No. 04-889

In The
Supreme Court of the United States

MILWAUKEE METROPOLITAN SEWERAGE DISTRICT,

Petitioner,

v.

FRIENDS OF MILWAUKEE'S RIVERS AND LAKE MICHIGAN FEDERATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES AND THE CALIFORNIA ASSOCIATION OF SANITATION AGENCIES IN SUPPORT OF PETITIONER

Of Counsel:

ALEXANDRA D. DUNN
General Counsel,
ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES
1816 Jefferson Place, NW
Washington, DC 20036
(202) 533-1803

ROBERTA L. LARSON
General Counsel,
CALIFORNIA ASSOCIATION OF SANITATION AGENCIES
813 Sixth Street
Sacramento, CA 95814
(916) 446-7979

DAVID W. BURCHMORE*
ALLEN A. KACENJAR
SQUIRE, SANDERS & DEMPSEY L.L.P.
4900 Key Tower
127 Public Square
Cleveland, OH 44114-1304
(216) 479-8500

**Counsel of Record*

Counsel for Amici

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Rule 37 of this Court, the Association of Metropolitan Sewerage Agencies ("AMSA") and the California Association of Sanitation Agencies ("CASA") respectfully request leave to file the attached *amicus curiae* brief in support of Petitioner. Consent for participation was requested of all parties, but was denied by Respondents Friends of Milwaukee's Rivers and Lake Michigan Federation.

AMSA is a trade association that represents the interests of nearly 300 publicly-owned wastewater treatment agencies nationwide. Collectively, AMSA member agencies serve the majority of the sewered population in the United States, and treat and reclaim more than 18 billion gallons of wastewater each day. CASA is a California non-profit Public Benefit Corporation created to further the common interests of 110 small, medium and large publicly-owned wastewater collection, treatment and reclamation agencies located within the State of California in their effort to provide the cost-effective treatment, disposal, reclamation and reuse of wastewater. AMSA's and CASA's members are dedicated to preserving public health and promoting sound environmental stewardship.

The primary question before the Court is whether a state court order reflecting the agreed resolution of Clean Water Act ("CWA") violations is subject to independent review through a separate citizen suit brought in federal court. AMSA's and CASA's members have a substantial interest in the correct resolution of this issue because it will directly impact the integrity of settlements that they enter into with their regulators. As public wastewater treatment agencies, AMSA's and CASA's members are entrusted with the responsibility of protecting public

health through effective environmental management. However, despite their regulatory role, these entities are simultaneously governed by the many rules and restrictions of the CWA and required to hold CWA discharge permits. These public entities are subject to enforcement under the CWA and frequently resolve these enforcement matters through agreements with state regulators. AMSA and CASA are concerned that the Seventh Circuit's failure to give the proper degree of deference to state enforcement actions, and state court orders implementing those actions, seriously undermines their viability as a means of resolving CWA violations and will, in turn, impact the ability of AMSA's and CASA's member agencies to protect public health and the environment.

The attached *amicus curiae* brief will assist the Court in evaluating the complex legal and technical issues presented in the petition for certiorari. This brief also draws on the decades of experience gained by AMSA and CASA through the representation of their members to provide the Court with a unique perspective on the practical concerns created by the Seventh Circuit's alteration of the basic relationship between enforcement and citizen suits under the CWA. Given the ramifications of this case for their members, AMSA and CASA respectfully request leave to file the attached brief *amicus curiae* in support of Petitioner.

Respectfully submitted,

DAVID W. BURCHMORE
Counsel of Record
ALLEN A. KACENJAR
SQUIRE, SANDERS & DEMPSEY L.L.P.
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114-1304

Attorneys for Amici Curiae

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BRIEF OF THE ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES and THE CALIFORNIA ASSOCIATION OF SANITATION AGENCIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER[1]

INTEREST OF *AMICI*

As detailed in the attached motion, AMSA and CASA represent the interests of several hundred small, medium and large wastewater treatment agencies throughout the United States. These public entities are entrusted with the crucial service of collecting, treating and reclaiming wastewater while simultaneously protecting the environment.

A central function of AMSA and CASA is the representation of their members' legislative, regulatory and environmental interests. As a result, AMSA and CASA actively participate in litigation that raises important CWA implementation and policy issues. The case before the Court involves sewer overflows, an issue which AMSA's and CASA's members take very seriously. Their collective goal is to provide the highest level of treatment available thereby maximizing the protection of public health and, ultimately, eliminating such overflows entirely. The primary legal question before the Court is whether a state court order reflecting the agreed resolution of CWA violations is subject to independent review through a separate citizen suit brought in federal court.

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[1] Pursuant to Rule 37.6 of this Court, *amici* represent that counsel for *amici* authored this brief in its entirety and that no person or entity other than *amici* and their representatives made any monetary contribution to the preparation or submission of this brief.

AMSA's and CASA's members have a substantial interest in the correct resolution of this issue because it will directly impact the integrity of settlements that they enter into with their regulators. As public wastewater treatment agencies, AMSA's and CASA's members hold National Pollutant Discharge Elimination System (NPDES) permits and are governed by the many other rules and restrictions of the CWA. These public entities are subject to enforcement under the CWA and frequently resolve CWA enforcement matters through agreements with their state regulators. AMSA and CASA are concerned that the Seventh Circuit's failure to give the proper degree of deference to state enforcement actions and related court orders will undermine their viability as a means of resolving CWA violations.

STATEMENT OF THE CASE

Amici adopt the statement of the case contained in Petitioner's brief.

SUMMARY OF THE ARGUMENT

Congress expressly entrusted states with the primary authority to enforce the CWA. It then granted citizens *supplemental* enforcement rights. Consistent with this structure, this Court and the majority of circuit courts have carefully limited citizen suits to their proper role by providing substantial deference to state enforcement efforts. In sharp contrast, the minority position adopted by the Seventh Circuit below would replace this deferential standard with a "detailed examination" of state-selected

remedies through federal court hearings regarding whether there is a "realistic prospect" of continuing violations. This enables citizen suits to challenge the enforcement decisions of state agencies – a direct contradiction of Congress' intent that they play a strictly supplemental role.

In addition to contradicting Congress' plan, the Seventh Circuit's failure to give state enforcement the requisite deference will expand the already alarming abuse of citizen suits. Recent Congressional testimony by AMSA, CASA and others establishes that the dramatic increase of citizen suits comes at a huge cost to the public and the environment. Abusive citizen filings thrive in jurisdictions where courts fail to grant the requisite deference to government enforcement. Allowing citizen suits where adequate government enforcement exists, as the Seventh Circuit would, ultimately results in duplicative liability, needless litigation and waste of finite public resources. Further, allowing citizens to collaterally undermine state enforcement efforts in federal court will actually delay needed improvements and discourage necessary wastewater treatment innovation. Thus, the conflict among the circuits exacerbated by the Seventh Circuit's opinion below presents an issue of national import that warrants proper resolution by this Court.

ARGUMENT

I. THE SEVENTH CIRCUIT'S FAILURE TO EXTEND THE REQUISITE DEFERENCE TO STATE ENFORCEMENT ACTIONS CONTRADICTS THE CLEAN WATER ACT'S TEXT, DISREGARDS CONGRESS' INTENT AND EXACERBATES AN EXISTING CONFLICT AMONG CIRCUIT COURTS.

A. Congress Granted Citizen Suits Only a Limited, Supplemental Role In Clean Water Act Enforcement.

Congress intentionally vested the states with primary enforcement authority under the CWA, explicitly stating that: "It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution. . . . " 33 U.S.C. §1251(b). The relationship between this primary enforcement authority and the alternate role to be played by citizen suits is established in 33 U.S.C. §1365 which bans citizen suits (1) prior to the provision of 60-days notice and (2) where the federal or state government is "diligently prosecuting" an enforcement action. As recognized by this Court, Congress crafted these restrictions to ensure that citizen suits would play a secondary role in CWA enforcement. *See Gwaltney v. Chesapeake Bay Foundation*, 484 U.S. 49, 60 (1987) ("The bar on citizen suits when governmental enforcement action is under way suggests that the citizen suit is meant to supplement rather than to supplant governmental action.").

This basic relationship is borne out in the legislative history. As this Court has acknowledged:

> The legislative history of the Act reinforces this view of the role of the citizen suit. The Senate Report noted that "[t]he Committee intends the great volume of enforcement actions [to] be brought by the State," and that citizen suits are proper only "if the Federal, State, and local agencies fail to exercise their enforcement responsibility."

Gwaltney at 60 (quoting S. REP. NO. 92-414, p. 64 (1971)). This same Senate Report quoted in *Gwaltney* further provides that the restrictions on citizen suits were actually crafted "to further encourage and provide for agency enforcement. . . ." *Id*. at 79. Similarly, the U.S. EPA testified to Congress that these restrictions on the filing of citizen suits were needed to "discourage unnecessary or abusive use of the citizen suit device." *Fed. Water Pollution Control Act Amend. of 1972: Hearing on S. 75 et seq. Before the S. Subcomm. on Air and Water Pollution*, 92nd Cong. 69 (1971) (Letter from William Ruckelshaus, Administrator, U.S. EPA).

B. The Majority of Circuit Courts Limit Citizen Suits to Their Proper Role by Viewing Governmental Enforcement Efforts with Substantial Deference.

Most circuit and lower courts have adopted deferential interpretations of the CWA's citizen suit provision that fit with Congress' plan to put primary enforcement authority squarely in governmental hands. For example, in *North and South Rivers Watershed Ass'n v. Town of Scituate*, 949 F.2d 552 (1st Cir. 1991), the State of Massachusetts ordered a town to: (1) prohibit new connections to its sewer system, (2) take all steps necessary to construct new

wastewater treatment facilities and (3) begin upgrading their facility. *Id*. at 553-54. While the town was in the process of complying with this order, a citizens' group brought suit arguing that this was "diligent non-prosecution." *Id*. at 557. The First Circuit rejected this invitation to second-guess Massachusetts' chosen enforcement scheme, instead indicating that it was entitled to substantial deference, stating that, "[w]here an agency has specifically addressed the concerns of an analogous citizen's suit, deference to the agency's plan of attack should be particularly favored." *Id*.

