United States v. Allegheny Ludlum Corp.: For Better or Worse, the Third Circuit Recognizes the Laboratory Error Defense

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I. INTRODUCTION

Allegheny Ludlum Corporation (ALC) manufactures steel.[1] To that end, ALC owns and operates five plants in Western Pennsylvania together comprising three specialty steel manufacturing facilities.[2] ALC uses water from adjacent rivers in the steelmaking process, and employs water in two different ways: as process water and as noncontact cooling water.[3] Process water makes direct contact with steel or steelmaking equipment, while noncontact cooling water "cools the steelmaking equipment without actually touching the steel."[4] To handle the "considerable amount of pollution" generated by the steelmaking process, ALC operates six on-site wastewater treatment plants (WWTPs) to treat the water before discharging it back into adjacent waterways.[5]

The United States commenced the present action against ALC on June 28, 1995.[6] The amended complaint alleged three types of violations.[7] First, the complaint alleged that each of ALC's five facilities discharged in excess of permitted amounts as shown by Discharge Monitoring Reports (DMRs) submitted by ALC to the Environmental Protection Agency (EPA).[8] Second, the complaint alleged that discharges

1. United States v. Allegheny Ludlum Corp., 366 F.3d 164, 170 (3d Cir. 2004).
2. *Id.* ALC owns and operates plants, steelmaking facilities, and wastewater treatment plants WWTPs in Brackenridge, Natrona, West Leechburg, Bagdad, and Vandergrift, Pennsylvania. *Id.*
3. *Id.*
4. *Id.*
5. *Id.* ALC discharges water into the Allegheny River and the Kiskiminetas River. *Id.* The Vandergrift WWTP discharges first to the Kiski Valley Water Pollution Control Authority which further treats the water before discharging it into the Kiskiminetas River. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*

from one of ALC's WWTPs (specifically their facility in Vandergrift) interfered with the operation of the Kiski Valley Water Pollution Control Authority.[9] The third violation alleged was "ALC's failure to report violations as required by its permits."[10]

The district court did not allow ALC to raise several defenses to the reported violations, including the laboratory error defense at issue on appeal.[11] ALC contended below that "erroneous laboratory analyses" had overstated zinc pollutant levels in their discharges, resulting in an overreporting of violations.[12] Reasoning that the laboratory error defense had not been previously recognized in the United States Court of Appeals for the Third Circuit, the district court declined to adopt this new defense because it interpreted the Clean Water Act (CWA or Act) as "creating an obligation to insure that the self-monitoring of pollutants is accurate" as well as "assigning the risk of inaccuracy to the company."[13] The district court granted partial summary judgment to the United States on that issue, and concluded that ALC had provided sufficient evidence to create genuine and triable issues of fact on the reporting failure and interference claims, therefore denying the government's motion for summary judgment.[14]

A jury trial was held from January 5 to February 2, 2001, and the jury found for ALC on all of the interference and reporting failure claims.[15] However, since the jury found for the government on half of the remaining reported violation claims, ALC was found to be in violation for a total of 1122 days from July 1990 through February 1997.[16] The district court then held a bench trial to determine the amount of penalty fines to be assessed against ALC, and entered a judgment on February 20, 2002, against ALC in the amount of $8,244,670.[17]

On appeal, the Third Circuit *held* that although the CWA operates under a regime of strict liability, the laboratory error defense is not inconsistent with this scheme where the error caused overreporting and accordingly vacated the judgment in part, remanding the case to allow

9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 171.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* In the interests of time, the court required experts to give direct testimony in the form of written proffers, although live cross-examination was allowed. *See id.*

consideration of the laboratory defense. *United States v. Allegheny Ludlum Corp.*, 366 F.3d 164, 176 (3d Cir. 2004).[18]

II. BACKGROUND

The CWA was enacted by Congress in 1972.[19] The stated purpose of the Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[20] To that end, the CWA prohibits the discharge of pollutants into the waters of the United States unless the discharger obtains a National Pollution Discharge Elimination System (NPDES) permit.[21] In order to comply with the CWA, dischargers must comply with the limits and conditions imposed by their NPDES permit.[22]

