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Bennett v. Spear: A New Interpretation of the Citizen-Suit Provision

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BENNETT V. SPEAR: A NEW INTERPRETATION OF THE CITIZEN-SUIT PROVISION

I. INTRODUCTION

As society becomes more populated and complex with the passing of each day, more and more stress is created. There is conflict between individual citizens and the laws set out by our government, as evidenced by the dockets in the criminal courts across the country. There are also conflicts between individual citizens themselves, as evidenced by the dockets in the civil courts across the country. One of the sources of this conflict is the ever increasing pressure that we are placing on our environment. In the 1970’s our government recognized the need to try to preserve our environment and began to implement a number of legislative acts targeted at reducing the pressures that the business and private sectors were placing on the environment.¹

One such legislative act was the Endangered Species Act of 1973 (ESA).² The ESA was enacted by Congress as a result of the pressures and stresses that were being placed on the environment. The act was drafted in order to provide a means whereby the ecosystems upon which endangered³ and threatened species⁴ depend would be conserved, to provide a program by which these species would be preserved and to take appropriate steps to imple-

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³ The term “endangered species” means any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provision of this chapter would present an overwhelming and overriding risk to man. 16 U.S.C. § 1532(6).
⁴ The term “threatened species” means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. 16 U.S.C. § 1532(20).
ment international treaties and conventions for the conservation of threatened and endangered species.\(^5\)

The Endangered Species Act was the predominate legislation that gave rise to *Bennett v. Spear*.\(^6\) This case arose as a result of a conflict in Oregon between ranch operators, certain irrigation districts, the Fish and Wildlife Service and the Bureau of Reclamation.\(^7\) The root of the conflict was the Klamath Irrigation Project and the determination that such project might affect two endangered species.\(^8\) The petitioners, irrigation districts that depended on water from the Klamath Project and operators of ranches in those districts, brought suit under section 1540(g)(1) of the ESA claiming that the jeopardy determination of the two endangered species and the imposition of a minimum water level requirement violated certain sections of the ESA.\(^9\) This suit was unprecedented in that the petitioners were seeking relief under the "citizen-suit" provision of the ESA, not in an effort to protect an endangered species or a critical habitat, but rather to challenge the overprotection of such species that would have a detrimental effect on the petitioners.

This Note examines the effect the Supreme Court's decision in *Bennett v. Spear* will have when the analysis used is applied to other environmental acts that include citizen-suit provisions. In particular, this Note will address how this decision might affect the protection of wetlands under the Clean Water Act.\(^10\) First, this Note will provide a review of the decision in *Bennett v. Spear*. Second, this Note will discuss the significance of wetlands and the Clean Water Act. Next, this Note will explain the history of the citizen-suit provision that is a part of so many environmental acts. This Note will also examine the actual language of the citizen-suit provisions of the ESA and the Clean Water Act and how the language of these acts might be interpreted in a similar manner. The Note concludes that, although legally sound, the Supreme Court's decision in *Bennett v. Spear* compromises the very reason that the ESA, the Clean Water Act, and other environmental acts were drafted: to protect and preserve the environment.

\(^7\) Id. at 1157.
\(^8\) Id.
\(^9\) Id.
The petitioners, irrigation districts receiving water from the Klamath Irrigation Project and operators of ranches in those districts, filed this action in the United States District Court for the District of Oregon under the citizen-suit provision of the Endangered Species Act alleging violations of the Act concerning the proposed use of reservoir water to protect two endangered species. The case was dismissed by Chief Judge, Michael R. Hogan and appeal was taken. The Court of Appeals for the Ninth Circuit affirmed the trial judge's dismissal of the case. Certiorari was granted and the Supreme Court held that: (1) zone-of-interests test of prudential standing did not preclude ranchers and irrigation districts from bringing claims under citizen-suit provision of ESA expressly allowing any person to bring civil action to enforce ESA; (2) rancher and irrigation districts alleged sufficient injury in fact, and that their injury from reduced water for irrigation was fairly traceable to Fish and Wildlife Service's biological opinion, for purposes of establishing Article III standing; (3) claim alleging that Secretary of Interior failed to consider economic impact of critical habitat designation was reviewable under citizen-suit provision of ESA; and (4) claim that biological opinion failed to comply with ESA's requirement for use of best scientific and commercial data available was reviewable under Administrative Procedure Act (APA).

