

## **Who Sues For The Fishes--Justice Douglas, Where Are You When We Need You?**

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### **I. INTRODUCTION**

There exists an increased concern over the country's natural resources. From the controversy over the spotted owl to the Exxon Valdez disaster, society is becoming more aware of the fragility of the environment and of the limited natural resources available for exploitation.[1] As this concern continues to increase, society will turn to the country's environmental laws and case law to protect what is left and restore what has been lost. Accordingly, litigation over the recovery for natural resource damages is, and will continue to be, an emerging area of environmental law.[2]

This essay examines the issues surrounding litigation for damages to natural resources. Part II provides a brief background of the environmental movement. Part III examines the emergence of environmental statutes and the respective rights under state and federal law. Part IV discusses the issues germane to the controversy over environmental standing. Finally, part V summarizes the issues and articulates recommendations that would add more protections to natural resources to the existing law.

### **II. HISTORICAL BACKGROUND OF THE ENVIRONMENTAL MOVEMENT**

#### **A. Emergence of Environmental Laws-The Role of the Legislature**

The environmental movement achieved an unprecedented level of public consciousness in the early 1970's, culminating in the enactment of some of the most far-reaching, most controversial legislation in the history of any nation. "It has been estimated that Congress, reacting to growing public concern, enacted more than 35 major regulatory measures between 1962 and 1976." [3]

Some critics of this solution-by-legislation approach have chastised Congress for launching itself into an arena about which it was ill-informed and for which it was ill-equipped to undertake such a massive legislative assault. "Several points can be made about this legislative surge. First, it was a reaction to a perceived crisis. Second, most Congressmen and Senators had little idea of what they were voting on. Third, scant consideration was given to any cost-benefit analysis of the problem to be solved and the means of solving. Fourth, guidelines and standards were established which make the federal judiciary the main arbiter of what is an unreasonable risk of injury health or the environment." [4]

Nevertheless, in 1970 alone the federal incursion into this area resulted in enactment of persuasive national policies evidenced by legislation such as The National Environmental Policy Act,[5] the Environmental Quality Improvement Act,[6] the Environmental Education Act,[7] as well as the establishment of the Council on Environmental Quality[8] and the Environmental Protection Agency.[9] And, also created at that time were the National Oceanic and Atmospheric Administration[10] in the United States Department of Commerce and the National Advisory Committee on Oceans and Atmosphere,[11] as well as the promulgation of the first Presidential Executive Order on pollution control at federal facilities.[12]

#### **B. Emerging Theories Addressing the Environment**

Perhaps the early 1970's marked the awakening by the American government in Washington, D.C. to the need for comprehensive legislative policies to fill a growing vacuum being created by Congressional inaction in this area. Or perhaps the 1970's marked the beginning of a shift in federal legislative philosophy concerning environmental issues, fundamental to which was a more respectful view of our

country's fragile environment treasures. This more sensitive view toward the environment has been referred to as the biocentric outlook, the core beliefs of which are:

- a. "The belief that humans are members of the Earth's Community of Life in the same sense and on the same terms in which other living things are members of that community.
- b. The belief that the human species, along with all other species, are integral elements in a system of interdependence such that the survival of each living thing, as well as its chances of faring well or poorly, is determined not only by the physical conditions of its environment but also by its relations to other living things.
- c. The belief that all organisms are teleological centers of life in the sense that each is a unique individual pursuing its own good in its own way.
- d. The belief that humans are not inherently superior to other living things."<sup>[13]</sup>

Nevertheless, (and even though undoubtedly federal legislation has focused national attention on previously overlooked environmental problems) the federal government's inroads into environmental regulation have been criticized as being, in essence, an overreaction to the perceived fear that individual states could not be trusted to enact sufficient environmentally-sensitive legislation to actually protect natural resources--the so-called "race to the bottom" rationale for pervasive federal environmental regulation. "Perhaps the most widely accepted justification for environmental regulation at the federal level is that it prevents states from competing by offering pollution control standards that are too lax. This competition is said to produce a 'race to the bottom'--that is, a race from the desirable levels of environmental quality that states would pursue if they did not face competition from industry to the increasingly undesirable levels that they choose in the face of such competition..."<sup>[14]</sup> This eventually leads to a cost-benefit analysis; whether economic forces outweigh the costs associated with the protection of the environment and the possible benefits of that protection.

Regardless of whether we, as a society, ultimately decide to develop a national, federalistic approach or an individual, states' rights theory (even possibly allowing for environmental regulation by governmental units within states, for example, counties, cities, villages or even homeowners' associations) to protect our natural resources and environment, the fact, and undeniable truth, is that our environment is a fragile entity dependant on long term protection. From Justice William O. Douglas' passionate, yet unconventional, plea in his dissent in *Sierra Club v. Morton*,<sup>[15]</sup> "[c]ontemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own protection," to and including Justice Antonin Scalia's recent, equally unconventional articulation in *Bennett v. Spear*<sup>[17]</sup> that the traditional, often applied "zone of interests" test CANNOT be employed to permit ONLY those considered pro-environment (i.e., "environmentalists") to assert purported federal rights in environmental litigation, with the observation, "...the citizen suit provision [of the Endangered Species Act, 16 U.S.C. sec. 1540(g)] does favor environmentalists in that it covers all private violations of the Act but not all failures of the Secretary to meet his administrative responsibilities; but there is no textual basis for saying that its expansion of standing requirements applies to environmentalists alone,"<sup>[18]</sup> it is clear that federal attention to environmental concerns is a reality that will continue to be debated within the context of today's political, economic, and social climate. Even though Justice Douglas and Justice Scalia are at opposite ends of the political spectrum on issues concerning the environment, nevertheless, by the force of their decisions, each one of them is ensuring that the environmental debate will continue. Both Justices' views are important and monumental because it focuses public attention to natural resources.

The historical development of natural resources law, particularly in the last two decades or so, clearly demonstrates an increasing emphasis on the protection of natural resources.<sup>[19]</sup>

### **C. The Role of Courts in Environmental Law**

First, every judge who is called on to decide an environmental law case should recognize that our environmental laws, by and large, are working.<sup>[20]</sup> Our progress in protecting the environment over the past two decades is truly an American success story. Let us look at some facts. Our air today is much cleaner than it was twenty-five years ago, due primarily to the federal Clean Air Act.<sup>[21]</sup> Our oceans, rivers, and drinking water are much cleaner thanks to the Clean Water Act and Safe Drinking Water Act.<sup>[22]</sup> And the federal courts have played a critical role in this success.

The 1990s however are witnessing a sea change in federal judicial attitudes toward environmental protection.[23] Gone are the 1970s, when federal judges proudly announced themselves responsible for ensuring that the newly enacted environmental laws were not lost in the bureaucracy.[24] Judges, then, did not shy away from being dubbed "judicial activists" on behalf of environmental protection measures.[25] Nor is the federal judiciary today comparable to that existing in the 1980s, when the judges were the catalyst for the revolution in the practice of environmental law. The federal courts, in the 1980s, believed in the urgency of the public health and safety needs CERCLA sought to address, they prompted every major law firm to establish an environmental practice and virtually every major business, municipality, bank, insurance company, and real estate venture to become concerned about environmental compliance and liability.[26]

The 1990s are proving decidedly different. Recent court decisions are indicative. For example, in *Steel Co. v. Citizens for a Better Environment*,[27] the United States Supreme Court denied standing to a community group based on bringing suit on wholly past violations. Courts have also denied standing in *Friends of the Earth, Inc. v. Crown Central Petroleum*,[28] and *Florida Audubon Society v. Bentsen*. [29]

### **III. RIGHTS UNDER STATE AND FEDERAL LAW**

The National Environmental Policy Act of 1969,[30] commonly referred to as NEPA, has been described as "the most important and far-reaching environmental measure ever enacted by the Congress." [31] Further, primary responsibility for implementing the national policy to improve environmental quality rests with state and local governments.[32] The following section describes the emergence of natural resource damages laws and respective rights granted under the state and federal laws.

Existing statutes and applicable common law principles provide the necessary framework for defining the opportunity for public natural resource damage claims and for private damage claims involving injuries to, or losses of, public resources.[33]

There are state environmental laws and common law claims such as nuisance and negligence under which natural resource damage actions can be brought.[34] On the federal level, there are three major environmental laws that provide for the recovery of natural resource damages: The Clean Water Act (CWA), the Oil Pollution Act of 1990 (OPA), and the Comprehensive Environmental Response, Comprehensive and Liability Act (CERCLA).[35]

#### **A. Historical Background of Natural Resource Damages Laws**

The history of natural resource damage laws is one of steady, gradual expansion beginning in 1973 and continuing right through to today.[36] After establishing the basic format in 1973[37] and 1974, Congress has continuously expanded the doctrine's scope of applicability: who can sue, what they can sue for, and how to measure the damages.

