Can We Really Be the Change We Wish to See? The Inherent Limitations of Citizen Suits in Remedying Environmental Injustice Under the Clean Air Act

Alexandra M. George

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CAN WE REALLY BE THE CHANGE WE WISH TO SEE? THE INHERENT LIMITATIONS OF CITIZEN SUITS IN REMEDYING ENVIRONMENTAL INJUSTICE UNDER THE CLEAN AIR ACT

I. GASping for AIR: THE HARSH REALITY OF ENVIRONMENTAL RACISM ON PHILADELPHIA’S AIR QUALITY

“If you live in Philadelphia County, the air you breathe may put your health at risk.”1 Where a person lives plays a crucial role in shaping their overall health outcomes and life expectancy.2 An individual’s zip code alone can determine up to sixty percent of their health.3 In the United States, significant racial disparities exist among communities affected by environmental pollution.4 Black Americans face higher levels of air pollution compared to White Americans and are significantly more likely to live in fence-line communities than the average American.5

Among states, Pennsylvania has the second largest racial and socioeconomic disparities in air pollution exposure.6 Moreover, the City of Philadelphia is the fourth highest city in the nation for asthma prevalence and has the highest rate of asthma-related deaths

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3. Id. (noting significance of individual’s place of residence on health).
4. See Lesley Fleischman & Marcus Franklin, Fumes Across the Fence-Line: The Health Impacts of Air Pollution from Oil & Gas Facilities on African American Communities 6 (Katherine Taylor & Sarah Uhl, eds., 2017) (explaining racial disparities among communities impacted by environmental pollution).
5. See id. (detailing Black Americans’ higher exposure to air pollution). Fence-line communities are adjacent to industrial areas and directly impacted by the noise, odor, traffic, and chemical emissions of their operations. Id. (defining fence-line communities). In the United States, the majority of fence-line communities consist of individuals who already face systemic oppression: low-income individuals and people of color. Id. (explaining general composition of fence-line communities).

(153)
A significant portion of those with asthma are Black, who are three times more likely to suffer from asthma and die from it than White Americans. Although the national statistics show more modest disparities between Black and White American adults, Black children face a death rate from asthma that is ten times higher than that of White children.

While personalized solutions such as medications and patient education are available, they cannot completely resolve the high incidence of asthma in communities of color. The root of this problem lies in the enduring effects of systemic racism, which has relegated these communities to neglected neighborhoods in cities across the nation. These areas often suffer from substandard housing, situated near sources of air pollution such as heavy industrial sites and transportation hubs. Adding to this longstanding issue, companies have historically taken advantage of communities with limited political power, leveraging their authority to secure necessary permits with lower transaction costs, thereby exerting significant influence on local governments to prioritize their interests.

The North Philadelphia neighborhood of Nicetown exemplifies how environmental pollution significantly contributes to health disparities. The Pennsylvania Department of Environmental Protection

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11. See id. (detailing effects of institutional racism).

12. See id. (explaining role of institutional racism in air pollution disparities).

13. See Fleischman & Franklin, supra note 4, at 6 (detailing exploitation of low-income communities).

designated Nicetown as an “Environmental Justice Area,” meaning that at least thirty percent of its residents are from minority groups or twenty percent live below the poverty line. With a population that is over sixty percent Black and forty percent living in poverty, Nicetown exceeds these criteria.

In November 2017, the Philadelphia Department of Air Management Services approved a permit for the Southeastern Pennsylvania Transportation Authority to construct a combined heat and power plant in Nicetown. This resulted in an increase of approximately twenty-two tons of nitrogen oxides, sixteen tons of volatile organic compounds, and twenty-seven tons of carbon monoxide emissions per year. Despite this, the numerous buses stationed at the Midvale Bus Depot and the neighboring highway were already causing high levels of diesel exhaust within the Nicetown community. This exposure affected essential locations in the community, including five schools, a community center, several religious institutions, and many parks near these sources of emissions.

According to the City of Philadelphia’s 2017 Community Health Assessment, children residing within Nicetown’s zip code had some of the highest asthma hospitalization rates in the city. Yet, Air Management Services approved the permit to add another pollution-emitting facility in the neighborhood. Regrettably, the Nicetown community represents only one of the numerous ongoing instances of environmental injustice in the City of Philadelphia and Pennsylvania at large.

16. See Testimony from Ebony Griffin, supra note 14, at 2 (designating Nicetown as Environmental Justice Area).
18. See id. (listing emissions resulting from permit approval).
19. See id. (providing emissions levels already present in Nicetown).
22. See SEPTA Notice of Application, supra note 17 (documenting permit approval).
23. See PA Env’t Justice Areas, supra note 14 (mapping Environmental Justice Areas in Pennsylvania); see also Testimony from Ebony Griffin, supra note 14, at 2 (discussing reason behind Nicetown’s designation as Environmental Justice Area).
II. STANDING UP TO INJUSTICE: THE PROSPECTIVE POWER OF CITIZEN SUITS

Environmental injustice revolves around the unequal distribution of environmental hazards and benefits among different populations. In the late twentieth century, the environmental justice movement emerged in response to the growing concerns about the inequitable impact of environmental hazards on marginalized communities. The push toward environmental justice grew from the civil rights movement and draws on the principles of equal protection under the law, equal access to the benefits of a healthy environment, and the right to participate in decisions that affect the environment and public health. Historically, the progress of environmental justice has been primarily documented not by federal authorities but by everyday citizens and advocacy groups.

