

ARTICLE

ENVIRONMENTAL CITIZEN SUITS AND THE INEQUITIES OF RACES TO THE TOP

by David Adelman & Jori Reilly-Diakun

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Citizen suits are filed disproportionately in a small number of states with robust environmental programs. This bias magnifies disparities across states both directly, by ensuring that standards and procedures are followed in favored states, and indirectly, by driving development with significant environmental impacts towards states in which citizen suits are rare and enforcement is less rigorous.

Among environmentalists and liberal commentators, citizen suits are lauded for their capacity to augment government enforcement and to compel ideologically antagonistic administrations to take legally required action.¹ Among skeptics, citizen suits threaten the constitutional authority of federal agencies to implement the law² and allow private organizations to take advantage of broad legislative mandates without any political accountability.³

*Editors' Note: This Article is adapted from David Adelman and Jori Reilly-Diakun, *Environmental Citizen Suits and the Inequities of Races to the Top*, 92 U. COLO. L. REV. 377 (2021), and used with permission.*

1. See Eileen Gauna, *Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice*, 22 *ECOLOGY L.Q.* 1 (1995); James R. May, *Now More Than Ever: Trends in Environmental Citizen Suits at 30*, 10 *WIDENER L. REV.* 1 (2003); William B. Rubenstein, *On What a "Private Attorney General" Is—and Why It Matters*, 57 *VAND. L. REV.* 2129 (2004); Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 *MICH. L. REV.* 589 (2005); Christian Langpap & Jay P. Shimshack, *Private Citizen Suits and Public Enforcement: Substitutes or Complements?*, 59 *J. ENV'T ECON. MGMT.* 235 (2010); Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 *VA. L. REV.* 93 (2005); Will Reisinger, Trent A. Dougherty & Nolan Moser, *Environmental Enforcement and the Limits of Cooperative Federalism: Will Courts Allow Citizen Suits to Pick Up the Slack?*, 20 *DUKE ENV'T L. & POL'Y F.* 1 (2010); Matthew D. Zinn, *Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits*, 21 *STAN. ENV'T L.J.* 81 (2002).
2. See Charles S. Abell, *Ignoring the Trees for the Forests: How the Citizen Suit Provision of the Clean Water Act Violates the Constitution's Separation of Powers Principle*, 81 *VA. L. REV.* 1957 (1995).
3. See Frank B. Cross, *Rethinking Environmental Citizen Suits*, 8 *TEMP. ENV'T L. & TECH. J.* 55 (1989); Jeannette L. Austin, *The Rise of Citizen-Suit Enforcement in Environmental Law: Reconciling Private and Public Attorneys General*, 81 *Nw. U. L. REV.* 220 (1987); Stephen M. Johnson, *Sue and*

From this perspective, rather than acting as "private attorneys general," environmental groups exploit government power for their own ends, overriding the interests of local communities and private actors.⁴

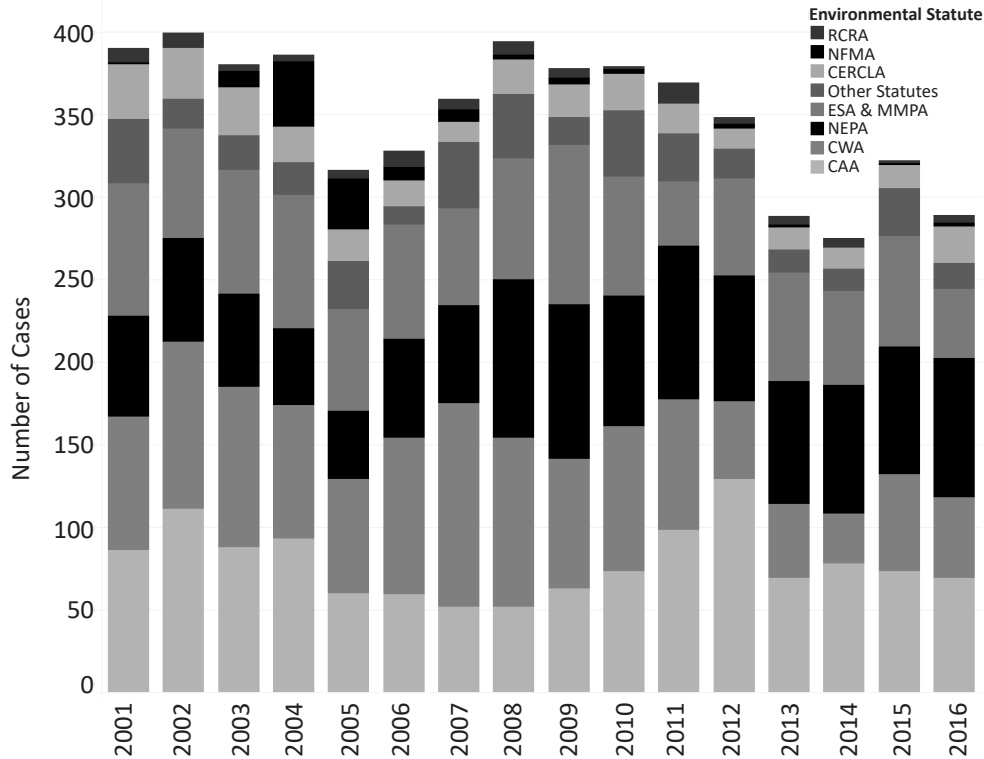
We find little evidence for either perspective for the simple reason that few citizen suits are filed annually and a relatively small proportion of them involve "retail" litigation against individual private entities. Most citizen suits operate at the "wholesale" level through challenges to major policies or programs. They are filed against the federal or a state government for regulatory violations or, more commonly, for noncompliance with statutory mandates, including nondiscretionary duties,⁵ substantive criteria, and procedural requirements.⁶ Moreover, the concentration of citizen suits in states where public support is strong for environmental programs both negates critics' concerns about conflicts with local values and highlights the socioeconomic inequities of access to this form of legal recourse.

