relief.⁷⁴ The Court further noted that civilian penalty actions are not set forth separately in Section 1365 as they are in the sections of the CWA that detail governmental enforcement actions.⁷⁵ Moreover, the First Circuit points out that Section 1365 of the CWA does not authorize civil penalties separately from injunctive relief; rather, the two forms of

68. *Cont'l Carbon Co.*, 428 F.3d at 1299.

69. *Id.*

70. *N. & S. Rivers Watershed Ass'n, Inc., v. Town of Scituate*, 949 F.2d 552, 552 (1st Cir. 1991).

71. *Id.* at 553.

72. *Id.* at 557.

73. *Id.* at 558.

74. *Id.* at 557.

75. Arne R. Leonard, *When Should an Administrative Enforcement Action Preclude a Citizen Suit Under the Clean Water Act?*, 35 NAT. RESOURCES J. 555, 612 (1995).

relief are referred to in the same subsection, even in the same sentence.⁷⁶ The First Circuit went on to hold that if the limitations of the civilian suits were to have any beneficial effect on enforcement of clean water legislation, the Section 1319(g) ban must cover all civil actions.⁷⁷ In response to the public interest group's argument that the Section 1319(g) ban only addressed civil penalties, the Court held that even if a literal reading of Section 1319 would lead to such a result, that result would lead to deferring to the primary enforcement responsibility of the government only where a penalty is sought in a civilian action, as if the policy considerations limiting civilian suits were only applicable within that context.⁷⁸

B. Coalition for a Liveable West Side, Inc. v. New York City Department of Environmental Protection

In 1993, the United States District Court for the Southern District of New York was the first court after the *North & South Rivers* case to take up this issue once again.⁷⁹ The Court upheld the importance of citizen suits, stating that it would be appropriate to stay the citizen action while the city demonstrated that the State was indeed diligently prosecuting its action and seeking adequate relief.⁸⁰ The District Court disagreed with the First Circuit's decision in *North & South Rivers*, holding that the CWA portion addressing citizen suits, as drafted, would not produce irrational results.⁸¹ The District Court further held that it found no basis for the First Circuit's redrafting of the statute, suggesting that the language of Section 1319(g)(6) is clear and unambiguous, in that it bars only civil penalty actions.⁸²

In *Coalition for a Liveable West Side*, the District Court for the Southern District of New York reasoned that, "as written, Section 1319 ensures that an entity that has violated the CWA will not be subject to duplicative civil penalties for the same violations."⁸³ The Court went on to further say that the statute permits a federal district court to entertain an injunctive relief from a citizen suit even if there is a state enforcement action underway, while managing the action such that the entity being

76. *Id.*

77. *N. & S. Rivers*, 949 F.2d at 557.

78. *Id.* at 558.

79. *Coal. for a Liveable W. Side, Inc. v. New York City Dep't of Env'tl. Prot.*, 830 F. Supp. 194 (S.D.N.Y. 1993).

80. *Id.* at 197.

81. *Id.*

82. *Id.*

83. *Id.*; Donovan, *supra* note 4, at 158-59.

pursued in the suit is not overwhelmed by multiple actions.⁸⁴ Examples of this include where a permit holder may have paid the relevant civil penalties, but continues to violate its permit limitations, or where the injunctive relief obtained in the state proceedings turns out to be inadequate to address the violations at issue.⁸⁵

C. The Eighth Circuit's Reinforcement of N. & S. Rivers

Later on in 1993, the Court of Appeals for the Eighth Circuit followed the First Circuit's lead in *North & South Rivers*, rather than the District Court for the Southern District of New York's decision in *Coalition for a Liveable West Side*.⁸⁶ In *Arkansas Wildlife Federation v. ICI Americas, Inc.*, the plaintiff wildlife federation appealed from a district court's decision granting summary judgment for a defendant manufacturer in the wildlife federation's action against the manufacturer pursuant to a citizen suit.⁸⁷ The manufacturer received a permit from the Arkansas Department of Pollution Control and Ecology, under the Federal National Pollutant Discharge Elimination System (NPDES) permit program in order to discharge wastewater.⁸⁸ The manufacturer had begun taking steps to comply with standards when the wildlife federation filed suit.⁸⁹ The district court granted the manufacturer's motion for summary judgment, saying that the wildlife federation was jurisdictionally barred from proceedings under the citizen suit portion of the Clean Water Act.⁹⁰