The petitioners brought the suit to challenge the biological opinion that was issued by the Fish and Wildlife Service, in accordance with the ESA, in regards to the Klamath Irrigation Project and the project's potential impact on two species of endangered fish. The issue before the court was one of first impression as no party had before attempted to use a citizen-suit provision in order to challenge the overprotection of the environment to the detriment of that party. Before the decision in this case, only individual citizens and environmental groups had used these citizen-suit provisions in an attempt to protect or preserve the environ-

11. See infra Section IV for discussion of the history of citizen-suit provisions.
13. Id.
14. Id.
15. Id.
16. Id. at 1158 (The biological opinion was issued in accordance with the Endangered Species Act of 1973 (ESA), 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-1544 (1994.).)
ment or a particular species. The issue before the Bennett Court was whether the petitioners, who had economic and other interests affected by the biological opinion, had standing to seek judicial review of the biological opinion under the citizen-suit provision of the ESA\textsuperscript{17} and the Administrative Procedure Act (APA).\textsuperscript{18}

A. ESA Background

In order to understand the case it will be necessary to first examine the basic procedures required by the ESA when a particular project could possibly affect an “endangered” or “threatened” species. Under the ESA, the Secretary of Interior has the duty to list all species of animals that are “threatened” or “endangered”\textsuperscript{19} and to designate their “critical habitat.”\textsuperscript{20} If any agency determines the action it proposes to take may adversely affect a listed species, it must formally engage the Fish and Wildlife Service (hereinafter referred to as “Service”) for consultation.\textsuperscript{21} The Service must provide the agency with a written statement called a Biological Opinion which explains how the proposed action might affect the species or habitat.\textsuperscript{22} If the Service determines that the project could “jeopardize the continued existence of any species or result in the destruction of [critical habitat],”\textsuperscript{23} then the Opinion must discuss any “reasonable and prudent alternatives that the Service believes will avoid the adverse consequence.”\textsuperscript{24}

\begin{itemize}
\item \textsuperscript{17} 16 U.S.C. § 1540(g)(1).
\item \textsuperscript{18} Bennett, 117 S. Ct. at 1159.
\item \textsuperscript{19} See supra notes 3 and 4 for the criteria used to determine if a particular animal is “endangered” or “threatened”.
\item \textsuperscript{20} Bennett, 117 S. Ct. at 1159. (The term “critical habitat” is defined as the specific areas within the geographical area occupied by the species, at the time it is listed . . . [as threatened or endangered] on which are found those physical or biological features essential to the conservation of the species and which may require special management considerations or protection. Specific areas outside the geographic area occupied by the species can also qualify is the Secretary determines that such areas are essential to the conservation of the species. 16 U.S.C. § 1532(5)).
\item \textsuperscript{21} Id. (citing 50 C.F.R. § 402.14).
\item \textsuperscript{22} Id. (citing 16 U.S.C. § 1536(b)(3)(A)).
\item \textsuperscript{23} Id. (citing 16 U.S.C. § 1536(a)(2)).
\item \textsuperscript{24} Id. (citing 16 U.S.C. § 1536(b)(3)(A)).
\end{itemize}
B. Factual Basis and Procedural History

The Klamath Project is a series of lakes, rivers, dams and irrigation canals that run between northern California and southern Oregon.25 The project is under the administration of the Bureau of Reclamation, and in 1992 the Bureau notified the Service that the project might affect two species of fish that were on the endangered species list.26 After researching the project, the Service determined that the long-term operation of the project was likely to jeopardize the existence of the two endangered species of fish.27 The Service recommended several measures that it believed would avoid the jeopardy to the species, which included the maintenance of minimum water levels on two of the reservoirs that were included in the project.28 Pursuant to this recommendation, the Bureau decided to comply with the Service's Biological Opinion.29