By taking a broader perspective of citizen suits filed over two presidential administrations, we examine the connections between the structures of statutory regimes and patterns of litigation. For example, we find that almost 90% of the citizen suits filed under the Clean Air Act (CAA) involve wholesale rulemaking challenges, whereas retail litigation accounts for a similar percentage of cases under the National Environmental Policy Act (NEPA). These differences reflect the substantive and procedural elements of each statute. Recognizing the practical limits of and struc-

Settle: Demoning the Environmental Citizen Suit, 37 *SEATTLE U. L. REV.* 891 (2014); David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 *YALE L.J.* 616, 630-41 (2013).

4. See Engstrom, *supra* note 3, at 639-41.
5. Such suits can be filed under environmental statutes, such as the Endangered Species Act (ESA) §1540(g)(1)(B), 16 U.S.C. §1531 or the Clean Air Act (CAA) §7604(a)(2), 42 U.S.C. §7401 (2012), or the Administrative Procedure Act [hereinafter APA] §706(1), 5 U.S.C. §500 (2012).
6. These suits may also be filed under the APA, 5 U.S.C. §706(2) (authorizing courts to "hold unlawful and set aside agency action" found to be in violation of any of six standards of review), or a governing environmental statute, e.g., 33 U.S.C. §1369(b) (Clean Water Act (CWA)); 42 U.S.C. §6976 (Resource Conservation and Recovery Act (RCRA)); 42 U.S.C. §7607(b) (CAA).

Figure 1: Federal Environmental Cases by Year and Statute 2001-2016



tural constraints on citizen suits is therefore essential to identifying effective reforms.

I. Normative and Empirical Perspectives on Environmental Citizen Suits

Relatively few studies have been conducted on environmental citizen suits, and they are now almost all over a decade old.⁷ Most of this work has focused on cases against private or public entities alleged to be in violation of regulatory standards or protocols. Further, while studies of litigation exist under specific natural resource statutes, they often focus either on broad national statistics or litigation involving specific federal agencies, with little attention to variation across states or circuits and little consideration of differences in the nature of suits. We will show that the gaps in the empirical record explain, in part, the prevailing misperceptions about citizen suits and the divergent views about their efficacy and value.

Citizen suits may be filed against the federal government or against regulated, private third parties. Congress

believed, and proponents continue to assert, that citizen suits supplement or prod agency enforcement through “shaming [an agency] or by forcing it to intervene.”⁸ Critics have argued that citizen suits “disrupt government regulatory schemes and lead to wasteful or excessive enforcement.”⁹ Both positions are premised on empirical questions, as they turn on the balance between the benefits of supplementing government enforcement versus the potential shortcomings of overly zealous or counterproductive citizen-led suits.

The current study seeks to fill the empirical gaps in the literature by providing comprehensive estimates of the volume of litigation over time and how it varies geographically. This information is critical to informing public understanding about the influence that local politics has on the filing of citizen suits and the ways in which citizen suits complement (or frustrate) agency action and priority setting.

II. Litigation Trends Do Not Conform to Prevailing Views of Citizen Suits

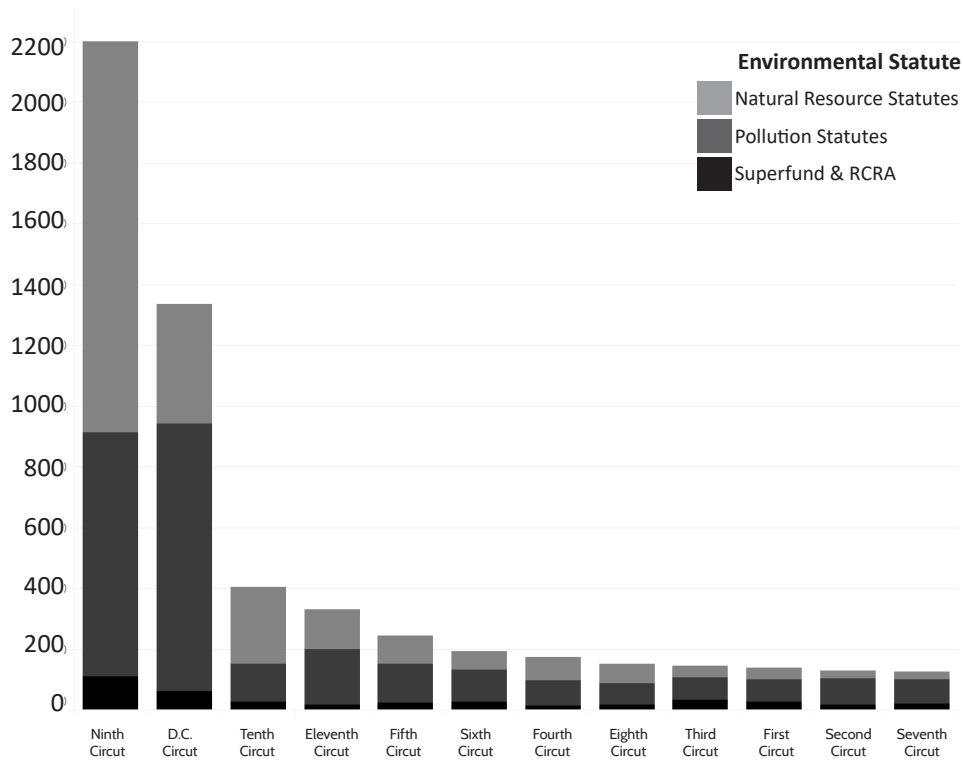
Our principal findings are that (1) the number of citizen suits filed and concentration of cases in certain jurisdic-

