Citizen Suits in U.S. Environmental Law

: An Overview and Assessment

Melissa Powers*

＜Abstract＞

Citizens have long played a direct role in U.S. governance, but the availability of citizen suits has allowed citizens to have a particularly strong part in environmental policy development and implementation. Citizens have the ability to influence and challenge government decisions under the Administrative Procedure Act (APA), which allows interested parties to challenge both federal agency actions and inaction in certain contexts. Substantive environmental statutes also allow citizens to challenge agency conduct.

This article will provide an overview of U.S. citizen suitsand explore how they have influenced environmental law. Part II of this article will introduce the three general types of citizen actions that U.S. authorizes: challenges to agency actions; suits seeking to compel agency action; and citizen enforcement actions against regulated entities. Part III will discuss some of the legal hurdles citizens must clear to bring their cases before court. Part IV will conclude with a brief evaluation of the role of citizen suits in U.S. environmental law.

Yet, even after 40 years of citizen enforcement, debates continue about whether citizens should continue to play such a role in U.S. governance and compliance.It is unlikely that debates about the priority of citizen enforcement will abate any time soon. It is safe to say, however, that environmental citizen suits will continue to influence the U.S. legal and political system for years to come.

Key words : Citizen Suits, challenges to agency actions, suits seeking to compel agency action, citizen enforcement actions against regulated entities, Standing

* Associate Professor of Law, Lewis & Clark Law School

Ⅰ. Introduction

Citizens have long played a direct role in U.S.governance, but the availability of citizen suits has allowed citizens to have a particularly strong part in environmental policy development and implementation.Citizens have the ability to influence and challenge government decisions under the Administrative Procedure Act (APA),[1] which allows interested parties to challenge both federal agency actions and inaction in certain contexts.Substantive environmental statutes[2] also allow citizens to challenge agency conduct.Perhaps more controversially, many environmental laws give private citizens, nongovernmental organizations, and other private actors the right to directly enforce environmental laws against alleged violators.[3] The availability of citizen suits against government agencies and private parties represents a unique innovation in environmental policy development.Nonetheless, it remains a hotly disputed development in U.S.environmental law.

This article will provide an overview of U.S.citizen suits and explore how they have influenced environmental law.Part II of this article will introduce the three

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1) Administrative Procedure Act (APA), 5 U.S.C.§§ 551 559, 701 706.

2) This article will focus on citizen suits under the Clean Water Act (formally called the Federal Water Pollution Control Act), 33 U.S.C.§§ 1251 1387, Clean Air Act, 42 U.S.C.§§ 7401 7671q, Resource Conservation and Recovery Act (RCRA) (also called the Solid Waste Disposal Act), 42 U.S.C.§§ 6901 6992k, and Endangered Species Act (ESA), 16 U.S.C.§§ 1531 1599.

3) Clean Water Act § 505, 33 U.S.C.§ 1365; Clean Air Act § 304; 42 U.S.C.§ 7604; RCRA § 7002, 42 U.S.C.§ 6972; ESA § 11(g); 16 U.S.C.§ 1540(g).

general types of citizen actions that U.S.authorizes: challenges to agency actions; suits seeking to compel agency action; and citizen enforcement actions against regulated entities.Part III will discuss some of the legal hurdles citizens must clear to bring their cases before court.Part IV will conclude with a brief evaluation of the role of citizen suits in U.S.environmental law.

Ⅱ. An Overview of Citizen Suits

Citizens have played a direct role in federal agency governance since Congress passed the Administrative Procedure Act in 1948.Under the APA, interested parties may challenge final agency actions[4] and may also sue agencies to compel action "unlawfully withheld or unreasonably delayed."[5] These two aspects of the APA—allowing parties to challenge both agency action and inaction—have enabled citizen groups (as well as industry organizations and other interested parties) to profoundly influence agency policy.

The APA became particularly important for environmental protection when Congress enacted environmental laws in the late 1960s and throughout the 1970s.These environmental statutes give content to the procedural rights the APA affords.They also give citizens additional rights to challenge agency action and inaction.In addition, several environmental laws allow citizens to act as the direct enforcers of environmental violations.Moreover, the APA and the environmental laws establish expansive definitions of persons who can sue under citizen suits.Finally, citizens may recover attorneys' fees and costs when they prevail.As a result of the right to sue and the ability to recover fees and costs, citizen suits have become a key component of U.S.environmental law.

A. Citizen Suits Challenging Federal Agency Actions

4) APA, 5 U.S.C.§ 702.
5) APA, 5 U.S.C.§ 706.

Citizens may challenge actions taken by federal agencies under either the APA or substantive environmental statutes that provide a right of review.The APA acts as a default statute, in that it affords a citizen the right of review unless they otherwise have another adequate remedy in court.[6] Environmental statutes sometimes allow interested parties to challenge certain types of agency actions and usually establish clear deadlines and judicial fora for these statutory challenges.[7] Whether the suits arise under the APA or the substantive statutes, they ultimately turn on whether the agency acted "in excess of statutory jurisdiction" or issued an agency action that was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[8] While courts often blur the distinctions between these claims, this section will discuss actions that are "in excess of statutory jurisdiction" separately from "arbitrary and capricious" decisions.

In a typical challenge alleging that an agency has acted "in excess of statutory jurisdiction," the citizen must show that the agency behaved in contravention of a statute's express or implied intent.In this type of challenge, a court must first assess what the statute means and then determine whether the agency's action conforms to statutory intent.In undertaking this assessment, courts typically follow the *Chevron* two step approach.In *Chevron U.S.A.v.Natural Resources Defense Council*,[9] the Supreme Court established a two step approach for statutory

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6) APA, 5 U.S.C. §§ 702 (noting that "[a] person suffering legal wrong because of agency action ...is entitled to judicial review thereof"), 704 ("Agency action made reviewable by statute and final agency action for which there is not other adequate remedy in a court are subject to judicial review.").

7) As an example, the Clean Water Act directs interested parties to challenge seven categories of agency actions in the "Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business" within 120 days from the date of the agency's final action.CWA § 509(b)(1), 33 U.S.C.§ 1369(b)(1).The Clean Air Act requires interested parties to challenge most final federal agency actions that have national effect in the Court of Appeals for the District of Columbia Circuit and other final actions with local impacts in the affected judicial Circuit Court of Appeals.CAA § 307(b)(1), 42 U.S.C.§ 7607(b)(1).

8) APA, 5 U.S.C.§ 706(2)(A)&(C).Suits may also challenge agency action adopted "without observation of procedure required by law." *Id.*at § 706(2)(D).

9) 467 U.S.837 (1984).Later cases have added conditions to the *Chevron* doctrine.For example, the Supreme Court has indicated that agencies should typically receive *Chevron* deference (deference to an agency's reasonable interpretation) only where the agency's

construction.[10] Under step one, a court determines whether Congress made its intent clear, by evaluating the statute's plain language, structure, context, and other indications of congressional intent.[11] If the court finds that congressional intent is clear, "that is the end of the matter," and the court will then assess whether the agency's action conforms to this clear intent.[12] If, however, the statute is ambiguous, the analysis proceeds to step two, under which a court will determine whether the agency's interpretation of the statute is "reasonable."[13] In making this assessment, the court must defer to the agency's interpretation.[14] Thus, where a party challenges an agency action as being "in excess of statutory jurisdiction," the court will first decide what the statute requires and then determine whether the agency's action conforms to that requirement.If a statute is ambiguous, the agency will be able to both interpret the statute and explain how its action conforms to that interpretation.

Under challenges alleging that an agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,"[15] citizens are typically challenging the factual and procedural basis of an agency's decision.The question is not what the law means; rather, the primary question is whether the agency adequately justified its action based on the information before it.The Supreme Court has identified four key factors courts should assess when deciding whether an agency has behaved arbitrarily and capriciously:

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interpretation appears in a rulemaking or other "formal" agency decision that would indicate the agency gave meaningful consideration to the interpretation.U.S.v.Mead Corp., 533 U.S.218, 228 29 (2001).Interpretations that appear in informal agency documents typically receive less deference and must generally be persuasive, not simply permissible.*Id.*at 234 35; *Skidmore v.Swift & Co.*, 323 U.S.134, 140 (1944).Additionally, only agencies charged with administering the relevant statute receive deference.*Chevron*, 467 U.S.at 844.

10) *Chevron*, 467 U.S.at 842 43.

11) *Id.*at 842

12) *Id.*at 842 43.

13) *Id.*at 843 44.

14) *Id.*at 844.

15) APA, 5 U.S.C.§ 706(2)(A).

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[16]

In other words, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[17] To implement this requirement, an agency usually will compile an administrative record that contains the relevant factual and policy information on which the agency based its decision.The agency will then explain how the information supports its decision.If the agency can demonstrate that the record supports the agency's final action, it should survive judicial revie w.[18] However, if the record evidence contradicts the agency's findings, and the agency has not explained the deviation, the agency's action will likely be found arbitrary or capricious.

B. Citizen Suits Challenging Federal Agency Inaction

Citizen suits can also influence an agency's decision to take action at all.As with challenges to agency actions, the authority to challenge agency inaction may arise under both the APA (in what are commonly called "failure to act" or "unreasonable delay" cases) or under substantive statutes (in what are commonly called "mandatory duty" cases).As with challenges to agency actions, the APA acts as a default statute that citizens can use when substantive statutes do not otherwise provide a right of review.

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16) Motor Vehicles Mfrs.Ass'n, Inc.v.State Farm Mutual Auto.Ins.Co., 463 U.S.29, 43 (1983).

17) *Id.*(quoting Burlington Truck Lines v.U.S., 371 U.S.156, 168 (1962)).

18) *Id.*("The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency.").

