Where are All the Citizens Suits?: The Failure of Safe Drinking Water Enforcement in the United States

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INTRODUCTION

Most Americans never give a thought to what is found in the water they bathe in or that comes out of their kitchen faucet. When people travel around the United States, they drink the tap water, no matter where in the country they are. They use the shower in their hotel without ever wondering if the water might irritate their skin. In restaurants, waiters rarely ask if patrons want bottled water—tap water is automatically served.

The drinking water that comes out of our faucets originates from either surface water sources or through wells that pull from a groundwater source. Utilities companies typically treat this water to make it safe for human consumption before it reaches our homes. The government regulates this water, just as it regulates the food we eat, the cars we drive, and the institutions necessary for society to function, all to provide a safe living environment. But maybe we should not be so quick to trust that the water we drink is completely safe. When evidence shows that our drinking water is not as safe as we think it is, and the government is not quick to respond to these concerns, to where should citizens turn for a remedy?

This Note explores the public health threat of unsafe drinking water in the United States today. Part I of this Note examines the types of contaminants found in our drinking water, and the negative health

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effects that these contaminants may have on humans. In particular, Part I looks at: (1) the challenges of regulating lead, a contaminant that is governed by the Safe Drinking Water Act (SDWA); (2) the health effects of perchlorate, a contaminant not currently regulated by the SDWA; and (3) the particular problems that simultaneous exposure to multiple contaminants can pose, when it is not clear which contaminants are causing what harm. Hundreds of contaminants exist that can be harmful to human health, over ninety of which are regulated under the SDWA.

Part II discusses the SDWA in detail and examines the manner in which the SDWA regulates drinking water. Part III determines that harm from contaminated drinking water occurs primarily due to (1) a lack of enforcement of the law currently in place, and (2) a need for a stricter law that would regulate more contaminants. Part III then examines potential barriers to stricter regulation.

Part IV proposes a partial solution to the question of how to ensure enforcement of the SDWA by discussing the citizen suit provision of the SDWA. In large part, harm from drinking water is due to widespread violations of the SDWA. Congress created the citizen suit provision of the SDWA specifically for this purpose—for citizens to enforce the law when the government fails to do so. The citizen suit provision permits individual citizens to bring suit against the government or any person who violates the SDWA, with the goal of stopping the violation and enforcing the law. Part IV examines the purpose and utility of citizen suit provisions in general, as well as the SDWA citizen suit provision specifically. Part IV discusses the federal standing requirement, the implications of standing on a SDWA citizen suit, and what a citizen suit under the SDWA might entail. Part IV also draws upon the success of the Clean Water Act (CWA) citizen suit provision to conclude that citizen suits brought under the SDWA should find similar success.

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2 Study Findings: Testing Finds Hundreds of Contaminants in America’s Drinking Water, Envtl. Working Grp. (Dec. 2009), http://www.ewg.org/tap-water/reportfindings [hereinafter Study Findings] (stating, based on its own studies, that “the number of contaminants detected [in drinking water] has been rising” and that “hundreds of chemicals found in drinking water remain unregulated.”).


Part V suggests changes that must occur to make the SDWA citizen suit provision a viable enforcement tool. Citizen suits are an excellent short-term solution to the challenge of enforcing the current law. Part V argues that by increasing public awareness of the existence and utility of the citizen suit provision, more citizens will actually file citizen suits. Additionally, Part V recommends that Congress amend the SDWA to provide for imposition of civil penalties in citizen suits, payable to a special fund for drinking water improvements, and require that the U.S. Environmental Protection Agency (EPA) periodically update the list of regulated contaminants. Finally, Part V emphasizes that, while there are considerable barriers to stricter regulation, the threat to drinking water is a serious public health issue and must be made a priority.

I. THE PROBLEM: UNSAFE DRINKING WATER

Lack of access to clean drinking water is a major problem in many parts of the world. Each year, water-borne diseases kill at least two million people worldwide, most of whom are children. Of the ten million child deaths that occurred worldwide in 2004, many were linked to unsafe water and lack of sanitation, as children are less able to fight off infection when water-borne diseases weaken their bodies. Highlighting the importance of clean drinking water, improving lack of access to clean water was part of the eight Millennium Development Goals set by the United Nations in 2000.

The importance of clean drinking water is well known. Humans cannot survive without clean water. Water is essential for regulating body temperature, protecting organs and tissue, removing waste, and carrying nutrients and oxygen to cells. A person must consume approximately two and a half quarts of water per day in order to stay healthy.

Most people do not consider access to clean water to be a problem in the United States. Clean drinking water is something that most

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6 Id.
9 Id.
Americans take for granted. Americans collectively drink more than one billion glasses of tap water per day, and the average American uses over 100 gallons of water per day for all uses such as drinking, bathing, and watering the garden. As residents of the wealthiest, most developed country in the world, Americans simply assume that the water coming out of their taps is safe.

Yet the news abounds with reports of people harmed by their drinking water. In April of 1993, 400,000 people became sick and forty-seven people died when the city of Milwaukee’s water became infected with Cryptosporidium parvum, a waterborne parasite that was detected in the city’s water supply, which draws water from Lake Michigan. The EPA began regulating cryptosporidium under the SDWA in 1998. More recently, Mark and Sandy Mangan of Medina County, Ohio, have had “murky, salty, bubbly and smelly” tap water since September 29, 2008, the day a nearby company drilled a gas well into the ground near their home. The Mangans believe that oil and gas well drilling has polluted the groundwater, but the Ohio Department of Natural Resources disagrees. The Mangan’s situation is part of a national debate that is taking place between the natural gas and oil industries and environmentalists and citizen advocate groups over whether the practice of hydraulic fracturing, used in approximately 90 percent of natural gas and oil wells, poses a threat to groundwater.

As these examples and others show, some Americans no longer take clean drinking water for granted. States and the EPA are failing to enforce existing law in some parts of the country, and polluters often escape punishment. Additionally, other evidence indicates that

10 Id.
13 Clark, supra note 12, at 66. The EPA issued a proposed rule in 1994, establishing its goal of zeroing out cryptosporidium in drinking water. Id. The EPA issued its final rule in December of 1998. Id.
15 Id.
16 Id.
the law is not strict enough and fails to regulate pollutants and harmful chemicals at a level necessary to protect public health. The following subsections illustrate the public health threat that contaminants pose, particularly in situations where: (A) the EPA already regulates a contaminant but fails to enforce the regulations in place (i.e., lead); (B) the EPA does not regulate a contaminant despite evidence showing that it should (i.e., perchlorate); and (C) the EPA faces difficulty in knowing what to regulate, due to the simultaneous presence of or exposure to multiple contaminants.

A. Regulated Contaminants: Lead

Lead is regulated by the SDWA but nonetheless is often found at unsafe levels in drinking water. In Baltimore, Maryland, lead was detected in the schools’ drinking fountains in the 1990s, attributed to old pipes in the buildings.\(^\text{17}\) Officials ordered the contaminated fountains turned off and made repeated attempts to fix the problem, but by 2007, some water fountains were still not at levels deemed to be operational and safe.\(^\text{18}\) Baltimore finally instituted a school system-wide shift to bottled drinking water after determining that it was more cost effective to provide bottled water than to make the necessary changes to the infrastructure of the existing buildings to keep the lead at safe levels.\(^\text{19}\)

The extremely harmful effects of lead on humans, and children in particular, are well-known. In 1991, the Secretary of the Department of Health and Human Services declared lead the “number one environmental threat to the health of children in the United States.”\(^\text{20}\) Lead exposure can occur through various media, including air, drinking water, food, contaminated soil, dust, and deteriorating paint.\(^\text{21}\) Most well and city water does not contain lead, but lead may contaminate drinking water if household plumbing is made with lead materials.\(^\text{22}\)

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\(^\text{17}\) Press Release, City of Baltimore, Baltimore City Public Schools’ CEO Announces System-Wide Shift to Bottled Drinking Water (July 7, 2007) [hereinafter Shift to Bottled Drinking Water], available at http://www.bcps.k12.md.us/News/PDF/Lead_in_Water110707.pdf.

\(^\text{18}\) Oversight Hearing on Federal Drinking Water Program, Before the U.S. Senate Comm. on Environment & Public Works, 111th Congress (2009) (statement of Benjamin L. Cardin, Chairman of the Water & Wildlife Subcomm.).

\(^\text{19}\) Shift to Bottled Drinking Water, supra note 17.


\(^\text{21}\) Id.

\(^\text{22}\) See id.
Lead poisoning can affect "nearly every system in the body." At high levels, lead can cause convulsions, coma, and even death, while lower levels of exposure to lead can cause adverse health effects on the central nervous system, kidney, and blood cells. In children, exposure to lead can cause delays in physical and mental development, lower levels of IQ, shortened attention spans and increased behavioral problems.

B. Unregulated Contaminants: Perchlorate

The EPA has recently considered whether to regulate perchlorate, a contaminant not currently regulated under the SDWA. Perchlorate is a chemical used to manufacture fireworks, explosives, flares, and rocket propellant. Controversy exists regarding what level of exposure to perchlorate is safe, and how much perchlorate is necessary to cause harm. The EPA found perchlorate to be present in over 4% of public water systems nationwide between 2001 and 2005. Independent researchers have estimated that the number of people at risk of

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25 Id.
26 After much pressure and controversy, the EPA recently announced that it intends to begin regulating perchlorate under the SDWA, though thanks to the burdensome administrative process, it will be at least a few years before regulation begins. See infra Part III.B.4 for discussion regarding the controversy over whether to regulate perchlorate. In 2008, the EPA made a preliminary determination not to regulate perchlorate, stating that "a national primary drinking water regulation (NPDWR) for perchlorate would not present 'a meaningful opportunity for health risk reduction for persons served by public water systems.'" Drinking Water: Preliminary Regulatory Determination on Perchlorate, 73 Fed. Reg. 60,262, 60,262 (Oct. 10, 2008). However, on February 11, 2011, the EPA reversed its 2008 determination and issued a proposed rule announcing its determination that perchlorate "meets SDWA’s criteria for regulating a contaminant." Drinking Water: Final Regulatory Determination on Perchlorate, 76 Fed. Reg. 7762, 7762 (proposed Feb. 11, 2011) (to be codified at 40 C.F.R. pt. 141). Through its proposed rule EPA announced that it will initiate the process of proposing a NPDWR for perchlorate, and that it intends to publish a proposed NPDWR “for public review and comment within 24 months of this regulatory determination . . . [and] will continue to evaluate the science as [it] develop[s] the proposed NPDWR.” Id. at 7762, 7767. EPA estimates that promulgation of a final rule will happen within eighteen months of the proposed rule. Id. at 7767, 7763. See infra Part III.B.4 for further discussion regarding the debate over whether the EPA should regulate perchlorate.
28 Id.
exposure to unsafe levels of perchlorate is potentially twenty to forty million. The EPA and other independent researchers disagree over what level of perchlorate is safe. For example, with levels of perchlorate currently deemed safe by the EPA, bottle-fed infants would be exposed to more than five times the level of perchlorate that the National Academy of Sciences has deemed safe. While it is clear that perchlorate can be very harmful, the debate is: considering the costs and benefits of regulating, should perchlorate be regulated, and at what level?