7. ENV'T L. INST., CITIZEN SUITS: AN ANALYSIS OF CITIZEN ENFORCEMENT ACTIONS UNDER EPA-ADMINISTERED STATUTES V-7 (1984) [hereinafter ELI]; Wendy Naysnerski & Tom Tietenberg, *Private Enforcement of Federal Environmental Law*, 68 LAND ECON. 28 (Feb. 1992); May, *supra* note 1; Kristi M. Smith, *Who's Suing Whom?: A Comparison of Government and Citizen Suit Environmental Enforcement Actions Brought Under EPA-Administered Statutes, 1995-2000*, 29 COLUM. J. ENV'T L. 359, 371 (2004); Langpap & Shimshack, *supra* note 1.

8. Stephenson, *supra* note 1, at 110.

9. Stephenson, *supra* note 1, at 106; *id.* at 114; see also Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 Nw. U. L. REV. 173, 224 (1997).

Figure 2: Litigated Cases by Class of Environmental Statute and Circuit



tions foreclose conflicts between agency priority setting and the values of local communities; (2) the practical barriers to filing citizen suits and the difficulty of obtaining attorney’s fee awards exacerbate rather than mitigate disparities across states in the implementation and enforcement of environmental laws; and (3) almost 85% of citizen suits are filed against the federal government, and a large share of these cases involve wholesale challenges to regulations, rather than retail litigation over discrete agency decisions.

The number of cases over the 16-year period of the study varied by roughly plus-or-minus 15% of the average 350 cases per year. The volume of litigation under each of the statutes has also remained relatively stable over time. The data also make clear that litigation is unevenly spread across federal environmental statutes, with more than 80% of federal environmental litigation filed under the Clean Water Act (CWA), CAA, Endangered Species Act (ESA), and NEPA, each of which accounted for roughly 20% of environmental litigation during this period.

A. Most Environmental Litigation Is in the Ninth and D.C. Circuits

The U.S. Court of Appeals for the Ninth Circuit and the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit together accounted for about 67% of the cases filed under the natural resource statutes, 60% of the pollution

statutes, and 43% of the cases filed under Superfund and Resource Conservation and Recovery Act. No other circuit exceeded 10% of the total number of cases filed over this period, and most were below 5%.

The most striking observation that emerges from the state-level data is the low volume of litigation. For natural resource statutes, just two states (California and Oregon) averaged over 10 suits per year, whereas the vast majority of states averaged in the low single digits. For the pollution statutes, only two states (California and Washington) averaged more than four cases per year and only 18 averaged more than one per year. The numbers are tiny in comparison to the number of federal actions, permits granted, and regulatory violations that occur each year.

Among the leading states, California and the District of Columbia are in a class of their own for all of the statutes (see Table 1). Oregon, Montana, and Idaho are also arguably exceptional for natural resource litigation, particularly in comparison to other similarly situated states (e.g., Wyoming and New Mexico). The variation among states with respect to the pollution statutes is striking for a different reason. Specifically, the lack of association between industrial development is notable for heavily industrialized states, such as Texas and Louisiana, as it demonstrates the disconnect between citizen suits and states with relatively lax environmental programs. Perhaps for similar reasons, the politics of the state do not appear to be a major factor when selecting a venue to file citizen suits.

Table 1: Environmental Cases Litigated in 15 Top States

Natural Resource (81%)*		Pollution (76%)		CERCLA & RCRA (67%)	
California	499	California	345	California	57
D.C.	364	D.C.	213	Washington	20
Oregon	178	Washington	148	New Jersey	19
Montana	134	Georgia	57	Ohio	15
Idaho	112	Florida	55	Pennsylvania	15
Arizona	102	New York	37	New York	14
Washington	100	Colorado	33	Texas	14
Florida	90	Oregon	33	Arizona	13
Colorado	83	Louisiana	30	Illinois	13
New Mexico	76	Pennsylvania	30	D.C.	12
Alaska	65	Wisconsin	29	New Mexico	12
Texas	46	Alabama	28	Rhode Island	11
Wyoming	45	Idaho	27	Florida	10
Nevada	44	Ohio	25	Massachusetts	10
Utah	37	West Virginia	24	Alaska	8

* The percentages for each category represent the percent of all cases in the class that were litigated in the top 10 states by volume of cases. The data reflected here represent all the cases in the DOJ database, including those for which there is no information on case outcome.

B. Environmental Plaintiffs Sue the Federal Government Far More Often Than They Sue Private Third Parties

Environmental litigation largely involves environmental organizations, companies, or individuals suing the federal government. Environmental organizations were the most common plaintiffs, participating in more than 40% of the cases, and their cases were evenly split across the natural resource and pollution statutes (see Table 2). Corporations were plaintiffs frequently, but most of their litigation was under the pollution statutes. State, local, and tribal governments (SLTs) were also important, but they filed far fewer cases and most were in a handful of states.

