Private Environmental Litigation: Some Problems and Pitfalls.

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PRIVATE ENVIRONMENTAL LITIGATION: SOME PROBLEMS AND PITFALLS

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I. INTRODUCTION

Environmental law has come into its own during the last decade by developing a unique body of statutory and case law. Although for many years some of the more obvious areas of environmental concern, such as air and water pollution, have had their own special legislative treatment, many areas did not. Subsequent to 1970,
however, more extensive federal legislation with an environmental focus has addressed various environmental problems, including noise pollution, solid waste disposal, historic preservation, coastal zone preservation, pesticides, and more recently surface mining, to name but a few. This legislative treatment, in turn, has generated extensive litigation that has evolved into what today can accurately be described as a common law of the environment.

With the addition of special legislation reflecting greater environmental concern has come a watchdog role for environmental groups and individuals who seek to preserve environmental quality. These groups and individuals frequently study the performance of the federal agency charged with the legislative mandate of preserving environmental quality. The environmentalists seek to assure that the agencies' actions maximize protection of the environment. When the environmentalists believe that the agency is not fulfilling its legislative mandate, recourse is often sought in the courts for review of the agency's action.

Environmental litigation in recent years has shown that having environmental protection statutes on the books did not resolve all the problems of a lawsuit. The lawsuit would be permitted or judicial review of the agency action allowed only in otherwise appropriate situations. At the procedural level the environmentalist plaintiff often is confronted with defenses questioning plaintiff's standing to sue or asserting sovereign immunity, the lack of consent of the governmental defendant to the suit. Jurisdictional issues frequently raised include challenges questioning whether the particular agency action was reviewable. Another major obstacle to private environmental litigation is the high—often prohibitive—cost, including at-

torney fees, of the lawsuit. One of the more publicized examples of the complexity, time, and expense involved in environmental litigation is the extensive Alaskan Pipeline litigation that continued from 1970 to 1975.8

How the courts have resolved the jurisdictional, procedural, and cost problems confronting environmental litigants will be examined to determine the present state of the law. How these problems have been affected by federal and selected state legislation will also be discussed. This review will illustrate those problems which have not yet been resolved judicially; it also will identify those areas which require further legislative action. In the procedural area, for example, additional legislation may be justified to remove procedural obstacles that have been strictly applied by courts to bar otherwise meritorious litigation. In other instances, the legislation may be required to clarify policy issues appropriately left to a legislature.

II. JURISDICTIONAL PROBLEMS

A. Federal Question Jurisdiction

An early problem in environmental litigation in federal courts is stating a cause of action over which the federal courts have subject matter jurisdiction. Often jurisdiction is invoked under section 1331, the general federal question jurisdiction statute.10 In Texas v. Pankey,11 for example, pesticides used on crops in New Mexico were carried into the Canadian River which flowed into Texas where it was used for drinking water by a Texas community. In that case the plaintiffs claimed that the liability should be determined under a federal common law of nuisance, rather than under the laws of either of the concerned states. Application of federal law was urged to avoid the result under the Erie doctrine12 that the law of the state where the federal diversity court sits must be applied. In Pankey the court did apply federal common law.13

The development of a federal common law for interstate water

11. 441 F.2d 236, 2 Envir. Rep. Cas. (BNA) 1200 (10th Cir. 1971).
pollution suffered an apparent setback, however, in Ohio v. Wyandotte Chemical Corporation. In that case Ohio sought to invoke the original jurisdiction of the Supreme Court to abate a nuisance, the pollution of Lake Erie by an Ohio and Canadian corporation depositing mercury in the lake. The Court invoked the abstention doctrine and exercised its discretion not to take jurisdiction over the cause of action even though it had subject matter and personal jurisdiction over the parties. It reasoned that its original jurisdiction should be extended sparingly and not to a case where the purposes for original jurisdiction would not be furthered. The Court emphasized that Ohio law probably would govern the dispute whether decided by a state or federal court. It further noted that, under modern principles of long-arm jurisdiction, Ohio would have no problem getting jurisdiction over the non-resident defendants. Hence the Court concluded that the appropriate forum for the case was an Ohio state court. The retreat from developing a federal common law of pollution came in a footnote by the Court which explained that concurrent jurisdiction did not exist in federal courts because, on the facts in Wyandotte, neither diversity nor federal question jurisdiction was available. That note seemed to indicate that pollution of interstate waters was not a matter for federal common law.

The Court’s footnote in Wyandotte indicating that the pollution of Lake Erie was not a federal question was put aside in Illinois v. Milwaukee. In that case Illinois sought to bring an original action in the Supreme Court against the City of Milwaukee for creating a public nuisance by discharging raw or inadequately treated sewage or other waste material into Lake Michigan, a body of interstate water. The Court first rejected Milwaukee’s contention that a suit against a subdivision of a state was a suit against the state. Section 1251(a) would then have placed the suit under the exclusive original jurisdiction of the Supreme Court. The Court refused to follow that contention and held that concurrent jurisdiction existed with other federal district courts. It was held also that federal question jurisdiction under section 1331 would be appropriate in a federal district court because the pollution of interstate or navigable waters is a

15. Id. at 498 n.3, 2 Envir. Rep. Cas. (BNA) 1333.
cause of action "arising under" the "laws" of the United States within the meaning of section 1331. The Court concluded that section 1331 embraces causes of action based on both statutory and common law. In so doing, however, they passed over the seeming contrary indication in Wyandotte by merely noting that the Wyandotte Court was primarily concerned with a fact situation clearly requiring application of state law and raising no federal issues.

Problem areas in applying the new federal common law of interstate pollution include whether that action may be based on alleged violations of a regulatory statute, such as the Federal Water Pollution Control Act Amendments of 1972 (FWPCA), and whether it may be used in lieu of, or in addition to, specific statutory review provisions. The latter question usually arises when the statutory review is unavailable because time limitations or notice requirements have not been met.

The availability of section 1331 jurisdiction using an Illinois v. Milwaukee cause of action as an alternative to barred statutory review was questioned in Massachusetts v. United States Veterans Administration. After its jurisdictional claim under section 505 of the FWPCA was denied, the state claimed section 1331 federal question jurisdiction. It maintained that the facts alleged in the complaint were sufficient to support a nuisance cause of action for pollution of navigable waters. That in turn would justify invoking section 1331 jurisdiction under the doctrine of Illinois v. Milwaukee. The state's nuisance action was based on allegations that the Veterans Administration violated the FWPCA by emitting effluents contrary to the conditions of its NPDES permit.

The court pointed out certain issues relevant to the state's federal question jurisdiction theory that could dispose of it. First, the court

19. Id. at 100.
23. "NPDES" stands for National Pollution Discharge Elimination System and consists of a permit system for the discharge of all wastewater approved by the administrator of EPA or by the state under an approved state permit program. See 33 U.S.C. § 1342 (Supp. V 1975).
noted that there is conflict among the circuits whether nuisances based on alleged violations of the FWPCA are exclusively reviewable under that Act or can be reviewed under federal question jurisdiction. Second, the court noted the uncertainty about the new federal common law of nuisance under *Illinois v. Milwaukee*. The new federal action was created, according to the court, to fill a void in those cases in which the pollution arose in one state, but caused damage in another. Whether that same law should apply to a situation like the one before the court where all the acts occurred within one state has not yet been answered. Third, the court suggested that the FWPCA may have preempted part of the federal common law of nuisance.

The court, however, did not rely on these issues, but instead applied the doctrine of sovereign immunity to bar the suit.24 Because the suit was an action against an agency of the federal government and sought monetary penalties from the agency, it was an action against the "federal sovereign" and could not be maintained without consent of Congress. Massachusetts sought to argue that consent was present in section 505 of the FWPCA, but the court rejected this point. It held that the consent contained in that provision waiving immunity should not be liberally construed.25 Read literally, the right to sue was limited to suits appropriately brought under section 505, which the state could not do in this case.

Another case more clearly required that an action based on *Illinois v. Milwaukee* must involve interstate pollution. *Board of Supervisors v. United States*26 involved allegations that a federal prison constituted a public nuisance. The alleged nuisance was caused by escapes, riots, and other similar disturbances. In addition, the plaintiffs claimed that waste, coal dust runoff, and gas emissions from the prison complex resulted in a nuisance by causing air and water pollution. The district court held that for the pollution action to stand independent of violations of any federal statutes it must allege that the pollution is interstate. Therefore, the plaintiffs were allowed to amend their complaint to include the interstate nature of the pollution. After a hearing on the merits, the court concluded that the prison facility was now in compliance with fed-

25. Id. at 123, 9 Envir. Rep. Cas. (BNA) at 1510.
eral and state air quality standards. It also determined that the amended complaint allegations of interstate pollution were not proven at trial. Nonetheless, the court concluded that, since the federal and state nuisance causes of action arose from the same operative facts, pendent jurisdiction was proper, and it would decide the state claim even though the federal water pollution claim must fail. The court concluded that the operation of the prison facility was a public nuisance which the District of Columbia must abate by a plan for better security and regulation of the water pollution.

Another limitation on this new federal cause of action in nuisance for pollution of interstate waters may be that it has to constitute a public rather than merely a private nuisance. In Committee for the Consideration of the Jones Fall Sewage System v. Train the court rejected an effort by private individuals to abate an alleged nuisance. The court stated in part:

Perhaps with the exception of actions by the United States to abate public nuisances created in navigable waters by polluters, but consistent with section 1251(b), the doctrine of Illinois v. Milwaukee has not been extended beyond the abatement of public nuisances in interstate controversies where the complainant is a state and the offenders are creating extra-territorial harm.

B. Diversity Jurisdiction

Diversity jurisdiction under section 1332 is frequently invoked if the parties are citizens of different states and the jurisdictional amount requirement is satisfied. Although complete diversity does not always exist, it may be found, for example, in a situation in which the problem complained of is pollution of an interstate stream or lake. Frequently in an environmental case this element is present because of the interstate nature of many pollution problems. In those instances it is often more favorable for the plaintiff to go to a federal rather than a state court and use its long-arm statute to obtain jurisdiction over the non-resident defendant. One

28. Id. at 1892-93.
29. An interlocutory appeal was denied by the Fourth Circuit. 10 Envir. Rep. Cas. (BNA) 1895 (4th Cir. 1977).
31. Id. at 1009, 9 Envir. Rep. Cas. (BNA) at 1214 (citations omitted).
reason for this is that the federal court may be more impartial in the sense of avoiding the parochialism of a local state court. In addition, since Illinois v. Milwaukee the federal court has the option in some instances of using the new federal common law to mold or fashion a remedy to fit old environmental problems. Another reason for using the federal court is its more expeditious and simplified procedural rules. Federal discovery proceedings also may be more favorable, and pretrial conferences can narrow the issues and minimize the matters to be settled at trial. In both diversity jurisdiction and most federal question jurisdiction cases, except section 1331 actions against the United States, its agencies, or its offices, the amount in controversy (commonly called the jurisdictional amount) must exceed $10,000.

Once subject matter and personal jurisdiction are established, a problem arises in diversity cases concerning what law should govern the particular suit. Suppose a plaintiff who is a citizen of Texas sues a defendant who is a citizen of New Mexico and brings the suit under diversity jurisdiction in the Federal District Court for the Northern District of Texas. The federal court could apply the substantive law of either New Mexico or Texas. If New Mexico and Texas laws are the same, it may not matter which is chosen; but if they are different, each party will argue the law of his state should apply if it is favorable to his position. In 1938 the United States Supreme Court in Erie Railroad Co. v. Tompkins decided that the federal district court sitting in diversity jurisdiction should apply the substantive law of the state in which the district court is located; in the example above, Texas law. One reason for this holding was to achieve a uniform result between the state and federal court. The Erie Court feared that plaintiffs would select a federal court which

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34. Congress recently amended section 1331(a) to remove the jurisdictional amount requirement in actions against the United States, its agencies, or officers acting in their official capacity. Act of Oct. 21, 1976, Pub. L. No. 94-574, § 703, 90 Stat. 2721 (1976).
35. 304 U.S. 64 (1938).
might apply either federal law or another state's law which was
more favorable to the plaintiff than the law of the state in which the
federal court is located thereby leading to forum shopping among
the federal courts. To avoid this, the federal court was required to
reach the same result that the state court in the state where it sits
would reach by having the federal court apply the local law used in
the state courts.36

Although the Court in Erie said there is no federal common law,
the statement cannot be taken literally. On the same day that Erie
was decided, the Court in Hinderlider v. La Plata River & Cherry
Creek Ditch Co.37 applied federal common law, irrespective of the
state law, to determine water rights in interstate streams. Federal
common law has also been applied in a suit involving interstate
boundaries.38 The significance of this is that the Court has always
carefully avoided applying Erie too literally. Diversity cases in
which federal law rather than state law was applied include Hanna
v. Plumer39 and Bank of America National Trust & Savings Associ-
ation v. Parnell.40 Other cases applying federal common law include
Zschernig v. Miller41 and Banco Nacional de Cuba v. Sabbatino.42
In these situations, even if the jurisdiction of the federal court is
based on diversity of citizenship of the parties, the substantive law
that applies comes from federal rather than state sources. Also, if
the case were brought in the state court, these are situations in
which the Court has said the state must apply the federal law (ex-
cept for procedural matters) rather than its own law because of the
need for national uniformity. The most recent example of the appli-
cation of federal law in a non-diversity context is Illinois v. Milwau-
kee43 in which the Court held federal common law applied
to cases involving interstate water pollution.

Zahn v. International Paper Co.44 involved private parties invok-
ing the diversity jurisdiction of the federal court and a claim under
the new federal common law of Illinois v. Milwaukee. In Zahn the
plaintiffs were private owners of land immediately adjacent to Lake

36. Id. at 74-75.
37. 304 U.S. 92 (1938).
40. 352 U.S. 29 (1956).
42. 376 U.S. 398 (1964).
Champlain which was allegedly being polluted by the defendant’s plant, located in New York. The four landowners asserted individual claims and class claims on behalf of all other persons owning property around the lake who were suffering similar damage. The claims of the four named plaintiffs were sufficient to satisfy the diversity requirements and the jurisdictional amount as there existed absolute diversity of citizenship between them and the defendant and each of their claims was in excess of $10,000. The problem was that every other member of the class did not have an individual claim exceeding $10,000. The plaintiffs wanted to satisfy the required jurisdictional amount by aggregating the claims of all of the named members of the class. The defendant, on the other hand, argued that under the federal rules diversity jurisdiction obtained only if each individual class member satisfied the requisite jurisdictional amount. The Supreme Court in Zahn agreed with the defendant by holding that the principle of Snyder v. Harris, that aggregation of individual claims could not satisfy the jurisdictional amount when no single claim suffices, applied in this situation. Aggregation of class member’s claims to continue insufficient individual ones was inappropriate even though some individual claims satisfied the jurisdictional amount.

C. Jurisdiction Under Citizen Suit Provisions

Jurisdictional issues also have arisen in conjunction with the

45. Id. at 299-300, 6 Envir. Rep. Cas. (BNA) at 1123.
48. Several recent environmental statutes have provisions for citizen suits. The Clean Air Act and the Federal Water Pollution Control Act provisions have been selected for detailed discussion because they have been more extensively litigated and because they serve as a model for some of the citizen suit provisions in other statutes. For similar provisions see Conservation and Recovery Act of 1976, Pub. L. No. 94-580, § 7002, 90 Stat. 2825 (1976); Toxic Substance Control Act of 1976, Pub. L. No. 94-469, § 20, 90 Stat. 2041 (1976); and Noise Control Act of 1972, 42 U.S.C. § 4901 (Supp. V 1975).

scope of jurisdiction granted under the citizen suit provisions in the Federal Clean Air Act, and the Federal Water Pollution Control Act Amendments. One court has observed that the citizen suit provision in the Clean Air Act took broad steps to facilitate the citizen’s role in the enforcement of the Act, both in renouncing those concepts that make federal jurisdiction dependent on diversity of citizenship and jurisdictional amount, and in removing the barrier, or hindrance, to citizens suits that might be threatened by challenges to plaintiff’s standing.

For example, under the Clean Air Act “any citizen” may bring the suit, not merely those who are adversely affected or aggrieved by the agency’s action. The Federal Water Pollution Control Act, although its provisions are modeled after the Clean Air Act, was not quite that broad. It incorporated the standing requirement of Sierra Club v. Morton by limiting suits to “citizens” which the Act defines as “persons having an interest which is or may be adversely affected.” Notwithstanding this broadening of review of agency action, however, the citizen suits provisions in both statutes are not unlimited authorizations to sue, but rather are confined to certain narrow circumstances.

