Public Participation in State NPDES Enforcement: Questionable Basis, Good Policy

Water pollution control vigilantes were significantly aided by the 1979 Seventh Circuit decision in *Citizens for a Better Environment v. Environmental Protection Agency ("CBE").*[1] The court held that section 101(e) of the Federal Water Pollution Control Act Amendments of 1972 ("FWPCA")[2] requires the Environmental Protection Agency ("EPA") Administrator to provide for citizen participation in the enforcement of state National Pollutant Discharge Elimination System ("NPDES") permits.[3] This determination emerged from a challenge by Citizens for a Better Environment ("Citizens") to the Administrator's approbation of the Illinois NPDES implementation plan.[4] The EPA evaluates state programs according to its guidelines.[5] Because these guidelines failed to require a meaningful role for the public in the enforcement process, the court found the Administrator's approval to be invalid.[6]

Although the authors question the statutory basis for the court's finding, more community involvement in pollution control will probably further the Act's essential purpose—to clean the nation's waters. This note will examine the court's determination, the impact of the decision and the regulations designed to augment the public's enforcement role.

1. 596 F.2d 720 (7th Cir. 1979). The case commonly has been referred to as "CBE" by authorities.

2. 33 U.S.C. §§ 1251-1376 (1976).

3. *Id.* § 1251(e).

4. The Administrator is required to approve state implementation plans if they include all the necessary components listed in the FWPCA at 33 U.S.C. §§ 1314(i)(2), 1342(b) (1976).

5. 40 C.F.R. §§ 124.1-124.135 (1979).

6. The court ruled that the Administrator is required to publish valid guidelines according to 33 U.S.C. § 1314(i)(2) (1976) before approving any state NPDES permit plans. Citizens for a Better Environment v. EPA, 596 F.2d 720, 726 (7th Cir. 1979).

I. THE COURT'S DECISION

A. *The Standard of Review*

In the area of environmental legislation the problem of the proper standard of review[7] has been acute. In many cases, Congress appears to have delegated to the EPA a great deal of rulemaking and quasi-legislative discretion.[8] In addition, EPA action is often subject to special deference because of the courts' comparative lack of technical expertise,[9] and the ambiguity in the

7. In general, actions of agencies entrusted with the duty of administering a federal law receive deferential treatment by the courts. International Brotherhood of Teamsters v. Daniel, 439 U.S. 551, 566 n.20 (1979); Southeastern Community College v. Davis, 442 U.S. 397, 99 S. Ct. 2361, 2369 (1979). This is necessary to some extent under the constitutional doctrine of separation of powers. *See* Note, *Perfecting the Partnership: Structuring the Judicial Control of Administrative Determinations of Questions of Law*, 31 VAND. L. REV. 90, 121-23 (1978) [hereinafter cited as *Perfecting the Partnership*]. It is necessary to some extent so that agencies can have some flexibility in administration. Mourning v. Family Publications Service, Inc., 411 U.S. 356, 369-72 (1975). But, deference does not mean that the courts must shut their eyes completely. *Perfecting the Partnership, supra*, note 7, at 107; Woodward and Levin, *In Defense of Deference: Judicial Review of Agency Action*, 31 AD. L. REV. 329, 335 (1979); Comment, *The Environment: An Agency-Court Battle*, 17 NAT. RES. J. 123, 137 (1977).

For descriptions of circumstances in which agencies are accorded a great deal of deference, *see* Miller v. Youakin, 440 U.S. 125 (1979) (agency prepared the legislation in question); Quern v. Mandley, 436 U.S. 725, 738 (1978) (agency interpretation of statute is consistent with previous interpretations upheld by court); Zenith Radio Corp. v. United States, 437 U.S. 443, 450 (1978) (deference to longstanding—here 80 years—interpretation of statute); Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977) (area of agency expertise); American Horse Protection Ass'n v. United States Department of Interior, 551 F.2d 432 (D.C. Cir. 1977) (Congress delegated broad powers to the administrative agency to decide particular cases).

For descriptions of circumstances in which agencies are not accorded substantial deference, *see* Southeastern Community College v. Davis, 99 S. Ct. at 2369 (normally the court has a duty to interpret statute); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) (court must look to see that agency has taken into account the necessary factors in making its decision); International Brotherhood of Teamsters, 439 U.S. at 566 n.20 (court must look to "the clear meaning of a statute, as revealed by its language, purpose, and history."); Morton v. Ruiz, 415 U.S. 199, 237 (1974) (there will be no deference if the court finds the agency's interpretation contrary to the intent of Congress).

8. Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir. 1976), *cert. denied*, 426 U.S. 941 (1976). The one check the courts are willing to make on this discretion is that they will review agency action to make sure it takes into account a variety of interests. *See generally* Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 530-33 (1974) [hereinafter cited as Leventhal]. *See* note 11, *infra*.

9. Environmental Defense Fund v. EPA, 598 F.2d 62, 82, 90 (D.C. Cir. 1978);

statutes.[10] However, where problems of statutory construction have arisen or the EPA has not taken allegedly substantial interests into account in its rulemaking, the courts have been vigilant.[11]

The Seventh Circuit gave little weight to the EPA's contention that its regulations satisfied the requirements of section 101(e) of the FWPCA[12] or to the argument that the Administrator had acted within the discretion granted to him to promulgate regulations

Weyerhauser v. Costle, 590 F.2d 1011 (D.C. Cir. 1978); Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir. 1976); Natural Resources Defense Council v. Train, 510 F.2d 692, 706 (D.C. Cir. 1975). Commentators approve this trend towards deference in technical matters, which is not often specifically discussed in the cases. Leventhal, *supra* note 8 at 532-33; McGowan, *Reflections on Rulemaking Review*, 53 TULANE L. REV. 681, 688-89 (1979) [hereinafter cited as McGowan]; Sive, *Environmental Decisionmaking: Judicial and Political Review*, 28 CASE W. L. REV. 827, 830-34 (1978) [hereinafter cited as *Environmental Decisionmaking*]; Sive, *Roles and Rules in Environmental Decisionmaking*, 62 IOWA L. REV. 637, 639 (1977) [hereinafter cited as *Roles and Rules*].

10. Train v. Natural Resources Defense Council, 421 U.S. 60, 87 (1976); American Frozen Food Institute v. Train, 539 F.2d 107, 131 (D.C. Cir. 1976). It is of special note that both of these cases involved interpretation of the FWPCA.

11. Weyerhauser v. Costle, 590 F.2d 1011 (D.C. Cir. 1979); International Harvester v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973). Recently, however, the trend has been toward according EPA determinations substantial deference because of the increased knowledge and expertise of the agency in certain areas. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978); American Petroleum Institute v. Knecht, 456 F. Supp. 889 (C.D. Cal. 1978). The commentators have generally approved close scrutiny by the courts, tempered by respect for the EPA's judgment where it has expertise, because of the weighty and possibly irreversible effects of any actions significantly affecting the environment. *See* Leventhal, *supra* note 8, at 530-31; McGowan, *supra* note 9, at 691-93; *Environmental Decisionmaking, supra* note 9, at 827; *Roles and Rules, supra* note 9, at 640; Stewart, *The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons from the Clean Air Act*, 62 IOWA L. REV. 713, 720-21 (1977).

12. Judge Swygert found insufficient the regulations contained in both 40 C.F.R. Part 124 (1979) and 40 C.F.R. § 105.4 (1978). Citizens for a Better Environment v. EPA, 596 F.2d 720, 724, 726 (7th Cir. 1979).

The court referred vaguely to the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5362, 7521 (1976). That statute supports the court's interpretation:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law [and] interpret constitutional and statutory provisions. . . . The reviewing court shall—
>
> (1) compel agency action unlawfully witheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—. . .
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; . . . .

Id. § 706.

"after considering all the relevant factors."[13] It was probably correct to give such little deference to the EPA's interpretation of the statute. The question presented was not of a complex scientific nature and the statute was not so ambiguous as to be uninterpretable. The EPA did not make either of these claims. The mere fact that it could argue a contrary interpretation to that of Citizens[14] is not sufficient to take the question away from the court.

B. *Statutory Analysis*

The most pertinent provisions of the FWPCA[15] are: section 101(e),[16] which states the congressional policy favoring public participation; section 402(b),[17] which outlines the procedures for the transfer of permit-issuing authority from the EPA to the states; and section 304(i),[18] which requires the Administrator to issue guidelines for state implementation plans. Although the public may bring enforcement actions on state permits in federal courts according to the section 505 citizen suit provision,[19] nowhere does the FWPCA specifically create that right in state courts.

Section 101(e) provides that:

> *Public participation in the* development, revision, and *enforcement* of any regulation, standard, effluent limitation, plan, or program *established by the Administrator or any State* under this Act *shall be provided for*, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.[20]

(Emphasis added.)

The court viewed this section as directing the EPA Administrator to devise guidelines for and actively encourage public participation in the enforcement process of state NPDES programs in state courts. The language, however, is susceptible to a different construction in light of the section 505 federal court citizen suit provi-

13. Citizens for a Better Environment v. EPA, 596 F.2d 720, 724 (7th Cir. 1979).

14. The EPA argued that §§ 402 and 304 of the FWPCA contained the exclusive requirements for state NPDES program guidelines. Brief for Defendant at 10, Citizens for a Better Environment v. EPA, 596 F.2d 720 (7th Cir. 1979) [hereinafter cited as Brief for Defendant].