Two Eighth Circuit opinions similarly give the requisite deference to state enforcement efforts. In *Arkansas Wildlife Federation v. ICI Americas, Inc.*, 29 F.3d 376 (8th Cir. 1994), a citizens' group challenged the diligence of enforcement where the State of Arkansas required a herbicide manufacturer to take remedial actions through an administrative order. Specifically, the citizen plaintiffs argued that Arkansas had "repeatedly and unnecessarily abandoned all of its enforcement powers, failed to address ICI's violations, gave ICI repeated extensions for compliance, and assessed insignificant amounts of civil penalties. . . ." *Id*. at 380. The Eighth Circuit rejected these arguments because "such suits are proper only when the federal, state, or local agencies fail to exercise their enforcement responsibility [and] should not considerably curtail the governing agency's discretion to act in the public interest." *Id*. at 380-81 (citing *Gwaltney*, 484 U.S. at 60-61 and *Scituate*, 949 F.2d at 557).

Similarly, in *Comfort Lake Assoc., Inc. v. Dresel Contracting, Inc.*, 138 F.3d 351 (8th Cir. 1998), a conservation group sued a contractor for alleged permit violations. In finding that these claims were barred by the settlement

of a state administrative action, the court noted that "as a final agency enforcement action, that Agreement is entitled to considerable deference if we are to achieve the Clean Water Act's stated goal of preserving 'the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution.'" *Id*. at 357 (citing 33 U.S.C. §1251(b)).

Precedent under the parallel citizen suit provisions in other environmental statutes further confirms that substantial deference to government enforcement is required. For example, in *Ellis v. Gallatin Steel Co.*, 390 F.3d 461 (6th Cir. 2004), citizens sued a steel manufacturer under the Clean Air Act, alleging violations that were resolved in a government consent decree.[2] The district court endorsed the decree but also provided additional injunctive relief to the citizens. *Id*. at 469. On appeal, the Sixth Circuit resoundingly rejected this collateral attack on the government's remedial strategy:

> Such second-guessing of the EPA's assessment of an appropriate remedy – a mere three months after the entry of the decrees – fails to respect the statute's careful distribution of enforcement authority among the federal EPA, the States and private citizens, all of which permit citizens to act where EPA has "failed" to do so, not where EPA has acted but has not acted aggressively enough in the citizens' view.

Id. at 477 (citing *Gwaltney*, 484 U.S. at 61).[3]

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[2] The citizen suit provision in the Clean Air Act is identical to the one before the Court here in all material respects. *See* 42 U.S.C. §7604.

[3] A substantial number of lower courts have also endorsed the majority position that the CWA mandates deference to public enforcement efforts. *See, e.g., Atl. States Legal Foundation, Inc. v. Hamelin*,

(Continued on following page)

C. The Minority View Adopted by the Seventh Circuit Impermissibly Expands the Role of Citizen Suits by Failing to Give Proper Deference to Prior Governmental Enforcement.

The Seventh Circuit opened its analysis in the present case by stating that "diligence on the part of the State is presumed" and reciting two of the well-accepted reasons for that rule: (1) "the intended role of the State as the primary enforcer of the Clean Water Act" and (2) that "courts are not in the business of designing, constructing or maintaining sewage treatment systems." Appendix to Petition ("Pet. App.") 24a. However, its ultimate decision discarded these concepts entirely. The Seventh Circuit first characterized Wisconsin's chosen remedy as "the potentially self-serving statements of a state agency and the violator with whom it settled." *Id*. This characterization suggests a *highly skeptical*, rather than a highly

182 F. Supp. 2d 235, 246 (N.D. N.Y. 2001) ("[t]he standard for evaluating the diligence of the state in enforcing its action is a low one which requires due deference to the state's plan of attack"); *Comm. of Cambridge v. City of Cambridge*, 115 F. Supp. 2d 550, 554 (D. Md. 2000) (Plaintiffs' burden of proving that a state's prosecution is not diligent "is a heavy one because diligence on the part of the enforcement agency is presumed"); *Penn. Envt'l Defense Foundation v. Borough of North East*, 1997 U.S. Dist. LEXIS 23865 at *34 (W.D. Penn. Dec. 31, 1997) ("a State may choose to forgo heavy penalties and immediate compliance in lieu of requiring costly long-term improvements to a polluter's facilities"); *Williams Pipeline Co. v. Bayer Corp*., 964 F. Supp. 1300, 1324 (S.D. Iowa 1997) ("the CWA calls for a more deferential approach that does not circumscribe the administrator's discretion") (internal quotations omitted); *Coastal Fisherman's Ass'n v. Remington Arms Co.*, 777 F. Supp. 173, 183 (D. Conn. 1991) ("court[s] must presume the diligence of the state's prosecution of a defendant absent persuasive testimony that the state has engaged in a pattern of conduct in its prosecution that could be considered dilatory, collusive or otherwise in bad faith").

deferential, approach. The Seventh Circuit ultimately mandated that the lower court, after giving "some" deference to the judgment of the state, perform its own "detailed examination" to prove that Wisconsin's enforcement plan leaves no "realistic prospect" of "violations due to the same underlying causes." Pet. App. 33a. This result places citizens squarely in the middle of the state's enforcement case thus failing to preserve the state's role as "primary enforcer."

The Seventh Circuit's approach also contradicts its own advice that courts should avoid entering the "business of designing, constructing or maintaining sewage treatment systems." Pet. App. 24a. Instead, its decision to conduct an after-the-fact "detailed examination" of Wisconsin's enforcement plan does just that. At the Seventh Circuit's direction, a federal court would be required to evaluate the technical soundness of Wisconsin's settlement with the Milwaukee Metropolitan Sewerage District to determine whether it will conclusively solve the problems addressed. In other words, it would require that court to determine whether the State agency's engineering decisions (which are based on its substantial expertise and long experience with the system at issue) were wrong. This goes far beyond the limited role that the Seventh Circuit conceded should apply – determining whether state enforcement activity was "dilatory, collusive, or otherwise in bad faith." Pet. App. 23a (quoting *Connecticut Fund for the Env't v. Contract Plating Co.*, 631 F. Supp. 1291, 1293 (D. Conn. 1986).[4]

[4] This effectively reverses, without any explanation, the Seventh Circuit's much more deferential analysis under RCRA's substantively identical citizen suit provision in *Supporters to Oppose Pollution, Inc. v.*

(Continued on following page)

The Seventh Circuit is not alone in conducting an in-depth reexamination of state enforcement proceedings in contravention of Congressionally-mandated deference to the states. The Second Circuit has also expressed a similar view that advanced inquiry into state enforcement actions is warranted to determine "whether violations will continue notwithstanding the polluter's settlement with the government." *Atl. States Legal Foundation, Inc. v. Eastman Kodak*, 933 F.2d 124, 127-28 (2d Cir. 1991).[5] The Ninth Circuit has also espoused a narrow reading of the citizen suit bar in CWA §309(g) on at least two occasions. *See Washington Public Interest Research Group v. Pendleton Woolen Mills*, 11 F.3d 883 (9th Cir. 1993) (narrowly construing the requirement in 33 U.S.C. §1319(g)(6)(A)(i) that a preclusive enforcement action must be brought "under this subsection"); and *Citizens for a Better Environment v. Union Oil Co.*, 83 F.3d 1111 (9th Cir. 1996) (adopting an extremely narrow reading of the "comparable state law" requirement in 33 U.S.C. §1319(g)(6)(A)(iii)). In doing so, like the Second and Seventh Circuits, it rejected the deferential approach reflected in the First Circuit's *Scituate* opinion, "which was grounded in that court's concern that the discretion of enforcement authorities to choose enforcement methods be preserved." *Washington*

Heritage Group, 973 F.2d 1320 (7th Cir. 1992). In that case, the Seventh Circuit held that "public agencies' litigation decisions may not be second-guessed by the device of filing an independent suit," and confirmed that "[p]rimary responsibility lies with public enforcers." *Id.* at 1324.

[5] A distinct minority of lower court opinions supports this theory. Many of those are from lower courts in the Second Circuit and, therefore, bound by its decision in *Atlantic States*. *See, e.g., New York Coastal Fisherman's Ass'n v. New York City Dep't of Sanitation*, 772 F. Supp. 162, 168 (S.D. N.Y. 1991).

Public Interest Research Group, 11 F.3d at 885; *Citizens for a Better Environment*, 83 F.3d at 1117.

The Second and Seventh Circuits' interpretation of the "diligent prosecution" requirement, and the Ninth Circuit's narrow construction of the other elements of the citizen suit bar, stand in marked contrast to the deferential standard adhered to in the First, Sixth and Eighth Circuits. The latter effectively gives state remedies the time and opportunity they need to work. While this does require some patience by citizen groups, by no means does it deny them their ultimate right to ensure that violations cease. Rather, these groups are simply kept from "jumping the gun" before it is known whether the state's selected remedy will be effective. If the violations continue after the remedy has been implemented, then the need for enforcement action resumes and citizen suits may be brought. In contrast, the less deferential approach would allow citizen suits to challenge the efficacy of the often complex fixes to water quality problems immediately – before they are given the chance to work. This is, consequently, a clear and direct conflict among the circuits which demands this Court's attention. Unless corrected by this Court, the Seventh Circuit's recent decision will undermine the intent of Congress that citizen suits should "supplement" rather than "supplant" governmental action and will further contribute to the disturbing trend towards protracted and duplicative litigation described below.

