



Fall 1991

Consent Judgement in Environmental Lawsuits: More Than You Thought

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Recommended Citation

Mitchel S. Jofuku, *Consent Judgement in Environmental Lawsuits: More Than You Thought*, 31 Nat. Resources J. 921 (1991).

Available at: <https://digitalrepository.unm.edu/nrj/vol31/iss4/11>

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NOTE

CONSENT JUDGMENTS IN ENVIRONMENTAL LAWSUITS: MORE THAN YOU THOUGHT?

The law of consent judgments is noteworthy for attorneys who settle environmental citizen suits because, as the Ninth Circuit demonstrated in *Sierra Club v. Electronic Controls Design, Inc.*,¹ courts use a liberal standard to approve consent judgments in these cases. This standard allows consent judgments that fund efforts by private plaintiffs that accomplish objectives set forth by environmental statutes. When the courts and government regulators approve of such judgments, they recognize that citizen plaintiffs have a role in preserving our natural resources, such as water, air, and endangered species, that goes beyond deterring polluters.

STATEMENT OF THE CASE

In February 1987, the Sierra Club filed a complaint in federal district court against Electronic Controls Design, Inc. (ECD) under the citizen's suit provision of the Clean Water Act.² ECD owns and operates a printed circuit board manufacturing plant near the Milk Creek which feeds the Molalla River in northwest Oregon.³ The Sierra Club alleged that ECD was violating the terms of its National Pollution Discharge Elimination System (NPDES)⁴ permit by discharging pollutants from its circuit board plant into Milk Creek.⁵ Section 301(a) of the Clean Water Act⁶ prohibits such discharge. The Sierra Club asked for declaratory and injunctive relief, litigation costs, and that civil penalties be imposed.⁷

The parties settled their case before trial. After the Sierra Club filed its suit, ECD improved its NPDES permit compliance.⁸ Consequently, the parties submitted a settlement to the district court for entry as a consent judgment.⁹ ECD agreed to pay the Sierra Club \$45,000 to be distributed to other private environmental organizations.¹⁰ ECD also agreed to make

1. 909 F.2d 1350 (9th Cir. 1990).

2. 33 U.S.C. § 1365(c) (1988).

3. *Sierra Club, Inc. v. Electronic Controls Design, Inc.*, 703 F. Supp. 875, 876 (D. Or. 1989).

4. 33 U.S.C. § 1342 (1988).

5. *Sierra Club*, 703 F. Supp. at 876.

6. 33 U.S.C. § 1342 (1988).

7. *Sierra Club*, 703 F. Supp. at 876.

8. *Id.*

9. *Id.*

10. *Id.* (the Sierra Club keeps none of the \$45,000 for itself and the money is to support projects dedicated to maintaining and protecting water quality).

additional payments (liquidated damages) to the Sierra Club if ECD violated its NPDES permit between September 1, 1988 and June 1, 1989.¹¹

The United States Department of Justice objected to the proposed consent judgment.¹² The Department of Justice argued that the judgment violated the Clean Water Act by directing civil penalties (the settlement payments) to private organizations instead of to the federal Treasury.¹³ The district court agreed with the Department of Justice and refused to enter the consent judgment.¹⁴ The court encouraged the parties to amend the proposed judgment so that the payments would go to the Oregon Water Quality Program, an official state program.¹⁵ Instead of amending the proposed judgment, the Sierra Club appealed the decision.¹⁶

This casenote focuses on one issue from the appeal. Can a consent judgment in a Clean Water Act citizen suit direct the defendant to pay funds only to the private plaintiff and not to the U.S. Treasury?¹⁷ This issue assumes that such payments are not civil penalties and the Ninth Circuit validated that assumption.¹⁸ The Ninth Circuit concluded the proposed consent judgment should be entered as the judgment met the legal requirements to be valid.¹⁹ The appellate court remanded the case to the district court with instruction to enter the consent judgment.²⁰

THE LAW OF CONSENT JUDGMENTS

A consent judgment²¹ is an alternative for parties who wish to settle their case but want a resolution more easily enforceable than an out of court settlement.²² A consent judgment is a settlement that a court has

11. *Id.*

12. *Sierra Club*, 703 F. Supp. at 876. ("No consent judgment shall be entered in an action in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator." 33 U.S.C. § 1365(c)3 (1988)).

