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Abstract
This article critiques the feminist view Ute Gerhard offers in “Debating Women's Equality: Toward a Feminist Theory of Law from a European Perspective”. Throughout Debating Women's Equality, Gerhard appears to have three ambitious objectives in mind: (1) to decry the paucity of research into women's legal history while beginning to do the needed work, focusing primarily on Germany but also broadly exploring European trends, (2) to demonstrate that German/European women's legal history ultimately vindicates reliance on “equal rights” as a political strategy for women, and (3) to develop an understanding of legal equality that can serve as a meaningful tool in the struggle for women's self-determination. Gerhard succeeds admirably at the first objective. But in our view, she falls short on the second objective: we found ourselves depressed rather than encouraged by her recitation of German women's struggle for civil rights. As a work of history, however, her book will be valuable both to those in the know about women's legal history in the United States and are interested in comparing the German/European experience, and to those who have not yet studied any kind of women's legal history. But as a philosophical treatise or a blueprint for pragmatic action in the struggle for women's self-determination, the book can be overlooked in favor of other more extensive, future-looking and specific treatments.

Keywords
Environmental law, Environmental Protection Agency, environmental project funds, Chesapeake Bay Foundation v. Bethlehem Steel, Sparrows Point, Gwaltney of Smithfield v. Chesapeake Bay Foundation

Disciplines
Administrative Law | Environmental Law

Comments
This article is co-authored by Janis L. Barnes
PENALTIES IN SETTLEMENTS OF CITIZEN SUIT ENFORCEMENT ACTIONS UNDER THE CLEAN WATER ACT

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INTRODUCTION

The citizen suit provision of the Clean Water Act (CWA)\(^1\) authorizes any citizen to commence a civil action against a private or public facility that is polluting waterways in violation of limits imposed under the statute.\(^2\) Citizen enforcement is pro-

† Professor of Law, William Mitchell College of Law. William Mitchell Law Review and Professor Gelpe retain a joint copyright in this article.


2. The statute authorizes any citizen to commence a civil action:
   (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation.


Effluent standards are issued by the Administrator of the Environmental Protection Agency (EPA) under sections 1316 and 1317 of the CWA. 33 U.S.C. §§ 1316, 1317 (1988). An effluent limitation is “any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.” 33 U.S.C. § 1362(11) (1988).

The Administrator must issue an order in respect to such a standard or limitation to a person who is found by the Administrator to be violating any of several statutory provisions or to be violating a permit issued under the CWA. 33 U.S.C. § 1319(a)(3) (1988). States may also issue orders if allowed to do so by state law. E.g., Minn. Stat. § 115.03 (1988).
vided by Congress to help ensure compliance with the law, even if the federal government is lax on enforcement, and to motivate the government to be more vigorous in its enforcement efforts. In addition, citizen suit enforcement adds private enforcement resources to those available in the government and provides a remedy in addition to those available under state law for persons adversely affected by water pollution.

A recent study found 882 citizen suit enforcement actions filed under the Clean Water Act. It is relatively easy for a citizen plaintiff to prove violations of the Clean Water Act in enforcement actions. All dischargers must file regular reports of their discharges. These reports are available to the public, and they provide adequate proof of a violation. The ease of


Legislative history of the Clean Air Act (CAA) citizen suit provision is often used to determine the legislative intent behind the citizen suit provision of the CWA, since the latter was enacted only two years after the CAA provision and was closely patterned on it. See Hallstrom v. Tillamook County, 110 S. Ct. 304, 310 (1989) (using legislative history of the citizen suit provision of the CAA to construe the citizen suit provision of the Resource Conservation and Recovery Act, 42 U.S.C. § 6972 (1982 & Supp. V 1987)); Nauen, Citizen Environmental Lawsuits After Gwaltney: The Thrill of Victory or the Agony of Defeat?, 15 WM. MITCHELL L. REV. 327, 328–32 (1989).

4. See S. Rep. No. 1196, supra note 3, at 36–37 ("Authorizing citizens to bring suits for violations of standards should motivate governmental agencies charged with the responsibility to bring enforcement and abatement proceedings.").


