WHERE THE TWAIN SHALL MEET: STANDING AND REMEDY IN *ALASKA CENTER FOR THE ENVIRONMENT V. BROWNER*

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In 1994, the Ninth Circuit affirmed standing for citizens to sue to compel the EPA Administrator to undertake a statewide TMDL program. Although the citizens had standing for only some of the water-quality-limited waters in Alaska, the court held that the underlying cause of action was the EPA's failure to initiate the TMDL process for Alaska. This Note proposes that the court improperly reasoned its way to the correct holding. Like the EPA, the court confused standing to sue with the ultimate scope of the remedy. This Note proposes a three-step analysis to consider issues of standing and remedy. The first step is to determine the scope of the underlying action by analyzing the legal duty that forms the basis for the claim. This scoping action is critical since it serves as the referent for the next two steps. The second step is to determine whether the plaintiff has standing with respect to the underlying action. If the court decides on the merits of the case that the plaintiff should prevail, the third step is to determine the appropriate remedy. In this step, the court starts with the underlying cause of action and incorporates other factors as appropriate. This three-step analysis decouples the standing and remedy analyses and should lead to better reasoned opinions.

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I. INTRODUCTION

In *Alaska Center for the Environment v. Browner (ACE III)*,[1] the Ninth Circuit distinguished between standing to sue and the ultimate scope of the remedy. The court affirmed standing for a group of citizens to compel the U.S. Environmental Protection Agency (EPA)

1. Alaska Ctr. for the Env't v. Browner (*ACE III*), 20 F.3d 981 (9th Cir. 1994). The entire case history is Alaska Ctr. for the Env't v. Reilly (*ACE I*), 762 F. Supp. 1422 (W.D. Wash. 1991) (finding that Alaska made a constructive submission that no total maximum daily loads, or TMDLs, were necessary for Alaska, triggering the EPA's nondiscretionary duties), *later proceeding* Order Denying Defendants' Motion for Partial Summary Judgment re: Standing, Alaska Ctr. for the Env't v. Reilly, No. C90-595R (W.D. Wash. Feb. 14, 1992) (order denying partial summary judgment to limit remedy on the basis of standing) [hereinafter Standing Order], *later proceeding* Alaska Ctr. for the Env't v. Reilly (*ACE II*) (granting a statewide TMDL remedy), 796 F. Supp. 1374 (W.D. Wash. 1992), *aff'd* Alaska Ctr. for the Env't v. Browner (*ACE III*), 20 F.3d 981 (9th Cir. 1994) (affirming the statewide TMDL remedy).

Administrator to perform her nondiscretionary duty to set total maximum daily loads (TMDLs)[2] for all the water quality limited (WQL) waters in Alaska.[3] Furthermore, the Ninth Circuit held that in light of the EPA's thirteen-year dereliction of duty, the district court did not abuse its discretion in granting a statewide remedy.[4]

However, like the EPA, which the district court chided as having "confuse[d] standing requirements with the ultimate scope of the court's remedy,"[5] the Ninth Circuit jumbled the two in its analysis. Other courts have also commingled standing and remedy by denying standing to plaintiffs where it would be more appropriate to limit the scope of the remedy.[6] This Note proposes that litigants and courts confuse standing and the scope of the remedy because they do not first determine the scope of the disputed action. Confusing standing and remedy is of more than academic importance. By indiscriminately mixing standing and remedy, courts open the way for further confusion.[7] Where confusion exists, the potential for inequitable decisions increases. This Note attempts to reduce the confusion and the attendant possibility of inequity.

It is important to establish the appropriate analysis because the issues raised in *ACE III* will likely arise again in the future. Only a few states have undertaken the required TMDL process.[8] As other citizen groups seek to compel the EPA Administrator to perform her

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2. Total maximum daily loads (TMDLs) are required for water quality limited (WQL) bodies of water. Federal Water Pollution Control Act § 303(d), 33 U.S.C. § 1313(d) (1988 & Supp. V 1993). *See infra* notes 54-64 and accompanying text.

3. *See ACE III*, 20 F.3d at 984-86.

4. *Id.* at 987.

5. Standing Order, *supra* note 1, at 10. Specifically, the EPA confused the standing requirements of injury in fact and redressability with the scope of the remedy. *ACE III*, 20 F.3d at 984. The source of this confusion is a central theme of this Note.

6. *E.g.*, Conservation Law Found. v. Reilly (*CLF*), 950 F.2d 38 (1st Cir. 1991), discussed *infra* at notes 107, 241-50 and accompanying text; *cf.* Davis v. Passman, 442 U.S. 228, 240 n.18 (1979) ("The Court of Appeals appeared to confuse the question of whether petitioner had standing with the question of whether she had asserted a proper cause of action").

7. To borrow the words of Justice Brennan, "an approach that treats separately the distinct issues of standing, reviewability, and the merits decides each on the basis of its own criteria, assures that these often complex questions will be squarely faced, thus contributing to better reasoned decisions and to greater confidence that justice has in fact been done." Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 178 (1970) (Brennan, J., concurring) (arguing against the majority's requirement that a plaintiff's interest fall within the zone of interests protected by the statute in question).

8. ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 929-30 (1992); *infra* note 62; Joan Laatz & Rob Eure, *Environmentalists Sue EPA Over Water Protection*, THE OREGONIAN, Nov. 15, 1994, at B3.

nondiscretionary duty to set TMDLs under the Clean Water Act (CWA), courts and litigants will face standing and remedy issues similar to those in *ACE III*. Furthermore, confusion of standing and remedies extends beyond TMDLs and the CWA. The common confusion is to ask whether the plaintiff has standing for the remedy. However, this approach is incorrect. A plaintiff has standing with respect to the underlying action. Courts can easily determine the scope of the action at the outset of litigation and should avoid determining the remedy until the close of the litigation.

This Note proposes that the appropriate manner in which to analyze the standing-remedy problem is through a three-step analysis.[9] The first step is to determine the extent of the act that the defendant performed or the duty that the defendant violated (the "scoping" step). The second step is to determine whether the plaintiff has standing to challenge that act or violated duty (the "standing" step). After deciding the merits of the case, the final step is to determine the appropriate scope of the remedy (the "remedy" step). This framework decouples standing and remedy and the concerns that factor into each inquiry.

Section II establishes the general principles of the three-step analysis and describes the appropriate determination of the scope of an action. Section II also provides background on standing, remedies, and the CWA. The CWA discussion focuses on TMDLs and its citizen suit provision; the remedies discussion focuses on injunctions and equitable discretion. Section III analyzes the history, issues, arguments, and ultimate resolution of *ACE III*. This section contrasts the court's analysis in *ACE III* with this Note's three-step analysis. Section IV discusses the implications that this case and the three-step analysis may have in other cases and jurisdictions. The author concludes that the three-step analysis would help courts frame and subsequently address the issues more clearly, yielding rulings that appropriately resolve standing and remedy problems.

II. THE THREE-STEP ANALYSIS AND BACKGROUND

A. *GENERAL PRINCIPLES*

The general principle of this Note is that, although a plaintiff cannot seek relief without establishing standing, the relief sought may

9. For the purposes of this Note, the analytical framework that the author proposes will be called the "three-step" or "three-step analysis."

well extend beyond the plaintiff's injury in fact if the injury is the result of a single discrete action.[10] This may seem self-evident, but litigants and courts continue to confuse the standing requirement of injury in fact with the scope of the remedy that the court may grant. The confusion arises in part because the parties do not establish the scope of the disputed action from the outset of the case.

When using the three-step analysis, a court would determine: (1) the scope of the cause of action (for example, statutory violation); (2) whether the plaintiff has standing to sue with respect to the cause of action; and (3) if the plaintiff establishes standing, the appropriate scope of the remedy. The first step is usually straightforward, but it is critical to the other two steps. Clearly stating the cause of action can make the analysis much simpler and more accurate, as the underlying legal duty discerned in the first step is the referent for both the standing and remedy analysis. In the second step, the litigants and court should consider the three constitutional standing requirements of injury in fact, traceability, and redressability,[11] along with any prudential standing requirements that might apply.[12] This step is particularly important in controversies involving citizen suit provisions in environmental laws that allow citizens to sue the EPA Administrator to compel the performance of a nondiscretionary duty, since the underlying legal duty is often broad in scope.[13] The court

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10. If there is no underlying discrete action, the plaintiff cannot seek such expansive relief. That claims are similar is not sufficient; they must have a common cause.

11. This is the basic three-step test of Lujan v. Defenders of Wildlife (*Defenders*), 112 S. Ct. 2130, 2136 (1992).

12. A statutory interest usually supersedes prudential requirements. Peter A. Alpert, *Citizen Suits Under the Clean Air Act: Universal Standing for the Uninjured Private Attorney General?*, 16 B.C. ENVTL. AFF. L. REV. 283, 305-07 (1988); Warth v. Seldin, 422 U.S. 490, 501 (1975).

13. Where statutes impose statewide or nationwide obligations, establishing the scope of the duty supplants arguments asserting that the plaintiff has standing for only its particular injury in fact. *See e.g.*, Alaska Ctr. for the Env't v. Browning (*ACE III*), 20 F.3d 981, 985-86 (9th Cir. 1994). For these statutes (including citizen suit provisions), the scope of the violation is usually straightforward. The plaintiff simply needs to indicate which statutory section or sections the Administrator has violated. Then, the relevant questions are whether the Administrator's action or inaction harmed the plaintiff (injury in fact and traceability) and whether compelling the Administrator to perform the statutory act or duty would remedy the plaintiff's injury (redressability). *See infra* note 107 discussing *CLF*.

For example, in *ACE III*, the argument can be made that the EPA's inaction is the failure to set TMDLs for those waters used by the plaintiff. However, the statute unambiguously requires each state to set TMDLs for all water quality limited waters within its state. If the state fails to perform adequately, the EPA must step in. The duty is with respect to the entire state's waters. The Ninth Circuit relied on the CWA's priority ranking as a further indication that the

needs to determine whether the plaintiff has standing to challenge the defendant's (in *ACE III*, the EPA's) action or inaction; the measure should not be the extent of the injury, but rather the extent of the duty violated.

Once a plaintiff has established standing, the court then rules on the merits of the claim. Finally, the court must decide the scope of the remedy.[14] A court's granting standing does not ensure that the court will enjoin or compel the defendant's action in whole or even in part. When exercising its equitable discretion in granting an injunction, a court may consider several factors: whether the statute under which the plaintiff is suing allows for discretion;[15] the nature and extent of the plaintiff's injuries;[16] the burden that an injunction would impose on the defendant;[17] the utility of granting an injunction;[18] the availability of other remedies;[19] and other factors the court deems appropriate. The final action may range from no injunction,[20] to an injunction that applies only to the plaintiff's injury,[21] to an injunction that compels or forbids the underlying

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duties are imposed on a statewide basis, because otherwise citizens could impose their own prioritization based on the waters for which they have standing rather than on the severity of the pollution and the uses of the water. *See ACE III*, 20 F.3d at 985; 33 U.S.C. § 1313(d)(1)(A).

14. There may be intermediate justiciability issues of mootness and ripeness, but once a plaintiff establishes standing (including that he was injured in a concrete way, that the defendant was the cause of the injury, and that a favorable judgment would redress plaintiffs injury), the next major phase of the case is remedy.

15. In TVA v. Hill, the Supreme Court held that the Endangered Species Act, 16 U.S.C. §§ 1531-1543 (1973), "admits of no exception" and thus foreclosed the usual equitable discretion. 437 U.S. 153, 173 (1978). In contrast, the Supreme Court later found that the CWA did not foreclose the court's usual exercise of equitable discretion because the statutory scheme and purpose generally requires the court to balance interests. Weinberger v. Romero-Barcelo, 456 U.S. 305, 320 (1982).

16. This constitutes the burden to the plaintiff. The extent may be geographic, qualitative, or quantitative (how many people were harmed).

17. The burden might be in the form of infringing on the discretion of an agency in how to conduct affairs, economic burden, or other similar concerns. *E.g., Romero-Barcelo,* 456 U.S. at 318-19 (burden heavy on Navy and national defense); *ACE III*, 20 F.3d at 986-87 (burden minimal on the EPA's discretion in how to pursue legal obligations).

18. For example, in *Romero-Barcelo*, the Supreme Court found that an injunction was not warranted because the Navy had applied for a permit and there was no reason to think that it would not receive the permit. 456 U.S. at 320.

19. If a legal remedy is available that would redress the plaintiff's injury, an injunction is inappropriate. *Id.* at 312.

20. The court might find that although the defendant's action or inaction injured the plaintiff, the balance of the interests weighs against any form of injunction. *E.g., id.*

21. *E.g.,* Conservation Law Found. v. Reilly (*CLF*), 950 F.2d 38, 43 (1st Cir. 1991).

action that injured the plaintiff even though the injunction redresses others' injuries.

B. *Scope of the Disputed Action*

The plaintiff's legal action[22] depends on the nature of the underlying legal duty,[23] which originates in positive law.[24] This determination is frequently a trivial procedural exercise, but it can be critical to how one approaches the remaining issues in a case. Once a court establishes the scope of the action, the action serves as the referent for future analyses. In determining whether a plaintiff has standing, the court will inquire whether the plaintiff has standing with respect to the action. In determining what relief a plaintiff should get, the court will start its remedial analysis with the complained-of action. Consequently, defining the scope of the action sets up the case-specific parameters for subsequent analyses. If a court too narrowly circumscribes the scope of the action, the court risks an inequitable result.[25] Similarly, if a court defines the scope of an action too broadly, the court risks a separation of powers problem by compelling the Executive Branch to act beyond the province of the court's power. Frequently, the scoping step is so obvious that both parties agree as to the extent of the action, even though they dispute the merits of the case.

A more complicated scenario arises when one party harms many parties, particularly when only a subclass of the injured parties files suit. Then, the issue is whether the injuries resulted from multiple actions or from a discrete action by the defendant. For example, if the EPA finds in five separate cases that five specific bodies of water

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22. For the purposes of this paper, "action" includes both affirmative acts and omissions or inaction; *see also*, Administrative Procedure Act, 5 U.S.C. § 551(13) (1988) (defining agency action to include failure to act).

23. Daniel A. Farber, *Equitable Discretion, Legal Duties, and Environmental Injunctions*, 45 U. PITT. L. REV. 513, 536-38 (1984).

24. *See* Cass R. Sunstein, *Standing Injuries*, *in* THE SUPREME COURT REVIEW, 37, 63 (Dennis J. Hutchinson et al. eds., 1993) (arguing that for standing purposes, injuries cannot be identified without reference to positive law and noting the recent shift in Supreme Court precedent to support his thesis).

25. If Congress established a discrete duty composed of subparts and a court held that the subparts were themselves independent discrete duties, the court would deny standing for the overarching duty unless the plaintiff established standing for each subpart. Where the subparts are interdependent, as in *ACE III*, denying standing for the overarching discrete duty would not properly redress the cause of the plaintiff's injury. Furthermore, such a ruling could also violate separation of powers by infringing on the power of Congress to write laws.

are not WQL, and so it does not need to set TMDLs for those bodies, then each finding is arguably a different action.[26] Alternatively, if the EPA determines in a single action that five specific bodies of water are not WQL, and it does not need to set TMDLs, then that finding is a single action. This analysis may seem formalistic for the above example,[27] but it has significant implications where an overarching plan dictates the outcome of otherwise separate actions. Rather than challenging each action individually, injured plaintiffs can then challenge the validity of the entire plan.[28]

Determining the scope of the litigated action is critical in framing the subsequent issues. To decide if the plaintiff has standing to bring the case, a court must ascertain standing with respect to a particular action. The remedy is similarly dependent on what constitutes the alleged violation. Consequently, in order to accurately analyze standing and remedy, a court must first accurately determine the scope of the disputed action.

