Citizens for a Better Environment v. Union Oil Company of California: Keeping Citizen Suits Alive in the Face of Inadequate State Government Enforcement

Frank M. Howard
CITIZENS FOR A BETTER ENVIRONMENT V.
UNION OIL COMPANY OF CALIFORNIA:
KEEPING CITIZEN SUITS ALIVE IN THE
FACE OF INADEQUATE STATE
GOVERNMENT ENFORCEMENT

I. INTRODUCTION

In Citizens For a Better Environment v. Union Oil Company of California, the Ninth Circuit held that a settlement agreement between the San Francisco Bay Region of the California Regional Water Quality Control Board and Union Oil Company did not preclude the plaintiff from commencing a citizen suit against Union Oil for violating the Clean Water Act. The settlement included a final order by the California Regional Water Quality Control Board against Union Oil accompanied by a settlement payment by Union Oil to the state. The court found that Union Oil's settlement payment to avoid state enforcement action was not a penalty within the Clean Water Act's provision that precludes citizen suits where the state has assessed a penalty under law comparable to the Act's provision. Also, the court held that the state law provision under which the settlement was issued was not comparable to the Clean Water Act's administrative penalties provi-

1. 83 F.3d 1111 (9th Cir. 1996), cert. denied, 65 U.S.L.W. 3502 (1997). Citizens For a Better Environment is now known as Communities For a Better Environment.
2. Id. at 1120.
3. Id. at 1114.
4. Id. at 1115-16.
sion. By so holding, the court allowed the citizen suit to proceed in an attempt to ensure compliance with the law where the state had failed to do so.

This note examines the Ninth Circuit's ruling on Union Oil's settlement payment and the comparability of the applicable state law to the Clean Water Act's administrative penalties provision. In so doing, this note also offers background on the Clean Water Act's citizen suit and administrative penalties provisions and discusses their applicability to the Ninth Circuit's holding.

II. BACKGROUND OF CITIZEN SUITS UNDER THE CLEAN WATER ACT

A. HISTORY OF THE CLEAN WATER ACT

The Federal Water Pollution Control Act of 1948 was the precursor to today's Clean Water Act. The 1948 Act gave enforcement powers for controlling water pollution to the states' governors. The only enforcement procedures under this Act consisted of conferences and negotiations between polluters and government officials with judicial review of abatement conference recommendations. The court could order abatement only after finding that compliance with the order was feasible. Congress amended the Federal Water Pollution Control Act in 1956, 1965, and 1970, requiring states to develop water quality standards and continuing the 1948 Act's enforcement procedures.

In 1972, Congress made its most dramatic changes to the Act, and what became the Clean Water Act (hereinafter

5. Id. at 1118.
6. See part IV for a discussion of the Ninth Circuit's analysis.
7. See part II for background on these provisions. See part V for a discussion of these provisions as they relate to the court's holding.
9. Id.
10. Id.
11. Id.
12. Id. at 3669-70.
"CWA") established a permit system and banned the discharge of pollutants without a permit into navigable waters. Under the National Pollutant Discharge Elimination System (NPDES), a permit which sets effluent discharge standards or limitations for specified pollutants is issued to an individual point source pollutant discharger. Failure to comply with an NPDES permit is a violation of the Clean Water Act. Administration of the NPDES permit system can be delegated to a state or regional agency that meets minimum federal requirements. In addition to the NPDES permit system, the CWA required the application of technology-based controls on polluters and included a citizen suit provision.

B. HISTORY OF THE CITIZEN SUIT PROVISION

The CWA's citizen suit provision, based largely on a similar provision contained in the Clean Air Act of 1970, allows private citizens to bring actions against illegal polluters.

---

14. 33 U.S.C. § 1342 (1994). Section 1342 states, in relevant part, that "the Administrator may . . . issue a permit for the discharge of any pollutant, or combination of pollutants . . . upon condition that such discharge will meet . . . prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter." 33 U.S.C. § 1342(a)(1) (1994).


16. 33 U.S.C. § 1342(b) (1994). Regarding the delegation of power to the states to carry out the NPDES program, the CWA provides, in part, that "the Administrator cannot approve a submitted state program if the state does not have the authority to issue permits which 1) insure compliance with the CWA, 2) are for fixed terms of five years or less, and 3) can be terminated or modified for cause, including violation of the permit. 33 U.S.C. § 1342(b)(1)(A)-(C) (1994).

17. PERCVIAL ET AL., supra note 13, at 107.

19. A citizen is defined as "a person or persons having an interest which is or
and against an ineffectively acting Environmental Protection Agency (hereinafter “EPA”). This provision gives the district courts jurisdiction to enforce effluent limitations or standards, to enforce orders regarding such limitations or standards, to order the EPA Administrator to carry out a non-discretionary act or duty, and to assess appropriate civil penalties for violating the CWA. The civil penalties are paid to the government, not the plaintiffs, although the court can award litigation costs to any “prevailing or substantially prevailing” party.

Citizen suits against alleged effluent limitations violators cannot be commenced until sixty days after the citizen plaintiff has given notice of the violations to the EPA Administrator, the state where the alleged violations are occurring, and the alleged violator. The notice is required to give the alleged violator a chance to bring itself into compliance with the CWA. A citizen suit is also precluded if the EPA Administrator or a state is prosecuting a civil or criminal action involving the same violations “presumably because governmental action has rendered [the citizen suit] unnecessary.”

