Tailoring Citizen Enforcement to an Expanding Clean Water Act: The San Francisco Baykeeper Model

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I. INTRODUCTION

On October 22, 1997, the Federal Clean Water Act turned twenty-five years old. Like most twenty-five-year-olds, the Act is now beginning to hit its stride. In its first two decades, the Act focused almost exclusively on larger, more obvious “point sources” of water pollution. The Act’s coverage included every sewage plant in the country, raising the quality of treatment of...
our communities' municipal sewage from largely "primary" treatment, involving simple screening technologies, to "secondary" and "tertiary" treatment, involving active biological treatment of sewage. To a large extent, that nationwide upgrade has controlled many previous existing health and environmental threats posed by large quantities of concentrated human waste. Similarly, throughout those two decades, waste discharges from industrial operations have at least been regulated, albeit, given the diversity and complexity of many of the pollutants discharged by industrial sources both directly to the nation's waters and through our sewage plants, the risks posed by many discharged contaminants is only now beginning to be understood and controlled through the permitting process. Simply put, most of the gross, more obvious sources of contamination have been brought within the Act's purview, regulated through the Act's permitting program, and brought under some measure of control. Massive amounts of sewage have been removed from our waters. Significant sources of industrial contaminants have been reduced.

Despite those efforts and their accompanying successes, all indications are that our nation's waters continue to decline in quality and ecosystems remain on the verge of collapse based in part on impaired water quality.2 As it turns out, the obvious pollution is only a part — granted a significant part even today — of the problem. Having put in place a system for regulating the obvious, the Act, as a young adult, has now begun to turn its attention to more difficult challenges. These challenges include more "exotic" and previously under-recognized water contaminants, like selenium discharges from oil refineries and aerial deposition of very dangerous contaminants, such as dioxin from incinerator smokestacks.3 Perhaps the most far-

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2. The San Francisco Bay and its Delta are a case in point with observable increases in a number of highly toxic pollutants, including pesticides and heavy metals. See SAN FRANCISCO ESTUARY PROJECT, STATE OF THE ESTUARY 1992-1997, 41-44 (1997).

3. See, e.g., KIM TAYLOR, PLANNING AND POLICY UNIT, SAN FRANCISCO BAY REGIONAL WATER QUALITY CONTROL BOARD, SELENIUM IN THE BAY ENVIRONMENT - AN OVERVIEW OF THE ENVIRONMENTAL CONCERNS, REGULATORY HISTORY, AND CURRENT STATUS (May 21, 1997); Staff Summary Report, San Francisco Regional Water Quality
reaching, in terms of a general source of a significant percentage of the pollution reaching our waters and the size of the regulated community, is storm water pollution.

This article focuses on the Act's storm water pollution control program as it is being implemented in California. In particular, the article focuses on that aspect of the storm water regulations where the rubber meets the road — the enforcement arena — and on the ever more important role of citizen enforcers as the Act reaches out to pollution problems that call on pollution control and prevention actions by tens of thousands of industrial and municipal facilities in California, and hundreds of thousands, perhaps millions, of facilities nationwide. The article includes three case studies demonstrating how citizen enforcement actions can be effective. Each of the case studies involves actions brought by the non-profit organization San Francisco BayKeeper and its upstream Stockton-based project, DeltaKeeper.

The three case studies are organized based on the financial, rather than the physical size, of a number of representative dischargers. It perhaps goes without saying that the financial capabilities of a permittee under the Act matter. As the Act evolves to address storm water as well as other less centralized sources of water pollution, many smaller businesses that previously had no experience with the Act's requirements, are coming within its mandate. As enforcement efforts have begun to bring these more numerous and smaller dischargers into compliance with the Act, inequities become apparent between the enforcement burden placed on the economically largest violators and that placed on smaller businesses. For the economically larger violator, the burden tends to be too small and pro-

Control Board [hereinafter “SFRWQCB”], Workshop on Dioxin and Dioxin-like Compounds (May 7, 1997).

4. Other groups involved in the described actions include, most importantly, Communities For A Better Environment [hereinafter “CBE”], who are the lead plaintiffs in the case against Union Oil Company. In addition, The Bay Institute, Save San Francisco Bay Ass'n, and S. Anglers For Environmental Rights [hereinafter “SAFER”] are plaintiffs with CBE and BayKeeper on the Union Oil case. The Petaluma River Council brought several of the junkyard cases with BayKeeper in the northern part of San Francisco Bay.
vides the largest companies an incentive to litigate rather than comply. The enforcement burdens placed on the smallest dischargers is relatively much greater where, in many cases, a small shop cannot afford to engage in federal court litigation and still be expected to pay for necessary compliance measures and an appropriate civil penalty. Based upon the three representative case studies, this article concludes with specific legislative recommendations to fine tune the Act's enforcement provisions to better reflect the full range of pollution issues and facilities now being addressed by the Act, twenty-five years into its important life.

II. THE EVOLUTION OF THE CLEAN WATER ACT: THE EARLY YEARS

A. BIRTH

The modern Clean Water Act was not born of subtlety. It was born of catastrophic pollution, visibly stifling vast ecosystems. The Act's political conception began on January 28, 1969, when almost three million gallons of crude oil began surging from an oil drilling platform in the Santa Barbara Channel operated by the Union Oil Co. The oil which washed...
onto the previously immaculate beaches of Santa Monica for months after the spill persisted on the beaches and in the minds of the entire country. In August 1969, after a speech in Santa Barbara, one of the sole political standard bearers for environmental issues at the time, Senator Gaylord Nelson (D-Wis), moved by the catastrophic oil spill and another tragedy of the day, the Vietnam War, conceived of the idea of Earth Day.7

Grafting a strategy of teach-ins, then popular on college campuses to educate people into action responding to the War, onto the pressing environmental concerns underscored by the Santa Barbara oil spill, Senator Nelson put in motion what would be the largest demonstration in United States history.8 Twenty million participants throughout the country gathered for the first Earth Day on April 22, 1970.9

The Clean Water Act was born on October 18, 1972.10 The Act was the fourth statute in a cascade of environmental laws — including the National Environmental Policy Act, Clean Air Act, and Resource Conservation and Recovery Act — that were enacted in the wake of Earth Day.11 Concrete problems de-
served concrete law. Up until the Clean Water Act’s enactment, federal water quality law relied exclusively on the development by individual states of ambient water quality standards without any effective process to translate the relative contribution of any individual pollution source. In order to address any significant source, a state would have to prove that the facility caused a violation of a water quality standard through a complicated administrative and legal process. Confronted with water pollution incidents of such significant magnitude, like the Cuyahoga River fire, prevention of which was entirely stymied by the pre-1972 Act’s unduly burdensome enforcement process, Congress enacted a regulatory system that focused on controlling pollution at the point where it left the polluting facility rather than waiting for it, along with the state’s enforcement authority, to be diluted in the receiving waters.

The result was the National Pollutant Discharge Elimination System (“NPDES”). The system’s basic components included the continuation of the individual states promulgating water quality standards though more closely reviewed by the recently created Environmental Protection Agency (“EPA”). The truly significant development was the establishment of a permitting system which refocused individual pollution dis-

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12. The Senate Committee on Public Works Report prepared for Senate Bill 2770, which later became the Federal Water Pollution Control Act of 1972, provides an excellent summary of the prior federal water quality laws which led up to that Act. See S. REP. NO. 92-414 (1972), reprinted in U.S.C.C.A.N. 3668, 3669. The Report describes the inadequacy of enforcement at that time: “The continued use of the 1948 abatement procedure also contributes to delay. The record shows an almost total lack of enforcement. Under this procedure, only one case has reached the courts in more than two decades.” Id. at 3669-73. Most of the permitting and enforcement provisions in the 1972 amendments focused on rectifying the impracticalities of that previous law. See Sheldon M. Novick, Law of Environmental Protection § 12.01[3] (1987).


14. See Grad, supra note 10, at 3-78 - 3-80.


Because the Act largely was responding to obvious water pollution problems and needed a specific point at which compliance could be measured in order to effectively implement the NPDES permitting program, it originally limited its scope to regulating discharges from "point sources."\footnote{19}{As the United States Supreme Court explained: Such direct restrictions on discharges facilitate enforcement by making it unnecessary to work backward from an overpolluted body of water to determine which point sources are responsible and which must be abated. In addition, a discharger's performance is now measured against strict technology-based effluent limitations - specified levels of treatment - to which it must conform, rather than against limitations derived from water quality standards to which it and other polluters must collectively conform. Environmental Protection Agency v. California, 426 U.S. at 204-05 (footnotes omitted). See also S. REP. NO. 92-414, reprinted in 1972 U.S.C.C.A.N. at 3675.} In addition to providing for a clear compliance point, the Act's effort to confine its jurisdiction to such point sources also was derived from a concern for EPA's and the states' anticipated burden for initiating the permitting program, a concern that was to hold true for the first years of the Act's existence.
B. INFANCY

The Federal Water Pollution Control Act, most commonly referred to as "The Clean Water Act," mandated that all permits be issued by December 31, 1974. Until a permit was issued, a discharger was deemed to be in compliance, provided the discharger had applied for a permit within 180 days of the Act's enactment. The Act further provided that technology-based effluent limitations based on the "best practicable control technology currently available" ("BPT") was to be achieved by industrial dischargers from "point sources" by July 1, 1977. Prior to that date, the initial permits could provide for less stringent discharge controls, including compliance schedules to achieve BPT by the July, 1977, deadline. Compliance with even more stringent technology-based limitations, the "best available technology economically achievable" ("BAT"), was required to be achieved by the original 1972 amendments as of July 1, 1983.

Despite the statutory deadlines, first round permits were issued by the Environmental Protection Agency ("EPA") from about 1972 through 1977. Those first round permits focused on pollutants for which the agency felt it had sufficient technical knowledge, for example, total suspended solids, pH, biological oxygen demand ("BOD"), chemical oxygen demand ("COD"), oil and grease, heat, phenols, arsenic, cyanide, metals (including mercury, zinc, chromium, iron, aluminum, copper and nickel), and some organic compounds related to pesticide

25. See NOVICK, supra note 12, at § 12.05[2][a], n. 35.
Thus, "exotic" pollutants were largely ignored in those initial permits. For each of those reasonably well-understood pollutants, EPA developed nationwide effluent limitations applying to whole categories of industry. The initial industrial categories addressed by EPA were limited to twenty-seven categories specified by Congress in the 1972 amendments. The resulting single number effluent limitations were published in EPA national effluent guidelines which were, in turn, relied upon by the various permit writers.

In addition to the technology-based effluent limitations, the other prominent feature of the Clean Water Act and other environmental laws enacted in the wake of Earth Day and the Santa Barbara Channel oil spill was the inclusion of a citizen suit enforcement provision. The Clean Water Act's citizen enforcement provision, as well as its principle predecessor in the Clean Air Act, grew out of eighty years of citizen investigations, rewards and attempts at private attorney enforcement under the Rivers and Harbors Act. The provisions also were directly influenced by the Michigan Environmental Protection Act of 1970, which was enacted on October 1, 1970, and was authored by Professor Joseph Sax, then of Michigan Law School. This article will not attempt to review the mechanisms and evolution of citizen enforcement under the Clean Water Act, as a number of excellent overviews already exist. Suffice it to say that citizens have been authorized to bring enforcement actions for violations of the Act, and their efforts constitute a critical component of the overall enforcement of the Clean Water Act.

The only citizen suits brought during the Act’s infancy were brought by national environmental organizations, such as the Natural Resources Defense Council (“NRDC”), against EPA focusing on development of the Act’s various components, including, for example, the promulgation of effluent limitation guidelines and criteria for state permitting programs. Obviously, no enforcement against dischargers was contemplated by the Act until at least July 1, 1977, the deadline for compliance with the first level of technology-based standards, i.e., BPT. Even as that deadline approached, EPA issued a policy memorandum acknowledging its belief that, in many instances, despite good faith efforts by various companies, it would not be feasible for them to comply with the 1977 BPT deadline, and that in those instances, the agency would apply its prosecutorial discretion and issue an Enforcement Compliance Schedule Letter (“ESCL”) attempting to provide the company with more time to comply.

