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Is the Citizen Suit a Substitute for the Class Action in Environmental Litigation? An Examination of the Clean Air Act Of 1970 Citizen Suit Provision

GABRIEL N. STEINBERG*

PRESENT STATE OF THE ENVIRONMENTAL CLASS ACTION

In an editorial reprinted in the Chicago Sun-Times, from the Arizona Daily Star, the death knell for the environmental lawsuit was rung.

The ruling on class-action lawsuits, by the U.S. Supreme Court, strikes a damaging blow to the millions of anonymous, often powerless individuals for whom the class-action suit has become the only effective recourse against systematic inequities.

Ruling on the case of a New York shoe merchant who had sued in behalf of small investors against high brokerage fees for odd lot

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The views expressed herein are those of the author. They do not represent the views of EPA or any other agency. This article was written by Gabriel N. Steinberg in his private capacity. No official support or endorsement by the EPA or any other agency is intended or should be inferred.

stock buyers, the high court declared that plaintiffs in class actions must individually notify all members of the class they represent "whose names and addresses may be ascertained by reasonable effort."

It requires very little extrapolation to determine that this spells death for such environmental and health lawsuits as those filed against major polluters, in behalf of a city, county or state population whose lives may be threatened by fouled air and water. Consumer interests and legal-aid assistance to the poor and minorities also have been dealt crippling setbacks.

The class action was born out of the simple fact that a lone individual, injured by a polluter, or by an overcharging business, by a dishonest used car dealer, or an unfair landlord, might not have a serious enough complaint to warrant jury trial, or might lack the resources to press his suit. Collectively, plaintiffs who could demonstrate that they were among other people thus injured—whether the remainder of that "class" chose to join the suit, or even knew of it—could command the attention of the court.

Now, high cost has again put justice out of the reach of those most in need of it.¹

The editorial, while compelling and forceful but intended for the layman, does not express the viewpoint of this attorney. *Eisen v. Carlisle and Jacquelin*² does not spell death for the environmental lawsuit. Along with *Zahn v. International Paper*,³ however, *Eisen* will demand that the environmental lawyer thoroughly analyze his case for procedural difficulties before commencing suit. An adage expressed by Judge Decker in another class action case is very appropriate. "A lawsuit is a fruit tree planted in a lawyer's garden."⁴

One can carry the metaphorical image of a garden further and find, as Professor Arthur John Keeffe has, that the class action has become "ungreened" and that "a single weed spoils the garden."⁵ *Zahn* stands for the rule that if there is a possibility that one plaintiff has less than \$10,000 in damages, the whole class must be dismissed. In other words, in class actions founded upon diversity

1. Editorial, *Justice out of Reach*, Chicago Sun-Times, June 15, 1974, at 27, reprinted from Arizona Daily Star.

2. *Eisen v. Carlisle and Jacquelin*, 94 S. Ct. 2140 (1974) [hereinafter cited as *Eisen*].

3. *Zahn v. International Paper Co.*, 414 U.S. 291 (1973) [hereinafter cited as *Zahn*].

4. *Kiser v. Miller*, 364 F. Supp. 1311, 1316 (D.D.C. 1973), quoted from Judge Decker in *Illinois v. Harper and Row Publishers*, 55 F.R.D. 221, 224 (N.D. Ill. 1972). Judge Richey said that the purpose of suit was to restore the rights of a deprived class and in such circumstances a sizeable diversion of the recovery for attorneys' fees would merely constitute a substitution of one fiduciary with another.

5. Keeffe and Lash, *The Ungreening of the Class Action*, 60 A.B.A.J. 739 (1974) [hereinafter cited as Keeffe].

jurisdiction every member of the plaintiff class must meet the \$10,000 jurisdictional amount requirement. The *Eisen* case holds that a class action suit requires individual notice to all class members who can be identified through reasonable effort with the cost of notification borne by the plaintiff.

The *Zahn* and *Eisen* decisions were not unexpected blows to the class action under Rule 23(b)(3).⁶ During the 1960's and early 1970's both the substantive field of environmental law and the procedural one of the class action were expanding rapidly, but such advances could not be allowed to continue indefinitely.⁷ There have been several environmental class action cases that have been quickly dismissed because the procedural niceties were not or could not be observed, and the environmental control demanded was too great.⁸ For example, a case brought by the Heart Disease Research Foundation and two individual plaintiffs sought \$375 trillion in air pollution damages from the major American car manufacturers on behalf of the residents in the metropolitan areas of the United States. In not placing practical limits on the size of the class and the claim, the plaintiffs earned a rebuke from the court:

It would be interesting to ruminate upon all the ironies and absurdities, intended or unintended, of this amended pleading Plaintiffs and their counsel have failed to realize that the damages sought are some 300 times more than the annual gross national product of the United States.⁹

The negative reaction to both the environmental and class action lawsuit has been building. The kindness to environmental lawsuits that has been exhibited by many courts is giving way increasingly to the proposition that these suits must meet the procedural demands require of other lawsuits. The effort of environmental lawyers to turn every suit into a class action¹⁰ will be as self-de-

6. *The Supreme Court Restricts the Class Action: Zahn v. International Paper*, 4 ENV. REP. 10034 (1974).

7. The *Eisen* and *Zahn* Supreme Court cases, the energy crisis, and several other court cases on federal environmental litigation (e.g., the Alaska pipeline) have combined to check the progress made in developing cause of action in the environmental field.

8. Comment, *The Viability of Class Actions in Environmental Litigation*, 2 ECOLOGY L.Q. 533, 536-37 (1972).

9. *Heart Disease Research Foundation v. General Motors Corp.*, 463 F.2d 98 (2nd Cir. 1972) [quote appears in full text of the opinion cited in 3 ERC 1710, 1711 (1972)].

10. Comment, *The Federal Class Action in Environment Litigation: Prob-*

feating as challenging every administrative action affecting the environment as "arbitrary, capricious, and unreasonable."¹¹ Either type of action would exhibit a miscomprehension of pollution, legal procedure, and the economic costs of pollution abatement.

The *Zahn* case did not exhibit plaintiffs blatantly demanding too much from the courts or disobeying the procedural niceties then existing, but it is illustrative of the recent judicial checking of environmental and procedural advances. The case may mean that the mass tort action at the federal level has become unavailable. By upholding the decision of the Second Circuit, Justice White's opinion apparently agreed with the following:

Once appellee's liability had been established, and even assuming that appellee's defenses would not vary as to different members of appellants' class, it would be an enormously time consuming task to assess the damages suffered by each of the 200 riparian landowners, each of whose claims is regarded as separate and distinct. Indeed, the Advisory Committee did not intend that Rule 23(b)(3) ordinarily be utilized in a mass tort situation. Moreover a second policy consideration relied upon in *Snyder* is relevant here: local controversies involving claims to be settled on the basis of state law "can often be most appropriately tried in state courts."¹²

Justice White held:

We conclude . . . that the Court of Appeals . . . accurately read and applied *Snyder v. Harris*. Each plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case—one plaintiff may not ride in on another's coattails.¹³

The majority opinion, basing its decision on *Snyder v. Harris*,¹⁴ quoted from that case in stating:

The doctrine that separate and distinct claims could not be aggregated was never, and is not now, based upon the categories of old Rule 23 or of any rule of procedure.

. . . Nothing in the amended Rule 23 changes this doctrine. . . . The fact that judgments under class actions formerly classified as spurious may now have the same effect as claims brought under the joinder provisions is certainly no reason to treat them *differently* from joined actions for purposes of aggregation.

It is interesting from the environmental standpoint to note that

lems and Possibilities, 51 N.C. L. REV. 1358 (1973).

11. Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612 (1970). The author of this article has seen many briefs challenging the actions of the EPA Administrator. The challenged actions are almost always "arbitrary, capricious, and unreasonable"; it is a litany for the administrative lawyer. See, e.g., *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

12. *Zahn v. International Paper Co.*, 469 F.2d 1033, 1036 (2d Cir. 1972).

13. *Zahn*, 414 U.S. at 301.

14. 394 U.S. 332, 336-37 (1969).

the Supreme Court in *Zahn* specifically included and therefore seemingly limited a case considered to be an environmental victory. Justice White stated in Footnote 11 of the *Zahn* case:

Because a class action invoking general federal-question jurisdiction under 28 U.S.C. §1331 would be subject to the same jurisdictional amount rules with respect to plaintiffs having separate and distinct claims, the result here would be the same even if a cause of action under federal law could be stated, see *Illinois v. City of Milwaukee*, 406 U.S. 91, 98-101 (1972), or if substantive federal law were held to control this case. . . .¹⁵

Thus, *Illinois v. City of Milwaukee*,¹⁶ in which the Supreme Court held that there is a right to sue in United States District Court to abate pollution of interstate or navigable waters under a federal common law nuisance theory, was severely limited.

At oral argument Justices Brennan and White asked counsel whether the suit was not subject to federal common law (Justice Brandeis notwithstanding) under *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972). Lest we surmise that *Zahn* is but a figment of the court's antipathy for diversity cases, Justice White, writing for the majority, slips in a final footnote to remind us that federal claims, not exempted by statute, are also subject to the \$10,000 requirement and thus to the *Zahn* rule.¹⁷

Justice Brennan, in his well-reasoned dissent, did not directly reply to Justice White, but both Justices were, I am sure, aware of cases that had extended the right to abate pollution under the doctrine of federal common law nuisance. For example, in *United States v. U.S. Steel Corporation*,¹⁸ the Northern District Court of Illinois found that non-governmental parties could sue under federal common law nuisance, that the federal government could sue under federal common law, and that this action could be brought despite the existence of comprehensive water pollution control legislation at the federal level.¹⁹ In another case referring to *Illinois v. City of Milwaukee*, a Vermont District Court noted that the general public has substantial rights to the use and enjoyment of water not polluted, and this right not only belongs to those who live in

15. *Zahn*, 414 U.S. at 302.

16. 406 U.S. 91 (1972).

17. Keefe, *supra* note 5, at 739.

18. 356 F. Supp. 556 (N.D. Ill. 1973).

19. Federal Water Pollution Control Act (FWPCA), and, as amended 1972, 33 U.S.C. § 1151 *et seq.* (1970) and 33 U.S.C. § 1251 *et seq.* (Supp. II 1972).

the state where the body of water is located but extends also to out-of-state guests and visitors—and if unreasonably interfered with constitutes a public nuisance.²⁰

While the *Zahn* decision has interfered with the possibility of private actions under federal common law,²¹ the *Eisen* case has evidently interfered with the right of the consumer, the little guy, to take on the large corporation. According to several observers, because of *Eisen*, “it has become easier to cheat a million people out of a dollar each than to cheat one person out of \$1-million.”²² It is felt that the *Eisen* case will have its most significant impact on consumer suits and on those dealing with corporate liability and violation of federal securities law. While we note that environmental disclosure is now required under Securities and Exchange Commission regulations,²³ environmental class actions have not had the notice problems the consumer and stockholder derivative actions have had. This may be because environmental costs are passed on indirectly to the citizen rather than directly (e.g., where the citizen pays the defendant directly for his service or product). It appears that pollution class action suits have met the notice requirement of 23(c) (2) of the Federal Rules of Civil Procedure, “the best notice practicable under the circumstances, . . .” or have met the limited notice requirements for injunctive class action suits under 23(c) (3).

In commenting on the *Eisen* case, “Rod Cameron, the Executive Director of the Environmental Defense Fund, said, ‘generally, it will not have much of an effect,’ on the group’s legal activities, since it is ‘almost always’ seeking injunctive relief rather than damages. ‘We don’t see it as a major impingement on what we do,’ he said.”²⁴ Others have also commented on the trend in environmental litigation towards seeking injunctive relief. “Environmental litigation in the past few years has concentrated on enjoining harmful activities or compelling beneficial acts before the damage has taken place;

20. *United States v. Ira S. Bushey & Sons, Inc.*, 346 F. Supp. 145 (D. Vt. 1972).

