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Environmental Citizen Suits at Thirtysomething: A Celebration & Summit Part II

Article

***353 THE VALUE OF AGENCY-FORCING CITIZEN SUITS TO ENFORCE
NONDISCRETIONARY
DUTIES**

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Introduction

Most of the federal pollution control statutes contain citizen suit provisions, as does the Endangered Species Act (ESA). [\[FN1\]](#) These statutory provisions authorize private citizens [\[FN2\]](#) to sue persons alleged to be in violation of their statutory or regulatory obligations or to sue government agencies alleged to have failed to perform nondiscretionary duties. [\[FN3\]](#) There is extensive literature on the first kind of citizen suit, but considerably less has been written about the second kind. This article addresses citizen suits against the government for failure to perform nondiscretionary duties. After first describing the origins and scope of these agency-forcing [\[FN4\]](#) citizen suit provisions, the article in Part II analyzes some examples of the cases in which agency-forcing citizen suits have had the greatest impact. The article considers cases in which these suits have induced agencies to create entirely new regulatory programs, shift the emphasis of existing regulatory programs, significantly expand the scope of existing regulatory programs, or accelerate the pace of existing regulatory programs. Part III of the article analyzes the justification for agency-forcing citizen suits, as well as the potential disadvantages of allowing private citizens to sue agencies to force them to perform nondiscretionary duties. It concludes that the value of agency-forcing citizen suits in fostering the accountability of administrative agencies justifies the intrusions on agency autonomy that result from these suits.

***354 I. The Origins and Scope of Agency-Forcing Citizen Suits**

Agency-forcing citizen suits are a form of what Professors Richard Stewart and Cass Sunstein have called "private rights of initiation." [\[FN5\]](#) A private right of initiation involves a suit by a regulatory beneficiary in which that beneficiary challenges an agency's failure to take action. [\[FN6\]](#) Until relatively recently, regulatory beneficiaries were precluded from challenging an agency's failure to exercise its regulatory authority. According to Stewart and Sunstein, private rights of initiation first emerged during the 1960s, as public interest groups sought to redirect agency priorities under both traditional economic regulatory statutes and more recently adopted social regulatory enactments. [\[FN7\]](#)

The first agency-forcing citizen suit provision to appear in the federal environmental laws was the citizen suit provision of the 1970 Clean Air Act (CAA). [\[FN8\]](#) The CAA's citizen suit provision, which authorized both suits against those alleged to be in violation of regulatory obligations and suits against agencies allegedly violating nondiscretionary duties, [\[FN9\]](#) originated in the Senate bill. The House bill contained no analog. The Senate bill would have authorized suits against the Administrator of the new Environmental Protection Agency (EPA) for failure to exercise "any duty established under this Act." [\[FN10\]](#) Although the Senate Report on the bill explained the rationale

for and scope of the citizen suit provision in some detail, it devoted little attention to the agency-forcing component of citizen suits. The Report stated that citizen suits would be "carefully restricted to actions where . . . a failure on the part of officials to act [is] alleged." [FN11] It added that "actions will lie against [the Administrator of EPA] for failure to exercise his duties under the Act, including his enforcement duties. The Committee expects that many citizen suits would be of this nature, since such suits would reduce the ultimate burden on the citizen of going forward with the entire action." [FN12] Senator Edmund Muskie explained on the floor of the Senate that "[t]he concept of compelling bureaucratic agencies to carry out their duties is integral to democratic society. . . . The concept in the bill is that administrative failure should not frustrate public policy and that citizens should have the right to seek enforcement where administrative agencies fail." [FN13]

*355 The Senate bill provoked objections by those who feared that the agency-forcing aspect of the citizen suit provision would prompt a flood of litigation, thereby interfering with EPA's ability to administer the Act. [FN14] In response, the Conference Committee amended the provision to limit citizen suits to situations in which the Administrator had failed to perform an act or duty which is "not discretionary." [FN15] The amendment was meant "to limit the number of citizen suits which could be brought against the Administrator and to lessen the disruption of the Act's complex administrative process." [FN16]

Subsequent citizen suit provisions, including the agency-forcing component, were modeled after the CAA version. Thus, the legislative history of the citizen suit provision of the Clean Water Act (CWA), adopted in 1972, is limited, largely emphasizing that the provision was patterned after the CAA's citizen suit provision. [FN17] Like the CAA's legislative history, the legislative history of the CWA indicates that agency-forcing suits were supposed to be limited to "situations in which the Administrator is compelled by law to act." [FN18] The CAA citizen suit provision has subsequently served as the model [FN19] for similar provisions in at least thirteen other federal environmental statutes. [FN20]

Each of these provisions limits agency-forcing suits to situations in which the agency sued has allegedly failed to perform a nondiscretionary duty. Despite those limitations, the scope of these provisions is potentially enormous; by one *356 count, the Solid Waste Disposal Act (SWDA) alone imposes on EPA as many as two hundred nondiscretionary duties. [FN21] Obviously, the scope of the agency-forcing provisions turns on the distinction between a discretionary and a nondiscretionary duty. Defining that distinction has turned out to be troublesome. [FN22] One court has characterized nondiscretionary duties as involving "purely ministerial acts," while labeling as discretionary determinations that are "judgmental." [FN23] As Professor William Rodgers has indicated, "mandatory deadlines are the easy cases," so that courts readily require EPA and other affected agencies to issue regulations or reports or take other actions for which statutory deadlines have passed. [FN24] The deadline need not necessarily appear on the face of the statute, as long as it is "readily ascertainable by reference to some other fixed date or event." [FN25] Attacks on the substance of agency decisions will *357 typically fall outside the scope of citizen suit jurisdiction as discretionary determinations. [FN26] Efforts to force agencies to exercise their enforcement authorities have been rejected as involving discretionary determinations, [FN27] though the courts are not in full agreement as to the dividing line between nondiscretionary and discretionary duties in the enforcement context. [FN28] Actions *358 seeking to force the agency to make program-wide, as opposed to more discrete, determinations also may be dismissed on the ground that the duties involved are discretionary in nature. [FN29]

II. The Impact of Agency-Forcing Citizen Suits

Before turning to an assessment of the comparative benefits and adverse effects of agency-forcing citizen suits, [FN30] it may be useful to examine some of the impacts that these suits have had on the federal agencies with environmental protection responsibilities, including but not limited to EPA. Because an exhaustive review of the

cases is not possible in a symposium piece of this sort, I will instead review in this part examples of citizen suits that have led to the creation of new regulatory programs, the shift in emphasis of existing regulatory programs, the expansion of existing regulatory programs, or the accelerated implementation of existing regulatory programs. These examples provide insight into the value provided by agency-forcing citizen suits over the last three decades.

A. The Creation of New Regulatory Programs

1. Prevention of Significant Deterioration

Perhaps the most dramatic example of a citizen suit that resulted in the creation of a new regulatory program is *Sierra Club v. Ruckelshaus*, [\[FN31\]](#) the 1972 decision of the federal district court for the District of Columbia, which resulted in the creation of the prevention of significant deterioration (PSD) program [*359](#) under the CAA. The Sierra Club sued EPA under section 304 of the CAA, [\[FN32\]](#) seeking to enjoin the agency from approving portions of state implementation plans (SIPs) which had been submitted to EPA. [\[FN33\]](#) EPA challenged the district court's jurisdiction, arguing that the court should force the Sierra Club to wait until EPA approved the plans and then appeal the approvals to the Courts of Appeals. [\[FN34\]](#) The court ruled instead that it had jurisdiction under the citizen suit provision, which authorized "any person [to] commence a civil action on his own behalf . . . against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator." [\[FN35\]](#) EPA had declined to require SIPs to protect against significant deterioration of existing clean air areas because the agency believed it lacked that power. [\[FN36\]](#) EPA had even issued a regulation permitting states to submit SIPs which would allow clean air areas to be degraded, as long as the plans were merely "adequate to prevent such ambient pollution levels from exceeding [the] secondary [national ambient air quality] standard." [\[FN37\]](#) The court concluded that Sierra Club's allegation-that EPA's refusal to require protection of clean air areas and its promulgation of a regulation to the contrary violated the Act-is precisely the type of claim which Congress, through [the citizen suit provision], intended interested citizens to raise in the district courts. In view of this clear jurisdictional grant, the Administrator's assertion that plaintiffs should await his approval of the state plans (formulated, in part, pursuant to his allegedly illegal regulation) and then proceed to appeal his approval . . . is, in our opinion, untenable. [\[FN38\]](#) On the merits, the court turned to section 101(b) of the statute, [\[FN39\]](#) which states the purpose of the Act as "to protect and enhance the quality of the Nation's air resources." [\[FN40\]](#) The court stated that "[o]n its face, this language would appear to declare Congress' intent to improve the quality of the nation's air and to prevent deterioration of that air quality, no matter how presently pure that quality in some sections of the country happens to be." [\[FN41\]](#) Based largely on the stated purpose of the 1970 CAA and the legislative history of that statute and its predecessors, the court held that EPA's regulation permitting air quality degradation of clean air up to the levels demanded by the secondary air quality standards was contrary to [*360](#) statutory policy and therefore invalid. [\[FN42\]](#) The court issued the injunction requested by the plaintiff, requiring EPA to "carry out [its statutory] duties under the Act." [\[FN43\]](#) On appeal, the D.C. Circuit affirmed without opinion, [\[FN44\]](#) and the Supreme Court affirmed without opinion by an equally divided Court. [\[FN45\]](#) Pursuant to the district court's order, EPA reviewed and disapproved all of the states' SIPs in 1973 because "none was found to contain explicit and enforceable regulations for implementing" a policy to prevent or minimize deterioration of air quality. [\[FN46\]](#) At the same time, the agency viewed the Supreme Court's decision as leaving open the question of whether the CAA required the prevention of significant deterioration of air quality. [\[FN47\]](#) EPA continued to insist that section 110 of the Act [\[FN48\]](#) "requires EPA to approve [SIPs] that will attain and maintain the national ambient air quality standards, and that the Act does not require EPA or the States to prevent significant

deterioration of air quality." [\[FN49\]](#) EPA nevertheless proposed several alternative methods of defining and preventing significant deterioration, in order to comply with the district court's injunction. [\[FN50\]](#)

EPA issued its final PSD regulations in 1974, two and a half years after issuance of the district court's injunction. [\[FN51\]](#) The preamble to the final regulations repeated that EPA was taking the action in response to the district court's injunction. [\[FN52\]](#) The preamble indicated that the Nixon/Ford Administration had drafted an amendment to the CAA which would eliminate the requirement for preventing the significant deterioration of air quality. [\[FN53\]](#) By that time, EPA had decided not to endorse the pending amendment, and it indicated that it was **367* issuing its final PSD regulations "because the [district court] has ruled that the current Clean Air Act requires the Administrator to prevent significant deterioration, and this requirement must be met even though it is possible that Congress may provide additional guidance and/or legislative changes in the future." [\[FN54\]](#)

Three years later, Congress did amend the CAA, but by endorsing instead of reversing the district court's decision and at least some of what EPA had done in response to that decision. [\[FN55\]](#) After discussing the litigation in *Sierra Club v. Ruckelshaus*, the House Report stated that the intended purposes of the provisions that now appear in the CAA under the rubric of "Prevention of Significant Deterioration of Air Quality" [\[FN56\]](#) were (1) to affirm the decision that the act requires a policy of prevention of significant deterioration; (2) to provide additional congressional guidance to specify what "significant deterioration" is and how it must be prevented; [and] (3) to delete the current EPA regulations and to substitute a system which gives a greater role to the States and local governments and which restricts the Federal Government in [several] ways. [\[FN57\]](#)

At the same time, the legislation adopted the "allowable increment approach" which EPA had developed in its 1974 regulations. [\[FN58\]](#) The legislative history therefore, leaves little doubt as to the key role the district court's decision played in the adoption and implementation of the PSD program. In at least one other case, another federal district court ordered EPA to issue PSD regulations for oxides of nitrogen, which were not then covered by the regulatory program. [\[FN59\]](#)

**362* 2. Regulation of Ozone-Depleting Substances

Another citizen suit that sought to force EPA to establish a new regulatory program was filed by the Natural Resources Defense Council (NRDC) in 1984. [\[FN60\]](#) NRDC claimed that the CAA required that EPA regulate emissions of chloroflourocarbons (CFCs) as a result of a finding by the agency in 1980 that those substances posed a significant threat to human health. [\[FN61\]](#) In 1985, NRDC and EPA entered a consent decree in which EPA "agreed to hold conferences on CFC emissions and obtain additional technical information concerning CFCs. In 1986 EPA produced a risk assessment document that claimed an 85% reduction in CFC emissions would be necessary to prevent further destruction of stratospheric ozone." [\[FN62\]](#) The settlement reached by the parties obviously fell short of NRDC's goal of the establishment of regulations limiting CFC emissions, but Congress stepped in when it adopted the 1990 amendments to the CAA by phasing out the production and use of CFCs and other ozone-depleting substances. [\[FN63\]](#)

B. Shifts in Focus of Existing Regulatory Programs

Agency-forcing citizen suits have played a dramatic role not only by inducing the creation of new regulatory programs, but also by assisting in shifts of focus of existing regulatory programs. The 1972 Federal Water Pollution Control Act Amendments authorized EPA to regulate toxic water pollutants through two different mechanisms: the issuance of health-based standards under section 307 of the Act, [\[FN64\]](#) which would be developed without regard to the cost of compliance, and the issuance of technology-based standards under section 301(b) of the Act. [\[FN65\]](#) EPA's initial thrust at controlling discharges of toxic water pollutants was directed at the issuance of the

section 307 health-based standards. As a result of ^{*363} the limited availability of data on the aquatic toxicology and the fate and transport of toxic water pollutants, the agency could not manage the task. As a result, it missed the deadline for issuing the section 307 standards. [\[FN66\]](#)

Several environmental groups, frustrated by the slow pace of regulation, [\[FN67\]](#) initiated a series of citizen suits against EPA under section 505 of the CWA. [\[FN68\]](#) One suit sought to compel EPA to expand the list of toxic pollutants promulgated under section 307 of the CWA. [\[FN69\]](#) Two others sought to require EPA to promulgate regulations for the toxic pollutants already listed under section 307. [\[FN70\]](#) One final suit sought to force EPA to issue pretreatment standards for introduction of toxic pollutants into public sewage treatment plants. [\[FN71\]](#) What each of the suits had in common was a desire to "force the regulation of toxic pollutants." [\[FN72\]](#) The suits were eventually consolidated and heard before the federal district court for the District of Columbia before Judge Flannery. The suit was settled by consent decree. [\[FN73\]](#) EPA represented to the court that it was now of the view that the technology-based approach to regulation of toxic pollutants was preferable because, among other things, it allowed industry-wide regulation rather than pollutant-by-pollutant regulation, [\[FN74\]](#) thereby enhancing the predictability of pollution control costs for industry, and it allowed EPA to consider cost and technological feasibility in determining the level of regulation. [\[FN75\]](#) In accepting the settlement, the court ordered EPA to develop regulations containing effluent limitations on discharges of toxic pollutants by classes and categories of point sources based on application of the best available technology economically ^{*364} achievable. [\[FN76\]](#) In particular, EPA was obliged to issue regulations covering sixty-five toxic pollutants discharged by twenty-one industries. [\[FN77\]](#)