The petitioners claim that there is a complete lack of any commercial or scientific evidence indicating that the continued operation of the project will have any adverse effect on the named species or that the compliance with the Biological Opinion will have any beneficial effect on the populations of these same species.30 The petitioners claim a competing interest in the very water that the Biological Opinion claims is vital to the preservation of the endangered fish. The district court dismissed the action because the petitioners' interests were outside of the "zone of interests"31 that were meant to be protected by the ESA and thus they lacked standing.32 The court of appeals affirmed, saying that the petitioners were outside the class of people that could obtain relief either under the ESA or the APA and that only those that allege an interest in the preservation of endangered species could maintain a suit under these provisions.33 After granting certiorari, the Supreme Court addressed two questions: (1)

25. Id.
27. Id.
28. Id.
29. Id.
30. Id. at 1159 - 1161.
31. The "zone of interests" formulation tests "whether the interest sought to be protected by the complainant is arguably within the zone of interest to be protected by the statute or constitutional guarantee in question." Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970).
32. Bennett, 117 S. Ct. at 1160.
33. Id. (The Administrative Procedure Act (APA) authorizes a court to "set aside agency action, findings, and conclusions found to be . . . arbitrary,
whether the "zone of interests" test applies to claims brought under the citizen-suit provision of the ESA; and (2) if so, whether the petitioners have standing notwithstanding the fact that they seek to advance economic rather than environmental interests. 34

Petitioners' complaint raised three claims that are relevant to this Note. The first two claims alleged the Service's determinations and the resulting minimum water level imposition violated section 7 of the ESA. 35 The third claim alleged that section 4 of the ESA was violated because it failed to take into account the designation's economic impact. 36 The petitioners contended that their claims could be brought under both the ESA and the APA, but the ESA would be more beneficial to the petitioners because it allowed them to recover litigation costs when the court deemed it appropriate 37 and because the APA only allows recovery when "there is no other adequate remedy in a court." 38

C. Standing

For the preceding reasons, the Court addressed the ESA claims first. 39 The court determined that in order for the petitioners to have standing to seek judicial review they must meet the Article III "case" and "controversy" requirements as well as the judicially self-imposed requirement of the "zone of interests" test. 40 The court points out that the breadth of the zone of interests test varies depending on the provisions of law at issue. 41 For

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34. Id.
35. Id. (The petitioners alleged a violation of the following provision, in pertinent part, "Each Federal Agency shall, . . . In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available." 16 U.S.C. § 1536(a)(2)).
36. Id. ("The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, and other relevant impact, of specifying any particular area as critical habitat (emphasis added)." 16 U.S.C. § 1533(b)(2)).
37. Id. (citing 16 U.S.C. § 1540(g)(4)).
38. Id. at 1161 (citing 5 U.S.C. § 704).
39. Bennett, 117 S. Ct. at 1161.
40. Id. (Article III refers to the Article III of the United States Constitution. For an in depth discussion of the "zone of interests" test see Stanford A. Church, Note, A Defense of the "Zone of Interests" Standing Test, 1983 Duke L.J. 447 (1983)).
41. Id.
example, obtaining judicial review of administrative action under the "generous review provisions" of the APA would be easier than obtaining review under many other statutes when using the same zone of interests test. The zone of interests test applies unless expressly negated. The language of the ESA citizen-suit provision is extremely broad when compared with other language that Congress normally uses. In fact, the Court held that the term "any person" should be construed not only to include environmentalists, but also those asserting overenforcement of the ESA.

There are several reasons to for such an expansive reading of the term "any person." First, the overall subject matter of the ESA is the environment, "a matter in which it is common to think all persons have an interest." Secondly, the Court reasoned that Congress intended this Act to be enforced by so called "private attorneys general" as evidenced by the elimination of the amount in controversy and the diversity of citizenship requirements as well as the addition of a provision for the recovery of litigation costs. The Court then noted that standing can be expanded beyond the particular applicable test as evidenced by its decision

42. Id. (citing Clarke v. Securities Indus. Assn., 479 U.S. 388, 400, n.16 (1987)).
44. 16 U.S.C. § 1540(g) in pertinent part, states as follows:
(1) Except as provided in paragraph (2) of this subsection any person may commence civil suit on his own behalf –
(A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof; or . . . (C) against the Secretary where there is a failure of the Secretary to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary. The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation, or to order the Secretary to perform such act or duty, as the case may be . . .

