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Using Citizen Suits To Remedy Environmental Injustice and Achieve Clean Water in California

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**USING CITIZEN SUITS TO REMEDY ENVIRONMENTAL INJUSTICE AND
ACHIEVE CLEAN WATER IN CALIFORNIA**

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Introduction

Nearly fifty years since the passage of the Clean Water Act (“CWA”) in 1972,¹ widespread pollution of California’s surface and groundwater continues across the state. “Over half of California’s lakes, bays, wetlands, and estuaries are too polluted to swim, drink, or fish,” according to the State Water Resources Control Board.² Poor and working-class communities suffer disproportionately from the negative externalities and environmental impacts of water pollution, including effects on human health and wellness.³ With a focus on the CWA citizen suit provision,⁴ this paper examines how the legal and administrative processes for water pollution control have not effectively addressed the disproportionate burden of environmental hazards borne by California’s poor communities.

Part I discusses the background and legal history of water pollution control in California.

Part II considers that CWA citizen suits play an essential role in enabling plaintiffs to supplement government enforcement of water pollution and to challenge agency inaction. Lawyers representing environmental justice communities have successfully used the citizen suit provision to enjoin and penalize polluting activity in clients’ neighborhoods.⁵

Part III focuses on two major limitations of CWA citizen suits: addressing agricultural pollution and seeking appropriate remedies. Agriculture is the primary source of California’s water pollution but its runoff is regulated by California law and cannot be challenged by federal citizen suit actions. Plaintiffs that do succeed against polluters are limited to injunctive and

¹ 33 U.S.C. Section 1251 et seq.

² State Water Resources Control Board, *Staff Report: 2014 and 2016 California Integrated Report Clean Water Act Sections 303(d) and 305(b)*, (October 3, 2017).

³ California Coastkeeper Alliance, *A solution to California water pollution: The benefits of citizen lawsuits and their value for clean water enforcement in California*, (August 15, 2018).

⁴ 33 U.S.C. Section 1365.

⁵ California Coastkeeper Alliance, *supra* note 3.

punitive relief and may be left without a meaningful acknowledgement of the affected community or a reasonable likelihood that the plaintiffs will attain clean water.

Part IV recommends that a state-level citizen suit provision should be written into California's Porter-Cologne Water Quality Control Act⁶ ("Porter-Cologne Act") to allow plaintiffs to challenge agricultural runoff. This section also recommends that plaintiffs should be allowed to seek comprehensive remedies under federal and state law to ensure that judicial relief properly acknowledges, respects, and remedies environmental injustice suffered by the poor.

Part I: Background

A. Clean Water Act of 1972

Pursuant to 33 U.S.C. Section 1365, "any citizen may commence a civil action" on their own behalf against any person "who is alleged to be in violation of an effluent standard" or against the EPA Administrator "where there is alleged a failure of the Administrator to perform any [nondiscretionary] act or duty."⁷ In other words, as long as a private citizen or group can prove standing to sue, that plaintiff has a legal avenue against polluters who violate permit requirements and against regulators who fail to enforce those requirements. In seeking remedies for an alleged violation of the CWA, plaintiffs can seek injunctive relief, civil penalties, and award of reasonable attorney and expert witness fees.⁸

Passing the CWA in 1972, Congress intended private citizen suits to supplement government enforcement of water pollution, given the agencies' lack of resources for uniform enforcement of individual operations nationwide.⁹ In addition, the CWA is only intended to

⁶ California Water Code Section 13000 et seq.

⁷ 33 U.S.C. Section 1365(a)(1).

⁸ 33 U.S.C. Section 1365(a)(2) and (d).