21. See, Comment, *Environmental Law—Water Pollution Remedies—Use of Public Nuisance Theory in Suit by Federal and State Governments—United States v. United States Steel Corp.*, 15 B.C. IND. & COM. L. REV. 795, 808-09 (1974).

22. Raymond Brown, Laywer, Public Citizens Litigation Group, quoted in an article by Charlton, *Impact of Ruling by Court Studied: Lawyers See Strong Effect on Class-Action Suits by Consumer Groups*, N.Y. Times, May 30, 1974, at 55, col. 3.

23. SEC Securities Act Release No. 5386 (April 20, 1973), reprinted in CCH FED. SEC. L. REP., ¶ 79,342.

24. Quoted in an article by Charlton, *supra* note 22.

ensuring that adequate compensation is paid after the fact is at best a secondary goal."²⁵

A case prior to *Zahn* that illustrates the tailored notice to satisfy the courts in seeking relief in the form of a class action is *Biechele v. Norfolk and W.R. Co.*²⁶ This action by city residents in the area of a railroad company's coal storage facilities was held properly maintainable as a class action under Rule 23(b). The court said that common questions of fact predominated. In ascertaining the geographical boundaries of the class, the court accepted evidence as to the extent and duration of the alleged injuries, together with a knowledge of the prevailing winds. The action, which had been removed to the Federal District Court on the ground of diversity of citizenship involved not only a claim for damages, but also a claim for injunctive relief. Thus, Rules 23(b)(1)-(3) were involved. The court granted the relief sought and discussed its procedure of notice by publication in the *Sandusky Register*. The author, who has viewed notice as a mere formality, finds this case interesting in that 731 residents joined the damage action, 532 filed declinations to participate, and several thousand took no action. With regard to the effect of *Zahn* on a case like this, the court in assuming jurisdiction over the entire controversy in the interest of judicial efficiency because it had jurisdiction of the injunctive action, pointed out that the damage claims of the individual members of the class could not be aggregated to achieve the jurisdictional amount.

The successful outcome of *Biechele* is an example of what some observers thought would become a commonplace occurrence in environmental litigation—namely, the successful use of the class action format. In an often-cited article, Robert Lohrmann discussed the rationale for the class action in environmental litigation as follows:

The class action is a procedural device used by the courts to effect a remedy for the plaintiff who has a small stake in a large controversy. Given the widespread effect of most incidents of pollution, the class action, born out of equity where joinder was impracticable, would seem an ideal method of seeking redress in environmental litigation.²⁷

25. *The Supreme Court Restricts the Class Action*, *supra* note 6, at 10035.

26. 309 F. Supp. 354 (N.D. Ohio 1969); see generally Annot., *Pollution of Environment Class Action*, 7 A.L.R. Fed. 907-10.

27. Lohrmann, *The Environmental Lawsuit: Traditional Doctrines and*

Lohrmann continues on in his discussion of the desirability of class actions in the environmental field and cites a widely quoted passage from an article on the economics of class actions to justify his point:²⁸ “. . . the most suitable controversies for resolution in a class action are those that arise as a result of: (1) violation of a standard of conduct by a single defendant, which (2) causes the same type of harm to many individuals, where (3) the few defenses raised are common to all the separate bilateral relationships.”²⁹ Lohrmann concludes his passage: “Thus, pollution traceable to the activities of a single industrial firm and affecting a substantial number of neighboring individuals would certainly appear to be an apt subject for class litigation.”³⁰

Two recent state court actions in the Chicago area illustrate the attraction of the class action format. A suit seeking \$2.6 million in damages was filed on behalf of Hammond and Whiting residents whose homes allegedly were damaged when Standard Oil's huge storage tanks in that area were chemically cleaned.³¹ In another tank storage case, three suits seeking more than \$125 million for health and property damage were filed against Bulk Terminals for a silicon tetrachloride leak on Chicago's southside in April 1974.³² The immense sums involved in these two cases exemplify another litigational advantage of the class action that is pointed out by Lohrmann.

Furthermore, the class action would allow the potentially prohibitive costs of this type of suit, e.g., obtaining counsel of sufficient

Evolving Theories to Control Pollution, 15 WAYNE L. REV. 1085 (1970), reprinted in H.F. Sherrod, ed., 2 ENVIRONMENT L. REV. 199, 213 (1971).

28. See Note, *The Cost-Internalization Case for Class Actions*, 21 STAN. L. REV. 383 (1969).

29. *Id.* at 411.

30. Lohrmann, *supra* note 27, at 213.

31. *OK Class Action against Oil Firm*, Chicago Sun-Times, June 7, 1974, at 17, cols. 1-3. This action was brought under Indiana law and was discussed by the author with the plaintiffs' attorney Alan R. Smulevitz, telephone conversation, June 25, 1974.

32. *Chemical Firm Fined in Gas Leak*, Chicago Daily News, July 19, 1974, at 5. The City of Chicago filed a \$5.5 million damage suit against the Bulk Terminals Co., the owners of a chemical tank which leaked large quantities of silicon tetrachloride into the air over the city in April 1974. The suit which was filed as a class action on behalf of all residents of the city charged the firm with the creation of an immediate and irreparable danger to the health of the people of Chicago, as well as to plant, animal life, and personal property in the city. Bulk Terminals was also charged with maintenance of a common law nuisance. The city's suit also asked for \$450,000 in costs incurred by the city in attempting to stop the leak. In a settlement agreed to between the city and the company, the city collected a \$31,000 fine and the company agreed not to store the chemical in the city. This action was discussed by the author with Assistant Corporation Counsel for the City of Chicago, Barry Greenburg, conversations May-July 1974.

caliber to match that of the offending industry, providing expert witness fees, financing the necessary technical and legal research, etc., to be shared among members of the class. Additionally, where the remedy sought includes damages, the potential recovery for the aggregate claims may attract attorneys otherwise reluctant to represent a single claimant.³³

However desirable the class action appears theoretically, the fact remains that at the present time *Zahn* and *Eisen* have limited the usefulness of this procedural device. The fact situation of *Zahn* was, theoretically, the ideal controversy to be settled by a class action.³⁴ The lawsuit arose as a result of (1) violation of a standard of conduct by a single paper mill, which (2) discharged into Lake Champlain causing damage to the numerous property owners and other people surrounding the lake, where (3) the defendant's course of conduct would be the same for the bilateral relationships. The Supreme Court, however, still felt that the potential for abuse of the class action was too great, and every plaintiff must show the requisite \$10,000 or more amount of injury or be dismissed from the lawsuit. While the Court may have feared the overcrowding of courtrooms with class action litigation, the *Zahn* decision may actually have the opposite result by causing inefficient judicial administration of similar claims. As Justice Brennan pointed out in his dissent:

And the practical reasons for permitting adjudication of the claims of the entire class are certainly as strong as those supporting ancillary jurisdiction over compulsory counterclaims and parties that are entitled to intervene as of right. Class actions were born of necessity. The alternatives were joinder of the entire class or redundant litigation of the common issues. The cost to the litigants and the drain on the resources of the judiciary resulting from either alternative would have been intolerable. And this case presents precisely those difficulties: approximately 240 claimants are involved, and the issues will doubtless call for extensive use of expert testimony on difficult scientific issues.³⁵

With the *Zahn* decision, the enthusiasm for the class action as "the most important device for the declaration of environmental rights"³⁶ must be rethought. In agreeing with Justice Brennan's dissent, one commentator noted:

33. Lohrmann, *supra* note 27, at 213.

34. See text accompanying notes 28-30, *supra*.

35. *Zahn*, 414 U.S. at 307.

36. V. YANACONE & B. COHEN, 1 ENVIRONMENTAL RIGHTS AND REMEDIES, § 6:10, at 363 (1972).

Today, there is an increasing public concern over the quality of our urban and natural environment. Plaintiffs have sought to use the class action as a means for the expeditious resolution of the numerous claims resulting from environmental pollution. . . . As a result of the majority opinion in *Zahn*, companies such as International Paper can successfully limit their liability only to named plaintiffs that can show the requisite jurisdictional amount for suit in the federal courts.

The fear of opening the "floodgates" to class action litigation . . . gives little credit to the ability of the judiciary to determine what prospective class actions are properly or improperly brought. Not only will the effect of *Zahn v. International Paper Company* be to render impotent the class action procedure in environmental suits, but it will also retard the development of more efficient and economical procedures for judicial administration.³⁷

A similar viewpoint to that expressed above concerning *Zahn* was taken in Justice Douglas' dissenting opinion in *Eisen*:

I agree with Chafee that a class action serves not only the convenience of the parties but also prompt, efficient judicial administration. I think in our society that is growing in complexity there are bound to be innumerable people in common disasters, calamities or ventures who would be begging for justice without the class action but who could with all regard to due process be protected.³⁸

In describing these people who could benefit from the class action, Justice Douglas, his love of the outdoors showing,³⁹ specifically mentioned the environmentalists. "Some may be environmentalists who have no photographic development plant about to be ruined because of air pollution by radiation but who suffer perceptibly by smoke, noxious gases, or radiation."⁴⁰ Finally, in his dissent, Justice Douglas quoted Judge Weinstein, who said, "When the organization of a modern society, such as ours, affords the possibility of illegal behavior accompanied by widespread, diffuse consequences, some procedural means must exist to remedy—or at least to deter—that conduct."⁴¹

After the opinions above concerning the difficulties that class action suits now face, what recourse is left for the environmental attorney? The initial instinct of the attorney would be to stick with the class action; perhaps not Rule 23 (b) (3) actions but actions

37. Snow, *RECENT DECISIONS: FEDERAL COURTS: Multiple Plaintiffs with Separate and Distinct Claims Must Each Satisfy the Jurisdictional Amount for Class Action Suits in Federal Courts*. *Zahn v. International Paper Company*, 94 S. Ct. 505 (1973), 62 ILL. B. J. 516, 518 (1974).

38. *Eisen*, 94 S. Ct. at 2156.

39. Justice Douglas is the author of several books on the outdoors, including *MAN AND MOUNTAIN* (19—).

40. *Eisen*, 94 S. Ct. at 2156.

41. *Id.*, quoted from Judge Weinstein writing in the *New York Law Journal*, at 4, May 2, 1972.

for injunctive relief under 23(b)(2) or (b)(1). The argument would be that a federal court may choose to assume jurisdiction over an equitable claim considered true and then exercise its ancillary jurisdiction to hear an action for damages arising out of the same facts. The use of ancillary jurisdiction is a discretionary device if the litigation of the issues becomes burdensome.⁴² However, once the court secures jurisdiction over the injunctive action, it can exercise its ancillary jurisdiction and determine membership in the class and assess damages.⁴³ This is simply an argument for the extension of ancillary jurisdiction and it is not clear that the courts would do this very often since it is clearly discretionary.

CITIZEN SUITS

A more certain means of securing access to federal courts and accomplishing some pollution abatement may be the recently enacted citizen suit statutes in the relatively new federal environmental legislation.⁴⁴ It is the primary purpose of this article to present the citizen suit provision as a method for environmental litigation that should become increasingly useful to the environmental lawyer. The relatively few significant cases under these provisions indicate an insufficient utilization of an important new procedural method for obtaining environmental relief.

Before discussing the relevant provisions, we should define and explain the meaning of "citizen suit" for our purposes. We are discussing essentially the citizen suit provisions in the Clean Air Act of 1970,⁴⁵ the Federal Water Pollution Control Act of 1972,⁴⁶ and the Noise Control Act of 1972.⁴⁷ There are other environmental acts, such as the National Environmental Policy Act (NEPA)⁴⁸ and

42. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).

43. See C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* § 1784 (1972); also see generally Snow, *supra* note 37, and Lohrmann, *supra* note 27, at 218.

44. See Clean Air Act of 1970, as amended, 42 U.S.C. § 1857 *et seq.*, Federal Water Pollution Control Act of 1972, 33 U.S.C. § 1251 *et seq.*, and Noise Control Act of 1972, 42 U.S.C. § 4901 *et seq.*

45. 42 U.S.C. § 1857h-2 (1970). Since this section will be referred to throughout this paper, the author has attached as Appendix A a copy of this section, and the author shall hereinafter call this citizen suit provision, section 304, as in the statutes at large.

