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## **An Agricultural Law Research Article**

### **Coping with CAFOs: How Much Notice Must a Citizen Give?**

by

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# Coping with CAFOs: How Much Notice Must a Citizen Give?

*Community Ass'n for Restoration of the Environment v. Henry Bosma Dairy*<sup>1</sup>

## I. INTRODUCTION

Like it or not, large-scale corporate “farms” are now a major part of our nation’s agricultural supply system.<sup>2</sup> Concentrated animal feeding operations (“CAFOs”)<sup>3</sup> have located in agricultural areas nationwide, often bringing environmental contamination with them.<sup>4</sup> Regulation of these facilities has

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1. 305 F.3d 943 (9th Cir. 2002). The case has a rich history of reported lower court decisions. See Cmty. Ass’n for Restoration of the Env’t v. Henry Bosma Dairy, No. CY-98-3011, 2001 WL 1704240 (E.D. Wash. Feb. 27, 2001), *aff’d*, 305 F.3d 943 (9th Cir. 2002) (ruling on penalty phase of *Bosma* trial); Cmty. Ass’n for Restoration of the Env’t v. Henry Bosma Dairy, 65 F. Supp. 2d 1129 (E.D. Wash. 1999), *aff’d*, 305 F.3d 943 (9th Cir. 2002) (ruling on liability phase of *Bosma* trial); Cmty. Ass’n for Restoration of the Env’t v. Sid Koopman Dairy, 54 F. Supp. 2d 976 (E.D. Wash. 1999), *aff’d*, 305 F.3d 943 (9th Cir. 2002) (granting partial summary judgment as to all four related CARE/dairy cases); Cmty. Ass’n for Restoration of the Env’t v. DeRuyter Bros. Dairy, 54 F. Supp. 2d 974 (E.D. Wash. 1999), *aff’d*, 305 F.3d 943 (9th Cir. 2002) (allowing amicus curiae).

2. The Environmental Protection Agency (“EPA”) estimates there to be approximately 1.3 million farms with livestock in the United States, about 238,000 of which involve confined conditions for the animals. Standards for CAFOs, 68 Fed. Reg. 7176, 7179 (Feb. 12, 2003). Such “agriculture enterprises where animals are kept and raised in confinement” are called animal feeding operations (“AFOs”). *Id.* The EPA recognizes “[t]he continued trend toward fewer but larger operations, coupled with greater emphasis on more intensive production methods and specialization.” *Id.* at 7180.

3. Generally CAFOs are the largest AFOs. See generally 40 C.F.R. § 122.23 (2002). In Missouri, Class IA CAFOs (the largest classification) are those having the capacity for at least seven thousand “animal units.” MO. REV. STAT. § 640.703(3) (2000). Missouri is currently home to twenty-one of these giants, which must obtain site-specific permits. E-mail from Ogle Hopkins, Environmental Specialist III, Missouri Department of Natural Resources, to Martin Miller (Mar. 25, 2003, 03:25:00 CST) (on file with author). Class IB and IC CAFOs must also obtain permits, and typically qualify for a general permit. *Id.* Class II facilities are generally considered AFOs, which may voluntarily obtain “letters of approval” from the Department of Natural Resources. *Id.* Class II facilities have the capacity for more than 300 animal units, but below that level AFOs are not classified and are thus not directly tracked by the state. See MO. REV. STAT. § 640.703(6) (2000). The Department of Natural Resources has issued permits to more than 400 AFOs and has a record of over 1,000 of them statewide, but clearly many more exist. E-mail from Dann East, Environmental Engineer, Missouri Department of Natural Resources, to Martin Miller (Nov. 18, 2003, 10:43:00 CST) (on file with author).

4. AFOs “annually produce more than 500 million tons of animal manure that, when improperly managed, can pose substantial risks to the environment and public health.” Standards for CAFOs, 68 Fed. Reg. 7176, 7179 (Feb. 12, 2003).

proven a formidable task for federal and state governments.<sup>5</sup> Generally, the federal Clean Water Act (“CWA”) prohibits the “discharge of a pollutant”<sup>6</sup> from “point sources”<sup>7</sup> into “navigable waters”<sup>8</sup> unless the discharger has obtained a National Pollution Discharge Elimination System (“NPDES”) permit.<sup>9</sup> To help promote compliance, Section 505 of the CWA provides for citizen suits as a means of supplementing governmental enforcement efforts.<sup>10</sup> But substantive and procedural hurdles abound for citizens seeking to take on the role of “private attorneys general” and enforce environmental laws when their government fails to do so. This Note examines the largely successful efforts of one citizen organization that sought to bring two Washington dairies into compliance with the CWA.

Much of the controversy in this case centered around the CWA’s sixty-day “notice and delay” requirement,<sup>11</sup> which is a prerequisite to filing a citizen suit. This Note focuses on what constitutes sufficient notice and suggests how citizen groups should handle additional violations discovered after suit has been filed.

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5. The EPA has noted that “[d]espite more than 25 years of regulation of CAFOs, reports of discharge and runoff of manure and manure nutrients from these operations persist.” *Id.* The EPA acknowledged that “these conditions are in part due to inadequate compliance with and enforcement of existing regulations,” but also cited a need to revise its rules. *Id.* The EPA further aspired that its “final regulations being announced today will reduce discharges that impair water quality by strengthening the permitting requirements and performance standards for CAFOs.” *Id.* Clearly the struggle continues. *See, e.g., Bosma Dairy*, 65 F. Supp. 2d at 1149 (noting how the state of Washington historically “lacked the resources to be proactive”); Missouri Department of Natural Resources, *Enforcement Actions Against Animal Production Facilities: 1982 – August 14, 2000*, at [http://www.sierraclub.org/factoryfarms/rapsheets/missouri/dnr\\_edb.pdf](http://www.sierraclub.org/factoryfarms/rapsheets/missouri/dnr_edb.pdf) (Aug. 14, 2000) (listing completed enforcement actions in Missouri).

6. The terms “discharge of a pollutant” and “discharge of pollutants” broadly encompass “any addition of any pollutant to navigable waters from any point source.” Clean Water Act § 502(12), 33 U.S.C. § 1362(12)(A) (2000). “Pollutant” is also defined by the CWA. *See* Clean Water Act § 502(6), 33 U.S.C. § 1362(6) (2000).

7. The term “point source” basically includes any discrete location from which pollutants are discharged (such as a drainage pipe), as well as CAFOs. *See infra* note 57 and accompanying text.

8. The term “navigable waters” is not limited to water bodies that are actually capable of being navigated in the traditional sense. *See infra* notes 51-55 and accompanying text.

9. *See, e.g., Miss. River Revival, Inc. v. City of Minneapolis*, No. 01-2511, 2003 WL 256734, at \*1 (8th Cir. Feb. 7, 2003) (citing Clean Water Act §§ 301(a), 402, 33 U.S.C. §§ 1311(a), 1342 (2000); *Ass’n to Protect Hammersley, Eld, and Totten Inlets v. Taylor*, 299 F.3d 1007, 1009 (9th Cir. 2002); *City of Milwaukee v. Illinois*, 451 U.S. 304, 310-11 (1981)). The NPDES program is described in Section 402. *See* Clean Water Act § 402, 33 U.S.C. § 1342 (2000).

10. *See* Clean Water Act § 505, 33 U.S.C. § 1365 (2000).

11. *See id.* § 505(b)(1)(A).

Although the Ninth Circuit had previously taken a fairly strict approach in interpreting notice requirements, *Bosma Dairy* indicates a shift toward a more forgiving approach by allowing the plaintiff to include certain non-noticed violations in its lawsuit. This Note urges the continued movement away from a rigid and formalistic approach.

