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Community Participation in Environmental Protection

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I. INTRODUCTION

Much has been written in recent years concerning the erosion of citizens' rights to file suits alleging environmental harm against industry. An article in Bergen, New Jersey's *Record* newspaper typifies these writings: "You don't need a chainsaw to damage the environment. A gavel and a black robe can be far more effective."[1] Of course, commentary such as this tends to shed more heat than light on the subject by condemning integral decision-makers and shifting focus away from substantive issues. The purpose of this article, however, is to approach the issue in a manner that illuminates the role of citizen participation in environmental protection rather than descending into argument. Analyzed herein are the two primary vehicles which citizens have successfully used to seek redress for alleged environmental harm: (1) citizen suits under the major environmental bodies of law; and (2) civil rights Title VI actions for environmental justice. Finally, the Collaborative Compact Model is proposed and analyzed. This model provides a progressive alternative to citizen suit litigation by promoting a partnership between a community and an

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1. Keri Powell & Robert Shapiro, *U.S. Courts Unfriendly to Citizen Environmental Suits*, BERGEN COUNTY REC., July 23, 1999, at L7.

industry that can effectively address and rectify a community's environmental concerns.

II.
ORIGINS OF CITIZEN SUIT PROVISIONS

One of the basic features of our nation's environmental protection system is the right of citizens to sue in federal court to force industry to comply with environmental standards. Congress included citizen suit provisions in major environmental laws, such as the Clean Water Act[2] ("CWA") and the Clean Air Act,[3] to enable citizens to act as "private attorneys general" and to supplement the government's limited enforcement resources.[4] These provisions ensure the rigorous enforcement of environmental laws when states do not or will not address serious pollution problems in good faith. Citizen suits have been a narrow, but very important, statutory remedy.

It is important to note that these provisions authorize citizens to complement government action, not to compete with or replace it. For example, section 505 of the CWA authorizes any citizen to commence a civil action against a person or entity "alleged to be in violation" of an effluent standard or limitation.[5] The citizen-plaintiff must provide notice of the alleged violation to the Administrator of the U.S. Environmental Protection Agency, to the enforcement agency of the state where the alleged violation occurs, and to the alleged violator at least sixty days before he may file suit.[6] The 60-day notice requirement allows for the industry to come into compliance and provides the government with an opportunity to act in lieu of the citizen-plaintiff to avoid multiple lawsuits.

As indicated in the Senate Report on the Federal Water Pollution Control Act Amendments of 1972[7] ("FWPCA"), "[t]he Committee intends the great volume of enforcement actions to be brought by the State" and that citizen suits are proper only "if

2. The Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended in scattered sections of 33 U.S.C.), are generally called the Clean Water Act.

3. This is the common name of the Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended in scattered sections of 42 U.S.C.) .

4. EPA v. City of Green Forest, 921 F.2d 1394, 1405 (8th Cir. 1990).

5. 33 U.S.C. § 1365(a)(1) (2000).

6. § 1365(b)(1)(A).

7. Pub. L. No. 92-500, 86 Stat. 816 (codified as amended in scattered sections of 33 U.S.C.); *see also supra* note 4.

the Federal, State, and local agencies *fail to exercise* their enforcement responsibility."[8] Further, citizen suits are to "ignite agency enforcement" and to act as an "alternative enforcement mechanism *absent* agency enforcement."[9] Thus, a citizen suit is not authorized unless the state has failed or declined to take action or has not "diligently prosecuted" a claim after receipt of the 60-day notice.[10]

Congress' aversion to the duplicative actions that can result from simultaneous or subsequent citizen suits is also illustrated by the "diligent prosecution" provision of the CWA.[11] This provision mandates that no citizen suit may be undertaken "if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order." The meaning of these provisions could not be clearer - citizen suits are barred when the state has commenced and is diligently prosecuting a civil action in court to require compliance. Further, the relief authorized under the CWA includes injunctive relief and penalties that are payable to the U.S. Treasury, not to the private citizens. This eliminates the financial incentive that might otherwise encourage competitive litigation and supports the premise that "private attorneys general" actions are meant to complement government action, rather than to compete with or replace it.

Further, courts have expressed a clear aversion to multiple suits. "Duplicative actions aimed at exacting financial penalties in the name of environmental protection at a time when remedial measures are well underway do not further [our] goal. They are, in fact, impediments to environmental remedy efforts."[12] Similarly, the U.S. Supreme Court has often described the role of citizen suits as *supportive* and has recognized that state agencies administering the FWPCA are to be given significant discretion. The Court noted in one case that the bar on citizen suits during

8. *City of Green Forest*, 921 F.2d at 1403 (citing S. Rep. No. 92-414, at 64 (1971)).

9. Conn. Fund for Env't v. Upjohn Co., 660 F. Supp. 1397, 1403 (D. Conn. 1987) (citing Baughman v. Bradford Coal Co., 592 F.2d 215, 218 (3d Cir. 1978)) (emphasis added).