46. 33 U.S.C. § 1365 (1972).

47. 42 U.S.C. § 4911 (1972).

48. 42 U.S.C. §§ 4321-47 (1970). The most heavily litigated provision in

the Rivers and Harbors Act of 1899,⁴⁹ which allow some form of private action—whether challenging administrative agencies or receiving a bounty⁵⁰ for gathering evidence. These actions, however, are by and large for or against the government. At the federal level, the procedure for suing a polluter as a private citizen at the present time remains through the specific pollution control acts. This article will concentrate on the Clean Air Act of 1970 because it was an archetype for the environmental control legislation that came afterwards;⁵¹ other legislation, and cases, though, will be mentioned.

These federal citizen suit provisions arose, however, as a limited response to the demand for the creation of a broad private right to sue for purposes of environmental protection.⁵² Some observers felt that trees and rocks, like ships, should be able to sue in their own name,⁵³ and others have felt that the Constitution created a right to live in a decent, healthful environment.⁵⁴ Professor Sax of the University of Michigan based his right to private action on the public trust doctrine.⁵⁵ This doctrine suggests that government has a high fiduciary duty of care and responsibility to the general public much like a trustee to the beneficiary. The state as trustee for the public cannot, by acquiescence, abandon the trust property or enable a diversion of it to private ends different from the object for which the trust was created.⁵⁶ The Professor noted the difference between the public trust doctrine and a constitutional right to a decent environment. "A right with constitutional status does

the National Environmental Policy Act (NEPA) has been section 102(2) (c) setting forth the basic requirements for impact statements.

49. 33 U.S.C. §§ 403, 407, 411, (popularly known as the "Refuse Act").

50. Informants under the 1899 Refuse Act (33 U.S.C. § 411) may be entitled to a portion of the collected fine. The Fourth Circuit has held that the statute requires an award of one-half the fine to the informant. *Miller v. United States*, 455 F.2d 833 (4th Cir. 1971).

51. Two books that discussed and criticized the federal air pollution program and suggested changes prior to the Clean Air Act of 1970 are: J. DAVIES, *THE POLITICS OF POLLUTION* (1970), and J. ESPOSITO, *VANISHING AIR* (1970), (also known as the Nadar Study Report on Air Pollution).

52. J. SAX, *DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION* (1970). [Hereinafter SAX].

53. See, e.g., Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 *YALE L.J.* 1315 (1974).

54. See, e.g., *Tanner v. Armco Steel Corp.*, 340 F. Supp. 532 (S.D. Tex. 1972), discussion at notes 180-84, *infra*.

55. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 *MICH. L. REV.* 473, 485-88 (1970). [Hereinafter Sax, *MICH. L. REV.*]. See also Cohen, *The Constitution, the Public Trust Doctrine and the Environment*, 1970 *UTAH L. REV.* 388, for constitutional argument.

56. Sax, *supra* note 55, at 485-88.

indeed create the opportunity for its enforcement in the courts, but it also—and herein lies the danger—gives the courts ultimate authority.”⁵⁷ Sax feels that ultimate decision-making power should be left in the hands of the people through their elected representatives.⁵⁸ H. Floyd Sherrod, Jr., the editor of *Environment Law Review*, commented in 1971 on the distinction between a legislative cause of action and a constitutional one as follows:

It is instructive to compare the difficulties of controlling air pollution by assertion of a constitutional right with the citizens' suit provision of the Clean Air Amendments of 1970. Under those amendments the policy-balancing activities would have already been generally determined by the legislature, and pursuant to the established policies administrative agencies (with public participation) will have set the standards. However, citizens can see that these standards are enforced by the courts. Generally, the only issue in such suits would be whether or not a particular alleged polluter has violated a specific pre-established standard. Thus citizens and their organizations will have an opportunity to be of real assistance in the enforcement process, and through the courts can assure that agencies do their job of carrying out the legislative will. The court then has a manageable issue with which to work.⁵⁹

Mr. Sherrod's idealistic vision of the citizen suit provision has unfortunately (or maybe fortunately for lawyers) not come about. This concept of the citizen suit, arising from Professor Sax's resurrection of the public trust doctrine has proved difficult for lawyers and judges to grasp. It is not a panacea for air pollution, but neither is it limited to taking action only against the Administrator of the United States Environmental Protection Agency (EPA). The citizen suit can be an effective tool for a better environment and enlarge the arsenal of the environmental lawyer which has become diminished through the limitations placed on the class action. “If lawyers and their clients are willing to ask for less than the impossible, the judiciary can be expected to play an increasingly important and fruitful role in safeguarding the public trust.”⁶⁰ Put another way, the citizen suit provisions derived from the public trust doctrine offer the environmental lawyer means of nurturing that fruit tree into a worthwhile, viable lawsuit.

57. SAX, *supra* note 52, at 237-38.

58. This is why the Michigan Environmental Protection Act (Public Law 127) is not a blanket invitation to sue but applies standards before a citizen can obtain relief. Michigan Environmental Protection Act of 1970, MCLA Sec. 691.1202, MSA 14.529 (202).

59. Sherrod, *Introductory Survey*, 2 ENVIRONMENT L. REV. xvii (1971).

60. Sax, *supra* note 55, at 566.

To use these provisions reasonably requires an understanding of the statutory basis. While the Clean Air Act has correctly been called lengthy and complicated,⁶¹ we will explain its essential provisions before commencing our discussion of the limitations and uses of section 304⁶² of the Act. The Clean Air Act was designed as a comprehensive piece of federal legislation to place primary responsibility for control of air pollution on the states and ultimate responsibility on the federal government.⁶³ To implement this control of air pollution, a strict timetable was detailed in the Act to attain healthful air quality across the nation by mid-1975 or at the latest by mid-1977. If the states defaulted on plan development in implementing the timetable, then the federal government would promulgate its own regulations.

The Administrator of the U.S. EPA on April 30, 1971, published in the Federal Register national ambient air quality standards: primary standards to protect the public health and secondary standards to assure the public welfare.⁶⁴ Within nine months thereafter, or by January 31, 1972, to achieve these clean-air objectives, each state was required to adopt and submit to EPA for approval, an implementation plan which contained procedures and regulations for reducing emissions from sources of air pollution within the state; the plan was to be designed to achieve the national ambient air quality standards within established time limits.

To assist the states in the preparation of these implementation plans, the Administrator promulgated on August 14, 1971, regulations setting forth requirements for the preparation, adoption, and submittal of state implementation plans.⁶⁵ Four months after the state submitted their plans to EPA, on May 31, 1972, the Administrator approved, with specified exceptions, those plans.⁶⁶ The Clean Air Act provides that EPA approval of a state's implementation plan makes the requirements of that plan enforceable by the federal government as well as by the state. The Administrator ap-

61. *West Penn. Power v. Train*, — F. Supp. — (W.D. Penn. 1974), 6 ERC 1722.

62. See note 45, *supra*.

63. 42 U.S.C. § 1857 (1970). See e.g., Trumbull, *Federal Control of Stationary Source Air Pollution*, 2 *Ecology L.Q.* 283 (1972), and Steinberg, *The Federal Clean Air Act Structure and Program*, remarks before Environmental Engineering Seminar, Northwestern University, speech available at Technological Institute from Professor James Quon.

64. 36 Fed. Reg. 8187 (1971), 40 C.F.R. Part 50.

65. 36 Fed. Reg. 15486 (1971), 40 C.F.R. Part 51.

66. 37 Fed. Reg. 10842 (1972), 40 C.F.R. Part. 52. Amendments have been promulgated from time-to-time for all parts of the regulations implementing the Clean Air Act.

proved those plans that met the standards set forth in section 110 (a) (2) of the Act.⁶⁷ Besides the attainment dates for the air quality standards, each state implementation plan was required to have most important emission limitations, schedules, and timetables for compliance with such limitations to attain and maintain the air quality standards, including, if necessary land-use and transportation controls.⁶⁸

Essential to pollution control under the Clean Air Act are these emission limitations. It is through these emission control regulations that the amount of pollutant going into the ambient air is reduced. Emission control is commonly in terms of opacity of smoke, pounds of pollutant emitted per ton of process weight or per million BTU of heat input of fuel, and by sulfur or ash content of the fuel.⁶⁹ Whether these regulations are adopted by the state and approved by EPA, or if EPA promulgates regulations for a state where that state has failed to act, these regulations become federal law enforceable by the states, EPA, and private citizens.

Federal enforcement of implementation plans is carried out under section 113 of the Clean Air Act.⁷⁰ Section 113(a) (1) provides for a notice of violation to any person in violation of the applicable implementation plan. If the violation continues past 30 days after the Administrator's notification, then the Administrator may issue an order, after giving the pollution source an opportunity to confer, requiring compliance, or EPA may commence a civil action for appropriate relief. In addition, section 113(c) sets forth certain criminal penalties that are available if such violation is a knowing violation of a plan requirement or EPA order.

The citizen suit provision, section 304, is a supplemental enforcement tool for it allows any person to commence a civil action to

67. 42 U.S.C. § 1857c-5 (a) (2) (1970).

68. 42 U.S.C. § 1857c-5 (a) (2) (B) (1970).

69. See, e.g., 36 Fed. Reg. 22406-408 (1971). Two local ordinances that this author has had occasion to examine include the Los Angeles County Air Pollution Ordinance and the Wayne County, Michigan Air Pollution Control Ordinance. For a good explanation of air pollution control regulations, this author suggests Opinion of the Illinois Pollution Control Board (by Chairman David Currie), In the matter of Emission Standards, PCB R71-23 (April 13, 1972).

70. 42 U.S.C. § 1857c-8 (1970).

enforce the requirements of a federally approved or promulgated plan after giving the EPA, the state in which the violation occurs, and the source of the violation (the polluter) sixty days notice, and allows for suits against the Administrator when he fails to perform an act that is not discretionary under the Act.⁷¹ "The term 'person' includes an individual corporation, partnership, association, State, municipality, and political subdivision of a State."⁷²

Besides section 304, the other major provision allowing for judicial intervention in EPA administration of the Clean Air Act is section 307(b).⁷³ It allows for judicial review of various actions of the Administrator as he carries out the 1970 Amendments. It prescribes the U.S. Courts of Appeals as where the petitions for review must be filed. Petitions to review promulgation or approval of an implementation plan may be filed only in the U.S. court of appeals covering the state plan being challenged. Petitions must be filed within 30 days from the date of EPA approval or promulgation. Actions of the Administrator that are reviewable only in the U.S. Court of Appeals for the District of Columbia include: ". . . action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard under [the hazardous emission section], any standard of performance under [the new source performance standards section], . . ."⁷⁴ and any standard or control measure under Title II of the Act, which allows for establishment of emission standards and controls for mobile sources of air pollution, e.g., auto emission standards⁷⁵ and unleaded gasoline regulations.⁷⁶

On the surface, the practical distinction between sections 304 and 307 appears clear; however, courts and lawyers have had difficulties distinguishing which suits should be brought under what sections to obtain judicial review of EPA actions. "The courts have indicated that the dividing line between suits that fall under section 304 and those falling under 307 often is a narrow one. That dividing line is important because the sections specify different forums for review, and filing under the wrong sections will mean dismissal

71. See Appendix A *infra*.

72. 42 U.S.C. § 1857h-(e) (1970).

73. 42 U.S.C. § 1857h-5(b) (1970). See generally Lunenburg and Roselle, *Judicial Review under the Clean Air Amendments of 1970*, 15 B.C. IND. & COM. L. REV. 667 (1974).

74. 42 U.S.C. § 1857h-5(b) (1) (1970).

