Implied Private Rights of Action: Encouraging Responsible Environmental Planning

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I. INTRODUCTION

In 1974, the city of Painesville, Ohio, submitted a grant proposal to the Environmental Protection Agency (EPA) that outlined its intention to expand the city's wastewater treatment facility.[1] In that proposal, the city included Painesville Township as part of the expanded service area.[2] The EPA approved the city's proposal in 1975, and the city constructed a publicly owned treatment works (POTW) with the grant.[3] However, when the time came for the POTW to open, the city refused to extend sewer service to anyone outside city boundaries.[4] In September 1997, the residents of Painesville Township filed suit, asking the court to infer a private

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1. *See* Board of Trustees v. City of Painesville, 200 F.3d 396 (6th Cir. 1999).
2. *See id.*
3. *See id.*
4. *See id.*

right of action for injunctive relief under the Clean Water Act (CWA).[5] Citing the Supreme Court's decision in *Middlesex County Sewerage Authority v. National Sea Clammers Association*,[6] the Sixth Circuit denied Painesville Township's claim, holding that no private rights of action may be implied under the CWA, since the Act provides for narrow citizen suit rights in its citizen suit provision.[7] However, in *Sea Clammers*, as in most cases, the phrase "private right of action" refers to an action for damages. This comment will argue that the *Sea Clammers* holding should be limited to suits for private damages beyond those already provided for in the applicable statute, thus permitting courts to imply a private right of action for injunctive relief. Doing so would permit cases like *Painesville* to proceed, where plaintiffs merely seek injunctive relief. While the existence of citizen suit provisions should certainly preclude actions for additional damages, permitting injunctive suits would encourage responsible environmental planning. In short, if the law permits the city of Painesville to receive grant money based on a wide wastewater treatment service area, then later to narrow the area after having received the grant, the aims of the CWA will be circumvented, and the health of our nation's waters compromised. Permitting affected citizens to sue under the CWA for injunctive relief, on the other hand, affords them an expedient, effective, environmentally responsible remedy consistent with existing legal principles. While this comment focuses on the CWA, one may apply its legal arguments with equal force to provisions of the Clean Air Act (CAA) and the Resource Conservation and Recovery Act (RCRA), lending strength to the environmental protection weapons of three of our nation's most prominent environmental statutes.[8]

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5. *See* Brief for Plaintiffs-Appellants at 3-4; Board of Trustees v. City of Painesville, 200 F.3d 396 (6th Cir. 1999) (No. 98-4004) (on file with the *Tulane Environmental Law Journal*).

6. 453 U.S. 1 (1981).

7. *See* 33 U.S.C. § 1365(a) (1997); Board of Trustees v. City of Painesville, 200 F.3d at 396 (6th Cir. 1999).

8. The Clean Air Act provides, for example, that federal funds may be given to support "clean coal technology projects" that are intended to reduce emissions of sulfur dioxides or nitrogen oxides. Residents of areas that are the intended beneficiaries of such projects could conceivably face a *Painesville*-type problem. The statute provides in part, "For the purposes of this section, "clean coal technology" means any technology, including technologies applied at the precombustion, combustion, or post combustion stage, at a new or existing facility which will achieve significant reductions in air emissions of sulfur dioxide or oxides of nitrogen associated with the utilization of coal in the generation of electricity, process steam, or industrial products." 42 U.S.C. § 7651 (1997). RCRA includes a federal grant program for "resource recovery systems and improved solid waste disposal facilities." Residents benefiting from such grants could similarly be positively affected by permitting implied rights under the statute. The statute provides in part:

II. BACKGROUND

A. Clean Water Act

Since its inception, the Clean Water Act (CWA) has made the cleanliness of our nation's waters a national goal.[9] As it stands today, the CWA incorporates effluent limits, water quality standards, pollutant discharge permits, and grant programs into a comprehensive package meant to protect and improve the quality of navigable waters in the United States.[10] The Environmental Protection Agency (EPA) is statutorily charged with enforcing this far-reaching environmental statute.[11]

1. Waste Management Grant Provisions: Process and Intent

Subchapter II of the CWA provides that grants may be given by the federal government to aid in the construction of publicly owned treatment works (POTWs).[12] The construction grant process consists of three steps: the creation of facilities plans (Step 1), the preparation of drawings and specifications for the POTW (Step 2), and the actual construction of the POTW (Step 3).[13] At Step 1, applicants are required to draw up a plan for the proposed project and submit it to the State, which in turn forwards the application to the EPA Regional Administrator.[14] The plan may later be modified with the approval of the EPA, but once approval has been given, the United States is

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> The Administrator is authorized to make grants pursuant to this section to any State, municipal, or interstate or intermunicipal agency for the demonstration of resource recovery systems or for the construction of new or improved solid waste disposal facilities . . . . A grant under this section for the construction of a new or improved solid waste disposal facility may be made only if (A) a State or interstate plan for solid waste disposal has been adopted which applies to the area involved, and the facility to be constructed (i) is consistent with such plan, (ii) is included in a comprehensive plan for the area involved which is satisfactory to the Administrator for the purposes of this chapter . . . .