The EPA is vested with the authority to delegate permit writing and program control to state programs which meet the criteria set forth under the CWA.[23] Although state programs are held to standards at least as strict as the federal standard, the CWA encourages states to enforce standards stricter than the standards set forth in the Act itself.[24] The state or federal permitting authority is then authorized under the CWA to bring enforcement actions for both injunctive relief and penalty fines of up to $25,000 a day, per violation.[25] The EPA can prove a violation of the CWA by showing that the defendant discharged pollutants either into navigable waters in violation of the terms of their NPDES permit or into a Publicly Owned Treatment Works (POTW) in violation of the

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18. *Id.* at 169-70. The Third Circuit also held that the penalty assessed to ALC by the district court "so vastly overstate[d] the economic benefit to ALC of its improper discharges" that it constituted an abuse of discretion on the part of the district court. *Id.* at 169. Further, the court held that the district court should have based ALC's penalty calculation (which considers the economic benefit ALC received from the violations) on the least costly method of compliance. *Id.* Although district courts have discretion to determine "how many violation days should be assessed for penalty purposes for the violation of a monthly average limit," the district court did not have the benefit of this standard and was instructed to consider it on remand. *Id.* However, this note shall focus solely on the Third Circuit's holding regarding the laboratory error defense.

19. *Id.* at 172.

20. CWA § 101(a), 33 U.S.C. § 1251(a) (2000).

21. CWA §§ 301(a), 402, 33 U.S.C. §§ 1311(a), 1342.

22. CWA § 402(k), 33 U.S.C. § 1342(k).

23. CWA § 402(b), 33 U.S.C. § 1342(b); Chesapeake Bay Found. v. Bethlehem Steel Corp., 608 F. Supp. 440, 443 (D. Md. 1985).

24. CWA § 402(b), 33 U.S.C. § 1342(b).

25. CWA § 309(d), 33 U.S.C. § 1319(d). The CWA provides numerous factors that the court must consider when assessing a civil penalty, including: "the seriousness of the violation"; the economic benefit the violator received as a result of the violation; the violator's history of violations; "good-faith efforts" to comply with the requirements; "the economic impact of the penalty on the violator"; and other considerations "as justice may require." *Id.*

pretreatment standard.[26] The permit conditions themselves may "not be subject[ed] to judicial review in any civil or criminal proceeding for enforcement."[27] Hence, the CWA operates under a system of strict liability for reported violations.[28]

The CWA operates under a self-monitoring system.[29] The discharger must not only comply with the limits imposed by his permit, but is also required to fulfill monitoring and reporting obligations, thus facilitating the enforcement of his permit.[30] Permit holders must install monitoring equipment, sample and monitor discharges, and report the results as required by their permit by filing DMRs.[31] Once filed, DMRs must be publicly accessible, "except on showing that the record or reports would reveal a trade secret entitled to protection as a trade secret."[32]

The reporting requirements accomplished through DMRs, coupled with the stiff civil penalties imposed for violations under the CWA, have been challenged on the grounds that the assessment of civil penalties constitutes a "criminal case within the meaning of the Fifth Amendment's guarantee against compulsory self-incrimination."[33] In 1980, the Supreme Court disposed of this argument.[34] In *United States v. L.O. Ward*, the Court upheld the civil penalties coupled with the DMR requirement, finding that in light of the "overwhelming evidence" that Congress intended to create a civil penalty, it would be anomalous to suggest that the monitoring reports triggered the protections afforded by the Fifth Amendment in criminal cases.[35]

The CWA also authorizes citizen enforcements suits.[36] Under section 505(a), "any citizen may commence a civil action on his own

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26. United States v. Allegheny Ludlum Corp., 366 F.3d 164, 170 (3d Cir. 2004) (citing CWA § 307(d), 33 U.S.C § 1317(d)). EPA regulations include "general pretreatment standards and national categorical pretreatment standards for the iron and steel manufacturing industry." *Id.* (citing 40 C.F.R. §§ 403, 420.01 (2002)).