## II. FACTS & HOLDING

An environmental group named Community Association for Restoration of the Environment (“CARE”) brought a citizen suit against two Washington dairy operations (collectively referred to as “Bosma”), alleging violations of the CWA.<sup>12</sup> Each dairy stabled or confined at least 2,250 cows and otherwise met the definition of a CAFO.<sup>13</sup> CARE sought to hold Bosma liable for numerous alleged discharges of pollutants and animal waste into “waters of the United States”<sup>14</sup> before obtaining an NPDES permit as required, and in violation of the permit once it was finally obtained.<sup>15</sup> CARE sought to impose civil penalties on Bosma, to obtain injunctive relief, and to collect attorney fees and costs.<sup>16</sup>

Bosma’s “long history of compliance problems” began shortly after the dairy opened in 1973 with a citation from the Washington Department of Ecology (“WADOE”) for discharging waste manure into a drainage ditch that eventually flows into the Yakima River.<sup>17</sup> Between 1976 and 1996, WADOE unsuccessfully instructed Bosma to obtain an NPDES permit four times.<sup>18</sup>

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12. Cmty. Ass’n for Restoration of the Env’t v. Henry Bosma Dairy, 305 F.3d 943, 946 (9th Cir. 2002). CARE actually brought four different lawsuits involving dairies before a federal district judge in Washington, who allowed the cases to be temporarily consolidated for limited discovery purposes and for partial summary judgment regarding common issues. Cmty. Ass’n for Restoration of the Env’t v. Sid Koopman Dairy, 54 F. Supp. 2d 976, 978 (E.D. Wash. 1999), *aff’d*, 305 F.3d 943 (9th Cir. 2002). The instant decision by the Ninth Circuit involved only one of these lawsuits, in which Bosma was a defendant. *Bosma Dairy*, 305 F.3d at 946. Both the “Henry Bosma Dairy” and the adjacent “Liberty Dairy” were owned and operated by Henry Bosma and “Bosma Enterprises” (collectively referred to as “Bosma” in this Note). *Id.*

13. *Bosma Dairy*, 305 F.3d at 946-47; *see also* Cmty. Ass’n for Restoration of the Env’t v. Henry Bosma Dairy, 65 F. Supp. 2d 1129, 1145-46 (E.D. Wash. 1999), *aff’d*, 305 F.3d 943 (9th Cir. 2002) (discussing CAFOs during liability phase of trial); 40 C.F.R. § 122.23 (2002).

14. *See infra* notes 51-55 and accompanying text.

15. *Bosma Dairy*, 305 F.3d at 946. For a brief discussion of NPDES permits, *see infra* notes 48-49 and accompanying text.

16. *See* Cmty. Ass’n for Restoration of the Env’t v. Henry Bosma Dairy, No. CY-98-3011, 2001 WL 1704240, at \*2 (E.D. Wash. Feb. 27, 2001), *aff’d*, 305 F.3d 943 (9th Cir. 2002).

17. *Bosma Dairy*, 305 F.3d at 947.

18. *Id.*

During that time several complaints were made about other discharges, and WADOE cited Bosma for those that were verified.<sup>19</sup> Bosma was finally issued a General Dairy Permit<sup>20</sup> on January 31, 1997, and almost a year later (on the same day CARE filed its lawsuit) this permit was modified to include the Liberty Dairy.<sup>21</sup>

CARE sent its notice of intent to sue on October 31, 1997, giving Bosma more than the sixty days required by the CWA's citizen suit provision.<sup>22</sup> This notice alleged twelve discharges, but Appendix B of CARE's complaint added thirty-two more violations that were discovered after notice had been given.<sup>23</sup>

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19. *Id.*

20. The CWA allows individual states to administer their own permit programs, as long as such programs meet federal requirements and are approved by the EPA. *Id.* Through WADOE, the state of Washington regulates dairies via a combined permit which contains federal NPDES requirements as well as state requirements. *Id.* at 956. Such General Dairy Permits (more fully named "Dairy Farm National Pollutant Discharge Elimination System and State Waste Discharge General Permits") incorporate a Dairy Waste Management Plan. *Id.* at 947-48. Bosma's permit states that "[t]here shall be no discharge of process waters to surface waters of the state, except for overflow" from waste containment facilities resulting from a twenty-five year rain fall event. *Id.* at 948. It also notes the possibility of a citizen suit. *Id.*

21. *Id.* at 947. This last minute inclusion prevented CARE's success on some of its claims. See Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy, 65 F. Supp. 2d 1129, 1153 (E.D. Wash. 1999), *aff'd*, 305 F.3d 943 (9th Cir. 2002) (finding that because the NPDES permit was modified to cover the Liberty Dairy on the same date the complaint was filed, the court was unable to include this as another ongoing violation).

22. *Bosma Dairy*, 305 F.3d at 948. For general information regarding the citizen suit provision, see *infra* notes 64-73 and accompanying text.

23. *Bosma Dairy*, 305 F.3d at 948.

The additional allegations included overapplication<sup>24</sup> of waste to Bosma's land, erosion of one of its lagoons, and more illegal discharges.<sup>25</sup>

CARE alleged three counts in its complaint: (1) operating and discharging pollutants before obtaining a permit, (2) violating the permit, and (3) causing violations of water quality standards.<sup>26</sup> The district court resolved several pertinent issues via summary judgment. It found that CARE's pre-suit notice was adequate, that Bosma's dairies were CAFOs and thus point sources, and that CARE could enforce both state and federal restrictions.<sup>27</sup>

At the liability portion of the trial, the district court ruled that CARE had proven sixteen of the forty-eight alleged ongoing violations, and that at the time

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24. Animal manure contains nitrogen, phosphorus, and potassium, and is often used to fertilize crops. See, e.g., John A. Lory, *Managing Manure Phosphorus to Protect Water Quality*, Department of Agronomy and Commercial Agriculture Program, University of Missouri-Columbia, at <http://www.muextension.missouri.edu/explore/agguides/soils/g09182.htm> (Apr. 1, 1999). Applying manure to land (land application) can present water quality problems, especially with regard to nitrogen and phosphorus. See *id.* "The progressive deterioration of water quality from overstimulation by nutrients is called eutrophication." *Id.* (emphasis omitted). Numerous forms of manure management can be utilized. See David Pfost et al., *Beef Manure Management Systems in Missouri*, University of Missouri-Columbia, at <http://www.muextension.missouri.edu/explore/enqual/eq0377.htm> (Oct. 31, 2000).

Poor manure management can cause the loss of fertilizer nutrients into nearby surface and ground waters, bacterial contamination and fish kills, harmful odors and gases, unwanted plant growth (i.e., algae), as well as "turbidity and other undesirable conditions in the water." Charles D. Fulhage, *Reduce Environmental Problems with Proper Land Application of Animal Manure*, Department of Biological and Agricultural Engineering, University of Missouri-Columbia, at <http://www.muextension.missouri.edu/explore/envqual/eq0201.htm> (June 30, 2000). In contrast, a proper management plan can reduce the cost of commercial fertilizers, improve production efficiency and animal health, and protect water resources and air quality. *Id.* Therefore, to avoid environmental contamination while putting animal manure to use, "[l]ivestock or poultry production enterprises should have a comprehensive manure nutrient management plan." *Id.*

The environmental and health risks associated with the mismanagement of animal waste are significant. The EPA says that AFOs "annually produce more than 500 million tons of animal manure that, when improperly managed, can pose substantial risks to the environment and public health." Standards for CAFOs, 68 Fed. Reg. 7176, 7179 (Feb. 12, 2003). Recently, the EPA adopted a rule requiring the largest CAFOs to "develop and implement a nutrient management plan as a condition of an NPDES permit." *Id.*; see also 40 C.F.R. § 122.42(e)(1) (2003) (requiring CAFO permits to include a nutrient management plan); 40 C.F.R. § 412.4 (2003) (specifying best management practices for the land application of manure and wastewater).

25. *Bosma Dairy*, 305 F.3d at 951.

26. *Id.* at 948.

27. *Id.* at 948-49; Cmty. Ass'n for Restoration of the Env't v. Sid Koopman Dairy, 54 F. Supp. 2d 976, 980-82 (E.D. Wash. 1999), *aff'd*, 305 F.3d 943 (9th Cir. 2002).

the complaint was filed there were ongoing violations with respect to: (1) wastewater discharges from a truck wash on Bosma's property, (2) overapplication or misapplication of animal wastewater to a nearby field, and (3) discharges to a joint drain and nearby canal because of the operation and maintenance of the dairies.<sup>28</sup> However, CARE failed to prove an ongoing violation with respect to operation without an NPDES permit and with respect to seepage and capacity problems with Bosma's storage ponds.<sup>29</sup>

In the trial's penalty phase, Bosma was ordered to pay \$171,500 in civil penalties to the United States Treasury and \$428,304 in attorney fees and costs to CARE.<sup>30</sup> The civil penalty represented the court's computation of the \$25,000 maximum daily penalty, less appropriate reductions for certain mitigating factors.<sup>31</sup> This penalty was roughly forty percent of the maximum possible under the statute.<sup>32</sup> After making certain adjustments to CARE's request for costs and attorney fees, the court imposed a thirty percent reduction to account for CARE's limited success.<sup>33</sup>

Both parties appealed various aspects of the decision.<sup>34</sup> Bosma challenged the district court's subject matter jurisdiction by arguing that CARE failed to provide adequate notice of its intent to sue,<sup>35</sup> that its drainage ditch did not constitute "waters of the United States,"<sup>36</sup> and that its "fields where manure is stored and ditches therein" were not point sources.<sup>37</sup> Bosma argued that CARE failed to prove any violations in connection with its truck wash, and that no ongoing violations existed with respect to the application of wastewaters and

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28. *Bosma Dairy*, 305 F.3d at 949 (quoting Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy, 65 F. Supp. 2d 1129, 1134 (E.D. Wash. 1999), *aff'd*, 305 F.3d 943 (9th Cir. 2002)).