Regardless of the debate over what level of perchlorate may cause harm, it is well-documented that too much perchlorate causes significant negative health effects. The thyroid gland produces hormones that aid mental and physical development and control metabolism. Consequently, "[w]hen perchlorate enters the body, it can block the thyroid gland from [absorbing] iodine," which the thyroid gland needs to regulate how the body uses energy. These thyroid problems particularly affect high-risk subpopulations, such as pregnant women, newborns, and children. Even small changes in thyroid function in infants can cause behavioral and perception problems and a loss of IQ.

C. Simultaneous Exposure to Multiple Contaminants

In a recent series on toxic water, the New York Times exposed systemic violations of the SDWA, and offered insight into the cumulative risks of exposure to multiple pollutants. Ill health effects of

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31 Eilperin, supra note 29.
33 NAT'L ACAD. OF SCI., supra note 30.
34 Eilperin, supra note 29. One study by the Centers for Disease Control and Prevention found an association between levels of perchlorate in urine and decreased thyroid function in women twelve years of age and older. About thirty-six percent of women in the United States test for low iodine levels in their urine, and this study showed that perchlorate exposure for these women resulted in small to moderate changes in their levels of thyroid hormones. Perchlorate Fact Sheet October 5, 2006, supra note 32.
35 Charles Duhigg, Toxic Waters: A Series About the Worsening Pollution in American Waters and Regulators' Response, N.Y. TIMES, Mar. 1, 2010,
contaminated tap water may be felt, and tests may show elevated levels of multiple contaminants, but often it is impossible to know which contaminant causes which harm. The cumulative risk that the presence of multiple pollutants in a single glass of water may pose is unknown.\textsuperscript{36}

The series discussed the case of Jennifer Hall-Massey, whose life was severely impacted by contaminated water.\textsuperscript{37} Ms. Hall-Massey lives seventeen miles from Charleston, West Virginia. Her family no longer uses tap water to drink, brush their teeth, or bathe. Her youngest son has scabs on his legs, chest, and arms where bathwater has caused painful rashes. Her oldest son has multiple crowns on his teeth. Medical professionals in the area attest to unusually high rates of health problems, such as significant tooth enamel damage, chronic stomach problems, and gallbladder illness.\textsuperscript{38}

Tests show that Ms. Hall-Massey’s tap water contains arsenic, barium, lead, manganese, and other chemicals and metals, at concentrations that may cause cancer, organ failure, damage to the nervous system, and developmental problems.\textsuperscript{39} Arsenic, barium, and lead are all contaminants regulated by the SDWA.\textsuperscript{40} Manganese is less strictly regulated under the EPA’s secondary standards.\textsuperscript{41} There has been no action on the part of state officials or the EPA, despite known violations of the SDWA.

**II. REGULATION UNDER THE SAFE DRINKING WATER ACT**

President Ford signed the SDWA into law in 1974, with the goal of assuring that “water supply systems serving the public meet mini-
mum national standards for protection of public health." In order to understand why this harm is occurring in spite of SDWA regulation we must first understand the relevant provisions of the SDWA.

Congress through the SDWA authorizes the EPA to set national health-based standards for drinking water. The EPA has set standards for over ninety contaminants in drinking water. The states have primary implementation authority of these standards, and must follow the national standards or adopt standards of their own that are more stringent. Consequently, the "EPA, states, and [public] water systems . . . work together to make sure [the SDWA] standards are met."

A. Substantive Requirements

The SDWA seeks to protect public health, which is the overarching goal behind every EPA decision to regulate a contaminant. The SDWA attempts to regulate water in two ways: (1) it imposes requirements on public water systems (PWSs) by setting a maximum level for each regulated contaminant found in the PWS's water, and (2) it seeks to prevent contamination of sources of drinking water.

1. Public Water Systems

The EPA Administrator must select those contaminants to regulate that present the greatest public health concern. The Administrator is to determine the risk of adverse health effects by considering both the needs of the average citizen and the special needs of subgroups such as infants, children, pregnant women, the elderly and those with a history of serious illness. The Act also requires the EPA to perform a cost-benefit analysis to ensure that the cost of intervention is justified by the benefits to human health.

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43 Regulating Public Water Systems, supra note 3.
45 See infra Part II.A.1 for definition and further discussion of PWSs.
46 42 U.S.C. § 300g-1(b)(1)(c) (2009); UNDERSTANDING THE SAFE DRINKING WATER ACT, supra note 44.
47 42 U.S.C. § 300g-1(b)(3).
When considering how to regulate a contaminant, the EPA first establishes a maximum contaminant level goal,\(^48\) by considering the "adverse effect on the health of persons" caused by the contaminant.\(^49\) This goal level is not often realistically enforceable, because it allows for a margin of safety and does not take into consideration possible barriers to achieving the goal level. Rather, it represents an ideal maximum level of a contaminant. The EPA then sets an enforceable standard, which takes one of two possible forms: either a maximum contaminant level, or a treatment technique. Maximum contaminant levels\(^50\) are set "as close to [the maximum contaminant level goal] as feasible," after considering available technology and cost.\(^51\) Thus, the actual level that PWSs must follow is not the maximum contaminant level goal, but as close to that ideal goal as is feasible taking into account practical considerations.\(^52\) A treatment technique may be set in lieu of a maximum contaminant level if it is not "economically or technologically feasible" to set an appropriate numeric maximum level for a particular contaminant.\(^53\) Rather, with use of a treatment technique, the Administrator establishes the process which shall be used to reduce the level of the contaminant, and adherence to the process (rather than a maximum contaminant level) is required.\(^54\)

\(^{48}\) EPA defines maximum contaminant level goal as "the maximum level of a contaminant in drinking water at which no known or anticipated adverse effect on the health of persons would occur, and which allows an adequate margin of safety. Maximum contaminant level goals are nonenforceable health goals." 40 C.F.R. § 141.2 (2010).

\(^{49}\) 42 U.S.C. § 300g-1(b)(1)(A).

\(^{50}\) The EPA defines a maximum contaminant level as "the maximum permissible level of a contaminant in water which is delivered to any user of a public water system." 40 C.F.R. § 141.2.


\(^{52}\) CLEVELAND DIV. OF WATER, 2008 CLEVELAND WATER QUALITY REPORT (2008), available at http://www.clevelandwater.com/About_us/WQR/wqr2008eng-11x17-WEBpgs.pdf. For example, the maximum contaminant goal level for lead is zero, while the maximum contaminant level is fifteen. Id. Therefore, as long as levels of lead remain below fifteen, there is no violation of the SDWA. Ideally, levels would always test at zero, but by setting the maximum contaminant level at fifteen, EPA recognizes that zero is not a feasible number.

\(^{53}\) 42 U.S.C. § 300g-1(b)(7)(A).

\(^{54}\) See DRINKING WATER STANDARDS AND HEALTH EFFECTS, supra note 51. For example, the Surface Water Treatment Rule requires disinfection and filtration for any PWS that pulls water from surface water, as opposed to ground water. Id; see also Surface Water Treatment Rule, U.S. ENVTL. PROT. AGENCY, http://water.epa.gov/lawsregs/rulesregs/sdwa/swtr/index.cfm (last updated Dec. 30,
Once the EPA sets maximum contaminant levels or treatment techniques for particular contaminants, the states adopt drinking water programs to facilitate direct oversight of PWSs. States must apply to the EPA for “primacy,” which a state receives when the EPA grants the state direct power to oversee the program. All states currently have primacy except Wyoming and the District of Columbia. States with primacy are responsible for testing water systems for contaminants, reviewing plans for water system improvements, conducting on-site inspections and sanitary surveys, and providing training and technical assistance to operators of water systems. States also must adopt a Source Water Assessment Program, subject to EPA approval. Source Water Assessment Programs differ by state, but they share a common goal of assessing each PWS to identify potential sources of contamination and susceptibility to contamination. This information is released to the public.

These health-based standards set by the EPA and implemented by the states apply to every PWS in the United States. Congress defines a PWS as “a system for the provision to the public of water for human consumption through pipes or other constructed conveyances,” if the system has “at least fifteen service connections” or regularly serves “at least twenty-five individuals.” Thus, contrary to logical inference, not all PWSs are publicly owned; they may be privately owned as well. Each PWS must ensure that its water complies with the requirements set by the EPA and the respective state. There are currently more than 170,000 PWSs in the United States, providing water to almost every American and most cities, towns, schools, businesses, campgrounds, and shopping malls.

2. Protection of Underground Sources

In addition to regulating PWSs, the SDWA seeks to protect underground sources of drinking water from contamination. It does so in various ways, including the underground injection control (UIC) pro-
gram, the sole source aquifer demonstration program, state programs to establish wellhead protection areas, and state ground water protection grants. This Note will focus on the UIC program because of the UIC program’s impact on groundwater and implications on citizen suits.

Underground injection is the practice of injecting fluids underground by well, typically for the purpose of storage or disposal. There are currently more than 800,000 injection wells used by facilities in the United States to discharge fluids into the ground. Underground injection is considered a necessary alternative to surface disposal. Agribusiness and the chemical and petroleum industries find it to be more cost effective than the alternative of always treating and releasing waste into surface waters. The EPA’s UIC program is intended to ensure that injection wells are properly sited, constructed, and operated, so that injection wells pose no danger to drinking water sources. All injection wells must be authorized by the EPA under general rules or specific permits.