27. CWA § 509(b)(2), 33 U.S.C. § 1369(b)(2).

28. Conn. Fund for the Env't v. Upjohn Co., 660 F. Supp. 1397, 1409 (D. Conn. 1987).

29. *See Allegheny Ludlum Corp.*, 366 F.3d at 168. The Act also provides for the delegation of administration of the NPDES program by the states subject to the Administrator's approval. *See Upjohn*, 660 F. Supp. at 1407.

30. Chesapeake Bay Found. v. Bethlehem Steel Corp., 608 F. Supp. 440, 443 (D. Md. 1985).

31. *See id.* at 443 (citing CWA § 308(a), 33 U.S.C. § 1318(a); 40 C.F.R. § 122.41(j) (2004)).

32. *See* S. REP. NO. 92-414 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3747.

33. United States v. L.O. Ward, 448 U.S. 242, 244 (1980).

34. *Id.* at 254-55.

35. *Id.*

36. CWA § 505(a), 33 U.S.C. § 1365(a).

behalf . . . against any person . . . who is alleged to be in violation of . . . an effluent standard or limitation [under this Act]."[37] Regarding the requirement of standing, the CWA defines a citizen as "a person or persons having an interest which is or may be adversely affected."[38] The citizen enforcement provision serves the double purpose of acting as "a spark to ignite agency enforcement," as well as, an alternative enforcement mechanism should the agency be derelict in its enforcement duties.[39]

Nowhere in the CWA is the defense of laboratory error mentioned.[40] However, courts faced with the assertion of the laboratory error defense have divided on whether defendants should be able to impeach their sworn DMRs with evidence of error. Some courts, like the district court in the instant case, have dismissed it out of hand.[41]

In *Connecticut Fund for the Environment v. Upjohn Co.*, the district court conceded that the defendant's basis for assertion of the laboratory error defense was credible, but dismissed the defense as conflicting with congressional intent to impose strict liability for violations of the CWA.[42] Because "[a]ny scientific process is capable of refinement and improvement," the court reasoned that Congress did not intend the courts to determine the accuracy of laboratory results.[43] The court then held that although the defendants may have a factual basis to contest the accuracy of the laboratory reports, this defense is unavailable to them as a matter of law.[44]

In perhaps the strongest statement against the laboratory error defense, *Sierra Club v. Union Oil Co.* involved a citizen suit brought to enforce permit limitations against Union Oil, alleging seventy-six violations of Union Oil's NPDES permit.[45] The lower court excused Union Oil's exceedences of its permit limitations based on three different

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37. *Id.*

38. CWA § 505(g), 33 U.S.C. § 1365(g).

39. Conn. Fund for the Env't v. Upjohn Co., 660 F. Supp. 1397, 1403 (D. Conn. 1987).

40. *See* CWA § 101, 33 U.S.C. § 1251. However, the federal regulations were amended to include the "upset defense." Clean Water Act Regulations, 40 C.F.R. § 122.41 (2002).

41. United States v. Allegheny Ludlum Corp., 366 F.3d 164, 170 (3d Cir. 2004); Sierra Club v. Union Oil Co., 813 F.2d 1480 (9th Cir. 1987); Chesapeake Bay Found. v. Bethlehem Steel Corp., 608 F. Supp. 440, 452-53 (D. Md. 1985).

42. 660 F. Supp. at 1417.

43. *Id.*

44. *Id.*; *see also Bethlehem Steel*, 608 F. Supp. at 452 ("Given the heavy emphasis on accuracy in the Act and the clear Congressional policy that DMRs should be used for enforcement purposes, the Court will not accept claims of inaccurate monitoring as a defense to this action.").

45. 813 F.2d at 1482.

defenses.[46] Among them was a "sampling error defense," in which Union Oil asserted that thirteen of the exceedences of the permit limit were actually "caused by error in wastewater sampling or analysis."[47] The United States Court of Appeals for the Ninth Circuit reversed.[48] In light of the multiple EPA regulations demonstrating the agency's concern that DMRs be accurate, the court reasoned that if DMRs were considered to be anything other than conclusive evidence of violation, citizen groups would be taking a considerable risk initiating citizen enforcement actions.[49] The court concluded that allowing a sampling error defense would create the "perverse result of rewarding permittees for sloppy laboratory practices" and hence "undermine the efficacy of the entire self-monitoring program."[50] The Ninth Circuit held that when a permittee's DMRs show that the permittee exceeded permitted limitations, that permittee "may not impeach its own reports by showing sampling error."[51]