C. *Standing*

Having determined the scope of the disputed action, a court must then determine whether the plaintiff has standing to bring suit.[29] A jurisdictional doctrine requiring that the plaintiff have a sufficient stake in the case to ensure diligent prosecution,[30] standing is a

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26. It may be that the separate findings of no TMDLs are part of a concerted plan to not promulgate TMDLs. The overarching plan would be a discrete action whose success depends on separate actions. The success of this argument would depend on the concreteness of the plan (*see* Lujan v. National Wildlife Fed'n, 497 U.S. 871 (1990) (holding that there was no plan)) and on the extent to which the overarching plan dictates the outcome of the separate action (*see infra* notes 210-15 and accompanying text).

27. In an effort to have fewer actions challenged, an agency—the EPA in this example—would simply make separate findings. Thus, only those particular actions—declining to set TMDLs for a particular water body—for which injured parties came forward could be challenged. However, if the decision is part of a definite, concrete plan to not set TMDLs, then the entire plan can be challenged. Compare the arguments made in the context of Land and Resource Management Plans, *infra* notes 210-15 and accompanying text.

28. This is efficient for all involved: it reduces court costs for both parties, it reduces the uncertainty about future actions, and it reduces the burden on the court system. This reasoning is similar to that used to justify class actions.

29. *See* Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 168-96 (1992) (providing a history of standing and an analysis of its components).

30. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 204 (1962) (holding that plaintiffs had standing to challenge the apportionment of voting districts); Sierra Club v. Morton, 405 U.S. 727, 731-32 (1972) (holding that although aesthetic and environmental injuries were cognizable legal injuries for standing purposes, the Sierra Club did not have standing because the Club did not

mixture of constitutional and prudential requirements that restricts access to the courts, as well as statutory grants of interest that facilitate access to the courts.[31] The Case or Controversy Clause[32] of the Constitution is the root of the standing doctrine.[33] Through a series of decisions, the Supreme Court has interpreted this clause to require a plaintiff to prove: (1) that a concrete and particularized injury is either actual or imminent (the "injury in fact" requirement); (2) that the injury is traceable to an action by the defendant (the "traceability" or "causation" requirement); and (3) that a judicial remedy will redress the plaintiff's injury (the "redressability" requirement).[34] If the plaintiff fails to satisfy any one of these requirements, the plaintiff lacks standing, even if the plaintiff otherwise satisfies the statutory requirements for bringing a citizen suit.[35]

The theory behind the doctrine of standing has evolved from a standard of vigorous prosecution to one of separation of powers.[36] Initially, the Court was concerned that a plaintiff who did not have a sufficient stake in the claim would not vigorously litigate or prosecute

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sufficiently allege that its members would be injured); Los Angeles v. Lyons, 461 U.S. 95, 101-02 (1983) (holding that plaintiff did not have standing to compel the L.A. Police Department to change chokehold practices).

31. *See, e.g.*, Robert B. June, *Citizen Suits: The Structure of Standing Requirements for Citizen Suits and the Scope of Congressional Power*, 24 ENVTL. L. 761, 768 (1994).

32. U.S. CONST. art. III, § 2, cl. 1.

33. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 750 (1984).

34. Lujan v. Defenders of Wildlife (*Defenders*), 112 S. Ct. 2130, 2136 (1992) (holding that the plaintiffs did not have standing because they did not satisfy injury in fact or redressability). For a thorough analysis of the impact of *Defenders*, see Sunstein, *supra* note 29. *See also* Harold Feld, *Saving the Citizen Suit: The Effect of Lujan v. Defenders of Wildlife and the Role of Citizen Suits in Environmental Enforcement*, 19 COLUM. J. ENVTL. L. 141 (1994); Stanley E. Rice, *Standing on Shaky Ground: The Supreme Court Curbs Standing for Environmental Plaintiffs in Lujan v. Defenders of Wildlife*, 38 ST. LOUIS U. L.J. 199 (1993).

35. *See, e.g., Defenders*, 112 S. Ct. at 2136-37.

36. Rice, *supra* note 34, at 208-12. Standing was traditionally viewed as being based on separation of powers. It was not until around 1960 that vigorous prosecution became a significant factor. Justice Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882-85 (1983). The most liberal standards for standing came in the early 1970s with Sierra Club v. Morton, 405 U.S. 727 (1972) (holding that aesthetic and environmental injuries were cognizable legal injuries for standing purposes but denying standing to the Sierra Club because the Club did not sufficiently allege that its members would be injured), and United States v. Students Challenging Regulatory Agency Procedures ("SCRAP"), 412 U.S. 669 (1973) (holding that students had standing to challenge a proposed increase in railroad freight rates because the higher rates would decrease recycling and increase the use of natural resources, thereby reducing their enjoyment of those natural resources).

the case.[37] In recent years, the adequate prosecution analysis has yielded to a separation of powers analysis.[38] Justice Scalia, who has written the two most recent Supreme Court standing cases,[39] has asserted that standing is strictly a separation of powers concern.[40]

With the focus no longer on whether a party would vigorously litigate a case, citizen-plaintiffs pursuing environmental claims are facing more challenges to standing.[41] Faced with a narrower interpretation of standing,[42] many courts are denying standing to citizens outright, instead of granting standing but otherwise limiting the plaintiffs' remedy.[43] Thus, confusion about standing shades into confusion regarding the scope of the remedy.

D. *Remedies: Injunctions and Equitable Discretion*

Frequently, environmental plaintiffs seek a remedy with a scope exceeding the specific bounds of their injury in fact. By their nature, environmental injuries typically are widespread: water pollution can

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37. *See* Baker v. Carr, 369 U.S. 186, 204 (1962); Sierra Club v. Morton, 405 U.S. at 731-32.

38. *See* Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471-76 (1982) (holding that taxpayers did not have standing to challenge the transfer of surplus government real property to a church because neither psychological injury or paying taxes was sufficient to establish injury in fact); Allen v. Wright, 468 U.S. 737, 750-52 (1984) ("[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers"); *Defenders,* 112 S.Ct. at 2136. The principle underlying separation of powers is that the role of the courts is "solely to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion." Marbury v. Madison 5 U.S. (1 Cranch) 137, 170 (1803).

39. Lujan v. National Wildlife Federation (*NWF*), 497 U.S. 871 (1990); *Defenders,* 112 S. Ct. at 2130. In recent years, Justice Scalia has driven the separation of powers view of standing. Rice, *supra* note 34, at 227.

40. Scalia, *supra* note 36, at 881. In fact, Justice Scalia would deny standing to those who share injury with a majority of U.S. citizens, because in a democracy a majority can always exert its power and prevent it from being further injured. *Id.* at 894. This view has significant implications in environmental law where injuries are often diffuse and widespread. *See also* Rice, *supra* note 34, at 226-28 (critiquing Justice Scalia's view of standing).

41. *See* Feld, *supra* note 34, at 145 n.18, 162-63. If Congress wanted to grant everyone standing to sue under a statute, it could simply amend the statute to include a cash bounty for plaintiffs who bring suit. This *qui tam* provision would provide the necessary stake in a case to assure adversity and satisfy separation of powers concerns. *See id.* at 182; Sunstein, *supra* note 29, at 232-34.

42. *See* Feld, *supra* note 34, at 152-53.

43. *See* Flast v. Cohen, 392 U.S. 83, 100 n.22 (1968) ("the standing rationale was simply a device used by the Court to avoid judicial inquiry into questions of social policy and the political wisdom of Congress") *citing* Maurice Finkelstein, *Judicial Self-Limitation,* 37 HARV. L. REV. 338, 359-64 (1924). Although Finkelstein's observation is seventy years old, it continues to apply today as it did in *Flast.* Flast v. Cohen, 392 U.S. at 100.

injure people for miles downstream,[44] hazardous waste can displace entire communities,[45] and air pollution can travel hundreds of miles.[46] The plaintiff, seeking to end the injury, requests the court to enjoin the cause of the injury.[47] Since the underlying cause has often injured many people, the plaintiff may request a remedy that extends beyond his particular injury in fact. Consequently, establishing the underlying legal duty that the defendant allegedly violated is an important step towards determining an appropriate remedy.

One example of this typical scenario, where a single, discrete act injures many, arises when an agency violates a statutory duty. Citizen suit provisions allowing private enforcement of these duties usually refer to nondiscretionary duties, as distinguished from discretionary duties—the former being subject to citizen enforcement while the latter are not. Examples range from failing to evaluate the impact of an agency action on the environment[48] to refusing to set TMDLs for a state's WQL water bodies.[49] In these examples, action or inaction harms many, and the court need not limit the remedy to the plaintiff's particular injury. By instead addressing the underlying cause of the injury, the courts would be able to grant a more expansive remedy.

In most environmental cases, a plaintiff seeks an injunction to end the injurious action.[50] In order to obtain an injunction, the

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44. *See generally* Scott v. Hammond, 741 F.2d 992, 993-95 (7th Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985) (plaintiff seeking to compel the EPA Administrator to establish TMDLs for waters draining into Lake Michigan).

45. Love Canal, NY, and Times Beach, MO, are two of the more notorious examples. PERCIVAL ET AL., *supra* note 8, at 201-03. *See generally* Charles Davis, *Approaches to the Regulation of Hazardous Wastes*, 18 ENVTL. L. 505 (1988).

46. *See, e.g.*, R. Nicole Cordan, *Lost in the Haze? Central Arizona Fulfills Congress's Promise to Protect Visibility in the National Parks*, 24 ENVTL. L. 1371, 1372-78 (1994) (discussing the effect of air pollution on national parks).

47. A plaintiff may not obtain damages for injuries suffered by others. *See* Walls v. Waste Resource Corp., 761 F.2d 311, 316 (6th Cir. 1985) (holding that the CWA allows injunctive relief but not a private right of action for damages). The one exception to this would be where the other plaintiffs are effectively represented through a class action.

48. Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985) (holding that the Forest Service must complete an environmental impact statement where connected effects are sufficiently certain).

49. *E.g.*, Alaska Ctr. for the Env't v. Browner (*ACE III*), 20 F.3d 981 (9th Cir. 1994). In this situation, everyone who uses water quality limited waters is adversely affected by the EPA's refusal to promulgate TMDLs. When someone sues to compel the EPA to perform their statutory duty—promulgating TMDLs for the state—the plaintiff will normally be seeking a more expansive remedy than his suffered injury. The plaintiff, having standing for some water quality limited waters, probably does not have standing for all water quality limited bodies of water in the state.

50. *E.g.*, Walls v. Waste Resource Corp., 761 F.2d at 315-16.

plaintiff must prove that he suffered irreparable injury and that legal remedies are inadequate.[51] If the plaintiff's claim satisfies these two threshold criteria, a court may issue an injunction. Since an injunction is an equitable remedy, a court usually has discretion as to whether it will grant the request and as to the scope of the final remedy.[52] However, where the injury arises from a violation of a statutory duty, a court will analyze the statute's language and the legislative intent to determine whether the statute allows courts to exercise equitable discretion in granting an injunction.[53]

Based on the statute in question, a court usually may exercise its discretion to determine the appropriate scope of an injunction, and the injunction might therefore be more expansive or limited than the plaintiff's injury in fact.

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51. Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982) (holding that the CWA did not preclude equitable discretion, so the trial court did not have to issue an injunction where the equities weighed against an injunction). *See also* Califano v. Yamasaki, 442 U.S. 682, 702 (1979) (holding that the Social Security Act does not preclude injunctive relief and that the plaintiffs could seek prerecoupment hearing relief).

52. *See Romero-Barcelo*, 456 U.S. at 320. In *Village of Gambell*, the Supreme Court held that courts have equitable discretion unless there is a clear statement of congressional intent in a statute to foreclose the discretion. Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 543 (1987) (holding that there is no clear indication in the Alaska National Interest Lands Conservation Act that Congress intended to limit district courts' equitable discretion by requiring them to issue injunctions in all cases). *See also* Lemon v. Kurtzman, 411 U.S. at 200.

53. *Romero-Barcelo*, 456 U.S. at 320. In *Romero-Barcelo*, the Court found that the Clean Water Act frequently allowed for balancing the interests of the EPA, states, and individuals. *See id.* at 316-19. This was in contrast to TVA v. Hill, 437 U.S. 153 (1978), where the Court held that the Endangered Species Act did not allow for any discretion or balancing of interests, and so there was no discretion as to the extent a court may grant an injunction. *Id.* at 173.

Professor Brown has argued that when a right is statutory rather than constitutional, courts should defer to Congress' institutional expertise in remedial matters. George D. Brown, *Letting Statutory Tails Wag Constitutional Dogs—Have the Bivens Dissenters Prevailed?*, 64 IND. L.J. 263, 265-66 (1989). Professor Plater would further limit a court's equitable discretion when dealing with statutory violations. Zygmunt J.B. Plater, *Statutory Violations and Equitable Discretion*, 70 CAL. L. REV. 524, 527 (1982) (Plater's thesis is that "[w]hen a court in equity is confronted on the merits with a continuing violation of statutory law, it has no discretion or authority to balance the equities so as to permit that violation to continue."). *See also* ELAINE W. SHOBEN & WM. MURRAY TABB, CASES AND PROBLEMS ON REMEDIES 254 (1989) ("A statute may affect equitable discretion in many ways: (1) by enumerating some remedies but not others, leaving a question of interpretation whether additional remedies may be implied; or (2) by prohibiting courts from issuing injunctions in a narrowly defined type of dispute; or (3) by requiring a court to enjoin certain types of conduct upon a showing that the statutory elements are met").

For a discussion of the factors that a court may consider in exercising its equitable discretion, see *infra* notes 153-61 and accompanying text.

E. *Clean Water Act and TMDLs*

Congress passed the Clean Water Act[54] (CWA or Act) "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[55] In order to accomplish these goals, Congress mandated a two-pronged approach. First, it applied technology-based limits on a nationwide basis through a permit system (NPDES permits).[56] Second, where technology-based limits proved insufficient to ensure water quality,[57] Congress required more stringent water-quality-based standards.[58]

The EPA and the states implement water-quality-based standards through TMDLs. The Act requires each state to identify WQL bodies of water within its borders, meaning those bodies for which technology-based requirements are not stringent enough to protect their designated uses.[59] In addition, each state must priority rank the bodies of water, taking into account the severity of the pollution and the designated uses of the waters,[60] and then establish the TMDL for

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54. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (1988 & Supp. V 1993). Congress originally passed the FWPCA in 1948. After the 1972 amendments the FWPCA became known as the Clean Water Act. (For a good overview of the CWA, William F. Pedersen, Jr., *Turning the Tide on Water Quality*, 15 ECOLOGY L.Q. 69 (1988)).

55. 33 U.S.C. § 1251(a) (1988 & Supp. V 1993).

56. The CWA requires point sources to obtain a permit prior to discharging any pollutants into navigable bodies of water. 33 U.S.C § 1311 (1988 & Supp. V 1993). These permits are part of the National Pollutant Discharge Elimination System and commonly termed "NPDES permits." Standards for NPDES permits are set on an industry-by-industry basis, depending on the technology that is available to the particular industries. Technology-based requirements are easier to set because all that is required is an assessment of the available technology.