15. 33 U.S.C. §§ 1251-1376 (1976).

16. *Id.* § 1251(e).

17. *Id.* § 1342(b).

18. *Id.* § 1314(i).

19. *Id.* § 1365(a).

20. *Id.* § 1251(e).

sion.[21] It could be viewed as only requiring the Administrator and

21. Section 505 states:

(a) 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 of 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 309 (d) of this Act.

(b) 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 306 and 307(a) of this Act. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c)(1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

(d) The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

(f) For purposes of this section, the term "effluent standard or limitation under this Act" means (1) effective July 1, 1973, an unlawful act under subsection (a) of

the states to encourage and assist public utilization of the right to bring citizen suits in federal courts, by publishing "regulations specifying minimum guidelines" to further use of section 505.[22] It is not unreasonable to assume that Congress contemplated imposing the section 101(e) duty with reference to enforcement mechanisms specifically created elsewhere in the legislation. It is less likely that section 101(e) requires states to create completely new avenues of enforcement, absent some statutory intimations of this intention.

The suggested construction gains credibility when viewed in the context of section 402(b), which details the procedure for transferring permit-issuing and regulatory authority.[23] When any state desires to administer its own NPDES permit program, the governor of that state must submit to the EPA Administrator a complete description of the proposed program. Each plan must include nine components,[24] one of which requires states to have adequate authority "[t]o abate violations of the permit or permit program, including civil and criminal penalties and *other ways and means of enforcement* . . ." (emphasis added).[25] If Congress had intended to mandate citizen participation in all state plans with respect to enforcement it could have easily specified that intent, as it did in a companion provision requiring public notification and participation in state permit application hearings.[26]

section 301 of this Act; (2) an effluent limitation or other limitation under section 301 or 302 of this Act; (3) standard of performance under section 306 of this Act; (4) prohibition, effluent standard or pretreatment standards under section 307 of this Act; (5) certification under section 401 of this Act; or (6) a permit or condition thereof issued under section 402 of this Act, which is in effect under this Act (including a requirement applicable by reason of section 313 of this Act).

(g) For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

(h) A Governor of a State may commence a civil action under subsection (a), without regard to the limitations of subsection (b) of this section, against the Administrator where there is alleged there is a failure of the Administrator to enforce an effluent standard or limitation under this Act the violation of which is occurring in another State and is causing an adverse effect on the public health or welfare in his State, or is causing a violation of any water quality requirement in his State.

33 U.S.C. § 1365 (1976).

22. Following this construction, the Administrator could be attacked to the extent that he has failed to develop such guidelines. *Id.* § 1251(e).

23. *Id.* § 1342(b).

24. *Id.* § 1342(b)(1)-(9).

25. *Id.* § 1342(b)(7).

26. *Id.* § 1342(b)(3).

Section 304(i) directs the Administrator to promulgate minimum program guidelines for state NPDES permit plans.[27] According to this provision, guidelines must include four procedural components, one of which covers "enforcement."[28] Once again there is no mention of public involvement. In contrast, one of the other four components which covers "reporting" specifically provides for "procedures to make information available to the public."[29]

Given the Act's explicit delineation of certain absolute rights of citizens under both sections 402(b) and 304(i), the failure to list other specific citizens' rights, which would arise in the context of these provisions, renders them less than mandatory. Although the Administrator should consider the section 101(e) policy in drafting state program requirements, the exercise of that consideration, in connection with the detailed NPDES delegation procedure, should be discretionary.

C. *Legislative History Analysis*

Because the ambit of public participation is ambiguous in the statute, the court looked to the legislative history of the FWPCA for interpretative guidance.[30] Faltering at this pivotal step, it relied on two flimsy indicia of congressional intent. Although the court's position could have been more authoritatively supported, there is also evidence of a contrary legislative intent. Most apparent, however, is that Congress never contemplated the issue. The over 1,729 pages of legislative history contain no authoritative reference to the application of section 101(e) to the guidelines for state NPDES implementation plans.[31]

The court quoted first from the Report of the House Public Works Committee:

> [T]he Committee has included provision for public participation in the development, revision and enforcement of any regulation, standard, or effluent limitation established by the Administrator or any State under this Act. Not only is this specifically required

27. *Id.* § 1314(i)(2).
28. *Id.* § 1314(i)(2)(C).
29. *Id.* § 1314(i)(2)(B).
30. Citizens for a Better Environment v. EPA, 596 F.2d 720, 723 (7th Cir. 1979).
31. UNITED STATES SENATE, COMMITTEE ON PUBLIC WORKS, A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, 93rd Cong., 1st Sess., (1973) (two volumes) [hereinafter cited as I or II LEGISLATIVE HISTORY].

> in section 101(e) but the Administration is directed to encourage this participation.[32]

This document is less authoritative than either the Senate or Conference reports, however, because of the secondary role played by the House Committee. The House bill[33] was basically patterned after S. 2770,[34] which had been passed unanimously before any House consideration.[35] In addition, the House Committee on Public Works lacked jurisdiction over air pollution, so was not involved in the drafting of the 1970 Clean Air Act,[36] which furnished several important precedents for the FWPCA, particularly in its provisions for citizen participation[37] and in its basic enforcement approach.[38] Most importantly, the final bill most closely adhered to the philosophy of its senatorial authors.[39]

The weight of the quoted passage is further reduced when viewed in the context of what the House Committee actually did. While extolling the importance of citizen participation, the Committee reported out a bill in which the role of the public was restricted: H.R. 11896 tightened citizen suit standing requirements.[40] The House bill also placed greater emphasis on the need for state flexibility in administering the permit system,[41] while the

32. Citizens for a Better Environment v. EPA, 596 F.2d 720, 724 (7th Cir. 1979). In the original House version, § 101(e) was listed as § 101(a).

33. H.R. 11896, 92d Cong., 2d Sess. (1972).

34. S. 2770, 92d Cong., 1st Sess. (1971).

35. The vote was 86 in favor, 0 opposed. In addition, the House Committee gave S. 2770 great deference in recognition of the central role played by Senator Edmund Muskie (D.-Me.), who had created and chaired the Senate Air and Water Pollution Subcommittee, had acquired considerable expertise in pollution control legislation, had just finished engineering the enactment of the Clean Air Act and who emerged at that time as the probable Democratic candidate for the presidency. H. LIEBER, FEDERALISM AND CLEAN WATER: THE 1972 WATER POLLUTION CONTROL ACT 39-40, 55 (1975) [hereinafter cited as H. LIEBER].

36. 42 U.S.C. § 1857 (1976).

37. II LEGISLATIVE HISTORY, *supra* note 31 at 820.

38. S. REP. NO. 92-414, 92d Cong., 1st Sess. (1971), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 3668, 3670, 3730, [hereinafter cited as Senate Report].

39. The only relevant exception is that the final version toughened the S. 2770 citizen suit standing requirement to more closely correspond to the House version.

40. *See* CONFERENCE REP. NO. 92-1236, 92d Cong., 2d Sess., 145-46 (1972) (1972), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 3668, 3823, [hereinafter cited as CONFERENCE REP.]. *See* note 39 *supra*.

41. H.R. 11896 favored more restricted federal enforcement once state permit programs went into effect by requiring more extensive notice requirements, § 309, before commencing an enforcement action and curtailing federal review of individ-

court's construction of section 101 will force states to comply with more EPA mandates, effectively constricting flexibility.

Finally, the excerpt was extracted from the Committee's description of the section 505 citizen suit provision rather than the discussion of general policies or state implementation plan components. In light of the reference to section 101(e) in this section, greater weight should be accorded the alternative construction suggested previously:[42] the Administrator's duty is limited to encouraging and assisting the public's utilization of the section 505 federal court enforcement mechanism already provided.

To bolster this questionable indication of congressional intent, the court quoted from remarks made in floor debate by Representative Dingell emphasizing:

> . . . the importance of section 101(e) of this bill which encourages public participation in the development, revision and enforcement of various actions taken under this statute. I sincerely hope that the Administrator understands that this applies across the board, including the establishment of the permit program under section 402 of the bill.[43]

This passage carries negligible weight because the role of Rep. Dingell in shaping the final bill was secondary. He was neither a conferee nor a member of the House Public Works Committee. The court touted his "sponsorship of the Reuss-Dingell amendments"[44] more than was deserved, given that they were not original but were patterned after the previously passed Senate bill.[45] In fact, his only proposal which specifically dealt with citizen suits was omitted from the final Act.[46] His floor comments should be disregarded also because they were unrelated to the subject of debate in which they appeared. The House was discussing a motion to override a presidential veto entirely premised on fiscal objections.[47] Dingell's last minute attempt to interject his disfavored po-

ual state permits, § 402(c)(3). H.R. REP. NO. 911, 92d Cong., 2d Sess., 127 (1972), *reprinted in* I LEGISLATIVE HISTORY, *supra* note 31, at 814.

42. *See* note 22 and accompanying text *supra*.

43. Citizens for a Better Environment v. EPA, 596 F.2d 720, 724 (7th Cir. 1979).

44. *Id.* at 723-24.

45. H. LIEBER, *supra* note 35, at 71-73.

46. *See* note 39 *supra*.