II. THE DECISION BELOW AND THE ASSOCIATED CONFLICT AMONG CIRCUIT COURTS WILL INTENSIFY THE ABUSE OF CITIZEN SUITS.

In recent years, there has been an alarming growth in the rate of citizen suit filings. Between 1978 and 1983, the Environmental Law Institute identified an annual average of 100 notices of intent to sue under all environmental statutes combined. ENVTL. L. INST., CITIZEN SUITS: AN ANALYSIS OF CITIZEN ENFORCEMENT ACTIONS UNDER EPA – ADMINISTERED STATUTES III-10 (1984). In contrast, according to a recent survey:

> Statistical trends show more citizen suits than ever. Since 1995, citizens have filed 426, or about one lawsuit a week . . . under the CWA and CAA alone. During the same period, under all environmental statutes, citizens have submitted more than 4,500 notices of intent to sue, including more than 500 and 4,000 against agencies and members of the regulated community, respectively. This is an astonishing pace over eight years of about two notices of intent to sue every business day.

James May, *Now More Than Ever: Trends in Environmental Citizen Suits at 30*, 2003 WIDENER L. REV., Issue 1 at 4. While many of these threatened and filed citizen suits presumably play the legitimate supplemental role that Congress envisioned, the vast experience of AMSA's and CASA's members shows that duplicative citizen litigation is commonplace.

On September 30, 2004, AMSA, CASA and others were invited to testify before the House of Representatives' Subcommittee on Water Resources and Environment to

address the concern "that some citizen suits do little or nothing to enhance water quality, because the suits involve violations that are already being addressed in an enforcement action with government regulators. . . ." *Are Citizen Suit Provisions of the Clean Water Act Being Misused? Before the House Comm. on Water Resources and Environment*, 108th Cong. (Sept. 30, 2004) (*Amicus* App. at 7). The Subcommittee explained that "the basis for these concerns are that such citizen suits have little or no economic or environmental value added, and the substantial transaction and settlement costs associated with such suits would divert funding from necessary infrastructure and environmental projects." *Id*.

The resulting testimony confirmed that the abuse of citizen suits is a real problem. Abusive citizen filings thrive in jurisdictions where courts fail to grant the requisite deference to government enforcement. Much of this recent activity has occurred in California under insufficiently deferential interpretations by the Ninth Circuit. *See, e.g., Citizens for a Better Environment*, 83 F.3d at 1117-19 (9th Cir. 1996) (refusing to recognize the equivalency of an EPA-approved California law for citizen suit preclusion purposes and requiring that a fiscal penalty has been assessed); *Knee Deep Cattle Co. v. Bindana Inv. Co.*, 94 F.3d 514 (9th Cir. 1996) (same).

AMSA's testimony regarding the recent problems in Los Angeles provides a perfect example. In that instance, the City of Los Angeles experienced several overflows during the Winter of 1998. *Amicus* App. at 16-19. The City's regulators initiated enforcement regarding these overflows and, during September of 1998, resolved the enforcement action with a Cease and Desist Order requiring the City to pay an $850,000 penalty and construct

major sewer projects costing more than $600,000,000. *Id*. at 17. However, despite this settlement, an activist group filed suit the very next month. *Id*.

This suit was held ***not*** to be precluded by the government's ongoing enforcement action because the citizen group alleged that future spills would occur. *Id*. at 17-18; *see also Knee Deep* at 516 (categorically deeming prior enforcement efforts insufficient to address ongoing violations); *Citizens for a Better Environment*, 83 F.3d at 1117-19 (9th Cir. 1996) (same). This overlapping enforcement "did not yield additional environmental benefit to the citizens of Los Angeles." *Id*. at 19. Rather, it cost the City: (1) almost $5,000,000 in attorneys' fees; (2) $2,000,000 in citizen attorneys' fees; (3) $800,000 in duplicative cash penalties and (4) $8,500,000 for supplemental projects. *Id*. Thus, the City of Los Angeles was forced to divert more than $16,000,000 in limited resources from needed improvement work.[6]

The Seventh Circuit's ruling below constitutes a significant step towards the creation of similar problems in Indiana, Illinois and Wisconsin. Instead of clearly informing potential citizen plaintiffs that state enforcement efforts will be honored absent proof of bad faith, they are now invited to initiate a collateral federal challenge

[6] The other testimony described similar incidents impacting smaller California public bodies that were ultimately obligated to expend substantial sums on private litigation in lieu of providing public services. *See Amicus* App. at 21-32 (Testimony of CASA before Congress regarding citizen suit abuse against the Lake County Sanitation District, the City of Pacific Grove, the El Dorado Irrigation District, the City of Healdsburg and the City of Santa Rosa), and *Amicus* App. at 33-40 (Testimony of the City of Fort Bragg before Congress detailing the history of citizen suit abuse against the City of Fort Bragg).

questioning the factual sufficiency of state settlements. This will tend to move citizen suits in this area even further from the "interstitial" role proclaimed in *Gwaltney* and more squarely into the "potentially intrusive" role which the CWA and this Court have forbidden. *Gwaltney*, 484 U.S. at 61. This concern is not limited to the bounds of the CWA. Rather, as this Court recognized in *Gwaltney*, most of the principal environmental statutes contain nearly identical citizen suit provisions, including several that are remarkably similar to the one at issue here.[7] The Seventh Circuit's decision in this case, therefore, has the potential for a far-ranging impact on state enforcement activities across the entire spectrum of environmental law.

III. THE SEVENTH CIRCUIT'S FAILURE TO EXTEND THE REQUISITE DEFERENCE TO STATE ENFORCEMENT WILL LEAD TO THE INEFFICIENT ENFORCEMENT OF THE CLEAN WATER ACT.

A. The Seventh Circuit's Decision Will Discourage Settlement and Thus Increase Litigation Costs.

One fundamental concern is that the Seventh Circuit's new "detailed examination" standard will impair the ability of regulators and regulated parties alike to reach CWA settlements. As an initial matter, states will be less inclined to settle violations because every settlement – even those that are approved in a final judgment entered

[7] *Gwaltney*, 484 U.S. at 57; *see*, *e.g.*, 42 U.S.C. §6972 (Resource Conservation and Recovery Act); 42 U.S.C. §7604 (Clean Air Act); 15 U.S.C. §2619 (Toxic Substance Control Act); 42 U.S.C. §11046 (Emergency Planning & Community Right to Know Act).

by state courts – will be open to independent factual review in federal court. The natural reaction of state regulators, particularly in large high-profile enforcement actions, will be to simply take settlement off the table as an option. The disincentive to settle that this lack of finality creates will similarly deter settlement by those regulated under the CWA because they cannot secure a firm agreement. Rather, even the most final settlement agreement will be at risk of subsequent revision by a federal court in response to a redundant citizen suit.

The inability to rely on settlements will have real costs. In many cases, regulators will be forced to pursue final court judgments through extended litigation. This additional litigation will come at the high cost described in AMSA's testimony before the House of Representatives. *See Amicus* App. at 19. Importantly, this increase in costs will not be borne exclusively by regulated entities but will also tap state resources as they either bear the burden of obtaining judgment or defending their settlements from collateral attack. Further, federal and state courts will be forced to handle this additional litigation despite increasingly clogged dockets.

As noted above, many of those regulated under the CWA are public entities entrusted with providing services essential to public health and the environment to their constituents. Subjecting these entities to the additional costs of increased litigation and needless attorneys' fees will necessarily result in the increased cost of basic services. In these situations, the additional expenditure of state funds will often find local taxpayers paying twice to fund litigation that otherwise could have been resolved more efficiently through settlement.

B. The Seventh Circuit's Decision Will Delay Needed Improvements.

The primary benefit of citizen suits is their ability to force action where there is true environmental need but no enforcement activity. In that context, they can serve as a useful vehicle to help accomplish the CWA's goals. Ironically, allowing citizen suits to continue after the entry of final state settlements will have exactly the opposite effect. Upon entering a settlement agreement, the settling party is typically obligated to begin its remedial work in keeping with an approved schedule. However, a Seventh Circuit citizen suit that triggers a "detailed review" of an approved settlement's factual adequacy would necessarily forestall the needed improvements – perhaps for quite some time. Similarly, in those many instances where the parties choose litigation over a settlement that lacks finality, the conditions at issue will persist while litigation continues. This cannot be what Congress intended when creating the citizen suit right "[i]n order to further encourage and provide for agency enforcement. . . ." S. REP. NO. 92-414, p. 79 (1971).

C. The Seventh Circuit's Decision Will Stifle Innovation.

The state and federal enforcement agencies tasked with the primary responsibility of ensuring CWA compliance have significant legal expertise gained through hundreds of enforcement actions under the CWA. Even more importantly, they have decades of experience with the complex dynamics of the specific wastewater systems that they regulate. Because of this expertise, these regulators should be entrusted with the crucial decision of setting optimal enforcement strategy. Protection of the

enforcement flexibility necessary to use this expertise was at the heart of this Court's warning that citizen suits may not "seek the civil penalties that the Administrator chose to forgo" where it instead required the installation of "particularly effective but expensive machinery." *Id*. at 61.

Requiring federal courts to conduct a "detailed examination" of state-ordered remedial plans and requiring a factual showing that these plans leave "no realistic prospect" of "violations due to the same underlying causes" substantially damages this scheme by forcing regulators to dramatically revamp their tactics. They will lose the flexibility to select innovative remedies which may well be effective, but are not yet proven. Similarly, they will not be able to use iterative approaches which allow the requisite flexibility to address the ever-evolving needs of growing communities. Instead, regulators would be limited to the subset of complete and traditional fixes which citizen groups believe satisfy the "no realistic prospect" standard. Thus, the Seventh Circuit's position will stunt the evolution of treatment technology and wastewater engineering practices and result in the less efficient provision of public services. In contrast, the appropriately deferential approach adopted by the majority of circuit courts encourages regulators to explore innovate solutions with the aim of improved effectiveness and efficiency.

