Lawmaker as Lawbreaker: Enforcement Actions against Municipalities for Failing to Comply with the Clean Water Act

G. Nelson Smith III

Follow this and additional works at: http://engagedscholarship.csuohio.edu/clevstlrev

Part of the Environmental Law Commons, and the State and Local Government Law Commons

How does access to this work benefit you? Let us know!

Recommended Citation

This Article is brought to you for free and open access by the Law Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Cleveland State Law Review by an authorized administrator of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.
LAWSMAKER AS LAWBREAKER: ENFORCEMENT ACTIONS AGAINST MUNICIPALITIES FOR FAILING TO COMPLY WITH THE CLEAN WATER ACT

G. NELSON SMITH, III

I. INTRODUCTION ........................................ 686

II. THE CLEAN WATER ACT AND LEGISLATIVE HISTORY BEHIND MUNICIPAL LIABILITY UNDER THE CLEAN WATER ACT ........ 688

III. OPERATING A MUNICIPAL WASTEWATER TREATMENT SYSTEM ... 691
  A. Primary and Secondary Treatment of Municipal Wastewater ........................................ 691
  B. Publicly Owned Treatment Works (POTWs) ........................................ 692
  C. Pretreatment and National Pollutant Discharge Elimination System Permit Requirements for POTWs ........................................ 694
     1. Pretreatment ........................................ 695
     2. The National Pollutant Discharge Elimination System Permit System .......... 698

IV. PROBLEMS ASSOCIATED WITH MUNICIPAL WASTEWATER TREATMENT SYSTEMS ........................................ 700
  A. Financial Assistance from the Federal Government ........................................ 700
  B. Municipal Liability Under the Clean Water Act ........................................ 702
     1. Background ........................................ 702
     2. Citizen Suits ........................................ 706
  C. Imposition of Civil Penalties on Municipalities Who Fail to Comply with Their National Pollutant Discharge Elimination System Permits ........................................ 708

V. WHY THE CURRENT MUNICIPAL LIABILITY SCHEME UNDER THE CLEAN WATER ACT IS A FAILURE, AND WHAT STEPS ARE NECESSARY TO ACHIEVE MAXIMUM COMPLIANCE BY MUNICIPALITIES ........................................ 710

1Attorney, Amelle and Hastie, San Francisco, California. B.A., Howard University, 1982, (Magna Cum Laude); J.D., University of Virginia, 1986. Mr. Smith practices in the area of environmental law. The author gives special thanks to his wife, Susan, for all her love and support while he was writing this article.
I. INTRODUCTION

During the Presidential campaign of 1992, President Clinton proposed two significant changes which would drastically effect how cities and municipalities run their government. First, then Candidate Clinton proposed to improve the infrastructure of cities. These improvements were seen as being necessary to create jobs. Second, he also pledged to be the 'environmental President.' As part of his environmental pledge, President Clinton vowed to enforce environmental laws to the fullest extent possible. While for most, these two pledges could co-exist without any sort of conflict, such is not necessarily the case with municipalities who violate the Clean Water Act.

In attempting to understand exactly how the Clean Water Act applies to municipalities, the best starting point is to examine the language of the statute itself. The Act makes it unlawful for anyone, including municipalities, to discharge a pollutant into navigable waters except as authorized by specific


3 Id.


5 See supra note 4.


8 Under 33 U.S.C. § 1362(4)(1988), the term "municipality" is defined as: a city, town, borough, county, parish, district, association, or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 1288 of this title.

9 Under 33 U.S.C. § 1362(12)(1988), the term "discharge of a pollutants" is defined as: "A) any addition of any pollutant to navigable waters from any point source, B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft."
sections of the Act. To implement this prohibition, as well as the exceptions, the Clean Water Act established a complex system regulating all discharges into the navigable waters of the United States. The principal method of regulating such discharges in these cases is the National Pollutant Discharge Elimination System (NPDES).

While the complexities of the NPDES system will be explained later, basically, the EPA Administrator, or if delegated to a State, the head of the state water pollution control agency, issues an NPDES permit to an individual discharger. The permit sets specific effluent limits for that discharger. All permit holders are required to self-monitor their compliance with the permit by maintaining and transmitting to the Administrator or delegated state agency discharge monitoring reports (DMRs). These DMRs are available to the public. Moreover, these DMRs are required to be submitted monthly or weekly depending upon the terms and conditions of the permit.

Under the Act, the discharge of pollutants without a permit or in violation of a permit condition may result in civil penalties of up to $25,000 per day per violation and/or a criminal penalty of up to $50,000 per day per violation. While these penalties could be extremely costly for municipalities, the problem becomes even more severe because many times correcting the problem could cost millions and sometimes billions of dollars for municipalities. If the municipalities do not have the money to correct the problems, the
municipalities continue to violate the Clean Water Act, thereby subjecting themselves to astronomical fines.

The purpose of this article is to outline the difficulties that municipalities face in meeting the legal discharge requirements, and to establish why subjecting municipalities to civil penalties which are ultimately deposited to the U.S. Treasury is an ineffective way of correcting municipal problems. Finally, this article seeks to provide an alternative solution that will not only ensure that municipal violations of the Clean Water Act will be corrected, but that such municipal violations will be corrected in a more efficient manner than the methods that are currently being used today.

II. THE CLEAN WATER ACT AND LEGISLATIVE HISTORY BEHIND MUNICIPAL LIABILITY UNDER THE CLEAN WATER ACT

In 1972, Congress passed amendments to the Federal Water Pollution Control Act (FWPCA). The purpose of the FWPCA amendments was to restore and maintain the chemical, physical and biological integrity of the nation's waters. It is through this comprehensive legislation that Congress has asserted federal power over water pollution matters which relate to municipalities. The FWPCA amendments of 1972 totally revised all previous water pollution control legislation, including the FWPCA of 1965 which concentrated on water quality standards. Moreover, the earlier act established standards for the acceptable levels of pollution in a state's navigable waters. The problem with the 1965 Act, however, stemmed from the character of the standards themselves which focused on the tolerable effects, rather than the preventable causes, of water pollution. The problems also resulted from the awkwardly shared federal and state responsibility in implementing such standards, and from the cumbersome enforcement procedures and standards which governed the conduct of individual

26 Wisconsin Elec. Power Co. v. State of Wis. Natural Resources Bd., 280 N.W.2d 218 (Wis. 1979). In Wisconsin Electric Power Co., the Wisconsin Supreme Court defined the difference between water quality standards and effluent standards in that "water quality standards refer to maximum concentrations of pollutants in a body of water while effluent standards refer to absolute limitation on pollutants discharged from a particular source. The former are concerned with the quality of a water body in general while the latter emphasize the quality of a discharge source entering a water body." Id. at 224; see also, Montgomery Envtl. Coalition v. Fri, 366 F. Supp. 261 (D.D.C. 1973).
polluters. The earlier legislation was, in essence, ineffectual in protecting the public from water pollution.

The 1972 Amendments accomplished two significant changes in the regulatory scheme. First, they provided the maximum effluent limitations on "point sources," and established water quality standards. The direct restriction on discharges made enforcement easier because it was no longer necessary to work backward from an overpolluted body of water to determine which point sources were responsible and which should have been abated. In addition, the Amendments measured the discharger's performance against strict technology based effluent limitations to which the discharger would have to conform rather than against limitations derived from water quality standards to which the discharger and other polluters would have to collectively confer.

Second, the Amendments established the NPDES system. Under the NPDES system, permits are to be obtained in the first instance from the EPA. The permits issued by EPA are required to conform with Section 402 of the Act. However, in recognition of the interest of the States and in order to encourage their continued interest in reducing and ultimately eliminating pollution, Congress provided that a State program approved by EPA could issue permits. Specifically, this delegation was passed "to recognize, preserve and protect the primary responsibilities and the rights of states to prevent, reduce and eliminate pollution."

The 1972 Amendments were also significant in that all Publicly Owned Treatment Works (POTWs) that discharged over five million gallons of effluent per day were required to meet secondary treatment standards no later than

[29] ld at 202-03.

[31] "Point Sources" are defined in 33 U.S.C. § 1362(14)(Supp. 1993), as: any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

[33] ld.


[36] ld. at 202-09.

[37] Id. at 207-08.