45. Bennett, 117 S. Ct. at 1162.
46. Id.
47. Id.
in *Trafficante v. Metropolitan Life Ins. Co.*, which held that standing was expanded to the full extent permitted under Article III by a provision of the Civil Rights Act of 1968 that had similar "any person" language. The *Bennett* Court then held as follows:

It is true that the plaintiffs here are seeking to prevent application of environmental restrictions rather than implement them. But the 'any person' formulation applies to all the causes of action authorized by section 1540(g) . . . not only to actions against the Secretary asserting underenforcement under section 1533, but also to actions against the Secretary asserting overenforcement under section 1533.

**D. Further Analysis**

The Government also advanced several alternative grounds by which the Court could uphold the dismissal of the petitioners' suit. Although the district and appellate courts found the zone of interests test to be dispositive, because the other issues were fully briefed and argued before the Court, the Court exercised its discretion to consider them rather than remand them for disposition at a lower level. The first contention was that the complaint failed to satisfy the standing requirements imposed by Article III. Next the respondents argued that the petitioners were not entitled to judicial review under the ESA's citizen-suit provision under "subsection (A) because the Secretary is not 'in violation' of the ESA, and under subsection (C) because the Secretary had not failed to perform any nondiscretionary duty under section 1533."

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49. *Bennett*, 117 S. Ct. at 1162-1163 (The Civil Rights Act, which was at issue in the *Trafficante* case allows "any person" who has been injured by a discriminatory housing practice to bring suit for violation of the Act. This very same "any person" language is used in the ESA which allows "any person" to commence a civil suit to enjoin any person from violating the Act.).

50. *Id.* at 1163 (The term "Secretary" as it is used in the context of the ESA means the Secretary of Interior or the Secretary of Commerce as program responsibilities are vested pursuant to the provisions of the Reorganization Plan Numbered 4 of 1970 . . . 16 U.S.C. § 1532(15) (1994)).

51. *Id.*

52. *Id.*

53. *Id.* at 1163-1165 (The Court, however, found that the petitioners had adequately met the Article III standing requirements. This determination will not be further discussed as it is not relevant to the scope of this Note.).

54. *Id.* at 1165. *See supra* note 42 for the text of the relevant portions of the ESA citizen-suit provision.
The Court held that the petitioners claims under Section 1533(b)(2) were reviewable because the government failed to "take into consideration the economic impact and other relevant impact" and failed to use "the best scientific data available" as this was not a discretionary duty of the Secretary. The Court also determined section 1540(g)(1) limited recovery to violations of section 1533; therefore recovery could not be had for violations of section 1536 under any provision of the ESA alleged in the complaint. To complete its analysis, the Court had to determine if petitioners' section 1536 claims could be brought under the APA.

The APA provides for judicial review of all "final agency action for which there is no other adequate remedy in a court," and applies universally "except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." The Court found no indication that the ESA citizen-suit provision in anyway precluded the application of the APA.

To determine the zone of interest standing requirement under the APA one must look to the substantive provisions of the legislation in question, here the ESA, and the complaint that gave rise to the action. "Whether the plaintiff's interest is 'arguably . . . protected . . . by the statute' within the meaning of the zone-of-interests test is to be determined not by reference to the overall purpose of the Act in question (here species preservation), but by reference to the particular provision of law upon which the plaintiff relies." Thus, the Court held that the lower courts' determinations were

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55. See supra note 36 for the text of this section.
56. Bennett, 117 S. Ct. at 1165-66 (Under Subsection (C) of 16 U.S.C. 1540(g)(1), recovery can only be had where the Secretary has failed to perform a duty under section 1533 which is not discretionary with the Secretary. The Court determined that the "shall" language used in section 1533(b)(2) made such duties an obligation, rather than discretionary.).
57. Id.
58. Id. at 1167.
59. Id. (citing 5 U.S.C. §§ 701(a) and 704 (1994)).
60. Id.
61. Id. (The APA is simply a statute that gives plaintiffs standing to challenge the violation of other substantive statutes such as the ESA; therefore you must look to the underlying statute to see if the interest sought to be protected by the complainant is within the zone of interests to be protected by that statute.).
62. Bennett, 117 S. Ct. at 1167 (The Court goes on to quote one of its earlier decisions on that same proposition: "the plaintiff must establish that the injury he complains of . . . falls within the 'zone-of-interests' sought to be protected by
nation that the petitioners failed to meet this standing requirement (because petitioners were not seeking to vindicate the preservation of species) was in error because the lower courts applied the zone of interests test incorrectly. 63

