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CITIZEN SUITS: TOWARD A WORKABLE SOLUTION TO HELP CREATED WETLANDS SUCCEED*

*Maria E. Chang***

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I. INTRODUCTION

Society's relatively recent recognition of the critical importance of restoring and maintaining the quality of the environment has placed the regulation of wetlands under close scrutiny. As the knowledge of wetlands continues to grow, we realize that altering wetlands adversely affects the things that sustain life. Wetlands detain floodwaters, reducing their size and their destructiveness.[1] Wetlands absorb and filter pollutants that would otherwise degrade groundwater or the water quality of rivers, lakes, and estuaries. Wetlands provide direct spawning and rearing habitats and the food supply which supports both freshwater and marine fisheries.[2] Wetlands provide the principal habitat for virtually all waterfowl. Wetlands also provide an important habitat for a wide diversity of plants and animals, including a large portion of federally listed threatened or endangered species.[3] Some wetlands recharge aquifers that provide drinking water.[4] Wetlands stabilize shorelines and prevent erosion by binding stream banks and by absorbing wave energy.[5] Wetlands also play an early and basic role in land formation, particularly in coastal areas that regularly lose land to the ocean.[6] Finally, wetlands support the multi-billion dollar fishing, hunting, and outdoor recreation industries nationwide.[7]

Despite the important functions that wetlands serve, protecting them has been difficult. Over fifty-five percent of the nation's original wetland acreage has been lost,[8] and substantial wetland acreage continues to be destroyed each year. Estimates of lost wetlands vary from 300,000 to 500,000 acres annually.[9]

Currently, the principal source of wetlands protection and regulation is a

1. STATEWIDE WETLANDS STRATEGIES — A GUIDE TO PROTECTING AND MANAGING THE RESOURCE 4 (1992).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* at 6.
7. *Id.*
8. Michael D. Blumm & D. Bernard Zaleha, *Federal Wetlands Protection Under the Clean Water Act: Regulatory Ambivalence, Intergovernmental Tension, and a Call for Reform*, 60 U. COLO. L. REV. 695, 697 (1989) (citing U.S. FISH AND WILDLIFE SERVICE, WETLANDS OF THE UNITED STATES: CURRENT STATUS AND RECENT TRENDS (1984)).
9. Blumm & Zaleha, *supra* note 8, at 695.

federal statute — section 404 of the Clean Water Act (the "CWA").[10] *Inter alia,*[11] section 404 of the CWA provides for "mitigation" of wetlands.[12] Mitigation compensates for the impact on wetlands by replacing or providing substitute resources or environments.[13] Mitigation may include restoration, enhancement, or creation of wetlands.

This paper evaluates the failure of created wetlands.[14] Part II summarizes the section 404 program and describes the problematic aspects of created wetlands. Part III examines citizen suits in general and the citizen suit provision of the CWA in particular. Part IV considers the applicability of a private enforcement mechanism to ameliorate the problems of creation of wetlands mitigation. Finally, Part V concludes that there is no harm in developing a provision enabling citizens to sue to enforce created wetlands permit conditions in an effort to decrease the nation's serious wetland losses.

II. SECTION 404 OF THE CWA: SEQUENCING, CREATION, AND ENFORCEMENT

Section 404 regulates activities involving wetlands[15] by requiring a permit for discharges of dredged or fill material in "waters of the United States."[16] The permit issuing agency is the U.S. Army Corps of Engineers (the "Corps") while the agency responsible for the oversight of the program is the U.S. Environmental Protection Agency (the "EPA"). Section 404 requires the EPA, "in conjunction with" the Corps, to promulgate "guidelines" governing the permit program[17] and authorizes the EPA to prohibit or deny permits.[18]

Certain activities which involve minor discharges are exempt from individual federal permits by section 404(f). In addition, section 404(r) exempts federal construction projects specifically authorized by Congress[19] from sec-

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10. 33 U.S.C. § 1344 (1982).

11. *See infra* notes 15-35 and accompanying text.

12. *See infra* notes 36-46 and accompanying text.

13. Roy R. Lewis III, *Wetlands Restoration/Creation/Enhancement Terminology: Suggestions for Standardization, in* 2 WETLAND CREATION AND RESTORATION: THE STATUS OF THE SCIENCE 1-3 (Jon A. Kusler & Mary E. Kentula eds., 1989) (citing 40 C.F.R. § 1508.20 (1988)).

14. Important questions remain about whether created wetlands are a worthwhile endeavor at all, given their uncertain ecological success. However, this paper focuses on a workable solution given the fact that created wetlands are currently the most common form of mitigation.

15. Wetlands are "areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands include swamps, marshes, bogs, and similar areas." 40 C.F.R. § 230.3(t) (1992).

16. 33 U.S.C. § 1362(7) (1982). This paper does not attempt to tackle the issues and problems regarding the federal agencies' geographic jurisdiction over wetlands. *See* Blumm & Zaleha, *supra* note 8, at 713-19 for an overview of this issue. Much of the summary of § 404 is drawn from this source.

17. 33 U.S.C. § 1344(b)(1) (1982).

18. *Id.* § 1344(c).

19. *Id.* § 1344(r). Few projects have been exempted, and none has been judicially challenged. Blumm

tion 404 permit requirements. Section 404(e) authorizes the Corps to issue "general permits" on a state, regional, or nationwide basis, exempting certain categories of activities from individual permit requirements.[20]

A. *Permit Procedures*

Individual section 404 permits may be issued either in advance of a discharge or after a discharge occurs.[21] Permit applicants must submit their proposals to the local Corps District Engineer,[22] who notifies interested parties and the general public,[23] decides whether to have a hearing,[24] and analyzes the environmental effects of the proposal in an environmental assessment ("EA").[25] If the proposed action may have a significant effect on the quality of the environment, an environmental impact statement ("EIS") is prepared.[26] Based on the analysis of the EA and/or the EIS, the Corps District Engineer then decides whether and under what conditions a permit should be issued.[27] In the event that the EPA, the Fish and Wildlife Service, or the National Marine Fisheries Service objects to the proposal, additional procedures are required.[28] Despite all these procedures, a large percentage of section 404 applicants receive permits.[29]

The Corps' decision whether to grant a permit is initially governed by the public interest review. The Corps is to carefully weigh the "benefits which may reasonably be expected to accrue" from a proposed discharge against its "reasonably foreseeable detriments."[30] If the proposed activities fail the public interest review, the Corps may deny the permit. However, if

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& Zaleha, *supra* note 8, at 723.

