Note

Grassroots Enforcement of EISA: The Need for a Citizen Suit Provision in the Energy Independence and Security Act of 2007

Megha Shah*

Introduction

Secretary General Ban Ki-moon of the United Nations has described climate change as "the defining challenge of our age."[1] Indeed, the global community has reached a point where the realities of climate change must be confronted. Recently, Congress passed the Energy Independence and Security Act of 2007 ("EISA"),[2] legislation aimed at reducing energy dependence and increasing energy efficiency. The passage of EISA marks a major step toward dealing with the issue of climate change. Although the Act attempts to achieve positive changes in U.S. energy policy, its ability to actually effectuate these changes would be significantly strengthened if it were amended to include an effective enforcement mechanism. This Note proposes that EISA be amended to include a citizen suit provision to aid in enforcing the mandates of the Act.

---

* J.D., expected May 2009, The George Washington University Law School; B.A., 2005, Barnard College, Columbia University. The author would like to thank Susan Kaufmann Nash and Vered Jona for their advice and support in developing this Note.

1 Elisabeth Rosenthal, *U.N. Chief Seeks More Leadership on Climate Change*, N.Y. TIMES, Nov. 18, 2007, at A3.

2 Energy Independence and Security Act of 2007 ("EISA"), Pub. L. No. 110-140, 121 Stat. 1492.

Part I of this Note addresses the factual background of global warming. Part II discusses citizen suit provisions in general and demonstrates how they have contributed to the environmental movement. Part III assesses the current state of the law on standing, and concludes that a citizen suit provision is an important vehicle for enabling plaintiffs to meet the requirements for standing to enforce environmental laws. Part IV looks at the specific provisions of EISA and describes what changes it seeks to implement in American energy policy. Part V proposes that EISA be amended to include a citizen suit provision, allowing private citizens to sue to enforce the provisions of the statute and thereby combat global warming.

I. Global Warming Basics

A. The Science of Climate Change

When it comes to climate change, the verdict is in: atmospheric temperatures are rising.[3] Indeed, the scientific community is largely in agreement that not only is global warming happening,[4] but that the warming trend is accelerating.[5] Eleven of the twelve years in the period between 1995 and 2006 rank among the twelve warmest years on record.[6] Climate change has brought about a variety of ecological changes, such as widespread melting of glaciers and snowcaps, rising ocean temperatures, and rising sea levels.[7] These environmental changes have far reaching consequences.[8] Scientists warn that global warming has the potential to cause species extinction and increase the

---

3 *See* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: SYNTHESIS REPORT: SUMMARY FOR POLICYMAKERS 2 (2007) [hereinafter IPCC SUMMARY REPORT], *available at* http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_spm.pdf. The Intergovernmental Panel on Climate Change, or the IPCC, is an intergovernmental scientific body set up by the United Nations Environment Programme and is considered to be one of the most authoritative sources on climate change. *See* Walter Gibbs & Sarah Lyall, *Gore Shares Peace Prize for Climate Change Work*, N.Y. TIMES, Oct. 13, 2007, at A1. In 2007, the IPCC shared the Nobel Peace Prize with Al Gore for "their efforts to build up and disseminate greater knowledge about man-made climate change." *See* Press Release, The Norwegian Nobel Comm., The Nobel Peace Prize for 2007 (Oct. 12, 2007), *available at* http://nobelprize.org/nobel_prizes/peace/laureates/2007/press.html.

4 In this Note, the terms "global warming" and "climate change" are used interchangeably.

5 *See* IPCC SUMMARY REPORT, *supra* note 3, at 2; *see also* Ken Alex, *A Period of Consequences: Global Warming as Public Nuisance*, 26 STAN. ENVTL. L.J. 77, 80–81 (2007).

6 IPCC SUMMARY REPORT, *supra* note 3, at 2.

7 *Id.*

8 *Id.*

risk of extreme weather events, such as droughts, heat waves, hurricanes, and floods.[9]

Climate change is attributed to increased atmospheric levels of greenhouse gases ("GHGs").[10] GHGs are gases that trap heat radiated from the sun into the Earth's atmosphere, resulting in higher atmospheric temperatures.[11] To a certain degree, GHGs are natural and indeed are necessary to maintain a temperature on Earth hospitable to human life.[12] Without the natural greenhouse effect these gases provide, the Earth's atmosphere would be sixty degrees lower, and life as we know it would not be possible.[13] The increased concentration of GHGs in the atmosphere has created what scientists refer to as an "enhanced greenhouse effect,"[14] accelerating the natural warming process of the Earth, thereby increasing atmospheric temperatures.[15]

One of the most prominent GHGs is carbon dioxide ("CO2").[16] In the past twenty years, the atmospheric level of CO2 has risen dramatically, jumping by nearly eighty percent between the years of 1970 and 2004.[17] There is a strong consensus among the scientific community that this increased level of atmospheric GHGs is almost entirely attributable to human activity.[18] CO2, for example, is emitted when fossil fuels, such as coal, oil, and gas, are burned for energy.[19] In the United States, fossil fuel combustion is the largest source of CO2 emissions, accounting for nearly seventy-nine percent of GHG emissions.[20] Scientists warn that unless anthropogenic GHG emissions are

---

9 *See id.* at 19.

10 *See id.* at 5.

11 U.S. Environmental Protection Agency, Climate Change—Science, http://www.epa.gov/climatechange/science/index.html (last visited Nov. 16, 2008).

12 *Id.*

13 *Id.*

14 Pew Center on Global Climate Change, The Greenhouse Effect, http://www.pewclimate.com/global-warming-basics/facts_and_figures/climate_science_basics/ghe.cfm (last visited Nov. 16, 2008).

15 *Id.*

16 Intergovernmental Panel on Climate Change, Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change 98 (S. Solomon et al. eds., 2007), *available at* http://ipcc-wg1.ucar.edu/wg1/Report/AR4WG1_Print_FAQs.pdf.

17 *See* IPCC Summary Report, *supra* note 3, at 5.

18 *See generally* Naomi Oreskes, *Beyond the Ivory Tower: The Scientific Consensus on Climate Change*, 306 Science 1686 (2004).

19 U.S. Environmental Protection Agency, Climate Change—Greenhouse Gas Emissions, http://epa.gov/climatechange/emissions/co2_human.html (last visited Nov. 16, 2008).

20 U.S. Envtl. Prot. Agency, Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2006, at ES7 (2008), *available at* http://epa.gov/climatechange/emissions/downloads/08_CR.pdf.

reduced, the negative implications of global warming will continue with both increasing speed and impact on the environment.[21]

B. The United States' Response to Climate Change

Despite the potentially catastrophic dangers of global warming, the United States' response in countering the trend has been "less than aggressive."[22] For example, the United States is not a party to the Kyoto Protocol, an international treaty mandating that signatory states reduce their GHG emissions to a specified level by 2012.[23] The United States government has consistently opposed any "targets or timetables" that involve a mandatory reduction or stabilization of GHGs.[24] This stance stems from concerns about scientific uncertainty regarding the effects of global warming, combined with the fear that the costs of compliance with the Kyoto Protocol and other similar agreements may have adverse effects on the United States economy.[25]

Instead of mandatory reductions, the United States has favored a voluntary approach that emphasizes research and development of alternative forms of energy.[26] The Bush Administration has called for "voluntary, regulatory, or incentive-based programs on energy efficiency, agricultural practices, and greenhouse gas reductions."[27] President Bush thus proposes a market-based approach that affords flexibility and economic efficiency and profitability.[28] This reluctance to adopt mandatory GHG emissions reductions is in stark contrast to the international response to climate change.[29] For example, as of December 2006, nearly 170 countries were signatories to the Kyoto Pro-

---

21 *See* Alex, *supra* note 5, at 81.

22 *Id.* at 82–83.

23 Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22, *available at* http://unfccc.int/resource/docs/convkp/kpeng.pdf; *see also* Kyoto Protocol Status of Ratification, http://unfccc.int/kyoto_protocol/status_of_ratification/items/2613.php (last visited Nov. 16, 2008).

24 David Hunter & James Salzman, *Negligence in the Air: The Duty of Care in Climate Change Litigation*, 155 U. PA. L. REV. 1741, 1741 (2007).

25 *See generally id.* (analyzing the costs of addressing climate change as compared with the costs of failing to do so).

26 *See* SUSAN R. FLETCHER & LARRY PARKER, CONG. RESEARCH SERV., CLIMATE CHANGE: THE KYOTO PROTOCOL AND INTERNATIONAL ACTIONS 11 (2007), *available at* http://fpc.state.gov/documents/organization/80734.pdf.

27 *See* The White House, Climate Change Fact Sheet, http://www.whitehouse.gov/news/releases/2005/05/20050518-4.html (last visited Nov. 16, 2008).