July 1, 1977.39 This deadline did not prevent the EPA from requiring compliance by an earlier date. It just meant that secondary treatment standards had to be achieved by that date.40 As of 1989, there were over 1,500 municipalities operating POTWs that discharge over five million gallons per day.41 Moreover, the Regional Administrator or the Director of a Program42 also had the discretion to control POTWs with a design flow of below five million gallons per day. If the Regional Administrator or the Director of a Program determines that "circumstances warrant" such a program in order to prevent industrial pollutants from interfering with or passing through the POTW, then a pretreatment program must be developed.43 If the State does not have an approved pretreatment program,44 then the NPDES permit issued to the smaller POTW must have a modification clause.45 Under these circumstances, only the Regional Administrator may actually modify the permit.46

In 1977, aware of delays in secondary treatment implementation caused by failures of funding and public leadership at the local, state and federal levels, Congress amended the Act again to permit extensions of the 1977 effluent limitations deadline up to July 1, 1983 for certain POTWs identified by EPA.47 The 1977 amendments made it clear, however, that the EPA had no authority to extend the secondary treatment standard deadlines beyond July 1, 1983.48 Congress, however, subsequently extended the deadline to July 1, 1988.49

40Id.
41Parthenia B. Evans, Municipal Liability Under the CWA, 6 NAT. RESOURCES & ENV'T 3 (Summer 1991).
43A Director is defined under 40 C.F.R. § 403.3(e)(1992) as the chief administrative officer of a state pollution agency with both an approved NPDES permit program and an approved State pretreatment program. For a discussion of the terms "interfering with" and "passing through," see infra notes 93-104 and accompanying text.
44For a discussion on approved pretreatment programs, see infra notes 84-89 and accompanying text.
46Id.
48675 F. Supp. at 194.
4933 U.S.C. § 1311(i)(1988). This extension does not extend the date of compliance beyond July 1, 1983, in all cases. It only extends the date to July 1, 1988, when there is a reduction in the amount of financial assistance under the Act or changed conditions affecting the rate of construction beyond the control of the owner or operator which will make it impossible to complete the construction by July 1, 1983. Township of Franklin Sewerage Auth. v. Middlesex County Util. Auth., 787 F.2d 117, 123 (3rd Cir. 1986), cert. denied, 479 U.S. 828 (1986).
III. OPERATING A MUNICIPAL WASTEWATER TREATMENT SYSTEM

A. Primary and Secondary Treatment of Municipal Wastewater

The treatment of wastewater comes in two stages, primary and secondary treatment. Sewage and wastewater receive "primary treatment" when physical processes are used to screen out solids. The purpose of the primary treatment is to remove pollutants that will either settle, such as heavier suspended solids, or float, such as grease. Congress became convinced that providing only the basics of primary treatment was not protecting the water quality. Consequently, Congress shifted from concentrating on water quality and began concentrating on limiting discharges. As will be discussed later in more detail, Congress ordered the EPA to set effluent limitations based upon secondary treatment standards.

---

50 City of Hoboken, 675 F. Supp. at 192.

51 United States v. City of Providence, 492 F. Supp. 602, 604 (D.R.I. 1980). An example of a "primary" sewage treatment facility was outlined in the case of Hawaii's Thousand Friends v. City and County of Honolulu, 821 F. Supp. 1368 (D. Haw. 1993). In this case, after sewage was pumped to the plant through the collection system, it received preliminary treatment consisting of screening to remove large objects, grit removal and pre-aeration to facilitate grease and floatables removal. The sewage then entered the primary clarifiers, which are designed to remove suspended solids and organic materials through sedimentation to the bottom of the tank and by removal of floatables from the surface. The sewage then traveled through an effluent screen (with a 1/4 inch square mesh) and left through the outfall pipe. The effluent sewage was dispersed into the ocean waters through a multiport diffuser.

The primary treatment defined in the case of United States v. Metropolitan Dist. Comm'n, 23 Env't Rep. Cas. (BNA) 1350 (D. Mass. 1985), was slightly different from that outlined in Hawaii's Thousand Friends, nevertheless it shows that in both instances, the treatment of the waste is very basic. In the Metropolitan District Commission's primary treatment,

large objects such as sticks and stones and other wastes such as rags and sanitary napkins are shifted out. The effluent is then reshifted for smaller particles such as grit and sand. Next, the sewage flows into large holding tanks and is allowed to settle. The surface of these tanks is skimmed to remove debris such as small sticks and human waste. The waste that settles to the bottom of these large vats is called sludge. The sludge remains in the holding tanks when the liquid sewage that remains after the skimming is drawn off. The liquid is chlorinated and released in the Harbor through a series of outfall pipes. Additionally, the sludge itself (which is simply the filth that settled out of the incoming raw sewage) is discharged into the Harbor twice a day at high tide.

Id. at 1352.

52 See infra notes 60-75 and accompanying text.

53 "Effluent Limitations" are defined in 40 C.F.R. § 122.2 (1992) as "any restriction imposed by the Director on quantities, discharge rates, and concentrations of 'pollutants' which are 'discharged' from 'point sources' into 'waters of the United States,' the waters of the 'contiguous zone' or the ocean."
The EPA responded by setting the standards three ways. First, the EPA Administrator established discharge effluent limitations for categories of industrial "point sources" which discharged into navigable waters. Second, the Administrator set effluent limitations for POTWs which treated municipal sewage or industrial wastewater. Third, the Administrator promulgated regulations to regulate, control, and limit the toxicity of the pollutants discharged into POTWs.

Unfortunately, while secondary treatment is far more effective at removing pollutants than primary treatment, it is also far more expensive. The upgrading of some publicly owned treatment works from primary to secondary treatment plants in some instances could cost several billion dollars.

B. Publicly Owned Treatment Works (POTWs)

Generally, municipalities are exposed to liability under the Clean Water Act as a result of their Publicly Owned Treatment Works ("POTWs"). A POTW is defined as "any device or system used in the treatment (including recycling and reclamation) of municipal sewage or industrial waste of a liquid nature which is owned by a 'State' or 'municipality'. This definition includes sewers, pipes or other conveyances only if they convey wastewater to a POTW providing treatment."

While the purpose of regulating the POTWs is to control what is released into waters of the United States, there is not necessarily a correlation between

---

54 Hawaii's Thousand Friends, 821 F. Supp. at 1372-73. "Secondary treatment" is defined as "the use of biological treatment (i.e., digestion of microorganisms) of sewage in addition to the physical treatment processes provided by 'primary treatment'" which occurs when in addition to physical processes, biological processes are used to breakdown some of the impurities remaining from the primary treatment. City of Hoboken, 675 F. Supp. at 193; Metropolitan Dist. Com'n, 23 Env't Rep. Cas. (BNA) at 1352. Thus, secondary treatment is a more sophisticated and effective method of removing the pollutants that remain in sewage after the most basic or "primary" treatment.

55 See supra note 31.


57 Id.

58 Id. In United States v. City of Providence, 492 F. Supp. 602 (D.R.I. 1980), secondary treatment was to be accomplished by the use of an activated sludge process in which a mixture of wastewater and biological sludge, called a "biomass," is agitated and aerated. Id. at 604. The result is that the microorganisms in the biomass absorb the harmful organisms in the wastewater, forming large clumps which settle and can be then separated from the wastewater. As a final step in the process, before the effluent is discharged into Narragansett Bay, it is treated with chlorine in order to kill pathogenic or disease causing bacteria and viruses.

effluent discharges and the quality of the body of water in which the effluent flows. In other words, the EPA saw the need to develop technical limitations which would lead to effluent reduction by POTWs instead of concentrating on whether a person has a right to use the nation's waterways for the purpose of disposing wastes. For POTW discharges, the EPA's concern focused primarily on five different effluent limitations. Biological Oxygen Demand (BOD) is the "measure of oxygen required by microorganisms to stabilize organic matter." BOD materials are "organic substances in wastewater effluent that bind oxygen thereby depleting the oxygen in the water and degrading water quality." When there are low levels of oxygen in the presence of waste loads, the oxygen is ultimately consumed in the process of the waste flowing into the water. If the levels of oxygen are low enough, fish and plants eventually die.

The EPA also sought to limit the Total Suspended Solids (TSS). TSS indicate the physical quantity of the solid sewage present in the water. The light transmission necessary for photosynthesis which supports plant life can be effected by very high levels of suspended solids. Settleable Solids (SS), also limited by EPA, measure the settleable matter in wastewater, indicate the effectiveness of treatment plant clarifiers, and determine the degree of sedimentation that may occur in the water. Large amounts of settleable wastewater solids in the water may deplete the oxygen supply thereby strangling fish and aquatic life as a result of its adverse effect on the habitat of aquatic life.