13. *Sierra Club*, 703 F. Supp. at 876. The government also argued that the settlement directed money to projects which did not satisfy the Environmental Protection Agency's settlement policy. Brief of the United States as Amicus Curiae at 20-27, *Sierra Club, Inc. v. Electronic Controls Design, Inc.*, 909 F. 2d 1350 (9th Cir. 1990) (No. 89-35120) [hereinafter Amicus Brief]. The Ninth Circuit deemed the government's argument over the settlement policy as immaterial to the case. *Sierra Club, Inc. v. Electronic Controls Design, Inc.*, 909 F.2d 1350, 1354 n.6 (9th Cir. 1990).

14. *Sierra Club*, 703 F. Supp. at 876-879.

15. *Id.* at 879. The court noted that other district courts have entered consent judgments where civil penalties were paid to state water pollution funds. *Id.*

16. *Sierra Club*, 909 F.2d 1350. The Department of Justice did not intervene but appeared as amicus in the appeal; ECD did not argue in the appeal as it approved of the settlement. *Id.* at 1352.

17. *Id.* at 1355.

18. *Id.* at 1354 (civil penalties must go to the Treasury, not private entities).

19. *Id.* at 1356.

20. *Id.* at 1356.

21. The terms judgment and decree are synonymous for purposes of this note. Fed. R. Civ. P. 54(a).

22. Note, *The Consent Judgment as an Instrument of Compromise and Settlement*, 72 Harv. L. Rev. 1314, 1314-16 (1959).

entered, at the parties' consent, as a judgment.²³ Consent judgments combine aspects of private contracts and judicial decrees.²⁴

Once entered, consent judgments are difficult to modify because courts prefer the balance of equities as struck by the parties' own bargain.²⁵ Consent judgments are easier to enforce than private contracts as contempt citations are available.²⁶ But like contracts, consent judgments rely on the parties' mutual consent for their legal force and are only entered when both parties agree to the judgment.²⁷ Consent judgments also have the effect of *res judicata*²⁸ and, sometimes, collateral estoppel.²⁹

Courts apply a liberal standard when assessing proposed consent judgments.³⁰ Consent judgments may grant broader relief than a judgment after trial.³¹ For example, parties might agree to specific performance as part of a consent judgment when the court could only grant damages after trial. Courts "need not inquire into the precise legal rights of the parties nor reach and resolve the merits of the claims or controversy. . . ."³²

Consent judgments must satisfy three requirements.³³ First, the judgment must be within the scope of the pleadings; this requirement is easily satisfied.³⁴ Second, judgments must further the objective of the law from which the complaint is based.³⁵ This is the least precise of the requirements. Consent judgments need not work precisely to meet the objective of the relevant law, just come reasonably close.³⁶ Finally, judgments

23. *Id.*

24. *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986) (citing to 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice*, ¶0.409[5], p. 331 (1984)).

25. Jost, *From Swift to Stotts and Beyond: Modification of Injunction in the Federal Courts*, 64 *Tex. L. Rev.* 1101, 1129-31 (1986).

26. *Local No. 93, Int'l Ass'n of Firefighters*, 478 U.S. at 524 n.13.

27. *Id.* at 522 (citing to *United States v. Ward Baking Co.*, 376 U.S. 327 (1964) (cannot enter consent judgment where only one party has consented as the court's authority to enter such a judgment springs from all parties' consent)). Both parties in *Sierra Club* wanted the consent judgment and thus, consent was not an issue.

28. 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice*, ¶0.409[5], p. 333 (1991).

29. *Id.* at ¶0.433[3], pp. 799-816.

30. Branfman, *Antitrust Consent Decrees-A Review and Evaluation of the First Seven Years Under the Antitrust Procedures and Penalties Act*, 27 *Antitrust Bull.* 303, 348-52 (1982); Scharzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 *Duke L.J.* 887, 908.

31. *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 526 (1986).