The impact of the Flannery consent decree was every bit as striking as was the decision in the PSD case. Some years ago, when thirty former EPA attorneys were asked what court decision had the greatest impact on EPA policies and administration, twenty-eight responded by citing to the Flannery consent decree. [\[FN78\]](#) Legal academics seem to agree. William Rodgers characterized the consent decree as "represent[ing] a pronounced change in the approach to the regulation of toxics." [\[FN79\]](#) Not only did EPA commit itself to regulate rather than await the accrual of more information, but according to another source, the decree "energized EPA to pursue toxic water pollutants aggressively." [\[FN80\]](#) In addition, the course charted by the consent decree "strayed radically from the path envisioned by the original mapping of Section 307" by switching from the "absolutist" health-based approach of section 307 to the technology-based approach of section 301(b). [\[FN81\]](#)

The Flannery consent decree that resulted from the environmental groups' suits resembled the result of the PSD case in another respect. Just as Congress in the 1977 amendments to the CAA codified the PSD program, Congress in the 1977 amendments to the CWA adopted the approach to regulation of toxic water pollutants sketched out in the Flannery consent decree. [\[FN82\]](#) The amended section 301(b) of the Act requires EPA to issue effluent limitations for categories and classes of point sources discharging toxic pollutants based on the application of the best available technology. [\[FN83\]](#) ^{*365} Even after the Flannery consent decree and the 1977 CWA amendments, citizen suits have continued to play a crucial role in the implementation of the effluent limitation program. As one recent press report put it, "[t]he development of effluent guidelines and standards has been driven up to now by lawsuits because the agency was not meeting the statutory deadlines in the Clean Water Act." [\[FN84\]](#) A 1992 consent agreement, for example, required EPA to issue effluent limitation guidelines for eleven point source categories. [\[FN85\]](#)

C. Significant Expansion of Existing Regulatory Programs

1. Listing of Criteria Pollutants

Agency-forcing citizen suits have been instrumental in expanding the scope of existing regulatory programs by forcing agencies to list additional substances to be regulated or

resources to be protected. A good example of a substance listing case is *Natural Resources Defense Council, Inc. v. Train*. [FN86] NRDC and other plaintiffs sued EPA under the CAA's citizen suit provision seeking to force it to list lead as a criteria pollutant under section 108 of the CAA. [FN87] EPA argued that the listing of pollutants under section 108 is a discretionary function, and therefore the court lacked jurisdiction to hear the case. [FN88] The court disagreed, determining "that the statutory scheme contemplates a mandatory duty on the part of the Administrator which is enforceable" in a citizen suit. [FN89] EPA contended that other sections of the Act provide alternative remedies for lead pollution (such as establishing standards for the lead content of motor gasoline) and that the existence of these alternatives vested in EPA the discretion to choose among the remedies provided by the Act. [FN90] The court, however, found that the statutory language failed to support the contention that EPA has the discretion to choose among the Act's alternative remedies. [FN91] Instead, once the *366 factors for listing enumerated in section 108 are met, [FN92] EPA must list the pollutant involved. [FN93] Finally, EPA argued that it needed discretion not to list lead because the data necessary to support listing were arguably lacking. [FN94] According to the court, the potential lack of data would not have supported a decision not to list. [FN95] The court ordered EPA to place lead on the list of criteria pollutants within thirty days. [FN96] On appeal, the Second Circuit affirmed. [FN97] The court reasoned that accepting EPA's argument that it has the discretion whether to list a pollutant even when the conditions for listing have been met would be "contrary to the structure of the Act as a whole, and . . . would vitiate the public policy underlying the enactment of the 1970 Amendments." [FN98] According to the court, the CAA's structure and legislative history, as well as previous judicial interpretations, leave no room for an interpretation which makes the issuance of air quality standards for lead under § 108 discretionary. The Congress sought to eliminate, not perpetuate, opportunity for administrative foot-dragging. Once the [statutory] *367 conditions . . . have been met, the listing of lead and the issuance of air quality standards for lead become mandatory. [FN99] EPA issued final ambient air quality standards for lead in 1978. [FN100] Those standards were attacked in court and upheld in 1980. [FN101] Both emissions and ambient concentrations of lead fell significantly during the 1980s and 1990s, as did average blood lead levels of Americans. Some studies have attributed much of this improvement to the removal of lead from gasoline under the CAA, [FN102] but the ambient air quality standard for lead that emanated from the NRDC litigation undoubtedly played a role in those reductions as well.

2. Endangered Species Listing and Critical Habitat Designation

Not all of the action has come in private rights of initiation brought against EPA. The Interior Department has been the target of litigation initiated by environmental groups which have sought to force the agency to take actions such as adding species to the lists of endangered or threatened species, or designating critical habitat for such species under the ESA. [FN103] The Ninth Circuit, for example, has recognized that the obligation of the Fish and Wildlife Service *368 (FWS) to act on a proposed rule to list a species as endangered within one year of the date of its publication (either by promulgating a final rule, withdrawing the proposal if there is insufficient information to justify listing, or extending the one-year period) [FN104] "is a mandatory, nondiscretionary duty which may be enforced by citizen suit." [FN105] More generally, Professor Holly Doremus has characterized the implementation of the ESA as a consistent effort by the FWS and the National Marine Fisheries Service to exploit "their discretion to the fullest to avoid political controversy. That tendency has been checked only by the ability of citizen suits to force the agencies to perform politically unpalatable duties." [FN106] Citizen suits, according to Doremus, "have played an important role in almost every phase of ESA implementation, including obtaining the protections of the ESA for noncharismatic species, [and] overseeing the section 7 consultation process." [FN107] Similarly, Professor Pat Parenteau has described the role of citizens in the ESA

listing process as a key one. [\[FN108\]](#) He cites as an example, a 1993 "mega-suit" filed by several wildlife organizations that yielded a settlement requiring the listing of 400 species of plants. [\[FN109\]](#)

Aside from the Snail Darter case, [\[FN110\]](#) the northern spotted owl litigation may be the most well known, and certainly is some of the most controversial litigation that the ESA has produced. One observer has stated that "[t]he citizen's suit provision has proved invaluable in the case of the northern spotted owl. Virtually every action taken by federal agencies to protect the spotted owl has been prompted by court decisions in response to citizen suits." [\[FN111\]](#) Technically, this statement is not accurate if the author is using the term "citizen suit" as this article is-to refer to an action in federal district court under an enumerated citizen suit provision to force a recalcitrant agency to perform a nondiscretionary duty. Few if any of the reported northern spotted owl listing or critical habitat *369 designation cases were brought under the ESA's citizen suit provision. [\[FN112\]](#) Instead, citizen groups filed petitions with the FWS requesting listing or critical habitat designation, as section 4 of the ESA allows them to do. [\[FN113\]](#) Thereafter, citizen groups sought review of the denial of their petitions in federal district court basing jurisdiction on the federal question statute [\[FN114\]](#) and seeking a determination that the agency acted in an arbitrary and capricious manner. [\[FN115\]](#) As one experienced environmental litigator has indicated, this route is in many ways the functional equivalent of an enumerated citizen suit. [\[FN116\]](#) Moreover, stonewalling by the agency after a petition has been filed may not allow the agency to escape judicial scrutiny. If the agency fails to act on an appropriately filed petition beyond deadlines for review set forth in the statute, an action for review may be available in which the petitioner seeks a ruling that the agency has engaged in unreasonable delay [\[FN117\]](#) and should be forced to rule on the petition. [\[FN118\]](#)

Northern Spotted Owl (*Strix Occidentalis Caurina*) v. Hodel [\[FN119\]](#) is illustrative of the kind of impact citizen groups can have through the petitions process. [\[FN120\]](#) Environmental groups sued the FWS, challenging its decision not to list the northern spotted owl as endangered or threatened, after the FWS denied their petition under the ESA to list the owl. [\[FN121\]](#) The court found that the FWS's decision not to list the owl was arbitrary and capricious and contrary to law and *370 ordered the agency to provide within ninety days an analysis for its decision that listing was not currently warranted. [\[FN122\]](#)

The FWS listed the owl as threatened in 1990, but indicated that it would defer designation of critical habitat on the ground that it was not "determinable." [\[FN123\]](#) The environmental groups returned to court to challenge the agency's decision to defer designation. [\[FN124\]](#) The court found that the FWS abused its discretion when it determined not to designate critical habitat concurrently with its listing of the owl. [\[FN125\]](#) It ordered the FWS to submit a plan for completing its review of critical habitat for the owl by a specified date, to publish its proposed critical habitat plan within forty-five days of that, and to issue a final rule "at the earliest possible time under the appropriate circumstances." [\[FN126\]](#) In these and subsequent suits, "environmental groups were able to . . . force some extremely high profile actions [that the Forest Service and the Bureau of Land Management (BLM)] would surely rather have avoided, including broad injunctions against logging on federal lands in the Pacific Northwest." [\[FN127\]](#)

A recent ESA citizen suit further illustrates the potential for litigation under that provision to affect a wide variety of potential land development activities, as well as the willingness of courts to consider injunctive decrees that extend beyond fashioning a timetable for compliance with nondiscretionary statutory duties. [\[FN128\]](#) Conservation groups filed petitions with the FWS requesting that the agency list the Canada Lynx. [\[FN129\]](#) When the FWS concluded that listing of the lynx *371 was not warranted, the groups challenged that decision in court. [\[FN130\]](#) The district court rejected the agency's rationales for not listing the lynx. [\[FN131\]](#) Following that decision, the FWS determined that listing of the lynx was warranted, but that it was precluded by the agency's need to work on higher priority species. [\[FN132\]](#) After the conservation groups

sued again, the parties settled, the FWS agreeing to issue a proposed listing. [\[FN133\]](#) The FWS eventually listed the lynx as threatened, but failed to designate critical habitat for the species. [\[FN134\]](#) The conservation groups brought a third suit, under both the ESA's citizen suit provision and the APA, challenging the decision to list the lynx as threatened, rather than endangered, and the FWS's failure to designate critical habitat. [\[FN135\]](#)

The ESA defines an endangered species as one "which is in danger of extinction throughout all or a significant portion of its range." [\[FN136\]](#) The FWS supported its conclusion that the lynx was not endangered by determining that three areas in which the lynx was imperiled nevertheless did not collectively constitute a significant portion of its range. [\[FN137\]](#) The district court found this determination to be "counterintuitive and contrary to the plain meaning of the ESA." [\[FN138\]](#) As a result, the court set aside the agency's decision not to list the lynx as endangered. [\[FN139\]](#) It also found, without much dispute on the part of the FWS, that the FWS had violated the statute by failing to designate critical habitat or issue a finding that habitat was not then determinable. [\[FN140\]](#)

The remaining issue was what kind of relief to provide to the plaintiffs. The ESA requires an agency that proposes to take an action that may affect an endangered or threatened species or its critical habitat to engage in formal consultation with the FWS, culminating in the issuance of a biological opinion "detailing how the agency action affects the species or its critical habitat." [\[FN141\]](#) FWS regulations allow an agency to avoid formal consultation if the FWS issues a "written concurrence" that the proposed action "is not likely to adversely affect any listed species or critical habitat." [\[FN142\]](#) The plaintiffs requested that the court enjoin the FWS from issuing any further such concurrences, thus requiring formal consultation for any proposed agency action that might affect the lynx or ^{*372} its critical habitat. [\[FN143\]](#) The FWS argued that the ESA precludes that kind of injunctive relief because the statute only allows courts to order the FWS to perform nondiscretionary duties. [\[FN144\]](#) The court, however, relying on the citizen suit provision's savings clause, [\[FN145\]](#) concluded that Congress intended to preserve the courts' traditional equitable discretion to remedy agency violations of nondiscretionary statutory duties. [\[FN146\]](#) Because the court found that the injunctive relief requested by the plaintiffs was "essential to fully and effectively carry out the will of Congress," [\[FN147\]](#) it enjoined the FWS from issuing any concurrences until it completed the process of designating critical habitat for the lynx. [\[FN148\]](#) The case illustrates that courts may be willing to use creative remedies in agency-forcing suits other than simply requiring agencies to implement the statutory tasks assigned to them.

Litigation under the ESA concerning other protected species, such as salmon, has had effects similar to the effects of the spotted owl and lynx litigation. [\[FN149\]](#) Indeed, the ESA listing process has been largely driven by citizen petitions and lawsuits. Of the 1,225 species listed since 1974, 896 listings (seventy-three percent) resulted from citizen petitions or lawsuits. [\[FN150\]](#) Most listings (704, or fifty-seven percent of all listings) have occurred since 1991. [\[FN151\]](#) Of those 704 listings, eighty-five percent resulted from citizen petitions or lawsuits. [\[FN152\]](#) The role of citizen initiative in the ESA listing process has therefore increased over the last decade or so.

^{*373} D. Accelerated Implementation of Existing Regulatory Programs

1. The TMDL-Setting Process

One more area in which agency-forcing citizen suits have played a crucial role involves suits seeking accelerated implementation of existing regulatory programs. This function of the citizen suit mechanism is exemplified by the efforts of environmental groups to force EPA to redress state failure to implement the water quality standard setting process under the CWA. The CWA supports its technology-based effluent limitations program [\[FN153\]](#) with a program, under section 303 of the Act, that requires the states to issue water quality standards designed "to protect the public health or welfare, enhance the quality of water and serve the purposes" of the CWA. [\[FN154\]](#) Each water

quality standard is composed of a designated use and water quality criteria sufficient to assure the availability of the affected body of water for that use. [\[FN155\]](#) The state must identify and rank bodies of water for which the technology-based effluent limitations are not stringent enough to achieve compliance with the state's water quality standards. [\[FN156\]](#) The state is then obliged to calculate a total maximum daily load (TMDL) for those impaired bodies of water. [\[FN157\]](#) The TMDL represents the aggregate amount of a particular pollutant that the receiving body of water is capable of assimilating without exceeding the maximum pollutant concentrations set forth in the water quality criteria, factoring in a margin of safety. [\[FN158\]](#) Finally, the state must allocate the TMDL among sources discharging into the impaired water body. [\[FN159\]](#) EPA's initial efforts to implement the CWA focused on the technology-based effluent limitations program (especially after the Flannery consent decree described above.) [\[FN160\]](#) EPA let the water quality standard-setting process in general, **374* and the TMDL process in particular, lapse, perhaps on the ground that until the technology-based program was in place, it was premature to tackle the program meant to be its backstop. [\[FN161\]](#) In the absence of pressure from EPA to carry out their TMDL-setting responsibilities, the states had little incentive to move forward with the process. [\[FN162\]](#) Most therefore did not.

It was in that context that environmental groups began to file a series of lawsuits against EPA, seeking to compel it to implement those portions of the TMDL program that the states had failed to implement. Although some suits were brought as early as the 1980s, the litigation began in earnest during the 1990s, so that by early 1999, "litigation had challenged compliance in more than half the states of the country, and yet more was brewing." [\[FN163\]](#) The impact of these suits has been significant. Professor Oliver Houck put it this way:

Against a background of federal environmental programs in which litigation has played a central role, it is hard to think of any program more precipitously driven by citizen suits from absolute zero toward its statutory destiny than TMDLs. Short of some outside impetus, whatever Congress prescribed in § 303(d) was going to be ignored for no more complex reasons than (1) compliance was hard and (2) ignoring seemed possible.

