The Availability of State Environmental Citizen Suits

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Citizens play an important role in ensuring compliance with the nation's environmental laws. Sixteen of the nation's principal federal environmental laws invite citizens to sue as "private attorneys general" to force compliance, or to force agencies to perform mandatory duties. The archetypal federal citizen suit provision allows "any person" to "commence a civil action on his own behalf" against either "any person" who violates a legal prohibition or requirement or the U.S. Environmental Protection Agency (EPA) for failure "to perform any act or duty ... which is not discretionary." Clean Air Act, 42 U.S.C. § 7604(a) (2000), Clean Water Act, 33 U.S.C. § 1365(a). Citizen suit authority reflects "a deliberate choice by Congress to widen citizen access to the courts, as a supplemental and effective assurance that [environmental laws] would be implemented and enforced." Natural Resources Defense Council v. Train, 510 F.2d 692, 700 (D.C. Cir. 1974).

Citizen suits are not an exclusively federal phenomenon. Every state in the Union has enacted environmental laws. As a 1997 survey found, twenty-six states allow citizens to enforce state environmental laws ("state environmental citizen suits") in one way or another. See George, Snape, and Rodriguez, The Public in Action: Using State Citizen Suit Statutes to Protect Biodiversity, 6 U. Balt. J. Env'tl. L. 1 (1997). Some of these statutes allow citizens generally to sue to enforce state environmental laws. Others allow citizens to enforce specific attributes of environmental media-specific statutes.

This article examines the prevalence and limitations of state environmental citizen enforcement provisions in the context of compliance with environmental requirements. It observes that of the four legs of environmental enforcement—federal, state, federal citizen suits, and state citizen suits—the latter are the most underutilized. Nonetheless, owing to declines in federal and state governmental enforcement efforts, coupled with increasing statutory, constitutional, and practical challenges facing federal citizen suit litigation, the time may be ripe for the ascendency of state environmental citizen suits.

Citizen suits to enforce state laws are part of a four-legged table designed to ensure compliance with federal and state environmental laws. The first leg is federal enforcement by EPA. To compel compliance with federal environmental laws, EPA has three choices to address noncompliance. First, it can bring administrative actions—that is, seek compliance short of filing a federal lawsuit. This usually means sending a notice of violation, and that failing, issuing an administrative order seeking compliance and/or the payment of an administrative penalty. EPA can prosecute administrative actions relatively easily. They can be pursued quickly, cheaply, and decisively. EPA does not have to refer administrative enforcement to the U.S. Department of Justice (DOJ). There is no need to file a lawsuit, conduct discovery, or try a case. Other than defending the action in the event of appeal, the time and expense of litigation can be avoided. Owing to these advantages, more than 95 percent of EPA's enforcement efforts are administrative.

Administrative actions, however, have shortcomings. They cannot be enforced in court. Some statutes impose restrictions, limits, or procedures. The Clean Water Act, for example, limits "Class 1" administrative penalty amounts to $25,000. "Class 2" penalties are limited to $125,000, and must be preceded by an opportunity for a hearing. When administrative action alone cannot recover the economic benefit of noncompliance or secure compliance, EPA has the option of bringing a civil or criminal action.

Second, EPA can refer an action to DOJ for civil prosecution seeking compliance and/or civil penalties. Unlike administrative actions, successful civil actions result in enforceable court orders to comply or pay a penalty. Although Congress often limits penalty amounts per violation, penalty amounts theoretically are unlimited. For instance, the Clean Water Act imposes a penalty of $27,500 per day, per violation, makes penalty amounts a function of factors such as extent and severity of violations and ability to pay, but does not cap total potential penalty amounts. On the other hand, civil actions take far more resources than administrative actions and divert far more of the agency's resources toward litigating and away from implementing federal environmental legislation. Thus, less than 5 percent of EPA's overall enforcement efforts are civil actions.

Third, in the instance of intentional, reckless, or extremely dangerous violations, DOJ can institute a criminal action for criminal penalties and/or incarceration. Criminal actions, of course, take more resources than do either administrative or civil actions. Accordingly, criminal actions make up less than 1 percent of EPA's overall enforcement efforts.

