STAND OR DELIVER: CITIZEN SUITS, STANDING, AND ENVIRONMENTAL PROTECTION

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Give me where to stand, and I will move the earth.

Archimedes

Stand in the place where you live.

R.E.M.

INTRODUCTION

Until *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*,[1] it appeared that a majority of the Supreme Court would keep many environmental citizen-suit plaintiffs out of court. In *Lujan v. Defenders of Wildlife*,[2] and other cases,[3] the Court's majority placed Constitutional and prudential limits on standing for environmental citizen suits. The *New York Times* reported that this trend was one of the "most profound setbacks for the environmental movement in decades."[4] Justice Harry Blackmun accused the Court's *Lujan* ma-

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1. 528 U.S. 167 (2000)

2. 504 U.S. 555 (1992)

3. *See*, *e.g.*, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998); Lujan v. National Wildlife Fed'n, 497 U.S. 871 (1990). Environmental activists also raised concerns about the Court's willingness to recognize the standing of ranchers to challenge a determination under the Endangered Species Act. *See generally*, Bennett v. Spear, 520 U.S. 154 (1997).

4. William Glaberson, *Novel Antipollution Tool Is Being Upset by Courts*, N.Y. TIMES, June 5, 1999, at A1.

jority of taking a "slash and burn expedition through the law of environmental standing."[5] The losing counsel in *Lujan* accused the Supreme Court of putting environmental attorneys "out of business."[6] In 1999, John Echeverria and Jon Zeidler warned that the very "ability of American citizens to vindicate their legal rights to a clean and healthy environment is rapidly eroding."[7] With *Laidlaw*, the Supreme Court reversed course, lowering the standing barriers faced by environmental citizen-suit plaintiffs. From this standpoint, the Supreme Court's Laidlaw decision was "a win for the environment."[8]

This perspective on standing assumes that citizen suits play an important role in safeguarding environmental values.[9] By implication, any legal doctrine, such as that embodied in *Lujan*, which curtails citizen suits is "anti-environmental." Citizen suits, insofar as they enhance governmental enforcement of environmental laws and prompt cleanup, *should* be environmentally beneficial. Yet this "conventional view," which equates more liberal citizen-suit standing rules with greater environmental protection, is in the words of one commentator, "too facile."[10] More environmental citizen suits do not necessarily yield better environmental protection.

The *Laidlaw* decision certainly will benefit citizen-suit plaintiffs. This does not mean, however, that *Laidlaw* will advance environmental protection. Ecological values may well be better protected under a set of standing rules, such as those embodied in Justice Scalia's *Lujan* opinion, which require a demonstration of environmental harm. This article argues that liberalized standing rules that disconnect standing from a concrete and particularized injury in fact *cannot* be assumed to enhance environmental quality. Nor will increasing the volume of citizen suits inexorably increase the effectiveness of environmental regulation. This article further presents evi-

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5. Lujan v. Defenders of Wildlife, 504 U.S. at 605 (Blackmun, J., dissenting). *See also*, Karin Sheldon, Lujan v. Defenders of Wildlife*: The Supreme Court's Slash and Burn Approach to Environmental Standing*, 23 ENVTL. L. REP. 10,031, 10,031 (Jan. 1993).

6. *See* Marcia Coyle & Marianne Lavelle, *Eco-Groups Standing Curtailed*, NAT'L L.J., June 22, 1992, at 3 (quoting Brian O'Neil).

7. *See* John D. Echeverria & Jon T. Zeidler, *Barely Standing: The Erosion of Citizen "Standing" to Sue to Enforce Federal Environmental Law* at 1 (Envtl. Policy Project, Georgetown University Law Ctr., June 1999).

8. *See A Win for the Environment*, WASH. POST, Jan. 16, 2000, at B6.

9. Ann Carlson notes that the critical commentaries on *Lujan* "all assume that a standing doctrine making access to federal courts open ended to environmental plaintiffs will help the environmental cause." *See* Ann E. Carlson, *Standing for the Environment*, 45 UCLA L. REV. 931, 935 (1998).

10. *See id.*

dence suggesting that expansive citizen-suit litigation may even exacerbate the environmental failings of the current regulatory regime. Whether a liberalized standing regime enhances or undermines environmental protection is an open question.[11] In the meantime, there are many reasons to believe that an alternative framework for environmental citizen-suit standing would do more to advance the protection of environmental resources.

Part I of this article provides an overview of environmental citizen suits in theory and practice, with a particular focus on the use of citizen suits to enforce environmental regulations against emitters. While environmental citizen suits are designed to improve regulatory enforcement, and thereby reduce pollution, the pattern of litigation suggests that citizen suits do not consistently serve this purpose. Part II provides a brief overview of the role of standing in citizen-suit litigation. It examines the Court's competing approaches to standing, as typified by *Lujan* and *Laidlaw* and the latter decision's likely effect on citizen suits. As already intimated, *Laidlaw* will make it much easier for prospective plaintiffs to file citizen suits under existing environmental laws. Part III outlines the theoretical and empirical basis for questioning the importance of liberal standing rules for environmental protection. More citizen suits will not necessarily produce greater environmental protection and, in some cases, will exacerbate the failings of the existing regulatory regime. Part IV suggests an alternative approach to citizen-based environmental protection that replaces conventional citizen-suit provisions with property rights in environmental resources. Rather than liberalizing standing rules by eliminating the injury in fact requirement, this article proposes the extension of property rights in environmental resources. By giving prospective plaintiffs a defined place to stand, property rules can encourage greater protection of environmental resources.

I. ENVIRONMENTAL CITIZEN SUITS

Since the late 1960s, environmental activist groups have used state and federal courts to steer the course of environmental policy.[12] Several groups, including the Natural Resources Defense Council (NRDC) and Sierra Club Legal Defense Fund (since renamed the

11. As discussed *infra* Part I.B, there has been little empirical work on the actual effects of environmental citizen suits on environmental protection. What work has been done suggests the environmental value of citizen suits under current law is overrated.

12. This development is briefly summarized in JONATHAN H. ADLER, ENVIRONMENTALISM AT THE CROSSROADS 42-48 (1995).

Earthjustice Legal Defense Fund), were formed for precisely this purpose. Over time, environmental litigators have demonstrated that legal victories in the right cases can have profound effects nationwide. To some environmental activists, "litigation is the most important thing the environmental movement has done" since the early 1970s.[13] Most major federal environmental laws contain citizen-suit provisions. As a result, environmental citizen suits are now "a central element of American environmental law."[14]

A. *Theory*

Most environmental regulations are premised upon the theory of "market failure."[15] In the simplest of terms, markets "fail" to account for the external environmental costs—"externalities"—produced by various activities, from the production of steel and generation of power to the disposal of waste and hauling of freight.[16] When a factory pollutes, for example, the costs are "externalized;" they are imposed upon others, presumably without their consent. Environmental impacts receive insufficient attention in the marketplace because the costs of these impacts are not accounted for in the price signals that regulate market transactions. Government intervention in the form of regulations or fiscal instruments is required to constrain private actions that would otherwise cause environmental harm. Thus, various state and federal agencies are instructed to prevent private parties, typically private corporations, from emitting various substances into the air and water beyond politically prescribed limits. Under the Clean Water Act[17] and other laws, emissions beyond the limits prescribed in the Code of Federal Regulations or an individual facility permit are strictly prohibited, and punishable by substantial fines.

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13. *See* Tom Turner, *The Legal Eagles*, *in* CROSSROADS: ENVIRONMENTAL PRIORITIES FOR THE FUTURE 53 (P. Borelli ed., 1988) (quoting Rick Sutherland, then-executive director of the Sierra Club Legal Defense Fund).

14. *See* George Van Cleve, *Congressional Power to Confer Broad Citizen Standing in Environmental Cases*, 29 ENVTL. L. REP. 10,028, 10,028 (Jan. 1999). *See also* Echeverria & Zeidler, *supra* note 7, at 1 (arguing that citizen suits are "one of the basic features of our nation's environmental protection system").

15. *See*, *e.g.*, TOM TIETENBERG, ENVIRONMENTAL AND NATURAL RESOURCE ECONOMICS 51-54 (3d ed., 1992). For an alternative framework, see Fred L. Smith, Jr., *Markets and the Environment: A Critical Reappraisal*, 13 CONTEMP. ECON. POL'Y 62 (1995) and *infra* Part IV.

16. Of course, few analysts ever recommend government intervention to assist in the internalization of positive externalities.

17. Federal Water Pollution Control (Clean Water) Act, 33 U.S.C. § 1251 (1994 & Supp. IV 1998).

There are reasons to suspect that the current regulatory regime is itself far from optimal. Political institutions are no less prone to "failure" than markets.[18] Even if one assumes that Congress has enacted the ideal legislative framework for addressing pollution problems, these rules must be implemented and enforced. Regulatory agencies face various hurdles that can limit their ability to provide the optimal level of enforcement. In particular, agencies are constrained by scarce resources, limited information, and political pressures. This is as true in the environmental field as it is in any other.[19] For this reason, starting in 1970 Congress enacted environmental citizen-suit provisions to help address these concerns by enabling local citizens and environmental groups to supplement governmental enforcement efforts.[20] Congress sought to "extend[] the concept of public participation to the enforcement process."[21] This participation would include the right to second-guess governmental enforcement decisions. As Cass Sunstein observed, the citizen-suit device is "a mechanism for controlling unlawfully inadequate enforcement of the law."[22]

Tens of thousands of facilities are subject to federal environmental regulations nationwide. On any given day, a substantial portion of these facilities violates the technical requirements imposed by environmental regulations. Given the vast number of regulatory violations, "[i]t is not feasible to assume that the government is going to engage in the inspections and the enforcement necessary to ensure compliance with the standards."[23] Allowing for citizen suits theoretically fills the void by deputizing countless private citizens and activist groups to act as private attorneys general without any public oversight.

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18. *See*, *e.g.*, JAMES BUCHANAN, EXPLORATIONS INTO CONSTITUTIONAL ECONOMICS 28 (1989) (noting that insofar as "markets fail, . . .'politics fails' when evaluated by the same criteria").

19. *See* David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority Is Shared by the United States, the States, and Their Citizens?*, 54 MD. L. REV. 1552, 1560 (1995).

20. For example, Congress included citizen-suit provisions in the Clean Water Act to ensure that "if the Federal, State, and local agencies fail to exercise their enforcement responsibility, the public is provided the right to seek vigorous enforcement action." *See* S. REP. NO. 92-414, at 64 (1972). "Congress . . . recognized that government enforcement alone would not be sufficient to insure that the goals were met." Hodas, *supra* note 19, at 1555.

21. *See* 116 CONG. REC. 32, 903 (1970) (statement of Sen. Muskie).

22. *See* Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 165 (1992).

23. Richard Lazarus, *Panel II: Public vs. Private Regulation*, 21 ECOLOGY L.Q. 431, 472 (1994).

Centralized regulatory agencies are further limited in their ability to provide optimal enforcement of environmental regulations because they have limited information. The environmental impact of various activities will vary from place to place, and local knowledge and expertise is necessary to identify those environmental impacts which are of greatest concern. This sort of location-specific information is inherently beyond the reach of centralized regulatory agencies.[24] Local citizen groups, on the other hand, may be in a better position to observe these effects and act accordingly.

Citizen suits also can operate to prevent political considerations within the executive department from limiting enforcement activities.[25] In their *amicus curiae* brief submitted in the *Laidlaw* case, John Echeverria and Jon Zeidler argue that "[t]he citizen suit provision of the Clean Water Act represents a reasonable and entirely legitimate effort by Congress to promote effective implementation of the Act and to counteract the danger that the regulated community could successfully undermine the Act during the administrative implementation process."[26] In this sense, citizen suits can guard against "agency capture."[27] According to the late Judge Skelly Wright, one aim of environmental citizen suits is "to see that important legislative purposes heralded in the halls of Congress are not lost or misdirected in the vast hallways of the federal bureaucracy."[28] Since citizen-suit provisions entitle members of the public at large to bring suit, subject to minimal constraints, there is little danger that political considerations will prevent the initiation of a suit necessary to address pressing environmental harm.

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24. *See* HENRY N. BUTLER & JONATHAN R. MACEY, USING FEDERALISM TO IMPROVE ENVIRONMENTAL POLICY 27 (1996) ("Federal regulators never have been and never will be able to acquire and assimilate the enormous amount of information necessary to make optimal regulatory judgments that reflect the technical requirements of particular locations and pollution sources.").

25. Some would argue that the nature of executive authority should include the authority to make "political" judgments about how to allocate prosecutorial resources.

26. *See* Brief Amicus Curiae for Americans for the Environment at 2, Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167 (2000) (No. 98-822).

