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## The Clean Air Act Amendments of 1990: Citizen Suits and How They Work

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# THE CLEAN AIR ACT AMENDMENTS OF 1990: CITIZEN SUITS AND HOW THEY WORK

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## INTRODUCTION

The Clean Air Act (the Act)<sup>1</sup> embodies both a goal and a challenge: achieving the ideal of clean air while maintaining the benefits of life in a modern industrial economy. Congress recognized that the reconciliation of these often conflicting desires requires resources, time and institutional commitment. Having codified this dual objective, Congress entrusted the mandate of the Act to the Environmental Protection Agency (EPA).<sup>2</sup>

As enacted in 1970, the Act empowered citizens to enforce its provisions by bringing suit in federal court if and when the EPA procrastinated or defaulted in prosecuting violations. Where grounds for suit existed, citizen plaintiffs would be in a position to compel the EPA to more vigorously enforce the anti-pollution standards. In cases where the EPA remained sluggish, the citizen suit was available as an alternate enforcement mechanism.<sup>3</sup>

Although Congress envisioned citizens supervising the EPA's progress toward meeting the Act's objectives,<sup>4</sup> the citizen suit provisions in the 1970 Clean Air Act legislation<sup>5</sup> merely set forth specific rights of action. The limited character of these rights would later provoke congressional review and change.<sup>6</sup>

The Act provides citizens with three principal means of enforcement. First, citizens are entitled to file suit to force a party into compliance

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1. Clean Air Amendments of 1970, Pub. L. 91-604, 84 Stat. 1706 (codified as amended at 42 U.S.C. §§ 1857-1858(a) (1970)).

2. *Maine v. Thomas*, 874 F.2d 883, 884 (1st Cir. 1989).

3. See *Baughman v. Bradford Coal Co.*, 592 F.2d 215, 218 (3d Cir. 1979) (the legislative history of the citizen suit provisions of the Clean Air Act show congressional intent for citizens to supervise EPA enforcement), *cert. denied*, 441 U.S. 961 (1979). See generally Nauen, *Citizen Environmental Lawsuits After Gwaltney: The Thrill of Victory or the Agony of Defeat?*, 15 WM. MITCHELL L. REV. 327 (1989) (citizen's suits provisions of the Clean Air Act are the progenitor of all environmental citizen actions and were designed to help achieve the goals of the Act).

4. See *Gardeski v. Colonial Sand & Stone Co.*, 501 F. Supp. 1159, 1162 (S.D.N.Y. 1980).

5. See 42 U.S.C. § 7604(a) (1988); see generally Clean Air Amendments of 1970, Pub. L. 91-604, 84 Stat. 1706 (codified as amended at 42 U.S.C. §§ 1857-1858(a) (1970)).

6. Cf. *Maine v. Thomas*, 874 F.2d at 884-85 (lack of clarity in jurisdictional provisions of citizen suits under the Clean Air Act created confusion among the courts and potential plaintiffs).

with national emissions standards if the EPA Administrator has failed to prosecute the violator.<sup>7</sup> Second, citizen enforcement may compel the Administrator to perform a nondiscretionary duty.<sup>8</sup> Third, a related provision allows a right of review of final Agency action<sup>9</sup> by petition to the United States Court of Appeals for the appropriate circuit.<sup>10</sup> Congress amended the Act in 1977 to include a citizen right of action<sup>11</sup> to restrain construction or operation of a new or modified major emitting facility without a permit.<sup>12</sup>

Shortcomings of the Act, as amended in 1977, became apparent in its practical application. One problem was the requirement that the defendant be in actual violation of an emission standard before the case could be considered ripe. This requirement made all citizen actions for past violations moot, no matter how serious the infraction. Another drawback was the limited set of remedies available to citizen plaintiffs. The Act, as in force through mid-1990, allowed only injunctive relief; money damages were never granted.<sup>13</sup>

The Clean Air Act Amendments of 1990 (1990 Amendments)<sup>14</sup> are designed to address structural deficiencies in the existing clean air programs and to solve air pollution control problems that have arisen since the 1977 revisions. The citizen suit provisions in the 1990 Amendments retain all the benefits of the earlier statute, such as relaxed jurisdiction and attorney's fee awards, but strengthen the citizen suit instrument by addressing many of the issues left unresolved in 1977.

Part I of this Article provides an overview of the pre-1990 Act. Part II discusses the legacy of continuing problems under the Act and the 1977 Amendments, for example, the myriad of confusing and contradictory judicial interpretations. Part III focuses on the new provisions of the 1990 Amendments directed at problems inherent in earlier versions of the legislation. Part IV addresses four major issues that remain unresolved after the 1990 Amendments.

## I. THE 1977 CITIZEN SUIT PROVISIONS

The histories of the 1970 legislation and 1977 Amendments reveal Congress' dual intent to use citizen suits—or at least the threat of them—

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7. 42 U.S.C. § 7604(a)(1) (1988).

8. 42 U.S.C. § 7604(a)(2) (1988).

9. Administrative Procedure Act, 5 U.S.C. § 555(b) (1966).

10. 42 U.S.C. § 7607(b)(1) (1988).

11. Pub. L. No. 95-95, tit. III, § 303(a)-(c). 91 Stat. 771, 772 (1977); Pub. L. No. 95-190, § 14(a)(77), (78). 91 Stat. 1404 (codified as amended at 42 U.S.C. § 7604(a)(3) (1988)).

12. 42 U.S.C. § 7604(a)(3) (1988).

13. *See* Gwaltney, Ltd. v. Chesapeake Bay Found., 484 U.S. 49, 62 (1987) (remedies available pursuant to the citizen suit provisions authorized by the Clean Air Act are "wholly injunctive in nature").

14. Pub. L. No. 101-549, 104 Stat. 2399 (1990) (to be codified as amended at 42 U.S.C. §§ 7401-7626).

to goad the responsible agencies into more vigorous enforcement of the Act and, if the agencies remained passive, to provide a backup enforcement mechanism.<sup>15</sup>

For purposes of formal analysis, the citizen suit provisions of the 1970 Act, including the 1977 Amendments, are contained in six subparagraphs that address: (a) authorization of the civil action and jurisdiction, (b) notice, (c) venue and intervention, (d) attorney's fees and security, (e) non-restriction of other rights of action, and (f) definitions.<sup>16</sup> Section 307(b)(1) of the Act, a related measure also enacted in 1970, details matters relating to judicial review of final actions.<sup>17</sup> These provisions collectively outline a procedural as well as substantive road map for a citizen plaintiff who seeks to prosecute a violation of the Clean Air Act.

The requirements for citizen suits after the 1977 Act have been neither numerous nor complex. They are designed to serve as an early warning system to prompt compliance by an alleged violator before formal litigation can be initiated.<sup>18</sup> These requirements, however, are not meant to be so stringent as to keep meritorious citizen claims out of the courts if notice to the alleged violator is not enough to compel compliance.<sup>19</sup> The congressional objective of supplying simple and efficient procedures to allow viable citizen complaints into court, without opening a floodgate of litigation, is also evidenced by the Act's relaxed jurisdictional requirements.

#### A. Jurisdiction

Federal jurisdiction over citizen suits is statutory. The Act vests jurisdiction in the district courts for three principal types of actions:

- (1) violations of emissions standards or of an order issued by the EPA Administrator or a state;
- (2) alleged failure by the Administrator to perform an act or duty which is not discretionary; and
- (3) to enjoin proposed and actual construction of a major emitting facility without a permit.<sup>20</sup>

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15. See S. REP. NO. 1196, 91st Cong., 2d Sess. 2 (1970); 116 CONG. REC. 32,902, 32,903 (1970) (comments of Sens. Muskie and Boggs); *Baughman v. Bradford Coal Co.*, 592 F.2d 215, 218 (3d Cir. 1979), *cert. denied*, 441 U.S. 961 (1979).

16. 42 U.S.C. § 7604 (1988).

17. 42 U.S.C. § 7607(b)(1) (1988).

18. See *Friends of the Earth v. Potomac Elec. Power Co.*, 546 F. Supp. 1357, 1361 (D.D.C. 1982).

19. See *Friends of the Earth v. Carey*, 535 F.2d 165, 172-73 (2d Cir. 1976), *cert. denied*, 434 U.S. 902 (1977).

20. See 42 U.S.C. § 7604(a) (1988). Section 7604(a) reads in part:

(a) Authority to bring civil action; jurisdiction

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

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the [e]leventh [a]mendment to the Constitution) who is alleged to be in violation of (A) an

### 1. Violation of emission standards or orders

Under section 304(a) a citizen may commence a civil suit against any person who is alleged to be in violation of an emission standard or limitation, or of an order issued by the Administrator.<sup>21</sup> The original Act, as amended in 1977, required a defendant to be in violation at the time the action was filed.<sup>22</sup> The Supreme Court, however, has determined that the language of section 304(a) requires that the plaintiff "allege a state of either continuous or intermittent violation — that is, a reasonable likelihood that a past polluter will continue to pollute in the future."<sup>23</sup>

### 2. Jurisdiction over nondiscretionary EPA action

Jurisdiction is conferred on the district courts for actions brought by a citizen plaintiff directly against the Administrator for failing to perform a nondiscretionary duty.<sup>24</sup> The problem with this cause of action is that the distinction between discretionary and nondiscretionary duties is not always readily apparent.<sup>25</sup>

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emission standard or limitation under this chapter or (B) an order issued by the Administrator or a [s]tate with respect to such a standard or limitation,  
 (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator, or  
 (3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment) or who is alleged to be in violation of any condition of such permit.

*Id.*

21. 42 U.S.C. § 7604(a)(1) (1988). *See, e.g.,* Wilder v. Thomas, 854 F.2d 605 (2d Cir. 1988) (failure of state to eliminate carbon monoxide hot spots not eligible for suit by citizens) *cert. denied*, 489 U.S. 1053 (1989); League to Save Lake Tahoe, Inc. v. Trounaday, 598 F.2d 1164 (9th Cir. 1979) (federal jurisdiction exists to review state administrative determinations regarding SIPs), *cert. denied*, 444 U.S. 943; Illinois v. Commonwealth Edison Co., 490 F. Supp. 1145 (N.D. Ill. 1980) (operating permit requirement for utility is an emission standard).

22. 42 U.S.C. § 7604(a)(7) (1988).

23. *Gwaltney, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 57 (1987). Although *Gwaltney* was a Clean Water Act case, the Court found the meaning and language relating to present violations to be identical to that used in the Clean Air Act. The Court stated that "the 'alleged to be in violation' language of the citizen suit provisions of the two Acts is not accidental; rather, the two provisions share the common central purpose of permitting citizens to abate pollution when the government cannot or will not command compliance." *Id.* at 62. *See also* Note, *Subject Matter Jurisdiction, Standing and Citizen Suits: The Effect of Gwaltney v. Chesapeake Bay Foundation, Inc.*, 48 MD. L. REV. 403 (1989) [hereinafter Note, *Subject Matter Jurisdiction*] (Congress modeled the Clean Water Act citizen suit provisions after those of the Clean Air Act and the legislative history suggests that Congress intended that the two provisions be comparable despite changes introduced).

24. 42 U.S.C. § 7604(a)(2) (1988).

25. *Compare* NRDC v. New York State Dep't of Envtl. Conservation, 700 F. Supp. 173 (S.D.N.Y. 1988) (the Act imposes a mandatory duty on the Administrator to specify a revision date for an inadequate SIP and this duty is nondiscretionary); *with* Kennecott Copper Corp. v. Costle, 572 F.2d 1349 (9th Cir. 1978) (determination of whether ambient

Generally, the Administrator's nondiscretionary duties are found throughout the provisions of the Clean Air Act.<sup>26</sup> Examples of such nondiscretionary duties include: (1) enforcement of regulations set out in a state implementation plan (SIP); (2) enforcement of limitations contained in an operating permit; (3) enforcement of the procedural requirements embodied in a SIP; and (4) issuance of notice to that state of a violation of its implementation plan.<sup>27</sup> The duty to order a revision of an inadequate SIP is also mandatory, but the Administrator has discretion as to the date of the revision.<sup>28</sup> The term "nondiscretionary" should be given limited application in order to effectuate Congress' intent to limit the number of citizen suits brought against the Administrator and to lessen disruption of the administrative process.<sup>29</sup>

In contrast, discretionary duties, which are not appropriate for citizen suits, are those which the Act does not specifically require. The preliminary determination of whether a duty is discretionary may be decided by a federal court.<sup>30</sup> Discretionary duties include the determination as to whether the ambient air quality standards are being met<sup>31</sup> and the refusal to begin an investigation of SIP violations.<sup>32</sup>

### 3. Construction or modification without a permit

The 1977 Amendments provided citizens with a cause of action: "against any person who proposes to construct or constructs any new or modified major emitting facility without a permit . . . or who is alleged to be in violation of any condition of such permit."<sup>33</sup> This right of citizen action is not dependent on any action or inaction by the Administrator. If a citizen believes that the permit requirements of the Act have been violated, the citizen has the right to immediately file a complaint under section 304(a)(3).<sup>34</sup>

### 4. Relaxed jurisdictional requirements

Congress' justification for granting jurisdiction to district courts relies

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air quality standards are being met is infused with discretion and therefore is an inappropriate subject for citizen suit).

26. See *Mountain States Legal Found. v. Costle*, 630 F.2d 754, 766 (10th Cir. 1980) *cert. denied*, 450 U.S. 1050 (1981); *NRDC v. New York State Dep't of Env'tl. Conservation*, 700 F. Supp. at 177 (Administrator has a nondiscretionary duty to review the SIP under § 110 of the Clean Air Act).

27. *Wisconsin Env'tl. Decade, Inc. v. Wisconsin Power and Light Co.*, 395 F. Supp. 313, 318-19 (W.D. Wis. 1975).

28. *NRDC v. New York State Dep't of Env'tl. Conservation*, 700 F. Supp. at 177.

29. *Kennecott Copper Corp. v. Costle*, 572 F.2d at 1353.

30. See *NRDC v. Train*, 411 F. Supp. 864 (S.D.N.Y.), *aff'd*, 545 F.2d 320 (2d Cir. 1976) (section 7604(a) grants district courts jurisdiction to decide whether a function is mandatory or discretionary).

31. *Kennecott Copper Corp. v. Costle*, 572 F.2d 1349, 1354 (9th Cir. 1978).

32. *City of Seabrook v. Costle*, 659 F.2d 1371, 1374 (5th Cir. 1981).

33. 42 U.S.C. § 7604(a)(3) (1988).

34. *Id.*

more on the specific issues presented than on the citizenship of the parties or the amount in controversy.<sup>35</sup> Under the provisions of section 304(a),<sup>36</sup> the district courts are granted absolute jurisdiction over the three types of cases enumerated in the statute. This relaxation of federal jurisdictional requirements for citizens who bring actions under section 304(a) was deemed essential to endow citizens with a meaningful supervisory role over Clean Air Act violations.<sup>37</sup>

### B. Notice

Section 304(b), which governs the procedural requirement of notice, was adopted by Congress as a means of allowing the polluter, the Administrator or other officials to rectify a violation of the Act.<sup>38</sup> The notice requirements of the citizen suit provisions require that no action may be commenced:

- (1) without sixty days notice to the Administrator, the [s]tate and the alleged violator, or
- (2) if the Administrator or state has commenced and is diligently prosecuting the violation (however, the citizen plaintiff may intervene as a matter of right), or
- (3) prior to sixty days after the citizen plaintiff has given notice to the Administrator.<sup>39</sup>

There are two exceptions to the notice requirement of section 304(b). Notice to the Administrator of his failure to perform a mandatory duty may be disregarded if the alleged EPA default is the granting of an exemption from a national emission standard by the Administrator.<sup>40</sup>

35. *Id.* § 7604(a).

