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Early in the environmental decade of the 1970s,[1] Congress turned its attention to the quality of the nation's water resources. Congress found, to its dismay, that many cities and industries were continuing to use the nation's surface waters as a convenient disposal site for ever increasing amounts of waste.[2] Moreover, the existing federal water pollution control program[3] appeared unable to stem the rising tide of water pollution.[4] Thus confronted by the

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1. The Council on Environmental Quality aptly described the 1970s as an "environmental decade" when it surveyed the intensive efforts made by the federal government during those years to enhance the quality of the environment. COUNCIL ON ENVTL. QUALITY, TENTH ANNUAL REPORT 11-15 (1979).

2. *See* S. REP. NO. 414, 92d Cong., 1st Sess. 7 (1971), *reprinted in* 2 LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 1425 (1973) [hereinafter LEGISLATIVE HISTORY 1972]; 117 CONG. REC. 38,797-98 (1971) (remarks of Sen. Edmund Muskie), *reprinted in* 2 LEGISLATIVE HISTORY 1972, *supra*, at 1253-54.

3. Water Pollution Control Act, Pub. L. No. 80-845, 62 Stat. 1155 (1948) (superseded 1972).

4. S. REP. NO. 414, 92d Cong., 1st Sess. 1-7 (1971), *reprinted in* 2 LEGISLATIVE

twin evils of severe water quality degradation and a failed federal initiative to control it, Congress opted to discard the earlier federal program and chart a new, more effective course. Congress, consequently, enacted the Federal Water Pollution Control Act Amendments of 1972[5] (1972 Amendments) with the objective of restoring and maintaining "the chemical, physical, and biological integrity of the Nation's waters."[6]

A major weakness of the prior federal program lay in the area of enforcement. Federal efforts to exact compliance with clean water objectives had languished for years.[7] In fact, in over twenty years of the program's existence, only one case against a polluter had been prosecuted in federal court.[8] Thoroughly disenchanted by this experience, Congress set out in 1972 to ensure vigorous enforcement.[9]

In order to achieve its objective of clean water and to facilitate enforcement, Congress established the National Pollutant Discharge Elimination System (NPDES), through which precise re-

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HISTORY 1972, *supra* note 2, at 1419-25. Senator Edmund Muskie described this distressing situation in vivid fashion:

> Our planet is beset with a cancer which threatens our very existence and which will not respond to the kind of treatment that has been prescribed in the past. The cancer of water pollution was engendered by our abuse of our lakes, streams, rivers, and oceans; it has thrived on our half-hearted attempts to control it; and like any other disease, it can kill us.
>
> We have ignored this cancer for so long that the romance of environmental concern is already fading in the shadow of the grim realities of lakes, rivers, and bays where all forms of life have been smothered by untreated wastes, and oceans which no longer provide us with food.

118 CONG. REC. 33,692 (1972), *reprinted in* 1 LEGISLATIVE HISTORY 1972, *supra* note 2, at 161-62.

5. Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1376 (1982)). Congress recently overrode a presidential veto, *see* 133 CONG. REC. H525-26 (daily ed. Feb. 3, 1987); 133 CONG. REC. S1708 (daily ed. Feb. 4, 1987), to enact major amendments to this legislation. *See* Water Quality Act of 1987, Pub. L. No. 100-4, 1987 U.S. CODE CONG. & ADMIN. NEWS (101 Stat.) 7 (to be codified in scattered sections of 33 U.S.C.).

This Article will refer to the amended Federal Water Pollution Control Act as the Clean Water Act, its most common title, unless referring specifically to the original 1948 Act or its subsequent amendments, including the 1972 Amendments.

6. Clean Water Act § 101(a), 33 U.S.C. § 1251(a) (1982).

7. *See* S. REP. NO. 414, 92d Cong., 1st Sess. 5 (1971), *reprinted in* 2 LEGISLATIVE HISTORY 1972, *supra* note 2, at 1423.

8. *See id.*; *Water Pollution Control Programs: Hearings Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 92d Cong., 1st Sess. 55-78 (1971) [hereinafter *Senate Oversight Hearings 1971*] (summary of enforcement actions since 1956). This solitary case, involving the pollution of the Missouri River, was brought against the city of St. Joseph, Missouri in 1960. *See Senate Oversight Hearings 1971, supra*, at 59; C. DAVIES & B. DAVIES, THE POLITICS OF POLLUTION 207-08 (2d ed. 1975).

9. 117 CONG. REC. 38,797-802 (1971) (remarks of Sen. Muskie), *reprinted in* 2 LEGISLATIVE HISTORY 1972, *supra* note 2, at 1253-65.

quirements are set for individual dischargers.[10] Under the NPDES program, it is unlawful to discharge a pollutant without first obtaining a permit and complying with its terms and conditions.[11] The permit transforms generally applicable effluent limitations and other standards into enforceable obligations of the individual discharger.[12] The permit, in short, defines compliance for the discharger[13] and eases the task of government enforcement.[14]

Congress also streamlined and strengthened enforcement procedures in 1972.[15] Whenever the Administrator of the United States Environmental Protection Agency (EPA) learns of a violation of a NPDES permit or of another relevant violation of the Act, the Administrator is empowered to take quick, effective action to obtain compliance.[16] Among the available mechanisms for direct federal enforcement are the issuance of administrative compliance orders,[17] and the institution of civil suits for injunctive relief[18] and civil monetary penalties.[19]

Congress obviously thought that there had been too much talk about stringent enforcement and too little action. The EPA, however, has not always acted vigorously to enforce the requirements of the Clean Water Act. According to the United States General Accounting Office (GAO), the number of enforcement actions initiated by the EPA under the Clean Water Act fell over 51% between 1977 and 1979.[20] This decline reached its nadir in 1982, by which time EPA enforcement amounted to only 26.9% of its 1977 effort; in other words, enforcement dropped 73.1% between 1977 and 1982.[21] This precipitous decrease in enforcement activity coin-

10. Clean Water Act § 402, 33 U.S.C. § 1342 (1982); *see* EPA v. California *ex rel.* State Water Resources Control Bd., 426 U.S. 200, 205 (1976).

11. Clean Water Act § 402(a), 33 U.S.C. § 1342(a).

12. Permits are issued only for discharges that will meet the requirements of the Act. *Id.* § 402(a)(1), 33 U.S.C. § 1342(a)(1). The limitations and conditions contained in a permit are enforceable under the Act. *Id.* §§ 309, 505, 33 U.S.C. §§ 1319, 1365.

13. Compliance with the terms of the permit, however, is not deemed compliance for purposes of any standard established pursuant to section 307 of the Clean Water Act, 33 U.S.C. § 1317, for a toxic pollutant which is "injurious to human health." *Id.* § 402(k), 33 U.S.C. § 1342(k); *see State Water Resources Control Bd.*, 426 U.S. at 205.

14. *State Water Resources Control Bd.*, 426 U.S. at 205.

15. *See* H.R. REP. NO. 911, 92d Cong., 2d Sess. 114 (1972), *reprinted in* 1 LEGISLATIVE HISTORY 1972, *supra* note 2, at 801; 117 CONG. REC. 33,704 (1971) (remarks of Sen. John Sherman Cooper), *reprinted in* 1 LEGISLATIVE HISTORY 1972, *supra* note 2, at 189; *id.* at 38,827 (remarks of Sen. William Proxmire), *reprinted in* 2 LEGISLATIVE HISTORY 1972, *supra* note 2, at 1317.

16. *See* Clean Water Act § 309(a), (b), 33 U.S.C. § 1319(a), (b).

17. *Id.* § 309(a), 33 U.S.C. § 1319(a).

18. *Id.* § 309(a), (b), 33 U.S.C. § 1319(a), (b).

19. *Id.* § 309(d), 33 U.S.C. § 1319(d).

20. The EPA initiated 1523 enforcement actions in fiscal year (FY) 1977 as opposed to only 736 enforcement actions in FY 1979. U.S. GEN. ACCOUNTING OFFICE, WASTEWATER DISCHARGERS ARE NOT COMPLYING WITH EPA POLLUTION CONTROL PERMITS 24 (1983). These enforcement figures represent the total number of notices of violations and administrative compliance orders issued by the EPA and the referrals for civil actions made by the EPA to the Department of Justice. *See id.* at 24-25.

21. In FY 1982, the EPA initiated only 410 enforcement actions. Of these, 300 were administrative compliance orders, 72 were notices of violations, and 38 were re-

cided with a fall of approximately 41.5% in the number of compliance inspections undertaken by the EPA[22] and a fall of 25.5% in the number of permanent full-time personnel assigned to Clean Water Act enforcement.[23]

The downturn in EPA enforcement efforts was not due to sudden compliance with the terms of NPDES permits. After surveying the performance of 531 water polluters from October 1980 through March 1982, the GAO reported that 82% of these dischargers had violated their permits at least once during that period.[24] More important, the GAO discovered that 24% of these polluters were in significant noncompliance with Clean Water Act requirements.[25] The EPA, therefore, certainly had enforcement

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ferrals to the Department of Justice. *Id.* at 25. The Department of Justice took exception to the number of civil referrals reported by the GAO for FY 1982, noting instead that only 32 cases were referred during that fiscal year. *See id.* at 58.

Some would contend that looking at the total number of enforcement actions alone is misleading because the raw numbers reveal neither the quality of the EPA's actions nor the significance of the alleged violations. *See e.g.*, Brown, *EPA Enforcement — Past, Present and Future,* ENVTL. F., May 1984, at 12. Nevertheless, these statistics, however crude a measure of ultimate enforcement effort, provide virtually the only means by which to determine the vigor with which the EPA is enforcing the Clean Water Act. *See* Mintz, *Enforcement in the Second Ruckelshaus Era,* ENVTL. F., Mar. 1984, at 6, 9-10.

22. In FY 1977, the EPA conducted 3014 compliance inspections, consisting of 1115 sampling inspections and 1899 compliance evaluation inspections. *Department of Housing and Urban Development — Independent Agencies Appropriations for 1979, Pt. 4: Hearings Before a Subcomm. of the House Comm. on Appropriations,* 95th Cong., 2d Sess. 505 (1978) [hereinafter *Budget Hearings 1978*]. In FY 1982, the EPA conducted approximately 1763 compliance inspections. *Department of Housing and Urban Development — Independent Agencies Appropriations for 1984, Pt. 4: Hearings Before a Subcomm. of the House Comm. on Appropriations,* 98th Cong., 1st Sess. 553 (1983) [hereinafter *Budget Hearings 1983*].

23. During FY 1977, there were 590 permanent water quality enforcement positions. *Budget Hearings 1978, supra* note 22, at 500. By FY 1982, the number of permanent enforcement positions had dropped to 440.6, as measured in total permanent work years. *Budget Hearings 1983, supra* note 22, at 549.

In addition to this contraction of personnel resources available for water enforcement, EPA enforcement efforts suffered, during the early years of the Reagan Administration, from poor management and a long series of debilitating organizational changes. Miller, *The Decline and Fall of EPA Enforcement,* ENVTL. ANALYST, Aug. 1983, at 3, 5-6; *see also* Comment, *Federal Water Pollution Laws: A Critical Lack of Enforcement by the Environmental Protection Agency,* 20 SAN DIEGO L. REV. 945, 952-53 (1983) (discussing the confusion and the ineffective water pollution enforcement caused by at least four EPA reorganizations that occurred during the early 1980s).

24. U.S. GEN. ACCOUNTING OFFICE, *supra* note 20, at 7.

25. Of the 531 polluters surveyed, the GAO determined that 130 polluters had been in significant noncompliance. *Id.* at 9. A polluter was deemed in significant noncompliance by the GAO "when concentration or quality limits were exceeded by 50% or more for at least one permit parameter in at least four consecutive months during the 18-month period." *Id.*

In commenting on a draft of the GAO report, the EPA indicated that it found a somewhat lower rate of significant noncompliance among these polluters. *See id.* at 10. This discrepancy was attributed to the EPA's use of a different definition of significant noncompliance. *Id.* at 10-12.

work to do. And just as certainly, EPA enforcement activity had dwindled to an anemic level.

Amid the evidence of widespread noncompliance, there were numerous indications that water quality had not improved substantially. The Council on Environmental Quality (CEQ) reported in 1980 that water pollution from conventional and toxic pollutants was still widespread.[26] In fact, the CEQ report revealed little or no improvement nationally in ambient water quality from 1975 through 1979 despite indications that water quality was better in some localities.[27] Furthermore, additional studies completed in 1982 concluded that the overall quality of the nation's waters had changed little since 1979.[28]

It appears, consequently, that the EPA's efforts to enforce the Clean Water Act had declined dramatically at a time when much remained to be done to restore the integrity of the nation's waters. This disturbing state of affairs did not go unnoticed. Concerned about the adequacy of EPA enforcement efforts, private environmental groups embarked on an unprecedented drive to enforce the terms of the Clean Water Act by filing dozens of citizen suits[29] against alleged violators.[30] In addition, the press constantly publicized the lapse in EPA enforcement,[31] while former Agency officials and members of Congress complained openly that EPA

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26. COUNCIL ON ENVTL. QUALITY, ELEVENTH ANNUAL REPORT 100 (1980). In reaching this discouraging conclusion, the CEQ had analyzed six key pollution indicators in rivers and streams using data from the United States Geological Survey and EPA definitions of water quality. *Id.* at 100-08.

27. *Id.* at 100. The CEQ acknowledged, however, that "[t]he fact that the nation's surface water has not deteriorated despite a growing population and an increased gross national product is an accomplishment for control efforts." *Id.*

28. After examining water quality data, the Conservation Foundation found "that, nationally, there has been little change in water quality over the past seven years — at least with respect to the 'conventional' pollutants." THE CONSERVATION FOUND., STATE OF THE ENVIRONMENT 1982, at 97 (1982). In another study, the EPA and the United States Fish and Wildlife Service assessed the biological condition of the nation's waters and declared that the ability of the "waters to support sport fish has not changed appreciably during the last 5 years." OFFICE OF WATER, EPA & U.S. FISH & WILDLIFE SERV., 1982 NATIONAL FISHERIES SURVEY, VOLUME 1 TECHNICAL REPORT: INITIAL FINDINGS vii (1984) (copy on file at the *George Washington Law Review*).

29. Section 505 of the Clean Water Act authorizes "any citizen" to commence a civil action against any water polluter who is allegedly in violation of effluent standards or limitations. 33 U.S.C. § 1365 (1982); *see infra* notes 114-24 and accompanying text.

30. *See* ENVTL. L. INST., CITIZEN SUITS: AN ANALYSIS OF CITIZEN ENFORCEMENT ACTIONS UNDER EPA-ADMINISTERED STATUTES vi-vii (1984). From the beginning of 1982 through April 1984, a coalition of regional and national environmental groups brought a total of 162 citizen suits under the Clean Water Act for alleged violations. *Id.* at vi; *see also* Hackett & Schwartz, *Citizen Suits Against Private Industry Under the Clean Water Act*, 17 NAT. RESOURCES LAW. 327, 327 (1984) (noting the dramatic increase in citizen suits brought by environmental groups under the Clean Water Act); Miller, *Private Enforcement of Federal Pollution Control Laws Part III*, 14 Envtl. L. Rep. (Envtl. L. Inst.) 10,407, 10,424-25 (1984) (discussing the sharp rise in citizen suits brought by environmental groups in response to the breakdown in EPA enforcement under the Clean Water Act); Comment, *Private Enforcement of the Clean Air Act and the Clean Water Act*, 35 AM. U.L. REV. 127, 129-31 (1985) (noting the surge in citizen suits due to the decline in the EPA's enforcement performance).

31. *See, e.g., Poison at the EPA*, THE NEW REPUBLIC, Mar. 24, 1982, at 7; Henry,

enforcement had slowed substantially.[32] Such criticism apparently had a salutary effect, for enforcement activity soon perked up. In 1983, EPA enforcement rose to 58% of its 1977 level — an increase of 116% over 1982.[33]

However, enforcement began to fall again during the first quarter of 1984.[34] Prompted by the general drop in enforcement and reports on the levels of noncompliance, EPA Administrator William Ruckelshaus chastised a group of Agency enforcement officials early in 1984.[35] "I am nervous about what I perceive to be an apparent lack of action and serious commitment to ensuring that these laws and regulations are enforced."[36] A moment later he added: "Let me disabuse anyone who believes EPA, while I am there, will not have the will and the determination to enforce the laws as written by Congress."[37] When the Administrator finished, the audience seemed stunned; but, after a moment of awkward silence, the gathering of enforcement officials gave Ruckelshaus a long standing ovation.[38]

The Administrator's remarks evidently struck a responsive chord within the EPA, since enforcement activity quickly accelerated.[39] In fact, the total number of enforcement actions undertaken in 1984 exceeded the 1977 level by some 30%.[40] The

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This Ice Queen Does not Melt, TIME, Jan. 18, 1982, at 16; Morganthau, *The "Ice Queen" at EPA*, NEWSWEEK, Oct. 19, 1981, at 67.

32. *See, e.g., Current Developments*, 13 Env't Rep. (BNA) 533-34 (Aug. 20, 1982) (former EPA General Counsel, Michelle Corash, criticizing the cuts in the EPA's enforcement budget); Wash. Post, Mar. 1, 1983, at A6, col. 1 (Rep. John Dingell blaming EPA Administrator Anne Burford for the slump in the Agency's enforcement effort); Train, *The Destruction of EPA*, Wash. Post, Feb. 2, 1982, at A15, col. 5 (Russell Train, former EPA Administrator, asserting that "[e]nforcement has ground practically to a halt"); L.A. Daily J., Oct. 16, 1981, at 3, col. 1 (reporting that former acting EPA Assistant Administrator for Enforcement, Jeffrey Miller, declared that the "enforcement program has ground to a screeching halt" and that Rep. Anthony Moffet announced an investigation into the reasons for the shrinking number of cases referred for prosecution).

33. In 1983, there were a total of 887 enforcement actions. Of these, 781 were administrative compliance orders, 50 were notices of violations, and 56 were referrals to the Department of Justice. *Implementation of the Federal Clean Water Act: Hearings on EPA Enforcement of the National Pollutant Discharge Elimination System Permit Program Before the Subcomm. on Investigations and Oversight of the House Comm. on Public Works and Transportation*, 98th Cong., 2d Sess. 451 (1984) [hereinafter *NPDES Enforcement Oversight Hearings 1984*].

34. In the first quarter of FY 1984, only five civil cases were referred to EPA headquarters from the various EPA regional offices. *Id.* at 440.

35. *See Transcript of William D. Ruckelshaus' Remarks before the EPA National Compliance and Enforcement Conference*, ENVTL. F., Apr. 1984, at 14-17.

36. *Id.* at 14.

37. *Id.* at 15.

38. *Id.* at 14 (editorial note).

39. During the second and third quarters of FY 1984, 63 civil cases were referred to EPA headquarters. *NPDES Enforcement Oversight Hearings 1984, supra* note 33, at 440.

40. In FY 1984, the EPA undertook a total of 1828 enforcement actions. Of these,

immediate crisis, therefore, had ceased.

The experience of the early 1980s suggests that a hiatus in EPA enforcement can be halted either by forceful public and political reaction or by an Administrator dedicated to strong enforcement. However, water pollution enforcement may slow to a virtual standstill before Congress or the public reacts vigorously enough to reverse the trend.[41] In addition, there is no guarantee that the Administrator will always be a person of good will and vision. It thus appears possible that federal water pollution enforcement could falter once again, thereby allowing substantial damage to the nation's waters before the public or Congress can turn the tide.

The fact that federal enforcement can drop so significantly at times runs counter to Congress's expressed desire for a consistently strong water pollution enforcement program.[42] But did Congress, despite its desire, give the EPA discretion not to enforce the Clean Water Act, or did Congress, in anticipation of such a problem, create a mandatory duty to enforce? If Congress did create a mandate that the EPA initiate a particular form or forms of enforcement in appropriate cases, then federal district courts possess the authority to compel such enforcement in a case brought pursuant to the citizen suit provision of the Clean Water Act.[43]

The Agency, as might be expected, has argued that it possesses unreviewable discretion to decide whether to enforce the requirements of the Clean Water Act.[44] Some courts have agreed; others have not.[45] The conflict among the courts is understandable, for the question is not easily resolved.

The primary enforcement provision of the Clean Water Act, section 309,[46] contains a confusing melange of mandatory and discretionary language. Section 309(a) seemingly presents the EPA with a series of mandatory enforcement duties. In the event a state-issued NPDES permit is violated, the EPA either "shall" issue a notice of violation to the state and the polluter, or "shall" issue an administrative compliance order or institute suit against

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1644 were administrative compliance orders, 94 were notices of violations, and 90 were civil referrals from regional offices to EPA headquarters. *Department of Housing and Urban Development — Independent Agencies Appropriations For 1986, Pt. 4: Hearings Before a Subcomm. of the House Comm. on Appropriations,* 99th Cong., 1st Sess. 570 (1985).

41. *See Water Pollution Control Legislation, 1971: Hearings on H.R. 11896 and H.R. 11895 Before the House Comm. on Public Works,* 92d Cong., 1st Sess. 455 (1971) [hereinafter *Reopened House Hearings 1971*] (statement of Professor Joseph Sax, University of Michigan Law School) ("[E]ven the most alert congressional committees cannot give continuous and detailed attention to the entire range of agency enforcement"); Note, *Judicial Review of Administrative Inaction,* 83 COLUM. L. REV. 627, 638-42 (1983) (discussing the general inability of the political branches to control agency actions in nonimplementation contexts).

42. *See infra* notes 158-64, 169-71, 175-84 & 269-73 and accompanying text.

43. § 505, 33 U.S.C. § 1365 (1982).

44. *See infra* note 281 and accompanying text.

45. *See infra* notes 288-89 & 301 and accompanying text.

46. 33 U.S.C. § 1319 (1982).

the polluter.[47] If the Agency chooses the first alternative, and appropriate state enforcement is not forthcoming within thirty days, the EPA "shall" issue an administrative compliance order or commence civil enforcement.[48] In the event of any other relevant violation of the Act, the EPA "shall" issue a compliance order or bring a civil enforcement action.[49] Section 309(b), on the other hand, uses discretionary language when referring to civil actions and compliance orders. It provides that the EPA is "authorized" to initiate a civil action "for any violation for which [the EPA] is authorized to issue a compliance order" under section 309(a).[50]

The resolution of the apparent ambiguities found in section 309 requires a thorough consideration of the statute's legislative history to determine, if possible, what Congress intended to accomplish through the use of this language. In order to place that legislative material in its proper historical context, however, it is necessary to begin with an examination of the problems with federal water pollution enforcement that Congress meant to cure in 1972, as well the specifics of that cure. Part I of this Article therefore examines both the history of federal water pollution enforcement prior to 1972 and the contours of the enforcement scheme

47. Clean Water Act § 309(a)(1), (3), 33 U.S.C. § 1319(a)(1), (3).

48. *Id.* § 309(a)(1), 33 U.S.C. § 1319(a)(1).

49. *Id.* § 309(a)(3), 33 U.S.C. § 1319(a)(3).