The EPA considers underground injection to endanger drinking water sources if the injection could result in “the presence in underground water which supplies or can reasonably be expected to supply any public water system of any contaminant,” or if the presence of a contaminant could result in the system failing to comply “with any national primary drinking water regulation,” or if it otherwise adverse-

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64 42 U.S.C. § 300h-6. The sole source aquifer demonstration program provides additional protection for areas that have only one aquifer that is the sole or principal drinking water source for the area, so that if it were to be contaminated there would be a significant public health hazard. Id. § 300h-3(e).
65 Id. § 300h-7. Wellhead protection programs are run by the states for the purpose of protecting wellhead areas from contaminants that could have an adverse effect on human health if they were to enter a well supplying water to a PWS. Id. § 300h-7(a), (e).
66 Id. § 300h-8. Through the state groundwater protection grant program, states may receive grants for the “development and implementation” of programs that ensure that groundwater resources within the state are protected. Id. § 300h-8(a).
67 Id. § 300h(d).
68 See Underground Injection Control Program, supra note 63.
70 Id.
71 See id.
72 Id.
ly affects the health of persons. The EPA expects states to take primary enforcement authority of the UIC program. The EPA grants primacy to states for the UIC program separately from primacy to regulate PWSs. To date, thirty-three states have primacy to regulate injection wells, and seven states share primacy with the EPA.

B. Monitoring and Reporting

The SDWA additionally seeks to regulate PWSs and protect underground drinking water sources by imposing detailed monitoring and reporting requirements on PWSs and UIC permit holders. The EPA regulates PWSs even before they are formed by imposing specific siting requirements that must be followed before a new PWS is created. The EPA additionally imposes sampling and analytical requirements on PWSs for monitoring their water supplies. These requirements are very detailed and specific to each contaminant. Additionally, the EPA requires strict reporting and recordkeeping on the part of PWSs to show compliance. The PWSs must notify the state or the EPA within forty-eight hours of a failure to comply with a national primary drinking water regulation, including failure to comply with monitoring requirements. The EPA also requires PWSs to maintain detailed records of all sampling performed.

The states and the EPA maintain enforcement programs to ensure that the goals of the SDWA are met. If a PWS is not in compliance with applicable requirements, the Administrator may notify the state and contact the PWS to provide advice or technical assistance. If informal action fails and the state does not take enforcement action within thirty days, the Administrator may commence a civil action in a U.S. district court or pursue an administrative order requiring

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74 See id. § 300h-1.
75 US EPA’s Program to Regulate, supra note 69. Shared primacy between states and the EPA simply means that the state may have enforcement authority over certain classes of wells, but not others. See UIC Program Primacy, U.S. Envtl. Prot. Agency, http://water.epa.gov/type/groundwater/uic/Primacy.cfm (last updated Dec. 10, 2010).
76 40 C.F.R. § 141.5 (2010).
77 Id. §§ 141.21-.35.
78 See id.
79 Id. §§ 141.31-.35.
80 Id. § 141.31(b).
81 Id. § 141.33
83 Id. § 300g-3(a)-(b).
compliance. The Administrator may assess civil penalties for any party who fails to comply. For violations of state programs protecting underground sources of drinking water, the Administrator may commence an administrative order or civil action, or a criminal action if the violation is willful.

In addition, the SDWA includes provisions that seek to provide consumers with full access to information on their drinking water. PWSs must submit samples of their water for laboratory testing, and every laboratory that tests and analyzes water must be certified by the states or the EPA. Each PWS is required to prepare an annual water quality report by July 1 of each year. The report must disclose whether its water systems within the state met drinking water standards. The EPA also maintains a Safe Drinking Water Hotline and a database called the Safe Drinking Water Information System that contains information on every PWS in the nation.

III. THE CAUSE OF THE PROBLEM: HOW THE SAFE DRINKING WATER ACT IS FALLING SHORT

There are two identifiable ways in which the SDWA is failing to meet expectations. First, harm is occurring due to a lack of enforcement of the current law. Evidence indicates that PWSs frequently violate maximum contaminant levels, yet these violations go unnoticed and unpunished by the states and the EPA. Additionally, UIC permit violations sometimes go unpunished, causing harm to drinking water sources. Second, problems occur because the current law is not expansive enough. The EPA’s SDWA program does not regulate many contaminants believed to be harmful to human health. Moreover, the SDWA excludes from regulation certain drinking water sources, such

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84 Id. § 300g-3(g).
85 Id.
86 Id. § 300h-2(a)-(c).
88 For an example of what one such report looks like, see the 2008 Cleveland Water Quality Report, easily found on the Cleveland Division of Water’s website, http://www.clevelandwater.com/About_us/WQR/wqr2008eng-11x17-WEBpgs.pdf.
89 DRINKING WATER MONITORING, COMPLIANCE AND ENFORCEMENT, supra note 87. The EPA encourages people to call the Safe Drinking Water Hotline, at 1-800-426-4791, in various places on its website. See, e.g., id.
as private wells. Finally, problems such as runoff, which neither the SDWA nor the CWA directly regulate, cause human harm.

A. Lack of Enforcement

It is for the states and the EPA to enforce legal limits and take appropriate action when violations of the SDWA occur. As Part I discusses, if neither the state nor the EPA takes enforcement action and violations of the SDWA continue, harmful health effects might result. The regulations that the EPA has promulgated under the SDWA are only effective so long as they are enforced.

B. Insufficient Regulation

In addition to failing to enforce the laws already in place, the SDWA does not regulate certain contaminants and practices that cause harm. Furthermore, there are many factors that influence decisions regarding what and how to regulate. As the following subsections illustrate, various factors serve as barriers to regulation and make it difficult to fully achieve Congress' goal of protecting public health.

1. Practical Limitations

The decision to regulate a certain contaminant is often not straightforward. The EPA must consider whether the benefits of regulation outweigh the costs. Often there is scientific debate concerning whether or not the contaminant is harmful and in what concentration the contaminant must be present to cause harm. The science is complicated, and there can be many unknown factors. Also, it may be virtually impossible to perform the scientific experiments necessary to

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91 UNDERSTANDING THE SAFE DRINKING WATER ACT, supra note 44.
93 See Charles Duhigg, Health Ills Abound as Farm Runoff Fouls Wells, N.Y. TIMES, Sept. 18, 2009, at A1; see also infra Part III.B.3.
94 See supra Part II.
95 To compound the problem, harmful health effects are frequently not immediately apparent, as some chemicals are harmful only when absorbed into the body slowly over a long period of time. See Charles Duhigg, Millions in U.S. Drink Dirty Water, Records Say, N.Y. TIMES, Dec. 8, 2009, at A1. This fact highlights the importance of prompt enforcement immediately after a violation occurs, rather than waiting until health problems become apparent to take action.
96 See UNDERSTANDING THE SAFE DRINKING WATER ACT, supra note 44.
know what level of a certain chemical is appropriate. For example, if the potential victims are pregnant women or infants, it is difficult to test these subgroups safely.\(^7\) It may also be difficult or impossible to pinpoint one chemical as the sole cause of a particular harm, because often many chemicals are simultaneously present.\(^8\) Furthermore, harm may often not develop or become apparent until years after exposure.\(^9\)

2. Citizen Skepticism

Citizen skepticism regarding the necessity of regulation can be a further barrier to regulation. Americans tend to think that what is legal must be safe.\(^10\) Citizens may be opposed to increased regulation if they see it as unnecessary, and particularly if it will cause an increase in monthly water costs. The City of Los Angeles recently faced such criticism from residents.\(^11\) Dr. Pankaj Parekh, director of the water quality division for the City of Los Angeles, discovered that the water in some city reservoirs contained certain contaminants that, when exposed to sunlight, formed bromates, compounds associated with cancer.\(^12\) The city dumped six and a half million little black balls into the reservoirs, to block the water from sunlight and thus eliminate the risk of carcinogen formation.\(^13\) Angry owners of the homes around the reservoirs left profane phone messages and attacked city regulators on blogs,\(^14\) to such an extent that Los Angeles plans to replace the reservoirs with underground storage tanks.\(^15\) The homeowners disliked the aesthetic appearance of the black balls, despite the fact that the balls were there to keep them safe. When told that the balls were there to protect, one citizen asked “If the water is so dangerous, why can’t

\(^7\) See Charles Duhigg, Debating Just How Much Weed Killer Is Safe in Your Water Glass, N.Y. TIMES, Aug. 23, 2009, at A1 (discussing the challenges regarding regulation of atrazine and stating that “[d]efinitive scientific proof would probably require unethical experiments, like exposing pregnant women to the chemical in controlled settings.”).

\(^8\) See generally Duhigg, supra note 36 (explaining that research often “cannot definitively say that chemicals in drinking water were the sole cause of disease.”).

\(^9\) See Duhigg, supra note 95 (noting that “Many of the most dangerous contaminants regulated by the Safe Drinking Water Act have been tied to diseases like cancer that can take years to develop.”).

\(^10\) Duhigg, supra note 36.

\(^11\) Id.


\(^13\) Duhigg, supra note 36.

\(^14\) Id.

\(^15\) Id.
they tell us what laws it’s violated?” Many people simply assume that if a regulated substance is at a legal level it is safe, and oppose any regulation that goes above and beyond.

3. Gaps in Regulation

Additionally, some Americans drink water that the SDWA exempts from regulation. Private drinking water wells are not covered under the SDWA, and those individuals who have private wells must therefore monitor and test their own water regularly. This exemption is not surprising, as private drinking water wells by definition service less than twenty-five individuals. However, most people with private wells live in agricultural areas of the country, where agricultural runoff can cause significant contamination problems.