42 U.S.C. § 6977 (1997).

9. *See* 33 U.S.C. § 1251(a) (1997) ("The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.").

10. *See generally* 33 U.S.C. §§ 1255-1256, 1311, 1113, 1342.

11. *See id.* § 1251(d).

12. *Id.* § 1251(a)(4) (stating that "it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works."). The Act later provides for grants for both publicly and privately owned treatment works, but this comment will focus only on the provisions dealing with the former. *See, e.g.*, *id.* §§ 1281, 1283-1284, 1288.

13. *See* 40 C.F.R. § 35.903(a) (2000).

14. *See id.* § 35.903(e).

contractually liable to pay the amount specified in the grant agreement.[15] EPA regulations further provide:

> By its acceptance of the grant, the grantee agrees to complete the treatment works in accordance with the facilities plan, plans and specifications, and related grant documents approved by the Regional Administrator, and to maintain and operate the treatment works to meet the enforceable requirements of the Act for the design life of the treatment works.[16]

Throughout the grant process, the EPA focuses on Step 1, or the facilities planning stage.[17] The purpose of facilities planning is to ensure that the proposed POTW will be both "cost-effective" and compliant with the effluent limitations and water quality standards set forth in Subchapter III of the CWA.[18] The extensive treatment given to facilities planning in the regulations establishes that it is crucial to ensuring that finished projects achieve the goals of the grant program and the CWA.[19] Further, the EPA's emphasis on area and boundary determinations indicates that the agency places substantial importance upon the designation of the area to be served. This emphasis is necessary to accurately assess the cost-effectiveness and environmental compliance of a comprehensive project.[20]

Determining area and boundaries is also important to the goal of promoting "areawide" waste management, as set forth in the CWA. Section 101 provides, "[I]t is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State . . . ."[21] In Subchapter II, where the grant program is set

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15. *See id.* § 35.903(e)(i).

16. *Id.* § 35.935-1(b).

17. *See id.* § 35.917(c) ("EPA requires full compliance with the facilities planning provisions of this subpart before award of step 2 or step 3 grant assistance."); *see also id.* § 35.917(d) ("Grant assistance for step 2 or step 3 may be awarded before approval of a facilities plan for the entire geographic area to be served by the complete waste treatment system of which the proposed treatment works will be an integral part if: (1) . . . the facilities planning related to the proposed step 2 or step 3 project has been substantially completed; and that the step 2 or step 3 project for which grant assistance is made will not be significantly affected by the completion of the facilities plan . . . .").

18. *See id.* § 35.917(b) (2000); *see also* 33 U.S.C. § 1311, 1313 (1997) (referencing standards for effluent limitations and water quality in 33 U.S.C. § 1311 (1997)).

19. *See, e.g.*, 40 C.F.R. §§ 35.917-35 - .917-9 (2000).

20. *See id.* § 35.917-2(a) ("To assure that facilities planning will include the appropriate geographic areas, the State shall: (1) Delineate, as a preliminary basis for planning, the boundaries of the planning areas. In the determination of each area, appropriate attention should be given to including the entire area where cost savings, other management advantages, or environmental gains may result from interconnection of individual waste treatment systems or collective management of such systems . . . ."). This detailed analysis, based on the geographical area to be served, illustrates the importance of accurate representation of plan boundaries.

21. 33 U.S.C. § 1251(a)(5) (1997).

out in detail, the CWA states, "[t]o the extent practicable, waste treatment management shall be on an areawide basis and provide control or treatment of all point and nonpoint sources of pollution."[22]

In order to ensure that grantees have complied with the detailed provisions of the grant program, the EPA has the authority under the CWA to effectively annul the grant.[23] The CWA provides:

> In any case in which the recipient of a grant made pursuant to this subsection does not comply with the terms of the agreement entered into . . . the Administrator is authorized to take such action as may be necessary to recover the amount of the Federal contribution to the project.[24]

According to the EPA, however, this is not a practical option. Grants represent multimillion dollar investments and construction of facilities takes years to complete. The recovery of monetary damages for breached agreements would require the EPA to cease a project in mid-construction and demand the return of millions of already-spent dollars.[25] Given the fact that violations of the grant agreement are often relatively minor, the EPA does not feel that annulling grants is an appropriate option.[26] In particular, while the scope of facilities plans is concededly not minor, the EPA has taken the position that when community groups disagree over facilities plans, as in Painesville, the dispute is better settled on a local level.[27] In fact, according to the EPA's Municipal Support Division of the Office of Wastewater Management, the scope of a facilities plan is a "highly localized issue," and there is "no active program where [EPA tries] to review grant agreements and compliance."[28] Thus, although the CWA technically gives the EPA authority to annul grants, practically speaking this authority is rarely exercised.