[\[FN164\]](#)

An early TMDL agency-forcing suit that set the tone for much of what was to follow was the 1984 *Scott v. City of Hammond* case, decided by the Seventh Circuit. [\[FN165\]](#) An individual brought a CWA citizen suit against the defendants, complaining about pollution of Lake Michigan which forced Chicago to close its beaches during the summer of 1980. [\[FN166\]](#) The district court dismissed the suit for failure to state a claim. [\[FN167\]](#) Scott challenged EPA's failure to set a TMDL for discharges into Lake Michigan. In addition, he alleged that EPA was under a nondiscretionary duty to ensure that water quality standards adopted under the **375* CWA protect the public health and welfare, and complained that the state water quality standards approved by EPA did not protect against viruses. [\[FN168\]](#) The court concluded that the content of water quality standards cannot ordinarily be challenged through a citizen suit because the content of the standards is "at least somewhat discretionary." [\[FN169\]](#) Therefore, challenges to the water quality standards approved by EPA must be brought under the APA. [\[FN170\]](#) A citizen suit to require performance of a nondiscretionary duty cannot be used to challenge the substance or content of an agency action. [\[FN171\]](#) Scott's claim that EPA unlawfully failed to promulgate TMDLs for discharges into Lake Michigan, however, was the kind of allegation for which the citizen suit provision was designed. [\[FN172\]](#) The appellate court disagreed with the district court's conclusion that EPA was not required to act unless and until the state submitted a proposed TMDL. It stated its belief that "if a state fails over a long period of time to submit proposed TMDL's, this prolonged failure may amount to the 'constructive submission' by that state of no TMDL's." [\[FN173\]](#) At that point, EPA would be under an obligation to approve or disapprove that "submission." [\[FN174\]](#) If EPA disapproved, it would then be required to issue its own TMDL. [\[FN175\]](#) EPA claimed that Congress did not intend that EPA issue TMDLs upon a state failure to do so. The court responded that it was "unlikely that an important aspect

of the federal scheme of water pollution control could be frustrated by the refusal of states to act." [\[FN176\]](#) The court therefore declined to allow the states' inaction to frustrate the legislative objective that TMDLs be established promptly, in accordance with the statutory timetable. [\[FN177\]](#) It found that EPA's inaction was "tantamount to approval of state decisions that TMDL's are unneeded. State inaction amounting to a refusal to act should not stand in the way of successfully achieving the goals of federal anti-pollution policy." [\[FN178\]](#)

The Scott court's "constructive submission" theory was subsequently endorsed by other courts. A federal district court in Washington State found in 1991 that "[s]ection 303(d) expressly requires the EPA to step into the states' shoes if their TMDL submissions or lists of water quality limited segments are inadequate. It is consistent to conclude that the 'inadequacy' of a submission includes *376 deliberate, silent inaction." [\[FN179\]](#) The court ordered EPA to initiate the process of promulgating TMDLs for Alaska, including all steps necessary to identify the appropriate waterbodies. [\[FN180\]](#) In a subsequent phase of the case, the court found that EPA also had a nondiscretionary duty to ensure the state's compliance with the TMDLs set by EPA or initiate its own process, including a schedule for implementation of the process, if Alaska failed to do so. [\[FN181\]](#) The court ordered EPA to review Alaska's revised list and priority ranking of water quality limited segments and either approve or disapprove it. [\[FN182\]](#) If EPA disapproved the list, it would have to promulgate its own list and priority ranking. [\[FN183\]](#) In addition, EPA was ordered to establish a proposed schedule for the establishment of TMDLs for all waters designated as water quality impaired; submit a report on ambient water quality monitoring; and propose a schedule for implementation of measures identified in the report as "appropriate and practicable." [\[FN184\]](#) On appeal, the Ninth Circuit affirmed, rejecting the charge that the district court exceeded its remedial powers and concluding instead that it "acted with great restraint in requiring only that steps undeniably necessary to the development of TMDLs in Alaska be accomplished by deadlines that are far more lenient than those contained within the CWA itself." [\[FN185\]](#)

Not all courts have bought into the "constructive submission" doctrine. A federal district court in New York concluded that the CWA does not expressly require EPA to deem state inaction a "constructive submission" by any particular date. Because the statute does not provide a particular date by which EPA must intervene, "EPA has at least some discretion to determine at what point it is *377 appropriate to deem state inaction a 'constructive submission' meriting intervention." [\[FN186\]](#) Accordingly, the court held that it lacked subject matter jurisdiction over a suit by environmental groups to force EPA to establish TMDLs after nineteen years of inaction by New York. [\[FN187\]](#)

Even among those courts that have accepted the doctrine, some have construed it narrowly. In *Hayes v. Whitman*, [\[FN188\]](#) for example, Oklahoma submitted and EPA approved a small number of TMDLs and a schedule to develop more. [\[FN189\]](#) Plaintiffs (individuals who used the state's waters and groups that advocated protecting water quality in the state) did not attack the validity of EPA's approval of those TMDLs. They alleged instead that the state's failure to develop TMDLs for most of the impaired water bodies in the state was so deficient as to amount to a "constructive submission" of no TMDLs, triggering EPA's duty to develop the TMDLs itself. [\[FN190\]](#) The Tenth Circuit found that the "constructive submission" doctrine was "not designed to challenge the timeliness or adequacy of the state's TMDL submissions, which involve discretionary (rather than nondiscretionary) duties of the EPA." [\[FN191\]](#) Characterizing the "constructive submission" doctrine as "necessarily a narrow one," the court limited it to situations in which the state clearly and unambiguously decides to submit no TMDLs for a particular body of water. [\[FN192\]](#) The doctrine did not apply in *Hayes* because the state had submitted a number of TMDLs and was making progress toward completing others. [\[FN193\]](#) The court held that the district court lacked jurisdiction under the CWA's citizen suit provision because the plaintiffs could point to no nondiscretionary duty with which EPA had failed to comply. [\[FN194\]](#)

More recently, the Ninth Circuit agreed with the reasoning in *Hayes* that a state's submission of some TMDLs precludes a finding that the state has clearly decided not to

submit TMDLs. [\[FN195\]](#) California made several submissions that listed water quality limited segments, but none contained TMDLs. [\[FN196\]](#) The plaintiff argued that section 303(d)(2) requires that a TMDL be submitted simultaneously with every submission of those segments, and that the state's failure to submit TMDLs with its segments list constituted a "constructive submission" of no TMDLs that triggered a nondiscretionary duty on EPA's part to act. [\[FN197\]](#) The court **378* rejected the argument, deferring instead to EPA's view that the statute does not require simultaneous submission. [\[FN198\]](#) It therefore found that EPA's duty to establish TMDLs for the state had not been triggered through either "constructive submission" or actual submissions that did not list TMDLs. [\[FN199\]](#) Thus, the Ninth Circuit affirmed the district court's dismissal. [\[FN200\]](#) This recent narrowing of the "constructive submission" doctrine [\[FN201\]](#) has led Professor James May to despair that [t]he standard for ordering EPA to comply [with its obligation to issue TMDLs for a state that has failed to do so] is nearly insurmountable, requiring both (1) an explicit refusal by a state to take any TMDL action, and (2) unreasonable EPA delay in declaring such refusal a "constructive submission" of no TMDLs. Not surprisingly, no state is so bold as to declare the intent to refuse to participate in the TMDL program, and EPA has many reasons for delay. Thus, despite the hype, the constructive submission doctrine and related theories appear moribund. [\[FN202\]](#) Even if the narrowing of the "constructive submission" doctrine severely undercuts the utility of future agency-forcing citizen suits to require EPA to establish TMDLs, [\[FN203\]](#) the TMDL citizen suits have already served as an important break on agency footdragging. EPA's website currently lists twenty-two states in which EPA is under court order or has agreed in a consent decree to establish TMDLs if states do not do so. [\[FN204\]](#)

Moreover, the CWA's citizen suit provision has served as the vehicle for forcing EPA to take a series of other steps to implement the water quality standard provisions of the CWA. Courts have issued orders in citizen suits requiring EPA to issue water quality standards after it disapproved a state's standards [\[FN205\]](#) and to issue water quality standards for a state that had refused to comply with EPA's antidegradation policy. [\[FN206\]](#) Another court held that the district court improperly dismissed for lack of jurisdiction a citizen suit seeking to force **379* EPA to review a state statute to determine whether it amounted to revision in the state's water quality standards. [\[FN207\]](#) Citizen suits also have been the vehicle for efforts to force EPA to redress deficiencies in state permitting programs under the CWA. [\[FN208\]](#)

2. Other Examples of Agency-Forcing Suits Following State Inaction

The CWA is not the only environmental statute whose citizen suit provision has assisted environmental groups in compelling EPA to act following a state's inactivity or deficient activity. Courts have found, for example, that EPA had nondiscretionary duties under the CAA to determine whether SIPs complied with the statute; [\[FN209\]](#) to establish a date for its revision of an SIP that EPA found inadequate; [\[FN210\]](#) and to issue federal regulations to address deficiencies in a state's SIP. [\[FN211\]](#) In response to a recent citizen suit, EPA forced Louisiana to change rules contained in its SIP that provided tradeable credits for voluntary emissions reductions already mandated by federal and state law. [\[FN212\]](#)

3. National Emission Standards for Hazardous Air Pollutants

Another context in which citizen suits have prompted accelerated action by EPA under the CAA relates to the implementation of the pre-1990 version of section 112, which authorizes EPA to establish national emission standards for hazardous air pollutants (NESHAPs). [\[FN213\]](#) EPA was "extreme[ly] reluctant" to invoke that provision of the statute [\[FN214\]](#) because of its prohibition on consideration **380* of the cost or technological feasibility of regulation. [\[FN215\]](#) EPA issued only seven regulations under the pre-1990 version of section 112, despite the existence of hundreds of substances that may have qualified as hazardous air pollutants. [\[FN216\]](#) Much of what little EPA did

do was prompted by citizen suits against it. In *New York v. Gorsuch*, [\[FN217\]](#) the state of New York sued EPA under the CAA's citizen suit provision seeking a declaration that EPA had failed to perform a nondiscretionary duty by failing to issue proposed NESHAPs for inorganic arsenic, more than two years after listing it as a hazardous air pollutant. [\[FN218\]](#) Pursuant to a consent order, the court found the EPA had violated its duty under section 112. [\[FN219\]](#) The state then sought an order enforcing the statutory timetable. [\[FN220\]](#) EPA argued that it needed more time to study the problem, but the court found this to be an insufficient excuse for further delay. [\[FN221\]](#) The statute's purposes and legislative history revealed a congressional desire for prompt regulation and control of hazardous air pollution. [\[FN222\]](#) By imposing deadlines for EPA to regulate, Congress decided "that prompt, though imprecise, regulations were preferable to no regulations during the period while further studies were being conducted to provide the Administrator with more complete information." [\[FN223\]](#) The court regarded it as "unseemly" for EPA to assert that the CAA vested it with the discretion to balance the need for prompt regulation ^{*381} against the need for informed standards. [\[FN224\]](#) Congress had already struck the balance by establishing definite time limits for regulatory action. In short,

[i]f Congress wanted to leave the Administrator with the flexibility to implement regulation based upon her own judgment of the most desirable time schedule, it obviously knew how to do so. Clearly, however, it did not. It is, therefore, incumbent upon the Administrator to establish promptly some guidelines, however general, for the regulation of inorganic arsenic emissions. [\[FN225\]](#)

The court ordered EPA to issue proposed regulations within six months. [\[FN226\]](#) EPA later withdrew its proposed standards due to inadequate scientific justification. [\[FN227\]](#) Similarly, in an earlier case in California, environmental groups brought a citizen suit alleging that EPA failed to perform its duty to establish NESHAPs for radionuclides. [\[FN228\]](#) EPA had already listed radionuclides as a hazardous air pollutant, but had failed to issue proposed standards for that pollutant in accordance with the statutory deadline. [\[FN229\]](#) The court had already ruled that EPA failed to perform its nondiscretionary duty to issue proposed standards and requested that EPA propose a schedule for compliance. [\[FN230\]](#) EPA proposed that it be given another seven years to comply. [\[FN231\]](#) Despite acknowledging the existence of its equitable power to extend the time for compliance with statutory deadlines based on infeasibility, the court refused to exercise that power on EPA's behalf. "Certainly," the court said, "if the EPA had sufficient knowledge to justify listing radionuclides as 'hazardous' in 1979, it should have enough knowledge two and one-half years thereafter to at least issue proposed tentative regulations which can be revised from time to time." [\[FN232\]](#) No one would claim that the health-based version of section 112 of the CAA was a smashing success. If not for the initiatives of the environmental groups that filed agency-forcing suits under the CAA's citizen suit provision, that program would have been even more of a dead letter than it was. [\[FN233\]](#)

^{*382} E. The Hidden Impact of Agency-Forcing Citizen Suits

The reported cases handed down in citizen suits, brought to force agencies such as EPA and the Interior Department to perform nondiscretionary duties, tell only a part of the story of the impact of such suits. The federal agencies that become defendants in such suits regularly settle them by agreeing to take the action sought by the citizen suit plaintiffs or some alternative action deemed acceptable to them. Some of these settlements are accompanied by a great degree of fanfare and become matters of widespread knowledge. The Flannery consent decree requiring EPA to issue technology-based standards for toxic pollutants under the CWA is a good example. [\[FN234\]](#) In other instances, citizen suit settlements are referred to in subsequent reported cases. A case in which a group of irrigation districts sought to invalidate EPA rules requiring a reduction in air pollution from a power plant located near the Grand Canyon is one example. [\[FN235\]](#) The case referred to a citizen suit settlement in which EPA had to review CAA SIPs for deficiencies and issue federal implementation plans providing

protection against visibility impairment for states failing to cure identified deficiencies. [\[FN236\]](#) Agencies such as EPA often publish notices of citizen suit settlements in the Federal Register. [\[FN237\]](#) Even if these settlements are not as highly visible as settlements that appear or are referred to in reported cases, they also can have appreciable impacts such as expanding or accelerating existing regulatory programs. Even less visible are the actions taken by agencies such as EPA to avoid impending, threatened, or anticipated citizen suits. As one observer has remarked, the mere threat of [an ESA] section 9 prosecution is a very intimidating thing. And so even though the cases themselves have not been brought, just the mere existence ^{*383} of that threat and the fact that there's a citizen suit provision, which can allow third parties to enjoin the Secretary to try and force him to enforce section 9, has been a very intimidating feature of the act, and it's one reason why perhaps it's had an effect above and beyond just the number of cases that have actually been brought. [\[FN238\]](#) The citizen suit provisions of other environmental protection statutes undoubtedly have had a similar impact on the implementing agencies.