75. See, e.g., *International Harvester v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973).

76. See, e.g., *AMOCO Oil v. EPA*, — F. Supp. — (D.C. Cir. 1974), 6 ERC 1481.

of the suit."⁷⁷ This author suggests that the courts are moving towards using section 304 in enforcement related matters while looking towards section 307 when the Agency has improperly carried out its ministerial rather than prosecutorial duties under the Act.⁷⁸

To use section 304 for enforcement purposes requires an understanding of recent cases illuminating the provision through which an understanding of the problems, limitations, and possibilities of the provision can hopefully be gained. Although the section provides for suits against the Administrator, the EPA has facilitated an understanding of this provision through reprinting of a Natural Resources Defense Council article *Citizen Suits under the Clean Air Act Amendments of 1970*.⁷⁹ This pamphlet explains in detail the statutory provision, but the cases were not yet available for a reading of how the statute would operate in practice. This portion of the article shall attempt to show how the provision has been working in practice and whether it holds out any real hope for becoming as an important a tool for environmental litigation as the class action.

The first question is who has standing under the section. Any "person," as defined above, has the right to sue any other person to enjoin violations of the Act. At first glance, it appears from the use of the term "any person" that standing is not a problem under this section. This is not wholly true for the courts have been using the standing test enunciated by the Supreme Court in *Sierra Club v. Morton*.⁸⁰ In *Coalition for Clean Air v. District of Columbia*,⁸¹ an action brought under the Clean Air Act to enforce an emis-

77. Bolbach, *The Courts and the Clean Air Act*, Monograph No. 19, 5 Environment Reporter 6 (1974).

78. Luneburg and Roselle, *supra* note 73, at 691: "Actions pursuant to 42 U.S.C. § 1857h-2(a) (2) (1970) are, in a sense, proceedings for enforcement, and therefore 42 U.S.C. § 1857h-5(b) (2) (1970), by its express terms, applies thereto to prevent the raising of issues which could have been raised earlier."

79. Ayres and Miller, *Citizen Suits under the Clean Air Act Amendments of 1970*, 1 Natural Resources Defense Council, Inc. Newsletter, Issue 4 (1972), reprinted by U.S. Environmental Protection Agency, Office of Public Affairs, Washington, D.C., EPA-335 (hereinafter referred to as Ayres and Miller).

80. 405 U.S. 727 (1972).

81. — F. Supp. — (D.D.C. 1974), 6 ERC 1363.

sion limitation against a municipal incinerator⁸² rather than permit a year's variance, Federal District Judge Robinson stated:

Defendants also dispute Plaintiffs' standing to sue. As noted the Act allows "any person" to file suit to enforce clean air standards. Nevertheless this does not, as Plaintiffs seem to arguably dispense with the necessity that such a person demonstrate a sufficient interest in the specific controversy as to meet traditional concepts of standing. *Sierra Club v. Morton*, 405 U.S. 727 (1972) set forth the test for standing as allegation of an "injury in fact" attributable to the challenged action of the Defendant. The Court finds that the Complaints herein, though inartfully drawn, adequately allege injury to the health and property interests of the Plaintiff as residents of the locality in which the emission violations occur.⁸³

While *Sierra Club v. Morton* was a suit where review was sought under the Administrative Procedure Act,⁸⁴ it seems apparent that a plaintiff or group of plaintiffs would have no difficulty in establishing standing under section 304. The difficulty arises in interpreting whether Congress by enacting the section, and in specifying that suits brought under it do not have to satisfy either a jurisdictional amount requirement or diversity of citizenship, intended that plaintiffs' standing to bring suit would be controlled by a case decided two years after enactment of the section and which concerns another law. We note that the *Sierra* criteria can be met rather easily,⁸⁵ but an additional test to be met does not seem to be carrying out the Congressional purpose.

The Federal Water Pollution Control Act of 1972, enacted after *Sierra*, has, for practical purposes, clarified this difficulty for this observer. In its citizen suit section, the FWPCA says "any citizen may commence a civil action . . ."⁸⁶ "Citizen" is defined in subsection (g) to mean "a person or persons having an interest which is or may be adversely affected."⁸⁷ It is EPA's position this definition was added by the Conference Committee to reflect the decision in *Sierra Club v. Morton*.⁸⁸ Providing a precedent for EPA's inter-

82. The author took part in another Clean Air Act case involving an incinerator which resulted in a federal order under section 113 and the same date for ceasing operations as the federal order required in an order of the State of Illinois Pollution Control Board. See, *Ill. EPA v. Village of Skokie*, PCB 74-74 (May 23, 1974), and U.S. EPA *In re Village of Skokie, Municipal Incinerator*, Order No. EPA-5-A-74-18 (April 2, 1974).

83. *Coalition for Clean Air v. District of Columbia*, 6 ERC at 1365.

84. *Adm. Procedure Act*, § 10: 5 U.S.C. § 702 (1970).

85. Judge James L. Oakes, *Developments in Environmental Law*, 3 ENV. REP. 50001, 50002 (1973); reprinted in substantially the same form, *Environmental Litigation: Current Developments and Suggestions for the Future*, 5 CONN. L. REV. 531 (1973). [Hereinafter referred to as OAKES.]

86. 33 U.S.C. § 1365 (a) (1972).

87. 33 U.S.C. § 1365 (g) (1972).

88. Preamble, *Prior Notice of Citizen Suits*, 38 Fed. Reg. 15040 (1973), 40 C.F.R. Part 35.

pretation is another decision of the District Court of the District of Columbia. In *Montgomery Environmental Coalition v. Fri*,⁸⁹ defendants said that the complaining community groups lacked standing because they failed to allege that they or their members would be adversely affected by defendants' actions. Applying this *Sierra* criterion of "adversely affected" even though the suit was brought under section 505, the court stated:

While the statutory language relied on for standing in the instant case is arguably broader in scope than that relied on in *Sierra*, the Court takes note of congressional intent behind section 1365(g) which sought to base standing requirements on those pronounced in *Sierra*. Applying the *Sierra* guidelines to plaintiff community groups, the Court finds that standing has been established.⁹⁰

Therefore, while the citizen suit provision of the Clean Air Act is also "arguably broader," to be safe one should allege the *Sierra* criterion of "adversely affected." Indeed, *Sierra* has turned out to be merely a pleading decision.⁹¹ The Sierra Club amended its complaint and alleged that its members would be affected in their activities by the proposed Disney development, and the amendment was found sufficient.⁹² The "liberalized law of standing" as developed in *Barlow*⁹³ and *Data Processing*⁹⁴ appears, then, to remain as the standard for bringing suit under the Clean Air Act. Even with the statutory provision, the plaintiff must allege "injury in fact" or such a "personal stake" in the controversy to ensure preservation of a genuine adversary context.⁹⁵

Jurisdiction, not standing, however, has proven to be the key procedural issue. *U.S. Steel v. Fri*,⁹⁶ illustrates the problem of basing jurisdiction on section 304. When section 304 was first proposed and enacted, commentators were concerned mostly with the possibility of citizen suits disrupting EPA enforcement programs by reordering the priorities or the difficulties in coordinating citizen

89. 366 F. Supp. 261 (D.D.C. 1973).

90. *Id.* at 1210.

91. Oakes, *supra* note 85, at 50002.

92. *Sierra Club v. Morton*, 348 F. Supp. 219 (N.D. Cal. 1972).

93. *Barlow v. Collins*, 397 U.S. 159 (1970).

94. *Assn. of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970).

95. See generally Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970).

96. *United States Steel Corp. v. Fri*, 364 F. Supp. 1010 (N.D. Ind. 1973).

suits with the whole regulatory scheme.⁹⁷ They failed to read the statute as Judge Beamer did in the *U.S. Steel* case. In granting pre-enforcement review to some matters in an EPA order, the Judge held: "Although both parties have ignored the provision, the Court finds that section 1857h-2(304) of the Act clearly provides jurisdiction."⁹⁸ The Judge based his decision on the savings clause, section 304(e):

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).⁹⁹

The Judge's reasoning was that review was not precluded because the dispute concerns the legal sufficiency of the Administrator's order—an enforcement matter. The case is unlike *Getty Oil*¹⁰⁰ where EPA enforced a Delaware air implementation plan regulation against the DELMARVA electric company and its fuel supplier Getty objected to the regulation as being unreasonable and adopted improperly. The Third Circuit held in *Getty Oil* that the company was foreclosed from challenging the regulation and plan in an enforcement case and should have challenged the plan under Section 307 of the Clean Air Act. Judge Beamer, however, is saying that challenging specific aspects of an EPA order prior to enforcement of that order is permitted under section 304.

While agreeing with Judge Beamer that section 304 concerns enforcement matters, we disagree that an action initiated under another section of the same Act can be bootstrapped into the savings clause and section 304. The savings clause concerns actions under other statutes or at common law.¹⁰¹ To find that the polluter him-

97. Crampton and Boyer, *Citizen Suits in the Environmental Field: Peril Or Promise?*, 2 *ECOLOGY L.Q.* 407, 427 (1972). Some of these fears have been justified as the EPA Administrator approved state implementation plans not providing for transportation and land use controls for air quality maintenance or plans having provisions to prevent deterioration of air quality in regions already meeting the air quality standards (non-degradation). See, respectively, *Natural Resources Defense Council, Inc. v. EPA*, 475 F.2d 988 (D.C. Cir. 1973), and *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D.D.C. 1972), *aff'd*, 4 ERC 1815 (D.C. Cir. 1972), *aff'd by an equally divided Court sub nom.*, *Fri v. Sierra Club*, 412 U.S. 541 (1973).

98. *United States Steel Corp. v. Fri.*, 364 F. Supp. 1010, 1013 (N.D. Ind. 1973).

99. *Id.* at 1019.

100. *Getty Oil Co. (Eastern Operations) v. Ruckelshaus*, 342 F. Supp. 1006 (D. Del. 1972), *remanded*, 467 F.2d 349 (3d Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

101. Senate Comm. on Public Works, Subcomm. on Air and Water Pollution, National Air Quality Standards Act of 1970, Sen. Report No. 91-1116, 91st Cong., 2d Sess. 38 (1970) [hereinafter cited as Sen. Rep.]

self gets judicial review, not under the enforcement section (113), but under a supplemental enforcement provision seems to turn the intent of the provision topsy-turvy. Section 304 appears to be invocable in the case of enforcement orders under section 113 only when the Administrator's order is not sufficient with respect to an emission limitation or standard under the Act or when the Administrator is not enforcing his order. Section 304 is not intended to grant pre-enforcement review to the very receiver of such an order. The Administrator's action may be reviewed in accordance with section 113 or the Administrative Procedure Act.

Two decisions, although not directly concerned with EPA enforcement actions, have denied review to companies challenging the Administrator's adoption of certain regulations in state implementation plans. These companies brought suit under section 304 when they should have challenged such adoption under section 307. In *West Penn. Power v. Train*,¹⁰² the court found that section 304 did not allow judicial review of a regulation prohibiting use of tall stacks to attain air quality under the Pennsylvania implementation plan. The court said, "A reference to 42 U.S.C. 1857c-5 (Section 110) shows that the Administrator has ample discretion in determining approval of state plans and hence it is the holding of this court that no suit will lie under 1857h-2."¹⁰³ Using the reasoning of *Getty Oil and Duquesne Light Co. v. EPA*,¹⁰⁴ the court found that section 307 designated an exclusive forum for judicial review.

Review by federal courts of actions taken by the Administrator is circumscribed by section 307(b)(1). It provides that petitions for review of the Administrator's actions approving implementation plans are to be filed in the United States Court of Appeals for the appropriate circuit, within thirty days of the date of the Administrator's approval. Subsection (2) of 307(b) forecloses later litigation in enforcement proceedings of issues for which review could have been had under section 307(b)(1).¹⁰⁵

In *Anaconda v. Ruckelshaus*,¹⁰⁶ the Tenth Circuit held that section 304 does not provide jurisdiction for a district court to hear a suit asserting that the Administrator should have prepared a National Environmental Policy Act environmental impact statement

102. — F. Supp. — (W.D. Pa. 1974), 6 ERC 1722.

103. *Id.* at 1724.

104. 481 F.2d 1 (3d Cir. 1973).

105. *Id.* at 4.