29. *Id.*

30. *Id.*; *see also* Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy, No. CY-98-3011, 2001 WL 1704240, at \*22 (E.D. Wash. Feb. 27, 2001), *aff'd*, 305 F.3d 943 (9th Cir. 2002).

31. *Bosma Dairy*, 2001 WL 1704240, at \*7-16. The court followed the "top down" analysis of beginning with the maximum penalty and using the statutory factors to make any necessary reductions. *Id.* at \*8 (citing Clean Water Act § 309(d), 33 U.S.C. § 1319(d) (2000)). Bosma was entitled to no leniency based on the "seriousness of the violation[s]," the "economic benefit of violations," or the economic impact on Bosma. *Id.* at \*8-15. However, the court imposed less than the maximum statutory penalty because of Bosma's "substantial and expensive" improvements, its "good faith efforts to comply" with certain requirements, and the "heavy precipitation" that slowed Bosma's progress one winter. *Id.* at \*11-15.

32. *Id.* at \*16.

33. *Id.* at \*21.

34. *Bosma Dairy*, 305 F.3d at 949.

35. *Id.* at 949-53.

36. *Id.* at 954-55.

37. *Id.* at 955.

other discharges.<sup>38</sup> Bosma also argued that CARE lacked standing to enforce state imposed standards and that the court's award of attorney fees should be further reduced because of CARE's partial success.<sup>39</sup>

CARE disputed the amount of the award for civil penalties and attorney fees, contending that it offered sufficient proof that Bosma "applied manure to frozen ground," admitted six 1997 violations, and had three more violations during the 1997 summer.<sup>40</sup> CARE further disagreed with the district court's partial award of attorney fees, arguing that its partial success did not render a full award excessive.<sup>41</sup>

On appeal, the court focused on two "central" issues: (1) the adequacy of CARE's notice, and (2) the existence of ongoing violations. It found the parties' other arguments to have "little merit" and addressed them very briefly.<sup>42</sup> The Ninth Circuit affirmed the district court's decision in all respects. It held that when a citizen's CWA complaint includes additional violations not identified in the notice of intent to sue, the notice will be deemed adequate if it contains all information specifically required by law and if the additional violations are "sufficiently similar" to those in the notice by (1) originating from the same source, (2) being of the same nature or type, and (3) being easily identifiable in terms of the time frame and specific location involved.<sup>43</sup> As for the existence of ongoing violations, the court found no error in the district court's rulings.<sup>44</sup>

### III. LEGAL BACKGROUND

Congress enacted the CWA,<sup>45</sup> sometimes called the Federal Water Pollution Control Act, in 1972.<sup>46</sup> Its stated goals include restoring and maintaining "the chemical, physical, and biological integrity of the Nation's waters."<sup>47</sup> As noted above, the CWA generally prohibits pollutant discharges from point sources into navigable waters unless the discharger has obtained an NPDES permit.<sup>48</sup> NPDES permits incorporate effluent limitations that allow discharges only below

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38. *Id.* at 953-54.

39. *Id.* at 956.

40. *Id.*

41. *Id.*

42. *Id.* at 946 n.1.

43. *Id.* at 951-53.

44. *Id.* at 953-54.

45. 33 U.S.C. §§ 1251-1387 (2000).

46. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 174 (2000).

47. *Gwaltney of Smithfield, Ltd., v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 52 (1987) (citing Clean Water Act § 101(a), 33 U.S.C. § 1251(a) (1982)).

48. *See, e.g., Ass'n to Protect Hammersley, Eld, and Totten Inlets v. Taylor*, 299 F.3d 1007, 1009 (9th Cir. 2002).



certain specified thresholds.<sup>49</sup> Further, the CWA contains a citizen suit provision that allows private parties to file suit and enforce the CWA when the appropriate government agencies fail to do so.<sup>50</sup>

### A. Jurisdictional Waters of the CWA

The term “navigable waters” is defined in the CWA as “waters of the United States”<sup>51</sup> and is not limited to those waters which are in fact navigable in the traditional sense.<sup>52</sup> The Environmental Protection Agency (“EPA”) has further defined such waters by regulation to include tributaries of other water bodies subject to the CWA.<sup>53</sup> Several federal circuits, including the Ninth Circuit, have affirmed CWA jurisdiction over tributaries.<sup>54</sup> The jurisdictional reach of the CWA even extends to irrigation canals and other “tributaries that flow intermittently.”<sup>55</sup>

### B. Point Sources

The CWA defines a “pollutant discharge” as “any addition of any pollutant to navigable waters from any point source.”<sup>56</sup> “Point sources” are further defined as “any discernible, confined and discrete conveyance, including but not limited to any . . . concentrated animal feeding operation . . . from which pollutants are or may be discharged.”<sup>57</sup> Thus, CAFOs are explicitly included as point sources. However, “agricultural stormwater discharges and return flows from irrigated

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49. *Bosma Dairy*, 305 F.3d at 946; *see also* Clean Water Act § 402(a), 33 U.S.C. § 1342(a) (2000). Effluent limitations are further described in Section 301. *See* Clean Water Act § 301, 33 U.S.C. § 1311 (2000).

50. *See* Clean Water Act § 505, 33 U.S.C. § 1365 (2000); *infra* notes 64-73 and accompanying text.

51. Clean Water Act § 502(7), 33 U.S.C. § 1362(7) (2000); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 163 (2001).

52. *Solid Waste*, 531 U.S. at 167.

53. 40 C.F.R. § 122.2 (2002) (defining terms related to NPDES permits, specifically Subpart (e) of the definition for “Waters of the United States”). The Army Corps of Engineers has a similar, but not identical definition which applies to its Section 404 permit program for dredged or fill material. *See* Clean Water Act § 404, 33 U.S.C. § 1344 (2000); 40 C.F.R. § 230.3(s)(5) (2002).

54. *See* *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001); *United States v. TGR Corp.*, 171 F.3d 762, 764 (2d Cir. 1999); *United States v. Eidson*, 108 F.3d 1336, 1341-42 (11th Cir. 1997); *United States v. Tex. Pipe Line Co.*, 611 F.2d 345, 347 (10th Cir. 1979); *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1325 (6th Cir. 1974).

55. *Headwaters*, 243 F.3d at 533-34.

56. Clean Water Act § 502(12), 33 U.S.C. § 1362(12) (2000).

57. *Id.* § 502(14).

agriculture” are expressly exempted from coverage,<sup>58</sup> so the argument remains open as to whether parts of CAFOs (i.e., crop production fields) can meet this agricultural exemption.<sup>59</sup>

### C. Enforcement of the Clean Water Act and Citizen Suits

Enforcement of the CWA has been characterized as “a partnership between the States and the Federal Government.”<sup>60</sup> States have the option of regulating their own citizens (subject to certain federal requirements) or allowing the EPA to directly administer the program.<sup>61</sup> Under the delegated approach, the EPA promulgates the minimum set of “effluent limitations” that states must incorporate into their NPDES permits and also assists the states in adopting supplemental “water quality standards” as a type of safety-net.<sup>62</sup> The state of Washington administers its own NPDES permit program through WADOE.<sup>63</sup>

When the government fails to take proper enforcement action,<sup>64</sup> citizens can act as “private attorneys general”<sup>65</sup> and sue violators to enforce NPDES permit limitations pursuant to Section 505 of the CWA.<sup>66</sup> Citizens can enforce not only

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58. *Id.*

59. See *infra* notes 157-63 and accompanying text. As the district court pointed out, efforts to amend the CWA to exempt land application of livestock manure from the definition of a point source were unsuccessful. See Cmty. Ass’n for Restoration of the Env’t v. Henry Bosma Dairy, 65 F. Supp. 2d 1129, 1136 (E.D. Wash. 1999), *aff’d*, 305 F.3d 943 (9th Cir. 2002).