A recent situation in rural Wisconsin highlights the problems that these gaps in regulation create. Approximately 800,000 private drinking water wells provide water to Wisconsin residents. Farmers often use animal waste as fertilizer, which is safe and cost-effective when used properly. However, when applied in excess, this animal waste can flow into the ground and cause much harm, including contamination of groundwater and drinking water wells. Parasites and bacteria from animal waste in the water cause chronic diarrhea, stomach illnesses, and severe ear infections. In one Wisconsin county more than 100 wells became contaminated after an early thaw melted frozen fields. Within just a few days of the thaw, the drinking water contained coliform bacteria, E. coli, and nitrates, all of which are byproducts of manure and fertilizer.

Neither the CWA nor the SDWA directly regulates agricultural runoff—most runoff is completely exempt from federal regulation.
Consequently, people with private wells fall outside the protection of the SDWA, even though their wells are highly susceptible to drinking water pollution caused by runoff. The largest farms are the greatest contributors to the runoff problem, and indeed, the EPA has created regulatory rules\textsuperscript{116} for such farms.\textsuperscript{117} But the EPA's power to regulate is limited because Congress has not expressly given the EPA authority to regulate most agricultural runoff.\textsuperscript{118} While states and counties can, and do, implement regulations to combat the runoff problem,\textsuperscript{119} many believe federal regulation is necessary to truly protect public health.

4. Political Considerations

Political considerations also impede the regulation of drinking water. Industry lobbying and political influence can have a strong effect on an EPA decision to regulate a contaminant.

The current situation with regulation of perchlorate\textsuperscript{120} illustrates the powerful effects of industry lobbying. Because most perchlorate contamination of drinking water happens as a result of improper disposal at rocket test sites, military bases, and chemical plants, the Department of Defense has a strong interest in keeping perchlorate out of the regulatory realm of the SDWA.\textsuperscript{121} Perchlorate is found not just in


\textsuperscript{117} Concentrated Animal Feeding Operations ("CAFOs") are considered point sources under the Clean Water Act, and are thus regulated by the NPDES program. Pollutant Discharge Elimination System (NPDES): Animal Feeding Operations, U.S. ENVTL. PROT. AGENCY, http://cfpub.epa.gov/npdes/home.cfm?program_id=7 (last updated Jan. 4, 2011). A CAFO is defined in part by the actual number of animals at the CAFO location, with only the largest farms qualifying as CAFOs. Id.; 73 Fed. Reg. 70,421 (Nov. 20, 2008); see also Regulatory Definitions of Large CAFOs, Medium CAFOs, and Small CAFOs, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/npdes/pubs/sector_table.pdf (last visited Feb. 17, 2011). Many believe that real change will not likely occur until Congress passes a federal law granting the EPA broad powers to regulate farms. Duhigg, supra note 93.

\textsuperscript{118} See National Pollutant Discharge Elimination System (NPDES): Agriculture, supra note 115 (noting that irrigated agriculture and agricultural stormwater runoff are excluded from NPDES regulations).


\textsuperscript{120} See supra Part I.B.

\textsuperscript{121} Eilperin, supra note 29.
drinking water, but in food and soil as well. Yet a nationwide cleanup of perchlorate could potentially cost billions of dollars, and several defense contractors have threatened to sue the Department of Defense if they are ultimately required to pay for this cleanup. The Government Accountability Office reported in the spring of 2008 that the Pentagon had been pressuring the EPA not to regulate perchlorate for several years. The White House Office of Management and Budget has also influenced the EPA’s scientific studies; for example, the Washington Post reported that the EPA’s preliminary regulatory determination was “heavily edited” by officials at the White House Office of Management and Budget.

In October of 2008, the EPA made a preliminary regulatory decision not to regulate perchlorate contamination of drinking water. After protest from health advocates and scientists, including three EPA scientific advisory panels, the EPA agreed to reconsider its decision. In January of 2009, the EPA issued an interim health advisory for perchlorate (a non-binding recommendation to state and local authorities) recommending that drinking water not exceed fifteen parts per billion of perchlorate. In August of 2009, the EPA published a Supplemental Request for Comments in the Federal Register, seeking input on additional ways to evaluate the threat and analyze data.

Public health concerns seem to have trumped political considerations. Finally, on February 2, 2011, EPA Administrator Lisa Jackson announced the EPA’s decision to develop a regulation for perchlorate

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122 See Perchlorate, ENVTL. WORKING GRP., http://www.ewg.org/chemindex/chemicals/perchlorate (last visited Feb. 22, 2011). One 2003 analysis of government data found perchlorate in drinking water, groundwater, or soil in at least forty-three states. Id. And lab tests of lettuce grown in Southern California or Arizona showed that 18% of the lettuce sampled contained perchlorates, at a level such that an average serving of this lettuce would cause a person to consume four times more than the level of perchlorate considered safe by the EPA. Id.
123 Eilperin, supra note 29.
124 Id.
125 Id.
127 Perchlorate, supra note 122.
128 Id.; Drinking Water Contaminants: Perchlorate, supra note 126.
under the SDWA. On February 11, 2011, the EPA issued a proposed rule in the Federal Register stating its regulatory determination to initiate the process of proposing a national primary drinking water regulation for perchlorate under the SDWA, admitting that "perchlorate meets SDWA’s criteria for regulating a contaminant—that is, perchlorate may have an adverse effect on the health of persons; perchlorate is known to occur or there is a substantial likelihood that perchlorate will occur in public water systems with a frequency and at levels of public health concern; and in the sole judgment of the Administrator, regulation of perchlorate in drinking water systems presents a meaningful opportunity for health risk reduction for persons served by public water systems." 

Political considerations influence the regulation of agricultural runoff as well. The powerful farm lobby has successfully blocked the implementation of new environmental regulations. For example, the Wisconsin Department of Natural Resources has promulgated many rules for the prevention and management of agricultural runoff. But after passing a new rule prohibiting farmers from spraying manure during the winter, the farmers’ association lobbied and won a provision requiring the state to finance up to 70 percent of the cost of implementing these new regulations. This is an economic burden that many states cannot withstand, and thus severely limits the effect of the regulations and makes them difficult to enforce.

5. Stretched Resources

Stretched resources remain a perpetual concern for the EPA and make the EPA slow to react to new evidence of risk. As EPA Ad-
ministrator Lisa Jackson recently acknowledged, "resources are limited at the federal and state level during these challenging economic times and [...] we must meet our highest environmental priorities first . . . ." Budget constraints thus make it difficult to fully meet public health and environmental goals.

IV. THE CITIZEN SUIT: ONE POSSIBLE REMEDY

A. Citizen Suit Provisions in General

The SDWA contains a citizen suit provision, as do most major environmental laws. Congress created citizen suit provisions in environmental laws specifically to ensure enforcement and promote compliance. The citizen suit provisions in the various environmental laws are similar and share the same basic premise and components.

Citizen suits serve as a way for the public to step in and get involved in the absence of proper enforcement of a law. The purpose of citizen suits is to promote compliance and prevent toxic harm, not to provide private redress. A private citizen may file a citizen suit against any regulated person or government entity for any action that is in violation of an environmental statute. Alternatively, any pri-

have not been updated since the 1980s, or earlier, since the Act's passage in 1974. Duhigg, supra note 36.


140 See Jeffrey G. Miller, Overlooked Issues in the "Diligent Prosecution" Citizen Suit Preclusion, 10 WIDENER L. REV. 63, 63 (2003); see also David S. Mann, Polluter-Financed Environmentally Beneficial Expenditures: Effective Use or Improper Abuse of Citizen Suits Under the Clean Water Act?, 21 ENVTL. L. 175, 179-87 (1990) (discussing citizen suits in general).


142 The legislative history of the Clean Air Act indicates that civil penalties were adopted to deter, rather than to compensate. Mann, supra note 140, at 186.

vate citizen also can initiate a citizen suit against the government for failure to perform a non-discretionary duty.\footnote{144} Citizens who prevail typically can recover attorney fees and other litigation costs.\footnote{145} Filing a citizen suit does not prevent a person from additionally suing for toxic tort,\footnote{146} but this must be done in a separate action.

Congress passed the first environmental citizen suit provision in 1970, codified in section 304 of the Clean Air Act (CAA).\footnote{147} The CAA legislative history is often used to interpret citizen suit provisions of other statutes, because the provisions are so similar and because there is an abundance of CAA legislative history.\footnote{148} In passing the CAA, Congress recognized the many problems with existing enforcement mechanisms and sought to supplement the EPA’s enforcement ability by partially delegating enforcement power to concerned citizens.\footnote{149} Congress’ idea was to allow for multiple enforcers of the environmental statutes.\footnote{150} Furthermore, Congress hoped that the provision would prompt the government to enforce on its own, while still allowing a citizen redress in federal court in the absence of government enforcement.\footnote{151} Congress thought of citizen suits as a way to encourage the meaningful participation of citizens in the administrative process, as well as a means to perform a public service, and thus encouraged courts to be receptive to these suits.\footnote{152}

\footnote{144} Id. § 300j-8(a)(1)-(2). A non-discretionary duty is a “mandatory duty” imposed by the statute upon the Administrator of the agency; in other words, it is a “duty to act” or a “duty to make a finding” in a specific instance. Amigos Bravos v. Envtl. Prot. Agency, 324 F.3d 1166, 1171 (10th Cir. 2003). Typically, “an agency’s decision not to prosecute or enforce . . . is a decision generally committed to an agency’s absolute discretion.” Heckler v. Cheney, 470 U.S. 821, 831 (1985). However, some actions fall outside of the agency’s discretion. For example, in Natural Resources Defense Council v. U.S. Environmental Protection Agency, environmental organizations sued the EPA under the CWA seeking to compel the EPA to promulgate certain standards for storm water pollution discharges caused by industry. The Ninth Circuit held that the CWA required EPA to promulgate these standards, and thus that it was not within the discretion of the Administrator to decide whether or not to do so. 542 F.3d 1235, 1250-51 (9th Cir. 2008).

\footnote{145} See generally 42 U.S.C. § 300j-8(d) (granting the court the power to award attorney fees and other litigation costs).

\footnote{146} See id. § 300j-8(e).


\footnote{149} See Miller, supra note 140, at 63; see also Mann, supra note 140, at 180.

\footnote{150} See supra note 149.

\footnote{151} Miller, supra note 140, at 70.

