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COMMENT

**Greater Public Participation in the
Enforcement of the Clean Water Act**

John Bliss

*The Ninth Circuit Court of Appeals held in **Sierra Club v. Electronic Control Design, Inc.** that monies paid by violators of the Federal Clean Water Act (CWA) to settle a citizen suit may be used to fund environmental projects unrelated to the settled violation. This decision has been opposed by the Department of Justice and runs counter to the trend of recent Supreme Court holdings which generally restrict citizen suits. This article examines the citizen suit provisions of the CWA, the **Electronic Control Design** decision and the arguments against it, and analyzes the shortcomings of the decision.*

Since the first citizen suit provision was included in the Clean Air Act in 1970,¹ congressional action² and federal court decisions³ have tailored and refined the role of the private cit-

1. Clean Air Amendments of 1970, Pub. L. No. 91-604, § 304, 84 Stat. 1676, 1706 (1970) (codified as amended at 42 U.S.C. § 7604 (1982)).

2. LISA JORGENSEN & JEFFERS KIMMEL, ENVIRONMENTAL CITIZEN SUIT: CONFRONTING THE CORPORATION 3 (BNA Special Report)(1988).

3. See *Sierra Club v. Morton*, 405 U.S. 727 (1971); *Middlesex County Sewerage*

izen in the enforcement of environmental statutes. In a recent decision within this evolution, *Sierra Club v. Electronic Control Design, Inc.*, (*Electronic Control Design II*),⁴ a court of appeals held for the first time⁵ that parties may settle citizen suits under the Clean Water Act (CWA)⁶ with consent judgments⁷ that provide for payments to fund environmental projects unrelated to the original violation.⁸ The decision recognized that public participation in enforcement of the CWA may include a voice in directing recovered funds toward environmental projects. This appellate decision runs counter to the trend of recent Supreme Court decisions which have restricted the use of citizen suits,⁹ and may have important consequences because CWA citizen suits have proliferated in recent years¹⁰ and can involve substantial sums of money.¹¹

Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981); *Gwaltney of Smithfield Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987); *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989).

4. 909 F.2d 1350 (9th Cir. 1990).

5. District courts in many different circuits have approved settlements which provide for such payments. *Sierra Club v. Electronic Control Design*, (*Electronic Control Design I*), 703 F. Supp. 875, 878 (D. Or. 1989) (citing *Sierra Club v. Port Townsend Paper Corp.*, Civ. No. C87-316C (W.D. Wash. Oct. 28, 1988), *Friends of the Earth v. Eastman Kodak Co.*, 656 F. Supp. 513 (W.D.N.Y. 1987); *Natural Resource Defense Council v. Duquensne Light Co.*, Civ. No 87-0511 (D. Pa. Aug. 14, 1987)). This is the first court of appeals decision to consider whether such payments are legal.

6. Federal Water Pollution Control Act 33 U.S.C. §§ 1251-1387 (1988). The statute authorizes any citizen to commence a civil action:

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such standard or limitation.

33 U.S.C. § 1365(a)(1) (1988).

7. "A judgment, the provisions and terms of which are settled and agreed to by the parties to an action." BLACK'S LAW DICTIONARY 756 (5th ed. 1979).

8. *Electronic Control Design II*, 909 F.2d at 1356.

9. *E.g.*, *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981) (holding citizen suit provision of the CWA may not be used to sue for private damages). *Gwaltney of Smithfield Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987) (limiting citizen suit jurisdiction to present but not past violations); *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989) (construing strictly notice provisions of environmental statutes).

10. JORGENSEN & KIMMEL, *supra* note 2, at 12.

Under the decision, monies paid in settlement may fund a range of environmental projects¹² not tied to the original violations; citizen groups may construct their settlements with violators to fund projects which they feel most deserving.¹³ The court of appeals held that district courts may approve of such payments, even though the payments are outside the relief authorized by the CWA,¹⁴ and rejected the government's position that the payments should be considered penalties which the CWA requires be paid to the United States Treasury.¹⁵

Part I of this Note introduces the factual and procedural history of *Electronic Control Design*. Part II presents the primary principles of law applied in this case, including a brief outline of the operation and use of consent judgments by the courts, the relevant portions of the citizen suit provisions of the CWA, and the legislative history of those provisions. Part III outlines the Department of Justice's arguments against such payments, the counterarguments made by the Sierra Club, and then surveys other cases in which courts have ruled on the issues presented by those arguments. Part IV sets forth the lower court and court of appeals decisions in *Electronic Control Design*. Part V presents an analysis of the *Electronic Control Design* decision which consists of three sections. Section A explicates and critiques the court of appeals decision as compared to the district court decision with regard to the appropriate degree of inquiry necessary for approving CWA consent judgments. Section B presents a comparison of the ways in which an apparent conflict between statements of the Su-

11. *Student Public Interest Group v. Hercules, Inc.*, Civ. No. 83-3262 (D.N.J. Apr. 6, 1989) (1.68 million dollar settlement under the CWA).

12. The funds may go to related as well as unrelated environmental projects, since it is the parties not the court which determine the terms of a consent judgment. *Evans v. Jeff D.*, 475 U.S. 717, 731 (1986); *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 235-37 (1975) ("[C]onsent decrees are normally compromises in which the parties give up some thing they might have won in litigation and waive their rights to litigation. . . . [T]hey should be basically construed as contracts.")

13. Marcia R. Gelpe, *Pollution Control Laws Against Public Facilities*, 13 *HARV. ENVTL. L. REV.* 69, 99-100 (1989).

14. *Electronic Control Design II*, 909 F.2d at 1354-55.

15. *Id.* at 1354.

preme Court and the legislative history of the CWA have been resolved by the court of appeals, the district court, the government, and the Sierra Club. Section C examines why the appellate decision does not fully protect the public interest and explores ways in which district courts may address this. Part VI assesses the impact which *Electronic Control Design* may have on the settlement of CWA citizen suits in other circuits.

I. Factual Setting and Procedural History

The Sierra Club believed that Electronic Control Design, Inc. was discharging pollutants from its printed circuit board manufacturing plant into the Milk Creek in excess of the facility's NPDES permit. Sierra Club filed the appropriate notice to the United States and the State of Oregon of its intent to bring a citizen suit under section 505 of the CWA¹⁶ alleging violation by Electronic Control Design of section 301(a) of the CWA.¹⁷ Neither the United States nor the State of Oregon chose to bring an enforcement action or intervene in the suit.¹⁸ After the suit was commenced, the parties agreed to a series of stipulated extensions in the litigation schedule to permit compliance negotiations.¹⁹ As a result, Electronic Control Design complied with the terms of its permit for several months.²⁰ At the same time, the parties entered into settlement negotiations which resulted in a proposed consent judgment. The proposed consent judgment provided that Electronic Control Design would: 1) comply with the terms of its permit; 2) pay a total of \$45,000 to several third party environmental organizations; 3) pay stipulated penalties if Electronic Control Design violated the terms of its permit within the period September 1, 1988 to June 1, 1989; and 4) pay

16. 33 U.S.C. § 1365(a)(1) (1988).

17. 33 U.S.C. § 1311(a) (1988).

18. Brief for Appellant at 5-6, *Sierra Club v. Electronic Control Design*, 909 F.2d 1350 (9th Cir. 1990) (No. 89-35120) [hereinafter Brief for Sierra Club].

19. *Id.* at 5.