20. 33 U.S.C. § 1365(a) (1994). The citizen suit provision, with certain restrictions, allows a citizen to “commence a civil action on his own behalf (1) against any person . . . 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.” 33 U.S.C. § 1365(a)(1) (1994).

21. 33 U.S.C. § 1365(a) (1994). With certain restrictions, “any citizen may commence a civil action . . . (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.” 33 U.S.C. § 1365 (a)(2) (1994).


24. 33 U.S.C. § 1365(d) (1994). “The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate.” Id.


27. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 484 U.S. 49, 59-60 (1987). See 33 U.S.C. § 1365(b)(1)(B) (1994). “No action may be commenced- (1) under subsection (a)(1) of this section . . . (B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or
The CWA's citizen suit provision is an integral part of the Act's enforcement program. Such suits enable private citizens to enforce the Act where the federal government or the states do not. EPA Assistant Administrator Steve Herman stated that

citizen suits complement and enhance [the federal government's] own program and ... are an essential part of the program ... [G]iven the diminishing nature of our resources and the great extent of area to be covered in terms of inspections and enforcement[, ...] neither we nor the states are fully capable of handling the entire load.

Perhaps most importantly, citizen suits allow enforcement where the government has been lax, or where the government lacks enforcement resources. Citizen suits expand enforcement with less burden on public funds and encourage public authorities to enforce environmental laws. Citizens have brought hundreds of suits under this provision, with some resulting in penalty awards in the millions of dollars.


See, e.g., Public Interest Research Group of N.J., Inc. v. Powell Duffryn...
D. A New Bar On Citizen Suits: Administrative Penalty Actions

Congress amended the CWA by passing the Water Quality Control Act of 1987 which allows the EPA to assess administrative penalties to obtain compliance with the CWA where an administrative order would be ineffective, but full judicial proceedings would not be necessary. The administrative penalties provisions provide additional enforcement mechanisms and are not meant to replace current enforcement methods. Judicial enforcement is still the primary enforcement method for serious violations of the CWA, large penalty actions, and cases requiring injunctive relief.

Under the Water Quality Control Act, citizen suits are prohibited when the EPA Administrator or a state is prosecuting an administrative penalty action. This Act also bars such suits when the Administrator or state has issued a final order which is not subject to judicial review, and where the violator has paid an administrative penalty. For a citizen suit to be barred in this instance, a state must be prosecuting an action, or the violator must have paid a penalty to the state, under a state law comparable to the CWA's administrative penalties subsection.


36. Leonard, supra note 18, at 567.

37. See Leonard, supra note 18, at 567 (citing S. REP. No. 50, 99th Cong., 1st Sess. 26-27 (1985)).


40. 33 U.S.C. § 1319(g)(6) (1994). In the text of this note, this provision will be described as the administrative penalty action bar on citizen suits, or with similar terminology.
E. WHEN A STATE ACTION PRECLUDES A CITIZEN SUIT: A SPLIT IN THE CIRCUITS

The CWA does not describe how a state law would be comparable to the administrative penalties subsection. During the final senate debates on the Water Quality Control Act, Senator Chafee, the bill's chief sponsor, stated that "a State law must provide for a right to a hearing and for public notice and participation... similar to those... in [section 1319(g)]; it must include analogous penalty assessment factors and judicial review standards; and it must include provisions that are analogous to the other elements of [section 1319(g)]." Despite this interpretation, a conflict among the circuits has developed as to when a state law is comparable to the CWA's administrative penalties subsection.

The First and Ninth Circuits have split on when an action bars a citizen suit under CWA section 1319(g)(6)(A). The First Circuit interprets the administrative penalty bar on citizen suits broadly so that more government actions against illegal polluters will preclude citizen suits. The Ninth Circuit interprets section 1319(g)(6)(A) more narrowly so that only government actions involving administrative penalties prohibit citizen suits. Thus, the issuance of an administrative order without a penalty will not preclude a citizen suit.


43. See Citizens For a Better Env't v. Union Oil Co., 83 F.3d 1111 (9th Cir. 1996), cert. denied, 65 U.S.L.W. 3502 (1997); North and South Rivers Watershed Ass'n, Inc. v. Scituate, 949 F.2d 552 (1st Cir. 1991).
44. See Washington Pub. Interest Research Group v. Pendleton Woolen Mills, 11 F.3d 883 (9th Cir. 1993); North and South Rivers Watershed Ass'n, Inc. v. Scituate, 949 F.2d 552 (1st Cir. 1991). The Eighth Circuit has agreed with the First Circuit in its interpretation of § 1319(g)(6). See Arkansas Wildlife Fed'n v. ICI Americas, Inc., 29 F.3d 376, 383 (8th Cir. 1994) (holding that states have latitude in deciding how to enforce "comparable" state acts and that the comparability requirement is satisfied if the state law has penalty provisions comparable to CWA § 1319(g) that the state is authorized to enforce).
45. See infra notes 48-60 and accompanying text.
46. See infra notes 61-68 and accompanying text.
47. See infra notes 61-68 and accompanying text.
shed Association, Inc. v. Scituate, the defendant was discharging pollutants from a sewage treatment facility into a coastal estuary without a federal permit. The Massachusetts Department of Environmental Protection (MDEP) issued an order prohibiting the defendant from making new connections to its sewer system, and requiring the defendant to develop a new waste water treatment facility and upgrade its existing facility. The state did not assess a penalty, but reserved the right to do so at a later date.

