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Private Rights of Action and Judicial Review in Federal Environmental Law

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PRIVATE RIGHTS OF ACTION AND JUDICIAL REVIEW IN FEDERAL ENVIRONMENTAL LAW

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INTRODUCTION

Two recent Supreme Court cases, *California v. Sierra Club*[1] and *Middlesex County Sewerage Authority v. National Sea Clammers Association,*[2] illustrate the increasing importance of private rights of action in environmental litigation. The decisions, however, have created difficulty in the area of judicial review. It is tempting to apply the Supreme Court's analysis of the private rights issue in these two cases to suits seeking judicial review of administrative action, particularly in environmental cases. This Article emphasizes the importance of maintaining a clear conceptual distinction between a private right of action and an action seeking judicial review. The Article then demonstrates that the analysis of the private rights question in *California v. Sierra Club* and *Sea Clammers* does not apply to suits to obtain judicial review of administrative action.

I
CAUSES OF ACTION BASED ON FEDERAL ENVIRONMENTAL LAWS

Suits to secure judicial review of administrative action and those pursuing private rights of action are commonly employed in litigation relying on the federal environmental laws.[3] Because pri-

* Senior Circuit Judge, United States Court of Appeals for the Second Circuit. This article is based on a speech delivered by Judge Timbers to the American Law Institute-American Bar Association Course of Study on Environmental Law on February 18, 1982, in Washington, D.C.

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The views presented in this article are those of the authors and do not represent positions of the United States Court of Appeals for the Second Circuit or the United States Department of State.

1 451 U.S. 287 (1981).

2 453 U.S. 1 (1981).

3 A number of federal statutes address primarily environmental matters. *See, e.g.*, Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-36y (1982); Toxic Substances Control Act, 15 U.S.C. §§ 2601-29 (1982); Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1407 (1982); Marine Protection, Research, and Sanctuaries Act of

vate parties can initiate both types of action, the labels used to describe those actions may create confusion. To avoid this problem, the following two sections will describe the fundamental elements of the two kinds of action.[4]

A. Private Rights of Action

This Article defines a private right of action under a substantive regulatory statute as a private party's action to enforce a regulatory standard.[5] This definition does not confine a private right of action to any class of defendant or to any form of relief. There is, however, the presupposition of a valid and enforceable regulatory norm. Because of this assumption, a private right of action might better be termed a "citizen enforcement action."[6] Promoting the purpose of a statute through citizen initiative is an important policy goal behind a private right of action.[7]

1972, 16 U.S.C. §§ 1431-34 (1982), 33 U.S.C. §§ 1401-45 (1982); Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-64 (1982); Endangered Species Act of 1973, 16 U.S.C. §§ 1531-43 (1982); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328 (1982); Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1982); Deepwater Port Act of 1974, 33 U.S.C. §§ 1501-24 (1982); Safe Drinking Water Act, 42 U.S.C. §§ 300f to 300j-10 (1982); National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-70 (1982); Noise Control Act of 1972, 42 U.S.C. §§ 4901-18 (1982); Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-87 (1982); Clean Air Act, 42 U.S.C. §§ 7401-7642 (1982); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-57 (1982).

Other federal statutes whose primary purpose is not to remedy or prevent environmental problems also have substantial environmental components. *See, e.g.*, Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-56, 1801-66 (1982) (purpose is to permit offshore resource development in a manner consistent with environmental considerations). This discussion, moreover, is not confined to legislation with an environmental content but could apply to any substantive regulatory statute.

4 This Article assumes that all suits are brought in federal court relying solely on federal statutes. The analysis could, however, be extended to other situations.

5 *See* J. MASHAW & R. MERRILL, INTRODUCTION TO THE AMERICAN PUBLIC LAW SYSTEM 82 (1975).

6 The term "private right of action" as applied to a substantive regulatory statute appears to have developed in the context of a distinction between governmental and private enforcement of regulatory standards. *See, e.g.*, J.I. Case Co. v. Borak, 377 U.S. 426, 431-32 (1964) (recognizing private right of action for violation of Securities Exchange Act of 1934 even though statute did not provide expressly for private relief). The discussion in this Article, by contrast, involves a distinction among actions that private parties may commence. Consequently, the word "private" in this context may be misleading.

7 *See, e.g.*, Guardians Ass'n v. Civil Serv. Comm'n, 103 S. Ct. 3221, 3231 (1983)("If [a plaintiff] obtains an injunction [under title VI], he does so not for himself alone but also as a 'private attorney general', vindicating a policy that Congress considered of the highest priority.") (quoting Newman v. Piggie Park Enter., 390 U.S. 400, 401-02 (1968)); J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964) (implication of private right of action under § 14(a) of Securities Exchange Act of 1934 necessary "to provide such remedies as are necessary to make effective the congressional purpose"); Friends of the Earth v. Carey, 535 F.2d 165, 172 (2d Cir. 1976) ("citizen groups are . . . to be treated . . . as welcomed participants in the vindication of environmental interests" under citi-

Private rights of action under substantive federal regulatory statutes can be express or implied. Express private rights of action appear in "citizen suit" provisions in a substantial number of federal environmental laws.[8] A typical citizen suit provision authorizes any

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zen suit provision creating express private right of action for enforcement of Clean Air Act); S. REP. No. 414, 92d Cong., 2d Sess. 81, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 3668, 3747 ("The Courts should recognize that in bringing legitimate actions under [citizen suit provision creating express private right of action for enforcement of Federal Water Pollution Control Act] citizens would be performing a public service . . . ."); S. REP. No. 1196, 91st Cong., 2d Sess. 39, *reprinted in relevant part in* Natural Resources Defense Council v. Train, 510 F.2d 692, 725 (D.C. Cir. 1974) (same remark with respect to citizen suit provision creating express private right of action for enforcement of Clean Air Act); Stone, *The Place of Enterprise Liability in the Control of Corporate Conduct*, 90 YALE L.J. 1, 61 & n.235 (1980) (The provision of "an additional source of discipline of management misconduct . . . that reaps no revenues for the public coffers, but at least needs no public funds to implement" is a "traditional justification for implied causes of action."); Comment, *Implied Rights of Action in Federal Legislation: Harmonization Within the Statutory Scheme*, 1980 DUKE L.J. 928, 929 n.2 (doctrine of implied private action has been justified as means of effectuating purposes of legislation); Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 HARV. L. REV. 285, 291 (1963) (recognizing argument that "implying a cause of action may increase the likelihood of compliance with [a] statute by giving victims incentive to assist in its enforcement").

