Citizens' Environmental Lawsuits

By James T. Lang

I. Introduction

The citizens' environmental lawsuit provisions in the Clean Water Act (CWA),[1] the Clean Air Act (CAA),[2] and the Resource Conservation and Recovery Act (RCRA)[3]—the media statutes—are the primary focus of this article though there are, of course, citizens' environmental lawsuit provisions in several other environmental laws.[4] This article examines the use of citizen suit provisions to force an alleged environmental violator to comply with environmental law,[5] and does not discuss use of a citizens' environmental lawsuit against the United States Environmental Protection Agency (EPA) when the EPA has allegedly failed to perform a nondiscretionary duty.[6]

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1 33 U.S.C. § 1365 (2012).

2 42 U.S.C. § 7604.

3 *Id.* § 6972.

4 There are citizen suit provisions in several other important environmental laws such as the Endangered Species Act (ESA), 16 U.S.C. § 1540(g) (2012), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9659, the Emergency Planning and Community Right-to-Know Act (EPCRA), *id.* § 11046(a)(1), the Safe Drinking Water Act (SDWA), *id.* § 300j-8, and the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2619 (2012). For those environmental laws that lack a citizen suit provision (such as the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321–70m-12, and the Marine Mammal Protection Act (MMPA), 16 U.S.C. §§ 1361–1423h), judicial review of final agency action is available pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701–06 (2012), with legal fees recoverable under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412 (2012).

5 *See, e.g.*, Sierra Club v. Franklin Cty. Power of Ill., LLC, 546 F.3d 918 (7th Cir. 2008) (Sierra Club obtains permanent injunction that halts construction of coal fired power plant where the defendant attempted to build the plant after its CAA permit had expired).

6 *See*, *e.g.*, Nat. Res. Def. Council v. Costle, 568 F.2d 1369 (D.C. Cir. 1977) (forcing EPA to regulate pollution discharged by stormwater into waters of the United States after EPA attempted to avoid this result by issuing a rule that exempted such discharges from the reach of the NPDES permit program); Nat. Res. Def. Council v. Train, 545 F.2d 320 (2d Cir. 1976) (forcing EPA to list lead as a criteria pollutant under the CAA, which brought about the nationwide elimination of lead from gasoline); Nw. Envtl. Advocates v. U.S.

This article begins by suggesting that the citizens' environmental lawsuit is a highly specialized tool for use by non-governmental actors to respond to "government failure."[7] The cost of the tool is so high that most individuals cannot afford to use it. Non-governmental organizations can afford it and they use the citizens' environmental lawsuit quite frequently.[8] Next, it describes how the court proceedings played out in a recently concluded citizens' environmental lawsuit in the United States District Court for the Western District of Virginia, based on a review of the pleadings in the court docket. The description of those court proceedings is offered for illustrative purposes so the reader may consider the points made about government failure and the further points made about the cost to file, prosecute, and defend a citizens' environmental lawsuit. The article concludes by outlining the law on two key issues in the litigation of a citizens' environmental lawsuit: (i) the notice of intent to sue letter; and (ii) civil penalties.

II. CITIZENS' ENVIRONMENTAL LAWSUITS—A RESPONSE TO GOVERNMENT FAILURE (FOR THOSE WHO CAN AFFORD TO USE IT)

As the United States Supreme Court wrote in its 1987 decision in the case of *Gwaltney of Smithfield v. Chesapeake Bay Foundation*, "citizen suits are proper only 'if the Federal, State, and local agencies fail to exercise their enforcement responsibility.'"[9] Federal and state authorities have a prominent role in enforcing the media statutes. The EPA has primary authority. In the widespread and common instance where the EPA has

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Envtl. Prot. Agency, No. C 03-05760 SI, 2006 U.S. Dist. LEXIS 69476 (N.D. Cal. 2006) (forcing EPA, via citizen suit, to regulate pollution discharged by vessels into waters of the United States after EPA attempted to avoid this result by issuing a rule that exempted from the reach of the NPDES permit program discharges "incidental to the normal operation of a vessel"); Am. Canoe Ass'n v. U.S. Envtl. Prot. Agency, 54 F. Supp. 2d 621 (E.D. Va. 1999) (forcing EPA, via citizen suit, to ensure that Total Maximum Daily Loads "TMDLs" are issued for impaired waters in Virginia after EPA had failed for over 19 years in its duty to do this).

7 The term "government failure" is an offspring of the "market failure" concept. "Market failure" describes the situation where the free market misallocates goods and services, oftentimes due to externalities but there are other causes as well. The economist Francis Bator introduced the concept of "market failure" in 1958. *See* Francis M. Bator, *The Anatomy of Market Failure*, 72 Q.J. ECON. 351 (1958). (This highly technical article defines market failure and offers several conditions that bring about market failure.) Mainstream economic thought holds that the free market is the preferred mechanism for distributing goods and services. Under this view, government regulation is considered a poor (but necessary) alternative to the free market, but only in situations of market failure. "Government failure," then, describes the situation where the market failed, government regulation was called upon to address the market failure, and the government botched the job. For a thoughtful discussion of "government failure," *see* Barak Orbach, *What is Government Failure?*, 30 YALE J. REG. 44 (2013).

8 Orbach, *supra* note 7.

9 Gwaltney of Smithfield v. Chesapeake Bay Found., 484 U.S. 49, 60 (1987) (quoting S. REP. NO. 92-414, p. 64 (1971), reprinted in 2 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, 1482 (1973)).

delegated its enforcement authority,[10] the state environmental regulatory agencies[11] possess a similar enforcement responsibility.

There are times when both the EPA and a state environmental regulatory agency declines to act on a complaint of environmental violation. The no-action decision in some circumstances is entirely appropriate. At other times, however, the decision to do nothing is a government failure.

It is obviously proper for the EPA and a state environmental regulatory agency to take no action when presented with a frivolous complaint. The failure to act in that instance is a government success, not a government failure. No-action may also be a rational outcome as to complaints with merit. Enforcement budgets are not unlimited. The EPA and the state environmental regulatory agencies must prioritize their enforcement efforts. This means they must decline to act if prosecuting the complained-of violation would preclude these agencies from prosecuting a more consequential violation occurring elsewhere.

There are other times, however, when the decision to take no action against a polluter is an outright government failure. It is government failure when no action is taken because the government mischaracterizes a bona fide environmental violation as one that lacks merit. Additionally, there is research suggesting that government failure occurs more frequently when pollution burdens a community inhabited by people at the lower rungs of the socio-economic ladder, or in a community populated by people of color.[12] These communities may not always receive the same degree of responsiveness

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10 Each of the media statutes provides a mechanism for the EPA to delegate enforcement authority to the states. One example is found in that part of RCRA, 42 U.S.C. §§ 6901–6992k, that allows the EPA to authorize each state to carry out the hazardous waste program within such state "in lieu of the Federal program." *Id.* § 6926(b). The regulations at 40 C.F.R. §§ 271.1–.27 explain the process a particular state must follow to obtain authority from the EPA to run its own hazardous waste program, and the criteria that the EPA will use in determining whether to grant or deny the authorization to the state. A central criteria is that the state program must be "no less stringent" than the federal program. *See* 42 U.S.C. § 6926(b)(1) (state will not receive authority if the EPA finds that the state program "is not equivalent" to the federal program); 40 C.F.R. § 271.1(i) (state may adopt a program that is "more stringent" than the federal program). According to the EPA State Authorization Tracking System (StATS), 50 states and territories have received authorization to implement the "base or initial" RCRA hazardous waste program in lieu of the EPA. *State Authorization under the Resource Conservation and Recovery Act (RCRA)*, U.S. Envtl. Prot. Agency, https://www.epa.gov/rcra/state-authorization-under-resource-conservation-and-recovery-act-rcra (last updated Nov. 14, 2016). Texas, for example, obtained authority from the EPA to implement the "base or initial" program in 1984. *See* Texas: Decision on Final Authorization of State Hazardous Waste Management Program, 49 Fed. Reg. 48,300 (Dec. 12, 1984) (codified at 40 C.F.R. pt. 271).