One route to addressing environmental justice concerns is through citizen suits. Citizen suit provisions allow citizens to take legal action against individuals or entities that violate environmental laws. These provisions are present in nearly all federal environmental statutes. Lawmakers designed citizen suits to provide an important check against government inaction or inadequate enforcement of environmental laws. Some critics have argued, however,


26. See id. (framing civil rights movement’s influence on environmental justice movement); see also Learn About Environmental Justice, supra note 24 (explaining environmental justice movement’s underlying principles).


28. See id. (contextualizing role of citizen suits in environmental justice movement).


that citizen suits would disrupt government regulatory schemes and lead to wasteful or excessive enforcement.\textsuperscript{32}

In theory, citizen suits can remedy environmental injustice by empowering communities and individuals to hold polluters accountable for their actions.\textsuperscript{33} Yet, over the last two decades, citizen suits have not provided the remedies they promise.\textsuperscript{34} In most states, citizen suits are infrequently filed and are more prevalent in states with strong environmental programs and high levels of public support.\textsuperscript{35} In fact, critics’ concerns regarding the potential for citizen suits to hinder the government’s enforcement of environmental laws lack substantial evidence.\textsuperscript{36} This underperformance highlights how the structural and practical limitations on the availability of citizen suits have hindered their ability to realize their full potential.\textsuperscript{37}

This Comment examines how various limits on the availability of citizen suits have impeded their role in remedying environmental injustice under the Clean Air Act (CAA).\textsuperscript{38} Part III explains the regulatory framework of the CAA and its citizen suit provision.\textsuperscript{39} Part IV explores the structural, procedural, and practical limitations that affect the ability of those impacted by environmental injustice to bring citizen suits.\textsuperscript{40} Finally, Part V suggests various types of reforms available to address these limitations and explores the Biden Administration’s efforts to remedy environmental injustice through CAA enforcement.\textsuperscript{41}

\begin{itemize}
  \item[35.] See \textit{id.} at 381-82 (detailing logistics of citizen suits prevalence). During a sixteen-year study period, approximately sixty-seven percent of the citizen suits filed under the natural resource statutes and sixty percent of those filed under pollution statutes occurred in the Ninth Circuit and the District of Columbia Circuit combined. \textit{Id.} at 412-13 (analyzing geographic location of citizen suit filings). None of the other circuits exceeded ten percent of the total number of cases filed during this time, and the majority of them were below five percent. \textit{Id.} at 413 (analyzing geographic location of citizen suit filings).
  \item[36.] See \textit{id.} at 381-82 (arguing that some critics’ concerns are misguided).
  \item[37.] See, e.g., \textit{id.} at 450-51 (noting limitations to use of citizen suits).
  \item[38.] For a discussion of the limitations the availability of citizen suits, see \textit{infra} notes 69-145 and accompanying text.
  \item[39.] For a discussion of the CAA’s regulatory framework and its citizen suit provision, see \textit{infra} notes 42-68 and accompanying text.
  \item[40.] For a discussion of the structural, procedural, and practical limitations on the availability of citizen suits, see \textit{infra} notes 69-145 and accompanying text.
  \item[41.] For a discussion of potential reforms and the future role of citizen suits, see \textit{infra} notes 146-202 and accompanying text.
\end{itemize}
III. Clearing the Air: An Overview of the Clean Air Act’s Regulatory Framework

Citizen suit provisions empower private individuals to take legal action against regulated individuals and entities who have violated specific requirements of environmental laws. Apart from suing violators for enforcement purposes, citizens can also sue public officials for neglecting to fulfill mandatory duties outlined in the relevant environmental law. Citizens primarily file suit under pollution control statutes including the CAA, the Clean Water Act (CWA), and to a lesser extent, the Resource Conservation and Recovery Act (RCRA).

A. The Regulatory Structure of the Clean Air Act

The CAA regulates air emissions from stationary sources, such as power plants and factories, and mobile sources, such as vehicles, to protect public health and the environment from harmful air pollutants. The statute operates under a cooperative federalism model, in which states receive delegated power to administer federal law. Accordingly, states must develop State Implementation Plans (SIPs), which explain how they intend to administer the CAA within their borders. The CAA uses several mechanisms to control emissions of regulated air pollutants, including establishing air quality standards, emissions limitations for stationary and mobile sources, and other regulatory programs designed to address specific environmental problems.

43. See id. (discussing controversy of citizen suit provisions).
44. See Adelman & Reilly-Diakun, supra note 34, at 386 (noting prevalence of citizen suits under pollution control statutes). The focus of the pollution control statutes is to control, enforce, or provide information about air, water, and land-based pollution. Id. (describing purpose of pollution control statutes).
46. See Clean Air Act § 101, 42 U.S.C. § 7401(a) (4) (indicating air pollution prevention and air pollution control are primary responsibility of states and local governments).
47. See Clean Air Act § 110, 42 U.S.C. § 7410(a)(1) (explaining SIP administration). The SIPs must ensure that state-administered programs will be at least as stringent as the federal requirements. Id. § 7410(a)(2)(D) (noting requirements for SIPs).
The National Ambient Air Quality Standards (NAAQS) reflect the maximum concentrations of pollutants in the ambient air that will still protect public health and welfare. The EPA has identified six “criteria” pollutants that are prevalent and pose a significant risk to public health and welfare: sulfur dioxide, particulate matter, nitrogen oxide, carbon monoxide, ozone, and lead. After implementing a specific NAAQS, the EPA reviews the standards every five years to decide if any revisions are necessary.

After the EPA has set the NAAQS for a specific air pollutant, the air quality must not exceed the designated NAAQS. Consequently, the EPA must categorize all regions in the country as either meeting the standards (i.e., their air quality is at least as good as the NAAQS) or not in attainment with the standards. The states are primarily responsible for achieving and preserving compliance with the NAAQS by creating and executing SIPs. Furthermore, the CAA contains four main schemes for regulating emissions of air pollutants from stationary sources: New Source Performance Standards, New Source Review (NSR), National Emissions Standards for Hazardous Air Pollutants, and Title V.