In *Arkansas Wildlife Federation*, the Eighth Circuit upheld the district court's grant of summary judgment for the manufacturer, stating that the wildlife federation's claims, in light of the state's ongoing diligent efforts at administrative enforcement, could result in undue interference with the legitimate efforts of the state agency.⁹¹ The Court further stated that such a result would undermine, rather than promote, the goals of the CWA, and that this result is not the intent of the Congress in enacting the CWA.⁹²

84. *Coal. for a Liveable W. Side, Inc.*, 830 F. Supp. at 197.

85. *Id.*

86. *Ark. Wildlife Fed'n v. ICI Ams., Inc.*, 29 F.3d 376 (8th Cir. 1994).

87. *Id.*

88. *Id.* at 377.

89. *Id.*

90. *Id.* at 378.

91. Leonard, *supra* note 75, at 603.

92. *Ark. Wildlife Fed'n*, 29 F.3d at 383.

D. The Tenth Circuit's Interpretation—What this Could Mean for the Future of Citizen Suits

Thus far, the Tenth Circuit is the only circuit court upholding equitable relief claims when there is a citizen suit bar within the Clean Water Act. In 2005, the Tenth Circuit took up this issue again in *Paper Allied-Industrial Chemical and Energy Workers International Union v. Continental Carbon Company*.⁹³ In *Continental Carbon*, the plaintiffs, a union and a Native American tribe, brought a citizen suit against a manufacturer under the citizen suit portion of the CWA and claimed that the manufacturer was, without authorization or permit, discharging wastewater into the lagoons of the Arkansas River.⁹⁴

Unlike the First and Eighth Circuits, the Tenth Circuit said that it was not inclined to interpret Section 1319(g)(6)(A)(ii) in the same broad manner. The Tenth Circuit held that Section 1319(g)(6)(A)(ii) bars only civil penalty claims and not claims requesting declaratory or injunctive relief.⁹⁵ In *Gwaltney*, the Supreme Court held that a civil penalty may only be sought when the citizen is also seeking injunctive relief.⁹⁶ In other words, the Court held that a civil penalty suit cannot be maintained when the plaintiffs in a civil action cannot enjoin the polluter.⁹⁷ Here, the Tenth Circuit disagreed with the Continental Carbon Company (CCC) in its brief when it suggested that *Gwaltney* held that civil penalties and injunctive remedies are inextricably intertwined.⁹⁸ The Tenth Circuit went on to say that the issue before it in this case was the mirror image of the Supreme Court's holding in *Gwaltney*.⁹⁹ The Tenth Circuit said that it was compelled to disagree with the First and Eighth Circuits for several reasons, including that: (1) the language of the statute is strong evidence that Congress did not intend to exclude equitable remedies when it enacted the citizen suit portion of the CWA; (2) there is evidence in the legislative history that Congress contemplated the position adopted by the district court and evidenced by the statutory language; and (3) the Court was not persuaded that allowing a citizen suit for an injunction to proceed while there is an ongoing state enforcement action would lead to an "inconceivable result."¹⁰⁰ The court went on to say that the governing principle behind Section 1319(g) is to avoid duplicative monetary

93. *Paper, Allied-Indus., Chem. & Energy Workers Int'l Union v. Cont'l Carbon Co.*, 428 F.3d 1285, 1285 (10th Cir. 2005).

94. *Id.* at 1290.

95. *Id.* at 1299.

96. *Id.*; Donovan, *supra* note 4, at 144.

97. *Cont'l Carbon Co.*, 428 F.3d at 1299.