11 The environmental regulatory agencies in the 50 states have various names. Texas refers to its environmental regulatory agency as the Texas Commission on Environmental Quality, or "TCEQ." In Virginia, it is the Department of Environmental Quality, or "DEQ." North Carolina has its Department of Environment and Natural Resources, or "DENR." For California, it is the California EPA, or "CalEPA." This article will refer to them generically as "the state environmental regulatory agency."

12 Tonya Lewis & Jessica Owley, *Symbolic Politics for Disempowered Communities: State Environmental Justice Policies*, 29 BYU J. PUB. L. 183, 189, n.34 (2014). Note how, in 1987, the

from elected or appointed government officials, as compared to affluent or majority white communities.[13] A further explanation for government failure with respect to environmental violations is that the EPA and the state environmental regulatory agencies, each of which were created to act in the public interest, instead may be advancing the economic concerns of the industry that they are charged to regulate, a phenomenon known as "regulatory capture."[14]

United Church of Christ Commission for Racial Justice released a study finding that people of color are 47 percent more likely to live near a hazardous waste site than white Americans. *Id.* at 189, n.236 (citing COMM'N FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES (1987)). Lewis & Owley credit this 1987 study as "the seminal study" on the issue. *Id.* at 221, n.236. As of 2002, it appeared that lower-income people living in urban areas were exposed to greater amounts of air pollution and other environmental hazards as compared to higher-income populations living in urban areas. Daniel R. Faber & Eric J. Krieg, *Unequal Exposure to Ecological Hazards: Environmental Injustices in the Commonwealth of Massachusetts*, 110 ENVTL. HEALTH PERSPECTIVES 277, 282 (2002). This study also found a similar disparity as between people of color and whites. *Id.* at 279. Finally, the study concluded that race was a stronger indicator of disparate pollution exposure as compared to socio-economic level. *Id.* Lewis & Owley recommend Maureen G. Reed & Colleen George, *Where in the World is Environmental Justice?*, 35 PROGRESS HUM. GEOGRAPHY 835 (2011) for a more recent evaluation of the research concerning disparate impact of pollution on low-income populations and people of color. Lewis & Owley, *supra*, at 189, n.34.

13 Exec. Order No. 12,898 represents an effort to address this particular cause of government failure, at least in part. The Executive Order requires each federal agency to make environmental justice "part of its mission by identifying and addressing . . . disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations." Federal Actions to Address Environmental Justice in Minority Populations and Low-income Populations, Exec. Order No. 12,893, 59 Fed. Reg. 7629, at 7629 (Feb. 16, 1994).

14 The sole judicial mention of "regulatory capture" in a reported environmental law case is Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp., 824 F.3d 507, 527 (5th Cir. 2016) ("we think it is possible that the agreement between Exxon and the TCEQ is a sterling example of regulatory capture at its worst."). Government agencies, as well as powerful corporations, can reduce the regulator from watchdog to lapdog. Consider the influence the U.S. Navy wielded to cow the National Marine Fisheries Service after the Navy's use of sonar killed a large number of whales in March 2000. JOSHUA HORWITZ, WAR OF THE WHALES 266–67, 286, 305, 311 (2014). The concept of regulatory capture did not, however, originate in environmental law nor is the use of the concept limited to the environmental field. Credit for the regulatory capture concept goes to economist George Stigler. *See* George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. AND MGMT. SCIENCE 3, at 3 (Spring 1971) ("regulation is acquired by the industry and is designed and operated for its benefit"). The facts in Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167 (2000), suggest that industry may have co-opted the South Carolina Department of Health and Environmental Control (DHEC). There, the owner of a hazardous waste incinerator facility violated the daily average limit for discharge of mercury, this limit being the one specified in the CWA permit that DHEC had issued to the facility. *Id.* The facility violated the mercury limit 489 times between 1987 and 1995. *Id.* at 176. An economic benefit in the amount of $1,092,581 was gained by the facility through its decision to forego implementing control strategies that would have eliminated the mercury ex-

No matter whether the government appropriately declines to act because it lacks enforcement resources, or it declines to act for one of the other reasons constituting government failure, the result is, "among other things, accommodation of externalities."[15] The citizens' environmental lawsuit combats these externalities at least in part and, in so doing, helps to correct a source of market failure.[16] Stated differently, the successful citizens' environmental lawsuit assists the operation of the free market economy.[17] The citizen suit plaintiff who puts a stop to the pollution, forces the polluter to clean up the contamination, pay a monetary fine, and reimburse the citizen suit plaintiff

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ceedances. *Id.* at 178. The DHEC was doing nothing to hold the facility accountable for its failure to comply with the permit limits. Thus, it appears that the regulatory agency may have been complicit in the facility's decision to cheat on its permit, a strategy that enabled the facility to improve its bottom line profitability by more than $1M. An environmental non-governmental organization, Friends of the Earth, decided to use the citizens' environmental lawsuit provision in the CWA to force the facility to come into compliance with its CWA permit. *Id.* at 167. The facts suggest that the DHEC went to great lengths to shield the facility from accountability and compliance:

> [Friends of the Earth] sent a letter to Laidlaw notifying the company of their intention to file a citizen suit against it under § 505(a) of the Act after the expiration of the requisite 60–day notice period, i.e., on or after June 10, 1992. Laidlaw's lawyer then contacted DHEC to ask whether DHEC would consider filing a lawsuit against Laidlaw. The District Court later found that Laidlaw's reason for requesting that DHEC file a lawsuit against it was to bar FOE's proposed citizen suit through the operation of 33 U.S.C. § 1365(b)(1)(B). 890 F. Supp. 470, 478 (SC 1995). DHEC agreed to file a lawsuit against Laidlaw; the company's lawyer then drafted the complaint for DHEC and paid the filing fee. On June 9, 1992, the last day before FOE's 60–day notice period expired, DHEC and Laidlaw reached a settlement requiring Laidlaw to pay $ 100,000 in civil penalties and to make " 'every effort' " to comply with its permit obligations. *Id.* at 479-481.

Id. at 176–77; *see also* Michael Biesecker, *NC Toxicologist: Water Near Duke's Dumps Not Safe to Drink*, ASSOCIATED PRESS (Aug. 2, 2016), http://bigstory.ap.org/article/d832ac7182f546cb98aa533325259617/nc-toxicologist-water-near-dukes-dumps-not-safe-drink (North Carolina's top public health official, under pressure from the office of the Governor, falsely told residents living near coal ash pits owned by Duke Energy that the water was safe to drink when, in fact, he knew it was contaminated with hexavalent chromium. The Governor previously worked for Duke Energy for nearly three decades.). The regulatory capture concept has seen widespread use in the healthcare field, probably owing to a 1981 article in the Georgetown Law Journal. *See* France Miller, *Antitrust and Certificate of Need: Health System Agencies, the Planning Act, and Regulatory Capture*, 68 GEO. L.J. 873 (1981); *cf.* HORWITZ, *supra*. The concept has also received judicial recognition in the banking field. *See* Wultz v. Bank of China 61 F. Supp. 3d 272, 292 n.102 (S.D.N.Y. 2013) (raising the possibility that the judgment of the Office of the Comptroller of the Currency was compromised by regulatory capture).