1. Mandatory Duty Cases Under Substantive Statutes

Mandatory duty cases arise from the substantive statutes themselves.The Clean Water Act, Clean Air Act, RCRA, and ESA all authorize citizen suits against agencies for failing to perform non discretionary duties under the statutes.[19] A body of case law has reached a general consensus that a mandatory duty exists when an agency has the obligation to perform a discrete task by a date certain.[20] For example, the Clean Water Act requires EPA to review and either approve or disapprove state water quality standards within 90 days of receiving such standard s.[21] If EPA fails to act on a state submission of water quality standards, it would be subject to a citizen suit for failing to perform a mandatory duty.[22] Similarly, the Clean Air Act directs EPA to review and, if appropriate, revise certain air pollution control standards every eight years.[23] If EPA fails to follow that time frame, it will face a mandatory duty citizen suit.[24] Mandatory duty cases are particularly common under the ESA, which requires agencies to act on petitions to list species as threatened or endangered within a specific timeframe.[25] It is

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19) Clean Water Act § 505(a)(2), 33 U.S.C.§ 1365(a)(2); Clean Air Act § 304(a)(2); 42 U.S.C.§ 7604(a)(4); RCRA § 7002(a)(2), 42 U.S.C.§ 6972(a)(2); ESA § 11(g)(1)(C); 16 U.S.C.§ 1540(g)(1)(C).

20) *See* Sierra Club v.Thomas, 828 F.2d 783, 790 91 (D.C.Cir.1987); Sierra Club v.Johnson, 444 F.Supp.2d 46, 52 (D.D.C.2006).Importantly, however, courts also stress that mandatory duty claims do not involve review of the merits of agency action.*See* Kennecott Copper Corp.v.Costle, 572 F.2d 1349, 1355 (9th Cir.1978*)* (quoting Wisconsin Envtl.Decade, Inc.v.Wisconsin Power & Light Co., 395 F.Supp.313, 321 (W.D.Wis.1975) (a mandatory duty claim "'was intended to provide relief only in a narrowly defined class of situations in which the Administrator failed to perform a mandatory function; it was not designed to permit review of the performance of those functions, nor to permit the court to direct the manner in which any discretion given the Administrator in the performance of those functions should be exercised.'").

21) CWA § 303(c)(3), 33 U.S.C.§ 1333(c)(3).The statute gives the agency 60 days to approve and 90 days to disapprove submitted standards.*Id.*

22) Fl.Pub.Interest Research Group Citizen Lobby, Inc.v.EPA, 386 F.3d 1070, 1088 90 (11th Cir.2004).

23) CAA § 111(b)(1)(B), 42 U.S.C.§ 7411(b)(1)(B).

24) *See* Portland Cement Ass'n v.EPA, 665 F.3d 177, 193 94 (D.C.Cir.2011).

25) *See* ESA § 4(b)(3); 16 U.S.C.§ 1533(b)(3); *see also* Benjamin Jesup, *Endless War or End this War? The History of Deadline Litigation Under Section 4 of the Endangered Species Act and the Multi district Litigation Settlements*, 14 Vt.J.Envtl.L.327 (2013).

important to keep in mind, however, that mandatory duty cases involve the question of whether the agency failed to act as required; these cases do not evaluate the substance of agency actions.[26]

In many mandatory duty cases, the real issue in dispute is usually the appropriate remedy.For citizen litigants, the purpose of a mandatory duty suit is to either compel immediate agency performance or, more realistically, to obtain a court order or settlement agreement directing the agency to act by a date certain.[27] Even if an agency has missed a statutory deadline by several years, courts usually recognize that the agency will need extra time to complete its task.[28] In practice, therefore, mandatory duty suits usually compel agencies to act within a timeframe set by the court or agreed to by the parties, rather than the deadlines set by the statute.

2. APA Failure to Act and Unreasonable Delay Cases

The APA authorizes suits to "compel agency action unlawfully withheld or unreasonably delayed."[29] In these suits, parties may allege that a federal agency 1) has failed to perform a mandatory duty under a statute that does not provide a direct right of review; 2) has failed to perform a required action that does not have a specific statutory deadline; or 3) has failed to perform a discretionary

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26) *See*, *e.g.*, Envtl.Defense Fund v.Thomas, 870 F.2d 892, 899 (2d Cir.1989) ("[T]he district court has jurisdiction, under Section 304, to compel the Administrator to perform purely ministerial acts, not to order the Administrator to make particular judgmental decisions.");
NY Pub.Interest Research Group, Inc.v.Whitman, 214 F.Supp.2d 1, 3 (2002); Friends of the Earth v.EPA, __ F.Supp.2d __, 2013 WL 1226822 (D.D.C.2013) (dismissing a mandatory duty claim after finding the statute did not clearly require the agency to act).

27) *See* David T.Buente, Jr., *et al.*, *Limited Oversight: The Role of the Federal Courts Vis à vis the Environmental Protection Agency in Air Pollution Control Under the Clean Air Act*, 21 Duke Envtl.L & Pol'y Forum 309, 327 28 (2011).

28) *See* NRDC v.Train, 510 F.2d 692, 704 05 (D.C.Cir.1975) (upholding the district court's schedule for EPA to complete a nondiscretionary task); Envtl.Def.v.Leavitt, 329 F.Supp.2d 55, 61, 70 71 (D.D.C.2004) (entering consent decree establishing a schedule for EPA to perform nondiscretionary duties); Buente *et al.*, *supra* note 27, at 327 330.

29) APA, 5 U.S.C.§ 706(1).

action that does not have a specific statutory deadline.Parties seeking to compel agency action have a better chance of success under the first two categories.

Citizen suits seeking to compel required agency action proceed as either "failure to act" or "unreasonable delay" cases.In a "failure to act" case, a party will usually allege that an agency has failed to perform a required action by a date certain.[30] These cases proceed much like mandatory duty cases; if a court determines the agency does indeed have an obligation to act by a specific date, it will usually direct the agency to take the action by a court established deadlin e.[31] In most cases, however, statutes may direct the agency to take certain actions, but will not establish a deadline for the action.[32] At some point, the agency's failure to act may become "unreasonable."[33] Most courts apply the so called "TRAC factors"[34] to evaluate the reasonableness of the agency's delay.According to these factors:

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30) *See* Forest Guardians v.Babbitt, 174 F.3d 1178, 1190 (10th Cir.1999) ("Thus, the distinction between agency action 'unlawfully withheld' and 'unreasonably delayed' turns on whether Congress imposed a date certain deadline on agency action."); Norton v.Southern Utah Wilderness Alliance, 542 U.S.55, 64 (2004); *see also* Michael D.Sant'Ambrogio, *Agency Delays: How a Principal Agency Approach Can Inform Judicial and Executive Branch Review of Agency Foot Dragging*, 79 Geo.Wash.L.Rev.1381 (2011).Under the APA, "agency action" is defined to include "failure to act." APA, 5 U.S.C.§ 551(13).

31) *Forest Guardians*, 174 F.3d at 1190 ("However, when Congress by organic statute sets a specific deadline for agency action, neither the agency nor any court has discretion.The agency must act by the deadline.If it withholds such timely action, a reviewing court must compel the action unlawfully withheld.To hold otherwise would be an affront to our tradition of legislative supremacy and constitutionally separated powers."); In re Bluewater Network, 234 F.3d 1305, 1316 (D.C.Cir.2000) (ordering agency rulemaking in light of "a clear statutory mandate, a deadline nine years ignored, and an agency that has admitted its continuing recalcitrance"); *see also* Sant'Ambrogio, *supra* note 30, at 1414 (noting that courts will usually "compel agency action that violates a clear statutory deadline").

32) Sant'Ambrogio, *supra* note 30, at 1414; Jacob E.Gersen & Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 U.Pa.L.Rev.923, 941, 983 tbl.4 (2008).

33) The APA directs agencies to conclude matters presented to them in a "reasonable time." APA, 5 U.S.C.§ 555(b).

34) Telecommunications Research & Action Center v.FCC (*TRAC*), 750 F.2d 70, 80 (D.C.Cir.1984).

> (1) the time agencies take to make decisions must be governed by a "rule of reason"; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.'"[35]

In short, the TRAC factors balance the interests favoring agency action against the agency's other competing responsibilities and priorities.Where a court determines that the balance favors an agency response, it will usually direct the agency to act by a specified time.Thus, whether styled as a failure to act or unreasonable delay case, citizens can often compel agency action.[36]

Not all statutes, however, clearly require agency action in all contexts.Indeed, many statutes give agencies broad discretion to decide when or if they will act at all.In these circumstances, the Supreme Court has held, the APA does not offer any relief.[37] In *Norton v.Southern Utah Wilderness Alliance*, the Supreme Court held that APA "failure to act" claims "can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*."[38] The Court also cautioned against allowing failure to act claims seeking broad, programmatic relief.[39] Thus, citizens' ability to compel agency action is usually limited to targeting specific, discrete actions the agency must otherwise perform.[40]

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35) *Id.*(internal citations omitted).

36) *But see* Sant'Ambrogio, *supra* note 30, at 1388 (lamenting "weak and ad hoc judicial review of agency delays").

37) Norton v.Southern Utah Wilderness Alliance, 542 U.S.55, 61 65 (2004).

38) *Id.*at 64 (emphasis in original).

39) *Id.*at 64 65.

C. Citizen Enforcement Suits

Several U.S.environmental statutes authorize citizens to sue alleged violators directly through citizen enforcement actions.The Clean Water Act, Clean Air Act, and RCRA, for example, authorize citizens to file suit against any person alleged to be in violation of many of the statutes' requirements designed to abate pollution from specific facilities.[41] The Endangered Species Act authorizes citizen suits against any person alleged to have unlawfully imported, exported, possessed, sold, or taken a protected species.[42] This section will briefly explain citizen suits under three pollution control statutes (the Clean Water Act, Clean Air Act, and RCRA) and the Endangered Species Act.