##### **1. The Trans-Alaska Pipeline Authorization Act**

With the enactment of the Trans-Alaska Pipeline Authorization Act (TAPAA),[38] the natural resource damages concept made its first step into federal environmental law.[39] The TAPAA was enacted to authorize the construction of an oil pipeline to bring oil from wells in northern Alaska to southern Alaska for loading onto tankers.[40] It further makes the company that holds the pipeline right-of-way "strictly liable to all damaged parties, public, or private, without regard to fault for such damages, and without regard to ownership of any affected lands, structures, fish, wildlife, or biotic or other natural resources relied upon by Alaska Natives, Native Organizations, or others for subsistence or economic purposes." [41] Also, the TAPAA makes the owners and operators of ships carrying Alaskan oil liable for "all damages, including clean-up costs, sustained by any person or entity, public or private." [42] The TAPAA explicitly authorizes a compensatory federal cause of action. It set a precedent for making polluters pay for their harm. As one can see, the TAPAA was an important forerunner of more mature natural resource damage provisions.

## **2. The Deepwater Port Act of 1974**

Another Act passed by Congress that authorized a federal cause of action for natural resource damages is the Deepwater Port Act of 1974 (DPA).[43] The DPA creates liability for damages and defines damages to mean damages "suffered by any person, or involving...the natural resources of the marine environment, or the coastal environment." [44] The DPA further introduced concepts of a public official serving as a trustee to recover for natural resource damages, providing that the Secretary of Transportation "may act on behalf of the public as trustee of the natural resources of the marine environment to recover for damages," [45] and that "[s]ums recovered shall be applied to the restoration and rehabilitation of such natural resources by the appropriate agencies of Federal or State government." [46] When fashioning the legislation of the DPA, Congress seems to have known that it was creating a new breed of legislation, capable of expansion. [47] The Senate committee report noted that "[i]t is hoped that some of the concepts and standards embodied in the liability provisions of the Deepwater Port Act of 1974 will be incorporated in any comprehensive liability system to compensate for damages to the marine environment." [48]

## **3. The Federal Water Pollution Control Act**

Paralleling the pattern set in the DPA, Congress took up amendments to the Federal Water Pollution Control Act (FWCPA), resulting in the Clean Water Act of 1977. [49] In the FWCPA's 1977 amendments, Congress expanded liability to include natural resource damages, explicitly contemplating the "restoration or replacement of natural resources damaged or destroyed as a result of a discharge or oil or a hazardous substance." [50] The FWCPA further required that "[s]ums recovered shall be used to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of the Federal Government, or the State government." [51] In addition, Congress also expanded who could sue under the natural resource damage doctrine. While the DPA authorized only federal official to serve as trustees for natural resources and bring natural resource damage cause of action, the FWCPA now also allowed states to serve as trustees and bring lawsuits as well. [53] The number of enforces for natural resource damages increased from one, the federal government, to fifty-seven. [54]

## **4. The Outer Continental Shelf Lands Act Amendments of 1978**

One year after the FWCPA, Congress further expanded the natural resource damage doctrine's scope of applicability with the Outer Continental Shelf Lands Act amendments of 1978 (OSCLA amendments) which regulate oil exploitation on the outer continental shelf. The OSCLA amendments created liability for "injury to, or destruction of, natural resources," and vested trusteeship and enforcement authority in the federal and state governments. [55]

## **5. The Comprehensive Environmental Response, Compensation, and Liability Act**

Like its conceptual predecessors, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) [56] makes those who release hazardous substances into the environment liable for "damages for injury to, destruction of, or loss of natural resources." [57] In addition to expanding the scope of applicability of the natural resource damages doctrine, CERCLA also dramatically expands the class of plaintiffs that can bring actions. Case law has determined that for these purposes, "states" include municipal governments also, with reasoning that would extend to the full range of local government entities, including counties and perhaps special purpose districts. [58] Under this case law, in addition to the fifty to sixty state and territorial governments, local governments also can bring natural resource damage action. [59]

CERCLA has virtually dominated environmental law since its enactment. It's enactment in 1980 has dramatically expanded both the kinds of problems to which the natural resource damage doctrine could apply and the class of plaintiffs who could bring causes of action. However, the federal government at first largely ignored the doctrine in administering the law. [60] Congress, therefore moved to reaffirm its commitment to the natural resource damages doctrine by ordering strengthened implementation. Congress amended CERCLA with the Superfund Amendments and Reauthorization Act of 1986. [61] The added mandatory provisions were designed to force the federal government to more actively pursue

natural resource damages.[62] Further, the amendments expanded the class of natural resource damages plaintiffs still one step further to include Indian tribes as authorized trustees.[63]

## **6. The Oil Pollution Act of 1990**

Unlike CERCLA and the CWA, however, the Oil Pollution Act of 1990[64] specifically provides that liability is to the state for natural resource damages belonging to, managed by, controlled by, or appertaining to political subdivisions of a state.[65] The OPA further utilizes a system of designating state trustees by the Governors similar to that used in CERCLA as amended.[66] OPA also addresses municipal involvement in the natural resources area, noting that state and local officials are to be designated as natural resource trustees.[67]

### **B. Federal Law**

Therefore, under CERCLA, § 311 of the Clean Water Act, OPA, and several other federal statutes[68] federal and state agencies designated as natural resource trustees have express authority to act on behalf of the public to seek damages for the injury, loss, or destruction of natural resources attributable to an oil spill or release of hazardous substances.[69]

### **C. State Law**

As discussed above state agencies designated as natural resource trustees have express authority to act on behalf of the public to seek damages for the injury, loss or destruction of natural resources. Courts have held that there exists a sovereign's right to act on behalf of the public in matters of "sovereign" or "quasi-sovereign" interest.

For example, in *Alaska Sport Fishing Ass'n v. Exxon Corp.*,[70] the ninth circuit held that the "parens patriae" doctrine recognizes authority of states to act as representative of all its citizens in matters of sovereign interest.[71] Further, in *Maine v. M/V Tamano*,[72] the court recognized that the state has a sovereign interest in natural resources sufficient to support action for damages based on injury or loss due to oil spill.[73]

### **D. The Adoption of Citizen Suits Into Environmental Law**

In the environmental context, many statutes contain citizen suit provisions[74] but many others do not.[75] Citizen suit provisions in the environmental law context are a recognition of the need for environmental access to the courts. Citizen suits are designed to supplement the enforcement responsibilities of federal, state, and local governments.[76] That is, where the responsible governments fail to enforce the standards of environmental law, a citizen may step in to make sure the law is enforced.[77] In 1971, Congress considered the Environmental Protection Act of 1971[78] that would have granted broad standing to environmental plaintiffs. The proposed bill provided that: "[a]ny person may maintain an action for declaratory or equitable relief in his own behalf or in behalf of a class of persons similarly situated for protection of air, water, [and] land...from unreasonable pollution, impairment, or destruction." [79] This bill recognized that because environmental interests are uniquely widespread, achieving standing is sometimes difficult. Because this bill was never enacted, and because not every statute which affects the environment has a citizen suit provision,[80] standing for environmental groups is still a very real problem.[81]

There are two basic kinds of "citizen suits" in environmental law: (1) suits by private citizens against other private citizens alleged to be violating a federal environmental law, and (2) suits by private citizens against the executive branch of the federal government, usually the EPA, alleging that the government has not carried out a mandatory duty in implementing an environmental law.[82]

In the context of natural resource damages, citizen suits are actions brought by private citizens or groups of citizens seeking compensation to remedy the public harm of natural resource damages.[83] Essentially, they involve citizens acting as "private attorneys general", because they involve citizens vindicating public rights, they are different from private causes of action for harm to the plaintiffs

personally.[84] Thus, they do not include toxic tort suits for personal injury or property damage. They also do not include private suits for personal losses suffered when public resources are damaged. While losses to people and property from pollution are important, as plaintiffs can bring suits under tort or some other type of law, they are different from the losses to the environment itself.

### **E. Intervention as a Right**

Another right which may be utilized to protect natural resources is through intervention. Intervention is a procedure which allows an outsider to enter an ongoing federal court case.[85] An outsider with an interest in a lawsuit may come in as a party even though not named as a party by the existing litigants.[86] Federal Rule of Civil Procedure 24 (Rule 24)[87] provides for intervention if conferred by a statute;[88] by the nature of the intervenor's interest in the ongoing proceeding;[89] or by permission of the court.[90] An example of an environmental statute that contains such a provision is The Clean Water Act.[91] This Act provides that in any government action brought to enforce compliance with the Act's standards, "any citizen may intervene as a matter of right." [92] A "citizen" is defined as a person "having an interest which is or may be adversely affected." [93]

Courts have liberally construed Rule 24 and its interest requirement to protect outsiders.[94] Intervention of right is, thus, a tool for the protection of the interests of nonparties. These interests can be public interests. For example, in *Sagebrush Rebellion, Inc. v. Watt*, [95] the court allowed the Audubon Society to intervene as of right based on Audubon's interest in, and knowledge of, the protection of birds and other animals and their habitats.[96]

Similarly, in *United States v. Reserve Mining Co.*, [97] a court allowed multiple environmental groups claiming to represent the public interest in the protection and enhancement of the environment to intervene in a government action against a polluter of Lake Superior.[98] The court ruled that the environmentalists' interest in Lake Superior as a source of drinking water, recreation, and natural beauty were substantial interests, sufficient to qualify for intervention of right under Rule 24(a)(2).[99] Therefore, as another right, intervention allows full participation in a lawsuit [100] and is a good mechanism for environmental judicial review.