98. *Id.*

99. *Id.*

100. *Id.* at 1299–1300.

penalties for the same violation, and in this particular case, the district court's order below served this purpose.¹⁰¹

V. PERMITTING EQUITABLE RELIEF IN CITIZEN SUITS

A. California Sportfishing Protection Alliance v. Chico Scrap Metal, Inc.

Since the Tenth Circuit's 2005 decision affirming equitable relief in CWA civil suits no court has taken up this issue. However, the fact that three different circuit courts have now come out with conflicting opinions on this issue indicates that it remains an unresolved, recurring, and pressing issue. Because citizen suits have and will continue to play a critical role in the enforcement of environmental legislation, this issue is unlikely to be settled until the Supreme Court resolves this circuit split. Thus, various courts will continue to interpret both the language of the statute as well as the language of *Gwaltney* in critical and conflicting manners.

In 2011, the District Court for the Eastern District of California nearly addressed the issue under decision in *California Sportfishing Protection Alliance v. Chico Scrap Metal, Inc.*, but ultimately decided the case on different grounds.¹⁰² In *California Sportfishing*, the defendant, Chico Scrap Metal, operated scrap metal facilities in Butte County, California, and was issued NPDES permits by the State of California.¹⁰³ In 2007, the State brought individual criminal actions against three of the named defendants in the case.¹⁰⁴ The State claimed that these defendants were responsible for violating various state environmental laws while operating scrap metal facilities.¹⁰⁵ In October 2008, the criminal defendants entered into a global plea agreement that resolved the criminal cases, and the defendants also entered into consent orders with the California Department of Toxic Substances.¹⁰⁶

In December 2009, the California Regional Water Quality Control Board (CWQCB) sent letters to the defendant, Chico Scrap Metals, Inc., stating that storm water runoff from the scrap metal facilities exceeded the Environmental Protection Agency's benchmarks.¹⁰⁷ The letters also

101. *Id.* at 1300; Donovan, *supra* note 4, at 149–50.

102. California Sportfishing Prot. Alliance v. Chico Scrap Metal, Inc., No. 2:10-cv-01207-GEB-GGH, 2011 U.S. Dist. LEXIS 77731 (E.D. Cal., July 15, 2011) (granting defendants-violators' request to stay discovery until jurisdiction/statutory preclusion is resolved).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

stated that the failure to respond to the excess runoff was a violation of the NPDES Permits.¹⁰⁸ In March 2010, a citizen group, the California Sportfishing Protection Alliance, provided notice to the defendants about the CWA violations occurring at the scrap metal facilities.¹⁰⁹ The plaintiff proceeded to file a claim against the scrap metal facilities for violating their NPDES permits.¹¹⁰ The plaintiff later filed its initial complaint in May 2010, and in June 2010, the CWQCB also put the defendants on notice for violations of their discharge permits.¹¹¹ Finally, in June 2011, the State of California filed a Petition for Violation of Probation in each of the state court criminal cases, all alleging the defendants' violations of their NPDES permits.¹¹²

In *California Sportfishing*, the district court stated that per the citizen suit portion of the CWA, the plaintiff citizen group "bears the burden of proving that [the state of California] has not diligently prosecuted [its state criminal cases against the criminal [d]efendants based on their violations of their NPDES permits]."¹¹³ The district court ultimately held that the October 2008 probation order constituted a commenced action in a state court under Section 1365(b)(1)(B), and thus the Section 1365(b)(1)(B) bar prevents the federal court from having jurisdiction in the federal lawsuit, even though some of the defendants in the federal lawsuit were not on state probation in the state criminal cases.¹¹⁴

B. The Importance of Equitable Relief in Citizen Suits Under the CWA

The court's decision in *California Sportfishing* did not address the issue of the possible preclusion of equitable relief under the civil penalty bar in the CWA, and the issue remains unresolved. The citizen suit against the scrap metal companies demonstrates that citizen suits will continue to play a key enforcement mechanism, particularly when a polluter is not facing pending government actions. Citizen suits remain one of the most effective and cost efficient methods of enforcing environmental legislation, especially given the pending uncertainty of the government's fiscal landscape.¹¹⁵