III. The Benefits and Adverse Effects of Agency-Forcing Citizen Suits

A. The Justifications for Agency-Forcing Citizen Suits

Agency-forcing suits can be justified as a mechanism for enhancing agency accountability, increasing opportunities for citizen participation in the policymaking process, and inducing agencies to overcome political obstacles to regulate. [\[FN239\]](#) Professors Stewart and Sunstein have asserted that private initiation rights are justifiable "as a means of filling the gaps that have arisen between the traditional system of electoral representation and the present reality of bureaucratic regulation." [\[FN240\]](#) Agency-forcing citizen suits and other forms of private initiation rights provide a means of mitigating the tendency toward agency capture. [\[FN241\]](#) Professors Barry Boyer and Errol Meidinger, in a seminal study during the 1980s of citizen suits, pointed out that citizen suit provisions were first enacted by Congress during a period when "capture" theories dominated scholarly and popular thought about regulation. Agencies were regarded as unduly sympathetic to the interests of the regulated industries for a variety of reasons, including the belief that there was often a serious imbalance of the interests represented in agency decision making. . . . The general answer to this imbalance of representation was the creation of greater rights and opportunities for public participation in administrative decisions. . . . The citizen ^{*384} suit, which gives the public a right to be heard . . . is a logical outgrowth of this public participation movement. [\[FN242\]](#) The citizen suit provisions generally, and the action-forcing component in particular, benefitted pro-regulatory forces because "agencies have always had strong incentives to listen to regulated firms. . . . Expansion of public participation [through citizen suits and other mechanisms] thus enfranchises parties who traditionally could claim no constitutional right to process and thus had no natural leverage in the process." [\[FN243\]](#) By making the courts, the branch of government most insulated from political influence, available at the behest of regulatory beneficiaries to force recalcitrant agencies to perform their statutory duties, adoption of private initiation rights such as agency-forcing citizen suits could counterbalance domination of legislative and executive branches by powerful interest groups. [\[FN244\]](#) In the introduction to Joseph Sax's book, *Defenders of the Environment: A Strategy for Citizen Action*, Senator George McGovern remarked that "[t]he powerlessness of people to participate effectively in the institutional decisions that affect their lives marks the end of a true democratic society." [\[FN245\]](#) Professor Sax argued that litigation "is in many circumstances the only tool for genuine citizen participation in the operative process of government." [\[FN246\]](#) Citizen suits, by providing a new forum for public input into the environmental decisionmaking process, would enhance such participation. [\[FN247\]](#) Thus, key legislators such as Senators Muskie and Gary Hart saw citizen initiation of agency-forcing suits under the CAA as a way for public participation in the

administrative process not only to address the problem of agency capture, but also to check economic ^{*385} incentives to ignore breaches of the environmental laws. [\[FN248\]](#) Similarly, the legislative history of the 1972 CWA indicates that Congress envisioned agency-forcing suits as a device for "expand[ing] public participation in the regulatory process through the use of citizen suits. . . . [T]he history of the 1972 Amendments stresses encouragement of public participation in the implementation of the new water pollution controls." [\[FN249\]](#)

Finally, citizen suits are a means of inducing agencies to take actions that would otherwise be politically difficult or impossible. As Professor Holly Doremus has pointed out,

The most enduring and effective statutory constraint on the agencies' ability to exploit their discretion [under the ESA] to reduce species protections is the citizen suit device. . . . Citizen suits can force agencies . . . to comply with the terms of a statute in situations where political forces would permit the government to turn a blind eye. Furthermore, they can provide political cover, allowing agencies to deflect responsibility for controversial decisions or strong statutory interpretations. . . . [\[FN250\]](#) Officials at EPA have confirmed the view "that action-forcing suits can sometimes serve a useful function in breaking bureaucratic logjams and forcing the agency to make hard decisions. As one official described the process: '[I]t is very hard to get [the program office] to move on a regulation unless there is a court deadline.'" [\[FN251\]](#) Similarly, court deadlines resulting from agency-forcing citizen suits and similar private rights of initiation can put pressure on other executive officials like the Office of Management and Budget with authority to review agency regulations before they are promulgated. [\[FN252\]](#)

B. The Potential Disadvantages of Agency-Forcing Citizen Suits

Although agency-forcing citizen suits serve the useful function of increasing the accountability of administrative agencies by providing a check on their susceptibility to the influence of political forces aligned with the regulated community, they are not without their costs. Private initiation mechanisms such as agency-forcing citizen suits can interfere with agency autonomy and permit courts to encroach onto legislative and executive prerogatives. [\[FN253\]](#) According to Professor Mark Seidenfeld:

^{*386} Statutory action-forcing mechanisms meant to coerce agencies to deliver [on congressional] promises, such as deadlines for adopting regulations and citizen suit provisions, leave agency agendas vulnerable to efforts by particular interest groups that may not have the public interest at heart. Thus the EPA, for example, often finds itself prioritizing its regulatory programs based on pressures from members of Congress, whose constituents may have a peculiar environmental concern, or lawsuits by environmental groups that also have their unique peeves, rather than according to objective assessments of which regulations are likely to provide the greatest benefit. [\[FN254\]](#)

Successful agency-forcing suits can result in a skewing of agency priorities. An agency required to take action pursuant to court order may find itself unable to direct its attention to problems that the agency deems more significant. [\[FN255\]](#) The result, in the opinion of at least one observer, is the likelihood of misallocation of agency resources. "To the extent that deadlines induce an agency to forgo dealing with such previously unanticipated, and potentially more important problems, regulatory resources are misallocated and social welfare is diminished." [\[FN256\]](#) The necessity of responding to judicial decrees issued at the behest of regulatory beneficiaries in citizen suits may preclude agency planning, or at least hinder agencies from implementing their plans. [\[FN257\]](#)

Professors Stewart and Ackerman suggest that, [w]hile agency inaction is . . . a serious problem . . . the reliance on 'action-forcing' through litigation may well be a cure worse than the disease. Such a strategy invites a 'pollutant of the month' approach to priority-setting. There is no assurance that the initiatives selected by different environmental groups will result in a sensible allocation of limited administrative and compliance resources. [\[FN258\]](#)

Incremental citizen suits make planning difficult and, in the absence of planning, agencies such as EPA, in the words of one expert on public administration, are "reduced to a dedicated yet ineffective group of 'keystone cops' rushing from one crisis to another." [\[FN259\]](#)

*387 Those skeptical of the value of agency-forcing citizen suits also assert that such suits provide opportunities for the judicial branch to encroach on legislative and executive prerogatives. According to Stewart and Sunstein, suits to require agency compliance with statutory duties require courts to compare the benefits of the action sought by the plaintiff with the actions the agency will be precluded from pursuing as a result of the need to commit resources to compliance with the court's order. [\[FN260\]](#) They claim that "[t]he judiciary . . . is poorly equipped to make such an evaluation. For this and other reasons, control over an agency's allocation of resources is traditionally regarded as a legislative or executive rather than a judicial responsibility." [\[FN261\]](#) In short, the skeptics claim, if compliance with court orders generated by agency-forcing citizen suits becomes a top priority, the result may be that congressional mandates are overtaken and representative democracy is threatened. [\[FN262\]](#) Thus, some have argued that, instead of promoting democratic values, agency-forcing citizen suits have the potential to undermine them.

C. Accountability v. Autonomy

The citizen suit provisions of the federal environmental laws, by compelling compliance with nondiscretionary statutory duties, have played a hand in forcing agencies to create new regulatory programs, shift the focus of or expand the scope of existing regulatory programs, and speed up the pace of statutory implementation. By publicizing agency inactivity in the face of statutory command and by requiring agencies to hew more closely to statutory directives, *388 judgments in citizen suits have undoubtedly bolstered agency accountability. At the same time, the issuance of court decrees forcing agencies to take actions they had resisted taking has infringed on agency autonomy. In some cases, this judicial action has resulted in the diversion of agency resources from tasks the agency considered more serious to those it deemed not worthy of current regulatory attention. On balance, do the accountability gains that stem from private rights of initiation such as citizen suits justify the losses attendant upon the interference with agency autonomy that stems from such successful initiatives?

The federal statutory citizen suit provisions all require that the targeted agencies comply with nondiscretionary statutory duties. In this context, the policy of promoting accountability should trump the desire to preserve agency autonomy. Congress made the choice when it included an agency-forcing component in the citizen suit provision of the CAA in 1970, and it subsequently confirmed that choice in other statutory contexts, to sacrifice autonomy to accountability, given the fear that agencies would ignore or subvert statutory goals absent the availability of outside pressure to force them to comply with their statutory obligations. [\[FN263\]](#) The citizen suit provisions originated at a time when the fear of capture made policymakers skeptical of the ability of agency decision-makers to resist adopting the mind set and the objectives of the entities they were charged with regulating. [\[FN264\]](#) Agency-forcing citizen suits provided a means of mitigating those tendencies.

It remains particularly important to promote accountability when agency regulators are perceived as being hostile to the goals of the regulatory schemes they are charged with implementing. [\[FN265\]](#) Under those circumstances, the availability of citizen suits to force the performance of nondiscretionary duties fosters the legitimacy of the regulatory program. It does so by providing an outlet for citizens who are convinced that the agency is undermining statutory objectives through inaction to air those concerns before an independent decisionmaker, the federal judiciary, with the authority to rein in unlawful agency behavior.

Moreover, the accountability gains produced by citizen suits come at the expense of a relatively small degree of infringement on agency autonomy. The infringement on autonomy that results from agency-forcing citizen suits is limited *389 in that it occurs

only when agencies fail to perform nondiscretionary duties. By definition, those situations involve statutory provisions that have already divested agencies of their autonomy. So the agency interest in preserving autonomy is minimal to non-existent in this context. If disgruntled environmental groups, regulated industries, or other interested parties want to challenge an agency's discretionary decisions, they will be relegated to suing to seek review of the propriety of those decisions. Judicial review will tend to be deferential under the typically applicable "arbitrary and capricious" test.

[\[FN266\]](#)

The infringement on agency autonomy that is the inevitable consequence of citizen suits to force the performance of nondiscretionary duties should not be cause for undue concern for another reason. Courts are often cognizant of the burdens that their orders place on agency resources, and they often fashion compliance timetables in accordance with agency suggestions. They tend to be pragmatic in this regard. [\[FN267\]](#) In a CWA case in which the court contemplated ordering EPA to issue effluent limitation guidelines, for example, the court took cognizance of two types of constraints on the agency's ability to produce those guidelines by the deadline set forth in the statute. [\[FN268\]](#) First, the budgetary commitments and manpower demands required to complete the task by the applicable deadline might "unduly jeopardize the implementation of other essential programs." [\[FN269\]](#) Second, EPA might be unable to generate the information and analysis necessary to finish the assigned task. Taking these factors into account, the court cautioned as follows:

The courts cannot responsibly mandate flat guideline deadlines when the Administrator demonstrates that additional time is necessary to insure that the guidelines are rooted in an understanding of the relative merits of available control technologies. The delay required to give meaningful consideration to the technical intricacies of promising control mechanisms may well speed achievement of the goal of pollution abatement by obviating the need for time-consuming corrective measures at a later date. [\[FN270\]](#)

The court added that if resource or methodological constraints threatened to delay action beyond the deadline, the agency would have the opportunity to request an extension of time from the district court. [\[FN271\]](#) The task of the court would be to "separate justifications grounded in the purposes of the Act from the *390 footdragging efforts of a delinquent agency." [\[FN272\]](#) The court could decline to hold the agency to the deadline if it were "convinced by the official involved that he has in good faith employed the utmost diligence in discharging his statutory responsibilities. The sound discretion of an equity court does not embrace enforcement through contempt of a party's duty to comply with an order that calls him 'to do an impossibility.'" [\[FN273\]](#)

Another court . . . recognized that because "the public interest would be ill-served by unworkable . . . regulations which would not survive judicial review, it would be inappropriate to set an infeasible schedule in order to punish a delinquent agency."

[\[FN274\]](#)

There may be situations in which, despite judicial willingness to accommodate agency resource constraints, the courts are not capable of effectively relieving an agency of the burdens attributable to the obligation to comply with a series of statutory deadlines. Multiple court orders requiring compliance with a series of statutory deadlines might wreak havoc with an agency's efforts to prioritize its regulatory agenda. The problem in such a situation is not so much the fault of the availability of agency-forcing citizen suits, however, as it is Congress's decision to impose too many deadlines at once or to make available to the agency insufficient resources to implement its statutory responsibilities. The solution should not take the form of the elimination of agency-forcing remedies. Instead, Congress should either enact statutory revisions to transform nondiscretionary to discretionary duties (if it is more concerned with restoring autonomy than preserving accountability) or appropriate additional money to finance the agency's operations (if it deems preservation of accountability more important than protection of agency autonomy in the particular context).

I am not aware of much empirical work that has been done to measure the comparative accountability gains and autonomy losses of agency-forcing citizen suits. An early,

landmark study of citizen suits, however, failed to "uncover any serious concerns" that agency-forcing suits had adverse effects on the quality of agency decisions. "Rather, the suits seem to function as a partial antidote to the familiar bureaucratic inertia summarized in the maxim [that] 'It will all get done eventually.'" [\[FN275\]](#) Another study in the 1980s determined that EPA did not sacrifice quality of workmanship to meet statutory deadlines. [\[FN276\]](#)

**391* The concern that agency-forcing citizen suits invite courts to encroach on legislative and executive prerogatives is likewise largely unfounded. Congress has authorized courts to entertain citizen suits. Agencies only have authority delegated to them by Congress, within constraints laid down by Congress. Thus, in entertaining and deciding citizen suits, the courts are only exercising the legitimate role envisioned for them by Congress. Furthermore, a failure by the courts to enforce nondiscretionary duties could amount to an encroachment of either the executive branch or the courts upon legislative prerogatives.

The citizen suits seeking to force EPA to develop national emissions standards for hazardous air pollutants under the CAA are illustrative. A federal district court in New York took cognizance of the potential for the denial of relief in an agency-forcing citizen suit to result in executive branch infringement on legislative prerogatives. [\[FN277\]](#) The court asserted that allowing EPA to ignore its duty to comply with statutory deadlines "would be to grant [the Administrator] unbridled discretion to administer the Clean Air Act according to her own time schedule, regardless of specific congressional directions to the contrary." [\[FN278\]](#) EPA's failure to issue the proposed rules required by the statute reflected not impossibility, "but rather a difference in rulemaking philosophy from that evinced by Congress. . . . If the Administrator disagrees with the burden Congress has imposed upon her Agency, her proper recourse is to persuade Congress to amend the statute, not to defy the statute and seek relief from the courts." [\[FN279\]](#)

A federal district court in California was alert to the possibility of judicial encroachment on the legislative domain if the request for an agency-forcing injunction were denied. [\[FN280\]](#) EPA argued that it had not met the statutory deadline for regulating, and that it should not be subjected to a judicial timetable for doing so, because it lacked the necessary resources and information to regulate. [\[FN281\]](#) The court found that "EPA has not met its heavy burden of demonstrating that it would be infeasible or impossible to issue the proposed regulations" within the six-month schedule proposed by the plaintiffs. [\[FN282\]](#) In addition,

**392* To accept EPA's proposal for further, indefinite, and virtually open-ended extension of the time for compliance, without a more convincing demonstration of evident impossibility, would be to, in effect, repeal the Congressional mandate. Further, to substitute the Court for making scientific determinations for which the Court has neither the investigative tools, nor expertise, and, further, to grant an extension such as required by the EPA, would involve the Court, rather than Congress, in changing, qualifying or amending, if advisably, the unqualified, mandatory provisions of [the statute]. Such relief, as sought by EPA should come from the Congress - not from the Courts. [\[FN283\]](#)

Courts, then, are not improperly invading the realm of legislative power when they issue injunctions requiring agencies to conform to statutory duties. They are instead performing a task delegated to them by Congress. In doing so, they are ensuring that agencies operate within the constraints imposed upon them in their authorizing legislation, much as they do when they review the substance of discretionary agency decisions to determine whether those actions constitute an abuse of discretion or otherwise exceed the scope of delegated authority.

