Clean Water Act Section 404 Enforcement

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I. Section 404 Violations and Enforcement Authority

Federal water pollution policy relies on federally mandated permits issued under the National Pollutant Discharge Elimination System (“NPDES”) program to control discharges of pollutants into the waters of the United States.\(^1\) In addition, Section 404 of the Clean Water Act (“CWA” or “Act”) regulates the removal or addition of materials (so-called “dredge and fill” operations) into the navigable waters of the United States through the permit program. Persons (either individuals or business entities) violate the Act in two ways: (1) disobeying the terms or conditions of an NPDES or Section 404 permit; or (2) discharging pollutants or dredge or fill material into waters of the United States without a permit.\(^2\) Violations of the CWA invite enforcement actions on both public and private fronts. The U.S. Environmental Protection Agency (“EPA”), U.S. Army Corps of Engineers (“Corps”), and states authorized to administer the Section 404 program (currently, Michigan and New Jersey) are the principal enforcers of Section 404. States are the primary enforcers of NPDES permits because EPA has authorized most states to administer that program.\(^3\) Private parties and public interest groups may also play a prominent role in enforcing the CWA by filing citizen suits under Section 505 of the Act.\(^4\)

Under a 1989 Memorandum of Agreement concerning CWA enforcement,\(^5\) the Corps and EPA share authority to issue administrative orders,\(^6\) impose monetary penalties,\(^7\) and make referrals for civil and criminal judicial enforcement.\(^7\) The Corps acts as lead enforcer against those who violate the terms of a Corps-issued permit or discharge pollutants without a permit. In cases involving repeat offenders, flagrant violations, or where the Corps recommends an EPA

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\(^1\) Clean Water Act (“CWA”) § 301(a), 33 U.S.C. § 1311(a) (2006). The CWA prohibits the discharge of pollutants without meeting certain conditions. \(Id.\) The U.S. Environmental Protection Agency (“EPA”) has authority to issue permits allowing the discharge of pollutants meeting these conditions, or such conditions as EPA deems necessary. \(Id.\) § 402, 33 U.S.C. § 1342(a). The Act also establishes a distinct permit program under which the U.S. Army Corps of Engineers (“Corps”) issues dredge and fill permits that apply to the removal (dredging) or addition (fill) of materials from or to navigable waters. \(Id.\) § 404, 33 U.S.C. § 1344.

\(^2\) \(Id.\) §§ 402, 404, 33 U.S.C. §§ 1342, 1344.

\(^3\) EPA was initially responsible for issuing all NPDES permits. The CWA, however, authorizes the delegation of permitting authority to states. \(Id.\) § 402(b), 33 U.S.C. § 1342(b). “States” includes certain U.S. possessions and territories. \(Id.\) Currently, forty-seven states, including Texas, have full or partial authority to issue NPDES permits to sources within their jurisdiction.

\(^4\) Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of the Section 404 Program and the Application of the Exemptions Under Section 404(F) of the Clean Water Act, 1989.

\(^5\) CWA § 309(g), 33 U.S.C. § 1319(g).

\(^6\) \(Id.\) §§ 309(b), (d), 33 U.S.C. §§ 1319(b), (d).

\(^7\) \(Id.\) § 309(c), 33 U.S.C. § 1319(c).
administrative penalty action, EPA steps in as principal enforcer. EPA may also request that the Corps refer a class of cases or a particular case for enforcement. EPA, through the Department of Justice, enforces criminal violations.

Most states enforce Section 402 as part of their delegated authority to administer the NPDES program within their borders. However, EPA retains the right to initiate an enforcement action when states fail to act. In Texas, the Texas Commission on Environmental Quality ("TCEQ") exercises federal regulatory authority over most pollutant discharges to the State’s surface waters, and can also use the Act’s enforcement provisions to bring NPDES violators to heel. Even though Texas has not received Section 404 permitting authority, it may still rely on the CWA’s citizen suit provision to press enforcement.