32. *Citizens for a Better Environment v. Gorsuch*, 728 F.2d 1117, 1126 (D.C. Cir. 1983) (citing to *Metropolitan Housing Dev. Corp. v. Village of Arlington Heights*, 616 F.2d 1006, 1014 (7th Cir. 1980)).

33. The initial issue of whether a court has jurisdiction to enter a consent judgment is not discussed. This casenote assumes jurisdiction exists.

34. *Local No. 93, Int'l Ass'n of Firefighters*, 478 U.S. at 526 (citing to *Pacific R.R. Co. v. Ketchum*, 101 U.S. 289, 297 (1880) (for consent judgments, parties may agree to any matters that are in reference to the subject matter of their litigation)).

35. *Local No. 93, Int'l Ass'n of Firefighters*, 478 U.S. at 526.

36. *EEOC v. Safeway Stores, Inc.*, 611 F.2d 795 (10th Cir. 1979) (action under Title VII of the Civil Rights Act of 1964). Title VII has the purpose of securing relief for past and possible future

cannot violate the law.³⁷ Overall, courts assess proposed consent judgments by whether they are "fair, adequate, reasonable and appropriate under the particular facts. . . ."³⁸

ANALYSIS OF THE CASE

Sierra Club illustrates the liberal standard courts use to review consent judgments. The Ninth Circuit found the three requirements for a valid consent judgment not difficult to satisfy. This result is consistent with the ordinary law of consent judgments.

The consent judgment met the problem stated by the complaint and reflected the complaint.³⁹ The consent judgment and the *Sierra Club's* complaint sprang from the same event, ECD discharging pollutants from its manufacturing plant.⁴⁰ Thus, the consent judgment fell within the scope of the pleadings.⁴¹

The consent judgment satisfied the second requirement of valid consent judgments because the judgment furthered the Clean Water Act's objective.⁴² In the consent judgment, ECD agreed to comply with its NPDES permit.⁴³ NPDES permit compliance specifically furthers the Act's objective of reducing and eliminating pollution.⁴⁴ But the appellate court also noted that the judgment furthered the Act's objective by funding projects of private environmental organizations.⁴⁵

employment discrimination. *Id.* at 799. The court upheld the consent judgment as sufficiently satisfying the purpose of Title VII. *Id.* The consent judgment provided for no discrimination in future personnel actions by Safeway but did not address past discrimination. *Id.* The court held that consent judgments may vary from statutory purposes to some degree to facilitate voluntary settlement. *Id.* See also *Gorsuch*, 718 F.2d at 1125. D.C. Circuit rejected attack on consent judgment that had more criteria for toxic waste regulations than required by the Clean Water Act. *Id.* The court noted that the judgment was consistent with the purpose of the Act, that purpose being to curb water pollution. *Id.*

37. *Local No. 93, Int'l Ass'n of Firefighters*, 478 U.S. at 527 (parties may not agree "to take action that conflicts with or violates the statute [that is the source of their dispute]").

38. *Citizens for a Better Environment v. Gorsuch*, 728 F.2d 1117, 1126 (D.C. Cir. 1983) (citing to *Metropolitan Housing Dev. Corp. v. Village of Arlington Heights*, 616 F.2d 1006, 1014 (7th Cir. 1980)).

39. *Sierra Club, Inc. v. Electronic Controls Design, Inc.*, 909 F.2d 1350, 1355 (9th Cir. 1990).

40. *Id.*

41. *Id.*

42. *Id.* Recall that the Act's stated objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (1988).

43. *Sierra Club*, 909 F.2d at 1355.

44. *Id.* (citing to *Sierra Club, Inc. v. Electronic Controls Design, Inc.*, 703 F. Supp. 875, 878 (D. Or. 1989)). NPDES permits are part of the Act's regulatory scheme to achieve the Act's objective. See *Committee For Consideration of Jones Falls Sewage System v. Train*, 539 F.2d 1006, 1007-08 (4th Cir. 1976).

45. *Sierra Club*, 909 F.2d at 1355. The projects are all in Oregon. *Sierra Club's Opening Brief On Appeal* at 7 n.3, *Sierra Club, Inc. v. Electronic Controls Design, Inc.*, 909 F.2d 1350 (9th Cir. 1990) (No. 89-35120) [hereinafter *Opening Brief*].