57. Such a situation might arise when there is significant nonpoint source pollution or where there are many point sources. The CWA does not directly regulate nonpoint source pollution. Thus, where there is significant runoff from agricultural or silvicultural operations, technology-based restrictions on point sources would be insufficient. Another problem occurs where there are many point sources, each following a general technology-based limitation and discharging into a single body of water. Cumulatively, they may discharge more pollutants than the water body can absorb without degradation. Technology-based limits are inadequate in these circumstances, because they do not take into account the characteristics of a particular body of water or the number or volume of other dischargers into that body of water.

58. 33 U.S.C. § 1311(b)(1)(C). Water-quality-based standards are those discharge standards which are necessary to protect designated uses. The uses of a particular body of water are set by the state. At a minimum, the uses must include fishing and swimming. *See* 33 U.S.C. § 1251(a)(2). For an explanation of why these standards are difficult to implement, see Oliver A. Houck, *Ending the War: A Strategy to Save America's Coastal Zone*, 47 MD. L. REV. 358, 389 (1988).

59. *See* 33 U.S.C. § 1313(d)(1)(A).

60. *Id.*

each body of water in that order.[61] The Act requires each state to submit its priority-ranked list of water bodies and corresponding TMDLs to the EPA Administrator by June 26, 1979.[62] The Administrator must either approve or reject each state's submission within thirty days.[63] If the Administrator rejects a submission, the Administrator then has to identify the state's WQL bodies herself and set the required TMDLs within thirty days of the rejection.[64]

The CWA does not address what happens if a state fails to initiate the TMDL process. The Act adopts a dual state-federal approach toward implementation, with a preference for state implementation.[65] Some courts have held that a long period of state inaction constitutes a "constructive submission" by the state that no TMDLs are necessary, thereby triggering the EPA's statutory duties to review the state's deemed submission.[66] This will usually mean

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61. 33 U.S.C. § 1313(d)(1)(C). The TMDL should account for seasonal variations and include a margin of safety. *Id.*

62. Alaska Ctr. for the Env't v. Browner (*ACE III*), 20 F.3d 981, 983 (9th Cir. 1994). The CWA requires that each state submit the first list of WQL bodies of water and corresponding TMDLs within 180 days of the date that the EPA promulgated regulations regarding which pollutants should be considered. 33 U.S.C. § 1313(d)(2). The EPA did not promulgate the relevant regulations until December 28, 1978. June 26, 1979 is 180 days later. Scott v. Hammond, 741 F.2d 992, 996 (7th Cir. 1984), *cert. denied,* 469 U.S. 1196 (1985). The CWA requires that after a state submits its first list of WQL waters to the EPA, the state shall "from time to time" submit priority ranked WQL waters and TMDLs to the EPA. 33 U.S.C. § 1313(d)(2).

Only a few states have pursued the required process of listing WQL waters and setting TMDLs. *See, e.g.,* PERCIVAL et al., *supra* note 8, at 929; Alaska Ctr. for the Env't v. Reilly (*ACE I*), 762 F. Supp. 1422, 1425 (W.D. Wash. 1991). Alaska was not one, hence this suit. In a similar suit, citizens in Washington state have filed suit to compel the EPA Administrator to set TMDLs for water quality limited waters in that state. Amended Complaint, Northwest Envtl. Advocates v. Browner, No. C91-427R (W.D. Wash. Nov. 15, 1994). *See also* Consent Decree at 3-4, Northwest Environmental Defense Center v. Thomas, No. 86-1578-BU (D. Or. June 3, 1986) (agreeing to list WQL segments and set TMDLs in Oregon).

63. 33 U.S.C. § 1313(d)(2).

64. *Id.* It is significant that the Act uses mandatory, nondiscretionary ("shall") language here. *See infra* notes 96-101 and accompanying text.

65. This approach is in notable contrast to the Clean Air Act and other environmental statutes which concentrate implementation and enforcement powers in federal agencies. *See, e.g.,* PERCIVAL, *supra* note 8, at 894-95. The reason for this may lie in the fact that states have traditionally regulated water use, and water pollution is frequently perceived of as a local, state phenomenon. Congress explicitly recognized the states' authority to allocate water and asserted that "[f]ederal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources." 33 U.S.C. § 1251(g).

66. *E.g., Scott,* 741 F.2d at 996; *ACE I,* 762 F. Supp. at 1429.

that the EPA rejects the submission that no TMDLs are necessary,[67] and the EPA must then identify and priority rank WQL waters in the state and set the corresponding TMDLs.[68] Thus, although the CWA did not explicitly require the EPA to act upon a state's failure to undertake TMDLs, courts have interpreted the Act's structure and purpose to require EPA action.

To guarantee that its goals will be achieved, the CWA allows many parties to enforce its provisions: the EPA ensures that the states perform their duties,[69] and citizens ensure that the EPA performs its duties.[70] As with most environmental statutes,[71] the

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67. If there are any WQL segments, the state or the EPA should list them and set TMDLs for them. 33 U.S.C. § 1313(d)(1)(A), (C), (d)(2).

68. Scott v. Hammond, 741 F.2d 992, 996-98 (7th Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985); Alaska Ctr. for the Env't v. Reilly, 762 F. Supp. 1422, 1429 (W.D. Wash. 1991); Sierra Club v. Browner, 843 F. Supp. 1304, 1312 (D. Minn. 1993).

The analysis that inaction constitutes a constructive submission of TMDLs may also be applied in the case of limited action by the EPA, as when the EPA partially approves or partially disapproves a state's submission. By partially approving or disapproving a submission, the EPA has neither approved nor disapproved the state's submitted list and corresponding TMDLs as required by the CWA. *See id.* at 1308; Alaska Ctr. for the Env't v. Reilly (*ACE II*), 796 F. Supp. 1374, 1375 (W.D. Wash. 1992). By partially approving or disapproving a submission, the EPA would otherwise be able to effectively disapprove a submission without triggering its own responsibilities. *See* 33 U.S.C. § 1313(d)(2).

69. 33 U.S.C. § 1311(d) (requiring the EPA to review and correct states' work on TMDLs to ensure that the states protect the waters' uses).

70. 33 U.S.C. § 1365(a)(2) (1988 & Supp. V 1993).

71. These include the Toxic Substances Control Act § 20, 15 U.S.C. § 2619 (1988 & Supp. V 1993); Endangered Species Act of 1973 § 11(g), 16 U.S.C. § 1540(g) (1988); Surface Mining Control and Reclamation Act of 1977 § 520, 30 U.S.C § 1270 (1988); Marine Protection, Research, and Sanctuaries Act of 1972 § 105, 33 U.S.C. § 1415(g) (1988); Deepwater Ports Act § 17, 33 U.S.C. 1515 (1988); Public Health Service Act § 1449, 42 U.S.C. § 300j-8 (1988); Noise Control Act of 1972 § 12, 42 U.S.C. § 4911 (1988); Energy Policy and Conservation Act § 335, 42 U.S.C. § 6305 (1988); Resource Conservation and Recovery Act of 1976 § 7002, 42 U.S.C. § 6972 (1988); Clean Air Act § 304, 42 U.S.C. § 7604 (1988 & Supp. V 1993); Powerplant and Industrial Fuel Use Act of 1978 § 725, 42 U.S.C. § 8435 (1988); Comprehensive Environmental Response, Compensation, and Liability Act of 1980 § 310, 42 U.S.C. § 9659 (1988); Emergency Planning and Community Right-to-Know Act of 1986 § 326, 42 U.S.C. § 11046 (1988 & Supp. V 1993); Outer Continental Shelf Lands Act § 208, 43 U.S.C. § 1349 (1988).

Four major environmental statutes still do not have citizen suit provisions. These are the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370d (1988 & Supp. V 1993); Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1784 (1988 & Supp. V 1993); Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 (1988 & Supp. V 1993); and Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y (1988 & Supp. V 1993). The first three are framework statutes, and so are arguably more subject to agency discretion. However, the fourth is a regulatory statute with specific compliance and enforcement provisions, so its lack of a citizen suit provision is anomalous.

In statutes where Congress did not provide citizen suits, some courts have implied a right for aggrieved parties to sue based on congressional intent to ensure enforcement. Feld, *supra*.

CWA's citizen suit provision allows private citizens to enforce provisions of the Act.[72] Under the Act, any citizen may file suit against the EPA Administrator where the Administrator has failed to perform a nondiscretionary act or duty under the CWA.[73] The Act also granted district courts the jurisdiction to compel the Administrator to perform such act or duty.[74] Thus, the CWA gave citizens the role of "private attorneys general" to ensure enforcement of the CWA's mandates.[75]

III. ALASKA CENTER FOR THE ENVIRONMENT V. BROWNER (ACE III)

A. *Brief History*

The CWA required each state to submit to the EPA a priority-ranked list of WQL waters and corresponding TMDLs by June 26, 1979.[76] For more than ten years, the state of Alaska did not submit any list or TMDLs to the EPA.[77] Likewise, the EPA failed to take any action to list WQL waters or establish TMDLs for Alaska's waters. Following the required sixty day notice of intent to sue,[78] four citizens groups (collectively "ACE") sued in federal district court to compel the EPA to issue TMDLs for all WQL waters in the state of Alaska.[79]

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note 34, at 145 (citing Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971)). The significance of these provisions is further discussed in subsection IV.C *infra*.

72. 33 U.S.C. § 1365.

73. 33 U.S.C. § 1365(a)(2). Additionally, any citizen may sue private parties who are violating their permits. 33 U.S.C. § 1365(a)(1).

74. 33 U.S.C. § 1365(a).

75. For a discussion of the role of private attorneys general, see Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 14-18 (1981) (holding that "private attorneys general" must show injury to establish standing).

76. 33 U.S.C. § 1313(d)(2). This subsection requires each state to submit its lists "from time to time," with the first list due not later than 180 days after the publication of pollutants listed in § 1314(a)(2)(D) (1988 & Supp. V 1993). The pollutant list was published on December 28, 1978. June 26, 1979 is 180 days later. Scott v. Hammond, 741 F.2d 992, 996 (7th Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985).

Courts interpret § 1313(d) as allowing states to identify WQL waters and set TMDLs in a piecemeal fashion. *See* Alaska Ctr. for the Env't v. Browner (*ACE III*), 20 F.3d 981, 986-87 (9th Cir. 1994); Sierra Club v. Browner, 843 F. Supp. 1304, 1314 (D. Minn. 1993).

77. Alaska Ctr. for the Env't v. Reilly (*ACE I*), 762 F. Supp. 1422, 1425 (W.D. Wash. 1991).

78. 33 U.S.C. § 1365(b)(2) (1988 & Supp. V 1993).

79. *ACE I*, 762 F. Supp. at 1423, 1425.

In response to a motion for partial summary judgment in *ACE I*,[80] the district court held that the state of Alaska's long-term failure to submit any TMDLs constituted a "constructive submission" of no TMDLs, triggering the EPA's nondiscretionary duty to promulgate TMDLs.[81] The district court concluded that the EPA needed to initiate its own TMDL process.[82] Since the court ruled on a partial summary judgment motion, it postponed resolving the precise scope of the EPA's duties.[83]

Subsequently, ACE moved to compel the EPA to perform its nondiscretionary CWA duties,[84] specifically requesting a statewide remedy.[85] The EPA moved for partial summary judgment to limit the scope of the remedy to those bodies of water for which ACE had established standing.[86] The district court, in an unpublished order, held that the defendants had confused the "standing requirements [of injury in fact and redressability] with the ultimate scope of the court's remedy."[87] In *ACE II*,[88] the district court granted a statewide injunction compelling the EPA to promulgate TMDLs for Alaska.[89] In *ACE III*, the Ninth Circuit affirmed *ACE II*,[90] similarly noting that the EPA had confused the requirements of standing with scope of remedy.[91] The Ninth Circuit specifically held that ACE had

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80. *Id.* at 1423.

81. *Id.* at 1426-29. The court used the Seventh Circuit's constructive submission language from Scott v. City of Hammond, 741 F.2d 992, 996 (7th Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985). *ACE I*, 762 F. Supp. at 1426. The nondiscretionary duty to promulgate TMDLs is at 33 U.S.C. § 1313(d)(2).

82. ACE I, 762 F. Supp. 1422, 1429 (W.D. Wash. 1991).

83. *Id.* The court wished to work out the details with the parties at a future date. *Id.*

84. For a more complete analysis of what consistutes a "nondiscretionary act or duty," *see infra* notes 97-99 and accompanying text.

85. Alaska Ctr. for the Env't v. Reilly (*ACE II*), 796 F. Supp. 1374, 1376 (W.D. Wash. 1992).

86. Alaska Ctr. for the Env't v. Browner (*ACE III*), 20 F.3d 981, 984 (9th Cir. 1994).

87. Standing Order, *supra* note 1, at 10.

88. Alaska Ctr. for the Env't v. Reilly (*ACE II*), 796 F. Supp. 1374 (W.D. Wash. 1992).

89. *Id.* at 1381. For the entire remedy that the district court granted, see *infra* note 148 and accompanying text. The court held that the nature of the CWA requirements and the equities of the case justified a statewide remedy, noting "The only 'consistently held interpretation' that the EPA has demonstrated with respect to the CWA's TMDL requirements has been to ignore them." *ACE II*, 796 F. Supp. at 1379.

90. Alaska Ctr. for the Env't v. Browner (*ACE III*), 20 F.3d 981 (9th Cir. 1994).

91. *Id.* at 984.

standing to sue for a statewide remedy[92] and that the trial court had not abused its discretion by granting a statewide remedy.[93]

B. *Scope of Statutory Violation in ACE III*

The first step in this Note's three-step analysis is to determine the scope of the wrongful action. This step is particularly significant in *ACE III* because the analyses of standing and remedy depend upon whether the EPA violated a duty to undertake the TMDL process for Alaska or whether the EPA violated the separate duties of listing individual WQL bodies of water and setting TMDLs for those waters. If the former is true, the plaintiff can seek a statewide remedy; if the latter is true, the plaintiff can only seek remedies for those bodies of water for which the plaintiff has standing. Ultimately, the scope of the EPA's failure to act depends on the nature of the statutory duty.[94]

ACE alleged that the EPA violated a discrete nondiscretionary duty by failing to promulgate TMDLs for Alaska and that this violation caused ACE's injury. Under section 303(d)(2) of the CWA, each state must submit to the EPA Administrator priority-ranked lists of WQL waters and corresponding TMDLs "from time to time."[95] Subsequently, the Administrator "shall" determine whether to approve the submission, and the Administrator "shall" identify the appropriate waters and set TMDLs for the waters if she rejects the state's submission.[96] Courts generally interpret the imperative "shall" in a statute as imposing a nondiscretionary duty,[97] especially

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92. *Id.* at 984-86.

93. *Id.* at 986-87.

94. Sunstein, *supra* note 23, at 63 (arguing that for standing purposes, injuries cannot be identified without reference to positive law).

95. 33 U.S.C. § 1313(d)(2).

96. The relevant statutory language reads

> The Administrator *shall* either approve or disapprove such identification and load not later than thirty days after the date of submission. . . . If the Administrator disapproves such identification and load, he *shall* not later than thirty days after the date of such disapproval identify such waters in such State and establish such loads for such waters as he determines necessary to implement the water quality standards applicable to such waters . . . .

Id. (emphasis added).