27. *See*, *e.g.*, Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement*, 34 BUFF. L. REV. 833, 843 (1985) ("The modern citizen suit provisions were first enacted at a time when 'capture' theories dominated scholarly and popular thought about regulation."); Hodas, *supra* note 19, at 1624; Sunstein *supra* note 22, at 192-93.

28. *See* Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n, 449 F.2d 1109, 1111 (D.C. Cir. 1971). It is worth noting that then-Judge Scalia commented that one aim of limiting standing is to ensure that some actions *are* "lost or misdirected" within the federal bureaucracy. *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 897 (1983).

There may also be broader institutional limits on the public's ability to mobilize countervailing political pressure against government agencies. "It is a commonplace observation that the diffuse nature of environmental harms makes environmental interests relatively difficult to organize into an effective political force."[29] More broadly, some argue that "as a result of free rider problems and the high costs of collective political action, effective expression of the broad public interest in environmental protection faces major obstacles in the American political system."[30] Citizen-suit provisions address this concern by enabling a small group of individuals to enforce environmental regulations directly without any concern for political constraints.

Underlying all of these arguments is the idea that public-spirited activists and citizen groups concerned about local environmental problems will utilize environmental citizen-suit provisions; "environmental citizen-plaintiffs are supposed to be altruists."[31] Thus, environmental citizen-suit provisions, unlike those in other contexts, do not explicitly provide for "bounties" paid to the initiators of the suit. Attorneys' fees and litigation costs may be recovered and, under the Clean Water Act, suits may produce fines payable to the treasury, but (at least in theory) there is no direct payment to the group bringing the suit.[32] In theory, this should ensure that citizen suits are used primarily for the protection of environmental quality.

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29. Echeverria & Zeidler, *supra* note 7, at 8.

30. *See* Brief Amicus Curiae of Americans for the Environment at 1-2, *Laidlaw*, (No. 98-822). Of course, this has not stopped the profusion of environmental statutes and regulations over the past three decades. If the free rider problem is a substantial limitation on environmental protection, one must ask why so many environmental laws were enacted in the first place. *See* Daniel A. Farber, *Politics and Procedure in Environmental Law*, 8 J.L. ECON. & ORG. 59, 59 (1992) (noting that "from the perspective of positive political theory, the puzzle is not that Congress produces public goods such as clean air so inefficiently, but that Congress manages to produce any public goods at all"). One possible explanation is that environmental regulations benefit various special interests. *See* Todd J. Zywicki, *Environmental Externalities and Political Externalities: The Political Economy of Environmental Regulation and Reform*, 73 TUL. L. REV. 845, 856 (1999); ENVIRONMENTAL POLITICS: PUBLIC COSTS, PRIVATE REWARDS (Michael S. Greve & Fred L. Smith, Jr., eds., 1992). This thesis can explain the enactment of at least some environmental laws. *See* E. Donald Elliott et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313, 326-29 (1985) (discussing efforts by large automakers to preempt state regulations with uniform federal standards); *See generally* Jonathan H. Adler, *Clean Politics, Dirty Profits: Rent-Seeking Behind the Green Curtain*, *in* POLITICAL ENVIRONMENTALISM: GOING BEHIND THE GREEN CURTAIN (T. Anderson ed., 2000).

31. *See* Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339, 341 (1990).

32. This does not mean that groups utilizing citizen-suit provisions cannot reap economic

B. *Practice*

Every major environmental statute contains a citizen-suit provision save one.[33] These provisions authorize private suits against private parties that violate federal law, as well as against the EPA Administrator for failing to perform her statutorily mandated duties. The standard environmental citizen-suit provision authorizes "any person" or "any citizen" to bring suit against "any person" that is allegedly violating the environmental law in question.[34] As a practical matter, this means that the vast majority of companies are potential citizen-suit targets. In a recent survey of corporate counsels, only 30 percent believed it was possible for their firm to comply fully with state and federal environmental requirements.[35] As the authors of one environmental treatise point out, "it is virtually impossible for a major company . . . to be in complete compliance with all regulatory requirements" and yet "virtually every instance of noncompliance can be readily translated into a violation."[36]

Typically, the citizen must notify the federal EPA, the state regulatory agency, and the entity alleged to be in violation of the law sixty days before commencement of the suit.[37] The notice requirement affords the subject of the suit "an opportunity to bring itself into

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rewards. *See infra* notes 54-57.

33. *See* Air Pollution Prevention and Control (Clean Air) Act, 42 U.S.C. § 7604(a) (1994); Federal Water Pollution Control (Clean Water) Act, 33 U.S.C. § 1365(a) (1994); Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9659(a) (1994); Emergency Planning and Community Right to Know Act (EPCRA) 42 U.S.C. § 11046(a)(1) (1994); Resource Conservation and Recovery Act (RCRA) 42 U.S.C. § 6972 (1994); Safe Drinking Water Act, 42 U.S.C. § 300j-8 (1994 & Supp. IV 1998); Toxic Substances Control Act, 15 U.S.C. § 2619 (1994). The one major environmental statute without a citizen-suit provision is the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136 et seq. (1994).

34. The Clean Water Act's formulation is a bit different. Tracking the language of the Supreme Court's *Sierra Club v. Morton*, 405 U.S. 727 (1972), decision, the CWA provides jurisdiction over suits filed by "a person or persons having an interest, which is or may be adversely affected." *See* 33 U.S.C. § 1365(g) (1994).

35. Figure cited in Marianne Lavelle, *Environmental Vise: Law, Compliance*, NAT'L L.J., August 30, 1993, at S1.

36. *See* CHRISTOPHER HARRIS ET AL., ENVIRONMENTAL CRIMES 1-8 (1992). As the Environmental Protection Agency similarly observed, "a regulated hazardous waste handler must do hundreds of things correctly to fully comply with the regulations, yet doing only one thing wrong makes the handler a violator." *See* U.S. ENVIRONMENTAL PROTECTION AGENCY, THE NATION'S HAZARDOUS WASTE MANAGEMENT PROGRAM AT A CROSSROADS: THE RCRA IMPLEMENTATION STUDY 36 (July 1990).

37. The Clean Water Act and the RCRA contain exceptions to this requirement for suits against the EPA Administrator under specified provisions. *See* 33 U.S.C. § 1365(b) (1994); 42 U.S.C. § 6972(c) (1994).

complete compliance . . . and thus . . . render unnecessary a citizen suit."[38] If the EPA or relevant state agency has already begun enforcement action against the alleged violator before the suit is commenced, the citizen suit is barred. This is true even if the state or federal prosecution began *after* notice of intent to sue was given. One purpose of the notice provision is to enable the relevant state or federal regulatory agency to preclude the citizen suit with an enforcement action of its own. In practice, however, such preclusion rarely occurs, especially by the federal government.[39]

Most environmental citizen-suit provisions only provide for injunctive relief and legal costs, (including attorneys' fees) for successful plaintiffs. Whether the suit is against a regulatory agency or a private party, the relief is aimed at remedying the permit violation or other illegal action. In this regard the Clean Water Act (CWA) and Clean Air Act (CAA), as amended in 1990, are exceptions. Under the CWA and CAA, environmental citizen-suit plaintiffs are empowered to sue private firms for civil fines payable to the treasury. In the case of the CWA, these fines can be substantial, up to $25,000 per violation, per day.[40] In theory, these fines help to deter future violations.[41]

The CWA's regulatory framework, in particular its combination of reporting requirements and strict liability for permit violations, is particularly favorable to prospective plaintiffs. Companies are required to obtain permits, as well as to report on their emissions. A violation of the Act is determined by an exceedence of the emission level specified in the permit, not the degradation of water quality.[42] As one commentator noted, "if the discharge violates the explicit terms of the permit, the discharger has violated the CWA, *even if there is no scientifically identifiable adverse impact on the receiving water*."[43] Once liability is so determined, courts are instructed to as-

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38. *See* Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 60 (1987) (applying the Clean Water Act).

39. *See* Boyer & Meidinger, *supra* note 27, at 897-98. In the *Laidlaw* case, Friends of the Earth's citizen suit was almost barred by the "diligent prosecution" provisions by the South Carolina Department of Health and Environmental Control's filing of a complaint. The complaint, however, was drafted and filed by Laidlaw on behalf of the state agency. The district court found this to be less-than-diligent prosecution of Laidlaw's technical violations. *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 890 F. Supp. 470, 498 (D.S.C. 1995).

40. *See* 33 U.S.C. § 1319(d) (1994).

41. According to the Court, "all civil penalties have some deterrent effect." *See* Hudson v. United States, 522 U.S. 93, 102 (1997).

42. *See* 33 U.S.C. § 1311(a) (1994).

43. *See* Hodas, *supra* note 19, at 1565 (emphasis added).

sess civil fines against the offending company.[44] The "ease of developing cases from public records" under the CWA most likely explains why more citizen suits are filed under CWA than under any of the other major media-specific environmental laws.[45] This structure also facilitates the selection of enforcement targets for non-environmental reasons.

The ostensible purpose of environmental citizen-suit provisions is to empower local groups to ensure that federal regulations are enforced and that environmental problems are corrected. When federal regulators overlook local environmental deterioration or are compromised by interest group pressure, local groups in affected areas are empowered to trigger enforcement themselves. Empirical research suggests that citizen suits have not worked out that way. Historically national environmental groups have filed a large proportion of environmental citizen suits. In Michael Greve's review of citizen-suit activity under the Clean Water Act in the 1980s, he found that five national organizations—the Natural Resources Defense Council, Sierra Club Legal Defense Fund, Atlantic States Legal Foundation, Public Interest Research Group, and Friends of the Earth—were responsible for the majority of suits filed from May 1984 to September 1988.[46] A later review found that "the vast majority of penalties collected between 1988 and 1993—$9.3 million out of a total of $11.3 million—were obtained in cases brought by four respected (if not always liked) groups who carefully screened potential cases."[47] While local groups filed suits as well, these were in the minority.

More interesting to note is that the pattern of litigation did not correlate with environmental concerns. The national groups filed most of their suits against private industry even though municipalities and agriculture were responsible for a greater share of water pollution. Indeed, between 1984 and 1988, there were over six times as many CWA citizen suits against industrial facilities as there were against governmental entities. "This pronounced preference for proceeding against private industry cannot be explained by environmental considerations—municipal facilities cause far more water

44. Under the Clean Water Act, violators "shall" be subject to civil fines. *See* 33 U.S.C. § 1319(d).

45. *See* Adeed Fadil, *Citizen Suits Against Polluters: Picking Up the Pace*, 9 HARV. ENVTL. L. REV. 23, 66 (1985).

46. *See* Greve, *supra* note 31, at 353.

47. *See* Peter H. Lehner, *The Efficiency of Citizens Suits*, 2 ALB. L. ENVTL. OUTLOOK 4, 8 (1995).

pollution than private industry, and violate their [CWA] permits far more frequently."[48] Citizen suits are indeed filed against municipal dischargers, but what little empirical work has been done on the subject suggests they are in the minority, despite the large share of water pollution that comes from municipal sources.

The CWA regulatory regime facilitates enforcement of permit terms as it is relatively easy to determine whether the permit has been violated—and extremely easy to prevail in court once a permit violation is found. It does not, however, ensure that any given enforcement action results in environmental improvement. Compliance with permit terms does not ensure water quality, as the permit terms do not correlate with those measures that are necessary to maintain water quality. While some 6,700 point sources nationwide are subject to NPDES permits, these permits only limit the emissions of the largest emitters—the point sources. For many water bodies the greatest sources of pollution are largely uncontrolled non-point sources. Thus, full enforcement of the Clean Water Act will not necessarily maximize environmental protection.[49]

Existing citizen-suit provisions also expand the likelihood that enforcement actions will be taken without regard to environmental benefits.[50] Government prosecutors, unlike private citizen plaintiffs, face budgetary and political constraints that limit their ability to prosecute every technical offense. As a result, government prosecutors are encouraged to focus their resources on the most egregious offenses.[51] Citizen-suit plaintiffs, on the other hand, do not face similar constraints. Their financial resources are certainly limited, but they face no significant political repercussions for setting unwise enforcement priorities. Moreover, by reducing the costs of litigation against noncomplying sources, and increasing the likelihood of victory when a suit is filed, the citizen-suit regime facilitates greater enforcement

48. Greve, *supra* note 31, at 362.

49. As some analysts have observed, "none of the available data" can demonstrate that water quality nationwide is demonstrably better than it would have been absent the Clean Water Act. *See* A. Myrick Freeman, III, *Water Pollution Policy*, *in* PUBLIC POLICIES FOR ENVIRONMENTAL PROTECTION 97, 114 (Paul Portney ed., 1990). *See also* Roger E. Meiners & Bruce Yandle, *Clean Water Legislation: Reauthorize or Repeal? in* TAKING THE ENVIRONMENT SERIOUSLY 73, 86-87 (Roger E. Meiners & Bruce Yandle eds., 1993).