1. The Federal Clean Air Act (CAA). Federal courts have not had an easy task interpreting the CAA citizen suit provisions which became the models for similar provisions in the FWPCA. The specific provision in section 304 of the CAA provides:

any person may commence a civil action on his own behalf ... against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator. The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties ... to order the Administrator to perform such act or duty, as the case may be.


52. See note 48 supra.


Under the CAA one of the duties of the Administrator is to approve or disapprove implementation plans proposed by the states.\(^{56}\) The deadline for submission and approval was May 31, 1972. Prior to that date the Administrator indicated that the EPA would not require provisions protecting against degradation of a state’s existing clean air areas when approving state plans to implement the national primary and secondary ambient air quality standards. As the Administrator interpreted the CAA, he lacked the power to require a nondegradation provision in state implementation plans.

In *Sierra Club v. Ruckelshaus*\(^{57}\) the court was confronted with a section 304 action seeking to enjoin the EPA from approving state implementation plans (SIP) which did not provide for protection against degradation of existing air quality. The Administrator challenged the jurisdiction of the court claiming that review of SIP approval actions was within the exclusive jurisdiction of the court of appeals under section 307.\(^{58}\) Section 307 provides for review of the Administrator’s action in approving or disapproving SIPs by the circuit court of appeals for the state in which the circuit is located.\(^{59}\) The district court concluded that the Administrator’s interpretation of the Act regarding his lack of authority and his issuance of a regulation permitting degradation of existing air quality constituted a failure to perform a non-discretionary act or duty within section 304.\(^{60}\) Hence, jurisdiction was properly invoked in the district court. The court’s nondegradation ruling became an important interpretation of the CAA.\(^{61}\)

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\(^{61}\) The most recent case tracing events subsequent to *Fri* is *Sierra Club v. EPA*, 540 F.2d 1114, 9 Envir. Rep. Cas. (BNA) 1129 (D.C. Cir. 1976), cert. denied, ___ U.S. ___, 97 S. Ct. 1610, 51 L.Ed.2d 802 (1977). The Sierra Club challenged the EPA issuance and approval of new nondegradation regulations which included only two of the six primary air pollutants. *Id.* at 1123, 9 Envir. Rep. Cas. (BNA) at 1134; see 40 C.F.R. § 50 Appendix A-F (1975). The court sustained the EPA’s determination that the significant deterioration should
A recent, major decision was issued by the United States Supreme Court concerning what matters the courts of appeals can review pursuant to section 307 of the Clean Air Act. In *Union Electric Co. v. Environmental Protection Agency* the company sought review of the Administrator's approval on May 31, 1972, of the Missouri Implementation Plan. Initially the company applied for and received state variances from the emission limitations affecting its plants for one year periods. On May 31, 1974, the company was applying for extensions of the variances when the Administrator notified it that its plants were violating the emission limitations of the Missouri Plan. Shortly thereafter the company petitioned the court of appeals to review the Administrator's 1972 approval of the Missouri Implementation Plan. The company contended that it did not have to satisfy the thirty-day statutory period for review contained in section 307(a) because the information on which the petition was based was discovered more than thirty days after the approval and hence was within the exception in section 307(b). The basis for reviewing the approval was “newly discovered or available information” on the technological and economic infeasibility of the standards contained in the plan.

The company argued that in obtaining review after the thirtieth day under section 307(b) it was not limited to factors the Adminis-
The utility argued that claims of technological and economic infeasibility could be reviewed, even if those grounds could not have been considered by the Administrator in his initial decision to approve or disapprove a plan. The Court rejected this argument, construing section 307(b) to be limited to consideration of factors that the Administrator could have considered in his initial action in approving or disapproving the plan. Then the Court proceeded to consider those factors and concluded that section 110(a) enumerates eight factors the Administrator can consider in approving or disapproving a plan, but found those factors not to include economic and technological feasibility. In addition, if the eight factors are present in the plan, the Administrator has the mandatory duty to approve the plan. Under those circumstances economic and technological factors are not valid considerations by the Administrator in his approval action and hence not subject to review under section 307. In reaching this conclusion the Court emphasized the "technology-forcing" character of the statutory requirements and acknowledged the states might in some instances adopt requirements "designed to force regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible."

The Court continued noting that the appropriate places for consideration of economic and technological feasibility would be under sections 110(e) or 110(f) when a state may intervene on behalf of the polluter. The state may request an extension for attainment of the standard if it is technologically infeasible to comply, or a postponement of a compliance date if it is technologically infeasible and the operation of the source is essential to national security or public health and welfare. Also under section 113 enforcement proceedings, the Court suggested economic and technological feasibility

63. Id. at 255, 8 Envir. Rep. Cas. (BNA) at 2146.
64. Id. at 255, 8 Envir. Rep. Cas. (BNA) at 2146.
65. Id. at 257, 8 Envir. Rep. Cas. (BNA) at 2146-47.
66. Id. at 257, 8 Envir. Rep. Cas. (BNA) at 2146.
68. Id. § 1857c-5(f). The 1977 Amendments changed section 110(f) and added subsection (g) to authorize a temporary emergency suspension of parts of an applicable state implementation plan for energy or economic reasons. Pub. L. No. 95-95, § 107, 91 Stat. 691-92 (1977).
might be considered by the Administrator in determining whether to seek a compliance order or civil or criminal enforcement of the Act. The Court then noted in a footnote that economic and technological infeasibility might be raised as a defense in either a civil or criminal enforcement suit, whether brought by the government or by citizens under section 304.

The Court's opinion raised other jurisdictional issues in footnote 19. There the Court acknowledged the company's argument that it might be denied due process under the fifth amendment unless given an opportunity to raise economic and technological feasibility before a court. The Court refused to resolve that issue, in part because there was no showing that section 307(b) was the only opportunity for the petitioner to raise its claims of economic and technological possibility before a court. That of course suggests those claims might be raised under the Act in some other manner.

That possibility was quickly picked up in another section 307(b) action, West Penn Power Co. v. Train. In an earlier decision, the Third Circuit had held that the Administrative Procedure Act (APA) did not provide an independent source of jurisdiction. The court noted, however, that the decision did not conclude that review of EPA action under the APA would be within the jurisdiction of federal courts under general jurisdiction statutes such as sections 1337 or 1331 since neither of those jurisdictional bases was raised for the court's consideration. Moreover, the court suggested that the compliance order which was issued in West Penn might constitute final agency action that could be reviewable under the APA. The court concluded that Union Electric's denial of section 307 review was indistinguishable from West Penn, thus Union Electric controlled, and the petition was dismissed.


76. Id. at 1021-22, 9 Envir. Rep. Cas. (BNA) at 1207.
The issue of where review should be sought under sections 304 and 307 was raised in an earlier case. In City of Highland Park v. Train\textsuperscript{77} two municipalities and an environmental group sought to enjoin construction of a proposed shopping center. They wanted to have the Administrator issue significant deterioration regulations and indirect source regulations that would effectively bar construction of the shopping center. The Administrator did issue indirect source regulations subsequent to the filing of the complaint, but those regulations exempted sources if the construction was to begin before January 1, 1975, as the shopping center involved in Highland Park was. The court held, however, that review of the indirect source regulation would be appropriate only under section 307(b) in the court of appeals and not in the district court under section 304.\textsuperscript{78} It was reasoned that the federal standards were brought into the state plans by the Administrator's promulgation of the indirect source regulations. Thus, those regulations were in effect the EPA's promulgation of substitute provisions to replace deficient areas in state plans. Review of EPA approval or promulgation of a plan can be brought exclusively under section 307.\textsuperscript{79} The court also rejected plaintiff's characterization of the exemption for pre-January 1, 1975, facilities as "a failure to promulgate regulations with respect to such facilities." The court held that the scope of the regulations was an integral part of their substance, and it properly awaited review of those regulations in the pending section 307 petition which had been transferred to the District of Columbia Circuit.\textsuperscript{80}

The court next considered efforts to review the alleged failure to issue significant deterioration regulations under section 304. Section 304 provides in subsection (b) that "[n]o action may be commenced . . . under subsection (a)(2) of the section prior to 60 days after the plaintiff has given notice of such action to the Administr-
The court held that the sixty-day notice was a prerequisite to jurisdiction and failure to provide it was fatal to jurisdiction. The court also denied review under the revised APA. Section 704 of the APA provides that "agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court" is subject to judicial review under its provisions. The court concluded, however, that review under the APA was not available because it determined that there was an adequate remedy in a court under section 304. The court also denied jurisdiction under section 1331 and under the federal mandamus statute, section 1361. It held the mandamus relief was proper only when no other adequate remedy was available. Here, because the very act creating the rights asserted provided means to protect those rights, there was no need for the equitable mandamus jurisdiction. Because no federal question was presented under the mandamus statute, no basis existed for section 1331 jurisdiction. The court noted that its decision was diametrically opposed to the reasoning in Natural Resources Defense Council, Inc. v. Train. The majority in that case, interpreting section 505 of the Federal Water Pollution Control Act, held that judicial review could be obtained under that Act or other federal statutes, specifically section 704 of the APA and section 1331. The Highland Park court disagreed with the rationale underlying that decision and especially with its holding that the section 505(e) savings clause preserved other statutory remedies when section 505 itself could not properly be invoked.

In a final matter the court had to consider a petition filed January 6, 1975, to review the significant deterioration regulations already promulgated on December 5, 1974. The petition for review

84. City of Highland Park v. Train, 519 F.2d 681, 693 (7th Cir. 1975), cert. denied, 424 U.S. 927 (1976).
85. Id. at 692.
86. 510 F.2d 692 (D.C. Cir 1975). For discussion of this case see text accompanying note 110 infra.
87. Id. at 703.
raised the same substantive issues that were raised in the district court. The court held that the petition must be dismissed because it sought to compel issuance of new regulations. The court then concluded that section 307 review of the correctness of regulations was not intended to encompass review of alleged failures to act or situations requiring injunctions ordering the Administrator to act.88 Those situations are appropriately within the scope of section 304 which, because of the time delay here, could not be brought.

In Oljato Chapter of Navajo Tribe v. Train89 another citizen suit was brought under section 304 to review the EPA’s refusal to revise new statutory source standards of performance promulgated under the CAA. The revision was requested by the plaintiffs one year after the new source regulations had been issued, but suit was not filed until approximately eighteen months after the regulations had been approved. Suit was in the district court under section 304 of the CAA and section 10 of the APA. Petitioners asked the court to order the Administrator to issue new source standards implementing the stricter requirements they had requested in their revision.90 The court noted that section 304 permits a suit against the Administrator as long as he is given a sixty-day notice period. Under section 307, however, the suit must be brought within thirty days after the approval of an implementation plan or standard of performance issued by the Administrator and after the thirtieth day only if the petition is based on grounds arising subsequent to the thirtieth day.91

The court next rejected the claim that the refusal to revise a standard of performance constituted a “failure to perform a non-discretionary duty” under section 304 of the CAA. It agreed with the Administrator that the challenge was to “the action of the administrator in promulgating” the standard of performance within the meaning of section 307.92 The District of Columbia Court of Appeals held that section 307 is an exclusive remedy in which the challenge can be raised only on a direct petition before it. Moreover, the court

90. Id. at 657, 7 Envir. Rep. Cas. (BNA) at 2192.
continued, any litigation concerning revision of a national standard must also be brought under section 307. Finally, a prerequisite to that suit is providing the new information to the Administrator in order for a proper determination of whether his refusal to revise was correct or not.

The court expressly rejected arguments for section 304 jurisdiction and concluded that CAA section 111 determinations for revision of standards of performance are discretionary acts and hence outside the provisions of section 304.\(^3\)

But the court explained in a footnote that jurisdiction premised on section 304 also might be concurrent with jurisdiction under the APA.\(^4\) Concurrent jurisdiction under section 304 and the APA is possible because of the broad savings clause in section 304 that preserves other remedies,\(^5\) including review for abuse of discretion under the APA.\(^6\) Similarly, if the exclusive appellate jurisdiction of section 307 is not applicable, the APA may grant jurisdiction to review abuse of discretion even if there is no section 304 jurisdiction. This is because of the "gap-filling" nature of the APA section 704 jurisdiction to provide review if there is no adequate judicial remedy. Here, however, because section 307 review was appropriate, the APA did not apply. The court then prescribed procedures for section 307 review. It then dismissed the appeal without prejudice because those procedures were not complied with.

Very recently the issue of where review of the promulgation of standards by the EPA may be had was raised in a criminal proceeding. In *United States v. Adamo Wrecking Co.*\(^7\) the court was confronted with a criminal indictment that had been dismissed by the lower court. The standard allegedly violated in *Adamo Wrecking* applied to emissions of particulate asbestos material into the air. The standards required, in part, that in the demolition of a building that had asbestos insulation or fireproofing, the material should be wetted and removed prior to destruction of the building itself. The defendant allegedly did not do this in demolition of a four and a half

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93. Id. at 662, 7 Envir. Rep. Cas. (BNA) at 2196.
94. Id. at 663 n.14, 7 Envir. Rep. Cas. (BNA) at 2197.
story masonry building. The trial court had rejected a challenge to the sufficiency of the indictment but had accepted a challenge to the substance of the emissions standard. The trial court had interpreted the word "promulgating" in section 307 as referring to exclusive review by the court of appeals of procedural matters relating to the emission standards, but not their substantive validity. Hence substantive validity could be reviewed by the district court. The appellate court rejected this argument which the court feared would result in procedural review of standards in the courts of appeals on an expedited basis at the same time that disparate results were being obtained in the district courts across the country concerning the substantive content of particular standards. Under that approach the validity of the national standards would be totally in question and subject to a high probability of conflicting interpretations. The court adopted the reasoning of the District of Columbia Circuit in Ojato Chapter of Navajo Tribe v. Train98 and held that the section 307 language, "action of the Administrator in promulgating," applies equally to both the procedures by which the regulation was adopted and the substantive content of the regulation itself. The court concluded that review of the substance and procedure of the promulgation of an emission standard is exclusively within the province of the court of appeals under section 307 and may not be raised in the district court, even in a criminal proceeding.

The United States Supreme Court reversed the Sixth Circuit in Adamo Wrecking Co. v. United States99 and held that a defendant in a criminal enforcement action under section 112 of the Clean Air Act may challenge whether a regulation is, in fact, an "emission standard." The Court rejected the argument that whether a regulation is an "emission standard" under section 112 is a question exclusively reviewable in a court of appeals pursuant to the section 307(b) proceedings. It held that the preclusive provisions of section 307(b) do not apply when the issue is raised as a defense in a criminal proceeding. To reach that conclusion, the Court examined the civil and criminal enforcement provisions under the Act, as well as the standards and review provisions. From an examination of those provisions, the Court concluded that Congress was clear in providing what matters were subject to exclusive review of adminis-

98. See text accompanying note 89 supra.
trative matters in the courts of appeals under section 307. Those matters include examination of the administrative procedures used in promulgating the regulation, the reasonableness of the regulation, whether it is arbitrary or capricious or supported by the administrative record, and a general judicial review of administrative proceedings. Each of those issues must arise in the exclusive review proceedings under section 307 which also precludes their consideration by a district court in a criminal enforcement proceeding. But the Court determined that Congress had prescribed criminal liability in limited situations, specifically under section 112 if a hazardous emissions standard had been violated. Because a criminal statute was involved, those provisions were construed strictly against the government, and hence, the Court concluded that for criminal liability to attach, the regulation violated must be within the congressional meaning of “emissions standard.” Determination of that issue in the section 307 proceeding does not necessarily resolve it for a criminal proceeding. Thus a district court in a subsequent criminal enforcement action may inquire whether a regulation alleged to have been violated is in fact an emissions standard within the meaning of section 112.