Had *California Sportfishing* turned on the citizen group's right to demand equitable relief under the civil penalty bar, the pursuit of

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. Hodas, *supra* note 20, at 1651.

equitable relief by citizen groups would have provided the most direct means by which to stop the scrap metal industry's excess discharge of pollutants into California waters. Civil penalties alone, including monetary relief, would not get to the heart of the problem. Moreover, demanding monetary relief does not necessarily guarantee that the scrap metal companies will abide by their NPDES permits. Common law jurisprudence illustrates the principal that courts have the discretion to address situations that pose unreasonable harm of injury through their authority to issue injunctions.¹¹⁶ On the other hand, an injunction would impose judicial authority mandating cooperation by defendants with the threat of court action. Companies would then face the risk of shutting down or irreparably damaging their reputations.

There are a fair number of policy reasons for disallowing civil penalties in citizen suits when there is already a government action underway. Among the most critical policy reasons for disallowing civil penalties in citizen suits is the concept of a double penalty. It would be unduly burdensome for a defendant to face demands of monetary relief from the federal government and also face those same demands from a citizen group bringing the same charges.¹¹⁷ On the other hand, there are no similar policy reasons for barring equitable relief under the same civil penalty exclusion. The civil penalty bar under the CWA ensures that once the government has sought civil penalties from a defendant, there is no risk that the citizen group can demand the same type of relief.¹¹⁸ Allowing equitable relief, such as an injunction, would not impute any additional monetary burden on the defendant.¹¹⁹ Rather, an injunction would simply allow a court to demand that the defendant halt certain actions until the suit is settled.

As suggested in an amici curiae brief written for the Natural Resources Defense Council (NRDC), the courts of equity have historically ordered both public and private nuisance principles to intercept harmful conduct and address conditions posing serious threats to the public.¹²⁰ In the past, when the threats have been sufficiently serious, courts have determined that circumstances giving rise to the harm constitute nuisance. The courts have then enjoined the harmful

116. Brief for Natural Resources Defense Council et al. as Amici Curiae Supporting Respondents at 5, *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 1133 (2010) (No. 09-475), 2010 WL 1393439.

117. Hodas, *supra* note 20, at 1623.

118. *Id.* at 1620.

119. *Id.*

120. *Id.*

conduct when deeming it necessary to achieve equity.¹²¹ In short, “where faced with sufficiently serious threats of irreparable harm, courts have recognized that the threats themselves constitute a likely and enjoicable injury, under bedrock principles of equity jurisdiction.”¹²²

In looking at the history of the CWA and its inception, it is evident that controlling water pollution through the permit system is a major component of the Act.¹²³ Moreover, one of the biggest frustrations that led to the 1972 amendments to the CWA was the slow pace of the pollution cleanup efforts and suspicion that control technologies were being developed but not applied to the problems.¹²⁴

Once waterways become contaminated it is difficult to reverse the effect. This is one of the primary reasons why equitable relief, in addition to civil penalties like monetary relief, ought to be considered. Banning equitable relief under the civil penalty bar means that defendants who violate their NPDES permits are not prevented by court order from repeating the same violations. Injunctions ensure that violators discontinue their excessive discharges, and thereby eliminate the need for additional pollution cleanup efforts. Injunctive relief reaches the heart of the issue and addresses the discharge problem directly, rather than through monetary penalties.

