

**ADOPTING THE CITIZEN SUIT PROVISION OF THE  
UNITED STATES CLEAN WATER ACT AS A TOOL FOR  
WATER POLLUTION ENFORCEMENT IN TURKEY**

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## I. INTRODUCTION

“High quality water is more than the dream of the conservationists, more than a political slogan; high quality water, in the right quantity at the right place at the right time, is essential to health, recreation, and economic growth.”

—Edmund S. Muskie

Water is the core of life. “Without it, life ceases.”<sup>1</sup> Water is a vital natural resource that most living creatures have in high levels<sup>2</sup> and is essential to our daily lives in many ways. From our morning coffee or afternoon beverage, to washing our hands or preparing our meals, we are extremely dependent on the existence of fresh, clean water.<sup>3</sup>

Access to uncontaminated water, however, has long been a challenge in many parts of the world. It is estimated that at least 1.1 billion people worldwide lack access to safe water.<sup>4</sup> Additionally, due to an unequal distribution of water, some territories have less amounts of fresh water than others. For example, Middle Eastern and North African countries have only 1% of accessible water despite their relatively large populations.<sup>5</sup>

“Water pollution is not new;” the waters of the earth have been polluted since life began.<sup>6</sup> However, water has been mostly misused since the dawn of “industrial-urban growth and development.”<sup>7</sup> Even the most developed countries suffer from the

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1. ROBERT GLENNON, *WATER FOLLIES: GROUNDWATER PUMPING AND THE FATE OF AMERICA'S FRESH WATERS* 13 (Island Press, 2nd ed. 2002).

2. See OLGA COSSI, *WATER WARS: THE FIGHT TO CONTROL AND CONSERVE NATURE'S MOST PRECIOUS RESOURCE* 13 (New Discovery Books, 1st ed. 1993).

3. RAYMOND GABLER & THE EDITORS OF CONSUMER REPORTS BOOKS, *IS YOUR WATER SAFE TO DRINK?* 7 (Consumers Union 1988).

4. *Water Facts*, WATER AMBASSADORS CANADA, WATER AMBASSADORS CANADA, <http://www.waterambassadorscanada.org/PDF/WACpamphlet.pdf> (last visited July 8, 2017).

5. Dr. Raneek Khooshie Lal Panjabi, *Not a Drop to Spare: The Global Water Crisis of the Twenty-First Century*, 42 GA. J. INT'L & COMP. L. 277, 308 (2014).

6. CLAIRE JONES, STEVE J. GADLER & PAUL. H. ENGSTROM, *POLLUTION: THE WATERS OF THE EARTH* 13 (Lerner Publications Co. 1971).

7. Robert D. Hennigan, *Water Pollution*, 19 BIOSCIENCE 976, 976 (1969).

adverse effects of water pollution. According to the United States Environmental Protection Agency (EPA), approximately 55% of the country's rivers are not in a healthy condition for aquatic life.<sup>8</sup> It is believed that water pollution will increase in the years to come. According to Peter Gleick, one of the world's foremost experts on the water crisis, seventy-six million people could die from waterborne diseases by 2020.<sup>9</sup>

The global water crisis has adversely affected Turkey as well. The shortage of usable water is becoming an increasingly serious problem in many parts of the country, not only due to drought and the growing need for water, but also due to high levels of contamination in water, arising from point and non-point sources.

Turkey's regulatory framework for protecting water quality and preventing pollution dates back to the 1920's and 1930's, the early years of the country. The contemporary legal structure for water protection and management, however, only began in the early 1980's and is based on an elaborate regulatory scheme. The Turkish Constitution of 1982 is, hierarchically, the primary source of water pollution-related legislation.<sup>10</sup> In addition to the Constitution, there are a number of laws related directly or indirectly to Turkey's legislative framework for water pollution control. Such laws have continued to serve as the basis upon which further by-laws, declarations, and guidelines have since been promulgated.<sup>11</sup> Furthermore, numerous studies and projects have been carried out in order to implement the EU Water Framework Directive.<sup>12</sup> Despite such various legal instruments, Turkey lacks a national comprehensive water law—a law which would decrease the problems that have resulted from the application of existing regulations.

The Turkish government has taken a significant step towards eliminating this deficiency. The Ministry of Development, formerly known as the State Planning Organization, charged the General Directorate of the State Hydraulic Works (DSI) to prepare a comprehensive water law. In response, legal advisers examined national water acts from different countries that have had long-established legal frameworks such as France, as well as Brazil and South Africa, which have recently undergone a similar

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8. Press Release, EPA, EPA Survey Finds More Than Half of the Nation's River and Stream Miles in Poor Condition (Mar. 26, 2013), <http://yosemite.epa.gov/opa/admpress.nsf/0/C967210C37CFFB6885257B3A004CFAF6>.

9. Panjabi, *supra* note 5, at 300.

10. Türkiye Cumhuriyeti Anayasası [T.C. Ana.] [Constitution] m.17, 56 (Turkey).

11. Türkay Baran & Sevinç D. Özkul, *Türkiye'de Su Hukuku [Water Law in Turkey]*, 419 TÜRKİYE MÜHENDİSLİK HABERLERİ [TURKEY'S ENGINEERING NEWS] 52, 54 (2002).

12. *Id.*

restructuring.<sup>13</sup> However, although nearly fifteen years have passed since it was first formed, the draft law has still not been enacted due to an obligatory procedural process in the Turkish Grand National Assembly (TBMM).

The United States also faced water pollution problems in the late 1960's, and as a result, took necessary measures such as significantly amending the Federal Water Pollution Control Act<sup>14</sup> (FWPCA) of 1948. The Act was then amended in 1972, with the stated aim to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."<sup>15</sup> The 1972 Amendments have allowed American citizens to sue any person, including the government, who is in violation of the Act.<sup>16</sup> The Turkish regulatory framework has also allowed citizen enforcement of water pollution laws to some extent.

Many other nations also have legal regulations that allow citizens to bring an action to enforce water quality requirements; however, the American statutory mechanism quite likely presents the most comprehensive form of citizen enforcement in this regard. The success of citizen suits in the United States has prompted adoption of the law, and practices presented in the law, by other countries.<sup>17</sup> An analysis of the CWA citizen suit experience is undoubtedly insightful for Turkey in determining what kind of innovations would be most effective for better water pollution enforcement.

This study primarily analyzes the importance of citizen participation in the enforcement of water pollution laws and regulations in light of the citizen suit provision found in the CWA.<sup>18</sup> After discussing the American framework, this study analyzes citizen enforcement of water pollution legislation in Turkey and suggests that Turkey adopt a citizen suit provision modeled on that of the CWA, since Turkish environmental laws lack specifically-regulated citizen suit provisions. As this analysis will indicate, there are four vital elements that should be included in a CWA-modeled citizen suit provision: (1) the adoption of both a notice requirement and a diligent prosecution bar in order to

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13. Gokhan Orhan & Waltina Scheumann, *Turkey's Policy for Combating Water Pollution*, in *TURKEY'S WATER POLICY* 21 (Annika Kramer, Aysegul Kibaroglu & Waltina Scheumann eds., 2011).

14. The Federal Water Pollution Control Act was renamed the Clean Water Act in 1977.

15. 33 U.S.C. § 1251(a) (1972).

16. See 33 U.S.C. § 1365(a) (2012).

17. James R. May, *Now More Than Ever: Trends in Environmental Citizen Suits at 30*, 10 *WIDENER L. REV.* 1, 7 (2003).

18. See 33 U.S.C. § 1365.

prevent excessive litigation and to supplement, but not supplant, governmental enforcement; (2) the establishment of an obligatory self-monitoring requirement for wastewater dischargers, and the creation of an on-line system that discloses compliance performance of permittees to the public; (3) the adoption of an explicit fee provision that allows for the award of attorneys' fees to prevailing environmental attorneys; and (4) the establishment of a special fund that collects the money necessary for the payment of cleanup measures.

The ultimate goal of this study is to help shape Turkey's poor citizen enforcement performance of water pollution legislation by seeking solutions to citizen inaction, which in large part, is the result of inadequacies in the environmental laws themselves. This is an appropriate time for such a study, as the Turkish Draft Law on Water was submitted to public opinion by the Ministry of Forestry and Water Affairs (MoFWA) in 2012 and is still pending.

Part II following this introduction is dedicated to a review of the American experience in its adoption of the citizen suit provision in the CWA. The chapter is designed to provide the information necessary to best understand the study, by presenting the legislative and historical evolution of the CWA's citizen suit provision. Additionally, it presents the importance of citizen enforcement of environmental laws.

Part III primarily introduces some of the key concepts found in the CWA. It then describes the modern federal water pollution enforcement system in the United States. Lastly, it analyzes the role of citizen enforcement in the implementation of the CWA regulatory scheme. The aim of this chapter is to reveal the necessity of citizen enforcement under the CWA. It argues that the U.S. governmental enforcement mechanism is insufficient to ensure adequate protection for the nation's waters.

Part IV analyzes citizen enforcement of water pollution legislation in Turkey. Turkey lacks specifically-regulated citizen suit provisions in its environmental laws. While this necessarily limits the scope of the chapter, such a lack of legislation and enforcement serves as the basis for the study. This chapter then argues that the adoption of a CWA-modeled citizen suit provision is necessary and beneficial for the protection of Turkey's waters and will promote water pollution enforcement in Turkey. Lastly, it suggests that Turkey should adopt a citizen suit provision like that of the CWA, and, while doing so, it should consider the four fundamental elements previously mentioned, in order to make

citizen suits an effective mechanism for water pollution enforcement in Turkey. Finally, the fifth chapter concludes the study by presenting the main findings of the research.

## II. CONCEPTUAL FRAMEWORK: CITIZEN ENFORCEMENT OF ENVIRONMENTAL LAWS IN THE UNITED STATES IN LIGHT OF THE CITIZEN SUIT PROVISION EXPERIENCE OF THE CLEAN WATER ACT

“Globalization was supposed to break down barriers between continents and bring all peoples together. But what kind of globalization do we have with over one billion people on the planet not having safe water to drink?”

—Mikhail Gorbachev

### A. *Environmental Citizen Suits in General*

Joseph Sax, who supports the authorization of citizens to sue violators of environmental laws, initially raised the idea of an environmental citizen suit provision over forty-five years ago.<sup>19</sup> He argued that the need for environmental citizen suits arose from the political pressures and monetary difficulties that have weakened the capacity of governments to successfully enforce environmental laws.<sup>20</sup> Subsequently, the University of Michigan Law School succeeded in adding “a citizen’s right to litigate to protect environmental and public trust resources” to the Michigan Environmental Protection Act of 1969.<sup>21</sup> This step was followed by the enactment of the citizen suit provision of the Clean Air Act (CAA) in 1970. The CAA was the first federal environmental statute to include a citizen suit provision,<sup>22</sup> and today nearly all federal environmental statutes involve citizen suit provisions.<sup>23</sup>

In addition to federal environmental laws, state environmental statutes also include citizen suit provisions.<sup>24</sup> While some state environmental citizen suit provisions allow citizens to sue for the

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19. Peter H. Lehner, *The Efficiency of Citizens Suits*, 2 ALB. L. ENVTL. OUTLOOK 4, 4 (1996).

20. *Id.*

21. Karl S. Coplan, *Citizen Litigants Citizen Regulators: Four Cases Where Citizen Suits Drove Development of Clean Water Law*, 25 COLO. NAT. RESOURCES, ENERGY & ENVTL. L. REV. 61, 65 (2014).

22. 42 U.S.C. § 7604 (2012); See Lynwood P. Evans, *Bennett v. Spear: A New Interpretation of the Citizen-Suit Provision*, 20 CAMPBELL L. REV. 173, 184 (1997).

23. Evans, *supra* note 22, at 184.

24. James R. May, *The Availability of State Environmental Citizen Suits*, 18 NAT. RESOURCES & ENV'T 52, 53 (2004).

enforcement of environmental laws, others allow citizens to enforce specific attributes of environmental statutes.<sup>25</sup>

Environmental law was not the first field of law involving citizen enforcement and participation.<sup>26</sup> Prior to the creation of citizen suit provisions in environmental laws, statutes in other fields of law, such as the antitrust treble-damage provision, allowed the private enforcement of laws.<sup>27</sup> Citizen suits in environmental laws, however, were the first provisions that authorized private citizens to seek statutory rights for the benefit of all society, rather than personal benefit.<sup>28</sup>

In general, a citizen suit provision empowers citizen groups to enforce the laws of the United States by acting as “private attorneys general.”<sup>29</sup> It grants a statutory right of action to individuals or organizations to enforce laws,<sup>30</sup> and authorizes the public to ensure that the enforcement mechanisms of environmental laws work properly.<sup>31</sup>

The purpose for creation of the citizen suit provisions in environmental legislation is to ensure enforcement of laws and to promote compliance.<sup>32</sup> Senator Edmund Muskie, one of the first environmentalists to enter the Senate, stated that citizen suits allow “regular people” to enforce environmental laws.<sup>33</sup> Citizen suits have served as a significant enforcement tool to promote environmental enforcement by allowing the public to be involved in the lack of precise enforcement of laws.<sup>34</sup>

One author expressed that “[c]itizen enforcement was to be a major balance wheel in the complex new regulatory machinery.”<sup>35</sup> Citizen suits are strong enforcement tools for individuals and organizations to protect the environment when the government

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25. *Id.*

26. Jeffrey G. Miller, *Private Enforcement of Federal Pollution Control Laws Part I*, 13 ENVTL. L. REP. 10309, 10309 (1983).

27. *Id.*

28. *Id.*

29. Harold J. Krent & Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 MICH. L. REV. 1793, 1795 n.10 (1993).

30. Laveta Casdorff, *The Constitution and Reconstitution of the Standing Doctrine*, 30 ST. MARY'S L.J. 471, 507 (1999).

31. *See id.* at 495.

32. Jeffrey G. Miller, *Overlooked Issues in the “Diligent Prosecution” Citizen Suit Preclusion*, 10 WIDENER L. REV. 63, 63 (2003).

33. Eugene C. McCall Jr. & Ryan W. Trail, *Citizen Suits to Enforce Federal Environmental Laws*, 23 S.C. LAW. 33, 34 (2012).

34. Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 185 (2000).