*Adamo Wrecking* could severely undercut criminal enforcement proceedings under the Clean Air Act. Notwithstanding the Court’s effort to narrow significantly the impact of the decision, it nonetheless permits determinations of what constitutes an emission standard to be settled by various district courts across the country. Moreover, the district court’s opinion in *Adamo Wrecking* illustrates the problem of attempting to limit issues in the section 112 jurisdictional determination by the district court, where those issues overlap review of the administrative issues relating to the regulation itself. The trial court in *Adamo Wrecking* considered whether the procedures used and the method of promulgating the regulation were proper and whether the regulation was unconstitutionally vague as well as whether the regulation itself was an emissions limitation within the meaning of section 112. Although the Court clearly states that judicial review of strictly administrative matters by the district court in a criminal proceeding is improper, the room for abuse is obvious, notwithstanding Justice Rehnquist’s admonition to the contrary for the *Adamo Wrecking* plurality. And even though it had notice, had an opportunity to be heard concerning the regulation, and filed a belated section 307 action, Adamo Wrecking ignored the hearings and review proceedings and continued to oper-
ate in knowing violation of the promulgated regulation.\textsuperscript{100} Other violators may do likewise in the future.

The Court also seems to retreat from positions recently taken in other environmental cases. The most significant step back is its failure to give deference to the Administrator's determination that a regulation was an emissions standard. In \textit{Train v. NRDC}\textsuperscript{101} the Court had concluded that if the Administrator's interpretation was sufficiently reasonable, it precluded initial review by courts of appeals. This same deference was given to the Administrator's interpretations of the Federal Water Pollution Control Act in \textit{E.I. du Pont de Nemours & Co. v. Train}\textsuperscript{102} last year. The \textit{Adamo Wrecking} foursome interestingly quoted \textit{du Pont} for its statement that the district court may determine what constitutes an effluent limitation for purposes of section 505 or section 509 review under the FWPCA. The \textit{du Pont} Court noted also that that question was inextricably intertwined with the issue of the statutory authority of the Administrator under the FWPCA.\textsuperscript{103} But \textit{du Pont} did not hold that the district court may reexamine the same determination in a subsequent criminal enforcement proceeding. In fact, it emphasized that the section 509 review under the FWPCA was exclusively in the courts of appeals. Hence, its use in \textit{Adamo Wrecking} seems dubious. Moreover, its use illustrates vividly the problem with the result reached in \textit{Adamo Wrecking}: by allowing the district court to examine whether a regulation is an emission standard, the Court is in effect permitting the trial court to examine whether the regulation was within the statutory authority of the Administrator. Mr. Justice Stewart's dissenting opinion in \textit{Adamo Wrecking} recognized this point and emphasized that the statutory authority issue is precisely the type of issue relevant in administrative review proceedings.

\textsuperscript{100} \textit{Id. at} \textsuperscript{--}, 98 S. Ct. at 579 n.12, 54 L. Ed. 2d at 556-57 n.12, 11 Envir. Rep. Cas. (BNA) at 1090 (dissenting opinion). Under these circumstances the Court's concern for small businesses unaware of notices in the Federal Register seems misplaced. \textit{Id. at} 572 n.2, 11 Envir. Rep. Cas. (BNA) at 1087. \textit{Adamo Wrecking} hardly appears as the ideal plaintiff to raise substantive due process and other constitutional issues. \textit{But see id. at} 575, 11 Envir. Rep. Cas. (BNA) at 1087 (Powell J., concurring). Those constitutional arguments seem lessened in light of the established danger of asbestos to human health that Congress clearly authorized regulating by arguably stricter hazardous pollutant standards which are to be implemented more expeditiously than other standards. Nowhere were these factors discussed in the \textit{Adamo Wrecking} opinions.


\textsuperscript{102} \textit{See text accompanying note 155 infra.}

which are conducted under section 307 and are precluded from being reviewed in subsequent proceedings. Mr. Justice Steven's dissenting opinion noted that the Court in concluding that the regulation was not an emissions standard provided no test or basis for a district court to make that determination in the future. Accordingly, without a carefully articulated test to make the determination of what constitutes an emission limitation under section 112, trial courts will have wide latitude to reexamine the regulation and administrative process used to promulgate it, contrary to the preclusive provisions of section 307.

Hopefully Adamo Wrecking will not cause the EPA to discontinue criminal enforcement proceedings to enforce the Clean Air Act. It is also possible that the case could work to the disadvantage of defendants. For example, the failure to articulate a test to determine what constitutes an emission limitation suggests that the Court objected to the so-called work practice rule because it provided no numerical limitation on emissions. The EPA had not promulgated a numerical standard because it considered that a "no visible emissions" standard would be difficult, if not impossible, to comply with. Hence, it adopted a more moderate work practice rule. The net effect of Adamo Wrecking could be a no visible emissions standard that might be more onerous for those regulated than the work practice rule previously developed.

A clear case illustrating the failure to act situation of section 304 arose recently with the EPA arguing that it had the discretion not to list lead as a pollutant under section 108. By failing to list lead as an air pollutant, sections 109 and 110 of the Act did not become operative. If applicable, they would require that air quality criteria and air quality standards be promulgated for lead. In Natural Resources Defense Council, Inc. v. Train, the court allowed the suit under section 304 and held that the decision to declare a substance a pollutant under section 108 was mandatory once the section 108 requirements were satisfied as they had been in the case of lead. Hence it was not a discretionary function and was subject to review under section 304.

104. Id. at __, 98 S. Ct. at 576, 54 L. Ed. 2d at 552-53, 11 Envir. Rep. Cas. (BNA) at 1087-88 (dissenting opinion).
105. Id. at __, 98 S. Ct. at 577, 54 L. Ed. 2d at 554, 11 Envir. Rep. Cas. (BNA) at 1088 (dissenting opinion).
2. The Federal Water Pollution Control Act Amendments of 1972 (FWPCA). Similar problems to those that arose under the CAA have been raised under the FWPCA. The citizen suit and direct appellate review provisions of the FWPCA were modeled after sections 304 and 307 of the CAA. Bifurcated review is allowed so that any citizen may bring an action to review the Administrator's failure to perform non-discretionary functions in federal district courts, and "interested persons" may petition for review of the Administrator's actions in promulgating regulations under specified sections of the Act in the courts of appeals. The similarity of these provisions in the two acts was illustrated in *Natural Resources Defense Council, Inc. v. Train*. That case was an action to review the Administrator's failure to include certain pollutants as toxic substances under the FWPCA. In that respect it resembles the prior case between the same parties under the CAA in which the NRDC sought to have lead listed as a pollutant.

The jurisdictional issue in the *Train* case involving the FWPCA was whether review must be brought by a petition directly to the court of appeals under section 509 or may be brought in a federal district court pursuant to section 505. The environmental plaintiffs in the district court sought to review the EPA's determination to omit certain pollutants from the agency's list of toxic substances under section 307 of the FWPCA. Under section 505 a citizen may bring an action to review a failure of the Administrator to perform a non-discretionary duty in federal district courts without regard to the amount in controversy or the citizenship of the parties. Under section 509 review of the Administrator's action in promulgating any effluent standard or prohibition under section 307 of the FWPCA is placed in the circuit court of appeals where the person resides. The EPA argued that determination of the criteria and substances to be listed as toxic was within its discretion and, hence, not reviewable under the provisions of section 505. Moreover, the

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EPA maintained that there was an "inextricable connection" between "the listing stage and the standard setting stage of the [FWPCA] section 307 process" that necessitates any challenge to its action be raised in the court of appeals under section 509.\(^\text{117}\) Otherwise duplicative suits could be pending in a district court and a court of appeals on different stages of the same overall standard setting process. The court noted the catch-22, or in its words the "jurisdictional limbo," in the situation.\(^\text{118}\) If the substance is not listed, then no standard or prohibition will be promulgated for it, and nothing exists to be subject to section 509 review. Similarly, if the decision not to list the substance is within the EPA's discretion, the decision will not be subject to review under section 505. But the court avoided determining under which section of the FWPCA review was proper. Instead it relied on an earlier section 505 case in which it held that the FWPCA is not the exclusive means to review the Administrator's actions under the FWPCA.\(^\text{119}\) Jurisdiction was validly exercised pursuant to the Administrative Procedure Act which authorizes review of administrative action "not expressly made reviewable to determine whether there has been an abuse of discretion."\(^\text{120}\) That escape hatch, however, may no longer be available even to those circuits which had concluded that the APA is a jurisdiction-granting statute. The court's holding in that respect cannot stand in light of the recent Supreme Court interpretation of the APA as not being an implied grant of subject matter jurisdiction.\(^\text{121}\)

The earlier case relied on by the District of Columbia Circuit was *Natural Resources Defense Council, Inc. v. Train.*\(^\text{122}\) NRDC sought to require the Administrator to perform a non-discretionary duty under the Act: to publish effluent limitation guidelines for point sources. The EPA argued that the court lacked subject matter jurisdiction because a citizen's suit to compel him to perform a non-discretionary function must be brought under section 505 which requires sixty days prior notice of the action to the Administrator,
which was not given. The lack of proper notice, according to the EPA, is a fatal jurisdictional defect. NRDC argued, to the contrary, that the savings clause in section 505(e) preserved jurisdiction under other statutes, including section 1331 and the APA.

The District of Columbia Circuit agreed with NRDC. The court reviewed the legislative history, especially the background for the citizen suit provision in the CAA after which the section 505 was modeled and concluded that the congressional purpose was to expand federal jurisdiction, but not without limits. The court concluded that differences between the citizen suit provisions in the FWPCA and the CAA were minor. Both acts provide limited special circumstances for citizen suits, but neither purports to restrict jurisdictional bases otherwise available to the parties. According to the court, the provisions "do not cut back on federal court jurisdiction over actions that would have been maintainable even in the absence of that special authorization. This intent is confirmed by the savings clause of subsection (e)." The District of Columbia Court of Appeals found little help resolving this problem in prior cases since none were by appellate courts, and district court results were varied. Nonetheless, based on its interpretation of the statute, the court permitted jurisdiction under the APA. On the merits the court also sustained the NRDC

123. Id. at 700-01, 7 Envir. Rep. Cas. (BNA) at 1213.
124. Id. at 702, 7 Envir. Rep. Cas. (BNA) at 1214.
126. Natural Resources Defense Council, Inc. v. Train, 510 F.2d 692, 703 (D.C. Cir. 1975). This holding and interpretation of the APA must be reconsidered in light of the more recent decision by the Supreme Court. See text accompanying notes 180-83 infra.

The Second Circuit followed the D.C. Circuit's reasoning in Train in Natural Resources Defense Council, Inc. v. Callaway, 524 F.2d 79, 8 Envir. Rep. Cas. (BNA) 1273 (2d Cir. 1975). It adhered to its holding in Conservation Soc'y v. Secretary of Transp., 508 F.2d 927, 938, 7 Envir. Rep. Cas. (BNA) 1236, 1244 (2d Cir. 1974) that the sixty-day notice provision is not a bar to earlier suits by private citizens under the FWPCA. It reaffirmed its position in Conservation Society that jurisdiction under section 505(b) is not exclusive or necessary, but could come under section 1331 or the APA. See text accompanying note 10 supra. This interpretation gives maximum effect to the section 505 savings clause. 33 U.S.C. § 1365(e) (Supp. V 1975). In Callaway jurisdiction under the APA was not necessary because it existed under section 1331 by alleging an action enforcing the FWPCA. The Second Circuit's construction of the APA, however, must also be reevaluated. See text accompanying note 180-83 infra.
contentions and ordered the EPA to promulgate point source effluent limitations.

Unfortunately, the complexities of the notice and time requirements of section 505 and the exclusivity of section 509 are not so easily laid to rest. Both issues were again present in *Sun Enterprises Ltd. v. Train.* First the plaintiffs sought to use the holding in *Natural Resources Defense Council, Inc. v. Callaway,* that section 505 review is not exclusive so that review is possible under other federal statutes, even if the section 505 sixty-day notice provision has not been complied with. Plaintiffs sought to review issuance of a NPDES permit by the EPA and alleged jurisdiction under the APA, section 1331, the mandamus statute, and section 505 of the FWWPCA. They were appealing the trial court's dismissal of the suit and rejection of all the jurisdictional bases. The appellants also filed simultaneously with their appeals an original petition for section 509 review. The appeal and petition were considered together by the court.

The court rejected the appellants' jurisdictional arguments and dismissed the appeal. Relying on prior cases interpreting the similar provision in the Clean Air Act, it concluded that jurisdiction to review the Administrator's grant or denial of a permit is explicitly placed in courts of appeals under section 509 and that section 509 jurisdiction is exclusive. The court followed a strong presumption against simultaneous review in district courts under other statutes, on the one hand, and in the court of appeals under section 509, on the other. Because *Sun Enterprises* involves an action by the Administrator subject to review only under section 509, it can be effectively distinguished from *Callaway.*

The court next considered whether section 505, mandamus, or APA review was available. Section 505(a)(2) review and the mandamus statute did not apply because the review sought was not of "a failure of the Administrator to perform a non-discretionary duty,”

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but rather, the review was of how the Administrator had performed statutory duties, in this case, issuance of a permit.\footnote{Sun Enterprises, Ltd. v. Train, 532 F.2d 280, 288, 8 Envir. Rep. Cas. (BNA) 1891, 1896 (2d Cir. 1976).} Review of performance of statutory duties lies expressly and exclusively in the court of appeals pursuant to section 509.\footnote{33 U.S.C. § 1369(b) (Supp. V 1975).} Because 505(a) did not provide a jurisdictional basis for the suit in the district court, its saving clause, subsection (e), did not apply. Hence it could not authorize or preserve review under other federal statutes. The court also stated that the APA by its own terms was inapplicable because there were adequate remedies in a court under the section 509 review process.

Next the court considered the consolidated original petition under section 509 which was filed more than a year after the Administrator approved the challenged permit. The court held the petition was time-barred because it was not filed within ninety days of the Administrator’s action as required under section 509.\footnote{Sun Enterprises, Ltd. v. Train, 532 F.2d 280, 288, 8 Envir. Rep. Cas. (BNA) 1891, 1895 (2d Cir. 1976); see 33 U.S.C. § 1369(b)(1) (Supp. V 1975).} The court refused to distinguish \textit{Peabody Coal Co. v. Train},\footnote{518 F.2d 940, 7 Envir. Rep. Cas. (BNA) 2125 (6th Cir. 1975).} that dealt with approval of a state plan, from \textit{Sun Enterprises}, dealing with issuance of a single permit. It noted that more serious risks are involved with error in a state plan, yet the \textit{Peabody Coal} court dismissed a petition that was only two days late when filed. Apparently those risks are not as great in a single permit situation, particularly when the petition is filed more than a year after the action.

Whether the ninety-day period to file a section 509 petition in the court of appeals is a jurisdictional requirement had been considered earlier. In \textit{Peabody Coal Co. v. Train}\footnote{Id. at 942-43.} the petition was filed ninety-two days after the action of the Administrator in approving the state NPDES. The court held that it lacked jurisdiction to hear the petition and decided that the short time period in which to file the petition was not arbitrary and unreasonable in light of the need for expediency in getting a permit system operating and the urgency to proceed with environmental protection.\footnote{Oljato Chapter of Navajo Tribe v. Train, 515 F.2d 654, 660 (D.C. Cir. 1975) (discussed in text accompanying note 89 \textit{supra}); Granite City Steel Co. v. Environmental Protec-} The court relied heavily on prior cases interpreting the Clean Air Act.\footnote{Id.}
The First Circuit reached a similar conclusion about the notice requirements of section 505. In *Massachusetts v. United States Veterans Administration* \(^{137}\) Massachusetts, invoking jurisdiction under section 505(a), sued the VA and EPA. The state sought civil penalties for the VA's violation of conditions on its emissions permit. Notice of the suit was sent to the defendants on June 12, 1975, and the suit was filed on July 22, 1975. The court held that Massachusetts had improperly invoked jurisdiction under section 505 because subsection (b) of that section requires that the plaintiff have sixty days notice of the alleged violation before the suit is filed. Here the suit was filed prematurely. The court rejected the state's argument that it had substantially complied with the spirit of the notice requirement because no administrative action could have rectified the alleged past violations of the Act. Hence, there was no purpose for a sixty-day waiting period after notice of the suit was given to the parties. The court acknowledged that the past actions could not be rectified, but believed that under the circumstances administrative or judicial action during the sixty-day period would serve the same purpose, to expedite the planned tie-in to sewer systems that the permit was intended to do. Hence, the claim of futility was insufficient to justify the theory of constructive compliance with the section 505(b) notice requirement.