However, intervention of right may be hindered if standing requirements [101] are incorporated into intervention. Intervention is fundamentally different than standing to sue in its language, function, origin, procedural posture, and in its applicability to both plaintiffs and defendants.[102]

## **IV. UNDERSTANDING THE DILEMMA OF ENVIRONMENTAL STANDING**

### **A. Defining the Terms**

Standing is a complex doctrine.[103] The courts have further commented on how standing is a confusing and somewhat ambiguous doctrine.[104] Standing is a threshold, jurisdictional doctrine that courts use to decide whether a plaintiff may or may not bring his or her claim to court.[105] The Standing doctrine originates in Article III of the United States Constitution, which limits "the judicial power of the United States to ...cases [and]...controversies." [106] Standing requires the Constitutional requirements as discussed above and the Prudential requirements discussed below.

### **B. The Categories of Standing and the Prima Facie Case**

#### **1. Constitutional Standing**

Adopting the test put forth in *Lujan v. Defenders of Wildlife*, [107] the United States Supreme Court in *Steel Co. v. Citizens For a Better Environment*, [108] stated that "standing is the 'irreducible constitutional minimum' necessary to make a justiciable 'case' or 'controversy' under Article III, § 2. [109] According to Justice Scalia in *Steel Co.*, standing requires three parts: injury in fact to the plaintiff, [110] causation [111] of that injury by the defendant's complained-of conduct, and redressability--a likelihood that the requested relief will redress that injury. [112] The triad of injury in fact, causation, and redressability comprises the core of Article III's case or controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence. [113]

## 2. Prudential Standing

In addition to the constitutional component of standing, the Supreme Court has itself promulgated three further requirements: (1) no third party standing; (2) a claimant must be within the zone of interests to be protected by the statute or constitutional guarantee in question; and (3) no abstract questions of wide public significance which amount to generalized grievances, pervasively shared, and most appropriately addressed by the representative branches. These three court-fashioned requirements are the prudential component of standing.

### C. The Application of the Standing Doctrine in Causes of Actions

The long-standing rule of tort law remains that a private party can recover for injury to public resources if the party has sustained damage different from that incurred by the general public.

The common law also often provides an appropriate cause of action to the prospective private plaintiff who has suffered particularized harm.<sup>[116]</sup> Suits in negligence, nuisance, strict liability, and trespass have all been employed in private actions regarding public resources.<sup>[117]</sup> Recovery on behalf of the public is generally not pursued using these traditional causes of action.<sup>[118]</sup>

#### 1. Local Government Causes of Action

Under the liability provisions of CERCLA, § 311 of the Clean Water Act, and OPA, and other federal statutes, the right to seek recovery damages for the loss of a natural resource is allocated to designated natural resource trustees.<sup>[119]</sup> CWA provides that the United States or the authorized representative of any State "shall act on behalf of the public as trustee of the natural resources...to recover for the cost of replacing or restoring such resources."<sup>[120]</sup> OPA states that such damages "shall be recoverable by a United States trustee, a State trustee, an Indian tribe trustee, or a foreign trustee."<sup>[121]</sup> CERCLA provides that liability should be to the "United States Government and to any State for natural resources within the State or belonging to, managed by, controlled by or appertaining to such State."<sup>[122]</sup> Section 9607(f)(1) provides that "the President or the authorized representative of any State, shall act on behalf of the public as trustee of such natural resources to recover for such damages."<sup>[123]</sup> Finally, CERCLA's definition of "State" is expansive rather than restrictive; unlike most CERCLA definitions, which are introduced by the word "means," CERCLA provides that "state" shall "...include the several states of the United States."<sup>[124]</sup>

Prior to 1986, when CERCLA was amended, the provision for actions involving damage to natural resources provided that those responsible for the destruction of natural resources would be liable to the federal government and the government of the state in which the damage occurred.<sup>[126]</sup> On its face, this provision did not seem to permit political subdivisions of a state to bring an action for natural resource damages. The first court to consider whether a municipality could bring an action under this provision, however, decided that municipalities were not precluded from bringing suit.<sup>[127]</sup> In *Mayor of Boonton v. Drew Chemical Corp.*,<sup>[128]</sup> the court held that municipalities have standing to recover for damages to natural resources owned by them<sup>[129]</sup> based on two alternative and independent lines of reasoning.

First, the court began by examining the definition of "state"<sup>[130]</sup> contained within CERCLA. The court held that because the definition was inclusive, it did not follow that Congress necessarily intended to exclude municipalities.<sup>[131]</sup> The court concluded that reasonable expansions to the definition, such as allowing for municipalities, could be made.<sup>[132]</sup> The court supported its conclusion by pointing to other statutes where Congress has defined "state" to include political subdivisions of states, such as municipalities.<sup>[133]</sup>

Secondly, in a less-textual and more policy-oriented discussion, the court stated that not allowing municipal recovery would frustrate CERCLA's broad remedial purpose.<sup>[134]</sup> As the court noted:

[i]t would be anomalous for this far reaching remedial statute to give states a cause of action for damages to natural resources owned by the State but for it to exclude cities from access to such a cause of action

while expressly including resources owned by local government's within the scope of the protected subject of [CERCLA].

As in *Mayor of Boonton*, the United States District Court for the Southern District of New York in *City of New York v. Exxon*, also considered two lines of reasoning to conclude that a municipality is a proper plaintiff.[136] The reasoning in *City of New York v. Exxon Corp.*,[137] is similar to that in *Mayor of Boonton*, in that the court appealed to the overriding purposes of CERCLA, which the court described as the quick and effective cleanup of hazardous wastes and the restoration of environmental quality.[138]

Therefore, prior to the 1986 amendments, municipalities were able to recover natural resource damages under CERCLA. Although the language of CERCLA did not support this position explicitly, the courts ruled that purposes of CERCLA were served better by providing municipalities with standing. Granting municipalities standing to recover the costs of destroyed natural resources furthers CERCLA's purposes of restoring natural resources and remediating contaminated sites.

As discussed above,[142] municipalities have not, in their own right, tried to recover natural resource damages under either the Clean Water Act or the Oil Pollution Act of 1990 and therefore there is no judicial interpretation as to whether municipalities may do so. The bulk of municipal action in the area of federal environmental law has been under the various provisions of CERCLA.[143] It is therefore reasonable to assume that courts would look to CERCLA cases in interpreting cases brought under the Clean Water Act or the Oil Pollution Act.[144]

Although the recent trend has been to deny municipalities standing to recover response costs as a "state," it has been held that municipalities could enter into settlements as a "state." [145] Furthermore, CERCLA grants municipalities power to carry out CERCLA's and the CWA's objectives in several aspects.[146] Because the Clean Water Act and Oil Pollution Act of 1990 provide for recovery of natural resource damage, municipalities should learn to act locally and use their privilege and power to enforce environmental laws under citizen suit provisions.[147]

## 2. Private causes of Action

Historically, private claims for pollution-related damages have been based on common law actions in tort--notably, negligence, nuisance, and trespass.[148] At common law, the opportunity for a private claimant to recover damages for the lost use of a natural resource following a pollution incident depends on whether the claimant suffered a harm, loss, or injury that is separate and distinct from that suffered by the public.[149] As the court held in *Burgess v. M/V Tamano*,<sup>150</sup> "a private individual can recover in tort for invasion of a public right only if he has suffered damage particular to him--that is, damage different in kind, rather than simply in degree, from that sustained by the public generally." [151]

Private claims arising in maritime settings are subject to admiralty law within the jurisdiction of the federal courts.[152] Admiralty law, also referred to as "federal maritime law," has a common law component that includes common law tort principles. For example, in *Carbone v. Ursich*, [153] members of a crew libeled another vessel for negligently fouling their net. They claimed their share of the lost catch and the prospective catches of fish lost during the period in which the net was being repaired.[154] In a lengthy discussion, the court considered, among other things, whether or not the crew could bring the action itself or whether it had to be brought by the owner of the fishing vessel.[155] Although the owners of the vessel intervened, the court found the fishermen to be the real parties in interest despite the lack of any property rights in the fish, the boat or the net.[156] Also, in *Consolidated Aluminum Corp. v. C.F. Bean Corp.*, [157] and *Rollins v. Peterson Builders, Inc.*, [158] the courts found that general principles of negligence apply to the analysis of maritime tort claims.[159]