2. Citizen Suit Provision: Congressional Intent and Limitations

Relying on *Sierra Club v. Morton* and its interpretation of standing in public actions, the citizen suit provision of the CWA can be interpreted to have conferred the powers of "private attorneys

22. *Id.* § 1281(c).
23. *See id.* § 1283(f)(9).
24. *Id.*
25. Although hundreds of POTW grants were issued in the 1970s and 1980s, many have not been constructed because of lagging compliance issues. *See* Telephone Interview with Paul Baltay, Municipal Support Division of the Office of Wastewater Management, Environmental Protection Agency (Feb. 16, 2000) (notes on file with the *Tulane Environmental Law Journal*).
26. *See id.*
27. *See id.*
28. *Id.*

general" upon citizens who suffer injuries from infringements of the CWA.[29] The citizen suit provision provides in pertinent part:

> Except as provided in subsection (b) of this section . . . , any citizen may commence a civil action on his own behalf—(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.[30]

The provision's "savings clause" states that: Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).[31]

On the other hand, in order to ascertain the existence of a right to bring citizen suits when there are no express provisions, one must look to legislative intent. The evidence of legislative intent indicates that the citizen suit provision should be limited, but the focus is on Congress' intent to limit the remedy available, not the right to seek that remedy. In *Sea Clammers*, for instance, the Court noted that Senate Reports on both the CWA and the CAA demonstrate Congressional intent to limit the scope of citizen suits.[32] Noting that the CWA's citizen suit provision was "expressly modeled on the parallel provision of the Clean Air Act," the Court cited the Senate Reports surrounding the CAA in detail.[33] In so doing, the Court illustrated Congressional focus on preventing individual gain by effectively limiting citizen suit remedies to injunctive relief.[34] For example, Senator Hart stated:

> It has been argued . . . that conferring additional rights on the citizen may burden the courts unduly. I would argue that the citizen suit provision of S.4358 has been carefully drafted to prevent this consequence from arising. First of all, it should be noted that the bill *makes no provision for damages to the individual. It therefore provides no incentives to suit other than to*

29. *See* 33 U.S.C. § 1365(g) (1997); Sierra Club v. Morton, 405 U.S. 727, 737 (1972).
30. 33 U.S.C. § 1365(a) (1997).
31. *Id.* § 1365(e).
32. 453 U.S. 1, 18 n.27 (1981) (citing S. REP. NO. 92-451, at 23; S. REP. NO. 92-414, at 81).
33. *Id.*
34. *See id.*

> *protect the health and welfare of those suing and others similarly situated*.[35]

The Court went on to note:

> [D]uring the debates on the Clean Air Act, Senator Muskie, in response to concerns expressed by other Senators, contrasted the citizen-suit provision with the terms of S.3201, a consumer protection bill that would have authorized private suits for damages: 'Senate bill 3201 provides damages and a remedy for recovery of fines and restitution, and other monetary damages. The pending bill is limited to seek [*sic*] abatement of violation of standards established administratively under the act, and expressly excludes damage actions.'[36]

Thus, one may safely conclude that the congressional intent underlying the CWA's and CAA's citizen suit provisions allows private attorney generals to enforce the acts, provided that the remedies sought are equitable rather than for the plaintiff's monetary benefit. Ironically, the existence of an implied right pivots on the type of remedy sought.

B. Cases Dealing with Implied Rights of Action

1. General Implied Rights Under Federal Statutes

Over the years, the United States Supreme Court has grown increasingly disinclined to imply private rights of action under federal statutes, absent the express grant of a right or plain language indicating congressional intent. In 1975, in an effort to balance the competing interests of establishing an implied right and adhering to congressional intent, the Court devised a four-part balancing test in *Cort v. Ash*—a benchmark implied rights case.[37] In *Cort*, the Court considered a stockholder's claim of an implied right to damages under a statute prohibiting corporate contributions to federal political campaigns.[38] The test asks:

> First, is the plaintiff 'one of the class for whose especial benefit the statute was enacted,' that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the

35. *Id.* (quoting 116 CONG. REC. 33104 (1970)) (emphasis added).
36. *Id.* (quoting 116 CONG. REC. 33102 (1970)).
37. 422 U.S. 66, 78 (1975).
38. *See id.* at 66.