106. *Anaconda Co. v. Ruckelshaus*, 482 F.2d 1301 (10th Cir. 1973).

concerning the proposed Montana implementation plan.¹⁰⁷ The Court of Appeals reasoned that in the statute Congress specifically provided that review of an implementation plan be filed only in the U.S. Court of Appeals for the District of Columbia Circuit or for the appropriate circuit. "The intent of Congress to make the Court of Appeals the exclusive forum is apparent from that wording."¹⁰⁸ The Court, citing *Getty Oil*, continued,

To allow review by way of injunction in the case at bar could only serve to cause delay and to take the case up in a district court removed from the scene is not appropriate either, for it could conceivably encourage forum shopping and the thwarting of procedures which Congress has carefully adopted. It follows then that where, as here, Congress has specifically designated a forum for judicial review of administrative action and does so in unmistakable terms except under extraordinary conditions, that forum is exclusive.¹⁰⁹

The *Anaconda* court also stated that since the regulation was merely a proposed one, the case was not ripe for injunctive relief. This going to court prematurely against the EPA Administrator has occurred in other cases. In *Plan for Arcadia v. Anita Associates*,¹¹⁰ the District Court for the Central District of California held: "Since the plaintiffs' only remedy under the Act is against persons who are in violation of regulations promulgated under the Act and since no regulations have been promulgated with respect to shopping centers, it follows that no cause of action is stated against the corporate defendants."¹¹¹ The court went on to dismiss the complaint against all parties, since section 304 does not authorize a suit against the EPA or the state where there is no regulation for the governmental bodies to enforce.

In *Pinkney v. OEPA*,¹¹² the District Court of Northern Ohio followed *Anaconda* in stating that suits challenging EPA actions in

107. Challenges both by citizen groups and industry have been against EPA for not filing impact statements when promulgating regulations under the Clean Air Act. See, e.g., *Getty Oil*, 342 F. Supp. 1006, and *Buckeye Power, Inc. v. EPA*, 481 F.2d 162 (6th Cir. 1973). In the FWPCA this issue has been clarified by 33 U.S.C. § 1371 (1972) to not require impact statements under most regulatory circumstances.

108. *Anaconda Co. v. Ruckelshaus*, 482 F.2d 1301, 1304 (10th Cir. 1973).

109. *Id.* at 1304-05.

110. 6 ERC 1606 (C.D. Cal. 1973).

111. *Id.* at 1607.

112. *Pinkney v. Ohio EPA*, 6 ERC 1625, 1 PCG Par. 15060 (N.D. Ohio 1974). But cf., *Citizens Assn. of Georgetown v. Washington*, 370 F. Supp. 1101 (D.D.C. 1974), which was in accord with *Pinkney* in stating that jurisdiction does not lie under § 304; however, the District Court, Judge Richey, found jurisdiction under 28 U.S.C. § 1331, since a substantial federal question exists. The Court deferred to the administrative judgment of EPA in finding that retroactive application of the indirect source review procedures was both inequitable and unnecessary to air quality. Concerning the Pink-

promulgating regulations under the Clean Air Act must be raised in federal appeals court rather than a federal district court. In dismissing this class action suit brought on behalf of the residents of Cuyahoga County—which charged that creation of a shopping center would cause the violation of ambient air quality standards and that Ohio had violated the Clean Air Act by failing to adopt indirect source regulations and that the EPA had improperly extended by 180 days the effective date of federal indirect source regulations—Judge Lambros also ruled that the litigants had failed to observe the mandatory 60 day prefiling notice requirement of section 304.

Before discussing the notice requirement of section 304, one other case should be mentioned as strongly limiting jurisdiction of federal district courts under section 304. In *Arizona Public Service Company v. Fri*,¹¹³ complainants sought damages and injunctive relief in federal district court. The power companies charged that EPA approval of a state implementation plan amounted to inverse condemnation, denied them due process and violated NEPA. The Arizona District Court held that such claims should have been presented in the Court of Appeals. The court followed *Anaconda* in making clear that a plaintiff cannot forum shop among courts to obtain jurisdiction.

In contrast, the nondegradation case of *Sierra Club v. Ruckelshaus*¹¹⁴ shows clearly that given the right issue a plaintiff can obtain jurisdiction under section 304 even if there is no emission stand-

ney case and its meaning, the author wishes to acknowledge the assistance of Attorney Ronald Mastriana of the Edward J. DeBartolo Corporation of Youngstown, Ohio, for supplying him with the pleadings. The author, while with Region V wrote the first two letters determining that indirect source review was not applicable for two developments. There have been over 52 lawsuits filed concerning indirect source review and the EPA regulations, 39 Fed. Reg. 25292 (July 9, 1974), 40 C.F.R. Part 52, § 52.22(b). The term "indirect source" is defined to mean a facility, building, structure, or installation which attracts or may attract mobile source activity (e.g., automobiles) that results in emissions of a pollutant (e.g., carbon monoxide, ozone) for which there is a national standard. Indirect sources include highways, parking facilities, shopping centers, airports and office buildings. The author foresees more federal land use planning under the Clean Air Act, see generally, Mandelker and Rothschild, *The Role of Land-Use Controls in Combating Air Pollution under the Clean Air Act of 1970*, 3 *Ecology L.Q.* 235 (1973).

113. — F. Supp. — (D. Ariz. 1973), 5 ERC 1878.

114. *Sierra Club v. Ruckelshaus*, 4 ERC 1205 (1972).

ard or limitation to enforce and a definite lack of the same. Judge Pratt of the District of Columbia held that EPA failed to perform a non-discretionary act by not requiring nondegradation provisions in state implementation plans. Furthermore, the case was "precisely the type of claim which Congress, through 52 U.S.C. §1857h-2(a), intended interested citizens to raise in the district courts."¹¹⁵ The Judge concluded that the Act is based, in important part, on a policy of non-degradation and that the Administrator had no right to permit the states to submit air pollution control plans which would allow pollution levels of clean air to rise to the secondary standard level of pollution.

It is unfortunate, but several of the actions brought under section 304 have been severely handicapped due to procedural errors either inadvertently, or perhaps knowingly, made.¹¹⁶ Lawyers have not followed, or in some cases have not wanted to follow, the procedural rules governing the giving of notice required by subsection 304(b) of the Act as a prerequisite for commencing the lawsuit.¹¹⁷ Except for a violation of an EPA order or a hazardous pollutant standard, plaintiffs must give 60 days notice to the Administrator. Concerning this procedural requirement, Judge Decker said in *Highland Park v. Train*:¹¹⁸

Not only is strict adherence mandated by the statute, it is supported by compelling practical and policy considerations, especially in cases of a complex nature such as the one before the court. Congress was aware of the 60 days granted the United States, or an officer or employee thereof, to answer complaints in civil suits Had the drafters of the Act considered the Rule 12 period alone to be sufficient, they would not also have required notice prior to commencement of the suit.¹¹⁹

Judge Decker, besides pointing out the literal, statutory language, gave several policy reasons for the 60-day period. The period led to negotiated settlements.

Further, without the grace period, the EPA would be accorded only a few days . . . to . . . prepare a response to, a difficult, multi-count suit, seeking substantially more than mere ministerial action. In addition, complex matters might necessitate deploying attorneys from Washington. And, of course, institution of suit interrupts the on-going process of regulation development and other substantive EPA concerns.¹²⁰

115. *Id.* at 1206. For EPA proposals arising out of this case, see, 38 Fed. Reg. 18986 (July 16, 1973), and *Clean Air Mess*, 104 Time Mag. 69 (Sept. 2, 1974).

116. Sometimes cases have been brought to gain publicity for the lawyer rather than to win for the client.

117. 40 C.F.R. Part 54.

118. — F. Supp. — (N.D. Ill. 1974), 6 ERC 1464.

119. *Id.* at 1469.

120. *Id.*

This observer of EPA action finds that Judge Decker is on firm ground when he examines the statutory intent of the 60-day notice period, but finds that EPA's enforcement and rule-making activities continue until altered by judicial decisions—the initiation of a law suit is hardly enough to slow or enough to quicken the bureaucratic process.

Standing opposed to Judge Decker's opinion is that of Judge Hill's in *Riverside v. Ruckelshaus*:¹²¹

There has been . . . actual constructive compliance by plaintiffs with the sixty-day notice provision . . . in that:

. . . .

2) Sixty days elapsed between the filing date and the date that hearing on plaintiffs' request for injunction was complete and this Court rendered its judgment.

3) During that sixty day period the Administrator had all the beneficial effect of the sixty day notice provision, so the purposes of the provision were fulfilled.¹²²

Judge Decker, in referring to *Riverside's* holding that personal service upon the Administrator, together with a lapse of 60 days between filing and completion of hearing for a preliminary injunction, was adequate for jurisdiction, said: "Such an approach to the notice provision constitutes, in effect, judicial amendment in abrogation of explicit, unconditional statutory language and this court respectively declines so to ignore or modify the notice requirement."¹²³

The district court in the *Pinkney* case also discussed the notice requirement and interpreted the "savings clause" subsection 304(e) the same way as the author did above in *United States Steel v. Fri*:¹²⁴

The proceeding language, however, clearly refers to suits arising under laws other than the Clean Air Act. Indeed, any other interpretation would render the notice requirements meaningless because suits for violations would regularly be filed without prior notice. Moreover, this is the interpretation suggested by the legislative history of the Act.

. . . .

Since all three of plaintiffs' statutory claims are based on rights arising under the Clean Air Act, subsection (e) does not exempt

121. — F. Supp. — (C.D. Cal. 1972), 4 ERC 1728.

122. *Id.* at 1731.

123. — F. Supp. — (N.D. Ill. 1974), 6 ERC 1464, 1469.

124. See notes 77-78 and 96-101, *supra*, and accompanying text.

plaintiffs from the mandatory 60-day notice requirement prior to commencing suit.¹²⁵

This review of the notice requirement of section 304, which was purposefully made simple,¹²⁶ leads one to agree for entirely different reasons with Ayres and Miller: "In suits against polluters it may not be as benign as it would first appear."¹²⁷ Ayres and Miller were worried about state officials bringing their own suit during the 60-day period to head off citizen suits; instead, the record shows that too many cases have been handicapped because attorneys have ignored as a trifling formality the 60-day notice requirement. To this observer, the 60-day notice requirement is not simply another formality. This author has personally seen and developed cases brought to his attention through the notification to the EPA Administrator 60 days before commencing suit. He has also seen cases where the Administrator has taken some action and that action has been enough to alleviate the condition or mollify the complainant. Other cases have, of course, not worked out as well; in these cases the Administrator and citizens have disagreed as to whether a violation of an emission limitation or state plan actually exists. The important thing is that the author has seen the agency respond to all formal citizen complaints under section 304. The agency has responded with investigations and in many cases these investigations have led to EPA Notices of Violation and Orders under section 113 of the Clean Air Act.¹²⁸

In water pollution, the effect of the citizen suit provision has been less pronounced in enforcement due to the relatively short time the FWPCA has been in existence, but the District of Columbia has commented on the notice requirement which parallels that of the Clean Air Act:

In May 10, 1973, purported notices were given by plaintiff community groups to defendants Administrator of the Environmental Protection Agency, Washington Suburban Sanitary Commission, Montgomery County Council, James Gleason, and Maryland Governor Marvin Mandel. On June 1, 1973, the Administrator prescribed notice regulations pursuant to section 1365 (b). 40 C.F.R. 135 *et. seq.*

125. *Pinkney v. Ohio EPA*, 6 ERC 1625, 1 PCG Par. 15436 (N.D. Ohio 1974).

126. Sen. Rep. at 37.

127. Ayres and Miller, *supra* note 79, at 4.

128. Citizen groups in Northwest Indiana (Gary area) gave notice to the Administrator of EPA and to Region V, Midwest Region, that they would bring suit against the steel mills in the area. Region V responded with notices of violation and in some cases orders against the steel mills: including United States Steel, Bethlehem Steel, Inland Steel, and Youngstown Sheet and Tube.

