COMMENTS

Judicial Review of EPA Action Under the Citizen Suit Provision

I. INTRODUCTION

The right to judicial review of administrative action has been described as a "necessary condition" of a system of administrative decision making which claims to be legitimate.[1] This right has been judicially recognized in the "presumption" that "judicial review . . . will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress."[2] In the area of environmental rulemaking, the need for judicial review is no less if not more than in other areas of the law: environmental concerns, which are inevitably delegated to agency solution, peculiarly involve public rights.[3] Congress has recognized this need and included in recent major federal pollution control legislation[4] two statutory provisions authorizing judicial review of specified actions by the Administrator of the Environmental Protection Agency (EPA) or his failure to perform nondiscretionary duties.

Section 307(b)(1) of the Clean Air Amendments of 1970 (CAA) provides that a "petition for review" of action of the Administrator in promulgating national standards or in approving or promulgating

1. L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 320 (1965).
2. Abbot Laboratories v. Gardner, 387 U.S. 136, 140 (1967).
3. *See* J. SAX, DEFENDING THE ENVIRONMENT 192 (1971).
4. Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified at 42 U.S.C. §§ 1857-1857*l* (1970)); Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 896 (codified at 33 U.S.C. §§ 1251-1376 (Supp. V 1975)); Noise Control Act of 1972, Pub. L. No. 92-574, 86 Stat. 1234 (codified at 42 U.S.C. §§ 4901-4918 (Supp. V 1975)). Most recently, Congress enacted the provisions in substantially the same form in the Toxic Substances Control Act, Pub. L. No. 94-469, 90 Stat. 2003, and the Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795.

a state implementation plan may be filed in a court of appeals.[5] This section was also enacted virtually unchanged into the Federal Water Pollution Control Act Amendments of 1972 (FWPCA) and the Noise Control Act of 1972 (NCA).[6] One purpose of the provision was simply to establish clearly the availability of judicial review under the Acts.[7]

However, Congress also intended to limit review by providing it "within controlled time periods" and by specifying the forum.[8] One characteristic of federal air pollution regulation prior to 1970 was lengthy administrative delay.[9] Therefore, in order to meet the time sequences it had established in the CAA, Congress foreclosed review 30 days after approval or promulgation of the standard or plan in issue unless based "solely on grounds arising after such 30th day."[10] Nor may courts review such standards or plans in enforcement proceedings when review could have been obtained earlier under section 307(b)(1).[11]

5. 42 U.S.C. § 1857h-5(b)(1) (1970); *see also* S. REP. NO. 1196, 91st Cong., 2d Sess. 41 (1970) [hereinafter cited as SENATE REPORT].

6. Federal Water Pollution Control Act Amendments of 1972 § 509(b)(1), 33 U.S.C. § 1369(b)(1) (Supp. V 1975); Noise Control Act of 1972 § 16(a), 42 U.S.C. § 4915(a) (Supp. V 1975).

Because they were first enacted in the Clean Air Amendments, the legislative history of the judicial review and citizen suit provisions, *see* note 14 *infra*, under these two acts is slim. Thus, reference to legislative history and purpose will primarily be to the Clean Air Amendments.

7. One of the uncertainties in the existing Clean Air Act is the availability or opportunity for judicial review of administratively developed and promulgated standards and regulations. . . .

. . . [S]ince precluding review does not appear to be warranted or desirable, the bill would specifically provide for such review. . . .

SENATE REPORT, *supra* note 5, at 40.

8. *Id.* at 41. CONFERENCE REPORT ON THE CLEAN AIR AMENDMENTS OF 1970, H.R. REP. NO. 1783, 91st Cong., 2d Sess. 57 (1970), *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 5374.

9. Luneburg & Roselle, *Judicial Review Under the Clean Air Amendments of 1970*, 15 B.C. INDUS. & COM. L. REV. 667, 672 (1974).

10. Clean Air Amendments of 1970 § 307(b)(1), 42 U.S.C. § 1857h-5(b)(1) (1970). For the FWPCA and the NCA, the period within which suit must be brought is 90 days after promulgation, approval or determination. Federal Water Pollution Control Act Amendments of 1972 § 509(b)(1), 33 U.S.C. § 1369(b)(1) (Supp. V 1975); Noise Control Act of 1972 § 16(a), 42 U.S.C. § 4915(a) (Supp. V 1975).

11. Clean Air Amendments of 1970 § 307(b)(2), 42 U.S.C. § 1857h-5(b)(2) (1970); Federal Water Pollution Control Act Amendments of 1972 § 509(b)(2), 33 U.S.C. § 1369(b)(2) (Supp. V 1975); Noise Control Act of 1972 § 16(a), 42 U.S.C. § 4915(a) (Supp. V 1975). *See also* Bleicher, *Economic and Technical Feasibility in the Clean*

To obtain uniform standards under the CAA, a single forum is specified for those administrative actions national in scope, the United States Court of Appeals for the District of Columbia.[12] For those administrative actions involving a single air quality control region—approval or promulgation of state implementation plans—review is had in the United States Court of Appeals "for the appropriate circuit."[13]

The controversial provision allowing for "citizen suits" was first enacted in the CAA.[14] It too has been enacted into the FWPCA and the NCA virtually unchanged.[15] Subsection (a) allows "any person" to commence a civil action in the district courts "without regard to the amount in controversy or the citizenship of the parties"

> (1) against any person . . . who is alleged to be in violation of (A) an emission standard or limitation . . . or (B) an order issued by the Administrator or a State . . . or
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under th[e] Act which is not discretionary . . . .[16]

Air Act Enforcement Against Stationary Sources, 89 HARV. L. REV. 316 (1975); Luneburg & Roselle, *Judicial Review Under the Clean Air Amendments of 1970*, 15 B.C. INDUS. & COM. L. REV. 667, 672-93 (1974). *But see* Buckeye Power, Inc. v. EPA, 481 F.2d 162 (6th Cir. 1973), *cert. denied*, 425 U.S. 934 (1976).

12. Clean Air Amendments of 1970 § 307, 42 U.S.C. § 1857h (1970). *See* SENATE REPORT, *supra* note 5, at 41.

13. Clean Air Amendments of 1970 § 307(b)(1), 42 U.S.C. § 1857h-5(b)(1) (1970). Under the FWPCA, suits reviewing a federal effluent standard or a section 402 permit are to be brought in the "Circuit Court of Appeals of the United States for the Federal judicial district in which [the plaintiff] resides or transacts such business." Federal Water Pollution Control Act Amendments of 1972 § 509(b)(1), 33 U.S.C. § 1369(b)(1) (Supp. V 1975). Under the NCA, review of regulations to establish noise emission standards for railroads, trucks, products distributed in commerce, and aircraft, as well as regulations establishing labeling requirements may be filed only in the United States Court of Appeals for the District of Columbia. Noise Control Act of 1972 § 16(a), 42 U.S.C. § 4915(a) (Supp. V 1975).

14. Clean Air Amendments of 1970 § 304, 42 U.S.C. § 1857h-2 (1970).

15. Federal Water Pollution Control Act Amendments of 1972 § 505, 33 U.S.C. § 1365 (Supp. V 1975); Noise Control Act of 1972 § 12, 42 U.S.C. § 4911 (Supp. V 1975).

16. The Senate Report for the Clean Air Act makes clear that the citizen suit was not intended to allow for the creation of an environmental common law as envisioned by Professor Sax and others. Under this concept, the courts would be relied upon to develop a branch of environmental law based upon principles of public rights and interests. SENATE REPORT, *supra* note 5, at 36. *See* SAX, *supra* note 3, at 192; Bleicher, *supra* note 11, at 324.

However, to encourage agency action, the plaintiff is required to give notice to the Administrator, the state and any alleged violator 60 days before commencement of the action.[17] "The time between notice and filing of the action should give the administrative enforcement office an opportunity to act on the alleged violation."[18] Also significant is the express authorization to the courts to award costs of litigation "to *any party*, whenever the court determines such award is appropriate."[19] While this is intended to reward litigants who have brought an action in the public interest, it is also designed to discourage "frivolous" or "harassing" actions since the court may award costs against the plaintiff.[20] A saving clause makes clear that rights "under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief" remain unaffected.[21]

Although each statute provides for direct agency enforcement of standards against violators,[22] subsection (a)(1) of the citizen suit provision was intended to allow for "citizen participation in the enforcement of standards and regulations established under [the] Act."[23] Congress was concerned with stimulating government enforcement since "[g]overnment initiative in seeking enforcement under the Clean Air Act ha[d] been restrained."[24] Citizen suits

17. Clean Air Amendments of 1970 § 304(b)(1)(A), 42 U.S.C. § 1857h-2(b)(1)(A) (1970); Federal Water Pollution Control Act Amendments of 1972 § 505(b)(1)(A), 33 U.S.C. § 1356(b)(1)(A) (Supp. V 1975); Noise Control Act of 1972 § 12(b)(1)(A), 42 U.S.C. § 4911(b)(1)(A) (Supp. V 1975).

18. SENATE REPORT, *supra* note 5, at 37.

19. Clean Air Amendments of 1970 § 304(d), 42 U.S.C. § 1857h-2(d) (1970); Federal Water Pollution Control Act Amendments of 1972 § 505(d), 33 U.S.C. § 1365(d) (Supp. V 1975); Noise Control Act of 1972 § 12(d), 42 U.S.C. § 4911(d) (Supp. V 1975) (emphasis added).

20. SENATE REPORT, *supra* note 5, at 38. *See Hearings on S. 3229, S. 3466, S. 3546 Before the Subcomm. on Air & Water Pollution of the Comm. on Public Works, U.S. Senate*, 91st Cong., 2d Sess., pt. 2, 816-40 (testimony of Stanley Preiser, Esq. and Prof. James W. Jeans) [hereinafter cited as *Hearings on S. 3229*].

21. Clean Air Amendments of 1970 § 304(e), 42 U.S.C. § 1857h-2(e) (1970); Federal Water Pollution Control Act Amendments of 1972 § 505(e), 33 U.S.C. § 1365(e) (Supp. V 1975); Noise Control Act of 1972 § 12(e), 42 U.S.C. § 4911(e) (Supp. V 1975).

22. Clean Air Amendments of 1970 § 113, 42 U.S.C. § 1857c-8 (1970); Federal Water Pollution Control Act Amendments of 1972 § 309, 33 U.S.C. § 1319 (Supp. V 1975); Noise Control Act of 1972 § 11(d)(1), 42 U.S.C. § 4910(d)(1) (Supp. V 1975).

23. SENATE REPORT, *supra* note 5, at 36.

24. *Id.*

under subsection (a)(1) are to encourage and supplement agency enforcement.

The purpose and the function of enforcement actions is clear and will not be examined critically. Subsection (a)(2), however, which allows suits "against the Administrator where there is alleged failure . . . to perform any act or duty . . . which is not discretionary,"[25] presents issues which are the basis of this Comment. A liberal interpretation of this section easily engulfs the judicial review provision. For example, a petition to review the Administrator's approval of a state implementation plan may also be characterized as a suit alleging his failure to perform a nondiscretionary "duty" under the terms of the CAA.[26] Resolving whether such overlap exists and establishing the jurisdictional scope of each provision is by no means an academic issue. Dismissals for being in the "wrong" court have occurred because of resulting confusion as to the proper provision under which to seek review. Plaintiffs who choose the incorrect forum not only must relitigate but may also be barred by the temporal limitation contained in the judicial review provision. While the courts have attempted to clarify the scope of each provision, they have done so to plaintiffs' detriment by interpreting the citizen suit provision restrictively. Part I of this Comment will clarify the jurisdictional reach of each provision as interpreted by the courts and then proceed to suggest expansion of the jurisdiction of the citizen suit provision. Part II, in similar fashion, will discuss the scope of review used by the courts under the citizen suit. A more rigorous standard will be advocated.

II. JURISDICTIONAL SCOPE OF THE CITIZEN SUIT

A. *Is a Petition for Review Pursuant to the Citizen Suit?*

The broad language of the citizen suit provision has resulted in the award of attorneys' fees and costs to the plaintiffs in a suit

25. The House version of the Clean Air Amendments contained no citizen suit section. H.R. 17255, 91st Cong., 2d Sess. (1970). The Senate bill provided for suits "against the [Administrator] where there is alleged a failure . . . to exercise any duty established by th[e] Act." S. 4358, 91st Cong., 2d Sess. § 304(a)(1)(B)(ii) (1970). The conference committee added the requirement that it be a failure "to *perform a nondiscretionary act* or duty." H.R. REP. NO. 1783, 91st Cong., 2d Sess. (1970) (emphasis added).

