Federal Water Pollution Laws: A Critical Lack of Enforcement by the Environmental Protection Agency

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Recommended Citation
Available at: https://digital.sandiego.edu/sdlr/vol20/iss4/17
The Environmental Protection Agency (EPA) has recently come under attack for curtailing enforcement of environmental laws. Congress, the Justice Department, and environmental groups have pressed for investigations of the EPA’s handling of hazardous waste cleanup. Enforcement problems in the EPA, however, are not limited to hazardous waste or to the current administration. The problems in enforcement are rooted in the EPA’s discretionary power not to enforce. This discretionary power has resulted in a critical lack of enforcement in the federal government’s attempts to clean up the nation’s waters.

INTRODUCTION

The rise of the environmental movement and extensive publicity of pollution problems during the 1970's prompted Congress to strengthen the laws protecting the nation’s air and water resources. One of the most important of these laws is the Federal Water Pollution Control Act Amendments of 1972 (FWPCA).

The 1972 Amendments to the FWPCA mandated drastic and immediate changes in water pollution control strategy. Congress’

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stated objective was to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” To achieve this goal, Congress delegated substantial enforcement powers to the Environmental Protection Agency (EPA) to reduce discharges of pollutants into the waters of the United States. A provision allowing citizens to sue the EPA to require enforcement was also included.

Unfortunately, these enforcement provisions have not become the weapons against water pollution that Congress intended. United States Geological Survey statistics show that there has been little change in the national water quality since 1975. In fact there has been an increase in certain pollutants such as mercury and total phosphorous. The impact of pollutants such as these is immense. Synthetic chemicals and pesticides are contaminating drinking water and entering food chains. Certain industries such as commercial shellfishing have been damaged by closures of coastal waters due to pollution.

Although Congress has allocated billions of dollars for technical research and complex monitoring systems to solve these pollution problems, widespread noncompliance by both industrial and municipal dischargers continues. EPA legal enforcement, however, has decreased, as demonstrated by the dramatic drop in abatement orders and civil suits filed. During the same period the courts have limited the citizen’s ability to sue either the violator for damages or the EPA to require enforcement.

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6. While there are several enforcement remedies included in the Federal Water Pollution Control Amendments of 1972 (FWPCA), this Comment will concentrate on those legal remedies provided to the Environmental Protection Agency (EPA) in section 309(a)(3) and to private citizens in section 505. 33 U.S.C. § 1319(a)(3), 1365 (1976 & Supp. V 1981).
10. See N.Y. Times, Dec. 19, 1982, § 1, at 1, col. 6. “An Environmental Protection Agency report says that thousands of pits, ponds, and lagoons around the country contain waste that poses serious threats of groundwater contamination . . . . For many communities water supplies are drawn from groundwater.” Id.
12. See Council on Environmental Quality, supra note 9, at 63-64. Statistics “show that most of the 22 [coastal] states had 10 to 25 percent of their active shellfish harvesting areas closed at all times.” Id. at 64.
13. Id. at 255. Federal expenditures for water quality control amounted to over four billion dollars per year from 1977 to 1979.
14. See infra notes 52-53 and accompanying text.
15. See infra notes 91-97 and accompanying text.
16. See infra notes 73-89 and accompanying text.
Problems that have plagued other government agencies, such as administrative delay and industry influence, have certainly diminished the EPA's overall effectiveness. However, it is the EPA's immense discretionary power not to enforce that is key to the EPA's unwillingness to make dischargers comply with federal standards. Although the federal role in water pollution control has increased greatly, there is a pressing need for even tougher enforcement standards.

This Comment will trace the federal role in water pollution enforcement and critique the discretionary powers of the EPA to refrain from enforcing the current water pollution laws. The effectiveness of the citizen suit provision and the viability of alternatives to EPA enforcement will also be examined. Finally, this Comment will outline a proposal to strengthen enforcement of the FWPCA by limiting discretionary enforcement.

STATUTORY HISTORY

Until the 1972 amendments, the federal role in the effort to control water pollution was “limited to support of the assistance to the states.” Congress first responded to water pollution by enacting the Federal Water Pollution Control Act of 1948. This legislation authorized the federal government to supply the states with technical research and financial assistance for the construction of municipal treatment facilities. Federal authorities were also authorized to assist the states in enforcement duties. The 1948 Act, however, lacked any strong enforcement provision.

