

# THE ROLE OF THE CITIZEN IN ENVIRONMENTAL ENFORCEMENT

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## SUMMARY

This paper explores the ways in which citizen involvement can improve the fairness and effectiveness of environmental enforcement. Section 1 of the paper discusses the overall value of such citizen involvement. Section 2 surveys the wide range of roles citizens can play in the enforcement process. Section 3 focuses on ways in which citizens can use the courts to work towards environmental enforcement goals. Section 4 examines citizen involvement in practice, highlighting some practical considerations relevant to designing and implementing citizen participation mechanisms.

## 1 INTRODUCTION

Citizens are one of a nation's greatest resources for enforcing environmental laws and regulations. They know the country's land and natural attributes more intimately than a government ever will. Their number makes them more pervasive than the largest government agency. And because citizens work, play, and travel in the environment, each has a personal stake in its beauty, health, and permanence. (1) Citizens are omnipresent, motivated, and uniquely interested in environmental quality.

A bird-watcher walking in the woods sees chemical waste flowing through a stream, traces the source to a neighboring factory, and alerts government agencies to the factory's violation of its emissions discharge permit. A local citizen group in a small town near a coal mine suggests to a state mining agency practical ways, based on the citizens' own observations of the mine in operation, of making environmental standards for mines easier to administer and enforce. A city resident notices that municipal buses are emitting noxious fumes, sues the bus company, and wins a court order requiring the company to place pollution control devices in the bus exhaust systems. These are just a few examples of the many and varied influences citizens can have on the process of environmental enforcement.

Drawing on the resources of citizens can enrich and strengthen the environmental enforcement process in several ways. First, citizen participation in environmental enforcement taps the direct, immediate connection between individuals and their environment. Citizens are uniquely

knowledgeable about their own communities. Their day-to-day observations give them access to information about environmental conditions that the government could never obtain. Involving citizens in environmental enforcement encourages productive use of this information. The intimate connection between individuals and their own communities also enables citizens to concentrate on localized environmental problems. A federal or even a state government agency might not consider such "small-scale" threats to the environment serious enough to justify action on the national or regional levels. But correcting these harms can be vital to the survival of a particular town or rural area. Citizen participation in environmental enforcement thus broadens access to enforcement resources.

Second, the injection of varied, non-institutional perspectives and information sources into the enforcement process may improve the quality of enforcement decisions. For example, the views of individual users of a national park on how a ban on logging in the park should be implemented may well differ from those of a timber company that wants to restrict logging by its competitors. Both are likely to be different from the position of the government enforcement agency which lacks the funds to investigate and prosecute violations. Allowing and encouraging the hikers and loggers to affect the outcome, by, for example, participating in government enforcement actions or suing on their own to implement the ban, may increase compliance, deter violations, and contribute to a more realistic and responsive environmental enforcement strategy.

The dynamic between citizens and the government agencies officially charged with enforcing environmental laws adds to the potential effect of citizen participation in this area. In the context of environmental enforcement, citizens and government are presumed to share a goal -- that of maximizing compliance for the good of all. This presumption of a common interest is reflected in the dual meaning of the adjective "public," when used in conjunction with the operation of a democratic system of government. In this context, "public" refers both to the citizenry at large -- which engages in "public participation" -- and to the government -- which formulates and implements "public policy."

Yet tension sometimes arises between these two "public" entities. The government may fear that citizen involvement in environmental enforcement will disrupt its own enforcement efforts and will reduce its flexibility to tailor enforcement decisions to particular circumstances. (2) Government enforcers may also believe that if enforcement actions in the courts are mounted on a piecemeal basis, rather than as part of a coordinated strategy, poor judicial precedents may be set that could hinder further enforcement efforts. (3) Consequently, government agencies sometimes decline to support, or may even resist, private enforcement initiatives. Citizens, on the other hand, often suspect government agencies of not properly fulfilling their enforcement responsibilities. Citizens may view government employees as overly susceptible to the influence of the business interests they regulate. (4) Or they may attribute government inaction to bureaucratic inertia. Either way, agency enforcers often are seen as overlooking or impeding environmental protection goals. (5)

This tension between government and citizens can result in improved environmental enforcement. The government's desire to prevent citizen action it views as disruptive can encourage agencies to take their own regulatory or enforcement steps. The public's suspicion that government may not vigorously implement certain laws may prompt the legislature to grant citizens a statutory right to bring a lawsuit to require the government to perform its assigned regulatory duties. And in instances when the government insists on inaction, citizen participation

can replace government enforcement. Not only may compliance be achieved, but the government can be forced to account publicly for its own inaction. (6)

When the interests of the government and the citizens are similar -- as is often the case -- individuals can fill gaps in government enforcement caused by resource constraints. (7) The sheer size of the citizenry, for example, enables individual citizens to monitor compliance throughout the nation and identify violations an understaffed investigative agency might miss. An enlightened government agency can also use citizen volunteers to implement a comprehensive enforcement strategy. This could both help the government meet its enforcement objectives and avoid the potential conflicts that may result from piecemeal enforcement efforts.

Finally, public involvement in enforcement is a logical next step for democratic political systems that have encouraged public participation in the creation of environmental statutes and regulations. (8) Allowing citizens to have a concrete role in implementing the regime they helped to design strengthens public support for and awareness of environmental goals. If citizens are denied a role in enforcement, or if they are not educated about and encouraged to assume a permitted role, even the most sophisticated system of environmental protection laws may exist only on paper. Several countries in Central and Eastern Europe, for example, have for years boasted a system of stringent environmental controls. Yet these provisions have seldom been enforced by the government. (9) Nor do these countries have a tradition of citizen participation in public affairs that can be drawn on to promote or supplement government action. Developing and nurturing a role for the citizens in enforcement efforts could provide the missing ingredient necessary to make these countries' environmental protection goals a reality.

On paper, the environmental laws in Central and Eastern Europe are not dramatically different from those in the United States. Yet the U.S. has been more successful in implementing and enforcing those laws. One major difference between the two systems is the role of the citizen in the environmental enforcement process. The public has played an increasingly important role in the U.S. in forcing industry and government to comply with environmental statutes since the beginning of the modern environmental movement in the late 1960s. Over two decades of U.S. experience with citizen enforcement mechanisms have distilled some principles that may be applicable in other countries as well. Drawing on the experience of the U.S. and of selected other countries with various forms of citizen enforcement efforts, this paper analyzes various avenues for public participation in environmental enforcement.

## **2 THE RANGE OF PUBLIC INVOLVEMENT IN ENVIRONMENTAL ENFORCEMENT**

Avenues for public participation in enforcement are many and varied. Some require special expertise, and some require only energy and common sense. Some involve working alongside the government, some place the citizen in the shoes of the government, and some call for citizens to oppose the government's activities. Some require extensive financial expenditures, and some cost only time. Separately or in concert, these mechanisms can help to effectuate compliance with environmental controls.

### **2.1 Collecting Information for Use in Enforcement**

On the most basic level, citizens can use their eyes and ears to identify areas in need of further regulation and to monitor compliance in areas already regulated. (10) Individuals are uniquely qualified for this role. As ever-present observers in their local communities, citizens are particularly good at identifying unusual occurrences. They may, for example, notice the presence of an oil sheen on a river, an unusually serious emission from a smokestack, or the activity of a developer in a swamp. These occurrences might escape the government enforcer unfamiliar with community conditions and unequipped to perform frequent field investigations. Citizen monitoring can occur informally, as a result of chance observations of individuals in their communities. Citizens can also monitor on a more regular basis through community, regional, or national environmental organizations.

Such citizen participation in information-gathering and reporting efforts is critical if enforcement goals are to be met. The sheer size of environmental problems and the increasing demands on limited government resources combine to make environmental agencies woefully unequipped to perform all necessary investigatory and monitoring duties. In the United States, for example, over 60,000 permits have been issued under the Clean Water Act alone -- only one of several environmental protection statutes -- and government funding for enforcement efforts has consistently fallen throughout the last decade. (11) Government agencies simply cannot take full responsibility for gathering the information necessary for effective environmental enforcement.

### 2.1.1 How to Assemble Information

#### 2.1.1.1 Physical Observation

Methods of collecting valuable environmental data are numerous. One way is to gather information from physical observation. For example, some organizations in the United States have begun "harborwatch" programs to identify oil spills or other emissions in local harbors. (12) Others teach citizens to "walk" streams, identifying locations of pollutant emissions and observing the effects of these emissions on water quality or indicator species. (13) Although detailed scientific monitoring of pollutants is too expensive and complex for most individuals to undertake, certain simple tests (judging the density of plumes of air pollutants, for example) can be learned by citizens. (14) Violations identified through these information-gathering activities can then be reported to environmental organizations or government agencies or can be publicized through the media.

Because of the benefits that can be gained from citizen monitoring, government often chooses to promote these activities. Government support may range from establishing an office to receive reports of violations to providing funding for citizen groups collecting environmental information. Through such programs, federal and state government agencies in the U.S. have been able to accomplish monitoring that would otherwise be impossible by tapping into the time and energy represented by concerned individuals.

Although many environmental problems are obvious from a distance, it may be difficult for citizens to acquire detailed information about threats to the environment that can only be perceived at close range. Sometimes citizens can take advantage of public access to natural resources to scrutinize potential violations. For example, in the United States, the public is

allowed access to rivers, streams, and beaches, and can use those routes to approach and examine points of pollution emission. (15) If access via public waters is not possible, a more costly alternative for obtaining information would be to take to the open skies to monitor pollution emissions or the management of natural resources from the air. (16)

In most cases, however, the activities that threaten to violate environmental controls will take place on private property to which citizens will not have direct access. One approach to encouraging citizen involvement in environmental enforcement would be to permit citizens to enter private property to undertake environmental monitoring when warranted by a serious threat to public health. Another option would be to allow citizens to assist the government in carrying out its own environmental monitoring activities. For example, water quality legislation in Argentina allows private parties who have filed a complaint about a facility to participate in any inspection of the facility during the investigation. (17)

Another means of obtaining access to private property for monitoring purposes is for a citizen to file a lawsuit against an alleged violator. In the United States, filing such a lawsuit allows a plaintiff to conduct discovery on topics relevant to the case -- including, in lawsuits brought to enforce environmental laws, the extent of the pollution caused by the alleged violator. As part of this discovery process, the court can order the defendant to admit the plaintiff to its property to collect such information. (18)

#### 2.1.1.2 Use of Government Information

Citizens can also gather data about environmental violations through the use of information collected by the government, either through its own efforts or by means of reporting requirements imposed on polluters. In the United States, for example, many federal and state environmental regulations require regulated parties to submit periodic reports about their pollution emission levels or their storage, use, and discharge of hazardous materials. (19) In order for the information gathered by the government to benefit the public, citizens must be afforded access to that information. Several means of citizen access to government-held data are provided in the U.S. Some U.S. environmental statutes that impose self-monitoring and reporting requirements also require the data reported to be made publicly available. In addition, the federal government is subject to a generalized information access law, under which the public can ask to review or copy certain information in the possession of government agencies. (20) Finally, for citizen monitoring to be truly effective, it is important that citizens be able to compare the monitoring reports against clear compliance standards, such as individualized permits or regulatory limits. (21) These standards must also be publicly available.

