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CITIZEN SUITS AND THE ENVIRONMENT
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CITIZEN SUITS AND THE ENVIRONMENT
*A monograph of the presentation delivered at the 1996
Warren M. Anderson Legislative Breakfast Series*

MARCH 12, 1996

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Albany Law School

The Garden Room
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WARREN M. ANDERSON

Warren M. Anderson is a distinguished alumnus of Albany Law School, and an active member of the Government Law Center Advisory Committee. Having served in the New York State Senate for thirty-five years, he is perhaps best known for his leadership during his tenure as President Pro Tem and Majority Leader from 1973 to 1988.

Warren Anderson began his legal career as an Assistant County Attorney in Broome. He then joined the law firm of Hinman, Howard & Kattell where he is currently practicing law. Throughout his career he has received numerous honors and awards.

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In furtherance of its mission to serve as a resource to government at all levels in the resolution of specific problems, the Government Law Center is pleased to present the fifth annual Warren M. Anderson Breakfast Seminar Series. Monthly breakfast programs will feature distinguished professors who will address the legal aspects of a variety of policy issues pending before the Legislature. The seminars are designed to provide access to current legal information on a given topic. The Government Law Center welcomes your suggestions for future programs.

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CITIZEN SUITS AND THE ENVIRONMENT

Presentation by --
Professor David Markell*

Good morning. What I like to do at 8:00 breakfast sessions is start out with a few questions to see if folks are awake and also to give me a sense of where you are in terms of your familiarity with the issues we're going to discuss. I have two sets of questions. First, in terms of your degree of familiarity with citizen suits: How many of you here have a reasonable knowledge of citizens suits? Please raise your hands. Okay, we have a pretty sophisticated crowd. As a follow up question, how many have heard of the *Gwaltney* Supreme Court decision? *Gwaltney* is a famous 1987 U.S. Supreme Court decision that is probably the seminal, the most important, decision coming out of the Supreme Court on citizen suits.

My second set of questions: How many of you have formed a view as to whether citizen suits at the state level are a good idea? About 1/3 of you. Of those of you who have an opinion, how many people are in favor? It looks like most. How many people are opposed? A few.

I've created some overheads for today. They're in your packets so that you can follow along (see **APPENDIX**). Feel free to interrupt anytime and raise questions, make comments, and challenge points in the presentation.

I'll start with what I consider to be some of the key features of citizen suit provisions.

There are at least six of them:

- 1) Standing. The issue of who can sue.
- 2) Types of causes of action. Basically that's the question of the kinds of cases or lawsuits that a citizen can bring--in what circumstances can a citizen sue?
- 3) Notice requirements. What types of notice should citizens be required to give before they bring suit?
- 4) Types of relief available. What kinds of relief should citizens be able to get?
- 5) The relationship between citizen suits and government action. I personally think this is a very difficult issue.
- 6) Attorneys' fees and costs. Under what circumstances should either party, plaintiffs or defendants, be able to recoup the costs associated with litigation?

Issue number one is the issue of standing--who can enforce, who can sue? What I've tried to do in the overheads is to make this as useful as possible at the state level by comparing Assembly Bill 191 with some of the operative provisions at the federal level. In

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terms of standing, the operative language of A.191 is that any person who has suffered or may suffer an injury in fact can sue. Clean Water Act § 505 is the operative provision at the federal level and basically this issue has been litigated quite a bit. What it has come down to at the Federal level is a three-part test that the Supreme Court adopted in 1982 in a case called *Valley Forge Christian College v. Americans United for Separation of Church and State*. The bottom line is you must show: 1) that there's a personal injury; 2) that the personal injury is fairly traceable--that's a key phrase--fairly traceable to the violation; and 3) that the injury will be redressed by a favorable decision. This test as articulated by the Supreme Court applies across the board not only to federal Clean Water Act citizen suits, but to citizen suits under the other federal environmental statutes. Just a couple of observations on the standing issue. It has been litigated quite a bit--there have been a number of Federal Supreme Court cases on this. The second overarching point to leave you with is that standing depends not only on the statutory language, the operative language of A.191 or whatever is passed at the state level, but it also requires a review of constitutional principles because the Constitution limits access to the court system.