In view of the fact that the supplemental pleadings were filed more than sixty days after the May 10th notice and in view of the fact that said notice complied in full with the spirit of the Administrator's June 1st regulations, plaintiff community groups are found to have given proper notice under section 1365(b).

Accordingly, jurisdiction has been established by plaintiff community groups.¹²⁹

While the District of Columbia court was liberal in construing the notice requirement above, the message of this section has been, do not count on always finding this "trifling formality" waived by the courts. In its way it is just as formal as the renowned *Eisen* notice requirement.

After the formalities have been fulfilled, the issue arises anew of who to sue and what to allege. Any person may bring suit against any other person for violations of

(A) an emission standard or limitation . . . or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or . . . against the Administrator where there is alleged a failure . . . to perform any act or duty . . . which is not discretionary . . .".¹³⁰

Section 304(f) defines the term "emission standard" or limitation:

(1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard, or (2) a control or prohibition respecting a motor vehicle fuel or fuel additive, which is in effect under this chapter . . . or under an applicable implementation plan.¹³¹

We have previously outlined the Act and the regulations it establishes. All these regulations can be enforced using section 304. A problem arises, however, when the Administrator refuses to take action on the grounds that the action is discretionary with the agency. The Administrator argues in enforcement cases that he has discretion to take action under the rubric of "prosecutorial discretion."¹³² For example, a citizen serves notice that unless the

129. *Montgomery Environmental Coalition v. Fri*, 366 F. Supp. 261, 1213 (D.D.C. 1973). *But cf.* *NRDC v. Train*, 6 ERC 1033 (D.D.C. 1973), where the court stated that EPA's failure to publish within one year of enactment of 1972 FWPCA final § 304(b) (1) (A) effluent limitation guidelines violated the Act and required a court order establishing a publication schedule for guidelines that provides for final publication of all guidelines by November 29, 1974.

130. 42 U.S.C.A. § 1857h-2(a) (1) and (2) (1970).

131. 42 U.S.C.A. § 1857h-2(f) (1970).

132. K. DAVIS, *PROSECUTORIAL DISCRETION* (1971). The author participated in one case where a citizens group filed a complaint against EPA for not

Administrator issues a notice of violation under section 113 to a polluter within 60 days, the Administrator and the polluter will be sued for a violation of the state implementation plan. In other words, may citizens successfully sue the EPA to compel Federal enforcement against violators of emission standards or limitations? The EPA has argued that decisions with respect to Federal enforcement can be considered discretionary.

The answer to this problem turns not just on the meaning of "shall" in the enforcement section of the Clean Air Act, but concerns the legislative history of section 304. The enacted version of section 304 differs from the original provision in the Senate report. The Senate bill would have given the courts jurisdiction

to enforce, or to require the enforcement to any applicable schedule or timetable of compliance, emission requirement, standard of performance, emission standard, or prohibition established pursuant to this Act. Civil actions for such enforcement, or to require such enforcement, may be brought . . . against the Secretary where there is alleged a failure of the Secretary to exercise (i) his authority to enforce standards or orders established under this Act; or (ii) any duty established by this Act.¹³³

Had the Senate version been enacted, it seems clear that any person would have been able to sue the Administrator for enforcement against any violator. The Senate report reinforces this view:

The Committee bill would provide in the citizen suit provision that actions will lie against the Secretary 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.¹³⁴

The enacted language, however, narrows the scope of citizen actions against the Administrator and the conference report says, "Suits against the Administrator are limited to alleged failure to perform mandatory functions to be performed by him."¹³⁵ Re-

finding a violation of the state implementation plan where the state adamantly set forth the position that it had acted in accordance with the proper administrative procedures and there would be no air quality violation. The bi-level or even tri-level jurisdictional basis of the Clean Air Act often does provide situations where one air pollution control agency may be in disagreement with another. In the case of Wisconsin's Environmental Decade, Inc. v. Wisconsin Power and Light Co., Complaint filed January 17, 1974, W.D. Wis., both the federal and state agencies agreed not to take action pursuant to the citizen suit for the power plant development had been reviewed for compliance with applicable regulations previously and the matter had been litigated in Dane County Circuit Court. See text at 127, *supra*. Does section 304(b) (1) (B) apply to this situation?

133. Sen. Rep. at 122-23.

134. *Id.* at 38-39.

135. *Id.* at 36.

marks by legislators also stress this limitation.¹³⁶ Finally, a letter from HEW Secretary Richardson to the Conference Committee prior to issuance of the conference report should be considered in determining the Administrator's discretion in reaction to section 304:

The authorization of citizen suits against the Secretary to force him to take enforcement action in a particular case would have the unintended result of reducing the overall effectiveness of our air pollution control efforts by distorting enforcement priorities that are essential to an effective national control strategy. Therefore, we recommend the deletion of that portion of the provision authorizing suits against the Secretary. This deletion will not affect the right of citizens to move directly against polluters, including the Federal Government.¹³⁷

Since the bill was altered, although not to the extent that Richardson wanted, the question of the Administrator's prosecutorial discretion under the Act remains. The Richardson letter along with the deletion of the enforcement language in the citizen suit provision of the Senate version indicates that the Administrator has discretion in enforcement related matters. The courts have also been reluctant to interfere in enforcement activities, although the decision not to enforce may be reviewable in some cases.¹³⁸

HOW MUCH FRUIT WILL THE TREE BEAR?

At the beginning of this article, we quoted a newspaper editorial that concluded: "Now, high cost has again put justice out of the reach of those most in need of it."¹³⁹ The issues of attorneys fees, damages, and group suits are the essential issues that challenge the utility of citizen suit provisions. These topics have been discussed numerous times in articles solely devoted to them; thus, this paper will not do more than sketch out the arguments and refer to some of the cases in the area.¹⁴⁰ We will, of course, emphasize the cases that have arisen under the Clean Air Act, but we must point out that the courts have vacillated in their decisions in cases involving

136. See Remarks of Rep. Staggers, House Manager, 116 CONG. REC. H12061 (Dec. 18, 1970).

137. Letter, from HEW to conference committee, Nov. 10, 1970.

138. K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 28.16, at 982-990 (1972 Supp.).

139. *Supra* note 1.

140. See generally Note, *The Allocation of Attorneys' Fees after Mills v. Electric Auto-Lite Co.*, 38 U. CHI. L. REV. 316 (1971).

the same subject matter. To a large extent, the more meritorious the claim proves to be, the greater is the ultimate fee for the attorney.

Regarding the citizen suit, whether it can be viewed as a substitute for the classic, environmental class action depends on who will bear the costs of litigation and the eventual reward both to client and attorney. How much fruit will the tree bear? While in theory everyone has a right to litigate and seek a remedy for a right, there is usually no successful outcome to a dispute without either money from the client or a lawyer who forgoes income from a case. This is not to disparage the numerous lawyers who take cases *pro bono publico*; however, in most situations to do justice both the lawyer and client choose their opportunity. A parallel is the contingent fee arrangement in automobile accident cases; some claims are simply not worth litigating.¹⁴¹

The Clean Air Act and other environmental statutes are no exception to the general rule that the lawyer must still nurture and water his fruit tree. The precedents for awarding attorneys' and expert witness' fees are increasing in environmental litigation involving other than class actions. The class action, though, still presents the possibility of accruing fantastic sums of money and exerting a large amount of pressure for special causes. If one is able to maneuver around the new obstacles established by *Eisen* and *Zahn*, the class action presents the greatest opportunity for financial and probably psychic satisfaction. "They are one of the last outposts of free enterprise," says New York attorney Edward Labaton. "You have to have a shop, maybe some capital, and you can do big things."¹⁴²

The financial rewards of environmental litigation are hardly in the same class, especially if one is suing a corporate polluter rather than defending one, but the trend towards receiving reimbursement in environmental litigation when claims are brought on behalf of groups or the public at large, is increasing. For instance, litigation under NEPA indicates that fees will be awarded despite another federal act that prohibits the awarding of attorneys' fees and expenses against the United States or any agency or official acting in his official capacity.¹⁴³ In reaching a decision on the Alaskan

141. See Note, *Awarding Attorney and Expert Witness Fees in Environmental Litigation*, 58 CORNELL L. REV. 1222, 1237-46 (1973).

142. Quoted in Andrews, *The Class Action Bar: It's All Cat and Mouse*, 4 JURIS DOCTOR 18 (January 1974).

143. 28 U.S.C.A. § 2412; used in *Riverside v. Ruckelshaus*, 4 ERC 1231 (C.D. Cal. 1972).

pipeline, the U.S. Court of Appeals for the District of Columbia, Judge Skelly Wright presiding, held that groups challenging, under NEPA and the Mineral Leasing Act of 1920, the construction of the pipeline, were entitled to an equitable award of attorneys' fees and costs, even though the groups did not obtain the judicial relief requested.¹⁴⁴ The groups were entitled to fees because the suit served the public interest by insuring compliance with NEPA and by focusing debate on the relative merits of trans-Alaskan and trans-Canadian pipeline routes. The reasoning apparently followed that of Judge Peckham from the Northern District of California in *La Raza Unida v. Volpe*,¹⁴⁵ where both attorneys' and expert witness' fees were awarded against the California Highway Department.

The basis of the award was that the suit helped enforce a congressional policy in an environmental action; the court took the lead from the "private attorney-general concept," advanced by Judges Wisdom and Johnson in segregation and civil rights cases. Judge Peckham held that the following factors should be considered in deciding whether the "private attorney general concept" is applicable: (a) strength of congressional policy, (b) the number of people benefited by the litigant's efforts, and (c) the necessity and financial burden of private enforcement.¹⁴⁶

In deciding whether a private attorney would handle a class action, the same factors of Judge Peckham would still be important—especially, the number of people benefited and the burden of enforcement. However, carrying out the intent of congressional policy of serving the public interest while serving your clients' interest, appears to be an essential element in collecting a fee under citizen suit provisions. In *Delaware Citizens v. Stauffer Chemical*,¹⁴⁷ District Judge Stapleton interpreted section 304's provision providing for the award of litigation costs as being highly discretionary with the court. Despite section 304(d) that does not allow for awards to a prevailing party, Judge Stapleton felt that awarding of costs is still an extraordinary remedy.

As earlier suggested, however, I do not believe good faith alone should require an award of attorney's fees to an unsuccessful litigant under Section 304. While I do not fault plaintiff for instituting

144. *Wilderness Society v. Morton*, 6 ERC 1427 (D.C. Cir. 1974).

145. 337 F. Supp. 221 (N.D. Cal. 1971), 1 ELR 20642 (N.D. Calif. 1971), 2 ELR 20691 (N.D. Cal. 1972).

146. Oakes, *supra* note 85, at 50004.

147. 6 ERC 1541 (D. Del. 1973).

this action when it did, I cannot say that this was the exceptional kind of case in which the public interest requires a successful defendant to pay the full costs of litigation.¹⁴⁸

The District Judge distinguished the case from the kind "in which a recalcitrant polluter is left free to ignore Clean Air Act standards simply because neither the state nor the federal enforcement agencies possess the resources necessary to force his compliance."¹⁴⁹

The author dissents from the Judge's opinion. He suggests that while there will be instances where the citizen is clearly acting unfairly in bringing suit against a polluter, in many cases, including *Stauffer*, the citizen has a public duty to see that postponements, variances, and schedules are developed and granted properly under the Act. The citizen or citizen group, perhaps, should not be reimbursed by the polluter; but the state and federal agencies should encourage citizen monitoring of their programs.¹⁵⁰ The citizen suit is intended not only as a supplemental enforcement device but also to encourage viable, effective air pollution control programs. Such a program should grant variances only as a matter of necessity and demand compliance as expeditiously and as pragmatically as the Clean Air Act mandates.¹⁵¹

For cases awarding costs of litigation under the Clean Air Act, we may examine two cases which challenged the Administrator's action, and not that of the polluters, of approving state implementation plans. The First Circuit Court of Appeals in *Natural Resource Defense Council v. EPA*¹⁵² interpreted section 304 to apply also to section 307 suits. The successful petitioners in *NRDC v. EPA*¹⁵³ requested the court to award them attorneys' fees as well as costs against the EPA for their efforts in obtaining orders requiring the EPA in Massachusetts and Rhode Island to comply with certain of its obligations under the Clean Air Act, including plan approval for air quality control regions, emission data availability, and plan revisions. The court explored the history of awarding attorneys' fees and other costs of litigation. It explained that orig-

148. *Id.* at 1543.