8 *E.g.*, Toxic Substances Control Act § 20(a)(1), 15 U.S.C. § 2619(a)(1) (1982); Endangered Species Act of 1973, § 11(g)(1)(A), 16 U.S.C. § 1540(g)(1)(A) (1982); Surface Mining Control and Reclamation Act of 1977, § 520(a)(1), 30 U.S.C. § 1270(a)(1) (1982); Federal Water Pollution Control Act § 505(a)(1), 33 U.S.C. § 1365(a)(1) (1982); Marine Protection, Research, and Sanctuaries Act of 1972, § 105(g)(1), 33 U.S.C. § 1415(g)(1) (1982); Deepwater Port Act of 1974, § 16(a)(1), 33 U.S.C. § 1515(a)(1) (1982); Safe Drinking Water Act § 1449(a)(1), 42 U.S.C. § 300j-8(a)(1) (1982); Noise Control Act of 1972, § 12(a)(1), 42 U.S.C. § 4911(a)(1) (1982); Resource Conservation and Recovery Act of 1976, § 7002(a)(1), 42 U.S.C. § 6972(a)(1) (1982); Clean Air Act § 304(a)(1) & (3), 42 U.S.C. § 7604(a)(1) & (3) (1982); Outer Continental Shelf Lands Act § 23(a)(1), 43 U.S.C. § 1349(a)(1) (1982). The Clean Air Act contains the first citizen suit provision and is the model for the rest.

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A second clause of the typical citizen suit provision creates a cause of action to compel the federal official responsible for implementing the statute to perform a nondiscretionary act or duty. *E.g.*, Toxic Substances Control Act § 20(a)(2), 15 U.S.C. § 2619(a)(2) (1982); Endangered Species Act of 1973, § 11(g)(1)(B) & (C), 16 U.S.C. § 1540(g)(1)(B) & (C) (1982); Surface Mining Control and Reclamation Act of 1977, § 520(a)(2), 30 U.S.C. § 1270(a)(2) (1982); Federal Water Pollution Control Act § 505(a)(2), 33 U.S.C. § 1365(a)(2) (1982); Deepwater Port Act of 1974, § 16(a)(2), 33 U.S.C. § 1515(a)(2) (1982); Safe Drinking Water Act § 1449(a)(2), 42 U.S.C. § 300j-8(a)(2) (1982); Noise Control Act of 1972, § 12(a)(2), 42 U.S.C. § 4911(a)(2) (1982); Resource Conservation and Recovery Act of 1976, § 7002(a)(2), 42 U.S.C. § 6972(a)(2) (1982); Clean Air Act § 304(a)(2), 42 U.S.C. § 7604(a)(2) (1982).

Actions created by these clauses to compel federal officials to perform nondiscretionary acts or duties are analytically distinct from private rights of action as defined above. These statutorily created actions are better discussed under theories of judicial review, *see* Administrative Procedure Act § 10(e)(1), 5 U.S.C. § 706(1) (1982) ("reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed") [hereinafter cited as APA], or mandamus, *see* Mandamus and Venue Act of 1962, 28 U.S.C. § 1361 (1982) ("action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plain-

person to commence a civil action on his own behalf against any person, including the United States or a government agency, to enforce the statute, regulations promulgated under its authority, or other requirements contemplated by the statutory scheme, such as permits or administrative orders.

The Supreme Court recently has decided a significant number of cases in which parties have asserted implied private rights of action under various federal statutes.[9] Courts scrutinize congressional intent in determining whether an implied private right of action exists under a substantive regulatory statute.[10] Examining additional

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tiff"). *See also* Allegheny County Sanitary Auth. v. EPA, 732 F.2d 1167, 1176-77 (3d Cir. 1984) (equating purposes of APA § 10(e)(1) and mandamus portion of Federal Water Pollution Control Act citizen suit provision). *See generally* J. MASHAW & R. MERRILL, *supra* note 5, at 891 (characterizing action to compel official to perform his duty as general mandamus action and noting that its primary value may be jurisdictional). *Cf.* Natural Resources Defense Council v. Train, 510 F.2d 692, 702 (D.C. Cir. 1974) (noting that Federal Water Pollution Control Act citizen suit provision "may add little to the jurisdiction of federal courts as a practical matter"). *See infra* note 14 (discussing Mandamus and Venue Act of 1962).