36. The last paragraph of § 304(a) of the 1977 amended version of the Clean Air Act states in pertinent part: "The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be." 42 U.S.C. § 7604(a) (1988).

37. See S. REP. NO. 1196, 91st Cong., 2d Sess. 2, 36-30 (1970); 116 CONG. REC. 32, 902-18 (1970) (comments of Sens. Muskie and Boggs).

38. *Friends of the Earth v. Potomac Elec. Power Co.*, 546 F. Supp. 1357, 1361 (D.D.C. 1982).

39. See 42 U.S.C. § 7604(b) (1988). Section 7604(b) states:

No action may be commenced—

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

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

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

(2) [no action may be commenced] under subsection (a)(2) [action against the Administrator to perform a nondiscretionary duty] of this section prior to 60 days after the plaintiff has given notice of such action to the Administrator.

40. *Id.* § 7412(c)(1)(B) (the Administrator may grant a waiver for up to two years after the effective date of a pollution standard).

Also, if the Administrator has issued an order to the violator to comply with the requirements of an applicable implementation plan, the citizen plaintiff may file his complaint without giving any notice.<sup>41</sup> Under these limited circumstances the citizen plaintiff may bring suit immediately after notification as prescribed by the Administrator.<sup>42</sup>

### C. *Venue and Intervention*

Section 304(c) covers venue and intervention by the Administrator and is consistent with traditional federal venue rules. It requires the citizen suit to be brought only in the judicial district in which the violating source is located.<sup>43</sup>

The intervention provision in section 304(b) allows a citizen to intervene as a matter of right in an action to which he is not already a party.<sup>44</sup> Section 304(c) allows the Administrator to intervene as a matter of right where he is not already a party.<sup>45</sup>

### D. *Attorney's Fees*

Section 304(d) provides for attorney's fees, at the court's discretion, whenever such an award is determined to be appropriate.<sup>46</sup> This section states that, "the court, in issuing any final order in any action brought

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41. *Id.* § 7413(a). This section requires the Administrator to issue an order for the violator to comply with the applicable implementation plan within 30 days of notification of the violation. If the violation is so widespread that it appears that the reason for the violation is the failure of the state to effectively enforce an implementation plan, the state must be notified. If the failure of the state to enforce the plan extends past day 30 of this notification, the Administrator must also notify the public. After giving the public notice of the default by the state, the Administrator may enforce the implementation plan by issuing an order to the state to comply with the plan or by bringing a civil action under § 7413(b). The Administrator may also issue an order under this section when he finds that any person is in violation of new source performance standards, hazard emission standards or energy related standards. The Administrator may enjoin the construction or modification of any major emitting source if appropriate. An order issued pursuant to this section is not effective until the violator has had an opportunity to confer with the Administrator. This affords the violator the same due process considerations as the notice provision of the citizen suit statute. Therefore, the citizen plaintiff may bring an action immediately after the Administrator issues an order or brings a civil action pursuant to this section.

42. *Id.* § 7604(b)

No [citizen] action may be commenced [without notice] except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of section 7412(c)(1)(B) of this title or an order issued by the Administrator pursuant to section 7413(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

43. *See* 42 U.S.C. § 7604(c)(1) (1988). Section 7604(c) requires: "(1) Any action respecting a violation by a stationary source of an emission standard or limitation or an order respecting such standard or limitation may be brought only in the judicial district in which source is located."

44. *Id.* § 7604(b)(1)(B).

45. *Id.* § 7604(c)(2).

46. *Id.* § 7604(d).



pursuant to . . . this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate."<sup>47</sup>

The possibility that the costs of litigation would exceed the amount awarded to a plaintiff in a citizen suit was seen by Congress as having a potentially chilling effect on citizens initiating litigation that may be beneficial to the public. To prevent this, and to encourage citizen suits, Congress authorized courts to award attorney's fees to prevailing plaintiffs.<sup>48</sup>

#### E. *Savings Clause*

The provisions of section 304(e) insure the retention by the citizen plaintiff of any rights that he may have under any statute or at common law. Section (e) states in part: "[n]othing 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 the Act] or to seek any other relief."<sup>49</sup>

The reservation of certain rights to state, local and interstate authorities, also found in this section, reflects Congress' original intent to rely on these levels of government to be collectively responsible for enforcement. The states, as well as any other local or interstate authorities, retain the right to bring actions in state or local courts or to bring administrative actions against any federal governmental unit.<sup>50</sup> This reservation of common law rights to local authorities, represents an accommodation of state and municipal law, which is generally the primary source of air pollution control and abatement standards.<sup>51</sup>

#### F. *Emission Standards or Limitations*

Section 304(f) of the Act, which was added in the 1977 Amendments, defines the phrase "emission standard or limitation."<sup>52</sup> It is given a broad definition under the statute and has been further broadened by

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47. 42 U.S.C. § 7604(d) (1988). This section also grants the court the discretion to require adequate security where a temporary restraining order or preliminary injunction is sought. If the court requires the filing of a bond, the security must be ordered in compliance with FED. R. CIV. P. 62(b).

48. See H.R. REP. NO. 294, 95th Cong., 1st Sess., at 337 (1977), reprinted in 1977 U.S. CODE CONG. & ADMIN. NEWS 1077, 1416 [hereinafter H.R. REP. NO. 294].

49. 42 U.S.C. § 7604(e) (1988).

50. *Id.*

51. See *id.* § 7418(b). Compliance by the federal government in the same manner as nongovernmental entities is governed by § 7418. This section requires federal compliance with all local and interstate laws in the same manner as civilian entities. This compliance is mandatory, despite any immunity for federal agencies under other rules of law. However, no federal employee may be held personally liable for any civil penalty for which he is not otherwise liable. Section 7418(b) provides exemptions for federal entities under the Clean Air Act if the President determines that the violation of the Act is "in the paramount interest of the United States."

52. *Id.* § 7604(f).

judicial interpretation.<sup>53</sup> Generally, this phrase refers to a state threshold or limit on emissions that is legally binding and aimed at attaining or maintaining air quality standards.

Emission standards encompass transportation control measures,<sup>54</sup> procedural provisions of state implementation plans,<sup>55</sup> and operating permit requirements,<sup>56</sup> as well as other limitations designed to reduce pollution.<sup>57</sup> A citizen suit may be brought for a violation of a limit contained in a SIP<sup>58</sup> relating to such transportation control measures, air quality plans, inspection and maintenance programs, or vapor recovery requirements.<sup>59</sup> In order to sustain a citizen suit under the Act, a plaintiff must allege a violation of a specific strategy or commitment in the SIP and describe, with particularity, how the compliance is deficient.<sup>60</sup>

### G. *Review of Final Agency Actions Under Section 307*

In addition to the section 304 rights, which provide for federal district court actions, section 307(b)(1) establishes a separate right of judicial review of the Administrator's final actions.<sup>61</sup> Section 307 enumerates the types of actions suitable for review by an appellate court.<sup>62</sup> There is also a catch-all provision that permits a citizen to petition for review of "any other final action of the Administrator under this chapter."<sup>63</sup> The term "other final action" has been construed to include partial approval or

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53. See *League to Save Lake Tahoe, Inc. v. Trounday*, 598 F.2d 1164, 1173 (9th Cir.) (emission standards language in § 304 of the Act includes limits on the construction size of a source facility, conditions in the application for registration approval and permitting procedure), *cert. denied*, 444 U.S. 943 (1979).

54. *Id.* at 1170.

55. See *Kentucky ex rel. Hancock v. Ruckelshaus*, 497 F.2d 1172, 1176 (6th Cir. 1974), *aff'd sub nom. Hancock v. Train*, 426 U.S. 167 (1976).

56. See *Illinois v. Commonwealth Edison Co.*, 490 F. Supp. 1145, 1150 (N.D. Ill. 1980).

57. See *Friends of the Earth v. Potomac Elec. Power Co.*, 419 F. Supp. 528, 533-34 (D.D.C. 1976) (visible emission limitations designed to reduce pollution more than primary or secondary air quality standards may be contained in the state implementation plan, and such limitations are enforceable by way of citizen suits); *Atlantic Terminal Urban Renewal Area Coalition v. New York City Dep't Env'tl. Protection*, 697 F. Supp. 157, 160 (S.D.N.Y. 1988) (the provision in the state implementation plan, in which the city committed to implement mitigating measures if the environmental impact statement for the project proposal identified a violation of carbon monoxide standard, was "an emission standard or limitation" which could form the basis for a citizen suit); *Wilder v. Thomas*, 659 F. Supp. 1500, 1505 (S.D.N.Y. 1987) (a citizen plaintiff may bring a citizen action for violation of an emission standard or limitation if a condition or requirement relating to transportation control measures, air quality maintenance plans, vehicle inspection programs, or vapor recovery requirements, is breached), *aff'd*, 854 F.2d 605 (2d Cir. 1988), *cert. denied*, 489 U.S. 1053 (1989).

58. 42 U.S.C. § 7410 (1988).

59. *Wilder v. Thomas*, 659 F. Supp. at 1505.

60. *Id.* See also *League to Save Lake Tahoe, Inc. v. Trounday*, 598 F.2d 1164, 1173-74 (9th Cir.), *cert. denied*, 444 U.S. 943 (1979).

61. See 42 U.S.C. § 7607(b)(1) (1988).

62. *Id.*

63. *Id.*

disapproval of a SIP,<sup>64</sup> reclassification of an area as a nonattainment area,<sup>65</sup> deferral of a mandatory action,<sup>66</sup> and an order directing the owner of a facility under construction to cease work on the project.<sup>67</sup>

Section 307(b) allows for direct petition to an appellate court for a review of the Administrator's "final action." In contrast, citizen suits dealing with the violations of an emission standard, or unreasonable delay by the Administrator, or the construction or operation in violation of a permit, must be brought before the district courts.

The venue of cases for judicial review under section 307(b) is divided.<sup>68</sup> If laws are of national scope or effect, then the appropriate forum for the Administrator's final action is the appellate court in the District of Columbia Circuit Court.<sup>69</sup> Final Agency decisions affecting only regional or local areas are reviewable in the circuit court that has local jurisdiction.<sup>70</sup>

## II. PROBLEMS OF CITIZEN ENFORCEMENT AFTER 1977

Citizen suit provisions in the 1977 Amendments to the Act were designed to enable a citizen plaintiff to bolster the government enforcement effort.<sup>71</sup> Despite the optimistic goal of the legislation, citizen litigants in practice, frequently found themselves shut out of court.<sup>72</sup> Courts were often presented with repetitive violations that were purely retrospective in nature and, therefore, not within the EPA jurisdiction conferred by section 304. Also, the limited relief available to citizens was seldom sufficient incentive to expend the large amounts of time, energy and money necessary to prosecute violations.

In addition, the citizen suit provisions proved to be ambiguous and, therefore, subject to judicial interpretation. Such judicial interpretation has often resulted in decisions that limit citizen action and recovery.<sup>73</sup> In particular, the various judicial applications of section 304 have compli-

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64. *Bethlehem Steel Corp. v. EPA*, 782 F.2d 645, 652 (7th Cir. 1986).

65. *Id.*

66. *See Maine v. Thomas*, 690 F. Supp. 1106, 1111 (D. Me. 1988) (EPA's publicly announced decision to defer action becomes a final action for the purposes of review under the Clean Air Act), *aff'd* 874 F.2d 883 (1st Cir. 1989). *But see City of Seabrook v. Costle*, 659 F.2d 1371, 1373 (5th Cir. 1981) (EPA may defer decision to begin investigation of alleged Clean Air Act violations).

67. *Solar Turbines, Inc. v. Seif*, 688 F. Supp. 1012, 1013-14 (M.D. Pa. 1988), *aff'd* 879 F.2d 1073 (3d Cir. 1989).

68. 42 U.S.C. § 7607(b)(1) (1988).

69. *Id.*

70. *Id.*

71. *See id.* § 7604.

72. *Gwaltney, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49 (1987). The prospective nature of jurisdiction under the Clean Air Act immunized polluters who violated the act only once or only in the past, no matter how serious the violation. This jurisdictional loophole protected serious first-time and past violations of the Act from citizen suits, thereby frustrating the clean air goals sought through citizen enforcement of the Act.

73. *See CITIZEN'S SUITS AND ATTORNEY'S FEES*, 317 ALI-ABA 829 (1988).

cated the requirements of citizen standing.<sup>74</sup> Judicial debate over available remedies under section 304 and the appropriate award of attorney's fees further frustrated citizen prosecutions.

### A. Jurisdictional Issues

Court-derived tests of constitutional and statutory standing under the citizen provisions disclosed what was arguably the most pressing defect remaining in the citizen enforcement machinery after the 1977 Amendments — the lack of jurisdiction over past violations.<sup>75</sup> Fundamentally, the jurisdiction of the federal courts is defined by article III of the United States Constitution. The jurisdictional tenets drawn by the courts from provisions in the Constitution profoundly affect the authority of the courts in cases brought under section 304 of the Clean Air Act.

#### 1. Article III Issues

The question of proper federal jurisdiction in any case begins with an examination of whether the cause of action meets the constitutional requirements of article III. Pursuant to article III, the judicial power of the federal courts is restricted to cases and controversies.<sup>76</sup> Embodied in the words "cases or controversies" are the doctrines of justiciability<sup>77</sup> and standing.<sup>78</sup>

With regard to the article III justiciability requirement, the Supreme Court has interpreted section 304(a) to prohibit a court from deciding cases solely on "wholly past violations" on the grounds that such a case would be moot.<sup>79</sup> Consistent with this interpretation, a citizen bringing suit was required to allege in good faith an ongoing noncompliance with

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74. *Id.*

75. *Cf. Gwaltney, Ltd. v. Chesapeake Bay Found.*, 484 U.S. at 62-63. This shortcoming in the Act was the battleground in the *Gwaltney* case. The case highlights this deficiency in the citizen enforcement arsenal under the Clean Air Act.

76. U.S. CONST. art. III, § 2, cl. 1.

77. Justiciability means that the issues cannot be moot, the opinions cannot be advisory and the court cannot decide political questions. *Flast v. Cohen*, 392 U.S. 83, 95 (1968). The principle of mootness has been particularly important in citizen suit litigation because the pre-1990 Amendments conferred jurisdiction over citizen suits only if the violation was current or intermittent. *Gardeski v. Colonial Sand & Stone Co.*, 501 F. Supp. 1159, 1161 (S.D.N.Y. 1980). In a minor expansion of this rule, it has been held that even if a violation did not exist as of the commencement of the suit, a claim would exist if it could be shown that the violation had not ended, but was merely dormant or intermittent and therefore likely to recur. *Id.*

78. *Valley Forge Christian College v. Americans United, Inc.*, 454 U.S. 464 (1982).

79. *Cf. Gwaltney, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 62-63 (1987). *Gwaltney* is a Clean Water Act case, but the language which the Court analyzes is identical to the language in the Clean Air Act. The Supreme Court in *Gwaltney* notes that the Clean Water Act affords a remedy only where the violation is presently occurring. The *Gwaltney* case also permits jurisdiction over intermittent or sporadic violations until a time when there is no real likelihood of repetition. In Clean Water Act cases subsequent to *Gwaltney*, courts have allowed the plaintiffs' cases to withstand the defenses of mootness where defendants remain legally empowered to recommence the challenged discharges in the future. *See Gardeski v. Colonial Sand & Stone Co.*, 501 F. Supp. at 1161.

the Act.<sup>80</sup> If the violation occurred in the past or the defendant could prove absolutely that the violation could not be expected to recur, the action would be dismissed as moot.<sup>81</sup>

The second major issue stemming from article III is standing. The Supreme Court has construed the standing doctrine as encompassing three distinct elements.<sup>82</sup> First, the party seeking review must have suffered some real or threatened injury as a result of the challenged action (injury-in-fact). Second, the injury must be caused by the challenged action (causation). Finally, the injury must be capable of redress by a court decision.<sup>83</sup>

In decisions dealing with citizen standing under the Clean Air Act, injury-in-fact has proved the most elusive of the three parameters. Some courts have concluded that no injury-in-fact is required under section 304(a).<sup>84</sup> Other courts have held that some showing relating to injury-in-fact is required for the citizen's claim to withstand a motion for dismissal, but that a mere increased risk of injury is sufficient.<sup>85</sup>

The Supreme Court held in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, that the injury-in-fact need not be great and that even "an identifiable trifle" would be sufficient to substantiate standing.<sup>86</sup> However, in *Lujan v. National Wildlife Federation*,<sup>87</sup>

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80. *Gwaltney, Ltd. v. Chesapeake Bay Found.*, 484 U.S. at 65-66 (holding that Congress intended good faith allegations grounded in fact to suffice for jurisdictional purposes).