28 *See id.*

29 *See* Randall S. Abate, *Kyoto or Not, Here We Come: The Promise and Perils of the Piecemeal Approach to Climate Change Regulation in the United States*, 15 CORNELL J.L. & PUB. POL'Y 369, 370–71 (2006).

tocol.[30] United States' reluctance to adopt mandatory emissions reductions is particularly alarming considering the fact that it is currently the world's largest emitter of GHGs, as expressed in emissions per person.[31] Though Americans make up only four percent of the world's population,[32] the United States is responsible for twenty-one percent of anthropogenic GHG emissions.[33]

On December 19, 2007, however, Congress passed the Energy Independence and Security Act of 2007 ("EISA" or "the Act"),[34] a landmark bill designed to "move the United States toward greater energy independence and security."[35] President Bush declared that the Act represents "a major step toward reducing our dependence on oil, confronting global climate change, expanding production of renewable fuels and giving future generations a nation that is stronger, cleaner and more secure."[36] EISA has also been described by commentators as "a historic opportunity . . . to take steps in the battle against global warming"[37] and "one of the largest single steps on energy that the nation has taken."[38] While EISA does not contain any mandatory GHG emissions reductions, the White House has characterized the Act as advancing "the U.S. commitment . . . to pursue quantifiable actions to reduce carbon emissions."[39]

Because EISA does not contain any mandatory emissions caps, it is critically important that the measures the Act does mandate are actually carried out. In order for EISA to live up to its promise of energy independence, it is necessary for its provisions to be effectively enforced. Noticeably missing from EISA, however, is a citizen suit provision. Such a provision, allowing for private citizens to sue violators of the Act, will greatly enhance the potency of EISA's mandates

---

30 *See* FLETCHER & PARKER, *supra* note 26, at 2.

31 Although China is currently the world's largest total emitter of CO2, the United States has the highest level of CO2 emissions as expressed in terms of emissions per person. *See* Neth. Envtl. Assessment Agency, *Global CO2 Emissions: Increase Continued in 2007*, June 13, 2008, http://www.mnp.nl/en/publications/2008/GlobalCO2emissionsthrough2007.html.

32 Natural Resources Defense Council, Global Warming Basics, http://www.nrdc.org/globalWarming/f101.asp (last visited Nov. 16, 2008).

33 *See supra* note 31.

34 Energy Independence and Security Act of 2007 ("EISA"), Pub. L. No. 110-140, 121 Stat. 1492.

35 *Id.*

36 John M. Broder, *Bush Signs Broad Energy Bill*, N.Y. TIMES, Dec. 19, 2007, at A24.

37 Editorial, *A Shameful Presidential Threat*, N.Y. TIMES, Dec. 13, 2007, at A40.

38 *See* Broder, *supra* note 36.

39 *See* The White House, Fact Sheet: Energy Independence and Security Act of 2007, http://www.whitehouse.gov/news/releases/2007/12/20071219-1.html (last visited Nov. 16, 2008).

and will ensure that the legislation does in fact deliver on its promise of energy independence.

II. The Citizen Suit

In order to appreciate how a citizen suit provision can improve EISA, it is important to understand how such provisions have functioned historically. This Part outlines the basic history and structure of citizen suit provisions, and highlights the arguments that have been made for and against them. As this Part demonstrates, a citizen suit provision is an important enforcement mechanism, particularly in the context of environmental legislation.

A. Historic Antecedents to the Citizen Suit

Although the first citizen suit provision in American legislation did not appear until relatively recently, private enforcement of public law is not a new phenomenon.[40] Nor is it unique to the context of environmental law.[41] As one commentator notes, "[s]tatutes giving private parties the right to seek judicial sanctions for violations of health and safety standards have been used for at least 600 years in Anglo-American law."[42] The English common law system employed a variety of tools that sought to enlist private citizens in the enforcement of laws that were designed to protect the public at large.[43] For example, the mandamus action was available to any citizen seeking to guard the public interest. The purpose of such an action was to require the executive branch to comply with the obligations imposed on it by law.[44] Similarly, early American practice envisioned a citizenry equipped with the ability to bring suit in order to enforce various laws. For example, the *qui tam* action was a congressionally created grant of authority to all citizens, affording them the right to bring a civil suit against criminal offenders to aid in the enforcement of federal criminal law.[45] During the first decade after America's independence from England, Congress included *qui tam* provisions in a number of crimi-

---

40 *See generally* JEFFREY G. MILLER, CITIZEN SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL LAWS 1 (1987); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 172–79 (1992).

41 *See generally supra* note 40.

42 Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFF. L. REV. 833, 835 (1985).

43 *See* MICHAEL D. AXLINE, ENVIRONMENTAL CITIZEN SUITS 28–29 (1995).

44 *See* Sunstein, *supra* note 40, at 172–73.

45 *See id*. at 175.

nal statutes, including those prohibiting the importation of liquor without paying duties, certain trade with Native American tribes, and slave trade with foreign nations.[46] As these early English and American practices demonstrate, private enforcement of public interest law, at least in theory, is not novel, nor is it specific to the context of environmental law.

B. The Clean Air Act of 1970: The First Modern Citizen Suit Provision in Federal Law

The first modern citizen suit provision in federal legislation appeared in 1970 with the newly enacted Clean Air Act ("CAA").[47] The CAA was passed in response to the growing public awareness about the dangers of air pollution.[48] The CAA seeks to "protect and enhance the quality of the Nation's air resources" and "achieve the prevention and control of air pollution."[49] At the time of enactment, however, Congress was concerned that the statutory obligations of the CAA would be thwarted by an unenthused and lax bureaucracy.[50] Enforcement mechanisms of older federal environmental statutes from the 1960s had proven to be "both cumbersome and ineffective."[51] As popular interest in environmental protection grew, public awareness of these deficiencies became more acute.[52] During Senate debates on the CAA in 1971, Senator Muskie commented: "It is clear that enforcement must be toughened if we are to meet the [mandates of the CAA]."[53] Senator Muskie also recognized that "[c]itizens can be a useful instrument for detecting violations and bringing them to the attention of the enforcement agencies and the courts alike."[54] To counteract the feared lack of resolve in carrying out the objectives of the CAA, Congress included a citizen suit provision allowing any citizen to sue to enforce the mandates of the Act.[55]

---

46 *See id*.

47 *See* 42 U.S.C. §§ 7401, 7604 (2000).

48 U.S. Environmental Protection Agency, The Plain English Guide to the Clean Air Act: Understanding the Clean Air Act, http://www.epa.gov/air/caa/peg/understand.html (last visited Nov. 16, 2008).

49 42 U.S.C. § 7401(b)(1)–(2).

50 *See* Sunstein, *supra* note 40, at 193.

51 *See* MILLER, *supra* note 40, at 3.

52 *See id.*

53 116 CONG. REC. S32,901 (daily ed. Sept. 21, 1970) (statement of Sen. Muskie).

54 *Id*. at S32,927.

55 *See* 42 U.S.C. § 7604(a) (2000); *see also* Sunstein, *supra* note 40, at 193 (discussing purpose of including citizen suit provisions in environmental legislation).

Of course, the inclusion of a citizen suit provision in the CAA was not without criticism. Senator Hruska warned that the CAA's citizen suit was "unprecedented in American history" and "predicated on the erroneous assumption that officials of the Executive Branch of the United States Government will not perform and carry out their responsibilities and duties under the [CAA]."[56] Furthermore, he noted that the CAA "provides the regulatory agencies with ample powers to formulate standards and to secure effective enforcement of the regulations."[57] Affording private citizens a cause of action to enforce the CAA was therefore unnecessary, and would only result in "a multiplicity of suits which will interfere with the Executive's capability of carrying out its duties and responsibilities."[58]

Despite these concerns, the final version of the CAA included what turned out to be the first citizen suit provision in federal legislation.[59] The citizen suit provision of the CAA allows "any person" to commence a civil action on his behalf against "any person"—whether it is a private entity or public agency—who is alleged to have violated an emission standard, limit, or order under the Act.[60] It also authorizes suit against state and federal agencies who fail to fulfill any nondiscretionary duty mandated by the Act.[61]

In 1972, Congress included an almost identical provision with the enactment of the Clean Water Act ("CWA"),[62] a federal law designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[63] Since then, almost every major federal

---

56 116 CONG. REC. S32,925 (daily ed. Sept. 21, 1970) (statement of Sen. Hruska).

57 *Id*.

58 *Id*.

59 *See* MILLER, *supra* note 40, at 2.

60 *See* 42 U.S.C. § 7604(a).

61 42 U.S.C. § 7604(a); *see also* AXLINE, *supra* note 43, at 1–8 (discussing citizen suits under environmental laws "against governmental agencies for violations of obligations imposed by Congress").

62 33 U.S.C. § 1365(a) (2006). It states that:

> [A]ny citizen may commence a civil action on his own behalf (1) against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

Id.