Finally, the respondents argued that the “Biological Opinion” did not constitute final agency action. 64 Two conditions must be met for agency action to be final: “[F]irst, the action must mark the ‘consummation’ of the agency’s decision making process, 65 . . . it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’” 66 The Court determined that both of these requirements were met and that petitioners had standing to seek recovery under the APA. 67

III. WETLANDS AND THE CLEAN WATER ACT

Much like the Endangered Species Act that was at issue in Bennett, there are many other legislative acts that have been adopted to help protect and preserve the environment. One such legislative act is the Federal Water Control Act Amendments passed in 1972 by Congress. 68 This legislation is now generally known as the Clean Water Act (CWA). The CWA was enacted in order “to restore and maintain the chemical, physical, and biological integrity of the Nation’s Waters.” 69 In order to achieve this goal, the CWA prohibits the discharge of any pollutants, including dredged or fill material into navigable waters, except in accordance with the Act. 70 By prohibiting the discharge of any pollu-

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63. Id.
64. Id.
65. Id. at 1168 (citing Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948)).
66. Id. (citing Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 71 (1970)).
67. Id. at 1168-69 (The first requirement was uncontested and the second requirement was met because the Biological Opinion and the Incidental Take Statement legally altered the authority of the agency by giving them the authority to “take” the endangered species.).
68. Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251-1387 (1994)). (The act was originally enacted in 1948 and has since been amended several times.).
70. § 1311(a).
tants into certain areas the Act serves to protect one of the most valuable natural resources that we have, wetlands.

Wetlands are "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and under normal conditions do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas." Wetlands are located between upland areas and deep water areas, such as oceans, bays, rivers and lakes.

Wetlands serve a number of different functions. They recycle pollutants, purify water by holding nutrients, provide flood and storm protection to upland areas by blocking storms and serving as rainwater runoffs. They also provide vital food resources and habitat for wildlife and fish.

Congress expressed at the time of the 1977 amendments to the CWA:

The wetlands and bays, estuaries and deltas are the Nation's most biologically active areas. They represent a principal source of food supply. They are the spawning grounds for much of the fish and shellfish which populate the oceans, and they are passages for numerous upland game fish. They are also nesting areas for a myriad of species of birds and wildlife. The unregulated destruction of these areas is a matter which needs to be corrected and which implementation of section 404 has attempted to achieve.

Section 404 of the CWA authorizes the Secretary of the Army, acting through the Corps, to issue permits for the discharge of dredged or fill material at specified locations. These permit decisions are made on the basis of guidelines developed by the Administrator of the Environmental Protection Agency (EPA) and the

71. 33 C.F.R. § 323.2(c) (1987).
73. Id. (citing United States v. Riverside Bayview Homes, 474 U.S. 121, 134-135 (1985). See also Phillip M. Bender, Slowing the Net Loss of Wetlands: Citizen-Suit Enforcement of Clean Water Act § 404 Permit Violations, 27 ENVTL. L. 245, 251 (Wetlands serve many valuable functions for people of the United States.).
74. Id.
77. 33 U.S.C. § 1344(a).
78. 40 C.F.R. § 230.
Corps. The initial decision of whether or not to issue a section 404 permit is made by the Corps, but the Administrator of the EPA has been granted the authority to prohibit, deny, or restrict a Corps-issued permit for a particular site.

Enforcement of the CWA is shared between the Corps and the EPA. The Corps has the authority to contact violators and can then determine whether legal action needs to be taken. Similarly the EPA can issue compliance orders, commence enforcement actions, and levy administrative penalties. The CWA also has a third method of enforcement. A citizen-suit provision was included as part of the enforcement mechanism of the act.