The First Circuit in *Veterans Administration* also had serious reservations concerning federal question jurisdiction. In a footnote the court acknowledged the controversy among the courts over what is "saved" by the section 505 "saving clause," subsection (e). Some courts limit this clause to actions arising independent of the FWPCA, while others have limited it to "saving" only nuisance actions under state law. \(^{138}\) The court, however, avoided resolving that controversy or the section 1331 jurisdiction question by applying the doctrine of sovereign immunity to bar the suit under any theory. \(^{139}\)

The question of what matters are subject to review under section 509 and the section 505 notice requirements have both been raised as issues in recent cases in several courts of appeals. In these cases various plaintiffs have sought to review effluent limitations issued

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\(^{137}\) *Massachusetts v. United States Veterans Administration*, 501 F.2d 925, 926 (7th Cir. 1974); *Anaconda Co. v. Ruckelshaus*, 482 F.2d 1301, 1304 (10th Cir. 1973).

\(^{138}\) *Id.* at 119, 9 Envir. Rep. Cas. (BNA) 1507 (1st Cir. 1976).

\(^{139}\) *Id.* at 122 n.4, 9 Envir. Rep. Cas. (BNA) at 1509.
by the EPA under section 301 and effluent limitation guidelines issued under section 304. Section 509 authorizes review of particular actions of the Administrator done pursuant to sections 301, 302, 306, 307, and 402, but not those taken under section 304; the latter were excluded from the section 509 enumeration. Thus, one issue is whether review of the Administrator's action issuing section 304 guidelines is reviewable in the court of appeals. On one hand the companies and industry groups have contended review of the Administrator's section 304 action is not within the exclusive section 509 action, but rather lies in the district courts under section 505 or the APA.

Defendant EPA has argued, on the other hand, that the guidelines and effluent limitations under sections 301 and 304 are intricately intertwined. According to EPA it is to issue both the effluent limitations under section 301 and the effluent limitation guidelines under section 304 prior to beginning the state permit process. Under that view the EPA promulgates the section 304 guidelines that define the norms for the section 301 effluent limitations. Those definitions are then applied in the section 301 limitations and then incorporated into the permit by the respective permit-grantors, typically the states.

`Natural Resources Defense Council, Inc. v. Environmental Protection Agency` illustrates this problem quite clearly. The environmental groups brought an action to review and set aside the exemption authority given the permit-grantor under point source effluent limitation guidelines issued by the EPA pursuant to section 304(b)(1)(A) of the FWPCA. Jurisdiction was challenged because the sixty-day waiting period following notice of the suit to the EPA under section 505(b)(2) had not expired at the time suit was brought. EPA alleged this was a jurisdictional defect.

NRDC argued that the jurisdiction under section 505 was not exclusive; hence it could invoke jurisdiction under other statutes, in particular the APA or section 1331. The court agreed, holding that the limitations on the expansion of jurisdiction in section 505 were not intended to limit jurisdiction over actions that were otherwise maintainable under appropriate law. This interpretation, accord-

141. The parties' (including companies and industry groups as plaintiffs and EPA as defendant) contentions have been summarized from the various cases discussed in the text.
143. Id. at 646-47, 8 Envir. Rep. Cas. (BNA) at 1991-92.
ing to the court, was consistent with the savings clause in section 505(e). The court noted, however, that this holding turned on whether the APA was viewed as a jurisdiction granting statute, a position the Second Circuit has taken previously, but which the Supreme Court had not addressed at that time. In addition, if federal question jurisdiction is invoked, the jurisdictional amount requirement must be satisfied. But these factors, the court believed, did not mean that section 505 was the exclusive means for jurisdiction. The court also noted, however, that contrary rulings have been reached by several district courts.

In NRDC v. EPA the section 509 jurisdiction issue was raised by individual companies and industry groups that would be affected by the guidelines. They were allowed to intervene and present the argument that section 304 actions were not reviewable under section 509 because they were not included in the section 509 enumeration. In Hooker Chemicals & Plastics Corp. v. Train. The Company brought the suit under section 509 within the ninety-day time period to avoid losing that avenue of appeal if the court of appeals held it had jurisdiction. The Company contended, however, that the court did not have jurisdiction and review should be sought under the APA in the district court. Hooker Chemicals argued that the section 301 effluent limitations are to be determined on an ad hoc, case-by-case basis. This is to be done by the permit-grantor, usually the state, which in turn is to rely on the section 304 guidelines to determine the best practicable control technology (BPCT) (for 1977) and the best available technology economically achievable (BATEA) (for 1983). The section 304 guidelines are, according to that argument, to be used to assist the state in setting section 301 effluent limitations.

The Hooker Chemicals court rejected the Company’s contentions. It reviewed the conflicting decisions among the courts of appeals and the legislative history of the FWPCA and concluded, that the draftsmen of the Act intended the promulgation of effluent limitations by regulations apart from the permit-granting process. Furthermore, the Administrator is authorized “to prescribe such regulations as are necessary to carry out his functions under this Act.”

144. But see cases cited note 126 supra.
We are persuaded that he did so pursuant to [sections] 301 and 304 of the Act. Thus, we believe that we are adhering to Congressional purpose and intent in holding that we have jurisdiction to review these regulations under [section] 509.147

That position was reaffirmed and applied in NRDC v. EPA to reject the intervenors' jurisdictional arguments. The court simply said, "Our decision there [Hooker Chemicals] is equally applicable to this case. Although the question is doubtful and the statute ambiguous, we hold that the challenged regulations may, in combination, be considered as [section] 301 effluent limitations and [section] 304 guidelines."148

The issue has divided the federal courts of appeals. In an earlier case, American Iron & Steel Institute v. Environmental Protection Agency,149 the Third Circuit arrived at the same result as had the Second Circuit in Hooker Chemicals. There the court concluded that the EPA did have authority to issue the section 301 effluent limitations (at least inferentially) and, hence, that action could be reviewed under section 509.150 The court also noted the significant difference between the positions of the EPA and the companies over whether the EPA can promulgate national point source effluent standards or whether those standards will be set by states on an individual, plant-by-plant basis.

The Seventh Circuit has also accepted section 509 review in American Meat Institute v. Environmental Protection Agency.151 The court's opinion turned in part on whether the agency's interpretation of section 301 was "sufficiently reasonable to preclude us from substituting our judgment for that of the agency."152 The court concluded the agency's view should stand, and section 509 review was proper.

The only court of appeals that rejected section 509 jurisdiction is the one that considered the issue first, the Eighth Circuit. In CPC

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147. Id. at 628, 8 Envir. Rep. Cas. (BNA) at 1966.
150. Id. at 1036-37, 8 Envir. Rep. Cas. (BNA) at 1323.
151. 526 F.2d 442, 8 Envir. Rep. Cas. (BNA) 1369 (7th Cir. 1975).
International, Inc. v. Train\textsuperscript{153} it held that section 304 guidelines could not be directly reviewed under section 509. The court concluded that review of effluent limitation guidelines was proper in the district courts under the APA.\textsuperscript{154}

The jurisdiction and authority issues were recently resolved by the United States Supreme Court. E.I. duPont de Nemours & Co. v. Train\textsuperscript{155} was a section 505 citizen suit brought to review effluent limitation standards promulgated by the EPA pursuant to the FWPCA. The Court held that the EPA had the authority to issue national, uniform standards under sections 301 and 304 and that those standards were reviewable only in a court of appeals under section 509.\textsuperscript{156} The Court also rejected the Fourth Circuit's determination that the regulations were only "presumptively applicable."\textsuperscript{157} According to the Court the regulations were intended by the EPA to be an absolute prohibition, which comports with congressional intent under the FWPCA.\textsuperscript{158} The Fourth Circuit's holding that the regulations must provide for variances because they are appropriate to the regulatory process was also rejected. The Court stated that what is important is what Congress, not the courts, intended. Finally, the Court deferred to the EPA in its interpretation of the FWPCA. The Court applied its language from Train v. National Resources Defense Council that judicial review of the EPA's interpretation is precluded if it is "sufficiently reasonable."\textsuperscript{159}

The problem of what is within the scope of review of section 509 has arisen in other contexts. Mianus River Preservation Committee v. Environmental Protection Agency\textsuperscript{160} required an interpretation of what constitutes "Administrator's action" under section 509. The action sought to be reviewed in Mianus was the issuance of a modified NPDES permit by the appropriate Connecticut state agency. The court held that the state's action was not subject to review because under the section 402 permit system the state is given much autonomy. It rejected arguments that the state was acting as the

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153. 515 F.2d 1032, 7 Envir. Rep. Cas. (BNA) 1887 (8th Cir. 1975).
154. Id. at 1037, 7 Envir. Rep. Cas. (BNA) at 1890.
155. Id. at 1041, 7 Envir. Rep. Cas. (BNA) at 1903 (1977).
156. Id. at --, 97 S. Ct. at 979, 51 L. Ed. 2d at 222.
157. Id. at --, 97 S. Ct. at 978, 51 L. Ed. 2d at 221.
158. Id. at --, 97 S. Ct. at 980, 51 L. Ed. 2d at 223.
159. Id. at --, 97 S. Ct. at 978, 51 L. Ed. 2d at 221. For an extensive discussion of the cases and issues raised by the duPont cases, see Parenteau & Tauman, The Effluent Limitations Controversy: Will Careless Draftsmanship Foil the Objectives of the Federal Water Pollution Control Act Amendments of 1972?, 6 Ecology L.Q. 1 (1976).
Administrator's agent under a delegation of authority theory or that failure to veto the polluter's application for a permit (as the EPA is authorized to do) constituted "action" by the Administrator within the meaning of section 509. 161

The court rejected the delegation of authority theory reasoning that it was inconsistent with the explicit congressional mandate to place the primary responsibility for the permit system on the state and because it was inconsistent with the mandatory duty imposed on the Administrator to approve a duly qualified state permit program. 162 The court held that Congress did not give the Administrator a discretionary power to delegate authority to states with approved programs. 163 EPA's action determining that the state program is sufficient under the statutory criteria is reviewable under section 509. Thus, federal standards, limitations, and participation in the permit system exist in ways other than by having a state act as an agent.

The "veto power as action" theory was rejected in part because the court did not view the EPA's countenancing the lapse of ninety days as constituting action in the sense that it actively participated in a decision to veto or not to veto or to approve the permit. 164 Reviewing the legislative history of the FWPCA, the court concluded that the state was to have the principal responsibilities concerning the permit program and the Administrator was to have limited supervisory duties that would usually enable the EPA to remain passive with respect to individual state permits. Since the record indicated no evidence of an exercise of control over the state agency nor approval of action of the state agency, but merely no action by the EPA, the court concluded there was nothing within the meaning of "Administrator's action in issuing a permit" that was reviewable under section 509. 165

Another situation presenting the scope of review problem arose in Bethlehem Steel Corp. v. Environmental Protection Agency. 166 The company sought section 509 review of the EPA's action in approving New York State's revised water quality standards issued pursuant to section 303 of the FWPCA. The petition for review was filed in

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161. Id. at 903, 9 Envir. Rep. Cas. (BNA) at 1176.
162. Id. at 903, 9 Envir. Rep. Cas. (BNA) at 1176-77.
163. Id. at 905, 9 Envir. Rep. Cas. (BNA) at 1179.
164. Id. at 909, 9 Envir. Rep. Cas. (BNA) at 1182-83.
165. Id. at 909, 9 Envir. Rep. Cas. (BNA) at 1182.
166. 538 F.2d 513, 9 Envir. Rep. Cas. (BNA) 1027 (2d Cir. 1976).
the court of appeals. To avoid the fact that section 303 actions are not expressly made reviewable under section 509, the company argued that the section 303 water quality standards are the same as, or at least functionally equivalent to, section 301 effluent limitation standards. For that reason, the company continued, actions by the Administrator under section 303 should be subject to section 509 review just as the section 301 effluent limitations are. The court rejected this functional equivalence argument. It held these are two distinct concepts even though they are related in that effluent limitations may be based on water quality standards. Moreover, under the FWPCA the concepts are consistently treated differently.

Relying on CPC International, Inc. v. Train, Bethlehem Steel also argued that the effluent limitations under section 301 included regulations promulgated by a state. Hence those would also embrace water quality standards. The court noted that it had refused to follow CPC International in Hooker Chemicals, at least concerning the relationship between section 301 and 304 actions. The court concluded, however, that even adopting the CPC International approach to sections 301 and 304—that the state alone can issue section 301 effluent limitations—does not mean that section 303 water quality standards (also issued by the state) must be reviewed under section 509. Even though the adoption and issuance process might be the same, the difference between the functions and purpose of water quality standards and effluent limitations remains. And that difference, according to the court, “is at the heart of the 1972 Amendments” and reasonably accounts for different treatment of them for review purposes.

The court next rejected the company’s argument that the word “approving” in section 509(b)(1)(E) must refer to actions other than those enumerated because no “approval” by the EPA is required under the enumerated sections. The court traced the source of section 509 and the word “approving” to an early bill which did not contain any provisions regarding the subsequently added state water quality standards. The court concluded that whatever was the purpose of the word “approving,” it was not intended to reach ap-

167. Id. at 518, 9 Envir. Rep. Cas. (BNA) at 1032.
168. 515 F.2d 1032, 7 Envir. Rep. Cas. (BNA) 1887 (8th Cir. 1975).
171. Id. at 515, 9 Envir. Rep. Cas. (BNA) at 1029.
Lastly, the court rejected Bethlehem Steel's argument that its interpretation should be adopted on policy grounds to avoid "bifurcated" review of EPA actions under the FWPCA, with courts of appeals reviewing actions under section 301 and district courts reviewing actions under section 303. The court adhered to strict statutory construction of section 509 and limited it to those actions expressly enumerated. According to the court, Congress's failure to enumerate other actions indicated that they are not to be so reviewed. The court did not find a distinction between review for effluent limitations and water quality standards as irrational as Bethlehem Steel did. It pointed out that the effluent limitations apply nationally and have a more immediate impact on large classes of polluters than do water quality standards which will apply locally within a state and have less direct effect on individual businesses. In conclusion the court stated:

But it seems to us that when a jurisdictional statute sets forth with such specificity the actions of an administrative agency which may be reviewed in the courts of appeals, a litigant seeking such review of an action that is not specified bears a particularly heavy burden. Given the clear distinction and the legislative history of the statute between water quality standards and effluent limitations, Bethlehem's argument that inclusion of the latter in section 509(b)(1) must cover the former as well is unconvincing.74

The petition to review was dismissed for lack of jurisdiction.

A recent example of a citizens suit brought successfully under section 505 was Train v. Colorado Public Interest Research Group, Inc.77 The public interest group challenged the EPA's determination that it would not regulate the discharge of radioactive materials that were subject to regulation by the Atomic Energy Commission or its successors. The plaintiffs claimed that failure to regulate nuclear discharges into navigable waters constituted a failure to perform a non-discretionary duty under the FWPCA. Although the plaintiffs lost on the merits, the group's jurisdictional right to bring the suit was upheld.78 A similar conclusion occurred in a section 509 action to review the Administrator's action concerning state permit
Although the states lost on the merits, their jurisdictional basis for the suit under section 509 was upheld.\footnote{177. See Environmental Protection Agency v. California, 426 U.S. 200, 210, 8 Envr. Rep. Cas. (BNA) 2089, 2092 (1976).}

III. PROCEDURAL AND RELATED PROBLEMS

A. *The Administrative Procedure Act and Califano v. Sanders*

The APA was recently amended by Congress to allow more review of agency action by limiting the defense of sovereign immunity. The APA now provides:

\footnote{178. *Id.* at 210 n.20, 8 Envr. Rep. Cas. (BNA) at 2092.}

The United States Supreme Court recently resolved the question whether the APA is an independent grant of jurisdiction to federal courts. The courts of appeals have been divided in answering that question in cases interpreting jurisdiction under citizen suit provisions of the CAA and the FWPCA. The Court in *Califano v. Sanders* resolved the conflict among the circuits. It held that the APA was not an implied grant of subject matter jurisdiction to federal courts to review agency action. Thus, in the future, jurisdiction must arise under federal statutes other than the APA. Interestingly, the Court's reasoning in *Sanders* relied heavily on the amendment to section 1331(a) that removed the jurisdictional amount requirement in actions against the government. But the Court did not consider the new amendments to the APA which were contained in the same public law that amended section 1331. Even if the Court had considered the amendments to the APA, however, it is doubtful a different result would have been reached. Those amendments are designed primarily to clarify section 702 as a waiver of the sovereign immunity defense and to eliminate problems under the old APA such as dismissal on the merits for failure to join or name the proper individual or agency. As amended, unless a statute requires a particular form, the action for review should be sufficient if it is against the United States, the agency, or appropriate officer.