7. Id. § 1318(b).

8. See L. Jorgenson & J. Kimmel, supra note 5, at 10 (proof of Clean Water Act violations is relatively easy due to citizen access to automatic reporting system). See, e.g., Gwaltney of Smithfield v. Chesapeake Bay Found., 484 U.S. 49, 53 (1987) (violations were recorded in "Discharge Monitoring Reports").
pursuing such enforcement actions, and the fact that several "public interest" law firms have taken on the mission of filing such suits, have contributed to the large number of actions. Of course, in many of these cases, settlements are reached.

The statute provides three types of remedies for citizen suit enforcement actions. The court is empowered to enforce the legal requirement that has been violated, to require the defendant to pay civil penalties, and to award the plaintiffs attorney fees and litigation costs.

The civil penalty provision has been the source of much interest and controversy in the lawsuits. Recently, in Pennsylvania Environmental Defense Foundation v. Bellefonte Borough, a federal district court severely limited the types of penalties that may be assessed in a citizen suit action when the parties propose to settle the litigation through a consent decree. This article discusses the civil penalty remedy in the citizen suit provision, describes the Bellefonte holding which limits the civil penalty remedy, and analyzes the implications of that holding for citizen suit enforcement of the CWA.

I. Penalties and Their Use Prior to Bellefonte

The CWA contains two main enforcement provisions. Section 309 of the Clean Water Act is the general provision on enforcement by the government. Section 309(d) provides that any person who violates designated statutory provisions, permit conditions or limitations, or an administrative order issued by the Administrator of the Environmental Protection Agency (EPA), "shall be subject to a civil penalty not to exceed $25,000 per day for each violation." The court is instructed to consider several factors in determining the amount of the penalty. These factors are "the seriousness of the violation or violations, the economic benefit (if any) resulting from the vio-

9. The district courts have jurisdiction "to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title." 33 U.S.C. § 1365(a) (1988).
10. Id. § 1365(d). Actually, the court may award fees and costs to the prevailing party, regardless of whether that party is the plaintiff or the defendant. Id. See also L. Jorgenson & J. Kimmel, supra note 5, at 17-18 (reasonable attorney fees awarded to plaintiff's attorney upon successful outcome in case).
13. Id. § 1319(d).
lation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require."\textsuperscript{14}

Section 505 of the CWA\textsuperscript{15} addresses enforcement through citizen suits. It empowers the federal courts "to apply any appropriate civil penalties under section 1319(d) of this title [section 309(d) of the CWA]."\textsuperscript{16} Thus, on the face of it, civil penalties in citizen suit actions are like those in government enforcement actions to the extent "appropriate."

Usually, when the federal government collects a penalty, it is turned over to the United States Treasury.\textsuperscript{17} If a case is settled rather than litigated to its conclusion, the federal government sometimes agrees to allow the defendant to pay for an environmentally beneficial project in place of part of the monetary penalty. These payments have been called "environmentally beneficial expenditures"\textsuperscript{18} and "mitigation projects."\textsuperscript{19} In this article they are referred to as "environmental project funds."\textsuperscript{20}

The federal EPA has developed two policy documents on penalties which address these environmental project funds in the CWA context. The EPA Civil Penalty Policy gives general guidance for all EPA programs that have civil penalty authority.\textsuperscript{21} The Clean Water Act Penalty Policy for Civil Settlement Negotiations is based on this general guidance but incorporates considerations specific to enforcement of the CWA.\textsuperscript{22}

Under the CWA Penalty Policy for Civil Settlement Negotiations, EPA officials are to consider six guiding criteria in deciding whether to accept environmental protection funds. These criteria are:

\textsuperscript{14} Id.
\textsuperscript{15} Id. § 1365.
\textsuperscript{16} Id. § 1365(a).
\textsuperscript{17} See S. Rep. No. 414, supra note 3, at 80 ("It should be noted that any penalties imposed would be deposited as miscellaneous receipts and not be recovered by the complainant.").
\textsuperscript{18} See Environmental Protection Agency Civil Penalty Policy, Env't Rep. (BNA) 41:2991, 3002 (February 16, 1984) [hereinafter EPA Civil Penalty Policy].
\textsuperscript{20} See Gelpe, Pollution Control Laws Against Public Facilities, 13 Harv. Env'tl L. Rev. 69, 98 (1989).
\textsuperscript{21} EPA Civil Penalty Policy, supra note 18.
\textsuperscript{22} CWA Penalty Policy, supra note 19, at 2.
1. The project must be beyond what is required by law.
2. It is best if the project "closely addresses" the environmental harm from the violation.
3. The cost of the project, reduced by the tax benefit to the defendant, must at least equal the penalty reduction.
4. The defendant must show good faith.
5. The settlement should also require a substantial penalty, to preserve its deterrent effect.
6. The consent decree should be judicially enforceable.  

At least some of the reasons the EPA may accept expenditures on environmental projects in lieu of part of the penalties are obvious. Penalties deposited in the United States Treasury do not directly improve the environment. Agency officials imbued with the zeal of their environmental cause are going to be happier to see polluters pay for environmental improvement than to see polluters pay for defense, medical care for the elderly, or generally reduced taxes.

In addition, agency officials are likely to have favored projects that have not received public funding, and environmental project funds can be used to pursue these activities. Also, such funding is likely to provide visible results that will accrue to the agency's credit more than will deposits to be swallowed up by the treasury. Environmental project funds are attractive to violators, too. They garner good publicity instead of bad for violators and may be tax deductible while civil penalties are not.

It appears that the U.S. Department of Justice, which generally represents the EPA in enforcement actions, is not enthusi-

23. Id. at 6–8.
24. See Gelpe, supra note 20, at 98–101 (with environmental project funds, the enforcing agency may gain funding for some research it wants but cannot support under its normal budget).
25. See EPA Civil Penalty Policy, supra note 18, at 41:3002.
26. "No deduction shall be allowed under subsection (a) for any fine or similar penalty paid to a government for the violation of any law." I.R.C. § 162(f) (1988). See Colt Indus. Inc. v. United States, 30 Env't Rep. Cas. (BNA) 1179 (Fed. Cir. July 24, 1988) (company may not deduct civil penalties assessed under Clean Air Act and Clean Water Act). Environmental project funds may be deductible as a charitable contribution for the use of "[a] corporation, trust, or community chest, fund, or foundation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes . . . ." I.R.C. § 170(c)(2)(B) (1986). The Internal Revenue Code also allows a deduction for amounts paid or permanently set aside, such as an estate or trust, for a charitable purpose specified in section 170(c). I.R.C. § 642(c)(1) (1986).
astic about environmental project funds. In testimony before a congressional subcommittee, a Justice Department official cited several objections, including: unfettered use of environmental project funds may have substantial benefits for polluters, they may significantly undermine the deterrent impact of governmental enforcement action, they complicate enforcement efforts because they are difficult to negotiate and complex, monitoring compliance with the projects is burdensome, and courts may inappropriately decide that this form of alternative sentencing is proper in other types of law enforcement for which the Department of Justice is responsible.

The motivations for using environmental project funds or other payments in lieu of civil penalties are much stronger in enforcement actions by citizens. Most importantly, the CWA has no provision for the court to grant damages or other funds that a citizen plaintiff can use as compensation or repair costs for the harm caused by the discharge. An environmental project fund can serve at least the second of these two objectives. Beyond this, a civil penalty gives no value to a citizen plaintiff aside from its deterrent effect on the behavior of the defendant or on others similarly situated who may also affect the plaintiff’s interests. This same deterrent effect can be gained by other types of payments which are equally painful to the defendant.

A citizen plaintiff will have even less interest in enriching the United States Treasury than will an EPA official, who can at least feel a part of the government that reaps the benefit. If the


28. The Justice Department official referred to environmental project funds as “credit projects” in his testimony. Id. at 20.

29. Polluters often attempt to take tax deductions for payments to environmental trusts, or for money they use to finance an environmental project. Additionally, corporate polluters often claim that they do not need to alert their shareholders to these payments in SEC filings and other state filings. Id. at 21.