10. City of Green Forest, 921 F.2d at 1403; *accord Scituate*, 949 F.2d at 557; *see also* Conn. Coastal Fishermen's Ass'n v. Remington Arms, Co., 777 F. Supp. 173, 179 (D. Conn. 1991).

11. § 1365(b)(1)(B).

12. N. & S. Rivers Watershed Ass'n, Inc. v. Town of Scituate, 949 F.2d 552, 556 (1st Cir. 1991).

governmental enforcement action clearly indicates "that the citizen suit is meant *to supplement* rather than *supplant* governmental action."[13]

III.
Key Question: Did the State Diligently Prosecute?

The threshold issue in determining whether a citizen suit should be barred is whether the state "diligently prosecuted" the subject industry. An analysis of whether diligent prosecution has taken place neither encompasses *de novo* assessment of the agency's procedure in seeking enforcement and computing sanctions nor requires a comparison of the agency's activities with what the citizen group or the court may prefer. In fact, a heavy burden has been placed on citizens who allege that the state has not diligently prosecuted: "The court must presume the diligence of the State's prosecution of a defendant absent persuasive evidence that the State has engaged in a pattern of conduct in its prosecution of the defendant that could be considered dilatory, collusive or otherwise in bad faith."[14] Instead, to overcome the presumption that the state agency did prosecute diligently, citizen-plaintiffs must show that the actions by the state agency amounted to inaction.[15]

Diligence is the act of remedying the violations in any manner that the state decides. The mere fact that the state does not take the precise action that plaintiffs would prefer does not constitute lack of diligence.[16] Therefore, absent fraud or collusion, a citizen suit that visits identical issues in order to seek a remedy other than the state sought is inappropriate. While a citizen may be dissatisfied with an agency's ultimate resolution, the filing of a citizen suit out of dissatisfaction would impinge on federal and state agency authority and autonomy and create the possibility for duplicative actions. For example, the fact that the state "alleged fewer separate violations" and that it "sought a less substantial civil penalty" was not enough to overcome the presumption of "diligent prosecution."[17]

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13. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 484 U.S. 49, 60 (1987) (emphasis added).

14. *See Remington Arms*, 777 F. Supp. at 183 (citing Conn. Fund for the Env't v. Contract Plating Co., F. Supp. 1291, 1293 (D. Conn. 1986)).

15. *See Gwaltney*, 484 U.S. at 60–61.

16. *See Remington Arms*, 777 F. Supp. at 183–86.

17. *See id.* (citing Conn. Fund for the Env't v. Contract Plating Co., 631 F. Supp. 1291, 1293 (D. Conn. 1986)).

The Act authorizes injunctions and civil penalties which are payable to the U.S. Treasury.[18] In determining the amount of a civil penalty, the court must evaluate "the seriousness of the violation . . . the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require."[19] However, the First Circuit has held that diligent prosecution by a state agency does *not* require assessing any penalty at all. In *North and South Rivers Watershed Assn. vs. Scituate*,[20] the court explained that a decision otherwise would expand the "supplemental" role envisioned for such suits and would create a potentially intrusive role for citizens.[21] A citizen suit may not be brought merely to obtain attorneys' fees incurred in pursuit of a citizen suit when the agency has already remedied the problem causing the violations.[22] Since citizens suing under the FWPCA are deemed "private attorneys general," there is little left to do after the government has negotiated an agreement.[23]

IV.
State Enforcement and Settlements — Water Pollution Example

States are afforded the opportunity to establish their own water quality standards and discharge limits in individual permits they issue.[24] Many states have adopted more stringent standards than the federal limits require in an effort to achieve lower levels of pollution in their waters.[25] A number of states also encourage the development of innovative technologies to achieve lower levels of pollution. Such decisions may affect the method of en-

18. 33 U.S.C. § 1365(a) (2000); *see also Gwaltney*, 484 U.S. at 53.

19. § 1319(d).

20. 949 F.2d 552 (1st Cir. 1991).

21. *Id.* at 526 (citing *Gwaltney*, 484 U.S. at 61).

22. Friends of the Earth v. Laidlaw Envtl. Servs., Inc. (Laidlaw III), 528 U.S. 167, 168 (2000). In this Article, we cite to *Laidlaw* at the district, appellate and supreme court levels. For convenience, we have labeled the cases Laidlaw I (Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 956 F. Supp. 588 (D.S.C. 1997)), Laidlaw II (Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 149 F.3d 303, 305 (4th Cir. 1998)), and Laidlaw III (528 U.S. 167, 168 (2000)).

23. Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 21 (1981).

24. 33 U.S.C. § 1251(g) (2000).

25. *See, e.g.*, Metropolitan Sanitary Dist. of Greater Chicago v. U.S. Steel Corp., 332 N.E.2d 426, 432 (Ill. App. 1975).

forcement by the state agencies. For example, a state agency may require that a company expend money for new equipment or implementation of new technology in lieu of a strict penalty.[26] In addition, states are afforded latitude in selecting the specific mechanisms of their enforcement program and are given great deference to proceed in a manner they consider to be in the best interests of all parties involved.