Recognition of the overriding rights of certain classes of private individuals has not been limited to cases emanating from United States Coastal waters. In *Masonite Corp. v. Steede*, [160] a plaintiff-appellee claimed damages for destruction of her fishing business and for loss of profits as a result of the discharge of effluents into a river which ran through her property upon which her business was located. The appellant argued that although the effluent discharged was from their plant, plaintiff had no cause

of action against them because she did not own the fish.[161] The court recognized that the appellee did not own the fish in the river, but that she and all other persons on the Pascagoula River could obtain access to the fish and that she had the right to permit or exclude others from obtaining access to the river through her property.[162]

In *Union Oil Co. v. Oppen*,[163] the United States Court of Appeals for the Ninth Circuit again considered the question of whether commercial fisherman had a cause of action for damages caused by the Santa Barbara oil spill.[164] Defendant's Motion to Dismiss was denied by a special master who recognized that the "injuries resulting from 'an interference by defendants with [plaintiff's] economic right to fish in public waters' were legally compensable." [165] The district judge affirmed the special master's order in that its resolution was not dependent on whether plaintiffs had a proprietary interest in the sea life of the Santa Barbara Channel, and that the diminution of the aquatic life constituted a legally compensable injury.[166]

Other than in the area of private claims for clean-up costs, neither CWA nor CERCLA include liability provisions for compensation of private injuries and losses resulting from oil spills or releases of hazardous substances.[167] Thus, before the 1990 passage of OPA, admiralty law and common law rules provided the basis for private claimants to recover damages following a pollution incident, including damages for the lost use or enjoyment of a natural resource.[168]

In general, there is no private right of action to recover for damages to natural resources.[169] This is primarily because private citizens do not own natural resources--they are public resources. Nonetheless, it is not an entirely novel concept that private individuals can indeed have an overriding interest in public resources to such an extent that certain individuals can sue and recover for damages connected with publicly owned natural resources.

One such class of individuals is comprised of fisherman, hunters and others who commercially harvest natural resources. It is generally recognized that before harvest, ownership of these resources is vested with the state or local government.[170] Nonetheless, courts have extended protection to commercial fisherman, oystermen, crabbers, and shrimpers by granting them a cause of action under general law damages to natural resources in which their interests are greater than the public's interest, even in absence of any proprietary rights.[171]

In several cases, courts found standing under the Supreme Court's test in *Lujan v. Defenders of Wildlife*. [172] In *Committee to Save the Rio Hondo v. Leondaerd Lucero*, [173] an environmental organization, had standing to challenge the Forest Service's decision to allow summertime use of a ski area in a national forest. In *Sierra Club v. Lone Star Chapter the Cedar Point Oil Co., Inc.*, [174] the court held that an environmental group had standing under the Clean Water Act to prevent unpermitted discharges from a waste treatment facility into a bay used for recreational activities.[175] In *NutraSweet Co. v. X-L Engineering Corp.*, [176] a former property owner who retained responsibility to fund the operation of a remediation system had an injury in fact sufficient to support a claim against a neighbor for contamination under CERCLA.

However, in several other cases, the courts denied standing under the *Lujan* test.[177] In *Friends of the Earth, Inc. v. Crown Central Petroleum Corp.*, [178] an organization whose membership includes individuals who bird watch and fish at a lake 18 miles and 3 tributaries from the source of an unlawful water pollution did not meet the fairly traceable component of standing [179] to sue for violations of the FWPCA. In *Florida Audubon Society v. Bentsen*, [180] environmental groups failed to establish personal injury or an injury fairly traceable to challenged acts in an action against the Secretary of Treasury and the Commissioner of the Internal Revenue Service for authorizing a tax credit for the use of an alternative fuel additive, ethyl tertiary butyl ether, without preparing an Environmental Impact Statement. In *Wilderness Society v. Alock*, [181] environmental groups did not establish injury in an action under the National Forest Management Act where a resource plan called regarding future decision making for future timber harvest goals.

### **3. Standing to Sue for Clean Up and/or Injunctive Relief**

Natural resources are broadly defined in CERCLA to mean "land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States...[or] any State or local government..."[182]

### **Clean Up**

Responsible parties are liable for "damages for injury to, destruction of, or loss of natural resources, including the reasonable cost of assessing such injury, destruction, or loss."[183] These damages are recoverable in addition to the recovery of cleanup costs incurred in responding to the contamination.[184]

Suing for natural resources damages is a cause of action seeking a money judgment for harm to the environment. The money is then used to restore the environment to its original condition, or where that is not possible, make up for the harm by improving the environment elsewhere in the same general vicinity.[185] The natural resource damages doctrine is conceptually very similar to the tort law doctrine providing the sum of money necessary to "make the victim whole again." [186]

Trustees are authorized to recover damages for 1) the costs of restoring resources, 2) compensation for the interim loss of natural resources and/or services from the time of injury until full recovery of the resources, and 3) reasonable costs of assessment.[187]

Neither environmental citizen suit provisions nor CERCLA's cost recovery authority provides for compensation of private parties for personal injury or property damage.[188] However, the costs of actions taken to prevent, mitigate, clean up, or otherwise respond to actual or threatened environmental contamination are potentially recoverable response costs under CERCLA.[189] Moreover, under court rulings that local governments fall within CERCLA's definition of "state[s]," local governments may recover damages for injury to natural resources resulting from releases hazardous substances.[190] Additionally, federal courts generally have discretion, pursuant to the doctrine of pendent jurisdiction, to entertain claims under state statutory or common law in conjunction with citizen suit and cost recovery claims arising from the "same nucleus of operative fact." [191]

### **Injunctive Relief**

All environmental citizen suit provisions authorize courts to enter mandatory injunctive relief.[192] Additionally, under many environmental laws[193] courts may assess substantial civil penalties. Assessment of penalties may be invaluable in deterring future offenses and encouraging compliance.[194]

Moreover, once a plaintiff has incurred response costs as governed by CERCLA,[195] a court may enter a declaratory judgment establishing a clean up plan for the site at issue, including standards and requirements that must be met at the site, and declaring the defendant liable for the plaintiff's future costs of implementing that plan, or of compelling and overseeing the defendant's implementation of the plan.[196] Once the court, by declaratory judgment establishes the standards and requirements the court may enter an appropriate injunction under CERCLA,[197] governing citizen suits. Also, CERCLA cost recovery claims may be brought in conjunction with claims for injunctive relief under other environmental citizen suit provisions.[198] Thus, CERCLA's cost recovery authority and environmental citizen suit provisions may be used together to obtain expeditious clean up at the cost of the polluter.

## **V. RECOMMENDATIONS**

Fortunately for the environment, the law is a dynamic process. Over the years, as our conception of the environment's value has changed, so have the laws. Because of those changes and new attitudes regarding both landowners and governments, there now appears to be more opportunity to protect, preserve, enhance, and restore our natural resources. It is not too late.

### **1) Utilize New and Existing Law**

In many instances, it is time to begin attempting the use of new strategies of restoration. One such strategy is the enforcement of the public's legally protected interest in damaged natural resources regardless of whether they are publicly or privately held.[199] Another is for environmental groups, the public and local governments to take litigation initiative and assert claims for both response costs and natural resource damages. If responsibility to recover for damages to natural resources were left exclusively with agencies whose capabilities are already strained, many claims would be left unheard and unasserted. With the recovery of damages, the local governments and the public could further the purpose and objective of environmental laws like CERCLA, which the court described as quick and effective cleanup and the restoration of environmental quality.[200]

## **2) Increase Citizen Enforcement**

Despite an increase in citizen enforcement activity, and the recent ruling in *Steel Co.*, citizen suit and cost recovery provisions of federal environmental laws generally continue to be underutilized. In practice, federal, state, and local governments have brought few natural resource damage actions, but certainly, many cases exist that could have and should have been brought but have not been.

Accordingly, citizen suits and actions to recover costs of responding to damage to our natural resources can be expected to provide affordable and effective remedies to plaintiffs who wish to take advantage of them.

## **3) Claim Your Right of Intervention**

Further, another mechanism that needs to be utilized more is Rule 24, the intervention of right. As courts have held, Rule 24's flexibility, allows for the protection of the public interest.[201] Environmental and conservation organizations need to intervene more in environmental lawsuits. Intervention can become a viable means to access to the courts for environmental interests and natural resource damages if the Supreme Court will specifically hold that standing analysis is not applicable to proposed intervenors.

If intervention is free from standing's burdens, it can operate as an alternative mechanism for achieving judicial review. Environmental and conservation groups could use Rule 24, intervention of right, to promote their values by adding to the court's information on environmental degradation, and to supplement to the legal expertise of overworked agency personnel in enforcing or defending environmental regulations.

## **4) Influence and Implement Legislation**

With the complexities of standing, environmental groups and the public need to educate and influence law makers of the uniqueness and variety of environmental interests. By getting law makers to introduce, propose and support environmental issues, standing requirements laws could be changed. Legislation similar to that proposed in 1971, The Environmental Protection Act of 1971,[202] could increase citizen enforcement and grant broad standing to environmental plaintiffs.