⁹ S. Rep. No. 50, 99th Cong., 1st Sess. 28 (1985) ("Citizen suits . . . operate as Congress intended – to both spur and supplement government enforcement action.").

address pollution from any “point source,” meaning “any discernible, confined, or discrete conveyance, including . . . any pipe, ditch, [or] channel” and not including “agricultural stormwater discharges and return flows from irrigated agriculture.”¹⁰ Discrete point source pollution is controlled by National Pollutant Discharge Elimination System (“NPDES”) permits issued by the EPA.¹¹ Control of pollution from diffuse nonpoint sources (“NPS”) such as agricultural runoff, the primary source of water pollution in California, is largely the role of state and local governments which are required to assess NPS and develop best management practices for long-term control and compliance.¹²

B. California Water Pollution Control

Despite a comprehensive federal, state, and local regulatory framework established over the past fifty years to address pollution, widespread water pollution continues in California. As described above, over half of California’s waterbodies are impaired, according to reports from the State Water Resources Control Board (“State Water Board”)¹³. This dynamic between comprehensive regulation and meager results suggests that the CWA and Porter-Cologne Act are only effective as they are enforced by federal, state, and local agencies. Environmental justice (“EJ”) advocates like California Coastkeeper Alliance have argued that agencies have proven “unwilling or unable” to address significant violations or compel industry compliance, “particularly in California’s less affluent inland areas.”¹⁴ The result is an uneven regulatory patchwork which exacerbates existing negative consequences of environmental pollution in poor communities. In his 1992 piece *The Need for Environmental Poverty Law*, scholar and attorney

¹⁰ 33 U.S.C. Section 1362(14).

¹¹ 40 CFR Section 112.1.

¹² 33 U.S.C. Section 1329.

¹³ State Water Board, *supra* note 2.

¹⁴ California Coastkeeper Alliance, *supra* note 3.

Luke W. Cole reminds us that “poor people bear the brunt of environmental dangers . . . and their negative effects on human health and safety . . . [and] the fewest resources to cope with these dangers, legally, medically, or politically.”¹⁵ The situation is no different in California, where poor people suffer disproportionately from pollution and are at a greater risk of health consequences than residents of affluent areas.¹⁶

Agriculture is the primary source of California’s water pollution, with excess pesticides and fertilizers entering surface water and groundwater through irrigation and stormwater runoff.¹⁷ As pollution from agricultural runoff continues to worsen, the Water Boards are unable to determine the actual numbers of polluted wells or people affected.¹⁸ It is estimated that “[h]undreds of thousands of residents in [California’s] agricultural areas draw their drinking water from untreated wells with potential nitrate contamination” linked to blue-baby syndrome, birth defects and cancers.¹⁹ Rural and predominantly Latino communities in the Central Valley are burdened by a lack of access to safe and reliable water for everyday uses such as hand-washing and showering, relying on bottled water for drinking and cooking.²⁰ While California agriculture is a “multibillion dollar industry that produces more than half of the nation’s fruits, nuts, and vegetables,”²¹ the negative externalities of this industry are most often felt by poor people, particularly the very farmworkers that sustain the industry’s labor. At the same time, too

¹⁵ Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 *ECOLOGY L.Q.* 619, 668 (1992).

¹⁶ California Coastkeeper Alliance, *supra* note 3.

¹⁷ Isaac Cheng & Alicia Thesing, *California regulation of agricultural runoff*, Trends: ABA Section of Environment, Energy, and Resources Newsletter, 49(2), 15-17 (2017).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Jose A. Del Real, *They Grow the Nation’s Food, but They Can’t Drink the Water*, The New York Times (May 21, 2019); available at <https://www.nytimes.com/2019/05/21/us/california-central-valley-tainted-water.html>

²¹ Cheng & Thesing, *supra* note 17.

often “these low-income communities cannot afford alternative water supplies,”²² let alone the health care costs resulting from pollution-related illness.