97. *See, e.g.*, Alaska Ctr. for the Env't v. Reilly (*ACE I*) 762 F. Supp. 1422, 1427 (W.D. Wash. 1991). What constitutes a "nondiscretionary act or duty" has been extensively litigated. Usually the court will look at the plain language of the statute. *See* Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984). In such an analysis, the court will look for mandatory language like "shall" or discretionary language such as "may." *See, e.g.*, South Carolina Wildlife Fed'n v. Alexander, 457 F. Supp. 118, 130 (D.S.C. 1978) (stating that

when the statute's primary purpose is the protection of public or private rights.[98] The EPA objected that imposing a nondiscretionary duty on the EPA to promulgate TMDLs when a state fails to do so goes beyond the clear language of the statute.[99] Both the district court and the Ninth Circuit disagreed, finding that the EPA had a mandatory duty to take affirmative action if a state failed to submit a list or any TMDLs.[100]

Having established that the EPA had a mandatory duty, the Ninth Circuit then sought to define the scope of the duty. The court observed that "the CWA imposes no narrower obligation" on the Administrator than to establish TMDLs for the entire state.[101] Of particular importance to the court was the priority ranked list of WQL water bodies that determines the order in which TMDLs are set within a state.[102] The court reasoned that it would frustrate congressional intent "to permit individual plaintiffs or a federal court to deal with only a fraction of the waters and, in effect, impose their own prioritization upon the EPA by limiting the scope of an ordered

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"statutory language that an act 'shall' be carried out is generally regarded as mandatory"). *See also* Illinois *ex rel.* Scott v. Hoffman, 425 F. Supp. 71, 77 (S.D. Ill. 1977) (holding "shall" in § 309 of the CWA imposes a mandatory duty on the EPA Administrator to take appropriate enforcement actions when a violation exists). *But cf.* Committee for Consideration of Jones Falls Sewage Sys. v. Train, 387 F.Supp. 526, 529 (D. Md. 1975) (holding that § 1364 of the CWA is discretionary because the statute uses the word "may" and decisions whether to prosecute have traditionally been a matter of executive discretion).

98. South Carolina Wildlife Fed'n v. Alexander, 457 F. Supp. at 130 (stating that "where the statute's purpose is the protection of public or private rights, as opposed to merely providing guidance for government officials, courts usually interpret 'shall' as imposing mandatory rather than directory duties"). Since the TMDL section of the CWA, 33 U.S.C. § 1313(d), is meant to protect public health and welfare, the duties imposed on the EPA Administrator using "shall" are mandatory. For that matter, the primary purpose of the CWA, and most environmental laws, is to ensure that the public is free from unwarranted pollution and to protect the quality of the environment. These are private and public rights, and statutory language including "shall" should be interpreted to impose mandatory duties.

99. *ACE I*, 762 F. Supp. at 1427-28.

100. *See id.* at 1429; Alaska Ctr. for the Env't v. Browner (*ACE III*), 20 F.3d 981, 983 (9th Cir. 1994).

101. *ACE III*, 20 F.3d at 985. The court cited 33 U.S.C. § 1313(d)(2): "'If the administrator disapproves [the State's identification of TMDLs], he shall . . . identify such waters *in each state* . . . .'" (emphasis added by the court). *Id.*

102. 33 U.S.C. § 1313(d)(1)(A) requires that the ranked list account for "the severity of the pollution and the uses to be made of such waters." *ACE III*, 20 F.3d at 985. *See also* Dioxin/Organochlorine Ctr. v. Rasmussen, No. C93-33D, 1993 U.S. Dist. LEXIS 15595, at *22 (W.D. Wash. Aug. 10, 1993) (holding that the EPA can set TMDLs one pollutant at a time and one WQL water body at a time, that requiring the EPA to address all TMDL requirements for a WQL segment before progressing to the next TMDL would frustrate the prioritized approach to remediate the worst pollution problems first).

remedy to specific streams of paramount concern to the parties before the court."[103] The Ninth Circuit concluded, "for CWA regulatory purposes, all waters within a state are interrelated."[104] Thus, the EPA had a mandatory duty to list WQL waters, priority rank the list, and set TMDLs for the entire state of Alaska. Consequently, the EPA's TMDL duty was a discrete duty to undertake the TMDL process for the entire state of Alaska, not a composite of separate duties.[105]

As discussed earlier, the scoping step of this Note's three-step analysis is critical to properly framing subsequent issues because the scope of the action serves as the referent of the arguments. Does the plaintiff have standing with respect to the underlying action? Is the underlying action justiciable and ripe? What are the merits of the underlying action? What is the appropriate remedy for the plaintiffs with respect to the underlying action? To determine the scope of the underlying action, it is necessary to examine the positive law at issue.[106] In *ACE III*, the underlying action was the EPA's failure to undertake the TMDL process for WQL waters in the state of Alaska. Thus, the statewide nondiscretionary TMDL duty will serve as the touchstone for the analyses of standing and of the appropriate scope of the remedy.

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103. *ACE III*, 20 F.3d at 985.

104. *Id.* It is significant that the court did not base its state-wide remedy on the physical interrelatedness of the "hydrologic cycle." For an explanation of the hydrologic cycle, *see, e.g.*, G. TYLER MILLER, JR., LIVING IN THE ENVIRONMENT: AN INTRODUCTION TO ENVIRONMENTAL SCIENCE 104-06 (7th ed. 1992). Rather, the court found that the statutory structure and language suggested that Congress preferred a state-wide remedy when it crafted the CWA. To apply a physical interconnectedness reasoning would be a substantial departure from the legal analysis of: (1) was the plaintiff injured?; (2) what did the defendant do or fail to do that caused plaintiff's injury?; and (3) based on the injury and the cause of the injury, what is the equitable remedy? To use the interconnectedness of a biological or physical system as the basis for granting a remedy would approach judicial legislating of what constitutes a remediable injury, a serious infringement on congressional power and a violation of separation of powers.

105. Neither the district court nor the Ninth Circuit articulated the duty in these precise terms. However, the district court recognized that the EPA needed to identify and prioritize the WQL waters in Alaska and set TMDLs for the state, all of which indicates a discrete state-wide duty that consists of many components. *See* Alaska Ctr. for the Env't v. Reilly *(ACE II)*, 796 F.Supp. 1374, 1375, 1378-81 (W.D. Wash. 1992). Similarly, the Ninth Circuit relied heavily on priority ranking the list and setting the TMDLs according to the list. Alaska Ctr. for the Env't v. Browner *(ACE III)*, 20 F.3d 981, 985 (9th Cir. 1994). The Ninth Circuit also noted that the cause of the injury was the violation of a state-wide duty: "[ACE's] injury is the result of the EPA's failure to comply with the CWA to establish TMDLs for the state of Alaska." *Id.*

106. *See* Sunstein, *supra* note 23, at 63.

C. *Standing in ACE III*

Once a court determines the scope of the action, the second step in the analysis is for the court to determine whether the plaintiff has standing to pursue the action. In *ACE III,* the disputed action was the EPA's failure to perform its nondiscretionary statutory TMDL duty for the WQL waters in Alaska. Therefore, the Ninth Circuit needed to determine whether ACE had standing to challenge the EPA's violation of a discrete statewide duty. By using this Note's three-step analysis, the number of waters for which ACE has standing is irrelevant to the question of standing itself, so long as ACE has standing for at least one water body. The breadth of ACE's injury is relevant only to the appropriate scope of the remedy. Simply put, if a plaintiff has standing for a component of a discrete action, then the plaintiff has standing for the action; the plaintiff need not show injury in fact for the entire scope of the action.[107]

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107. The EPA challenged ACE's ability to meet its standing requirement, by relying on three cases: (1) Conservation Law Foundation v. Reilly (*CLF*), 950 F.2d 38 (1st Cir. 1991); (2) Lujan v. National Wildlife Federation (*NWF*), 497 U.S. 871 (1990); and (3) People for the Ethical Treatment of Animals v. Department of Health & Human Services (*PETA*), 917 F.2d 15 (9th Cir. 1990). In *CLF,* the plaintiffs sought to compel the EPA Administrator to complete its nationwide assessment and evaluation of hazardous waste sites. The First Circuit held that although the plaintiffs had standing for ten sites in New England, their injury in fact did not warrant nationwide relief because the plaintiffs suffered injury only at the ten sites. *CLF,* 950 F.2d at 41. In *NWF,* the plaintiffs challenged the administration of the Bureau of Land Management's (BLM) "land withdrawal review program," which included roughly 1,250 individual actions performed pursuant to the program. The Supreme Court held that the program did not "refer to a single BLM order or regulation, or even to a completed universe of particular BLM orders and regulations." *NWF,* 497 U.S. at 890. Consequently, the program did not constitute a discrete action which the plaintiffs could challenge. In *PETA,* the Ninth Circuit denied standing to animal activists who sued federal agencies for failure to prepare environmental impact statements before awarding research grants to institutions that conducted animal research. The court held that the plaintiffs had failed to establish injury sufficient to confer standing to sue, because PETA's claim of injury was too speculative. *PETA,* 917 F.2d at 17.

In citing *CLF, NWF,* and *PETA,* the EPA attempted to prove that ACE did not have standing for a statewide remedy. The EPA implicitly argued that the duty was not statewide; therefore, ACE needed to show standing for every body of water to receive a statewide remedy. Both the district court and the Ninth Circuit rejected these arguments. The Ninth Circuit distinguished the statute in *CLF* as not imposing a priority ranking and, therefore, less likely to constitute a discrete duty to act nationwide. Alaska Ctr. for the Env't v. Browner (*ACE III*), 20 F.3d 981, 985-86 (9th Cir. 1994). In *ACE III,* the Ninth Circuit distinguished *NWF* and *PETA* as cases that declined to grant standing because the plaintiffs had failed to establish any injury in fact; in neither *NWF* nor *PETA* did the court limit the scope of the remedy granted based on the plaintiffs' standing. *Id.* at 986 n.3. Thus, *CLF, NWF,* and *PETA* did not require a court to limit ACE's remedy to those bodies of water for which they established standing.

A plaintiff who is in fact a group or organization presents additional problems for determination of standing to bring suit. An organization may establish standing to sue through representational standing or informational standing.[108] ACE, an organization with members throughout Alaska, tried both avenues and ultimately proved representational standing to the Ninth Circuit's satisfaction.[109]

To establish representational standing—standing to represent its members' interests—an organization must show that (1) the interests that the organization seeks to protect are related to the organization's purpose, (2) neither the claim nor the requested remedy needs the organization's members to participate, and (3) the organization's members have standing to sue.[110] The third requirement comprises the test for individual standing described in section II.C as having three components: injury in fact, traceability, and redressability.[111]

ACE satisfied all the requirements necessary to show representational standing. The interests that ACE sought to protect—clean water in Alaska—were germane to their organizational goal of protecting the Alaskan environment. The CWA claim did not require individualized proof, so the court could properly resolve it in a group context. Thus, ACE satisfied the first two requirements of representational standing. To establish the final element, ACE needed to prove that its members had standing to sue. Specifically, ACE had to show that its members suffered injury in fact that was traceable to

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Instead, the statutory language and congressional intent of the CWA support the finding that there was a discrete duty to establish TMDLs for WQL waters in each state.

108. Commentators and courts debate the validity of informational standing. Lawrence Gerschwer, *Informational Standing under NEPA: Justiciability and the Environmental Decisionmaking Process*, 93 COLUM. L. REV. 996 (1993) (arguing for recognition of informational standing in NEPA cases); Matthew C. Porterfield, *Agency Action, Finality and Geographical Nexus: Judicial Review of Agency Compliance with NEPA's Programmatic Environmental Impact Statement Requirement After Lujan v. National Wildlife Federation*, 28 U. RICH. L. REV. 619, 642 n.129 (1994) (highlighting the uncertain legal status of informational standing in light of recent court rulings). However, representational standing is well established. *See, e.g.*, Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 342-44 (1977) (holding that a statutory agency that promotes and protects the interests of the Washington State apple industry may represent its member's interests in a suit challenging a North Carolina statute restricting sale and transport of apples); Warth v. Seldin, 422 U.S. 490, 511 (1975) (noting that an association can have standing as a representative of its members even if the association itself has not suffered injury).

109. *See ACE III*, 20 F.3d at 984-85.

110. *See Hunt*, 432 U.S. at 343.

111. *See supra* note 34 and accompanying text.

the EPA's failure to set TMDLs in Alaska and could be redressed by a favorable court decision.

1. *Injury in fact.* To establish injury in fact, a plaintiff must show that he suffered an injury to a legally protected interest—the injury must be concrete and particularized, and the injury must be actual or imminent.[112] Six members of ACE averred that they used ten named streams and many unnamed streams in Alaska;[113] and that water pollution impaired their use and enjoyment of those streams.[114] The CWA explicitly protects recreational uses,[115] and the Supreme Court has recognized impaired recreational, environmental, and aesthetic values as injury in fact.[116] Thus, ACE's members had a legally protected interest in clean water. The injury was concrete and actual because ACE's members suffered ongoing impaired use and enjoyment of the waters. Therefore, ACE's members suffered injury in fact for the ten named and many unnamed bodies of water in Alaska.

Even though ACE established injury in fact as to some bodies of water, the EPA argued that ACE had not suffered injury in fact for all the water bodies in the state and, therefore, should not obtain a statewide injunction.[117] The district court and the Ninth Circuit were unsympathetic. They found that proving injury in fact for all water bodies would be too heavy a burden for ACE.[118] Furthermore, the "[p]laintiffs established that they were adversely affected by the inadequate water quality of a representative number of waters throughout the state of Alaska."[119] Thus, the Ninth Circuit factored the breadth of the plaintiff's injury into its analysis of standing.

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112. Lujan v. Defenders of Wildlife (*Defenders*), 112 S. Ct. 2130, 2136 (1992).

113. Appellee's Response Brief at 20, Alaska Ctr. for the Env't v. Browner, 20 F.3d 981 (9th Cir. 1994) (No. 92-36825) [hereinafter ACE Reply Brief].

114. *Id.* at 3. Furthermore, ACE has members in most communities in Alaska who use the local waters. Standing Order, *supra* note 1, at 9 n.6.

115. *See* 33 U.S.C. § 1251(a)(2).

116. Sierra Club v. Morton, 405 U.S. 727, 734 (1972).

117. Appellants' Reply Brief at 4-7, Alaska Ctr. for the Env't v. Browner, 20 F.3d 981 (9th Cir. 1994) (No. 92-36825) [hereinafter EPA Reply Brief].

118. Standing Order, *supra* note 1, at 7; Alaska Ctr. for the Env't v. Browner (*ACE III*), 20 F.3d 981, 985 (9th Cir. 1994). Alaska has an estimated 3,000,000 lakes, 170,000,000 acres of wetlands, 365,000 miles of rivers and streams, and 36,000 coastal miles. *Id.* (citing Alaska Department of Environmental Conservation, "Alaska Water Quality Assessment: Section 305(b) Report to the Environmental Protection Agency," at 3 (April 1990)).

119. *ACE III*, 20 F.3d at 985. *See also* Standing Order, *supra* note 1, at 9 n.6 (the plaintiff organizations have members living in sixty-one Alaskan towns).