26. *See* NRDC v. EPA, 484 F.2d 1331 (1st Cir. 1973); note 27 and accompanying text *infra*.

brought under the judicial review provision, although there is no express language in the latter section authorizing the award. In *NRDC v. EPA (NRDC I)*,[27] NRDC petition under section 307 of the CAA for review of the decision of the EPA approving portions of the Rhode Island and Massachusetts air pollution implementation plans. The court of appeals held for the petitioners who subsequently moved for attorneys' fees and costs. While noting the general rule that costs and expenses will not be awarded against the United States in the absence of a statute directly authorizing it,[28] the court sidestepped the problem that section 307 did not expressly authorize an award. Instead, it interpreted the attorneys' fees section of the citizen suit provision to apply to the judicial review section as well.

What is striking in the opinion is the court's view that the judicial review action should be interpreted as a type of citizen suit, or, more specifically that

> a petition for review is to be regarded as an action pursuant to § 304(a). Section 307 designates the forum . . . ; it goes no further. The authorization for, and conditions of, suits are contained in § 304(a).[29]

An important ground for the court's decision was the broad language of the citizen suit provision: section 307 was viewed as a species of the more general authorization for judicial review contained in subsection (a)(2) of the citizen suit section. In other words, section 307 was a particular instance of a suit against the Administrator for his failure to exercise nondiscretionary duties. Subsection (a)(1) was distinguished as a general authorization for enforcement suits.

The court pointed to language in the conference report stating that section 307 "*specif[ies] forums* for judicial review of certain actions . . . *provided for* under the Act and the proposed

27. 484 F.2d 1331 (1st Cir. 1973).

28. The doctrine of sovereign immunity precludes the award of attorneys' fees against the government without an express waiver. United States v. Chemical Foundation, Inc., 272 U.S. 1, 20 (1926). The 1966 statutory waiver of sovereign immunity, 28 U.S.C. § 2412 (1970), allows costs against the United States, but does not extend so far as to allow the award of attorneys' fees. Allowance for costs is limited to those enumerated in 28 U.S.C. § 1920 (1970). *See also* Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 HARV. L. REV. 849 (1975).

29. 484 F.2d at 1336.

amendments."[30] This implied that section 307 merely specified forums while another section, 304(a)(2), "provided for" review. Nor did the court think that the rationale of section 307—to limit the forum and period of review—had any relevance to whether attorneys' fees should be awarded. Instead, it noted the public policy of encouraging citizens to bring actions by awarding fees. Finally, the court placed significance on the absence of any language on standing in the judicial review provision; on the other hand, the Senate bill had originally provided that "[*a*]*ny interested person* may file a petition."[31] Since the Conference committee had dropped the "any interested person" language, the court reasoned that it "apparently contemplated that the standing provisions of [the citizen suit] would be applicable to" judicial review actions.[32] It concluded that the attorneys' fee provision should similarly apply.

NRDC made the same arguments to the Court of Appeals for the District of Columbia but encountered a different response. In *NRDC v. EPA (NRDC II)*,[33] NRDC had challenged EPA regulations issued pursuant to section 211 of the CAA. As originally proposed, the regulations required gas retailers to carry at least one brand of unleaded gasoline and also included standards governing the use of lead additives. In final form, they contained only the lead free brand requirement. After NRDC's complaint was filed, EPA notified the court that it intended to issue the desired regulations. NRDC thereupon sought an award of attorneys' fees and costs.

The court denied the motion, and expressly disagreed with the First Circuit. In a footnote it rejected the First Circuit's reading of the conference report language:

> The [*NRDC I*] court put heavy emphasis on "provided for" which it read as qualifying "judicial review." We think this construction, which was aided by the omission of the phrase "of the Secretary" in the First Circuit's quotation of the passage, is questionable. . . . [T]he syntax suggests "actions of the Secre-

30. H.R. REP. NO. 1783, 91st Cong., 2d Sess. 57 (1970); 484 F.2d at 1337 (emphasis added).

31. S. 4358, 91st Cong., 2d Sess. § 308(a) (1970); 484 F.2d at 1336.

32. 484 F.2d at 1336-37. *But see* NRDC v. EPA, 507 F.2d 905 (9th Cir. 1975); NRDC v. EPA, 481 F.2d 116 (10th Cir. 1973).

33. 512 F.2d 1351 (D.C. Cir. 1975).

> tary" as a more likely referent for "provided for" than "judicial review."[34]

The D.C. Circuit also emphasized the citizen suit's restrictive scope. But most important to the court's decision was the conflict it perceived between the 60 day notice requirement of section 304(b) and the 30 day limit within which to petition for review under section 307(b). NRDC's argument resulted in a "tortured reading" of section 304—the judicial review provision was to be read pursuant to section 304(d), providing attorneys' fees and costs, but not pursuant to section 304(b), the notice requirement.[35] The court surmised that Congress did not provide for attorneys' fees in section 307 because the award would be unnecessary to spur actions reviewing regulations—industry would be willing to pay to obtain review.[36]

It is understandable why the First Circuit in *NRDC I* felt an award was appropriate: the suit was brought by a citizen's group with an apparent public benefit and could be characterized as the Administrator's failure to perform a nondiscretionary act. The D.C. Circuit was itself troubled that its case "also resemble[d] in important respects the class of cases contemplated by section 304(a)" and recognized the purpose of section 304(d) would be served by awarding fees.[37] Nevertheless, based upon legislative history and purpose, the First Circuit's analysis of the relationship between the citizen suit and the judicial review provisions can not be supported.[38] The only evidence in the legislative history of the CAA suggesting Congress intended the judicial review action to be a particular species of citizen suits, the language of the Conference Report, is equivocal. Not only is there the inconsistency mentioned by the D.C. Circuit between the notice provision and the time limit contained in each section, there is conflict between the saving clause of the citizen suit and the purpose of the judicial review provision to preclude other modes of review.[39] Moreover, the

34. *Id.* at 1355 n.20.
35. *Id.* at 1356.
36. *Id.* at 1357-58.
37. *Id.* at 1356.
38. For a similar conclusion, *see* Bolbach, *The Courts and the Clean Air Act*, 5 ENVIR. REP. (BNA), Monograph No. 19, at 4 (1974).
39. *See* notes 8 & 21 and accompanying text *supra*.

genesis of each provision also fails to reveal unitary, interdependent development as would be expected from the First Circuit's interpretation. While precursors to both provisions were introduced roughly the same time in committee, they were placed in separate titles.[40] Only when a provision allowing a form of review by the Secretary of HEW was discarded did the judicial review section shift close to its present position in the CAA.[41]

Although the legislative history is silent on why the conference bill deleted the standing language contained in the Senate bill, and why no attorneys' fees were provided, the First Circuit's inference from these two factors is too speculative. The change in standing language was interpreted by the D.C. Court to reflect only an implied adoption of the standing requirements of the Administrative Procedure Act (APA).[42] It is also significant that the FWPCA reincorporated the "any interested person" language in its judicial review section; it makes clear that, at least for the FWPCA, the citizen suit section does not supply standing criteria.[43] The D.C. Circuit's explanation concerning Congress' failure to provide attorneys' fees in a petition for review is possible, though it may be questionable as a policy matter.[44] The overall objective of the citi-

40. *Hearings on S. 3229, supra* note 20, Committee Print No. 1, § 116(a) (judicial review), § 304 (citizen suit).

41. Judicial review was originally provided in section 116(a) of Committee Print No. 1 whereas review by the Secretary of HEW was provided in section 308(a). *Id.* The latter provision was dropped in the final committee bill and the judicial review provision shifted to its place. S. 4358, 91st Cong., 2d Sess. (1970).

42. "Our examination of § 307's origins . . . suggests that the omission reflects nothing more than a determination to let standing in § 307 suits be controlled by the Administrative Procedure Act . . . ." 512 F.2d 1351, 1354 n.14 (1st Cir. 1973).

There is no express language in the judicial review provision regarding the appropriate standard of review. Yet, the courts have consistently held that it embodies the scope of review provided in the APA. *See, e.g.*, Maryland v. EPA, 530 F.2d 215 (4th Cir. 1975), *cert. granted*, 426 U.S. 904 (1976); American Meat Institute v. EPA, 526 F.2d 442 (7th Cir. 1975); Duquesne Light Co. v. EPA, 522 F.2d 1186 (3rd Cir. 1975), *vacated and remanded*, 427 U.S. 902 (1976); CPC International, Inc. v. Train, 515 F.2d 1032 (8th Cir. 1975); South Terminal Corp. v. EPA, 504 F.2d 646, 655 (1st Cir. 1974); Friends of the Earth v. EPA, 499 F.2d 1118 (2d Cir. 1974); Texas v. EPA, 499 F.2d 289 (5th Cir. 1974), *cert. denied*, 421 U.S. 945 (1975). The judicial review sections of the Toxic Substances Control Act, 42 U.S.C.A. § 2619 (West Supp. 1976), and the Resource Conservation and Recovery Act of 1976, 42 U.S.C.A. § 6976 (West Supp. 1976) expressly adopt the APA as the standard of review.

43. Federal Water Pollution Control Act Amendments of 1972 § 509(b)(1), 33 U.S.C. § 1369(b)(1) (Supp. V 1975).

44. *See* note 88 and accompanying text *infra*.

zen suit provision is to allow and encourage suits brought by citizens to enforce standards and to prod the Administrator when he has failed in a "nondiscretionary act or duty". In contrast, Congress may have expected petitions to review regulations to emanate primarily from industry, who would contest standards for being too stringent. In the latter case, there is, of course, a built-in monetary incentive to bring suit which precludes the need to authorize attorneys' fees and costs.

While the D.C. Circuit's holding in *NRDC II* is consistent with the overall purposes of the two provisions, the First Circuit's decision underscores the confusion resulting from the broad language of the citizen suit provision. Conceivably a judicial exception could be developed out of the First Circuit's holding to allow the award of attorneys' fees in an action brought under section 307 when the courts feel a public benefit has been conferred. It must be clear, however, that the theory supporting such a doctrine can not rest on a perceived interrelationship between sections 304 and 307.[45] The issue nevertheless remains whether the overlap perceived by the First Circuit between the two sections will allow concurrent jurisdiction in some cases.

B. *The Judicial Review Section Is an Exclusive Source of Jurisdiction*

While all circuits which have decided the question have held the judicial review provision to be an exclusive source of jurisdiction, there have been suggestions that there is concurrent jurisdiction in some situations. Judge Skelly Wright was the first to suggest that jurisdiction over identical issues could be found concurrently under both provisions. He felt that the action in *NRDC II* could have been brought as a citizen suit as well:

> [The Administrator's] failure to perform that nondiscretionary duty [issue lead additive regulations] created District Court jurisdiction . . . under Section 304, while his simultaneous promulgation of related lead regulations created jurisdiction in this court [of appeals] under Section 307.[46]

45. However, whether the courts would be willing to award fees on any other basis is doubtful. There must be an express waiver of sovereign immunity. *See* note 28 *supra*.

46. NRDC v. EPA, 512 F.2d 1351, 1361 (D.C. Cir. 1975).

In *Oljato Chapter of Navajo Tribe v. Train*[47] Judge Wright writing for the court stated in dictum its unwillingness to dismiss completely the possibility of concurrent jurisdiction. *Oljato* was a challenge to the Administrator's refusal to revise previously published standards governing sulfur oxide emissions for new coal fired power plants promulgated under the authority of section 111 of the CAA. When published, the standard was challenged under section 307 by affected utilities claiming it was too strict. Plaintiffs in *Oljato*, however, failed to join in appealing the approval of the standard. Instead, they filed suit over a year later asserting jurisdiction in the district court in part under section 304 of the CAA. The district court dismissed for lack of jurisdiction.

Plaintiffs claimed the Administrator's refusal to revise the standards was a failure to perform a nondiscretionary duty. They also argued for the distinction between review of an original rule, properly subject only to section 307 review, and the review of a refusal to modify a rule, the subject for section 304 review. In rejecting the distinction, the court of appeals thought the essence of the action was a challenge to the standard itself and not to the Administrator's act of refusal and held that "any litigation seeking revision of a national standard of performance must be brought as a direct appeal to [the Court of Appeals for the District of Columbia] under section 307."[48]

In a footnote, the court admitted overlap was conceivable between the jurisdiction of both sections:

> Section 304 allows challenges to the Administrator's failure to act, while section 307 speaks of challenges to his action. While these appear to involve separate issues, overlap is conceivable, for instance, where the Administrator acts but, in the view of the challengers, does not act far enough. If nondiscretionary duties are involved, the challenge might fairly be said to lie under either section 304 or section 307.[49]

The court did not appear to foreclose the possibility that section 307 does not oust jurisdiction under section 304 in all cases.[50]

47. 515 F.2d 654 (D.C. Cir. 1975).

48. *Id.* at 661.