Conclusion

Citizen suits to force agencies to comply with nondiscretionary duties have made a significant contribution to the implementation of those federal environmental statutes that authorize private entities to seek such relief. Agency-forcing citizen suits spurred the creation in the early 1970s of at least one significant CAA new regulatory program. They

also assisted later that decade in engineering a shift in focus away from a CWA regulatory program that had not worked well because of the difficulty of promulgating health-based pollution controls to a more easily implemented technology-based program. Subsequent legislation codifying the results of these endeavors indicates that Congress recognized the value in the decrees generated by these citizen suits. More commonly, throughout the thirty plus-year period since the adoption of the first federal environmental citizen suit provision, agency-forcing suits have prevented regulatory programs that agencies were slow to implement from languishing indefinitely in the face of statutory deadlines that reflected a congressional sense of urgency. Agency-forcing citizen suits have undoubtedly in some cases disrupted the ability of agencies such as EPA or the Interior Department to set their own agenda and allocate their limited resources in accordance with the agencies' own priorities. That loss of independence is an acceptable cost, however, of providing a mechanism by which the courts can oversee agency performance of decisions over which the agencies, by congressional design, have been granted little room to maneuver. Congress imposes nondiscretionary duties on agencies precisely because it is the sense of the legislature that agencies cannot ³⁹³ be trusted, whether because of the susceptibility of agencies to capture or the presence of other political obstacles to regulation, [\[FN284\]](#) to set their own agenda or otherwise exercise their discretion in a manner consistent with legislative policy. [\[FN285\]](#)

The role of citizen initiatives in preventing agencies with environmental protection responsibilities from frustrating statutory policies will probably continue to be an important one. As Oliver Houck has predicted, "[t]he likely role [of citizen suits] in the foreseeable future is for environmental groups to keep the process [of statutory implementation] moving at a pace that is plainly uncomfortable to EPA, the states, and the regulated community." [\[FN286\]](#) The continuing vigor of the agency-forcing citizen suit is reflected in recent reports that environmental groups have either filed or planned to file CAA citizen suits to force EPA to issue air quality criteria and promulgate revised national ambient air quality standards for particulate matter and ozone [\[FN287\]](#) and to regulate greenhouse gases emitted from mobile sources. [\[FN288\]](#) In addition, a group of states from the northeast reportedly planned to sue to force EPA to regulate carbon dioxide emissions from power plants. [\[FN289\]](#) Unless Congress eliminates this aspect of citizen suit litigation, or the courts significantly diminish its utility by narrowly construing the rules governing standing to sue, there is little reason to believe that private citizens bringing agency-forcing suits will not continue to assist Congress in holding agencies accountable to statutory mandates.

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[\[FN1\]](#). [16 U.S.C. § 1540\(g\) \(2000\)](#).

[\[FN2\]](#). These can be individuals, public interest groups, or regulated entities such as corporations. See, e.g., [16 U.S.C. § 1532 \(13\) \(2000\)](#).

[\[FN3\]](#). See, e.g., [16 U.S.C. § 1540\(g\) \(2000\)](#).

[\[FN4\]](#). The term "agency-forcing" citizen suits is used by, among others, Professor Frank Cross. Frank B. Cross, [Rethinking Environmental Citizen Suits](#), 8 *Temp. Env'tl. L. & Tech. J.* 55 (1989). Other authors have referred to these citizen suits as "bureaucracy-forcing," see John E. Bonine & Thomas O. McGarity, *The Law of Environmental Protection: Cases - Legislation - Policies* 787, 789 (2d ed. 1992), or as "action-forcing." See, e.g., Bruce A. Ackerman & Richard B. Stewart, [Reforming Environmental Law](#), 37 *Stan. L. Rev.* 1333, 1360 n.61 (1985); Barry Boyer & Errol Meidinger, [Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Sual Environmental Laws](#), 34 *Buff. L. Rev.* 833, 848.

[863 n.71 \(1985\)](#).

[FN5]. Richard B. Stewart & Cass R. Sunstein, [Public Programs and Private Rights](#), 95 [Harv. L. Rev.](#) 1193, 1197 (1982).

[FN6]. *Id.*

[FN7]. *Id.* at 1219 n.100.

[FN8]. The current version of this provision appears at [42 U.S.C. § 7604 \(2000\)](#).

[FN9]. *Id.* at [§ 7604\(a\)](#).

[FN10]. [Natural Res. Def. Council, Inc. v. EPA](#), 512 F.2d 1351, 1355 (D.C. Cir. 1975).

[FN11]. S. Rep. No. 91-1196, at 36 (1970).

[FN12]. *Id.* at 38-39.

[FN13]. 1 Comm. on Pub. Works, A Legislative History of the Clean Air Amendments of 1970, at 351 (1974) [hereinafter 1970 Legislative History] (remarks of Sen. Muskie).

[FN14]. See Daniel P. Selmi, [Jurisdiction to Review Agency Inaction Under Federal Environmental Law](#), 72 [Ind. L.J.](#) 65, 104 (1996).

[FN15]. *Id.* "A floor sponsor of the bill indicated that suits brought against the Administrator are limited to actions in which the plaintiff alleges that the Administrator 'fail[ed] . . . to perform mandatory duties imposed by statute.'" *Id.* (quoting 116 Cong. Rec. 42,393 (1970) (statement of Rep. Spong), reprinted in 1970 Legislative History, at 147) (alterations in original). See also H.R. Rep. No. 91-1783, at 56 (1970), reprinted in 1970 U.S.C.C.A.N. 5356, 5388 (noting the conference substitute limited citizen suits against the Administrator "to alleged failure to perform mandatory functions to be performed by him").

[FN16]. [Kennecott Copper Corp. v. Costle](#), 572 F.2d 1349, 1353 (9th Cir. 1978).

[FN17]. Selmi, *supra* note 14, at 105. See also [Natural Res. Def. Council, Inc. v. Train](#), 510 F.2d 692, 699 (D.C. Cir. 1975) ("The citizen suit provision of section 505 was explicitly 'modeled on the provision enacted in the Clean Air Amendments of 1970.'" (quoting [S. Rep. No. 92-414, at 79 \(1971\)](#)). The current version of the CWA's citizen suit provision is at [33 U.S.C. § 1365 \(2000\)](#).

[FN18]. Selmi, *supra* note 14, at 105.

[FN19]. E.g., [Conservation Law Found., Inc. v. Browner](#), 840 F. Supp. 171, 177 n.11 (D. Mass. 1993) (stating that the citizen suit provision of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) was also modeled on the CAA provision).

[FN20]. Reuel E. Schiller, [Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945-1970](#), 53 [Vand. L. Rev.](#) 1389, 1450 (2000). The complete list of the fourteen statutes, including the CWA, can be found at Cass R. Sunstein, [What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III](#), 91 [Mich. L. Rev.](#) 163, 165 n.11 (1992). See also William H. Timbers & David A. Wirth, [Private Rights of Action and Judicial Review in Federal Environmental Law](#), 70 [Cornell L. Rev.](#) 403, 405 n.8 (1985).

[FN21]. 4 William H. Rodgers, Jr., *Environmental Law: Hazardous Wastes and Substances* § 7.6, at 18 (1992).

[FN22]. See, e.g., 1 William H. Rodgers, Jr., *Environmental Law: Air and Water* § 3.4, at 223 (1986) ("Sorting out the nondiscretionary obligations of the Administrator [under section 304 of the CAA] that may be enforced by citizen suits is another difficult judicial task."); 2 William H. Rodgers, Jr., *Environmental Law: Air and Water* § 4.5, at 71 (1986) ("Distinguishing obligatory official duties answerable to citizen suits from protected islands of discretionary choice presents one of the more delightful conundrums of the law."). One reason that the nondiscretionary duty cases tend to be difficult to categorize "is that these lawsuits, especially those charging open-and-shut violations of statutory deadlines, usually are settled by consent orders that are not published in the usual reporters." Rodgers, *supra* note 21, § 7.6, at 18.

[FN23]. [Env'tl. Def. Fund v. Thomas, 870 F.2d 892, 899 \(2d Cir. 1989\)](#), cert. denied, [493 U.S. 991 \(1989\)](#).

[FN24]. 2 Rodgers, *supra* note 22, § 4.5, at 72. See also [Sierra Club v. Thomas, 828 F.2d 783, 791 \(D.C. Cir. 1987\)](#).

In order to impose a clear-cut nondiscretionary duty, we believe that a duty of timeliness must 'categorically mandat[e]' that all specified action be taken by a date-certain deadline. In such circumstances, the only question for the district court to answer is whether the agency failed to comply with that deadline. *Id.* at 791 (alteration in original).

[FN25]. [Thomas, 828 F.2d at 790](#). When no deadline can be readily ascertained from the statute, a litigant may nevertheless be able to seek judicial review by claiming unreasonable delay on the agency's part. See [5 U.S.C. § 706\(1\) \(2000\)](#). At least in the D.C. Circuit, such a case will be governed by the test for unreasonable delay set forth in [Telecommunications Research & Action Ctr. v. FCC, 750 F.2d 70 \(D.C. Cir. 1984\)](#). See [In re United Mine Workers of Am. Int'l Union, 190 F.3d 545, 549 \(D.C. Cir. 1999\)](#) (action seeking writ of mandamus to compel Mine Safety and Health Administration (MSHA) to take action, by issuing regulations controlling exhaust from diesel engines in coal mines, that was unreasonably delayed); [Oil, Chem. & Atomic Workers Int'l Union v. Zegeer, 768 F.2d 1480, 1483 \(D.C. Cir. 1985\)](#) (suit alleging unreasonable delay in response by MSHA to petition to promulgate emergency temporary standard for exposure of miners to radon). See also [Pub. Citizen Health Research Group v. Chao, 314 F.3d 143, 159 \(3rd Cir. 2002\)](#) (finding that OSHA engaged in unreasonable delay in failing to adopt workplace exposure limit for hexavalent chromium); [Pub. Citizen Health Research Group v. Comm'r, FDA, 740 F.2d 21, 35 \(D.C. Cir. 1984\)](#) (listing factors for issuing mandamus order to mandate action unreasonably delayed). Environmental groups have brought unreasonable delay claims against the federal land management agencies. These agencies are governed by statutes that, except for the ESA, lack citizen suit provisions. See, e.g., [Mont. Wilderness Ass'n v. United States Forest Serv., 314 F.3d 1146, 1151 \(9th Cir. 2003\)](#) (finding that the Forest Service has a nondiscretionary duty to protect wilderness study areas under the Montana [Wilderness Study Act](#)); [S. Utah Wilderness Alliance v. Norton, 301 F.3d 1217, 1233 \(10th Cir. 2002\)](#) (holding that the Bureau of Land Management had a nondiscretionary duty to prevent impairment of wilderness study areas and remanding to district court to determine whether the agency violated that duty), cert. granted, [124 S.Ct. 462 \(2003\)](#); [Forest Guardians v. Babbitt, 174 F.3d 1178, 1193 \(10th Cir. 1999\)](#) (compelling FWS to designate critical habitat for silvery minnow); [Nat'l Wildlife Fed'n v. Cosgriffe, 21 F. Supp. 2d 1211, 1218-19 \(D. Or. 1998\)](#) (ordering the Bureau of Land Management to prepare a comprehensive management plan under the Wild and Scenic Rivers Act). Cf. [Raymond Proffitt Found. v. United States Army Corps of Eng'rs, 128 F. Supp. 2d 762, 770 \(E.D. Pa. 2000\)](#) (finding that the Army Corps of

Engineers has a nondiscretionary duty under the Water Resources Development Act "to include environmental protection as one of its primary missions in operating and maintaining water resources projects").

[FN26]. See, e.g., [Kennecott Copper Corp. v. Costle](#), 572 F.2d 1349, 1354 (9th Cir. 1978) (concluding that EPA had a nondiscretionary duty to make some decision regarding the validity of a revision of a state implementation plan under the CAA but that the agency retained discretion as to the content of that decision); [Nat'l Wildlife Fed'n v. Adamkus](#), 936 F. Supp. 435, 442 (W.D. Mich. 1996) (holding that EPA did not have a nondiscretionary duty to initiate proceedings to withdraw a state's dredge and fill permit program under the CWA).

[FN27]. E.g., [Dubois v. Thomas](#), 820 F.2d 943, 946-47 (8th Cir. 1987) (holding that duties to investigate, make findings, and enforce under the CWA are discretionary); [Kraczek v. Exide Corp.](#), No. CIV. A. 00-CV-1965, 2000 WL 1130088 at *4 (E.D. Pa. Aug. 9, 2000) (dismissing citizen suit to force EPA to require corrective action under Resource Conservation and Recovery Act); [Atl. Terminal Urban Renewal Area Coalition v. New York City Dep't of Env'tl. Prot.](#), 705 F. Supp. 988, 991 (S.D.N.Y. 1989) (finding duty to issue a finding that a violation has occurred to be discretionary with EPA); [Comm. for the Consideration of the Jones Falls Sewage Sys. v. Train](#), 387 F. Supp. 526, 530 (D. Md. 1975) (holding that EPA did not have nondiscretionary duty to resort to emergency enforcement powers under the CWA).

[FN28]. See, e.g., W. Va. [Highlands Conservancy v. Norton](#), 190 F. Supp. 2d 859, 866 (S.D. W. Va. 2002) (finding that court had subject matter jurisdiction under citizen suit provision of the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270(a)(2) (2000), to force the Interior Department to substitute direct federal enforcement over surface coal mining operations and to implement a federal program in lieu of the state program); [Greene v. Costle](#), 577 F. Supp. 1225, 1230 (W.D. Tenn. 1983) (finding EPA had nondiscretionary duty to enforce, although it had discretion as to the method of enforcement); [S.C. Wildlife Fed'n v. Alexander](#), 457 F. Supp. 118, 134 (D.S.C. 1978) (holding that EPA had nondiscretionary duties to make findings concerning alleged CWA violations and issue a compliance order or file a civil action if it finds a violation); [Wis.'s Env'tl. Decade, Inc. v. Wis. Power & Light Co.](#), 395 F. Supp. 313 (W.D. Wis. 1975) (holding that EPA had nondiscretionary duty to issue a notice of violation of CAA state implementation plan to power company).

[FN29]. See, for example, [New York Public Interest Research Group, Inc. v. Whitman](#), 214 F. Supp. 2d 1 (D.D.C. 2002), where the plaintiffs sought an injunction forcing EPA to respond to petitions filed under the CAA in a timely manner. The petitions requested that EPA object to permits issued by states under Title V of the CAA. The plaintiffs alleged that EPA had engaged in a pattern and practice of failing to respond to similar petitions in a timely manner, and they sought an order requiring EPA to take steps to ensure that it would respond to future petitions in accordance with the statutory deadlines. In granting EPA's motion to stay discovery, the court characterized the suit as one for "broad programmatic relief to remedy what [the plaintiffs] perceive to be flaws in the agency's system for responding to petitions." [Id.](#) at 3. That kind of relief was outside the purview of a citizen suit. "In effect, plaintiffs ask this Court to intrude upon the agency's discretionary domain to organize its operations with respect to Title V petitions; however, the Court lacks jurisdiction to provide such a remedy." [Id.](#)

[FN30]. See *infra* Part III.