The federal authorities' only remedy for violations was to sue for abatement of a public nuisance. Only interstate pollution could be abated, and then only after a long and complex administrative procedure was exhausted. For example, an alleged violator was allowed two notifications, a public hearing, and an opportunity to respond and negotiate before a suit could be

17. Friendly, A Look at the Federal Administrative Agencies, 60 Colum. L. Rev. 429 (1960) (Judge Friendly identifies several of the problems federal agencies face such as delay and special interest pressure).
19. See H. LIEBER, supra note 1, at 11.
21. Id. at 1158.
The Federal Water Pollution Control Act Amendments of 1956\footnote{23} attempted to expand federal anti-pollution efforts by establishing a federal-state partnership. The 1956 Act authorized the federal government to convene a conference at which a violator and federal and state enforcement agencies could discuss and solve pollution problems. Six months later the administrator of the FWPCA could finally request the Attorney General to sue the violator.\footnote{24}

The three stages—conference, hearing, and finally, court action—proved time-consuming and complicated.\footnote{25} Between 1965 and 1971 only 53 conferences were initiated and only 4 cases were even considered by the hearing board.\footnote{26}

\textbf{The 1972 Amendments}

After two years of intense consideration\footnote{27} Congress passed the Federal Water Pollution Control Act Amendments of 1972.\footnote{28} Congress declared that "it is the national goal that the discharge of pollutants into navigable waters be eliminated by 1985."\footnote{29} In furtherance of this goal, the federal program for water pollution was totally restructured. The 1972 amendments supplemented the prior acts' water quality standards with specific effluent limitations\footnote{30} and established a national system of discharge permits.\footnote{31}

Responding to the "almost total lack of enforcement"\footnote{32} of earlier abatement procedures, the 1972 amendments instituted a variety of new enforcement remedies. Under the 1972 amendments, the EPA has broad emergency powers to seek an immediate injunction against any source of pollution which presents substan-

\footnote{22. \textit{Id.} at 1156.}
\footnote{24. \textit{Id.} at 504.}
\footnote{26. \textit{Id.}}
\footnote{27. \textit{ENVIRONMENTAL POLICY DIVISION, CONGRESSIONAL RESEARCH SERVICE OF THE LIBRARY OF CONGRESS, A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972,} at 1265 (Comm. Print. 1973) [hereinafter cited as \textit{LEGISLATIVE HISTORY}]. The Senate Public Works Committee held 33 days of public hearings, which resulted in 6,400 pages of testimony from 171 witnesses and 470 additional written statements.}
\footnote{29. 33 U.S.C. § 1251(a)(1) (1976).}
\footnote{31. \textit{See id.} §§ 1341-1345.}
\footnote{32. \textit{LEGISLATIVE HISTORY, supra} note 27, at 1423.}
tial danger to health and welfare. In addition, these amendments address several problems such as hazardous waste that were not covered by prior legislation.

Section 309—Abatement Orders and Civil Penalties

Congress gave the EPA substantial punitive powers in response to "sanctions under existing law [that] have not been sufficient to encourage compliance with the provisions of the [FWCPA]." Section 309 gives the EPA a variety of enforcement options when a discharger is in violation of permit conditions of other effluent limitations set out in the FWCPA. If the EPA discovers a violation it may defer to the appropriate state authority or, if that state does not initiate enforcement within thirty days, the EPA may initiate its own enforcement procedures. Additionally, the EPA may commence a criminal action if the violation has been willful or negligent.