47. House Debate on Overriding the President's Veto of S. 2770 (Oct. 18, 1972), *reprinted in* I LEGISLATIVE HISTORY, *supra* note 31, at 95-135; Veto Message from the President of the United States (Oct. 17, 1972), *reprinted in* I LEGISLATIVE HISTORY, *supra* note 31, at 137-39.

sition into the legislative history should have been ignored.

In saying that the "uncontradicted statements" from the House Committee Report and Rep. Dingell "confirm the plain meaning of section 101(e),"[48] the court overstates. Unambiguous references to citizen participation in state court enforcement are curiously absent in the committee reports.[49] In addition, no responsible congressional actor specifically addressed the *CBE* issue in floor debates. In fact, in the abundant verbiage of the legislative history, one finds generalities, both supporting[50] and conflicting with the court's view.

However, legislators also made several expressions of principles inconsistent with the court's interpretation. Most prominent of the conflicting statements, as the Agency argued,[51] is the section 101(b) policy of federal-state permit plan partnership.[52] During Senate debates on S. 2770, Senator Muskie, acting as floor manager of the legislation,[53] responded to concern over the diminished role and initiative of the states in "particular reference to the power being granted the Administrator of the EPA in preparing guidelines and accepting plans."[54] He replied that although strong federal action was warranted, the states' role would not be diminished and they "will have initiatives under several features of the

48. Citizens for a Better Environment v. EPA, 596 F.2d 720, 724 (7th Cir. 1979).

49. *See* the Conference Committee Report summary of major Senate, House and Conference positions on § 101(e) (general policy provision), § 304(h)(2) (outlining the scope of the Administrator's duty to publish minimum guidelines for state programs), § 402 (state NPDES permit program guidelines), and § 505 (citizen suits). *Conference Report*, *supra* note 40, at 3777-78, 3801-03, 3816-18, 3822-23.

50. The principle behind the court's decision could have been more authoritatively supported. The Senate Public Works Committee Report on S. 2770, describing the NPDES permit program and the procedure for delegating permit authority to the states, wrote that "[a]n essential element in any control program involving the nation's water is *public participation*" (emphasis added). Senate Report, *supra* note 38, at 3738. The court also could have cited congressional expressions supporting specific policies of the Act which would be furthered by the court's construction, such as: 1) promoting national uniformity in enforcement standards, *id.* at 3720; 2) ending state enforcement laxity, *id.* at 3672, 3675, 3685; and 3) encouraging expeditious enforcement through citizen scrutiny, *id.* at 3745.

51. Brief for Defendant, *supra* note 14, at 14.

52. "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution . . . It is the policy of Congress that the States . . . implement the permit programs under sections 402 and 404 of this Act." 33 U.S.C. § 1251(b) (1976).

53. I LEGISLATIVE HISTORY, *supra* note 31, at 161, 189.

54. *Id.* at 1342.

bill."[55] When prodded to outline the precise inroads into states' control over pollution permits,[56] he denied any further encroachments. "We have not eliminated the role of the state, but have reestablished it in a clearcut fashion."[57] Considering the vociferous concern for states' rights during the drafting and passage of the Act,[58] one might infer that encroachments into state prerogatives should be strictly construed.

Congress' regulatory scheme contemplated citizen oversight of state enforcement. Because state regulatory agencies lacking NPDES authority would not carefully scrutinize the EPA, the Senate Committee pointed out that section 505 citizen suits provide a necessary safeguard against lax federal enforcement.[59] Where states bear primary regulatory responsibility, however, citizen oversight is less crucial because "the enforcement power of the Federal government [is] available in cases where States . . . are not acting expeditiously and vigorously to enforce control requirements."[60]

In the final analysis, although expressions of policies both supportive and inconsistent with the court's construction may be dug out of the legislative record, it appears that Congress neither endorsed nor condemned the application of the section 101(e) principle to the guidelines for state NPDES implementation plans.

II. Effects of the Decision

The court's section 509 jurisdiction was limited to reviewing "the Administrator's action in making any determination as to a State permit program."[61] The EPA argued therefore that the court's opinion regarding the general adequacy of the guidelines for state NPDES implementation plans, apart from the Illinois plan, is

55. *Id.*

56. The Senate Report characterized the primary principle behind federal water pollution legislation before the FWPCA: "The States shall lead the national effort to prevent, control and abate water pollution. As a corollary, the Federal role has been limited to support of, and assistance to, the States." Senate Report, *supra* note 38, at 3669.

57. II Legislative History, *supra* note 31, at 1365-66.

58. H. Leiber, *supra* note 35, at 52 (quoting from a personal interview with Tom Jorling, Minority Counsel to the Senate Public Works Committee regarding regional hearings preceding the Senate's draft of S. 2770).

59. Senate Debate on S. 2770 in I Legislative History, *supra* note 31, at 1261. *See* note 21 *supra*.

60. *Senate Report*, *supra* note 38, at 3730.

61. 33 U.S.C. § 1369(b)(i)(D) (1976).

purely advisory.[62] However, the court first had to decide whether the Administrator had established valid guidelines before it could consider the adequacy of the Illinois program.[63] Furthermore, because the identical issue would arise with respect to any EPA state plan approval, the Agency will be bound by this determination with respect to its present standards. This point is of little practical consequence, however, because the EPA has promulgated new guidelines.

Citizens for a Better Environment brought suit initially in the circuit court under section 509.[64] However, where it is alleged that the Administrator has failed to perform a non-discretionary duty and the plaintiff has given 60 days notice of the action to the Administrator, jurisdiction is properly in the district, not the circuit court under section 505.[65] Citizens for a Better Environment therefore might have brought suit to compel a change in NPDES guidelines by alleging that the Administrator had failed to perform the non-discretionary duty contained in section 101(e). But, bringing suit under section 509 allowed citizens to avoid the 60 day

62. Brief for Defendant, *supra* note 14, at 16, n.6.

63. Citizens for a Better Environment v. EPA, 596 F.2d 720, 725 n.9 (7th Cir. 1979). The court refused to decide whether the Illinois plan met the statutory requirements.

64. *Id.* at 722. Section 509(b)(1) provides that:

> Review of the Administrator's action . . . (D) in making any determination as to a State permit program submitted under section 402(b), . . . may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person. Any such application shall be made within ninety days from the date of such determination . . . or after such date only if such application is based solely on grounds which arose after such ninetieth day.

33 U.S.C. § 1369(b)(1) (1976).

65. *See* note 21 *supra*. In this type of case, there is probably no reason to require the 60-day waiting period. In addressing the issue of whether alternate jurisdiction should be allowed, one commentator has said that, "Congress evidently thought notice to the Administrator served an important purpose in affording an opportunity for administrative enforcement that might avoid the need for court action." Currie, *Judicial Review Under Federal Pollution Laws*, 62 IOWA L. REV. 1221, 1231-32 (1977) (discussing Natural Resources Defense Council v. Train, 510 F.2d 692 (D.C. Cir. 1975). *Accord*, Note, *Federal Water Pollution Control Act: Citizen Suits Under Section 505(a)(2) Held Not Exclusive Jurisdictional Ground to Challenge Agency Failure to Act*, 7 RUT.-CAM. L.J. 391 (1976). However, both of these commentators note that where the EPA is intransigent, as it certainly was in *CBE*, there is really no reason to adhere to the 60 day notice provision. *Cf.* Minnesota v. Callaway, 401 F. Supp. 524, 528 n.4 (D. Minn. 1975) (in suit of unyielding alleged polluter, no reason to give 60 day notice when no prospect of enforcement agency action to stop pollution either).

waiting period while obtaining a hearing for their cause in a higher court. Others may follow their example.

The Seventh Circuit's construction of section 101(e) could require increased citizen involvement in other facets of water pollution control,[66] such as pre-permit hearings. In the same section which requires state NPDES programs to provide for enforcement, states are directed to "provide an opportunity for public hearing."[67] Just as inadequate enforcement opportunities were challenged in *CBE*, the EPA's failure to insure effectively public input could also be attacked.[68]

Section 101(e) also may require greater citizen participation in planning under the Act.[69] Because that section mandates "[p]ublic participation in the development [and] revision of . . . any . . . plan,"[70] the *CBE* holding should apply with equal force to FWPCA programs other than the NPDES. The court in *CBE* acknowledged that the duty to provide for citizen participation could not arise from the statutes describing the NPDES implementation mechanism alone.[71] The Administrator's duty emerged from the policy directive in section 101(e), but was attacked in the NPDES context through the jurisdiction provided by section 509. Citizens could contribute to planning on any of the four levels contemplated un-

66. *See* JAMES RAGAN ASSOCIATES, *The Water Pollution Control Act of 1972: Institutional Assessment* 183 (1975) (sponsored by the National Commission on Water Quality) (available in print or on microfiche from the National Technical Information Service (NTIS), catalog number: PB-245 410) [hereinafter cited as JAMES RAGAN ASSOCIATES]. This study suggests that § 101(e) might apply to 179 provisions of the Act.

67. 33 U.S.C. § 1342(b)(3) (1976).

68. The EPA's minimum program guidelines for state plans 40 C.F.R. §§ 124.1-124.135 (1979), offer no guidance for state administrators to determine whether citizen interest is sufficient to require a public hearing. While a separate set of guidelines had outlined the standards for public hearings in water pollution control, 40 C.F.R. § 105.1 (1977), they had not been uniformly utilized as a benchmark for approving state plans. Arnold, *Effluent Limitation and NPDES: Federal and State Implementation of the Federal Water Pollution Control Act Amendments of 1972*, 15 B.C. INDUS. & COM. L. REV. 767, 791-92 (1974). The same deficiency exists with regard to public hearings for modifications of compliance standards. 33 U.S.C. § 1342(b)(1)(c) (1976).

