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Citizen Suits in the Environmental Field: Peril or Promise? †

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Private citizen litigation has often been mentioned as the most direct method of allowing citizens actively to pursue a quality environment. A variety of proposals have been introduced and attempted both in state legislatures and in Congress. With the proposed House and Senate legislation in mind, this Article warns that the major proposals presently being considered may ultimately prove to be detrimental rather than beneficial to the cause of environmental preservation.

How shall we protect the environment? This deceptively simple question is now confronting virtually every major business in the country, every governmental agency, every legislator, and every concerned citizen. The awakening of the nation's environmental conscience within the past few years has been truly dramatic, and many who shrugged off the ecology movement as a mere passing fad have learned to their sorrow that the public will no longer tolerate disregard for the natural environment.

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This newfound awareness is clearly a desirable and necessary change in our basic assumptions. It is becoming increasingly clear that we as a nation—and perhaps as a planet—can no longer afford to ignore the environmental consequences of our actions without risking serious physical disruptions and social dislocations. Yet, because of the pervasive nature of the problems, the imperfect state of our knowledge about man's interaction with ecosystems, and the difficult value judgments and tradeoffs that must be made to achieve environmental protection, there is continuing uncertainty as to what kinds of governmental institutions are best suited to the task of preventing further degradation of our lands, waters, and air.

The most significant recent improvement in environmental decision making is, of course, the impact statement requirement imposed upon federal agencies by the National Environmental Policy Act (NEPA).¹ Although the Act is seemingly innocuous on its face—one could hardly quarrel with the proposition that governmental bodies should consider the environmental consequences of their actions—NEPA has proved to be a powerful lever for forcing the agencies and those whom they regulate to find ways of minimizing or avoiding damage to the environment.² New organizations, such as the Environmental Protection Agency and the Council on Environmental Quality, have been established to create within the Government a reservoir of expertise on environmental problems, and to institutionalize the advocacy of ecological, scenic, cultural, and historical values. Comprehensive regulatory programs, such as the Clean Air Amendments of 1970,³ Federal Water Pollution Control Act Amendments of 1972,⁴ and the Federal Environmental Pesticide Control Act of 1971,⁵ have been enacted to deal with specific problems, and more legislation of this nature may be forthcoming.⁶ On balance, there has been a rather re-

1. 42 U.S.C. §§ 4321-47 (1970). The basic requirements of NEPA impact statements are set forth in section 102(2)(c) of the Act. *Id.* § 4332(2)(c).

2. For a description of the changes which NEPA is making in the Federal bureaucracy, see Cramton & Berg, *Enforcing the National Environmental Policy Act in Federal Agencies*, 18 PRAC. LAW. 79 (1972). For a discussion of the effect of the impact statement requirement on the AEC's regulations for granting construction permits and operating licenses for nuclear power reactors and fuel reprocessing plants see Note, 40 GEO. WASH. L. REV. 558 (1972).

3. Pub. L. No. 91-604, 84 Stat. 1676, amending 42 U.S.C. §§ 1857-571 (Supp. V, 1970) (codified at 42 U.S.C. §§ 1857-58a (1970)). See generally Trumbull, *Federal Control of Stationary Source Air Pollution*, 2 ECOLOGY L.Q. 283 (1972).

4. Pub. L. No. 92-500 (Oct. 18, 1972), 1972 U.S. CODE CONG. & AD. NEWS 4825, formerly 33 U.S.C. §§ 1151-75 (1970). The bill was passed over a presidential veto. *Washington Post*, Oct. 19, 1972, at A1, col. 1.

5. Pub. L. No. 92-516 (Oct. 21, 1972), 1972 U.S. CODE CONG. & AD. NEWS 5013, amending 7 U.S.C. §§ 135 *et seq.* (1970).

6. For a list of major pending legislation see ENVIRONMENTAL QUALITY: THE THIRD ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 150 (1972) [hereinafter cited as 1972 ENVIRONMENTAL QUALITY REPORT].

markable flow of energy, talent and resources into the environmental area within the past few years.

Still, there is substantial and understandable discontent among the nation's environmentalists. The achievement of fundamental change in large organizations, whether in the public or private sector, is a slow and often frustrating process. In the meantime, pollutants continue to fill the air and waters, and unique natural resources may be irretrievably lost. As a result, a number of articulate spokesmen for environmental causes have begun to assert that a different approach is needed: that the most expeditious and effective method of halting threats to the environment is to allow individual citizens or public interest groups to bring lawsuits directly against alleged polluters, and to empower the courts to re-examine fully on the merits all administrative decisions affecting the environment.⁷ While most of the arguments which have been advanced in favor of such citizen suits deserve serious consideration, we believe that the major proposals for the creation of broad private rights to sue for purposes of environmental protection are neither philosophically sound nor carefully crafted, and that if enacted they could ultimately prove a serious setback rather than a victory for the cause of preserving our environment.

7. The leading work in the field is a book by Professor Joseph L. Sax. J. SAX, *DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION* (1970) [hereinafter cited as *CITIZEN ACTION*]. See also Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970) [hereinafter cited as *Public Trust Doctrine*].

The principal bills introduced in the Ninety-Second Congress which incorporate this approach are S. 1032, 92d Cong., 1st Sess. (1971), and H.R. 8331, 92d Cong., 1st Sess. (1971). Since these companion bills are similar in their essential provisions this Article will focus upon H.R. 8331. Another bill, H.R. 49, 92d Cong., 1st Sess. (1971), is of similar effect. Some of the major differences between H.R. 8331 and H.R. 49 are as follows:

- (a) H.R. 8331 would permit suits to be brought by any aggrieved person or organization, while H.R. 49 is limited to class actions.
- (b) H.R. 8331 allows only declaratory or injunctive relief while H.R. 49 also provides for recovery of money damages.
- (c) H.R. 49 does not create a right of action for "pollution, impairment or destruction of the . . . public trust of the United States," as provided in section 303 of H.R. 8331.
- (d) H.R. 8331 explicitly provides for judicial review of federal and state agency action, while section 304 of H.R. 49 provides that the bill would not "preempt or otherwise interfere with any Federal or State law."
- (e) H.R. 49 imposes liability due to "any pollution of air or water or . . . creation of any unreasonable noise," while H.R. 8331 provides broad standards under which the defendant may attempt to show that the harm to the environment is socially justifiable.

The texts of H.R. 49, H.R. 8331, and S. 1032 are set forth in Appendices A, B and C. For a detailed analysis of an earlier but essentially identical version of S. 1032 see Comment, *Standing on the Side of the Environment: A Statutory Prescription for Citizen Participation*, 1 *ECOLOGY* L.Q. 561, 609-48 (1971).

I

INSTITUTIONAL COMPETENCE

A. *Legitimacy of Decision-Making Authority*

A key premise of the broad citizen-suit proposals is the belief that regulatory agencies inevitably become captives of those whom they are supposed to regulate, and that even if an agency is diligently attempting to enforce its statutory mandate, the sordid realities of bureaucratic survival in a highly political atmosphere will compel it to compromise enforcement decisions to an unacceptable degree.⁸ The remedy, therefore, is to shift the primary decision-making authority from the agencies to the courts, which are insulated from day-to-day political pressures and free from the "insider perspective" that results from single-minded expertise.⁹ This shift can be accomplished by stripping away the worn-out doctrinal baggage of ripeness, exhaustion, primary jurisdiction, the substantial evidence rule, deference to administrative discretion, and similar technicalities which prevent the courts from getting at the guts of environmental problems.¹⁰

8. See, e.g., *Hearings on S. 1032 Before the Subcomm. on the Environment of the Senate Comm. on Commerce*, 92d Cong., 1st Sess., pt. 2, at 202 (1971) [hereinafter cited as *Senate Hearings*] (testimony of Ralph Nader):

The daily damage being done to our air, our water, and our land should be sufficient to convince us that what passes for agency "expertise" is often nothing more than institutionalized private power against the public interest. By giving our industry-ridden administrative agencies a monopoly in the area of discretionary decisionmaking, we have in effect handed over the job of defending the environment to the wealthy and powerful institutions who are destroying it.

The public's defenselessness is exacerbated by a host of additional legal barriers to redress in the courts.

Cf. 116 CONG. REC. 6579 (1970) (remarks of Sen. McGovern on introducing S. 3575, 91st Cong., 2d Sess. (1970), a predecessor to S. 1032):

These cases [challenging Government activity affecting the environment] indicate the discontent that many citizens feel with the public agencies that are supposed to be protecting the public interest. They indicate the widespread feeling [that] public agencies regulating private interests often end up not regulating but representing that private interest.

9. See *CITIZEN ACTION*, *supra* note 7, at 53:

From the inside perspective of a government agency, hard choices must be made. An agency has its own priorities and legislative program; it has conflicting constituencies among which it must mediate, and in whose eyes it must—for its own good—appear to have a balanced position; it has a budget to consider and thereby a need for friends in the legislature.