In addition to technical and resource constraints in getting the NPDES up and running, aggressive enforcement likely was confounded by the continued presence of managers and consultants who had gained their experience and expertise through implementation of the previous grant-based programs which did not rely on a command and control system or vigorous enforcement proceedings. Prior to 1972, the federal role in regulating water quality focused primarily on grant programs administering funds to states, and ultimately individual municipalities, to assist in funding the construction of sewage treatment facilities. The construction grants program in many states conditioned funding for cities and towns on using

33. See BNA Environment Reporter 241-42 (June 11, 1976); Bethlehem Steel, 544 F.2d at 660. Interestingly, in discussing the import of EPA’s policy on the mootness of that case, the Third Circuit noted the important role of citizen suits under the Act and the non-binding nature of the policy on citizen enforcers. Thus, even in the first instance under the Act where EPA’s judgment sought to downplay the need for enforcement, the citizen suit provision acted as an important check on such discretionary decisions. See id.
34. See NOVICK, supra note 12, at § 12.01[1], n.2. In addition, the Federal Water Pollution Control Administration had some authority to publish guidance information on stream classifications and the development by states of effluent limitations. See id.
certain approved consulting engineers.\textsuperscript{35} That common feature
gave rise to a tight knit community of consulting engineers and
state water pollution grant managers which greatly affected
implementation of the new Clean Water Act when it was
amended in 1972.\textsuperscript{36} Many of the consulting engineers went to
work for industry in preparing applications under the new
NPDES permitting program. As the grant managers rose in
the ranks of the agencies, although their mandate changed
considerably in 1972, their individual outlooks tended toward
engineered solutions and de-emphasized the importance of en­
forcement and penalties for noncompliance.\textsuperscript{37}

Thus, in general, for a number of years, the Act focused on
the largest industries and municipal sewage plants. In doing
so, perhaps for good reason, the agencies at the time largely
ignored any exotic contaminants, focusing their limited re­
sources on the best known pollution parameters. Similarly,
enforcement under the new regulatory scheme was approached
hesitantly, given EPA's struggle to keep up with the permitting
and effluent limitation deadlines established by Congress in
the 1972 Act and the important role played by managers of the
previous grant-based program and their close association with
consulting engineers relied on by that program, many of whom
went over to working for industry after 1972.

C. CHILDHOOD

Throughout the 1970's and into the early 1980's, the almost
exclusive use of the Clean Water Act's citizen suit provision
was to challenge EPA decisions or omissions.\textsuperscript{38} Many of the
cases were brought by national environmental organizations

\textsuperscript{35} See id. at § 12.01[2][a].
\textsuperscript{36} See id.
\textsuperscript{37} See id.
\textsuperscript{38} See Miller (Part I), supra note 29, at 10313. Writing in 1983, having departed
as the head of EPA's enforcement department, Mr. Miller observed at the time: "While
the citizen suit was conceived and designed to allow private enforcement of the law
against polluting violators, its most celebrated uses have been against EPA for its
failures to implement the environmental statutes in a timely and complete manner."
Id.
with a program-wide perspective.\textsuperscript{39} In the early 1980’s, that focus began to change.

One of the main reasons for this change was the election of President Ronald Reagan and the resulting precipitous decline in enforcement by EPA.\textsuperscript{40} The decline in federal enforcement started even before Reagan took office. In 1983, EPA only filed twenty-three enforcement cases under the Clean Water Act throughout the entire country.\textsuperscript{41} During the same period, two non-profit organizations — the Natural Resources Defense Council (“NRDC”) and the New Jersey Public Interest Research Group (“NJPIRG”) — filed eighteen citizen enforcement actions.\textsuperscript{42} Likewise, in 1983, it was estimated that EPA was receiving roughly seventy-five notices of intent to sue per year from citizens, a vast majority of which were addressing illegal discharges by violators, as compared to the roughly twenty-four notices per year prior to that time, most of which had been focused on EPA transgressions.\textsuperscript{43} According to Jeffrey Miller, who spent much of the 1970’s as an EPA official, including serving as the head of its enforcement program, by the end of 1983, citizen suits took their place as “the dominantly used federal judicial enforcement mechanism.”\textsuperscript{44} The initial wave of citizen enforcement under the Clean Water Act was, thus, in the form of a rebellion against observed and anticipated obstruction and politicization of EPA’s enforcement powers. With that rebellion at the end of the Act’s first decade, the Act entered its teenage years.

D. TEENAGE YEARS

The trend observed by Miller continued into the mid- and late 1980’s, with NRDC establishing a nationwide project — the Enforcement Project, NJPIRG filing many cases in New Jersey alone and other groups picking up the baton, other PIRGs including many cases filed by the Sierra Club, Citizens

\textsuperscript{39} See id.
\textsuperscript{40} See id. at 10313, n. 37.
\textsuperscript{41} See id.
\textsuperscript{42} See Miller (Part I), supra note 29, at 10313, n. 37.
\textsuperscript{43} See id. at 10314 n. 38.
\textsuperscript{44} Id. at 10314.
For A Better Environment in California and Illinois, Atlantic States Legal Foundation ("ASLF"), Hudson River Fishermen’s Association, and Trustees For Alaska, among others. Almost all of these cases involved clearly written permits with specific numeric effluent limitations applicable to sizable corporate dischargers. Thus, the citizen enforcement cases of that period remained driven by the original purposes of the Act — which was to address the more obvious point sources and better understood pollutants. This is not to suggest that there was anything wrong with that priority. Indeed, there was no other way to start in order to address the recognized problems at the time or to secure better results because the economic capabilities for the larger point sources were that much greater and the simplicity of the permits made for a string of citizen victories that is unprecedented in the history of private litigation.

The Supreme Court’s decision in Gwaltney of Smithfield v. Chesapeake Bay Foundation epitomized the tone of citizen enforcement throughout this “rebellious” period. Certainly at the federal level, there was no reason to anticipate that EPA, controlled by an anti-environmental administration, would be anything but hostile to citizen enforcement. This tone was carried down to the state level, triggered by the challenge to pre-

45. It is difficult to calculate exactly how many citizen enforcement actions were initiated during the 1980’s because EPA, for many years, did not maintain a complete file of notices received by private groups. See Miller (Part I), supra note 29, at 10314, n. 38. Nevertheless, as of February, 1987, Frank Thomas, in an article published in the Environmental Law Reporter, cited no less than 35 published decisions involving separate citizen suits filed by private organizations. See Frank M. Thomas, Jr., Citizen Suits and the NPDES Program: A Review of Clean Water Act Decisions, 17 Envt’l L. Rep. 10050-10055 (Feb. 1987).


47. See Thomas, supra note 45, at 10050 et seq. Groups bringing successful citizen enforcement suits included NRDC, NJPIRG, and the Sierra Club.

48. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, 484 U.S. 49 (1987). In Gwaltney, the United States Supreme Court held that citizens were limited to bringing enforcement actions under Section 505 of the Act that seek prospective relief. The standard enunciated by the Court required citizen plaintiffs to allege and ultimately prove that a reasonable likelihood of continued or intermittent violations by the defendant existed at the time of filing the complaint. See id. at 57.
empt citizen actions laid down by the *Gwaltney* decision itself.49

During this time, the grassroots environmental groups began to permeate the field of citizen enforcement, expanding their programs into areas that once were the sole concern of national groups, especially NRDC. NJPIRG demonstrated the accessibility of the Clean Water Act’s enforcement provisions to a regional group and demonstrated the viability of making enforcement a primary part of its regional agenda. Although most of the citizen suits of that time were still brought by groups staking out a national scope, such as NRDC and ASLF, regional groups’ roles were growing.50 Indeed, as the Act reached its young adulthood, national enforcement efforts have largely become a thing of the past. NRDC’s Enforcement Project was disbanded while actions brought by local regional groups have continued to grow and take important places in particular watersheds and state agency jurisdictions, perhaps best exemplified by the expansion of Keeper programs on watersheds throughout the country, each including as a mainstay

49. It is fair to say that the tone established by the *Gwaltney* decision was one of general suspicion towards citizen enforcement efforts. The Court in effect found that citizens could not be trusted with the initiation of enforcement proceedings for wholly past violations, a task with which only the good reason of the federal and state governments should entrusted. Looking back, one can see that *Gwaltney* was the first major court decision which began a trend toward restricting citizen enforcement actions on a number of fronts, including in addition to prospective relief, ever higher hurdles to establish standing (see Public Interest Research Group of New Jersey v. Magnesium Elektron, Inc., 1997 WL 434864 (3d Cir. 1997)), ever more detailed specificity in notice letters, and ever more care in evaluating the potentially preemptive actions of local state agencies (see Communities For A Better Environment, et al. v. Union Oil Co., 861 F. Supp. 889 (N.D. Cal. 1994), aff’d 83 F.3d 1111 (9th Cir. 1996), cert. denied, 177 S. Ct. 789 (1997)). See infra Part V.B.3. for a detailed discussion of the *Union Oil* case. Unfortunately, many of the hurdles established are procedural in nature and focus the courts’ attention on the actions of the plaintiff citizen groups and the timing of their efforts rather than the pollution problems the cases seek to have addressed. Nevertheless, much of these restrictions have been overcome by the expansion of the Act to address previously ignored pollutant problems and adjustments made by the groups engaged in enforcement activities to avoid procedural pitfalls.

50. During that time, NRDC frequently teamed up with regional organizations including, for example, the Chesapeake Bay Foundation, Connecticut Fund For the Environment and others. Thus, although regional groups were involved in many of the enforcement cases, the litigation strategy was driven by the availability of the national group’s agenda.
III. THE ACT COMES OF AGE: FROM POINT TO "NON-POINT" SOURCE REGULATION

The Clean Water Act is perhaps most notable for the degree of forward thinking which Congress exhibited in the language adopted in 1972. It is indeed remarkable how little the framework of the Act has had to adjust since that time. Several deadlines have had to be extended, but Congress, from the beginning, saw clearly past the initial permitting phase and anticipated that its water quality goals likely would not be solved once the major industrial and municipal point sources were permitted. The Act included provisions anticipating that water quality standards would still be violated even after BAT was being achieved throughout a watershed. In that event, the Act provided for additional measures to be required of dischargers — beyond BAT.52 These requirements would be driven by water quality based effluent limitations, going beyond the pre-existing technology.53 The Act also anticipated the contribution of pollution from non-point sources and devised procedures to determine and address both point and non-point source pollution on impaired water bodies through a waste load allocation and total maximum daily load process.54

Most relevant to this article, Congress responded to those point sources which were more difficult for EPA and the states to focus their resources on — in particular, the multitude of industrial and municipal facilities contributing pollutants

51. Hudson RiverKeeper was the first Keeper program in the country, established by the Hudson River Fishermen's Association in 1984. J. CRONIN & ROBERT F. KENNEDY, JR., THE RIVERKEEPERS (Scribner 1997). Beginning that year and continuing to the present day, the Hudson RiverKeeper has maintained a steady docket of citizen enforcement cases based exclusively on pollution of the watershed of the Hudson River. The continuing vitality of RiverKeeper's watershed-based enforcement effort underscores the ability of a regional-based enforcement program to maintain its enforcement capabilities despite changes in the law or judicial decisions.
53. See id.
through their discharges of contaminated storm water. In this instant, Congress recognized that the Act's requirements already encompassed this important pollution source but that EPA and the states were unprepared to expend the resources necessary to apply the NPDES permitting program as it had been applied to the more "traditional" point sources. In 1987, Congress thus sought to streamline this aspect of the permitting program, allowing the agencies to cut some corners in hopes that they could regulate the perhaps hundreds of thousands of storm water dischargers without bankrupting their budgets. As will be discussed further below, Congress has not, however, adequately reflected on the enforcement burdens posed by the storm water program and the necessary evolution of those mechanisms to keep pace with the evolving regulatory mandate.

IV. STORM WATER POLLUTION

It is certainly no mystery that significant quantities of pollution enter our waterways by way of storm water flows. In her seminal work, *Silent Spring*, biologist Rachel Carson described one incident of storm water contamination which occurred in the Colorado River downstream of Austin, Texas, in 1961, where nearly every fish in that stretch was killed. Ms. Carson described the source of the massive fish kill as a decade-old practice of dumping or allowing various insecticides to be washed into Austin's storm sewers. As she wrote in 1962:

The manager of [one] plant admitted that quantities of powdered insecticide had been washed into the storm sewer recently and, more significantly, he acknowledged that such disposal of insecticide spillage and residues had been common practice for the past 10 years.