In understanding the importance of *Sanders*, it is necessary to note what the case did not do. In no way does the opinion or the amendment undermine the presumption of reviewability that attaches to agency action. Only if review is expressly prohibited by law or the action committed to agency discretion by law is judicial review precluded. What the opinion does do, particularly in environmental cases involving statutes not expressly authorizing review, is require allegations asserting federal question jurisdiction, stating that the challenged action is nondiscretionary and contrary to federal law, and stating that judicial review is not expressly prohibited by law. In addition, the APA should be included, not to establish jurisdiction, but to raise the presumption of reviewability of agency action. The *Sanders* Court reaffirmed the general reviewability doctrine underlying the APA. After noting that the APA is not worded as a typical jurisdictional statute, the Court continued: "On the

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181. Id. at ___, 97 S. Ct. at 984, 51 L. Ed. 2d at 199.
other hand, the statute undoubtedly evinces Congress' intention and understanding that judicial review should be widely available to challenge the actions of federal administrative officials.\textsuperscript{182} And if the review involves even colorable constitutional issues, "the availability of judicial review is presumed."\textsuperscript{183}

In short, after the amendment and Sanders, litigants seeking judicial review of agency action must establish jurisdiction by diversity, federal question, or other jurisdictional statutes. The pleadings must show clearly that the action raises a federal question which is within the presumption of reviewability under the APA. In addition, the pleadings should state what law is to apply in order to avoid the argument that the action is one committed to agency discretion by law. The net effect may be to require more specificity in pleading concerning the action to be reviewed, the federal question presented, and the law to apply in order to utilize the presumption of reviewability under the APA. Thus, although the APA no longer can be used as a basis of jurisdiction, it can still be used to create a presumption of reviewability and to provide a standard for review.

B. \textit{Standing To Sue}

A standing to sue requirement is frequently imposed as a defense to an environmental lawsuit. The standing requirement raises the issue whether the plaintiff is the appropriate party to seek judicial review of the agency's action. The government frequently argues that the plaintiff is not being affected in a manner different from any other individual in the public. In addition, because the agency's action has been taken in the public's interest, it should be carried out. The standing requirement has been justified in that it assures that parties are adverse to one another so that a true controversy in the constitutional sense will be presented to the court for a judicial resolution. It also has been justified as assuring that individuals asserting the claim will have sufficient stake in the outcome to pursue the position to the fullest.

Standing to sue presents a more serious procedural problem in environmental lawsuits. The requirement of standing arises from article III in the United States Constitution that extends the judicial power to "cases or controversies." Because a case or controversy requires adversity, federal courts normally do not render advisory

\textsuperscript{182} Id. at \textsuperscript{183} Id.
opinions.\textsuperscript{184} Also, this provision has been interpreted to require that the agency action has caused, or threatens to cause, imminent harm to the plaintiff. If the complaint is over a matter which may or may not occur or concerning potential problems whose happening is only speculative, it may present a dispute in the sense that the parties disagree, but it does not present a case or controversy in the constitutional sense. Hence it will not be settled judicially.

In determining if the parties have standing, or are the proper ones to press the case, courts consider whether the plaintiff is being affected or harmed by the particular action. Another consideration is whether the harm complained of is the same as that experienced by the public at large or peculiar to the complaining party. For example, a taxpayer normally will not have standing to object to a federal project which is being funded by federal money simply because the person is a taxpayer. The plaintiff must allege that the project exceeds Congress’ legislative power under the Constitution\textsuperscript{185} or that the plaintiff has been injured in fact and is within a “zone of interests” protected by a federal statute or the Constitution.\textsuperscript{184} Reference is made also to the adversity of the parties. A justification for the standing requirement is that the diverse and opposed views on the merits of the case will be presented to the court. In that sense it is an effort to avoid using judicial resources to resolve collusive or friendly suits. Standing is a means the judiciary uses to assure that a party has sufficient interest in the outcome of the litigation so that the party will present points in favor of its position as forcefully as possible and that the other party will oppose them with equal vigor.

Standing can be granted if the party is raising a statutory or constitutional claim. In addition, a person has standing to sue if a statute identifies persons authorized to sue and the plaintiff is within the statutory group. Likewise, if the asserted claim is that an individual’s constitutionally protected right has been violated, the claimant has standing to bring the suit against the party allegedly infringing those constitutional rights. Also if a person is directly and adversely affected by the action of the government or agency, that person has the interest necessary to seek judicial review of the

\textsuperscript{184} Muskrat v. United States, 219 U.S. 346, 362 (1911).
\textsuperscript{185} Flast v. Cohen, 392 U.S. 83, 102 (1968)(funds appropriated under the taxing and spending power exceed limitations imposed by the Establishment Clause).
agency action under the Federal Administrative Procedure Act. 187

The standing issue in environmental litigation has been considered recently by the United States Supreme Court. *Sierra Club v. Morton* 188 was a typical environmental case that presented the standing issue quite clearly. The Sierra Club sought to enjoin the Department of Interior from granting licenses and permits that would allow development of a ski resort and recreation area in a national game refuge and national forest. They also sought to review the granting of the licenses under section 10 of the Administrative Procedure Act which provides: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 189 The injury complained of by the Sierra Club was that the aesthetics and ecology of the area would be changed by the agency's action. But the complaint did not allege any use of the park by the Club or its members nor did it allege that any of its members would in fact be harmed by the agency's actions. 190

The Supreme Court held that the Sierra Club lacked standing to bring the suit, 191 although the Club had definitely identified a cog-

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188. 405 U.S. 727, 3 Envir. Rep. Cas. (BNA) 2039 (1972). For a provocative argument for changing standing requirements to permit environmental lawsuits in rem, i.e., in the name of the natural object or area threatened with environmental degradation, see Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972). This article and position formed the basis of Justice Douglas' dissent in *Sierra Club*. He began:

The critical question of "standing" would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage. Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation . . . This suit would therefore be more properly labeled as *Mineral King v. Morton.* 405 U.S. at 741-42, 3 Envir. Rep. Cas. (BNA) at 2044 (citations omitted).

Although this position was not raised by the parties in *Sierra Club* and hence technically was not before the Court, it was embraced by Justices Brennan and Blackmun who concurred in Justice Douglas' dissent on this point. Thus, three of the seven Justices deciding *Sierra Club* favored reforming standing requirements in environmental lawsuits. Hopefully Justice Douglas' dissent will muster greater support when the issue is presented directly to the courts for resolution. Arguably, not only is it a more realistic approach to the standing problem, but also a means to simplify that problem.

191. *Id.* at 741, 3 Envir. Rep. Cas. (BNA) at 2044.
nizerie interest to be protected. The Court stated specifically that ecological and environmental interests are among those satisfying the injury in fact requirement of the APA, but held that the Sierra Club failed to establish that it was among those persons injured by the agency’s action as the injuries complained of would fall indiscriminately upon every citizen, not just members of the Sierra Club.

Significant for environmental litigation is the Court’s express rejection of the Sierra Club’s contention that it was acting as a representative of the public and asserting the public interest by suing on its behalf—in effect, a private attorney general theory. The Court held that the standing requirement means that the person or group complaining must establish that it is among the persons injured. Once standing is established, the party may then raise the broader public interest in having the agency comply with its statutory mandate. Failure in the first instance to establish the individual harm, however, prevents the individual or group from seeking judicial review. The Court noted that this standing requirement thus operates as an attempt to assure that the person bringing the suit has a direct stake in the outcome of the litigation. The requirement avoids permitting suit by “individuals who seek to do no more than vindicate their own value preferences through the judicial process.”

The most recent environmental case by the Supreme Court on the standing issue came in United States v. Students Challenging Regulatory Agency Procedures (SCRAP I). In SCRAP I a law student environmental group sought to enjoin the ICC approval of a surcharge on rail rates that it claimed would have the effect of increasing the cost of transporting recyclable goods. That cost increase allegedly would lessen the use of recyclables, which in turn would increase the demand for natural resources. The plaintiff in its amended complaint alleged “that [their] members [used] the forests, streams, mountains, and other resources in the Washington metropolitan area for camping, hiking, fishing, and sightseeing, and

192. Id. at 734, 3 Envir. Rep. Cas. (BNA) at 2042.
193. Id. at 734, 3 Envir. Rep. Cas. (BNA) at 2042.
194. Id. at 735, 3 Envir. Rep. Cas. (BNA) at 2042.
195. Id. at 735, 3 Envir. Rep. Cas. (BNA) at 2042.
196. Id. at 734-35, 3 Envir. Rep. Cas. (BNA) at 2042.
197. Id. at 737, 3 Envir. Rep. Cas. (BNA) at 2043.
198. Id. at 740, 3 Envir. Rep. Cas. (BNA) at 2044.
that this use [was] disturbed by the adverse environmental impact caused by nonuse of recyclable goods . . . "200

The federal defendants claimed that these allegations were insufficient to establish that the plaintiffs were "adversely affected" or "aggrieved" within the meaning of section 10 of the Administrative Procedure Act. In effect they claimed that the harm complained of was too remote or removed from the action being reviewed. The Court, however, disagreed and reaffirmed earlier assertions that the group of cognizable injuries under the APA had been expanded.201 That expansion encompassed not only economic, but also ecological or environmental harm. The Court quickly distinguished Sierra Club, saying that there the plaintiff had not alleged any harm to the organization or its members, whereas in SCRAP I, the plaintiffs did allege harm.202

These two major decisions on the standing issue by the Supreme Court unfortunately have not resolved all of the difficulties. In an earlier case, Environmental Defense Fund, Inc. v. Hardin,203 an environmental group sought review of the Department of Agriculture decision not to cancel registration of all economic poisons containing DDT. The injury alleged was "the biological harm to man and to other living things resulting from the Secretary's failure to take action which would restrict the use of DDT in the environment."204 The court concluded that the Environmental Defense Fund did have standing to bring the suit. It stated:

Consumers of regulated products and services have standing to protect the public interest in the proper administration of a regulatory system enacted for their benefit. The interest asserted in such a challenge to administrative action need not be economic. Like other consumers, those who "consume"—however unwillingly—the pesticide residues permitted by the Secretary to accumulate in the environment are persons "aggrieved by agency action within the meaning of a relevant statute." Furthermore, the consumers' interest in environmental protection may properly be represented by a membership association with an organizational interest in the problem.205

Thus standing is not to be denied merely because of the number of persons affected by the agency action, that is, all people might

200. Id. at 685, 5 Envir. Rep. Cas. (BNA) at 1452.
201. Id. at 686-87, 5 Envir. Rep. Cas. (BNA) at 1453.
202. Id. at 687, 5 Envir. Rep. Cas. (BNA) at 1453.
204. Id. at 1096, 1 Envir. Rep. Cas. (BNA) at 1349.
205. Id. at 1097, 1 Envir. Rep. Cas. (BNA) at 1350.
suffer from it, or because the immediacy of the harm is not specifically pinpointed. The Supreme Court apparently approved of the Hardin approach by citing it after stating in SCRAP I:

Unlike the specific and geographically limited federal action of which the petitioner complained in Sierra Club, the challenged agency action in this case is applicable to substantially all of the Nation's railroads, and thus allegedly has an adverse environmental impact on all the natural resources of the country. Rather than a limited group of persons who use a picturesque valley in California, all persons who utilize the scenic resources of the country, and indeed all who breathe its air, could claim harm similar to that alleged by the environmental groups here. But we have already made it clear that standing is not to be denied simply because many people suffer the same injury. Indeed some of the cases on which we relied in Sierra Club demonstrated the patent fact that persons across the Nation could be adversely affected by major governmental actions.\textsuperscript{206}

An easy solution to the standing problem would seem to be coming into court under a statute expressly authorizing review of particular action. However, that is not always the case. The Federal Clean Air Act has been viewed by many as being designed to evoke greater public participation in environmental matters.\textsuperscript{207} Throughout the Act public participation is encouraged in many of the hearings and proceedings under the Act.\textsuperscript{208} Specifically, with respect to the question of enforcement of the Act, review is authorized through citizen suits, and costs may be allocated to either party.\textsuperscript{209} In addition, the Act provides, in part:

a petition for review of the Administrator's action in approving or promulgating any implementation plan under Section 1857c-5 . . . may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within thirty days from the date of such promulgation or approval . . . \textsuperscript{210}

The Natural Resources Defense Council, Inc. has used that section

\begin{itemize}
\item \textsuperscript{206} 412 U.S. 669, 687-88, 5 Envir. Rep. Cas. (BNA) 1449, 1455 (1973).
\item \textsuperscript{207} For a full discussion see Natural Resources Defense Council, Inc. v. Train, 510 F.2d 692, 699-700, 7 Envir. Rep. Cas. (BNA) 1207 (D.C. Cir. 1975) and text accompanying note 51 supra.
\end{itemize}
successfully in many cases to seek review of EPA approval of state implementation plans issued pursuant to the Clean Air Act. But in two recent cases its standing to sue under the Act was raised and denied.

In *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*\(^\text{211}\) review was sought of the EPA’s approval of the state implementation plans for Colorado, Utah, and New Mexico. The court pointed out that none of the petitions named individuals as petitioners, nor gave any information about the organization or its membership, nor made any allegations about harm to any individual, member, or the organization itself.\(^\text{212}\)

The court proceeded to discuss the issue of standing from three perspectives: first, as a constitutional requirement of a “case or controversy” within the meaning of article III of the Constitution; second, as a statutory zone of interest to be protected or regulated; and third, as a rule of judicial self-restraint to be applied by the court at its own discretion. The court concluded that if standing were part of the constitutional requirement, the petitioners did not have standing because they did not assert injury in fact that would be a requisite for a case or controversy within the meaning of article III. The court further stated its disbelief that section 1857h-5 of the Clean Air Act created a zone of interest that embraced the petitioners. The court believed that the intent to permit persons who lived outside the affected states to bring a petition for review was not clearly expressed by Congress. Hence those who would be permitted to bring the suit and have the statutory standing must be individuals within the affected state. Finally, as a matter of judicial restraint, the court concluded that it should not grant standing in cases of this nature because to so interpret the statute would permit unlimited review of administrative action in courts of appeals, which the court felt was beyond the intent of the statute. For these reasons the petitioner’s standing was denied.

That decision by the Tenth Circuit was followed in a subsequent opinion by the Ninth Circuit.\(^\text{213}\) These decisions are at odds with other cases brought by NRDC under its Project Clean Air which it established in 1970 to oversee implementation of the Clean Air Act. In each of the earlier cases the standing issue was not raised or

\(\text{211. 481 F.2d 116, 5 Envir. Rep. Cas. (BNA) 1509 (10th Cir. 1973).}\)

\(\text{212. Id. at 117-18, 5 Envir. Rep. Cas. (BNA) at 1510.}\)

\(\text{213. Natural Resources Defense Council, Inc. v. EPA, 507 F.2d 905, 7 Envir. Rep. Cas. (BNA) 1181 (9th Cir. 1974).}\)
contested by the parties. In fact, in the Tenth Circuit case the issue was raised by the court itself. In a later opinion, Train v. Natural Resources Defense Council, Inc.,214 the Supreme Court raised the issue of standing for the parties even though certiorari was sought only to review a decision by the Fifth Circuit concerning the Georgia implementation plan. After hearing argument on the standing issue,215 however, the Court ultimately failed to mention the issue in its opinion on the merits. The Court did note that the named petitioners included not only the NRDC but also individual citizens of the state of Georgia. That precaution obviously should be taken in any situation, even when a statute purports to authorize review. Such precaution assures that an injury in fact is stated and enables determination that the person or organization allegedly injured is within the zone of interest sought to be protected by the statute.

