

## Diluting the Power of the Private Attorney General to Enforce Environmental Laws: The Conflict Between Clean Water Act Citizen Suits and the Bankruptcy Code Automatic Stay

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Without [citizen suits], increasingly we will find the frustration which is already a matter of grave concern in other areas, the powerlessness of the individual to influence even those things adversely affecting his [or her] environment, heightened to a point where there is an absolute final conclusion made that the [g]overnment doesn't work.<sup>1</sup>

### An Introduction to the Conflict

The discharge of waste into our nation's waters by corporate polluters frustrates and enrages many environmentally concerned citizens. Their frustration is compounded when polluting corporations file bankruptcy petitions. Bankruptcy filings, which stay nearly all suits against debtors,<sup>2</sup> effectively shield corporations from citizen suits for injunctive relief brought under the Clean Water Act (CWA). Not allowing citizen suits against bankrupt, corporate polluters, in the absence of adequate government enforcement, deprives citizens of their statutory authority to enforce the CWA against permit violators. Because citizen suits are an integral part of the CWA's enforcement scheme, the preclusion of citizen suits diminishes the CWA's effectiveness in preserving our nation's waters.

Precluding a citizen suit against a polluting debtor, when a government suit would be allowed to proceed, contravenes Con-

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1. *Water Pollution Control Act Legislation: Hearings Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 92d Cong., 1st Sess., pt. 2, at 1019 (1971) (statement of Senator Hart).

2. See *infra* notes 12 and 28 (automatic stay provision of the Bankruptcy Code and the governmental unit exception).

gress' unequivocal intent to include the citizen suit provision as a vital enforcement mechanism of the CWA. The unequal treatment of citizen suits also sanctions continuing pollution by corporate debtors and undermines the role of citizens in preserving environmental integrity. Because both the government and citizen groups have been given the statutory authority to oversee and help ensure the preservation of the environment, an action brought by a citizen group against a polluting debtor should not be precluded by the automatic stay when the same action brought by the government would be excepted from the stay.

Congress recognized the need for citizen involvement in preserving environmental integrity and policing increasing corporate pollution when it enacted the Federal Water Pollution Control Act (CWA).<sup>3</sup> The Act "established a permit-based scheme . . . requir[ing] water pollution dischargers to comply with standards set by the United States Environmental Protection Agency (EPA)."<sup>4</sup> "In contrast to the previous policy of post-discharge water quality regulation, the Act established a new system of permits which regulated discharge limits before pollutants entered the navigable waters."<sup>5</sup> The permits are issued by the EPA, but may be enforced either by the EPA or by the state.<sup>6</sup>

As a response to the slow pace of federal enforcement of the CWA, Congress enacted section 505,<sup>7</sup> which expressly makes citi-

3. 33 U.S.C. §§ 1251-1387 (1982), as amended by Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 (1987) [hereinafter Clean Water Act or CWA].

4. Gail J. Robinson, *Interpreting the Citizen Suit Provision of the Clean Water Act*, 37 Case W. Res. 515, 515 (1986-87).

Section 1311(b) of the Act directs the EPA to set effluent limitations prescribing the technological control standards that dischargers must meet and to set compliance deadlines. These limitations are enforced through the Act's permit program. Section 1311(a) declares the discharge of pollutants unlawful unless the discharger has acquired a permit, while § 1342(a)(1) states that permits must require dischargers to comply with effluent limitations.

*Id.* at n.2.

5. Lisa Marie Kuhn, *The Clean Water Act: Citizen Suits No Longer a Valid Enforcement Tool for Past Violations*, 34 Wash. U.J. Urb. & Contemp. L. 413, 418 (1988). "Congress envisioned this new system of permits setting effluent discharge limitations as a more direct approach to eliminate water pollution." *Id.* at 419 n.26.

6. See 33 U.S.C. § 1342(a)(1) (EPA shall issue the requisite discharge permits); 33 U.S.C. § 1342(b) (EPA may approve state-administered permit programs provided the state has the ability to implement the program); 33 U.S.C. § 1342(b)(2)(B)(7) (state seeking EPA approval must have the means to enforce permit condition); 33 U.S.C. § 1319 (EPA may seek injunctions, civil penalties, or criminal penalties for permit violators).

7. "[A]ny citizen may commence a civil action on his own behalf—(1) against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the [a]dministrator or a [s]tate with respect to such a standard or limitation . . ." 33 U.S.C. § 1365.

zen suits a part of the enforcement scheme by allowing citizens to sue permit violators. The inclusion of the citizen suit provision in the CWA reflects Congress' intent to ensure that the Act will be enforced.<sup>8</sup> Congress made "a deliberate choice . . . to widen citizen access to the courts, as a supplemental and effective assurance that the Act would be implemented and enforced."<sup>9</sup> The legislative history of the citizen suit provision indicates that "[c]itizens should be unconstrained to bring these actions."<sup>10</sup> Clearly, suits by citizens represent a vital enforcement mechanism of the CWA.

When a corporate polluter seeks the protection of the Bankruptcy Code, however, it can shield itself from citizen suits and thus deter enforcement of the CWA. By filing a petition for reorganization under Chapter 11 of the United States Bankruptcy Code,<sup>11</sup> an automatic stay is enacted which prohibits "the commencement or continuation . . . of a judicial . . . action or proceeding."<sup>12</sup> This provision has prohibited citizen environmental groups from suing bankrupt corporations which continue to engage in illegal polluting activities.<sup>13</sup> Because citizen suits are a vital means of enforcing the CWA and government enforcement is often inade-

8. Robinson, *supra* note 4, at 519.

9. Natural Resources Defense Council, Inc. v. Train, 510 F.2d 692, 700 (D.C. Cir. 1975). "[S]tate and local governments have not responded adequately. . . . It is clear that enforcement must be toughened if we are to meet the national deadlines. More tools are needed, and the [f]ederal presence and backup authority must be increased." Gail K. Nagel, *Environmental Law—Citizen Suits and Recovery of Civil Penalties*, 36 Kan. L. Rev. 529, 532 n.25 (1988) (citation omitted); see also S. Rep. No. 1196, 91st Cong., 2d Sess. 36-37 (1970) (purpose of citizen suit provision includes prodding government to enforce).

10. Robinson, *supra* note 4, at 520 n.30.

11. 11 U.S.C. §§ 101-1330 (1978) (amended 1986) [hereinafter Bankruptcy Code].

12. 11 U.S.C. § 362(a)(1).

Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.

11 U.S.C. § 362(a)(1)-(3).

13. See, e.g., *Revere Copper Products, Inc. v. Hudson River Sloop Clearwater, Inc. (In re Revere Copper & Brass, Inc.)*, 29 Bankr. 584 (Bankr. S.D.N.Y.), *aff'd*, 32 Bankr. 725 (S.D.N.Y. 1983); see *infra* notes 111-20 and accompanying text (court refused to interpret exception to automatic stay for governmental units, 11 U.S.C. § 362(b)(4), to apply to a citizen environmental group).

quate or nonexistent, the automatic stay, in effect, provides bankrupt corporations with a license to continue polluting in violation of their CWA permits.

This article describes the requirements for bringing a CWA citizen suit and explains the purpose of the citizen suit provision: to allow private attorneys general suits as an alternative, enforcement method to government enforcement of the CWA. In its discussion of the Bankruptcy Code's automatic stay, this article examines the exception for governmental units<sup>14</sup> and analyzes cases allowing suits by the government for non-monetary, injunctive relief against bankrupt polluters to proceed despite the corporations' bankruptcy filings. Environmental citizen suits seeking identical relief, however, have been precluded by the courts' interpretation of these provisions of the Bankruptcy Code, an interpretation which is detrimental to the enforcement of the CWA. This article argues that citizen suits to enjoin polluting debtors should be excepted from the automatic stay in order to compel bankrupt corporations to comply with environmental laws.

This article concludes with two suggestions for reform. Ideally, Congress should amend the Bankruptcy Code to except environmental citizen suits for injunctive relief from the automatic stay. Alternatively, courts should interpret the automatic stay provision to permit environmental citizen suits for injunctions to proceed. Because *true* governmental units would be allowed to sue to enjoin bankrupt violators of the CWA, citizen suits seeking identical relief are not harassing and should not be stayed in order to protect the debtor. When government enforcement is inadequate or nonexistent, citizen suits are a vital means of enforcing the CWA and should be allowed to proceed against a bankrupt corporation in order to protect the integrity of the environment.

