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Now More Than Ever: Environmental Citizen Suit Trends

by James R. May

Introduction

Environmental citizen suits matter. In 1970, borne in a fulcrum of necessity due to inadequate resources and resolve, and borrowing a bit from common-law *qui tam* without the bounty, the U.S. Congress experimented by providing citizens the remarkable authority to file federal lawsuits as "private attorneys general" to enforce the Clean Air Act (CAA).[1] Unless precluded, forestalled, unconstitutional, or otherwise unwise, the archetypal citizen suit provision allows "any person" to "commence a civil action on his own behalf" against either (1) "any person" who violates a legal prohibition or requirement, or (2) the U.S. Environmental Protection Agency (EPA) for failure "to perform any act or duty . . . which is not discretionary."[2]

The experiment worked. Nowadays, most of the dozen and one-half bulwarks of federal environmental law, and numerous state and foreign laws, invite citizen enforcement.[3]

Environmental citizen suit activity has increased markedly in the last quarter century. In five years from 1978 to 1982, the Environmental Law Institute tallied a total of 125 notices of intent to sue and citizen lawsuits for EPA-administered statutes.[4] In the five years between 1978 and 1983, citizens averaged less than 100 notices of intent to sue a year, most of which were Clean Water Act (CWA) cases.[5] Between 1998 and 2003, citizens averaged about 550 notices of intent to sue a year, spread liberally throughout the nation's environmental laws, but not including Endangered Species Act (ESA) notices.

Early on, environmental groups brought nearly all citizen suits.[6] No more. These days, citizen suits are hardly only for "environmentalists." One in three citizen suits are brought by nontraditional citizens, including companies, landowners, developers, industry, and, ever more frequently, states[7] and faith-based organizations.[8] Indeed, the vast majority of Resource Conservation and Recovery Act (RCRA) and Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) citizen suits are brought by regulated entities. Since the first environmental citizen suit in 1970,[9] and 880 more by 1988,[10] citizens of all walks and pursuits, some with environmental interests, others economic, have likely filed more than 2,000 citizen suits.

Citizen suits work. They have secured compliance by myriad agencies and thousands of polluting facilities. They

Jim May is a Professor of Law at Widener University School of Law. On April 4, 2003, Widener and the Mid-Atlantic Environmental Law Center hosted a symposium entitled "Environmental Citizen Suits at Thirtysomething: A Celebration and Summit." The *Environmental Law Reporter*, a cosponsor of the conference, is publishing the edited remarks from several conference speakers elsewhere in this issue. The *Widener University Law Symposium Journal* will publish other conference materials in the coming months. This Article serves as a companion to the remarks and materials. An earlier version appeared in continuing legal education materials accompanying the symposium. *See* James R. May, *Now More Than Ever: Recent Trends in Environmental Citizen Suits*, *in* Environmental Citizen Suits at Thirtysomething: A Celebration and Summit (Widener Univ. 2003). The research assistance of Jennifer Murphy and Amy Shellenberger is acknowledged with gratitude. This Article reports legal developments from November 2001 through May 2003, and statistical trends from 1995 to the present. The U.S. Department of Justice's (DOJ's) Policy, Legislation, and Special Litigation Section and the U.S. Environmental Protection Agency's (EPA's) Office of General Counsel provided some of the background data upon which this Article relies. The author thanks Jim Payne, the DOJ, Carol Ann Siciliano and Charlie Garlow, both from EPA, for their efforts in providing statistical information.

1. 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618.
2. *Id.* §7604(a), ELR Stat. CAA §304(a).
3. These are, in more or less sequential order, CAA §304, *id.* §7604, ELR Stat. CAA §304; Surface Mining Control and Reclamation Act (SMCRA) §520, 30 U.S.C. §1270, ELR Stat. SMCRA §520; Clean Water Act (CWA) §505, 33 U.S.C. §1365, ELR Stat. FWPCA §505; Endangered Species Act (ESA) §11(g), 16 U.S.C. §1540(g), ELR Stat. ESA §11(g); Deep Seabed Hard Mineral Resources Act (DSHMRA) §117(c), 30 U.S.C. §1427(c); Marine Protection, Research, and Sanctuaries Act (MPRSA) §105(g), 33 U.S.C. §1415(g)(4); Deepwater Port Act (DPA) 33 U.S.C. §1515(d); Resource Conservation and Recovery Act (RCRA) §7002, 42 U.S.C. §6972, ELR Stat. RCRA §7002; Energy Policy and Conservation Act (EPCA) 42 U.S.C. §6305(d); Powerplant and Industrial Fuel Use Act (PIFUA) 42 U.S.C. §8435(d); Ocean Thermal Energy Conservation Act, 42 U.S.C. §9124(d); Outer Continental Shelf Lands Act (OCSLA) 42 U.S.C. §1349(a)(5); Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) §310, 42 U.S.C. §9659, ELR Stat. CERCLA §310; Toxic Substances Control Act (TSCA) §20, 15 U.S.C. §2619, ELR Stat. TSCA §20; Safe Drinking Water Act (SDWA) §1449, 42 U.S.C. §300j-8, ELR Stat. SDWA §1449; Emergency Planning and Community Right-To-Know Act (EPCRA) §326, 42 U.S.C. §11046, ELR Stat. EPCRA §326. Notable exceptions include the Federal Insecticide, Rodenticide, and Fungicide Act (FIFRA) 7 U.S.C. §§136-136y, ELR Stat. FIFRA §§2-34, the Marine Mammal Protection Act (MMPA) 16 U.S.C. §§1361-1421h, ELR Stat. MMPA §§2-409, and the National Environmental Policy Act (NEPA) 42 U.S.C. §§4321-4347, ELR Stat. NEPA §§2-209.
4. Environmental Law Institute, Citizen Suits: An Analysis of Citizen Suit Enforcement Actions Under EPA-Administered Statutes III-10 (1984).
5. *Id.* at III-10.
6. *Id.* at I-6–8.
7. *See, e.g.*, New York v. Niagara Mohawk Power Corp., No. 02-CV-24S, 2003 U.S. Dist. LEXIS 8500 (W.D.N.Y. Apr. 28, 2003) (CAA citizen suit by state of New York for failure to obtain preconstruction permit.)
8. *See, e.g.*, Interfaith Community Org. v. Honeywell Int'l, Inc., No. 95-2097, U.S. Dist. LEXIS 8475 (D.N.J. May 20, 2003) (RCRA citizen suit finding deposition of hexavalent chromium at site in Jersey City is an "imminent and substantial endangerment," and ordering cleanup).
9. It is hard to tell who filed the first environmental citizen suit. One of the first reported decisions sought to have the U.S. Army Corps of Engineers (the Corps) obtain a CAA permit. Citizens for Clean Air v. Corps of Eng'rs, 356 F. Supp. 14 (S.D.N.Y. 1973) (observing "civil private remedy, now provided in the [CAA], applies only to violations of emission standards and orders of the Administrator").
10. *See* L. Jorgenson & J. Kimmel, *Environmental Citizen Suits: Confronting the Corporation* 19 (BNA Special Rep. 1988).

have diminished pounds of pollution produced by the billions. They have protected hundreds of rare species and thousands of acres of ecologically important land. The foregone monetary value of citizen enforcement has conserved innumerable agency resources and saved taxpayers billions.

This Article tracks juridical trends since the U.S. Supreme Court's watershed citizen suit ruling in *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.*,[11] and statistical trends since 1995, a time from which the most reliable data concerning citizen suit information is available. Citizen suitors are in a bit of a probationary period; trends exhibited over the last two years are likely to represent the pinnacle of their sway, and presage the worst may be yet to come. Case law demonstrates, if nothing else, that statutory shortcomings coupled with judicial ambivalence make for tough sledding for environmental citizen suit enthusiasts ("citsuithiasts," anyone?).

Part I explains why citizen suits matter. Citizen suits are at the heart of the field of environmental law, and to some extent, all federal law. Three out of every four judicial opinions stemming from the nation's principal environmental enforcement laws involves, at its core, a citizen suit. Citizen suits catalyze environmental enforcement. Not including most brought under the ESA,[12] there are at least 1,000 citizen suit legal actions—judicial opinions, notices of intent to sue, complaints, and consent orders—a year. Citizen suits influence a wide array of federal laws. The five venerable environmental citizen suits decided by the Court have been cited as authority in the federal judicial system more than 10,000 times.

Part II examines jurisprudential and statistical trends, and finds that while citizen suits are harder to litigate and are pursued less frequently in some contexts, their jurisprudential and statistical impact is expanding. Challenges abound, including statutory and common-law preclusion, constitutional challenges such as standing, mootness, sovereign immunity and separation of powers, and remedies and attorneys fees.

The last seven years in particular show more citizen suits than ever. Since 1995, citizens have filed about 400 lawsuits, i.e., on average about 1 a week, and earned about 270 compliance-forcing consent orders under the CWA and CAA alone. During the same period, citizens have submitted more than 4,500 notices of intent to sue, including more than 500 and 4,000 against agencies and members of the regulated community, respectively. This is an astonishing pace over eight years of about one and one-half notices of intent to sue every calendar day, or two every business day.

While enforcement cases—except against states—are on the rebound, agency-forcing cases are in a dwell. For example, the last five years, notices of intent to sue federal agencies have dropped 75%, and corresponding lawsuits by 50%.

Part III cites recent reports and trend data to show that environmental laws are being enforced less vigorously, making citizen suits vitally important. Its enforcement budget slashed and priorities changed, EPA is referring fewer cases to the U.S. Department of Justice (DOJ) for enforcement. The DOJ is bringing comparably fewer civil environmental cases. The cases the DOJ brings tend to be for lower civil penalty amounts and supplemental environmental project (SEP), administrative penalty, and injunctive relief values. The number of CWA and CAA cases EPA referred to the DOJ fell 25% overall, with a 55% decline for the CWA alone. DOJ civil enforcement actions are down 20%. Judicial orders the DOJ has earned are down 40%. Civil penalties have declined 62%. SEP values have decreased by 70%. Injunctive relief and administrative penalties values have both fallen. EPA itself has expressed concerns about diminishing inspections and criminal referrals, down 15 and 40%, respectively. The diminution of pollution burden resulting from EPA enforcement has decelerated by a phenomenal 90%. Current national security prerogatives do not make it easy for agencies to perform duties Congress has declared mandatory. These trends are unlikely to alter course anytime soon.

The clarion call for citizen suits has thus sounded, now more than ever.

I. Why Citizen Suits Matter

There are good reasons for citizen suits. They foster the rule of law, agency accountability, representational democracy, and environmental stewardship. First, citizen suits force compliance with national environmental protection objectives. Citizen suits are especially vital when noncompliance stands equipoise to nonenforcement: "Citizen resources are an important adjunct to governmental action to assure that these laws are adequately enforced. In a time of limited government resources, enforcement through court action prompted by citizen suits is a valuable dimension of environmental law."[13]

Second, citizen suits hold unelected governmental agencies accountable: "The [citizen suit] provision is directed at providing citizen enforcement when administrative bureaucracies fail to act."[14] Citizen suits thereby motivate agencies to act: "Authorizing citizens to bring suits for violations of standards should motivate governmental agencies charged with the responsibility to bring enforcement and abatement proceedings."[15]

Third, citizen suits help uphold bicameral law making and tripartite governance: "[C]itizen suits authorized in the legislation will guarantee that public officials are making good on our national commitment to provide meaningful environmental protection."[16] They stem directly from the core of a representation reinforcing democracy: "In a society of Government of and by the people we foreclose participation by citizens at our peril."[17] Foreclosed not, citizen suits help assure laws enacted by Congress, in whom "all legislative authority vests,"[18] are "faithfully executed" by the executive branch,[19] with "controversies" resolved by the judicial branch.[20]

Last, citizen suit authority invites responsible environmental stewardship elsewhere. The success of citizen suits

11. 528 U.S. 167, 30 ELR 20246 (2000).