The next issue is types of situations in which a suit may be brought. A.191 authorizes citizen suits in two kinds of cases. Number one is against any person for any violation of an order compelling investigation or remediation of a hazardous waste disposal site--for example, the Title 13 program in New York. The second type is for violations of any rule, order, permit, an so on.

Under the federal statutes, the Clean Water Act § 505 also authorizes citizen suits in two situations. One is for any violation of any permit, and the second is for the government's failure to perform what is considered to be a nondiscretionary act--an act that is not discretionary with the administrator.

The Clean Air Act, which was amended in 1990, is the most recent major federal statute we have in this country. Section 304 is a little different from the Clean Water Act § 505, which is why I'm going to run it by you now. Basically § 304 allows citizens to sue any party who is alleged to have violated or who is alleged to be in violation. So, there is a different two-part test in the Clean Air Act for being able to bring a citizen suit. What does this mean? What's the difference between the Clean Air Act and the Clean Water Act? The difference is extremely important and this is where *Gwaltney* comes in. Back in 1987 the Supreme Court of the United States, construing the Clean Water Act, held that citizens can only sue if there's what's called an ongoing violation. The flip side is you can't sue if you're a citizen if the violation is wholly past, if the violation is cured before the lawsuit is filed. Much of the scholarly literature complains about *Gwaltney*. Many commentators don't like the public policy outcome.

It appears from the 1990 amendments to the Clean Air Act that Congress didn't like it either because § 304 broadens the circumstances under which citizens can sue by allowing citizens to sue for past violations as well as for ongoing violations. That's a fairly significant change made by the federal government. The state needs to decide which, if

either, of the two options to adopt. In my view, there's some ambiguity in the current version of A.191. The other big difference concerning types of causes of action is the nondiscretionary duty cause of action. As I mentioned, many federal environmental statutes give citizens the right to sue if the government fails to perform what's called a nondiscretionary act. If Congress passes a law that requires the EPA to put in place some kind of approach by 1995, and the EPA doesn't do that, then this provision of the citizen suit laws allows the citizen to go into court and try to get a court to order the EPA to implement the approach. It's something that citizens have availed themselves of quite a bit in this country under several of the statutes. I saw a report not too long ago that indicated that the EPA has met a grand total of something like 14% of the deadlines Congress has established under the environmental laws. As you can tell, there's enormous opportunity on the part of citizens to bring suits under this provision. Again, one of the differences between A.191 and the federal statutes is that A.191 does not contain a nondiscretionary act cause of action so this is an area where A.191 is narrower in scope than the federal citizen-suit statutes.

Issue number three is notice requirements. Under what circumstances, if any, should citizens be required to notify the alleged violator or the government before the citizen brings suit? A.191 contemplates that the citizens would give sixty-day notice to the government and the alleged violator before they bring suit. There's a caveat, or exception, to that, which is that a citizen has to provide notice but not wait the sixty days if the situation may present an imminent endangerment or hazard to the environment; a common sense approach in my view.

The idea of notice is not new or unique to A.191. Clean Water Act § 505 has the same kind of concept, requiring citizens to provide sixty days notice before they can sue. There is an out for discharge of toxic pollutants. Citizens don't have to wait the sixty days. I've included a reference to RCRA § 7002 just to show you that in fact these kinds of provisions aren't unique to the Clean Water Act. They run through most of the major environmental statutes -- Clean Water, Clean Air, RCRA, EPCRA, and so on. There are citizen suits provisions in most of the major federal environmental laws. Virtually everyone has a sixty-day notice provision or a ninety day notice provision, depending on the statute, and then there is also a provision waiving the notice period under appropriate circumstances.

Another point on the notice provision is that there's a Supreme Court case called *Hallstrom v. Tillamook County*, decided in 1989, that held that strict adherence to notice requirements is required.

There is a threshold public policy issue concerning notice provisions. If we're going to allow citizen suits, should we require notice? There are basically two sides of the argument. One side suggests that we should not require notice. Citizens are acting as "private attorneys general." They're basically not representing private interests but they represent the public. They're standing in the shoes of the public, the shoes of the government. If the government does not have to provide notice, then why should citizens?