69. *See* for an in depth analysis of planning under the FWCPA, Donley, Moss, Outen and Speth, *Land Use Controls Under the Federal Water Pollution Control Act: A Citizen's Guide*, 5 ENVT'L L. REP. 50092 (1975).

70. 33 U.S.C. § 1251(e) (1976).

71. Citizens for a Better Environment v. EPA, 596 F.2d 720, 723 (7th Cir. 1979).

der the Act: 1) basin planning,[72] 2) state planning,[73] 3) areawide or regional planning,[74] and 4) facility planning.[75] Because these plans are intended to be linked to the Act's money channelling mechanisms,[76] the most effective occasion for challenging inadequate public participation in these areas would be to attack the validity of a conditional FWPCA grant.[77] Jurisdiction for a challenge of this nature could lie under section 505, which permits citizens to sue the Administrator for failing to perform a non-discretionary act.[78]

III. PUBLIC POLICY ANALYSIS OF REGULATIONS

A. *The Analytical Context*

The EPA argued that provision for public participation in enforcement pursuant to section 101(e) was sufficiently made by existing regulations which did not require states to allow citizens to become parties to enforcement actions.[79] *CBE* and its rehearing clearly mandate some kind of real requirement by the EPA that states include in their NPDES programs a provision that citizens can become parties to enforcement actions.[80] Within this general

72. 33 U.S.C. § 1289 (1976).

73. 33 U.S.C. §§ 1256, 1313(e) (1976).

74. 33 U.S.C. § 1288 (1976).

75. 33 U.S.C. §§ 1281, 1252 (1976).

76. W. RODGERS, ENVIRONMENTAL LAW 425 (1977) [hereinafter cited as W. RODGERS].

77. For example, EPA grants for state pollution control programs are conditioned under § 106(f)(3) of the Act upon the Administrator's approval of the state's "program for the prevention, reduction and elimination of pollution in accordance with the purposes and provisions of this Act in such form and content as the Administrator may prescribe." 33 U.S.C. § 1256(f)(3) (1976). Citizens could challenge the Administrator's failure to perform her non-discretionary duty § 505(a)(2), of requiring public planning input. *See also*, Section 105 (grants for research and development), 33 U.S.C. § 1255 (1976); Sections 201-09 (grants for construction of treatment works), 33 U.S.C. §§ 1281-89 (1976).

78. 33 U.S.C. § 1365 (1976).

79. Brief for Defendant, *supra* note 14, at 14 (the EPA argued that 40 C.F.R. Part 124 satisfies the § 101(e) mandate); Citizens for a Better Environment v. EPA, 596 F.2d 720, 726 (7th Cir. 1979) (on petition for rehearing by the EPA, the court rejects the argument that 40 C.F.R. § 105 satisfies the § 101(e) mandate).

80. In the first opinion, the court said that "the Administrator of the EPA has a duty to establish state program guidelines and evaluate state programs to insure that there is public participation in the enforcement of these programs." Citizens for a Better Environment v. EPA, 596 F.2d 720, 724 (7th Cir. 1979). In addressing 40 C.F.R. § 105.4(f) and (g) the court said:

> [S]ection (f), in effect, requires only that a state agency answer its telephone and listen and look into the complaints of a private citizen. . . . This provision is no

directive the EPA was left a broad range of options, since the court refused to dictate the content of those regulations.[81] The court specifically did not say that state programs must contain all the federal level provisions in section 505 or that the Illinois program would or would not be acceptable under the statute.[82]

As a result of the decision, the EPA radically changed its policy on citizen intervention in state courts[83] and promulgated the following proposed rule:

> (1) Any State administering a program shall have authority which allows citizens to intervene as a right in any suit brought in State court to recover civil penalties for any of the violations specified in paragraph (a)(3) of this section.
> (2) All new programs must comply with this paragraph upon approval. Any approved State NPDES program which requires modification to conform to this paragraph shall be so modified within one year of the date of promulgation of this paragraph, unless the State must amend or enact a statute in order to make the required modification in which case such modification shall take place within two years.[84]

more than a legalistic articulation of a common courtesy and hardly can be cited as satisfaction of the EPA's statutory duty to issue regulations promoting public participation in state enforcement. . . . [S]ection (g) states only that a state agency cannot conceal from the public information requested by a private citizen when that information is already of public record because it is a part of a legal proceeding. The regulation merely states the obvious.

Id. at 726.

Subsections 105.4(f) and (g) have been recodified at 40 C.F.R. §§ 25.9, 25.4(e) (1979).

81. Citizens for a Better Environment v. EPA, 596 F.2d 720, 725 (7th Cir. 1979).

82. *Id.* Section 505, 33 U.S.C. § 1365 (1976), allows citizens to sue permit violators, allows intervention in an action brought by the Adminstrator and allows for the award of attorney and expert witness fees to any party. For text *see* note 21 *supra*.

83. The EPA previously concluded that "requiring states to allow citizens to intervene in State enforcement actions is neither necessary to foster public involvement in permit enforcement nor required by law." 44 Fed. Reg. 34,257 (1979). However, in August the EPA responded to the *CBE* decision by proposing that citizen intervention be allowed at the state level. 44 Fed. Reg. 49,276 (1979).

84. 44 Fed. Reg. 49,276 (1979) (proposed 40 C.F.R. § 123.10(d)).

The proposed rule would cover the NPDES and programs under § 404 of the Clean Water Act, 33 U.S.C. § 1344 (1976); § 3006 of the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6926 (1976); and § 1422 of the Safe Drinking Water Act, 42 U.S.C. § 300h-1 (1976). The move by the EPA to consolidate regulations under these programs will result in administrative efficiency and ease the permit application process for persons falling under more than one of the programs. This action is called for by explicit language in the Resource Conservation and Recovery Act. § 1006(b), 42 U.S.C. § 6905(b) (1976).

The mandate for coverage of § 404 programs is strong because § 101(e) covers that

It also listed alternatives (Alternatives (1)-(4)) to the rule which would require that:

> (1) Citizens be allowed to directly initiate enforcement actions in State court;
> (2) States authorize the award of attorney's fees to citizen intervenors where appropriate;
> (3) Citizens be allowed to initiate or intervene as a right in any administrative proceeding brought to enforce elements of the program; and
> (4) States publish for public comment any proposed settlement of an action brought for violation of a State program.[85]

The rules finally adopted by the EPA were the following:

> [§123.9]
> (d) Any State administering a program shall provide for public participation in the State enforcement process by providing either:
> (1) Authority which allows intervention as of right in any civil or administrative action to obtain remedies specified in paragraphs (a)(1), (2), or (3) of this section by any citizen having an interest which is or may be adversely affected; or
> (2) Assurance that the State agency or enforcement authority will:
> (i) Investigate and provide written responses to all citizen complaints submitted pursuant to the procedures specified in §123.8(b)(4);
> (ii) Not oppose intervention by any citizen when permissive intervention may be authorized by statute, rule, or regulation; and
> (iii) Publish notice of and provide at least 30 days for public comment on any proposed settlement of a State enforcement action. . . .
> §123.13
> (g) State NPDES programs only. All new programs must comply with these regulations immediately upon approval. Any approved State section 402 permit program which requires revision to conform to this Part shall be so revised within one year of the date of promulgation of these regulations, unless a State must amend or enact a statute in order to make the re-

section as well as § 402. The statutory mandate for citizen enforcement at the state level is probably even stronger under the Resource Conservation and Recovery Act than under the FWPCA. The citizen suit provisions of the former do not distinguish between federal and state courts, 42 U.S.C. § 6972(c) (1976), and it contains language identical to § 101(e). 42 U.S.C. § 6944(b) (1976). The Safe Drinking Water Act contains language comparable to that of § 101(e). 42 U.S.C. § 300j-8 (1976).

85. 44 Fed. Reg. 49,276 (1979) (proposed 40 C.F.R. § 123.10(d)).

> quired revision in which case such revision shall take place within 2 years . . . .[86]

In one sense the EPA has clearly gone beyond the mandate of the Seventh Circuit's decision in *CBE* because the substantive regulations cover, in addition to the NPDES program, other provisions of the Clean Water Act, one program administered under the Safe Drinking Water Act and one program under the Resource Conservation and Recovery Act.[87]

B. *Problems with the Formulation of the Proposed and Final Rules*

1. The Second Alternative in the Final Regulation

States choosing the second alternative in the final regulations, (i) must investigate and respond to citizen complaints, (ii) not oppose permissive intervention by citizens, and (iii) publish notice of settlement and allow 30 days for public comment.[88] Subsection (i) does nothing more than require state agencies to investigate complaints. As the Seventh Circuit stated, such requirements do not significantly aid citizen participation in enforcement.[89] Subsection (ii) adds very little to the rights citizens already have in state courts and allows states wishing to frustrate citizen action to narrow or eliminate permissive intervention. Subsection (iii), while it encourages citizen input, does nothing to insure that state agencies will take heed. As a whole the second alternative gives states an easily implemented way to minimize citizen participation. The intent of the Seventh Circuit would be much better served by the first alternative.

