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### Recommended Citation

Gardenswartz, Hannah (2018) "Can Courts Stop Citizens from Prosecuting Criminal Cases Under the Clean Water Act?," *Sustainable Development Law & Policy*: Vol. 19 : Iss. 1 , Article 3.  
Available at: <https://digitalcommons.wcl.american.edu/sdlp/vol19/iss1/3>

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# CAN COURTS STOP CITIZENS FROM PROSECUTING CRIMINAL CASES UNDER THE CLEAN WATER ACT?

Hannah Gardenswartz\*

The citizen suit provision in the Clean Air Act<sup>1</sup> was copied almost verbatim into the Clean Water Act, with one key change:

If the Administrator or State has commenced and is diligently prosecuting a civil *or criminal* action in a court of the United States or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any person may intervene as a matter of right.<sup>2</sup>

The addition of “or criminal” opens up a new possibility for intervention under the Clean Water Act that was not available under the Clean Air Act. This Article argues that citizens have a right to intervene in criminal actions brought by the government under the Clean Water Act; however, doing so would be so disruptive to the penal system that a court could not allow intervention in this context.

## I. HISTORY OF THE CLEAN AIR ACT AND CLEAN WATER ACT

The Clean Air Act incorporated the first modern citizen suit provision in 1970. Since then, almost all major environmental statutes—including the Clean Water Act—have included citizen suit provisions.<sup>3</sup> The citizen suit provisions were designed so that if the government should fail to bring a case, the public is guaranteed the right to seek enforcement of the statute.<sup>4</sup> The Senate Committee on Public Works specifically allowed for intervention by both the public – at the court’s discretion – and the Environmental Protection Agency’s (EPA) Administrator.<sup>5</sup> The House of Representative’s bill did not include a provision for citizen suits, but the Senate amendment authorized citizen suits against violators, government agencies, and the EPA Administrator.<sup>6</sup> In the end, Congress knew that the provision for citizen suits was far-reaching, but the provision was included anyway because it was necessary to ensure that the Clean Air Act was enforced.<sup>7</sup>

The citizen suit provisions of the Clean Water Act were expressly modeled on the Clean Air Act, but with the unusual addition that citizens may intervene in criminal cases.<sup>8</sup> However, the legislative history is silent on why Congress chose to modify the Clean Air Act citizen suit provision to potentially allow citizen intervention in criminal cases.<sup>9</sup> Public interest groups took advantage of the ability to participate in the enforcement of the Clean Water Act, and private civil enforcement quickly exceeded federal civil enforcement.<sup>10</sup> In some years private Clean Water Act litigation has equaled overall civil enforcement

by both the state and federal governments.<sup>11</sup> While the doctrine of standing has been used to limit private litigation,<sup>12</sup> the citizen suit provisions and the ability to intervene in cases has pushed public participation in Clean Water Act civil enforcement action. Because of a large amount of public participation in the civil realm, it is surprising that there are no cases where citizens have intervened in criminal cases.

## II. RULES GOVERNING INTERVENTION

If interventions in criminal cases were to be allowed, the procedure for doing so would be modeled on the Federal Rules of Civil Procedure (“Civil Rules”) and Federal Rules of Criminal Procedure (“Criminal Rules”). The court would be able to interpret the rules for intervenors and the rules for victims together to create a procedure for citizen intervention in criminal cases.

The Civil Rules already provide the procedure for intervenors. Civil Rule 24(a)(1) requires that courts *must* permit intervention if a federal statute gives citizens the unconditional right.<sup>13</sup> A party has a right to intervene only if the intervenor shows timeliness, an interest regarding the action, a practical impairment of the party’s ability to protect that interest, and an inadequate representation by the parties to the suit.<sup>14</sup>

Under the Criminal Rules, victims have a right to participate in the prosecution of a crime.<sup>15</sup> Victims have a right to be given “reasonable, accurate, and timely notice” of public proceedings in the case and be heard at public hearings regarding release, pleas, or sentencing.<sup>16</sup>

If intervenors are allowed in criminal Clean Water Act cases, it will be difficult for the intervening party to show inadequate representation by the prosecution. Once the intervenor clears that hurdle, the participation allowed could be similar to the participation rights of victims.<sup>17</sup>

## III. WHY CITIZENS CANNOT INTERVENE IN CRIMINAL CASES

The difference between civil cases and criminal cases is more likely to be the factor that allows for intervention in one context and precludes it in the other. The government brings criminal cases on behalf of the people<sup>18</sup>—this is one of the defining elements of how criminal cases are prosecuted.<sup>19</sup> Criminal cases are treated as offenses against the community at large, and the *community* then brings the case, not the victim.<sup>20</sup> Under the Clean Water Act, citizens are only able to intervene in cases being brought by the government because the case centers on an

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offense against the community at large.<sup>21</sup> In this way, the civil environmental law cases are similar in purpose to criminal law cases.

One of the biggest distinctions between civil cases and criminal law cases is the type of remedy or penalty that may be sought.<sup>22</sup> In criminal law, the remedy may be punitive and may include incarceration as a punishment for behavior the community deems to be wrong.<sup>23</sup> In Clean Water Act citizen suits, citizens are only allowed to seek injunctive relief for ongoing violations.<sup>24</sup> Because citizens are strictly limited in what remedies they are allowed to seek, allowing them to use the criminal justice system would be inconsistent with the Court's precedent.