The judgment, by an objective standard, is not specific in how the projects further the Act's objective. The judgment describes the projects as "future activities to maintain and improve water quality in Oregon . . . [acquiring] wetlands in Oregon . . . [funding] public education and projects to maintain and improve water quality in Oregon . . . [and] . . . future activities to maintain and protect surface and groundwater quality in Oregon."⁴⁶ Yet, the Ninth Circuit accepted these projects. Thus, a consent judgment can act sufficiently to further a statutory objective through private projects that *generally* help achieve that objective.

A liberal standard for whether a consent judgment furthers a statutory objective is reasonable. The statutory objective in *Sierra Club* is broad because activities of private or governmental entities can work to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."⁴⁷ The issue of a valid consent judgment was reviewed for abuse of discretion.⁴⁸ This standard of review reflects the Ninth Circuit's acceptance of a liberal standard. The Ninth Circuit also noted that the Act's legislative history favors settling cases with funds directly put towards environmental protection.⁴⁹

The Ninth Circuit examined the Act's legislative history in determining that the consent judgment did not violate the Act by directing funds straight to private organizations. The Ninth Circuit found sparse, but positive, congressional intent that consent judgments in Clean Water Act suits need not direct funds to the U.S. Treasury.⁵⁰ The Act does not expressly restrict consent judgments regarding any transfer of funds.

Before 1987, the Act made no mention of consent judgments.⁵¹ In 1987, Congress amended the Act to require that the Attorney General have an opportunity to review all proposed consent judgments.⁵² The amendment did not specify that private organizations could not receive money in consent judgments.⁵³ The Ninth Circuit concluded from this sparse legislative history that the Act allows consent judgments that direct money only to private environmental organizations.⁵⁴

46. Opening Brief, *supra* note 45, at 25 n.15.

47. 33 U.S.C. § 1251(a) (1988) (stated objective of the Clean Water Act).

48. *Sierra Club*, 909 F.2d at 1356.

49. *Sierra Club, Inc. v. Electronic Controls Design, Inc.*, 703 F. Supp. 875, 877 (D. Or. 1989) (citing to H.R. Conf. Rep. No. 1004, 99th Cong. 2d Sess. 139 (1986), reprinted in 132 Cong. Rec. H10,571 (daily ed. Oct. 15, 1986), noting settlements that "preserve the punitive nature of enforcement actions while putting the funds collected to use on behalf of environmental protection" are to be encouraged).

50. *Sierra Club*, 909 F.2d at 1356.

51. Water Quality Act of 1987, Pub. L. No. 100-4, § at 7, 101 Stat. 7, 75 (codified at 33 U.S.C. § 1365(c)3 (1988)).

52. *Id.*

53. *Id.*

54. *Sierra Club*, 909 F.2d at 1356.

ANALYSIS OF OTHER ENVIRONMENTAL STATUTES

Sierra Club will affect consent judgments in citizen suits under other environmental statutes as well. Comparing some other environmental statutes to the Clean Water Act, two similarities arise: breadth of objective and lack of provisions barring consent judgments that direct all funds paid under the judgment to private plaintiffs. These similarities involve the key issues⁵⁵ that led the Ninth Circuit to uphold the consent judgment in *Sierra Club*: whether the judgments further statutory objectives and whether the judgments violate the statutes.

Objectives of Other Environmental Statutes

In *Sierra Club*, the Ninth Circuit found that a valid consent judgment may include methods that do not work precisely to further a statutory objective. Furthermore, a liberal standard for consent judgments is appropriate when the statutory objective is broad. Thus, for an environmental protection statute similarly broad in objective as the Clean Water Act, a consent judgment similar to that in *Sierra Club* would be possible.