12. But for those suits filed against EPA, citizen suit data respecting the ESA are not readily available.

13. 136 Cong. Rec. S3162-04 (1990) (remarks of Sen. Durenberger).

14. *Id*. at 33103.

15. S. Rep. No. 91-1196, at 36-37 (1970).

16. 116 Cong. Rec. S4358, 33102 (statement of Sen. Scott).

17. *Id*. at 33103.

18. U.S. Const. art. I.

19. *Id*. art. II.

20. *Id*. art. III.

in the United States has informed the adoption of citizen suit authority by other countries.[21] Citizen suits help to shape international legal norms, including notions of sustainable development.[22] Perhaps most importantly, citizen suit litigators have inspired, and help support, public interest advocacy worldwide.[23]

Environmental citizen suits have left an indelible imprint on modern federal jurisprudence. It is hard to envision modern constitutional, administrative, property and labor law, or civil procedure without the body of law environmental citizen suits engender. Try it. Crack open most constitutional or administrative law textbooks, for example, and chance you will find much of the law taught through citizen suits. In 30 years, federal courts have cited just five environmental citizen suit cases more than 10,000 times, including 2,728 for *Sierra Club v. Morton*,[24] 1,882 for *Tennessee Valley Authority v. Hill*,[25] 809 for *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*,[26] 3,916 for *Lujan v. Defenders of Wildlife*,[27] and 603 already for *Laidlaw*, still toddling along at three years old.[28]

Citizen suit law is the engine that propels the field of environmental law. Most of the legal opinions issued under the nation's principal environmental statutes that allow citizen suits derive from citizen litigation. Table 1 shows the number of decisions federal courts issued in environmental citizen suit cases since their inception. Citizens have accounted for more than 1,500 reported federal decisions in civil environmental cases. At an average of nearly 85 a year since 1995, roughly 3 in 4 (75%) of all reported civil environmental decisions are citizen suits. This is striking. What it means is the vast majority of the growing jurisprudence interpreting the nation's environmental laws is attributable to citizen suits.

Table 1[29]

Reported Judicial Opinions in Environmental Citizen Suit Cases: 1970-2002											
1970	0	1976	8	1982	24	1988	66	1994	70	2000	70
1971	0	1977	12	1983	24	1989	74	1995	99	2001	101
1972	0	1978	10	1984	34	1990	62	1996	87	2002	75
1973	7	1979	11	1985	48	1991	53	1997	71	Total	1,511
1974	13	1980	30	1986	48	1992	66	1998	101		
1975	18	1981	23	1987	49	1993	93	1999	64		

21. *See* Svitlana Kravchenko, *Citizen Enforcement of Law to Protect the Environment in Eastern Europe*, *in* Environmental Citizen Suits at Thirtysomething: A Celebration and Summit 634 (Widener Univ. 2003) (continuing legal education materials) [hereinafter Widener CLE]; Job C. Heintz, *Citizen Enforcement of Law to Protect the Environment in Nepal*, *in id.* at 678.
22. *See* John C. Dernbach, *Citizen Suits and Sustainability*, *in* Widener CLE, *supra* note 21, at 661.
23. *See* John E. Bonine, *Worldwide Environmental Law Stories, Public Interest Environmental Lawyers—Global Examples and Personal Reflections*, *in* Widener CLE, *supra* note 21, at 611.
24. 405 U.S. 727, 2 ELR 20192 (1972). Bruce Terris tells the story behind this case elsewhere in this issue.
25. 549 F.2d 1064, 7 ELR 20172 (1977), *aff'd*, 437 U.S. 153, 8 ELR 20513 (1978). Prof. Zygmunt Plater's comments about how this case can be found elsewhere in this issue.
26. 484 U.S. 49, 18 ELR 20142 (1987). Prof. Ann Powers discusses this case elsewhere in this issue.
27. 504 U.S. 555, 22 ELR 20913 (1992).
28. 528 U.S. at 167, 30 ELR at 20246. Terris' remarks about this case can be found elsewhere in this issue.
29. The *Environmental Law Reporter*, Westlaw, and Lexis search of citizen suit and civil cases reported under the statutes listed *supra* note 3 (last searched May 15, 2003).

Presupposing 75% of reported civil environmental cases are citizen suits merely hints at their heft. As discussed later, since 1995, there is an annual average of nearly 500 citizen "actions" a year—aggregating notices (about 650), complaints (at least 70), and judicial consent orders (at least 50). Coupled with an average of 85 reported decisions annually, there are nearly 800 citizen suit "legal events" every year. Moreover, given that many citizen actions and decisions in citizen suits are unreported, and acknowledging that data gathering about citizen suits lacks a certain modicum of precision, the number of citizen legal events is likely much greater.

Statistical trends, however, reveal an overall decline in citizen legal events since 1995, although the numbers are rebounding. Three factors likely contribute most significantly to the decline. First, citizen suit litigation is best suited for the intrepid. Scaling the statutory and constitutional architecture of environmental citizen suits is difficult, expensive, and protracted, and the results often either fleeting or dubious.[30] Citizen litigators must navigate the perilous shoals of, inter alia, jurisdiction, notice, standing, mootness, preclusion, limited remedies, and foregone or forgiven attorneys fees.[31] Second, in general, judiciaries are at best ambivalent about citizen suits. Congress expected federal courts "should recognize that in bringing legitimate actions under this section citizens would be performing a public service."[32] Yet many judges would rather defer to agencies or devote their efforts to leavening their criminal or national security dockets than adjudicate a citizen suit. Why? Some are hostile to them, few know much about them, and fewer still are conversant with the myriad suite of statutory, common, and constitutional law citizen suits occupy. Third, from 1999-2001, many citizen litigators had misgivings about how the Court would resolve *Laidlaw*, and about associated aftershocks.

Yet, as discussed below, the diminishment in citizen enforcement actions has turned course. With *Laidlaw* upholding the notion it is injury to the environment, instead of the person, that matters for Article III standing, citizens can eschew the stress of various *sub rosa* issues, such as how to pay a lymnologist tens of thousands of dollars to help prove diminution in the water quality of an affected stream, to attend to other novel defenses, constrained only, like interuniversal travel and reality TV, by the imagination of the defense bar. The game, the aphorism goes, is back on.

II. Juridical and Statistical Trends Show More Citizen Suit Activity Than Ever Before

Judicial activity and statistical trends respecting notices of intent to sue, enforcement and agency-forcing cases, standings, and fees reveal considerable citizen suit activity and several important existing and potential limitations. For example, judicial trends show courts construing citizen suit notice requirements more strictly. Quality matters. A citizen who sends a less than perfect notice letter is one who courts disaster. Statistically, perhaps owing to the effort notice preparation engenders, citizens are sending far fewer notices of intent to sue than in the heyday of the latter one-half of the 1990s.

In addition, judicial and statistical trends in citizen suits against members of the regulated community who pollute ("enforcement" cases) display the wide breadth of government activities that can preclude a citizen suit. Recent decisions confirm citizen suits can be precluded by statute or common law when a government agency takes enforcement action of nearly any stripe. Moreover, recent cases confirm citizens may "commence" an enforcement case, and jurisdiction exists, only when there is incontrovertible evidence of repeated, ongoing violations of federal law by a regulated party, even when the statute does not require such a showing. Furthermore, courts are unlikely to impose either remedies beyond those minimally necessary to comply with explicit permit or regulatory conditions or more than a fraction of the civil penalties allowed by law, even, at times, failing to recapture the economic benefit the defendant enjoys from years of skirting federal environmental laws. SEPs offer hope of having the citizen suit help restore the area affected by noncompliance. Statistical trends show a decrease in citizen enforcement cases, though some rebound is underway.

Moreover, juridical trends show less tolerance for citizen suits seeking agency compliance with mandatory duties ("action-forcing" cases) absent a strong showing that the federal agency (usually EPA) failed entirely to perform a mandatory duty Congress specifically ordered accomplished by a date-certain deadline. When citizens prevail, courts often merely order the agency to do what Congress declared be done, and no more, no matter how dilatory or deleterious the agency delay. Statistical trends show action-forcing cases are in precipitous decline.

Likewise, constitutional defenses continue to limit citizen suits. For example, *Laidlaw* was thought to have made standing analysis academic provided citizens produced affidavits claiming injury to a person—environmental injury is beside the point. A recent case, however, portends renewed vibrancy to standing challenges by requiring proof of injury at trial. Mootness continues to loom large. In addition, statistical trends show sovereign immunity under the Eleventh Amendment of the U.S. Constitution has severely curtailed the number of citizen enforcement cases against state sovereigns.

Last, in light of *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*,[33] recent decisions demonstrate successful citizen suitors may never see a payday. Fees are available at best "as appropriate" and at worst to the "prevailing or substantially prevailing party." Statutes with the latter provision, including the CWA and its analogues, serve to encourage defendants to stave off compliance in favor of exhausting every conceivable defense, secure in the belief they can avoid paying citizen suit attorneys fees and costs by coming into compliance at any time before judicial compunction. When the former provision is available, citizen attorneys must demonstrate

30. *See, e.g.*, Jim Hecker, *The Difficulty of Citizen Enforcement of the Clean Air Act, in* Widener CLE, *supra* note 21, at 441; Patrick Parenteau, *Citizen Suits Under the Endangered Species Act: The Last Line of Defense*, *in* Widener CLE, *supra* note 21, at 458.

31. These can be the tip of the iceberg, no less. Surmounting tall statutory, common-law, and constitutional obstacles can be comparatively easy to the litany of other defenses and issues de rigeur in civil practice involving everything from service to discovery to local rules to experts, none owing to cheap or quick dispatch. Oh, and then there are the lofty expectations of ever more sophisticated clients. Suffice to say environmental citizen suits are not for the faint of heart, mind, or pocket.

32. CWA Amendments of 1972, S. Rep. No. 92-414, at 81 (1972).

33. 121 S. Ct. 1835 (2001). *See* Adam Babich, *Fee Shifting After* Buckhannon, 32 ELR 10137 (Jan. 2002).

the reasonableness of both the rates charged and the amount of time spent prosecuting the action to judiciaries with more important things to do than adjudicate fee petitions.

Notice, preclusion, jurisdictional, constitutional, and fee defenses, though not the only issues facing citizen suitors, are often preeminent. What follows examines recent juridical and statistical trends in these areas. At bottom we see citizen suits have more impact than ever.

A. Requirements to Provide Notice of Intent to Sue Demand Adherence

Except in rare circumstances, environmental citizen suitors must send a notice of intent to sue to appropriate persons at least 60 days before commencing an action.[34] The prototypical provision, CWA §505(b), 33 U.S.C. §1365(b), provides:

> (b) Notice
>
> No action may be commenced . . . (1) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order.

Citizen suit notice requirements are considerably more demanding than notice pleading under the Federal Rules of Civil Procedure.[35] Citizens must give notice in the manner prescribed by the EPA Administrator. EPA rules generally require notices of intent to sue to identify the specific standards and limitations the recipient of the notice is alleged to be violating, the person responsible, the location of the alleged violation, the date or dates of such violation, and the full name and address of the person giving the notice.[36] Though it is questionable whether advance notice is "jurisdictional," there is no question it must be perfected before commencing a citizen suit.[37]

1. Juridical Trends

Judicial trends show courts construing citizen suit notice requirements more strictly. A citizen who sends a less than perfect notice letter is one who courts disaster. The incidence of notice letters serves as a predictor of sorts for the health of the pursuit. What we find is citizens are sending far fewer notices of intent to sue than in the heyday of the latter one-half of the 1990s, but there are signs of rebound.