1. Citizen Suits Under Pollution Control Statutes

U.S.pollution control laws typically require regulated entities to obtain permits for certain behavior and then use the permits to restrict or limit the amount or type of pollution the entity may release into the environment.[43] These laws also

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40) Citizens may attempt to evade this limitation by petitioning an agency to take specified actions.Under the APA, federal agencies must give interested persons the right to petition for agency action, and the agency must respond to such petitions.APA, 5 U.S.C.§§ 553(e), 555(e).If an agency receives a petition and fails to respond, citizens may compel a response through an unreasonable delay case under APA section 706(1), in which case a court will apply the *TRAC* factors to assess the reasonableness of the agency's delay.At some point, the agency will need to answer the petition and explain its response.*Id.*If an agency denies a request asking the agency to act and justifies its denial by noting that it has higher regulatory priorities, courts will often defer to that reasoning.*See* Am.Horse Prot.Ass'n v.Lyng, 812 F.2d 1, 4 5 (D.C.Cir.1987).However, if a court believes the substantive statute limits the agency's ability to defer regulation, it may compel the agency to act.*See* Massachusetts v.EPA, 549 U.S.497, 532 35 (2007) (rejecting EPA's arguments that it could refuse a petition to regulate greenhouse gases under the Clean Air Act by relying on policy reasons "divorced from the statutory text").

41) Clean Water Act § 505(a)(1), 33 U.S.C.§ 1365(a)(1); Clean Air Act § 304(a)(1), 42 U.S.C.§ 7604(a)(1); RCRA § 7002(a)(1)(A), 42 U.S.C.§ 6972(a)(1)(A).

42) ESA §§ 11(g)(1) (citizen suit provision), 9(a) (describing prohibited acts); 16 U.S.C.§§ 1540(g)(1), 1538(a).

43) *See*, *e.g.*Clean Water Act §§ 301(a) (prohibiting "the discharge of any pollutant by any person" except as in compliance section 402), 402 (establishing the National Pollutant

usually require permittees to monitor and report their compliance (or lack of compliance) with the permit terms.[44] In a typical environmental citizen suit, a concerned person or organization alleges that a polluter has violated the law either by failing to obtain a required permit or by violating the terms of a required permit.[45] Under RCRA, citizens may also sue entities for causing environmental harm even where the facility does not require a permit or is operating in compliance with a permit.[46] The vast majority of citizen enforcement cases, however, hinge on the existence of, or alleged noncompliance with, a required permit.[47] The specific questions that often arise in these cases are therefore seemingly straightforward: is the defendant engaging in unpermitted conduct that triggers the obligation to obtain a permit, or did the defendant violate to the permit's limitations? If a citizen group can prove such violations, it can usually obtain declaratory and injunctive relief and civil penalties.

a. Proving the Case

Proving the merits of a citizen suit requires a plaintiff to demonstrate that the defendant has engaged in regulated conduct without conforming to regulatory requirements.Many citizen suits involve an allegation that the defendant has operated illegally by engaging in unpermitted activity that requires a permit.These cases present may present significant challenges to citizen enforcers, at least under

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Discharge Elimination System permit program), 33 U.S.C.§§ 1311(a), 1342.

44) *See* Clean Water Act § 308(a), 33 U.S.C.§ 1318 (a) (establishing monitoring and reporting requirements).

45) The Clean Water Act and Clean Air Act both anticipate these types of suits.Under the Clean Water Act, citizens may sue for violations of "an effluent standard or limitation," which includes discharges of pollutants without, or in violation of, discharge permits.Clean Water Act §§ 505(a)(1) & (f), 33 U.S.C.§ 1365(a)(1) & (f).Under the Clean Air Act, citizens may enforce against violations of "an emission standard or limitation," which is defined to include permit conditions or requirement to obtain a permit.Clean Air Act §§ 304(a)(1) & (f), 42 U.S.C.§§ 7604(a)(1) & (f).

46) RCRA § 7002(a)(1)(B), 42 U.S.C.§ 6972(a)(1)(B) (authorizing citizen suits "against any person ...who has contributed or is contributing to the past or present handling ...or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment").

47) *See* James R.May, *2009 2010 Developments: Clean Water Act Environmental Citizen Suits*, SS005 ALI ABA 343 (2010) (summarizing cases).

some statutes.Under the Clean Water Act, which broadly prohibits unpermitted discharges of any pollutant,[48] a citizen enforcer should prevail on the merits by demonstrating the defendant has added any pollutant from any point source into a water of the United States.[49] While legal questions abound in proving these elements,[50] a citizen that can show pollution flowing through a discrete channel into a navigable waterway should succeed in proving a violation, since the Clean Water Act regulates any discharge in any amount.[51] Under the Clean Air Act, in contrast, only new or modified facilities that will emit specified threshold amounts of pollutants typically require permits, but the regulatory triggers vary from program to program.[52] Proving that a facility will exceed these emissions thresholds and thus trigger the permit requirement is often extremely complicated and expensive.[53] The Clean Air Act's regulations governing modifications only increase the degree of difficulty.[54] The more complicated the trigger for a permit

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48) Clean Water Act § 301(a), 33 U.S.C.§ 1311(a).

49) *Id.*; *see also* Clean Water Act §§ 502(6)(7)(12)&(14), 33 U.S.C.§§ 1362(6)(7)(12)&(14) (defining relevant terms).

50) For example, the meaning of the term "navigable waters," which the Clean Water Act defines as "waters of the United States," has been litigated for decades, resulting in three major Supreme Court cases but not yet resulting in a clear definition.*See* nited States v.Riverside Bayview Homes, Inc., 474 U.S.121 (1985); Solid Waste Agency of Northern Cook Cty.v.Army Corps of Engineers, 531 U.S.159 (2001); Rapanos v.U.S., 547 U.S.715 (2006).Similarly, it is not entirely clear what an "addition" of a pollutant involves.*See* Los Angeles Cty.Flood Control Dist.v.Natural Res.Defense Council, Inc., 133 S.Ct.710 (2013).

51) Clean Water Act § 301(a), 33 U.S.C.§ 1311(a).

52) *See* Clean Air Act §§ 165(a) & 169(1), 42 U.S.C.§§ 7475(a) & 7479(1) (defining "major emitting facilities" and setting the emissions thresholds for the Prevention of Significant Deterioration program at 100 tons per year for certain categories of facilities and at 250 tons per year for all other sources); Clean Air Act §§ 182(c), (d), & (e), 42 U.S.C.§§ 7511a (c), (d), & (e) (defining "major sources" that require permits as sources that will emit 50, 25, and 10 tons per year of volatile organic compounds, depending on the severity of air pollution in which the sources are located); Clean Air Act § 112(a)(1), 42 U.S.C.§ 112(a)(1) (defining "major sources" of hazardous air pollutants (HAPs) facilities that will emit at least 10 tons per year of any single HAP or 25 tons per year of any combination of HAPs).

53) *See* Edward Lloyd, *Citizen Suits and Defenses against Them*, ST051 ALI ABA 893 (2012); *see also* Jim Hecker, *The Difficulty of Citizen Enforcement of the Clean Air Act*, 10 Widener L.Rev.303 (2004).

may be, the more likely it is that citizens will need to enlist the help of experts to demonstrate violations.Perhaps not surprisingly, the vast majority of U.S.citizen suits arise under the Clean Water Act,[55] which requires permits for *any* discharge.

Proving violations of permit requirements also presents varying levels of difficulty.Under the Clean Water Act, when a defendant already has a permit it can be sometimes quite easy for plaintiffs to prove their case using the defendant's own data.The Clean Water Act requires defendants to submit regular monitoring reports documenting the types and amounts of pollutants discharged.[56] Courts have held that these reports alone can prove violations.[57] Of course, the ease with which a citizen group can prove its case—even using the defendant's own data—often turns on the nature of the permit.If a permit contains numeric limitations restricting the amount or type of pollutant a facility may release, a citizen will have an easier time using monitoring reports to prove a violation.In contrast, if the permit contains qualitative prohibitions—for example, Clean Water Act permits may generally prohibit discharges that violate water quality standards without specifying what such violations would involve—it may become more difficult to establish a violation.[58] Additionally, many permits—particularly Clean Air Act permits—

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54) *See* Jonathan Remy Nash & Richard L.Revesz, *Grandfathering and Environmental Regulation: The Law and Economics of New Source Review,* 101 Nw.U.L.Rev.1677 (2007) (discussing how regulations complicate the determination of whether a facility has made a modification); *see also* U.S.v.DTE Energy Co., 711 F.3d 643 (6th Cir.2013) (describing the complicated nature of the regulations governing modifications).

55) Lloyd, *supra* note 53.

56) *See* Clean Water Act § 308(a), 33 U.S.C.§ 1318 (a) (establishing monitoring and reporting requirements); Clean Air Act § 504(a c), 42 U.S.C.§ 7661c(a c) (requiring permits to include monitoring and reporting terms).

57) *See* Sierra Club v.Simkins Industries, Inc., 847 F.2d 1109, 1115 n.8 (4th Cir.1988).In addition, the failure to submit required reports is itself an actionable violation.*Id.*at 1115.

58) *Compare* Nw.Envtl.Advocates v.City of Portland, 834 F.2d 842 (9th Cir.1987), *with* Piney Run Preservation Ass'n v.County Commissioners of Carroll County, Maryland, 268 F.3d 255 (4th Cir.2001) (plaintiffs could not sue for violations of thermal water quality standards unless permit established a specific numeric limitation for thermal discharges).These cases involve the Clean Water Act's "permit shield," which states that compliance with a permit equals compliance with the statute.In both cases, the permits included a catch all term prohibiting the discharger from violating water quality standards.As these cases show, courts have issued different opinions regarding the enforceability of this broad permit conditions.

contain exceptions or incorporate defenses that shield defendants from liability.[59] Thus, the terms of the permits play a critical role in promoting or undermining citizen enforcement.

b. Remedies

If a citizen group prevails in demonstrating a violation, three types of remedies exist.First, a group may receive a declaratory order that will simply state that the defendant violated the law.[60] Second, a group may receive injunctive relief, in which the court directs the defendant to take action to comply with the relevant statute.[61] Third, the group will seek civil penalties against the defendant.[62] Unlike typical damages that go to the injured parties, civil penalties go to the U.S.Treasury.[63] Citizen litigants do not benefit directly from the penalty award.Indeed, even though regulations allow for some amount of civil penalties to go toward a supplemental environmental project—a project designed to offset some of the environmental harm caused by the defendant's violations[64]—the litigating citizen group almost never receives the funding for the supplemental project.