60. *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992).

61. See Clean Water Act § 402(b), 33 U.S.C. § 1342(b) (2000); *Arkansas*, 503 U.S. at 101.

62. *Arkansas*, 503 U.S. at 101-02.

63. WASH. REV. CODE §§ 90.64.050(1)(d)-(e), 90.64.050(2) (Supp. 2003); *Bosma Dairy*, 65 F. Supp. 2d at 1136-37. Washington’s local conservation districts also retain certain enumerated duties, which include providing technical assistance and referring complaints. WASH. REV. CODE § 90.64.070(1) (Supp. 2003); *Bosma Dairy*, 65 F. Supp. 2d at 1137. In Missouri, the NPDES permit program is administered through the Department of Natural Resources. See MO. REV. STAT. § 640.010 (2000) (creating the Department); *id.* §§ 644.006-.150 (2000) (Missouri Clean Water Law).

64. Citizen suits are actually barred when the government is diligently pursuing enforcement action. Clean Water Act § 505(b)(1)(B), 33 U.S.C. § 1365(b)(1)(B) (2000); see also *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987) (“The bar on citizen suits when governmental enforcement action is under way suggests that the citizen suit is meant to supplement rather than to supplant governmental action.”).

65. See, e.g., *Bennett v. Spear*, 520 U.S. 154, 165 (1997); *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972); *Ashoff v. City of Ukiah*, 130 F.3d 409, 413 n.4 (9th Cir. 1997); *EPA v. City of Green Forest, Ark.*, 921 F.2d 1394, 1403 (8th Cir. 1990).

66. Clean Water Act § 505(a), 33 U.S.C. § 1365(a) (2000); see, e.g., *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 174-75 (2000). In this

federal limitations, but also more stringent state standards incorporated into the permit.<sup>67</sup> Successful citizen plaintiffs may be entitled to injunctive relief and litigation costs, while any civil penalties ordered by the court must be paid to the United States Treasury.<sup>68</sup>

However, there are important limitations of which citizens must be aware. The United States Supreme Court interpreted the “to be in violation of” language<sup>69</sup> in the CWA’s citizen suit provision to mean that citizens may not sue alleged violators for “wholly past violations.”<sup>70</sup> In other words, an “ongoing violation” is required, and citizens must allege a “*continuous* or *intermittent* violation.”<sup>71</sup> Lower courts have noted two ways of meeting this requirement: (1) proving that a certain violation continues, or (2) convincing the court that intermittent or sporadic violations are likely to recur.<sup>72</sup> When a citizen relies on

context the term “citizen” includes “persons having an interest which is or may be adversely affected.” Clean Water Act § 505(g), 33 U.S.C. § 1365(g) (2000).

67. *EPA v. California*, 426 U.S. 200, 224 (1976) (the statutory language makes “clear that *all* dischargers (including federal dischargers) may be sued to enforce permit conditions, whether those conditions arise from standards and limitations promulgated by the [EPA] Administrator or from stricter standards established by the State”); *see also Ashoff*, 130 F.3d at 412-13.

68. *See* Clean Water Act § 505(d), 33 U.S.C. § 1365(d) (2000) (“The court . . . may award costs of litigation (including reasonable attorney and expert witness fees) to any . . . substantially prevailing party, whenever the court determines such award is appropriate.”); *Gwaltney*, 484 U.S. at 53 (“If the citizen prevails in such an action, the court may order injunctive relief and/or impose civil penalties payable to the United States Treasury.”).

69. *Gwaltney*, 484 U.S. at 56-58. The relevant part of the citizen suit provision declares: “Except as provided . . . any citizen may commence a civil action on his own behalf . . . 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 . . . with respect to such a standard or limitation.” Clean Water Act § 505(a), 33 U.S.C. § 1365(a) (2000) (emphasis added). The *Gwaltney* Court stated that “[t]he most natural reading of ‘to be in violation’ is a requirement that citizen-plaintiffs 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.” *Gwaltney*, 484 U.S. at 57 (emphasis added).

70. *Gwaltney*, 484 U.S. at 64.

71. *See id.* at 64-66 (emphasis added).

72. *Sierra Club v. Union Oil Co.*, 853 F.2d 667, 671 (9th Cir. 1988). In the court’s own words, “a citizen plaintiff may prove ongoing violations ‘either (1) by proving violations that continue on or after the date the complaint is filed, or (2) by adducing evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations.’” *Id.* (quoting *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 844 F.2d 170, 171-72 (4th Cir. 1988); *see also* *EPA v. City of Green Forest, Ark.*, 921 F.2d 1394, 1406 (8th Cir. 1990) (affirming jurisdiction of district court, which found “good-faith allegations of ongoing violations” and a “reasonable likelihood of a recurrence of intermittent violations”) (citations omitted).

intermittent or sporadic violations, the violations are considered ongoing until “there is no real likelihood of repetition.”<sup>73</sup>

Additionally, these “would-be plaintiff[s]” must notify the EPA, the state, and the alleged violator at least sixty days before filing suit.<sup>74</sup> If the state or the EPA brings an enforcement action against the violator within this period, the citizen suit is barred.<sup>75</sup> Thus, citizen suits were designed to “supplement rather than to supplant governmental action.”<sup>76</sup> The United States Supreme Court has characterized the purpose of this “notice and delay” requirement as “obviating the need for citizen suits” by (1) allowing the government “to take responsibility for enforcing environmental regulations” and (2) giving the defendant a chance to achieve complete compliance with the law.<sup>77</sup>

#### *D. Contents of Notice and the “Additional Violations” Problem*

In *Hallstrom v. Tillamook County*, the United States Supreme Court strictly construed a notice requirement similar to the one in the CWA and found that dismissal of a citizen suit was required after the plaintiffs failed to notify the EPA and the state of their intent to sue.<sup>78</sup> The Court refused to allow equitable and practical considerations to trump clear statutory language regarding the timing of notice,<sup>79</sup> but did not address the *content* of the notice.<sup>80</sup>

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73. *Sierra Club*, 853 F.2d at 671 (quoting *Chesapeake Bay Found.*, 844 F.2d at 171-72).

74. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 174-75 (2000) (citing Clean Water Act § 505(b)(1)(A), 33 U.S.C. § 1365(b)(1)(A) (2000)). The Second Circuit has begun to refer to such notice letters as “NOI letter[s].” *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 485 (2d Cir. 2001).

75. *Gwaltney*, 484 U.S. at 59-60 (citing Clean Water Act § 505(b)(1)(B), 33 U.S.C. § 1365(b)(1)(B) (2000)). Lower courts have found that an investigation or an administrative compliance order does not prevent the citizen suit. See *Proffitt v. Township of Bristol*, 754 F.2d 504, 507 (3d Cir. 1985).

76. *Gwaltney*, 484 U.S. at 60.

77. *Hallstrom v. Tillamook County*, 493 U.S. 20, 29 (1989) (citing *Gwaltney*, 484 U.S. at 60).

78. *Id.* at 31 (holding “that the notice and 60-day delay requirements are mandatory conditions precedent to commencing suit under the [Resource Conservation and Recovery Act’s] citizen suit provision”). The court specifically left open the question of whether the notice and delay requirements were “jurisdictional in the strict sense of the term.” *Id.* Other courts have interpreted such requirements as jurisdictional. See *Cnty. Ass’n for Restoration of the Env’t v. Henry Bosma Dairy*, 305 F.3d 943, 950 (9th Cir. 2002) (“[I]n *Hallstrom*, the Court held that the district court lacked subject matter jurisdiction.”).