Satisfying EPA's rules is no mean feat. The issue of notice adequacy continues to foment ample satellite litigation, particularly in the U.S. Court of Appeals for the Ninth Circuit. In *San Francisco Baykeeper, Inc. v. Tosco Corp.*,[38] the court ruled that a defendant may not defeat sufficient notice of alleged violations by selling a polluting facility to a third party. In *Tosco*, the plaintiff notified the company of its intent to sue for illegal discharges, waited more than 60 days, and filed suit. The company then sold the offending facility. The lower court granted its motion for dismissal based, inter alia, on lack of notice.

The Ninth Circuit reversed and remanded, holding that a defendant cannot defeat proper notice by selling the facility that is the subject of the notice. Citing EPA regulations, the court found a notice letter is sufficient if it is "reasonably specific" as to the nature and time of the alleged violations."[39] Moreover, the court found the plaintiff's claims for civil penalties not moot, reasoning that a defendant cannot escape liability simply by selling the facility.

Notice of ongoing violations includes those of the same variety in the future. In *Community Ass'n for Restoration of the Environment v. Henry Bosma Dairy*,[40] the Ninth Circuit affirmed the lower court's finding that the plaintiff provided adequate notice to sue regarding allegedly illegal discharges by two concentrated animal feeding operation (CAFO) dairies in Washington. The plaintiff provided notice of 12 illegal discharges, and then filed a complaint concerning these and 32 additional violations. The court held that notice was adequate because the additional violations listed in the complaint originated from the same source (the dairy farm), were of the same nature (into a common drainage ditch), were easily identifiable and involved the same claims, i.e., discharge of manure into a drainage ditch without a permit, and were in violation of a general permit and state water quality standards.

Cautionary tales, however, abound. In *ONRC Action v. Columbia Plywood, Inc.*,[41] the Ninth Circuit upheld the dismissal of two citizen suit claims for failure to provide notice of two claims related to the one for which plaintiffs gave notice. The plaintiff provided a notice of intent to sue for the untimely submission of a permit application. The complaint pled this and a related claim for failure to renew the permit, and challenged the state's decision to waive the grace period. The court dismissed the latter claims, holding that the notice did not adequately describe an intent to sue for them.[42]

34. *See, e.g.*, CWA §505(b)(1)(A), 33 U.S.C. §1365(b)(1)(A), ELR STAT. FWPCA §505(b)(1)(A); CAA §304(b)(1)(A), 42 U.S.C. §7604(b)(1)(A), ELR STAT. CAA §304(b)(1)(A); ESA §11(g)(2)(A)(i), (B)(i), 16 U.S.C. §1540(g)(2)(A)(i), ELR STAT. ESA §11(g)(2)(A)(i); RCRA §7002(B)(1)(A), (2)(A), 42 U.S.C. §6972(B)(1)(A), (2)(A), ELR STAT. RCRA §7002(B)(1)(A), (2)(A) (90 days for violating certain solid waste requirements); CERCLA §310(d)(1), 42 U.S.C. §9659, ELR STAT. CERCLA §310(d)(1); TSCA §20(b), 15 U.S.C. §2619(b), ELR STAT. TSCA §20(b); SDWA §1449(b), 42 U.S.C. §300j-8, ELR STAT. SDWA §1449(b); EPCRA §326(d), 42 U.S.C. §11046(d), ELR STAT. EPCRA §326(d). *But see* ESA §11(g)(2)(C), 16 U.S.C. §1540(g)(2)(C), ELR STAT. ESA §11(g)(2)(C) (notice not required if action "poses a significant risk to the well-being of any protected species"). *See also* RCRA §7002(B), 42 U.S.C. §6972(B), ELR STAT. RCRA §7002(B) (notice, but not delay, required for illegal disposal of statutory hazardous wastes amounting to "imminent and substantial endangerment").

35. FED. R. CIV. P. 4 (general civil "notice" pleading). *Compare* National Parks Conservation Ass'n v. Tennessee Valley Auth., 175 F. Supp. 2d 1071, 1077 (E.D. Tenn. 2002), *with* Torres Maysonet v. Drillex, S.E., 229 F. Supp. 2d 105 (D.P.R. 2002).

36. *See* 40 C.F.R. §54.3(b) (CAA); *id*. §135 (CWA). Some statutes, like the ESA, lack a notice rule counterpart.

37. Hallstrom v. Tillamook County, 493 U.S. 20, 20 ELR 20193 (1989). Prof. Karl Coplan concludes that notice is not jurisdictional, and describes why it matters to citizen suitors. Karl C. Coplan, *Is Citizen Suit Notice Jurisdictional and Why Does It Matter?*, *in* Widener CLE, *supra* note 21, at 177 (noting that the "non-jurisdictional nature of notice implicates the proper procedure for raising notice objections, the means of curing notice defects, the question of waiver of notice objections, and the timing of raising notice objections").

38. 309 F.3d 1153, 33 ELR 20098 (9th Cir. 2002).

39. 40 C.F.R. §135.

40. 305 F.3d 943, 33 ELR 20048 (9th Cir. 2002).

41. 286 F.3d 1137, 1142-43, 32 ELR Digest 20638 (9th Cir. 2002).

42. *Id.* at 1143 (quoting Natural Resources Defense Council v. Southwest Marine, Inc., 236 F.3d 985, 31 ELR 20503 (9th Cir. 2000)).

In *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*,[43] the court dismissed without prejudice plaintiffs' thermal discharge claim for failure to provide notice of intent to sue. Plaintiffs' notice identified violations of standards regarding "suspended solids." The complaint claimed violations of effluent limitations for suspended solids, turbidity, and heat. Although the notice of violation of permit limits for suspended solids and turbidity requirements was sufficient, the presence of suspended solids, the court observed, does not necessarily cause a violation of thermal standards.[44]

In *City of Olmstead Falls v. U.S. Environmental Protection Agency*,[45] the city of Cleveland applied for a CWA §404 permit from the U.S. Army Corps of Engineers (Corps) and a corresponding §401 water quality certification from the Ohio Environmental Protection Agency (OEPA). After the OEPA notified the Corps of its decision to waive the §401 process, the Corps issued Cleveland the §404 permit. On appeal, Ohio's environmental review board found that state law does not permit the OEPA to waive the §401 certification process. Accordingly, the plaintiff requested that the Corps revoke the permit. The Corps declined. The federal EPA did not exercise its authority to object to issuance of the §404 permit.

Without providing notice of its intent to sue, the plaintiff filed suit against EPA to force it to intervene and oppose the permit. The court dismissed the action due to lack of notice, agreeing with EPA that the Act waives sovereign immunity only if citizens comply with the Act's notice requirement. Therefore, because the plaintiffs did not comply with CWA §505(b), the court lacked subject matter jurisdiction to hear the claim.

2. Statistical Trends

Table 2 reports the total number of notices of intent to sue against EPA, the Corps, other federal agencies, industry, and state and local governments from 1995 through May 2003. It reveals news both good and bad, depending on your ox. The good news is that citizens send hundreds of notices annually. Since 1995, citizens have sent about 4,500 agency-forcing and enforcement notices, including about 480 in 2002. This is an astonishing pace over eight years of 550 per year, or about 1.5 per calendar day, and nearly 2 per business day. Bad news is that citizens are sending fewer notices of intent to sue. In 1995, citizens sent 708 notices. By last year, this number sheared nearly 50 %, to 397. Even though the numbers rebounded somewhat last year to 479, recent trends find citizens sending fewer notices to EPA and other federal agencies, industry, and state and local governments.

Table 2[46]

Total Citizen Notices of Intent to Sue Against Sectors (1995-2003)							
	EPA	Corps	Other Federal Agencies	Industry	State & Local Gov'ts	Various RCRA	Totals
1995	46	17	9	154	124	338	688
1996	35	13	10	199	111	223	591
1997	30	14	18	210	89	138	499
1998	51	10	15	266	120	202	664
1999	67	10	9	167	67	248	568
2000	54	6	15	182	69	204	530
2001	44	19	8	128	67	131	397
2002	15	3	3	215	73	170	479
2003[47]	14	0	3	60	36	49	162
Total	356	92	90	1,581	756	1,703	4,578

43. 273 F.3d 481, 32 ELR 20229 (2d Cir. 2001).

44. *See also* River Oaks Homeowners v. Edington, 32 Fed. Appx. 929 (9th Cir. 2002) (dismissing without prejudice CWA portions of fair credit consumer complaint for failure to send notice to EPA).

45. 223 F. Supp. 2d 890 (N.D. Ohio 2002).

46. Except as otherwise noted, the data reflected in Tables 2 through 11 are derived from spreadsheets kept by the U.S. EPA Offices of General Counsel and of Air and Waste Remediation (on file with author). The data reported under the CAA likely undercount actual notices because they do not necessarily include notice letters sent directly to the EPA Administrator. ESA data, except for agency-forcing cases against federal agencies, are not readily available, and are not included. NEPA does not have a citizen suit provision. Therefore, NEPA cases are not included. Each would likely have added significantly to the reported numbers.

47. The figures listed for year 2003 in the tables in this Article are current through May 31, 2003.

B. Enforcement Cases

The vast majority of citizen suits are filed against polluters for not complying with permit and other requirements. Most federal environmental laws allow citizens to sue "any person" who violates a legal requirement, most likely a permit condition, or who fails to obtain a required permit.[48]

1. Juridical Trends: Threat of Preclusion Advances, Jurisdiction Stays the Course, Remedies Atrophy

In general, recent cases confirm citizens may "commence" a case only when government authorities have not already commenced an enforcement action, however diligent or insipid.[49] Moreover, regardless of the language of the enabling statute, jurisdiction is a fair bet only when there is incontrovertible evidence of repeated, ongoing violations of federal law by a regulated party. Statistical trends show a precipitous decline in citizen actions against the regulated community, though some rebound may be underway.

a. Statutory and Common-Law Preclusion Read Broadly

Citizen enforcement suits are precluded when, prior to commencement of the citizen suit, a state or federal agency "commences" and is "diligently prosecuting" a civil or criminal action "in a Court of the [United States],"[50] or under the CWA there is diligent prosecution of an administrative action, collection of a penalty, and citizens do not file an action before institution of the agency action or within 120 days of sending proper notice.[51] Overcoming statutory preclusion is half the battle. Common-law preclusion also awaits the unsuspecting plaintiff.

Although there is a textual argument that statutory preclusion only applies if the government is diligently prosecuting an *ongoing* action,[52] recent decisions show how difficult it is to overcome the statutory preclusion presumption whenever a state or EPA takes enforcement action of nearly any variety.[53] Preclusive enforcement need not even be against the defendant. In *American Canoe Ass'n v. Westvaco*,[54] the court held that the state's institution of a civil action, the imposition of a $400,000 penalty, and a compliance schedule for installation of a $2.5 million upgrade to a wastewater treatment plant (the defendant was a private paper mill) was "diligent prosecution" precluding a citizen suit. The court rejected plaintiff's argument that the only enforcement action that could preclude its suit was one brought against the defendant itself. The court also found that the penalty amount suggested diligence, even though it was about one-half of the economic benefit enjoyed through years of noncompliance.