20. 33 U.S.C. § 1344(e)(1) (1982). Only activities which are "similar in nature" and which have minimal individual or cumulative adverse effects may be authorized by general permits.

21. 33 C.F.R. §§ 325.8, 326.3(e) (1988). "After-the-fact" permits are widely used. Applicants apply for "after the fact," retroactive permits to cure discharges that have been made illegally without a permit. These permits present troublesome issues because they conflict with the concept of a regulatory program based on assessing the impacts of activities before they take place. Blumm & Zaleha, *supra* note 8, at 729-30.

22. 33 C.F.R. § 325.1(b) (1989).

23. *Id.* § 325.3(d).

24. *Id.* §§ 325.2(a)(5), 327.4(a).

25. *Id.* §§ 230.7(e), 230.9, 230 app. a.

26. *Id.* §§ 230.6, 230 app. b.

27. *Id.* § 325.4.

28. *Id.* § 320.4(c). In deference to their expertise, the Corps guarantees "full consideration" to the views of the federal and state fish and wildlife agencies. However, ultimately, the Corps need not agree with their conclusions. *See, e.g.*, Sierra Club v. United States Army Corps of Eng'rs (Westway II), 772 F.2d 1043, 1054 (2d Cir. 1985) (only "serious consideration" warranted); River Rd. Alliance, Inc. v. Corps of Eng'rs, 764 F.2d 445, 452 (7th Cir. 1985).

29. Blumm & Zaleha, *supra* note 8, at 729.

30. 33 C.F.R. § 320.4(a) (1992): "All factors which may be relevant to the proposal must be considered including the cumulative effects thereof. . . ." *Id.* The Corps has a presumption against filling of wetlands on its public interest balancing, but its effect is unclear. Blumm & Zaleha, *supra* note 8, at 733.

the proposal passes the public interest review, the applicant must still comply with the section 404(b) guidelines.

The section 404(b) guidelines are the chief environmental criteria in the section 404 program.[31] The guidelines establish a presumption against discharges where there are practicable alternatives which have a less damaging impact on the aquatic ecosystem, so long as the alternative does not have other significant environmental consequences.[32] "Practicable alternatives" consider technical and logistical factors as well as cost to the applicant.[33] Discharges into "special aquatic sites," such as wetlands, for nonwater dependent uses are presumed to have practicable alternatives.[34] Despite these guidelines, considerable losses of wetlands have been sustained even though practicable alternatives often exist. Applicants have circumvented the alternatives requirement by defining their project purposes so narrowly as to eliminate the availability of practicable alternatives. For its part, the Corps has been extremely deferential to the applicants' stated purpose and alternatives.[35]

B. *Mitigation*

One of the reasons for the continued significant losses of wetlands is that the regulations implementing section 404 proscribe all discharges *unless* "appropriate and practicable" mitigation measures are taken.[36] It is relatively easy for applicants to circumvent the practicable alternatives test by defining their proposed activities so as to eliminate the availability of practicable alternatives. At the same time, applicants can propose mitigation to compensate for any impacts that their activities may have on wetlands.[37] Mitigation

31. Blumm & Zaleha, *supra* note 8, at 736; 40 C.F.R. § 230 (1988). The § 404(b) guidelines also apply to general permits, permits issued under approved state § 404 programs, and federal projects exempted by § 404(r). Blumm & Zaleha, *supra* note 8, at 738.

32. 40 C.F.R. § 230.10(a) (1988).

33. *Id.* However, the lack of property ownership does not necessarily determine what is practicable. 40 C.F.R. §§ 230.10(a)(1)-(2) (1988).

34. *Id.* § 230.10(a)(3).

35. *See, e.g.*, National Audubon Soc'y v. Hartz Mountain Dev. Corp., 14 ENVTL. L. REP. 20,724 (D.N.J. 1983) (upholding a Corps permit allowing loss of 127 acres of wetlands for a commercial development finding it consistent with the practicable alternative guidelines). The Corps determined that the basic purpose of the proposed activity was the development of raw land to profitably build a commercial-industrial complex. The Corps rejected the alternative of abandoning the plan because it did not achieve the activity's basic purpose; the Corps also rejected reducing the project's scale because the purpose of the activity was to build a large-scale development. The Corps found the applicant could not acquire and develop another site because other sites would be less attractive to purchasers, and therefore, less profitable. *Id.*

36. 40 C.F.R. § 230.10(d) (1988).

37. In its 1978 National Environmental Policy Act (NEPA) guidelines, the Council on Environmental Quality (CEQ) broadly defined mitigation options for all federal activities affecting the environment as follows:

is intended to offset the biological and other functions that are lost when a natural wetland is destroyed.[38] The Corps' mitigation policy[39] states that consideration of mitigation will occur throughout the permit process and that mitigation includes avoiding, minimizing, rectifying, reducing, or compensating[40] for resource losses.[41] The EPA's mitigation guidelines[42] generally provide for a sequence of mitigation that begins with evaluating practicable alternatives for avoiding adverse effects, and allows for compensation only as a last resort.[43]

The EPA has expressed concern over the Corps' implementation of mitigation, specifically the Corps' failure to identify avoidance of adverse impacts on wetlands as a preferred option over compensation.[44] The extent to which "sequencing"—avoiding wetlands, then minimizing impacts, then compensating for impacts—is required is unclear.[45] Although its ultimate success is highly uncertain,[46] compensation, not surprisingly, is the most common form of mitigation.[47]

C. *Creation of Wetlands*

The most common form of mitigation in Florida is the creation of wetlands.[48] Wetland creation projects are designed to create new wetlands to offset the losses which are sustained when a wetland is destroyed. However,

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* avoiding the impact altogether by not taking a certain action or parts of an action;
* minimizing impact by limiting the degree or magnitude of the action and its implementation;
* rectifying the impact by repairing, rehabilitating or restoring the impacted environment;
* reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; and
* compensating for the impact by replacing or providing substitute resources or environments.