9 *E.g.*, Daily Income Fund v. Fox, 104 S. Ct. 831 (1984) (no implied private right of action for investment company under § 36(b) of Investment Company Act of 1940); Guardians Ass'n v. Civil Serv. Comm'n, 103 S. Ct. 3221, 3227-32 (1983) (implied private right of action found in title VI of Civil Rights Act of 1964); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 388-95 (1982) (implied private cause of action under Commodity Exchange Act as amended by Commodity Futures Trading Commission Act of 1974); Texas Indus. v. Radcliff Materials, 451 U.S. 630, 639-40 (1981) (Sherman and Clayton Acts do not explicitly or implicitly create a right to contribution among co-conspirators); Northwest Airlines v. Transport Workers Union, 451 U.S. 77, 86-95 (1981) (no implied right to contribution against co-violator of Equal Pay Act of 1963 and title VII of the Civil Rights Act of 1964); Universities Research Ass'n v. Coutu, 450 U.S. 754, 771-73 (1981) (no implied private right of action for back wages under Davis-Bacon Act where government contract does not contain prevailing wage stipulations); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 18-19 (1979) (implied private right of action exists under § 215 of the Investment Advisers Act of 1940 to void a contract made in violation of that act); Touche Ross & Co. v. Redington, 442 U.S. 560, 568-76 (1979) (no implied private right of action under § 17(a) of Securities Exchange Act of 1934); Cannon v. University of Chicago, 441 U.S. 677, 689-709 (1979) (implied private right of action exists under title IX of the Education Amendments of 1972); Santa Fe Indus. v. Green, 430 U.S. 462, 471-74 (1977) (no private cause of action under rule 10b-5 of SEC Rules and § 10(b) of Securities Exchange Act of 1934 where disputed appraisal of stock for purposes of merger did not involve manipulation or deception); Piper v. Chris-Craft Indus., 430 U.S. 1, 24-26 (1977) (no implied private cause of action under circumstances of tender offer under § 14(e) of Securities Exchange Act of 1934); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 197-206 (1976) (no private cause of action under rule 10b-5 of SEC rules and § 10(b) of Securities Exchange Act of 1934 where no allegation of intent to deceive, manipulate, or defraud).

10 *See, e.g.*, Texas Indus. v. Radcliff Materials, 451 U.S. 630, 639 (1981) ("[The] focus . . . in any case involving the implication of a right of action . . . is on the intent of Congress."); Universities Research Ass'n v. Coutu, 450 U.S. 754, 770 (1981) ("whether a statute creates a private right of action is ultimately [a question] 'of congressional intent' "); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15-16 (1979) ("The question whether a statute creates [an implied cause of action] is basically a matter of statutory construction.") (quoting Touche Ross & Co. v. Redington, 442

factors also may help a court ascertain the existence of a private remedy.[11]

B. Judicial Review of Administrative Action

Judicial review of administrative action provides an opportunity to contest the legality or adequacy of governmental action implementing a regulatory statute through a comparison of official conduct in a particular case with specified legal standards.[12] Many environmental statutes contain their own provisions authorizing judicial review.[13] The Administrative Procedure Act (APA)[14] provides additional assurance that final federal agency action, with certain

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U.S. 560, 568 (1979)); *see also* Northwest Airlines v. Transport Workers Union, 451 U.S. 77, 91 (1981) ("The ultimate question . . . is whether Congress intended to create [a] private remedy . . . .").

11 A unanimous Court revised the approach to the implied private rights question in Cort v. Ash, 422 U.S. 66 (1975). The Court articulated four factors relevant to the existence of an implied private right of action: (1) whether the plaintiff is a special beneficiary of the statute; (2) whether Congress intended to create a private cause of action; (3) whether a private remedy is consistent with the purpose of the statute; and (4) whether and to what extent the right and remedy are traditionally covered by state law. *Id.* at 78. The Court has since made clear that legislative intent is the most important factor. *See* cases cited *supra* note 10. *See also* Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394 (1982). Sunstein characterizes the Court's current approach as follows: "[U]nless the language or history of [a] statute indicates an affirmative intent on the part of Congress to create [private rights], the courts will not recognize them." *Id.* at 413. In Sunstein's view, "the Supreme Court has . . . effectively abandon[ed] the approach of *Borak* and *Cort*." *Id.*

For a discussion of the pre-*Cort* law of implied private rights of action, see generally Comment, *Private Rights of Action under* Amtrak *and* Ash*: Some Implications for Implication*, 123 U. PA. L. REV. 1392 (1975).

12 *See, e.g.*, Stark v. Wickard, 321 U.S. 288, 310 (1944) ("Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power."); Office of Communication of United Church of Christ v. FCC, 465 F.2d 519, 524 (D.C. Cir. 1972) (in proceeding for review of FCC order, "[i]t is the . . . task of [a] court to undertake a careful and deliberate scrutiny of an agency's decision to insure compliance with law and the legislative mandate." (footnote omitted)); Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 MICH. L. REV. 387, 395 (1970) (judicial review "rests on the premise . . . that courts can make a useful contribution to administration by testing the legality of official action which adversely affects private persons"); Note, *Judicial Review of Agency Inaction*, 83 COLUM. L. REV. 627, 627 (1983) ("Judicial review provides, and has always provided, vital legitimacy to actions of administrative agencies in the American system of government.").

13 *E.g.*, Federal Insecticide, Fungicide, and Rodenticide Act § 16, 7 U.S.C. § 136n (1982); Toxic Substances Control Act § 19, 15 U.S.C. § 2618 (1982); Surface Mining Control and Reclamation Act of 1977, § 526, 30 U.S.C. § 1276 (1982); Deepwater Port Act of 1974, § 17, 33 U.S.C. § 1516 (1982); Federal Water Pollution Control Act § 509, 33 U.S.C. § 1369 (1982); Safe Drinking Water Act § 1448, 42 U.S.C. § 300j-7 (1982); Noise Control Act of 1972, § 16, 42 U.S.C. § 4915 (1982); Resource Conservation and Recovery Act of 1976, § 7006, 42 U.S.C. § 6976 (1982); Clean Air Act § 307, 42 U.S.C. § 7607 (1982); Comprehensive Environmental Response, Compensation, and Liability

limited exceptions, will be reviewable in the federal courts.[15]

Act of 1980, § 113, 42 U.S.C. § 9613 (1982); Outer Continental Shelf Lands Act § 23, 43 U.S.C. § 1349 (1982).