Part II: Past Successes of CWA Citizen Suits

Generally, the CWA has provided citizens with access to court for private enforcement of environmental law and for recourse against polluters and regulators.²³ The citizen suit provision has been an essential legal avenue for private citizens and groups to supplement government enforcement of water pollution, directly serving Congress’ intent for the provision. The citizen suit provision thereby helps to empower communities which have borne the brunt of environmental injustice by helping to control unaddressed sources of pollution in plaintiffs’ own neighborhoods.²⁴

Plaintiffs pursuing CWA citizen suits can also challenge national rulemaking and agency inaction.²⁵ Challenging agency inaction is particularly important to overburdened communities which can take action in the place of unwilling or restrained federal and state agencies. Plaintiffs can also seek compliance orders and civil penalties, helping to enjoin and penalize polluters’ unlawful activity.²⁶ Without citizen suit provisions under federal environmental law, discrete sources of pollution would be less likely to be addressed, while private citizens would lose a successful legal method for environmental enforcement.²⁷

²² *Id.*

²³ Richard E. Schwartz & David P. Hackett, *Citizen Suits Against Private Industry Under the Clean Water Act*, 17 NAT. RESOURCES LAW. 327, 338 (1984).

²⁴ See Jeanne Marie Zokovitch Paben, *Approaches to Environmental Justice: A Case Study of One Community’s Victory*, 20 SO. CAL. REV. L. & SOCIAL JUSTICE 235 (Spring 2011).

²⁵ Schwartz & Hackett, *supra* note 23.

²⁶ Schwartz & Hackett, *supra* note 23, at 353-60.

²⁷ Helen H. Kang, *Pursuing Environmental Justice: Obstacles and Opportunities—Lessons from the Field*, 31 Wash. U. J. L. & Pol’y 121 (2009).

According to Mark A. Ryan, former EPA attorney and editor of the ABA's *Clean Water Act Handbook*, CWA citizen suits have served Congress' intent by helping to supplement government enforcement when agencies are falling behind.²⁸ Ryan believes that "[t]he large number of citizen suits filed" compared to the "relatively high success rate of those suits" suggests that the CWA citizen suit provision is directly serving its congressional purpose "of enforcing the law where the government has either failed or opted not to enforce."²⁹ The suits are spread in a mix of red and blue states and "are dominated by local or regional groups rather than the large national environmental groups."³⁰ In other words, the citizen suit provision is being used by private citizens and groups to take action when there is unlawful pollution and agency inaction in their own neighborhoods.

While it is not possible to determine the overall quantitative impact of CWA citizen suits on all California waterbodies, several cases have undoubtedly led to positive developments in reducing long-term pollution in poor neighborhoods. After reaching settlements with polluters, plaintiffs' efforts have led to long-term cleanup projects and quantifiably reduced long-term pollution in clients' neighborhoods.³¹ Over a recent five-year period, "citizen lawsuits defending clean water in California produced more than \$8.8 million in funding for environmental projects that benefit local communities harmed by the pollution underlying the case."³²

At the same time, the large quantity of CWA citizen suits has arisen because federal and state agencies have too often fallen short in addressing water pollution, either for lack of agency

²⁸ Mark A. Ryan, *Clean Water Act Citizen Suits: What the Numbers Tell Us*, Natural Resources & Environment Volume 32, Number 2 (Fall 2017).

²⁹ *Id.*

³⁰ *Id.*

³¹ California Coastkeeper Alliance, *supra* note 3.

³² *Id.*

resources or for lack of political will.³³ While California leads the nation in the number of CWA citizen suits, this work has been necessary to supplement agency action where enforcement is lacking.³⁴ For example, while the “Regional Water Boards only brought penalty actions against stormwater violators 0.47 percent of the time” in 2016, whereas during a recent five-year period, “83 percent of stormwater penalty enforcement cases were brought by citizen enforcement in California.”³⁵

Part III: Existing Limitations of CWA Citizen Suits

While fifty years have elapsed since the passage of the CWA and the Porter-Cologne Act, California’s 1969 predecessor to the CWA, water pollution remains widespread across the state. In both rural and urban contexts, poor communities continue to bear a disproportionate burden of water pollution and its negative environmental consequences, relying on bottled water for essential uses. While plaintiffs from EJ communities have successfully used citizen suits for recourse against polluters and regulators, often acting where agencies have failed or opted not to act, the CWA citizen suit provision is also limited as an avenue (A) for addressing widespread agricultural runoff pollution and (B) for seeking meaningful and comprehensive judicial relief.