62 United States v. Metropolitan Dist. Comm'n, 23 Env't Rep. Cas. (BNA) 1350, 1353 n.4 (D. Mass. 1985). The oxygen demand measures the amount of oxygen consumed through the oxidation of waste to carbon dioxide and water and also indicates the amount of organic material present. See also Stoddard v. Western Carolina Regional Sewer Auth., 784 F.2d 1200, 1203 n.4 (4th Cir. 1986) (stating that dissolved oxygen is essential to aquatic life and is treated as a separate entity from BOD).
64 Stoddard, 784 F.2d at 1203 n.4.
65 Id.; Metropolitan Dist. Comm'n, 23 Env't Rep. Cas. (BNA) at 1353 n.4.
66 TSS are the total amount of solid particulates contained in wastewater effluent. Hawaii's Thousand Friends, 821 F. Supp. at 1371.
68 Metropolitan Dist. Comm'n, 23 Env't Rep. Cas. (BNA) at 1353 n.4 (quoting Office of Water Programs Operations, United States Environmental Protection Agency, Primer for Wastewater Treatment 5-6 (1980)).
69 Id.
fish and plant life. Consequently, SS is also monitored by the EPA. Finally, the EPA closely examines "total fecal coliform" which is a measure of both fecal and non-fecal coliform bacteria. "Total fecal coliform" is used to indicate the presence of harmful bacteria.

In the case of *Stoddard v. Western Carolina Regional Sewer Authority*, the court recognized the dangers associated with high levels of any or all wastewater contaminants, stating,

> While all lakes eventually fill in and die through a process called eutrophication, this process is normally extremely slow. Human intervention, however, can dramatically speed up the process, resulting in what is known as cultural eutrophication.

In cultural eutrophication, high levels of nutrients are added to a lake, dissolved oxygen levels are lowered, and the lake experiences a rapid growth in rooted plants along the shore and algae in the water. Phosphorus is a predominant element in promoting the growth of algae, and the district court found that the Fountain Inn plant contributes at least two-thirds of the phosphorous which flows into Stoddard’s Lake. Expert testimony at trial indicated that the plant’s discharges have caused the premature eutrophication of Stoddard’s Lake, resulting in massive algal blooms, fish kills, and odor problems.

It is the releases of these and other pollutants that the EPA or a delegated state generally seek to control through pretreatment requirements and NPDES permits.

C. Pretreatment and National Pollutant Discharge Elimination System Permit Requirements for POTWs

The potential liability that municipalities may incur for POTWs as a result of violating the Clean Water Act primarily occurs at two stages. At the first stage, the EPA seeks to control the introduction of wastes from non-domestic sources. In implementing this goal, the EPA has established mechanisms and

---

70Id.

71"Fecal coliform bacteria" is a type of bacteria associated with the digestive tracks of warm blooded mammals, including humans." Id. While fecal coliform in and by itself is not harmful, it indicates the presence of pathogenic microorganisms which can cause diseases such as typhoid fever, amebic dysentery, diarrhea, salmonellosis, gastroenteritis and cholera. Id.

72Metropolitan Dist. Comm’n, 23 Env’t Rep. Cas. (BNA) at 1353 n.4 (quoting Office of Water Programs Operations, United States Environmental Protection Agency, *Primer for Wastewater Treatment* 5-6 (1980)).

73784 F.2d at 1204.

http://engagedscholarship.csuohio.edu/clevstlrev/vol41/iss4/4
The purpose of regulating pretreatment pollutants is three-fold:

(a) To prevent the introduction of pollutants into POTWs which will interfere with the operation of a POTW, including interference with its use or disposal of municipal sludge;

(b) To prevent the introduction of pollutants into POTWs which will pass through the treatment works or would otherwise be incompatible with such works; and

(c) To improve opportunities to recycle and reclaim municipal and industrial wastewaters and sludges.

At the second stage, the EPA seeks to control the release of effluent through its NPDES permit program. While both the pretreatment and NPDES permit programs seek to reduce the amount of pollutants released into waters of the United States, each program is administered differently. Moreover, the role of the municipality or POTW is markedly different at both stages as well.

1. Pretreatment

The term pretreatment has been defined as "the reduction of the amount of pollutants, the elimination of pollutants, or the alteration of the nature of pollutant properties in wastewater prior to or in lieu of discharging or otherwise introducing such pollutants into a POTW." Reducing or altering the pollutants may be obtained by physical, chemical or biological processes, process changes or by other means, except as prohibited by EPA. "Appropriate pretreatment technology includes control equipment, such as equalization tanks or facilities, for protection against surges or slug loadings that might interfere with or otherwise might be incompatible with the POTW." If the "wastewater from a regulated process is mixed in an equalization facility with unregulated wastewater or with wastewater from another regulated process, the effluent ... must meet an adjusted pretreatment limit calculated in accordance with [40 C.F.R.] § 403.6(e)."

The EPA regulations governing the pretreatment of pollutants seek three levels of administrative control. First, most major POTWs will be required to develop a locally run pretreatment program which will ensure that non-domestic users of the municipal system comply with pretreatment procedures known as pretreatment standards. The purpose of regulating pretreatment pollutants is three-fold:

(a) To prevent the introduction of pollutants into POTWs which will interfere with the operation of a POTW, including interference with its use or disposal of municipal sludge;

(b) To prevent the introduction of pollutants into POTWs which will pass through the treatment works or would otherwise be incompatible with such works; and

(c) To improve opportunities to recycle and reclaim municipal and industrial wastewaters and sludges.

At the second stage, the EPA seeks to control the release of effluent through its NPDES permit program. While both the pretreatment and NPDES permit programs seek to reduce the amount of pollutants released into waters of the United States, each program is administered differently. Moreover, the role of the municipality or POTW is markedly different at both stages as well.

1. Pretreatment

The term pretreatment has been defined as "the reduction of the amount of pollutants, the elimination of pollutants, or the alteration of the nature of pollutant properties in wastewater prior to or in lieu of discharging or otherwise introducing such pollutants into a POTW." Reducing or altering the pollutants may be obtained by physical, chemical or biological processes, process changes or by other means, except as prohibited by EPA. "Appropriate pretreatment technology includes control equipment, such as equalization tanks or facilities, for protection against surges or slug loadings that might interfere with or otherwise might be incompatible with the POTW." If the "wastewater from a regulated process is mixed in an equalization facility with unregulated wastewater or with wastewater from another regulated process, the effluent ... must meet an adjusted pretreatment limit calculated in accordance with [40 C.F.R.] § 403.6(e)."

The EPA regulations governing the pretreatment of pollutants seek three levels of administrative control. First, most major POTWs will be required to develop a locally run pretreatment program which will ensure that non-domestic users of the municipal system comply with pretreatment procedures known as pretreatment standards. The purpose of regulating pretreatment pollutants is three-fold:

(a) To prevent the introduction of pollutants into POTWs which will interfere with the operation of a POTW, including interference with its use or disposal of municipal sludge;

(b) To prevent the introduction of pollutants into POTWs which will pass through the treatment works or would otherwise be incompatible with such works; and

(c) To improve opportunities to recycle and reclaim municipal and industrial wastewaters and sludges.

At the second stage, the EPA seeks to control the release of effluent through its NPDES permit program. While both the pretreatment and NPDES permit programs seek to reduce the amount of pollutants released into waters of the United States, each program is administered differently. Moreover, the role of the municipality or POTW is markedly different at both stages as well.

1. Pretreatment

The term pretreatment has been defined as "the reduction of the amount of pollutants, the elimination of pollutants, or the alteration of the nature of pollutant properties in wastewater prior to or in lieu of discharging or otherwise introducing such pollutants into a POTW." Reducing or altering the pollutants may be obtained by physical, chemical or biological processes, process changes or by other means, except as prohibited by EPA. "Appropriate pretreatment technology includes control equipment, such as equalization tanks or facilities, for protection against surges or slug loadings that might interfere with or otherwise might be incompatible with the POTW." If the "wastewater from a regulated process is mixed in an equalization facility with unregulated wastewater or with wastewater from another regulated process, the effluent ... must meet an adjusted pretreatment limit calculated in accordance with [40 C.F.R.] § 403.6(e)."

The EPA regulations governing the pretreatment of pollutants seek three levels of administrative control. First, most major POTWs will be required to develop a locally run pretreatment program which will ensure that non-domestic users of the municipal system comply with pretreatment procedures known as pretreatment standards. The purpose of regulating pretreatment pollutants is three-fold:

(a) To prevent the introduction of pollutants into POTWs which will interfere with the operation of a POTW, including interference with its use or disposal of municipal sludge;

(b) To prevent the introduction of pollutants into POTWs which will pass through the treatment works or would otherwise be incompatible with such works; and

(c) To improve opportunities to recycle and reclaim municipal and industrial wastewaters and sludges.

At the second stage, the EPA seeks to control the release of effluent through its NPDES permit program. While both the pretreatment and NPDES permit programs seek to reduce the amount of pollutants released into waters of the United States, each program is administered differently. Moreover, the role of the municipality or POTW is markedly different at both stages as well.