63 *Id*. § 1251(a).

environmental statute has included a citizen suit provision inviting private enforcement of public law.[64]

C. The Basic Structure of a Citizen Suit Provision

The basic structure of most citizen suit provisions reflects the tension between the desire to provide a mechanism for enforcement and accountability and the fear of flooding the courts with litigation.[65] Thus, although these provisions are liberal in granting authority to bring suit, they also contain procedural requirements designed to limit the number of suits that are actually initiated.[66] For example, the CAA liberally allows suit to be commenced by "any person" against "any person" alleged to be in violation of the act.[67] In addition, the CAA confers jurisdiction on the federal district courts to hear citizen suits without regard to the diversity of citizenship or amount in controversy requirements.[68]

At the same time, however, most citizen suit provisions contain procedural requirements countering the liberal conferral of authority to bring suit. For example, the CAA citizen suit provision contains a notice requirement, requiring that private enforcers give the potential defendant sixty days notice before initiating any proceedings in court.[69] This grace period is designed to afford the Environmental Protection Agency ("EPA"), the administrative agency charged with implementing the provisions of the CAA and other environmental statutes, the opportunity to make an independent inquiry into the facts of the case.[70] Upon investigation, the EPA may bring its own suit against the polluter, thereby barring the private suit.[71] In addition, the CAA allows the court in its discretion to award litigation costs, including attorney's fees, to "any party,"[72] an attempt to curtail frivolous litigation.[73]

---

64 *See* James R. May, *Now More than Ever: Trends in Environmental Citizen Suits at 30*, 10 WIDENER L. REV. 1, 2 (2003).

65 *See* Jeffrey G. Miller, *Private Enforcement of Federal Pollution Control Laws: The Citizen Suit*, 303 A.L.I.-A.B.A. 821, 821 (1999); *see also supra* text accompanying notes 50–58.

66 *See* Boyer & Meidinger, *supra* note 42, at 849–51.

67 42 U.S.C. § 7604(a) (2000).

68 *Id.* § 7604(a)(3); *see also* MILLER, *supra* note 40, at 7.

69 42 U.S.C. § 7604(b)(1)(A).

70 Boyer & Meidinger, *supra* note 42, at 849.

71 *Id.*

72 42 U.S.C. § 7604(d).

73 *See* MILLER, *supra* note 40, at 9.

The primary remedy available under most citizen suits in the environmental law context is injunctive relief.[74] Thus, a losing defendant will be forced to comply with the relevant requirements of the statute it has been found to have violated.[75] In addition, some citizen suit provisions allow for the assessment of penalties.[76] These penalties, however, are to be paid to the federal treasury, and not to the individual plaintiff.[77] In practice, however, defendants being sued under citizen suit provisions will often choose to settle claims, in which case the plaintiff is entitled to the settlement amount.[78]

D. Benefits of Citizen Suits

There are numerous justifications for citizen suits. First and most importantly, they encourage compliance with the rule of law.[79] In the case of lax governmental enforcement of environmental statutes, a citizen suit provision serves as an alternative enforcement mechanism.[80] In addition, even with diligent government enforcement, the knowledge that concerned citizens have the ability to enforce compliance serves as a deterrent for those entities contemplating violating the law.[81] Thus, citizen suits encourage compliance with environmental statutes by both serving as an enforcement mechanism for past violations of the statute and as a deterrent against future violations.

Second, a citizen suit serves important democratic functions. For one, by allowing private citizens to sue a government agency to comply with a duty imposed on it by the relevant statute, citizen suits hold those agencies accountable to the will of the people.[82] The government agencies that are charged with the task of carrying out environmental legislation, such as the EPA, consist of unelected officials appointed by the executive branch. In contrast, Congress, the lawmaking body of the federal government, is directly elected by the general populace.[83] The threat of a citizen suit provides a mechanism to

---

74 *See id*. at 73.

75 *See id.* at 81.

76 *See id.* at 83. The only two statutes that allow for the assessment of penalties under a citizen suit are the CWA and the Resource Conservation and Recovery Act. *Id.*

77 *Id*.

78 *Id*.

79 *See* May, *supra* note 64, at 5.

80 *See* MILLER, *supra* note 40, at 14.

81 *See* May, *supra* note 64, at 5.

82 *See id*. at 6.

83 U.S. CONST. art. II, § 2, cl. 2.

ensure that unelected agency officials do in fact carry out the tasks they are obligated by law to perform.[84]

In addition, citizen suits provide a means of ensuring that the political commitments of our elected lawmakers are in fact carried out.[85] By enacting an environmental statute, for example, Congress is essentially expressing the will of the people to protect the environment. This commitment must be effectively carried out if the will of the people is to be adequately served. A citizen suit provision allowing private plaintiffs to compel compliance ensures that the decision to promote environmental welfare is actually implemented, and is not just an empty promise of Congress.[86]

Third, in the context of environmental law, citizen suits promote "environmental stewardship."[87] The citizen suit has often been lauded as a bulwark of environmental law.[88] One commentator describes the citizen suit as "the engine that propels the field of environmental law."[89] Indeed, as Professor May points out, in the ten years between 1993 and 2002, nearly three out of every four federal civil environmental cases in which courts issued opinions were citizens suits.[90] The existing jurisprudence interpreting federal environmental statutes is almost entirely attributable to citizen suits.[91] Thus, citizen suits have played an important role in shaping environmental law jurisprudence.

E. Criticisms of Citizen Suits

In his article *The Private Enforcement of Environmental Law*, Michael Greve argues that the private enforcement of public interest legislation through use of a citizen suit does more harm than good.[92] First, Greve cites the very basic economic argument that people are generally good judges of their own rights and interests, but are simply unable to assess competently the rights and interests of other people.[93] Greve argues that environmental statutes mandate "very ambitious goals and standards"[94] that are sometimes "unattainable even in the-

84 *See* May, *supra* note 64, at 6.

85 *Id.*

86 *Id.*

87 *Id.* at 6–7.

88 *Id.* at 1.

89 *Id.* at 7.

90 *Id.* at 8.

91 *Id.*

92 Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339, 344 (1990).

93 *Id.* at 343–44.

94 *Id*. at 378.

ory."[95] The societal costs of full compliance with those goals are enormous.[96] A citizen who brings suit against a polluter under the CAA, for example, may not take into account the net societal benefit in allowing the polluting activity to continue. The task of enforcing environmental laws, Greve argues, is more suited for the executive and legislative branches, which are better positioned to evaluate the full costs and benefits of full enforcement.[97]

This line of reasoning, however, is flawed in two respects. First, in the context of environmental law, the nature of the alleged injury—harm to the environment—is such that it affects all citizens. The citizen-plaintiff is not bringing suit to enforce some abstract right belonging only to others, but rather an alleged injury suffered by the plaintiff herself—something that she presumably is well-situated to evaluate. Second, assuming *arguendo* that the societal cost of full compliance with a given environmental law is prohibitively high, the solution should not be to aim for under-enforcement of those laws by foreclosing citizen suits. Rather, the solution should be to draft legislation that will accurately take into account the full costs of enforcing the statute.

Another criticism Greve makes of the citizen suit is that it amounts to an "off-budget entitlement program for the environmental movement."[98] When Congress first began including citizen suit provisions in environmental laws, it envisioned a plaintiff who was essentially an "altruist"—a concerned citizen who brought suit solely for the benefit of the public interest.[99] In practice, however, the typical citizen-plaintiff is not an average citizen concerned with contaminated water in a nearby community lake.[100] To the contrary, most citizens do not have the wherewithal to sue a violator of an environmental statute. In reality, the vast majority of citizen suits have been brought by highly organized and well-funded environmental advocacy groups who *do* have access to the resources necessary to bring suit.[101] If the defendant-polluters decide to settle (as is often the case with environmental citizen suits), the settlement money amounts to a direct payment to the environmental group that presumably then uses it to fund

---

95 *Id*.

96 *Id*.

97 *Id*. at 344.

98 *Id*. at 341.

99 *See id*. at 351.

100 *See id.*

101 *Id*. (pointing out that most enforcement actions have been brought by environmental advocacy groups such as the Natural Resources Defense Council).

whatever environmental project it deems appropriate.[102] As a result, through the citizen suit, Congress has created an "environmental enforcement cartel," subsidizing the environmental movement without having to worry about the partisan implications it may entail.[103]

The problem with this argument is that it essentially criticizes the citizen suit for working too well. That the majority of citizen-plaintiffs are well-informed and well-funded public interest groups does not detract from the fact that a violation of federal law has occurred. The alleged violation still warrants a penalty. Whether relief is awarded to an unorganized group of community members or to a sophisticated environmental protection group, the citizen suit still provides an effective mechanism to enforce the terms of the statute and a way of deterring future violations.

Furthermore, the fact that the majority of plaintiffs are environmental groups is better for society at large. These groups are likely better situated than ordinary citizens to allocate the damages or settlement award from a citizen suit to projects they have identified, based on their extensive knowledge and expertise, as being of critical importance to the environment.

Thus, despite the criticisms, there is good reason to include citizen suit provisions in environmental legislation. Especially today, when the need for vigilant environmental protection is so acute, citizens should not be denied the opportunity to use litigation as a means of bringing about increased compliance with environmental statutes.

III. Standing

The presence of a citizen suit provision does not definitively answer the question of whether the plaintiff can sue to enforce a particular statute. The Supreme Court has held that even if a statute contains a citizen suit provision, a plaintiff must also independently satisfy standing requirements in order to bring the lawsuit.[104] The issue of standing is essentially about whether a plaintiff is entitled to have a court decide the merits of the dispute or issue in question, or whether the issue is one that must be addressed by another branch of govern-

---

102 *See id*. at 355–56.