While section 309 as a whole contains the Act's most important enforcement provisions, section 309(a)(3) enumerates what are probably its most direct and effective methods of enforcement. This section provides that whenever the Administrator of the EPA discovers a violation "he shall issue an order requiring such person to comply with such section or requirement, or he shall"

34. Id. § 1321 (1976 & Supp. V 1981) (civil and criminal penalties may be imposed upon dumpers of oil and hazardous waste); id. § 1342(b) (Supp. V 1981) (municipal treatment plant operators who violate the Act may be restricted or prohibited from making new sewer connections).
35. LEGISLATIVE HISTORY, supra note 27, at 1482.
38. Id. § 1319(c).
39. Id. § 1319(a)(3). Section 309(a)(3) states:

Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 1311, 1312, 1316, 1317, 1318, 1329, or 1346 of this title, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by him or by a State or in a permit issued under section 1344 of this title by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.
bring a civil action” for “appropriate relief.”\textsuperscript{40} Section 309(a)(3) is \textit{direct} in that an abatement order can be issued “immediately” without a hearing, a conference, or other delays.\textsuperscript{41} It is \textit{effective} because civil penalties can be used to deter polluters and compensate government cleanup outlays.\textsuperscript{42}

\textit{Section 505—Citizen Suits}

Congress further expanded the Act’s enforcement potential by giving enforcement power not only to the EPA, but also to private citizens. Under section 505, citizens can bring suits:

1) against any person . . . who is alleged to be in violation of (A) an effluent standard . . . or (B) an order issued by the Administrator . . . or

2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.\textsuperscript{43}

By allowing private citizens to enforce the FWPCA, Congress encouraged them to fight aggressively against pollution\textsuperscript{44} and provided the EPA help in monitoring violators.

Section 505 requires sixty-days’ notice before a private action is commenced and restricts citizens from filing a separate suit if the EPA or a state agency has already commenced suit against the violator.\textsuperscript{45} The legislative intent was evidently that the EPA or state officials should have the primary enforcement role. The Senate Report states that the citizen-suit provision was intended only to supplement section 309 when federal agencies had “failed to exercise their enforcement responsibilities.”\textsuperscript{46}

\textbf{Who Can Enforce the FWPCA?}

Theoretically there are three groups who can enforce the standards and limitations outlined in the FWPCA: 1) the state governments; 2) the federal government; and 3) private citizens.

The drafters of the FWPCA said that the states should retain the primary responsibility of enforcing the Act.\textsuperscript{47} However, sev-
eral state officials and close observers agree that Congress intended the EPA to be "in the driver's seat." Many states are unable to enforce the national standards of FWPCA for the following reasons. First, only states with EPA-approved permit programs may initiate enforcement against permit violators. Second, regional political concerns, such as desire to attract industry, often prevent stringent enforcement. Finally, pollution does not respect political boundaries and jurisdictions.

The enforcement role then falls on the federal government, through the EPA's Office of Legal and Enforcement Counsel (OLEC), and on private citizens. Unfortunately, the EPA refuses to enforce the law and citizens are being frustrated in their enforcement actions by the courts.

**The EPA—Enforcement Is Down**

In 1978 the General Accounting Office (GAO) prepared a report on EPA enforcement of industrial compliance with discharge permits. The report found that delays in issuing abatement orders and referring civil actions to the Justice Department inhibited enforcement. The GAO also commented that EPA monitoring of permit violators was not aggressive.

In 1982 the GAO again reported on the EPA's enforcement activities. Although not taking a stance on the overall effectiveness of the EPA, the report did note that reorganizations have disrupted the EPA's enforcement function and presented figures showing a sharp drop in enforcement since 1978. Statistics gathered by the EPA's Office of Legal and Enforcement Counsel confirm that EPA water pollution enforcement is ineffective.

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50. See infra text accompanying notes 117-19.
53. Administrative abatement orders, which numbered 1,238 in 1977, dropped to 562 in 1981, and 329 in 1982. The EPA, which had referred an average of 106 cases to the Department of Justice from 1977 thru 1979, referred only 35 in 1981, and 58 in 1982. Through June 1, 1983, only 17 cases have been referred. Letter
Lack of recent enforcement is all the more critical because widespread violations continue. Industry often sees compliance with pollution standards as harmful to profits; therefore abatement only takes place if spurred by government action. Studies by the GAO "have shown a high incidence of noncompliance with established water pollution limits on the part of both industrial and municipal sources." The legal enforcement office’s poor record is due to three major problems: poor organization, lack of internal standards, and a substantial discretionary power not to enforce.