Government action need not require compliance. In *Clean Air Council v. Sunoco*,[55] the court dismissed a CAA citizen suit against a petroleum company because, the court ruled, a post-notice but pre-complaint $450,000 penalty for hundreds of significant violations, when coupled with a *plan* to comply, were sufficiently diligent.

Sometimes, post-citizen suit agency enforcement is not sufficient. In *Altamaha Riverkeeper v. City of Cochran*,[56] the court found that neither a fine nor a compliance order imposed by the state were "diligent prosecution" precluding citizen suit. On January 25, 2003, the court upon recommendation of a special master imposed a civil penalty of $1 million, and enjoined future violations.

For a state administrative action to preclude a CWA citizen suit, state law must be "comparable" to the Act.[57] In *McAbee v. City of Fort Payne*,[58] the U.S. Court of Appeals for the Fifth Circuit determined an administrative action brought by the state of Alabama did not preclude a citizen suit because Alabama law does not provide for public participation in a manner comparable to the Act. In comparison, the same court, in *Lockett v. U.S. Environmental Protection Agency*,[59] upheld a lower court's ruling that Louisiana's public participation process, though not identical to the Act's, was good enough. The determination may well be dicta, for the court also held that the citizen landowner's suit was precluded because the plaintiff neither filed suit before the state action nor within 120 days of sending its notice of intent to sue, as required by the Act.

Even when statutory preclusion does not apply, common-law preclusion may. In light of *Harmon Industries, Inc. v. Browner*,[60] defendants have had some success arguing state principles of res judicata serve to preclude any subsequent enforcement, whether by citizens or the federal government.[61] That failing, some defendants inflate devolution to argue for dismissal of enforcement citizen suits that do not also name the state as a party defendant.[62] Compare, *Johnson v. Calpine Corp.*,[63] where the court rebuked plaintiff's efforts to litigate a citizen suit in state court. After plaintiff filed its action in state court, the federal court granted defendant's removal motion, holding the Act ex-

48. *See supra* note 3 and accompanying text.

49. However, the United States continues to take the position that citizen suits do not estop it from bringing enforcement actions. Memorandum from Glenn L. Unterberger Associate Enforcement Counsel for Water, to Regional Counsels, Regions I-X (June 19, 1987) (on file with author).

50. *See* CWA §505(b)(1)(B), 33 U.S.C. §1365(b)(1)(B), ELR STAT. FWPCA §505(b)(1)(B); CAA §304(b)(1)(B), 42 U.S.C. §7604(b)(1)(B), ELR STAT. CAA §304(b)(1)(B); ESA §11(g)(2)(iii), (b)(iii), 16 U.S.C. §1540(g)(2)(iii), (b)(iii), ELR STAT. ESA §11(g)(2)(iii), (b)(iii); RCRA §7002(b)(1)(B), (2)(B), 42 U.S.C. §6972(b)(1)(B), 2(B), ELR STAT. RCRA §7002(b)(1)(B), (2)(B).

51. *See* CWA §309(g)(6), 33 U.S.C. §1319(g)(6), ELR STAT. FWPCA §309(g)(6). *See also* ESA §11(g)(2)(A)(ii), 16 U.S.C. §1540(g)(2)(A)(ii), ELR STAT. ESA §11(g)(2)(A)(ii) (preclusion if agencies commence action to impose penalty).

52. *See* Jeffrey G. Miller, *Overlooked Issues in "Diligent Prosecution" Citizen Suit Preclusion*, *in* Widener CLE, *supra* note 21, at 191.

53. *See* Peter A. Appel, *The Diligent Prosecution Bar to Citizen Suits: The Search for Adequate Representation*, *in* Widener CLE, *supra* note 21, at 214.

54. No. L-00-484 (D. Md. July 24, 2002).

55. No. 02-1553 GMS, 2003 U.S. Dist. LEXIS 5346 (D. Del. 2003).

56. 162 F. Supp. 2d 1368 (M.D. Ga. 2001).

57. CWA §309(g)(6)(A), 33 U.S.C. §1319(g)(6)(A), ELR STAT. FWPCA §309(g)(6)(A).

58. 318 F.3d 1248, 33 ELR 20151 (5th Cir. 2003).

59. 319 F.3d 678, 33 ELR 20150 (5th Cir. 2003), *aff'g* 176 F. Supp. 2d 629 (E.D. La. 2001).

60. 191 F.3d 894, 29 ELR 21412 (8th Cir. 1999).

61. *See* William Luneburg, *Claim Preclusion, Full Faith and Credit, and Clean Air Enforcement: The Ghosts of* Gwaltney, *in* Widener CLE, *supra* note 21, at 233.

62. Friends of Concord Creek v. Springhill Farm Sewage Auth., No. 02-2742, 2003 U.S. Dist. 3123 (E.D. Pa. Feb. 12, 2003) (holding state not an indispensable party to citizen enforcement suit).

63. No. Civ. A. 02-2242, 2002 WL 31640484 (E.D. La. Nov. 20, 2002).

pressly grants federal jurisdiction. In so doing, the court rejected the argument that removal requires a demonstration of exclusive, as well as original, jurisdiction.

b. Jurisdictional Temporal Requirements Status Quo

Most federal environmental laws only allow citizens to "commence" civil actions against polluters who repeatedly violate the law. Each statute has its own temporal jurisdictional requirement. For example, the CWA requires good-faith allegations of ongoing violations (that the polluter is "alleged to be in violation"),[64] while the CAA allows for prosecution of past violations "if there is evidence that the alleged violation has been repeated,"[65] and RCRA for past violations that "may present an imminent and substantial endangerment."

Post-complaint violations form a good-faith basis for alleging ongoing violations under the CWA. In *Henry Bosma Dairy*,[66] the Ninth Circuit affirmed the lower court's finding of jurisdiction. There was ample evidence that the violations were ongoing when plaintiffs filed suit, including evidence of repeated, uncorrected violations, poor operation and maintenance, and manure piles in the vicinity of the receiving stream after the lawsuit was filed. Similarly, in *California Sportfishing v. Diablo Grande*,[67] the court granted the plaintiffs' motion for partial summary judgment, holding that a good-faith basis existed for alleging an ongoing violation because additional violations occurred after commencement of the action.

Under RCRA, citizens may sue owners or operators of disposal facilities that may present an imminent and substantial endangerment to the environment.[68] An endangerment that is "imminent" is not necessarily one precipitating immediate harm.[69] Rather, a harm that may not be realized for some time may form the basis for "imminent" endangerment.[70] An endangerment that is "substantial" need not quantify the risk of harm.[71] Instead, some reasonable cause for concern regarding risk of exposure may form the basis for a "substantial" endangerment claim.[72]

As a general matter, citizen suits are not available to challenge permit conditions.[73] Moreover, they cannot be used to trigger preenforcement review of CERCLA cleanup plans.[74]

64. CWA §505(a), 33 U.S.C. §1365(a), ELR STAT. FWPCA §505(a).
65. CAA §304(a)(1), 42 U.S.C. §7604(a)(1), ELR STAT. CAA §304(a)(1).
66. 305 F.3d at 943, 33 ELR at 20048.
67. 209 F. Supp. 2d 1059 (E.D. Cal. 2002).
68. Albany Bank & Trust Co. v. Exxon Mobil Corp., 310 F.3d 969 (7th Cir. 2002).
69. Maine People's Alliance v. Holtrachem Mfg. Co., 211 F. Supp. 2d 237, 32 ELR 20826 (D. Me. 2002).
70. *Id.*
71. *Id.*
72. *Id.*
73. National Parks Conservation Ass'n v. Tennessee Valley Auth., 175 F. Supp. 2d 1071, 1079 (E.D. Tenn. 2002). *See also* Bayview Hunters Point Community Advocates v. Metropolitan Transp. Comm'n, 212 F. Supp. 2d 1156 (N.D. Cal. 2002) (district court was not entitled to modify or review limitations of an EPA-approved, CAA-mandated state implementation plan).
74. Broward Gardens Tenants Ass'n v. EPA, 311 F.3d 1066, 1072 (11th Cir. 2002) (barring citizen challenges until remedy plans are completed).

c. Remedies Atrophy

Even victorious citizen suitors are apt to find effective remedies elusive. Recent decisions show how courts (1) are reluctant to require more than those upgrades minimally necessary to comply with explicit permit or regulatory conditions, no matter the extent of malfeasance, especially if the upgrades might upset company economic or agency policy prerogatives, and (2) seldom impose more than a fraction of the civil penalties allowed by law, even, at times, failing to recapture the economic benefit the defendant enjoys from years of skirting federal environmental laws. Most environmental statutes allow the DOJ a 45-day review period for consent decrees resulting from citizen enforcement actions prior to entry,[75] though these provisions have little practical effect.[76] SEPs offer the possibility of utilizing citizen suits to help restore the sites or areas affected by noncompliance, though their effectiveness is difficult to monitor.

Citizens may seek injunctive relief and civil penalties comparable to their federal counterparts. For example, the CWA allows for injunctive relief and civil penalties in the amount of up to $27,500 per day per violation,[77] and administrative penalties up to $10,000 per day per violation, but no more than a total of $125,000.[78] Citizen suits may seek mandatory or prohibitory injunctions, civil penalties, and declaratory relief, but not damages.[79]

In meting out injunctive relief, equities still come in to play, sometimes resulting in imaginative or Draconian effects.[80] By comparison, penalty assessments in citizen suits are often modest, and aim to ensure recovery of the economic benefit the violator enjoyed by not taking steps to comply.

Once in a great while, penalties and injunctive relief catch the eye. In *Catskill Mountains Chapter of Trout Unlimited*,[81] the U.S. Court of Appeals for the Second Circuit held that New York City's diversion of polluted water from a reservoir through a city-owned tunnel for release into Esopus

75. CWA §505(c)(3), 33 U.S.C. §1365(c)(3), ELR STAT. FWPCA §505(c)(3); CAA §304(c)(3), 42 U.S.C. §7604(c)(3), ELR STAT. CAA §304(c)(3).
76. On occasions when it has a concern, the DOJ either convinces the parties to amend the decree or objects. Courts usually pay little heed to DOJ objections to consent decrees in citizen enforcement cases.
77. CWA §309(d), 33 U.S.C. §1319(d), ELR STAT. FWPCA §309(d).
78. *See id.* §309(g)(2), 33 U.S.C. §1319(g)(2), ELR STAT. FWPCA §309(g)(2).
79. *See, e.g.*, Hassain v. EPA, 41 Fed. Appx. 888 (7th Cir. 2002) (citing RCRA §7002(a)(2), 42 U.S.C. §6972(a)(2), ELR STAT. RCRA §7002(a)(2)); Meghrig v. KFC W., Inc., 516 U.S. 479, 26 ELR 20820 (1996).
80. U.S. Pub. Interest Research Group v. Atlantic Salmon of Me., 33 ELR 20207 (D. Me. May 9, 2003) (salmon farm owner held in contempt for violating a previous CWA court order not to introduce any new class of fish into its net pens, and enjoined from any further stocking of fish); Northern Plains Research Council v. Fidelity Dev. & Exploration Co., 325 F.3d 1155 (9th Cir. 2003) (ordering methane gas extraction company to apply for CWA permit for discharge into river of unaltered groundwater from mining process); Interfaith Community Org. v. Honeywell Int'l, Inc., No. 95-2097, U.S. Dist. LEXIS 8475 (D.N.J. May 20, 2003) (RCRA citizen ordering cleanup of hexavalent chromium at site in Jersey City). *Cf.* Pacific Rivers Council v. Brown, No. 02-243-BR, 2003 U.S. Dist. LEXIS 8139 (D. Or. Apr. 21, 2003) (holding despite relaxed standard for injunctive relief to protect endangered species, the organizations had not carried the burden of showing likelihood of success on the merits due to conflicting evidence about effects of logging on coho salmon).
81. 273 F.3d at 481, 32 ELR at 20229.