The NSR program consists of two separate regulatory programs: nonattainment NSR (NNSR) and prevention of significant deterioration (PSD). Both programs have the same basic framework. Each requires sources to obtain permits prior to constructing a new

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49. See Clean Air Act § 108, 42 U.S.C. § 7408(a)(1)(A) (directing EPA to establish list of air pollutants that “cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare”).


51. See Clean Air Act § 109, 42 U.S.C. § 7409(d) (providing EPA review process).


53. See id. (distinguishing attainment and nonattainment areas).

54. See id. (highlighting states’ role in NAAQS implementation). SIPs have two primary objectives: (1) to show that the state has the necessary elements of an air quality management program to implement a new or updated NAAQS, and (2) to determine the emissions control regulations that the state will use to achieve and sustain the primary and secondary NAAQS. Id. (delineating primary purposes of SIPs).

55. See LATTANZIO, supra note 48, at 11-16 (explaining CAA’s primary enforcement mechanisms).

56. See Clean Air Act § 172, 42 U.S.C. §§ 7502(c) (5), 7503 (outlining NSR program); Clean Air Act §§ 160-169, 42 U.S.C. §§ 7470-7479 (outlining PSD program).

source or modifying an existing one; they require sources to meet technology-based emissions limitations; and they include mechanisms aimed at protecting ambient air quality.\(^{58}\)

The PSD program establishes the following requirements for major emitting facilities: each facility must obtain a permit prior to construction or modification; the source must meet emissions limitations that reflect the “best available control technology” for each pollutant subject to regulation; the source must perform emissions monitoring necessary to determine the effect the emissions have on air quality; and the facility’s emissions must not violate NAAQS or increments.\(^{59}\) On the other hand, major sources proposing to construct or modify in nonattainment areas must meet several requirements.\(^{60}\) First, they must obtain and comply with NNSR permits; if the EPA has determined that the state is not effectively implementing the SIP for the nonattainment area, the state cannot issue permits.\(^{61}\) Second, new and modified sources must meet the “lowest achievable emission rate.”\(^{62}\) Third, the source’s owner or operator must prove that all other sources are following all applicable emissions limitations and standards.\(^{63}\) Fourth, the owner or operator must complete a cost-benefit analysis detailing the benefits of the proposed source as opposed to the risks of environmental and social burden.\(^{64}\) Finally, the owner or operator must obtain emissions reductions from other facilities to offset any increased emissions of air pollutants from the new or modified source.\(^{65}\)

B. The Clean Air Act’s Citizen Suit Provision

Under the CAA’s citizen suit provision, “any person” may commence a civil action against (1) an individual alleged of violating an emissions standard, limitation, or an order issued by the Administrator or state related to such standards or limitations, (2) the Administrator in cases of alleged violations, or (3) any individual

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58. See NSR Core Principles, supra note 57 (describing structure and requirements of NSR programs).
60. See NSR Core Principles, supra note 57 (noting different requirements apply to NNSR and PSD programs).
61. See Clean Air Act §§ 172-173, 42 U.S.C. §§ 7502(c)(5), 7503 (stating requirement to obtain and comply with NNSR permit).
63. See id. § 7503(a)(3) (describing owner and operator obligations).
64. See id. § 7503(a)(5) (explaining owner and operator obligations).
65. See id. § 7503(c) (outlining emissions offsets program).
intending to construct or constructing a new or modified major emitting facility without the required permit or violating any conditions in such a permit. The plaintiff must provide notice of the violation to the Administrator, the state in which the violation occurs, and to any alleged violator sixty days prior to commencing the lawsuit. This provides an opportunity for the violator to come into compliance, avoiding litigation altogether. Moreover, a plaintiff may not bring an action if the Administrator or the state has already begun prosecuting a civil action in a court.

IV. A Suffocating Grip: The Clean Air Act’s Shortcomings in Remedying Environmental Injustice

Congress’s guarantee that “any person” may commence a civil action under a citizen suit provision may have been disingenuous. Although citizen suit provisions allow ordinary individuals to seek justice through the legal system, there are inherent restrictions on this access. Some limitations that can hinder citizens’ access to justice include establishing standing to sue, data availability to build a successful case, complexities of the permitting scheme, and programs that may exacerbate inequities.

A. Standing to Sue

Like any plaintiff seeking relief through the court system, environmental citizen suit plaintiffs must first establish that they have standing to bring the lawsuit. The prerequisite for establishing standing derives from the “case or controversy” mandate of Article III of the Constitution, which limits the jurisdiction of federal courts.

67. See id. § 7604(b) (specifying notice requirements).
68. See id. (describing notice requirements).
69. See id. (explaining diligent prosecution bar).
70. See generally Heather Elliott, Congress’s Inability to Solve Standing Problems, 91 B.U. L. Rev. 159, 161-67 (2011) (shedding light on potential separation of powers issues standing requirements create).
71. See id. at 174 (noting limitations on ability of citizen suits to proceed).
to actual cases or controversies. The basic concept underlying the standing requirement is to ensure that only parties with a vested interest in the case’s outcome are authorized to initiate the lawsuit.

For an individual to have standing to sue, the plaintiff must show three elements: (1) injury in fact, (2) causation, and (3) redressability. To establish injury in fact, a plaintiff must show invasion of a legally protected interest which is “concrete and particularized” and “actual or imminent,” not speculative. To establish causation, a plaintiff’s injury must be directly linked to the defendant’s contested conduct, and not the result of an independent action of a third party not involved in the court proceedings. Finally, to establish redressability, there must be a strong likelihood that a favorable decision from the court would resolve the plaintiff’s injury.

