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Feature

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THE AVAILABILITY OF STATE ENVIRONMENTAL CITIZEN SUITS

Citizens play an important role in ensuring compliance with the nation's environmental laws. Sixteen of the nation's principal federal environmental laws invite citizens to sue as "private attorneys general" to force compliance, or to force agencies to perform mandatory duties. The archetypal federal citizen suit provision allows "any person" to "commence a civil action on his own behalf" against either "any person" who violates a legal prohibition or requirement or the U.S. Environmental Protection Agency (EPA) for failure "to perform any act or duty ... which is not discretionary." Clean Air Act, 42 U.S.C. § 7604(a) (2000), Clean Water Act, 33 U.S.C. § 1365(a). Citizen suit authority reflects "a deliberate choice by Congress to widen citizen access to the courts, as a supplemental and effective assurance that [environmental laws] would be implemented and enforced." *Natural Resources Defense Council v. Train*, 510 F.2d 692, 700 (D.C. Cir. 1974).

Citizen suits are not an exclusively federal phenomenon. Every state in the Union has enacted environmental laws. As a 1997 survey found, twenty-six states allow citizens to enforce state environmental laws ("state environmental citizen suits") in one way or another. *See* George, Snape, and Rodriguez, *The Public in Action: Using State Citizen Suit Statutes to Protect Biodiversity*, 6 U. BALT. J. ENVTL. L. 1 (1997). Some of these statutes allow citizens generally to sue to enforce state environmental laws. Others allow citizens to enforce specific attributes of environmental media-specific statutes.

This article examines the prevalence and limitations of state environmental citizen enforcement provisions in the context of compliance with environmental requirements. It observes that of the four legs of environmental enforcement-- federal, state, federal citizen suits, and state citizen suits--the latter are the most underutilized. Nonetheless, owing to declines in federal and state governmental enforcement efforts, coupled with increasing statutory, constitutional, and practical challenges facing federal citizen suit litigation, the time may be ripe for the ascendancy of state environmental citizen suits.

Citizen suits to enforce state laws are part of a four-legged table designed to ensure compliance with federal and state environmental laws. The first leg is federal enforcement by EPA. To compel compliance with federal environmental laws, EPA has three choices to address noncompliance. First, it can bring administrative actions--that is, seek compliance short of filing a federal lawsuit. This usually means sending a notice of violation, and that failing, issuing an administrative order seeking compliance and/or the payment of an administrative penalty. EPA can prosecute administrative actions relatively easily. They can be pursued quickly, cheaply, and decisively. EPA does not have to refer administrative enforcement to the U.S. Department of Justice (DOJ). There is no need to file a lawsuit, conduct discovery, or try a case. Other than defending the action in the event of appeal, the time and expense of litigation can be avoided. Owing to these advantages, more than 95 percent of EPA's enforcement efforts are administrative.

Administrative actions, however, have shortcomings. They cannot be enforced in court. Some statutes impose restrictions, limits, or procedures. The Clean Water Act, for example, limits "Class 1" administrative penalty amounts to $25,000. "Class 2" penalties are limited to $125,000, and must be preceded by an opportunity for a hearing. When

administrative action alone cannot recover the economic benefit of noncompliance or secure compliance, EPA has the option of bringing a civil or criminal action.

Second, EPA can refer an action to DOJ for civil prosecution seeking compliance and/or civil penalties. Unlike administrative actions, successful civil actions result in enforceable court orders to comply or pay a penalty. Although Congress often limits penalty amounts per violation, penalty amounts theoretically are unlimited. For instance, the Clean Water Act imposes a penalty of $27,500 per day, per violation, makes penalty amounts a function of factors such as extent and severity of violations and ability to pay, but does not cap total potential penalty amounts. On the other hand, civil actions take far more resources than administrative actions and divert far more of the agency's resources toward litigating and away from implementing federal environmental legislation. Thus, less than 5 percent of EPA's overall enforcement efforts are civil actions.

Third, in the instance of intentional, reckless, or extremely dangerous violations, DOJ can institute a criminal action for criminal penalties and/or incarceration. Criminal actions, of course, take more resources than do either administrative or civil actions. Accordingly, criminal actions make up less than 3 percent of EPA's overall enforcement efforts.

EPA's annual *Enforcement and Compliance Assurance Accomplishments Report*, 1995-2002, shows fewer federal enforcement efforts. EPA is referring fewer cases to DOJ for enforcement. DOJ is bringing comparably fewer civil environmental cases. The cases DOJ brings tend to be for lower civil penalty amounts and supplemental environmental project (SEP), administrative penalty, and injunctive relief values. In the last few years, the number of CWA and CAA cases EPA referred to DOJ fell 25 percent overall, with a 55 percent decline for the CWA alone. ***54** DOJ civil enforcement actions are down 20 percent. Judicial orders DOJ has earned are down 40 percent. Civil penalties have declined 62 percent. SEP values have decreased by 70 percent. Injunctive relief and administrative penalties values have fallen about 15 percent. EPA itself has expressed concerns about diminishing inspections and criminal referrals, down 15 percent and 40 percent, respectively. The diminution of pollution burden resulting from EPA enforcement has decelerated at 90 percent. *See generally Environmental Results Through Smart Enforcement*, 2002 EPA ANN. REP. 59.

