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Mr. Ipsen and Mr. Raisch discuss the enforcement options created by the Federal Water Pollution Control Act. The authors believe that the successful implementation of the Act is heavily dependent upon voluntary compliance by the affected industries and municipalities. This article provides a brief overview of the development of federal water quality legislation, explains the major elements of the present Act and critically examines each of the enforcement provisions of the Act.

ENFORCEMENT UNDER THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972†

*Henry W. Ipsen**

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INTRODUCTION

THE nation's policy for achievement of clean water has evolved through six legislative enactments since passage of the initial Water Pollution Control Act in 1948.¹ The latest of these enactments, the Federal Water Pollution Control Act Amendments of 1972,² became law on October 18, 1972,

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1. 33 U.S.C. §§ 1155-1175 (1970).

2. 33 U.S.C. §§ 1251-1376 (Supp. 1973).

when Congress overrode a presidential veto by a vote of 247 to 23 in the House and 52 to 12 in the Senate.³

It is the purpose of this article to discuss and explore the enforcement options created by the Act. The article should be of special interest to both dischargers of pollutants and environmentalists. It is hoped that a more thorough understanding of the requirements of the Act by dischargers will result in a greater degree of voluntary compliance. Further, knowledge of the requirements which the Act places on dischargers, state pollution control agencies, and the Environmental Protection Agency should be of help to environmentally concerned groups and individuals in seeing that the goals and purposes of the Act are carried out.

There are two topics which are preliminary to a thorough discussion of the enforcement options created by the Act. The first is a brief overview of the development and past failures of federal water quality legislation. The second topic is an explication of the major provisions of the Act which are subject to enforcement action. Without a basic grasp of these provisions, the reader will not achieve a thorough understanding of the enforcement options.

HISTORY OF STATUTORY EFFORTS

The Federal Water Pollution Control Act was initially enacted in 1948 on a temporary basis and extended in 1952.⁴ The 1948 Act recognized the primary rights and responsibilities of the states to control water pollution,⁵ a congressional policy which is still reflected in the present law. The initial Act provided for comprehensive water pollution control programs, research, financial assistance to states, municipalities, and interstate agencies for waste treatment facilities.⁶ Also included was a program for construction loans and preliminary planning grants that was never implemented

3. House Debate on Overriding the President's Veto of S. 2770, October 18, 1972. Senate Debate on Overriding the President's Veto of S. 2770, October 17, 1972. As reported in, Committee on Public Works, 93d Cong., 1st Sess., A Legislative History of the Water Pollution Control Act Amendments of 1972, at 109 and 135 (Comm. Print 1973).

4. 33 U.S.C. §§ 1159-1160 (1970).

5. See enacting clause 33 U.S.C. §§ 1155-1175 (1970).

6. 33 U.S.C. § 1152 (1970).

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because funds were not appropriated.⁷ The pollution of interstate waters which endangered the health or welfare of persons in a state other than that in which the discharge originated was declared to be a public nuisance, subject to abatement.⁸ Abatement procedures provided for federal court suits after two notifications were given to the discharger and the state in which the discharge occurred.⁹ If no remedial action was taken by the discharger or the state, the Act required that a public hearing be held. Only after the discharger was given a "reasonable" opportunity to comply with the recommendations resulting from the hearing could suit be filed. In addition, the Act required that the state in which the discharge originated consent to the suit. That these enforcement procedures were cumbersome and ineffectual is evidenced by the fact that only one hearing was held, and no suits were ever taken to court under the 1948 Act.

Amendments passed in 1956 authorized federal grants for construction of waste treatment works, as well as for establishment and maintenance of state water pollution control programs.¹⁰ They also established a three-step enforcement procedure in the case of interstate pollution of interstate waters endangering the health or welfare of persons.¹¹ The first step was a federal-state enforcement conference, with participation by local officials and other interested persons, to discuss the pollution problem. If the conference was not successful, a public hearing followed. The conference could be called either at state request where interstate or intrastate pollution was involved, or initiated by the federal government where interstate pollution was concerned. The conferees convened to review the existing situation and any progress made, to lay a basis for future action and to give states, local governments, and industries an opportunity to take any appropriate remedial action pursuant to state or local law.

In 1961, enforcement authority was extended to navigable, as well as interstate, waters and was applied in cases

7. 33 U.S.C. § 1155 (1970).
 8. 33 U.S.C. § 1152(d) (1970). ✓
 9. 33 U.S.C. § 1152(d) (1970). ✓
 10. 33 U.S.C. §§ 1160 and 1151 (1970).
 11. P.L. 84-660, § 8, 70 Stat. 504 (1956).

of intrastate pollution on request of the governor of a state.¹² The term "interstate waters" was redefined to include coastal waters. These changes greatly expanded the subject matter jurisdiction of the law. In addition, the authorization for grants, both for construction of waste treatment works and for state water pollution control programs, was increased and extended.

The 1965 law provided for the establishment, revision and enforcement of water quality standards for the nation's interstate waters.¹³ This represented a new approach to water pollution control. The public nuisance concept of prior legislation was abandoned. The standards consisting of water quality criteria were designed to provide water of proper quality for a range of designated uses. A plan for implementation and enforcement was to be prepared in conjunction with the standards. The states were given the first opportunity to adopt standards subject to federal approval. If a state failed to do so, the federal government set the standards. Any discharge which reduced the quality of the receiving water below the criteria or in violation of any implementation plan was subject to enforcement action. Federal enforcement consisted of bringing suit for abatement after at least 180 days' notice of violation to the discharger. During the 180-day interim period, informal hearings were held to attempt to correct the violation.

Because of the cumbersome and time-consuming nature of the 180-day notice procedure, the 1965 Amendments turned out to be seriously deficient as an enforcement tool. Enforcement proceedings invariably consisted of endless rounds of negotiations, which rarely culminated in court action. During the period of administration of the 1965 Amendments by the Department of the Interior, few 180-day notice actions were initiated for violations of water quality standards. None of these cases were resolved by judicial abatement under the Act.¹⁴ A more vigorous enforcement program was conducted subsequent to the vesting of enforcement responsi-

12. 33 U.S.C. § 1171 (1970).

13. 33 U.S.C. § 1158 (1970).

14. Status Report of 180-Day Notice Actions prepared by the U.S. Environmental Protection Agency, April 1972.

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bility with the Environmental Protection Agency in December of 1970.¹⁵ EPA initiated 144 actions prior to the enactment of the Federal Water Pollution Control Act Amendments of 1972; however, only four of these cases resulted in actual court action by the Justice Department.¹⁶

The Act was again amended in 1966¹⁷ and 1970.¹⁸ The Water Quality Improvement Act of 1970 provided for the abatement of pollution by oil in the navigable waters of the United States, adjoining shorelines or contiguous zones.¹⁹ Federal enforcement was authorized in the following instances:

- 1) Failure to notify of an oil spill;²⁰
- 2) Knowingly discharging oil;²¹
- 3) Marine disaster creating a substantial pollution hazard;²²
- 4) Imminent and substantial threat by an offshore or onshore facility;²³
- 5) Recovery of cleanup cost;²⁴
- 6) Violation of removal and prevention regulations.²⁵

Perhaps the most effective federal law from an enforcement point of view prior to passage of the 1972 Act was the 1899 Refuse Act.²⁶ This Act was revived and used as a valuable water pollution enforcement tool in 1970. It prohibits the discharge of refuse into any navigable water of the United States or its tributaries without a permit. The Refuse Act

15. Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15623 (1970), 5 U.S.C. Reorg. Plan of 1970 No. 3 (1970).

16. U.S. ENVIRONMENTAL PROTECTION AGENCY, *THE FIRST TWO YEARS: A REVIEW OF EPA'S ENFORCEMENT PROGRAM* (1973).

17. 33 U.S.C. §§ 1153, 1155-1158, 1160, 1173, 1175, 431-437, and 466 (1970).

18. 33 U.S.C. §§ 1151-1175 (1970), amending Federal Water Pollution Control Act of 1948, as amended, 33 U.S.C. §§ 466-66n (Supp. 1970).

19. 33 U.S.C. § 1161(b)(1) (1970).

20. 33 U.S.C. § 1161(b)(4) (1970).

21. 33 U.S.C. § 1161(b)(5) (1970).

22. 33 U.S.C. § 1161(d) (1970).

23. 33 U.S.C. § 1161(e) (1970).

24. 33 U.S.C. § 1161(f) (1970).

25. 33 U.S.C. § 1161(j) (1970).

26. 33 U.S.C. §§ 403, 407, 411 (1964). See also Rodgers, *Industrial Water Pollution and the Refuse Act: A Second Chance for Water Quality*, 119 U. PENN. L. REV. 761 (1971).

was administered by the Army Corps of Engineers primarily in the interest of navigation. The Refuse Act permit program was established by Executive Order on December 23, 1970,²⁷ and took effect on July 1, 1971. The program required that all discharges or deposits into navigable waters or their tributaries, or waste treatment systems other than municipal systems from which the matter flowed into navigable waters or tributaries, should be made only pursuant to the conditions of a permit issued by the Corps of Engineers. The EPA was given responsibility for water quality determinations concerning the permit. The states participated to the extent that they were required to certify that a proposed discharge would not violate water quality standards. If a state denied certification, the permit could not be issued.

The Refuse Act permit program was short lived. On December 21, 1971, a federal court in *Kalur v. Resor*²⁸ enjoined the Corps from issuing permits until it amended its permit regulations to require compliance with the National Environmental Policy Act.²⁹ That Act required all federal agencies undertaking federal action significantly affecting the quality of the human environment to prepare an environmental impact statement concerning the action.³⁰ The court also held that the Refuse Act only authorized issuance of permits for deposits into navigable waters and that no permits could be issued for discharges into non-navigable tributaries of navigable waters. These obstacles to the permit program were removed by passage of the Amendments of 1972.

BASIC PROVISIONS OF THE ACT

It was generally recognized that the policies and procedures established under existing and earlier laws were inadequate. While there were isolated cases of success,³¹ the overall record of cleaning up the nation's waters was bleak. At best the nation had merely held the line on pollution. The

27. Executive Order 11574, C.F.R. § 309 (1973).

28. 335 F. Supp. 1 (D.D.C. 1971).

29. 42 U.S.C. §§ 4331-4347 (1970).

30. 42 U.S.C. § 4332 (1970).

31. See COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY, CHAPTER 2, CLEANING UP THE WILLAMETTE (1973).

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effects of increased quality of treatment had been cancelled by larger quantities of wastes. As a result of this failure, Congress again turned toward strengthening the Federal Water Pollution Control Act. After nearly three years of deliberation, Congress passed the 1972 Amendments.

The 1972 Amendments abandoned the approach of prior law which had the goal of making individual waters clean enough to support one or more beneficial uses, such as swimming, fishing, water supply, and irrigation. The keystone of the old approach was water quality standards which were set to achieve the desired beneficial uses. It was well recognized that basing compliance and enforcement orders on a case-by-case judgment of a particular discharger's impact on ambient water quality was technically, legally and administratively difficult. Hence, the new Act rejected distinctions among water bodies in terms of use. By contrast, it aims "to restore and maintain the chemical, physical, and biological integrity of the nation's water."³² To achieve this objective, the Act set forth two principal goals:

- 1) That the discharge of pollutants into the navigable waters of the United States be eliminated by 1985;³³ and
- 2) That as an interim goal there be attained by 1983 water quality which provides for the protection and propagation of fish, shellfish and wildlife, and provides for recreation in and on the water.³⁴

The Act changed the emphasis from water quality standards to effluent limitations which together with the discharge permit program are the basic means toward achievement of the 1983 and 1985 goals.

The Act takes a three-phase approach toward achievement of the final goal of no discharge by 1985.³⁵ It provides two interim dates of July 1, 1977, and July 1, 1983, by which different levels of treatment must be achieved. Phase One, October 18, 1972 to July 1, 1977, calls for achievement of

32. 33 U.S.C. § 1251(a) (Supp. 1973).

