



# **CALIFORNIA ASSOCIATION of SANITATION AGENCIES**

925 L Street, Suite 1400 Sacramento, CA 95814 PH: (916) 448-4808 [www.casaweb.org](http://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**

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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 its 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 be 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 Thorne, 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.