The federal government has available various enforcement options under the CWA, including the authority to seek civil penalties in an administrative or judicial forum, criminal sanctions, and equitable relief. Generally, EPA recommends that regulators use the least resource-consuming enforcement option.\(^8\) Aside from this general policy, EPA advises that civil judicial actions are more likely appropriate for cases needing court intervention to order immediate or long-term compliance measures, such as a temporary restraining order or injunction.\(^9\) For serious violations or an uncooperative violator, EPA may prefer a civil action for injunctive relief and penalties. In addition, criminal enforcement is preferred over administrative proceedings for knowing or negligent violations. Civil or administrative actions should generally abate during a criminal prosecution, unless there is a need for prompt injunctive relief.\(^10\) If the Agency seeks large penalties, it must proceed by civil judicial enforcement, due to the statutory ceiling on administrative penalties.\(^11\) But if a violation warrants only minor penalties, EPA will weigh the cost of proceeding with an administrative penalty action in determining whether to seek enforcement.\(^12\)

II. Civil Administrative Penalties: Sections 309(a) and (g)

The vast majority of EPA’s enforcement is accomplished through administrative actions. Section 309(a) authorizes EPA to issue broad administrative orders mandating compliance with the CWA. These orders may command persons to cease their unpermitted discharges or to restore filled wetlands under a compliance schedule. Section 309(g) complements EPA’s injunctive powers by prescribing two classes of administrative penalties that EPA can levy against CWA violators. Based on a finding that a person has violated any permit condition, and after consulting with the state where the violation occurred, the EPA Administrator ("Administrator") or the Secretary of the Corps ("Secretary") may assess either a Class I or Class II civil penalty. Class I penalties, for less egregious conduct, may not exceed $16,000 per violation, with a maximum of $37,500.\(^13\) Class I violators are not entitled to the procedural

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\(^9\) Id. at 3.
\(^10\) Id. at 4.
\(^11\) Id. at 5.
\(^12\) Id. at 6.
\(^13\) EPA increased the maximum civil penalties under most of its statutes by ten percent under the authority of the Debt Collection Improvement Act of 1996 ("DCIA"). EPA reviews these civil monetary penalties at least once
protections of the Administrative Procedure Act ("APA"), but they do receive a “reasonable opportunity to be heard and to present evidence” within thirty days of receiving written notice. Violations that are more serious invite Class II penalties, which may not exceed $16,000 for each day the violation continues, with a maximum of $187,500. In these cases, the provisions of the APA apply and violators have a right to a hearing on the record. Both categories of penalties are subject to judicial review; Class I in federal district courts, Class II penalties in the federal courts of appeals.

The Administrator and the Secretary are instructed to assess penalties taking into account multiple factors listed under Section 309(g). They must consider the nature, circumstances, extent, and gravity of the violation(s), as well as factors specific to the violator, including its ability to pay, prior history of violations, degree of culpability, economic benefit or savings (if any) resulting from the violation, and “such other matters as justice may require.” Although EPA’s calculation is not guided by written policy, EPA uses a settlement policy, discussed infra, which incorporates these factors, to determine the amount that it will seek in settlement of a claim of violation. Courts are instructed to consider these same factors when determining a defendant’s potential penalty liability in a civil action.

III. Civil Judicial Penalties: Sections 309(b) and (d)

Sections 309(b) and (d) authorize EPA to bring federal judicial enforcement actions seeking injunctive relief and civil penalties. For injunctive actions brought under Section 309(b), jurisdiction arises in the district where the violator resides or conducts business. Federal district courts may fashion many forms of equitable relief, including, for instance, requiring the violator to implement best management practices, ordering the cessation of activities until compliance is achieved, and mandating remediation of contaminated sediments caused by NPDES violations.