40 C.F.R. § 1508 (1988).

38. Ann Redmond, *How Successful Is Mitigation?*, 14 NAT'L WETLANDS NEWSLETTER, FOCUS ISSUE: WETLAND MITIGATION BANKING, Jan./Feb. 1992, at 1.

39. Stated in its regulations implementing the § 404 program. 33 C.F.R. § 320.4(r) (1988).

40. "Compensating" is used in this context as restoring, enhancing, or creating a wetland.

41. 51 Fed. Reg. 41227 (1986).

42. The specific requirement for mitigation under § 404(b) is in 40 C.F.R. § 230.10(d) (1988).

43. NATIONAL WETLANDS POLICY FORUM, ISSUES IN WETLANDS PROTECTION 176 (citing to 45 Fed. Reg. 85, 336-85, 357 (1986)). The Henderson Wetlands Act of 1984 requires the Florida Department of Environmental Regulation (DER) to consider mitigation proposed by the applicant in deciding whether to issue a dredge and fill permit. FLORIDA DEPARTMENT OF ENVIRONMENTAL REGULATION, REPORT ON THE EFFECTIVENESS OF PERMITTED MITIGATION (1991) [hereinafter DER STUDY].

44. NATIONAL WETLANDS POLICY FORUM, *supra* note 43, at 179 (citing to a 1986 oversight hearing of the Environmental Pollution Subcommittee of the Senate Environment and Public Works Committee).

45. The CEQ definition of mitigation leaves the issue of sequencing open to interpretation. *See supra* note 37.

46. *See infra* notes 52-58, 63-67 and accompanying text; *see also supra* note 37.

47. NATIONAL WETLANDS POLICY FORUM, *supra* note 43, at 181.

48. DER STUDY, *supra* note 43, at 1.

the limited success of created wetlands is well-documented.[49]

1. The Florida DER Study on Created Wetlands

In 1990, the Florida Department of Environmental Regulation (the "DER") began a study to assess the effectiveness of required mitigation projects.[50] The study focused on the success of wetland creation projects. From 1985 through 1990, the DER issued 1,262 permits which included the required creation, enhancement, or preservation of wetlands.[51] The permits authorized the loss of 3,305 acres of wetlands and required the creation of 3,345 acres, the enhancement of 7,301 acres, and the preservation of 7,588 acres. In addition to determining the acres of wetland permitted to be mitigated, the goals of the study were to evaluate the effectiveness of the permitted mitigation and to identify needs for improvement.

The DER examined 119 wetland creation sites required by 63 permits. Each site was evaluated for compliance with the permit requirements and for ecological success.[52] The study found a surprisingly high rate of noncompliance. Only four of the 63 permits reviewed were in full compliance with the permit mitigation requirements.[53] Noncompliance ranged from minor nonsubmittal of required reports to major deviations from the permitted mitigation design. Furthermore, in about thirty-four percent of permits, the required mitigation had not been done at all, although the wetlands had been destroyed.[54] At sites where the mitigation was actually accomplished, the ecological success rate of the permits reviewed was twenty-seven percent.[55] In some cases, it appeared that success rates could be improved by simple remedial measures such as nuisance species control and construction of connecting flow-ways.[56]

The DER study also found that in one of twelve cases, developers were later allowed to fill in and build on wetlands created as mitigation for earlier projects.[57] The DER therefore recommended that perpetual easements pro-

49. *See id; see also* U.S. General Accounting Office, Wetlands: The Corps of Engineers' Administration of the Section 404 Program (1988) [hereinafter GAO REPORT]; David Crewz & Roy R. Lewis III, AN EVALUATION OF HISTORICAL ATTEMPTS TO ESTABLISH EMERGENT VEGETATION IN MARINE WETLANDS IN FLORIDA (Florida Sea Grant Technical Paper TP-60 1991).

50. DER STUDY, *supra* note 43, at 1.

51. *Id.* executive summary.

52. "Ecological success was defined as whether the site is, or appears likely to become, a functional wetland of the intended type of mitigation wetland." *Id.*

53. *Id.*

54. *Id.* at 2; *see, e.g., Developer Offers Funds after Not Making Wetlands*, FLA. TIMES-UNION, Aug. 12, 1992, at B3.

55. DER STUDY, *supra* note 43, at 2.

56. *Id.* at 7.

57. *Id.* at 18.

tecting created wetlands become part of the permit.[58]

In light of the low success rate of created wetlands, the DER recommended an emphasis on sequencing. The study found that the DER should focus on avoiding wetlands destruction and on minimizing the effects of permitted activities on wetlands.[59] Creation is a last resort measure and should only be accepted if the proposal provides reasonable assurances of success.[60] In light of the high level of noncompliance, the DER also recommended that fines for noncompliance be assessed and that the applicant's compliance record be considered as part of the initial decision to issue a permit.[61] The DER also recommended that its staff be increased to improve enforcement of permits.[62]

2. The GAO Report on the Section 404 Program

The 1988 General Accounting Office (the "GAO") Report on the section 404 program[63] investigated the implementation of the permit program by five Corps district offices.[64] The GAO Report noted the Corps' lack of enforcement. The GAO found that surveillance is not a high priority and that the Corps seldom inspects permit sites. The GAO also found that the EPA assumes only a limited enforcement role.[65] The GAO found that the 404 program lacks any systematic monitoring and enforcement. The GAO Report concluded that neither the EPA nor the Corps has implemented an effective program to detect violations of permits.[66] The GAO recommended that if the loss of wetlands is to be avoided, the EPA and the Corps need to establish a coordinated enforcement program that includes routine surveillance, compliance inspections, and investigation and reporting of unauthorized activities.[67]

3. Funding Agencies to Increase Enforcement?

The lack of adequate monitoring of permit conditions, particularly in verifying the success of creation projects, is a serious problem.[68] A more effective enforcement program that includes monitoring long-term compliance would not only decrease the nation's wetlands losses, but could provide

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58. *Id.* executive summary.
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. GAO REPORT, *supra* note 49.
64. *Id.* at 1.
65. *Id.* at 55-56.
66. Blumm & Zaleha, *supra* note 8, at 748.
67. GAO REPORT, *supra* note 49, at 73-74.
68. NATIONAL WETLANDS POLICY FORUM, *supra* note 43, at 187.

valuable information that might give us scientific understanding of the viability of created wetlands.[69] However, such a program could be very expensive. Close monitoring requires staff and technical support. Also, results from enforcement programs and creation projects may not be realized immediately; therefore, a long-term management structure would need to be in place. At a time when both state and federal governments are facing serious budgetary constraints, to suggest that the enforcement agencies should simply be given increased funding would be naive.