33. 33 U.S.C. § 1251(a)(1) (Supp. 1973).

34. 33 U.S.C. § 1251(a)(2) (Supp. 1973).

35. 33 U.S.C. § 1311 (Supp. 1973).

effluent limitations which require application of the "best practicable control technology currently available" by all dischargers other than publicly owned treatment works.³⁶ Publicly owned facilities must utilize "secondary treatment"³⁷ and, if an industrial discharger uses such facilities, certain "pretreatment standards" must be met.³⁸ In addition, by July 1, 1977, effluent limitations may be imposed so that any criterion established pursuant to state law may be met.³⁹

Phase Two, July 1, 1977 to July 1, 1983, calls for achievement of effluent limitations which represent the "best available technology economically achievable," by all dischargers other than publicly owned treatment works.⁴⁰ Such works will be held to the standard of "best practicable waste treatment."

36. 33 U.S.C. § 1311(b) (1) (Supp. 1973). "Best practicable technology" will represent the average of the best existing performance by well operated plants within each industrial category. Where existing treatment is generally inadequate, EPA will set more stringent standards if technology can be made available through good engineering practice at a reasonable cost.

37. Primary and secondary treatment are basic methods used to attain certain removal efficiencies in waste water treatment. Primary treatment employs processes of a physical nature such as screening, shredding, sedimentation, and flotation, to remove the gross settleable and floatable solids as well as up to 65 percent of the suspended solids, and as much as 40 percent of oxygen-demanding substances.

Secondary treatment is the application of biological processes involving the use of micro-organisms to oxidize waste materials, generally in addition to the primary treatment process. There are two principal types of secondary treatment, the trickling filter method and the activated sludge process. (Municipalities, however, are not limited to these methods.)

In the trickling filter method, the waste passes through a thick bed of stones on which bacteria gather and multiply, until they consume most of the organic matter in the sewage. The cleaner water trickles out through pipes on the bottom of the filter for further treatment.

In the activated sludge process, the sewage leaves the settling tank in primary treatment and is pumped into an aeration tank where it is mixed with air and sludge containing bacteria, further breaking down the organic matter. The solids are pumped into a sedimentation tank and the effluent is chlorinated.

The effluent reduction attainable by secondary treatment is expressed in terms of biochemical oxygen demand (BOD), suspended solids (SS), fecal coliform bacteria (FC), and acidity-alkalinity (pH). BOD is a measure of the amount of oxygen consumed during decomposition of organic matter. Excessive depletion of oxygen reduced the usefulness of water.

For BOD the requirements are a maximum 30-day average of 30 milligrams per liter of water and for SS, a maximum 7-day average of 45 milligrams per liter.

A monthly maximum average of 200 per 100 milliliters of water and a weekly average of 400 per 100 milliliters are required for fecal coliform bacteria. The effluent pH must be within the range of 6 to 9.

38. 38 Fed. Reg. 30982 (1973).

39. Such criteria may include water quality standards or more stringent state effluent standards.

40. 33 U.S.C. § 1311(b) (2) (Supp. 1973). "Best available technology" will be based on the very best control and treatment measures that have been or are capable of being economically achieved.

In addition, any other applicable pretreatment standards must be achieved.

The third phase, July 1, 1983 to January 1, 1985, will be devoted to attainment of the goal of no discharge of pollutants.

The terms "best practicable" and "best available technology" are being defined for various industries by effluent guidelines issued by EPA.⁴¹ Such guidelines are adjusted by various factors such as the age of the equipment or facilities involved, the process employed, the engineering aspects of the application of control techniques, process changes, and non-water quality environmental impact.⁴²

Water Quality Standards

Although the Act shifted emphasis from water quality standards to effluent limitations, the new law did not ignore the concept of water quality standards in achievement of the 1983 and 1985 goals. The Act carried forward interstate water quality standards set under the old law, provided that such individual standards were consistent with the applicable requirements of the Act.⁴³ Further, the Act carried forward any previously established intrastate water quality standards provided that they also were consistent with the applicable requirements of the Act.⁴⁴ If inconsistent or if no intrastate standards existed, the states were required either to change or set appropriate standards. EPA was given the authority to reject state standards which failed to meet the requirements of the Act.⁴⁵ EPA's rejection of all or a part of a state's standards forced the state to present an acceptable alternative. Failure to do so resulted in EPA setting the

41. EPA failed to issue such guidelines within the statutory deadline of one year from passage of the Act. Hence, the Natural Resources Defense Council brought suit to force more timely issuance. As a result of *NRDC v. EPA*, 6 ERC 1033 (D.D.C. 1973), EPA was ordered to publish effluent guidelines as expeditiously as possible and no later than November 29, 1974. To this end, the court imposed a publication schedule on EPA specifying dates by which certain guidelines must be published.

42. 33 U.S.C. § 1314(b)(2)(A) (Supp. 1973).

43. 33 U.S.C. § 1313(a)(1) (Supp. 1973).

44. 33 U.S.C. § 1313(a)(2) (Supp. 1973).

45. To determine whether state standards met the requirements, EPA published Guidelines for Developing or Revising Water Quality Standards, January 1973, amended April 1973.

standard.⁴⁶ If water quality standards cannot be protected by the application of best practicable control technology by industries and secondary treatment by publicly owned treatment works by July 1, 1977, then the states must establish maximum daily loads of pollutants permitted in the waters to allow the propagation of fish, shellfish and wildlife.⁴⁷ A similar procedure is required for establishment of maximum daily load of thermal discharges.

Water Quality Related Effluent Limitations

If at any time it is determined that application of best available control technology by 1983 will not assure protection of public water supplies, agricultural and industrial uses, and the protection and propagation of fish, shellfish and wildlife, and allow recreational activities in and on the water, additional effluent limitations must be established to assure attainment or maintenance of water quality.⁴⁸ In setting such limitations, EPA must consider the relationship of the economic and social costs of their achievement, including any economic or social dislocation in the affected community or communities, the social and economic benefits to be obtained, and determine whether or not such effluent limitations can be implemented with available technology or other alternative control strategies.⁴⁹

Toxic and Pretreatment Effluent Standards

In addition to the establishment of effluent standards, the Act required EPA to set toxic and pretreatment effluent standards.⁵⁰ Toxic effluent standards address pollutants or combinations of pollutants which, after discharge and upon either direct or indirect exposure to any organism, will cause death, disease, or other abnormalities in the organism or its offspring.⁵¹ Such pollutants include mercury, cyanide and cadmium.⁵² In setting such standards, EPA was given au-

46. 33 U.S.C. § 1313(a)(3) (Supp. 1973).

47. 33 U.S.C. § 1313(d)(1) (Supp. 1973).

48. 33 U.S.C. § 1312(a) (Supp. 1973).

49. 33 U.S.C. § 1312(b)(1) (Supp. 1973).

50. 33 U.S.C. § 1317 (Supp. 1973).

51. 33 U.S.C. § 1362(13) (Supp. 1973).

52. 38 Fed. Reg. 35388 (1973).

thority to completely prohibit the discharge of toxic pollutants if necessary.⁵³

Pretreatment standards cover those pollutants which are determined not to be susceptible to treatment by publicly owned treatment works or which would interfere with the operation of such works.⁵⁴ Thus, pretreatment standards may require any industry discharging such pollutants into a municipal sewage treatment plant to pretreat its effluent.

National Standards of Performance

In addition to setting effluent standards for existing sources, the Act requires EPA to set new source performance standards for 27 major types of industry.⁵⁵ Such standards must reflect the greatest degree of effluent reduction determined to be achievable by application of the "best available demonstrated control technology," processes, operating methods, or other alternatives, including where practicable, a standard permitting no discharge of pollutants.⁵⁶ In establishing such standards, EPA must take into consideration the cost of achieving such effluent reduction, and any non-water quality environmental impact and energy requirements.⁵⁷ The purpose of establishing national standards of performance is to assure that new sources of water pollution are designed, built, equipped and operated to minimize the discharge of pollutants.

Inspection, Monitoring and Entry Requirements

The Act created authority for EPA to require the owner or operator of each point source to install, use, and maintain monitoring equipment; to sample effluents; to establish and maintain records; to make reports; and to provide such other information as EPA may reasonably require.⁵⁸ It also gave EPA the right to enter any premises where an effluent source or records pertaining thereto are located, to have access to copy any records, to inspect any required monitoring

53. 33 U.S.C. § 1317(a)(1) (Supp. 1973).

54. 33 U.S.C. § 1317(b)(1) (Supp. 1973).

55. 33 U.S.C. § 1316 (Supp. 1973).

56. 33 U.S.C. § 1316(a)(1) (Supp. 1973).

57. 33 U.S.C. § 1316(b)(1)(B) (Supp. 1973).

58. 33 U.S.C. § 1318 (Supp. 1973).

equipment and to sample any effluents which the owner or operator is required to sample.⁵⁹ Further, any records, reports, or information obtained must, in the case of effluent data, be related to applicable effluent limitations, toxic, pre-treatment, or new source performance standards.⁶⁰ They must also be available to the public unless entitled to protection as a trade secret.⁶¹ The purpose of these requirements is twofold. First, it will provide the necessary information to assure compliance with the Act by dischargers. Second, it will provide the data base upon which EPA can guide its actions to assure that the 1983 and 1985 goals will be met.

The National Pollution Discharge Elimination System

Under the Act no discharge is permitted except as is authorized by a discharge permit.⁶² This requirement applies to municipal as well as industrial discharges. Discharge permits must be consistent with effluent limitations, water quality standards and other requirements of the Act.⁶³ They may not exceed a period of five years⁶⁴ and may be revoked or modified when a violation of a permit condition takes place or when changed conditions dictate the need for further reduction of the permitted discharge.⁶⁵ With limited exceptions, discharge permits are no longer issued under the River and Harbor Act of 1899.⁶⁶ However, permits previously issued under the 1899 Act remain in effect until they expire.⁶⁷ Discharges not previously subject to the permit requirements under the 1899 Act were given until April 14, 1973, within which to apply under the new Act.⁶⁸

The Act established the National Pollution Discharge Elimination System (NPDES) which gave permit authority to EPA but contemplates state participation and operation.⁶⁹ Regulations concerning elements necessary for state partici-

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- 59. 33 U.S.C. § 1318(a) (Supp. 1973).
 - 60. 33 U.S.C. § 1318(b) (Supp. 1973).
 - 61. 33 U.S.C. § 1318(b) (Supp. 1973).
 - 62. 33 U.S.C. §§ 1311(a)(1), 1342(a)(1) (Supp. 1973).
 - 63. 33 U.S.C. § 1342(a)(1) (Supp. 1973).
 - 64. 33 U.S.C. § 1342(b)(1)(B) (Supp. 1973).
 - 65. 33 U.S.C. § 1342(b)(1)(C) (Supp. 1973).
 - 66. 33 U.S.C. § 1342(a)(5) (Supp. 1973).
 - 67. 33 U.S.C. § 1342(a)(4) (Supp. 1973).
 - 68. 33 U.S.C. § 1342(k) (Supp. 1973).
 - 69. 33 U.S.C. § 1342(b) (Supp. 1973).

pation in the NPDES have been published.⁷⁰ When a state permit program is found acceptable by EPA, permit issuance is turned over to the state.⁷¹ After a state program goes into effect, EPA retains the right, unless waived, to review proposed permits to determine whether they meet the requirements of the Act.⁷² If a state fails to properly administer its program, EPA may revoke the entire delegation.⁷³ The Act provides an immunity defense against some enforcement actions until December 1974, where a permit has been applied for pursuant to the Act but which has not been given a "final administrative decision."⁷⁴

SUBJECT MATTER JURISDICTION

A. General Application

The basic prohibition of the Act is found in Section 301(a) which provides that, except as in compliance with other sections of the Act, "the discharge of any pollutant by any person shall be unlawful."⁷⁵ The Act broadly defines the term "discharge of a pollutant" as:

- (A) any addition of any pollutant to navigable waters from any point source,
- (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.⁷⁶

Thus, enforcement of the general prohibition against discharges applies only to point sources which are defined as:

[a]ny discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged, or from which there is or may be a thermal discharge.⁷⁷

70. 40 C.F.R. § 124 (1972).