This shift in enforcement emphasis from federal to state agencies is clearly reflected in the 1987 amendments to the FWPCA.[27] The FWCPA created a program "to restore and maintain the chemical, physical, and biological integrity of the nation's waters."[28] In addition, the FWCPA recognizes Congress's vision that states would monitor the performance of their permitted industries and take administrative, civil and criminal enforcement action in response to violations as necessary to protect the quality of the waters within their jurisdictions. The extent of enforcement employed is often dependent upon the specific circumstances of each violation. Most violations are resolved through negotiations and the issuance of administrative and judicially approved consent agreements and orders. The orders provide for a compliance timetable, the payment of civil penalties or the performance of supplemental environmental projects in lieu of some portion of the civil penalties. Negotiations are conducted between the regulator and the regulated industry whereby an agency may be willing to forego a higher penalty in order to obtain greater protection of the water quality. As part of its enforcement discretion, the agency may require monitoring and prevention of future contamination, including requiring the installation or implementation of new technology or equipment.[29]

Such collaborative and innovative environmental protection efforts between a state agency and regulated industry may be thwarted by the threat of potential citizen suits. In essence, these suits would second-guess an agency's discretion after the settlement. In cases where the plaintiff/citizen groups have attempted to impose their judgment after an agency has negotiated to pro-

26. *See, e.g.*, *Laidlaw I*, 956 F. Supp. at 607–10.

27. *See* Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 (codified as amended in scattered sections of 30 U.S.C.). Among other things, the amendments amended Sections 1251, 1342, and 1344.

28. EPA v. City of Green Forest, 921 F.2d 1394, 1398 (8th Cir. 1990) (quoting 33 U.S.C. § 1251(a)).

29. *Laidlaw I*, 956 F. Supp. at 588.

tect waterways and force an extreme penalty through judicial fiat, courts have correctly denied them access to this remedy. It is critical that the agencies and their industrial and municipal permittees have confidence in the enforcement process and the level of resolution that it achieves. When that process is undertaken in good faith, the parties should not face lingering concerns over whether there may be a citizen group or a federal court that regards the settlement as less than the required "diligent prosecution."[30] If industry is subject to additional enforcement action, namely the prospect of penalties in excess of those already imposed by the agency, then they are less likely to negotiate the resolution of their violations. Clearly, this would result in the unnecessary proliferation of litigation. Even state courts would not be safe from scrutiny as to whether the penalties they imposed or approved are strict enough and whether the injunctive relief they awarded or approved is sufficient to be considered a "diligent prosecution."

In short, allowing a citizen suit to proceed in such circumstances has the very real potential of seriously disrupting the enforcement discretion that is necessarily inherent in the delegation of the enforcement of federal environmental programs to the states. The Supreme Court has also recognized the inherent danger in permitting citizen suits to revisit the efficacy of governmental enforcement activities creating a disincentive to settle. In *Gwaltney of Smithfield Ltd. v. Chesapeake Bay Foundation*,[31] the Court considered the following hypothetical:

> Suppose that the Administrator [of the EPA] identified a violator of the Act and issued a compliance order under §309(a). Suppose further that the Administrator agreed not to assess or otherwise seek civil penalties on the condition that the violator take some extreme corrective action, such as to install particularly effective but expensive machinery that it otherwise would not be obliged to take. If citizens could file suit, months or years later, in order to seek the civil penalties that the Administrator chose to forego, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably. The same might be said of the discretion of state enforcement authorities. Respondents' interpretation of the scope of the citizen suit [i.e., that such suits should be permitted to recover civil penalties for past violation] would change the nature of the citizens' role from interstitial to

30. § 1365(b)(1)(B).
31. 484 U.S. 49 (1987).

> potentially intrusive. We cannot agree that Congress intended such a result.[32]

Duplicative actions aimed at exacting financial penalties in the name of environmental protection do not further the goal of environmental laws. States should maintain the flexibility to develop strong, innovative policies and to cooperate with regulated industry. This flexibility will allow them to continue to encourage technological advances and processes to achieve the federal objective of restoring and maintaining the integrity of the environment. Such flexibility recognizes that problem solving and collaboration are at least as effective in achieving these national goals as enforcement through litigation.