EPA's annual Enforcement and Compliance Assurance Accomplishments Report, 1995-2002, shows fewer federal enforcement efforts. EPA is referring fewer cases to DOJ for enforcement. DOJ is bringing comparably fewer civil environmental cases. The cases DOJ brings tend to be for lower civil penalty amounts and supplemental environmental project (SEP), administrative penalty, and injunctive relief values. In the last few years, the number of CWA and CAA cases EPA referred to DOJ fell 25 percent overall, with a 55 percent decline for the CWA alone.
DOJ civil enforcement actions are down 20 percent. Judicial orders DOJ has earned are down 40 percent. Civil penalties have declined 62 percent. SEP values have decreased by 70 percent. Injunctive relief and administrative penalties values have fallen about 15 percent. EPA itself has expressed concerns about diminishing inspections and criminal referrals, down 15 percent and 40 percent, respectively. The diminution of pollution burden resulting from EPA enforcement has decelerated at 90 percent. See generally Environmental Results Through Smart Enforcement, 2002 EPA Ann. Rep. 59.

The second table leg is state enforcement of state environmental laws. States usually have at their disposal the same tools as EPA to seek compliance. Most states have enabling legislation that allows state environmental agencies to pursue administrative actions much like EPA and refer civil and criminal actions for prosecution to state attorneys general. The distribution of state administrative, civil, and criminal environmental actions is about the same as at the federal level.


The third leg is citizen enforcement of federal environmental laws. Federal environmental citizen suits have dominated the citizen suit landscape. Since 1993, citizens averaged annually about 550 notices of intent to sue, 350 lawsuits, and fifty federal court orders to comply with the nation's environmental laws. Since the first federal environmental citizen suit in 1970, citizens of all walks and pursuits, some with environmental interests, others with commercial ones, have filed more than two thousand citizen suits. There are at least 850 citizen suit legal actions—judicial opinions, notices of intent to sue, complaints, and consent orders—a year. Since 1995, citizens have filed 426 lawsuits (about one a week), and have earned 315 compliance-forcing judicial consent orders under the CWA and CAA alone. During the same period, under all environmental statutes, citizens have submitted more than four thousand five hundred notices of intent to sue, including more than five hundred against agencies and four thousand against members of the regulated community. This is an astonishing pace over eight years of about two notices of intent to sue every business day, which easily outpaces EPA referrals to DOJ. See generally May, New More Than Ever, Environmental Citizen Suits at 30, 10 WIDENER L. REV. 1 (2003).

The majority of the legal opinions issued under the nation's principal environmental statutes that allow citizen suits derive from citizen litigation. In the thirty years from 1973 to 2002, citizens accounted for more than 1,500 reported federal decisions in civil environmental cases. In the ten years from 1993 to 2002, federal courts issued opinions in an average of 110 civil environmental cases a year. Of these, eighty-three a year, roughly three in four or 75 percent, are citizen suits. See generally May, 10 WIDENER L. REV. 1 (2003). What this means is the majority of the growing jurisprudence interpreting the nation's environmental laws is attributable to federal citizen suits.

Given the fact that 75 percent of reported civil environmental cases are citizen suits merely hints at their heft. Since 1995, there is an annual average of nearly 770 citizen "actions" a year—aggregating notices (about 650), complaints (at least seventy), and judicial consent orders (at least fifty). Coupled with an average of eighty-three reported decisions annually, there are about 850 citizen suit "legal events" every year. Moreover, given that many citizen actions and decisions in citizen suits are unreported, and acknowledging that data gathering about citizen suits lacks precision, the number of federal citizen legal events is likely much greater.

Furthermore, federal citizen suits are powerful tools some states and municipalities use to ensure compliance with environmental laws. For example, New York and other states have filed federal citizen suits to seek compliance with the Clean Air Act by utility and industrial emitters in the Midwest. California and most northeastern states have challenged EPA's latest New Source Review rules and commenced another action to force EPA to regulate carbon dioxide as a criteria pollutant under the Clean Air Act. Local governments have turned to citizen suit provisions to enforce the Clean Water Act.