[FN31]. [344 F. Supp. 253 \(D.D.C. 1972\)](#), *aff'd per curiam* without opinion, 2 Env'tl. L. Rep. 20,656 (D.C. Cir. 1972), *aff'd* by an equally divided Court, [Fri v. Sierra Club](#), 412 U.S. 541 (1973).

[FN32]. The current version is at [42 U.S.C. § 7604 \(2000\)](#).

[FN33]. [Ruckelshaus, 344 F. Supp. at 254](#).

[FN34]. Id.

[FN35]. Id. (quoting 42 U.S.C. § 1857h-2(a)(2) (1970)).

[FN36]. Id.

[FN37]. Id. (quoting 40 C.F.R. § 51.12(b) (1972)).

[FN38]. Id. at 254-55.

[FN39]. That provision is now at [42 U.S.C. § 7401\(b\) \(2000\)](#).

[FN40]. Id.

[FN41]. [344 F. Supp. at 255](#).

[FN42]. [Ruckelshaus, 344 F. Supp. at 256](#).

[FN43]. [Id. at 257](#).

[FN44]. *Sierra Club v. Ruckelshaus*, 2 *Env'tl. L. Rep.* 20,656 (D.C. Cir. 1972).

[FN45]. [Fri v. Sierra Club, 412 U.S. 541 \(1973\)](#).

[FN46]. *Approval and Promulgation of Implementation Plans: Prevention of Significant Air Quality Deterioration*, 38 *Fed. Reg.* 18,986, 18,986 (July 16, 1973).

[FN47]. Id.

[FN48]. That provision is now found at [42 U.S.C. § 7410 \(2000\)](#).

[FN49]. *Prevention of Significant Air Quality Deterioration*, [38 Fed. Reg. at 18,986](#).

[FN50]. Id.

[FN51]. *Approval and Promulgation of Implementation Plans: Prevention of Significant Air Quality Deterioration*, 39 *Fed. Reg.* 42,510 (1974).

[FN52]. The preamble states:

This action [disapproval of all state SIPs insofar as they failed to provide for the prevention of the significant deterioration of air quality] was taken in response to a preliminary injunction issued by the District Court for the District of Columbia, which also required the administrator to promulgate regulations as to any state plan which either permits the significant deterioration of air quality in any portion of any state, or fails to take the measures necessary to prevent such significant deterioration.

Id.

[FN53]. Id.

[FN54]. *Air Quality Implementation Plans: Prevention of Significant Air Quality Deterioration*, 39 *Fed. Reg.* at 42,510.

[\[FN55\]. H.R. Rep. No. 95-294, at 7-8 \(1977\).](#)

[\[FN56\]. 42 U.S.C. §§ 7470-7492 \(2000\).](#)

[\[FN57\]. H.R. Rep. No. 95-294, at 7 \(1977\).](#) Statements on the floor of Congress also indicate that the intent of the amendments was to codify and amplify the district court's decision. See, e.g., 123 Cong. Rec. 18,459 (1977) (statement of Sen. Scott) ("The present bill before us would provide a statutory basis for the court decision [in *Sierra Club v. Ruckelshaus*] and this is what my amendment is addressed to."). See also *id.* at 18,464 (statement of Sen. Muskie) (agreeing that the objectives of the decision in *Sierra Club v. Ruckelshaus* and of the 1977 amendments were the same).

[\[FN58\]. H.R. Rep. No. 95-294, at 152 \(1977\).](#) The Senate Report stated that the amendments "provide[d] the statutory substance to the more general language in section 101(b) of the act, which articulates the concept of the prevention of significant deterioration. The committee intends in this new subsection . . . to completely define the requirements of the [CAA] to prevent significant deterioration." S. Rep. No. 95-127, at 29 (1977).

[\[FN59\].](#) See [Sierra Club v. Thomas, 658 F. Supp. 165, 175 \(N.D. Cal. 1987\)](#). Not all citizen suits seeking to force implementation of the PSD program have resulted in similar success. See, e.g., [Env'tl. Def. Fund, Inc. v. Costle, 448 F. Supp. 89, 95 \(D.D.C. 1978\)](#) (dismissing for lack of subject matter jurisdiction citizen suit to accelerate application of PSD permit program to certain stationary sources of air pollution). EDF claimed that EPA had a nondiscretionary duty to implement the PSD permit program promptly. [Id. at 90.](#) EDF sued under section 304(a)(2) to prevent issuance of permits to facilities not in compliance with the PSD provisions of the statute and to stay construction of a major emitting facility by any party not holding a PSD permit issued since adoption of the 1977 CAA amendments. *Id.* The court decided that the PSD permit program need not be made effective immediately. *Id.* at 94. EPA therefore had the discretion to decide whether to delay its implementation. *Id.* The announcement that compliance with section 165 of the Act, which established the permit program, would not be required retroactively to its date of enactment was discretionary, and the district court therefore lacked jurisdiction. *Id.* at 95.

[\[FN60\].](#) Arnold W. Reitze, Jr., [A Century of Air Pollution Control Law: What's Worked; What's Failed: What Might Work, 21 Env'tl. L. 1549, 1640 n.513 \(1991\)](#) (citing *Natural Res. Def. Council, Inc. v. EPA*, No. 84-3587 (D.D.C. Nov. 27, 1984)).

[\[FN61\].](#) *Id.*

[\[FN62\].](#) *Id.*

[\[FN63\]. 42 U.S.C. §§ 7671-7671q \(2000\).](#)

[\[FN64\]. 33 U.S.C. § 1317 \(2000\).](#)

[\[FN65\].](#) *Id.* § 1311(b).

[\[FN66\].](#) See Robert V. Percival et al., *Environmental Regulation: Law, Science, and Policy* 685 (3d ed. 2000) (stating that "EPA found the task Congress had given it to be hopelessly difficult"). See also John S. Applegate et al., *The Regulation of Toxic Substances and Hazardous Waste* 461-62 (2000) (stating the stringency of the section 307 health-based standards, "while very much intended by Congress, paralyzed EPA because of the lack of needed data and the difficulty of establishing a cause-and-effect

relationship between pollutants and health effects, especially under the procedural burdens that Congress also imposed") (footnote omitted).

[FN67]. See Applegate et al., *supra* note 66, at 462 (referring to frustration by what the environmental groups regarded as "EPA's dithering on toxic water pollutants").

[FN68]. [33 U.S.C. § 1365 \(2000\)](#).

[FN69]. [Env'tl. Def. Fund, Inc. v. Costle, 636 F.2d 1229 \(D.C. Cir. 1980\)](#).

[FN70]. [Id. at 1234](#).

[FN71]. *Id.*

[FN72]. [Natural Res. Def. Council, Inc. v. Train, Civ. A. Nos. 2153-73, 1976 WL 23667 \(D.D.C. June 9, 1976\)](#), modified, 9 *Env'tl. L. Rep.* 20,176 (D.D.C. 1979), *aff'd* and remanded *sub nom.* [Env'tl. Def. Fund, Inc. v. Costle, 636 F.2d 1229 \(D.C. Cir. 1980\)](#).

[FN73]. *Id.*

[FN74]. *Id.* The Supreme Court had held that EPA has the authority to issue technology-based effluent limitations for classes or categories of industrial point sources in [E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112, 127-28 \(1977\)](#).

[FN75]. *Train*, 1976 WL 23667.

[FN76]. *Train*, 1976 WL 23667.

[FN77]. Percival et al., *supra* note 66, at 685. The initial lists were later expanded to cover 126 pollutants discharged by thirty-four industrial categories. *Id.*

[FN78]. Rosemary O'Leary, [The Courts and the EPA: The Amazing "Flannery Decision"](#), 5 *Nat. Resources & Env't* 18, 18 (1990). O'Leary's article provides a chronological summary of subsequent events in the litigation, indicating that the decree was reopened fourteen times in ten years. *Id.* For further discussion of the consent decree and its implementation, see Ridgeway M. Hall, Jr., *The Evolution and Implementation of EPA's Regulatory Program to Control the Discharge of Toxic Pollutants to the Nation's Waters*, 10 *Nat. Resources Law* 507 (1977).

[FN79]. 2 *Rodgers*, *supra* note 22, § 4.33, at 483.

[FN80]. Applegate et al., *supra* note 66, at 462.

[FN81]. 2 *Rodgers*, *supra* note 22, § 4.33, at 483. See also Percival et al., *supra* note 66, at 685 ("The agreement shifted EPA's focus from health-based regulation to technology-based standards with tight deadlines for issuance."). See also *id.* at 692 ("[T]he Act and the Flannery Decree forced EPA to make engineering judgments based on detailed studies of production processes and pollution control technologies on an industry subcategory-by-subcategory basis.").

[FN82]. See Percival et al., *supra* note 66, at 685 ("The Flannery Decree was subsequently ratified, amended in some details, and incorporated in section 301 of the Act by the 1977 Amendments.").

[FN83]. [33 U.S.C. § 1311\(b\)\(2\)\(A\), \(C\)-\(D\) \(2000\)](#). Congress subsequently largely abandoned the health-based approach to the regulation of hazardous air pollutants in

favor of technology-based regulation when it adopted the 1990 amendments to the CAA. Compare [42 U.S.C. § 7412 \(1988\)](#), with [42 U.S.C. § 7412 \(2000\)](#).

[FN84]. Susan Bruninga, Clean Water Act: Improvements in Monitoring Data Collection Seen as Vital to Furthering Water Act Goals, *Env't Rep.*, Jan. 17, 2003, at S-18.

[FN85]. *Id.* (citing *NRDC v. EPA*, D.D.C., No. 89-2980 (Feb. 24, 2000)).

[FN86]. [411 F. Supp. 864 \(S.D.N.Y. 1976\)](#), *aff'd*, [545 F.2d 320 \(2d Cir. 1976\)](#).

[FN87]. *Id.* at 866. Pollutants listed pursuant to section 108 are referred to as "criteria pollutants" because EPA must issue air quality criteria reflecting the latest scientific knowledge on the effects of the pollutants within twelve months of listing and simultaneously with the issuance of proposed NAAQS for that pollutant. [42 U.S.C. §§ 7408\(a\)\(2\), 7409\(a\)\(2\) \(2000\)](#).

[FN88]. [Train](#), 411 F. Supp. at 866.

[FN89]. *Id.* at 867.

[FN90]. *Id.* at 867-68.

[FN91]. *Id.*

[FN92]. These include a determination that emissions of the pollutant "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare [and that] the presence [of the pollutant] in the ambient air results from numerous or diverse mobile or stationary sources." [42 U.S.C. § 7408\(a\)\(1\)\(A\)-\(B\) \(2000\)](#).

[FN93]. [Train](#), 411 F. Supp. at 868.

[FN94]. *Id.* at 870.

[FN95]. The court refused to decide what would happen if EPA were to address a pollutant which met the listing criteria of section 108 but for which no criteria or national standard is possible. The issue was not before the court. [Id.](#) at 870.

[FN96]. *Id.* at 871.

[FN97]. [Natural Res. Def. Council, Inc. v. Train](#), 545 F.2d 320 (2d Cir. 1976).

[FN98]. *Id.* at 324.

[FN99]. [Train](#), 545 F.2d at 328. But cf. [Natural Res. Def. Council, Inc. v. Thomas](#), 885 F.2d 1067 (2d Cir. 1989) (concluding that there was no nondiscretionary duty to add eight pollutants to list of hazardous air pollutants under the pre-1990 version of section 112 of the Clean Air Act). In *Thomas*, NRDC sued EPA under section 304(a)(2) to compel EPA to add two metals and six organic chemicals to the list of hazardous air pollutants. [Id.](#) at 1069. NRDC argued that EPA had a nondiscretionary duty to add the pollutants to the list because each had been recognized as a known or probable carcinogen in a series of notices published by EPA in the Federal Register. *Id.* The district court ruled that the conclusions in the notices were preliminary and did not constitute statutory determinations that the eight pollutants were hazardous for purposes of section 112. *Id.* Therefore, EPA's decision whether to list was discretionary and nonreviewable. *Id.* The Second Circuit found the lead listing case, *Natural Res. Def. Council, Inc. v. Train*, to be

distinguishable because in that case EPA conceded that lead was an air pollutant that met the tests for a criteria pollutant under section 108(a). [Thomas, 885 F.2d at 1074](#). In *Thomas*, EPA did not concede that the eight pollutants met the statute's definition of a hazardous air pollutant. Instead, EPA alleged that it had made no final determination as to the degree of risk posed by each pollutant. The court agreed. EPA was still compiling data and available testing methodologies were limited. [Id. at 1074](#).

[FN100]. National Primary and Secondary Ambient Air Quality Standards for Lead, 43 Fed. Reg. 46,246 (Oct. 5, 1978).

[FN101]. [Lead Indus. Ass'n v. EPA, 647 F.2d 1130 \(D.C. Cir.\)](#), cert. denied, [449 U.S. 1042 \(1980\)](#).

[FN102]. See Robert L. Glicksman et al., *Environmental Protection: Law and Policy* 323 (4th ed. 2003). The 1990 CAA amendments made it unlawful for any person to sell or use as fuel in a motor vehicle any gasoline which contains lead or lead additives. [42 U.S.C. § 7545\(n\) \(2000\)](#).

[FN103]. The part of the ESA's citizen suit provision that authorizes suits to force the Interior Department to perform nondiscretionary duties was added in the 1982 amendments to the ESA. See H.R. Rep. No. 97-835, at 35 (1982), reprinted in 1982 U.S.C.C.A.N. 2807, 2876.

[FN104]. See [16 U.S.C. § 1533\(b\)\(6\)\(A\) \(2000\)](#).

[FN105]. [Env'tl. Def. Ctr. v. Babbitt, 73 F.3d 867, 871 \(9th Cir. 1995\)](#). See also [Am. Lands Alliance v. Norton, 242 F. Supp. 2d 1 \(D.D.C. 2003\)](#) (finding duty violated).

[FN106]. Holly Doremus, [Adaptive Management, the Endangered Species Act, and the Institutional Challenges of "New Age" Environmental Protection](#), 41 *Washburn L.J.* 50, 58 (2001). She adds that "[l]istings, especially those of species lacking charisma or standing in the way of development, have typically been initiated by citizen petition rather than agency action, and often finalized only after litigation produced court orders." *Id.* Judicial review of denial of a citizen petition for listing filed pursuant to [16 U.S.C. § 1533\(b\)\(3\) \(2000\)](#) would not be brought under the citizen suit provision. See *infra* notes 112-118 and accompanying text.

[FN107]. Doremus, *supra* note 106, at 65.

[FN108]. Patrick Parenteau, [Rearranging the Deck Chairs: Endangered Species Act Reforms in an Era of Mass Extinction](#), 22 *Wm. & Mary Env'tl. L. & Pol'y Rev.* 227, 261-62 (1998).

[FN109]. [Id. at 262](#) (citing *Fund For Animals v. Lujan*, Civ. No. 92- 800 (D.D.C. 1992)).

[FN110]. [Tenn. Valley Auth. v. Hill, 437 U.S. 153 \(1978\)](#).

[FN111]. Elizabeth A. Foley, [The Tarnishing of an Environmental Jewel: The Endangered Species Act and the Northern Spotted Owl](#), 8 *J. Land Use & Env'tl. L.* 253, 264 (1992).