IV. HISTORY OF THE CITIZEN SUIT

The "citizen-suit" concept was born in the Clean Air Act. The citizen suit met great resistance when it was first proposed as a part of the Clean Air Act. Because of the strong interest and feelings about environmental legislation in the late 60's and early 70's it became politically impossible to oppose the citizen suit. The proponents of the provision eventually won out on the argument that it was an essential tool by which to remedy the ever increasing problem of the enforcing agencies' inability to control the huge number of violations of the environmental legislation.

It has since been included in almost all environmental legislation enacted after the Clean Air Act. As one commentator put it, "cit-
izen enforcement was to be a major balance wheel in the complex new regulatory machinery."89

Citizen suits have several characteristics that make them such an important part of ensuring that environmental statutes are complied with. Because they are funded by the citizen or group that brings them,90 they are free from the budgetary constraints that can bind governmental enforcement of environmental policy violations.91 In addition to the monetary constraints, governmental agencies are for the most part, because of the complexity of their policies, very slow when it comes to enforcement.92 Citizen suits help to remedy this by allowing swift attack by those unencumbered citizens who have an interest in stopping violators from continuing their violative behavior.93 Over the years, citizen-suit provisions have become a very useful and productive enforcement mechanism.94 Without citizen-suit provisions many violators would go unpunished because they could be fairly assured that the governmental enforcement mechanisms probably would not find the violation and even if they did, they would not have the resources to force the discontinuance of the violation. This is true because, many times, even when the violations are brought to the attention of the appropriate governmental agency, that agency fails to investigate and subsequently punish the violator because of the above mentioned limited resources of these agencies.95 Due to the above mentioned factors, citizen suits are an essential element of the enforcement scheme of most environmental legislation.96

V. THE CLEAN WATER ACT'S CITIZEN-SUIT PROVISION

In light of the successes of citizen-suit provisions in other environmental legislation, the Clean Water Act included such a

89. Bender, supra note 73, at 264 (citing Miller, supra note 85).
90. Most citizen-suit provisions contain a mechanism whereby the successful party can recoup litigation costs including attorneys fees from the offending party at the judges discretion.
91. Bender, supra note 73.
92. Id.
93. Id.
94. Id.
95. Id. at 265-266.
96. Id. at 266.
provision in order to aid in enforcement of the Act. Section 1365 of Title 33 of the United States Code states:

any citizen 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 be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator 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.97

Citizen is defined as "a person or persons having an interest which is or may be adversely affected."98

The Court in Bennett commented on the tremendous breadth of language from the ESA that is very similar to the language expressed above. The CWA language is slightly more limiting than the ESA language in that it requires the plaintiff to have an interest which is adversely affected. In actuality this distinction is of no consequence because in order to maintain a suit, the plaintiff must meet the Article III Constitutional standing requirements in addition to falling within the statutory limits. This is evidenced by the Bennett Court's discussion of Article III standing requirements in addition to the judicially determined "zone of interests" test that it applied.99 The Article III "case" and "controversy" requirements require the plaintiff to have "injury in fact" in order to maintain an action;100 therefore, a potential plaintiff would not have any different standing requirements simply based on the language difference in the CWA and the ESA.

The CWA citizen-suit provision also contains notice,101 venue,102 and recovery-of-litigation-costs103 provisions that are similar to those found in the ESA. The CWA recovery of litigation cost provision varies slightly from that of the ESA in that the CWA only allows for recovery of costs to "any prevailing or substantially prevailing party" whereas this limitation is not found in the

98. § 1365(g).
100. Id.
102. § 1365(c).
103. § 1365(d).
The jurisdictional clauses contained in both acts are similar in that they both eliminate the normal amount in controversy or diversity of citizenship requirements that are usually required to get into the federal court system.  

The CWA citizen-suit provision seems to give a similar class of plaintiffs the power to enforce the Act as does the ESA citizen-suit provision. In light of the similar nature of the key clauses contained in the citizen-suit provisions in both the ESA and the CWA, it appears that a plaintiff will be able to maintain an action seeking not only to protect the environment, but also when seeking to prevent the overprotection of the environment. If this interpretation of the provisions is correct, what practical effect will this have on the CWA's ability to successfully continue to accomplish its purpose of "restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters"?

As the above discussion indicates, wetlands are a key component in maintaining the high water quality that the CWA was enacted to ensure. How will the Court's interpretation of the ESA citizen-suit provision in *Bennett*, affect the preservation of wetlands across our country? Only time will adequately answer this question.