Despite the influence of federal environmental citizen suits, recent data show citizens are pursuing them less frequently. In 2002, citizens sent 25 percent fewer notices of intent to sue and filed one-third fewer lawsuits than they did in 1995. Accordingly, in 2002 they earned one-third fewer consent decrees to force compliance with the Clean Air Act and Clean Water Act than they did in 1995. See May, 10 WIDENER L. REV. at 21. Agency-forcing cases are also down one-third since 1995. Id. at 30.

There are myriad reasons for the decline in federal citizen suits. Federal citizen suits have various statutory, constitutional, and practical shortcomings. First, most federal environmental laws require advance notice of intent to sue. In Hallstrom v. Tillamook County, 493 U.S. 20 (1989), the Supreme Court held citizens may not sue for wholly past violations. Despite the influence of federal environmental citizen suits, recent data show citizens are pursuing them less frequently. In 2002, citizens sent 25 percent fewer notices of intent to sue and filed one-third fewer lawsuits than they did in 1995. Accordingly, in 2002 they earned one-third fewer consent decrees to force compliance with the Clean Air Act and Clean Water Act than they did in 1995. See May, 10 WIDENER L. REV. at 21. Agency-forcing cases are also down one-third since 1995. Id. at 30.

Second, the jurisdictional reach of federal environmental citizen suits is much more limited than that of governmental counterparts. Most federal environmental laws merely allow citizens to sue those "alleged to be in violation." See, e.g., 33 U.S.C. § 1365 (a)(1) (Clean Water Act). In Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49 (1987), the Supreme Court held this means citizens may not sue for wholly past violations, no matter how egregious, recurrent, or harmful.

Third, citizen suits may be precluded by state or federal enforcement efforts of virtually any stripe. Most federal environmental statutes preclude citizens from enforcing laws after a state or EPA commences and diligently prosecutes a civil action seeking compliance. See, e.g., Clean Air Act, 42 U.S.C. § 7604(b)(1)(B). Some preclude citizen suits when a state or EPA takes administrative action, even if it does not seek compliance. See, e.g., Clean Water Act, 33 U.S.C. § 1319(g)(6). Furthermore, when a state has settled an action—even if it does not seek or secure compliance—state common law principles of claim preclusion can preclude citizen enforcement.
Fourth, standing is nearly always at issue in citizen suits. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC)*, 528 U.S. 167 (2000), makes clear it is injury to the person, not the environment, that is the basis for the "injury in fact" component of constitutional standing. While this is an easier lift than showing tort-type injury to the environment, citizens must still prove the alleged injury, and that it is caused by the defendant and redressible by a court.

Fifth, ongoing post-complaint compliance moots claims for injunctive relief, although under *Laidlaw* claims for civil penalties may survive. Moreover, in agency-forcing cases, citizens may only pursue rce claims challenging a final agency action, and in some instances, only after exhausting available administrative remedies.

Sixth, states are all but immune from federal environmental citizen suits. *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), and its Eleventh Amendment progeny have severely limited the extent to which Congress may subject state polluters to federal laws, including federal environmental laws subject to citizen enforcement.

Finally, the difficulty of recovering fees provides a significant barrier to pursuit of a citizen suit. Some key federal environmental statutes, such as the Clean Water Act, allow fee recovery to "prevailing" or "substantially prevailing" parties. 33 U.S.C. § 1365(d). Applying this language, courts have allowed fee recovery whenever citizens either earned a court order that beneficially alters the legal relationship between the parties or in the absence of such court order, could prove their action resulted in (i.e., "catalyzed") compliance. *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598, 610 (2001), did away with the catalyst theory, however subsequent cases continue to recognize it when applied to statutes, such as the Clean Air Act and the Endangered Species Act, which allow courts to award fees as "appropriate." 42 U.S.C. § 7604(d); 16 U.S.C. § 1540(g)(4).