The burden of establishing statewide standing and the breadth of the plaintiff's injury in fact are irrelevant in determining whether the plaintiff has standing to challenge a discrete statewide duty. These findings are more relevant with regard to the scope of the remedy.[120] When considering injury in fact and standing, the important question is whether the plaintiff suffered an injury, not the extent of the injury. Both the district court and the Ninth Circuit found that ACE's members suffered concrete, particularized injury in fact. Since injury in fact for a single WQL water body is enough to establish standing, inquiry into the breadth of the injury was unnecessary.[121]

2. *Traceability.* To satisfy traceability, the second requirement of standing, a plaintiff must prove that the defendant's conduct caused the plaintiff's injury.[122] As for injury in fact, traceability relies on the scope of the action ascertained in the first step of this Note's three-step analysis. The conduct in *ACE III* was the EPA's failure to list WQL waters and to promulgate TMDLs for the state of Alaska. Neither party disputed that the plaintiff's injury resulted from poor water quality, the indirect result of the EPA's failure to promulgate TMDLs. Once the EPA establishes TMDLs, the load is incorporated into the NPDES permits for the water body. As a result, poor water quality may persist until TMDLs are set and implemented. Therefore, where the EPA has an affirmative duty to set TMDLs for WQL waters, injury from poor water quality can be traced to the EPA's failure to perform that duty. On appeal, the EPA did not challenge the assertion that ACE's injury was traceable to the EPA's inac-

120. *See infra* notes 153-61 and accompanying text.

121. It needs to be emphasized that the breadth of the plaintiff's injury is not irrelevant. It is highly relevant to determining the appropriate scope of the remedy, particularly where a court uses equitable discretion. The breadth of injury is also important when determining standing for many discrete actions, since the plaintiff must establish standing for each discrete action. However, the breadth of injury is not important when considering standing for a particular discrete action.

122. Lujan v. Defenders of Wildlife (*Defenders*), 112 S. Ct. 2130, 2136 (1992). The traceability requirement precludes cases where a third party not before the court independently caused the injury.

tion,[123] and the Ninth Circuit noted that ACE satisfied traceability.[124]

3. *Redressability.* To satisfy the standing doctrine's redressability requirement, the relief requested must be likely to redress the plaintiff's injury.[125] In *ACE III*, the plaintiffs claimed that TMDLs, once established for WQL water bodies, would be incorporated into NPDES permits, and the water quality would be restored,[126] thereby redressing ACE's injury.[127]

The EPA countered that ACE's injury was not redressable because ACE's relief depended upon the actions of a third party—the State of Alaska.[128] Under the CWA, states are responsible for addressing nonpoint source pollution;[129] and the EPA claimed that much of the pollution that caused a water body to be WQL came

123. The EPA claimed that ACE's injuries were not likely to be redressed because a third party (the State of Alaska) was partly responsible for the injury. This argument rested on the premise that only states can promulgate regulations to control nonpoint source pollution. Alaska Ctr. for the Env't v. Browner (*ACE III*), 20 F.3d 981, 984 (9th Cir. 1994). Traceability requires only a causal connection; the complained-of cause need not be the sole cause. *See* Block v. Meese, 793 F.2d 1303, 1309 (D.C. Cir.), *cert. denied*, 478 U.S. 1021 (1986) (writing for the D.C. Circuit, Justice Scalia held that the government need not be the sole cause of the plaintiff's injury because standing in fact requires no more than de facto causality). Thus, the EPA's claim is more appropriately analyzed in the context of redressability.

124. *See ACE III*, 20 F.3d at 985.

125. *Defenders*, 112 S. Ct. at 2136.

126. *See* ACE Reply Brief, *supra* note 113, at 34-35; *supra* note 59.

127. Compelling the EPA to set TMDLs for the waters for which ACE established standing would also redress the plaintiff's injury. This is not the appropriate way to view redressability, though. The underlying action is the statewide failure to set TMDLs for WQL waters in Alaska. A favorable decision on the underlying action would redress the plaintiff's injury. For redressability purposes, it does not matter whether remedying a portion of the underlying action would redress the plaintiff's injury. Likewise, granting a nationwide remedy would remedy the plaintiff's injury. The ultimate scope of the remedy should be left to the remedy stage and not narrowed at the standing stage if the plaintiff has standing for the underlying action.

128. By the plain meaning of the CWA, the EPA Administrator, but not states, may be sued for failure to perform a nondiscretionary duty under the Act. § 505(a)(2), 33 U.S.C. § 1365(a)(2). Consequently, the state of Alaska was not a party to the suit.

129. Section 319 of the CWA requires states to prepare assessment reports which identify waters that do not meet water quality standards due to nonpont pollution and significant sources of that pollution. 33 U.S.C. § 1329(a)(1) (1988 & Supp. 1993). States also have to develop state management plans that propose methods of reducing nonpoint source pollution and improving water quality. *Id.* at § 1329(b). However, the EPA retains oversight, and if a state fails to submit a report, the EPA Administrator shall prepare the report for the state. *Id.* at § 1329(d)(3).

from nonpoint sources.[130] The EPA relied on *Fernandez v. Brock*[131] to support its assertion that ACE's injury was not redressable without the State of Alaska's presence in the suit.[132] In *Fernandez*, the court refused to compel the Secretary of Labor to promulgate regulations which might affect plaintiffs' eligibility for retirement benefits. The court reasoned that since any increase in benefits would be entirely contingent upon the plaintiffs' private employer—a third party—plaintiffs' relief was purely speculative.[133] In *ACE III*, the Ninth Circuit distinguished *Fernandez* by finding that "Congress and the EPA have already determined that establishing TMDLs is an effective tool for achieving water quality standards in waters impacted by non-point source pollution."[134] Since TMDLs can address nonpoint source pollution and since the EPA can set TMDLs, the court held that the State of Alaska was not a necessary party to the litigation.[135] Therefore, ACE satisfied redressability.

4. *Conclusion.* ACE established that its members suffered injury in fact, that the injury was traceable to the EPA's failure to list WQL waters and set TMDLs, and that a favorable judgment would redress their injury. Consequently, ACE's members had standing to sue individually. Since ACE also established that the interests it sought to protect were aligned with the organization's purpose and the claim was appropriately settled in a group context, ACE had representational standing.

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130. Nonpoint source pollution is frequently described as pollution borne by runoff from agriculture, silviculture, and cities. *See* PERCIVAL et al., *supra* note 8, at 944. Because nonpoint source pollution is a significant portion of the pollution in many Alaskan waters and because the CWA relegates nonpoint source pollution to the sphere of the states, the EPA argued that redressing ACE's injury depended upon the State of Alaska's nonpoint source actions. Appellants' Brief at 26-28, Alaska Ctr. for the Env't v. Browner, 20 F.3d 981 (9th Cir. 1994) (No. 92-36825) [hereinafter EPA Brief]; Alaska Ctr. for the Env't v. Browner (*ACE III*), 20 F.3d 981, 984 (9th Cir. 1994).

131. Fernandez v. Brock, 840 F.2d 622 (9th Cir. 1988) (holding that plaintiffs did not have standing to compel the Secretary of Labor to establish regulations that might affect their eligibility for retirement benefits because their ultimte benefits depended on the actions of the plaintiffs' private employer).

132. *ACE III*, 20 F.3d at 984.

133. *See Fernandez*, 840 F.2d at 626-28.

134. *ACE III*, 20 F.3d at 985. The Ninth Circuit did not expand on this conclusion.

135. *See id.* at 984-85.

D. *Remedy in ACE III*

Once a plaintiff has established standing and the court decides on the merits that the defendant has unlawfully injured the plaintiff, the final step is to fashion a remedy.[136] The starting point of this final analysis is the defendant's action or lack thereof.[137] From there, a court may expand or narrow the scope of the injunction, depending on other relevant factors including the extent of the plaintiff's injury.[138]

The equitable remedy analysis is frequently a source of confusion, however. For example, although the Ninth Circuit in *ACE III* distinguished between standing and the scope of the remedy,[139] the court wrongly considered the number of water bodies for which ACE established injury-in-fact in the context of standing.[140] Such a discussion is more appropriately undertaken in the context of the remedy. Confusion also arises about how to properly weigh the

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136. The line between standing and remedy is frequently blurred. In determining whether an injury is redressable (the third component of standing), a court may look to the remedy sought to determine redressability. Likewise, in fashioning a remedy, a court needs to ensure that the remedy is sufficient to redress plaintiff's injury yet not so overly broad as to grant a remedy to one who does not have a concrete interest that extends as far as the proposed remedy. This is perhaps the origin of the confusion regarding standing and remedies. The Supreme Court has asserted that "[case-or-controversy considerations] obviously shade into those [considerations] determining whether the complaint states a sound basis for equitable relief . . . . " O'Shea v. Littleton, 414 U.S. 488, 499 (1974). A decade later, the Court further explained, "[t]he latter set of considerations [regarding equitable relief] should therefore inform our judgment about whether respondents have standing." Allen v. Wright, 468 U.S. 737, 760-61 (1984) (holding that plaintiffs who alleged IRS grant of tax-exempt status to private schools that discriminated on the basis of race did not have standing to sue since removing the tax-exempt statuts would not force the schools to desegregate). This seems like an intentional smudging of the line, but the Court only applied it in a classic separation of powers case where the plaintiffs sought to restructure an "apparatus established by the Executive Branch to fulfill its legal duties" rather than "enforce specific legal obligations whose violation works a direct harm." *Id.* at 761.

137. This is where the scoping action in the first step of this Note's three-step analysis becomes particularly relevant. Califano v. Yamasaki, 442 U.S. 682, 702 (1979) ("[T]he scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class"); Farber, *supra* note 22, at 538-44 (focusing the analysis of injunctions on the nature of the underlying legal duty).

138. For other relevant factors to consider when reviewing a request for injunctive relief, see *infra* notes 153-61 and accompanying text.

139. Alaska Ctr. for the Env't v. Browner (*ACE III*), 20 F.3d 981, 984 (9th Cir. 1994) ("the defendants had confused the standing requirements of injury in fact and redressability with the ultimate scope of the court's remedy").

140. *Id.* at 985-86.

different factors to achieve an equitable result.[141] Ultimately, a court must decide what is "fair" to arrive at an equitable result.[142]

1. *Remedy Granted by the District Court in ACE III.* In July 1990, three months after ACE filed suit, Alaska submitted a list of 48 WQL waters to the EPA.[143] The EPA partially approved the list on September 10, 1991, requesting more information about additional suspected WQL water bodies.[144] Subsequently, the EPA and the Alaska Department of Environmental Conservation signed a memorandum of understanding regarding TMDL implementation in Alaska on January 27, 1992.[145]

In determining the scope of the remedy, the district court considered the schedule for setting TMDLs in the memorandum of understanding, the EPA's self-imposed limitations,[146] the extended period of inaction, congressional intent for prompt action, and general principles of equity.[147] With these considerations in mind, the

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141. *See infra* notes 153-61 and accompanying text (discussing fairness and general "balancing"). What constitutes an equitable result is also uncertain. Generally, an equitable result arises not out of established principles, but rather from "common sense and socially acceptable notions of fair play." SHOBEN & TABB, *supra* note 53, at 4. This presents a problem in a heterogeneous society: whose common sense and notions of fair play set the standard? *See* JOHN SELDEN, TABLE-TALK 46 (Edward Arber ed., 1972) (1st ed. 1689) ("Equity is a Roguish thing, for Law we have a measure, know what to trust to, Equity is according to [the] Conscience of him that is Chancellor, and as that is larger or narrower, so is Equity. 'Tis all one as if they should make the Standard the measure we call a Chancellors Foot, what an uncertain measure would this be? One Chancellor has a long Foot, another a short Foot, a third an indifferent Foot. 'Tis the same thing in the Chancellors Conscience.").

142. This Note attempts to aid courts in achieving equitable results by clarifying the analysis by which courts approach the cases before them. Hopefully, this will lead to better reasoned opinions, thereby reducing the possibility of an inequitable or confusing result.

143. Administrative actions can bar citizen suits. 33 U.S.C. § 1319(g)(6)(A) (1988 & Supp. 1993). However, since the citizen suit was filed before the administrative action, the administrative action does not bar the citizen suit from proceeding. 33 U.S.C. § 1319(g)(6)(B)(i). *See infra* notes 187-95 and accompanying text (discussing whether an administrative action moots a citizen suit).

144. Alaska Ctr. for the Env't v. Reilly (*ACE II*), 796 F. Supp. 1374, 1375-76 (W.D.Wash. 1992). This was more than a year after the statutory thirty-day deadline for approval or disapproval. *See* 33 U.S.C. § 1313(d)(2). ACE contended that by partially approving Alaska's list, the EPA sought to avoid triggering its § 1313(d)(2) statutory duty to promulgate its own list of WQL water bodies and corresponding TMDLs. Thus, ACE requested that the court compel the EPA to make its final approval or disapproval. *ACE II*, 796 F. Supp. at 1377-78.

145. *ACE II*, 796 F. Supp. at 1376.

146. The limitations were primarily budgetary. However, these were self-imposed as the EPA did not request funds for its TMDLs program for fiscal year 1992. *Id.* at 1379 n.8.

147. *See ACE II*, 796 F. Supp. at 1375-81.

district court granted ACE its requested injunction.[148] The court ordered the EPA to approve or reject Alaska's submission. If it rejected Alaska's list, the Court required the EPA to promulgate its own list of WQL waters, to set a schedule for promulgating TMDLs, to submit a report on ambient water quality monitoring, and to set a schedule for implementing the appropriate measures of the report.[149] The EPA needed to complete all the requirements in accordance with an agreed-upon schedule.[150]

2. *Review of the Remedy.* A court should grant injunctive relief only when a plaintiff has suffered or could suffer irreparable injury and when legal remedies are inadequate.[151] Environmental injuries are prime candidates for injunctive relief, because the injuries are frequently irreparable and money damages are usually inadequate. Despite, or perhaps due to, courts' willingness to grant injunctive relief, the litigants frequently debate the scope of the injunction.[152] Depending upon the equitable factors of the case, injunctive relief may be broad in scope, or it may be limited to the plaintiff's particular injury.

When courts grant equitable relief, they have extensive discretion in fashioning an appropriate remedy.[153] The trial court may consid-

148. *Id.* at 1381-82.

149. The precise remedy that the district court granted and the Ninth Circuit upheld is: (1) the EPA shall review Alaska's revised April of 1992 list and priority ranking of water quality limited segments and, within 90 days of April 1, 1992, the EPA shall either approve or disapprove the list; (2) in the event that the EPA disapproves Alaska's list, the EPA shall promulgate its own list and priority ranking of water quality segments within 30 days of disapproval; (3) within 90 days of the EPA's approval or disapproval of Alaska's list of water quality limited segments, the EPA shall propose a schedule for the establishment of TMDLs for all waters designated as water quality limited; (4) within one year of the EPA's approval or disapproval of Alaska's list of water quality limited segments, the EPA shall submit to the court its report on ambient water quality monitoring; (5) within 30 days of the submission of the report, the EPA shall propose a schedule for the implementation of those measures identified as appropriate and practicable in its report; and, (6) two years from [June 2, 1992], the parties shall submit to the court a joint status report, on which basis the court shall determine whether to retain jurisdiction for an additional period. Alaska Ctr. for the Env't v. Reilly (*ACE II*), 796 F. Supp. 1374, 1381-82 (W.D. Wash. 1992).

150. In the memorandum of understanding with the Alaska Department of Environmental Conservation, the EPA had agreed to most of the deadlines that the district court imposed. *Id.* at 1378. The district court simply held the EPA to its own schedule.

151. Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982).

152. *See, e.g.,* Alaska Ctr. for the Env't v. Browner (*ACE III*), 20 F.3d 981, 985 (9th Cir. 1994).