103 *Id*. at 385–91. Essentially, the argument is that with a citizen suit, Congress is supporting the environmental movement without having to balance the potential interests at stake, such as economic considerations. Furthermore, Congress is able to do so in a way that will not attract bad publicity, thereby reducing accountability for the consequences of its actions.

104 *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 576–77 (1992).

ment.[105] There are two dimensions to the standing inquiry: constitutional standing and prudential standing.[106] A plaintiff suing under a citizen suit provision must satisfy requirements for both prongs of the standing inquiry.[107]

Because of the widespread nature of global warming, establishing standing is particularly problematic in the context of climate change litigation.[108] However, recent cases demonstrate that courts are increasingly willing to find that plaintiffs have met the requirements of standing, especially when the action is brought pursuant to a citizen suit provision.[109] Thus, if EISA were amended to include a citizen suit provision, plaintiffs seeking to sue to enforce its mandates would have an easier time establishing standing.

A. Constitutional Standing

Although the Constitution does not explicitly articulate a standing doctrine, the requirement that a plaintiff have standing to bring a lawsuit stems from the case-or-controversy requirement in Article III of the Constitution.[110] "[T]he standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf."[111] In order to meet constitutional standing requirements, a plaintiff must prove three elements: "injury in fact," causation, and "redressability."[112] "Injury in fact" requires that a plaintiff have suffered an invasion of a "legally protected interest that is (a) concrete and particularized, and (b) 'actual or imminent,' not 'conjectural' or 'hypothetical.'"[113] The element of causation requires that there be a "causal

---

105 *See id*. at 577; *see also* Warth v. Seldin, 422 U.S. 490, 498 (1975).

106 *See Warth*, 422 U.S. at 498 (noting that question of standing "involves both constitutional limits on federal-court jurisdiction and prudential limits on its exercise"); *see also* Bennett v. Spear, 520 U.S. 154, 162 (1997) ("In addition to the immutable requirements of Article III, the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing." (citation omitted)).

107 *Bennett*, 520 U.S. at 152.

108 *See* David R. Hodas, *Standing and Climate Change: Can Anyone Complain About the Weather?*, 15 J. Land Use & Envtl. L. 451, 451 (2000).

109 *See, e.g.*, Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167 (2000) (holding that plaintiff organization had standing to sue under the citizen suit provision of the CWA where one of plaintiff's members was deterred from fishing and swimming in a river allegedly polluted by defendant).

110 *See Warth*, 422 U.S. at 498.

111 *Id.* at 498–99 (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).

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

113 *Id.* at 560 (citation omitted).

connection between the injury and the conduct complained of."[114] In other words, the alleged harm must be the result of the challenged conduct of the defendant—not of "some third party not before the court."[115] "Redressability" requires that if the court ultimately rules in favor of the plaintiff, the decision is likely to provide the plaintiff with some sort of remedial relief.[116]

B. Prudential Standing

In addition to constitutional standing, a plaintiff must also satisfy prudential standing requirements. Prudential standing refers to the court's determination that even though the plaintiff has met the minimum standing requirements under Article III, the case is one that the court should in fact adjudicate. A plaintiff has not satisfied prudential standing if the court determines that it is wise as a matter of judicial administration not to adjudicate the dispute.[117] The "generalized grievance" rule—that plaintiffs may not normally invoke judicial review for a harm that is shared by "all or a large class of citizens"[118]—is an example of how prudential standing considerations work to foreclose standing even when constitutional standing requirements are met.[119] The rule that plaintiffs may not typically seek judicial redress when the cause of action is predicated on the rights of third parties, as opposed to their own rights, is another example.[120] Unlike constitutional standing, Congress may modify prudential standing requirements by statute.[121] When Congress does choose to limit the applicability of prudential standing, courts are obligated to observe the modified standards.[122]

C. The Special Problem of Standing in Climate Change Litigation

In the context of climate change litigation, establishing standing is particularly problematic because of prudential standing considerations. The problem is that in these cases, "the harm complained of is widely, if not universally, shared."[123] Any injury allegedly stemming

---

114 *Id.*

115 *Id.* (citation omitted).

116 *Id*. at 561.

117 *See* Warth v. Seldin, 422 U.S. 490, 499–500 (1975).

118 *Id*. at 499.

119 *Id*.

120 *Id*.

121 *See* Bennett v. Spear, 520 U.S. 154, 162 (1997); *see also* AXLINE, *supra* note 43, at 29.

122 *See* AXLINE, *supra* note 43, at 29–30.

123 Hodas, *supra* note 108, at 451.

from global warming could thus be characterized as a generalized grievance that is better left for resolution by the political branches—the Executive and Congress—and not the courts.[124]

In 1983, before he was appointed to the Supreme Court, Justice Scalia authored a law review article that argued that the law of standing restricts courts to their traditional role of protecting minority interests by leaving interests that affect the majority (i.e., generalized grievances) to the political branches.[125] Justice Scalia argued that allowing courts to adjudicate claims involving harms affecting "all who breathe,"[126] (a category that would presumably include widespread environmental harms) violates separation of powers principles.[127] If courts are allowed to protect the interests of the majority, Justice Scalia reasoned,

> they are likely (despite the best of intentions) to be enforcing the political prejudices of their own class . . . . It may well be, of course, that the judges know what is good for the people better than the people themselves . . . but [that is] not the premise[ ] under which our system operates.[128]

Following Justice Scalia's view, the harmful effects of global warming, because of their widespread nature, would not cause a typical plaintiff the kind of injury that standing doctrine requires. As Justice Scalia explained, "[u]nless the plaintiff can show some respect in which he is harmed *more* than the rest of us . . . he has not established any basis for concern that the majority is suppressing or ignoring the rights of a minority that wants protection, and thus has not established the prerequisite for judicial intervention."[129]

Justice Scalia's view on standing—that "injury to all is injury to none"[130]—has been echoed by many judges. For example, Judge David Sentelle of the United States Court of Appeals for the District of Columbia Circuit adopted this view in his opinion dissenting in part and concurring in the judgment in *Massachusetts v. EPA*.[131] In that

---

124 *Cf.* Allen v. Wright, 468 U.S. 737, 751 (1984).

125 *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894–95 (1983).

126 *Id*. at 896.

127 *See id*. at 894–96.

128 *Id*. at 896–97.

129 *Id*. at 894–95.

130 *See* Bradford C. Mank, *Standing and Global Warming: Is Injury to All Injury to None?*, 35 ENVTL. L.J. 1, 29–37 (2005).

131 Massachusetts v. EPA, 415 F.3d 50, 59–60 (D.C. Cir. 2005) (Sentelle, J., dissenting in part and concurring in the judgment), *rev'd on other grounds*, 127 S. Ct. 1438 (2007); *see also* Ctr. for Biological Diversity v. Abraham, 218 F. Supp. 2d 1143, 1154–55 (N.D. Cal. 2002) (rejecting

case, the issue before the court was whether the CAA required the EPA to regulate GHG emissions.[132] A divided court dismissed the case in favor of the EPA, ruling that it was within the agency's discretion to refuse to regulate GHG emissions.[133] In his separate opinion, Judge Sentelle argued that global warming was "harmful to humanity at large"[134] and constituted the "sort of general harm eschewed as insufficient to make out an Article III controversy . . . ."[135] Judge Sentelle concluded, "[a] case such as this, in which plaintiffs lack particularized injury is particularly recommended to the Executive Branch and the Congress."[136]

However, there is good reason to believe that courts are increasingly willing to find standing in the context of global warming. On appeal, the Supreme Court in *Massachusetts v. EPA*[137] issued a landmark opinion, finding that the plaintiffs did in fact have standing to bring suit.[138] The fact that the injury complained of—namely, global warming—was widely shared did "not minimize [the plaintiffs'] interest in the outcome of [the] litigation."[139]

Although the holding of *Massachusetts v. EPA* could be read quite narrowly—the Court found standing for Massachusetts by virtue of its "special solicitude" for plaintiffs that are states—at least one commentator has argued persuasively that *Massachusetts v. EPA*'s holding has broader implications.[140] Professor Kimberly Brown argues that the decision fundamentally changes standing analysis, at least in the context of public law cases such as global warming. Professor Brown argues that after *Massachusetts v. EPA*, at least in cases where Congress has statutorily defined an injury, for example, by mechanism of a citizen suit provision, "it is the rare statutory case that will be barred as an impermissible generalized grievance."[141]

---

standing based on harms stemming from global warming but finding standing on different grounds).

132 *See Massachusetts v. EPA*, 415 F.3d at 53.

133 *See id.* at 58.

134 *Id.* at 60.

135 *Id.*

136 *Id.*

137 Massachusetts v. EPA, 127 S. Ct. 1438 (2007).

138 *Id*. at 1458.

139 *Id*. at 1456; *see also* Nw. Envtl. Def. Ctr. v. Owens Corning Corp., 434 F. Supp. 2d 957, 965 (D. Or. 2006) ("Standing has never required proof that the plaintiff is the *only* person injured by the defendant's conduct.").

140 *See* Kimberly N. Brown, *Justiciable Generalized Grievances*, 67 MD. L. REV. (forthcoming 2009).