30. The Justice Department official also expressed concern that frequent use of environmental project funds may present legal problems under the Miscellaneous Fees Act, The Anti Deficiency Act, other statutes, and the Constitution. Id.
government pays the cost of the enforcement action, there is clear justice in letting it gain a monetary reward. With a citizen suit, even a plaintiff who collects attorney fees pays some uncompensated price for the effort of litigation.\textsuperscript{31} It is likely to seem unfair to have all the dollars at stake paid to the United States, which did not pursue the violator in the first place and did not even bother to become a party to the action.\textsuperscript{32}

The fact that environmental project payments are tax deductible will not be much of a drawback for private plaintiffs. While public officials charged broadly with protecting the public interest, which includes the public purse, may be concerned about tax consequences, private plaintiffs have less reason to be motivated by the same concern. In fact, the more favorable tax treatment for the defendant may make it willing to put more money into an environmental project fund than into a civil penalty.

One more important factor will lead citizen plaintiffs to favor environmental project funds. The citizens may have pet projects that are not supported by their private fund raising, so a payment to such a fund in lieu of a civil penalty will be particularly attractive. Environmental groups can use citizen suits against violators of the CWA as a way of funding broad-ranging activities. Since violations are easy to prove, an environmental group, as citizen plaintiff, may bring an enforcement action against a violating facility, then seek funding of its programs as part of a settlement. In fact, citizen plaintiffs often do try to negotiate settlements of their citizen enforcement suits under the CWA and to include in those settlements environmental project funds.\textsuperscript{33}

A recent survey reveals how environmental project funds are used in negotiated settlements of citizen suit action.\textsuperscript{34} The survey covers settlements from 1984 to 1987 involving consent decrees allocating monies to a third party environmental fund.


\textsuperscript{32} The Administrator of the EPA has the right to intervene in any citizen enforcement action. 53 U.S.C. § 1365(c)(2) (1988).

\textsuperscript{33} See Nauen, supra note 3, at 341 (citizen groups traditionally attempt to negotiate settlements which call for payment by the alleged violator to various environmental projects); L. Jorgenson & J. Kimmel, supra note 5, at 17 ("[m]any citizen suit settlements include the provision that the defendant company will make a donation to a third-party environmental group, or to an environmental project").

\textsuperscript{34} See L. Jorgenson & J. Kimmel, supra note 5 and accompanying text.
The settlements include contributions to public universities and colleges, monies to purchase and preserve, maintain, or improve land, funds for an environmental survey, and monies for other less specific environmental improvement projects. The largest settlement to a third party environmental fund was $1 million, decreed in NRDC and Chesapeake Bay Foundation v. Bethlehem Steel, Sparrows Point.

35. See, e.g., id. app. 2 at 124, 139 citing Sierra Club v. Vanderbilt Chem. Corp. ($13,000 contribution to Murray State University for the breeding of injured bald eagles and reintroduction of the species along the lower Mississippi and Ohio rivers in the Southeast); New Jersey Public Interest Research Group (NJPIRG) and Atlantic States Legal Fund (ASLF) v. Public Service Elec. & Gas Co. (contribution of $15,000 to a Cook College research fund for oyster culture).

36. See, e.g., id. app. 2 at 129, 137, 146, 147, 149 citing Sierra Club and Natural Resources Defense Council (NRDC) v. Raytheon Co. (decree of $50,000 to purchase and preserve land in Massachusetts); NJPIRG & NRDC v. JT Baker Chem. Co. (decree of $10,000 to Open Space Institute for land acquisition in the Delaware Valley); Friends of the Earth (FOE) v. Alcan Aluminum Corp. (decree of $30,000 for development and maintenance of environmental and recreational areas); ASLF & FOE v. Welch Allyn (decree of $37,500 to Arise, Inc. to develop and improve nature trails); ASLF & FOE v. Moench Tanning Co. (decree of $10,000 to Missouri Botanical Gardens); Hudson River Fishermen's Ass'n v. Federal Block, Inc. (decree of $20,000 to Quassack Creek Fund for restoration and remedial action in the area).