\footnote{152} Id. at 72-73.
The citizen suit provisions initially met some resistance. Some feared that citizen suits would burden the courts, that plaintiffs would harass or bring frivolous suits against industry, or that citizen suits would squander agency resources and divert attention away from the EPA’s appointed tasks. In response to these concerns, Congress included some limitations in the citizen suit provisions. Citizens may only sue for enforcement, not damages, and attorney fees are not available for frivolous or harassing suits. Additionally, citizen plaintiffs must give notice to both the agency and the violating party prior to the filing of the complaint. The statutes require a delay between the notice and commencement of citizen enforcement, so that the agency has a chance to bring its own enforcement action and the polluter can halt additional violations. Finally, a citizen may not pursue enforcement if the government has already initiated an action concerning the same violations.

The inclusion of citizen suit provisions in the environmental laws has been successful. Indeed, in 1985, fifteen years after inclusion of the first citizen suit provision in an environmental law, the Senate Committee on Environment and Public Works recognized that “citizen suits are a proven enforcement tool. They operate as Congress intended—to both spur and supplement . . . government enforcement actions. They have deterred violators and achieved significant compliance gains.” Citizens brought few suits during the first decade after the provisions were established, and most involved environmental groups suing the EPA. In the 1980s, the number of citizen suits began to rise, and the focus of the suits began to shift to suits filed against regulated industry. Citizens have been steadily filing suits ever since. Between 1993 and 2002, federal courts issued opinions in approximately 110 civil environmental cases per year, and about

153 Id. at 71.
154 Mann, supra note 140, at 180.
156 Mann, supra note 140, at 176. Indeed, the Supreme Court has recognized the purpose of notice to be to give the alleged violator “an opportunity to bring itself into complete compliance with the Act and thus . . . render unnecessary a citizen suit.” Friends of the Earth v. Laidlaw Envtl. Serv., 528 U.S. 167, 174 (2000) (quoting Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 60 (1987)).
157 See Miller, supra note 140, at 66.
158 Id. at 72 (quoting S. Rep. No. 99-50, at 28 (1985)).
159 See Lloyd, supra note 148, at 855; James R. May, Now More than Ever: Trends in Environmental Citizen Suits at 30, 10 WIDENER L. REV. 1, 3 (2003); Smith, supra note 141, at 365.
160 Lloyd, supra note 148, at 855.
161 See May, supra note 159, at 4-5.
75\% of those were citizen suits.\textsuperscript{162} These statistics illustrate the impact citizen suits have had on enforcement in recent years. Notably, a majority of jurisprudence concerning our environmental laws arises from citizen suits.\textsuperscript{163}

B. The SDWA Citizen Suit Provision

The SDWA citizen suit provision very closely resembles the other environmental citizen suit provisions.\textsuperscript{164} It allows any person to commence a civil action against any other person, government instrumentality or agency,\textsuperscript{165} or against the EPA Administrator, if the Administrator fails to perform a non-discretionary act or duty.\textsuperscript{166} Therefore, a citizen may sue any person or entity that violates the SDWA, or the EPA if the EPA fails to act as required by the statute,\textsuperscript{167} under the jurisdiction of a U.S. district court.\textsuperscript{168}

As with other environmental laws, the SDWA citizen suit provision includes a notice and delay period.\textsuperscript{169} The citizen plaintiff may not commence the action prior to sixty days after giving notice to the intended defendant.\textsuperscript{170} If the EPA Administrator, the Attorney General, or the state is already diligently prosecuting a civil action regarding the violation, or begins to do so within sixty days after receiving notice of the citizen’s intent to file suit, the citizen plaintiff may no longer commence his or her action.\textsuperscript{171} The citizen plaintiff may, however, “intervene as a matter of right” in any action already com-

\textsuperscript{162} ld. at 8.
\textsuperscript{163} ld.
\textsuperscript{164} Note that the SDWA citizen suit provision does not provide for imposition of civil penalties, whereas many other environmental statutes do. See discussion infra at Part V.B.1.
\textsuperscript{165} Note that, while any citizen may sue the government pursuant to § 300j-8(a)(1), this is only “to the extent permitted by the Eleventh Amendment,” thus preventing a citizen from suing a state. 42 U.S.C. § 300j-8 (2009).
\textsuperscript{166} ld. § 300j-8(a)(2). See sources cited supra note 144.
\textsuperscript{167} Included in the citizen suit provision is § 300j-8(a)(3), which provides for commencement of a civil action in order to force a federal agency to pay a penalty to the United States government that was previously assessed by the Administrator, if more than eighteen months has passed from the date of the final order to pay the penalty. In a proposed rule in the Federal Register in September of 1998, the EPA explained that § 300j-8(a)(3), added to the SDWA by the 1996 Amendments, was a typographical error, instead intended to refer to § 300j-6. Safe Drinking Water Public Water System Program: Citizen Collection Action, 63 Fed. Reg. 48,078, 48,078 n.1 (Sept. 8, 1998).
\textsuperscript{168} 42 U.S.C. § 300j-8(a).
\textsuperscript{169} See supra note 156.
\textsuperscript{170} 42 U.S.C. § 300j-8(b)(1)(B). The citizen plaintiff must notify various parties, depending on who they are suing. ld.
\textsuperscript{171} ld.
mentsed by the government. Likewise, the Administrator or the Attorney General may always intervene as a matter of right in any citizen civil action.

As with all other environmental citizen suit provisions, the court may award costs of litigation to the citizen plaintiff, including reasonable attorney fees, if the court determines that an award is appropriate. Furthermore, the filing of a citizen suit does not prevent other causes of action related to the violation at issue. Thus, the citizen plaintiff may seek other types of relief under other statutes or at common law. Nor does involvement in a citizen suit prevent a state or local government from bringing an action or obtaining a remedy in state court or through an administrative action.

While citizen suits have played an important role in the enforcement mechanisms of other environment statutes, there have not been many citizen suits brought under the SDWA. Between January 1995 and December 2000, citizen plaintiffs initiated 287 enforcement actions under all environmental statutes. Of these, 252 were brought under the CWA. Remarkably, not a single citizen case was brought under the SDWA during this six-year period. I will discuss possible explanations for this lack of citizen suits under the SDWA and possible remedies in Part V of this Note.

C. Standing

In addition to the notice and delay requirement, citizen plaintiffs must also overcome the procedural hurdle of standing before filing a citizen suit. Unlike tort or nuisance claims, which a plaintiff would likely file in state court, federal district courts have jurisdiction over

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172 Id.
173 Id. § 300j-8(c).
174 Id. § 300j-8(d).
175 Id. § 300j-8(e).
176 Id.
177 There is no central repository of information regarding numbers of citizen suits filed. Smith, supra note 141, at 367. This leaves statistical information about the number and nature of citizen suits severely lacking. The EPA commissioned the Environmental Law Institute (ELI) to study citizen enforcement suits brought under all of the statutes in which EPA has enforcement authority. Id. The ELI published its study in 1984. Id. The government has not commissioned a more recent comprehensive study of frequency or outcomes of citizen and government environmental enforcement actions. Id. In this note I rely upon the results of the ELI study, as well as two other studies performed by individuals, to evaluate the implications of citizen suit provisions in relation to the SDWA. Id. at 359.
178 Smith, supra note 141, at 385.
179 Id. at 386.
180 Id.
SDWA citizen suits, and plaintiffs must satisfy federal standing requirements.

Article III, Section 2 of the Constitution of the United States limits the jurisdiction of federal courts to "cases" and "controversies," which the Supreme Court has interpreted to mean "those disputes which are appropriately resolved through the judicial process." To decide standing, federal courts must determine whether the plaintiff has alleged "such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction." The plaintiff bears the burden of showing that he has standing. To seek injunctive relief, the plaintiff must show: (1) that he is under threat of suffering a concrete and particularized "injury in fact"; (2) that the threat is "actual or imminent, not conjectural or hypothetical"; (3) that the injury is "fairly traceable to the challenged action of the defendant"; and (4) a favorable judicial decision will likely prevent or redress the injury.

The Supreme Court has articulated the precise standing requirement for citizen plaintiffs in environmental suits in various ways since 1970, when the first citizen suit provision was passed by Congress. Most recently, in March of 2009, the Supreme Court in Summer v. Earth Island Institute articulated a somewhat heightened standing requirement. The plaintiff environmental groups in Summer challenged a Forest Service decision to exclude several timber sales in the Sequoia National Forest from the notice, comment, and appeal process typically required by the Appeals Reform Act.

The Court in Summer stated that the plaintiffs could only demonstrate standing if they could show that application of the Forest Service regulations would affect them. The Court found that the plaintiffs did not have standing because no member could articulate specific plans to visit the particular areas of the National Forests where a timber sale was to take place. The Court found that this constituted a

\[\text{181} \quad 42 \text{ U.S.C. } \S\ 300j-8(a) \text{ (2009).} \]
\[\text{182} \quad \text{U.S. Const. art. III, } \S\ 2, \text{ cl. 1; Lujan v. Defenders of Wildlife, 504 U.S. 555, 559 (1992).} \]
\[\text{184} \quad \text{Id.} \]
\[\text{185} \quad \text{Lujan, 504 U.S. at 560-61; see also Friends of the Earth v. Laidlaw Envtl. Servs, 528 U.S. 167, 180-81 (2000).} \]
\[\text{186} \quad \text{Clean Air Amendments of 1970, Pub. L. 91-604, } \S\ 304, 84 Stat. 1675, 1706-07 \text{ (codified as amended at 42 U.S.C. } \S\ 7604 \text{ (2006)).} \]
\[\text{187} \quad 129 \text{ S.Ct. 1142 (2009).} \]
\[\text{188} \quad \text{Id. at 1147-48.} \]
\[\text{189} \quad \text{Id. at 1149.} \]
lack of a "specific and concrete plan" to enjoy the National Forests, and thus that the plaintiffs could not show that the Forest Services' regulations would threaten "imminent and concrete harm" to their interests.  

*Summers* is significant because the Court articulated a rather strict standing requirement. However, the situation of the *Summers* plaintiffs is distinguishable from that of a SDWA citizen plaintiff, because a SDWA citizen plaintiff would more likely be able to present a sufficient allegation of causation. While the plaintiffs in *Summers* could not identify any timber sales affecting lands that they themselves planned to use, a SDWA citizen plaintiff can more easily show a factual link between a defendant's violation of the SDWA and the plaintiff's drinking water.