Figure 3 (next page) displays the litigation volumes by circuit and statute; it reveals the divergence in litigation patterns across the four classes of plaintiffs and statutes. The large number of cases under the pollution statutes filed by environmental nongovernmental organizations (NGOs) in the Ninth Circuit sets them apart from the other classes of plaintiffs, suggesting that they may be particularly sensitive to the forum. We observe broadly similar trends in the complementary Westlaw third-party-suit data; although, it shows an even higher concentration of cases filed by environmental NGOs in the Ninth Circuit and other liberal circuits.¹⁰ Together, these results conflict

10. Corporations also engage in forum-shopping, with 34% of their cases filed in the U.S. Court of Appeals for the Fifth Circuit and just 25% in the Ninth Circuit, with most of these cases representing challenges to state permitting decisions.

Table 2: Environmental Cases by Statute and Party Class

Statute	Env. NGO		Company		Trade Gr.		Individual		SLT Gov't	
	Pl.	De.	Pl.	De.	Pl.	De.	Pl.	De.	Pl.	De.
CAA	546	2	242	56	235	4	103	12	141	15
CERCLA	13	0	81	63	2	1	33	18	54	28
CWA	728	6	74	374	89	6	180	102	100	118
ESA/MMPA	223	37	15	5	22	1	21	250	22	6
NEPA	691	10	34	8	44	6	144	17	117	17
NFMA	89	0	0	0	2	0	7	0	14	1
Other	69	4	38	2	30	0	24	11	36	3
RCRA	19	1	20	8	17	1	15	5	9	11
Total	2,378	60	504	516	441	19	527	415	493	199

with critics' claims that third-party suits routinely override agency priorities and local values.

In Figure 4 (next page), we focus on the relative rates (percentages) at which plaintiffs prevailed, as opposed to the absolute number of cases won. It shows that environmental NGOs consistently succeeded at higher rates than the other plaintiff groups. This suggests that environmental NGOs were more selective in the cases they filed and undermines critics' claims that lawsuits are often filed for purely strategic reasons. There is also no association between the success rates of environmental NGOs and the number of cases they filed.

We observe a difference of about 8%¹¹ in the success rates of environmental and other NGOs between the Ninth and D.C. Circuits and all other circuits, whereas consistent differences are not observed across circuits in the success rates of the other classes of plaintiffs.¹² This observation suggests that the higher preference for the Ninth Circuit among environmental NGOs is supported empirically, and that forum is a salient factor for determining where cases are filed.

Environmental plaintiffs' focus on litigating against the federal government, outside of limited contexts, further upsets the arguments made by both critics and advocates of citizen suits. The data show that environmental plaintiffs reinforce geographic disparities in environmental protection and that most litigation surrounds high-level policy decisions by the federal government.

11. Environmental NGOs won 40% of their cases in the Ninth Circuit, 44% in the D.C. Circuit, and 32% in all other circuits; other NGOs won at similar rates as well.

12. For example, companies won 36% of their cases in the Ninth Circuit, 20% in the D.C. Circuit, and 30% in all other circuits.