81. *Id.* In a sense, the Supreme Court's decision in *Gwaltney* relegated claims concerning wholly past violations to the status not of moot claims, but of nonclaims. As a matter of statutory interpretation, a wholly past violation did not sound within the Act at all.

82. *Valley Forge Christian College*, 454 U.S. at 472.

83. *Id.*

84. See *Friends of the Earth v. Carey*, 535 F.2d 165, 172-73 (2d Cir. 1976) (while injury-in-fact is not required under the citizen suit provisions of the Clean Air Act, the relevant issue is whether the suit is justiciable), *cert. denied* 434 U.S. 902 (1977); *Metropolitan Wash. Coalition for Clean Air v. District of Columbia*, 511 F.2d 809, 814 (D.C. Cir. 1975) (a citizen organization has standing to litigate the claim of a violation of the Act without alleging "injury-in-fact" where Congress has determined that "any citizen" was a proper party to bring suit under the citizen suit provisions of the Clean Air Act). Arguably, proof of injury-in-fact should not affect the standing of citizen plaintiffs because they should be treated as if they were the Attorney General. Congress' intent was to encourage citizens to act as private attorneys general for the purpose of enforcing the Act. This is confirmed by the statute's legislative history as well as by the abandonment of traditional jurisdictional barriers. CITIZEN SUITS AND ATTORNEY'S FEES, *supra* note 73. It is well established that when the Attorney General brings a suit against a polluter, proof of injury-in-fact is not an issue. See Note, *Subject Matter Jurisdiction*, *supra* note 23 at 403.

85. *Wilderness Society v. Griles*, 824 F.2d 4, 12 (D.C. Cir. 1987).

86. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973) (quoting with approval Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 613 (1968)). SCRAP involves the National Environmental Policy Act of 1969 (NEPA) not the Clean Air Act. However, the injury-in-fact discussion in SCRAP is relevant for the purposes of the Clean Air Act because the citizen plaintiffs in SCRAP alleged the same type of injury frequently asserted by plaintiffs under the clean air laws. Specifically, the citizen plaintiffs in SCRAP brought suit under the

the Court clarified its earlier position by stating that the "identifiable trifle" standard was applicable only to the particular facts of the *SCRAP* case, and that a more substantial degree of injury-in-fact would generally be required for standing.<sup>88</sup> The Court also stated that the *SCRAP* standard was an "expansive expression [of injury-in-fact] . . . and has never since been emulated by this Court."<sup>89</sup> Although the majority<sup>90</sup> in *Lujan* intended to limit the former liberal interpretation of injury-in-fact for the purposes of section 304(a), the Court did not specify the type of injury sufficient to constitute standing. The Supreme Court instead left lower courts with an amorphous standard that invites varying interpretations.

In addition to justiciability and standing, jurisdiction by a federal court depends on several judicially created prudential or statutory considerations. These may prevent a court from exercising jurisdiction despite a plaintiff's showing of sufficient justiciability and standing in the article III sense.<sup>91</sup>

## 2. Prudential Considerations

The current prevailing analysis concerning standing encompasses two components: constitutional and prudential. The District of Columbia Circuit Court in *Hazardous Waste Treatment Council v. EPA*<sup>92</sup> held that:

For constitutional standing, a plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.<sup>93</sup> For prudential standing, a plaintiff usually must show, in addition, that "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute . . . in question."<sup>94</sup> Under the zone of interest test, the "essential inquiry is whether Congress intended for [a particular] class [of plaintiffs] to be relied upon to challenge agency disregard of the law."<sup>95</sup>

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citizen action provisions of NEPA for the harm to recreational areas due to the use of nonrecyclable goods by railroads. The "aesthetic well-being and quality of life" arguments used by the plaintiffs in *SCRAP* were found substantial enough to constitute injury-in-fact under the NEPA statute.

87. 110 S. Ct. 3177 (1990).

88. *Id.* at 3189.

89. *Id.*

90. Justice Scalia delivered the opinion in *Lujan* in which Chief Justice Rehnquist, Justices White, O'Connor, and Kennedy joined. Justice Blackmun filed a dissenting opinion in which Justices Brennan, Marshall and Stevens joined.

91. See Wardinski, *The Doctrine of Standing: Barriers to Judicial Review in the D.C. Circuit*, 5 NAT. RESOURCES & ENV'T 7 (1990).

92. *Hazardous Waste Treatment Council v. EPA*, 861 F.2d 277, 281 (D.C. Cir. 1988) [hereinafter *HWTC II*], *cert. denied*, 490 U.S. 1106 (1989).

93. *Id.* at 281-82 (citing *Valley Forge Christian College v. Americans United, Inc.*, 454 U.S. 464, 472 (1982)).

94. *Id.* at 282 (quoting *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970)).

95. *Id.* (quoting *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 389 (1987)). See generally *Valley Forge Christian College v. Americans United, Inc.*, 454 U.S. 464 (1982).

Thus, not only must the constitutional standing factors be considered, but the court must also engage in a review of the intent of Congress to confer standing to a particular plaintiff under the statute involved. However, the Supreme Court has made it clear that the "zone of interests" test should not be used in all cases. Even when it is appropriately employed, different interpretations may be required depending upon the context of the case.<sup>96</sup>

These prudential criteria will be of critical importance in two contexts of citizen enforcement under the Act. First, in suits brought by citizens under section 307(b) of the Clean Air Act, for review of final Agency action, prudential standing will determine whether the case gets into court. Second, in suits under section 304, a "zone of interest" evaluation will likely have value as courts determine whether the citizen is a plaintiff that Congress sought to protect.

The District of Columbia Circuit Court held that citizens seeking review of final Agency action must show that the statute creates a presumption of standing in their favor<sup>97</sup> or that the plaintiff is a particularly suitable challenger of administrative neglect, and therefore, Congress would have intended the plaintiff to have standing.<sup>98</sup>

In *HWTC II*,<sup>99</sup> the D.C. Circuit struggled with the test of standing that demands less than a showing of explicit congressional intent to benefit, but more than a marginal relationship to the statutory purpose in cases brought forward for review of Agency action. The court recognized that to give standing to any plaintiff who is merely disadvantaged by the EPA's action or whose interests are marginally related to the purpose of the statute would destroy the requirement of prudential standing; because any party with constitutional standing would, therefore, be in a position to bring suit. Ultimately, the D.C. Circuit Court decided that the plaintiffs in *HWTC II* had standing to challenge EPA rules because this challenge advanced the goal of the relevant statute to regulate pollution from improper disposal techniques. However, the court also found that the plaintiffs, who had brought actions for competitive losses under the same solid waste disposal law, had no standing to sue because such

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96. *Clarke v. Securities Indus. Ass'n*, 479 U.S. at 400 n.16. "While inquiries into reviewability or prudential standing in other contexts may bear some resemblance to a 'zone of interest' inquiry under the APA [Administrative Procedure Act, 5 U.S.C. § 702], it is not a test of universal application."

97. See *HWTC II*, 861 F.2d 277, 283 (D.C. Cir. 1988), *cert. denied* 490 U.S. 1106 (1989) (if it were Congress' intent to benefit a particular class of plaintiffs, there would be a presumption of standing). The *HWTC II* case was decided pursuant to the Administrative Procedure Act, sections 701-06, which permits appellate review of final EPA actions. 5 U.S.C. §§ 701-06 (1988). The action was not brought under the Clean Air Act, but instead under the Solid Waste Disposal Act which authorizes review of final agency rulings. 42 U.S.C. § 6976(a)(1) (1988). The Clean Air Act, in § 307, explicitly incorporates the right of review under the APA into the Act itself. See 42 U.S.C. § 7607 (1988).

98. *HWTC II*, 861 F.2d at 283.

99. 861 F.2d at 277.

losses were not within the zone of interests protected by the statute.<sup>100</sup>

In regard to section 304 suits challenging a decision of the EPA not to prosecute, an argument can be made that prudential standing should be interpreted broadly. Supreme Court decisions under various federal statutes, other than the Clean Air Act, indicate that where the potential plaintiff is the subject of the underlying statute, prudential considerations should not bar standing.<sup>101</sup> Although it is recognized that the prudential limits set by the Supreme Court must be acknowledged in citizen suits under the Clean Air Act,<sup>102</sup> it is obvious that these limitations should not be an obstacle where the Act contemplates that citizens are the proper plaintiffs in suits concerning Agency inaction.<sup>103</sup>

The Supreme Court has recognized that Congress can eliminate prudential limitations by granting an express right of action in a statute, to plaintiffs who would otherwise be barred by prudential rules.<sup>104</sup> The Court has held that so long as Congress has not manifested an intent to preclude review, the prudential considerations test is satisfied if the plaintiff's interests bear a "plausible relationship" to the goals of the relevant statute.<sup>105</sup> Despite this relaxation of prudential requirements by the Supreme Court, several lower courts continue to impose significant prudential barriers on otherwise sufficient citizen claims under the Clean Air Act.<sup>106</sup>

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100. *Id.* at 280.

101. *See e.g.*, *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399-400 (1987) (the zone of interests "test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff").

102. *See HWTC II*, 861 F.2d 277, 282 (D.C. Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989).

103. *See Clarke v. Securities Indus. Ass'n*, 479 U.S. at 399-403 (where Congress intended for a particular class of plaintiffs to be relied upon to challenge the Administrator's or the Agency's disregard of the law, the zone of interests test for prudential standing is not necessary in determining a court's right to review because Congress has intended that these plaintiffs have an automatic cause of action); *Cf. Wardinski, The Doctrine of Standing: Barriers to Review in the D.C. Circuit*, 5 NAT. RESOURCES & ENV'T 7, 43 (1990) (zone of interests test was not intended by Congress to be especially demanding and does not require an express indication of congressional purpose to benefit the plaintiff).

104. *See Clarke v. Securities Indus. Ass'n*, 479 U.S. at 399 (where the potential plaintiff is the subject of the relevant statute, the "zone of interests" test cannot deny the right to review).

105. *Id.* at 403 (where plaintiff asserts a plausible relationship to policies underlying the statute in question, plaintiff has standing to request review of that statute).

106. *See HWTC II*, 861 F.2d at 283. Despite the Supreme Court's admonitions in *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399-403 (1987), which cautioned lower courts against applying substantial prudential barriers to review of agency action, the District of Columbia Circuit Court in *HWTC II* dismissed, as inadequate to fulfill the "zone of interests" test, damage to the competitive and commercial interests of an organizational plaintiff. However, the statute in question did not specifically exclude this type of plaintiff from seeking review. Nonetheless, the D.C. Circuit found that *HWTC II* did not meet the precedential, or statutory, requirements of standing because "in the absence of either some explicit evidence of an intent to benefit such firms, or some reason to believe that such firms, similar to *HWTC II*, would be unusually suitable champions of



In summary, the Clean Air Act, as amended in 1977, fell short of its goal of providing citizens with a feasible enforcement role because of the prospective nature of its remedies and its sensitivity to judicial interpretation on the issue of standing.

### B. *Insufficiency of Remedies*

The Clean Air Act, as amended through 1977, provided the citizen plaintiff with a means of enforcing the standards set out by the Act and recovering the costs of this enforcement.<sup>107</sup> The Act also enabled the plaintiff to compel the Administrator to perform a mandatory duty. However, since the original remedies were purely injunctive,<sup>108</sup> the Act turned out to be far less effective than anticipated. Indeed, the unavailability of civil penalties as a deterrent against future violations weakened the citizen enforcement weapon. Civil penalties were omitted as a remedy under section 304 even though state law often permitted such awards for clean air violations.<sup>109</sup>

### C. *Attorney's Fees*

Section 304(d) allows the court to "award the costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate."<sup>110</sup> Pursuant to this section, the Clean Air Act expressly permits citizens to seek review of EPA promulgated air quality and emissions standards, and to be reimbursed for the expense of discharging their supervisory role.<sup>111</sup>

In 1977, the Supreme Court in *Ruckelshaus v. Sierra Club*<sup>112</sup> held that the primary purpose of the fee awards provision in section 304 was to discourage frivolous litigation.<sup>113</sup> This interpretation signaled that the

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Congress' ultimate goals, no one would suppose them to have standing to attack regulatory laxity."

107. See 42 U.S.C. § 7604(a), (d) (1988); Note, *Attorney's Fees and Ruckelshaus v. Sierra Club: Discouraging Citizens from Challenging Administrative Agency Decisions*, 33 AM. U. L. REV. 775, 783 (1984) [hereinafter Note, *Attorney's Fees and Ruckelshaus*] (Congress tried to encourage beneficial litigation by authorizing courts to award attorney's fees in several citizen suit statutes).

108. See *Gwaltney, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 62 (1987) (remedies available pursuant to the citizen suit provisions authorized by the Clean Air Act are "wholly injunctive in nature").

109. *Illinois v. Commonwealth Edison Co.*, 490 F. Supp. 1145, 1151 (N.D. Ill. 1980).

110. 42 U.S.C. § 7604(d) (1988). Section 7604(d) allows either party to collect the "costs of litigation." The costs recoverable under this section include attorney's fees and expert witness fees. Other fees that may be awarded are listed in 28 U.S.C. § 1920. *Id.*

111. Note, *Attorney's Fees and Ruckelshaus*, *supra* note 107, at 776.

112. 463 U.S. 680 (1983).

113. *Id.* at 692-93. The opinion in *Ruckelshaus* states that the central purpose of § 304(d), (codified at 42 U.S.C. § 7604(d)), which permits the award of fees, was to establish a barrier to potentially meritless suits that Congress feared would follow the authorization of citizen suits under the Clean Air Act. Despite the Court's opinion, the Senate Committee intended to discourage harassing suits by permitting fee awards to a defendant who could show that the suit was brought in bad faith. There is no evidence from the

fee awards section was a double-edged sword—encouraging citizen litigation, but also threatening a potential plaintiff with a surcharge in the form of recompense of an adversary's costs if it was determined that the plaintiff's suit was not brought in good faith.

The *Ruckelshaus* case is also noteworthy for setting a minimum eligibility standard for fee awards to a partially successful plaintiff. The opinion limits the discretion of the courts in awarding fees by forbidding such awards to parties who achieve only slight or purely procedural successes.<sup>114</sup> The Supreme Court's decision in *Ruckelshaus* put an end to the controversy over whether fees could be awarded to an unsuccessful plaintiff if the litigation nonetheless substantially contributed to furthering the Act's objectives by stating that a party must achieve some success on the merits to be eligible to receive attorney's fees.<sup>115</sup>

Having decided the "partial success" issue in *Ruckelshaus*, the Supreme Court left significant fee issues unresolved. There is no clear rule, for example, for collection of litigation costs by a plaintiff if the claim is settled prior to a final decision by the court.<sup>116</sup> Nor is it clear whether fees may be awarded when the citizen plaintiff intervenes in an action that the Administrator is "diligently prosecuting."<sup>117</sup> These issues are likely to leave potential plaintiffs in a quandary as to the possibility of settling a claim or intervening in a suit that others have already begun to prosecute.