### An Illustration of the Conflict

An example of a court giving higher priority to debtor protection than to environmental protection is found in *In re Chateaugay Corp.*<sup>15</sup> The New York bankruptcy court refused to allow a citizens' environmental group, Minnesota Sportfishing Congress (Sportfishing), to bring suit against LTV Steel Mining Company (LTV) to enjoin LTV from its continuous, ongoing violations of its CWA permit. Since 1962 LTV has owned and operated an iron ore, open pit mine called Dunka Mine near Babbitt, Minnesota. Dunka

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14. See *infra* note 28 (11 U.S.C. § 362(b)(4) exception to the automatic stay for governmental units).

15. 118 Bankr. 19 (Bankr. S.D.N.Y. 1990).

Mine's operations entail removing the overlying rock and soil, known as overburden, which contains high levels of metal compounds and sulfates hazardous to the environment.<sup>16</sup>

For almost thirty years, this hazardous material has been stockpiled along the perimeter of the mine pit. The metals and sulfates in the overburden leach into the water, which is discharged near the stockpiles.<sup>17</sup> The quality of the water discharged is subject to effluent limitations set by the EPA and enforced by a CWA permit.<sup>18</sup> Consistently, the level of hazardous metals and sulfates contained in Dunka Mine's discharges has exceeded that allowed by its permit.<sup>19</sup> As recently as May 1990, a new seep with metal and sulfate concentrations in violation of the permit was found by the Minnesota Pollution Control Agency (PCA) at the site.<sup>20</sup> This ongoing violation demonstrates that a significant water pollution problem continues to exist at the Dunka Mine.<sup>21</sup>

In 1985 a stipulation agreement between the PCA and Erie Mining Company, LTV's predecessor in interest, purported to address Dunka Mine's continuing violations.<sup>22</sup> This plan, however, was developed when the mining industry was depressed and Dunka Mine's operations were substantially decreased. Since 1986 LTV has resumed significant mining activities.<sup>23</sup> As a result, the stipulation agreement has become outdated and ineffective in controlling the widespread, water pollution caused by Dunka Mine's excessive discharge of hazardous pollutants.<sup>24</sup>

The polluted, discharging water flows through EM-1, which is the last, effluent measuring point. The violations of water quality goals at this juncture are especially crucial because from EM-1 the contaminated water enters the surrounding wetlands and flows through a creek into Bob Bay, Birch Lake, and subsequently into the Boundary Waters Canoe Area, a protected wildlife area in northern Minnesota and Canada.<sup>25</sup> Thus, the pollution caused by

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16. See Affidavit of Toivo M. Maki at paras. 5-6, *In re Chateaugay Corp.*, 118 Bankr. 19 (Bankr. S.D.N.Y. 1990) (No. 86 B 11273 (BRL)) [hereinafter Maki]; see also Chris M. Sande, Memorandum on Sportfishing Motion for Relief from Bankruptcy Stay at 1, *In re Chateaugay Corp.* (No. 86 B 11273 (BRL)) [hereinafter Memorandum].

17. Maki, *supra* note 16, at para. 8.

18. See *supra* note 4 (explaining 11 U.S.C. § 1311 permit system).

19. See Stipulation Agreement at 10-12, *In re Chateaugay Corp.* (No. 86 B 11273 (BRL)); see also Memorandum, *supra* note 16, at 1.

20. Memorandum, *supra* note 16, at 1.

21. *Id.*

22. Stipulation Agreement, *supra* note 19; see Maki, *supra* note 16, at para. 11.

23. Memorandum, *supra* note 16, at 2.

24. *Id.*

25. *Id.* at 4.

the discharges' high metal and sulfate concentrations is not confined to the immediately adjacent wetlands. These hazardous pollutants spread to the surrounding, pristine, wilderness areas, adversely affecting wildlife and its enjoyment by people such as the members of Minnesota Sportfishing.<sup>26</sup>

In 1986 LTV and its affiliated entities filed for reorganization under Chapter 11 of the Bankruptcy Code.<sup>27</sup> This filing activated the Bankruptcy Code's automatic stay provision. In 1990, because of the mining company's continuing noncompliance with its permit and the government's inaction to adequately enforce the permit, Sportfishing filed a motion to lift the automatic stay in order to bring its citizen suit against LTV to compel LTV to stop polluting Minnesota's waters. Pursuant to section 505 of the CWA, Sportfishing sought to act as a private attorney general and to bring a citizen suit in the absence of adequate, government enforcement. Thus, Sportfishing asserted that it should be considered a governmental unit and its suit should be allowed under the exception to the automatic stay for governmental units that allows suits by governmental units to proceed despite the filing of a bankruptcy petition.<sup>28</sup>

Sportfishing's proposed litigation sought "to monitor post-petition remedial activities and to enjoin or abate ongoing violations."<sup>29</sup> Sportfishing did not wish to obtain or enforce a money judgment against LTV. It only sought to halt LTV's ongoing pollution.<sup>30</sup> Despite Sportfishing's goal of injunctive relief for LTV's

26. See Stipulation Agreement, *supra* note 19, at 8. (Studies showed high concentrations of metals in the tissues of water lilies and the flesh of northern pike in the water near Dunka Mine.)

27. The PCA recognized that the Chapter 11 filing meant that:

expenditures necessary to accomplish actions described in the Stipulation Agreement may be subject to prior approval [by] the bankruptcy court. . . . In the event the [b]ankruptcy [c]ourt approval is necessary and the court determines not to approve an expenditure required by this agreement, the [s]tate retains the right to pursue other remedies to require Erie to comply with [s]tate and [f]ederal pollution laws.

Minnesota Pollution Control Agency Amendment No. 1 to Water Quality Stipulation Agreement at 2, *In re Chateaugay Corp.* (No. 86 B 11273 (BRL)).

28. *In re Chateaugay Corp.*, 118 Bankr. at 21. The Bankruptcy Code provides an exception for governmental units bringing suit against bankrupt corporations:

The filing of a petition under section 301, 302, or 303 of this title . . . does not operate as a stay—

. . . .  
(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power.

11 U.S.C. § 362(b)(4).

29. 118 Bankr. at 23.

30. *Id.* Sportfishing recognized that a claim based on pre-petition environmental violations would be discharged in bankruptcy. *Id.* "So long as there is a pre-

ongoing violations of the CWA, the court nonetheless refused to allow Sportfishing's citizen suit to proceed.<sup>31</sup>

The court declined to interpret the Bankruptcy Code's exception to the automatic stay for a governmental unit suing to enforce its police and regulatory powers to include suits by private attorneys general.<sup>32</sup> Furthermore, the court refused to grant Sportfishing relief from the automatic stay,<sup>33</sup> citing the legislative history of the provision as "indicat[ing] that Congress intended that the scope of the automatic stay be broad in order to effectuate its protective purposes on behalf of both debtors and creditors."<sup>34</sup> The court heavily favored the Bankruptcy Code's goal of protecting the debtor over the CWA's goal of protecting the environment. In so doing, the court allowed LTV's bankrupt status to shield it from a citizen suit to enjoin LTV from polluting and to compel LTV to comply with its CWA permit.

In support of its decision not to allow Sportfishing's citizen suit to proceed, the court found that LTV's environmental violations were "already being addressed by the Mining Company and the state agency charged with enforcement of the environmental laws."<sup>35</sup> The PCA's efforts to address LTV's violations through the stipulation agreement, however, had not resulted in forcing the mining company to comply with its permit. The lack of adequate enforcement by the PCA was the impetus for Sportfishing's attempted citizen suit. The court, however, ignored the outdated stipulation agreement's inability to control LTV's pollution of Minnesota waters.

*In re Chateaugay Corp.* illustrates the tension between the federal Bankruptcy Code and federal environmental laws—specifically, the conflict created by sections 362(a)(3)(automatic stay pro-

petition triggering event, i.e., the release or threatened release of hazardous waste, the claim is dischargeable, regardless of when the claim for relief may be in all respects ripe for adjudication." *Id.* (citation omitted).

31. *Id.* at 24.

32. *Id.* at 22.

33. *Id.* at 24. Sportfishing had requested, as an alternative to proceeding pursuant to 11 U.S.C. § 362(b)(4), that the bankruptcy court grant it relief from the stay pursuant to 11 U.S.C. § 362(d)(1):

On request of a party in interest and after notice and a hearing, the court shall grant relief from a stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest.

11 U.S.C. § 362(d)(1).

34. 118 Bankr. at 22; see *infra* note 82 and accompanying text (legislative history of the automatic stay).