**Poor Organization.** One reason for EPA’s enforcement problems is the mismanagement of the agency’s enforcement division. A report to Congress by the Senate Appropriations Committee notes that during the four reorganizations of the EPA in 1980 and 1981 there were often only ten attorneys in the enforcement division of the Office of Legal Enforcement (OLEC). The committee report concludes that “the effectiveness of the enforcement division was virtually destroyed by a combination of mismanagement and mixed signals.”

**Lack of Standards.** In addition to having organizational problems, EPA management has failed to produce consistent or complete policy guidelines. A reorganization of the enforcement division was announced on June 12, 1981, yet it was not until July 6, 1982, that final OLEC operating procedures were even published. In the meantime attorneys at regional offices and at the Washington headquarters were without guidelines because the reorganization superseded all other policies.

The EPA still has not issued specific guidelines on enforcement policy. In a memo since rescinded, a former director of OLEC

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55. U.S. General Accounting Office, Cleaning Up the Environment: Progress Achieved but Major Unresolved Issues Remain 46 (1982). A New Jersey public interest group examined the discharger monitoring reports of 158 dischargers in EPA Region II and found 4,327 violations. The EPA responded to a mere 13 percent of those violations, by issuing just 21 administrative orders and 5 referrals to the Department of Justice. Id. at 47.
58. U.S. Environmental Protection Agency, Memorandum on General Operating Procedures for the Civil Enforcement Program from Robert M. Perry, Associate Administrator (1982) [hereinafter cited as General Operating Procedures].
59. Telephone interview with Chris Dunsky, Water Compliance Division, Environmental Protection Agency (Feb. 22, 1983).
said that policies for issuing notices of violations and administrative orders were under development.\(^6\) An attorney in charge of regional water pollution enforcement stated recently that there are currently no policies for issuing notices of violations and administrative orders.\(^6\) The regional attorney also said there were no regional policies on enforcement, nor were there any requirements to explain or give reasons for a decision not to prosecute.

When regional counsel are without policy guidance, the potential arises for unequal treatment of violators.\(^6\) Also, regional counsel left with no guidance will often choose not to act rather than risk taking the wrong action. One EPA program official confirmed that the attorneys, as a result of “confusing signals,” were “reluctant to take enforcement action.”\(^6\)

**Power Not to Enforce.** Federal agencies such as the EPA are subject to great pressures from industry and special interests.\(^6\) These pressures sometimes result in agencies becoming the arm of industries they are supposed to regulate.\(^6\) A major problem in water pollution control is the “vast economic and political power” of the larger polluters.\(^6\) The general de-emphasis in current EPA water pollution control is shown by the EPA’s proposed budget cuts of ninety million dollars from water quality programs in fiscal 1982.\(^6\)

The particular de-emphasis on water pollution control in the legal enforcement office is shown by the drop in suits filed amid extensive noncompliance.\(^6\) Even where legislative pressure\(^6\) is

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61. Telephone interview with Mary Ann Muirhead, Assistant Regional Counsel, Region IX, Environmental Protection Agency (Dec. 28, 1982).

62. 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 9.1, at 218 (1979). “Discretionary power not to enforce is the power to discriminate.” Id.


64. See Friendly, supra note 17, at 438.


66. D. ZWICK & M. BENSTOCK, supra note 54, at 395. Zwick and Benstock had previously given an example of this power by citing the names of several powerful corporations dumping waste into Lake Erie from greater Detroit such as Ford Motor Company, Scott Paper and Firestone Tire and Rubber.


68. See supra notes 57-65 and accompanying text.

69. Congress has scheduled several hearings concerning EPA enforcement activities. See House Panels, Gorsuch Debate Record of EPA During Reagan Administration, 13 ENV’T REP. (BNA) 419, 420 (July 30, 1982).
placed on the EPA to enforce, EPA officials still retain the discretionary power not to enforce. Lack of a mandatory enforcement provision has left EPA administrators and attorneys free to ignore violations of pollution standards.

Section 309 of the FWPCA provides: "Whenever . . . the Administrator finds that a person is in violation . . . he shall issue an order . . . or he shall bring a civil action."70 Although the language "shall" appears to be mandatory, several courts71 have found that powers to issue abatement orders and file suits are discretionary.72 These decisions reaffirming the EPA’s discretionary power also prevent citizens from suing the EPA to require enforcement.