15 Orbach, *supra* note 7, at 50.

16 *See* James T. Lang, *Clean Air Act Section 176 General Conformity Program*, 2 ENVTL. LAW. 353, 400–04 (1996).

17 *See id.* The author has argued in other settings about the ability of environmental regulatory programs to aid the operation of the free market through elimination of externalities.

for her litigation expenses, does a service that benefits herself and benefits the community at large. As one Court wrote:

> [C]itizens' suits . . . play [an important role] in the enforcement of [the environmental laws]. The EPA must classify cases in order to maximize its scarce enforcement resources. There are some violations that, by necessity, may not be pursued aggressively. However, [an environmental] violation is only "small" to one who does not live near the offending hazardous waste facility. Indeed, the [citizens' environmental lawsuit] is a testament to Congress' wisdom in recognizing that those who live in close proximity to hazardous waste facilities often are the most diligent enforcers of [environmental law] mandates.[18]

Citizens' environmental lawsuits are litigated in the federal courts, which are generally a costlier forum for litigants, as compared to state court. The legal and scientific complexity inherent in the citizens' environmental lawsuit is another factor that drives up cost in this type of litigation. Each party in a case, plaintiff and defendant, will be at a disadvantage unless their legal team is staffed with specially trained attorneys, preferably those with an advanced legal degree in environmental law,[19] or those who are experienced in prosecuting or defending citizen environmental litigation, plus a team of PhD consulting and testifying experts, and a budget for laboratory testing of environmental samples. A prospective plaintiff contemplating a citizens' environmental lawsuit needs a war chest of at least $100,000.00 to finance the litigation and, yet, even this budget oftentimes is insufficient to cover the entire expense. Several hundred thousand dollars would be better. This high cost serves the useful purpose of deterring those who might otherwise yield to the temptation of filing a frivolous citizens' environmental lawsuit. But it also operates as a financial barrier to entry for private persons who seek to redress provable environmental violations. It is for this reason that the vast majority of citizens' environmental lawsuits are prosecuted by non-governmental organizations. Many of these non-governmental organizations are national in scope: Natural Resources Defense Council,[20] Sierra Club,[21] Greenpeace,[22] Friends of the Earth,[23] Trout Unlimited,[24] De-

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18 Sierra Club v. Chem. Handling Corp., 824 F. Supp. 195, 197–98 (D. Colo. 1993).

19 The Master of Laws degree, or LL.M., is an internationally recognized postgraduate law degree. It is usually obtained by a one-year full time program to gain expertise in a specialized field of the law. The George Washington University School of Law offers what is perhaps the premier program in the world for the LL.M. in environmental law.

20 *See, e.g.*, Nat. Res. Def. Council v. S.W. Marine, Inc., 236 F.3d 985 (9th Cir. 2000) (NRDC brings CWA citizen suit that forces large shipyard on San Diego bay to come into compliance with the act and pay a $799,000.00 civil penalty).

21 *See, e.g.*, Sierra Club v. Hamilton Cty. Bd. of Cty. Comm'rs, 504 F.3d 634 (6th Cir. 2007) (Sierra Club issues notice of intent to sue letter that serves as catalyst for state and EPA enforcement, and then files CWA citizen suit on its own, which together forces reduction and/or elimination of sewer overflow into Mill Creek and the Little Miami River near Cincinnati, Ohio).

22 *See, e.g.*, Cal. *ex rel.* Lockyer v. U.S. Dept. of Agriculture, 575 F.3d 999 (9th Cir. 2009) (Greenpeace files Endangered Species Act citizen suit that blocks the Forest Service from allowing roads and recreational activities in certain roadless areas in National Forests).

fenders of Wildlife,[25] and others. There is another tier of these non-governmental organizations who have a regional footprint, such as Environment Texas.[26] Additionally, local citizens sometimes will coalesce around an issue, pool their resources, and prosecute a citizens' environmental lawsuit to address an issue of local concern.[27]

Defendants in a citizens' environmental lawsuit likewise need significant financial resources. The typical defendant is a governmental entity such as the EPA, or is a corporate industrial entity. These defendants, for the most part, enjoy a financial advantage relative to the typical plaintiff. Owing to their financial advantage, defendants may be inclined to heavily contest the issues, engage in robust motions practice, and, in the event that the defendant loses in the district court, these defendants will actively consider carrying the litigation into the court of appeals.

III. An Illustrative Case

In May 2012, the Sierra Club and two regional non-governmental organizations (Southern Appalachian Mountain Stewards[28] and Appalachian Voices[29]) filed a CWA citizens' environmental lawsuit against the corporate owner of a coal mine.[30] The citizen suit plaintiffs sought to stop pollution of the water in the Kelly Branch and Callahan

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23 *See, e.g.*, Friends of the Earth v. Consol. Rail Corp., 768 F.2d 57 (2d Cir. 1985) (Friends of the Earth brings CWA citizen suit to force Conrail to comply with permit limits for discharge of pollutants into Butternut Creek).

24 *See, e.g.*, Trout Unlimited v. U.S. Dept. of Agriculture, 441 F.3d 1214 (10th Cir. 2006) (Trout Unlimited fails in its effort to force the Forest Service to release reservoir water for the purpose of maintaining downstream fish habitat).

25 *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (Defenders of Wildlife fails with Endangered Species Act citizen suit designed to force the United States to apply the Endangered Species Act in foreign nations).

26 *See, e.g.*, Env't Tex. Citizen Lobby v. ExxonMobil Corp., 824 F.3d 507 (5th Cir. 2016) (Environment Texas Citizen Lobby (and Sierra Club) filed CAA citizen suit to force ExxonMobil to comply with limitations in permits and pay civil penalty).

27 *See, e.g.*, Little v. Louisville Gas & Elec., 33 F. Supp. 3d 791 (W.D. Ky. 2014) (Kathy Little, Greg & Debra Walker, Richard Evans, and Phillip & Faye Whittaker join together to prosecute a CAA Citizen suit designed to stop a power plant from discharging dust and coal ash into the air).

28 "Southern Appalachian Mountain Stewards (SAMS) is an organization of concerned community members and their allies who are working to stop the destruction of our communities by surface coal mining, to improve the quality of life in our area, and to help rebuild sustainable communities." *Mission Statement*, SAMS, http://www.samsva.org/?page_id=1528 (last visited Nov. 19, 2016).

29 Appalachian Voices is an environmental non-profit founded in 1997, whose mission is to protect "the land, air and water of the central and southern Appalachian region, focusing on reducing coal's impact on the region." *See About Us*, Appalachian Voices, www.appvoices.org/about/ (last visited Nov. 19, 2016).

30 Compl. for Declaratory and Injunctive Relief and for Civil Penalties, S. Appalachian Mountain Stewards v. A & G Coal Corp., No. 2:12CV000009, 2013 WL 3814340 (W.D. Va. 2013), 2012 WL 5217245 [hereinafter Complaint].

Creek in Wise County, Virginia.[31] They contended that the defendant coal corporation was discharging the toxic pollutant selenium into these waters without a permit from the state environmental regulatory agency.[32] Selenium reduces survival and causes skeletal deformities in fish.[33] This degradation in water quality, and associated harm to the citizen suit plaintiffs, was the externality that was being accommodated through government inaction.[34]

The plaintiffs, prior to filing the legal action in court, made the EPA and the state environmental regulatory agency aware of the selenium violations at the coal mine through a formal written notice provided to both governmental agencies.[35] The service of such formal written notices, and a 60 day waiting period, are required prior to filing a citizens' environmental lawsuit under the CWA.[36] For whatever reason, the EPA and the state environmental regulatory agency received the notice but took no action, after which the plaintiffs filed suit.[37] In the complaint, the plaintiffs asked the court to order the coal mine to apply to the state environmental regulatory agency for a permit,[38] to pay a civil penalty to the United States in an amount up to $37,500.00 per violation per day,[39] and to pay the plaintiffs for their costs of the litigation.[40]

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31 *Id.*

32 The state environmental regulatory agency had received a delegation from the EPA to administer the CWA NPDES permit program through the process described at *supra* note 10.