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Senate report that the "primary" purpose of the attorney's fee clause in the Clean Air Act was to discourage such suits. Instead, the House and Senate appear to have been in consensus that the primary purpose of the fee shifting provision was to encourage citizen suits where the Administrator had failed to act. 116 CONG. REC. S32,925-27 (1970) (statements of Sens. Hruska and Muskie) (Senate debate on statutory authorization of § 304); S. REP. NO. 1196, 91st Cong., 2d. Sess. 38 (1970) (fee awards should discourage abuse of citizen suit provision).

114. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 688 n.9 (1983).

115. *Id.* at 691; *Sierra Club v. Gorsuch*, 672 F.2d 33, 39 (D.C. Cir. 1982) (*Gorsuch* holds that although a party did not substantially prevail on the merits of its case, it may still be awarded fees if the action contributed to the goals of the Clean Air Act), *rev'd sub nom.* *Ruckelshaus v. Sierra Club* 463 U.S. 680 (1983).

116. See Dawson, *Lawyers and Involuntary Clients: Attorney's Fees From Funds*, 87 HARV. L. REV. 1597, 1626 n.97 (1974); Note, *Attorney's Fees and Ruckelshaus*, *supra* note 103, at 785. There are three exceptions to the American Rule which mandates that each party must pay its own fees: (1) bad faith, (2) private attorney general, (3) the common fund. In the common fund exception, success is not necessary. Settlement without a final judgment is enough. Similarly, where a citizen plaintiff acts as a private attorney general, any settlement which advances the goals of the Act should be eligible for an award of the fees incurred by the citizen.

117. 42 U.S.C. § 7604(b)(7)(B) (1988) (intervention, as a matter of right, is permitted by "any person"). See *United States v. National Steel Corp.*, 782 F.2d 62 (6th Cir. 1986) (citizen plaintiffs may be awarded fees only if the state or Administrator is not diligently prosecuting the claim). See generally Baughman v. Bradford Coal Co., 592 F.2d 215 (3d Cir.) (explanation of what constitutes "diligent prosecution" for the purposes of a citizen suit under the Act), *cert. denied*, 441 U.S. 961 (1979); Student Public Interest Research Group v. Fritzsche Dodge & Olcott, 579 F. Supp. 1528 (D.N.J. 1984) (discussion of when a citizen's suit is preempted by state or agency "diligent prosecution"), *aff'd*, 759 F.2d 1131 (3d Cir. 1985).

#### D. Other Problems of Citizen Enforcement

In addition to the issues discussed above, potential citizen plaintiffs also have a maze of other, less complex but nonetheless serious, obstacles to overcome when contemplating a suit under section 304. These issues are often important enough to keep citizen cases out of court unless rectified before the defendant can move for dismissal.

##### 1. The jurisdictional dichotomy between the district and appellate courts

The 1977 Amendments left room for much jurisdictional uncertainty between the district and appellate courts under sections 304 and 307. District courts were given jurisdiction over suits brought under section 304(a),<sup>118</sup> and appellate courts were granted judicial review over final agency decisions in section 307.<sup>119</sup> This jurisdictional dichotomy has created a puzzling allocation of the suits brought under the Clean Air Act.<sup>120</sup>

In *Maine v. Thomas*,<sup>121</sup> citizen organizations and states filed suit under section 304(a)(2) alleging that the Administrator's promise of future action on the issue of regional haze amounted to failure to perform a non-discretionary duty.<sup>122</sup> The plaintiff asserted that the promise was not a "final action" under section 307(b), and that appellate jurisdiction under section 307(b) was improper.

The district court's reception to the plaintiff's jurisdictional argument can best be described as frosty. The district court dismissed the case on the grounds that any EPA announcement to defer action, or not to act at all, results in a final action for the purposes of review under section 307(b), and that the district court did not have jurisdiction to hear the case.<sup>123</sup>

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118. Section 7604(a) grants jurisdiction to the district courts over actions to: (1) enforce an emission standard, limitation or order issued by the Administrator, (2) compel the Administrator to perform a nondiscretionary duty, (3) to stop the construction or modification of a major emitting facility. 42 U.S.C. § 7604(a)(1)-(3) (1988).

119. Section 7607(b)(1) grants the appropriate circuit court jurisdiction over review of final agency action. *Id.* § 7607(b)(1).

120. See *Maine v. Thomas*, 874 F.2d 883, 884 (1st Cir. 1989); *Solar Turbines, Inc. v. Seif*, 897 F.2d 1073 (3d Cir. 1989) (description of the allocation of Clean Air Act cases between the district court and the court of appeals); *Greater Detroit Resource Recovery v. EPA*, 916 F.2d 317 (6th Cir. 1990) (description of the court of appeals jurisdiction compared with district court jurisdiction under the Clean Air Act). Compare *Natural Resources Defense Council v. EPA*, 902 F.2d 962 (D.C. Cir. 1990) (court of appeals has jurisdiction over suits to compel the Administrator to revise NAAQS), with *Environmental Defense Fund v. Thomas*, 870 F.2d 892, 897 (2d Cir. 1989) (the federal district courts have jurisdiction to compel the Administrator to take action to revise NAAQS or to decline to revise these standards), *cert. denied*, 110 S. Ct. 537 (1989).

121. *Maine v. Thomas*, 874 F.2d at 883.

122. *Id.* at 886.

123. *Maine v. Thomas*, 690 F. Supp. 1106, 1110-12 (D. Me. 1988), *aff'd* 874 F.2d 883 (1st Cir. 1989).

The plaintiffs in *Thomas* appealed. The First Circuit agreed that the district court did not have jurisdiction over the suit, but for different reasons. The circuit court held that dismissal was proper because the petition for review of the Agency's final decision had not been filed within sixty days as mandated by the statute.<sup>124</sup> But the First Circuit rejected the plaintiff's argument that the Agency had failed to fulfill its mandatory duty of fighting regional pollution because, said the court, by installing a future plan for air quality maintenance, the Agency had indeed satisfied its nondiscretionary duty under the Act.<sup>125</sup> The circuit court stated that, although the Administrator's action was "entirely promissory with respect to regional haze, [it] nevertheless amounted to a 'final action taken' within the ambit of [section 307(b) and] although there is a route whereby citizens may require EPA to act on self-imposed duties . . . that route does not pass through the district court."<sup>126</sup>

Part of the difficulty in allocating these suits springs from the Administrator's authority to defer nondiscretionary decisions. Early cases under the citizen suits provisions held that the Administrator could postpone such decisions without having to contend with a collateral citizen suit in the district courts under section 304.<sup>127</sup> The citizen plaintiff had no recourse in the district court for a review of a postponement decision, but instead had to wait until the Administrator made a conclusive decision.<sup>128</sup> Only after the final decision was made could the citizen plaintiff seek judicial review in the appropriate appellate court. The consequence of these deferred decisions was that the polluter could violate clean air standards during the postponement period without fear of prosecution.<sup>129</sup>

## 2. Interstate Pollution

The 1977 Act also failed to provide out-of-state citizens with a remedy for violations originating within another state. The Clean Air Act originally did not regulate stationary sources of pollution; it simply designated certain air pollutants dangerous to public health. The Act then established national emission standards (the NAAQS) for those pollutants and charged state governments with the responsibility of implementing regulations that complied with federal standards.<sup>130</sup>

The Clean Air Act gives the states the freedom to adopt air quality standards more stringent than those required by federal law.<sup>131</sup> Nothing in the Act, however, suggests that a state must respect a neighboring air

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124. *Maine v. Thomas*, 874 F.2d 883, 887 (1st Cir. 1989).

125. *Id.*

126. *Id.*

127. *Delaware Citizens for Clean Air, Inc. v. Stauffer Chem. Co.*, 367 F. Supp. 1040, 1044 (D. Del. 1973), *aff'd mem.* 510 F.2d 969 (3d Cir. 1975).

128. *Id.*

129. *Id.*

130. 42 U.S.C. § 7412 (1988).

131. 42 U.S.C. § 7416 (1988).

quality standard if the standard is more stringent than that required by federal law.<sup>132</sup> The 1977 Amendments seem to have been carefully drafted to preclude that interpretation.<sup>133</sup>

The Second Circuit decided that a neighboring state may only petition for review of EPA action in another state, if the Agency action fails to meet the minimum federal requirements established by the Act.<sup>134</sup> The Second Circuit refused to overturn any action that complied with federal—but not neighboring state—standards.<sup>135</sup>

The Supreme Court strengthened the Second Circuit position by holding in *International Paper Co. v. Ouelette*<sup>136</sup> that the federal Clean Air Act preempts the common law of the affected state to the extent that common law imposes liability on a source of pollution located in another state. As a result of these findings, citizens have largely lost the power to control serious, but federally acceptable, levels of pollution emanating from out-of-state sources.<sup>137</sup> This limitation on interstate pollution suits seriously undermines the Clean Air Act's goal of protecting regional air quality. The problem is even more serious when the Administrator in one state exempts a major emitting facility from compliance with his state's SIP, even though this exemption has serious repercussions for neighboring states.<sup>138</sup>

### 3. Statute of Limitations

The absence of a specific statute of limitations in the 1977 Act has also created uncertainty in citizen suits by leaving the issue to the states, which have instituted different policies. In New Jersey, for example, the court has consistently rejected attempts to enforce the Clean Air Act under the state's two year statute of limitations for "any forfeiture upon any penal statute . . . when the forfeiture is or shall be limited to the state of New Jersey."<sup>139</sup> In other states, however, the courts have permitted

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132. 42 U.S.C. § 7410(a)(3)(A) (1988).

133. See *Connecticut v. EPA*, 656 F.2d 902 (2d Cir. 1981).

134. *Id.*

135. *Id.* at 909. The Second Circuit's opinion reads in relevant part, "[n]othing in the Act, however, indicates that a state must respect its neighbor's air quality standards (or design its SIP to avoid interference therewith) if those standards are more stringent than the requirements of federal law." *Id.*

136. See *International Paper Co. v. Ouelette*, 479 U.S. 481, 494 (1987) (the opinion concludes that "the Clean Water Act [like the Clean Air Act] precludes a court from applying the law of an affected [s]tate against an out-of-state source").

137. See generally, Note, *Federal Preemption of State Law Remedies*, 49 LA. L. REV. 193 (1988) [hereinafter Note, *Federal Preemption*].

138. See *Connecticut v. EPA*, 656 F.2d at 902, 904 (2d Cir. 1981) (New Jersey and Connecticut cited, in vain, the "strong, undesirable impact on air quality within their . . . state boundaries" that would result from New York's approval of its state SIP which authorized a "special limitation" for a "test burn" that allowed the use of the fuel oil with maximum sulfur content).

139. See *Student Public Interest Research Group v. Tenneco Polymers*, 602 F. Supp. 1394, 1398-99 (D.N.J. 1985) [hereinafter SPIRG I]; *Student Public Interest Research Group v. Monsanto Co.*, 600 F. Supp. 1474, 1477 (D.N.J. 1985) [hereinafter SPIRG II]

application of a state statute of limitations for citizen suits based on state regulations or comparable actions brought by the government under the Clean Air Act.<sup>140</sup> It is critical for the potential citizen plaintiff to determine the applicable statute of limitations in his district. Failure to do so could result in a procedural dismissal before the court ever reaches the merits of the case.

### III. THE 1990 AMENDMENTS TO THE CLEAN AIR ACT

The new citizen suit amendments, that comprise a small piece of this landmark legislation, like the preexisting provisions, are designed to promote enforcement through the initiatives of private citizens. The 1990 Amendments strengthened the right of a citizen to act when the government declines to pursue a violation.<sup>141</sup>

The 1990 Amendments include five major changes concerning citizen suits. Section 707(g) amends section 304(a) of the Act to include past violations.<sup>142</sup> Second, section 304(a) is amended by section 707(a) to permit courts to award appropriate civil penalties.<sup>143</sup> The third major change was the addition to section 304(a) of language granting citizens

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*aff'd* 891 F.2d 283 (3d Cir. 1989). *See also*, *Sierra Club v. Simkins Indus., Inc.*, 617 F. Supp. 1120, 1124-25 (D. Md. 1985), *aff'd*, 847 F. 2d 1109 (4th Cir. 1988), *cert. denied* 491 U.S. 904 (1989).

140. *See* Connecticut Fund for the Env't v. Job Plating Co., 623 F. Supp. 207 (D. Conn. 1985) (because a citizen suit brought under the Clean Air Act is closely analogous to an action brought under the Act on behalf of the United States, the five year statute of limitations is applicable).

141. 136 CONG. REC. H12,896 (daily ed. Oct. 26, 1990) (comments of Collins, author of the citizen suits provisions in the 1990 Clean Air Act, concerning the objective of the provisions).

142. *Compare* 42 U.S.C. § 7604(a)(1), (3) with HOUSE COMM. ON CONFERENCE, CLEAN AIR ACT AMENDMENTS OF 1990 CONFERENCE REPORT, H.R. REP. NO. 952, 101st Cong., 2d Sess. 299 § 707(g) (1990), [hereinafter CONF. REP. 952]. Section 304(a) (codified as 42 U.S.C. § 7604(a)) has been amended by § 707(g) to read:

(a) Authority to bring civil action; jurisdiction

(1) Except as provided in subsection (5) of this section any person may commence a court action on his own behalf against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the [e]leventh [a]mendment to the Constitution) who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (a) an emission standard or limitation under this chapter or (b) an order issued by the Administrator or a [s]tate with respect to such a standard or limitation, . . .

(3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit . . . or who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of any condition of such permit. [emphasis added].

143. *Compare* 42 U.S.C. 7604(a) with CONF. REP. 952, *supra* note 142, at 297. Section 7604(a) has been amended by § 707(a) to read in pertinent part:

The district courts have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties (except for actions [against] Administrator to perform a mandatory duty).

the authority to bring suit to compel Agency action that is unreasonably delayed.<sup>144</sup> The fourth significant change allows any person to challenge the Administrator's deferral of final actions.<sup>145</sup> The last major change was the creation of a penalty fund.<sup>146</sup>

### A. Jurisdiction Over Past Violations

The new language allowing citizen suits for wholly past violations is a compromise between the House and Senate versions of the 1990 law.<sup>147</sup> It establishes a cause of action by a citizen plaintiff if the alleged polluter has repeatedly violated the Act, despite the retrospective nature of the violations. The statute now permits a citizen to bring suit:

(1) against any person . . . who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a [s]tate with respect to such a standard or limitation . . . [or] (3) against any person who . . . is alleged

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144. Compare 42 U.S.C. 7604(a) with CONF. REP. 952, *supra* note 142 at 298. The following language was added to the end of paragraph (a) of § 7604 by § 707(f):

The district courts of the United States shall have jurisdiction to compel (consistent with paragraph (2) of this subsection) agency action unreasonably delayed except that an action to compel agency action referred to in section 307(b) which is unreasonably delayed may only be filed in a United States District Court within the circuit in which such action would be reviewable under section 307(b). In any such action for unreasonable delay, notice to the entities referred to in subsection (b)(1)(A) shall be provided 180 days before commencing such action.

145. Compare 42 U.S.C. 7607(b)(2) with CONF. REP. 952, *supra* note 137, at 299. The following language was added to the end of § 7607(b)(2) by § 707(h): "Where a final decision by the Administrator defers performance of any nondiscretionary statutory action to a later time, any person may challenge the deferral pursuant to paragraph (1)."

