


2-2024

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Recommended Citation

Virginia C. Thomas, *Who's Going to Sue? A Look at Environmental Citizen Suits*. 103 MICH B J 38 (February 2024).

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LIBRARIES & LEGAL RESEARCH

Who's going to sue? A look at environmental citizen suits

BY VIRGINIA C. THOMAS

You may be familiar with lawsuits brought by private individuals or non-government organizations under statutes that provide some measure of protection to non-human species.¹ These civil actions brought by citizen plaintiffs are commonplace these days. In fact, strategic use of the citizen-suit provisions in environmental statutes allowed animal welfare advocates to successfully seek appropriate remedies in federal and state courts.²

But aren't government agencies delegated the authority to enforce statutes intended to promote animal welfare? The short answer is yes. However, there is a critical difference in the enforcement provisions of anti-cruelty statutes in place and those that protect the environment more broadly. A growing number of environmental law statutes, including the Endangered Species Act,³ explicitly provide for citizens to compel compliance with the law if the designated agency fails to do so despite its legal mandate. That means suing alleged violators and seeking injunctions, civil penalties, and attorney's fees.

CITIZEN-SUIT LEGISLATION: BLAME MICHIGAN

The concept of the citizen suit may be second nature to environmentalists, but perhaps not to others. The first federal citizen-suit provision was added to the Clean Air Amendments of 1970 (CAA 1970).⁴ Essentially, §304(a) of CAA 1970 enables any individual or organization to initiate a civil action in a federal district court against a person who has acted in violation of the act or against the Environmental Protection Agency for failure to perform its non-discretionary duties under the act.⁵

Almost two years in the making, this legislation was not a bicameral slam dunk. As the 91st Congressional session drew to a close, two primary bills were in play: HR 17255 and S 4358. The original House bill, which ultimately was enacted, did not include citizen-suit language. That provision, which was featured prominently in the various Senate bills, was the source of considerable debate.⁶ Citizen-suit proponents advocated for greater public participation in setting environmental standards,⁷ while the conference committee

juxtaposed citizen concerns with corporate resistance.⁸ Ultimately, the provision was added to HR 17255 per conference committee recommendation. The House and Senate voted to approve the conference committee report and President Richard M. Nixon signed the bill into law on Dec. 31, 1970.

Joseph L. Sax, a member of the University of Michigan law faculty when the statute was enacted, has been credited as the source of the citizen-suit concept.⁹ Sax was a fervent advocate of citizen-initiated environmental litigation as evidenced by his scholarly writings and legislative engagement. In fact, he drafted the bill that became the Michigan Environmental Protection Act.¹⁰ And, yes, that legislation included a citizen-suit provision.¹¹ His citizen-suit ideas also reached Sen. Edmund S. Muskie, D-Maine, who largely shepherded the CAA 1970 measure through the legislative process. Ironically, Muskie is said to have "hated" the idea at first.¹²

More than 20 federal environmental statutes and a number of state laws have included similar citizen-suit provisions since the enactment of the CAA 1970.¹³

NOT WITHOUT (CASE OR) CONTROVERSY

The constitutionality of the citizen-suit provision has not gone unchallenged.¹⁴ Legal scholars have expressed concerns regarding Article II separation of powers issues, suggesting that citizen suits convert executive branch authority to enforce, appoint personnel, and execute the law.¹⁵

The doctrine of standing also raises constitutional concerns under Article III. Can standing be legislated? Or is it not within the purview of the courts to decide whether a plaintiff has met the requisite standards for determining whether a case or controversy exists?

Still, the cases keep coming. In 2022, for example, the Animal Legal Defense Fund (ALDF) filed suit in the U. S. District Court for the Eastern District of Texas against Tiger Creek Animal Sanctuary for

violations of the Endangered Species Act.¹⁶ The ALDF alleged that Tiger Creek was responsible for the deaths of numerous animals since 2018 including nine lions and tigers. The court rejected Tiger Creek's argument that the Big Cat Public Safety Act strips the sanctuary's lions and tigers of the protections they receive under the Endangered Species Act.¹⁷ At this writing, the case is still pending.

CITIZEN SUITS AND MICHIGAN COURTS

With the enactment of its Environmental Protection Act (MEPA) in 1970, Michigan's citizen-suit provision had been regarded among "the most muscular" of all the states.¹⁸ Residents and non-residents alike were permitted to initiate suit on virtually any environmental issue. Since then, however, the Michigan Supreme Court has fine-tuned the broad "any person" standard for bringing a citizen suit under the MEPA.

In a 2001 non-environmental case, *Lee v. Macomb County Board of Commissioners*, the Court applied the U.S. Supreme Court's test for standing set out in *Lujan v. Defenders of Wildlife*.²⁰ The *Lee* Court wrote that "to neglect the importance of standing would imperil the constitutional architecture" of our government.²¹ Specifically, the claim would have to demonstrate "particularized" and "imminent" injury to meet the Court's requirements for standing.