Other courts, while accepting the possibility that a defendant might escape penalty under the CWA through the laboratory error defense, have held defendants' evidentiary assertions insufficient to support such a defense.[52] Responding to the defendant's motion for summary judgment, the court in *Public Interest Research Group v. Yates Industries* found the defendant's contentions that reported violations were due to false readings required the support of "actual evidence of test errors."[53] The court then denied the defendant's motion, concluding that the "evidence" of error was "too speculative to defeat the plaintiff's motion for summary judgment."[54]

In *Public Interest Research Group v. Magnesium Elektron*, the district court refused to accept a defense analogous to the laboratory

46. *Id.*
47. *Id.* at 1491.
48. *Id.* at 1492.
49. *Id.*
50. *Id.*
51. *Id.* The Ninth Circuit also held invalid an "upset defense," which would excuse permit violations based on exigent circumstances beyond the reasonable control of the permittee, where no provision was made for such defense in the permit. *Id.* at 1482, 1487-88.
52. *See* Pub. Interest Research Group v. Yates Indus., 757 F. Supp. 438, 447-48 (D.N.J. 1991); *see also* Student Pub. Interest Research Group v. Tenneco Polymers, Inc., 602 F. Supp. 1394 (D.N.J. 1985).
53. *Yates Indus.*, 757 F. Supp. at 447.
54. *Id.*; *see also Tenneco Polymers*, 602 F. Supp. at 1400 (holding that affidavits offered by defendant fail to raise a question of fact that there were errors in the actual tests performed which resulted in overreporting of violations).

error defense.[55] Magnesium Elektron asserted that it should escape liability under the CWA because the amount discharged above permitted levels was within a margin of error that it claimed was inherent in the results of laboratory tests.[56] The *Magnesium Elektron* court dismissed this defense, holding that it "did not raise a question of fact that there were errors in the *actual tests* performed which showed permit violations."[57]

The United States District Court for the District of New Jersey, located within the Third Circuit, alone found that a defendant contesting the accuracy of its DMRs had met its "heavy burden to establish faulty analysis" in *Public Interest Research Group v. Elf Atochem North America, Inc.*[58] Elf Atochem had already settled its penalty with the government, but was still subject to the citizens' damages provision of the CWA.[59] Recognizing the weight of the defendant's burden, the court granted summary judgment against the defendants with regard to some of their laboratory error claims, finding that the sampling procedures used merely cast doubt on the accuracy of the DMRs and were insufficient to defeat liability for its violations.[60] However, with regard to three discharge violations, enough doubt was cast on the laboratory results for the defendant to escape summary judgment.[61] The court reasoned that although the CWA is clearly designed to impose strict liability for violation, when the violation is the result of laboratory error, it would be more accurate to hold the defendant liable for a monitoring violation.[62] In crafting this partial defense to CWA liability, the court surmised that the distinction between a discharge violation and a monitoring violation would be significant at the penalty phase, because in determining the civil penalty assessed, the Act directs the courts to consider good faith efforts towards compliance as well as the seriousness of the violation.[63]

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55. Pub. Interest Research Group v. Magnesium Elektron, Inc., No. CIV.A.89-3193 (JCL), 1992 WL 16314, at *7 (D.N.J. Jan. 23, 1992).
56. *Id.*
57. *Id.*
58. Pub. Interest Research Group v. Elf Atochem N. Am., Inc., 817 F. Supp. 1164, 1178 (D.N.J. 1993).
59. *Id.* at 1174-75.
60. *Id.* at 1179.
61. *Id.*
62. *Id.*
63. *Id.* at 1179-80.