49. *Id.* at 661 n.9. In this instance, the court proceeded to find that the issue would not fall under the citizen suit anyway since it felt the revision of new source standards was discretionary with the Administrator. *Id.* at 662. *See* notes 136-38 and accompanying text *infra*.

50. 515 F.2d at 661.

Notwithstanding these judicial suggestions that a gray area where simultaneous jurisdiction between the two provisions exists, the courts have consistently *held* otherwise.[51] *Anaconda v. Ruckelshaus*[52] was a suit brought in the district court seeking injunctive relief against EPA promulgation of a proposed rule controlling sulfur oxide emissions in Deer Lodge County, Montana, under section 110(c) of the CAA. While other issues were involved, the jurisdictional dispute centered over the power of the district court to entertain the suit. It had invoked section 304 as a partial basis of its jurisdiction and the Administrator appealed.

The Tenth Circuit reversed on the basis of ripeness. Since the proposed regulation was to be part of the state implementation plan, the majority held that review was possible under the judicial review section after the regulation was finally promulgated. Review under the citizen suit provision was precluded:

> [W]here, as here, Congress has specifically designated a forum for judicial review of administrative action and does so in unmistakable terms except under extraordinary conditions, that forum is exclusive.[53]

The legislative purpose of the judicial review section supports this conclusion. Several commentators have noted or approved the general proposition that a special statutory procedure for review is the exclusive means for obtaining review in those cases where it applies.[54] One justification offered is a presumption that the policies Congress has in mind when it adopts a special review provision or statute are best served by requiring litigants to follow its procedures.[55] The legislative intent to limit review both as to time

51. *See* Oljato Chapter of Navajo Tribe v. Train, 515 F.2d 654 (D.C. Cir. 1975); City of Highland Park v. Train, 519 F.2d 681 (7th Cir. 1975), *cert. denied*, 424 U.S. 927 (1976); *cf.* West Penn. Power Co. v. Train, 378 F. Supp. 941 (W.D. Pa. 1974), *aff'd* 522 F.2d (3d Cir. 1975, *cert. denied*, 426 U.S. 947 (1976); Anaconda Co. v. Ruckelshaus, 482 F.2d 1301 (10th Cir. 1973); *see also* Bolbach, *supra* note 38, at 4; Steinberg, *Is the Citizen Suit a Substitute for the Class Action in Environmental Litigation? An Examination of the Clean Air Act of 1970 Citizen Suit Provision*, 12 SAN DIEGO L. REV. 107, 127 (1974).

52. 482 F.2d 1301 (10th Cir. 1973).

53. *Id.* at 1304-05.

54. Note, *Jurisdiction to Review Federal Administrative Action: District Court or Court of Appeals*, 88 HARV. L. REV. 980, 982 (1975); Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185, 200 (1974); Pederson, *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 45 (1975).

55. *Jurisdiction to Review Federal Administrative Action*, *supra* note 54, at 983.

and as to place, as revealed in the legislative history, has been remarked upon.[56] As the courts in *Anaconda* and *Oljato*[57] recognized, allowing review under the citizen suit provision in those instances, subject only to the requirement of 60 days notice, would circumvent the time limits under the judicial review section and contravene the congressional purpose to minimize court generated delay.

The courts of appeal are also more appropriate forums to review informal rulemaking.[58] The district court's trial function is unnecessary in this instance and involves a potential for lengthy trial which would again contravene the legislative purpose. Review in the district courts is also a possible source of numerous, inconsistent rulings, contrasting sharply with the careful scheme under the CAA, for example, of placing review of national emission standards in the D.C. Circuit and review of state implementation plans in the appropriate court of appeals.

Two additional policy reasons support the position that the judicial review provision is exclusive in its jurisdiction. Simplicity is one:[59] to the extent there already exists an adequate remedy, concurrent jurisdiction adds unnecessary confusion and complexity for courts and litigants without substantial benefit to litigants' rights. This policy is reflected in the APA, which provides for judicial review "[e]xcept to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law."[60] The congressional purpose to insure consistent standards also meshes with the general doctrine disfavoring bifurcation of jurisdiction over identical litigation.[61] In most instances bifurcation is a legislative over-

56. *See* note 8 and accompanying text *supra*.

57. 482 F.2d 1301 (10th Cir. 1973); 515 F.2d 654 (D.C. Cir. 1975). *See also* City of Highland Park v. Train, 519 F.2d 681 (7th Cir. 1975), *cert. denied*, 424 U.S. 927 (1976); notes 68-73 and accompanying text *infra*.

58. It is hard to deny the fact that the courts of appeal are the more appropriate forums to review informal rulemaking procedures, since the district court's trial function is rarely necessary. And while the district court could act like a court of appeals by deciding motions for summary judgment, there is always a disruptive potential for lengthy trial and the spectre of injunctive relief which upsets the statutory scheme.

Verkuil, *supra* note 54, at 204.

59. JAFFE, *supra* note 1, at 152. According to Professor Jaffe, a system of judicial remedies should strive for three objectives: comprehensiveness, simplicity, and predictability. *Id.*

60. Administrative Procedure Act § 10(c), 5 U.S.C. § 703 (1970).

61. JAFFE, *supra* note 1, at 422; Oljato Chapter of Navajo Tribe v. Train, 515 F.2d

sight rather than a deliberate choice. And it is one that leads to a bad result—a district court with little expertise of an agency's work is required to handle an occasional odd case.[62]

For the same policy reasons, the courts have held the judicial review section to preclude relief under other jurisdictional statutes. In *Getty Oil Co. v. Ruckelshaus*,[63] the Administrator had issued a compliance order limiting the sulfur content in fuel burned in generating stations within a designated area. Getty filed suit in district court for a temporary restraining order and a preliminary and permanent injunction claiming a violation of due process and the Administrator's failure to comply with NEPA. The Administrator contested the court's jurisdiction arguing that pre-enforcement review was foreclosed by section 307 since the issue would have been reviewable under that provision and the 30 day period had run.[64] On appeal, the Third Circuit agreed with the Administrator. Getty was found to be making a direct challenge to the regulation and thus in the wrong court by virtue of section 307. Neither the Declaratory Judgment Act or the APA were appropriate bases for jurisdiction:

> If Congress specifically designates a forum for judicial review of administrative action, such a forum is exclusive and this result does not depend on the use of the word "exclusive" in the statute providing for a forum for judicial review.[65]

C. *The Highland Park Test*

While the rule of exclusivity is supportable, because of the open-ended language of the citizen suit, it often occurs, in the words of Judge Skelly Wright, that "the courts play jurisdictional badminton with the provisions, batting one case back to the Dis-

654, 660 (D.C. Cir. 1975); Sun Enterprises Ltd. v. Train, 532 F.2d 280, 287 (2d Cir. 1976).

62. JAFFE, *supra* note 1, at 422.

63. 467 F.2d 349 (3d Cir. 1972), *cert. denied*, 409 U.S. 1125 (1972).

64. *See* note 10 and accompanying text *supra*.

65. 467 F.2d at 356. *Accord*, Utah International, Inc. v. EPA, 478 F.2d 126 (10th Cir. 1973); West Penn. Power Co. v. Train, 378 F. Supp. 941 (W.D. Pa. 1974), *aff'd*, 522 F.2d 302 (3d Cir. 1975), *cert. denied*, 426 U.S. 947 (1976).

In Pinkney v. Ohio EPA, 375 F. Supp. 305 (N.D. Ohio 1974), a claim for APA jurisdiction was also rejected. The court cited section 703 of the APA which provides for judicial review "[e]xcept to the extent that prior, adequate, and exclusive opportunity . . . is provided by law." Section 307 of the CAA was held to be an adequate and exclusive opportunity.

trict Court under Section 304 while taking another . . . one under Section 307."[66] Jurisdiction may seem to come within the literal terms of the citizen suit provision, yet because the judicial review section is exclusive, the plaintiff will discover he is in the wrong forum.[67] A clear delineation of the reaches of each section should save litigants and courts wasted effort and prevent lost opportunities for review.

City of Highland Park v. Train[68] provides the most comprehensive articulation by the courts of a test distinguishing actions properly brought under either of the two provisions, and it seems to have been followed at least implicitly by most courts.[69] Plaintiffs sought to block construction of a shopping center by compelling the Administrator to publish "indirect source" and "significant deterioration" regulations by a citizen suit.[70] The district court dis-

66. NRDC v. EPA, 512 F.2d 1351, 1361 (D.C. Cir. 1975) (Skelly Wright, J., concurring and dissenting).

67. For thorough discussion on the problems faced by litigants when there is uncertainty whether review lies in the district court or the court of appeals, see Note, *Jurisdiction to Review Federal Administrative Action: District Court or Court of Appeals*, 88 HARV. L. REV. 980 (1975).

68. 519 F.2d 681 (7th Cir. 1975), *cert. denied*, 424 U.S. 927 (1976).

69. *Cf.* Sun Enterprises Ltd. v. Train, 532 F.2d 280, 288 (2d Cir. 1976):

> Nor do § 505(a)(2) [citizen suit] or 28 U.S.C. § 1361 [mandamus] justify the district court suit. It is not the failure of the Administrator to perform a non-discretionary duty which is at issue; rather it is the manner in which those duties are performed which appellants are challenging.

See also California *ex rel.* State Water Resources Bd. v. EPA, 511 F.2d 963, 974 (9th Cir. 1975), *reversed on other grounds*, 426 U.S. 200 (1976):

> What is challenged here is not a failure to perform any single "act" or "duty," as much as the Administrator's general misinterpretation of the scope of state regulatory jurisdiction under the Act. . . . [It] seems to be the exact type of challenge that Congress must have contemplated in enacting Section 509.

One commentator views the citizen suit as a grant of judicial relief that otherwise would be unavailable: "[I]t would be difficult for a citizen to obtain judicial cognizance of the *failure of an administrative agency to take action*, due to application of the doctrines of standing and ripeness, without the express authorization in 304 [of the CAA] which makes clear that a court can issue *a writ of mandamus* to the administrator." On the other hand, the judicial review provision merely establishes procedures for obtaining judicial review of "administrative action that *already has been taken*"—review which is already guaranteed by the APA and the presumption of judicial review. This view is consistent with the *Highland Park* test. Bolbach, *supra* note 38, at 4 (emphasis added).

70. In addition, plaintiffs relied on an equal protection claim and charged that the Department of Transportation was obligated to file a NEPA statement. 519 F.2d at 683.

missed the claims under the CAA for failure to comply with the 60 day notice requirement of section 304(b).[71]

On appeal, the court of appeals found the plaintiffs to have filed in the wrong forum on the issue of indirect source regulations. The Administrator had published the regulations after the complaint was filed. Therefore, these regulations were reviewable only in the court of appeals under section 307.[72] Plaintiffs attempted to characterize an exemption[73] in the regulations as a failure to promulgate regulations and hence cognizable under section 304. The court rejected the argument, finding the exemption to be integral to the regulations. Plaintiffs were held to be attacking the validity of the regulation itself.

Plaintiffs' complaint in regard to significant deterioration regulations cited the Administrator's promulgation of only two out of six identified pollutants. The court of appeals agreed with the lower court that failure to provide notice barred jurisdiction.[74] However, plaintiffs also filed a petition for review in compliance with the judicial review section in an attempt to establish jurisdiction in the court of appeals. The Seventh Circuit set out the following test in response:

> [T]he function of a petition for review is to invoke a review for correctness by the Court of Appeals of regulations *adopted* by the Administrator and not to compel the Administrator to act *when he has failed to act*. . . . The appropriate procedure *for compelling the Administrator to act* is that provided in 304(a) . . . .[75]

Since plaintiffs were trying to compel the Administrator to act where he had failed to—to issue regulations for the remaining identified pollutants—they were now in the wrong court.

71. *See* note 17 *supra*. The court also dismissed for failure to state a claim on which relief can be granted, and on the ground that some relief requested was already the subject of orders issued by other federal courts. 519 F.2d at 683.

72. The indirect source regulations were purported to be promulgated pursuant to section 110, by setting out national standards and disapproving various parts of the state implementation plan, and therefore were reviewable under the judicial review section. *Id.* at 688.

73. The regulations exempted from their coverage facilities on which construction had begun prior to Jan. 1, 1975. 519 F.2d at 689.

74. *See* note 166 *infra*.

75. 519 F.2d at 697 (emphasis added).

The *Highland Park* test is laudable for its apparent simplicity in distinguishing the jurisdiction of the two provisions. To restate, judicial review actions are a response to regulations *adopted* by the Administrator. Implied is a rejection of the dictum in *Oljato* that citizen suits may be pressed where the Administrator acts, but not far enough. In other words, once the substance of a promulgated regulation is contested, including its completeness, the courts are apparently loathe to read the citizen suit provision to support the action.[76] In contrast, a suit to compel promulgation of regulations is properly brought as a citizen suit. Courts and commentators have described it as in the nature of a writ of mandamus.[77] For example, in *PROD v. Train*,[78] a citizen's group filed a citizen suit to compel the Administrator to publish railroad noise emission standards under the NCA. Such a suit clearly does not interfere with any time sequences established by Congress but is instead, as in *PROD*, often an attempt to enforce them. Nor does it provide for inconsistent standards since the gravamen of the complaint is the Administrator's failure to act and not the substance of the regulation.