One possible consequence involves the denial of section 1344 permits (permit to fill wetlands). Individuals who wish to challenge the denials have been forced to do so under the Administrative Procedure Act because the citizen-suit provision of the CWA does not expressly grant the right to judicial review based on a section 1344 violation. Nowhere in the provision is section 1344 mentioned when other sections of the Act are expressly included. Under the definition of "effluent standard," the CWA citizen-suit

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104. § 1365(d).
105. 33 U.S.C. § 1365(a); 16 U.S.C. § 1540(g).
107. Given the widespread use of the citizen-suit provision in some seventeen environmental legislative acts, it is obviously beyond the scope of this Note to explore all the possible ramifications that the decision in *Bennett* could have on environmental legislation in general. In fact, the Clean Water Act itself is too broad in and of itself to be fully explored in this Note. This Note is only attempting to point out the great effect that the *Bennett* Court's interpretation of the citizen-suit provision could have and to give a few examples of how the same provision could specifically affect wetlands through the section 404 permitting process. Dredge and fill permits, which are commonly called section 404 permits, are governed by the legislation that is codified today in 33 U.S.C. § 1344.
provision expressly gives plaintiffs wishing to bring suit for the violation of sections 1311, 1312, 1316, 1317, 1341, 1342, 1323, and 1345 the right to do so.\textsuperscript{109} It has been argued that a citizen suit action should be able to be brought for a violation of section 1344 because of the overall intent of the act to protect the environment.\textsuperscript{110} Nevertheless, a citizen suit has, to date, not been successfully maintained by a plaintiff attempting to enforce violations of section 1344.

Even though a citizen suit to enforce section 1344 violations is not expressly authorized, there is another angle that a potential plaintiff could argue. As previously discussed, the decisions to grant or deny a particular application for a dredge and fill permit (section 1344) are made on the basis of guidelines that are delineated in 40 C.F.R. \S\ 230 and 33 C.F.R. \S\ 320. Section 320.4 describes the general policies for evaluating permit applications and it begins as follows, "[t]he following policies shall be applicable to the review of all applications."\textsuperscript{111} Under the Public Interest review this section says:

\begin{quote}
[t]he benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonable foreseeable detriments . . . . All factors which may be relevant to the proposal must be considered including the cumulative effects thereof: among those are conservation, economics, aesthetics . . . and, in general, the needs and welfare of the people.\textsuperscript{112}
\end{quote}

Now, keep in mind that the CWA citizen-suit provision authorizes suit against the Administrator where the Administrator fails to perform any nondiscretionary duty.\textsuperscript{113} The Court in Bennett held that "shall" was language that indicated an obligation rather than discretion.\textsuperscript{114} Given that the language of section 320.4 provides that the policies "shall" be applicable and then delineates that "all" relevant factors must be taken into consideration including "economics" and the "needs and welfare of the people," depending on the fact pattern, a potential plaintiff could make a case under the CWA citizen-suit provision claiming that the Administrator failed to take into account his economic interests in denying

\begin{footnotes}
\item[109] 33 U.S.C. \S\ 1365(f).
\item[110] For a full discussion of why citizen suits should be allowed to enforce \S\ 1344, see Bender, \textit{supra} note 73.
\item[111] 33 C.F.R. \S\ 320.4 (1997).
\item[112] \textit{Id}.
\item[113] 33 U.S.C. \S\ 1365(a)(2) (1994).
\item[114] Bennett, 117 S. Ct. at 1165-66.
\end{footnotes}
the issuance of a 404 permit. The hypothetical situation described above is similar to the scenario in Bennett, a case in which the plaintiff successfully obtained judicial review under the citizen-suit provision of the ESA.

The specifics of the above example are really not all that significant. What is important is the fact that the Bennett decision opens the door to a type of suit that potential plaintiffs can bring that will effectively reduce the efficiency by which the EPA and the Corps will be able to regulate the issuance of section 404 permits. As discussed above, the resources of these governmental agencies are limited. As a result, they are already, without the added burden of defending these types of suits, forced to pick and choose which enforcement battles they are able to fight. It was also discussed above that the very reason that citizen-suit provisions were implemented was to aid the governmental agencies in the enforcement of violations of these environmental acts. The purpose of implementing these citizen-suit provisions was to further the overall goal of the legislative acts themselves: the protection and preservation of the environment.