III. THE COURT'S DECISION

The Third Circuit described the question presented as "whether a permittee violates its permit if its discharges in fact comply with the terms of the CWA but its reports erroneously indicated the permit was violated."[64] Acknowledging that this was a pure question of law, the court reviewed the district court's decision de novo.[65]

First, the court addressed the government's contention that the CWA "establishes a scheme of strict liability aimed at facilitating enforcement" in the interests of avoiding "lengthy fact finding, investigations, and negotiations at the time of enforcement."[66] The United States relied on *Union Oil* to support its contention that because Congress deemed accurate DMRs "critical to the effective operation of the Act," courts should treat DMRs, certified as accurate by the dischargers, as conclusive evidence of a violation, and hence "sufficient to determine liability under the CWA."[67] Regulations mandate that DMRs be amended whenever a discharger discovers a reporting error.[68] This is not an empty threat, as failure to follow these regulations constitutes a "criminal violation in and of itself."[69] The government also argued that allowing permittees to contest the accuracy of their own sworn DMRs conflicts with the statutory intent of the Act, as well as the intent of the regulations, and would thus "create the perverse result of rewarding permittees for sloppy laboratory practices."[70]

ALC countered this argument by citing numerous cases decided by courts within the Third Circuit that have either explicitly or implicitly recognized the general availability of the laboratory error defense.[71] In most of these cases, the laboratory error defense failed to survive summary judgment, but the court attributed this to an inability on the part of the defendants to "raise a genuine issue of material fact as to the existence of a laboratory error."[72] The Third Circuit largely attributed this to the "heavy burden" placed on a defendant attempting to contest the

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64. United States v. Allegheny Ludlum Corp., 366 F.3d 164, 174 n.2 (3d Cir. 2004).
65. *Id.*
66. *Id.* at 172 (citing S. REP. NO. 92-414, at 62 (1971)).
67. *Id.* (quoting Sierra Club v. Union Oil Co., 813 F.2d 1480, 1492 (9th Cir. 1987)).
68. *Id.* at 173.
69. *Id.* (citing CWA Regulations, 40 C.F.R. § 122.41(k)(2), (*l*)(8) (2002)).
70. *Id.* (quoting *Union Oil*, 813 F.2d at 1492).
71. *Id.*; *see* Pub. Interest Research Group v. Yates Indus., Inc., 757 F. Supp. 438 (D.N.J. 1991) (finding cover letters stating that defendant "feels" that the violations are erroneous too speculative to defeat summary judgment).
72. *Allegheny Ludlum*, 366 F.3d at 173.

accuracy of its DMRs.[73] A defendant asserting the defense of laboratory error "may not rely on unsupported 'speculation' of measurement error" but instead must "present direct evidence of reporting inaccuracies."[74] The court then concluded that defendants in these cases were not precluded from using the defense "*as a matter of law*."[75]

The Third Circuit then examined the *Elf Atochem* court's analysis of *Bethlehem Steel* where the court refused to accept the defense of laboratory error "[g]iven the heavy emphasis on accuracy in the Act and the clear Congressional policy that DMRs should be used for enforcement purposes."[76] While the Third Circuit agreed with the *Upjohn* court that it would be inconsistent with the Act to "allow permit holders to escape liability altogether on the basis of laboratory error" the court was persuaded by *Elf Atochem*'s reasoning that it would be more "accurate . . . to hold a defendant liable for a monitoring violation rather than a discharge violation."[77]

To determine whether DMRs can be considered conclusive proof of a violation or merely evidence of a violation, the Third Circuit reasoned that if a DMR shows that a permittee has violated its permit terms, that report is sufficient merely to discharge the plaintiff's burden of production.[78] Then the court posited that neither the "CWA itself nor any regulation of which we are aware makes such report conclusive," and that the trier of fact, whether judge or jury, must still be persuaded that the violation actually occurred.[79] Hence, evidence that the DMRs overreported due to laboratory error is relevant to show that, in reality, no violation occurred.[80]

The Third Circuit clarified that "laboratory error is not an affirmative defense to liability."[81] Instead, it is merely evidence relevant to proving whether or not a violation actually occurred.[82] Adopting the *Elf Atochem* court's partial defense standard, the court concluded that the discharger should still be held liable for monitoring and reporting