35. Phillip M. Bender, *Slowing the Net Loss of Wetlands: Citizen Suit Enforcement of Clean Water Act § 404 Permit Violations*, 27 ENVTL. L. 245, 264 (1997) (quoting JEFFREY G. MILLER, CITIZEN SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL LAWS vii (1987)).

fails to do so itself. In the absence of environmental citizen suits, citizens do not have the ability to adequately enforce environmental statutes and mitigate pollution.<sup>36</sup> This is because, first, environmentally-affected citizens do not have many alternative remedies to combat pollution; additionally, the few remedies that citizens may have, such as the common law nuisance action, which requires citizens to prove that they have suffered personal injuries rather than general injury to the public, are not as effective to combat pollution.<sup>37</sup> Second, the U.S. government has sometimes failed to successfully enforce environmental laws due to a lack of “financial and human resources.”<sup>38</sup> Therefore, without the existence of citizen suits, violators of environmental laws can more easily escape the repercussions of their unlawful actions.<sup>39</sup>

### *B. Citizen Suit Provision of the Clean Water Act*

In 1972, Congress added a citizen suit provision, § 505, to the CWA.<sup>40</sup> While adding the citizen suit provision to the CWA, Congress intended federal and state governments to be primarily responsible for enforcing the Act, and simultaneously citizen groups would take a significant “role in filling gaps that remained.”<sup>41</sup> Congress believed that the protection of environmental quality has national value and should be dually regarded by both the government and public interest groups. Therefore, Congress supported citizen participation in the enforcement of the CWA, which not only creates public confidence in the government’s ability to enhance water quality, but also guarantees enforcement of the Act.<sup>42</sup>

Congress intended to supplement the Act’s enforcement mechanism with the enactment of § 505.<sup>43</sup> Such an innovation was needed as both the federal and state governments had failed to

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36. Lehner, *supra* note 19 at 4.

37. *Id.*

38. Mark Seidenfeld & Janna Satz Nugent, “*The Friendship of the People*”: Citizen Participation in Environmental Enforcement, 73 GEO. WASH. L. REV. 269, 269 (2005).

39. Peter A. Appel, *The Diligent Prosecution Bar to Citizen Suits: The Search for Adequate Representation*, 10 WIDENER L. REV. 91, 91 (2004).

40. Russell S. Frye, *Citizens’ Enforcement of the US Clean Water Act*, in WATER POLLUTION LAW AND LIABILITY 183 (Patricia Thomas ed., Graham & Trotman & International Bar Association 1993).

41. Laird Lucas, Citizen Suits, in THE CLEAN WATER ACT HANDBOOK 258 (Mark A. Ryan ed., ABA Publishing 2d ed. 2003).

42. Gail J. Robinson, *Interpreting the Citizen Suit Provision of the Clean Water Act*, 37 CASE W. RES. 515, 519 (1987).

43. *Id.* at 517.

successfully enforce the federal water quality standards set up under the CWA. Citizen enforcement not only assures compliance with the Act when the government fails, but also provokes the government to be more robust in its enforcement actions.<sup>44</sup>

The real innovation of the CWA's citizen suit provision was not, however, that it gave private citizens a right to sue for degradation or pollution of waters. Before this provision was enacted, citizens had applied common law tort actions to terminate or mitigate water pollution; "under actions for negligence, trespass, private and public nuisance," citizens could demand injunctive relief and damages.<sup>45</sup> The real innovation was that the CWA citizen suit provision empowered citizens or citizen groups to enforce the standards of the Act. Plaintiff citizens would no longer bear the relatively difficult burden of proof to succeed in their lawsuit. They would only have to show that the defendant was out of compliance with the CWA.<sup>46</sup>

The CWA provides two types of citizen suits. First, § 505(a)(1) authorizes "any citizen" to commence a suit against "any person" alleged to be in violation of the Act's "effluent standard or limitation" or an order of the Administrator or the state that is issued with respect to an effluent standard or limitation.<sup>47</sup> The CWA defines the term of "person" broadly; according to the Act, "person" includes individuals as well as a vast variety of entities such as corporations, partnerships, associations, municipalities, commissions, and interstate bodies.<sup>48</sup> Additionally, the citizen suit provision itself indicates that the term "person" includes "(i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution."<sup>49</sup>

Second, according to § 505(a)(2) of the Act, a citizen may commence an action against the Administrator if he or she fails to "perform any act or duty" under the CWA, "which is not discretionary with the Administrator."<sup>50</sup> The issue that must be addressed in this type of suit is whether a particular duty is

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44. Marcia R. Gelpel & Janis L. Barnes, *Penalties in Settlements of Citizen Suit Enforcement Actions Under the Clean Water Act*, 16 WM. MITCHELL L. REV. 1025, 1025–26 (1990).

45. Sharon Elliot, *Citizen Suits Under the Clean Water Act: Waiting for Godot in the Fifth Circuit*, 62 TUL. L. REV. 175, 176 (1987).

46. 33 U.S.C. § 1365 (2017).

47. 33 U.S.C. § 1365(a)(1).

48. *Id.* § 1362(5).

49. *Id.* § 1365(a)(1).

50. *Id.* § 1365(a)(2).

nondiscretionary.<sup>51</sup> If the CWA asks the EPA to act in a specified way by a specified date, it establishes a nondiscretionary duty; however, decisions concerning whether or not to “approve a grant for the construction of an underground sewage retention basin,” prosecute a violation or violations of the CWA, or deny a permit issued under the Act, are some examples discretionary duties.<sup>52</sup>

Statistics show that the Act’s citizen suit provision has clearly been the most frequently litigated provision among all environmental statutes.<sup>53</sup> According to a Recent Trends article, between the years of 1995 and 2001, a total of 298 citizen suit complaints were received under the CWA; while, at the same time, only thirty-eight citizen suit complaints were received under the CAA.<sup>54</sup>

There are several reasons behind the relative popularity of the CWA’s citizen suit provision. First, it is easy to prove violations of the National Pollutant Discharge Elimination System (NPDES) permits.<sup>55</sup> The NPDES program prohibits the discharge of any pollutant from any point source into the nation’s waters except as authorized by a permit.<sup>56</sup> NPDES permits determine the amount of pollutants that can be lawfully discharged from various point sources over several periods of time.<sup>57</sup>

NPDES permittees are obliged to record test outcomes and other statistics with the EPA, which is an independent agency of the U.S. federal government and maintains the primary “responsibility for water quality and water pollution issues.”<sup>58</sup> The EPA collaborates with state agencies by keeping information updated on Discharge Monitoring Reports (DMRs).<sup>59</sup> The ease of proving violations of NPDES permits arises from the fact that DMRs filed by the NPDES permittees are subject to disclosure under freedom of information laws.<sup>60</sup> Additionally, EPA and state agency websites have been making some compliance information

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51. Lucas, *supra* note 41, at 261.

52. *Id.* at 262.

53. Edward Lloyd, *Citizen Suits and Defenses Against Them*, 101 A.L.I. A.B.A. CONTINUING LEGAL EDUCATION, ENVIRONMENTAL LITIGATION 885, 889 (2004).

54. *Id.*

55. Frye, *supra* note 40, at 184.

56. 33 U.S.C. § 1342 (1972); *id.* § 1311(a).

57. Matthew M. Werner, *Mootness and Citizen Suit Civil Penalty Claims Under the Clean Water Act: A Post-Lujan Reassessment*, 25 ENVTL. L. 801, 803 (1995).

58. JACKSON B. BATTLE & MAXINE I. LIPELES, *WATER POLLUTION 2* (3d ed. 1998).

59. Emily A. Berger, *Standing at the Edge of a New Millennium: Ending a Decade of Erosion of the Citizen Suit Provision of the Clean Water Act*, 59 MD. L. REV. 1371, 1373 (2000).

60. Coplan, *supra* note 21, at 70.

available to the public.<sup>61</sup> Many courts have held that DMRs are admissible as evidence of violation or violations of the CWA.<sup>62</sup> Therefore, a plaintiff may easily succeed in a citizen suit brought under the CWA only by proving that the declared discharge amount exceeds the permissible limit specified in the NPDES permit.<sup>63</sup>

Another reason for the popularity of the citizen suit provision in the CWA is that it is comparatively easy for citizens to take samples of water discharges, and inexpensive laboratory water examinations are available throughout the country.<sup>64</sup> Moreover, the CWA has obtained great publicity since its enactment; to give only one example “the media bombardment of the public with images of the Cuyahoga River burning” led Americans to realize that many parts of the nation’s water “were no longer swimmable or fishable.”<sup>65</sup> Furthermore, the CWA is a relatively well-known statute, the average American has probably heard more about the CWA than other environmental laws.<sup>66</sup>

Another explanation of why the citizen suit provision in the CWA has significantly succeeded in enforcing the Act is the developing Waterkeeper movement, which started “with the creation of the Hudson Riverkeeper in 1996.”<sup>67</sup> Under this movement, Waterkeepers, which are nonprofit organizations, frequently initiate citizen suits themselves or stimulate others to do so.<sup>68</sup> Additionally, public interest groups have made enormous contributions to citizen enforcement of the CWA. For example, the Natural Resources Defense Council, the Sierra Club, the Chesapeake Bay Foundation, and Public Interest Research Group branches have brought hundreds of suits against violators of the Act since the early 1980’s.<sup>69</sup> Such growth in the number of citizen suits under the CWA demonstrates that citizen groups have great concern over the contamination of the nation’s water, and are willing to put forth effort to protect it.

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61. *Id.* at 71.

62. *Id.*

63. Christine L. Rideout, *Where are All the Citizen Suits?: The Failure of Safe Drinking Water Enforcement in the United States*, 21 HEALTH MATRIX 655, 685–86 (2011).

64. Coplan, *supra* note 21, at 70.

65. Rideout, *supra* note 63, at 686–87.

66. *Id.* at 687.

67. JOEL M. GROSS & KERRI L. STELCEN, CLEAN WATER ACT 131 (2d ed. 2012).

68. *Id.* at 132.

69. Frye, *supra* note 40, at 184.

### *C. Importance of Environmental Citizen Suits*

The enactment of citizen suit provisions gave individuals and organizations a direct role, for the first time, in enforcing environmental laws.<sup>70</sup> Over the years, environmental citizen suits have become a very effective and compelling enforcement tool.<sup>71</sup> According to James May, “[c]itizen suits are at the heart of the field of environmental law.”<sup>72</sup> They are necessary and effective to control agencies’ incapability to reduce or prevent violations of environmental statutes.<sup>73</sup> Statistics indicate that the federal and state governments have failed to adequately and frequently enforce environmental statutes.<sup>74</sup> The wide use of citizen suits can protect the enforcement mechanism of environmental laws by preventing inadequate and weak governmental enforcement of such laws.<sup>75</sup>

Without citizen participation, environmental litigation would be incomplete.<sup>76</sup> There are several reasons that make citizen suits such an important component of environmental litigation. First, unlike governmental environmental enforcement actions, which are constrained by insufficient funds,<sup>77</sup> citizen suits are free from financial constraints. Such a feature allows for environmental citizen suits to be more easily litigated compared to governmental actions. Second, citizens are able to enforce environmental statutes more easily than governmental agencies because governmental agencies, by their very nature, are subject to more complicated and bureaucratic processes, which can often cause delays and other hindrances to proceedings.

Third, government agencies and officials do not have adequate staff or expertise to act properly in the enforcement of environmental laws.<sup>78</sup> Adverse effects from violations of environmental laws may differ from place to place, and “location-specific

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70. JAMES SALZMAN & BARTON H. THOMPSON, JR., *ENVIRONMENTAL LAW AND POLICY* 78 (3d ed. Thompson Reuters/Foundation Press 2010) (2003).

71. Bender, *supra* note 35, at 265–66, 268.

72. May, *supra* note 17, at 4.

73. Elliot, *supra* note 45, at 177.

74. May, *supra* note 17, at 5.

75. David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority is Shared by the United States, the States, and Their Citizens?*, 54 MD. L. REV. 1552, 1561 (1995).

76. See Walter B. Russell, III & Paul Thomas Gregory, *Awards of Attorney’s Fees in Environmental Litigation: Citizen Suits and the “Appropriate” Standard*, 18 GA. L. REV. 307, 324–25 (1984).

77. Bender, *supra* note 35, at 261.

78. Russell & Gregory, *supra* note 76, at 324.

information” and local expertise are needed to detect such effects.<sup>79</sup> Centralized agencies have very limited information and expertise in this regard; local citizens, however, are in a better position to monitor and identify those environmental effects.<sup>80</sup>

Fourth, due to political pressure, government agencies may be unwilling to prosecute violations of environmental laws.<sup>81</sup> Citizen suits solve this issue by allowing individuals or small groups of people to directly enforce environmental laws without facing any political limitations.<sup>82</sup> As evidenced by the analysis thus far, environmental citizen suits have provided “political, environmental and economic benefits.”<sup>83</sup> Additionally, the expanded environmental enforcement provided by citizen suits has reduced the number of violations of environmental regulations, and, undoubtedly, fewer violations means a safer and cleaner environment.<sup>84</sup>

In summation, environmental citizen suits are necessary and, indeed, vital for the effective enforcement of environmental laws; they are especially valuable when the federal and state governments fail to enforce those laws. Such suits have secured compliance with environmental laws and have helped to prevent pollution and keep the environment clean and safe.

### III. MODERN FEDERAL WATER POLLUTION ENFORCEMENT SYSTEM IN THE UNITED STATES

“Children of a culture born in a water-rich environment,  
we have never really learned how important water is to us.  
We understand it, but we do not respect it.”

—William Ashworth

#### *A. Review of the Clean Water Act*

The CWA is one of the two major statutes governing water quality in the United States.<sup>85</sup> It was especially designed to establish a comprehensive framework for national pollution control standards.<sup>86</sup> The Act additionally provides “technical tools” and

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79. Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 DUKE ENVTL. L. & POL'Y F. 39, 44 (2002).

80. *Id.*

81. Russell & Gregory, *supra* note 76.

82. Adler, *supra* note 79, at 45.

83. Lehner, *supra* note 19, at 8.

84. *Id.* at 7.

85. BATTLE & LIPELES, *supra* note 58, at 4.

86. *Id.*

“financial assistance” to protect the integrity of U.S. surface waters.<sup>87</sup> The second major statute governing water quality is the Safe Drinking Water Act, which provides the mechanism for developing national primary drinking water standards and guidelines to protect groundwater quality.<sup>88</sup>

Congress passed the CWA to achieve three objectives.<sup>89</sup> The first objective was to “restore and maintain the ‘chemical, physical, and biological integrity of the nation’s waters.’”<sup>90</sup> The second was “that the discharge of pollutants into the navigable waters be eliminated by 1985.”<sup>91</sup> The third objective was to ensure “fishable and swimmable” waters.<sup>92</sup>

A number of acts and amendments constituted grounds for the creation of the CWA.<sup>93</sup> The Rivers and Harbors Act of 1899, also known as the Refuse Act, is commonly accepted as the first piece of federal water pollution control law.<sup>94</sup> Section 13 of the Act prohibited the discharge of any refuse, except for municipal storm-water and sewage, into navigable U.S. waters without a U.S. Army Corps of Engineers permit.<sup>95</sup> However, the Corps for many years tended to apply this rule “only to the discharge of materials that could impede navigation.”<sup>96</sup> Consequently, the Refuse Act became insufficient soon after it had passed into law.<sup>97</sup>

The enactment of the FWPCA of 1948 was the first contemporary attempt to control water pollution.<sup>98</sup> According to the Act, primary authority to control water pollution belonged to the states;<sup>99</sup> they could choose to accept or refuse the federal

87. *Id.*

88. *Id.* at 5.