50. *Id.* § 309(b), 33 U.S.C. § 1319(b). The Water Quality Act of 1987, Pub. L. No. 100-4, 1987 U.S. CODE CONG. & ADMIN. NEWS (101 Stat.) 7 (to be codified in scattered sections of 33 U.S.C.) (1987 Amendments), provides the EPA with a second administrative enforcement tool. The 1987 Amendments permit the EPA to assess administrative civil penalties for particular violations. *See* Water Quality Act of 1987 § 314, 1987 U.S. CODE CONG. & ADMIN. NEWS (101 Stat.) 7, 46-49 (adding Clean Water Act § 309(g)) (to be codified at 33 U.S.C. § 1319(g)). This new authority, however, does not alter the procedures applicable to the EPA's issuance of simple administrative compliance orders. *See id.* § 314(a), 1987 U.S. CODE CONG. & ADMIN. NEWS (101 Stat.) 7, 49 (adding Clean Water Act § 309(g)(11)) (to be codified at 33 U.S.C. § 1319(g)(11)). Moreover, the 1987 Amendments do not change in any way the language found at section 309(a) and (b) of the Clean Water Act. Congress merely intended to give the EPA an additional administrative enforcement method, while leaving existing administrative and civil enforcement mechanisms intact. *See* 132 CONG. REC. H10,571 (daily ed. Oct. 15, 1986) (the legislative history of S. 1128, which was pocket vetoed by President Reagan on November 6, 1986, introduced as H.R. 1 and S. 1 in January 1987, and enacted into law as the 1987 Amendments, forms the legislative history for the 1987 Amendments, *see* 133 CONG. REC. S733 (daily ed. Jan. 14, 1987) (statement of Sen. Burdick)).

This new authority to impose administrative penalties is clearly couched in discretionary language. *See* Water Quality Act of 1987 § 314(a), 1987 U.S. CODE CONG. & ADMIN. NEWS (101 Stat.) 7, 46 (adding Clean Water Act § 309(g)(1)) (to be codified at 33 U.S.C. § 1319(g)(1)). It therefore does not pose the same questions as presented in the issuance of compliance orders or the institution of civil actions. As a consequence, the assessment of administrative penalties will not be a subject of this Article. Any references in the Article to administrative enforcement or administrative orders are meant to refer exclusively to administrative compliance orders, unless otherwise indicated.

created in 1972. Part II then surveys at length the legislative history of section 309.

That legislative history demonstrates, as more fully explained in Part III, that, although Congress gave the EPA complete discretion to institute civil enforcement, Congress did impose a mandatory duty upon the EPA to issue administrative compliance orders for particular violations of the Clean Water Act. That duty, however, is not a rigid command to use this kind of administrative enforcement in every instance of a relevant violation. Congress intended to infuse this mandatory duty with limited discretion: first, to determine whether the Act was violated, and second, to establish appropriate priorities for federal enforcement based on the seriousness of the violation, its relationship to national policy, and whether, in some instances, a state government has undertaken appropriate enforcement action. Therefore, despite the fact that Congress opted for a form of compulsory enforcement, Congress tempered this approach in recognition of the need to utilize a certain amount of administrative expertise in the execution of a rational and effective enforcement program.

Nevertheless, Congress vested the judiciary with jurisdiction to hear citizen suits alleging a failure by the EPA to perform such a mandatory duty. Because this particular duty contains significant elements of discretion, Part IV of this Article suggests a form of limited judicial review that should enable the courts to fulfill Congress's intent to ensure vigorous administrative enforcement within a framework that relies heavily upon the expert judgment of the EPA. The course that Congress thus charted eschewed reliance solely upon mere words exhorting vigorous enforcement; instead, Congress acted to assure it. In doing so, however, Congress chose a reasonable middle path between a rigid form of mandatory enforcement and complete enforcement discretion.

I. The Evolution of Federal Water Pollution Enforcement

A. The Initial Experience: 1948-1972

The first comprehensive federal legislation aimed at controlling water pollution was the 1948 Water Pollution Control Act[51] (1948 Act). The enforcement provisions of the 1948 Act proved so ineffective, however, that Congress repeatedly amended those provisions and added new ones prior to 1972[52] in attempts to strengthen federal enforcement. Despite all these efforts, federal water pol-

51. Pub. L. No. 80-845, 62 Stat. 1155 (1948) (superseded 1972). In 1956 Congress redesignated the Act as the "Federal Water Pollution Control Act." Water Pollution Control Act Amendments of 1956, Pub. L. No. 84-660, § 1, 70 Stat. 498, 507 (superseded 1972).

52. *See, e.g.*, Water Pollution Control Act Amendments of 1956, Pub. L. No. 84-660, 70 Stat. 498 (superseded 1972); Federal Water Pollution Control Act Amendments of 1961, Pub. L. No. 87-88, 75 Stat. 204 (superseded 1972); Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903 (superseded 1972); Clean Water Restoration Act of 1966, Pub. L. No. 89-753, 80 Stat. 1246 (superseded 1972); Water Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 91 (superseded 1972).

lution enforcement remained a slow and awkward process until 1972.[53]

Under the 1948 Act, federal enforcement authority was limited to those instances in which the "pollution of interstate waters" actually endangered the "health or welfare" of persons in a state other than the state where the pollution was discharged.[54] Polluters, consequently, were immune from federal enforcement as long as they endangered only local residents.[55] Moreover, polluters were free in any case to degrade water quality up to the point where public health or welfare was threatened.

Even if a polluter were subject to this restricted federal authority, the enforcement procedures established by the 1948 Act were fraught with obstacles and delay. The federal government could bring suit against a polluter only after issuing two notices to abate the pollution and after holding a public hearing.[56] Such a suit, furthermore, could proceed only with the consent of the state where the pollution originated,[57] thus subjecting any federal suit to a state veto. If the federal government were fortunate enough to surmount all these difficulties, it still faced two hurdles before obtaining judicial relief. First, it had to prove that a specific polluter had actually endangered public health or welfare in an adjacent

53. *See* S. REP. NO. 414, 92d Cong., 1st Sess. 4-5 (1971), *reprinted in* 2 LEGISLATIVE HISTORY 1972, *supra* note 2, at 1422-23; MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING A PROGRAM TO SAVE AND ENHANCE THE ENVIRONMENT, H.R. DOC. NO. 46, 92d Cong., 1st Sess. 5-6 (1971); 117 CONG. REC. 38,799 (1971) (remarks of Sen. Muskie), *reprinted in* 2 LEGISLATIVE HISTORY 1972, *supra* note 2, at 1256-57. *See generally* J. RIDGEWAY, THE POLITICS OF ECOLOGY 47-69 (1970) (giving a critical, historical account, full of interesting anecdotes, of the federal water pollution control program prior to 1970); Barry, *The Evolution of the Enforcement Provisions of the Federal Water Pollution Control Act: A Study of the Difficulty in Developing Effective Legislation*, 68 MICH. L. REV. 1103 (1970) (giving an excellent discussion of the shortcomings of federal enforcement prior to 1972).

54. Water Pollution Control Act § 2(d). "[I]nterstate waters" were defined as "all rivers, lakes, and other waters that flow across, or form a part of, State boundaries." *Id.* § 10(e). Federal enforcement jurisdiction, however, extended to pollution that reached interstate waters through tributaries. *Id.* § 2(d)(1).

55. *See* Barry, *supra* note 53, at 1105.

56. In such a case, the Surgeon General was required to give formal notice to both the polluter and the state government where the discharge originated. This notice could contain recommendations for remedial measures and set a reasonable time for compliance with those recommendations. If the polluter failed to undertake remedial action within the time allowed, the Surgeon General could issue a second notice. Water Pollution Control Act § 2(d)(2). In the event the polluter still failed to initiate abatement action, the Federal Security Administrator was authorized to appoint a board to conduct a hearing. (At this time, the Surgeon General was subject to the supervision of the Federal Security Administrator. *See id.* § 1.) After the hearing, the board was directed to make reasonable recommendations for abating the pollution in question. *Id.* § 2(d)(3). After giving the polluter a "reasonable opportunity to comply with the recommendations of the board," the Federal Security Administrator was authorized, if the state where the pollution originated gave its consent, to request the Attorney General to bring suit. *Id.* § 2(d)(4).

57. *Id.* § 2(d)(4).

state.[58] Second, the 1948 Act required that a court consider, in issuing its judgment, "the physical and economic feasibility" of abating any such pollution.[59] Thus a polluter who was proven to have endangered persons in another state might avoid an adverse decision by showing that it could not afford to do business in any other way. It should come as no surprise, therefore, that the 1948 Act posed no real deterrent to water pollution.[60]

Congress made some effort to remedy these deficiencies when it amended the Act in 1956[61] and 1961.[62] The 1956 Amendments eliminated the power previously given a polluting state to veto any federal court action.[63] Congress, nevertheless, managed to create another problem. A conference procedure was inserted into the administrative process after notification but before any hearing.[64] This new conference procedure ultimately produced even more delay.[65] The 1961 Amendments, on the other hand, extended federal enforcement authority to situations in which the pollution of "interstate or navigable waters" endangered the "health or welfare of any persons," including those living in the state where the pollution was discharged.[66] However, this expansion of federal au-

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58. *See* Barry, *supra* note 53, at 1111.

59. Water Pollution Control Act § 2(d)(7).

60. Murray Stein, who served as a federal enforcement official during this period, perhaps did not exaggerate when he described the 1948 abatement procedure as "a very peculiar one, almost an Alice in Wonderland technique." *Water Pollution Control Legislation, 1971: Oversight Hearings Before the House Comm. on Public Works*, 92d Cong., 1st Sess. 184 (1971) [hereinafter *House Oversight Hearings 1971*].

61. Water Pollution Control Act Amendments of 1956, Pub. L. No. 84-660, 70 Stat. 498 (superseded 1972).

62. Federal Water Pollution Control Act Amendments of 1961, Pub. L. No. 87-88, 75 Stat. 204 (superseded 1972).

63. The requisite state consent could now be provided by either the governor of the affected state or the governor of the polluting state. Water Pollution Control Act Amendments of 1956 § 1 (amending Water Pollution Control Act § 8(f)).

64. The new procedure required the Surgeon General to give formal notice to the polluting state if he found a case involving actionable pollution or was requested to do so by a state government. The Surgeon General then was directed to convene a conference with all the interested states. *Id.* (amending Water Pollution Control Act § 8(c)(1)). If the conference revealed that effective progress to abate the pollution was not being made, the Surgeon General was ordered to recommend necessary remedial action to the appropriate state agency. The state agency was given at least six months within which to undertake that action. *Id.* (amending Water Pollution Control Act § 8(d)). If the state government failed to do so, the Secretary of Health, Education, and Welfare was required to appoint a board and call a hearing. The hearing board was charged with making recommendations for abating the pollution with which the polluter had at least six months to comply. *Id.* (amending Water Pollution Control Act § 8(e)). Congress thus created a three-step administrative process prior to the commencement of suit consisting of notice, a conference, and a hearing.

65. It took at least one year after notice was issued before the federal government could file suit. *See* Barry, *supra* note 53, at 1108; *supra* note 64.

66. *See* Federal Water Pollution Control Act Amendments of 1961 § 7(a) (amending Federal Water Pollution Control Act § 8(a)). Although the 1961 Amendments did not define "navigable waterways," the House Report referred to the generally accepted definition of "navigable waterways" found in The Daniel Ball, 77 U.S. (10 Wall.) 557 (1871). *See* H.R. REP. NO. 306, 87th Cong., 1st Sess. 10 (1961), *reprinted in* 1961 U.S. CODE CONG. & ADMIN. NEWS 2076, 2084. In *The Daniel Ball*, the Court stated:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or

thority to such an intrastate situation was severely restricted, for the federal government could convene an enforcement conference only at the request of the state's governor.[67]

Congress again amended the Act in 1965. The Water Quality Act of 1965[68] (1965 Amendments) created a separate enforcement procedure for the violation of federally approved water quality standards for interstate waters.[69] The new procedure authorized the Secretary of Health, Education, and Welfare[70] to request the Attorney General to file suit to abate such water quality violations.[71] The federal government, therefore, could take enforcement action without showing actual danger to public health or welfare. However, before the initiation of judicial proceedings, the Secretary was required to give the polluter 180 days notice of

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> are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

77 U.S. (10 Wall.) at 563.

67. Federal Water Pollution Control Act Amendments of 1961 § 7(c) (amending Federal Water Pollution Control Act § 8(c)(1)). In such a case, moreover, the federal government could not file suit until the governor had given consent. *Id.* § 7(e) (amending Federal Water Pollution Control Act § 8(f)(2)).

The federal government could still convene an abatement conference, sua sponte, when the pollution of "interstate or navigable waters" in one state endangered the health or welfare of persons in another state. *Id.* § 7(c) (amending Federal Water Pollution Control Act § 8(c)(1)).

68. Pub. L. No. 89-234, 79 Stat. 903 (superseded 1972).

69. Water Quality Act of 1965 § 5(a) (adding Federal Water Pollution Control Act § 10(c)(5)). This enforcement procedure was intended only as an alternative to the 1948 abatement procedure. *See* H.R. CONF. REP. NO. 1022, 89th Cong., 1st Sess. 13 (1965), *reprinted in* 1965 U.S. CODE CONG. & ADMIN. NEWS 3324, 3327.

The 1965 Amendments required every state to adopt water quality standards, subject to federal approval, for its interstate waters. Water Quality Act of 1965 § 5(a) (adding Federal Water Pollution Control Act § 10(c)). These standards were required to "protect the public health or welfare, [and] enhance the quality of water . . . ." *Id.* (adding Federal Water Pollution Control Act § 10(c)(3)). The Amendments further required states to base the standards upon a consideration of the water's "use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other legitimate uses." *Id.* If a state failed to adopt acceptable water quality standards, the Secretary of Health, Education, and Welfare was authorized to promulgate appropriate standards. *Id.* (adding Federal Water Pollution Control Act § 10(c)(2)). *See generally* Gaba, *Federal Supervision of State Water Quality Standards Under the Clean Water Act,* 36 VAND. L. REV. 1167, 1177-99 (1983) (discussing the establishment of water quality standards under the 1965 Amendments).

70. The 1965 Amendments created the Federal Water Pollution Control Administration within the Department of Health, Education, and Welfare to administer the federal water pollution control program. Water Quality Act of 1965 §§ 1, 2 (adding Federal Water Pollution Control Act § 1(a)(3), (b), 2). Shortly thereafter, the Federal Water Pollution Control Administration was transferred to the Department of the Interior. Reorg. Plan No. 2 of 1966, 3 C.F.R. 1021 (1966-1970), *reprinted in* 5 U.S.C. app. at 1103-05 (1982).

71. Water Quality Act of 1965 § 5(a) (adding Federal Water Pollution Control Act § 10(c)(5)).

the alleged violation.[72] This enforcement mechanism, therefore, was slow;[73] it also contained many other weaknesses. The procedure, of course, did not apply to the pollution of intrastate waters. Further, if the offending discharge affected only persons in the state where the discharge originated, the governor of that state had to consent to the federal suit.[74] Finally, the federal government was required to prove which particular polluter caused the violation of water quality standards,[75] which was no easy task.[76]

Both approaches to federal enforcement, the older conference mechanism as well as the newer procedure for violations of water quality standards, left much to be desired.[77] They proved so ineffective[78] that the Administration was prompted in 1970 to revive

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72. *Id.* Congress intended for an informal hearing to be held during the 180-day period "so that if possible there can be voluntary agreement reached during this period, thus eliminating the necessity for suit." H.R. CONF. REP. NO. 1022, 89th Cong., 1st Sess. 12 (1965), *reprinted in* 1965 U.S. CODE CONG. & ADMIN. NEWS 3324, 3327.

73. *See House Oversight Hearings 1971, supra* note 60, at 56 (remarks of Elmer B. Staats, Comptroller General of the United States) ("[I]t appears to us to be unreasonable, to give polluters . . . 6 months to take, or to agree, to take long overdue abatement action.").

74. Federal Water Pollution Control Act Amendments of 1961 § 7(e) (adding Federal Water Pollution Control Act § 8(f)).

75. *See* EPA v. California *ex rel.* State Water Resources Control Bd., 426 U.S. 200, 202-03 (1976).

76. *See House Oversight Hearings 1971, supra* note 60, at 11 (statement of Elmer B. Staats, Comptroller General of the United States) ("[I]t is difficult to relate a change in water quality to a specific municipal or industrial discharge."); Gaba, *supra* note 69, at 1179 (stating that "[w]hile proof of actual endangerment under the 1948 Act was extraordinarily difficult, proof of violation of the 1965 Act water quality standards was merely very hard").

The federal government faced an additional difficulty in abating a violation of water quality standards. The 1965 Amendments instructed the federal courts to consider "the practicability and . . . the physical and economic feasibility of complying with such [water quality] standards." Water Quality Act of 1965 § 5(a) (adding Federal Water Pollution Control Act § 10(c)(5)).

77. Congress further amended the Act in 1966 with the passage of the Clean Water Restoration Act of 1966 (1966 Amendments), Pub. L. No. 89-753, 80 Stat. 1246 (superseded 1972). This legislation authorized the Secretary of the Interior to obtain data from polluters concerning their discharges. Clean Water Restoration Act of 1966 § 208 (a)-(b) (adding Federal Water Pollution Control Act § 10(k) and amending § 10(f)). Such data could be required either during the conference or the hearing. *Id.* Although the federal government now possessed a way to gather more evidence for enforcement purposes, the enforcement process itself remained time consuming and cumbersome.

Congress again amended the Act in 1970 through the Water Quality Improvement Act of 1970 (1970 Amendments), Pub. L. No. 91-224, 84 Stat. 91 (superseded 1972). While the 1970 Amendments added new enforcement provisions dealing with such problems as oil pollution and hazardous substances, Water Quality Improvement Act of 1970 § 102 (adding Federal Water Pollution Control Act §§ 11, 12), the basic enforcement mechanisms were left untouched. The Amendments, however, transferred the administration of the program to the Federal Water Quality Administration (FWQA). *Id.* § 110 (amending Federal Water Pollution Control Act § 2). Shortly thereafter, the FWQA became part of the newly created United States Environmental Protection Agency. Reorg. Plan No. 3 of 1970, 3 C.F.R. 1072 (1966-1970), *reprinted in* 5 U.S.C. app. at 1132-37 (1982).

78. Although a total of 51 enforcement conferences had been convened from 1956 through 1970, only one case had reached the litigation stage. *See Senate Oversight Hearings 1971, supra* note 8, at 55-58. Furthermore, only 14 notices of violation of

the Rivers and Harbors Act of 1899[79] as a device for federal enforcement.[80] Section 13 of this Act prohibited the discharge of industrial "refuse" into navigable waters except as authorized by a permit from the Army Corps of Engineers.[81] Although section 13 removed a number of impediments to federal enforcement,[82] its utility was limited. For example, it did not apply to the discharge of municipal sewage,[83] which was the second leading cause of water pollution in the United States.[84] The time, therefore, was ripe for a new federal initiative in the fight against water pollution.

B. A New Beginning: The Federal Water Pollution Control Act Amendments of 1972

Congress completely revised the federal approach to water pollution control when it enacted the Federal Water Pollution Con-

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water quality standards had been issued prior to 1971, and not one court action had been filed. *See id.* at 55.

Despite its obvious limitations, the conference procedure did serve to publicize some complex and persistent pollution problems. *See House Oversight Hearings 1971, supra* note 60, at 179 (statement of John Quarles, Assistant Administrator for Enforcement and General Counsel of the EPA).

79. Ch. 425, 30 Stat. 1121 (codified as amended in scattered sections of 33 U.S.C. (1982)).

80. *See* Exec. Order No. 11,574, 3 C.F.R. 986 (1966-1970), *reprinted in* 33 U.S.C. § 407 app. at 638-39 (1982).

81. Rivers and Harbors Act of 1899 § 13, 33 U.S.C. § 407. For many years, section 13, popularly known as the Refuse Act, was thought to apply solely to discharges that obstructed or impeded navigation. *See House Oversight Hearings 1971, supra* note 60, at 262-63 (statement of Brigadier General Richard Groves, Deputy Director of Civil Works, Office of the Chief of Engineers, Department of the Army). In 1966, however, the Supreme Court interpreted the Act to apply to the discharge into navigable waters of almost all pollutants discharged by industry. United States v. Standard Oil Co., 384 U.S. 224, 229-30 (1966). *See* Rodgers, *Industrial Water Pollution and the Refuse Act: A Second Chance for Water Quality*, 119 U. PA. L. REV. 761, 770-71 (1971); Note, *The Refuse Act: Its Role Within the Scheme of Federal Water Quality Legislation*, 46 N.Y.U. L. REV. 304, 307 n.22 (1971).

82. The Act, for example, authorized immediate criminal prosecution for violations of section 13. Rivers and Harbors Act of 1899 § 16, 33 U.S.C. § 411. Moreover, the courts interpreted the Act to allow for direct civil actions seeking injunctive relief. *See e.g.*, United States v. Florida Power & Light Co., 311 F. Supp. 1391, 1392 n.1 (S.D. Fla. 1970); *see also* Note, *supra* note 81, at 311-14 (stating that courts had made a variety of remedies available for section 13 violations, despite the Act's prescribing only criminal penalties).

83. *See* EPA v. California *ex rel.* State Water Resources Control Bd., 426 U.S. 200, 203 (1976). In addition, the permitting system was cumbersome, *see* 117 CONG. REC. 38,799 (1971) (remarks of Sen. Muskie), *reprinted in* 2 LEGISLATIVE HISTORY 1972, *supra* note 2, at 1257, and enforcement actions were reserved for only the most serious cases of abuse, *see House Oversight Hearings 1971, supra* note 60, at 250 (statement of John Quarles, Assistant Administrator for Enforcement and General Counsel of the EPA).

84. 2 ADMINISTRATOR OF THE EPA, ANNUAL REPORT, THE COST OF CLEAN WATER, S. DOC. NO. 23, 92d Cong., 1st Sess. 59-62 (1971).

trol Act Amendments of 1972.[85] These Amendments established the basic structure of the current Federal Water Pollution Control Act,[86] better known today as the Clean Water Act.[87] The pollution control strategy of the Clean Water Act centers upon a broad prohibition contained in section 301(a), which forbids "the discharge of any pollutant by any person" to waters of the United States, unless the discharge conforms with certain provisions of the Act.[88] Among those provisions are several that call upon the EPA to promulgate effluent limitations that apply to every discharger in a particular category.[89] To implement and monitor compliance with those limitations and other standards,[90] section 301(a) also requires a discharger to obtain a permit and comply

85. Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1376 (1982)), *reprinted in* 1 LEGISLATIVE HISTORY 1972, *supra* note 2, at 3.

86. R. ZENER, GUIDE TO FEDERAL ENVIRONMENTAL LAW 59 n.1 (1981). The 1987 Amendments did not alter that basic structure.

87. *See* Gaba, *supra* note 69, at 1168 n.3.