153. *See* Lemon v. Kurtzman, 411 U.S. 192, 200 (1973) ("In shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow");

er "what is necessary, what is fair, and what is workable,"[154] balance public and private interests,[155] account for equitable defenses,[156] and examine the requirements and intent of the governing statute.[157] A trial court may also consider good-faith efforts of the parties to comply with their respective obligations.[158] These concerns may narrow, but not expand, the remedy.[159] Further, prudential considerations of overbreadth and vagueness act only to constrain the court's remedial powers.[160] Taken together, these factors ensure that a remedy is equitable by being neither too narrow nor too broad. Despite the broad discretion afforded the trial court, the injunction must nevertheless be sufficiently narrow to give only the relief to which the plaintiff is entitled.[161]

On appeal to the Ninth Circuit, the EPA objected to the trial court's order in *ACE II* granting statewide injunctive relief on multiple grounds. The EPA contended that the district court abused its discretion by granting a statewide remedy including long-term and

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Orantes-Hernandez v. Thornburgh, 919 F.2d 549, 558 (9th Cir. 1990) ("Once plaintiffs establish they are entitled to injunctive relief, the district court has broad discretion in fashioning a remedy"). Because trial courts have equitable discretion when granting an injunction, the standard of review is abuse of discretion when an appellate court reviews an order granting or denying an injunction. *Romero-Barcelo,* 456 U.S. at 320.

154. Lemon v. Kurtzman, 411 U.S. at 200 (holding that the district court did not abuse its discretion by allowing Pennsylvania to reimburse schools for costs incurred relying on a statutory scheme that was later invalidated).

155. *See* Brown v. Board of Education, 349 U.S. 294, 300 (1955) (balancing the plaintiffs' interest in nondiscriminatory admission to public schools against the interest of school systems in regulating their own affairs); Hecht Co. v. Bowles, 321 U.S. 321, 329-31 (1944) (balancing the public and the Administrator's interests in controlling inflation to determine whether injunctive relief is warranted under § 205(a) of the Emergency Price Control Act of 1942).

156. California v. American Stores Co., 495 U.S. 271, 296 (1990) ("[E]quitable defenses such as laches, or perhaps 'unclean hands,' may protect consummated transactions from belated attacks by private parties when it would not be too late for the Government to vindicate the public interest").

157. *See* Weinberger v. Romero-Barcelo, 456 U.S. 305, 318 (1982).

158. *See infra* note 193 and accompanying text.

159. A plaintiff may not seek a remedy beyond the plaintiff's *legal* injury in fact. *See supra* section II.C on standing.

160. Walker v. City of Birmingham, 388 U.S. 307, 317 (1967) (questioning the breadth and vagueness of an injunction banning demonstrations and parades without a city permit).

161. *See* Califano v. Yamasaki, 442 U.S. 682, 702 (1979). In a case dealing with recouping overpayment of Social Security benefits, the Court held that nationwide class relief is not inconsistent with the principle that the remedy should be limited to that which is necessary to provide complete relief to the plaintiff, since "the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class." *Id. But see* Thomas v. County of Los Angeles, 978 F.2d 504, 509-10 (9th Cir. 1992) (holding an injunction overly broad because it did not specifically define what activities were banned).

short-term timetables and a report on the adequacy of water quality monitoring in Alaska.[162] Specifically, the EPA asserted that: (1) the remedy should not be statewide;[163] (2) the timetables were beyond the court's power to set;[164] and (3) the requested report was excessive since the CWA did not require it.[165]

The Ninth Circuit disagreed with the EPA on all three counts.[166] In its standing analysis, the court observed that the EPA failed to perform its mandatory duty of establishing TMDLs for the state of Alaska and that this inaction injured the plaintiffs.[167] Furthermore, since the plaintiffs resided throughout the state,[168] the public interests, the statutory obligations, and the extent of the injury show that a statewide remedy was within the court's discretion.[169]

The conduct at issue in *ACE III* was the EPA's failure to establish TMDLs for Alaska following the State's inaction.[170] The court held that the EPA's duty was discrete, nondiscretionary, and statewide in scope. Accordingly, the claim and the relief granted should have focused on this statewide action.

The district court's short-term schedule that provided deadlines for the EPA's TMDL actions was the agreed-upon schedule set forth in the EPA's memorandum of understanding with Alaska.[171] The schedule was less stringent than the timetable set out in section

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162. Alaska Ctr. for the Env't v. Browner (*ACE III*), 20 F.3d 981, 986 (9th Cir. 1994). For the precise remedy granted, *see supra* note 149.

163. EPA Reply Brief, *supra* note 117, at 4-7.

164. *Id.* at 17-18. The EPA claimed that the CWA left the pace at which TMDLs are set to their discretion. *Id.* at 16-17. However, the district court observed, "The only 'consistently held interpretation' that the EPA has demonstrated with respect to the CWA's TMDL requirements has been to ignore them. Such 'interpretation' is clearly not 'reasonable' . . . ." Alaska Ctr. for the Env't v. Reilly (*ACE II*), 796 F. Supp. 1374, 1379 (W.D. Wash. 1992). EPA further objected that the court did not have power to require good cause to deviate from the schedule. *See id.* at 1380.

165. EPA Reply Brief, *supra* note 117, at 20-24.

166. *ACE III,* 20 F.3d at 986-87.

167. As discussed *supra* section II.B, such an analysis is more applicable in the context of the appropriate scope of the remedy.

168. *See* Alaska Ctr. for the Env't v. Browner (*ACE III*), 20 F.3d 981, 985-86 (9th Cir. 1994). The district court noted that the plaintiffs had members in 61 towns throughout Alaska. Standing Order, *supra* note 1 at 9-10, n.6 (citing Exhibit A, Plaintiffs' Opposition to Defendants' Motion for Partial Summary Judgment).

169. *See ACE III,* 20 F.3d at 985-86.

170. "In this case the established wrong is the failure of the EPA to take any steps to establish the TMDLs mandated by Congress for more than a decade." *ACE III*, 20 F.3d at 986.

171. Alaska Ctr. for the Env't v. Reilly (*ACE II*), 796 F. Supp. 1371, 1378 (W.D.Wash. 1992).

303(d)(2) of the CWA.[172] Because the trial court did not require a schedule that was more strict than either the EPA or Congress had approved, the trial court's schedule was not unduly burdensome on the EPA.[173] The Ninth Circuit held that the trial court did not abuse its discretion in requiring a short-term schedule for establishing TMDLs of waters listed in the State's submission.[174]

The Ninth Circuit similarly upheld the district court's long-term schedule for setting TMDLs in the state of Alaska, even though the schedule was not required by the CWA,[175] emphasizing the congressional intent in passing the CWA.[176] "[T]o ensure prompt and attentive adherence to the mandate of the CWA"[177] and in light of the EPA's chronic inaction,[178] the district court had the power to set a reasonable compliance schedule.[179] It chose, and the Ninth Circuit agreed, to hold the EPA to a long-range schedule of setting TMDLs that the EPA set for itself in the memorandum of understanding with Alaska.[180] Further, both courts recognized that the EPA would

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172. *See* Alaska Ctr. for the Env't (*ACE III*), 20 F.3d 981, 986 (9th Cir. 1994). The CWA requires that the Administrator either approve or disapprove the proposed identification of WQL waters and the corresponding TMDLs within 30 days of the date of submission. 33 U.S.C. § 1313(d)(2). If the Administrator disapproves the submission, he has 30 days from the date of disapproval in which to identify WQL waters and establish the corresponding TMDLs. *Id.* The short-term schedule allows the EPA 90 days to approve or disapprove the already submitted list of WQL water segments. *ACE II*, 796 F. Supp. at 1381. If it disapproves the list, the EPA has 30 days to promulgate its own list. *Id.* Finally, the EPA has 90 days from the date of its approval or disapproval in which to set a schedule for establishing TMDLs for the listed waters. *Id.* In all cases, the deadlines are no more stringent than required by the CWA.

173. *Id.*

174. *See ACE III*, 20 F.3d at 986.

175. *ACE III*, 20 F. 3d at 986.

176. *See ACE II*, 796 F. Supp. at 1379; *ACE III*, 20 F.3d at 986.

177. Alaska Ctr. for the Env't v. Reilly (*ACE II*), 796 F. Supp. 1374, 1379 (W.D. Wash. 1992).

178. Ten years after the statutory deadline, when ACE filed suit, neither the State of Alaska nor the EPA had set a single TMDL for Alaskan waters. Even after the suit was filed, neither the State of Alaska nor the EPA made any reasonable efforts to establish any TMDLs, ultimately resulting in a thirteen-year delinquency. *See ACE II*, 796 F. Supp. at 1377-80.

179. "When the intent of Congress clearly requires the Agency to act without undue delay, courts have the authority to order the EPA to establish a reasonable schedule in which to achieve compliance." *Id.* at 1379.

180. Alaska Ctr. for the Env't v. Browner (*ACE III*), 20 F.3d 981, 986-87 (9th Cir. 1994). The district court noted, and the Ninth Circuit affirmed, that the memorandum of understanding was insufficient to fully comply with the CWA. *ACE II*, 796 F. Supp. at 1379; *ACE III*, 20 F.3d at 987. Consequently, a long-range schedule was an appropriate remedy.

have discretion in determining the substance and manner in which it would achieve compliance with the CWA.[181]

The district court and the Ninth Circuit utilized a similar analysis in ordering the report on water quality monitoring. They considered the congressional objectives of the CWA,[182] the EPA's long-standing recalcitrance with respect to TMDLs in Alaska,[183] and the nature of equitable discretion.[184] The courts concluded that the report was necessary to establish TMDLs in Alaska and that it did not unduly infringe on the EPA's discretion.[185]

By balancing the private and public interests at stake and accounting for good faith compliance efforts, the district court and the Ninth Circuit both concluded that a broad remedy was appropriate. Since the underlying action was a statewide duty, the courts granted a statewide remedy that forced the EPA to form long-term and short-term timetables, as well as a report on the adequacy of water quality monitoring in Alaska.[186] Despite its breadth, the court's remedy left the manner and substance of achieving compliance to the EPA, thereby protecting the public interest in clean water while respecting the EPA's power to decide how to pursue its obligations.

E. *Mootness in ACE III*

A case is moot when there is no longer a "live" case or controversy,[187] meaning a favorable decision would not benefit the plaintiff, or the plaintiff no longer has a legally cognizable interest in the

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181. *ACE III*, 20 F.3d at 986-87; *ACE II*, 796 F. Supp. at 1379; *cf.* Lujan v. National Wildlife Federation (*NWF*), 497 U.S. 871, 893 (1990) (holding that a plaintiff generally cannot seek wholesale changes in a program, but must sue on particular actions). The Ninth Circuit did not directly address the EPA's contention that requiring leave of the court to deviate from the schedule infringed on the EPA's discretion. However, the court upheld the district court's schedule, and thereby implicitly supported the restriction on deviating from the schedule that the EPA set. The remedy allowed the EPA to deviate from the long-range schedule when the EPA could show good cause. *ACE II*, 796 F. Supp. at 1380. This is a reasonable balance between the requirements that are necessary to ensure the development of TMDLs in Alaska and the substantive and procedural discretion that the EPA has in setting and ordering TMDLs.

182. Alaska Ctr. for the Env't v. Reilly (*ACE II*), 796 F. Supp. 1374, 1379 (W.D. Wash. 1992); Alaska Ctr. for the Env't v. Browner (*ACE III*), 20 F.3d 981, 983, 985 (9th Cir. 1994).

183. *ACE II*, 796 F. Supp. at 1378-79; *ACE III*, 20 F.3d at 983.

184. *ACE II*, 796 F. Supp. at 1376-77; *ACE III*, 20 F.3d at 986.

185. *See ACE II*, 796 F. Supp. at 1380-81; *ACE III*, 20 F.3d at 986-87.

186. *See supra* note 149 for the full remedy granted by the district court in *ACE II*.

187. *E.g.*, Murphy v. Hunt, 455 U.S. 478, 481 (1982) (per curiam) (noting that plaintiff's claim to pretrial bail would be moot if he were convicted).

case.[188] Three months after ACE filed suit, the State of Alaska submitted a list of proposed WQL waters that the EPA subsequently conditionally approved.[189] Thereafter, the EPA and the State signed a memorandum of understanding regarding TMDLs in Alaska.[190] Signing the memorandum of understanding to list WQL waters and set TMDLs in Alaska arguably satisfied ACE's needs. The Administrator could have argued that these good faith actions subsequent to the suit's commencement mooted ACE's claim. The court could have found the case moot and that it was unnecessary to compel the EPA to establish TMDLs for Alaska.[191] However, the trial court in *ACE II* reasonably believed that the EPA would not act in a timely manner and would continue to violate its statutory duty to ensure that TMDLs were promulgated for Alaska.[192] Since the court did not believe that the EPA would appropriately perform its duties, it held that ACE still had a legally cognizable interest in the outcome of the case, thereby avoiding the mootness problem. So, even though the State of Alaska and the EPA had arguably commenced the TMDL process satisfying their CWA duties, it was within the district court's discretion to impose the statewide injunction because neither party was necessarily making a bona fide effort to comply with the CWA.[193]

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188. *See id.* at 481-82.

189. Alaska Ctr. for the Env't v. Reilly (*ACE II*), 796 F. Supp. 1374, 1375-76 (W.D. Wash. 1992); *see also supra* note 68.

190. *ACE II*, 796 F.Supp. at 1376.

191. *See* Sierra Club v. Browner, 843 F. Supp. 1304 (D. Minn. 1993) (mooting plaintiff's claim where neither the state of Minnesota nor the EPA had set any TMDLs for thirteen years, the citizens had suffered injury in fact throughout the state's waters, the state had submitted lists of WQL waters, the EPA had partially rejected the final list, and the EPA and Minnesota were in the process of establishing TMDLs).

192. *See ACE II*, 796 F. Supp. at 1379. The trial court also noted that the memorandum of understanding did not ensure that the TMDLs would be established for the waters to be studied or for any other water quality limited segments. *Id.* at 1378.

193. The Ninth Circuit did not rule on this issue, but the court noted the necessary steps that the district court imposed on the EPA to achieve compliance with the CWA. Alaska Ctr. for the Env't v. Browner (*ACE III*), 20 F.3d 981, 986-87 (9th Cir. 1994). Since an injunction is an equitable remedy, equitable factors including the parties' good faith efforts are important. Brown v. Board of Education, 349 U.S. 294, 299-300 (1955) (holding that "courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles" and "[t]he burden rests upon the defendants to establish that [extra time to carry out the ruling in an effective manner] is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date"); *see generally* SHOBEN & TABB, *supra* note 53, at 115 (equitable remedies account for equitable defenses).

While the CWA provides that administrative actions can bar citizen suits in certain circumstances,[194] the district court properly declined to dismiss the suit. Because the EPA and the State of Alaska signed the memorandum of understanding after ACE filed the citizen suit, the administrative action could not preclude the suit from going forward.[195] Thus, the claim was neither precluded nor mooted by administrative actions undertaken subsequent to ACE filing suit.

IV. IMPLICATIONS OF THE THREE-STEP ANALYSIS

A. *Potential Problems*

There are some potential pitfalls in using this Note's three-step analytical framework. Potential problems include: "slippery slope" arguments that the courts might grant too much relief; narrower use of equitable discretion which would lead courts to grant less relief; and statutory grants of interest. However, closer inspection shows that these problems are either phantoms or exist regardless of the three-step analysis.

The EPA might complain that under this analysis a plaintiff who could establish standing for one lake would have standing to compel the EPA to undertake the whole TMDL process for a state.[196] While it is true that even a single plaintiff who is injured on a single lake would have standing in such a suit, that plaintiff would not necessarily receive expansive relief. Granting the plaintiff standing would simply defer to the remedy stage the determination of whether the court should award a statewide remedy or a waterbody-specific remedy. In exercising its equitable discretion, the court could easily balance the public and private interests and simply grant an injunction compelling the EPA to set TMDLs for the single body of water for which the plaintiff had standing.[197] Used in this manner, equitable

194. Administrative actions preclude citizen suit actions only when the citizens have not filed suit in the 120 days after giving notice of intent to sue. 33 U.S.C. § 1319(g)(6)(B).