56. See RACHEL CARSON, SILENT SPRING 144-46 (Houghton-Mifflin 3d Prtg 1962). Roughly one thousand pounds of dead fish were observed per mile of riverbank. See id. at 145-46.
57. See id. at 145.
On searching further, the fishery officers found other plants where rains or ordinary clean-up waters would carry insecticides into the sewer. The fact that provided the final link in the chain, however, was the discovery that a few days before the water in lake and river became lethal to fish the entire storm-sewer system had been flushed out with several million gallons of water under high pressure to clear it of debris. This flushing had undoubtedly released insecticides lodged in the accumulation of gravel, sand, and rubble and carried them into the lake and thence to the river, where chemical tests later established their presence.58

Despite that obvious pollution source, EPA opted not to address pollution from storm sewers for many years, with the exception of sewage, and placed storm sewers generally outside the scope of the NPDES program.59

Twenty-five years after Ms. Carson's observation, Congress found it necessary to amend the Clean Water Act to clarify a process to bring storm water discharges, including municipal storm water systems, under the NPDES permitting program.60 Although a vast majority of storm water discharges from industrial facilities, and certainly from any municipal storm sewer system, occur through “point sources,” the sheer number of such pipes and conduits, the vast number of contributors of pollution to those systems, and the perceived difficulties of controlling storm water flows led to hesitation by EPA and the State agencies. In 1987, Congress amended the Act to establish a framework for EPA and the States to regulate the quality of municipal and industrial storm water discharges through the NPDES permitting program.61

58. Id.
61. 33 U.S.C. § 1342(p) provides, in pertinent part, the following:
(p) Municipal and industrial storm water discharges
(1) General rule. Prior to October 1, 1992, the Administrator or the State (in the case of a permit program approved under this section)
The Clean Water Act's storm water requirements are set forth at Section 402(p) of the Act. Section 402(p) creates a process which in large part replicates, in the storm water pollution context, the initial implementation process for the Section 402 program carried out by EPA and a number of the states during the 1970's. The section provides an initial five year grace period for most storm water dischargers. The section sets forth the effluent limitation standards to be applied by the storm water permits. For industrial discharges, these are the same technology-based standards required at Section 301. For municipalities, a "maximum extent practicable" standard is set forth with brief elaboration. Section 402(p) then sets out

shall not require a permit under this section for discharges composed entirely of stormwater.

(2) Exceptions
Paragraph (1) shall not apply with respect to the following stormwater discharges:
(A) A discharge with respect to which a permit has been issued under this section before February 4, 1987.
(B) A discharge associated with industrial activity. (C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more. (D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000. (E) A discharge for which the Administrator or the State, as the case may be, determines that stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(3) Permit requirements
(A) Industrial discharges. Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 of this title. (B) Municipal discharges. Permits for discharges from municipal storm sewers — (i) may be issued on a system- or jurisdiction-wide basis; (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants. Id.

63. See Clean Water Act § 402(p)(1), 33 U.S.C. § 1342(p)(1). Compare Clean Water Act § 402(k), 33 U.S.C. § 1342(k) (giving permit applicants a slightly more than two year grace period to receive and comply with an NPDES permit); Clean Water Act § 301(b), 33 U.S.C. § 1311(b) (providing that dischargers shall comply with appropriate technology-based effluent limitations, set forth in NPDES permits, by July 1, 1977, almost five years after the Act was signed into law).
66. See Clean Water Act § 402(p)(3)(B)(iii), 33 U.S.C. § 1342(p)(3)(B)(iii). See supra note 61 for the text of the section. In at least one instance, the municipal standard of "maximum extent practicable" has been defined as equivalent to BAT.
a schedule for dischargers to apply for permits and for EPA to issue permits as well as regulations. Thus, although storm water discharges were not exempted from the original NPDES program, Congress, in effect, decided to acknowledge EPA's determination to defer regulating storm water, but provided the agency with programmatic guidance to bring storm water into the NPDES.

Almost without exception, prior NPDES permits issued under the Act included numerical effluent limitations, prepared by the agencies, controlling the specific quantity of pollution that a discharger could release through its wastewater. The only responsibility delegated to the discharger was to determine how they would comply with those limitations. The agency was solely responsible, after mandated public participation requirements, for determining the limitations. Under the framework established for storm water, numerical effluent limitations are de-emphasized as a regulatory tool except for a small fraction of the larger industrial dischargers covered by EPA's national categorical standards. In California, the practical effect of that conceptual shift has amounted to a delegation to both municipalities and industry to determine, to a significant degree, what quality of their storm water discharges is deemed to be sufficient. As for the industrial permit in Cali-


68. See Citizens For A Better Environment v. EPA, 942 F.2d 1427 (9th Cir 1991) (unsuccessful challenge to municipal storm water permit for failure to include numeric effluent limitations).

69. In California, this trend is especially true in the formulation and implementation of municipal storm water permits. In the San Francisco Bay area, for example, the municipal permits issued thus far to municipalities in Santa Clara and Alameda Counties rely almost exclusively on storm water management plans drafted by the municipalities, with final approval resting with staff of the local Regional Water Quality Control Board, largely outside of any formal public review process. Perhaps more significantly, the municipal permits have provided an exception for the city's storm water discharges to comply with water quality standards where they have followed their self-drafted SWMP. This new style of NPDES permit serves to cut the interested public out
fornia, two significant holdovers from prior forms of NPDES permits maintain much of the integrity of the permits — the requirement that industrial facilities must achieve BAT and the requirement that, regardless of the pollution control technology applied, their discharges meet all applicable water quality standards.

The State of California opted to implement the industrial storm water regulations through the issuance of a statewide general permit. The State’s reliance on a general permit was based on lessening the “overwhelming administrative burden associated with start up of a new program to regulate industrial storm water discharges” and because “[i]t is . . . the least costly way for a discharger to obtain a permit and comply with USEPA’s regulations.” The application process consists of a

of the permit drafting and enforcement process to a significant degree because the programs tend to be very complicated with numerous plans addressing different categories of pollution sources and municipal actions (including, e.g., inspection programs, educational programs, sewer maintenance programs, enforcement programs, etc.). Because the individual plans are drafted and approved outside of the formal permitting issuing authority, the public is at a distinct disadvantage in attempting to keep up with the perpetually evolving permits.

As to enforcement, because water quality standards have effectively been written out of the municipal permits, enforcement is limited to overseeing implementation of the program rather than responding to excessive pollution. Given the complexity of the programs and the once per year filing of an annual report describing in brief the entire effort, it is almost impossible for either agency staff or a citizen to ever really understand what is going on on the ground in any given municipality and whether any particular plan is being implemented as described.

In response to this steady decline in clarity of the municipal permits, San Francisco BayKeeper has filed administrative changes with the State Water Resources Control Board for the two municipal permits issued thus far by the San Francisco Bay regional Board - the Santa Clara and Alameda county permits. At least one other challenge also was filed against a permit issued to Orange County by the Regional Water Quality Control Board for the San Diego Region. In response, the State Water Resources Control Board recently issued an order, responding to the EHC petition but establishing language to be used throughout the State of California making municipalities subject to water quality standards as of the next reissuance of their permits.


71. FACT SHEET FOR NPDES GENERAL PERMIT (as amended September 17, 1992) FOR STORM WATER DISCHARGES ASSOCIATED WITH INDUSTRIAL ACTIVITIES EXCLUDING CONSTRUCTION ACTIVITIES (“1992 GENERAL PERMIT FACT SHEET”) 2 (Oct. 15, 1992). In issuing the general permit, the State Board, however, noted its expectation “that as the storm water program develops, the Regional Water Boards will issue individual and
simple requirement that existing facilities subject to its terms have filed a Notice of Intent ("NOI") for coverage under the permit by March 30, 1992.

The terms of the General Permit consist of three principle components — development and implementation by each facility of a Storm Water Pollution Prevention Program ("SWPPP"), development and implementation of a Monitoring and Reporting Program ("RPM"), and specific prohibitions of water quality impairing discharges.

A. STORM WATER POLLUTION PREVENTION PROGRAM

Section A(1) of the General Permit requires dischargers to have developed and implemented a SWPPP no later than October 1, 1992. The SWPPP must include pollution control measures that are equivalent to BAT and Best Conventional Pollutant Control Technology ("BCT"). The SWPPP must also include, among other elements: (1) a description of potential sources of pollutants to the storm water system; (2) a site map showing the storm water conveyance system and areas of actual and potential pollutant contact; (3) a description of storm water management practices and preventive maintenance; and (4) a summary of storm water sampling points. Provision A(6) of the General Permit requires dischargers to eliminate non-storm water discharges to storm water conveyance systems prior to the implementation of the SWPPP.

72. Although the permit uses the phrase "best management practices" in a number of its provisions, it is important to emphasize that the Act itself does not anticipate "management practices" as the applicable control standard for industrial storm water dischargers. Management practices are only referred to in the context of municipal storm water programs. Compare § 402(p)(3)(B)(iii), 33 U.S.C. § 1342(p)(3)(B)(iii) and § 402(p)(3)(A), 33 U.S.C. § 1342(p)(3)(A). Indeed, use by the Act of the actual phrase "best management practices" is limited to non-point sources of pollution governed by area-wide management plans authorized by section 208, 33 U.S.C. § 1288. Industrial dischargers governed by California's General Permit are not "non-point source" discharges. They are, by definition, point source discharges governed by the NPDES permitting program.

73. The SWPPP components were further specified in the reissuance of the General permit on April 17, 1997. See State Water Board Water Quality order No. 97-03-
B. MONITORING AND REPORTING PROGRAM

Section B(2) of the General Permit requires that dischargers have prepared and implemented a Monitoring and Reporting Program no later than January 1, 1993. Section B(5)(a) requires that dischargers conduct site inspections to identify areas contributing to storm water discharges and to evaluate the effectiveness of the SWPPP measures in reducing pollutant loading. Section B(5)(b) and (c) requires dischargers to conduct observations to identify sources of non-storm water pollution and to identify all storm water discharge locations that produce a significant storm water discharge. Section B(5)(d)(i) requires dischargers to sample and analyze during the wet season for pH, total suspended solids ("TSS"), specific conductance, and total organic content ("TOC") or oil and grease. Section B(5)(d)(ii) requires sampling for toxic chemicals and other pollutants likely to be in the storm water discharged from the facility. Section B(11) requires dischargers to collect samples from all locations where storm water is discharged.

C. SPECIFIC PROHIBITIONS CONTAINED IN THE GENERAL PERMIT

The Act prohibits storm water discharges associated with industrial activity without a permit.74 Provision A(1) of the General Permit prohibits discharge of material other than storm water to a storm sewer system or waters of the nation, unless such discharges are regulated by a NPDES permit. Provision A(3) of the Permit prohibits the discharge of storm water which causes or threatens to cause pollution, contamination, or nuisance. Provision B(1) of the Permit prohibits the discharge of storm water to surface or groundwater which adversely impacts human health or the environment.

The General Permit applies to a broad range of industrial facilities, ranging from automobile wrecking yards to hazardous waste treatment facilities, to mines to transportation facili-

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ties. For the first time in the history of the Clean Water Act, numerous small businesses have been brought within its permitting program who, certainly in 1992, likely had little familiarity with the Act and the implementing agencies. Hence, for the first three years that California has issued permits, much of the agencies’ efforts have focused on informing the regulated industries of their obligations under the permit program. Although by 1997, many facilities had filed NOI’s with the State Board, many other facilities remained outside of the program despite its coverage of their operations. Thus, despite the General Permit’s goals of minimizing burdens on agency staff, the sheer number of facilities and the need to search them out where they have not come forward voluntarily remains a daunting administrative task for the State Board and Regional Boards.

V. REFLECTIONS ON CITIZEN ENFORCEMENT: “MOMS AND POPS” AND THE ELUSIVE MAXIMUM PENALTY

The course of citizen enforcement of the storm water requirements appears to be following a path similar to the initial history of citizen enforcement under the Act. Like the initial phase of the NPDES permit program, the storm water program has started with a period of relatively little enforcement while the program has come on line. Like the proliferation of citizen suits under the NPDES program in the early to late 1980’s as compared to a de-proliferation of EPA and state actions, citizen suits under the storm water program, especially in California, began in the vacuum of few state and EPA actions and have quickly outnumbered the efforts of the state’s Regional Water Quality Control Boards. Whereas citizen suits under the “traditional” NPDES permits peaked and indeed appeared

75. See 1997 General Permit, Attachment 1.
76. NRDC itself has played its traditional role in policing EPA’s implementation of the nationwide storm water program prescribed by Congress. As is noted below, however, NRDC has still played an important role as a citizen enforcer in California, albeit, that national organization’s strategies have taken on a decidedly regional character, focusing on two regions of the State — Los Angeles and San Diego — and pursued through alliances with two watershed-based groups — Santa Monica BayKeeper and San Diego BayKeeper.
to tail off as of the early 1990's, the sheer number of facilities governed by the storm water requirements and the more localized nature of the citizen enforcers leading this new wave of citizen enforcement likely will result in a longer period of time than a single decade where citizen action will play a role comparable to the agencies themselves. Moreover, because of the more local character of the groups, with a more intimate knowledge not only of their local watersheds but also a more thorough and personal knowledge of their local enforcement agencies, this period of enforcement promises to be characterized by more cooperative relationships between agency and citizens than the Gwaltney era portended.