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73. *Id.*
74. *Id.* (quoting Student Pub. Interest Research Group v. Ga. Pac. Corp., 615 F. Supp. 1419, 1429 (D.N.J. 1985)).
75. *Id.* (emphasis added).
76. *Id.* (quoting Pub. Interest Research Group v. Elf Atochem N. Am., Inc., 817 F. Supp. 1164, 1179 (D.N.J. 1993)).
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.* at 174 n.3.
82. *Id.*

violations even with the successful assertion of laboratory error.[83] The Third Circuit buttressed its position by noting that "failure to correct an inaccurate DMR is an independent violation of the CWA" and the same circumstances that would successfully support a laboratory error defense would be highly relevant in finding a monitoring violation.[84]

The court was decidedly "underwhelmed" by the government's contention that recognizing the laboratory error defense would burden NPDES litigation by depriving it of strict liability, asserting "[s]trict liability relieves the government of the obligation to show *mens rea*, and not the *actus reus*."[85] Even though the court conceded that the CWA "unambiguously imposes strict liability for unlawful discharges," the court concluded that faulty reporting does not necessarily trigger the same strict liability regime.[86]

Turning to the government's argument that there was insufficient evidence to support laboratory error, the court noted that this "followed a trial at which the laboratory error defense had been *excluded*."[87] Even though the district court heard some evidence of laboratory error during the penalty phase, because the district court had already determined ALC's liability, the "after-the-fact" weighing of the evidence failed to cure the district court's error in excluding the evidence in the jury trial.[88] Accordingly, the Third Circuit vacated the jury verdict and remanded so that the laboratory error defense could be considered and adjudicated with respect to the affected claims.[89]

IV. ANALYSIS

On the surface, the Third Circuit's recognition of the laboratory error defense makes sense.[90] If permittees can prove that their reported violations were not violations at all, but simply laboratory errors which caused them to believe that they were violating the conditions of their permit, it makes sense to hold them accountable for only a monitoring violation and not the more expensive permit violation. However, in reality, the recognition of the laboratory error defense, even as a partial defense to liability, contravenes the congressional imposition of strict liability for violations of the CWA and thwarts the additional

83. *Id.* at 175.
84. *Id.*
85. *Id.* at 174, 176.
86. *Id.* at 175.
87. *Id.* at 176.
88. *Id.*
89. *Id.*
90. *Id.*

enforcement intended by Congress through citizen enforcement suits.[91] Allowing this defense will force citizen enforcers into the uncomfortable position of not knowing whether they are prosecuting an actual violation of the CWA or a mirage created through laboratory error.[92]

Congress intended that the Act provide "manageable and precise benchmarks for enforcement."[93] Because Congress intended to facilitate the prosecution of permit violations it streamlined the fact-finding process in two ways.[94] First, it placed the burden of measuring and reporting pollutant levels on permit holders, rendering enforcement not only simpler, but less expensive, as the permit holders are responsible for the expense of compiling and documenting the evidence of violations.[95] Second, the CWA imposes strict liability for permit violations "such that a court need not enquire into a defendant's culpability or good faith in order to find liability."[96] As the Ninth Circuit indicated in *Union Oil*, the laboratory error defense would sanction "countless additional hours of NPDES litigation and creat[e] new, complicated factual questions for district courts to resolve."[97] Congress's intended purpose of allowing for "swift and simple" prosecution for permit violations would be significantly thwarted by allowing the laboratory error defense, which would generate evidentiary problems not contemplated by the CWA.[98]

Because the standards for bringing a suit for enforcement are the same whether under administrative enforcement or through citizen enforcement, recognition of the laboratory error defense would also greatly impact the ability of citizens to bring suit to enforce provisions of the CWA.[99] Permit holders are required by the Act not only to monitor their discharge, but to publicly file their DMRs.[100] Thus, citizen groups relying on the DMRs would have grounds to believe that a violation was taking place, while private evidence unavailable to them might reveal a laboratory error which rendered those reports useless.[101] If the DMRs are

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91. *See generally* S. REP. NO. 92-414 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668.

92. *See* Sierra Club v. Union Oil Co., 813 F.2d 1480, 1492 (9th Cir. 1987).

93. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500; S. REP. NO. 92-414 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3747.