The second table leg is state enforcement of state environmental laws. States usually have at their disposal the same tools as EPA to seek compliance. Most states have enabling legislation that allows state environmental agencies to pursue administrative actions much like EPA and refer civil and criminal actions for prosecution to state attorneys general. The distribution of state administrative, civil, and criminal environmental actions is about the same as at the federal level.

EPA data show a steep lessening in state environmental enforcement. From 1993 to 2001, state referrals for civil or criminal enforcement of state environmental laws fell 55 percent. From 1998 to 2001, state environmental administrative actions fell 40 percent. Overall, state prosecutions for environmental noncompliance are at the lowest levels on record. *See generally* U.S. EPA, *FY2001 State Enforcement Activity (by Region)*, Measures of Success Report FY2001, *available at* www.epa.gov/compliance/resources/reports.

The third leg is citizen enforcement of federal environmental laws. Federal environmental citizen suits have dominated the citizen suit landscape. Since 1993, citizens averaged annually about 550 notices of intent to sue, 350 lawsuits, and fifty federal court orders to comply with the nation's environmental laws. Since the first federal environmental citizen suit in 1970, citizens of all walks and pursuits, some with environmental interests, others with commercial ones, have filed more than two thousand citizen suits. There are at least 850 citizen suit legal actions--judicial opinions, notices of intent to sue, complaints, and consent orders--a year. Since 1995, citizens have filed 426 lawsuits (about one a week), and have earned 315 compliance-forcing judicial consent orders under the CWA and CAA alone. During the same period, under all environmental statutes, citizens have submitted more than four thousand five hundred notices of intent to sue, including more than five hundred against agencies and four thousand against members of the regulated community. This is an astonishing pace over eight years of about two notices of intent to sue every business day, which easily outpaces

EPA referrals to DOJ. *See generally* May, *Now More Than Ever, Environmental Citizen Suits at 30*, 10 WIDENER L. REV. 1 (2003).

The majority of the legal opinions issued under the nation's principal environmental statutes that allow citizen suits derive from citizen litigation. In the thirty years from 1973 to 2002, citizens accounted for more than 1,500 reported federal decisions in civil environmental cases. In the ten years from 1993 to 2002, federal courts issued opinions in an average of 110 civil environmental cases a year. Of these, eighty-three a year, roughly three in four or 75 percent, are citizen suits. *See generally* May, 10 WIDENER L. REV. 1 (2003). What this means is the majority of the growing jurisprudence interpreting the nation's environmental laws is attributable to federal citizen suits.

Given the fact that 75 percent of reported civil environmental cases are citizen suits merely hints at their heft. Since 1995, there is an annual average of nearly 770 citizen "actions" a year--aggregating notices (about 650), complaints (at least seventy), and judicial consent orders (at least fifty). Coupled with an average of eighty-three reported decisions annually, there are about 850 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 precision, the number of federal citizen legal events is likely much greater.

Furthermore, federal citizen suits are powerful tools some states and municipalities use to ensure compliance with environmental laws. For example, New York and other states have filed federal citizen suits to seek compliance with the Clean Air Act by utility and industrial emitters in the Midwest. California and most northeastern states have challenged EPA's latest New Source Review rules and commenced another action to force EPA to regulate carbon dioxide as a criteria pollutant under the Clean Air Act. Local governments have turned to citizen suit provisions to enforce the Clean Water Act.

Despite the influence of federal environmental citizen suits, recent data show citizens are pursuing them less frequently. In 2002, citizens sent 25 percent fewer notices of intent to sue and filed one-third fewer lawsuits than they did in 1995. Accordingly, in 2002 they earned one-third fewer consent decrees to force compliance with the Clean Air Act and Clean Water Act than they did in 1995. *See* May, 10 WIDENER L. REV. at 21.Agency-forcing cases are also down one-third since 1995. *Id.* at 30.

There are myriad reasons for the decline in federal citizen suits. Federal citizen suits have various statutory, constitutional, and practical shortcomings. First, most federal environmental laws require advance notice of intent to sue. In *Hallstrom v. Tillamook County,* 493 U.S. 20 (1989), the Supreme Court held citizens must comply strictly with applicable notice requirements. This makes citizen notice far more demanding than "notice pleading" under Federal Rule of Civil Procedure 4.

Second, the jurisdictional reach of federal environmental citizen suits is much more limited than that of governmental counterparts. Most federal environmental laws merely allow citizens to sue those "alleged to be in violation." *See, e.g.*, 33 U.S.C. § 1365 (a)(1) (Clean Water Act). In *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987), the Supreme Court held this means citizens may not sue for wholly past violations, no matter how egregious, recurrent, or harmful.

Third, citizen suits may be precluded by state or federal enforcement efforts of virtually any stripe. Most federal environmental statutes preclude citizens from enforcing laws after a state or EPA commences and diligently prosecutes a civil action seeking compliance. *See, e.g.*, Clean Air Act, 42 U.S.C. § 7604(b)(1)(B). Some preclude citizen suits when a state or EPA takes administrative action, even if it does not seek compliance. *See, e.g.,* Clean Water Act, 33 U.S.C. § 1319(g)(6). Furthermore, when a state has settled an action--even if it does not seek or secure compliance--state common law principles of claim preclusion can preclude citizen enforcement.