Empowering citizens to enforce compliance with required mitigation may be a viable solution. Part III briefly examines the citizen suit provision that already exists in the CWA[70] and identifies some of the issues that need to be tackled before a citizen suit provision could be used to enforce compliance of required mitigation.

III. CITIZEN SUITS AND THE CWA

A. *Citizen Suits in General*[71]

In the early 1980's, private environmental organizations mounted a large-scale litigation campaign to enforce several major regulatory statutes against polluters.[72] The statutes which enabled them to enforce these environmental regulations, commonly described as "citizen suit" provisions, had been written into law in the 1970s, but had remained relatively unused until the early 1980s.[73] By 1985, more than 350 citizen suits had been initiated.[74]

Deterrence is the primary purpose of citizen suits.[75] Government agencies are often unable or unwilling to enforce regulatory laws as they should be enforced because of bureaucratic, political, financial, or logistical constraints.[76] Citizen suits politically spur the government's own enforcement and actually perform the enforcement role when the government lacks the

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69. *Id.*

70. This paper focuses on the citizen suit provision of the CWA because the CWA regulates activities on wetlands. However, citizen suit provisions are present in at least 12 other environmental laws: the Clean Air Act, the FWPCA, the MPRSA, the Noise Control Act, the Endangered Species Act, the DPA, the Resource Conservation and Recovery Act, the Safe Drinking Water Act, the Surface Mining Control and Reclamation Act, CERCLA, the Emergency Planning and Community Right-to-Know Act, and the OCSLA. Barry Breen, *Citizen Suits for Natural Resource Damages: Closing a Gap*, 24 WAKE FOREST L. REV. 851, 871 (1989).

71. For a comprehensive treatment of citizen suit provisions, see Jeffery G. Miller, CITIZEN SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL LAWS (Envtl. L. Inst. 1987) (Portland, Or.).

72. Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFFALO L. REV. 833, 835 (1985).

73. *Id.*

74. For a historical perspective of citizen suits, see Boyer & Meidinger, *supra* note 72, at 946-57.

75. *Id.* at 836.

76. *Id.* at 836-37.

resources to enforce on its own.[77]

There are two basic kinds of citizen suits in environmental law: (1) suits by private citizens against other private citizens alleged to be in violation of a federal environmental law and (2) suits by private citizens against the executive branch of the federal government, usually the EPA, alleging the government has not carried out a mandatory duty in implementing an environmental law.[78] Citizens are essentially acting as "private attorneys general" because they are vindicating public rights.[79]

B. *The Citizen Suit Provision of the CWA*

The citizen suit provision of the CWA authorizes any citizen to commence a civil action against a private or public facility that is polluting waterways in violation of the limits imposed under the statute. A citizen may also commence an action against the EPA for its failure to perform any duties mandated under the CWA.[80] The statute provides three types of remedies for citizen suit enforcement actions.[81] The court has the power to enforce the legal requirement that has been violated, to require the defendant to pay civil penalties,[82] and to award the plaintiffs attorney fees and litigation costs.[83]

Citizen suits have centered on the CWA.[84] Concerned with a perceived gap in federal and state agencies enforcement, several well-known environmental groups such as the Sierra Club, Natural Resources Defense Council, and Friends of the Earth have led a national citizen suit effort under the CWA.[85] By 1988, 882 citizen suits had been filed under the CWA.[86] One

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77. Breen, *supra* note 70, at 874.

78. *Id.* at 870.

79. *Id.*

80. 33 U.S.C. § 1365(a) (1982): Any citizen 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 effluent standard or limitation under this Act or (B) an order issued by the Administrator of 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.

Id.

81. Marcia R. Gelpe & Janis L. Barnes, *Penalties in Settlements of Citizen Suit Enforcement Actions under the Clean Water Act*, 16 WM. MITCHELL L. REV. 1025, 1027 (1990).

82. 33 U.S.C. § 1365(a) (1988).

83. *Id.* § 1365(d).

84. *See* Boyer & Meidinger, *supra* note 72, at 917; Comment, *Polluter-Financed Environmentally Beneficial Expenditures: Effective Use or Improper Abuse of Citizen Suits Under the Clean Water Act?*, 21 ENVTL. L. 175, 182 (1991).

85. Theodore L. Garrett, *U.S. Supreme Court's Ruling in Gwaltney Case Marks Watershed in Citizen*

of the main reasons for the citizen suits' centering on the CWA is the system of monitoring, self-reporting, and data processing developed under that statute.[87] All dischargers are required to file regular reports of their discharges.[88] These reports are available to the public[89] and provide adequate proof of a violation.[90] Citizen suits under the CWA have prodded the EPA and state agencies to emphasize and enforce compliance with the statute.[91]

C. *Constraints on Citizen Suits*

There are some constraints on citizen suits. Private parties may only sue to enforce the precise limits established by the appropriate agencies.[92] Furthermore, suits against the EPA are only allowed when the EPA has failed to perform a nondiscretionary duty.[93] Finally, the party bringing the suit must give the EPA, the state where the violation allegedly occurred, and the alleged violator sixty days' notice before filing the complaint. The EPA may then elect to take control of the controversy and thereby bar the citizen suit.[94]

The Supreme Court's 1987 decision in *Gwaltney v. Chesapeake Bay Foundation, Inc.*,[95] where the Court ruled that citizens could not bring suits based wholly on past violations,[96] is unlikely to affect section 404 citizen enforcement.[97] Illegal discharges of dredged or fill material remain statutory violations until they are permitted; therefore they are not past, but present, violations of the statute.[98] In addition, a provision empowering citizens to sue persons who are violating mitigation requirements would likely be unaffected by *Gwaltney*. Serious violators of mitigation requirements are unlikely to be able to create a wetland in the sixty-day interim period between the

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Enforcement of Environmental Laws, *in* ENV'T REP. (BNA), Jan. 15, 1988.

86. Gelpe & Barnes, *supra* note 81, at 1026.

87. *Id.*

88. 33 U.S.C. § 1318(a) (1988).