In 2004, however, the Court in *National Wildlife Federation v. Cleveland Cliffs Iron Co.*²² addressed "whether the Legislature can by statute confer standing on a party who does not satisfy the judicial test for standing."²³ In this case, environmental citizen plaintiffs sought an injunction under MEPA's "any person" provision. The Court ruled that the plaintiffs did indeed have standing under the MEPA, however, it also questioned the constitutionality of its citizen-suit provision in dicta.²⁴

A few years later, the Court applied the *Lujan* test in *Michigan Citizens for Water Conservation v. Nestle Waters North America Inc.*²⁵ and found that the plaintiff demonstrated the requisite injury with respect to one affected area to support its MEPA claim but failed to meet the bar for others. More recently, the Court denied leave to appeal under MEPA in *Lakeshore Group v. State*²⁶ in a split decision that was deemed significant for its impact on the future of environmental law.

Ongoing developments in MEPA's citizen-suit provision analyzed in the Wayne Law Review's Annual Survey of Environmental Cases.²⁷ Stay tuned.

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ENDNOTES

1. See, for example, *Animal Legal Defense Fund, Litigation* <https://aldf.org/how_we_work/litigation/> [<https://perma.cc/J4JY-U6PY>] (All websites accessed January 18, 2024).
2. Hill, *Combating Animal Cruelty with Environmental Law Tactics*, 4 J Animal L 19 (2008). Author explains how animal welfare advocates use the Clean Water Act, Clean Air Act, Migratory Bird Treaty Act, National Environmental Policy Act, and others to promote animal welfare.
3. 16 USC 1533.
4. 42 USC 7604. Meltz, *The Future of the Citizen Suit After Steel Co. and Laidlaw*, Congressional Research Service (January 5, 1999) at [1].
5. *Id.* Such civil suits are contingent upon specific notice requirements. The citizen-plaintiff may not file if the EPA or other authorized authority is engaged in its own civil action to enforce compliance with the law but may intervene in that action as a matter of right.
6. Congressional Research Service, Environmental Policy Division, *A Legislative History of the Clean Air Amendments of 1970 Together with A Section-by-Section Index* (1974).
7. HR Rept 91-1783, Clean Air Amendments of 1970, p.225.
8. *Id.*
9. Daniels, et al., *The Making of the Clean Air Act*, 71 Hastings L J 901 (2020) <https://repository.uchastings.edu/hastings_law_journal/vol71/iss4/3/> [perma.cc/XJ55-UP8F].
10. *Id.* at 930.
11. Sax & DiMento, *Environmental Citizen Suits: Three Years' Experience under the Michigan Environmental Protection Act*, 4 Ecology L Q 1 (1974) at 2. Available at <<https://www.jstor.org/stable/24112341>> (free registration required).
12. Daniels, et al., at 930.
13. Meltz, n 2 at p 4. See also Mercury Export Ban Act of 2008, 15 USC 2601 *et seq.*
14. Miller & Dorner, *The Constitutionality of Citizen Suit Provisions in Federal Environmental Statutes*, 27 J. Env't L. & Litig. 401 (2012) <<http://digitalcommons.pace.edu/lawfaculty/891/>> [<https://perma.cc/MP4E-B5P8>].
15. *Id.*
16. *Animal Legal Defense Fund v. Nat'l Foundation Rescued Animals D/B/A Tiger Creek Sanctuary*, (ED Texas, 2022) (Case No. 6-22-cv-00097-JDK).
17. Animal Legal Defense Fund, *Court Allows Lawsuit Against Tiger Creek Animal Sanctuary to Proceed: First Ruling Pertaining to Recently Enacted Big Cat Public Safety Act* <<https://aldf.org/article/court-allows-lawsuit-against-tiger-creek-animal-sanctuary-to-proceed/>> [perma.cc/DTL2-NEN8] (posted June 23, 2023).
18. May, *The Availability of State Environmental Suits*, 18 Nat'l Resources & Env 53 (Spring 2004) at 4.
19. *Lee v Macomb County Board of Commissioners*, 464 Mich 726 (2001).
20. *Lujan v Defenders of Wildlife*, 504 US 555 (1992).
21. *Id.* at 735.
22. *National Wildlife Federation v Cleveland Cliffs*, 471 Mich 608 (2004).
23. *Id.* at 663.
24. Comment, *Still Standing but Teed Up: The Michigan Environmental Act's Citizen Suit Provision after National Wildlife Federation v Cleveland Cliffs*, 2005 Mich St L R 1297 (2005).
25. *Michigan Citizens for Water Conservation v Nestle Waters North America Inc.*, 479 Mich 280 (2007).
26. *Lakeshore Group v State*, 977 N.W.2d 789 (Mich 2022). For discussion see *State Citizen Suits, Standing and the Underutilization of Environmental Law*, 52 Env't L Rep 10473 (2022).
27. See, for example, 68 Wayne L R 495 (2023) at 501.