## IV. CONCLUSION

Legislative history shows that the purpose of the Clean Air Act and Clean Water Act citizen suit provisions is to give citizens the ability to bring cases when the government fails to do so. The legislative history of the Clean Water Act does not directly address why Congress choose to allow intervention in the criminal context, yet the plain meaning of the Act directly states that citizens would have a right to intervene in criminal cases. Further, the legislative and judiciary branches already provide a specific set of rules that require the courts to give citizens the right to intervene in the civil cases. Therefore, on plain reading of the statutes and legislative history, citizens may intervene in Clean Water Act criminal cases. While the statute's purpose aligns with that of the criminal system, courts could not allow citizens to intervene and use the penalties of the criminal justice system.



## ENDNOTES

<sup>1</sup> 42 U.S.C. § 7604(b)(1)(B) (2012) ("If the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any person may intervene as a matter of right.").

<sup>2</sup> 33 U.S.C. § 1365(b)(1)(B) (2012) (emphasis added).

<sup>3</sup> Mark Seidenfeld & Janna Satz Nugent, "The Friendship of the People: Citizen Participation in Environmental Enforcement," 73 GEO. WASH. L. REV. 269, 283-84 (2005).

<sup>4</sup> S. Rep. No. 91-1196 at 21 (Sept. 17, 1970) (guaranteeing the public the right to seek "vigorous enforcement," should the federal, state, or local governments fail to bring a case); see also *Friends of the Earth v. Carey*, 535 F.2d 165, 173 (2d Cir. 1976) ("[T]he very purpose of the citizens' liberal right of action is to stir slumbering agencies and to circumvent bureaucratic inaction that interferes with the scheduled satisfaction of the federal air quality goals.").

<sup>5</sup> S. Rep. No. 91-1196 at 56 (Sept. 17, 1970) ("Where the Secretary is not automatically a party to the action, he must intervene to present evidence and argument on the merits of the petition. Others may also intervene at the court's discretion.").

<sup>6</sup> See Conf. Rep. No. 91-1783 at 55-56 (Dec. 17, 1970) (retaining the Senate's citizen suit provision during the reconciliation process, but with limitations as to the cases that could be brought by citizens against the EPA Administrator).

<sup>7</sup> See 91 Cong. Rec. 19223 (June 10, 1970); S. Rep. No. 91-1196 at 36-39 (Sept. 17, 1970).

<sup>8</sup> *Nat. Resources Def. Council v. Train*, 510 F.2d 692, 699 (D.C. Cir. 1974) ("The citizen suits provision of section 505 was explicitly modeled on the provision enacted in the Clean Air Amendments of 1970.").

<sup>9</sup> See, e.g., S. Rep. No. 92-414 at 79-82 (discussing the citizen suit provision but not mentioning citizen intervention in criminal cases).

<sup>10</sup> Seidenfeld & Nugent, *supra* note 3, at 285.

<sup>11</sup> *Id.*

<sup>12</sup> See, e.g., *Friends of the Earth v. Laidlaw Envtl. Serv., Inc.*, 528 U.S. 167, 184-88 (2000) (limiting Article III standing to injury to the plaintiff, not injury to the environment); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 108-10 (1998) (finding that because the citizen group alleges only a past

infraction, injunctive relief will not redress the injury, and that because the relief sought would not remedy the alleged injury, the citizens lack standing).

<sup>13</sup> FED. R. CIV. P. 24(a)(1).

<sup>14</sup> See, e.g., *United States v. Oregon*, 913 F.2d 576, 587 (9th Cir. 1990).

<sup>15</sup> 18 U.S.C. § 3771 (2012); FED. R. CRIM. P. 60.

<sup>16</sup> FED. R. CRIM. P. 60(a)(1), (a)(3).

<sup>17</sup> The Crime Victims' Rights Act defines "crime victim" as "a person directly or proximately harmed as the result of the commission of a Federal offense." 18 U.S.C. § 3771(e) (2012). However, an environmental crime may be a crime without a victim or the party with interest seeking to may not be the crime victim. As such, the normal rules for victim participation would not be applicable to the party seeking to intervene.

<sup>18</sup> Samuel W. Buell, *Why Do Prosecutors Say Anything? The Case of Corporate Crime*, 96 N.C.L. REV. 823, 840 (2018) ("[P]rosecutors seem to share an abiding and reasonable belief that . . . their 'client' is the public . . . Prosecutors act with a fiduciary-like concept of their relationship to the communities in which they work—'your officials know your best interests' . . .").

<sup>19</sup> But see *id.* (noting that until the 19th century, victims often had the burden of directly prosecuting criminal cases, and, though uncommon, victims are still sometimes allowed to privately prosecute cases in England).

<sup>20</sup> See *Criminal Law*, BLACK'S LAW DICTIONARY (10TH ED. 2014) (defining criminal law as "the body of law defining offenses against the community at large").

<sup>21</sup> 33 U.S.C. § 1365(b)(1)(B) (2012).

<sup>22</sup> See Henry M. Hart Jr., *The Aims of Criminal Law*, 23 LAW AND CONTEMP. PROBS., 401, 404 (1958) ("What distinguishes a criminal from a civil sanction and all that distinguishes it, it is ventured, is the judgment of community condemnation which accompanies and justifies its imposition.").

<sup>23</sup> See *id.* at 405 (defining crime as "conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community.").

<sup>24</sup> *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59 (1987); *United States v. City of Toledo*, 867 F. Supp. 595, 597 (N.D. Ohio 1994). But see *Friends of the Earth v. Laidlaw Envtl. Serv., Inc.*, 528 U.S. 167, 181 (2000) (holding that if the defendant continues to violate a statute after the citizen suit has commenced, then the plaintiff has standing to sue for penalties to be paid the U.S. because of the deterrent effect of those penalties).