The First Circuit addressed whether the MDEP order constituted diligent state action under a state law comparable to the CWA's administrative penalties provision. Observing that the CWA precludes a citizen suit where the "[s]tate has commenced and is diligently prosecuting an action under [s]tate law comparable to [the administrative penalties] subsection," the court broadly interpreted "comparable state law." The First Circuit held that a state was proceeding under comparable state law if 1) the statutory scheme under which the state was proceeding contained a penalty provision comparable to the CWA provision, 2) the state was authorized to assess penalties, and 3) the state statutory scheme and the CWA were focused on correcting the same violations. The court further held that the state did not have to actually use the

---

48. 949 F.2d 552 (1st Cir. 1991) ("Scituate").
49. Id. at 553.
50. Id.
51. Id. at 554. See also Julia A. Glazer, Student Article, The Clean Water Act Enforcement Provision: What Constitutes Diligent Enforcement Under Comparable State Law, 23 N. Ky. L. REV. 129, 134 (1995). Glazer argued that the Supreme Court's denial of certiorari in Arkansas Wildlife Federation v. ICI Americas, Inc. (see supra note 44) can be interpreted as endorsing the Eighth Circuit's broader, more preclusive take on "comparable" state law. She also concludes that this approach is consistent with Congress' intent that the citizen suit only be used as a supplemental method of enforcing the CWA. Id. at 144. The Supreme Court has also denied certiorari in the case that is the subject of the present article, Citizens For a Better Environment, Inc. v. Union Oil Co., in which the Ninth Circuit interpreted comparable state law in a more narrow, less preclusive manner than did the Eighth Circuit. Union Oil Co. v. Citizens For a Better Env't, 65 U.S.L.W. 3502 (1997). See part IV.B for a discussion on the Ninth Circuit's interpretation of comparable state law.
52. Scituate, 949 F.2d at 555.
54. Id. at 556. Accord Arkansas Wildlife Fed'n v. ICI Americas, Inc., 29 F.3d 376 (8th Cir. 1994).
penalty provision of its state law scheme. Applying this test, the court affirmed summary judgment for the defendant, holding that the CWA's administrative penalty action bar on citizen suits precluded the plaintiff's citizen suit because the MDEP order met the comparability requirement.

The First Circuit interpreted the comparable state law requirement broadly to preserve the state's choice of enforcement methods to prevent "duplicative enforcement actions." The First Circuit found that citizen suits were meant to supplement, not supplant, governmental action. Therefore, the state chooses what enforcement action to take and "the need for citizen's suits vanishes," preserving the state's choice.

In contrast, the Ninth Circuit construed the CWA administrative penalty bar on citizen suits more narrowly. In Washington Public Interest Research Group v. Pendleton Woolen Mills, the EPA issued a compliance order to the defendant for violating its NPDES permit. The defendant made substantial improvements, but evidence of continued violations prompted the plaintiff's citizen suit. The Ninth Circuit allowed the citizen suit to go forward, holding that CWA section 1319(g) deals only with administrative penalty actions and that the section did not preclude citizen suits "in the face of an administrative compliance order." The court noted that the

55. Scituate, 949 F.2d at 556.
56. Scituate, 949 F.2d at 558.
57. Id. at 556.
58. Id.
59. Id. at 555 (quoting Gwaltney of Smithfield v. Chesapeake Bay Found., 484 U.S. 49, 60 (1987)).
60. Id. at 555.
62. 11 F.3d 883 (9th Cir. 1993) ("WASHPIRG").
63. Id. at 884.
64. Id. at 885.
65. Id. at 885-86. An administrative compliance order, issued by the Administrator, requires that a person violating the CWA comply with the condition or limitation being violated. 33 U.S.C. § 1319(a) (1994). An administrative penalty action determines if a penalty will be assessed and the amount of the penalty. Before issuing an order assessing such a penalty, the Administrator must give public notice, allow for comments, and allow presentation of evidence or a hearing. 33 U.S.C. § 1319(g)(1)-(4) (1994). Many factors are considered in determining the penalty amount. See note 120, infra for a list of these factors.
plain language of section 1319(g) states that citizen suits are barred only when the EPA (or state) is prosecuting an administrative penalty action, and that no legislative history demonstrated a congressional intent to extend the bar on citizen suits to anything other than an administrative penalty action. The court expressly stated that it was not persuaded by the *Scituate* court's reasoning that a citizen suit is barred even when a state is prosecuting a compliance action and not a penalty action. Therefore, even if the state's statutory scheme contains a penalty provision, CWA section 1319(g)(6) requires that the government take action pursuant to a penalty provision to preclude a citizen suit.

III. FACTS AND PROCEDURAL HISTORY

On February 20, 1991, the California Regional Water Quality Control Board (hereinafter “Regional Board” or “Board”) declared San Francisco Bay a toxic “hot spot” and issued an order setting a final selenium discharge concentration limit on Unocal's oil refinery in Rodeo, California. The final selenium limitation was to go into effect on December 12, 1993. On June 16, 1991, the Regional Board issued

---

66. WASHPIRG, 11 F.3d at 885-86.
67. Id. at 886.
68. Id.
69. Selenium, a nonmetallic trace element found in soil and crude oil, is a toxic pollutant under the CWA. Refining high selenium crude oil increases selenium waste. Selenium has been known to cause reproductive failures, birth defects, and deaths in many bird species. GREG KARRAS, POISON FOR PROFIT 10-11, 16 (Citizens For a Better Env't Report No. 95-1, May 1995).
Order No. 91-099 which included an interim selenium limit, less stringent than the final limit, which went into effect immediately and was to last until the final limit took effect. The Board issued these orders pursuant to section 1314(l) of the Clean Water Act.