The other side of the argument is that citizens are not intended to supplant government enforcement. They're designed to supplement it. Requiring citizens to provide notice to the government gives the government the opportunity to take a look at the case to see if it's significant and to step in if it chooses. That's why notice is a good idea. The other reason that folks have given as to why notice is a good idea is that, especially with the *Gwaltney* test, notice gives the company, an alleged violator, a chance to cure its violation before the lawsuit can start, in which case the violator can essentially stop the lawsuit from happening by being in compliance. So if you've got the ongoing violation issue as part of a framework, as the Clean Water Act does, then the sixty-day notice can serve that function as well.

Issue four is types of relief available. Assembly Bill 191 says that a civil action for injunctive relief or declaratory relief is available. Clean Water Act § 505 gives the court authority to impose injunctive relief and penalties. Penalties go to the U.S. Treasury. This is another of the major differences between the proposed state statute and the federal statute. The federal statute is much broader and is a much more powerful tool for citizens, because it gives citizens the opportunity to seek penalties as part of an enforcement case. A.191 is limited to allowing suits for injunctive relief. Basically injunctive relief involves the idea that a court would order the other party to clean up its act to cure its violations. That would be the sole kind of relief available to citizens under the state law if passed in its current form. That's different than under the Clean Air Act, the Clean Water Act and many other environmental statutes at the federal level, which also provide an opportunity for penalties to be assessed against the violator. This is a big difference, especially if one believes that penalties are an important part of a compliance mix -- that you have to have carrots and sticks, and that penalties have to be a part of the "sticks" involved. This is a significant departure from the federal statute.

The next topic--the relationship between citizen suits and government enforcement--is the most complicated. The federal cases are all over the ballpark. One of the purposes of citizen suits is to put the government on notice that there's a problem so the government can take a look, decide whether government action is appropriate, and, if so, essentially take over the case. Basically, A.191 and the federal statutes give the government a chance to step in earlier to take enforcement action if it feels it's appropriate and thereby preempt citizen suits. I'm not going to go through the actual provisions but they are laid out in your materials. A couple of points: 1) government does have a chance to step in early on after a notice is filed, file suit or enter into a settlement, and thereby preempt the citizen suit. That's one tool associated with both the state bill and the federal bill; 2) with respect to A.191, there is an effort to try to keep the government in the loop as to what's going on in citizen suits, so you don't have citizens going off and doing whatever they want without the government being aware of what's occurring.

Here's the sequence of events. Some citizen groups file a notice of an intent to sue. That's step one. You clearly have citizens who are concerned about these alleged violations and want to be involved in trying to solve them. Step two, the government

decides that this is a case that warrants government involvement because the violations rise to that level of significance, so the government initiates a lawsuit. The question is, government having taken the ball and started to run with it, why should the citizens be involved? And if the citizens are involved, why should the violator continue to negotiate? One response to that would be the idea that the company should be concerned about its neighbors, folks who live in the community, who are potentially concerned about the operations, especially if their level of concern rises to the level of causing them to invest the time and the effort to develop a potential lawsuit. So, if you've got a series of violations, that's allegedly sufficiently significant to warrant not only citizens mobilizing to take action, but also the government beginning to do so. A question is, if I were the company--depending on the circumstances--I might consider arguing, let's bring these guys in. Let's let them know what we're doing to try to solve the problems so we don't have a case where they think we're in cahoots with the government. Let's make it clear to them that here's the situation, here's the cause of the alleged violations, here's what we're going to do to try to solve them and try to come up with a comprehensive settlement that satisfies all parties. People who would be proponents of that view would take the position that that's the enlightened approach the company should take. They shouldn't be trying to isolate themselves from their neighbors. They should be trying to be good neighbors.

Assuming that citizens can be allowed to intervene to play a part, the question is what role should they play? Should they have veto power? I don't think anybody believes that they should. At least I haven't seen anything in the literature to suggest that they should. Oftentimes what will happen is if the parties reach a settlement, they'll have to submit papers to the court explaining basically why the parties think this settlement is a good idea--how it resolves the violations, why it's fair, why it's consistent with state policy, and so on. For better or worse, a lot of settlements don't create the opportunity for people who aren't parties to the case to offer their comments. This is one mechanism that would expand the process. It can, however, delay things. It can slow things down. It can raise impediments. I think it's a balancing of the interests.