#### 2.1.2 How to Use Information

Once citizens have gathered environmental data and sifted through it to identify violations, they may put their information to a number of uses. One possibility would be to approach the violators directly in an attempt to induce voluntary compliance. Publicizing the violations in the press or through community meetings could create pressure on industrial polluters to comply.

The citizens could also choose to alert the government to their findings. In the United States,

most state and federal agencies are set up to receive information reported through both formal and informal citizen monitoring. (22) Of course, there is no guarantee that agencies can or will act on the report of a citizen. If the government decides that enforcement proceedings are warranted, however, information gathered by citizens -- or testimony about observations by citizens -- may be used in court as evidence against the violators. Under some U.S. statutes, if the information provided leads to a criminal conviction or civil penalty, the government may reward the reporting citizen with up to \$10,000. (23)

Alternatively, citizens may be able to use the information they have collected by going to court themselves to enforce environmental controls. (24) For example, after collecting and analyzing a large volume of water pollution reporting data, one U.S. environmental organization filed a series of lawsuits against industrial polluters who were violating toxic discharge limits contained in their permits. This concerted litigation effort was largely responsible for the initial growth of citizen suits in the United States in the mid-1980s. (25) Considerations relevant to determining how citizens might be able to advance environmental enforcement goals through the court system are discussed in more detail in Section 3 of this paper.

## 2.2 Participation in Government Regulatory or Enforcement Action

A second avenue of citizen involvement in environmental enforcement enlists the resources of citizens to complement agency regulatory or enforcement efforts. In this context, the government will have chosen a particular vehicle for accomplishing environmental protection goals, and the citizen will bring his or her viewpoint to bear in ensuring that the government's actions are as well-informed and effective as possible.

### 2.2.1 Commenting on Regulations and Permits

A government agency charged with administering an environmental statute may have decided to issue a regulation setting specific standards by which to achieve the goals spelled out in the law. Or the agency may have already established such standards, and it may be working within them to determine the content of a particular polluter's environmental permit. Allowing the public to comment on proposals for regulations or on the terms and conditions of permits may aid in future enforcement activities. The public can contribute practical knowledge of real-world conditions that will help the agency to devise rules or issue permits that are feasible and effective. In addition, the public can review the regulations and permits with an eye towards future enforcement efforts and ensure that the regulations and permits contain clear standards and procedures that will ensure simple and effective enforcement. (26)

### 2.2.2 Participating in Government Enforcement Actions

If the government has chosen to bring an enforcement action against an alleged polluter, a citizen can still play a role in the enforcement process. Several mechanisms exist in

the United States that permit citizens to make their views known during enforcement proceedings. For example, citizens may intervene in suits brought by the government against potential violators. By joining a lawsuit as an interested party, a citizen would not have primary responsibility for prosecuting the case, but could still take part in negotiations and make his or her perspective known to the judge. Because the court may be reluctant to strain judicial resources by allowing unrestricted participation in the lawsuit, the right to intervene might normally be limited to citizens with tangible interests in the outcome of the case. (27) However, most U.S. environmental statutes that authorize citizen enforcement suits also grant citizens the right to intervene in government enforcement proceedings. (28) In any event, even citizens with purely ideological concerns can participate in a case by filing non-binding *amicus curiae*, or friend-of-the--court, briefs setting forth their positions.

### 2.2.3. Reviewing the Terms of Consent Decrees

Finally, the filing of a lawsuit, or even the threat of a lawsuit, by the government will typically lead to negotiations between the government and defendant. In many cases, the parties can agree on a settlement without resorting to a court adjudication. In enforcement actions, these agreements, called consent decrees, are usually entered with the court as a sort of contract between the parties and have the same enforceable effect as a court judgment. If a citizen has intervened in the case, that citizen will be a party to the consent decree and will be involved in the settlement negotiations. (29) Even when a citizen is not actively participating in the case, the government prosecutor may be required to publish the proposed consent decree and request public comment on the decree. (30) Any comments by the public on the decree can be filed with the court, which will take them into account in approving or rejecting the agreement.

## 2.3 Recourse to Courts When Government Is Unwilling or Unable to Act

A third category of citizen involvement consists of instances in which the public may seek direct access to the courts to accomplish environmental enforcement objectives. For example, citizens may go to court to prompt tardy government regulatory action. The defendant in such a case would be the responsible government agency, in its capacity as a regulator. Alternatively, citizens may mount enforcement actions against violators of environmental controls when the government lacks the desire or the ability to prosecute. In the course of its operations, the government itself may engage in conduct that harms the environment. This is particularly true in countries, such as the post-communist nations in Central and Eastern Europe, in which industry and property ownership have been nationalized. Therefore, the defendant in an enforcement suit could be either a private party or a government agency acting in its proprietary, rather than its regulatory, capacity.

### 2.3.1 Lawsuits Pressuring Agencies to Regulate

#### 2.3.1.1 Non-Discretionary Agency Decisions

Most environmental protection statutes in the United States set forth general goals or objectives, while delegating to an administrative agency the responsibility of implementing those general goals through regulations and the issuance of permits. For example, a statute may direct that discharge of toxic pollutants into surface waters be reduced by a certain percentage, and it may charge the agency with the tasks of defining which pollutants are covered by the directive and approving plans to achieve the specified goal. If the agency does not perform its obligations under the statute, the target set forth in the law will never be achieved. One essential role of citizens may be to ensure that agencies carry out the tasks the legislature has assigned to them. Citizens could be permitted to fulfill this role in several ways. One way would be to allow citizens to go to court to force agencies to perform their specific statutory assignments. Several U.S. environmental statutes contain provisions allowing citizens to seek judicial review of an agency's failure to act as the legislature has instructed. (31) These provisions permit "any person" to bring suit against an agency for failure to perform an act or duty which is not discretionary under the statute -- i.e., for not doing something that the statute says the agency "shall" do. (32) The citizen must notify the agency before bringing the suit to give the agency an opportunity to avoid litigation by performing the required regulatory action. If the citizen wins the suit, the court may order the agency to perform the act or duty it has delayed. (33)

### 2.3.1.2 Discretionary Agency Decisions

Although the mechanisms described above allow citizens to require government action in cases where the legislature has mandated it, they do not necessarily extend to situations in which the decision whether or not to regulate is within an agency's discretion. Nor do they allow citizens to prescribe the content of the regulatory action taken by the agency. In the United States, citizens can challenge discretionary agency decisions about whether and how to regulate, either under particular environmental statutes or under a generalized act governing the procedures to be followed by administrative agencies. (34) However, prevailing in these discretionary suits is difficult. Typically, an agency's substantive decision will be reversed only if it is found to be "arbitrary and capricious" or if it is "contrary to law." Courts have interpreted the "arbitrary and capricious" requirement as warranting reversal of an agency action only when the action lacks any reasonable basis in fact. Moreover, U.S. courts tend to defer to agency decisions in matters within the regulatory expertise of the agency. Courts will even defer to a "reasonable" agency construction of the statute the agency is administering, barring clear statutory language to the contrary. (35)

Even though it may be difficult for citizens to succeed in such suits by challenging the substantive outcome of a discretionary agency decision, challenges to the method by which the agency reached its conclusion may be more promising. Experience in the United States has shown that courts will defer to agencies' substantive decisions, but only if they are sure that the agency has taken a "hard look" at the available options. If the decision making process appears sloppy, or if the views of certain constituencies have been entirely ignored, the court may find that the agency has acted in an "arbitrary and capricious" manner. The threat of citizen challenges to discretionary decisions is thus an effective means of ensuring that agencies at least consider the perspective of the public in their decisions. (36)



### 2.3.1.3 Enforcement Decisions by the Agency

In the United States, the reluctance of courts to infringe on the discretion of government agencies has also precluded the public from contesting an agency's decision not to take a particular enforcement action. Federal and state agencies in the United States enjoy the doctrine known as "prosecutorial discretion," which leaves the decision whether or not to enforce a requirement against an individual entirely to the judgment of the prosecuting party. (37) Even though citizens cannot force agencies to take enforcement action, they may be able to take on the role declined by the agencies and sue the violators themselves. (38) These citizen enforcement actions are discussed in Section 2.3.2 below.

### 2.3.2 Lawsuits Pressuring Others to Comply with Laws, Regulations, and Judicial Standards

If the government has made clear its intention not to prosecute, or even simply if a citizen has a personal stake in a matter that a remedy provided under an environmental statute cannot adequately satisfy, the citizen may decide to enforce environmental controls against a violator. In the United States, citizen enforcement of environmental controls can be pursued directly by means of citizen suit provisions contained in particular environmental protection statutes.

Even in the absence of a statutory authorization of citizen suits, opportunities exist for citizens to obtain judicially-enforced sanctions against industrial or government polluters. Countries with systems of rights and remedies that have evolved from a tradition of case-by-case adjudication, such as the United States or Great Britain, offer "common law" causes of action to protect against or redress environmental harms. And in other countries whose legal system is based on a civil code, that code may provide general environmental rights that can serve as the basis for judges to remedy environmental harms in particular cases.

#### 2.3.2.1 "Citizen Suits" or "Enforcing Suits"

One method of harnessing the energy and commitment of citizens to effectuate public environmental protection goals is to authorize citizens to enforce environmental laws and regulations. In the United States, most environmental statutes contain "citizen suit" provisions enabling citizens to prosecute violators of the statutory regime. (39)

Such citizen suit provisions have their roots in over two hundred years of U.S. law. Since 1790, United States citizens have been able in limited cases to sue to vindicate certain public rights -- those granted by statute to the population as a whole. (40) These citizen suits have been used to enforce federal regulations in diverse areas ranging from antitrust to consumer protection. (41) Citizen suit provisions are said to create "private attorneys general," for they confer upon the individual the right to enforce public laws against other citizens.

Although the concept of a citizen suit is not new, the statutes permitting citizen enforcement of environmental laws and regulations are unique. In most other areas where citizen suits are permitted, a personal economic interest, such as an interest in correcting unfair competition or

preventing fraud, must coincide with the claimed public rights. In citizen suits brought under environmental protection statutes, however, there is no such personal economic stake in the outcome. The environmental statutes truly provide citizens with the authority to represent the interests of the public. Environmental citizen suits, in their strongest form, might even be characterized as permitting citizens to sue on behalf of the environment itself. The United States is almost unique in this grant of power to the private citizen: Few other nations have extended such rights. (42)

The U.S. Clean Air Act (CAA), enacted in 1970, was the first federal environmental statute of the modern era with a citizen suit provision. The CAA provision's underlying structure is the basis for citizen suit clauses in almost every other major piece of federal environmental legislation. Today, citizens can bring suit against private parties and government for violations of certain sections of statutes regulating air, water, toxic waste, endangered species, mining, noise, the outer continental shelf, and more. (43) Under many statutes, the remedies available to the citizen are equivalent to those granted to the federal agency charged with administering the statute. (44)

The basic citizen suit provision permits any "person" (including an individual, organization, or corporation) to sue any other "person" (including the United States) who is violating the requirements of the given Act. Before filing suit, a citizen must notify state and federal agencies as well as the alleged violator that a lawsuit is impending. This notice provision serves an important purpose, because the threat of a citizen suit often prompts the violator to halt its violations, or at least to negotiate with the potential plaintiff. As long as the violation continues and the state or federal government is not pursuing a "diligent enforcement" action against the alleged violator in court, a lawsuit may be filed. Once the suit is filed, the government has no power to dismiss it, and may affect the outcome only by intervening in the case.