Most civil suits filed by the government seek both injunctive relief and civil penalties. In penalty actions, federal courts labor over determining the number of violations and the penalty amount. Section 309(d) authorizes a court to assess a “civil penalty not to exceed $37,500 per day for each violation” of a permit. All violations of separate Clean Water Act requirements or permit conditions are separately subject to penalty assessment on each and every day such

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15 Id. §§ 309 (b), (d), 33 U.S.C. §§ 1319(b) (injunctive relief provision) and (d) (civil penalties).
16 Id. § 309(b), 33 U.S.C. § 1319(b).
18 CWA § 309(d), 33 U.S.C. § 1319(d).
violations continue. For the purposes of Section 402, each discharge in excess of an NPDES limitation constitutes a separate violation. For purposes of Section 404, a day of violation may either be a day that actual discharge or dredged or fill material takes place, or may also include any day that such dredged or fill material is allowed to remain in the waters or wetlands. The courts which have examined this question have generally concluded that “[a] day of violation constitutes not only a day in which [the defendant] was actually using a bulldozer or backhoe [to fill the waters] but also every day [the defendant] allowed illegal fill material to remain therein.” Although strict application of this policy produces draconian fines, in practice it serves as a penalty ceiling. In most cases, actual fines track the perceived or actual economic benefit derived from the violation(s).

Civil liability under the CWA is not limited to intentional violations. The statute provides for strict liability. However, the amount of the penalty is often less despite serious violations when the defendant’s actions are not willful. Once liability is established and the court identifies the statutory ceiling, it considers six factors found in Section 309(d) to determine an appropriate penalty:

1. the economic benefit (if any) resulting from the violation;
2. the seriousness of the violation(s);
3. any history of such violations;
4. any good-faith efforts to comply with the applicable requirements;
5. the economic impact of the penalty on the violator; and
6. such matters as justice may require.

When applying these factors, courts often turn to EPA written policies for guidance, though they have discretion in determining a method to weigh them and arrive at a penalty figure. Some courts employ a “top-down” method, first determining the maximum statutory penalty, then reducing that amount based on the mitigating factors listed in Section 309(d). Others use the “bottom-up” approach, initially identifying the defendant’s economic benefit, and then adjusting upward or downward based on the five remaining factors.

IV. Six Penalty Factors Enumerated in the Clean Water Act

A. Economic Benefit

Controversial and heavily contested, the economic benefit factor is a cornerstone of EPA’s civil penalty provision. The Agency will usually insist on recovering at least this amount.

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24 CWA § 309(d), 33 U.S.C. § 1319(d).
from a CWA violator. EPA contends that recapturing economic benefit is necessary to “level the economic playing field by preventing violators from obtaining an unfair financial advantage over their competitors who made the necessary expenditures for environmental compliance.”27 The economic benefit value should therefore reflect the net costs a violator avoided by disobeying the law. A court employing the “bottom-up” approach begins its assessment with this figure.

To calculate the appropriate economic benefit penalty, EPA uses a computer model called “BEN,” which analyzes two types of economic benefit: (1) “delayed costs” associated with capital investments or one-time expenditures required to comply with environmental regulations; and (2) “avoided costs” including operation and maintenance or annually recurring costs.28 Pollution control equipment or efforts to remove unpermitted fill material and wetland restoration are common examples of delayed costs, whereas one-time costs often involve installing reporting systems or purchasing land. Avoided costs often include operation and maintenance costs or labor and raw materials. BEN also accounts for after-tax cash flows, inflation, and the time value of money.

EPA uses the BEN model in settlement negotiations, but if a civil action proceeds to trial, the Agency will rely on expert testimony to prove a company’s economic benefit. In many cases, a precise figure is difficult or impossible to determine, so courts accept a “reasonable approximation” of economic benefit from plaintiffs.29 An “elaborate evidentiary showing” by the government is unnecessary, and a court may adjust the government’s proposed penalty as it sees fit.30 Defendants may hire economic experts to emphasize the complexity and inadequacy of the BEN model and its underlying factors.