20. *Id.*

\$5,000 in attorneys' fees to the Sierra Club.²¹

As required, the parties notified the government of the proposed consent judgment. The government as *amicus curiae* objected that the consent judgment did not require Electronic Control Design to pay any monetary penalty to the United States Treasury.²² The district court considered and refused to approve the settlement because it found that the terms of the settlement violated the CWA by providing for payment of a penalty to a private environmental group rather than to the United States Treasury.²³ The case went before the Court of Appeals for the Ninth Circuit on interlocutory appeal.²⁴

II. Background

A. Consent Judgments

A consent judgment is a negotiated settlement which becomes a judgment after court approval.²⁵ Consent judgments²⁶ provide parties flexibility in settling their suits with a minimum of judicial supervision.²⁷ Through these judgments, the parties to a lawsuit contractually agree to compromise their differences.²⁸ When the compromise is approved by the court, it has the same effect as any other judicial decree.²⁹ Consent judgments are the favored method for settling lawsuits because they achieve a result which is agreeable to the parties

21. *Id.* at 6-8.

22. *Electronic Control Design II*, 909 F.2d at 1352.

23. *Id.* at 1354.

24. *Id.* at 1353.

25. BLACK'S LAW DICTIONARY 756 (5th ed. 1979).

26. Most citizen suits are settled through consent judgments. JORGENSEN & KIMMEL, *supra* note 2, at 17. The government also uses consent judgments to settle its litigation. The standards which set out acceptable terms for a consent judgment for a CWA violation when the government is the plaintiff are set out in EPA's *Clean Water Act-Penalty Policy for Civil Settlement Negotiations*. See *infra* note 109. The main issue presented in *Electronic Control Design* is what are the appropriate standards for a CWA settlement when a private citizen is the plaintiff.

27. *Id.*

28. *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236 (1975).

29. *The Consent Judgment as an Instrument of Compromise and Settlement*, 72 HARV. L. REV. 1314, 1316 n.18 (1959) [hereinafter *Instrument of Compromise*].

with a minimal expenditure of judicial resources.³⁰ As judgments, they have a *res judicata* effect so that the basic elements of the decree may not be relitigated³¹ and a violation of the decree can lead to a contempt of court citation.³²

B. Case Law

In environmental suits, citizen plaintiffs may sue for the relief which a statute authorizes.³³ In an important exception to this rule, recognized in *Local No. 93, International Association of Firefighters v. City of Cleveland*,³⁴ the Supreme Court held that a court may approve a consent judgment which includes relief which is not available if the suit is litigated through to completion, provided that the decree: 1) "spring[s] from and must resolve a dispute within the court's subject matter jurisdiction";³⁵ 2) "come[s] within the general scope of the case made by the pleadings";³⁶ 3) "further[s] the objectives of the law upon which the complaint was based,"³⁷ and 4) "[does] not dispose of the claims of a third party."³⁸

In approving consent judgments, courts generally confine their inquiry to whether the agreement is fundamentally fair, adequate and reasonable, and refrain from deciding the case on its merits.³⁹ In certain cases, some commentators have argued that additional review by the court is necessary to protect the public interest.⁴⁰ These commentators have distinguished between public and private consent judgments.⁴¹ In

30. *E.g.*, *Jeff D. v. Andrus*, 888 F.2d 617, 623 (9th Cir. 1989).

31. *Instrument of Compromise*, *supra* note 29, at 1320.

32. *Id.* at 1316 n.18.

33. *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1145-46 (E.D. Pa. 1982).

34. 478 U.S. 501 (1986).

35. *Id.* at 525.

36. *Id.*

37. *Id.*

38. *Id.* at 529.

39. *EEOC v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 889 (9th Cir. 1985).

40. Abram Chayes, *The Supreme Court 1981 Term—Forward: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 4-6 (1982); Maimon Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 5 DUKE L.J. 887 (1984).

41. Chayes, *supra* note 40, at 4-6; Schwarzschild, *supra* note 40, at 887.

contrast to private consent judgments which only affect the rights of the parties, public consent judgments involve the application of public policy and affect the interests of many persons not a party to the lawsuit. Consequently, reviewing courts should consider the effect of a proposed consent judgment on the public interest.⁴²

According to this distinction, environmental suits are public in nature. Settlement of these suits determines how environmental statutes are enforced and consequently affect millions of persons. Courts have required that the "public interest" be protected as a condition of approving an environmental consent judgment.⁴³

Courts have allowed the "public interest" to be represented in different ways depending on whether the plaintiff is a private citizen or the government. In approving consent judgments which resolve citizen initiated enforcement actions based on the CWA, the courts rely on the government to voice any objection that the settlement is not in the public interest.⁴⁴ However, in *United States v. Ketchikan*,⁴⁵ where the government was the plaintiff, the court held that conducting a full evidentiary hearing to justify the settlement terms was unnecessary to protect the public interest.⁴⁶ The court held that such a hearing would amount to the equivalent of a full trial and was a waste of judicial resources since the parties and the *amicus* had provided an adequate record for the court to assess the public interest.⁴⁷

42. Schwarzschild, *supra* note 40, at 887.

43. Courts have generally assessed the public interest by allowing the Department of Justice either as an intervenor or as *amicus curiae* to voice objections when a private citizen group seeks to reach a consent judgment with a polluter. See *Pennsylvania Env'tl. Defense Found. v. Bellefonte Borough*, 718 F. Supp. 431, 434 (M.D. Pa. 1989); *Friends of the Earth v. Archer Daniels Midland Co.*, 31 Env't Rep. Cas. (BNA) 1779 (N.D.N.Y. 1990). When the government seeks a consent judgment with a violator, courts have allowed interested parties (private citizen groups) to intervene for purposes of presenting their views but not for objecting to the terms of the settlement. *United States v. Ketchikan*, 430 F. Supp. 83 (D. Alaska 1977).

44. *Bellefonte*, 718 F. Supp. 431; *Archer Daniels*, 31 Env't Rep. Cas. (BNA) 1779.

45. 430 F. Supp. 83 (D. Alaska 1977).

46. *Id.* at 86.

47. *Id.*

C. Statutory

In the scheme of the CWA, section 505 allows private citizens to bring a citizen suit in the government's place when the government has failed to act.⁴⁸ Under section 505, a private citizen may sue for the relief of injunctive action and penalties⁴⁹ as provided in section 309 of the CWA.⁵⁰ The role of citizen suits, as originally envisioned, was that of supplemental enforcer.⁵¹ Federal and state governments were to be the primary enforcers of the CWA, and the function of citizen suits was to assure that those governmental bodies diligently enforced the Act.⁵²

As environmental law evolved, citizen suits took a larger

48. A citizen plaintiff must give the government appropriate notice of his/her intent to sue. The government has 60 days to commence its own action. If at the end of that 60 day period, the government has failed to act, the citizen/plaintiff may commence a suit against the violator. *Hallstrom v. Tillamook*, 493 U.S. 20, 26 (1989). A plaintiff must demonstrate a cognizable injury to herself in order to have standing to sue. *Sierra Club v. Morton*, 405 U.S. 727, 735 (1971). However, an aesthetic injury to the environment which a person (or the members of a group) uses is cognizable. *Id.*

49. The Clean Water Act allows citizen groups to sue for civil penalties as well as injunctive relief such as requesting a court to order a violator to take remedial action. 33 U.S.C. § 1319(b), (d). It is unlike its model, the Clean Air Act, which only allows for injunctive relief. 42 U.S.C. §§7401-7642 (1988 & Supp. II 1990).

50. Section 309 of the CWA allows the government to sue for injunctive action and civil penalties of up to \$25,000 per day per violation. 33 U.S.C. § 1319(b), (d) (1988). Section 505(a) of the CWA allows citizens to sue for the same penalties as the government under section 309(d). 33 U.S.C. § 1365(a) (1988).