The state water board dismissed a petition submitted by Unocal and other refiners challenging the selenium discharge limits. Unocal and the others then filed a petition for writ of mandate in Solano County Superior Court seeking to set aside the interim and final limits, arguing that the Regional Board's listing San Francisco Bay as a hot spot violated parts of the Clean Water Act and EPA administrative regulations. Unocal and the other refiners entered into settlement discussions with the Regional Board and the California Attorney General's Office. On November 8, 1993, Unocal and the other refiners reached a settlement with the state and the

50 parts per billion (ppb) and a mass emission rate of .85 pounds per day, calculated on a running annual average. Id.

72. Id.

73. Id. Section 1314(l) requires, in part, that each state submit "a list of all navigable waters in such State for which the State does not expect the applicable standard under section 1313 of this title will be achieved ... due entirely or substantially to discharges from point sources of any toxic pollutants listed pursuant to section 1317(a) of this title[.""] 33 U.S.C. § 1314(l)(1)(B) (1994); see supra note 70.

74. The other refiners involved in the appeal and subsequent suit and settlement were Exxon, Shell Oil Company, Tosco Corporation, Chevron U.S.A., and Pacific Refining Company, as well as the refiners' trade association, the Western States Petroleum Association. Chevron, Tosco, and Pacific reduced their discharge levels so that they would be in compliance with the final limits when they went into effect. Union Oil, 861 F. Supp. at 895.

75. Citizens, 83 F.3d at 1114.

76. Union Oil, 861 F. Supp. at 895. Primarily, the petitioners claimed that under the CWA and its regulations the Regional Board could list the San Francisco Bay as a hot spot only if selenium in the Bay exceeded California's numeric criterion for selenium. The petitioners argued that the ambient selenium concentrations in the Bay were consistently less than .3 ppb, while the numeric criterion is 5 ppb for fresh water and 71 ppb for salt water. Unocal and the others claimed that the listing was thus "predicated on an unlawful act by [the] EPA." Petitioner's Verified Petition for Writ of Mandate at 9-10, WSPA v. The California Regional Water Quality Control Bd., San Francisco Bay Region (Case Number 121078, Superior Court for the State of California, County of Solano). Numeric criteria are levels at which a pollutant could be reasonably expected to interfere with state designated water uses. 33 U.S.C. § 1313(c)(2)(B) (1994).

77. Union Oil, 861 F. Supp. at 895.
Regional Board. Pursuant to the settlement, the refiners agreed to drop their lawsuit and the Board agreed to issue a cease and desist order (CDO). The CDO provided that Unocal shall cease and desist from discharging its waste in a violative manner by implementing technology capable of meeting the final selenium discharge limits. After public hearings, the Regional Board issued the CDO on January 19, 1994.

In the settlement agreement, Unocal and the other refiners dropped their suit without prejudice and paid the state two million dollars. The CDO relieved Unocal, Exxon, and Shell from meeting the final selenium limits until July 31, 1998, thus allowing Unocal to continue discharging selenium into the Bay in amounts above the permissible limits.

Citizens For a Better Environment (hereinafter “CBE”) filed a lawsuit against Unocal on March 24, 1994. CBE brought the action in the District Court for the Northern District of California pursuant to the citizen suit provision of the Clean Water Act. CBE challenged Unocal’s discharge of waste water containing selenium into the San Francisco Bay, claimed violations of CWA effluent and water quality standards, and filed a state law claim for unfair business practices. Unocal moved to dismiss the claims, asserting that the

78. Citizens, 83 F.3d at 1114.
79. Id.
80. Union Oil, 861 F. Supp. at 896. See infra note 83.
81. Citizens, 83 F.3d at 1114. Citizens For a Better Environment participated in the public hearings on the proposed CDO. Id.
82. Id. See Union Oil, 861 F. Supp. at 896. Unocal, Exxon, and Shell, the three refiners that had not complied with their final selenium limits, paid the $2 million. Unocal’s share was $780,000. Citizens, 83 F.3d at 1114.
83. Citizens, 83 F.3d at 1114. The CDO states, in part, that “[t]he dischargers shall implement a removal technology[,] . . . or an alternate control strategy, which has been determined by the dischargers to be capable of achieving compliance with the discharge limitations as specified in [the NPDES permits] and shall comply with these limits, no later than July 31, 1998.” Id. (quoting the CDO).
84. Union Oil, 861 F. Supp. at 896. The original suit included Exxon as a defendant. The District Court for the Northern District of California determined that venue over the Exxon case properly belonged in the U.S. District Court for the Eastern District of California and transferred the case to that court. Id. at 898.
86. Citizens, 83 F.3d at 1113.
87. Id. CBE claimed that Unocal, by failing to meet the December 12, 1993
effluent standards and state water claims were precluded by the CWA's administrative penalty action bar on citizen suits. Unocal argued that the Regional Board had commenced and prosecuted an enforcement action and that Unocal had paid a penalty, thus precluding a citizen suit under CWA section 1319(g)(6)(A).