37. See, e.g., id. app. 2 at 131 citing Sierra Club v. Keystone Automotive Plating Co. (decree of $250,000 to Nature Conservancy for an environmental survey of a river).

38. See, e.g., id. app. 2 at 138, 144, 144, 144, 145, 151 citing NJPIRG & ASLF v. Tenneco Polymers, Inc. (decree of $255,000 to American Littoral Society for work in the Delaware River Basin); Sierra Club v. Interpace Corp. (decree of $25,000 awarded for environmental projects in Genesee County, New York); Sierra Club v. Oneida, Ltd. (decree of $20,000 divided among environmental projects in New York state); Sierra Club v. Philips E.C.G., Inc. (decree of $10,000 to environmental conservation in the Seneca River-Barge Canal); Sierra Club v. United States Gypsum (decree of $25,000 for environmental projects in upstate New York); ASLF v. Wyth Lab & Am. Home Products Corp. (decree of $20,000 to American Clean Water Project).

39. See id. app. 2 at 131 (case summarized). Eight of the cases involving environmental project funds also included a payment to the U.S. Treasury. See, e.g., id. app. 2 at 121, 131, 137, 137, 138, 139, 146, 153 citing Sierra Club v. Florida Wire & Cable Co. ($16,000 to the U.S. Treasury, $10,000 to Jacksonville University, and $10,000 to Open Space Institute); NRDC & Chesapeake Bay Found. v. Bethlehem Steel, Sparrows Point ($500,000 to the U.S. Treasury and $1,000,000 to a third party environmental fund); NJPIRG v. Jersey Cent. Power and Light Co. ($150,000 to the U.S. Treasury and Fisheries Aquaculture Technology Ext. Center); NJPIRG & NRDC v. JT Baker Chem. Co. ($10,000 to the U.S. Treasury and $10,000 to Open Space Institute); NJPIRG v. Jersey Cent. Power & Light Co., Oyster Creek ($75,000 to the U.S. Treasury and $75,000 to Fisheries and Aquaculture Technology Ext. Center); NJPIRG & ASLF v. Public Serv. Elec. & Gas Co. ($40,000 to the U.S. Treasury, $15,000 to Cook College research fund, and $15,000 to New Jersey Conservancy Foundation); ASLF & FOE v. Consolidated Rail Corp. ($85,000 to the U.S. Treasury, $43,750 to Great Lakes United, and $43,000 to Trout Unlimited); Sierra Club v.
II. The Bellefonte Decision

In Bellefonte, the Pennsylvania Environmental Defense Foundation (PEDF) brought a citizen suit, pursuant to the CWA, which alleged that Bellefonte Borough operated a sewage treatment plant that discharged waste water into Spring Creek. The plant’s discharge violated the terms and provisions of Bellefonte’s water discharge permit by emptying more pollutants into Spring Creek than authorized by the permit.

Bellefonte filed a motion to enter a consent decree along with a copy of the proposed decree. The United States filed comments opposing the proposed consent decree because (1) it did not provide for a penalty payment to the United States Treasury, and (2) the money it would pay into an environmental project fund would not be used to mitigate the environmental harm caused by Bellefonte’s violations.

The PEDF filed a motion requesting the court to ignore the comments of the United States regarding the proposed consent decree when making its decision. The court determined that it would consider the United States’ comments on the proposed settlement, even though it was not a party to the action. The court considered the comments appropriate for three reasons: (1) the United States has the primary responsibility for enforcing the CWA, (2) the purpose of a citizen suit is to advance the public’s interest, and (3) the United States can provide valuable information on the public interest.

The court then rejected the EPA’s first ground of opposition to the settlement. It reasoned that the Supreme Court’s decision in Gwaltney of Smithfield v. Chesapeake Bay Foundation precluded it from disapproving the settlement for lack of a civil penalty payable to the United States Treasury. Gwaltney holds that a court may not entertain a citizen suit for wholly past violations of the CWA. Only ongoing or recurrent violations of the CWA are actionable. The Bellefonte court noted that there

Lowengart and Co., Inc. ($5,000 to the U.S. Treasury and $25,000 to Western Penn Conservancy).