1. Pretreatment

The term pretreatment has been defined as "the reduction of the amount of pollutants, the elimination of pollutants, or the alteration of the nature of pollutant properties in wastewater prior to or in lieu of discharging or otherwise introducing such pollutants into a POTW." Reducing or altering the pollutants may be obtained by physical, chemical or biological processes, process changes or by other means, except as prohibited by EPA. "Appropriate pretreatment technology includes control equipment, such as equalization tanks or facilities, for protection against surges or slug loadings that might interfere with or otherwise might be incompatible with the POTW." If the "wastewater from a regulated process is mixed in an equalization facility with unregulated wastewater or with wastewater from another regulated process, the effluent ... must meet an adjusted pretreatment limit calculated in accordance with [40 C.F.R.] § 403.6(e)."

The EPA regulations governing the pretreatment of pollutants seek three levels of administrative control. First, most major POTWs will be required to develop a locally run pretreatment program which will ensure that non-domestic users of the municipal system comply with pretreatment procedures known as pretreatment standards. The purpose of regulating pretreatment pollutants is three-fold:

(a) To prevent the introduction of pollutants into POTWs which will interfere with the operation of a POTW, including interference with its use or disposal of municipal sludge;

(b) To prevent the introduction of pollutants into POTWs which will pass through the treatment works or would otherwise be incompatible with such works; and

(c) To improve opportunities to recycle and reclaim municipal and industrial wastewaters and sludges.

At the second stage, the EPA seeks to control the release of effluent through its NPDES permit program. While both the pretreatment and NPDES permit programs seek to reduce the amount of pollutants released into waters of the United States, each program is administered differently. Moreover, the role of the municipality or POTW is markedly different at both stages as well.

1. Pretreatment

The term pretreatment has been defined as "the reduction of the amount of pollutants, the elimination of pollutants, or the alteration of the nature of pollutant properties in wastewater prior to or in lieu of discharging or otherwise introducing such pollutants into a POTW." Reducing or altering the pollutants may be obtained by physical, chemical or biological processes, process changes or by other means, except as prohibited by EPA. "Appropriate pretreatment technology includes control equipment, such as equalization tanks or facilities, for protection against surges or slug loadings that might interfere with or otherwise might be incompatible with the POTW." If the "wastewater from a regulated process is mixed in an equalization facility with unregulated wastewater or with wastewater from another regulated process, the effluent ... must meet an adjusted pretreatment limit calculated in accordance with [40 C.F.R.] § 403.6(e)."

The EPA regulations governing the pretreatment of pollutants seek three levels of administrative control. First, most major POTWs will be required to develop a locally run pretreatment program which will ensure that non-domestic users of the municipal system comply with pretreatment procedures known as pretreatment standards. The purpose of regulating pretreatment pollutants is three-fold:

(a) To prevent the introduction of pollutants into POTWs which will interfere with the operation of a POTW, including interference with its use or disposal of municipal sludge;

(b) To prevent the introduction of pollutants into POTWs which will pass through the treatment works or would otherwise be incompatible with such works; and

(c) To improve opportunities to recycle and reclaim municipal and industrial wastewaters and sludges.

At the second stage, the EPA seeks to control the release of effluent through its NPDES permit program. While both the pretreatment and NPDES permit programs seek to reduce the amount of pollutants released into waters of the United States, each program is administered differently. Moreover, the role of the municipality or POTW is markedly different at both stages as well.

1. Pretreatment

The term pretreatment has been defined as "the reduction of the amount of pollutants, the elimination of pollutants, or the alteration of the nature of pollutant properties in wastewater prior to or in lieu of discharging or otherwise introducing such pollutants into a POTW." Reducing or altering the pollutants may be obtained by physical, chemical or biological processes, process changes or by other means, except as prohibited by EPA. "Appropriate pretreatment technology includes control equipment, such as equalization tanks or facilities, for protection against surges or slug loadings that might interfere with or otherwise might be incompatible with the POTW." If the "wastewater from a regulated process is mixed in an equalization facility with unregulated wastewater or with wastewater from another regulated process, the effluent ... must meet an adjusted pretreatment limit calculated in accordance with [40 C.F.R.] § 403.6(e)."

The EPA regulations governing the pretreatment of pollutants seek three levels of administrative control. First, most major POTWs will be required to develop a locally run pretreatment program which will ensure that non-domestic users of the municipal system comply with pretreatment
requirements. Second, where POTWs are not required to develop a local program, NPDES States with approved pretreatment programs will have first line responsibility for enforcing pretreatment requirements. Third, the regulations also discuss establishing and reporting Pretreatment Standards. The pretreatment regulations define in great detail what constitutes an approvable pretreatment program. At a minimum, the program must contain:

1) a survey of industrial users and their actual and potential discharges to the treatment system;
2) a detailed technical evaluation, including industrial use monitoring and laboratory analysis, of the potential for interference with the operation of the treatment system, the discharge of pollutants that would adversely impact receiving waters, and an analysis of sludge to prevent interference with the POTW and to prevent inappropriate sludge disposal;
3) a municipal ordinance that allows the POTW to implement and enforce both categorical pretreatment standards and local limits that are needed to prevent interference (if the local pretreatment standards are more stringent than the federal standards, the local standards will apply); and
4) a plan for implementing the pretreatment program which generally includes an identification of user reporting requirements, inspection procedures, budgeting for equipment, and support personnel.

POTWs must submit their proposed plans to the approval authority. Upon a preliminary determination that the program submission meets the requirements of Section 403 of the Code of Federal Regulations, the approval authority will issue a public notice and if there are no significant comments or no requests for a public hearing, the plan will be approved. Finally, it should be noted that the EPA established regulations relating directly to the determination and reporting of pretreatment standards.

The reasons for regulating pretreatment of pollutants into POTWs is that industrial discharges to POTWs are known to be the source of significant...
problems. For example, a number of the pollutants discharged by industrial users of the POTWs are substances for which there is evidence that such pollutants are carcinogenic, mutagenic, and/or teratogenic. Other pollutants are known to have acute toxic effects on human or aquatic organisms at sufficiently high concentrations. Many of these pollutants are persistent in the environment and some bioaccumulate and enter food chains.

If pollutants which enter into a POTW exceed legal limits, then those pollutants can cause several problems. First, they can interfere with the operation of the POTW. The interference can cause the POTW to do an inadequate job of treating normal domestic wastes as well as industrial wastes. As a result, the POTW can be prevented from meeting its permit requirements. The EPA sees the identification and regulation of an interference problem as a local responsibility. Consequently, because the presence of an interference problem is so dependent on local conditions, a POTW is required to develop specific limits for industrial users to guard against interference with the operation of the municipal treatment works.

The second problem is associated with managing the sludge at the POTW. Specifically, some toxic pollutants that are removed from the effluent stream by treatment at the POTW enter the POTW’s sludge and can contribute to sludge management problems. The effect of the commingling of the sludge with industrial pollutants, particularly metals, can limit the sludge management alternatives available to the POTW and increase the cost to the public of providing adequate sludge management. In some cases, the improper management of sludges contaminated with metals and other toxic pollutants can result in uptake of these pollutants by crops in the human food chain or leaching of these pollutants into the groundwater. Because of the problem and the threat associated with sludge management, the EPA believed it necessary to regulate the pollutants through categorical pretreatment standards.