10. See, e.g., *Senate Hearings*, *supra* note 8, at 202, 243-44 (statements of Robert M. Hallman & Charles R. Halpern on behalf of Common Cause, Inc.); Letter from Prof. Joseph Sax to Congressman John Dingell, May 18, 1971, at 5, on file with the *Ecology Law Quarterly* [hereinafter cited as *Sax Letter*].

The requirements of ripeness and exhaustion of administrative remedies are both primarily concerned with the timing of judicial review of administrative action. The requirement of ripeness is based on the principle that courts should focus their attention on problems which are real and present or imminent, and not squander judicial energy on those which are abstract, hypothetical, or remote. 3 K. DAVIS, ADMINIS-

Like most clichés, this argument contains a germ of truth and a high degree of misleading oversimplification. Until recent years, many administrative agencies have been the ignored stepchildren of the Government, escaping the harsh scrutiny of the public eye and becoming deeply reinforced in the performance of narrow missions by the political process.¹¹ As any administrator can testify, those calm days are rapidly vanishing, and public criticism is increasingly vocal and informed. The agencies' response, while often slow, has been significant. The possibility of real and enduring reform in Government administration is probably greater now than it has been in many years.

At the least, history should caution against too ready acceptance of the courts as an alternative to the agencies. After all, it has not been long since proponents of the New Deal argued that creation of administrative agencies was necessary in order to overcome the obstructionist tendencies of the courts,¹² and even in more recent times judges have occasionally proven themselves to be as insensitive as any bureaucrat to the needs of the environment.¹³ On a more fundamen-

TRATIVE LAW TREATISE § 21.01 (1958). The exhaustion requirement is founded on the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.

Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938).

The doctrine of primary jurisdiction, unlike the doctrines of ripeness and exhaustion, does not govern the timing of judicial review or administrative action, but rather is used to determine whether the court or the agency should make the *initial* decision of a problem. It is premised on the rule that cases which raise issues of fact that are not within the conventional experience of judges or which require the exercise of administrative discretion should first be decided by the appropriate agency, subject, of course, to later judicial review. The doctrine is in essence, then, a recognition of the fact that the work of agencies and of courts should be orderly and sensibly coordinated. 3 K. DAVIS, *supra*, § 19.01.

The substantial evidence rule is employed by courts to define the scope of judicial review of administrative action. The rule provides in essence that courts, in reviewing agency actions, should decide questions of law, but limit themselves to the test of reasonableness in reviewing questions of fact. *Id.* at § 29.01.

Finally, the doctrine of deference to administrative discretion is based on the recognition by courts that there are cases which, because of their complex and unique factual background or because of other special circumstances, are incapable of adequate judicial resolution and should be properly left to the expertise of the appropriate administrative agency. See generally 4 *id.* §§ 28.06-.07.

11. See generally Lazarus & Onek, *The Regulators and the People*, 57 VA. L. REV. 1069 (1971).

12. For an analysis of the relative merits of courts and agencies in the New Deal context see Openheimer, *The Supreme Court and Administrative Law*, 37 COLUM. L. REV. 1 (1937).

13. See, e.g., *Sierra Club v. Hickel*, 433 F.2d 24, 1 ERC 1669 (9th Cir. 1970), *affd sub nom. Sierra Club v. Morton*, 405 U.S. 727, 3 ERC 2039 (1972); cf. *Senate Hearings, supra* note 8, at 203 (testimony of Ralph Nader):

If a citizen is fortunate enough to ever get to the merits of his [environmental] case [in court], he may run into precedent extending from the

tal level, however, the argument against the agencies errs because it fails to take adequate account of the comparative institutional capabilities of courts and agencies to deal with environmental problems.

Proper environmental decision making is not merely a matter of quantifying and totaling up costs and benefits, although this in itself is an immensely difficult task and one that is susceptible to heavy value inputs at each stage of the process.¹⁴ Rational resolution of environmental problems also involves benefit and resource-distribution judgments which affect broad segments of the economy and population, questions which are necessarily highly political in nature.

For example, determination of whether thermal and chemical discharges in a particular stream should be wholly or partially abated raises a series of issues such as whether the possibility of increased local and regional unemployment, or increased costs to consumers of goods produced there, or losses to stockholders of affected companies, are justified by preservation of the ecological or recreational features of the stream. At a broader level, issues may be raised as to whether a growth economy and expanding gross national product are appropriate national goals, and whether demand for certain types of products, such as electricity, should be curtailed in order to protect the environment. The range of potential solutions to each of these broad problems is vast, and each possible solution may have a distinct impact on different segments of society, both immediately and in the future. There is no "right" answer to these questions, in the sense of an authoritative solution based on the application of accepted general principles to particular facts.

Yet, it seems clear that courts and judicial procedures are designed precisely for the purpose of applying basic principles to specific factual situations. Of our major institutions of government, the courts are—and should be—the least politically responsive. Thrusting these kinds of questions into the judicial arena can only cast doubt upon the legitimacy of the decisions made, and, ultimately, on the legitimacy of the courts themselves.¹⁵

early days of the industrial revolution which holds that the payrolls and progress industry provides justify whatever unfortunate environmental side effects ensue. . . .

Our air, water, and soil have been the victims of a system of justice geared to provide the greatest protection to those who need it least. On the scale of judicial priorities, the environment comes out somewhere near the bottom.

14. See generally J. SAX, *WATER LAW, PLANNING AND POLICY* 35-46 (1968).

15. Cf. *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 222-23, 257 N.E.2d 870, 871, 309 N.Y.S.2d 312, 314, 1 ERC 1175, 1176 (1970):

A court performs its essential function when it decides the rights of parties before it. . . . It is a rare exercise of judicial power to use a decision in private litigation as a purposeful mechanism to achieve direct public objec-

For some broad environmental issues—such as the question of whether the Government should take steps to curb the rapidly growing demand for electricity—the impact on national goals, economic relationships, and social values is so pervasive that Congress is the most appropriate forum for decision making. For less sweeping policy issues—such as what emission standards should be established in a particular watershed or airshed—administrative agencies acting in a quasi-legislative capacity seem preferable to the courts.¹⁶ The agency is not only more amenable to oversight by elected officials of the Executive branch and Congress; it also is more capable of employing a wide variety of procedures (*e.g.*, legislative-type hearings, informal consultations, advisory committees, and publication of notice of opportunity to file written comments) which can assure that affected interests have an opportunity to participate and to make their desires felt. If this basically political process is functioning properly, it is unwise to invite the courts to revise or reject the agency's determination.

B. *Technical Competency*

In addition to the basic issue of legitimacy of decision-making authority, it is doubtful whether the federal courts have the technical competency or institutional capacity to deal with broad, relatively undefined environmental problems. Proponents of citizen suit legislation frequently suggest that the environmental issues presented to the court would be no more difficult than comparable issues regularly litigated in areas such as antitrust.¹⁷ This is by no means clear or self-evident. Antitrust matters, for example, usually require input from only a single non-legal discipline, economics, while environmental problems frequently involve a diverse mix of unrelated disciplines such as chemistry, biology, physics, ecology, and medicine, in addition

tives greatly beyond the rights and interests before the court.

Effective control of air pollution is a problem presently far from solution even with the full public and financial powers of government. . . .

It seems apparent that the amelioration of air pollution will depend on technical research in great depth; on a carefully balanced consideration of the economic impact of close regulation; and of the actual effect on public health. It is likely to require massive public expenditure and to demand more than any local community can accomplish and to depend on regional and interstate controls.

A court should not try to do this on its own as a by-product of private litigation and it seems manifest that the judicial establishment is neither equipped in the limited nature of any judgment it can pronounce nor prepared to lay down and implement an effective policy for the elimination of air pollution.

16. See generally Special Comm. on Electric Power and the Environment of the Ass'n of the Bar of the City of New York, *Electricity and the Environment: The Reform of Legal Institutions* (1972) [hereinafter cited as *Electricity and the Environment*].

17. See, *e.g.*, Sax Letter, *supra* note 10, at 1.

to economics. Moreover, even in the antitrust area, where the courts have had extensive experience in grappling with complex economic data, one can find numerous statements of judicial discontent with ad hoc analysis and an expressed need to decide cases according to clearly defined rules.¹⁸ Thus, the Supreme Court recently stated its reluctance "to ramble through the wilds of economic theory:"

The fact is that courts are of limited utility in examining difficult economic problems. Our inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector is one important reason we have formulated *per se* rules.¹⁹

In contrast to the courts, agencies have a considerable advantage in their ability to use internal structuring and staffing policies in dealing with complex, multifaceted problems. Agencies can subdivide technical problems into manageable subunits for staff analysis, retain outside consultants or create panels of independent experts, assign staff members the task of advocating particular interests, undertake programs of testing or empirical research, and investigate various alternatives in a systematic fashion.²⁰

The only comparable managerial mechanism which a court has is the power to appoint a master,²¹ and this authority has traditionally been invoked only in limited circumstances.²² Moreover, the use of a

18. See *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5 (1958):

This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.