Figure 3: Distribution of Environmental Litigation by Plaintiff Class

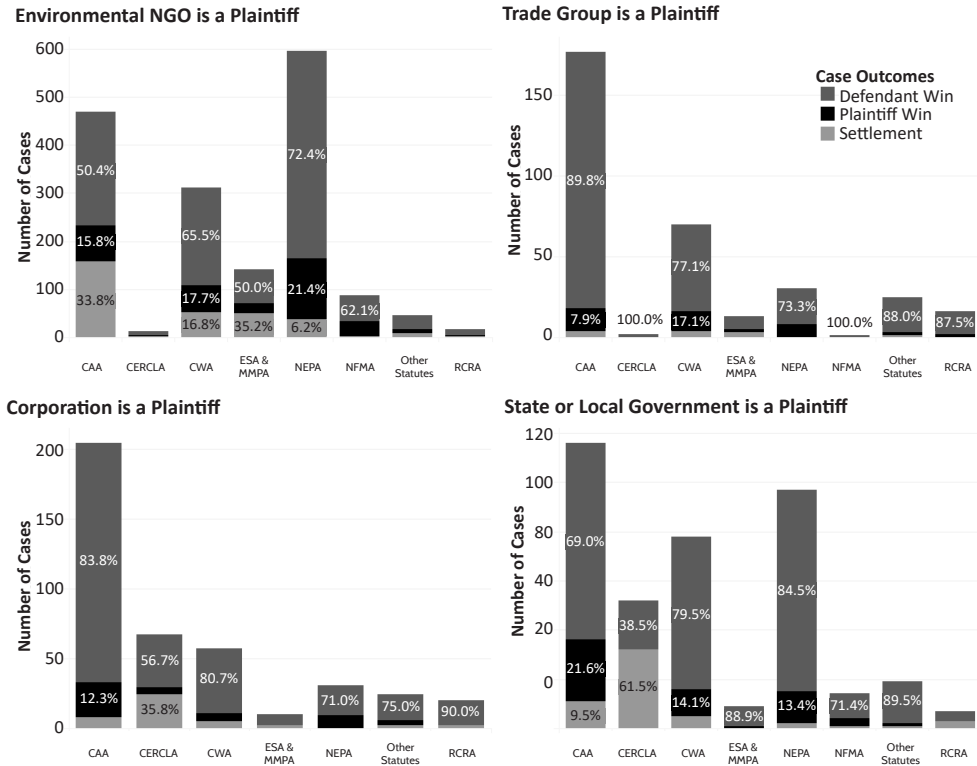


Figure 4: Case Outcomes by Statute and Class of Plaintiff

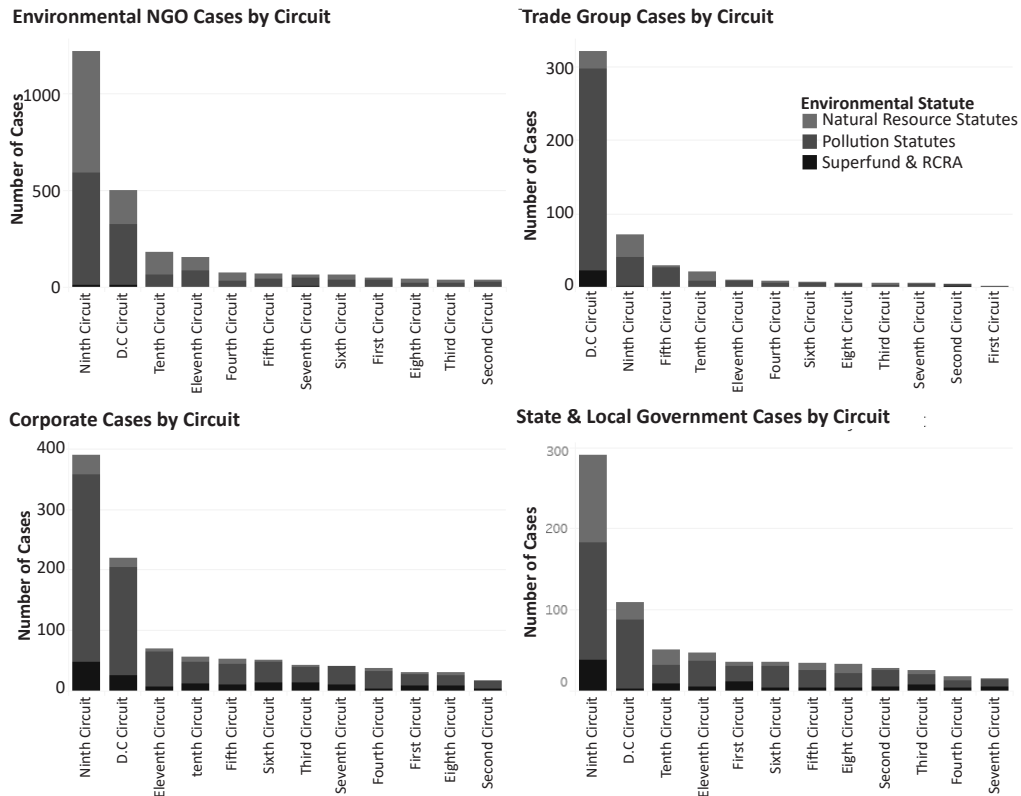


Figure 5: Average and Median Attorney Fee Awards by Year

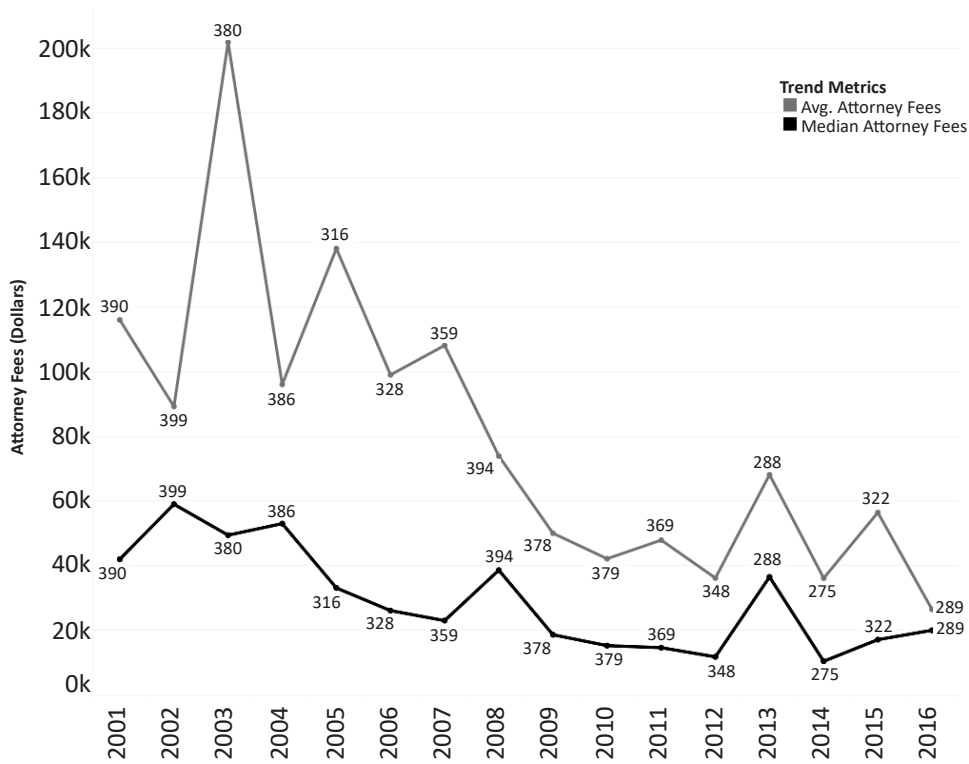
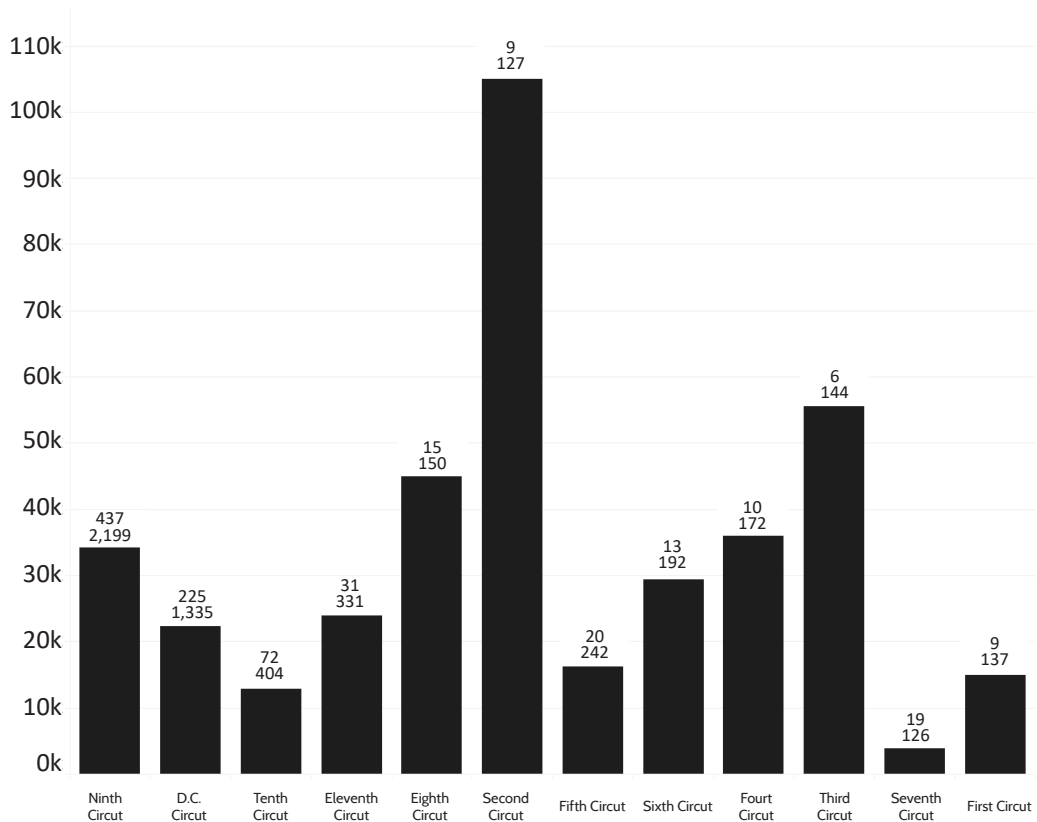


Figure 6: Median Attorney Fee Awards by Circuit



C. The Low and Declining Rates at Which Attorney Fees Are Awarded

Overall, the data suggest that environmental plaintiffs receive attorney fees in a small fraction of the cases, and that while the low rate of granting attorney’s fees is relatively stable, the average and median amount of attorney fees awarded declined substantially over the period of the study.

Somewhat surprisingly, while there is some variability in the rate at which fees were awarded,¹³ it is overshadowed by the infrequency of fee awards overall (see Figure 6).

Overall, attorney fee awards are rare and declining everywhere. Thus, the low frequency at which attorney’s fees are awarded likely exacerbates the economic barriers to filing citizen suits.¹⁴

D. Support for Environmental Policies and Perceptions About Judicial Forums Are the Strongest Determinants of Where Citizen Suits Are Filed

We conducted regressions on a broad range of explanatory variables, including the following state-level data: population, politics, amount of federal lands, number of environmental NGOs, attorney’s fee awards, number of permits, government inspection and enforcement rates, and location of a state within the Ninth Circuit. Given the substantive differences in the natural resource and pollution statutes, particularly the importance of public lands in the former and permitting in the latter, we ran regressions on the two classes of cases separately.