V.
THE HIGH COURT RESPONDS

A quick review of pertinent Supreme Court citizen suit jurisprudence draws attention to three cases. First, in *Gwaltney*, citizen-plaintiffs alleged past and ongoing violations of the Clean Water Act.[33] The court of appeals affirmed the lower court ruling that citizens could bring action for past violations alone.[34] However, the Court disagreed, holding that an action could not be brought based only on past violations. The Court remanded the case to determine if there was a good faith allegation of ongoing violations.[35] In its ruling, the Court discussed at length the role of citizen suits and emphasized that they are meant to "supplement, not supplant" governmental action.[36] In fact, the legislative history of the Act clearly indicates that the roles of a citizen-plaintiff are to enforce a current violation and to halt ongoing pollution.[37] The Court further stressed that:

> [i]f we assume, as respondents urge, that citizen suits may target wholly past violations, the requirements of notice to the alleged violator becomes gratuitous. Indeed, respondents, in propounding

32. *Id.* at 60.
33. *Id.* at 54.
34. *Id.* at 56.
35. *Id.*
36. *Id.* at 60.
37. *Id.* at 61 (citing *Water Pollution Control Legislation: Hearings Before the Subcomm. on Air and Water Pollution of the Senate Comm. of Public Works*, 92d Cong. 707 ("Citizen suits . . . are brought for the purpose of abating pollution." (statement of Sen. Eagleton)) (1971); H.R. Rep. No. 92-911, at 407 (1972) ("[C]itizens may institute suits against polluters for the purpose of halting that pollution." (additional views of Reps. Abzug & Rangel)).

their interpretation of the Act, can think of no reason for Congress to require such notice other than "it seemed right" to inform an alleged violator that it was about to be sued.

Second, in *Steel Co. v. Citizens for a Better Environment*,[38] the citizens filed a private enforcement action for declaratory and injunctive relief alleging that Steel Co. had failed to file timely reports required by the Emergency Planning and Community Right-To-Know Act of 1986[39] ("EPCRA"). The district court first found that, because the filings were brought up-to-date by the time the complaint was filed, it lacked jurisdiction to hear the suit for a present violation.[40] It then found that, since EPCRA does not allow for purely historical violations, there was no claim upon which relief could be granted. The Seventh Circuit reversed the district court decision concluding that EPCRA allows citizen suits for past violations.[41] The Supreme Court reversed on the issue of Article III standing, holding that the relief sought would not remedy the citizens' alleged injury in fact.[42] Therefore, the Court determined the citizens lacked standing to maintain the suit and the lower courts lacked jurisdiction to hear it.[43] The "'irreducible constitutional minimum of standing' contains three requirements."[44] As the Court stated, there must be injury in fact, causation, and redressability.

> First and foremost, there must be alleged (and ultimately proven) an "injury in fact"—a harm suffered by the plaintiff that is "concrete" and "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be causation—a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. And third, there must be redressability—a likelihood that the requested relief will redress the alleged injury. This triad of injury in fact, causation, and redressability comprises the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence.[45]

The Supreme Court found the citizens' complaint failed the redressability test because the relief sought would not remedy

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38. 523 U.S. 83 (1998).

39. Pub. L. No. 99-499, 100 Stat. 1728 (codified as amended at 44 U.S.C. §§ 11001–11050 (2000)).

40. *Steel*, 523 U.S. at 88.

41. *Id.*

42. *Id.* at 109.

43. *Id.* at 110.

44. *Id.* at 102 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

45. *Id.* at 103–04 (citations omitted).

injuries suffered by the plaintiffs.[46] That relief sought included: a declaratory judgment that Steel Co. had violated EPCRA; injunctive relief authorizing the citizens to make periodic inspections of Steel Co.'s facility and records; the requirement that Steel Co. give the citizens copies of its compliance reports; and, orders requiring Steel Co. to pay civil penalties and litigation costs to the U.S. Treasury.[47]

The Supreme Court made clear and compelling arguments in both *Gwaltney* and *Steel Co.* to the following effect. First, citizens bringing a private enforcement action must follow the statutory standards. Second, citizens bringing a private enforcement action are no different than all other plaintiffs bringing an action and must meet Article III standing. Simply because the action is brought in the name of the environment does not mean that the plaintiffs receive special treatment from the Court. The requisite analysis for standing focuses on the plaintiff rather than the environment despite any alleged injury to the environment that the plaintiff is being accused of causing.[48] The Supreme Court indicated its distaste for a different standard of review for cases which involve environmental harm and restated prior holdings that environmental plaintiffs meet the Article III standing requirement when they "aver that they use the affected area."[49]

In 2000, the Supreme Court handed down *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*[50] This ruling may significantly impact the future of all citizen lawsuits. Laidlaw owned and operated a hazardous waste incinerator in Roebuck, South Carolina.[51] As part of that facility, Laidlaw maintained a wastewater treatment plant for water used in its air pollution control system. Laidlaw discharged the treated wastewater into the North Tyger River pursuant to a National Pollutant Discharge Elimination System ("NPDES") permit issued by the South Carolina Department of Health and Environmental Control ("DHEC"). Once it received its permit, Laidlaw repeatedly discharged mercury in excess of the permitted levels, among other violations.

46. *Id.* at 105.
47. *Id.* at 105–06.
48. *See Laidlaw III*, 528 U.S. at 181.
49. *Id.* at 183 (citing Sierra Club v. Morton, 405 U.S. 727, 735 (1972)).
50. 528 U.S. 167 (2000).
51. The facts as laid out in this paragraph are from *id.* at 175–76.