51. REPORT OF THE CONFERENCE COMMITTEE ON THE CLEAN AIR ACT, 116 CONG. REC. 42,382 (1970) (statement of Sen. Muskie) "Although the Senate did not advocate [citizen suits] as the best way to achieve enforcement, it is clear that they should be an effective tool." *Id.* The legislative history of the Clean Air Act (CAA) citizen suit provision is often cited with reference to the CWA because it was enacted two years before the CWA and served as the model for the CWA's citizen suit provision. See *Hallstrom v. Tillamook County*, 493 U.S. 20, 23 & n.1 (1989); Marcia R. Gelpe & Janus L. Barnes, *Penalties in Settlement of Citizen Suit Enforcement Actions under the Clean Water Act*, 16 WM. MITCHELL L. REV. 1025, 1026 n.3 (1990).

52. At the time when the original citizen suit provision in the CAA was enacted, the theory of agency capture had wide acceptance. Under this theory, organizations captured the agencies which were supposed to regulate them because the staff of those agencies would later seek employment with the organizations. To offset this phenomenon, citizens were given the power to bring suits if the government failed to act. Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits under Federal Environmental Laws*, 34 BUFFALO L. REV. 833, 843 and n.12 & 13 (1985).

role than originally envisioned by Congress. In response, Congress included in the 1987 amendments to the CWA⁵³ specific sections which placed additional safeguards on the public interest with regard to citizen suits.⁵⁴ First, Congress amended section 309 to include objective criteria upon which civil penalties for violation of the CWA must be based.⁵⁵ Second, Congress added section 505(c)(3) which forbids consent judgments from being entered unless the parties have given the government forty-five days notice of the proposed agreement.⁵⁶ The purpose of this provision is to allow the Department of Justice to voice any objection to any "abusive, collusive, or inadequate settlements and to maintain the ability of the Government to set its own enforcement priorities."⁵⁷ Third, Congress added section 505(d) to provide that attorneys' fees in a CWA citizen suit may only be awarded to prevailing or substantially prevailing parties.⁵⁸ Frivolous suits are thereby discouraged since unsuccessful plaintiffs must bear their own attorney costs.

In connection with these amendments, the legislative history contains a statement upon which the Ninth Circuit Court of Appeals based its decision in *Electronic Control Design II*. The legislative conferees encourage where appropriate the use of penalties to fund "research, development and other related

53. Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 (codified as amended in scattered sections of 33 U.S.C.).

54. JORGENSEN & KIMMEL, *supra* note 2, at 3.

55. 33 U.S.C. § 1319(d) (1988).

In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

Id.

56. 33 U.S.C. § 1365(c)(3).

57. 131 CONG. REC. Part II, S737 (daily ed. Jan. 14, 1987) (statement of Senator Chaffee).

58. 33 U.S.C. § 1365(d). This amendment codified the decision in *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983), which held that it was not appropriate to award attorneys' fees in a citizen suit unless the plaintiff prevailed in his suit. *Id.* at 694. To qualify as a partially prevailing party, a citizen/plaintiff must achieve "some success, even if not major success." *Id.* at 687-88.

projects. . .to investigate pollution problems other than those leading to the violation. Settlements of this type preserve the punitive nature of enforcement actions while putting the funds collected to use on behalf of the environmental protection."⁵⁹

III. Comparison of the Government and Sierra Club Arguments

A. The Government's Position

The government's consistent position has been that consent judgments are acceptable only if a sizable portion of the settlement is paid to the United States Treasury as a penalty and that any environmental projects receiving monies are remedial in nature, closely related to the underlying violation.⁶⁰ The government's reasoning is that citizen enforcers have only limited jurisdiction to enforce the act.⁶¹ Under the statute, citizens may sue for the specific remedies of civil penalties and injunctive action.⁶²

The government objected to the proposed consent judgment resolving *Electronic Control Design* because the settlement provided for payments for environmental projects unrelated to the original violation. The government argued the payments were unlawful either as penalties or injunctive action.⁶³ The language of the statute is mandatory,⁶⁴ requiring the imposition of penalties in virtually all cases.⁶⁵ Thus, a por-

59. H.R. CONF. REP. NO. 1004, 99th Cong., 2d Sess. 139 (1986) reprinted in 132 CONG. REC. H10,571 (daily ed. Oct. 15, 1986).

60. See *Public Interest Research Group of New Jersey Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 82 (3d Cir. 1990); *Pennsylvania Env'tl. Defense Found. v. Bellefonte Borough*, 718 F. Supp. 431, 435 (M.D. Pa. 1989); *Friends of the Earth v. Archer Daniels Midland Co.*, 31 Env't Rep. Cas. (BNA) 1779 (N.D.N.Y. 1990).

61. Brief for the United States as Amicus Curiae at 19, *Sierra Club v. Electronic Control Design*, 909 F.2d 1350 (9th Cir. 1990) (No. 89-35120) [hereinafter Brief for United States] (citing *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 17-18 n.27 (1981)).

62. 33 U.S.C. § 1319(b) & (d) (1988).

63. Brief for United States, *supra* note 61, at 20, 27.

64. 33 U.S.C. § 1319(d) (1988). "[A]ny person who violates [the CWA] shall be subject to a civil penalty. . . ." *Id.*

65. Brief for United States, *supra* note 61, at 24, (citing *Stoddard v. Western*

tion of any CWA settlement must include a penalty.

Under *Gwaltney of Smithfield Ltd. v. Chesapeake Bay Found.*⁶⁶ and *Middlesex County Sewage Auth. v. National Sea Clammers Ass'n*⁶⁷ any civil penalties assessed must be paid to the United States Treasury.⁶⁸ Some of the money which is paid in settlement of a CWA suit may be put to use in remedial environmental projects because section 309(d) of the CWA states that "any good faith efforts to comply with applicable requirements"⁶⁹ may be taken into account in setting any penalty. Money paid to mitigation projects⁷⁰ can be used to partially reduce penalties payable to the United States Treasury because such payments show good faith efforts.⁷¹ Money paid to unrelated projects are unlawful because such payments are not made to "comply with applicable requirements."⁷²

According to the government, payments for environmental projects other than mitigation are not allowable under the court's broad injunctive power because a court's injunctive reach "may extend no farther than required by the nature of the violation."⁷³ To allow settlement payments to go to environmental projects not directly related to the violation would amount to citizen suits becoming funding vehicles for projects of the plaintiff's choice.⁷⁴ Such settlements would violate the CWA because they would be for private not public interests.⁷⁵ Such payments would also not be available under the excep-

Carolina Regional Sewer Auth., 784 F.2d 1200, 1208 (4th Cir. 1986)).

66. 484 U.S. 49 (1987). "If the citizen prevails in such an action, the court may order injunctive relief and/or impose civil penalties payable to the United States Treasury." *Id.* at 53.

67. 453 U.S. at 14 n.25. "Under the [CWA], civil penalties, payable to the Government, also may be ordered by the court." *Id.*

68. Brief for United States, *supra* note 61, at 27.

69. 33 U.S.C. § 1319(d) (1988).

70. Projects to mitigate the environmental damage caused by the violation.

71. Brief for United States, *supra* note 61, at 21.

72. *Id.* at 23.

73. *Id.* (citing *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 399 (1982)).

74. *Id.*

75. *Id.* at 24.

tion set forth in *Local No. 93*,⁷⁶ because the settlement does not "further the objectives of the law upon which the complaint was based."⁷⁷ The objective of the CWA is to abate water pollution, not raise funds for private projects.⁷⁸

B. Sierra Club's Position

The role of the court in approving a consent judgment is fundamentally different than that of a court in reaching an adjudication on the merits. In approving a consent judgment, the main inquiry is whether the public interest is served.⁷⁹ The public interest is served in a number of ways by settlements which provide for payments to public interest organizations. First the money is put to environmentally beneficial use, while at the same time the punitive nature of a penalty is preserved.⁸⁰ Second, the payments further the goals of the CWA⁸¹ by funding new⁸² or existing⁸³ public interest endowments. Third, the payments are a powerful enforcement mechanism,⁸⁴ providing for enforcement where the state or government has failed to act and recovering tens of millions of dollars.⁸⁵

The government's argument that penalties must be paid to the United States Treasury is incorrect. The legislative history of the 1987 amendments to the CWA clearly shows that Congress encourages settlements of fines and penalties to fund related projects which further the goals of the CWA and to investigate problems other than those leading to the violation.⁸⁶ Supreme Court decisions⁸⁷ which said that penalties

76. *Local No. 93*, 478 U.S. at 525, 529.