While acknowledging the necessity of standing requirements to avoid excessive litigation, critics have asserted that standing requirements have significant disadvantages. Most importantly, standing requirements leave some legal violations unenforced. If a plaintiff lacks standing, the court dismisses its complaint even if the defendant has violated the law. Moreover, standing tends to selectively favor certain interests. Demonstrating standing will usually be easy for regulated

74. See id. (implying standing doctrine preserves separation of powers).
76. See Defs. of Wildlife, 504 U.S. at 560-61 (setting forth standing requirements).
77. See id. (defining injury in fact requirement).
78. See id. (illustrating causation requirement).
79. See id. (defining redressability requirement); see also Kelsey McCowan Heilman, Comment, The Rights of Others: Protection and Advocacy Organizations’ Associational Standing to Sue, 157 U. PA. L. Rev. 237, 251 (2008) (presenting associational standing doctrine). For an organization to bring a lawsuit as the representative of one or more of its members, it must meet three additional requirements: (1) at least one member must have constitutional standing to sue in his or her own right, (2) the interests the organization seeks to protect through the litigation must be applicable to its purpose, and (3) participation of individual members in the lawsuit must be unnecessary to resolve either the claim asserted or relief requested. Id. (noting courts have recognized benefits to allowing organizations to litigate claims on behalf of their members).
81. See id. (noting shortcomings of standing requirements).
82. See id. (spelling out consequences of lack of standing).
entities, as courts routinely recognize the economic injuries caused by regulatory controls as an appropriate basis for standing. Yet, the beneficiaries of environmental regulation often try to vindicate interests that cannot be easily quantified in economic terms, and sometimes their claims of injury rely on complex or uncertain causal chains. Even further, some critics allege that the standing requirement is subject to excessive judicial discretion, giving courts too much ability to manage their dockets, thereby effectively allowing them to evade cases brought by disfavored plaintiffs.

Given these significant disadvantages, lack of standing has become a primary defense against environmental citizen suits as courts have continuously narrowed the doctrine’s scope. For example, in Center for Biological Diversity v. University of North Carolina at Chapel Hill, a North Carolina federal district court dismissed the majority of the claims asserted in a citizen suit against the University of North Carolina at Chapel Hill (UNC) due to lack of standing. In their complaint, the plaintiffs asserted several claims for alleged recordkeeping, inspection, reporting, and monitoring violations under UNC’s Title V permit issued under the CAA. The plaintiffs argued that the alleged procedural violations caused them concrete injury by exposing them to harmful pollutants. Yet, the court held that, although it is undisputed that UNC emitted harmful pollutants, the plaintiffs offered no evidence to support their allegations that they suffered concrete, demonstrable harms resulting from UNC’s failure to comply with the conditions of its Title V permit. Citing

84. See generally Iowa League of Cities v. EPA, 711 F.3d 844, 870 (8th Cir. 2013) (holding that group of cities had suffered injury in fact where complying with EPA water treatment regulations would be costly); City of Waukesha v. EPA, 320 F.3d 228, 234 (D.C. Cir. 2003) (finding city had sufficient injury in fact because it would face substantial costs to comply with EPA drinking water regulations).
85. See Charles H. Haake & Raymond B. Ludwiszewski, Standing Up for Industry Standing in Environmental Regulatory Challenges, 42 B.C. ENVTL. AFF. L. REV. 305, 318 (2015) (noting that adducing evidence establishing harm, causation, and redressability is ordinarily substantially more difficult to establish than it would be for party that is object of action or inaction).
86. See id. at 317 (demonstrating judicial discretion involved in standing challenges).
89. See id. at *11 (granting defendant’s motion for summary judgment).
90. See id. at *1-3 (detailing plaintiffs’ complaint).
91. See id. at *3 (summarizing plaintiffs’ complaint).
92. See id. (describing shortcomings of plaintiffs’ cause of action).
United States Supreme Court precedent, the court explained that the alleged violations amounted to nothing more than “bare procedural violation[s], divorced from any concrete harm,” which is insufficient to establish standing.93

In addition, the plaintiffs tried to satisfy the injury in fact requirement by arguing that their members had suffered informational injury.94 Under this theory, the plaintiffs alleged UNC’s failure to comply with the monitoring and reporting requirements prevented them from knowing whether UNC complied with emission requirements.95 The court, however, rejected this argument as well, explaining that the plaintiffs’ complaint lacked a statutory right to this information or proof that they would be harmed by lack of access to such information.96

Nevertheless, ongoing litigation in the Fifth Circuit may shift how courts interpret the scope of standing requirements.97 In Environment Texas Citizen Lobby, Inc. v. ExxonMobil Corp.,98 the court of appeals grappled with whether the plaintiff’s allegations concerned bare procedural violations or something more.99 The lawsuit originated in 2010 when Environment Texas Citizen Lobby, Inc. and the Sierra Club sued ExxonMobil (Exxon), alleging noncompliance with CAA operating permits.100 In defense, Exxon argued that the plaintiffs lacked standing for 3,651 of the 16,836 violation days stipulated by the parties.101 Yet, the Fifth Circuit disagreed, creating precedent to expand the basis on which entities could successfully allege standing in the future.102