89. *Id.* § 1318(b).

90. Gelpe & Barnes, *supra* note 81, at 1026.

91. Boyer & Meidinger, *supra* note 72, at 957.

92. *Id.* at 846.

93. 33 U.S.C. § 1365(a)(2) (1988).

94. *Id.* § 1365(b)(1)(A)-(B). In Hallstrom v. Tillamook County, 493 U.S. 20 (1989), the Supreme Court held that where a party suing under RCRA's citizen suit provision had failed to meet the 60-day notice requirement, suit had to be dismissed. Although the Court did not need to determine whether notice was a jurisdictional requirement in the strict sense of the term, the Court held that notice was a mandatory condition precedent for suit. *Id.*

95. 484 U.S. 49 (1987).

96. *Id.* at 64.

97. For a comprehensive analysis of *Gwaltney*'s effect on citizen suits under the CWA, see Beverly McQueary Smith, *The Viability of Citizens' Suits Under CWA After* Gwaltney Smithfield v. Chesapeake Bay Foundation, 40 CASE W. RES. L. REV. 1 (1990).

98. Blumm & Zaleha, *supra* note 8, at 753.

time they are notified of the impending suit and the time the suit is commenced. Any mitigation requirement violation would therefore likely be a present, not a past, violation.[99]

However, a recent Supreme Court decision that narrowed standing will probably constrain citizen suits. *Lujan v. Defenders of Wildlife*[100] involved a challenge to a rule promulgated by the Secretary of the Interior interpreting section 7 of the Endangered Species Act (the "ESA") making the ESA inapplicable to U. S. governmental actions taken in foreign nations.[101] The rule was challenged by Defenders of Wildlife as a violation of the ESA.[102] The environmental group asserted standing based primarily on affidavits from two of its members who had studied and observed various endangered species overseas.[103] Plaintiffs alleged that U. S. government-funded activities would destroy these species and that destruction of these species would injure them because they intended to return overseas to observe the species.[104]

Speaking through Justice Scalia, the Supreme Court found that the attenuated injury to two individual members of the national organization was not sufficient to confer standing to sue.[105] Justice Scalia summarily rejected the plaintiffs' "ecosystem nexus," "animal nexus," and "vocational nexus" standing theories.[106] Plaintiffs further asserted they had standing under the ESA's citizen suit provision, which provides that "any person may commence a civil suit on his own behalf" to enjoin violations of the ESA.[107] However, Justice Scalia archly rejected this assertion, reasoning that Congress has no authority to compel courts to entertain claims by citizens who did not independently satisfy Article III's standing requirements.[108] Justice Scalia then went on to question the constitutionality of citizen suit provisions in general and expounded his theory that the duty to "take care that the laws be faithfully executed" is inherently an executive function that should not be usurped by courts and private litigants; that the courts should address individual harms and that the "majoritarian" harms should be addressed by the political

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99. Some minor violations such as nonsubmittal of required reports could be corrected in the interim period. However, the most egregious violations, which the DER study found are surprisingly common, are not likely to be corrected. *See supra* text accompanying notes 53-56.

100. 112 S. Ct. 2130 (1992).

101. *Id.* at 2135.

102. *Id.*

103. *Id.* at 2137-38.

104. *Id.* at 2138.

105. *Id.*

106. *Id.* at 2139-40. Under the "ecosystem nexus" theory, plaintiffs asserted standing based on their use of a part of a contiguous ecosystem which would be adversely affected by the funded activity. Under the "animal nexus" theory, plaintiffs asserted standing based on their interest in studying or seeing the endangered animals. Under the "vocational nexus" theory, plaintiffs asserted standing based on their professional interest in the endangered animals. *Id.*

107. *Id.* at 2142.

108. *Id.* at 2144-45.

branches.[109]

Given Scalia's hostility toward novel standing theories in particular[110] and to citizen suit standing in general, typical plaintiffs who take advantage of citizen suit provisions should anticipate problems establishing standing. Absent a specific factual showing of injury, plaintiffs would need to rely on an explicit statement by Congress establishing their right to sue. However, *Lujan* made clear that Congress cannot simply confer standing to sue on citizens who do not independently meet the constitutional standing requirements embodied in Article III. Congress therefore would need to explicitly define new injuries that are sufficient to confer standing to sue.[111]

Given the recent history of citizen suits and the issues these provisions give rise to, the question becomes whether a citizen suit provision enabling private parties to enforce required mitigation would be both desirable and feasible. Part IV examines this question.

IV. CITIZEN SUITS: PRIVATE ENFORCEMENT AND MONITORING OF REQUIRED MITIGATION

Citizen suits under the CWA have spurred government agencies to enforce provisions and have been enforcement tools themselves when government agencies have been unable to enforce provisions on their own.[112] At the same time, creation of wetlands mitigation has enjoyed very limited success mainly because of the permittees' high rate of noncompliance and the responsible agencies' lack of enforcement and monitoring.[113] Enacting a provision empowering private citizens to commence an action against an agency which has failed to enforce mitigation requirements as well as against a person who is not complying with required mitigation seems like a logical step towards ameliorating the success rate of created wetlands.

A. *Citizen Suits: A Modest Solution*

A citizen suit provision would not be the panacea to the problems of created wetlands. The limited success of created wetlands is attributable to a combination of failures including misguided policies, lack of scientific knowledge, and lack of enforcement and monitoring. Citizen suits would

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109. Boyer & Meidinger, *supra* note 72, at 946; *see also* Robert Gordon, *The U.S. Supreme Court Year in Review, 1991-1992*, NEW JERSEY L.J., Aug. 24, 1992, at 9.

110. "Standing is not 'an ingenious academic exercise in the conceivable'. . . ." 112 S. Ct. at 2139 (citing United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 688 (1973)).

111. *See infra* text accompanying notes 129-30 for proposed new injuries that Congress could explicitly define.

112. *See supra* text accompanying notes 76-77, 85-91.

113. *See supra* note 49 and accompanying text.

only directly address the enforcement and monitoring problems.