CONCLUSION

This case presents a clear conflict between the Circuit Courts of Appeals regarding the level of deference owed by federal courts to state-approved resolutions of CWA liability. Additionally, for the above reasons, it represents

an issue of substantial importance to all parties involved in the implementation of the CWA. It is thus appropriate for this Court to resolve the confusion created by the discordant opinions on this important issue.

For all the foregoing reasons, *amici* respectfully request that the petition for certiorari be granted.

Respectfully submitted,

DAVID W. BURCHMORE*
ALLEN A. KACENJAR
SQUIRE, SANDERS & DEMPSEY L.L.P.
4900 Key Tower
127 Public Square
Cleveland, OH 44114-1304
(216) 479-8500

*Counsel of Record

Of Counsel:

ALEXANDRA D. DUNN
General Counsel,
ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES
1816 Jefferson Place, NW
Washington, DC 20036
(202) 533-1803

ROBERTA L. LARSON
General Counsel,
CALIFORNIA ASSOCIATION OF SANITATION AGENCIES
813 Sixth Street
Sacramento, CA 95814
(916) 446-7979

FEBRUARY 2005

The Subcommittee on Water Resources and Environment

Hearing on

Are Citizen Suit Provisions of the Clean Water Act Being Misused?

PURPOSE

On Thursday, September 30, 2004, at 10:00 a.m., in Room 2167 of the Rayburn House Office Building, the Subcommittee on Water Resources and Environment will hold a hearing on whether citizen suit provisions of the Federal Water Pollution Control Act (the "Clean Water Act" or the "Act") are being misused. The Subcommittee will receive testimony from representatives of two small communities in Northern California and from the City of Los Angeles about their experiences with lawsuits filed under the Clean Water Act's citizen suit provisions, and possibly from a representative of a public interest group.

BACKGROUND

The Federal Water Pollution Control Act (the "Clean Water Act" or the "Act") makes unlawful the discharge of pollutants into navigable waters, unless the discharge is authorized by, and in compliance with, a National Pollution Discharge Elimination System (NPDES) permit issued by the U.S. Environmental Protection Agency (EPA) or by a State under a comparable State program. Most States have been authorized under the Act to issue such permits, which typically contain effluent standards and limitations, and monitoring and reporting requirements.

The holder of a Federal NPDES or a State-issued permit is subject to an enforcement action by EPA or a State for failure to comply with the conditions of the permit. A Federal enforcement action may include administrative, civil, or criminal penalties. State enforcement programs may include civil and criminal penalties, and may include other means of enforcement. In the absence of Federal or State enforcement, a citizen who has an interest that is or may be adversely affected may commence a civil action, under "citizen suit" provisions included in the Clean Water Act, against any person (including the United States and any other governmental instrumentality) alleged to be in violation of, among other things, the conditions of a Federal or State NPDES permit or a Federal or State order.

While the citizen suit provisions in the Clean Water Act serve as a safety net in instances where the regulatory agency does not enforce the water quality laws, the provisions have resulted in allegations of misuse in a number of lawsuits and out of court settlements.

CITIZEN SUITS

Section 505 of the Clean Water Act grants "any citizen" the right to commence a civil action on his own behalf against "any person" who is "alleged to be in violation of" its NPDES permit. A "citizen" is "a person or persons having an interest which is or may be adversely affected." (Clean Water Act § 505(g).) A "person" is "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." (Clean Water Act § 502(5)) Section 505 also allows for a citizen to commence a suit against EPA,

where EPA has failed to perform a duty under the Act that is not discretionary. The Act requires would-be citizen plaintiffs to provide, to the alleged violator, the State in which the violation is alleged to be occurring, and EPA, an advance notice of intent to file a suit, at least 60 days prior to filing the suit.

Actionable ongoing violations exist when a defendant's violations have continued after the date the plaintiff files suit, or there is a reasonable likelihood that the defendant will violate the Act again in the future. A citizen may not commence a suit under the Act for one-time, or "wholly past," violations.

The relief sought by a citizen plaintiff may include an injunction requiring compliance with a permit limitation, the assessment of civil penalties, and the costs of litigation, including attorney and expert witness fees, where appropriate. No compensatory damages are authorized under the Act. Penalties are paid to the U.S. Treasury. However, settlements between citizen plaintiffs and defendants requiring defendants to pay funds for other purposes are not prohibited. As a result, in settlements of litigation, citizen plaintiffs routinely seek and defendants pay funds for other purposes, including for "supplemental environmental projects" or environmental trust funds administered by an environmental group, as well as attorney fees. (Supplemental environmental projects may also be an element of settlements in enforcement cases brought by Federal or State regulators.)

Sections 505 and 309 of the Act set out certain instances where citizen suits are barred. Generally, dismissal of a citizen suit is required where the defendant can demonstrate that either the State or EPA is concurrently maintaining an

action over the same alleged violations. A citizen may not bring a citizen suit to enforce the Act where either EPA or the State is "diligently prosecuting" a civil or criminal action regarding the same violations. Enforcement actions in a court of law will bar a citizen suit, as will some administrative enforcement proceedings. A citizen may not bring a citizen suit for violations for which EPA or the State has commenced and is diligently prosecuting an administrative action to assess penalties, or for which either EPA or the State has issued a final order not subject to further judicial review and the alleged violator has paid a penalty assessed under the Act or comparable State law. The determination of what constitutes diligent prosecution of a government enforcement action sufficient to bar a citizen suit is based on a number of factors. These factors include whether compliance has been or will be achieved, whether the enforcement activity has resulted or will result in installation of the necessary pollution control equipment or upgrades, whether the initial enforcement action has been followed up as necessary, and, in some cases, whether penalties were sought or paid.

The U.S. Supreme Court has observed that the bar on citizen suits when government enforcement action has been taken or is under way "suggests that the citizen suit is meant to supplement rather than to supplant governmental action." (Gwaltney of Smithfield v. Chesapeake Bay Foundation, 484 U.S. 49 (1987) ("Gwaltney").) Citizen suits are proper only "if the Federal, State, and local agencies fail to exercise their enforcement responsibility." (Id., citing S. Rep. No. 92-414, at p. 64 (1971)).

The Federal Circuit Courts of Appeals are not uniform in determining whether a State's enforcement action and issuance of an enforcement order bars a citizen suit under

the Clean Water Act. In some Circuits, a State's enforcement action and issuance of an enforcement order bar a Clean Water Act citizen suit. (See, e.g., North and South Rivers Watershed Association v. Town of Scituate, 949 F.2d 552 (1st Cir. 1991) ("Scituate"); Ailor v. City of Maynardville, Tennessee, 368 F.3d 587 (6th Cir. 2004) ("Ailor").) The U.S. Court of Appeals for the First Circuit has said that the "focus of the statutory bar to citizen's suits" is "on whether corrective action already taken and diligently pursued by the government seeks to remedy the same violations as duplicative civilian action." (Scituate.) "Duplicative enforcement actions add little or nothing to compliance actions already underway, but do divert State resources away from remedying violations in order to focus on the duplicative effort" (Id.) Duplicative actions "are, in fact, impediments to environmental remedy efforts," "so long as the provisions in the State Act adequately safeguard the substantive interests of citizens in enforcement actions." (Id.) The Sixth Circuit similarly has observed that a citizen suit, which has been filed where a State is already diligently prosecuting an enforcement action for the same violations, changes the "nature of the citizens' role from interstitial to potentially intrusive." (Ailor.)

This, however, is not the case in States such as California, which are within the jurisdiction of the Court of Appeals for the Ninth Circuit. Under the Act, a citizen may not bring a citizen suit for violations for which EPA or the State has commenced and is diligently prosecuting an administrative action to assess penalties, or for which either EPA or the State has issued a final order not subject to further judicial review and the alleged violator has paid a penalty assessed under the Act or comparable State law. (Clean Water Act, § 309(g)(6).) The Ninth Circuit has

interpreted this language strictly and has held that the existence of an enforcement action, alone, will not bar a citizen suit for the same violations unless EPA or the State has commenced and is diligently prosecuting a judicial action or an administrative action to assess penalties, or the alleged violator has actually paid an administrative penalty.

In Citizens for a Better Environment, et al. v. Union Oil Company, 83 F.3d 1111 (9th Cir. 1996) ("Union Oil"), the Ninth Circuit determined that an administrative settlement with the State was insufficient to bar a citizen suit under the Clean Water Act. (Union Oil.) In Union Oil, the court said that, before a State administrative action can preclude a citizen suit under the Clean Water Act, it must be commenced under a provision of State law comparable to Section 309(g) of the Act, including notice and comment procedures and penalty assessment factors. (Id.) According to the Court, unless a penalty is assessed according to a provision of state law that is comparable to Section 309(g), there is no guarantee that the public will be given the requisite opportunity to participate or that the penalty assessed is of the proper magnitude. (Id.) The Union Oil court declined to follow the First Circuit's Scituate case, as it concluded the Scituate holding could lead to an anomalous conclusion that State administrative enforcement actions would more broadly preclude citizen suits than would EPA enforcement actions. (Id.)

POTENTIAL FOR MISUSE OF CITIZEN SUITS

Congress envisioned that citizen enforcement of the Clean Water Act would be a useful supplement to government agency oversight, given limited resources at both the State

and Federal levels and the potential that some States might not be sufficiently vigorous in implementing the law. Many citizen lawsuits have been filed since enactment of the Act in 1972, and have played a positive role in addressing water quality issues in a number of instances.