76. *See* notes 49 and 73 and accompanying text *supra*; Oljato Chapter of Navajo Tribe v. Train, 515 F.2d 654 (D.C. Cir. 1975); City of Highland Park v. Train, 519 F.2d 681, 689 (7th Cir. 1975), *cert. denied*, 424 U.S. 927 (1976).

77. "[T]he suits which are permitted are essentially those which seek relief in the nature of mandamus." Wisconsin's Environmental Decade, Inc. v. Wisconsin Power & Light Co., 395 F. Supp. 313, 320 (W.D. Wis. 1975). *See also* Bolbach, *supra* note 38, at 4; *cf.* Sun Enterprises Ltd. v. Train, 532 F.2d 280, 288 (2d Cir. 1976); California *ex rel.* State Water Resources Bd. v. EPA, 511 F.2d 963 (9th Cir. 1975), *reversed on other grounds*, 426 U.S. 200 (1976).

78. 8 ERC 1887 (D.D.C. 1976). *See* Wisconsin's Environmental Decade, Inc. v. Wisconsin Power & Light Co., 395 F. Supp. 313 (W.D. Wis. 1975) (suit to compel EPA to notify Wisconsin Power of a violation of the Wisconsin implementation plan under section 304 of the CAA; City of Riverside v. Ruckelshaus, 4 ERC 1728 (C.D. Cal. 1972) (suit to enforce EPA to publish an implementation plan for the state of California); *cf.* Colorado Public Interest Research Group, Inc. v. Train, 373 F. Supp. 991 (D. Colo.), *rev'd*, 507 F.2d 743 (10th Cir. 1974) *rev'd*, 426 U.S. 1 (1976) (citizen suit to compel the Administrator to control discharges of radioactive materials into navigable waters). *But cf.* Sierra Club v. Ruckelshaus, 344 F. Supp. 253 (D.D.C.), *aff'd*, 4 ERC 1815 (D.C. Cir. 1972), *aff'd by an equally divided Court sub nom.* Fri v. Sierra Club, 412 U.S. 541 (1973) (suit to enjoin EPA approval of state implementation plans); United States Steel Corp. v. Fri, 364 F. Supp. 1013 (N.D. Ind. 1973) (suit for injunctive and declaratory relief from a notice of violation issued by EPA); West Penn. Power Co. v. Train, 378 F. Supp. 941 (W.D. Pa. 1974), *aff'd*, 522 F.2d 302 (3d Cir. 1975), *cert. denied*, 426 U.S. 947 (1976) (suit for injunctive and declaratory relief from enforcement of a notice of violation of a state implementation plan).

D. *Expansion of the Citizen Suit: A New Test*

The *Highland Park* test is generally an accurate description of the present law. One objection, however, is the overbreadth of its formulation in regard to suits appropriately brought under the judicial review section. While the CAA, FWPCA, and NCA are complex statutes requiring the adoption of diverse regulations by the Administrator, only specified actions are expressly made reviewable under the judicial review section. On its face, the *Highland Park* test only distinguishes between administrative action and inaction. Under which statutory provision are regulations adopted by EPA but *not* explicitly reviewable under the judicial review section to be reviewed? Expanding the judicial review section's scope is untenable since it is clear Congress made a deliberate choice in placing only those standards requiring consistent interpretation in the courts of appeal. However, the presumption of review should not allow these issues to go remediless.

It is unfortunate that the courts have analogized the citizen suit to a mandamus action.[79] This has saddled the provision with an unnecessarily archaic and constricted role. One commentator has criticized "the intricacies of mandamus, which are fundamentally at variance with an efficient system of judicial review of administrative action, [because they] seriously impair the heretofore satisfactory remedies of injunction, mandatory injunction, and declaratory judgment."[80] Aside from a restricted scope of review, to be discussed below, mandamus relief is limited to compelling agency action.[81] This limitation draws an impractical line between prohibitory and mandatory decrees.[82] In short, the mandamus doc-

79. *See* note 77 and accompanying text *supra*.

80. 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 23.09, at 334 (1958).

81. Mandamus in its most usual definition commands an officer to perform a duty which he has refused to perform. Refusal to act may take many forms: refusal to grant the ultimate object sought (license, job); refusal to hold a hearing or make a decision mandated by law; refusal to make regulations needed to implement rights to which the petitioner is entitled. . . . Most of the rules concerning mandamus assume a more or less total refusal to act.

JAFFE, *supra* note 1, at 176 (footnote omitted). Professor Jaffe does suggest that in modern practice mandamus is used to review affirmative agency action. *Id.* at 177. *Compare* Howe v. Attorney General, 325 Mass. 268, 90 N.E.2d 316 (1950) *with* Van Arsdale v. Town of Provincetown, 344 Mass. 146, 181 N.E.2d 597 (1962).

82. Professor Davis points to the example of American School v. McAnnulty, 187 U.S. 94 (1902), where "[t]he Supreme Court in that opinion said that complainants

trine establishes an irrational procedural barrier to review. Rather than directing the inquiry toward whether an administrative wrong has been committed, attention is focused upon the nature of the relief that is desired.

Commentators have suggested that the mandamus statute be interpreted to reflect the development of mandatory injunctions in equity courts.[83] In addition to mandatory injunctions, a court of equity has discretion to grant other appropriate relief—prohibitory injunctions or declaratory relief. "The superiority of the equitable tradition stems from the fact that in actions applying equitable principles, 'Courts and counsel typically focus immediately upon merits' " rather than on the type of relief sought.[84] However, the courts have so far been reluctant to develop the equity tradition under the mandamus statute, perhaps because of clear congressional intent that the mandamus tradition is to be followed.[85]

The *Highland Park* test, by adopting the mandamus principle, similarly limits the citizen suit provision. Substantive issues are obscured by procedural considerations. Review is arbitrarily cut off if the Administrator has acted affirmatively even though such action may not be reviewable under the judicial review section either. There is no room for declaratory relief even though a position adopted by an administrator, "[o]nce announced, . . . begins to affect officials, persons, and groups active in the regulated field in ways little different from the promulgation of rules."[86]

were entitled to an injunction 'to prohibit the further withholding of the mail from complainants.' The form of the language is prohibitory. But the substance is mandatory." He concludes that "[q]uibbling about what is affirmative and what is negative is unprofitable and injurious." 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 23.09, at 339 (footnote omitted).

83. Byse & Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308 (1967); 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 23.10 (Supp. 1970).

84. Byse & Fiocca, *supra* note 83, at 333.

85. 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 23.10, at 805 (Supp. 1970).

86. Vining, *Direct Judicial Review and the Doctrine of Ripeness in Administrative Law*, 69 MICH. L. REV. 1445, 1448 (1971).

This is not to say that every adverse attitude taken by the Administrator is reviewable. The doctrines of ripeness and exhaustion of administrative remedies remain as means for courts to weigh the appropriateness of judicial review at an early stage—to consider the potential harm to the plaintiff and the public, the interference with the administrative process, and how well defined the issue is.

Sierra Club v. Ruckelshaus, 344 F. Supp. 253 (D.D.C.), *aff'd mem.*, 4 ERC 1875 (D.C. Cir. 1972), *aff'd by an equally divided court sub nom.* Fri v. Sierra Club, 412

It is suggested that the citizen suit be interpreted less restrictively than the courts have generally been willing. The equity powers of the courts should be invoked rather than the mandamus tradition in determining the availability of citizen suit review. The broad reading of the citizen suit provision in *NRDC I* may be recalled, suggesting a failure to perform a nondiscretionary duty is not limited to agency inaction but may encompass agency action as well. The First Circuit's interpretation of the interrelationship between the citizen suit and judicial review sections does not appear to be correct, but this need not imply its view of the availability of citizen suit review was erroneous. In other words, unless the EPA action falls within the narrow purview of the judicial review provision, review may be by citizen suit. Courts should then inquire directly into the harm alleged and issue whatever equitable relief is appropriate in the circumstances whether it be prohibitory, mandatory, or declaratory.

It remains to be demonstrated that a broader interpretation is consistent with the statutory language of the citizen suit provision and the congressional intent. Limiting the citizen suit to the function of a writ of mandamus is supported by the similarity between the provisions. The mandamus provision authorizes district courts to entertain jurisdiction of actions "in the *nature of mandamus* to compel an officer or employee of the United States of any agency thereof *to perform a duty* owed to the plaintiff."[87]

U.S. 541 (1973), is a rare example of a successful injunctive action brought under the citizen suit section. Plaintiff sought to enjoin EPA approval of state implementation plans because of the Administrator's failure to issue nondegradation regulations under the CAA. EPA challenged the district court's jurisdiction under section 304 claiming the plaintiff should wait until actual approval and then seek review in the court of appeals under section 307, 42 U.S.C. § 1857h-5(b)(1) (1970). The court accepted the plaintiff's claim that EPA's failure to assert authority requiring significant deterioration standards was "a failure to perform a nondiscretionary duty" and injunctive relief was granted. The court was clearly impressed by the threat of irreparable harm to clean air areas as well as indications that the Administrator's position was set. He had not only testified before Congress as to his declination to assert authority, but had promulgated regulations permitting degradation of ambient air quality.

Compare Anaconda Co. v. Ruckelshaus, 482 F.2d 1301 (10th Cir. 1973), where the court of appeals reversed on the basis of ripeness in a suit seeking injunctive relief against EPA promulgation of a proposed rule controlling sulfur oxide emissions. The court held that review was possible under the judicial review section after the regulation was finally promulgated.

87. 28 U.S.C. § 1361 (1970) (emphasis added).

On the other hand, there is no clear evidence of a legislative intent to restrict citizen suits to the mandamus tradition as there is in statutory mandamus.[88] The congressional purpose behind the citizen suit provision suggests a broader function for the provision. There is a distinction between public interest and traditional litigation. The latter involves vindication of private rights for which review is easily had.[89] The mandamus statute reflects this orientation toward private rights when it speaks of a "duty *owed to the plaintiff*." In contrast, plaintiffs in public interest litigation "face a bout of preliminary litigation in which they must show that the court has jurisdiction."[90] The citizen suit was intended to circumvent this problem by providing a specific statutory right to review for litigants vindicating public interests. The different purpose of the citizen suit is revealed when it refers to a "duty . . . *under th[e] Act*". Duty is established by reference to the Act rather than the plaintiff. An analogy exists between the citizen suit and the writ of mandamus, since they are both utilized to compel an agency to perform a duty, but it should be limited to an analogy. Compelling the Administrator to perform a duty under the CAA, FWPCA, or NCA, in other words, need not be confined to rectifying inaction. Preliminary inquiry into the nature of the relief sought should be avoided, and courts should proceed directly to the merits of the issue to determine whether a duty under the act has been breached.

This interpretation is contradicted in part by the legislative history of the CAA. During the course of the congressional debates, Senator Muskie, chairman of the Senate Public Works Committee, referred to a staff memorandum:

> The APA provides that reviewing courts "shall . . . compel agency *action* unlawfully withheld." The concept of compelling bureaucratic agencies to carry out their *duties* is integral to democratic society. Senator Hruska mentioned yesterday an example where an administrative agency *failed to act*. . . .[91]

88. *See* note 83 *supra*. The significance of the inclusion of "nature of mandamus" in the language of the mandamus statute is thoroughly discussed in the Byse & Fiocca article. Despite their recommendation that the equity tradition be developed, the phrase is strongly indicative of a congressional intent that the mandamus tradition be followed.

89. Vining, *supra* note 86, at 1449.

90. *Id.*

91. 116 CONG. REC. 33102-05 (1970) (remarks of Senator Muskie).

By citing section 706(1) of the APA, the staff memorandum places a restrictive interretation on "duty," equating it with action. Further support for the *Highland Park* view is in the House debates on the CAA. Congressman Springer stated that "[c]itizen suits may be instituted against the administrator only for failure to act where he must."[92]

However, another memorandum placed in the hearings to the CAA emphasized that the "types of actions which appear authorized under [the citizen suit] are almost infinite."[93] Several examples provided are consistent with a restrictive interpretation;[94] but others are not limited to instances where the Administrator has failed to act:

> (vii) to require additions to or modifications of performance standards promulgated under 113(b)(2) [new source standards];
>
> . . . .
>
> (xi) to require additions to or modification of emission standards promulgated under 114(c)(1) [proposed emission standards];
>
> . . . .
>
> (xvi) to require the revision or modification of emission standards promulgated under 115(a)(3) [standards for hazardous pollutants];[95]

While two of these examples are currently reviewable only under the present judicial review section as a consequence of changes made in the final Senate bill, this did not occur primarily through a restriction in the language of the citizen suit. Congress did limit citizen suits to failures by the Administrator to perform *nondiscretionary* acts or duties,[96] but did so primarily to relieve EPA of a

92. 116 CONG. REC. 42522 (1970) (remarks of Congressman Springer).