50. See discussion *infra* notes 111-115 and accompanying text.

51. Although, it should be noted that political and other considerations can distort governmental enforcement priorities as well. *See*, *e.g.*, Jonathan H. Adler, *Bean Counting for a Better Earth: Environmental Enforcement at the EPA*, REG., Spring 1998. Nonetheless, political agencies remain more accountable to the general public for their enforcement decisions than private citizen-suit plaintiffs.

for enforcement's sake, irrespective of any environmental benefit. This creates strong incentives for even the most ecology-minded environmental activist to consider the relative ease of victory when setting litigation priorities.

Just because there is no tangible environmental benefit from many environmental citizen suits does not mean that such suits do not benefit environmental organizations. Environmental activist organizations have "organizational incentives to bring suits for the purpose of attracting or retaining members."[52] Insofar as courts or legislatures remove barriers to citizen suits, the relative role of such motivations should increase.[53] Greve's research suggests that corporations were the objects of most citizen suits in the 1980s because litigating groups can profit from such litigation by obtaining attorneys' fees or settlements that can be used to finance subsequent litigation or other environmental initiatives. "Substantial portions of [citizen suit] settlements constitute direct transfer payments to environmental groups," including above-cost attorney's fees and payments to third-party environmental groups to fund conservation efforts.[54]

Defendants have ample reason to settle when faced with a citizen suit under the Clean Water Act or Clean Air Act. Liability for a permit violation is rarely in doubt. The maximum potential fines are substantial, and citizen-suit plaintiff attorneys' fees can be as well. Thus, when an environmental citizen-suit plaintiff offers to drop the suit in exchange for an environmental restoration project funded by the defendant, such an agreement is in both parties' interest. The cost to the defendant is lower than the fines, and the plaintiff gets to determine how the defendant's money is spent. Under the Clean Water Act, the EPA Administrator and Attorney General are to have 45-day notice of consent decree terms before they take effect in order to review the terms, but such review is fairly cursory in practice.

The result of this dynamic can be settlements of several million dollars or more; when the Sierra Club Legal Defense Fund sued the oil company Unocal, the settlement totaled over $5 million, including approximately $2.5 million for the Trust for Public Land, another non-profit environmental group.[55] A 1987 Natural Resources Defense Council suit against Bethlehem Steel produced similar gains for environmental activist groups. In addition to over $1 million in fines,

52. *See* Boyer & Meidinger, *supra* note 27, at 840.
53. *See id.*
54. *See* Greve, *supra* note 31, at 356.
55. *See id.* at 358.

Bethlehem was required to make sizeable contributions to the Trust for Public Lands ($200,000), the National Fish and Wildlife Foundation ($100,000), and Save Our Streams ($50,000).[56] These cases are not isolated. Rather, it appears that there have been "scores of citizen suits that have been settled in exchange for contributions to private environmental causes."[57]

In theory, environmental citizen-suit provisions are designed to supplement inadequate government enforcement of environmental laws with altruistic private initiatives. The pattern of litigation suggests otherwise. The only empirical analyses of environmental citizen-suit activity suggest that national advocacy groups file the lion's share of suits, and that most suits are filed against the least significant sources. By removing any need for the consideration of actual environmental impacts, and driving down the costs of establishing defendant liability, the citizen-suit provisions encourage the filing of suits against vulnerable plaintiffs, irrespective of the environmental benefit. Under the CWA, the prospect of large fines further facilitates rent extraction, through private settlements, again with little need to consider the environmental results. "[O]ne need not characterize these private recoveries as extortion to recognize how they subvert the intended scheme of citizen suits."[58]

While some citizen suits are no doubt motivated by pure intentions, and some certainly produce tangible environmental gains, it is not clear how much environmental benefit citizen-suit provisions actually provide. As discussed below, there is also reason to believe that excessive citizen-suit litigation may produce environmental harm. If so, liberalized standing rules may not yield net environmental gains.

II. STANDING FROM LUJAN TO LAIDLAW

For a suit against an alleged polluter to proceed, a prospective plaintiff must have standing. This is true whether the prospective plaintiff seeks to file a common law nuisance action or a statutorily authorized environmental citizen suit. Under the common law, standing is based upon a particularized injury suffered by the plaintiff. Citizen-suit standing, on the other hand, is a function both of judicial interpretations and legislative enactment. Congress's power to be-

56. *See* ADLER, *supra* note 12, at 46. *See also* Frank Cross, *Rethinking Environmental Citizen Suits*, 8 TEMP. ENVTL. L. & TECH. J. 55, 70-71 (1989) (discussing citizen-suit settlements that included funding for the Izaak Walton League and other environmental groups).

57. *See id*. at 71.

58. *Id*.

stow standing upon citizens to act as "private attorneys general" is limited by both Constitutional and prudential considerations. Even where Congress's intent to grant standing is clear, courts can only exercise jurisdiction over the claim if the plaintiff has "a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy."[59]

The *Lujan* and *Laidlaw* decisions represent two fundamentally different approaches to citizen-suit standing. Under *Lujan*, the requirement of a tangible, particularized injury to the plaintiff—"an injury in fact"—is an absolute prerequisite for standing under the Constitution.[60] Under *Laidlaw*, however, more speculative claims of perceived threats to a statutorily recognized interest from governmental action, suffice to establish a "sufficient stake" in the matter. The cases cannot be reconciled without undermining the doctrinal basis of one, the other, or both.[61]

It is not the aim of this article to assess the constitutional validity or doctrinal consistency of the Supreme Court's various standing opinions. Rather, it is to assess the likely environmental impacts of the *Lujan* and *Laidlaw* approaches to standing represented by *Lujan* and *Laidlaw* respectively. Because the two decisions are so different in their premises and potential applications, they create two different sets of incentives for potential plaintiffs in environmental citizen suits.

A. *Lujan – Injury in Fact*

In *Lujan v. Defenders of Wildlife*,[62] the plaintiffs sought to challenge a Fish & Wildlife Service (FWS) determination that the Endangered Species Act's prohibition of federal activities "likely to jeopardize the continued existence of any endangered species"[63] is inapplicable to actions in foreign countries. In particular, the citizen-suit plaintiffs—several environmental groups and some of their members—alleged that the FWS' policy would allow continued federal funding of overseas projects that threatened endangered species in

59. *See* Sierra Club v. Morton, 405 U.S. 727, 731 (1972).

60. For the purposes of this analysis, I am highlighting Justice Scalia's opinion for the Court. Insofar as the Court's holding was moderated by Justice Kennedy's concurring opinion, the *Lujan*/*Laidlaw* dichotomy is less stark.

61. Although some of my colleagues at the symposium seek to distinguish the cases and reconcile their holdings, the policy implications of the opinions authored by Justice Scalia in *Lujan* and Justice Ginsburg in *Laidlaw* could not be more different, as Justice Scalia's *Laidlaw* dissent makes clear. *See Laidlaw*, 528 U.S. at 198 (Scalia, J., dissenting).

62. 504 U.S. 555 (1992).

63. *See* 16 U.S.C. § 1536(a)(2) (1994).

Egypt and Sri Lanka. Plaintiffs' standing was asserted through the affidavits of two members of Defenders of Wildlife alleging that they had visited the habitats of imperiled species, particularly the Nile crocodile and Asian elephant, and that they hoped to do so again.

In rejecting the plaintiff's standing, the *Lujan* court adopted a limited approach to citizen-suit standing focused on identifying the particular grievance suffered by the plaintiff. The court held that the permissible scope of standing conferrable by Congress is narrowly circumscribed by the limits of Article III.[64] In the *Lujan* court's words, the "irreducible constitutional minimum of standing" comprises "three elements:" 1) "the plaintiff must have suffered an 'injury in fact,'" 2) a "causal connection between the injury and the conduct complained of," and 3) a likelihood that the "the injury will be 'redressed' by a favorable decision."[65] The "injury in fact" must itself be "concrete and particularized," and "actual or imminent" as opposed to "conjectural or hypothetical"[66] In this sense, *Lujan* built upon the court's holding in *Allen v. Wright* that the standing requirement "has a core component derived directly from the Constitution. A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."[67]

Lujan clearly focuses on a particularized injury, suffered by an individual or other legally cognizable entity, not on an injury to some common entitlement in a given regulatory process or outcome. Under *Lujan*, whether or not a party has standing "depends considerably on whether the plaintiff is himself an object of the action (or foregone action) at issue."[68] Where the plaintiff is the object of the government's action, there is "little question" that there has been an injury in fact, and the plaintiff has standing.[69] On the other hand, in those cases in which "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *some-*

64. Numerous commentators have made powerful arguments that the *Lujan* court's approach to Article III standing was "ahistorical" and not based on the text of the Constitution. *See*, *e.g.*, Sunstein *supra* note 22; Steven L. Winter, *What if Justice Scalia Took History and the Rule of Law Seriously?*, 12 DUKE ENVTL. L. &. POL'Y F. 155, 163 (2001). The constitutional basis for the *Lujan* holding, or lack thereof, is beyond the scope of this article.

65. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

66. *See id*. at 560.

67. *See* 468 U.S. 737, 751 (1984).

68. *See Lujan*, 504 U.S. at 561.

69. *See id*. at 561-62.

one else, much more is needed."[70] Moreover, on prudential grounds, the courts require that "a plaintiff's grievance must arguably fall within the zone of interests protected *or regulated* by the statutory provision . . . invoked in the suit."[71] According to the decision, mere assertions that a plaintiff has used lands governed by a given regulatory decision, or plans to one day visit the habitat of a species that may be endangered by a governmental action, are simply insufficient.[72]

The standing inquiry is designed to provide "an answer to the very first question that is sometimes rudely asked when one person complains of another's actions: 'What's it to you?'"[73] Without a concrete injury in fact, the plaintiff does not have a stake in the outcome of the case or controversy. If the plaintiff wins, there is no guarantee that she is better off than she was before, and if the plaintiff loses, it is uncertain whether she will be any the worse for wear. When a plaintiff does not have such a personal stake in the outcome of the case or controversy, there is less assurance that the plaintiff is motivated by a genuine concern for protecting the interest that allegedly has been harmed. In the environmental context, when the plaintiff is not required to have a stake in a given environmental resource, there is less assurance that the interest motivating the plaintiff is the well-being of the threatened resource, rather than some other interest.[74]

"Pure" citizen suits, such as when a political activist sues to force an agency action or extract rents from a private firm merely because the letter of the law has been violated, are clearly precluded by the *Lujan* approach. The standing requirement set forth in *Lujan* cannot be satisfied by a "congressional conferral upon *all* persons of an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by the law," such as the "right" created by the various environmental citizen-suit provisions.[75] The injury suffered by the plaintiff in such cases is that suffered by each and every citizen of the country, or at least all those in the generalized vicinity of the alleged regulatory violation, whereas the *Lujan* approach requires "some sort of personal harm that sets the plaintiff apart from

70. *See id*. at 562.

71. Bennett v. Spear, 520 U.S. 154, 162 (1997) (emphasis added).

72. *See generally Lujan*, 504 U.S. at 563-64; Lujan v. National Wildlife Fed'n, 497 U.S. 871, 886-889 (1990).

73. *See* Scalia, *supra* note 28, at 882

74. For examples of this, see *infra* Part III.A.

75. *See Lujan*, 504 U.S. at 573; *see also* Sunstein, *supra* note 22, at 226.

the world at large. . . ."[76] In this sense, the *Lujan* court limited the scope of likely motivations for citizen-suit plaintiffs by requiring that plaintiffs have a close, demonstrated relationship between their concrete and particularized interests and the government action or inaction which they wish to challenge or supplement with private enforcement activity.[77] In other words, *Lujan* precludes standing when no tangible interest of the plaintiff is impacted in a measurable way. *Laidlaw* adopted a different approach.

B. *Laidlaw – Injury in Fiction*

The plaintiffs in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.* filed suit alleging that a Laidlaw facility had repeatedly violated its NPDES permit under the Clean Water Act. In particular, plaintiffs alleged that "Laidlaw consistently failed to meet the permit's stringent 1.3 ppb (parts per billion) daily average limit on mercury discharges" into the North Tyger River.[78] The district court found that Laidlaw had violated its permit limits nearly 500 times over several years, yet there was *no* evidence that Laidlaw's discharges had *any* impact on the river's water quality.[79] Indeed, the district court explicitly found that the "permit violations at issue did not result in *any* health risk or environmental harm" and that the river's water quality exceeded the quality necessary for recreation and swimming.[80]

To support their claim for standing, the citizen-suit plaintiffs submitted affidavits from local residents expressing their subjective fears that Laidlaw's discharges *could* be affecting water quality, despite the absence of any scientific evidence to that effect. Due to their fears, the plaintiffs claimed that they used the river less often than they might have had Laidlaw not violated its permits. These conjectural apprehensions, lacking any basis in the district court's

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76. MICHAEL S. GREVE, THE DEMISE OF ENVIRONMENTALISM IN AMERICAN LAW 45 (1996). In this sense the *Lujan* approach to standing is quite similar to that required for a public nuisance claim under the common law.