2. Intervention Restricted to Civil Remedy Actions

States may bring actions for either civil remedies or injunctive relief under section 402, but under the proposed regulation citizens could intervene only in those brought for civil relief.[90] Not

86. 45 Fed. Reg. 33,463, 33,464 (1980) (to be codified in 40 C.F.R. §§ 123.9(d), 123.13(g)).

87. 45 Fed. Reg. 33,456 (1980) (to be codified in 40 C.F.R. § 123.1). *See* note 84 *supra*.

88. *See* text accompanying note 86 *supra*.

89. *See* note 80 *supra*.

90. For proposed regulations, *see* text accompanying notes 84-85 *supra*.

only may a rule so narrow not meet the requirements of *CBE*,[91] but intervention here is particularly important because states tend to bring actions for injunctive relief.[92] The proposed regulation would have encouraged this behavior in states wishing to avoid increased citizen participation.

It is hard to argue that such a distinction is mandated or even suggested by the statute.[93] Nor is there any reason why such a distinction should be more necessary at the state level than at the federal level. The final regulations wisely eliminated it.

3. Definition of 'Citizen'

The proposed regulation would have allowed intervention by 'any citizen.'[94] The term 'citizen' could be interpreted in any of three ways by the states. The first interpretation is that it includes

91. Comments of Citizens for a Better Environment, # 104, to 44 Fed. Reg. 49,276 (1979) (proposed 40 C.F.R. § 123.10(d)) [hereinafter cited by name and number]. Comments cited in this and later footnotes are collated by number and available for inspection at:

Environmental Protection Agency
Public Information Reference Unit
401 'M' Street SW, Room 2922 PM-213
Washington, D.C. 20460

The EPA did not seem to want citizen participation in suits where injunctive relief is available because where such a potentially severe sanction is available citizen control could hamper state efforts at settlement. Comments on the proposed regulations by industry and the states also voice this fear. Comments of Hinton, #46; Arkansas Department of Pollution Control and Ecology, #98; Tennessee Department of Public Health, #35; Evans, Kitchel & Jencks, P.C., #53 (for Phelps Dodge Corp.); Division of Environmental Engineering, Vermont Agency of Environmental Conservation, #45.

The EPA may have thought that citizen participation in civil remedies actions, on the other hand, would bolster a basically weak sanctioning mechanism. *See* ENVIRONMENTAL LAW INSTITUTE REPORT: ENFORCEMENT OF FEDERAL AND STATE WATER POLLUTION CONTROLS 361 (1975) (sponsored by the National Commission on Water Quality) (available in print or on microfiche from the National Technical Information Service (NTIS), catalog number: PB-246 320; in two volumes, volume I: PB-246 321, volume II: PB-246 322) [hereinafter cited as ELI ENFORCEMENT REPORT]; Comment of Environmental Action of Michigan, Inc., #128.

92. ELI ENFORCEMENT REPORT, *supra* note 91, at 9.

93. Citizens are to be encouraged to participate in enforcement of the FWPCA. Friends of the Earth v. Carey, 535 F.2d 165, 172 (2d Cir. 1976) (discussing Clean Air Act, on which FWPCA is based); United States v. Ketchikan Pulp Co., 74 F.R.D. 104, 108 (D. Alas.), *consent decree approved*, 430 F. Supp. 83 (D. Alas. 1977); *Senate Report*, *supra* note 38, at 3679, 3730, 3738, 3745, 3746, 3747.

94. For proposed regulations, *see* text accompanying notes 84-85 *supra*. Note that Alternative (1) would allow 'citizens' to bring suit in state court. Alternative (3) would allow 'citizen' to initiate an action or intervene in administrative enforcement proceedings.

by its plain meaning anyone who is a citizen of the state. Indeed, the states' comments indicate that they are afraid that this is exactly what it means.[95] The states would probably prefer a second interpretation: that it means any citizen who would have standing under existing state court procedure. This argument is supported by Congress' desire for maximum state autonomy in administration of the NPDES.[96] The third possibility is that the definition of 'citizen' from section 505 would be read into the regulation. Section 505 defines a 'citizen' as anyone having an 'interest' in a matter. By this Congress meant that a person must be able to meet the standing requirements of *Sierra Club v. Morton*,[97] in order to prevent unbridled litigation that might clog the federal courts.[98] It is hard to see why this consideration would be less important in state courts. This comparatively liberal interpretation could be supported by reference to Congress' intent that citizens be instrumental in the enforcement process.[99] By effectively giving states the choice of adopting either the second or third interpretation the EPA has prevented needless litigation on this issue.[100]

4. Attorneys' Fees

It is unclear why, under Alternative (2) of the proposed regulations, attorneys' fees should be given to citizen intervenors and not to other possible litigants, such as citizen suitors, who may also vindicate the public interest. Both kinds of citizen-litigants have limited access to funds,[101] so the possibility of receiving attorneys'

95. Comments of Oregon Department of Justice, #58. *See* note 91 *supra*.

96. *Senate Report*, *supra* note 38, at 3686, 3730.

97. 405 U.S. 727 (1971). *See* Ohio *ex rel.* Brown v. Callaway, 497 F.2d 1235, 1242 (6th Cir. 1974); United States v. Ketchikan Pulp Co., 74 F.R.D. 104 (D. Alas.), *consent approved*, 430 F. Supp. 83 (D. Alas. 1977); Montogomery Environmental Coalition v. Fri, 366 F. Supp. 261 (D.D.C. 1973); *Conference Report*, *supra* note 40.

98. Brown v. Ruckelshaus, 364 F. Supp. 258 (C.D. Cal. 1973); *Senate Report*, *supra* note 38, at 3746.

99. *See* note 97 *supra*. Natural Resources Defense Council v. EPA, 481 F.2d 116 (10th Cir. 1973). Note also that implicit in this reliance on *Sierra Club v. Morton* is a 'case or controversy' underpinning from Article III of the Constitution. *See* United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973).

100. The first option allows intervention by "any citizen having an interest which is or may be adversely affected." The second encourages permissive intervention by citizens as "authorized by statute, rule, or regulation." 45 Fed. Reg. 33,463 (1980) (to be codified in 40 C.F.R. § 123.9).

101. *Environmental Groups Tell of Trouble Raising Funds*, N.Y. Times, January 7, 1980, at A15, col. 1.

fees would encourage them to participate in the enforcement process. Enforcement would be further enhanced if permit-holders felt that should they violate the terms of their permits, they might have to pay attorneys' fees to their opponents in any litigation.[102]

Provision for awarding attorneys' fees is usually opposed out of fear of encouraging enforcement by citizen/bounty-hunters. This concern should carry little weight, however, because courts would award fees only "where appropriate."[103] In section 505 actions attorneys' fees have been deemed appropriate only when the public interest is served.[104] Successful prosecution of the suit is an important factor, though admittedly it is not completely determinative.[105]

Defendants, too, should be allowed to collect attorneys' fees if plaintiffs bring frivolous claims. Such claims unduly burden both defendants and courts. Congress sought to protect defendants in federal court by allowing award of fees to "any party."[106] Recognizing that in order to promote citizen enforcement, they

102. This might be called 'extortion' by some, but harmful conduct by citizen-litigators is not likely because getting attorneys' fees is not certain. Courts may even be hostile to their award. ELI ENFORCEMENT REPORT, *supra* note 91, at 14. If a citizen has a good case and forces a violator to comply with the law, such 'extortion' is not uncalled for. It might be a problem when the cost of compliance falls heaviest on smaller permittees. The threat of attorneys' fees could be used to force them to take measures over and above those required by law.

103. 44 Fed. Reg. 49,276 (1979) (proposed 40 C.F.R. § 123.10(d)).

104. There have been indications from the federal courts that successful citizen-plaintiffs should be awarded fees for their public services unless they act in bad faith or litigate vexaciously. Save Our Sound Fisheries Ass'n v. Callaway, 429 F. Supp. 1136, 1145 (D.R.I. 1977), *citing* Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968) (covering attorneys' fees under the Civil Rights Act of 1964). When a plaintiff prevails in an action brought to compel the performance of a non-discretionary act by a government agency, the award of attorneys' fees is especially appropriate. Natural Resources Defense Council v. Costle, 12 E.R.C. 1181, 1182 (D.D.C. 1978); Natural Resources Defense Council v. Fri, 7 E.R.C. 1346 (D.D.C. 1974).

Generally, if a party does not win it will not receive attorneys' fees. Colorado Public Interest Research Group, Inc. v. Train, 373 F. Supp. 991, 995 (D. Colo. 1974), *rev'd and remanded on other grounds*, 507 F.2d 743 (10th Cir. 1974), *rev'd and remanded on other grounds*, 426 U.S. 1 (1976) (no attorneys' fees where plaintiff loses on summary judgement motion by government defendant); ELI ENFORCEMENT REPORT, *supra* note 91, at 363-64. However, in exceptional circumstances, attorneys' fees may be awarded. In one case a district court awarded attorneys' fees to losing plaintiffs in a NEPA suit even without any statutory directive such as that contained in § 505, because of the public service performed. Sierra Club v. Lynn, 364 F. Supp. 834, 847-49 (W.D. Tex. 1973).

105. *See* note 104 *supra*.