B. Seriousness of the Violation

Courts judge the seriousness of a defendant’s violations by “the frequency and severity of the violations, and the effect of the violations on the environment and the public.”31 Here, specific monetary figures are rarely requested by judges or produced by plaintiffs.32 Instead, a number of circumstances influence courts: the number and frequency of violations, how far the violator’s discharges exceed the permit parameters, the presence, delay, or absence of state enforcement, the toxicity of the discharged substance, and violations of reporting requirements.33 Courts generally link the seriousness of a violation to the level of environmental harm caused by

27 64 Fed. Reg. 32,948 (June 18, 1999).
28 Id. at 32,949.
30 Gulf Park, 14 F. Supp. 2d at 863 (subtracting factors and expenses for the economic benefit calculation that the defendants actually incurred because of noncompliance).
31 Smithfield Foods, 972 F. Supp. at 343 (citations omitted); see Hawaii’s Thousand Friends v. City & County of Honolulu, 821 F. Supp. 1368, 1383 (D. Haw. 1993) (looking to the number of violations, the duration of noncompliance, the significance of the violation, and the actual or potential harm to human health and the environment).
33 See PRIG, 720 F. Supp. at 1163.
the violation, but some treat the lack of material environmental harm from those violations as a significant mitigating factor.\textsuperscript{34} Other courts believe that significant penalties may be appropriate even without evidence of actual negative effect because of the inherent difficulties in proving environmental harms.\textsuperscript{35}

C. History of Violations

Prior lawsuits for violations of the CWA, past settlements in administrative actions, violations of consent decrees, and pollution incidents that are reported by inspectors but omitted from the present allegations may count toward the history of CWA violations. The duration of a defendant’s current violations is also considered.

D. Good Faith Efforts to Comply

Whether a defendant seeks to prove his bona fide efforts to comply with the Act, or merely pleads lack of bad faith, this factor ultimately looks to whether the defendant “took any actions to decrease the number of violations or made efforts to mitigate the impact of their violations on the environment.”\textsuperscript{36} Evidence of good faith efforts may include proof of insufficient or inadequate efforts to comply, conducting environmental compliance audits, hiring consultants, or similar endeavors to obey permitting requirements.\textsuperscript{37}

E. Economic Impact on the Violator

It is EPA’s policy to not “seek a penalty that would seriously jeopardize the violator’s ability to continue operations and achieve compliance, unless the violator’s behavior has been exceptionally culpable, recalcitrant, threatening to human health or the environment, or the violator refuses to comply.”\textsuperscript{38} Consistent with this attitude, courts may show defendants clemency by balancing any penalty against their ability to survive as viable entities after it imposes a fine. Courts will consider defendants’ total assets and liabilities, company size, market share, and the financial status of parent corporations, with the aid of expert testimony from both sides.\textsuperscript{39}

F. Other Matters as Justice May Require

Under this final factor, a defendant’s bad faith conduct, attitude toward achieving compliance, and actual ability to follow the Act’s requirements can move a court to mitigate or ratchet up its initial penalty. The court’s equitable power to make these adjustments is closely tied to the economic benefit factor, and, under either the “top-down” or “bottom-up” approach,\textsuperscript{34} \textsuperscript{35} \textsuperscript{36} \textsuperscript{37} \textsuperscript{38} \textsuperscript{39}
penalty awards ultimately reflect the violator’s ill-gotten gains, rather than the maximum possible statutory penalty.

For example, in United States v. Smithfield Foods, Inc., the U.S. Court of Appeals for the Fourth Circuit affirmed a $12.4 million penalty levied against Smithfield Foods, Inc. (“Smithfield”) under the CWA.\footnote{Smithfield Foods, 972 F. Supp. at 353.} In this case, Smithfield owned and operated two pig slaughterhouses located on the Pagan River in Virginia. Smithfield treated the wastewater generated by the operations in facilities on the site. From August 1991 to August 1997, Smithfield discharged treated wastewater into the Pagan River. Smithfield was discharging wastewater pursuant to a valid permit when Virginia adopted a lower discharge limit for phosphorous. Smithfield was required to significantly upgrade its wastewater facilities to comply with the new regulations and complained that this requirement was impossible to meet under the required deadlines. Smithfield filed suit challenging the new phosphorous limitation.