It is important to note that DHEC set the mercury discharge limit at 1.3 parts per billion (ppb) for Laidlaw from 1988 through 1993, while the limit for other facilities was typically 2.0 ppb.[52] The 1.3 ppb standard actually required Laidlaw to discharge water that was cleaner than drinking water, which has a mercury standard of 2.0 ppb. The state's initial permit limit required Laidlaw's discharge at the pipe to contain 25% less mercury than is permitted in drinking water, even before being diluted by the river.

DHEC brought a formal action against Laidlaw alleging noncompliance with the NPDES permit.[53] A consent agreement was reached and approved by the state Circuit Court. The agreement included a civil penalty of $100,000. It also required that Laidlaw make "every effort" to comply with the permit. Laidlaw continued to explore additional technologies and ultimately found a solution to meet the 1.3 ppb limit through experimentation utilizing activated carbon, micro-filtration, and ion exchange.

Immediately after the DHEC action, the Friends of the Earth ("FOE") and Citizens Local Environmental Action Network, Inc. ("CLEAN") brought an action against Laidlaw in U.S. District Court alleging noncompliance with the NPDES permit. The plaintiffs sought declaratory and injunctive relief, the imposition of civil penalties, and the award of costs including attorneys' and witness fees. The lower court found that the plaintiffs had Article III standing to bring the suit.[54]

The lower court denied Laidlaw's motion to dismiss on the grounds that the citizen suit was barred under Section 505(b)(1)(B) of the CWA.[55] The court held that DHEC had not "diligently prosecuted" the action because the agency did not calculate and review the economic benefit Laidlaw received by continually failing to comply with the permit even after the lawsuit was initiated.[56] The court also found that there was no fraud or collusion between DHEC and Laidlaw and specifically ruled that Laidlaw had acted in good faith in working with the state enforcement agency.[57] It found that no harm had occurred to the environment, that Laidlaw had expended in excess of $1 million

52. The facts in this paragraph come from *Laidlaw I*, 956 F. Supp. at 593–94.

53. The facts as asserted in the following two paragraphs are from *Laidlaw III*, 528 U.S. at 177.

54. *Id.*

55. *Id.* at 167; *see also* 33 U.S.C. § 1365(b)(1)(B) (2000).

56. *Laidlaw III*, 528 U.S. at 177–78.

57. *Laidlaw I*, 956 F. Supp. at 607–08.

in various attempts to achieve compliance, and that compliance had in fact been achieved. The district court ultimately denied the plaintiff's equitable relief, but did impose a penalty of $405,800.[58] This sum was deemed adequate after taking into account the "total deterrent effect" of the judgment and that Laidlaw was required to pay plaintiff's legal fees.[59]

The citizens appealed the adequacy of the penalty. Laidlaw cross-appealed both claiming that the citizens lacked standing because they had suffered no injury in fact and that the suit should have been barred since DHEC had diligently prosecuted a prior action regarding the same violations.[60] The Fourth Circuit dismissed the action on the grounds that it had become moot.[61] In doing so, the court emphasized that the three elements of standing must continue to exist at every stage of review, not merely at the time of the filing of the complaint.[62] Since FOE did not appeal the denial of injunctive or declaratory relief, the only potential relief available to redress their claimed injuries would be the civil penalty. However, relying on the decision in *Steel Co.*, the court of appeals held that, because any civil penalty would be paid to the U.S. Treasury, such penalties could not redress any injury suffered by a citizen plaintiff.[63] The court of appeals concluded that a citizen suitor's claim for civil penalties must be dismissed as moot because the only remedies available upon appeal were civil penalties payable to the government, and therefore the damages assessed would not redress the injury to the plaintiff.[64]

In January 2000, Justice Ginsburg, writing for the Court, reversed the appellate court's decision.[65] Justice Ginsburg opined for the majority:

> [I]n directing dismissal of the suit on ground of mootness, the Court of Appeals incorrectly conflated our case law on initial standing to bring suit . . . with our case law on post-commencement mootness . . . . A defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case. The Court of Appeals also misperceived the remedial potential of civil penalties. Such penalties may serve, as an alternative to an injunc-

58. *Laidlaw III*, 528 U.S. at 178.
59. *Id.*
60. *Id.* at 179.
61. *Id.*
62. *Id.*
63. *Id.* at 179.
64. *Laidlaw II*, 149 F.3d. at 306-7.
65. *Laidlaw III*, 528 U.S. at 167.

> tion, to deter future violations and thereby redress the injuries that prompted a citizen suitor to commence litigation.