89. *The 1998 Idaho Water Quality Symposium*, 35 IDAHO L. REV. 453, 455 (1999); Jacob Creuder, *Amazing Grace or Sad Disgrace: Can the Clean Water Act Evolve to Provide Stronger Protection in the Wake of Natural Disasters?*, 14 U. BALT. J. ENVTL. L. 101, 114 (2007); 33 U.S.C. § 1251(a)(1)–(2) (1972).

90. Creuder, *supra* note 89, at 114; 33 U.S.C. § 1251(a).

91. 33 U.S.C. § 1251(a)(1); Creuder, *supra* note 89, at 114.

92. 33 U.S.C. § 1251(a)(2); Creuder, *supra* note 89, at 114.

93. See Kenneth M. Murchison, *Learning from More Than Five-and-a-Half Decades of Federal Water Pollution Control Legislation: Twenty Lessons for the Future*, 32 B.C. ENVTL. AFF. L. REV. 527, 527–32 (2005).

94. Act of Mar. 3, 1899, ch. 425, § 13, 30 Stat. 1152 (codified as amended at 33 U.S.C. § 407 (2012)); William L. Andreen, *The Evolution of Water Pollution Control in the United States—State, Local, and Federal Efforts, 1789-1972: Part II*, 22 STAN. ENVTL. L.J. 215, 220 (2003) [hereinafter Andreen, *Evolution*]; William H. Rodgers, Jr., *Industrial Water Pollution and the Refuse Act: A Second Chance for Water Quality*, 119 U. PA. L. REV. 761, 762 (1971).

95. 33 U.S.C. § 407; Andreen, *Evolution*, *supra* note 94, at 221.

96. Andreen, *Evolution*, *supra* note 94, at 221.

97. THOMAS T. LEWIS, *ENCYCLOPEDIA OF ENVIRONMENTAL ISSUES: WATER AND WATER POLLUTION* 16 (Craig W. Allin ed., 2011).

98. Creuder, *supra* note 89, at 103.

99. BATTLE & LIPELES *supra* note 58, at 13; Frank J. Barry, *The Evolution of the Enforcement Provisions of the Federal Water Pollution Control Act: A Study of the Difficulty*

pollution abatement plan that was prepared under the FWPCA.<sup>100</sup> The federal government had a secondary role, which was to provide assistance to state and local bodies through technical advice and additional funding.<sup>101</sup>

The FWPCA was amended five times between 1948 and 1972; however, each amendment made only a small contribution to improving federal interaction in the water pollution control process.<sup>102</sup> Congress recognized by the early 1970's that their earlier effort to regulate and control water pollution was neither effective nor sufficient.<sup>103</sup> As a result, some form of comprehensive reform seemed urgent and inevitable. In response, in 1972, Congress enacted comprehensive amendments to the FWPCA in order to restructure the federal water pollution control process,<sup>104</sup> and the Act of 1972 brought many innovations in this regard.

Primarily, the Act instituted a wholly new system of nationally uniform technology-based effluent limitations, which have been applied to point source discharges across the nation to achieve Congress' expressly stated goal of establishing nationally uniform water pollution control standards.<sup>105</sup> The Act defined the term "effluent limitation" as a "restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources."<sup>106</sup>

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in *Developing Effective Legislation*, 68 MICH. L. REV. 1103, 1104 (1970); Andreen, *Evolution*, *supra* note 94, at 237; Murchison, *supra* note 93, at 530; N. William Hines, *Nor Any Drop to Drink: Public Regulation of Water Quality Part III: The Federal Effort*, 52 IOWA L. REV. 799, 810 (1967); Creuder, *supra* note 89, at 103.

100. LEWIS, *supra* note 97.

101. Andreen, *Evolution*, *supra* note 94, at 237; Creuder, *supra* note 89, at 103; Hines, *supra* note 99.

102. Creuder, *supra* note 89, at 104.

103. John Dolgetta, Case Note, *Friends of the Earth v. Crown Central Petroleum: The Surrogate Enforcer Must Be Allowed to "Stand Up" For the Clean Water Act*, 15 PACE ENVTL. L. REV. 707, 710 (1998); Michael I. Krauthamer, Note, *Public Interest Research Group v. Magnesium Elektron, Inc.: Undetectable Injury, A Loophole in Citizen Suit Standing*, 50 ADMIN. L. REV. 837, 852-53 (1998).

104. William L. Andreen, *Beyond Words of Exhortation: The Congressional Prescription for Vigorous Federal Enforcement of the Clean Water Act*, 55 GEO. WASH. L. REV. 202, 215-16 (1987) [hereinafter Andreen, *Beyond Words*]; Creuder, *supra* note 89, at 104.

105. William L. Andreen, *Water Quality Today—Has the Clean Water Act Been a Success?*, 55 ALA. L. REV. 537, 537 (2004) [hereinafter Andreen, *Water Quality Today*]; Robert Erickson, Comment, *Protecting Tribal Waters: The Clean Water Act Takes Over Where Tribal Sovereignty Leaves Off*, 15 TUL. ENVTL. L.J. 425, 439 (2002); Carie Goodman McKinney, *Statute of Limitations for Citizen Suits Under the Clean Water Act*, 72 CORNELL L. REV. 195, 197 (1986); Andreen, *Evolution*, *supra* note 94, at 286.

106. 33 U.S.C. § 1362(11); Alberto B. Lopez, *Laidlaw and the Clean Water Act: Standing in the Bermuda Triangle of Injury in Fact, Environmental Harm, and "Mere" Permit Exceedances*, 69 U. CIN. L. REV. 159, 170 (2001).

Congress changed the focus of water quality legislation from *detection* to *prevention* by implementing water quality-related effluent limitations instead of “state-established water quality standards.”<sup>107</sup> The mechanism regulating water quality standards was found insufficient, partly because it focused only on common consequences of water pollution instead of causes, partly because of the rigorousness of demonstrating responsibility under such an approach, and partly because it did not provide efficient “federal back-up authority” either in applying or enforcing the standards.<sup>108</sup> Therefore, Congress favored the use of technology-based effluent limitations, which are uniformly applied to all dischargers without considering the character of the receiving waters.<sup>109</sup>

However, state water quality standards, which are subject to EPA approval, were maintained, extended, and developed to strengthen and improve the technology-based limitations.<sup>110</sup> They were framed for the utilization and benefit of specific waters.<sup>111</sup> According to the scheme covering water quality standards, each state was asked to zone its waters for designated purposes such as recreation or fish and wildlife protection.<sup>112</sup> The Act of 1972 has provided more stringent water quality-based effluent limits for certain rivers or lakes in instances where water quality is still impaired following the application of the technology-based effluent limitations.<sup>113</sup> Such an approach intends to promote more rigorous pollution control whenever necessary by providing further protection.<sup>114</sup>

In addition to the institution of a uniform system of technology-based effluent limitations, § 301(a) of the Act strictly prohibits the discharge of any kind of pollution into the nation’s waters unless specifically authorized by an NPDES permit obtained from either the Administrator of the EPA or a state agency that has a

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107. Arthur G. Carine, III, Note, *The Clean Water Act, Standing, and the Third Circuit's Failure to Clean Up the Quagmire*: Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc., 4 VILL. ENVTL. L.J. 179, 180–81 (1993); BATTLE & LIPELES *supra* note 58, at 181; Dolgetta, *supra* note 103, at 710–11; Krauthamer, *supra* note 103, at 853.

108. BATTLE & LIPELES *supra* note 58, at 18–82.

109. *Id.* at 182.

110. 33 U.S.C. § 1313; William L. Andreen, *Motivating Enforcement: Institutional Culture and the Clean Water Act*, 24 PACE ENVTL. L. REV. 67, 68 (2007) [hereinafter Andreen, *Motivating Enforcement*]; BATTLE & LIPELES, *supra* note 58, at 182; Andreen, *Evolution*, *supra* note 94, at 276; Andreen, *Water Quality Today*, *supra* note 105, at 548.

111. Andreen, *Water Quality Today*, *supra* note 105, at 548.

112. BATTLE & LIPELES, *supra* note 58, at 5; Andreen, *Water Quality Today*, *supra* note 105, at 548.

113. BATTLE & LIPELES, *supra* note 58, at 5; Andreen, *Water Quality Today*, *supra* note 105, at 537–38.

114. BATTLE & LIPELES, *supra* note 58, at 5.

federally-approved discharge program.<sup>115</sup> Congress instituted the NPDES to manage and control both effluent limitations and more stringent effluent limits.<sup>116</sup>

Under this system, dischargers have been required to obtain a permit specifying the permissible and lawful amount of pollutant that they can discharge into the nation's waters.<sup>117</sup> Section 402 of Act has authorized the EPA to issue NPDES permits; however, simultaneously, states may also be authorized to issue such permits if they prove that their water pollution control programs are adequately sufficient to satisfy minimum federal requirements.<sup>118</sup> The State Pollutant Discharge Elimination System (SPDES) permit program must be approved by the Administrator of the EPA to become valid and applicable.<sup>119</sup> Additionally, the EPA can always withdraw a state's authority to issue permits if the state laws become too lenient.<sup>120</sup> In brief, the Act of 1972 gives the federal government ultimate authority in issuing permits;<sup>121</sup> it allows the EPA to be the prevailing authority in a case where states have "long held sway."<sup>122</sup>

Under the Act of 1972, the EPA has been authorized to impose monitoring and reporting requirements for NPDES and SPDES permits holders.<sup>123</sup> Accordingly, permittees have been required to monitor their discharges and periodically file monitoring reports (DMRs).<sup>124</sup> In order to make DMRs accessible to the public, these reports must be provided to the EPA and the relevant state agency at the time specified on the permits.<sup>125</sup> Consequently, detection of violations of permit conditions or limitations is relatively easy

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115. 33 U.S.C. § 1342; Amanda J. Masucci, *Stand By Me: The Fourth Circuit Raises Standing Requirements in Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 12 VILL. ENVTL. L.J. 171, 175 (2001); Carine, *supra* note 107, at 181; Werner, *supra* note 57, at 803.

116. William L. Andreen, *Do Citizen Suits Seeking Civil Penalties Become Moot When Pollution Violations Are Cured?*, ABA PREVIEW 7, 7 (2000) [hereinafter Andreen, *Citizen Suits*]; Lopez, *supra* note 106, at 171.

117. 33 U.S.C. § 1342 (2012); Lopez, *supra* note 106, at 171.

118. 33 U.S.C. § 1342(b); Lopez, *supra* note 106, at 171.

119. 33 U.S.C. § 1342(b); Leonard O. Townsend, Note, *Hey You, Get Off [of] My Cloud: An Analysis of Citizen Suit Preclusion under the Clean Water Act*, 11 FORDHAM ENVTL. L.J. 75, 80 (2000).

120. 33 U.S.C. § 1342(c)(3); Goodman McKinney, *supra* note 105, at 198.

121. Goodman McKinney, *supra* note 105, at 198.

122. Andreen, *Evolution*, *supra* note 94, at 286.

123. 33 U.S.C. § 1318 (a)(A); Andreen, *Citizen Suits*, *supra* note 116, at 8; Andreen, *Water Quality Today*, *supra* note 105, at 549; Townsend, *supra* note 119, at 81.

124. 33 U.S.C. § 1318 (a); Andreen, *Citizen Suits*, *supra* note 116, at 8; Andreen, *Water Quality Today*, *supra* note 105, at 549; Lopez, *supra* note 106, at 171; Townsend, *supra* note 119, at 81.

125. Dolgetta, *supra* note 103, at 711; Krauthamer, *supra* note 103, at 853; Lopez, *supra* note 106, at 171; Townsend, *supra* note 119, at 81.

in most circumstances, needing only a comparison of permit requirements with permit holders' presented performances.<sup>126</sup>

Additionally, the 1972 amendments sought to protect "aquatic habitat[s]." <sup>127</sup> For instance, the Act created a new system to protect wetlands. <sup>128</sup> Under this system, discharges of dredge or fill materials are required to obtain a permit from the Corps to guarantee that dredging and filling activities are performed in an environmentally-friendly manner. <sup>129</sup> Moreover, the law has funded many states and local government projects to improve water quality; <sup>130</sup> for example, it has funded the construction of various municipal wastewater infrastructure projects. <sup>131</sup>

The Act of 1972 also established a broad pattern of sanctions for violations of the Act. <sup>132</sup> In this regard, the federal government has been authorized to enforce the Act through administrative, <sup>133</sup> civil, <sup>134</sup> or criminal <sup>135</sup> means. Further, state agencies have been authorized with concurrent power to enforce state-issued permits. <sup>136</sup> The Act of 1972 has provided additional authority to the federal government to ensure compliance with the Act by authorizing the EPA to take action upon a state's incapability or reluctance to enforce the Act's requirements. <sup>137</sup> In addition to the federal enforcement patterns, Congress included a citizen suit provision, which has allowed private citizens to enforce the Act. <sup>138</sup>

126. Andreen, *Citizen Suits*, *supra* note 116, at 8; Andreen, *Water Quality Today*, *supra* note 105, at 549.

127. BATTLE & LIPELES, *supra* note 58, at 5.

128. *See* 33 U.S.C. § 1344; BATTLE & LIPELES, *supra* note 58, at 5; Andreen, *Water Quality Today*, *supra* note 105, at 538.

129. *See* 33 U.S.C. § 1344; BATTLE & LIPELES, *supra* note 58, at 5; Andreen, *Water Quality Today*, *supra* note 105, at 538.

130. BATTLE & LIPELES, *supra* note 58, at 5.

131. BATTLE & LIPELES, *supra* note 58, at 5; Andreen, *Water Quality Today*, *supra* note 105, at 538.

132. Andreen, *Citizen Suits*, *supra* note 116, at 8; Andreen, *Water Quality Today*, *supra* note 105, at 549.

133. 33 U.S.C. § 1319(a) (2017) (through use of administrative compliance orders); 33 U.S.C. § 1319(g) (through use of administrative penalties); Andreen, *Citizen Suits*, *supra* note 116, at 8; Andreen, *Water Quality Today*, *supra* note 105, at 549.