35. 118 Bankr. at 23.

vision) and 362(b)(4)(exception for governmental unit) of the Bankruptcy Code and section 1365 (citizen suit provision) of the Clean Water Act. Courts have refused to treat citizen environmental groups acting as private attorneys general as governmental units.<sup>36</sup> As a result, private attorneys general are deprived of their statutory authority to sue corporate polluters when the corporations file bankruptcy petitions. The history of the CWA citizen suit provision indicates that Congress intended citizen suits against bankrupt polluters to be an integral part of the enforcement scheme;<sup>37</sup> however, the courts' narrow interpretation of the automatic stay provision's exception to preclude citizen suits strips the CWA of much of its potency in protecting the environment.<sup>38</sup>

The policy behind the automatic stay is to protect the debtor from harassing and unnecessary suits.<sup>39</sup> When a bankrupt corporation continues to violate environmental laws, and the government is not adequately enforcing the laws, however, citizen suits are necessary. A citizen suit for an injunction may be an inconvenience to the debtor, but the automatic stay should not protect the debtor from a mere inconvenience when the environment suffers as a result. By stifling legitimate citizen suits, the Bankruptcy Code undermines the CWA's expressed purpose: to preserve the environmental integrity of our nation's waters.<sup>40</sup> Refusing to allow citizen suits for injunctive relief against bankrupt polluters to proceed, in lieu of government enforcement, endangers the environment and shields the debtor from having to comply with the CWA.

### I. The Structure of and Policy Behind the Clean Water Act's Citizen Suit Provision

"The objective of [the Clean Water Act] is to restore and maintain the chemical, physical, and biological integrity of the [n]ation's waters."<sup>41</sup> The plain language of the citizen suit provision, as well as the legislative history of the CWA, indicate that

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36. See, e.g., *Revere Copper Products, Inc. v. Hudson River Sloop Clearwater, Inc.* (*In re Revere Copper & Brass, Inc.*), 29 Bankr. 584 (Bankr. S.D.N.Y.), *aff'd*, 32 Bankr. 725 (S.D.N.Y. 1983); see *infra* notes 113-20 and accompanying text (courts' reasoning for not treating citizen groups as governmental units for purposes of the exception to the automatic stay).

37. See *supra* notes 8-10 and accompanying text; see *infra* note 42 (legislative history indicates the vital role of citizen suits in enforcement of environmental laws).

38. See *infra* notes 111-46 and accompanying text.

39. See *infra* notes 80-82 and accompanying text.

40. 33 U.S.C. § 1251(a) (1982) (amended 1987).

41. *Id.*



this objective is to be realized, at least in part, through suits instigated by citizens.<sup>42</sup> "Perhaps more than any other [f]ederal program, the regulation of environmental quality is of fundamental concern to the public. It is appropriate, therefore, that an opportunity be provided for citizen involvement."<sup>43</sup>

There are essentially four requirements which a citizen environmental group must fulfill in order to bring a citizen suit under section 505 of the CWA.<sup>44</sup> First, article III of the United States Constitution imposes the requirement of *standing*,<sup>45</sup> which was interpreted by the United States Supreme Court in the context of citizen environmental suits in *Sierra Club v. Morton*.<sup>46</sup> A citizen group can demonstrate standing by showing an *injury* to an aesthetic or environmental interest.<sup>47</sup>

To establish standing, a citizen environmental group "must allege injury in fact to an individual member of the group due to defendant's violations."<sup>48</sup> In any environmental lawsuit, including a CWA citizen suit under section 505, the plaintiff must demonstrate a substantial likelihood that the relief requested will redress the injury claimed.<sup>49</sup> The injury:

may be established by showing that a defendant has 1) discharged some pollutant in concentrations greater than allowed by its permit 2) into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant and that 3) this pollutant causes or contributes to the

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42. 33 U.S.C. § 1365 (citizen suit provision); see also H.R. Rep. No. 911, 92d Cong., 1st Sess. 132 (1972). ("[S]teps are necessary to restore the public's confidence and to open wide the opportunity for the public to participate in a meaningful way in the decisions of government.")

43. Robinson, *supra* note 4, at 519 n.24 (citation omitted).

44. Section 505(g) of the CWA defines citizen as "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g). "'Citizen' . . . has been held to include environmental organizations representing citizen members." Gretchen W. Anderson, *Uniformity in Clean Water Act Enforcement: Applying a Five Year Federal Statute of Limitations to Citizen Suits*, 6 Temp. Envtl. L. & Tech. J. 49, 53 (1987).

45. U.S. Const. art. III, § 2, cl. 1.

46. 405 U.S. 727 (1972).

47. *Id.* at 734. "[T]he 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself [or herself] among the injured." *Id.* at 734-35. "Reflecting Congress' desire to facilitate enforcement, the standing requirement under section 505 is fairly broad. . . . [T]he 'interest' involved may include aesthetic or conservational interests, historic preservation, and recreational or economic interests." Lauren Mileo O'Sullivan, *Citizen Suits Under the Clean Water Act*, 38 Rutgers L. Rev. 813, 819 (1986). "The Morton standard was specifically adopted by the conference committee in its report." *Id.* at n.51 (citation omitted).

48. Charles N. Nauen, *Citizen Environmental Lawsuits After Gwaltney: The Thrill of Victory or the Agony of Defeat?*, 15 Wm. Mitchell L. Rev. 327, 333 (1989).

49. See *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 75 n.20 (1978).

kinds of injuries alleged by the plaintiffs.<sup>50</sup>

The three remaining requirements for bringing a citizen suit under the CWA are imposed by the statute. The notice requirement provides that the citizen may not file suit until sixty days after giving notice to the EPA, the state and the violator.<sup>51</sup> The lack of diligent prosecution requirement mandates that a citizen filing a suit must show that the state or the EPA is not diligently prosecuting the violator in a court of the United States.<sup>52</sup> The final requirement for commencing a citizen suit has been recently clarified by the United States Supreme Court in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*.<sup>53</sup> The Court held that section 505 of the CWA does not permit citizens to sue for wholly past violations; citizens must "allege a state of either continuous or intermittent violation—that is, a reasonable likelihood that a past polluter will continue to pollute in the future."<sup>54</sup> Ac-

50. Public Interest Research Group of N.J. v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 72 (3d Cir. 1990).

51. No action may be commenced—

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prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the [s]tate in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order . . . .

33 U.S.C. § 1365(b)(1)(A).

52. No action may be commenced—

.....

if the Administrator or [s]tate has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a [s]tate to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

33 U.S.C. § 1365(b)(1)(B). "Recent litigation also has focused on what constitutes a 'court' action. A citizen suit is prohibited if an agency administrative proceeding, a consent decree, or a state administrative proceeding [that is currently pending] is a 'court' action." Nagel, *supra* note 9, at 534 n.34. See *Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57, 62 (2d Cir. 1985) (consent orders resulting from state agency action are not court proceedings); *Student Pub. Interest Research Group of N.J. v. Fritzsche, Dodge & Olcott, Inc.*, 759 F.2d 1131, 1132 (3d Cir. 1985) (EPA administrative enforcement action is not a court proceeding). Because other environmental statutes have provisions which render agency proceedings alone sufficient to bar citizen suits, the absence of such a provision in the CWA "supports the view that only a court action can preclude citizen suits brought under that Act." Robinson, *supra* note 4, at 518. "Congress has frequently demonstrated its ability to explicitly provide that either an administrative proceeding or a court action will preclude citizen suits. . . . Had Congress wished to impose this broader prohibition on citizen suits under the Clean Water Act, it could easily have done so. It did not." *Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d at 63.

53. 484 U.S. 49 (1987).

54. *Id.* at 57. The Court relied on:

the pervasive use of the present tense throughout section 505 of the CWA, as well as in other environmental citizen statutes. This fact, coupled with the statutory definition of "citizen," led the Court to con-

ording to one commentator, the Supreme Court's holding in *Gwaltney* limits citizen suits to injunctive relief. "Violators not pursued by the EPA face no threat of penalty for past wrongs. . . . A violator is thus immune from any reprimand for damage it has already imposed on the environment, seemingly without regard to whether past violations caused irreparable damage."<sup>55</sup>

Despite the limitation placed on citizen suits by *Gwaltney*, citizen suits seeking injunctions for ongoing violations remain a proper and vital means of enforcing the CWA. "It is undisputed that a citizen-plaintiff may seek relief, in the form of injunction and civil penalties, for violations occurring on or after the date the lawsuit is commenced."<sup>56</sup> Because the civil penalty provided for in the CWA must be paid to the United States Treasury and is not recoverable by the plaintiff, citizen-plaintiffs have no remedy in damages.<sup>57</sup> Citizen enforcement suits, then, are initiated against polluters not to obtain a private, pecuniary remedy, but rather to promote the health and safety of the citizen-plaintiffs and the general public.