The Court also distinguished this case from *Steel Co.,* which did not reach the issue of standing to "seek penalties for violations that are ongoing at the time of the complaint and that could continue into the future."[66] Thus, the case was remanded for further consideration on the issue of mootness and payment of attorney's fees.[67]

Looking beyond the scholarly legal opinions, *Laidlaw* raises several important questions. First, did the state regulators do their job and was enforcement rigorous? Yes. A DHEC agent was on-site at the facility on a daily basis. DHEC closely monitored the feasibility studies and established schedules for the installation and implementation of new technologies. Penalties were voluntarily assessed against Laidlaw on two different occasions, one totaling $20,000, the other, $100,000. Second, was there harm to the environment? No. After numerous days of testimony, the District Court specifically found that *no harm to the environment* had occurred.[68] Third, was anything achieved by this lawsuit beyond that accomplished by the settlement agreement? No. Compliance was achieved by the industry through its own efforts in cooperation with the regulating agency. The courts, state, industry and environmentalists all spent untold hours pursuing or defending a lawsuit over seven years that resulted in protections that were no more beneficial to the environment than the terms of the consent order. These insights illustrate how traditional litigation often fails to achieve its intended goal of protecting the environment. Instead, seeking redress through the court system often costs money and expends valuable time with a result indistinguishable from an environmental perspective as the alternative of cooperation.

VI.
ENVIRONMENTAL JUSTICE

Unfortunately, *Friends of the Earth* is all too typical of most environmental debates. It pitted industry against activists, rhetoric against reality, and posturing against partnering. Laidlaw never stated it believed there was no value to citizen suits. In-

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66. *Id.* at 188.
67. *Id.* at 195.
68. *Id.* at 181.

stead, the company repeatedly stated its position that this case should be dismissed since DHEC's actions qualified as diligent prosecution precluding litigation.[69]

Legal analysis aside, the larger question at issue is whether there are ways for citizens and industries to address their concerns without resorting to lawsuits. The answer can be found in an area that is just as contentious as citizen lawsuits, if not more so – environmental justice. Like citizen suits, citizen activity has also increased in the area of environmental justice as plaintiffs seek "environmental equity" through Title VI of the Civil Rights Act.[70]

The Environmental Justice Movement began in 1982 when hundreds of African-Americans objected to North Carolina's plan to bury PCBs in a proposed landfill in Warren County.[71] They were joined by leaders of the United Church of Christ, the Southern Leadership Council, and Walter Fauntroy, U.S. House delegate from the District of Columbia.[72] The protestors believed that Warren County had been unjustly chosen for the landfill because it was one of the poorest regions of the state and had the highest percentage of people of color of any North Carolina county.[73] After 400 demonstrators were arrested amid a surge of national attention, Governor Jim Hunt declared that no new landfills would be built in Warren County.[74] The location of the landfill was a political decision. There is evidence that the site was not the most suitable from an environmental or scientific perspective, but it was chosen as the place to locate the landfill given the demographic composition of the community.[75]

Two decades later, little consensus exists as to the validity of charges that environmental threats are being forced upon communities of color because those areas do not possess the political or economic strength to resist. However, four major studies undertaken between 1982 and 1992 do support this argument.[76] All

69. *Laidlaw III*, 528 U.S. at 167, 179.

70. 42 U.S.C. § 2000(d) (2000).

71. ROBERT D. BULLARD, DUMPING IN DIXIE: RACE, CLASS AND ENVIRONMENTAL QUALITY 35 (1990).

72. *Id.* at 42.

73. *Id.* at 37.

74. *Id.* at 42.

75. *Id.* at 40.

76. *See generally* UNITED CHURCH OF CHRIST, COMMISSION FOR RACIAL JUSTICE, TOXIC WASTES AND RACE IN THE UNITED STATES (1987); U.S. GENERAL ACCOUNTING OFFICE, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES,

reached a strikingly similar conclusion: exposure to hazardous wastes was falling disproportionately upon minority and/or low-income populations.[77]

In a contrasting study,[78] a comprehensive examination of environmental justice across the state of South Carolina analyzed the areas surrounding 59 non-governmental facilities that had Resource Conservation and Recovery Act of 1976[79] Part B permits for the treatment, storage and disposal of hazardous wastes. It evaluated demographics in those areas according to zip codes, census tracts, and a 2.5-mile radius around each site.[80] The study found that racial compositions near these facilities were within three percent of the state average.[81] Beyond that, it also concluded that: 1) a majority of the hazardous waste facilities were located in areas where the percentage of minorities was lower than the state average; 2) the facilities were located in areas that had a smaller percentage of people below the poverty level than did the state as a whole; and, 3) there was no disparity in the way regulators enforced environmental rules in minority communities as opposed to others.[82]

After almost twenty years of study, this issue is still defined more by conflict than common ground. Environmental justice remains mired in a policy war of attrition that pits citizen activists against the business community. "To reach the promise of [a] new dialogue is to escape from gridlocked, two-way discourses between traditional environmental groups and industry. Both are now locked into a rhetoric of combat and fault that places

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GAO/RCED-83-168 (1983); U.S. ENVIRONMENTAL PROTECTION AGENCY, ENVIRONMENTAL EQUITY, REDUCING RISKS FOR ALL COMMUNITIES (1993); Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide In Environmental Law A Special Investigation: The Federal Government, in Its Cleanup of Hazardous Sites and Its Pursuit of Polluters, Favors White Communities over Minority Communities Under Environmental Laws Meant to Provide Equal Protection for All Citizens, a National Law Journal Investigation Has Found*, NAT'L L.J., Sept. 21, 1992, at S2.