The objectives of the Clean Air Act, Endangered Species Act, Resource Recovery and Conservation Act (RCRA), and Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), are all broad like the Clean Water Act. The Clean Air Act's objective is to protect public health through the abatement of air pollution.⁵⁶ The objectives of the Endangered Species Act are to conserve endangered wild species⁵⁷ and protect their habitats.⁵⁸ RCRA's stated objectives are to promote "the protection of health and the environment and to conserve valuable material and energy resources."⁵⁹ CERCLA's objective is to make those responsible for improper past hazardous waste disposal that causes health and environmental problems bear the costs of cleaning up such disposal.⁶⁰

The Clean Air Act, RCRA, and the Endangered Species Act, like the Clean Water Act, have objectives broad enough so that activities by private entities can address those objectives. CERCLA's objective can be addressed by private entities and CERCLA expressly seeks to ensure funding of activities that clean up the air, water, and land.

55. The first requirement of the settlement being within the scope of the pleadings is assumed to be satisfied here. This first requirement is quite mechanical compared to the other two requirements.

56. See *Lloyd A. Fry Roofing Co. v. United States E.P.A.*, 415 F. Supp. 799, 805 (W.D. Mo. 1976).

57. See *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 181-85 (1978).

58. See *Palila v. Hawaii Dep't of Land and Natural Resources*, 649 F. Supp. 1071, 1076 (D. Haw. 1986), *aff'd*, 852 F.2d 1106 (9th Cir. 1988).

59. 42 U.S.C. § 6902(a) (1988).

60. See *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986).

The legislative history of all four statutes supports the propriety of awarding funds directly for protecting natural resources. The Clean Air Act's legislative history includes written testimony that voluntary settlements should be encouraged in citizen suits.⁶¹ This testimony shows that Congress knew the citizen suit provision would give rise to actions that might be resolved in consent judgments. Still, Congress chose not to enact restrictions on such judgments. The Clean Air Act has also been amended recently so that funds can be more directly channeled to projects that address air pollution.⁶²

RCRA's legislative history shows that Congress favored strengthening citizen enforcement.⁶³ At the same time, Congress did not place any restrictions on consent judgments in RCRA citizen suits.⁶⁴ This strengthening of citizen suits and simultaneously not restricting consent judgments is similar to the Clean Water Act legislative history that validated the *Sierra Club* consent judgment.⁶⁵

CERCLA's legislative history shows congressional intent similar to that of RCRA.⁶⁶ In addition, Congress clearly preferred settling government enforcement actions and emphasizing expediting clean up actions.⁶⁷ This preference is significant when combined with the intent that there

61. See *Hearings Before Subcommittees on Air and Water Pollution of the Committee on Public Works United States Senate on S. 3229, S. 3466, and S. 3546*, 91st Cong., 2d Sess. 1590 (1970).

62. Comment, *Polluter-Financed Environmentally Beneficial Expenditures: Effective Use or Improper Abuse of Citizen Suits Under the Clean Water Act?*, 21 *Env'tl. L.* 176, 206-07 (1991) [hereinafter Comment]. Congress created a special fund for civil penalties assessed in citizen suits under the Clean Air Act. In lieu of having civil penalties paid to the special fund, courts may direct civil penalty funds to "beneficial mitigation projects which are consistent with . . . [the Clean Air Act] . . . and enhance the public health or the environment." Clean Air Act Amendments of 1990, Pub. L. 101-549, § 707(b), 104 Stat. 2399, 2682-83 (1990) (to be codified at 42 U.S.C. § 7604(g)).

63. See Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, § 401(b)2, 98 Stat. 3221, 3269 (1984) (codified at 42 U.S.C. § 6972(a) (1988)) [hereinafter Pub. L. No. 98-616]. The purpose of the 1984 amendments is "to make . . . [changes] . . . in the Act in order to assure adequate protection of public health and the environment." H.R. Rep. No. 98-198, 98th Cong., 2d Sess. pt. 1 at 18 (1984). The House noted that, besides insufficient progress in redressing the solid waste problem, "[e]qually distressing is the inadequate effort by the [EPA] with respect to criminal and civil enforcement actions." *Id.* at 20. Thus, Congress sought to strengthen citizen enforcement by allowing courts to assess civil penalties in citizen suits. Pub. L. No. 98-616, *supra*.