195. Alaska submitted the initial list three months after ACE filed its citizen suit, and the EPA and the State did not sign the memorandum of understanding until January 27, 1992, 21 months after ACE filed suit. *See* Alaska Ctr. for the Env't v. Reilly (*ACE II*), 796 F. Supp. 1374, 1376 (W.D. Wash. 1992).

196. It seems disingenuous for an agency that fails to perform a mandatory statutory duty to complain when someone invokes a citizen suit provision to compel such action. *See* Farber, *supra* note 23, at 535-36.

197. In this example, some relevant factors in balancing the public and private interests at stake include the fact that the CWA allows for the use of equitable discretion, it would be extremely burdensome for the EPA to promulgate TMDLs for the entire state, only one plaintiff

discretion would encourage potential plaintiffs to seek out many people who had been harmed in connection with many water bodies.[198] This would enhance not only their likelihood of establishing standing but also their chance for statewide relief.[199] A plaintiff who has a narrow injury will find it difficult to justify an expansive remedy on the equities. Thus, critics need not worry about the existence of a "slippery slope" because the courts have equitable discretion to determine the appropriate scope of the remedy.

On the other hand, environmentalists might object that emphasizing the third step (exercising equitable discretion) might make courts less likely to grant statewide injunctions. This would make it harder for citizen groups to ensure that the EPA fully performed its mandatory duties.[200] However, courts have always had the power

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was claiming to be injured, and the injury was localized to a single lake.

In *ACE III*, the court talked of a "representative number of waters throughout the state of Alaska," and the plaintiffs had "demonstrated representation and injury throughout the entire area for which they seek relief." *ACE III*, 20 F.3d at 985-86. Similarly, the court in Sierra Club v. Browner distinguished *CLF* on the basis that plaintiffs "use a large number of waters throughout Minnesota" and "they have a personal stake in the quality of waters throughout the state." 843 F. Supp. 1304, 1310 (D. Minn. 1993). The line as to when a court should grant a statewide injunction and when it should grant an injury-specific injunction is necessarily vague. There are many factors that enter into the decision, and the number of waters for which the plaintiffs have established injury is but one factor, albeit an important one.

Amoco Prod. Co. v. Village of Gambell stands as a counterweight to a narrow injunction. Since environmental injury is usually irreparable and not remedied by money damages, the Supreme Court noted that "the balance of harms will usually favor the issuance of an injunction to protect the environment." *Village of Gambell*, 480 U.S. 531, 545 (1987). The Supreme Court did not address how the nature of environmental injury factored into the scope of an injunction. The Court placed great weight on environmental injury, so environmental injury militates in favor of a broad injunction. However, in *Village of Gambell*, the Court rejected the Ninth Circuits assertion that "[irreparable] damage is presumed" and required the plaintiff to prove actual injury. *Id.* at 544-45. In other cases, the court has affirmed remedies that do not protect the environment. *See, e.g.*, Weinberger v. Romero-Barcelo, 456 U.S. 305, 320 (1982).

198. To some extent, plaintiffs already see value in having a large, widespread group of potential plaintiffs who have been injured by the defendant. *See, e.g.*, Standing Order, *supra* note 1, at 9-10 n.6 (four plaintiff organizations represented members in 61 towns and cities throughout Alaska); Sierra Club v. Browner, 843 F. Supp. at 1306, 1309 (D. Minn. 1993) (four organizations representing members throughout Minnesota).

199. From a judicial standpoint, trying many claims simultaneously is efficient and it ensures that the plaintiffs are more likely to accurately represent the interests of the all the injured parties.

200. If courts exercised their equitable discretion conservatively and consistently limited relief to the extent of the plaintiff's injury, then public interest groups would be hard-pressed to pursue their goals of social and environmental reform and protection. Comity or separation of powers is the primary justification for limiting relief.

to limit injunctive relief to reflect the equities of a case.[201] Furthermore, courts do not have unbounded discretion to deny or limit injunctive relief since their decisions are subject to review. Where the plaintiffs' injuries are severe or widespread and the burden on the government agency is relatively minor, balancing the public and private interests readily favors a large-scale injunction. Consequently, the fear that courts will be less likely to grant broad injunctions is not novel to this Note's analysis. In fact, the three-step analysis would make courts' decisions more transparent by showing that the decision rested on the equities rather than on standing.[202]

A more difficult problem arises where statutes give citizens a broad "right," enforceable by citizen suits.[203] Citizens could then demand action from the executive branch to remedy situations well beyond the citizens' injury. This could conflict with the principle of separation of powers, particularly if the statutory right was so broad that it essentially allowed private citizens the ability to dictate large-scale programmatic decisions.[204] However, courts always have equitable discretion as to whether and to what extent they will grant an injunction. The equitable discretion can include factors such as the comparative extent of the plaintiff's injury, the duties that are imposed on the defendant, and separation of powers concerns.

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201. Equity is one of the oldest doctrines of jurisprudence, and courts have long been recognized to exert equitable discretion when fashioning equitable remedies including injunctions.

202. When a court denies standing, the court does not hear arguments on the merits of the case and does not rule on the merits. Standing can thus be a convenient, but misused, tool that allows courts to avoid cases that they do not want to hear. In contrast, granting a narrow remedy puts the judge on the spot to explain why the court denied more expansive relief.

203. For example, Congress could try to provide that each U.S. citizen has a right to efficient government and provide for citizen suits to enforce that right.

204. The plaintiffs in such a case would probably lack standing. Courts have justified the standing requirement as resting on separation of powers concerns. Thus, Justice Scalia has asserted that where injury is shared by everyone, or even a simple majority, no one has standing to pursue the claim. If we are to rely on democracy as a political system, Justice Scalia claims, the majority can always exert their will through the electoral process and control the Legislative and Executive Branches' actions. Justice Scalia, *supra* note 35.

There is an irony to a separation of powers justification for courts not to compel an agency to perform a duty that the legislature has deemed to be nondiscretionary, *i.e.* the law. The irony is that it preserves the Executive Branch's prerogative on whether to enforce a law at the expense of the Legislative Branch's right to create the law and the Judicial Branch's duty to interpret the law, particularly when the Legislative Branch says that in this case, the Executive does not have discretion whether to enforce the law. Mandatory sentences and sentencing guidelines are analogous in that the Legislative Branch has removed or constrained the Judiciary's traditional role of determining the appropriate sentence.

Consequently, where a claim infringes on separation of powers, a court can appropriately limit the scope of the remedy.

Thus, the factors that enter into equitable discretion resolve most of these potential problems. Delaying these considerations until the remedy stage may appear to prolong litigation, but considering equitable factors during the standing stage is inconsistent with the jurisdictional purpose of the standing requirement.[205]

B. *Other Areas of Law*

Most environmental statutes include citizen suit provisions that allow private individuals to sue to compel an agency to perform a nondiscretionary duty under the statute.[206] Since these statutes often establish agency duties that could affect many individuals, cases that are functionally similar to *ACE III* are bound to arise. In these cases, an individual who is injured by an agency's action or inaction should have standing to compel that agency to perform its nondiscretionary duty. Whether the court grants the requested remedy will be a matter of equitable discretion.

Regardless of whether a statute includes a citizen suit provision, plaintiffs can always attempt to sue under the Administrative Procedure Act (APA).[207] This will undoubtedly be more difficult, since the APA requires that the challenged action be a final agency action.[208] When an agency fails to take any action, including a refusal to take action which would be reviewable under the APA,

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205. Standing is a jurisdictional, not an equitable, doctrine. *See supra* note 29 and accompanying text. To include an equitable element (e.g., the extent of the plaintiff's injury or the burden to the defendant) at the standing stage is to give that element paramount weight in relation to the other equitable elements. This is inappropriate; the equitable elements should be considered together and weighed in their totality to determine the appropriate equitable remedy. *See* City of Los Angeles v. Lyons, 461 U.S. 95, 131 (1983) (noting the "dangers inherent in any doctrine that permits a court to foreclose any consideration of that remedy by ruling on the pleadings that the plaintiff lacks standing to seek it").

206. For a complete list of these statutes, *see supra* note 71.

207. 5 U.S.C. §§ 501-706 (1994).

208. 5 U.S.C. § 704 (1994). In *NWF*, the plaintiffs sued under the APA but lost because in addition to not finding injury in fact and traceability, the Supreme Court held that there was no "identifiable 'final agency action.'" Lujan v. National Wildlife Fed'n (*NWF*) 497 U.S. 871, 890 n.1 (1990). Similarly, in *Scott*, the Seventh Circuit denied the APA claim, because the plaintiff did not explain "what agency action is to be reviewed." Scott v. Hammond, 741 F.2d 992, 996 (7th Cir. 1984). The court went on to hold that the plaintiff stated a valid claim under the citizen suit provision of the CWA, since there was a "constructive submission" of TMDLs on which the EPA needed to act. *Id.* This illustrates one of the problems of trying to compel the agency to act.

then a court may find it difficult to identify a final agency action.[209] Nevertheless, where the court finds a final agency action, the injured plaintiff may establish standing with respect to the action by showing injury in fact, traceability, and redressability, and thereby challenge the entire action. Under these circumstances, it is important to identify the underlying (final agency) action, determine standing with respect to that action, and determine the appropriate remedy. Thus, this Note's three-step analysis applies to suits pursued under the APA as well.

The method of analyzing standing and remedy proposed in this Note is particularly appropriate where there is an overarching plan or

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209. *E.g.* Rockford League of Women Voters v. United States Nuclear Regulatory Comm'n, 679 F.2d 1218, 1222 (7th Cir. 1982) (citing Dunlop v. Bachowski, 421 U.S. 560, 572-73 (1975)) ("[T]he scope of judicial review of agency inaction is very limited."). Consequently, citizen suit provisions are important, because they allow private parties to compel an agency to perform a nondiscretionary duty and courts do not have to identify a concrete final agency action where there is only agency inaction.

The Court in *NWF* recognized that statutes might allow judicial review that would otherwise be unavailable under the APA:

> Some statutes permit broad regulations to serve as the "agency action," and thus to be the object of judicial review directly, even before the concrete effects normally required for APA review are felt. Absent such a provision, however, a regulation is not ordinarily considered the type of agency action "ripe" for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him.

NWF, 497 U.S. at 891.

In contrast to the APA challenge in *NWF*, *ACE III* dealt with a statutory provision that imposed an explicit, unambiguous duty on the EPA Administrator. The EPA's 10 year failure to perform its duty (establishing TMDLs for the state of Alaska) injured the plaintiffs. The plaintiffs in *ACE III* sued under § 505, the citizen suit provision, of the Clean Water Act rather than the APA. This was in all likelihood a result of the Seventh Circuit decision in Scott v. City of Hammond, 741 F.2d 992 (7th Cir. 1984). In *Scott*, the plaintiffs sued under both section 505(a)(2) of the CWA and under the APA. The court held that the complaint did not sufficiently allege "what agency action [was] to be reviewed." *Id.* at 996. This was probably because an absence of action is not considered to be an agency action that is subject to review (as distinguished from a decision not to take action, which might reviewable). *See* Heckler v. Chaney, 470 U.S. 821, 832 (1985) (holding that while agency action provides a focus for judicial review, agency inaction provides no such focus). *But see* 5 U.S.C. § 551(13) (1978) (defining "agency action" to include "failure to act"); *Chaney*, 470 U.S. at 833 (stating that the issue did not involve a claim that the agency abdicated its statutory responsibilities). The court did find that a state's failure to submit proposed TMDLs over a long period of time constituted a "constructive submission" that triggered the EPA's duty to review the submission and subsequently act. *Id.* at 996-97. Thus, the Seventh Circuit avoided the final agency action analysis for the APA and characterized agency inaction as a constructive action triggering duties under the citizen suit provision.

action that injures many people.[210] A non-CWA example is the impact of land and resource management plans (LRMPs)[211] under the National Forest Management Act of 1976.[212] These plans provide guidance for how the Forest Service will use or set aside each national forest.[213] Thus, if an action (for example, a timber sale) undertaken pursuant to the plan harmed someone, he or she would have standing to challenge not only the particular sale, but also the cause of their injury — the underlying plan.[214] Not to challenge an LRMP as a whole could lead to injury that site-specific challenges could not avoid.[215] The success of the claim would depend in part on whether the plan dictated the outcome of the individual action, but the plaintiff would have the opportunity to challenge the offending plan.

In a pair of school desegregation cases, the U.S. Supreme Court implicitly utilized a three-step analysis.[216] In *Keyes v. School District,*[217] the Court upheld a district-wide desegregation remedy

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210. As noted in Section II.A, the three-step analysis simplifies cases by tackling one issue at a time. When an action injures many people, litigants will argue whether the plaintiff has standing for the entire action. The three-step inquires whether the action is a discrete, coherent action. If the action is discrete, then the next issue is whether the plaintiff has standing for that action. For standing purposes, it is irrelevant whether the plaintiff has standing for all or part of the action.

211. 16 U.S.C. § 1604 (1988 & Supp. V 1993).

212. 16 U.S.C. §§ 1600-1687 (1988 & Supp. V 1993).

213. *See* Resources Ltd. v. Robertson, 8 F.3d 1394, 1397 (9th Cir. 1994) (holding that plaintiffs had standing to challenge the LRMP, that the challenge was ripe, but the environmental impact statement of the plan was acceptable). All the subsequent actions undertaken on the land have to be consistent with the LRMP. *See* Pacific Rivers Council v. Thomas, 30 F.3d 1050 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 1793 (1995).

214. *See, e.g., Resources Ltd.*, 8 F.3d at 1397 (holding that plaintiffs had standing to challenge the LRMP); *Pacific Rivers Council*, 39 F.3d at 1057 (holding the comprehensive LRMPs to be ongoing plans that the plaintiffs can challenge). This assumes that the LRMP dictated the outcome of a defective sale. The Eighth Circuit found that LRMPs are only advisory, and so the injury was not traceable to the plan. Sierra Club v. Robertson, 28 F.3d 753, 758 (8th Cir. 1994) (holding that finding environmental injury based solely on an LRMP would "take[] us into the area of speculation and conjecture"). For a further discussion of standing and other issues relating to LRMPs, *see* John P. Hogan, *The Legal Status of Land and Resource Management Plans for the National Forests: Paying the Price for Statutory Ambiguity*, 25 ENVTL. L. 865 (1995).

215. *Resources Ltd.*, 8 F.3d at 1398.

216. For a discussion of school desegregation in light of these cases, *see* Robert A. Sedler, *Metropolitan Desegregation in the Wake of Milliken—On Losing Big Battles and Winning Small Wars: The View Largely from Within*, 1975 WASH. U. L.Q. 535; Leonard P. Strickman, *School Desegregation at the Crossroads*, 70 NW. U. L. REV. 725 (1975).

217. 413 U.S. 189 (1973).

where only one school in the district had de jure discrimination.[218] The Court thus allowed the trial court to desegregate the entire city of Denver.[219] In contrast, the Court struck down a multidistrict remedy in *Milliken v. Bradley*.[220] The Court held that "without an inter-district violation and inter-district effect, there is no constitutional wrong calling for an inter-district remedy."[221]

The distinction between *Keyes* and *Milliken* rests upon the "established doctrine" that requires focusing on school districts. The Court emphasized that "[t]he constitutional right . . . is to attend a unitary school system in that district."[222] Thus, the scope of the duty is districtwide. Where there is a violation of this districtwide duty, an aggrieved person has standing to seek a districtwide remedy. However, without evidence of a more expansive violation, a court cannot grant a remedy beyond that particular district.[223] Thus, the three-step analysis for standing and remedy has the potential to extend well beyond TMDL citizen suits.