While it may seem that citizen groups would have little interest in seeking penalties from which they receive no direct benefit, the amount of penalty is often a major focus of litigation disputes.Citizen groups believe—and the Supreme Court has affirmed—that civil penalties play a key role in deterring violations by both the specific defendant and in general.[65] Indeed, environmental laws are premised upon this belief.The major environmental statutes establish a maximum penalty of $25,000 per day per violation, adjusted for inflation.[66] Under the most recent

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59) Lloyd, *supra* note 53; Hecker, *supra* note 53.

60) James R.May, *Now More than Ever: Trends in Environmental Citizen Suits at 30*, 10 Widener L.Rev.1, 20 (2003) [hereinafter May, *Trends*].

61) *Id.*at 20 n.136 (discussing examples of injunctions).

62) Friends of the Earth, Inc.v.Laidlaw Environmental Services (TOC), Inc., 528 U.S.167, 175 (2000).

63) *Id.*

64) EPA, Supplemental Environmental Projects Policy 1 (1998).

65) *Laidlaw*, 528 U.S.at 185 87.

66) *See*, *e.g.*, Clean Water Act § 309(d), 33 U.S.C.§ 1319(d); Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C.§ 2461 note, as amended by the DCIA, 31

regulatory revision, maximum penalties are now $37,500 per day per violation.[67] EPA guidelines further indicate that civil penalties should, at a minimum, recover the economic benefit the defendant received from violating the law and be set at a level necessary to deter wrongful behavior.[68] Yet, despite these indications that civil penalties should be quite high, courts usually shy away from significant penalty awards.[69] This dynamic may undermine the power of citizen enforcement.

2. Citizen Suits Under the Endangered Species Act

Section 11(g)(1)(A) of the ESA also authorizes citizens to "commence a civil suit ...to enjoin any person ...who is alleged to be in violation of any provision ...or regulation" of the ESA.[70] In practice, this provision primarily allows citizen suits against private parties and government actors that illegally import, export, possess, sell, buy, or otherwise "take"[71] species protected under ESA Section 9.[72] If a federal district court finds a violation of these prohibitions, it may issue an injunction to enforce any applicable law or regulation against the defendant.[73] However, in contrast to the pollution control statutes, civil penalties are not

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U.S.C.§ 3701 note.

67) EPA, Civil Monetary Penalty Inflation Adjustment Rule, 74 Fed.Reg.626, 627 (Jan.7, 2009), codified at 40 C.F.R.§ 19.4 tbl.1.

68) EPA, A Framework for Statute Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties 2 3 (1984).

69) May, *Trends*, *supra* note 60, at 19 21.

70) ESA § 11(g)(1)(A), 16 U.S.C.§ 1540(g)(1)(A).

71) The term "take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such contact." ESA § 3(19), 16 U.S.C.§ 1532(19).The Supreme Court narrowly upheld regulations interpreting this definition to include habitat modification that actually kills or injures listed species.Sweet Home Chapter of Communities for a Great Oregon v.Babbitt, 515 U.S.687 (1995).

72) ESA § 9(a)(1), 16 U.S.C.§ 1538(a)(1).These prohibited acts apply to endangered species of fish or wildlife and to any threatened species of fish or wildlife to which the Secretary of Interior or Commerce has extended such protections.*Id.*at §§ 1538(a)(1) & (a)(1)(G). In practice, almost all threatened fish and wildlife species have such protections.Endangered and threatened plants are also protected from illegal import, export, sale, and possession, but not from "take." *Id.*at § 1538(a)(2).Endangered and threatened insects do not receive protection under ESA Section 9.

73) ESA § 9(g)(1), 16 U.S.C.§ 1540(g)(1).

available through citizen suits.

Enforcement actions under this part of the ESA are much less common than ESA mandatory duty claims or other environmental citizen suit provisions.This may be a function of the scope of prohibited acts under the ESA: while the statute does prohibit a range of activities related to import, export, possession and sale,[74] most species protected under the ESA are threatened or endangered due to habitat loss, not illegal trade.[75] The regulatory definition of take, moreover, is quite narrow, in that it includes habitat modification that results in actual injury or death "by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering" of a listed species.[76] While a party may be able to demonstrate that habitat destruction has such an effect, citizens would need to produce a significant amount of nearly incontrovertible evidence to prove their case.Perhaps this explains why citizen enforcement actions, as opposed to mandatory duty cases, remain relatively rare under the ESA.

While ESA enforcement cases are uncommon, enforcement actions under the pollution control statutes are not.As of 2003, citizens had filed more than 2,000 enforcement cases since 1970.[77] Although the pace of citizen enforcement appeared to be slowing in the late 1990s and early 2000s, citizens nonetheless sent more than 4,000 notices of intent to sue from 1995 to 2003.[78] While many of these notices likely did not result in litigation, they may have generated out of court settlements between environmental groups and regulated industries.Whether this is a good or bad dynamic is likely in the eye of the beholder.Nonetheless, these data indicate the significant potential for citizens to affect implementation of environmental laws.

D. Parties Entitled to Bring Citizen Suits

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74) ESA § 9(a)(1), 16 U.S.C.§ 1538(a)(1).

75) U.S.Fish & Wildlife Serv., Why Save Endangered Species? 2 (2005).

76) 50 C.F.R.§ 17.3 (1993).

77) May, *Trends*, *supra* note 60, at 3.

78) *Id.*at 4.

As the above sections indicate, the APA and several environmental statutes provide citizens substantial opportunities to affect agency actions and private behavior through citizen suits.These opportunities are perhaps even greater than they may initially seem when one considers the scope of parties entitled to bring citizen suits.Indeed, both the APA and substantive environmental laws allow a wide range of actors to file citizen suits.

Under the APA, "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."[79] Under this right of review, any "person" suffering legal wrong may sue.[80] The APA then defines "person" as "an individual, partnership, corporation, association, or public or private organization other than a [federal] agency."[81] Under this expansive definition, individuals, groups, trade associations, and industries all have the right to challenge federal agency action and inaction.It is little wonder, then, that litigation against the federal government is often considered a regular part of doing business in the United States.

Substantive environmental statutes similarly include expansive definitions of citizens or persons who may sue.For example, the Clean Water Act states, "any citizen may commence a civil suit"[82] and defines "citizen" as "a person or persons having an interest which is or may be adversely affected."[83] The statute then defines "person" as "an individual, corporation, partnership, association, State, municipality, commission, or political division of a State, or any interstate body ."[84] Much like the APA, the Clean Water Act essentially authorizes any non federal entity to use the citizen suit provisions to enforce against federal agencies or private entities allegedly in violation of the statute.The other environmental statutes discussed here have similarly expansive definitions of citizen or person

79) APA, 5 U.S.C.§ 702.

80) In practice, courts typically evaluate whether a person has suffered legal wrong by applying the Article III standing inquiry described in further detail below.

81) *Id.*at § 551(2); *see also id.*at § 551(1) defining "agency."

82) Clean Water Act § 505(a), 33 U.S.C.§ 1365(a).

83) *Id.*at 505(g), 33 U.S.C.§ 1365(g).

84) Clean Water Act § 502(5), 33 U.S.C.§ 1362(5).

who may sue.[85]

As these broad definitions make clear, many types of "citizens" may sue under the judicial review provision of the APA and the citizen suit provisions of the environmental statutes.The expansive definitions of "citizen" and "person" allow individuals to join organizations pursuing litigation.The definitions also allow organizations to form coalitions united against or for a common cause.In many ways, then, the expansive definitions allow groups to assert greater power collectively than most individuals would likely be able to assert alone.At the same time, they likely contribute to the prevalence of citizen suits in the U.S.legal system, because groups can pool resources and expertise in their litigation efforts.

E. Attorneys' Fees and Costs

In addition to the express citizen suit authorizations found in specific statutes and the APA, the U.S.legal system also promotes citizen suits by allowing prevailing public interest litigants to recover costs and attorneys' fees from losing defendants.[86] The citizen suit provisions of the Clean Water Act, Clean Air Act, RCRA, and ESA authorize courts to award costs of litigation (including attorney and expert fees) to plaintiffs whenever the court determines an award is appropriate.[87] Although the statutes use different language—for example, the Clean

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85) *See* RCRA § 7002(a), 42 U.S.C.6972(a) (authorizing "any person" to commence an action), RCRA § 1004(15), 42 U.S.C.6903(15) (defining "person" to include an individual, trust, firm, corporation, and state, as well as "each department, agency, and instrumentality of the United States"); Clean Air Act § 304, 42 U.S.C.§ 7604 (authorizing "any person" to commence an action), Clean Air Act § 302(e), 42 U.S.C.7602(e) (defining "person" to include an individual, corporation, association and state, as well as "any department, agency, and instrumentality of the United States"); ESA § 11(g), 16 U.S.C.§ 1540(g) (allowing "any person" to commence a suit), ESA § 3(13), 16 U.S.C.§ 1532(13) (defining "person" to include an individual, corporation, association, or "any ...instrumentality of the Federal Government [and] of any State.").

86) While it is technically possible for a defendant to seek attorneys' fees against a citizen plaintiff, most courts have held that fees should be awarded to defendants only in the rare circumstances that the plaintiff's case was frivolous or vexatious.*See* Christiansburg Garment Co.v.EEOC, 434 U.S.412, 421 (1978); Marbled Murrelet v.Babbitt, 182 F.3d 1091 (9th Cir.1999) (applying standard to ESA); Razore v.Tulalip Tribes of Washington, 66 F.3d 236 (9th Cir.1995) (applying standard to Clean Water Act and RCRA).