64. See Pub. L. No. 98-616, *supra* note 63.

65. See *supra* text accompanying notes 51-54.

66. CERCLA's 1986 amendments raised civil penalties, enacted a settlement provision for government enforcement actions, and added a citizen suit provision. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, §§ 109, 122, 206, 100 Stat. 1613, 1633, 1678, 1703 (1986) (§ 109 is civil penalties, § 122 is settlements, and § 206 is citizen suits) (codified at 42 U.S.C. §§ 9608, 9621, 9659 (1988)). The amendments manifest Congress's view of citizen suits as an essential supplement to government enforcement. *Regan v. Cherry Corp.*, 706 F. Supp. 145, 148-50 (D. R.I. 1989). The House noted that the amendments should encourage settlements in government enforcement actions and thus, expedite clean up action. H.R. Rep. No. 99-253 (I), 99th Cong., 2d Sess. 58-59 (1985). The two points of concentrating more on actual clean up work instead of litigation and that citizen suits are an essential supplement to government enforcement shows Congress's support of settlements like that in *Sierra Club*.

67. H.R. Rep. No. 99-253(I), 99th Cong., 2d Sess. 58-59 (1985).

be potent citizen suits to supplement government enforcement. The combination shows support for quick and efficient enforcement lawsuits. The suits should settle, preferably with the result of furthering activity (government or private) to address the affected natural resource.

The Endangered Species Act also has little legislative history regarding consent judgments in citizen suits. There is positive legislative history that Congress supports private efforts to conserve endangered species, but in a limited fashion.⁶⁸ Nevertheless, Congress does recognize that *private* effort can further the Act's objective. A court drawing on the liberal standard in *Sierra Club* should validate a consent judgment that funds private activity to preserve endangered species.

Settlements Do Not Violate Statutes

In *Sierra Club*, the appellate court concluded that the Clean Water Act did not prohibit the entry of the consent judgment. The court noted both the lack of any language in the Act prohibiting such consent judgments and the positive legislative history regarding Congress's attitude toward such judgments.⁶⁹ The Clean Air Act,⁷⁰ Endangered Species Act,⁷¹ RCRA,⁷² and CERCLA⁷³ all lack language which might prohibit consent judgments directing money to private entities. These statutes all have some legislative history suggesting such judgments are appropriate.⁷⁴

POLICY ISSUES SURROUNDING *SIERRA CLUB* CONSENT JUDGMENTS

The most significant benefit of *Sierra Club* consent judgments is that funds paid by alleged violators go directly to protecting natural resources.⁷⁵ Congress is aware of this benefit and has enacted legislation that permits more direct funding of work to preserve the environment by

68. The 1978 amendments to the Act included provisions for allowing private efforts to preserve endangered species through captive breeding for eventual release into the wild. See H.R. Conf. Rep. No. 95-1804, 95th Cong., 2d Sess. at 23 (1987). Congress supports such private efforts by exemptions in the "taking" provision of the Act. See 16 U.S.C. §§ 1538-39 (1988).

69. *Supra* text accompanying notes 50-54.

70. See 42 U.S.C. § 7604 (1988) (citizen suit provision, no language restricting settlements that direct money to private environmental organizations).

71. See 16 U.S.C. § 1540 (1988) (citizen suit provision).

72. See 42 U.S.C. § 6972 (1988).

73. See 42 U.S.C. § 9622 (1988) (CERCLA does address consent judgments in government enforcement actions but no similar provision was enacted to address citizen suits).

74. *Supra* text accompanying notes 61-68.

75. Boyer & Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 Buffalo L. Rev. 833, 932-33 (1985). For an extensive sample of district court cases entering such consent judgments, see Opening Brief, *supra* note 45 at 16-23.

violators of the Clean Air Act.⁷⁶ The Environmental Protection Agency also recognizes that direct funding is productive.⁷⁷

Moreover, consent judgments represent an economically efficient allocation of funds. This is true because consent judgments are the product of bargaining coupled with the strict enforcement of the bargain through the judicial mechanism of contempt.⁷⁸

There is potential for abuse of *Sierra Club* consent judgments. Citizens plaintiffs, for example environmental groups, may become bounty hunters looking for a wealthy defendant, hoping to raise funds for themselves through a lucrative judgment. There is also the problem of ensuring that the judgment money actually goes towards furthering a statute's objectives.