Courts Diminish Citizen Role

Despite the seemingly plain statutory language,73 courts disagree when asked to decide whether Congress intended enforcement under section 309 to be mandatory or discretionary.74 The interpretation of the words "shall order" is extremely important because citizens can only file suits to force the EPA to act if the Administrator’s duty to act is not discretionary.75 In Sierra Club v. Train,76 the plaintiffs filed a suit against the Administrator of the EPA to compel him to issue a compliance order to two companies polluting a creek. The court held that the Administrator’s duties to issue abatement orders and sue violators were discretionary and not subject to review by plaintiffs.

A year later, in South Carolina Wildlife Federation v. Alexander,77 a district court rejected the Train court’s rationale and held that the Administrator’s duty to issue orders is mandatory. The South Carolina Wildlife decision required the Administrator to issue an abatement order to the Corps of Engineers to comply with section 301 of the FWPCA.

71. Sierra Club v. Train, 557 F.2d 485 (5th Cir. 1977); Caldwell v. Gurley Refining Co., 553 F. Supp. 252 (E.D. Ark. 1982); see also City of Seabrook v. Costle, 659 F.2d 1371 (5th Cir. 1981) (court denied citizens the right to sue under a parallel citizen suit provision in the Clean Air Act).
76. 557 F.2d 485 (5th Cir. 1977).
The *South Carolina Wildlife* court examined legislative intent more closely than did the *Train* court. The *Train* court emphasized the technical wording of the statute to conclude that the duty to act is discretionary.

However, even the statutory interpretation of *Train* is strained. In *Train*, the court said that subsection (b) of section 309 of the FWCPA “authorizes,” not commands, the EPA to issue an abatement order.78 This, however, misconstrues the statute. A more reasonable interpretation is the subsection (b) reference to “authorizes,” “means that the Administrator cannot act unless he ‘finds’ a violation of the Act.”79 The *Train* court also said that because prosecuting is a discretionary decision, it would be unreasonable to conclude that the Administrator’s duty to first issue an abatement order is mandatory. The abatement order would be an “empty gesture” if the Administrator is not bound to file suit if the order is disobeyed.80 The court in *South Carolina Wildlife* correctly rebutted this hypothesis by saying that if no order was issued at all, then even less would be done to “foster the goal of pollution elimination.”81

*Train* in fact never mentions the goal of pollution elimination, exemplifying its limited analysis of the entire FWPCA, and, in particular, section 505. Congress intended that citizens be “unconstrained” in bringing actions under section 505.82 According to the Senate Report, the citizen-suit provision would ensure “that actions will lie against the Administrator for failure [to] exercise his duties under the Act, including his enforcement duties.”83

*Train*, then, limits the use of the citizen suit that has enormous potential. In permitting citizen suits, Congress intended public interest groups to have 1) a substantial role in helping the EPA monitor violators,84 and 2) the ability to force the EPA to act when political factors prevent effective enforcement.85 Both political pressure and administrative delay now inhibit EPA enforce-

78. 557 F.2d at 490-91.
79. 457 F. Supp. at 133-34.
80. 557 F.2d at 490-91.
81. 457 F. Supp. at 133.
82. *LEGISLATIVE HISTORY, supra* note 27, at 1498.
83. *Id.* at 1499 (emphasis added).
84. *Id.* at 1498.
85. *Id.* at 1423.

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Elimination of water pollution would be greatly advanced if public interest groups could sue the EPA when it was obvious that abatement orders should be issued. Public interest groups, though, are hesitant to use section 505 in this way in view of the Train decision. Reluctance to challenge Train is probably wise in light of a 1982 district court decision that closely followed Train.

Ironically, one of the Train court's reasons for its decision is that, even when citizen suits under the FWPCA are limited, the citizen has the alternative of directly bringing suit against and receiving damages from an alleged polluter. However, use of the federal courts and FWPCA standards has been sharply curtailed by recent Supreme Court decisions. Citizens are thus finding that private methods of enforcing water pollution laws are being cut off by the courts.