91 Id.
92 Id.
93 Id.
94 Id.
95 46 Fed. Reg. at 9406.
96 Id.
97 Id.
98 Id. Leaching derives from the term Leachate which has been defined as materials that pollute water as it sweeps through solid waste.
99 Id.
100 46 Fed. Reg. at 9406.
Third, even when the inhibition/interference and sludge management problems mentioned above have been addressed, there still exist many industrial toxic pollutants that do not receive adequate treatment in most POTWs. These toxic pollutants in essence pass through the POTWs with levels of pollutants that would be unacceptable if the POTW were an industrial direct discharger.\footnote{Id.} These toxic pollutants which pass through the POTW can prevent reuse of municipal wastewaters and the productive recycling of organic matter and nutrients in land treatment systems.\footnote{Id.} They can also prevent the attainment of water quality standards and increase the cost to consumers of treating drinking water.\footnote{Id.} Consequently, like pollutants that interfere with sludge use or disposal, pollutants which generally pass-through the POTW in unacceptable concentrations or amounts may be subject to regulation through categorical pretreatment standards.\footnote{Id.}

2. The National Pollutant Discharge Elimination System Permit System

The 1972 Amendments readily prohibit the discharge of any pollutant to navigable waters from a point source unless the discharge is authorized by an NPDES permit.\footnote{33 U.S.C. § 1311(a)(1988). That section provides "Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, 1344 of this title, the discharge of any pollutant by any person shall be unlawful." Id.} Under this system, the EPA, or a delegated State, issues the NPDES permit to an individual discharger.\footnote{33 U.S.C. § 1342 (1988); United States v. Metropolitan Dist. Comm'n, 23 Env't Rep. Cas. (BNA) 1350, 1352 (D. Mass. 1985); United States v. City of Menominee, 727 F. Supp. 1110, 1114 (W.D. Mich. 1989).} In other words, the EPA may issue, administer, and enforce NPDES permits itself, or it may delegate much of that responsibility to the State.\footnote{City of Menominee, 727 F. Supp. at 1114.} In States where the delegation has occurred, the States assume primary responsibility for issuing the NPDES permits.\footnote{Id.} Under this delegated program, States may only administer a program upon the EPA's approval.\footnote{Id.} The EPA may require a delegated State's submitted plan to be modified or revised, but when a State's plan is in compliance with EPA guidelines under Section 304(h)(2),\footnote{Id.} and the submitted program is supported by adequate authority to achieve the ends of Sections 402(b)(1)-(9), the EPA is required to approve the State's program and suspend
EPA's issuance of permits under Section 402 as to those navigable waters subject to such program.\textsuperscript{111} A State must forward a copy of each permit application to the EPA for it's review.\textsuperscript{112} The EPA has the discretion to waive review for particular classes of point sources or for a particular permit application.\textsuperscript{113}

A delegated State must inform the EPA of every action related to the permit and forward to the EPA a copy of any new or modified permit proposed to be issued by the State.\textsuperscript{114} If the EPA objects to the issuance of the permit in writing and within 90 days from the date of being notified of the proposed permit, then the permit cannot be issued.\textsuperscript{115} Similarly, if the EPA objects to the proposed permit as being outside of the scope of the guidelines and requirements of the Act within 90 days of the date of transmittal of the proposed permit, then the delegated State may not issue a permit.\textsuperscript{116} Under both scenarios, the EPA's objection must contain a statement outlining the effluent limitations and the conditions the permit would include if issued by it.\textsuperscript{117} In short, the EPA retains final authority to review State issued permits, including permits issued in delegated States, to ensure compliance with guidelines and requirements set forth in the Act.\textsuperscript{118}

If the EPA objects to the proposed permit, the delegated State may request a public hearing on the objection, or may submit a revised permit for EPA review, provided the request is made in a timely manner.\textsuperscript{119} If the delegated State fails to exercise these options, or if the State and the EPA reach an impasse, exclusive issuance passes to the EPA.\textsuperscript{120} On the other hand, if a State or the EPA properly issues an NPDES permit, the permit remains in force unless it is revoked, suspended or modified.\textsuperscript{121} The usual life of a permit is five years. Generally, if a permittee applies for a new permit or modification of an existing permit before the permit's expiration, the effluent limitations, terms and conditions

\begin{itemize}
  \item \textsuperscript{111}33 U.S.C. § 1342(c)(1)(1988).
  \item \textsuperscript{112}Id. § 1342(d)(1).
  \item \textsuperscript{113}Id. § 1342 (d)(3).
  \item \textsuperscript{114}Id. § 1342 (d)(1).
  \item \textsuperscript{115}Id. § 1342 (d)(2)(A).
  \item \textsuperscript{116}Id. § 1342 (d)(2)(B).
  \item \textsuperscript{118}Id. (citing 33 U.S.C. § 1342(b)-(e)); Ford Motor Co. v. United States EPA, 567 F.2d 661, 664, 669-72 (6th Cir. 1977).
  \item \textsuperscript{119}City of Menominee, 727 F. Supp. at 1114-15.
  \item \textsuperscript{120}Id. (citing 33 U.S.C. § 1342(d)(4); 40 C.F.R. § 123.12(g)(1979)); Champion Int'l Corp. v. United States EPA, 648 F. Supp. 1390, 1399 (W.D.N.C. 1986), \textit{vacated on other grounds}, 850 F.2d 182 (4th Cir. 1988).
  \item \textsuperscript{121}City of Menominee, 727 F. Supp. at 1115.
\end{itemize}
remain in effect until issuance of a new or modified permit. Furthermore, as a general rule, the new or modified permit is supposed to be no less stringent than the permit before it.

IV. PROBLEMS ASSOCIATED WITH MUNICIPAL WASTEWATER TREATMENT SYSTEMS

A. Financial Assistance from the Federal Government

In 1989, the EPA reported that over two-thirds of the 15,600 wastewater treatment plants in the United States failed to comply with the CWA standards. Moreover, approximately 50% of the municipalities with violating plants have severe financial problems and have per capita incomes that are less than 75% the national average. To complicate the problem even further, in 1989, the EPA admitted that improving these facilities would use up its budget for the next seventeen years. Because of the catastrophic costs to low income communities, Senator John D. Rockefeller stated that forcing these communities to comply with the CWA without providing financial assistance would force them into bankruptcy.

Title II of the Clean Water Act establishes a program of federal grants to states, municipalities and intergovernmental agencies for the construction of POTWs. The purpose of the funding is to assist in financing the facilities so that they can reduce the effluent as prescribed in the Act. Under Title II, "grants may only be awarded to the most cost-effective project for addressing a water pollution problem in a specific geographic area." By using economic and social considerations, the applicant for a federal construction grant must

122 Id. (citing 33 U.S.C. § 1342(b)(1)(B)).
125 Id. at 767 n.27 (citing Sewage Treatment: Rockefeller to Propose Deadline Extension for Municipal Sewage Treatment Requirements, 19 Env't Rep. (BNA) 177 (June 3, 1988)).
126 Louisville & Jefferson County Metro. Sewer Dist., 36 Env't Rep. Cas. (BNA) at 1469.
127 Deegan, supra note 124.
128 State Water Control Bd. v. Train, 559 F.2d 921, 923 (4th Cir. 1977).
129 Id.
130 City of Mount Clemens v. United States EPA, 917 F.2d 908, 910 n.3 (6th Cir. 1990) (citing 33 U.S.C. § 1298); City of Garland v. Zurn Indus., Inc., 870 F.2d 320, 325 (5th Cir. 1989).
show that its project is the most economical means of meeting effluent and water quality goals in a specific geographic area.131

Before any grant is given, there are complex procedures which must be followed, including certification of the project by the States, and a determination by the State that the project has priority over other works within the State.132 Furthermore, the applicant must submit to the EPA, or its delegate, a completed facilities plan, which includes an environmental impact statement and cost effectiveness analysis.133 The purpose of the cost-effectiveness analysis is "to determine which waste treatment management system or component part will result in the minimum total resource costs over time to meet Federal State or local requirements."134 Such projects would include, but are not limited to, construction, operation, maintenance and replacement costs. Furthermore, the EPA must establish that the applicant has agreed to pay the non-federal costs of the project and has made adequate provision for assuring proper and efficient operation of the facility in accordance with a plan of operation approved by the State Water Pollution Control Agency.135 The EPA must also determine that the size and capacity of the POTW relates directly to the needs served by the POTW, including sufficient reserve capacity, and that no specification for bids in connection with the POTW has been drafted in a manner as to contain proprietary, exclusionary, or discriminatory requirements.136 In short, only when an application is made to the EPA, the State certifies the project as having priority, and the EPA approves the application after the applicant has followed the required procedures, can funding be obligated.137

Under Title II, funds are available to be obligated for one year. If there are any unobligated funds at the end of the fiscal year, then the EPA is required to reallocate the funds.138 While the funds are reallocated, the EPA is barred from issuing the funds back to the State which did not use the funds earlier.139

131City of Mount Clemens, 917 F.2d at 910 n.3; City of Garland, 870 F.2d at 325.
133City of Mount Clemens, 917 F.2d at 910 n.3 (citing 40 C.F.R. § 35.917).
134Id. (citing 33 U.S.C. § 1298(b)).
135United States v. City of Detroit, 720 F.2d 443, 446 (6th Cir. 1983).
136Id.
137Id.
138Id. at 446-47 (citing 33 U.S.C. § 1285(b)(1)).
139Id. (citing 40 C.F.R. § 35.2010(b)).
B. Municipal Liability Under the Clean Water Act

1. Background

With nearly two-thirds of the large POTWs violating the Clean Water Act, establishing the liability of municipalities has been relatively simple since the Clean Water Act is a strict liability statute.\(^{140}\) A violation of the Act occurs when (1) a municipality "(2) discharges a pollutant (3) into navigable waters (4) through a point source (5) while not in compliance with the provisions of the Act, including NPDES permit standards."\(^{141}\) While good faith efforts\(^{142}\) and willingness to comply\(^{143}\) with the Act are relevant when assessing the amount of civil penalties, they are irrelevant when establishing liability.\(^{144}\) In other words, courts believe for purposes of liability "[e]xcuses are irrelevant; under the Act the party must either achieve the discharge levels it has been allowed, or pay the consequences of its discharge, or stop discharging."\(^{145}\)

As stated earlier, the NPDES permit program provides an exception to the general pollution prohibition, allowing those with permits to discharge wastewater, within prescribed effluent limitations, directly into navigable waters.\(^{146}\) "An NPDES permit is not a contract, rather it is a legally enforceable rule drafted by a regulatory agency. As such, it is akin to any agency regulation or rule, which a court would normally interpret."\(^{147}\) Section 1311(a) of the CWA, however, clearly states that discharging without, or in violation of, a permit is a violation of the Act.\(^{148}\)


\(^{143}\)See supra note 142.