About four years into the storm water program, i.e., in the past two years, a wave of enforcement actions under the General Permits has begun. Whereas the government had a roughly seven-year head start on enforcing the original NPDES permit program, an interesting thing about the storm water enforcement actions is that a vast majority of even the initial enforcement cases under the storm water program have been brought by citizen groups, in particular the BayKeeper programs in San Francisco Bay, Santa Monica Bay and San Diego Bay, as well as the Stockton-based DeltaKeeper, a project of San Francisco BayKeeper. San Francisco BayKeeper alone has brought 30 actions to enforce the General Permit in the last two years. In total, about 60 storm water enforcement actions have been initiated by citizen groups throughout the State of California. This is more than the number of en-


78. In addition to San Francisco BayKeeper and DeltaKeeper's thirty enforcement actions, the total actions brought by other citizen groups include the following: Santa Monica BayKeeper and the Natural Resources Defense Council - eleven actions (see telephone interview with Terry Tamminen, Executive Director, Santa Monica BayKeeper, Sept., 1997); Communities For A Better Environment ("CBE") - five actions (see telephone interview with Richard Drury, Legal Director, CBE, Sept., 1997); Environmental Protection and Information Center ("EPIC") - four cases (see interview with Sharon Duggan, Legal Counsel for EPIC, Sept., 1997); San Diego BayKeeper - three cases (see telephone interview with Ken Moser, Executive Director, San Diego
This result is not surprising given the huge number of facilities covered by the General Permit and the relatively small amount of staff time assigned to the storm water program at each Regional Board. In addition, the relative prominence of citizen enforcement reflects the collected knowledge gained by environmental organizations from almost two decades of experience enforcing environmental laws. That collective experience, carried by individuals who started as interns or associates with many of the environmental groups, like NRDC and NJPIRG, who were bringing those cases in the mid-1980's, has allowed the groups in California to play a quicker and more prominent role in enforcing the storm water requirements, relative to the government agencies.

The new storm water requirements underscore the need for citizen enforcement. With perhaps tens of thousands of facilities to be inspected and convinced of the need to comply with the storm water requirements, many staff persons within the
state regional boards as well as EPA understand the need to look outside of the agency, to environmental organizations and other private parties, to begin to complete the tasks envisioned by the storm water permit program. Just to figure out how many covered facilities exist and who should have applied for coverage under the general permit, is a Herculean task. By necessity, the storm water program is forging new relationships between agencies and citizen groups willing to do enforcement work. In many ways, the limited logic of the United States Supreme Court's *Gwaltney* decision is becoming more and more superfluous as understaffed agencies realize the magnitude of enforcing the newer permitting programs, especially with regard to the storm water program, and the availability in many regions of highly efficient and professional environmental organizations willing to adopt an enforcement agenda.

In addition to having a profound effect on the relationship between citizen groups and state agencies, another interesting effect of the storm water pollution enforcement actions is their underscoring of an apparent disparity between the relative harshness of the Clean Water Act's penalties on smaller businesses as compared to large companies. Fifty thousand dollars spent on addressing an enforcement action by a small wrecking yard that nets a profit of $100,000 per year compared to a $10 million penalty assessed against a company the size of Unocal, which nets billions of dollars per year, is relatively a much heavier financial burden.

The biggest violators are not being punished enough. Violations continue to be viewed by the largest operations as simply a cost of doing business and not a legal and moral obligation. Since enforcement of the Act began over two decades ago, the case law demonstrates that federal judges have been reluctant to utilize the full effect of the penalty provisions provided by Congress. Thus, no judge has ever come close to assessing the maximum penalties allowed by the statute of $25,000 per day per violation. Looking to the existing case law, citizen plaintiffs likewise have been unable to achieve settlements that do not significantly compromise the statute's maximum penalties. Twenty-five years into the Act, it is hard to believe that a num-
ber of major violators have not yet come along who would have been penalized to the full extent of the penalty provisions.

At the other end of the spectrum are the many smaller businesses who for the first time find themselves obligated to consider their contribution to water pollution. Not only is the Act's statutory maximum well beyond the realm of the possible for the average "mom and pop" shop, even the cost of the citizen suit process provided by the Act is a significant burden, making it very difficult for a many of them to even defend themselves in federal court should that become necessary. Although incentives to settle are important, an incentive derived solely from the cost of the right to defend oneself is not a fair incentive. Hence the need for the Act to evolve to provide a citizen enforcement process with potentially much lower transaction costs that would be able to assess significant penalties where appropriate and encourage settlements of disputes based on the merits of the violation and environmental harm rather than the cost of litigation.

The Act should expand in both directions. First, federal judges should not be so reluctant to apply the Act's maximum penalties where economic benefits were realized by a company for its noncompliance and it has substantial financial where-withal and deterrence is costly. Judges indeed should be encouraged by a change to the law that would allow judgments to go beyond $25,000 per day when that maximum fails to disgorge all ill-gotten profits or would otherwise fail adequately to deter a large violator or category of violators. On the other end of the spectrum, the Act should provide an enforcement action, open to citizen enforcers, which is brought before an administrative tribunal, reducing costs to both the enforcing citizen and the financially smaller violator. Such an administrative enforcement process for citizens would allow more money to be spent on compliance and appropriate penalties rather than transaction costs, such as attorney's fees and court costs, while maintaining citizens' ability to bring the actions by still reimbursing their costs and better enabling defendants to defend themselves by lessening the cost of their defense.
As the Act's scope evolves and reaches out to address the full range of pollution problems, so too must its enforcement mechanisms grow and expand. Likewise, the courts, the agencies, and the citizen enforcers need to explore new ways of effectively playing their roles in implementing the Act and striving for its ambitious yet non-negotiable goals — fishable and swimmable waters.

VI. SAN FRANCISCO BAYKEEPER AND DELTAKEEPER — CITIZEN ENFORCEMENT COMING OF AGE

San Francisco BayKeeper was formed eight years ago, as the Clean Water Act hit its late teens and the number of citizen enforcement cases involving larger discharges with sufficient numbers of violations began to tail off. The tailing off of citizen cases did not, however, correlate to a healthy San Francisco Bay. Although many of the more apparent pollution problems had largely been controlled, new, less visible, but still highly damaging, pollution issues continued to be identified. Perhaps more conspicuously, BayKeeper's formation coincided with the development of the new storm water programs.

A. BAYKEEPER'S CITIZEN ENFORCEMENT ACTION STRATEGIES

BayKeeper's initial forays into citizen enforcement did not begin until 1993, about four years after its formation. From the beginning, BayKeeper's enforcement strategies have been significantly informed by its identification with a particular watershed and the group's constant contact with the local re-

80. See The Enforcer, S.F. CHRON., July 7, 1989, at B3; Sullied Bay Gets a Defender with Launching of Patrol, SAN JOSE MERCURY NEWS, July 7, 1989, at 1B.

81. The first formal enforcement case brought by San Francisco BayKeeper was against a Bay Area gun club which was discharging lead pellets directly into the Bay. See Group Wants Gun Club To Quit Filling Bay With Lead, WEST COUNTY TIMES, March 24, 1993, at 3A; Water Board To Ban Lead Shot at Gun Clubs, WEST COUNTY TIMES, March 26, 1993, at 1A; Environmentalists Eye Gun Clubs Along Bay, THE RECORDER, March 31, 1993, at 3. BayKeeper's enforcement program then brought a number of cases in the Petaluma River area for violations of pretreatment requirements. See Group: Petaluma Hasn't Come Clean, SANTA ROSA PRESS DEMOCRAT, May 20, 1993, at B1; Firms Work On Pollution Woes, PETALUMA ARGUS COURIER, July 20, 1993, at 1. The fourth case which BayKeeper became involved in, along with Citizens For A Better Environment and others, was against the Union Oil Co.
gional board and other entities. In terms of its watershed, BayKeeper does not work on issues outside of its watershed. The group is limited to the Bay, the Delta, and their numerous tributaries. Thus, almost every issue which BayKeeper confronts involves either the Regional Water Quality Control Board for the San Francisco Bay Region or the Central Valley Region, the two regional boards which cover the Bay and Delta. As a matter of practice, a BayKeeper representative is interacting with Board staff on a daily basis. This is significant because, unlike in the 1970’s and 80’s, when industry in general had a larger presence in front of the agencies implementing the Clean Water Act, the BayKeeper model shows that a watershed-based group can maintain a greater presence in front of a water quality agency than even the largest company as long as the group maintains its focus on a particular watershed. By coupling that presence with carefully developed and thoughtfully implemented independent strategies and appropriate advance notice to the local agency, BayKeeper has become part of the regulatory landscape in the Bay Area and, more recently, the Delta.

As in other areas of the country, BayKeeper's initial wait of four years to mount an enforcement program, in part, had much to do with the fact that there were not many “traditional” Clean Water Act cases to be brought in the Bay Area. Thus, BayKeeper's initial cases began by focusing on a number of pretreatment enforcement actions and a few simple, but somewhat exotic pollution discharges, most notably discharges of lead shot into the Bay from local skeet and trap shooting ranges.

Those initial cases, and especially the Unocal case described below, served as a transition for BayKeeper from cases that largely looked like the traditional citizen enforcement actions into new arenas that were just coming on line. By 1995, BayKeeper began setting the stage for mounting a coordinated

82. There are nine regional water quality control boards in California organized more or less on a regional watershed basis.
and sustained effort to assure that the new storm water re-
requirements were being complied with by local industries.

Over the years, BayKeeper has developed an integrated
three prong strategy for pursuing citizen enforcement cases.
The three prongs include some form of an agency-based initia-
tive, an ability to bring an independent citizen enforcement
action, and media or public outreach. Each is formulated for
specific cases (or categories of cases) to maximize the local
agency's ability to coordinate with BayKeeper's agenda and to
assure, one way or another, that a pollution problem is re-
solved. Cooperation with the agency is heightened by the com-
plete integration of the three prongs.

In terms of an agency initiative, BayKeeper in most in-
stances will offer the agency's staff the option of focusing on
sites that the group has identified, usually many months before
a notice letter has been sent. We are, in fact, working with our
local agency to help them identify those cases and sites that fit
within their own priorities. BayKeeper also tends to be very
forthright with agency staff about our ability to bring our own
enforcement action and whether the group is prepared to do so
in any given instance.

As for media, BayKeeper focuses on the polluter — not the
agency. Unless there is direct collusion between the agency
and a polluter, there is generally nothing gained by criticizing
the local agency for "not doing its job" or otherwise blaming the
agency for a polluter's action. Instead, a strategy of encour-
agement coupled with a demonstration of independent action
has established relationships between BayKeeper's program
and two local regional boards that truly are interactive, mutu-
ally supporting enforcement roles.

It may well be that BayKeeper's strategies are effective only
in the context of California's water quality regulatory system.
California's system consists of multiple tiers, starting with staff
level decisions, followed by consideration by a nine member
regional board and finishing with review by the State Water
Resources Control Board. The interaction with staff and the
public is, generally, one on one and outside of the public eye.
The Regional Boards do business at monthly public meetings, interacting with the public through a reasonably formal hearing process. That mix of internal staff process and decision making with the public venue before the regional boards establishes a dynamic where staff can never be entirely sure what the regional boards' decisions will be, especially where public interest organizations, among others, have established a rapport with the Board and have earned a level of respect from its members.

Likewise, the fact that the Regional Board itself is not the last word likely makes its decisions somewhat more reflective of the range of concerns brought to bear on any given decision. In states where the agency delegated with responsibility to implement its water quality laws has only one tier or a second tier that consists solely of, for example, a review board that does not regularly interact with the public but only individual appellants, it is likely that its decisions tend to be more rigid and rely on less interaction amongst various stakeholders prior to the decisions proposal.

B. THE BAYKEEPER STRATEGY AT WORK: THREE CASE STUDIES

The best way to explain how BayKeeper's program has functioned over the last three years and to evaluate the employed strategies' application to other state regulatory regimes is to provide a number of case studies which cover a spectrum of dischargers.