93. *Hearings on S. 3229*, *supra* note 20, at 1587 (Memorandum of Law: Summary Analysis of Citizen Suit Provisions of National Air Quality Standards Act of 1970 (§ 304), Collier, Shannon, Rill, & Edwards).

94. *E.g.*,

(i) *to require* the *designation* of air quality control regions;

. . . .

(iv) *to require* the *disapproval* of implementation plans submitted by the states . . . ;

. . . .

(xv) *to require* the *promulgation* of a prohibition under 115(a) [prohibition of emissions of hazardous pollution agents];

Id. at 1587-88 (emphasis added).

95. *Id.*

96. *See* notes 136-87 and accompanying text *infra*.

multiplicity of suits compelling it to perform its enforcement duties,[97] which are discretionary with the Administrator.[98]

Courts have turned to other jurisdictional statutes when the action has not fallen within the purview of the citizen suit or judicial review sections. A ready alternative basis for review would substantially mitigate the need to expand the availability of citizen suit review. Federal question jurisdiction of claims alleging illegal administrative action under the CAA, FWPCA, or NCA is occasionally found.[99] However, the $10,000 jurisdictional amount has traditionally been a significant obstacle to review under the statute.[100] Courts and litigants most commonly resort to the APA as a gap-filling measure,[101] since it apparently waives the amount in controversy requirement.[102]

For example, in *Bethlehem Steel Corp. v. EPA*,[103] plaintiffs petitioned for review under the judicial review section of the FWPCA, section 509(b), of EPA's partial approval of New York State's revised water quality standards (thermal) in accordance with section 303. EPA claimed there was no jurisdiction under section

97. *See* notes 183-87 and accompanying text *infra*.

98. *Id.* Review of new source and hazardous pollutant standards was placed in the judicial review section after expressions of concern that citizen suits would result in undue delay in achieving standards. *Hearings on S. 3229*, *supra* note 20, at 1576-1666 (testimony of Automobile Manufacturers Ass'n, Union Carbide Corp.). Citizen suit review of proposed emission standards may also be unavailable under the holding of Anaconda Co. v. Ruckelshaus, 482 F.2d 1301 (10th Cir. 1973), where review of proposed regulations under the citizen suit was precluded because later review under the judicial review section could be had after they were finally promulgated. *See* note 52 and accompanying text *supra*. *But see* Sierra Club v. Ruckelshaus, 344 F. Supp. 253 (D.D.C.), *aff'd mem.*, 4 ERC 1875 (D.C. Cir. 1972), *aff'd by an equally divided court sub nom.* Fri. v. Sierra Club, 412 U.S. 541 (1973).

99. *See, e.g.*, Minnesota v. Callaway, 401 F. Supp. 524 (D. Minn. 1975); NRDC v. Callaway, 389 F. Supp. 1263 (D. Conn. 1974), *rev'd*, 524 F.2d 79 (2nd Cir. 1975); NRDC v. Train, 510 F.2d 692 (D.C. Cir. 1975); United States Steel Co. v. Fri, 364 F. Supp. 1013 (N.D. Ind. 1973).

100. *But cf.* Minnesota v. Callaway, 401 F. Supp. 524 (D. Minn. 1975), where the court suggested the jurisdictional amount is assumed in cases involving the purity of interstate waters.

101. *See, e.g.*, Bethlehem Steel Corp. v. EPA, 538 F.2d 513 (2d Cir. 1976); CPC International, Inc. v. Train, 515 F.2d 1032 (8th Cir. 1975); E.I. duPont Nemours & Co. v. Train, 528 F.2d 1136 (4th Cir. 1975); NRDC v. Callaway, 389 F. Supp. 1263 (D. Conn. 1974), *rev'd*, 524 F.2d 79 (1st Cir. 1975); NRDC v. Train, 519 F.2d 287 (D.C. Cir. 1975); NRDC v. Train, 510 F.2d 692 (D.C. Cir. 1974).

102. 5 U.S.C. §§ 701-706 (1970); *see also* Califano v. Sanders, 522 F.2d 1167 (7th Cir. 1975), *rev'd*, 97 S. Ct. 980 (1977).

103. 538 F.2d 513 (2d Cir. 1976).

509 since there was no mention of review of section 303 water quality standards in that section. Bethlehem Steel argued that the language in section 509 providing review of "any effluent limitation or other limitation under section 301, 302, or 306" included water quality standards under 303. The court accepted the Administrator's view stating "the complexity and specificity of section 509(b) in identifying what action of EPA under the FWPCA would be reviewable in the court of appeals suggests that not all such actions are so reviewable."[104] It concluded that there was a conscious bifurcation of review between effluent limits, national in scope, and state water quality standards. The petition for review was dismissed for lack of jurisdiction with an indication that district court review under the APA was appropriate.[105]

This example raises the major issue, only recently decided by the Supreme Court, whether the APA is actually an independent grant of jurisdiction. The circuits had been split.[106] In those jurisdictions rejecting the APA as an independent source of review, agency action not reviewable by citizen suit or under the judicial review provision had presumably gone remediless.[107] The Supreme Court has held, in *Califano v. Sanders*,[108] that the APA is not an independent grant of jurisdiction largely because of Congress' amendment in October 1976 of the federal question statute. The statute now provides for district court jurisdiction of civil actions arising under the Constitution or laws of the United States where the amount in controversy exceeds $10,000 "except that no such sum or value shall be required in any action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity."[109] By removing the amount in con-

104. *Id.* at 517.

105. *Id.* at 517 n.10.

106. *Compare* Aguayo v. Richardson, 473 F.2d 1090, 1101-02 (2d Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974) *with* Pickus v. United States Bd. of Parole, 507 F.2d 107, 1109-10 (D.C. Dir. 1974).

107. *See, e.g.*, West Penn. Power Co. v. Train, 378 F. Supp. 941 (W.D. Pa. 1974), *aff'd*, 522 F.2d 302 (3d Cir. 1975), *cert. denied*, 426 U.S. 947 (1976), where the court dismissed for lack of jurisdiction. Although one ground for dismissal was plaintiff's failure to provide notice under the citizen suit, the APA could not provide an alternate basis for jurisdiction since it had not been determined to be a grant of jurisdiction.

108. 97 S. Ct. 980 (1977).

109. 28 U.S.C.A. § 1331(a) (West Supp. 1976). Furthermore, Congress amended

troversy requirement in suits against federal agencies, Congress has made readily available federal question jurisdiction of those issues unreviewable under the *Highland Park* test.[110]

Expanding the availability of citizen suit review, therefore, may have little or no effect upon rights of plaintiffs to increased judicial review, especially in the face of recent congressional action. Fear that expansion will engender a multiplicity of suits, which may have led courts to restrict citizen suits to mandamus-like actions, is unfounded. The gap-filling function formerly performed by the APA in some jurisdictions is now provided by the federal question statute. Even prior to this development the D.C. Circuit, which recognized the APA as an independent grant of review, realized in *NRDC v. Train*[111] that the citizen suit provision "may add little to the jurisdiction of federal courts as a practical matter.[112]

section 10(b) of the APA, which presumably continues to govern the form of judicial review proceedings under the federal question statute. Section 10(b) provides that "[i]f no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer" thus eliminating sovereign immunity problems. 5 U.S.C.A. § 703 (West Supp. 1976).

110. There is the argument that the citizen suit and judicial review sections are "special statutory proceedings" precluding other remedies, but in Abbot Laboratories v. Gardner, the Supreme Court refused to reach the conclusion that a special review statute in itself "evince[d] a congressional purpose to bar agency action not within its purview from judicial review." 387 U.S. 136, 141 (1967). In addition, the saving clause within the citizen suit provision is evidence of a congressional intent not to preclude other causes of action.

111. 510 F.2d 692 (D.C. Cir. 1974).

112. One commentator has suggested that the provision provides for review for writs of mandamus where it ordinarily might be unavailable due to the doctrines of ripeness and standing. Such an assessment of the chances of otherwise obtaining review seems overly pessimistic. The APA specifically provides "actions for . . . writs of . . . mandatory injunction." 5 U.S.C.A. § 703 (West Supp. 1976). Of course, previously there was a split in authority whether the APA was a grant of jurisdiction. Now presumably it governs review under the federal question statute. Nor are significant differences in standing between the APA and the citizen suit provision likely: despite the ability of "any person" to sue under the citizen suit provision, the constitutional requirement of an "injury in fact" must still be shown. *Compare* Sierra Club v. Morton, 405 U.S. 727 (1972) *with* Sierra Club v. Ruckelshaus, 344 F. Supp. 253 (D.D.C.), *aff'd mem.*, 4 ERC 1875 (D.C. Cir. 1972), *aff'd by an equally divided court sub nom.* Fri v. Sierra Club, 412 U.S. 541 (1973). Only one case has dispensed with any showing of an "injury in fact." Metropolitan Washington Coalition for Clean Air v. District of Columbia, 373 F. Supp. 1089 (D.D.C.), *aff'd*, 511 F.2d 809 (D.C. Cir. 1975) (enforcement suit). It is doubtful whether this is good law in light of continued Supreme Court pronouncements that an "injury in fact" is a constitutional requirement to make out a "case or controversy." *See, e.g.*, Warth v. Seldin, 422 U.S.

However, other procedural benefits should be recognized from an expansion of the citizen suit. Certainty is one. Confusion over the availability of citizen suit review and review under the judicial review provision can be minimized but may be inevitable.[113] Distinguishing between prohibitory and mandatory relief only adds unnecessary complexity to the statutory scheme of review. Odds that the jurisdictional badminton complained of by Judge Skelly Wright will occur are increased. Plaintiffs who file under the federal question statute only to discover the action should be properly brought as a citizen suit may find the entire action barred by failure to provide 60 days notice.[114] With a liberally construed citizen suit provision, review of administrative action under the CAA, FWPCA, or NCA is either as a petition for review or as a citizen suit.

There is also no reason to deny the award of attorneys' fees when injunctive or declaratory relief is sought. In any suit reviewing the Administrator's action under the federal question statute an award of fees against the government is barred under the doctrine of sovereign immunity.[115] The congressional purpose hypothesized in *NRDC II*, where the court surmised Congress did not intend to provide attorneys' fees if the suit was one to review administrative action, argues against expanding the citizen suit provision. However, the argument was only accepted in so far as it indicated a conceivable congressional intent behind the failure to provide for attorneys' fees in a petition for review. In a suit alleging a failure to perform a nondiscretionary duty under a statute, the presumptive public benefit is the same whether administrative action is to be compelled or restrained. Moreover, the award is intended to "encourage quality actions."[116] Quality actions are undeniably desirable in contexts other than compelling agency action.

490 (1975). Anaconda Co. v. Ruckelshaus, 482 F.2d 1301 (10th Cir. 1973), suggests the doctrine of ripeness applies with equal force to the citizen suit. *See* note 52 and accompanying text *supra*; *cf.* Sierra Club v. Ruckelshaus, 344 F. Supp. 253 (D.D.C.), *aff'd mem.*, 4 ERC 1875 (D.C. Cir. 1972), *aff'd by an equally divided court sub nom.* Fri v. Sierra Club, 412 U.S. 541 (1973); note 111 and accompanying text *supra*.

113. *See Jurisdiction to Review Administrative Action*, *supra* note 54, at 997; note 120 *infra*.

114. *See* notes 163-66 and accompanying text *infra*.

115. *See* note 28 *supra*.