## **5) The Role of Courts--A Call for the Return of Judicial Activism**

Finally, Courts need to grant environmental claims representation. "[C]itizen groups are not to be treated as nuisances or troublemakers[,] but rather as welcomed participants in the vindication of environmental issues." [203]

As discussed above,[204] courts play a vital role in shaping environmental law. By denying access to the courts, our environment may suffer. By imposing harsher civil and criminal penalties, our environment and society would benefit. Courts need to take into consideration the reality that environmental laws work,[205] the American people value environmental protection,[206] environmental statutes are complex and often call for courts to defer to agencies,[207] and that they live in the environment as well. Let us not forget our nature just because it does not speak for itself.

## **VI. ENDNOTES**

[1]. See, generally Terry Fox, *Natural Resource Damages: The New Frontier of Environmental Litigation*, 34 S.TEX.L.J. 521, 522 (1993) See also Michael J. Wittke, *Municipal Recovery of Natural Resource Damages Under CERCLA*, 23 B.C. ENVTL. AFF. L. REV. 921 (1996).

[2]. *Id.*

[3]. 61A AM. JUR. 2D Pollution Control §2 (1981).

[4]. See 61A AM. JUR. 2D Pollution Control at 419 n.15 (1981).

[5]. 42 USCS §§4321 et seq. (Congress described its purpose in enacting the National Environmental Policy Act as follows: to declare a national policy which will encourage productive and enjoyable harmony between humanity and its environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; and to enrich the understanding of the ecological systems and natura resources of the nation.) *Id.*

[6]. 42 USCS §§ 4371 et seq. (The Environmental Quality Improvement Act of 1970 was enacted on the finding that (1) humanity has caused changes in the environment, (2) that many of these changes may affect the relationship between humanity and its environment, and (3) that population increases and urban concentration contribute directly to pollution and the degradation of our environment, declares also that there is a national policy for the environment which provides for the enhancement of environmental quality) *Id.*

[7]. 20 USCS §§1531-1536 (Congress enacted the Environmental Education Act to encourage and financially support "environmental education" which is defined as the educational process dealing with humanity's relationship with its natural and artificial surroundings, and includes the relation of population, pollution, resource allocation and depletion, conservation, transportation, technology, economic impact, and urban and rural planning to the total human environment.) *Id.* at §1532(a)(2).

[8]. 42 USCS §§4371 et seq. (NEPA provided for the creation of a Council on Environmental Quality (CEQ) in the Executive Office of the President directed to perform the following: assist the President in the development of national policies for improvement of the environment; gather information concerning conditions and trends in the quality of the environment; document and define changes in the natural environment; and review and appraise the various federal programs and activities in the light of the policies set forth in NEPA) *Id.*

[9]. The Environmental Protection Agency was created in 1970 as an independent agency in the Executive Branch of the Federal Government in order to consolidate the major environmental pollution responsibilities of the Federal Government). See 61A AM. JUR. 2D, Pollution Control, §7 at 431.

[10]. 15 USCS §1511 (In transmitting to Congress the proposal for the creation of the Administration, the President stated that he expected NOAA "to exercise leadership in developing a national oceanic and atmospheric program of research and development.") (For the text of the President's message of transmittal, see *Environmental Quality, First Annual Report of the Council on Environmental Quality, Appendix H p. 294.*)

[11]. 33 USCS §§ 857-13 et seq. (NACOA was established to undertake a continuing review of national ocean policy, coastal zone management, and the status of the federal marine and atmospheric science and services programs, and to advise the Secretary of Commerce with respect to the carrying out of the purposes of the National Oceanic and Atmospheric Administration.) 33 USCS §857-14(d).

[12]. See President Nixon's State of the Union Address, Jan. 22, 1970, which is devoted largely to the environment, and his Message on the Environment, Feb. 10, 1970. See also 61A AM. JUR. 2D, Pollution Control, §1 at 417 n.8.

[13]. RICHARD L. REVESZ, *FOUNDATIONS OF ENVIRONMENT LAW AND POLICY*, p. 29 essay by Paul W. Taylor, *Respect for Nature: A Theory of Environmental Ethics* © 1986 Princeton University Press.

[14]. RICHARD L. REVESZ, FOUNDATIONS OF ENVIRONMENTAL LAW AND POLICY, See Richard L. Revesz, Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation Reprinted from 67 New York University Law Review 1210 (1992).

[15]. *Sierra Club v. Morton*, 405 U.S. 727, 31 L.Ed. 2d 636 (1972)(holding that in absence of allegation that corporation or its members would be affected in any of their activities or pastimes by the proposed project, the corporation, which claimed special interest in conservation of natural game refuges and forests, lacked standing under the Administrative Procedure Act to maintain the action.) Id. at 1361.

[16]. Id. at 1369. See also William O. Douglas, *The Three Hundred Year War, A Chronicle of Ecological Disaster*, Random House New York, © 1972. (Discussing the concerns of standing, Justice Douglas explains, "'standing' to sue has usually been considered to be a dry, technical problem. But in the field of environmental questions it has broad philosophical connotations. When a man [or woman] speaks against destruction of a valley, say by the Soil Conservation Service, he [or she] speaks for the entire community that lives there. The water ouzel is in that community; the red fox, the coyote, the bear, are others; the deer is included; so are the birds overhead, the earthworms and golden-mantled ground squirrels underneath, the fish in the stream, and the rest of the wildlife dependent on the river. The entire community includes of course the trees, the shrubs, the spring beauty and all of the wonders underfoot. These members of the community have ways of communicating with each other. Even the coyote and the fox talk, though man [and woman] does not understand what they say. The members of the community, in other words, are in no position to be heard at any public hearing. Only man [and woman] can speak for them. He [and she] who knows them and understands them and appreciates their role in the community has 'standing' to speak before they are destroyed. That is the essence of the 'legal' question in the environmental setting.") Id. at 180-181.

[17]. *Bennett v. Spear*, 117 S.Ct. 1154 (1997) Justice Scalia discovered the merits of expansive citizen standing in a case where the concerned citizens are arguing that the government is protecting species too much; See also Richard Lazarus, *Government Shifts Strategy in ESA Case*, THE ENVIRONMENTAL FORUM, Vol.13, Num. 6, Nov./Dec. 1996 at 12. See also Richard Lazarus, *Enviros, Industry Can Applaud Bennett*, THE ENVIRONMENTAL FORUM, Vol. 14, Num.3, May/June 1997 at 10.

[18]. *Bennett*, 117 S.Ct. 1157-58 (discussing how the ESA's citizen-suit provision, 16, U.S.C. § 1540(g) has no textual basis for saying that the formulation's expansion of standing requirements applies to environmentalists alone.) Compare *Steel Co. v. Citizens for a Better Environment*, 1998 WL 88044 (U.S) (Justice Scalia denied standing to a community group who sought to bring standing based on wholly past violations of the Emergency Planning and Community Right-to-Know-Act.)

[19]. See Gregg L. Spyridon & Sam A. LeBlanc, III, *The Overriding Public Interest in Privately Owned Natural Resources: Fashioning a Cause of Action*, 6 TUL. ENVTL. L.J. 287 (1993).

[20]. See Lois J. Shiffer & Timothy J. Dowling, *Reflections on the Role of the Courts in Environmental Law*, ENVIRONMENTAL LAW NORTHWESTERN SCHOOL OF LAW OF LEWIS & CLARK COLLEGE, Volume 27, Summer 1997 Number 2 at 327.

[21]. Id. at 329 (explaining how since 1970, lead emissions have dropped by ninety-eight percent; emissions of fine soot, a cause of respiratory disease, have fallen seventy-nine percent; emissions of carbon monoxide, a killer poison, have declined twenty-eight percent; emissions of volatile organic compounds, a precursor of groundlevel ozone and smog, have fallen twenty-five percent).

[22]. Id. at 330 (explaining how our waters and rivers are safer and cleaner; Lake Erie once barren is now teeming with fish...)

[23]. See generally Richard Lazarus, *A Sea Change in Judicial Activism*, THE ENVIRONMENTAL FORUM, Volume 14, Number 1, January/February 1997, at 6.

[24]. Id.

[25]. Id.

[26]. Id.

[27]. No. 96-643, 1998 WL 88044 (U.S.) (decided March 4, 1998)

[28]. 95 F.3d 358 (5th Cir. 1996), reh'g denied, 1996 U.S. App. LEXIS 28091 (5th Cir. 1996); See *infra* discussion part IV.C.2.

[29]. 94 F.3d 658 (D.C. Cir. 1996) The court ruled that the environmental groups failed to establish personal injury. See *infra* discussion part IV.C.2.

[30]. 42 USCS §§4321 et seq.

[31]. 61A AM.JUR. 2D, Pollution Control, §9 (citing statement made by Senator Jackson, sponsor of the bill in the Senate. 115 Cong Rec S 7451 (daily ed Dec 20, 1969)) Id. at fn. 52.

[32]. 61A AM. JUR. 2D, Pollution Control, §9; 42 USCS §4371, subd b(2).