A. The Need to Address Agricultural Pollution in California

Agriculture is the primary source of California’s water pollution.³⁶ As the result of overapplication of synthetic pesticides and fertilizers, there are widespread impairments of California waterbodies and groundwater.³⁷ Despite the success of CWA citizen suits in addressing discrete sources of pollution, the CWA plays a limited role in preventing and

³³ *Id.*

³⁴ Ryan, *supra* note 28.

³⁵ California Coastkeeper Alliance, *supra* note 3.

³⁶ Cheng & Thesing, *supra* note 17.

³⁷ *Id.*

addressing pollution from NPS such as agricultural runoff and urban stormwater. While EJ groups have won victories in legal and administrative challenges to the State and Regional Water Boards' agricultural permits and their regulation of NPS,³⁸ there is an urgent need for more ambitious regulatory action to address agricultural runoff and its environmental impacts, raising the need for CWA citizen suits on behalf of farmworker communities.

Instead, the CWA explicitly excludes “agricultural stormwater discharges and return flows from irrigated agriculture” from its regulation of discrete point sources.³⁹ In California, regulation of agricultural runoff is largely the role of State and Regional Water Boards acting under authority of the Porter-Cologne Act.⁴⁰ The Water Boards are required to assess NPS and to develop policies and practices for its control.⁴¹ As with the CWA, however, the NPS policy is only as effective as its enforcement. Yet there is no citizen suit provision found in the Porter-Cologne Act, despite the need for supplemental private enforcement.

Dr. Melissa McCoy of the Association of Clean Water Administrators reminds us that while the NPDES permitting system has “substantially reduced the amount of pollution discharged from point sources,” contaminants from NPS such as agricultural runoff and urban stormwater “are by far the greatest contributors to surface water pollution in the U.S.”⁴² Dr. McCoy urges readers to participate in federal, state, and local efforts to regulate NPS pollution: “the website of your state or local environmental protection department should provide information on current regulations and opportunities to submit public comments or attend public

³⁸ *Monterey Coastkeeper v. State Water Resources Control Board*, 28 Cal. App. 5th 342 (2018).

³⁹ 33 U.S.C. Section 1362(14).

⁴⁰ California Water Code Section 13369.

⁴¹ See State Water Resources Control Board, *Policy For Implementation And Enforcement Of The Nonpoint Source Pollution Control Program*, (May 20, 2004).

⁴² Dr. Melissa McCoy, *Establishing requirements to control nonpoint source pollution under the U.S. Clean Water Act: The role of public participation* (2014).

hearings related to water quality regulations” and management plans.⁴³ There are also “opportunities to submit written comments on proposed EPA rule makings. Academic researchers and coalitions of multiple parties or members of the public can be effective advocates for change,” especially with supportive evidence.⁴⁴ While participation in administrative processes is an essential tool of lawyers and EJ advocates, participation in this process assumes that state and local agencies are developing the political will to enforce control measures, particularly from agricultural runoff.⁴⁵ In addition, the working poor are systematically excluded from this process because participation in a hearing or rulemaking meeting may require time off work, access to a computer and internet, access to transportation, and technical expertise.

B. The Need for Comprehensive Judicial Relief

Plaintiffs pursuing CWA citizen suit actions are limited to seeking injunctive relief, civil penalties, and award of reasonable attorney and expert witness fees.⁴⁶ Potential judicial relief afforded by the CWA can help to enjoin and penalize polluters’ unlawful activity at discrete point sources and ensure due process for clients with fewer resources. At the same time, plaintiffs that successfully challenge polluters’ unlawful activity at discrete point sources may continue to suffer from widespread impacts of diffuse NPS.⁴⁷ Successful plaintiffs may be left without a meaningful acknowledgement of their communities by polluters and regulators or a reasonable chance that their neighborhoods will attain clean water at some point in the future.⁴⁸

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ California Coastkeeper Alliance, *supra* note 3.

⁴⁶ 33 U.S.C. Section 1365(a)(2) and (d).

⁴⁷ Schwartz & Hackett, *supra* note 23, at 353-60.