Concerns have been raised, however, that some citizen suits do little or nothing to enhance water quality, because the suits involve violations that are already being addressed in an enforcement action with government regulators and/or that they focus on what can be characterized as minor, sporadic, or technical violations. Concerns also have been expressed that citizen suits are subject to being misused, for example, when a citizen suit and the threat of very substantial litigation costs and penalties associated with it, is used to exact payment of significant settlements, including sizeable plaintiffs' attorney fees. The bases for these concerns are that such citizen suits have little or no economic or environmental value added, and the substantial transaction and settlement costs associated with such suits would divert funding from necessary infrastructure and environmental projects.

Recent experiences reported in the State of California illustrate some of these problems. Numerous third party citizen lawsuits have been brought against communities in California alleging Clean Water Act violations, even though State regulators already may have taken enforcement action against the communities. Some of the communities include Lake County, Fort Bragg, Los Angeles, Cotati, Covelo, Crescent City, El Dorado, Eureka, Fallbrook, Fortuna, Healdsburg, Occidental County, Pacific Grove, Petaluma, Redding, Santa Rosa, Sonoma County, and Willits, California. Sixty-day notice letters have been sent to additional communities, including Forestville,

Occidental, Russian River, Santa Rosa, Sea Ranch, Sonoma County, and Wikiup, California. Many of the suits have been brought by the same plaintiff, who has sought significant settlement payments and attorney fees from the communities. It is in part the prevalence of citizen suits by the same plaintiff that has created a sentiment on the part of some California communities that the law is being misused.

A State, including California, could institute a timely action to bar a citizen suit under the citizen suit provisions of the Clean Water Act, which would stay the citizen suit until the State action is completed, but in the case of the communities listed above, it appears the State did not do so. Some communities, including some of those listed above, that are faced with the threat of very substantial litigation costs and penalties if they lose, decide to reach settlements rather than litigate the issues. The terms of these settlements are reviewed by the presiding judge, the attorney general, and EPA.

Regulators sometimes decline to assess administrative penalties against a municipality, particularly if they are fairly small and have only limited financial resources. The regulators often prefer to allow the community's limited resources to be directed at improvements that will prevent future violations and improve water quality. However, even though the regulators have exercised their enforcement powers in these cases, citizen suits are still allowed to proceed in the Ninth Circuit when penalties were not sought.

In several cases, the State has placed the community's wastewater facility under one or more enforcement orders that direct the local agency to take steps to correct violations

within a specified timeframe prior to the filing of a citizen suit. For example, the Lake County Sanitation District has been subject to ongoing enforcement, including cease and desist orders, by the State regulatory agency at two of the District's treatment plants and associated sewer collection systems. As a result of the State enforcement, the District has implemented several new programs to address the community's compliance issues. Because the District had not paid a monetary penalty as part of the State enforcement actions, under Ninth Circuit case law, the plaintiff's suit was not barred under the Act. Subsequently, the State issued a complaint for monetary penalties against the District for what the community has said are many of the same violations cited by the plaintiff, and the District is now faced with defending both a citizen lawsuit and an administrative enforcement action. A witness at the hearing, from Lake County, is expected to discuss the enforcement actions the State has brought against his and other communities in Northern California, steps the communities are taking to address their compliance issues, and their experiences in being sued under the Act's citizen suit provisions, despite being subject to ongoing enforcement over the same issues.

In the City of Fort Bragg, the State issued a series of enforcement orders requiring the City to upgrade certain of its wastewater infrastructure in order to meet its effluent limitations. The State also had proposed changes to the City's permit to more accurately reflect limits applicable to the technologies used at the City's treatment plant. Here, too, the City remained vulnerable to a citizen suit because it had not yet completed resolving all of its alleged compliance issues, and had paid no penalties. The City received a 60-day notice letter, alleging violations

that the community has said had been addressed in the State's enforcement orders. A citizen suit was subsequently filed. The City settled the suit prior to litigation, with a settlement agreement and order in which the City agreed to, among other things, pay attorney fees and costs to the plaintiffs lawyer, and additional money to a public education fund. The full cost of the suit to the City was in the order of $150,000, much of which was directed to actions not required for or related to compliance with the City's permit requirements. Another witness, from Fort Bragg, is expected to describe the enforcement actions the State brought against his community, the steps his community has taken to come into compliance, and the community's experiences in dealing with the threat of a citizen suit involving what the community has said were the same issues.

The State also had already issued administrative complaints or orders to other small and larger communities, including Los Angeles, when they were sued by citizen plaintiffs. A witness from Los Angeles is expected to discuss the City's long-standing case that was only recently settled with citizen plaintiffs, the State, and EPA. The case stemmed from a number of wastewater overflows that occurred between 1993 and 1998, including from the record-breaking El Nino rainy season in 1998. In the case, the State originally sought to enforce against the City for the overflows as well as other small spills caused by root and grease blockages. In September 1998, the City and State agreed to settle the enforcement action by agreeing to a cease and desist order and well over a half billion dollars worth of major sewer projects to be completed on an accelerated schedule, and paying an $850,000 civil penalty. Despite the settlement, however, a month and a

half later, in November of the same year, the citizen plaintiffs filed a citizen suit against the City concerning the same sewer outfalls that were recently addressed by the State's Cease and Desist Order. Here, the plaintiffs' suit was allowed to proceed, despite the City's prior settlement, because the plaintiffs had alleged that the City would have future overflows, while the remedial projects were underway. The plaintiffs demanded $550 million in penalties be paid to the United States.

After six years of litigation and millions of dollars of litigation costs, the City reached a settlement with the citizen plaintiffs, and with the State and EPA (both of whom joined the lawsuit in 2001). The witness is expected to testify that the settlement addressed the same violations already dealt with in the 1998 settlement between the City and State, and imposed much the same requirements that the City had already agreed to in the 1998 settlement. The witness also is expected to testify that the citizen suit did not yield additional water quality benefits beyond what the State's 1998 enforcement action had achieved, and cost the citizens of Los Angeles millions of dollars in litigation costs.

Congress envisioned that citizen enforcement of the Clean Water Act would be a useful supplement to government agency oversight, but was not intended to supplant governmental action. It remains appropriate, where a regulator is not diligently enforcing the Clean Water Act, that citizen suits be available to fill the gap. However, there are questions whether all citizen suits under the Clean Water Act are serving that function.

WITNESSES

PANEL I

City of Fort Bragg
Honorable Jere Melo
Mayor Fort Bragg, California

California Association of Sanitation Agencies
Mr. Mark Dellinger
Special Districts Administrator
Lake County, California

Association of Metropolitan Sewerage Agencies
Mr. Christopher M. Westhoff
Assistant City Attorney
Department of Public Works General Counsel
Los Angeles, California

amsa

Association of
Metropolitan
Sewerage Agencies

TESTIMONY OF THE

ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES (AMSA)

September 30, 2004

Presented by

CHRISTOPHER M. WESTHOFF
Assistant City Attorney
Public Works General Counsel
Los Angeles, California

Submitted to the

SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT

in

WASHINGTON, DC

1816 Jefferson Place, NW
Washington, DC 20036-2505
202.833.AMSA
202.833.4657 FAX
info@amsa-cleanwater.org

Testimony of Christopher Westhoff
Assistant City Attorney,
Public Works General Counsel,
Los Angeles, California
on behalf of the
Association of Metropolitan Sewerage Agencies

Introduction

Good morning Chairman Duncan, Congressman Costello, Congressman Thompson, and members of the Committee, my name is Chris Westhoff. I am an Assistant City Attorney for the City of Los Angeles and I have served as General Counsel to the City's Department of Public Works for over 20 years. I am also a Board member of the Association of Metropolitan Sewerage Agencies ("AMSA") and serve as AMSA's Secretary and as Chair of AMSA's Legislative Policy Committee. AMSA represents nearly 300 clean water agencies across the country. AMSA's members treat more than 18 billion gallons of wastewater each day and service the majority of the U.S. sewered population.

On behalf of AMSA and the City of Los Angeles, I would like to thank you, Chairman Duncan, and the members of this Committee for your continued commitment to clean water issues – in California and nationwide. Your dedication to solving the challenges our communities face across the nation, including in Los Angeles, is essential to achieving the goals of the Clean Water Act.

Our nation's streams, rivers, lakes and oceans are cleaner today than they have been in over half a century. This has been accomplished by the unparalleled efforts of the many cities, special districts, municipalities, and industries that discharge treated effluent into the waters of the United States. The backbone of the transformation of America's waters has been the Federal Clean Water Act.

Hundreds of billions of dollars have been spent by the federal government, states, industries, and cities around the country to bring our nation's waters to their current condition. And, we must continue to spend billions more to maintain the improvements we have achieved to date and

to continue moving forward in the pursuit of improving the quality of our receiving waters.

Without question, the efforts of the governmental regulators entrusted with enforcement authority under the Clean Water Act – and in cases, the actions of citizens and environmental organizations stepping in when governmental regulators neglected to act – have contributed to our national water quality improvements. However, the natural tension between appropriate governmental regulatory action and citizen enforcement frequently has placed permitted entities like my City in a losing battle.

The drafters of the Clean Water Act clearly saw *governmental enforcement* against permitted dischargers as the critical element in the ultimate success of the intent of the Act. In the Act itself, *citizen enforcement* was designed to play a secondary, supplementary role, allowed only when the appropriate governmental regulators failed to diligently prosecute a permit holder for violations.

Yet today, the combination of court precedent and the U.S. Environmental Protection Agency's ("EPA's") narrow interpretation of its own regulations has skewed the intent of Congress concerning citizen enforcement. Today, permitted dischargers like my City, in California and across the country, routinely suffer the indignity, negative publicity, and substantial financial burden of having to respond to third party lawsuits brought by environmental activist groups for substantially the same violations addressed in prior enforcement actions by our regulators.

The concept of "double jeopardy" is fundamental in American jurisprudence. While not rising to the level of actually violating this foundational cornerstone, when a permitted discharger has already answered to its governmental

regulator in an enforcement action, it is patently unfair for the permit holder to be required to address the same issues in a third party lawsuit filed under the citizen suit provisions of the Clean Water Act. When regulators diligently enforce, citizen suits should be precluded.