The strongest predictors for natural resource cases were the number of environmental organizations in the state and whether the state was located in the Ninth Circuit. Natural resource cases are filed disproportionately in states where environmental organizations are located, as well as where the judicial forum, the Ninth Circuit, is perceived to be favorable for environmental litigants. Major environmental organizations were slightly more willing to file cases in politically conservative states and, at the same time, had a greater bias towards filing cases in the Ninth Circuit.

We view the number of environmental organizations in a state as a useful proxy for public support of environmental issues, which implies that natural resource suits are more likely to be filed in jurisdictions where public support is higher. This association suggests that environmental organizations tend to be parochial; they file litigation where they and their members are located.

Table 3: Regression on Number of Cases Per State for the Natural Resource Statutes

Independent Variables	Coefficient	Standard Er.	p-value	Beta
No. Environmental NGOs	0.5115	0.0362	0.000	0.8618
Ninth Circuit	46.770	17.299	0.012	0.2382
Percent Public Lands	0.8858	0.3181	0.010	0.2312
Mean Income	-0.0019	0.0006	0.002	-0.2459
Attorney Fees Expectation	0.0010	0.0004	0.013	0.1781
PPI 538	-0.5660	0.3627	0.131	-0.1231
Intercept	83.672	41.622	0.055	–

Source: ALAN C. ACOCK, A GENTLE INTRODUCTION TO STATA 302-04 (3d ed. 2012) (describing the meaning of each of the statistics in Table 3).