[FN112]. Some suits to force the FWS to list other species or designate their critical habitat seem to have proceeded on the basis of two theories concurrently: (1) that the FWS violated a nondiscretionary duty by failing to list or designate; and (2) that the agency's inaction constituted unreasonable delay under the Administrative Procedure Act (APA). See, e.g., [Butte Env'tl. Council v. White, 145 F. Supp. 2d 1180, 1181 \(E.D. Cal. 2001\)](#) (seeking designation of critical habitat for fairy shrimp).

[FN113]. [16 U.S.C. § 1533\(b\)\(3\) \(2000\)](#).

[FN114]. [28 U.S.C. § 1331 \(2000\)](#).

[FN115]. The applicable review provision comes from the APA, [5 U.S.C. § 706\(2\)\(A\) \(2000\)](#).

[FN116]. Interview by author with Michael D. Axline (Feb. 4, 2003).

[FN117]. See [5 U.S.C. § 706\(1\) \(2000\)](#) (allowing courts to compel agency action "unreasonably delayed").

[FN118]. An order forcing action based on unreasonable delay may be available even in the absence of a statutory deadline if the delay is sufficiently egregious. See, e.g., [Pub. Citizen Health Research Group v. Chao, 314 F.3d 143, 154-58 \(3d Cir. 2002\)](#) (concluding that neither scientific uncertainty nor competing priorities justified delay in OSHA's issuance of health and safety standard for hexavalent chromium).

[FN119]. [716 F. Supp. 479 \(W.D. Wash. 1988\)](#).

[FN120]. The APA affords "an[y] interested person the right to petition for the issuance, amendment, or repeal of a rule." [5 U.S.C. § 553\(e\) \(2000\)](#). Thus, interested persons may file a petition for regulatory action and seek judicial review based on unreasonable delay in the absence of an agency response even if the agency's enabling statute does not include its own petitions process.

[FN121]. [Hodel, 716 F. Supp. at 480](#).

[FN122]. [Hodel, 716 F. Supp. at 483](#).

[FN123]. [55 Fed. Reg. 26,114, 26,124 \(1990\)](#).

[FN124]. [Northern Spotted Owl \(*Strix Occidentalis Caurina*\) v. Lujan, 758 F. Supp. 621 \(W.D. Wash. 1991\)](#). The Court again reviewed the agency's action under [§ 706\(2\)\(A\)](#) of the APA (the arbitrary and capricious standard), without specifying the basis for its subject matter jurisdiction.

[FN125]. [Id. at 629](#). The court's reference to the agency's discretion indicates that the action was not brought as a citizen suit under the ESA to compel the performance of nondiscretionary duties.

[FN126]. [Id.](#)

[FN127]. Doremus, *supra* note 106, at 59-60. The recalcitrance of the Forest Service and the BLM to take measures to protect the northern spotted owl "backfired when the appellate courts upheld sweeping injunctions which virtually shut down timber sales and cutting in affected areas of the Pacific Northwest administered by [those agencies]." 2 George Cameron Coggins & Robert L. Glicksman, *Public Natural Resources Law* § 15C:2 (1991). Cf. Greg D. Corbin, *The United States Forest Service's Response to Biodiversity Science*, 29 *Env'tl. L.* 377, 398 (1999) ("As public attitudes toward Forest Service management of the national forests deteriorated, a cluster of citizen suits in the Pacific Northwest forced the federal courts to begin determining the limits of Forest Service discretion. Those cases established that [National Forest Management Act] and its regulations impart on the Forest Service a substantive duty to maintain biodiversity and viable populations in the national forests.") (footnote omitted) (citing [Seattle Audubon](#)

[Soc'y v. Evans, 952 F.2d 297, 301-02 \(9th Cir. 1991\)](#); [Seattle Audubon Soc'y v. Moseley, 798 F. Supp. 1484 \(W.D. Wash.\)](#), [aff'd, 998 F.2d 699 \(9th Cir. 1993\)](#)).

[FN128]. [Defenders of Wildlife v. Norton, 239 F. Supp. 2d 9 \(D.D.C. 2002\)](#).

[FN129]. [Id. at 14](#).

[FN130]. [Norton, 239 F. Supp. 2d at 16](#).

[FN131]. [Defenders of Wildlife v. Babbitt, 958 F. Supp. 670, 685 \(D.D.C. 1997\)](#).

[FN132]. [Norton, 239 F. Supp. 2d at 15-16](#).

[FN133]. [Id. at 16](#).

[FN134]. [Id.](#)

[FN135]. [Id. at 17](#).

[FN136]. [16 U.S.C. § 1532\(6\) \(2000\)](#).

[FN137]. [Norton, 239 F. Supp. 2d at 19](#).

[FN138]. [Id.](#)

[FN139]. [Id. at 25](#).

[FN140]. [Id. at 21-22 \(citing 16 U.S.C. § 1533\(b\)\(6\)\(C\) \(2000\)\)](#).

[FN141]. [Id. at 22 \(citing 16 U.S.C. § 1536\(b\)\(3\)\(A\) \(2000\)\)](#).

[FN142]. [Id. \(citing 50 C.F.R. § 402.14\(a\), \(b\)\)](#).

[FN143]. [Norton, 239 F. Supp. 2d at 22](#).

[FN144]. [Id.](#)

[FN145]. [Id. at 23](#). That clause provides that:
The injunctive relief provided by this subsection shall not restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief (including relief against the Secretary or a State agency).
[16 U.S.C. § 1540 \(g\)\(5\) \(2000\)](#).

[FN146]. [Norton, 239 F. Supp. 2d at 23](#).

[FN147]. [Id.](#)

[FN148]. [Id. at 25](#).

[FN149]. See Coggins & Glicksman, *supra* note 127, § 15C:2.

[FN150]. E-mail from Kieran S. Suckling, Executive Director, Center for Biological Diversity, Tucson, Ariz., to Erica Dew, third-year law student, University of Kansas School of Law (Feb. 7, 2003, 11:54:58 PST) (on file with author). The information was derived from the Center's database of federally threatened and endangered species. Ms. Suckling

indicated that most of the petitions were filed by scientists, although environmental groups filed many as well. Almost all of the litigation was initiated by environmental groups.

[\[FN151\]](#). *Id.*

[\[FN152\]](#). *Id.*

[\[FN153\]](#). Existing point sources of pollution are regulated by effluent limitations issued by EPA under CWA section 301(b), [33 U.S.C. § 1311\(b\) \(2000\)](#). New point sources are regulated by national standards of performance issued by EPA under CWA section 306, *id.* § 1316. The controls applicable to both existing and new point sources are applied to these sources through permits issued by EPA or an authorized state under CWA section 402, *id.* § 1342.

[\[FN154\]](#). *Id.* § 1313(c)(2)(A). Point sources must comply with any effluent limitations that are more stringent than the section 301(b) technology-based limitations, including those necessary to meet state water quality standards. *Id.* [§ 1311\(b\)\(1\)\(C\)](#).

[\[FN155\]](#). *Id.* § 1313(c)(2)(A).

[\[FN156\]](#). *Id.* § 1313(d)(1)(A).

[\[FN157\]](#). *Id.* § 1313(d)(1)(C).

[\[FN158\]](#). *Id.*

[\[FN159\]](#). *Id.*

[\[FN160\]](#). See Oliver A. Houck, *The Clean Water Act TMDL Program: Law, Policy, and Implementation* 49 (1999) ("Following the passage of the FWPCA Amendments of 1972, EPA was fully occupied, indeed overwhelmed, in promulgating technology standards for point sources under the CWA and defending them in court.") (footnotes omitted).

[\[FN161\]](#). *Id.*

[\[FN162\]](#). "A few states submitted a few lists. Most states submitted nothing at all. The question became: what now? EPA's answer, based on a literal reading of the Act, was: nothing [I]f the states submitted nothing at all, there was this unfortunate disconnect: there was nothing the Agency could do." *Id.* at 51 (footnote omitted).

[\[FN163\]](#). *Id.* at 76. See also Michael M. Wenig, [How "Total" Are "Total Maximum Daily Loads"? - Legal Issues Regarding the Scope of Watershed-Based Pollution Control Under the Clean Water Act](#), 12 *Tul. Envtl. L.J.* 87, 94 (1998) ("Both the EPA and the states have largely ignored the TMDLs process until recently, when citizen-plaintiffs, imbued with the ecosystem consciousness, launched a tidal wave of lawsuits to force the EPA and the states to implement the TMDLs process.").

[\[FN164\]](#). Houck, *supra* note 160, at 75. See also Sarah Birkeland, Note, [EPA's TMDL Program](#), 28 *Ecology L.Q.* 297, 302 (2001) ("The emergence of new TMDL regulations is the result of a string of successful citizen's suits forcing EPA and the states to fulfill their duties under Section 303(d).").

[\[FN165\]](#). [741 F.2d 992 \(7th Cir. 1984\)](#).

[\[FN166\]](#). [Id. at 993](#).

[\[FN167\]](#). [Id. at 993-94.](#)

[\[FN168\]](#). [Scott, 741 F.2d at 994.](#)

[\[FN169\]](#). [Id. at 995.](#)

[\[FN170\]](#). [Id.](#)

[\[FN171\]](#). [Id. at 996.](#)

[\[FN172\]](#). [Id.](#)

[\[FN173\]](#). [Id.](#)

[\[FN174\]](#). [Id. at 997.](#)

[\[FN175\]](#). [Id.](#)

[\[FN176\]](#). [Id.](#)

[\[FN177\]](#). [Id. at 998.](#)

[\[FN178\]](#). [Id.](#)

[\[FN179\]](#). [Alaska Ctr. for the Env't v. Reilly, 762 F. Supp. 1422, 1429 \(W.D. Wash. 1991\).](#) See also [Friends of the Wild Swan, Inc. v. United States EPA, 130 F. Supp. 2d 1207 \(D. Mont. 2000\)](#); [Kingman Park Civic Ass'n v. United States EPA, 84 F. Supp. 2d 1 \(D.D.C. 1999\)](#); [Am. Canoe Ass'n v. EPA, 30 F. Supp. 2d 908 \(E.D. Va. 1998\)](#). In American Canoe Ass'n, the court stated:

In the final analysis, the most compelling reason to follow Scott and its progeny is that EPA's alternative interpretation of the statute would allow recalcitrant states to short-circuit the Clean Water Act and render it a dead letter. The structure and purpose of the CWA, coupled with the mandatory tone Congress adopted throughout § 303, counsel against such a reading. It seems highly likely that Congress intended that EPA should be required to act not only when states promulgate lists that fail to meet the standards set forth in § 303, but also when states completely ignore their mandatory statutory responsibilities and fail to promulgate any list at all.

[Id. at 921.](#)

[\[FN180\]](#). [Reilly, 762 F. Supp. at 1429.](#)

[\[FN181\]](#). [Alaska Ctr. for the Env't v. Reilly, 796 F. Supp. 1374, 1381 \(W.D. Wash. 1992\), aff'd, 20 F.3d 981 \(9th Cir. 1994\).](#)

[\[FN182\]](#). [Id.](#)

[\[FN183\]](#). [Id.](#)

[\[FN184\]](#). [Id.](#)

[\[FN185\]](#). [Alaska Ctr. for the Env't v. Browner, 20 F.3d 981, 986 \(9th Cir. 1994\).](#)

[\[FN186\]](#). [Natural Res. Def. Council, Inc. v. Fox, 30 F. Supp. 2d 369, 377 \(S.D.N.Y. 1998\).](#)

[\[FN187\]](#). [Id.](#)

[FN188]. [264 F.3d 1017 \(10th Cir. 2001\)](#).

[FN189]. [Id. at 1020](#).

[FN190]. [Id. at 1021](#).

[FN191]. [Id. at 1024](#).

[FN192]. [Id.](#)

[FN193]. [Id.](#)

[FN194]. [Id.](#)

[FN195]. [S.F. Baykeeper v. Whitman, 297 F.3d 877, 883 \(9th Cir. 2002\)](#).

[FN196]. [Id. at 883](#).

[FN197]. [Id. at 884](#).

[FN198]. [S.F. Baykeeper, 297 F.3d at 884](#).

[FN199]. [Id. at 885](#).

[FN200]. [Id. at 884-85](#).

[FN201]. Cf. [Sierra Club v. Meiburg, 296 F.3d 1021, 1034 \(11th Cir. 2002\)](#) (holding that the CWA does not require EPA to ensure that state-issued TMDLs include implementation plans).

[FN202]. James R. May, Recent Developments in TMDL Litigation: 1999-2002, 2002 ALI-ABA Course of Study Materials 133, 135, available at SH041 ALI-ABA 133.

[FN203]. See, e.g., Ben German, Rulings May Force Activists To Limit TMDL Suits Against EPA, Inside E.P.A. Wkly. Rep., July 26, 2002, at 1 (stating that courts will not compel EPA to issue TMDLs even if a state has made limited progress in developing TMDLs, as long as the state has done something, and that litigation may have to proceed in state court in such circumstances).

[FN204]. See TMDL Litigation by State, available at <http://www.epa.gov/owow/tmdl/lawsuit1.html> (last visited Mar. 28, 2003).

[FN205]. [Idaho Conservation League v. Browner, 968 F. Supp. 546 \(W.D. Wash. 1997\)](#).

[FN206]. [Raymond Proffitt Found. v. United States EPA, 930 F. Supp. 1088, 1096-98 \(E.D. Pa. 1996\)](#).

[FN207]. [Miccosukee Tribe of Indians v. United States, 105 F.3d 599 \(11th Cir. 1997\)](#).

[FN208]. See, e.g., [Save the Valley, Inc. v. United States EPA, 223 F. Supp. 2d 997 \(S.D. Ind. 2002\)](#) (finding that the district court had subject matter jurisdiction over citizen suit to compel EPA to reassume enforcement of National Pollutant Discharge Elimination System (NPDES) permit program due to the state's failure to regulate confined animal feedlot operations, but refusing to issue such relief on the merits); [Save the Valley, Inc. v. United States EPA, 99 F. Supp. 2d 981 \(S.D. Ind. 2000\)](#) (finding that the district court

had jurisdiction over citizen suit to compel EPA to assume enforcement of NPDES permits in Indiana and to initiate proceedings to withdraw the state's authority to enforce permits, based on the state's failure to require concentrated animal feeding operations to acquire NPDES permits).

[FN209]. [Citizens for a Better Env't v. Costle](#), 515 F. Supp. 264, 270-71 (N.D. Ill. 1981).

[FN210]. [Natural Res. Def. Council, Inc. v. N.Y. State Dep't of Env'tl. Conservation](#), 700 F. Supp. 173, 181 (S.D.N.Y. 1988).

[FN211]. [Citizens for a Better Env't v. Costle](#), 610 F. Supp. 106, 114 (N.D. Ill. 1985). See also [Wisconsin v. Thomas](#), No. 87-C-395, 1989 WL 65522 (E.D. Wis. Jan. 18, 1989).

[FN212]. See EPA To Review Embattled Louisiana Emission Trading Scheme, Inside E.P.A. Wkly. Rep., Jan. 31, 2003, at 14.

[FN213]. 1 Rodgers, supra note 22, § 3.20, at 344.