> States, so that it would be inappropriate to infer a cause of action based solely on federal law?[39]

The Court held that the right to damages was not implied under the statute, finding in particular that awarding damages "would not aid the primary congressional goal."[40]

The *Cort* test has been cited extensively since its inception. Four years later, for example, in *Cannon v. University of Chicago*, the Supreme Court utilized the *Cort* factors in its analysis of a sexual discrimination claim brought under Title IX of the Education Amendments.[41] It recognized the difficulty in finding legislative history to support an implied right of action when the statute was silent on the issue.[42] Specifically, the Court noted that "the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person."[43] The Court held, however, that ample legislative history existed to support its finding of an implied right of action under Title IX, arguing that when the remedy "is necessary or at least helpful to the accomplishment of the statutory purpose, the Court is decidedly receptive to its implication under the statute."[44]

In subsequent years, the Supreme Court and lower courts have retained the *Cort* test, but have moved toward an emphasis on determining affirmative legislative intent before granting implied rights. Specifically, the Court's decision in *Touche Ross & Company v. Redington* was the first such case.[45] In *Touche*, the Court determined whether a Securities Exchange Act provision requiring broker/dealers to maintain certain records gave rise to an implied private right of action for damages when the broker/dealer failed to do so.[46] Analyzing the issue under the *Cort* test, the Court focused almost entirely on legislative intent.[47] Finding an absence of support in the legislative history for a damages claim, and noting that granting such a remedy would significantly broaden the class of people to

39. *Id.* at 78 (citations omitted).
40. *Id.* at 84.
41. 441 U.S. 677, 694 (1979).
42. *See id.* ("[T]he legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question.").
43. *Id.* at 688.
44. *Id.* at 703.
45. 442 U.S. 560 (1979).
46. *See id.* at 569.
47. *See id.*

whom the statute had already provided a remedy, the Court refused to recognize an implied private right of action.[48]

Two years later, in *Texas Industries, Inc. v. Radcliff Materials, Inc.*, the Court considered the question of whether the federal antitrust laws grant defendants the right to sue fellow conspirators for contribution for civil damages, costs, and attorney fees.[49] The Court again applied the *Cort* test, focusing on the question of congressional intent. Noting that Congress had expressly provided such a right in other statutes, but had chosen not to extend the right in the statute at bar, the Court refused to imply it in the antitrust context.[50]

Therefore, it appears that the present general attitude toward implying private rights of action under federal statutes is one of caution. The Supreme Court's line of decisions indicates that the four-part *Cort* test remains intact, but that the Court will focus on congressional intent to determine the existence of the right, express or implied. As discussed more fully below, in the context of the CWA, the Supreme Court has indicated that the only pertinent inquiry is if legislative intent establishes an implied right.

2. Implied Rights Under the CWA

Middlesex County Sewerage Authority v. National Sea Clammers Association contemplated the existence of an implied right of a private party to sue for monetary damages under the CWA.[51] In its analysis, the Court considered the claim of an association of fishermen suing for equitable relief as well as compensatory and punitive damages.[52] The fishermen claimed that due to the ocean dumping of "sewage, sewage 'sludge,'" and other waste by the sewage treatment board, they had suffered from the "collapse of the fishing, clamming and lobster industries which operate in the waters of the Atlantic Ocean."[53] Plaintiffs filed suit under the citizen suit provision of the CWA, claiming that the savings clause permitted the Court to infer a right of action for damages.[54] The Court of Appeals held that the plaintiffs were entitled to relief and stated that injunctive relief and monetary damages were one of the "pre-existing remedies

48. *See id.* at 569, 574.
49. 451 U.S. 630 (1981).
50. *See id.* at 640 n.11 ("That Congress knows how to define a right to contribution is shown by the express actions for contribution under § 11(f) of the Securities Act of 1933 . . . and 18(b) of the Securities Exchange Act of 1934 . . . .").
51. 453 U.S. 1 (1981).
52. *See id.*
53. *Id.* at 4-5.
54. *See id.* at 5, 12.

preserved by the savings clause."[55] The Supreme Court, however, finding that the CWA "contain[ed] unusually elaborate enforcement provisions," held that the plaintiffs did not have an implied right to private damages under the citizen suit.[56] The Court noted the recent frequency with which the issue of implied rights of action had arisen, but declined to apply all factors of the *Cort* test.[57] Instead, the Court focused directly on legislative intent. It stated, "[w]e look first, of course, to the statutory language, particularly to the provisions made therein for enforcement and relief. Then we review the legislative history and other traditional aids of statutory interpretation to determine congressional intent."[58]

The Court focused on the enforcement mechanisms of the CWA, noting that both private citizens and the government have enforcement authority.[59] The Court emphasized the availability of various remedies, including civil and criminal penalties and injunctive relief, all of which apply to the CWA's effluent and water quality limitations.[60] Because the CWA explicitly gives both the EPA and private citizens narrowly-tailored enforcement authority, the Court noted, "it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens."[61] The Court went on to provide language that appears to bar all implied rights under the CWA by stating that "the [congressional] Report[s] and debates provide affirmative support for the view that Congress intended the limitations imposed on citizen suits to apply to all private suits under [this Act]."[62]

Sea Clammers gave rise to a number of decisions that foreclosed private rights under the CWA. As in *Sea Clammers*, the majority of these cases concern actions for private damages in the pollutant-discharge context.[63] In *Walls v. Resource Corporation*, for example,

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55. *Id.* at 2622 n.20. The savings clause states that "nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)." 33 U.S.C. § 1365(e) (1997).