This *public purpose* of citizen suits is reflected in the legislative history of the CWA.<sup>58</sup> "[Public] participation not only builds public confidence in the government's efforts to improve water quality, but also ensures enforcement of the Act."<sup>59</sup> The 1987 amendments to the CWA<sup>60</sup> maintained the citizen suit provision, illustrating that Congress still insists on enforcement and contin-

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clude that "the harm sought to be addressed by the citizen suit lies in the present or the future, not in the past."

Nauen, *supra* note 48, at 346-47 (citation omitted).

55. Kuhn, *supra* note 5, at 432.

56. Nauen, *supra* note 48, at 344. Under the CWA, citizens may seek civil penalties, which as of February 4, 1987, were increased from \$10,000 to \$25,000 per day per violation. *Id.* at 340; see 33 U.S.C. § 1319(d). Civil penalties are paid to the United States Treasury, and plaintiffs may recover litigation costs if the suit is successful. O'Sullivan, *supra* note 47, at 819.

57. O'Sullivan, *supra* note 47, at 818-19. See *Sierra Club v. SCM Corp.*, 580 F. Supp. 862, 863 n.1 (W.D.N.Y.), *aff'd*, *appeal dismissed*, 747 F.2d 99 (2d Cir. 1984); *City of Evansville, Ind. v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008 (7th Cir. 1979) (citizen suit provision authorizes no damages award to citizen plaintiffs), *cert. denied*, 444 U.S. 1025 (1980).

58. See *supra* notes 42-43 and accompanying text.

59. Robinson, *supra* note 4, at 519. Because the CWA citizen suit provision is derived from the Clean Air Act's (CAA) citizen suit provision, the legislative history of the CAA is also relevant in determining congressional intent. See, e.g., Hunter C. Quick, *Baughman v. Bradford Coal Co., Inc.: A Reaffirmation of Citizen Suits Policy Within the Clean Air Act*, 82 W. Va. L. Rev. 709, 710-11 (1980). (One purpose of CAA citizen suit provision is to widen "citizen access to the courts, enabling citizens to participate in the fight against air pollution, which directly affects their health and safety.")

60. Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 (1987).

ues to strongly support citizen suits as a means of enforcement.<sup>61</sup>

Congress has persistently included the citizen suit provision in the CWA and, at the same time, appropriated no additional funds or personnel to the EPA for enforcement of the Act.<sup>62</sup> These combined factors indicate a congressional intent to strengthen citizen suit enforcement of the CWA and "suggests a strong congressional commitment to a viable role for private attorneys general in the enforcement of environmental laws."<sup>63</sup> "Broad authority for private attorneys general would best effectuate [this] intent."<sup>64</sup> Citizen suit plaintiffs suing polluters that the government is unable or unwilling to pursue supplements and enhances government enforcement.<sup>65</sup>

The role of citizen suits has "blossomed under all environmental statutes, [and] particularly under the CWA."<sup>66</sup> For example, in the first *four months* of 1984 there were eighty-seven citizen suit notices filed, compared to only sixty-three EPA referrals of cases to the Department of Justice in the first *six months* of 1984.<sup>67</sup> The rise in numbers of citizen suits is the result of a number of factors. First, an increase in the scope of regulated activities has increased the number of potential violators.<sup>68</sup> Second, citizens recognize that regulations are meaningless unless adequately enforced.<sup>69</sup> Finally, and most importantly, the decline in the federal government's enforcement activity in the early 1980s fostered public distrust in the government's ability to carry out the purpose and the spirit of the CWA.<sup>70</sup>

Citizen suits are now an essential means of enforcing environmental laws. "[C]itizen suits have become more than an occasionally used safety valve. Under the Clean Water Act they are now the dominantly used federal judicial enforcement mecha-

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61. "Congress' continued strong support of citizen suits in the recent Clean Water Act amendments stems, in part, from [a] distrust of executive enforcement." Jeanette L. Austin, *The Rise of Citizen-Suit Enforcement in Environmental Law: Reconciling Private and Public Attorneys General*, 81 Nw. U.L. Rev. 220, 233 (1987).

62. Nagel, *supra* note 9, at 562.

63. Austin, *supra* note 61, at 261.

64. Nagel, *supra* note 9, at 562.

65. Austin, *supra* note 61, at 261.

66. Nagel, *supra* note 9, at 559.

67. *Id.* at n.192.

68. Austin, *supra* note 61, at 233.

69. *Id.*

70. *Id.* "Citizen suit enforcement under all environmental statutes has increased in importance, in part because of a decrease in federal enforcement." Nagel, *supra* note 9, at 560; see *supra* note 67 and accompanying text (1984 figures indicate lower levels of federal enforcement than of citizen enforcement of the CWA).

nism.”<sup>71</sup> The CWA is not being enforced by the government, which is either unwilling or unequipped to take the necessary actions against CWA permit violators.<sup>72</sup> Thus, precluding citizen suits against a CWA violator who has filed a bankruptcy petition allows the bankrupt polluter to escape its CWA permit obligations.

To compensate for the lack of government enforcement, the enforcement power of the private attorney general<sup>73</sup> should be identical to that of the state or the administrator. Treating private attorney general enforcement of environmental laws as less important than public attorney general enforcement, by not allowing citizen suits against bankrupt polluters, often means that environmental laws go unenforced.<sup>74</sup> This threatens the integrity of the environment and the spirit of the CWA. Private attorneys general “are not to be treated as nuisances or troublemakers but rather as welcomed participants in the vindication of environmental interests.”<sup>75</sup> Both private attorneys general and the EPA represent these interests in environmental litigation and should *both* be allowed to seek the remedy of injunctive relief against bank-

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71. Jeffrey G. Miller, *Private Enforcement of Federal Pollution Control Laws* (pt. 1), 13 *Env'tl. L. Rep.* 10,309, 10,314 (1983).

72. See Austin, *supra* note 61, at 261. (“One major reason for such congressional persistence is distrust of the EPA’s ability (or willingness) to enforce . . . the law.”) “The basic argument for the [citizen suit] provision is plain: namely, that [g]overnment is simply not equipped to take court action against the numerous violations of legislation of this type which are likely to occur.” 116 *Cong. Rec.* 33,104 (1970) (statement of Senator Hart).

73. The term *private attorneys general* is based on the proposition that:

Instead of designating the [a]ttorney [g]eneral . . . Congress can constitutionally enact a statute conferring on any non-official person, or on a designated group of non-official persons, authority to bring suit to prevent action by an officer in violation of his statutory powers; for then . . . there is an actual controversy, and there is nothing constitutionally prohibiting Congress from empowering any person, official or not, to institute a proceeding involving such a controversy even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private [a]ttorney [g]enerals.

*Associated Indus. v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943). “This view of the citizen-plaintiff expands the executive authority to include [c]ongressionally designated citizens as a substitute for government enforcement.” Anderson, *supra* note 44, at 56.

74. See, e.g., *Revere Copper Products v. Hudson River Sloop Clearwater, Inc.* (*In re Revere Copper & Brass, Inc.*), 29 Bankr. 584 (Bankr. S.D.N.Y.), *aff'd*, 32 Bankr. 725 (S.D.N.Y. 1983) (citizen suit to enforce CWA precluded by automatic stay); see also *supra* notes 66-72 and accompanying text (increase in number of environmental citizen suits and decline in government enforcement of environmental laws indicate that citizen suits are a vital means of enforcing CWA).

75. *Friends of the Earth v. Carey*, 535 F.2d 165, 172 (2d Cir. 1976). The citizen suit provisions of the Clean Air Act and the Clean Water Act are designed “to encourage citizen participation rather than to treat it as [a] curiosity or a theoretical remedy.” *Id.*; see also *Fishel v. Westinghouse Elec. Corp.*, 617 F. Supp. 1531, 1536 (M.D. Penn. 1985); *Proffitt v. Commissioners*, 754 F.2d 504, 506 (3d Cir. 1985).

rupt polluters. "The standards for which enforcement would be sought either under administrative enforcement or through citizen enforcement procedures are *the same*. Therefore the participation of citizens in the courts seeking enforcement of water pollution control requirements *should not result in inconsistent policy*."<sup>76</sup>

Inconsistent policy and unequal treatment have resulted, however, from the courts' interpretation of the conflict between the Bankruptcy Code and the Clean Water Act's citizen suit provision. While governmental units are allowed to sue bankrupt polluters for injunctive relief, private attorneys general have been precluded by the courts' narrow reading of the exception to the automatic stay provision for governmental units.<sup>77</sup> Congress' intent in including the citizen suit provision in the CWA was to strengthen the ability of citizens to enforce this environmental law. The preclusion of citizen suits by the automatic stay undermines this intent and the policy behind the CWA citizen suit provision.