See also *United States v. Trenton Potteries Co.*, 273 U.S. 392, 395-402 (1927); Van Cise, *The Future of Per Se in Antitrust Law*, 50 VA. L. REV. 1165 (1964).

19. *United States v. Topco Associates, Inc.*, 405 U.S. 596, 609 (1972).

20. For example, in passing on applications for licenses to construct atomic reactors, the AEC first provides a detailed review by a technical staff, then an assessment by a panel of independent experts on reactor technology, and finally a public hearing before a board composed of two technically qualified persons and a chairman skilled in the conduct of administrative proceedings. See generally Ellis & Johnston, *Licensing of Nuclear Power Plants by the Atomic Energy Commission*, reprinted in *Hearings on AEC Licensing Procedure and Related Legislation Before the Subcomm. on Legislation of the Joint Comm. on Atomic Energy*, 92d Cong., 1st Sess., pt. 2, at 544 (1971). This licensing structure may not be an ideal system, but it is at least illustrative of the rich variety of procedures and types of tribunals available in the administrative process.

21. Both the House and the Senate versions of the recent citizen-suit bills would authorize the court to appoint a master. See S. 1032, 92d Cong., 1st Sess. § 4(c) (1971); H.R. 8331, 92d Cong., 1st Sess. § 303(b) (1971), reprinted in Appendices A-C.

22. FED. R. CIV. P. 53(b), states:

A reference to a master shall be the exception and not the rule. In ac-

master can greatly increase the cost to the litigants since the existing practice is to compensate the master by assessing costs against the parties.²³ The use of a master can also protract the proceeding significantly,²⁴ without substantially relieving the burden on the court.²⁵ And, in non-jury cases, where the master's findings are accepted unless clearly erroneous,²⁶ it is questionable whether the use of a master in court adjudication would really be much different from judicial review of an administrative proceeding.²⁷

C. *Costs and Burdens of Participation*

Another type of difficulty which would result from investing the courts with wide-ranging authority to resolve environmental questions

tions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

23. FED. R. CIV. P. 53(a) provides:

The compensation to be allowed to a master shall be fixed by the court, and should be charged upon such of the parties or paid out of any fund or subject matter to the action, which is in the custody and control of the court as the court may direct.

24. *See, e.g.,* *Adventures in Good Eating, Inc. v. Best Places to Eat, Inc.*, 131 F.2d 809, 815 (7th Cir. 1942):

Litigants are entitled to a trial by the court, in every suit, save where exceptional circumstances are shown. It is a matter of common knowledge that references greatly increase the cost of litigation and delay and postpone the end of litigation. . . . The delay in some instances is unbelievably long. Likewise, the increase in cost is heavy. For nearly a century, litigants and members of the bar have been crying against this avoidable burden of costs and this inexcusable delay Greater confidence in the outcome of the contest and more respect for the judgment of the court arise when the trial is by the judge.

25. In *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 2 ERC 1331 (1971), the Court denied a motion for leave to file an environmental suit under its original jurisdiction, in part because the factual issues involved were technically complex. Despite Justice Douglas' dissenting argument that the burden on the Court would be eased by appointment of a special master, the majority concluded:

The notion that appellate judges, even with the assistance of a most competent Special Master, might appropriately undertake at this time to unravel these complexities is, to say the least, unrealistic. Nor would it suffice to impose on Ohio an unusually high standard of proof. That might serve to mitigate our personal difficulties in seeking a just result that comports with sound judicial administration, but would not lessen the complexity of the task of preparing responsibly to exercise our judgment, or the serious drain on the resources of this Court it would entail.

Id. at 504, 2 ERC at 1335.

26. FED. R. CIV. P. 53(e)(2).

27. *See* 5A J. MOORE, *FEDERAL PRACTICE* ¶ 53.05, at 2940 (2d ed. 1971), where it is noted that the policy that references to a master shall be the exception rather than the rule

flows from (1) the function of the master to hear only those matters which it would unduly hamper the court (or jury) to deal with; and (2) Rule 43(a) requiring all testimony to be taken in open court, [and] is an obvious corollary of the policy against the judiciary abrogating its functions.

at the request of concerned citizens arises from the costs, delays, and risks of inconsistency that currently beset the federal judicial system. At both trial and appellate levels, the federal courts are confronted with a serious and seemingly intractable backlog problem. The most recently published statistics indicate that nearly ten percent of all civil actions pending in the district courts are more than three years old, and this backlog is highly concentrated in major metropolitan districts.²⁸ Even assuming that citizen plaintiffs would be willing and able to bring their actions in the less congested districts,²⁹ it would still be possible under most of the citizen-suit proposals for companies to use the legislation as a means of attacking Government regulatory programs,³⁰ or to anticipate the possibility of a citizen suit and use a declaratory judgment action to get a forum of their own choosing.³¹ In these situations, the tactical advantages of delay are obvious.

Another facet of the delay problem is the balkanization of federal law which now exists in many areas, and which would be exacerbated by the citizen-suit proposals. The United States Supreme Court, which is heavily involved in the resolution of constitutional controversies, has only limited time to guide lower federal courts in the interpretation of federal statutes and regulations. Conflicts of authority between the circuits on many significant questions of federal law often persist for a number of years. The growth in the number of judges on the various courts of appeals has also made it more difficult for some of these courts to resolve intra-circuit conflicts through the use of en banc rehearings. Many knowledgeable observers believe that the uniformity and stability of federal law have been gravely impaired by the

28. See Director of the Administrative Office of the United States Courts, 1971 Annual Report, II-51 to -54.

29. The venue provisions of H.R. 8331, 92d Cong., 1st Sess. § 302(a) (1971), would permit the plaintiff to bring his action in "any judicial district in which the defendant resides, transacts business or may be found." This approach seems ill-conceived and susceptible to forum-shopping abuses. Since most environmental issues will involve site-related factors, the most logical place to try them would be where "the cause of action arose," as provided in the general venue statute, 28 U.S.C. §§ 1391 (a), (e) (1970). This approach was recently adopted by the Second Circuit in *NRDC v. TVA*, 459 F.2d 255, 3 ERC 1976 (2d Cir. 1972). In its present form, the proposed venue provision would undoubtedly lead to numerous motions for transfer of venue pursuant to 28 U.S.C. §§ 1404, 1406 (1970). See generally Brecher, *Venue in Conservation Cases: A Potential Pitfall for Environmental Lawyers*, 2 ECOLOGY L.Q. 91 (1972).

30. NEPA has been employed for this purpose on several occasions. See, e.g., *National Helium Corp. v. Morton*, 326 F. Supp. 151, 2 ERC 1373 (D. Kan.), *aff'd*, 455 F.2d 650, 3 ERC 1129 (10th Cir. 1971); *Kalur v. Resor*, 355 F. Supp. 1, 3 ERC 1458 (D.D.C. 1971). See generally 1972 ENVIRONMENTAL QUALITY REPORT, *supra* note 6, at 254-55.

31. See 28 U.S.C. § 2201 (1970). For a recent example of the use of a declaratory judgment action to challenge environmental regulation, see *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 4 ERC 1129 (1972).

growth of the number of appeals and the lengthening of the time required for the authoritative resolution of important questions of federal law.³² Placing the decision of environmental matters in district courts, when combined with the lack of guidance on the substantive policies to be applied, would multiply the chances for inconsistency and conflict, and slow the process of conflict resolution even further, at a time when uniform national and regional environmental policies are sorely needed.

Another question which must be addressed in assessing the relative merits of courts and agencies as arbiters of environmental questions is the crucial matter of costs of participation. Substantial public input in environmental decision making is clearly desirable, given the nature and importance of the issues involved. At the same time, many environmental issues are complex and therefore expensive to litigate. Environmental organizations are often financially handicapped, since they usually have little financial stake in the outcome of litigation and must rely on voluntary contributions from concerned citizens.³³ Thus, it is particularly important that any system of environmental decision making have available some means of minimizing the burdens faced by individuals and public interest groups that desire to participate.

In court, an environmental interest group either would have to rely on whatever data and expert testimony it could assemble from its own resources, or else use information elicited from the defendant through discovery and cross-examination—both of which are expensive and time-consuming processes. Provisions granting the courts discretion to award expert witness and attorney fees have been proposed in statutes regulating specific environmental problems³⁴ and in

32. See, e.g., Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542 (1969).

33. See note 49 *infra*. Court litigation is probably at least as expensive as participation in an administrative trial-type hearing involving comparable issues, and a recent study made under the auspices of the Administrative Conference of the United States found:

Frequently the cost of participation in an administrative proceeding mounts into tens of thousands of dollars, and prolonged, multiple party proceedings cost even more. Public interest groups are often financially unable to participate. Some organized and established groups have been able to finance participation by fund-raising, relying on foundations and individual contributions. Ad hoc committees, *pro bono publico* efforts of lawyers, and volunteered services of students and others are occasionally relied upon to meet the cost of participation. But these random, ad hoc sources of support obviously cannot meet the cost of effective participation on a sustained and reliable basis.

Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359, 389 (1972).

34. For example, section 505(d) of the Water Pollution Control Act Amend-

general citizen-suit bills.³⁵ However, this seems an imperfect answer at best. Power to award fees can be a two-edged sword, and it is conceivable that a court would assess large sums against a plaintiff public interest group if it considered the case insubstantial. Moreover, the power to award costs is wholly discretionary with the court, and the matter is not determined until the close of litigation. Thus, in any event, the uncertainty of compensation may prevent plaintiffs from securing adequate legal and technical assistance, particularly during the vital period of pretrial preparation.

In the administrative context, there is a greater possibility of reducing the burdens of participation. If an agency exercises its discretion to attack particular problems on a general basis through notice-and-comment rulemaking, rather than using a case-by-case approach, the costs of presenting relevant data and views will usually be substantially lessened, and the right to participate undisputed.³⁶ Even when an agency uses trial-type proceedings, there are a number of ways in which citizen input can be achieved more cheaply and efficiently than in a courtroom contest. The disclosures forced by the NEPA impact statement requirement, and the practice in some agencies of routinely putting

ments of 1972, Pub. L. No. 92-500 (Oct. 18, 1972), provides that

[t]he court, in issuing any final order in any action brought pursuant to this section [to enforce a federal standard], may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

35. For example, H.R. 8331, 92d Cong., 1st Sess. (1971) contains a number of provisions designed to relieve the burdens of citizen litigation. Section 306 provides that the court may award fees for attorneys and expert witnesses. In addition, section 303(a) places the burden on the defendant to show that there is no "feasible and prudent alternative" to the polluting activity, and that it is justified in cost-benefit terms, once the plaintiff has shown some impairment of the environment. However, since the plaintiff's initial burden is slight, and the substantive standards are vague, it seems likely that the defendant could make a colorable showing in most cases, and that the burden would be shifted back to the plaintiff. Even a wholly negative case, based on cross-examination of the defendant, would often require considerable preparation and technical assistance.

Perhaps in contemplation of this situation, section 303(c) of the bill provides that the court or master can subpoena expert witnesses and documents *sua sponte*. However, if an expert witness were required to undertake independent study and prepare expert testimony, subject only to the witness fees and travel expenses provided under 28 U.S.C. § 1821 (1970), this might constitute a taking of property without due process of law.

In spite of the lack of any express statutory provision authorizing the award of attorney fees, the district court that had granted plaintiffs an injunction in *La Raza Unida v. Volpe*, 337 F. Supp. 221, 3 ERC 1306 (N.D. Cal. 1971), later granted plaintiffs' motion for recovery of fees from defendants, under the theory that plaintiffs had acted as "private attorneys general" to effectuate the strong congressional policies behind the statutes upon which the suit was based. *La Raza Unida v. Volpe*, No. C-71-1166 RFP (N.D. Cal., Oct. 19, 1972).

36. See Gellhorn, *supra* note 33, at 369.

all relevant documentary material in the public record,³⁷ can help to prevent the wars of attrition over discovery that are frequently waged in the courts. In addition, the Administrative Conference of the United States has recommended that agencies take affirmative steps to encourage public participation by providing easy access to file information and staff experts, furnishing free or low-cost transcripts, and waiving multiple-copy filing and service requirements.³⁸ Finally, the Comptroller General of the United States recently ruled that the Federal Trade Commission has discretionary authority to use its appropriations for the purpose of paying attorneys' expenses, witness fees, and travel and subsistence expenses for intervenors and their witnesses when this is necessary to secure adequate participation.³⁹ The reasoning of this ruling seems equally applicable to agencies charged with responsibility for protecting the environment. When the ruling is considered in conjunction with the *Scenic Hudson*⁴⁰ principle that an agency has an affirmative obligation to build a record adequate to resolve all substantial issues raised by public intervenors,⁴¹ it is possible to conclude that a dramatic reduction in the financial barriers to public participation in administrative proceedings is now within reach.

II

VIABLE STANDARDS

Another major shortcoming of the recent citizen-suit proposals is the extreme vagueness of the standards which they prescribe for courts

37. See, e.g., 37 Fed. Reg. 9331, 9332 (1972) (Proposed Amendments to AEC Rules of Practice for Licensing of Production and Utilization Facilities):

The proposed amendments would . . . liberalize the current rules considerably to provide for disclosure of more AEC documents as a matter of course. With respect to such documents, those that are relevant to the proceeding would generally be publicly available as a matter of course unless there is a compelling justification for their nondisclosure Since the routinely available documents should, under this approach, reasonably disclose the basis for the staff's position, staff-directed discovery could then be limited to information concerning a matter vital to a decision in the case and not obtainable elsewhere It is emphasized that this proposal is not intended to inhibit discovery procedures as a legitimate means of obtaining needed information. It is, rather, an attempt to devise a means of making masses of material readily and routinely available without resort to time-consuming and perhaps less fruitful formal discovery procedures.

38. Admin. Conf. of the United States, Recommendation 28, Public Participation in Administrative Hearings (adopted Dec. 7, 1971).

39. 52 DECISIONS COMP. GEN. — (No. B-139703, July 24, 1972); cf. *Students Opposing Unfair Practices, Inc. v. FTC*, 449 F.2d 1142 (D.C. Cir. 1971), concluding that a nonprofit corporation which had been a public interest intervenor in an agency proceeding was not entitled to proceed in forma pauperis under 28 U.S.C. § 1915(a) (1970) for purposes of seeking judicial review of the agency's order.

40. *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608, 1 ERC 1084 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966).

41. *Id.* at 620-21, 1 ERC at 1092-93.

to use in resolving environmental issues. In the bill that is receiving the most serious consideration by the Congress,⁴² any person or class of persons would be allowed to maintain an action for declaratory or equitable relief against any individual or any private or public entity—federal, state or local—if he could show that the defendant's activity affected interstate commerce and had or may have an adverse impact upon "the air, water, land or public trust of the United States . . ."⁴³ Once this negligible prima facie showing had been made, the burden would shift to the defendant, and he would be required to make a three-part showing: that there was no "feasible and prudent alternative" to the activity in question, that the activity was consistent with and reasonably required for promotion of the public health, safety and welfare, and that the social and economic benefits of the activity outweighed its social and economic costs.⁴⁴

These standards are at best nebulous and at worst utterly baffling. What, for example, does the concept of "public trust" mean in this context? Not even the proponents of the legislation seem to have any clear idea,⁴⁵ yet this principle, and the three tests which must be satisfied in order to present an affirmative defense, are standards designed to regulate primary conduct in the day-to-day world of business and governmental decision making.

As an illustration of some of the problems which this type of legislation would create, the standards described above will be applied to some hypothetical situations. Assume that in a city there are a distillery, a toy factory, a chemical plant producing napalm for the armed forces, and a state penitentiary. Each burns coal for heat and uses electricity obtained from an oil-burning utility company. A citizen brings separate suits against each facility and has no difficulty making the requisite prima facie showing, inasmuch as all consumption of fossil fuels involves some air pollution. Furthermore, since the city's sewage treatment facilities are overstrained, all the defendants contribute to water pollution. Thus, the burden shifts to all four defendants to justify their activities.

42. H.R. 8331, 92d Cong., 1st Sess. §§ 302-03(a) (1971). S. 1032, 92d Cong., 1st Sess. §§ 3-4(a) (1971) are similar in this respect. See Appendices B & C.

43. H.R. 8331, 92d Cong., 1st Sess. § 303(a) (1971).

44. *Id.* S. 1032, 92d Cong., 1st Sess. § 4(a) (1971) differs slightly. It does not expressly incorporate the social and economic cost-benefit criterion, but may have substantially the same effect since it explicitly notes that activities are to be judged in light of the nation's concern for a *reasonable* degree of environmental protection.

45. For example, in *Public Trust Doctrine*, *supra* note 7, at 553, the author's survey of existing case law on the public trust doctrine concludes with the statement that

[p]erhaps the most striking impression produced by a review of public trust cases in various jurisdictions is the sense of openness which the law provides; there is generally support for whatever decision a court might wish to adopt.

First, each must show that there is "no feasible and prudent alternative" to its activity. But is this inquiry limited to alternative sources of heat, power, and waste disposal or may the court consider alternatives involving the total cessation of the defendants' activities? If so, must the court consider the environmental effects if defendants relocate elsewhere or if non-defendants expand to take over the defendants lost "markets"? Is it a feasible and prudent alternative to require the distillery and the toy factory to install expensive anti-pollution equipment when this would impose greater costs of production than those borne by their competitors?