***55** Fourth, standing is nearly always at issue in citizen suits. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000), makes clear it is injury to the person, not the environment, that is the basis for the "injury in fact" component of constitutional standing. While this is an easier lift than showing tort-type injury to the environment, citizens must still prove the alleged injury, and that it is caused by the defendant and redressable by a court.

Fifth, ongoing post-complaint compliance moots claims for injunctive relief, although under *Laidlaw* claims for civil penalties may survive. Moreover, in agency-forcing cases, citizens may only pursue ripe claims challenging a final agency action, and in some instances, only after exhausting available administrative remedies.

Sixth, states are all but immune from federal environmental citizen suits. *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), and its Eleventh Amendment progeny have severely limited the extent to which Congress may subject state polluters to federal laws, including federal environmental laws subject to citizen enforcement.

Finally, the difficulty of recovering fees provides a significant barrier to pursuit of a citizen suit. Some key federal environmental statutes, such as the Clean Water Act, allow fee recovery to "prevailing" or "substantially prevailing" parties. 33 U.S.C. § 1365(d). Applying this language, courts have allowed fee recovery whenever citizens either earned a court order that beneficially alters the legal relationship between the parties or in the absence of such court order, could prove their action resulted in (i.e., "catalyzed") compliance. *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 US. 598, 610 (2001), did away with the catalyst theory, however subsequent cases continue to recognize it when applied to statutes, such as the Clean Air Act and the Endangered Species Act, which allow courts to award fees as "appropriate." 42 U.S.C. § 7604(d); 16 U.S.C. § 1540(g)(4).

State Environmental Citizen Suits: The Fourth Leg of the Enforcement Table

The fourth leg is citizen enforcement of *state* environmental laws. Unfortunately, citizen suits under state environmental laws are not as easy to describe as under federal laws. States invite citizen suits in limited and wildly divergent ways. With the states serving as laboratories for experimentation of how to have citizens enforce environmental laws, the common denominator seems to be underutilization.

Sixteen states grant citizens the general authority to enforce state environmental laws. At least eight more allow citizens to sue to enforce media-specific state environmental statutes. Two more allow citizens to sue agencies to perform mandatory duties.

The most muscular state citizen suit provisions allow citizens to sue to enforce all state laws governing the environment. Seven states follow this approach. Michigan enacted the progenitor and high mark of state environmental citizen suit laws in 1969, the Michigan Environmental Protection Act (MEPA). MICH. COMP. LAWS § 324.1701-.1706 (2003). MEPA allows "any person" to maintain an action against "any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction." *Id.* §§ 324.1701. Michigan thus allows any citizen, including those who are not residents, to bring either compliance or agency-forcing suits respecting virtually any environmental issue. South Dakota has a nearly identical law. S.D. CODIFIED LAWS ANN. §§ 34A-10-1 (allowing "any person" to sue "for the protection of the air, water, and other natural resources and the public trust therein from pollution, impairment or destruction"). Other states have followed suit, though substituting "environment" for "public trust" and "natural resources." N.J. REV. STAT. §§ 2A:35A-1 to -14; N.D. CENT. CODE §§ 32-40-06 (allowing "any person" "to enforce [an environmental] statute, rule or regulation, or to recover any damages that have occurred."). Minnesota and Nevada have nearly identical entitlements, although limited to state residents. MINN. STAT. §§ 116B.01-.13 (2003); NEV. REV. STAT. §§ 41.540-.570. Massachusetts is the same, but requires at least ten state residents to join as plaintiffs. MASS. GEN. LAWS ANN. ch. 214, § 7A (2003). The Louisiana Environmental Quality Act also allows citizens to enforce nearly any aspect of state environmental law. LA. REV. STAT. ANN. §

30:2026 (allowing "any person having an interest, which is or may be adversely affected" to sue "any person" who violates state environmental law).

At least three states invite citizen enforcement under color of state constitutional law. The constitutions of Pennsylvania, Illinois, and Hawaii allow "any person" to enforce a "right to a clean and healthful environment" against "any party." HAW. CONST. art. XI, § 9.; ILL. CONST. art. 11, § 2.

Some states allow citizens to sue them or their agencies to protect against significant environmental impacts. Connecticut allows citizens to sue the state and its agencies for the "protection of the public trust" of "natural resources" from "unreasonable pollution, impairment or destruction." CONN. GEN. STAT. §§ 22a-14 to -20. Likewise, Florida invites citizens to sue state environmental and other agencies "for the protection of the air, water, and other natural resources of the state." FLA. STAT. ANN. § 403.412 (2003); IND. CODE §§ 13-30-1-1 to -12 ("for the protection of the environment of Indiana from significant pollution, impairment, or destruction").

Some states allow agency-forcing cases like those allowed under federal law. *See, e.g.*, MD. NAT. RES. §§ 1-501 to -508 (against state or subdivision "for failure ... to perform a nondiscretionary ministerial duty imposed upon them under an environmental statute, ordinance, rule, regulation ... for the protection of air, water, or other natural resources of the state").