71. 33 U.S.C. § 1342(b) (Supp. 1973).

72. 33 U.S.C. § 1342(d)(2) (Supp. 1973).

73. 33 U.S.C. § 1342(c)(3) (Supp. 1973).

74. 33 U.S.C. § 1342(k) (Supp. 1973).

75. 33 U.S.C. § 1311(a) (Supp. 1973).

76. 33 U.S.C. § 1362(12) (Supp. 1973).

77. 33 U.S.C. § 1362(14) (Supp. 1973).

Since this definition encompasses virtually all major sources of pollution, this apparent restraint should be nominal insofar as enforcement of the Act is concerned. Even if the Act did not contain such a limitation, practical realities would have had a similar effect. Non-point sources are extremely difficult to control inasmuch as non-point source wastes that create water quality problems are more diffuse than those resulting from municipal and industrial activities and generally cause widespread environmental degradation instead of easily identifiable point-source impacts.

Inasmuch as the discharge permit requirements of the Act apply equally to small farmers and large industries, EPA took the position that it had discretion to distinguish among categories and sizes of agricultural sources. Consequently, EPA promulgated regulations excluding certain agricultural discharges from NPDES requirements.⁷⁸ The basis of such exclusions was that the expenditure in resources necessary to process discharge permit applications from every small farmer would be disproportionate to the water quality benefits obtained. In order to prevent the diversion of the EPA's resources from the larger, more significant point sources of pollution, the EPA by regulation excluded the smaller, less significant agricultural and silvicultural discharges including some irrigation return flows and runoff from fields, orchards, crop and forest lands. It is significant to note, however, that such exclusions apply only to the necessity to apply for a NPDES discharge permit and are not exemptions from the Act. A point source falling within such exemption is nevertheless subject to enforcement under the Act if it is discharging pollutants in such quantities as to warrant enforcement action.

B. Navigable Waters

S. 2770 defined the term navigable waters to mean "the navigable waters of the United States, portions thereof, and

78. 38 Fed. Reg. 18000 (1973). For example, exclusions include animal feed-operations less than 1,000 feeder cattle and irrigation return flows where return flow is from land areas of less than 3,000 contiguous acres.

The Natural Resources Defense Council has taken issue with EPA's position. *NRDC v. EPA*, No. 1629-73 (D.D.C. 1974). It is NRDC's contention that EPA has no authority to distinguish between categories and sizes of agricultural sources.

the tributaries thereof, including the territorial seas and the Great Lakes.”⁷⁹ H.B. 11896 defined the term to mean “the navigable waters of the United States, including the territorial seas.”⁸⁰ Section 502(7) of the Conference Bill, which became the Act, defines it as “the waters of the United States including the territorial seas.”⁸¹ Thus, after dropping the word “navigable” the Conference Bill adopted the House definition of the term. The Senate Consideration of the Report of the Conference Committee contains the following statement.

One matter of importance throughout the legislation is the meaning of the term “navigable waters of the United States.”

The conference agreement does not define the term. The Conferees fully intend that the term “navigable waters” be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.

Based on the history of consideration of this legislation, it is obvious that its provisions and the extent of application should be construed broadly. It is intended that the term “navigable waters” include all water bodies, such as lakes, streams, and rivers, regarded as public navigable waters in law which are navigable in fact. It is further intended that such waters shall be considered to be navigable in fact when they form, in their ordinary condition by themselves or by uniting with other waters or other systems of transportation, such as highways or railroads, a continuing highway over which commerce is or may be carried on with other States or with foreign countries in the customary means of trade and travel in which commerce is conducted today. In such cases the commerce on such waters would have a substantial economic effect on interstate commerce.⁸²

79. S. 2770, 92d Cong., 1st Sess., § 502(h) (1971).

80. H.B. 11896, 92d Cong., 2d Sess., § 502(8) (1972).

81. SENATE CONFERENCE REPORT No. 92-1236, 92d Cong., 2d Sess. 144 (1972).

82. Senate Consideration of the Report of the Conference Committee, as reported in COMMITTEE ON PUBLIC WORKS, 93d CONG., 1st SESS., A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 178 (Comm. Print 1973).

During the House Consideration of the Report of the Conference Committee Rep. Dingell discussed the term as follows:

Third, the conference bill defines the term "navigable waters" broadly for water quality purposes. It means all "the waters of the United States" in a geographical sense. It does not mean "navigable waters of the United States" in the technical sense as we sometimes see in some laws.

. . .

Although most interstate commerce 150 years ago was accomplished on waterways, there is no requirement in the Constitution that the waterway must cross a State boundary in order to be within the interstate commerce power of the Federal Government. Rather, it is enough that the waterway serves as a link in the chain of commerce among the States as it flows in the various channels of transportation—highways, railroads, air traffic, radio and postal communications, waterways, et cetera. The "gist of the Federal test" is the waterway's use "as a highway," not whether it is "part of a navigable interstate or international commercial highway."

. . .

Thus, this new definition clearly encompasses all water bodies, including main streams and their tributaries, for water quality purposes. No longer are the old, narrow definitions of navigability, as determined by the Corps of Engineers, going to govern matters covered by this bill. Indeed, the conference report states on page 144:

"The conferees fully intend that the term navigable waters be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."⁸³

As a result of the above legislative history, the EPA determined that the deletion of the word "navigable" from the definition of navigable waters eliminates the requirement of navigability. Pollution of water courses which fall within the purview of the Act must only be capable of affecting

83. *Id.* at 250.

interstate commerce in order for federal jurisdiction to attach.⁸⁴ EPA reasoned that the term "navigable waters of the United States" depended upon the application of two tests: first, the waters in question were required to be navigable in fact, and second, that the waters had to be capable of being used in interstate commerce.⁸⁵ Since the navigability requirement had been removed, this left only the interstate commerce requirement.

For the purposes of making initial administrative determinations, the EPA concluded that the following are "waters of the United States":

- (1) All navigable waters of the United States;
- (2) Tributaries of navigable waters of the United States;
- (3) Interstate waters;
- (4) Intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes;
- (5) Intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce; and
- (6) Intrastate lakes, rivers, and streams which are utilized for industrial purposes by industries in interstate commerce.⁸⁶

The navigability question has already been considered by two courts. In *United States v. Ashland Oil and Transportation Co.*,⁸⁷ the defendant was charged under Section 311 (b)(5) of the Act for failing to immediately notify an appropriate federal agency after gaining knowledge that it had discharged oil into a non-navigable stream. In denying defendant's motion to dismiss on the grounds that the Act applies only to the classical "navigable waters of the United States" the court held that navigability was not an element

84. See memorandum from Asst. Administration for Enforcement and General Counsel to All Regional Counsels, reported in *Environment Reporter*, III Current Developments 1240 (February 9, 1973).

85. *Id.*

86. *Id.*

87. *United States v. Ashland Oil & Transportation Co.*, 364 F. Supp. 349 (W.D. Ky. 1973) (This case is presently on appeal.)

of the offense. The court further held that in prosecution under the Act, the government is not required to establish the effect on interstate commerce of any particular discharge or of any particular stream. The court relied on the Act's legislative history in noticing "that water pollution is a national problem severely affecting the health of our people, the welfare of the nation and the efficient conduct of interstate commerce." The court further held that congressional attention to the effects of pollution on interstate commerce allows federal regulation of any activity within the class of pollution discharges or class of streams without regard to whether a particular discharge or stream has a discernible interstate effect.

In *United States v. Holland*,⁸⁸ the court in holding non-navigable mosquito canals and mangrove wetlands to be within the purview of the Act, stated that Congress is not limited by the "navigable waters" test in its authority to control pollution under the Commerce Clause and that the legislative history of the Act manifests a clear intent to break from prior limitations to get at the sources of pollution.

C. Ground Water

The Act does not specifically address EPA's enforcement authority over ground waters. The national goal of abatement of pollution by 1985 contained in Section 101 refers only to "navigable waters." However, if the basis for authority over surface waters is no longer tied to the navigability requirement, but rather to a showing that interstate commerce is affected, then there should be no reason why the Act should not be extended to ground waters. If the navigability issue is still viable, it may be argued that since tributaries of navigable waters may be subject to federal control because they affect navigable waters, ground-water, which also affects navigable waters, may be subject to federal regulation.⁸⁹

88. 6 ERC 1388 (M.D. Fla. 1974).

89. Comment, *Ground Water Pollution in the Western States—Private Remedies and Federal and State Legislation*, 8 LAND & WATER L. REV. 537, 551 (1973).

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If the broad assertion that the Act extends to ground waters as well as surface waters is not accepted, there is nevertheless authority contained in the Act which supports the argument that EPA does have power to control the disposal of pollutants into wells for the purpose of preventing the eventual contamination of surface waters. Section 402 (a) (3) provides that the permit program run by EPA shall be subject to the same terms and conditions which apply to a state permit program under Section 402. Subsection (b) (1) (D) of Section 402 requires a state to have authority to control disposal of pollutants into wells. Wells are included in the definition of a point source.⁹⁰ Hence, it could be argued that EPA may control discharges of pollutants from wells.

Furthermore, the Administrator is expressly charged by Section 102(a) to develop "comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters and ground waters and improving the sanitary condition of surface and underground waters." Enforcement authority over the discharge of pollutants to ground waters would enhance the Administrator's ability to carry out his responsibility to provide comprehensive programs under Section 102(a).

ENFORCEMENT ACTIONS UNDER SECTION 309 GENERALLY

The most important of the enforcement procedures provided by the 1972 Act are set out in Section 309. This section provides the Administrator of the Environmental Protection Agency with a wide variety of enforcement remedies ranging from administrative compliance orders to criminal fines of up to \$50,000 per day and imprisonment for up to two years. Enforcement action under Section 309 can be initiated by the Administrator against any discharges in violation of Sections 301, 302, 306, 307 or 308 of the Act, or against any person in violation of any condition or limitation implementing any of the foregoing sections in a NPDES permit issued by the Administrator pursuant to Section 402 of the Act. The Administrator may also initiate enforce-

90. 33 U.S.C. § 1362(14) (Supp. 1973).

ment action under Section 309 for violations of NPDES permits issued by a state pursuant to a federally approved permit program.⁹¹

The Act has, however, provided an immunity defense to enforcement actions for violations of Sections 301 (effluent limitations) and 306 (new source performance standards). This defense is set out in Section 402(k) of the Act, which provides that any discharger who has a pending application for a NPDES permit on file with the Administrator, and who has not in any way delayed final administrative disposition of such application, shall be deemed in compliance with Sections 301 and 306 for purposes of Section 309 until December 31, 1974. Although the immunity defense does not apply to violations of Sections 302 (water quality related effluent standards), 307 (toxic pollutants), and 308 (inspections and monitoring), the immunity provision of Section 402(k) is of great importance in view of the fact that the effluent limitations provided by Section 301 constitute the fundamental regulatory feature of the Act.

Because of the broad scope of the immunity provision of Section 402(k), the issuance of NPDES permits is crucial to the conduct of any serious enforcement program by the Administrator, at least prior to January 1, 1975. That EPA has recognized this fact is evidenced by the high priority the Agency has assigned to the issuance of permits to major industrial dischargers.⁹² Consequently the possession and subsequent violation by a discharger of the terms and conditions of its permit will provide the factual background for the great majority of enforcement actions under Section 309, and the provisions of Section 309 will be discussed herein primarily in this context.

COMPLIANCE ORDERS—SECTION 309(a) (3)

Whenever the Administrator⁹³ has made a finding that a discharger is in violation of its NPDES permit, he has a

91. 33 U.S.C. § 1319(a) (3) (Supp. 1973).