Let's assume a citizen has filed notice and then a formal complaint in court before the government has acted. Then the government comes in after the fact and settles the case or begins its own litigation. The question is what happens to the citizen suit? The honest answer is that the courts have not yet figured out the answer. Even the Second Circuit, which is a federal court of appeals that governs New York State, is still trying to sort out what it thinks. Two cases make this point. One is *Atlantic States Legal Foundation v. Eastman Kodak*, a 1991 decision by the United States Court of Appeals for the Second Circuit, basically holding that a DEC settlement operated to moot out or cause a dismissal of a citizen suit. The citizens had filed notice. They also filed suit. DEC came in and settled the case. I was actually involved with that settlement when I was at the DEC, just to put that on the table. The Court dismissed the citizen suit on the basis of the DEC settlement, saying that the DEC settlement was a comprehensive disposition of the issues involved in the citizen suit.

A couple of years later, a second suit came before the court involving Pan American Tanning. The citizens had filed notice. They filed suit. The government is the local government, a publicly owned wastewater treatment plant. The local government entered into a settlement with the company and here the Second Circuit held that the settlement did not warrant absolute dismissal of the citizen suit. Instead it held that the injunctive part of the case is moot, but it allowed the penalty part to go forward. So, here we've got the same court basically in a two-year period, and the court distinguished the previous decision based on the facts. These cases show that there's a continuing debate within the judiciary as to the appropriate relationship between citizen suits and government.

The last issue I want to discuss is attorneys' fees. Assembly Bill 191 contains four points or principles: 1) it allows courts to award costs and reasonable attorneys fees to any prevailing or substantially prevailing party; 2) it limits that amount to \$10,000 if it's the defendant that prevails; 3) it indicates that, to secure its costs, the defendant must establish that the plaintiff's case was frivolous; and 4) it creates an exception for state government-- basically saying that no attorneys' fees will be awarded against the state.

The Clean Water Act authorizes the court to award costs and reasonable attorney fees to any prevailing or substantially prevailing party. One big issue that has been litigated is the definition of "prevailing or substantially prevailing" party. In the *Kodak* case, the Atlantic States Legal Foundation brought suit, and then DEC entered into a settlement. The court dismissed the citizen suit but it held that the citizens were substantially prevailing parties and therefore entitled to their attorney fees because the court presumed that it was the initiation of the citizen suit that at least partially caused the DEC to go forward with the settlement. The court construed "substantially prevailing" fairly broadly, fairly liberally in that case. The other issue is the definition of reasonable attorneys' fees. There's a 1992 U.S. Supreme Court decision on this called *City of Burlington*. The Court held that reasonableness should be defined in terms of hourly rates, rather than allowing for contingency fee-type recoveries.

Let me conclude by mentioning two books on citizen suits that I think are very helpful. One is by Michael Axline, a professor in Oregon. The second one is written by Jeff Miller, a professor at Pace. Both individuals have long-standing experience in the area of citizen suits and they walk through the elements fairly comprehensively. If you are interested in getting a more sophisticated and elaborate gloss on the different issues, you may want to review these books. Thanks for your time.

APPENDIX

I. COMMON FEATURES OF CITIZEN SUIT PROVISIONS

- A. STANDING: WHO CAN SUE?
- B. TYPES OF CAUSES OF ACTIONS
- C. NOTICE REQUIREMENTS
- D. TYPES OF RELIEF AVAILABLE
- E. RELATIONSHIP BETWEEN CITIZEN SUITS AND GOVERNMENT ENFORCEMENT ACTIONS [PERHAPS THE MOST COMPLICATED ASPECT OF THE CITIZEN SUIT ISSUE UNDER FEDERAL LAW].
- F. ATTORNEY FEES AND COSTS