146. CONF. REP. 952, *supra* note 142, § 707(g).

147. The House bill made no provision for a cause of action for wholly past violations. The logical conclusion to draw from this omission is that the House did not intend to change the holding in *Gwaltney*, which required an ongoing violation for a court to have jurisdiction over a citizen suit. *Gwaltney Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49 (1987). See H.R. 3030, 101st Cong. 2d Sess. (1990). See also *Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection*, 474 U.S. 494, 501 (1986) ("[t]he normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific"). However, the Senate bill did provide for citizen suits for wholly past violations. See S. 1630, 101st Cong. 2d Sess. (1990). The Conference Committee Report adopts the Senate version which allows for suits based on repetition of past violations. CONF. REP. 952, *supra* note 142, at 299. The adoption of this version reflects the intent of Congress to resolve the jurisdictional problems caused by the *Gwaltney* "ongoing violation" standard. See 136 CONG. REC. E3695 (daily ed. Nov. 2, 1990) (Hon. Norman F. Lent of New York stated that "in the enforcement section [of the citizen suit provisions] we [the Conference Committee] drew primarily from the House language although we modified the citizen suit provision on past violations to conform to the Supreme Court's *Gwaltney* decision"); 136 CONG. REC. S18,040 (daily ed. Oct. 24, 1990) (Mr. Baucus stated that "in response to the Supreme Court ruling in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, [cite omitted] the conference agreement allows citizen suits to be brought with respect to past violations if there is evidence that the violation has been repeated").

to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of any condition of [a] . . . permit.<sup>148</sup>

The pre-1990 standard for jurisdiction over Clean Air Act violations required a citizen to allege an ongoing or predictably intermittent violation.<sup>149</sup> The Supreme Court in *Gwaltney v. Chesapeake Bay Foundation* resolved a three-way split among the circuits<sup>150</sup> by holding that the Clean Air Act did not allow citizen suits unless the violation was ongoing.

Originally, the House version of the new law required only an allegation of repeated or continuous past violations.<sup>151</sup> The Conference Committee, however, narrowed this language by requiring citizens to present competent evidence<sup>152</sup> of past violations that demonstrated a history of infractions.

While the new Amendments allow citizens to sue for wholly past violations, the circumstances are limited. A citizen suit action based on such violations is conditioned upon an evidentiary showing that: (1) the

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148. The Conference Report explains further that § 707(g) has a delayed period of effectiveness. This Amendment takes effect two years after the enactment of the Clean Air Act Amendments of 1990. CONF. REP. 952, *supra* note 142, at 299.

149. See *Gwaltney, Ltd. v. Chesapeake Bay Found.*, 484 U.S. at 58-59. ("citizens . . . unlike the Administrator, may seek . . . penalties only in a suit brought to enjoin or otherwise abate an ongoing violation"). *Gwaltney* was a Clean Water Act case, but the Court specifically applied the ongoing violation requirement to the Clean Air Act, by stating that the "language of the citizen suit provisions of the two Acts is not accidental; rather, the two provisions share the common central purpose of permitting citizens to abate pollution when the government cannot or will not command compliance. This understanding of the 'alleged to be in violation' language as a statutory term of art rather than a mere stylistic infelicity is reinforced by the consistent adherence in the Senate and House Reports to the precise statutory formulation." *Id.* at 62. See also *Pawtucket Cove Marina v. Ciba-Geigy*, 807 F.2d 1089, 1094 (1st Cir. 1986) (citizen suit is proper if violations are intermittent but continuous).

150. 484 U.S. 49 (1987). Compare, *Hamker v. Diamond Shamrock Chem. Co.*, 756 F.2d 392, 395 (5th Cir. 1985) (requiring that "a complaint brought under [§ 505] must allege a violation occurring at the time the complaint is filed"); with *Pawtucket Cove Marina v. Ciba-Geigy*, 807 F.2d 1089, 1094 (1st Cir. 1986) (interpreting § 505 as requiring a fair allegation by the citizen plaintiff of the "continuing likelihood that the defendant, if not enjoined, will again proceed to violate the Act"), *cert. denied*, 484 U.S. 975 (1987); [and] *Chesapeake Bay Found. v. Gwaltney, Ltd.*, 791 F.2d 304, 309 (4th Cir. 1986) (permitting citizen suits for wholly past violations), *vacated* 484 U.S. 49 (1987). The First Circuit's interpretation precluded suits based on past violations only, but permitted suits based on intermittent violations, even if there were no violations at the time the suit was filed. The Fourth Circuit's opinion in *Gwaltney* stated that § 505 "can be read to comprehend unlawful conduct that occurred only prior to the filing of a lawsuit as well as unlawful conduct that continues into the present."

151. 136 CONG. REC. E3677 (daily ed. Nov. 2, 1990) (comments of Rep. Fields).

152. Neither Conference Committee report nor the legislative history of the 1990 Amendments explain "competent evidence." However, cases under older versions of the Act discuss several types of evidence that have been found admissible to prove clean air violations. Such evidence includes air samples and visible evidence. See *Natural Resources Defense Council v. Thomas*, 845 F.2d 1088, 1090 (D.C. Cir. 1988) (discussion of the types of sampling admissible to prove that a specific source has exceeded emission limitations); *Maine v. Thomas*, 690 F. Supp. 1106, 1108 n.6 (D. Me. 1988) (discussion of visible evidence which can be used as evidence in cases asserting violations of the Act), *aff'd*, 874 F.2d 883 (1st Cir. 1989).



past violations were frequent, (2) that the alleged violator habitually ignored applicable requirements and (3) that the Agency did not adequately enforce the law.<sup>153</sup>

The courts have generally held that the citizen plaintiff must first establish the frequency of past violations and that the defendant violated an emissions standard or limitation under section 304(a) of the Act.<sup>154</sup> To prove this violation, the plaintiff must allege in good faith that the defendant violated the SIP. The allegation must include reasons for the plaintiff's belief that the SIP was violated and the dates or periods on which the violations occurred.<sup>155</sup>

Second, citizens must prove that the alleged violator habitually ignored applicable requirements.<sup>156</sup> The legislative history does not define what constitutes habitual disregard of the Act's requirements. The accepted definition of habitual is the "customary, usual, of the nature of habit; frequent use or custom."<sup>157</sup> It would seem, then, that the plaintiff must assert that the alleged violator has exceeded emission standards as a common practice.

Finally, the citizen plaintiff must allege that the Agency did not adequately enforce the prohibition against these past violations and that prosecution by a citizen is proper. The Administrator is deemed to have inadequately enforced the Act, with respect to violations of emission standards, if the penalty exacted is less stringent than normally required by such a violation. A penalty insufficiently burdensome to prevent the particular polluter from future breaches of the law also constitutes inadequate enforcement.<sup>158</sup>

### B. Civil Penalties

The second significant area of change under the 1990 Amendments is the award of civil penalties. The previous version of the Act merely provided for injunctive relief.<sup>159</sup> The new language of section 304(a) states

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153. Pub. L. No. 101-549, 104 Stat. 2399 (1990).

154. 136 CONG. REC. S16,953 (daily ed. Oct. 27, 1990) (Clean Air Act Amendments of 1990, Chafee-Baucus Statement of Senate Managers).

155. *Id.*

156. See CONF. REP. 952, *supra* note 142, § 707(g).

157. BLACK'S LAW DICTIONARY 640 (5th ed. 1983). Cases that define the word "habitual" often do so with reference to a specific statute. See *Barbieri v. Morris*, 315 S.W.2d 711, 713 (Mo. 1958) (a habitual violator of traffic laws is defined as one who has been convicted of four moving violations within a two year period); *but see McVey v. McVey*, 119 N.J. Super. 4, 289 A.2d 549, 550 (Ch. Div. 1972) (habitual drunkenness is fixed, frequent, irresistible, or a regular habit). For the purposes of the Act, it is best to take a practical approach when determining whether a violator is a habitual offender since Congress has chosen not to apply a quantitative definition at this time.

158. See *Baughman v. Bradford Coal Co.*, 592 F.2d 215, 218-19 (3d Cir. 1979), *cert. denied*, 441 U.S. 961 (1979).

159. See *Gwaltney, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 62 (1987). "The remedies available under the Act . . . for citizen suits provisions authorized by the Clean Air Act . . . are injunctive in nature." *Id.*

that:

The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty as the case may be, and to apply any appropriate civil penalties.<sup>160</sup>

The Senate bill authorized the Administrator to "issue administrative orders assessing civil penalties for violations of the SIP, of [federal clean-air regulations] or whenever any person attempts to construct, modify, or operate a major stationary source that is not in compliance with the new source provisions of the Act."<sup>161</sup> The Senate proposed a maximum penalty of \$25,000 per day for major violations. The Senate bill also contained a proposal authorizing the Administrator to implement a field citation program for minor violations of the Act that would have capped the amount of such citations at \$5,000 per inspection.<sup>162</sup>

The House adopted language that would allow the Administrator to issue administrative orders assessing civil penalties for the same violations referred to in the Senate bill. The House amendment, like the Senate bill, adopted a field citation program and capped the field citation penalties at \$5,000 per day of violation.<sup>163</sup>

The Conference Agreement adopted the Senate language authorizing administrative orders assessing civil penalties up to \$25,000 per day and provided for "field citation" penalties up to \$5,000 per day.<sup>164</sup> Such orders assessing appropriate penalties can be entered for past and present violations of the SIP, as well as for violations of any requirement or prohibition in the Act. This provision, allowing for courts to award civil penalties when citizens step into the Administrator's shoes and prosecute neglected violations, mirrors the penalties available to the EPA under the Act.<sup>165</sup>

The ability of the courts to order civil penalties will have an important impact on future enforcement activities and on deterrence.<sup>166</sup> It was the design of the Conference Committee that citizens be allowed to seek civil penalties against violators of the Act whenever two or more past viola-

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160. CONF. REP. 952, *supra* note 142 at 297, § 707(a).

161. 136 CONG. REC. S16,951-52 (daily ed. Oct. 27, 1990).

162. *Id.* at S16,952.

163. *Id.*

164. See *EESC Summary of Laws, Clean Air Act Amendments of 1990*, Pub. L. 101-549 at 60.

165. See 135 CONG. REC. S15366-68 (daily ed. Nov. 9, 1989) (statements of Mr. Reid). The Act allows the federal government, or a state, or a court to enforce the new provisions by ordering civil penalties to be paid by a violator. The new provisions also allow citizen suits to enforce the requirements of the new Act.

166. See *Baughman v. Bradford Coal Co.*, 592 F.2d 215, 218 (3d Cir.), *cert. denied*, 441 U.S. 961 (1979) (monetary sanctions as well as injunctive relief were seen by Congress as necessary to deter future violations and ensure effective enforcement).

tions occurred or for ongoing violations.<sup>167</sup>

The Act requires the Administrator and the courts to consider a number of factors before arriving at an appropriate penalty, including the economic benefit to the violator as a result of the violation. Congress specifically sought to ensure that violators should not be able to obtain an economic advantage over their competitors by violating environmental laws.<sup>168</sup>

The legislative history of the 1990 Amendments indicates that the determination of economic benefit does not require an elaborate or burdensome evidentiary showing and that reasonable approximations will suffice.<sup>169</sup> Other factors customarily taken into account in assessing penalties, such as the history of the violations, good faith efforts to comply and the economic impact on the violator, may also be considered in arriving at an appropriate fine.<sup>170</sup>

### C. Suits for Unreasonable Delay

The Amendments also provide for citizen suits for unreasonable delay, which may be filed only in a district court within the circuit in which the agency action would be reviewable under section 307(b).<sup>171</sup> The statute allows a citizen plaintiff to file suit for unreasonable delay 180 days after notification to the Administrator, the state and the alleged violator.<sup>172</sup>

The original version of the House bill did not contain an explicit provision concerning unreasonable delay. The bill generally allowed citizens to file unreasonable delay suits under the Administrative Procedure Act, but did not grant citizens the right to file such suits under the provisions of the Clean Air Act.<sup>173</sup>

The Senate bill permitted citizen suits if the EPA unreasonably delayed performance of a nondiscretionary duty.<sup>174</sup> The Conference Committee adopted the language of the Senate bill, which essentially granted citizens the right to sue for unreasonable delay of a nondiscretionary duty.<sup>175</sup> However, the Conference Report specifically notes that

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167. 136 CONG. REC. S16,953 (daily ed. Oct. 27, 1990) (Clean Air Act Amendments of 1990, Chafee-Baucus Statement of Senate Managers).

168. *Id.* at S16,952.

169. *Id.*

170. *Id.*

171. *See* 136 CONG. REC. E3672 (daily ed. Nov. 2, 1990) (statement of Rep. Oxley).

172. *See* 136 CONG. REC. S16,953 (daily ed. Oct. 27, 1990) (Clean Air Act Amendments of 1990, Chafee-Baucus Statement of Senate Managers). The six month waiting period for unreasonable delay suits should apply only to newly authorized actions. Pre-existing actions are not subject to this six month grace period.

173. H.R. 3030, 101st Cong., 2d Sess. (1990).

174. S. 1630, 101st Cong., 2d Sess. (1990).

175. *Id.* Citizens suits against the EPA can only be brought to compel performance of a duty that is not discretionary. This limitation has been interpreted as restricting suits to "actions seeking to enforce specific nondiscretionary clear-cut requirements" of the Act. *See* *Scott v. City of Hammond*, 741 F.2d 992 (7th Cir. 1984) (*per curiam*), *cert. denied*, 469 U.S. 1196 (1985); *Mountain States Legal Found. v. Costle*, 630 F.2d 754 (10th Cir.

the appellate courts should retain jurisdiction over the judicial review of final agency actions.<sup>176</sup> It appears that the Conferees did not intend to weaken the existing case law, which holds that any EPA deferral of final action is subject to challenge in the federal courts of appeal under section 307(b)(1).<sup>177</sup>

The Conferees rejected the Senate definition of unreasonable delay of six months or more.<sup>178</sup> The failure of the House and Senate to agree on a specific definition reflects the Conferee opinion that the EPA's conduct is better addressed by the more flexible case-by-case approach inherent in "unreasonable delay suits."<sup>179</sup>

The unreasonable delay provision authorizes the appropriate district courts to enforce the provision of the Administrative Procedure Act that requires an agency, "within a reasonable time," to "proceed to conclude a matter presented to it."<sup>180</sup> It is designed to allow the courts to compel the agency to respond to a petition for rulemaking, or other request for agency action, if the agency has not responded within a reasonable time.

In deciding whether the EPA unreasonably delayed action, the courts must weigh several factors before selecting a remedy. These factors include: (1) limitations on agency resources, (2) concomitant need to establish priorities, (3) the complexity of the Agency's task, and (4) the time needed to allow for meaningful public participation in the Agency's proceedings.<sup>181</sup>

The 1990 Amendments do not alter the criteria that must be balanced before a court can formulate an order compelling agency action. This balancing also appears under the existing section 304(a)(2), in deadline suits for claims in which the Administrator has failed to perform a non-discretionary duty within the time limit provided by the relevant statute. As in the deadline suits, the district courts in unreasonable delay cases will have broad discretion to fashion schedules that require the EPA to take action within a reasonable time.

#### D. *Deferral of Agency Final Action*

The 1990 Amendments also modify the provisions for judicial review

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1980), *cert. denied*, 450 U.S. 1050 (1981). See also *City of Seabrook v. Costle*, 659 F.2d 1371 (5th Cir. 1981); *Anaconda Co. v. Ruckelshaus*, 482 F.2d 1301 (10th Cir. 1973).

176. 136 CONG. REC. S16,953 (daily ed. Oct. 27, 1990).

177. *Id.* Section 307(b)(1) of the Clean Air Act governs judicial review of the Administrator's final actions, in contrast to § 7604 (a)(2), which governs actions to compel the Administrator to perform a mandatory duty. The new law clearly differentiates between deferral of a mandatory duty and deferral of a final action. See *Solar Turbines, Inc. v. Seif*, 879 F.2d 1073, 1077-78 (3d Cir. 1989) (discussion on and examples of what constitutes a final agency action).