If the citizen wins, the court may order the defendant to stop the violating activities. In certain circumstances, the court costs and attorney fees associated with bringing the action may be awarded to the plaintiff. Some statutes allow the plaintiff to ask the court to impose civil penalties upon the violator, payable to the U.S. Treasury. (45)

### 2.3.2.2 Common Law or Civil Code Suits

Even in the absence of mechanisms for enforcing specific environmental controls set forth in a system of statutes and regulations, citizens can still achieve environmental protection objectives in the courts. Both common law systems such as that in the United States and the civil code systems that prevail in many other countries provide latitude for judicially-developed methods of remedying environmental harms. Under these systems, environmental controls are not enshrined in statutory or regulatory standards, but are developed on a case-by-case basis by courts applying general legal principles to the facts of each lawsuit. A receptive judiciary can employ the flexibility inherent in such systems both to offer citizens redress for environmental degradation that injures them individually and to correct harms to public environmental interests.

#### 2.3.2.2.1 Common Law Suits

Prior to the adoption of recent environmental statutes in the United States, the only way in which

a private citizen could prevent environmental harm through the courts was by exercising his or her rights under common law. These rights are based on precedents set during centuries of case-by-case adjudication in Great Britain and the U.S. They allow individuals to counteract harms caused by the behavior of others by seeking compensation for those harms and/or obtaining a court order halting the offending behavior. Even with the advent of statutory citizen suit provisions, common law causes of action continue to provide an important mechanism for achieving environmental protection goals.

Most common law environmental claims require some injury or threat of injury to the plaintiff's person or property. The most common "environmental" common law action is that of private nuisance. A person suffering a "substantial and unreasonable interference with the use and enjoyment of an interest in land" can bring a private nuisance suit. For example, a property owner could sue a neighboring factory for emitting dangerous or even annoying fumes that permeated his or her property. Another common law claim for injury to property is trespass, which requires an actual physical invasion of the property's limits. A fuel storage facility whose tanks leaked oil that flowed into a neighbor's fish pond might be liable to the pond-owner in a trespass suit.

Common law actions can compensate for injury to one's person as well. For example, someone who lives near a toxic waste dumping site, and who becomes sick from fumes emanating from the site, may be able to sue the owner of the site on the basis of that injury. If the plaintiff joins together in one lawsuit with other citizens living near the site who have suffered the same damage, the resulting "class action" lawsuit can have a significant effect on the polluter's behavior.

The potential strength of such common law suits as a weapon in the environmental enforcement arsenal stems from the financial costs they can impose on a violator. Common law claims are the only avenues through which individuals can recover for damage to themselves or their personal property. And damages awarded in such suits in the U.S. can be substantial. For example, a potential court judgment for personal injury resulting from toxic pollution could include compensation for medical expenses, lost wages, and diminished earning capacity. Damages in a common law suit involving a newborn baby who will be permanently disabled by injuries caused by the defendant's polluting activities could easily amount to millions of dollars. (46) The threat of a sizeable award of damages can substantially strengthen a citizen's power to trigger compliance -- it can deter potentially polluting activities and force industry to pay attention to citizens' claims.

The common law actions described are aimed primarily at correcting violations of individual rights. By fining a defendant for such violations, or by ordering a halt to the offending activity, they can lead to broader environmental benefits as well. The common law also provides mechanisms through which citizens can vindicate public, rather than private, rights. These doctrines generally require that the plaintiff share some personal stake in the "public" goal pursued in the suit; moreover, they do not allow the plaintiff to recover money damages from the defendant unless the plaintiff has suffered injury to his or her person or property. Nonetheless, the doctrines of public nuisance, public trust, and certain broad statutory mandates reveal some of the possibilities inherent in the flexibility of judge-made law.,

Public nuisance involves interference with public rights such as the right to health, safety, or comfort. Traditionally, only the government could sue to protect these rights. Recent

developments, however, allow suits by individuals who suffer "special injury" different in kind from that suffered by the rest of the public. (47) A second common law action that recognizes communal rights is known as the "public trust" doctrine. This doctrine posits that the government must hold public lands and natural resources in trust for the use and enjoyment of the citizens. If the government fails to consider this trust in its management and maintenance of resources like navigable waters, fisheries, or parklands, individual citizens may sue those in control of the lands. (48) While the doctrine is, at first glance, not applicable to privately-owned land, some state and federal courts have hinted that a regulatory or contractual link between the landowner and the government may be enough to bring the doctrine into play and to render the landowner liable for environmental harms. (49)

Finally, some U.S. states have explicitly recognized public rights to environmental quality in their statutes and constitutions. Most constitutional provisions have been ineffective, because they do not permit citizens to sue for the violation of their constitutional environmental rights.

Michigan's unique Environmental Protection Act, adopted in 1970, has been more successful. The Act permits any person to sue any other person "for the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction." (50) It grants courts broad powers of review of both individual and agency actions, and permits orders altering or halting the harmful activities unless there is no "feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare." Michigan courts have interpreted the Act as conferring upon them the responsibility of creating "the equivalent of an environmental common law." (51)

#### 2.3.2.2.2 Civil Law Suits

Civil code countries also offer judicially developed remedies for environmental harms. In civil code countries, standards governing environmental quality are codified, and judicial precedent is not as important as it is in common law systems. At the same time, however, code provisions relevant to environmental quality are usually general in nature, and thus are open to interpretation by judges applying the provisions in particular cases.

Most civil code standards that can protect environmental quality are similar to those available under common law, especially those actions preventing or recovering for harm to property or person. (52) Many civil codes also contain provisions that appear to go further than the common law in granting individuals the right to enforce public environmental interests. For example, Hungary's code allows individuals to sue others for violating an obligation not to behave so as to disturb others needlessly, "especially neighbors." The "neighborhood" encompassed by this provision is not restricted to property immediately adjoining the site of the polluting activity, but includes anyone affected by the pollution. (53)

In Colombia, the civil code provides for "popular actions," which permit citizens to sue for damages to communal environmental rights. (54) And in Argentina, courts have made use of a constitutional guarantee called *amparo*, which can be loosely translated as "protection," to defend individual or collective environmental rights derived from statutes, international treaties, or the constitution itself. (55)

### 3 THE STRUCTURE AND FUNCTION OF COURT ACCESS MECHANISMS

The court actions described above can be potent methods of achieving environmental compliance. They may not be appropriate in every case, however. For one thing, going to court will not always be a feasible option. Mounting a private lawsuit is a costly undertaking. It will probably require hiring an attorney, paying court filing and transcription fees, generating and duplicating legal briefs and other documents, and conducting extensive discovery to assemble the facts necessary to prove one's case. These efforts may exceed the capability of a private citizen.

Frequent recourse to litigation as a method of achieving environmental compliance can pose societal disadvantages as well. Some commentators in the United States have complained that public interest lawsuits create a logjam in the courts and strain overtaxed judicial resources with frivolous or peripheral claims. Others claim that promoting litigation as a preferred alternative for citizen involvement in environmental enforcement creates an atmosphere of adversarial hostility that may discourage future cooperation.

Despite these potential limitations, the ability of citizens to obtain judicial relief from environmental harms can be a valuable enforcement tool. First, citizen access to court remedies improves the quality and fairness of the enforcement process. Allowing citizens into court helps to guarantee that other important players in the political system -- such as industry and government -- will give citizen viewpoints their due. Without such a guarantee, the voices of citizens advocating environmental protection may be drowned out. For example, a large business engaging in polluting activities may be inclined to disregard the views of local citizens who want to impose pollution curbs. The government, in turn, might give citizen comments during regulatory proceedings less weight than those of industry, whose lobbyists may be more vocal and well-financed and who may have developed ties to the regulators.

Citizen suits can serve as the microphone that helps citizen views to be heard. Before the court, all litigants are equally deserving of a fair hearing in each case. A citizen with access to a court action can invoke the power of the judiciary in the service of her cause. The availability of an enforcement suit enables individuals and organized citizen groups to secure treatment as equals by government and industry. Opening the courthouse door to citizens thus promotes the rule of law over the rule of politics and advances the common goal of environmental protection.

Enabling citizens to implement environmental protection objectives in the courts also reinforces other forms of citizen participation in environmental enforcement. For example, citizens may prefer to focus primarily on participation in government regulatory or permitting processes in the ways discussed in Section 2.2.1 above. The knowledge that citizens can challenge the government's outcome in court may increase the agency's attentiveness to such comments and enhance the usefulness of the public's efforts. Ensuring that citizens will be heeded increases the value of their message, whatever mechanism they may choose to convey it.

Finally, allowing citizens to sue can have concrete effects on a society's progress towards implementing environmental controls. Actual litigation need not even occur in order to achieve this result. The very possibility of an enforcement suit against a violator may be sufficient to trigger compliance, influence industry to enter into a negotiated agreement with the citizens, or otherwise induce a polluter to alter his behavior, thus obviating the need to sue at all.

Experience in the U.S. with citizen suit provisions has revealed that the mere notification to a violator that a citizen intends to sue often prompts the potential defendant to cease the violations.

### 3.1 Why Sue?

Whether a citizen will need to have recourse to the courts, and if so, through what mechanism, will depend on what that citizen hopes to achieve. For example, a citizen may be motivated to respond to environmental harms by seeking money for herself or for the government. The citizen may want the government to take some sort of regulatory action. Or she may simply want to put a halt to the polluting activity.

Given the cost and effort involved in bringing suit, citizens may prefer to explore other methods of attaining their objectives. For example, a civic group targeting permit violations by a local industrial water polluter might first try to induce voluntary compliance by confronting the polluter directly. If that effort did not succeed, the group could approach the local media with information it had collected about the violations, hoping to embarrass the polluter into compliance. An alternative step might involve forwarding evidence to the government for enforcement action. If these various approaches were not successful, the civic group could file a court complaint against the polluter under an environmental statute containing a citizen suit provision. Even that course of action might well stop short of a trial or other judicially determined outcome. Merely notifying a polluter or a government regulator that a lawsuit is impending, as most citizen suit provisions require, often triggers "voluntary" compliance by the polluter or regulatory or enforcement action by the government. The prospect of court action may also prompt the parties to settle the case between themselves rather than engaging in expensive and time-consuming litigation. Settlement substitutes a definite, certain result for the unpredictable risks of a trial. (56) In the United States, litigants have found this trade-off appealing: over 90 percent of the lawsuits filed in the United States are resolved without a trial. (57)

### 3.2 What Kind of Lawsuit to File?

The objective of a potential citizen plaintiff -- the legal "remedy" the plaintiff desires to obtain -- will determine both the range of available litigation strategies and the way in which the case will proceed. A political system is likely to impose controls on a citizen's access to remedies that will vary with the nature of the remedy itself. The structure imposed by the government, in turn, will influence the citizens' enforcement strategies. This section surveys the various methods in which a citizen may be able to achieve a particular enforcement goal.