However, there are safeguards against abuse. Citizen plaintiffs must establish standing to bring suit against private defendants; otherwise, the parties have no access to the court for entry of a consent judgment.⁷⁹ Citizen plaintiffs establish standing by showing injury to themselves and not by asserting the rights of other citizens who are injured.⁸⁰ Standing remains a significant hurdle for citizen suits under federal environmental law⁸¹ and given this hurdle, bounty hunting by environmental groups is unlikely.

Three other safeguards ensure that consent judgments actually further the relevant environmental statute and are not the product of collusive action by the parties. First, all of the environmental statutes examined require that citizen plaintiffs notify the government of their intent to litigate.⁸² Government regulators have the opportunity to monitor proposed consent judgments and may intervene or at least make their objection known to the court.⁸³ Second, consent judgments must still survive the scrutiny of the courts before being entered.⁸⁴ A liberal standard for

76. Cf. Comment, *supra* note 62.

77. See Memorandum of Environmental Protection Agency, New Clean Water Act Penalty Policy (Feb. 11, 1986) (located in Opening Brief, *supra* note 13 (included in the addendum)).

78. See R. Posner, *Economic Analysis of Law* 337-40 (1972) (this proposition can be skewed depending on the parties' relative bargaining position, but this goes beyond the scope of this note).

79. See *supra* note 33.

80. See *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 474 (1982) (citing to *Warth v. Sedlin*, 422 U.S. 490, 499 (1975)); see Beers, *Standing and Related Procedural Hurdles in Environmental Litigation*, 1 J. Envtl. L. and Litigation 65, 67-71 (1986).

81. See *Lujan v. Nat'l Wildlife Fed'n.*, 110 S. Ct. 3177, 3187-89 (1990) (citizen plaintiffs must be specific in proof of injury to themselves to defeat summary judgment motion for lack of standing). See generally Beers, *supra* note 80 at 65-78.

82. See, e.g., Clean Water Act, 33 U.S.C. § 1365(b) (1988); Clean Air Act, 42 U.S.C. § 7604 (1988); Endangered Species Act, 16 U.S.C. § 1540(g) (1988); Resource Recovery and Conservation Act, 42 U.S.C. §§ 6972(b)-(c) (1988); Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9659(b), 9659(e) (1988).

83. *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 528-29 (1986).

84. See *supra* text accompanying notes 33-37.

entry of consent judgments does not mean that courts automatically approve consent judgments. Third, consent judgments clearly do not prevent the government or other citizens from later suing a defendant because consent judgments are binding only on parties to the judgment.⁸⁵

Another policy issue for consent judgments is their deterrence value. Consent judgments, like that in *Sierra Club*, do deter future acts against the environment as effectively as civil penalties. Civil penalties deter based on their amount and not because the money goes to the Treasury.

Thus, the policy surrounding consent judgments like that in *Sierra Club* favors such judgments, and illuminates the role of citizen plaintiffs in preserving natural resources. Citizen suits are an essential supplement to government enforcement but the consent judgment in *Sierra Club* shows that citizen plaintiffs have a role beyond deterring violation of federal environmental law.

CONCLUSION

The Ninth Circuit held that the Clean Water Act allows consent judgments that direct money to citizen plaintiffs for projects to preserve the environment. The appellate court applied a liberal standard for validating the consent judgment. *Sierra Club's* broad implication is that such judgments are available under other major federal environmental statutes. While there is potential for abuse of such judgments, abuse is unlikely because there are safeguards. Moreover, *Sierra Club* manifests jurisprudential recognition that citizen plaintiffs serve a larger role than deterring the abuse of natural resources. Citizen plaintiffs have a valued role of *directly* preserving natural resources through their projects and thereby further the objectives of environmental statutes protecting such resources.

Government's efficiency in protecting natural resources is continually called into question. Federal programs to protect natural resources are good at addressing problems on a national scale, but often have difficulty addressing particular local problems. Government is not the only solution to protecting natural resources everywhere. Citizens themselves can also be part of the solution. Thus, it makes good sense when courts allow consent judgments that fund citizen groups and their projects with money from violators of federal environmental law.

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85. *Local No. 93, Int'l Ass'n of Firefighters*, 478 U.S. at 529.