134. 33 U.S.C. § 1319(b) (through use of civil suits for injunctive relief); 33 U.S.C. § 1319(d) (through use of civil penalties); Andreen, *Citizen Suits*, *supra* note 116, at 8; Andreen, *Water Quality Today*, *supra* note 105, at 550.

135. 33 U.S.C. § 1319(c) (through use of criminal penalties); Andreen, *Citizen Suits*, *supra* note 116, at 8; Andreen, *Water Quality Today*, *supra* note 105, at 550.

136. 33 U.S.C. § 1319(a)(1)-(2); Andreen, *Citizen Suits*, *supra* note 116, at 8; Andreen, *Water Quality Today*, *supra* note 105, at 549-50.

137. 33 U.S.C. § 1319; Creuder, *supra* note 89, at 105-06.

138. Creuder, *supra* note 89, at 106; Andreen, *Water Quality Today*, *supra* note 105, at 550; Lopez, *supra* note 106, at 171; Stephen Fotis, *Private Enforcement of the Clean Air Act and the Clean Water Act*, 35 AM. U.L. REV. 127, 135-36 (1985); *see* Andreen, *Citizen Suits*, *supra* note 116, at 8.

In 1977, substantial amendments to the FWPCA were passed by Congress, and the Act was renamed the Clean Water Act (CWA).<sup>139</sup> The 1977 amendments have provided further limitations on the discharge of pollutants and have authorized states to implement federal programs.<sup>140</sup> Additionally, many projects that addressed “cleanup, funding and restoration of various regions throughout the country” were implemented by the enactment of 1977 amendments.<sup>141</sup> Furthermore, the Act of 1977 focused on technological subjects; it has required industries to use the best available pollutant-control technology.<sup>142</sup>

In 1981, the CWA was amended again, and, although the 1981 amendments improved water quality standards, feasibility-based standards were further weakened or diluted.<sup>143</sup> Many problems, however, were reported: (1) declination of federal funding of treatment plans, (2) dismissal of “higher standards for publicly-owned treatment facilities,” and (3) failure to improve “overall ambient water quality.”<sup>144</sup>

Six years later, the Act was amended yet again with the enactment of the Water Quality Act of 1987.<sup>145</sup> The Act of 1987 stated that some programs should immediately be designated and implemented in order to control non-point sources of pollution and to meet the goals of the Act.<sup>146</sup> In response, several programs dealing more rigorously with non-point source pollution were adopted, including non-point source management programs.<sup>147</sup>

Additionally, the amended Act required states to prepare non-point source pollution assessment reports and allowed them to request federal funding when necessary.<sup>148</sup> Water quality standards have started to become a significant component of the water pollution control mechanism since the 1987 amendments.<sup>149</sup> Consequently, the water quality approach under the CWA, which was mainly shaped by the technology-based effluent limitations

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139. BATTLE & LIPELES, *supra* note 58, at 13; Murchison, *supra* note 93, at 557; *see* Creuder, *supra* note 89, at 106.

140. Masucci, *supra* note 115, at 177.

141. Creuder, *supra* note 89, at 106.

142. LEWIS, *supra* note 97, at 17.

143. Creuder, *supra* note 89, at 106–07; Murchison, *supra* note 93, at 564, 565.

144. Creuder, *supra* note 89, at 107; *see* Murchison, *supra* note 93, at 565.

145. LEWIS, *supra* note 97, at 17; GROSS & STELCEN, *supra* note 67, at 11; Creuder, *supra* note 89, at 107; Michael R. Bosse, Comment, *George J. Mitchell: Maine's Environmental Senator*, 47 ME. L. REV. 179, 191–92 (1995).

146. Creuder, *supra* note 89, at 107; 33 U.S.C. § 1251(a)(7) (2012).

147. GROSS & STELCEN, *supra* note 67, at 11; *see* Creuder, *supra* note 89, at 107; *see* Bosse, *supra* note 145.

148. Creuder, *supra* note 89, at 107; 33 U.S.C. § 1329(a)(1)(D).

149. BATTLE & LIPELES, *supra* note 58, at 181.

with the enactment of the 1972 amendments, is now focused primarily on water quality standards as it was prior to 1972.<sup>150</sup> In the following years, additional laws have amended parts of the CWA. To give just one example, the Oil Pollution Act of 1990 established cleanup provisions and penalties for oil discharges.<sup>151</sup>

### *B. Modern Federal Water Pollution Enforcement System*

While drafting the CWA in 1972, Congress realized the significance of an enforcement mechanism to guarantee the success of the Act's objectives.<sup>152</sup> The degree to which the CWA protects and improves the quality of the nation's waters is based not only on the integrity and sustainability of the Act, but also on the efficiency of the enforcement system.

Senator Edmund Muskie emphasized the importance of the enforcement when he stated that "tougher enforcement" was needed to ensure that the goals of the CWA were met.<sup>153</sup> Prior to 1972, the FWPCA of 1948 represented "fundamentally symbolic enforcement that accomplished very little environmental protection."<sup>154</sup> The pre-1972 law did not provide effective means for the federal enforcement of water quality standards and requirements.<sup>155</sup> The FWPCA of 1948 has been amended five times since 1972; however, some of the central issues with the enforcement provisions of the Act were never completely solved, as each amendment to the Act used "half measures" to remedy them or never attempted to tackle them.<sup>156</sup> The pre-1972 law made enforcement extremely burdensome for the federal government.<sup>157</sup> Essentially, federal enforcement was based on a complicated and time-consuming conference process that required a great amount of exertion to negotiate disagreements prior to any court action.<sup>158</sup>

Recognizing the great necessity to establish a more effective and applicable enforcement mechanism to successfully control water pollution, Congress focused heavily on the enforcement provisions of the FWPCA when redesigning the Act in 1972.

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150. *Id.*

151. 33 U.S.C. §2701 et seq. (1990).

152. GROSS & STELCEN, *supra* note 67, at 121.

153. Clifford Rechtschaffen, *Enforcing the Clean Water Act in the Twenty-First Century: Harnessing the Power of the Public Spotlight*, 55 ALA. L. REV. 775, 777 (2004); Andreen, *Evolution*, *supra* note 94, at 261-62.

154. PETER CLEARY YEAGER, *THE LIMITS OF LAW: THE PUBLIC REGULATION OF PRIVATE POLLUTION* 83 (Cambridge University Press 1991); Hodas, *supra* note 75, at 1554.

155. Hodas, *supra* note 75, at 1554-55.

156. Barry, *supra* note 99, at 1130.

157. *See* Hodas, *supra* note 75, at 1554.

158. *Id.* at 1564.

Congress made significant efforts to tackle the almost total lack of enforcement brought under the pre-1972 law, not only by creating an enforceable pollution control scheme, but also by improving and reinforcing the enforcement procedure itself.<sup>159</sup> Briefly, the 1972 amendments to the FWPCA created the fundamental scheme of the current water pollution control mechanism<sup>160</sup> and, as Bill Andreen has noted, robust enforcement was a main congressional objective.<sup>161</sup>

The Act of 1972 introduced a new pollution control scheme issued in § 301(a) of the Act.<sup>162</sup> Section 301(a) prohibits “the discharge of any pollutant by any person” to waters of the United States without a permit<sup>163</sup> issued through the NPDES.<sup>164</sup> Under this policy, anyone who discharges a pollutant without an NPDES permit or found in violation of such a permit is liable under the Act<sup>165</sup> and may be subject to enforcement proceedings.<sup>166</sup> This approach was essentially based on the principle that “no one has the right to pollute the nation's waters.”<sup>167</sup> Enforcement, therefore, is no longer restricted to cases in which public health or welfare is endangered or where the government is able to demonstrate that a violation of water quality standards is derived from a specific source of pollution.<sup>168</sup> Instead, the 1972 amendments make it illegal to “discharge a pollutant without a NPDES permit or in violation of such a permit.”<sup>169</sup>

Furthermore, Congress has authorized the EPA to impose monitoring and reporting requirements on NPDES permittees.<sup>170</sup> Under this authorization, NPDES permittees are obliged to file a regular discharge monitoring report that exposes the levels of pollutants existing in their emissions.<sup>171</sup> Any discharge exceeding the emission level specified in the NPDES permit violates the Act

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159. Andreen, *Motivating Enforcement*, *supra* note 110, at 68.

160. See Jeffrey M. Gaba, *Federal Supervision of State Water Quality Standards Under the Clean Water Act*, 36 VAND. L. REV. 1167, 1168 (1983).

161. Rechtschaffen, *supra* note 153, at 776–77.

162. Andreen, *Beyond Words*, *supra* note 104, at 216; Hodas, *supra* note 75, at 1564; see 33 U.S.C. § 1311(a) (2012).

163. 33 U.S.C. § 1311(a); Andreen, *Beyond Words*, *supra* note 104, at 216; Hodas, *supra* note 75, at 1564.

164. 33 U.S.C. § 1342; Hodas, *supra* note 75, at 1564.

165. Hodas, *supra* note 75, at 1565; 33 U.S.C. § 1311.

166. Werner, *supra* note 57.

167. Hodas, *supra* note 75, at 1565; Mark C. Van Putten & Bradley D. Jackson, *The Dilution of the Clean Water Act*, 19 U. MICH. J.L. REFORM 863, 874 (1986).

168. Andreen, *Beyond Words*, *supra* note 104, at 217.

169. *Id.*

170. *Id.*; see 33 U.S.C. § 1318(a).

171. See Andreen, *Beyond Words*, *supra* note 104, at 217; see Adler, *supra* note 79, at 47.

and subjects the permittee to enforcement actions.<sup>172</sup> In brief, in the Act of 1972, Congress combined the reporting requirement with strict liability for NPDES violations.<sup>173</sup>

Under the 1972 amendments, government enforcement authority is shared by the states and the federal government.<sup>174</sup> Like other major environmental statutes, the Act of 1972 functions under a “cooperative federalism” structure.<sup>175</sup> According to this framework, the federal government determines national standards and is “ultimately responsible” for guaranteeing that such standards are successfully enforced.<sup>176</sup> The EPA, however, authorizes states to implement their own programs under its authority. This delegation of authority serves at least two purposes: (1) it helps the federal budget, and (2) it provides greater supervision of compliance with environmental standards as states are in a better position than the federal government to monitor and detect inappropriate activities.<sup>177</sup>

The Act of 1972 has given the EPA tremendous power to enforce the Act; simultaneously, states have had a significant role in state governmental enforcement under the Act.<sup>178</sup> States are authorized to set their own water quality standards; additionally, they can obtain authorization to manage and enforce the Act’s permit program within their boundaries.<sup>179</sup> To obtain such authorization, states must set standards at least as stringent as federal standards and prove that they have sufficient staff, enforcement officials, and other capabilities to achieve successful administration of the program.<sup>180</sup>

Congress established this scheme of “overlapping enforcement authority” as an intentional response to previous patterns of lax enforcement.<sup>181</sup> Congress was skeptical about the EPA’s capacity or enthusiasm to consistently and powerfully enforce the Act; as a result, Congress “added a second governmental layer to the enforcement mix.”<sup>182</sup>

Although the Act sets national goals and objectives to improve water quality, designation of water quality standards and

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172. See 33 U.S.C. § 1311(a); see Adler, *supra* note 79, at 47.

173. See Adler, *supra* note 79, at 47.

174. Hodas, *supra* note 75, at 1578.

175. Rechtschaffen, *supra* note 153, at 781.

176. *Id.*

177. DANIEL RIESEL, ENVIRONMENTAL ENFORCEMENT: CIVIL AND CRIMINAL, § 1.04[1] (Law Journal Press 1997).

178. Andreen, *Motivating Enforcement*, *supra* note 110, at 69.

179. *Id.*; see 33 U.S.C. § 1342(b) (2014).

180. Rechtschaffen, *supra* note 153, at 781; see 33 U.S.C. § 1342(b).

181. Andreen, *Motivating Enforcement*, *supra* note 110, at 69.

182. *Id.*

enforcement schemes are essentially an “exclusively local activity.”<sup>183</sup> States with approved permit programs are primarily responsible for the enforcement of water pollution standards.<sup>184</sup> Once a violation is revealed in a state with an approved permit program, the federal government’s inclination and authority to “take over enforcement” is decreased.<sup>185</sup> The vast majority of enforcement actions, therefore, are brought by states.<sup>186</sup> Authorities approximate that states initiate at least 70% of all enforcement proceedings and that state officers carry out the wide majority of inspections.<sup>187</sup>

However, even in approved states, the Administrator of the EPA retains its enforcement authority; basically, the EPA can initiate an enforcement action for any violation that the state has not terminated.<sup>188</sup> The Administrator of the EPA may assume authority of the enforcement if the state has declined to respond to a critical and important matter in a proper and timely manner.<sup>189</sup> More specifically, the EPA may reclaim its authority under the following circumstances: (1) if the state fails to enforce water quality standards in a proper way, (2) if the state enforcement action causes water quality problems at a national level, or (3) if political pressure adversely affects the state’s enforcement capacity.<sup>190</sup>

In brief, while states have primary enforcement responsibility, the final enforcement authority remains with the federal government because the Administrator of the EPA has a significant responsibility to control and oversee approved states.<sup>191</sup> By authorizing the EPA to have ultimate enforcement power, Congress intended to “eliminate the tendency of states to compete for industrial investment and jobs by offering lenient pollution control policies.”<sup>192</sup>

The 1972 amendments allow for a wide range of governmental enforcement proceedings. The federal government has been authorized with enormous power to enforce the Act through civil

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183. Hodas, *supra* note 75, at 1656.

184. *Id.* at 1578.

185. Seidenfeld & Nugent, *supra* note 38, at 272.

186. Hodas, *supra* note 75, at 1578.

187. Seidenfeld & Nugent, *supra* note 38, at 272; David L. Markell, *The Role of Deterrence-Based Enforcement in a “Reinvented” State/Federal Relationship: The Divide Between Theory and Reality*, 24 HARV. ENVTL. L. REV. 1, 32 (2000).

188. BATTLE & LIPELES, *supra* note 58, at 439–40.

189. Seidenfeld & Nugent, *supra* note 38, at 272; Creuder, *supra* note 89, at 105–06; *see* Rechtschaffen, *supra* note 153, at 777; *see* 33 U.S.C. § 1319(a)(1) (2017).