178. *Id.*

179. *Id.*

180. Administrative Procedure Act (APA), 5 U.S.C. § 555(b) (1982).

181. See 42 U.S.C. § 7607(b)(1) (1988); see also 136 CONG. REC. E3673 (daily ed. Nov. 2, 1990) (statement of Rep. Oxley).

of final agency actions in the appellate courts. Unlike the other citizen suit provisions of the 1990 Amendments, this clause amends section 307(b)(2) of the Act, not section 304. The new paragraph provides: "[w]here a final decision by the Administrator defers performance of any nondiscretionary statutory action to a later time, any person may challenge the deferral pursuant to paragraph (1)."<sup>182</sup>

The deferral provision essentially mandates that any decision by the Administrator to postpone a statutory or nondiscretionary duty will be treated as if the Agency had made a final decision. This final decision is then immediately appealable under section 307(b). This provision counterbalances any inclination the Administrator might have to defer a mandatory duty. In light of the broad availability of this remedy, it is likely that when the statutory deadlines are approaching for rulemaking on such matters as the regulation of air toxins, the Administrator's only choices under the 1990 Amendments will be to grant or deny a petition for rulemaking.

Existing case law addressing the issue of the Administrator's deferral of a final action pursuant to section 307, treated such deferral as within the discretion of the Agency.<sup>183</sup> The D.C. Circuit has held that a court does not have jurisdiction to review an Administrator's deferral of rulemaking. In *Natural Resources Defense Council v. Thomas*,<sup>184</sup> the plaintiff, who petitioned for judicial review of Agency delay, was admonished by the circuit court, which explained that the case required a conclusive Agency decision to be justiciable.<sup>185</sup> Under the 1990 Amendments, however, the Administrator's insulation from review in these situations is eliminated. The decision to defer is considered a reviewable final action.

The distinction between the deferral clause, which amends section 307(b)(2), and the unreasonable delay language amending section 304 of the 1990 Amendments, is important. Citizen plaintiffs suing under the two sections vindicate different rights: section 304 plaintiffs seek *enforcement* of the Clean Air Act statutes or EPA rules, while section 307 plain-

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182. CONF. REP. 952, *supra* note 142, at 299. Section 7607(b) allows a citizen to petition for review of any action of the Administrator in the promulgation of a final decision. Paragraph one divides the venue for judicial review between the United States Court of Appeals for the District of Columbia if the decision is national in scope and the United States Court of Appeals for the appropriate circuit if the decision has regional or local effect. See 42 U.S.C. § 7607(b)(1) (1988).

183. See *Natural Resources Defense Council v. Thomas*, 845 F.2d 1088, 1091-92 (D.C. Cir. 1988) (agency deferral of final decision establishing proper methodology for implementation of NAAQS is not ripe for judicial review. A final decision by the Administrator is essential for the review to be justiciable); *Bethlehem Steel Corp. v. EPA*, 782 F.2d 645, 654-55 (7th Cir. 1986) (court of appeals lacks the authority to order EPA to cease deferral of rulemaking and take action within a certain time period). See *generally* *Harrison v. PPG Indus., Inc.*, 446 U.S. 578 (1980) (discussion of "final actions" under 42 U.S.C. § 7607(b)(1) (1988)).

184. 845 F.2d 1088 (D.C. Cir. 1988).

185. *Id.* at 1091-92.

tiffs challenge the validity of EPA rulings.<sup>186</sup>

Fundamentally, the unreasonable delay suits, should be used to prompt the Agency to act when it has dragged its feet in performing a statutory duty. If the court determines that the action has been delayed, the court is empowered to impose a time schedule that must be adhered to by the Agency.<sup>187</sup>

Once the Agency is ordered by the district court to act, the Administrator has three options: he can perform the nondiscretionary duty; he can refuse to perform the nondiscretionary duty; or he may defer promulgation of a decision for any number of reasons. If the Administrator performs the duty, this performance is a final action that may be reviewed under section 307(b)(1).<sup>188</sup> Should the Administrator decide not to perform the obligation, the district court has the power to fashion any remedy it sees fit<sup>189</sup> if it decides that Agency action is nonetheless mandated by the Act. If the Agency decides to defer the decision, it is treated as a final action and is immediately eligible for judicial review in the appropriate circuit court as outlined in section 307.

### E. *The Penalty Fund*

The last major change in the 1990 citizen suit legislation is the creation of a penalty fund. By drafting this innovative section, Congress ensured that the EPA would have the necessary financing to enforce existing clean air laws and the funds to improve and research antipollution technology.

Section 304(g) reads in part:

(1) Penalties received. . . shall be deposited in a special fund in the United States Treasury for licensing and other services. Amounts in such fund are authorized to be appropriated and shall remain available until expended for use by the Administrator to finance air compliance and enforcement activities. . . .

(2) Notwithstanding paragraph (1) the court in any action under this subsection to apply civil penalties shall have discretion to order that such civil penalties, in lieu of being deposited in the fund referred to in paragraph (1), be used in beneficial mitigation projects which are consistent with this Act and enhance the public health or the environment. The court shall obtain the view of the Administrator in exercising such discretion and selecting any such projects. The amount of any such payment in any such action shall not exceed \$100,000.

The first version of the House bill contained a brief provision address-

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186. Note, *Attorney's Fees and Ruckelshaus*, 33 AM. U.L. REV. 775, 806 (1984).

187. 136 CONG. REC. E3673 (daily ed. Nov. 2, 1990) (statement of Rep. Oxley).

188. See 42 U.S.C. § 7607(b)(1) (1988).

189. 136 CONG. REC. S16,953-55 (daily ed. Oct. 27, 1990) (Clean Air Act Amendments of 1990, Chafee-Baucus Statement of Senate Managers).

ing the penalty fund.<sup>190</sup> The language used in later versions of the bill is identical to the first paragraph of section 707(g), as adopted by the Conference Committee.<sup>191</sup> The House proposals, however, did not contain any reference to the court's ability to order the use of civil penalties to fund environmental projects chosen at the court's discretion.

The initial Senate bill also contained a short section providing for a penalty fund. This section, like the House versions, allowed the Administrator access to the funds deposited in the United States Treasury.<sup>192</sup> The discretionary allocation of these funds by the courts was not mentioned. Later versions of the Senate bill expand upon the language allowing the Administrator to allocate funds for enforcement activities. These versions of the bill grant courts the discretion to withhold penalties from the Treasury funds and instead allocate those funds directly to worthy environmental projects.<sup>193</sup>

The Senate bill placed two important limits on a court invoking this discretionary allocation power. First, the court must consult with the Administrator in the selection of a worthy environmental project.<sup>194</sup> Second, the court can use this section to channel funds into worthy environmental projects only up to the amount of \$100,000.<sup>195</sup>

The Conference Report ultimately adopted the precise language adopted in the final version of the Senate bill.<sup>196</sup> By doing so, the Committee in effect permitted the Administrator and the courts to access

190. See H.R. 3030, 101st Cong., 1st Sess. § 610(b) (1989). This first version stated in relevant part:

(b) Section 304 of the Clean Air Act is amended by adding the following new subsection after subsection (f):

(g) PENALTY FUND. - Penalties recovered under subsection (a) shall be deposited in a special fund in the United States Treasury for licensing and other services, which shall be available for appropriation, and remain available until expended for use by the Administrator to finance air compliance and enforcement activities.

191. See H.R. 3030, 101st Cong., 2d Sess. § 608(b) (1990) (version three of the House Amendments to the Clean Air Act). The third version of this bill is almost identical to § 707(g)(1) as adopted by the Conference Committee.

192. See S. 1630, 101st Cong., 1st Sess. § 309(2) (1989). This initial provision stated in pertinent part:

(2) Section 304 of the Clean Air Act is amended by adding the following new subsection:

“(g) PENALTY FUND. - Penalties received under subsection (a) shall be deposited in a special fund in the United States Treasury for licensing and other services, which shall be available for appropriation, and remain available until expended for use by the Environmental Protection Agency to finance air compliance and enforcement activities.”

193. See S. 1630, 101st Cong., 2d Sess. § 707(b) (version seven of the Senate bill). This version of § 707(b)(1) and (2) is identical to language finally adopted by the Conference Committee.

194. *Id.*

195. *Id.*

196. *See id.*

funds paid by violators of the Act as civil penalties. These funds may now be efficiently utilized in enforcement and research activities.

The 1990 Amendments allow courts to withhold civil penalties from the newly created penalty fund to use such funds in projects that advance the objectives of the Clean Air Act. The court's allocation power over these awards, however, is limited by the fact that the Administrator must be consulted before the court exercises this option.<sup>197</sup> In addition, the maximum amount the court may award to a worthy project is \$100,000.<sup>198</sup>

### F. Interstate Pollution

New avenues for citizen involvement, short of litigation, were charted by Congress in the interstate pollution provisions of the 1990 Amendments. The new provisions reflect the importance to Congress of wrestling with the interstate transport phenomenon.

#### 1. Transport Commission Requests

The Interstate Transport Commissions are established by section 176A(b) of the Act. Among the required members are the governors of each state in the region, or the designee of each governor, and an air pollution control official representing each state in the region, appointed by the governor. The role of the Transport Commission is to:

[a]ssess the degree of interstate transport of the pollutant or precursors to the pollutant throughout the transport region, assess strategies for mitigating the interstate pollution, and recommend to the Administrator such measures as the Commission determines to be necessary to insure that the plans for the relevant [s]tates meet the requirements of section 110A(2)(D).<sup>199</sup>

The Commission may also "request the Administrator to issue a finding . . . that the implementation plan for one or more of the [s]tates in the transport region is substantially inadequate to meet the requirements of section 110A(2)(d)."<sup>200</sup> The Administrator must act on the request by approving, disapproving or partially approving and partially disapproving it within eighteen months of its receipt. In acting on the request, the Administrator must "provide an opportunity for public participation."<sup>201</sup>

The effect of agency approval on a request is that the state implementation plan is revised to reflect the provisions of the request. The original

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197. The language adopted by the Conference Report requires the court to obtain the Administrator's view before exercising the option of funding environmental projects with civil penalties. However, the court need not adhere to the Administrator's view. The language also fails to describe the degree of deference the court must give the Administrator's opinion.

198. *Id.*

199. CONF. REP. 952, *supra* note 142, § 176A(b)(2).

200. *Id.* § 176A(c).

201. *Id.*



implementation plan, approved or promulgated by the Administrator pursuant to the 1977 Amendments, remains in effect, except to the extent that such a revision is approved by the Administrator pursuant to the 1990 Amendments.<sup>202</sup>

## 2. Notice of Permit Applications to Contiguous States

Procedures for review of permit applications also reflect Congress' recognition of the central significance of interstate air pollution transport. The "permitting authority" must notify states: "A. Whose air quality may be affected and that are contiguous to the [s]tate in which the emission originates, or B. That are within [fifty] miles of the source."<sup>203</sup>

They must also provide an opportunity for such states to submit written recommendations regarding the issuance of the permit and its terms and conditions. If any part of those recommendations are not accepted by the permitting authority, such authority must notify the state and the Administrator "in writing of its failure to accept those recommendations and the reasons therefor."<sup>204</sup>

Presumably, a state that is contiguous to the source state or an area within fifty miles of the source, will be responsive to political pressures from its own citizens to articulate cogent and relevant "recommendations" to the permitting authority in the neighboring state. This type of citizen involvement is only implicit in this provision and no specific procedures for gathering or responding to citizen initiatives in the neighboring state are provided in the Act.

The EPA's provisions for objection also provide an opportunity for public involvement. The Administrator is obligated to object to issuance of a permit if he determines that its provisions are not in compliance with applicable requirements of the Act.<sup>205</sup> Upon receipt of an objection by the Administrator, the permitting authority may not issue the permit unless it is revised and issued in accordance with the objection.<sup>206</sup> If the Administrator fails to object in writing to issuance of a permit, pursuant to section 505B(1), the rights of petition accrue to "any person."<sup>207</sup> In situations where the Administrator was obligated to object to the permit under the Act, but failed to do so, a citizen may bring suit directly against the Administrator for failure to perform a nondiscretionary act. These rights are exercisable within sixty days after expiration of the forty-five day review period specified for the Administrator.<sup>208</sup> The

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202. See 136 CONG. REC. H13,101 (daily ed. Oct. 27, 1990).

203. CONF. REP. 952, *supra* note 142, § 505(a)(2). Congress contemplated this to mean states with authority delegated from EPA.

204. *Id.*

205. *Id.* § 505(b)(1).

206. *Id.* § 505(b)(3).

207. *Id.* § 505(b)(2).

208. CONF. REP. 952, *supra* note 142, § 505(b)(2).

available grounds for this petition are limited, however, and may be based:

[o]nly on objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting agency (unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objections within such a period or unless the grounds for such objection arose after such period).<sup>209</sup>

Action by the Administrator after the petition has been filed must take place within sixty days after the filing of a petition.

#### IV. THE 1990 AMENDMENTS: EFFECTS AND PERSISTENT QUESTIONS

The 1990 Amendments remedy several of the shortcomings of the 1977 Amendments. The most important improvements are: (1) jurisdiction over past violations, (2) the ability of courts to exact civil penalties from polluters, (3) the option of allowing citizens to sue the EPA Administrator for unreasonable delay, (4) judicial review in the federal appellate courts for review of final Agency actions, and (5) the ability of citizens in one state to object to the issuance of a permit to emitting sources in another state.

Despite these dramatic improvements in the citizen enforcement, the 1990 Act failed to resolve several important issues.

##### A. *Jurisdiction*

The extension of the jurisdiction of the federal courts to include citizen allegations of wholly past violations<sup>210</sup> is a particularly significant advantage to citizens who may now sue for repetitive past violations. The new language changes the prospective nature of jurisdiction granted to the district courts under the 1977 Amendments. It does not, however, resolve the related issue of what constitutes injury-in-fact under section 304.

The type and amount of injury a plaintiff must allege to fulfill the standing requirements of a citizen plaintiff is still debatable. In *Lujan v. National Wildlife Federation*, the Supreme Court held that there must be some actual injury to the plaintiff.<sup>211</sup> The narrow question Congress left

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209. *Id.*

210. 136 CONG. REC. S16,953 (daily ed. Oct. 27, 1990) (The Clean Air Act Amendments of 1990, Chafee-Baucus Statement of Senate Managers). The change in the language of the citizen suit statute, allowing jurisdiction over wholly past violations, does not take effect immediately. Instead, Congress postponed the effective date for the jurisdictional change for two years. The Conference Committee Report states that "the amendment made by this subsection [g] shall take effect with respect to actions brought after the date [two] years after the enactment of the Clean Air Act Amendments of 1990." CONF. REP. 952, *supra* note 142, § 707(g).

211. See *Lujan v. National Wildlife Fed.*, 110 S. Ct. 3177, 3186 (1990).

open in the 1990 Amendments is, how serious must the injury be in order to gain standing?

According to the normal rules of statutory construction, "if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific."<sup>212</sup> Since Congress has decided to leave the construction of injury-in-fact to the courts, citizen plaintiffs are faced with an uncertain definition of this element of standing under section 304.

### B. Citizen Remedies

The 1990 Amendments broadened the relief available under the citizen suit provisions to include civil penalties against a polluter,<sup>213</sup> but they do not change the law with respect to compensatory damages. Section 304 does not grant the court the ability to award a plaintiff damages. Ostensibly, citizens injured by the defendant's actions will have little incentive to expend the time and energy to prosecute infractions if they are not compensated for damages.