94. See id. (noting details of plaintiffs’ complaint). A constitutionally cognizable informational injury requires that a person lack access to information to which he or she is legally entitled and that the denial of that information creates a “real” harm with an adverse effect. See Spokeo, 578 U.S. at 339 (providing examples of informational injury).
95. See Ctr. for Biological Diversity, 2021 WL 3861388, at *3 (noting details of plaintiffs’ complaint).
96. See id. at *3-4 (holding that plaintiffs did not make a sufficient showing that they suffered a concrete injury as result of any recordkeeping, reporting, monitoring, or inspecting violations).
97. See, e.g., Env’t Tex. Citizen Lobby, Inc. v. ExxonMobil Corp., 968 F.3d 357, 365 (5th Cir. 2020) (observing categorial basis for standing).
98. 968 F.3d 357, 365 (5th Cir. 2020) (observing categorial basis for standing).
99. See id. (recounting question of whether plaintiffs had standing to seek redress for violations).
100. See id. at 363, 372 (providing procedural history of case).
101. See id. at 365 (explaining Exxon asserted plaintiffs only proved standing for handful of violations and challenged new penalty determination).
102. See id. (noting standing analysis for each violation is unnecessary).
The court explained it is unnecessary to list all sixteen thousand alleged violations and state whether each is justiciable.\textsuperscript{103} The plaintiffs alleged broad injuries — for example, Exxon’s illegal emissions made plaintiffs less likely to recreate in an area — and did not need to demonstrate that any particular individual violation caused such injuries.\textsuperscript{104} Instead, the court reasoned that it could establish standing on a categorical basis.\textsuperscript{105}

In October 2022, however, Exxon petitioned for rehearing en banc, seeking further clarification on the decision.\textsuperscript{106} Exxon argues that the Fifth Circuit’s approach contradicts Supreme Court precedent, posing a risk of converting citizen suits from their intended purpose of resolving specific disputes into tools for shaping environmental policy.\textsuperscript{107} The Fifth Circuit granted the petition for rehearing in February 2023.\textsuperscript{108}

\textbf{B. Access to Data and Public Participation}

Environmental plaintiffs often need access to data to build their case and sue for violations of environmental laws.\textsuperscript{109} Data availability can be critical to establishing the existence and extent of environmental harm and demonstrating that a particular defendant is responsible for the harm.\textsuperscript{110} In some cases, environmental plaintiffs may obtain the necessary data through public records requests, such as requests for information from government agencies or companies that are required to report certain data under environmental laws.\textsuperscript{111} In other cases, however, data may not be readily available or may be difficult to obtain.\textsuperscript{112} In such cases, environmental plaintiffs may need to conduct their own testing and monitoring to gather

\begin{itemize}
\item \textsuperscript{103} See \textit{Env’t Tex. Citizen Lobby, Inc.}, 968 F.3d at 365-67 (explaining court does not need to conduct separate standing inquiry for each violation).
\item \textsuperscript{104} See id. (stating courts may categorize violations to establish standing).
\item \textsuperscript{105} See id. (noting option of categorizing violations to establish standing).
\item \textsuperscript{107} See id. (explaining defendant’s argument for court to rehear case en banc).
\item \textsuperscript{108} See id. (indicating court granted petition for rehearing en banc).
\item \textsuperscript{110} See id. (noting importance of data availability in environmental litigation).
\item \textsuperscript{111} See id. (describing mechanisms for environmental plaintiffs to obtain data).
\item \textsuperscript{112} See id. (noting plaintiff’s practical difficulties in accessing pertinent data).
\end{itemize}
necessary data. This can be an expensive and time-consuming process and may require specialized expertise.

More specifically, when a community group has limited resources, it can be particularly challenging to access information about public risks that may be obscure. In addition, it can be difficult for members of such communities to mobilize and initiate legal proceedings. Therefore, the initial step in enforcing environmental laws in marginalized and impoverished communities is to empower citizens with the means and knowledge to identify non-compliant activity in their area.

One of the primary tools the Biden Administration has deployed as a part of its environmental justice initiatives is “fenceline monitoring,” which regulators can use to protect environmentally overburdened communities. Fenceline monitoring refers to the process of measuring and analyzing the air quality at the boundary of a facility, such as an industrial plant, using sensors installed on or near the perimeter fence. The purpose of fenceline monitoring is to detect and quantify the emission of pollutants from the facility and ensure that they do not exceed regulatory limits and pose a risk to public health and the environment. The facility data collection can identify the sources and patterns of emissions from the facility, assess the effectiveness of control measures, and inform the development of mitigation strategies, if necessary.

C. A Problematic Permitting Scheme

Legal scholars have argued that the regulatory framework created by the CAA is excessively complex. This complexity can result

113. See id. (observing practical difficulties in accessing pertinent data).
114. See Chekouras, supra note 108, at 112-16 (noting practical difficulties in access to pertinent data).
116. See id. (exemplifying difficulties for citizens to mobilize without sufficient data).
117. See id. at 602-03 (noting how availability of data has revitalized citizen suits).
120. See id. (identifying purpose of fenceline monitoring).
121. See id. (explaining use of fenceline monitoring).
122. See Adelman & Reilly-Diakun, supra note 34, at 439 (arguing CAA’s complexity substantially limits number of enforcement suits).
in regulated entities struggling to understand their legal obligations, state agencies lacking sufficient resources to administer the regulatory programs properly, and concerned citizens finding it difficult to participate in regulatory decisions or to challenge actions they believe violate the law. Moreover, some of the regulatory provisions of the CAA tend to exacerbate environmental inequities.