## II. Policy and Structure of the Bankruptcy Code Automatic Stay and Exception for Governmental Units

The Bankruptcy Act of 1879 was repealed and replaced by the Bankruptcy Reform Act of 1978<sup>78</sup> in an effort to modernize bankruptcy law to conform with social developments.<sup>79</sup> The legislative history of the revised Bankruptcy Code indicates an underlying intent to provide the debtor with an economic "fresh start."<sup>80</sup> To facilitate this goal, Congress included the automatic stay provision in the Bankruptcy Code, which goes into effect upon the filing of a bankruptcy petition.<sup>81</sup>

The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his [or her] creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him [or her] into bankruptcy.

76. Anderson, *supra* note 44, at 57 (citation omitted) (emphasis added).

77. See, e.g., *infra* notes 111-46 and accompanying text.

78. Douglas J. Smillie, *When Worlds Collide: The Effect of the Bankruptcy Stay on Environmental Cleanup Litigation*, 8 Temp. Envtl. L. & Tech. J. 77, 80 (1989); see 11 U.S.C. §§ 101-1330.

79. Linda Johannsen, *United States v. Whizco, Inc.: A Further Refinement of the Conflict Between Bankruptcy Discharge and Environmental Cleanup Obligations*, 20 Envtl. L. 207, 210 (1990).

80. H.R. Rep. No. 595, 95th Cong., 2d Sess. 174, reprinted in 1978 U.S. Code Cong. & Admin. News 5963, 6135.

81. 11 U.S.C. § 362(a)(1)-(3).

The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors.<sup>82</sup>

The automatic stay is "[o]ne of the widely recognized benefits of filing a bankruptcy petition, and in many cases the motivating factor."<sup>83</sup> The protection afforded by the stay is intended to be broad in scope and "should apply to almost any type of formal or informal action against the debtor or the property of the state."<sup>84</sup>

The Bankruptcy Reform Act of 1978 created protections for all debtors regardless of financial distress, which led to the "danger that the provisions of the Bankruptcy Code [could] be used to overturn the application or enforcement of strong public policy . . . ."<sup>85</sup> To address this danger, Congress included the exception to the automatic stay provision for "the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power."<sup>86</sup> The legislative history of this provision "specifically identifies actions to prevent or stop violation of environmental laws, including actions to fix damages for these violations, as instances of governmental actions to enforce police or regulatory powers."<sup>87</sup>

The Bankruptcy Code limits this exception for governmental units by making the enforcement of a money judgment subject to

82. H.R. Rep. No. 595, 95th Cong., 1st Sess. 340, reprinted in 1978 U.S. Code Cong. & Admin. News 5963, 6296-97.

83. Smillie, *supra* note 78, at 80.

84. Jonathan K. Van Patten & Richard D. Puetz, *Bankruptcy and Environmental Obligations: The Clash Between Private Relief and Public Policy*, 35 S.D.L. Rev. 220, 230-31 (1990).

85. *Id.* at 220. "Congress' desire to provide debtors with a respite from creditor pressure was tempered by a recognition that some conduct falling within the broad reach of the stay remains necessary for the continued protection of other societal interests." Smillie, *supra* note 78, at 81.

86. 11 U.S.C. § 362(b)(4). Governmental unit is defined in the Bankruptcy Code as follows:

"governmental unit" means United States; [s]tate; [c]ommonwealth; [d]istrict; [t]erritory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a [s]tate, a [c]ommonwealth, a [d]istrict, a [t]erritory, a municipality, or a foreign state; or other foreign or domestic government.

11 U.S.C. § 101(26).

87. Katherine Simpson Allen, *Belly Up Down in the Dumps: Bankruptcy and Hazardous Waste Cleanup*, 38 Vand. L. Rev. 1037, 1044 (1985). "[W]here a governmental unit is suing a debtor to prevent or stop [a] violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay." S. Rep. No. 989, 95th Cong., 2d Sess. 52, reprinted in 1978 U.S. Code Cong. & Admin. News 5787, 5838 (emphasis added).

the automatic stay.<sup>88</sup> In *Ohio v. Kovacs*,<sup>89</sup> the United States Supreme Court explained this limitation. When a legal obligation—here, to clean up a hazardous waste site—was converted to a money judgment, the government's suit against the bankrupt obligor was precluded by the automatic stay.<sup>90</sup> Essentially, "the automatic stay provision does not apply to suits to enforce the regulatory statutes of the [s]tate, but the enforcement of such a judgment by seeking money from the bankrupt . . . is another matter."<sup>91</sup>

The *Kovacs* Court, however, made clear that the stay only precludes a suit by a governmental unit when it is suing a bankrupt polluter for a money judgment. A governmental unit can sue a debtor for an injunction pursuant to its police and regulatory powers to protect the health and safety of the public when the debtor is "causing, contributing to or maintaining a hazardous condition. In that situation, the state's police powers will not be restrained by the automatic stay."<sup>92</sup> A debtor in possession cannot hide behind the automatic stay to avoid having to comply with environmental laws. "Plainly, that person or firm may not maintain a nuisance, pollute the waters of the [s]tate, or refuse to remove the source of such conditions."<sup>93</sup>

When a governmental unit brings an action against a bankrupt polluter to force compliance with environmental laws solely through an injunction, the action is not one for a money judgment and thus not subject to the stay even if the injunctive relief requires the expenditure of money by the debtor.<sup>94</sup> While an effort

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88. "The filing of a petition . . . does not operate as a stay. . . . (5) under subsection (a)(2) of this section, of the enforcement of a judgment, *other than a money judgment*, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." 11 U.S.C. § 362(b)(5) (emphasis added). The legislative history to § 362(b)(5) states that "the exception extends to permit an injunction and enforcement of an injunction, and to permit the entry of a money judgment, but does not extend to permit enforcement of a money judgment." S. Rep. No. 989, 95th Cong., 2d Sess. 52, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5838.

89. 469 U.S. 274 (1985).

90. *Id.* at 283.

91. *Id.* at 282 n.11.

92. Smillie, *supra* note 78, at 85.

93. *Ohio v. Kovacs*, 469 U.S. at 285.

94. *Penn Terra Ltd. v. Department of Env'tl. Resources*, 733 F.2d 267, 277-79 (3d Cir. 1984). The issue turns on whether the injury is one which is "traditionally rectified by a money judgment and its enforcement." *Id.* at 278. "[A]n equitable action to prevent future harm [does] not constitute an action to enforce a money judgment. The automatic stay provision of 11 U.S.C. § 362 is therefore inapplicable." *Id.* at 278-79; *see also* *United States v. Jones & Laughlin Steel Corp.*, 804 F.2d 348 (6th Cir. 1986) (government action under CWA for an injunction against bankrupt corporation excepted from the automatic stay). If the government's action:



to seek execution on the judgment will be precluded by the automatic stay,<sup>95</sup> the government can sue a bankrupt corporation for an injunction and for entry of a money judgment under its police and regulatory powers.<sup>96</sup> The policy behind allowing governmental units to enjoin and enter a judgment against bankrupt polluters is to facilitate the enforcement of environmental laws.<sup>97</sup> Governmental actions to fix damages and to "determin[e] the severity and effect of discharges on the receiving waters are actions to protect the public health and safety" and are purely regulatory.<sup>98</sup> Thus, a suit by the government for an injunction to compel a bankrupt corporation to comply with environmental laws is excepted from the shield against money judgments afforded to the debtor by the automatic stay.

To facilitate the enforcement of laws to protect the environment, the judicial trend has been to broaden governmental units' abilities to enforce environmental laws against bankrupt corporations. Consistent with this trend, the court in *City of New York v. Exxon Corp.*<sup>99</sup> held that a municipality is a governmental unit for purposes of the exception to the automatic stay.<sup>100</sup> The court noted that "a broad reading" of the provision of the Comprehensive Environmental Response, Compensation, and Liability Act of

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is to carry out the government's police or regulatory power then there should be no stay. . . . If on the other hand, [the] proceeding concerns the enforcement or collection of a money judgment then the filing of the Chapter 11 petition should operate to stay [the] proceeding and the penalty monies would be subject to the bankruptcy court.