41. Id. at 435.
42. Id. at 434–35.
44. Id. at 67.
45. Id. at 58–59.
was no proof of ongoing or recurrent violations. Apparently it reasoned that a court can entertain a settlement of the action, even though an essential element has not yet been proven. The court can also approve remedies that no one would be entitled to if that element did not exist, but cannot demand that a standard civil penalty be among such remedies.\textsuperscript{46}

The court accepted the EPA's second objection. It disapproved the proposed consent decree because it provided that Bellefonte would pay $35,000.00 into an escrow account (that is, an environmental project fund), but did not require that the money be used to mitigate the adverse effects of the alleged polluting discharges.\textsuperscript{47}

The court based its disapproval on the EPA's document, CWA Penalty Policy for Civil Settlement Negotiations. According to the court, this document authorized the EPA to consent to settlements only if funds that would otherwise go into a civil penalty payable to the United States Treasury were instead used on a project which "closely addresses the environmental effects of the defendant's violation."\textsuperscript{48} The court, while not bound to do so, choose to accede to the EPA's position.\textsuperscript{49}

The court rejected the PEDF argument that the funds would be spent for projects on Spring Creek, the site of Bellefonte's violations.\textsuperscript{50} The court found no such specific requirement in the proposal.\textsuperscript{51}

III. The Implications of Bellefonte

The holding in Bellefonte prevents citizen plaintiffs from us-

\textsuperscript{46} The court said:

Because of the absence of proof that Bellefonte's sewage treatment plant is violating or will violate the applicable pollutant discharge limits, we are of the view that the Supreme Court's decision in Gwaltney of Smithfield v. Chesapeake Bay Foundation makes it impermissible in a citizen suit brought pursuant to 33 U.S.C. § 1365 to disapprove a proposed consent decree solely for the reason because it does not contain a provision requiring the Defendant to pay a civil penalty to the United States.

\textit{Bellefonte,} 718 F. Supp. at 436. The court's position on this matter is interesting, especially in light of the fact that it thought itself in a position to demand another specified remedy be included in the consent judgment.

\textit{See also infra} text accompanying note \textsuperscript{58} (discussion of civil penalties after \textit{Gwaltney}).

\textsuperscript{47} \textit{Bellefonte,} 718 F. Supp. at 437.

\textsuperscript{48} \textit{Id.}

\textsuperscript{49} \textit{Id.}

\textsuperscript{50} \textit{Id.}

\textsuperscript{51} \textit{Id.}
ing monetary assessments in enforcement actions to fund other organizational activities. This removes the incentive to bring citizen suit enforcement actions in any case where some motivation other than halting and remedying the effects of the violation is necessary. The result is that it would prevent a plaintiff from pursuing an action if the plaintiff primarily desires funding for some auxiliary activity. An action would not be initiated if the plaintiff's interest in halting and remedying the discharge were not in itself sufficiently strong to justify the costs of litigation, both monetary and human, that are not compensated by an attorney fee award. In this way it would lead to fewer citizen suits.

This change would have two adverse effects. First, more violations of the law would continue unabated. If a facility is discharging in violation of its permit or other legal requirement, but that discharge is not having a substantial adverse environmental impact, or the impact is not felt by people, it is more likely that the violation would continue. The *Bellefonte* rule, if generally adopted, would remove the motivation to sue such facilities, leaving those violations to continue unremedied. Second, environmental groups would have a harder time funding their activities.

The possibility of continued pollution is troubling. Of course, some violators would still be sued: those causing significant environmental degradation, particularly the kind of degradation that has adverse monetary effects on someone or some group. In these cases the plaintiffs would be more likely to be motivated predominantly by their desire to stop the pollution and have its effects remedied. *Bellefonte* would not impair their ability to attain those objectives. In other cases, violations would probably continue.