The District Court for the Northern District of California denied Unocal's motion to dismiss the effluent standards claim and the state law claim. The district court held that the $780,000 that Unocal paid to the state was not a penalty because in entering into the settlement agreement, the Regional Board was settling the refiners' lawsuit and not exercising its enforcement authority. The court also held that the payment was not assessed under a state law comparable to CWA section

88. Citizens, 83 F. 3d at 1113. The administrative penalty action bar on citizen suits provides, in relevant part:

(i) any violation

(ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, or

(iii) for which the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be,

shall not be the subject of a civil penalty action under . . . section 1365 of this title.


89. Union Oil, 861 F. Supp. at 913.

90. Id. at 913. The district court granted Unocal's motion to dismiss the water quality standards claim. The court agreed with Unocal that Northwest Environmental Advocates v. Portland, 11 F.3d 900, 906-11 (9th Cir. 1993), held that water quality standards contained in NPDES permits are not enforceable in citizen suits under the CWA. CBE acquiesced. Id. The opinion in Northwest Environmental Advocates v. Portland, 11 F.3d 900 (9th Cir. 1993) has since been withdrawn and superseded by Northwest Environmental Advocates v. Portland, 56 F.3d 979 (9th Cir. 1995). See text accompanying notes 14-16, supra for an explanation of the NPDES system.

91. Union Oil, 861 F. Supp. at 909. The district court also found that the Board was exercising its authority to issue cease and desist orders under California Water Code § 13301 which does not authorize the Board to assess civil penalties. Id.
1319(g). Thus, the district court found that the CWA's administrative penalty action bar did not preclude CBE's citizen suit against Unocal. The district court certified its order denying the motions to dismiss for immediate appeal. On appeal, the Ninth Circuit affirmed the district court's ruling.

IV. THE COURT'S ANALYSIS

The Ninth Circuit analyzed Unocal's argument that CWA section 1319(g)(6)(A)(iii) barred CBE's citizen suit. Noting that a citizen suit is barred when the state has issued a final order and when the violator has paid a penalty under a state law comparable to CWA section 1319(g), the court determined that the administrative penalty action bar did not preclude the citizen suit in this case. First, the court decided that Unocal's payment to the state was not a penalty. Second, the court concluded that the payment was not assessed under a state law comparable to section 1319(g)(6). As such, the court allowed the citizen suit to go forward, thereby enabling CBE to protect the environment where the state had failed to do so.

A. WAS THE PAYMENT A PENALTY?

The Ninth Circuit first analyzed whether Unocal's pay-
ment was a penalty. The court recognized that the Regional Board issued the CDO pursuant to its authority under California Water Code (hereinafter "CWC") section 13301 which governs cease and desist orders. Section 13301 does not authorize the Board to assess civil penalties. The court also noted that the Board expressly stated in the CDO that it was not invoking its authority to impose a civil penalty under California Water Code section 13385. Thus, the Board's use of section 13301 is dispositive of what type of enforcement the Board wanted to take, i.e., one without a civil penalty.

Although Unocal argued that the $780,000 payment was a penalty in substance, if not form, the court noted that Unocal benefitted by having the money designated as a payment rather than a penalty. First, designation of the settlement amount as a payment rather than a penalty was desirable to

100. Citizens, 83 F.3d at 1115-16.
101. Id. at 1116. California Water Code § 13301 states, in pertinent part:
When a regional board finds that a discharge of waste is taking place . . . in violation of requirements or discharge prohibitions prescribed by the regional board or the state board, the board may issue an order to cease and desist and direct that those persons not complying with the requirements or discharge prohibitions . . . (b) comply in accordance with a time schedule set by the board . . .
CAL. WATER CODE § 13301 (West, WESTLAW through the 1995 legislation).
102. CAL. WATER CODE § 13301 (West, WESTLAW through the 1995 legislation).
103. Citizens, 83 F.3d at 1116. The CDO states in part that:
[t]he Regional Board has considered the various enforcement and penalty options . . . including the issuance of a [CDO] or . . . imposition of an administrative penalty . . . Under the circumstances detailed in the [findings . . . the Regional Board has determined that the most appropriate course of action is settlement of the litigation and issuance of a [CDO].
Id. (quoting the CDO).

Section 13385 is analogous to the penalty provision of CWA § 1319(g). It states, in relevant part, that "[a]ny person who violates any of the following shall be liable civilly . . . (5) [a]ny requirements of Section 301, 302, 306, 307, 308, 318, or 405 of the Federal Water Pollution Control Act . . . " CAL. WATER CODE § 13385(a) (West, WESTLAW through the 1995 legislation).
105. Citizens, 83 F.3d at 1116.
avoid the stigma associated with the term “penalty.” Second, the court suggested that Unocal avoided the formal procedures normally followed and the factors usually considered when determining a penalty amount under CWC section 13385. Therefore, the court concluded that the payment was not a penalty, but “a settlement made to avoid an enforcement action by the Regional Board.”

B. WHAT CONSTITUTES COMPARABLE STATE LAW?

The Ninth Circuit next considered whether the Board assessed the payment under a state law comparable to the CWA's administrative penalties subsection. The court observed that the penalty provision of California Water Code section 13385 is comparable to that in the CWA's administrative penalties subsection, but that Unocal's payment was not levied under CWC section 13385. The court set out to determine, therefore, whether a payment assessed under a related section of the same state statutory scheme containing CWC section 13385, but not under section 13385, was assessed under “comparable [s]tate law.”