1. The Junk Yard Initiative

One of the industrial categories covered by California's general storm water permit is wrecking and scrap yards. Wrecking yards and scrap yards can be significant sources of pollutants, including heavy metals, oil and grease, PCB's and solvents. In 1995, in the San Francisco Bay Area, that category of industrial facilities was believed to be one where significant numbers of facilities were not complying with the Gen-

83. See General Permit at 42 (Sector M. Automobile Salvage Yards, SIC 5015).
eral Permit, in many cases failing to even file the requisite notice of intent to operate under the General Permit. The concern was heightened by the propensity of junk yards and scrap yards to have been historically located along the edge of the Bay in what were considered fifty years ago to be swamps, i.e., the delicate marsh habitat around the fringe of the Bay. Although a significant potential source of storm water contamination, the wrecking yards are a good example of facilities for which, in general, the Act’s citizen enforcement procedures could be better tuned to the facilities’ violations if they included a less costly, administrative enforcement process, in addition to the existing litigation option.

a. Waiting for the Agency — Patience As an Agency Strategy

As BayKeeper looked into the issue of junkyards’ storm water pollution beginning in mid-1995, through meetings with regional board staff, it learned that the agency was intending to send out a general letter to every junk yard in the region which it believed may be covered by a storm water permit but had not signed onto the General Permit. Much to the agency’s credit, staff had prepared a comprehensive list of potential wrecking yard and scrap yard facilities who likely were subject to the general storm water permit. Because of considerable uncertainty and the time needed by staff to visually inspect all of the potential yards, the letter was to include a response form which also allowed a particular facility to explain why it believed it was not covered by the General Permit. In order to allow the board to implement its strategy, BayKeeper adjusted its storm water enforcement agenda to focus on other types of facilities for the time being.

About eight months after BayKeeper was informed by the board staff of their intentions, no letters had yet gone out to any junk yards or scrap yards. Around that time, BayKeeper got a call on its hotline (1-800 KEEP BAY), describing significant amounts of pollution at a wrecking yard facility in

84. It is estimated that 95% of the Bay’s historic wetland areas of been destroyed. Of the 5% remaining, many of the largest junkyards can be found nearby.
Hayward, California, run by Pick Your Part, Inc. BayKeeper investigators paid their $1 and toured the yard, cameras in hand. The thirteen acre yard was located adjacent to a drainage channel which separated it from a seasonal marsh area and a portion of Hayward Shoreline Park District. The yard was a do-it-yourself facility which allowed customers to identify the auto part they wanted and remove it on their own. Of course, the care and cleanliness with which that removal process occurred varied from one customer to another. The unpaved yard was strewn with hub caps filled with used motor oil, numerous oil spills, dripping car parts, overturned batteries, spills of glycol, and lead releasing radiators. During rain events, each of those observed contaminants would be mobilized and discharged into adjacent channels and ultimately the southeastern portion of San Francisco Bay.

BayKeeper has an obligation to respond to incidents reported to it on its hotline, therefore, BayKeeper continued to investigate the Pick Your Part site. As a result, the group put together the information necessary to prepare a notice of intent to sue letter triggering a citizen enforcement action to remedy the obvious storm water issues at the site. BayKeeper called the Regional Board staff to inform them of the observed violations at this particular site. That call triggered a quick site visit by the agency, the City, and the Park District to the facility. However, no particular agency enforcement strategy was triggered by the visit. Having waited eight months for the Regional Board letter, BayKeeper opted to move ahead with an enforcement action, and the Regional Board staff did not object.

b. Independent Action

In 1996, BayKeeper filed a notice of intent to sue against Pick Your Part for violations of the general storm water permit. The violations BayKeeper had observed at the facility included the facility's failure to prepare an adequate SWPPP, failure to implement its existing SWPPP, and failure to adequately moni-

tor discharges from the site. Before the end of the sixty day notice period, BayKeeper held several settlement meetings with the company and reached an agreement in principle. BayKeeper filed a complaint and a consent decree in the case simultaneously. Through the consent decree, the company agreed to comply with the General Permit. The compliance measures to which it agreed included paving the entire yard and directing flows to a collection system, installing a treatment system removing both oil and grease and heavy metals to less than Basin Plan standards, reorganizing the yard to remove certain car parts from uncovered areas, removing debris scattered throughout the adjacent marsh, and adjusting their procedures to minimize the carelessness of customers. In addition to complying with the statute, the company agreed to pay a $50,000 mitigation fund towards local water quality projects. Lastly, Pick Your Part paid $12,000 to reimburse BayKeeper for its investigation costs and covering its attorneys' fees to prepare the notice, complaint, negotiate, and prepare the consent decree.

In terms of junk yards, Pick Your Part was a somewhat special case, being a relatively large company with wrecking yards throughout California, and a few in Arizona. Most yards are owner-operated and have much fewer resources to draw upon than Pick Your Part. With that fact in mind, BayKeeper nevertheless resolved to follow up on the Pick Your Part action in a manner that was sensitive to the corporate size of most yards, but at the same time did not shy away from enforcing the law. BayKeeper assembled a group of twelve attorneys and volunteers. Starting with the list of wrecking yards prepared by Board staff, BayKeeper's teams began systematically visiting yards in three counties representing different areas of the San Francisco Bay watershed. In all, BayKeeper looked at thirty different facilities. Some of the inspections were on-site where the yards allowed the public in for a fee. Many of the inspections were done from the fence line, observing the presence or absence of storm water controls such as berming or roofing, and gauging the amount of fluids and dirty car parts exposed to storms and the likely drainage patterns from the yards. Many of the inspections were done during or immediately after rain events, where the drainage from the site was clearly apparent.
Ultimately, BayKeeper selected seventeen sites which it intended to send notice letters to, one of which contained eighteen separate tenants with a multitude of storm water contamination concerns.

One key element of BayKeeper's strategy was to send all eighteen notices at the same time. This allowed BayKeeper to respond effectively to claims by individual yards, almost all of whom were small businesses, that BayKeeper was unfairly singling them out. By covering eighteen facilities with twenty-nine different operators all at once, no one could maintain such a claim for long.

A second key element to BayKeeper's junk yard strategy was a policy of full disclosure to the Regional Board and its staff. Of course, BayKeeper already had informed Regional Board staff of the Pick Your Part case. After completing the investigation work on the additional sites, but prior to sending the notice letters, BayKeeper arranged for a meeting with Regional Board staff and laid out its information on each of the sites of concern. At that time, roughly one year had passed since staff had indicated its intention to send the compliance letters to the numerous potential non-filers they had identified. Roughly half of the sites investigated by BayKeeper were included on that list. A main question asked at this update meeting was whether there was a scheduled date for the Regional Board letters to go out. When staff informed BayKeeper that there was not an anticipated date, they acknowledged that the group had been very patient in allowing the agency to follow through on its strategy prior to triggering any citizen enforcement and, at that point, welcomed BayKeeper's assistance in addressing the storm water concerns for bay area junk yards.

With staff's acknowledgment of the merits of BayKeeper's strategy, the notices were sent on a single day, accompanied by a Bay Area-wide press release. The following week, at the first scheduled Regional Board meeting, BayKeeper made a presentation to the Regional Board itself, during the public forum portion of the meeting, describing the notice letters and the concern about junk yards, and thanking staff for their assis-
tance and own efforts in addressing this considerable area of concern. The presentation elicited a number of comments from the Board members, unanimously thanking BayKeeper for its help, recognizing the significant noncompliance by many facilities of the storm water permit and the related importance of enforcing the storm water requirements. Armed with that agency support, BayKeeper began negotiations and followed through on the notices.

Of the original eighteen notices, seventeen have resulted in negotiated settlements, both in and out of court. Of particular note was the, so far, partial resolution of the site which includes eighteen separate tenants. Referred to by its address, 716 McCosker Street was a sprawling yard located at the end of a lonely road on the edge of the Bay's wetland fringe in Richmond, California, a few hundred feet from Wildcat Creek. Of all the junk yards observed during BayKeeper's investigation, this particular site was the worst polluted site. None of the required documents had been filed pursuant to the General Permit, including the notice of intent to operate under the permit. No efforts at all had been made to prevent contaminated storm water from running off the property and into nearby Wildcat Creek.

The complexities of addressing contamination at this site were considerable. First, with eighteen tenants, each with car parts, wrecks, tires and debris piled high in no particular order, evaluating all the potential contamination was a daunting task. Second, all of the tenants were very small businesses with few resources. Many were hobbyists working on cars as a part time activity. Third, the owner of the land was the widow of a gentleman who originally had purchased the land and leased it cheaply to many of the tenants shortly after World War II when they returned from tours of duty looking to start small businesses to make a living.

In addition to the complexities of the site and its owner's and operators' situation, the Regional Board staff were interested in bringing their own enforcement action for 716 McCosker Street. Board staff sent a notice of violation to the owner of the building, and one to each of the tenants. Because
BayKeeper had already sent its notice, that notice of violation did not trigger any preclusion effect under Section 309(g) of the Act. Nevertheless, BayKeeper requested, and staff agreed, to bring, in effect, a joint administrative action against the owner. Thus, BayKeeper and staff, together, negotiated a settlement with the owner. The terms included compliance steps consistent with the owner's financial wherewithal.

The agreement was broken out into two settlement pieces. The first was a settlement agreement between the owner and BayKeeper providing for reimbursement of costs and attorneys' fees associated with the notice and negotiations. The second piece was to be handled by the Regional Board, and was to include a Cease and Desist Order to cover the agreed-upon compliance steps and an Administrative Civil Liability Order ("ACL") covering the agreed-upon mitigation fund. Although creative and agreed upon by the owner, the Regional Board staff, unfortunately, has failed to propose either of the orders contemplated by the settlement agreement even one year after the agreement was reached. BayKeeper's next step will be to petition the Regional Board to get the staff to act.

The other junk yard agreements were more traditional in nature, consisting generally of a consent decree negotiated by the parties and signed by the court, requiring certain enumerated compliance steps and a payment of a mitigation fund towards projects seeking to improve the health of San Francisco Bay in the vicinity of the facility. In addition to consent decrees, a number of the cases were resolved using settlement

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86. In lieu of an administrative penalty, the Regional Board allows for the payment of mitigation projects relating to the health of San Francisco Bay in the vicinity of violations alleged in an ACL.

87. Compliance generally would consist of berming the facility, roofing certain operations at the facility, installing treatment for petroleum where appropriate, installing settling basins, and monitoring.

In most of the cases, mitigation funds were paid to the San Francisco Bay Citizen Action Fund managed by The Rose Foundation, a private foundation based in Oakland, California. Each consent decree would earmark the mitigation fund towards projects in a specific geographic area related to the facility. The Rose Foundation would provide a letter agreeing to abide by the terms of the consent decree and, through a grant making process, distribute the funds to deserving projects, not including San Francisco BayKeeper, and track their expenditure by the grantees.
agreements, the terms of which were incorporated into a stipulation to dismiss the action. 88

The constant refrains from many of the junk yards related to their limited resources. In negotiating the cases, BayKeeper had to constantly evaluate the merits of claims of poverty and, where the information we had bore them out, attempt to minimize the need for the court action to drive the negotiation. In short, in order to assure the availability of funds to pay for necessary clean-up and compliance measures, BayKeeper could not, without first exhausting other avenues, use the court process to its fullest extent. Although the cost of the court process itself provided the yards a great incentive to settle their cases, BayKeeper would have preferred to have more access to motion practice without the extra concern that it would bankrupt a defendant or use up all of their compliance money. Likewise, fairness required that the yards should have had the opportunity to argue any defenses before a judge.

The junk yard strategy was effective as a means of getting the attention of hundreds of other yards throughout the State of California. One of BayKeeper’s mantras at this point is that enforcement is the best educational tool. As soon as the eighteen notice letters were received by the individual facilities, it was a short routing to industry associations such as the Southern California Auto Dismantlers Association (“SCADA”). In addition to attempting to mediate several of the cases, each of the associations quickly spread the news of the notice letters to all of their other members. There likely would not have been a quicker way to get the attention of almost every wrecking yard in the State. 89

88. Regardless of form, and despite not being labeled “consent judgments,” each of BayKeeper’s settlements is reviewed by EPA for the 45 day period anticipated by statute. See Clean Water Act § 505(c)(3), 33 U.S.C. § 1365(c)(3) (1988).