\(^{144}\)See supra note 142.


Establishing such a violation is very basic. For example, while the discharge monitoring reports are public records, they may also be used to establish liability. A violation of a monthly or weekly average permit limitation constitutes a violation of each day of the relevant month or week. This is true even if a violation is technical or insignificant in nature. Thus, most prosecutors can meet their prima facie burden with very little effort.

When an action is brought against a municipality for violating the Clean Water Act, the State is joined as a party defendant. As joined, the State is liable for any judgment or expenses a municipality is prevented by state law from being able to pay. In federal court, States cannot bring actions against municipalities for violating the CWA, either as a "person" or "citizen" as defined in the Act. If state law allows, however, the State may assert a claim in state court.

Like the State, the EPA's role is extremely limited when a violation of the CWA is alleged. The Act imposes a non-discretionary duty on the EPA to take action to prevent permit violations, including issuing compliance orders by the Administrator and filing civil lawsuits. Thus, the EPA may not have any authority to avoid moving against a municipality if the municipality violates its permit. Moreover, in assessing liability, courts are not bound by internal


149 See supra note 18 and accompanying text.


154 Id.


156 Id. at 529.


158 City of Hoboken, 675 F. Supp. at 199.
EPA documents,\textsuperscript{159} nor will they consider the fact that the EPA is partly responsible for the failure.\textsuperscript{160} In essence, the liability net against a municipality for violating the Clean Water Act is extremely wide.

There are, however, two instances worth noting in which municipalities may avoid liability when the terms and conditions of the permits are violated. The "upset" regulation temporarily forgives non-compliance due to extraordinary circumstances.\textsuperscript{161} An upset is defined as "an exceptional incident in which there is unintentional and temporary non-compliance with technology based permit effluent limitations because of factors beyond the reasonable control of the permittee."\textsuperscript{162}

An upset does not include non-compliance to the extent that the non-compliance was caused by operation error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance or careless or improper operation.\textsuperscript{163} There are detailed notice requirements which the permittee must establish to meet the definition of upset.\textsuperscript{164} These requirements include 1) notifying within 24 hours the EPA of the upset, and 2) providing a written follow-up notice within five days specifying a) the date and time of the upset b) the reasons for the upset; and c) the steps that have been or will be taken to correct the problem.\textsuperscript{165}

The burden of proof for establishing an upset is on the permittee.\textsuperscript{166} By placing the burden of proof and the responsibility to comply with the extensive notice requirements on the permittee through regulations, the EPA sought to ensure that "prosecution for permit violations be swift and simple."\textsuperscript{167} The swift and simple prosecution approach was sought by the EPA to avoid long, drawn-out inquiries into the causes of the violations.\textsuperscript{168}

\textsuperscript{160}City of Hoboken, 675 F. Supp. at 200.
\textsuperscript{162}Id. (citing 40 C.F.R. § 122.41(n)(1)).
\textsuperscript{163}Id.
\textsuperscript{164}Id. (citing 40 C.F.R. § 122.41(n)(3)(iii)).
\textsuperscript{165}Id. (citing 40 C.F.R. § 122.41(a)(6)(ii)(B)).
\textsuperscript{166}Metropolitan Dist. Comm’n, 23 Env’t Rep. Cas. (BNA) at 1359 (citing 40 C.F.R. § 122.41(n)(4)).
\textsuperscript{167}Id. at 1360 n.11; 44 Fed. Reg. 32, 863 (1979); 40 C.F.R. Part 403.
\textsuperscript{168}Metropolitan Dist. Comm’n, 23 Env’t Rep. Cas. (BNA) at 1360 n.11.
The rules for an "upset" defense for pretreatment violations are similar but not identical to the upset regulations for an NPDES permit violation. Upon becoming aware of a violation, the discharger notifies the POTW, not the EPA, of the violation within 24 hours. The discharger must also repeat the sampling within 30 days. All "dischargers must 'promptly notify the POTW in advance of any substantial change in the volume or character of pollutants in their discharge.'" If this discharger notifies the POTW of the occurrences mentioned herein as required by the pretreatment regulations, then it may become the responsibility of the POTW to inform the EPA or the delegated state agency of the change of conditions. If the POTW fails to report these changes, then the POTW could be held liable for violating the Act. Furthermore, if an inhibition or disruption of the POTW is caused not by the discharge of the industrial user but by a mistake or malfunction at the POTW, then the POTW may be held liable for the inhibition or interference.

Congress has also provided a second means by which municipalities can avoid liability without complying with a traditional NPDES permit. In 1977, Congress amended the Act with section 301(h), to include, in certain extraordinary circumstances, a waiver from secondary treatment for municipalities discharging from deep ocean outfalls. The Act only allows waiver permits in very limited circumstances which the EPA has regulated to process the Section 301(h) waivers. Moreover, the EPA must make several factual findings before a waiver can be granted. Once the EPA recommends that a waiver be granted, the decision can be appealed and the EPA cannot issue the waiver until a detailed appeal and hearing process has been completed.
In short, attempting to gain a waiver under Section 301(h) could be a very long, drawn-out process.

2. Citizen Suits

Federal, state and local agencies are not the only group of individuals that may bring an enforcement action against municipalities for violating the Clean Water Act. Section 505 of the Act allows suits in the absence of either federal or state prosecution under the CWA or a comparable state statute.\(^{180}\) In other words, if the federal government or a State is diligently pursuing a claim under the CWA or comparable state law, a citizen suit cannot be brought.\(^ {181}\) Moreover, if an action is brought by the federal or a state government, no citizen suit can be brought, for any purpose, including even if its only purpose is to seek

\(^{180}\) 33 U.S.C. § 1365(a) & (b) (Supp. 1993) states:
(a) Authorization; jurisdiction. Except as provided in subsection (b) of this section . . . any citizen may commence a civil action on his own behalf—
(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319 of this title.
(b) Notice. No action may be commenced—
(1) under subsection (a)(1) of this section—
(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or
(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.
(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316 and 1317(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.


injunctive relief. The bar on citizen suits when the government is pursuing an enforcement action implies that citizen suits are meant to supplement rather than to supplant government action. The Senate report on the CWA acknowledged that "the Committee intends the great volume of enforcement actions to be brought by the State, and that citizen suits are proper only if the federal, state and local agencies fail to exercise their enforcement responsibility." If the federal or state government fails to diligently pursue the action, then irrespective of whether there is a consent decree or even a court action, a citizen suit may be brought.

Citizen suits may be brought only for a violation of a permit condition which is in effect under the Act. Before a suit may be instituted, the citizens filing the suit must give notice to the alleged violator, the EPA, and the State in which the alleged violation occurred. If the EPA or the State fails to commence an enforcement action within 60 days, then a citizen suit may be filed. The suit, however, must allege that there is an ongoing violation and that he or she has standing to raise the ongoing violation. A citizen plaintiff may establish ongoing violations two ways: 1) by proving violations that continue on or after the date the complaint is filed, or 2) by producing evidence that a trier of fact could reasonably find a continuing likelihood of a recurrence in intermittent or sporadic violations. Ongoing violations do not cease to be ongoing until the date there is no real likelihood of repetition. To establish standing, the citizen plaintiff must show that: 1) he personally suffered some actual or threatened injury as a result of the illegal conduct of the defendant; 2) the injury can be traced to the alleged actions; and 3) the citizen plaintiffs are likely to be redressed by a favorable decision. If the citizen plaintiffs prevail, they may


184 New York Coastal Fisherman's Ass'n., 772 F.Supp at 168, see also Mumford Cove Ass'n v. Town of Groton, 640 F. Supp. 392, 396 (D. Conn. 1986) (noting that a state modifying order after withdrawing action is not diligently pursuing).