Whatever alternatives the defendants adopt, short of ceasing to operate, there will be some adverse impact on the environment since all fuel consumption involves some pollution. Therefore, the court must move to the second branch of the inquiry: whether the defendants' activities are "consistent with and reasonably required for promotion of the public health, safety, and welfare." Obviously, there is room for differences of views here. Some observers might not consider the operations of the distillery to be "reasonably required for promotion of the public health, safety, and welfare." Others might object to the activities of the chemical plant. Proponents of penal reform might argue that liberal probation and the institution of "half-way houses" are cheaper and preferable to maintaining penitentiaries. Even some might be found who regard toy manufacturing as a frivolous and antisocial activity, particularly if some of the factory's products have fallen afoul of the Federal Hazardous Substances Act.⁴⁶ Are the merits of all these arguments and the subsidiary questions they raise to be resolved by the district court in simultaneous lawsuits?

Do not forget the third inquiry: Do the social and economic benefits of the activities outweigh the social and economic costs? This question seems to overlap the second considerably, but it does introduce additional elements. All the enterprises generate some employment. Displaced employees may or may not be absorbed into other jobs. Perhaps the distiller's export sales have a positive effect on the balance of payments. On the other hand, the toy company's president asserts that if it is forced to cease operations, the company will move to Taiwan. All these factors and many more arguably are relevant to a balancing of the economic and social costs and benefits.

The plain fact that must be emphasized is that there is no wholly "clean" source of power; consequently, any activity which uses energy contributes its mite to air or water pollution. Yet the clear language of this bill states that a *prima facie* case can be made against every business activity in the country, against every automobile owner,

46. 15 U.S.C. §§ 1261-74 (1970).

against every homeowner, indeed against every user of electricity. One searches in vain for any standard of *de minimis* or, more significantly, for any suggestion that activities which are undertaken in compliance with applicable standards or requirements imposed by appropriate governmental bodies should be considered reasonable *per se*. Thus, virtually every enterprise or activity in the country might be required to justify its continued existence in legal proceedings on the basis of an *ad hoc*, open-ended, and wholly nebulous balancing of social costs and benefits.

Courts cannot be expected to provide wise resolutions for complex environmental problems on the basis of "standards" that offer no guidance as to the permissible scope of the issues, the relative weights to be assigned to competing values, or the reliance to be placed on the determinations of other branches of government. Business decisions cannot be made on the basis of assurance by a preponderance of the evidence that there is no "feasible and prudent alternative" to the proposed activity and that "the social and economic benefits . . . outweigh the social and economic costs thereof." And corporations or individuals who engage in private conduct not prohibited by law or regulation should not be required to demonstrate in court that the activity is "reasonably required for promotion of the public health, safety, and welfare." If such legislation were enacted, and if courts diligently tried to discharge the duties thus thrust upon them, the resulting chaos could wipe out many of the gains which have been made in the field of environmental protection during the last decade.

It is true that the State of Michigan has had a law in effect for two years which is basically similar to the citizen-suit proposals described above,⁴⁷ and has not experienced severe disruption of its governmental functions.⁴⁸ However, the implication of the Michigan experience for purposes of assessing a proposed federal law are far from clear. Relatively few cases have been brought under the Michigan Environmental Protection Act, in part because state environmental groups have lacked the resources and expertise for litigation.⁴⁹ On

47. Michigan Environmental Protection Act of 1970, MICH. COMP. LAWS ANN. §§ 691.1201-07 (Supp. 1972).

Connecticut also has recently enacted analogous legislation declaring "a public trust in the air, water and other natural resources of the state" and permitting citizen suits for declaratory or equitable relief from "unreasonable pollution, impairment or destruction" of those resources. Connecticut Environmental Protection Act of 1971, CONN. GEN. STATS. ANN. §§ 22a-14 to -20 (Supp. 1972).

48. A description of the Michigan statute and the early cases brought under it may be found in Sax & Connor, *Michigan's Environmental Protection Act of 1970: A Progress Report*, 70 MICH. L. REV. 1003 (1972).

49. Sax & Connor, *id.* at 1007, report that only 36 actions were filed under the Michigan EPA during the first sixteen months after it was passed. They conclude

the other hand, the federal government's experience under NEPA, with approximately 250 suits filed in less than three years,⁵⁰ suggests that citizen-suit legislation at the national level would inspire far more litigation—particularly when it is remembered that NEPA applies to a much more limited range of activity than the citizen-suit proposals.

The cases brought under the Michigan statute also illustrate that plaintiffs can be expected to use the courts in attempts to achieve sweeping realignments of governmental and private activity.⁵¹ Similarly broad attacks on Government regulatory programs under a federal citizen-suit statute could be more disruptive than in the state context, because of the greater factual complexity inherent in nationwide issues, the large number of regulatory programs and agencies existing in the federal government, and the more extensive and complex body

that state environmental groups "have thus far neither the funds nor the staff to undertake an organized litigation program," *id.* at 1008, and that

[t]he inability of plaintiffs to recruit expert witnesses or to launch expensive, full-scale litigation has certainly undermined the potential usefulness of some cases, and has prevented others even from being filed.

Id. at 1080.

50. Information supplied to the authors by Philip Soper, General Counsel's Office, Council on Environmental Quality. See generally 1972 ENVIRONMENTAL QUALITY REPORT, *supra* note 6, at 248-55.

51. For example, in *Roberts v. Michigan*, *appeal docket*, No. 13640, 2 ERC 1612 (Mich. Ct. App. 1971), an inventor of devices for controlling automobile exhaust emissions sought to use the Michigan Act as a means of effecting a radical restructuring of state transportation policies:

[The plaintiff] alleged first that the Secretary of State violated the [Act] by granting licenses to operate motor vehicles that polluted the air and by failing to adopt standards and regulations to control motor-vehicle-caused pollution. The plaintiff sought to have adequate standards imposed by court order and to have the licensing and operating of motor vehicles enjoined until such standards were established and enforced.

[He] also alleged that the State Highway Department was violating the EPA by allocating tax money for construction and maintenance of highways in the state, the use of which caused air pollution. Plaintiff sought the establishment of regulations to govern pollution arising from the use of highways, and also asked that highway construction be enjoined unless and until adequate safeguards dealing with this problem were adopted.

Sax & Connor, *supra* note 48, at 1017. The authors report the filing of another ambitious case in which the plaintiff

sought to obtain by judicial mandate what other environmentalists hope to accomplish through the [then] pending federal Water Pollution Control bill: a no-discharge rule for Michigan streams and lakes.

Id. at 1019 n.71. The authors also note that

[t]he federal bill is itself hotly controverted as an unrealistic aspiration—even for ten years hence when the bill takes effect and even with a multi-billion dollar authorization for treatment works construction.

Id.

The Michigan courts have not yet had to grapple with the merits of such unmanageable cases. In *Roberts* the trial court concluded that the statute constituted an impermissible delegation of legislative power as applied to the facts of the case, and this ruling is currently on appeal; the water pollution suit was voluntarily dismissed by the plaintiff. See *id.*

of doctrine that has evolved in federal administrative law.⁵²

III

FEDERAL VERSUS STATE INTERESTS

A final major flaw in some of the current citizen-suit proposals is their tacit assumption that all environmental questions must be resolved as a matter of federal law, and that the interests of the state governments are entitled to no weight. For example, the citizen-suit bill previously discussed would permit suits by any individual or organization against "any department, agency, or instrumentality of . . . a State or local government,"⁵³ and would place upon these governmental entities the burden of proving by a preponderance of the evidence that there is "no feasible and prudent alternative" to the proposed action, that it is "reasonably required for promotion of the public health, safety, and welfare," and that it is justified in broad cost-benefit terms.⁵⁴

While the Supreme Court has recently concluded that actions for pollution abatement may be brought against the political subdivisions of a state in the federal district courts consistent with the eleventh amendment,⁵⁵ there is reason to doubt the wisdom of exercising this power to its fullest extent. The range of state action which has some impact on the environment of neighboring states is potentially quite broad. For instance, the land-use policies of a states' political subdivisions may affect the kinds of industries which locate there or the rate of its population growth and, consequently, the volume of pollutants which cross into neighboring states.⁵⁶ Yet it surely would be absurd to have the federal courts review the actions of every local zoning board on the merits.

52. For example, H.R. 8331, 92d Cong., 1st Sess. (1971), makes no effort to harmonize its provisions governing judicial review of environmental matters with other statutes providing judicial review for particular kinds of agency action. Since the most common form of judicial review is in the courts of appeals, the bill leaves open the possibility that portions of the same controversy would be pending simultaneously at different levels of the federal judicial system and in different areas of the country.

53. H.R. 8331, 92d Cong., 1st Sess. §§ 302(a), (b) (1971); S. 1032, 92d Cong., 1st Sess. §§ 3(a), (b) (1971).

54. H.R. 8331, 92d Cong., 1st Sess. § 303(a) (1971). Compare S. 1032, 92d Cong., 1st Sess. § 4(a) (1971).

55. *Illinois v. City of Milwaukee*, 406 U.S. 91, 4 ERC 1001 (1972). See generally Garton, *The State Versus Extraterritorial Pollution—States' "Environmental Rights" Under Federal Common Law*, 2 ECOLOGY L.Q. 313 (1972); Note, *Federal Common Law and Interstate Pollution*, 85 HARV. L. REV. 1439 (1972).