Creek, a trout stream from which the city withdrew drinking water, amounted to an "addition" of "pollutants." On remand, the U.S. District Court for the Southern District of New York, after an unusual bench trial litigated by law students with the Pace Environmental Litigation Clinic, used a "top-down" approach to fine the city $5.75 million, the maximum allowed for each day of violations occurring after the Second Circuit's ruling, but reducing the number of days of violations to account for the terrorist attacks of September 11, 2001.[82] The district court also ordered the city to provide the New York Department of Environmental Conservation (DEC) with all information needed to issue a discharge permit, and, pursuant to the court's authority under the All Writs Act, ordered the DEC, as a third-party defendant, to complete an application process and issue a discharge permit within 18 months.

In *Tamaska v. City of Bluff City, Tennessee*,[83] the court upheld the lower court's imposition of civil penalties for the defendant city's violations of a consent decree between it and a property owner. The decree prohibited the discharge of untreated and partially treated waste from the defendant's wastewater treatment plant onto the owner's property and imposed compliance deadlines. Before entry of the decree, the city voluntarily ceased operating the treatment plant. It then failed to meet the decree's deadlines. Plaintiffs then sought to enforce the decree and the city complied.

The lower court ordered the city to pay penalties to the U.S. Treasury and plaintiffs' attorneys fees. The U.S. Court of Appeals for the Sixth Circuit affirmed, deciding that the cessation of discharge does not moot the authority of the court to impose civil penalties or award fees. The court also held that it is appropriate to have the penalty amount paid to the Treasury rather than the property owner because relief was granted under the terms of the decree, rather than by order of contempt.

2. Statistical Trends: Citizen Enforcement on Rebound Except Against States

Citizens are sending fewer notices of intent to sue members of the regulated community, including industry and state and local governments. Table 3 outlines total notices of intent to sue in enforcement cases by statute for the years 1995 through 2002. It shows citizens sent 25% fewer notices to regulated parties in 2002 than they did in 1995, i.e., 366 down from 481. The numbers had dipped by 50 % in 2001, but last year showed substantial rebound. One in three notices of intent, and nearly all under RCRA, are sent by members of the regulated community. Notwithstanding the recent upward swing in citizen enforcement cases, Table 4 shows those against state and local governments are waning, possibly owing to the Court's recent extensions of the degree of sovereign immunity states enjoy under the Eleventh Amendment mentioned below.

Tables 5 and 6, respectively, report citizen enforcement cases and consent decrees logged by the DOJ under the CWA and the CAA (the DOJ does not compile data respecting other programs) from 1995 through 2001. The tables show the annual as a roughly 25% decline in the total number of CWA and CAA citizen enforcement cases from eight-year highs brought and settled by judicial decree, though CAA activity is increasing.

The overall decreases in notices, complaints, and consent decrees are likely due to four factors. First, the energy and resources necessary to perfect a notice of intent to sue eclipse those for preparing a civil complaint. The prospects of extensive preclusion, jurisdictional, standing, procedural and merits challenges may dissuade some from the pursuit. This is unlikely to change. Second, citizens were wary of how the Court might decide *Laidlaw*, and were hesitant to devote hundreds of hours crafting and litigating a suit if the standard for Article III standing proved impossible to meet. As *Laidlaw* has largely settled the standing question by focusing on whether there is injury to the plaintiff (rather than to the environment), citizens are now more likely to enter the fray, though there is again reason for pause, as discussed below. Third, citizens are the victims, as it were, of their own success. Citizen suits achieve their dual intended effects of requiring compliance *and* catalyzing government enforcement[84]; thus, there is less to enforce. Fourth, the ascendancy of the Court's Eleventh Amendment sovereign immunity jurisprudence make citizen enforcement suits against states—who are often significant polluters that lack the resources or will to comply—less likely.[85]

Citizen enforcement suits also have the unintended dual effects offering the concurrent negative incentives for agencies (usually states) to roll back permit requirements, and for polluters to race into the awaiting arms of regulators to negotiate judicial settlements to preclude citizen enforcement.[86] These factors will ameliorate the numbers in years to come.

Table 3

Notices of Intent by Statute: Citizen Enforcement Cases (1995-2003)

	CAA	CWA	RCRA	MPRSA	Totals
1995	27	128	326	0	481
1996	20	179	208	0	407
1997	23	187	131	0	341
1998	29	237	179	0	445
1999	8	151	151	5	315
2000	9	173	198	0	380
2001	9	119	113	0	241
2002	18	197	151	0	366
2003	3	57	41	0	101
Total	146	1,428	1,498	5	3,077

82. Catskill Mountains Chapter of Trout Unlimited v. City of New York, No. 1:00-CV-511, 2003 WL 346217 (S.D.N.Y. Feb. 6, 2003).

83. 26 F. Appx. 482, 32 ELR 20404 (6th Cir. 2002).

84. There are no data on the frequency by which agencies take enforcement action after receiving a notice of intent to sue. Anecdotal information suggests such preclusion occurs far more in the case of states than with EPA.

85. *See* Hope Babcock, *The Effect of the Supreme Court's Eleventh Amendment Jurisprudence on Environmental Citizen Suits: Gotcha!*, *in* Widener CLE, *supra* note 21, at 326.

86. *See* Steven C. Russo & Elizabeth A. Read, *Defense Perspectives on Environmental Citizen Suits*, *in* Widener CLE, *supra* note 21, at 595, 599-606 (discussing litany of defenses to citizen suits).

Table 4

Notices of Intent to Sue State and Local Governments by Statute (1995-2003)					
	CWA	CAA	ESA	RCRA/ CERCLA	Totals
1995	102	4	0	12	118
1996	103	7	1	15	126
1997	88	1	0	7	96
1998	111	3	0	23	137
1999	64	3	0	97[87]	164
2000	69	0	0	6	75
2001	58	9	0	18	85
2002	71	0	2	19	92
2003	36	0	0	8	44
Total	702	27	3	205	937

Table 5

Citizen Enforcement Cases Logged by DOJ: CWA and CAA (1995-2001)			
	CWA	CAA	Totals
1995	43	3	46
1996	71	7	78
1997	53	4	57
1998	49	2	51
1999	24	1	25
2000	28	9	37
2001	30	12	42
Total	298	38	336

Table 6

Citizen Enforcement Suit Consent Decrees Reviewed by DOJ: CWA and CAA (1995-2001)			
	CWA	CAA	Totals
1995	30	2	32
1996	48	3	51
1997	54	1	55
1998	37	6	43
1999	41	3	44
2000	26	1	27
2001	20	6	26
Total	256	22	278

87. This number is inordinately high because in 1999 Phillips Petroleum Company, Union Oil, Unocal, and Shell Oil Company sent notice letters to almost every city clerk in California.

Table 7 shows civil penalties from 1996 through 2001 assessed in consent orders resulting from citizen enforcement efforts fluctuated wildly, with 2001 reporting the highest figures over that time. Rather than contribute civil penalties to the Treasury, many consent decrees direct funds for SEPs. Table 8 reveals that from 1999-2001, SEPs for 2001 were the highest, with a three year tally of nearly $10 million in additional environmental protection.

It is difficult to attribute increases in civil penalties and SEP values in citizen enforcement actions to any particular influence. Civil penalty assessments and SEPs usually lag behind the commencement of a successful action by several years. Thus, the upswing in values in 2000-2001 is likely attributable to the increase in cases filed in the mid-to-late 1990s. Therefore, figures for 2001-2003 may show a decline to reflect decreased activity in the early 2000s. But it is hard to tell. For example, the number of citizen enforcement actions and the value of penalties and SEPs do not appear directly correlative. That noted, suffice it to say that penalty and SEP values are likely a function of the number of citizen enforcement cases, though out of phase by a few years. With more citizen actions, SEPs in particular are likely to hold more sway in the upcoming years.[88]

Table 7[89]

Civil Penalties Assessed in Citizen Suit Consent Decrees Reported by DOJ: CWA and CAA (1996-2001)	
1996	$422,600
1997	N/A
1998	$198,750
1999	$4,500
2000	$25,800
2001	$537,500

Table 8[90]

Stated Value of SEPs Reported by DOJ Earned by Citizen Enforcement Cases: CWA and CAA (1999-2001)	
1999	$2,470,867.60
2000	$2,248,500.00
2001	$4,728,075.00

88. *See* Edward Lloyd, *Supplemental Environmental Projects Have Been Effectively Used in Citizen Suits to Deter Future Violations as Well as to Achieve Significant Supplemental Environmental Benefits, in* Widener CLE, *supra* note 21, at 381.

89. U.S. DOJ, Justice, Policy, Legislation, and Special Litigation Section, Annual Environmental Citizen Suit Report (2002) [hereinafter Annual DOJ Report] (on file with author).

90. *Id.*

C. Agency-Forcing Citizen Suits

Most federal environmental laws allow citizens to sue the agency that administers an environmental law to force it to comply with so-called nondiscretionary duties.[91] Recent case law suggests new hurdles for agency forcing cases, making them harder to litigate than ever. Supportive of this notion, the number of citizen action-forcing notices and cases in recent years has declined substantially.

1. Juridical Trends: Harder Than Ever

Recent cases confirm citizens may also file actions against federal agencies (usually EPA), but only if the agency fails to perform strict tasks Congress wanted done by a date-certain deadline. Accordingly, courts generally will not find EPA to be in the breach of a mandatory duty unless Congress both (1) specifies the duty, and (2) provides a date-certain or readily ascertainable deadline.[92] In general, the federal judiciary seems increasingly ambivalent toward such "agency-forcing" citizen suits, notwithstanding their attendant justification of making administrative agencies more accountable and effective.[93]

The total maximum daily load (TMDL) CWA litigation illustrates the reluctance of courts to force agency action absent a date-certain deadline.[94] Courts have not found EPA to have a mandatory duty to set TMDLs for states when a state refuses to act, notwithstanding the CWA's mandate that it "approve or disapprove" TMDLs states submit. For example, the Fifth and Ninth Circuits, and a lower court in New Jersey, declined to find that EPA failed a nondiscretionary duty to step in and establish TMDLs notwithstanding 30 years of inactivity by states, provided the states are now doing something, anything, to set TMDLs.[95] The standard for ordering EPA to comply is nearly insurmountable, requiring both an explicit refusal by a state to take *any* TMDL action and unreasonable EPA delay in declaring such refusal to be a "constructive submission" of no TMDLs.

Courts are also loath to find EPA has a mandatory duty to enforce the law. In *Sierra Club v. Whitman*,[96] the court held that EPA's failure or refusal either to find a violation or to take enforcement action against an Arizona wastewater treatment facility did not constitute a failure to perform a nondiscretionary duty. After the expiration of a permit and 128 violations over a period of five years, the plaintiff argued that CWA §309(a)(3), which states that EPA shall issue a compliance order or commence a civil action when presented with information of a violation, imposes a mandatory duty to enforce the Act actionable under §505(a)(2). The court disagreed, holding that to require EPA to investigate all complaints would infringe upon sovereign immunity, prosecutorial discretion/separation of powers, and would hinder EPA's ability to investigate more serious offenses. Moreover, in light of the Act's language, structure, and legislative history, the court held that Congress intended for §309(a)(3)'s "shall" to mean "may."