Under the NSR program of the CAA, “major” new sources of air pollutants, such as power plants or refineries, must obtain permits before building or modifying their operations. Regulators designed the NSR program to review proposals and define important equipment and operational standards before breaking ground. This, in turn, ensures that new or modified facilities do not cause significant increases in air pollution. The NSR program, however, includes provisions for “grandfathering,” which allows facilities that were constructed prior to the implementation of the program to continue operating without meeting NSR requirements. This gives businesses an incentive to operate older, more polluting sources, rather than investing in new sources subject to strict emissions controls, which has led to a suppression of improvements in air quality.

When Congress first implemented the program, it expected that existing facilities would remain exempt from technology control requirements for a very limited period of time as they gradually phased out over their typical economic lifespan or upgraded their facilities. Yet, many plants have avoided installing modern

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123. See id. (noting limitations to citizen suits under CAA framework).
125. For a discussion of the NSR program, see supra notes 56-64 and accompanying text. For a source to qualify as major, it must have the potential to emit at least one regulated air pollutant at or above the regulatory threshold. See Clean Air Act § 169, 42 U.S.C. 7479(1) (defining “major emitting facility”).
127. See id. (outlining purpose of NSR program).
128. See Heidi Gorovitz Robertson, If Your Grandfather Could Pollute, So Can You: Environmental “Grandfather Clauses” and Their Role in Environmental Inequality, 45 Cath. U. L. Rev. 131, 134 (1995) (defining environmental grandfathering clauses). Grandfathering provisions grant existing polluting facilities virtual “safe havens,” as they are exempted from the rigorous environmental standards that newly established facilities must adhere to. Id. (noting problematic nature of grandfathering provisions in environmental law).
129. See id. at 135 (highlighting that old facilities may continue to operate in locations where current regulations would not allow them to locate if they were new).
pollution controls for over forty years. Moreover, in the early 2000s, the Bush Administration adopted regulatory provisions that significantly extended the grandfathering of old plants. The regulatory changes reduced the number of modifications that are considered to increase emissions levels, and therefore, are subject to the NSR program. As a result, many old industrial plants have refrained from upgrading their facilities due to concerns about being regulated under the NSR program.

More specifically, in the assessment of whether a pre-construction permit is necessary, the EPA concentrates not on the physical alterations to the emitting facility itself, but rather on the effects of these modifications on the facility’s emissions. The EPA assesses the applicability of NSR by analyzing the changes in emissions resulting from other projects carried out at the source within a specified timeframe, typically five years; this assessment aims to ascertain whether the combined effect on all projects would result in a significant increase in emissions of the specified pollutant from the source. Making the NSR determination in this manner effectively allows facilities to design contemporaneous offset projects to fall back below NSR applicability thresholds. Thus, organizations can engage in additional modification projects without categorizing them as “major modifications,” thereby avoiding the activation of NSR.

Furthermore, under the NSR program, new or modified sources must obtain offsets or reductions in emissions that effectively cancel out or reduce the emissions they will generate. For greater

131. See id. (highlighting how facilities have avoided regulation under NSR).
132. See id. at 1696-97 (summarizing changes made by Bush Administration).
133. See id. at 1702-03 (noting effect of changes to NSR program).
134. See id. (noting effect of changes to NSR program).
136. See id. (providing regulations for NSR applicability).
137. See id. (noting how NSR determination provides opportunity for facilities to game system).
138. See id. (concluding requirements allow facilities to evade regulation more easily under NSR).
139. See Clean Air Act § 173, 42 U.S.C. §§ 7503(a)(1)(A), 7503(c) (outlining emissions offsets requirements). The type of pollutant and the level of nonattainment determine the required offsets. Id. (noting differences based on pollutant type). The offset ratio ranges from 1:1 to 1.5:1, and the offsets must come from sources in areas with comparable or worse nonattainment status. Id. (describing ranges of required offsets).
efficiency, states have established registries and trading programs that allow sources that decrease emissions to certify their emissions reductions and trade them as offset credits.\textsuperscript{140} Once a facility receives certifications, it can register the credits on an offset registry, and new or modified sources can purchase the required offset reductions via the registry.\textsuperscript{141}

Even though the overall effect of emissions offsets is to increase air quality, trading emissions can inadvertently concentrate emissions in some areas, causing reduced air quality in specific neighborhoods.\textsuperscript{142} These areas, where emissions from a major local polluter continue to accumulate by purchasing credits from external sources, are commonly referred to as “sacrifice zones.”\textsuperscript{143} Scholars have pointed out that underprivileged communities often bear a disproportionate burden of such facilities.\textsuperscript{144} In addition to regulated emissions sources, these facilities also release other harmful air pollutants like benzene, dioxin, and ammonia, which are typically not considered in emissions trading.\textsuperscript{145} Consequently, these schemes can potentially maintain or worsen the environmental injustices that low-income and minority communities already face.\textsuperscript{146}

V. BREATHING NEW LIFE: THE FUTURE OF ENVIRONMENTAL JUSTICE UNDER THE CLEAN AIR ACT

Although citizen suits can be a valuable tool for tackling environmental injustices, their availability and effectiveness are inherently limited, resulting in underutilization in practice.\textsuperscript{147} The strict standing requirements imposed by courts hinder injured plaintiffs’ access to justice and their ability to seek remedies through the court


\textsuperscript{141} See id. (summarizing mechanics of emissions registry).


\textsuperscript{143} See id. (defining “sacrifice zone” as concentration of emissions in particular area, wherein large local emitter continues emitting by buying credits from sources in other areas).

\textsuperscript{144} See id. (highlighting instances where oil refineries are disproportionately sited in underprivileged communities).

\textsuperscript{145} See id. (explaining unrecognized externalities associated with carbon trading).

\textsuperscript{146} See id. (arguing emissions trading programs can maintain and exacerbate existing exposures).