106. 33 U.S.C. § 1365(d) (1976). *Senate Report*, *supra* note 38, at 3747, *cited in*, Natural Resources Defense Council v. Costle, 12 E.R.C. 1181 (D.D.C. 1978).

must not normally be required to risk more than the usual cost of litigation,[107] federal courts have found award of fees to defendants "appropriate" only when plaintiffs bring such frivolous actions.[108] Thus, Alternative (2) of the proposed regulations should allow attorneys' fees where appropriate to citizen-parties and defendants.

C. *Policy Analysis of the Proposed and Final Rules*

To analyze the impact of the court's decision and the merit of the EPA's regulations, it is necessary to examine the extent to which they will further the public policies expressed and implied in the Act. The primary objective of the law, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters,[109] in all likelihood will be advanced by requiring greater citizen participation in enforcement.

Traditionally, state administrators had secured compliance through "coordination, cooperation and conciliation—*i.e.*, through a process that purported to educate the violator" rather than reprimand him.[110] While drafting the permit mechanism Congress viewed state enforcement laxity as the primary impediment to effective pollution control.[111]

Although the FWPCA has remedied certain deficiencies,[112] state enforcement is still inadequate. States continue to compete for industry with neighboring states, engendering a contest of beneficence to large polluters.[113] For this reason states might want to restrict annoying citizen participation. In addition, as the National Commission on Water Quality recognizes,[114] state resources for compliance monitoring are frequently inadequate and unreliable.[115]

107. Comments of Florida Audubon Society, #36. *See* note 91 *supra*.

108. Natural Resources Defense Council v. Costle, 12 E.R.C. 1181, 1182, 1186 (D.D.C. 1978). That court stated that the only time congressional purpose is served by awarding fees to a defendant is when it has been subjected to frivolous litigation.

109. 33 U.S.C. § 1251(a) (1976).

110. F. GRAD, TREATISE ON ENVIRONMENTAL LAW 3-209 (1978) [hereinafter cited F. GRAD].

111. *See* note 50 *supra*. *See generally* F. GRAD, *supra* note 110, at 3-201; Hines, *Nor any Drop to Drink: Public Regulation of Water Quality, Part I, State Pollution Control Programs*, 52, IOWA L. REV. 186, 203-04 (1966).

112. For example, states are now less vulnerable to coercion from industrial representatives on state pollution control boards. 33 U.S.C. § 1314(i)(2)(D) (1976).

113. Barfield, Environmental Report: Administration Fights Goals, Costs of Senate Water Quality Bill, *National Journal*, Jan. 15, 1972, at 94.

114. The National Commission on Water Quality was created by the FWPCA to report to Congress on the effectiveness of the Act. 33 U.S.C. § 1325 (1976).

115. ELI ENFORCEMENT REPORT, *supra* note 91, at 276.

Moreover, federal oversight of state enforcement has been sparse. Although the Act empowered the EPA to review every permit issued by states,[116] it has seldom exercised that power. The EPA often waives review of entire classes, types and sizes of polluters.[117] While it can withdraw NPDES authority from a state that fails to comply with section 402,[118] in practice, this power has never been exercised.[119] In addition, the EPA has never intervened during a health emergency.[120] Even recognizing that these review mechanisms were intended to be used "judiciously," recognizing "the abilities of the States to control their own permit programs,"[121] the EPA devotes insubstantial resources to overseeing the states.[122] This is in part due to heavy direct enforcement responsibilities in those jurisdictions lacking permit issuing authority.

It is argued that these enforcement deficiencies can be eradicated by more effective use of remedies already available.[123] Section 505(a) allows "any citizen" to sue alleged violators of permit conditions set by either the EPA or state administrators in federal district court.[124] However, section 505(b) bars such suits "if the Administrator or State has commenced had is diligently prosecuting a civil or criminal action in a court of the United States or a State."[125] Even if prosecuted 'diligently', however, citizens always have the right to intervene in actions brought in federal court.[126] It is only when a state enforcement agency is prosecuting its suit 'diligently' in state court that citizens normally cannot participate in enforcement.

116. 33 U.S.C. § 1342(d) (1976).

117. The EPA is allowed to waive its individual permit review. 33 U.S.C. § 1342(e) (1976).

118. 33 U.S.C. § 1342(c)(3) (1976).

119. The withdrawal authority of the EPA has been described as a "sort of nuclear deterrent, unlikely to ever be used unless a state's deficiencies are truly egregious." Zener, Federal Law of Water Pollution Control, FEDERAL ENVIRONMENTAL LAW, (E. DOLGIN and T. GUILBERT, eds., 1974), at 737. *See also* W. RODGERS, *supra* note 76, at 536.

120. The Administrator can assume permit enforcement authority if widespread violations have not been alleviated by state efforts after notification from the EPA. 33 U.S.C. § 1319(a)(2) (1976). *See also* W. RODGERS, *supra* note 76, at 536.

121. I LEGISLATIVE HISTORY, *supra* note 31, at 262.

122. ELI ENFORCEMENT REPORT, *supra* note 91, at 26; W. RODGERS, *supra* note 76, at 536.

123. Comments of Tennessee Gas Pipeline Co., #59; Utility Solid Waste Activities Group and Utility Water Act Group, #71. *See* note 91 *supra*.

124. *See* note 21 *supra* for text.

125. *See* note 21 *supra* for text.

126. 33 U.S.C. § 1365(b)(1)(B) (1976). *See* note 21 *supra* for text.

To avoid the section 505(b) prohibition, a private plaintiff may allege permit violations occurring at a different time[127] or substantive violations other than those alleged by the agency. As the District of Columbia Circuit pointed out, private actions ambitious in scope are not preempted by public actions more narrowly drawn.[128]

Other methods are available to plaintiffs in state forums[129] via common law nuisance actions,[130] state administrative procedure acts,[131] and independently adopted citizen suit provisions.[132] To the extent that these remedies can be successfully employed the need for state NPDES citizen suits is lessened. In practice, however, the state-level remedies have proven inadequate.

It was partially in recognition of the ineffectiveness of nuisance actions in stemming the flood of modern industrial pollutants that Congress enacted federal water pollution legislation.[133] Moreover, one problem with suits under state administrative procedure acts is

127. People *ex rel.* Watchtower Bible and Tract Society, Inc. v. Haring, 286 App. Div. 676, 146 N.Y.S.2d 151 (1955) (tax exemptions from one year to the next based on new facts must be relitigated).

128. Montgomery Environmental Coalition v. Washington Suburban Sanitary Comm'n, No. 75-1389 (D.C. Cir. 1976).

129. 33 U.S.C. § 1365(e) (1976). *See* note 21 *supra* for text. Citizens are not restricted to the remedies available under § 505. For example, United States v. United States Steel, 356 F. Supp. 556 (N.D. Ill. 1973) (FWPCA supplements rather than supersedes prior remedies).

130. For example, Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970).

Violation of a permit or effluent standard is generally *per se* evidence of unreasonable operation for purposes of nuisance law. Reserve Mining Co. v. United States, 514 F.2d 492, 524 (8th Cir. 1974); W. RODGERS, *supra* note 76, at 141. Evidence of conformity usually reveals that the defendant has complied only with the statutory or administrative minimum. People v. Reedley, 66 Cal. App. 409, 226 P. 408 (Dist. Ct. App. 1924); W. RODGERS, *supra* note 76, at 141.

Standing to bring a nuisance action may be very limited. For a thorough discussion of this point read L. JAFFE, *Standing to Sue in Conservation Suits*, LAW AND ENVIRONMENT (1971); Grad & Rockett, *Environmental Litigation—Where the Action Is?*, 10 NAT. RES. J. 742 (1970).

131. *See, e.g.*, N.Y. ENVIR. CONSERV. § 71-1715, N.Y. CIV. PRAC. §§ 7801-7806 (McKinney 1972). Under this and similar provisions suit would be brought against a state administrator rather than directly against a polluter.

132. *See, e.g.*, MICH. COMP. LAWS ANN. §§ 691.1201-.1207 (Supp. 1972) (Michigan Environmental Protection Act); J. SAX, DEFENDING THE ENVIRONMENT, A STRATEGY FOR CITIZEN ACTION 247-48 (1971); and more generally, F. GRAD, *supra* note 110, at 2-141 to 148.

133. Davis, *Theories of Water Pollution Litigation*, 1971 WISC. L. REV. 738 (1971).

that they are directed against state administrators rather than polluters. In addition, courts rarely interfere with an administrator's enforcement in the absence of a showing of impropriety or discrimination.[134] Finally, few states currently administering NPDES permit programs have independently allowed citizen suits.[135]

Thus, the need for effective NPDES enforcement is not obviated by any of the state-level alternatives. Nor should the existence of substantial rights of action in federal courts preclude EPA promulgation of regulations requiring states to provide for citizen enforcement in state courts. Citizens for a Better Environment suggested in its comments on the proposed regulations that an adversely affected citizen may find litigation in federal court more inconvenient and costly than in state court, especially if the small-town counsel retained by him is unfamiliar with federal practice.[136] Even if these inconveniences are only marginal, if the costs to the state are insignificant the alternative should be considered because it would give the states, through their courts, more control over development of their NPDES programs.