#### 3.2.1 Lawsuits to Obtain Money Damages

##### 3.2.1.1 The Nature of the Remedy

One goal of a citizen lawsuit might be financial compensation to the citizen for environmental harm caused by a polluter. It may be appropriate to set relatively strict limits on the ability of a plaintiff to obtain such compensation. Those responsible for designing and implementing a system of judicial enforcement may decide that financial benefits should only accrue to someone who has actually suffered from the complained-of harm.

In the United States, for example, a litigant seeking money damages for environmental harms is limited to the common law causes of action described above in Section 2.3.2.2.1, which

generally require an actual injury to the plaintiff's person or property. The U.S. government has chosen not to supplement that avenue with a statutory damages remedy. Because citizen suits under environmental statutes are designed to vindicate public rather than private rights, they do not allow plaintiffs to recover any personal damages for violations of environmental laws and regulations. (58)

### 3.2.1.2 The Elements of the Case and the Method of Proof

In order to win damages in a suit at common law, a plaintiff is required to establish several elements. The plaintiff must prove that the defendant has violated an expected standard of conduct -- by intentionally or negligently acting in a manner likely to result in harm, for example. The plaintiff must also establish that the defendant's behavior has caused actual damage to the plaintiff. This element of causation can be especially difficult to prove. In the case of injury to health resulting from toxic pollution, a plaintiff may have to supply scientific evidence and analysis establishing a physical link between the particular polluting activity and the harm. The long latency period that may intervene between a release of toxic substances and the manifestation of a resulting injury contributes to the difficulty of proving this element. (59)

In a private nuisance lawsuit, a plaintiff would also be required to establish that the harm resulting from the defendant's conduct outweighs the social utility of the polluting activity. This too can be a heavy burden, because it may force the court to weigh the plaintiff's right to grow crops that are free from pollution damage against the community's desire to retain the jobs created by the defendant's polluting factory.

In some instances, a system of government might conclude, the public interest warrants reducing the burden of proof on a plaintiff seeking financial compensation for harms caused by polluting activities. In the United States, courts responsible for developing and interpreting the common law have made several such adjustments. One example is the creation of different rules of liability for what courts have determined are "abnormally dangerous activities," such as the transportation of hazardous waste. Courts have concluded that the defendant conducting abnormally dangerous activities has voluntarily taken on the risk of causing harm to others. The defendant thus should be "strictly liable" for the resulting damage, even when the defendant's actions were not negligent or intentional.

Judicial rules can also lessen a plaintiff's burden of proving the causation element of a common law damages case. For example, a judicially established presumption that certain kinds of polluting activity cause certain kinds of physical damage might allow a plaintiff to recover without proving conclusively that the defendant's practice was the actual cause of her injury. (60)

The existence of statutory or regulatory environmental standards can assist a plaintiff as well. Federal or state statutes regulating toxic chemicals may serve as evidence of the chemicals' toxicity. In addition, violation of the regulatory requirements can demonstrate negligence on the part of the defendant. Similarly, "right-to-know" laws often require companies to reveal to workers and communities the dangers associated with any toxic chemicals that the companies store, use, or release. A judge may conclude that this statutory reporting requirement assigns to the defendant a duty to warn the plaintiff of known hazards, and that violation of the requirement breaches that duty. (61) Environmental standards enacted by the legislature and refined by administrative agencies can thus influence the development of judge-made law.

### 3.2.2 Lawsuits to Halt Violations

#### 3.2-2.1 The Nature of the Remedy

A plaintiff whose desired remedy is a court order requiring a polluter to stop the polluting activities may be offered more avenues for judicial relief and may face fewer hurdles to recovery. In the United States, this form of remedy is termed an injunction. It is the most likely outcome of a successful suit to enforce public rights, either under the common law or under an environmental statute. An order barring or otherwise limiting future environmentally harmful activity may also be the outcome of an environmentally-based suit in a civil code system.

#### 3.2.2.2 The Elements of the Case and the Method of Proof

Injunctive relief may be sought in an action at common law to enforce either private or public rights. In such a case, liability will be established in the manner discussed in Section 3.2.1 above. A citizen can also seek an injunction by suing under an environmental statute that contains a citizen suit provision.

In cases in which the citizen is acting as the enforcer of a federal statute by asking a court to prohibit behavior that violates the statute's terms, the citizen's burden of proof in court may be lighter than that required in a common law action for damages. In most cases, the citizen may need to prove only that certain statutory or regulatory controls or limitations are in force and that the defendant has failed to adhere to them. (62) In actions brought to enforce statutes that require regulated entities to report regularly to the government on their regulated activities, such as the U.S. Clean Water Act, proof might consist simply of the defendant's own reports. These reports may reveal violations of applicable emission limits or permit conditions.

In establishing the requirements governing the conduct of a statutory citizen suit, a government may want to ensure that citizen suits encourage, rather than impede, both voluntary compliance and government enforcement efforts. Therefore, most citizen suit provisions in U.S.

environmental statutes contain notice requirements and "diligent prosecution" limitations.

Before a citizen suit may be filed under a U.S. environmental statute, advance notice of up to 120 days must be given both to the alleged violator and to state and federal environmental officials. (63) The notice to the alleged violator allows it to examine its own record, to enter negotiations for settlement, or to come into compliance before being faced with the legal requirements that come with the filing of a lawsuit. If the defendant halts the offending actions upon receipt of notice, then the plaintiff may no longer file the lawsuit.

The notice provision also places some check on the ability of citizens to bring suit. If state or federal agencies would rather prosecute the violation themselves, the notice allows them an opportunity to do so, thereby preventing the citizen from filing suit. The statutes prohibit citizens from filing enforcement suits if the government is "diligently prosecuting" a case against the alleged violator. (64)

Once the citizen plaintiff has proved a violation of law, she must still establish her entitlement to injunctive relief. Traditionally in the United States, a court asked to issue an injunction must first balance the plaintiff's need for the injunction, the harm the injunction might cause the defendant,



and the effect of the injunction on the public interest. The outcome of this balancing process is likely to depend on the nature of the right the plaintiff is seeking to enforce.

In a lawsuit brought to enforce an environmental protection statute, the very enactment of the statute supplies a presumed public interest in environmental protection. In addition, the remedy requested confers a public, not a private, benefit. Indeed, some U.S. plaintiffs have argued that if an environmental statute is violated, a court *must* issue an injunction. (65) The present consensus, however, is that most U.S. statutes merely require that a court bring about compliance, and endow the court with the discretion to select the appropriate method of achieving that goal. (66) This process often involves a judicial balancing of the private interests involved, but with an overall eye to the public interest in preventing environmental damage. For example, a judge might not close down a polluter on the basis of a minor permit violation, but might rather impose on the violator a deadline for attaining compliance.

A similar application of the balancing approach is likely in a common law suit to enforce a public right, such as a suit based on public nuisance or the public trust doctrine. Injunctive relief is also available in a common law cause of action brought to redress a private environmental injury, such as a private nuisance suit. However, because there is no presumed public interest in the outcome of such an action, and because a private common law action is brought for the personal benefit of the plaintiff rather than in the public interest, it may be difficult for a private common law plaintiff to obtain injunctive relief. Instead, a court may decide that an award of damages adequately compensates the plaintiff for any injury sustained. (67)

### 3.2.3 Citizen Enforcement Suits Seeking Civil Penalties

#### 3.2.3.1 The Nature of the Remedy

Another potential remedy that can shape the course of litigation is the imposition of monetary penalties on a violator. These penalties, payable to the government, are designed to punish the violator, to eliminate any profit earned by the violator due to the polluting activities, and to compensate for the environmental harms caused by the violator's actions. (68) The imposition of monetary penalties has traditionally been reserved for government enforcement agencies. In the United States, however, a limited number of environmental statutes contain provisions allowing citizens to seek civil penalties in suits brought to enforce the statutes. Because this remedy provides a public benefit, it is not an available remedy in U.S. common law actions. In statutory enforcement lawsuits, the requisite cause of action and burden of proof for recovery of civil penalties are the same as for other statutory citizen suit remedies.

The U.S. Clean Water Act and Resource Conservation and Recovery Act have included civil penalty provisions in their citizen suit clauses for several years, and a similar provision was added to the Clean Air Act in 1990. (69) While the United States government can request civil penalties under many other statutes, (70) only these three acts also permit citizens to request that the penalties be assigned. In some environmental laws these statutory penalties can amount to \$25,000 per day, per violation. (71)

By permitting individual plaintiffs to request civil penalties ranging into the millions of dollars, the citizen suit provisions have granted the public significant power over alleged violators. This power has caused heated debate in the United States. Supporters argue that plaintiffs will

initiate suits only if they have enforcement powers equivalent to those of the government. The ability of citizens to seek civil penalties can improve their bargaining position in settlement negotiations, and may increase the overall success of citizen enforcement programs. Permitting civil penalties in citizen suits also equalizes the enforcement powers of government and the citizen. This equality ensures some consistency in enforcement practices, treats violators equally, and prevents violators from evading full enforcement by "shopping" for citizen rather than government enforcement actions.

Those who oppose allowing citizens to request civil penalties claim that conferring this power on citizens invites abuse and threatens to undermine the traditional structure of government. In the view of these critics, suits for civil penalties serve the national interest in law enforcement, an interest traditionally confided to the jurisdiction of the executive branch of government.

Assignment of the power to exact civil penalties to anyone other than an executive branch official thus arguably violates the constitutionally-established balance of powers among the branches of the federal government. (72)

In several citizen suit settlement agreements under the Clean Water Act, the alleged violators have avoided the infliction of civil penalties by instead paying a sum of money to a third party environmental organization or to an otherwise environmentally beneficial project. For the parties, these are win-win arrangements. The defendant pays less than it might have had to in civil penalties, and the citizen plaintiff (or environmental organization) benefits indirectly through the payment of funds to a "public interest" organization.

To critics, these "environmentally beneficial expenditures" suggest extortion, draw funds away from the U.S. Treasury, and diminish the overall level of environmental enforcement. (73) The federal government has looked upon settlements involving third-party payments with some suspicion, and carefully examines consent decrees containing payments to environmental organizations. However, courts have upheld consent decrees containing such payments. (74) "Environmentally beneficial expenditures" have the potential to aid in achieving environmental compliance. The availability of such third party payments may encourage defendants to enter into settlement agreements. Because these payments can be characterized as "voluntary," in contrast to the coercive and punitive aspect of civil penalties, they may be relatively palatable to defendants. On a symbolic level, an agreement to pay environmentally beneficial expenditures does not brand the contributor as a guilty party as civil penalty payments might. Such expenditures offer financial advantages as well: Unlike civil penalties, they may be tax-deductible as business expenses. (75)

Civil penalty assessments have had an important effect on the number and effectiveness of citizen suits in the United States. The ability to request civil penalties improves the citizen's bargaining position. It offers citizen plaintiffs a simple means of punishing and deterring future violators. As suggested by the large number of citizen enforcement cases under the Clean Water Act, these effects, in combination with clear standards and self-reporting requirements, make the civil penalty provisions a significant incentive to bring citizen suits. (76)

### 3.2.4 Suits to Influence Government Action

#### 3.2.4.1 The Nature of the Remedy

Finally, the remedy a citizen litigant may desire is the accomplishment of a particular regulatory action by the government. The plaintiff may hope to force the agency to perform a task the legislature has assigned to it. In such cases, barriers to suit will likely be minimal, because the private party is simply forcing the agency to initiate an action the legislature has already endorsed, not attempting to dictate the way in which the action should be carried out or the action's end result.