⁴⁸ Catherine M. Kaiman, *Environmental Justice and Community-Based Reparations*, 39 SEATTLE U. L. REV. 1327 (2016).

Instead, plaintiffs often resort to the use of settlements to achieve long-term cleanup projects and quantifiably reduced long-term pollution in clients' neighborhoods.⁴⁹

Part IV: Recommendations

As the CWA citizen suit provision has enabled plaintiffs to supplement government enforcement of water pollution control and to challenge agency inaction, usage of the provision is limited in its ability to address pollution from NPS such as agricultural runoff and to deliver effective judicial relief to successful plaintiffs. Agency inaction amid continuing impairments of water in California suggests that comprehensive federal and state regulation is urgently needed to address water pollution. An effective regulatory framework coupled with actual enforcement can help to prevent pollution's severe impacts on the health of poor and vulnerable communities.

Lawyers, policymakers, and EJ advocates can take specific steps to make the legal and administrative processes for water pollution control more equitable and effective, even if more urgent political action and national regulation are required to address water pollution sufficiently. The California legislature should write a state-level citizen suit provision into the Porter-Cologne Act to enable plaintiffs to challenge agricultural runoff and other forms of NPS pollution in their own neighborhoods, outside of existing legal and administrative processes for NPS which are time-consuming and resource-intensive. Given the past success of federal citizen suit actions in achieving Congress' purpose of supplemental enforcement, the California legislature can craft a citizen suit provision under state law which plays a similar supplemental and supportive role toward the ongoing regulatory effects of the State and Regional Water Boards.

⁴⁹ California Coastkeeper Alliance, *supra* note 3.

We can also ensure that remedies for CWA citizen suits and similar actions properly acknowledge and respect poor neighborhoods and communities of color that have borne the brunt of environmental injustice. Congress should revise its CWA citizen suit provision to allow plaintiffs to seek comprehensive remedies against polluters. If passed, the California legislature should also establish a strong remedies subsection within any state-level citizen suit provision. Attorney Catherine M. Kaiman's suggested model for environmental injustice reparations includes: "1) *recognition of and responsibility* for environmental injustices; 2) *acknowledgment* of the affected community; 3) *respect and incorporation* of the affected community in the discussion; and 4) *reparations* in the form of community-based or individual funds."⁵⁰

While the existing framework for judicial relief often forces plaintiffs to settle with violators in order to accomplish cleanup, a revised statute might allow plaintiffs to seek judicial relief in the form of funding and development of long-term cleanup and restoration projects. Monetary awards for EJ communities and similar remedies for historic exposure to pollution can help to acknowledge past injustice exacerbated by unlawful industry action and agency inaction. In addition to injunctive relief and civil penalties, these remedies would allow plaintiffs to hold violators publicly responsible for ongoing pollution in their neighborhoods and resulting health impacts. These remedies would also help to incorporate plaintiffs' needs into judicial relief as opposed to relying on punitive action against violators. In turn, federal and state regulators would be required to take an active role in attaining clean water in plaintiffs' neighborhoods, realizing the legislative intent for citizen suit provisions under environmental law.

⁵⁰ Kaiman, *supra* note 48.

Conclusion

Despite the comprehensive federal, state, and local regulatory framework for water pollution control developed over the last fifty years, water pollution remains widespread in California, with agriculture as the primary source of the pollution. Poor and working-class communities are disproportionately exposed and burdened by the environmental and health impacts of water pollution. While the CWA citizen suit provision has enabled plaintiffs living in poor communities to supplement government enforcement of discrete point sources and to seek recourse against violators, the existing regulatory framework does not effectively regulate pollution from NPS such as agricultural runoff. Plaintiffs that eventually succeed in CWA citizen suits are often forced to settle with polluters in order to attain water quality standards. The development of a state-level citizen suit provision under the Porter-Cologne Act, as well as meaningful and comprehensive remedies under federal and state law for water pollution control, could help remedy environmental injustice and attain clean water in California's most vulnerable and overburdened communities.