116. SENATE REPORT, *supra* note 5, at 38.

Finally, citizen suit jurisdiction should be expanded because the notice requirement in the citizen suit provision encourages an administrative solution by providing the Administrator 60 days to deal with the plaintiff's claim outside the courts. The Seventh Circuit in *Highland Park* stated the specific congressional intent was "to provide for citizen's suits in a manner that would be least likely to clog already burdened federal courts and most likely trigger governmental action which would alleviate any need for judicial relief."[117] Also, incentive to use this provision is increased by the likelihood of an award against the Administrator of attorneys' fees if he fails to act upon the plaintiff's complaint. Without this threat, the Administrator may be more willing to resist claims and litigate, especially if the plaintiff, for example a local citizen's group, lacks extensive resources to fund protracted litigation.[118] Congress has carefully provided a mechanism for encouraging resolution of environmental issues outside the overburdened courts, and broadening the availability of the citizen suit may reduce total litigation. This benefit is lost if claims are litigated under other jurisdictional statutes. Gap-filling jurisdiction may also encourage litigants to forego notice even when an issue is properly under the jurisdiction of the citizen suit provision. The presumption of reviewability may weigh heavily on the court and jurisdiction under a general jurisdictional statute entertained, even though a specific congressional policy is contravened.[119]

In lieu of the *Highland Park* formula, a different test is offered which reconciles the broad language of the citizen suit and the necessity of providing exclusive review when an issue is properly reviewable in a court of appeals. Quite simply, a preliminary inquiry is made to determine if the action should be brought as a petition for review. If not, then it may be brought as a citizen suit, whether or not it is to review agency action, in the nature of a writ of mandamus, an injunctive proceeding, or to obtain declaratory relief. While determining if an issue is reviewable under the ju-

117. City of Highland Park v. Train, 519 F.2d 681, 690 (7th Cir. 1975), *cert. denied*, 424 U.S. 927 (1976).

118. *See* note 28 *supra*.

119. *See, e.g.*, NRDC v. Train, 510 F.2d 692 (D.C. Cir. 1974); Minnesota v. Callaway, 401 F. Supp. 524 (D. Minn. 1975); *See also* notes 161-62 and accompanying text *infra*.

dicial review section is not necessarily simple,[120] basically the statutory language of the judicial review section is clear as to specific EPA action which is reviewable there.[121]

NRDC v. Train[122] may be used to illustrate the application of the test. NRDC had challenged the publication of an initial list of toxic pollutants and challenged the criteria used for inclusion on the list. The statutory authorities for the Administrator's authority were sections 101(a)(3) and 307(a)(1) of the FWPCA. NRDC premised the district court's jurisdiction in part upon section 505 of the FWPCA (citizen suit). The Administrator argued (1) publication was discretionary, hence unreviewable under section 505, and (2) the list was related to the promulgation of an effluent standard, section 307, and therefore reviewable only in the court of appeals under section 509(b). While the court agreed with the Administrator that the list was sufficiently interwoven with the publication of effluent standards ordinarily to find section 509 review—once the list was published effluent standards were to be established for each toxic pollutant listed—a problem arose when there was a claimed omission from the list. No standards would ever be promulgated; thus the issue could never be reviewed under section 509. Since the Administrator had argued publication was discretionary and not reviewable under section 505, review of the list was "consigned to jurisdictional limbo."[123]

120. A well-litigated controversy over the power of the Administrator under the FWPCA to issue effluent limitations is one example of the potential problems in distinguishing EPA actions properly subject to review in the court of appeals under the judicial review provision. The Fourth Circuit upheld the Administrator's power to issue both effluent guidelines, under section 304, and effluent limitations, under section 301. Furthermore, effluent guidelines were held to be pursuant to section 301 limitations and therefore reviewable in the court of appeals along with effluent limitations. E.I. duPont de Nemours & Co. v. Train, 528 F.2d 1136 (4th Cir. 1975). In contrast, the Eighth Circuit held that the Administrator had authority only to issue section 304 effluent guidelines which were reviewable in the district courts. CPC International, Inc. v. Train, 515 F.2d 1032 (8th Cir. 1975). *See generally* Parenteau & Tauman, *The Effluent Limitations Controversy: Will Careless Draftsmanship Foil the Objectives of the Federal Water Pollution Control Act Amendments of 1972?* 6 ECOLOGY L.Q. 1 (1976). The Supreme Court has since upheld the Administrator's authority to issue both effluent guidelines and limitations. The jurisdictional issue was not directly addressed. E.I. duPont de Nemours & Co. v. Train, 97 S. Ct. 965 (1977).

121. *See* note 13 *supra*.

122. 519 F.2d 287 (D.C. Cir. 1975).

123. *Id.* at 291.

While the court ultimately resolved the jurisdictional dilemma by turning to the APA, its general acceptance of the Administrator's argument that the list of toxic pollutants was reviewable under section 509 may be disputed. Section 509 of the FWPCA provides that "[r]eview of the Administrator's action in promulgating any *effluent standard, prohibition, or treatment standard* under section 307 may be had."[124] The specificity of actions performed in accordance with section 307 which are reviewable carries a negative implication that any other action is not.[125] Section 307(a)(1) provides that "[t]he Administrator shall . . . publish . . . a *list* which includes any toxic pollutant."[126] Thus what was in issue in the case clearly was not a "standard" or a "prohibition" but a "list." Under the proposed formula, having found the issue to be unreviewable under section 509, review would automatically devolve on the citizen suit.[127]

124. 33 U.S.C. § 1369(b) (Supp. V 1975) (emphasis added).

125. *See, e.g.*, Bethlehem Steel Corp. v. EPA, 538 F.2d 513 (2d Cir. 1976); notes 102-03 and accompanying text *supra*.

126. 33 U.S.C. § 1317(a)(1) (Supp. V 1975) (emphasis added).

127. Whether the issue is discretionary and thus unreviewable under the citizen suit is a subsequent issue which is discussed below. *See* notes 135-87 and accompanying text *infra*.

Review of the Administrator's determination of water quality standards under section 303 of the FWPCA, the issue involved in Bethlehem Steel Corp. v. EPA, 538 F.2d 513 (2d Cir. 1976), has also been mentioned as a possible candidate for citizen suit review under this expanded definition. Other examples of EPA action reviewable under a liberally construed citizen suit provision are numerous. The following is a suggested list of potential suits challenging administrative action, though it is by no means exhaustive:

Under the CAA: challenges to the Administrator's determination of Air Quality Criteria pursuant to § 108, 42 U.S.C. § 1857c-3 (1970), challenges to the Administrator's designation of Air Quality Control Regions under § 107, 42 U.S.C. § 1857c-2 (1970); challenges to testing procedures established under § 207(b), 42 U.S.C. § 1857f-5(b) (1970).

Under the FWPCA: challenges to the Administrator's designation of "hazardous substances" pursuant to section 311(b)(2)(A), 33 U.S.C. § 1321(b)(2)(A) (Supp. V 1975); challenges to the review of Administrator's determinations in regard to Water Quality Standards under § 303, 33 U.S.C. § 1313 (Supp. V 1975).

Under the NCA: challenges to the Administrator's determination of noise criteria under § 5, 42 U.S.C. § 4904 (Supp. V 1975); challenges to his determination of "low-noise-emission products" pursuant to § 15(b), 42 U.S.C. § 4914(b) (Supp. V 1975).

Injunctive and declaratory relief is appropriate when the Administrator's position is sufficiently fixed and the adverse effect immediate and irreparable as in Sierra Club v. Ruckelshaus, 344 F. Supp. 253 (D.D.C.), *aff'd mem.*, 4 ERC 1875 (D.C. Cir.

The *Highland Park* test is clear and for the most part workable. But, perhaps due to confusion over the availability of review between the citizen suit and judicial review provisions and to the fear of overburdened courts, availability of citizen suit review has been given short shrift. To be sure, the recently amended federal question statute may promise to leave no administrative failure unreviewable. Nevertheless, the courts' interpretation of the citizen suit may deprive plaintiffs and the administration of the substantial benefits of citizen suit review when other than mandamus relief is sought.

The trend in the courts otherwise is to look to the impact of the agency position upon affected parties and the administrative and statutory scheme as a whole rather than to categorize review in terms of types of sanctions. Questions about the existence and kinds of remedies available are no longer considered relevant to determine whether review will be allowed.[128] Any so-called "citizen suit" should similarly minimize procedural barriers to review. Unless there is conflict with the judicial review section, courts should proceed directly to the merits. The citizen suit, in other words, should reflect an equitable doctrine. The justiciability of a review action should depend upon "the substantive impact of the [agency] action rather than its label, form or chronological position in the administrative process."[129]

III. Scope of Review Under the Citizen Suit

Administrative discretion is the power under a statute to choose among a class of actions.[130] Yet discretion does not necessarily bar review: "Presumptively, an exercise of discretion is reviewable for . . . 'abuse.' "[131] Judical review for "abuse of discretion" is a court

1972), *aff'd by an equally divided court sub nom.* Fri v. Sierra Club, 412 U.S. 541 (1973).

128. *See* Vining, *supra* note 86, at 1468-87; Note, *Reviewability of Administrative Action: The Elusive Search for a Pragmatic Standard*, 1974 Duke L.J. 1382 (1974).

129. *Reviewability of Administrative Action*, *supra* note 128, at 407.

130. Jaffe, *supra* note 1, at 359. Berger, *Administrative Arbitrariness and Judicial Review*, 65 Colum. L. Rev. 55, 63 (1965).

131. Jaffe, *supra* note 1, at 363. Professor Davis qualifies his stance of presumptive reviewability with the view that any discernible legislative intent will be followed by the courts. 3 K. Davis, Administrative Law Treatise § 28.08 (Supp. 1970).

determination whether the administrative choice was within the permissible class of actions.

In *Citizens to Preserve Overton Park v. Volpe*[132] the Supreme Court rejected the Secretary of Transportation's contention that his decision approving funds to build a highway through Overton Park was unreviewable discretion. The agency action did not fall within the "very narrow exception" under the APA of action "committed to agency discretion."[133] Further, the APA was inapplicable only "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' "[134] The Court then placed its imprimatur upon section 706(2)(A) as the appropriate scope of review for informal agency action under the APA. The section provides that

> [t]he reviewing court . . . shall hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an *abuse of discretion* or otherwise not in accordance with law . . . ."[135]

Although review of discretionary acts is available under the APA, the courts have consistently held the scope of review under the citizen suit to preclude review for abuse of discretion. This is questionable both as a matter of policy and statutory interpretation.

There is dispute among commentators whether discretionary action is ever unreviewable. Mr. Berger takes the position that no discretionary action should be unreviewable: "Since . . . the right to be protected against arbitrariness is rooted in the Constitution, . . . judicial review of arbitrary action is a matter of right, not grace." Berger, *supra* note 130, at 58. Professors Jaffe and Davis both state instances of absolute discretion exist. JAFFE, *supra* note 1, at 359; Davis, *Judicial Control of Administrative Action: a Review*, 66 COLUM. L. REV. 635, 652-53 (1966). However, Professor Davis advocates a broader scope of reviewability, although he appears willing to live with some areas of absolute discretion. *See, e.g.*, Davis, *Administrative Arbitrariness is Not Always Reviewable*, 51 MINN. L. REV. 643 (1967).

132. 401 U.S. 402 (1971).

133. *Id.* at 410.

134. *Id.*; S. REP. NO. 758, 79th Cong., 1st Sess. 26 (1945). Both the Department of Transportation Act and the Federal-Aid to Highway Act provide that there be no approval by the Secretary of any highway program requiring the use of public parkland "unless (1) there is no feasible and prudent alternative . . . and (2) such program includes all possible planning to minimize harm to such park." 23 U.S.C. § 138 (1970); 49 U.S.C. § 1653(f) (1970). The Court concluded that "[p]lainly, there [wa]s 'law to apply'." 401 U.S. at 413.

135. 5 U.S.C. § 706(2)(A) (1970) (emphasis added).

A. *Current Law*

One ground for denying district court review in *Oljato Chapter of Navajo Tribe v. Train*[136] was the court's holding that section 307 review was exclusive.[137] However, the court also examined whether the issue could be otherwise reviewed under section 304, concluding it could not since revision of new source standards is discretionary with the Administrator. Though it accepted the plaintiffs' distinction between discretion and review of an abuse of discretion, the court rebuffed arguments that review of abuse of discretion could be pursued under the citizen suit provision. The court emphasized the change in the Senate language of the CAA by the conference substitute from suits for failure to exercise "any duty" to "any duty *not discretionary*." From this, the court concluded that Congress had intentionally deleted review of abuse of discretion from the provision.[138]

Wisconsin's Environmental Decade, Inc. v. Wisconsin Power & Light Co.[139] was a citizen suit by an environmental group to compel EPA to notify Wisconsin Power and Light that it was in violation of the Wisconsin implementation plan. Although the court felt the Administrator's duty to notify the company was not discretionary, it held his finding that there was no violation was discretionary and unreviewable. The court suggested review would be available under the APA except that that Act had not been determined to be an independent source of jurisdiction.[140]

The only case applying a more rigorous scope of review under the citizen suit, provides weak precedent for the proposition that

136. 515 F.2d 654 (D.C. Cir. 1975).

137. *See* notes 47-50 and accompanying text *supra*.

138. 515 F.2d at 663.