89. The educational impact was not limited potential violators. It also has stirred considerable activity by many other environmental groups sharing similar agendas to that of San Francisco BayKeeper and DeltaKeeper. Santa Monica BayKeeper and San Diego BayKeeper have now filed a total of five notices, which have gone out to junk yards. Additionally, notices have been sent to junk yards in northern California on behalf of the Northern California River Watch.
Since sending the original eighteen wrecking yard notices, another three notices have been sent to and enforcement actions filed against another three Bay area wrecking yards — two in American Canyon along the Napa River and one in Oakland. One other notice has gone out to a scrap yard facility in Stockton, California, on behalf of DeltaKeeper. Ultimately the true test of the success of the junk yard initiative will be the measurable improvement in Bay and Delta junk yards' storm water control measures and a high rate of voluntary compliance by the industry.90

2. The Port of Stockton

The Port of Stockton is an example of a case involving the relatively new storm water requirements for which the Act's enforcement procedures in federal court are well tailored. The Port is one of seven ports servicing the Bay, Delta and Central Valley area. Stockton is a bulk terminal, storing and moving very large amounts of materials associated predominantly with the agricultural industry.91 The facility is characterized by large brilliant yellow piles of sulfur, black hills of coke and coal, and large mounds of wood chips. The piles are uncovered, exposed to rainfall. Prior to mid-1996, storm water flowing off of those piles was, to a significant degree, allowed to flow unimpeded into the Port's storm drain system and directly into the adjacent San Joaquin River and the Stockton Deep Water Channel.92

90. Additionally, the initiative has helped to keep the Regional Board focused on pollution issues stemming from junk yards, albeit the focus has been somewhat tentative. Despite staff's efforts to document existing junk yards over two years ago, staff is only recently getting around to proposing a number of enforcement actions. At the Board's February 1998 Board meeting, the Regional Board assessed its first fine against a violating wrecking yard, contrary to staff's recommendation for the Board to delay its decision based on the alleged violator's belated acknowledgment of the violation complaint.

91. See RWQCB, Central Valley Region, Order No. 97-042 (NPDES No. CA0084077) Waste Discharge Requirements for Stockton Port District, Facility-Wide Storm Water Discharges From Municipal Separate Storm Sewer System and Non-storm Water Discharges From the Port of Stockton, San Joaquin County ("Port Permit") at Attachment p. 1 (Information Sheet) (Feb. 28, 1997).

92. See RWQCB Central Valley Region, Notice of Violation, Port of Stockton's Compliance With the State of California's General Permit for Stormwater Discharges
In the case of the Port of Stockton, staff at the Regional Water Quality Control Board for the Central Valley Region had been investigating the lack of storm water controls at the facility for a number of years. On April 10, 1996, staff issued a notice of violation to the Port documenting the results of that investigation, including numerous violations of the federal and state Clean Water laws. BayKeeper’s Stockton-based project, DeltaKeeper, immediately opened a dialogue with Regional Board staff to understand what enforcement follow-up to the notice was expected. Staff’s position was that the notice itself was sufficient to compel the Port to comply with the identified violations.93

a. Leading the Agency Agenda — A Petition For Enforcement

In 1996, DeltaKeeper wrote a letter to the Regional Board staff, urging staff to recommend to the Regional Board the issuance of an administrative penalty against the Port for the noticed violations. Staff indicated that they were not prepared to do so, preferring to utilize their limited resources to prepare an individual discharge permit addressing the Port’s various discharges, including the storm water discharges as well as discharges associated with the bulk loading operations. DeltaKeeper welcomed the opportunity to participate in the process for issuing that discharge permit.

When staff informed BayKeeper that they did not intend to recommend a penalty, DeltaKeeper asked whether staff would forward a petition from DeltaKeeper to the Board requesting that the Board issue an administrative penalty to the Port.

Associated With Industrial Activities General permit), WDID No. 5B39200097, San Joaquin County (“Port NOV”) (April 10, 1996). See also letter to Theodore A. Cobb, State Water Resources Control Board, from Nancee M. Murray, Department of Fish & Game (May 23, 1997).

93. Anticipating an enforcement oriented strategy to address the Port of Stockton’s violations, DeltaKeeper also became involved in a permit being issued around the time of the violation notice for the Port of Sacramento, another bulk loading port facility in the Delta. The Sacramento permit process allowed DeltaKeeper to address less serious but similar storm water concerns at another bulk materials facility in a less confrontational process, ultimately deferring to the Regional Board’s permitting decision and establishing informal contacts with the Port to review their progress towards to compliance.
Staff agreed to do so. DeltaKeeper prepared a petition requesting the Regional Board to follow through on staff's notice of violations not only with the anticipated individual discharge permit but also with an administrative penalty of $450,000.94 The petition included an evaluation of the criteria for assessing penalties provided under California's Porter-Cologne Water Quality Act, which are almost identical to those identified in the federal statute.

After reviewing the petition, staff once again informed DeltaKeeper that they would not recommend at that time that the Board issue a penalty against the Port.95 Moreover, instead of ordering compliance and assessing a penalty, the Regional Board's first reaction to its own notice of violation was to grant the Port a three year extension to come into compliance despite the years of obfuscation.96 Having anticipated this position from prior conversations, DeltaKeeper had prepared a notice of intent to sue letter including the violations addressed in the notice of violation and including several additional categories not addressed in that notice.97 While the petition to the Board was pending, DeltaKeeper served the notice of intent to sue on the Port. The purpose was at least three-fold. First, the notice preserved DeltaKeeper's discretion to go ahead with a citizen suit to pursue penalties and compliance measures should the Regional Board not assess any, or assess a modest amount of penalties, and should the anticipated permit not fully address all of the compliance issues.98 Second, the notice served to en-

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94. See Port of Stockton Sails Out from Under Pollution Cloud, STOCKTON RECORD, Sept. 15, 1996.
98. See Port May Be Sued, LODI NEWS SENTINEL, Oct. 8, 1996, at 1.
courage the Board and staff to take the petition seriously.\textsuperscript{99} Thirdly, the notice placed the Port in an awkward position, having to address their violations on two fronts, thereby encouraging them to consider settling the penalty and permitting issues.

Instead of bringing the Port to the settlement table, the notice drove the Port to attempt to create some defenses to the claims which it otherwise did not have, including attempting to cease its discharges of storm water into the San Joaquin River. The Port began sealing its storm drains and pumping its storm water to an unused area of the facility that purportedly would contain the discharge.\textsuperscript{100} Unfortunately, the Port's efforts were not aimed at preventing pollution sources, but rather were aimed at trying to frustrate DeltaKeeper's ability to maintain a citizen suit by creating a claim that they were no longer discharging to the river and had fully cured their long-standing noncompliance.\textsuperscript{101}

Subsequent to DeltaKeeper's notice, staff still did not support the recommended penalties. However, staff did place the petition on the agenda for the Regional Board's October, 1996, meeting. Prior to the October, 1996, hearing on the penalty petition, staff articulated its disagreement with DeltaKeeper's position in a staff memorandum. At the meeting, the Regional Board opted not to follow staff's recommendation and instead instructed staff to prepare an administrative civil complaint recommending an appropriate penalty. While waiting for a


\textsuperscript{100} See Delta Watchdogs Bite in Stockton, \textit{Antioch Daily Ledger-Post Dispatch}, Dec. 15, 1996.

\textsuperscript{101} Of course, it was almost impossible for a 600 acre facility to stop discharging storm water. The net effect was to flood many of its tenants and roadways. Moreover, during this time, a DeltaKeeper sample of deposits in the Port's storm channels was analyzed and found to contain hazardous levels of copper. That data comported with previous data analyzed by the California Department of Fish & Game showing similar levels in another portion of the storm drain system. This helped bolster DeltaKeeper's claim that the Port's new discharge to land was in violation of the Water Code's prohibition on such discharges without the filing of a report of discharge accompanied with appropriate characterization data. As it turned out, the land discharge did not in fact prohibit all surface discharges.
revised staff recommendation, on December 11, 1996, DeltaKeeper filed a citizen enforcement suit against the Port. DeltaKeeper had thus succeeded in formalizing a two track enforcement process. As will be discussed below, when those two tracks were coupled with the media around the process, the Port was up against a number of tiers which it was unlikely to overcome and avoid paying a penalty and significantly upgrading its effort to comply with the storm water requirements.

In January, 1997, staff issued a proposed ACL complaint recommending to the Board that a penalty of $260,000 be assessed against the Port. The Port took a very confrontational response to the proposed penalty, arguing for no penalty. DeltaKeeper submitted comments reflecting the Port's refusal to cooperate, the discovery of hazardous levels of copper in the storm drain, and the Port's less than admirable efforts to solve the problem by arguing for an administrative penalty of $2.12 million. Pursuant to the Regional Board's hearing rules, a full evidentiary hearing was held, allowing the Port to present evidence for ninety minutes. The only individual who appeared at the hearing who proposed to the Board that they at least double the proposed penalty was DeltaKeeper's Bill Jennings. Much to everyone's surprise, the Board almost did just that — assessing a penalty of $500,000 but allowing the Port to credit itself for expenditures on storm water compliance up to $175,000.

DeltaKeeper's petition and the Regional Board's subsequent penalty is probably one of the first, if not the only time, in the

103. See In re Port of Stockton, Complaint No. 97-041; State May Slap Port of Stockton with $260,000 Fine, STOCKTON RECORD, Jan. 22, 1997, at A1.
104. See letter to James R. Bennett, RWQCB, from Bill Jennings, DeltaKeeper, and Michael R. Lozeau, San Francisco BayKeeper (Feb. 24, 1997).
105. See memorandum to Theodore A. Cobb, SWRCB, from Gary Carlton, Executive Officer, RWQCB Central Valley Region (June 26, 1997) [hereinafter "Carlton Memo"] (responding to Port of Stockton's appeal of the administrative penalty).
106. See Carlton Memo at 4-5. See also Water Board Boosts Port's Pollution Fine, STOCKTON RECORD, March 1, 1997, at A1; Port of Stockton is Fined $500,000, SACRAMENTO BEE, March 1, 1997; Port of Stockton Fined $500,000, LODI NEWS-SENTINEL, March 1, 1997.
history of the State's Clean Water program that a citizens' group initiated an administrative enforcement process before the Board that resulted in an actual penalty. The Port, of course, was stunned at this turn of events and immediately filed an appeal, which staff successfully defended and which was dismissed without a hearing by the State Water Resources Control Board in August, 1997. 107

b. An Independent Citizen Enforcement Action

In addition to the State's administrative process, DeltaKeeper continued to pursue its own citizen suit. The independent citizen action was necessary in order to assure prompt compliance by the Port with both its new permit and certain requirements predating the new permit. The citizen suit also provided DeltaKeeper an avenue to pursue the additional penalties which it believed were appropriate. Also, the action served as an important safeguard in the unlikely event that the Port succeeded in overturning the State's administrative penalty through its appeal. Backed up by the findings of violation found by the Regional Board staff in its April, 1996, notice of violations, as well as regular surveillance and monitoring by DeltaKeeper staff documenting the Port's lack of attention to its storm water pollution control efforts, the case was strong on the facts. In terms of the potential penalty, DeltaKeeper adjusted its position to acknowledge the Regional Board's penalty by a willingness to credit the Port the amount assessed towards the penalty DeltaKeeper thought appropriate if the Port was willing to withdraw its appeal and lock in the Board's penalty.

Consistent with its response to each of the other proceedings, the Port opted to fight DeltaKeeper on this front. Again, its aggressive strategy proved ineffective. In March, 1997, the Port filed a motion to dismiss DeltaKeeper's action. The motion included three arguments, requesting dismissal based on principals of abstention, the primary jurisdiction of the state

107. DeltaKeeper submitted comments requesting the Board to dismiss the appeal for want of a significant issue. See letter to Theodore A. Cobb, SWRCB, from Bill Jennings, DeltaKeeper, and Michael R. Lozeau, San Francisco BayKeeper (June 26, 1997). See also, Port to Appeal Fine, STOCKTON RECORD, April 3, 1997.
agencies, and mootness. On April 24, 1997, the district court rejected the Port's motion, allowing DeltaKeeper to pursue its claims. Subsequent to that decision, both DeltaKeeper and the Port requested the Court to conduct a settlement meeting with the parties. This strategy seemed prudent given the thoroughness and style of the presiding judge, Judge Lawrence Karlton, the Chief Judge Emeritus for the Central District of California.