\textsuperscript{147} See Adelman & Reilly-Diakun, supra note 34, at 450 (suggesting underperformance of citizen suits).
Despite the fact that Congress granted “any person” the ability to hold polluters accountable in court, courts have narrowly interpreted the Constitution’s case or controversy mandate. This approach fails to acknowledge how certain procedural violations can harm affected parties.

Moreover, strict standing requirements constrain Congress’s ability to establish enforceable statutory rights and place the responsibility of determining which harms are “concrete” enough for judicial resolution solely in the hands of the court. Thus, while a primary focus of the case or controversy requirement is to respect the separation of powers, strict standing rules seem to thwart this goal by leaving judges with considerable discretion. Consequently, this approach favors regulated entities seeking redress in the courts, while individuals and communities who benefit from environmental laws are often left without a remedy. As long as courts maintain their current approach, advocates must pursue alternative methods to achieve reform.

A key concern related to establishing standing is the accessibility of information that enables plaintiffs to demonstrate how polluters have harmed them. Although certain programs under the CAA have reporting requirements, they are less extensive than those outlined in other environmental statutes such as the CWA. Under the CWA’s National Pollution Discharge Elimination System (NPDES) program, for example, individuals seeking to determine whether a

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148. For a discussion of the effects of standing requirements, see supra notes 72-107 and accompanying text.
149. For a discussion of the effects of standing requirements, see supra notes 72-107 and accompanying text.
150. For a discussion of the effects of standing requirements, see supra notes 72-107 and accompanying text.
151. See, e.g., Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016) (indicating Congress’s decision to prioritize intangible harms does not imply that plaintiff automatically meets injury in fact requirement). The Court noted that while historical context and congressional judgment are significant, it is valuable to evaluate if a purported tangible harm is closely linked to a traditionally recognized harm that forms the basis of a lawsuit in English or American courts. Id. (noting importance of considering historical practices).
153. For a further discussion of how standing requirements tend to favor certain interests, see supra notes 82-85 and accompanying text.
154. See Standing in the Way, supra note 152, at 1229-42 (discussing alternative methods to preserve the enforceability of statutory rights).
155. For a further discussion of the importance of plaintiffs’ access to data, see supra notes 108-20 and accompanying text.
156. See Adelman & Reilly-Diakun, supra note 34, at 439 (noting CWA’s mandatory reporting requirements).
point source violates the CWA can easily compare the effluent limitations specified in its NPDES permit with the reported discharges.\textsuperscript{157} Moreover, because the permits and reports are public records, anyone can inspect them for violations.\textsuperscript{158}

Furthermore, expanding the language of the CAA’s regulatory schemes and its citizen suit provision could offer individuals more avenues for enforcement.\textsuperscript{159} For example, the citizen suit provision contained in RCRA is broader in scope compared to other pollution control statutes.\textsuperscript{160} Under this provision, citizens may sue for matters that present an “imminent and substantial endangerment to the health or the environment.”\textsuperscript{161} A lawsuit under this provision thus does not necessarily require any specific violation of the statute.\textsuperscript{162} This broad language has proven useful in covering violations in other statutory schemes where a legal remedy is not explicitly available to citizens.\textsuperscript{163}

In addition, RCRA explicitly requires the EPA to consider environmental justice when implementing and enforcing regulations under the statute.\textsuperscript{164} This involves considering the potential impacts of waste facilities on low-income and minority communities and ensuring that these communities are protected from disproportionate impacts.\textsuperscript{165} The EPA must also ensure that information about these facilities is available to the public.\textsuperscript{166} Given this, RCRA’s language gives citizens more latitude to utilize citizen suits to help

\textsuperscript{157} See 40 C.F.R. § 122.41 (2023) (requiring self-monitoring and reporting for water pollution discharges). These “discharge monitoring reports” are filed with both state environmental agencies and EPA, making them subject to disclosure under freedom of information laws at both state and federal levels. See, e.g., Freedom of Information Act, 5 U.S.C. § 552 (outlining required information agencies must make available to public).

\textsuperscript{158} See 40 C.F.R. § 122.41 (requiring self-monitoring and reporting for water pollution discharges).

\textsuperscript{159} See, e.g., Kurt Wohlers, Note, The Particle Problem: Using RCRA Citizen Suits to Fill Gaps in the Clean Air Act, 121 Mich. L. Rev. 325, 337-38 (2022) (suggesting possibility of RCRA’s citizen suit provision to fill gaps in other regulatory schemes).

\textsuperscript{160} Compare Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a) (declaring “imminent and substantial endangerment” provision), with Clean Air Act § 304, 42 U.S.C. § 7604(a) (noting violations for which citizens may sue).

\textsuperscript{161} See Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a)(1)(B) (allowing lawsuits against individuals or agencies contributing to “imminent and substantial endangerment” harm).

\textsuperscript{162} See id. (implying lack of specific violation requirement).

\textsuperscript{163} See, e.g., Conn. Coastal Fishermen’s Ass’n v. Remington Arms Co., 989 F.2d 1305, 1308 (2d Cir. 1993) (applying RCRA citizen suit provision to water pollution).


\textsuperscript{165} See id. (describing environmental justice considerations).