Several of these provisions create jurisdiction in the courts of appeals through a petition for review. The general rule is that "[i]f . . . there exists a special statutory review procedure, it is ordinarily supposed that Congress intended that procedure to be the exclusive means of obtaining judicial review in those cases to which it applies." City of Rochester v. Bond, 603 F.2d 927, 931 (D.C. Cir. 1979). *See* APA § 10(b), 5 U.S.C. § 703 (1982) ("The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction . . . ."). *Cf.* Allegheny County Sanitary Auth. v. EPA, 732 F.2d 1167, 1176-77 (3d Cir. 1984) (holding that mandamus portion of citizen suit provision of Federal Water Pollution Control Act, 33 U.S.C. § 1365(a)(2) (1982), precludes reliance on APA action to compel federal official to perform mandatory duty).

Confusion has sometimes arisen in dealing with statutes that provide for jurisdiction in the courts of appeals over proceedings to obtain judicial review and jurisdiction in the district courts over citizen suits, especially those seeking to compel performance of a nondiscretionary duty. *See, e.g.*, Pennsylvania v. EPA, 618 F.2d 991 (3d Cir. 1980) (dismissing for lack of jurisdiction petition for review under Federal Water Pollution Control Act characterized by court as alleging administrative inaction); Environmental Defense Fund v. EPA, 598 F.2d 62, 90-91 (D.C. Cir. 1978) (same). *See generally* Environmental Defense Fund v. Gorsuch, 713 F.2d 802, 813 (D.C. Cir. 1983) (discussing jurisdictional distinction under Resource Conservation and Recovery Act of 1976); Council of Commuter Orgs. v. Metropolitan Transp. Auth., 683 F.2d 663, 665 (2d Cir. 1982) (same under Clean Air Act); Environmental Defense Fund v. EPA, 636 F.2d 1267, 1274 n.3 (D.C. Cir. 1980) (same under Toxic Substances Control Act); Sun Enters. v. Train, 532 F.2d 280, 287-88 (2d Cir. 1976) (same under Federal Water Pollution Control Act); Oljato Chapter of Navajo Tribe v. Train, 515 F.2d 654, 661-62 & n.9 (D.C. Cir. 1975) (same under Clean Air Act); Currie, *Judicial Review under the Federal Pollution Laws*, 62 IOWA L. REV. 1221 (1977) (arguing that district court jurisdiction should exist when rulemaking proceeding has not occurred and appeals court jurisdiction should exist when proceeding has occurred). *See generally* Note, *Jurisdiction to Review Federal Administrative Action: District Court or Court of Appeals*, 88 HARV. L. REV. 980 (1975) (discussing courts of appeals and district courts as alternative forums of judicial review and ways of reducing uncertainty as to the correct forum).

14 5 U.S.C. §§ 551-559, 701-706 (1982). Although the APA does not independently create jurisdiction in the federal courts, *see* Califano v. Sanders, 430 U.S. 99 (1977), the elimination of the threshold amount in 28 U.S.C. § 1331 (1982), conferring federal question jurisdiction on the district courts, means that "*the appropriate district court always has jurisdiction to review any reviewable action of a federal agency unless a specific statute is interpreted to withdraw the jurisdiction conferred on the district court by § 1331.*" 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 23.3 (2d ed. 1983) (emphasis in original).

The Mandamus and Venue Act of 1962, 28 U.S.C. § 1361 (1982), provides an alternative form of review in district courts through an action in the nature of mandamus. *See generally* Byse & Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308 (1967) (discussing relationship of § 1361 to other statutes involved in nonstatutory judicial review actions and arguing that availability and scope of nonstatutory review should be governed by equitable rather than mandamus principles).

15 APA § 10, 5 U.S.C. §§ 701(a), 704 (1982) (final agency action reviewable unless precluded by statute or committed to agency discretion). The question of reviewability should in principle be distinguished from the standing requirement. *See* Barlow v. Collins, 397 U.S. 159, 176 (1970) (Brennan, J., concurring in the result and dissenting). Likewise, questions as to the existence of a private right of action should be conceptually

To facilitate the salutary purpose of such suits, courts have established a presumption of reviewability in cases seeking judicial review of administrative action.[16] This differs from the treatment of an implied private right of action, the existence of which must be affirmatively demonstrated.[17] Although both forms of suit involve policy considerations based on public benefit from private initiative,[18] potential defendants in an action to secure judicial review under the federal environmental laws, unlike those available under a private right of action for enforcement, can only be the federal government or one of its agencies or officials.[19]

A private right of action is a necessary prerequisite to enforcing

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separate from the standing inquiry. *See* Davis v. Passman, 442 U.S. 228, 239 & n.18 (1979). These distinctions, however, have not been uniformly observed, and the question of the existence of a private right of action or an action for judicial review has affected the standing analysis in some cases. *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 500-01 (1975) ("standing . . . often turns on the nature and source of the claim asserted"); National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 456 (1974) ("it is only if [an implied cause of action] exists that we need consider whether the respondent had standing"). *See generally* Garvey, *A Litigation Primer for Standing Dismissals*, 55 N.Y.U. L. REV. 545, 565 (1980) (existence of private right of action as element of standing); Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 83 HARV. L. REV. 367, 367 (1968) (reviewability implicated by standing analysis); Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 673 (1977) ("The [Supreme] Court has never clearly recognized the relationship between standing cases and 'private right of action' cases.").