79. See *Hallstrom*, 493 U.S. at 27-31.

80. See *Atl. States Legal Found., Inc. v. Stroh Die Casting Co.*, 116 F.3d 814, 819

The CWA itself does not describe what the notice should contain, but it instructs the EPA to promulgate regulations addressing notice requirements.<sup>81</sup> The EPA's regulation requires that the notice:

include *sufficient information to permit the recipient to identify* [1] the specific standard, limitation, or order alleged . . . to constitute a violation, [2] the person or persons responsible for the alleged violation, . . . [3] the date or dates of such violation, and [4] the full name, address, and telephone number of the person giving notice.<sup>82</sup>

Thus, citizen plaintiffs must identify the (1) violations, (2) violators, (3) time frame, and (4) complainants. Despite this guidance, courts have struggled to address the requisite content of pre-suit notices.<sup>83</sup> Commentators have discerned two basic approaches: "strict construction" and the more liberal "overall sufficiency."<sup>84</sup> Courts in the former group have extended *Hallstrom's* rationale to the EPA regulations and carefully examine each requirement,<sup>85</sup> while those in the latter category have interpreted the "sufficient information" language in the regulation to allow a standard more generous to citizen plaintiffs.<sup>86</sup>

The Ninth Circuit appeared to take the strict approach in 1995.<sup>87</sup> By interpreting *Hallstrom* to mandate strict compliance with the EPA regulation, it dismissed a citizen suit because of the plaintiffs' failure to include all their identities, addresses, and phone numbers.<sup>88</sup> Additionally, the Middle District of Alabama explicitly adopted the "strict interpretive approach" after surveying several other cases.<sup>89</sup> It found the plaintiff's notice inadequate because of failure

(7th Cir. 1997).

81. Clean Water Act § 505(b), 33 U.S.C. § 1365(b) (2000) ("Notice under this subsection shall be given in such manner as the [EPA] Administrator shall prescribe by regulation."); *Bosma Dairy*, 305 F.3d at 950.

82. 40 C.F.R. § 135.3(a) (2002) (emphasis added).

83. See Robin Kundis Craig, *Notice Letters and Notice Pleading: The Federal Rules of Civil Procedure and the Sufficiency of Environmental Citizen Suit Notice*, 78 OR. L. REV. 105, 143 (1999).

84. *Id.* at 143-46.

85. *Id.*; see, e.g., *Wash. Trout v. McCain Foods, Inc.*, 45 F.3d 1351, 1354 (9th Cir. 1995) (dismissing CWA suit due to failure to identify all plaintiffs); *Atwell v. KW Plastics Recycling Div.*, 173 F. Supp. 2d 1213, 1222 (M.D. Ala. 2001) (strictly interpreting notice requirement).

86. Craig, *supra* note 83, at 143. Professor Craig includes the Third and Seventh Circuits in this category. *Id.* at 144-45.

87. See *Wash. Trout*, 45 F.3d at 1355.

88. *Id.* This has been termed a rejection of the "tag along plaintiff" rule. See Craig, *supra* note 83, at 133.

89. *Atwell*, 173 F. Supp. 2d at 1221.

to prove the “required connection” between (1) reporting and monitoring violations and (2) previously noticed discharge violations.<sup>90</sup>

Various decisions have been associated with the more liberal “overall sufficiency” approach. The Seventh Circuit has stated that “notice must be sufficiently specific to inform the alleged violator about what it is doing wrong, so that it will know what corrective actions will avert a lawsuit.”<sup>91</sup> It found that notice of violations occurring at one outfall<sup>92</sup> was sufficient when the defendant later redirected its effluent to another outfall.<sup>93</sup>

Perhaps the most notable case in the overall sufficiency category is *Public Interest Research Group of New Jersey, Inc. v. Hercules, Inc.*, where the Third Circuit focused on whether notice gave the alleged violator “enough information to be able to bring itself into compliance.”<sup>94</sup> The court stated that citizens need not “list every specific aspect or detail,” nor “describe every ramification” of each alleged violation.<sup>95</sup> But it read the EPA’s notice regulation to require enough information that the recipient could identify the specific discharge limitation violated, the parameter<sup>96</sup> and outfall involved, the date of the violation, and the persons involved.<sup>97</sup>

*Hercules* also marked the first federal circuit ruling that squarely addressed the adequacy of pre-suit notices that fail to list additional violations later incorporated into the complaint.<sup>98</sup> It held that a citizen’s initial notice of intent to sue for discharge violations was sufficiently broad to allow other violations

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90. *Id.* at 1223-25.

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

92. Basically, an outfall is “[t]he place where effluent is discharged into receiving waters.” *Terms of the Environment*, U.S. Env’tl. Protection Agency, at <http://www.epa.gov/OCEPATERMS/> (last modified Dec. 30, 2002). The EPA’s regulations define it more specifically only with respect to storm water discharges. See 40 C.F.R. § 122.26(b)(9) (2002). Judging by the agency’s own forms, the EPA apparently considers the term “outfall” to be synonymous with “point source.” See *U.S. Pub. Interest Research Group v. Heritage Salmon, Inc.*, No. CIV. 00-150-B-C, 2002 WL 240440, at \*14 n.22, (D. Me. Feb. 19, 2002).

93. *Atl. States*, 116 F.3d at 820. Despite the dissent’s objections, the court refused to adopt “an inflexible rule that would require outfall-by-outfall notice in all cases.” *Id.*

94. *Pub. Interest Research Group of N.J., Inc. v. Hercules, Inc.*, 50 F.3d 1239, 1248-49 (3d Cir. 1995).

95. *Id.* at 1248.

96. The EPA’s online glossary defines “parameter” as a “variable, measurable property whose value is a determinant of the characteristics of a system; e.g., temperature, pressure, and density are parameters of the atmosphere.” *Terms of the Environment*, *supra* note 92.

97. *Hercules*, 50 F.3d at 1248.

98. *Cnty. Ass’n for Restoration of the Env’t v. Henry Bosma Dairy*, 305 F.3d 943, 950-51 (9th Cir. 2002).

of the “same type” that occurred both during and after those in the notice letter.<sup>99</sup> While the similar violations at issue in *Hercules* were other discharges and related monitoring, reporting, and record keeping violations, the court repeatedly stressed that “same type” included the “same parameter, same outfall, [and] same time period” as violations in the notice.<sup>100</sup>

The Eighth Circuit briefly addressed the “additional violations” issue, agreeing with *Hercules* that citizen suits are “limited to violations that are closely related to and of the same type as the violations specified in the notice of intent to sue.”<sup>101</sup> It is important to note that while the strict-liberal distinction can be useful and has been cited by courts,<sup>102</sup> the cases do not always fit neatly into these categories.<sup>103</sup>

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99. *Hercules*, 50 F.3d at 1250.

100. *Id.* at 1253; *see also id.* at 1250.

101. *Comfort Lake Ass’n v. Dresel Contracting, Inc.*, 138 F.3d 351, 355 (8th Cir. 1998) (finding that failure to obtain NPDES permit for three settling ponds, and probable violations at defendants’ other sites were “not proper subjects of the lawsuit” because plaintiff’s notice only alleged permit violations relating to store construction).

102. *See, e.g., Atwell v. KW Plastics Recycling Div.*, 173 F. Supp. 2d 1213, 1217-18 (M.D. Ala. 2001).

103. *Hercules*’ approach allows non-noticed violations of the “same parameter, same outfall, [and] same time period” as noticed violations. *Hercules*, 50 F.3d at 1253. However, this test could potentially be quite strict if interpreted literally, especially considering that the EPA regulation does not speak directly to identifying the offending outfall. *See* 40 C.F.R. § 135.3(a) (2002). Indeed, the Seventh Circuit refused to read *Hercules* as establishing “an inflexible rule that would require outfall-by-outfall notice in all cases.” *Atl. States Legal Found., Inc. v. Stroh Die Casting Co.*, 116 F.3d 814, 820 (7th Cir. 1997). Since the court believed the polluter simply redirected its waste stream to another outfall, it decided the original notice was sufficient. *Id.* One of the judges disagreed, however, viewing *Hercules* as “a workable, bright-line rule” that requires identification of each outfall involved. *Id.* at 824 (Manion, J., dissenting). Read this way, *Hercules* hardly represents an “overall sufficiency” approach.

The Second Circuit has cited *Hercules* for the proposition that a notice letter must identify each separate pollutant involved in the alleged CWA violations. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 487 (2d Cir. 2001). It found the plaintiffs’ notice (which alleged problems with total suspended solids and settleable solids) sufficient with regard to turbidity and suspended solids, but insufficient with respect to thermal discharges (increased water temperature). *Id.* at 486-89. The court focused on whether the discharges were logically dependent on each other, and decided that the relationship between temperature and suspended solids was not close enough despite their “frequent association under ordinary circumstances.” *Id.* at 489.