77. As one commentator noted, "stricter standing rules could even lead environmentalists to think differently both about who is affected by the degradation of an environmental resource and about how to resolve the trade offs inherent in many environmental solutions." *See* Carlson, *supra* note 9, at 936.

78. *See Laidlaw*, 528 U.S. at 176.

79. *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 956 F. Supp. 588, 602 (D.S.C. 1997).

80. *See id*. The district court found that "the overall quality of the river exceeds levels necessary to support . . . recreation in and on the water." *See id*. at 600.

findings of fact, were sufficient for seven members of the Supreme Court to rule that the plaintiffs had standing. "Injury in fact" became injury in fiction.

While professing fealty to the Supreme Court's standing precedents, the approach adopted by the *Laidlaw* majority is starkly different from that of the *Lujan* court in that it emptied the injury in fact requirement of any real substantive content. In *Laidlaw*, the Supreme Court *explicitly* held that there need not be any environmental harm to support citizen-suit standing. An individual plaintiff could suffer a sufficient injury from a technical violation of a NPDES permit, even though the permit violation resulted in no measurable impact on water quality. The plaintiffs' mere knowledge that the permit was violated, and the resulting subjective apprehensions, are sufficient.

The "harm" in *Laidlaw* was not any measurable change in water quality, scientifically hypothesized increase in risk from ingestion of regulated chemicals, or harmless physical invasion of a defined property interest. The harm recognized by the Court was the lessening of the "aesthetic and recreational values of the area" brought about by nothing more than the plaintiffs' beliefs that the repeated violation of NPDES permits had a significant environmental impact. That the plaintiffs placed an indeterminate value on the North Tyger River, and that they believed full enforcement of the Clean Water Act was required to protect the river, meant that they could be harmed by Laidlaw's "unlawful conduct."[81] As the court explained:

> The relevant showing for purposes of Article III standing, however, is not injury to the environment, but injury to the plaintiff. To insist upon the former rather than the latter as part of the standing inquiry . . . is to raise the standing hurdle higher than the necessary showing for success on the merits in an action alleging noncompliance with an NPDES permit.[82]

A technical violation of an environmental permit requirement could produce no measurable impact, but nonetheless support standing if the citizen-suit plaintiffs claim to have modified their behavior

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81. In this sense, *Laidlaw* effectively provides for standing based upon existence value, and enables plaintiffs to litigate absent any tangible stake in the litigation's outcome. This is highly problematic in the context of environmental law. For a critique of the use of existence value in environmental policy, see Donald J. Boudreaux et al., *Talk Is Cheap: The Existence Value Fallacy*, 29 ENVTL. L. 765 (1999). As the authors note, "[s]ound government policy cannot be grounded upon allegations of subjective utility and disutility divorced from the obligation to support those policies with action." *See id*. at 793.

82. *Laidlaw*, 528 U.S. at 181.

as a result of their fears.[83] This is sufficient for the plaintiff to claim injury. Thus, under *Laidlaw*, the injury in fact requirement is not a substantive hurdle, but merely a technical pleading requirement that can be satisfied with something as simple as an affidavit alleging "fear" or "concern" about a given legal violation in the vicinity. Such harm is "fairly traceable" to the defendant's conduct, in that the defendant's illegal action causes plaintiffs' fear. Such harm is presumably redressable as well in that a favorable verdict will make the plaintiffs feel better. But the "harm" itself is merely that someone broke the law in the general vicinity of the plaintiffs. This is a meager basis upon which to confer standing.

The Court majority acknowledged that standing rules operate "to ensure, among other things, that the scarce resources of the federal courts are devoted to those disputes in which the parties have a concrete stake."[84] Yet if there need not be any environmental harm, then there is no assurance that allowing standing results in any tangible environmental benefit. And if there is no tangible environmental benefit from the decision, it is difficult to see what "concrete stake" the plaintiffs could have in the outcome, other than a generalized interest in seeing the faithful execution of the laws. Whereas the Court typically denies standing on the basis of such diffused injuries, *Laidlaw* makes an exception for environmental law. The relevant question is whether the environment will be any the better for it.

III. CITIZEN SUITS & ENVIRONMENTAL PROTECTION: DOES STANDING DELIVER?

Expanding opportunities for environmental activist groups to enforce environmental regulations through citizen suits will inevitably tighten the existing regulatory regime. Yet given the failings of the current generation of command-and-control environmental regulations, this may not translate into greater environmental protection. As Cass Sunstein notes, the citizen suit "is probably best understood as a Band-Aid superimposed on a system that can meet with only mixed success."[85] Insofar as the environmental regulatory scheme is ill-equipped to address given environmental concerns, increasing the stringency of enforcement will do little, if anything, to advance eco-

83. As the dissent noted, the plaintiffs' only real showings were "unsupported and unexplained affidavit allegations of 'concern'" and that the "affiants have established nothing but 'subjective apprehensions.'" *See* 528 U.S. at 199 (Scalia, J., dissenting).

84. *Id*. at 191.

85. Sunstein, *supra* note 22, at 222.

logical values. Insofar as detailed and complex regulatory provisions provide opportunities for special-interest rent-seeking, citizen suits can facilitate further exploitation outside of the legislative arena. Insofar as existing environmental programs embody mistaken priorities, citizen suits can amplify the improper emphases. And insofar as the existing regulatory regime is too rigid to allow for environmentally beneficial innovation, citizen suits threaten to ossify the process even more. Indeed, as this section will attempt to show, increasing the volume of environmental citizen-suit litigation would well do less good than harm.

A. *Interests and Incentives*

Environmental citizen suits facilitate and encourage litigation over paperwork violations and permit exceedences, which may or may not impact environmental quality. Citizen suits "encourage environmental litigants to supplement government enforcement activities."[86] They do not, however, provide any incentive to ferret out new and undetected violations.[87] Why bother investigating potential environmental harm when a technical violation is sufficient to support summary judgment? Why search for clandestine violations when permit reporting requirements force companies to provide potential plaintiffs with all the data necessary to prove a technical violation? As a result, the "incentive of the private attorney general under the current system is . . . to focus on those pollution sources which have already been identified in government filings, which are thus the cheapest and easiest to proceed against in a lawsuit."[88] For this reason, the priorities of environmental litigation outfits and individual citizen-suit plaintiffs will not always align with the public's interest in greater environmental protection.

Citizen-suit provisions create incentives for environmentalist plaintiffs to pursue their self-interest, in the form of settlements, remediation projects, and attorneys' fees, or to pursue symbolic victories with other value.[89] Insofar as there is no real injury in fact requirement, there is little incentive to redress particular environmental

86. Farber, *supra* note 30, at 73.

87. As noted *infra* notes 139-141, they also discourage such investigations by regulated entities as well.

88. Jeremy Rabkin, *Government Lawyering: The Secret Life of the Private Attorney General*, 61 LAW & CONTEMP. PROBS. 179, 191 (1998).

89. Citizen suits represent a relatively low cost way for environmental activist groups to exercise "agenda control" or to otherwise advance ideological values without resort to the legislative process. *See* Zywicki, *supra* note 29, at 875.

harms. Indeed, prior to the *Lujan* decision, there is little reason to believe that many environmental citizen plaintiffs even spent much time considering the tangible environmental impacts of their suits. It was enough that a corporation had violated the law and that a successful legal challenge was possible.[90] Even commentators in favor of broad citizen-suit standing acknowledge that "the issue of harm to the individual is at best a tangential question in the litigation."[91]

The lack of a substantive injury in fact requirement not only shifts the incentives faced by those individuals that would consider suing, it also increases the potential for rent-seeking and the pursuit of other agendas.[92] As noted above, there is good reason to believe that at least some environmental litigation is motivated by economic concerns.[93] There is also substantial evidence that citizen-suit provisions are often aimed at something other than securing the values identified by the authorizing statute.[94]

Environmental citizen suits that purport to address one environmental concern may well be aimed at another matter entirely. For an example of this phenomenon, one need look no further than one of the most celebrated cases in environmental law—*TVA v. Hill*.[95] This case was ostensibly about saving the Tennessee Snail Darter, a fish species believed to be threatened by construction of the Tellico Dam. Yet the real aim of the *TVA v. Hill* litigation was not protecting the fish, but stopping the dam.[96] The Snail Darter merely provided a legal

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90. As one attorney for the Natural Resources Defense Council commented, prior to *Lujan* there was "a sense that the citizen suit provision [automatically] gave you standing, and you didn't need to do more than establish a violation of the statute." *See* Carlson, *supra* note 9, at 959 (quoting interview with Gail Ruderman Feuer).

91. * MERGEFORMAT *See id*. at 962.

92. Then-judge Antonin Scalia noted that the court's inquiry in *Calvert Cliffs Coordinating Committee v. Atomic Energy Commission* was so shallow that the plaintiff committee could have represented any interest ranging from local landowners to jealous federal agencies. *See* Scalia, *supra* note 28, at 885.

93. *See supra* notes 52-57 and accompanying text.

94. *See generally* A.H. Barnett & Timothy D. Terrell, *Economic Observations on Citizen Suit Provisions of Environmental Legislation*, 12 DUKE ENVTL. L. &. POL'Y F. 1 (2001).

95. 437 U.S. 153 (1978).

96. *See* Ike C. Sugg, *Caught in the Act: Evaluating the Endangered Species Act, Its Effects on Man and Prospects for Reform*, 24 CUMB. L. REV. 1, 49-50 (1993). Opponents of the dam sought to use every tool at their disposal to stop its construction, including suits under the National Environmental Policy Act (NEPA) and Endangered Species Act (ESA). *See id*. After the latter proved successful, Congress passed legislation specifically authorizing dam construction to proceed. *See id*. at 50. Litigation continued, however, as opponents filed suit alleging, among other things, that the dam would flood Native American burial grounds. *See* Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159, 1159 (6th Cir. 1980). Several years later, it would turn out that the ESA claim was specious, as the species in question was never endangered. *See*

foothold for the campaign. In a similar fashion, environmentalist litigation under the Endangered Species Act over the northern spotted owl in the Pacific Northwest was motivated more by a desire to halt timber cutting than to save any endangered species.[97] This served the interests of both environmental activists who sought to prevent logging, as well as private timber companies that benefited from the rise in timber prices brought about by such restrictions.[98]

Economic interest groups have also been able to take advantage of environmental citizen suits due to broad standing rules. Incinerator companies, for example, have funded citizen suits against cement kilns by purportedly local, "grass-roots" groups. In November 1995, the newly formed Pennsylvania Environmental Enforcement Project (PEEP) filed suit against Keystone Cement Co. alleging that the burning of hazardous waste at Keystone's Bath, Pennsylvania, kiln posed an imminent threat to public health. Although a small and purportedly grass-roots group, among PEEP's lawyers was former Rep. James Florio, the chief lobbyist for the Alliance for Responsible Thermal Treatment, an incinerator association.[99] Keystone's lawyers became suspicious and sought discovery of PEEP's funding sources and the scientific bases for its allegations. The suit was soon dismissed, but not before Keystone learned that PEEP had received $250,000 from the Environmental Responsibility Fund (ERF), which was, in turn, controlled by a subsidiary of Rollins Environmental Services, a major incinerator operator.[100] This is unlikely to have been the only instance in which environmental citizen suits were utilized by

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Sugg, *supra*, at 50.

97. As Andy Stahl of the Sierra Club Legal Defense Fund explained at a law clinic in 1988, "The ultimate goal of litigation is to delay the harvest of old-growth forests so as to give Congress a chance to provide specific statutory protection for those forests." *See* Sugg, *supra* note 96, at 53. The spotted owl, in Stahl's words, was a "surrogate" in that it provided a legal mechanism to halt the cutting. *Id.* * MERGEFORMAT

98. *See Owls, of All Things, Help Weyerhauser Cash in on Timber*, WALL ST. J., June 24, 1992, at A1 (noting that Weyerhauser, a large owner of private timber land, employed wildlife biologists to locate spotted owls on federal land so as to trigger restrictions on timber cutting).

99. *See* Bruce Rubenstein, *Outraged Citizens or Public Relations Ploy?*, CORP. LEGAL TIMES (December 1996).