149. *Id.*

150. *E.g.*, Region V EPA gives a small grant to the Air Conservation Committee of the Northern Ohio Lung Association. Bucato, *One Woman versus 600 Smokestacks*, March 1974 ENVIRONMENT MIDWEST 3 (published by Region V, United States Environmental Protection Agency). The Conservation Committee through its Chairperson Pat Smith has filed to be a party to 140 variance hearings being held pursuant to Ohio law and the Clean Air Act. Besides § 304, § 110(a) of the Act encourages public participation (42 U.S.C. § 1857c-5(a) (1970)).

151. 42 U.S.C. § 1857c-5 (1970). See generally *Natural Resources Defense Council, Inc. v. EPA*, 489 F.2d 390 (5th Cir. 1974).

152. 484 F.2d 1331 (1st Cir. 1973).

153. 478 F.2d 875 (1st Cir. 1973).

inally attorneys' fees might be taxed to a private party who had sued or defended in bad faith. Attorneys' fees have also been awarded in equity proceedings where a plaintiff recovered through the litigation a fund in which others were entitled to share. Building upon this fund rationale, the First Circuit discussed the economic concept of spreading costs of litigation equitably among all the beneficiaries of an action and encouraging suits which promote the public interest. The court then analyzed whether sovereign immunity barred the suit and if section 304(d) allowed fees in district court, but said nothing about suits brought directly in the federal appellate courts as required by section 307(b). The court agreed with the Senate Report, which stated: ". . . in bringing legitimate actions under this section citizens [are] performing a public service and in such instances the courts should award costs of litigation to such party."¹⁵⁴ The Court also touched upon the concept that no award of fees would be made in frivolous litigation, and it pointed out the public service done by NRDC through this litigation.

We are at liberty to consider not merely "who won" but what benefits were conferred. The purpose of an award of costs and fees is not mainly punitive. It is to allocate the costs of litigation equitably, to encourage the achievement of statutory goals. When the government is attempting to carry out a program of such vast and unchartered dimensions, there are roles for both the official agency and a private watchdog. The legislation is itself novel and complex. Given the implementation dates, its early interpretation is desirable. It is our impression, overall, that petitioners, in their watchdog role, have performed a service.¹⁵⁵

However, petitioners, by volunteering and performing this public service, did not receive quite the financial reward that attorneys litigating solely for private clients might have received.

We must also recognize that petitioners, as surrogate attorneys for the interests of the public and the EPA, have volunteered and 'imposed' their services on 'clients' that never contracted for them. As attorneys for involuntary clients, their fees may properly be less than those they could have received by entering the marketplace and selling their services to the private client who would make the highest bid for them.¹⁵⁶

As an aside, we must point out, as the court did elsewhere, in the

154. Sen. Rep. at 38, *cited in* NRDC v. EPA, 484 F.2d 1331, 1337 (1st Cir. 1973).

155. *Id.* at 1338.

156. *Id.* at 1339.

opinion, that "only the public—certainly not the polluter—has the incentive to complain if the EPA falls short."¹⁵⁷

Regarding the issue of what is a "reasonable" attorneys' fee, the non-degradation case of *Sierra Club v. Ruckelshaus*¹⁵⁸ reoccurs in our discussion. An award of fees commensurate with what affluent private litigants would have had to pay (\$48,000) was granted the Sierra Club in this case. The Sierra Club also won an award of fees although it lost the case in an action brought under NEPA. A Texas district court reasoned in *Sierra Club v. Lynn*,¹⁵⁹ that the plaintiffs had caused the defendants to incorporate into their plans for a housing project environmentally protective features that would otherwise have been excluded. "With those provisions, the project was held to have satisfied the requirements of NEPA. Since the plaintiffs had succeeded in principle, the court was not to be dissuaded from awarding counsel fees by the fact that "technically" they had lost the case."¹⁶⁰

The successes of NRDC and the Sierra Club point out a newly emerging factor in environmental litigation—the group litigator. This factor may be making the class action less essential as citizens band together in groups to bear the cost of litigation. Group litigation has seemingly become more popular since the clarification of what a group needs for standing under *Sierra Club v. Morton*.¹⁶¹ For any group bringing an action, the best advice as gained from *Sierra Club v. Morton* is to allege that the group's members would be affected in their property, activity, or in some other manner. As these groups become more assertive of their rights under citizen suit and other provisions, the cost of financing environmental litigation should shift to the government and the polluter. That is, as more cases are won by environmentalists, and attorneys' fees and expert witnesses' fees are awarded, "the costs can increasingly be assumed either by the parties which cause or threaten the environmental damage, or by the public at large which benefits from the environmentalists' work."¹⁶² This watchdog role is being performed not only by national groups on a national basis, such as NRDC and the Sierra Club, but by local chapters of groups like Citizens for a Better Environment, the Izaak Walton League, and

157. *Id.* at 1334.

158. *Supra* note 97, and discussion at notes 114, 115, *supra*.

159. 3 ELR 20664 (W.D. Texas 1973).

160. *Attorney's Fees: The Growing Number of Awards to Public Interest Plaintiffs*, 4 ENV. REP. 10021, 10022 (1974). [Hereinafter cited as *Attorney's Fees*.]

161. See discussion at note 80, *supra*.

162. *Attorney's Fees*, *supra* note 160, at 10022.

the Tuberculosis Society. In Chicago, a group called Businessmen for the Public Interest even assisted the City of Gary, Indiana, in a lawsuit against U.S. Steel.¹⁶³

To promote further improvement of the environment by citizen suit actions, one more question needs answering: Are damages recoverable in actions brought under the citizen suit provision? Under the Clean Air Act, the conservative answer would be that the citizen suit provision does not provide for recovery of damages. One commentator has stated,

For the court to imply a private right to recover damages for air quality standard violations is to disregard the substantive rights test set out in *Bell*. The 1970 Amendments do not establish a substantive right. The right established is broad and general; it provides for air of a certain quality, but does not purport to protect individuals from property damage or personal injury.¹⁶⁴

While the commentator may be correct in stating that the Clean Air Act does not provide a right to recover damages, we feel his conclusion that the Clean Air Act does not purport to protect individuals from property damage or personal injury is incorrect. Indeed, the statutory scheme is to establish primary air quality standards to protect the public health and secondary standards to protect the public welfare. Such standards apply respectively to the impact of air pollution on human health, and the adverse effects of air pollution on property, vegetation, and materials.¹⁶⁵ Other commentators have discussed the possibility of whether a judgment in a section 304 citizen suit can serve as a basis for summary judgment in a subsequent class action or nuisance suit for damages against the same defendant?¹⁶⁶

163. This list is certainly not meant to be inclusive. The outcome of the Businessmen for the Public Interest (BPI) action was *U.S. Steel v. Gary*, 4 ERC 1273 (Indiana Superior Court, Lake County, May 22, 1972).

164. Note, *Environmental Protection: A Limited Expansion of the Citizen's Role*, 12 WASHBURN L. J. 54, 61 (1972).

165. 40 C.F.R. Part 50. The air quality standards are to reflect the latest scientific knowledge on the effect on public health and welfare which may be expected from the presence of pollutants in the air. Currently, the six criteria pollutants are particulate matter, sulfur oxides, photochemical oxidants, hydrocarbons, carbon monoxide, and nitrogen dioxide. § 108 (42 U.S.C. § 1857c-3) requires the Administrator of EPA to list each pollutant, and section 109 (42 U.S.C. § 1857c-4) requires the establishment of air quality standards. The primary standard is to protect the public health and the secondary standard is to protect the public welfare.

166. Ayres and Miller, *supra* note 79, at 2.

In a Section 304 suit against a polluter, the issue before the federal court would be whether the polluter has violated an applicable 'emission standard or limitation.' In a nuisance action, however, the issue is often whether the defendant's conduct constitutes an "unreasonable" interference with the plaintiff's health or use of his property, and proof that he violated an applicable emission standard or limitation might not necessarily be considered dispositive on this issue.¹⁶⁷

My comment would be that the suit for damages should not have to be a separate action; it could be an added count similar to the United States suit against Reserve Mining where the federal common law count is attached to the counts charging violations of the federal water pollution control law and the River and Harbors Act.¹⁶⁸ Already in an action for damages by 37 persons against three large polluters in the Detroit, Michigan area, the U.S. Court of Appeals for the Sixth Circuit has noted the applicability of the federal common law of nuisance and the citizen suit provision of the Clean Air Act.¹⁶⁹ We would argue that eventually an action for damages will be combined with an action for injunctive relief under section 304. The savings clause of section 304 (section 304 (e)) would seemingly preserve the damage action even if a court held that the actions could not be combined. Some observers have argued that the doctrine of pendent jurisdiction would allow the action for damages to be combined with the section 304 suit.

Pendent jurisdiction allows a federal court to hear a non-federal claim along with a federal claim against the same defendant without meeting the normal jurisdiction and amount in controversy requirements. The federal claim must be substantial and the non-federal and federal claims must derive from a common nucleus of operative facts. If plaintiffs' claims ordinarily would be tried in one proceeding and the federal claim is substantial, federal courts have the power to hear the non-federal claim. Considerations of judicial economy, convenience and fairness to litigants are the bases of pendent jurisdiction.¹⁷⁰

Regarding whether a violation of the Act *per se* would allow for the collection of damages, the answer is apparently no. The congressional intent was clearly to provide for civil relief in the form of abatement orders. Where there is a knowing violation of such an order, hazardous emission standard, or new source performance standard there are to be criminal penalties.¹⁷¹ Despite this intent, we are sure that learned counsel in attempting to gather a little

167. *Id.*

168. *United States v. Reserve Mining*, 6 ERC 1657 (D.C. Minn. 1974).

169. *Michie v. Great Lakes Steel Division*, 6 ERC 1444, 1446 (6th Cir. 1974).

170. Note, *Plaintiffs' Use of the Clean Air Amendments of 1970*, 12 WASHBURN L.J. 331, 341 (1973) [hereinafter cited as *Plaintiffs' Use*].

171. 42 U.S.C. § 1857c-8 (1970); see generally Sen. Rep.

more fruit from the tree will make an argument similar to that presented in a note in the *Washburn Law Journal*.¹⁷² The writer argues that section 304, if read literally, means federal courts are authorized to award money damages in citizen suits brought under the Clean Air Act. He says that "civil action" literally defined includes actions to recover damages.¹⁷³ The writer then makes an argument from statutory construction. He contrasts the detail on remedy in the administrative enforcement section 113 with the lack of detail in section 304.¹⁷⁴ While one should agree with the author that an argument can be made, his construction of the statutory intent appears to be based on finding ambiguities which are there for the basic reason that Congress never intended to provide a civil damage remedy; Occam's Razor could well be sharpened on his statutory intent argument. Finally, the author argues that the "implied remedy doctrine" could be used to argue that where there is a breach of a statute and one is injured who does not have adequate relief the court will extend an adequate remedy through implication.¹⁷⁵ One hopes with the writer in the *Washburn Law Journal* that the courts will allow a civil remedy for damages under section 304, but we do not foresee this occurring. The author, however, does present an excellent listing of the practical reasons for awarding civil damages. Many of the same advantageous, utilitarian reasons apply to other forms of environmental litigation, including class actions. He states that a civil damages remedy under the Act would serve several purposes: (1) provide relief to injured persons; (2) act as a deterrent and an enforcement device; (3) encourage citizens to litigate; and (4) compensate citizens for injury and efforts to abate pollution.¹⁷⁶ These practical reasons may someday outweigh in a court's mind the wording and legislative history of section 304.¹⁷⁷ It will, however, have to be the right lawsuit, in the right court, brought at the right time.