92. Memorandum from John Quarles, Acting Deputy Administrator to EPA Regional Administrators, August 21, 1973.

93. Since the Administrator has subdelegated his enforcement authority under the Act to the Administrators of EPA's ten regional offices [EPA ORDER

statutory mandate under Section 309(a)(3) to initiate one of two types of enforcement actions: he can either (1) issue an order requiring the violator to comply with the terms and conditions of its permit, or (2) bring a civil action pursuant to the provisions of Section 309(b). As stated above, the language of Section 309(a)(3) places a mandatory duty on the Administrator to initiate some kind of enforcement action in every case of a finding of violation. Since EPA's resources are limited, and since the number of reported permit violations will probably be large and varied in degree of severity, it would seem inevitable that the Administrator will attempt to exercise some form of prosecutorial discretion in implementing the enforcement provisions of Section 309. Whether such discretionary enforcement is allowable in view of the language of Section 309 is questionable; this issue has arisen in the context of Section 13 of the Rivers and Harbors Act of 1899.⁹⁴ Section 17 of the 1899 Act⁹⁵ provides that "it shall be the duty of the district attorneys . . . to vigorously prosecute all offenders whenever requested to do so by the Secretary of War" The Justice Department has exercised prosecutorial discretion in enforcing this Act, and the question of its authority to do so has been discussed by the courts. In *United States v. U.S. Steel Corp.*,⁹⁶ the court in dictum stated that the Justice Department has a mandatory duty to prosecute actions when requested; however, in *Bass Anglers Sportsman's Society v. Scholze Tannery*,⁹⁷ the court held that the Justice Department has absolute discretion to prosecute Refuse Act violations. The issue of the Administrator's discretionary power to initiate enforcement actions has particular importance in light of the citizen suit provisions of Section 505 of the Act.

As stated above, Section 309(a)(3) is phrased so that the Administrator must choose between issuance of a compliance order and filing of a civil action; he cannot take both actions simultaneously. If the Administrator determines to

No. 1260.6, Sept. 14, 1973], subsequent references in this article to the term "Administrator" are meant to include the Regional Administrators as well as the National Administrator of EPA.

94. 33 U.S.C. § 407 (1964).

95. 33 U.S.C. § 413 (1964).

96. 328 F. Supp. 354 (N.D. Ind. 1970).

97. 329 F. Supp. 339 (E.D. Tenn. 1971).

issue an administrative compliance order, he must follow the procedure set out in Section 309(a)(4); this subsection states the required contents of a compliance order, and establishes the procedure for service of such an order.

(1) *Contents*: The order must state with "reasonable specificity" the nature of the violation and should indicate what the violator must achieve to satisfy the order. The order must further state a reasonable time for compliance, which cannot exceed 30 days. In specifying a time for compliance, the Administrator must take into account the seriousness of the discharge and its impact on receiving waters, and any good faith efforts undertaken by the discharger to comply with the terms and conditions of its permits. If a compliance schedule has been incorporated into the permit condition, the permittee's progress in meeting such schedule would presumably be an important factor to be considered in specifying the time for compliance.

If the order is being issued for violation of monitoring requirements, under authority of Section 308, the order does not become effective until the recipient has had an opportunity to confer with the Administrator or his designee. Under these circumstances, an order issued on the basis of the permittee's violation of monitoring requirements would thus be in the nature of an administrative order to show cause.

(2) *Procedure*: Subsections 309(a)(3) and (4) do not provide for an administrative hearing prior to the issuance of a compliance order. The findings of fact by the Administrator which are a condition precedent to the issuance of such order are thus made *ex parte*. Section 309(a)(4) provides that copies of the compliance order must be sent to the state in which the violation occurs, and to any other state or states affected by the discharge—presumably those states located immediately downstream from the point of the violator's discharge.

The original of the compliance order is required to be issued by personal service upon the violator. Once service is obtained, the violator would have an immediate right of judicial review under Sections 10(a) and (c) of the Adminis-

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trative Procedure Act,⁹⁸ since Section 309 does not provide for review of administrative compliance orders, and since the recipient of such an order would have standing to seek judicial review.⁹⁹ Presumably, such review would consist of a trial de novo in the appropriate federal district court, and would take the form of an action for declaratory judgment or an action for civil injunctive relief.¹⁰⁰

If the compliance order is upheld on appeal, and the violator fails to comply with the terms of the order, the Administrator may then take action to enforce the order.

Probably the most effective course of action at this stage would be the filing by the Administrator of a civil action for injunctive relief to enforce the terms of the compliance order. Such action is not, however, expressly authorized by Section 309; the only reference to enforcement of a compliance order is in Section 309(d), which provides for civil penalties of up to \$10,000 per day for violation of such order. Authority to sue for injunctive relief may, however, be implicit in Section 309, in view of the authority provided by Section 309(a)(3), which allows the Administrator to proceed directly to such a remedy, and in view of the citizen suit provisions of Section 505, which, *inter alia*, authorizes a private citizen to commence such an action against any person in violation of an order issued by the Administrator. It would be patently absurd to read the Act as authorizing private citizens to sue to enforce an order of the Administrator, while denying such authority to the Administrator himself.

Issuance and subsequent enforcement of administrative compliance orders will necessarily be a cumbersome and time-consuming process, in view of the lack of statutory provision

98. 5 U.S.C. § 704(a) and (c) (1967).

99. See 5 U.S.C. § 702 (1967), and cases annotated thereunder, particularly *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). In *Abbott*, the Supreme Court held that an agency order requiring a party to make significant financial expenditures is sufficiently "adverse" for purposes of the statute when failure by the party to comply subjects it to potential civil and criminal liability. This holding clearly applies to an order issued by the Administrator pursuant to PUB. L. NO. 92-500, § 309(a)(3) (Oct. 18, 1972), since the failure by the recipient to comply with such an order renders it liable to civil and criminal sanctions, as discussed *infra*.

100. 5 U.S.C. § 703 (1967).

for administrative review procedures.¹⁰¹ For this reason, administrative compliance orders will be most effective in cases where such orders are not likely to be challenged by the recipient, or where the Agency has tentatively determined not to take punitive action against the violator. Cases where compliance orders would appear to be justified are: (1) where a permit holder fails to meet a compliance schedule incorporated in its permit, where such failure results from causes beyond the control of the permit holder, (2) where minor or isolated permit violations are involved, or (3) where a "first-time" permit violation by a particular discharger is involved. The violator's past record of cooperation under its permit would, of course, be an important factor in any decision by the Administrator as to what enforcement option to utilize. In the foregoing cases, the chief purpose of an administrative order is to remind the violator that he is expected to comply with the provisions of his permit, and that his failure to do so will result in the initiation of an enforcement action by the Agency.

Administrative compliance orders will also serve as a key element in the development of the Agency's enforcement record on the permit violation, which may prove valuable in the event a judicial enforcement action is subsequently initiated against the violator.

CIVIL ACTIONS UNDER SECTION 309(b)

As an alternative to issuing an administrative compliance order, the Administrator is authorized by Section 309(b) to proceed directly to a judicial remedy in cases of NPDES permit violations. This subsection authorizes the Admin-

101. The chief advantage of administrative enforcement remedies over their judicial counterparts is that the former can be expedited to a much greater degree, depending, of course, on the statutory authority and enforcement "will" of the particular agency involved. However, this advantage is almost completely negated when the authorizing statute fails to provide a procedure for administrative review of the agency's enforcement order (with the resulting instructions on judicial review), since, in the absence of such a procedure, the recipient is by constitutional right entitled to a judicial trial de novo with the standard burden of proof on the agency; no shift or reduction in such burden results from issuance of the order. Thus the order essentially has no legal effect—the enforcing agency might just as well have started with its judicial remedy. *See generally* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.10, at 448 (1958).

istrator to "commence a civil action for appropriate relief, including a permanent or temporary injunction" for such violations. In most cases, the remedy sought by the Administrator under Section 309(b) will be civil injunctive relief. In some cases the requested relief will be in the form of a prohibitory injunction, enjoining the permit holder from making further discharges from its facilities; however, in a majority of these suits the Administrator will seek a mandatory injunction, requiring the discharger to take affirmative action to alter its discharge to bring such discharge into compliance with its permit. Since the Administrator may seek, and the court has authority to require, any relief that is appropriate to bring the permit holder into compliance with its permit, the Administrator has authority to request an extensive variety of remedial actions by a permit holder. This broad authority is consistent with the prevailing rule that the government, when in the capacity of a plaintiff in a civil injunctive action to enforce a statute designed to protect the public interest, is entitled to relief that ensures the full effectiveness of the statute involved.¹⁰² In addition, it is well established that the Administrator when acting in this capacity is not required to allege and prove irreparable harm, which is the standard burden of proof imposed on private litigants in civil injunctions; he need only show a violation of the subject statute to be entitled to the appropriate remedy.¹⁰³

It is not clear whether the Administrator can obtain monetary damages under Section 309(b). Although there is no express provision authorizing damages, such relief may be available in view of the statutory language providing for "appropriate relief." Monetary damages may be appropriate in some cases. For example, where a discharger in the course of violating its permit causes a substantial fish kill, monetary damages could be used to pay for the restocking of the stream. In any event, it is clear that the government, in a civil suit for injunctive relief, is entitled to equivalent costs in dam-

102. *Wyandotte Transportation Co. v. United States*, 389 U.S. 191 (1967); *United States v. Underwood*, 344 F. Supp. 486 (M.D. Fla. 1972); *United States v. Douglas County*, 5 ERC 1577 (D.C. Nev. 1973).

103. *Hecht v. Bowles*, 321 U.S. 321 (1944); *Shafer v. United States*, 229 F.2d 124 (4th Cir. 1956).

ages, in situations where the government is compelled to perform the remedy.¹⁰⁴ If federal funds were somehow utilized to restock a stream depleted by a fish kill caused by the defendant, the government could recover from the defendant an amount equal to the federal expenditures.

Section 309(b) thus provides, either expressly or implicitly, a broad range of remedies to the Administrator, if he elects to proceed by commencing a civil action against the permit violator.

The type of remedy authorized by Section 309(b) would appear to be best suited to situations involving permit violations of a continuing nature, for example, where the permit holder has consistently failed to meet the compliance schedule incorporated in its permit, and as a result is exceeding either the interim or final effluent limitations imposed by the permit. In this situation, the primary objective of the Agency would be to force the discharger into compliance with the terms and conditions of its permit as quickly as possible, since protection of the receiving waters is of paramount importance. Punitive remedies such as those provided in subsections (e) and (d) of Section 309 are unquestionably effective in encouraging voluntary compliance, but the nature of the relief provided in these subsections (*i.e.*, fines and civil penalties) limits their effectiveness in achieving specific remedial action on the part of the discharger. An action for a criminal fine or civil penalty could, of course, accompany a civil suit for injunctive relief under Section 309(b).

The procedural requirements of Section 309(b) provide that actions be brought in the District Court of the United States for the district in which the defendant is located, resides, or is doing business. Section 309(b) further requires that when a civil action is filed, notice of such action shall be given to the appropriate state; such states would include the state where the action has been filed, and any state located immediately downstream from the permit violator.

104. *Wyandotte Transportation Co. v. United States*, *supra* note 102; *United States v. Perma Paving Co.*, 332 F.2d 754 (2d Cir. 1964); *United States v. Underwood*, *supra* note 102.

A section of the Act which has particular relevance to actions under Section 309(b) is Section 506, which provides that the Justice Department shall represent the United States in any civil or criminal suit initiated under the Act to which the Administrator is a party. This means that the regional offices of EPA will refer proposed enforcement actions to the various United States Attorneys' offices in much the same manner as referrals of proposed actions under the 1899 Refuse Act. However, Section 506 further provides that if the Justice Department fails to notify the Administrator within a "reasonable time" that it will appear in a proposed civil action, EPA's own attorneys are authorized to represent the government. Note that this exception applies only to civil actions, and it is highly unlikely that the Justice Department will abdicate its responsibilities in this area by failing to give timely notification. It is possible, however, that if the Justice Department were to determine that a proposed civil action against a permit violator was not justified, either for lack of evidence or for policy reasons, EPA attorneys could directly appear and represent the government in the action. It is likely that, in the vast majority of enforcement cases, the government will be represented by the appropriate United States Attorneys' Office, with EPA Regional enforcement attorneys acting in support.