56. For example, decisions construing NEPA's standard of "major Federal actions significantly affecting the environment," 42 U.S.C. § 4332(2)(c) (1970), have interpreted the provision quite broadly. See, e.g., *Hanley v. Mitchell*, 460 F.2d 640, 4 ERC 1153 (2d Cir. 1972); *City of New York v. United States*, 337 F. Supp. 150, 3 ERC 1570 (E.D.N.Y.), *appeal denied*, 344 F. Supp. 929, 4 ERC 1646 (E.D.N.Y. 1972).

The confusion and disruption in the relationships between federal agencies and courts that would be caused by the current citizen-suit bills are likely to be compounded when federal courts are asked to cope with the much more diverse structures, traditions, and relationships found within the state governments. There are, to be sure, strong federal interests in the field of environmental protection, such as securing uniform implementation of federal laws, preventing state action or inaction which has substantial extraterritorial environmental effects, and preserving unique natural resources. The federal interest, however, is not paramount in every respect, nor is it equally strong for all types of environmental issues. Procedural forms and structures can be devised which are far superior to the judicial forum in recognizing the local, state, regional, and national interests which are at stake in particular kinds of environmental issues, and in apportioning decisional responsibility in accord with these legitimate interests.⁵⁷

CONCLUSION

The many serious defects in the proposed citizen-suit bills should not be allowed to obscure the fact that courts can continue to play a vital role in the effort to safeguard the environment, and that a number of reforms can be made which would enhance the ability of citizen groups to assist the courts in performing this task. In the area of judicial review of administrative action, the environmentalists' long battle to obtain standing to sue seems largely to be won. The Supreme Court's recent decision in *Sierra Club v. Morton*⁵⁸ suggests that any threat to a citizen's scenic, cultural, historic, or environmental interests constitutes sufficient "injury in fact" to confer standing under the Administrative Procedure Act,⁵⁹ and that a litigant who achieves

57. For example, the Clean Air Amendments of 1970, 42 U.S.C. §§ 1857-58a (1970), amending 42 U.S.C. §§ 1857-57l (Supp. V, 1970), contain congressional findings that "the prevention and control of air pollution at its source is the primary responsibility of the States and local governments," and that "Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution." *Id.* §§ 1857(a) (3), (4). The Amendments contain a number of provisions designed to implement this sharing of authority, such as the requirement that the Administrator of EPA review and approve State implementation plans [*id.* § 1857c-5(a)(2)], and the provision that the Administrator establish a national program of research and development in pollution control, and provide technical and financial assistance to the States in developing such control techniques. *Id.* §§ 1857b(a), (b).

For a discussion of the history of the federal role in air pollution control, see generally Trumbull, *supra* note 3. For an interesting discussion of the varying interests of federal, regional, state, and local governments regarding the generation of electric power, see Electricity and the Environment, *supra* note 13, at I-1 to -8, VII-1 to -47, VIII-4 to -37.

58. 405 U.S. 727, 3 ERC 2039 (1972).

59. Section 10, 5 U.S.C. § 702 (1970). The second half of the standing test,

standing may assert nonpersonal "interests of the general public" in support of his claim.⁶⁰

Perhaps the next doctrinal barrier to fall will be the sovereign immunity rule.⁶¹ The archaic and unintelligible doctrine that government can not be sued when acting in its capacity as sovereign, has been employed to bar some environmental suits,⁶² and usually serves merely to obscure analysis of the real issue of whether the governmental activity in question has been committed to unreviewable agency discretion.⁶³ Moreover, the difficult problem of discretion will undoubtedly receive further attention from both the courts and the commentators, and attempts will be made to develop more precise guidelines to determine how much discretion an agency really needs in order to perform specific functions effectively.⁶⁴ In addition, the time

that "the alleged injury was to an interest 'arguably within the zone of interests to be protected or regulated' by the statutes that the agencies were claimed to have violated," [405 U.S. at 733, 3 ERC at 2041] presents little problem in the environmental area, since the relevant statutes are typically designed to safeguard the environmental interests of a large segment of the populace or of the entire nation.

60. *Id.* at 740 n.15, 3 ERC at 2044 n.15. The Court also reaffirmed the broad latitude which Congress has to confer standing under a "private attorney general" theory, consistent with the case-or-controversy limitation of article III of the Constitution. *Id.* at 732 n.3, 3 ERC at 2041 n.3. However, congressional action of this nature may be unnecessary if the lower federal courts construe the standing requirements in the generous fashion suggested by *Sierra Club*. See, e.g., *EDF v. EPA*, — F.2d —, 4 ERC 1523 (D.C. Cir. 1972); *Sierra Club v. Morton*, 348 F. Supp. 219, 4 ERC 1561 (N.D. Cal. 1972).

61. The sovereign immunity rule is based on the principle that the government cannot be sued without its own consent. Justice Holmes, speaking for a unanimous Supreme Court in a 1907 decision, explained the rationale behind the doctrine as follows:

A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.

Kawanakoa v. Polyblank, 205 U.S. 349, 353 (1907). The doctrine, however, has long been subject to stringent criticism by legal commentators. See 3 K. DAVIS, *supra* note 10, § 25.01.

62. See, e.g., *McQueary v. Laird*, 449 F.2d 608, 3 ERC 1184 (10th Cir. 1971); *Bass Anglers Sportsman's Soc'y v. United States Plywood-Champion Papers*, 324 F. Supp. 302, 2 ERC 1298 (S.D. Tex. 1971); *Bass Anglers Sportsman's Soc'y v. Scholze Tannery, Inc.*, 329 F. Supp. 339, 2 ERC 1771 (E.D. Tenn. 1971); *Bass Anglers Sportsman's Soc'y v. United States Steel Corp.*, 324 F. Supp. 412 (S.D. Ala. 1971); *Arthur v. Fry*, 300 F. Supp. 622 (E.D. Tenn. 1969).

63. The Administrative Conference of the United States has recommended that the Administrative Procedure Act be amended to abolish sovereign immunity as a bar to judicial review of agency or official action. Recommendation 9, *Statutory Reform of the Sovereign Immunity Doctrine*, 1 ADMIN. CONF. OF THE UNITED STATES REP. 190 (1970). See also Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 MICH. L. REV. 387 (1970).

64. The leading work on this problem is Professor Kenneth Culp Davis' book. K. DAVIS, *DISCRETIONARY JUSTICE* (1969). The Administrative Conference has con-

seems ripe for a thorough re-examination of "non-statutory review" of administrative action, in which the common law remedies of injunction, mandamus, or declaratory judgment are sought pursuant to the general federal-question jurisdiction statute⁶⁵ and similar provisions.⁶⁶ On the whole, however, the doctrinal tools necessary to obtain judicial review of administrative action are already in existence, and readily accessible.

More extensive changes are being made in the area of citizen suits directly against alleged polluters. The Clean Air Amendments of 1970,⁶⁷ the Federal Water Pollution Control Act Amendments of 1972,⁶⁸ and the Noise Control Act of 1972⁶⁹ all provide that citizens can bring actions directly against violators of the federal standards. While it is still too early to determine the practical efficacy of these provisions, and although there may be difficulties in coordinating citizen suits with Government enforcement programs,⁷⁰ this seems to be a sound approach to the perennial problem of inadequate enforcement resources.

ducted a number of studies on discretionary agency activities, and has issued several recommendations urging limitations on administrative discretion. *See, e.g.*, Recommendation 19, SEC No-Action Letters Under Section 4 of the Securities Act of 1933, 1 ADMIN. CONF. OF THE UNITED STATES REP. 34 (1970); Recommendation 27, Procedures of the Immigration and Naturalization Service in Respect to Change-of-Status Applications (adopted Dec. 6, 1971); Recommendation 34, Procedures of the United States Board of Parole (adopted June 9, 1972).

65. 28 U.S.C. § 1331 (1970).

66. *See generally* Cramton, *supra* note 63.

67. 42 U.S.C. § 1857h-2(a) (1970).

68. Pub. L. No. 92-500, § 505 (Oct. 18, 1972), 1972 U.S. CODE CONG. & AD. NEWS 4825, 4913-14.

69. Pub. L. No. 92-574, § 12 (Oct. 27, 1972), 1972 U.S. CODE CONG. & AD. NEWS —.

70. The citizen-suit provisions of both the Water Pollution Control Amendments and the Clean Air Amendments contain several features designed to coordinate private litigation with administrative enforcement. For example, section 304(b) of the Clean Air Amendments [42 U.S.C. § 1857h-2(b)(1970)] provides that the citizen plaintiff may not bring an action if the Administrator is diligently prosecuting a civil claim against the defendant, and that the plaintiff must in any event give 60 days' prior notice of his intent to bring suit to the Administrator, to the State in which the violation occurred, and to the alleged violator. Once the citizen suit is commenced, the Administrator may intervene as a matter of right. The Water Pollution Control Amendments contain similar limitations. *See* Pub. L. No. 92-500, §§ 505(b) & (c) (Oct. 18, 1972), 1972 U.S. CODE CONG. & AD. NEWS 4825, 4913-14.