100. *See id.* This information was kept confidential under court seal until Keystone sued to force public disclosure of Rollins' use of environmental groups to attack the competition. In lifting the protective order, the federal district court declared that "when a corporation attempts to use the litigation process to injure a competitor under the guise of a public interest lawsuit, this Court will remove the shield of confidentiality protecting that masquerade and allow the public to judge the merits of the dispute with full knowledge of the debate's participants." *Pennsylvania Envtl. Enforcement Project v. Keystone Cement*, Civil Action No. 96-588 (D.C. Del. 1997), at 9.

special interests seeking economic gain.[101]

Insofar as citizen-suit standing is not grounded in the demonstration of an injury in fact, there is little to anchor citizen-suit plaintiffs' motivations to environmental protection. If the legal rule does not require the plaintiff to have an actual environmental stake in the case at hand, there is little to prevent private plaintiffs from using citizen-suit provisions as a means of pursuing other agendas—from NIMBY opposition to development to economic rent-seeking or organizational empire-building. If there is no legal incentive to encourage potential citizen plaintiffs to consider the environmental costs and benefits of potential suits, then they will be driven by something else, at which point any benefit to the environment becomes incidental.

Prior to *Laidlaw* analysts warned that "major environmental problems" could "no longer be remedied through citizen suits."[102] This is true if what is meant by "major environmental problems" are technical violations of environmental regulations for which no party that satisfied a cognizable injury in-fact was willing to sue. Yet if there is no documented harm to the environment, other than failure to comply with permit conditions that may or may not safeguard environmental quality, it is hard to know what "major environmental problems" would remain unaddressed.

B. *Environmental Over-enforcement*

When not manipulated by interest groups, the primary function of environmental citizen-suit provisions is to increase the enforcement of environmental regulations. In the late 1980s and early 1990s, citizen-suit enforcement, as measured by the filing of 60-day notices of intent to sue, greatly exceeded federal enforcement in the courts.[103] Yet increased enforcement, even if it modifies the behavior of regulated entities, is not always a good thing. It is possible to heighten the stringency of environmental enforcement, increase prosecutions, fines, and even jail terms under environmental laws, without significantly improving environmental quality.[104] The amount of enforcement activity *may* indicate that more good is being done. It may also mean that there are more violations to punish.[105] Enforcement statis-

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101. *See generally*, Barnett & Terrell, *supra* note 94; Adler, *supra* note 30.

102. *See* Echeverria & Zeidler, *supra* note 7, at 1.

103. *See* Hodas, *supra* note 19, at 1572-73.

104. *See* Adler, *supra* note 51.

105. *See* JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 155 (1989) ("Suppose a police officer walking a beat makes no arrest. That

tics by themselves say very little about whether enforcement resources—public and private—are allocated in such a way as to maximize environmental protection.[106]

Even were it desirable, complete enforcement of federal environmental laws is impossible. Most firms are unable to comply fully with existing environmental regulations.[107] Nor do federal and state regulatory enforcers have the resources necessary to locate and prosecute every potential violation.[108] But this fact is hardly unique to environmental policy. In nearly every area of law, there will be more violations than can be identified and prosecuted. The state highway patrol does not seek to catch and fine every motorist who speeds, nor does the U.S. Justice Department seek to prosecute every attempted illegal gun purchase.

Optimal enforcement is nearly always less than complete enforcement. At some point, devoting resources to additional prosecutions will produce diminishing marginal returns. This is particularly true where, as in the environmental context, many violators have technically broken the law but have not caused any measurable harm.[109] Under most environmental laws, violations are not proven by a demonstration of any actual harm, but rather through a showing of some failure to comply with permit requirements or meet other technical rules. Such deficiencies may or may not impact environmental protection. In the case of citizen-suits under the Clean Water Act, the violations that are most often prosecuted by private plaintiffs are those of which the EPA is aware and has opted not to pursue.[110]

Full compliance with statutory requirements, such as those in the Clean Water Act, in no way ensures the clean air or water that prospective plaintiffs desire. The EPA reported in 1992 that some 18,000 bodies of water would still fail to meet water quality standards even if all effluent limits were observed.[111] The experience of North Carolina's Tar-Pamlico River Basin amply demonstrates this fact. When

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can mean either that no crime occurred or that the officer could solve none of the dozens of crimes that did in fact occur.").

106. *See* Sunstein, *supra* note 22, at 221.

107. *See supra* notes 35-36 and accompanying text.

108. *See supra* note 24 and accompanying text.

109. *See*, *e.g.*, Boyer & Meidinger, *supra* note 27, at 880-84.

110. *See* Rabkin, *supra* note 88, at 191 (noting that most CWA citizen suits are based upon permit violations uncovered in "EPA's own records").

111. *See* Bruce Yandle, *Community Markets to Control Agricultural Nonpoint Source Pollution*, *in* TAKING THE ENVIRONMENT SERIOUSLY, *supra* note 48, at (citing 1992 report of the EPA Office of Water and Office of Policy).

the river basin was declared "nutrient sensitive" by the state in 1989, "all of the direct dischargers were in compliance with their government-issued permits."[112] The imposition of stringent controls on the point sources in the river basin had not been enough to prevent substantial impairment of water quality from eutrophication.[113] Ratcheting down permitted effluent levels further would have done little to improve upon the situation, as point sources—the only sources controlled by the permitting system—only accounted for 15 percent of the nutrient discharge.[114] In the end, local officials were allowed to implement a marketable pollution credit scheme to facilitate nonpoint source pollution control—a more effective environmental protection strategy than more stringent enforcement of a permitting regime.[115]

The bottom line remains that more enforcement is not always better. Prosecutors must make judgment calls about which legal violations to enforce, and which to let go. Ideally, this decision is made after a consideration of the relative costs and benefits of each prosecution: whether the violator has been identified, the likelihood of conviction, the extent to which the violator constitutes an ongoing threat to the public, and so on. Calling for "full" or "complete" enforcement of environmental regulations may make for good political rhetoric, but it is unsound environmental policy. Allocating excessive resources to the enforcement of environmental laws, and the resulting legal conflicts, can be both economically wasteful and even environmentally harmful. Overly broad standing for environmental citizen suits is likely to result in the waste of enforcement resources on regulatory violations that produce minimal environmental payoff, and may even exacerbate the environmental failings of the existing regulatory framework.

C. *Unintended Consequences*

Over-enforcement of environmental regulations is not just eco-

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112. BRUCE YANDLE, COMMON SENSE AND COMMON LAW FOR THE ENVIRONMENT 59 (1997).

113. *See* David Riggs, *Environmental Quality, Biological Envelopes, and River Basin Markets for Water Quality*, *in* WATER MARKETING—THE NEXT GENERATION 147, 154 (Terry L. Anderson and Peter J. Hill eds., 1997) [hereinafter Riggs, *Environmental Quality, Biological Envelopes*]; *see also* David Riggs, *Market Incentives for Water Quality*, *in* THE MARKET MEETS THE ENVIRONMENT: ECONOMIC ANALYSIS OF ENVIRONMENTAL POLICY 167, 167 (Bruce Yandle ed., 1999) [hereinafter Riggs, *Market Incentives*].

114. *See supra* note 113.

115. *See* YANDLE, *supra* note 112, at 60-61.

nomically wasteful. It can also compromise efforts to improve environmental quality. By increasing the potential costs associated with facility siting and upgrade, over-enforcement can forestall the environmental improvement that results from technological advance and economic development. In particular, excessive enforcement can have negative environmental consequences by slowing the turnover of capital stock and accumulation of wealth. In addition, excessive enforcement of existing environmental rules can create perverse incentives to take "preventative" action that actually entails the destruction or degradation of environmental resources. The risk of enforcement actions can discourage experiments with new ways to reduce environmental impacts.

1. Slower Environmental Progress

Technological innovation is one of the most important drivers of environmental progress today. New methods of production, transportation, and service are capable of producing more while utilizing fewer resources and generating less waste. Innovation in the marketplace can "help us to identify new, less polluting ways to manufacture, distribute, and consume products. . . . [T]he sooner we innovate, the sooner we can reduce pollution."[116] Environmental regulations, by increasing the marginal cost of developing and deploying technological innovations can retard environmental progress. As a recent study by the Environmental Law Institute concluded, "our current environmental system . . . has created significant barriers to innovation." [117] By increasing the cost and stringency of environmental regulations, citizen suits can make these problems worse.

Even advocates of broad citizen-suit standing acknowledge that "the citizen suit should be seen as part and parcel of a largely unsuccessful system of command-and-control regulation."[118] This is faint praise. "Federal rules and procedures governing decision-making for protecting the environment often are complex, conflicting, difficult to apply, adversarial, costly, inflexible and uncertain," according to the United States Advisory Commission on Intergovernmental Relations.[119] This complexity encourages companies to base compliance

116. *See* John T. Preston, *Technology Innovation and Environmental Progress, in* THINKING ECOLOGICALLY 136, 136 (Marian R. Chertow & Daniel C. Esty eds., 1997).

117. *See* ENVIRONMENTAL LAW INSTITUTE, BARRIERS TO ENVIRONMENTAL TECHNOLOGY INNOVATION AND USE 5 (1998).

118. *See* Sunstein, *supra* note 22, at 221.

119. *See* U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, INTERGOVERNMENTAL DECISIONMAKING FOR ENVIRONMENTAL PROTECTION AND PUBLIC

decisions upon what avoids a technical violation, not what reduces actual environmental impacts.[120]

These problems are compounded by the substantial paperwork, and uncertainty, that is inherent in the permitting processes mandated under various environmental statutes. "New technologies must overcome a two-step approval process, the first being acceptance by risk-averse business managers and the second approval by risk-averse government permit writers. These two steps greatly increase the cost and time required to innovate."[121] Title V of the Clean Air Act (CAA), for example, imposes substantial paperwork burdens on industrial facilities in addition to numerous opportunities for government regulators and activists to intervene and delay facility upgrades or modifications. As the ELI report noted, "[t]he permitting process can also discourage innovation by making the approval process for new technologies lengthier, more cumbersome, and less certain than for conventional approaches."[122] Barriers include: "delays inherent in the permitting system, permit writers' lack of time, expertise and experience, the lack of rewards for implementing innovative technologies, and the cautious approach inherent in a government bureaucracy."[123]

The threat of citizen suits magnifies the anti-innovation aspects of the current regulatory regime by increasing the costs and uncertainty involved in the permitting process. When a new facility is built, or even an old one modified, new permits may be required. Insofar as environmental groups are able to use citizen-suit provisions, such as those added to the Clean Air Act in 1990, to second-guess regulatory decisions, they can increase the marginal cost and uncertainty involved with facility improvements. On the margin, the prospect of citizen suits can discourage investments in plant modifications in favor of investments in other areas.

Budgetary constraints force public prosecutors (other than independent counsels) to consider the relative merits of additional enforcement activity. Even when the EPA has made a judgment that additional enforcement or regulatory tightening is not in the public

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WORKS 1 (1992), *cited in* Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1165 (1995).

120. *See*, *e.g.*, Charles W. Powers & Marian R. Chertow, *Industrial Ecology: Overcoming Policy Fragmentation*, *in* THINKING ECOLOGICALLY, *supra* note 114, at 20, 22.

121. *See* ENVIRONMENTAL LAW INSTITUTE, *supra* note 117, at 6.

122. *See id*. at 9.

123. *See id*. at 15-16.

interest, or that leniency in a given case is likely to promote greater voluntary compliance in the future, citizen suits can be used to second-guess the agency's determination. As the Supreme Court acknowledged in *Gwaltney*, "the Administrator's discretion to enforce the Act in the public interest" can "be curtailed considerably" by citizen suits.[124]

There is a growing consensus in environmental law that environmental regulations can better achieve their goals if they are more flexible.[125] The EPA, for one, is stressing efforts to experiment with flexible compliance regimes that place environmental results over the technical terms of existing regulations. Existing citizen-suit rules undermine this process because anyone can sue. Indeed, even "stakeholder" efforts in which interested parties sit down in an effort to reach a consensus on a given environmental problem are put at risk because such efforts can not foreclose suit by the one party that did not participate. As a result, over enforcement can prevent the potential environmental gains and public health protections that such cooperative efforts can produce.

In the aggregate, citizen suits increase the overall cost of environmental compliance. This too can have negative health and environmental impacts as both health and environmental improvement correlate with economic wealth. As a general rule, both mortality and morbidity decline as wealth increases.[126] In a phrase, "wealthier is healthier."[127] Conversely, "when national income falls, there is often a significant increase in mortality and a decline in health status."[128] Expenditures on regulatory compliance are rarely wealth enhancing, and therefore increasing regulatory costs can reduce gains in public health.[129] As Justice Stephen Breyer observed, "at all times regulation imposes costs that mean less real income available to individuals

124. *See* Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 61 (1987).

121. *See*, *e.g.*, Karl Hausker, *Reinventing Environmental Regulation: The Only Path to a Sustainable Future*, 29 ENVTL. L. REP. 10,148 (March 1999).

126. *See*, *e.g.*, Susan L. Ettner, *New Evidence on the Relationship Between Income and Health*, 15 J. HEALTH ECON. 67 (1996); John D. Graham et al., *Poorer is Riskier*, 12 RISK ANALYSIS 333, (1992).