A more persuasive argument against expanding citizen enforcement provisions is the argument that by requiring additional state court procedures, the flexibility, and therefore the effectiveness of both the EPA and the states is curtailed. By substituting its judgment for the Agency's, the court was in effect constraining the Agency's power to balance competing policies and considerations. So too, the states will be less able to use their judgment as to what forms of public participation should be encouraged. Mandates by the EPA result in less constructive innovation by those who know local conditions. However, this theoretical drawback would carry more weight if the states had shown more creativity in their methods. In practice, state innovation has been minimal.[137] In addition, the final guidelines allow the states some flexibility by giving them a choice of compliance methods.

Both the actual and potential participation of private attorneys general should sharpen the regulatory responses of state administrative agencies, preventing, for example, regulators from being taken into the camp of the regulated. The positive impact of citizen

134. *See* note 7 through 30 and accompanying text *supra*.
135. F. GRAD, *supra* note 110, at 3-202, 3-203.
136. Comments of Citizens for a Better Environment, #104. *See* note 91 *supra*.
137. One laudable exception is Michigan. *See* note 132 *supra*.

participation on administrative attentiveness had already been demonstrated in federal courts.[138] Congress also continually recognizes the value of citizen suits in environmental protection generally[139] by routinely including provision for them in major environmental legislation.[140]

D. *Time and Resource Costs of Public Participation*

Public participation in enforcement augments the resources already available for pollution control,[141] so state administrative agencies can have greater flexibility in allocating their enforcement dollars and more states can assume permit-issuing authority.[142] However, the court's decision could increase the cost of the pollution permit system, contrary to Congress' intent to "encourage . . . the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government."[143] First, the cost involved in changing the EPA's administrative framework is not insubstantial.[144] Second, states currently possessing permit-issuing authority might be forced to repeal and reenact permit implementation plan legislation[145] in order to re-

138. Litigation by all parties, including citizens, over the meaning of the Act has slowed down implementation. NATIONAL COMMISSION ON WATER QUALITY, THE NATIONAL COMMISSION ON WATER QUALITY, STAFF REPORT I-68 (1976). The cause of this was the failure of the government to involve other parties in policy-making decisions. *Id.* at V-112, I-67. However, a government report found that: "Public participation through judicial processes has advanced the prospects for earlier, full implementation of the Act by speeding the pace of effluent limitations promulgation, by more clearly defining agency planning activities." *Id.* at V-117.

139. Public participation was envisioned as a part of the regulatory strategy of the FWPCA to keep pollution control officials vigilant. *Id.* at I-60 to 61.

140. 15 U.S.C. § 2619 (1976) (Toxic Substances Control Act); 16 U.S.C. § 1540(g) (1976) (Endangered Species Act of 1973); 33 U.S.C. § 1413(g) (1976) (Marine Protection, Research, and Sanctuaries Act of 1972); 33 U.S.C. § 1515 (1976) (Deepwater Port Act of 1974); 42 U.S.C. § 300j-8 (1976) (Energy Policy and Conservation Act); 42 U.S.C. § 6972 (1976) (Resource Conservation and Recovery Act of 1976). *See also* 15 U.S.C. § 2073 (1976) (Consumer Product Safety Act).

141. JAMES RAGAN ASSOCIATES, *supra* note 66, at xiii.

142. Many states are unqualified to assume authority at present because of lack of enforcement resources. F. GRAD, ENVIRONMENTAL LAW: SOURCES AND PROBLEMS 2-195 (2d ed. 1978).

143. 33 U.S.C. § 1251(f) (1976).

144. The EPA has had to draft, publish, and solicit comments on proposed alternative guidelines. 33 U.S.C. § 1314 (1976). It will have to publish valid guidelines and therefore must review, renegotiate and reapprove state implementation plans. 33 U.S.C. § 1342 (1976).

145. In light of the Supreme Court's position in National League of Cities v.

qualify.[146] In some cases, if intransigent state legislators delayed or refused to modify the existing plans, the EPA would be required to reassume permit-issuing authority on a temporary or permanent basis.[147] All of this could disrupt the administration of the permit

Usery, 426 U.S. 833 (1972), it has been argued that any regulations requiring states to provide citizens with access to their courts as a condition of exercising pollution control authority unconstitutionally infringes on the prerogatives of the states. Comments of Utility Solid Waste Activities Group and Utility Water Act Group 9, #71; Kerr-McGee Corp. 9, #107. *See* note 91 *supra*. In *EPA v. Maryland* the Agency attempted to require state enactment of air quality laws on pain of "injunctive and criminal sanctions." EPA v. Maryland, 530 F.2d 215, 228 (4th Cir. 1975), *per curiam vacated and remanded for mootness*, 431 U.S.99 (1977). However, in *CBE* the regulations would involve no such sanctions on noncomplying states. The real loser if states fail to comply will be the EPA because its limited resources would have to be spread thinner. Shell Oil Co. v. Train, 585 F.2d 408, 413-14 (9th Cir. 1978).

146. Comments of Arkansas Department of Pollution Control and Ecology, #98; Illinois Environmental Protection Agency, #133; Regional Administrator, Region 10, EPA, #153; Environmental Protection Division of the Department of Natural Resources, State of Georgia, #162. *See* note 91 *supra*.

In its statement of goals and policies of the FWPCA, Congress recognized "the primary responsibilities and rights of the States" to control water pollution. 33 U.S.C. § 1251(b) (1976). However, as the Act has been applied, the states' initiative and discretion have been eroded. F. GRAD, *supra* note 110, at 3-144; H. LIEBER, *supra* note 35, at 121, 196-98.

The Administrator sets procedures and substantive standards which the states must follow to avoid federal control over pollution permits. 33 U.S.C. § 1342(b) (1976). The effect of the court's decision in *CBE* is to further subject the states to federal control—in a matter not sufficiently crucial to the congressional design to have been mentioned in the legislative history or the Act itself. *See* JAMES RAGAN ASSOCIATES, *supra* note 66. The JAMES RAGAN ASSOCIATES study reviewed both state and federal implementation of § 101(e). However, the researchers did not uncover the 'mandatory duty' the Seventh Circuit found. They list numerous areas where implementation of § 101(e) might be called for, but requiring citizen suit or intervention at the state level is not one of them. *Id.*

147. 33 U.S.C. § 1342 (1976). *See* note 146 *supra*. *See*, Alton Box Board Co. v. EPA, 592 F.2d 395 (7th Cir. 1979) (the EPA took over the Illinois NPDES program after the *CBE* decision).

Refusal or inability to make the requisite changes is quite possible, according to a number of the comments. Comments of Tennessee Department of Public Health, #35; Vermont Agency of Environmental Conservation, #45; Oregon Department of Justice, #58; Missouri Department of Natural Resources, #61; Arkansas Department of Pollution Control and Ecology, #98; Illinois Environmental Protection Agency, #133; Regional Administrator, Region 10, EPA, #153; Department of Natural Resources, State of Georgia, #162. *See* note 91 *supra*. However, EPA deadlines for requalification are generous and can probably be extended or ignored so that states having difficulty meeting the new requirements will have plenty of time to change their statutes. EPA deadlines have a way of not being met. American Frozen Food Institute v. Train, 539 F.2d 107, 130 (D.C. Cir. 1976); Bird & King, *Water Cleanup Programs*, N.Y. Times, February 2, 1980, at E5, col. 1.

program, resulting in inefficiency and delay, the expense of which would eventually be passed on to taxpayers and consumers.

It is contended that opening the state courts to citizen suits would unduly burden already crowded state court calendars and delay enforcement.[148] Time delays add to costs and prolong damage to our nation's waters.[149] Excessive litigation might also slow implementation of other important national policies, such as development of vital energy projects.[150] These difficulties, however, would probably not arise. Studies of both the 'wide open' citizen suit provision in Michigan[151] and section 505 suits in federal courts[152] indicate that citizens exploit their enforcement opportunities sparingly. Additionally, environmental public interest litigators are severly underfunded.[153]

The issue of delay is more significant in considering the requirement that the states allow citizen intervention.[154] The state agencies and industry both seem to fear that if broad intervention is allowed, enforcement actions could last longer and cost more be-

148. Comments of Utility Solid Waste Activity Group and Utility Water Act Group, #71. *See* note 91 *supra*.

149. Professor Grad recognized that enforcement delays and confusion were in large part caused by the multitude of legal and administrative challenges to guideline requirements and permit conditions under the FWPCA. F. GRAD, ENVIRONMENTAL LAW: SOURCES AND PROBLEMS 2-195 (2d ed. 1978). Broader access to courts would aggravate this problem.

150. President Carter recently declared it a national goal to reduce procedural delays that impede development of vital energy projects. Statement of former President Carter, 15 Weekly Comp. of Pres. Docs. 1240 (July 15, 1979). Increasing opportunities for citizen opposition would hinder this pursuit.

151. Haynes, *Michigan's Environmental Protection Act in Its Sixth Year: Substantive Environmental Law from Citizen Suits*, 6 ENVT'L L. REP. 50067 (1976).

152. ELI ENFORCEMENT REPORT, *supra* note 91, at 14, 361.

153. *See* note 101 *supra*.