56. *Sea Clammers*, 453 U.S. at 13.

57. *See id.* at 12, 13 n.21.

58. *Id.* at 13.

59. *See id.*; *see also* Sierra Club v. Morton, 405 U.S. 427, 437 (1972) (stating that the Administrative Procedure Act confers power on "private attorneys general" whose interests are or may be adversely affected).

60. *See Sea Clammers*, 453 U.S. at 13; *see also* 33 U.S.C. § 1319 (1997) (listing various remedies).

61. *Sea Clammers*, 453 U.S. at 13.

62. *Id.* at 17.

63. *See, e.g.*, Ringbolt Farms Homeowners Ass'n v. Town of Hull, 714 F. Supp. 1246, 1255 (D. Mass. 1989) (homeowners bringing action for damages against town for breaching duty

the Sixth Circuit cited *Sea Clammers* in support of its finding that homeowners and residents were prohibited from recovering compensatory and punitive damages for the alleged pollution of their land by a neighboring landfill.[64] In *City of Evansville v. Kentucky Liquid Recycling, Inc.*, the Seventh Circuit refused to recognize the plaintiff's claim for damages resulting from the discharge of pollutants into a river.[65] Using the *Cort* test, the court looked to congressional intent before refusing to permit the damage claim, noting that "[t]he enforcement scheme is adequate without an inferred private right of action."[66] A pivotal factor in *Walls* and *Evansville* was the fact that the plaintiffs filed their claims for private civil damages under the CWA, claims that are clearly foreclosed by *Sea Clammers* and the legislative intent of the Act.[67] In contrast, as will be discussed more thoroughly below, the plaintiffs in *Painesville* filed for injunctive relief.

C. *Case Study:* Board of Trustees of Painesville Township v. City of Painesville

In the 1960s, like many cities in the United States, the City of Painesville, Ohio, began exploring options for improving its wastewater treatment facilities.[68] In 1975, under the CWA's requirements for facilities planning and grant agreements, the city obtained a POTW grant from the EPA to fund improvements to its existing wastewater treatment plant.[69] In its grant application, the city indicated that a large portion of Painesville Township would be included in the service area of the new plant.[70] After receiving the grant funds and completing construction of the POTW, however, the city refused to extend sewer service to the Painesville Township residents that had been included in the original facilities plan.[71] Although the CWA provides that grantees must advise the EPA of changes made to the facilities plan, the city of Painesville never

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to enforce the CWA); Conner v. Aerovox, Inc., 730 F. 2d 835 (D. Mass. 1984) (facts nearly identical to *Sea Clammers*, private damages not allowed).

64. 761 F.2d 311, 316 (1985).
65. 604 F. 2d 1008 (7th Cir. 1978).
66. *Id.* at 1015-16.
67. *See Walls*, 761 F.2d at 315-16; *Evansville*, 604 F. 2d at 1016.
68. *See* Brief of Plaintiffs-Appellants at 3, *supra* note 5.
69. *See id.* at 4.
70. *See id.*
71. *See id.*

apprised the agency of its intent to shrink the plant's service area.[72] The residents of Painesville township have requested that their sewage be treated by the city's plant, but their requests have been denied.[73] In September 1997, the residents filed suit in the United States District Court for the Northern District of Ohio.[74] They argued that the court should infer a private right of action under the grant provisions of the CWA so that the residents might obtain an injunction requiring the city to extend sewer service to the township.[75] Both the trial court and the Sixth Circuit dismissed the residents' case based on *Sea Clammers*' reasoning that one cannot assume that Congress implicitly authorized additional remedies for private actions under the CWA.[76]

The ramifications of the denial of city sewer service to the township are more complex than one might think. The affected area is mostly residential, consisting of upper-middle income housing developments, most of which are fairly new.[77] The township is an example of urban sprawl with numerous housing developments and growing business districts.[78] Unfortunately, as a result of the lack of access to city sewer service, the township's residents must use private septic systems, a less environmentally sound alternative than a wastewater treatment plant.[79] In fact, despite the high demand for housing in the Painesville township area, further construction of housing developments will not be permitted so long as the only wastewater treatment option is the use of private septic systems.[80]

Thus, the remedies available to Painesville township residents are extremely limited. Their first option has been foreclosed by the Sixth Circuit, and their attorney believes it is highly unlikely that they will appeal, based on the cost and the likelihood of success.[81] Another

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72. *See* 40 C.F.R. § 35.935-11 (2000) ("In addition to the notification of project changes required under § 30.900-1 of this chapter, the Regional Administrator's and (where necessary) the State agency's prior written approval is required for: (1) Project changes which may (i) Substantially alter the design and scope of the project; (ii) Alter the type of treatment to be provided; (iii) Substantially alter the location, size, capacity, or quality of any major item of equipment."); *see also* Telephone Interview with Anthony Coyne, Attorney for Plaintiffs-Appellants (February 18, 2000) (notes on file with the *Tulane Environmental Law Journal*).