Smithfield negotiated with Virginia regarding the implementation of the new phosphorous limitations, which culminated with Smithfield connecting its plants to the Hampton Roads Sanitation District wastewater treatment system. The negotiations and connection to the municipal system took over six years, however. Meanwhile, Smithfield continued discharging effluent into the Pagan River beyond the limit authorized by its permit.

During this time, EPA began its own investigation. EPA ultimately contacted Virginia and asked it to pursue an enforcement action against Smithfield, but Virginia took no action. Consequently, EPA filed its own lawsuit against Smithfield, claiming violations of the phosphorous limitations, false reporting, and late reporting.

The district court found Smithfield liable for 6,982 days of violations, resulting in a maximum penalty of $174.55 million. After weighing the Section 309(d) factors, the court found that the violations were serious, the company had a history of noncompliance, its financial status was healthy, and good-faith efforts to comply with the law were minimal.\footnote{Id. at 343–53.} However, when it deployed the “bottom-up” method, the court assessed the company’s economic benefit at $4.2 million and ultimately imposed a $12.6 million fine, approximately seven percent of the statutory maximum.\footnote{Id. at 349, 354.} On appeal, the Fourth Circuit affirmed the district court, but slightly reduced the penalty to $12.4 million.

Similarly, in United States v. Gulf Park Water Co., the court worked from the top down, starting its assessment by finding 1,825 violations justifying a maximum penalty of $46 million.\footnote{Gulf Park, 14 F. Supp. 2d at 857.} Again, the court found a long history of serious violations and few efforts to comply with the law,\footnote{Id. at 859–66.} but determined that the defendant’s economic benefit amounted to $600,000 and assessed a $1.5 million final penalty, just three percent of the maximum.\footnote{Id. at 869.}
V. Administrative Enforcement Considerations and Agency Guidance

A. Settlement Penalty Formula

The 1995 Interim Clean Water Act Settlement Policy (“Interim Settlement Policy”) provides the framework for EPA’s settlement penalty policy. At the core of this document is a penalty formula that, in principle, produces the lowest penalty figure that the government should be willing to accept, though the Agency reserves the right to pursue penalties up to the statutory maximum in cases where the parties cannot reach a settlement. The formula commingles the Section 309(d) and (g) factors:

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\text{Penalty} = \text{Economic Benefit} + \text{Gravity} +/\text{- Gravity Adjustment Factors} - \text{Litigation Considerations} - \text{Ability to Pay} - \text{Supplemental Environmental Projects}^{46}
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As previously noted, EPA uses the BEN model to calculate the economic benefit, which seeks to capture the delayed costs associated with capital investments or one-time expenditures required to comply with environmental regulations, and avoided costs, including operation and maintenance costs and annually recurring costs.\(^{47}\)

The gravity component, reflecting the perceived seriousness of the violation, aims to deter and punish violators rather than merely disgorging the wrongful benefits of their misconduct. EPA looks at four factors for each month during which the violation occurred: (A) the significance of the effluent limit violation; (B) actual or potential harm to the public health and environment; (C) the number of effluent limit violations per month; (D) the significance, in severity and number, of non-effluent violations per month.\(^{48}\) EPA then assigns point values to each category and then adds them to a money multiplier to arrive at the base gravity figure.

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\text{Monthly gravity component} = (1 + A + B + C + D \times $1,000)
\]

Finally, EPA considers additional “adjustment factors,” such as the defendant’s past recalcitrance (to increase gravity), including bad faith or unjustified delays in implementing mitigation measures, and quick settlement (to decrease gravity), which pressures defendants to settle early.\(^{49}\)

EPA may decide to reduce or increase the monthly gravity factor by three additional “adjustment” factors: (1) the flow reduction factor for small facilities; (2) a history of recalcitrance, including actions taken in bad faith or unjustified delays in prevention, mitigation, or remediation; and (3) quick settlement.\(^{50}\) Although the policy does not provide a specific adjustment factor for environmental auditing, EPA may assess smaller penalty amounts for violators who conduct environmental audits, disclose the results to the government, and promptly correct the violations.\(^{51}\) EPA may modify the penalty amount further in light of the relative

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\(^{46}\) EPA, supra note 38, at 4.