It also seems likely that, in order to avoid the necessity of costly and time-consuming litigation, the majority of civil actions under Section 309(b) will be resolved by means of settlements negotiated between EPA, the Justice Department, and the permit violator. This was often the result in civil actions under the Refuse Act instituted by the Justice Department against industrial dischargers. Such negotiated settlements presumably would be incorporated into the terms of a consent decree which would be submitted to the court having jurisdiction over the action. Upon the court's approval, the consent decree would have the force and effect of a final judgment on the merits. This procedure is now subject to the public notice requirements of rules and regulations promulgated by the Justice Department.¹⁰⁵

105. 28 C.F.R. § 50.7 (1973).

Section 309(e) requires that whenever a Section 309(b) action is filed against a municipality, the state in which the municipality is located is required to be joined as a party to the action. In the event a judgment is obtained against the defendant municipality, the state is liable for contribution to the extent that the state's municipal corporation laws prevent the municipality from raising revenues necessary to comply with the terms of the judgment.

CRIMINAL ACTIONS UNDER SECTION 309(c)

Section 309(c) provides for criminal penalties of varying amounts. Subsection (c)(1) provides that willful or negligent violations of NPDES permits shall be punishable by a fine of not less than \$2,500 nor more than \$25,000 per day of violation, or by imprisonment for not more than one year, or both. Second convictions can bring a fine of up to \$50,000 per day of violation, or imprisonment for up to two years, or both. Lesser penalties are provided by Section 309(c) for falsification of reports required under the Act. Subsection 309(c)(1) does not expressly provide for criminal penalties for violation of administrative compliance orders issued under Section 309(a)(3); however, it would seem that such penalties would be available against willful or negligent violators, since such orders essentially act as notices of violation of a permit and specify a time limit for correction; subsequent violation of a compliance order would thus constitute a willful violation of the subject permit, and would render the willful or negligent violator liable to criminal penalties. While a Section 309(c) action can be filed simultaneously with the issuance of a compliance order, the combining of the two would not, in most cases, seem to be proper from a policy standpoint, since criminal prosecutions are restricted to negligent or willful violators, a class which presumably would not qualify for the "grace period" provided by compliance orders.

Section 309(c)(3) provides that responsible corporate officials are also subject to criminal prosecution. Whether criminal proceedings under Section 309(c) will be instituted

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against corporate officials remains to be seen; however, it is noteworthy that EPA did not favor this approach when it was referring prosecutions to the Justice Department under the Refuse Act. In any event, there are valid reasons for electing to bring a criminal action against the corporate entity, rather than against an official of the corporation; in the former case, the government is not confronted with the constitutional privilege against self-incrimination,¹⁰⁶ while in the latter case, it may be more difficult to prove the necessary elements of willfulness or negligence. In addition, it seems likely that the government would be more successful in obtaining large monetary fines when a corporate defendant is involved, particularly when the case is tried before a jury.

Criminal prosecutions under Section 309(c) would seem to be particularly effective when used against dischargers who have refused to file applications for a NPDES permit; in such cases, the immunity provisions of Section 402(k) would not apply, and the problems of proving a willful or negligent violation would be minimal. Criminal prosecutions could also be utilized in conjunction with civil actions under Section 309(b) in the same manner as the simultaneous filing of criminal and civil actions by the Justice Department under the Refuse Act.

CIVIL PENALTIES UNDER SECTION 309(d)

The final enforcement alternative provided by Section 309 is set out in Section 309(d), which provides for civil penalties of up to \$10,000 per day of violation. Actions for collection of civil penalties under Section 309(d) can be brought either for violation of a compliance order issued under Section 309(a)(3), or directly for a permit violation. As in actions under 309(b) and (c), the appearance provisions of Section 506 apply to actions under 309(d), and the Administrator is required to make initial referral of such actions to the Justice Department.

106. *Campbell Painting Corp. v. Reid*, 392 U.S. 286 (1967); *United States v. White*, 322 U.S. 694 (1944).

In actions instituted under 309(d), the burden of proof imposed on the government would be the civil standard of a preponderance of the evidence, rather than the criminal burden of beyond a reasonable doubt. Neither negligence nor intent are elements of the offense described in 309(d), and consequently the government would not be required to prove their existence. Under the strict liability wording of this subsection, the government would merely be required to prove responsibility for the violation in order to prevail.

If an action to collect a civil penalty were instituted for violation of an administrative compliance order, the issuance of which had been appealed by the recipient as discussed above, any judicial findings of fact in the earlier proceeding would, in all probability, be admissible in the subsequent proceeding through the principle of collateral estoppel. The application of this principle would, of course, be conditioned on the government's ability to sustain its burden of showing identity of the issues and a final determination on the merits in the preceding action.¹⁰⁷ This may be difficult, since in some cases the alleged violations of a compliance order may well be based upon facts which differ from those involved in the initial permit violation, upon which the original issuance of the compliance order was based.

In addition to the relaxed burden of proof and the absence of certain required elements of proof, there are several other inherent advantages in bringing a civil action under Section 309(d), as opposed to initiating criminal action under Section 309(c). In a civil action, the constitutional privilege against self-incrimination would not apply, pleading would be more simple, and the government would retain the right of appeal, in the event it lost in the trial court.¹⁰⁸ In view of the foregoing considerations, it is likely that the government will elect to bring a far greater number of actions under Section 309(d) than under Section 309(c).

The wording of Section 309 does not preclude the combining of a civil penalty action with the issuance of an admin-

107. See generally RESTATEMENT OF JUDGMENTS, § 68 (1942).

108. A good discussion of criminal and civil penalties in the context of air pollution control can be found in Kovel, *A Case for Civil Penalties: Air Pollution Control*, 46 J. URB. L. 153 (1969).

istrative order pursuant to Section 309(a)(3). This enforcement approach would seem to be appropriate in certain cases. The civil penalty action constitutes regulation of past conduct (*i.e.*, a permit violation) while the administrative order seeks to regulate further conduct on the part of the violator. This combination has already been utilized in one case, *United States v. Great Western Sugar Company*,^{108a} wherein the defendant challenged the government's right to proceed with both measures simultaneously. However, the case was settled prior to any litigation on this issue.

In discussing the various enforcement options under Section 309, it should be noted that, during a court proceeding involving any one of the foregoing enforcement actions against a permit violator, the defendant in such proceeding is precluded from making a collateral attack on the original issuance of its permit. Section 509(b)(2) provides that action by the Administrator in issuing a permit under Section 402 (which is reviewable under the provisions of 509(b)(1)) shall not be subject to further judicial review in any subsequent civil or criminal proceeding for enforcement of such permit. Thus, a permit holder who waives his right to appeal the original issuance of his permit cannot seek to revive this right during a subsequent enforcement proceeding brought by the Administrator for violation of such permit.

THE CONNECTION BAN REMEDY: SECTION 402(h)

To assure the credibility of the municipal permit program, EPA must develop a consistent and comprehensive response to enforcement against permit violations. Although the Act does not make compliance by publicly owned treatment works¹⁰⁹ directly contingent upon the availability of federal construction grant funds, it has been administratively determined that where violation by publicly owned treatment works exist solely because of a lack of federal funds, initiation of an enforcement action would be inappropriate.¹¹⁰

108a. *United States v. Great Western Sugar Company*, Civil No. C-5602 (D. Col., filed Dec. 21, 1973).

109. The term "treatment works" is defined in Section 212(2)(A) of the Act, 33 U.S.C. § 1292 (Supp. 1973).

110. Memorandum from John Quarles, Jr., Deputy Administrator, to EPA Regional Administrators, December 28, 1973. The stated reason for this

Enforcement actions may take place, however, where other factors have contributed to the violation.

In a few cases involving violations by publicly owned treatment works, it may be appropriate to assess civil or criminal penalties. However, enforcement of the more significant violations should rely on the special power to impose connection bans. This power is set forth in Section 402(h) of the Act. It provides that, in the event the Administrator finds that a publicly owned treatment works is violating the terms of its NPDES permit, he is authorized to "restrict or prohibit" the future introduction of pollutants into such treatment works, so long as such pollutants are not from a source which was utilizing the treatment works prior to his finding of a violation. Thus, the Administrator has the authority in certain situations to wholly or partially enjoin additional sewer connections to municipal sewage treatment facilities. Action under 402(h) may be the only feasible alternative in cases of permit violations by such facilities, since it is highly unlikely that a court would enjoin the entire operation of a sewage treatment plant, and in many cases it may be financially impossible for a municipality to comply with the terms of a mandatory injunction to expand its facilities, even with state contribution pursuant to Section 309(e).

To better understand the possible uses of connection bans and to devise the most effective implementation techniques for Section 402(h) actions, the EPA has studied a number of bans enforced in recent years at the state and local levels. Such studies illustrate that a connection ban, if effectively implemented, can be a powerful tool for achieving environmental objectives.

The case studies show that the connection ban should not be used as a tool to achieve a "no growth" policy within an area. It should rather be used to achieve the goal of improved treatment capability or performance. The ban must be designed to precipitate response directed toward the prob-

decision was the shortage of federal funds caused by the increase of the federal share to 75% of construction costs pursuant to Section 202 of the Act. However, the presidential impoundment of \$9 billion of the total congressional authorization of \$18 billion undoubtedly contributed to this decision.

lem of inadequate treatment and not against the ban itself. The ban should be properly publicized to inform builders and the public of the objectives of the ban and how such objectives may be achieved. Finally, the objectives of the ban must incorporate provisions to ensure that overloading and inadequate treatment are avoided in the future. To accomplish this, the ban should include requirements for effective land use planning and environmental management as well as facility expansion.

To effectively influence local action, the ban must be designed to gain the attention of the local community. This requirement essentially precludes the application of the ban at the planning and engineering stages of the construction cycle. To apply the ban at this point would not result in abatement of the immediate violation. Hence, a connection ban, to have immediate impact, must be imposed so as to include projects at or near the end of the construction cycle. Previously issued building permits should be deferred pending capacity to treat the associated waste. The case studies show that inability to cope with issued permits has been the principal cause of the failure of many connection bans to date. The initial ban should include very few exceptions for economic hardships. However, once effective action is taken to alleviate the causes of the ban,¹¹¹ such exceptions should be allowed. A court-imposed ban should include specific remedial actions, both interim and final,¹¹² required to improve treatment capability and thereby achieve relaxation or removal of the ban. It must be assumed that the municipal discharger lacked either the capability or the will to effectively manage its own affairs, or else it would not have been the target of an enforcement action.

Other problems which must be considered in imposing a connection ban include diversion of developers' efforts to

111. Such action may include submission and approval of facility expansion plans, passage of a bond issue, formation of a new management agency, or passage of an effective land use ordinance.

112. Interim measures might include improved operation and maintenance procedures, minor facility modifications to improve treatment efficiency, passage and implementation of ordinances for land use management, preparation of an expansion plan, or establishment of a new management agency. Final measures might include initiation of construction of required waste treatment facilities or actual attainment of operational status, depending on the threat to water quality.

adjacent areas not subject to the ban but which are also ill-equipped to handle the new growth; proliferation of septic systems within the area of the ban; proliferation of small treatment plants constructed by the builder which serve only the immediate development thereby ignoring regional waste treatment management; and elimination of revenue from sewage tap fees resulting in further local inability to meet financial requirements associated with improvement of treatment facilities.

SECTION 311: ENFORCEMENT PROVISIONS
FOR DISCHARGES OF OIL AND
HAZARDOUS SUBSTANCES

Section 311 of the 1972 Act replaces Sections 11 and 12 of the old Federal Water Pollution Control Act,¹¹³ which dealt with the control of spills of oil and hazardous materials into the navigable waters. In addition to providing the government with a wide range of enforcement options, Section 311 sets out many complex provisions concerning liabilities and defenses of parties relative to the clean-up of spills of oil and hazardous materials into the nation's waterways. This article will, however, confine itself to a discussion of the various enforcement remedies provided to the Administrator and other federal agencies.