**State Environmental Citizen Suits:**
**The Fourth Leg of the Enforcement Table**

The fourth leg is citizen enforcement of state environmental laws. Unfortunately, citizen suits under state environmental laws are not as easy to describe as under federal laws. States invite citizen suits in limited and wildly divergent ways. With the states serving as laboratories for experimentation of how to have citizens enforce environmental laws, the common denominator seems to be underutilization.

Sixteen states grant citizens the general authority to enforce state environmental laws. At least eight more allow citizens to sue to enforce media-specific state environmental statutes. Two more allow citizens to sue agencies to perform mandatory duties.

The most muscular state citizen suit provisions allow citizens to sue to enforce all state laws governing the environment. Seven states follow this approach. Michigan enacted the progenitor and high mark of state environmental citizen suits in 1969, the Michigan Environmental Protection Act (MEPA). *Mich. Comp. Laws* § 324.1701–1706 (2003). MEPA allows "any person" to maintain an action against "any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction." *Id.* §§ 324.1701. Michigan thus allows any citizen, including those who are not residents, to bring either compliance or agency-forcing suits respecting virtually any environmental issue. South Dakota has a nearly identical law. *S.D. Codified Laws* Ann. §§ 34A-10-1 (allowing "any person" to sue for the protection of the air, water, and other natural resources and the public trust therein from pollution, impairment or destruction”). Other states have followed suit, though substituting "environment" for "public trust" and "natural resources." *N.J. Rev. Stat.* §§ 2A:35A-1 to –14; N.D. Cent. Code §§ 32-40-06 (allowing "any person" "to enforce [an environmental] statute, rule or regulation, or to recover any damages that have occurred."). Minnesota and Nevada have nearly identical entitlements, although limited to state residents. *Minn. Stat.* §§ 116B.01–13 (2003); *Nev. Rev. Stat.* §§ 41.540–570. Massachusetts is the same, but requires at least ten state residents to join as plaintiffs. *Mass. Gen. Laws* Ann. ch. 214, § 7A (2003). The Louisiana Environmental Quality Act also allows citizens to enforce nearly any aspect of state environmental law. *La. Rev. Stat. Ann.* § 30:2026 (allowing "any person having an interest, which is or may be adversely affected" to sue "any person" who violates state environmental law).

At least three states invite citizen enforcement under color of state constitutional law. The constitutions of Pennsylvania, Illinois, and Hawaii allow "any person" to enforce a "right to a clean and healthful environment" against "any party." *Haw. Const.* art. XI, § 9; *Ill. Const.* art. 11, § 2.

Some states allow citizens to sue them or their agencies to protect against significant environmental impacts. Connecticut allows citizens to sue the state and its agencies for the "protection of the public trust" of "natural resources" from "unreasonable pollution, impairment, or destruction." *Conn. Gen. Stat.* §§ 22a-14 to –20. Likewise, Florida invites citizens to sue state environmental and other agencies "for the protection of the air, water, and other natural resources of the state." *Fla. Stat. Ann.* § 403.412 (2003); *Ind. Code* §§ 13–30–1 to –12 ("for the protection of the environment of Indiana from significant pollution, impairment, or destruction").

Some states allow agency-forcing cases like those allowed under federal law. *See*, e.g., *Md. Nat. Res.* §§ 1-501 to –508 (against state or subdivision "for failure . . . to perform a nondiscretionary ministerial duty imposed upon them under an environmental statute, ordinance, rule, regulation . . . for the protection of air, water, or other natural resources of the state").

Other states subject government agencies and instrumentalities to citizen suits, but only to the extent allowed by federal law. *See*, e.g., *Wyo. Stat. Ann.* § 35-11-904 (2003) (allowing "any person having an interest which is or may be adversely affected [to sue] only to the extent that such action could have been brought" under federal environmental law).