It is still possible to win a mandatory duty case to enforce a statute lacking a date certain deadline, if a deadline is readily ascertainable through an examination of other requirements. In *Save the Valley v. U.S. Environmental Protection Agency*,[97] the court granted the plaintiff's motion for summary judgment because EPA failed to perform a mandatory duty to initiate proceedings under CWA §402(c)(3) to withdraw approval of Indiana's national pollutant discharge elimination system (NPDES) program. The court agreed with the plaintiff that EPA had actual knowledge that the state had failed to adopt and enforce adequate laws and regulations concerning the discharge of pollutants from CAFOs, particularly industrial hog farms, and failed to require those operations to obtain NPDES permits. Nevertheless, courts typically will not act to preempt dilatory agency action.[98]

The spoils of successful action-forcing cases can be fleeting. Even after finding an agency has failed to meet a mandatory duty, courts limit relief solely to what the enabling statute specifically provides be done, and no more, no matter how dilatory or environmentally destructive the delay. Recent agency forcing cases show injunctive relief is usually limited.[99]

2. Statistical Trends: Action-Forcing Suits Declining

The number of agency-forcing notices and cases has declined since 1995, and dramatically so since 1999. Table 9 tabulates the number of action-forcing notices of intent to sue EPA from 1995 to the present by the statutes the agency administers. Tables 10 and 11, respectively, do the same for the Corps and other federal agencies under the CWA, the ESA, and RCRA. As Tables 9-11 show, "action-forcing" notices of intent to sue EPA and other federal agencies dropped by more than one-half between 1999 and 2002.

91. *E.g.*, CWA §505(a)(2), 33 U.S.C. §1365(a)(2), ELR STAT. FWPCA §505(a)(2); CAA §304(a)(2), 42 U.S.C. §7604(a)(2), ELR STAT. CAA §304(a)(2); ESA §11(g)(1)(C), 16 U.S.C. §1540(g)(1)(C), ELR STAT. ESA §11(g)(1)(C); RCRA §7002(a)(2), 42 U.S.C. §6972, ELR STAT. RCRA §7002(a)(2).

92. Sierra Club v. EPA, 162 F. Supp. 2d 406, 421 (D. Md. 2001) (holding EPA had never approved or disapproved a conservation plan for Maryland as required by the CWA, and ordering it to do so within 90 days); Northwest Envtl. Advocates v. EPA, No. CV-01-510-HA, 2003 U.S. Dist. LEXIS 6482 (D. Or. Mar. 31, 2003) (finding EPA failed to perform a mandatory duty to promulgate water temperature criteria for the Williamette River "promptly"). *Cf.* Center for Biological Diversity v. Norton, 208 F. Supp. 2d 1044, 1050 (N.D. Cal. 2002) (finding that the ESA does not give courts the authority to compel agencies to perform mandatory duties).

93. *See* Robert L. Glicksman, *The Value of Agency-Forcing Citizen Suits to Enforce Nondiscretionary Duties*, *in* Widener CLE, *supra* note 21, at 492.

94. *See* James R. May, *Recent Developments in TMDL Litigation*, *in* Widener CLE, *supra* note 21, at 530.

95. *See* San Francisco Baykeeper v. Whitman, 297 F.3d 877, 32 ELR 20772 (9th Cir. 2002); American Littoral Soc'y v. EPA, 199 F. Supp. 2d 217, 238-42 (D.N.J. 2002); Sierra Club v. Browner, 257 F.3d 444, 31 ELR 20817 (5th Cir. 2001) (rejecting use of special master).

96. 268 F.3d 898, 32 ELR 20214 (9th Cir. 2001).

97. 223 F. Supp. 2d 997 (S.D. Ind. 2002).

98. *See, e.g.*, New York Pub. Interest Research Group v. Whitman, 214 F. Supp. 2d 1 (D.D.C. 2002) (rejecting CAA citizen suit to enjoin EPA in advance to review Title V permits within 60 days, as required by the Act).

99. For instance, in Kansas Natural Resources Council v. EPA, No. 00-2555-GTV, 2003 U.S. Dist. LEXIS 5387 (D. Kan. Mar. 31, 2003), the court ordered EPA to take final action in 90 days in accordance with the CWA, notwithstanding equities. *See also* Northwest Envtl. Advocates v. EPA, No. CV-01-510-HA, 2003 U.S. Dist. LEXIS 6482 (D. Or. Mar. 31, 2003) (ordering EPA action after finding it had not acted "promptly" to promulgate water temperature criteria for the Williamette River).

The plummet in agency-forcing notices against federal agencies portends a curious period of quietude between them and citizens. Though it is too early to tell, the decline in activity in agency-forcing matters is likely attributable to four factors. First, citizens have all but exhausted nondiscretionary duty citizen suits to enforce water quality requirements, including those to have EPA set TMDLs and curative water quality standards under CWA §303(d) and corresponding actions under §7 of the ESA.[100] EPA was inundated with such notices from the mid-1990s through the first half of 2001. Second, the Bush Administration is more prone both to defend itself vigorously against citizen suits and to contest attorneys fees in light of *Buckhannon*, making action-forcing litigation less attractive. Third, it is more challenging to find courts sympathetic to environmental issues, particularly as President George W. Bush's judicial appointments grow more numerous. Last, patriotism and fairness play in. There is a palpable sense among environmental organizations to give federal agencies more leeway to divert resources and attend to new priorities after September 11, 2001.

Table 9

Notices of Intent to Sue EPA (1995-2003)							
	CWA	ESA	SDWA	MPRSA	RCRA	CAA	Totals
1995	36	5	0	0	8	4	53
1996	26	3	1	0	0	5	35
1997	23	4	1	0	1	2	31
1998	47	3	0	1	12	1	64
1999	52	8	0	4	6	2	72
2000	40	9	4	0	12	1	66
2001	25	15	2	0	14	2	58
2002	13	3	2	1	15	0	34
2003*	12	2	0	0	3	0	17
Total	274	52	10	6	71	17	430

* As of May 2003.

Table 10

Notices of Intent to Sue Corps (1995-2003)				
	CWA	ESA	RCRA	Totals
1995	12	5	0	17
1996	11	2	0	13
1997	9	5	0	14
1998	8	2	1	11
1999	8	2	1	11
2000	6	0	0	6
2001	12	7	0	19
2002	1	3	2	6
2003	0	0	1	1
Total	67	26	5	98

Table 11

Notices of Intent to Sue Other Agencies[101] (1995-2003)				
	CWA	ESA	RCRA	Totals
1995	8	1	7	16
1996	8	2	4	14
1997	17	1	5	23
1998	12	5	8	25
1999	7	2	15	24
2000	11	4	3	18
2001	4	4	5	13
2002	2	1	10	13
2003	3	0	N/A	3
Total	72	20	57	149

Table 12 reports actual action-forcing cases filed against EPA from 1983 through 1998 (only figures available). Table 12 shows action-forcing cases also in decline, attributable to the legal challenges action-forcing cases present, coupled with the reasons cited earlier for the decline in corresponding notices of intent to sue. Unlike actions against regulated parties, however, there is no evidence of rebound for the number of action-forcing cases.

100. *See generally* May, *supra* note 94, at 530–55; Glicksman, *supra* note 93, at 515 ("Even if the narrowing of the constructive submission theory severely undercuts the utility of future agency forcing citizen suits to require EPA to establish TMDLs, the TMDL citizen suits have already served as an important break on agency footdragging.").

101. Includes the U.S. Forest Service, the U.S. Department of Defense and its component branches (Army, Navy), the U.S. Department of Agriculture (U.S. Park Service), U.S. Department of Commerce (National Marine Fisheries Service), and the U.S. Department of Transportation.

Table 12

	Number of Citizen Suits Against EPA
1983	0
1984	3
1985	9
1986	2
1987	2
1988	12
1989	14
1990	28
1991	32
1992	33
1993	17
1994	11
1995	40
1996	41
1997	40
1998	20

D. Constitutional Challenges Still Tough

Citizen suits are subject to a variety of difficult constitutional defenses, including standing, mootness, separation of powers, and sovereign immunity. Recent case law shows that of these three, standing and mootness are still the most challenging to citizen suitors. Even post-*Laidlaw*, standing is a rigorous, if somewhat academic,[102] exercise: it is injury to the person, not the environment, that conveys standing, though proof may require trial. A defendant can, however, still make injunctive relief, if not civil penalties, moot by complying at any time before the issuance of a judicial order. Other constitutional doctrines, including sovereign immunity and separation of powers, further limit the reach of citizen suits.

1. Article III (Standing and Mootness)

Though there is questionable textual basis in Article III for the standing doctrine,[103] it is well settled that a citizen association has standing to assert its members' claims when: (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.[104]

Standing issues usually query into whether individual members of an association have standing. To have individual standing, citizens must show: (1) they have suffered an injury-in-fact that is concrete and particularized, actual and imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the defendant's challenged action; and (3) it is likely, as opposed to speculative, that the injury will be redressed by a favorable court decision.[105] Plaintiffs need not establish the causal connection with absolute scientific rigor.[106]

Citizen suitors need not show prudential standing. As a general matter, plaintiffs invoking federal laws should show their claim falls "within the zone of interests" meant to be protected by the statute.[107] Yet this does not apply when Congress grants citizen suit authority.[108]

Standing challenges lost some steam in the aftermath of *Laidlaw*.[109] In *Altamaha Riverkeeper*,[110] the court found that plaintiffs had standing by demonstrating lessening of members' use and enjoyment of rivers due to a decrease in fish populations attributed to discharge violations from a sewage treatment plant. Similarly, in *Puerto Rico Campers' Ass'n v. Puerto Rico Aqueduct & Sewer Authority*,[111] and in *Diablo Grande, Inc.*,[112] the courts found that the plaintiffs had standing to bring their citizen suits. The court in a New Jersey TMDL case rejected EPA's challenge to plaintiffs' injuries concerning the failure to list impaired waters, finding that demonstration of the use of some impaired waters was sufficient to show injury for the failure to list others.[113] Standing was even upheld in an action brought under the moribund citizen suit provision of the Emergency Planning and Community Right-To-Know Act.[114]

Some challenges to citizen suit plaintiffs' standing were successful. In *Mississippi River Revival, Inc. v. City of St. Paul*,[115] the plaintiff alleged that the city's NPDES permit-

102. *See* John D. Echeverria, *Standing and Mootness Decisions in the Wake of* Laidlaw, *in* Widener CLE, *supra* note 21, at 305 (showing challenges to standing less successful since *Laidlaw*).

103. *See* Bruce J. Terris, *Standing on Weak Ground*, *in* Widener CLE, *supra* note 21, at 294.

104. California Sportfishing Protection Alliance v. Diablo Grande, Inc., 209 F. Supp. 2d 1059 (E.D. Cal. 2002) (holding that the sport fishing association had standing to bring action under the CWA where the purpose of the association was germane to the matter at issue in the case) (citing Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977)). *See also* Puerto Rico Campers' Ass'n v. Puerto Rico Aqueduct & Sewer Auth., 219 F. Supp. 2d 201, 209, 33 ELR 20033 (D.P.R. 2002) (quoting Dubois v. Department of Agric., 102 F.3d 1273, 1280-81 (1st Cir. 1996) (holding the constitutional dimension of standing derives from the requirement that federal courts can act only upon a justifiable case or controversy).

105. *See, e.g.*, Interfaith Community Org. v. Honeywell Int'l, Inc., 188 F. Supp. 2d 486, 496 (D.N.J. 2002) (RCRA case).