Other states subject government agencies and instrumentalities to citizen suits, but only to the extent allowed by federal law. *See, e.g.*, WYO. STAT.ANN. § 35-11-904 (2003) (allowing "any person having an interest which is or may be adversely affected [to sue] only to the extent that such action could have been brought" under federal environmental law).

At least eight states allow citizens to sue to enforce compliance with media-specific state environmental laws. In nearly identical provisions to those allowed under most federal environmental laws, a host of states allow "any citizen" to "commence a civil action" on one's own behalf to sue to force compliance with state requirements. Many, including those in New Hampshire, ***56** New Mexico, Virginia, West Virginia, and Wisconsin, involve state mining laws. N.H. REV. STAT. ANN. § 12-E:14 (2003); N.M. STAT.ANN. § 69-25A-24 (1978) (repealed effective July 1, 2006); VA. CODE ANN. § 45.1-246.1 (1979); W.VA. CODE ANN. § 22-3-25); WIS. STAT.ANN. § 293.89 (2003). Others states allow citizens to sue to enforce other programs, such as those concerning hazardous wastes, IDAHO CODE § 39-4416; oil or hazardous substances spills, N.C. GEN. STAT. § 143-215.94FF; water quality, PA. STAT.ANN. tit. 35, § 691.601; and low-level radioactive waste disposal, PA. STAT.ANN. tit. 35, § 7130.508.

Unlike federal environmental laws, few states allow citizens to sue agencies for failing to perform "nondiscretionary" duties. Exceptions include Arizona, which allows citizens to sue state agencies for failing to meet mandatory duties imposed by its water quality laws, ARIZ. REV. STAT.ANN. § 49-264 (1997); and Virginia, to compel agency performance under state surface mining laws, VA. CODE ANN. § 45.1-246.1 (1979).

Most states that allow citizens to bring compliance-forcing cases do not allow them to recover fees. For example, of the eight states that allow citizens to enforce state environmental laws mentioned above, only four allow citizens to seek litigation fees: Idaho, Pennsylvania, Virginia, and West Virginia. Thus, the vast majority of media-specific reported citizen suit case law issues from these states, with citizen actions concerning "mountaintop mining" in West Virginia recently showcasing their potential impact on state, and federal, environmental policies. *See, e.g., Bragg v. West Virginia Coal Ass'n*, 248 F.3d 275, 297 (4th Cir. 2001) (noting authority under West Virginia state law).

State Environmental Citizen Suits Are Underutilized

Notwithstanding the variety of rights that citizens have to enforce environmental laws under general grants in state law, citizens file few state cases compared to their federal counterparts. Based on a Lexis review, there are more than three

thousand reported decisions in federal citizen suits, as compared with only about two hundred in state environmental citizen suits.

There are at least three reasons state environmental citizen suits are not more prevalent. First, it is difficult to develop an expertise in state environmental citizen suit law. No state citizen suit laws are alike. Although there is a progenitor state environmental citizen suit provision (MEPA), there is no model one. While a majority of states allow citizens to sue to enforce environmental laws, fewer than one-third have general laws allowing both compliance and agency-forcing cases to enforce the full panoply of the state's environmental laws. Fewer than one-third of the states without general provisions allow citizens to sue for violations of specific statutes. Roughly one-half of the states do not invite citizen suits at all.

Second, some state courts erect additional procedural, substantive, and constitutional hurdles above those found in federal law. For example, some state courts engraft onto state law a requirement for citizens to demonstrate "standing" akin to that required for *federal* citizen suits to enforce *federal* laws. While the evolution of modern standing jurisprudence makes this seem natural enough at first blush, no state constitution examined in this article requires citizens to demonstrate "standing" or otherwise enmeshes the jurisdictional parameter of *state* courts to that granted to federal courts under the U.S. Constitution as construed by the U.S. Supreme Court.

Nevertheless, many states, like Florida, require citizens to prove a truncated version of standing that mirrors federal law. *See, e.g., Florida Wildlife Fed'n v. State Dep't of Envtl. Regulation*, 390 So.2d 64 (Fla. 1980). Some have a standing test more onerous than that under federal law. *See, e.g., Gerst v. Marshall*, 549 N.W.2d 810 (Iowa 1996) ("traceability" requires demonstration of tort-like causation) citing IOWA CODE § 455B.111 (granting standing "if the person is adversely affected by the alleged violation or alleged failure to perform a duty or act"). Some require citizens to show injury to commercial or economic interest, which all but cuts off citizen enforcement to all except business interests. Still other states all but do away with standing. *See, e.g.*, MD. NAT. RES. §§ 1-501 to -508 (standing for any "person, regardless of whether he possesses a special interest different from that possessed generally by the residents of Maryland, or whether substantial personal or property damage to him is threatened").