Nonetheless, Los Angeles just finished six years of litigation initially filed in 1998 by a third party citizen group, the Santa Monica Baykeeper, and ultimately joined years later by the EPA and the U.S. Department of Justice. This citizen suit was brought *notwithstanding the fact that the City had settled an enforcement action for the same violations with our state permitting entity in the month immediately prior.*

Because of its size and reputation, Los Angeles may not engender a lot of sympathy when it finds itself as the victim of a lawsuit filed by an environmental group. However, if it can happen to Los Angeles, it can happen to any other permitted discharger – industrial, special district, or municipality – large or small across this nation.

Los Angeles has a municipal wastewater collection system that consists of close to 7,000 miles of pipe ranging from six inches to over 12 feet in diameter. In the winter of 1998 Los Angeles experienced an “El Nino” climatic condition which resulted in one of the wettest winters in 120 years of recording such statistics. In the month of February 1998 alone, we received over 14 inches of rain, the rainiest February on record. To put this in perspective, the average total rainfall *for a year* in Los Angeles is just over 15 inches.

Needless to say, the City’s wastewater collection system was overtaxed and experienced overflows during this rainy winter. Close to 50 million gallons of wastewater spilled

from the City's pipes in Winter 1998. The good news in this experience was that even with the incredible amount of rain we experienced, the wastewater that spilled from the system was confined to six distinct locations in the City – and projects to remediate these six locations were already underway. I know 50 million gallons seems like a large number, but to give you a frame of reference, Los Angeles transports close to 190 *billion* gallons of wastewater a year – so even in this extraordinarily wet year, the City still only spilled less than ½ of one percent (.005 percent) of all the wastewater collected that year, and kept 99.995 percent of the wastewater in the pipes.

The City's permitting regulator sought to enforce against the City for these spills as well as other small spills caused by root and grease blockages. In September 1998, the City agreed to settle the enforcement action by agreeing to a Cease and Desist Order from the regulator and paying an $850,000 penalty ($200,000 in cash and $650,000 in environmental projects). Further, Los Angeles agreed to construct major sewer projects totaling over $600 million on an accelerated schedule of just over six years. One project alone was the largest single public works project ever awarded by the City of Los Angeles at just over $250 million for a 12 foot diameter mainline sewer tunnel. This project was built in a compressed timeframe through the simultaneous use of four tunnel boring machines, the first time this was ever done.

In October of the same year, the Santa Monica Baykeeper held a press conference and announced their lawsuit concerning the exact same sewer spills addressed by the Cease and Desist Order issued by the City's permitting regulator just one month before. You may wonder why the Baykeeper's suit was not precluded by our prior settlement.

Because all they had to allege is that the City would have future spills – while our remediation projects were underway – and their case could proceed. To complicate matters, in January 2001, the EPA, through the Department of Justice, filed yet another lawsuit – this one covering the *same spills* as the Cease and Desist Order and the Baykeeper lawsuit, and adding on small spills that had occurred between 1998 and 2001.

It is important to note that in the six years since the 1998 "El Nino" winter, Los Angeles has had *only four* wet weather related spills. All other spills during that time frame have been caused by root and grease blockages. Also, in the six years since 1998, the average yearly volume of wastewater spilled out of the Los Angeles collection system has been one ten thousandth of one percent (.000001%) of the total volume collected. That is a pretty good batting average in any league except the Clean Water Act. You see, EPA's interpretation of its own Clean Water Act regulations is that all spills from a separate sanitary sewer collection system are flatly prohibited, regardless of volume, cause, or impact on water quality.

Even with our comprehensive maintenance program, a municipal wastewater collection system works at its heart like your pipes at home – only our systems are dramatically larger with more potential spill points. When do you call Roto Rooter® out to your house, before or after you have a backup? And, unlike a homeowner who can stop running water when they have a blockage in their line to prevent a spill out of a toilet, sink or bathtub; the wastewater in our pipes keeps coming 24 hours a day, seven days a week, and 52 weeks a year.

EPA has publicly documented that *even the best run, best maintained separate City sewer systems will overflow*. And yet, using a strained regulatory and legal analysis, EPA and enforcement authorities take a strict liability approach to these inevitable overflows. This makes every community with separate sewers an *easy target* for enforcement by third party plaintiffs.

The hard dollar cost to my City of our recent citizen suit experience – and let me reiterate that we were sued *after we had been diligently enforced against* by our regulator – reads like this: City's outside attorney fees, almost $5 million; Baykeeper attorney fees, $1.6 million; other citizen intervenors attorney fees, over $400,000; penalties, $800,000 (cash), $8.5 million (environmental projects). And this figure does not account for the incredible amount of staff time spent supporting the litigation effort and diverting staff from their core responsibilities. I can attest that this duplicative citizen suit did not yield additional environmental benefit to the citizens of Los Angeles – although it is the citizens' money that ultimately pays for needless litigation and attorneys fees through rising sewer rates.

Let me be clear. No one is asking that citizen suits go away. As responsible environmental stewards, we realize that the citizen suit provision of the Clean Water Act is a powerful and necessary tool – *to fill enforcement gaps*. Where a regulator is not diligently enforcing the Clean Water Act, citizen suits are a critical and important *secondary* source of Clean Water Act enforcement. However, where Congress' intended prime Clean Water Act enforcer has done or is doing its job, municipalities need protection from redundant third party lawsuits that will raise the cost of the clean water services we provide.

Let me conclude by stating that AMSA would welcome the opportunity to work with this Subcommittee to discuss ways to focus future third party lawsuits against municipalities where Congress intended them – where there is an enforcement gap. I note that some of the witnesses today will offer the Subcommittee specific reforms to begin this dialogue. We will be pleased to contribute to the process.

Again, I thank you for your attention to this important issue. At this time, I would be happy to answer any questions.

[LOGO]

CALIFORNIA ASSOCIATION of SANITATION AGENCIES
925 L Street, Suite 1400 Sacramento, CA 95814
PH: (916) 448-4808 www.casaweb.org

TESTIMONY OF THE

CALIFORNIA ASSOCIATION OF SANITATION AGENCIES

Presented by

MARK DELLINGER
SPECIAL DISTRICTS ADMINISTRATOR
LAKE COUNTY, CALIFORNIA

Submitted to the

SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
U.S. HOUSE OF REPRESENTATIVES

WASHINGTON, DC

September 30, 2004

Ensuring Clean Water For California

Good Morning, Mr. Chairman and Members of the Subcommittee:

I am Mark Dellinger, Special Districts Administrator for the Lake County Sanitation District in Northern California. It is my privilege to address the Subcommittee today on behalf of the California Association of Sanitation Agencies (CASA). CASA is a statewide nonprofit association of over 100 local public agencies that provide wastewater collection, treatment, disposal and water recycling services to millions of Californians. Lake County Sanitation District is a member of CASA.

There is no question that citizen enforcement has played an important role in the implementation of the Clean Water Act and other environmental statutes. Congress envisioned that the role of the citizen lawsuit would be to supplement, not supplant, the primary enforcement function of the States and the federal government. In recent years in California, however, we have seen a cottage industry develop in which plaintiffs' attorneys file citizen suit after citizen suit against numerous local agencies without regard to the magnitude or the environmental impact of the alleged violations, and despite the fact that communities may already be taking steps to rectify their situations, either voluntarily or because the State or USEPA has already undertaken administrative enforcement action.

The Clean Water Act imposes strict liability upon regulated entities. Local public agencies are required to conduct thousands of analytical tests each year, so it is not surprising that there may be a few exceedances. The results must be reported in the form of public records. Thus, establishing a Clean Water Act case is generally very simple. And no matter how strong a showing the local agency can make that it is doing everything it can to comply with its permit and protect water quality, proof of even a handful of violations over a five year period is sufficient to render the plaintiff a "prevailing party" entitled to payments of attorneys fees and costs. As local agencies strive to comply with ever changing, increasingly stringent regulatory requirements, every violation, however minor, is accompanied by the specter of possible administrative enforcement and citizen litigation.

I would like to briefly discuss the Lake County Sanitation District's experience, summarize the experiences of several

other communities around the State, and close by offering the Subcommittee some suggestions for reform that we believe will help to reinforce the original intent that citizen litigation serve as a “gap filler,” to provide a safety net for the enforcement of real environmental violations where the government fails to step in.

The Lake County Sanitation District manages and operates four wastewater treatment plants and is responsible for 200 miles of sewer collection pipes. We serve a large geographic area that is relatively rural, with a low population density, which makes it more difficult and costly to manage. The median household income in the communities we serve is 62% of the statewide average. In recent years, the District has undertaken a number of capital improvement projects, implemented an enhanced spill response program and made staffing changes to reduce overflows of treated effluent from our treatment facilities as well as to control overflows from our sewer system. Our Board recently approved a series of rate increases to raise revenues to improve our entire system. In addition, the District has received federal and state grant funding for our Full Circle project, which involves supplying our treated effluent to recharge the Geysers steam field. We see this as a win-win situation; water quality is improved due to the beneficial reuse of our effluent as an alternative to discharge, and the Geysers project generates clean energy for California residents and businesses.