VI. SOLUTION

The decision of the Bennett Court is legally sound. The Court relies on a long line of judicial precedent and a well reasoned scheme of statutory interpretation that has been used to interpret legislation of all types. When interpreting a statute to see if the plaintiff asserts an interest that is within the "zone of interests" test, the proper analysis focuses not on the overall purpose of the Act, but rather the purpose of the particular provision upon which the plaintiff relies.

It appears that the solution does not lie with the judiciary, but rather with the legislature. If the legislature is dissatisfied with the effect that this decision has on the overall purpose of the environmental acts that contain these citizen-suit provisions, it can easily amend the legislation. The amendments would not have to create sweeping change or drastically alter how any of these acts are carried out. In fact, a simple addition that limited the class of

115. See Bender, supra note 73, at 261 (Enforcement is a low priority partly because of budgetary constraints.).
116. Even the Court in Bennett, recognizes that the overall purpose of the legislation is the environment. See Bennett, 117 S. Ct. at 1162.
117. See Bennett, 117 S. Ct. at 1167 (citing Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970)).
people that could bring the citizen suits to those that were seeking to further the overall purpose of the legislation would adequately resolve the issue.

This type of amendment would not greatly restrict the rights of those individuals that wished to challenge the effect of certain governmental actions under the authority of any of these acts. All final agency decisions are currently subject to judicial review under the APA. The proper inquiry under the APA is whether the particular governmental agency's determination or action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." This method of obtaining review is widely used.

In addition to review under the APA, potential plaintiffs also have all of the common law rights of action that can be brought to obtain judicial review. The CWA citizen-suit provision expressly states that nothing in the section shall restrict any statutory or common law right that any person might use to seek enforcement of any limitation or standard imposed by the Act.

A party that seeks judicial review of an agency action that is precluded from receiving such review based on the citizen-suit provision in the applicable act, does have other options. It is, however, important to remove the citizen suit as an additional tool that can be used to thwart the very purpose for which these environmental legislative acts were enacted. This tool does not need to be available, among other reasons, because it not only removes the usual amount in controversy and diversity requirements necessary to get into federal court, it also provides for the recovery of litigation costs.

119. § 706(2)(A).
120. See Child v. United States, 851 F. Supp. 1527, 1534 (D. Utah 1994) (APA used to review final agency action); see also Bersani, v. United States Environmental Protection Agency, 674 F. Supp. 405, 412 (N.D.N.Y 1987); See also Town of Norfolk v. United States Army Corps of Engineers, 968 F.2d 1438, 1445 (D. Mass 1992); See also Bailey v. United States, 647 F. Supp. 44, 46 (D. Idaho 1986); There are countless other cases where the APA was used in order to gain judicial review of an agency determination.
121. These rights are of course subject to the limitations of the Eleventh Amendment and the concept of governmental sovereign immunity.
122. 33 U.S.C. § 1365(e).
VII. CONCLUSION

“There can be no doubt today that every effort must be made individually and collectively to protect our natural heritage, and to pass it to future generations unspoiled. The destruction of ancient civilizations by human misuse of the environment, such as that at Ephesus, teaches the need for public policies that work within the natural environment, rather than attempt radically to alter it.”123 There is no doubt our wetlands are a very valuable resource that we, as a society, need to make every effort to protect. Wetlands are part of a much larger picture; therefore, when they are filled to build houses, malls, etc. in the “pursuit of progress,” we actually digress.

The Bennett Court’s holding that a citizen suit can be maintained not only by a plaintiff seeking relief as a result of the underprotection of the environment, but also for the overprotection of the environment, is not by itself going to lead to the destruction of the environment. However, this decision does give developers, homebuilders, etc. more leverage which they can exert in order to build that new structure, or divert the course of that stream and in so doing put that much more pressure on the environment. There is no doubt that as our population grows, sacrifices will have to be made; but, we must strive to reach some kind of balance whereby we can meet our needs without depleting and destroying the environment in which we live.

Lynwood P. Evans