### 3.2.4.2 The Elements of the Case and the Method of Proof

In the United States, a litigant seeking to trigger a non-discretionary agency action will need to establish only the existence of a statutory duty and the agency's failure to perform that duty. (77) In cases in which the litigant is attempting to influence the content of agency action, however, more deference to the agency's presumed regulatory expertise may be warranted. In practical terms, this deference will be carried out through the standard of review a court employs in assessing the challenged agency action. As discussed in Section 2.3.1.2 above, it is likely that a U.S. plaintiff taking issue with discretionary agency action will have to convince a court that the action was "arbitrary and capricious" -- a standard difficult to meet. Even though judicial review of substantive agency action does not often succeed in overturning an agency's result, it may force the agency to be more careful about the procedures it employs in reaching that result.

## 3.3 Who Should Be the Parties to the Suit?

An important consideration for a political system setting up and administering methods for citizens to enforce environmental standards in the courts is the identities of the appropriate plaintiffs and defendants. A society may want to ensure that a plaintiff who is asserting a public environmental right will represent that public interest fairly and thoroughly, or that the judicial branch does not engage in legislative policymaking by deciding cases in which no real injury has been suffered. In addition, a society may want to make a policy decision about the range of freedom granted to the government in its non-regulatory activities. And as a potential defendant, the government may want to control the instances in which it can be sued.

### 3.3.1 Plaintiffs and the Issue of "Standing"

In the United States, courts have limited the category of plaintiffs eligible to enforce environmental controls by requiring that the plaintiff possess "standing" to bring the suit. The standing requirement stems both from the U.S. Constitution and from judicial interpretation of environmental statutes containing citizen suit provisions. Under the constitution, as interpreted by the Supreme Court, plaintiffs bringing a lawsuit must allege that: (1) they have been or will be injured by the actions or threatened actions of the defendant; (2) the injury is traceable to the challenged action; and (3) the harm alleged is likely to be redressed by a favorable decision. (78) These requirements are supposed to ensure that the judiciary engages only in redressing actual wrongs, not in the policymaking activities that the constitution entrusts to the legislative branch. (79) Traditionally, this standard required an economic injury. For example, if the stream running past an outdoor cafe becomes polluted by an upstream paper mill, driving away patrons,

the cafe-owner would have standing to sue the mill-owner. (80)

Over the years in the U.S., changing attitudes, the scope of environmental regulation, and broad citizen suit provisions have altered the contours of this standing test. During the inception of the environmental citizen suit movement in the 1970s, courts found even a plaintiff's allegation of occasional or anticipated aesthetic injury sufficient to confer standing. (81) For example, a plaintiff might have alleged successfully that her view of a national park she had visited and planned to visit again was being impaired by emissions from a regional power plant.

However, more recently, the constitutional standing test has been rendered more stringent by courts concerned with reducing the amount of public interest environmental litigation. In its latest treatment of the issue, the Supreme Court found that citizen plaintiffs lacked standing to challenge a regulatory action even when they alleged an injury very similar to the kinds of injuries the Court had found sufficient just twenty years earlier. Even the fact that Congress had expressly authorized citizen suits under the statute in question did not alter the outcome. (82) The essential ambiguity of the constitutional standing principle renders it susceptible to such restrictive judicial interpretations, and has allowed this requirement to become a major impediment to citizen enforcement suits in the United States.

The second element of standing in the United States applies only to citizen lawsuits based on statutory, rather than common law, causes of action. Traditionally, only the U.S. government could bring a lawsuit to vindicate public rights vested in the population as a whole. Through citizen suit provisions, the U.S. Congress has chosen to extend this right to individuals. Courts have attempted to ensure that citizens empowered to sue in this manner are effective advocates for these public rights by requiring that any injury claimed by the plaintiff be within the "zone of interests" of the statute in question. (83) This limits potential environmental enforcement plaintiffs to those who base their standing on environmental injury. Thus, one cement factory might not be allowed to sue another that was violating emission standards by claiming that the violations allowed unfair competition -- the Clean Air Act's zone of interest is air quality, not levels of competition. (84)

Other countries, however, have not deemed it necessary to restrict public access to the courts for plaintiffs seeking to redress public environmental harms. For example, in Argentina, an environmental lawyer was allowed to challenge certain licenses granted by the federal government to two Japanese corporations. The licenses allowed the corporations to capture and export fourteen dolphins from the South Atlantic Ocean, off the coast of the Argentine province of Chubut. The court concluded that the plaintiff's individual right to the protection of the ecology, as expressed or implied by several constitutional and statutory provisions, entitled the plaintiff to challenge the licenses in court. (85) The court invalidated the licenses, on the grounds that the government had not examined the environmental impact of the captures, that past licenses had resulted in the death of the captured animals, and that the licenses had been granted over the opposition of the provincial government.

### 3.3.2 Defendants and "Sovereign Immunity"

Implementation of an environmental enforcement regime will often necessitate bringing lawsuits against the government, either in its regulatory or in its proprietary capacity. As a regulator, the government may be the target of a suit designed to prompt or to challenge its

implementation of statutory objectives. As an owner of property, the government also engages in activities that may pollute the environment. For example, the government may operate research laboratories or maintenance facilities at which hazardous wastes have been stored. (86) In post-communist regimes in Central and Eastern Europe, where up to 90% of all property is in government hands, the vast majority of all pollution will be traceable to government action. (87) Unless enforcement actions can be brought against the government, environmental protection goals can never be fully achieved.

Yet the government often restricts its own liability in court. In the United States, for example, the doctrine of "sovereign immunity" generally prevents citizens from suing the government unless the government has explicitly waived that exemption. Such a waiver is found in several environmental statutes authorizing citizen enforcement suits. A citizen suit under such a statute offers a private plaintiff a unique opportunity to ensure government compliance with its own rules and regulations. (88) For citizens to participate fully in the environmental protection process, the government will need to render itself accountable in court for the environmental effects of its operations.

### 3.4 How Will the Suit Be Financed?

The previous discussions' outline the ways in which court actions can be used to accomplish particular enforcement goals. Even the most impressive array of such litigation options is useless, however, if citizens cannot afford to go to court. The single most important factor in encouraging citizen suits may thus be the ability of citizens to recover court costs and attorney fees following the successful prosecution of a citizen suit. On budgets even more limited than those of state and federal governments, few citizens could take on the role of private attorney general if environmental statutes did not contain "fee-switching" provisions. In the United States, the traditional "American rule" requires that each party pay its own court costs and attorney fees regardless of who wins the lawsuit. In contrast, many other nations require that the losing side pay both sides' costs and fees (the "British system"). Both systems act as a significant deterrent to citizen enforcement suits that are brought for the public, rather than private interest. Why should an individual bring a suit which, if won, will offer only a diffuse sense of goodwill from the vindication of the public interest, and if lost, require the litigant to shoulder the cost of his own and perhaps (under the British system) the defendant's legal fees? Because of this disparity between private costs and public benefits, there is a strong argument for altering the traditional rule in citizen suits brought under environmental protection statutes. (89)

Under the U.S. environmental citizen suit provisions, for example, a successful plaintiff may request that the losing defendant pay both parties' court costs and attorney fees. To discourage frivolous suits, the environmental statutes permit judges to assess the costs and fees of the defendant against a plaintiff who has engaged in litigation that is clearly unfounded in law or fact. Some risk to the plaintiff still exists. The plaintiff might lose the case and be forced to shoulder his or her own expenses, or the suit could be deemed frivolous and the citizen could be forced to pay the costs of both sides. However, by selecting the most meritorious and winnable cases, environmental plaintiffs can minimize these risks and maximize the chance of recovering their own financial outlays.

In some cases, these "fee shifting" provisions allow plaintiffs to recover more than the lawsuit actually cost. Because courts calculate attorney fees using the "market price" for environmental attorneys, but most environmental plaintiffs' attorneys work for well below that price, the final fee award can be more than the plaintiff actually spent to bring the suit. What results is a windfall -- or at least an amount better than break-even -- for a winning plaintiff. Successful citizen suit plaintiffs -- particularly environmental organizations -- can channel any excess attorney fee funds into bringing other lawsuits. The profits from past wins finance future litigation risks and enable environmental organizations to maintain a series of citizen suits with less outside financial assistance than they would otherwise need. (90)

## **4 CITIZEN INVOLVEMENT IN PRACTICE**

Various practical considerations will influence both citizens' choice among the enforcement mechanisms discussed in this paper and their ability to employ those mechanisms effectively. Both a government considering how citizen participation might fit into an overall environmental enforcement system and the public employing that system once it is set up will need to be informed of and sensitive to those considerations.

### **4.1 A Citizen's Choice of Mechanisms for Participation**

A citizen's choice of how to participate will vary with several factors. The most basic is the citizen's own motivation. Is the problem to be addressed a lack of applicable standards -- possibly calling for an agency-forcing suit -- or a perceived failure on the part of the government to act against violators -- which may be a candidate for a citizen enforcing suit? A second factor is the role of the government in the enforcement system. Obviously, if the government is actively proceeding against violators, there will be little room for citizen enforcement lawsuits, especially in a system, such as that in the U.S., in which diligent government prosecution prevents private actions. In such a situation, a citizen might choose to focus on assisting the government in its enforcement efforts by engaging in private monitoring or other information-gathering activities.

The identity of the citizen -- or the environmental organization -- who wants to participate in environmental enforcement is also relevant. For example, industry entities who want to alert authorities to permit violations by particular competitors may choose a different enforcement mechanism than would a citizen group targeting industry-wide violations. Another important variable is the resources available to the individual or entity. A single citizen with no financial backing may be limited to volunteering his time to monitor compliance, while a large public interest organization might be able to finance a large-scale lawsuit. Even a public interest organization may choose to minimize litigation costs by filing suit only in cases involving clear-cut violations of demonstrable standards, while leaving more complicated situations to the government.

The possibility of combining two or more of these avenues may also influence citizen involvement in practice. For example, a private action for damages can be brought concurrently with a citizen enforcement suit; the damages action may serve as leverage to effectuate a

settlement on the defendant's part. Agency-forcing judicial review suits brought by citizens can help spur the development of clear and enforceable regulations, indirectly aiding direct enforcement efforts. (91)

One of the best examples of the potential for citizen action in environmental enforcement has been the U.S. experience with the Surface Mining Control and Reclamation Act of 1977 (SMCRA). (92) Although states, federal agencies, and industry all resisted implementation of SMCRA, citizens were able, through the use of a variety of methods, to make the Act a useful and effective tool for environmental protection. For example, when SMCRA's regulatory agency rewrote and weakened the statute's implementing regulations in the early 1980s, citizens challenged the agency's actions in court. The resulting victories included limiting the number and scope of exceptions to the Act's standards and strengthening regulations governing mining in national forests.