Metropolitan Washington Coalition for Clean Air v. District of Columbia216 illustrates the relationship of the Clean Air Act to the standing issue and a remedy for improper notice under the section 304 citizens suit provision. In that case the suit originally was brought during the sixty-day notice period. After the period had passed, the plaintiffs filed a second lawsuit giving the statutory notice. These cases were consolidated by the trial court which ruled that sufficient notice had to be given. The court of appeals agreed. On the standing issue it said:

The standing argument presents no barrier to plaintiffs’ action. Under the Clean Air Act’s citizen suit provision, the general requirements for standing have been relaxed to permit suits by “any citizen.” In this way, citizens are recruited to serve as private attorneys-general to facilitate enforcement of the act in the face of official inaction. Appellants responded to this Congressional invitation to invoke the judicial process and assert the public interest. The question of whether there would have been standing under this complaint had the action been for private damages is not at issue. It is clear appellants had standing under the statute to represent the public.217

When environmentalists seek to review agency action in situations in which statutory review is not expressly authorized, however, the problem is even more complicated. In those cases the plaintiff

217. Id. at 814, 7 Envr. Rep. Cas. (BNA) at 1815.
must allege an injury in fact, and the injury must arguably be within the zone of interests protected by the statute. Much National Environmental Policy Act of 1969 (NEPA) litigation falls within that category. A NEPA case illustrating the problem is *Natural Resources Defense Council, Inc. v. Morton.* In that case the environmental plaintiffs sought to enjoin the sale of oil and gas leases of eighty tracts of submerged land off the coast of Louisiana. The plaintiffs alleged that in entering into the leases the Department of Interior had failed to comply with the requirements of NEPA in its preparation of a detailed environmental impact statement. The plaintiffs, however, were not affected economically by the decision, as would have been the case had they been losing bidders at the lease sale or competitors of the lessee objecting to the sale. Rather, they were merely concerned citizens who sought to have the Secretary comply with the statute to assure minimum environmental degradation and maximum environmental protection.

The standing issue was not raised in *Morton,* probably because it falls in that category of cases where the plaintiff asserts injury in fact to an interest arguably within the zone of environmental interests protected by NEPA. The argument is that NEPA creates a zone of environmental interests that is cognizable by the court and protected from premature action by the procedural safeguards and environmental impact statement requirements of NEPA. The harm to the environmental interests protected by NEPA that would result from the agency's noncompliance with NEPA arguably would be experienced by every citizen everywhere. Hence, the standing requirement is satisfied. In that sense it is interesting to note that *SCRAP I* involved not only the ICC rate-making procedures, but also allegations that the rate surcharge had been approved by the ICC without compliance with NEPA. Moreover, the Court was careful to observe in *SCRAP I,* that the interests asserted by the plaintiffs were those subject to protection under NEPA.

In this manner, NEPA, by creating a special, statutorily protected, environmental zone of interests, may be easing the standing requirement in environmental lawsuits insofar as the persons seeking review need not show either the immediacy of harm or individual harm from the threatened action.


In the past, we have often accepted the non sequitur that where all are the intended beneficiaries of an interest, none have standing to protect it. The dangers inherent in this philosophy are now apparent: Both logic and experience support the emerging view that an interest so fundamental that all are within the protected class must be permitted its champion. The National Environmental Policy Act has created such an interest.\footnote{188}

Other cases, however, have noted that economic interests alone usually do not fall within the environmental zone of interests protected by NEPA. In Clinton Community Hospital Corp. v. Southern Maryland Medical Center\footnote{196} the plaintiffs sought under NEPA and another federal act to enjoin construction of a large 200-bed hospital that would be two miles away from plaintiff's existing 33-bed facility. The plaintiffs alleged harm to their pecuniary interests because of the smaller unit's inability to compete with the proposed larger hospital and the resultant ruin of their business. The court concluded, "If it has in fact suffered an injury, appellant's economic well-being vis-a-vis its competitors is certainly not arguably within the zone of interest to be protected by the Federal environmental laws."\footnote{197}

Standing based solely on economics was also asserted by disgruntled carriers in Churchill Truck Lines, Inc. v. United States.\footnote{199} The plaintiffs sought to have an order of the Interstate Commerce Commission (ICC) set aside. The order granted a permit to competitors of the plaintiffs. The court concluded that the plaintiffs lacked standing to question the ICC's determination that the permit was not a major federal action necessitating an environmental impact statement under NEPA. The court noted that the plaintiffs did not allege any environmental injury to themselves and held that the plaintiffs' interest in their economic well-being is not within the zone of interests protected by NEPA.

Similarly, in Gifford-Hill & Company, Inc. v. Federal Trade Commission\footnote{200} an action was brought to nullify an FTC complaint alleging antitrust violations on the grounds that the FTC had not prepared an environmental impact statement prior to filing the

\footnote{196. 510 F.2d 1037, 7 Envir. Rep. Cas. (BNA) 1655 (4th Cir. 1975).}
\footnote{197. Id. at 1038, 7 Envir. Rep. Cas. (BNA) at 1655.}
\footnote{199. 533 F.2d 411, 10 Envir. Rep. Cas. (BNA) 1201 (8th Cir. 1976).}
\footnote{200. 523 F.2d 730, 8 Envir. Rep. Cas. (BNA) 1526 (D.C. Cir. 1975).}
complaint. The trial court and appellate court both denied standing to the plaintiff. Acknowledging that the plaintiff had suffered an injury in fact, the appellate court concluded that,

[t]his “injury in fact,” however, does not affect an interest even arguably “within the zone of interest to be protected or regulated” by NEPA. NEPA’s concern is with protection of the environment, not with the desire of parties to prevent or delay administrative efforts to enforce the antitrust laws.226

Most recently, NEPA was invoked in an FTC divestiture proceeding. In *Mobil Oil Co. v. FTC*227 the companies claimed that the divestiture proceedings could not continue until the FTC filed an environmental impact statement. The district court agreed, notwithstanding the effect on the prosecutorial functions of the FTC in enforcing the antitrust laws.

The Second Circuit subsequently reversed the trial court.228 The court agreed with the result in *Gifford-Hill & Co.* and held that the suit was premature. It, therefore, did not decide the question whether the companies had standing under prior Second Circuit cases on standing reviewability.

Another element of standing was litigated in *Chamber of Commerce v. Department of Interior.*229 A series of cases230 raised the issue whether an agency’s legislative proposals to Congress must be accompanied by a NEPA environmental impact statement. The plaintiff in *Chamber of Commerce* sought to enjoin the defendant from submitting legislative proposals and giving testimony to Congressional committees before an impact statement was prepared on the proposals. The district court held the plaintiff lacked standing and dismissed the suit. The court noted that the plaintiff alleged injury in fact through the organization’s interest in conservation of natural resources. Moreover, the court noted the organization could represent its members based on injury to any one of them. Additionally, the organization does not lose its right to sue merely because an overriding economic interest was combined with the environmental one under NEPA. The court concluded, however, that the plain-

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226. Id. at 731-32, 8 Envir. Rep. Cas. (BNA) at 1527 (citations omitted).
228. Mobil Oil v. FTC, 562 F.2d 170, 10 Envir. Rep. Cas. (BNA) 1710 (2d Cir. 1977).
stiff had not sustained an injury in fact which is a prerequisite to standing. The court held that the injury resulting from submission of legislative proposals without an environmental impact statement and without an opportunity to participate in its preparation was too remote and speculative to constitute harm to the plaintiff. In the court's words: "[t]he speculative and conjectural foundation for plaintiff’s allegation of injury, together with the fact that the alleged injury will occur, if at all, in the future, undermine the 'concreteness of the controversy' and severely militate against a finding of injury in fact for purposes of standing to sue." The court also rejected standing under the zone of interest approach because of the lack of causation, that is, the defendant's transmittal of proposals to Congress produced no direct injury to plaintiff's environmental interests. The court reinforced its holding by noting that the declaratory and injunctive relief sought would seriously disrupt the legislative process. That holding emphasized the underlying political nature of the controversy and raised separation of powers issues which, according to the court, necessitate proof of direct injury to a plaintiff before the judiciary becomes involved in executive or legislative affairs.

Merely because a plaintiff has an economic interest in the action, however, does not mean that environmental interests within NEPA cannot be asserted. An extreme example of NEPA being used advantageously by a party with a large economic stake in the action was National Helium Corp. v. Morton. There the helium producers sought to enjoin the Secretary of Interior's termination of the helium purchase program until a NEPA environmental impact statement was prepared. The government was the principal purchaser and user of helium produced. The court allowed the suit and enjoined the termination pending compliance with NEPA. The court found it "passing strange" to have the "giants of the oil and gas industry" asserting claims based on NEPA, but concluded that no person or group has an exclusive right to do so.

An interesting twist on the economic aspects of standing occurred in Cady v. Morton. In that case some plaintiffs were individuals living on lands that were within the leased lands and others were members of an environmental group. They challenged the validity

233. 527 F.2d 786, 8 Envir. Rep. Cas. (BNA) 1097 (9th Cir. 1975).
of mining leases between a coal corporation and the Crow tribe which had been approved by the Bureau of Indian Affairs and the Department of Interior. The plaintiffs claimed standing under the provisions of section 10 of the APA. The court concluded that the plaintiffs had standing because they alleged "injury to both environmental and economic interests which are within the 'zone of interest' to be protected by NEPA."\textsuperscript{234} The court continued:

This conclusion is not altered either by the fact that Indians were parties to the leases being attacked or by the fact that the Secretary of the Interior acted in his capacity as a fiduciary for such Indians in approving the leases. NEPA's stated purpose is to "assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings ....\textsuperscript{235}

The court concluded by noting that "[t]o restrict standing, as did the lower court, to institute an environmental challenge to the Crow tribe would limit standing under the circumstances of this case to a group having a strong economic incentive to alter substantially the environment. NEPA is not such a false promise."\textsuperscript{236}

Plaintiffs with economic interests are also allowed standing if the proposed action that adversely affects the environment also affects the plaintiffs' economic interests. This frequently happens when a person operates a recreation-related business in, or owns property adjacent to, the area where the action and alleged environmental harm will occur. For instance, standing was granted a non-profit environmental corporation and a head of a corporation that conducted river tours for profit to have the Secretary of the Interior take action to prevent the spread of impounded water from Lake Powell into Rainbow Bridge National Monument.\textsuperscript{237} Noting that the purposes of both the environmental and the business corporation include, "the 'preservation,' 'restoration,' and 'rational use' of the environment in the United States and throughout the world," the court stated they did have standing to bring the action.\textsuperscript{238}

Concerned Residents of Buck Hill Falls v. Grant\textsuperscript{239} presented a similar case where homeowners objected to destruction of aestheti-
cally pleasing areas adjacent to their homes. The plaintiffs sought to enjoin construction of a proposed dam that allegedly violated the NEPA and the Watershed Protection and Flood Prevention Act.\textsuperscript{240} It was under the latter act that the Soil Conservation Service proposed construction of the dam as a flood control measure. The alleged harm was that the plaintiffs as owners of property and residences located immediately around the proposed dam would suffer a reduction in the recreational and aesthetic surroundings. The court concluded that these economic and conservation interests do satisfy the requirement of injury in fact and that those interests are arguably within the zone of interest protected by the Watershed Protection and Flood Prevention Act.

On the other hand, the plaintiff’s lack of any economic interest in the agency action is not a sufficient basis to deny standing to assert environmental interests. In \textit{Environmental Defense Fund, Inc. v. Environmental Protection Agency}\textsuperscript{241} the plaintiff challenged the EPA’s decision not to suspend registration and use of all economic poisons containing DDT. In holding the plaintiff had standing, the court observed that the \textit{Sierra Club} requirements were satisfied. The court rejected the argument that FIFRA\textsuperscript{242} grants review only to registrants and applicants for registration.

\textit{Sierra} in no wise supports or countenances the contention that FIFRA affords review only to registrants and applicants for registration. Insofar as it rejects that contention, \textit{Environmental Defense Fund, Inc. v. Hardin . . .}, remains undiminished by \textit{Sierra . . .}. As for the particular case, we think EDF’s allegation that it is composed of “citizens dedicated to the protection of our environment” is adequate to cover protection from carcinographic input as well as other matters, and such dangers obviously affect the health of the individual members of the petitioner.\textsuperscript{243}

Under the federal pesticide registration legislation, however, a person may have standing based solely on economic harm. In \textit{Environmental Defense Fund, Inc. v. Environmental Protection Agency}\textsuperscript{244} pesticide producers sought review of EPA’s decision to suspend the registration and prohibit the sale of two pesticides,

\textsuperscript{241} 465 F.2d 528, 4 Envir. Rep. Cas. (BNA) 1523 (D.C. Cir. 1972).
\textsuperscript{244} 510 F.2d 1292, 7 Envir. Rep. Cas. (BNA) 1689 (D.C. Cir. 1975).
aldrin and dieldrin. The producers alleged only economic harm from lost sales; it alleged no environmental harm. The court allowed the appeal.

The Grant case\textsuperscript{245} also illustrates the use, not only of NEPA, but also of other federal statutes to create the protected zone of interests. That effort is not always successful. In Higginbotham \textit{v. Barrett}\textsuperscript{246} plaintiffs sought to challenge county zoning ordinances and to enjoin the EPA from making sewage treatment plant grants to the county. They claim they are homeowners and residents of property adjacent to a river that will be polluted because of inadequate sewage facilities on the land where a proposed apartment is to be built. The court held that the plaintiffs lacked standing to sue the regional administrator of the EPA under the Federal Water Pollution Control Act. Although the court concluded that injury in fact had been established by the alleged water pollution, the interest in eliminating the water pollution near their residences is not within the zone of interests protected by the Federal Water Pollution Control Act. The court noted that the FWPCA provides no remedy in nuisance or abatement of the water pollution for private parties. It also noted that the FWPCA principally relies on research, planning, and other techniques requiring cooperation among federal, state, and local governments to handle the water pollution problem.

Impairment of use of the area where the proposed project will be built or in areas adjacent to it is frequently alleged as harm. In Greene County Planning Board \textit{v. Federal Power Commission}\textsuperscript{247} the harm to use of the county's land would not occur for several years, if at all. The challenge to standing was based on the fact that the generating plant which had been licensed by the FPC would be located several miles from Greene County, hence, the county would not suffer injury in fact from granting the license. Greene County could be involved in the future if a transmission line or corridor would be necessary for a statewide system, and that alternative had been acknowledged by the utility. The court admitted that other people in the state of New York may also raise claims similar to those of Greene County, but said that that is not an obstacle to granting standing. "The Greene County Planning Board is surely as greatly aggrieved as the Scenic Hudson Preservation Conference

\textsuperscript{245} Concerned Residents \textit{v. Grant}, 537 F.2d 29 (3d Cir. 1976).
\textsuperscript{246} 473 F.2d 745, 5 Envir. Rep. Cas. (BNA) 1019 (5th Cir. 1973).
\textsuperscript{247} 528 F.2d 38 (2d Cir. 1975).
was in the original Storm King case, even though the threat here is one somewhat further in the future.248 The court proceeded to reject the standing challenge.

Establishing harm through impairment of use is also difficult if the lands to be developed are privately owned. In Conservation Council of North Carolina v. Costanzo49 conservation groups sought to enjoin construction of a marina by a developer on Bald Head Island pending preparation by the Corps of Engineers of an environmental impact statement under NEPA. The Corps had to issue a permit for dredging the channel into navigable waters under the jurisdiction of the Corps. In Costanzo the court rejected the standing allegations to the extent that they were based on prior uses of the privately owned land on the island. The court noted that if such use was as licensee or trespasser, it could be terminated at any time, and hence impairment of those uses by construction of the marina would not constitute the requisite harm for the standing requirement.

Another troublesome situation to show the requisite harm to establish standing can arise with proposed shopping centers or planned developments. These projects frequently raise objections to loss of open spaces, impaired scenic view, increased traffic, and increased air and noise pollution. These are injuries to "off-tract" interests in the land that are not as clearly within the zone of interests protected by environmental legislation. However, the breadth of current environmental law, particularly NEPA, the FWPCA, and the CAA, suggests those are arguably protected interests and at least one court has agreed.

In Coalition for the Environment v. Volpe250 the environmental organizations and individuals sought to enjoin a planned unit development that would provide a balanced residential, commercial, and industrial community for approximately 29,000 people in an unincorporated municipality near St. Louis. The land on which the development was to be built was located in the Missouri River flood plain. The developers, after purchasing the land, petitioned the relevant zoning authorities to get rezoning that would allow the contemplated development. The plaintiffs sought to enjoin the project until the Corps of Engineers and the Department of Transportation prepared an environmental impact statement under NEPA.

248. Id. at 44.
250. 504 F.2d 156, 6 Envir. Rep. Cas. (BNA) 1872 (8th Cir. 1974).
The Corps of Engineers' permit was needed in order to construct an urban levee and flood protection system that would replace an already existing agricultural levee on part of the tract. The Department of Transportation's action would be required for construction of an interstate exchange connecting it with a nearby highway, Interstate I-70.

The trial court had characterized the issue between the parties: "The plaintiffs want open space, while the corporate defendants want a planned urban community. Judicial review does not extend under the [Administrative Procedure Act] to those who seek to do no more than vindicate their own value preferences through the judicial process." In an amended complaint the plaintiff alleged harm because of off-site visibility of the community from I-70 and adjacent communities, the loss of view of open space in natural environment, and the use of the area by individual plaintiffs to drive or hike in the natural surroundings. Additionally, the inconvenience, noise and air pollution from the increased traffic, and the loss of the area for a regional park for St. Louis County were also alleged as harm.