77. *Id.* at 525.

78. Brief for United States, *supra* note 61, at 29.

79. Brief for the Sierra Club, *supra* note 18, at 13, (citing *United States v. Seymour Recycling Corp.*, 554 F. Supp. 1334, 1337 (S.D. Ind. 1982)).

80. Brief for Sierra Club, *supra* note 18, at 14.

81. *Id.* at 15.

82. *Id.* at 16.

83. *Id.* at 17.

84. *Id.* at 14.

85. *Id.* at 16.

86. *Id.* at 24.

87. *Middlesex County Sewage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 14

must be paid to the United States Treasury did not deal directly with the issue of payment of penalties to public interest organizations. Rather, they were concerned with whether individuals could use the CWA to recover private damages.⁸⁸ Congress intended that settlement money from CWA suits be put to environmentally beneficial use. To carry out congressional intent, it is how the money is used that is relevant, not who designates that use.⁸⁹

Even if penalties must be paid to the United States Treasury, payments to environmental groups are allowable because they are not penalties. Under *Local No. 93* consent judgments may include terms broader than available under the statute, provided certain conditions are met.⁹⁰ Those conditions are met when the settlement provides for a cessation of the violation. Payments to public interest organizations are consistent with Congress' desire to encourage settlements which benefit the environment.⁹¹ In addition, the settlements do not dispose of the rights of third persons since the EPA is free to pursue its own enforcement actions.⁹²

C. Comparison Between the Government and Sierra Club Positions

The arguments advanced by the Department of Justice and Sierra Club raise several issues which are fundamental to the result in *Electronic Control Design*. Both sides agree that money may not be paid to promote private interests. The government's position is that the private character of the citizen/plaintiff, who designates where the money is to be spent, determines whether the settlement promotes private interests.⁹³ Sierra Club's position is that the use of the money determines

n.25 (1981); *Gwaltney of Smithfield Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 53 (1987).

88. Brief for Sierra Club, *supra* note 18, at 25 n.12.

89. *Id.* at 25.

90. *Local No. 93*, 478 U.S. at 525-529.

91. Brief for Sierra Club, *supra* note 18, at 26.

92. *Id.* at 27.

93. See *supra* note 74 and accompanying text.

whether the settlement promotes public or private interests.⁹⁴ In advancing its position the government argues that a literal, narrow reading of the statute is appropriate.⁹⁵ Sierra Club's position is that a broader interpretation which relies on the legislative history is correct.⁹⁶

Finally, the two sides disagree on how the public interest is protected. The Government argues that the public interest is violated when payments are paid to private groups,⁹⁷ while Sierra Club maintains that the public interest is protected by cessation of the violation and funding of environmentally beneficial projects.⁹⁸

D. Related Court Decisions

Courts have addressed these issues a number of times with differing results. The United States Supreme Court in *Weinberger v. Romero-Barcelo*⁹⁹ considered whether the courts' normally broad equitable power in deciding relief was restricted by the language and statutory scheme of the CWA.¹⁰⁰ The Court held that the CWA did not require the issuance of an injunction for dumping without a permit.¹⁰¹ *Weinberger* suggests that the CWA contemplates the exercise of discretion and balancing of equities and that courts may use their traditional equitable powers in approving consent decrees.¹⁰²

In *Public Interest Research Group of New Jersey v. Powell Duffryn Terminals*,¹⁰³ the Third Circuit Court of Appeals considered whether the approval of payments to public interest groups as part of a CWA enforcement action was within

94. See *supra* note 89 and accompanying text.

95. See *supra* note 62 and accompanying text.

96. See *supra* note 86 and accompanying text.

97. See *supra* note 78 and accompanying text.

98. See *supra* note 80 and accompanying text.

99. 456 U.S. 305 (1982).

100. *Id.* at 306-16.

101. *Id.* at 318.

102. *Id.*

103. 913 F.2d 64 (3d Cir. 1990).

the court's equitable power.¹⁰⁴ The court held that a court could approve such payments through its equitable powers, but that if these payments were labeled as penalties then the monies must be paid to the United States Treasury.¹⁰⁵

A district court in *Pennsylvania Environmental Defense Found. v. Bellefonte*¹⁰⁶ considered whether under the CWA settlements must include mandatory civil penalties payable to the United States Treasury.¹⁰⁷ The court held that settlements could provide for monies directed to environmental projects and need not include penalties paid to the United States Treasury.¹⁰⁸ To protect the public interest, the court adopted the EPA's *Clean Water Act-Penalty Policy for Civil Settlement Negotiations*¹⁰⁹ which provides that environmental projects are acceptable only if they are closely related to the underlying environmental harm.¹¹⁰ By requiring that payments be made to remedial projects,¹¹¹ the court insured that such payments could not be improperly made to private interests.

*Friends of the Earth v. Archer Daniels Midland Co.*¹¹² considered whether penalties must be paid to the United

104. *Id.* at 82.

105. *Id.*

106. 718 F. Supp. 431 (M.D. Pa. 1989).

107. *Id.* at 435-37.

108. *Id.* at 436.

109. *Id.* at 436-37. ENVIRONMENTAL PROTECTION AGENCY, CLEAN WATER ACT-PENALTY POLICY FOR CIVIL SETTLEMENT NEGOTIATIONS (Feb. 11, 1986). This policy, which is binding on governmental but not private settlements, governs EPA's use of consent judgments to settle CWA suits. It includes formulas for determining the size of civil penalties which are paid to the United States Treasury. In addition, it contains a requirement that environmental projects which are included in settlements must mitigate the harm caused by the original violation. In its ruling in *Bellefonte*, the court adopted the mitigation rule. An analysis by Donald Stever in *Environmental Penalties and Environmental Trusts—Constraints on New Sources of Funding for Environmental Preservation*, 17 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 10,356 (1987), would support the conclusion that the primary concern of EPA's *Penalty Policy* mitigation rule is compliance with the *Miscellaneous Fees Act*, 31 U.S.C. § 3302 (1988) rather than environmental welfare. Because the *Miscellaneous Fees Act* applies only to the government, this policy consideration is not applicable to private citizens settlements.

110. *Bellefonte*, 718 F. Supp. at 437.

111. *Id.* at 437-38.

112. 31 *Env't Rep. Cas.* (BNA) 1779 (N.D.N.Y. 1990).

States Treasury and whether environmental projects funded by the payments must be directly related to the original harm.¹¹³ That court held that penalties in settlements under the CWA may be paid to environmental projects rather than the United States Treasury and that there is no requirement that projects be directly related to the underlying violation.¹¹⁴

The court noted in dicta that there was considerable support for the government's position that payments in CWA citizen suits may never be paid to private individuals.¹¹⁵ The court opined that it would approve of the consent order if it was reformulated to make a settlement payment to a state sponsored environmental water quality control program.¹¹⁶ The court's objective was to guarantee that the money be spent improving New York State water quality and not be diverted to private interests.¹¹⁷

IV. *Electronic Control Design*

A. The Decision of the District Court

The district court held that it could not approve the settlement between Electronic Control Design, Inc. and Sierra Club because its terms violated the CWA.¹¹⁸ The court reasoned that the sole purpose of section 505 is to provide private parties with a mechanism to compel enforcement of the effluent standards promulgated under the CWA.¹¹⁹ Citizen participation in enforcement of the CWA is to be carefully channeled, limited to seeking injunctive relief and civil penalties for violations.¹²⁰ The legislative history of the CWA makes it clear that private citizens may not sue for damages and that civil penalties must be paid to the United States

113. *Id.* at 1780.