The Ninth Circuit’s own opinions indicate a lack of clarity about the approach it prefers. In the instant case it proclaimed to follow a strict construction approach, but discussed the overall sufficiency method at length. *Bosma Dairy*, 305 F.3d at 951. A subsequent decision repeats this recital, first pointing to strict construction but later requiring “no more than ‘reasonable specificity.’” *San Francisco Baykeeper, Inc. v.*

### *E. Awards of Attorney Fees to Citizen Plaintiffs*

The CWA also gives judges discretion to award costs and fees to a citizen-plaintiff who qualifies as a “substantially prevailing party.”<sup>104</sup> The assessment of reasonable attorney fees can include an adjustment for the “results obtained” when a plaintiff is only partially successful.<sup>105</sup> In making this adjustment, the court must consider (1) whether the unsuccessful claims were related to the successful claims, and (2) whether the hours expended are an appropriate basis for the award given the plaintiff’s overall level of success.<sup>106</sup> Even if some claims fail, time spent on those claims may be compensable, in full or in part, if they contribute to other successful claims.<sup>107</sup> Using its equitable judgment, the court has discretion to either “attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success.”<sup>108</sup>

## IV. INSTANT DECISION

In *Bosma Dairy*, the Ninth Circuit began by framing the “two central issues” in the case as follows:

First, we must determine whether under the citizen suit provision of the [CWA,] the plaintiffs’ 60-day notice letter adequately notified the defendants of alleged violations. Second, we must determine whether the district court erred by concluding that ongoing violations existed.

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Tosco Co., 309 F.3d 1153, 1157-58 (9th Cir. 2002). Possibly this means that the court will require strict compliance only with certain requirements, such as the plaintiffs’ own identities and contact information. *See id.* (citing Wash. Trout v. McCain Foods, Inc., 45 F.3d 1351, 1355 (9th Cir. 1995)).

104. Clean Water Act § 505(d), 33 U.S.C. § 1365(d) (2000) (“The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or *substantially prevailing* party, whenever the court determines such award is appropriate.”) (emphasis added).

105. *See Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983) (setting the standard for fee awards under federal civil rights statute). The Supreme Court noted that the “standards set forth in this opinion are generally applicable in all cases in which Congress has authorized an award of fees to a ‘prevailing party.’” *Id.* at 433 n.7; *see also* Thorne v. City of El Segundo, 802 F.2d 1131, 1140-41 (9th Cir. 1986) (adopting the *Hensley* approach).

106. *Hensley*, 461 U.S. at 434.

107. *Cabrales v. County of Los Angeles*, 935 F.2d 1050, 1052 (9th Cir. 1991).

108. *Hensley*, 461 U.S. at 436-37.



The district court resolved both questions in favor of the plaintiffs and imposed penalties for 16 proved violations.<sup>109</sup>

After providing some background information about the facts and procedural history, the court began its discussion of CARE's notice.

The court pointed out its *de novo* standard of review with regard to the adequacy of the notice, laid out the statutory and regulatory notice requirements, and then discussed relevant case law.<sup>110</sup> It described how the United States Supreme Court began a trend of strictly construing explicit requirements for notice in environmental statutes, but that some courts had been less demanding when it came to the *content* of otherwise valid notices.<sup>111</sup> The court discussed the Third Circuit's "overall sufficiency" approach at length.<sup>112</sup> After noting its own adherence to "the rule of 'strict compliance,'" the court indicated that the "key language in the notice regulation is the phrase 'sufficient information to permit the recipient to identify' the alleged violations and bring itself into compliance."<sup>113</sup>

The court found that CARE's notice contained everything mandated by the EPA regulation.<sup>114</sup> After enumerating the violations contained in the original notice and those added later in Appendix B, the court pointed out that CARE's notice letter provided Bosma with a "range of dates during which the violations later listed in Appendix B occurred."<sup>115</sup> The court noted that both sets of violations involved the same source (two dairies that milk cows in a confined space), the same waste material (manure), and a "small, identifiable strip" of the same outfall (a single drainage ditch).<sup>116</sup> Additionally, the court observed that Bosma's extensive history of problems with WADOE "made both parties acutely aware of the location and course of [the drainage ditch]."<sup>117</sup>

The court viewed the purpose of the sixty-day notice as providing the agencies and the defendant with information regarding the *cause* and *type* of alleged violations, so allowing CARE to include the Appendix B violations did not "undermine the purpose of the citizen suit provision or the [EPA]

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109. Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy, 305 F.3d 943, 946 (9th Cir. 2002) (citations omitted).

110. *Id.* at 949-50. This standard of review was well settled in the Ninth Circuit. *See, e.g.*, Natural Res. Def. Council v. Southwest Marine, Inc., 236 F.3d 985, 996 (9th Cir. 2000).

111. *Bosma Dairy*, 305 F.3d at 950-51.

112. *Id.* at 950-53.

113. *Id.* at 951.

114. *Id.*

115. *Id.* at 951-52.

116. *Id.* at 952.

117. *Id.*

requirements.”<sup>118</sup> Therefore, CARE’s notice provided Bosma and the relevant agencies with “sufficient detail” and the violations listed in Appendix B were “sufficiently similar” to those in the notice.<sup>119</sup>

The court then recited the standard of review in the Ninth Circuit with regard to the existence of ongoing violations: findings of fact are reviewed for clear error while conclusions of law are reviewed de novo.<sup>120</sup> The court first dealt with Bosma’s argument that no ongoing violations existed at its truck wash because it capped the drain shortly after the complaint was filed.<sup>121</sup> Because Bosma had not proven that the drain was capped, and because the district court was reluctant to believe that Bosma fixed it without notifying the person monitoring the compliance efforts, the ruling was not clearly erroneous.<sup>122</sup> Second, because residents had testified about seeing the application of manure wastewater to the field and the resulting spills into a nearby canal, the Ninth Circuit affirmed the finding of ongoing violations with respect to wastewater application.<sup>123</sup> Bosma’s argument regarding discharges to the drainage ditch met a similar fate. Given Bosma’s history of repeat violations, the poor maintenance and operation of the dairies, and evidence of further problems even after CARE filed suit, the district court’s finding of a likelihood of recurring violations was justifiable.<sup>124</sup>

The court then turned to the parties’ less meritorious arguments, addressing each in turn. First was Bosma’s argument that the joint drainage ditch was not subject to regulation under the CWA. Since the Yakima River undisputedly fell within the definition of “waters of the United States,” testimony that the drainage ditch eventually empties into the Yakima River by one of two possible routes was sufficient to uphold the district court’s ruling.<sup>125</sup>

Bosma’s next argument was that its manure storage fields were not part of the CAFO and thus not a point source covered by the CWA.<sup>126</sup> The court noted that agricultural waste is considered a pollutant under the CWA when it is discharged into water,<sup>127</sup> and that Bosma failed to show that it qualified for any agricultural point source exception.<sup>128</sup> It then cited the Second Circuit for the

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118. *Id.* at 952-53.

119. *Id.* at 952.

120. *Id.* at 953.

121. *Id.* at 953-54.

122. *Id.* at 954.

123. *Id.*

124. *Id.*

125. *Id.* at 954-55.

126. *Id.* at 955.

127. *Id.* (citing Clean Water Act § 502(6), 33 U.S.C. § 1362(6) (2000)) (“The term ‘pollutant’ means . . . agricultural waste discharged into water.”).

128. *Id.* at 955-56.

propositions that the definition of a point source should be broadly construed,<sup>129</sup> and that “liquid manure spreading operations are a point source within the meaning of [the CWA] because the farm itself falls within the definition of [a] CAFO and is not subject to the agricultural exemption.”<sup>130</sup> Given the CWA’s purpose of controlling pollutant discharges to restore and maintain the nation’s waters, the court concluded that a CAFO includes “any manure spreading vehicles, . . . manure storing fields, and ditches used to store or transfer the waste.”<sup>131</sup>

The court was similarly unimpressed with Bosma’s argument that CARE lacked standing to enforce state requirements. Finding Bosma’s permit to be a combined permit that incorporated both state and federal requirements, the Ninth Circuit went on to reaffirm its previous decision “that the CWA allows citizen suits to enforce more stringent state standards.”<sup>132</sup> Therefore, CARE had standing to enforce violations of both federal and state standards incorporated into Bosma’s permit and waste management plan.<sup>133</sup>

The court next addressed Bosma’s argument that the violations CARE successfully proved were unrelated to its unsuccessful claims, thus making a further reduction in the award appropriate.<sup>134</sup> Since CARE’s claims all shared similar facts, legal theories, and focused on “a single course of conduct by Bosma,” the court found no error in reducing the fee award by thirty percent.<sup>135</sup> CARE’s cross-appeal on two other minor issues was also denied.<sup>136</sup>

## V. COMMENT

### A. Notice

The amount of information that citizen plaintiffs are required to provide in their notice of intent to sue has proven to be a difficult issue for federal courts. Different jurisdictions have required varying degrees of specificity. Following *Hallstrom*’s rationale, the Ninth Circuit had historically taken a very strict approach with the items listed in the EPA’s notice regulation.<sup>137</sup> But *Bosma*

129. *Id.* (citing *Dague v. City of Burlington*, 935 F.2d 1343, 1354 (2d Cir. 1991)).