Water Act and RCRA mention "prevailing or substantially prevailing party,"[88] while the ESA and Clean Air Act mention "any party"[89]— courts tend to treat the fee recovery provisions alike.[90] Under the Equal Access to Justice Act (EAJA), certain prevailing parties may recover costs, fees, and attorneys' fees from a losing federal agency.[91] EAJA fees are available to individuals with net values of $2 million or less and to organizations with net values no greater than $7 million at the time the case was filed.[92] If a party meets these eligibility requirements, it may recover if it can demonstrate that it prevailed in the litigation and that the "position of the United States was not substantially justified."[93] While both EAJA and the substantive statutes would seem to limit citizen groups' ability to recover costs and attorneys' fees, by requiring citizen groups to demonstrate a lack of substantial justification (under EAJA) or giving the court discretion to award fees as appropriate (under the substantive statutes), in practice, most prevailing parties receive some fees.[94]

The ability of citizen groups to recover their costs and fees may be almost as important to citizen litigation as the statutory right to enforce at all.Citizen groups do not receive direct economic rewards when they enforce environmental laws, and most citizen suits involve actions seeking to protect a public resource.This dynamic could result in a collective action problem that would make it unlikely that citizen groups would be able to justify spending their own money and time protecting a

87) Clean Water Act § 505(d), 33 U.S.C.§ 1365(d); Clean Air Act § 304(d); 42 U.S.C.§ 7604(d); RCRA § 7002(e), 42 U.S.C.§ 6972(e); ESA § 11(g)(4), 16 U.S.C.§ 1540(g)(4).

88) Clean Water Act § 505(d), 33 U.S.C.§ 1365(d); RCRA § 7002(e), 42 U.S.C.§ 6972(e).

89) ESA § 11(g)(4), 16 U.S.C.§ 1540(g)(4); Clean Air Act § 304(d); 42 U.S.C.§ 7604(d).

90) *See Marbled Murrelet*, 182 F.3d at 1094; Pennsylvania v.Delaware Valley Citizens' Council, 478 U.S.546, 560 (1986) (noting that the fee provision is meant to encourage "citizen participation in the enforcement of standards and regulations established under [the CAA]").

91) Equal Access to Justice Act, 28 U.S.C.§ 2412(a)&(b).

92) *Id.*at § 2412(d)(2).Certain organizations are exempt from the $7 million cap.*Id.*

93) *Id.*at § 2412(d)(1)(B).

94) Even with fee recovery provisions, citizen enforcers undertake significant risks when they litigate under environmental laws.If they lose, they will not receive any fees.Indeed, parties cannot recover fees for time spent on unsuccessful claims.Hensley v.Eckerhart, 461 U.S.424, 435 (1983).

common resource.[95] The availability of fees and costs for successful litigation addresses this problem to some extent by effectively allowing others to "share" in the costs of enforcement.[96] While citizen groups still undertake risks in bringing citizen suits, fee recovery provisions can significantly mitigate these risks.

In sum, as this overview reveals, citizens have multiple opportunities to enforce.They can challenge government action and compel government agencies to act under the APA and some substantive statutes.Citizens can also enforce against violators of federal environmental statutes, including the Clean Water Act, Clean Air Act, RCRA, and the ESA.Through these suits, citizens can usually obtain injunctive relief and, except under the ESA, civil penalties from private parties.Finally, citizen groups that prevail in litigation can often recover their costs and attorneys' fees (while facing a very low risk of having to pay another party's fees and costs).Combined, these aspects of citizen enforcement lend weight to the idea that citizen enforcement is a powerful—to some, perhaps an overly powerful—tool in environmental law.However, as the next section explores, citizen groups must clear many legal hurdles as part of their enforcement efforts.Thus, while citizen enforcement is a powerful tool, it is also one that citizen groups must wield with care and precision.

Ⅲ. Legal Hurdles to Citizen Enforcement.

Despite the clear intention of Congress to promote citizen enforcement, a number of legal hurdles stand in the way of citizen suits.Indeed, Congress erected many of these hurdles in the very statutes it created to authorize citizen

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95) See, e.g., William B.Rubinstein, *Why Enable Litigation?: A Positive Externalities Theory of the Small Claims Class Action*, 74 UMKC L.Rev.709, 710 12 (2006) (discussing this dynamic under tort law).

96) Defendants who must pay attorneys' fees and costs to prevailing citizen groups likely do not view fee shifting provisions appropriate ways to "share" enforcement costs.However, where government agencies are the defendants, costs are indeed shared through taxes that support the agencies' programs.Even with private defendants, costs may be shared through higher prices passed onto consumers.

enforcement.However, Congress did not always clarify the underlying purposes of these hurdles, leaving courts to issue an array of conflicting decisions about the statutory prerequisites and bars to citizen enforcement.Moreover, even where a citizen litigant meets the statutory requirements for citizen enforcement, courts may find that citizens have failed to show they have standing to sue.As this section will detail, these legal hurdles have affected ability of citizens to enforce some environmental statutes.

A. Statutory Prerequisites to Citizen Enforcement

The pollution control statutes and ESA contain different requirements citizens must fulfill prior to filing a citizen suit.First, all of the statutes require citizens to provide defendants and designated agencies notice of the citizens' intent to sue.[97] Second, the Clean Water Act, ESA, and RCRA allow suits against parties alleged "to be in violation," and thus appear to require suits for ongoing, as opposed to wholly past, violations.[98] Finally, the statutes also require citizens to defer to state or federal enforcement efforts, but they establish different rules regarding the scope of these preclusion requirements.[99] This part will briefly explore some of these statutory prerequisites.

1. Pre Suit Notice

The major environmental statutes typically require citizens to provide notice to the defendant and relevant government agencies prior to filing suit.In most cases, citizens must provide at least 60 days' notice prior to filing suit.[100] Regulations

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97) Clean Water Act § 505(b), 33 U.S.C.§ 1365(b); Clean Air Act § 304(b); 42 U.S.C.§ 7604(b); RCRA § 7002(b), 42 U.S.C.§ 6972(b); ESA § 11(g)(2), 16 U.S.C.§ 1540(g)(2).Citizens must also give notice if they plan to bring mandatory duty claims.

98) Clean Water Act § 505(a)(1), 33 U.S.C.§ 1365(a)(1); RCRA § 7002(a)(1)(A), 42 U.S.C.§ 6972(a)(1)(A); ESA § 11(g)(1)(A), 16 U.S.C.§ 1540(1)(A).

99) Clean Water Act § 505(a)&(b)(1)(B), 33 U.S.C.§ 1365(a)&(b)(1)(B); Clean Air Act § 304(b)(1)(B); 42 U.S.C.§ 7604(b)(1)(B); RCRA § 7002(b)(1)(B), 42 U.S.C.§ 6972(b)(1)(B); ESA § 11(g)(2)(A)(ii)&(B)(ii), 16 U.S.C.§ 1540(g)(2)(A)(ii)&(B)(ii).

100) *See supra* note 90.RCRA requires 90 days' notice for imminent and substantial endangerment claims.RCRA § 7002(b)(2)(A), 42 U.S.C.§ 6972(b)(2)(A).The statutes also

provide additional information regarding the required content of the pre suit notice.[101] They require the citizens to provide information sufficient to inform a potential defendant and regulators of the alleged illegal conduct, the alleged dates of violation, and other information necessary to allow the notice recipients to identify the violations.[102] The Supreme Court has emphasized the importance of adhering to the notice requirements: a party that fails to provide notice as specified can have a case dismissed even if the case has reached the highest court level.[103] An adequate pre suit notice is an essential component of citizen enforcement.

However, courts and litigants have struggled to understand the purpose of the 60 day notice requirement.The Supreme Court explained the notice requirement essentially allows defendants to avoid enforcement entirely.[104] First, the Court suggested the notice would allow alleged violators to come into compliance with the applicable law and thereby presumably avoid suit altogether.[105] Second, the Court stated the notice would allow state or federal government agencies to have the opportunity to enforce against the alleged violator, in lieu of the citizen grou p.[106] Yet, these purposes do not mesh with other aspects of citizen enforcement.For example, both the Clean Air Act and RCRA authorize citizen suits for past violations,[107] so even if a defendant receives a notice and stops violating the law, a citizen could still sue.In addition, environmental statutes limit the

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allow limited exceptions to the notice requirement, typically when hazardous pollutants or emergencies are at issue.*See* Lloyd, *supra* note 53.

101) *See* 40 C.F.R.§54.3(b) (Clean Air Act); *id*.§ 135.3(a) (Clean Water Act).

102) *Id.*; *see also San Francisco Baykeeper, Inc.v.Tosco Corp.*, 309 F.3d 1153, 1158 (9th Cir.2002) (a notice letter is sufficient if it is "reasonably specific as to the nature and time of the alleged violations" and provides "sufficient information to permit the recipient to identify" the alleged illegal conduct).

103) *See* Hallstrom v.Tillamook Cty., 493 U.S.20, 21 (1989).

104) *Id.*at 29 ("Rather, the legislative history indicates an intent to strike a balance between encouraging citizen enforcement of environmental regulations and avoiding burdening the federal courts with excessive numbers of citizen suits.").

105) *Id.*

106) *Id.*

107) CAA § 304(a)(1), 42 U.S.C.§ 7603(a)(1) ;RCRA § 7002(a)(1)(B), 42 U.S.C.§ 6972(a)(1)(B).

potential for agency enforcement to preclude citizen enforcement.[108] Thus, it seems unlikely that Congress intended for the notice requirement to serve as a shield against enforcement.More likely—and consistent with actual practice—the notice requirement allows citizen groups and notice recipients to resolve disputes through pre litigation settlements.It also allows government agencies to get involved in cases, but usually does not promote complete displacement or preclusion of citizen enforcement.[109] Thus, in most cases, the notice requirement serves as a mandatory prerequisite that citizens must closely follow, even though its purpose remains somewhat opaque.