The court first rejected the defendant's argument that the allegations of increased noise and air pollution would not constitute injury in fact unless they constituted violations of law or state emission standards. The court said to adopt that position would be a return to the "legal interests" test of standing which has been discarded by prior Supreme Court cases. The court went on to hold that harm to off-tract uses can suffice. "Thus plaintiffs' off-tract interest in the land may very well be impaired and such injury is adequate to give standing to challenge the proposed project." The court also rejected the trial court's characterization of plaintiffs' objections to loss of open space and to the potential or threatened changes by the project as "mere displeasure." The court concluded that these allegations were "statements of specific injury experienced by ascertainable individuals who reside near or pass through the affected area."

C. Class Actions

Environmentalists have other problems in addition to fitting their cause of action within the elements of traditional common law rem-
edies and the procedural difficulties already discussed. An environmental lawsuit involves a great deal of time and money. Not only are the costs of litigation increased by the prospects of a lengthy trial but also by the witnesses and evidence that need to be presented. The trial frequently involves expert testimony and many days in court. In addition to the actual cost of a trial are pretrial expenses. These can include pretrial hearings on motions (sometimes involving procedural obstacles such as standing or other procedural issues raised as a defense to the complaint), the pretrial conference, or discovery proceedings. Frequently a case will involve written interrogatories and depositions of the parties which have to be prepared by the attorney. Likewise, a party must respond to the opponent's requests for discovery. All in all, because of its technical nature, the environmental lawsuit in particular is an expensive one.

Environmentalists have sought to avoid or minimize some of these costs through the use of class actions. The principle involved in a class action is that one or a few individuals will be named as plaintiffs individually and as representatives of a class. Only the representatives appear in court, but they assert their claim as well as the claims of a larger group which they represent. Normally the named plaintiffs appearing in court have to establish that they can and will adequately represent the interests of the group at large. Moreover, they must show that the class is so large as to make it highly impractical, if not impossible, to bring each of the members of the class into the court. In addition, the class must have common questions of fact and law which are predominant in the suit. The principal reason for the last requirement is that any judgment entered as to the named individual will also apply to the members of the class at large who received notice of the proceedings. The defendant must have the opportunity to raise its defenses not only against the appearing class member, but also against other nonappearing members of the class.

The class action has been fairly popular with environmentalists because of its cost sharing attributes: it enables several persons to contribute to the expenses of a suit rather than one person having to sustain them alone. Also it avoids multiple lawsuits; one lawsuit on the same facts and law determines the rights of the parties and results in a judgment binding all members of the class. This is viewed favorably by the court because it also minimizes the use of judicial resources. Environmentalists have preferred the class action in the typical environmental lawsuit because it gives more clout to the majority group involved, the public. Although environmen-
talists are frequently asserting the public interest of the majority of the persons throughout the country, they are at a severe disadvantage when suing an economically and socially strong defendant such as a large corporation. This is true even though the large corporate defendant may be representing a more limited viewpoint, such as the industry's, the company's, or merely that of a particular plant. A class action enables an environmental group—at least in terms of numbers—to have a stronger voice. Moreover, the large corporation has less opportunity in that setting to wear down the plaintiff by making the suit so costly that it wins the case, not on the merits, but because the plaintiff is unable economically either to continue the case or to bring the suit in the first instance. In addition to these considerations, the class action has been used in a setting where an individual may not be inclined to bring the suit. For example, in the "company town" situation a representative who does not live in the immediate area may be willing to bring a class suit and avoid the initial unpopularity and potentially adverse backlash from the industry locally.

Although class actions are generally favored by the court because they can simplify the issues for the court and avoid multiple lawsuits, they have, nonetheless, presented some problems. A citizen class action to abate air and noise pollution is not without its difficulties. In Virginians for Dulles v. Volpe, for example, citizen groups brought a class action to abate noise and air pollution from jet planes using Washington National Airport. The court concluded that the class action for a nuisance could not be allowed because it was a private nuisance action requiring proof of specific injury that was not common to the entire class. For some members of the class no specific injury or harm was alleged. The court determined that substantial questions of fact were not common to the class. Hence, the named plaintiffs could pursue the cause of action individually, but not as representatives of the class.

No individual plaintiff in Virginians for Dulles appealed the judgment denying the individual claims. Nor did Virginians for Dulles appeal the lower court's ruling that it could not present the nuisance claim on behalf of the class. Thus, the court concluded that the appeal to review the denial of nuisance relief had to be dismissed because it was not properly before the court. The court noted, however, that the lower court did not deny Virginians for Dulles the
right to present an action on behalf of its members to compel the FAA to prepare an environmental impact statement. For this it did have standing.

The class action suit has been made even more difficult by the decision in Eisen v. Carlisle & Jacquelin. In that case a class action was presented on behalf of all odd-lot traders on the New York Stock Exchange complaining that the sellers had violated antitrust and securities laws. One issue was the problem of notice requirements under rule 23(c)(2). The lower court had said that the total class included over six million individuals who had purchased odd-lot shares and the average amount of each individual claim was about $70.00. The cost of notice to every individual class member would be so prohibitive that the suit would not be brought if the representative member had to sustain that cost. The district court concluded that rule 23(c)(2) and the Due Process clause did not require so great an expenditure to start a lawsuit. It authorized notification on a selective basis to two thousand identifiable class members with ten or more odd-lot transactions during the relevant period, individual notice to five thousand class members randomly selected, and prominent publication in the Wall Street Journal and other newspapers in New York and California. The district court, analogizing to relief by a preliminary injunction, concluded that the plaintiffs were likely to succeed on the merits and therefore held that ninety percent of the notice costs should be borne by the defendants. The Supreme Court disagreed on both points. It read rule 23(c)(2) literally and concluded that individual notice must be sent to class members whose names and addresses are ascertainable through reasonable efforts. The Court determined that the best notice practicable would be by mail when the names and addresses were available. In this case that included nearly two and a quarter million class members who were easily ascertainable. The Court held that the notice requirement is not discretionary with the trial court, but rather is a mandatory requirement under rule 23. Further, the Court held that the costs of notice must be borne by the plaintiff. The named representative must meet the require-

256. FED. R. CIV. P. 23(c)(2).
ments of rule 23 before being able to continue a lawsuit as a class action, and those include compliance with the notice requirements. Although Eisen is a securities case, the cost and notice requirements for class actions could impose heavy burdens on environmental litigants in many instances.

D. Sovereign Immunity

Sovereign immunity is a defense available to the government which bars any person from asserting a claim and obtaining relief against it, except in certain well-defined circumstances. The defense generally is available to the government (federal, state, and local) and its agencies acting for it. Today the doctrine has less vitality than in the past because of judicially grafted exceptions to its application. In addition many statutes expressly authorize suits against the government or its agency in the performance of its duties under the statute. Several of the cases discussed above illustrate that situation. In those instances the government has consented to suit and waived the defense. Nonetheless, the defense often is asserted in environmental lawsuits involving governmental units or agencies, and the plaintiff must be prepared to respond to that defense by showing the claim fits within exceptions to the doctrine or that the legislature has waived the defense by statute.

Several recent cases demonstrate the sovereign immunity issues in environmental lawsuits. Train v. City of New York is one example of avoiding the defense by suing the Administrator of the EPA rather than the agency (government) itself. The action in Train sought to declare illegal the Administrator’s impoundment of sewer treatment funds authorized and appropriated by Congress in the FWPCA. The lower courts granted the requested order that the Administrator allocate the funds among the states. The Supreme Court affirmed. The government conceded that the doctrine of sovereign immunity did not apply when the Administrator is sued as an individual.

Sierra Club v. Hickel illustrates a case where the requested


260. An example of this situation may be found in Massachusetts v. United States Veterans Administration, 541 F.2d 119, 9 Envir. Rep. Cas. (BNA) 1507 (1st Cir. 1976).


relief requires affirmative action by the government, such as the issuance of a deed. The suit sought to nullify a two-year-old land exchange agreement between the Department of Interior and two private utilities. The plaintiffs alleged that the Secretary of Interior had abused his discretion and statutory duties in making the exchange. The court held that jurisdiction did not lie under the APA because the exchange was "agency action committed to agency discretion by law" within the meaning of the APA. Furthermore, the court concluded this case was an action directly against the sovereign. It concluded that sovereign immunity was not waived by the government through the APA. Had the case been within the review authorized under the APA, sovereign immunity would not have barred the action.

Congress also has made judicial review of agency action easier by limiting the use of the defense of sovereign immunity. The APA has been amended to prohibit dismissal of a suit against an agency, its officer, or its employee on grounds that it is a suit against the United States or that the United States is an indispensable party. Suit is expressly authorized against the government and relief may be entered against it. Presently the amended APA also authorizes suit against the government in cases where no special statutory review proceeding exists.

Statutes authorizing suit against the government typically are strictly construed. The government is deemed to agree to be sued only when the conditions and limitations it imposes have been met. In Massachusetts v. United States Veterans Administration, for example, the court held the section 505 review under the FWPCA was barred by sovereign immunity when the sixty-day notice requirement was not adhered to. According to the court, the government only consented to be sued within the time prescribed.

E. Preemption

Another obstacle to environmental lawsuits is the problem of preemption. Obviously many situations may involve standards to control emissions of pollutants or regulations concerning the use of property. The state, local, and federal government may each be trying to establish the necessary standards or regulations. The prob-

263. Id. at 1051, 4 Envir. Rep. Cas. (BNA) at 1612.
265. 541 F.2d 119, 9 Envir. Rep. Cas. (BNA) 1507 (1st Cir. 1976).
lem of preemption concerns whether in a particular situation the federal regulatory action has completely precluded and barred any state regulation of the same subject matter.

The preemption problem arises from the Supremacy Clause of the United States Constitution which provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; . . . ." 266 The states assert their authority to make regulations in some matters pursuant to the tenth amendment to the Federal Constitution which provides: "The powers not delegated to the United States by the Constitution, nor prohibited to it by the State, are reserved to the States respectively, or to the people." 267

The problem basically is whether, if the federal government has set particular standards, a state may set more or less stringent ones. For example, if under the Clean Air Act the federal government sets higher national primary ambient air quality standards for certain pollutants, may the state set more or less stringent ones for its jurisdiction? Under the Clean Air Act Amendments of 1970 the issue was immediately raised whether by setting federal standards the state had to allow its cleaner air to deteriorate to the federal level. 268 In some air pollution situations the federal preemption is quite clear. For example, Part B of the Clean Air Act, section 233 provides "No State or political subdivision thereof may adopt or attempt to enforce any standard respecting emissions of any air pollutant from any aircraft or engine thereof . . . [unless that standard is identical to a national standard applicable] to such aircraft under this part." 269 Similar provisions concerning the motor vehicle emission standards under the Act are stated in section 209(a). 270 A more general provision on preemption in the air pollution area is section 116 of the Act, which provides:

Except as otherwise provided in section 209 . . . and 233 . . . nothing in this [Act] shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation

266. U.S. CONST. art. VI.
267. U.S. CONST. amend. X.
270. Id. § 1857f-6(a), as amended by Pub. L. No. 95-95, § 221, 91 Stat. 762 (to be codified in 42 U.S.C. 7543).
respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution . . . [so long as the state limitation is not less stringent than the national limitation].

Normally courts in a preemption situation have several major concerns. First is whether it is impossible to comply with the particular regulations of both the state and federal governments. These are situations in which a state regulation is stricter than the federal one, or vice versa, and satisfaction of the stricter encompasses the lesser. Typically, however, the cost of meeting the higher one is much greater, and that is why the party regulated is concerned. If it is a situation in which compliance with both is impossible, the courts usually conclude preemption was the intended result. Another factor in resolving the preemption situation is whether there is a need for national uniformity of the subject matter of the regulation. If it is in an area of national concern in which a congressional purpose of uniformity is evidenced, then preemption might be intended. If, however, national uniformity is not the objective and is not necessary, then the state and federal regulation might operate concurrently. A third factor frequently examined is the pervasiveness of the federal regulatory scheme.

The pervasiveness of the federal program was the controlling factor in Northern States Power Co. v. Minnesota which clearly raised the preemption issue. In Northern States Power the state through its proper administrative channels was trying to provide regulations concerning radioactive pollutants from atomic energy plants. The particular preemption question was whether the federal government through the Atomic Energy Act of 1946, which created the Atomic Energy Commission (AEC), had preempted the area of regulation of atomic energy plants. Under the federal act the AEC was authorized to license and regulate atomic energy plants. The utility argued that the federal government intended only federal regulation be applied in this area and that the state be precluded and barred from any effort to regulate. The state, of course, is asserting its right to regulation as an exercise of its inherent police power to protect the health and safety of its citizens. In Northern States Power the Eighth Circuit concluded that the Atomic Energy Act and its extensive involvement in nuclear energy industry had preempted the state water quality board from issuing stricter regu-

271. Id. § 1857d-1.
lations for thermal pollution. The court determined from the history of the Act and its initial purposes, including a federal monopoly for defense and national security reasons later opening up to a private nuclear energy industry, that Congress had never relinquished the federal control over regulations of radioactive material. The pervasive regulatory scheme convinced the court that there was no room for state involvement.

The preemption issue has also been raised in conjunction with the FWPCA. At least one court has suggested that the FWPCA preempts a nuisance action based on the new federal common law under *Illinois v. Milwaukee*.

Federal preemption was again an issue in litigation involving the roles of the federal and state governments under the new federal solid waste management program. New Jersey adopted a law that prohibits bringing waste collected outside the state into the state. In *Hackensack Meadowlands Development Commission v. Municipal Sanitary Landfill Authority* the New Jersey Supreme Court upheld the statute against constitutional challenges based on preemption, due process, and equal protection arguments. Before the United States Supreme Court heard the case, Congress adopted the Resource Conservation and Recovery Act of 1976. The Court, therefore, vacated the prior judgment and remanded the case to the New Jersey Supreme Court for reconsideration in light of the intervening federal act.

Subsequently in *City of Philadelphia v. New Jersey* the New Jersey Supreme Court again upheld the state statute. The court concluded that Congress did not intend to preempt state laws concerning solid waste management, but rather intended to encourage state regulation. Moreover, the court determined that compliance with the state statute did not unduly interfere with the federal program. Nor was compliance with both statutes impossible. Hence the state law was not preempted.

273. Massachusetts v. United States Veterans Administration, 541 F.2d 119, 9 Envir. Rep. Cas. (BNA) 1567 (1st Cir. 1976) and see notes 16-20 supra and accompanying text.
Another preemption case, *Atlantic Richfield Co. v. Evans*, in-
volved a challenge to a Washington state statute that regulated oil
tankers operating in the Puget Sound. A three-judge court con-
cluded that federal law preempted state regulation of size and de-
sign of oil tankers. That court rejected the state's arguments based
on the concept of cooperative federalism fostered by the federal
coastal zone management program. The state argued that its
Tanker Law was part of its coastal zone management plan that had
been approved by the Secretary of Commerce under the Federal
Coastal Zone Management Act of 1972. The court stated that this
approval did not constitute a waiver of preemption under other
federal acts, specifically the Port and Waterways Safety Act of 1972
(PWSA). The court concluded that Congress established an ex-
tensive federal regulatory program under the latter act that pre-
cludes state regulation which is inconsistent with it.

The United States Supreme Court recently affirmed the three-
judge court in *Ray v. Atlantic Richfield Co.* The Court noted the
traditional bases for preemption included situations where compli-
ance with both regulations is impossible or where the state law
stands as an obstacle to fulfillment of federal purposes and objec-
tives. The Court first held that the Washington state Tanker Law
requiring state licensed pilots in Puget Sound was in conflict with
federal law and invalid under prior decisions. The controversial size
and design provisions in the Tanker Law were more troublesome.
The Court determined that the federal PWSA evidenced congres-
sional intent to establish uniform national standards for design and
construction of tankers. This need for uniform national standards
precludes different or more stringent state requirements. The Court
distinguished prior environmental and conservation preemption
cases which had allowed state regulation to stand alongside federal
regulation. The Court stated, "But in none of the relevant cases
sustaining the application of state laws to federally licensed or in-
spected vessels did the federal licensing or inspection procedure
implement a substantive rule of federal law addressed to the object
also sought to be achieved by the challenged state regulation."
Finally, the Court concluded that the Tanker Law provisions prohibiting tankers in excess of 125,000 dwt from operating in the Puget Sound were invalid. The Court held that limitations on a vessel's size are clearly within the safety standards authorized under the federal act as interpreted and applied by the Secretary of Commerce. It concluded that the state may not impose more stringent size limitations than would be authorized under the federal regulations.