190. RIESEL, *supra* note 177, at § Ch. 1, 1.04[2].

191. Goodman McKinney, *supra* note 105, at 197.

192. *Id.*

(both judicially and administratively) and criminal actions.<sup>193</sup> Section 1319 of the Act requires the EPA to bring an enforcement action if a state has failed to comply with enforcement provisions.<sup>194</sup> Similar to the federal government, states also maintain the authority to institute “state administrative, civil, and criminal environmental actions.”<sup>195</sup> The Act, additionally, has allowed citizen participation (both individual and organizational) in the enforcement process by adopting the citizen suit provision.<sup>196</sup> Furthermore, when the Act was amended in 1987, Congress expanded the federal enforcement authority by granting authority to the EPA to enforce administrative penalties,<sup>197</sup> and by allowing it to impose higher civil penalties.<sup>198</sup>

### *C. The Role of Citizen Enforcement Under the Clean Water Act*

The CWA applies a strict liability standard for all permit noncompliance under the Act;<sup>199</sup> therefore, a permittee’s intent to comply or put forth a good faith effort to comply does not change the fact that the permittee violated the Act.<sup>200</sup> Regardless of this mandate, CWA permit violations have nevertheless been a longtime problem.<sup>201</sup> Many facilities that release pollutants into municipal sewer systems remain unable to satisfy pretreatment standards;<sup>202</sup> and many rivers and other waters fail to satisfy water-quality purposes.<sup>203</sup> According to a 2003 survey implemented by the EPA, for example, approximately 25% of major facilities were in massive noncompliance with their permits issued under the CWA.<sup>204</sup>

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193. 33 U.S.C. § 1319 (2017). Additionally, § 504 of the CWA authorizes the Administrator of the EPA to mitigate “imminent and substantial” endangerments. 33 U.S.C. § 1364.

194. Creuder, *supra* note 89, at 105–06; Rechtschaffen, *supra* note 153, at 777; 33 U.S.C. § 1319(a)(1); Seidenfeld & Nugent, *supra* note 38, at 272.

195. May, *supra* note 24, at 54.

196. Creuder, *supra* note 89, at 106; Fotis, *supra* note 138, at 127–28.

197. Creuder, *supra* note 89, at 109; Rechtschaffen, *supra* note 153, at 778; Murchison, *supra* note 93, at 570; See 33 U.S.C. § 1319(g)(1).

198. Creuder, *supra* note 89, at 109; See 33 U.S.C. § 1319(d).

199. Hodas, *supra* note 75 at 1567–68; Townsend, *supra* note 119, at 82.

200. Townsend, *supra* note 119, at 82.

201. Rechtschaffen, *supra* note 153, at 781.

202. Andreen, *Water Quality Today*, *supra* note 105, at 543.

203. *Id.*

204. Rechtschaffen, *supra* note 153, at 781–82. The survey also reported that, “As of September 2003, . . . approximately 15% of major facilities and one third of minor facilities were operating with outdated permits.” *Id.*

Such substantial noncompliance begs the question of who has authorization to enforce the CWA's standards and requirements. As previously mentioned, the state governments, the federal government, and private citizens have been authorized to enforce the Act.<sup>205</sup> The legislative history of the CWA shows that Congress intended that state governments and the federal government hold primary enforcement authority and citizens solely reinforce the governmental authority to guarantee sufficient enforcement.<sup>206</sup> Thus, Congress included a notice requirement in the CWA's citizen suit provision to indicate that citizen enforcement acts as a supplement to state or federal enforcement.<sup>207</sup> Accordingly, at least sixty days prior to the commencement of a civil action, notice must be provided to the alleged discharger, to the federal government, and to the state in which the violation occurs.<sup>208</sup> The notice requirement provides governmental authorities with an opportunity to enforce the Act before citizens initiate civil actions.<sup>209</sup> Citizens may file suit unless, at the end of sixty days, the EPA or state "has commenced and is diligently prosecuting a civil or criminal action."<sup>210</sup>

This diligent prosecution bar limits citizen participation if the federal or a state authority is diligently prosecuting an action.<sup>211</sup> It supports the Congressional intent to allow citizen suits to function as a supplement to primary governmental enforcement,<sup>212</sup> and ensures that citizen suits under the CWA help, but do not take over, governmental enforcement authority.<sup>213</sup>

Statistics indicate, however, that both the state governments and the federal government have failed to successfully enforce the

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205. Edward E. Yates, *Federal Water Pollution Laws: A Critical Lack of Enforcement by the Enforcement Protection Agency*, 20 SAN DIEGO L. REV. 945, 950 (1983).

206. Thomas R. Head, III & Jeffrey H. Wood, *No Comparison: Barring Citizen Suits in Dual Enforcement Actions*, 18 NAT. RESOURCES & ENV'T 57, 57 (2004).

207. Appel, *supra* note 39, at 94.

208. *Id.* at 92; 33 U.S.C. § 1365(b)(1)(A) (2017).

209. Andreen, *Beyond Words*, *supra* note 104, at 221.

210. 33 U.S.C. § 1365(b)(1)(B); Andreen, *Beyond Words*, *supra* note 104, at 221. In 1987, the CWA extended this bar by adding § 1319(g)(6), which bars citizen suits if the EPA diligently prosecutes particular types of administrative remedies or if a state diligently prosecutes administrative actions under a comparable state law to the CWA. Section 1319(g)(6)(B), however, has provided an exception to this bar; accordingly, administrative proceedings cannot prevent citizen suits if a citizen suit has been brought prior to commencement of such proceedings or if the EPA or state agencies commence administrative proceedings after citizen plaintiffs have given notice of their intent to sue, provided the citizen suit is filed within 120 days after such notice is given.

211. Patrick S. Cawley, *The Diminished Need for Citizen Suits to Enforce the Clean Water Act*, 25 J. LEGIS. 181, 182 (1999).

212. Appel, *supra* note 39, at 101; *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987).

213. *See* Appel, *supra* note 39, at 101.

Act.<sup>214</sup> Many studies have shown that there is a significant deficiency in state enforcement programs, including failure to perform inspections, failure to act in a proper and effective manner, and failure to impose a high amount of penalties.<sup>215</sup> To give one example, a 2003 study by the Minnesota Pollution Control Agency found that approximately 18% to 31% of Minnesota's municipal and industrial facilities were in critical noncompliance, and that 45% of these facilities exceeded their effluent standards or limitations at least once.<sup>216</sup>

Similarly, in Louisiana, a 2002 study by the Legislative Auditor's Office reported extensive deficiencies in the state's enforcement programs; it showed out that approximately 80% of enforcement actions were not brought in a timely and appropriate manner, and that around 58% of pecuniary penalties charged for water-quality violations between the years of 1999 and 2001 were not collected.<sup>217</sup>

These results beg the question of why many states have failed to successfully enforce the CWA's requirements and standards. There are several reasons behind this criticality. First, only states with approved permit programs may commence enforcement actions against violators.<sup>218</sup> Second, local political concerns, including enthusiasm to attract industry, frequently impede rigorous enforcement.<sup>219</sup> Third, water pollution does not take notice of "political boundaries and jurisdictions."<sup>220</sup> Finally, limited state government budgets and rising interstate competition prevent stringent state enforcement activities.<sup>221</sup> The State Water Quality Management Resource Analysis concludes that state

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214. Rechtschaffen, *supra* note 153, at 781–87 ("From 1999 to 2001, the number of state and EPA inspections decreased by 8%. The number of EPA and state formal enforcement actions dropped by 11%, and the number of informal action declined by 50%. During this period, only 24% of significant violations resulted in a formal enforcement response. Additionally, a low percentage (9%–13%) of enforcement actions are carried out in a 'timely and appropriate' fashion, only about 40% of formal actions result in penalties, and average penalties imposed are low, between \$5000 and \$6000 per action."); Yates, *supra* note 205, at 951–54.

215. Rechtschaffen, *supra* note 153, at 784; Clifford Rechtschaffen, *Competing Visions: EPA and the States Battle for the Future of Environmental Enforcement*, 30 ENVTL. L. REP. 10803, 10807–09 (2000).

216. Rechtschaffen, *supra* note 153, at 784.

217. *Id.* at 785.

218. Yates, *supra* note 205, at 951.

219. *Id.*

220. *Id.*

221. Hodas, *supra* note 75, at 1572.

agencies have been gaining “less than one-half of the resources they need” to successfully enforce the CWA’s standards and requirements.<sup>222</sup>

Theoretically, the EPA, in its duty to control state programs should overcome weaknesses in state enforcement activities; however, the EPA has shown failure to exhibit efficient and sufficient performance to encourage and promote greater state enforcement.<sup>223</sup> There are a number of reasons behind this lack of federal promotion. First, local EPA administrators and officers have had intimate relationships with the states they control; thus, they have been reluctant to take appropriate actions against them.<sup>224</sup> Second, many oversight mechanisms are infrequently used, in part due to political constraints and in part due to limited resources.<sup>225</sup> At the same time, other traditional mechanisms have not been particularly effective and thus have been unable to promote better state performance.<sup>226</sup>

The EPA, however, is not only responsible for overseeing state programs, but also for enforcing the CWA itself.<sup>227</sup> Like state governments, the federal government has also been unable to successfully enforce the Act’s standards due to: (1) “poor organization,” (2) “lack of internal standards,” and (3) “substantial discretionary power not to enforce.”<sup>228</sup> First, the EPA has failed to successfully manage the agency’s enforcement division. In addition to this organizational deficiency, it has failed to issue consistent policy guidelines on enforcement procedure. Finally, EPA administrators and attorneys have been permitted not to enforce the CWA due to the lack of any mandatory statutory language.<sup>229</sup>

In summation, there has been a high-level of noncompliance with the CWA’s standards and requirements among regulated entities.<sup>230</sup> In addition to this failure on the part of regulated entities to comply with the CWA, the state and federal governments have also failed in their roles as enforcers. Consequently, the enforcement responsibility then falls upon private citizens.

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222. Rechtschaffen, *supra* note 153, at 789.

223. *Id.* at 787.

224. *Id.*

225. *Id.*

226. *Id.*

227. Yates, *supra* note 205, at 950.

228. *Id.* at 952.

229. *Id.* at 952–54 (“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.’ Although the language ‘shall’ appears to be mandatory, several courts have found that powers to issue abatement orders and file suits are discretionary.”).

230. Rechtschaffen, *supra* note 153, at 814.

#### IV. CITIZEN ENFORCEMENT OF WATER POLLUTION LEGISLATION IN TURKEY

“We’ve poisoned the air, the water, and the land. In our passion to control nature, things have gone out of control. Progress from now on has to mean something different. We’re running out of resources and we are running out of time.”

—Robert Redford

##### *A. The Turkish Public’s General Attitude Towards Environmental Protection*

The 1970’s was the first period the local people began to express their concerns and expectations about environmental problems and to seek solutions to those problems.<sup>231</sup> For example, in 1975, many local villagers living in a rural district adjacent to the city of Samsun, Turkey, protested the government, claiming that poisonous waste discharged by the copper facility damaged their produce.<sup>232</sup>

Environmental social movements in Turkey have begun to accelerate rapidly since in the 1980’s as a result of significant efforts by several non-governmental environmental organizations.<sup>233</sup> The power of such organizations, however, has remained weak in comparison to Western societies due to financial constraints, lack of volunteer involvement of the people, and inadequate interest of governmental bodies.<sup>234</sup> Despite such obstacles, these organizations have worked hard to catch the public’s attention and increase the number of environmentally-conscious people, and consequently have made impressive progress in protecting environmental resources and values.<sup>235</sup>

Similarly, Turkish individuals have become more aware of their ability to enforce environmental protection laws and

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231. Bülent Duru, Çevre Bilincinin Gelişim Sürecinde Türkiye’de Gönüllü Çevre Kuruluşları [Voluntary Environmental Institutions in Turkey during the Development of the Environment] 56 (1995) (unpublished master thesis, Ankara University).

232. E. Yasemin Ozdek, İnsan Hakki Olarak Çevre Hakki [The Right to Environment as a Human Right] 181 (Türkiye ve Orta Dogu Amme Idaresi Enstitüsü [Turkey and Middle East Public Administration Institution] 1993).

233. Ahmet Kısa, Türkiye’deki Sivil Toplum Kuruluşlarının Çevre ve Ormancılık Politikalarındaki Yeri [The Role of the Environmental and Forestry Policies of Non-governmental Organizations in Turkey] (2008) s. ii (unpublished master thesis, Suleyman Demirel University) (on file with the Suleyman Demirel University Library).

234. *Id.*

235. *Id.* at 20.

regulations since the beginning of the 1980's.<sup>236</sup> To give one example, 3,975 citizens living in the city of Kocaeli, Turkey, took legal action against the government, calling upon it to close the facility that polluted the city tremendously and threatened human health.<sup>237</sup>

More recently, in 2013, demonstrations that began in Taksim Square's Gezi Park in Istanbul have shown that Turkish individuals care seriously for their environment.<sup>238</sup> The Gezi Park movement began as a protest by an environmental group that gathered to protect trees from being cut down as a result of a government project to rebuild the park and Taksim Square.<sup>239</sup> Many people from various fields and backgrounds demonstrated their support for this civic environmentalist movement.<sup>240</sup>

As recently as February 2016, the people of Artvin protested a mining project that would likely be devastating to both humans and the environment.<sup>241</sup> The protesters blocked the construction from taking place by creating a human wall, placing their lives at risk in an effort to protect their environment.<sup>242</sup> In response, construction activities have been suspended until the Council of State, the highest court for administrative disputes, decides the issue on appeal.<sup>243</sup>

It is evident that the Turkish people have not ignored the problems arising from environmental pollution. Rather, they have continued to express concern and have taken responsive action since the early 1970's, and they remain today, gravely alarmed by the continued environmental degradation taking place in Turkey.

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236. Duru, *supra* note 231, at 57.

237. *Id.* at 56.

238. Ömür Harmansah, *Urban Utopias and How They Fell Apart: The Political Ecology of Gezi Parki*, in *THE MAKING OF A PROTEST MOVEMENT IN TURKEY: #OCCUPYGEZI* 121, 122–23 (Umut Özkirimli ed., 2014).

239. Kamil Demirhan, *Social Media Effects on the Gezi Park Movement in Turkey: Politics Under Hashtags*, in *SOCIAL MEDIA IN POLITICS: CASE STUDIES ON THE POLITICAL POWER OF SOCIAL MEDIA* 281, 282–83 (Bogdan Patrut & Monica Patrut eds., 2014).

240. *Id.* at 283.

241. Yonca Poyraz Dogan, *People of Artvin are Against Mining Because Their Way of Life is Threatened*, *TODAY'S ZAMAN*, (Mar. 2, 2016), <http://yoncapoyrazdogan.blogspot.com.tr/2016/03/artvin-halk-madencilige-kars-cunku.html>.