106. *Id. See also* Maine People's Alliance v. Holtrachem Mfg. Co., 211 F. Supp. 2d 237, 32 ELR 20826 (D. Me. 2002) (holding, inter alia, that plaintiffs only had to establish that defendant released waste of a type that could contribute to endangerment).

107. *Puerto Rico Campers'*, 219 F. Supp. at 213, 33 ELR at 20033 (quoting Devlin v. Scardelletti, 536 U.S. 1, 11 (2002) (observing the "[r]ule bar[s] the adjudication of generalized grievances more appropriately addressed in [the legislature], and [ ] require[s] that a plaintiff's complaint fall within the zone of interest protected by the law").

108. *See Puerto Rico Campers'*, 219 F. Supp. at 213-14, 33 ELR at 20033 (holding prudential standing requirements need not be considered in cases brought under the CWA because the Act explicitly confers standing to citizen groups).

109. 528 U.S. at 167, 30 ELR at 20246.

110. 162 F. Supp. 2d at 1368.

111. 219 F. Supp. 2d 201, 33 ELR 20033 (D.P.R. 2002).

112. 209 F. Supp. 2d at 1059.

113. *See* American Littoral Soc'y v. EPA, 199 F. Supp. 2d 217 (D.N.J. Mar. 28, 2002).

114. Trepanier v. Ryan, No. 00 C 2393, 2003 U.S. Dist. LEXIS 8640 (N.D. Ill. May 21, 2003).

115. 33 ELR 20131 (D. Minn. Dec. 2, 2002).

required annual reports concerning storm sewer discharges were inadequate. The court held that plaintiffs did not allege any concrete and particularized injury stemming from the inadequate reports, and, thus, dismissed the claim for lack of standing.

In *American Canoe Ass'n v. Carrollton Utilities*,[116] in a split ruling the court held that one environmental plaintiff had standing, but another did not. The Sierra Club had standing because a member had standing, its interests were germane to the group's purpose, and neither the claim asserted nor the relief requested required participation by an individual member. On the other hand, another plaintiff in the suit lacked standing because it did not show how alleged violations injured members' interests in reviewing monitoring and discharge reports.

In *Fisher v. Chestnut Mountain Resort, Inc.*,[117] the court held that individuals did not have standing to bring a citizen suit against a ski resort for discharging pollutants without a permit. The resort operated a snow-making machine that withdrew polluted water from the Mississippi River. When the artificial snow melted, it flowed into Watercress Circle, which in turn flows adjacent to both the resort and the plaintiff's property. The court held that the plaintiff failed to show how the operation injured his aesthetic and property values, or how such injuries might be "fairly traceable" to the operation.[118]

An open question remains as to where and how citizens *prove* standing. Harkening back to *Lujan*, the U.S. Court of Appeals for the Fourth Circuit recently ruled district courts must base standing determinations on a *trial*, suggesting that the common practice of demonstrating standing by affidavit does not suffice.[119]

Jurisdictional and standing issues aside, mootness lurks. Generally, a case might become moot if subsequent events make it absolutely clear that the alleged wrongful behavior could not reasonably be expected to recur.[120] The defendant, of course, carries the burden of demonstrating mootness.[121] Courts have reaffirmed that mootness is assessed at the point at which citizens file the lawsuit, and that a defendant's subsequent voluntary cessation of the challenged activity does not moot the case, particularly as to civil penalties.[122]

Mootness still looms large in cases brought for unpermitted discharges under CWA §301(a), which are mooted by either voluntary revocation or permit procurement. In *Ozark Society v. Melcher*,[123] a district court held the defendant's voluntary revocation of an NPDES permit mooted an action against an unpermitted discharge. In *Mississippi River Revival, Inc. v. City of Minneapolis, Minnesota*,[124] the U.S. Court of Appeals for the Eighth Circuit upheld the lower court's dismissal as moot of a citizen suit for discharge without a permit, including claims for civil penalties, after the defendant procured a permit.

2. Article II (Separation of Powers)

Defendants have increasingly raised separation-of-powers defenses to citizen enforcement suits brought under CWA §505(a)(1). Article II of the Constitution vests all executive power in the president (the Vesting Clause), requires that the president take care that laws are faithfully executed (the Take Care Clause), and allows the president to nominate and, with the advice and consent of the U.S. Senate, appoint officers of the United States (the Appointments Clause). No Article II defense has been successful. In *North Carolina Shellfish Growers Ass'n v. Holly Ridge Associates*,[125] the court held that §505(a)(1)'s citizen enforcement authority does not offend notions of separation of powers. To the contrary, the provision amply respects separation of powers. It gives the executive branch 60 days to pursue an enforcement action of its own; if it does not pursue an enforcement action it has the authority to intervene as of right, and it has the authority to comment on any consent decree prior to its lodging. Thus, citizen suits do not encroach on the Vesting, Take Care, or the Appointments clauses of Article II.

The U.S. District Court for the Eastern District of North Carolina found §505(a)(1) does not violate the Appointments Clause. In the consolidated opinions in *Holly Ridge* and *Water Keeper Alliance v. Smithfield Foods, Inc.*,[126] the court ruled that because enforcement is not limited to the president, Congress could give enforcement authority to whomever it wanted, including those not appointed by the president. Thus, the Act's citizen suit provision does not offend separation of powers.

3. Attorneys Fees More Challenging Than Ever

Generally, successful citizens are eligible to recover attorneys fees.[127] For example, the CWA and its analogues allow reasonable attorneys fees for the "prevailing or substantially prevailing party."[128] In contrast, the ESA, the CAA, and their analogues allow for recovery "as appropriate."[129]

Recent lower court decisions construing *Buckhannon* show that the catalyst theory is likely no longer available for claims based on the CWA model.[130] This development will

116. No. 3:01-CV-35, 2002 WL 1291820 (E.D. Ky. Mar. 1, 2002).

117. 32 ELR 20559 (N.D. Ill. 2002).

118. *See also* Crutchfield v. Corps of Eng'rs, 230 F. Supp. 2d 687 (E.D. Va. 2002) (holding landowners lack standing to challenge Corps permit for construction of sewer line).

119. American Canoe Ass'n v. Murphy Farms, Inc., 326 F.3d 505, 33 ELR 20175 (4th Cir. 2003) (granting hog farm company's appeal and ordering remand to adjudicate CWA standing at trial).

120. *Puerto Rico Campers'*, 219 F. Supp. 2d at 220, 33 ELR at 20033.

121. *Id.* (citing *Laidlaw*). *See also* Tamaska v. City of Bluff City, Tenn., 26 Fed. Appx. 482, 32 ELR 20404 (6th Cir. 2002); *American Canoe*, 326 F.3d at 505, 33 ELR at 20175.

122. *Tamaska*, 26 Fed. Appx. at 486, 32 ELR at 20405 (citing *Laidlaw*). *See also American Canoe Ass'n*, WL 12191820, at *4 (citing *Tamaska*).

123. 248 F. Supp. 2d 810 (E.D. Ark. 2003).

124. 319 F.3d 1013, 33 ELR 20143 (8th Cir. 2003).

125. 200 F. Supp. 2d 551, 32 ELR 20320 (E.D.N.C. 2001).

126. 32 ELR 20320 (E.D.N.C. 2001).

127. CWA §505(d), 33 U.S.C. §1365(d), ELR STAT. FWPCA §505(d); CAA §304(d), 42 U.S.C. §7604(d), ELR STAT. CAA §304(d); RCRA §7002(e), 42 U.S.C. §6972(e), ELR STAT. RCRA §7002(e).

128. Tamaska v. City of Bluff City, Tenn., 26 Fed. Appx. 482, 32 ELR 20404 (6th Cir. 2002). *See also* ONRC Action v. Columbia Plywood, Inc., 286 F.3d 1137, 32 ELR Digest 20404 (9th Cir. 2002); Community Ass'n for Restoration of the Env't v. Henry Bosma Dairy, 305 F.3d 943, 33 ELR 20048 (9th Cir. 2002).

129. CAA §304(d), 42 U.S.C. §7604(d), ELR STAT. CAA §304(d); ESA §11(g), 16 U.S.C. §1540(g), ELR STAT. ESA §11(g).

130. Amigos Bravos v. EPA, 324 F.3d 1166, 33 ELR 20166 (10th Cir. 2003) (action by citizens to compel EPA action made moot by EPA's issuance of NPDES permit. Catalyst theory rejected because court found EPA action not mandatory.).

encourage defendants to stave off compliance in favor of exhausting every conceivable defense, secure in the belief they can avoid paying citizen suit attorneys fees and costs merely by complying at any time before judicial compunction, and invites a more sensible "violator-pays" rule.[131] Regardless, defendants may not obtain attorneys fees for nonfrivolous complaints on unresolved legal issues.[132] Courts do not, however, have subject matter jurisdiction over citizen suit claims for money damages.[133]

Nevertheless, under the CAA and ESA model the catalyst theory survives. The linchpin remains whether the citizen action "catalyzed" compliance.[134] For example, the court in *Tamaska* awarded the citizen suit plaintiff reasonable attorneys fees because it prevailed by achieving some of the benefits sought by the suit.[135]

In any event, citizen attorneys must demonstrate to judiciaries with more important things to do than adjudicate fee petitions the reasonableness of both the rates charged and the amount of time spent prosecuting the action.

EPA and the DOJ do not keep statistical data on attorneys fees.

III. Enforcement Trends Suggest Citizen Suits Are Needed Now More Than Ever

Statistical trends showing declines in EPA enforcement referrals and DOJ filed actions, values for civil penalties, SEPs, injunctive relief, administrative penalties, and state environmental enforcement actions, support the thesis we need citizen suits now more than ever.

First, comparing the number of EPA referrals to the DOJ for enforcement to the number of notice letters of intent to bring an enforcement action citizens send shows citizens every bit as active, and often more so, as EPA on the enforcement front. EPA does not have authority to file an action to enforce the environmental laws it administers. It must instead "refer" a case to the DOJ to do so. Referral rates, therefore, serve as a fair measure of the vigor by which EPA is enforcing environmental laws. Citizen suit notices and EPA referrals are roughly twin documents used for similar purposes. They thus serve as a fair barometer of the supplemental role of environmental citizen suits.

Comparing raw numbers of citizen notices versus EPA referrals does not necessarily either evince a need for more citizen suits or predict government enforcement practices. It does, however, provide a fair measure of the extent by which citizens "supplement" government enforcement efforts. Table 13 compares EPA referrals to the DOJ for civil enforcement under the CWA and the CAA (the only figures available) against citizen suit enforcement notices for the years 1995-2002. It shows citizen notices of intent to sue for enforcement more often than not outpace EPA referrals. Indeed under the CWA and RCRA citizens consistently provide notice of intent to sue more frequently than EPA refers cases to the DOJ, often at a two or three—and last year at four—times the pace. EPA still consistently refers more cases for enforcement than citizens send notices under the CAA.

The widening gap between notices and referrals suggests a waning of agency enforcement. In 2001, EPA made 28 fewer referrals than citizens sent notices. Last year, the gap increased sixfold, to 179. Over two years, therefore, the gap increased by 151, more than in any consecutive years on record, suggesting a severe overall drop in government, as compared to citizen, enforcement.

Contrasting absolute increases or decreases in CWA and CAA referrals is perhaps an even more reliable metric for evaluating the need for citizen suits. EPA is making far fewer referrals to the DOJ to enforce the civil provisions of the nation's foremost environmental laws, the CWA and the CAA. Overall referrals under the CWA and the CAA in 2002 fell by 25% from recent highs, i.e., from 209 to 168. During the same time frame, the overall number of citizen notices of intent to sue remained about even, at an annual average of almost 200 per year. This is about 10% more than EPA's annual referral average.