88. *See* Clean Water Act § 301(a), 33 U.S.C. § 1311(a) (1982). The "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." *Id.* § 502(12), 33 U.S.C. § 1362(12). "Navigable waters," meaning "the waters of the United States," *id.* § 502(7), 33 U.S.C. § 1362(7), is a term Congress intended to give the broadest possible definition under the Constitution. S. CONF. REP. No. 1236, 92d Cong., 2d Sess. 144 (1972), *reprinted in* 1 LEGISLATIVE HISTORY 1972, *supra* note 2, at 327; *see also* United States v. Riverside Bayview Homes, Inc., 106 S. Ct. 455, 462 (1985) (stating that Congress thereby rejected the limits placed on federal regulation by prior legislation and exercised its power under the commerce clause of the Constitution to extend regulation to waters not deemed navigable under the earlier, traditional notions of navigability).

A "point source" is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." Clean Water Act § 502(14), 33 U.S.C. § 1362(14). Return flows from irrigated agriculture, however, are not defined as point sources. *Id.* In addition, the 1987 Amendments exclude "agricultural stormwater discharges" from the definition of a point source. *See* Water Quality Act of 1987, Pub. L. No. 100-4, § 503, 1987 U.S. CODE CONG. & ADMIN. NEWS (101 Stat.) 7, 75 (amending Clean Water Act § 502(14)) (to be codified at 33 U.S.C. § 1362(14)). The term "pollutant" is defined as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." Clean Water Act § 502(6), 33 U.S.C. § 1362(6). While Congress thus limited, to a certain extent, the meaning of "pollutant," it nevertheless entrusted the EPA with some discretion to decide which specific substances can reasonably be designated "pollutant[s]" pursuant to the statutory definition. *See* National Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 173-74 (D.C. Cir. 1982).

89. Section 301(b) envisions the establishment of effluent limitations for publicly owned sewage treatment plants based upon secondary treatment. Clean Water Act § 301(b)(1)(B), 33 U.S.C. § 1311(b)(1)(B). It also contemplates the promulgation of technology-based effluent limitations for existing industrial facilities. *Id.* § 301(b)(1)(A), (b)(2), 33 U.S.C. § 1311(b)(1)(A), (b)(2). In addition, section 306 requires the EPA to establish new source performance standards, *id.* § 306(b)(1)(B), 33 U.S.C. § 1316(b)(1)(B), and section 307 directs the promulgation of toxic effluent standards, *id.* § 307, 33 U.S.C. § 1317. *See* F. ANDERSON, D. MANDELKER & A.D. TARLOCK, ENVIRONMENTAL PROTECTION: LAW AND POLICY 344-45 (1984) (discussing effluent limitations in more detail).

90. Dischargers, for example, are also subject to more stringent conditions if necessary to achieve compliance with water quality standards. Clean Water Act § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C); *see* EPA v. California *ex rel.* State Water Resources Control Bd., 426 U.S. 200, 205 n.12 (1976); Gaba, *supra* note 69, at 1169-70.

with its terms.[91] Such a permit is issued through the National Pollutant Discharge Elimination System (NPDES), established by section 402,[92] which serves as a means for transforming most of the requirements of the Act into specific obligations of the individual discharger.[93]

Enforcement, therefore, is no longer limited to instances where public health is endangered or where the government can show that a particular source of pollution is responsible for violation of a water quality standard. Instead, the Clean Water Act makes it unlawful to discharge a pollutant without a NPDES permit or in violation of such a permit. Furthermore, to enhance the EPA's ability to determine whether a discharger has violated its NPDES permit, Congress authorized the Agency to impose substantial monitoring and reporting requirements on the regulated community.[94] Pursuant to this authority, the EPA requires each permittee to file periodically a discharge monitoring report (DMR) that reveals the levels of pollutants found in the permittee's effluent.[95] The determination of permit violations, consequently, is in many cases a relatively simple affair requiring only a comparison of the permit conditions with the permittee's actual performance as shown by a DMR.[96]

Moreover, the Clean Water Act eliminated the procedural impediments to effective enforcement and created a wide array of sanctions for violations of the Act. In doing so, the Act gives the federal government enormous power to enforce the Act through administrative action and direct access to the courts to seek in-

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91. *See* Clean Water Act § 301(a), 33 U.S.C. § 1311(a) (by virtue of requiring compliance with section 402, 33 U.S.C. § 1342); *see also* United States v. Tom-Kat Dev., Inc., 614 F. Supp. 613, 614 (D. Alaska 1985) (interpreting the permit requirement as " 'unconditional and absolute' ").

92. 33 U.S.C. § 1342. States, however, are permitted to administer their own permit programs within their jurisdiction if they meet a number of federal requirements. *See id.* § 402(b)-(c), 33 U.S.C. § 1342(b)-(c). Thirty-eight states now possess the authority to administer the NPDES program. *See* 52 Fed. Reg. 3700, 3701 (1987). Under the 1987 Amendments, states may also receive permission to administer a partial NPDES program, provided certain conditions are satisfied. *See* Water Quality Act of 1987, Pub. L. No. 100-4, § 403(a), 1987 U.S. CODE CONG. & ADMIN. NEWS (101 Stat.) 7, 66-67 (adding Clean Water Act § 402(n)) (to be codified at 33 U.S.C. § 1342(n)).

93. *See State Water Resources Control Bd.*, 426 U.S. at 205.

94. *See* Clean Water Act § 308(a), 33 U.S.C. § 1318(a).

95. 40 C.F.R. §§ 122.41(j)-(l), 122.44(i), 122.48 (1986) (imposed as a condition in each NPDES permit issued by the EPA or under a state program). The EPA, moreover, is authorized to conduct its own compliance inspections to determine, independently of the discharger's DMR, whether a violation is occurring. Clean Water Act § 308(a)(B), 33 U.S.C. § 1318(a)(B). Under the 1987 Amendments, it is clear that the EPA may authorize a contractor to conduct such an inspection. *See* Water Quality Act of 1987, Pub. L. No. 100-4, § 310(a)(2), 1987 U.S. CODE CONG. & ADMIN. NEWS (101 Stat.) 7, 42 (amending Clean Water Act § 308(a)(B)) (to be codified at 33 U.S.C. § 1318(a)(B)).

96. *See* Comment, *supra* note 30, at 163-64.

junctive relief, civil monetary penalties, and even criminal sanctions.[97] The Act also provides private citizens with a civil right of action to obtain compliance with its requirements.[98]

1. Federal Enforcement

The primary mechanisms provided by the Act for federal enforcement of the NPDES program are found in section 309. Whenever the Administrator of the EPA finds that a discharger has violated the terms of a state-issued NPDES permit, section 309(a)(1) requires the Administrator to react in one of two ways. One option states that the Administrator "shall" notify the discharger and the state government of the alleged violation. If the state fails to take "appropriate enforcement action" within thirty days, the Administrator either "shall issue" an administrative order requiring the discharger to comply with its permit or "shall bring" a civil enforcement suit.[99] This option recognizes that states having a qualified permit program[100] possess primary enforcement responsibility with regard to their permits,[101] while the EPA serves "as a backstop."[102] The second available course of action, however, recognizes that federal enforcement power is concurrent with that of state governments.[103] Under this alternative, the Administrator is to proceed under section 309(a)(3), which provides that he "shall" issue a compliance order or institute civil proceedings without giving notice or awaiting state enforcement.[104] In cases not involving the violation of a state-issued permit, the Administrator is not given the option of deferring to state action. Therefore, where the Administrator finds a violation of a federally issued NPDES permit or a discharger who has failed to obtain a permit, the Administrator is required, pursuant to section 309(a)(3), to issue a compliance order or to bring suit.[105]

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97. Clean Water Act § 309, 33 U.S.C. § 1319.

98. *Id.* § 505, 33 U.S.C. § 1365.

99. *Id.* § 309(a)(1), 33 U.S.C. § 1319(a)(1).

100. *See supra* note 92.

101. *See* S. REP. NO. 414, 92d Cong., 1st Sess. 64 (1971), *reprinted in* 2 LEGISLATIVE HISTORY 1972, *supra* note 2, at 1482; H.R. REP. NO. 911, 92d Cong., 2d Sess. 115 (1972), *reprinted in* 1 LEGISLATIVE HISTORY 1972, *supra* note 2, at 802.

102. F. ANDERSON, D. MANDELKER & A.D. TARLOCK, *supra* note 89, at 432.

103. *See* S. REP. NO. 414, 92d Cong., 1st Sess. 64 (1971), *reprinted in* 2 LEGISLATIVE HISTORY 1972, *supra* note 2, at 1482.

104. *See* Clean Water Act § 309(a)(3), 33 U.S.C. § 1319(a)(3). Moreover, whenever the Administrator determines that violations of state-issued NPDES permits are "so widespread that such violations appear to result from a failure of the State to enforce," the Administrator is directed to so notify the state. If the Administrator is not satisfied within thirty days that the state will enforce its program, the Administrator is required to assume enforcement responsibility for state-issued permits. *Id.* § 309(a)(2), 33 U.S.C. § 1319(a)(2).

105. *Id.* § 309(a)(3), 33 U.S.C. § 1319(a)(3). Enforcement action is also triggered by the violation of certain other regulatory requirements, regardless of whether those requirements are incorporated into a discharger's permit. *Compare id.* (setting forth a list of statutory provisions the violation of which is subject to enforcement) *with id.* § 402(k), 33 U.S.C. § 1342(k) (stating that compliance with a permit is deemed compliance with certain statutory provisions for purposes of enforcement). Such violations include the violation of monitoring requirements, *id.* § 308, 33 U.S.C. § 1318, and the

Despite the mandatory language used in section 309(a), section 309(b) merely authorizes the Administrator to undertake civil actions "for any violation for which he is authorized to issue a compliance order under [section 309(a)]."[106] In such civil actions,[107] the Administrator may seek injunctive relief[108] as well as civil penalties.[109]

In addition to compliance orders and civil actions, the Clean Water Act provides for a host of other remedial and punitive actions. Section 309(c) authorizes criminal prosecutions for knowing

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violation of toxic effluent standards, *id.* § 307, 33 U.S.C. § 1317, for a pollutant that is injurious to human health. *Compare id.* § 309(a)(3), 33 U.S.C. § 1319(a)(3) *with id.* § 402(k), 33 U.S.C. § 1342(k) (indicating that compliance with a permit is not deemed compliance with § 308 or § 307 standards for toxics injurious to human health).

All compliance orders issued under section 309 must specify the nature of the violation, and must set a time for compliance. *Id.* § 309(a)(5)(A), 33 U.S.C. § 1319(a)(5)(A). If a final deadline has been violated, the time set for compliance may not exceed a "reasonable" period, considering the seriousness of the violation and the good faith efforts of the discharger to comply. *Id.* In the event the discharger violates an interim compliance schedule or an operation and maintenance requirement, however, the time specified in the order for compliance may not exceed 30 days. *Id.* (Two other statutory mechanisms for extending compliance deadlines are no longer available since the last possible date for compliance under either alternative has long since passed. *See id.* § 309(a)(5)(B), (a)(6), 33 U.S.C. § 1319(a)(5)(B), (a)(6).)

Any compliance order issued by the EPA must be served on the discharger. *Id.* § 309(a)(5)(A), 33 U.S.C. § 1319(a)(5)(A). If the discharger is a corporation, a copy of the order must be served on "any appropriate corporate officers." *Id.* § 309(a)(4), 33 U.S.C. § 1319(a)(4). In addition, a copy of the order must be sent to the state where the violation occurred and to other affected states, if any. *Id. See generally* Memorandum from Rebecca Hanmer, Director of the Office of Water Enforcement and Permits, United States Environmental Protection Agency, to Regional Water Management Division Directors (July 30, 1985) (copy on file at the *George Washington Law Review*) (containing current EPA guidance on the issuance of compliance orders).

106. Clean Water Act § 309(b), 33 U.S.C. § 1319(b). Such an action may be brought in the federal district court where the defendant resides, is located, or is doing business. *Id.* Notice of the action must be given to the appropriate state government. *Id.*

107. In every civil and criminal case instituted under the Clean Water Act, the Administrator of the EPA must request the Attorney General to represent the government. If the Attorney General does not notify the EPA within a reasonable time that he will appear in a civil action for the Agency, Agency attorneys are authorized to appear and represent the Agency. *Id.* § 506, 33 U.S.C. § 1366. The EPA and the Department of Justice have entered into a memorandum of understanding (MOU) that delineates the respective roles of the Agency and the Department in all civil litigation. *See NPDES Enforcement Oversight Hearings 1984, supra* note 33, at 474-87 (reprinting the MOU and subsequent revisions).

108. Clean Water Act § 309(b), 33 U.S.C. § 1319(b).

109. *Id.* § 309(d), 33 U.S.C. § 1319(d). The 1987 Amendments increased the maximum daily civil penalty per violation from $10,000 to $25,000. *See* Water Quality Act of 1987, Pub. L. No. 100-4, § 313(b)(1), 1987 U.S. CODE CONG. & ADMIN. NEWS (101 Stat.) 7, 45 (amending Clean Water Act § 309(d)) (to be codified at 33 U.S.C. § 1319(d)). The Amendments also added a number of factors to be considered in establishing an appropriate civil penalty. *See id.* § 313(c), 1987 U.S. CODE CONG. & ADMIN. NEWS (101 Stat.) 7, 45 (amending Clean Water Act § 309(d)) (to be codified at 33 U.S.C. § 1319(d)).

or negligent violations.[110] A conviction under this provision subjects a discharger not only to fines and possible imprisonment,[111] but also to debarment from federal contracting.[112] In addition, the Administrator is authorized, in an emergency, to bring suit immediately to abate any "pollution" that presents a danger to public health or the livelihood of individuals.[113]

2. *Private Enforcement*

In order to both supplement and induce government enforcement, Congress empowered citizens to gain access to the courts to enforce the pollution requirements of the Clean Water Act.[114] Specifically, section 505 — the citizen suit provision — authorizes "any citizen"[115] to commence a civil action against a discharger who is allegedly in violation of an "effluent standard or limitation"[116] or a compliance order issued by either the EPA or a

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110. *Id.* § 312, 1987 U.S. CODE CONG. & ADMIN. NEWS (101 Stat.) 7, 42-45 (amending Clean Water Act § 309(c)) (to be codified at 33 U.S.C. § 1319(c)).

111. *Id.*

112. Clean Water Act § 508, 33 U.S.C. § 1368.

113. *Id.* § 504, 33 U.S.C. § 1364. The term "pollution" is broadly defined as the "man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." *Id.* § 502(19), 33 U.S.C. § 1362(19).

The Act also provides separate enforcement schemes for spills of oil and hazardous waste upon or into waters of the United States or adjoining shorelines, *id.* § 311, 33 U.S.C. § 1321, and for violations of dredge and fill permits issued by the Corps of Engineers, *id.* § 404, 33 U.S.C. § 1344.

Congress, moreover, recently provided the EPA with an additional enforcement device. Under the 1987 Amendments, the EPA may opt to impose civil penalties for many violations through a two-tiered administrative procedure. *See supra* note 50. Under this new scheme, the EPA may impose a class I or class II penalty. Class I penalties, which may be assessed after notice and an opportunity for an *informal* hearing, may not exceed a maximum total penalty of $25,000 (up to $10,000 per violation). *See* Water Quality Act of 1987, Pub. L. No. 100-4, § 314(a), 1987 U.S. CODE CONG. & ADMIN. NEWS (101 Stat.) 7, 46 (adding Clean Water Act § 309(g)(2)(A)) (to be codified at 33 U.S.C. § 1319(g)(2)(A)). Class II penalties, on the other hand, may range as high as $125,000 (no more than $10,000 per day of violation), but may be imposed only after notice and an opportunity for a *formal* adjudicatory hearing. *See id.* § 314(a), 1987 U.S. CODE CONG. & ADMIN. NEWS (101 Stat.) 7, 46 (adding Clean Water Act § 309(g)(2)(B)) (to be codified at 33 U.S.C. § 1319(g)(2)(B)). The Amendments also extend elaborate rights to interested parties and provide for judicial review of Agency determinations. *See id.* § 314(a), 1987 U.S. CODE CONG. & ADMIN. NEWS (101 Stat.) 7, 47-48 (adding Clean Water Act § 309(g)(4), (8)) (to be codified at 33 U.S.C. § 1319(g)(4), (8)).

114. *See* Miller, *Private Enforcement of Federal Pollution Control Law Part I,* 13 Envtl. L. Rep. (Envtl. L. Inst.) 10,309, 10,310 (1983); Comment, *supra* note 30, at 136.

115. "Any citizen" is defined as any "person or persons having an interest which is or may be adversely affected." Clean Water Act § 505(g), 33 U.S.C. § 1365(g). In adopting this definition, Congress intended to extend standing to citizens who have an economic, environmental, or aesthetic interest. *See* 118 CONG. REC. 33,699-700 (1972) (remarks of Sen. Muskie), *reprinted in* 1 LEGISLATIVE HISTORY 1972, *supra* note 2, at 179; 118 CONG. REC. 33,716 (1972) (remarks of Sen. Birch Bayh), *reprinted in* 1 LEGISLATIVE HISTORY 1972, *supra* note 2, at 217; 118 CONG. REC. 33,756 (1972) (remarks of Rep. Dingell), *reprinted in* 1 LEGISLATIVE HISTORY 1972, *supra* note 2, at 250; *see also* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 16-17 (1981) (finding that citizens may sue for noneconomic as well as economic injuries).

116. Clean Water Act § 505(a)(1)(A), 33 U.S.C. § 1365(a)(1)(A). The term "effluent standard or limitation" includes an unpermitted discharge, the violation of a NPDES permit, a violation of effluent standards or limitations, and the violation of a

state.[117] Such cases may be brought in federal district courts, which possess jurisdiction to enjoin those violations and impose civil penalties.[118]

At least sixty days prior to the commencement of a private enforcement action, however, the citizen generally must give notice of the violation to the EPA, the state, and the discharger.[119] This notification requirement was intended to give the administrative agencies a chance to enforce the law before allowing a citizen suit to proceed.[120] If at the end of sixty days the EPA or a state agency is not "diligently prosecuting a civil or criminal action," the citizen may file the suit.[121]

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state certification for a federally issued permit. Clean Water Act § 505(f), 33 U.S.C. § 1365(f).

Congress intended to allow citizens to sue not only for ongoing violations, but also for violations committed entirely in the past. *See* 118 CONG. REC. 33,699-700 (1972) (remarks of Sen. Muskie), *reprinted in* 1 LEGISLATIVE HISTORY 1972, *supra* note 2, at 179; *see, e.g.*, Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd., 791 F.2d 304, 308-13 (4th Cir. 1986), *cert. granted*, 107 S. Ct. 872 (1987) (No. 86-473); Student Pub. Interest Research Group, Inc. v. Georgia-Pacific Corp., 615 F. Supp. 1419, 1425-26 (D.N.J. 1985); Sierra Club v. Aluminum Co. of America, 585 F. Supp. 842, 853-54 (N.D.N.Y. 1984). *But see* Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp., 807 F.2d 1089, 1094 (1st Cir. 1986) (holding that a citizen suit may not proceed solely on allegations of completed past violations); Hamker v. Diamond Shamrock Chem. Co., 756 F.2d 392, 395-96 (5th Cir. 1985) (relying solely on the language of section 505 to hold that a defendant must be in actual violation at the time the complaint is filed).

117. Clean Water Act § 505(a)(1)(B), 33 U.S.C. § 1365(a)(1)(B).

118. *Id.* § 505(a), 33 U.S.C. § 1365(a). Congress indicated that these civil penalties should be deposited as miscellaneous receipts in the United States Treasury. H.R. REP. NO. 911, 92d Cong., 2d Sess. 133 (1972), *reprinted in* 1 LEGISLATIVE HISTORY 1972, *supra* note 2, at 820; S. REP. NO. 414, *supra* note 2, at 79, *reprinted in* 2 LEGISLATIVE HISTORY 1972, *supra* note 2, at 1497.

District courts may also award reasonable attorney and expert witness fees to any party where appropriate. Clean Water Act § 505(d), 33 U.S.C. § 1365(d). However, the 1987 Amendments expressly limit such awards to a "prevailing or substantially prevailing" party. Water Quality Act of 1987, Pub. L. No. 100-4, § 505(c), 1987 U.S. CODE CONG. & ADMIN. NEWS (101 Stat.) 7, 76 (amending Clean Water Act § 505(d)) (to be codified at 33 U.S.C. § 1365(d)).

119. Clean Water Act § 505(b)(1)(A), 33 U.S.C. § 1365(b)(1)(A). Actions to enforce performance standards for new sources and effluent limitations for toxic pollutants, however, may be brought immediately following notification. *Id.* § 505(b), 33 U.S.C. § 1365(b).

120. S. REP. NO. 414, 92d Cong., 1st Sess. 79-80 (1971), *reprinted in* 2 LEGISLATIVE HISTORY 1972, *supra* note 2, at 1497-98; 118 CONG. REC. 33,699-700 (1972) (remarks of Sen. Muskie), *reprinted in* 1 LEGISLATIVE HISTORY 1972, *supra* note 2, at 179.

121. Clean Water Act § 505(b)(1)(B), 33 U.S.C. § 1365(b)(1)(B). Even if a citizen suit is barred due to governmental enforcement action, a citizen may nonetheless intervene in a government suit that is pending in federal court. *Id.* The 1987 Amendments, however, bar the initiation of a citizen suit seeking civil penalties (but not an action for injunctive relief) for a violation as to which the EPA or a state is diligently prosecuting an administrative civil penalty assessment. *See* Water Quality Act of 1987, Pub. L. No. 100-4, § 314(a), 1987 U.S. CODE CONG. & ADMIN. NEWS (101 Stat.) 7, 47-48 (adding Clean Water Act § 309(g)(6)(A)) (to be codified at 33 U.S.C. § 1319(g)(6)(A)). Nevertheless, if the citizen gives notice prior to the commencement of such an administrative penalty action, the citizen suit may proceed provided the suit is filed within 120 days after notice is given. *See id.*, 1987 U.S. CODE CONG. &

To ensure that the EPA complies with its mandatory duties under the Act, section 505 also allows a citizen to bring suit against the Administrator for an alleged failure to perform any nondiscretionary act or duty.[122] District courts have jurisdiction to compel the performance of such duties.[123] However, sixty-days notice must be given to the Administrator before filing suit,[124] apparently to allow the EPA time to act.

II. Of Duties and Discretion: The Legislative History of Section 309

Recognizing the need for a more effective federal strategy to contend with water pollution, the Senate began to consider major remedial legislation in 1970.[125] Although extensive hearings were held on the proposed legislation,[126] the Senate Committee on Public Works decided to forego further action until it had addressed the amendment of the Clean Air Act.[127] That effort, however, consumed the rest of 1970.[128] Consequently, it was not until the beginning of the Ninety-Second Congress in 1971 that water pollution moved to the top of the congressional agenda.[129]

On February 2, 1971, Senator Edmund Muskie introduced a bill to comprehensively amend the Federal Water Pollution Control Act.[130] In his introductory remarks, Senator Muskie struck a theme that he would repeat time and again over the next two

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ADMIN. NEWS (101 Stat.) 7, 48 (adding Clean Water Act § 309(g)(6)(B)) (to be codified at 33 U.S.C. § 1319(g)(6)(B)).