In West Penn. Power Co. v. Train, 378 F. Supp. 941 (W.D. Pa. 1974), *aff'd*, 522 F.2d 302 (3d Cir. 1975), *cert. denied*, 426 U.S. 947 (1976), the district court's finding that jurisdiction under the citizen suit could not be entertained because EPA enforcement of notification of a violation of the state implementation plan was discretionary was not appealed in the court of appeals. 522 F.2d at 310, 307 n.20. The court of appeals affirmed the lower court's rejection of the APA and the Declaratory Judgment Act as grants of jurisdiction, though it did assume arguendo that the APA was a jurisdictional grant. It decided the Administrator's decision to enforce a violation is "committed to agency discretion" within the meaning of the APA anyway. *Id.* at 310.

139. 395 F. Supp. 313 (W.D. Wis. 1975).

140. *Id.* at 321 n.10.

discretionary acts may be reviewable under that provision. *NRDC v. Train*[141] was an action by the citizen's group to compel EPA to list lead as an air pollutant for which air quality criteria must be issued under section 108 of the CAA. EPA argued that listing under the section was discretionary. The court responded that

> [w]hile 304 does not provide jurisdiction over *distinctly* discretionary functions of the Administrator, . . . it does permit jurisdiction to decide whether a function is mandatory or discretionary.[142]

The court held the function to be "mandatory," but arguably it decided only that listing lead was not a *distinctly* discretionary act, that is, it was discretionary but reviewable. Section 108(a)(1)(A) provides that the Administrator "*shall* from time to time thereafter revise, a list which includes each air pollutant . . . which *in his judgment* has an adverse effect on public health and welfare."[143] Thus in substance the court was reviewing a discretionary duty, but in form and language the court maintained that it was not.

B. *In the Nature of a Writ of Mandamus*

Although the courts have relied ostensibly on the congressional intent to determine the appropriate scope of review,[144] comparisons with the writ of mandamus may have influenced these determinations as well, as they have influenced the availability of review.[145] The citizen suit has been held to a narrower scope of review than the APA, just as "[t]o some uncertain and fluctuating extent, the scope of review when mandatory relief is sought is more restricted than what the APA provides."[146] Under the mandamus doctrine this is the result of the distinction between so-called "ministerial" and "discretionary" action:

> Mandamus is employed to compel the performance, when refused, of a ministerial duty, this being its chief use. It is also

141. 411 F. Supp. 864 (S.D.N.Y. 1976).

142. *Id.* at 866 (emphasis added).

143. 42 U.S.C. § 1857c-3(a)(1)(A) (1970) (emphasis added).

144. *E.g.*, Oljato Chapter of Navajo Tribe v. Train, 515 F.2d 654, 663 (D.C. Cir. 1975); Wisconsin's Environmental Decade, Inc. v. Wisconsin Power & Light Co., 395 F. Supp. 313, 321 (W.D. Wis. 1975); United States Steel Corp. v. Fri, 364 F. Supp. 1013, 1018 (N.D. Ind. 1973).

145. *See* notes 80-86 and accompanying text *supra*.

146. 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 23.09, at 335 (1958).

> employed to compel action, when refused in matters involving judgment or discretion, but not to direct the exercise of judgment or discretion in a particular way . . . .
>
> . . . Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command it is regarded as being so far ministerial that its performance may be compelled by mandamus . . . . But where the duty is not thus plainly prescribed but depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus.[147]

In other words, reviewing courts will compel official action only where the duty is sufficiently clear under the statute as to be "ministerial." This includes compelling an agency to exercise its discretion. But courts will not review administrative duties where there is enough doubt as to involve "judgment or discretion."

The similarity between the ministerial-discretionary distinction and nondiscretionary-discretionary duties is readily apparent. Citizen suits may compel EPA action. But the courts have similarly precluded review of statutory issues under the provision that involve discretion by the Administrator. Moreover, the evils associated with the mandamus distinction have equal force when the distinction is one of reviewability of nondiscretionary duties and absolute unreviewability of discretionary duties under the citizen suit.

To begin with, unreviewability of discretionary acts conflicts with the general presumption of reviewability stated by the Supreme Court in *Abbot Laboratories v. Gardner*.[148] Further, almost all activity by agencies involves the exercise of some discretionary power; the real issue is the scope of discretion[149] or, under the APA, to what extent such power is *"committed"* to agency discretion so as to be unreviewable.[150] The discretionary-nondiscretionary distinction allows courts to avoid this difficult task even though it is a function the courts are especially trained to perform—the function of statutory interpretation. Perhaps most unsatisfactory of all, it deprives the plaintiff of any kind of meaningful review.

147. Wilbur v. United States *ex rel.* Kadrie, 281 U.S. 206, 218 (1930).
148. 387 U.S. 136, 140 (1967).
149. DAVIS, *supra* note 146 § 28.08 (Supp. 1970).
150. 5 U.S.C. § 701 (1970).

Wisconsin's Environmental Decade, Inc. v. Wisconsin Power & Light Co.[151] exemplifies this unhappy result. Despite the court's express recognition that the issue was "a finding of a kind typically reviewed by the courts and which does not involve matters not susceptible of judicial scrutiny," it refused to review the issue under the citizen suit.[152]

Finally, it does not seem to make sense to have limited review under the citizen suit but more rigorous review when the issue involves other kinds of relief. One commentator's criticism in the context of the mandamus action is appropriate:

> Law which allows a court to set aside an administrator's abuses of discretion when a negative injunction happens to be appropriate but not when affirmative action should be ordered does not deserve to survive. Furthermore—and even more emphatically —law which cuts off the courts from correcting a statutory misinterpretation by an administrator has nothing to justify it. Courts which have developed such law have the responsibility for molding it further to keep it abreast of modern understanding.[153]

C. *Nonstatutory Review of Discretionary Administrative Action*

The criticisms leveled against the court decisions refraining from review of discretionary acts or duties of the Administrator under the citizen suit are greatly dispelled if concurrent jurisdiction under a statute providing for review of abuse of discretion is allowed. In a footnote, the D.C. Circuit in *Oljato* indicated its willingness to allow concurrent review under the APA, and consequently to review discretionary action, but only if the suit was properly brought under the citizen suit.[154] On the other hand, in *Wisconsin's Environmental Decade*,[155] where the court held that the APA was not an independent grant of jurisdiction, review for abuse of discretion was foreclosed. Presumably, the jurisdictional amount under the federal question statute was an obstacle to review under that statute.[156]

151. 395 F. Supp. 313 (W.D. Wis. 1975).
152. *Id.* at 321 n.10.
153. DAVIS, *supra* note 146 § 23.10 (Supp. 1970).
154. 515 F.2d 654, 664 n.16 (D.C. Cir. 1975).
155. 395 F. Supp. 313 (W.D. Wis. 1975).
156. *But cf.* Minnesota v. Callaway, 401 F. Supp. 524 (D. Minn. 1975) where the court assumed the jurisdictional amount was met in any environmental litigation involving the purity of interstate waters.

Congress' amendment to the federal question statute in October of 1976[157] may have changed this situation completely. The Supreme Court has rejected the APA as an independent source of jurisdiction in *Califano v. Sanders*,[158] but did so largely because the amendment to section 1331, removing the jurisdictional amount for suits against the United States and its agencies, has obviated the need for the APA as a grant of review.[159] Assuming the APA continues to determine the scope of review of federal question actions, review of the Administrator's abuse of discretion is now potentially available with citizen's suits. The availability hinges on concurrent federal question jurisdiction with the citizen suit.

D. *Concurrent Jurisdiction—Is the Citizen Suit Exclusive?*

The law on the exclusivity of citizen suit jurisdiction is unclear. The question has been litigated largely in the context of the provision's notice procedure since a surprising number of litigants have failed to conform with the requirement.[160] This has left the courts with the uncomfortable task of deciding whether lack of notice bars jurisdiction completely or whether jurisdiction may nevertheless be entertained under a statutory grant other than the citizen suit.

In *NRDC v. Train*,[161] the court held that failure to provide notice was not an absolute barrier to suit. Although jurisdiction

157. 28 U.S.C.A. § 1331(a) (West Supp. 1976).

158. 97 S. Ct. 980 (1977); *see* note 108 and accompanying text *supra*.

159. *Id.* at 984.

160. *See, e.g.*, Conservation Soc. of Vt. Inc. v. Secretary of Transp., 508 F.2d 927 (2d Cir. 1974), *vacated*, 413 U.S. 809 (1975), *rev'd*, 531 F.2d 637 (2d Cir. 1976); Friends of the Earth v. Carey, 401 F. Supp. 1386 (S.D.N.Y. 1975), *rev'd in part, aff'd in part*, 535 F.2d 165 (2d Cir. 1976) (enforcement); Metropolitan Washington Coalition for Clean Air v. District of Columbia, 511 F.2d 809 (D.C. Cir. 1975) (enforcement suit); Minnesota v. Callaway, 401 F. Supp. 524 (D. Minn. 1975) (enforcement suit); NRDC v. Callaway, 389 F. Supp. 1263 (D. Conn. 1974), *rev'd*, 524 F.2d 79 (2d Cir. 1975) (enforcement suit); NRDC v. Train, 510 F.2d 692 (D.C. Cir. 1974); City of Riverside v. Ruckelshaus, 4 ERC 1728 (C.D. Cal. 1972); City of Highland Park v. Train, 519 F.2d 681 (7th Cir. 1975), *cert. denied*, 424 U.S. 927 (1976); Pinkney v. Ohio Environmental Protection Agency, 375 F. Supp. 305 (N.D. Ohio 1974); West Penn. Power Co. v. Train, 378 F. Supp. 941 (W.D. Pa. 1974), *aff'd*,522 F.2d 302 (3d Cir. 1975), *cert. denied*, 426 U.S. 947 (1976); *cf.* United States Steel Corp. v. Fri, 364 F. Supp. 1013 (N.D. Ind. 1973) (jurisdiction granted under the citizen suit although plaintiff alleged jurisdiction under APA).

161. 510 F.2d 692 (D.C. Cir. 1975).

under the citizen suit was itself precluded, other theories of district court power could be asserted. NRDC had commenced an action against EPA seeking to compel publication of effluent guidelines called for by section 304 of the FWPCA. On appeal, after the district court had granted relief, the government contended that the court lacked subject matter jurisdiction since NRDC had not provided the requisite 60 days notice. The court of appeals held that the notice limitation applied only to the jurisdiction of the citizen suit and, as articulated in the saving provision, not to actions otherwise maintainable without the citizen suit provision. Jurisdiction under the APA and federal question statute was sustained.[162]

In contrast, *Pinkney v. Ohio Environmental Protection Agency*[163] represents the opposing view that the citizen suit provision is exclusive in its jurisdiction at least when no notice is given. Plaintiffs failed to provide notice but relied upon the saving clause to preserve their CAA claims. However, the court interpreted the clause to preserve only the right to "suits arising under laws *other than* the CAA."[164] To support its position, it pointed to the conference report which stated that "[o]ther rights to seek enforcement of standards under *other provisions of law* were not affected [by the citizen suit section]."[165] The essence of the court's position appears to be a distinction between substantive and remedial rights. Only the former are preserved. Plaintiff's claims were still based upon the CAA and not "other" substantive provisions of law and there-

162. A similar result was reached by the Second Circuit in NRDC v. Callaway, 389 F. Supp. 1263 (D. Conn. 1974), *rev'd*, 524 F.2d 79 (2d Cir. 1975). This was a suit brought under section 505(a) of the FWPCA claiming that the Army Corps of Engineers had issued a permit to the Navy to dump polluted dredged spoil in violation of section 404 of the FWPCA. Plaintiff had given notice but commenced the action less than 60 days later. The district court never reached the merits, but dismissed for lack of jurisdiction:

> These alleged violations . . . may not be complained of under some other jurisdictional head (e.g., 28 U.S.C. 1331 (1970)), even though section 1365 of Title 33 contains a saving clause . . . . [S]ubsection (e) apparently was not intended to allow violations of the Act to be prosecuted except as they create some rights independent of the Act . . . .

389 F. Supp. at 1271 n.28. The court of appeals reversed, primarily on a different reading of the saving clause that was consistent with *NRDC v. Train*.

163. 375 F. Supp. 305 (N.D. Ohio 1974); *accord*, West Penn. Power Co. v. Train, 378 F. Supp. 941 (W.D. Pa. 1974), *aff'd*, 522 F.2d 302 (ed Cir. 1975), *cert. denied*, 426 U.S. 947 (1976); City of Riverside v. Ruckelshaus, 4 ERC 1728 (C.D. Cal. 1972).

164. 375 F. Supp. at 308.

165. *Id.*; CONFERENCE REPORT, *supra* note 8, at 55.

fore were not preserved by the saving clause: "Indeed, any other interpretation would render the notice requirement meaningless because suits for violation of the Act would regularly be filed without prior notice."[166]

Unfortunately, these failure of notice cases provide little guidance for predicting whether federal question jurisdiction is concurrent with the citizen suit when notice is properly given. In that situation, concern that the notice provision is rendered meaningless is obviously mooted. However, the interpretation of the saving clause in *Pinkney*, that only substantive rights are preserved, might still preclude federal question jurisdiction.