33 *See Aquatic Life Criterion – Selenium*, U.S. Envtl. Prot. Agency, https://www.epa.gov/wqc/aquatic-life-criterion-selenium (last visited Nov. 20, 2016).

34 Orbach, *supra* note 7.

35 *S. Appalachian Mountain Stewards*, No. 2:12CV000009, 2013 WL 3814340, at *2 (W.D. Va. July 22, 2013).

36 33 U.S.C. § 1365(b) (2012).

37 Complaint, *supra* note 30.

38 *See* 33 U.S.C. § 1311, which is commonly considered the "cornerstone" of the CWA, requires a permit before any person may "discharge . . . any pollutant." *Id.* § 1311. This statutory provision must be read in concert with the definitions section at 33 U.S.C. § 1362. *Compare id.* § 1311, *with id.* § 1362 (defining "discharge of a pollutant").

39 Complaint, *supra* note 30. The CWA allows for penalties of $25,000.00 per violation per day. 33 U.S.C. § 1319(d). Congress enacted a provision that authorizes the EPA to increase the statutory maximum so that civil penalties keep pace with inflation, maintain deterrent effect, and promote compliance with the law. *See* Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890 (codified as amended at 28 U.S.C. § 2461 note (2012)), *amended by* Pub. L. No. 114-74, 129 Stat. 599 (2015) [hereinafter Adjustment Act]. The EPA set CWA penalties at the present level of $37,500.00 per violation per day in 2008. *See* Civil Monetary Penalty Inflation Adjustment Rule, 73 Fed. Reg. 75,340, at 75,345 (Dec. 11, 2008) (codified as amended at 40 C.F.R. § 19.4). Similarly, the statutory caps for civil penalties under the CAA and RCRA have also been raised. *Id.*

40 The CWA allows the Court to award "costs of litigation" to "any prevailing or substantially prevailing party." 33 U.S.C. § 1365(d). This quite obviously means that *either* plaintiff or defendant could recover its costs of litigation from the other party, depending on the identity of the "prevailing or substantially prevailing party." *Id.*

Unlike many defendants in a citizens' environmental lawsuit, the defendant coal mine in this case opted to forego filing a Rule 12(b)[41] motion to dismiss and, instead, filed its answer in July 2012.[42] The court set June 17, 2013, as day one of a five-day bench trial.[43] Once the issues were joined, discovery took place over the next eight months with only light involvement by the Court.[44] The parties filed cross-motions for summary judgment in April 2013.[45] On May 22, 2013, the Court entered an order cancelling the trial dates and setting argument on the pending summary judgment motions for June 17, 2013, the date formerly scheduled as day one of trial.[46]

The court ruled on the summary judgment motions in July 2013,[47] granting summary judgment to plaintiffs and denying the defendant's motion for summary judgment.[48] The court found that the defendant violated the CWA by discharging selenium into the two water bodies, just as the plaintiffs had alleged.[49] The court ordered the defendant to conduct sampling for selenium in the Kelly Branch and in Callahan Creek at locations and on a schedule suggested by the plaintiffs, to provide the results of this sampling to the state environmental regulatory agency and to the plaintiffs, to apply to the state environmental regulatory agency for a permit for its selenium discharges, to provide the Court with periodic written reports as to the defendant's progress in obtaining the required permit (with a copy of the reports served to the plaintiffs), and, as requested by the plaintiffs, the Court deferred consideration of the civil penalty to be imposed on the defendants for its violations until such time as the defendant eventually obtained its permit.[50]

The defendant took a losing appeal[51] to the United States Court of Appeals for the Fourth Circuit (the Fourth Circuit affirmed the decision of the district court in July

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41 Fed R. Civ. P. 12(b) requires that every defense to a claim for relief in any pleading be asserted in the responsive pleading if one is required. A party may assert the following defenses by motion: (1) lack of subject-matter jurisdiction; (2) lack of personal jurisdiction; (3) improper venue; (4) insufficient process; (5) insufficient service of proacess; (6) failure to state a claim upon which relief can be granted; and (7) failure to join a party under Rule 19. A motion asserting any of these defenses must be made before any responsive pleading is filed.

42 Answer, S. Appalachian Mountain Stewards v. A & G Coal Corp., 2013 WL 3814340 (No. 2:12-CV-0009) (W.D. Va. July 2, 2012), ECF No. 15.

43 Scheduling Order, *S. Appalachian Mountain Stewards*, 2013 WL 3814340, ECF No. 23.

44 For an example of the activity by the court during the discovery period, *see, e.g.*, Order, *S. Appalachian Mountain Stewards*, 2013 WL 3814340 ECF No. 50.

45 Def. A & G Coal Corp.'s Mot. for Summ. J., *S. Appalachian Mountain Stewards*, 2013 WL 3814340, ECF No. 51; Pls.' Mot. for Summ. J., *S. Appalachian Mountain Stewards*, 2013 WL 3814340, ECF No. 54.

46 Order, *S. Appalachian Mountain Stewards*, 2013 WL 3814340, ECF No. 62.

47 *S. Appalachian Mountain Stewards*, 2013 WL 3814340.

48 *Id.* at *8.

49 *Id.* at *7–*8.

50 *Id.* at *8–*9.

51 Notice of Appeal, *S. Appalachian Mountain Stewards*, 2013 WL 3814340, ECF No. 83.

2014).[52] The defendant asked the district court to stay the action while the appeal was pending,[53] but that motion was summarily denied.[54] Motions practice and other activity in the district court docket accelerated during the eleven–month period while the appeal was pending, which means that the parties were actively litigating simultaneously in two different courts.[55] In October 2014, three months after the Fourth Circuit affirmed the district court's entry of summary judgment, the district court ordered the defendant to pay the plaintiffs $175,623.18 to reimburse them for legal fees and costs incurred through the date when the plaintiffs prevailed in the Fourth Circuit.[56] Not long after, the parties settled the case on terms that required the defendant to pay $252,000 to fund three supplemental environmental projects, pay a $28,000 civil penalty to the United States, transfer title to property that will be converted to recreational use by a nearby town, and to continue daily monitoring of its outfalls for selenium (and report the results of that monitoring) until the date on which the defendant obtains a permit from the state environmental regulatory agency authorizing the discharge of selenium into the receiving water body.[57] The case concluded in January 2016, three-and-one-half years after it started.[58]

IV. NOTICE OF INTENT TO SUE LETTER

The media statutes require the prospective citizen suit plaintiff to give "notice of the alleged violation" to the EPA, the state environmental regulatory agency, and to the

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52 S. Appalachian Mountain Stewards v. A & G Coal Corp., 758 F.3d 560 (4th Cir. 2014); *see also* USCA Mem., *S. Appalachian Mountain Stewards*, 2013 WL 3814340 (No. 2:12-CV-00009), ECF No. 114.

53 Def. A & G Coal Corp.'s Mot. for Stay of Certain Provisions of the Ct.'s July 22, 2013 Op. and Order, *S. Appalachian Mountain Stewards*, 2013 WL 3814340, ECF No. 81.

54 *S. Appalachian Mountain Stewards*, No. 2:12-CV-00009, 2013 WL 5149792 (W.D. Va. Sept. 13, 2013).