127. *See* AARON WILDAVSKY, SEARCHING FOR SAFETY 68 (1988).

128. James B. MacCrae, Jr., Acting Director of the Office of Information and Regulatory Affairs, Office of Management and Budget, Statement before the Senate Committee on Governmental Affairs, March 19, 1992.

129. *See* Frank B. Cross, *When Environmental Regulations Kill*, 22 ECOLOGY L.Q. 729, 742 (1995); Ralph L. Keeney, *Mortality Risks Induced by Economic Expenditures*, 10 RISK ANALYSIS 147, 149 (1990).

for alternative expenditure . . . [which] itself has adverse health effects."[130] So too with environmental protection. Wealthier societies have both the means and the desire to address a wider array of environmental concerns.[131] "Countries undergo an environmental transition as they become wealthier and reach a point at which they start getting cleaner."[132] This occurs first with particularly acute environmental concerns, such as access to safe drinking water and sanitation services. As affluence increases, so does the attention paid to conventional pollution concerns, such as fecal coliform bacteria and urban air quality.[133] Thus, insofar as citizen suits increase the economic drag imposed by environmental regulations, they can be expected to dampen the health and environmental gains that are produced by economic growth.

2. Perverse Incentives

Overenforcement of environmental regulations can also generate perverse incentives that discourage voluntary compliance with environmental rules and encourage environmentally harmful behavior. The paradigmatic example of the perverse incentives that can be created by environmental regulation is habitat destruction under the Endangered Species Act. It is now widely recognized that the ESA discourages conservation efforts and even creates incentives for habitat destruction insofar as it imposes substantial costs on the creation and ownership of habitat. As Sam Hamilton, former Fish and Wildlife Service administrator for the state of Texas, noted: "The incentives are wrong here. If I have a rare metal on my property, its value goes up. But if a rare bird occupies the land, its value disappears."[134] This economic reality creates a powerful incentive for landowners to destroy

130. *See* STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE 23 (1993).

131. *See* Seth W. Norton, *Property Rights, the Environment and Economic Well-Being*, *in* WHO OWNS THE ENVIRONMENT? 37, 45 (Peter J. Hill & Roger E. Meiners eds., 1998). Norton notes that insofar as environmental quality is viewed as a "good" then "consumption" of environmental quality will increase as wealth increases.

132. Indur Goklany, *Richer Is Cleaner*, *in* THE TRUE STATE OF THE PLANET 339, 341 (Ronald Bailey ed., 1995).

133. Goklany observes that while the "environmental transition" for drinking water and sanitation occurs "almost immediately as the level of affluence increases above subsistence," the transition appears to occur at approximately $1,375 per capita for fecal coliform and $3,280 and $3670 per capita for urban particulate matter and sulfur dioxide concentrations respectively. *See id*. at 342. For a fuller treatment of the correlation between affluence and air quality, see generally, INDUR GOKLANY, CLEARING THE AIR (1999).

134. Quoted in Betsy Carpenter, *The Best-Laid Plans*, U.S. NEWS & WORLD REPORT, October 4, 1993, at 89.

existing habitat, whenever such actions would be legal, and to avoid creating or owning potential species habitat in the first place.[135]

There have been numerous concerns that land use regulations have these perverse effects at the expense of habitats. For instance,

> when the golden-cheeked warbler was listed as endangered as the result of an emergency listing, the managers of Ross Perot's development companies feared the company would lose its three hundred and thirty-three acre prime real estate to the bird. Being a neotropical migratory species, the warblers were down in South America when the decision was made to raze the juniper trees on Perot's Hill Country property.[136]

The creation of recent regulatory reforms under the ESA, such as "safe harbor" and "no surprises," were motivated by concerns that the strict enforcement of prescriptive regulations under the ESA has negative effects.

Citizen suits, by empowering environmental activists to force the imposition of regulatory measures even when the administering agency feels such measures are unwise, can exacerbate these perverse incentives. After environmental groups sued to force the listing of the northern spotted owl in the Pacific Northwest, the Fish and Wildlife Service reported that the resulting regulations made private landowners fear they would lose the use of their land. This had negative results on habitat as "this concern or fear has accelerated harvest rotations in an effort to avoid the regrowth of habitat that is usable by owls."[137] Independent studies of timber harvesting trends reveal similar results from the imposition of habitat protection regulations.[138]

Citizen suits filed under the Clean Water Act may not encourage

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135. *See* Lee Ann Welch, *Property Rights Conflicts Under the Endangered Species Act: Protection of the Red-Cockaded Woodpecker*, *in* LAND RIGHTS 151, 167-68, 173-78 (Bruce Yandle, ed., 1995). Welch relates the story of Ben Cone, a forest landowner in North Carolina who actively managed his land to create and enhance wildlife habitat there. Cone's efforts, which included selective harvesting of timber, attracted red-cockaded woodpeckers, a species listed under the Endangered Species Act. The resulting regulatory land-use restrictions reduced the value of his land by an estimated 96 percent. *See id*. at 175. Cone subsequently engaged in preventative action on his other land holdings, clearing timber at a faster rate so as to avoid additional losses from endangered species regulations. Cone's case received significant national attention, and he eventually received an incidental take permit for portions of his land after much potential habitat had been lost. *See* 62 Fed. Reg. 54,121-22 (1997). *See also* Sugg, *supra* note 96, at 75.

136. *See* Sugg, *supra* note 96, at 45.

137. *See* 60 Fed. Reg. 9484, 9507-8 (1995).

138. *See*, *e.g.*, Dean Lueck & Jeffrey A. Michael, *Preemptive Habitat Destruction under the Endangered Species Act* (Mar. 2000) (Montana State University Working Paper) (indicating that timber companies have shortened their cutting rotations in response to habitat regulations, resulting in long-term reductions in species habitat).

environmentally destructive behavior in the same fashion, but they can discourage voluntary environmental improvements, such as those which can result from cooperative compliance efforts. As the Clinton Administration's 1995 *Reinventing Environmental Regulation* report concluded, the "adversarial approach" to environmental protection "precludes opportunities for creative solutions that a more collaborative system might encourage."[139] Citizen suits can make this problem worse. The prospect of a citizen suit will discourage companies from seeking to develop or implement new management or control systems that can improve environmental performance at the expense of an occasional permit violation.[140] Citizen suits "threaten any cooperative compliance by their very nature. The mere filing of a citizen suit may destroy ongoing cooperative compliance."[141]

These examples are not provided as proof that citizen suits are inherently anti-environmental. Rather, they serve to demonstrate that citizen suits, by tightening regulatory enforcement, can exacerbate the existing failings of the current regulatory regime. What little empirical work has been done on citizen suits to date reinforces these conclusions. Any future effort to assess the environmental value of citizen-suit provisions must include some consideration of the potential negative effects. Given that many citizen suits pursued as a result of expansive standing doctrines may not produce significant environmental gains, the potential for negative environmental impacts from citizen suits must be assessed to determine the *net* environmental benefits of liberalized standing rules. To date, no such analysis has ever been done.

IV. STANDING FOR THE ENVIRONMENT—AN ALTERNATIVE FRAMEWORK

In the wake of *Lujan*, environmental activists sought to restore

139. *See* Adler, *supra* note 51, at 43.

140. By way of hypothetical example, consider an effluent control system that greatly reduces average contaminant levels, but that causes a periodic "spike." Such a system may significantly reduce a facility's environmental impact and yet would be vulnerable to a citizen suit because its operation produces an occasional permit violation. For other potential enforcement inequities of citizen-suit enforcement, see Cross, *supra* note 56, at 65-66.

141. *See id*. at 67. A similar phenomenon can be observed in the context of environmental audits. Companies are less likely to engage in voluntary self-audits of environmental performance if the audit results can be used in subsequent enforcement actions. As a result, many environmental problems remain undiscovered or undisclosed, and therefore unaddressed. *See* Adler, *supra* note 51, at 45-46. *See also* Ben Lieberman, *Environmental Audits: State Carrots Versus Environmental Sticks* 8 (Competitive Enterprise Institute, March 1997).

citizen access to court by challenging the *Lujan* approach to standing.[142] This aim appears to have been accomplished with the Supreme Court's about-face in *Laidlaw*. This decision will no doubt be good for environmental litigants, as they will only need to vault the most minimal hurdles to demonstrate standing. Yet as the preceding has sought to show, the liberalization of citizen-suit standing rules might not enhance environmental protection. The presumption that increasing the number of environmental citizen suits improves environmental protection has not been demonstrated through empirical research. However, there is empirical evidence that, in at least some instances, excessive citizen-suit litigation may itself become an obstacle to continued environmental progress.

The preceding is not meant as a defense of the status quo. It is certainly possible that effective environmental protection requires public participation in the form of private legal action to supplement regulatory efforts to curtail pollution. Centralized governmental authorities face many obstacles in seeking to provide optimal levels of environmental protection, not least of which is the difficulty in centralizing sufficient knowledge to allocate resources in an efficient manner.[143] Regulatory agencies are also subject to substantial interest group pressure, which can further serve to distort enforcement priorities. Liberalizing standing rules so as to unleash a veritable horde of self-appointed private attorneys general to enforce environmental regulations through citizen suits is not necessarily the best means of addressing this concern, however. Another option is the extension of property institutions to cover a greater array of environmental resources, so as to provide standing for those citizens whose tangible interests are effected by environmental violations. There is reason to believe that the establishment of property rights in environmental resources would both encourage greater resource stewardship *and* resolve the standing muddle created by inconsistent court opinions.

A. *Property-based Environmental Protection*

The importance of property rights in environmental protection is well known. As Garrett Hardin noted in his seminal 1968 essay on "The Tragedy of the Commons," the creation of property rights in threatened resources encourages their protection and sustainable

142. *See*, *e.g.*, Echeverria & Zeidler, *supra* note 7.

143. This is one of the seminal insights of Nobel laureate Friedrich Hayek. *See* Friedrich A. Hayek, *The Use of Knowledge in Society*, 35 AMER. ECON. REV. 519, 519 (1945). *See also* BUTLER & MACEY, *supra* note 24, at 27.

use.[144] In Hardin's words, "[t]he tragedy of the commons as a food basket is averted by private property, or something formally like it."[145] Environmental problems, therefore, are essentially "property rights problems" which are solved by the extension, definition, and defense of property rights in environmental resources.[146]

The creation of property interests empowers owners to act as stewards of environmental resources and facilitates conservation efforts in the private sector.[147] Whereas public or politically managed lands often suffer, "private owners have the ability to protect their lands from over use."[148] The recognition of conservation easements empowers conservation groups to purchase development rights from a given parcel of land and protect the present ecological values.[149] Some states recognize property interests in instream water flows. This empowers local environmental groups to purchase instream flows from farmers to improve and maintain fish habitat.[150] Internationally, allowing the commercial utilization and quasi-ownership of elephants in Zimbabwe has led to larger herds and the devotion of greater acreage for wildlife habitat.[151] In New Zealand and Iceland, the creation of fishing rights known as "individual transferable quotas" (ITQs) reduced overfishing and encouraged fishermen to support sustainable harvesting.[152] In each instance, the creation of property

144. *See*, Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1245 (1968).

145. *See id*. Hardin's reluctance to call for broader property rights in other environmental resources, such as air and water, stemmed from his belief that such resources "cannot be readily fenced," not out of any concern that the power of property rights to promote sound resource use was limited to farmlands and pastures. *See id.*

146. *See* Peter J. Hill & Roger E. Meiners, *Property Rights and Externalities: Problems and Solutions*, *in* WHO OWNS THE ENVIRONMENT? *supra* note 131, at xi. For a broader discussion of this approach to environmental policy, see LIBERTY, ECOLOGY, AND PROPERTY: A FREE MARKET ENVIRONMENTAL READER (Jonathan H. Adler ed., 2000); TERRY ANDERSON & DONALD LEAL, FREE MARKET ENVIRONMENTALISM (1991).

147. For a good summary of private conservation activities in the United States, see *Special Report: The Public Benefits of Private Conservation*, *in* COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY 1984 363-429 (1984). It should be noted that here the phrase "private sector" is used to encompass all non-governmental institutions and undertakings, and not just for-profit corporations and profit-seeking individuals.

148. *See id*. at 367.

149. *See* STEPHEN EAGLE, CONSERVATION EASEMENTS AND PRIVATE LAND STEWARDSHIP (1997).

150. *See* TERRY L. ANDERSON & PAMELA SNYDER, WATER MARKETS: PRIMING THE INVISIBLE PUMP 111-32 (1997).

151. *See* Ike C. Sugg & Urs P. Kreuter, *Elephants and Ivory: Lessons from the Trade Ban*, IEA STUDIES ON THE ENVIRONMENT NO. 2, 51-53 (1994).