1. Misguided Policies

Requiring applicants to sequence — avoiding wetlands destruction and minimizing the effects of permitted activities before considering compensation — would likely decrease the number of permits allowing wetlands destruction. Only after all attempts to avoid and minimize fail should mitigation be considered. In that instance, enhancement, preservation, and creation, in that order, should be considered.[114] However, even if sequencing were a clearly nondiscretionary step that the permitting agency was required to take in the initial decisionmaking process, lax enforcement of this duty could be a problem. The legislative history of the CWA reflects considerable skepticism, if not despair, over the prospect of effective government enforcement.[115] Simply restating the policies that are to be followed may not be sufficient because it would be placing the burden on the same agencies that have had serious problems enforcing the existing regulations.

Furthermore, although avoiding and minimizing are the preferred courses of action, compensating, in the form of created wetlands, remains the primary form of mitigation.[116] Although less than ideal, creation of wetlands is the alternative that most applicants opt for. Until a more viable solution is proposed, we should ensure that created wetlands are as ecologically successful as they can be.

2. Lack of Scientific Knowledge

The ecological success of created wetlands is limited by current scientific and technological knowledge. At present, wetland creation remains an unproven technology and at best can replace only certain wetland functions (e.g., flood storage), but not others (e.g., groundwater recharge and wildlife habitat).[117] However, given the fact that wetland creation remains the most common form of mitigation, falling back on the argument that there is simply not enough we know about created wetlands to make them work is unacceptable. Rather, we must work on expanding our scientific and technological knowledge about created wetlands.

Furthermore, our current lack of scientific knowledge of created wetlands stems primarily from a past failure to monitor created wetlands. The Florida DER study proposed several recommendations to improve the success rate of creation projects based on the close monitoring of existing created

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114. DER STUDY, *supra* note 43, executive summary.
115. Boyer & Meidinger, *supra* note 72, at 846.
116. NATIONAL WETLANDS POLICY FORUM, *supra* note 43, at 181; DER STUDY, *supra* note 43, at 1.
117. Blumm & Zaleha, *supra* note 8, at 763.

wetlands.[118] Stricter enforcement and close, long-term monitoring is likely to expand our knowledge about created wetlands and thereby make their future ecological success more feasible.

3. Lack of Enforcement and Monitoring

A citizen suit provision empowering private citizens to commence an action against an agency that has failed to enforce mitigation requirements, as well as against a person who is in noncompliance with mitigation requirements, would certainly address the lack of enforcement and monitoring problems. A citizen suit provision to enforce monitoring coupled with an attorneys' fee recovery provision would give environmental groups that have made use of other citizen suit provisions an opportunity to help make created wetlands work. Groups such as the Sierra Club, Friends of the Earth, and Natural Resources Defense Council would likely commence suit against violators of required mitigation and against the EPA for lack of enforcement. The media could be used to inform the general public about the new program and about how to become involved.

In the event that the citizen suit provision does not work effectively, namely, if too few actual suits are filed, the risk to the environment is low.[119] Government enforcement through the existing approach would continue to work, or not work, just as it does today.[120] This is a modest proposal; if it does not work, nothing would be lost.

However, the proposed provision to enforce mitigation is likely to be effective. Like water violations, violations of required mitigation are geographically fixed, and the areas affected can be fairly readily identified by would-be plaintiffs. Cases where citizen suits are available, but have not been very effective, include instances where the violation of the statute is neither a concrete nor an easily observable occurrence. A case in point is the citizen suit provision in the Clean Air Act (CAA).[121] Emissions of toxic substances into the air are not obvious. Furthermore, the source of the emission may be hard to trace. Consequently, private citizens are less prone to be motivated by a violation they cannot see. Even if citizens are motivated to sue the violator in an effort to deter would-be violators, they are more likely to be discouraged by the difficulty of proving that this non-concrete violation caused some adverse impact on their interests.

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118. For example, the study found that freshwater creation sites were less successful than tidal wetlands sites. The DER therefore recommended that freshwater wetland creation should be authorized only when the applicant has substantiated the future range of the water table elevation at the creation site. DER STUDY, *supra* note 43, at 24.

119. Breen, *supra* note 70, at 853-54 (discussing the effectiveness of citizen suits in general).

120. *Id.*

121. 42 U.S.C. § 7604 (1982).

On the other hand, filling and dredging a wetland and failing to recreate one are concrete occurrences that can be observed with the naked eye. Therefore, private citizens who observe the destruction of a wetland and the failure to recreate one may be offended at both the violator and at the agency which leaves the violation undisturbed. It is this kind of indignation that likely spurs citizen suits. Concrete violations are not only more likely to motivate private citizens than abstract violations would, but also make proof of adverse impact on private interests easier because harm is more easily traceable to a concrete violation than to an abstract one.

It should also be noted that expanding citizen enforcement rights in the CWA adds virtually nothing to the federal budget deficit. This is a key consideration because it makes the concept more "enactable" in Congress and makes it more sustainable in the long term because it is not subject to budget cuts.[122] In today's economy, government programs that stand the best chance of surviving and succeeding are those that are self-executing without the need of federal funds.[123]

B. *Drafting the Citizen Suit Provision*

1. Procedural Device

The proposed provision would be most appropriately enacted in the CWA because this statute already protects wetlands and has been the focus of most citizen suits because of its self-monitoring and self-reporting requirements. The infrastructure of the substantive doctrine of mitigation is already in place; the citizen suit provision would merely be a procedural device to help enforce substantive law.[124] The proposed provision would only be an addition; it would not replace anything. Therefore, there would be no need to repeal any existing law.

2. Coordination Needs

There would be a need to coordinate public and private enforcement so both the responsible agencies and private citizens can work towards a common purpose.[125] Private enforcement should not interfere with the enforcement efforts of the responsible agencies. Also, like cases should be treated alike. If there is a widespread perception of inequity, voluntary compliance could be undermined. Furthermore, inconsistency in enforcement invites litigation, which in turn causes delay and increases costs.[126]

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122. Breen, *supra* note 70, at 875.
123. *Id.* at 877.
124. *Id.* at 877 (discussing the procedural nature of citizen suit provisions in general).
125. Boyer & Meidinger, *supra* note 72, at 839.
126. *Id.* at 895-96.

Incorporating a sixty-day notice requirement in the proposed provision similar to the one in the CWA[127] would address this coordination concern. The proposed citizen suit provision should require the plaintiff to give notice to the EPA, the state where the violation occurred, and the alleged violator before filing suit. This interim period would permit government enforcers to take control of the matter by bringing their own action during the waiting period and relegating private enforcers to intervention in the government's suit. The existing 60-day notice requirement to the EPA has caused some criticism because it has been argued that 60 days is simply not enough time for the government to bring suit.[128] The proposed provision could address this concern by extending the waiting period to ninety days.