These types of improvements do not happen over night, of course, and unfortunately, as the District has worked to implement its long-range plans, violations of its state discharge permits have occurred, some of which may also be violations of the Clean Water Act. The State regulatory

agency, the Regional Water Quality Control Board, placed one of the District's two largest treatment systems under an enforcement order, which requires that certain actions be taken by specified dates. The Regional Board was contemplating taking similar enforcement action for the District's Southeast Regional system, but had not yet issued an administrative order when a so-called "citizen group," Northern California River Watch, sued the District in October 2003 for alleged violations of the Clean Water Act at both of the treatment plants and the associated sewer collection systems. Because the District had not paid a monetary penalty as part of the State enforcement and compliance actions, under Ninth Circuit case law, River Watch's suit was not barred by Clean Water Act Section 1319(g). After River Watch's suit was filed, the Regional Board issued a complaint for monetary penalties against the District for some of the same violations, and the District is now faced with the worst of both worlds: expending its limited resources to defend a citizen lawsuit and paying potentially duplicative penalties in a parallel administrative enforcement action. This is surely not what Congress envisioned.

Other witnesses you will hear from today will tell their similar stories. I would just like to mention a couple of other examples of citizen lawsuits against public agencies to assist the Subcommittee in understanding that Lake County's experience is not unique.

In January 2000, in response to a significant sewer overflow from **the City of Pacific Grove's** collection system into surface waters, the Regional Board levied a $70,000 fine, required payment toward a supplemental environmental project, and set forth specific directives to upgrade and enhance Pacific Grove's sanitary sewer collection

system. The City paid the fine and began implementing the programs and asset improvements as directed. In June, 2003, the Ecological Rights Foundation filed a citizen suit against Pacific Grove for alleged violations of the Clean Water Act based on very small sewer overflows, overflows that most likely did not reach navigable waters, and the 2000 overflow in response to which Pacific Grove had already undertaken several new programs to address the prevention of sewer overflows. The resulting consent decree largely memorialized the work the City was already undertaking and did not measurably enhance water quality protection. All but two of the overflows alleged in the complaint were less than 100 gallons. The majority of the alleged violations were less than 20 gallons and did not make it to the Bay. Pacific Grove will pay plaintiffs $300,000. The amount of fees and costs the plaintiff requested were over $400,000, all of which were allegedly incurred within one year and without going to trial. The aggressive pursuit of litigation versus meaningful settlement negotiations was the major factor in the large fees incurred.

The El Dorado Irrigation District, located in the Sierra foothills, experienced a series of wastewater compliance issues caused by growth in the local service area, combined with a wastewater treatment facility which – unknown to the District until it was too late – was not capable of functioning to its designed capacity. The facility discharged treated water into a seasonal stream that would not have existed without the facility's discharge. Despite the facility's difficulty in meeting all of its permit requirements, the water it discharged into the stream had allowed a thriving ecosystem of native fish, plants, animals, and birds

to develop and to survive and flourish through the dry summer months.

In order to meet its permit requirements more consistently, the District embarked on a fourteen million dollar treatment plant upgrade project. The project was proceeding under the oversight of the Regional Water Quality Control Board, which was also processing an enforcement order for penalties for past violations, when the California Sportfishing Protection Alliance filed a citizens' suit seeking penalties for exactly the same permit violations.

Even after the District paid a $105,000 penalty to the Regional Board, the Sportfishing Protection Alliance refused to dismiss its suit. The District was ultimately compelled to pay an additional $140,000 for a supplemental environmental project in lieu of penalties and $160,000 in costs and attorneys fees to settle the citizens' suit simply to avoid the continued cost of litigation. Although supplemental environmental projects are supposed to bear some relationship to the harm caused by the violations, the project selected by the citizen's group was for riverbank restoration tens of miles away from the wastewater treatment facility in an area that had never been affected by the District's facility.

The City of Healdsburg, located in the Northern California wine country, instituted a state-of-the-art sewer maintenance program to eliminate any risk of sewer system overflows. Although it had no sewer system overflows for over three years, and there had been only two overflows in the two years before that (each of which was due to blockages in private laterals, not in the public system), Northern California River Watch filed a notice of intent to file a citizens' suit seeking affirmative injunctive

relief and penalties for sewer system overflows. Healdsburg met with River Watch's attorney and made their entire set of public records available for review to demonstrate the effectiveness of their program. Nonetheless, the citizen group filed the lawsuit and, after Healdsburg had defended itself for over a year and spent tens of thousands of its taxpayers dollars on it own attorneys, the citizen's group settled for no penalties and only $7,500 in attorneys fees.

In 1995, a citizen group filed its first lawsuit against **the City of Santa Rosa**. The City won the first lawsuit at trial and on appeal. The same citizen group sued the city again in 1998 and then settled after the city agreed to pay for environmental remediation and a portion of the attorneys' fees and costs. The citizen group agreed not to sue the city for violations that might occur before a date in the future. In 2000, **the City of Santa Rosa** was sued for a third time by the same attorney representing substantially the same plaintiffs. Throughout the time all three lawsuits were initiated and pending, the City was under a Cease & Desist Order issued by the Regional Water Quality Control Board, under which the City was required to develop and implement a reclaimed water disposal project within a specific time schedule. That project was later implemented in compliance with the state-issued enforcement order.

Prior to the filing of the third lawsuit, the State commenced a comparable enforcement action (seeking monetary penalties) against the City by publishing notice and scheduling a hearing regarding the issuance of a complaint for administrative penalties against the City. However, because the penalty order was not issued until *after* plaintiffs' lawsuit was filed, the Federal District

Court found that the state's comparable enforcement action did not bar the plaintiffs' lawsuit.

The City was not only fined $98,350 by the RWQCB for violations alleged in the third lawsuit but also settled the third lawsuit for a total of $195,000 ($75,000 in attorneys fees and $120,000 to fund a grant program). Under the terms of the settlement of the third lawsuit, plaintiff Northern California River watch agreed not to sue the City pursuant to the Clean Water Act for a period of four years. On July 15, 2004 – exactly two months after the expiration of the stipulated moratorium on litigation – River Watch filed a Notice of Intent to Sue Santa Rosa for what can best be described as "creative" interpretations of the Act and the City's permit. This will be the fourth Clean Water Act lawsuit against the City in less than 10 years.

There are many more examples like these. I want to emphasize that none of these communities were "perfect," in that each of them had experienced compliance problems and did not have spotless records. The important point is that in each case, either the community was already acting by itself or the State had already stepped in and programs were being implemented to guard against similar future violations. Just as the citizen suit was intended to supplement government action, it was also intended to be "forward looking." Citizens may not sue for wholly past violations. Given the length of time it takes to plan, finance and construct improvements, many agencies find themselves in a gray area where even though they have committed to a specific set of improvements, they cannot avoid occasional violations while these upgrades are being made.

From CASA's point of view, reform is needed to ensure that citizen suits serve their intended purpose of supplementing limited government enforcement resources and preventing future violations. I would like to briefly mention several potential reforms for the Subcommittee's consideration.

Clarify Availability of Attorneys Fees:

The availability of attorneys fees is without question a significant motivation for some third party plaintiffs to bring or threaten lawsuits. Under the Clean Water Act, a "prevailing" citizen plaintiff is entitled to attorneys fees and costs; a prevailing defendant may only recover fees if it can demonstrate that the plaintiff's suit was frivolous or entirely without merit. Thus, except in the most ill advised cases, there is very little downside to pursuing litigation for a third party plaintiff. Contrast that with the circumstance of a local public agency defendant that knows it has a strong case against sizeable penalties but nonetheless has some exposure because of a few minor violations. If the defendant goes all the way through trial, even if it significantly reduces the penalty assessed, it may find itself on the hook for not only its own attorneys' fees, expert fees, and costs, but also similar costs and fees incurred by the plaintiff. These facts place the plaintiff's attorney in a very strong bargaining position with regard to settlement.

Of all of the possible reforms, revisions to the attorneys' fees provisions of the Act are most likely to bear fruit, as the availability of these fees is what is motivating many of the abuses. With that in mind, CASA recommends that the Subcommittee consider the following:

- Limit attorney fee awards to the degree of success on the claims included in the complaint. For example, if a plaintiff alleges 100 violations and proves 10, plaintiff should able to recover only a proportionate amount in fees.
- Issue a clear statement of congressional intent that the attorney fee provision of the Act be read as reciprocal, so that attorneys' fees are available to the prevailing party – period. The language of the Act supports this reading, but the Courts have interpreted the language to allow prevailing plaintiffs to recover fees while prevailing defendants are held to a much more difficult standard.
- Place a cap on the amount of fees that may be obtained in a lawsuit against a public agency. The cap could be set as either an absolute cap or as a percentage of any penalties assessed. In the latter case, a proportionate cap would insure fees are not disproportionate to the nature of the violations actually proven. While these steps may not prevent "nuisance" suits, they would limit a community's potential exposure to exorbitant fees and make it less of a target.

Reinforce Primary Role of the States

Congress specified that no citizen suit could be maintained where the State or the USEPA is "diligently prosecuting" an action against the alleged violator. Given the time it takes to process a State enforcement action, the fact that the State is already "diligently prosecuting" is not enough to bar a citizen suit. In addition, the Ninth Circuit has determined that only a State enforcement action requiring the payment of monetary penalties will serve as a defense to a citizen lawsuit. Because achieving compliance rather

than punishment is generally the goal of water quality enforcement actions, the State or USEPA will often choose not to require payment of monetary penalties preferring to allow the agency to spend its limited resources on fixing the problem. In light of this, we ask the Subcommittee to consider:

- Requiring courts to consider the improvements and actions already being undertaken by the community either on its own initiative or pursuant to an enforcement order, a capital improvement program, or master plan, etc. The citizen suit should not go forward unless it can be shown it is likely to "trigger" further, significant and necessary improvement or redress the violations in a manner supplemental to those already underway. Courts could be authorized and encouraged to stay citizen litigation while the improvements already contemplated by the community are developed and implemented.
- Clarifying that where the State has already taken, or is in the process of taking, an enforcement action for violations, citizen litigation for the same or similar violations is barred, whether or not the State action is complete or included the assessment of monetary penalties. The 60 day window within which government is supposed to act is simply not adequate time for a state regulatory agency to investigate alleged violations, evaluate the appropriate enforcement approach, issue a complaint, provide an opportunity for public notice and comment, hold any required hearing and complete the action. It should be sufficient for the State or USEPA to make a determination as to whether it intends to enforce within a specified number of days. If the government decides to bring an action, the citizen suit should be stayed

> pending initiation and resolution of the agency enforcement action. If the State enforcement action is not completed within a reasonable period of time, the third party plaintiff could then proceed with its suit.