77. *See generally* UNITED CHURCH OF CHRIST, *supra* note 76; U.S. GENERAL ACCOUNTING OFFICE, *supra* note 76; Lavelle & Coyle, *supra* note 76.

78. *See* Thomas S. Mullikin, Business and the Environment, Address at the Environmental Justice Symposium, Charleston, South Carolina, (Jan. 22, 1999), *in* 65 VITAL SPEECHES 333 (1999).

79. Pub. L. No. 94-580, 90 Stat. 2795 (codified as amended in scattered sections of 42 U.S.C.).

80. TOM MULLIKIN, ENVIRONMENTAL SOLUTIONS 7 (1995).

81. Mullikin, *supra* note 78, at 334.

82. *Id.*

communities and their immediate concerns at a distance."[83] Rather than forging a constructive dialogue that at least respects the concerns of all stakeholders, the debate is too often fueled by agitation, self-interest, politics, partisanship, and rhetoric. The movement of all stakeholders beyond the current charge versus countercharge scenario will require a new model that acknowledges two very important realities. First, to the extent that industrial facilities are located in minority communities, the people who live there tend not to gain any significant economic advantages from those sites. Second, the needs and interests of the community and business do not necessarily conflict. If there is ever to be a constructive discourse on environmental justice, both sides must recognize this truth.

VII. LITIGATION ALTERNATIVES

The availability of citizen suits has given environmental advocacy groups a powerful litigation tool. However, this forum for controversial environmental decisions has limited accessibility for most environmentally assaulted people. A new model being proposed herein uses the realities stated above as a point of departure. It unites basic theories of receiver-centered communications with the win-win objectives of negotiated rule-making. It is based on the belief that there is a clear parallel between rational regulatory promulgation and reasoned environmental debate.

A. *The Collaboration Compact Model*

This new paradigm, called the Collaboration Compact Model, uses a seven-step process to create a binding corporate-community partnership. The steps are as follows:

1. Assessment of company and community needs and an initial determination of where they might coincide; identification of each stakeholder's objective and priorities. facilitates this evaluation;
2. Alignment of those needs to reflect the mutual interests of both primary stakeholders leads to discovery of areas of agreement;
3. Concurrence as to what constitutes a mutually acceptable outcome; creation of a "win-win" result for both parties;

83. Robert W. Collin & Robin Morris Collin, *Sustainability and Environmental Justice: Is the Future Clean and Black?*, 31 ENVT'L L. REP. 10,968, 10,978 (2001).

4. Development of a comprehensive program designed to secure the desired outcomes and unite the interests of each party; honest and open communication between shareholders and impacted third parties is required;
5. Modification of the initial plan either to fine-tune and/or clarify objectives and strategies or to reflect changes in circumstances or events;
6. Acceptance of the program with a finalized memorandum of understanding as to what will be expected from all parties and delineating the role of the stakeholders in assuring program success; and,
7. Implementation of a jointly approved program pursuant to the terms of a memorandum of understanding.

The successful execution of this strategy requires six characteristics from the participating stakeholders. First, there must be *willingness to compromise* and recognition of the value that compromise brings to the process. This model focuses on issues that unite rather than divide and maintains a positive focus to encourage completion of the program. As such, matters of singular interest to either the company or the community may remain unresolved. All parties must acknowledge and accept that priorities and goals may need to be adjusted to facilitate a successful outcome. All parties must be prepared to make concessions for the benefit of the group.

Second, there must be *shared political management*. This refers to the willingness and ability of those who have something at stake—the company and the community—to persuade all affected third parties of the validity of the program and the process by which it was reached. These third parties include, but are not limited to, regulators, elected officials, media, employees and members of the larger business and activist communities. This element requires that the stakeholders identify third parties early in the process and involve them in discussions to ensure cooperation. An otherwise effectively planned program can face potentially fatal roadblocks by third parties whose interests are not taken into account.

Third, there must be *joint leadership*. Project oversight cannot be the province of either the business or the community organization. Rather, it must be the result of a real and perceived partnership among individuals who have the authority to negotiate and act on behalf of their respective stakeholder groups. Once identified as leaders, these individuals must demonstrate a will-

ingness and ability to work as a council focused on mutual goals rather than on unilateral interests of their respective organizations. This will ensure that when problems arise, they can be fairly and efficiently addressed without derailing the entire program.

Fourth, there should be *clear-cut responsibilities.* That is, the company and the community each must know exactly what they are responsible for and those responsibilities should be clearly detailed in a memorandum of understanding. This written memorial prevents misunderstandings as to each party's role and commitment to the program. It also encourages extensive input and consideration prior to implementation. Defining responsibilities clearly and in writing makes the parties accountable to each other and to the agreement.