130. *Id.* at 955 (quoting *Concerned Area Residents for the Env’t v. Southview Farm*, 34 F.3d 114, 115 (2d Cir. 1994)) (citations omitted).

131. *Id.*

132. *Id.* at 956 (citing *Ashoff v. City of Ukiah*, 130 F.3d 409, 413 (9th Cir. 1997)).

133. *Id.*

134. *Id.*

135. *Id.*

136. The court affirmed that civil penalties were properly denied for three sets of violations which CARE simply failed to prove, and that the reduced fee award adequately reflected CARE’s partial success. *Id.* at 956-57.

137. *See supra* notes 87-88 and accompanying text.

*Dairy*, which relied heavily on the Third Circuit's more forgiving approach, arguably marks the Ninth Circuit's movement toward a more liberal and relaxed standard more favorable to citizen plaintiffs. Although the court continued to proclaim its adherence to the "rule of 'strict compliance,'" it discussed the Third Circuit's "overall sufficiency" approach at length and indicated a new focus on the "sufficient information to . . . identify the . . . violation" language in the EPA regulation.<sup>138</sup>

The basic policy behind citizen suits is to encourage enforcement of environmental laws, but Congress was also concerned with overburdening the federal courts.<sup>139</sup> Hence the notice and delay prerequisite, and the requirement of ongoing violations. Since the notice and delay requirement serves to spur either agency enforcement or voluntary compliance,<sup>140</sup> it makes sense that citizens must provide enough information to make one of these two alternatives possible. As a matter of fairness, the defendant needs to know what problems need to be solved. But imposing an insurmountable informational burden on citizen plaintiffs (without the benefit of discovery)<sup>141</sup> contravenes both the text<sup>142</sup> and the purpose<sup>143</sup> of the EPA regulation. Additional reasons for courts to be receptive to citizen suits include the equitable nature of allowing affected citizens to ensure compliance, and the fact that citizens stand to gain nothing from their efforts other than attorney fees and compliance itself.<sup>144</sup>

While the court failed to discuss the precise contents of CARE's notice, it found the notice to be proper with respect to the originally noticed violations<sup>145</sup> and then turned to the "additional violations" question. The hypothetical

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138. *Bosma Dairy*, 305 F.3d at 951.

139. *Hallstrom v. Tillamook County*, 493 U.S. 20, 29 (1989).

140. *Id.* (citing *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987)).

141. See *Craig*, *supra* note 83, at 199 (concluding that imposing strict notice requirements can undermine the notice pleading standard of the Federal Rules of Civil Procedure).

142. Recall the regulation's "sufficient information to . . . identify the . . . violation" language. 40 C.F.R. § 135.3(a) (2002).

143. As Professor *Craig* points out, legislative history in both the Senate and the House of Representatives stated that EPA regulations should not place "unnecessary" or "impossible" burdens on citizen plaintiffs. *Craig*, *supra* note 83, at 200-01. Further, recall that the purpose of the notice and delay period is to achieve (1) governmental enforcement or (2) voluntarily compliance. *Hallstrom*, 493 U.S. at 29. Neither of these requires perfect knowledge regarding every aspect of a violation. Citizens should be able to proceed as long as the government and the defendant are able to identify the violations, violators, time frame, and complainants. See 40 C.F.R. § 135.3(a) (2002).

144. See *supra* note 68 and accompanying text.

145. See *Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, 305 F.3d 943, 951 (9th Cir. 2002) ("CARE's notice included all of the information required by the EPA regulations.").

example borrowed from *Hercules* illustrates the court's simple logic that if a citizen fails to give notice for one out of five violations, "[w]hether the agency or the permit holder is informed of four or five excess discharges of pollutant 'x' will probably make no difference in a decision to bring about compliance."<sup>146</sup> One might argue that the hypothetical four out of five violations is quantitatively a very different ratio than the twelve out of forty-four at issue in *Bosma Dairy*.<sup>147</sup> However, the EPA regulation says nothing about identifying a certain number or percent of the ultimately discovered violations. The judicial construction of a percentage limitation would seem to be arbitrary and unnecessary, especially when the plaintiff successfully identifies the parameter, outfall, and time frame involved. Furthermore, it seems counterproductive to increase the burden on plaintiffs when they discover much greater environmental contamination than originally anticipated.

Requiring additional allegations of violations to involve the same time frame as violations in the notice is consistent with the text of the EPA regulation<sup>148</sup> and helps ensure that the same course of action by the polluter is targeted. Moreover, the time frame limitation is significant because it prevents citizens from piggybacking a new and different set of violations onto the original enforcement action (this would increase the likelihood of surprise). Additionally, if a longer time span is involved and a history of violations is brought to the attention of state officials, then the state might consider the violator a more serious offender and become actively involved in the enforcement efforts itself.

The "same nature" requirement is similarly associated with both the *seriousness*<sup>149</sup> of the violations and the defendant's ability to *identify*<sup>150</sup> the problem. Both of these considerations could impact either a decision to bring about compliance voluntarily, or an agency's decision to pursue enforcement action.

146. *Id.* at 953 (citing *Pub. Interest Research Group of N.J., Inc. v. Hercules, Inc.*, 50 F.3d 1239, 1248 (3d Cir. 1995)).

147. *See supra* note 23 and accompanying text.

148. Recall that the regulation requires a citizen's notice to "include sufficient information to permit the recipient to identify . . . the date or dates of such violation." 40 C.F.R. § 135.3(a) (2002).

149. Absent a "same nature" requirement, the plaintiff could include vastly different violations in its eventual lawsuit, and both the defendant and the government might fail to act because of a failure to grasp the severity of the problem.

150. Requiring violations to be of the same nature makes them easier to identify because in theory, plaintiff's complaint about pollutant X at location #1 does not necessarily inform the defendant about pollutant Y which might be discharged at location #2. Requiring readily identifiable violations also makes agency enforcement easier to pursue, and thus more likely to occur.

*Bosma Dairy* allows citizen plaintiffs some leeway with regard to the content of their notice of intent to sue by allowing them to include additional violations (of the same nature, source, and time frame) without further procedural hassle and delay.<sup>151</sup> This means defendants will be unable to rely solely on the notice letter to determine the violations for which they could be held responsible. But due to the similarity and time frame limitations,<sup>152</sup> and the Ninth Circuit's likelihood of remaining quite strict about other aspects of the EPA regulation,<sup>153</sup> it remains unlikely that any defendant will truly be taken by surprise. With one less procedural battle to deal with, hopefully citizen plaintiffs can address the merits and help ensure that the CWA is enforced.

Even when a notice letter is found inadequate, the citizen plaintiff may be able to rectify the problem by (1) providing a supplemental notice conforming to the court's expectations and (2) amending the original complaint.<sup>154</sup> Indeed, the district court would have allowed CARE to cure part of its notice in this way, but after providing supplemental notice of claims relating to a nearby location, CARE failed to amend its complaint to include those violations.<sup>155</sup> Of course, a second notice triggers a new sixty-day delay period, and by that time the citizen may lose the ability to take part in enforcement because either the defendant or the government finally decides to act. But by that time, at least, the problem is solved (in theory) and the citizen suit has fulfilled its function.

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151. See *Bosma Dairy*, 305 F.3d at 952-53.

152. The Ninth Circuit further elucidated the time frame limitation in a more recent case. See *San Francisco Baykeeper, Inc. v. Tosco Co.*, 309 F.3d 1153, 1155 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 2296 (2003) (holding "that as long as a notice letter is *reasonably specific* as to the nature and time of the alleged violations, the plaintiff has fulfilled the notice requirement") (emphasis added).

153. The Ninth Circuit continues to cite *Washington Trout* for its dismissal of a citizen suit due to failure to include the identity and contact information of each plaintiff. See *Baykeeper*, 309 F.3d at 1157-58.