II. WHO CAN ENFORCE (STANDING)

- A. A.191: "ANY PERSON WHO HAS SUFFERED OR MAY SUFFER AN INJURY IN FACT, REGARDLESS OF WHETHER SUCH INJURY IS DIFFERENT IN KIND OR DEGREE FROM THAT SUFFERED BY THE PUBLIC AT LARGE,
- B. CWA § 505: "ANY CITIZEN ..."
 - 1. THE VALLEY FORGE TEST REQUIRES "THE PARTY WHO INVOKES THE COURT'S AUTHORITY TO 'SHOW THAT HE PERSONALLY HAS SUFFERED SOME ACTUAL OR THREATENED INJURY AS A RESULT OF THE PUTATIVELY ILLEGAL CONDUCT OF THE DEFENDANT,' ... AND THAT THE INJURY 'FAIRLY CAN BE TRACED TO THE CHALLENGED ACTION' AND 'IS LIKELY TO BE REDRESSED BY A FAVORABLE DECISION....'" VALLEY FORGE CHRISTIAN COLLEGE V. AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, 454 U.S. 464, 472 (1982).
 - 2. BOTTOM LINE: THREE-PART TEST: 1) PERSONAL INJURY; 2) FAIRLY TRACEABLE TO THE VIOLATION;
 - 3. INJURY WILL BE REDRESSED BY A FAVORABLE DECISION.
- C. OBSERVATIONS: STANDING DEPENDS ON MEETING THE RELEVANT STATUTORY CONDITIONS. THE CONSTITUTION CONTAINS LIMITS ON STANDING THAT A PROSPECTIVE PLAINTIFF MUST MEET AS WELL.

III. TYPES OF SITUATIONS IN WHICH SUIT MAY BE BROUGHT

- A. A.191: "AGAINST ANY PERSON FOR ANY VIOLATION OF AN ... ORDER COMPELLING THAT PERSON TO INVESTIGATE OR REMEDIATE AN INACTIVE HAZARDOUS WASTE DISPOSAL SITE ..., OR FOR A VIOLATION OF [RULES, PERMITS, ORDERS, ETC.] ...ISSUED [UNDER SEVERAL TITLES OF THE ECL].
 - 1. EXCEPTION: "NO ACTION MAY BE BROUGHT AGAINST THE STATE OR ANY OF ITS ... POLITICAL SUBDIVISIONS EXCEPT IN THEIR CAPACITY AS OWNER OR OPERATOR OF A POLLUTION SOURCE OR AS A PERSON RESPONSIBLE FOR THE INVESTIGATION OR REMEDIATION OF AN INACTIVE HAZARDOUS WASTE DISPOSAL SITE ...
- B. CWA § 505: AGAINST ANY PERSON WHO IS ALLEGED TO BE IN VIOLATION ... OR "AGAINST THE [EPA] ADMINISTRATOR WHERE THERE IS ALLEGED A FAILURE TO PERFORM ANY ACT OR DUTY ... WHICH IS NOT DISCRETIONARY WITH THE ADMINISTRATOR."
- C. CAA § 304: AGAINST ANY PERSON WHO IS ALLEGED TO HAVE VIOLATED (IF THERE IS EVIDENCE THAT THE ALLEGED VIOLATION HAS BEEN REPEATED) OR TO BE IN VIOLATION ..
- D. OBSERVATIONS:
 - 1. THE "GWALTNEY" ONGOING VIOLATION ISSUE: THE STATE PROPOSAL, LIKE THE

FEDERAL CAA, APPEARS TO REJECT THE "GWALTNEY" APPROACH. THAT IS, WHOLLY PAST VIOLATIONS ARE ACTIONABLE UNDER THE PROPOSED CITIZEN SUIT PROVISION. IT'S NOT NECESSARY TO SHOW AN ONGOING VIOLATION FOR THE COURT TO HAVE JURISDICTION TO HEAR THE CASE.

2. THE NONDISCRETIONARY ACT CAUSE OF ACTION: WHILE FEDERAL LAW AUTHORIZES CITIZENS TO SUE THE GOVERNMENT FOR ITS FAILURE TO PERFORM A NONDISCRETIONARY ACT, NO SUCH AUTHORITY APPEARS TO EXIST UNDER THE PROPOSED STATE LAW.

IV. NOTICE REQUIREMENTS

A. A.191: 60 DAYS' NOTICE TO DEC, THE AG, AND THE ALLEGED VIOLATOR REQUIRED AS A CONDITION TO SUIT, EXCEPT THAT THE CITIZEN MAY INITIATE SUIT ANYTIME AFTER GIVING NOTICE IF THE ALLEGED VIOLATION "INVOLVES A SUBSTANTIAL AND IMMINENT HAZARD TO THE ENVIRONMENT."