16 *E.g.*, Califano v. Sanders, 430 U.S. 99, 104 (1977) (discussing "Congress' intention and understanding that judicial review should be widely available to challenge the actions of federal administrative officials"); Dunlop v. Bachowski, 421 U.S. 560, 567 (1975) ("strong presumption" favoring judicial review); Tooahnippah v. Hickel, 397 U.S. 598, 606 (1970) ("we start with the presumption that aggrieved persons may obtain [judicial] review") (citing City of Chicago v. United States, 396 U.S. 162, 164 (1969)); Abbott Laboratories v. Gardner, 387 U.S. 136, 140-41 (1967) (APA's "generous review provisions"); Central Hudson Gas & Elec. Corp. v. EPA, 587 F.2d 549, 555 (2d Cir. 1978) (judicial review should be foreclosed only on explicit showing of contrary legislative intent).

17 *See supra* notes 9-11 (citing cases).

18 *See, e.g.*, Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 154 (1970) (characterizing plaintiff in judicial review proceeding as "private attorney general to litigate the issues of the public interest"); Associated Indus. v. Ickes, 134 F.2d 694, 704 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943) ("[T]here is nothing constitutionally prohibiting Congress from empowering any person, official or not, to institute a proceeding [to prevent action by official in violation of statutory powers], even if the sole purpose is to vindicate the public interest."). *Cf. supra* note 7 and accompanying text (public benefit from citizen enforcement).

19 *See, e.g.*, APA §§ 10(a) & (b), 5 U.S.C. §§ 702, 703 (1982) (establishing right of review of agency action and form and venue of proceeding). Unlike some private rights of action, money damages are not available as a remedy in a suit to obtain judicial review under the APA. *Id.* § 10(a), 5 U.S.C. § 702. As a general matter, damages are not available under citizen suit provisions. *Sea Clammers*, 453 U.S. at 17 n.27. *But see* Surface Mining Control and Reclamation Act of 1977, § 520(f), 30 U.S.C. § 1270(f) (expressly authorizing action for damages). *See generally* Miller, *Private Enforcement of Federal Pollution Controls Part II*, 14 ENVTL. L. REP. (ENVTL. L. INST.) 10063, 10079-80 (1984) (discussing penalties).

a substantive regulatory statute against a nonfederal defendant.[20] But against a federal party, a private right of action may be superfluous to the extent that the factual situation provides an opportunity for judicial review. In a suit against a federal party, however, there is an opportunity for conceptual overlap between a private right for enforcement and an action seeking judicial review, which may make it difficult to determine under which theory a particular case should be approached. For example, a federal agency could engage in rulemaking that could be challenged under a theory of judicial review, or it could be sued as a polluter in an action for abatement under a citizen suit provision.[21] Cases involving allegations of administrative inaction against a federal party may involve additional analytical difficulty.[22]

II

THE IMPACT OF *CALIFORNIA V. SIERRA CLUB* AND *SEA CLAMMERS*

The Supreme Court's treatment of the private rights issue in *California v. Sierra Club* and *Sea Clammers* is of principal importance in discussing causes of action under federal environmental statutes.

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20 In Maine v. Thiboutot, 448 U.S. 1 (1980), the Supreme Court concluded that a plaintiff could maintain suit under 42 U.S.C. § 1983 (1982) based solely on a violation of a federal statute. A *Thiboutot* action, by definition, is commenced against an official acting under color of state law. This kind of action in the environmental field would best serve to enforce a statute or regulations promulgated under it against violations by a state or municipal authority. For these reasons, *Thiboutot* cases under the environmental laws are similar to citizen suits seeking enforcement. *See supra* note 8. This Article will treat such cases as a type of private right of action. *See* Smith v. Robinson, 104 S. Ct. 3457, 3466-67 (1984) (characterizing *Thiboutot* cases as a form of private right of action). *See generally* Sunstein, *supra* note 11, at 427 (characterizing *Thiboutot* suits as based on private causes of action, but suggesting some similarity to APA review). *Cf.* Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 617-18 (1979) (42 U.S.C. § 1983 (1982) does not create substantive rights).

21 Several of the environmental statutes apply to federal facilities. *E.g.*, Federal Water Pollution Control Act § 313, 33 U.S.C. § 1323 (1982); Clean Air Act § 118, 42 U.S.C. § 7418 (1982). The citizen suit provisions of those statutes create causes of action for abatement of pollution from federal sources. *See, e.g.*, South Carolina Wildlife Fed'n v. Alexander, 457 F. Supp. 118 (D.S.C. 1978) (Federal Water Pollution Control Act); California v. Department of the Navy, 9 Env't Rep. Cas. (BNA) 2077 (N.D. Cal. 1977) (Clean Air Act). *See also* S. REP. No. 1196, 91st Cong., 2d Sess. 36-39, *reprinted in relevant part in* Natural Resources Defense Council, Inc. v. Train, 510 F.2d 692, 724 (D.C. Cir. 1975) ("Since Federal agencies have been notoriously laggard in abating pollution . . . it is important to provide that citizens can seek, through the courts, to expedite the government performance specifically directed under section 118 [of the Clean Air Act].").

22 *See supra* note 8 (action seeking mandatory injunction as form of judicial review). *Cf.* Environmental Defense Fund v. Hardin, 428 F.2d 1093, 1099 (D.C. Cir. 1970) (administrative inaction equivalent to agency order for purposes of judicial review). *See generally* Note, *supra* note 12 (arguing that doctrinal barriers to judicial review of agency inaction should be removed).

The Court's opinions, however, contain somewhat abbreviated statements of facts and telescoped histories of the cases. Because the Supreme Court did not discuss important elements of the two cases from the point of view of the present analysis, this Article briefly sets out their history in the following sections.