141 *Id.*

Exactly how *Massachusetts v. EPA* will influence standing doctrine is yet to be determined. In the interim, it is necessary to understand traditional standing doctrine and its relation to citizen suits to understand fully how a citizen suit provision can benefit EISA. The next Section examines the interplay between citizen suit provisions and traditional standing doctrine.

D. The Impact of a Citizen Suit Provision on the Standing Inquiry

The inclusion of a citizen suit provision affects both the constitutional and prudential standing inquiries by making it easier for the plaintiff to meet the requirements of each.

i. Constitutional Standing

Three cases outline the existing doctrine on citizen suits and its relation to constitutional standing: *Lujan v. Defenders of Wildlife*,[142] *Federal Election Commission v. Akins*,[143] and *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc*.[144]

a. Lujan v. Defenders of Wildlife

In *Lujan v. Defenders of Wildlife*, the Supreme Court ruled that a citizen suit provision has no bearing on the question of whether a plaintiff has satisfied constitutional standing requirements.[145] In that case, environmental organizations brought suit under the citizen suit provision of the Endangered Species Act of 1973 ("ESA"),[146] a law aimed at protecting endangered species.[147] The Department of Interior issued a regulation stating that a key provision of the ESA, which required each federal agency to consult with the Secretary of the Interior to insure that any agency action would not harm endangered or threatened species, did not apply extraterritorially, and the plaintiffs brought suit alleging that the regulation violated the ESA.[148] The plaintiffs argued that the lack of required consultation for agency activities abroad threatened the existence of certain ecosystems in Sri Lanka and Egypt.[149] Plaintiffs argued that if the United States did not comply with the ESA and work to protect those ecosystems overseas,

142 Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

143 Fed. Election Comm'n v. Akins, 524 U.S. 11 (1998).

144 Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167 (2000).

145 *See Lujan*, 504 U.S. at 576.

146 16 U.S.C. § 1540(g) (2006).

147 *See id.* § 1531(b).

148 *See Lujan*, 504 U.S. at 558–59.

149 *See id.* at 562–63.

they would not be able to observe the endangered species should they choose to visit those sites in the future.[150] In his plurality opinion, Justice Scalia found that the plaintiffs lacked standing because they could not show that they suffered an injury in fact.[151]

Turning to the relevance of the citizen suit provision of the ESA, Justice Scalia rejected the view that the citizen suit created a procedural right for all citizens that the ESA be properly carried out.[152] The court of appeals had held that the plaintiffs suffered a procedural injury when the ESA was not properly enforced, thereby satisfying the injury-in-fact requirement of standing.[153] Justice Scalia firmly rejected the notion that "the injury-in-fact requirement had been satisfied by congressional conferral upon *all* persons of an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law."[154] Consistent with the thesis of his law review article discussed above, Justice Scalia argued that the requirements of standing stem from separation of powers principles.[155] Standing assures that courts are reviewing actual "cases" or "controversies"—that they are abiding by their constitutionally defined role and are not impinging on the duties of the other branches.[156] Issues that affect the public at large are the domain of the executive and legislative branches.[157] The question becomes, then, whether Congress can convert the public interest into an individual right through a statutory provision. For Justice Scalia, the answer was a clear "no." In *Lujan*, he argued that

> [t]o permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed."[158]

---

150 *See id*. at 563–64.

151 *See id*. at 562. In this case, the requirement of injury in fact was not met because the plaintiffs did not demonstrate that they had any concrete plans to visit those sites in the future. "Such 'some day' intentions—without any description of concrete plans . . . do not support a finding of the 'actual or imminent' injury that our cases require." *Id*. at 564.

152 *See id*. at 57–76.

153 *See* Defenders of Wildlife v. Lujan, 911 F.2d 117, 119–22 (8th Cir. 1990), *rev'd*, 504 U.S. 555 (1992).

154 *Lujan*, 504 U.S. at 573.

155 *See* Scalia, *supra* note 125, at 894–95.

156 *See id.*

157 *See id.*

158 *Lujan*, 504 U.S. at 577 (citation omitted).

Thus, after *Lujan*, even when there is a citizen suit provision, a plaintiff must still independently meet the three requirements of constitutional standing.

Justice Scalia's separation of powers argument did not convince the entire Court, however. In a concurring opinion, Justice Kennedy, with whom Justice Souter joined, rejected Justice Scalia's constitutional bar to Congress's ability to create new causes of action.[159] Justice Kennedy argued that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before . . . ."[160] That power, however, is not a *carte blanche*: "Congress must at the very least identify the injury it seeks to vindicate *and* relate the injury to the class of persons entitled to bring suit."[161] Justice Kennedy concluded that because the citizen suit provision of the ESA did not meet these requirements, it could not provide standing in the instant case.[162] That is not to say that a better-drafted provision would not have passed constitutional muster, however, or could not do so in the future.

b. Federal Election Commission v. Akins

Justice Scalia's underlying notion in the *Lujan* opinion—that Congress cannot create a private cause of action for a generalized grievance by way of a citizen suit provision—was challenged in *Federal Election Commission v. Akins*.[163] Although *Akins* did not deal with environmental law, its central holding is nonetheless applicable to the inquiry of how a citizen suit provision may affect constitutional standing. In *Akins*, the plaintiffs, a group of dissatisfied voters, brought suit under the citizen suit provision of the Federal Election Campaign Act of 1971 ("FECA").[164] Plaintiffs argued that the Federal Election Commission ("FEC") violated the act when it failed to require that the American Israeli Public Affairs Committee, a lobbying group, make disclosures regarding its membership, funding, and spending that the FECA otherwise required.[165]

---

159 *Id.* at 580 (Kennedy, J., concurring); *see also* Hodas, *supra* note 108, at 466–67.

160 *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring).

161 *Id.* (emphasis added).

162 *Id*. The citizen suit provision of the ESA did not meet Justice Kennedy's minimal requirements because while it conferred a right of action upon the public to sue a violator of the Act, it did not specify that there is in fact an injury to the public created by a violation. *Id*.

163 *See* Fed. Election Comm'n v. Akins, 524 U.S. 11, 19–26 (1998); *see also* Hodas, *supra* note 108, at 470.

164 *See* 2 U.S.C. § 437g(a)(8)(A) (2006); *see also Akins*, 524 U.S. at 13.

165 *See Akins*, 524 U.S. at 16.

The Court rejected the argument that plaintiffs lacked standing for failure to satisfy the injury-in-fact requirement. The plaintiffs' injury, the Court reasoned, was the "inability to obtain information . . . that . . . would help [plaintiffs] . . . to evaluate candidates for public office . . . ."[166] In response to the FEC's argument that this type of "informational injury" is a generalized grievance better left for resolution by the political process, the Court found that the fact that an injury is widely held does not preclude an injured plaintiff from seeking redress through litigation.[167] The Court reasoned that what prevents a generalized grievance from being reviewed is not the fact that it is widely shared, but rather that it is of an "abstract and indefinite nature."[168] In addition, the Court explained, the fact that there is an adequate alternative forum—the political process—that can also address the harm does not automatically disqualify the interest from being reviewed in court.[169] A sufficiently concrete and specific injury may still qualify as an injury in fact, and "the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in federal courts."[170] Thus, *Akins* essentially permits Congress to articulate injuries upon which citizens can sue, amounting to nearly a direct rejection of Justice Scalia's argument in *Lujan*.[171]

c. Friends of the Earth, Inc. v. Laidlaw Environmental Services

The Court further rejected Justice Scalia's view of standing and citizen suits in *Friends of the Earth, Inc. v. Laidlaw Environmental Services*.[172] In that case, a consortium of various environmental groups brought suit against the operator of a hazardous waste incinerator pursuant to the citizen suit provision of the CWA, alleging that the defendant was discharging pollutants into a waterway in violation of the CWA.[173] The citizen suit of the CWA authorizes district courts to assess civil penalties, which are payable to the United States Treasury.[174] In *Friends of the Earth*, the Court held that plaintiffs had alleged an injury in fact because the discharge of pollutants into the

166 *Id*. at 21.

167 *See id*. at 23–24.

168 *Id*. at 23.

169 *Id*. at 24.

170 *Id*. at 25.

171 *See* Hodas, *supra* note 108, at 473.

172 Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167 (2000).

173 *See id.* at 175–77; *see also supra* note 62.

174 *See supra* note 62.

water directly affected the plaintiffs' "recreational, aesthetic, and economic interests."[175]

The more significant question in *Friends of the Earth* was whether the "redressability" requirement was met. The defendants argued that because any monetary penalty would be paid to the government, the civil penalties offered no redress to the plaintiffs.[176] The Court rejected that argument and held that because civil penalties encourage compliance with the law and deter future violations, "they afford redress to citizen plaintiffs who are injured or threatened with injury as a consequence of ongoing unlawful conduct."[177] More importantly, the Court reaffirmed the principle that it was for Congress, not the judicial branch, to decide what remedies will best effectuate the policy goals underlying legislation: "How to effectuate policy—the adaptation of means to legitimately sought ends—is one of the most intractable of legislative problems. Whether proscribed conduct is to be deterred by *qui tam* action or triple damages or injunction . . . is a matter within the legislature's range of choice."[178]

Friends of the Earth has several implications for the constitutional standing inquiry. It acknowledges Congress's power to define the injury-in-fact and redressability prongs of the standing test. By requiring only a minimal showing of injury, *Friends of the Earth* affirms the liberal attitude towards injury in fact demonstrated by the *Akins* Court. The *Friends of the Earth* Court noted that the required showing for injury in fact is "not injury to the environment but injury to the plaintiff. To insist upon the former rather than the latter as part of the standing inquiry . . . is to raise the standing hurdle higher than . . . necessary . . . ."[179] This emphasis on maintaining a low threshold for standing suggests that in future cases, courts may be more willing to find that plaintiffs suffered an injury in fact in the context of citizen suits than they would in other types of litigation, even when that harm is widely shared by others, such as environmental harm.