55 *See, e.g.*, Def. A & G Coal Corp.'s Mem. in Opp'n to Pls.' Mot. for an Award of Att'ys Fees and Expenses, *S. Appalachian Mountain Stewards*, 2013 WL 3814340, ECF No. 99 (arguing against plaintiffs' motion for attorney fees in the district court on September 30, 2013); Def. A & G Coal Corp.'s Resp. to Pls.' Req. for Interest and Fees Relating to Certain Expenses, *S. Appalachian Mountain Stewards*, 2013 WL 3814340, ECF No. 110 (arguing against plaintiffs' motion in the district court on January 02, 2014); Br. of Appellees, *S. Appalachian Mountain Stewards*, 758 F.3d 560 (No. 13-2050).

56 *S. Appalachian Mountain Stewards*, No. 2:12-CV-00009, 2014 WL 4955702, at *4 (W.D. Va. Oct. 2, 2014).

57 Consent Decree, *S. Appalachian Mountain Stewards*, 2013 WL 3814340, ECF No. 148; *see also* Amendment to Consent Decree, *S. Appalachian Mountain Stewards*, 2013 WL 3814340, ECF No. 153.

58 *See* Complaint *supra* note 30, ECF No. 1 (setting forth the complaint and initiating the case on May 03, 2012); Amendment to Consent Decree, *S. Appalachian Mountain Stewards*, 2013 WL 3814340, ECF No. 153 (setting forth an amendment to the consent decree on October 21, 2016).

alleged violator.[59] The defendant in the illustrative case elected not to contest the adequacy of the notice of intent to sue letter.[60] Citizen suit defendants typically scour the notice of intent to sue letter to search for defects. Those defects, when found, typically give rise to a Rule 12(b)(1) motion to dismiss. These motions, when successful, bring about dismissal of parties, dismissal of individual counts in the complaint and, in some instances, an outright dismissal of the entire action. So long as the court has not entered the final judgment order, a citizen suit defendant may raise a motion to dismiss for lack of subject matter jurisdiction several years into the litigation, basing the motion on defects in the notice of intent to sue letter.[61]

In addition to requiring the prospective citizen suit plaintiff to furnish notice, the media statutes also require the prospective citizen suit plaintiff to delay before filing suit (for most types of claims).[62] Sixty days is the default period of pre-filing delay for most of the claims brought in environmental citizen suits,[63] although ninety days is required in at least one instance,[64] and no delay is required in a few other instances.[65] It is widely held that the two purposes of the notice and delay provisions are to provide the violator an opportunity to cure the violation[66] and to "allow the enforcer of first resort, the EPA or the appropriate state agency, to bring its own enforcement action . . . which would preempt the citizen lawsuit."[67]

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59 CWA, 33 U.S.C. § 1365(b)(1)(A) (2012); RCRA, 42 U.S.C. § 6972(b)(1), (2) (2012); CAA, 42 U.S.C. § 7604(b) (2012).

60 *See generally*, S. Appalachian Mountain Stewards v. A & G Coal Corp., 758 F.3d 560 (4th Cir. 2014) (the case history indicates defendant directly responding to suit).

61 For example, the Fifth Circuit in a CWA decision wrote that "'[o]bjections to subject-matter jurisdiction . . . may be raised at any time,' such as after trial, which can result in the waste of 'many months of work on the part of attorneys and the court.'" La. Envtl. Action Network v. City of Baton Rouge, 677 F.3d 737, 747 (5th Cir. 2012) (quoting Henderson v. Shinseki, 562 U.S. 428, 434-35 (2011)); *accord* Friends of the Earth v. Gaston Copper Recycling, 629 F.3d 387, 400 (4th Cir. 2011) (the defendant "timely raised" objections to the notice of intent to sue letter "two years after the district court had concluded hearing evidence in the case"); *see also* Fed. R. Civ. P. 12(h)(3).

62 *See, e.g.*, 42 U.S.C. § 7604(b)(1)(A).

63 *See, e.g.*, *id.* § 7604(b)(1)(A), (b)(2).

64 *See, e.g.*, *id.* § 6972(b)(2)(A) (citizen suit to address imminent and substantial endangerment associated with the past or present handling, storage, treatment, transportation, or disposal of solid or hazardous waste).

65 *See, e.g.*, *id.* § 7604(b) (pre-filing delay not required for citizen suit addressing certain emissions of hazardous air pollutants).

66 Hallstrom v. Tillamook County, 493 U.S. 20, 29 (1989) ("[N]otice gives the alleged violator 'an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit.'") (quoting Gwaltney of Smithfield v. Chesapeake Bay Found., 484 U.S. 49, 60 (1987)).

67 Catskill Mountains Chapter of Trout Unlimited v. City of New York, 273 F.3d 481, 487 (2d Cir. 2001); *see also Hallstrom*, 493 U.S. at 29 (citing *Gwaltney of Smithfield*, 484 U.S. at 60).

Each of the media statutes require the EPA to promulgate regulations directing the manner in which notice shall be given.[68] The typical EPA regulations, such as those used for the media statutes, address two topics: "service of notice"[69] and "content of notice."[70] It is widely held that appellate review of the district court's decision regarding adequacy of the notice of intent to sue letter is conducted on the *de novo* standard.[71]

The United States Supreme Court issued its first, and only, holding with respect to a notice of intent to sue letter in *Hallstrom v. Tillamook County*, decided in 1989.[72] The issue before the Court was the question of whether the citizen suit plaintiff had complied with the EPA's service of notice regulation[73] in a RCRA citizens' environmental lawsuit. The Court confirmed that compliance with the EPA regulations regarding manner of notice is jurisdictional.[74] The regulation required the prospective citizen suit plaintiff to serve the notice letter to the violator, the EPA, and the state in which the alleged violation occurred.[75] The citizen suit plaintiff in that case served the alleged violator but neither the EPA nor the state. The Court dismissed the citizens' environmental lawsuit in its entirety, holding that the failure to serve the notice of intent to sue letter in accordance with the regulation stripped the Court of subject matter jurisdiction over the citizen suit plaintiff's environmental claims.[76]

A variation on the fact pattern in *Hallstrom* occurs when the citizen suit plaintiff serves the notice of intent to sue letter to some, but not all, of the prospective defendants. In such case, the court lacks subject matter jurisdiction as to the claims against the unserved defendant but the case may proceed against the other defendants (upon whom the notice of intent to sue letter was served).[77]

Turning now to the sufficiency of the mandatory pre-suit notice, the EPA regulations obligate the prospective citizen suit plaintiff to identify the violator, and to describe the nature of the environmental violation(s), with a certain degree of specificity.[78] The CWA regulation on "contents of notice" is typical:

> Violation of standard, limitation or order. Notice regarding an alleged violation of an effluent standard or limitation or of an order with respect thereto, shall include sufficient information to permit the recipient to identify the specific

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68 42 U.S.C. § 6972(c) & 40 C.F.R. §§ 254.2, 254.3 (2016) (manner of notice for citizens' environmental lawsuit under RCRA); 33 U.S.C. § 1365(b) (2012) & 40 C.F.R. §§ 135.2, 135.3 (2016) (CWA); 42 U.S.C. § 7604(b) & 40 C.F.R. §§ 54.2, 54.3 (2016) (CAA).

69 *See, e.g.*, 40 C.F.R. § 135.2 (service of notice for CWA citizens' environmental lawsuit).

70 *See, e.g.*, *id.* § 135.3 (content of notice for CWA citizens' environmental lawsuit).

71 *See, e.g.*, Paolino v. JF Realty, 710 F.3d 31, 36 (1st Cir. 2013).

72 *Hallstrom*, 493 U.S. 20.

73 40 C.F.R. § 254.2 is the service of notice regulation that the EPA promulgated for a RCRA citizens' environmental lawsuit.