C. *Other Jurisdictions*

The Supreme Court has yet to face a fact pattern similar to that presented to the Ninth Circuit in *ACE III*. However, in its existing decisions, the Court has decided that an individual who has been harmed by an action need not prove standing with respect to all the impacts of the action in order to challenge it.[224] If the action was concrete, for instance, and defined by statute, then a person could challenge the action, provided the constitutional standing requirements of injury in fact, traceability, and redressability, and any relevant prudential standing requirements, were satisfied. It is unimportant that the remedy sought would redress others' injuries, so long as the remedy addressed the cause of the plaintiff's injuries. Whether the court would grant the requested remedy is a matter within its equitable discretion.[225]

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218. *Id.* at 204.

219. *Id.*

220. 418 U.S. 717 (1974).

221. *Id.* at 745.

222. *Id.* at 746.

223. *See* Milliken v. Bradley, 433 U.S. 267, 282 (1977) ("the remedy does not exceed the violation if the remedy is tailored to cure the condition that offends the Constitution.")

224. *See, e.g.*, Lujan v. National Wildlife Fed'n (*NWF*), 497 U.S. 871, 890 (1990).

225. *See* Weinberger v. Romero-Barcelo, 456 U.S. 305, 320 (1982).

In *City of Los Angeles v. Lyons*, a divided Supreme Court addressed standing and remedies, holding that a plaintiff must show standing for each claim for relief.[226] Lyons brought suit against the City of Los Angeles and four of its police officers seeking damages, an injunction, and declaratory relief.[227] Lyons claimed that a police choke hold violated his constitutional rights.[228] The majority held that Lyons had to show standing separately for each claim for relief[229] and that Lyons did not show standing for the requested injunction.[230] The Court reasoned that Lyons did not establish a likelihood that he would be injured again,[231] nor did he satisfy the preconditions for injunctive relief, namely irreparable injury and inadequate remedies at law.[232] Writing for the four dissenters, Justice Marshall noted that *Lyons* marked a drastic change in standing and remedy analysis.[233] Before *Lyons*, the Court's cases uniformly

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226. *See* City of Los Angeles v. Lyons, 461 U.S. 95, 105 (1983).

227. *Id.* at 97.

228. *Id.* at 98 (Lyons claimed that the use of the choke hold where there was no threat of deadly force violated the First, Fourth, Eighth, and Fourteenth Amendments).

229. *See id.* at 105 ("That Lyons may have been illegally choked . . . while presumably affording Lyons standing to claim damages against the individual officers and perhaps against the City, does nothing to establish [injury to justify an injunction] . . . ."); *id.* at 111 (noting that Lyons had an adequate remedy at law, thereby recognizing that he had standing for the damages claim but not the injunction). The district court severed the damages claim from the claim for equitable relief. *Id.* at 105 n.6. It is unclear what role severing the two claims played in the Court's decision, since the Court recognized that Lyons had standing to pursue his damages claim. *Id.* at 105. Under the majority's analysis, if Lyons sought damages and injunctive relief in the same suit, he would have to prove standing for the claim for injunctive relief separately.

230. *Id.* at 105.

231. *Id.* at 105-09.

232. *Id.* at 111. The Court presented their concerns of irreparable injury and adequate remedy at law in the remedies context, explaining that before plaintiffs can seek injunctive relief, they must satisfy "the requirements for entry [standing] and the prerequisites for injunctive relief [appropriateness of the remedy]." *Id.* at 112. Underlying much of the Court's standing analysis were concerns that an injunction was not an appropriate remedy since the plaintiff could not show a sufficient likelihood that he would be choked again. *Id.* at 105. This analysis ignores the requirement that to satisfy injury in fact, a plaintiff must prove that his injury is "actual or imminent." Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2136 (1992). Although Lyons did not prove that his injury was imminent, that there was a sufficient likelihood that the police would choke him again, Lyons did establish that he suffered actual injury when the police choked him. City of Los Angeles v. Lyons, 461 U.S. 95, 98 (1983). The Court therefore should have recognized Lyons' standing. The Court's concerns about likelihood of future injury goes to whether there is an adequate remedy at law and is a remedy issue. The Court confused the requirements of standing with the requirements of an equitable remedy.

233. *Lyons*, 461 U.S. at 122-23 (Marshall, J., dissenting) ("[B]y fragmenting a single claim into multiple claims for particular types of relief and requiring a separate showing of standing for each form of relief, the decision today departs from this Court's traditional conception of

looked to the underlying dispute, not the relief sought, to determine standing.[234]

Under this Note's three-step analysis, the dissenters in *Lyons* should have prevailed. The underlying legal dispute was the validity of a police policy on choke holds.[235] The plaintiff suffered injury in fact as a consequence of the police choke hold,[236] and therefore he should have standing to challenge the validity of the choke hold. Whether the police are likely to choke Lyons in the future goes to whether the damages are an adequate remedy, not whether Lyons satisfied injury in fact. Thus, the *Lyons* majority confused the requirements for standing with the requirements for equitable relief.

In *Allen v. Wright*,[237] the Supreme Court backed away from a broad reading of *Lyons*.[238] The Court characterized *Lyons* as a case where the plaintiff sought an injunction against the general "way in which government goes about its business."[239] The *Wright* Court distinguished cases where the plaintiff seeks to restructure a governmental apparatus designed to fulfill the Executive Branch's legal duties, which would violate separation of powers concerns, from cases where the plaintiff seeks to enforce a specific legal duty whose violation harms the plaintiff.[240] In making this distinction, the *Wright* Court limited *Lyons* to its facts.

The First Circuit followed a different approach in *Conservation Law Foundation v. Reilly (CLF)*[241] than the Ninth Circuit used in *ACE III*. The plaintiffs in *CLF* sought to compel the EPA Administrator to complete its nationwide assessment and evaluation of hazardous waste sites.[242] The First Circuit held that the plaintiffs'

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standing and of the remedial powers of the federal courts").

234. *Id.* at 128 (Marshall, J., dissenting); *see also id.* at 130 ("Until now, questions concerning remedy were relevant to the threshold issue of standing only in the limited sense that some relief must be possible.").

235. *Id.* at 98.

236. *Id.* at 97-98.

237. Allen v. Wright, 468 U.S. 737 (1984).

238. *Id.* at 760-61.

239. *Id.* at 760.

240. *Id.* at 761. The desire to respect the principle of separation of powers and consequently not hear the case may have led the Court to conveniently deny Lyons standing where a more appropriate decision would have deemed the remedy to be unavailable. Having dropped the claim for damages—for which Lyons had standing—all that remained was his prayer for injunctive relief. The Court could have declared that injunctive relief was unavailable due to the nature of the remedy sought.

241. Conservation Law Found. v. Reilly, 950 F.2d 38 (1st Cir. 1991).

242. *Id.* at 39.

remedy would be limited to the specific facilities for which the plaintiffs established standing. However, the court could have achieved that end by granting standing to sue on the violation of the statutory duty and denying a nationwide injunction in favor of a local injunction on equitable grounds. Although the statutory language does not provide much support, the First Circuit could also have explicitly interpreted CERCLA to impose separate duties rather than a single duty on the Administrator. These would have been more rational analyses and the First Circuit would have achieved the same result—a limited, localized injunction.

The First Circuit's interpretation of *Allen v. Wright* and its application to the facts of *CLF* highlighted the court's confusion.[243] In *Wright*, the Supreme Court denied standing to plaintiffs challenging discriminatory conduct by the IRS, reasoning that the plaintiffs had not personally suffered a denial of equal protection or any other injury. The Court said that simply paying taxes that go toward discriminatory practices was not enough to show standing; the plaintiffs[244] or their children[245] had to experience the stigmatizing injury caused by racial discrimination. The Court held that granting plaintiffs standing to seek restructuring of the Executive Branch apparatus established to fulfill its legal duties would violate separation of powers.[246] In *CLF*, the First Circuit refused to grant standing, as doing so would allow any citizen to pursue a claim that government officials acted illegally—essentially discarding the standing requirement of injury in fact.[247] The Supreme Court held that "an asserted right to have the Government act in accordance with the law is not sufficient, standing alone, to confer jurisdiction on a federal court."[248] The Court proceeded to find that the plaintiffs suffered

243. *CLF*, 950 F.2d at 43.

244. *Id.* at 753-56.

245. *Id.* at 756-58.

246. *Id.* at 760-61.

247. *See* Conservation Law Found. v. Reilly (*CLF*), 950 F.2d 38, 43 (1st Cir. 1991).

248. Allen v. Wright, 468 U.S. 737, 754 (1984). *Wright* is also distinguishable from the case at hand because the plaintiffs had not pointed to any "specifically identifiable Government violations of law." *Id.* at 759. The Court cited three cases in which plaintiffs sought, but were refused, injunctions directed at particular system-wide law enforcement practices, because the plaintiffs did not allege a specific threat of being subject to the challenged practices. *Id.* at 760-61 (citing O'Shea v. Littleton, 414 U.S. 488 (1974); Rizzo v. Goode, 423 U.S. 362 (1976); Los Angeles v. Lyons, 461 U.S. 95 (1983)). The Court concluded that separation of powers "counsels against recognizing standing in a case brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek a restructuring of the apparatus established by

no concrete injury in fact traceable to the defendant's conduct.[249] Thus, the plaintiffs in *Wright* did not have standing. In contrast, CLF suffered injury due to the the EPA Administrator's failure to evaluate hazardous waste sites on the docket as required by CERCLA.[250] CLF had standing, and the scope of the remedy should have been determined at the remedy stage.

The Seventh Circuit has followed the same basic approach as the Ninth Circuit in granting standing to challenge actions that have an effect beyond injuring the plaintiff. However, the Seventh Circuit's analysis did not parallel the three-step analysis in this Note. In *Scott v. City of Hammond*,[251] the court held that the State's long-standing failure to set TMDLs for Lake Michigan constituted a constructive submission that no TMDLs were necessary, triggering the EPA's duties.[252] Since the plaintiff complained about only one TMDL on one body of water, the court did not analyze the underlying legal duty to list, prioritize, and set TMDLs.[253] Thus, the Seventh Circuit's analysis in *Scott* at least appears consistent with the Ninth Circuit's analysis in *ACE III* and this Note's three-step analysis.[254]

A district court in the Eighth Circuit faced a case in which citizens tried to compel the EPA Administrator to establish TMDLs. In *Sierra Club v. Browner*,[255] the court agreed with the analysis in *Scott* and the trilogy of *ACE* cases, holding that citizens had standing to sue to compel the Administrator to list WQL waters and set TMDLs for the state of Minnesota.[256] The court recognized that the scope of the action was statewide and that the plaintiffs had standing

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the Executive Branch to fulfill its legal duties." *Wright*, 468 U.S. at 761.

249. *Id.* at 764-66.

250. 42 U.S.C. § 9620(d) (1986). The underlying legal duty was a nationwide duty. Thus, CLF had standing for the nationwide action.

251. Scott v. City of Hammond, 741 F.2d 992 (7th Cir. 1984).

252. *Id.* at 996-97.

253. It is not clear how the Seventh Circuit would have approached the problem of the underlying legal duty. They would have had two obvious choices: (1) a statewide duty to set TMDLs as the Ninth Circuit found in *ACE III*, or (2) a duty to set TMDLs on a water body by water body basis. In *Scott*, the Seventh Circuit effectively found the latter, since they limited the remedy to Lake Michigan, as requested by the plaintiff. Had they found the former, the court would have faced the first hypothetical in Section IV.B. *See supra* notes 196-99 and accompanying text.

254. The Seventh Circuit's analysis is not necessarily consistent because the scope of the underlying legal duty, which the court never explicitly circumscribed, was different that the Ninth Circuit's analysis of § 301(d) of the CWA.

255. Sierra Club v. Browner, 843 F. Supp. 1304 (D. Minn. 1993)

256. *Id.* at 1310-11.

for the entire action.[257] However, the court ruled in favor of the defendants because the EPA and the State of Minnesota were in the process of listing waters and setting TMDLs at the time of the decision.[258] Thus, the district court in *Sierra Club v. Browner* also utilized an analysis that is similar to this Note's three-step analysis.

No jurisdiction has explicitly used the three-step analysis proposed by this Note. However, many rulings support various parts of the analysis. Courts generally recognize that the relief granted can exceed the plaintiff's particular injury in fact.[259] Thus, the threshold step is not the extent of the plaintiff's injury. Instead, this Note's scoping step focuses on the nature and extent of the underlying legal duty.[260] Having defined the scope of the action, courts determine whether the plaintiff has standing to sue on that action.[261] If a court decides the merits of the case in favor of the plaintiff, the court must then determine an appropriate remedy. For injunctive relief, courts generally look at the nature of the underlying claim, the same legal duty that forms the basis for the standing analysis.[262] Thus, although no court has yet explicitly used this Note's three-step analysis for standing and remedy, courts' rulings en masse affirm this approach.

V. CONCLUSION

The Ninth Circuit's decision in *ACE III* highlights the confusion that exists regarding the relative roles of standing and remedy in citizen suits. This Note concludes that the proper way to approach the problem is to first determine the scope of the underlying legal

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257. *See id.* at 1310. The decision suggests that the court held that the plaintiffs had standing for waters throughout Minnesota, but not necessarily every WQL body of water in the state. If this is the case, the district court essentially used a breadth-of-injury analysis similar to that of the Ninth Circuit, an analysis that this Note maintains confuses standing and remedies concerns.

258. *Id.* at 1314.

259. *E.g.*, Lujan v. National Wildlife Fed'n. (*NWF*), 497 U.S. 871, 890 (1990).

260. *See also* Farber, *supra* note 23, at 536-38; *cf.* Alaska Ctr. for the Env't v. Browner (*ACE III*), 20 F.3d 981, 985 (9th Cir. 1994) ("[ACE's] injury is the result of the EPA's failure to comply with the CWA to establish TMDLs for the State of Alaska; the CWA imposes no narrower obligation").

261. *E.g.*, Sierra Club v. Browner, 843 F. Supp. 1304, 1310-11 (D. Minn. 1993); Allen v. Wright, 468 U.S. 737, 752 (1984) ("[T]he standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the *particular claims asserted*" (emphasis added)).

262. *ACE III*, 20 F.3d at 985-86.

duty. To determine the specific legal obligation that the defendant violated, a court should look to positive law. The next step is to determine whether the plaintiff has standing to challenge that violation (that is, whether the plaintiff suffered injury in fact, the injury is traceable to the defendant's violation, and a favorable judgment would redress the plaintiff's injury). Then, the court addresses the merits of the case. If the plaintiff succeeds on the merits, the final step is to determine the appropriate scope and form of the remedy. If the underlying duty is statutory, the court should determine whether the statute mandates an injunction or otherwise precludes or limits equitable discretion. If the relief may include injunctive relief, the court should balance the interests at stake to determine whether and to what extent it would be equitable to grant an injunction. An injunction may address the entire scope of the underlying legal duty or it may address only part of the duty. Thus, determining the underlying legal duty is important at both the standing and remedy stages of a case. This Note provides a simple way for courts to avoid confusing standing and remedy, thereby reducing the possibility of inequitable decisions.