73. *See* Interview with Anthony Coyne, *supra* note 72.

74. *See* Board of Trustees v. City of Painesville, 100 F.3d. 396 (6th Cir. 1999).

75. *See* Brief of Plaintiffs-Appellants at 2-4, *supra* note 60.

76. *See Painesville*, 200 F.3d at 736; Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 13 (1981).

77. *See* Interview with Anthony Coyne, *supra* note 72.

78. *See id.*

79. *See id.*

80. *See id.*

81. *See id.*

option is to approach the EPA, plead their case, and hope that the EPA affords them a remedy.[82] However, as discussed above, the enforcement powers of the EPA are limited and rather impractical. The amount of the Painesville grant is approximately twenty million dollars, so annulling the grant by requiring the city to repay the federal government would be highly unrealistic.[83] Further, as expressed by the EPA's Municipal Support Division of the Office of Wastewater Management, it is an option that the EPA is not generally amenable to pursuing.[84]

Negotiating further with the city is an option, although there is no indication that the city would begin to cooperate at this point, especially because of its great incentive to hold out. As was noted earlier, Painesville township consists mainly of upper-middle income housing developments, none of which pay taxes to the city. Add to the equation the fact that the township is much more affluent than the city, and it is easy to see why the city would want to require annexation as a condition of extending sewer service to the township.[85] It does not require much imagination to conclude that this sort of annexation problem is probably common in similar disputes. In fact, the EPA considers this to be one of the top two issues involved in POTW grant disputes that come to the attention of the agency.[86] Realistically, it is probably in the best interest of cities to use sewer service as leverage, considering that there is no legal obligation for them to provide service to townships under POTW grants, based on the current interpretation of *Sea Clammers* and its progeny. This is precisely why, as advocated in more detail below, the most efficient manner of dealing with *Painesville*-type disputes is to imply private rights of action for injunctive relief under these environmental grant programs.

III. ANALYSIS

As part of its goal of restoring the "chemical, physical, and biological integrity of the Nation's waters,"[87] the CWA sets out a detailed program for POTW construction grants.[88] As discussed

82. *See id.*
83. *See id.*
84. *See* Interview with Paul Baltay, *supra* note 25.
85. *See* Interview with Anthony Coyne, *supra* note 72.
86. Along with disputes over annexation, another issue before the EPA involves usage charges. *See* Interview with Paul Baltay, *supra* note 25.
87. 33 U.S.C. § 1251(a) (1997).
88. *See, e.g.*, 33 U.S.C. §§ 1281, 1283-1284, 1288 (1997).

above, the program's goal is the promotion of "areawide" waste treatment management practices so that "adequate control of source pollutants in each State" may be achieved.[89] The direct beneficiaries of the CWA's grant program, and of the grant agreements produced as a result of the program, are the citizens whose environment stands to be improved through the POTWs' construction.[90] If those beneficiaries are denied the benefit of wastewater treatment as originally proposed in the grant application, it follows that there should be a remedy for their injury.

However, the traditional remedy for citizens under the CWA is the citizen suit provision, which only allows for enforcement of effluent standards, or of nondiscretionary EPA duties.[91] Citizens are left with EPA enforcement or implied rights as their only remedies because the grant program is not included in the citizen suit provision. As discussed above, EPA enforcement is certainly a desirable option, but not as the sole remedy. Further, the EPA does not generally interfere with what it deems to be highly localized issues.[92] Thus it is not realistic to expect that grant provisions will be enforced through this avenue.[93] It is also apparent that the drafters of the CWA were aware of the need to supplement EPA authority, as evidenced by the inclusion of the citizen suit provision to the already-extensive enforcement mechanism of the CWA. The availability of citizen suits is especially important in cases like *Painesville*, where the affected parties are in a better position than the EPA to be aware of the injury and to seek a remedy. Therefore, if citizens are to have the power to challenge denial of benefits under a POTW construction grant, the only remaining avenue is through implied private rights of action.

It is evident that absent a clear, expressly stated congressional intent, it has become increasingly difficult to win recognition of implied rights under federal statutes. In fact, the case law set forth above would seem to indicate that implied rights are completely foreclosed under the CWA.[94] However, this is due largely to the fact that the phrase "implied private right of action" usually refers to a right to damages over and above what is already outlined in the

89. 33 U.S.C. § 1251(a)(5) (1997).

90. In other words, residents of areas included in facilities plans as part of federal grant applications.

91. *See* 33 U.S.C. § 1365(a) (1997).