This decision proved to be very effective, allowing the parties to read very clearly the judge's view of the case and allowing the parties to reach a relatively quick settlement. In short, the settlement provided for heightened compliance as well as additional payments towards mitigation projects to complete the penalty picture. Given the size of the six hundred-acre facility and the number of potential pollution sources and conduits, the compliance measures featured an aggressive audit process, including oversight by DeltaKeeper's technical consultants. In addition, the Port agreed to additional monitoring, additional oversight of its tenants, and the creation of an Environmental Management position. As for the penalty issue, the Port agreed to pay $150,000 towards projects to benefit the health of the San Joaquin River and the Stockton Deep Water Channel.

c. The Role of the Media

Another important piece of the Port case study was the role played by the media. The Delta is an area of California marked by keen interest by the local public in their local waters. In contrast, the Delta is marked by a significant absence of regionally-based environmental groups focusing on day-to-

110. The $150,000 payment went towards several projects, including a $70,000 grant for a study of fish tissue contamination in the Delta to be conducted by the San Francisco Estuary Institute, a $40,000 grant to the University of California at Davis for toxicity monitoring in the Delta, and a grant to the Lincoln Unified School District for students to conduct in-stream bioassays in the Stockton area.
day issues affecting the health of those waters.\textsuperscript{111} DeltaKeeper has successfully filled that void. As a result, there has been a significant interest by local media outlets in DeltaKeeper's program.\textsuperscript{112} This interest was accentuated in the case of the Port. The largest local daily, \textit{The Stockton Record}, reported on the Port's storm water problem from the very beginning, when it documented inaction by the Department of Fish and Game to muster an enforcement response to documented toxicity from the site.\textsuperscript{113} Each step of the various proceedings was covered by the \textit{Stockton Record}, including the notice of violation, DeltaKeeper's petition, DeltaKeeper's filing of the lawsuit, the Board's request that staff prepare a recommended ACL, staff's proposed ACL, the Board's decision to assess a fine, the Court's dismissal of the Port's motion to dismiss, the Port's appeal of the fine, and the State Board's dismissal of that appeal. Each article educated the Stockton public about both the Port's issues as well as the critical role played by DeltaKeeper in assisting in herding that process towards a strong result.

Most notable was the Port's effort to take control of the negative press it was receiving by purchasing a double page advertisement in the \textit{Stockton Record} the same day that a story by one of the paper's business reporters appeared regarding the decline of the Port's profits.\textsuperscript{114} The Port's ad attempted to look like actual articles in the \textit{Stockton Record} and featured headlines such as "Port Attacked Instead of Commended."\textsuperscript{115} The ad featured a photograph of an employee drinking the Port's storm water runoff.\textsuperscript{116} In general, the ad sought to paint the


\textsuperscript{112} Since initiating its work on the Port of Stockton pollution issues, the issue as well as DeltaKeeper's involvement have been the subject of over 30 newspaper articles at this time. In addition, several of the decision points were covered extensively by local television and radio.


\textsuperscript{114} \textit{See Stockton Record}, Feb. 16, 1997.

\textsuperscript{115} \textit{Id}.

\textsuperscript{116} \textit{See id}.
Regional Board, the Department of Fish and Game, and DeltaKeeper as agencies run amok.

The ad proved more effective for DeltaKeeper than for the Port. First, the ad raised the importance of DeltaKeeper as comparable to that of the agencies, a notable feat given DeltaKeeper's staff of two and, at the time, less than one year of actual operations. Second, the ad was not credible because it demonstrated that two agencies and DeltaKeeper agreed that the Port had a problem, yet claimed somehow they all were wrong and the Port — purchaser of the ad — was right. This impression was highlighted by the Port's resorting to an ad which sought to trick people into thinking it was editorial text of the paper.

Third, and most importantly, the ad brought readers to the defense of DeltaKeeper, not the Port. This result was assisted by a rather caustic quote attributed to the Port's Director and included in an actual article calling DeltaKeeper's action "extortion." The reporter failed to ask DeltaKeeper for any response to that quote. As a result, the paper published a full rebuttal by DeltaKeeper in its editorial section the following Sunday. 117 Five letters to the editor subsequently were published in support of DeltaKeeper. 118 Only one letter was published in support of the Port. 119 The paper then tried to add its own editorial spin, and in doing so stated that DeltaKeeper would benefit financially from its case. 120 To finish off DeltaKeeper's media coup, the paper was compelled to publish an

117. See Bill Jennings, Editorial, Port of Stockton Has No Immunity from the Rules, STOCKTON RECORD, March 1, 1997. See also, Port of Stockton in Troubled Waters - Pollution Levels Poisoning Reputation, March 9, 1997, at A1 (featuring a 3-columnwide photo of Bill Jennings at Port's storm water channel).
118. See J.D. Withers, Letter to the Editor, Questioning Port of Stockton, STOCKTON RECORD, March 15, 1997; Bruce Giudici, Letter to the Editor, DeltaKeeper Solution Oriented, STOCKTON RECORD, March 20, 1997; Bill Ferrero, Letter to the Editor, Watchdog Groups Deserve Thanks, STOCKTON RECORD, Apr. 3, 1997.
119. See Rod Barklow, Letter to the Editor, Questioning Port of Stockton, STOCKTON RECORD, Mar. 15, 1997.
120. See Editorial, Port Water Pollution: Solve Problem Now, STOCKTON RECORD, Mar. 12, 1997.
opinion piece by DeltaKeeper to correct that careless editorial comment.121

Add in interest by other major papers in the region and substantial coverage by local television news, radio and other outlets and it is without a doubt that DeltaKeeper had the clear advantage in the media play. This almost certainly played a significant role in the willingness of the Port to come to the table.

The case against the Port represents a case in which the scope of the Clean Water Act’s enforcement provisions works well. The Port’s annual profits are in the range of $10 million, what might be referred to as a medium sized discharger. For that sized discharger, daily maximum penalties of $25,000 per day per violation are significant, but the federal court process is not so expensive as to prevent them from taking stock of their situation through some motion practice and discovery. Coupled with some thoughtful agency and media strategies, even a modest sized group like BayKeeper’s DeltaKeeper office can successfully take on a very large player like the Port with little difficulty. It is this type of case for which the Act is well-designed.

3. The Unocal Case

The third case study does not involve a storm water case. I nevertheless include it here to make two points. First, it exemplifies a scenario where the discharger’s large economic size and physical size involves such large economies of scales that it can afford to drag out an enforcement action as long as the process will allow. Given the general hesitancy shown by judges thus far to assess penalties at the maximum levels authorized by Congress and the huge costs of compliance avoided by the company for a period of years, such a strategy is unfortunately predictable. Second, this case study exemplifies another area of pollution previously unrecognized by the Act’s regulators but yet addresses it by applying numeric, end-of-pipe effluent lim-

its. Thus, this case makes for an interesting transition case, demonstrating the evolution of both the Act and citizen suits enforcing the Act.

Union Oil Company ("Unocal") is one of three oil refineries in the Bay Area identified as the primary sources of selenium to San Francisco Bay. The whole northern sweep of San Francisco Bay has been identified by EPA and the Regional Board as impaired by selenium, a very powerful teratogen. In order to address this concern, the Regional Board issued permits in 1990 along with interim effluent limits to the refineries which ordered the companies to reduce the concentration of selenium in their wastewater to fifty ug/l by not later than December 12, 1993. This was the first time that selenium was recognized as a pollutant contributed by refineries and accordingly regulated under the Clean Water Act.

Instead of accepting the new limits, the companies chose to challenge the permits, losing before the State Board and filing an appeal to the Solano County Superior Court. That case was placed on a slow track until negotiations began with the agency in the fall of 1993. In the meantime, the company did not meet the December 12, 1993 deadline. Indeed, the quantity of selenium discharged by Unocal during that period actually went up. When the company's certain noncompliance became apparent to Regional Board staff and they began discussing potential enforcement against the company, the com-

122. The other main source of selenium to the Bay is from agricultural runoff occurring in the Central Valley of California. See TAYLOR, supra note 3, at 4.
123. See RWQCB San Francisco Bay Region, Order No. 91-026 (Feb. 20, 1991). See also Communities for a Better Environment v. Union Oil Co., 83 F.3d 1111, 1113 (9th Cir. 1996).
124. See RWQCB San Francisco Bay Region, Order No. 94-015, ¶ 8 (Jan. 19, 1994). See also TAYLOR, supra note 3, at 6-7.
125. See TAYLOR, supra note 3, at 8. See Western States Petroleum Ass'n v. California Regional Water Quality Control Board, No. 121078 (County of Solano Superior Court) (filed October 16, 1992).
126. See TAYLOR, supra note 3, at 8; RWQCB San Francisco Bay Region, Resolution No. 94-016 (Jan. 19, 1994); Western States Petroleum Ass'n v. California Regional Water Quality Control Board, No. 121078 (County of Solano Superior Court), Stipulation for Settlement and Dismissal of Action (entered into by RWQCB on Jan. 20, 1994).
127. See Communities for a Better Environment, 83 F.3d at 1114.
pany's attorneys were ready with the leverage provided by their still pending permit appeal to forestall a vigorous enforcement action by the Board. Instead, they convinced the Board to extend the timeline for complying by five years in exchange for the company committing $780,000 to the Board to assist staff in understanding the selenium issues and dismissing its permit challenge. However, because the company did not want to suffer the stigma of a real penalty, the payments were included in a settlement agreement rather than an enforcement order. In order to give the Board's action some veneer of enforcement, the extension of the compliance timeline was not placed in the permit, but rather in a cease and desist order.

A number of environmental groups, led by Communities For A Better Environment ("CBE") and BayKeeper, were aware of Unocal's compliance problem as well as the deal in the making. Fearful that the Regional Board's position had been compromised by the permit appeal and perhaps staff's concern with dealing with a previously underrecognized pollution problem, CBE, BayKeeper, a coalition of three other environmental organizations, and two individual anglers, sent a notice of intent to sue to the company, citing its imminent violations of its selenium limit. Coupled with that notice, BayKeeper and CBE launched a strategic effort to assure that the Board's proposed "enforcement" action was identified for what it was, an extension of time rather than enforcement, without any real penalty or other punishment to the company. This effort had a number of rationales behind it. First, it is what the groups believed the proposed deal represented. Second, the groups' attorneys understood well the implications of the Clean Water Act's citizen suit preclusion provisions which only applied to administrative enforcement actions that assessed a penalty against a violator.128

In fact, the groups' enforcement action not only began with the notice letter, but also, to a large extent, it began, and at least one argument was won, during the administrative process

seeking to approve the Board staff's recommended settlement with Unocal. In response to questions by BayKeeper and CBE, both staff and Unocal attorneys admitted during that proceeding that the $780,000 payment to the Board was not a penalty. Similarly, staff and the companies also made clear that the compliance extension was not a change to the existing permit but rather was an enforcement decision of the Board. These statements guided the district court through two of Unocal's key arguments made in defense of the groups' subsequently filed citizen suit.

In many ways, the Unocal case marked a turning point in the relationship between citizen enforcement groups in the Bay Area, especially BayKeeper, and the Regional Board. The Unocal case probably marks one of the last times where BayKeeper criticized the agency along with the violator for its failure to hold the company to its permit requirements. That dual criticism resulted first from the agency's failure to include the interested groups in the negotiations leading up to the settlement which presumed to decide not the selenium effluent limit issue, but rather the compliance issue. That proposed result was perceived to infringe on matters outside of the permit appeal, i.e. enforcement of the terms, and did not represent an aggressive defense of the validity of the original permit terms. Instead, it was a decision that appeared to be more informed by the agency's resource limitations, not the validity of the permit. Once it had gone down that path, the Regional Board further put itself on the defensive when it began to promote, and ultimately defend, the proposed settlement. In defending the settlement, the Board was in the position of defending the oil companies, again, not because they were right, but because the agency was nervous about the resources necessary to defend its prior decision.

As the criticism of the agency, as well as Unocal, grew, and the environmental groups began to rack up victories in the case despite the agency's position, the agency was placed in a position where the settlement result was not only effectively questioned, but continuously belittled as adequate enforcement by
two federal court decisions. In terms of an apparent transition, that negative effect of the citizen suit on the Board's preferred process likely was taken to heart and future proposed actions have been noticeable for their inclusion of the interested groups.

At the same time that the citizens' enforcement case inherently criticized the agency's settlement decision, the two tiers of action represented by the agency's order and the groups' enforcement case also presented a rather unique two-fold strategy to bring Unocal into compliance with a new effluent limit. Prior to filing their enforcement case, the groups recognized the value of having the agency and, in this case even the discharger, say the right things prior to initiation of a case. As Unocal's legal strategy resulted in delays in the enforcement case, the groups also recognized the value of the perhaps less aggressive but nevertheless substantive process that the Regional Board's agreement with the company had established, including both important technical information which otherwise may not have been produced and a clear fallback timeline to the extent the company succeeded in delaying the litigation out a number of years.