Section 311(b) (5) is essentially a reenactment of Section 11(b) (4), although the former has been expanded to apply to spills of both oil and hazardous materials. Section 311(b) (5) requires that any person in charge of a vessel or of an on-shore or off-shore facility from which a discharge of oil or hazardous substances occurs shall, as soon as he has notice of such discharge, give immediate notification of the discharge to the appropriate agency of the federal government. Pursuant to Executive Order 11735,¹¹⁴ the U.S. Coast Guard has been designated the "appropriate agency" for the purpose of receiving such notices, although it is likely that the Coast Guard will subdelegate this function to the EPA in geographical areas which lack Coast Guard facilities. The

113. 33 U.S.C. §§ 1161, 1162 (1970).

114. 38 Fed. Reg. 21243 (1973).

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immediate notification requirement of Section 311(b)(5) has been held not to be vague or unreasonable.¹¹⁵ While the precise meaning of the term "immediate" has never been defined by the courts, it is likely that the cases construing similar notification requirements, such as found in the Federal Wreck Act,¹¹⁶ will be relied upon to a great extent. Cases construing the aforementioned statute have held that such a requirement does not mean literally "at once" but rather "as soon as practicable" or "within a reasonable time in light of the circumstances involved."¹¹⁷ Section 311(b)(5) provides for a fine of up to \$10,000 and imprisonment for up to one year for failure to give the required notification. Evidence obtained from such notification cannot be used by the government in any subsequent criminal prosecution, including prosecutions under statutes other than the Federal Water Pollution Control Act.¹¹⁸ Compliance with the notification requirement does not however, render the discharger immune from *civil* penalties under Section 311(b)(6),^{118a} or from prosecution under other federal statutes.¹¹⁹

Section 311(b)(6) is an expanded version of old Section 11(b)(5). Section 311(b)(6) provides for assessment of civil penalties of up to \$5,000 for discharges of harmful quantities of oil and hazardous substances; it is not required that the government, in its assessment of such penalties, establish negligence or willfulness on the part of the discharger. This strict liability provision differs from old Section 11(b)(5), which applied only to "knowing" discharges. The removal of scienter as an element of the offense has reduced the burden of proof on the agencies charged with enforcement of Section 311(b)(6), and has resulted in a great increase in the assessment of civil penalties under the statute.

115. *United States v. Refinery Corp.*, Criminal Action No. 72-CR-100 (Colo. 1972).

116. 33 U.S.C. § 409 (1964).

117. *Petition of Anthony O'Boyle, Inc.*, 161 F.2d 966 (2d Cir. 1947).

118. *United States v. Mobil Oil Corp.*, 464 F.2d 1124 (5th Cir. 1972).

118a. *But see United States v. LeBeout Bros. Towing Co.*, Civ. Action 73-915 (E.D. La. June 14, 1974), where the court held that 33 U.S.C. 1161 (b)(5), the predecessor to Section 311(b)(6), was criminal in character, notwithstanding its designation as a civil penalty and therefore could not be applied against a discharger who had given proper notification of a spill. This decision is presently being appealed by the Government.

119. In *United States v. General American Transportation Corp.*, 6 ERC 1024 (D.C. N.J. 1973), the court held immunity conferred by Section 311 to be use immunity only, and not transactional in scope.

As was the case with old Section 11(b)(4) and (5), the civil and criminal penalty provisions of Section 311(b)(5) and (6) do not apply to all discharges of oil (or hazardous materials). These subsections provide penalties only for discharges in violation of Section 311(b)(3), which prohibits only those discharges into the navigable waters which are in "harmful quantities" as defined by the President pursuant to Section 311(b)(4). The provisions of 311(b)(3) would appear to contradict the declaration of legislative policy set out in 311(b)(1), which states the national policy to be the complete prohibition of all discharges of oil or hazardous substances into the navigable waters. This apparent contradiction is partially resolved, at least with regard to oil, by the extremely broad definition of "harmful quantity" set out by regulation in 40 C.F.R. Sections 110.3 and 110.6.¹²⁰ This definition in effect provides that, with the exception of discharges from vessel engines, any oil which is discharged in a visually detectable amount is ipso facto a "harmful quantity." This broad definition was developed under old Section 11, but its effect is preserved under the savings clause provision of Section 4(b) of the Act. The validity of this administrative determination has been sustained in at least one prosecution under Section 11(b)(4).¹²¹

Enforcement proceedings under Sections 311(b)(5) and (6) thus far have been confined to cases involving oil spills, since no implementing regulations have been promulgated for hazardous substances under Section 311(b)(4).

Chief responsibility for enforcement of the civil penalty provisions of 311(b)(6) lies with the Coast Guard, although EPA has also been vested with extensive responsibilities in this area. While EPA has no direct enforcement role under 311(b)(6), it does provide investigative support to the Coast Guard in cases involving spills into the inland navigable waters, particularly in geographical areas which lack Coast Guard facilities.¹²² The commanders of the thirteen Coast

120. 40 C.F.R. § 110.3 (1971).

121. *United States v. Boyd*, No. 72-2620 (9th Cir. April 18, 1973).

122. With the exception of two reserve units located in Denver and in Salt Lake City, the Coast Guard has no facilities within the six states which comprise Region VIII of EPA: Utah, Colorado, Wyoming, North Dakota, Montana, and South Dakota.

Guard Districts are responsible for the assessment and collection of civil penalties. Although Section 311(b)(6) states that no penalty shall be assessed unless the person charged has been given notice and opportunity for a hearing, recipients of civil penalties under this subsection do not have the opportunity for a full adjudicatory hearing at the administrative level. Parties are simply notified of the investigation, and upon the preliminary assessment of a civil penalty, are notified of their right to an informal hearing before a hearing officer designated by the District Commander; a party may also submit written objections for the hearing officer's consideration. This proceeding is the only administrative forum provided to a recipient of a civil penalty assessment; at this stage the recipient may present arguments against the amount of the penalty, or against the basis for its assessment. Nearly all civil penalty actions are completed at this stage of the administrative process. If, following the informal hearing, the Coast Guard determines not to withdraw the penalty assessment, and the recipient of the penalty subsequently refuses to pay, the case is forwarded to the United States Attorneys' Office for collection. It is only at this stage that the recipient/defendant is entitled to a full trial on the merits. The *de novo* proceeding at the penalty collection stage preserves the defendant's constitutional right to due process.¹²³

The civil penalty procedure established under Section 311(b)(6) would appear to be a far more expeditious procedure than the alternative measures of immediate judicial action to collect the penalty or of granting a full adjudicatory hearing to the defendant at the administrative level. The summary administrative procedure is, of course, aided by the minimal statutory burden of proof imposed on the enforcing agency by Section 311(b)(6); the enforcing agency need only prove that the spill occurred into navigable waters, and that the defendant was responsible. The agency need not prove any degree of fault on the part of the defendant. Defendants in Section 311(b)(6) actions are not rendered immune from penalty assessment by their compliance with the

123. See cases cited in 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 7.10, at 448 (1958).

notification requirements of Section 311(b)(5); however, the Coast Guard as a matter of policy usually will not base a civil penalty assessment solely on a discharger's notification. Some independent evidence of the oil spill is usually required. This policy seems to be founded more on basic notions of fairness than on any constitutional theory of self-incrimination.

It should be noted that, once the Coast Guard has found a party to be in violation of Section 311(b)(3), the mandatory wording of Section 311(b)(6) requires it to assess a civil penalty. The agency cannot use its own discretion as to whether a penalty should be assessed. Under the old FWPCA, the Coast Guard pursued a policy of selective enforcement of the civil penalty provisions of the predecessor of Section 311(b)(5); this approach was severely criticized by the House Committee on Government Operations,¹²⁴ and the Coast Guard subsequently adopted a policy of strict enforcement. The agency does, however, exercise discretion in determining the size of the civil penalty to be assessed,¹²⁵ and EPA will make recommendations as to the appropriate amount, in cases where it is responsible for investigation of the spill.

In addition to the above-described enforcement procedure provided for spills of harmful quantities of oil and hazardous substances, Section 311 establishes a separate penalty procedure for discharges of hazardous substances which have been determined to be non-removable by the Administrator.¹²⁶ Section 311(b)(2)(A) requires the Administrator to promulgate regulations designating as hazardous substances such elements which, when discharged into the navigable waters in any quantity, present an imminent and substantial danger to the public health or welfare. Once the Adminis-

124. See the TWENTIETH REPORT BY THE COMMITTEE ON GOVERNMENT OPERATIONS, H.R. REP. No. 1401, 92d Cong., 2d Sess. 24-33 (1972).

125. PUB. L. No. 92-500, § 311(b)(6) (Oct. 18, 1972), provides that, in determining the amount of the penalty, the appropriateness of such penalty to the size of the business of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the violation shall be considered.

126. PUB. L. No. 92-500, § 311(a)(8) (Oct. 18, 1972) defines "remove" or "removal" as referring to "removal of the oil or hazardous substances from the water and shorelines or the taking of such other actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines and beaches."

trator has made such designation, he is further required by Section 311(b)(2)(B) to determine the extent of removability of any of the designated hazardous substances. Discharges of those substances determined not removable are liable for civil penalties, which are assessed by the Administrator. In assessing such penalties, the Administrator is required to take into consideration the toxicity, degradability, and dispersal characteristics of the substance.¹²⁷ The maximum penalty which can be imposed is \$50,000, in the absence of proof of "willful negligence" or willful misconduct on the part of the owner or operator of the responsible facility. The Administrator is further required by Section 311(b)(2)(D)(iv) to establish units of measurement for the purpose of determining the amounts of such penalties; fixed monetary amounts are then to be set for each unit. The size of the amounts are to be based upon the toxicity, degradability, and dispersal characteristics of the substance.

It should be noted that Section 311(b)(2) does not provide for strict liability on the part of a discharger, as is the case with 311(b)(5). If the discharger can establish one of the defenses to liability set out in 311(f), he can avoid assessment of the civil penalty.¹²⁸

Section 311(e), which is a carryover from old Section 11, provides for actions for injunctive relief whenever the President has determined that there exists an imminent and substantial threat to the public health and welfare because of an actual or threatened discharge or oil or hazardous substance into or upon the navigable waters. Such actions are brought by the appropriate U.S. Attorney's Office. The authority for making the above-described determinations has been delegated to both the Coast Guard and to EPA.¹²⁹ The former has such authority in cases of actual or threatened discharges from transportation-related on-shore and off-

127. A determination that the hazardous substance was discharged in a harmful quantity for purposes of Sections 311(b)(3) and (4) is not required for assessment of a civil penalty under Section 311(b)(2)(B).

128. PUB. L. No. 92-500, § 311(f) (Oct. 18, 1972) provides for the following defenses to liability: (1) an act of God, (2) an act of war, (3) negligence on the part of the United States Government, and (4) an act or omission of a third party without regard to whether any such act or omission was or was not negligent.

129. 38 Fed. Reg. 21243 (1973).

shore facilities, while the latter has such authority in cases involving non-transportation related facilities, both on-shore and off-shore. The language of 311(e) would appear to authorize a broad range of remedies by the government to abate an actual or threatened spill of oil or hazardous materials. This broad authorization is, however, qualified by a "balancing of the equities" provision, which presumably will insure that the detrimental effects of the required remedy will not outweigh the seriousness of the actual or threatened discharge.¹⁸⁰

To date, only one determination of an imminent and substantial threat has been made by the Administrator. This case¹⁸¹ involves a large waste oil sludge pit located adjacent to a wildlife refuge on the shore of the Great Salt Lake. The government has filed suit for injunctive relief in U.S. District Court for Utah, and the matter is presently in litigation.