3. Effect of *Gwaltney*

Giving a ninety-day notice to the alleged violator would rarely make the case moot or cause any *Gwaltney* concerns[129] because it is unlikely that violators of mitigation requirements will be able to create a wetland in ninety days. Regardless, the proposed provision could anticipate these problems by expressly stating that private parties can sue for past violations of required mitigation projects.

4. Standing Concerns

Given the recent Supreme Court decision of *Lujan*, which Justice Blackmun characterized as a "slash-and-burn expedition through the law of environmental standing,"[130] the proposed citizen suit provision should also anticipate standing problems.[131] *Lujan*'s likely impact for typical plaintiffs who would take advantage of the proposed enforcement provision is unclear. The plaintiffs using the proposed provision will typically have connections to wetlands similar to those that the plaintiffs in *Lujan* had to endangered animals. Canoeists, birdwatchers, and students of nature will be the likely plaintiffs asserting injuries to aesthetic, recreational, and educational interests under the proposed provision. They would probably need to show, through *specific* facts, that they would be *directly* affected by the destruction and non-recreation of wetlands. Absent this specific factual showing, plaintiffs would have to rely on an explicit statement by Congress establishing their right to sue.

Although Justice Scalia archly rejected the notion that Congress had the

127. 33 U.S.C. § 1365(b) (1988).
128. Boyer & Meidinger, *supra* note 72, at 898.
129. *See supra* notes 95-98 and accompanying text.
130. 112 S. Ct. at 2160 (Blackmun, J., dissenting).
131. *See supra* notes 101-08 and accompanying text.

authority to confer standing on citizens who did not independently meet the constitutional standing requirements embodied in Article III, he did note that "[s]tatutory broadening of the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury."[132] Therefore, Congress could sidestep *Lujan* in the proposed provision by expressly stating that citizens who have recreational and aesthetic interests in wetlands suffer an injury-in-fact when wetlands are destroyed and not recreated. The provision could also expressly state that a "vocational nexus," under which professionals interested in studying wetlands vegetation would have the requisite injury-in-fact from their destruction and non recreation, is sufficient to establish standing.

Despite Scalia's hostility to novel standing theories, injuries to aesthetic, recreational, and educational interests have been accepted in the past as sufficient to establish standing.[133] Furthermore, Scalia's separation of powers concerns may be unfounded. Private enforcement could in fact serve to *correct* a separation of powers deficiency by overriding bureaucratic defiance in the executive branch and carrying out the will of the political branches as authoritatively expressed in legislation.[134]

It should also be noted that Justice Scalia has yet to recruit a stable majority of the Court to his hostile views regarding standing. Justices Kennedy and Souter felt compelled to note in a separate concurrence that "[as] government programs and policies become more complex and far-reaching, we must be sensitive to the articulation of new rights of actions that do not have clear analogs in our common-law tradition."[135] Justice Stevens also concurred in the judgment, but he did so because he believed the plaintiffs lost on the merits, not because he believed they lacked standing.[136] Furthermore, in a dissent which Justice O'Connor joined, Justice Blackmun noted that the Court owed substantial deference to congressional findings of a relationship between substantive rights and procedural remedies and that, except in unusual cases, such findings should be sufficient to confer standing on citizens seeking to enforce the law.[137] Therefore, if Congress can be explicit about how lack of enforcement of mitigation requirements harms a citizen's interests so that the citizen suffers an injury-in-fact, courts may not flatly reject

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132. 112 S. Ct. at 2145-46 (quoting Sierra Club v. Morton, 405 U.S. 727, 738 (1972)).

133. *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727, 734 (1972) (injury to aesthetic interests); United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 686-87 (1973) (injury to recreational interests); Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 230-31, n.4 (1986) (injury to educational interests).

134. Boyer & Meidinger, *supra* note 72, at 946.

135. 112 S. Ct. at 2146 (Kennedy & Souter, JJ., concurring).

136. *Id.* at 2147 (Stevens, J., concurring).

137. *Id.* at 2159 (Blackmun & O'Connor, JJ., dissenting).

the fact that citizens have standing.

For its part, Congress has shown an increased readiness to extend citizen suits to new applications. Despite the controversial enactment[138] of the citizen suit provision of the Clean Air Act of 1970, citizen suit provisions are now an almost automatic part of new environmental laws.[139] Today, virtually every major environmental law contains a citizen suit provision, and Congress has shown no inclination to weaken or eliminate their use.[140]

5. Enforcement of Nondiscretionary Duties

Even if standing is established, private citizens cannot enforce the EPA's discretionary duties under the CWA citizen suit provision.[141] Although courts are split as to whether the CWA imposes a mandatory duty to enforce on the EPA, the majority view seems to be that this duty is discretionary.[142] Therefore, if a court finds that the EPA's duty to enforce mitigation requirements is discretionary, and because a nondiscretionary duty is a prerequisite to a citizens' suit, it follows that the duty to enforce would not be a proper predicate for a citizen suit. Also, enabling private citizens to enforce duties that are discretionary with the EPA is likely to cause tension and interference between the private and the public enforcers.

The proposed provision could expressly state that enforcing mitigation requirements is a mandatory duty of the EPA. Therefore, the EPA's failure to enforce would be a proper predicate for a citizen suit. However, making enforcement a mandatory duty puts the EPA in a difficult position to the extent that it lacks adequate enforcement resources. Furthermore, the notion that enforcement is discretionary is fairly deeply embedded in our laws. In *Heckler v. Chaney*,[143] the Supreme Court noted the "general unsuitability for judicial review of agency decisions to refuse enforcement."[144] Therefore, how to ensure that citizens are able to sue for enforcement of mitigation requirements through the proposed provision is an open question that remains to be tackled.

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138. Breen, *supra* note 70, at 874.

139. *Id.*

140. Comment, *supra* note 84, at 181.

141. 33 U.S.C. § 1365(a)(2) (1988).

142. Note, National Wildlife Federation v. Hanson: *Content-Based Review of Corps Wetlands Determinations Under the Citizens' Suit Provision of the Clean Water Act*, 67 N.C. L. REV. 695, 703-04 (1989).