122. *See* Clean Water Act § 505(a)(2), 33 U.S.C. § 1365(a)(2).

123. *Id.* § 505(a), 33 U.S.C. § 1365(a). As with cases brought against those responsible for pollution violations, fees for attorneys and expert witnesses may be awarded where appropriate, *id.* § 505(d), 33 U.S.C. § 1365(d), but only to "prevailing or substantially prevailing" parties, Water Quality Act of 1987, Pub. L. No. 100-4, § 505(c), 1987 U.S. CODE CONG. & ADMIN. NEWS (101 Stat.) 7, 76 (amending Clean Water Act § 505(d)) (to be codified at 33 U.S.C. § 1365(d)).

124. Clean Water Act § 505(b)(2), 33 U.S.C. § 1365(b)(2).

125. At least 12 separate bills were introduced in the Senate to overhaul the existing federal progam. *See Water Pollution — 1970, Pt. 1: Hearings on S. 3687, S. 3468, S. 3470, S. 3471, S. 3472, S. 3181, S. 3484, S. 3500, S. 3507, S. 3614, S. 3688, and S. 3697 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works,* 91st Cong., 2d Sess. 2-5 (1970) [hereinafter *Senate Hearings 1970*]. Several of these bills emphasized changes in the enforcement mechanisms of the Federal Water Pollution Control Act. *See* S. 3687, 91st Cong., 2d Sess. § 4 (1970), *Senate Hearings 1970, Pt. 1, supra,* at 33-48 (by Sen. Muskie); S. 3471, 91st Cong., 2d Sess. § 3 (1970), *Senate Hearings 1970, Pt. 1, supra,* at 80-102 (by Sen. Scott); S. 3614, 91st Cong., 2d Sess. § 2 (1970), *Senate Hearings 1970, Pt. 1, supra,* at 159-63 (by Sen. Cook).

126. *See Senate Hearings 1970, Pts. 1-5, supra* note 125.

127. *See Water Pollution Control Legislation, Pt. 1: Hearings on S. 75, S. 192, S. 280, S. 281, S. 523, S. 573, S. 601, S. 679, S. 927, S. 1011, S. 1012, S. 1013, S. 1014, S. 1015, and S. 1017 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works,* 92d Cong., 1st Sess. 103 (1971) [hereinafter *Senate Hearings 1971*]. The House Committee on Public Works also had a busy schedule in 1970 and thus decided not to take up the matter of water pollution until the Senate was prepared to address it. *See* J. QUARLES, CLEANING UP AMERICA 146 (1976).

128. *See* J. QUARLES, *supra* note 127, at 146.

129. *See id.*

130. S. 523, 92d Cong., 1st Sess., *Senate Hearings 1971, Pt.1, supra* note 127, at 193-240.

years. Enforcement under the existing federal water quality program had been so ineffectual and "spotty" that polluters were able, with seeming impunity, to continue fouling the nation's streams and lakes.[131] Thus, it was time "to require . . . tougher enforcement."[132]

Senator Muskie, however, chose not to utilize an inflexible form of mandatory enforcement. After declaring that the violation of water quality standards and effluent requirements was prohibited,[133] his bill gave the Administrator of the EPA discretion to undertake most enforcement actions. Where the Administrator found both a relevant violation and inadequate state enforcement, the bill provided that the Administrator "may" issue a compliance order or bring a civil action.[134] The exercise of this discretion, nevertheless, was subject to judicial review. The bill's citizen suit provision authorized "any person" to bring suit against the Administrator for an alleged failure "to perform any act or duty under this Act, including the enforcement of [water quality standards and effluent requirements]."[135] Thus, citizens were to be afforded means to compel federal enforcement, albeit apparently limited to instances in which the EPA had abused its enforcement discretion.

Soon after Senator Muskie's bill was introduced, the President transmitted his environmental message to Congress, calling for strengthened federal water pollution enforcement.[136] It was late February, however, when Senator John Sherman Cooper introduced a bill[137] containing the Administration's proposals to modify water enforcement.[138] Although the bill provided for more direct enforcement, the enforcement mechanisms were couched, for the most part, in discretionary language.[139] A citizen suit, further-

131. 117 CONG. REC. 1346-47 (1971) (remarks of Sen. Muskie).
132. *Id.* at 1347.
133. S. 523, *supra* note 130, § 5 (proposing a new section 11(a) to the FWPCA).
134. *Id.* (proposing a new section 11(b)(1) to the FWPCA). The bill, however, provided that the Administrator shall bring suit in emergency situations, such as the creation of "an imminent or substantial endangerment to the health of persons." *Id.* (proposing a new section 11(h) to the FWPCA).
135. *Id.* (proposing a new section 11(i)(1)(B) to the FWPCA). The district courts would have jurisdiction to compel the performance of such acts. *Id.*
136. MEASSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING A PROGRAM TO SAVE AND ENHANCE THE ENVIRONMENT, H.R. DOC. NO. 46, 92d Cong., 1st Sess. 56 (1971).
137. S. 1014, 92d Cong., 1st Sess. (1971), *Senate Hearings 1971, Pt. 1, supra* note 127, at 306-35. In the meantime, the Senate Subcommittee on Air and Water Pollution, chaired by Senator Muskie, had held oversight hearings on the existing water pollution control program. *Senate Oversight Hearings 1971, supra* note 8.
138. *See Senate Hearings 1971, Pt. 1, supra* note 127, at 4 (remarks of EPA Administrator William Ruckelshaus).
139. Upon determining that a violation had occurred, the Administrator was required ("shall") to give notice to the polluter and the state of both the violation and

more, could not force the government's hand on enforcement because the Administrator could be compelled only to perform nondiscretionary acts or duties.[140] Thus, a division appeared early between those legislators who wanted to give the EPA complete enforcement discretion and those who preferred, in some way, to limit that discretion.

In March 1971, the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works began to hold hearings on the proposed legislation.[141] During those hearings a number of environmentalists attacked both Senator Muskie's bill and Senator Cooper's bill for containing a loophole that might defeat the goal of clean water: neither bill expressly required the EPA to commence enforcement actions.[142] Lloyd Tupling of the Sierra Club reflected the disgruntlement of these environmentalists when he testified:

> [T]he time has long passed . . . when the Federal Government should have the choice of acting or not acting in the courts or through other means to curb pollution of both interstate and intrastate waters. These enforcement sections need to be tightened up by substituting the word "shall," whenever the word "may" now occurs.[143]

This onslaught did not go unheeded. During his questioning of one such environmentalist, Senator Thomas Eagleton, the Subcommittee's Vice-Chairman,[144] indicated that he understood both the fear of lax governmental enforcement and how the creation of mandatory enforcement duties might allay much of that concern.[145]

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the required remedial action. If, after 30 days, the remedial action had not been taken or the state had not acted, the Administrator was authorized ("may") to issue a compliance order or ask the Attorney General to bring suit. S. 1014, *supra* note 137, § 1 (proposing amendment to Federal Water Pollution Control Act § 10(f)(1)). The Administrator was authorized ("may") to request the Attorney General to bring suit to enjoin discharges presenting "an imminent and substantial danger" to public health or water quality. *Id.* (proposing amendment to Federal Water Pollution Control Act § 10(j)).

140. *Id.* (proposing amendment to Federal Water Pollution Control Act § 10(k)(1)(B)).

141. *Senate Hearings 1971, Pts. 1-9, supra* note 127.

142. *See infra* note 143 and accompanying text.

143. *Senate Hearings 1971, Pt. 2, supra* note 127, at 610; *see also id.* at 603 (testimony of Barbara Reid, Environmental Action) ("The Administrator must be required to begin abatement procedures upon discovery of a violation."); *id.* at 607 (testimony of Carl Pope, Zero Population Growth) ("[T]he enforcement of all this elaborate machinery remains optional. The Administrator may enforce, which means he may choose not to enforce — which means that citizens cannot sue him to compel enforcement."); *id.* at 728 (testimony of David Zwick, editor of a Nader report on water pollution) ("The Administrator must be given a clear-cut legal duty to enforce under specified conditions. Otherwise the provision which gives the citizen a right to sue the Administrator to compel him to perform any 'duty' is meaningless in the area of enforcement.").

Only a representative from the Natural Resources Defense Council seemed to acknowledge that S. 523 (by Sen. Muskie) would authorize a citizen to seek enforcement by suing the Administrator of the EPA. *See id.* at 720 (statement of Richard Hall).

144. *See id.* at 599.

145. After alluding to the fears of the environmental community, Senator Eagleton asked David Zwick whether the use of mandatory enforcement language would help

At the conclusion of these hearings, the Subcommittee went into executive session to draft its bill.[146] There was little indication of what the Subcommittee was up to[147] until a staff working print of its bill was issued in July 1971.[148] The Subcommittee apparently had taken to heart the criticism from the environmental community. The primary provision of its draft bill dealing with federal enforcement was replete with mandatory directives. For instance, section 309(a)(1) stated that upon a finding of violation, the Administrator was required to issue notice to both the state and the polluter. If after thirty days the violation continued and the state had not begun vigorous enforcement, the Administrator was ordered to bring either a civil suit or issue a compliance order.[149] In the event a polluter failed to comply with a compliance order, section 309(b) directed the Administrator to "commence a civil action for appropriate relief."[150] Furthermore, the citizen suit provision, section 505, authorized an action against the Administrator to compel the performance of "any act or duty under [the] Act."[151] It was now industry's turn to be disgruntled.

Only two industrial groups, however, took up the gauntlet in this regard. While the American Paper Institute and the National Association of Electric Companies suggested that the mandatory language in section 309(a) relating to compliance orders and civil suits be changed to "may,"[152] industry, for the most part, ignored

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strengthen Senator Muskie's bill. Zwick replied that the change "would beef it up considerably." *Id.* at 731-32.

These environmentalists received support during the hearings from a rather unlikely source — James Rill, a partner at a Washington law firm that represented the American Iron and Steel Institute. Mr. Rill gave his testimony as a private citizen, *id.* at 693, but his views were echoed to a large extent in a memorandum written by his firm and submitted to the Subcommittee by the American Iron and Steel Institute, *id.* at 1074-75. Mr. Rill admitted that, at times, administrative agencies have been "guilty of laxity, lassitude and less than efficient enforcement." *Id.* at 697. As a result, he suggested that there should be "some room" for citizen suits under this legislation. *Id.* He argued, however, that such suits should not lie against the polluter, but against the EPA to compel the EPA to enforce. Mr. Rill believed that this approach would result in a more consistent enforcement policy emanating solely from the EPA, although "shaped" and "possibly invigorated" by the judiciary. *Id.*

146. *See* J. QUARLES, *supra* note 127, at 147.

147. *Id.*

148. *Senate Hearings 1971, Pt. 4, supra* note 127, at 1549-1601. This draft was prepared for discussion purposes. *Id.* at 1549.

149. *Id.* at 1579.

150. *Id.* at 1580. The emergency enforcement provision, section 504, also contained clear enforcement duties. In case of "an imminent or substantial endangerment" to public health, the Administrator was directed to issue an abatement order, and, in case of substantial economic injury to persons engaged in shellfishing, the Administrator was ordered to institute civil proceedings. *Id.* at 1595.

151. *Id.* at 1595.

152. *Senate Hearings 1971, Pt. 4, supra* note 127, at 1664 (comments of the American Paper Institute); *id.* at 1745 (comments of the National Association of Electric Companies). The National Association of Electric Companies further recommended

the challenge.[153] Even the Department of Justice failed to take exception to the creation of mandatory enforcement obligations.[154]

Following this opportunity for comment, the Subcommittee approved the draft bill in early August and sent it to the Senate Committee on Public Works.[155] After two months of negotiation and drafting, the Committee voted unanimously on October 19, 1971, to report its bill, S. 2770,[156] to the Senate.[157] The bill retained the hard-line approach to federal enforcement. Section 309(a)(1) provided that the Administrator, upon a finding of violation, "shall notify" the polluter and the state. If, after thirty days, the state has not undertaken appropriate enforcement, the Administrator "shall issue" a compliance order or "shall bring a civil action."[158] Section 309(a)(3) also gave the Administrator a mechanism for immediate enforcement. Whenever the Administrator finds a violation, the Administrator "shall" order compliance or bring suit.[159] Additionally, section 309(b) provided that the Administrator "shall" commence a civil action whenever, for example, a compliance order is disobeyed or an unpermitted discharge occurs.[160] The citizen suit provision was altered slightly to allow for suits against the Administrator to compel the performance of "any act or duty under this Act which is not discretionary with the Administrator."[161] The bill's language plainly suggests that a citizen suit would lie to prompt mandatory EPA enforcement. The Committee's report supports this reading, although it adds a significant twist.

In its discussion of section 309, the Committee noted the poor enforcement record under the existing federal water pollution control program. According to the Committee, this was due to the lack of enforceable standards as well as weaknesses in the en-

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substituting "may" for "shall" in Section 309(b), which provided for civil suits where, inter alia, compliance orders were disobeyed. *Id.* at 1746.

153. Industry may well have been too preoccupied with other aspects of the draft bill to focus precisely upon the mandatory enforcement issue. *See, e.g., id.* at 1606-62 (comments of the American Iron and Steel Institute) (criticizing, among other things, the citizen suit provision); *id.* at 1665-75 (comments of the American Petroleum Institute) (finding fault with many provisions including the authorization of criminal penalties for those who "knowingly" violate certain requirements).

154. Letter from Richard Kleindienst, Deputy Attorney General, to Senator Jennings Randolph, Chairman, Senate Committee on Public Works (Aug. 4, 1971), *reprinted in Senate Hearings 1971, Pt. 4, supra* note 127, at 1832-33.

155. *See Current Developments,* 2 Env't Rep. (BNA) 421 (Aug. 13, 1971).

156. S. 2770, 92d Cong., 1st Sess. (1971), *reprinted in* 2 LEGISLATIVE HISTORY 1972, *supra* note 2, at 1534.

157. S. REP. NO. 414, 92d Cong., 1st Sess. 92 (1971), *reprinted in* 2 LEGISLATIVE HISTORY 1972, *supra* note 2, at 1509. The Subcommittee and full Committee had held a total of 45 executive sessions before approving the bill. *See Current Developments,* 2 Env't Rep. (BNA) 720 (Oct. 22, 1971).

158. S. 2770, *supra* note 156 § 309(a)(1).

159. *Id.* § 309(a)(3).

160. *Id.* § 309(b). Section 504, which provided the EPA with emergency enforcement powers, remained mandatory. *Id.* § 504.

161. *Id.* at § 505(a)(2).

forcement procedures available to the federal government.[162] Consequently, the Committee provided for the imposition of precise requirements on polluters to make the determination of violations an easier task.[163] To cure the latter problem, the Committee not only provided for more direct enforcement but created a series of mandatory enforcement obligations:

> When EPA discovers a violation of any effluent limitation, it *must* provide notice to the polluter and the State. Unless the State initiates enforcement action within 30 days, EPA *shall* issue an order requiring compliance or bring a civil suit against the polluter.
>
> . . . .
>
> When EPA finds anyone violating Sections 301, 302, 306, 307, 308, or 402, the agency *must* either issue an order that requires immediate compliance or bring a civil suit. . . . The Administrator *shall* initiate a civil suit for appropriate relief, such as an injunction, against anyone who refuses to comply with any such abatement order.[164]

Thus, the Committee clearly indicated that it was creating a series of mandatory duties; nevertheless, the Committee also acknowledged that the EPA needed some leeway within which to act.

First, the Committee stated that the Agency would possess "a minimum" of discretion to decide whether an infraction had occurred. This discretion was limited because the "[e]nforcement of violations of requirements under this Act should be based on relatively narrow fact situations requiring a minimum of discretionary decision making or delay."[165] The Committee also declared that federal enforcement power remained concurrent with that of the states and thus was not intended "to supplant state enforcement."[166] Consequently, the Committee cautioned:

> [T]he authority of the Federal Government should be used judiciously by the Administrator in those cases [that] deserve Federal action because of their national character, scope, or seriousness. The Committee intends the great volume of enforcement actions be brought by the State[s]. It is clear that the Administrator is not to establish an enforcement bureaucracy but rather to reserve his authority for the cases of paramount

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162. S. REP. NO. 414, 92d Cong., 1st Sess. 63 (1971), *reprinted in* 2 LEGISLATIVE HISTORY 1972, *supra* note 2, at 1481.

163. *Id.* at 64, *reprinted in* 2 LEGISLATIVE HISTORY 1972, *supra* note 2, at 1482. The Committee was referring to the requirement of NPDES permits, which would incorporate both relevant effluent limitations and any requirements necessary to implement water quality standards. S. 2770, *supra* note 156, § 402(a)(1).

164. S. REP. NO. 414, 92d Cong., 1st Sess. 63 (1971), *reprinted in* 2 LEGISLATIVE HISTORY 1972, *supra* note 2, at 1481 (emphasis added).

165. *Id.* at 64, *reprinted in* 2 LEGISLATIVE HISTORY 1972, *supra* note 2, at 1482.

166. *Id.*

interest.[167]

This statement, taken out of context, could lend some credence to an argument that the "shall[s]" in this version of section 309 were not really mandatory in nature.[168] However, the Committee subsequently reinforced the notion that "shall" meant "shall," although tempered with a degree of enforcement discretion.

The Senate Committee believed that strong federal enforcement was crucial to the eventual success of this new effort to restore water quality.[169] In order to assure such vigorous federal enforcement, the Committee emphasized that the bill's citizen suit provision would authorize actions to "lie against the Administrator for failure [to] exercise his duties under the Act, including his enforcement duties."[170] That statement flies in the face of any contention that the EPA would possess unfettered discretion not to enforce. Moreover, the Committee indicated how limited the EPA's flexibility would be when it concluded:

> The purpose of the bill is to establish clear and enforceable requirements . . . . Monitoring requirements . . . should reveal violations . . . with a minimum of factual complexity. Once the Administrator has, under the procedures established under the bill, determined a violation, the government should immediately proceed to abatement. Once this determination is made there should be no further discretionary decision making by government officials.[171]

This conclusion, however, neglected to mention one other element of discretion given the EPA within the context of an otherwise mandatory duty to enforce. The Committee also intended to allow the EPA some power to set its own enforcement priorities by stating that the EPA was to reserve its power for serious cases.[172]

The floor debate in the Senate likewise indicates that the Senate intended to impose mandatory enforcement duties upon the EPA. In addition, the debate sheds a great deal of light on why the Senate believed the creation of such duties was necessary.

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167. *Id.*

168. *See infra* notes 317-18 and accompanying text.

169. *See* S. REP. NO. 414, 92d Cong., 1st Sess. 65 (1971), *reprinted in* 2 LEGISLATIVE HISTORY 1972, *supra* note 2, at 1483.

170. *Id.* at 81, *reprinted in* 2 LEGISLATIVE HISTORY 1972, *supra* note 2, at 1499.

171. *Id.* at 82, *reprinted in* 2 LEGISLATIVE HISTORY 1972, *supra* note 2, at 1500.

In view of all these specific references to the mandatory nature of both administrative compliance orders and civil enforcement, little significance should be attached to a brief statement regarding enforcement found in the report's introduction. After criticizing the prior course of enforcement activity, *id.* at 5, *reprinted in* 2 LEGISLATIVE HISTORY 1972, *supra* note 2, at 1423, the Committee wrote: "[The Administrator] is authorized to enforce permit violations immediately, or if a State fails to act within 30 days after receipt of a notice of violation, the Administrator may issue an order to comply or go to court against the violator." *Id.* at 10, *reprinted in* 2 LEGISLATIVE HISTORY 1972, *supra* note 2, at 1428. If that introductory remark is construed in a manner consistent with the Committee's detailed descriptions of the EPA's enforcement responsibilities, then the Committee apparently was referring, albeit inartfully, only to the choice given the EPA of undertaking immediate enforcement or, in appropriate cases, of deferring to state action.

172. *See supra* note 167 and accompanying text.

The sponsor of the Senate bill, Senator Muskie,[173] set the tone for the Senate's consideration during his opening remarks.[174] "[T]oday, the rivers of this country serve as little more than sewers to the seas. Wastes from cities and towns, from farms and forests, from mining and manufacturing, foul the streams, poison the estuaries, threaten the life of the ocean depths."[175] He placed much of the blame for this plight upon a general failure to enforce the law against polluters.[176] According to Senator Muskie, the conference procedure resulted in "an almost total lack of enforcement,"[177] the water quality standards procedure was too slow,[178] and the Refuse Act was too weak.[179] Senator after senator then rose to call for tougher, more effective federal enforcement.[180]

A strong signal indicating that the Senate bill indeed created mandatory enforcement obligations came during a colloquy between Senators Muskie and Proxmire. Senator Proxmire asked whether section 309(b)[181] meant "that EPA must sue wherever a violation occurs" or that the EPA would "have discretion to go after some polluters, and leave others to continue discharging."[182] Senator Muskie replied that the EPA is "mandated to enforce . . . wherever a pollution occurs."[183] And, according to Senator Mus-

173. *See* S. 2770, *supra* note 156, at 1, *reprinted in* 2 LEGISLATIVE HISTORY 1972, *supra* note 2, at 1534; *see also* EPA v. National Crushed Stone Ass'n, 449 U.S. 64, 71 n.10 (1980) (referring to Senator Muskie as "the principal Senate sponsor of the Act").

174. 117 CONG. REC. 38,797-802 (1971), *reprinted in* 2 LEGISLATIVE HISTORY 1972, *supra* note 2, at 1253-65.

175. *Id.* at 38,797, *reprinted in* 2 LEGISLATIVE HISTORY 1972, *supra* note 2, at 1253.

176. *See id.* at 38,799, *reprinted in* 2 LEGISLATIVE HISTORY 1972, *supra* note 2, at 1256-57.

177. *Id., reprinted in* 2 LEGISLATIVE HISTORY 1972, *supra* note 2, at 1257; *see supra* notes 64-67 and accompanying text (describing the conference enforcement procedure).

178. 117 CONG. REC. 38,799 (1971), *reprinted in* 2 LEGISLATIVE HISTORY 1972, *supra* note 2, at 1256-57. *See supra* notes 68-76 and accompanying text (explaining the water quality standards enforcement mechanism).

179. 117 CONG. REC. 38,799 (1971) (stating that the Act applied only to industrial polluters), *reprinted in* 2 LEGISLATIVE HISTORY 1972, *supra* note 2, at 1257; *see supra* notes 79-84 and accompanying text (discussing enforcement under the Refuse Act).

180. *See* 117 CONG. REC. 38,809 (1971) (remarks of Sen. Lloyd Bentsen), *reprinted in* 2 LEGISLATIVE HISTORY 1972, *supra* note 2, at 1281; *id.* at 38,827 (remarks of Sen. William Proxmire), *reprinted in* 2 LEGISLATIVE HISTORY 1972, *supra* note 2, at 1317; *id.* at 38,832 (remarks of Sen. Percy), *reprinted in* 2 LEGISLATIVE HISTORY 1972, *supra* note 2, at 1332; *id.* at 38,833 (remarks of Sen. Howard Baker), *reprinted in* 2 LEGISLATIVE HISTORY 1972, *supra* note 2, at 1334; *id.* at 38,834 (remarks of Sen. Walter Mondale), *reprinted in* 2 LEGISLATIVE HISTORY 1972, *supra* note 2, at 1337; *id.* at 38,841 (remarks of Sen. Gaylord Nelson), *reprinted in* 2 LEGISLATIVE HISTORY 1972, *supra* note 2, at 1356; *id.* at 38,864 (remarks of Sen. Byrd), *reprinted in* 2 LEGISLATIVE HISTORY 1972, *supra* note 2, at 1412.