B. CWA § 505: 60 DAYS' NOTICE TO DEC, EPA, AND THE ALLEGED VIOLATOR REQUIRED AS A CONDITION TO SUIT, EXCEPT THAT THE CITIZEN MAY INITIATE SUIT ANYTIME AFTER GIVING NOTICE IF THE ALLEGED VIOLATION INVOLVES DISCHARGE OF TOXIC POLLUTANTS.

C. RCRA § 7002: 60 DAYS' NOTICE TO DEC, EPA, AND THE ALLEGED VIOLATOR REQUIRED AS A CONDITION TO SUIT, EXCEPT THAT THE CITIZEN MAY INITIATE SUIT ANYTIME AFTER GIVING NOTICE IF THE ALLEGED VIOLATION INVOLVES THE SYSTEM FOR MANAGING HAZARDOUS WASTE.

D. MISCELLANEOUS: STRICT CONSTRUCTION GIVEN TO NOTICE REQUIREMENTS UNDER FEDERAL LAW. SEE E.G., HALLSTROM V. TILLAMOOK COUNTY, 110 S.CT. 304, 310 (1989)(HOLDING THAT NOTICE REQUIREMENTS ARE TO BE STRICTLY CONSTRUED. COURTS MUST DISMISS SUITS FILED WITHOUT PROPER NOTICE).

E. OBSERVATIONS:

1. A THRESHOLD POLICY QUESTION IS WHETHER NOTICE SHOULD BE REQUIRED AS A CONDITION TO INITIATING A CITIZEN SUIT.

a. ON THE ONE HAND, THE GOVERNMENT GENERALLY DOES NOT HAVE TO PROVIDE SUCH NOTICE. CITIZENS ACT AS "PRIVATE ATTORNEYS GENERAL" WHEN THEY BRING CITIZEN SUITS. AS A RESULT, WHY SHOULD THEY BE IN A DIFFERENT POSTURE FROM GOVERNMENT ENFORCERS?

b. ON THE OTHER HAND, MANY COURTS HAVE CONCLUDED THAT CITIZEN ENFORCERS ARE ACTING AS A SUPPLEMENT TO GOVERNMENT ENFORCEMENT, AND THAT THE NOTICE PERIOD SERVES A USEFUL FUNCTION. IT BRINGS POSSIBLE VIOLATIONS TO THE ATTENTION OF GOVERNMENT PERSONNEL SO THAT THEY CAN DECIDE WHETHER OR NOT TO PURSUE THEM. FURTHER, IT PROMOTES COMPLIANCE BY GIVING THE ALLEGED VIOLATOR AN INCENTIVE TO CURE THE ALLEGED VIOLATIONS IMMEDIATELY IN ORDER TO AVOID ENFORCEMENT.

c. THIS QUESTION OF WHETHER OR NOT TO REQUIRE NOTICE FOR CITIZENS BUT NOT FOR GOVERNMENT ENFORCEMENT INVOLVES A FUNDAMENTAL PUBLIC POLICY JUDGMENT.

2. BOTH THE PROPOSED STATE BILL AND THE FEDERAL LAWS DISPENSE WITH NOTICE IN SOME CASES. THE STATE BILL APPEARS TO IMPROVE UPON THE FEDERAL APPROACH HERE. THE STATE BILL MAKES IT CLEAR THAT THE DIVIDING LINE IS WHETHER THE SITUATION PRESENTS AN IMMINENT ENDANGERMENT; IF SO, THE 60-DAY WAITING PERIOD IS WAIVED. THIS SEEMS PREFERABLE TO THE

FEDERAL APPROACHES, WHICH DRAW THE DIVIDING LINE AT DIFFERENT PLACES THAT, IN MY VIEW, MAKE LESS SENSE.

V. TYPES OF RELIEF AVAILABLE

A. A. 191: "A CIVIL ACTION ... FOR INJUNCTIVE AND/OR DECLARATORY RELIEF.

B. CWA § 505: GIVES THE COURT AUTHORITY TO IMPOSE INJUNCTIVE RELIEF AND PENALTIES. PENALTIES GO TO THE U.S. TREASURY.

C. OBSERVATIONS: FEDERAL LAW IS SIGNIFICANTLY BROADER THAN THE PROPOSED STATE LAW IN TERMS OF RELIEF AVAILABLE IN CITIZEN SUITS. FEDERAL LAW AUTHORIZES CITIZENS TO OBTAIN PENALTIES WHILE STATE LAW DOES NOT ALLOW CITIZENS TO RECOVER PENALTIES.