Conversely, the Supreme Court articulated a more relaxed view of standing in April 2007, with its decision in *Massachusetts v. EPA*. *Massachusetts* brought suit against the EPA asking the Court to consider whether: (1) the EPA had authority under the CAA to regulate greenhouse gas emissions from new motor vehicles; and (2) if so, whether the EPA's refusal to do so was consistent with the CAA. At issue was whether Massachusetts had standing to bring the suit. The Court stressed that it would not "entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws," but rather must identify the "injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." The Court found that Massachusetts could show injury in a "concrete and personal way," and that the EPA's refusal to regulate greenhouse gas emissions presented both an "actual and imminent" risk of harm to Massachusetts.

*Massachusetts* is particularly significant because it shows the Court's willingness to find actual and imminent risk of harm from a threat such as greenhouse gas emissions. The harmful health effects of climate change are widespread but somewhat attenuated, as the actual specific health effects are harder to identify. A plaintiff bringing a citizen suit under the SDWA could likely prove a more specific "actual and imminent" risk of harm than that of climate change. However,

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190 *Id.* at 1150-51.  
192 *Id.* at 505.  
193 *Id.* at 516-17 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580-81 (1991) (Kennedy, J., concurring in part and concurring in judgment)).  
194 *Id.* at 517 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 581 (1991) (Kennedy, J., concurring in part and concurring in judgment)).  
195 *Id.* at 521 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1991) (internal quotations omitted)).
the two situations are somewhat distinguishable, as the effects of climate change are broad and affect everyone, whereas polluted drinking water may affect only those people drawing from the polluted source or PWS.

*Summers* and *Massachusetts* indicate that the standing requirement requires a citizen plaintiff to show that he or she is *personally* affected in some way. The requirement was heightened in *Summers*, while in *Massachusetts* the Court adopted a more relaxed standard. Perhaps most instructive is the 2000 Supreme Court decision in *Friends of the Earth v. Laidlaw.*

*Laidlaw* involved several environmental groups bringing an action pursuant to the citizen suit provision of the CWA against Laidlaw for Laidlaw’s violation of its CWA permit. Laidlaw had violated its permit repeatedly by discharging high levels of mercury into the North Tyger River. The Court stressed that the relevant showing for Article III standing is injury to the plaintiff, and found that the plaintiffs satisfied such a showing of injury.

Multiple members of the plaintiff environmental groups submitted affidavits stating that, due to their concerns regarding the polluted water, they no longer were able to fish, swim, picnic near, or enjoy the river. The affiants all lived near the river or wanted to use the river at varying distances from Laidlaw’s operating facility, ranging from one quarter-mile away to as far as forty miles downstream. The Court found that the affiants’ sworn statements regarding their “reasonable concerns” showed that Laidlaw’s discharges “directly affected those affiants’ recreational, aesthetic, and economic interests.” The Court stated that it is the “reasonableness of [the] fear” of the citizen plaintiff that is at issue. The Court found it probable and “entirely reasonable” that residents no longer wanted to use the river for recreational use and feared “other economic and aesthetic harms, given their knowledge of a nearby company’s continuous discharges of illegal pollutants.” Consequently, the Court found an injury in fact, and the plaintiffs established standing.

Applying the *Laidlaw* standard to a citizen suit under the SDWA, a citizen would need to show that, due to the pollution caused by the

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197 *Id.* at 176.
198 The Supreme Court has held that the plaintiff may supply “further particularized allegations of fact” to support the standing requirement by submitting affidavits in support of the plaintiff’s position. *Warth v. Seldin*, 422 U.S. 490, 501 (1975).
199 *Laidlaw*, 528 U.S. at 181-85.
200 *Id.* at 184 (quoting Los Angeles v. Lyons, 461 U.S. 95, 108 n.8 (1983)).
201 *Id.* at 184-85.
202 *Id.* at 185-86.
defendant’s violations of the SDWA, the fear of being harmed by drinking water is reasonable. This showing would not be difficult for a citizen suing its PWS, because PWS reports show exactly what contaminants come out of a citizen’s tap and in what amounts. From this, a citizen could use the permit to show precisely which contaminants are at illegal levels. Therefore, just as the Laidlaw plaintiffs showed that illegal levels of contaminants in the river caused them to fear river pollution, citizen plaintiffs could show that illegal levels of contaminants caused them to fear that their tap water is polluted. Both are reasonable fears.

It may be slightly harder for a citizen plaintiff to show that a reasonable person would fear harmful health effects stemming from a company’s violations of its UIC permit. Unlike a PWS, where a violation of the maximum contaminant level directly affects the citizen’s tap water, the connection between injection of illegal contaminant levels into the ground and pollution of tap water could be more tenuous. Citizens must establish a reasonable likelihood that the contaminants illegally injected into the ground reached their tap water. Laidlaw suggests that to establish this, a citizen would likely need to obtain an affidavit from an expert saying that it is reasonable to assume that the injected contaminants could have traveled through the groundwater to reach the source of the citizen’s tap water. The citizen would not need to prove this definitively—he just needs to show the “reasonableness of the fear.”

D. How the Safe Drinking Water Act Citizen Suit Provision May be Used

1. Types of Suits

The SDWA citizen suit provision provides an effective way for citizens to achieve enforcement of the SDWA standards. In particular, violations of UIC permits and PWS violations are especially amenable to citizen suit enforcement.

The plight of Ms. Hall-Massey highlights a situation in which a citizen suit under the SDWA could be beneficial. The New York Times article discussing Ms. Hall-Massey does not specify how she receives her water. The article indicates that the water comes from a

203 See supra note 198.
204 See Laidlaw, 528 U.S. at 184 (alteration omitted) (quoting Los Angeles v. Lyons, 461 U.S. 95 n.8 (1983)).
205 See generally Duhigg, supra note 37 (describing Ms. Hall-Massey’s difficulties with the tap water in her home).
206 Id.
well but does not state whether it is a private well, or a well from which a PWS draws water (which would be covered by the SDWA).\(^{207}\)

The article reveals that nearby coal companies have disclosed in public reports that they injected illegal levels of contaminants regulated by the SDWA into the ground.\(^{208}\) Therefore, at least some of these coal companies have violated their UIC permits. If Ms. Hall-Massey can prove a violation of a UIC permit based on the coal company’s own reports, she can likely win her citizen suit. Moreover, if Ms. Hall-Massey receives her water from a PWS, she may bring a citizen suit against her PWS, if she can show illegal concentrations of contaminants in the water coming out of her tap. Ms. Hall-Massey would need to use the PWS reports to show that the PWS violated the legal standards set under the SDWA.

Once a citizen establishes standing, the fact that a violation occurred is enough to win a citizen suit, and this is the strength of the citizen suit provision. As opposed to many common law actions, citizens bringing SDWA suits do not have to prove conclusively that a particular contaminant injected by a certain violating company was the exact contaminant that caused them to become sick.\(^{209}\) This is in accordance with the goal of citizen suits—to induce compliance.\(^{210}\)

Furthermore, if underground injections are occurring, a citizen may choose against whom to bring suit—the PWS, or the injector who violates its UIC permit. Finally, even a citizen who has a private well not regulated under the SDWA could file a citizen suit if his well is contaminated due to a UIC program permit violation that resulted in contaminated groundwater.

2. The Clean Water Act—A Model

Because precedent relating to citizen suits filed under the SDWA is difficult to find,\(^{211}\) we have no direct examples of the value of citizen suits in solving the SDWA enforcement problem. Examination of other environmental statutes in comparison to the SDWA, however, indicates that the SDWA is a good candidate for citizen suit enforcement.

\(^{207}\) Id.
\(^{208}\) Id.
\(^{209}\) Citizens do have to wholly prove causation to fulfill the federal standing requirement. See supra Part IV.C.
\(^{210}\) This also means that citizen suits could be much easier to prove than, for example, a tort action, in which the citizen would need to prove all of the elements of a standard tort action.
\(^{211}\) See supra note 177.
Citizen suits filed under the CWA have been very successful; the CWA is undoubtedly the most popular environmental statute for citizen suits.\footnote{Mann, supra note 140, at 182.} Of the 287 CWA citizen suit enforcement actions filed between January 1995 and December 2000, 252 were brought under the CWA. This popularity may be explained by two factors: (1) the Act’s regulatory mechanisms, and (2) the immense publicity the Act has received. One indication of the probable success of citizen suits filed under the SDWA is that the enforcement provisions of the SDWA are quite similar to those of the CWA. The SDWA and CWA function in largely the same way: they both rely on standard-setting, self-monitoring and self-reporting. To understand the similarity between the SDWA and the CWA, it is necessary to examine the CWA.

Enforcement of CWA requirements is quite straightforward. The CWA generally requires that any person who discharges a pollutant into a water of the United States get a permit.\footnote{See 33 U.S.C. §§ 1251-1387 (2009); see also Rapanos v. United States, 547 U.S. 715, 723 (2006).} Numerous court cases have debated what it means to discharge, what qualifies as a pollutant, and which waters qualify as “waters of the United States,”\footnote{See, e.g., 33 U.S.C. § 1362(12) (defining the term “discharge of a pollutant”); § 1362(7) (defining the term “navigable waters”); 40 C.F.R. § 230.3(s) (2010) (defining the term “waters of the United States”). Indeed, the EPA in 2007 issued guidance on the issue of CWA jurisdiction, intending to clarify the various Supreme Court opinions on the issue. See Clean Water Act Definition of “Waters of the United States”, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/owow_keep/wetlands/guidance/CWAwaters.html (last updated Dec. 29, 2009).} all of which are factors that determine when a permit under the CWA is required. However, once a person has a permit and is governed by the CWA, it is quite easy to identify when that permit-holder has exceeded its permit. Permits under the CWA set a specific effluent limitation on the amount or concentration of pollutants the permit-holder is allowed to discharge.\footnote{See 33 U.S.C. § 1342 (discussing issuance of permits for discharge of pollutants); see also id. §§ 1311-1313 (discussing setting and enforcing standards of effluent limitations under the CWA permit system).} The permit-holder must monitor its own discharges and report the results of the monitoring to the proper authority, usually the state. All of this information is publicly available. Therefore, a citizen plaintiff may simply look at the reported discharge amount, compare that to the permissible limit stipulated in the permit, and be able to prove a violation if the reported discharge is
over the limit. If a citizen can show a permit violation, he has won his citizen suit.\textsuperscript{216}

Conversely, the Clean Air Act (CAA) has proven far more difficult for citizen suits than the CWA.\textsuperscript{217} The CAA also uses permitting, self-monitoring, and self-reporting of releases.\textsuperscript{218} However, consistent, publicly available monitoring results are less available under the CAA than under the CWA.\textsuperscript{219} Because of the nature of the science itself and how the CAA operates to regulate air pollutants, there is more opportunity for factual dispute concerning when a violation has occurred under the CAA.\textsuperscript{220} Consequently, it is more difficult and complicated for a citizen to bring suit under the CAA than under the CWA. Similarly, the number of citizen suits filed under the Resource Conservation and Recovery Act (RCRA) has been low.\textsuperscript{221} RCRA cases often involve complicated technical issues that are difficult for both plaintiffs and courts to understand.\textsuperscript{222} Issues of proof regarding violations, therefore, may explain why the CWA has been such a successful environmental statute for citizen suits.