A. *California v. Sierra Club*

In *California v. Sierra Club*,[23] two individuals and an environmental group sought to enjoin construction and operation of a joint water diversion project in California. Plaintiffs named both federal and state officials as defendants, alleging a violation of section 10 of the Rivers and Harbors Appropriation Act of 1899.[24] The district court recognized an implied private right of action to enforce section 10, and further concluded that the permits issued to build the project were insufficient under section 10 to grant administrative authorization for the entire project.[25] On appeal, the Ninth Circuit affirmed the district court's conclusion that a private right of action exists under section 10.[26] The Supreme Court reversed, holding that a private right of action does not exist under section 10.[27]

The primary question in the Supreme Court was whether a private right of action exists under section 10, and, if so, whether additional section 10 permits were necessary to proceed with the project. Because the Court had granted certiorari only to state and municipal defendants,[28] it was not called upon to address the ques-

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23 451 U.S. 287 (1981), *rev'g* Sierra Club v. Andrus, 610 F.2d 581 (9th Cir. 1979).

24 33 U.S.C. § 403 (1982). *See* 400 F. Supp. at 620. Section 10 provides that absent affirmative authorization by Congress, construction that hinders navigation on the nation's waters must be recommended by the Chief of Engineers and authorized by the Secretary of the Army.

25 400 F. Supp. at 635.

26 610 F.2d at 587-92. The Ninth Circuit, however, reversed the district court in part on the ground that portions of the project had been affirmatively authorized by Congress. *Id.* at 600-05.

27 451 U.S. at 298. The Supreme Court focused on the first two factors of the approach in Cort v. Ash, 422 U.S. 66 (1975) (discussed *supra* note 11) to ascertain the existence of an implied private right of action under the statute. The Court decided that the statute was not intended to benefit the plaintiffs in that case particularly, but rather was intended to benefit the public at large. 451 U.S. at 293-98.

28 The state defendants and the intervenor-defendant public water agencies, but not the federal defendants, petitioned for certiorari. *See* 449 U.S. 818 (1980) (order granting petitions for certiorari). The federal defendants appeared before the Supreme Court as respondents. SUP. CT. RULE 19.6. *See* 451 U.S. at 288.

In their brief in the Supreme Court, the federal defendants expressed concern primarily over the incidental effect on the federal government if the Court recognized a private cause of action against the state defendants. In the event of such a holding, claimed the federal defendants, "the [Army] Corps [of Engineers] is effectively required by district court orders to process permit applications relating to activities that, in the view of the Corps, have an insignificant effect on navigable waters." Brief for Federal Respondents at 23 n.15, *Sierra Club*, 451 U.S. 287. Plaintiffs petitioned for certiorari on

tion whether the case involved reviewable agency action. Consequently, the applicability of the APA was not discussed.[29] Accordingly, the Court properly held that the *California v. Sierra Club* plaintiffs had to establish the existence of a private right of action to maintain their suit against the state defendants.[30] This holding should not, however, be construed as authority for dismissing a cause of action for judicial review against the federal government or one of its agencies or officials when the facts present an opportunity for judicial review and the plaintiffs rely on the APA or other authority for judicial review.[31] Unfortunately, some cases have interpreted the Supreme Court's opinion to preclude judicial scrutiny of otherwise reviewable agency action.[32]

B. *Sea Clammers*

In *Sea Clammers*,[33] a fishermen's organization and an individual sued federal and municipal defendants, alleging that sewage and other waste discharged into the New York Harbor, the Hudson River, and the Atlantic Ocean had adverse effects on commercially valuable fisheries. The complaint alleged causes of action for damages and for declaratory and injunctive relief based in part on the citizen suit provisions of the Federal Water Pollution Control Act

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an unrelated issue. *See* Sierra Club v. Watt, 451 U.S. 965 (1981) (order granting certiorari, vacating judgment, and remanding for further consideration in light of *California v. Sierra Club*).

29 Although the plaintiffs relied on the APA for jurisdictional purposes, *see* Complaint ¶ 1, *Sierra Club*, 400 F. Supp. 610, they did not rely on the APA for their claim under the Rivers and Harbors Authorization Act. *See id.* ¶¶ 38-48. Further, the plaintiffs did not plead the APA specifically in any of their other claims for relief. *See id.* ¶¶ 49-101. None of the opinions in the case discussed the relevance of the APA.

30 Both the district court, *see* 400 F. Supp. at 625 n.16, and the court of appeals, *see* 610 F.2d at 588, 590 n.15, apparently believed that a private right of action was necessary for plaintiffs to maintain their suit against the federal defendants. The Supreme Court did not explicitly address the necessity for a private right of action against the federal, as distinguished from the state, defendants as a prerequisite to plaintiffs' maintaining suit against the federal defendants.

31 *See* Chrysler Corp. v. Brown, 441 U.S. 281, 317-18 (1979); Seafarers Int'l Union v. United States Coast Guard, 736 F.2d 19, 25 (2d Cir. 1984); California v. Watt, 683 F.2d 1253, 1270 (9th Cir. 1982), *rev'd on other grounds sub nom.*, Secretary of the Interior v. California, 104 S. Ct. 656 (1984); Glacier Park Found. v. Watt, 663 F.2d 882, 885 (9th Cir. 1981); Worthington Compressors, Inc. v. Costle, 662 F.2d 45, 50 (D.C. Cir. 1981).

32 *E.g.*, Sierra Club v. Army Corps of Eng'rs, 701 F.2d 1011, 1033-34 (2d Cir. 1983) (relying on *California v. Sierra Club* in dismissing APA action for review of federal defendant's decision to grant permit under § 10 of Rivers and Harbors Authorization Act); *cf.* Faust v. South Carolina State Highway Dep't, 721 F.2d 934, 939 (4th Cir. 1983), *cert. denied*, 104 S. Ct. 2678 (1984) (citing *California v. Sierra Club* for proposition that issuance of permits under Rivers and Harbors Authorization Act is unreviewable discretionary function).

33 Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981), *rev'g* National Sea Clammers Ass'n v. City of New York, 616 F.2d 1222 (3d Cir. 1980).