In addition to challenging agency regulations, citizen plaintiffs also sued state and federal agencies for failing to conduct required investigations, neglecting to collect fines under the statute, and declining to carry out state implementation programs. Several of these lawsuits resulted in settlement agreements or court-ordered remedies that not only directed the agencies to fulfill their statutory responsibilities, but made structural changes in the way the agencies enforced the statutes. Finally, citizens worked closely with state and federal agencies as the agencies developed the new enforcement and implementation techniques required as a result of the citizen litigation. This broad range of public involvement improved the enforcement of SMCRA by increasing both the capability and the desire of the agencies to implement the statute effectively.

## 4.2 Requirements for Effective Citizen Enforcement

Citizen participation in environmental enforcement cannot fully succeed without support from other institutions within the environmental protection system.

### 4.2.1 A Sound Legal Framework

For citizen participation to be truly effective, the system of environmental regulation must provide the mechanisms to accommodate and encourage it. The most obvious such accommodation -- on which this paper has focused -- is the provision of avenues allowing citizens to go to court to force agency action, challenge the results of agency government decisions, or prosecute violators. Even if these avenues are made available, citizens may be able to use them only if the law includes cost-and fee-shifting provisions like those mentioned in Section 3.4 above.

Another, less obvious, contributor to effective citizen enforcement is the establishment of clear standards of conduct against which the behavior of potential violators can be compared. When a citizen is provided with specific emission levels, deadlines for compliance, or other definite substantive requirements contained in statutes, regulations, or permits, it will be easier not only to identify but to prove the violation. Such substantive requirements are particularly effective when used in conjunction with industry self-monitoring obligations, reporting schedules, or other information access mechanisms. Clear standards can stem from statutory language, regulations

developed by agencies in accordance with statutory duties, or industry-specific permits issued pursuant to the regulations.

Perhaps the most essential element in the legal framework is the existence of a judicial system that is receptive to citizen participation. On an overall level, a supportive judiciary can instill in the public a sense that their involvement is accepted and rewarded, thus increasing public confidence in the enforcement system. As a practical matter, judicial attitudes can have a concrete effect on the success or failure of environmental law suits brought by citizens. Through threshold rulings restrictive of citizen standing, for example, judges can effectively bar the courthouse door to citizen litigants. The extent of judicial damage awards and the content of injunctive relief also influence the likelihood that citizens will choose to sue in the future and the kind of cases citizens may bring.

Legal controls provide both the overall framework within which environmental protection goals can be articulated and a powerful incentive encouraging the achievement of those goals. A strong legal system thus helps citizens to participate effectively in environmental enforcement through non-court mechanisms as well as in the courts.

#### 4.2.2 Adequate Citizen Resources

A second important requirement for effective citizen enforcement is a citizenry with the knowledge and confidence to avail itself of its various options for participating in environmental enforcement. As an initial matter, particularly in societies unused to citizen participation, some effort may be necessary to educate the public about those options and how to use them. Both government and environmental organizations could sponsor such a public education program. Environmental organizations can play a crucial role in other ways as well. Because the costs of prosecuting citizen suits or monitoring industries on a regular basis are so high, individuals act on their own only rarely, particularly in court cases. (93) More often than not, environmental organizations or "public interest law firms" are the only actors with the resources and expertise to pursue citizen suits and many other associated enforcement actions. (94)

Providing some form of incentives -- whether financial or otherwise -- for citizens to participate in environmental enforcement could encourage and enable individuals and small local groups, as well as large-scale organizations, to increase their involvement. One possibility would be for the government to support citizen monitoring and inspection efforts either through direct funding or by cloaking private citizens with some of its own power to impose limited fines for clear-cut violations. For example, if the government wanted to avail itself of citizen manpower to patrol national parks to prevent littering, careless setting of fires, or other infractions, it could deputize citizens to act as private forest rangers, who could issue citations to violators. The Polish government has recently established such a program. (95) Another option might be for the government to subsidize citizen environmental enforcement litigation directly. One Australian territory has encouraged citizen suits by directly subsidizing them through legal assistance. (96) Industry cooperation with private monitoring efforts could be encouraged by either publicizing the value of such efforts or subsidizing them by allowing a tax deduction for the costs of the program. Finally, statutory fee and cost-shifting provisions can give citizens the financial capability to initiate their own enforcement actions.



### 4.2.3 Accessible Information

Almost all of the citizen involvement in environmental enforcement discussed above would be impossible if citizens did not have ready access to information about potential violations. One invaluable source for such information is data on pollution levels supplied by polluters themselves, as part of a regulatory self-monitoring and reporting regime. It is difficult to overstate the importance of such reports in not only initiating suits, but also giving citizens the capability to win them. (97)

In the U.S., the Clean Water Act's requirement that the holders of permits to discharge effluents from point sources submit regular Discharge Monitoring Reports (DMRS) to the government is perhaps the best example of a regulatory mechanism for creating and disseminating information that citizens can use in enforcement. (98) DMRs are often accepted by courts as definitive proof of a violation, since they are written and filed by the alleged violator itself.

Another useful information access mechanism in the U.S. is the so-called "right-to-know" statute, which requires industries storing and using certain hazardous substances to report to workers and communities on the amounts of the substances stored, used, and discharged on-site. (99) This "right-to-know" provision has helped citizens to identify and prove environmental violations. Of course, it is essential to ensure that self-monitoring and reporting data are easily available to the public. A government-wide access-to-information provision, such as the U.S. Freedom of Information Act, can ensure that citizens are able to obtain those data, as well as other information held by the government that may be relevant to environmental enforcement efforts. The government could attempt to meet citizens halfway by not only responding to citizen requests, but affirmatively disseminating environmental data collected in the course of its regulatory duties. (100)

## 5 CONCLUSION

Citizen involvement is crucial to the establishment and implementation of a fair and effective environmental protection regime. As this paper has attempted to illustrate, the opportunities for -- and the benefits from -- citizen involvement are many and wide-ranging. Citizens can both supplement government enforcement efforts and encourage the government to maintain and sharpen its focus on environmental protection. Indeed, involvement by the public may be the vital ingredient necessary to transform environmental protection statutes and regulations from aspirations into reality. Policymakers setting up and implementing environmental controls can draw upon the resources of citizens to further the common goal of environmental protection by making enforcement work.

## ENDNOTES

1. This triad of environmental concerns was described in S. HAYS, *BEAUTY, HEALTH, & PERMANENCE: ENVIRONMENTAL POLITICS IN THE UNITED STATES 1955-1985* (1987).
2. See *Cross, Rethinking Environmental Citizen Suits*, 8 TEMP. ENVTL. L. & TECH. J. 55, 64-70 (1989) (discussing U.S. court cases upholding environmental regulations on the ground that the U.S. Environmental Protection Agency could prevent unduly harsh effects by making administrative exceptions in particular cases).
3. See the exchange between an environmental plaintiff's attorney and an agency representative in *Private Watchdogs: Internal Auditing and External Enforcement -- Three Perspectives*, 17 ENVTL. L. REP. (Envtl. L. Inst.) 10,255, 10,263 (1987).
4. This may be especially true in state agencies and enforcement programs, whose employees tend to be closer financially, politically, and personally to the potential violators than are federal officials. See Smith, *The Viability of Citizen Suits under the Clean Water Act after Gwaltney*, 40 CASE W. RES. L. REV. 1, 55-56 (1989-90).
5. See ENVIRONMENTAL L. INST., *AN ANALYSIS OF CITIZEN ENFORCEMENT ACTIONS UNDER EPA-ADMINISTERED STATUTES V-1 1 to V-12* (Sept. 1984) [hereinafter ELI STUDY].
6. See *Webb, Taking Matters into Their Own Hands: The Role of Citizens in Canadian Pollution Control Enforcement*, 36 McGill L.J. 770, 819 (1991) (discussing how private prosecutions in Canada clearly illuminate the unfairness and incoherence of current enforcement activities).
7. In the United States, government agencies have expressed appreciation for citizen enforcement efforts. See *Chesapeake Bay Foundation v. Bethlehem Steel Co.*, 652 F. Supp. 620, 625 (D. Md. 1987) (citing Brief of the U.S. as *amicus curiae* in support of the Clean Water Act at 1-2, *Student Public Interest Research Group v. Monsanto*, 600 F. Supp. 1474 (D.N.J. 1985) (indicating that the EPA Administrator enthusiastically supported the role of citizens in enforcement proceedings)); ELI STUDY, *supra* note 5, at V-7; L. JORGENSON & J. KIMMEL, *ENVIRONMENTAL CITIZEN SUITS: CONFRONTING THE CORPORATION -- A BNA SPECIAL REPORT* 17 (1988) [hereinafter BNA REPORT]; Price, *Private Enforcement of the Clean Water Act*, 1 NAT. RESOURCES & ENV'T 31, 60 (1986).
8. Many nations permit and encourage active public participation in the enforcement of environmental laws. For examples of the citizen's role in various nations, see *Preston, Public Enforcement of Environmental Laws in Australia*, 6 J. ENVTL. L. & LITIG. 39 (1991); *Webb, supra* note 6, at 770; *PARTICIPATION AND LITIGATION RIGHTS OF ENVIRONMENTAL ASSOCIATIONS IN EUROPE* (M. Führ

& G. Roller eds. 1991) [hereinafter EUROPE].

9. See Bowman & Hunter, *Environmental Reforms in Post-Communist Central Europe: From High Hopes to Hard Reality*, 13 MICH. J. INT'L L. 301, 351 (1992).

10. Many nations rely on citizens and environmental organizations to identify and report violations -- and in some cases to pressure agencies into enforcement actions. This ability is a particularly important part of the European Community enforcement program. See *EUROPE*, *Supra* note 8, at 146; Smith & Hunter, *The European Community Environmental Legal System*, 22 ENVTL. L. REP. (Envtl. L. Inst.) 10,106, 10,113 (1992). Some Central and Eastern European nations are also beginning to recognize the utility of citizen monitoring. See Allen, *The Polish Ecological Clubs: "Before, we could blame the communists. Now we have to have the best arguments."*, TRANSATLANTIC PERSPECTIVES (German Marshall Fund, Washington, D.C.), Spring 1992, at 10 (describing the Polish Ecological Club's environmental inventory of a polluted creek, its report to the city government, and the follow-up by the state enforcement agency).

11. See OFFICE OF WATER, U.S. ENVTL. PROTECTION AGENCY, NATIONAL WATER QUALITY INVENTORY: 1986 REPORT TO CONGRESS 109, 115 (1987); Smith, *supra* note 4, at 54-56.

12. See *Steinhart, Waterway Watchdogs*, AUDUBON, Nov. 1990, at 26.

13. Because waterways in the U.S. are state property, citizens may directly approach point sources of pollutants, or identify areas where nonpoint pollution (from fertilizers or feed lots, for example) is causing a water quality problem. As an example of the role of organized citizen groups, the Izaak Walton League of America trains citizens to monitor the health of local and regional streams. Those citizens then report information to a national clearinghouse, which notifies state or federal agencies. Although citizens volunteer for the monitoring program, personal interest is not the only motivating force: State agencies help fund the League's training and reporting programs. Telephone Interview with Loren Kellogg, National Monitoring Coordinator for the Save Our Streams Program, Izaak Walton League of America (June 8, 1992).