106. Id. At the motion to dismiss hearing in the district court, Unocal's counsel stated that, at the state lawsuit settlement, Unocal would not sign paperwork that characterized the payment as a penalty because of the bad implications the public associates with that term. Id.

107. Id. For example, subsection (e) states that:
In determining the amount of any liability imposed under this section, the regional board, the state board, or the superior court, as the case may be, shall take into account the nature, circumstances, extent, and gravity of the violation, and, with respect to the violator, the ability to pay, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violation, and other matters that justice may require.

CAL. WATER CODE § 13385(e) (West, WESTLAW through the 1995 legislation).

The court also noted CBE's assertion that while an administrative penalty under California Water Code § 13323(d) must be paid within 30 days, Unocal did not have to pay half of its payment for one year. Citizens, 83 F.3d at 1116.

108. Citizens, 83 F.3d at 1116.

109. Id. If a payment is considered a penalty, a state agency or board must still have assessed the penalty under a state law comparable to 33 U.S.C. § 1319(g) to bar any citizen suits against the polluter. See supra note 88.

110. Id. at 1116-17.

111. Id. at 1117.
In analyzing the comparable state law issue, the Ninth Circuit looked to previous decisions by the First and Ninth Circuits in *North and South Rivers Watershed Association v. Scituate* and *Washington Public Interest Research Group v. Pendleton Woolen Mills*, respectively.

The court rejected the First Circuit's "same statutory scheme" reasoning for three reasons. First, the court disagreed with the *Scituate* court's interpretation of CWA section 1319(g)(6)(A). The *Scituate* court found that comparability is met where the state statutory scheme contains a penalty provision comparable to the CWA even if the state does not use the state's comparable penalty provision. Following its earlier decision in *WASHPIRG*, the Ninth Circuit concluded that the language of CWA section 1319(g)(6)(A) is plain on its face. That is, the statute requires the state law to be comparable to "this subsection" which, according to *WASHPIRG*, deals with administrative penalties.

Second, the Ninth Circuit noted that section 1319(g) requires certain public participation procedures and penalty assessment factors which may not be adhered to unless a penalty is levied according to the specific provision of state law comparable to section 1319(g). Without these procedures

---

112. 949 F.2d 552 (1st Cir. 1991). See text accompanying notes 48-60, supra.
113. 11 F.3d 883 (9th Cir. 1993). See text accompanying notes 61-68, supra.
114. Citizens, 83 F.3d at 1117.
115. Id. at 1118.
116. Id.
117. *Scituate*, 949 F.2d at 555-56. The *Scituate* court reasoned that the state Act's statutory scheme is comparable to the federal Act's scheme. Even though the specific statutory section under which the state issued its order does not contain a penalty provision, another section of the same statute does. "These two coordinate parts are cogs in the same statutory scheme implemented by the State for the protection of its waterways." *Id.* at 556.
120. Citizens, 83 F.3d at 1118. For example, before issuing an order assessing a civil penalty, the Administrator must give notice and an opportunity to comment. The Administrator must also give notice of any hearings to any person who comments and if the Administrator issues an order without a hearing, any person who commented can petition the Administrator to set aside the order and provide a hearing. 33 U.S.C. § 1319(g)(4) (1994). See Natural Resources Defense Council v. Vygen Corp., 803 F. Supp. 97, 101 (N.D. Ohio 1992); Public Interest Research Group, Inc. v. GAF Corp., 770 F. Supp. 943, 951 (D.N.J. 1991).
and factors, the court determined that there would be no guarantee that the assessed penalty would be of the proper amount.\textsuperscript{121}

Third, the court stated that the \textit{Scituate} holding leads to the conclusion that state administrative enforcement actions would more broadly bar citizen suits than an EPA enforcement action.\textsuperscript{122} That is, under \textit{Scituate}, if a state issued and sought to enforce a non-penalty compliance order under a statutory scheme that contained a separate penalty provision, then section 1319(g)(6) would preclude a citizen suit.\textsuperscript{123} However, as the Ninth Circuit held in \textit{WASHPIRG}, if the EPA brought a non-penalty enforcement action, one not brought under section 1319(g), a citizen suit would be allowed.\textsuperscript{124} Therefore, the Ninth Circuit concluded that for the Regional Board to have levied a penalty under “comparable state law,” it would have had to assess the penalty under the \textit{specific} provision of state law that is comparable to section 1319(g).\textsuperscript{125}

\begin{quote}
Also, in determining the amount of the penalty:
the Administrator shall take into account the nature, circumstances, extent, and gravity of the violation . . . and, with respect to the violator, the ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters that justice may require.
\end{quote}


\textsuperscript{121} 
\textit{Citizens}, 83 F.3d at 1118.

\textsuperscript{122} \textit{Id}.

\textsuperscript{123} See generally North and South Rivers Watershed Ass'n v. Scituate, 949 F.2d 552 (1st Cir. 1991).

\textsuperscript{124} See generally Washington Pub. Interest Research Group v. Pendleton Woolen Mills, 11 F.3d 883 (9th Cir. 1993) (holding that CWA § 1319(g)(6) bars citizen suits when the EPA is prosecuting an action dealing with administrative penalties, not with administrative compliance orders). See supra note 65 for the difference between an administrative penalty action and an administrative compliance order.