Notwithstanding these carefully drawn provisions, however, it is conceivable that a substantial volume of citizen litigation could disrupt EPA's enforcement program. If a large number of citizen suits are pending, EPA may be confronted with a choice between postponing or forgoing other cases which it deems of higher priority in order to participate in the citizen suits, or of staying out of these actions and thereby incurring the risk that the citizen plaintiffs will make bad law, whether from lack of resources or from failure to advance all relevant factors affecting the public interest. Moreover, regardless of what *res judicata* or collateral estoppel effect is accorded the decision in the citizen suit, there may be unfortunate consequences. If the result in the first citizen suit precludes subsequent actions, either by other citizen plaintiffs or by the Administrator, then a hasty, ill-prepared or under-funded effort by the first plaintiff

Another significant expansion in the role of citizen litigation to protect the environment was the Supreme Court's recent declaration in *Illinois v. City of Milwaukee*⁷¹ of a federal common law right to abate interstate pollution. This common law action, which is designed to operate in the interstices of existing environmental statutes and be guided by their principles,⁷² should prove a valuable supplement to existing enforcement programs. Finally, the concept of an implied right of private action under anti-pollution statutes such as the Rivers and Harbors Act of 1899⁷³ seems capable of further development at the instance of enterprising litigants.⁷⁴

can effectively immunize activity which is causing harmful and unjustifiable pollution. On the other hand, if the defendant cannot rely on a favorable decision as a bar to subsequent actions, there is an obvious potential for harassment through multiple litigation. The latter possibility seems remote so long as the financial burdens of litigation remain substantial, but obviously any effort to make meritorious suits less costly increases the risk of frivolous actions.

71. 406 U.S. 91, 4 ERC 1001 (1972).

72. The Court noted that "while the various environmental protection statutes will not necessarily mark the outer bounds of the federal common law, they may provide useful guidelines in fashioning . . . rules of decision." 406 U.S. at 103 n.5, 4 ERC at 1005 n.5. See Garton, *supra* note 55, at 320-31.

73. 33 U.S.C. §§ 401 *et seq.* (1970). The existence of an implied right of civil action by the Government under section 15 of the Act [*id.* § 409] was upheld by the Supreme Court in *Wyandotte Transportation Co. v. United States*, 389 U.S. 191 (1967).

74. The logic of the *Wyandotte Transportation* case tends to support the existence of declaratory and injunctive relief for private parties as well as for the Government. The basic rationale for this type of action is simple, and long established:

[D]isregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law.

Texas & Pac. Ry. Co. v. Rigsby, 241 U.S. 33, 39 (1916). More pragmatic rationales for the implied right of private action are the impossibility of agencies' achieving full enforcement of regulatory statutes, and the potential inadequacy of available remedies at state law. *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964).

Several recent decisions have rejected private parties' attempts to bring *qui tam* actions under the provision of the Rivers and Harbors Act of 1899 which states that one-half of the fine imposed for violation of the criminal sections shall "be paid to the person or persons giving information which shall lead to conviction." 33 U.S.C. § 411 (1970). Instead, the courts have concluded that the statute allows an informer to recover only after the Government has brought and successfully prosecuted a criminal case on the basis of information supplied. See, e.g., *Connecticut Action Now v. Roberts Plating Co.*, 457 F.2d 81, 3 ERC 1934 (2d Cir. 1972); *Guthrie v. Alabama By-Products Co.*, 328 F. Supp. 1140, 2 ERC 1692 (N.D. Ala. 1971); *Bass Anglers Sportsman's Soc'y v. U.S. Plywood-Champion Papers, Inc.*, 324 F. Supp. 302, 2 ERC 1298 (S.D. Tex. 1971); *Bass Anglers Sportsman's Soc'y v. Scholze Tannery, Inc.*, 329 F. Supp. 339, 2 ERC 1771 (E.D. Tenn. 1971).

However, these decisions do not seem dispositive of the question of whether an implied right of private action exists under certain provisions of the Rivers and Harbors Act of 1899, and may simply reflect the longstanding judicial hostility to informers' actions. See, e.g., *United States ex rel. Marcus v. Hess*, 37 U.S. 537, 560-61 (1943) (Jackson, J., dissenting); *United States ex rel. Brensilber v. Bausch & Lomb*, 131 F.2d

On the whole, then, there are numerous and growing opportunities for citizen litigation to protect the environment, and the public interest lawsuit will doubtless remain an essential facet of the total effort to reverse the destruction of our natural heritage. But courts and lawsuits cannot do the whole job, or even the major portion of it. The drama of courtroom conflict and the exhilaration of clearcut victories may be emotionally satisfying, but they cannot substitute for the hard work of amassing detailed factual data, organizing informed public support for environmental causes, and helping to make the necessary tradeoffs and interest balancing through participation in legislatures, planning councils, and administrative agencies. If the environment is to be protected, the major effort must be made in these arenas.

545 (2d Cir. 1942), *aff'd by an equally divided court*, 320 U.S. 711 (1943).

And in *Alameda Conservation Ass'n v. State of California*, 437 F.2d 1087, 2 ERC 1175 (9th Cir. 1971)—a suit alleging that defendant's filling of the San Francisco Bay violated sections 401-06 of the Act—the court assumed that a private right of action would lie to enjoin illegal filling. That decision has since been followed in *Sierra Club v. Leslie Salt Co.*, — F. Supp. —, 4 ERC 1663 (N.D. Cal. 1972), which distinguished cases denying a private right of action on the basis that they involved sections 407 and 411 of the Act—which provides only for criminal penalties—and not sections 401-06, which provide for injunctive relief as well. — F. Supp. at —, 4 ERC at 1666 n.2. And see *Hawkinson v. Blandin Paper Co.*, 347 F. Supp. 820, 4 ERC 1009 (D. Minn. 1972) (federal jurisdiction upheld where plaintiff alleged that violation of Refuse Act injured his rights of navigation and anchorage).

APPENDIX A

H.R. 49
92d Cong., 1st Sess.

IN THE HOUSE OF REPRESENTATIVES

A BILL to amend the National Environmental Policy Act of 1969 to provide for class actions in the United States district courts against persons responsible for creating certain environmental hazards.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the National Environmental Policy Act of 1969 is amended by adding at the end thereof the following new title:

TITLE III

CLASS ACTIONS TO PROTECT ENVIRONMENT

SEC. 301. (a) The Congress finds and declares that each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

(b) The Congress further finds and declares (1) that existing provisions of Federal law are insufficient to protect various groups of persons from the harmful effects of air, water, and noise pollution, and (2) that civil actions on behalf of classes or groups of persons injured or endangered can be an effective and useful machinery for the protection against these harmful effects.

(c) The Congress further finds and declares that many States provide no remedy under State law whereby many persons, each having a small claim, can seek redress in the courts for the hazards and harmful effects to which they are subjected as a result of the pollution of air and water and as a result of unreasonable noises. It is, therefore, in the public interest to provide a Federal remedy for groups having a common interest in that they are adversely affected by these environmental hazards.

(d) The Congress further finds and declares that air and water pollution and the creation of unreasonable noises have a deleterious effect on the health and welfare of persons who are exposed to these hazards. The Congress further finds that these environmental hazards are largely caused by persons who are engaged in interstate commerce, or in activities affecting interstate commerce.

SEC. 302. Any person who is engaged in any activity which affects interstate commerce and who is responsible for any pollution of

air or water or for the creation of any unreasonable noise shall be subject to liability in monetary damages, injunction, declaratory judgment, or other appropriate relief in a class action brought by any person representing the interest of a group or class of persons whose lives, safety, health, property, or welfare has been endangered or adversely affected in any way by such pollution or noise.

SEC. 303. The United States district courts shall have jurisdiction of class actions brought under section 302 of this title without regard to the amount in controversy.

SEC. 304. The remedies provided by this title are in addition to, and not in derogation of, any other remedies which may be available under any statute or common law, and nothing in this title shall be held to preempt or otherwise interfere with any Federal or State law.

APPENDIX B

H.R. 8331

92d Cong., 1st Sess.

IN THE HOUSE OF REPRESENTATIVES

A BILL to amend the National Environmental Policy Act of 1969 to provide for citizens actions in the United States district courts against persons responsible for creating certain environmental hazards.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the National Environmental Policy Act of 1969 is amended by adding at the end thereof the following new title:

TITLE III

CITIZENS' ACTIONS TO PROTECT ENVIRONMENT

SEC. 301. (a) The Congress finds and declares that each person is entitled by right to the protection, preservation, and enhancement of the air, water, land, and public trust of the United States and that each person has the responsibility to contribute to the protection and enhancement thereof.