14. See J. MILLER & ENVTL. L. INST., CITIZEN SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL LAWS 133 (1987) [hereinafter CITIZEN SUITS]; K. NOLL & J. DUNCAN, INDUSTRIAL AIR POLLUTION CONTROL 36 (1975).

15. See *supra* note 13.

16. Consider the activities of the environmental organization Lighthawk, which uses private planes and pilots to monitor environmental harm from the air in the U.S. and

other countries. See Wood, *Aerial Crusaders*, THE CHRISTIAN SCIENCE MONITOR, July 14, 1988, at 10.

17. See Ley 13.577 Creaci6n de Obras Sanitarias de la Naci6n, art. 31 & 32 [Creation of Sanitary Work Agency]; Decreto 674/89 Regimen contra la Contaminaci6n de Rios Bs. As. 24N/89 [River Pollution Regime]. The U.S. Surface Mining Control and Reclamation Act of 1977 contains a similar provision. See 30 U.S.C. § 1271 (a)(1) (1988).

18. See CITIZEN SUITS, *supra* note 14, at 134.

19. The U.S. Federal Water Pollution Control (Clean Water) Act requires holders of permits allowing discharge of pollutants into the water to submit regular "Discharge Monitoring Reports." See 33 U.S.C. § 1318 (1988). The U.S. Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C.A. §§ 11001-11050 (West 1983 & Supp. 1992), imposes extensive self monitoring and reporting requirements on certain industries that use and release extremely hazardous chemicals. A summary of monitoring reports required under U.S. environmental protection statutes in the mid-1980s can be found in CITIZEN SUITS, *supra* note 14, at 132-33. In addition, a forthcoming Environmental Law Institute Working Paper, PUBLIC ACCESS TO ENVIRONMENTAL INFORMATION, will analyze in greater detail such reporting requirements and their possible applications to public participation in the environmental protection system.

20. Freedom of Information Act of 1966, 5 U.S.C. § 552 (1988).

21. For a discussion of the importance of information and clear standards, see ELI STUDY, *supra* note 5, at V- 13 to V- 15.

22. Many environmental organizations publish lists of reporting numbers for citizens to call with information. See, e.g., IZAAK WALTON LEAGUE OF AMERICA, A CITIZEN'S DIRECTORY FOR WATER QUALITY ABUSES: A STATE-BY-STATE RESOURCE LIST OF ENVIRONMENTAL AGENCY TELEPHONE NUMBERS (undated).

23. Clean Air Act § 113(f), 42 U.S.C.A. § 7413 (West 1983 & Supp. 1992).

24. If the citizen is bringing a lawsuit under an U.S. environmental statute with a citizen suit provision, he or she will be required to give advance notice to the alleged violator and to the government. This notice provision allows the violator an opportunity to come into compliance and enables the government to eliminate the need for the citizen suit by taking its own enforcement action. See *infra* Section 2.3.2.1.

25. See CITIZEN SUITS, *supra* note 14, at 11-12; Greve, *The Private Enforcement*

of *Environmental Law*, 65 TUL. L. REV. 339, 352-53 (1990).

26. For a more detailed discussion of the various ways in which the public can participate in the environmental protection process, see ENVIRONMENTAL L. INST., PUBLIC PARTICIPATION IN ENVIRONMENTAL REGULATION (ELI Working Paper, Jan. 1991).
27. In the U.S., for example, courts generally presume that the individual is adequately represented by the government. See CITIZEN SUITS, *supra* note 14, at 66-67. Intervention is governed by statutes regulating all federal court cases which require that the intervener have an interest in the "property or transaction" at issue. FED. R. Civ. P. 24(b).
28. See M. AXLINE, ENVIRONMENTAL CITIZEN SUITS § 5.03, at 5-3 & n.5 (1991).
29. Similar consent decrees can result from lawsuits filed by the citizen. See *infra* note 56.
30. See, e.g., Clean Air Act § 11 3(g).
31. See, e.g., Clean Air Act § 304(a)(2); Endangered Species Act § 11 (g)(1)(C), 16 U.S.C. § 1540(g) (1988).
32. For example, if a statute provides that an agency "shall complete a thorough review" of air quality criteria, the agency must undertake such a review, regardless of whether the review is likely to prompt revision of the criteria. See *Environmental Defense Fund v. Thomas*, 870 F.2d 892 (2d Cir. 1989).
33. Such a court order will subject the agency to judicial penalties if the agency violates the order by continuing its failure to act.
34. Administrative Procedure Act (APA) § 702, 5 U.S.C. § 702 (1988). For an example of a statutory "discretionary" suit provision, see Clean Air Act § 307(b)(1). The standards of judicial review under the APA are set forth in § 706(2)(A).
35. See *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-45 (1984).
36. Suits seeking judicial review of agency decisions have been particularly important as a way of forcing agencies to consider the environmental impacts of their actions under the U.S. National Environmental Policy Act of 1970 (NEPA), 42 U.S.C. § 4321 (1982). The first suit brought under NEPA was brought by citizens and established the

right of citizens to bring suits to enforce the environmental assessment requirements of the statute. See *Calvert Cliffs Coordinating Comm. v. Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971). Since that time, numerous suits have been brought against agencies for failure to file an environmental impact statement, or for filing an inadequate one. In the 1980s, over 800 suits led to 116 injunctions preventing agency action without further environmental assessment. U.S. COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY 1991, at 142-43 (1992).

As with many other environmental regulations, judicial review under NEPA has been limited to an examination of the procedural rather than the substantive requirements of the statute. Nonetheless, those procedural requirements, enforced by citizen suits, have forced agencies at least to examine the environmental consequences of their actions -- a significant step beyond the pre-NEPA requirements. For additional information about the relationship between the substantive and procedural requirements of NEPA and the role both have played in altering agency action, see ENVIRONMENTAL L. INST., ENVIRONMENTAL IMPACT ASSESSMENT: INTEGRATING ENVIRONMENTAL PROTECTION AND DEVELOPMENT PLANNING (ELI Working Paper, June 1991).

37. Courts in the United States have willingly carried the doctrine of prosecutorial discretion through to the environmental statutes. Even where statutory language would appear to make enforcement a non-discretionary duty, courts have held that unless the language is explicit, discretion remains in the agency. See, e.g., *DuBois v. Thomas*, 820 F.2d 943 (8th Cir. 1987) (under the Clean Water Act, citizen suits cannot require enforcement).

38. In a system, such as that in the U.S., that embraces the doctrine of prosecutorial discretion, allowing citizens to take enforcement actions will be crucial to achieving environmental protection goals.

39. See generally M. AXLINE, *supra* note 28; CITIZEN SUITS, *supra* note 14.

40. *Krent, Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 Nw. U. L. REV. 62, 82 n.95 (1990).

41. See Clayton Antitrust Act of 1914, 15 U.S.C. § 15 (1988); Consumer Product Safety Act of 1972, 15 U.S.C. § 2060(a) (1988).

42. Although European-Community (EC) law permits organizations to sue governments for violations of EC regulations, this is only true when individual nations grant standing to that group, and most European nations do not. See, e.g., *EUROPE*, *supra* note 8, at 85 (discussing standing provisions in West Germany). Only Ireland's laws appear comparable to U.S. provisions: Irish citizens may bring a suit for injunctive relief against any person for violations of water, air, or land use regulations. Because

of the risk that the plaintiff will have to pay defendant's costs and fees, however, the suits have not been commonly used. *Id.* at 11-12. In addition, Spain and Ireland appear to grant citizens some rights to enforce summarily those countries' limited criminal environmental statutes. *Id.* at 13, 37. Under Brazilian law, citizen organizations that have been in existence for at least two years can file "public actions" requesting the state or federal attorney general to investigate threats to the environment. Interview with Alberto Ninio, Staff Attorney at the Environmental Law Institute, in Washington, D.C. (July 1, 1992).

43. All but one of the major federal environmental acts permit direct enforcement by citizens in the courts against violators. See, e.g., Toxic Substances Control Act § 20, 15 U.S.C. § 2619 (1988); Endangered Species Act § 11 (g), 16 U.S.C. § 1540(g) (1988); Surface Mining Control and Reclamation Act of 1977 § 520, 30 U.S.C. § 1270 (1988); Marine Protection, Research, and Sanctuaries Act § 105(g), 33 U.S.C. § 1415 (g) (1988); Federal Water Pollution Control (Clean Water) Act § 505, 33 U.S.C. § 1365 (1988); Safe Drinking Water Act § 1449, 42 U.S.C. § 300j-8 (1982 & Supp. V 1987); Noise Control Act § 12, 42 U.S.C. § 4911 (1982 & Supp. V 1987); Resource Conservation and Recovery Act (RCRA) § 7002, 42 U.S.C. § 6972 (1982 & Supp. V 1987); Clean Air Act § 304, 42 U.S.C. § 7604 (West 1983 & Supp. 1992); Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) § 310, 42 U.S.C. § 9659 (1982 & Supp. V 1987); Outer Continental Shelf Lands Act § 23, 43 U.S.C. § 1349 (1982). The only major environmental statute without a citizen suit provision is the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 (1988). Numerous state statutes also allow citizens to sue to enforce statutory provisions.

As an example of the growth in this category of suits, only twelve actions were filed under citizen suit provisions in 1978-79. See *HAYS*, *Supra* note 1, at 481. Just ten years later, citizens were filing hundreds of suits a year against private individuals and government agencies, and the numbers were, if anything, increasing. See BNA REPORT, *supra* note 7, at 21-111 (1988) (78 suits filed for enforcement purposes under RCRA, CERCLA, and the Clean Water Act in 1987); U.S. COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY 1987-88 (88 suits filed against government agencies for NEPA violations in 1987).

44. Compare, e.g., Clean Air Act § 304(a) (citizen suit judicial enforcement) *with id.* § 113(b) (federal suit judicial enforcement).

45. See Clean Air Act § 304(a), § 113(d)(1); *infra* Section 3.2.3.

46. In addition, if the defendant's conduct is found to be malicious or wanton, a jury can award additional damages, beyond those necessary to compensate the plaintiff, solely for the purpose of punishing the defendant. There is no requirement that these "punitive damages" be proportional to compensatory damages. See *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989) (upholding a jury's award of \$6

million in punitive damages in a case involving compensatory damages of only \$51,146).

47. Consider a factory that emits particulates that cause fog to form on a nearby highway, slowing traffic and causing occasional accidents. Any single traveler on the highway might not be able to bring a suit to abate this public nuisance, but the roadside homeowner into whose house fog-blinded vehicles regularly crashed would have a "special injury" and would be able to bring suit.

48. See *Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471 (1970); Z. PLATER, R. ABRAMS & W. GOLDFARB, *ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY* 365-412 (1992) [hereinafter ENVIRONMENTAL LAW].

49. See *Marks v. Whitney*, 6 Cal. 3d 251, 98 Cal. Rptr. 790, 491 P.2d 374 (1971) (public right in submerged land under streams and lakes on privately-owned property subjects private property owners to public trust doctrine); ENVIRONMENTAL LAW, *supra* note 48, at 400-01.