Compensatory damages provide the courts with a powerful tool to help promote deterrence<sup>214</sup> and make the plaintiff whole by redressing any injuries caused to him by the defendant's wrongs. The injuries are particularly egregious under section 304 because the Administrator essentially forced the citizen plaintiff to take its place in prosecuting offenses.<sup>215</sup>

The legislative history of the 1970 Act clearly indicated that damages for injury to person or property should not be recoverable under citizen suit provisions.<sup>216</sup> Consequently, compensatory damages have been denied consistently to citizen plaintiffs, particularly environmental organizations that seek damages on behalf of their members.<sup>217</sup>

However, in *Delaware Citizens for Clean Air, Inc. v. Stauffer Chemical Co.*, the Delaware District Court, which denied an environmental organization compensatory damages on behalf of its members, stated that a right to compensatory damages could be properly invoked by an individual citizen plaintiff. The opinion assumes that "there is a private right to damages under the citizens suit section of the Act, . . . and that such a right could be properly invoked by an injured party on the facts of this

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212. *Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection*, 474 U.S. 494, 501 (1986).

213. See CONF. REP. 952, *supra* note 142, § 707(a).

214. *Cf. Baughman v. Bradford Coal Co.*, 592 F.2d 215, 218 (3d Cir.), *cert. denied*, 441 U.S. 961 (1979) (Congress views monetary sanctions, as well as injunctive relief, as necessary to ensure effective enforcement and deter future violations).

215. *Cf. id.* (Congress intended citizen suits as an alternate enforcement mechanism when the Administrator fails to enforce the mandates of the Act).

216. S. REP. NO. 1196, 91st Cong., 2d Sess. 38 (1970) (comments of Comm. of Public Works).

217. *Delaware Citizens for Clean Air, Inc. v. Stauffer Chem. Co.*, 367 F. Supp. 1040, 1047 (D. Del. 1973), *aff'd*, 510 F.2d 969 (3d Cir. 1975).

case."<sup>218</sup>

Since one of the principal objectives of the Act's providing citizens with greater incentives to perform their supervisory role is the enforcement of the Clean Air Act, the 1990 Amendments should have provided for compensatory damages.

### C. Attorney's Fees

The language of section 304(e) remains unchanged in the 1990 Amendments. Attorney's fees may still be awarded to either party at the discretion of the court. The 1990 Amendments permit citizens to seek review of EPA-promulgated air quality and emissions standards and to recover the costs of this litigation. The fact that Congress did not change any of the language of this provision in 1990, leads to the conclusion that Congress is aware of the *Ruckelshaus v. Sierra Club* "partially successful plaintiff" standard, and continues to find this standard acceptable.<sup>219</sup> Alternatively, the absence of consensus on a change in the 1990 Amendments indicates merely that no political agreement was reached to alter the rule as interpreted in *Ruckelshaus*.

Few courts have addressed the issue of whether a citizen plaintiff may collect attorney's fees for initiating prosecution of a violation of the Act which is settled before trial.<sup>220</sup> However, some courts have decided that plaintiffs who settle a case before trial should be awarded fees. These cases base the award of fees on the rationale that the attempted prosecution of violations advances the goals of the Act.

In *Pennsylvania v. Delaware Citizen's Council*,<sup>221</sup> the Supreme Court granted certiorari to decide whether section 304(d) authorizes the recov-

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218. *Id.* Judge Stapleton also implied in his opinion that if the environmental organization had brought this case as a class action, the individual members might have recovered damages.

219. 463 U.S. 680 (1983). It is important to understand that Congress specifically addressed the prospective language problem presented by the *Gwaltney* decision. It is evidence that Congress is aware of these standard setting Supreme Court cases and will change the standard where it finds the Court's interpretation does not comply with the congressional intent in passing the statute.

220. See *Pennsylvania v. Delaware Valley Citizens' Council*, 478 U.S. 546, 559-60 (1986)(plaintiffs entitled to recover attorney's fees for time spent monitoring state compliance with consent decree). See *Natural Resources Defense Council v. EPA*, 484 F.2d 1331, 1338 (1st Cir. 1973) (petitioners entitled to award of attorney's fees where settlement order required EPA to comply with certain requirements of the Clean Air Act); *McCann v. Coughlin*, 698 F.2d 112, 128 (2d Cir. 1983) (a favorable settlement is sufficient by itself to support an award of attorney's fees without any adjudication or admission of liability). See also *Davenport v. St. Mary's Hosp.*, No. 84-4549, 1988 U.S. Dist. LEXIS 1332 (E.D. Pa. Feb. 23, 1988) (citing attorney's fees provisions of Clean Air Act), the court in this case held that the plaintiff may recover the attorney's fees necessary to enforce the terms of a settlement agreement. *Cf.*, Note, *Awards of Attorneys' Fees to Nonprevailing Parties Under the Clean Air Act: Ruckelshaus v. Sierra Club*, 59 WASH. L. REV. 585, 587 (nonprevailing plaintiffs, as well as intervenors or plaintiffs, who settle can be awarded fees under the broad discretion granted to the courts in § 304(e) language "whenever appropriate").

221. 478 U.S. 546 (1986).

ery of attorney's fees for time spent by plaintiff's counsel participating in regulatory proceedings after the case was settled by a consent decree.<sup>222</sup> The case was the result of a complaint filed by the citizen's organization and the United States to compel Pennsylvania to implement a vehicle emission inspection and maintenance program as required by the Clean Air Act.<sup>223</sup>

The Commonwealth of Pennsylvania agreed to establish such programs and a consent decree was approved in 1978. The programs did not proceed smoothly in the years that followed, and in 1981, the parties were again before the district court. The court at this time ruled that Pennsylvania was in violation of the Act for failing to implement vehicle emission inspection and maintenance programs as mandated by the Act and the 1978 consent decree.<sup>224</sup>

The plaintiff, Delaware Valley Citizen's Council, sought attorney's fees and costs for their work, which was performed after issuance of the consent decree in 1978.<sup>225</sup> The district court awarded Delaware Valley substantial fees.<sup>226</sup> Pennsylvania objected to the payment of these fees because they were primarily incurred as a result of plaintiff's counsel attending post-decree regulatory proceedings and were not the direct "costs" of litigation.<sup>227</sup> The district court rejected this contention. It found that because the proposed regulations would have affected Delaware Valley's rights under the consent decree, the group had a unique interest in the proceedings that made its work sufficiently related to the litigation to be compensable.<sup>228</sup>

The Court of Appeals for the Third Circuit affirmed the fee award<sup>229</sup> and the State of Pennsylvania appealed to the Supreme Court, which granted certiorari. The Supreme Court held that the fee award was appropriate for time spent monitoring state compliance with the consent decree. The Court's opinion urged lower courts to "recognize that in bringing legitimate actions under [section 304(d)] citizens would be performing a public service and in such instances the courts should award the costs of litigation to such party."<sup>230</sup> The Court also stated that there was no reason to interpret section 304 as "requiring that work done by

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222. *Id.* at 548.

223. *Id.* at 549.

224. *Id.* at 549-52.

225. The original 1978 agreement contained a provision that required Pennsylvania to pay \$30,000 in attorney's fees to Delaware Valley for attorney's fees and costs incurred prior to the entry of the consent decree. *Id.* at 549.

226. See *Delaware Valley Citizens' Council v. Pennsylvania*, 581 F. Supp. 1412, 1433 (E.D. Pa. 1984), *aff'd*, 762 F.2d 272 (3d Cir. 1985), *aff'd in part rev'd in part*, 478 U.S. 546 (1986).

227. *Pennsylvania v. Delaware Valley Citizens' Council*, 478 U.S. 546, 558 (1986).

228. *Id.* at 558-61.

229. *Delaware Valley Citizens' Council v. Pennsylvania*, 762 F.2d 272, 274 (3d Cir. 1985), *aff'd in part rev'd in part*, 478 U.S. 546 (1986).

230. *Pennsylvania v. Delaware Valley Citizens' Council*, 478 U.S. at 560 (citing with approval S. REP. NO. 1196, 91st Cong., 2nd Sess., at 36 (1970)).

counsel be in the context of traditional judicial litigation, [for] section 304 does not preclude an award of reasonable attorney's fees for work done after the consent decree."<sup>231</sup>

Although the *Delaware Valley* opinion addresses the issue of an award of attorney's fees *after* a settlement is reached, the language used in *Delaware Valley* by the Supreme Court is broad enough to encompass fees incurred before settlement where the actions of the citizen are a public service and the claim is legitimate.<sup>232</sup>

In *Friends of the Earth v. Eastman Kodak Co.*,<sup>233</sup> citizens sued Kodak for violations of the Clean Water Act. The parties agreed to settle the action and they incorporated their agreement in a consent decree. Under the decree each party reserved the right to assert a claim for costs of litigation, including reasonable attorney's fees.<sup>234</sup>

The plaintiff later applied for an award of attorney's fees which the district court allowed. However, the parties could not agree on the proper amount to be awarded and ultimately appealed on this issue.<sup>235</sup> The Second Circuit held that the district court's interpretation that the plaintiff had achieved "some success" in light of the favorable consent decree was correct and that "an award was appropriate."<sup>236</sup> However, the court stated that "[s]ince there was no trial and the recovery was minimal . . . [the fee should be small]."<sup>237</sup> Therefore, the Second Circuit found that a trial on the merits, as well as prevailing party status, are important elements in determining the appropriateness of the size of a fee award.<sup>238</sup>

Other courts have found that a trial on the merits and prevailing party status are not only important in determining the amount of fees to be awarded, but essential as to whether fees should be awarded at all.

In *United States v. Hooker Chemicals & Plastics Corp.*,<sup>239</sup> the district court denied citizen intervenors attorney's fees for their participation in a Clean Water Act case. The plaintiffs claimed that they were "partially successful" because the settlement agreement was modified to include conditions advantageous to their interests. The plaintiffs also took the position that these conditions would not have been included in the settlement if they had not intervened.<sup>240</sup> The district court rejected the plain-

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231. *Id.*

232. *Id.* This conclusion does not interfere with the holding in *Ruckelshaus v. Sierra* as long as the plaintiff prevails on some issues in the settlement.

233. 834 F.2d 295 (2d Cir. 1987).

234. *Id.* at 296-97.

235. *See id.* at 297 (lodestar figure is the award of reasonable hours multiplied by a reasonable hourly fee increased or decreased by facts the court finds relevant).

236. *Id.*

237. *Friends of the Earth v. Eastman Kodak Co.*, 834 F.2d 295.

238. *Id.* at 298.

239. 591 F. Supp. 966 (W.D.N.Y. 1984).

240. *Id.* at 968.

tiff intervenors motion for fees.<sup>241</sup> The court found that litigants who achieve no success on the merits cannot be awarded attorney's fees and that "purely procedural victories" cannot be considered justification for such awards. Therefore, the court in *Hooker* required a plaintiff to prevail on substantive issues before any fees may be granted.<sup>242</sup>

The award of attorney's fees is particularly important if the citizen plaintiff, as in *Hooker* intervenes in an action being diligently prosecuted by the Administrator. The language of the citizen suit provisions allows the citizen plaintiff to intervene as a matter of right.<sup>243</sup> The reward of attorney's fees for the performance of this supervisory function, however, may not be available to them.<sup>244</sup>

In *United States v. National Steel Corp.*,<sup>245</sup> the Sixth Circuit held that section 304(d) does not authorize an award of attorney's fees to persons who intervene in enforcement actions brought and diligently prosecuted by the United States.<sup>246</sup> The court in *National Steel* stated that when "an intervenor's action is brought pursuant to section 304(a) . . . attorney fees are available . . . under section 304(d) of the Act only in cases in which the Administrator or [s]tate is not diligently prosecuting the action."<sup>247</sup>

This preference for awarding fees to citizens who initiate an action but withholding a fee award to citizens who intervene in an existing action is illogical. The identity of the party who initially files the action should not be the decisive factor in determining whether the actions of the citizen plaintiff promote the objectives of the Clean Air Act. It is the allegations contained in the complaint, as well as the remedies requested, that define the correlation between citizen action and the advancement of the goals of the Act. Citizen plaintiffs may allege different facts or request different remedies than the Administrator. These differences may result in a prosecution of the defendant that is far more effective due to citizen intervention.

Courts should encourage citizen plaintiffs to perform supervisory functions by awarding fees in either the settlement or intervention scenarios.

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241. *Id.*

242. *Id.*

243. 42 U.S.C. § 7604 (1988). The citizen intervenors in *Hooker Chemicals* were denied attorney's fees for reasons other than their status as intervenors. The court in *Hooker Chemicals* specifically did not address the issue of whether only the original plaintiffs in an action under section 304(a) may recover fees. *United States v. Hooker Chems. & Plastics Corp.*, 591 F. Supp. 966, 971 (W.D.N.Y. 1984).

244. Compare *United States v. National Steel Corp.*, 782 F.2d 62, (6th Cir. 1986) (no fee award under § 304(d) for persons who intervene in enforcement actions being diligently prosecuted by the Administrator), with *Hensley v. Eckerhart*, 461 U.S. 424 (1983) (where plaintiffs prevail in attaining their objectives, which would not have occurred without their efforts, fees are appropriate without analysis of individual motions and litigated claims). Cf. *Pennsylvania v. Delaware Valley Citizens' Council*, 478 U.S. 546 (1986) (attorney's fees are appropriate where organization's participation in administrative proceedings is crucial to the vindication of the group's rights under a consent decree).

245. 782 F.2d 62 (6th Cir. 1986).

246. *Id.* at 64.

247. *Id.*

Although the citizen does not act as a private attorney general in intervention situations, no language in the Act requires fees to be awarded only for fulfillment of this role. Instead, courts should examine the citizen's contribution to the overall effectiveness of the case in order to determine if the situation is appropriate for fees to be awarded.

#### D. *Citizen Suits for Unreasonable Delay and Deferral*

The 1990 Amendments to the Act provide citizens with a means to prosecute unreasonable Agency delay or deferral of mandatory duties pursuant to section 304(a)<sup>248</sup> or section 307.<sup>249</sup>

##### 1. Unreasonable Delay

The district court has jurisdiction to order the Agency to perform a nondiscretionary duty after it determines that the Agency's procrastination is unreasonable. The 1990 Amendments, however, do not specify what constitutes "unreasonable" delay for the purposes of a citizen suit.

Pre-existing case law is relevant in determining what constitutes unreasonable delay in a citizen suit. The case law, consistent with the legislative history of the 1990 Amendments,<sup>250</sup> illustrates that the unreasonable delay provisions are similar to deadline suits where the Administrator has a statutory duty which must be performed within the deadline set forth by the statute.

The existing case law concerning unreasonably delayed Agency action is convoluted. It is important to note that in pre-1990 cases, unreasonable delay is not clearly distinguished from deferral of final Agency action even though this distinction is critical in determining whether the district or appellate courts have jurisdiction. Therefore, these cases should be used cautiously as precedent for interpreting the 1990 provisions which sought separate remedies for unreasonable delay suits as opposed to deferral suits.

As an example of such pre-existing case law, in *Environmental Defense Fund v. Thomas*,<sup>251</sup> environmental organizations and several states<sup>252</sup> brought an action to compel the Administrator to promulgate revised National Ambient Air Quality Standards (NAAQS) for sulphur oxides.<sup>253</sup> The plaintiffs alleged that section 109(d) of the Act required the Administrator to publish standards by a specific statutory deadline.<sup>254</sup>

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248. CONF. REP. 952, *supra* note 142 at 298.

249. CONF. REP. 952, *supra* note 142 at 299.

250. 136 CONG. REC. S16,953 (daily ed. Oct. 27, 1990).

251. 870 F.2d 892 (2d Cir. 1989).

252. *Id.* The states involved in this case were New York, Connecticut, New Hampshire, Massachusetts, Vermont, Minnesota and Rhode Island.

253. *Id.* at 894.

254. The Clean Air Act provided at the time of this case: "[n]ot later than December 31, 1980, and at five-year intervals thereafter, the Administrator shall complete a thorough review of the criteria published under [s]ection 7408 . . . and promulgate such new standards as may be appropriate . . . The Administrator may review and reverse criteria



The plaintiffs further argued that the Administrator had a nondiscretionary duty to revise the NAAQS.