Finally, it is all but impossible for even the most successful state citizen suit lawyer to make a living at it. While it is challenging for citizens to recover fees under federal environmental laws, the vast majority of states do not allow citizens to recover fees at all. Only about one-third of states that allow environmental citizen suits allow for recovery of costs, fees, or both. Fewer than 20 percent, that is, only three--Connecticut, Massachusetts and New Jersey--of the sixteen states with citizen suit laws allow for recovery of both attorney and expert fees and costs. Only three more--Michigan, Nevada, and North Dakota--provide for recovery of *costs*, such as filing and service fees, but exclude attorney and expert fees. About two-thirds of the states with general citizen suit provisions (including Florida, Hawaii, Illinois, Indiana, Iowa, Louisiana, Maryland, Minnesota, Pennsylvania, South Dakota, and Wyoming) do not provide for recovery of costs or fees, and thereby shift the economic burden of the citizen suit entirely on the adversely affected party. Even though fees are hard to recover under federal law, *every* federal environmental law that allows citizen enforcement has a fee-shifting provision. This has the effect of cannibalizing some actions that could otherwise be brought under state laws that do not.

The time seems ripe for more state environmental citizen suits. Of the four enforcement tools, state environmental citizen suits seem the most underutilized. In the absence of state legislative or judicial changes to address obstacles to state environmental citizen suits, however, this is unlikely to change. Some states allow citizens to sue for violations of any state environmental laws. Most do not. Many allow citizens to sue to enjoin violations of specific laws addressing media, like air or water, or practices, like mining. Most state laws governing media and practices, however, do not. Of those states allowing either general or specific enforcement, most do not allow citizens to recover attorney fees and only a few allow recovery of ministerial costs. Yet despite these limitations, as state and federal governmental enforcement of environmental laws declines and obstacles to federal citizen suits increase, state environmental citizen suits may soon need to ascend.

Footnotes

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Clean Water Act Citizen Suits: What the Numbers Tell Us

Mark A. Ryan

Citizen suits have played a major role in environmental law since the early 1970s when Congress passed most of the federal environmental statutes that now make up our environmental law canon. Suits brought by citizens against violators and the government have done much to define modern environmental law. Of the three cornerstone environmental statutes—the Clean Water Act (CWA), the Clean Air Act, and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)—the citizen suit provisions of the CWA have been some of the most heavily litigated and thus provide a good view into the workings of citizen suits generally. This article looks at the data surrounding the numbers and types of CWA citizen suits filed over time as well as who is filing them, and where.

There are four different vehicles for CWA citizen suits: CWA subsections 505(a) and (b), CWA section 509, and the arbitrary and capricious standard under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). This article will focus largely on CWA section 505 citizen suit enforcement, which comprises the bulk of citizen suit actions under the CWA. In the context of section 505 actions, this article will look selectively at standing because it has generated much of the section 505 litigation and serves as a good viewpoint from which to assess CWA citizen suits in general. The second part of this article will look at trends over time with the numbers and types of CWA citizen suit cases. The last section looks at the state of CWA citizen suits. (Section 509 petitions filed in the courts of appeals to seek review of the U.S. Environmental Protection Agency's (EPA's) promulgation or approval of effluent limitations or guidelines will not be covered here.)

Historically, citizen suits have played a central role in the development of the CWA case law. Individuals and nongovernmental organizations (NGOs) rather than the government have brought many of the landmark environmental cases under section 505(a)(1). *See e.g., Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001) (irrigation ditches to which herbicide is applied are "waters of the United States" because they "exchange water with a number of natural streams and at least one lake"). Challenges by citizens or trade groups to government action under the APA, 5 U.S.C. §§ 701–708, also have played an important role in developing a working interpretation of the CWA. *See, e.g., National Mining Assoc. v. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998) (invalidating the *Tulloch* rule on grounds that "statutory term 'addition' cannot reasonably be said to encompass the situation in which material is removed from the waters of the United States and a small portion of it happens to fall back").

Citizen lawsuits continue to be an important part of the case law today, both in substance and in sheer number of cases filed. In 2016, for example, most of the reported federal court CWA cases were citizen suits. Of the 79 CWA reported decisions issued by the federal courts in 2016, 50 listed an environmental group or individual as plaintiff, 19 involved a company or industrial trade group as plaintiff, and only 10 had the United States as plaintiff. And the cases are not all enforcement cases. The United States was the defendant in 41 of those 79 cases (primarily EPA and the United States Army Corps of Engineers (Corps)). We see a similar trend in 2017. Through March 2017, 30 reported federal court decisions addressed the CWA, and only two of those listed the United States as the plaintiff. The EPA or the Corps was the defendant in 12 of those 30 cases. The interesting finding here is that a very large percentage of the citizen suits litigated are against the government, not private parties or municipalities.

There are many sub-issues within CWA citizen suits, but few are litigated as regularly as standing. There are lessons to be drawn from the voluminous jurisprudence on standing. Environmental and trade groups that sue under CWA section 505(a) must prove standing, and standing is frequently challenged. So, the question is, how often do the respective parties prevail when defendants raise lack of standing as a defense?

First, the case law shows that standing often is litigated fruitlessly. The database of CWA standing decisions reviewed for this article included 119 federal district court and courts of appeals cases issued between 1979 and 2016. While this data set was not complete, it was large enough to draw general conclusions regarding large-scale trends. The appellate courts were nearly evenly split on finding standing. In 20 reported cases, the courts found the plaintiffs had standing, and in 17 they did not. Given the relatively low bar for establishing standing, the district courts were not surprisingly much more lopsided: 60 times they found for plaintiffs versus just 22 times for defendants. One would expect a closer ratio in the appellate courts, where the more difficult standing cases are appealed.