There may be other reforms suggested here today. CASA is very appreciative of the Subcommittee's interest and leadership in finding solutions to the citizen suit abuses. We urge the Subcommittee to consider carefully the various options for improving the law and ensuring that citizen suits against local government only proceed where they will promote real environmental solutions. Local agencies want to be partners with the federal government and the states in achieving water quality improvements. Diverting attention, limited resources, and energy to defend third party lawsuits where compliance solutions are already underway is counterproductive and disheartening.

Thank you for your time. Melissa Thorme, an Attorney with the Sacramento law firm of Downey Brand, LLP, and a Member of CASA's Attorneys Committee, is here with me and we would be pleased to answer any questions that the Subcommittee may have.

[LOGO]

CITY OF FORT BRAGG

Incorporated August 5, 1889
416 N. Franklin St.
Fort Bragg, CA 95437
Phone: (707) 961-2823
Fax: (707) 961-2802
ci.fort-bragg.ca.us

TESTIMONY PRESENTED BY

JERE MELO
MAYOR
CITY OF FORT BRAGG, CALIFORNIA

Submitted to the

SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
U.S. HOUSE OF REPRESENTATIVES

WASHINGTON, DC

September 30, 2004

Mr. Chairman and Members of the Subcommittee:

Thank you and your staff for the invitation to present testimony to the Subcommittee today.

My name is Jere Melo, and I am the Mayor, City of Fort Bragg, California. The City is located about 150 miles north of San Francisco, right on the Pacific Ocean. Fort Bragg is a city of about 7,000 residents, and it serves a population of 18,000 to 20,000 persons who live and work along about 65 miles of the California coast.

I refer you to the details in the "City of Fort Bragg Case Study", which is attached hereto. My presentation will be as a small town mayor, not as an NPDES permit or Clean Water Act legal expert.

"Are Citizen Suit Provisions of the Clean Water Act Being Misused?"

To get right to the point of this hearing, I believe the citizen suit provisions of the Clean Water Act are being misused. The City of Fort Bragg has been damaged by the provisions for citizen suits. We were faced with the uncertainty and expense of a threatened citizen lawsuit against the discharges from our waste water treatment plant. We believe we were in compliance with our NPDES permit for nearly all of the alleged violations listed in the citizen complaint, but the time and cost to defend the charges was beyond the diminished return. And so, we came to a settlement with the citizen group in order to cut our losses.

I believe it is important to state that in our case, the citizen group was not made up of local, concerned citizens. The group was from a city about 100 miles from Fort Bragg and located in a different county.

Citizen Suits Have Been Used Against Many Cities, Sanitation Districts and Businesses in the Redwood Empire and Across California.

Fort Bragg's experience is not unique. Nearly all of the cities in our part of California have encountered citizen suits. One particular, larger city, Santa Rosa, has been challenged several times, all with the same result. Each city, or sanitation district, settled before the matter went to court. The potential cost of defending the suit and the

uncertainty of prevailing on all points raised makes a settlement the most cost-effective solution.

Businesses are also not exempt from citizen suits. There are some manufacturing operations that have an NPDES permit and a waste water treatment process. The same group that challenges publicly-owned treatment plants is the group that threatens suit against business. To some degree, the citizen suit can be a job-killer, in that the cost to settle makes the cost of production rise, and plants become marginal with increases in costs.

I am very active in environmental policy matters through the League of California Cities. I tell you that the experience I relate to you about Fort Bragg and its neighboring cities is becoming more frequent throughout California. As more plaintiff's attorneys see the possibility of easy money in settlements, there are more threats of citizen suits. It is a matter that deserves at least the attention this subcommittee is giving.

Citizen Suits Come From Small Groups

Earlier I indicated that the group that threatened our city with a citizen suit is located about 100 miles away. It is also a very small group. The membership of this group, Northern California **Riverwatch**, seems to consist of less than 10 persons. **Riverwatch** has threatened and collected settlements from all of the cities in our area. In one case of the larger city being challenged multiple times, **Riverwatch** changed its name, but the persons involved were the same. And so, the citizen suit provisions of the Clean Water Act have been co-opted as a new business of threatened litigation and a real goal of extracting money from entities that treat waste water.

Riverwatch Does Not Promote Water Quality Improvements

Once a settlement is complete, there is little interest from our so-called citizen group. The "book" on a **Riverwatch** threat is to suggest a settlement as soon as possible. While the first reaction to a settlement is a rejection, no one has waited long for the settlement negotiations to begin. And they always begin with discussion about their cost to prepare the threat, some costs for their board members to review your plant and process and some other funding for public groups or pet projects.

In Fort Bragg's case, we paid $12,000 to a **Riverwatch** selected consultant to review our plant. In an unmitigated promotion of his private business, his recommendation was to purchase his brand of water treatment chemicals, the "White Knight" brand, as I recall. Now this consultant is a **Riverwatch** board member.

Another provision was to set aside $35,000 in an educational fund, which we did. A group known locally as "Noyo Watershed Alliance" (the Noyo River is the primary water source for Fort Bragg) was given control of the funds for education or land use improvement. The group has unanimously agreed to work to relocate a county road in three locations where very substantial amounts of sediment are now placed in the river. **Riverwatch** is objecting to the use of funds for this work. My best guess is that **Riverwatch** wants the $35,000 to end up in someone's pocket of its choosing, rather than eliminating three substantial sources of sediment to a stream providing habitat for coho salmon and steelhead trout.

RECOMMENDATION

The citizen suit provisions of the Clean Water Act need amendment to prevent misuse. The current system, as applied in the Redwood Empire of California, essentially allows allegations of water quality violations to lead to cash settlements, even where the public agency is already subject to a compliance order and has made commitments toward better operation and maintenance or constructing new facilities or processes. There is no consideration for a record of otherwise good performance, no consideration for a record of investment for improvements, and no consideration for working with regulatory agencies to achieve consistent compliance and to make continued improvements. Some additional burden of reason and proof needs to be placed on those who threaten a federal suit, prior to filing the 60-day notice, and such suits should be forbidden where a city or other permittee is already under a compliance order, notwithstanding that penalties were not paid. We look forward to any help you can provide to us in this regard.

Thank you,

Jere Melo
Mayor of Fort Bragg (CA)

City of Fort Bragg Case Study:

The City operates a small trickling filter sewage treatment plant rated for 1 million gallons per day in dry weather, but can reach as high as 5-7 million gallons per day in wet weather due to large rain events.

State Action: On January 23, 1997, the Regional Water Quality Control Board issued Cease and Desist Order No.

97-2, which required repairs to the City's collapsed biofiltration process. The secondary biofilter was repaired in September, 1997.

On December 10, 1998, another Cease and Desist Order ("CDO") No. 98-126 required the preparation of a plan to meet the City's effluent limitations, which were not based on the type of treatment plant operated by the City. The City submitted the plan in February, 1999 and included a time schedule for proposed improvements.

On March 22, 2001, the City's permit was scheduled to be renewed by the Regional Water Quality Control Board, including proposed changes to reflect limits for "treatment equivalent to secondary treatment" applicable to the City's trickling filter plant. However, following comment by RiverWatch, the Board took no action on the permit, but rescinded CDO No. 98-126 and adopted CDO No. R1-2001-23, which modified the time schedule for improvements. Because the permit was never changed, the City remained subject to permit limits not appropriate for the type of treatment plant it operated and made the City vulnerable to citizen suits for permit violations.

The Citizen Suit: In February of 2001, after the Regional Water Board had already issued enforcement orders, RiverWatch sent a 60-day notice letter alleging continuing violations of effluent limits, failure to comply with NPDES permits and reporting requirements, and discharge of raw sewage and pollutants into the Pacific Ocean. The case, which was settled prior to litigation, resulted in a Consent Decree issued July 9, 2002.

Case Results: As a result of the citizen suit filed by River Watch, the City of Fort Bragg:

- As part of the RiverWatch requirements during the settlement process, the City had to retain Bob Rawson, selected by Jack Silver, to conduct an audit/evaluation of Fort Bragg's collection system and treatment facility at a cost of $12,000. Bob Rawson proceeded to review and make recommendations for treatment plant improvements. One of his recommendations was that the City use a biological product that Rawson just happened to sell. Mr. Rawson is a current member of the RiverWatch Board.
- Paid $25,000 in attorneys fees and costs to Jack Silver plus an equivalent amount in fees to the City's own attorneys.
- Set up a Public Education fund in the amount of $35,000, currently being overseen by the Noyo Watershed Alliance, and now being disputed by Jack Silver.
- The City developed and implemented a grease trap ordinance and inspection program to reduce the risk of improper disposal of grease by restaurants in the City.
- Hired Nute Engineering to complete a pre-chlorination study of the wastewater treatment facility for a cost of $5,000.
- Began the process of addressing inflow and infiltration (I/I) issues. The City has authorized expenditures of $50,000, which was necessary to secure grant funding totaling nearly $720,000 to perform the work. Complete by May 30, 2007, all sewer line repairs identified in a report prepared by the City in 2000.
- Nute Engineering nearly completed the design of the Sand Filter Project as required by the Cease

> and Desist Order at a cost of approximately $35,000. This project is no longer necessary because of the City's implementation of a permanent chemical feed process that has brought the City into compliance.

The full cost of the suit was in the range of $150,000 to upwards of $200,000 and required the City to do things already obligated to do under the Cease and Desist Order or to do things not required or not related to compliance with the City's permit requirements.