(FWPCA)[34] and the Marine Protection, Research, and Sanctuaries Act of 1972 (MPRSA).[35] The district court held that the plaintiffs' failure to give the notice required by both citizen suit provisions before commencing suit was a jurisdictional bar to their FWPCA and MPRSA actions and granted summary judgment to defendants.[36] On appeal, the Third Circuit reversed the district court's dismissal of plaintiffs' causes of action based on the FWPCA and the MPRSA. The Third Circuit found that implied rights of action exist under the FWPCA and the MPRSA, holding that the "savings" clauses in the citizen suit provisions of both statutes preserved those implied private rights of action, notwithstanding the defect in notice.[37] The Supreme Court reversed the court of appeals, concluding that no implied private rights of action exist under either statute.[38] The Court concluded that Congress did not intend an implied private right of action because it made the two statutory schemes particularly comprehensive, incorporating public enforcement mechanisms and provisions for judicial review in addition to the citizen suit provisions.[39] The Court also found that Congress did not intend to preserve rights of action under the statutes themselves.[40]

Noncompliance with the prescribed notice provisions forced

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34 33 U.S.C. §§ 1251-1376 (1982) [hereinafter cited as FWPCA].

35 33 U.S.C. §§ 1401-1444 (1982) [hereinafter cited as MPRSA].

36 National Sea Clammers Ass'n v. City of New York, 12 Env't Rep. Cas. (BNA) at 1122-24.

37 616 F.2d at 1228-32. The savings clause of the FWPCA citizen suit provision states: "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief." FWPCA § 505(e), 33 U.S.C. § 1365(e) (1982). The savings clause of the MPRSA citizen suit provision states: "The injunctive relief provided by this subsection shall not restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief." MPRSA § 105(g)(5), 33 U.S.C. § 1415(g)(5) (1982). The court of appeals also held that plaintiffs had a cause of action based on the federal common law of nuisance, reversing the district court's dismissal of plaintiffs' claim based on that theory. 616 F.2d at 1233-35.

38 453 U.S. at 13-21. The Supreme Court construed the opinion of the court of appeals as acknowledging the existence of an action for damages under the FWPCA and the MPRSA against the federal defendants. *Id.* at 9 & n.14.

39 The Court ascribed particular importance to the FWPCA's judicial review provision. 453 U.S. at 17. However, it also glossed over one difference between the two statutes. The MPRSA, in contrast to the FWPCA, does not contain its own provision for judicial review. *See infra* note 53.

The Court also reversed the court of appeals on the federal common law of nuisance issue, concluding that the FWPCA preempted the federal common law of nuisance in the area of water pollution. 453 U.S. at 21-22. In addition, the Court concluded that the comprehensive character of the FWPCA and MPRSA statutory schemes precluded a *Thiboutot* action under 42 U.S.C. § 1983 (1982) against the nonfederal defendants under those statutes. 453 U.S. at 19-21. *See supra* note 20.

40 453 U.S. at 15-16 & n.26.

the plaintiffs in *Sea Clammers* to try to establish the existence of an implied private cause of action under the FWPCA and the MPRSA to maintain their suit against the municipal defendants. Against the federal defendants, however, plaintiffs could have proceeded under the theory of judicial review unless the actions complained of were not reviewable[41] or the relief sought, such as money damages, was unavailable.[42] As in *California v. Sierra Club*, the Supreme Court did not address the applicability of the APA.[43] Accordingly, neither case is authority for precluding judicial review of federal administrative action simply because there is no private right of action.[44] Some cases, however, have adopted a different interpretation.[45]

III
ACTIONS AGAINST FEDERAL PARTIES

As discussed in this Article, the main area of potential analytical overlap between the concepts of judicial review and private rights of action arises in cases against a federal party. Against all other defendants, a private right of action is necessary to maintain a suit al-

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41 Discharges of the type complained of in *Sea Clammers* are probably not reviewable under the FWPCA § 509(b), 33 U.S.C. § 1369(b) (1982) (providing for appellate review of various administrative actions including standards of performance, determinations, effluent standards, prohibitions, pretreatment standards, determinations as to state permit programs, effluent limitations, and permits). *See* City of Baton Rouge v. EPA, 620 F.2d 478, 480 (5th Cir. 1980) (courts of appeals "lack power to review actions of the EPA over which § 1369(b)(1) does not specifically grant review").

Likewise, allowing these discharges probably is not reviewable agency action within the meaning of APA § 4(b)(13), 5 U.S.C. § 551(13) (1982) (" 'agency action' includes . . . an agency . . . license, sanction, relief, or the equivalent or denial thereof, or failure to act"). A portion of plaintiffs' 13-count complaint, however, may have alleged causes of action that fairly could be characterized as based on a theory of judicial review. *See* Complaint ¶¶ 55(a) & 59(a) (alleging that federal defendants had failed to promulgate regulations as required by MPRSA and FWPCA), National Sea Clammers Ass'n v. City of New York, 12 Env't Rep. Cas. (BNA) 1118 (D.N.J. 1978). *See generally supra* notes 8 & 14 (mandamus as form of judicial review).

42 *See, e.g.*, APA § 10(a), 5 U.S.C. § 702 (1982) (waiving sovereign immunity in suit for judicial review seeking other than money damages).

43 The district court discussed the APA only as it related to jurisdiction, 12 Env't Rep. Cas. (BNA) at 1119 n.5, and to a claim based on the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-70 (1982), 12 Env't Rep. Cas. (BNA) at 1124, 1127. The Third Circuit made a passing reference to the APA in the latter context, 616 F.2d at 1237, and in discussing standing, *id.* at 1226 n.5, and sovereign immunity, *id.* at 1231 n.22. The Supreme Court's opinion, which did not discuss the National Environmental Policy Act issue, did not mention the APA at all. Unlike *California* v. *Sierra Club*, the federal defendants in *Sea Clammers* petitioned for and were granted certiorari. *See* 453 U.S. at 10.