The numbers get more interesting upon identification of the defendants and plaintiffs. In the appellate courts, for example, environmental groups prevailed on standing arguments 17 times and lost 12 times, but trade groups lost 5 and won only once. In the district courts, environmental groups won 50 standing arguments and lost only 9, while the trade groups won 1 and lost 1. One could argue court bias here, but the lower success rates by trade groups likely reflect the more difficult task of showing injury. It is relatively easy for an environmental group to show that one of

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its members has been harmed by pollution. In *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv., Inc.*, 528 U.S. 167 (2000), the Supreme Court held that the plaintiffs need not show that the environment was harmed but only that the plaintiffs were harmed by the defendant's conduct. Post-*Laidlaw* case law demonstrates that plaintiff groups routinely meet the standing requirement by simply alleging that one or more of their members live near and recreate in water affected by defendant's discharges and are adversely impacted by the defendant's conduct. *See e.g., Ohio Valley Envt'l Coalition v. Foal Coal Co., LLC*, 2017 WL 1276059 (S.D.W. Va. 2017) (plaintiffs had standing to sue where members of organization recreated in waters affected by mine runoff; "plaintiffs may rely on circumstantial evidence such as proximity to polluting sources, prediction of discharge influence, and past pollution to prove both injury in fact and traceability"). *But see, Public Employees for Envt'l Responsibility v. Schroer*, 2017 WL 943942 (E.D. Tenn. 2017) (holding, on motion for summary judgment, that plaintiffs had not proved standing where they challenged adequacy of wetlands mitigation project but named plaintiff's declaration only set out generalized grievance and not actual, individualized harm).

Trade groups have a more difficult path. It is less obvious in many cases how trade group members are harmed by regulations or permits that have often not yet gone into effect. For example, in *National Association of Homebuilders v. EPA*, 786 F.3d 34 (D.C. Cir. 2015), the court held that issue preclusion barred the trade group from challenging the Corps' preliminary jurisdictional determination (JD) in Arizona where the trade group failed to cure the defects found in its prior challenge, namely that any of the plaintiffs had been harmed by the issuance of a final JD for their property. The court held that threat of increased likelihood of future regulation is not enough.

A fair number of reported citizen suit standing cases also have been litigated against EPA and the Corps. In the appellate courts, the environmental groups won two and lost none, and, in the district courts, they won only 9 and lost 12. These district court data contrast starkly with the 50-win and 9-loss record in cases against nonfederal defendants. These data suggest that plaintiffs, at least at the district court level, may have a tougher time establishing standing when the federal government is the defendant. Although bias may play a role, this phenomenon likely is indicative of the same hurdle trade groups face: when challenging an EPA or Corps regulatory action, it is harder to show actual harm.

What is the takeaway? Defendants routinely and, it appears, reflexively, move to dismiss on standing grounds, usually trying to prove that the environmental plaintiffs have not established an injury. It is unclear why defendants litigate this issue so aggressively. It may be that many cases involve clear-cut liability, leaving standing as the only chance to knock out the case early in the litigation. But it is clear that *Laidlaw* established a fairly easy test for showing injury, making it hard for defendants to succeed in challenging citizen standing. The numbers bear this out. In the reported district court decisions, plaintiffs won their standing arguments on roughly a 3:1 basis. If one reads the few cases where plaintiffs failed to establish standing, the picture looks even worse for defendants. In most of those cases the plaintiffs either were *pro se*, simply made bad arguments, or failed to marshal the basic facts needed to show injury. These days, most environmental groups are sophisticated enough to build a record to support standing.

Department of Justice Data

The data in this next section were derived from a Freedom of Information Act (FOIA) request submitted to the Department of Justice (DOJ) in January 2017, requesting CWA section 505 cases from 2007 to 2016. For that period, the author requested a list of all 60-day notice letters filed, all complaints filed, and all consent decrees entered. Because the database search would have been much more involved, the FOIA request did not request data on APA cases against the government related to government CWA decisions. For purposes of this discussion, the data will be broken into two groups: (1) CWA section 505(a)(1) cases—those filed by citizens against nonfederal government entities (primarily private parties and municipal/state governments)—and (2) cases filed by citizens and industry groups under CWA section 505(a)(2) against EPA and the Corps for failure to exercise a nondiscretionary duty. The second category does not include cases filed solely under the APA, which comprise a significant number of CWA challenges to government-issued permits and rulemakings.

DOJ does not formally track 60-day notices, so this article was not able to address the question of how many 60-day notices turn into cases. Similarly, EPA also does not track the notices carefully. Based on the author's personal experience working in EPA Region 10, the notices often are reviewed quickly when received, then filed away and forgotten. Unless EPA sees an issue of great importance to the agency, it seldom gets involved in CWA section 505 actions filed by a citizen against a private entity or municipality. The absence of good data on 60-day notices is unfortunate. It would have been interesting to know how many 60-day notices are filed and were never followed through on or were settled without the filing of a complaint.