114. *Id.* at 1782.

115. *Id.*

116. *Id.* at 1783.

117. *Id.*

118. *Electronic Control Design I*, 703 F. Supp. at 879.

119. *Id.* at 876.

120. *Id.*

Treasury.¹²¹ The court further held that the settlement payments to private environmental groups must either be penalties or damages.¹²² If the payments are characterized as penalties, they are improper if they are not paid to the United States Treasury. If the payments are deemed personal damages, they are not authorized.¹²³ The court held the *Electronic Control Design* settlement payments to be penalties.¹²⁴ The court said that labeling them did not change the nature of the payment. The award of attorneys' fees, which may only be awarded to substantially prevailing parties, supported the view that the plaintiffs had prevailed in the suit.¹²⁵

The court recognized Congress' desire in appropriate cases to have payments made in CWA suit settlements go to environmental projects.¹²⁶ The court said that it would approve of a settlement which included payments to Oregon's Water Quality Control Program because such a settlement would conform to Congress' wish to encourage environmental projects and would not violate the prohibition against paying penalties to private citizens.¹²⁷ The court's underlying concern in approving payments to public groups as opposed to private groups is that the public groups are directly accountable to the electorate.¹²⁸

B. The Decision of the Ninth Circuit Court of Appeals

The Ninth Circuit Court of Appeals affirmed the district court's holding that the CWA requires payment of penalties to the United States Treasury.¹²⁹ Accordingly, if the proposed payments were penalties within the meaning of the CWA, they must be paid to the United States Treasury.¹³⁰

121. *Id.* at 876-77.

122. *Id.* at 877.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 878.

127. *Id.* at 879.

128. *Id.*

129. *Electronic Control Design II*, 909 F.2d at 1354.

130. *Id.*

However, the court of appeals rejected the district court's distinction between civil penalties paid to public and private groups. The court of appeals held that if the amounts paid are penalties they may not be paid to either private or state affiliated public groups but only to the United States Treasury.¹³¹ The court of appeals held that it was powerless under the statute to order such penalties to either public or private groups.¹³²

The court of appeals held the district court's refusal to approve the proposed consent decree was an abuse of its discretion because the monies to be paid were not civil penalties.¹³³ No violation of the CWA was found or determined by the proposed settlement. The court of appeals held that when a defendant agrees before trial to make payments to environmental organizations without admitting liability, the agreement is simply part of an out-of-court settlement which the parties are free to make."¹³⁴

The standard to be used in determining whether to approve the consent judgment is whether the judgment is "fair, reasonable and equitable and does not violate law or public policy."¹³⁵ Review should not include inquiry into the merits to determine the nature of the settlement terms because consent judgments may contain terms which would have been unavailable had the suit been litigated through to completion. A court may approve a consent judgment containing broader relief, provided that the consent judgment complies with the criteria set forth in *Local No. 93*.¹³⁶

The court of appeals held that the consent decree complied with the criteria laid out in *Local No. 93*¹³⁷ and that the

131. *Id.* at 1356.

132. *Id.* at 1355.

133. *Id.* at 1356.

134. *Id.* at 1354.

135. *Id.* at 1355.

136. *Id.*

137. *Id.* The criteria which the settlement must satisfy to fall within the exception are that the settlement:

- 1) "must spring from and serve to resolve a dispute within the court's subject matter jurisdiction;" *Local No. 93*, 478 U.S. at 525.
- 2) "comes within the general scope of the case made by the pleadings;" *Id.*

proposed consent judgment "came within the general scope of the case made by the pleadings."¹³⁸ The Sierra Club's complaint was based on the allegation that Electronic Control Design was not in compliance with the CWA, and the consent judgment resolved that complaint.¹³⁹

The court of appeals found that the consent judgment furthered "the objectives upon which the law is based."¹⁴⁰ The consent judgment required that Electronic Control Design comply with its permit and make payments for environmental use which furthered the national goal of clean water.¹⁴¹ The proposed consent judgment did not violate the statute upon which the complaint was based because the legislative history of the CWA states that Congress encourages "settlements of this type which preserve the punitive nature of enforcement actions while putting the funds collected to use on behalf of environmental protection."¹⁴²

The court of appeals held that there is nothing in the CWA which provides for a limitation on these types of payments. The 1987 amendments to the CWA provide that private parties must give the government a forty-five day notice of a proposed consent judgment but contain no limitation on the terms of a proposed consent judgment.¹⁴³

Finally, the court of appeals held that the proposed settlement did "not dispose of the claims of a third party"¹⁴⁴ because the government still had the option to bring its own suit.¹⁴⁵

3) "furthers the objectives of the law upon which the complaint was based;"
Id.

4) "does not dispose of the claims of a third party".
Id. at 529.

138. *Electronic Control Design II*, 909 F.2d at 1355.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* quoting H.R. CONF. REP. No. 1004, 99th Cong., 2d Sess. 139 (1986) reprinted in 132 CONG. REC. H10.571 (daily ed. Oct. 15, 1986).

143. *Electronic Control Design II*, 909 F.2d at 1356.

144. Local No. 93, 478 U.S. at 529.

145. *Electronic Control Design II* at 1356 n.8.

V. Analysis

A. Analysis of the Appropriate Degree of Inquiry for Approving a Consent Judgment

In *Electronic Control Design II*, the court of appeals ruled the district court had misapplied the standard of review in considering approval of the proposed consent judgment. Instead of examining the merits, the court of appeals focused its review on whether the proposed agreement was in violation of law or public policy.¹⁴⁶ The court noted the 1987 CWA amendments failed to specify whether citizen groups as well as the government could enter into environmentally beneficial settlements.¹⁴⁷ In light of all the restrictions which the 1987 CWA amendments placed on citizen suits, the court of appeals concluded that Congress sought to encourage environmentally beneficial settlements without regard to whether the plaintiff was the government or a citizen group. The court's rationale for this conclusion was the absence of distinction between government and citizen plaintiffs in an otherwise comprehensive set of limitations.¹⁴⁸

The district court's interpretation of the standard of review that the consent judgment be "fair, reasonable and equitable . . . and that the decree does not violate law or public policy"¹⁴⁹ differed greatly from the interpretation of the court of appeals. The district court's starting assumption was that payment of penalties to private individuals would constitute a violation of the CWA.¹⁵⁰ The scope of review must include an inquiry into the settlement's merits to determine whether the settlement terms included penalties.¹⁵¹ The district court held that the "'labeling' of the remedy [by the parties], therefore clearly does not control"¹⁵² and if settlement provided for

146. *Id.* at 1356.

147. *Id.*

148. *Id.*

149. *Electronic Control Design I*, 703 F. Supp. at 876. (quoting *Sierra Club v. Coca Cola*, 673 F. Supp. 1555-56 (M.D. Fla. 1987)).

150. *Id.* at 877.

151. Brief for United States, *supra* note 61, at 18.

152. *Electronic Control Design I*, 703 F. Supp. at 877.

penalties payable to private persons, the settlement violated the law.¹⁵³

The holding of the district court views the settlement payments realistically. Under a realistic view, a violator settles the suit because it is in her best interests to limit the loss when faced with the prospect of losing a suit and incurring large legal costs. In this respect, consent decrees resemble plea bargains,¹⁵⁴ in which defendants agree to a lesser sentence in return for saving the State the cost of a full trial. The district court noted, that after approving a consent judgment, courts must make a determination on the merits when deciding whether to award attorneys fees.¹⁵⁵ "If the Club is indeed the prevailing party . . . the money received must be a penalty."¹⁵⁶

Such a characterization may not be completely accurate. In *Gwaltney of Smithfield Ltd. v. Chesapeake Bay Found.*,¹⁵⁷ the Supreme Court held that district courts were without jurisdiction to hear CWA citizen suits for wholly past violations. Since CWA violations are easy to prove,¹⁵⁸ the principle issue in many citizen suits is whether the basis of an ongoing violation exists.¹⁵⁹ A consent judgment in this situation would represent a contractual compromise resolving jurisdiction rather than a judgment on the merits of the case.