United States Steel Corp. v. Fri[167] is the only instance of concurrent review with the citizen suit provision outside the failure of notice context. United States Steel sought injunctive and declaratory relief from an order issued by EPA alleging that the company's steel mill facilities were in violation of the Indiana implementation plan. The Administrator challenged the court's jurisdiction, but the court found it had jurisdiction under the CAA citizen suit section, 42 U.S.C. § 1857h-2(a)(2), as well as under 28 U.S.C. § 1331, the federal question statute.[168] The Administrator argued that jurisdiction under the latter provision was precluded but was rebutted by the court and its reliance on the saving clause.

Although the court looked to the APA to determine the scope of

166. 375 F. Supp. at 308.

See also City of Highland Park v. Train, 519 F.2d 681 (7th Cor. 1975), *cert. denied*, 424 U.S. 927 (1976). In affirming the lower court's denial of jurisdiction under the citizen suit section, the Seventh Circuit dealt with plaintiffs' assertion of alternative remedies. It acknowledged Congress' purpose to encourage citizen participation in environmental lawsuits, but emphasized the restrictive intent that was also behind the provision. The crux of the court's reasoning was the availability of an existing, adequate remedy—section 304—combined with the court's equitable power to decline jurisdiction. Statutory mandamus and general federal question jurisdiction were both denied on these grounds. In the same vein, the court referred to the statutory language in section 10 of the APA which provides for APA review when "there is no other adequate remedy in a court" to deny APA jurisdiction. 5 U.S.C. § 704 (1970).

The *Highland Park* court also disagreed with the D.C. Circuit's reliance on the saving clause to support concurrent jurisdiction with the citizen suit section. In its view, the notice requirement applied to these alternative remedies as well: the saving clause did not "have the affirmative effect of removing conditions which existing law impose[d] on those rights [provided under the CAA]." 519 F.2d at 693.

167. 364 F. Supp. 1013 (N.D. Ind. 1973).

168. Jurisdiction was also predicated upon 28 U.S.C. § 1337 (1970), district court jurisdiction over commerce and antitrust regulations.

review for federal question jurisdiction, nevertheless it refused to review for abuse of discretion, stating simply that "in the Court's view, § 1857h-2 reveals a clear legislative intent to preclude review of discretionary acts of the Administrator in any pre-enforcement action."[169] Thus one ground for its refusal to review EPA's inspection and monitoring requirements under section 114 of the CAA was their discretionary character. But whether the issue would fall into the "narrow exception" of actions the Supreme Court has acknowledged are *committed* to agency discretion is debatable.[170] There appears to be "some law to apply" since section 114(a)(1) specifies the nature of the record keeping and monitoring duties the Administrator "may" impose but limits these to what "he may *reasonably* require."[171] In sum, the court strictly construed the scope of review even though the federal question statute was an alternative basis for review. Thus, even if concurrent jurisdiction is available, the courts may apply their restrictive interpretation of the citizen suit's scope of review to the federal question statute. Only the D.C. Circuit has indicated it will not, in *Oljato*.[172] For litigants to obtain review of discretionary acts under the citizen suit, they may have to revert back to advocating a broader statutory interpretation of its scope of review.

E. *The Issue of Statutory Interpretation*

The Senate Report to the CAA, quoting from the D.C. Circuit in *Environmental Defense Fund v. Hardin*,[173] expressly recognized that the

> Courts have held that even in matter committed by statute to administrative discretion, preclusion of judicial review "is not lightly to be inferred . . . it requires a showing of *clear evidence of legislative intent*."[174]

It has been stated that the presumption of reviewability is "stronger and steadier" with respect to review of nondiscretionary

169. 364 F. Supp. at 1018.

170. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971). *See* notes 132-35 and accompanying text *supra*.

171. 42 U.S.C. § 1857c-9(a)(1) (1970) (emphasis added).

172. *See* note 138 *supra*.

173. 428 F.2d 1093 (D.C. Cir. 1970).

174. SENATE REPORT, *supra* note 5, at 40 (emphasis added).

action, "[y]et the presumption as stated by the Supreme Court [in *Abbot Laboratories v. Gardner*] applies across the board."[175]

"Minimally we should ask for the clearest evidence, even in the teeth of the most unambiguous words, before attributing to Congress an intention by a remedial statute to accomplish such remarkable results [precluding review of abuse of discretion]."[176] The following inquiry will evaluate the legislative history of the CAA to determine if there exists "clear evidence of legislative intent" to preclude review for abuse of discretion.

In *Oljato*, the modification of the Senate's citizen suit provision by the conference committee was considered decisive evidence of a congressional intent to preclude review for abuse of discretion. Additional support for the D.C. Circuit's view was garnered from the Conference Report of the CAA:

> The conference substitute retains provisions for citizen suits with *certain limitations*. Suits against the Administrator are limited to alleged failure to perform mandatory functions to be performed by him.[177]

And in a colliquy between Senator Eagleton and Senator Muskie during the Senate debates on the conference bill, Senator Eagleton inquired whether the function of the citizen suit was to allow for broad citizen participation in preventing air pollution. Senator Muskie responded:

> That was the thrust of the Senate bill in many respects, and although we did modify the citizen suit provision, I feel that thrust is retained.[178]

But these fragments of legislative history only indicate the nature of the conference committee's change—that it was indeed restrictive—and not the extent of the change.

Section 10(a) of the APA is as follows:

> (a) This chapter applies . . . except to the extent—
> . . . .

175. 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 28.08 (Supp. 1970).

176. Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55, 59 (1965).

177. 515 F.2d 654, 663 (D.C. Cir. 1975); CONFERENCE REPORT, *supra* note 8, at 56.

178. 116 CONG. REC. 42381 (1970).

> (2) agency action is committed to agency *discretion* by law . . . .[179]

The language is similar to the citizen suit which precludes review of discretionary acts or duties of the Administrator. Thus, on its face, the APA also precludes review of discretionary action; yet, the Supreme Court's reading of the APA in *Citizens to Preserve Overton Park v. Volpe*[180] counsels against a literal reading of the APA—discretion does not prohibit review for abuse of discretion.[181] The similarity between the two provisions cautions against a literal interpretation of the citizen suit provision as well. Instead, the provision should be interpreted to allow courts to decide whether the Administrator's choice lies within the granted area of discretion. If the court determines the choice to have been reasonable, the court will not substitute its judgment. It is in this limited sense then that a citizen suit will not lie to control a discretionary act.

The wide scope of the Senate version of the citizen suit provision prior to the conference substitute is significant. The Senate bill provided for citizen suits against the

> Secretary where there is alleged a failure of the Secretary to exercise . . . *any duty* established by th[e] Act.[182]

The exact scope of review under the Senate bill is unclear. Arguably all discretionary duties would have been reviewable under such a formulation. Less debatable, however, is the proposition that the scope of review under the Senate bill would have been broader than that under the APA, which provides for review except when "agency action is committed to agency discretion by law." In short, an alternative to the *Oljato* interpretation of the conference committee's intent in changing the section 304(a)(2) language is to view the modification as an attempt to make the provision consistent with, not narrower than, APA review.

Strongly indicative of a congressional intent to preclude review of discretionary acts by citizen suit is a statement by Congressman Springer, a manager on the part of the House, during the debates

179. 5 U.S.C. § 701 (1970).
180. 401 U.S. 402 (1971). *See* notes 130-35 and accompanying text *supra*.
181. *See* Berger, *supra* note 176, at 60.
182. S. 4358, 91st Cong., 2d Sess. § 304(a)(1)(B)(ii) (1970).

over the conference bill: "[W]herever [the Administrator] is given discretion in the act, he may may [*sic*] not be sued. He may be sued only for those matters imposed in the bill upon the administrator as a matter of law."[183] However, this statement should be interpreted in light of the specific congressional concern at the time—the reviewability of the Administrator's enforcement duties.[184] Secretary of HEW, Elliott Richardson, wrote a controversial letter expressing fear that suits forcing him to perform his enforcement duties might have the negative effect of "distorting the enforcement priorities that are essential to an effective national control strategy."[185]

Section 113(a)(1) of the CAA, the federal enforcement provision, provides for notification by the Administrator whenever he finds anyone in violation of a state implementation plan.

> If such violation extends beyond the 30th day, the Administrator *may* issue an order requiring such person to comply with the requirements of such plan or he *may* bring a civil action . . . .[186]

183. 116 CONG. REC. 42522 (1970).

184. The conference committee also deleted from the Senate bill a clause providing specific authority to bring a citizen action against the Secretary where there is alleged a failure to exercise "his authority to enforce standards or orders established under this Act." S. 4358, 91st Cong., 2d Sess. § 304(a)(1)(B)(i) (1970). It can be argued that legislative intent to preclude review of enforcement duties is revealed in this action by the conference committee and an intent to preclude review of discretionary acts generally revealed in the change limiting suits to a failure to perform nondiscretionary duties. However, deletion of the clause providing specific authority to challenge the Administrator's enforcement duties would not preclude challenge under the broad terms of the clause in the Senate bill allowing actions for failure to perform "any duty." Limiting the latter language is also necessary to preclude review of enforcement duties.

185. 116 CONG. REC. 42390 (1970) (Letter of Secretary Richardson). Prior to the conference bill, existing law had provided that the provision of the Clean Air Act be carried out by the Secretary. While the conference committee was considering the bill, these functions were transferred to the EPA under the authority of Reorganization Plan No. 3 of 1970.

The controversy over the letter was due not only to its substance but also its timing. The Administration had kept relatively silent on its views of the amendments up until Congress had nearly finished consideration of the legislation—at which time, Secretary Richardson issued his letter. That the change in language by the conference substitute was directed at this concern is evident from Chairman Harley Staggers' remarks during passage of the conference bill that citizen suits would "be limited to those duties which are mandatory under the legislation and the suits [would] not extend to those *areas of enforcement* with regard to which the Administrator has discretion." 116 CONG. REC. 42520 (1970) (emphasis added).

186. 42.U.S.C. § 1857h-8(a)(1) (1970) (emphasis added).

In light of the express legislative intent, this is a clear instance where agency action falls within the "narrow exception" of actions committed to discretion by law under the terms of the APA. Moreover, the lack of identifiable standards determining if and when the Administrator should issue an enforcement order after the 30th day of violation is an example where a statute is "drawn in such broad terms that . . . there is no law to apply."[187]

Although the congressional intent supports a finding of absolute discretion in the Administrator's enforcement duties, it does not inevitably lead to the general conclusion that review of all discretionary action is precluded under the citizen suit. Instead, it suggests unreviewability is only partially determined by the grant of review, the citizen suit provision, much like the APA precludes review of agency action *committed* to discretion. The major determinant is the statutory provision in question and whether "in a given case, there is law to apply."

In sum, the legislative intent as to the citizen suit's scope of review is equivocal. Literally, review of discretionary acts and duties is foreclosed. Yet, the example of the APA suggests the line of reviewability and unreviewability may not be so clearly drawn. An alternative to the D.C. Circuit's interpretation of the conference substitute is to view the purpose of the change as a restriction on the virtually unlimited Senate bill provision to make citizen suits consistent with the APA scope of review. Some EPA action is unreviewable: the legislative history of the CAA as well as the language of section 113 precludes citizen suit review of the Administrator's duty to enforce notices of violations. But "clear evidence of legislative intent" to preclude review of all discretionary acts or duties by citizen suit is lacking.

IV. CONCLUSION

To eliminate confusion between the citizen suit and judicial review provisions and perhaps because of concern with overburdened dockets, citizen suits have been limited by the courts to compelling the Administrator to act when he has breached a nondiscretionary duty. Expanding the availability and scope of review may appear to be a frightening proposition, but in light of recent congressional

187. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971); *see* notes 130-35 and accompanying text *supra*.

action the absolute rights of litigants to bring suit would not be affected a great deal. Rather, the purpose would be to minimize the procedural obstacles to review. Attention would be shifted from distinctions of agency action and inaction or from mandatory and prohibitory decrees to the nature of the harm alleged.

The APA standard of review has been a satisfactory balance between the need to provide injured parties with meaningful review without unnecessary interference in the administrative process. Yet, review for abuse of discretion is precluded under the citizen suit. The unfortunate analogy to the writ of mandamus is complete. Courts are able to shy away from the task of determining the scope of administrative discretion and citizen-plaintiffs denied relief from administrative abuse of discretion on the basis of the statutory remedy involved. That citizen actions vindicating environmental rights should be denied the same right of review as plaintiffs under the judicial review provision is not only doubtful as a matter of legislative intent but as a matter of policy.

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