804 F.2d at 350.

95. *United States v. Nicolet, Inc.*, 857 F.2d 202, 207 (3d Cir. 1988). The government successfully argued in *Nicolet* that it could "obtain a verdict and entry of judgment, consistent with § 362(b)(4) and not run afoul of the money judgment exception so long as it did not seek execution on the judgment." Van Patten & Puetz, *supra* note 84, at 235.

96. 857 F.2d at 210. "[I]t was Congress' intent that proceedings such as this be exempt from the automatic stay up to and including entry of a monetary judgment." *Id.*; see *supra* note 87 and accompanying text (legislative history of exception to automatic stay for governmental units, 11 U.S.C. § 362(b)(4), indicates that the governmental unit suing to prevent violation of environmental law may "fix damages for violation of such a law" consistent with its police and regulatory powers).

97. See 857 F.2d at 207. The police and regulatory power exception to the automatic stay, which exempts governmental units from the stay up to and including entry of a money judgment, "embod[ies] Congress' recognition that enforcement of the environmental protection laws merits a higher priority than the debtor's rights to a 'cease fire' or the creditor's right to an orderly administration of the estate." *Id.*

98. *Word v. Commerce Oil Co. (In re Commerce Oil Co.)*, 847 F.2d 291, 296 (6th Cir. 1988).

99. 112 Bankr. 540 (S.D.N.Y. 1990).

100. *Id.* at 546.

1980 (CERCLA),<sup>101</sup> giving the city standing to sue, "is entirely consistent with the overall purpose of the Act."<sup>102</sup> Here, the action by the city for injunctive relief and to fix damages was "exempt from the automatic stay because it is undertaken pursuant to the police or regulatory powers of a governmental unit."<sup>103</sup> The court's broad reading illustrates the judicial trend of concern over environmental violations by bankrupt corporations.

The courts have interpreted the exception to the automatic stay to allow suits by federal, state and local governments against bankrupt polluters to strengthen enforcement of environmental laws. The courts, however, have closed the door on citizen enforcement of environmental laws against bankrupt polluters by excluding private attorneys general from the class of governmental units with the ability to sue a bankrupt polluter for injunctive relief. This narrow interpretation contravenes congressional intent to make CWA citizen suits a vital enforcement tool. Excluding private attorneys general from the definition of governmental units frustrates enforcement of the CWA against bankrupt polluters.

### III. Cases Illustrating the Courts' Refusal to Treat Private Attorneys General as Governmental Units

Enforcement of the CWA is frustrated by case law, which refuses to give private attorneys general the same ability as public attorneys general to sue bankrupt corporations for violations of environmental laws. A citizen suit to compel a polluter to cease its ongoing violations was thwarted by bankruptcy in *Revere Copper Products, Inc. v. Hudson River Sloop Clearwater, Inc. (In re Revere Copper & Brass, Inc.)*.<sup>104</sup> Hudson River Sloop Clearwater, Inc. and Natural Resources Defense Council, both non-profit environmental public interest groups, gave the proper sixty-day notice of intent to sue Revere Copper Products, Inc. (RCPI), a New York corporation engaged in the business of manufacturing and selling copper and copper alloy products.<sup>105</sup> The plaintiffs intended to sue RCPI for violations of its permit to discharge hazardous pollutants into the Mohawk River.<sup>106</sup> After receiving notice of the citizens' intent to sue, RCPI filed a petition under Chapter 11 of the Bank-

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101. 42 U.S.C. §§ 9601-9675 (1982), as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

102. 112 Bankr. at 546 (citing *City of New York v. Exxon Corp.*, 697 F. Supp. 677, 685 (S.D.N.Y. 1988)).

103. *Id.* at 546 (citation omitted); see 11 U.S.C. § 362(b)(4)-(5)(1982).

104. 29 Bankr. 584 (Bankr. S.D.N.Y.), *aff'd*, 32 Bankr. 725 (S.D.N.Y. 1983).

105. 32 Bankr. at 726.

106. 29 Bankr. at 585, 32 Bankr. at 726.

ruptcy Code, which enacted the automatic stay.<sup>107</sup>

The two citizen groups then filed a complaint in district court against RCPI. In the complaint, the plaintiffs requested relief, including an order declaring RCPI to be in violation of the CWA and an injunction preventing RCPI from operating its facility in violation of its permit.<sup>108</sup> The plaintiffs, acting as private attorneys general pursuant to the section 505 citizen suit provision of the CWA,<sup>109</sup> chose to take enforcement action against RCPI "because [RCPI] [was] among those companies with a persistent and historic pattern of permit non-compliance and because there had been no diligent prosecution . . . by [f]ederal and state authorities."<sup>110</sup> Despite RCPI's blatant violations, the citizen suit was permanently enjoined by the bankruptcy court based on the automatic stay.<sup>111</sup>

On appeal, the district court affirmed the bankruptcy court's finding that environmental public interest groups were not governmental units for the purpose of applying the 11 U.S.C. § 362(b)(4) exception to the automatic stay.<sup>112</sup> The court justified its determination that "private attorney generals seeking to enforce the environmental laws" are not "given the same status as governmental units with respect to bankrupt defendants" by limiting the Bankruptcy Code's definition of governmental units to "true governmental entities."<sup>113</sup> Citing the legislative history of this definition,<sup>114</sup> the court concluded that "[c]learly, both the statutory language and the legislative history demonstrate that the term 'governmental unit' in the [B]ankruptcy [C]ode refers exclusively to actual governmental groups and *not* to organizations acting in [the] governmental capacity."<sup>115</sup>

The court's narrow interpretation of governmental unit, however, ignores the role given to private attorneys general by Congress, which expressly made citizen suits an integral part of the

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107. 29 Bankr. at 585, 32 Bankr. at 726.

108. 29 Bankr. at 585-86.

109. 33 U.S.C. § 1365 (1982); *see also supra* note 73 (explanation of private attorney general concept).

110. 29 Bankr. at 586.

111. 29 Bankr. at 589; *see* 11 U.S.C. § 362(a)(1)-(3)(1982).

112. 32 Bankr. at 728; *see* 11 U.S.C. § 362(b)(4) (exception to the automatic stay for governmental units).

113. 32 Bankr. at 727; *see* 11 U.S.C. § 101(26) (definition of governmental unit).

114. 32 Bankr. at 727. "Entities that operate through state action such as through the grant of a charter or license, and have no further connection with the state or federal government are not within the contemplation of the definition." *Id.* (citation omitted).

115. 32 Bankr. at 727 (emphasis added).

enforcement scheme of the CWA.<sup>116</sup> Congress gave private attorneys general more power than a mere grant of a charter or license.<sup>117</sup> The citizen suit provision empowers private attorneys general to fill the enforcement void created by the absence of government enforcement suits and makes citizen suits a substitute for inadequate, government enforcement.<sup>118</sup> Furthermore, citizen suits are an essential means of enforcing environmental laws because they "are now the dominantly used federal judicial enforcement mechanism" under the CWA—more dominantly used than government enforcement.<sup>119</sup> The vital role that citizen suits play in enforcing environmental laws compels a broad reading of the Bankruptcy Code's definition of governmental unit, which would include private attorneys general as "instrumentalit[ies] of the United States."<sup>120</sup> Excepting both government and citizen enforcement actions for injunctions against polluting debtors from the automatic stay would facilitate enforcement of laws to preserve and protect the environment.<sup>121</sup>

In accordance with the policy of giving citizens the authority to enforce environmental laws, a federal district court in *Illinois v. Electrical Utilities*<sup>122</sup> allowed a suit by the state "on behalf of its citizens"<sup>123</sup> to proceed despite the filing of bankruptcy by the defendant, Electrical Utilities Company (EUC).<sup>124</sup> The state brought the action against EUC alleging that EUC had violated the Toxic Substances Control Act (TSCA)<sup>125</sup> by dumping polychlorinated biphenyls (PCBs) on EUC's manufacturing site.<sup>126</sup> Although the state sued EUC under the citizen's civil actions provision of TSCA,<sup>127</sup> the court found that the suit was allowable under the ex-

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116. See *supra* notes 58-72 and accompanying text (citizen suits' integral role in CWA enforcement scheme).

117. See *supra* note 114.

118. See Anderson, *supra* note 47, at 56 (private attorneys general defined as "[c]ongressionally designated citizens" who are "a substitute for government enforcement").

119. Miller, *supra* note 71, at 10,314; see also *supra* notes 66-70 and accompanying text (recent increase in citizen enforcement suits under the CWA and the lack of adequate enforcement of the CWA by the government).