B. The Apparent Contradiction between Supreme Court Statements and the Legislative History of the CWA

The central issue underlying the dispute in *Electronic Control Design* is whether the CWA allows consent judgments to provide for payments of penalties to persons other than the United States Treasury. The government's authority for the

153. *Id.*

154. "The process whereby the accused and the prosecutor in a criminal case work out . . . a disposition of the case subject to court approval. It usually involves the defendant's pleading guilty to a lesser offense . . . in return for a lighter sentence than that possible for the graver charge." BLACK'S LAW DICTIONARY 1037 (5th ed. 1979).

155. *Electronic Control Design I*, 703 F. Supp. at 877.

156. *Id.*

157. 484 U.S. 49 (1987).

158. JORGENSEN & KIMMEL, *supra* note 2, at 10.

159. *Id.* at 7.

position that it does not are two statements by the Supreme Court that penalties recovered under the CWA must be paid to the United States Treasury.¹⁶⁰ The Sierra Club's authority for the contrary position is the conferee report to the 1987 CWA amendments which said that Congress encourages the use of "penalties to fund research, development and other related problems."¹⁶¹ Since penalties may not fund research or other projects if they are paid to the United States Treasury, the conferee report and the Supreme Court statements are in apparent contradiction. The determination of which authority controls is basic to deciding this issue. The district court, the court of appeals, the government, and the Sierra Club treated this apparent contradiction in different ways.

The district court ignored this contradiction and as a result produced a decision which is illogical and unsound. The district court relied on the authority of the Supreme Court's statements to hold settlement payments to environmental groups illegal since all penalties must be paid to the United States Treasury.¹⁶² The district court then relied on the legislative history as authority to approve of settlement payments to a state affiliated environmental organization.¹⁶³ Such a result is contradictory; if penalties must be paid to the United States Treasury, then it is impermissible to pay them to either a state agency or a private environmental group.¹⁶⁴

The district court in *Friends of the Earth v. Archer Daniels Midland Co.*¹⁶⁵ came to the same conclusion but relied on a different analysis which was not contradictory. In its analysis, the court held that the legislative history of the 1987 CWA amendments indicated Congress encouraged that CWA penal-

160. "If the citizen prevails in such an action, the court may order injunctive relief and/or impose civil penalties payable to the United States Treasury." *Gwaltney of Smithfield Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 53 (1987). "Under the [CWA], civil penalties, payable to the Government, also may be ordered by the court." *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 14 n.25 (1981).

161. See *supra* note 59 and accompanying text.

162. *Electronic Control Design I*, 703 F. Supp. at 877.

163. *Id.* at 879.

164. *Electronic Control Design II*, 909 F.2d at 1354.

165. 31 Env't Rep. Cas. (BNA) 1779 (N.D.N.Y. 1990).

ties be put to use in environmental projects unrelated to the original violation.¹⁶⁶ The court also held the CWA prohibited payments to private individuals.¹⁶⁷ Accordingly, the court could approve of penalty payments to state affiliated organizations but not to private ones.¹⁶⁸ In order to reach this holding, the court held that the Supreme Court's statements were not applicable because they were dicta made after considering a different issue.¹⁶⁹

The government, in its brief, also ignored the conflict and relied only on the Supreme Court's statements. The government's position was that penalties must be paid to the United States Treasury and may not be paid to either private or state sponsored environmental projects.¹⁷⁰ The EPA's *Clean Water Act-Penalty Policy for Civil Settlement Negotiations*¹⁷¹ which applies to settlement of CWA actions in which the government is the plaintiff, embodies this position. The government argued¹⁷² that its construction of the CWA should be given great deference by the court under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*.¹⁷³ The court of appeals declined to accept the government's position on the grounds that EPA's penalty policy only applied to actions in which the government is the plaintiff.¹⁷⁴

The government's reliance on Supreme Court statements is inadequate because it ignored relevant legislative history in ascertaining congressional intent. Nonetheless, a case could be made that the legislative history is not controlling because one Congress may not supply legislative intent for what another Congress has enacted. The 1987 CWA amendments did not

166. *Id.* at 1781.

167. *Id.* at 1782.

168. *Id.*

169. *Id.* at 1781.

170. Brief for United States, *supra* note 61, at 29 n.20.

171. *Clean Water Act-Penalty Policy for Civil Settlement Negotiations* (1986), *supra* note 109.

172. Brief for United States, *supra* note 61, at 21 n.12.

173. 467 U.S. 837 (1984). When an agency entrusted with the administration of a statute interprets a statute, the courts must give that interpretation substantial weight. *Id.* at 843-45.

174. *Electronic Control Design II*, 909 F.2d at 1354-55 n.6.

change the remedies provided in the 1972 legislation.¹⁷⁵ It is the intent of the 1972 Congress, which enacted those remedies, which is relevant to deciding to whom penalties may be paid. On that basis, the Supreme Court statements could control, since they interpreted the intent of that Congress.

The counterargument is that the 1987 CWA amendments provided a comprehensive scheme of regulation on the use of citizen suits.¹⁷⁶ These amendments incorporated the original statutory language authorizing penalties into a revised scheme. Congress' approval of the way penalties could be used to benefit the environment is intrinsic to the revision. Therefore, the legislative history explains the way carryover provisions are used in the scheme.

Assuming that the legislative history of the CWA properly indicates congressional intent, punitive settlement payments may be made to entities other than the United States Treasury. First, under traditional statutory interpretation, courts consult the legislative history when statutory language is ambiguous.¹⁷⁷ Second, conferee reports are accorded authoritative weight in ascertaining congressional intent because they are the reports which Congress reads before approving a bill.¹⁷⁸ Third, the conferee report is explicit and unambiguous in approving of such payments.¹⁷⁹ Such analysis would support the Sierra Club's contention that CWA penalties are properly payable to fund environmental projects rather than the United States Treasury.

However, even if settlement money may go to fund environmental projects, the legislative history is silent with regard to whether private citizen groups may administer the money. In support of the position that a private group may administer settlement money, the Sierra Club argued that citizen suits under the CWA "have emerged as potent weapons for

175. Federal Water Pollution Control Act of 1972 § 319(d), Pub. L. No. 92-500, § 309 (d), 86 stat. 816, 860 (1972) as amended 33 U.S.C. § 1319(d) (1988).

176. See *supra* notes 53-59 and accompanying text.

177. WILLIAM N. ESKRIDGE JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION STATUTES AND THE CREATION OF PUBLIC POLICY, 697 (1988).

178. *Id.* at 709.