181. S. 2770, *supra* note 156, § 309(b).

182. 117 CONG. REC. 38,831 (1971), *reprinted in* 2 LEGISLATIVE HISTORY 1972, *supra* note 2, at 1331.

183. *Id.*

kie, that meant for every violation.[184]

Senator Muskie had exaggerated somewhat, if the committee report was an accurate barometer of intent. Although the EPA was required to enforce through a series of mandatory duties, these duties were limited by granting the EPA some discretion to determine the existence of a violation and to set enforcement priorities.[185] Nevertheless, this statement by the bill's principal sponsor is strong evidence that the administrative and civil enforcement duties contained in the Senate's version of section 309 were sufficiently mandatory to provide a district court with jurisdiction over a citizen's claim that the EPA had neglected its enforcement obligations.

The Senate debate was brief.[186] No senator in the fall of 1971 was particularly disposed to oppose the goal of clean water.[187] When the Senate voted, the bill passed by an overwhelming vote of 86 to 0.[188] The story, however, is not over.

The House of Representatives was a little slower than the Senate to address the question of amending the Federal Water Pollution Control Act. It was March 1971 when two major bills were introduced that would significantly change the enforcement mechanisms available to the EPA. On March 11, 1971, Representative William Harsha introduced the Administration's bill[189] dealing with enforcement.[190] As with Senator Cooper's bill,[191] Representative Harsha's bill provided the EPA with expanded but discretionary enforcement powers.[192] Moreover, Representative Harsha's citizen suit section supplied no means by which to com-

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184. *Id.* This exchange was so specific that it refutes any contrary signal that could be drawn from an earlier, more general statement made by Senator Muskie. During his introductory remarks, Senator Muskie stated:

> The task of enforcing provisions of the bill is assigned to the Administrator. He is authorized to enforce permit violations immediately; or, if a State fails to act within 30 days after receipt of a notice of violation, the Administrator may issue an order to comply or go to court against the polluter.

Id. at 38,800, *reprinted in* 2 LEGISLATIVE HISTORY 1972, *supra* note 2, at 1261. Not only was the Senator speaking in general terms, but he may well have been referring to the fact that the EPA was given an option to act immediately against a violator or only after providing the state with an opportunity to act first.

185. *See supra* notes 165-67 and accompanying text.

186. The entire debate lasted one day, November 2, 1971. *See* 117 CONG. REC. 38,797-888 (1971), *reprinted in* 2 LEGISLATIVE HISTORY 1972, *supra* note 2, at 1253-1414.

187. *See* J. QUARLES, *supra* note 127, at 151.

188. 117 CONG. REC. 38,865 (1971), *reprinted in* 2 LEGISLATIVE HISTORY 1972, *supra* note 2, at 1413-14.

189. *See* 117 CONG. REC. 6032 (1971) (remarks of Rep. Harsha).

190. H.R. 5966, 92d Cong., 1st Sess. (1971). In total, over 200 separate bills to amend the Federal Water Pollution Control Act were introduced in the House during the Ninety-Second Congress. *See* H.R. REP. NO. 911, 92d Cong., 2d Sess. 69 (1972), *reprinted in* 1 LEGISLATIVE HISTORY 1972, *supra* note 2, at 756.

191. *See supra* notes 137-39 and accompanying text.

192. *See* H.R. 5966, *supra* note 190, § 1 (proposing amendment to Federal Water Pollution Control Act § 10(f)(1)); *see also supra* note 139 (describing the identical provision found in Senator Cooper's bill, S. 1014). Representative Harsha's bill also gave the Administrator of the EPA discretion to ask the Attorney General to bring an action to abate "an imminent and substantial" endangerment to health or water qual-

pel Agency enforcement.[193] Later in March, Representative John Dingell introduced a bill[194] that stood in vivid contrast to the Administration's bill advanced by Representative Harsha.

Representative Dingell's bill expressly required the Administrator of the EPA to issue a compliance order whenever the Administrator found both a water quality violation and ineffective state action to abate it.[195] If the polluter failed to abide by the order, the Administrator was ordered to commence an appropriate judicial action.[196] In the event the Administrator did not perform either duty, the citizen suit provision would give district courts jurisdiction to order the Administrator to enforce.[197] The House, consequently, was confronted with a choice between two distinctively different approaches to federal enforcement — one wholly discretionary, the other mandatory.

During its oversight hearings, which began in May 1971,[198] the House Committee on Public Works heard lengthy testimony about the shortcomings of the enforcement mechanisms then available to the federal government.[199] Moreover, Assistant Administrator for Enforcement and General Counsel John Quarles, testifying for the EPA, admitted that federal enforcement activity had been inadequate to the task.[200] With that as background, the Committee

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ity. H.R. 5966, *supra* note 190, § 1 (proposing amendment to Federal Water Pollution Control Act § 10(j)).

193. An action against the Administrator of the EPA could only be based on the alleged failure to perform an act or duty "which is not discretionary with the Administrator." H.R. 5966, *supra* note 190, § 1 (proposing amendment to Federal Water Pollution Control Act § 10(k)(1)(B)).

194. H.R. 6722, 92d Cong., 1st Sess. (1971) *reprinted in Senate Hearings 1971,* Pt. 1, at 396.

195. Whenever the Administrator found a violation of water quality requirements, the bill provided that the Administrator "shall notify" both the polluter and the appropriate state agency. *Id.* § 5 (proposing a new section 202(a)(i) to the FWPCA). Unless the Administrator determined that the state agency was acting effectively to abate the violation within 20 days, the bill stated that the Administrator "shall immediately issue or cause to issue" a compliance order. *Id.*

196. The bill provided that "[t]he Administrator shall commence a civil action for appropriate relief" whenever a polluter failed to abide by the terms of the compliance order. *Id.* (proposing a new section 202(d)(1) to the FWPCA). In addition, section 204 required the Administrator to undertake a suit in case of emergencies such as an "imminent or substantial endangerment to the health or welfare of persons." *Id.* (proposing a new section 204 to the FWPCA).

197. Section 205 authorized "any person" to file suit against the Administrator for an alleged "failure of the Administrator to perform any act or duty under this Act, including the enforcement of . . . water quality standard[s] . . . [and] timetable[s] of compliance." *Id.* (proposing a new section 205(a)(2) to the FWPCA). In such cases, district courts would possess jurisdiction to issue necessary orders. *Id.* (proposing a new section 205(b) to the FWPCA).

198. *See House Oversight Hearings 1971, supra* note 60.

199. *See, e.g., supra* notes 60, 73, 76.

200. Quarles said: "I agree . . . that 20 [notices of violation of] water quality standards . . . and 30 [Refuse Act] cases do not represent a sufficient Federal enforcement activity in light of the fact that we know that there are very widespread numbers of

proceeded in July to hold its first set of hearings on the pending legislation.[201]

Numerous witnesses testified that strong enforcement was essential to the success of any scheme to control water pollution.[202] In recognition of that relationship, the Chairman of the Council on Environmental Quality, Russell Train, asserted that Representative Harsha's bill[203] would provide adequate means to obtain prompt and effective enforcement.[204] Others disagreed. These witnesses, most of whom represented environmental organizations, argued that past experience indicated that mandatory governmental enforcement was imperative to guard against the possibility, perhaps certainty, of sluggish federal enforcement.[205] Once again, Lloyd Tupling of the Sierra Club summed up their views[206] in succinct fashion: "Casual enforcement of pollution abatement must not be continued. Mandatory action should be required. We are opposed to the permissiveness which is implied in some legislative proposals which give the administrator of the Environmental Protection Agency discretionary authority on enforcement. This can only lead to nonenforcement."[207] With the battle lines thus drawn, the hearings concluded at the end of September 1971.[208]

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situations where there is a violation of water quality standards of one sort or another." *House Oversight Hearings 1971, supra* note 60, at 208-09.

201. *Water Pollution Control Legislation — 1971: Hearings on Proposed Amendments to Existing Legislation Before the House Comm. on Public Works,* 92d Cong., 1st Sess. (1971) [hereinafter *House Hearings 1971*].

202. *See, e.g., id.* at 1686 (statement of Mrs. Donald Clusen, League of Women Voters); *id.* at 1156 (testimony of David Zwick, editor of a Nader report on water pollution); *id.* at 724 (testimony of David Nixon, Instructor, Department of Political Science, Pennsylvania State University).

203. H.R. 5966, 92d Cong., 1st Sess. (1971).

204. *House Hearings 1971, supra* note 201, at 1564-65.

205. *See infra* note 207 and accompanying text.

206. *See supra* note 143 and accompanying text (recounting a portion of Tupling's prior testimony before the Senate Subcommittee on Air and Water Pollution).

207. *House Hearings 1971, supra* note 201, at 860 (Tupling, adding that "[the] [e]nforcement sections need to be tightened by substituting the word 'shall' wherever the word 'may' occurs"); *see also id.* at 858 (statement of Barbara Reid, Environmental Action) ("The Administrator of [the EPA] . . . has never been required by past legislation to enforce anything for anybody. It is vital that [this] legislation . . . require the Administrator to act . . . when [a violation] is discovered."); *id.* at 866 (testimony of Carl Pope, Zero Population Growth) ("Failure to enforce the law corrodes respect for the law . . . ; [t]he law should make as many duties as possible mandatory."); *id.* at 1164 (testimony of David Zwick, editor of a Nader report on water pollution) ("The key point . . . is not giving the administrator the discretion not to enforce."); *id.* at 1687 (statement of Mrs. Donald Clusen, League of Women Voters) ("[I]n order to see real progress, the Administrator must be required to issue abatement orders or initiate a civil suit when he receives information that a person is in violation of any water quality standard or effluent limitation . . . ."); *id.* at 1746-47 (statement of Richard Hall, Natural Resources Defense Council) (stating that "[w]eak enforcement is one of the grave flaws in our efforts to clean our waters," and advocating citizen suits to supplement governmental enforcement).

Three of these witnesses suggested that citizen suits should lie against the EPA for failures to comply with enforcement mandates. *See id.* at 866 (testimony of Carl Pope); *id.* at 1687 (statement of Mrs. Donald Clusen); *id.* at 1747-48 (statement of Richard Hall).

208. The first set of hearings essentially ended on September 24, 1971, *see id.* at

The House Committee now had to decide whether to draft its own bill or wait to see what the Senate did.[209] By delaying the start of executive sessions until the last week of October, the Committee apparently opted for the latter alternative.[210] The House did not have long to wait. In mid-October the Senate Committee on Public Works reported S. 2770,[211] and shortly thereafter, the bill was passed by the entire Senate.[212]

An attack was soon mounted against the Senate's bill. On November 8, the White House announced that it was so unhappy with the Senate's version that it would seek further hearings before the House Committee on Public Works.[213] The Administration wanted new House hearings to give it a legislative forum to voice its criticism of the Senate bill.[214] Without such an opportunity, the Administration feared that the House might just adopt the Senate's bill.[215] Despite tremendous pressure brought to bear by the Administration,[216] the Chairman of the House Committee, Representative John Blatnik, opposed the Administration's overture.[217] Then, Representative Blatnik suffered a heart attack.[218]

In the aftermath, the House Public Works Committee relented and gave the Administration a means through which it could attack the Senate's bill. On November 19, 1971, H.R. 11896[219] was introduced with the cosponsorship of the entire Committee.[220]

2235-90, even though the Committee met in hearing once more, in November, to hear from Dr. Thor Heyerdahl, *see id.* at 2291-313.

209. *See Current Developments*, 2 Env't Rep. (BNA) 667 (Oct. 8, 1971).

210. *See id.*

211. *See supra* notes 156-57 and accompanying text.

212. *See supra* note 188 and accompanying text.

213. *See Current Developments*, 2 Env't Rep. (BNA) 815 (Nov. 12, 1971) (announcement by White House Press Secretary Ronald Ziegler).

214. N.Y. Times, Nov. 20, 1971, at 62, col. 7.

215. *See* J. QUARLES, *supra* note 127, at 152-53. The White House was alarmed by, among other things, increases in spending, the expansion of federal authority, and the policy of eliminating pollutants in the nation's waters by 1985, all of which were found in the Senate's bill. *Id.* at 151-52.

216. In order to press its attack, the administration enlisted aid from industry, many state governments, and Republicans and southern Democrats on the House Public Works Committee. N.Y. Times, Nov. 20, 1971, at 62, col. 7.

217. *See Current Developments*, 2 Env't Rep. (BNA) 847 (Nov. 19, 1971) (quoting Representative Blatnik in stating that "he does not think 'anything is to be gained by rehashing the testimony [they had] been examining for the past six months' "); *see also* J. QUARLES, *supra* note 127, at 154 (stating that "[s]ensitive over his position [as a former champion of tougher water pollution measures], Blatnik opposed reopening the hearings"). Representative Blatnik, in fact, had already stated that he was in general agreement with the terms of the Senate bill, although he believed that several changes were necessary. *See Current Developments*, 2 Env't Rep. (BNA) 815 (Nov. 12, 1971).

218. *See* J. QUARLES, *supra* note 127, at 154.

219. H.R. 11896, 92d Cong., 1st Sess. (1971), *reprinted in Reopened House Hearings 1971*, *supra* note 41, at 1.

220. *Reopened House Hearings 1971*, *supra* note 41, at 199.

Further, the Committee announced that it would reopen hearings in early December.[221] H.R. 11896 bore marked resemblance to the Senate bill[222] but did not enjoy full support from all members of the Committee.[223] According to Representative Robert Jones of Alabama, Acting Chairman of the Committee, the bill was merely a vehicle to reopen hearings in the House to discuss various aspects of the Senate bill.[224]

With regard to federal enforcement, H.R. 11896 was remarkable for its lack of originality. The primary enforcement provision, section 309, was identical to that contained in S. 2770.[225] Taken at face value, the House Committee's bill thus created a clear series of mandatory administrative and civil enforcement duties for the EPA. Upon finding a violation of effluent limitations, the EPA had to issue notice, wait thirty days, and, if the state had not acted effectively, issue a compliance order or file suit.[226] In addition, whenever the Administrator found, inter alia, a violation of a NPDES permit, a discharge without a permit, or a violation of effluent limitations, the EPA was required to immediately issue a compliance order or bring suit.[227] The citizen suit provision was also identical to the Senate's version[228] and hence would provide a forum that could compel the Administrator to perform his nondiscretionary enforcement duties.

The second round of House hearings gave the Administration a chance to air any displeasure it may have had with the creation of mandatory administrative and civil enforcement duties. It may come as a surprise to learn that the Administration did not do so. The Administrator of the EPA, William Ruckelshaus, indicated to the Committee that the EPA was "in general agreement" with the terms of section 309.[229] However, he did find fault with the seem-

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221. The hearings were scheduled to begin on December 7, 1971. *See Current Developments,* 2 Env't Rep. (BNA) 879 (Nov. 26, 1971).

222. *Compare* H.R. 11896, *supra* note 219 *with* S. 2770, *supra* note 156. For a brief description of similarities and differences, see *Current Developments,* 2 Env't Rep. (BNA) 879 (Nov. 26, 1971).

223. *See* H.R. REP. NO. 911, 92d Cong., 2d Sess. 69 (1972), *reprinted in* 1 LEGISLATIVE HISTORY 1972, *supra* note 2, at 756. Representative Harsha, the ranking Republican member of the Committee, stressed that the bill did not represent a "meeting of the minds" on the Committee. *See Current Developments,* 2 Env't Rep. (BNA) 879 (Nov. 26, 1971).

224. *See Current Developments,* 2 Env't Rep. (BNA) 879 (Nov. 26, 1971).

225. *Compare* H.R. 11896, *supra* note 219 § 309 *with* S. 2770, *supra* note 156 § 309. The differences were totally insubstantial — the House Committee made three grammatical corrections to the Senate version. *Compare* S. 2770, *supra* note 156 § 309(a)(1), (a)(2), (a)(3) *with* H.R. 11896, *supra* note 219 § 309(a)(1), (a)(2), (a)(3).

The emergency enforcement provision, section 504, was absolutely identical. *Compare* H.R. 11896, *supra* note 219 § 504 *with* S. 2770, *supra* note 156 § 504.

226. H.R. 11896, *supra* note 219 § 309(a)(1).

227. *Id.* § 309(a)(3). In addition, section 309(b) required the Administrator to file a civil action in a number of situations including the violation of an administrative compliance order or a discharge without a permit. *Id.* § 309(b). Finally, section 504 ordered the Administrator to take enforcement action in certain emergencies. *Id.* § 504. *See supra* note 150 (discussing the same provision in the Senate bill).

228. *See* H.R. 11896, 92d Cong., 1st Sess. § 505(a)(2) (1971).

229. *Reopened House Hearings 1971, supra* note 41, at 301 (letter responding to request for comments on H.R. 11896).

ing conflict between section 309(a)(1), which provided, in case of a violation of certain effluent limitations, for thirty-days notice before requiring the initiation of federal enforcement, and section 309(a)(3), which, in the same circumstance, required immediate federal enforcement.[230] Consequently, he suggested a revision to section 309(a)(3) that would subject it to the procedural requirements of section 309(a)(1) prior to the commencement of federal enforcement action for such a violation.[231] In addition to eliminating the apparent conflict between the two provisions, the proposed revision also conformed to his belief that states generally should have a chance to take appropriate action before the EPA acts.[232] Ruckelshaus also advocated changing section 309(b) to require the Administrator to commence an immediate civil suit in an additional instance: for failure to comply with a section 504 emergency order issued by the Administrator.[233] At no time, however, did he voice opposition to the mandatory nature of section 309(a) and (b).

The absence of such opposition was not due to any misunderstanding about the mandatory nature of those duties. The EPA was quite aware of it. John Quarles, Assistant Administrator for Enforcement and General Counsel, testified not only that section 309 contained some "mandatory requirements . . . to take enforcement action" but that "a citizen suit could be brought" for failure to perform those duties.[234] Consistent with the position taken by Ruckelshaus, Quarles did not attack the creation of mandatory enforcement duties.[235] Rather, he criticized the existence of conflict-

230. *Id.* at 302.

231. *Id.*

232. *See id.* at 301.

233. *Id.* at 302. According to Ruckelshaus, sanctions had to be available in case an order issued by the Administrator were disobeyed. *See id.* Subsequently, however, Ruckelshaus recommended that the Committee drop altogether the provision for administrative orders in section 504. Instead, he advised changing section 504 to authorize the Administrator to request the Attorney General to bring suit to immediately enjoin all discharges of pollution that present an emergency. *Id.* at 308.

234. *Id.* at 338.

235. *See id.* This silence seems especially significant in light of the position taken by the Administration on a similar question during congressional consideration of the Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. §§ 7401-7642 (1982)). At that time, the Administration took strong exception to language that would have authorized citizen suits to force the federal government "to take enforcement action in a particular case." Letter from Elliot Richardson, Secretary, Department of Health, Education, and Welfare, to Senator Jennings Randolph, Chairman, Senate Committee on Public Works (Nov. 17, 1970), *reprinted in* 1 LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970, at 215 (1974) [hereinafter LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1970]. At that time, the Administration contended that the creation of such enforceable mandatory duties "would have the unintended result of reducing the overall effectiveness of our air pollution control efforts by distorting enforcement priorities that are essential to an effective national control strategy." *Id.*, *reprinted in* 1 LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1970, *supra*, at 215. For the

ing mandatory duties.[236] Quarles then recommended that the Committee consider drafting section 309 in such a way as to give the Administrator some leeway to determine whether state enforcement actions were adequate before mandating federal action.[237]

During the remainder of the hearings, a minimal amount of attention was focused on the issue of mandatory enforcement duties. The American Petroleum Institute did advise the Committee to change the word "shall" in section 309(a)(1), (a)(3), and (b) to "may" when referring to either the issuance of compliance orders or the institution of suit.[238] Otherwise, the bill "would make virtually every enforcement action non-discretionary with the Administrator, giving him no flexibility and opening the door to citizen suits any time a violation is alleged to have occurred."[239] On the other hand, the Sierra Club again stressed that federal enforcement should be mandatory,[240] and Professor Joseph Sax declared that enforcement decisions should not be "insulated from

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most part, Congress apparently complied with the Administration's wishes. *Compare* S. REP. NO. 1196, 91st Cong., 2d Sess. 39-43, 83-85 (1970), *reprinted in* 1 LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1970, *supra*, at 569-73, 613-15 *with* Pub. L. No. 91-604, 84 Stat. 1696, 1706, *reprinted in* 1 LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1970, *supra*, at 77-78, 97-98.

236. Quarles phrased it in the following manner:

> The bill provides in Section 309(a)[(1)] that if there is a violation found by the Administrator, the Administrator essentially shall give 30 days notice to the State, and wait and see if action is taken before he will step forward with action of his own.
>
> However, [section] 309[(a)(3)] says that in many of the identical situations . . . he would have to go ahead without waiting 30 days and issue either an order to . . . the discharger, or seek a civil suit . . . .
>
> Then if you turn over to . . . [section] 309(b)(6) . . . there is a directive that the Administrator must bring suit immediately upon finding one of these violations.
>
> So there are mandatory requirements to take action, two or three different actions, in fact, which are inconsistent with each other . . . .

Reopened House Hearings 1971, supra note 41, at 338.

237. Quarles stated: "I think there needs to be given a lot of thought to these provisions, to work them out in such a way that provides the discretion to operate the program as Mr. Ruckelshaus has just described." *Id.* What Ruckelshaus had just described was a situation where the EPA, first, had to determine whether state enforcement action was adequate before commencing federal enforcement. *Id.* at 337-38. In such cases, Ruckelshaus implied that the EPA needed some "discretion" in order to avoid unnecessary conflict between the state and federal governments. *Id.* I say "implied" because Quarles later stated that Ruckelshaus was describing the way the EPA operated at that time. *See id.* at 338.

238. *Id.* at 794 (statement of Peter Gammelgard, American Petroleum Institute).

239. *Id.* Several industry representatives also attacked the citizen suit provision and declared, in broad fashion, that it should be eliminated from the bill. *See id.* at 613 (statement of John Coffey, United States Chamber of Commerce); *id.* at 631 (statement of Dr. J. William Haun, National Association of Manufacturers); *id.* at 800 (testimony of J. Allen Overton, American Mining Congress).

240. *Id.* at 408 (testimony of Lloyd Tupling, Sierra Club). A number of other environmentalists, meanwhile, attempted to parry the blows made against the citizen suit provision. *See id.* at 358 (statement of Dr. Spencer Smith Jr., Citizens Committee on Natural Resources); *id.* at 366 (testimony of Louis Clapper, National Wildlife Federation); *id.* at 438-39 (testimony of David Zwick, The Nader Water Pollution Project); *id.* at 454-55 (statement of Professor Joseph Sax, University of Michigan Law School).

judicial scrutiny."[241] Little else, if anything, was said on the subject.