74 *Id.* § 254.1 (requires actions to be filed according to the rules of the district court where action is instituted).

75 *Id.* § 254.2(a).

76 *Hallstrom*, 493 U.S. at 33 ("Accordingly, we hold that where a party suing under the citizen suit provisions of RCRA fails to meet the notice and 60-day delay requirements of § 6972(b), the district court must dismiss the action as barred by the terms of the statute.").

77 *See, e.g.*, Paolino v. JF Realty, 710 F.3d 31 (1st Cir. 2013); City of Newburgh v. Sarna, 690 F. Supp. 2d 136 (S.D.N.Y. 2010).

78 40 C.F.R. § 135.3(a) (2016).

> standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the person giving notice.[79]

The courts evaluate content of the notice by referring to this regulation (or the comparable "contents of notice" regulation if the case arises under one of the other environmental statutes). The courts likewise are guided by the purpose that underlies the "notice of contents" regulation, which, as the United States Supreme Court stated in *Gwaltney*, is to give "the alleged violator . . . an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit."[80] The First Circuit used its 2013 decision in *Paolino v. JF Realty*[81] to survey and then sum up the prominent decisions of the various courts of appeals, with the exception of a case in the Eleventh Circuit,[82] as follows:

> The key language in § 135.3(a) is that pre-suit notice must permit "the recipient" to identify the listed information, i.e., the specific standard at issue, the dates on which violations of that standard are said to have occurred, and the activities and parties responsible for causing those violations. *See Pub. Interest Research Grp. of N.J., Inc. v. Hercules, Inc.*, 50 F.3d 1239, 1248 (3d Cir. 1995). Our sister circuits are in relative agreement that this language indicates the appropriate measure of sufficiency under § 135.3(a) is whether the notice's contents place the defendant in a position *to remedy* the violations alleged. *See, e.g., S.F. BayKeeper, Inc. v. Tosco Corp.*, 309 F.3d 1153, 1158 (9th Cir. 2002) ("Notice is sufficient if it is specific enough 'to give the accused company the opportunity to correct the problem.'" (quoting *Atl. States Legal Found., Inc. v. Stroh Die Casting Co.*, 116 F.3d 814, 819 (7th Cir. 1997))); *Atl. States*, 116 F.3d at 819–20 (finding that "notice must be sufficiently specific to inform the alleged violator about what it is doing wrong, so that it will know what corrective actions will avert a lawsuit," and that "[t]he key to notice is to give the accused company the opportunity to correct the problem"). We agree.
>
> The adequacy of the information contained in pre-suit notice will depend upon, inter alia, the nature of the purported violations, the prior regulatory history of the site, and the actions or inactions of the particular defendants. For example, where, as here, the alleged violations concern the unlawful discharge of pollu-

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79 *Id.*

80 Gwaltney of Smithfield v. Chesapeake Bay Found., 484 U.S. 49, 60 (1987); *see also* Brod v. Omya, 653 F.3d 156, 166 (2d Cir. 2011) ("the content of an NOI must serve the purpose of giving 'the appropriate governmental agencies an opportunity to act and the alleged violator an opportunity to comply'" (quoting Daque v. City of Burlington, 935 F.2d 1343, 1354 (2d Cir. 1991), *rev'd in part on other ground*, City of Burlington v. Daque, 505 U.S. 557 (1992)).

81 *Paolino*, 710 F.3d 31.

82 Nat'l Parks & Conservation Ass'n v. Tennessee Valley Authority, 502 F.3d 1316, 1329 (11th Cir. 2007) (held in a CAA case that "National Parks' notice letter was inadequate because it failed to provide enough information to permit TVA to identify the allegedly violated standards, dates of violation, and relevant activities with the degree of specificity required by the regulations").

> tants, several courts have found that only those discharges for which the notice identifies a particular pollutant will withstand a sufficiency challenge. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 629 F.3d 387, 401 (4th Cir. 2011); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 487–88 (2d Cir. 2001); *see also Brod v. Omya, Inc.*, 653 F.3d 156, 169 (2d Cir. 2011) (same under RCRA notice requirements (citing *Catskill*, 273 F.3d at 487)). Since that was done here, we do not decide whether it is always required.
>
> Moreover, in many cases, there must be sufficient facts asserted about the mechanisms and sources involved in these unlawful discharges so that the defendants may take appropriate remedial action. *Cf. Alt. States*, 116 F.3d at 819–20 (finding earlier pre-suit notice sufficient for new violations alleged in amended complaint where the source of violations was adequately disclosed).
>
> The CWA does not require, however, that a citizen plaintiff "list every specific aspect or detail of every alleged violation," or "describe every ramification of a violation." *Hercules*, 50 F.3d at 1248. This is so because, "in investigating one aspect" of an alleged violation, "the other aspects of that violation . . . will of necessity come under scrutiny" by the putative defendant. *Id.* Thus, the Ninth Circuit has twice found that a notice letter alleging continuing unlawful discharges of pollutants need not list every date on which such discharges occurred. *Waterkeepers N. Cal. v. AG Indus. Mfg., Inc.*, 375 F.3d 913 (9th Cir. 2004); *BayKeeper*, 309 F.3d 1153. In both cases, other information in the notice letter concerning the cause and source of the alleged discharges permitted the defendants to identify an adequate number of specific dates on which these discharges occurred and to take remedial action. *Waterkeepers*, 375 F.3d at 917-18 (violations caused on "every rain event over 0.1 inches" (internal quotation marks omitted)); *BayKeeper*, 309 F.3d at 1159 (violations caused "on each day when the wind has been sufficiently strong to blow" pollutants into adjacent slough (internal quotation marks omitted)). Similarly, the Third Circuit in *Hercules* held that a sufficiently alleged discharge violation in pre-suit notice also informed the defendants of "any subsequently discovered monitoring, reporting or recordkeeping violation that is directly related to the discharge violation." 50 F.3d at 1248. "In short, the Clean Water Act's notice provisions and their enforcing regulations require no more than 'reasonable specificity.'" *BayKeeper*, 309 F.3d at 1158 (quoting *Catskill*, 273 F.3d at 488); *Natural Res. Council of Me. v. Int'l Paper Co.*, 424 F. Supp. 2d 235, 249 (D. Me. 2006).[83]

Beyond the authorities cited immediately above in the *Paolino* legal summary for "contents of notice," there are perhaps another half-dozen appellate level decisions in the Ninth Circuit and scores of decisions in the United States District Courts. During the 45 years since the advent of environmental law in the early 1970's, the majority of the Federal Circuits have issued decisions addressing the legal requirements for sufficiency of notice of intent to sue letters. These decisions have created a coherent, well-developed, body of law that likely explains the absence of United States Supreme Court activity addressing the subject subsequent to the *Hallstrom* decision in 1989.

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83 *Paolino*, 710 F.3d at 31, 37–38.

V. Civil Penalties

The United States Supreme Court's first decision on civil penalties imposed for violation of the environmental laws was handed down in 1980, in the case of *United States v. Ward*.[84] This was a civil enforcement proceeding brought by the United States, as opposed to a citizens' environmental lawsuit.