**ALTERNATIVES TO FEDERAL ENFORCEMENT—NOT EFFECTIVE OR NOT THERE**

**Private Remedies**

Several non-statutory remedies for water pollution were available in federal court prior to 1981. Recent Supreme Court decisions, however, have eliminated the most important of these remedies. In 1981, the Court denied relief to plaintiffs who had argued three remedial theories: an implied private remedy under section 10 of the Rivers and Harbors Act of 1899, a remedy under federal common law for nuisance, and an implied remedy under the Federal Water Pollution Control Act. Therefore, the alterna-

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87. For example, James Banks, a senior attorney with the Natural Resources Defense Council, indicated that his group was not willing to spend time and money on this type of a suit because of the Train decision. Telephone interview with James Banks, Senior Attorney, Natural Resources Defense Council (Nov. 28, 1982).
89. Sierra Club v. Train, 557 F.2d at 490-91.
90. See infra notes 91-93 and accompanying text.
93. Middlesex County Sewage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981) (held that the inclusion of the citizen suit provision evinced a congressional intent to preclude other private remedies).
tive mentioned by Train for private citizens damaged by water pollution is no longer available. Other alternatives often stressed as substitutes for federal enforcement include state common law and state statutes. Unfortunately, these alternatives are seldom effective and have little impact on national water pollution problems.

State Law Alternatives

State Common Law. Although plaintiffs may still resort to state common-law remedies, the state laws do not contain the stringent standards of the FWPCA. Also, the common law focused on riparian rights and nuisances that allowed the plaintiff to recover only for a "special injury." Common-law private actions are an acceptable means of solving localized problems, but they are not a substitute for the more comprehensive standards and goals outlined in the FWPCA.

State Statutes. Dependence on state statutes to clean up the nation's waters would be a boon to industry. Industry's influence is more direct and effective on local government than on Congress. Local legislatures often base environmental quality decisions on needs for economic growth and competition for

94. 557 F.2d at 490-91.
95. See Comment, Federal Water Pollution Remedies; Non-Statutory Remedies are Eliminated, 17 LAND & WATER L. REV. 105, 137 (1982). After a thorough examination of City of Milwaukee v. Illinois and Michigan, 451 U.S. 304 (1981), and Middlesex County Sewage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981), the author concludes, "Since the FWPCA is a remedial statute, it is inconceivable that Congress intended to insulate dischargers from liability for injuries caused by their pollution. Yet the Court's recent decisions in Milwaukee II and Sea Clammers effectively do just that."
96. See Enforcement by EPA, ENVTL. SCI. AND TECH., Feb., 1983, at 73A-74A. "EPA repeatedly tries to justify its lack of enforcement activity on the grounds that the states will step up enforcement while federal enforcement declines." The article goes on to refute this proposition by stating that several states are currently reducing current funding for pollution and that federal grants to the states will also be reduced. Id.
97. The FWPCA includes national standards for water pollution emissions as well as national water quality goals. 33 U.S.C. § 1316 (1976).
98. T. SCHOENBAUM, ENVIRONMENTAL POLICY LAW 680 (1982) (few states have set more stringent standards than the FWPCA and many states prohibit the setting of standards more stringent than the FWPCA).
99. Comment, supra note 42, at 442.
100. Id.
A recent Library of Congress study suggests that relying too much on state and local efforts could recreate the very problems Congress sought to solve through water pollution laws.103

**Proposal—Controls Over Discretion**

A major congressional reason for the 1972 FWPCA amendments was to overcome the "almost total lack of enforcement" under previous acts.104 However, the problem of nonenforcement persists because the EPA is unable or unwilling to prosecute violators. The inability to enforce stems from the EPA's lack of guidelines and standards for its enforcement counsel.105 The unwillingness to enforce derives from the EPA's discretion not to act. A curb on this discretion would help ensure the aggressive enforcement needed to clean up the nation's waters.