92. *See* Interview with Paul Baltay, *supra* note 25.

93. *See id.*

94. *See, e.g.*, Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981); Walls v. Waste Resource Corp., 761 F.2d 311 (6th Cir. 1985); City of Evansville v. Kentucky Liquid Recycling, Inc., 604 F.2d 1008 (7th Cir. 1978).

statute, or a right to injunctive relief that is expressly forbidden elsewhere in the statute.[95] Cases like those are clearly distinguishable from *Painesville*-type cases, where the remedy sought is not private damages, but injunctive relief that is not otherwise statutorily prohibited.

Because the suits dealing directly with implied rights under the CWA analyze private damage claims, the reasoning underlying those opinions clearly should not apply to cases like *Painesville*. The *Sea Clammers* Court was concerned principally with legislative intent and spent a great deal of time discussing congressional concerns over private suits. However, the Court's opinion illustrates that the legislative concern was not that citizen suits would be brought at all, but that citizen suits would be brought for damages.[96] Senator Hart's comments specifically stated that there was no fear of flooding the courts due to the citizen suit provision because the only citizens with an incentive to file suit would be those seeking injunctive relief to "protect the health and welfare of those suing and others similarly situated."[97] It is clear that Congress realized the need for citizen enforcement, welcomed suits meant to protect public health, and unequivocally foreclosed suits for private damages over and above what is already provided for under the applicable statute. *Painesville* at issue does not concern private monetary damages. Instead the plaintiffs seek injunctive relief within the scope of permissible suits contemplated by Senator Hart when Congress drafted the citizen suit provision. Thus, granting injunctive relief in *Painesville*-type cases would harmonize with congressional intent.[98]

Sea Clammers and its progeny have looked to the enforcement mechanisms already in place under the CWA to support the contention that if Congress had intended to grant other rights, it would have done so expressly. Since the right to sue for private damages is not expressly provided for, the courts have held that it is inappropriate to imply such a right.[99] For example, in *City of Evansville v. Kentucky Liquid Recycling*, the Seventh Circuit held that a private action for damages sought to remedy an illegal discharge into the Ohio River could not be sustained under the CWA. The Court held that the

95. *See, e.g.*, *Sea Clammers*, 453 U.S. at 7; *Walls*, 761 F.2d at 314; City of Evansville v. Kentucky Liquid Recycling, Inc., 604 F.2d 1008 (7th Cir. 1979).

96. *See Sea Clammers*, 453 U.S. at 19 n.27.

97. *See id.* (quoting 116 CONG. REC. 33104 (1970)).

98. *See Sea Clammers*, 453 U.S. at 18 n.27 (quoting 116 CONG. REC. 33104 (1970)) ("[I]t should be noted that the bill makes no provision for damages to the individual.").

99. *See, e.g.*, *id.* at 15; Walls, 761 F. 2d at 314-15; Evansville, 604 F.2d at 1014.

CWA's enforcement mechanism provided an adequate remedy.[100] The *Sea Clammers* Court came to a similar conclusion on the issue of adequate enforcement. There the Court stated:

> These Acts contain unusually elaborate enforcement provisions, conferring authority to sue for this purpose both on government officials and private citizens. The [CWA], for example, authorizes the EPA Administrator to respond to violations of the Act with compliance orders and civil suits. He may seek a civil penalty of up to $10,000 per day, and criminal penalties also are available . . . . In addition, . . . 'any interested person' may seek judicial review . . . of various actions by the Administrator, including establishment of effluent standards and issuance of permits for discharge of pollutants.[101]

The enforcement scheme relied upon by the courts does not apply to the POTW construction grant program. In fact, the only enforcement provision included in the grant program allows the EPA to annul grants, but even the EPA acknowledges that this power is weak and impractical.[102] In contrast, citizens injured by the violation of a discharge permit, or any other form of effluent discharge, have the multitude of remedies outlined above available to them. The courts make an excellent argument against implying private rights for damages above and beyond the provisions of the statute, but that argument does not apply to suits for injunctive relief under the POTW grant program. If there is no detailed enforcement mechanism under the grant program as there is for effluent limitations, then granting an implied right to injunctive relief would not circumvent the other provisions of the CWA, thus eliminating this major concern of the courts.

Yet another of courts' concerns in the general jurisprudence of implied rights is that certain factors be fulfilled before rights will be implied. The *Cort* factors, as set out in the background section of this comment, are still present in one form or another, and whether or not the analysis is labeled as such, most courts go through the process of asking *Cort*'s four questions.[103] The recent trend has been to

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100. *See Evansville*, 604 F.2d at 1016.

101. *Sea Clammers*, 453 U.S. at 13 (citations omitted).

102. *See* Interview with Paul Baltay, *supra* note 25.