242. *Id.*

243. *Id.* (an administrative court's 2015 decision rejected the EIA report for the mining project, and in response, the mining company appealed the decision to the Council of State).

*B. Turkey's Citizen Enforcement of  
Water Pollution Legislation*

After examining the Turkish public's general perspective and attitude towards environmental protection, it is appropriate to explain what is meant by citizen enforcement of environmental laws in Turkey, particularly water pollution laws. When confronted with a violation of environmental laws, Turkish citizens have three options in the legal realm: (1) a civil action against the violator, focusing on damages as a result of environmental non-compliance; (2) a legal petition or an action against the government; and (3) a criminal action against any person who has violated environmental protection provisions of the Criminal Code (CK).

1. Civil Liability of Water Polluters

Essentially, access to the civil courts in Turkey is limited to actions in which a plaintiff is able to demonstrate that the defendant has caused damage to him.<sup>244</sup> Thus, mere evidence of non-compliance with water pollution legislation is insufficient to establish liability under the Turkish rules of civil law.

a. Civil Liability of Water Polluters Under the Civil Code

According to the rules of neighborhood law under Article 737 of the Turkish Civil Code (MK), property owners are restricted from using their property rights (especially while maintaining operational activities) in cases where they cause damage (higher than customary levels) to their neighbors by creating air and noise pollution.<sup>245</sup> Article 737 exclusively mentions noise and air pollution; however, the principle of numerous clauses—*expressio unius est exclusio alterius*—does not apply here; therefore, nuclear, land, and water pollutions are also considered in this regard.<sup>246</sup>

Article 737 determines the principles which regulate how people benefit from their environment: by using its resources in moderation, without damaging them, in order to prevent property

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244. MK. m. 737; BK. m. 49; Çevre Kanununda Degisiklik Yapilmasina Dair Kanun, m. 28 [Environment Law Article 28] [hereinafter Environment Law].

245. MK. m. 737.

246. Seda Irem Çakırca, *Çevreyi Kirletenin Hukuki Sorumluluğu [Civil Liability of the Polluter]*, 47 I.U. SİYASAL BİLGİLER FAKÜLTESİ DERGİSİ [J. OF THE FAC. OF POL. SCI., ISTANBUL U.] 59, 66–67 (2012).

owners from damaging their neighbors under the rules of neighborhood law.<sup>247</sup> Thus, it lacks the intention to protect the environment.<sup>248</sup>

Property owners are subject to strict liability for any violation; therefore, a plaintiff is not required to prove either intent or negligence.<sup>249</sup> Rather, to initiate a legal action under Article 737, the plaintiff must establish: (1) an illegal intervention, (2) the lack of legal compliance reasons, (3) an actual or threatened damage to the plaintiff, and (4) that the damage was caused by the defendant's action.<sup>250</sup>

The question to be addressed in considering this framework is what kind of legal action the plaintiff can bring against violators of Article 737. Article 730 answers this question clearly. First, the plaintiff may sue for restitution only if the defendant continues to act in violation of Article 737.<sup>251</sup> However, if the restitution does not eliminate the pollution or make it possible for the environment to revert to its former condition prior to the intervention, the plaintiff cannot sue for restitution; rather, he must sue for damages. Second, he may pursue compensation in the form of monetary and non-monetary damages.<sup>252</sup> If damage co-occurs with the intervention, the plaintiff may ask for restitution as a part of the compensation case.<sup>253</sup> Third, the plaintiff may sue for the termination of future danger if the damage has not yet occurred.<sup>254</sup> In order to bring this suit, the plaintiff must prove that the intervention will very likely result in damage to him in the near future.<sup>255</sup> Lastly, if pollution occurs at customary levels and does not arise from an illegal intervention, courts may determine a reasonable compensation for property owners based on the principle of the "balance of sacrifices."<sup>256</sup>

Additionally, Article 757 of the Turkish Civil Code regulates water pollution that occurs as a consequence of the practice of ownership and usage rights to water.<sup>257</sup> Accordingly, a plaintiff may sue to receive compensation for damages that occurred as a

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247. Birol Ertan & Kivileim Akkoyunlu Ertan, *Çevre Hukukunda Sorumluluk [Liability Under the Environment Law]*, 38 AMME IDARESI DERGISI [PUB. ADMIN. J.] 1, 8 (2005).

248. *Id.*

249. *Id.* at 12.

250. Çakırca, *supra* note 246, at 69.

251. *Id.* at 71; MK. m. 730.

252. MK. m. 730.

253. Çakırca, *supra* note 246, at 71.

254. MK. m. 730.

255. Çakırca, *supra* note 246, at 71–72.

256. MK. m. 730.

257. *Id.* m. 757.

result of polluted water.<sup>258</sup> He may also sue for restitution in cases in which the pollution continues, and the restitution does not appear to eliminate it or make it possible for the polluted water to revert to its former non-polluted state.<sup>259</sup>

#### b. Civil Liability of Water Polluters Under the Code of Obligation

Primarily, in accordance with Article 49, under the rules of tortious liability found in the Code of Obligation (BK), anyone who has caused water pollution by fault, and thus caused damage to his or someone else's property, may be held liable for his actions.<sup>260</sup> Consequently, under the principle of "negligent liability," anyone who has been damaged by water pollution arising from a tortious act may sue in order to receive compensation for his losses.<sup>261</sup>

Next, according to the principle of "liability without fault" under the Code of Obligation, in certain situations, those who have caused water pollution without fault, but have damaged their own or someone else's property, may be held liable.<sup>262</sup> Accordingly, anyone who has been damaged by water pollution resulting from one of the following circumstances des may sue to compensate for his losses.<sup>263</sup>

First, Article 66 provides that an employer may be held responsible for damages caused by his employees unless he establishes that he acted with due attention and care.<sup>264</sup> Second, Article 69 states that a construction owner may be held liable for the damages resulting from defects and deficiencies in construction or maintenance processes.<sup>265</sup> Third, Article 71 states that if a company has engaged in a dangerous activity, the owner or operator of the company may be held liable for the damages resulting from such activity.<sup>266</sup> In addition to the existence of one of these circumstances, in order to sue for compensation to recover from his losses, a plaintiff must prove that he has incurred actual damages as a result of such water pollution.<sup>267</sup>

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258. *Id.*

259. *Id.* m. 758.

260. Çakırca, *supra* note 246, at 72; BK. m. 49.

261. BK. m. 49.

262. Çakırca, *supra* note 246, at 72; BK. m. 66, 69, 71.

263. BK. m. 66, 69, 71.

264. *Id.* m. 66.

265. *Id.* m. 69.

266. *Id.* m. 71.

267. *Id.* m. 66, 69, 71.

c. Civil Liability of Water Polluters Under the Environment Law

Neither the Civil Code nor the Code of Obligation directly targets protection of the environment. The Environment Law, however, adopts the idea of environmental protection as a fundamental principle.<sup>268</sup> With regard to the civil liability of environmental polluters, Article 28 of the Law states that environmental polluters and devastators are responsible for compensation for all damages resulting from pollution and degradation without the need to prove fault.<sup>269</sup> It expressly provides that the Law adopts the “liability without fault” principle, and thus, a plaintiff is not required to prove either intent or negligence on the part of the wrongdoer.<sup>270</sup>

To initiate a legal action under Article 28, a plaintiff must first prove an illegal intervention; however, if any reason exists to cause termination of illegality, such as a relevant public policy consideration or a claim of self-defense, the defendant may not be held responsible.<sup>271</sup> Second, the plaintiff must prove concurrently that the pollution occurred as a result of the illegal intervention.<sup>272</sup>

Third, the plaintiff must prove an actual or threatened damage to himself or his property; thus, the mere evidence of water pollution is insufficient to hold someone liable under Article 28 of the Environment Law.<sup>273</sup> Lastly, he must prove that the damage is caused by water pollution and that the pollution is caused by the polluter’s illegal intervention.<sup>274</sup> This causal connection, however, cannot be interrupted because of force majeure or gross negligence of third parties or the plaintiff.<sup>275</sup>

Once the plaintiff is able to establish liability under the Environment Law, he may sue to obtain compensation for his losses.<sup>276</sup> He may also sue for restitution, and the termination of danger to himself under the general provisions, according to the

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268. Ertan & Akkoyunlu Ertan, *supra* note 247, at 8.

269. Kanun Çevre Kanununda Degisiklik Yapilmasina Dair Kanun. m. 28 [Environment Law Article 28].

270. Ertan & Akkoyunlu Ertan, *supra* note 247, at 12; Çakirca, *supra* note 246, at 80.

271. Çakirca, *supra* note 246, at 83–84. The Turkish Supreme Court, however, has narrowly interpreted the public policy exception, reasoning that any public service cannot be more valuable than human life.

272. Çakirca, *supra* note 246, at 83.

273. Hasan Demir, Çevreyi Kirletenin Hukuki Sorumluluğu [Civil Liability of an Environmental Polluter] 94, 97 (2011) (unpublished master thesis, Ankara University) (on file with the Zirve University Library); Çakirca, *supra* note 246, at 85.

274. Demir, *supra* note 274, at 108; Çakirca, *supra* note 246, at 85.

275. Demir, *supra* note 274, at 107.

276. Environment Law, m. 28; Demir, *supra* note 274, at 128.

second paragraph of Article 28.<sup>277</sup> Furthermore, because the right to a healthy and balanced environment is a fundamental personal right, the plaintiff may file a civil lawsuit against a violation of such personal rights under Articles 24 and 25 of the Civil Code.<sup>278</sup>

## 2. Administrative Liability for Violations of Water Pollution Legislation

In essence, both general laws (Article 125 of the Constitution and Articles 10, 11, and 12 of the Administrative Trial Procedure Act (IYUK)) and specialized environment based and water pollution laws (Articles 17 and 56 of the Constitution, Articles 1, 3, and 30 of the Environment Law, and Article 39 of the By-Law for Water Pollution Control) authorize both individuals and environmental organizations to file an administrative application or a suit against governmental authorities when they are alleged to be in violation of water pollution legislation or when there is an alleged failure on their part to perform a nondiscretionary obligation or duty arising from water pollution legislation.<sup>279</sup>

Article 125 of the Constitution is the primary legal basis for citizens to file an administrative application or suit against governmental authorities. Article 125 first provides that citizens may bring an action against administrative authorities for actions deemed illegal, including those causing water pollution or violating water pollution legislation.<sup>280</sup> Second, citizens may request suspension of execution of an administrative action, which is very likely to cause damages that are “difficult or impossible to compensate” for unless any of the specified exceptions exists.<sup>281</sup> Lastly, citizens may request compensation from the government for their losses resulting from unlawful administrative actions.<sup>282</sup>

The second legal basis for citizens to file an administrative application or a suit against governmental authorities is established in Articles 10, 11, and 12 of the Administrative Trial Procedure Act. Under Article 10, citizens may file informal complaints in order to draw the attention of administrative authorities to administrative transactions or actions that seem

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277. Environment Law, m. 28(2); Demir, *supra* note 274, at 128.

278. Demir, *supra* note 274, at 128; MK. m. 24–25.

279. Türkiye Cumhuriyeti Anayasası [T.C. Ana.] [Constitution] m.125, 17 (Turkey); IYUK. [Code of Administrative Trial Procedure] m. 10–12; Environment Law, m. 1, 3, 30; By-Law for Water Pollution Control, m. 39 (No. 26786) (2008).

280. T.C. Ana. [Constitution] m.125 (Turkey).

281. *Id.*

282. *Id.*

illegal and may be subject to administrative proceedings.<sup>283</sup> Similarly, citizens may file an administrative application prior to filing a suit against higher authorities in order to force them to revoke or change an administrative action or to initiate a new one, under Article 11.<sup>284</sup> Lastly, Article 12 authorizes citizens to file a suit as a result of a violation of their rights arising from an administrative action.<sup>285</sup>

Article 56 of the Constitution is another legal basis that enables citizens to bring an action against governmental authorities relating to enforcement of environmental laws and regulations. It specifies that “[e]veryone has the right to live in a healthy, balanced environment.”<sup>286</sup> Thus, citizens may claim that their constitutional right to live in a healthy and balanced environment has been violated in cases where water pollution occurred or water pollution legislation was violated. Additionally, Article 56 provides that the Turkish government and citizens are responsible for improving the natural environment, protecting the health of the environment, and ensuring the protection of the environment.<sup>287</sup> Therefore, citizens should apply to the relevant government bodies to compel them to perform their constitutional duty to protect the environment and promote environmental protection. By doing this, citizens not only enjoy their constitutional right to live in a healthy and balanced environment, but they also fulfill their constitutional duty to protect the environment and promote environmental protection.

As another legal basis, Article 17 of the Constitution proclaims that “[e]veryone has the right to life and the right to protect” and improve his or her corporeal and spiritual existence.<sup>288</sup> This

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283. IYUK. m. 10. Under this system, governmental bodies are required to investigate and respond to these complaints within a certain time period. *Id.* Article 10 states that if the relevant administrative body does not respond within 60 days, complaints are automatically deemed refused. *Id.*

284. *Id.* m. 11. Article 11 states that if the relevant administrative body does not respond within 60 days, applications are automatically deemed refused. *Id.* This provision, allowing citizens to seek a way to tip the scales in their favor, provides citizens an opportunity to revise the actions facilitated by administrative bodies.

285. IYUK. m. 12. According to Article 12, citizens may file their suits in the Turkish Council of State or in administrative or tax courts. *Id.* They may first file an annulment action, and after the annulment decision is finalized they may sue in order to obtain compensation for their losses. *Id.* Second, they may move directly to a suit for compensation. Lastly, they may file an annulment action and a compensation claim at the same time. *Id.* In order to sue for compensation, citizens must prove that they are damaged as a result of water pollution or violation of water pollution legislation that arises from an administrative action under the general provisions of the MK. *Id.* To file an annulment action, however, the mere evidence of water pollution or violation of water pollution legislation is adequate. *Id.*

286. T.C. Ana. m. 56.

287. *Id.*

288. *Id.* m. 17.

provision is not explicitly related to the protection of the environment; people's corporeal and spiritual existence, however, is rigidly dependent on living in a healthy and balanced environment. Therefore, violation of water pollution laws and regulations simultaneously may cause the violation of Article 17.

The Environment Law is one of the main legal bases used by citizens to bring an action against governmental authorities regarding compliance with environmental legislation. First, according to Article 1, the objective of the Law is to protect the co-existence of all living creatures in accordance with the principles of sustainable environment and sustainable development.<sup>289</sup> This provision intends to protect the environment and perceives the environment as a common wealth of the public; therefore, citizens may claim the infringement of Article 1 of the Environment Law in cases where water pollution occurred or water pollution legislation was violated.