**Guidelines and Standards**

EPA administrators should heed the Supreme Court's sensible statement in *Morton v. Ruiz*: "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, impliedly or implicitly by the Congress."106 EPA decisions concerning enforcement are usually made ad hoc and not subject to any standards.107 The EPA needs to formulate policy guidelines that indicate when administrative orders and civil suits should be filed.108 These guidelines should be written by experienced EPA attorneys, stating the procedures to be followed when dealing with the typical violation of a permit or a standard. These procedures could leave room for necessary case individualization, and innovation by regional attorneys.109

Another method of guiding discretion would be to require offi-

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102. Id. at 42.
103. Id. at vii.
104. LEGISLATIVE HISTORY, supra note 27, at 163.
105. See supra notes 57-63 and accompanying text.
107. See supra notes 58-63 and accompanying text.
108. See Envtl Defense Fund v. Ruckelshaus, 439 F.2d 584, 598 (D.C. Cir. 1971) (the court stated that administrative officers should be required to "articulate the standards and principles that govern their discretionary decisions in as much detail as possible").
109. "Every statute that requires enforcement would be supplemented with rules that clarify enforcement policies, so that discretionary power to enforce or not to enforce would not involve major policy-making but would be limited to needed individualizing, guided by the rules that would be specific as possible without cutting into needed individualizing." 2 K. DAVIS, supra note 62, § 9.4, at 228.
cials to give reasons for failure to prosecute. A policy requiring memoranda justifying administrative decisions would make the enforcement process more efficient and fair. EPA attorneys investigating alleged polluters could use the experience and research of other attorneys examining similar violations. Also, unequal justice to dischargers would be prevented by the attorney’s use of the memoranda recorded in previous case files. Making these files available to the alleged polluter would secure similar treatment for dischargers dealing with different attorneys. Those dischargers seeking to take advantage of non-enforcement situations would be deterred because these memos are not legal precedents preventing later prosecution.

Finally, private citizens could supplement EPA efforts if allowed to examine case files. Upon determining areas where EPA attorneys were less active, a private party could use the citizen-suit provision to sue the discharger directly for violations of the FWPCA or EPA regulations.

The EPA has, in certain situations, recorded and retained case files on decisions not to prosecute. In 1981 the EPA withdrew eleven civil actions after referring them to the Department of Justice. The case files contained internal EPA memoranda and written notations of conversations explaining the decisions to withdraw from or continue action on a particular case. Unfor-

110. Gardner, The Informal Actions of the Federal Government, 26 Am. U.L. Rev. 799 (1977). Even after arguing that most standards for administrative agency prosecutors are undesirable, the author makes the exception that “[i]t would seem both practicable and desirable if the prosecuting attorney were put to a brief explanation of his decision in every file closed without prosecution, and to send a copy to his superior . . . .” Id. at 818.

111. 2 K. DAVIS, supra note 62, § 9.10, at 267. “[G]uidelines or rules [by prosecutors] about nonenforcement or about selective enforcement therefore lack the authoritative effect of legislation rules or statutes.”


114. U.S. General Accounting Office, More Effective Action by the EPA Needed to Enforce Industrial Compliance with Water Pollution Control Discharge Permits (1978). The enforcement alternative available to the EPA is outlined here. Generally after a notice of violation is issued to an alleged polluter, the EPA will issue an administrative abatement order requiring abatement of the pollution discharge. Next the EPA will make the decision to take civil or criminal action and to refer the case to the Justice Department if the discharger has not abated the pollution.

115. Letter from Henry R. Van Cleve, Acting General Counsel, U.S. General Ac-
fortunately, the EPA’s enforcement office has not established a general policy of requiring these case files and appears reluctant to do so.

The trend prevailing in the courts, however, is to review informal actions and require a statement of reasons from administrators making informal decisions—such as the decisions not to prosecute. For example, in Dunlop v. Bachowski the Supreme Court acknowledged that the Secretary of Labor has a degree of discretion in selecting cases for prosecution, but nonetheless ruled that its decisions were subject to judicial review. The court also held that the Secretary must give written reasons for his decision. Dunlop brought uniformity and openness to the Labor Department’s decision-making. An EPA official who has decided not to prosecute should be held to Dunlop’s requirements. As in Dunlop, an EPA official would not be forced to prosecute but would only be required to explain why he did not.

**Discretion Not To Enforce**

Professor Kenneth Culp Davis argues that “discretion not to enforce is one of the main sources of injustice in our whole system of law and government.” The enforcement counsel of the EPA have used the power not to enforce at a crucial time of extensive noncompliance by dischargers. Discretionary enforcement within the EPA is what Professor Davis calls the “dangerous” power not to enforce for several reasons. First, decisions to enforce are subject to further scrutiny but decisions not to enforce counting Office to Representative John Dingell (Apr. 9, 1982) (EPA enforcement efforts).