103. The *Cort* test asks, "First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?" Cort v. Ash, 422 U.S. 66, 78 (1975) (citations omitted).

emphasize the analysis of legislative intent. Because *Painesville*-type cases satisfy all four prongs of the *Cort* test, the emphasis placed upon one factor or another is irrelevant.

The application of the *Cort* test to the Painesville case would ask whether the plaintiffs at issue are members of a class that the CWA was intended to protect.[104] The CWA was intended to protect the environment, for the benefit and enjoyment of all citizens, as evidenced by the CWA's statements of purpose and its emphasis on public participation.[105] The residents of Painesville township clearly belong to the public sector, for whom the benefits of the CWA were intended. Specifically, the residents of Painesville township are members of a smaller group of people that were the beneficiaries of the CWA's POTW grant provisions. In all respects, Painesville township residents and others similarly situated are the intended recipients of the benefits of the CWA.

The second and third *Cort* factors concern legislative intent and ask whether the implied right would be consistent with the legislative scheme. For the reasons set forth more fully above, it is clear that Congress was concerned that citizen suit provisions be limited and not permit a plaintiff's monetary gain. Permitting injunctive relief does not fall within this limitation, which was clearly meant to preclude private damages because injunctive relief would be undertaken for the benefit of the environment and of the public at large. In fact, permitting injunctive relief in *Painesville*-type cases would actually further the statutory purpose of promoting areawide waste management through federal grants. Not only does the CWA itself set forth a national policy of promoting areawide waste management, but EPA regulations for the grant program emphasize the importance of developing detailed facilities plans and service area boundaries in order to ensure that areawide waste management occurs in the most cost-effective and environmentally sound manner possible.[106] Approving grants based on a wide wastewater treatment area, but then

104. *See id.*

105. *See* 33 U.S.C. § 1251(a) (1997) ("The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."); *see also* 33 U.S.C. § 1251(e) ("Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States.").

106. *See* 33 U.S.C. § 1251(a)(5) (1997) ("[I]t is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State."); 40 C.F.R. § 35.917-2(a) (2000) (delineating the requirements of facilities plans, including project boundaries and scope).

narrowing the scope of service to only city residents contravenes the goal of areawide waste management. As the Supreme Court noted in *Cannon v. University of Chicago*, when the cause of action or remedy "is necessary or at least helpful to the accomplishment of the statutory purpose, the Court is decidedly receptive to its implication under the statute."[107] In *Painesville*, enforcement of the grant agreements directly accomplishes the statutory goal of areawide waste management.

Finally, the *Cort* test asks whether implying the right would infringe upon an area traditionally left to state law. Some would argue that the issue in *Painesville* is simply about annexation, which is traditionally a state law problem. It does seem that there are a great number of annexation considerations in the *Painesville* dispute, but they are brought on solely by the violator of the POTW grant. The fact remains that Painesville township residents are attempting to enforce the provisions of a federal grant. Asking whether a city should be permitted to apply for a federal grant, then to disregard its terms, is not a question of state law.

Apart from the *Cort* test, from a public policy perspective, it is less efficient for the EPA to bear the sole enforcement burden. Injured citizens may respond more promptly to the denial of access to wastewater treatment. The EPA may have the authority to enforce the CWA, but that authority is only as strong as its authority to enforce effluent limitations, and is not likely to be utilized.[108] Thus, if private citizens are not permitted to enforce POTW grant provisions, and the EPA cannot or will not, what is left to hold cities to their agreements besides implied private rights of action? The EPA shares the burden of enforcing effluent limitations with private citizens, so there is no reason why citizen suits for injunctive relief should be denied in *Painesville*-type cases.

It has been the goal of this comment to show that reliance upon *Sea Clammers* and its progeny should be limited to suits for private damages. Doing so would still preclude damage claims under statutes for which there are already comprehensive equitable remedies, while permitting injunctive relief to those for whom there is no other option. The legal arguments in the context of the CWA are equally pertinent to the grant provisions of the CAA and RCRA and would produce results equally beneficial to the environment.

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107. 441 U.S. 677, 703 (1979); *see also Cort v. Ash*, 422 U.S. 66, 84 (1975) (where the Court also declined to imply a right based on the fact that it "would not aid the primary congressional goal").

108. *See* Interview with Paul Baltay, *supra* note 25.

IV. CONCLUSION

Allowing private parties to enforce CWA provisions beyond those provided in the citizen suit provision would hold the EPA, government, and the wastewater treatment industry accountable for adhesion to environmental proposals that protect water quality. As it stands, industry and government agencies are encouraged to apply for grant money, then cut back on the extent of their original proposals, thus denying large numbers of citizens access to the health and environmental benefits of wastewater treatment works. Recognizing suits for equitable relief under such grant provisions would allow the parties most directly affected to act quickly in defense of the environment, in a manner that is clearly consistent with the intent and provisions of the Act in question, and within the rationale of implied rights jurisprudence.