179. See *supra* note 59 and accompanying text.

environmental enforcement,"¹⁸⁰ and that "federal courts around the country have routinely approved consent judgments under which the money goes to organizations like those named in the proposed judgment."¹⁸¹

The thrust of the Sierra Club's argument seems to be that because organizations like the Sierra Club have done such a good job of enforcing the CWA when the government has failed to act, the organizations can and should be trusted to select environmental projects. Courts may be influenced to allow private environmental organizations to have a role in funding "research, development, and other related projects"¹⁸² based on private organizations' track records in enforcing the CWA. The court of appeals resolved this issue by holding that Congress intended no distinction between citizen groups and governmental entities administering environmental projects funded through settlements because the comprehensive regulation of citizen suits enacted in the 1987 CWA amendments made no such distinction.¹⁸³

It appears that the Court of Appeals for the Ninth Circuit resolved the conflict between the Supreme Court's statements and the legislative history in a manner consistent with congressional intent and with proper deference to the Supreme Court. The court accomplished this through legal sleight of hand. The court of appeals agreed with the Supreme Court that CWA settlement penalties must be paid to the United States Treasury.¹⁸⁴ However, the court of appeals accomplished the congressional goal of funding environmental projects with CWA settlement payments by holding that the payments were not penalties.¹⁸⁵ Although these non-penalties were beyond the scope of the relief authorized by the CWA, the court of appeals held that it could approve them through the exception created in *Local No. 93*.¹⁸⁶

180. Brief for Sierra Club, *supra* note 18, at 14 (quoting U.S. Brief at 2).

181. *Id.* at 15.

182. See *supra* note 59 and accompanying text.

183. *Electronic Control Design II*, 909 F.2d at 1356.

184. *Id.* at 1354.

185. *Id.*

186. *Id.* at 1354-55.

The court did not achieve this harmony without incurring a cost. The appellate decision is confusing in that it uses different concepts of penalties in the same analysis, is unrealistic, and gives relief broader than the statute allows.

The appellate decision creates confusion: at the same time settlement payments are not penalties in the sense the Supreme Court's statements use the term, they are penalties in the context of the legislative history. The appellate decision narrowly defines the term penalty not to include settlement payments, while relying on the legislative history, which makes clear that such settlements are penalties, as authority to approve of the payments.¹⁸⁷ Under the appellate decision, a reviewing court should not consider a proposed settlement a penalty, and yet should consider the objective criteria for penalties in determining whether a settlement is "fair and adequate."

Furthermore, the logic that the settlement payments are not penalties because the consent decree contains no admission of liability is not realistic. The district court pointed out that labeling by the parties did not change the nature of the remedy and that the court must make a determination on liability in awarding legal fees.¹⁸⁸ Moreover, the legislative history only approves of settlement payments which are punitive in nature.¹⁸⁹

Finally, as non-penalties, the payments are outside the scope of relief authorized in the CWA. Consequently, the court must rely on the exception created in *Local No. 93* as authority for approving the consent judgment. On its face, the language of the *Local No. 93*¹⁹⁰ exception to CWA settlements is broad enough to support application, but the exception has never been considered by the Supreme Court. There are, however, differences between the factual and policy considerations

187. The legislative history's language refers to "penalties to fund research" and "settlements of this type. . . to preserve the punitive nature." H.R. CONF. REP. NO. 1004, 99th Cong., 2d Sess. 139 (1986) reprinted in 132 CONG. REC. H10,571 (daily ed. Oct. 15, 1986).

188. *Electronic Control Design I*, 703 F. Supp. at 877.

189. See *supra* note 59 and accompanying text.

190. 478 U.S. at 525, 529 (1986).

present in *Local No. 93* and those present in CWA citizen suit settlements upon which the Supreme Court might hold that the exception does not apply. *Local No. 93* was a Title VII discrimination suit in which the issue was whether the court could approve a settlement which provided "race-conscious relief that may benefit nonvictims."¹⁹¹ The payment of CWA settlement monies to unrelated environmental projects raises the different issue of whether the parties to a CWA settlement can direct settlement money to environmental projects rather than the United States Treasury.¹⁹² In *Local No. 93* the exception was recognized so that parties could take voluntarily actions which would have violated their constitutional rights if imposed by the court. In CWA settlements, the parties' settlement agreements affects the rights of a third party, the government, to receive settlement money.

The Supreme Court might find this difference important. The present Supreme Court has exercised judicial restraint and held that courts may not exercise powers which properly belong to Congress.¹⁹³ The power of the purse, the raising and allocation of public money, is one of the main functions of Congress.¹⁹⁴ On the basis of the separation of powers doctrine, the Supreme Court might hold that the CWA does not authorize district courts to approve settlements in which citizen plaintiffs direct public money to fund environmental projects. The language of the legislative history is general and does not specifically authorize private citizens to enter into such settle-

191. *Id.*

192. *Electronic Control Design II*, 909 F.2d at 1354.

193. For example, in *Hallstrom v. Tillamook County*, 493 U.S. 20, 27 (1989) the Supreme Court held that federal courts may not, through their equitable powers, cure technical deficiencies in the RCRA citizen suit provision waiting requirements. "[This court] is not at liberty to create an exception where Congress has declined to do so." *Id.*

194. "Under the Constitution no money may be drawn from the Treasury of the United States except 'in consequence of appropriations made by law.' U.S. CONST. art. I, § 9, cl. 7. The term 'law' here means an Act of Congress. This provision concentrates upon Congress the responsibility for appropriations, subject to the veto power of the President." J. MATHEWS, *THE AMERICAN CONSTITUTIONAL SYSTEM*, 246 (1st ed. 1932).

ments.¹⁹⁵ The Supreme Court might narrowly interpret the legislative history and hold that the exception created in *Local No. 93* does not apply to CWA citizen suits.

It would have been neater and less complicated had the Court of Appeals for the Ninth Circuit ruled that settlement penalties could be paid to private organizations. However, its decision does have the virtue of having avoided a lower court dismissal of Supreme Court statements as irrelevant. In practical application, the decision recognizes that citizen groups in appropriate circumstances can have input in directing settlement money to environmental projects. If the case is viewed as a fight for control over settlement money between the government and environmental groups, the decision allows the citizen groups in some circumstances to have some control to direct settlement money toward environmentally beneficial projects. In doing so, the decision recognizes that environmentally beneficial projects administered by private groups benefit public as opposed to private interests.

The decision raises another important control issue. The legislative history of the 1987 CWA amendments recognizes that the government may validly object to a consent judgment on the grounds that the settlement interferes with enforcement priorities.¹⁹⁶ Arguably, the government could maintain that the payment of penalty money to environmental projects would have less deterrent effect and interfere with the government's enforcement priorities. In such a case, a reviewing court would have the difficult task of apportioning settlement money between the citizen groups and the government.

C. Protecting the Public Interest Consistent with *Electronic Control Design II*

As approved, the consent judgment in *Electronic Control Design II* does not insure that the settlement money will be spent on public welfare. In its opinion, the Court of Appeals for the Ninth Circuit accepted without question that the set-

195. See *supra* note 59 and accompanying text.

196. See *supra* note 56 and accompanying text.

tlement money would be put to proper use in environmentally beneficial projects.¹⁹⁷ That assumption may not be justified. While the agreement stipulated that the money was to be put to environmentally beneficial use, the agreement contained no effective controls to insure that the money would promote the public welfare.¹⁹⁸ The agreement provided only for payments to private environmental organizations for use in undefined activities and projects.¹⁹⁹ It is foreseeable that after a consent judgment is approved and the parties are not under the supervision of the court, the settlement monies might be used to promote private rather than public welfare.

The district court addressed this problem by holding that it would approve of the agreement if it were reformulated to make the payment to a state affiliated agency for use in environmental work.²⁰⁰ Such a settlement insures that the money benefits the environment and is not diverted to private use because the administering agency is accountable to the public.

The district court in *Pennsylvania Environmental Defense Found. v. Bellefonte Borough*²⁰¹ insured that settlement money would be spent on proper purposes by requiring that the money be spent on "mitigation projects."²⁰² Under this approach, the money is not likely to be misspent because it is tied to specific environmental work. Both decisions can be seen as a compromise between honoring Congress' wish that settlement funds be used to better the environment and fulfilling the court's responsibility to insure that settlement monies be put to public benefit. The district court in *Electronic Control Design* accomplished this by limiting the user, while the *Bellefonte* court did so by limiting the use.