116. Telephone interview with Chris Dunsky, Office of Water Enforcement, Environmental Protection Agency (Feb. 22, 1983); see also General Operating Procedures, supra note 58, at 14. Regional counsels are directed to keep records on cases so that a record exists for cases referred to the Justice Department. No mention is made of decisions not to prosecute.


120. See supra note 55 and accompanying text.

121. 2 K. Davis, supra note 62, § 9.1, at 219. Professor Davis states that the discretion not to enforce is more dangerous than the power to enforce because it is less controlled.
are final.\textsuperscript{122} Second, decisions not to enforce are often made in secret and not subject to standards.\textsuperscript{123} Finally, findings and reasons often support enforcement decisions but are not required for discretionary decisions not to enforce.\textsuperscript{124}

The hazards in general of a discretionary system and the EPA’s poor enforcement record suggest that the EPA should no longer have discretion not to enforce. Congress should amend the FWPCA and charge EPA officials with a mandatory duty to issue abatement orders and issue civil suits if appropriate.\textsuperscript{125} The doctrine of mandatory enforcement has generally been rejected by the American system, but there are exceptions which demonstrate that such enforcement is deliberately chosen and can work successfully.\textsuperscript{126}

Mandatory enforcement would protect the EPA from political and economic pressures that interfere with the EPA’s duty to protect the environment. Removing enforcement discretion would also provide people with the right to use the citizen suit to compel the EPA to carry out the mandatory duty to enforce.\textsuperscript{127} A similar citizen-suit provision in the Clean Air Act has been used to force EPA officials to act where they had been delaying enforcement by

\textsuperscript{122} Decisions to prosecute are subject to review from regional counsel, regional administrators, enforcement counsel, and assistant administrators in Washington. There is no provision in the Operating Procedures for review of non-enforcement decisions. General Operating Procedures, supra note 58, at 10-11.

\textsuperscript{123} See supra notes 57-63 and accompanying text.

\textsuperscript{124} Telephone interview with Chris Dunsky, Water Compliance Division, Environmental Protection Agency (Feb. 22, 1983). A regional counsel said that there was no requirement of stated reasons in her regional office as well. Telephone interview with Mary Ann Muirhead, Assistant Regional Counsel, Region IX, Environmental Protection Agency (Dec. 28, 1982).

\textsuperscript{125} Generally a “Notice of Violation” will first be sent to a discharger informing him that he is in violation of the law. If compliance is not achieved through negotiations, then the Administrator may issue a formal order which mandates compliance within a certain period of time. Should the discharger fail to comply with terms of the order, the EPA may seek enforcement of that order in a United States District Court. See U.S. General Accounting Office, More Effective Action by the EPA Needed to Enforce Industrial Compliance with Water Pollution Control Discharge Permits (1978). This proposal would mandate that the EPA seek judicial enforcement of an order that has not been obeyed. Exceptions could be made where dischargers had complied or consent decrees had been issued by the courts.


\textsuperscript{127} Under the citizen suit provision, citizens can sue the EPA to compel them to perform non-discretionary duties. 33 U.S.C. § 1365(c)(2) (1976).
negotiations with dischargers. A mandatory enforcement provision would eliminate many of the delays in “restoring the integrity of the Nations’ waters.”

CONCLUSION

The significant changes in the enforcement provisions of the 1972 Amendments to the FWPCA symbolized congressional determination to clean up the nation's waters. Unfortunately, these provisions have failed to provide the effective enforcement needed to reach the water quality goals of the FWPCA on schedule. In fact, several of the pollution problems deemed dangerous in the early 1970's still plague the nation's waters today.

By reducing discretionary enforcement powers within the EPA, Congress can establish more accountable and effective enforcement. Congress should enact now what was suggested over a decade ago: a mandatory enforcement provision backed by a citizen-suit provision to force water pollution control officials to carry out their duties.

EDWARD E. YATES

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131. See D. Zwick & M. Benstock, Water Wasteland 5-23 (1972). The authors detail problems of chemicals in food chains and water supplies that existed in the early 1970's. These problems still remain as described supra notes 10-12.
132. Id. at 395-96.