Another explanation for the popularity of the CWA is that it received significant publicity in the years following its adoption by Congress. One such instance was the media bombardment of the pub-

\textsuperscript{216} Note, however, that a citizen plaintiff under the CWA is still subject to procedural requirements such as notice and delay and standing. See supra Part IV.C.

\textsuperscript{217} See Jim Hecker, The Difficulty of Citizen Enforcement of the Clean Air Act, 10 WIDENER L. REV. 303, 303 (2004) (discussing the difficulties of citizen enforcement of the CAA); see also Thomas G. Echikson & Karen K. Mongoven, Responding to and Defending Citizen Suits, 236 DEN B-I (Dec. 9, 2005).

\textsuperscript{218} The CAA operates to regulate any “air pollution agent . . . which is emitted into or otherwise enters the ambient air.” 42 U.S.C. § 7602(g) (2008). The EPA selects pollutants to regulate under the CAA, and states adopt implementation plans to attain the permitted levels of the pollutants. Id. §§ 7407-7409.

\textsuperscript{219} Echikson & Mongoven, supra note 217.

\textsuperscript{220} Prior to 1990, citizens could only seek injunctive relief and could not obtain civil penalties for violations under the CAA (as the SDWA is now). Hecker, supra note 217, at 303. Furthermore, monitoring of emissions was so infrequent that there was no accurate measure of compliance, and there were no federal requirements for operating permits, making it very difficult to determine emission limitations. Id. With the 1990 amendments to the CAA, Congress sought to address these problems and to make the CAA more amenable to citizen suits, yet it appears that “a decade of experience with citizen enforcement has shown that the CAA is very difficult to enforce.” Id. This is in stark contrast to the CWA, where the permittee may not challenge the terms of the underlying permit, where defenses to malfunction of technology are very limited, and where discharge monitoring reports are considered admissions of violations and very difficult to challenge in an enforcement action. Lloyd, supra note 148, at 881-2.

\textsuperscript{221} See Smith, supra note 141, at 369.

\textsuperscript{222} Echikson & Mongoven, supra note 217.
lic with images of the Cuyahoga River burning. As a result, Americans began to realize that many bodies of water in the United States were no longer swimmable or fishable. Indeed, strong citizen concern for water issues partly inspired the passage of the CWA and the comprehensive 1972 amendments to the CWA. Additionally, the CWA is simply a well-known statute. The average citizen is more likely to have heard of the CWA than the SDWA. Most citizens probably never wonder how tap water is regulated, and if they do, they may assume the CWA covers drinking water.

Citizen groups played a large role in encouraging citizen enforcement actions under the CWA. During the early years of the Reagan administration there was much concern over a dramatic decline in government enforcement, and the Natural Resources Defense Council (NRDC) initiated a national effort to use citizen suits as an enforcement tool. The NRDC specifically focused on CWA violations because they are easy to prove, and it combined with local environmental groups to assist in enforcement efforts. The NRDC systematically scrutinized discharge monitoring reports, sent notice letters to dischargers who reported a violation of permit limits, and subsequently followed up by filing a citizen suit. This campaign was very successful, raising the total number of CWA citizen suits from six in 1981 to sixty-two in 1983, which surpassed the number of CWA violations that the EPA referred to the Justice Department that year.

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223 The burning of the Cuyahoga River is considered to have encouraged the ecological movement and led toward the passage of the Clean Water Act in 1972. See Michael Scott, The Burning Cuyahoga Got Public’s Attention and Pushed Pollution Issues to the Forefront, PLAIN DEALER, Apr. 12, 2009, at A1 (discussing how a photo of the river burning “went viral”).


225 The SDWA and the CWA both deal with water in the United States, and while there is some overlap in the bodies of water that each Act regulates, the two Acts have two very different focuses. The SDWA seeks to regulate only the drinking water that comes out of Americans’ taps. The SDWA does this primarily by regulating PWSs, and by including provisions to ensure that original sources of drinking water—from which PWSs pull the water they treat—do not become contaminated and create extra work for the PWSs. The CWA, on the other hand, focuses on maintaining “the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a) (2009). It does this by regulating discharges of pollutants into surface waters, such as lakes and streams. Therefore, the two Acts both regulate water, but in two very different ways.


227 Id.

228 Id.
V. RECOMMENDATIONS

The citizen suit provision of the SDWA offers an effective short-term solution to the problems of SDWA enforcement. While citizen suits cannot be used to enforce regulation of contaminants not under SDWA jurisdiction, much harm would be avoided if the regulations currently in place were enforced. Yet the citizen suit provision has existed since the SDWA was passed by Congress in 1974 and citizens have failed to make meaningful use of it. Just as public support for the CWA increased following intense publicity of the nation’s polluted waters, there must be public awareness campaigns to make people aware of the public health threat posed by drinking water contamination and the availability of a citizen suit alternative.

A more long-term remedy is necessary as well. Congress should amend the SDWA to provide for imposition of civil penalties in citizen suits. Congress should specify that these civil penalties, payable to the U.S. government, must go into a separate fund to be used for research, regulation, and enforcement of drinking water standards, rather than into the general U.S. Treasury fund. Furthermore, Congress should amend the SDWA to require the EPA to periodically re-evaluate the contaminants regulated under the SDWA.

Safe drinking water must be a priority in this country. The EPA needs more money to conduct research—until this happens, government scientists will not have the reliable data that is necessary to make informed decisions regarding regulation of contaminants. Moreover, until EPA scientists are able to conduct thorough research, other parties may succeed in preventing greater regulation, for their own political or financial self-interest and at the expense of public health. Because we do not know the exact long-term consequences that contaminants in our drinking water pose to public health, it is even more important to invest money and resources now to educate ourselves about this threat, so that we do not pay for our ignorance years from now.

Greater publicity regarding the current public health threat associated with drinking water will help to ensure that these improvements happen. As EPA Administrator Lisa Jackson said, “when information is made public, it can be a powerful tool to help improve the environment directly.”229 Congress needs to be pushed to fill in the gaps in regulation—large farms and agricultural runoff must be regulated, and Congress must grant the EPA or another agency the authority to do so. Unsafe drinking water poses a significant public health threat, and

229 Memorandum from Lisa P. Jackson, supra note 137.
even if a "quick fix" solution exists, the problem is important, and must therefore be addressed on a more permanent basis.

A. Increase Public Awareness

The SDWA citizen suit provision is a viable enforcement tool, and the challenge is to make people use it to improve the quality of their drinking water. The most obvious explanation for why citizens are not filing SDWA citizen suits is that they are not aware of this enforcement mechanism. The average citizen is unlikely to be familiar with how and what the SDWA regulates. Even the author of the New York Times toxic waters series, Duhigg, supra note 35, who is very educated on the topic, frequently uses the CWA and the SDWA interchangeably, exhibiting confusion over which law applies to which type of violation. If a citizen such as Ms. Hall-Massey experiences health problems as a result of her tap water and complaints to local government go unanswered, where is that citizen likely to turn? That citizen will go to a lawyer, who would likely advise her to file a tort action, in the hope of abating the pollution and receiving compensation for the harm suffered. The average citizen simply would not know that filing a citizen suit is an option.

Public awareness campaigns are needed to make both citizens and lawyers aware of the problems with contaminated drinking water. Citizen groups such as the NRDC and the Environmental Working Group have recently been active in educating the public on drinking water issues. This is certainly a positive step, and even a small amount of publicity may make a difference. The EPA also maintains an extensive website aimed at supplying the public with information about drinking water. In a July 2009 memo, EPA Administrator Lisa P. Jackson emphasized the importance of an informed public. Speaking of clean and safe water in general, Jackson admitted that "in many parts of the country, the level of significant non-compliance with permitting requirements is unacceptably high and the level of enforcement activity is unacceptably low." Jackson explained that the first step in improving compliance and enhancing water quality is to improve transparency, because "an informed public is our best ally in pressing for better compliance."

230 Duhigg, supra note 35.
231 See Duhigg, supra note 37.
232 Memorandum from Lisa P. Jackson, supra note 137.
233 id.
234 id.
Public awareness of the existence and utility of citizen suits is essential not just for the public at large, but for lawyers as well. A key component of making citizens aware of citizen suits is making their lawyers aware of citizen suit provisions. Informing potential clients of the option to file a citizen suit should appeal to lawyers, as Congress allows for costs of litigation, including reasonable attorney and expert witness fees, to be awarded when appropriate.\textsuperscript{235} Indeed, prevailing plaintiffs are almost always awarded attorneys fees, so long as they bring their case in good faith.\textsuperscript{236} To deny attorney fees to the prevailing plaintiff would go against the legislative purpose of encouraging legitimate citizen suits, as most citizens would not be able to afford to bring suit.\textsuperscript{237} Awarding attorney fees and costs of litigation therefore serves as a way to encourage citizen suits. It is essential that the public—both lawyers and potential plaintiffs—are aware of this provision in the SDWA.