Second, Article 3(a) of the Law states that everyone is responsible for the protection of the environment and for the prevention of pollution.<sup>290</sup> This provision shows that it is the citizens' duty to prevent pollution and protect the environment. Therefore, citizens may and should bring actions against governmental authorities to compel them to enforce environmental pollution laws and regulations, particularly water pollution legislation.

Lastly, Article 30 of the Environment Law states that anyone who has sustained damage from or is aware of an action polluting or impairing the environment may apply to relevant authorities to demand necessary measures be taken in regard to the action or to demand the action be stopped.<sup>291</sup> This provision shows that in addition to those parties damaged by an action that pollutes or impairs the environment, others who are aware of such an action may also apply to the relevant administrative body in order to force them to take necessary measures or to stop the action.

The last and most specific legal basis used by citizens to bring an action against governmental authorities relating to compliance with wastewater permits is Article 39 of the By-Law for Water Pollution Control. It specifies that any person who has been or will probably be harmed from a discharge of wastewater into the receiving environment can apply to the relevant government

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289. Environment Law, m. 1.

290. *Id.* m. 3(a).

291. *Id.* m. 30.

department for the purpose of objecting to wastewater permits.<sup>292</sup> In response, government bodies are required to investigate the objection and if it is found to be justified, dischargers are obliged to take necessary treatment measures.<sup>293</sup>

### 3. Criminal Liability of Water Polluters

The criminal law field in Turkey is accessible to citizens with regard to environmental protection. According to Article 1 of the Turkish Criminal Code (TCK), protection of public health and the environment is one of the objectives of the Code.<sup>294</sup> To serve this objective, the Code defines several activities against the environment as crimes, punishable under chapter three (crimes against society), section two (crimes against the environment).<sup>295</sup>

The plain language of Articles 181 and 182 of the TCK indicates that citizens, as well as the state, can criminally pursue those who have intentionally or negligently caused water pollution.<sup>296</sup> This criminal enforcement option has significant potential to improve protection of the nation's waters since administrative measures and sanctions are generally not very effective in this regard.<sup>297</sup> In fact, administrative authorities can themselves be the cause of water pollution or degradation.<sup>298</sup> Additionally, pecuniary penalties and other sanctions such as injunctions do not really affect the wealthy and powerful or many legal entities; thus, such penalties or sanctions alone do not sufficiently deter those groups.<sup>299</sup> Therefore, criminal enforcement of water pollution legislation, which suggests a tougher sanction option (imprisonment), is needed and useful for better protection of waters.

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292. By-Law for Water Pollution Control, m. 39 (No. 26786) (2008).

293. *Id.*

294. Türk Ceza Kanunu [TCK] [Turkish Criminal Code] m. 1.

295. *Id.* m. 181–184. Articles 183 (causing noise) and 184 (pollution caused by construction) are not examined in this study because they are not relevant to water pollution.

296. *Id.* m. 181, 182.

297. Engin Güngör, Türk Ceza Kanununda Çevreye Karşı Suçlar [Crimes Against the Environment under the Turkish Criminal Code] 100 (2013) (unpublished master thesis, Nigde University) (on file with the Nigde University Library).

298. *Id.*

299. *Id.*

*C. Turkey Should Adopt the Citizen Suit  
Provision of the Clean Water Act*

As previously discussed,<sup>300</sup> Turkish citizens have three options in the legal realm when confronted with a violation of water pollution laws and regulations. These options demonstrate Turkey's lack of the American experience of citizen participation, which authorizes American citizens to bring a civil action against polluters, regardless of whether they or their properties have personally been damaged. The real innovation of the CWA's citizen suit provision is that it empowers citizens or citizen groups to enforce the standards of the Act. Plaintiff citizens no longer bear the relatively difficult burden of proof to succeed in their lawsuit. They only need to show that the defendant is not in compliance with the CWA.

Turkish citizens, however, cannot bring a civil action against a polluter based on a claim of mere non-compliance with pollution laws and regulations. Their first option indicates that they can only go to the courts if they are able to prove that they have been damaged as a result of non-compliance with water pollution legislation.<sup>301</sup> Thus, mere evidence of non-compliance with water pollution legislation does not give Turkish individuals or environmental organizations the right to sue water polluters in civil courts. As is evident, a citizen suit is preferable to the civil liability provisions because a citizen suit case is much easier to prove. Proving the pollution in question caused the plaintiff harm is quite difficult compared to proving someone discharged pollution.

Second, Turkish citizens can bring a legal petition or action against government authorities when they are alleged to be in violation of water pollution legislation or when there is an alleged failure to perform any obligation or duty under water pollution legislation that is not discretionary.<sup>302</sup> Basically, this option primarily deals with matters about which citizens have no authority to create laws and regulations or issue permits on their

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300. *See supra* Section IV.B.

301. MK. m. 737; BK. m. 49; Çevre Kanununda Degisiklik Yapilmasina Dair Kanun. m. 28 [Environment Law Article 28].

302. Türkiye Cumhuriyeti Anayasası [T.C. Ana.] [Constitution] m.125, and 17 (Turkey); İYUK. [Code of Administrative Trial Procedure] m. 10,11, and 12; Environment Law, m. 1, 3, and 30; By-Law for Water Pollution Control, m. 39 (No. 26786) (2008).

own.<sup>303</sup> It also authorizes citizens to force the government to do its job.<sup>304</sup> Thereby, the second option appears to be compatible with the citizen suit provision of the CWA.<sup>305</sup>

However, the Turkish government has failed to successfully enforce water pollution laws and regulations due to political pressures and limited financial resources for technical personnel, monitoring, and oversight. In fact, government authorities are sometimes the cause of water pollution or degradation.<sup>306</sup> By contrast, citizen suits brought under the CWA are powerful enforcement tools for the public to enforce water pollution legislation when the government fails to do so. They are supplemental to the government's enforcement capacity. They are a necessary and effective means to control government authorities' incapability to reduce or prevent violations of water pollution laws and regulations. Unless and until Turkey's water pollution laws are amended to include specifically-regulated citizen suit provisions, violators will continue to evade liability for their illegal conduct.

Third, Turkish citizens can criminally enforce violations of environmental protection provisions under the TCK and thus criminally pursue those who have intentionally or negligently caused water pollution.<sup>307</sup> However, criminal environmental actions are more difficult to prosecute than civil actions, mainly because, in most pollution cases, criminal judges have tended not to perceive environmental degradation activities as legitimate criminal actions.<sup>308</sup> These judges have consistently interpreted the environmental protection provision of the TCK narrowly and sought to find excuses for violators' illegal actions.<sup>309</sup> Lack of judicial enthusiasm for environmental protection in criminal

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303. IYUK. [Code of Administrative Trial Procedure] m. 11

304. *Id.* m. 11

305. See 33 U.S.C. § 1365 (2017). Such inference is based on the fact that § 505(a)(1) of the CWA authorizes "any citizen" to commence a suit "against any person," including "the United States, and any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution," alleged to be in violation of the Act's "effluent standard or limitation" or an order of the Administrator or the state that is issued with respect to an effluent standard or limitation. *Id.* at § 1365(a)(1). Additionally, § 505(a)(2) of the CWA states that a citizen may commence an action against the Administrator who fails to "perform any act or duty" under the CWA, "which is not discretionary with the Administrator." *Id.* at § 1365(a)(2).

306. Güngör, *supra* note 298.

307. TCK, m. 181–184.

308. 2013/387 (E) & 2013/1007 (K) 09/07/2013; 2012/943 (E) & 2013/697 (K) 06/11/2013; 2008/974 (E) & 2008/1281 (K) 25/12/2008; 2008/14 (E) & 2008/227 (K) 28/02/2008.

309. *Id.*

cases indicates that the criminal enforcement mechanisms for environmental laws do not always ensure the protection of the environment.

As is evident, the three legal options available to Turkish citizens have failed to provide efficient and sufficient protection for the nation's waters. In other words, Turkey's laws are not written in a way that encourages citizens to bring claims against violators. To solve this deficiency, Turkey should explore ways to encourage citizen participation in water pollution enforcement and make citizen enforcement a meaningful mechanism in this regard. The American model of the citizen suit provision of the CWA is a significant alternative model for Turkey since it quite likely presents a much more comprehensive form of citizen enforcement. Therefore, Turkey should adopt the citizen suit provision of the CWA in order to promote water pollution enforcement and provide better protection for the nation's waters.

#### *D. Making Citizen Suits an Effective Mechanism for Water Pollution Enforcement in Turkey*

Adopting the citizen suit provision of the CWA verbatim cannot guarantee better enforcement of water pollution laws and regulations in Turkey. A review of the citizen suit provision of the CWA and its history evidences four vital elements which must be included in the creation of the Turkish model of the citizen suit provision: (1) a notice requirement and diligent prosecution bar which prevents excessive litigation and supplements governmental enforcement, (2) obligatory self-monitoring of wastewater dischargers and the creation of an online system that discloses compliance performance of permittees to the public, (3) an explicit fee provision that allows attorneys' fees to be granted to winning environmental attorneys, and (4) a special fund that collects the money necessary for the payment of cleanup measures.

#### 1. Notice Requirement and Diligent Prosecution Bar

Opponents of the citizen suit provisions of environmental laws in the United States were concerned that citizen suits would burden the courts and impede the power of governmental actions.<sup>310</sup> The U.S. Congress was similarly reluctant to allow

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<sup>310</sup> Robert D. Snook, *Environmental Citizen Suits and Judicial Interpretation: First Time Tragedy, Second Time Farce*, 20 W. NEW ENG. L. REV. 311, 316 (1998).

citizens to interfere with governmental enforcement.<sup>311</sup> In response to these fears, Congress added both the notice requirement and the diligent prosecution bar limitations to the citizen suit provisions of environmental laws.<sup>312</sup>

Section 505(b)(1)(A) of the CWA mandates that citizens give prior notice of their intent to file a citizen suit.<sup>313</sup> According to this provision, no action may be commenced unless the EPA, the state in which the violation occurs, and the alleged violator have been given notice of the alleged violation at least sixty days prior to filing the suit.<sup>314</sup> The notice requirement gives the governmental enforcement authorities the opportunity to take action and renders unnecessary the citizen suit.<sup>315</sup> This function is compatible with one of the stated goals of citizen suit provisions—to goad government enforcement.<sup>316</sup> It also gives the alleged violators the opportunity to redress the alleged violations before the citizen suit is commenced and renders the lawsuit needless.<sup>317</sup> It is evident that adopting a notice requirement as a statutory element of citizen suits will prevent excessive litigation and will supplement, rather than supplant, governmental enforcement of water pollution legislation in Turkey. Therefore, Turkey should adopt a notice requirement while adopting the citizen suit provision of the CWA.

An analysis of judicial trends in the United States indicates that courts have labored to address two main issues regarding the notice requirement of the citizen suit provision of the CWA. First, they have addressed whether the sixty-day notice provision is a mandatory requirement for citizen-plaintiffs to file a suit or whether it might be disregarded by the courts at their discretion.<sup>318</sup> The majority of courts have held that citizen plaintiffs must comply strictly with the time limitation of the notice requirement, and their failure to comply with this limitation requires dismissal of the suit.<sup>319</sup> Second, courts are split regarding the content of notice. While most courts have interpreted the notice requirement generously, allowing citizen suits to proceed as

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311. *Id.* at 315.

312. *See* 33 U.S.C. § 1365(b)(1)(A); 33 U.S.C. § 1365(b)(1)(B).

313. 33 U.S.C. § 1365(b)(1)(A) (2017).

314. *Id.* § 1365(b)(1)(A).

315. McCall Jr. & Trail, *supra* note 33, at 34.

316. *See* Lloyd, *supra* note 53, at 893–94.

317. Lucas, *supra* note 41, at 263.

318. Frye, *supra* note 40, at 186–87.

319. *See* Nat'l Envtl. Found. v. ABC Rail Corp., 926 F.2d 1096, 1097–98 (11th Cir. 1991); Washington Trout v. McCain Foods, Inc., 45 F.3d 1351 (9th Cir. 1995).

long as there is compliance,<sup>320</sup> others have interpreted it more strictly.<sup>321</sup> Consequently, a mandatory and explicitly-defined notice requirement may help resolve confusion in the Turkish courts regarding the requirement's interpretation. As a strict notice requirement might lead to easy dismissals of citizen suits, the definition of the notice requirement should also be generously-defined in order to best serve the objective of the citizen suit provision.

Another limitation to the citizen suit provisions of environmental laws, established to prevent excessive litigation and to help, but not replace, governmental enforcement actions, is the diligent prosecution bar. According to the CWA, a citizen may not file a suit "if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court . . . ."<sup>322</sup> The diligent prosecution bar "allows citizen suits . . . to function the way Congress intended: as a supplement to primary enforcement by the states or the federal government but not as a primary tool of enforcement."<sup>323</sup> As is evident, adopting a diligent prosecution bar as a statutory element of citizen suits will prevent duplicate litigation and will supplement, rather than supplant, governmental enforcement of water pollution legislation in Turkey. Therefore, Turkey should adopt a diligent prosecution bar while adopting the citizen suit provision of the CWA.

Analysis of judicial trends in the United States indicates that, due to the lack of statutory definition, courts have labored to address whether a government action was diligently prosecuted so as to preclude a citizen suit.<sup>324</sup> The vast majority of courts have held that a state or EPA enforcement action enjoys a presumption of diligence.<sup>325</sup> For example, in 2007, the Tenth Circuit in *Karr v. Hefner* held that "Section 1365(b)(1)(B) does not require government prosecution to be far-reaching or zealous. It requires only diligence."<sup>326</sup> To give another example, the First Circuit in *N. & S. Rivers Watershed Ass'n v. Scituate* held that an enforcement action does not lose its diligence if violations occur

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320. See *Atl. States Legal Found., Inc. v. Stroh Die Casting Co.*, 116 F.3d 814, 819 (7th Cir. 1997).

321. See *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 629 F.3d 387 (4th Cir. 2011).

322. 33 U.S.C. § 1365(b)(1)(B) (2017); see *Cawley*, *supra* note 211, at 182; see also 33 U.S.C. § 1319(g)(6)(A); *supra*, note 207 and accompanying text.

323. *Appel*, *supra* note 39, at 101.

324. Arne R. Leonard, *When Should an Administrative Enforcement Action Preclude a Citizen Suit Under the Clean Water Act?*, 35 NAT. RESOURCES J. 555, 605–06 (1995).