\textsuperscript{125} \textit{Citizens}, 83 F.3d at 1118. The court also rejected Unocal's claim that CWA § 1319(g)(6)(A)(ii) precluded CBE's citizen suit. Section 1319(g)(6)(A)(ii) precludes citizen suits where a state is diligently prosecuting an action under a state law comparable to CWA § 1319(g). Unocal contended that the Regional Board was currently prosecuting an action against it. The court found that no action was currently being prosecuted at the time and that the Regional Board's action was not taken under state law comparable to that subsection. \textit{Id}. See supra note 88 for the text of CWA § 1319(g)(6)(A)(ii).

In addition, the Ninth Circuit rejected Unocal's contention that the Regional Board's CDO modified Unocal's NPDES permit to extend the deadline for the final...
Finding that CWA section 1319(g)(6) did not bar the citizen suit in this case, the Ninth Circuit affirmed the district court’s denial of Unocal’s motion to dismiss, thus allowing CBE’s action to continue. 126

V. CRITIQUE

The Ninth Circuit correctly determined that CBE’s citizen suit against Unocal should be allowed. 127 The court examined the intent and actions of the Regional Board and Unocal to properly find that Unocal’s settlement payment was not a penalty. 128 The Ninth Circuit also looked at the plain language of the Clean Water Act’s administrative penalty bar on citizen suits to find that Unocal’s payment was not assessed under state law comparable to the CWA’s administrative penalties provision. 129

The central purpose of citizen suits is to “abate pollution when the government cannot or will not command compliance.” 130 Surely, this must include situations where the gob-
Government enforcement is inadequate.\textsuperscript{131} The First Circuit has stated that the main function of citizen suits is to permit private parties to assist in enforcement where government authorities "appear unwilling to act."\textsuperscript{132} To preclude citizen suits where the state has acted, but is "unwilling" to do so in a wholly adequate manner undermines the effectiveness and very purpose of the CWA's citizen suit provision.\textsuperscript{133}

A. UNOCAL'S PAYMENT WAS NOT A PENALTY

Neither the Regional Board nor Unocal classified Unocal's settlement payment as a penalty and both parties worked to ensure that the payment was not deemed a penalty.\textsuperscript{134} The Regional Board exercised its authority under California Water Code section 13301 to issue a cease and desist order and consciously did not use its authority under CWC section 13385 to assess civil penalties.\textsuperscript{135}

Unocal benefitted from the Regional Board's non-use of its civil penalty assessment authority in two ways.\textsuperscript{136} First, by

\begin{footnotesize}
\begin{itemize}
  \item 62 (1987).
  \item 131. As part of the settlement, the Regional Board gave Unocal five extra years to comply with the Board's final selenium discharge limit because Unocal claimed it lacked the technological ability to meet the final limits on time. However, other refiners in the San Francisco Bay area were able to meet the final limits. \textit{Citizens}, 83 F.3d at 1114. Unocal refines high-selenium "heavy" crude oil which is less costly, but harder to refine. Normally, this oil produces less gasoline, but Unocal produces more gasoline from high-selenium oil by performing extra coking and hydrotreating processing. This extra processing, which enables Unocal to yield more profit, increases selenium pollution. GREG KARRAS, \textit{POISON FOR PROFIT} 10-11 (Citizens For a Better Env't Report No. 95-1, May 1995). Although Unocal may lack the technological ability to meet the final limits, it could do so by using cleaner crude oil to refine. Instead, Unocal chooses to profit at the expense of the environment, apparently with the backing of the Regional Board.
  \item 132. \textit{Scituate}, 949 F.2d at 555.
  \item 133. \textit{See} Citizens For a Better Env't v. Union Oil Co., 861 F. Supp. 889 (N.D. Cal. 1994), \textit{aff'd}, 83 F.3d 1111 (9th Cir. 1996), \textit{cert. denied}, 65 U.S.L.W. 3502 (1997). Chief Judge Henderson stated: "The Court can easily imagine that Congress, realizing that state enforcement agencies can be susceptible to regulatory 'capture' by the industries they regulate, might have feared that state agencies might consent to inappropriately lax compliance agreements." \textit{Id.} at 907.
  \item 134. \textit{See id.} at 1116.
  \item 136. \textit{Citizens}, 83 F.3d at 1116.
\end{itemize}
\end{footnotesize}
not having to pay a civil penalty under CWC section 13385, Unocal could take the position that it had done nothing wrong. Both the CDO and settlement agreement avoid the use of the word penalty. Furthermore, the Regional Board’s counsel intentionally avoided characterizing the payment as a penalty, stating that “[t]he settlement document does not characterize this as a penalty[,] [i]t characterizes it as a payment . . . I don’t see a need to make any interpretation as to whether this is a penalty or not.” Unocal deliberately insisted that the payment not be characterized as a penalty. Unocal did not want the stigma associated with having to pay a penalty. Although Unocal claimed that calling the payment anything other than a penalty elevated form over substance, the benefits Unocal gained by this designation show that in substance it was not a penalty.

Second, Unocal did not have to undergo the formal scrutiny required when considering the proper penalty amount. Because a payment is a penalty only where the statutory authority used empowers an agency to assess a penalty, the Ninth Circuit properly deemed Unocal’s payment a non-penalty.