[33]. See generally Carol A. Jones, et al., Public and Private Claims in Natural Resource Damage Assessments, 20 Harv. Envtl. L. Rev. 111 (1996). Part II discusses the legal issues associated with public and private claims for natural resource damages.

[34]. See e.g., *Werlein v. United States*, 746 F.Supp. 887, 890 (D.Minn. 1990) The plaintiffs brought actions in nuisance, trespass, and other common law claims as well as under Minnesota state environmental laws.

[35]. Respectively, the Clean Water Act, 33 U.S.C. § 1251 (1988); the Oil Pollution Act of 1990, 33 U.S.C. § 2701 (Supp. V 1993); CERCLA, 42 U.S.C. §9601 (1988 & Supp. V 1993).

[36]. See Barry Breen, Citizen Suits For Natural Resource Damages: Closing a Gap in Federal Environmental Law, 24 WAKE FOREST L. REV. 851, (1989). For a thorough discussion on the history of natural resource damage laws see part I and the accompanying text of Breen's article.

[37]. See e.g., TRANS-ALASKA PIPELINE AUTHORIZATION ACT, Pub. L. No. 93-153 (Title II, 87 Stat. 584 (1973) (codified as amended at 43 U.S.C. §§1651-1655 (1982)). The natural resource damages concept made its first step into federal environmental law in 1973, with the enactment of the Trans-Alaska Pipeline Authorization Act (TAPAA).

[38]. 43 U.S.C. §§1651-1655 (1994).

[39]. Barry Breen, *supra* note 36 at 855.

[40]. Id.

[41]. 43 U.S.C. § 1653(a) (1994).

[42]. 43 U.S.C. § 1653(c)(1) (1994).

[43]. DEEPWATER PORT ACT OF 1974, Pub. L. No. 93-627, 88 Stat. 2126 (1975)(codified as amended at 33 U.S.C. §§ 1501-1524 (1982)). Although both houses actually passed the statute on December 17, 1974, the "Deepwater Port Act of 1974" did not become law until 1975, when President Ford signed the legislation.

[44]. 33 U.S.C. § 1517(m)(2) (1994).

[45]. 33 C.F.R. § 137.509(a) (1988).

[46]. 33 C.F.R. § 137.503(b) (1988).

[47]. See Barry Breen, *supra* note 36 at 857.

[48]. Barry Breen, *supra* note 36 at 857 (citing S. REP. NO. 1217, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7529, 7543).

[49]. THE FEDERAL WATER POLLUTION CONTROL ACT, Pub. L. No. 95-217, 91 Stat. 1566 (1977)(codified as amended at 33 U.S.C. §§ 1251-1376 (1982)). The FWPCA liability provisions apply generally to oil spills throughout the United States waters. Even before 1977, the FWCPA had made oil spillers liable for the government's actual cleanup costs. With the 1977 amendments, Congress expanded this liability to include natural resource damages.

[50]. 33 U.S.C. § 1321(f)(4) (1994).

[51]. 33 U.S.C. § 1321(f)(5) (1994).

[52]. 33 U.S.C. § 1517(I)(3) (1994); See also above discussion of DPA's enactment.

[53]. 33 U.S.C. § 1321 (f)(5) (1994).

[54]. See Barry Breen, *supra* note 36 at 858. Explaining how "State" for FWCPA purposes includes not only the fifty states but also the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Trust Territory of the Pacific Islands. *Id.* at fn. 35.

[55]. OUTER CONTINENTAL SHELF LANDS ACT, Pub. L. No. 95-372, 92 Stat. 629 (1978); 43 U.S.C. § 1813 (1994).

[56]. COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT, Pub. L. No. 96-510, 94 Stat. 2767 (1980); 42 U.S.C. §§ 9601-9675 (1994).

[57]. 42 U.S.C. §9607(a)(4)(C) (1994)

[58]. See e.g., *City of New York v. Exxon Corp.*, 697 F.Supp. 677 (S.D.N.Y. 1988) and 633 F.Supp. 609 (S.D.N.Y. 1986); *Mayor of Boonton v. Drew Chem. Corp.*, 621 F.Supp. 663 (D.N.J. 1985); See also Part IV.C.1. and accompanying text.

[59]. See Barry Breen, *supra* note 36 at 861. Breen explains that expanding the class of plaintiffs who can bring natural resource damages actions to include local governments exponentially increases the number of authorized plaintiffs. Further, the Census Bureau reports in 1988 that there are 3,042 county governments, 19,200 municipal governments, 16,691 township and town governments, and 29,532 special district governments of the United States. Thus, Breen contemplates that under CERCLA, Congress has enlarged the universe of permissible plaintiffs to roughly 68,500. *Id.* at 861.

[60]. For a general discussion on how the federal government was lax in enforcing the law, see Barry Breen, *supra* note 36 at 861-862.

[61]. 42 U.S.C. §§9601-75 (Supp. V 1987).

[62]. 42 U.S.C. §9604(b)(2) (Supp. V 1987).

[63]. 42 U.S.C. §9607(f)(1) (Supp. V 1987).

[64]. 33 U.S.C. §§2701-2761 (Supp. V 1993).

[65]. 33 U.S.C. §2706 (Supp. V 1993).

[66]. Compare OIL POLLUTION ACT OF 1990, 33 U.S.C. §2706(b)(3) with CERCLA, 42 U.S.C. §9607(f)(2)(B).

[67]. See *id.* §§2706(b)(3)-(c)(2). Despite their right and power to bring suit under either the Clean Water Act or the Oil Pollution Act of 1990, municipalities have not tried to recover natural resource damages. For a discussion on this issue, see Michael J. Wittke, *Municipal Recovery of Natural Resource Damages Under CERCLA*, 23B.C. ENVTL.AFF.L.REV. 921 (1996).

[68]. Two other federal statutes—the National Marine Sanctuaries Act, 16 U.S.C. §§ 1431-1445 (1994), and the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. §§1651-1656 (1988 & Supp. V 1993)—have liability provisions authorizing natural resource trustees to collect damages under specific jurisdictional circumstances. Where either applies, public and private causes of action must be considered in light of these provisions.

[69]. See Jones, *supra* note 33, at 116.

[70]. 34 F.3d 769 (9th Cir.1994).

[71]. *Id.* at 773.

[72]. 357 F.Supp. 1097 (D.Me. 1973).

[73]. *Id.* at 1100.

[74]. See THE TOXIC SUBSTANCES AND CONTROL ACT, 15 U.S.C. §2619(a)-(d) (1994); THE ENDANGERED SPECIES ACT OF 1973, 16 U.S.C. §1540(g) (1994); THE SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977, 30 U.S.C. §1270(a)-(f) (1994); THE CLEAN WATER ACT, 33 U.S.C. §1365(a)-(h) (1994); THE OCEAN DUMPING ACT, 33 U.S.C. §1415(g) (1994); THE SAFE DRINKING WATER ACT, 42 U.S.C. §300j-8(a)-(e) (1994); THE RESOURCE CONSERVATION AND RECOVERY ACT, 42 U.S.C. §6972(a)-(g) (1994); THE CLEAN AIR ACT, 42 U.S.C. §7604(a)-(f) (1994); THE COMPREHENSIVE ENVIRONMENTAL RESPONSE COMPENSATION AND LIABILITY ACT, 42 U.S.C. §9659(a)-(I) (1994); and THE EMERGENCY PLANNING AND RIGHT TO KNOW ACT OF 1986, 42 U.S.C. §11046(a)-(h) (1994).

[75]. Examples of statutes that affect environmental quality and policy but do not contain a citizen suit provision include: THE FEDERAL INSECTICIDE FUNGICIDE AND RODENTICIDE ACT, 7 U.S.C. §§136-136(y)(1994); THE COASTAL ZONE MANAGEMENT ACT OF 1972, 16 U.S.C. §§1451-1464 (1994); THE FOREST AND RANGELAND RENEWABLE RESOURCES PLANNING ACT OF 1974, 16 U.S.C. §§1600-1687 (1994); THE NATIONAL ENVIRONMENTAL POLICY ACT, 42 U.S.C. §§4321-4370a (1994); THE FEDERAL LAND POLICY AND MANAGEMENT ACT, 16 U.S.C. §§3801-3845 (1994). Many other statutes are not specifically environmental, but may affect the environment nonetheless. Additionally, many government decisions that have an environmental impact fall under the catchall judicial review provision of THE ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. §702 (1994), which is not a citizen suit provision, but rather, grants standing to "[a] person suffering legal wrong because of an agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute."

[76]. See *Gwaltney of Smithfield, Ltd. V. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987).

[77]. See generally JEFFERY G. MILLER & ENVIRONMENTAL LAW INSTITUTE, *CITIZEN SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL LAWS* (1987).

[78]. See Ellyn J. Bullock, *Acid Rain Falls on the Just and the Unjust: Why Standing's Criteria Should Not Be Incorporated into Intervention of Right*, 1990 U. ILL. L. REV. 605 at 616 & n.104 (citing S. 1032, 92d Cong., 1st Sess. (1971)).