IV. ATTORNEY FEES

Costs of litigation are becoming a significant barrier to environmental lawsuits. Costs are especially high in most environmental cases because of the technological problems involved and the need for expert witnesses, extensive discovery proceedings, and lengthy trials. Occasionally, some cost can be alleviated by class action suits, but attorneys' fees still present significant barriers in any litigation. These can be especially high in prolonged litigation through extensive trial and appellate proceedings. The litigation frequently is brought by private, non-profit groups with limited financial resources. Often, the argument is made that the groups are presenting and protecting the public's interest in the environment. Because the groups are acting as private attorneys general the theory continues, they should be allowed to recover costs and attorney fees from the opposing parties.

A case in the Fifth Circuit presented the private attorney general issue quite clearly. In *Sierra Club v. Lynn* the Sierra Club had brought litigation to enjoin construction of a planned unit development, the San Antonio Ranch (SAR), near San Antonio, Texas. SAR would be located partially over the Edwards Aquifer. Objections to SAR were based on the lack of compliance with NEPA and other federal regulatory statutes, including the Federal Water Pollution Control Act. The lower court initially sustained the Sierra Club's contentions and required preparation of a NEPA impact statement which subsequently resulted in modifications to the plans for SAR. Ultimately, however, the lower court held that the federal officials had complied with NEPA and other federal regulatory statutes. The Sierra Club filed a motion for attorney fees, nonetheless, and the trial court granted its request. The trial court reasoned that

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the plaintiff had represented the public interest well and had achieved modifications to the project that benefited the public at large. It concluded that the award should be made unless specific reasons for denying it can be identified. On appeal SAR contended that the award of attorney fees was usually improper, but especially so in a case where the award was made to a losing party in the litigation. The Fifth Circuit agreed and reversed the order of attorney fees. It held that the award was not within the traditional categories for granting attorney fees to litigants and no special circumstance existed to make an exception.

The Fifth Circuit’s position was sustained by the United States Supreme Court in its opinion on attorney fees in environmental litigation in the Trans-Alaskan Pipeline case, *Alyeska Pipeline Service Co. v. Wilderness Society*. The lower court had adopted the “private attorney general theory” as an exception to the general rule barring recovery of attorney fees. It had held the pipeline company liable for one-half the amount of the reasonable value of the legal services rendered. The Court reversed, applying the American rule by which attorney fees are not recoverable by a prevailing litigant in federal litigation unless there is statutory authorization. The Court acknowledged two recognized exceptions to the American rule: 1) The “bad faith” exception that awards attorney fees against a party acting in bad faith; and 2) the “common benefit” exception that spreads costs of litigation among those benefiting from it. The Court refused to adopt the court of appeals’ exception in favor of those who “vindicate important statutory rights of all citizens . . . .” The Court reviewed the history of attorney fees at common law and under federal statutes and noted that treatment of costs and attorney fees had been handled in a variety of ways under different statutes over the years. It noted that attorney fees are not recoverable as an item of costs in lawsuits. Moreover, recent federal legislation, especially in antitrust, patent, and civil rights, provides specifically for the award of attorney fees. The Court concluded that because no statute existed authorizing the award here, it had no basis for granting the fees. Since it did not fit within the recognized exceptions to the general rule, the award was improper.

The full impact of the *Wilderness Society* decision has not yet been determined. Whether it will reduce environmental litigation

287. Id. at 245, 7 Envir. Rep. Cas. (BNA) at 1851.
remains to be seen. At a minimum environmental groups will probably be more cautious in the types of cases that they bring and will continue their efforts in specific selected areas such as pesticides, air and water quality, public land protection, and energy resource development. Hopefully the problem will be alleviated in those areas by statutory authorization to award attorney fees. Ideally the authorization of attorney fees will be tied into citizen suit provisions. Even with statutory authorization, however, the award of attorney fees is not always made.

Prior to Alyeska the NRDC had successfully sought attorney fees in various cases where it had sought review of the EPA approval of state implementation plans under the Clean Air Act. It did so on the theory that under section 304 of the Clean Air Act an award of attorney fees was authorized. The argument was made that section 304 expressly authorizes attorney fees and, since section 307 authorizes private suits similar to those under section 304, the section 304 authority for attorney fees should also cover section 307 suits. The policy supporting the awards is to encourage citizen suits in either case. To differentiate because the actions are brought in different courts and to review different actions is immaterial to the purposes of the provisions. That is, costs could be an obstacle to citizen suits in both instances. In Natural Resources Defense Council, Inc. v. Environmental Protection Agency the First Circuit agreed with the NRDC and awarded attorney fees. Similar suits subsequent to Alyeska, however, have resulted in unfavorable decisions for NRDC.

In a post-Alyeska case, Natural Resources Defense Council, Inc. v. Environmental Protection Agency, the plaintiff again sought attorney fees for a section 307 implementation plan approval review action. In this respect the case was identical to the earlier First Circuit’s case involving the same parties. In a short opinion the Fifth Circuit rejected the First Circuit’s approach and concluded that attorney fees were inappropriate.

The Fifth Circuit relied heavily on the opinion of the District of Columbia Court of Appeals in Natural Resources Defense Council, Inc. v. Environmental Protection Agency. In that case attorney

290. 539 F.2d 1068, 9 Envir. Rep. Cas. (BNA) 1298 (5th Cir. 1976).
fees again were sought in a section 307 action. The District of Columbia Circuit noted that section 304 authorizes the award of costs and attorney fees "whenever the court determines [that] such [an] award is appropriate."292 This is limited, however, to section 304 suits and not section 307 ones under which the current action was brought. The court in a lengthy opinion discusses the reasons for differentiating between allowing attorney fees in section 304 litigation and not allowing them in section 307 cases. The court concluded that it was reasonable for Congress to want to emphasize citizen suits as an enforcement device, but not necessarily allow costs in actions reviewing exercises of judgment by the Administrator under section 307. The court also rejected the First Circuit's approach because of the inconsistency in holding a section 307 action is similar to a section 304 action for purposes of subsection D regarding attorney fees, but not for purposes of subsection B regarding time restrictions on the suits. As noted earlier, section 307 actions must be brought within thirty days of the Administrator's action, whereas, under subsection B of 304, the suit cannot be brought prior to sixty days' notice to the Administrator.

The court, however, had to deal with the more complicated problem concerning the similarities between the section 307 and section 304 action in this particular instance. The NRDC sought to review final regulations published with respect to the type of gasoline retailers had to carry. The regulations issued had required gasoline retailers to provide one grade of unleaded gasoline, but not required the earlier proposed standards concerning the use of lead additives in all grades of gasoline. NRDC sought to review the immediate need for across-the-board controls on lead additives. Subsequently, the EPA agreed to issue the requested regulations, and the NRDC withdrew its petition. Then the NRDC moved for an award of attorney fees. The action to be reviewed, the court noted, is very similar to an action directed at the "failure of the Administrator to perform [an] act or duty . . . which is not discretionary . . .," that is, refusal to promulgate controls the Administrator has no choice but to promulgate.293 In fact that very position was urged by the EPA in arguing that the court of appeals lacked jurisdiction under section 307 and that the suit should be brought in the district court under section 304. The court suggested a reason for not granting fees under section 307 is that industries and affected parties would seek review

292. Id. at 1353, 7 Envir. Rep. Cas. (BNA) at 2042.
293. Id. at 1357, 7 Envir. Rep. Cas. (BNA) at 2044.
of the regulations whether they had the fees or not, but the enforce-
ment sought under section 304 would be possible for private citizens
and public interest groups only if the high costs were alleviated
somewhat. Then the court observed, however, that "[t]hese con-
siderations suggest that the purpose of section 304(d), even con-
strued in its strictest sense, is well served by the availability of fees
in this case and a small group of section 307 actions like it."294 For
these reasons the court acknowledged it was inclined to award fees
even though it did not agree with the First Circuit's construction of
the statute. But it declined to do so on the ground that it would be
stretching its function with respect to statutory interpretation.

The statutory authorization for attorney fees under the Clean Air
Act was amended in an interesting fashion. First, the 1977 amend-
ments change section 307 to allow attorney fees. As amended, the
new section 305(f) provides, "In any judicial proceeding under this
section, the court may award costs of litigation (including reasona-
ble attorney and expert witness fees) whenever it determines that
such award is appropriate."295 Thus, Congress has rendered moot
the prior cases denying attorney fees in section 307 suits. However,
under the 1977 amendments the section 307 suit is limited to the
judicial review set forth in the amended Clean Air Act.296

Another significant change occurred in the 1977 amendments.
The defendant in an enforcement proceeding is allowed to recover
attorney fees if the enforcement action is "unreasonable." The
amended section 113(b) provides:

In the case of any action brought by the Administrator under this
subsection, the court may award costs of litigation (including reason-
able attorney and expert witness fees) to the party or parties against
whom such action was brought in any case where the court finds that
such action was unreasonable.297

Attorney fees have been sought under other federal statutes than
the Clean Air Act. In Greene County Planning Board v. Federal
Power Commission298 the intervening environmentalist groups re-
quested, but did not get, attorney fees. The Second Circuit Court

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294. Id. at 1357, 7 Envir. Rep. Cas. (BNA) at 2045.
295. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 305(f), 91 Stat. 777 (to be
296. Id. § 303(d).
297. Id. § 111(b)(3).
298. 455 F.2d 412, 3 Envir. Rep. Cas. (BNA) 1595 (2d Cir.), cert. denied, 499 U.S. 849,
of Appeals, however, took a second look at the attorney fees problem and concluded that the fees might be appropriate. The court relied on a ruling by the General Accounting Office (GAO) to conclude that the Federal Power Commission (FPC) had the authority to award attorney fees in appropriate cases. The denial of fees in the prior case was based on a lack of express congressional authorization. Because the FPC, under the GAO ruling, has the express authority to award attorney fees, the case was remanded for FPC consideration of the request for reasonable attorney fees.

More recently, the Second Circuit sitting en banc reconsidered the Greene County panel decision which had remanded the case to the FPC for consideration of awarding attorney fees. The en banc majority disagreed with the panel and denied the petition to review the FPC's actions denying attorney fees to the intervenors. The en banc majority read the GAO's opinion very narrowly and strictly confined it to the situation that the opinion addressed: whether the NRC had authority to grant intervenor attorney fees in proceedings before the NRC. The Second Circuit concluded that the same statutory authority was not present for the FPC. It literally applied the Alyeska decision and concluded that without express statutory authorization the fees could not be granted. The court also noted that Congress has pending three bills which deal with the issues of intervenors' cost in administrative proceedings.

In another case a federal district court awarded attorney fees to a citizens' group plaintiff under the Civil Rights Attorney’s Fees Act of 1976. In Southeast Legal Defense Group v. Adams, the plaintiff challenged the proposed route for an interstate highway on both constitutional and environmental grounds. Although the trial court, using Alyeska, originally denied attorney fees, it reconsidered that ruling in light of the 1976 Attorney's Fees Act that was adopted while the case was being appealed. The court concluded the citizen group can recover reasonable attorney fees under the Act even though the plaintiff did not prevail in enforcing one of the civil rights acts.

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300. 565 F.2d 807, 11 Envir. Rep. Cas. (BNA) 1258 (2d Cir. 1977) (the value of this decision is in question because the opinion has been withdrawn from publication), cert. denied, ___ U.S. ___, 11 Envir. Rep. Cas. (BNA) 1263 (1978).
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rights statutes covered in the 1976 Attorney's Fees Act. The district court used the "common nucleus of operative fact" test to determine when fees would be allowed for a non-fee claim. It concluded that the claims joined were "substantial" and arose from the same operative facts. The court also considered it unfair to deny fees because the constitutional issues were not reached. Federal policy is to avoid constitutional questions if statutory construction can resolve the dispute. Joinder of constitutional and statutory claims furthers that policy. Hence, fees were allowed.

In Rhode Island Committee on Energy v. General Services Administration attorney fees were sought against a federal agency. The fees were sought based on the bad faith exception to the Alyeska rule. The First Circuit rejected the argument and held that the federal cost statute does not permit a "bad faith" exception to attorney fees not otherwise allowable. Recovery of attorney fees against the government is, therefore, not allowable.

V. CONCLUSION

At the end of the tunnel one would normally expect some light. Unfortunately, that is not available here in the form of meaningful conclusions. As is the case with all litigation, "you win some, you lose some," and environmental litigation is no exception. Although among the federal circuit courts of appeals an examination of each circuit's environmental lawsuits is possible to determine which is environmentally oriented, the track record of the United States Supreme Court would not be so revealing; it is a mixed bag at best. Nor are the positions of the individual Justices either always consistent or predictable. Unfortunately that type of jurisprudential study has limited value at best. In other respects, however, an examination of environmental litigation does provide useful information about problem areas and possible approaches to resolving those problems.

303. Id. at 894, 10 Envir. Rep. Cas. (BNA) at 1810.
305. Id. at 405, 10 Envir. Rep. Cas. (BNA) at 2017. In another case litigation costs, but not attorney fees, were sought by the prevailing federal defendant. The district court denied the requested costs in part because the litigation was brought in the public interest, provided public benefit, and concerned novel issues of law. County of Suffolk v. Secretary of Interior, 76 F.R.D. 469, 10 Envir. Rep. Cas. (BNA) 1938 (E.D.N.Y. 1977). The litigation concerned the adequacy of the Department of Interior's final EIS for oil and gas leases on the Outer Continental Shelf off the Atlantic Coast. County of Suffolk v. Department of Interior, 562 F.2d 1368, 10 Envir. Rep. Cas. (BNA) 1513 (2d Cir. 1977), cert. denied, ___U.S.____, 11 Envir. Rep. Cas. (BNA) 1272 (1978).
In some instances environmental litigation has been simplified by recent developments. The “new” federal common law in interstate pollution cases has opened the door for creative claims for nuisance abatement and control, often under federal statutes. The precise parameters of that cause of action remain to be developed.

In addition, new litigation for environmental protection has been fostered by the National Environmental Policy Act, the Federal Water Pollution Control Act, and the Clean Air Act. The emerging common law of NEPA environmental impact statements is providing a means to avoid environmental degradation through premature action and to maximize environmental protection through preventive measures. NEPA also has developed a body of environmental interests protected by statute that provides the basis for citizens generally to establish injury in fact in order to seek protective judicial review of agency action. In that manner it has alleviated the standing problems created by *Sierra Club v. Morton*.

The citizen suit provisions of recent environmental legislation has spawned much litigation. Those provisions in the FWPCA and the CAA have raised serious questions over jurisdictional requirements. Is the failure to comply with the notice or short time limitations a jurisdictional defect? What matters did Congress intend to be reviewed on an expedited basis in the courts of appeals and which in the federal district courts? When is an award of attorney fees appropriate under the citizen suit provision of each act?

At the same time, environmental litigation will continue to be hampered by procedural obstacles to getting into court. Rather than using a broader, functional approach to class actions, the Supreme Court used a narrow, literal interpretation of rule 23 that severely restricts their value to litigants because of the expense of notice. Use of class actions was further restricted by the jurisdictional amount requirements of *Zahn*. In addition to limiting class action as a cost sharing device for environmental litigants, the Court struck a serious blow to environmental litigation when it denied awarding attorney fees in any situation other than one expressly authorized by statute. To say that the Court is being mechanical and insensitive to the realities of the expenses incurred in environmental litigation is generous. Hopefully Congress and state legislatures will act to mitigate the effect of those cases.

Notwithstanding these difficulties, however, matters portend well for environmental litigation. The public and congressional concern for environmental matters reflected in recent state and federal legislation is encouraging. Moreover, proposed legislation in the land use
area and energy resource development demonstrate that this concern continues. Public interest in air and water quality is apparent by participation in public hearings and citizen lawsuits when necessary. And this public participation and input is important. Public awareness of environmental problems is crucial to solving them. Information is needed not only about the technological issues, but also about the trade-offs made legislatively and otherwise in resolving them. In the long run public participation and awareness should lead to environmentally oriented agency decisions in the first instance and to legislation which assures maximum environmental protection in areas where it is needed most.