185 Gwaltney of Smithfield, Ltd., 484 U.S. at 59 (citing 33 U.S.C. § 1365(f)).

186 Gwaltney of Smithfield, Ltd., 484 U.S. at 59 (citing 33 U.S.C. § 1365(b)(1)(B)).

187 Id.


189 Chesapeake Bay Found., 844 F.2d at 171-72; City of Waskom, 754 F. Supp. at 1110.

have an injunction granted and civil penalties assessed.\textsuperscript{191} They may also recover attorney fees.\textsuperscript{192}

\textbf{C. Imposition of Civil Penalties on Municipalities Who Fail to Comply with Their National Pollutant Discharge Elimination System Permits}

Without the necessary grant funding, one would suspect that the EPA and even citizen groups would be rather lenient on municipalities and attempt to work with them instead of trying to usurp massive civil penalties from the municipalities. While in some instances this does occur,\textsuperscript{193} this is the exception rather than the rule.\textsuperscript{194} It appears that the reason these groups seek civil penalties is deterrence.\textsuperscript{195} In other words, "[t]he purpose of the civil penalty is not to generate revenue. Rather, the penalty is punitive in nature, serving the purposes of both retribution and deterrence, in addition to restitution."\textsuperscript{196} Consequently, EPA citizen groups, and even some courts, believe that penalty must be high enough so that the discharger cannot "write it off" as an acceptable environmental trade-off for doing business.\textsuperscript{197}

"Congress has established a clear statutory scheme for courts to determine appropriate penalties for violations of the Clean Water Act. Section 309(d) of the Act provides a two-step process for courts to use in setting the appropriate civil penalty. First, [the] court is to calculate the maximum penalties that can

\begin{itemize}
\item \textsuperscript{191}\textit{Gwaltney of Smithfield, Ltd.}, 484 U.S. at 59; New York Coastal Fisherman’s Ass’n v. New York City Dept. of Sanitation, 772 F. Supp. 162, 165 (S.D.N.Y. 1991).
\item \textsuperscript{192}Atlantic States Legal Found. v. Tyson Foods, Inc., 897 F.2d 1128, 1142-43 (11th Cir. 1990); 33 U.S.C. § 1365(d)(1988).
\item \textsuperscript{193}United States v. Winchester Mun. Utils., 944 F.2d 301 (6th Cir. 1991). In \textit{Winchester Municipal}, the United States offered to settle for $40,000 in civil penalties notwithstanding the fact that the statutory maximum in penalties exceeded $50 million. Later, the government reduced its civil penalty proposal to $10,000. \textit{Id.} at 303.
\item \textsuperscript{194}Cf. \textit{Proffitt v. Lower Bucks County Joint Mun. Auth.}, No. CIV.A. 86-7220, 1988 WL 48552 (E.D. Pa. May 12, 1988), \textit{rev’d}, 877 F.2d 57 (3d Cir. 1989). In \textit{Proffitt} plaintiffs sought a penalty of $4,837,025 for violations of the Act between January 1, 1983 to January 31, 1987. The court, however, refused to impose any type of civil penalty. In doing so Judge Newcomer stated: I do not make this determination lightly. While the court acknowledges the serious nature of the Authority’s violations and the continuous history of the violations, the court finds very persuasive both the lack of an economic benefit from non-compliance and the Authority’s good faith efforts to comply with its permit. \textit{Id.} at 9.
\item \textsuperscript{195}Hawaii’s Thousand Friends v. City & County of Honolulu, 821 F. Supp. 1368, 1394 (D. Haw. 1993).
\item \textsuperscript{197}Hawaii’s Thousand Friends, 821 F. Supp. at 1394; PIRG v. Powell Duffryn Terminals, Inc., 720 F. Supp. 1158, 1166 (D.N.J. 1989) ("[A] civil penalty must be high enough to insure that polluters cannot simply absorb the penalty as a cost of doing business.").
\end{itemize}
be awarded against a violator of the Act."\textsuperscript{198} In calculating the maximum amount of civil penalties that could be assessed, the court must: "(1) determine the categories of violations; (2) add up the number of daily violations in each category; (3) total the violations for each category; and (4) multiply this total by $25,000."\textsuperscript{199}

"Second, by using the maximum penalty as a guideline, the court is to set the actual penalties by analyzing the specific statutory factors."\textsuperscript{200} Section 309(d) uses a six-pronged test in assessing civil penalties:

1. The seriousness of the violation or violators;
2. The economic benefit, if any, resulting from the violation;
3. Any history of such violation;
4. Good faith efforts to comply with applicable requirements;
5. Economic impact of the penalty on the violation; and
6. Other matters as Justice may require.\textsuperscript{201}

While courts have differed on whether civil penalties are mandatory,\textsuperscript{202} the courts are uniform in determining that the amounts to be assessed are left to the discretion of the court.\textsuperscript{203} That is because Congress' use of the words "shall consider" suggests that in arriving at a dollar figure for penalties, the court is to take into consideration each listed factor as well as any additional factors the court believes has a bearing on the question of penalties.\textsuperscript{204} The intent and purpose of allowing courts to impose penalties is to better serve the underlying purpose of voluntary compliance by municipalities.\textsuperscript{205} If the court chooses not to impose the maximum penalty, "it must reduce the fine in accordance with the factors spelled out in [the Act], clearly indicating the weight it gives to the factors in the statute and the factual findings that support its conclusion."\textsuperscript{206}

For example, if the facts and circumstance warrant, courts can exercise its

\textsuperscript{198}Hawaii's Thousand Friends, 821 F. Supp. at 1395.
\textsuperscript{199}Id.
\textsuperscript{200}Id.; see also Atlantic States Legal Found. v. Tyson Foods, Inc., 897 F.2d 1128, 1142 (11th Cir. 1990).
\textsuperscript{203}See supra note 202.
\textsuperscript{204}Tyson Foods, Inc., 897 F.2d at 1142.
\textsuperscript{205}Town of Wallkill, 572 N.Y.S.2d at 760.
discretion by imposing a nominal penalty of $1 or less per day per violation.\textsuperscript{207} A nominal penalty such as this could be imposed where the violator acted in good faith to voluntarily comply with the relevant requirements, but was frustrated through no fault of his own by events which left him no alternative but to violate the Act.\textsuperscript{208} Similarly, "ability to pay and litigation considerations are included in the factors to be considered in arriving at a just and equitable decision."\textsuperscript{209}

V. WHY THE CURRENT MUNICIPAL LIABILITY SCHEME UNDER THE CLEAN WATER ACT IS A FAILURE, AND WHAT STEPS ARE NECESSARY TO ACHIEVE MAXIMUM COMPLIANCE BY MUNICIPALITIES

A careful review of municipal liability under the Clean Water Act reveals one startling fact: the Act as it now exists is a failure. The CWA is a failure not because of the pretreatment regulations or effluent limitations set by the EPA. Those standards are based upon technological and statistical scientific analyses. Moreover, the standards set were subject to review and comment procedures leading up to establishment of the regulations.\textsuperscript{210} Similarly, the CWA is not a failure because of the liability it imposes. As a matter of fact, with nearly two-thirds of the POTWs failing to comply with the CWA, it is readily admitted that something must be done to correct the system's deficiencies. Furthermore, the Act does not fail because it allows citizen suits. Citizen suits are nothing more than a back-up to the state and federal government enforcement mechanisms. If the government fails to take appropriate action, citizens who will be affected by a municipality's noncompliance can take action to protect their rights. Where the act fails is with the right\textsuperscript{211}—and according to some courts, the obligation\textsuperscript{212}—of the courts to assess civil penalties against the municipalities.

Civil penalties assessed against municipalities do not accomplish the goals they seek to achieve. The purpose of assessing civil penalties against municipalities is to punish them for violating the CWA, and to deter others from doing the same.\textsuperscript{213} Yet, in seeking to punish municipalities who violate the Act, and attempting to deter others, an erroneous assumption is made. Namely, that most municipalities have the ability to control and ultimately change their noncompliance status. Unfortunately, without the necessary

\textsuperscript{207}Town of Wallkill, 572 N.Y.S.2d at 760.
\textsuperscript{208}Id.
\textsuperscript{210}Mumford Cove Ass'n v. Town of Groton, 640 F. Supp. 392, 394 (D. Conn. 1986).
\textsuperscript{211}See supra note 202.
\textsuperscript{212}Id.
\textsuperscript{213}See supra note 196.
funding from the government or private sources, municipalities often lack adequate funding to correct the problem at a POTW. Municipalities are different from private parties. The treatment of the wastewater for municipalities is essential. The essence of the relevant difference between municipalities and private parties is that municipalities cannot shut-off the publicly owned treatment works to stop the civil penalty clock from ticking. If they do, then the health of the municipalities' citizens would be jeopardized. Such an action would be in direct conflict with the purpose of the Act which is to protect the health and welfare of its citizens.