\(^{47}\) 64 Fed. Reg. 32,948 (June 18, 1999).

\(^{48}\) See EPA, supra note 38, at 6–9.

\(^{49}\) Id. at 12.

\(^{50}\) Id. at 12–13.

\(^{51}\) Id. at 13.
strength of its case and the likelihood of success at trial, the defendant’s ability to pay, and the existence of Supplemental Environmental Projects.\textsuperscript{52}

\section*{B. Supplemental Environmental Projects}

EPA defines Supplemental Environmental Projects (\textquotedblleft SEP\textquotedblright) as environmentally beneficial projects that a violator willingly undertakes in order to receive favorable penalty consideration in an enforcement action.\textsuperscript{53} To receive a reduced penalty, the violator’s project must conform to specific definitions and criteria in EPA’s SEP policy or receive advance approval by the Assistant Administrator. There must be \textquoteleft\textquoteleft no doubt that the project primarily benefits the public health or the environment\textquoteright\textquoteright and EPA must be involved in shaping the scope of the project before it is implemented.\textsuperscript{54} Furthermore, the project cannot begin until after the Agency has issued a notice of violation, administrative order, or complaint. However, projects starting before EPA initiates enforcement may mitigate penalties in other ways, for example, as proof of the defendant’s good faith efforts to reduce the severity and duration of its violations. Finally, qualifying SEPs cannot be part of any injunctive relief issued by the Agency, a court, or a state or local government.

EPA recognizes seven categories of qualifying SEPs: (1) public health (providing diagnostic, preventative, and/or remedial human health care); (2) pollution prevention (reducing pollution through \textquoteleft\textquoteleft source reduction,\textquoteright\textquoteright including equipment and technology modifications, energy conservation, and \textquoteleft\textquoteleft in-process recycling\textquoteright\textquoteright); (3) pollution reduction (using recycling, treatment, containment, or disposal techniques when pollution has already been released); (4) environmental restoration and protection (\textit{e.g.}, restoring wetlands or purchasing and managing a watershed area to protect drinking water supplies); (5) assessments and audits (pollution prevention assessments, environmental quality assessments, and compliance audits); (6) environmental compliance promotion (training and supporting other members of the regulated community in complying with environmental regulations); and (7) emergency planning and preparedness (\textit{e.g.}, providing computers and software, communications systems, and emissions detection and HAZMAT equipment to local response or planning entities).\textsuperscript{55} EPA specifically does not accept several types of projects as SEPs, including: (1) general public educational or environmental awareness projects; (2) contributions to environmental research at a college or university; (3) projects that benefit a community but are not related to environmental protection; and (4) projects that the defendant undertakes, in whole or in part, with loan guarantees, low-interest loans, contracts, grants, or other forms of federal financial assistance.\textsuperscript{56}

EPA uses the Settlement Penalty Formula and considers a violator’s SEPs for negotiating settlement fines, not for developing a penalty demand in a complaint, administrative hearing, or

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{52} Id.
\item \textsuperscript{54} Id.
\item \textsuperscript{55} Id. at 7–11.
\item \textsuperscript{56} Id. at 12.
\end{itemize}
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The Agency will pursue higher penalties in matters that go to trial or reach administrative hearings.  

VI. Criminal Enforcement: Section 309(c)

Under Section 309(c) of the CWA, EPA can seek criminal sanctions for four categories of offenses.  

First, anyone who negligently commits an unauthorized discharge or violates the requirements of a permit may be fined $2,500 to $25,000 per day of violation, or imprisoned up to one year, or both. Those who knowingly violate the Act may face fines between $5,000 and $50,000 per day of violation, imprisonment up to three years, or both. In cases where a criminal violation results in the knowing endangerment of another person, a defendant may be fined up to $250,000 ($1 million for a corporation), imprisoned up to fifteen years, or both. Finally, any person who knowingly makes a false material statement, representation, or certification in a document filed or required to be maintained under the CWA shall be fined up to $10,000, imprisoned up to two years, or both. The maximum fines and terms of imprisonment double for repeat offenders. For these enforcement provisions, a responsible corporate officer is a person subject to penalties.