2. Ongoing Violations

The Clean Water Act authorizes citizens to sue any person alleged "to be in violation" of various statutory requirements.[110] In *Gwaltney of Smithfield, Ltd.v.Chesapeake Bay Foundation, Inc*.,[111] the Supreme Court interpreted this language to require citizens to demonstrate that a defendant remained in "ongoing violation" of the Clean Water Act at the time the suit was filed.[112] In effect, this requirement means that citizens must either demonstrate that a defendant actually violated or had a reasonable probability of violating the Clean Water Act after the commencement of the suit.[113] In theory, this requirement may encourage a company to delay compliance with the Clean Water Act until it receives notice of a citizen group's intent to sue, at which point the company could come into

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108) *See infra* notes 112 to 118 and accompanying text.

109) Lloyd, *supra* note 53 ("In view of the time it takes for the government to act, it seems unlikely that notice often will provide government with sufficient time to enforce.").

110) Clean Water Act § 505(a)(1), 33 U.S.C.§ 1365(a)(1).The ESA and RCRA's permit enforcement section use the same language.RCRA § 7002(a)(1)(A), 42 U.S.C.§ 6972(a)(1)(A); ESA § 11(g)(1)(A), 16 U.S.C.§ 1540(1)(A).

111) 484 U.S.49 (1987).

112) *See, e.g.*, Am.Canoe Ass'n v.Murphy Farms, Inc., 412 F.3d 536 (4th Cir.2005); Natural Resources Defense Council v.Southwest Marine, Inc., 236 F.3d 985 (9th Cir.2000); Chesapeake Bay Foundation v.Gwaltney of Smithfield, Ltd., 844 F.2d 170 (4th Cir.1988).

113) *Id.*

compliance within 60 days and thereby avoid all liability.In practice, however, it seems unlikely that this dynamic would happen very often, as courts have found ongoing violations where plaintiffs show a mere likelihood of recurrent or sporadic post complaint violations.[114] Based on this plaintiff friendly standard, defendants are more likely to settle a case (or litigate it on other grounds) unless they are very confident about their ability to avoid any post complaint violations.

Nonetheless, there is a risk that the ongoing violation requirement may thwart citizen enforcement.For example, companies that violate permit requirements related to monitoring and reporting can potentially cure their violations by filing required reports within the 60 day notice period and escape enforcement.[115] Moreover, the "ongoing violation" requirement potentially exempts long standing Clean Water Act violations from paying penalties for past violations.[116] In response to these concerns, Congress amended the Clean Air Act—which also initially allowed citizen suits against facilities alleged "to be in violation"—to authorize citizen suits against wholly past violations that had been repeated.[117] RCRA's imminent and substantial endangerment provision also authorizes suits against any person who in

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114) Lloyd, *supra* note 53.

115) Courts have reached different results regarding the "ongoing violation" requirement as it applies to reporting and monitoring.The Fourth Circuit held that monitoring and reporting violations remain ongoing until they are cured.Sierra Club v.Simkins Industries, Inc., 847 F.2d 1109 (4th Cir.1988).Monitoring violations may be impossible to cure, however, because permits often require facilities to monitor their pollution releases on a daily, weekly, or monthly basis.If a facility fails to monitor as specified, it cannot go back in time to cure the violations.Not all courts agree with this result.*See* Arkansas Wildlife Federation v.Bekaert Corp., 791 F.Supp.769 (D.Ark.1992).

116) The five year federal statute of limitations, 28 U.S.C.§ 2462, limits defendants' liability for civil penalties to five years before the suit was filed.*See* Sierra Club v.Chevron U.S.A., Inc., 834 F.2d 1517, 1521 (9th Cir.1987).Even if a facility violated one of the pollution control statutes every day for 20 years, it would only have to pay penalties for violations during the five years that predated the filing of the suit, and for every day of violation after the suit was filed.The ongoing violation requirement would deprive the court of jurisdiction and thus eliminate a defendant's exposure to all penalties.

117) Clean Air Act § 304(a)(1), 42 U.S.C.§ 7604(a)(1).

the past contributed to the handling or storage of solid or hazardous waste that may present an imminent and substantial endangerment.[118] Aside from these exceptions, the ongoing violation requirement may serve as a bar to citizen enforcement under the Clean Water Act, ESA, and RCRA.

3. Diligent Prosecution Bars

Environmental statutes may also bar citizen suits where state or federal agencies enforce the same violations against the same defendant the citizen group has targeted.The clearest bars apply where a federal or state agency has commenced an action in court against the defendant.[119] While citizen groups may intervene as of right in the agency's suit, the citizen group may not initiate its own separate enforcement action.[120]

The Clean Water Act also allows administrative enforcement actions to preclude citizen penalty actions.The statute bars citizen claims for penalties where EPA or a state has commenced and is diligently prosecuting an administrative enforcement action or for which EPA or a State has issued a final order and the violator has paid a penalty.[121] A great deal of litigation has arisen under this "diligent prosecution" bar.First, courts do not always agree about what counts as "diligent" prosecution.Professor Edward Lloyd notes:

> The indicia courts have considered in determining whether the government is diligently prosecuting an action include: whether the government sought or required compliance with the violation alleged by the citizen; whether the

118) RCRA § 7002(a)(1)(B); 42 U.S.C.§ 6972(a)(1)(B); Potomac Riverkeeper, Inc.v.Nat'l Capital Skeet and Trap Club, Inc., 388 F.Supp.2d 582 (D.Md.2005).

119) Clean Water Act § 505(b)(1)(B), 33 U.S.C.§ 1365(b)(1)(B); Clean Air Act § 304(b)(1)(B); 42 U.S.C.§ 7604(b)(1)(B); RCRA § 7002(b)(1)(B), 42 U.S.C.§ 6972(b)(1)(B).

120) *Id.*

121) Clean Water Act § 505(a), 33 U.S.C.§ 1365(a) (noting that citizens may initiate civil suits except as provide in section 1319(g)(6)); Clean Water Act § 309(g)(6)(A), 33 U.S.C.§ 1319(g)(A).Although section 309(g)(A) only mentions "civil penalty actions" as being barred, some courts have found that diligent prosecution can bar claims for injunctive relief as well.

> government was monitoring the violator's activities after its settlement with the polluter; whether the violations are likely to continue if the citizen suit does not go forward; and whether the penalties assessed remove the economic benefit of non compliance.[122]

Yet, courts have found diligent prosecution when state agencies have not required compliance, have not monitored compliance, have not abated violations, and have not assessed penalties (or have assessed minimal penalties).[123] Second, courts have also reached varying conclusions about which requirements must exist for state administrative processes to be "comparable" to federal law.[124] Finally, courts do not always require agency enforcement to result in a penalty, despite the apparent congressional intent to allow only penalty actions to bar citizen penalty actions.[125] When considered in the aggregate, the diligent prosecution bar presents potentially significant limitations to citizen enforcement—at least in those jurisdictions where courts have given states considerable leeway to preclude citizen suits.

B. Constitutional Requirements for Citizen Suits: Article III Standing

In addition to the statutory requirements depicted above, citizen litigants (and, indeed, all litigants in federal courts) must meet a number of other requirements to have their case heard.In the environmental context, the most important constitutional requirements involve standing to sue, ripeness, and mootness.[126] Of

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122) Lloyd, *supra* note 53.

123) *Id.*

124) *Compare* Paper, Allied Industrial, Chem.and Energy Workers Int'l Union v.Continental Carbon Co., 428 F.3d 1285 (10th Cir.2005) (state law must have similar public participation, penalty assessment, and judicial review provisions), *with* N.& S.Rivers Watershed Ass'n, Inc.v.Town of Scituate, 949 F.2d 552 (1st Cir.1991).

125) *Compare* N.& S.Rivers Watershed Ass'n, Inc.v.Town of Scituate, 949 F.2d 552 (1st Cir.1991), *with* Citizens for a Better Environment California v.Union Oil Co., 83 F.3d 1111 (9th Cir.1996).

126) While Article III standing has dominated the constitutional landscape of citizen suits, two other doctrines, ripeness and mootness, deserve brief mention.These

these, standing often presents the greatest hurdle for citizen litigants.

The U.S.Constitution gives federal courts jurisdiction to hear "Cases or Controversies." The U.S.Supreme Court has interpreted that term to require parties to demonstrate they have "standing" to litigate.To make this demonstration a plaintiff must satisfy three prongs of the standing test— injury, causation, and redressability.More specifically:

> a plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and 3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.[127]

The Supreme Court's treatment of standing in environmental cases has gone through a number of phases, in which the Court has at time made standing a significant hurdle to citizen litigants.

1. The Evolution of Standing Law: 1970s 1990s

In the early days of environmental citizen suits, the Supreme Court made it clear that a group alleging an injury needed to demonstrate actual injury to the group or one of the group's members from the challenged activity; the party could not sue simply to represent environmental interests at large.[128] At the same time, the Court recognized that parties have standing to protect aesthetic, not just physical or economic, injuries.[129] Later cases similarly found spiritual and recreational injuries cognizable.Thus, while a plaintiff must show an actual injury to itself or one of its members, standing jurisprudence recognizes a broad array of

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two doctrines represent two sides of the same coin, in that ripeness seeks to ensure that a claim is not premature, and mootness seeks to ensure that claim is not stale.In essence, both doctrines work to make sure that courts adjudicate live controversies.

127) Laidlaw, 180 181.

128) Sierra Club v.Morton, 405 U.S.727, 734 35 (1972).

129) *Id.*at 734.

injuries that qualify.