152. *See* Hannes H. Gissurarson, *Overfishing: The Icelandic Solution*, IEA STUDIES ON THE ENVIRONMENT NO. 17, at 10-11 (2000); Michael De Alessi, *Fishing for Solutions*, IEA STUDIES

interests in environmental resources creates powerful economic incentives for sound resource stewardship and protection.

The security of property rights encourages owners to pursue the enhancement of their own subjective value preferences. Thus, property rights facilitate the protection of both commercial and non-commercial values. Property rights enable timber companies to protect their investment in planting trees or enhancing forest growth, but they also protect the investments made by conservation groups in ecological protection and restoration. At the turn of the last century, groups such as the National Audubon Society were able to use private property to protect threatened species habitat at a time when there was no political support for government action.[153] Indeed, private property empowers forward-looking conservationists to pursue unpopular ecological causes. Without the institution of private property, Rosalie Edge would not have been able to protect raptors from government subsidized slaughter through her purchase of Hawk Mountain.[154]

Property rights are also the foundation for markets, which themselves can produce substantial environmental gains through efficiency gains. In the simplest of terms, market competition creates tremendous pressure to minimize costs, and that means finding ways of doing more with less—producing more widgets with less material and energy. Thus, in market economies we see a continual drop in the energy and material inputs necessary for a unit of industrial output. As a direct result of market institutions, humans learn to do more with less—to meet human needs while using fewer, and less scarce, natural resource inputs and recovering materials for recycling or reuse where appropriate. This can be seen in the replacement of copper with fiber optics (made from silica—i.e., sand), the downsizing of computer circuitry, reducing the weight of packaging, the exploding agricultural productivity, and so on.[155] Less material is used and disposed of, reducing overall environmental impacts from productive activity.

Private markets provide constant pressure for efficiency improvements and wealth maximization. As noted earlier, the affluence produced by markets can enhance both public health and environ-

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ON THE ENVIRONMENT NO. 11, at 40-43 (1998).

153. This is summarized in ADLER, *supra* note 12, at 2-3.

154. *See Special Report*, *supra* note 147, at 387-94.

155. *See generally* Lynn Scarlett, *Doing More with Less: Dematerialization—Unsung Environmental Triumph*, *in* EARTH REPORT 2000 (Ronald Bailey ed., 1999); Indur Goklany, *Richer Is More Resilient: Dealing with Climate Change and More Urgent Environmental Problems*, *in* EARTH REPORT 2000.

mental protection. The key to such improvements is a system of well-defined and enforced property rights. International studies of economic and environmental trends demonstrate that "environmental quality and economic growth rates are greater in regimes where property rights are well defined than in regimes where property rights are poorly defined."[156] On both theoretical and empirical grounds, property rights should be viewed as the foundation for *both* economic prosperity *and* sound environmental stewardship.

B. *Pollution Prevention and Coasian Bargaining*

Property rights do not only encourage sound resource management. Well-defined and enforced property rights can also play a key role in stopping and preventing pollution. At their heart, property rights establish who has a right to what and, correspondingly, what rights others must respect. As Elizabeth Brubaker notes in her study of the use of property rights to protect environmental quality in Canada,

> [p]roperty rights govern who has the right to use the environment in which ways, and who has the duty to respect others' rights. They establish who must pay whom in order to exploit or protect resources, influencing the costs that polluters and their victims must take into account before making decisions.[157]

This is particularly true where the rights are protected by a property rule as opposed to a liability rule, as victims of pollution could seek injunctive relief.[158]

Consider the following hypothetical example: In an unregulated world without property rights in environmental resources, a company that opts to dispose of chemical wastes as effluent into a nearby river instead of seeking to recycle such wastes or send them to a disposal facility clearly does so because it is the least cost option. Dumping wastes into the river is a rational action motivated by a desire to maximize profits. Pollution is the least-cost action in this case because the river is an open-access commons. As an unowned resource,

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156. *See* Norton, *supra* note 131, at 51.

157. *See* ELIZABETH BRUBAKER, PROPERTY RIGHTS IN DEFENSE OF NATURE 18 (1995).

158. *See generally* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). As James Buchanan and Roger Faith observe, a property rule requires that "the permission of the party who may be potentially damaged must be purchased *in advance*" and therefore "the bargaining position of the damaged party is much stronger than it is under liability-rule protection." James M. Buchanan & Roger L. Faith, *Entrepreneurship and the Internalization of Externalities*, 24 J.L. & ECON. 95, 97 (1981).

there is no one to protect it. Were the river owned, or were those who live along the river to have clearly established rights in the continued use of the river, the company would have to negotiate with downstream rights holders before dumping its wastes. If the ecological impact of such dumping is negligible, the company could probably continue as before, and downstream rights-owners would not care. If not, the company would have to find a means of reducing the damage, compensating the owner, or developing an alternative means of waste disposal. Failure to satisfy the downstream rights holder risks damages and an injunction on the polluting activity. As Brubaker observed in her empirical study, when such rights are enforced, they provide a powerful incentive for firms to curtail pollution and reduce the harms it can cause.[159]

Facing the threat of an injunction, the company might seek a deal under which the company would provide given levels of compensation for given emissions as a means of avoiding litigation. In a sense, the company would seek to make a Coasian bargain with the holder of downstream rights, as the company's ability to keep emitting into the stream is contingent upon securing the consent of those that maintain rights in the water.[160] Companies would be encouraged to engage in negotiations with downstream parties because, unlike under the current system, they would have the ability to negotiate with the rights owners to secure an agreement, and thereby avoid the potential of litigation.[161] Insofar as such deals take place, all parties involved consider themselves to be better off. As Brubaker notes, "property law does its best job when land is held and exchanged in an orderly way without litigation."[162]

For exchange to take place it is not necessary for one party to transfer all of its rights to another. Where property rights are defined, one should expect to see rights holders develop contractual relationships that address their specific needs or concerns. For instance,

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159. *See* BRUBAKER, *supra* note 157, at 19.

160. *See id.* at 120 (noting that "injunctions allow the victim to negotiate his own price. If his environment is priceless, he may simply tell the polluter to go away. Alternatively, he may bargain away his rights or reach a compromise that benefits both him and the polluter"). *See also* Todd J. Zywicki, *A Unanimity-Reinforcing Model of Efficiency in the Common Law: An Institutional Comparison of Common Law and Legislative Solutions to Large Number Externality Problems*, 46 CASE W. RES. L. REV. 961, 1009 (1996) ("[A] property rule maintains subjective value.").

161. This is essentially the sort of scenario discussed in Ronald. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2-5 (1960).

162. *See* BRUBAKER, *supra* note 157, at 8.

an owner of riparian rights in a stream may be particularly concerned about the effects of upstream pollution on fish populations. However, protecting the fish may not require that upstream firms cease all emissions. Rather, it may only be necessary for firms to reduce emissions to a given level to avoid harming fish populations, or it may be possible for firms to finance mitigation efforts that help restore fish populations at a lower cost than reductions in emissions. In either case, property rights force the polluter to satisfy the rights holder's subjective value preference for how her property is used, and also force the rights holder to consider the values that are sacrificed by holding out and refusing a deal. The creation of property rights in the underlying resources encourages rights owners to discover ways of reconciling their competing interests so that all parties are better off. Property rights are essential for this to occur.

Even were the river owned in its entirety by the company itself, it would not simply dump its wastes with abandon, as that would destroy the river's value to other potential users. Any economically rational corporate executive would have to weigh the river's value as a disposal site with competing present and future uses. The fact that others in a market system place value on alternative uses of the river would force the company to consider these uses and seek to reconcile them with its own priorities, in order to fulfill the profit-maximizing mandate placed upon it by its shareholders. The activities of private firms will further be constrained by concern for reputational capital and public relations.[163]

The use of property rights to define who has a right to claim an injury from a given environmental action is opposed on many grounds. For one, some assert that insofar as this scheme was the basis for common law nuisance protections, property rights failed to protect environmental quality, leading to the existing regulatory regime.[164] Yet there is much in the historical record that undermines this account, including substantial evidence that both legislatures and courts undermined property rules in favor of liability rules or even de

163. Note that these factors presume that the general public places a value upon environmental protection and environmentally protective behavior by private firms. The lack of widespread public concern for environmental protection thus explains some portion of the poor corporate environmental behavior that was observed prior to the awakening of the environmental movement.

164. *See*, *e.g.*, Robert V. Percival & Joanna B. Goger, *Escaping the Common Law's Shadow: Standing in the Light of* Laidlaw, 12 DUKE ENVTL. L. &. POL'Y F. 119 (2001); Frank B. Cross, *Common Law Conceits: A Comment on Meiners & Yandle*, 8 GEO. MASON L. REV. 965 (1999).

facto easements for polluters.[165] The Cuyahoga River burned prior to the enactment of federal regulations—indeed it burned several times. But this was not due to any purported failure of common law. Rather, common law nuisance suits against companies that polluted the river were explicitly precluded under state law.[166]

Critics of the property-based framework suggest that transaction costs, collective action problems, and strategic behavior could prevent optimal levels of enforcement. For instance, the cost to an individual property owner of filing suit by himself may be too high given the magnitude of the anticipated benefit from a suit. While the collective benefit to all of the rights holders along a given stream could justify the costs of filing a suit, transaction costs and free rider problems could conceivably prevent the victims of pollution from organizing to put an end to it.[167] Similarly, strategic bargaining by rights holders could inhibit negotiations from resulting in efficient bargains over the allocation of environmental rights.[168] These concerns are real, but

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165. *See*, *e.g.*, THE COMMON LAW AND THE ENVIRONMENT: RETHINKING THE STATUTORY BASIS FOR MODERN ENVIRONMENTAL LAW (Roger E. Meiners & Andrew P. Morris eds., 2000); Roger Meiners & Bruce Yandle, *Common Law Environmentalism*, 94 PUB. CHOICE 49 (1998); Roger Meiners & Bruce Yandle, *Common Law and the Conceit of Modern Environmental Policy*, 8 GEO. MASON L. REV. 923 (1999); CENTER FOR PRIVATE CONSERVATION, THE COMMON LAW APPROACH TO POLLUTION PREVENTION: A ROUNDTABLE DISCUSSION (1998); YANDLE, *supra* note 110; Zywicki, *supra* note 160; Roger E. Meiners, *Elements of Property Rights: The Common Law Alternative*, *in* LAND RIGHTS: THE 1990S PROPERTY RIGHTS REBELLION 219 (Bruce Yandle ed., 1995); Roger E. Meiners & Bruce Yandle, *Clean Water Legislation: Reauthorize or Repeal?*, *in* TAKING THE ENVIRONMENT SERIOUSLY *supra* note 48 at 88-93.

166. *See* Stacie Thomas & Matt Ryan, *Burning Rivers*, *in* THE MARKET MEETS THE ENVIRONMENT 1, 3 (Bruce Yandle ed., 1999). *See also* Roger E. Meiners et al., *Burning Rivers, Common Law*, *and Institutional Choice*, *in* THE COMMON LAW AND THE ENVIRONMENT, *supra* note 165, at 54, 61 (describing how "the river burned because common law rights that might have precluded its conversion to an industrial dump were blunted by the Ohio legislature").

167. *See*, *e.g.*, Andrew M. Thompson, Comment, *Free Market Environmentalism and the Common Law: Confusion, Nostalgia, and Inconsistency*, 45 EMORY L.J. 1329 (1996).

168. In theory, strategic behavior should be a substantial obstacle to efficient trades when there is an "empty core" that precludes a stable, efficient outcome. *See* Varouj A. Aivazian & Jeffrey L. Callen, *The Coase Theorem and the Empty Core*, 24 J.L. & ECON. 175 (1981). In practice, however, it is not clear that this is a substantial problem under contract rules with expectancy damages. As Louis De Alessi notes, "[e]mpirically, there is no evidence that strategic bargaining has a visible effect on the allocation of resources." *See* Louis De Alessi, *Private Property Rights as the Basis for Free Market Environmentalism*, *in* WHO OWNS THE ENVIRONMENT *supra* note 131, at 19. As Aivazian and Callen acknowledge, "[c]ontracutal arrangements will evolve to force a solution on the bargaining process." *See* Aivazian & Callen, *supra*, at 181. *See also* Ronald H. Coase, *The Coase Theorem and the Empty Core: A Response*, J.L. & ECON. 183 (1981). Moreover, the creation of firms and associations can facilitate efficient bargaining. *See* James M. Buchanan, *The Institutional Structure of Externality*, 14 PUB. CHOICE 69, 77 (1973).

overstated, particularly when compared to the regulatory alternative.[169] Where externalities are severe enough, property owners have a substantial incentive to develop associations and firm-like institutions to reduce the transaction costs involved with protecting rights and negotiating solutions to incompatible uses. In addition, using the property rights framework as the foundation for environmental protection does not preclude legislative action to reduce obstacles to worthy legal actions.