Following the second round of House hearings, the Committee members moved quickly to resolve their differences. At a news conference held on December 16, 1971, the Committee announced that it had approved a bill.[242] The Committee, however, had not completed the final text of the bill and left the task of drafting the appropriate language to its staff.[243]

Finally, on March 11, 1972, the Committee on Public Works reported an amended H.R. 11896 to the full House.[244] Although section 309 had undergone substantial change, strong similarities remained. Section 309(a)(1) provided that the Administrator "shall" either proceed under section 309(a)(3) or issue a notice of violation to the polluter and the state in the event of a violation of "any condition or limitation" contained in a state-issued NPDES permit.[245] If, after thirty days, the state had not begun "appropriate enforcement action, the Administrator shall issue" a compliance order or "shall bring a civil action" pursuant to section 309(b).[246] Section 309(a)(3), in turn, stated that the Administrator "shall issue" a compliance order or "shall bring a civil action" under section 309(b) whenever he finds a violation of any NPDES permit[247] or a violation of any one of several other enumerated sections.[248] Section 309(b) now provided, however, that "[t]he Administrator *is authorized* to commence a civil action for appropriate relief . . . for any violation for which he *is authorized* to issue a

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241. *Reopened House Hearings 1971*, *supra* note 41, at 470-71 (testimony of Professor Joseph Sax, University of Michigan Law School). Professor Sax also made his point in a more colorful fashion: "[Enforcement] is the place where it is important for citizens to be able to poke the Administrator in the arm and say, 'You get busy and get these orders enforced.' " *Id.* at 470.

Perhaps the most significant comment made by Professor Sax, however, came when he criticized the fact that the only Agency action that could be compelled by citizen suits involved nondiscretionary acts. In a remarkably prescient statement, he wrote: "In a complex bill like H.R. 11896, it can be anticipated that years of litigation might be expended in determining what are, and are not discretionary, duties." *Id.* at 455. Unfortunately, Professor Sax accurately presaged the future. *See infra* notes 288-304 and accompanying text.

242. N.Y. Times, Dec. 17, 1971, at 42, col. 1.

243. J. QUARLES, *supra* note 127, at 155.

244. H.R. 11896, 92d Cong., 2d Sess. (1972) (as amended), *reprinted in* 1 LEGISLATIVE HISTORY 1972, *supra* note 2, at 893.

245. *Id.* § 309(a)(1), *reprinted in* 1 LEGISLATIVE HISTORY 1972, *supra* note 2, at 1000. The relevant conditions or limitations were those implementing sections 301, 302, 306, 307, 308, and 316. *Id.*

246. *Id.*

247. The provision referred to both state and federally issued NPDES permits. *Id.* § 309(a)(3), *reprinted in* 1 LEGISLATIVE HISTORY 1972, *supra* note 2, at 1001.

248. *Id.* These sections were §§ 301, 302, 306, 307, 308, and 316. *Id.*, *reprinted in* 1 LEGISLATIVE HISTORY 1972, *supra* note 2, at 1001.

compliance order under subsection (a) of this section."[249] The citizen suit provision still gave a district court jurisdiction to compel the Administrator "to perform any act or duty under this Act which is not discretionary with the Administrator."[250]

The House Committee thus produced a confusing situation. On one hand, section 309(a)(1) and (a)(3) seemingly created mandatory duties, in certain cases, to issue compliance orders or undertake suit. On the other hand, section 309(b) merely "authorized" the institution of suit in those cases and referred to the issuance of compliance orders as "authorized." The language of section 309 alone provides no clear answer to these apparent ambiguities.

The committee report, unfortunately, is no more illuminating:

> Whenever on the basis of any information . . . the Administrator finds that anyone is in violation of any of these requirements, he *may* take any of the following enforcement actions: (1) he *shall* issue an order requiring compliance; (2) he *shall* notify the person in alleged violation [and the state] of [a finding of violation]. If beyond the 30th day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator *shall* issue an order requiring such person to comply . . . ; or (3) he *shall* bring a civil action; or (4) he *shall* cause to be instituted criminal proceedings.[251]

That explanation, of course, provides no answer, for it is susceptible to two reasonable interpretations. First, the Administrator has discretion not to act, or second, the Administrator is required to act, but has discretion to choose how. The report was clear, however, in stating that section 309 was not intended to totally displace state enforcement.[252] In this regard, the House Committee was in complete accord with the sentiments of the Senate Public Works Committee.[253]

The floor debate in the House never came to grips with the question. At one point, a member of the Public Works Committee, Representative John Terry,[254] merely asserted that, in the case where a state-issued NPDES permit was violated, the Admin-

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249. *Id.* § 309(b), *reprinted in* 1 LEGISLATIVE HISTORY 1972, *supra* note 2, at 1002 (emphasis added). The emergency enforcement provision, section 504, provided that the Administrator "may bring suit" to halt the discharge of pollution presenting "an imminent and substantial endangerment" to health. *Id.* § 504, *reprinted in* 1 LEGISLATIVE HISTORY 1972, *supra* note 2, at 1073.

250. *Id.* § 505(a), *reprinted in* 1 LEGISLATIVE HISTORY 1972, *supra* note 2, at 1074.

251. H.R. REP. NO. 911, 92d Cong., 2d Sess. 114-15 (1972), *reprinted in* 1 LEGISLATIVE HISTORY 1972, *supra* note 2, at 801-02.

252. According to the report:

> The provisions of section 309 are supplemental to those of the State and are available to the Administrator . . . where . . . State . . . enforcement agencies will not or cannot act expeditiously and vigorously to enforce the requirements of this Act.

Id. at 115, *reprinted in* 1 LEGISLATIVE HISTORY 1972, *supra* note 2, at 802.

253. *See supra* notes 166-67 and accompanying text.

254. *See Reopened House Hearings 1971, supra* note 41, at II. Representative Terry, however, did not cosponsor the amended H.R. 11896. *See* H.R. 11896, *supra* note 244, *reprinted in* 1 LEGISLATIVE HISTORY 1972, *supra* note 2, at 893.

istrator would have "discretion" to "step in" immediately or defer to state enforcement.[255] No participant in the debate, however, addressed whether the Administrator was required to act either in a situation where the state failed to enforce a state-issued permit or in case of any other relevant violation.[256] At the conclusion of the debate, the House passed the bill by a resounding 380 to 14.[257] The House and Senate bills were then referred to conference in order to resolve their differences.[258]

The conference committee worked hard and long.[259] After four months of deliberations, the conference agreed on a substitute bill[260] and issued its report on September 28, 1972.[261] The conference accepted the House version of section 309.[262] Fortunately, however, the conference report reveals what the conferees intended with regard to mandatory enforcement.

In describing the Senate bill, the report stated that section 309 "requires" the Administrator, in case of a relevant violation, "to either issue an order that requires immediate compliance or to bring a civil suit. . . . If such an abatement order is not complied with, the Administrator would initiate a civil suit for appropriate relief."[263] The report then described the House version of the same provision as "basically the same as the Senate bill."[264] The only difference articulated by the report was that under the House bill, "the Administrator is authorized rather than required to initi-

255. 118 CONG. REC. 10,219 (1972), *reprinted in* 1 LEGISLATIVE HISTORY 1972, *supra* note 2, at 389.

256. *See id.* at 10,201-72, 10,611-73, 10,748-804, *reprinted in* 1 LEGISLATIVE HISTORY 1972, *supra* note 2, at 343-751.

257. *Id.* at 10,803, *reprinted in* 1 LEGISLATIVE HISTORY 1972, *supra* note 2, at 749. The vote took place on March 29, 1972. *See id.* at 10,803, *reprinted in* 1 LEGISLATIVE HISTORY 1972, *supra* note 2, at 610; N.Y. Times, Mar. 30, 1972, at 18, col. 4.

258. *See* 118 CONG. REC. 15,011 (1972) (House action); *id.* at 12,447 (Senate action). The following Senators were appointed as conferees on the part of the Senate: Muskie, Randolph, Bayh, Eagleton, Boggs, Cooper, and Baker. *Id.* at 12,447. The House named the following Representatives to the Conference: Blatnik, Jones (Alabama), Wright, Johnson (California), Roe, Harsha, Grover, Clausen, and Miller (Ohio). *Id.* at 15,011.

259. Beginning on May 11, 1972, the conferees held a total of 39 meetings. *See* 118 CONG. REC. 33,692 (1972) (remarks of Sen. Muskie), *reprinted in* 1 LEGISLATIVE HISTORY 1972, *supra* note 2, at 161. Senator Muskie recited: "I have never before participated in a conference which has consumed so many hours, been so arduous in its deliberations, or demanded so much attention to detail from the members." *Id.*

260. S. CONF. REP. NO. 1236, 92d Cong., 2d Sess. 99, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 3776, 3777, *and in* 1 LEGISLATIVE HISTORY 1972, *supra* note 2, at 282.

261. *Id.* at 1, *reprinted in* 1 LEGISLATIVE HISTORY 1972, *supra* note 2, at 281.

262. *Id.* at 132, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 3776, 3809, *and in* 1 LEGISLATIVE HISTORY 1972, *supra* note 2, at 315.

263. *Id.* at 131-32, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 3776, 3809, *and in* 1 LEGISLATIVE HISTORY 1972, *supra* note 2, at 314-15.

264. *Id.* at 132, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 3776, 3809, *and in* 1 LEGISLATIVE HISTORY 1972, *supra* note 2, at 315.

ate civil actions."[265] Apparently, therefore, the House and Senate conferees resolved their differences by creating a mandatory duty to issue compliance orders while giving the EPA discretion to undertake civil enforcement.[266] The conference, moreover, settled upon a citizen suit provision that would allow suits against the Administrator for failing to perform mandatory acts or duties.[267]

The tersely worded conference report was elaborated upon during the Senate's consideration of the report. According to Senator Muskie, the Senate floor manager of the conference report,[268] the conference agreement on section 309 would do much to assure effective enforcement.[269] He explained that pursuant to section 309:

> The Administrator *must* issue an abatement order whenever there is a violation of the terms or conditions of a permit, including the effluent limitations, time schedules, and monitoring requirements. Should he fail to issue an order, a citizen suit may be brought against him to direct the issuance of such an order.[270]

Senator Muskie thereby confirmed that the conference had, indeed, made the issuance of compliance orders compulsory.

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265. S. CONF. REP. NO. 1236, 92d Cong., 2d Sess. 132, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 3776, 3809, *and in* 1 LEGISLATIVE HISTORY 1972, *supra* note 2, at 315.

266. The conferees rejected the Senate's mandatory language that had appeared in the emergency enforcement provision, section 504. *Id.* at 145, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 3776, 3882, *and in* 1 LEGISLATIVE HISTORY 1972, *supra* note 2, at 328. Instead, the conference adopted the House version, which merely authorized the Administrator to bring an action to abate an imminent and substantial endangerment to public health. *Id.* The conference, however, also authorized the Administrator to bring suit in a case presenting "an imminent and substantial danger to the welfare of persons where such endangerment is to the livelihood of such persons such as inability to market shellfish." *Id.* In such cases, the Senate version had required the commencement of civil suit. S. REP. NO. 414, 92d Cong., 1st Sess. 169-70 (1971), *reprinted in* 2 LEGISLATIVE HISTORY 1972, *supra* note 2, at 1702-03.

267. S. CONF. REP. NO. 1236, 92d Cong., 2d Sess. 145-46, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 3776, 3823, *and in* 1 LEGISLATIVE HISTORY 1972, *supra* note 2, at 328-29.

268. *See* 118 CONG. REC. 33,692, 33,704 (1972), *reprinted in* 1 LEGISLATIVE HISTORY 1972, *supra* note 2, at 189. Senator Muskie was also the principal sponsor of the Senate's bill. *See supra* note 173 and accompanying text. The Supreme Court, moreover, has characterized Senator Muskie as "perhaps the Act's primary author." E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112, 129 (1977).

269. *See* 118 CONG. REC. 33,693 (1972), *reprinted in* 1 LEGISLATIVE HISTORY 1972, *supra* note 2, at 163.

270. *Id.* at 33,693 (emphasis added), *reprinted in* 1 LEGISLATIVE HISTORY 1972, *supra* note 2, at 163. Senator Muskie, however, neglected to mention that section 309(a)(3) would trigger, in like manner, the issuance of an abatement order in case of any violation of section 301, 302, 306, 307, or 308. *See* 33 U.S.C. § 1319(a)(3) (1982). Senator Muskie added:

> The Administrator's authority is not limited to those cases in which there is a continuing violation. Any discharge, intermittent or continuous, which the Administrator finds violates the terms of the permit, is to be enforced. The conferees expect that the Administrator will act as aggressively against those violations which only intermittently occur as he will act against those violations which occur on a continuous basis. Failure to take this kind of effective action will permit intermittent dumping of waste with impunity.

118 CONG. REC. 33,693 (1972), *reprinted in* 1 LEGISLATIVE HISTORY 1972, *supra* note 2, at 163.

Senator Muskie described what had happened during conference in the printed extension of his remarks. Despite the belief among the Senate conferees that "mandatory civil enforcement [was] far preferable to a discretionary responsibility," the Senate conferees had "receded to the House in not making civil enforcement mandatory."[271] Nevertheless, "the provisions requiring the Administrator to issue an abatement order whenever there is a violation were mandatory in both the Senate bill and the House amendment, and the conference agreement contemplates that the Administrator's duty to issue an abatement order remains a mandatory one."[272] Senator Muskie hastened to add that the Administrator could not shirk this "duty" by simply refusing to determine whether a violation had occurred.

> It is expected . . . that upon receipt of information giving the Administrator reason to believe that a violation has occurred, he has an affirmative duty to take the steps necessary to determine whether a violation has occurred, including such investigations as may be necessary, and to make his finding as expeditiously as practicable.[273]

This statement expanded upon the notion found in the Senate report that the Administrator would possess some limited discretion to determine the existence of a relevant violation.[274] Although a modicum of discretion was intended, and is perhaps inherent in making such a finding, the conferees certainly did not intend for the Administrator to reject, out of hand, evidence of a violation. Instead, the conferees imposed "an affirmative duty" upon the Administrator to discover the facts and make a finding.

No other senator, let alone a Senate conferee, objected to Senator Muskie's characterization of the conference agreement on section 309.[275] So interpreted, the conference substitute passed 74 to 0 on October 4, 1972.[276] During the House consideration of the conference report, no Representative even broached the issue.[277]

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271. 118 CONG. REC. 33,697 (1972), *reprinted in* 1 LEGISLATIVE HISTORY 1972, *supra* note 2, at 174. The Supreme Court, in the past, has relied heavily on Senator Muskie's printed remarks set forth in explanation of this conference report. *See E.I. du Pont*, 430 U.S. at 129-30 (holding that the EPA has authority to issue regulations establishing uniform effluent limitations pursuant to section 301); *see also* Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1045 n.52 (D.C. Cir. 1978) (relying on the same remarks in a case challenging the EPA's promulgation of effluent limitations).

272. 118 CONG. REC. 33,697 (1972), *reprinted in* 1 LEGISLATIVE HISTORY 1972, *supra* note 2, at 174.

273. *Id.*, *reprinted in* 1 LEGISLATIVE HISTORY 1972, *supra* note 2, at 174.

274. *See supra* note 165 and accompanying text.

275. *See* 118 CONG. REC. 33,702-18 (1972), *reprinted in* 1 LEGISLATIVE HISTORY 1972, *supra* note 2, at 184-223.

276. *Id.* at 33,718, *reprinted in* 1 LEGISLATIVE HISTORY 1972, *supra* note 2, at 222-23.

277. *See id.* at 33,747-67, *reprinted in* 1 LEGISLATIVE HISTORY 1972, *supra* note 2, at 225-79.

That chamber quickly approved the bill by a vote of 366 to 11.[278] After overcoming a presidential veto,[279] the Federal Water Pollution Control Act Amendments of 1972 were finally enacted into law on October 18, 1972.[280]

III. Sorting Out Duties and Discretionary Powers

The EPA has asserted repeatedly that its power to issue administrative compliance orders under the Clean Water Act is completely discretionary. Thus, the argument goes, district courts have no jurisdiction to entertain a citizen suit alleging a failure by the EPA to issue a compliance order.[281] Such an interpretation of a statute by the agency charged with its administration generally is entitled to great deference.[282] However, if the "EPA's interpretation is inconsistent with the language of the Clean Water Act, as interpreted in light of the legislative history . . . no amount of deference can save it."[283] For ultimately, the courts are the final arbiters on questions of statutory construction, and agency interpretations that run counter to congressional intent must be rejected.[284]

Statutory analysis, of course, starts with the printed text of the

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278. *Id.* at 33,767, *reprinted in* 1 LEGISLATIVE HISTORY 1972, *supra* note 2, at 276-79. The House also acted on October 4, 1972. *Id.* at 33,747, *reprinted in* 1 LEGISLATIVE HISTORY 1972, *supra* note 2, at 225.

279. President Nixon vetoed the bill on October 17, 1972. *Id.* at 36,859-60, *reprinted in* 1 LEGISLATIVE HISTORY 1972, *supra* note 2, at 137-39. His veto surprised many outsiders coming as it did only a few weeks before the 1972 presidential election. *See* J. QUARLES, *supra* note 127, at 160. Congress, however, promptly overrode the veto. 118 CONG. REC. 36,879, 37,060-61 (1972), *reprinted in* 1 LEGISLATIVE HISTORY 1972, *supra* note 2, at 109-13, 135-36.

280. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1376 (1982)), *reprinted in* 1 LEGISLATIVE HISTORY 1972, *supra* note 2, at 3.

281. *See, e.g.*, Sierra Club v. Train, 557 F.2d 485, 489 (5th Cir. 1977); Greene v. Costle, 577 F. Supp. 1225, 1228 (W.D. Tenn. 1983); Caldwell v. Gurley Ref. Co., 533 F. Supp. 252, 254-55 (E.D. Ark. 1982), *aff'd as to other parties on other grounds*, 755 F.2d 645 (8th Cir. 1985); South Carolina Wildlife Fed'n v. Alexander, 457 F. Supp. 118, 128-29 (D.S.C. 1978); Illinois *ex rel.* Scott v. Hoffman, 425 F. Supp. 71, 76 (S.D. Ill. 1977).

282. EPA v. National Crushed Stone Ass'n, 449 U.S. 64, 83 (1980); Udall v. Tallman, 380 U.S. 1, 16 (1965). For a critical appraisal of this concept, see Stever, *Deference to Administrative Agencies in Federal Environmental, Health and Safety Litigation — Thoughts on Varying Judicial Application of the Rule*, 6 W. NEW ENG. L. REV. 35, 59-62, 69-70 (1983). Donald Stever, former Chief of the Pollution Control and Environmental Defense sections of the Justice Department's Land and Natural Resources Division, concludes that "[t]here is no compelling argument for [giving] much deference to an agency's statutory interpretation under most circumstances. The tools for ascertaining legislative intent are readily accessible to judges." *Id.* at 69. Moreover, as Stever cautions, agencies may not always interpret a statute in utmost good faith; a particular interpretation may be motivated by the agency's own self-interest. *See id.* at 60.

283. National Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 171 (D.C. Cir. 1982); *accord* Federal Election Comm'n v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 32 (1981).

284. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 n.9 (1984); SEC v. Sloan, 436 U.S. 103, 117-19 (1978); Federal Maritime Comm'n v. Seatrain Lines, 411 U.S. 726, 745-46 (1973).

statute.[285] "In virtually every case, however, it does not end there but continues with a review of the legislative history."[286] Where, as here, the statutory language provides no clear answer, resort to the legislative materials becomes imperative.[287] Consequently, virtually all of the courts that have addressed this question have consulted the legislative history in an effort to ascertain the will of Congress. Their efforts, nevertheless, have produced confusion. One line of decisions has found that the issuance of compliance orders is a matter of discretion, while another group of cases has concluded that the same act is mandatory. However, neither line of cases has analyzed the legislative history in a manner that is wholly sensitive to congressional desires.

The Fifth Circuit's opinion in *Sierra Club v. Train*[288] is the leading case holding that the EPA's issuance of compliance orders is discretionary.[289] After examining only a few portions of the legislative history, the court found that it provided no definitive resolution of the question.[290] In doing so, the court misconstrued the conference report[291] and ignored clear signals contained in both the Senate report[292] and the floor debates.[293] Having thus deprived itself of valuable extrinsic aids, the court found itself confronted with a problem of linguistics. The court, however, was

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285. Watt v. Alaska, 451 U.S. 259, 265 (1981); *National Wildlife Fed'n*, 693 F.2d at 170.

286. *National Wildlife Fed'n*, 693 F.2d at 170. In fact, in rejecting an interpretation of the Clean Water Act grounded solely upon the wording of the statute, the Supreme Court wrote:

> To the extent that the Court of Appeals excluded reference to the legislative history of the [Clean Water Act] in discerning its meaning, the court was in error. As we have noted before: "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear."

Train v. Colorado Pub. Interest Research Group, Inc., 426 U.S. 1, 9-10 (1976) (quoting United States v. American Trucking Ass'ns, 310 U.S. 534, 543-44 (1940)).

287. *See* Blum v. Stenson, 465 U.S. 886, 896 (1984); United States v. Donruss Co., 393 U.S. 297, 303 (1967).

288. 557 F.2d 485 (5th Cir. 1977).

289. *Id.* at 491. Several district courts have reached the same result relying heavily upon the authority of *Sierra Club v. Train*. Zemansky v. EPA, 16 Envtl. L. Rep. (Envtl. L. Inst.) 20,862, 20,862 (D. Alaska 1986); National Wildlife Fed'n v. Ruckelshaus, 21 Env't Rep. Cas. (BNA) 1776, 1780 (D.N.J. 1983); Caldwell v. Gurley Ref. Co., 533 F. Supp. 252, 255-57 (E.D. Ark. 1982), *aff'd as to other parties on other grounds*, 755 F.2d 645 (8th Cir. 1985); Lanzo Constr. Co. v. EPA, No. 80-72895, slip op. at 9 (E.D. Mich. April 27, 1981).

Environmental groups have been reluctant, for the most part, to try to challenge the Fifth Circuit's decision in *Sierra Club v. Train*. *See* Comment, *supra* note 23, at 956.

290. 557 F.2d at 489-90.

291. *See infra* notes 345-50 and accompanying text.

292. *See infra* notes 312-14 & 319-21 and accompanying text.