(b) The Congress further finds and declares (1) that existing provisions of Federal law are insufficient to protect the air, water, land, and public trust of the United States from pollution, impairment, or destruction and (2) that civil actions initiated by individual persons or classes or groups of persons injured or endangered can be an effective and useful machinery for the protection against these harmful effects.

SEC. 302. (a) Any person may maintain an action for declaratory or equitable relief in his own behalf or in behalf of a class of persons similarly situated, for the protection of the air, water, land, or public trust of the United States from pollution, impairment, or destruction, wherever such activity and such action for relief constitute a case or controversy. Such action may be maintained against any person engaged in such activity and may be brought, without regard to the amount in controversy, in the district court of the United States for any judicial district in which the defendant resides, transacts business or may be found; *Provided*, That nothing herein shall be construed to prevent or preempt State courts from exercising jurisdiction in such action. Any complaint in any such action shall be supported by affidavits of not less than two technically qualified persons stating that to the best of their knowledge the activity which is the subject to [*sic*] the action damages or reasonably may damage the air, water, land, or public trust of the United States by pollution, impairment, or destruction. Copies of any pleadings filed pursuant to this Act shall also be filed with the Council on Environmental Quality.

(b) For the purpose of this Act, the term "person" means any individual or organization; or any department, agency, or instrumentality of the United States, a State or local government, the District of Columbia, the Commonwealth of Puerto Rico, or possession of the United States.

SEC. 303. (a) When the plaintiff has made a *prima facie* showing that the activity of the defendant affecting interstate commerce has resulted in or reasonably may result in pollution, impairment, or destruction of the air, water, land, or public trust of the United States, the defendant shall have the burden of establishing (1) that there is no feasible and prudent alternative, (2) that the activity at issue is consistent with and reasonably required for promotion of the public health, safety, and welfare in light of the paramount concern of the United States for the protection of its air, water, land, and public trust from pollution, impairment, or destruction, and (3) that the social and economic benefits of defendants' enterprise or activity outweigh the social and economic costs thereof.

(b) The court may appoint a master to take testimony and make a report to the court in the action.

(c) The court or master, as well as the parties to the action, may subpoena expert witnesses and require the production of records, documents, and all other information necessary to a just disposition of the case.

(d) Costs may be apportioned to the parties if the interests of justice require.

(e) No bond shall be required by the court of the plaintiff: *Provided*, That the court may, upon clear and convincing evidence offered by the defendant, impose a requirement for security to cover the costs and damages as may be incurred by defendant when relief is wrongfully granted: *Provided further*, That such security shall not be required of plaintiff if the requirement thereof would unreasonably hinder plaintiff in the maintenance of his action or would tend to prevent a full and fair hearing on the activities complained of, and shall in no case exceed \$500.

(f) Compliance with State laws or regulations, or with Federal regulations, shall not be a defense but shall be admissible as evidence that there is no feasible and prudent alternative to the activity at issue.

SEC. 304. The court may grant declaratory relief, temporary and permanent equitable relief, or may impose conditions on the defendant which are required to protect the air, water, land, or public trust of the United States from pollution, impairment, or destruction.

SEC. 305. This Act shall be supplementary to existing administrative and regulatory procedures provided by law and in any action maintained under the Act, the court may remand the parties to such procedures: *Provided*, That nothing in this section shall be deemed to prevent the granting of interim equitable relief where required and so long as is necessary to protect the rights recognized herein: *Provided further*, That any person entitled to maintain an action under this Act may intervene as a party in all such procedures: *Provided further*, That nothing herein shall be deemed to prevent the maintenance of an action, as provided in this Act to protect the rights recognized herein, where existing administrative and regulatory procedures are found by the court to be inadequate for the protection of such rights: *Provided further*, That at the initiation of any person entitled to maintain an action under the Act, such procedures shall be reviewable in a court of competent jurisdiction to the extent necessary to protect the rights recognized herein: *And provided further*, That in any such judicial review the court shall be bound by the provisions, standards, and procedures of sections 302, 303, and 304 of this Act, and may order that additional evidence be taken with respect to the environmental issues involved.

SEC. 306. The court, in issuing any final order in any action brought pursuant to this Act, may award costs of litigation (including reasonable attorney and expert witness fees). No award of such costs shall be made against either party where the court determines that the prospect of an award of such costs would unreasonably hinder either the maintenance or the defense of any action brought under this

title, or would tend to prevent a full and fair hearing on the activities complained of.

SEC. 307. The remedies provided by this title are in addition to, and not in derogation of, any other remedies which may be available under any statute or common law.

APPENDIX C

S. 1032
92d Cong., 1st Sess.

IN THE SENATE OF THE UNITED STATES

A BILL to promote and protect the free flow of interstate commerce without unreasonable damage to the environment; to assure that activities which affect interstate commerce will not unreasonably injure environmental rights; to provide a right of action for relief for protection of the environment from unreasonable infringement by activities which affect interstate commerce and to establish the right of all citizens to the protection, preservation, and enhancement of the environment.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Environmental Protection Act of 1971".

SEC. 2. (a) The Congress finds and declares that each person is entitled by right to the protection, preservation, and enhancement of the air, water, land, and public trust of the United States and that each person has the responsibility to contribute to the protection and enhancement thereof.

(b) The Congress further finds and declares that it is in the public interest to provide each person with an adequate remedy to protect the air, water, land, and public trust of the United States from unreasonable pollution, impairment, or destruction.

(c) The Congress further finds and declares that hazards to the air, water, land, and public trust of the United States are caused largely by persons who are engaged in interstate commerce, or in activities which affect interstate commerce.

SEC. 3. (a) Any person may maintain an action for declaratory or equitable relief in his own behalf or in behalf of a class of persons similarly situated, for the protection of the air, water, land, or public trust of the United States from unreasonable pollution, impairment, or destruction which results from or reasonably may result from any activity which affects interstate commerce, wherever such activity and such

action for relief constitute a case or controversy. Such action may be maintained against any person engaged in such activity and may be brought, without regard to the amount in controversy, in the district court of the United States for any judicial district in which the defendant resides, transacts business, or may be found: *Provided*, That nothing herein shall be construed to prevent or preempt State courts from exercising jurisdiction in such action. Any complaint in any such action shall be supported by affidavits of not less than two technically qualified persons stating that to the best of their knowledge the activity which is the subject of the action damages or reasonably may damage the air, water, land, or public trust of the United States by pollution, impairment, or destruction.

(b) For the purpose of this section, the term "person" means any individual or organization; or any department, agency, or instrumentality of the United States, a State or local government, the District of Columbia, the Commonwealth of Puerto Rico, or a possession of the United States.

SEC. 4. (a) When the plaintiff has made a prima facie showing that the activity of the defendant affecting interstate commerce has resulted in or reasonably may result in unreasonable pollution, impairment, or destruction of the air, water, land, or public trust of the United States the defendant shall have the burden of establishing that there is no feasible and prudent alternative and that the activity at issue is consistent with and reasonably required for promotion of the public health, safety, and welfare in light of the paramount concern of the United States for the protection of its air, water, land, and public trust from unreasonable pollution, impairment, or destruction.

(b) The court may appoint a master to take testimony and make a report to the court in the action.

(c) The court or master, as well as the parties to the action, may subpoena expert witnesses and require the production of records, documents, and all other information necessary to a just disposition of the case.

(d) Costs may be apportioned to the parties if the interests of justice require.

(e) No bond shall be required by the court of the plaintiff: *Provided*, That the court may, upon clear and convincing evidence offered by the defendant that the relief required will result in irreparable damage to the defendant, impose a requirement for security to cover the costs and damages as may be incurred by defendant when relief is wrongfully granted: *Provided further*, That such security shall not be required of plaintiff if the requirement thereof would unreasonably hinder plaintiff in the maintenance of his action or would tend unrea-

sonably to prevent a full and fair hearing on the activities complained of.

SEC. 5. The court may grant declaratory relief, temporary and permanent equitable relief, or may impose conditions on the defendant which are required to protect the air, water, land, or public trust of the United States from pollution, impairment, or destruction.

SEC. 6. This Act shall be supplementary to existing administrative and regulatory procedures provided by law and in any action maintained under the Act the court may remand the parties to such procedures: *Provided*, That nothing in this section shall be deemed to prevent the granting of interim equitable relief where required and so long as is necessary to protect the rights recognized herein: *Provided further*, That any person entitled to maintain an action under this Act may intervene as a party in all such procedures: *Provided further*, That nothing herein shall be deemed to prevent the maintenance of an action, as provided in this Act, to protect the rights recognized herein, where existing administrative and regulatory procedures are found by the court to be inadequate for the protection of such rights: *Provided further*, That at the initiation of any person entitled to maintain an action under the Act, such procedures shall be reviewable in a court of competent jurisdiction to the extent necessary to protect the rights recognized herein: *And provided further*, That in any such judicial review the court shall be bound by the provisions, standards, and procedures of sections 3, 4, and 5 of this Act, and may order that additional evidence be taken with respect to the environmental issues involved.