50. The standing requirements are very minimal, and nearly any individual can sue for violation of the statute. MICH. Comp. LAWS ANN. § 691.1201 (West Supp. 1984). Six other states adopted statutes based on Michigan's soon after 1970, but only Michigan's has been regularly used.

51. *Ray v. Mason Country Drain Commissioner*, 224 N.W.2d 883 (Mich. 1975). Despite the breadth and potential power of the Michigan statute, it has been used only rarely. By 1983, the statute had been the basis for only 185 actions, most of which were filed in its early years. See generally *Slone, The Michigan Environmental Protection Act: Bringing Citizen-initiated Environmental Suits Into the 1980s*, 14 ECOLOGY L.Q. 271 (1985).

52. Consider, for example, Japan's Civil Code Article 199, which provides that "[if] a possessor is disturbed in his possession, he may by an action for maintenance of possession demand discontinuance of the disturbance as well as compensation for damages." J. GRESSER, K. FUJIKURA & A. MORISHIMA, *ENVIRONMENTAL LAW IN JAPAN* 135 n.16 (1981).

53. See Bándi, *Environmental Enforcement in Hungary -- Today and Tomorrow* 10 (Paper Presented at the Second International Conference on Environmental Enforcement, Sept. 1992).

54. Interview with Beatriz Gonzales, Colombian public interest attorney, in Washington, D.C. (June 18, 1992). See G. SARMIENTO, *LAS ACCIONES POPULARES EN EL DERECHO PRIVADO COLOMBIANO* [POPULAR ACTIONS IN



COLOMBIAN PRIVATE LAW] 34 (1988).

55. See *infra* note 85 and accompanying text.

56. In addition, if the settlement results in a consent decree approved and enforced by the court, it can include legally enforceable provisions governing the future conduct of the parties, rather than simply allowing the defendant to pay an initial fee and then continue the challenged conduct. See M. AXLINE, *supra* note 28, at 7-29.

57. See G. BINGHAM, *RESOLVING ENVIRONMENTAL DISPUTES: A DECADE OF EXPERIENCE* 130-32, 134-37 (1986).

58. This policy decision often has strategic consequences for the citizen litigant. A plaintiff who happens to qualify for both a common law damages action and a statutory enforcement action might bring the two concurrently, thereby hoping to increase her bargaining power over the violator.

59. See M. DORE, *LAW OF Toxic TORTS* § 24.01 (1992).

60. See *id.* §§ 24.03-24.04 (1992). See generally Brennan, *Causal Claims and Statistical Links: The Role of Scientific Uncertainty in Hazardous Substance Litigation*. 73 CORNELL L. REV. 469 (1988).

61. See DORE, *supra* note 59, at § 5.1 0.

62. In the United States, citizens may only file enforcement suits if the violations are ongoing or if there is a substantial likelihood that they will be repeated. See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987).

63. U.S. courts take this requirement very seriously. See *Hallstrom v. Tillamook Cty.*, 493 U.S. 20 (1989). However, lawsuits may be brought immediately after filing notice in the event of violations of certain standards, particularly when the violation may threaten human health. See Clean Air Act § 304(b).

64. See generally CITIZEN SUITS, *supra* note 14, at 53-62.

65. See *id.* at 77. In some cases, as when an endangered species is threatened, a statute may explicitly require the court to issue an injunction. U.S. Endangered Species Act § 11 (g)(1).

66. See CITIZEN SUITS, *supra* note 14, at 77-78.

67. See, e.g., *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 319 N.Y.S.2d 312, 257 N.E.2d 870 (1970) (cement plant allowed to continue polluting upon payment of continuing damages to adjoining landowner).

68. Under one United States statute, the Clean Air Act, judges may assign up to \$100,000 of these penalties to a fund which will be used for "beneficial mitigation projects which are consistent with" the Act. Clean Air Act § 304(g)(2).

69. See Clean Water Act § 505(a); RCRA § 7002(a); Clean Air Act § 304(a). The 1990 inclusion of civil penalties in the Clean Air Act Amendments is significant, because it represents a recent Congressional endorsement of the usefulness of such provisions.

70. See, e.g., Toxic Substances Control Act § 16(a).

71. In one successful citizen suit brought to rectify permit violations by a wastewater treatment plant, the appellate court found that the trial court's civil penalty award of \$3.2 million was too low. The court of appeals instructed the trial court to recompute the penalty, suggesting that the appropriate total might be the statutory maximum of \$4.2 million. See *Public Interest Research Group of New Jersey v. Powell Duffyn Terminals, Inc.*, 720 F. Supp. 1158 (D.N.J. 1989), *aff'd in part and rev'd in part*, 913 F.2d 64 (3d Cir. 1990).

72. For academic criticism of civil penalties in citizen suits, see Blomquist, *Rethinking the Citizen as Prosecutor Model of Environmental Enforcement Under the Clean Water Act: Some Overlooked Problems of Outcome-Independent Values*, 22 GA. L. REV. 337 (1988) (philosophical critique of permitting citizens to prosecute); Lewis, *Environmentalists' Authority to Sue Industry For Civil Penalties is Unconstitutional Under the Separation of Powers Doctrine*, 16 ENVTL. L. REP. (Envtl. L. Inst.) 10, 1 01 (1 986). *But see Chesapeake Bay Foundation*, 652 F. Supp. at 623-26 (citizen civil penalty requests not unconstitutional).

73. See *Cross*, *supra* note 2, at 70-71 (1989). For a more appreciative perspective on this type of settlement, see *Mann*, *Polluter-Financed Environmentally Beneficial Expenditures: Efficient Use or Improper Abuse of Citizen Suits Under the Clean Water Act?* 21 ENVTL. L. 175 (1991).

74. See *Sierra Club v. Electronic Controls Design*, 909 F.2d 1350, 1354-56 (9th Cir. 1990).

75. See M. AXLINE, *supra* note 28, at § 7.06.

76. See *Price*, *supra* note 7, at 33.

77. As noted above in Section 2.3.1.3, the doctrine of "prosecutorial discretion" precludes citizen challenges to government decisions not to take particular enforcement actions in the United States. This limitation renders the availability of

citizen enforcement actions particularly important. Even in the U.S., however, a blanket failure to enforce *any* portion of a statutory or regulatory regime might still be subject to court challenge. See *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985).

78. *Valley Forge Christian College v. Americans United for Church and State*, 454 U.S. 464 (1982).

79. This constitutional standing requirement applies to all lawsuits, not just to enforcement suits brought under citizen suit provisions. In practice, most controversy over standing centers on statutory suits, not common law actions. Courts may perceive a greater threat of inappropriate citizen involvement in a statutory, as distinct from a common law, action. In the latter case, a plaintiff cannot prevail without proving that he was injured by the challenged actions; no such requirement applies to a citizen plaintiff in an environmental enforcement suit.

80. This view of standing remains common in many other nations. See *EUROPE*, *supra* note 8, at 81-82 (discussing West German standing provisions).

81. See *Sierra Club v. Morton*, 405 U.S. 727 (1972).

82. See *Lujan v. Defenders of Wildlife*, 60 U.S.L.W. 4495 (1992).

83. See *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970).

84. Contrast this with an Irish case in which "an association of traders who objected to the competition caused by [a] . . . development [that violated zoning laws] successfully sought an injunction to close it down, even though their motivation was largely commercial." *EUROPE*, *supra* note 8, at 13-14 (citations omitted).

85. See *Kaftan, A.E. y otro v. Gobierno Nacional (Poder Ejecutivo)*, 1983-D L.L. 568, 576 (1983). First, the judge construed the preamble of the 1853 Argentine Constitution, declaring the framers' intent to ensure and guarantee general welfare and property to future generations, as a mandate to all branches of government, including the judiciary, to protect the environment. Second, the judge found that a right to ecological protection was implied by another constitutional provision. Finally, the judge relied on a provision in a wildlife protection statute imposing on Argentine citizens a duty to protect wildlife, as well as a law ratifying an international convention on the trade of endangered species.

86. "An estimated 1,000 to 1,400 federal facilities in the United States are either on the Superfund list [i.e., they have been determined to contain significant hazardous waste deposits] or eligible for that list." M. AXLINE, *supra* note 28, § 2.08.

87. See *Bowman & Hunter*, *supra* note 9, at 345 (noting that at the time of the

revolutions in the region, over 90% of property and industries in Central and Eastern Europe were owned by the state, and that privatization is proceeding slowly); Bándi, *supra* note 53, at 4 (stating that over 80% of the Hungarian economy is still in state ownership).

88. In fact, because the federal government cannot sue itself, statutory citizen suits and suits brought by the states are effectively the only way in which environmental standards can be enforced in the United States against federal government entities.

89. Because common law actions for damages present an opportunity for a personal benefit to the plaintiff, the traditional rules of cost-bearing may be more appropriate in such cases.

90. While some groups are able to reach self sufficiency, some plaintiff's attorneys have noted that even these attorney fee provisions "are not nearly adequate enough to encourage people to bring suits -- not if they want to eat, anyway." Terris, *Private Watchdogs: Internal Auditing and External Enforcement--Three Perspectives*, 17 ENVTL. L. REP. (Envtl. L. Inst.) 10,254, 10,255 (1987). This difficulty is especially apparent for initial, "up front" litigation costs. ELI STUDY, *supra* note 5, at V-25.

91. See ELI STUDY, *supra* note 5, at V-13; CITIZEN SUITS, *supra* note 14, at 132; Preston, *supra* note 8, at 47-48.

92. See McElfish, *SMCRA and Environmental Groups*, in MOVING THE EARTH (U. Desai ed., forthcoming 1992).

93. See, e.g., Greve, *supra* note 25, at 353 (only one quarter of citizen suits filed in the United States between 1984 and 1988 were brought by individual or local coalitions, with the remainder filed by national or regional environmental organizations).

94. "Public interest law firms" encompass the litigation departments of large environmental organizations. These organizations, which rely for survival on attorney fee provisions in environmental, civil rights, and other statutes, are an additional driving force for the liberalization of the U.S. statutory regime and legal system. An introduction to the role of public interest law firms can be found in Bonine, *The New Private Public Interest Bar*, 1 J. ENVTL. L. & LITIG. Xi (1986).

95. The Polish Nature Protection Act provides for the deputization of private citizens as "Environmental Protection Guards," who enforce environmental regulations within national parks and forest reserves, or as "Communal Protectors of Nature," who maintain the parks and forests and instruct people about environmental regulations. See Bowman & Hunter, *supra* note 9, at 314.

96. See *Preston, supra* note 8, at 61-65.

97. A 1984 report on citizen suits in the United States identified the lack of readily accessible information as "the single most important factor inhibiting citizen enforcement." "The crucial variable" in a successful citizen suit regime was information provided to citizens in a form that identified key compliance indicators. ELI STUDY, *supra* note 5, at V-1 2 to V-1 3.

98. See *supra* note 19.

99. See *id.*

100. For a more detailed discussion of information access mechanisms and their uses, see ENVIRONMENTAL L. INST., PUBLIC ACCESS TO ENVIRONMENTAL INFORMATION (ELI Working Paper, forthcoming 1992).