As environmental litigation progressed, however, the Supreme Court seemed to narrow and restrict its standing jurisprudence regarding qualifying injuries.In *Lujan v.Defenders of Wildlife*,[130] the court held that the plaintiffs had failed to show their injuries were "actual or imminent" when they sought to challenge a change to ESA regulations that would eliminate U.S.agencies' obligations to evaluate the impacts of federal funding of foreign development projects on endangered specie s.[131] To demonstrate their standing, the plaintiffs produced affidavits from two of plaintiffs' members, both of whom had visited, and intended to return to, foreign countries where U.S. funded development projects would likely destroy habitat of endangered species.[132] These "some day" intentions to return, the Court held, failed to satisfy the "imminence" requirement of the injury prong.[133]

Similarly, in *Lujan v.National Wildlife Federation*,[134] the Supreme Court rejected a group's standing where the group's members failed to demonstrate that they would use the specific areas that would be affected by a general land management program covering 4,500 acres in a national forest.[135] Although the plaintiff's members had submitted declarations swearing that they used the forest for recreation, they did not include details about the locations within the forest they used.[136] This, the Court held, failed to meet the legal requirement that plaintiffs demonstrate they had suffered discrete injuries.[137]

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130) 504 U.S.555 (1992).

131) *Id.*at 559 60, 564.

132) *Id.*at 563 64.

133) *Id.*at 564.

134) 497 U.S.871 (1990).

135) *Id.*at 886 87.The plaintiffs specifically challenged a Bureau of Land Management program for managing withdrawn lands.*Id.*at 879.According to the district court, the challenge would have affected approximately 1,250 separate actions.*Id.*at 881.To show standing to challenge the program, the plaintiffs submitted affidavits to show standing to challenge actions affecting two specific locations.*Id.*

136) *Id.*at 889.

137) The Court conducted its analysis under APA § 702, which requires parties to demonstrate they are "adversely affected or aggrieved by agency action." *Id.*at 884, citing 5 U.S.C.§ 702.However, in supporting its analysis, the Court relied on Article III standing decisions.*Id.*at 885 889.

The Court also began to tighten its approach to redressability, the requirement that the plaintiff show that a favorable judgment would redress, at least in part, the plaintiff's injury.Under a doctrine called "procedural standing," the Supreme Court recognized that a plaintiff's burden to show imminent injury and redressability could be lighter where the injury involved alleged procedural violations.[138] However, in *Lujan v.Defenders of Wildlife* (a challenge to a change in ESA procedures), the Court nonetheless concluded the plaintiffs failed to show how a favorable judgment restoring ESA review for federally funded development projects could redress their injuries.[139] In the Court's view, any species loss would be the result of independent third parties—funding agencies and foreign governments—not before the Court.[140]

The Court dealt another blow to redressability in a case filed under a statute requiring facilities to report their releases of toxic pollutants.[141] The plaintiffs in *Steel Company* had sent a 60 day notice to a facility for failing to submit required reports.[142] Although the facility submitted its reports during the 60 day notice period, the plaintiffs filed suit anyway.[143] Ultimately, the case reached the Supreme Court regarding the question of whether the suit could proceed when the citizen suit provision authorized suits against parties alleged "to be in violation ."[144] Rather than decide the issue before it, however, the Court instead dismissed the case for a lack of standing, and specifically, lack of redressability.[145] Once the defendants had cured its violations, the Court said, none of its claims for relief would redress the plaintiffs' alleged injuries.Declaratory relief would be "worthless to all the world," since the defendants did not contest their obligation to file the reports.[146] Injunctive relief would have no value once the defendants voluntarily

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138) *Id.*at 572 n.7.
139) *Id.*at 568 71.
140) *Id.*
141) Steel Co.v.Citizens for a Better Env't, 523 U.S.83, 87 88 (1998).
142) *Id.*
143) *Id.*at 88.
144) *Id.*at 88 89.
145) *Id.*at 105.
146) *Id.*at 106.

submitted the reports.[147] And, as for civil penalties, the Court found they could not redress the plaintiffs' injuries when the U.S.Treasury, rather than the plaintiffs themselves, would receive any fines.[148] For many citizen groups, this case threatened to profoundly undermine citizen enforcement suits: when combined with the "ongoing violation" requirement of many environmental laws, it could encourage regulated facilities to delay compliance until they received a 60 day notice, at which point they would comply and face no legal consequences at al l.[149]

By the end of the 1990s, many scholars had begun to lament the loss of citizen suits as a result of the Supreme Court's jurisprudence.[150] Throughout the decade, lower courts had become increasingly resistant to citizen suits.Civil penalties seemingly no longer provided plaintiffs redressability.[151] And even causation—which the Supreme Court had not addressed in its environmental standing cases—became an issue of intense debate, particularly when plaintiffs sought to challenge pollution releases into already polluted water bodies.For some viewers, the end of the century signaled the impending end of citizen environmental litigation.[152]

2. *Laidlaw's* Sea Change?

The end, however, did not come.Instead, in 2000, the Supreme Court issued an environmental standing decision—*Friends of the Earth, Inc.v.Laidlaw Environmental Services (TOC), Inc.*[153]—that seemed to reverse, in substance and in tone, many

147) *Id.*at 108 09.

148) *Id.*at 106 07.

149) *See supra* 108 109 and accompanying text.

150) *See Cass R.Sunstein, What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III,* 91 Mich.L.Rev.163 (1992); Michael J.Wray, *Still Standing? Citizen Suits, Justice Scalia's New Theory of Standing and the Decision in* Steel Company v.Citizens for a Better Environment, 8 S.C.Envtl.L.J.207 (2000); Karin P.Sheldon, Steel Company v.Citizens for a Better Environment: Citizens Can't Get No Psychic Satisfaction, 12 Tul.Envtl.L.J.1 (1998); Aaron Roblan & Samuel H.Sage, *Steel Company v.Citizens for a Better Environment: The Evisceration of Citizen Suits under the Veil of Article Iii*, 12 Tul.Envtl.L.J.59 (1998).

151) *Steel Co.*, 523 U.S.at 106 07.

152) *See supra* note 143.

of the prior decade's decisions.Even where *Laidlaw* did not directly address an issue, lower court judges still viewed it as a "sea change" that should affect standing jurisprudence.[154]

In *Laidlaw*, an environmental group sued a facility for discharging pollutants in violation of its Clean Water Act discharge permit.[155] Years of litigation followed, resulting in the district court assessing more than $400,000 in civil penalties, but refusing to enjoin the facility on the grounds that it had come into "substantial compliance" with the Clean Water Act.[156] On appeal, relying on the *Steel Company* case, the Court of Appeals dismissed the case: now that the facility had come into compliance, the court held, civil penalties no longer provided redressability.[157] The plaintiffs then sought Supreme Court review.

The Supreme Court readily found the plaintiffs had standing.First, the Court noted that the plaintiffs had demonstrated sufficient injuries by showing that they had used the affected waterways for recreation, had stopped using the waterways due to the concerns about the Laidlaw facility's polluted discharges, but would again use the waterways if Laidlaw were to stop polluting.[158] The Court rejected the argument that the plaintiffs had to prove the discharges caused harm to the waterways themselves; it was enough for the plaintiffs to show injuries to themselves.[159] Moreover, the plaintiffs could demonstrate that injury by showing they had a reasonable fear of the defendant's discharge.[160] The Court also rejected the defendant's contention that the plaintiffs' plans to resume using the waterway once the pollution stopped should "be equated to 'some day' intentions' to visit endangered species halfway around the world."[161] While the plaintiffs' future

153) 528 U.S.167 (2000).

154) Friends of the Earth, Inc.v.Gaston Copper Recycling Corp., 204 F.3d 149 (4th Cir.2009) (*en banc*) (J.Niemeyer, *concurring*).

155) *Laidlaw*, 528 U.S.at 176 77.

156) *Id.*at 178.

157) *Id.*at 179.The court held that a case can become moot once a plaintiff no longer meets the three standing prongs.In the court's view, once the plaintiffs' claim was no longer redressable, the case was therefore moot.*Id.*

158) *Id.*at 181.

159) *Id.*at 181.

160) *Laidlaw*, 528 U.S.at 184 85.

behavior was contingent on the defendant's compliance, the plaintiffs were suffering actual injuries by foregoing uses of rivers they used to enjoy.

Second, the Court also readily found the injuries redressable, even if the defendant had come into compliance at some point during the litigation.[162] Standing, the Court noted, is measured at the time a party filed its case.[163] At the time the plaintiffs sued Laidlaw, the facility was discharging in violation of the permit and it was likely that a court could redress the injury through an injunction or penalties.The Court then seemed to overrule much of the *Steel Company* decision by declaring that civil penalties provide redressability by deterring violations.[164] While the Court distinguished *Steel Company* on the basis it involved "wholly past violations,"[165] the *Laidlaw* case also emphasized that civil penalties both deter specific violators and provide a general deterrence to future violators.[166] If general deterrence is relevant to the standing inquiry, it is unclear why civil penalties for wholly past violations would not provide some amount of redressability.Regardless, the Supreme Court readily found that the plaintiffs had standing to seek civil penalties against Laidlaw, even though those penalties would also go to the U.S.Treasury.

In the wake of *Laidlaw*, lower courts began to relax their own approaches to Article III standing.Some courts reversed previous decisions in which they had found that plaintiffs had failed to adequately demonstrate standing, noting that *Laidlaw* represented a reversal in the Supreme Court's approach.[167] At the same time, courts began to demand—and plaintiffs began to produce—much better documentation of their standing.[168] It may be that *Laidlaw* really did change the

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161) *Id.*at 184.

162) *Id.*at 189 90.

163) *Id.*

164) *Id.*at 185 86.

165) *Id.*at 188 89.

166) *Id.*at 185 87.

167) *See* Friends of the Earth, Inc.v.Gaston Copper Recycling Corp., 204 F.3d 149 (4th Cir.2009) (*en banc*).

168) *See* Sierra Club v.EPA, 292 F.3d 895 (D.C.Cir.2002) "When the petitioner's standing is not self evident, however, the petitioner must supplement the record to the extent necessary to explain and substantiate its entitlement to judicial review.").

way that courts approached standing, but it also might be that plaintiffs began to do a better job of preparing documents to support their standing arguments.Either way, the trends of the 1990s seemed to dissipate after the Supreme Court issued its decision in *Laidlaw*.But it is unclear if *Laidlaw* will have a lasting impact.

3. *Massachusetts v.EPA*: Standing for "Global" Harms?