One Congressional purpose behind the citizen suit provision was to increase compliance with the law,52 so *Bellefonte* contradicts this legislative purpose. Yet in general, some violations of the law go unpunished while others do not, and this is not particularly troubling. But it may be argued that the failure to enforce the law uniformly is justified only by the fact that enforcement resources are limited, so they must be used to address the worst problems. Enforcement discretion, usually in the hands of governmental enforcers, allows targeting enforce-

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52. *See supra* note 3 and accompanying text.
ment actions at the worst violators or at those having the most adverse impact on society. The citizen suit provisions circumvent the problem of resource limitations, so that the limitation on using them cannot be justified on the grounds that governmental enforcement is also limited. Under this analysis, the limitation imposed by Bellefonte is unjustified.

The Bellefonte limitation is justified, however, from a different standpoint. To the extent that the citizen suit provision augments state remedies for those adversely affected by water pollution, Bellefonte does not diminish a plaintiff's ability to accomplish this purpose. A citizen plaintiff primarily concerned with the effects of the pollution can still negotiate a settlement that includes an environmental project fund which provides for cleanup or restoration of the affected resources. This provides a remedy not usually available to a private plaintiff under state law.

Moreover, lawsuits that do not accomplish the purpose of providing a remedy to parties who sustain actual injuries, which is more narrow than increasing all compliance, may run against another legislative concern. The legislative histories of the citizen suit enforcement provision of the CWA and the similar provision of the Clean Air Act reveal considerable congressional concern over the possibility that the federal courts will be used too freely for enforcement actions. The legislative concern that "harmless" violators not be harassed by enforcement actions, but also reveals a concern with protecting the public purse and the functioning of the federal courts.

Citizen suits entail public costs, such as costs of providing courts, judges, and clerks. Congress can reasonably object that these costs should not be borne by the public in cases where no one is seriously affected by the pollution caused, even if there are provable violations of the law. In addition,


54. See Hallstrom v. Tillamook County, 110 S. Ct. 304, 310 (1989) ("[T]he legislative history [of the citizen suit provision of the Clean Air Act] indicates an intent to strike a balance between encouraging citizen enforcement of environmental regulations and avoiding burdening the federal courts with excessive numbers of citizen suits.").
every lawsuit crowds the court calendar, delaying resolution of other cases. This is justified only if the plaintiff is motivated by harm incurred from violations of federal law.

These public costs render the second adverse effect of the *Bellefonte* limitation unimportant. It is not a legally cognizable harm if environmental groups lose a source of funding. There is no particular reason why violators of the CWA, rather than violators of other environmental laws that lack citizen suit penalty provisions, should fund the activities of such groups. In fact, it is not clear why violators of environmental laws in general have a greater obligation to fund the activities of environmental groups to the extent that such activities are unconnected with the specific harms caused by the violations.

Even if violators were obligated to fund environmental activities due to some vague connection between their violations and the activities of the groups, it is questionable whether federal courts should be made available as a collection device, or whether a federal court could determine which groups and activities are worthy of funding. If an enforcement action is settled, the federal court must scrutinize the proposed consent decree to determine whether it is fair and reasonable, whether it is consistent with public policy, and whether it is consistent with congressional goals. 55

In the context of reviewing the consent settlement of an enforcement action, the court would have to spend considerable time and resources gathering and reviewing information on the legitimacy of the funded group and the validity of its planned activities. Even then, a court might have a difficult time evaluating whether the proposed project is consistent with public policy.

This analysis is consistent with that of the Supreme Court in *Gwaltney*, which held that citizen enforcement actions under section 505 are available only against ongoing violations by a facility. 56 Although most of the Court's discussion in that case

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focuses on the statutory language, overall it recognizes a congressional concern with using the citizen suit provision as a way of curing present water pollution problems.\textsuperscript{57} Similarly, the focus of \textit{Bellefonte} is on curative remedial action.