The decline in referrals for civil enforcement of the CWA is notable. CWA referrals over the last five years fell by a whopping 55%, from 111 to 50. Suggestive of a harbinger of things to come, CWA referrals in 2002 were 38% less than EPA's annual average of 80. In contrast, during the same time frame, citizen notices of intent to sue rose about 6%, from 187 to 197, or about 15% more than citizens annual average of 171.

Table 13[136]

Number of EPA Referrals to DOJ for Civil Environmental Enforcement Compared to Citizen Suit Enforcement Notices: CWA, CAA, and RCRA (1995-2002)				
	CWA (EPA v. Citizens)	CAA (EPA v. Citizens)	RCRA (EPA v. Citizens)	Totals
1995	54 v. 128	37 v. 27	14 v. 327	105 v. 482
1996	65 v. 179	70 v. 20	19 v. 208	154 v. 407
1997	111 v. 187	89 v. 23	49 v. 131	249 v. 341
1998	96 v. 237	113 v. 29	49 v. 136	258 v. 402
1999	91 v. 151	110 v. 8	39 v. 151	249 v. 310
2000	80 v. 173	125 v. 9	28 v. 198	233 v. 380
2001	84 v. 119	113 v. 9	16 v. 113	213 v. 241
2002	50 v. 197	108 v. 18	? v. 152	158 v. 367

131. *See* Adam Babich, *The Wages of Sin: The Violator Pays Rule for Environmental Citizen Suits*, *in* Widener CLE, *supra* note 21, at 407.

132. *See, e.g.*, ONRC Action v. Columbia Plywood, Inc., 286 F.3d 1137, 1144, 32 ELR Digest 20638 (9th Cir. 2002).

133. Adelina Torres Maysonet v. Drillex, S.E., 229 F. Supp. 2d 105, 109 (D.P.R. 2002) (CAA).

134. Loggerhead Turtle v. County Council of Volusia County, Fla., 307 F.3d 1318, 33 ELR 20057 (11th Cir. 2002). *See also* Environmental Protection Info. Ctr. v. Pacific Lumber Co., 229 F. Supp. 2d 993, 999 (N.D. Cal. 2002) (holding that issuance of plaintiff's injunction substantially contributed to the goals of the ESA, thereby justifying award of attorney fees to plaintiff); Southwest Ctr. for Biological Diversity v. U.S. Forest Serv., 307 F.3d 964, 33 ELR 20061 (9th Cir. 2002); Federation of Fly Fishers v. Daley, 200 F. Supp. 2d 1181 (N.D. Cal. 2002) (holding plaintiff's successful motion for summary judgment against defendant's failure to list evolutionary significant units qualified plaintiff as prevailing party, thereby making award of reasonable attorney fees to plaintiff proper).

135. Tamaska v. City of Bluff City, Tenn., 26 Fed. Appx. 482, 486-87, 32 ELR 20404, 20405 (6th Cir. 2002) (holding fees proper where citizens forced defendant into compliance and to pay penalty).

136. Except as otherwise noted, the data compiled for Tables 13-18 were obtained from Office of Enforcement & Compliance Assurance, U.S. EPA, Annual Report on Enforcement and Compliance Assurances (1999-2000), the Agency's *Measures of Success* reports for the years 2000-2001, and U.S. EPA, Protecting the Public and the Environment Through Innovative Approaches (2001).

Second, if it is not the number of *referrals* that matters, but instead the number of cases the DOJ *commences* that suggests enforcement predisposition, the outcome remains. As with most notice letters, many referrals do not mature into citizen suits. Pre-filing settlement, compliance, reconsideration, or other priorities can make pursuing the noticed action unnecessary. Yet the total number (not just CWA and CAA) of environmental civil actions filed by the DOJ is down by 20%, from 253 in 1998, to 216 in 2002.[137] As shown earlier in Table 5, the number of citizen suits commenced during this time frame also declined until 2001, where they displayed rebound.

Third, the trend is the same if one considers judicially enforceable settlements in enforcement cases, that is, *consent decrees*. Table 14 thus compares DOJ consent decrees under the CWA and the CAA (only figures available) to citizen suit enforcement consent decrees. It shows once again a stark decline under the CWA and the CAA, from a high of 122 to 70, a 40% decrease. Moreover, citizens often lodge more CWA consent decrees than does EPA, though the reverse is true under the CAA.

Table 14[138]

Number of DOJ Consent Decrees Compared to Those Pursuant to Citizen Suits, Enforcement Cases: CWA and CAA (1995-2001)			
	CWA (DOJ v. Citizens)	CAA (DOJ v. Citizens)	Totals
1995	24 v. 30	43 v. 2	67 v. 32
1996	60 v. 49	62 v. 3	122 v. 52
1997	35 v. 54	45 v. 1	80 v. 55
1998	33 v. 37	46 v. 6	79 v. 43
1999	24 v. 41	48 v. 3	72 v. 44
2000	22 v. 26	48 v. 1	70 v. 27
2001	27 v. 20	43 v. 6	70 v. 26

Fourth, EPA's civil penalty, SEP, injunctive relief, and administrative penalty values again suggest a decline in agency enforcement. Tables 15, 16, 17, and 18, respectively, report EPA civil judicial penalties, and SEP, civil injunctive relief, and administrative penalty values from 1995 through 2002. Tables 15 and 16 show the civil penalties and SEP values EPA has recouped in the last five years are down by an eye-opening 62 and 70%, respectively. Tables 17 and 18 show the value of the civil injunctive relief and administrative penalties also fell, though modestly.

Table 15

EPA Civil Judicial Penalties in Enforcement Cases 1995-Present (Approx. in Millions)			
	CWA	CAA	RCRA
1995	8.9	10.4	.94
1996	19.8	30.9	9.1
1997	22.1	13.8	9.7
1998	18.6	27.8	15.5
1999	7.4	104.6	24.5
2000	21.6	21.8	10.9
2001	18.0	55.0	26.0
2002	8.7	33.9	11.1

Table 16

EPA SEP Values in Enforcement Cases 1995-Present (Approx. in Millions)			
	CWA	CAA	RCRA
1995	50.1	4.3	5.5
1996	5.2	17.0	14.2
1997	38.8	22.0	13.0
1998	42.0	26.2	8.7
1999	8.6	142.0	74.8
2000	10.8	29.2	8.8
2001	3.4	33.8	44.4
2002	13.1	31.7	6.3

Table 17

EPA Civil Injunctive Relief Value 1995-Present (Approx. in Millions)			
	CWA	CAA	RCRA
1995	302.9	114.8	2.2
1996	577.0	205.6	61.0
1997	949.0	38.2	50.6
1998	859.6	305.7	33.5
1999	577.5	1,110.8	200.5
2000	156.8	N/A	285.7
2001	208.6	2,706.8	300.4
2002	2,305.6	479.1	60.3

137. Summary of EPA Enforcement Statistics for 2002, 34 Env't Rep. (BNA) 334 (2003) ("Numbers at a Glance").

138. *Id.*

Table 18

EPA Administrative Penalties Value 1995-Present (Approx. in Millions)			
	CWA	CAA	RCRA
1995	5.5	2.4	13.1
1996	3.4	2.4	7.8
1997	4.3	3.1	8.2
1998	4.8	3.4	5.5
1999	5.2	5.1	7.4
2000	5.4	3.1	9.3
2001	5.4	4.0	5.6
2002	4.9	5.9	5.5

Fifth, other signs point to decline in enforcement vigilance by EPA. EPA inspections have decreased by 15% during the past two years.[139] Referrals for criminal prosecutions are down 40%.[140] The annual amount of pollution eliminated by EPA enforcement activity plummeted an alarming 88%, from 7.50 billion to 0.92 million pounds.[141]

Last, the news is worse about environmental enforcement by the states. State agency referrals for environmental enforcement decreased every year save one (1999) from 1993 to 2001, with total numbers ebbing 55%, from 690 to 320.[142] State environmental administrative actions from 1998 to 2001 fell 40%, from 11,260 to 6,895.[143] EPA's most recent data thus shows states are prosecuting fewer civil and administrative environmental enforcement actions than at any time since EPA began keeping statistical compilations about state environmental enforcement in the early 1990s. Given the lessening of federal oversight, devolution, changing priorities, and budget shortfalls, the figures for 2002 and 2003 are likely to be lower still.

None of this bodes well for environmental protection enthusiasts. For example, EPA's own analysis shows the relationship between the decline in enforcement and the increase in the extent of recurrent, and sometimes unfettered, noncompliance. In "the broadest effort to date to document the failure of EPA and the states to fully enforce the CWA,"[144] EPA's Office of Enforcement and Compliance concluded earlier this year that 25% of the nation's largest industrial plants and water treatment facilities are in serious violation of the Act any one time.[145] Among the serious offenders, one-half exceeded pollution limits for toxic substances by more than 100%, and 13% were at least 1,000% over allowable limits. Yet EPA did not initiate enforcement actions against 85% of significant violators,[146] tacitly inviting citizens to fill the void.

Conclusion

As gravity is to earth, environmental citizen suits are to environmental law, easily overlooked, but always there, tugging toward a hard surface. As private attorneys general, citizens are duly authorized to enforce the nation's environmental laws. And enforce them they do. Despite ever more cascading burdens respecting notice, jurisdiction, preclusion, actions against EPA and third parties, remedies, SEPs, and attorneys fees, there are more reported environmental citizen suits than ever. On average, citizens send more than one notice of intent to sue a day, and file more than one lawsuit a week. These efforts help advance the rule of law and keep agencies honest. But there are signs citizen suits are needed now more than ever. EPA is referring fewer cases to the DOJ. Trend data show EPA civil judicial settlement, the value of injunctive relief, judicial and administrative penalties, and SEP values are in overall decline.

Current national security prerogatives do not make it easy for agencies to perform duties Congress has declared mandatory. The Bush Administration has not made environmental protection a priority. Its judicial appointees are likely to follow this lead. Even without these considerations, environmental enforcement is losing ground. These trends are unlikely to change course any time soon. The bugle for citizen suits has sounded. Citizen suits matter now more than ever.

139. Chris Bowman, *EPA Softer on Polluters Under Bush, Report Says*, Marin Ind. J., *at* http://www.marinij.com/Stores/0,1413,234%257E24410%257E1428956,00.html.

140. *Id.*

141. *Id.*

142. Office of Enforcement & Compliance Assurance, U.S. EPA, EPA 300-R-00-005, Annual Report on Enforcement & Compliance Assurance Accomplishments in 1999 (2000); U.S. EPA, *FY 2001 State Enforcement Activity (by Region)*, Measure of Success FY 2001, *at* http://www.epa.gov/compliance/resources/reports/mos/fy2001/mosfy2001eacfy2001stateenfactbyregion.pdf; U.S. EPA, *FY 2001 State Enforcement Activity (by Region)*, Measure of Success FY 2000, *at* http://www.epa.gov/compliance/resources/reports/mos/fy2000/mosfy2000eacfy2000statenforactregion.pdf.

143. *Id.*

144. U.S. EPA, A Pilot for Performance Analysis of Selected Components of the National Enforcement and Compliance Program (2003); Guy Gugliotta & Eric Pianin, *EPA: A Few Fined for Polluting Water*, Wash. Post, June 6, 2003, at A1.

145. *Id.*

146. *Id.*