At least eight states allow citizens to sue to enforce compliance with media-specific state environmental laws. In nearly identical provisions to those allowed under most federal environmental laws, a host of states allow "any citizen" to "commence a civil action" on one's own behalf to sue to force compliance with state requirements. Many, including those in New Hampshire,
State Environmental Citizen Suits Are Underutilized

Notwithstanding the variety of rights that citizens have to enforce environmental laws under general grants in state law, citizens file few state cases compared to their federal counterparts. Based on a Lexis review, there are more than three thousand reported decisions in federal citizen suits, as compared with only about two hundred in state environmental citizen suits. There are at least three reasons state environmental citizen suits are not more prevalent. First, it is difficult to develop an expertise in state environmental citizen suit law. No state citizen suit laws are alike. Although there is a progenitor state environmental citizen suit provision (MEPA), there is no model one. While a majority of states allow citizens to sue to enforce environmental laws, fewer than one-third have general laws allowing both compliance and agency-forcing cases to enforce the full panoply of the state's environmental laws. Fewer than one-third of the states without general provisions allow citizens to sue for violations of specific statutes. Roughly one-half of the states do not invite citizen suits at all.

Second, some state courts erect additional procedural, substantive, and constitutional hurdles above those found in federal law. For example, some state courts engraft onto state law a requirement for citizens to demonstrate "standing" akin to that required for federal citizen suits to enforce federal laws. While the evolution of modern standing jurisprudence makes this seem natural enough at first blush, no state constitution examined in this article requires citizens to demonstrate "standing" or otherwise enmeshes the jurisdictional parameter of state courts to that granted to federal courts under the U.S. Constitution as construed by the U.S. Supreme Court.

Nevertheless, many states, like Florida, require citizens to prove a truncated version of standing that mirrors federal law. See, e.g., Florida Wildlife Fed'n v. State Dep't of Envtl. Regulation, 390 So.2d 64 (Fla. 1980). Some have a standing test more onerous than that under federal law. See, e.g., Gerst v. Marshall, 549 N.W.2d 810 (Iowa 1996) ("traceability" requires demonstration of tort-like causation) citing IOWA CODE § 455B.111 (granting standing "if the person is adversely affected by the alleged violation or alleged failure to perform a duty or act"). Some require citizens to show injury to commercial or economic interest, which all but cuts off citizen enforcement to all except business interests. Still other states all but do away with standing. See, e.g., Md. Nat. Res. §§ 1-501 to -508 (standing for any "person, regardless of whether he possesses a special interest different from that possessed generally by the residents of Maryland, or whether substantial personal or property damage to him is threatened").

Finally, it is all but impossible for even the most successful state citizen suit lawyer to make a living at it. While it is challenging for citizens to recover fees under federal environmental laws, the vast majority of states do not allow citizens to recover fees at all. Only about one-third of states that allow environmental citizen suits allow for recovery of costs, fees, or both. Fewer than twenty percent, that is, only three—Connecticut, Massachusetts and New Jersey—of the sixteen states with citizen suit laws allow for recovery of both attorney and expert fees and costs. Only three more—Michigan, Nevada, and North Dakota—provide for recovery of costs, such as filing and service fees, but exclude attorney and expert fees. About two-thirds of the states with general citizen suit provisions (including Florida, Hawaii, Illinois, Indiana, Iowa, Louisiana, Maryland, Minnesota, Pennsylvania, South Dakota, and Wyoming) do not provide for recovery of costs or fees, and thereby shift the economic burden of the citizen suit entirely on the adversely affected party. Even though fees are hard to recover under federal law, every federal environmental law that allows citizen enforcement has a fee-shifting provision. This has the effect of carmibalizing some actions that could otherwise be brought under state laws that do not.

The time seems ripe for more state environmental citizen suits. Of the four enforcement tools, state environmental citizen suits seem the most underutilized. In the absence of state legislative or judicial changes to address obstacles to state environmental citizen suits, however, this is unlikely to change. Some states allow citizens to sue for violations of any state environmental laws. Most do not. Many allow citizens to sue to enjoin violations of specific laws addressing media, like air or water, or practices, like mining. Most state laws governing media and practices, however, do not. Of those states allowing either general or specific enforcement, most do not allow citizens to recover attorney fees and only a few allow recovery of ministerial costs. Yet despite these limitations, as state and federal governmental enforcement of environmental laws declines and obstacles to federal citizen suits increase, state environmental citizen suits may soon need to ascend.