The district court disagreed with the plaintiffs and instead held that the Administrator had discretion not to revise the standards if he so chose. The court concluded that because the duty to revise the NAAQS was discretionary, the district court lacked jurisdiction over the dispute to compel the agency to perform the delayed revisions.<sup>255</sup> The plaintiffs appealed the decision. The EPA argued that declining to publish a sulphur oxide standard was not reviewable by an appellate court under section 307 because it involved no decision or other Agency "action."<sup>256</sup>

The Second Circuit disagreed with both parties. The circuit found that the Agency had a duty to make *some* decision under section 109(d) and that its performance with regard to this mandatory decision is reviewable under section 307. Also, the court held that because the duty to make *some* decision is nondiscretionary, it is enforceable under section 304 in the district court.<sup>257</sup>

The Second Circuit in *Thomas* struggled with the issue of which court had jurisdiction over this case. The District of Columbia Court of Appeals had claimed jurisdiction over these unreasonable delay cases on the grounds that the Administrative Procedure Act dictates that the circuit courts are the sole forum for review of agency inaction.<sup>258</sup> The District of Columbia Court of Appeals had further ruled that, in contrast, when there is no deadline in the Clean Air Act, but a deadline is merely inferred from the overall statutory scheme, a claim alleging unreasonable delay is properly within the jurisdiction of the appropriate circuit court.<sup>259</sup>

Ultimately, the Second Circuit held that a district court has jurisdiction to compel the Administrator to take some formal action for the revision of NAAQS because this duty is nondiscretionary. The opinion also concluded that when EPA action is unreasonably delayed, the district courts have exclusive jurisdiction to compel Agency action.<sup>260</sup>

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or promulgate new standards earlier or more frequently than required under this paragraph." 42 U.S.C. § 7410 (1988).

255. *Environmental Defense Fund v. Thomas*, 870 F.2d 892, 894-95 (2d Cir. 1989), *cert. denied*, 493 U.S. 991 (1989).

256. *Id.* at 896.

257. *Id.*

258. *Id.* at 897; *see* *Sierra Club v. Thomas*, 828 F.2d 783 (D.C. Cir. 1987). The D.C. Circuit claimed jurisdiction over the case under the APA as well as § 307(b) of the Clean Air Act. Section 307(b) of the Act requires that final review of Agency *national* decisions is appropriate only in the D.C. Circuit, whereas actions for final review of Agency decisions that are local in nature should be filed in the circuit court with jurisdiction over the parties or issue. *See* 42 U.S.C. § 2707(b) (1988).

259. *Sierra Club v. Thomas*, 828 F.2d 783, 792-93 (D.C. Cir. 1987).

260. *Environmental Defense Fund v. Thomas*, 870 F.2d 892, 898-900 (2d Cir. 1989), *cert. denied*, 493 U.S. 991 (1989). Judge Mahoney wrote a dissent that would have upheld the district court's determination that it lacked subject matter jurisdiction. However, even the dissenting opinion would have allowed the district court jurisdiction over unreasonable delay suits. Judge Mahoney's opinion noted with approval that if, "[t]he

The Conferees who drafted the 1990 Amendments apparently agreed with the Second Circuit's holding in *Environmental Defense Fund v. Thomas*. The Committee granted unreasonable delay jurisdiction to the district courts in the new Amendments. Also, the Committee specifically rejected establishing a time frame for EPA response to citizen petitions, and instead decided that this is better addressed in the district courts by the more flexible case-by-case determination of what constitutes unreasonable delay.<sup>261</sup>

Pursuant to this revision of section 304(a), the citizen plaintiff need not seek appellate review of an agency's decision to delay prosecution of a violation or the performance of any other nondiscretionary duty. Instead, the right to sue in a district court for unreasonable delay is granted under section 304.<sup>262</sup> Therefore, the confusion as to jurisdiction over a citizen suit for delay or deferral is made less ambiguous in the 1990 Amendments by the distinction drawn between district and appellate jurisdiction. The critical question in deciding jurisdiction for delay or deferral is whether the suit is for deferral of a final action under section 307, or delay of a nondiscretionary duty under section 304.

## 2. Deferral of Final Action

The new Amendments also revise section 307 to permit citizens to bring suit against the EPA for deferred final actions.<sup>263</sup> This section is aimed at resolving the conflict among the courts interpreting whether the Administrator can defer performance of a mandatory duty.

The First Circuit case, *Maine v. Thomas*,<sup>264</sup> upheld a lower court's determination that once the EPA has publicly announced a formal decision to defer action, such deferral is treated as a final action for the purpose of review under the Act.<sup>265</sup> The court stated that the decision to defer in this case "constituted a fully developed part of the final action."<sup>266</sup>

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Administrator's *failure to respond* [to a petition for rulemaking] . . . may be appeal[ed] in the [d]istrict [c]ourt under the [Administrative Procedure Act] . . . . [T]he [d]istrict [c]ourt would have the power to demand the Administrator issue a response. . . ." *Id.* at 901, quoting *Oljato Chapter of Navajo Tribe v. Train*, 515 F.2d 654 (D.C. Cir. 1975).

261. S. 1630, 101st Cong., 2d Sess. § 707 (1990). The Senate bill, S. 1630, contained language that established a specific time which constituted unreasonable delay. Congress rejected this approach for the more flexible, court-determined method, which requires a balancing of several factors to determine whether the Agency has acted in an unreasonable manner. 136 CONG. REC. S16,953 (daily ed. Oct. 27, 1990) (Chafee-Baucus Statement of Senate Managers).

262. 42 U.S.C. § 7604 (1988).

263. 42 U.S.C. § 7607 (1988).

264. 874 F.2d 883 (1st Cir. 1989).

265. *See id.* at 891; *Maine v. Thomas*, 690 F. Supp. 1106, 1110-12 (D. Me. 1988), *aff'd*, 874 F.2d 883 (1st Cir. 1989); *see also* *Environmental Defense Fund v. Costle*, 448 F. Supp. 89, 92 (D.D.C. 1978) (deferral of final action reviewable only in the appropriate court of appeals).

266. *Maine v. Thomas*, 874 F.2d 883, 887 (1st Cir. 1989).

In *Thomas*, several states and environmental groups brought an action for declaratory judgment and injunctive relief requesting the court to compel the EPA to promulgate additional air pollution regulations for protection of visibility in federal parks and wilderness areas. The United States District Court for the District of Maine granted the EPA's motion to dismiss and the citizen plaintiffs appealed.<sup>267</sup>

The EPA argued in *Thomas* that the deferred action should not be reviewable in either the district or appellate courts, and that Congress did not intend for "persons confronted by a governmental promise of some future action to rush headlong" into court.<sup>268</sup> However, the First Circuit rejected the EPA's reasoning and held that the citizen plaintiff has an immediate cause of action, under section 307, if the Administrator defers the performance of a nondiscretionary duty.

In 1990, Congress followed the reasoning of *Maine v. Thomas* and drafted the deferral language of the new Amendments with reference to, and in compliance with, the holding in this case.<sup>269</sup> Congress specifically expressed that the deferral provision provides citizens with a cause of action when confronted with a *Thomas* situation.<sup>270</sup> Congress provided that any Agency decision to defer a nondiscretionary duty may be treated as a final action under section 307(b)(1).<sup>271</sup>

Therefore, the 1990 Act provides that where the EPA defers taking final action with regard to one of these obligations, this deferral will be treated as if it were a final decision and may be challenged in the appropriate federal appellate court.

The confusing history of unreasonable delay and deferral suits mandates caution when proceeding with these types of suits. Plaintiffs may only bring these actions to compel or review *nondiscretionary* duties. Thus, the difficult issue of whether a duty is mandatory must also be resolved. The absence of a definition of unreasonable delay adds to the complex nature of unreasonable delay suits, and warrants caution in interpreting existing case law.

### E. Interstate Pollution

The 1990 Amendments establish a system of regional coordination new to clean air enforcement. This system attempts to forge an interstate approach to air quality maintenance through mandatory participation in the Interstate Transport Commission program.<sup>272</sup> Also, the new legislation requires that a source state must give a contiguous or proximate state notice and the opportunity to object to an application for a permit

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267. *Id.* at 883.

268. *Id.* at 889.

269. 136 CONG. REC. S16,953 (daily ed. Oct. 27, 1990).

270. *Id.*

271. *Id.*

272. CONF. REP. 952, *supra* note 142, § 176A(c), at 23.

for a proposed emitting source.<sup>273</sup>

The Interstate Transport Commission provisions now require compulsory participation in regional air pollution control programs and recommendations for strategies for mitigation of interstate pollution if a participating state's SIP is found to be inadequate.<sup>274</sup> Under this scheme, states affected by regional pollution can force an offending state to amend its SIP if the plan is unacceptable to a majority of the states on the Commission. If a SIP is found to be inadequate, the Administrator is required to accept the Commission's recommendation for revision of the offending SIP or the Administrator must ensure the deficiency will be corrected within eighteen months through an alternate plan.<sup>275</sup>

Congress intentionally structured the 1990 Amendments in a manner that makes it difficult for federal regulators, or offending states, to block the air pollution standards adopted by a majority of states in the region.<sup>276</sup> The Administrator must either approve the Commission's action or develop a different pollution control approach that obtains the same result.<sup>277</sup>

Citizens are also given a new procedure to protest emissions from out-of-state sources under the 1990 Amendments. Any state which receives an application for a permit from a major emitting source must give notice of this application to contiguous and proximate states. The Amendments provide for citizen participation in affected states by requiring a public comment period. If the Administrator does not object to the issuance of an out-of-state permit that would violate the Act, the Administrator's right to object is granted to any citizen. However, this right to object to offending permits does not provide the citizen with direct means to prohibit the issuance of the permit. If the source state ultimately determines that the permit is valid, the objections of citizens may be overruled without repercussions to the source state. Therefore, citizen participation in the issuance of out-of-state permits is limited to recommendations that are accepted by the source state's officials.<sup>278</sup>

#### F. *Statute of Limitations*

The 1990 Amendments do not state the applicable statute of limitations for a citizen suit under section 304. Instead the plaintiff who files an action under this section must determine how long the statute of limitations is under the local rules of the appropriate district court.

In the case of *Student Public Interest Research Group (SPIRG) v.*

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273. *Id.* § 505(a)(2), at 257.

274. *Id.* § 176A(c), at 23.

275. *Id.* § 179(a), at 24.

276. 136 CONG. REC. S16,953 (daily ed. Oct. 27, 1990).

277. See CONF. REP. 952, *supra* note 142, § 179(a), at 24; N.Y. Times, May 7, 1991, § 2, at 1.

278. See CONF. REP. 952, *supra* note 142, § 505(a)(2), at 257.

*AT&T Laboratories (Bell Labs)*,<sup>279</sup> the federal district court in New Jersey addressed the issue of whether a citizen suit was time-barred under the Clean Water Act by the applicable state two year statute of limitations. The citizen plaintiffs in this case sought an adjudication that AT&T had violated specific permit regulations between 1977 and 1982. AT&T argued that because seventy of the eighty violations had occurred outside the applicable state statute of limitations the bulk of the claims were time-barred.<sup>280</sup>

The district court rejected the defendant's statute of limitations argument. The court held that "no state statute of limitations applies to citizen suit actions under the Federal Water Pollution Control Act."<sup>281</sup> The court reasoned that if the EPA had brought the suit, no state statute of limitations would apply. Therefore, because "Congress sought to promote regulatory uniformity by providing identical enforcement mechanisms for citizen and governmental suits," no state statute of limitations should time-bar a citizen suit.<sup>282</sup>

The district court also refused to apply the state statute of limitations because applying it would have provided incentive for states to favor business through environmental regulation. The court found that Congress specifically wanted a national policy of enforcement of federal environmental statutes, and that allowing states to adopt varying statutes of limitations would encourage some states to be more lenient in prosecuting violations.<sup>283</sup> This would allow some states to become havens for industrial polluters.<sup>284</sup> Therefore, the New Jersey District Court held that there is *no* statute of limitations on a citizen suit under section 304.

Conversely, in the case of *Chesapeake Bay Foundation v. Bethlehem Steel Corp.*,<sup>285</sup> which was decided on similar facts and in the same year as *SPIRG v. Bell Labs*, a federal district court in Maryland held that a federal five year statute of limitations was applicable to all citizen suits under the Clean Water Act.<sup>286</sup>

The court in this case agreed with the *SPIRG v. Bell Labs* reasoning that Congress did not intend federal courts to borrow state statutes for purposes of the Clean Water Act. The court in *Chesapeake v. Bethlehem Steel* also cautioned against allowing states to adopt varying statutes of limitations for the purposes of hospitality toward industries that violate the Act.<sup>287</sup>

The *Chesapeake* court also advocated the uniform application of stat-

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279. 617 F. Supp. 1190 (D.N.J. 1985).

280. *Id.* at 1202-03.

281. *Id.* at 1202.

282. *Id.*

283. Student Public Interest Research Group (SPIRG) v. AT&T (Bell Labs), 617 F. Supp. 1190, 1202-06 (D.N.J. 1985).

284. *Id.*

285. 608 F. Supp. 440 (D.C. Md. 1985).

286. *Id.*

287. *Id.* at 447.

utes of limitations to government as well as citizen suits. The court held that the federal statute of limitations for government actions<sup>288</sup> was "almost certainly" applied to Clean Water Act cases. The court stated that "[a]lthough there is no precedent for applying the statute of limitations applicable to government actions for civil penalties to a citizen suit [under the Act], this is the most appropriate statute. . . to be applied in this action."<sup>289</sup>

These cases illustrate the conflicting statutes of limitations applied to citizen suits. The 1990 Amendments did not address this conflict, nor does the legislative history provide any guidelines. Therefore, citizens bringing suit under the Clean Air Act must consider the applicable state statute of limitations to ensure their action is not time-barred.

### CONCLUSION

The citizen suit provisions of the Clean Air Act are designed as fail-safe mechanisms in the overall enforcement structure of the Act. These mechanisms are triggered whenever the Administrator is negligent in performing any mandatory enforcement or rulemaking obligation as required by the Act.

Despite the optimistic legislative intent behind the citizen suit legislation, inherent flaws interfered with its functioning. The 1990 Amendments to the Clean Air Act sought to ensure that citizens could fully enforce the Act if the Administrator failed to do so.

Congress aggressively attacked the pre-existing problems in the citizen suit provision in the language of the 1990 Amendments. Citizens now have additional power to bring suits under the Act, even if the violations are purely retrospective. Also, citizens now have a definite cause of action where the EPA has unreasonably delayed performing a nondiscretionary action or deferred a final decision. The new Amendments changed the remedies available in citizen suits to include civil penalties and provide for a fund made up of these penalties to be used in the financing of enforcement actions and worthy environmental projects.

Despite potentially far-reaching changes, the new Amendments leave several issues outstanding. First, the jurisdictional provisions do not resolve the question of what constitutes injury-in-fact for the purposes of gaining standing as a citizen plaintiff. Second, the attorney's fees section

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288. 28 U.S.C. § 2462 states in pertinent part:

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

*Id.* at 449 (quoting 28 U.S.C. § 2462 (1982)).

289. *Chesapeake Bay Found. v. Bethlehem Steel Corp.*, 608 F. Supp. 440, 448-49 (D. Md. 1988).

of the citizen suit provisions do not address the "partially prevailing party" standard with regard to settlement of claims and intervention. Third, the new provisions do not define unreasonable delay in Agency action. Last, the Amendments do not designate an applicable statute of limitations.

These shortcomings reduce the effectiveness of an otherwise tremendously useful and effective statute. Therefore, we advocate that Congress address the four major drawbacks noted above, so that citizens may fulfill the supervisory role assigned to them under the Clean Air Act.