The Ninth Circuit’s ruling prevented Unocal from benefitting by first claiming that in the settlement agreement its payment to the state was not a penalty and then claiming that

137. Union Oil, 861 F. Supp. at 909. At a proceeding before the Regional Board, Unocal’s counsel stated: “It has always been the refineries’ position that they have done nothing wrong and . . . it is inappropriate to characterize the payments . . . as a penalty.” Id. (quoting Reporter’s Transcript of Proceedings Before Regional Board, Dec. 15, 1993, at 38).
139. Id. (quoting from Reporter’s Transcript of Proceedings Before Regional Board, Dec. 15, 1993, at 37).
140. Id. at 910. A member of the Regional Board admitted that part of the settlement negotiations was that the payment not be called a penalty. Id.
141. Citizens, 83 F.3d at 1116.
142. See text and accompanying notes in this subsection.
143. See supra note 107 and accompanying text.
144. Union Oil, 861 F. Supp. at 909.
145. Citizens, 83 F.3d at 1116. Also, California Water Code § 13385 requires all penalties be paid into the California Water Pollution Cleanup and Abatement Fund. Only 10% of Unocal’s payment went into this fund. Id. at 1116 n.2. Thus, Unocal did not follow California law regarding payment of penalties.
the payment was a penalty to trigger the CWA administrative penalty preclusion on citizen suits. 146

The Ninth Circuit held that CBE's suit against Unocal was not precluded by the CWA's administrative penalty action bar on citizen suits. 147 The court found that a settlement payment by Unocal to the Regional Board was not a penalty. 148 This holding may have a negative impact on future citizen suits in that CWA violators that settle with state agencies may negotiate for a payment to be deemed a penalty. 149 However, because of the stigmatic connotations of wrongdoing associated with penalties, polluting companies like Unocal will likely still try to avoid conveying such a negative image to stockholders and consumers. 150 Also, as the Ninth Circuit did in this case, courts will probably look at the substance of, and the circumstances surrounding, any state imposed payment, and not just the form of the payment, before classifying it as a penalty. 151 In so doing, the Ninth Circuit in Citizens For a Better Environment v. Union Oil Company upheld the vitality and purpose of citizen suits in the face of inadequate state enforcement. 152

B. THE PAYMENT WAS NOT ASSESSED UNDER A COMPARABLE STATE LAW

Following the precedent of Washington Public Interest Research Group v. Pendleton Woolen Mills, 153 the Ninth Circuit correctly decided to interpret the administrative penalty bar on citizen suits according to the statute's plain meaning. 154 According to the WASHPIRG court, the plain language of the CWA's administrative penalties provision bars citizen

146. Citizens, 83 F.3d at 1116.
148. Id. at 1116.
149. See Lori Tripoli, Is It better to Fight Than to Settle?, 12 No. 1 ENVTL. COMPLIANCE AND LITIG. STRATEGY 1, 1 (June 1996).
150. See Tripoli, supra note 149, at 1.
151. Citizens, 83 F.3d at 1116.
152. Id. at 1120.
153. 11 F.3d 883 (9th Cir. 1993). See notes 61-68, supra, and accompanying text.
154. Citizens, 83 F.3d at 1118.
suits where a penalty has been "assessed under this subsection," or such comparable state law. In following the \textit{WASHPIRG} precedent, the Ninth Circuit properly rejected the First Circuit's interpretation of CWA section 1319(g)(6)(A) which broadly interprets the subsection to effectuate the congressional policy that citizen suits should not supplant government enforcement actions. There is nothing in section 1319(g)(6) that requires the policy analysis used by the First Circuit in determining comparability. "The most persuasive evidence of ... [congressional] intent is the words selected by Congress."

To be comparable to the administrative penalties subsection, a state law must contain various procedural safeguards including hearings, public notice, and public comment periods. This is evidenced by the comments of the Senator who chiefly sponsored the administrative penalties subsection of the Clean Water Act in final debates regarding the bill. The state statute under which Unocal's settlement payment was made does not require the procedures required by CWA section 1319(g). In fact, the state provision used does not even authorize the assessment of civil penalties.

If the Ninth Circuit had followed the First Circuit's interpretation of "comparable state law," it would have ignored the plain language of the statute and precluded a citizen suit based on the imposition of a "penalty" that was assessed with-
out the required procedures and considerations. Instead, the Ninth Circuit narrowly interpreted "comparable state law" to prevent Unocal from avoiding a citizen suit brought to enforce the law where the state had inadequately attempted to do so.

VI. CONCLUSION

In conclusion, the Ninth Circuit correctly denied Unocal's attempt to have it both ways regarding the "penalty" designation. The court also correctly used the plain meaning of the CWA's administrative penalty bar on citizen suits to maintain the true purpose and effectiveness of the citizen suit provision. The Ninth Circuit's holding will allow future citizen suits to go forward to ensure compliance with the Clean Water Act, and preserve the Nation's waters, where the state has refused to adequately do so.

Frank M. Howard*

167. See supra note 131.
169. Id.
* Golden Gate University School of Law, Class of 1997. Thanks go out to Professor Cliff Rechtschaffen and all of my editors for their contributions to this article. Special thanks go to Amber Bell for her invaluable input and never ending support. I would also like to thank my family, my friends who helped point me in the direction of my current path, and most of all my mother, FIMH.