CONCLUSION

This paper has attempted to show that the proper lawsuit may

172. *Plaintiffs' Use*, *supra* note 170, at 331.

173. *Id.* at 332.

174. *Id.* at 333-34.

175. *Id.* at 335-36.

176. *Id.* at 337.

177. Sen. Rep. at 38.

be a citizen suit action utilizing section 304 of the Clean Air Act. It has also pointed out similar provisions in other federal environmental legislation, and discussed several cases brought to implement the National Environmental Policy Act. Finally, it has been shown that the environmental class action has been limited by the *Zahn and Eisen* cases. There are, however, many avenues unexplored by this paper for bringing environmental actions. Many of these causes of action can fit into the class action format or complement the citizen suit format. Indeed, since citizen suits under the federal acts can be brought by any person, they can be brought by a class or classes as the term "person" is defined. These other forms of action may include the nuisance action,¹⁷⁸ whether public or private, a tort action,¹⁷⁹ based on negligence or strict liability, or even actions based on constitutional grounds.¹⁸⁰ The remedies sought include damages and injunctive relief. Before concluding this paper, the author will discuss in brief a few cases that illustrate other ways lawyers have attempted to get fruit from the tree in environmental litigation.

In *Hagedorn v. Union Carbide*,¹⁸¹ a West Virginia district court examined the constitutional arguments and determined that neither the Fifth, Ninth, nor Fourteenth Amendments allowed it to hear a case brought as a class action by plaintiffs alleging "that Union Carbide's smokestacks belch 'dirt, graphite, dust and particles, gases, fumes and other substances,' amounting to a 'rain of pollutants' . . ." ¹⁸² The district court felt that the precedent of *Tanner v. Armco Steel Corporation*¹⁸³ was too strong. In *Tanner*, plaintiffs too brought a class action alleging harm from air pollution, and unlike *Hagedorn* which also had a Clean Air Act count which was dismissed on grounds of lack of jurisdiction, plaintiffs alleged as their statutory basis for recovery the National Environmental Policy Act and the Civil Rights Act as well as the same constitutional grounds as mentioned in *Hagedorn*. The court refused to find a legally enforceable right to a healthful environment giving rise to an action for damages based upon the Constitution, and found that "to the extent that an environmental controversy such as this is presently justiciable, it is within the province of the law of torts, to wit: nuisance."¹⁸⁴

178. See generally Comment, *supra* note 3, at 533. Almost every article this author has seen cites for a nuisance action, *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870 (1970).

179. W. PROSSER, *LAW OF TORTS* § 36 (4th ed. 1971).

180. See note 55, *supra*.

181. 363 F. Supp. 1061 (N.D. W. Va. 1973).

182. *Id.* at 1063.

183. 340 F. Supp. 532 (W.D. Tex. 1972).

184. *Id.* at 537.

There are problems, however, with nuisance suits whether brought in the name of a class or brought on behalf of private individuals. A private action grounded on a theory of public nuisance will lie only if the plaintiff can demonstrate that he has suffered damage different in kind from the rest of the community.¹⁸⁵ There must be proof of some direct personal damage rather than merely that, for instance, air quality standards are exceeded over the city. This is why it is normally easier to collect damages for pollution from a source in an isolated area than from several sources in an industrial area.¹⁸⁶ Even if the plant is in an isolated area, the payment of damages can create problems similar to those that confronted the Supreme Court in *Zahn*. In *Nevada Cement Company v. Lemler*,¹⁸⁷ the Supreme Court of Nevada in reversing a damage award in a case involving pollution from a cement plant stated:

It is entirely proper to order the payment of damages to compensate for discomfort and annoyance caused by a temporary nuisance . . . In this case, however, the record is clear that some of the plaintiffs were considerably annoyed, while others were only minutely disturbed. Some of them lived near the cement plant, and others were miles distant. Some were within prevailing wind patterns and others were not. . . . Since the purpose of a general damage award is to compensate the aggrieved party for damage actually sustained, an identical award to multiple plaintiffs who are dissimilarly situated is erroneous on its face. In the light of the evidence, their annoyance and discomfort could not have been the same. Consequently, we perceive no rational basis upon which to affirm an award of \$5,000 to each of them.¹⁸⁸

185. W. PROSSER, LAW OF TORTS § 86 (4th ed. 1971).

186. *Jost v. Dairyland Power Cooperative*, 45 Wis. 2d 164, 172 N.W.2d 647 (1969). See generally Annot., 4 A.L.R.3d 902. The author participated on July 18, 1972, in a closing of the Dairyland case. It, however, really was not closed until an order of the Wisconsin Department of Natural Resources (Order No. 1A-72-06-01A) was approved in the Federal Register as part of the Wisconsin implementation plan, 38 Fed. Reg. 12713 (May 14, 1973). But cf., *City of Chicago v. State Line Power Plant*, 70 CCH 4022 (1973), where the city was unable to prove special damages since there was much industry in the vicinity although the power plant was much bigger than the one damaging vegetation in the Dairyland Power cases. The city did, however, claim a common law nuisance to bring an action against the plant which was located 400 feet within Indiana. Eventually, through efforts of the City of Hammond, State of Indiana, City of Chicago, State of Illinois, and U.S. EPA an order abating pollution at this plant was developed. See Fed. Reg., Feb. 19, 1974.

187. 514 P.2d 1180 (Nev. 1973).

188. *Id.* at 1182.

The above quotation points out some of the difficulties with the nuisance action even to recover damages, and as one commentator has pointed out: "To abate pollution is more difficult than to recover damages, and monetary damages are in any event inadequate if the private nuisance action is to prove an effective control on pollution."¹⁸⁹ Injunctive relief is necessary is what the commentator is saying. Yet that large damage awards or even the threat of such awards as created by class actions provide incentive for the polluter to take some sort of abatement action.¹⁹⁰

A recent nuisance action referred to earlier in this paper, *Michie v. Great Lakes Steel Division*,¹⁹¹ illustrates the possibilities of the suit for damages and shows that the plaintiff, by changing the form of his action, can at least obtain a hearing. The action was originally brought as a class action under Rule 23(b)(3) but when defendants filed a motion to dismiss the class action aspect of the case, plaintiffs conceded the motion and were allowed to substitute allegations of permissive joinder under Rule 20(a) of the Federal Rules of Civil Procedure. This substitution was a response to *Zahn*. In this case the Sixth Circuit, not known as an environmentally-conscious circuit,¹⁹² held that the federal district court did not abuse its discretion by refusing to dismiss the diversity suit of 37 Canadian residents who sought to hold three large corporations liable for the air pollution caused by their plants on the grounds of nuisance. The Court of Appeals held that under the law of the State of Michigan multiple defendants, whose independent actions allegedly create a nuisance, may be jointly and severally liable to multiple plaintiffs for individual injuries where the pollutants mix in the air so that their separate effects in creating the individual injuries are impossible to analyze.

Such imaginative use of the courts has occurred in environmental

189. Note, *Water Quality Standards in Private Nuisance Actions*, 79 YALE L.J. 102, 109 (1969). Concerning the awarding of injunctive relief in environmental litigation, Russell Peterson, Chairman of the Council on Environmental Quality stated in a letter to the Justice Department about the Reserve Mining case, "The appeals court 'should not misread lack of knowledge about a potential hazard as proof that the hazard is slight or does not exist.'" Peterson continued in the letter to show his concern about the stoppage of the asbestos-like emissions from the taconite plant. "[T]he traditional judicial balancing test in cases involving injunctions against health hazards should be revised to consider the probabilities of occurrence of harm, the certainty or lack of certainty about the probabilities of harm, the magnitude of the harm that could occur, and the length of exposure time during which little evidence of harm would be expected." *Current Developments*, 5 Environment Reporter 429 (August 2, 1974).

190. *Supra* note 32.

191. 6 ERC 1444.

192. *Buckeye Power, Inc. v. EPA*, 481 F.2d 162.

litigation and will continue to occur as the field continues to expand. With air pollution now being considered in land use planning and a goal of zero discharge for water polluters, the environmental law area has traveled far from being considered simply an adjunct to other fields of law.¹⁹³ This paper has attempted to discuss merely one aspect of one piece of legislation in the field—the citizen suit provision of the Clean Air Act. It has attempted to show that opportunities exist to sue polluters and the administrative agencies alike to make for a better environment. Robert Fri, former administrator of EPA, has pointed out that citizen suits have the potential both of making companies move ahead and making them take notice in abating pollution. He has also pointed out that citizen suits create uncertainties because of their unexpected intervention in the regulatory process from almost any quarter at almost any time.¹⁹⁴ However, it is because of this same intervention through citizen groups that the Clean Air Act now encompasses programs to prevent significant deterioration of air quality,¹⁹⁵ and include transportation controls,¹⁹⁶ indirect source review,¹⁹⁷ and air quality maintenance areas.¹⁹⁸ Other programs, such as new source performance standards, emergency episodes, and standards for hazardous pollutants,¹⁹⁹ have been toughened through citizen action.

This author, however, feels that it is now time to channel this citizen action into litigation with the polluter, rather than almost solely with the administrative agencies. The author was only able to cite one case brought under section 304 where a privately owned source of air pollution now polluting had been sued under the Act—namely, *Delaware Citizens v. Stauffer Chemical*.²⁰⁰ The author well recognizes the business risks that citizen suits create, but feels as a supplement to other forms of action, whether administrative or judicial, citizen suits are worth employing to aid in preserving and creating a better environment. The author has also sought to

193. The author notes that in the two years that he worked in Region V, U.S. EPA, the number of attorneys went from 7 to 21.

194. Fri, *Facing up to Pollution Controls*, 52 HARV. BUS. REV. 26 (1974).

195. *Supra* note 115.

196. See generally Bracken, *Transportation Controls under the Clean Air Act: A Legal Analysis*, 15 B.C. IND. AND COM. L. REV. 749 (1974).

197. *Supra* note 112.

198. NRDC v. EPA, 475 F.2d 968 (D.C. Cir. 1973).

199. Amendments to 40 C.F.R. Part 61, especially dealing with asbestos.

200. 6 ERC 1541 (D. Del. 1973).

illustrate in this paper that options exist to the class action of *Zahn* and *Eisen*. Contrary to the newspaper editorial, the individual can still command the attention of the court in the environmental field, and the lawyer can still obtain some fruit from the tree,—the lawsuit. We have seen that the class action in the procedural area of law and environmental law as a substantive area of law have both made great progress in the past decade and one should agree with Judge James L. Oakes of the United States Court of Appeals for the Second Circuit, that such progress will continue,

Indeed, some years hence one may look back upon the sixties and seventies as an era of the law's developing its own internal self-sustaining institution, meeting the social demand for law actively to subserve the public interest in environmental protection—creating in three steps (1) a public right, (2) persons (or objects) with standing to assert that right, and (3) provision of the means for paying the lawyers and technical experts who do the work to assert the right.²⁰¹

This article has suggested that citizen suit provisions, if utilized, include the three steps listed above.

201. Oakes, *supra* note 85, at 50004.

APPENDIX A

§ 1857h—2. Citizen suits—Establishment of right to bring suit

(a) Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) 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.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be.

Notice

(b) No action may be commenced—

(1) under subsection (a) (1) of this section—

(A) prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator, (ii) to the State in which the violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any person may intervene as a matter of right.

(2) under subsection (a) (2) of this section prior to 60 days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of section 1857c-7(c) (1) (B) of this title or an order issued by the Administrator pursuant to section 1857c-8(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

Venue; intervention by Administrator

(c) (1) Any action respecting a violation by a stationary source of an emission standard or limitation or an order respecting such standard or limitation may be brought only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

Award of costs; security

(d) The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

Non-restriction of other rights

(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

Definition

(f) For purposes of this section, the term "emission standard or limitation under this chapter" means—

(1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard or

(2) a control or prohibition respecting a motor vehicle fuel or fuel additive,

which is in effect under this chapter (including a requirement applicable by reason of section 1857f of this title) or under an applicable implementation plan.