Coordination problems and transaction costs were faced by the owners of riparian rights in British rivers, largely fishing clubs, in the decades following World War II, but this did not bar their efforts to protect their rights. In 1948, several fishing club members joined to form the Angler's Conservation Association (ACA). The ACA has helped fishing clubs pursue injunctions against upstream pollution ever since. To date, the ACA has been involved in over 1,500 cases where the ACA sought to vindicate riparian rights against actual harms caused by upstream entities, both public and private.

> In the ACA's history, there are incidents of a public water authority being successfully sued by a private individual, of an angling club stopping pollution of an estuary 40 miles downstream of the club itself, and of ACA lobbying dissuading the government from handing a license to pollute to large industries. Although they rarely make headlines, ACA cases are hugely influential. Many of its cases are settled by negotiation before the reach the courts—a very efficient process, but one that yields little publicity or recognition for the ACA as a pollution-preventing body.[170]

In the five decades after its founding, the ACA has brought an estimated two thousand or more actions, "losing only three."[171]

Environmental organizations, whether national or local, can play a similar role in overcoming collective action problems, supporting victims of pollution who have insufficient incentives or ability to act in their own defense. Many rivers are now guarded by private "river-keeper" organizations that monitor pollution levels, emission violations, and the like.[172] Defining property rights in water resources would more clearly define what rights river-keepers are empowered

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169. *See*, *e.g.*, Zywicki, *supra* note 160.

170. Roger Bate, *Protecting English and Welsh Rivers: The Role of the Anglers' Conservation Association*, *in* THE COMMON LAW AND THE ENVIRONMENT, *supra* note 165, at 86, 86-87

171. *See id*. at 97.

172. According to American Rivers, there are some 3,000 river conservation organizations throughout the country. Bruce Yandle, *Coase, Pigou and Environmental Rights*, *in* WHO OWNS THE ENVIRONMENT, *supra* note 131, at 119, 145 (citing Chad Smith, spokesman for American Rivers).

to enforce. Were the U.S. to move toward a property-based model of environmental protection, one can easily envision environmental litigation groups shifting from their current focus on permit violations and regulatory strictures toward cases of actual injuries to rights holders. If the establishment of property rights alone is insufficient to bring this about, the existing regulatory framework, complete with its strict liability regime for emission levels in excess of a permitted amount, could be maintained, with the added requirement that only those with a defined interest—a property right—in the given environmental resource would have standing to sue on its behalf. For the reasons outlined below, the combination of greater property rights in environmental resources and a *Lujan* standing doctrine would likely be environmentally superior to *Laidlaw* and the current regulatory regime.

C. *Property-based Standing*

Property rights align the interests of the owner with that of the underlying resource. A property owner is more likely to act in the long-term interest of her property than someone who only has a tangential relationship with the resource. If anyone is likely to sue when a resource is threatened, it is most likely to be the resource's owner or steward. The importance of creating defined property rights in environmental resources is not only that it encourages sound stewardship of resources, but it also encourages voluntary exchanges and the creation of associations that maximize the interests of concerned parties. Without the establishment of such rights, however, such exchange is not possible, and the potential gains from trade are lost.[173] Thus, liberalized standing rules, particularly in the absence of defined property rights in the underlying resources, are an obstacle to the resolution of environmental concerns through bargaining and institution building.

When rights are defined, upstream firms have the potential to avoid liability for permit violations by negotiating with affected rights holders. With broad citizen-suit standing, however, everyone has a right to sue and therefore the only means for companies to avoid litigation is to focus on achieving strict compliance with regulatory requirements and permit conditions. As noted above, insofar as these structures are not themselves environmentally optimal, environmental quality will suffer as a result.

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173. *See* James M. Buchanan, *Politics, Property and the Law: An Alternative Interpretation of* Miller v. Schoene, 15 J.L. & ECON. 439, 442 (1972) ("*some* structure, *any* structure, of well-defined rights is a necessary starting point for the potential 'trades.'") (emphasis in original).

Imposing the CWA regulatory regime on an emitting firm subjects the firm to liability when it exceeds the emission levels specified in its permit. Absent any standing for citizen suits, the firm could avoid liability for its emissions by negotiating with the relevant regulatory authorities. Such negotiations could result in a flexible compliance scheme that reduces environmental impacts.[174] Yet they may also result in a deal that protects the firm's interests at the expense of environmental protection. As noted at the outset of this article, citizen-suit provisions seek to address this concern by allowing private enforcement of the permit requirements.

Once private enforcement of permit terms is allowed, emitting firms now face a broader set of parties with whom they must negotiate to avoid liability. This increases the transaction costs of such negotiations, although it arguably reduces the threat of sub-optimal results from "agency capture." Citizen suits, at least in theory, give affected citizens a place at the table so that their interests are not underrepresented. Yet under the *Laidlaw* approach to standing, the universe of potentially affected parties becomes infinite, precluding any potential bargain among affected parties. The only way to preclude suits is either full compliance with permit terms or a diligent government prosecution. In a sense, liberalized standing for citizen suits creates a new commons problem with over-litigation replacing overgrazing. Just as no herder will forego placing an additional animal on the commons because there is no means to reap the environmental benefit of controlled use, no plaintiff (and, indeed, no defendant) will forego litigation in pursuit of a cooperative solution as there is no mechanism to prevent suit by another party. Recognizing property rights in environmental resources for the purpose of citizen suits facilitates bargaining and allows for the use of narrower standing rules without excluding the interests of potentially affected third parties.[175]

Under the *Lujan* approach, standing cannot be based upon "congressional conferral upon *all* persons of an abstract, self-contained, noninstrumental 'right.'"[176] It can, however, be based upon the recognition of rights in property resources. "If Defenders had had a prop-

174. *See supra* Part IV.B.

175. *See* Zywicki, *supra* note 160, at 1010 (noting that through the creation of property rights the common law framework internalizes the interests of third parties); David Schmidtz, *The Institution of Property*, *in* THE COMMON LAW AND THE ENVIRONMENT, *supra* note 165, at 109, 120 (noting that "privatization has the advantage of limiting the number of people having to be consulted about how to deal with the externality, which reduces transaction costs").

176. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 573 (1992).

erty interest in Nile crocodiles and Asian elephants, there would have been no question of standing when they attempted to protect that interest in court."[177] As even one of the harshest critics of *Lujan* acknowledged, "if Congress [were to create] property rights, . . . the Court would not be dealing with a 'citizen suit' at all. Instead it would be faced with a suit brought by property holders equipped with causes of action."[178]

The required demonstration of harm under a property rights scheme need not be the same as would be required under a common law action. At present, the Clean Water Act creates presumptive liability for a company that exceeds the emissions allowed under its permit. A mere showing that such a violation has a measurable impact on a resource in which a downstream party has a right could be deemed sufficient to establish the injury in fact. Congress could also amend the Clean Water Act to modify other presumptions or evidentiary rules to make it even easier for plaintiffs to prevail. Such reforms would operate to reinforce common law property rights protections, rather than to supplant them with a regulatory scheme, and would pose less risk of underenforcement than the current regime.

Once the rights are defined, this creates opportunities for property owners and offending facilities to develop new means of reducing the environmental impacts of polluting behavior. An illustrative example of the sorts of institutional arrangements that are possible is the effluent trading regime for non-point source pollution in the Tar-Pamlico River Basin.[179] The designation of the area as nutrient sensitive created a binding constraint upon private firms that emitted into the watershed. Much like a firm in violation of its NPDES permits, the firms that emitted into the Tar-Pamlico faced potentially severe restrictions on their activities if they did not develop an alternative solution. Recognizing that the imposition of additional controls would be unlikely to improve local water quality, the state provided local firms with a window of opportunity: If the firms could come up with an alternative means of reducing nutrient loading of the watershed, they would not be subject to additional, exceedingly stringent point source controls. The obvious solution was to find a means for point source firms to facilitate the control of nonpoint source pollution, particularly that from agriculture. This led to the creation of the

177. *See* Sam Kazman, *Defenders of Their Own Wildlife*, CEI UPDATE, June 1982 at 1, 3.

178. *See* Sunstein, *supra* note 22, at 235.

179. This discussion draws on Riggs, *Market Incentives*, *supra* note 113, Riggs, *Environmental Quality, Biological Envelopes*, *supra* note 113, and YANDLE, *supra* note 112.

Tar Pamlico Association, "the first transacting water pollution control trading community in North America."[180]

The Association is made up of participating companies in the watershed. It funds sampling, computer modeling of nutrient loads and their ecological impact, and coordinates efforts to reduce nonpoint source emissions by paying farmers to engage in agricultural practices that reduce runoff. In a sense, the Association is a transaction cost-reducing firm for companies in the watershed. If companies had to negotiate with farmers individually, the cost of the trading regime would be insurmountable.

Much as a firm that violated its NPDES permit could face a choice between complying with the permit requirement or negotiating an alternative settlement with downstream property holders, permitted facilities in the Tar Pamlico had a choice of joining the Association or suffering the imposition of more stringent regulatory requirements. One of the things that makes this type of arrangement possible and stable over time is the regulatory agencies' commitment to forego the imposition of yet another round of regulatory requirements on companies that hold up their end of the bargain. Without this reassurance, firms will not enter into this sort of arrangement, nor will they negotiate environmentally superior alternatives to reflexive compliance with permit conditions. Absent some limitation on the universe of potential citizen-suit plaintiffs, no such deal is possible between violating firms and members of potentially affected communities.

What is important about the property scheme is less the determination of what constitutes an injury—though this determination does matter—than the determination of who owns the rights to what, and who has the right to take legal action against a polluting party. Whether injury is defined by a physical invasion of another's property or a threat of harm above a given threshold or something else, what is most important is identifying which parties are "injured" by the offending action and therefore have standing to sue. Establishing property rights—not expanding standing rules—is the most sensible means to achieve this goal.

Establishing property rights in potentially threatened resources helps channel private litigation concerning environmental harm toward those cases that actually matter to environmental quality. Those with rights to a resource are likely to be the first to be aware of

180. Riggs, *Market Incentives*, *supra* note 113, at 154.

a given environmental threat, and are most likely to take action against it. By the same token, a property owner is less likely to use her property as a proxy for another interest in legal action if doing so could compromise the protection of the resource. When standing is divorced from such an interest, it is more likely that a given litigant may be motivated by some concern other than protecting the environmental resource in question. Equally important, once property rights are established, Coasian bargaining and other efforts to arrive at optimal resource management arrangements are possible. This sort of bargaining already occurs where rights are defined. Absent the definition of property rights, however, such innovation is difficult if not impossible.

CONCLUSION

There is no doubt that *Lujan* made it more difficult for Friends of the Earth, Natural Resources Defense Council, and other environmental activist groups to walk into court and pronounce themselves the Lorax, speaking for the trees. The *Lujan* approach restricted standing to those with an actual, tangible stake in the matter, but it is far from clear that this undermined environmental protection. By tying citizen-suit standing to concrete, particularized environmental harms, the *Lujan* approach to standing ensured that only those with a tangible stake in a given environmental concern would have standing to sue. While it may have reduced the overall volume of litigation, the *Lujan* approach also served to align litigants' incentives with the desire to protect a specific environmental resource and lessened the likelihood that the citizen suit in question was merely a proxy for some other social goal.

The *Laidlaw* majority's emasculation of the harm requirement for standing will no doubt increase the volume of environmental citizen suits. The courthouse doors have been flung wide open to environmental activists. But before we celebrate this as an environmental victory, we should ask whether more litigation over technical violations and aesthetic harms serves the broader goals of cleaner air, purer water, and the safeguarding of the natural world. Insofar as liberalized standing rules serve to increase the stringency of existing environmental rules, they could well exacerbate the inefficiencies and perverse incentives of environmental law.

The debate over whether the Supreme Court should adopt a broad or narrow view of standing requirements for citizen suits under Article III and the various environmental statutes obscures the larger

question of what sorts of institutional arrangements maximize the incentives for sound resource stewardship and environmental protection. The environmental regulatory model embodied in most federal environmental statutes has not produced the level of environmental protection that environmentalists would like. This article suggests that this approach will remain unsatisfactory even when supplemented by the most expansive citizen-suit provisions and the demolition of constitutional constraints.

One possible alternative is a model which recognizes that environmental problems derive from open-access commons, left outside of market institutions, and that the extension of such institutions to encompass environmental resources will improve environmental protection. Trees need not have standing when there are owners and stewards with property interests empowering them to stand for the trees. This model is more consistent with the *Lujan* approach to standing and also creates better incentives for sustainable environmental stewardship into the future. The standing to sue is a powerful tool. To ensure that it advances environmental progress, citizens should have standing where they have a stake. If citizens want standing to move environmental policy, they should seek to stand where they live.