The DOJ response showed that 573 complaints were filed against nonfederal defendants between 2007 and 2016. DOJ's database, however, is spotty, especially for the early years of the FOIA request, 2007–2009. (The DOJ FOIA cover letter included many caveats regarding the limitations of the information the department provided in response to the FOIA.) The lack of reported cases in the DOJ database from 2007 to 2009 (1, 0, and 5 cases, respectively) rendered those years useless for observing trends of any kind. For the years 2010–2016, DOJ reported 567 cases (51, 66, 96, 81, 96, 84, and 93, respectively), giving us a much larger sample set to review. Factoring out the first three years of weak data, on average, 80 complaints were filed per year during 2010–2017. The DOJ data showed filed consent decrees for almost all those entries, meaning virtually all 567 cases settled. During that same period, EPA filed 223 CWA complaints, which averages to 32 per year. By contrast, most states do not aggressively enforce under their authorized CWA programs. According to an EPA report, in 2015, 13 states took no enforcement actions and 21 states took fewer than 10. U.S. EPA, Annual Noncompliance Rept. 2015, at 11 (2016). Nine states accounted for 70 percent of all state-led CWA enforcement actions nationwide. *Id.*

From 2010 to 2016, the data did produce some interesting results. First, the distribution of cases across the country was extremely uneven. With 219 cases, California ran away with the lead in citizen suits alleging CWA violations. The top 12 states by filing of complaints were California (219), Washington (90), Massachusetts (55), West Virginia (36), New York (24), Tennessee (19), Georgia (17), New Hampshire (13), Connecticut (13), Oregon (11), Alabama (10), and North Carolina (7).

The numbers fall off quickly after North Carolina. Surprisingly, DOJ reported heavily industrialized states like Michigan and New Jersey had zero and one case respectively. It is unclear why there are so few cases where one would expect more. DOJ staff informed the author that these data reflect their experience tracking these cases—that there is an uneven spread of citizen suit litigation across the country. Citizen groups in some areas of the country, they report, are much more active than others. These wildly diverse numbers are roughly consistent with the case law, which shows more cases from California, Washington, and West Virginia (the latter primarily coal-mining related) than other states. It is worth noting that Massachusetts is the only nonauthorized state (EPA runs the NPDES program rather than the state agency) in the top 12 list. Finally, although the top 3 states are all blue, the top 12 most active states are an even mix of blue and red states, suggesting that citizen suit activity is not necessarily defined by state politics.

The large number of citizen suits filed—and the relatively high success rate of those suits—indicates that the suits are serving their intended purpose of enforcing the law where the government has either failed or opted not to enforce.

The DOJ database shows that regional rather than large national environmental groups file most of the cases. Names like Puget Soundkeeper Alliance, California Sportfishing Protection Alliance, Northwest Environmental Defense Center, and Ohio Valley Environmental Coalition predominate. There also are many individual plaintiffs on the list, showing that neighbors of violators and small local associations frequently exercise their right to enforce the CWA through section 505.

The cases against the federal government (primarily EPA and the Corps) under CWA section 505(a)(2) are an important but much smaller part of the picture. To be clear, those cases would not include cases filed exclusively under the APA, which probably comprise the bulk of the cases filed against the government. Challenges to Corps-issued CWA section 404 permits, for example, are brought under the APA. The author's database of reported 404 permit challenges includes 74 cases between 1998 and 2017. (Interestingly, the Corps won 53 of those 74 permit challenges.)

The DOJ list of complaints filed against the United States under section 505(a)(2) came with fewer caveats than the list of cases against nonfederal-government defendants, but it was also a significantly smaller list. Section 505(a)(2) allows citizens to sue EPA "where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator." 33 U.S.C. § 1365(a)(2). For the period 2007–2016, DOJ showed 48 complaints filed against EPA under section 505(a)(2) of the CWA (as opposed to 573 filed against nonfederal-government defendants).

The geographic distribution of these section 505(a)(2) cases roughly mimics those against nonfederal defendants. The leading states for filing these actions were Florida (8, likely water nutrient quality standards fights over the Everglades), Washington and Massachusetts (6), West Virginia (4), and Oregon and California (3 each). Fifteen other states had one or two cases each. Plaintiffs in this group were a mix of national, regional, and local environmental groups as well as industries and trade groups.

The State of Citizen Suits

All laws should be reevaluated from time to time, and CWA citizen suit provisions should not be an exception. This premise frames two obvious questions: (1) what would the environmental legal landscape look like if citizen suits were either abolished or strongly curtailed; and, conversely, (2) how would it look if we enhanced citizen suit authorities. Status quo is the default option should the first two questions yield unwanted likely results. We now have 40 years of experience with citizen suits under the CWA. Is it time to rework the equation, or is the statute working as intended?

Citizen suits are designed to be a supplement to government enforcement. See S. Rep. No. 50, 99th Cong., 1st Sess. 28, (1985) ("Citizen suits . . . operate as Congress intended—to both spur and supplement government enforcement actions."). Neither the federal nor state governments have the resources to pursue all violators, or even all big violators. The 567 federal court cases filed over seven years dwarf the 223 federal court cases filed by EPA during that same period. EPA, however, files most of its CWA enforcement cases administratively. Since citizens can file only in federal court, comparing the citizen suit federal court lawsuits against the number of EPA-filed federal court enforcement actions is of limited value. While some defendants likely would argue that the cases against them are unwarranted, the large number of citizen suits filed—and the relatively high success rate of those suits—indicates that the suits are serving their intended purpose of enforcing the law where the government has either failed or opted not to enforce.