[79]. *Id.* at 616 & n. 106 (citing S. 1032, 92d Cong., 1st Sess. §3.96 (1971)).

[80]. See supra note 75.

[81]. For a thorough discussion on why standing for environmental groups is still a very real problem See Ellyn J. Bullock, supra note 78 at 616 part B.1.-2.

[82]. Id.; See also Ray Vaughan, Proof of Standing in Environmental Citizen Suits, 35 AM. JUR. POF 3D 493 (1996).

[83]. See Barry Breen, supra note 36 at 870.

[84]. Id.

[85]. See C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND CIVIL PROCEDURE §1901 (2d. ed. 1986) [hereinafter WRIGHT & MILLER].

[86]. Id.

[87]. Rule 24 reads:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

[88]. FED. R. CIV. P. 24(a)(1).

[89]. FED. R. CIV. P. 24(a)(2).

[90]. FED. R. CIV. P. 24(b).

[91]. 33 U.S.C. §1365(a)-(h) (1994).

[92]. 33 U.S.C. §1365(b)(1)(B) (1994).

[93]. 33 U.S.C. §1365(g) (1994).

[94]. See generally Ellyn J. Bullock, supra note 78 at 623-632.

[95]. 713 F.2d 525 (9th Cir. 1983). Audubon Society was claiming that the Secretary of Interior, Watt, was not representing their environmental interests.

[96]. Id. at 528.

[97]. 56 F.R.D. 408 (D.Minn. 1972).

[98]. Id. at 417, 419.

[99]. Id. at 418.

[100]. See e.g., *In re Oceania Int'l, Inc.* 49 F.R.D. 329(S.D.N.Y. 1970)(once intervention of right has been granted intervenor should be entitled to litigate fully on the merits).

[101]. See *infra* discussion on standing.

[102]. See generally Ellyn J. Bullock, *supra* note 78 at 635-644. (Standing's prudential bar against generalized grievances and its sometimes overlapping requirement of injury in fact are not required by me in Rule 24.) *Id.* at 638.

[103]. See Ellyn J. Bullock, *supra* note 78 at 609.

[104]. See *Allen v. Wright*, 468 U.S. 737 (1984). In *Allen* the Court said standing concepts are "concededly not susceptible of precise definition." *Id.* at 751. See also *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1984) The court held commented that standing "has not been defined with complete consistency in all of the various cases decided by this Court which have discussed it...[and it] cannot be reduced to a one-sentence or one-paragraph definition." *Id.* at 475. See also *Haitian Refugee Center v. Gracey*, 809 F.2d 794 (D.C. Cir. 1987). The court said that, "the law of standing remains uncertain and unsettled in some of its major branches." *Id.* at 798.

[105]. See Ellyn J. Bullock, *supra* note 78 at 610.

[106]. U.S. CONST. art. III, §2.

[107]. 504 U.S. 555, 112 S.Ct. 2130 (1992).

[108]. *Steel Co.*, No. 96-643, 1998 WL 88044 (U.S.) (decided March 4, 1998).

[109]. *Id.* at \*2.

[110]. In *Steel Co.*, *supra* note 108 at \*11, Justice Scalia stated that, "that there must be alleged (and ultimately proven) an 'injury in fact'-a harm suffered by the plaintiff that is 'concrete' and 'actual or imminent, not 'conjectural' or 'hypothetical'". (Citing *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S.Ct. 1717, 1723 (1990)(quoting *Los Angeles v. Lyons*, 461 U.S. 95, 101-102, 103 S.Ct. 1660, 1665 (1983).

[111]. Further in *Steel Co.*, *supra* note 108 at \*11, Justice Scalia describes that the causation must be a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. (Citing *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42, 96 S.Ct. 1917, 1925-1926 (1976).

[112]. *Id.* (Citing *Lujan v. Defenders of Wildlife*, 504 U.S. at 560, 112 S.Ct., at 2136).

[113]. See *Steel Co.*, *supra* note 108 at \*11.

[114]. See *Valley Forge*, 454 U.S. at 474-75.

[115]. See e.g., *Burgess v. M/V Tamano*, 370 F.Supp. 247 (D.Me. 1973) The court allowed commercial fishermen to collect damages for the destruction of fishery resources held in trust by states and has permitted individuals to receive awards for contamination of community water supplies. See also *supra* Part III.C. and accompanying text.

[116]. See generally William P. Horn, *Private Claims and Public Resources*, *THE ENVIRONMENTAL LAW MANUAL* (Theodore L Garrett, ed., American Bar Association 1992) at 419.

[117]. *Id.* at 421.

[118]. *Id.*; see e.g. *Artesian Water Co. v. New Castle County*, 659 F. Supp. 1269, 1288 (D.Del.1987), *aff'd*, 851 F.2d 643 (3d Cir. 1988).

[119]. See Carol A. Jones, et. al., *supra* note 33 at 116.

[120]. 33 U.S.C. §1321(f)(5) (1988 & Supp. V 1993).

[121]. 33 U.S.C. §2702(b)(2)(A) (Supp. V 1993).

[122]. 42 U.S.C. §9607(f)(1) (1988 Supp. V 1993).

[123]. *Id.*

[124]. 42 U.S.C. §9601(27) (1988 Supp. V 1993).

[125]. 42 U.S.C. §9607(f) (1994).

[126]. See discussion on CERCLA, *supra* Part III.A.5.

[127]. See *Mayor of Boonton*, 621 F. Supp. at 668.

[128]. *Id.*

[129]. In *Mayor of Boonton*, the court allowed the town of Boonton to bring an action for natural resource damages originating from the chemical waste contamination of a town park. *Id.*

[130]. *Id.* at 666. The definition was, "United States and State include the several States of the United States, the District of Columbia, the Commonwealth, of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Marianas, and any other territory or possession over which the United States has jurisdiction." CERCLA, 42 U.S.C. §9601(27) (1994).

[131]. *Id.*

[132]. See *Mayor of Boonton*, 621 F.Supp. at 666.

[133]. *Id.* at 667.

[134]. See *id.* A holding against the municipality would mean that even though CERCLA expressly included natural resources owned by municipalities within the statute's protective scope, municipalities themselves could not bring suit to recover for damages to those resources.

[135]. See *Mayor of Boonton*, 621 F.Supp. at 666.

[136]. *Id.* at 619. First the court looked to the "clear purpose and intent of The Act to ensure prompt cleanup of hazardous waste and the restoration of the environment." Secondly, the New York court observed that the Act specifically provided that an action on behalf of the state could be maintained by the "authorized representative of any State." *Id.*

[137]. 633 F. Supp. 609 (S.D.N.Y. 1986). The United States District Court for the Southern District of New York upheld New York City's standing to bring suit for the contamination of groundwater caused by illegal dumping into city landfills. *Id.* at 618-19.

[138]. See *id.* at 619.

[139]. See *supra* Part III.A.5. and accompanying text.

[140]. See *Mayor of Boonton*, 621 F. Supp. at 666; *City of New York v. Exxon*, 633 F. Supp. at 619.

[141]. See Michael J. Wittke, *supra* note 1; See also Joseph J. Maraziti Jr., Local Governments: Opportunities to Recover for Natural Resource Damage, 17 ENVTL. L. REP. 10036, February 1987 for a thorough discussion of municipal and local government standing to recover for natural resource damage.

[142]. See *supra* note 67 and accompanying text.

[143]. See Peter H. Lehner, Act Locally: Municipal Enforcement of Environmental Law, 12 STAN. ENVTL.L.J. 50, 74 n.106 (1993).

[144]. CERCLA's natural resource provision provides that appointed trustees also may act for purposes of the Clean Water Act. See CERCLA 42 U.S.C. § 9607(f)(2)(B)(1994).

[145]. See *City of New York v. Exxon Corp.*, 697 F. Supp. at 686.

[146]. See respectively, 42 U.S.C. §9605(a)(4) & *supra* Part III.A.5. and accompanying text.

[147]. See e.g., *Gwaltney of Smithfield, Ltd.*, 484 U.S. at 60 (ruling that citizens suits are designed to supplement the enforcement responsibilities of federal, state, and local governments); *Atlantic City Mun. Utils. Auth. v. Regional Adm'r.*, 803 F.2d 96, 98 (3d Cir. 1986) (municipal authority brought action under Clean Water Act citizen suit to appeal denial of funding for purchase by municipal of sewage treatment facility); *Williams Pipe Line Co. v. City of Mounds View*, 651 F. Supp. 551, 560 (D. Minn. 1987)(city brought citizen's suit under Hazardous Liquid Pipeline Safety Act).

[148]. See W. PAGE KEETON ET. AL., PROSSER AND KEETON ON THE LAW OF TORTS §87, at 624 (5th ed. 1984).

[149]. See *Burgess v. M/V Tamano*, 370 F.Supp. 247 (D.Me.1973) discussed *infra*; See also KEETON ET AL., *supra* note 100, §90, at 646.

[150]. *Burgess*, 370 F.Supp. 247 (D.Me.1973).