Table 4: Regression on Number of Cases Per State for the Pollution Statutes

Independent Variables	Coefficient	Standard Er.	p-value	Beta
No. Environmental NGOs	0.314976	0.045568	0.000	0.768016
Ninth Circuit	53.35449	13.86705	0.001	0.340381
CWA & CAA Permits	0.008302	0.004001	0.050	0.181519
CWA & CAA Enforcement	3.768331	23.15368	0.872	0.015077
PPI 538	-0.56866	0.346738	0.115	-0.16089
Attorney Fees Expect.	0.000939	0.000853	0.283	0.092798
Intercept	-48.3089	11.63913	0.000	–

The regressions for the pollution statutes included controls for the number of permits in each state and the rigor of government inspections and enforcement in each state.¹⁵ Neither the politics of a state nor the expectation value for attorney’s fees was a significant predictor of the number of cases filed. These results indicate that litigation under the pollution statutes is also parochial and concentrated where environmental organizations are located; they also highlight once again the importance of judicial forum and specifically the Ninth Circuit.

13. The percentage of cases with fees awarded by circuit are as follows: Ninth Circuit (18.4%), U.S. Court of Appeals for the Tenth Circuit (15.5%), U.S. Court of Appeals for the Seventh Circuit (12.3%), D.C. Circuit (11.5%); the remainder of the circuits ranged between 4-9%.

14. Environmental litigation costs vary wildly depending on the complexity of the case, if experts are required, and many other factors. In 1984, ELI estimated that environmental litigation costs averaged \$40,000 per case—or put another way, between \$4,000 and \$200,000 per case. Those costs have no doubt risen significantly in the last 35 years.

15. After running regressions using several different measures of program implementation and enforcement, we find that the best metrics were the composite enforcement rates and number of permits under the CWA and CAA. None of the inspection data proved to be statistically significant.

The regression results contradict the narrative of both critics and proponents of citizen suits. Critics focus on the disruptive impact and unaccountability of citizen suits. Yet, both the volume and geographic distribution of citizen suits mitigate these concerns. Environmental litigation tends either to be parochial or to gravitate to states in which interest and support are highest. Our results are also inconsistent with the common narrative that citizen suits operate as a backstop to weak state enforcement of environmental laws. The skewed geographic distribution of citizen suits suggests that they may exacerbate disparities in enforcement and implementation more than they mitigate them.

III. Reassessing the Promise of Citizen Suits

The filing of citizen suits is, above all, limited by resources and thus reflects socioeconomic inequities that exist across states and federal circuits. The judicial forum and local environmental interest are the other principal drivers of where citizen suits are filed. These structural factors foreclose the worst fears of critics and place practical limits on the roles that citizen suits can play.

A. *The Practices and Resource Constraints That Limit the Impact of Citizen Suits*

1. Geographic Concentration and Low Numbers Limit Conflicts Between Citizen and Government Enforcement

The neglect of the practical limits on filing citizen suits is surprising given the extensive literature on the limits of government environmental enforcement. Yet, commentators have routinely presumed that citizen suits have the capacity either to offset the deficiencies of government programs or, through sheer volume, to override government priority setting and discretion. The resources of even the wealthiest organizations pale in comparison to those of the federal government and many states. These simple comparisons alone should have raised questions about whether government enforcement could be significantly augmented by citizen suits or overwhelmed given the resources available.

a. Citizen Suits Are More Likely to Exacerbate Rather Than Mitigate Disparities in the Enforcement and Implementation of Environmental Laws

Rather than conflicting with local values, citizen suits more often reflect them.

The local bias of organizations filing citizen suits also suggests that they may exacerbate interstate inequities in implementation and enforcement of environmental laws rather than mitigate them. This inference is reinforced by the low number of environmental justice suits—an estimated average of just six cases each year. If litigation, or

the threat of it, impacts development costs or uncertainty,¹⁶ the disparities could redirect development to states in which development costs and uncertainty are lower. It is the interstate differences in regulatory costs that exacerbate inequities. Thus, from the standpoint of equity, a race to the top can cause disparities that mirror those of a race to the bottom.

Similar disparities are observed under the natural resource statutes. The principal factors were whether a state is located within the Ninth Circuit and the number of environmental organizations in a state. Neither public support, as reflected in the number of environmental organizations, nor a favorable judicial forum is likely to be associated with weak implementation of federal natural resource laws.

2. Patterns of Wholesale and Retail Environmental Litigation

The patterns of citizen suits that we observe under the major environmental statutes exist along a continuum ranging from largely wholesale to largely retail litigation. The CAA is at the far extreme of wholesale litigation, with almost 90% of the cases involving petitions for review of EPA regulations. On the other extreme, litigation under NEPA is almost exclusively retail, with more than 90% of the cases involving discrete federal actions. Citizen suits under the CWA and ESA reside in the middle.

The differences we observe in the types and volume of litigation under the four major statutes suggest that there may be feedbacks between wholesale and retail litigation. In other words, the relative difficulty of retail litigation may elevate the importance of litigating over strict standards, as they represent both high-profile legal actions and may make it easier for government and public enforcement. We observe this pneumatic effect most directly in the contrast between litigation under the CAA and the CWA. With only limited options, environmental organizations may use the legal handles available to them—even if the scope and effect of the litigation are poorly calibrated to address their central concerns.