For those opposed to citizen suits in their current form, one way to reign them in would be to remove the attorney fees provision in CWA section 505(d) or modify the statute to require the nonprevailing party (be it the plaintiff or the defendant) to pay all costs and fees. Either change would alter dramatically the number of smaller cases brought but probably would have little effect on the larger organizations' efforts. The large national environmental groups and trade groups can afford to fund their own litigation. Those groups typically are litigating with some broad policy goal in mind, and they have grants or corporate funding to support their advocacy. The smaller regional groups or individual plaintiffs that bring cases usually aim to remedy a specific environmental problem. Those groups likely would curtail their enforcement efforts if they could not recover their fees or if they were faced with the prospect of paying defense fees and costs should they lose. A significant

percentage of all CWA section 505(a)(1) cases fit that latter category. It is doubtful that Congress would make amendments that effectively would deprive local groups of their right to protect their home turf from pollution.

Given the sea change currently underway at the EPA under the Trump administration, it is worth highlighting how those changes may play out in the context of CWA citizen suits. The Pruitt-led EPA has telegraphed that it would like to cut EPA funding by as much as 30 percent, reduce staff, eliminate programs, give more deference to the states, deemphasize enforcement, and repeal regulations. If that happens, what effect, if any, will it have on the number and types of citizen suits being filed?

First, plaintiffs currently are barred under CWA section 505(b)(1)(B) from filing actions where EPA or the state has commenced and diligently prosecuted a case against the same defendant. Section 505(b)(1)(B) has for years provided cover to the regulated community from citizen suits when EPA or the state has already begun an enforcement action. *See, e.g., Black Warrior Riverkeeper, Inc. v. Southeastern Cheese Corp.*, 2017 WL 359194 (S.D. Ala. 2017) (citizen suit filed while consent decree is still open from prior state enforcement action is barred because the state had commenced and was diligently prosecuting an action under state law). If EPA pulls back on enforcement and grants greater autonomy to the states, some states may step up their enforcement, but others may retreat. A large part of most state environment enforcement budgets comes from EPA (in Idaho, it is over 50 percent), and the Trump administration has proposed slashing funds provided to states. If that happens, expect to see reduced resources for state enforcement actions. And, as the 2015 EPA Report showed, most states already take few enforcement actions.

Where states pull back, environmental groups and private citizens will fill some of that void. However, without the ability to conduct inspections, or ask for documents from private parties outside of litigation, citizen groups never will have the evidence necessary to bring as many cases as the government. Citizen groups frequently seek larger penalties and more comprehensive injunctive relief than EPA or the states. Plaintiffs suing under section 505(a) are entitled to fees under section 505(d) if they substantially prevail. EPA and the states generally do not recover attorney fees when they enforce.

An analysis the author conducted in 2014 looking at EPA CWA enforcement cases in Idaho during 2000–2013 showed very little variation in the number of cases filed during the Clinton, Bush, and Obama administrations. That consistency arguably has allowed the regulated community to understand what the regulatory environment is and to plan accordingly. With an EPA retreat from enforcement, the regulated community may face more uncertainty in the form of an increased number of citizen suits. In sum, if EPA and the states pull back on enforcement, we likely will see more citizen suits, larger fines, payment of attorney fees, and less certainty for business.

Section 505(a)(2) allows citizens to sue EPA "where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator." 33 U.S.C. § 1365(a)(2). The DOJ data cited above show that 48 of the 77 section 505 cases filed against the government were against EPA under section 505(a)(2) for failure to exercise a nondiscretionary duty. If EPA under the Trump administration stops or slows down implementation of nondiscretionary duties under the CWA, citizen groups certainly will increase the number of challenges they bring against EPA. Defensive cases already consume a significant percentage of EPA's and DOJ's resources. Some of those resources now are devoted to industry challenges, and those would be expected to decrease under this administration. The number of section 505(a)(2) cases, however, in net likely will increase. When EPA loses section 505(a)(2) cases, it frequently is ordered to engage in rulemakings with specific results mandated by the courts. The downside of EPA inaction for the regulated community is often new, stricter regulations put in place subject to a court order rather than regulations that are established pursuant to agency discretion.

Citizen suits are not spread evenly across the country, but are concentrated largely in a handful of states that are a mix of red and blue, and are dominated by local or regional groups rather than the large national environmental groups that one often identifies with citizen suits.

In conclusion, the data show citizens play a major role in CWA enforcement and in forcing the government to do what it is obligated to do statutorily. Although not all citizen suits are successful, they enjoy a relatively high success rate, suggesting that they are doing what Congress intended them to accomplish, especially considering the weak state agency enforcement numbers. The data tell us that the suits are not spread evenly across the country, but are concentrated largely in a handful of states that are a mix of red and blue, and that citizen suits are dominated by local or regional groups rather than the large national environmental groups that one often identifies with citizen suits. We also have learned that a large percentage of the reported CWA citizen suits are against EPA or the Corps and not against private parties or municipalities, which dispels the common notion that these cases primarily target alleged permit violators for penalties. The status quo that has been in place since 1972 appears to be serving the purpose Congress intended, and the data do not appear to support a move to make any significant changes to the CWA's citizen suit provisions.