The defendant in *Ward* owned an oil and gas facility in Oklahoma.[85] The facility, in 1975, released oil into Boggie Creek, a tributary of the Arkansas River system.[86] The defendant reported the discharge to the EPA pursuant to the mandatory reporting requirement in the CWA.[87] When requested to do so, the defendant also submitted a written report to the EPA.[88] The EPA forwarded the report to the United States Coast Guard.[89] The Coast Guard imposed a civil penalty in the amount of $500 after which the defendant filed an action in the district court,[90] claiming that the mandatory reporting requirement violated his constitutional right against self-incrimination and that the incriminating information could not be used to support the assessment of a civil penalty.[91] The Court rejected these arguments, holding that the defendant was not entitled to the protections of the Fifth Amendment self-incrimination clause,[92] the Fifth Amendment double jeopardy clause,[93] or any of the clauses in the Sixth Amendment.[94]

The Court next took up the issue of civil penalties imposed for violation of the environmental laws in 1987, in the case of *Tull v. United States*.[95] This case, like *Ward* seven years earlier, was a civil enforcement action brought by the United States.[96]

The defendant in *Tull* had filled wetlands without a CWA permit at three locations on Chincoteague Island, Virginia. He also had illegally deposited fill material in a man-made waterway at the same location. The maximum civil penalty for these violations was $22,890,000.[97] The economic benefit of noncompliance was $75,000.[98] The defendant timely demanded a jury trial but the district court denied the request.[99] Following a 15–day bench trial, the district court found Mr. Tull violated the CWA and imposed a $75,000 civil penalty.[100] Interestingly, the district court imposed a "suspended" additional civil penalty in the amount of $250,000 payable in the event that Mr. Tull failed to restore navigability in the man-made waterway by removing the fill material he had

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84 United States v. Ward, 448 U.S. 242 (1980).
85 *Id.* at 246.
86 *Id.*
87 33 U.S.C. § 1251.
88 *Ward*, 448 U.S. at 246.
89 *Id.*
90 *Id.* at 246–47.
91 *Id.* at 247.
92 *Id.* at 254.
93 *Id.* at 253.
94 *Id.*
95 Tull v. United States, 481 U.S. 412 (1987).
96 *Ward*, 488 U.S. 242.
97 *Tull*, 481 U.S. at 415; *See also* Adjustment Act, *supra* note 39.
98 *See Tull*, 481 U.S. at 415.
99 *Id.*
100 *Id.*

improperly placed there.[101] The issue before the Supreme Court was whether, under the Seventh Amendment to the Constitution, Mr. Tull was entitled to a jury trial.[102] The Supreme Court held that "the Seventh Amendment required that petitioner's demand for a jury trial be granted to determine his liability, but that the trial court and not the jury should determine the amount of penalty, if any."[103]

Civil penalties imposed on the defendant in a citizens' environmental lawsuit must be paid to the U.S. Treasury, and not to the citizen-suit plaintiff:[104]

> Courts have consistently stated that penalties in citizen suits under the Act must be paid to the Treasury. *See e.g. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 108 S. Ct. 376, 379, 98 L. Ed. 2d 306 (1987) ("If the citizen prevails in such an action, the court may order injunctive relief and/or impose civil penalties payable to the United States Treasury"); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n.*, 453 U.S. 1, 14 n. 25, 69 L. Ed. 2d 435, 101 S. Ct. 2615 (1981) ("Under the FWPCA, civil penalties, payable to the Government, also may be ordered by the court"); *Atlantic States Legal Found. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1131 n. 5 (11th Cir. 1990) ("Penalties paid as a result of a § 1365 suit do not go to the plaintiff who instituted the suit, but rather are paid into the United States Treasury"); *Sierra Club v. Simkins Indus., Inc.*, 847 F.2d 1109, 1113 (4th Cir. 1988), *cert. denied*, 491 U.S. 904, 105 L. Ed. 2d 694, 109 S. Ct. 3185 (1989) ("the judicial relief of civil penalties, even if payable only to the United States Department of the Treasury, is causally connected to a citizen-plaintiff's injury"); *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1522 (9th Cir. 1987) ("any penalties recovered from such an action are paid into the United States Treasury"); *see also Sierra Club Inc. v. Electronic Controls Design, Inc.*, 703 F. Supp. 875 (1989) [rev'd., 909 F.2d 1350 (9th Cir. 1990)] (district court refusing to approve consent judgment in a citizen suit under the Act where settlement provided that monies be paid to Sierra Club Legal Defense Fund).
>
> Ordering that civil penalties be paid to the Treasury is entirely consistent with Congress' intent that citizen suits supplement the enforcement authority of the EPA. Directing that penalties be paid into the Treasury ensures that citizens bring suits to protect the public health and welfare, and not for private gain. *Middlesex County*, 453 U.S. at 18 n. 27.[105]

The media statutes provide the maximum amount of the civil penalty and, in addition, set forth a list of factors the court should consider when tailoring the civil penalty to the particular facts of the case.[106] This is the provision in the CWA:[107]

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101 *Id.*

102 *Id.* at 414.

103 *Id.* at 427.

104 Pub. Interest Research Grp. of N.J., Inc. v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 82 (3d Cir. 1990).

105 *Id.*

106 The CWA sets a daily maximum for civil penalties and sets forth penalty assessment criteria at 33 U.S.C. § 1319(d). The CAA sets a daily maximum for civil penalties at 42 U.S.C. § 7413(d) (2012), and sets forth penalty assessment criteria. *Id.* § 7413(e). RCRA sets a

> Any person who violates [various provisions in the Clean Water Act] shall be subject to a civil penalty not to exceed $ 25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.[108]

There is a similar provision in the CAA.[109] The approach taken in the RCRA differs slightly. As is the case in both the CWA and the CAA, there is a provision in RCRA that specifies the maximum civil penalty.[110] RCRA differs from the other two media statutes, however, because it lacks a listing of factors that the court should consider when deciding the amount of the civil penalty.[111] There is district court authority for the proposition that the court should simply borrow the factors found in an analogous part of RCRA:

> Although the statute does not contain any guidance for the Court in determining penalties in a judicial proceeding, RCRA § 3008(a)(3) [42 U.S.C. § 6928(a)(3)] provides factors that the Administrator shall consider in fixing a civil penalty in an administrative action. RCRA requires the Administrator to take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. In the absence of other statutory guidance, the Court may give consideration to these same factors in determining an appropriate penalty.[112]

Under this approach, the factors borrowed from an analogous part of RCRA are those found in 42 U.S.C. § 6928(a)(3): "In assessing such a penalty, the Administrator shall take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements."[113] Although there is facially a slight difference in the factors used in both the CWA and CAA, on the one hand, and the factors used in RCRA, on the other hand, this slight facial difference translates into no meaningful difference when courts go about the task of setting the amount of the civil penalty for violations in any of the media statutes.

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daily maximum for civil penalties but sets forth only administrative penalty assessment criteria. *Id.* § 6928(a)(3) (2012).

107 33 U.S.C. § 1319(d) (2012).

108 *Id.*

109 The CAA sets a daily maximum for civil penalties, 42 U.S.C. § 7413(d) (2012), and sets forth penalty assessment criteria. *Id.* § 7413(e) (2012).

110 42 U.S.C. § 6928(g) sets the maximum at $25,000.00 per violation per day. *See also* Adjustment Act, *supra* note 39.

111 *See* 42 U.S.C. § 6928.

112 U.S. Envtl. Prot. Agency v. Envtl. Waste Control, Inc., 710 F. Supp. 1172, 1242 (N.D. Ind. 1989), *aff'd sub nom.* U.S. Envtl. Prot. Agency v. Envtl. Waste Control, Inc., 917 F.2d 327 (7th Cir. 1990) (quoting United States v. T & S Brass & Bronze Works, Inc., 681 F. Supp. 314, 321 (D.S.C.), *aff'd in part, vacated in part,* 865 F.2d 1261 (4th Cir. 1988)).

113 42 U.S.C. § 6928(a)(3).