Another area in which administrative enforcement authority is divided between EPA and the Coast Guard is the development and enforcement of rules and regulations under Section 311(j). The purpose of these regulations is to establish procedures for removal of discharged oil and hazardous substances, to establish criteria for development and implementation of local and regional contingency plans for such removal, to establish requirements to prevent spills of oil and hazardous substances, and to establish procedures for inspection of vessels carrying cargoes of oil and hazardous materials. Section 311(j)(2) provides for civil penalties of up to \$5,000 for violations of such regulations, once they are promulgated. Pursuant to Executive Order 11735,¹⁸² the administrative responsibility for the development of oil spill prevention regulations, and for assessment of civil penalties for violation of such regulations, has been divided between EPA and the Coast Guard. The Coast Guard has been delegated responsibility for the prevention of discharges from transportation related facilities (*e.g.*, vessels), while EPA has

180. PUB. L. No. 92-500, § 311(e) (Oct. 18, 1972) provides that "[t]he district courts of the United States shall have jurisdiction to grant relief as the public interest and the equities of the case may require."

181. *United States v. Union Pacific*, No. NC-74-15 (D.C. Utah 1974).

182. 38 Fed. Reg. 21243 (1973).

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been delegated responsibility for non-transportation related facilities (*e.g.*, oil refineries).

On January 10, 1974, EPA promulgated regulations¹³³ requiring owners or operators of non-transportation related facilities which, due to their location, could reasonably be expected to discharge oil in violation of Section 311(b)(3) to prepare and implement oil spill prevention control and countermeasure (SPCC) plans, in accordance with substantive guidelines provided in the regulations.¹³⁴ Such plans must be completed within six months of the effective date of the regulations (January 10, 1974), and must be fully implemented not later than one year from such date. SPCC plans must be certified by a Professional Engineer, and are subject to amendment by EPA under certain circumstances.¹³⁵ Failure to comply with certain provisions of the regulations renders an owner or operator liable to a civil penalty of up to five thousand dollars per violation.¹³⁶

The assessment of civil penalties will be handled administratively by EPA and the Coast Guard, in accordance with the above-described allocation of responsibility. Persons charged with a violation of the regulations are entitled to an agency hearing on the charge prior to the assessment of a civil penalty. In assessing a penalty under Section 311(j)(2) the enforcing agencies are required to take into consideration the gravity of the violation and the demonstrated good faith of the owner or operator in attempting to achieve rapid compliance, following its receipt of a notice of violation. The enforcement program under Section 311(j) is similar to that conducted under Section 311(b)(6), in that neither program grants a full scale adjudicatory hearing to the violator at the agency level. As in the civil penalty procedures conducted under Section 311(b)(6), the *de novo* penalty collection proceedings in U.S. District Court preserve the defendant's constitutional right to due process.¹³⁷

133. 38 Fed. Reg. 34165 (1973).

134. 38 Fed. Reg. 34165, at §§ 112.1(b) and 112.3(a) (1973).

135. 38 Fed. Reg. 34165, at § 112.4 (1973).

136. 33 U.S.C. § 1321(j)(2) (Supp. 1973); 38 Fed. Reg. 34165, at § 112.6 (1973).

137. See *supra* note 123.

It is not clear just how the foregoing enforcement provisions of Section 311, particularly the notification and civil penalty provisions of 311(b)(5) and (6), relate to holders of NPDES permits. The issue of how such provisions relate to the NPDES program is likely to arise in a situation where a permit holder is discharging oil in violation of 40 C.F.R. Section 110.3,¹³⁸ yet is in compliance with all effluent limitations included within its permit. Does compliance with the permit render the holder immune from prosecution under Section 311? A reading of Section 402, which is the basic authorization for the NPDES program, indicates that compliance would not render such immunity, since Section 402 makes no mention whatsoever of Section 311; for example, Section 402(k) provides that compliance with a permit "shall be deemed compliance, for purposes of Section 309 and 505, with Sections 301, 302, 306, 307, and 403 . . ." Thus, it would seem that compliance with a NPDES permit is not ipso facto compliance with Section 311. In addition, the definition of discharge provided in Section 311 clearly covers those types of discharges within the purview of Section 402 (despite the fact that the clean-up and prevention provisions of Section 311 appear to be designed for spills, rather than continuous discharges).¹³⁹ The Conference Report on the bill simply states that Section 311 does not apply to those discharges of oil which are not in harmful quantities, and are pursuant to, and not in violation of, NPDES permits.¹⁴⁰ The Conference Report statement really does nothing to clarify the problem, since a discharge of oil not in a harmful quantity is never in violation of Section 311, regardless of whether or not such discharge is pursuant to a NPDES permit.

138. 40 C.F.R. § 110.3 (1971).

139. PUB. L. No. 92-500, § 311(a)(2) (Oct. 18, 1972) defines "discharge" as including, but not limited to, "[a]ny spilling, leaking, pumping, pouring, emitting, emptying or dumping . . ." The definition of "discharge" for purposes of Section 402 is given in Sections 502(12) and (16). Section 502(16) defines "discharge" as a discharge of a pollutant; the "discharge of a pollutant" is defined by Section 502(12) as "(A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft." The terms "pollutant" and "point source" are defined by Sections 502(6) and (14), respectively.

140. SENATE CONFERENCE REPORT No. 1236, 92d Cong., 2d Sess. 184 (1972).

At present, NPDES permits issued by EPA contain a clause stating that the permit does not preclude the holder from any responsibilities, liabilities, or penalties to which the holder is or may be subject to under Section 311.¹⁴¹ This approach is consistent with the Coast Guard's position that it will take action against violations of Section 311 whether or not NPDES permits are involved.¹⁴² It is likely that the above-described permit clause will be challenged by a permit applicant in the near future.

EMERGENCY POWERS OF THE ADMINISTRATOR UNDER SECTION 504

In addition to the broad enforcement powers conferred on him by Sections 309, 311, and 402, the Administrator is vested with certain emergency powers under Section 504. This section provides that, upon receipt of evidence that a pollution source is presenting an imminent and substantial endangerment to the health and economic welfare of persons, he may request the Justice Department to bring suit in the appropriate U.S. District Court to immediately enjoin the discharges of pollutants from such sources. However, use of this section will probably be restricted to drastic situations. A similar provision in the Clean Air Act¹⁴³ has been invoked only once since passage of the Act in 1970.¹⁴⁴ It is likely that the emergency provisions of Section 504 will be utilized as a supplement to the general regulatory program provided in other sections of the Act. The provisions of Section 504 would appear to be particularly effective in situations where a discharge from a facility in compliance with its NPDES permit was for some reason causing an imminent and substantial threat to the environment. The language of both Sections 402(k) and 504 makes it clear that compliance with a

141. Memorandum from EPA's Office of Enforcement and General Counsel to the Permit Program Chiefs of all EPA regional offices, September 18, 1973.

142. Information transmitted to the authors by Commander G. H. Dickman, Chief, Marine Environmental Protection Branch, Twelfth U.S. Coast Guard District by memorandum dated September 5, 1973.

143. 42 U.S.C. § 1857h-1 (1970).

144. Such action was taken in response to a severe air pollution problem in Birmingham, Ala. on or about November 17, 1971, *United States v. United States Steel*, No. 71-1041 (N.D. Ala. November 18, 1971).

NPDES permit is no defense to injunctive action action by the Administrator pursuant to Section 504.¹⁴⁵

RELATIONSHIP OF THE REFUSE ACT TO ENFORCEMENT UNDER THE FWPCA

The application of the immunity provision of Section 402(k)¹⁴⁶ to enforcement actions under the Refuse Act clearly indicates that Congress intended that the Refuse Act continue to exist as a viable enforcement tool outside the scope of such immunity provisions. The legislative history of the 1972 Act strongly supports this view.¹⁴⁷ In addition, Section 511 (a) specifically preserves the Secretary of the Army's authority under the River and Harbor Act of 1899, of which the Refuse Act is a part.

It is clear from the foregoing provisions of the Act that the effectiveness of the Refuse Act as an enforcement tool is preserved. However, it is the policy of EPA to rely mainly on the enforcement provisions of the FWPCA, and restrict the initiation of actions under the Refuse Act to those cases which do not fall within the purview of Section 309.¹⁴⁸ Three areas in which the Refuse Act will continue to be utilized are cases involving instantaneous or short-term discharges, such as oil spills, cases involving discharges from sources which fall outside the Act's definition of point sources,¹⁴⁹ and cases involving solid waste deposits into the navigable waters, where EPA has determined that the permit provisions of Section 402 are not applicable because of the short duration of the particular discharge or deposit.

145. Section 504 is not included within the immunity provision of Section 402(k).

146. PUB. L. No. 92-500, § 902(k) (Oct. 18, 1972) provides that "[u]ntil December 31, 1974, in any case where a permit has been applied for . . . but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) Sections 301, 306, or 402 of this Act, or (2) Section 13 of the Act of March 3, 1899."

147. S. REP. No. 414, 92d Cong., 1st Sess. 64 (1972):

Federal Government is not constrained in any way from acting against violators The Administrator retains, without qualification, the authority presently available under the Refuse Act to prosecute for unlawful discharges.

148. Memorandum from EPA Office of Enforcement and General Counsel, to Regional Enforcement Directors, January 24, 1973.

149. See p. 14 *infra*.

CITIZEN SUITS

Patterned after the provision for citizen suits contained in the Clean Air Act of 1970,¹⁵⁰ Section 505 of the Act establishes the right of citizen participation in the enforcement of control requirements and regulations created under the Act.¹⁵¹ Section 505 authorizes citizens to bring civil actions against any person, including the United States and any other governmental agency, alleged to be in violation of an effluent standard or limitation or an order issued by the EPA or a state with respect to such standards or limitations.¹⁵² Because the Act authorizes citizen action specifically in the above circumstances, the result of any citizen enforcement action should be the same as if the enforcement action were taken by EPA. In either case, the issue should be the same, namely whether a violation took place concerning an effluent standard or limitation or order issued by the EPA or a state with respect to such standards or limitations. Further, by specifically stating the circumstances under which a citizen may take action, the Act provides a concrete standard for the court in resolving the case. It must be noted that since citizen action may only be taken against a violator under 505(a), equitable actions to prohibit possible violations are not contemplated by the Act. Inasmuch as all effluent data, records and other information obtained under the Act must be available to the public,¹⁵³ many evidentiary problems encountered in early citizen lawsuits should be avoided. In the past, the only way to obtain such information, if it existed at all, was to engage in time-consuming and costly discovery procedure.

In addition to authorizing citizen suits under the above circumstances, the Act authorizes actions against the Administrator of EPA for alleged failure to perform duties mandated by the Act.¹⁵⁴ This provision expanded the scope of citizen action in the administrative process, mainly by clarifying the issues of standing and jurisdiction. Previously, a

150. 42 U.S.C. § 1857h-2 (1971).

151. 33 U.S.C. § 1365 (Supp. 1973).

152. 33 U.S.C. § 1365(a)(1) (Supp. 1973).

153. 33 U.S.C. § 1318 (Supp. 1973).

154. 33 U.S.C. § 1365(a)(2) (Supp. 1973).

citizen had to rely on agency action and then could only take court action by appealing the agency's action on the grounds that the agency abused its authority or that it violated explicit statutory language. The Act provides a statutory basis which authorizes a citizen to take immediate action against the agency. Thereby, a citizen may sue to compel the Administrator to take action where none was contemplated, or to challenge action which the Administrator is taking.