Under the court of appeals reasoning in *Electronic Control Design II*, restrictions imposed by the court on either use or user should be improper. Under the appellate decision, such court imposed restrictions would violate separation of

197. *Electronic Control Design II*, 909 F.2d at 1355.

198. Brief for United States, *supra* note 61, at 25-26.

199. *Id.*

200. *Electronic Control Design I*, 703 F. Supp. at 879.

201. 718 F. Supp. 431 (M.D. Pa. 1989).

202. *Id.* at 437-38.

powers because, by comprehensively regulating the area, Congress had placed restrictions it deemed adequate on citizen suit settlements.²⁰³ Imposing additional restrictions would amount to legislating by a reviewing court. In the case of use restrictions, the legislative history specifically notes that settlement money may go to unrelated environmental projects. Nevertheless, settlement terms which place restrictions on the use or user could play an important, even determinative, role in court approval of consent judgments. Use or user limitations in settlement terms could serve as evidence that a proposed settlement benefits public rather than private interests.

In reviewing a proposed consent judgment, one of the courts' essential inquiries is whether the "public interest" is protected.²⁰⁴ Whether a proposed settlement benefits public rather than private interests is a legitimate "public interest" question to be answered before a reviewing court grants approval. In order that this issue be satisfactorily examined, the courts could establish a rebuttable presumption that proposed consent judgments benefit private not public purposes. The proponents of the consent judgment would have the burden of convincing the court that the settlement would benefit the public welfare before the settlement could be approved. Proponents of a settlement could meet this burden by structuring their agreement to provide for restrictions on either the use or the user which would serve as controls to insure the money would be spent on the public welfare. Of course, proponents might justify the terms in other more difficult ways.²⁰⁵

The advantage of such a rebuttable presumption approach is that the court's authority derives from protecting the "public interest," rather than from implying restrictions

203. *Electronic Control Design II*, 909 F.2d at 1356.

204. *United States v. Ketchikan*, 439 F. Supp 83, 86 (D. Alaska 1977).

205. The key distinction is that any restrictions in the settlement agreement would be voluntarily taken by the parties to meet their burden of proof, rather than imposed by the court. However, since an agreement would have to guarantee that money would not be misapplied to private interests in the future, satisfying a reviewing court might be difficult. The reviewing court could consider the track record of the administering organization, limits on the use, or pressing environmental need in evaluating the potential for misapplication, but in most cases the parties would have difficulty satisfying the reviewing court that the money would not be misapplied.

to the statute. Authority for a court adopting a rebuttable presumption can be found in the legislative history of the CWA, case law, and common sense.

1. Statutory Authority

The 1987 amendments to the CWA provide that proponents of consent judgments must give notice to the government forty-five days before the consent judgment can be approved.²⁰⁶ The purpose of this provision is to provide the government with the opportunity to object to any abusive or collusive settlements.²⁰⁷ Since the government would make any objections to a reviewing court, the reviewing court must have the power to disapprove of a settlement which is abusive or collusive. A proposed consent judgment which provides for payments to private interests under the guise of being for the public benefit would be illegal as well as abusive and collusive.

2. Case Authority

In many contexts, courts have placed the burden of proof on the party which would benefit from the courts' ruling.²⁰⁸ Courts have traditionally used presumptions which allocate the burden of proof to insure that issues are litigated fairly before the courts.²⁰⁹ In *United States v. Ketchikan*,²¹⁰ the court considered the issue of whether the proponents of a proposed consent judgment would have to justify those terms to the reviewing court. Although the court in that case deferred to the government's prior fact finding and held that it was

206. 33 U.S.C. § 1356(c)(3) (1988).

207. See *supra* note 57 and accompanying text.

208. DAVID F. HERR ET AL., MOTION PRACTICE 63 (1991).

209. See *Reeves v. Ernst & Young*, 494 U.S. 56, 63 (1990) (holding that a note was presumed to be a security, and that a person could rebut this presumption); *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986) (holding that an attorney is presumed to be competent and that a person who was convicted while being represented by that attorney could rebut that presumption); *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that a rebuttable presumption of improper use of peremptory challenges was created by defendant's prima facie showing).

210. 430 F. Supp. 83 (D. Alaska 1977).

unnecessary to further justify its settlement's terms,²¹¹ the court's logic supports imposing such a burden when private citizens are the parties. The court's approach balanced the necessity of safeguards to protect the public interest against the court's interest in conserving judicial resources. The court held that where the government is a party, the comments of the *amicus curiae* adequately protected the public interest.²¹² Under the court's rationale, greater potential for abuse would justify increased allocation of judicial resources for additional safeguards.

3. Common Sense

The judicial system normally depends on the adversarial relationship of the parties as the mechanism which insures relevant issues are litigated before the court. In the case of settlements which resolve citizen suits, there is no adversarial relationship which insures that the public interest is protected, since both sides want the agreement ratified.²¹³ Conceivably, parties to such a consent agreement could propose settlement terms which inadequately protect the public interest in order to obtain a more favorable settlement for themselves. Unlike the government, private parties cannot be presumed to be acting in the public interest. To properly bring public interest concerns before a reviewing court, some additional mechanism is needed. A rebuttable presumption would provide an effective mechanism because it would create an incentive for the parties to make sure that the public interest is protected.

Besides creating an incentive for the parties to protect the public interest, a rebuttable presumption would also allocate the costs of settling the suit in an effective manner. The primary burden would be on the proponents of a proposed agreement with a lesser burden on the judicial system and the government. A rebuttable presumption would create an incentive for proponents of a settlement to include in the proposed

211. *Id.* at 86.

212. *Id.* at 86.

213. SCHWARZSCHILD *supra* note 40, at 888.

settlement internal controls to protect the public interest. The costs on the courts could also be limited because only the issues which affected the public interest would have to be justified. The need for additional expenditures of judicial resources would be weighed against the danger to the public interest. The cost on the government would also be minimized because the government would avoid an expensive case by case investigation of the terms of consent judgments. Since a mechanism to protect the public interest would be present in all consent orders, the government could marshal its resources to object to those proposed consent orders which it found most objectionable.

VI. Conclusion

Electronic Control Design II is a pro-environmental decision that recognizes that citizen enforcers of the CWA may have a voice in directing settlement monies toward environmental projects. The decision expands citizen participation in the enforcement of the CWA in two ways. First, the decision creates an incentive for private citizens to take a larger enforcement role in the CWA. Second, the decision allows citizen enforcers to fund the solving of some of the country's environmental problems.

However, the Ninth Circuit's recognition of congressional approval of such settlements creates a problem for the district courts. In considering whether to approve of a proposed agreement, a reviewing court must decide whether the agreement benefits public or private interests. An agreement which promotes public interests would be acceptable, whereas one which promotes private interests would not. In the normal course of business, district courts are ill-equipped to make this distinction. Courts are adjudicative, rather than investigative and depend on the adverse relationship of the parties to represent the interests involved. Because of a potential conflict of interest between the private parties and the "public interest," the adversarial relationship of the parties is not sufficient to insure that the public interest is represented. Furthermore, the allocation of resources to remedy environmental

ills is essentially a legislative act, which requires assessing the public need. Thus, a reviewing court is faced with making a legislative decision with incomplete information.

Courts reviewing settlements will try to narrow the scope of consent agreements so that the court can comfortably evaluate whether the agreement promotes the "public interest." The decision in *Electronic Control Design II* broadens the range of terms which consent judgments may include by holding that Congress did not intend limitations. Because of the inherent limitations of the ability of courts to review these terms, other circuits may not follow the Ninth Circuit's decision and may hold that limitations on use or user are permissible. This Article has proposed a method by which a reviewing court could effectively limit the terms of a consent judgment, consistent with *Electronic Control Design II*. The advantage of the Articles' approach is that it is grounded in legitimate judicial power, rather than on implying statutory restrictions.