293. *See infra* notes 322-25 & 351-53 and accompanying text.

undaunted. Despite its recognition of the mandatory language in section 309(a),[294] the Fifth Circuit held that the wording of section 309(b) that authorizes the Administrator to file suit "for any violation for which he is *authorized* to issue a compliance order"[295] clearly indicated the "discretionary flavor of the statute."[296] According to the court, such an interpretation was also reasonable.[297] Because the Administrator has discretion to bring suit, it would be an "empty gesture" to mandate the issuance of a compliance order. For if the order were disobeyed, the Administrator could not be compelled to enforce it.[298] The court thereby substituted its judgment for that of Congress and, additionally, failed to recognize both the effectiveness of compliance orders[299] and the likelihood that the EPA would file suit to enforce such orders.[300]

On the other hand, a number of district courts have held that the EPA possesses a mandatory obligation to issue compliance orders when faced with a relevant violation of the Clean Water Act.[301] Perhaps the principal case in this line is *South Carolina Wildlife Federation v. Alexander*.[302] There, the court correctly interpreted the conference report[303] and even took cognizance of Senator Muskie's explanation of that report on the floor of the Senate.[304] However, neither this decision nor any other decision reaching the same conclusion has discussed the limited contours of this mandatory duty.

Congress gave extensive consideration to the question of mandatory enforcement. That consideration demonstrates, the Fifth Circuit's analysis notwithstanding, that Congress intended to impose a mandatory duty upon the EPA to issue compliance orders for certain statutory violations. That duty, however, is not a rigid command to enforce against every single violation, no matter how technical or insignificant. Rather, the duty was tempered to a

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294. 557 F.2d at 489.
295. Clean Water Act § 309(b), 33 U.S.C. § 1319(b) (1982) (emphasis added).
296. 557 F.2d at 490.
297. *Id.*
298. *Id.* at 490-91.
299. *See infra* note 381 and accompanying text.
300. *See infra* notes 382-83 and accompanying text.
301. *See, e.g.*, Dubois v. EPA, 646 F. Supp. 741, 744-45 (W.D. Mo. 1986); Greene v. Costle, 577 F. Supp. 1225, 1230 (W.D. Tenn. 1983); South Carolina Wildlife Fed'n v. Alexander, 457 F. Supp. 118, 134 (D.S.C. 1978); Illinois *ex rel.* Scott v. Hoffman, 425 F. Supp. 71, 77 (S.D. Ill. 1977); United States v. Phelps Dodge Corp., 391 F. Supp. 1181, 1183 (D. Ariz. 1975). Three of these cases also suggest, either directly or indirectly, that the EPA may possess a mandatory obligation to file civil enforcement actions. *See DuBois*, 646 F. Supp. at 745 (broadly declaring, at one point, that the "duties" of § 309 are nondiscretionary); *Greene*, 577 F. Supp. at 1229-30 (expressing some doubt that civil enforcement is discretionary); *Hoffman*, 425 F. Supp. at 77 (holding that the EPA is directed to either issue a compliance order or file suit). The legislative history, however, clearly refutes any notion that mandatory enforcement extends to the institution of civil suits. *See supra* notes 262, 265-66 & 270-71 and accompanying text. Insofar as these cases either implied or found that a mandatory duty exists to initiate suit, they are in error.
302. 457 F. Supp. 118 (D.S.C. 1978).
303. *See id.* at 131.
304. *Id.* at 130, 131 n.6.

large degree by Congress in recognition that the EPA should retain some leeway within which both to determine whether a relevant violation had occurred and to select appropriate cases for enforcement.

From the beginning of the Ninety-Second Congress, the Senate Subcommittee on Air and Water Pollution was presented with the question of whether to limit the EPA's enforcement discretion. Senator Muskie's original bill would have given district courts the power to compel the EPA to act when the Agency had abused its enforcement discretion.[305] The Administration's bill, on the other hand, would have made enforcement totally discretionary.[306] The environmental community quickly reacted. During the Senate hearings, many environmentalists testified that neither bill was tough enough because neither gave the EPA an express mandate to enforce.[307] The Subcommittee seemed to respond. When the Subcommittee issued its working print of the bill, both the administrative and civil enforcement provisions of section 309 were phrased in mandatory terms.[308] Despite the suggestion from two industrial groups that the Subcommittee substitute permissive language,[309] the Subcommittee approved the bill and sent it to the full Public Works Committee.[310]

The bill which the Public Works Committee, in turn, submitted to the Senate retained this mandatory wording of section 309 for both administrative and civil enforcement.[311] In reporting on this provision, the Committee emphasized that the issuance of compliance orders or the commencement of suit was mandatory.[312] For instance, when an effluent limitation imposed by section 301 was violated, the EPA was ordered to issue a notice of violation to the state. If after thirty days the state had not instituted appropriate enforcement action, the EPA was directed to order compliance or begin civil enforcement.[313] In addition, the Agency was required to issue a compliance order or undertake civil action whenever a polluter violated the terms of a NPDES permit, discharged without a permit, or violated certain effluent limitations.[314]

Having made it plain, as an initial matter, that it was creating mandatory enforcement responsibilities, the Committee pro-

305. *See supra* notes 133-35 and accompanying text.
306. *See supra* note 139 and accompanying text.
307. *See supra* notes 142-43 and accompanying text.
308. *See supra* notes 149-51 and accompanying text.
309. *See supra* note 152 and accompanying text.
310. *See supra* note 155 and accompanying text.
311. *See supra* notes 156-60 and accompanying text.
312. *See supra* note 164 and accompanying text.
313. *See id.*
314. *See id.*

ceeded to explain that these obligations were not absolutely rigid. The Committee first noted that the EPA would retain some discretion to determine whether there had been a relevant violation.[315] Next, the Committee recognized that concurrent state enforcement power and the limited nature of federal resources would mean that the EPA need not and likely could not respond to each and every violation, however minor or technical. The report thus indicated that federal enforcement was not intended to displace appropriate state efforts; rather, the EPA was to reserve its power and resources for cases that deserve federal attention due to their scope or seriousness.[316]

This qualification of the EPA's mandatory enforcement duties was taken quite out of context by the Fifth Circuit in *Sierra Club v. Train.* There, the court failed to examine the initial remarks made by the Committee on section 309 and focused instead upon the Committee's subsequent qualification of the mandatory duties.[317] As a result, the court was able to say that the Senate report was inconclusive on this issue.[318] In doing so, the court also ignored two other specific references to mandatory enforcement responsibilities contained in discussions of enforcement related provisions. During its discussion of citizen suits, the Committee clearly stated that an action would lie against the EPA for a failure to enforce[319] and again stressed the mandatory nature of enforcement.[320] The entire thrust of the Senate report, consequently, runs counter to the Fifth Circuit's conclusion.[321]

The Fifth Circuit also paid no heed to the floor debate on the Senate bill.[322] Not only did many senators speak to the need for stronger enforcement,[323] but Senator Muskie, the sponsor of the Senate bill,[324] directly addressed the question of mandatory enforcement. According to his rather blunt remarks, the bill certainly imposed a mandate upon the EPA to enforce.[325]

When the House Committee on Public Works began to consider amendments to the Federal Water Pollution Control Act, it was

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315. *See supra* note 165 and accompanying text.

316. *See supra* notes 166-67 and accompanying text.

317. 557 F.2d at 490. The Fifth Circuit did quote some language from the conference report indicating that the Senate bill created mandatory enforcement duties and mistakenly characterized it as a portion of the Senate report. *Compare id. with* S. CONF. REP. NO. 1236, 92d Cong., 2d Sess. 131, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 3776, 3809 *and in* 1 LEGISLATIVE HISTORY 1972, *supra* note 2, at 314.

318. 557 F.2d at 490.

319. *See supra* note 170 and accompanying text.

320. *See supra* note 171 and accompanying text.

321. The Fifth Circuit also relied upon the brief passage appearing in the introduction to the Senate report which stated that the EPA "may" either issue a compliance order or sue a violator. Sierra Club v. Train, 557 F.2d at 490. As explained previously, this general language may well be read in a manner that is consistent with the lengthy and specific discussions found in the report that clearly indicate that the bill imposed mandatory enforcement duties upon the EPA. *See supra* note 171.

322. 557 F.2d at 489-90.

323. *See supra* note 180 and accompanying text.

324. *See supra* note 173 and accompanying text.

325. *See supra* notes 181-84 and accompanying text.

immediately presented with a stark choice between mandatory and discretionary administrative and civil enforcement. Representative Dingell's bill incorporated the former alternative,[326] while the Administration's bill opted for the latter approach.[327] During the initial hearings on the proposed legislation, a number of environmentalists who advocated mandatory federal enforcement expressly directed the Committee's attention toward the crucial difference between these two approaches to enforcement.[328] The Committee, however, delayed making its decision until after the Senate had acted.[329] Then, under considerable pressure, the Committee introduced a bill closely resembling the Senate's bill and announced further hearings.[330] Opponents of the Senate bill, therefore, were afforded a chance to attack it.

In this bill, the House Committee adopted the Senate's version of section 309.[331] Consequently, administrative and civil enforcement were phrased in mandatory terms,[332] and one must assume, in the absence of any contrary indication, that the Senate's qualification of those mandatory duties was also accepted by the House Committee. The Administration took advantage of the reopened hearings to express its views, but rather than criticize the imposition of mandatory enforcement, Administrator Ruckelshaus indicated that the EPA was largely in agreement with the terms of section 309.[333] Indeed, Ruckelshaus suggested a revision in section 309(b) that would have required the EPA to institute suit in an additional situation.[334] His major criticism of section 309 was limited to the partial conflict among the various mandates to enforce. Was the Agency required to give a state agency notice of a violation of certain effluent limitations and a chance to act before taking enforcement action, or was the Agency compelled to take immediate action?[335] Ruckelshaus thus recommended a change that would give the EPA enough flexibility to determine whether state enforcement was adequate before mandating federal action in those situations.[336]

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326. *See supra* notes 195-96 and accompanying text.
327. *See supra* note 192 and accompanying text.
328. *See supra* notes 205-07 and accompanying text.
329. *See supra* notes 209-12 and accompanying text.
330. *See supra* notes 213-22 and accompanying text.
331. *See supra* note 225 and accompanying text.
332. *See supra* notes 226-27 and accompanying text.
333. *See supra* note 229 and accompanying text. The EPA was quite aware of the presence of mandatory enforcement duties in this version of the bill. *See supra* note 234 and accompanying text.
334. *See supra* note 233 and accompanying text.
335. *See supra* note 230 and accompanying text.
336. *See supra* note 231 and accompanying text. A number of other witnesses specifically drew the committee's attention to the question of mandatory versus discretionary enforcement responsibilities. *See supra* notes 238-41 and accompanying text.

The House Committee then acted to revise its bill.[337] As reported to the full House, section 309 bore marked similarities to the Committee's earlier bill — and hence the Senate bill — and also contained some substantial differences. Section 309(a) was quite similar. The major change seemed to address the EPA's concern about the conflicting nature of the various mandatory duties imposed by the earlier subsection. Thus, section 309(a)(1) now provided that, if a state-issued NPDES permit were violated, the EPA would have a choice. The EPA could either issue notice and wait thirty days before acting in order to see if the state would institute appropriate enforcement or go ahead and act immediately under section 309(a)(3).[338] Section 309(a)(1), however, retained its mandatory language: the EPA was ordered to take one course of action or the other.[339] If the EPA chose to issue notice under section 309(a)(1), then, at the expiration of thirty days, the Agency was required to order compliance or bring suit unless the state had taken appropriate measures.[340] Section 309(a)(3) also remained mandatory in nature. The Agency was still required to issue a compliance order or to institute suit whenever a NPDES permit was violated or any other relevant violation occurred.[341] Of course, for a violation of a state NPDES permit, the EPA now had the leeway to forego immediate action under section 309(a)(3) and, instead, utilize the alternative procedure provided for in section 309(a)(1).

Section 309(b), on the other hand, had undergone considerable revision. Rather than compelling civil suit in the event of certain violations, section 309(b) now merely "authorized" the EPA to sue for violations for which the Agency was "authorized to issue a compliance order."[342] What in the world did the House Committee intend by this change? Section 309(a) apparently still imposed mandatory duties, while section 309(b), specifically addressed to civil suits but also mentioning compliance orders, now used permissive language. The Committee's report on section 309 did nothing to clarify this mystery;[343] neither did the floor debate.[344]

Since the conference committee adopted the House version of section 309,[345] it was a stroke of good fortune that the conference report came to grips with the conundrum created by the House. The conference report first described the Senate bill as mandating either administrative compliance orders or civil enforcement.[346]

337. *See supra* notes 242-43 and accompanying text.
338. *See supra* note 245 and accompanying text.
339. *See id.*
340. *See supra* note 246 and accompanying text.
341. *See supra* notes 247-48 and accompanying text.
342. *See supra* note 249 and accompanying text.
343. *See supra* note 251 and accompanying text.
344. *See supra* notes 254-56 and accompanying text.
345. *See supra* note 262 and accompanying text.
346. *See supra* note 263 and accompanying text. Furthermore, if a compliance order were not obeyed, the Senate bill gave the EPA no choice but to initiate a civil action. *See id.*

The House bill was then characterized as generally the same with only one noted exception: the commencement of civil enforcement was authorized, not required.[347] It therefore appears that the House had intended to leave the issuance of compliance orders a mandatory duty as it clearly was in both the original House bill and the Senate bill.

In *Sierra Club v. Train,* the Fifth Circuit completely misconstrued the conference report. Where there was compromise, the court saw "discord."[348] Specifically, it found that the report indicated "dissension" with regard to whether section 309 created mandatory or discretionary responsibilities.[349] Perhaps this was due to the court's unwillingness to distinguish between administrative compliance orders and civil enforcement.[350] But whatever the reason for the Fifth Circuit's mistaken impression, the conference report did contain a definitive resolution of this particular interpretive dilemma.

In presenting the conference report to the full Senate, Senator Muskie indicated that the Senate conferees had yielded, rather reluctantly, to the House on the issue of mandatory civil enforcement.[351] Nevertheless, he emphasized that both the Senate bill and the House bill had mandated administrative enforcement and that the conference agreement did not alter that approach.[352] The final version of section 309, consequently, created a mandatory duty for the EPA to issue compliance orders, which was enforceable via the citizen suit provision.[353]

Senator Muskie added that this mandate could not be avoided by arguing that the EPA had simply not determined whether a violation had occurred. Instead, once the Agency received information indicative of a violation, the Agency would possess "an affirmative duty" to investigate and determine whether a violation had indeed occurred.[354] So, although it seems clear from the Senate report that the EPA would have some flexibility in finding a violation,[355] this limited amount of discretion does not obviate the mandate Congress intended to impose.

It should be noted that a number of courts, in construing a somewhat similar provision in the Clean Air Act, have reached a contrary conclusion. The primary federal enforcement provision

347. *See supra* notes 264-65 and accompanying text.
348. 557 F.2d at 489.
349. *Id.*
350. *See infra* notes 374-76 and accompanying text.
351. *See supra* note 271 and accompanying text.
352. *See supra* note 272 and accompanying text.
353. *See supra* notes 270 & 272 and accompanying text.
354. *See supra* note 273 and accompanying text.
355. *See supra* note 165 and accompanying text.

of the Clean Air Act, section 113,[356] gives the EPA discretion to initiate either administrative or civil enforcement.[357] Nevertheless, section 113(a) does compel the EPA to issue a notice of violation upon the finding of a violation.[358] Most courts which have addressed this question have concluded that this finding is a completely discretionary function.[359] Consequently, in the absence of a finding of violation by the EPA, the mandatory duty to issue a notice of violation does not arise.[360] The reasoning of these decisions, however, is strained in that they have taken a mandatory duty and rendered it rather hollow.[361] Nevertheless, whatever their merit as an interpretation of the Clean Air Act, these cases do not prescribe in any logical manner the same result under section 309 of the Clean Water Act.

The legislative history of the Clean Water Act clearly demonstrates that Congress never meant to create a loophole through which the EPA could defeat a citizen suit seeking compulsory administrative enforcement by simply refusing to issue a finding of violation. After indicating that the duty to issue compliance orders was mandatory,[362] the Senate report plainly declared that a citizen suit would lie to exact its performance.[363] At no point did the report limit that broad declaration to only those instances in which the EPA had found a violation and then failed to act. In addition, the report placed whatever minimal discretion the EPA would have in making a finding of violation squarely within the context of mandatory enforcement obligations.[364] Consequently, a district court would appear to have jurisdiction — regardless of

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356. 42 U.S.C. § 7413 (1982).

357. West Penn Power Co. v. Train, 522 F.2d 302, 310 (3d Cir. 1975), *cert. denied*, 426 U.S. 947 (1976); Kentucky *ex rel.* Hancock v. Ruckelshaus, 497 F.2d 1172, 1177 (6th Cir. 1974), *aff'd on other grounds sub nom.* Hancock v. Train, 426 U.S. 167 (1976); Luckie v. Gorsuch, 13 Envtl. L. Rep. (Envtl. L. Inst.) 20,400, 20,402 (D. Ariz. 1983); New England Legal Found. v. Costle, 475 F. Supp. 425, 433 (D. Conn. 1979), *aff'd in part*, 632 F.2d 936 (2d Cir. 1980), *aff'd on other grounds*, 666 F.2d 30 (2d Cir. 1981); New Mexico Citizens for Clean Air & Water v. Train, 6 Env't Rep. Cas. (BNA) 2061, 2065 (D.N.M. 1974).

In one situation, however, the 1977 Amendments to the Clean Air Act may mandate enforcement action. *See* D. CURRIE, AIR POLLUTION: FEDERAL LAW AND ANALYSIS § 8.15 (1981). As amended, section 113(b) of the Act, 42 U.S.C. § 7413(b) (1982), provides that the EPA "shall . . . commence a civil action" for certain violations by a "major stationary source." *See* United States v. Associated Elec. Coop., 503 F. Supp. 92, 94 (E.D. Mo. 1980) (indicating, in dictum, that this responsibility may not be discretionary).

358. 42 U.S.C. § 7413(a) (1982).

359. *See* Council of Commuter Orgs. v. Metropolitan Transp. Auth., 683 F.2d 663, 671-72 (2d Cir. 1982), *aff'g* 524 F. Supp. 90 (S.D.N.Y. 1981); City of Seabrook v. Costle, 659 F.2d 1371, 1374-75 (5th Cir. 1981); *Luckie*, 13 Envtl. L. Rep. (Envtl. L. Inst.) at 20,402; United States Steel Corp. v. Fri, 364 F. Supp. 1013, 1019 (N.D. Ind. 1973) (dictum). *But see* Wisconsin's Envtl. Decade, Inc. v. Wisconsin Power & Light Co., 395 F. Supp. 313, 320 (W.D. Wis. 1975).

360. *See Council of Commuter Orgs.*, 683 F.2d at 671-72; *City of Seabrook*, 659 F.2d at 1374-75; *Luckie*, 13 Envtl. L. Rep. (Envtl. L. Inst.) at 20,402.

361. *See Wisconsin's Envtl. Decade*, 395 F. Supp. at 320.

362. *See supra* note 164 and accompanying text.

363. *See supra* note 170 and accompanying text.

364. *See supra* note 165 and accompanying text.

the existence of a finding of violation — to entertain a citizen suit challenging the EPA's failure to order compliance.[365]

This interpretation, moreover, is borne out by the explanation of the Act offered by one of its principal authors. In presenting the conference report to the Senate, Senator Muskie stressed that the EPA "must issue an abatement order" in the event of a relevant violation.[366] Should the Agency fail to do so, "a citizen suit may be brought against [the Administrator] to direct the issuance of such an order."[367] Again, there was no mention that an Agency finding was an absolute prerequisite to such an action. Furthermore, Senator Muskie declared that the Agency could not sit idly by when presented with evidence of a violation. In fact, he stated that the Agency actually has "an affirmative duty" to investigate an alleged violation and to make a finding as quickly as possible.[368]

It would certainly stand reason on its head, therefore, for a court to dismiss a citizen suit seeking the issuance of a compliance order merely because the EPA had not issued a finding of violation. This is especially true since the EPA must receive notice of the alleged violation at least sixty days prior to the commencement of a citizen suit.[369] Thus, the Agency should have adequate time prior to suit to investigate the allegation and make a determination. Should the EPA find that no violation occurred, a district court, nonetheless, would possess jurisdiction over the claim because the gravamen of the case would be the failure to issue a compliance order, an omission cognizable under the Act's citizen suit provision.[370] However, the fact that Congress granted some limited discretion to the EPA in deciding whether a violation had occurred[371] certainly would affect the nature of the subsequent judicial review.[372]

Before the scope of judicial review is addressed, however, one final issue awaits discussion. After the Fifth Circuit in *Sierra Club v. Train* erroneously found that the legislative history failed to show that the issuance of compliance orders is mandatory,[373] the court held that it was only "reasonable" to conclude that this

365. The EPA apparently did not think otherwise. During its testimony before the House Committee on Public Works, while that Committee was considering the Senate version of section 309, the Agency observed, without qualification, that a citizen suit could be brought for a failure to commence mandatory enforcement. *See supra* note 234 and accompanying text.
366. *See supra* note 270 and accompanying text.
367. *See id.*
368. *See supra* note 273 and accompanying text.
369. *See supra* note 124 and accompanying text.
370. *See, e.g., supra* notes 170 & 270 and accompanying text.
371. *See supra* note 165 and accompanying text.
372. *See infra* notes 384-426 and accompanying text.
373. 557 F.2d at 489-90.

form of enforcement is discretionary.[374] The Fifth Circuit believed that it would make no sense to require the EPA to issue a compliance order because, in the event a polluter failed to obey the order, the EPA could not be forced to begin civil proceedings.[375] Consequently, to compel the issuance of such an order "would be an exercise in practical futility."[376]

The Fifth Circuit, however, was not free to so interpret section 309. The legislative history is plain concerning the mandate to issue compliance orders. Correctly viewed, this is the end of the matter, for courts must give effect to the expressed will of Congress.[377] Moreover, the Fifth Circuit erred when it implied that a mandatory duty solely to issue compliance orders is unreasonable. Although, as a matter of law, the practical wisdom of a congressional enactment is beyond the purview of the judiciary,[378] it is a subject well within the scope of the present Article.

It may not have been entirely consistent for Congress to require the issuance of compliance orders, while not similarly compelling civil actions. However, the process of legislative compromise seldom yields, and perhaps in some cases should not yield, complete symmetry. It is also true that the result here may not ensure the same degree of compliance as could be achieved by the additional imposition of compulsory civil enforcement.[379] This congressional compromise, however, was by no means unreasonable, for, contrary to the Fifth Circuit's unsupported assertion, compliance orders are not "empty gesture[s]."[380]

Compliance orders issued under the Clean Water Act often achieve positive results.[381] Perhaps one reason for their partial

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374. *Id.* at 490-91.

375. *See id.*

376. *Id.* at 491. The court added that citizens were free, nevertheless, to file suit directly against a polluter with or without an existing compliance order. *Id.*

377. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984).

378. As the Supreme Court wrote in TVA v. Hill, 437 U.S. 153, 194-95 (1977):

> Our individual appraisal of the wisdom . . . of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto.

See also Chevron U.S.A., 467 U.S. at 866 ("The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones . . . .").

379. *See* South Carolina Wildlife Fed'n v. Alexander, 457 F. Supp. 118, 134 (D.S.C. 1978).