EPA and its state counterparts reserve criminal enforcement authority for only the most flagrant and egregious violations. Yet prosecutions do occur, resulting in multi-million dollar fines and prison sentences. In the past three years, EPA and TCEQ obtained two significant convictions against violators in Texas.

On November 2, 2012, EPA convicted Pemoco Services, Inc. with multiple Texas Water Code violations relating to the operation of its oil and gas waste landfarming site in Jefferson County. The Travis County District Attorney’s Environmental Protection Unit prosecuted the case against the corporation, which applied over 1.3 million barrels of used drilling muds at its facility in violation of its Section 404 permit. The judge ordered Pemoco to pay fines totaling $1.35 million; Pemoco also agreed to pay nearly $15,000 in restitution for lab analysis by the Texas Parks and Wildlife Department Laboratory and $1.1 million to clean up its now-closed facility.

In 2010, Fleet Management Limited, a Hong Kong corporation that operated a Panamanian motor vessel in the Port of Point Comfort, Texas, was charged in a federal district court in Texas with failing to keep accurate oil record books, presenting a false book for inspection, and submitting false entries to conceal the amount of oil wastewater on board its vessel. Fleet Management pled guilty to all counts and was assessed a $3 million criminal

57 Id. at 3.  
58 Id., supra note 38, at 22.  
59 CWA § 309(c), 33 U.S.C. § 1319(c).  
60 Id. § 309(c)(4), 33 U.S.C. § 1319(c)(4).  
61 Id. § 309(c)(6), 33 U.S.C. § 1319(c)(6).  
64 Press Release, Department of Justice, Ship Member Pleads Guilty for Obstruction of U.S. Coast Guard Pollution Investigation (Apr. 22, 2010) (on file with authors).
penalty along with forty-eight months of probation. The ship’s chief and second engineers also pled guilty and were sentenced to sixty months of probation.

VII. Citizen Suits: Section 505

Section 505(a)(1) authorizes private citizens to bring enforcement actions against persons violating a permit, or against the Administrator or Secretary for failing to carry out a non-discretionary duty (although the majority view is that Section 309 imposes only discretionary duties). Citizens may seek injunctive relief to enforce a standard or limitation and civil penalties payable to the federal government. In addition to satisfying constitutional standing requirements, citizens seeking to bring a citizen suit must satisfy certain statutory prerequisites.

VIII. Conclusion

CWA enforcement mechanisms include injunctions, civil administrative and judicial actions, and criminal prosecutions brought against both institutions and individuals. EPA’s delegation of Sections 402 and 404 permitting and enforcement responsibilities to states further complicates this enforcement scheme. Moreover, the CWA allows citizens to act as private attorneys general under its citizen suit provisions. Violators of the Act’s permit program and requirements face at least two levels of government enforcement as well as challenges by private litigants.

The Act promises that violators “shall be subject to a civil penalty,” yet government agencies and courts enjoy significant discretion in pursuing enforcement and assessing penalties. No single factor prescribed under Sections 309(b) (civil judicial penalties) or 309(g) (civil administrative penalties) is dispositive, but Agency guidance and penalty precedents demonstrate that violators can expect, at a minimum, fines at least equal to any economic benefit they achieved by disobeying the Act. Bad faith, long histories of noncompliance, and violations that significantly affect human health and the environment will almost certainly increase the ultimate penalty. Prompt and willing disclosures of violations, cooperation with Agency inspectors and enforcers, early settlement, and implementation of SEPs may reduce the sharpest fines.

65 CWA § 505(a)(1), 33 U.S.C. § 1365(a)(1); see, e.g., Dubois v. Thomas, 820 F.2d 943, 945 (8th Cir. 1987) (holding that the duties imposed by Section 309(a)(3) on the EPA Administrator to issue compliance orders are discretionary).
67 Id. § 505(b), 33 U.S.C. § 1365(b).