AS NOTED ABOVE, VIEWING CITIZEN SUIT PROVISIONS AS AUTHORIZING CITIZENS TO ACT AS PRIVATE ATTORNEYS GENERAL RAISES THE QUESTION: CONCEPTUALLY, SHOULDN'T CITIZENS "STAND IN THE SHOES" OF GOVERNMENT ENFORCERS? THAT IS, WHY SHOULDN'T CITIZENS ACTING AS PRIVATE ATTORNEYS GENERAL BE ABLE TO SECURE THE SAME RELIEF AS THE ATTORNEY GENERAL?

VI. RELATIONSHIP BETWEEN CITIZEN SUITS AND GOVERNMENT ENFORCEMENT ACTIONS

[PERHAPS THE MOST COMPLICATED ASPECT OF THE CITIZEN SUIT ISSUE UNDER FEDERAL LAW]. A. A. 191: 1) IF, WITHIN 60 DAYS AFTER RECEIVING THE CITIZEN SUIT NOTICE, OR PRIOR TO COMMENCEMENT OF A CITIZEN SUIT, WHICHEVER IS LATER, DEC COMMENCES AND IS ACTIVELY PROSECUTING AN ADMINISTRATIVE ENFORCEMENT ACTION, OR THE AG COMMENCES AND IS ACTIVELY PROSECUTING A CIVIL ENFORCEMENT ACTION RELATED TO THE ALLEGED VIOLATION, THE CITIZEN SUIT IS PREEMPTED.

2) SAME RESULT IF, PRIOR TO INITIATION OF THE CITIZEN SUIT, DEC/AG ENTER INTO AN AGREEMENT WITH THE ALLEGED VIOLATOR SETTING FORTH A COMPLIANCE SCHEDULE TO ELIMINATE THE ALLEGED VIOLATION WITHIN A REASONABLE TIME PERIOD AND THE ALLEGED VIOLATOR COMPLIES WITH THE AGREEMENT.

3) ALL MOTION PAPERS AND OTHER PLEADINGS IN CITIZEN SUITS TO BE PROVIDED TO DEC AND THE AG.

4) STATE INTERVENTION: THE STATE MAY INTERVENE AS A MATTER OF RIGHT IN ANY CITIZEN SUIT.

5) CITIZEN INTERVENTION: A CITIZEN WHO HAS GIVEN NOTICE MAY INTERVENE AS A MATTER OF RIGHT IN ANY ACTION SUBSEQUENTLY COMMENCED BY DEC OR THE AG RELATING TO THE VIOLATIONS ALLEGED IN THE NOTICE.

6) APPROVAL OF SETTLEMENTS: NO CITIZEN SUIT SHALL BE SETTLED EXCEPT UPON APPROVAL BY THE COURT. SIXTY DAYS' NOTICE MUST BE PROVIDED TO DEC AND THE AG, AND NOTICE OF THE PROPOSED SETTLEMENT MUST BE PUBLISHED IN THE ENVIRONMENTAL NOTICE BULLETIN (ENB).

7) APPROVAL OF SETTLEMENTS: A COURT MAY NOT APPROVE A SETTLEMENT IF IT FINDS THAT THE ALLEGED VIOLATOR HAS OFFERED OR PAID MONEY IN EXCESS OF THE COSTS AND REASONABLE ATTORNEY AND EXPERT WITNESS FEES.

8) POST-CITIZEN COMPLAINT GOVERNMENT ACTION: IF, AFTER A CITIZEN HAS COMMENCED SUIT, BUT WITH THE SUIT STILL PENDING, THE ALLEGED VIOLATOR ENTERS INTO A WRITTEN AGREEMENT WITH DEC WHICH SETS FORTH A REASONABLE SETTLEMENT, THE COURT MAY DISPOSE OF THE CASE. THE COURT MAY AWARD APPROPRIATE COSTS AND FEES IN SUCH CIRCUMSTANCES.