44 *See supra* note 31 and accompanying text.

45 *See* Howard v. Pierce, 738 F.2d 722, 723 n.2, 724-31 (6th Cir. 1984) (relying on *Sea Clammers* and *California v. Sierra Club* in implying private cause of action for injunctive and declaratory relief, notwithstanding plaintiff's and federal defendant's assertion that adequate relief available under APA). *See also* cases cited at *supra* note 32.

leging violations of a federal regulatory statute. Against a federal party, however, a private right may be unnecessary to the extent the factual situation presents a case amenable to resolution by judicial review.

A plaintiff may allege both a private right of action and a cause of action for judicial review against a federal defendant. If the federal defendant tries to dismiss the suit because a private right of action does not exist, the court initially should decide whether judicial review is available. Only after the court concludes that a cause of action for judicial review based on the facts is lacking, or that the relief requested cannot be granted under a theory of judicial review, should the court turn to the question whether a private right of action exists.

Three examples illustrate this approach. First, assume that a federal facility is violating the terms of a discharge permit issued pursuant to the FWPCA.[46] This activity probably could not be challenged in a proceeding for judicial review, because it is not a reviewable action under the judicial review provision of the FWPCA nor is it "agency action" under the APA.[47] A private party could, however, bring suit under the FWPCA's citizen suit provision to enjoin further violations. Because no cause of action for review is available, a private right of action, in this case expressly created by Congress in the citizen suit provision, is necessary for a private party to maintain suit against the federal defendant.[48]

A second example is that of a federal facility that is misusing a pesticide in violation of requirements promulgated under the authority of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).[49] As in the first example, this activity probably is not reviewable under either FIFRA's judicial review provision[50] or the APA. Unlike the FWPCA, however, FIFRA contains no citizen suit provision, and there is no known implied private right of action for FIFRA's enforcement.[51] The result is that a citizen plaintiff

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46 *See* FWPCA § 313, 33 U.S.C. § 1323 (1982) (FWPCA provisions apply to federal facilities unless specifically exempted by President). *See generally id.* § 402, 33 U.S.C. § 1342 (1982) (National Pollutant Discharge Elimination System).

47 *See supra* note 41.

48 *Cf.* Davis v. United States, 722 F.2d 1157 (4th Cir. 1983), *cert. denied,* 104 S. Ct. 2151 (1984) (no cause of action against United States for damages under Federal Tort Claims Act for violation of FWPCA).

49 7 U.S.C. §§ 136-136y (1982) [hereinafter cited as FIFRA].

50 FIFRA § 16, 7 U.S.C. § 136n (1982) (providing for review in courts of appeals of agency orders following public hearings and review in district courts of EPA refusals to cancel or suspend registration or change classifications without hearing).

51 *See* Fiedler v. Clark, 714 F.2d 77 (9th Cir. 1983) (no private right of action under FIFRA).

probably cannot challenge this kind of violation even if committed by a federal party.

Yet a third example is a challenge under the APA to the adequacy of a permit issued by a federal party under section 10 of the Rivers and Harbors Authorization Act. As discussed above, this fact situation is entirely different from *California v. Sierra Club,* in which the Supreme Court concluded that there was no private right of action to enforce section 10 against nonfederal parties. In this example, however, the issuance of a section 10 permit is clearly final agency action under the APA and reviewable in a suit naming the federal party as defendant. Because of the existence of an adequate remedy under a theory of judicial review, the question of the existence of a private right of action would not have to be addressed.[52]

In the first two examples, courts will treat a federal party as they would any private violator. This result is the equivalent of a conclusion that a private right of action is necessary for the suit to proceed. When, however, facts are alleged that present an opportunity for judicial review under appropriate authority, as in the third example, there is no analogy between the federal government and a private party defendant. Judicial review of government action involves a conceptually distinct proceeding, the availability of which is independent of the presence or absence of a private right of action.[53]

CONCLUSION

Judicial review in the federal courts is an indispensable mechanism for challenging arbitrary or unlawful government action. Although private rights of action for enforcing substantive regulatory statutes may generate incidental public benefits, those actions are no substitute for judicial review of administrative action.[54] Judicial review provides a valuable opportunity for citizen input into the decisionmaking process of the unelected bureaucracies. Recognizing the significance of judicial review of administrative action to the healthy functioning of our democratic processes, courts generally

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52 *But see* Sierra Club v. Army Corps of Eng'rs, 701 F.2d 1011, 1033 (2d Cir. 1983) (relying on *California v. Sierra Club* to preclude review of issuance of § 10 permit).

53 Because of the presumption of reviewability, *see supra* note 16 and accompanying text, an analysis of the type undertaken in *Sea Clammers,* in which the Court concluded that the statutory schemes at issue were intended to preclude other forms of action, could not without more suffice to support a holding that review is precluded under a substantive regulatory statute lacking a special judicial review provision. It is interesting that the MPRSA, which was a subject of the opinion in *Sea Clammers,* is an example of such a statute.

54 *Cf.* Miller, *Private Enforcement of Federal Pollution Control Laws Part I,* 13 ENVTL. L. REP. (ENVTL. L. INST.) 10309, 10320 (1983) (citizen suit provisions "are not substitutes for the judicial review sections of the various [pollution control] statutes" (citing pre-*California v. Sierra Club* cases)).

articulate a presumption of reviewability. A private right of action under a regulatory statute—an analytically distinct proceeding for enforcement of regulatory standards—is irrelevant to a proceeding for judicial review against a federal party challenging administrative action under that statute. Accordingly, neither the presence nor absence of a private right of action should be a factor sufficient to overcome the presumption favoring access to judicial review. The two types of suits should continue to remain distinct in the minds of both judges and litigants.