In summary, to satisfy constitutional standing, a plaintiff must prove that she has suffered an injury in fact caused by the defendant that will be redressable by a favorable decision in court. After *Akins* and *Friends of the Earth*, a citizen suit provision in an environmental

---

175 *Friends of the Earth*, 528 U.S. at 184.

176 *See id*. at 185.

177 *Id*. at 186.

178 *Id*. at 187 (citation omitted).

179 *Id*. at 181.

statute appears to make it easier for a plaintiff to establish the injury-in-fact and redressability prongs of the standing test.

ii. Prudential Standing

In the context of a citizen suit, the prudential standing inquiry turns on whether the plaintiff is "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[180] By including a citizen suit provision in a law, Congress has statutorily extended the zone of interest to the public.[181] "By creating a right in individuals to act in the public interest, Congress makes the personal interest of each citizen in enforcement of social legislation that was intended to benefit the class of individuals to which the citizen belongs roughly equivalent to that of the United States itself."[182] In *Bennett v. Spear*,[183] for example, the Court found that the citizen suit provision in the ESA essentially expanded the zone of interests of the statute to the public at large.[184] In other words, a citizen suit provision is a *per se* mandate from Congress prohibiting courts from refusing to adjudicate a dispute under the relevant statute on prudential grounds. Thus, a plaintiff suing under a citizen suit provision necessarily meets the zone of interests test for prudential standing.

Accordingly, while establishing standing in an environmental law case is sometimes more difficult than it is in other contexts, including a citizen suit provision makes it easier for plaintiffs to establish both prongs of the standing requirement. Similarly, concerned citizens who wish to enforce the provisions of EISA will be able to satisfy standing requirements with greater ease if the Act is amended to include a citizen suit provision.

IV. The Energy Independence and Security Act

A full appreciation of how a citizen suit provision can improve EISA requires a basic understanding of the legislation itself and the policies it seeks to implement. EISA is an omnibus energy policy law with two main objectives: increased energy efficiency and increased availability of alternative energy.[185] EISA attempts to implement

180 Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970).

181 *See* AXLINE, *supra* note 43, at 29–30.

182 *Id.* at 30.

183 Bennett v. Spear, 520 U.S. 154 (1997).

184 *See id.* at 164–66.

185 Energy Independence and Security Act of 2007 ("EISA"), Pub. L. No. 110-140, 121

these goals through four general avenues: increased vehicle fuel economy, increased production of renewable fuels, implementation of energy efficiency standards, and alternative energy research and development. This Part describes each of these provisions in turn.

A. Increased Vehicle Fuel Economy

EISA mandates an increase in vehicle fuel economy standards. The National Highway Traffic Safety Administration defines fuel economy as the average mileage traveled by an automobile per gallon of gasoline.[186] EISA requires the Secretary of Transportation, after consulting with the Secretary of Energy and the Administrator of the EPA,[187] to prescribe average fuel economy standards for each year from 2011 until 2020, at which point a minimum standard of thirty-five miles per gallon must be established.[188] This increase is significant, considering that the previous fuel economy minimum was 27.5 miles per gallon. The Act allows the Secretary of Transportation to promulgate separate average fuel economy standards for passenger cars, nonpassenger cars, and trucks.[189]

Car manufacturers are required to either meet a minimum fuel efficiency standard of 27.5 miles per gallon, or come within ninety-two percent of the minimum standard set by the Secretary for that model year, whichever is greater.[190] EISA requires that any civil penalties assessed for noncompliance with the fuel economy standards be deposited into the general fund of the United States Treasury to support future rulemaking and to provide grants to car manufacturers to invest in further research and development of increasing fuel efficiency of their fleets.[191]

EISA also requires the Secretary of Transportation, after consulting with the Secretary of Energy and the Administrator of the EPA, to develop and implement a mandatory consumer information program in which automobile manufacturers are required to provide customers

---

Stat. 1492; *see also* FRED SISSINE, CONG. RESEARCH SERV., ENERGY INDEPENDENCE AND SECURITY ACT OF 2007: A SUMMARY OF MAJOR PROVISIONS 1 (2007) [hereinafter CRS EISA REPORT], *available at* http://energy.senate.gov/public/_files/RL342941.pdf.

186 National Highway Traffic Safety Administration, CAFE Overview, http://www.nhtsa.gov/portal/site/nhtsa/menuitem.43ac99aefa80569eea57529cdba046a0/ (last visited Nov. 16, 2008).

187 EISA § 102.

188 *Id*. § 102.

189 *Id*. § 102.

190 *Id*. § 102.

191 *Id*. § 112; *see also* CRS EISA REPORT, *supra* note 185, at 4–5.

with fuel economy and emissions information.[192] This program will require manufacturers to label cars sold in the United States with information about a given model's fuel economy and GHG emissions, so as to provide consumers with an easy way to compare models and make an informed decision before they purchase a vehicle.[193]

B. Increased Production of Renewable Fuels

EISA also increases the renewable fuel standard ("RFS"), which requires that gasoline used for transportation in the United States contain a minimum volume of renewable fuel.[194] Renewable fuels are those that are produced from animal or plant products[195] and other natural sources that are "replenished in a relatively short period of time."[196] Most of the energy we currently use comes from non-renewable sources, such as oil, coal, and gas, which are finite. EISA increases the previous RFS, which was 5.4 billion gallons for 2008, to 7.5 billion by 2012.[197] The new standard under EISA starts at 9 billion gallons in 2008 and rises to 36 billion in 2022.[198]

C. Energy Efficiency Equipment Standards

EISA sets new efficiency standards for a variety of appliances and consumer products, such as refrigerators, freezers, air conditioners, dishwashers, clothes washers, and dehumidifiers.[199] The Secretary of Energy is allowed to set varying regional standards for heating and air-conditioning equipment.[200] In enforcing these standards, the Secretary is authorized to enforce the national base standard[201] and is directed to implement an effective enforcement plan not later than fifteen months after establishing any regional standards.[202] In addition, EISA sets energy efficiency standards for lighting[203] and imple-

---

192 EISA § 105.

193 *Id*. § 105.

194 *Id.* § 202.

195 Office of Transp. & Air Quality, U.S. Envtl. Prot. Agency, Renewable Fuel Standard Implementation: Frequently Asked Consumer Questions 1 (2007), *available at* http://www.epa.gov/OMS/renewablefuels/420f07062.pdf.

196 Energy Information Administration, Renewable and Alternative Fuels Basis 101, http://www.eia.doe.gov/basics/renewalt_basics.html (last visited Nov. 16, 2008).

197 *See* CRS EISA Report, *supra* note 185, at 5.

198 EISA § 202.

199 *Id.* § 311.

200 *See id*. § 306.

201 *Id*. § 306.

202 *See id*. § 306.

203 *Id*. §§ 321–324.

ments a consumer education and awareness program about lighting energy efficiency.[204] EISA also directs the Consumer Product Safety Commission to set energy efficiency labeling requirements for consumer electronic products.[205]

D. Alternative Energy Research and Development

EISA promotes research and development ("R&D") of various types of alternative energy. For example, it directs the Secretary of Energy to establish a program of R&D to provide lower cost and more viable thermal energy storage technologies, which could improve the operation of solar power electric generating plants.[206] In addition, the Secretary of Energy is directed to support programs of R&D to expand the use of geothermal energy—heat energy stored in the Earth's crust that can be used either directly or to generate electric power[207]—to a level of commercial readiness.[208] The Secretary of Energy is also directed to support R&D of marine and hydrokinetic renewable energy—technology that produces electricity from waves, tides, currents, and ocean thermal differences[209]—to determine their commercial application.[210] Finally, EISA directs the Secretary of Energy to carry out science and engineering research to develop and document the performance of new approaches of carbon capture and sequestration.[211] Carbon capture and sequestration is a method by which CO2 is separated and captured from emission sources and then sent to a storage facility, instead of being emitted directly into the atmosphere.[212] It is thus a way of mitigating CO2 emissions and stabilizing the atmospheric GHG concentrations.[213]

As the next Part demonstrates, each of the four key areas of EISA outlined above can be better enforced if the legislation is amended to include a citizen suit provision.

---

204 *Id*. § 321.

205 *Id*. § 325.

206 *Id*. § 602; *see also* CRS EISA Report, *supra* note 185, at 12.

207 EISA § 612.

208 *Id.* § 615.