[151]. *Id.* at 250.

[152]. ARTICLE III, §2 cl. 1 of the United States Constitution provides the basis for the admiralty law of the United States. Title 28 U.S.C. §1331(1) (1994) implements this provision by vesting admiralty jurisdiction in the federal district courts. Private claims arising in maritime settings are subject to admiralty law within the jurisdiction of the federal courts.

[153]. 209 F.2d 178 (9th Cir. 1953).

[154]. *Id.* at 179.

[155]. *Id.* at 179-82.

[156]. *Id.* at 182.

[157]. 833 F.2d 65 (5th Cir. 1987).

[158]. 761 F.Supp. 918 (D.R.I. 1990).

[159]. See *Consolidated Aluminum Corp.*, 833 F.2d at 67; *Rollins*, 761 F.Supp. at 927.

[160]. 23 So.2d 756 (Miss. 1945).

[161]. *Id.* at 757 (emphasis added).

[162]. *Id.* at 757-58.

[163]. 501 F.2d 558 (9th Cir. 1974).

[164]. In 1969, vast quantities of oil escaped from under and near Union Oil Company platform located on the Outer Continental Shelf of the United States in the Santa Barbara Channel. *Id.* at 559.

[165]. *Id.* at 560 (quoting special master's order).

[166]. *Id.* at 560. The court saw that the diminution of aquatic life was a "loss of a prospective economic advantage occasioned by the alleged diminishment of the quantities of available sea life [which] formed a sufficient basis for ...recovery under the law of negligence." *Id.* The Court of Appeals affirmed. 501 F.2d at 570.

[167]. See Carol A. Jones et. al., *supra* note 33 at 118; see also *Walls v. Waste Resource Co.*, 761 F.2d 311, 318 (6th Cir. 1985) The court held private right of action to recover response costs exists under 42 U.S.C. §§9607(a)(4)(B); *Exxon Corp v. Hunt*, 475 U.S. 355, 360 (1986) Noting that compensation for third party damages is beyond scope of CERCLA; *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1535-36 (10th Cir. 1992) Commenting on how legislative history of CERCLA confirms Congress' consideration and rejection of provisions for recovery of private damages unrelated to clean-up effort; *Middlesex County Sewage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 11 (1981) Holding that no implied private right of action for damages exists under amended CWA, and that federal common law of nuisance is preempted in area of ocean pollution.

[168]. See Carol A. Jones et. al., *supra* note 33 at 119.

[169]. *Gregg L. Spyridon & Sam A. LeBanc, III*, *supra* note 19 at 294 (citing *Artesian Water Co. v. New Castle County*, 659 F.Supp. 1269, 1288 (D.Del.1987), *aff'd*, 851 F.2d 643 (3d Cir. 1988)).

[170]. See *LaBauve v. Louisiana Wildlife & Fisheries Comm'n*, 444 F.Supp. 1370 (E.D.La.1978)(holding that fisherman, hunters, and others who commercially harvest natural resources have no proprietary interest with respect to the marine or nonmarine life until after it is harvested.) *Id.* at 1378.

[171]. *Louisiana v. M/V TESTBANK*, 524 F.Supp. 1170, 1173 (E.D.La.1981), *aff'd* 752 F.2d 1019 (5th Cir.1985), *cert. denied*, 477 U.S. 903 (1986); *Burgess v. M/V TAMANO*, 370 F.Supp. 247, 250-51 (S.D.Me.1973), *aff'd per curiam*, 559 F.2d 1200 (1st Cir.1977).

[172]. 504 U.S. 555 (1992); See also *supra* part B.1. and accompanying text for Lujan test; See also Linda E. Benfield et. al., 1996 SPECIAL COMMITTEE ON ENVIRONMENTAL LITIGATION TECHNIQUES ANN. REP. in *Natural Resources, Energy, and Environmental Law 1996 The Year in Review*, 1996 A.B.A. SEC. NAT.REC.,ENERGY, ENV.LAW.157.

[173]. 102 F.3d 445 (10th Cir. 1996).

[174]. 73 F.3d 546 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 57 (1996).

[175]. See also *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228 (D.C. Cir. 1996).

[176]. 933 F.Supp. 1409 (N.D.Ill. 1996).

[177]. See generally Linda E. Benfield et.al., *supra* note 172 at 159.

[178]. 95 F.3d 358 (5th Cir. 1996), *reh'g denied*, 1996 U.S. App.LEXIS 28091 (5th Cir. 1996).

[179]. See above discussion part IV.B.1. and accompanying text.

[180]. 94 F.3d 658 (D.C. Cir. 1996).

[181]. 83 F.3d 386 (11th Cir. 1996).

[182]. CERCLA 42 U.S.C. § 9601(16) (1994).

[183]. CERCLA 42 U.S.C § 9607(a)(4)(C)(1994).

[184]. CERCLA 42 U.S.C. § 9607(a)(4)(A) and (B) (1994).

[185]. See Barry Breen, *supra* note 36 at 853.

[186]. See e.g., 132 CONG. REC. H9613 (daily ed. Oct. 8, 1986)(statement of Rep.Jones, before enactment of a natural resource damage provision, that the purpose is "to make whole the natural resources that suffer injury from releases of hazardous substances.").

[187]. See Carol A. Jones, et. al., *supra* note 33, at 111. OPA provides that the measure of damages is "[1] the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of, the damaged natural resources; [2] the diminution in value of those natural resource pending restoration; plus [3] the reasonable cost of assessing those damages." 33 U.S.C.A. §2706(d)(West Supp.1995). CERCLA provides that the natural resource trustee shall recover damages for "injury to, destruction of, or loss of natural resources." 42 U.S.C. §9607(a)(4)(C)(1994). The amount recovered is to be used "to restore, replace, or acquire Th equivalent of such natural resources... The measure of damages...shall not be limited by the sums which can be used to restore or replace such resources.." 42 U.S.C. §9607(f)(1) (1994). *Id.* at n.5.

[188]. See Adam Babich & Kent E. Hanson, Opportunities for Environmental Enforcement and Cost Recovery by Local Governments and Citizen Organizations, 18 ENVTL. L. REP. 10165, Vol. Year XVIII, (May 1988); see also above discussion Part C. 2. and accompanying text.

[189]. See Adam Babich & Kent E. Hanson, *supra* note 188 & n.76.

[190]. *City of New York v. Exxon Corp.*, 633 F. Supp. 609 (S.D.N.Y. 1986); *Mayor of Boonton*, 621 F. Supp. 663 (D.N.J. 1985).

[191]. See *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966); See generally Kenison & Babich, *Pendent Claims and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980*, W. NAT. RESOURCE LITIGATION COMMENTARY, (Wtr. 1986), at 16.

[192]. See Adam Babich & Kent E. Hanson, *supra* note 188 & n.3.

[193]. See e.g. FWPCA §505(a), RCRA §7002(a), CERCLA §310(c), and EPCRA §326(c).

[194]. For a complete discussion on imposing penalties, both civil and criminal in order to achieve compliance, see University of Hawaii Law Review, *Recent Development, RCRA's Criminal Sanctions: A Deterrent Strong Enough to Compel Compliance?*, 19 U. HAW. L. REV. 425 (1997).

[195]. CERCLA §9607 governs cost recovery actions, provides reimbursement to plaintiffs of past response costs, i.e., costs already incurred in responding to actual or threatened contamination. *Id.* at 42 U.S.C. §9607(a)(1)-(4)(A) & (B) (1994).

[196]. See Babich & Hanson, *supra* note 188.

[197]. 42 U.S.C. §9659 (1994).

[198]. See e.g., 42 U.S.C. 6972(a)(1)(B) (1994).

[199]. For a general discussion on this point see Gregg L. Spyridon & Sam A. LeBlanc, III, *supra* note 19.

[200]. See e.g., *Mayor of Boonton*, 621 F.Supp. at 666; *City of New York v. Exxon*, 633 F.Supp. at 619.

[201]. See Sagebrush Rebellion, Inc., 713 F.2d 525 (9th Cir. 1983); United States v. Reserve Mining Co., 56 F.R.D. 408 (D.Minn. 1972).

[202]. See supra Part III.D. and accompanying text.

[203]. Friends of the Earth v. Carey, 535 F.2d 165, 172 (2d Cir. 1976), cert. denied, 434 U.S. 902 (1977).

[204]. See supra Part II.C. and accompanying text.

[205]. Id.

[206]. See generally Lois J. Schiffer & Timothy J. Dowling, supra note 20 (discussing and citing how poll after poll demonstrates that environmental protection is a core community value) Id. at 332-33.

[207]. It takes a genuine effort to grapple with the meaning of most of the environmental statutes. As stated in Chevron U.S.A., Inc., v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), unless Congress has used legislative language that speaks unambiguously to the precise issue before the court, a court should generally defer to the interpretation of the agency charged with administering the act. Id. at 842-845.

[208]. For elaboration on these points see Lois J. Schiffer and Timothy J. Dowling, supra note 20 at 327