[FN214]. Id. See also Applegate et al., supra note 66, at 490 ("EPA accumulated an impressive record of inaction under the 1970/1977 version of section 112.").

[FN215]. 1 Rodgers, supra note 22, § 3.8, at 231. See also John D. Graham, The [Failure of Agency-Forcing: The Regulation of Airborne Carcinogens Under Section 112 of the Clean Air Act](#), 1985 Duke L.J. 100, who argues that the perception that section 112 might require extremely strict emission limits appears to have had a counterproductive effect - the EPA has been reluctant to list pollutants and to promulgate emission standards. . . . Even if EPA lists a pollutant, the fear of excessively stringent emission requirements may paralyze or delay the process of setting standards. Id. at 131. Cf. John S. Applegate, [Worst Things First: Risk, Information, and Regulatory Structure in Toxic Substances Control](#), 9 Yale J. on Reg. 277, 309 (1992) (arguing that the pre-1990 version of section 112 failed "because it nullified the distinction between predicate and target by requiring that extremely rigorous controls follow automatically from listing. Since EPA could avoid unduly burdensome targets only by exercising discretion not to list in the first place, in most cases it took no action at all.") (footnote omitted). Congress identified 189 hazardous air pollutants for regulation when it adopted the 1990 amendments to section 112. See [42 U.S.C. § 7412\(b\)\(1\) \(2000\)](#); Applegate et al., supra note 66, at 490.

[FN216]. 1 Rodgers, supra note 22, § 3.20, at 231.

[FN217]. [554 F. Supp. 1060](#) (S.D.N.Y. 1983).

[FN218]. [Id. at 1061](#).

[FN219]. [Id. at 1062](#).

[FN220]. Id.

[FN221]. Id. at 1062, 1066.

[FN222]. Id. at 1064.

[FN223]. Id.

[FN224]. [Gorsuch](#), 554 F. Supp. at 1064.

[\[FN225\]](#). *Id.*

[\[FN226\]](#). *Id.* at 1066. In doing so, the court concluded that allegations of impossibility did not relieve EPA of its duty to comply with its nondiscretionary duty in a timely manner. *Id.* at 1065.

[\[FN227\]](#). See Graham, *supra* note 215, at 113.

[\[FN228\]](#). [Sierra Club v. Gorsuch, 551 F. Supp. 785 \(N.D. Cal. 1982\)](#).

[\[FN229\]](#). [Id. at 786](#).

[\[FN230\]](#). [Id. at 787](#).

[\[FN231\]](#). *Id.*

[\[FN232\]](#). *Id.* at 788. See also *Env'tl. Def. Fund v. Ruckelshaus*, 3 *Env'tl. L. Rep.* 20173 (D.D.C. 1973) (ordering EPA to issue national emission standards for hazardous air pollutants emission standards under section 112(b) for asbestos, beryllium, and mercury). Cf. [Env'tl. Def. Fund v. Thomas, 627 F. Supp. 566, 570 \(D.D.C. 1986\)](#) (ordering EPA to issue final permitting standards under RCRA for underground storage tanks).

[\[FN233\]](#). Some observers may have regarded less activity under the pre-1990 version as a good thing. See, e.g., Graham, *supra* note 215, at 150 (referring to the "fundamental defects" of section 112). Furthermore, Graham asserted that the action-forcing suits brought by environmental groups against EPA had "a perverse effect on EPA behavior" by delaying listings until proposed emission standards were ready for publication. See *id.* at 124.

[\[FN234\]](#). See *supra* notes 64-85 and accompanying text.

[\[FN235\]](#). [Cent. Ariz. Water Conservation Dist. v. United States EPA, 990 F.2d 1531, 1535 \(9th Cir. 1993\)](#), cert. denied, [510 U.S. 828 \(1993\)](#).

[\[FN236\]](#). *Id.*

[\[FN237\]](#). For examples of announcements of [consent decrees arising out of citizen suits under the CAA, see 67 Fed. Reg. 70,070 \(Nov. 20, 2002\)](#) (suit alleging that EPA failed to meet mandatory duty to designate areas for ozone NAAQS under CAA); [63 Fed. Reg. 47,493 \(Sept. 8, 1998\)](#) (suit alleging failure to perform nondiscretionary duty to determine nonattainment status of Idaho air quality control regions under CAA); [62 Fed. Reg. 27,023 \(May 16, 1997\)](#) (suit alleging failure to promulgate federal implementation plan (FIP) under CAA); [61 Fed. Reg. 52,941 \(Oct. 9, 1996\)](#) (suit seeking to force EPA to act on state SIPs or issue FIP); [59 Fed. Reg. 65,334 \(Dec. 19, 1994\)](#) (suit alleging failure to promulgate FIP).

[\[FN238\]](#). [Donald J. Barry, Opportunity in the Face of Danger: The Pragmatic Development of Habitat Conservation Plans, 4 Hastings W.-Nw. J. Env'tl. L. & Pol'y 129, 131 \(1998\)](#).

[\[FN239\]](#). See, e.g., Robert L. Glicksman & Stephen B. Chapman, [Regulatory Reform and \(Breach of\) the Contract with America: Improving Environmental Policy or Destroying Environmental Protection?](#), 5 *Kan. J.L. & Pub. Pol'y* 9, 12 & n.50 (1996) (agency-forcing suits are one component of a regulatory program that is designed to "promote accountability in agency decisionmaking by providing opportunities for public participation and judicial review and reducing the susceptibility of agencies to political or bureaucratic

pressures").

[FN240]. Stewart & Sunstein, *supra* note 5, at 1278.

[FN241]. *Id.* at 1278-79.

[FN242]. Boyer & Meidinger, *supra* note 4, at 843-44 (footnotes omitted).

[FN243]. Matthew D. Zinn, [Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits](#), 21 *Stan. Envtl. L.J.* 81, 117-18 (2002) (footnote omitted).

Zinn asserts that

[a]s inhabitants of a more genteel era of congressional protocol, members of Congress in the early 1970s would not publicly condemn government officials for acting in the interests of those they were supposed to regulate. Accordingly, the legislative history only hints at citizen suits' being responses to the problem of capture.

Id. at 118-19 n.145.

[FN244]. See Schiller, *supra* note 20, at 1415.

[FN245]. Senator George McGovern, Introduction to Joseph L. Sax, *Defending the Environment: A Strategy for Citizen Action*, at xi (1971).

[FN246]. Schiller, *supra* note 20, at 1416 (quoting Sax, *supra* note 245, at 56-57). Others argued at about the same time that "[t]he defense of the public interest . . . [demands] that law be applied to situations where . . . unbridled discretion was formerly the rule." *Id.* at 1416 (quoting Michael W. McCann, *Taking Reform Seriously: Perspectives on Public Interest Liberalism* 119 (1986) (quoting Simon Lazarus, *The Genteel Populists* 253 (1974))) (alterations in original).

[FN247]. See Peter H. Lehner, *The Efficiency of Citizen Suits*, 2 *Alb. L. Envtl. Outlook* 4, 4 (1995) (citizen suits can enhance public participation in environmental decisionmaking).

[FN248]. See Schiller, *supra* note 20, at 1447.

[FN249]. Selmi, *supra* note 14, at 105-06 (footnote omitted).

[FN250]. Doremus, *supra* note 106, at 65 (footnotes omitted).

[FN251]. Boyer & Meidinger, *supra* note 4, at 863 (footnote omitted).

[FN252]. *Id.* at 863-64. Cf. [Envtl. Def. Fund v. Thomas](#), 627 F. Supp. 566, 571 (D.D.C. 1986) (holding that OMB could not invoke its authority to delay issuance of EPA regulations past statutory deadline).

[FN253]. Selmi, *supra* note 14, at 139, describes the tension between the accountability-enhancing and autonomy-decreasing consequences of agency-forcing citizen suits.

[FN254]. Mark Seidenfeld, [A Big Picture Approach to Presidential Influence on Agency Policy-Making](#), 80 *Iowa L. Rev.* 1, 7 (1994) (footnotes omitted).

[FN255]. Thus, some have concluded that agency-forcing citizen suits and other private rights of initiation "may raise serious problems for regulatory administration. Successful suits could squander agency resources on isolated, minor controversies, thereby diverting energy from larger patterns of misconduct." Stewart & Sunstein, *supra* note 5, at 1206.

[FN256]. Alden F. Abbott, *The Case Against Federal Statutory and Judicial Deadlines: A*

[Cost-Benefit Appraisal, 39 Admin. L. Rev. 171, 192 \(1987\).](#)

[FN257]. Cf. Seidenfeld, *supra* note 254, at 8 n.42 ("Action-forcing mechanisms such as citizen suits may constrain agency discretion, but only by forcing the agency into an entirely reactive posture that discourages the agency from rationally prioritizing its regulatory agenda.").

[FN258]. Ackerman & Stewart, *supra* note 4, at 1360 n.61 (1985).

[FN259]. Rosemary O'Leary, *Environmental Change: Federal Courts and the EPA* 172 (1993).

[FN260]. Stewart & Sunstein, *supra* note 5, at 1270.

[FN261]. *Id.* (footnote omitted). See also *id.* at 1283 (judicial orders forcing agencies to act may require that a court "resort to timetables and deadlines to enforce its orders and thus assume a supervisory and managerial role that courts traditionally eschew").

[FN262]. See O'Leary, *supra* note 259, at 170. Professor O'Leary attributes much of the blame for this situation to Congress itself, however.

[M]uch of the responsibility for the negative effects of court decisions on the development of environmental policy and the administration of environmental laws within the EPA must lie with Congress. Congress created the EPA's statutes, which allow the agency to be second-guessed by outside groups. Congress set the numerous and unrealistic statutory deadlines, making the EPA an "easy mark" for litigation. And Congress created incentives for abundant incremental litigation against the EPA by liberally allowing and rewarding narrowly focused citizen suits.

Id. at 171. Professor Seidenfeld has taken the position that it may be justifiable to force an agency such as EPA to regulate by specific deadlines and to enforce the statutory mandates when the agency is using its discretion "to undermine the preference of the polity for stronger environmental regulation. In the context of an administration willing to implement the laws in good faith, however, these provisions are counter-productive."

Mark Seidenfeld, [Bending The Rules: Flexible Regulation and Constraints on Agency Discretion, 51 Admin. L. Rev. 429, 446 \(1999\).](#)

[FN263]. See, e.g., [Natural Res. Def. Council, Inc. v. EPA, 484 F.2d 1331, 1337 \(1st Cir. 1973\)](#) ("[T]he concept in the bill is that administrative failure should not frustrate public policy and that citizens should have the right to seek enforcement where administrative agencies fail.") (quoting 116 Cong. Rec. 33,102 (1970) (statement of Sen. Muskie)).

[FN264]. See *supra* notes 240-243 and accompanying text.

[FN265]. Cf. Watchdog Group's Report Finds Decline in Rules During Bush Era, *Inside E.P.A. Wkly. Rep.*, Jan. 17, 2003, at 13 (stating that the regulatory watchdog group OMB Watch has concluded that EPA has generally finalized rules during the George W. Bush Administration only when statutory or judicial deadlines force the agency's hand).

[FN266]. [5 U.S.C. § 706\(2\)\(A\) \(2000\).](#)

[FN267]. Cf. Stewart & Sunstein, *supra* note 5, at 1212 (arguing that private "initiation rights are less likely than [private] rights of action to subvert legislative oversight and fiscal control of the nature and amount of enforcement. In initiation cases, courts will ordinarily respect budget constraints aimed at limiting implementation and enforcement activity").

[FN268]. [Natural Res. Def. Council, Inc. v. Train, 510 F.2d 692, 712 \(D.C. Cir. 1974\).](#)

[\[FN269\]](#). *Id.*

[\[FN270\]](#). *Id.*

[\[FN271\]](#). *Id.* at 713.

[\[FN272\]](#). [Train, 510 F.2d at 713.](#)

[\[FN273\]](#). *Id.* (footnote omitted).

[\[FN274\]](#). [Sierra Club v. Thomas, 658 F. Supp. 165, 172 \(N.D. Cal. 1987\)](#) (citing decisions which established that "EPA is obligated to issue regulations within the statutory time frame unless it demonstrates that doing so is impossible or infeasible" for one of the reasons identified in [Natural Res. Def. Council, Inc. v. Train, 510 F.2d 692 \(D.C. Cir. 1974\)](#)).

[\[FN275\]](#). Boyer & Meidinger, *supra* note 4, at 864.

[\[FN276\]](#). See Sidney A. Shapiro & Robert L. Glicksman, [Congress, the Supreme Court, and the Quiet Revolution in Administrative Law, 1988 Duke L.J. 819, 835 n.79 \(1988\)](#). The same study, however, quoted a state official who alleged that "'EPA has sacrificed a lot of quality to meet deadlines. Deadlines have served to degrade performance.'" *Id.* (quoting Env'tl. & Energy Study Inst. & Env'tl. Law Inst., *Statutory Deadlines in Environmental Litigation: Necessary But Need Improvement* 35 (1985)).

[\[FN277\]](#). New York v. [Gorsuch, 554 F. Supp. 1060 \(S.D.N.Y. 1983\)](#).

[\[FN278\]](#). [Id. at 1065.](#)

[\[FN279\]](#). [Id. at 1066.](#)

[\[FN280\]](#). See [Sierra Club v. Gorsuch, 551 F. Supp. 785 \(N.D. Cal. 1982\)](#).

[\[FN281\]](#). The court found the first justification to be little more than a make-weight. So far as limitations of staff or budget are concerned, the EPA does not really show or seriously contend that limitations are such as to prevent it from undertaking the physical process of issuing the required regulations. The real basis of its attempted justification . . . is their claimed need of more time for further study. *Id.* at 789.

[\[FN282\]](#). *Id.*

[\[FN283\]](#). [Gorsuch, 551 F. Supp. at 789.](#)

[\[FN284\]](#). Cf. Doremus, *supra* note 106, at 66 (arguing that "the citizen suit device is a robust, durable institutional mechanism for constraining the inevitable tendency of agencies to avoid political controversy by softening protective mechanisms").

[\[FN285\]](#). See, e.g., Shapiro & Glicksman, *supra* note 276, at 824-28 (explaining why Congress amended EPA authorizing statutes in the late 1970s and 1980s to reduce the agency's discretion through, among other things, the imposition of numerous statutory deadlines).

[\[FN286\]](#). Houck, *supra* note 160, at 77. Professor Houck was discussing TMDL litigation, but his prognosis can be applied in a variety of regulatory contexts.

[\[FN287\]](#). Steve Cook, Environmental Groups Plan To Sue EPA Over Failure To Alter Ozone, Particulate Rules, *Env't Rep.*, Jan. 10, 2003, at 80; Environmentalists to Sue EPA for Failing To Complete NAAQS Review, *Inside E.P.A. Wkly. Rep.*, Jan. 10, 2003, at 14.

[\[FN288\]](#). Pamela Najar, Climate Change: Lawsuit To Force EPA To Regulate Greenhouse Gases from Mobile Sources, *Env't Rep.*, Dec. 13, 2002, at 2681.

[\[FN289\]](#). See Jennifer Lee, 7 States To Sue E.P.A. Over Standards on Air Pollution, *N.Y. Times*, Feb. 21, 2003, at A24, available at <http://www.nytimes.com/2003/02/21/politics/21ENVI.html> (last visited Feb. 21, 2003).
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