143. 470 U.S. 821 (1985).

144. *Id.* at 831. The Court noted that the reasons for this unsuitability include that often an agency's decision not to enforce involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency needs to assess whether a violation has occurred, whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and whether the agency has enough resources to undertake the action at all.

6. Remedies

The remedies that the proposed citizen suit should provide should be similar to the ones provided for in the CWA. The court should be empowered to enforce the required mitigation violations, require the defendant to pay civil penalties, and to award the plaintiff attorney fees and litigation costs.

If a case brought under a citizen suit provision is settled, the parties sometimes agree to allow the defendant to make payments for an environmentally beneficial project. Courts have affirmed these settlement agreements when they are fair, reasonable, equitable, and not in violation of the law or public policy.[145] However, when a case is litigated to its conclusion, a court ordinarily orders that civil penalties for CWA violations be deposited in the United States Treasury.[146]

Allowing private citizen groups to collect penalties from violators when a case is litigated to its conclusion would make the proposed provision self-supporting. This would allow and encourage citizen groups to continue bringing enforcement actions. It is unlikely that penalties deposited in the United States Treasury will directly improve the environment.[147] Also, environmental project funds would be attractive to violators because they would give them an opportunity to garner good publicity.[148]

Allowing citizen groups to collect penalties from violators would require a special provision. However, because this provision would radically change the status quo, it is likely to be heavily attacked by the EPA, the federal government, and the regulated industry. It is unclear why violators of a specific mitigation project should fund the activities of environmental groups.[149] Even if they were obligated, it is questionable whether the overcrowded federal court system should act as the collection device.[150] Also, concerns that overzealous attorneys would bring actions to collect monies without any intention to use them to improve the environment should be

145. *See, e.g.*, Sierra Club v. Electronic Controls Design, Inc., 909 F.2d 1350 (9th Cir. 1990) (court affirmed consent decree between parties because it furthered purpose of CWA and did not violate law or public policy; court also found defendant had not admitted liability under CWA, therefore payment did not constitute "penalty" and was not required to be paid into U.S. Treasury). *See also* Citizens for a Better Env't v. Gorsuch, 718 F.2d 1117 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1219 (1984). *But see* Friends of the Earth v. Midland, 780 F. Supp. 95 (court refused to affirm consent decree reasoning that once CWA violation found, the court was obligated to assess penalties).

146. *See Gwaltney*, 484 U.S. at 49, 53 ("[i]f the citizen prevails in such an action, the court may order injunctive relief and/or impose civil penalties payable to the United States Treasury"); Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 14 n.25 ("Under the [Federal Water Pollution Control Act], civil penalties, payable to the Government, also may be ordered by the court.").

147. Gelpe & Barnes, *supra* note 81, at 1029.

148. *Id.*

149. *Id.* at 1037.

150. *Id.*

considered. Perhaps a more acceptable change would be to allow for penalties to be paid directly to the EPA. Increased funding to the EPA would allow the agency to increase its staff and their qualifications, which would likely result in better enforcement and monitoring of mitigation requirements.[151]

7. Gaps in Proposed Provision

The proposed citizen suit provision would be of little use if the permit conditions that it sought to enforce were discretionary and vague. The adequacy, thoroughness, and clarity of the permit conditions determine how well the permitted work is done and the agency's ability to enforce compliance.[152] Therefore, permits issued along with mitigation requirements should clearly state the applicant's responsibilities while constructing the project. Permits should also clearly state that the applicant is responsible for long-term mitigation success.[153]

Developers would likely oppose the proposed provision because it would impose upon them the burden of success indefinitely into the future. However, as a matter of policy, the only justifiable rule is one that requires the permittee to ensure the success of the mitigation project. Faced with stricter mitigation requirements that are actually enforced, perhaps applicants for dredge and fill permits will be forced to sequence and will choose avoiding the destruction of wetlands and minimizing the impact on wetlands instead of compensating through mitigation.

Furthermore, because it is important that artificially created wetlands enjoy all the legal protections of natural wetlands, permit conditions should ensure for the permanent preservation of created wetlands. Finally, mitigation projects should require regular submittal of monitoring reports to the EPA to facilitate identification of violators. Although requiring submittal of regular reports would add a significant obligation to permittees, this obligation should be treated as an additional cost of created wetlands. Both public and private enforcement would be substantially more difficult without access to self-monitoring reports.

In addition, to facilitate the identification of violators, the monitoring reports could require an admission of a violation of permit requirements when such is the case. Because created wetlands projects involve complex scientific and technical issues, the presence or absence of a number of concrete factors that help to ensure the success of a created wetland[154] should

151. This paper does not attempt to tackle all the relevant issues regarding penalties for violations; careful analysis remains to be done in this area.

152. DER STUDY, *supra* note 43, at 14.

153. *Id.* executive summary.

154. For example, compliance with required elevation, required soils, required configuration, and re-

be explicitly included in the monitoring report. If self-monitoring reports make it fairly easy to identify violators, environmental groups, as well as the EPA, will spend less time and money consulting technical experts to prove violations.

V. CONCLUSION

The ecosystem cannot afford to continue losing wetlands at the alarming rate at which they are being destroyed. Mitigation requiring artificially created wetlands may help offset the loss of natural wetlands. However, all mitigation entails some risk, and created wetlands are no exception. There is much scientific and technical uncertainty surrounding wetland creation. Furthermore, high rates of noncompliance with permit conditions coupled with a lack of systematic enforcement and monitoring makes the success of these projects even more unlikely.

Citizen suits have prodded government agencies to enforcement and have been the enforcement tool when the responsible agencies were unable to enforce on their own. Most citizen suits have concentrated on the CWA because that statute requires monitoring and self-reporting, making it relatively easy to identify violations.

Enacting a provision empowering private citizens to commence an action against an agency which failed to enforce required mitigation, as well as against a person who is not complying with required mitigation, is an attractive alternative. Citizen suits are likely to improve enforcement of mitigation project requirements and thus increase the chances that created wetlands will succeed. Although a citizen suit provision is a limited solution, there seems to be no workable alternative at present. We have nothing to lose and much to gain.

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quired plantings would increase the chances of success of a created wetland. *See id.* at 5-7.