In the NRDC amici brief, the amici argued that the Supreme Court should honor the Congressional intent in the National Environmental Policy Act (NEPA), that potentially significant environmental risks be examined by allowing federal courts the broad equitable discretion to determine, when appropriate, that an agency’s failure to comply with NEPA poses a sufficient threat of harm to constitute a likelihood of irreparable injury.¹²⁵ Similarly, in a case like *California Sportfishing*, courts ought to have the authority to apply equitable relief where an entity has failed to comply with the Clean Water Act, and the failure poses a sufficient threat of harm to constitute irreparable injury. Certainly in *California Sportfishing*, the scrap metal companies’ failure to comply with their NPDES permits resulted in irreparable harm, an injury the CWA was enacted to prevent. Indeed, since its enactment, a primary emphasis of the Clean Water Act has been to control discharges of pollutants, both conventional and toxic.¹²⁶

121. *Id.*

122. *Id.*

123. CLAUDIA COPELAND, CONG. RESEARCH SERV., RL30030, CLEAN WATER ACT: A SUMMARY OF THE LAW (2010), available at <http://www.cnie.org/nle/crsreports/10May/RL30030.pdf>.

124. *Id.*

125. Brief for Natural Resources Defense Council et al., *supra* note 116, at 5.

126. Copeland, *supra* note 123.

C. The Need for Supreme Court Action

As with all other issues of law that are unsettled, Supreme Court review of the issue of equitable relief being excluded from the civil penalty bar in the CWA would bring a sense of finality to the issue. At this time, three different circuit courts and multiple district courts have taken up this issue, arriving at conflicting views on how to resolve the matters. A Supreme Court majority decision would not only settle the issue, but it would also send a message that environmental enforcement has become a priority as a result of the changing circumstances and limited resources in the fragile environment. Furthermore, it would send a message that limited government resources for enforcement require a supplement to government efforts to bring suit against violators.¹²⁷

Since their inception, citizen suits have not only deterred violators, but have also achieved significant compliance gains.¹²⁸ As the *Rapanos v. United States* Supreme Court plurality decision suggests, the Supreme Court should take up the issue of equitable relief and should hand a decisive victory to citizen litigants who seek to bring forth suits against violators of the CWA.¹²⁹ Though it was extremely important for the Supreme Court to take up the *Rapanos* case, the plurality decision in *Rapanos* has only brought more uncertainty to the issue of jurisdiction in regards to the CWA.¹³⁰ A clear Supreme Court majority decision in the current circuit split regarding the exclusion of civil penalties under the citizen suit provision of the CWA, indicating that the civil penalty bar under the citizen suit portion of the CWA does not include equitable relief. Such a decision would send a clear message to those that the CWA seeks to regulate, that environmental legislation enforcement is a clear priority for the government. Furthermore, it would reinforce the importance of citizen suits, and it would allow citizen litigants to ease some of the burden of enforcement from the government.¹³¹

VI. CONCLUSION

Citizen suits have recently come to the forefront of environmental legislation enforcement because of the government's diminished capacity to regulate violators. Citizen suits have historically played an important

127. Hodas, *supra* note 20, at 1619.

128. *Id.*

129. Jeff Kray, *Five Years After Rapanos—EPA Prepares New Clean Water Act Jurisdictional Guidance*, MARTEN LAW (Feb 23, 2011), <http://www.martenlaw.com/newsletter/20110203-epa-prepares-new-cwa-guidance>.

130. *Id.*

131. Hodas, *supra* note 20, at 1657.

role in the enforcement of environmental legislation, but with growing environmental concerns and fewer government resources, they will prove to be a critical aspect of environmental legislation enforcement in the coming years.

In ensuring that citizen litigants are given the full force of authority to pursue their claims against violators, they must be allowed to pursue equitable relief under the civil penalty bar of the citizen suit provision of the CWA. Equitable relief has played a historically significant role in halting harmful conduct and addressing conditions that pose a threat to the public.¹³² Without the ability to stop violators and address the root of the violation, citizen suits would lack one of the most critical components of enforcement. A binding Supreme Court majority decision allowing equitable relief under the civil penalty bar would not only reinforce the importance of citizen suits in environmental legislation enforcement, but would also send a clear message to those that the CWA regulates that environmental regulation is a priority and will continue to be a priority proceeding into the future.

132. Brief for Natural Resources Defense Council et al., *supra* note 116, at 5.