154. The United States Supreme Court acknowledged that dismissing a suit for inadequate notice will not deprive plaintiffs of their day in court, since they "remain free to give notice and file their suit in compliance with the statute to enforce pertinent environmental standards." *Hallstrom v. Tillamook County*, 493 U.S. 20, 32 (1989). Indeed, it may prove wise to adopt a "better-safe-than-sorry" approach, and provide a second notice anytime the lawsuit begins to deviate from the original notice. The Third Circuit noted approval for this approach, which would allow plaintiffs to amend their original complaint and include newly-noticed items, or to consolidate the original action with a second lawsuit stemming from additional violations. See *Pub. Interest Research Group of N.J., Inc. v. Hercules, Inc.*, 50 F.3d 1239, 1252 n.15 (3d Cir. 1995).

155. See *Cnty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, 65 F. Supp. 2d 1129, 1152-53 (E.D. Wash. 1999), *aff'd*, 305 F.3d 943 (9th Cir. 2002).

### B. Other Enforcement Issues

As CAFOs attempt to avoid environmental liability, the exact boundaries of the terms “waters of the United States” and “point source” continue to evolve. *Bosma Dairy* reaffirms the notion that irrigation canals and drainage ditches can be subject to the CWA when they empty into other waters of the United States.<sup>156</sup> While it is beyond dispute that CAFOs are point sources generally, the precise extent of that coverage has not been fully explored. For instance, at some large scale operations it may be difficult to determine where the “containment area” ends and the crop production fields (which may meet an agricultural exemption and be considered a non-point source) begin.<sup>157</sup>

The Ninth Circuit left open the question as to whether a more distant part of the CAFO could fall within an agricultural exemption.<sup>158</sup> The district court’s opinion had rejected the broadest possible interpretation of CAFO boundaries, noting that the point source exception for irrigated runoff must apply to something (namely, crop production fields).<sup>159</sup> Its formulation would, however, consider any discharges caused by wastewater overapplication to be CWA violations.<sup>160</sup> The Ninth Circuit was wise to avoid elaborating on this subject at length in *Bosma Dairy*, given the amount of evidence regarding Bosma’s poor land application practices. The court did leave the door open for future argument, but it adopted the Second Circuit’s broad interpretation of the term “point source” and properly left the burden on Bosma to show that it met an exception.<sup>161</sup> Even so, the whole argument could become much less important depending on how the EPA’s new waste management regulations are applied.<sup>162</sup> But for now, at least in the Ninth Circuit, manure storage fields and “ditches used to store or transfer the waste” are included as part of the CAFO.<sup>163</sup>

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156. *Bosma Dairy*, 305 F.3d at 954-55.

157. See *Ninth Circuit Update: CAFOs and Citizen Suits Under the CWA*, Perkins Coie, at <http://www.perkinscoie.com/content/ren/updates/env/cafos.htm> (last visited Oct. 4, 2003) (explaining impacts of *Bosma Dairy*).

158. See *Bosma Dairy*, 305 F.3d at 955-56 (stating that Bosma merely “failed to show that it falls within any of the agricultural point source exceptions”).

159. *Bosma Dairy*, 65 F. Supp. 2d at 1133 (citing Clean Water Act § 502(14), 33 U.S.C. § 1362(14) (2000)).

160. *Id.*

161. *Bosma Dairy*, 305 F.3d at 955-56.

162. See Standards for CAFOs, 68 Fed. Reg. 7176 (Feb. 12, 2003) (requiring certain CAFOs to adopt nutrient management plans); 40 C.F.R. § 122.42(e)(1) (2003) (requiring nutrient management plans to be included in CAFO permits); 40 C.F.R. § 412.4 (2003) (specifying best management practices for the land application of manure and wastewater).

163. *Bosma Dairy*, 305 F.3d at 955.

Although the court only addressed the issue briefly, it reaffirmed the notion that citizens can enforce state standards in federal court if they are incorporated into a combined permit.<sup>164</sup> Some might consider this to be “piggybacking” more stringent state standards onto federal permits, especially if state law does not provide for citizen suits as a means of enforcement.<sup>165</sup> But the ability to enforce state standards under the CWA is in harmony with its scheme of federal-state partnership<sup>166</sup> and cooperation, and is further supported by precedent.<sup>167</sup>

The attorney fees provision is an essential component of citizen suits that often makes enforcement possible. At the same time, courts have recognized the unfairness of giving full awards to largely unsuccessful plaintiffs or completely preventing awards for plaintiffs who merely fail to prove a few of their allegations.<sup>168</sup> In *Bosma Dairy*, the Ninth Circuit appropriately deferred to the district judge’s assessment that CARE’s limited success warranted a thirty percent fee reduction.<sup>169</sup> Importantly, this reduction does not correspond with the percentage of CARE’s allegations it successfully proved.<sup>170</sup> Especially in citizen suits where ongoing violations are required, success is not measured in terms of the defendant’s ultimate liability, but rather in terms of the cleanup actually achieved.

## VI. CONCLUSION

The factual setting of *Bosma Dairy* illustrates the need for the CWA’s citizen suit provision. Despite Bosma’s numerous violations and the state agency’s internal requests for enforcement action, bringing Bosma into compliance simply never made the priority list of a state that historically “lacked the resources to be proactive.”<sup>171</sup> Because of *Bosma Dairy*, citizen plaintiffs in CWA lawsuits are more likely to avoid procedural struggles regarding the

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164. *Id.* at 956.

165. See *Ninth Circuit Update*, *supra* note 157; *CAFOs, Liabilities, and Citizen Suits Under the CWA*, Marten Law Group, at [http://www.martenlaw.com/nrd\\_content\\_block.php3?articleid=488](http://www.martenlaw.com/nrd_content_block.php3?articleid=488) (last visited Mar. 6, 2003) (discussing impacts of *Bosma Dairy*).

166. See *supra* notes 60-62 and accompanying text.

167. See *supra* note 67.

168. See *supra* notes 104-08 and accompanying text.

169. See *Bosma Dairy*, 305 F.3d at 956.

170. As stated by the district court, “strict proportionality between relief obtained and attorney fees is not required.” *Cmty. Ass’n for Restoration of the Env’t v. Henry Bosma Dairy*, No. CY-98-3011, 2001 WL 1704240, at \*19 (E.D. Wash. Feb. 27, 2001), *aff’d*, 305 F.3d 943 (9th Cir. 2002) (citing *Riverside v. Riviera*, 477 U.S. 561, 574 (1986)).

171. See *Cmty. Ass’n for Restoration of the Env’t v. Henry Bosma Dairy*, 65 F. Supp. 2d 1129, 1149 (E.D. Wash. 1999), *aff’d*, 305 F.3d 943 (9th Cir. 2002).



content of their notice of intent to sue. The Ninth Circuit's opinion may also suggest a more sympathetic view toward citizen suits in general, and thus potentially increased liability for CAFOs. Although CAFO owners and operators may not appreciate such a trend, any impediment on their ability to contaminate their surroundings<sup>172</sup> is a small victory for both the environment and those who live nearby. And in parts of the nation where many of these facilities have chosen to locate, there is much at stake.

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172. See, e.g., *id.* at 1145 (over a two year period, water quality samples ranged between 4.7 and 650 times the allowable level for fecal coliform at a site where discharges flowed from Bosma and another dairy); *Corporate Hogs at the Public Trough: Premium Standard Farms, Missouri*, 1999 Sierra Club Report, at <http://www.sierraclub.org/factoryfarms/report99/premium.asp> (last visited Nov. 24, 2003) (describing one company's impact on three rural counties in Missouri); Mike Polioudakis, *AFOs and CAFOs*, Auburn University, at <http://www.ag.auburn.edu/BC/P5EnvFactsCAFO.html> (last visited Mar. 7, 2003) (noting the foul odors resulting from land application of animal manure). As one professor at the University of Missouri-Columbia has noted: "air and water are ambient, and belong to all (public goods) and not to the first to foul them with pollution from concentrated animal feeding operations. Neighbors to CAFOs should not have to 'put up and shut up' with neighboring CAFOs which pollute the common waters and air." Stephen F. Matthews, *Ag Production Contracts: Freedom to Contract, Public & Private Goods*, Missouri Agricultural Law Center, University of Missouri-Columbia, at [http://www.ssu.agri.missouri.edu/faculty/Smatthews/ag\\_production\\_contracts.htm](http://www.ssu.agri.missouri.edu/faculty/Smatthews/ag_production_contracts.htm) (Oct. 15, 2001) (discussing proposals for Missouri legislation and the EPA regulation).