The central challenges are socioeconomic and judicial, and both limit the volume of litigation and concentrate it in certain jurisdictions. Statutory frameworks can mitigate these impediments by lowering the barriers to filing citizen suits, as reflected in the dramatic differences observed in the volume and types of litigation under the major environmental statutes. In particular, the availability of procedural claims and reporting requirements are associated with higher levels of litigation and appear to mitigate pervasive resource constraints. Nevertheless, the number of cases filed under even the most accessible statutes remains tiny in comparison to government enforcement actions. As a consequence, absent dramatic increases in financial resources or incentives, it is unlikely that wholesale litiga-

16. See, e.g., Blair W. Will, *The Clean Water Act Citizen Suit Shakedown*, HMS L. GRP. NEWS (June 4, 2013), <https://www.hmslawgroup.com/clean-water-act-citizen-suit-shakedown> [https://perma.cc/TPE6-J72S].

tion on rulemaking could be significantly augmented or that retail litigation will evolve beyond the modest and geographically concentrated role it plays today.

B. *Reforming Our Vision for Citizen Suits and the Policies Needed to Realize It*

What is a realistic vision for citizen suits when the statutes with the most favorable frameworks fall woefully short of aspirations?

We have identified three types of legal and strategic reforms: (1) targeted legislative reforms lowering the barriers to filing citizen suits and creating incentives for filing them where they are most needed; (2) enhanced transparency about the filing of citizen suits and coordination among environmental organizations; and (3) education of judges about the types and importance of environmental citizen suits, including the volume of litigation, the tangible benefits, and the rates at which attorney's fee awards are granted.

1. Targeted Reforms to Facilitate and Support Citizen Suits

The most potent sources of opposition to citizen suits have been driven by perceptions that they are not in the interest of the general public, that they are filed principally for obstructionist objectives, or that they undermine government regulatory programs and priority setting. The challenge is to mitigate these concerns and misperceptions while still addressing the structural barriers to filing citizen suits that are of greatest importance—particularly distributional inequities.

Creating incentives for the filing of citizen suits based on low local enforcement rates, impacts of violations on human health or welfare, or disparate impacts on underserved communities would minimize opposition. The simplest way to augment incentives would be to create a strong presumption in favor of attorney's fee awards in cases that meet these types of criteria.¹⁷ Alternatively, organizations or individuals filing such cases could be given a portion of the fines levied against a defendant. Such reforms would offset recent trends in attorney's fee awards and leverage the limited resources available for filing citizen suits by focusing resources on critical lapses in enforcement and structural inequities reflected in the geographic distribution of citizen suits. More equitable distribution of foundation resources and other funding are the only other realistic options in the current political climate.

Identifying similar criteria for enhancing incentives to file citizen suits under the natural resource statutes is more challenging and likely to be more politically contentious. Because most of these cases involve challenges to federal

action, there is no analogue of relative enforcements. As a consequence, a reliable set of criteria for conditioning incentives does not appear to be available for natural resource cases.

2. Facilitating Coordination of and Transparency About Citizen Suits

Making information about the filing of citizen suits publicly available in a centralized database would enhance accountability, correct misperceptions about environmental litigation, and facilitate coordination between environmental organizations and other plaintiffs. Centralizing the collection and improving the quality of litigation data would also be of great value to researchers and policymakers.

New legislation could establish a program for compiling data on environmental citizen suits within the Council on Environmental Quality (CEQ), which already collects data and issues reports on litigation under NEPA. An expanded database for environmental citizen suits would require dedicated funding to ensure data quality and could be facilitated by reporting requirements for lead litigants. The new legislation could be readily integrated with citizen suit provisions under each of the federal environmental statutes or as a stand-alone provision for cases filed under the Administrative Procedure Act.

If legislation is not feasible, a similar, though less comprehensive database could be established by members of the environmental community and supported by interested funders.

A centralized and publicly accessible database for citizen suits, whether supported publicly or privately, would also put positive pressure on organizations to consider the distributive impacts of their decisions.

3. Educating Judges About the Patterns, Impacts, and Value of Citizen Suits

Outside the D.C. Circuit and several federal districts, most judges hear fewer than a handful of environmental citizen suits over the span of a decade. Informing them about the broader context of environmental litigation and the factors that motivate it would help to neutralize potential biases judges may have about environmental disputes and litigants.

Combating judicial bias is of greatest importance for rulings over which judges have especially broad discretion. We are thinking particularly of decisions on attorney fee awards, but this may also be true of constitutional standing determinations and rulings on compliance with administrative procedures. Similarly, in the context of suits involving private, third-party defendants, courts may view cases differently if they recognize just how rare they are.

Having a broader perspective on citizen suits and their social value, we hope, would provide a useful corrective to unfounded skepticism about environmental plaintiffs and the devolving trend in attorney fee awards across the country. It would also help to counteract environmental plain-

17. The difficulty of obtaining attorney fee awards is viewed as a significant barrier among representatives of environmental organizations. Interview with Nada Culver, Senior Counsel and Director, BLM Action Center, The Wilderness Soc'y, at 15 (Dec. 8, 2017).

tiffs' aversion to filing cases in circuits outside the Ninth Circuit and counteract the concentration of citizen suits in a small number of states.

IV. Conclusion

Citizen suits, by almost any measure, are underperforming. In most states, citizen suits are rarely filed, and they are concentrated in states where public support is high and environmental programs are relatively robust.

We find little to no evidence of the pathologies that critics commonly raise and little evidence that citizen suits systematically offset the shortcomings of government implementation or enforcement of environmental laws.

These realities place a premium on thoughtful prioritization and coordination of citizen suits, including consideration of distributional inequities. Our empirical work reveals deep inconsistencies and inequities in the filing of citizen suits that are overlooked by commentators across the political spectrum.