Many supporters of issuing civil penalties against municipalities who violate the CWA would argue that the violations have occurred because of the municipalities' refusal to seek adequate grant funding. Unfortunately, this is not necessarily true. The grant program as a whole has been extremely ineffective in helping POTWs meet effluent limitations. The reason is that the money authorized has been grossly inadequate.\(^{214}\) Moreover, disbursements of the authorized funds have been substantially delayed and decreased by Presidential and Congressional activities. For example, in 1972 when the Amendments were passed, they were passed over President Nixon's veto. Nixon subsequently authorized "no more than $2 billion of the [$5 billion] authorized for the fiscal year 1973, and no more than $3 billion of the [$6 billion] authorized for fiscal year 1974."\(^{215}\)

In 1987, the CWA was amended by the Water Quality Act.\(^{216}\) The Act only authorized $18 billion over nine years for the construction of municipal treatment systems.\(^{217}\) Equally important is the fact that the 1987 Amendments sought to phase-out federal assistance for municipal wastewater treatment plant construction. The grant program was only reauthorized through fiscal year 1990 for a total of $9.6 billion.\(^{218}\) After that, the grant program was replaced by an $8.4 billion program through fiscal year 1994 that would provide seed money for states to establish a permanent state run revolving loan funding programs. The revolving fund program requires states to contribute funding and does not give money to municipalities. It only permits municipalities to apply for low interest loans for the construction of sewage treatment systems.

In short, a drastic, new, financial burden is now placed on municipalities to find adequate funding to correct any problems associated with the POTWs.\(^{219}\)

---

\(^{214}\) State Water Control Bd. v. Train, 559 F.2d 921, 924 (4th Cir. 1977).

\(^{215}\) *Id.* at 924 n.18.


\(^{217}\) *Id.*

\(^{218}\) *Id.*

\(^{219}\) *Id.* Even with this heavy burden now being placed on municipalities, the Reagan Administration thought that the burden was not heavy enough. It proposed limiting grant construction authorizations to $6 billion with all federal funding for local construction to be terminated after fiscal year 1989. Mary J. Hounston, *The Clean Water Act Amendments of 1987*, BNA SPECIAL REPORTS (1987).
"These problems, together with the fiscal difficulties now confronting most State and local governments, [will make] it economically impossible for many localities to accomplish effluent reductions. Consequently assessing any type of civil penalty against municipalities under these conditions is counter-productive.

VI. HOW THE CRITERIA SET FORTH IN SECTION 309(d) POINTS TO NO CIVIL PENALTIES BEING ASSESSED AGAINST MUNICIPALITIES

In reviewing the criteria set forth to assess civil penalties against municipalities for violating the CWA, there is strong support for refusing to assess any civil penalty for such violations. First, courts must recognize that POTWs are not commercial or private entities operating for profit, but rather are public facilities run by public members of the community attempting to serve the community's needs. Consequently, the decision-making may not be as profit oriented as would be the case with a commercial or private entity. Second, with grant funding being virtually eliminated—the cities with the largest problems—those that have the lowest per capita incomes—would be adversely affected by a civil penalty. Fortunately, many courts have recognized the burden that would be placed on the taxpayer if a municipality was hit with a civil penalty. Some courts have simply refused to assess any penalty. As the Proffitt v. Lower Bucks County Joint Municipal Authority decision noted:

Because the defendant in this action is a municipal authority, any penalty imposed by this court would fall squarely on the taxpayers in the Authority's geographic region comprised of the blue collar town of Levittown, populated by persons with lower than average incomes and also characterized by a higher than average unemployment rate. Although it remains a distinct possibility, the imposition of a civil penalty should be carefully scrutinized because of its impact on the Authority's service areas residents.

Even in cases where there is not a real economic impact on the city, courts have still decided, in some instances, to carefully assess setting civil penalties for the same reasons as outlined in Lower Bucks County Joint Municipal Authority. Specifically, some courts have recognized the catastrophic effect such penalties

220State Water Control Bd. v. Train, 559 F.2d 921, 924 (4th Cir. 1977).
223Id.
224Id.
225Id.
226Id.
would have on the taxpayers. For example, in the case of United States v. City of San Diego, the court held:

[t]he city is not pleading poverty and has not stated that it is unable to pay the amount requested by plaintiffs. However, insofar as plaintiffs' request would represent a transfer of wealth from the residents of San Diego to the federal treasury, the court is concerned that the only victims in this case will be those residents. In addition, regardless of the penalties imposed, the proposed consent decree, if accepted, will create significant financial burdens for the City and those burdens will surely be passed on to the citizenry.

The civil penalty does nothing more than take money away from municipalities, which in many instances is already scarce, and lines the pockets of the U.S. Treasury. The United States has cut its funding for municipal sewage treatment facilities while at the same time it seeks inordinate civil penalties for violating the CWA. In essence, the United States is serving as a mirror image of Robin Hood by robbing the poor to feed the rich. It is inconceivable that such an action conforms with the goal or the intent of the Clean Water Act, to reduce effluent limitations.

Finally, one point should be made about the so-called economic benefit that municipalities have received as a result of their non-compliance. For example, in City of San Diego, the court found that "the City has saved in excess of $300 million dollars over approximately the last thirty years by failing to invest in capital improvements. Residents living here in those years earned 'dividends' in the form of lower sewer rates." However, if a careful analysis is conducted on most municipal projects, it will probably show that waiting to correct the problem is going to cost the municipalities much more in today's dollars than the money saved. Thus, the economic benefit argument also has little or no merit when determining whether to assess civil penalties against municipalities.

There is one argument that has been made by both citizen groups and the United States that has some validity regarding municipal liability under the CWA. POTWs must be brought into compliance with the CWA. However, one does not use a hammer to kill a fly on a glass window, for the hammer's use probably causes far more damage than the fly itself. The same is true with instituting civil penalties against municipalities. There are simply other less confrontational ways of bringing municipalities into compliance.

Instead of seeking civil penalties, courts could provide injunctive relief which would include a strict compliance schedule. Part of the compliance schedule could include how the upgrading of the POTW is to be funded. The court could also order periodic status conferences to insure that the compliance schedule and the funding needs have been met. If the municipality and the federal government or citizen plaintiffs are unable to agree on the compliance schedule or the funding mechanism necessary to upgrade the POTW, then the court can order the parties to submit a proposed plan along with memorandum and points of authority supporting each side’s argument. The court may then decide to choose one plan over the other, to support a combination of both, or to create a plan of its own.

If the municipality fails to meet the allotted timeframes, or the municipality is unable to secure funding with the allotted timeframe, then the court could order some type of sanction. The sanction, however, should not be a civil penalty. Instead, the court should consider appointing a receiver or trustee that will ensure that the municipality will take the appropriate steps to upgrade or retrofit the POTW.231 By appointing a receiver, the court, not the municipality, has control over the POTW. Moreover, the court gains control without depriving the municipality of any of the funding necessary to correct the problem. Such funds might not be available to the municipality which has been hit with a civil penalty. It should be noted that if it is determined that a civil penalty is mandatory, then the penalty should be small enough and quite possibly suspended so as not to take funding away from the POTW.

VII. CONCLUSION

To provide funding for bringing municipal POTWs into compliance with the Clean Water Act, exposure to civil penalties for violating the Act increases. This leaves both municipalities and the federal government in a quandary as to how to solve the problem of POTW non-compliance. Based upon the statistics noted earlier,232 it appears that the problem faced by municipal POTWs is far greater than the Act, when passed, ever contemplated. Moreover, by concentrating on the aspect of civil penalties, rather than fixing the so called problem, litigation in many cases has lasted much longer than necessary. By eliminating the fight over civil penalties, litigation time is reduced dramatically, since the only fight would be over how the POTW would be brought into compliance and the funding mechanism used to achieve compliance. In requiring both parties to submit a plan and the court’s choosing the best plan possible, litigation is reduced even further. The effect of all of this is that what little money the municipality has would be put towards the POTW, not to lawyers or to line the

231 For example, in United States v. City of Detroit, 476 F. Supp. 512 (E.D. Mich. 1979), the court appointed the Mayor of Detroit as the Administrator of the waste-water system. "[The court] empower[ed] and instruct[ed] him to obtain immediately the full-time services of an executive assistant, responsible only to him, to carry out this mandate." Id. at 520.

pocket of the U.S. Treasury. This appears to be the ultimate goal behind the Clean Water Act.