120. 11 U.S.C. § 101(26).

121. See *supra* notes 73-76 and accompanying text (enforcement of the CWA would be increased if the courts would treat private attorney general suits for injunctions against bankrupt polluters the same as public attorney general suits for the same relief).

122. 41 Bankr. 874 (N.D. Ill. 1984).

123. *Id.* at 876.

124. *Id.* at 877.

125. 15 U.S.C. §§ 2601-2671 (1976).

126. 41 Bankr. at 875.

127. 15 U.S.C. § 2619. Section 2619, like the CWA citizen suit provision, is modeled after the CAA citizen suit provision. "All of the citizen suit provisions in-

ception to the automatic stay for governmental units.<sup>128</sup> The court determined that the state acting "on behalf of its citizens" was acting as "*parens patriae*. The *parens patriae* power is the power to intervene on behalf of another party who cannot protect his or her own rights."<sup>129</sup> Here, "[t]he private right of a citizen to obtain relief under the TSCA coincides with the [s]tate's interest in protecting its citizens from PCB pollution."<sup>130</sup> Thus, the court allowed the suit to proceed solely because of the state's intervention in the suit.

The court addressed the *Revere Copper Products* court's imposition and affirmation of a permanent injunction against a citizen's group attempt to bring a suit against a polluting debtor,<sup>131</sup> by noting that:

the court . . . focused on the identity of the plaintiff instead of the statute creating the cause of action. . . . The stay exception failed to apply because a private organization, not the state, brought the action. . . . If the state had brought the action, it would have been exercising its police power to protect its citizens.<sup>132</sup>

Although RCPI and EUC were both corporate polluters that had declared bankruptcy and were engaged in ongoing violations of environmental laws, the cases were distinguished based on whether the proper plaintiff had brought the suit.

This distinction, made by the federal district court in *Electrical Utilities* between that case and *Revere Copper Products*, is unjustifiable. In both cases, a suit was brought by citizen groups who had standing to sue and pursuant to an environmental statute which authorizes citizen suits. In both cases, the citizens' interests coincided with the states' interest in suing a bankrupt polluter to enforce environmental laws to protect the public's health and safety. The only difference is technical: in *Electrical Utilities*, the state intervened in the action, while in *Revere Copper Products*, the citizens themselves attempted to enforce the environmental law against the bankrupt corporation. The discrepancy between the two courts' results presents a clear injustice: in the Illinois case, the polluter was sued for an injunction, while in the New

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corporate procedural protections to limit the scope of citizen suits and ensure their proper role in enforcement." Nagel, *supra* note 9, at 533.

128. 41 Bankr. at 876.

129. *Id.* at 876 (citation omitted).

130. *Id.* (emphasis added).

131. See *supra* note 111 and accompanying text.

132. 41 Bankr. at 876; see *Revere Copper Products, Inc. v. Hudson River Sloop Clearwater, Inc.* (*In re Revere Copper & Brass, Inc.*), 29 Bankr. 584, 587-88 (Bankr. S.D.N.Y.), *aff'd*, 32 Bankr. 725, 727 (S.D.N.Y. 1983).

York case, the polluter was allowed to continue violating the CWA. This inequitable result demeans the vital enforcement role of citizen suits and perpetuates harm to the environment.

A citizen suit against a bankrupt corporation was once again precluded by the Southern District of New York Bankruptcy Court in *In re Chateaugay Corp.*<sup>133</sup> The court agreed with the reasoning in *Revere Copper Products*<sup>134</sup> and held that "to the extent Sportfishing relies on the Code § 362(b)(4) governmental unit exception, that section is not applicable, and therefore, it is barred by the automatic stay . . . from filing suit against the [d]ebtors."<sup>135</sup> In its opinion, the court emphasized the policy and the legislative history behind the automatic stay of protecting the debtor.<sup>136</sup>

Because of its emphasis on debtor protection, the court refused to broaden the Bankruptcy Code's express authorization of a suit by a governmental unit against a bankrupt polluter to allow Sportfishing's citizen suit to proceed. As a result, LTV, which had continued to violate its CWA permit after it filed a Chapter 11 petition, was protected from a suit for an injunction to compel it to stop discharging excessive amounts of hazardous pollutants into northern Minnesota's pristine lakes and streams.<sup>137</sup> In this case, the automatic stay's purpose of protecting the debtor from undue harassment did not justify precluding Sportfishing's proposed citizen suit. When a corporate debtor continues to violate environmental laws after filing a bankruptcy petition, it should not be allowed to continue polluting just because a private attorney general rather than the government attempts to bring an enforcement action.

Sportfishing's citizen suit was precluded also because the court determined that Sportfishing had not shown cause to lift the stay.<sup>138</sup> The court found that LTV's violations were "already being addressed" by LTV and the PCA.<sup>139</sup> This finding was made despite an affidavit submitted by the director of the PCA's Water

133. 118 Bankr. 19 (Bankr. S.D.N.Y. 1990); see *supra* notes 15-35 and accompanying text.

134. 29 Bankr. 584; see *supra* notes 111-15 and accompanying text.

135. *In re Chateaugay*, 118 Bankr. at 22.

136. *Id.* at 22-23; see *supra* note 82 and accompanying text (legislative history to 11 U.S.C. § 362(a)(1)-(3)).

137. See *supra* notes 17-26 and accompanying text (LTV's ongoing violations of its CWA permit).

138. 11 U.S.C. § 362(d)(1) (relief from the stay "for cause").

139. *In re Chateaugay*, 118 Bankr. at 23. The court referred to the 1985 Stipulation Agreement between the PCA and Erie Mining Company. As previously discussed, the terms of this agreement had become inadequate to address the magnitude of the pollution problem at Dunka Mine. See *supra* notes 22-24 and accompanying text.

Quality Division attesting to the fact that the PCA lacks resources to prosecute all violations of the CWA. The affidavit also asserted that the PCA would welcome a citizen suit by Sportfishing against LTV. "A successful citizen suit requiring the permittee's compliance with the NPDES permit terms and conditions . . . would likely *supplement, not supplant*, the Agency's current administrative enforcement action . . . ."140

This testimony was dismissed by the bankruptcy court. "The affidavit . . . is unpersuasive" and the state "has not appeared or taken any official position on this application."<sup>141</sup> "[T]he position of Sportfishing that the proposed suit will act as a stimulus or prod for corrective action is not supported by the facts" and thus "there has been no cause shown to permit litigation by Sportfishing . . . ."142 The court declined to give credence to the statement of the water quality director and precluded Sportfishing from pursuing its proposed litigation.<sup>143</sup>

In refusing to allow Sportfishing to bring suit against LTV, the court ignored the failure of LTV and the state to remedy LTV's ongoing violations of its CWA permit. LTV's continuing noncompliance, combined with the lack of adequate enforcement by the PCA, were the impetus for Sportfishing's attempt to bring a citizen suit to enjoin LTV's polluting activities. The PCA admittedly was unable to effectively enforce the CWA with respect to LTV. Because the governmental unit which was responsible for enforcing the CWA was not taking any judicial action against LTV, a suit by Sportfishing was essential to the enforcement of the CWA and to the preservation of the waters near Dunka Mine.

Because of the absence of adequate, government enforcement efforts, Sportfishing's citizen suit should not have been precluded by LTV's bankruptcy. The automatic stay's purpose of protecting the debtor and providing the debtor with a fresh start makes sense when the stay is applied to a creditor seeking a money judgment against the debtor. Here, however, Sportfishing was seeking non-monetary, injunctive relief against a debtor who continued to violate the CWA. Taking this into account, the court could have expanded the Bankruptcy Code's definition of governmental unit to

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140. Affidavit of Timothy K. Scherkenbach at paras. 6-8, *In re Chateaugay Corp.*, 118 Bankr. 19 (Bankr. S.D.N.Y. 1990) (No. 86 B 11273 (BRL))(emphasis added).

141. *In re Chateaugay*, 118 Bankr. at 23.

142. *Id.* "Since the Mining Company under the active oversight and involvement of the Agency is working to resolve the environmental problems, and currently has proposed and implemented remedial activity for correcting these problems, the proposed lawsuit constitutes an enjoined surplus activity imposing burdens that are not offset by any discernable benefit." *Id.* at 24.

143. *Id.* at 24.

except Sportfishing, acting as an "instrumentality of the United States,"<sup>144</sup> from the restriction of the automatic stay. Instead, under the guise of debtor protection, the court refused to allow Sportfishing's citizen suit to enjoin a bankrupt corporation from continuing to violate environmental laws and to endanger the public health and safety.