Fifth, from the outset, there must be an agreement by both parties to *adhere to the so-called "rules of the game."* These rules include not only the specifics of the program such as what constitutes a "win-win," but also the guidelines for achieving program success. All rules are outlined in the memorandum of understanding and establish the basis for the relationship between the company and the community.

Lastly, there must be *inclusion.* In any scenario, there will be people who have the power, authority, ability or potential to impede or prevent successful completion of the program. To whatever degree possible and appropriate, these people should be brought into the process and given a role that helps assure their support. Whether private leaders or public officials, these individuals are typically prominent community members with the ability to significantly impact initiatives. Including these leaders in the development of the program can preempt possible public dissention and lends credibility to the program. In sum, by incorporating each of these points into a strategy for cooperation among the various interest-holders, a resolution suitable to all parties can be achieved. By identifying priorities to developing a cooperative program, it is possible to move away from the costly and time-consuming dispute resolution tool of litigation.

B. *The Collaboration Compact Model Applied*

This model was successfully applied by a South Central Los Angeles hazardous waste treatment storage and disposal facility ("TSDF") operating in the heart of an area devastated by the

Rodney King riots.[84] In mid-1998, the company began negotiations with the Concerned Citizens of South Central Los Angeles ("CCSCLA"), the state's oldest environmental justice organization. From the earliest discussions, it was clear that the group's leaders did not believe they had accrued sufficient benefits from having the world's largest recycler in their neighborhood. That became the starting point for a months-long dialogue that concentrated not on the issues that separated the company and the community, but on the interests that bound them together. Both sides agreed to reject rhetoric and use the Collaboration Compact Model to focus on realities.

The result was The Partnership for Environmental Training ("PET"). The program's objective was to improve the negative opinion in the community toward the company and to give the citizens an opportunity to benefit from the company's presence. It provided young men and women in the community with the requisite skills to seek and obtain good-wage, high-tech jobs in the environmental services industry. In 1999, a total of 72 students graduated from the program. The program included 80 hours of instruction sponsored by Safety-Kleen, Inc. at the company's Los Angeles facility. Additionally, the company underwrote the cost of pre-employment medical exams and drug screenings, paid for respirators, safety boots, work clothes, bus fares and all training materials.

A seven-member volunteer advisory council, a majority of which was appointed by the CCSCLA, managed the program. Representatives of the company occupied the three remaining seats. In addition to managing the program, the advisory council set up a temporary employment agency for each program graduate. Some were able to move into jobs with the company and others were placed in jobs with other corporations, including competitors. The goal was to ensure that the trainees had a new set of technical skills as well as the opportunity to put those skills to work in relevant, real-world situations.

PET grew from a mutual understanding of the needs and interests of both parties. Simply stated, the community needed jobs. The area's unemployment rate was approximately 52% at the time the program was implemented. Local organizations also had an interest in getting involved in programs that provided the

84. This is a model of first impression that was developed for the project in south central Los Angeles.

skills the residents needed to find meaningful jobs. On the other hand, the company needed a pipeline of trained professionals and had an interest in reaching out to the community to preempt future conflicts. PET enabled both groups to secure their institutional objectives.

Most importantly, the "winners" extended beyond the primary stakeholders. Three other organizations active in the revitalization of South Central Los Angeles were invited into the decision-making process. The City of Los Angeles benefited because PET graduates have the skills necessary to assist with household hazardous waste cleanups throughout the city. By helping to rid neighborhoods of dangerous materials, they assist in creating the safest possible communities for families and children.

Other temporary employment agencies in the area also benefited. Those companies would have had to spend up to $1,500 per person to screen, train and otherwise prepare employees for work on the job site. Since the company agreed to absorb those costs as part of its responsibilities, the temporary agencies could provide better, more fully trained prospects at a lower internal cost.[85]

Lastly, citizen-trainees clearly benefited. These individuals obtained quality job-skills training that increased their potential to acquire high paying careers in the industry. The program filled a void in the region by providing meaningful employment opportunities in an area where such opportunities were quite limited.

The Collaboration Compact Model was successfully implemented in California and resulted in benefits for all participants. The company was able to improve the community's perception of its operations and employ local residents while the host community achieved job creation and environmental improvement. Clearly, the men and women involved were provided skills training and educational opportunities that would not have been otherwise available.

VIII.
CONCLUSION

The conflicts between industries and their host communities are likely to continue to increase in severity until and unless innovative methods of relationship building are developed.. If history is any indication, these antagonistic relationships will

85. *See* Mullikin, *supra* note 78, at 335–36.

continue to spill over into the courts producing costly, time-consuming litigation that does not serve the environmental, community or business interests. This is especially true regarding citizen lawsuits in which community representatives feel they have been denied a voice in the process. Collaborative models, such as that defined by the Partnership for Environmental Training, have tremendous potential for building partnerships, defusing hostilities between stakeholders, and creating more win-win situations.