Another major standing case reached the Supreme Court in 2007, when several states and environmental groups challenged an EPA decision refusing to regulate greenhouse gas emissions from motor vehicles under the Clean Air Act.[169] EPA moved to dismiss the case on the grounds that none of the plaintiffs had Article III standing.[170] In essence, EPA's argument hinged on the fact that plaintiffs' injuries arose from climate change, a global phenomenon, and thus could not be "concrete or particularized."[171] While climate change may indeed result in significant injuries, EPA argued that none of the plaintiffs could distinguish their own injuries from the global harms climate change would cause.[172] Moreover, even if plaintiffs could show cognizable injuries, they could not link their injuries to the specific action they had challenged or show that a favorable court decision would redress their injuries.In terms of causation, EPA noted that motor vehicles account for a minute fraction of the total greenhouse gases emitted annually and historically, so they could not be the "cause" of any of the plaintiffs' alleged harms.[173] Likewise, even if the plaintiffs won and EPA regulated vehicle emissions, this would have no impact on global emission or temperatures.[174] In short, EPA argued, climate change was too big a problem to count as a legally cognizable injury and U.S.vehicle emissions were too small to affect the problem.On this basis, EPA urged the Supreme Court to dismiss the case.

In a 5 to 4 decision, the Supreme Court rejected EPA's arguments.After first

169) Massachusetts v.EPA, 549 U.S.497, 505, 510 (2007).
170) *Id.*at 517.
171) *Id.*
172) *Id.*
173) *Id.*at 523 24.
174) *Id.*

noting that it was giving "special solicitude" to the states involved in the case (but not really explaining how), the Court held that Massachusetts had adequately alleged that was suffering actual harm due to climate change and would suffer imminent harm as well.[175] By demonstrating harm at the state level, the Court found the injuries were both "concrete and particularized."[176] Similarly, the Court found that EPA's failure to regulate had a sufficient causal link to climate change (and thus the state's injuries).[177] While it was true that EPA's regulation alone would not redress the problem of climate change, the Court observed that it would certainly not make things worse and might spur other countries to reduce their emissions.[178] Thus, to the surprise of many, the Supreme Court narrowly found that states, at least, have standing to sue for climate change injuries.

In the wake of *Massachusetts*, however, courts have struggled to understand its meaning.In some cases, courts have referenced the Court's use of "special solicitude" for states and rejected *Massachusetts* as binding precedent at all.[179] Those courts have instead turned to *Lujan v.Defenders of Wildlife* to evaluate private citizens' standing in cases involving climate change.[180] Those courts have often concluded that private plaintiffs lack standing to bring climate change climates.[181] Other courts have used the same analytical approach that the Supreme Court used in *Massachusetts*, without affording any "special solicitude" to private parties.[182] Yet, even without this "special solicitude," they have found the standing requirement met.[183] Until another case reaches the Supreme Court, it is likely that standing for global harms will remain an issue of confusion and contention in the

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175) *Id.*at 518 23.

176) *Id.*at 521 23.

177) *Id.*at 524 25.

178) *Id.*at 525 26.

179) *See* Ctr.for Biological Diversity v.U.S.Dept.of Interior, 563 F.3d 466 (D.C.Cir.2009); Amigos Bravos v.U.S.Bureau of Land Management, 816 F.Supp.2d 1118 (D.N.M.2011).

180) *Id.*

181) *Id.*

182) *See* Connecticut v.American Elec.Power Co., Inc., 582 F.3d 309 (2d Cir.2009).

183) *Id.*

lower courts.

Beyond the specific issues raised by *Massachusetts*, standing jurisprudence remains far from settled.Indeed, even after the *Laidlaw* decision, many courts continue to use the 1990s Supreme Court cases, particularly *Lujan v.Defenders of Wildlife*, as their touchstone case for evaluating standing.[184] In so doing, they have continued to require increasing proof of plaintiffs' injuries and demonstrations that favorable court orders can redress these harms.In some cases, plaintiffs must produce more evidence simply to get into court than they need to produce to prevail on the merits of their cases.Courts have increasingly become the gatekeepers to citizen enforcement.As the next section concludes, this likely reflects the unease with which courts often approach citizen enforcement of environmental laws.

Ⅳ. Concluding Observations about the Value and Limits of Citizen Suits in U.S. Environmental Law

As this paper explores, citizens have a number of opportunities to enforce environmental laws, and citizens have used these opportunities to profoundly affect the U.S.legal system.Yet their role in environmental law remains far from settled.

Challenges to agency actions under both the "arbitrary and capricious" and statutory violation standards abound in U.S.environmental law.For example, in recent years, citizen groups have successfully challenged as *ultra vires* (or contrary to statutory jurisdiction) agency actions involving: the Environmental Protection Agency's refusal to regulate greenhouse gases under the Clean Air Act; EPA's decision to maintain a permit exemption for water pollution discharges from vessels under the Clean Water Act; and the Fish and Wildlife Service's regulations governing protection of critical habitat under the Endangered Species Act.[185]

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184) *See Ctr.for Biological Diversity*, 563 F.3d at 478.

185) Massachusetts v.EPA, 549 U.S.497 (2007); Nw.Envtl.Advocates v.EPA, 537 F.3d 1006 (9th Cir.2008); Gifford Pinchot Task Force v.U.S.Fish & Wildlife Serv., 378 F.3d 1059 (9th Cir.2004).

Courts have also invalidated numerous agency actions under the arbitrary and capricious test, finding that the administrative records did not support the agencies' conclusions.Without these challenges, it is likely that many pollutants would remain unregulated and many unsupported decisions would be U.S.law.On the other hand, these challenges interfere with agency authority and may result in bad environmental outcomes as well.

Collectively, citizen enforcement suits have also had a profound effect on the U.S.legal system.[186] While the common law had long allowed injured parties to sue polluters for damages and injunctive relief, common law claims typically hinged on plaintiffs being able to prove they had incurred damages and that the defendant had behaved unreasonably.Environmental statutes, in contrast, allow parties to sue even where they have not suffered direct physical or economic losses.While these parties must show that they have standing to bring their claims, the universe of potential plaintiffs has expanded dramatically as a result of citizen suits.

Yet, even after 40 years of citizen enforcement, debates continue about whether citizens should continue to play such a role in U.S.governance and compliance.To some observers, citizens play a critical gap filling role in enforcement and compliance: as government resources diminish and enforcement efforts subside, citizens have stepped in to ensure ongoing compliance with the nation's pollution control statutes.[187] Scholars also note that citizen litigants can bring balance to an otherwise imbalanced political landscape that increasing favors the wealthy and powerful at the expense of others.[188] In short, citizen led litigation may be a key component of a healthy democratic system, not to mention healthy environment.Others view citizen enforcement with much more skepticism.Some political leaders believe citizen enforcers are self interested parties who use enforcement to enrich themselves at the public's expense.[189] Some scholars and

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186) May, *Trends*, *supra* note 60.

187) *Id.*at 39 46.

188) *See* Sant'Ambrogio, *supra* note 30, at 1393 99.

189) *See* Lawrence Hurley, *GAO Audit Sparks Battle over Attorneys' Fees in Environmental Cases*, Greenwire, Sept.7, 2011.

jurists consider citizen enforcement to be a radical, perhaps even unconstitutional, construct.[190] Citizen enforcers intrude on the prerogatives of government leaders and turn a deliberative administrative process into a legal free for all.

It is unlikely that debates about the priority of citizen enforcement will abate any time soon.It is safe to say, however, that environmental citizen suits will continue to influence the U.S.legal and political system for years to come.

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190) *See* W.Lewis, *Environmentalists' Authority to Sue Industry for Civil Penalties Likely to Be Ruled Unconstitutional Under Separation of Powers Doctrine,* 16 Envtl.Law Rep.10101 (1986); *see also Will Separation Of Powers Challenges "Take Care" Of Environmental Citizen Suits? Article Ii, Injury In Fact, Private "Enforcers," And Lessons From Qui Tam Litigation*, 72 U.Colo.L.Rev.93 (2001).

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＜국문초록＞

미국 환경법상 시민 소송
— 개요 및 평가 —

Melissa Powers*

시민은 오랫동안 미국통치(governance)에 직접적인 역할을 해 왔지만, 특히 시민소송제도의 활용은 환경정책의 개발과 이행에 있어서 시민이 강력한 역할을 할 수 있게 하였다. 시민소송은 행정절차법(Administrative Procedure Act, APA)상 시민이 정부 행위의 작위와 부작위에 관해 이의를 제기할 능력을 부여한 조항에 뿌리를 두고 있으며 개별 환경실체법을 통해 시민들에게 정부, 그리고 직접적인 환경오염원자를 제소할 수 있는 보다 강력한 권리로 자리매김하였다.

본고는 미국의 시민소송을 개괄하고, 시민소송이 환경법에 미친 영향을 살펴볼 것이다. Ⅱ장에서는 미국이 인정하고 있는 일반적인 시민소송의 세 가지 유형(정부기관의 조치에 대한 이의제기, 기관의 이행을 강제하는 소송, 규제 대상기관에 대한 시민강제조치)을 소개할 것이다. Ⅲ장에서는 시민이 소송을 제기하기 위해 넘어야 하는 법적 장애물 중 일부를 논할 것이다. Ⅳ장에서는 미국 환경법 내에서의 시민소송의 역할에 대한 간단한 평가로 마무리할 것이다.

지난 40년간의 시민집행제도는 여전히 미국의 권력분립과 대의민주주의 원칙에서 논쟁의 주제이다. 그럼에도 불구하고 시민환경소송은 계속해서 향후 미국의 사법제도와 정치제도 전반에 걸쳐 중요한 영향을 줄 것임에 분명하다.

주제어: 시민소송, 정부기관의 조치에 대한 이의제기, 기관의 이행을 강제하는소송, 규제 대상기관에 대한 시민 강제조치, 원고적격

* 루이스앤클락 로스쿨 부교수.