There is well established and widespread judicial acceptance for two methods for determining the size of the civil penalty.[114] These are the "top down" and the "bottom up" methods. These two methods were explained by the Tenth Circuit as follows:

> In considering fines under the Act, courts generally presume that the maximum penalty should be imposed." *United States v. B & W Inv. Props.*, 38 F.3d at 368; *see also Dell'Aquilla*, 150 F.3d at 339 ("Courts usually calculate a fine under the CAA by starting with the maximum penalty."). When starting with the maximum penalty, courts then consider the factors described in 42 U.S.C. § 7413(e) to determine what degree of mitigation, if any, is proper. *See Dell'Aquilla*, 150 F.3d at 339; *see also United States v. Marine Shale Processors*, 81 F.3d 1329, 1337 (5th Cir. 1996) ("[W]hen imposing penalties under the environmental laws, courts often begin by calculating the maximum possible penalty, then reducing that penalty only if mitigating circumstances are found to exist."). This is not to say that this methodology must be used, but merely that we agree with the persuasive case law that concludes that this approach is satisfactory. *Dell'Aquilla*, 150 F.3d at 338 ("[A]though courts may, and frequently do, begin at the maximum, we have never suggested that such a procedure is always appropriate."). Other courts, for example, use a "bottom up" approach whereby the economic benefit a violator gained by noncompliance is established and then adjusted upward or downward, rather than a "top down" approach in which the maximum possible penalty is first established, then reduced following an examination of "mitigating" factors. *See United States v. Mun. Auth. of Union Twp.*, 150 F.3d 259, 265 (3d Cir. 1998) (collecting cases in a CWA case).[115]

It appears that most of the federal circuit courts allow the trial court to use either of the two methods. The Eleventh Circuit, however, appears to require the "top down" method.[116] The standard of review when a defendant appeals the manner in which the district court has calculated the size of the civil penalty is abuse of discretion.[117]

Several trends are apparent when reviewing the case law on civil penalties. When citizen-plaintiffs or government-plaintiffs appeal a district court's decision to impose a civil penalty of zero dollars, there is a high probability that the court of appeals will reverse.[118] Similarly, in the one court of appeals decision where the district court im-

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114 Pound v. Airosol Co., 498 F.3d 1089, 1094–95 (10th Cir. 2007).

115 *Id.* at 1094–95.

116 Atl. States Legal Found. v. Tyson Foods, 897 F.2d 1128 (11th Cir. 1990). This is a citizens' environmental lawsuit where the district court found the defendant had violated the CWA multiple times but imposed a $0 civil penalty. The Eleventh Circuit reversed and instructed the district court to first determine the maximum fine for which Tyson may be held liable and, if it chose not to impose the maximum, reduce the fine in accordance with the factors spelled out in section 1319(d), clearly indicating the weight it gave to each of the factors in the statute and the factual findings that support its conclusions. *Id.* at 1142.

117 *See* United States v. Mun. Auth. of Union Twp., 150 F.3d 259 (3d Cir. 1998); United States v. Smithfield Foods, 191 F.3d 516, 526 (4th Cir. 1999); Nat. Res. Def. Council v. Sw. Marine, Inc., 236 F.3d 985, 1001 (9th Cir. 2000); Env't Tex. Citizens Lobby, Inc. v. ExxonMobil Corp., 824 F.3d 507, 525 (5th Cir. 2016).

118 *Atl. States Legal Found.*, 897 F.2d 1128; *Env't Tex. Citizens Lobby, Inc.*, 824 F.3d 507; *Pound*, 498 F.3d 1089.

posed a civil penalty in the maximum amount, the court of appeals reversed.[119] A civil penalty that is fixed at the outer limit of the permissible range appears to invite scrutiny as to whether the district court applied the factors that are required to be considered when determining the amount of the civil penalty.[120]

Of the factors that must be considered when determining the size of the civil penalty, it is a miscalculation of the economic benefit of noncompliance that seems to cause the greatest trouble.[121] Giving proper consideration to the economic benefit the defendant received through its noncompliance is needed to "level the playing field."[122] And, when economic benefit of noncompliance is carefully proven, it will justify the affirmance of a very large civil penalty on appeal.[123]

The importance of forcing the polluter to pay an appropriate civil penalty is vital to the effectiveness of the law, as was explained by the United States District Court for the District of South Carolina when it imposed a $405,800 civil penalty on a polluter for its CWA violations.[124] The Court there wrote:

> The court in *PIRG v. Powell Duffryn Terminals, Inc.*, 720 F. Supp. 1158 (D.N.J. 1989), *aff'd in part, rev'd in part*, 913 F.2d 64 (3d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991), explained well the purposes behind civil penalties:
>
> > Civil penalties seek to deter pollution by discouraging future violations. To serve this function, the amount of the civil penalty must be high enough to insure that polluters cannot simply absorb the penalty as a cost of doing business. Otherwise, a rational profit maximizing company will choose to pay the penalty rather than incur compliance costs. Additionally, the probability that a penalty will be imposed must be high enough so that polluters will not choose to accept the risk that non-compliance will go unpunished.
>
> *Id.* at 1166 (citations omitted). Similarly, only by removing the economic benefit of noncompliance can a civil penalty ensure that a violator receives no economic advantage *vis-a-vis* its competitors who comply in a timely fashion with all environmental regulations. *PIRG v. Powell Duffryn Terminals, Inc.*, 913 F.2d at 80 (quoting S. Rep. No. 50, 99th Cong., 1st Sess. 25 (1985)).

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119 United States v. Dell'Aquilla, 150 F.3d 329 (3d Cir. 1998).

120 *See, e.g.*, *id.* at 338–39.

121 *Atl. States Legal Found.*, 897 F.2d 1128 (reversed because District Court did not consider economic benefit of noncompliance when setting amount of civil penalty); *Env't Tex. Citizens Lobby, Inc.*, 824 F.3d at 530 ("we conclude that the district court erred in failing to consider that evidence and enter specific findings as to whether the projects demonstrate that Exxon received an economic benefit from noncompliance"); United States v. Allegheny Ludlum Corp., 366 F.3d 164 (3d Cir. 2004); *Smithfield Foods*, 191 F.3d 516.

122 *Allegheny Ludlum*, 366 F.3d at 168.

123 *Mun. Auth. of Union Twp.*, 150 F.3d 259 (affirming civil penalty of $4,031,000 for CWA violations).

124 Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 956 F. Supp. 588 (D.S.C. 1997), *vacated*, 149 F.3d 303 (4th Cir. 1998), *rev'd*, 528 U.S. 167 (2000).

> Actually, to serve as an effective deterrent, a civil penalty must recover an amount beyond the economic benefit of noncompliance. If a penalty recovered merely required the polluter to disgorge the benefit it received from noncompliance, then from a purely economic standpoint, a discharger would be indifferent between spending the money necessary to achieve full compliance in a timely manner and ignoring the regulation and simply paying the civil penalty as a cost of doing business. *See SPIRG v. Monsanto Co.*, 29 Env't Rep. Cas. (BNA) 1078, 1090 (D.N.J. 1988) ("To simply equalize the economic benefit with the penalty would serve ill the possibility of discouraging other and future violations. Some additional penalty should be imposed as a sanction.").[125]

VI. CONCLUSION

Credit is owed to those who saw to the enactment of our environmental laws. They showed wisdom and great skill in putting in place legal measures to help all of us keep from poisoning ourselves with our refuse. They knew the government was needed because the free market could not keep us safe from excessive pollution. Government, though, is a human institution and is prone to human frailties. The drafters of our environmental laws recognized this basic fact and they provided the citizens' environmental lawsuit as an additional safeguard for those situations where the government ought to have acted but did not.

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125 Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 890 F. Supp. 470, 491–92 (D.S.C. 1995), *rev'd on other grounds*, 149 F.3d 303 (4th Cir. 1998), *rev'd*, 528 U.S. 167 (2007).