The district courts are given jurisdiction over citizen suits notwithstanding the amount in controversy or the citizenship of the parties.¹⁵⁵ However, action involving a violation of an effluent standard or limitation or an order involving such standard or limitation must be brought in the judicial district in which the discharge source is located.¹⁵⁶

Prior to commencing any action, the plaintiff must provide the alleged violator, the state and the Administrator with 60 days' notice of the alleged violation.¹⁵⁷ Where violations of new source performance standards and toxic standards are concerned, the notice requirement does not apply.¹⁵⁸ The obvious purpose of the notice requirement is to allow the violator, the state, or the Administrator to take abatement measures. In so providing, Congress left no doubt that it intended that EPA and the states have primary enforcement responsibility. Only where such responsibility was not properly carried out would citizen action be allowed. EPA has promulgated regulations concerning "Prior Notice of Citizen Suits."¹⁵⁹

If, after notice, no diligent action is taken against the violator by either the state or EPA, the plaintiff would undoubtedly choose to file the action. However, if the state or Administrator commences action subsequent to the citizen's notice, the options of the citizen under the Act are not clear. Subsection 505(b)(1)(B) provides:

155. 33 U.S.C. § 1365(a) (Supp. 1973).

156. 33 U.S.C. § 1365(c)(1) (Supp. 1973).

157. 33 U.S.C. § 1365(b) (Supp. 1973).

158. 33 U.S.C. § 1365(b) (Supp. 1973).

159. 38 Fed. Reg. 15040 (1973).

No action may be commenced . . . if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a state to require compliance with the standard, limitation, or order, but in any such action in any court of the United States any citizen may intervene as a matter of right.

This subsection could be read to preclude a separate citizen action where a state or the Administrator had initiated action subsequent to receipt of the citizen's notice of violation. This reading would allow the citizen only the alternative of intervention in such action in a court of the United States as a matter of right. This may give the citizen some input where a suit was initiated by the Administrator but leaves him no recourse where a state has commenced an action in a state court. This interpretation assumes that state courts are not included within the term "a court of the United States."

The other possible interpretation of Subsection 505(b) (1) (B) is that if the citizen is not satisfied with the action taken by either the state or the Administrator, he should be allowed to pursue his suit. Under such circumstances, the court would have to consider the suit in light of the agency action and could then determine that such action was adequate to justify suspension, dismissal, or consolidation of the citizen petition. If the court decided the agency action was inadequate, it could consider the citizen action notwithstanding any pending agency action.

Of the two possible interpretations, the second would seem more reasonable. However, a simple reading of Subsection 505(b) (1) (B) seems to indicate that the first interpretation was intended. The legislative history concerning this subsection is of no help inasmuch as the comments of the Senate Committee on Public Works support the second interpretation¹⁶⁰ and the Joint Explanatory Statement of the Committee on Conference supports the first interpretation.¹⁶¹

Another question raised by Section 505(b) (1) (B), but left unanswered, is whether or not a citizen may intervene in

160. S. REP. NO. 414, 92d Cong., 1st Sess. 79 (1971).

161. S. REP. NO. 1236, 92d Cong., 2d Sess. 145 (1972).

a suit initiated by the Administrator or a state in a court of the United States prior to receipt of the citizen's notice of violation. Resolution of this issue is important where the Administrator or state is pursuing a course of action which the citizen may not agree with. For instance, the Administrator or the state may only be pursuing equitable remedies to stop the violation and may not be seeking penalties for past violations.

The Act provides that in addition to assessing civil penalties against the violator, the court may award costs of litigation, including reasonable attorney and expert witness fees, to any party.¹⁶² In discussing this provision, the Senate Committee on Public Works recognized its potential value for all parties concerned.¹⁶³ Inasmuch as it could be applied against the plaintiffs where litigation is frivolous or harassing, it should have the effect of discouraging abuse of the citizen suit provision. On the other hand, the Committee stated:

The Courts should recognize that in bringing legitimate actions under this section citizens would be performing a public service and in such instances, the courts should award costs of litigation to such party. This should extend to plaintiffs in actions which result in successful abatement but do not reach a verdict. For instance, if as a result of a citizen proceeding and before a verdict is issued, a defendant abated a violation, the court may award litigation expenses borne by the plaintiffs in prosecuting such actions.¹⁶⁴

It should be noted that the statute does not require a party to prevail as a prerequisite to awarding attorney fees. In *Sierra Club v. Lynn*,¹⁶⁵ although the plaintiffs failed to prevail, the court recognized that they performed a valuable

162. 33 U.S.C. § 1365(d) (Supp. 1973); see *NRDC v. EPA*, 5 ERC 1891 (1st Cir. 1973), in which the U.S. Court of Appeals for the 1st Circuit assessed attorneys' fees against EPA in a suit not specifically arising under the Citizen Suit provision of the Clean Air Act.

163. See *supra* note 160.

164. *Id.* at 81.

165. 5 ERC 1745 (W.D. Tex. 1973). Concerning awards of counsel fees in general, see *La Raza Unida v. Volpe*, 57 FRD 94, 4 ERC 1797 (N.D. Cal. 1972); *Pyramid Lake Paiute Tribe v. Morton*, 360 F. Supp. 669 (D.D.C. 1973); *Hall v. Cole*, _____ U.S. _____, 93 S.Ct. 1943 (1973); *Colorado Public Interest Research Group v. Train*, _____ F. Supp. _____ (Colo. 1974).

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service for the public in bringing the suit and consequently awarded attorneys' fees to the losing party.

Section 505(d) further provides that if a temporary restraining order or preliminary injunction is sought, the court may require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure. The Federal Rules anticipate that the plaintiff will be required by the court to post sufficient security to cover the damages incurred by the defendant during the term of any wrongfully granted injunction.¹⁶⁶ This rule is fair where both parties are pursuing private interests. However, in environmental cases, a citizen sues as a private attorney general to protect the public as well as himself. A further distinction in suits for equitable relief brought under the Act is that the citizen is not merely attempting to enjoin damaging action, but criminal conduct as well.¹⁶⁷ Hence, the traditional method of computing the amount of security does not lend itself to suits of this type. To conclude otherwise would in effect deny citizens the right to equitable relief under the Act and would be tantamount to taking away with one hand what was given with the other. Courts have recognized the uniqueness of environmental suits where posting bond for security is concerned and have held that no more than a nominal bond should be required of plaintiffs who are acting as private attorneys general.¹⁶⁸ It must be borne in mind, however, that failure to require any security where security is required by law is error and may constitute grounds for reversal.¹⁶⁹

Generally, issuance of a preliminary injunction rests in the discretion of the trial court.¹⁷⁰ However, the following four factors are usually taken into consideration by courts in determining whether a preliminary injunction should be issued:

166. FED. R. CIV. P. 65(c).

167. See 33 U.S.C. § 1319 (Supp. 1973).

168. *West Virginia Highlands Conservancy v. Island Creek Coal Co.*, 441 F.2d 232 (4th Cir. 1971); *NRDC v. Morton*, 337 F. Supp. 167 (D.D.C. 1971); *EDF v. Corps of Engineers*, 331 F. Supp. 925 (D.D.C. 1971); *NRDC v. Grant*, 4 ERC 1657 (1972) and 4 ERC 1659 (1972).

169. *Telex Corp. v. Int'l. Business Machine Corp.*, 464 F.2d 1025 (8th Cir. 1972); *Pioche Mines Consol., Inc. v. Dolman*, 333 F.2d 257, 273-74 (9th Cir. 1964), *cert. denied*, 380 U.S. 956 (1964).

170. *Crowther v. Seaborg*, 415 F.2d 437 (10th Cir. 1969).

- 1) Whether the plaintiff will suffer immediate and irreparable harm;¹⁷¹
- 2) Whether the harm to the plaintiff outweighs the injury to the defendant by granting the injunction;¹⁷²
- 3) Whether the plaintiff is likely to succeed on the merits;¹⁷³
- 4) The public interest.¹⁷⁴

Meeting factors 1) and 3) should be facilitated by the requirement of the Act that all effluent data, reports and other information must be available to the public.¹⁷⁵ It has been held that when the acts sought to be enjoined have been declared unlawful or clearly against the public interest, plaintiff need not show irreparable harm,¹⁷⁶ nor a balance of hardship in his favor.¹⁷⁷

“Citizen” for the purposes of the citizen suit section is defined as a “person or persons having an interest which is or may be adversely affected.”¹⁷⁸ The definition was based on Section 10 of the Administrative Procedure Act,¹⁷⁹ and the interpretation given to that section in *Sierra Club v. Morton*.¹⁸⁰ In that case the Supreme Court held that under the Administrative Procedure Act a person has standing to seek judicial review only if he can show that he himself has suffered or will suffer injury by the action or inaction complained of. The Court referred to its decision in *Data Processing Service v. Camp*¹⁸¹ and held that non-economic injury to an environmental interest is sufficient to meet the announced test, stating that “the interest alleged to have been

171. *United States Steel v. Fri*, 364 F. Supp. 1013 (N.D. Ind. 1973); *Citizens Ass'n. v. Washington*, 6 ERC 1166 (D.D.C. 1974).

172. *Sierra Club v. Hickel*, 433 F.2d 24 (9th Cir. 1970); *Sierra Club v. Resor*, 329 F. Supp. 890 (D.C. Wis. 1971).

173. *Supra* note 171.

174. *United States Steel v. Fri*, 364 F. Supp. 1013 (N.D. Ind. 1973); *EDF v. TVA*, 339 F. Supp. 806 (E.D. Tenn. 1972).

175. 33 U.S.C. § 1318 (Supp. 1973).

176. *United States v. Hayes Int'l Corp.*, 415 F.2d 1038 (5th Cir. 1969); *S.E.C. v. Globus Int'l, Ltd.*, 320 F. Supp. 158 (S.D.N.Y. 1970).

177. *Youngstown Sheet & Tube Co. v. Sawyer*, 103 F. Supp. 569, 576 (D.D.C. 1952), *aff'd*, 343 U.S. 579 (1952); *Annot.*, 26 A.L.R.2d 1378 (1952).

178. 33 U.S.C. § 1365(g) (Supp. 1973).

179. 5 U.S.C. § 702 (1967).

180. 405 U.S. 727 (1972).

181. 397 U.S. 150 (1970).

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injured 'may reflect' aesthetic, conservational, and recreational 'as well as economic values.'¹⁸² The Court also emphasized that:

[a]esthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our country, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.¹⁸³

Thus, a party's or organization's mere concern or expertise with a problem, no matter how long standing the concern and no matter how qualified they may be in evaluating the problem, is not sufficient by itself to meet the test of being adversely affected.

CONCLUSION

Although the Federal Water Pollution Control Act Amendments of 1972 are well into their second year of existence, it is still too early to predict whether they will achieve the stated objective of restoring and maintaining the integrity of the nation's waters. The efforts of the Environmental Protection Agency during the last two years have largely been devoted toward implementation of the Act. Such efforts include issuance of discharge permits, awarding grants for the construction of municipal waste water treatment works, planning and monitoring, and setting effluent standards for various industries. Activities such as these must be done to provide a sound foundation prior to moving from the implementation stage to the enforcement stage of the Act. One implemetantion effort which has had particularly disappointing results has been delegation of the NPDES discharge permit program to the states. In the first eighteen months of the Act only six states have qualified for delegation.¹⁸⁴ This circumstance has severely taxed the resources of the EPA in that

182. 405 U.S. 727, 738 (1972).

183. 405 U.S. 727, 734 (1972). See also *United States v. SCRAP*, 5 ERC 1449 (1973) in which the U.S. Supreme Court made it clear that it did not intend to back off from its opinion in *Sierra Club*.

184. California, Michigan, Oregon, Connecticut, Washington and Wisconsin.

it has received approximately 65,000 permit applications to be processed. Because of this resource drain, it has been difficult to maintain a vigorous enforcement policy. Hopefully more states will qualify to issue and enforce permits in the near future. Whether or not the hoped for decentralization occurs, EPA should place high priority in the immediate future on enforcement against major violators and against persons who fail to file for a discharge permit.

The successful implementation of the numerous and complex provisions of the Act is heavily dependent upon voluntary compliance by the affected industries and municipalities. The strongest possible incentive for voluntary compliance is a vigorous enforcement program. The Act clearly gives EPA the tools to conduct an effective enforcement program. It is up to EPA to put them to good use. Failure to do so will undermine achievement of the goal of no discharge by 1985.