209 *See* CRS EISA Report, *supra* note 185, at 13.

210 EISA § 633.

211 *Id*. § 702.

212 National Energy Technology Laboratory, Carbon Sequestration FAQ Information Portal: What Is Greenhouse Gas, and How Will Carbon Capture and Sequestration Offset Global Climate Change?, http://www.netl.doe.gov/technologies/carbon_seq/FAQs/greenhouse-gas.html (last visited Nov. 16, 2008).

213 *Id.*

V. Proposal: EISA Should Include a Citizen Suit Provision

Although the passage of EISA constitutes significant progress in the nation's attempt at countering climate change, the legislation can be significantly strengthened by the inclusion of a citizen suit provision. This Part addresses how and why EISA will benefit from a statutory provision allowing private citizens the right to sue to enforce the mandates of the Act and concludes that Congress should amend EISA by including a citizen suit provision in the legislation.

A. The Benefits of Including a Citizen Suit Provision in EISA

A citizen suit provision in EISA is desirable for three main reasons: it will foster (1) increased compliance with the rule of law; (2) greater adherence to principles of democracy; and (3) environmental stewardship.[214]

Most importantly, allowing private enforcement encourages greater compliance with the rule of law. Citizen suits encourage compliance with environmental statutes by serving both as an enforcement mechanism for past violations of the statute and as a deterrent agent against future violations. Secondly, allowing private suits encourages greater adherence to democratic principles. The passage of EISA demonstrates that the American people, through their elected representatives, recognize the threat of climate change and that they demand a national response to counter the threat posed to the environment. By allowing private citizens the right to sue to enforce the provisions of the Act, the will of the people is better served, as they are equipped with statutory recourse in the event of noncompliance.

Finally, including a citizen suit provision in EISA promotes environmental stewardship. Affording private citizens the right to sue to enforce the mandates of EISA helps create a robust environmental law jurisprudence. Including a citizen suit provision in EISA will result in a greater number of lawsuits brought under the Act. As a result, the entire subject matter of EISA will be clarified; judges, litigants, and regular citizens will have a better idea of what the statute stands for, what type of behavior constitutes a violation, and what is permissible under the law.

---

214 *See supra* Part II.D.

B. Why EISA Is Amenable to a Citizen Suit Provision

EISA is amenable to a citizen suit provision for two main reasons. First, because EISA is essentially an environmental statute, adding a citizen suit provision to the Act will make enforcement of environmental law more consistent. Second, because the statutory language of EISA is already ripe for citizen enforcement, Congress can strengthen the potency of the Act without having to alter its provisions.

i. A Citizen Suit Provision Will Make EISA More Consistent with Other Environmental Statutes

Because EISA is essentially an environmental statute, including a citizen suit provision will make it more consistent with the other major federal environmental laws. While citizen suit provisions are not specific to the context of environmental law,[215] almost every major federal environmental statute contains such a provision.[216] On its face, EISA's main focus is energy policy. Critics may argue that energy policy is not sufficiently related to environmental protection to justify including a citizen suit provision in EISA solely to maintain consistency in environmental law. It is true that the purport of other environmental statutes containing citizen suit provisions has been more directly related to the nation's natural resources, such as air and water. However, energy policy is an area that is inextricably linked to environmental law. GHGs emitted from fossil fuels, the most significant source of energy in the United States today,[217] have been identified by the scientific community as the main culprit behind climate change.[218] EISA's stated purpose—promoting energy efficiency—is an explicit recognition of the link between energy policy and environmental protection. President Bush has even described the Act as "a major step toward . . . confronting global climate change."[219] EISA thus expands the scope of "typical" environmental legislation to include energy policy.

Because it is essentially an environmental statute, EISA should be as consistent with other environmental statutes as possible. Including a citizen suit provision in EISA is an important and necessary means to maintain consistency in the enforcement mechanisms availa-

---

215 *See* MILLER, *supra* note 40, at 6.

216 *See id*. at 5–6.

217 *See supra* Part I.

218 *See supra* Part I.

219 John M. Broder, *Bush Signs Broad Energy Bill*, N.Y. TIMES, Dec. 19, 2007, at A24.

ble to environmental plaintiffs. Consistency in available modes of enforcement is important for two main reasons: first, it lowers transaction costs and, second, it increases adherence to the rule of law.

a. Lowered Transaction Costs

By aligning the enforcement mechanism of EISA with that of other environmental statutes, potential plaintiffs will know what legal recourse is available to them even if they are not completely familiar with the specific text of the statute. This lowers the transaction costs for concerned citizens who are looking to play a more participatory role in the enforcement of environmental law. Environmental plaintiffs have grown accustomed to having the option of private enforcement in the context of environmental law. By keeping EISA consistent with the other environmental statutes, environmentalists can continue to rely on their previous tactics to enforce environmental law.[220]

b. Increased Adherence to the Rule of Law

By including a citizen suit provision in EISA and keeping it consistent with other environmental statutes, Congress will promote greater adherence to the rule of law. For example, private plaintiffs will rely on their past experience and continue to turn to citizen suits as a means of enforcing the mandates of the Act, just as they do for other environmental statutes. In addition, potential defendants, also relying on their past experience with other environmental statutes, will have a better idea of the consequences of their noncompliance with the mandates of the Act.[221] Consistent consequences for violations of law promote adherence to the law because actors know their noncompliance will not go unpunished, thereby reducing the likelihood of their violating the law.[222] Thus, by including a citizen suit provision in EISA, Congress can ensure that the mandates of the Act are more likely to be complied with.

---

220 In a way, this is an estoppel argument. Plaintiffs have relied on the existence of a right of private enforcement since the enactment of the CAA in 1970. Plaintiffs should be allowed to rely reasonably on this assumption without having to delve into the statutory language of every new environmental statute that Congress enacts. This is important particularly in the context of environmental law, where citizen-plaintiffs have played such a pivotal role in upholding the rule of law.

221 *See* United Nations Environment Programme, Consistency in Laws and Regulations, http://www.unep.org/dec/onlinemanual/Enforcement/InternationalCooperation/Consistencyin LawsRegulations/tabid/100/Default.aspx (last visited Nov. 16, 2008).

222 *See id.*

ii. EISA's Existing Provisions Are Ripe for Private Enforcement

Second, EISA is amenable to a citizen suit provision because its statutory provisions in their current form are ripe for private enforcement. Thus, if a citizen suit provision were added to EISA, Congress would not have to alter the remaining text of the statute. Most citizen suit provisions, including the one proposed by this Note, allow suits against any state or federal agency that fails to fulfill any nondiscretionary duty mandated by the relevant statute.[223] A nondiscretionary duty is one that involves "purely ministerial acts" which do not require any judgment on the part of the relevant agency.[224] A nondiscretionary duty can also be characterized as one that is mandatory and not permissive.[225] In determining whether a duty is mandatory, courts look to the plain language of the statutory text.[226] Whereas words such as 'shall' indicate a mandatory, nondiscretionary duty, words such as 'may' indicate that the duty is permissive and discretionary.[227] In addition, the imposition of time limitations has been found to signify a mandatory, nondiscretionary duty.[228]

EISA imposes a variety of nondiscretionary duties upon agency administrators that can be effectively enforced through a citizen suit provision. For example, EISA imposes a mandatory duty on the Secretary of Transportation to promulgate average fuel economy standards for automobiles:

> The Secretary shall prescribe a separate average fuel economy standard for passenger automobiles and a separate average fuel economy standard for non-passenger automobiles for each model year beginning with model year 2011 to achieve a combined fuel economy average for model year 2020 of at least 35 miles per gallon for the total fleet of passenger and non-passenger automobiles manufactured for sale in the United States for that model year.[229]

The statute's use of the word "shall" demonstrates that the promulgation of average fuel economy standards is a nondiscretionary duty imposed on the Secretary of Transportation. Should Congress

---

223 *See, e.g.*, 42 U.S.C. § 7604 (2000).

224 *Cf.* Envtl. Def. Fund v. Thomas, 870 F.2d 892, 899–900 (2d Cir. 1989) (finding that a statute is not nondiscretionary when it defers judgment to relevant agency).

225 *See, e.g.*, Sierra Club v. Leavitt, 355 F. Supp. 2d 544, 549–50 (D.D.C. 2005).

226 *Id.*

227 *See id.*

228 *See id.* at 250.

229 Energy Independence and Security Act of 2007 ("EISA"), Pub. L. No. 110-140, § 102, 121 Stat. 1492, 1499 (emphasis added).

choose to amend EISA to include a citizen suit provision, it would not have to amend this portion of the statute; thus it is already ripe for citizen enforcement.