B. CWA: 1) "A STATE OF CONSIDERABLE UNCERTAINTY."

- 2) WITHOUT GOING INTO DETAIL, TWO KEY VARIABLES ARE TIMING, AND WHETHER THE GOVERNMENT ENFORCEMENT ACTION IS ADMINISTRATIVE OR CIVIL JUDICIAL.
- 3) THE CWA (§ 505) PROVIDES FOR PREEMPTION IF EPA OR THE STATE "HAS COMMENCED AND IS DILIGENTLY PROSECUTING" A "CIVIL OR CRIMINAL ACTION IN A COURT OF THE UNITED STATES OR A STATE," PRIOR TO INITIATION OF A CITIZEN SUIT.
- 4) IT IS SOMEWHAT LESS CLEAR WHETHER AN ADMINISTRATIVE ENFORCEMENT ACTION COMMENCED PRIOR TO INITIATION OF A CITIZEN SUIT HAS PREEMPTIVE EFFECT. SEE E.G., CWA § 309(G)(6); FRIENDS OF THE EARTH V. CONSOLIDATED RAIL CORP., 768 F.2D 57, 63 (2ND CIR. 1985).
- 5) FOR GOVERNMENT ACTION FOLLOWING INITIATION OF A CITIZEN SUIT, OPEN ISSUES CONTINUE TO EXIST AS WELL. COMPARE ASLF V. EASTMAN KODAK, 933 F.2D 124, 127-28 (2ND CIR. 1991)(HOLDING THAT A GOVERNMENTAL ENFORCEMENT SETTLEMENT FINALIZED AFTER INITIATION OF A CITIZEN SUIT MOOTS A CITIZEN SUIT IF THE SETTLEMENT ELIMINATES ANY REASONABLE PROSPECT OF RECURRING VIOLATIONS) WITH ASLF V. PAN AMERICAN TANNING, 993 F.2D 1017 (2ND CIR. 1993)(HOLDING THAT A GOVERNMENT SETTLEMENT FINALIZED AFTER INITIATION OF A CITIZEN SUIT MOOTS THE INJUNCTIVE RELIEF PORTION OF THE CITIZEN SUIT BUT DOES NOT MOOT THE PENALTY CLAIM).

IX. ATTORNEYS' FEES AND COSTS

- A. A.191: IN ITS DISCRETION, THE COURT MAY AWARD COSTS AND REASONABLE ATTORNEY FEES TO ANY PREVAILING OR SUBSTANTIALLY PREVAILING PARTY.
 1. THE AWARD TO A DEFENDANT IS LIMITED TO A MAXIMUM OF \$10,000.
 2. TO RECOVER ITS COSTS, THE DEFENDANT MUST SHOW THAT THE ACTION WAS FRIVOLOUS.
 3. STATE GOVERNMENT EXCEPTION: NO COSTS, ATTORNEY FEES, ETC. MAY EVER BE AWARDED AGAINST THE STATE.
- B. CWA § 505(D): IN ITS DISCRETION, THE COURT MAY AWARD COSTS AND REASONABLE ATTORNEY FEES TO ANY PREVAILING OR SUBSTANTIALLY PREVAILING PARTY.
- C. OBSERVATIONS:
 1. TWO BIG ISSUES AT THE FEDERAL LEVEL HAVE INVOLVED THE DEFINITION OF "PREVAILING OR SUBSTANTIALLY PREVAILING" AND THE DEFINITION OF "REASONABLE" ATTORNEY FEES.
 2. COURTS HAVE BEEN FAIRLY FLEXIBLE IN ALLOWING CITIZENS TO RECOVER ATTORNEY FEES AS PREVAILING OR SUBSTANTIALLY PREVAILING PARTIES (IN ASLF V. EASTMAN KODAK, 933 F.2D 124 (2ND CIR. 1991), THE COURT PRESUMED THAT A POST-CITIZEN COMPLAINT WITH THE REGULATORS WAS MOTIVATED BY THE CITIZEN SUIT AND, THEREFORE, THE CITIZENS WERE A PREVAILING PARTY).
 3. IN CITY OF BURLINGTON V. DAGUE, 112 S.CT. 2638, 2641-44 (1992), THE SUPREME COURT HELD THAT THE CLEAN WATER ACT DID NOT AUTHORIZE ENHANCING ATTORNEY FEES DUE TO THE RISK OF NON-PAYMENT IF THE CITIZENS DID NOT SUBSTANTIALLY PREVAIL.