In the case of the pre-filing record, the groups' efforts before the Board during its consideration of the proposed settlement brought an element common to cases bringing challenges of administrative decisions, e.g. developing the administrative record prior to bringing a challenge under the National Environmental Policy Act (“NEPA”). This was a step largely unfamiliar to the way citizen suits had been brought prior to that time. Previously, citizen suits involved a relatively simple discussion of whether discharges were over the applicable effluent limits in a permit. The effort in the Unocal case to broaden the underlying evidence in a case was necessitated by the relative novelty of selenium being regulated by a discharge permit and the correlating hesitancy of the agency to move too aggressively, despite the pollutant's poisonous nature and EPA’s

finding of impairment. It also was required by the presence of Section 309(g) of the Act, the citizen suit preclusion provisions added by Congress in 1987. Few if any citizen suits had been constrained by both of those contexts prior to the time of the Unocal case. Not only did the environmental groups recognize at the time the need for careful maneuvers to position themselves in a way that would allow them to play their role as citizen enforcers, certainly one of the groups, BayKeeper, took many of the lessons to heart as it formulated its long term strategies to begin enforcing some of the new requirements then being introduced under the Act, especially the storm water rules.

Likewise, the utility of allowing the agency to decide its preferred course of action free of criticism, while possibly stating an alternative position and taking steps to prevent any willful disruption of citizen enforcement options where they are contemplated, has become a common position for BayKeeper to take. The resulting agency process generally will be supportive of any enforcement action decided upon by the group and the fact that the group participated constructively in the process makes it more likely that the agency will include BayKeeper and others in that unfolding process. That interaction, again, would allow BayKeeper even more opportunities to comment on key decisions relative to that parallel process, and perhaps convince the agency to mold that process in a way that better coordinates with any subsequent enforcement action.

In addition to participating in processes, the need for a group to interact with staff in order to keep pace with the various strategy levels contemplated above, encourages long-term relationships between that group and staff that, again, a strict citizen suit agenda would not encourage. Where, in the case of BayKeeper, the group's programmatic boundaries are limited to a particular watershed, albeit the rather huge watershed of San Francisco Bay, its Delta and other tributaries, those interactions are reinforced even further. Over time, the steady professional presence of BayKeeper on various levels of numerous pollution issues, presented in language constructive to staff's process, has resulted in a strong working relationship between the group's representatives and staff. It is unlikely that many,
if any dischargers, can match the presence of BayKeeper in and around the San Francisco Bay Regional Board. First, most could not afford to buy the personnel which BayKeeper’s volunteer-based program can muster. Second, they cannot always be worrying about just one agency, attention to which comprises a large part of BayKeeper’s agenda. Third, the dischargers whom BayKeeper is interested in are, in many cases, involved with compliance problems and, thus, not preemptively viewed by the Board as entirely objective of their situation.

Over time, these efforts to focus on how to participate in the agency proceedings have led to situations where the agency takes a similar view to BayKeeper’s proceedings. In part because of the constant reiteration, the agency has grown to realize that even where BayKeeper chooses a more aggressive enforcement posture, rarely will the agency’s compliance strategy be undermined. Indeed, the uncertainty of the outcome of such citizen strategies is a powerful incentive for dischargers to do exactly what the Regional Board says. Were the agency to resort to a strategy where it seeks to “protect” dischargers from citizen actions, in the long run, it would lose that incentive which makes its job easier, even if it were only aiming at compliance and not punishment.

Thus, where there is a recognized pollution problem for which enforcement is a legitimate strategy, and the agency opts not to pursue such a strategy, for lack of sufficient resources or for other reasons, it is more likely to make sure that BayKeeper not be disrupted should the group choose to pursue enforcement. Almost always, the Regional Board and BayKeeper are articulating the same compliance goal even where they differ on the best route to achieve that goal. However, where neither philosophy is so arrogant as to perceive its own agenda as being the only possibly correct one, allowing two agendas to act simultaneously will almost certainly achieve compliance as soon as is possible.

Thus, the Unocal case provides an important example of the pros and cons resulting from the various types of interactions between the environmental groups and the Regional Board. The path followed by BayKeeper subsequent to that case has
revolved around an effort by BayKeeper to keep criticism focused squarely on the polluter rather than the agency. That effort has resulted in processes viewed by staff as more constructive and allows for greater effectiveness on the administrative level by BayKeeper. That effectiveness is caused by not only the more constructive relationship, but also BayKeeper’s constant presence within the agency’s proceedings, a perception by both BayKeeper and the Board that their agendas are complimentary, not competitive, and a realization that two strategies are better than one when trying to assure the achievement of a specific result. As noted above, the evolution of these multi-tiered strategies is reinforced by the storm water program, involving thousands of dischargers and limited agency resources.

Despite the clarity of the administrative record and the language of the Clean Water Act and the effectiveness of the environmental groups in pursuing an enforcement action against the company, Unocal has been able to slow down the litigation process through aggressive yet unsuccessful appeals.\textsuperscript{130} This third case study exemplifies a situation where the magnitude of the company’s operation is so vast that it dwarfs the fines authorized by the Clean Water Act. Instead of encouraging voluntary compliance, an operation as large as Unocal’s is encouraged to first wait until someone discovers the violation and, second, delay any order to comply as long as possible. As mentioned above, judges have been hesitant to assess maximum fines. Where compliance may run into the tens of millions of dollars, legal fees may be half a million per year at the worst, and the likely penalty may be a few million dollars, it makes sense for the company to do as little as possible and focus on prolonging the litigation in order to avoid the heaviest costs as long as possible. These are the instances where either judges must take the maximum penalties already provided by statute more seriously, or Congress must authorize greater penalty maximums in order to encourage voluntary compliance.

\textsuperscript{130} Indeed, during 1997, Unocal completed the sale of its Rodeo refinery to Tosco Corporation. Tosco has now been added to the case, along with Unocal. As of the date of completion of this article, settlement conversations with the two companies were well underway.
rather than deferring compliance in exchange for less costly litigation or leveraging the Regional Board's relative lack of resources to defend itself against every lawsuit a refinery may wish to pursue.

VII. FINE TUNING THE CITIZEN ENFORCEMENT PROVISIONS OF THE CLEAN WATER ACT

BayKeeper's program is likely one of the more sophisticated citizen enforcement programs in the country. The three case studies described above demonstrate a need to make the Act's citizen enforcement proceedings more flexible in order to better adjust to the range of violators that are encountered. This is most apparent at the edges of the range of violators — the smallest and the largest. Although the strategies of groups like BayKeeper have adjusted to the new types of pollution being addressed by the Act as well as court interpretations of the citizen suit provisions, there is only so far that they can go without some guidance from the statute. Moreover, the effectiveness of BayKeeper's ability to work constructively with its local agencies to assure the most effective enforcement for the Bay and Delta regions may be limited to California's regulatory structure. The following recommendations would allow such innovations to become available to citizen groups throughout the country.

A. MAXIMUM CIVIL PENALTIES UNDER THE ACT SHOULD BE RAISED TO $50,000 PER DAY PER VIOLATION AND MINIMUM CIVIL PENALTIES ALSO SHOULD BE PRESCRIBED

As exemplified by Unocal's reaction to CBE's and BayKeeper's citizen suit, when dealing with violators involving very large facilities, like a refinery, the penalties and fee shifting provisions provided by the federal Clean Water Act for citizen enforcement actions do not provide adequate deterrents for dischargers to insure compliance. The Act should allow a higher range of penalties for a citizen to seek to have assessed in order to assure that the largest companies take the enforce-
ment process seriously. The maximum penalty should be set at $50,000 per day per violation. This will eliminate the disincentive to comply built into the current process for the largest companies. The additional potential penalties will assure that the courts have enough leeway to make sure that any penalty involving some of the largest dischargers will disgorge all ill-gotten profits. Moreover, raising the maximum penalty would provide federal judges with more incentive to understand the degree of severity with which Congress intended the courts to mete out punishment.

B. THE ACT SHOULD PROVIDE AN AVENUE FOR ADMINISTRATIVE CITIZEN ENFORCEMENT ACTIONS

As to smaller violators, the Act should include a parallel citizen enforcement action that proceeds in front of an administrative agency. In California, this could be established through the Regional Water Quality Control Boards. Another option would be an enforcement hearing board established at EPA's regional offices. In any event, an administrative enforcement process would (1) have much lower transaction costs than a federal lawsuit, (2) not require either the citizen enforcer or the violator to retain an attorney to represent them, and (3) presumably involve agency officials who already are more familiar with the local water bodies and the technical issues that may arise with regard to appropriate remedies. Such an administrative enforcement process should include provisions to assure that any penalties assessed be used to defray the agency's costs of maintaining the enforcement process. Other than the adjudicatory body, however, the main elements of the existing citizen suit provision should be maintained, including a citizen's ability to seek injunctive relief, civil penalties and recovery of their costs, including reasonable attorney and expert fees.

131. A number of states already have established a maximum penalty of $50,000.
C. SAN FRANCISCO'S CITIZEN ENFORCEMENT ORDINANCE: A WATERSHED APPROACH TO CITIZEN ENFORCEMENT

Consistent with those proposals to expand citizens' ability to apply their own discretion as to how best to address a water pollution violation, and not be forced to exercise an enforcement role through federal court, in the spring of 1997, BayKeeper proposed a citizen enforcement provision for the City and County of San Francisco. On March 17, 1997, the San Francisco Board of Supervisors passed BayKeeper's Citizen Enforcement Ordinance. The ordinance was introduced by Supervisor Sue Bierman and passed with a unanimous vote. Mayor Willie Brown signed the ordinance into law on March 28, 1997. The citizen enforcement ordinance authorizes citizens to enforce the City and County of San Francisco's laws prohibiting and controlling discharges of pollutants into the City's sewer system. The ordinance also encourages City residents to detect violations of the City's laws which, for example, prohibit the dumping of hazardous waste into the City's combined sewer/storm water system.

San Francisco's ordinance is interesting for a number of reasons. First, in addition to encouraging independent citizen enforcement, it also creates a reward system that encourages local citizens to report violations to the City's enforcement agency. This two-tiered citizen enforcement ordinance, thus, reflects the two-tiered strategies which BayKeeper has been working on for a number of years. Unlike the federal citizen suit provision, which, coupled with judicial decisions like Gwaltney, has served to drive the agencies and citizen enforcers apart in many instances, the San Francisco ordinance instead promotes them as allies, as they should be. The ordinance encourages the agency to do its enforcement work while at the same time making sure citizens are rewarded for assisting them. But, critically, the ordinance provides for independent enforcement authority for the investigating citizen should the agency opt not to follow through.

133. See id.
VIII. CONCLUSION

The Clean Water Act has come a long way since its birth on October 18, 1972. During that time, the Act has evolved through amendments, through regulations, and through judicial interpretations. At the same time, citizen enforcement has co-evolved, responding to the political ebbs and flows of the executive branch as well as the development of the law itself. After over twenty-five years, ample evidence now exists confirming the wisdom of Congress in authorizing citizens to play a key role in the Act's enforcement scheme. When government enforcement dropped off in the early 1980's, citizen enforcers stepped in. When the Act's pollution targets expanded to include a multitude of storm water pollution sources, citizen enforcers have stepped up to kick start the massive enforcement agenda which the storm water rules trigger. Time and time again, citizen enforcers have successfully brought cases or used the potential of a case to resolve important water pollution problems around the country. Over time, the citizen enforcement banner has been passed on from the ground breaking work of national groups like NRDC to more regional strategies, either driven by local watershed-based groups or by national groups working on regional agendas.

That evolution needs to continue. Further empowering citizens to apply their own discretion will encourage more and more cooperation between those groups and their local agencies, as well as the dischargers themselves. The more locally-based a group's enforcement program is, the more likely it is that cooperative enforcement agendas with local agencies will be possible and as effective, or more effective, than if either the local agency or the citizens group chose to proceed alone. The above proposals appeal to citizen enforcement authority which trusts the judgment of both the citizen enforcers and the courts and agencies considering their case. Enforcement authority that brings the largest corporations down to earth and acknowledges the burdens a federal court action may place on a small company, would provide an appropriate acknowledgment
of the past effectiveness of citizen enforcers and the expanding role they will continue to play as the Act continues to evolve.\textsuperscript{134}

\textsuperscript{134} I am thinking of various legislative proposals which would, among things, supersede the Supreme Court's \textit{Gwaltney} decision limiting citizen suits to "ongoing" violations of the Act or assure that the notice of intent to sue requirements do not exceed the rules of pleading generally.