380. Sierra Club v. Train, 557 F.2d at 490.

381. *See NPDES Enforcement Oversight Hearings 1984, supra* note 33, at 271-73. According to Rebecca Hanmer, former Director of the EPA's Office of Water Enforcement and Permits and currently Deputy Assistant Administrator for Water, "[compliance orders are] our fundamental most useful enforcement tool — if we use it quickly and well." *Id.* at 150.

Compliance orders, however, do not always demand an immediate cessation of a particular violation. In the event that a final deadline is violated, the EPA has the authority to issue a compliance order that extends the time for compliance until a "reasonable" time has elapsed. *See* Clean Water Act § 309(a)(5)(A), 33 U.S.C. § 1319(a)(5)(A) (1982). Since an extension of time to comply with the Act legitimizes

success is the knowledge that the EPA may not remain passive forever while regulated entities flaunt its orders. For many years, EPA enforcement policy provided for the commencement of a civil suit for a violation of an administrative order.[382] Current EPA policy also favors the institution of civil actions for all but minor violations of such orders.[383] It is thus apparent that Congress prescribed a potent remedy for any significant lapse of enforcement vigor on the part of the EPA.

IV. An Approach to Judicial Review

Conventional legal wisdom seems to subscribe to the view that the courts are an inappropriate forum in which to review an agency's decision not to enforce.[384] The reasons for this belief are multifaceted but generally stem from the notion that administrative expertise is a critical ingredient in deciding whether a particular case is appropriate for enforcement. For example, enforcement decisions involve an often complicated assessment of whether a violation has occurred, a determination of the likelihood of success, reference to specific agency goals and priorities, and an allocation of finite resources.[385] According to traditional

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a violation for that time period, such an order amounts to a de facto variance. *Cf.* W. RODGERS, HANDBOOK ON ENVIRONMENTAL LAW 345-47 (1977) (discussing a similar result under the Clean Air Act).

The fact that a compliance order may amount to a variance in some cases is not necessarily objectionable. After all, civil actions filed by the federal government to enforce the Clean Water Act usually result in a court order, by consent or otherwise, that sets forth a compliance schedule designed to cure a specific violation over a period of time. Weinberger v. Romero-Barcelo, 456 U.S. 305, 318 (1982) (citing Brief for the United States at 17).

The problem with using a compliance order as a variance mechanism lies in the possibility that the EPA may issue compliance schedules that are too long or leisurely. *Cf.* W. RODGERS, *supra*, at 347 (emphasizing the same problem under the Clean Air Act). EPA enforcement policy, however, has been aimed at returning a violator to compliance "as expeditiously as possible." *See, e.g.*, Memorandum from Edwin Johnson, Acting Assistant Administrator for Water, United States Environmental Protection Agency, to Regional Administrators 18 (June 28, 1985) (copy on file at the *George Washington Law Review*). If that policy is adhered to consistently, compliance orders should prod dischargers into compliance as soon as possible and thus not come to resemble long-term variances.

382. *See* Memorandum from Stanley Legro, Assistant Administrator for Enforcement, United States Environmental Protection Agency (March 7, 1977), *reprinted in NPDES Enforcement Oversight Hearings 1984, supra* note 33, at 573, 615-16.

383. *See* Memorandum from Lawrence Jensen, Assistant Administrator for Water, United States Environmental Protection Agency, to Regional Water Management Division Directors ch. II, attachment B (Feb. 27, 1986) (copy on file at the *George Washington Law Review*).

384. *See* Heckler v. Chaney, 470 U.S. 821, 831 (1985). A number of commentators, however, have argued for judicial scrutiny of agency enforcement decisions. *See, e.g.*, 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 9:1-9:6 (2d ed. 1979); Note, *supra* note 41.

385. *See Chaney*, 470 U.S. at 831. Courts are troubled as well by two other factors:

analysis, an administrative agency is far more qualified than a court to deal with a balancing of all these various and complex factors.[386] This conclusion has led, in no small part, to the familiar rule that an agency's decision not to undertake enforcement is "a decision generally committed to an agency's absolute discretion" and hence unreviewable in a court of law.[387] The Supreme Court in *Heckler v. Chaney*[388] placed this venerable axiom in the context of a rebuttable presumption of unreviewability.[389] The presumption may be rebutted where Congress has evinced an intent to withdraw discretion from an agency and has provided standards for the agency's exercise of its enforcement power.[390]

This presumption was amply rebutted by Congress in the context of administrative compliance orders issued under the Clean Water Act. The Act and its legislative history reveal that Congress both created a mandatory duty to institute such administrative enforcement and defined the precise violations which would trigger this duty. Congress, therefore, chose in this instance to alter the prevailing rule and, in doing so, invested the judiciary with the authority and obligation to ensure that the EPA carries out this delegated power within the bounds of law.

It may seem that Congress thereby imposed a tremendous burden upon the federal judiciary. How is this duty to be enforced when Congress itself indicated that the EPA would possess, within the confines of the duty, some discretion to both decide whether a violation had occurred and set its priorities for enforcement? Furthermore, how can a court review an alleged failure to enforce when, in many cases, the EPA will have no record of decision?

The Supreme Court has already provided a model for answering these questions. In *Dunlop v. Bachowski*,[391] the Court confronted a case in which a plaintiff sought to compel the Secretary of Labor

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because an agency has not yet acted, there is no action to review and often no record to form the basis of review. *See id.; see also* Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653, 672-75 (1985) (discussing these factors as one of four central reasons for the traditional reluctance to review agency inaction); Note, *supra* note 41, at 658-59 (discussing these "practical barriers").

386. *See Chaney*, 470 U.S. at 831-32.

387. *Id.; see* Vaca v. Sipes, 386 U.S. 171, 182 (1967).

388. 470 U.S. 821 (1985).

389. *See id.* at 832-33. Although the case dealt with the availability of judicial review under the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559, 701-706 (1982), the Court's reasoning went well beyond an interpretation of that statute alone. In fact, the Court construed the Act by relying on the traditional common law of judicial review. *See Chaney*, 470 U.S. at 832 ("For good reasons, such a decision has traditionally been 'committed to agency discretion,' and we believe that the Congress enacting the APA did not intend to alter that tradition.").

In his scholarly concurrence, Justice Thurgood Marshall strongly criticized the creation of a presumption against reviewability. *See id.* at 840-55. In Justice Marshall's view, "refusals to enforce, like other agency actions, are reviewable in the absence of a 'clear and convincing' congressional intent to the contrary, but . . . such refusals warrant deference when . . . there is nothing to suggest that an agency with enforcement discretion has abused that discretion." *Id.* at 840-41.

390. *See Chaney*, 470 U.S. at 834-38.

391. 421 U.S. 560 (1975).

to bring a civil suit to set aside a union election under the Labor-Management Reporting and Disclosure Act of 1959.[392] The statute states that, following the filing of a complaint by a union member, "[t]he Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation . . . has occurred . . . he shall . . . bring a civil action against the [labor union] . . . ."[393] After the plaintiff filed a complaint with the Secretary of Labor alleging violations of the Act, his complaint was investigated, but the Secretary found that a civil action was not warranted.[394] The plaintiff then sought review of the Secretary's refusal to enforce.[395] Following a dismissal in district court for lack of jurisdiction,[396] the Third Circuit reversed.[397]

On review of the Third Circuit's decision, the Supreme Court held that the district court possessed jurisdiction to hear the case[398] and that the decision not to enforce was not an unreviewable exercise of prosecutorial discretion.[399] In holding this decision reviewable, the Court characterized the duty possessed by the Secretary of Labor as mandatory,[400] relying upon the reasoning of the Third Circuit.[401] The Third Circuit had concluded that the language and purpose of this statutory provision indicated that the Secretary was required to file suit when faced with a meritorious complaint.[402]

The Supreme Court, nonetheless, recognized that Congress had entrusted the Secretary with some flexibility in the execution of this mandatory duty. According to the Court, Congress intended to utilize the expertise of the Department of Labor to some degree by delegating two significant questions to the Secretary: determining the existence of probable cause of a violation and its probable effect on the union election.[403] Therefore, the Court held

392. *See id.* at 562-64. This Act, codified at 29 U.S.C. §§ 401-531 (1982), is commonly referred to as the Landrum-Griffin Act.
393. 29 U.S.C. § 482(b), *quoted in Dunlop,* 421 U.S. at 563 n.2.
394. *See Dunlop,* 421 U.S. at 562-63.
395. *See id.* at 563-64.
396. *See id.* at 564 & n.4.
397. Bachowski v. Brennan, 502 F.2d 79, 90 (3d Cir. 1974), *modified sub nom.* Dunlop v. Bachowski, 421 U.S. 560 (1975).
398. *See Dunlop,* 421 U.S. at 566 (finding jurisdiction conferred by 28 U.S.C. § 1337 (1970) (current version, as amended, at 28 U.S.C. § 1337 (1982)).
399. *See id.* (finding the decision subject to review under provisions of the APA, 5 U.S.C. §§ 702, 704, 706(2)(A) (1982)).
400. *See id.* at 568.
401. *See id.* at 567 n.7.
402. *See* Bachowski v. Brennan, 502 F.2d 79, 87-88 (3d Cir. 1974), *modified sub nom.* Dunlop v. Bachowski, 421 U.S. 560 (1975); *see also Chaney,* 470 U.S. at 833-34 (reiterating the Third Circuit's holding in *Bachowski* and stating that "[t]he statute being administered [in *Dunlop*] quite clearly withdrew discretion from the agency and provided guidelines for exercise of its enforcement power").
403. *See Dunlop,* 421 U.S. at 571.

that the scope of judicial review must be narrowed in order to fulfill the objectives that Congress intended.[404]

In the case of the Clean Water Act, Congress also created a mandatory enforcement duty: namely, to issue compliance orders. However, as the Senate report indicates, Congress infused this mandatory duty with a degree of administrative discretion. First, the EPA was given some limited discretion to ascertain whether a relevant violation had occurred.[405] Second, Congress vested the EPA with discretion to set its own enforcement priorities based on the seriousness of the violation, its significance to national policy, and whether, in some cases, appropriate action has already been taken by a state agency.[406] Congress thus decided to utilize the special expertise of the EPA within an overall context of a mandatory duty. Consequently, either by analogy to *Dunlop* or by the application of reason alone, the nature of judicial scrutiny in suits seeking the issuance of a compliance order should be limited in order to adhere to the scheme envisioned by Congress.

In *Dunlop,* the Supreme Court proceeded to develop the contours of judicial review for such a case. The Court first emphasized that a reviewing court must not substitute its judgment for that of the Secretary because Congress intended to rely upon the Secretary to determine both a probable violation and its probable effect.[407] However, "to enable the reviewing court intelligently to review the Secretary's determination, the Secretary must provide the court and the complaining [union member] with copies of a statement of reasons supporting his determination."[408] This statement, in turn, should allow a reviewing court to decide whether or not the discretion that remained with the Secretary was exercised in a manner neither arbitrary nor capricious.[409] The statement of reasons, moreover, would serve additional purposes. For example, forcing the Department to articulate a rationale for its inaction "promotes thought by the [Department] and compels [it] to cover the relevant points and eschew irrelevancies."[410]

The Court declared that judicial review should be confined, except in rare cases, to an examination of that statement alone and to a determination of whether it reveals that the decision "is so irrational as to constitute the decision arbitrary and capricious."[411]

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404. *See id.* at 568.
405. *See supra* note 165 and accompanying text.
406. *See supra* notes 166-67, 245-48 & 255 and accompanying text.
407. *Dunlop,* 421 U.S. at 571.
408. *Id.*
409. *Id.*
410. *Id.* at 572. At least two commentators have noted the possibility that such a statement of reasons may represent, in some instances, a mere post hoc rationalization. *See* K. DAVIS, DISCRETIONARY JUSTICE 105 (1969); Note, *Reviewability of Prosecutorial Discretion: Failure to Prosecute,* 75 COLUM. L. REV. 130, 140 (1975). Consequently, it could well be argued that such statements ought to be viewed critically by a reviewing court. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971).
411. *Dunlop,* 421 U.S. at 572-73. The Court seemed to accept the Secretary of Labor's suggestion that the rare instances justifying more probing review might include

The Court based this limitation on the fact that Congress desired to settle such election disputes as quickly as possible.[412] Thus, review "may not extend to cognizance or trial of a [plaintiff's] challenges to the factual bases for the Secretary's conclusion either that no violations occurred or that they did not affect the outcome of the election."[413] If a court finds a rational basis for the Secretary's refusal to enforce, " 'then that should be an end of [the] matter. . . .' "[414] The Supreme Court, however, declined to address the question of an appropriate remedy in a case in which the decision not to enforce is so irrational as to amount to arbitrary and capricious action.[415]

In the context of the Clean Water Act, it would seem quite reasonable to require the EPA to produce a document setting forth its rationale for declining to issue a compliance order in a particular instance. This document would allow a court to fulfill its obligation to review the EPA's refusal to act[416] and would also help to inform the Agency's decision. Review, however, could extend beyond the confines of that solitary document for, unlike the situation in *Dunlop,* Congress evinced no intention that such disputes be resolved as expeditiously as possible. On the other hand, de novo review would seem inappropriate here since, as in most other cases involving informal adjudicatory action, "the focal point for judicial review should be the administrative record . . . ."[417] In such a case, the record should consist of the statement of reasons and whatever other documents, reports, or guidance the Agency relied upon in reaching its decision.[418] Thus composed, the record should present the court with an adequate basis upon which to conduct its review.

The next question involves the standard of review itself. In

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situations where the Secretary had declared that he would no longer enforce the statute or where the statute was enforced in a " 'constitutionally discriminatory manner.' " *Id.* at 574 (quoting Brief for Petitioner at 9 n.3). The Court added that other cases could be imagined where the Secretary might act beyond the confines of law. *Id.* One such additional situation could arise if an agency engaged in a pattern of nonenforcement contrary to statutory responsibilities. *See* Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973) (en banc).

412. *Dunlop,* 421 U.S. at 569, 573.

413. *Id.* at 573.

414. *Id.* (quoting DeVito v. Shultz, 72 L.R.R.M. (BNA) 2682, 2683 (D.D.C. 1969)).

415. *See id.* at 575 ("We have no occasion to address that question at this time."). However, the Court did note that if the statement of reasons inadequately discloses the agency's rationale, a court may afford the agency an opportunity to supplement the document. *Id.* at 574.

416. A court should perhaps view this statement of reasons critically for it may contain a post hoc rationalization. *See supra* note 410.

417. Camp v. Pitts, 411 U.S. 138, 142 (1973); *see* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 419-20 (1971).

418. In case of an alleged permit violation, the administrative record should contain, of course, a copy of the permit.

Dunlop, review was predicated upon the Administrative Procedure Act (APA),[419] which provides the arbitrary or capricious standard for cases involving informal adjudications.[420] However, the citizen suit provision of the Clean Water Act contains no language delineating a relevant scope of review.[421] Congress, nevertheless, entrusted district courts with the obligation to hear and determine such cases. Thus, since the arbitrary or capricious standard merely restated a norm of judicial review that existed prior to the enactment of the APA,[422] it would seem only appropriate to apply it in this context.[423] On review, therefore, a citizen suit alleging a failure to issue a compliance order should be dismissed unless the administrative record demonstrates that the EPA's determination was arbitrary or capricious.[424]

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419. *See supra* note 399 and accompanying text.

420. 5 U.S.C. § 706(2)(A) (1982); *see Camp,* 411 U.S. at 142; *Citizens to Preserve Overton Park,* 401 U.S. at 416.

421. *See* Clean Water Act § 505, 33 U.S.C. § 1365 (1982).

422. U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 108 (1947); *see also* 5 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29:1 (2d ed. 1984) (observing that the APA generally codified existing law concerning the scope of judicial review of administrative action).

423. *See* RITE — Research Improves the Env't v. Costle, 650 F.2d 1312, 1322 (5th Cir. 1981) (suggesting that the arbitrary and capricious standard of review has application to a case brought against the Administrator of the EPA under the citizen suit provision of the Clean Water Act).

One might also be able to rely upon the APA to supply this standard of review. After all, the APA may be used to review "[a]gency action made reviewable by statute," 5 U.S.C. § 704 (1982), and the citizen suit provision of the Clean Water Act, in addition to providing for jurisdiction, venue, and a remedy, certainly authorizes judicial scrutiny in these instances, *see* Clean Water Act § 505, 33 U.S.C. § 1365 (1982). One difficulty with this approach, however, lies in the possibility that a court would view the EPA's failure to enforce as "inaction" rather than "action." (For example, the EPA may never have refused, in writing, to enforce in a particular case. In *Dunlop,* by contrast, the Secretary of Labor had clearly taken some action by sending a letter in which he declined to undertake a civil suit. *See* 421 U.S. at 563.) Nevertheless, since the APA defines "agency action" to include a "failure to act," 5 U.S.C. § 551(13) (1982), it is at least arguable that the APA can be directly incorporated to provide the appropriate scope of review.

424. In performing its review, a court should consider whether the EPA based its decision "on a consideration of the relevant factors and whether there has been a clear error of judgment." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). Congress, of course, set forth a number of relevant factors that should guide such an enforcement decision: the existence of a relevant violation; the seriousness of the violation; the relation of the violation to the EPA's national enforcement policy; and the commencement by a state of appropriate enforcement for a violation of a state-issued NPDES permit. *See supra* notes 158-59, 165-67, 245-48 & 255 and accompanying text.

The latter three factors recognize the fact that the EPA is unlikely to ever be funded at a level sufficient to address all violations of the Clean Water Act. As a result, the EPA must make difficult decisions of how to allocate its limited budgetary and enforcement resources in order to make optimum use of these finite resources. A reviewing court, consequently, should show an appropriate amount of deference to the EPA's legitimate need to order its enforcement priorities according to its available resources. *See Chaney,* 470 U.S. at 854-55 (Marshall, J., concurring); *cf.* Sunstein, *supra* note 385, at 672, 675 (stating that a court must consider an agency's limited enforcement resources in deciding whether a failure to act is arbitrary). However, a claim of limited enforcement resources should be viewed critically in cases where the EPA has not pursued serious violations. *See* Note, *supra* note 410, at 145.

It would be obvious, moreover, that a decision by the EPA to pursue another course of enforcement, such as civil suit, administrative penalty, or criminal prosecution, is a

The Supreme Court in *Dunlop* failed to resolve the issue of a remedy in an instance in which the Secretary of Labor had acted arbitrarily. The Court noted that the issue presented some difficulty because the statute gave exclusive enforcement authority to the Secretary of Labor.[425] The same difficulty is not presented by the Clean Water Act. Congress expressly gave citizens the right to enforce the Act either by suing the polluter directly or by suing the EPA to compel it to order compliance. Thus, enforcement is not vested entirely in the hands of the executive branch. Moreover, Congress entrusted the judiciary with the task of ensuring that the EPA complies with the will of Congress. As a result, a district court would have no choice but to order the EPA to commence such administrative enforcement if the record reveals no rational basis for the Agency's inaction.[426]

I hope that cases that would necessitate the entry of such an order would be rare. Recognition of the existence of both this duty and an effective remedy for its breach should serve to dissuade the EPA from not enforcing the Clean Water Act in a consistently vigorous manner. Moreover, the requirement of a statement of reasons in such cases should give the EPA a final opportunity to reconsider its position and undertake enforcement in appropriate cases. Provided these assumptions are not excessively optimistic, the result should be stronger enforcement, as envisioned by Congress, with a minimum of judicial interference.

Conclusion

The success of the complex regulatory scheme created by the Clean Water Act depends ultimately upon the effective enforcement of its various requirements. In recognition of this critical relationship and keenly aware that previous federal enforcement efforts had languished, Congress gave the EPA substantial power

highly relevant consideration. *Cf.* Caldwell v. Gurley Ref. Co., 533 F. Supp. 252, 257 (E.D. Ark. 1982) (finding that the existence of alternative forms of enforcement indicates that a compliance order or civil enforcement is not mandated in all cases), *aff'd as to other parties on other grounds*, 755 F.2d 645 (8th Cir. 1985). In such a situation, however, a court should examine whether the specific enforcement action that the EPA has chosen is appropriate under the circumstances. For example, while the assessment of an administrative penalty is well designed to address past violations, it is not an effective means by which to abate current violations.

425. *Dunlop*, 421 U.S. at 575.

426. In a situation in which a state-issued NPDES permit is violated, the EPA should have the choice of issuing either a compliance order or a notice of violation. *See supra* notes 245-48 & 255 and accompanying text. If the Agency decides to issue a notice of violation and the notice does not prompt appropriate state enforcement action, then the Agency should be ordered to issue an administrative compliance order. In all other cases, the appropriate remedy should be an order compelling the issuance of a compliance order. *See* Clean Water Act § 505(a), 33 U.S.C. § 1365(a) (1982).

to exact compliance with the Act. Congress was reluctant, however, to rely exclusively upon either the enforcement resources of the EPA or its will to act. As a consequence, Congress not only acknowledged that state governments have a significant role in water pollution enforcement but also created a private right of action for citizens to enforce the Act against those responsible for pollution violations. Congress also turned to ordinary citizens to help ensure that the EPA would have the motivation necessary to establish a credible and vigorous enforcement program.

Congress imposed a mandatory duty upon the EPA to issue administrative compliance orders for relevant violations and provided citizens with the means to enforce this mandate. The legislative history reveals, however, that Congress did not intend thereby to deprive the EPA of all discretion in issuing compliance orders. First, Congress appreciated the fact that some administrative expertise may be necessary in determining whether a relevant violation of the Clean Water Act has occurred. Second, Congress gave the EPA the flexibility to set its enforcement priorities according to such factors as the seriousness of the violation, its relation to national policy, and whether a state agency has responded adequately to the violation. Thus, the EPA is not commanded to undertake such administrative enforcement against every violation of the Act. Rather, within the context of this mandatory duty, the EPA possesses enough discretion to reserve its finite enforcement resources for those situations that truly require a federal response.

Despite the fact that Congress intended to utilize the expertise of the EPA in making these decisions, the Act confers jurisdiction upon federal district courts to entertain a citizen suit alleging a failure by the EPA to perform its mandatory duty. The task of a district court, therefore, is to review the EPA's explanation for its inaction to determine whether the Agency has abused the discretion that still remains with it. That review must be sufficiently deferential to allow the Agency the flexibility it was given to carry out its enforcement program in an effective manner. No amount of deference, however, should shield an irrational refusal to enforce, because administrative inaction in such an instance constitutes a clear breach of the EPA's statutory duty.

Congress thus enlisted the aid of both citizens and the federal courts in an effort to assure administrative fidelity to the congressional objective of vigorous federal enforcement. In doing so, Congress rejected a rigid form of mandatory enforcement that could lead to a distortion of enforcement priorities. Instead, Congress chose a collaborative form of mandatory enforcement which respects the role of administrative expertise, yet permits citizens and the courts to scrutinize the basis for the EPA's refusal to act. The Clean Water Act, consequently, seeks to involve both citizens and the courts in the administrative enforcement process itself, not to substitute their judgment for that of the EPA, but to en-

courage the EPA to act in a responsible and effective manner. If this collaborative process for subjecting Agency enforcement inaction to rational and principled judicial review proves successful in practice, Congress will have created a model for use wherever it seeks to ensure that administrative agencies faithfully enforce the law.