In addition, EISA requires that the Secretary of Transportation develop a program to require automobile manufacturers to label their models with information related to the fuel economy and GHG emissions of the particular model: "The Secretary of Transportation . . . shall develop and implement by rule a program to require manufacturers to label new automobiles sold in the United States . . . ."[230] Furthermore, EISA imposes a rulemaking deadline on the Secretary of Transportation to establish this program: "The Secretary of Transportation shall issue a final rule under this subsection not later than 42 months after the date of the enactment of [the Act]."[231] Not only does this provision contain mandatory language ("shall"), it also imposes a deadline on the Secretary of Transportation by which he must comply with the mandates of the provision. This is characteristic of language courts have found to be indicative of a nondiscretionary duty.[232]

EISA imposes nondiscretionary duties on agencies in many other provisions as well.[233] Because EISA already contains many provisions such as the ones described above imposing nondiscretionary duties on agencies, it is amenable to a citizen suit provision. Congress has an easy task: it merely needs to add a subsection allowing for citizen enforcement of EISA; it does not need to alter the rest of the text of the statute.

In sum, because EISA is an environmental statute and because its provisions impose many nondiscretionary duties on administrators, it is amenable to a citizen suit provision. The next Section describes exactly what language this citizen suit provision should include.

C. Proposed Language for a Citizen Suit Provision for EISA

EISA should contain a citizen suit provision with language similar to that contained in the citizen suit provision of the Clean Air Act.[234] The proposed text reflects the tension evidenced in the CAA citizen

---

230 *Id*. § 105 (emphasis added).

231 *Id*. § 105.

232 *See, e.g.*, Envtl. Def. Fund v. Thomas, 870 F.2d 892, 900 (2d Cir. 1989).

233 For example, EISA requires that the Secretary of Energy implement a research and development program about the commercial viability of alternative sources of energy.

234 *See* 42 U.S.C. §§ 7401, 7604 (2000).

suit provision between affording citizens an effective mechanism of enforcement and the fear of flooding the courts with litigation.[235]

EISA should contain a provision containing the following language:

> (a) Authority to bring civil action; jurisdiction—Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf:
>
> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to have violated or to be in violation of:
>
> (A) a fuel economy standard or limitation under this chapter;
>
> (B) an energy efficiency standard or limitation under this chapter;
>
> (C) a renewable fuel standard or limitation under this chapter; or
>
> (D) a directive to implement a research and development program under this chapter;
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.
>
> The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such standard, limitation, or order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties.
>
> (b) Notice—No action may be commenced under subsection (a)(1) of this section:
>
> (1) prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator, (ii) to the State in which the violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or
>
> (2) if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order, but in any such ac-

235 *See* Miller, *supra* note 65, at 821; *see also supra* text accompanying notes 50–58.

> tion in a court of the United States any person may intervene as a matter of right.
>
> (c) Award of costs—The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.
>
> (d) Penalty fund
>
> (1) Penalties received under subsection (a) of this section shall be deposited in a special fund in the United States Treasury for use by the Administrator to finance energy efficiency compliance and enforcement activities.
>
> (2) Notwithstanding paragraph (1) the court in any action under this subsection to apply civil penalties shall have discretion to order that such civil penalties, in lieu of being deposited in the fund referred to in paragraph (1), be used in beneficial mitigation projects which are consistent with this chapter and enhance the public health or the environment. The amount of any such payment in any such action shall not exceed $100,000.

This language is desirable for several reasons. For one, it affords citizens a liberal right of enforcement. It allows suits by "any person," assuming that the requirements of standing are met, against "any person" who has allegedly violated the Act. It also allows federal district courts to entertain such suits without regard for diversity of citizenship or amount in controversy requirements. At the same time, however, this provision imposes a series of procedural requirements that will curtail the number of suits actually brought under the Act. For one, there is a sixty-day notice requirement and a diligent prosecution bar. These requirements allow the relevant administrative agency charged with carrying out the portion of the statute in question enough time to inquire into the circumstances. Should it decide to pursue the matter on behalf of the agency, the diligent prosecution exception will bar the suit. In addition, the provision allows the court to award costs to "any party." This provision discourages frivolous lawsuits, as plaintiffs may be forced to bear the costs themselves. Lastly, the penalty section allows any funds collected from a violator to be deposited into the United States Treasury. This rule also prohibits plaintiffs from pursuing frivolous suits, as they would not normally be eligible to receive any award should they win.

D. A Typical Suit Brought Under the Proposed Citizen Suit Provision of EISA

Should Congress adopt this proposal, suits brought under the citizen suit provision of EISA will likely take a fairly consistent form, with possible plaintiffs, defendants, and alleged injuries following the same form as examples from existing case law.

i. Possible Plaintiffs

Under the proposed citizen suit provision of EISA, likely plaintiffs are environmental groups and state governments. First, the plaintiff must meet the standards for "person" under the Act. EISA's proposed provision allows suit by "any person"—a very broad standard. As long as the plaintiff meets the requirements of standing, he will likely meet the definition of "person" under the Act. To establish standing, a plaintiff must meet the requirements for both constitutional and prudential standing.[236] The inclusion of a citizen suit provision is essentially a congressional mandate for courts not to invoke lack of prudential standing as a limitation on bringing suit.[237] Thus, if EISA is amended to include a citizen suit provision, citizen-plaintiffs automatically meet the requirements for prudential standing.

Establishing constitutional standing is a bit more difficult. As *Friends of the Earth* and *Akins* demonstrate, a citizen suit provision essentially constitutes congressional authorization that the plaintiff meets the injury-in-fact and redressability requirements of constitutional standing.[238] Thus, if EISA is amended to include a citizen suit provision, plaintiffs should not have a difficult time establishing standing, provided they can prove the requirements for causation.

Plaintiffs are likely to include environmental groups, such as Friends of the Earth and Greenpeace, because such groups are "highly pro-active and well aware of the effectiveness of using legal mechanisms to achieve environmental objectives."[239] In addition, state governments are likely to be possible plaintiffs under EISA. For example, California is particularly active in bringing suit in climate change litigation. The plaintiffs in the recent Supreme Court decision in *Massachusetts v. EPA*[240] are of the kind who will bring suit under a citizen suit provision. In that case, plaintiffs included states, cities, and

---

236 *See supra* Part III.

237 *See supra* Part III.B.

238 *See supra* Part III.A.

239 Joseph Smith & David Shearman, Climate Change Litigation 14–15 (2006).

240 Massachusetts v. EPA, 127 S. Ct. 1438 (2007).

environmental groups, all of whom brought suit under the citizen suit provision of the CAA in an effort to force the EPA to regulate GHG emissions.[241]

ii. Possible Defendants

Possible defendants under the proposed citizen suit provision of EISA will likely be manufacturers of cars and appliances regulated by the Act, and the government agencies charged with various tasks under the Act, namely the Departments of Transportation and Energy.[242] Manufacturers are required to abide by various fuel economy standards and energy efficiency standards. A manufacturer found to be in violation of those standards will likely be the type of defendant envisioned by the proposed citizen suit provision of EISA. In addition, agencies charged with nondiscretionary duties under EISA will also be possible defendants if they are alleged to have failed to comply with those duties. For example, the Secretary of Transportation may serve as a possible defendant if he fails to set fuel economy standards as mandated by EISA. *Massachusetts v. EPA* also serves as a prime example of the types of parties that serve as typical defendants in citizen suits. In that case, the defendants included the EPA, as well as a consortium of automobile industry representatives.[243]

iii. Possible Causes of Action

A citizen-plaintiff suing under the proposed citizen suit provision of EISA can assert one of several general types of claims. First, he can sue a manufacturer for violating a specific mandate of the Act, such as a fuel economy standard for automobiles or an energy efficiency standard in the case of appliances. Second, he can sue a government agency for failure to perform a nondiscretionary duty under the Act. For example, if the Secretary of Energy is not developing and implementing R&D programs dedicated to alternative sources of energy as mandated by EISA, a citizen-plaintiff will be allowed to bring suit to force him to comply with the Act. In the absence of any

---

241 Plaintiffs included Massachusetts, California, Connecticut, Illinois, New Jersey, Maine, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, the District of Columbia, the cities of New York and Baltimore, Environmental Advocates, Friends of the Earth, Environmental Defense, and Greenpeace, among others. *See* Petition for Writ of Certiorari, *Massachusetts v. EPA*, 127 S. Ct. 1438 (No. 05-1120).

242 *See* SMITH & SHEARMAN, *supra* note 239, at 17.

243 Defendants included EPA, the Alliance of Automobile Manufacturers, National Automobile Dealers Association, and Truck Manufacturers Association, among others. *See* Petition for Writ of Certiorari, *supra* note 241.

mandatory obligations for the reduction of GHG emissions, it is critically important that the government abide by its promise to research and develop alternative sources of energy as well as methods of dealing with climate change, such as carbon capture and sequestration. This is an area where environmental public interest groups can play an important role. They have the resources and expertise to monitor the progress of government R&D programs. If private groups had the ability to sue to enforce these provisions of EISA, the government would be more likely to adhere to its commitment of developing and implementing new sources of energy.

Conclusion

Global warming is happening. But it is not too late to do something about it. While EISA marks considerable progress in United States energy policy and its path towards adopting cleaner, more sustainable sources of energy, the Act can be stronger. A citizen suit provision will allow citizens to ensure that the promises of the Act are actually delivered. Given the current stance of the United States on global warming—to encourage rather than mandate solutions—EISA is especially vulnerable to lax enforcement. Without a citizen suit provision, EISA and its promise of energy independence run the risk of being empty rhetoric. That is a risk we cannot afford.