#### IV. Reconciling the Conflict Between Clean Water Act Citizen Suits and the Automatic Stay

The exception to the automatic stay for suits by governmental units to enjoin bankrupt polluters<sup>145</sup> gives effect to a congressional intent to facilitate enforcement of environmental laws to protect the health and safety of the public.<sup>146</sup> But while the automatic stay does not restrict governmental units from enjoining and obtaining the entry of money judgments against polluting debtors, the stay's restriction does stifle legitimate citizen suits against bankrupt polluters. Courts have been reluctant to interpret the exception to the automatic stay more broadly to include private attorneys general as "instrumentalit[ies] of the United States."<sup>147</sup> Thus, citizen suits by private attorneys general for injunctions against bankrupt corporations violating environmental laws have not been allowed to proceed, even in the absence of adequate enforcement by the government.

When a governmental unit has not taken adequate enforcement measures, suits by private attorneys general for injunctions against bankrupt polluters should not be subject to the automatic stay. In including the citizen suit provision in the CWA, "Congress . . . determined that the advantages of private attorneys general outweigh the disadvantages."<sup>148</sup> "Given Congress' intention to provide citizens liberal access to enforce the Act, as well as the statutory safeguards against abusive litigation, a *court-developed doctrine that precludes citizen suits when no court action has commenced appears to contravene Congress' intention.*"<sup>149</sup> The courts' refusal to allow citizen suits against polluting debtors results in a clash between the goals of two federal statutes—the CWA and the Bankruptcy Code—which needs to be recognized and confronted.

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144. 11 U.S.C. § 101(26).

145. 11 U.S.C. § 362(b)(4).

146. See *supra* notes 94-103 and accompanying text (cases where the courts have allowed governmental units to sue bankrupt polluters for injunctions pursuant to 11 U.S.C. § 362(b)(4)).

147. 11 U.S.C. § 101(26).

148. Nagel, *supra* note 9, at 533.

149. Robinson, *supra* note 4, at 521-22 (emphasis added).



Congress has determined, in enacting the exception to the automatic stay, that the goal of enforcing environmental laws by governmental units through an injunction overrides the goal of protection of the debtor. This policy should be applied to allow suits against bankrupt polluters by private attorneys general acting as a substitute for government enforcement. The non-monetary, injunctive relief sought by citizen suits is identical to the relief which a government suit could seek from a bankrupt corporation which is violating environmental laws. Because private attorneys general bringing suits for injunctions are not seeking private money damages, citizen suits against bankrupt polluters do *not* destroy the policy behind the automatic stay of protecting the debtor from harassment by creditors.<sup>150</sup>

The preclusion of citizen suits by the automatic stay does, however, destroy the CWA citizen suit provision's policy of spurring and supplementing governmental enforcement of the CWA.<sup>151</sup> This policy makes citizen suits vital to the goal of preserving our nation's waters—a goal which should not depend on who brings suit to enjoin corporate pollution. Enforcement of the CWA against debtors through injunctions should not be thwarted simply because the plaintiff is a citizens' group rather than a governmental unit. Under current law, water is protected if the suit is brought against a bankrupt polluter by the government and unprotected if the suit is brought by citizens. This inequitable result threatens the environmental integrity of our nation's waters and should not be tolerated.

The conflict between the Clean Water Act and the Bankruptcy Code needs to be addressed, whether through legislative reform or through judicial balancing. The "balancing the equities" approach weighs the conflicting goals of "protecting the public health and safety (environmental) against . . . the threat to the economic interest of the debtor, the government, and other creditors (economic)."<sup>152</sup> However, because governmental units' ability to bring suit against bankrupt, polluting corporations pursuant to the exception to the automatic stay<sup>153</sup> is undisputed, balancing the environmental and economic goals of the statutes is not the issue at stake in the conflict. The only issue which Congress needs to address is whether private attorneys general should be allowed to bring suit against polluting debtors in lieu of enforcement by *true*

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150. See *supra* notes 82-84 and accompanying text.

151. See Austin, *supra* note 61, at 236.

152. Johannsen, *supra* note 79, at 226.

153. 11 U.S.C. § 362(b)(4).

governmental units. Thus, the conflict between citizen suits and the automatic stay could be most effectively addressed by congressional action to define the role of private attorneys general in enforcing environmental laws against bankrupt polluters.

The vital role of private attorneys general in CWA enforcement stems from the lack of adequate enforcement by the government. Congress should recognize citizens' vital enforcement role by amending the Bankruptcy Code to exempt environmental citizen suits for injunctive relief against bankrupt polluters from the automatic stay. The private attorneys general are acting as a substitute for governmental units, and thus their suits to enjoin bankrupt polluters should be allowed to proceed. Because citizen suits under the CWA are the "dominantly used federal judicial enforcement mechanism,"<sup>154</sup> the private attorneys general should not be subordinate, but should be given authority equal to that of governmental units when enforcing environmental laws. Unequal treatment of private attorneys general threatens the environment by diminishing the viability of citizen suits in enforcing the Clean Water Act.

## V. Suggestions for Reform

The present state of conflict between the environmental statutes and the Bankruptcy Code is unacceptable. Congress should act to clarify the relationship between the statutes. The Bankruptcy Code should not supersede all other federal legislation to the detriment of the health and safety of the public and the quality of the environment.<sup>155</sup>

The problem addressed in this article should ideally be remedied by legislative reform. Congress should amend the Bankruptcy Code to include a specific exception from the automatic stay for environmental suits by private attorneys general to enjoin bankrupt polluters. Such an amendment would not undermine the Bankruptcy Code's purposes of protecting the debtor from harassment and of providing the debtor with a "fresh start."<sup>156</sup> Citizen suits could only be brought pursuant to the four requirements under the CWA and would be brought not to harass or drain the estate of the debtor, but solely to enjoin the debtor from violating environmental laws.<sup>157</sup> Amending the Bankruptcy Code to allow

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154. Miller, *supra* note 71, at 10,314.

155. Johannsen, *supra* note 79, at 227.

156. See *supra* note 82 (legislative history of automatic stay).

157. See *supra* notes 44-57 and accompanying text (requirements of standing, notice, lack of diligent prosecution and ongoing violation, and the case law effectively limiting citizen suits to injunctive relief).

citizen suits against corporate polluters that have filed bankruptcy petitions would facilitate the enforcement of other important federal statutes—federal environmental laws such as the Clean Water Act.

Given the narrow interpretation of 11 U.S.C. § 362(b)(4) by the bankruptcy courts that precludes private attorneys general from bringing environmental suits against bankrupt corporations, judicial reform to facilitate the enforcement of environmental laws against debtors seems unlikely. If the courts could be persuaded to construe liberally the existing automatic stay exception for governmental units to allow citizens to sue bankrupt violators of environmental laws, corporate debtors could be forced to comply with these laws. Because of their vital role in enforcing environmental laws, private attorneys general should be included in the exception to the automatic stay for governmental units. Allowing citizen suits for injunctions against bankrupt polluters to proceed would eliminate the law's current inequality created by staying these suits, when an identical governmental suit would be excepted from the stay. Furthermore, private attorneys general suits against polluting debtors for injunctive relief would facilitate enforcement of the Clean Water Act and protect the health and safety of the public.

## VI. Conclusion

In light of the policy considerations behind both the Clean Water Act and the Bankruptcy Code, citizen suits for injunctions against bankrupt polluters should not be precluded by the Bankruptcy Code's automatic stay. Suits by private attorneys general, who satisfy the Clean Water Act's section 505 requirements, should be allowed to proceed when a governmental unit is unable or unwilling to bring an enforcement action. Often, governmental units do not have the time, resources, and/or incentive to bring suit against a corporate polluter violating its permit. If suits by concerned and affected citizens are not excepted from the automatic stay, polluters can use the filing of bankruptcy to avoid having to comply with environmental laws.

Citizen suits are an essential means of enforcing the Clean Water Act. Under the exception to the automatic stay for governmental units, suits by the government against bankrupt polluters are allowed despite corporations' filings of bankruptcy. If the integrity of our nation's waters is to be protected, private attorneys general, acting in the place of the government, should be given the same right to sue bankrupt polluters as the public attorney gen-

eral. The courts have been reluctant to interpret the exception for governmental units to allow for environmental citizen suits against bankrupt corporations. To empower private attorneys general to force bankrupt corporations to comply with environmental laws, Congress must amend the Bankruptcy Code to provide that environmental citizen suits for injunctive relief against corporate polluters are excepted from the automatic stay.