In addition to promoting public awareness of the existence of citizen suits, citizen groups need to be more proactive in encouraging citizens to actually file citizen suits. Adding a section to their websites titled “What You Can Do” and explaining how citizen suits operate would be useful. The EPA should also provide information online explaining and encouraging SDWA citizen suits. Doing so would contribute to the EPA’s goal of promoting clean and safe water by improving transparency, boosting enforcement, and improving information technology to make information more public.\textsuperscript{238} The EPA, in a 1973 press release voicing support for the SDWA, emphasized that

suppliers of drinking water, who in almost all cases charge for their product, could not withstand the public pressure if their customers have noticed that they are receiving water not in compliance with mandatory health standards. The possibility of a citizen suit provides an additional incentive to suppliers to maintain compliance with the standards.\textsuperscript{239}

\begin{itemize}
  \item \textsuperscript{235} 42 U.S.C. § 300j-8(d) (2009).
  \item \textsuperscript{236} Kerry D. Florio, \textit{Attorneys' Fees in Environmental Citizen Suits: Should Prevailing Defendants Recover?}, 27 B.C. ENVTL. AFF. L. REV. 707, 708 (2000). Historically, courts have not awarded defendants attorney fees, even when they are the prevailing party, unless special circumstances exist such as an action that is frivolous, illegal, or without foundation. \textit{Id.}
  \item \textsuperscript{237} \textit{Id.} at 716.
  \item \textsuperscript{238} See Memorandum from Lisa P. Jackson, \textit{supra} note 137.
\end{itemize}
Having accessible information about SDWA citizen suits on its website, in perhaps the same section where the EPA highlights PWS violation reports,\(^\text{240}\) would be an effective way to promote citizen suits as an enforcement option. The EPA’s website is comprehensive, and it is rather surprising that the website does not already include this information.

Moreover, the success of the CWA shows that citizen action groups must lead by example and be proactive in filing citizen suits under the SDWA. While the NRDC was aggressive in filing CWA citizen suits in the 1980s,\(^\text{241}\) there has been no comprehensive effort by citizen groups to file SDWA citizen suits. Citizen groups are more powerful and have more resources at their disposal than individual plaintiffs. The filing of SDWA citizen suits by citizen groups would both encourage more significant enforcement and prove the viability of citizen suits as an enforcement option. Citizen groups must take the lead.

B. Strengthen the SDWA

1. Civil Penalties

Congress authorized civil penalties for violations in the citizen suit provisions of almost every other environmental law, including the CWA,\(^\text{242}\) CAA,\(^\text{243}\) RCRA,\(^\text{244}\) the Emergency Planning and Community Right-to-Know Act,\(^\text{245}\) and the Comprehensive Environmental Response, Compensation, and Liability Act.\(^\text{246}\) Civil penalties are a standard enforcement mechanism in environmental statutes.

Imposition of civil penalties is an effective way to deter potential violators. Sometimes injunctive relief alone is not enough of a threat to deter potential violators. Indeed, the Supreme Court has recognized that “[c]ivil penalties may serve . . . to deter future violations and thereby redress the injuries that prompted a citizen suitor to commence litigation.”\(^\text{247}\)

The text authorizing civil penalties in the CWA is very similar to that of the other environmental statutes. It stipulates that

\(^{240}\) Information about local drinking water can be accessed at http://water.epa.gov/drink/local./

\(^{243}\) See supra Part IV.D.2.


\(^{244}\) 42 U.S.C. § 6972(a) (2010).


\(^{246}\) Id. § 9659(c).

[t]he district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title. 248

The Supreme Court interprets this provision to mean that in order to compel future compliance with the CWA, district courts may grant injunctive relief, and additionally or alternatively, impose civil penalties payable to the United States Treasury. 249 In determining the appropriate amount of any civil penalty, district courts must 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 the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.” 250

Noticeably absent from the SDWA citizen suit provision is text authorizing the imposition of civil penalties on violators of the SDWA. While the EPA may issue civil penalties of up to $25,000 per day for violations, 251 nothing in the SDWA citizen suit provision provides for the issuance of civil penalties in enforcement actions by citizens. 252 The legislative history of the SDWA gives no indication of why Congress decided not to authorize the imposition of civil penalties on defendants in citizen suits under the SDWA. Most likely, Congress did not want to bankrupt PWSs—which frequently are small municipal governments—by forcing them to pay big penalties whenever a violation happens and a citizen brings suit.

The SDWA should be amended to include factors to consider in determining the amount of civil penalties awarded, similar to the factors included in the CWA. 253 These factors would protect small municipal PWSs that cannot afford to pay large civil penalties. Judges would have discretion to issue civil penalties when appropriate, such as when a citizen is suing a large coal company for violations of a UIC permit. Indeed, even just the threat of civil penalties may help to induce compliance. Congress has found that civil penalties in CWA cases deter future violations and “promote immediate compliance by

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249 Laidlaw, 528 U.S. at 173.
251 42 U.S.C. §§ 300g-3(b), 300h-2(b).
252 Id. § 300j-8.
limiting the defendant’s economic incentive to delay its attainment of permit limits . . . .”254

Congress should therefore amend the SDWA to allow for civil penalties in citizen suits, but should specify that these civil penalties be payable to the U.S. government, in a specific fund designated for drinking water issues.255 Many of the problems stemming from insufficient regulation could be ameliorated if more funding was available to the EPA for drinking water issues.256

2. Update and Add to the List of Regulated Contaminants

The EPA has not added to the list of regulated SDWA contaminants since 2000.257 There are many harmful contaminants found in our water supplies that the EPA should seriously consider regulating. For example, various pharmaceuticals258 were found in Chicago’s water supply in the summer of 2009, none of which are regulated under the SDWA. Methyl tertiary butyl ether (MTBE), a gasoline additive, is commonly found in water supplies but is not yet regulated by the SDWA, though some states such as California have been proactive in monitoring it on their own.259 The Environmental Working Group, a citizen group dedicated to drinking water issues, found that 201 of the 315 chemicals found in their study of the nation’s drinking water between 2004 and 2009 are unregulated.260 The EPA needs to evaluate these emerging threats continuously and add to the list of regulated

254 Laidlaw, 528 U.S. at 185.

255 While none of the other environmental statutes specify where the civil penalty money should go, beyond to the U.S. Treasury, Congress has mandated specific uses of money in other areas. For example, the Federal-Aid Highway Act of 1956 specified that revenue from the gas tax would go into a Highway Trust Fund, to be used for building and maintenance of the Interstate Highway System. Thomas Lee, The Water Excise Tax: Preserving a Necessary Resource, 4 Nw. J. L. & Soc. Pol’y 171, 175 (2009).

256 See supra Part III.B.5.

257 Duhigg, supra note 36.


260 Study Findings, supra note 2. Environmental Working Group found that for 96 of these unregulated contaminants, the EPA had failed to even issue non-binding, health-based advisories. Id.
contaminants; the fact that no contaminant has been added since 2000 suggests that this is not happening.

Additionally, many contaminants already under SDWA jurisdiction are commonly found in drinking water at levels that are legal under the SDWA but still believed to be harmful. These contaminants include: atrazine, a chemical found in weed killer\textsuperscript{261}; arsenic, a semi-metallic element both naturally-occurring and used in agricultural and industrial practices\textsuperscript{262}; trihalomethane, a by-product of chlorination of water\textsuperscript{263}; and haloacetic acids, a byproduct of drinking water disinfection.\textsuperscript{264}

Atrazine, for example, is an organic chemical used as a weed killer on crops, golf courses, and manicured lawns.\textsuperscript{265} The ill health effects of atrazine include birth defects, low birth weight, menstrual problems, and prostate cancer.\textsuperscript{266} The EPA has determined that no more than three parts per billion of atrazine, measured as an annual average, may be present in drinking water.\textsuperscript{267} Yet new evidence shows that concentrations of atrazine tend to peak during spring runoff, exposing humans to extremely high levels of atrazine in their water at these peak times, whereas at other times the levels may be safe. For example, in the farming community of Piqua, Ohio, the drinking water in April 2005 tested for atrazine concentrations of 59.57 parts per billion.\textsuperscript{268} In October 2009, the EPA finally initiated steps to evaluate whether atrazine regulation should be changed,\textsuperscript{269} but the process is slow, and harm continues to occur. Atrazine is banned in the European Union, and the NRDC advocates phasing out atrazine use in the

\textsuperscript{261} Duhigg, supra note 97.
\textsuperscript{262} See Duhigg, supra note 36.
\textsuperscript{263} Disinfection By-Products Trihalomethanes, Wilkes Univ. Ctr. for Envtl. Quality Envtl. Eng’g & Earth Sci., http://www.waterresearch.net/trihalomethanes.htm (last visited Feb. 23, 2011); see also Study Findings, supra note 2.
\textsuperscript{264} See Study Findings, supra note 2; Drinking Water Contaminants, supra note 3.
\textsuperscript{265} Duhigg, supra note 97; Drinking Water Contaminants, supra note 3.
\textsuperscript{266} Duhigg, supra note 97; John McQuade, Something in the Water: Farmers, Environmentalists, and the EPA are Taking a Closer Look at a Weedkiller that Makes its Way into Drinking Water, New Orleans Times Picayune, Jan. 26, 2003, at 1.
\textsuperscript{268} Duhigg, supra note 97.
United States.\textsuperscript{270} The EPA needs to re-evaluate what level of these contaminants is safe—public health demands this.

**CONCLUSION**

Our nation's drinking water is not safe in many areas of the country, and people are suffering as a result. While in many ways the SDWA is under-performing, it also does much good. If the SDWA was properly enforced, at least some of the threat to public health would be ameliorated. The first and easiest step is to encourage enforcement of the regulations already in place through citizen suits. Citizen action groups must do their part to encourage the use of citizen suits under the SDWA and lead by example. Public awareness campaigns are necessary to educate the public about the public health threat that drinking water currently poses and to spur action. Additionally, Congress must make drinking water a priority, amend the SDWA to provide for civil penalties, and require the EPA to periodically re-evaluate the list of regulated contaminants under the SDWA.

\textsuperscript{270} Atrazine: Poisoning the Well, supra note 267.