154. There is a general policy question, illustrated by courts' interpretations of Federal Rule of Civil Procedure 24(a)(2), of whether intervention in an action will contribute to the just and efficient resolution of the controversy. Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969); Crosby Steam Gage & Valve Co. v. Manning, Maxwell & Moore, Inc., 51 F. Supp. 972 (D. Mass. 1943); Brunet, *A Study in the Allocation of Scarce Judicial Resources: The Efficiency of Federal Intervention Criteria*, 12 GA. L. REV. 701 (1978) [hereinafter cited as Brunet]; Note, *Intervention in Government Enforcement Actions*, 89 HARV. L. REV. 1174 (1976) [hereinafter cited as *Intervention*]. The extent to which the addition of intervenors will unduly complicate or slow down adjudication is balanced against the benefits of intervention. Intervenors often present novel viewpoints and additional evidence. The involvement of intervenors may also effectively protect their rights and those of others affected by the litigation. Brunet, *supra*, at 719.

cause of added complexity.[155] Lack of cooperation between the state and intervenors may block settlements with defendants.[156] But, while intervenors might add evidence or arguments, they do not usually press additional claims[157] and in any case courts have discretion to limit the complexity of any suit.[158] Settlement may justly be delayed where intervenors place a higher priority on the protection of clean water at a particular point source than the state does after it has balanced its enforcement priorities.[159] Again, frivolous intervenors are unlikely because of the paucity of funds available for public environmental litigation.[160] In addition, courts have acted, on occasion, to muzzle troublesome participants.[161]

One alternative tendered by the EPA with the proposed rules would compel the states to publish proposed settlement agreements and receive public comment on the agreements even if no members of the public have chosen to intervene. This procedure would allow citizens without any significant interest in the litigation to interfere with state enforcement discretion and would clearly terminate both the privacy and ability to respond quickly necessary for effective settlement negotiation.[162] The second alternative of the final regulations requires only that notice of settlement be given to the public and thirty days allowed for comment. Although

155. Comments of Tennessee Department of Public Health, #35; Vermont Agency of Environmental Conservation, #45; Evans, Kitchel & Jenckes, P.C., #53 (for Phelps Dodge Corp.); Oregon Department of Justice, #58; Arkansas Department of Pollution Control and Ecology, #98. *See* note 91 *supra*.

These fears are not completely groundless. *See* note 154 *supra*. Commonwealth of Virginia v. Westinghouse Electric, 542 F.2d 214 (4th Cir. 1976); Wilderness Society v. Morton, 463 F.2d 1261, 1263 (D.C. Cir. 1972) (Concurrence) (in the environmental litigation context).

156. *See* note 154 *supra*. *Cf.* note 161 and accompanying text *infra*.

157. Wilderness Society v. Morton, 463 F.2d 1261, 1263 (D.C. Cir. 1972) (Concurrence); Office of Communication of the United Church of Christ v. Federal Communications Commission, 359 F.2d 994 (D.C. Cir. 1966); *Intervention, supra* note 154, at 1192.

158. For example, pretrial conferences, exclusion of redundant evidence, clarifying issues and speeding discovery.

159. *Intervention, supra* note 154, at 1193.

160. *See* note 101 *supra*.

161. For example, a district court in Alaska ordered that the intervenors in an FWPCA action be prohibited from impeding the settlement bargaining for by the Administrator. United States v. Ketchikan Pulp Co., 430 F. Supp. 83 (D. Alaska 1977).

162. Comments of Oregon Department of Justice, #58; Illinois Environmental Protection Agency, #133. *See* note 91 *supra*.

this will preserve the privacy of settlement negotiations it will still slow down agency responses.

It is argued that broadening access to court for private permit enforcement action invites abuse of the judicial process and waste of court time and threatens the confidentiality of business practices and trade secrets. As to the first point, nuisance actions could be brought to harass competitors or to exert pressure during a labor dispute,[163] but to the extent that the permittee is violating its permit, it deserves to be prosecuted regardless of plaintiff's motivation. Extensive safeguards against the second danger already exist.[164]

Many state-initiated enforcement actions are brought before quasi-judicial tribunals[165] without significant citizen input. Both choices in the final regulations will encourage more citizen intervention before these bodies. The EPA's third alternative of the proposed regulations would promote public scrutiny by allowing citizens to intervene or initiate enforcement before state administrators.[166] Because the costs of participation on the administrative level are generally less than in court,[167] citizens could bring more actions per dollar, resulting in more extensive enforcement.

One advantage of the proposed alternative would be its probable ease of implementation, since some states may be able to change their administrative practices without changing any statutes. Then,

163. This threat is easily regulated. For example, § 505 allows the court to award costs of litigation, including attorneys' and experts fees, against a party when the court deems it appropriate (such as for a frivolous or harassing enforcement action). For text, *see* note 21 *supra*.

164. Trade secrets are already protected under the FWPCA. 33 U.S.C. § 1318(b)(2) (1976); 40 C.F.R. § 125.36(1) (1979). Most state discovery rules are more restrictive than the Federal Rules of Civil Procedure, which provide that protective orders will direct "that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way." Fed. R. Civ. P. 26(c)(7) (1979).

165. For instance, § 31(b) of the Illinois Environmental Protection Act provides for citizen intervention at the administrative level. Ill. Rev. Stat., ch. 111½, § 1031 (1977). *See* Comments of Illinois Environmental Protection Agency, #133. *See* note 91 *supra*.

166. At the administrative level states may miscalculate the importance of a given violation. Office of Communication of the United Church of Christ v. Federal Communications Commission, 359 F.2d 994 (D.C. Cir. 1966); MacIntyre & Volhard, *Intervention in Agency Adjudications*, 58 VA. L. REV. 230, 243 (1972) [hereinafter cited as MacIntyre & Volhard]; Comments of Environmental Action of Michigan 6, #128. *See* note 91 *supra*.

167. ELI ENFORCEMENT REPORT, *supra* note 91, at 7.

if this were the only proposal adopted by the EPA, the states could more easily accept FWPCA delegation, which would promote the congressional intent that states assume administrative duties.

There could be costs to the states, however, if intervention is used as a "facile tool to disrupt the orderly and efficient" enforcement of the Act.[168] By allowing the public to bring actions before a state enforcement agency, that agency would lose its flexibility in allocating its limited resources to its own enforcement priorities.[169]

E. *Quality of Decisionmaking*

The court's rule could have the effect of improving the quality of decisionmaking, both administrative and judicial. First, private groups often articulate the concerns of a specific community and can analyze the costs versus the benefits of a given enforcement action with heightened sensitivity.[170] Note that "citizen" participation includes business corporations and trade associations as well as conservationists.[171] In contrast, a state pollution administrator's concerns are necessarily more macroscopic.

IV. CONCLUSIONS AND RECOMMENDATIONS

The Seventh Circuit reached its decision by questionable means. Even if it gave the EPA all the deference it deserved, the court misconstrued the significance of the language in section 101(e) and selectively read the legislative history to reach a desired result.

However, even if the means were questionable, the court reached the right result in light of the policy behind the FWPCA. Public participation would enhance enforcement of state NPDES permits. In general, state implementation agencies are inadequately manned and funded. Increased citizen involvement will augment enforcement resources. Additional costs to the EPA and

168. MacIntyre & Volhard, *supra* note 166, at 256.

169. The EPA often fails to make sure that states have the requisite legal staff to enforce the FWPCA. ELI ENFORCEMENT REPORT, *supra* note 91, at 276.

170. West Michigan Environmental Action Council v. Natural Resources Commission, 405 Mich. 741, 275 N.W.2d 538 (1979) (in determining the environmental impact, the court required the defendant Commission to consider the analyses of community groups as to the cost/benefit of oil drilling in a state forest).

171. Natural Resources Defense Council v. Costle, 561 F.2d 910 (D.C. Cir. 1977) (granting intervention to nine chemical companies and three rubber manufacturers, joining three environmental organizations, four trade associations and eight oil companies already parties to the lawsuit).

state agencies will be incurred, but these should be more than recompensed by the benefits of citizen participation in FWPCA enforcement. Involvement in the workings of government is fundamental to a successful democracy. Citizen participation in pollution control enforcement will build public confidence and support for the abatement effort.

The eventual cost or benefit of the *CBE* decision depends, however, on the regulations promulgated by the EPA. In the authors' view, the advantages to NPDES enforcement of citizen intervention, suits, and award of attorneys' fees outweigh their concomitant burdens. The final regulations should have included provisions for citizen suits and attorneys' fees as well as intervention. Because publication of proposed settlements would straight-jacket delicate negotiations by state agencies, we advise against it. The requirement in choice two of the final regulations that states give notice of proposed settlement is much less burdensome.

As mandated in the Act, the EPA should seek to minimize curbs on state flexibility in administering their NPDES programs by recognizing that some states have opted to enforce their NPDES programs primarily through quasi-judicial proceedings and other actions at the administrative level. The final regulations allow citizens to intervene in administrative proceedings. But the EPA should permit citizens to initiate enforcement actions in either judicial or administrative forums.

The guidelines should insure citizens an effective role within the state regulatory framework. The final regulations allow states a good deal of flexibility in implementation by allowing them to choose one of two alternatives. The second will not necessarily allow citizens an effective voice. By preventing state opposition to permissive intervention it adds little to the opportunities already available, and does not prevent states from taking them away completely by legislative action.

We recommend that the EPA require:

1) that states permit intervention at whatever level formal enforcement action by the state is initiated,

2) that states allow citizen initiation of enforcement actions at either the administrative or state court level, and

3) that attorneys' fees be awarded to citizens "where appropriate," and to defendants victimized by frivolous litigation.

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