94. Pub. Interest Research Group v. Elf Atochem N. Am., Inc., 817 F. Supp. 1164, 1178 (D.N.J. 1993).

95. *Id.*

96. *Id.*

97. *Union Oil*, 813 F.2d at 1492 (considering the analogous defense of "sampling error").

98. *Id.* at 1492.

99. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500; S. REP. NO. 92-414 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3746.

100. *Union Oil*, 813 F.2d at 1492.

101. *Id.*; Chesapeake Bay Found. v. Bethlehem Steel Corp., 608 F. Supp. 440, 451 (D. Md. 1985) (holding not only must the DMRs contain a "complete and accurate record of pollutant

rendered meaningless by this defense, then the promise that DMRs be made publicly available, ostensibly for the purpose of citizen enforcement, becomes an empty one.[102]

Congress specifically directed the courts to "recognize that in bringing legitimate actions under this section citizens would be performing a public service," and as such, Congress provided that the costs of litigation be awarded to citizen groups whenever a court determines that "such action is in the public interest."[103] Thus, a citizen group may believe, on the basis of the publicly available DMRs, that a violation either has occurred or is occurring and commence an enforcement action. If the defendant is excused of his discharge violation through the defense of laboratory error, the citizen group may be denied the costs of litigation Congress specifically intended to provide on the basis that, because of laboratory error, their action no longer fits into the category of "legitimate actions."[104] Under-funded citizen groups would not only be discouraged by the danger of prosecuting "mirage" violations in which a laboratory error resulting in overreporting violations that did not actually exist, but they might also be denied the congressionally mandated incentive to prosecute—reimbursement for the costs of litigation.[105]

The *Elf Atochem* court accurately predicts the effect that the partial defense of laboratory error will have on penalties, the primary enforcement measure under the Act.[106] The CWA provides that the violator of a permit under the CWA "shall be subject to a civil penalty not to exceed $25,000 per day for each violation."[107] In assessing the penalty, the courts are directed to consider "the seriousness of the violation" and any "good faith effort to comply with the applicable requirements."[108] Because these subjective criteria come into play at the penalty phase, monitoring violations could yield lower penalties, creating

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monitoring by permit holders," but that "[a]ccuracy is further encouraged by the availability of criminal penalties for false statements").

102. *Union Oil*, 813 F.2d at 1492.

103. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, S. REP. NO. 92-414 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3747.

104. *Id.*

105. CWA § 505(a)(1), 33 U.S.C. § 1365(a)(1) (2000). The citizen suit provision of the act only authorizes suits "against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this Chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation." *Id.*

106. Pub. Interest Research Group v. Elf Atochem N. Am., Inc., 817 F. Supp. 1164, 1179 (D.N.J. 1993).

107. CWA § 309(d), 33 U.S.C. § 1319(d).

108. *Id.*

the anomalous result of rewarding permittees for evading their responsibility to accurately monitor their discharges.[109] Allowing permit holders to escape liability through the assertion of the laboratory error defense creates incentive for them to wait until they are sued before ensuring that their laboratory results and their DMRs are accurate.[110] Thus, not only does allowing the laboratory error defense undermine enforcement, but it also undermines the very provisions of the CWA that demand accurate monitoring of discharges.[111]

V. CONCLUSION

The citizen suit provision in the CWA would be largely defeated if DMRs were treated merely as prima facie evidence, allowing a permittee to impeach its own reports, rather than as conclusive evidence of a violation.[112] Not only will it be more difficult to prove liability, but the laboratory error defense at best mitigates—and at worst eliminates—the incentives for citizen enforcement suits, even though such suits were explicitly encouraged by Congress. Simultaneously, recognition of the laboratory error defense would encourage poor monitoring by permittees.[113] This is clearly not the effect Congress had in mind when it enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[114]

Sara Porsia[*]

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109. Sierra Club v. Union Oil Co., 813 F.2d 1480, 1492 (9th Cir. 1987).
110. *Elf Atochem*, 817 F. Supp. at 1179.
111. *Union Oil*, 813 F.2d at 1492.
112. *Id.*
113. *Id.*
114. CWA § 101, 33 U.S.C. § 1251(a) (2000).

* J.D. candidate 2006, Tulane Law School; B.B.A. 1999, New York University.