The \textit{Bellefonte} holding has another salutary effect with respect to \textit{Gwaltney}. After the Supreme Court decision in \textit{Gwaltney}, a debate arose in the lower courts as to whether, in a citizen suit, \textit{Gwaltney} permits courts to impose a civil penalty for violations that occurred prior to the filing of the complaint. \textit{Gwaltney}'s emphasis on curing present water pollution problems suggests that penalties for past violations are inappropriate. On the other hand, the plain holding in \textit{Gwaltney} does not explicitly prohibit penalties for pre-complaint violations as long as ongoing or recurrent violations are alleged. The courts faced with this issue have split on whether \textit{Gwaltney} permits them to impose civil penalties for past violations that have been cured.\textsuperscript{58}

The \textit{Bellefonte} rule finesses this debate for settlements in which some payment remedy is used in lieu of penalties. By limiting payments to those used to repair the environmental damage from past violations, \textit{Bellefonte} complies with the \textit{Gwaltney} emphasis on curing present pollution problems while providing some remedy beyond an injunction for past violations.

\textsuperscript{57} See Nauen, \textit{supra} note 3, at 346–47 (discussion of \textit{Gwaltney}).

\textsuperscript{58} Compare Student Pub. Interest Research Group of New Jersey, Inc. v. Monsanto Co., 29 Env't Rep. Cas. (BNA) 1092, 1094 (D.N.J. 1988) (penalties may be imposed for violations occurring between notice of intent to sue and filing of complaint if violations continue after the complaint is filed, but none can be imposed for violations before notice of intent to sue) with Public Interest Research Group of New Jersey v. Carter-Wallace, Inc., 684 F. Supp. 115, 119 (D.N.J. 1988) (holding that \textit{Gwaltney} does not prohibit penalties for pre-complaint violations, based partly on the fact that the Supreme Court remanded the case in circumstances in which it was foreseeable that the trial court would impose such penalties).

Two other cases impose penalties for pre-complaint violations without discussing the issue. See Nauen, \textit{supra} note 3, at 351 & n.189 (Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd., 688 F. Supp. 1078, 1080 (E.D. Va. 1988); Sierra Club v. Chevron U.S.A., Inc., 834 F.2d 1517, 1522 (9th Cir. 1987)). See also Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd., 890 F.2d 690 (4th Cir. 1989) (permitting penalties for violations of one permit condition that occurred prior to filing the citizen enforcement action because they appeared to be ongoing at the time of filing, but disallowing penalties for violations of another permit condition that had clearly ceased before the enforcement action was filed); Work v. Tyson Foods Inc., 720 F. Supp. 132 (W.D. Ark. 1989) (imposing civil penalties for pre-filing violations that are ongoing or recurrent).
CONCLUSION

The *Bellefonte* case would prohibit using environmental project funds in settlements of citizen enforcement actions unless these funds would remedy the pollution caused by the violating discharge. This may discourage some citizen groups from bringing enforcement actions and leave more discharges unremedied. The *Bellefonte* rule would not discourage citizen suit enforcement actions where the plaintiffs suffer some substantial harm from the discharge or are mainly motivated by a desire to stop the discharges or alleviate their adverse environmental effects. In balance, it seems appropriate to limit enforcement in this way because it avoids using limited judicial resources, and a statute addressed to specified types of environmental harms, for cases in which elimination of such specified environmental harm is not the main motivation for the litigation.59

The rationale behind the *Bellefonte* rule should also apply to settlements in cases by governmental plaintiffs. It would limit environmental project funds in these settlements as well to those which address the environmental effects of the violations. This would constrain public agencies from using enforcement litigation and settlement as a way of gaining off-budget funding for their pet environmental projects. At present, the environmental project funds in some settlements meet the *Bellefonte* criteria, but in others they do not.60

59. Other means to gain more control over money in environmental project funds are suggested in Smith, *supra* note 55, at 74.

60. The EPA included environmental project funds in a number of settlements involving enforcement actions against municipal offenders. The agency reported it used such funds in approximately 15 percent of the 46 municipal settlements it entered from 1984 to 1987. *Environmental Improvement Projects, supra* note 27, at 7 (statement of Jonathan Cannon, Deputy Assistant Administrator, Office of Enforcement and Compliance Monitoring, EPA).

In both citizen and public enforcement cases, the *Bellefonte* rule should narrow the focus of the settlement discussions and encourage the parties to be more concerned about remedying the adverse environmental impacts caused by the violating facility. Narrowing the use of penalties to cleanups of problems caused by the violating facility yields an indirect mechanism for providing cleanup funds where no such remedy is specified directly by the statute.