325. See *id.* at 605–06; *Townsend*, *supra* note 119, at 91; *Karr v. Hefner*, 475 F.3d 1192, 1198 (10th Cir. 2007).

326. *Karr*, 475 F.3d at 1197.

again after the action is taken, as long as the government does everything reasonably possible to rectify the violations.<sup>327</sup>

The U.S. courts have tended to define most government actions as diligently prosecuted. This broad approach will endanger the protection of waters in Turkey. This is due to the fact that, first, criminal judges in Turkey have tended not to perceive environmental degradation activities as legitimate criminal actions.<sup>328</sup> They usually interpret the environmental protection provision of the TCK narrowly and try to find excuses for violators' illegal actions.<sup>329</sup> Thus, criminal environmental actions do not always ensure the best protection of Turkey's waters. Second, with regard to governmental administrative actions, the situation is not much brighter. Indeed, government authorities are sometimes the very ones who cause water pollution or degradation or who violate water pollution legislation.<sup>330</sup>

Additionally, pecuniary administrative penalties or other sanctions such as injunctions do not substantially affect wealthy and powerful people or legal entities sufficiently enough to act as a deterrent on those actors.<sup>331</sup> Thus, governmental administrative actions also do not guarantee enough protection for Turkey's waters. In brief, the broad interpretation of the diligent prosecution bar will fail to provide sufficient and efficient protection for Turkey's water. Therefore, Turkish lawmakers should be explicit and less broad in defining the criteria for whether a government action was diligently prosecuted so as to preclude a citizen suit, in order to best serve the objective of the citizen suit provision.

## 2. Self-Monitoring

One of the reasons for the success of the citizen suit provision of the CWA is that it is easy to demonstrate violations of the NPDES permits.<sup>332</sup> Under the Act, permittees are required to monitor their discharges and to periodically file monitoring

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327. *N. & S. Rivers Watershed Ass'n v. Scituate*, 949 F.2d 552, 558 (1st Cir. 1991).

328. 2013/387 (E) & 2013/1007 (K) 09/07/2013; 2012/943 (E) & 2013/697 (K) 06/11/2013; 2008/974 (E) & 2008/1281 (K) 25/12/2008; 2008/14 (E) & 2008/227 (K) 28/02/2008 (In Turkey, the government as well as citizens can pursue environmental polluters criminally.).

329. 2013/387 (E) & 2013/1007 (K) 09/07/2013; 2012/943 (E) & 2013/697 (K) 06/11/2013; 2008/974 (E) & 2008/1281 (K) 25/12/2008; 2008/14 (E) & 2008/227 (K) 28/02/2008.

330. Güngör, *supra* note 298.

331. *Id.*

332. Frye, *supra* note 40, at 184.

reports.<sup>333</sup> The ease of proving violations of the NPDES permits arises from the fact that monitoring reports are subject to disclosure under freedom of information.<sup>334</sup> In fact, EPA and state agency websites have made compliance information available to the public.<sup>335</sup> More importantly, many courts have held that DMRs are admissible as evidence of violation or violations of the CWA.<sup>336</sup> Consequently, self-monitoring establishes evidence which helps citizen-plaintiffs succeed in their claims without the need for overly-costly or burdensome discovery.

Similarly, in Turkey, the Declaration on the Sampling and Analysis Methods of the By-Law for Water Pollution Control allows wastewater permit holders to monitor their discharges.<sup>337</sup> Those who decide to self-monitor are required to periodically submit monitoring reports to the relevant Provincial Forestry and Water Affairs Directorates.<sup>338</sup> The Turkish system of self-monitoring of wastewater dischargers, however, differs in some respects from the American system.

First, while the CWA requires NPDES permittees to monitor their discharges,<sup>339</sup> the Turkish Declaration only provides an opportunity to do so.<sup>340</sup> Thus, unlike the American framework, permit holders in Turkey are not required to self-monitor their discharges; it is entirely optional. Second, unlike in the United States, where the EPA and state agency websites have made compliance information available to the public, Turkish citizens lack access to a website with information on the compliance performance of wastewater permittees.<sup>341</sup> The availability of such data, undoubtedly, is one of the main factors behind the success of the citizen suit provision of the CWA, as it eases the plaintiff's burden in establishing the existence of an NPDES violation. Thus, making self-monitoring an obligatory element of wastewater dischargers, and creating an on-line system that discloses compliance performance of permittees to the public will promote water pollution enforcement in Turkey.

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333. Townsend, *supra* note 119, at 81; Andreen, *Citizen Suits*, *supra* note 116, at 8; Lopez, *supra* note 106, at 171; 33 U.S.C. § 1318(a) (2017).

334. Coplan, *supra* note 21, at 70–71.

335. *Id.*

336. *Id.* at 71.

337. R.G. 10.10.2009, sa. 27372 m. 4(5) [Declaration on the Sampling and Analysis Methods of the By-Law for Water Pollution Control].

338. *Id.* m. 4(7).

339. See Townsend, *supra* note 119, at 81; Andreen, *Citizen Suits*, *supra* note 116, at 8; Lopez, *supra* note 106, at 171; 33 U.S.C. § 1318 (a)–(b) (2017).

340. R.G. 10.10.2009, sa. 27372 m. 4(5) [Declaration on the Sampling and Analysis Methods of the By-Law for Water Pollution Control].

341. Coplan, *supra* note 21, at 70–71.

### 3. Attorneys' Fees Provisions

Congress's initial objective for adopting attorneys' fees provisions "was to provide attorneys with an incentive to litigate citizen suit actions."<sup>342</sup> These provisions encourage attorneys to represent citizens in environmental citizen suits with the expectation that defendants will pay their fees if citizen plaintiffs prevail.<sup>343</sup> Similarly, they encourage citizens to bring claims who would otherwise be prevented from doing so due to the high costs of litigation.<sup>344</sup> On the other hand, attorneys' fees provisions compel citizen-plaintiffs to select circumstances "in which they have a direct interest."<sup>345</sup> The fear of paying litigation costs precludes the abuse of citizen suit provisions of environmental laws and thus prevents frivolous and harassing litigation by citizen plaintiffs.<sup>346</sup>

The American approach to attorneys' fees states that "[t]he court . . . may award costs of litigation (including reasonable attorney and expert witness fee) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate . . . ."<sup>347</sup> Under the Turkish legal system, the "loser pays" rule<sup>348</sup> is adopted with regard to litigation costs, including attorneys' fees. In practice, however, the actual amounts awarded to successful plaintiff attorneys are substantially less than the amount the plaintiffs initially agree to pay to their attorneys. Thus, even if plaintiffs win their case, they usually bear the bulk of the cost of their own attorney's fees.

Consequently, should the citizen suit provision of the CWA be adopted, Turkish citizens will hesitate to bring an action against violators of water pollution laws unless an explicit fee provision allowing the granting of attorneys' fees to prevailing environmental attorneys is also adopted.

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342. Joshua E. Hollander, *Fee-Shifting Provisions in Environmental Statutes: What They Are, How They Are Interpreted, and Why They Matter*, 23 GEO. J. LEGAL ETHICS 633, 633 (2010); Matthew Burrows, *The Clean Air Act: Citizen Suits, Attorneys' Fees, and the Separate Public Interest Requirement*, 36 B.C. ENVTL. AFF. L. REV. 103, 114–15 (2009).

343. Kerry D. Florio, *Attorneys' Fees in Environmental Citizen Suits: Should Prevailing Defendants Recover?*, 27 B.C. ENVTL. AFF. L. REV. 707, 708 (2000).

344. *Id.*; Mary Cile Glover-Rogers, *Who's Footing the Bill for the Attorneys' Fees?*, 18 MO. ENVTL. L. & POL'Y REV. 64, 64–65 (2011).

345. Lopez, *supra* note 106, at 193.

346. *See id.*

347. 33 U.S.C. § 1365(d) (2017).

348. According to the "loser pays" rule, the non-prevailing party must pay its own costs as well as those of the prevailing party.

#### 4. Special Fund

American courts have allowed polluters to perform Supplemental Environmental Projects (SEPs)<sup>349</sup> in lieu of paying civil penalties imposed under the CWA's citizen suit provision. This approach appears to be an effective method of protecting waters because, in contrast to the obligation that civil penalties be paid into the U.S. Treasury, these projects may direct funds toward environmentally beneficial initiatives.<sup>350</sup>

While civil penalties go into the general treasury and do not directly help the improvement of waters, cleanup measures imposed with regard to SEPs have a direct impact on reduction and prevention of water pollution and are thus more effective. As a result, environmentally-concerned citizens have more of an incentive to enforce the CWA's standards and requirements since the payment of civil penalties to the Treasury does not alone appear to be an adequate motivation for citizens.

Should the citizen suit provision of the CWA be adopted in Turkey, requiring damages to be paid into a special fund for the payment of cleanup measures will encourage individuals and environmental organizations to bring citizen suits against water polluters or violators of water pollution laws and regulations. In the absence of SEPs, Turkish citizens will prefer to criminally pursue water polluters since, compared to civil action, it is relatively easy and time-saving to file a criminal action. Additionally, the deterrent effect of criminal law enforcement is an incentive for Turkish citizens; they prefer that water polluters go to jail rather than simply pay civil penalties.

Consequently, unlike the American experience of citizen suits, Turkey should require civil penalties to be paid to a special fund that collects the money necessary for the payment of cleanup measures. Since the true concern of environmentally conscious citizens is the protection of their water, this innovation will facilitate citizen enforcement of water pollution legislation in Turkey. Those Turkish citizens who seek retribution for violations of water pollution laws and regulations may adopt the relatively

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349. Edward Lloyd, *Supplemental Environmental Projects Have Been Effectively Used in Citizen Suits to Deter Future Violations as well as to Achieve Significant Additional Environmental Benefits*, 10 WIDENER L. REV. 413, 414 (2004) (defining these projects as "environmentally beneficial projects included in settlements of environmental enforcement cases").

350. GROSS & STELCEN, *supra* note 67, at 128.

easy and expeditious process of invoking criminal penalties which carries the potentially tougher sanction of imprisonment.

## V. CONCLUSION

“Water is life's mater and matrix, mother and medium.  
There is no life without water.”  
—Albert Szent-Gyorgyi

Turkish citizens have expressed their dissatisfaction with the nation's contaminated waters since the late 1960's and early 1970's.<sup>351</sup> Regardless of this concern, however, they have remained passive in the enforcement of water pollution legislation mainly because of inadequacies in the environmental laws themselves. When confronted with a violation of water pollution laws or regulations, Turkish citizens have three options in the legal realm: (1) a civil action against the violator, focusing on damages as a result of environmental non-compliance, (2) a legal petition or an action against the government, and (3) a criminal action against any person who has violated environmental protection provisions of the TCK.

Analysis of these approaches shows that Turkish citizens have failed to provide efficient and sufficient protection of the nation's waters. This is because, first, according to rules of civil liability of polluters, in order to bring a successful claim, plaintiffs bear the difficult burden of proving that either they themselves, or their property, has been damaged as a result of water pollution or a violation of water pollution legislation.<sup>352</sup> Second, although a plaintiff can bring an action against the Turkish government,<sup>353</sup> the government has nevertheless failed to successfully enforce water pollution laws and regulations due to political pressures, and limited financial resources for technical personnel, monitoring and oversight. Third, although the criminal law field in Turkey is accessible to citizens with regard to environmental protection, criminal judges consistently interpret the environmental

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351. Duru, *supra* note 231, at 56.

352. MK. m. 737; BK. m. 49; Çevre Kanununda Degisiklik Yapilmasina Dair Kanun. m. 28 [Environment Law Article 28].

353. Türkiye Cumhuriyeti Anayasası [T.C. Ana.] [Constitution] m.125, 17 (Turkey); İYUK. [Code of Administrative Trial Procedure] m. 10,11, 12; Environment Law, m. 1, 3, 30; By-Law for Water Pollution Control, m. 39 (No. 26786) (2008).

protection provision of the TCK narrowly and tend not to perceive environmental degradation activities as legitimate criminal actions.<sup>354</sup>

Further, as discussed, Turkish laws relating to citizen enforcement of water pollution legislation do not provide much encouragement for citizens to bring such claims. To solve this deficiency and promote the enforcement of water pollution laws, Turkey should adopt a citizen suit provision comparable to that of the CWA. The real innovation of this provision is that it empowers citizens or citizen groups to enforce the standards of the Act. Plaintiff-citizens no longer bear the difficult burden of proving damages to prevail; they need only show that the defendant is out of compliance with the CWA.

However, the mere adoption of the citizen suit provision of the CWA does not guarantee better enforcement of water pollution laws and regulations in Turkey. In order for the citizen suit provision to be an effective mechanism for water pollution enforcement, Turkish lawmakers should consider four vital elements in adopting the provision. First, they should adopt both a notice requirement and a diligent prosecution bar in order to prevent excessive litigation and to supplement, but not to supplant, governmental enforcement. With regard to the notice requirement, Turkish lawmakers should first ensure that the notice requirement is mandatory, and then they should define the content of notice explicitly in order avoid confusion in the courts interpretation. A strict notice requirement may cause easy dismissal of citizen suits, thus it should be defined generously in order to best serve the objective of the citizen suit provision.

Furthermore, regarding the adoption of a diligent prosecution bar, a too broad interpretation of the diligent prosecution bar would fail to provide sufficient and efficient protection for Turkey's water. Therefore, Turkish lawmakers should be explicit and less broad in defining the criteria for analysis of whether a government action was diligently prosecuted so as to preclude a citizen suit, in order to best serve the objective of the citizen suit provision.

Turkish lawmakers should make self-monitoring an obligatory element of wastewater dischargers and should create an on-line system that discloses compliance performance of permittees to the public. The necessity for such reporting requirements is

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354. 2013/387 (E) & 2013/1007 (K) 09/07/2013; 2012/943 (E) & 2013/697 (K) 06/11/2013; 2008/974 (E) & 2008/1281 (K) 25/12/2008; 2008/14 (E) & 2008/227 (K) 28/02/2008.

demonstrated by the success of the CWA's citizen suit provision due in great deal to the ease of establishing violations of the NPDES permits.<sup>355</sup>

Turkish lawmakers should include the adoption of an explicit fee provision that allows attorneys' fees to be granted to prevailing environmental attorneys. Should the citizen suit provision of the CWA be adopted, Turkish citizens will nevertheless be hesitant to bring an action against water polluters or violators of water pollution laws unless an explicit fee provision allowing the granting of attorneys' fees to prevailing environmental attorneys is also adopted.

Lastly, Turkish lawmakers should require civil penalties to be paid into a special fund that collects the funds necessary for the payment of cleanup measures. This innovation will promote citizen enforcement of water pollution legislation in Turkey because the true concern of environmentally concerned citizens is the protection of their waters.

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355. Frye, *supra* note 40, at 184.