\textsuperscript{166} See id. (noting public reporting requirements).
remedy environmental injustices in their communities.\textsuperscript{167} This language, along with RCRA’s citizen suit provision, provides unique opportunities for citizens to get involved.\textsuperscript{168}

Another potential avenue for reform to address the injustices arising from the CAA’s grandfathering provisions and emissions offsets program could involve adopting an approach similar to the CWA’s Section 404 program and its public interest regulations.\textsuperscript{169} The CWA’s Section 404 permit program prohibits the discharge of dredged or fill material if a practical alternative is available that would result in a lesser adverse impact on the aquatic system, as long as the alternative does not pose other significant environmental consequences.\textsuperscript{170} If there is no practical alternative, a mitigation requirement mandates taking appropriate steps to minimize the potential adverse impacts of the discharge on the aquatic system.\textsuperscript{171} Discharges that violate water quality standards or cause significant degradation of United States waters are prohibited, even if the applicant agrees to mitigate.\textsuperscript{172}

In addition to these guidelines, the Army Corps of Engineers (Corps) has the authority to deny a permit, even if the proposed discharge meets the guidelines, if the Corps deems the permit issuance contrary to the public interest.\textsuperscript{173} When assessing the public interest, the Corps must consider several factors, including wetlands effects, aesthetics, economics, fish and wildlife values, recreation, energy needs, and general public welfare.\textsuperscript{174} The regulation that governs this authority is a unilateral control, meaning it can only be used to deny permits if the guidelines allow issuance; it cannot be used to justify granting permits if the guidelines are not met.\textsuperscript{175} If an analogue to the public interest regulations was implemented in conjunction with the CAA’s NSR program, it could allow for the

\textsuperscript{167} See Wohlers, supra note 159, at 337-38 (arguing for use of RCRA citizen suit provision in other contexts).

\textsuperscript{168} See id. (exemplifying possibilities of RCRA’s citizen suit provision).

\textsuperscript{169} See Clean Water Act § 404, 33 U.S.C. § 1344 (outlining permit requirements for dredged or fill material).

\textsuperscript{170} See 40 C.F.R. § 230.10(a) (2023) (describing consideration of practicable alternatives).

\textsuperscript{171} See id. § 230.10(d) (explaining mitigation requirements if no practicable alternative exists).

\textsuperscript{172} See id. § 230.10(b)(1)-(c) (prohibiting certain discharges regardless of mitigation).

\textsuperscript{173} See 33 C.F.R. § 320.4(a)(1) (2023) (establishing public interest guidelines). The § 404 program authorizes the Secretary of the Army to administer the permits, who then delegates this authority to the Corps. See 33 U.S.C. § 1344(a) (noting Secretary may issue permits).

\textsuperscript{174} See 33 C.F.R. § 320.4(a)(1) (outlining factors for consideration in assessing public interest).

\textsuperscript{175} See id. (establishing unilateral control device).
consideration of environmental justice concerns when determining whether an NSR permit is required.\footnote{176} Apart from the previously proposed reforms, the Biden Administration has taken several measures to address environmental justice, such as releasing new tools and data, issuing guidance and memoranda, and implementing wide-ranging initiatives to strengthen enforcement.\footnote{177} Along with these initiatives, the EPA has issued new guidelines on how to incorporate environmental justice into air permitting programs nationwide.\footnote{178} Although the guidelines themselves do not create new legal obligations and most air permitting programs are managed by the states which are not required to follow the EPA’s recommendations, the guidance suggests that there will be greater EPA and public scrutiny of projects that may disproportionately impact low-income or minority communities.\footnote{179} The guidance also indicates that going forward, the EPA is more likely to impose additional permit requirements for projects affecting environmental justice communities, either directly in the case of the few permits it issues or indirectly through comments and political pressure for state-issued permits.\footnote{180}

The guidance provides a set of principles for regional air permitting staff to apply immediately.\footnote{181} One of the first principles is for staff to use mapping tools like EJScreen to identify marginalized communities in need of environmental protection.\footnote{182} The guidance emphasizes early engagement in the permitting process to ensure fair treatment and meaningful participation.\footnote{183} Staff should also provide opportunities for public involvement, including training

\footnote{176. See 33 U.S.C. § 1344(a) (granting Secretary authority to issue permits). The Corps maintains that its authority to refuse permits, even when the guidelines are satisfied, stems from § 404(a), which empowers the Corps to grant permits “for the discharge of dredged or fill material into the navigable waters.” See \textit{id.} (delegating permitting authority).}

\footnote{177. See Exec. Order No. 14008, 86 Fed. Reg. 7619 (Jan. 27, 2021) (outlining policy to address environmental injustice).}

\footnote{178. See U.S. Env’t Prot. Agency, \textit{EJ in Air Permitting: Principles for Addressing Environmental Justice Concerns in Air Permitting} 1-2 (2022) [hereinafter \textit{EJ in Air Permitting}] (shedding light on how agency intends to incorporate environmental justice in air permitting programs).}

\footnote{179. \textit{See id.} (noting goal of document is to provide actionable items EPA regions can take to promote environmental justice).}

\footnote{180. \textit{See id.} at 4 (explaining agency’s future intentions).}

\footnote{181. \textit{See id.} at 2-5 (outlining guidance for air permitting staff).}

\footnote{182. \textit{See id.} (directing staff to utilize mapping tools); \textit{see also} EJScreen: \textit{Environmental Justice Screening and Mapping Tool}, U.S. Env’t Prot. Agency, https://www.epa.gov/ejscreen (last visited Mar. 10, 2023) (providing overview of EJScreen capabilities). These tools can help identify communities based on factors such as race, ethnicity, income, language barriers, and other indicators of social vulnerability. \textit{Id.} (explaining goals of mapping tools).}

\footnote{183. \textit{See id.} at 2 (emphasizing early engagement).}
community members on interpreting and commenting on permits, ensuring easy access to permit documents, holding public hearings, and addressing participation barriers.\textsuperscript{184}

Additionally, the EPA suggests that staff conduct a “fit for purpose” environmental justice analysis when a permit action disproportionately impacts a community’s health or environment.\textsuperscript{185} If a preliminary analysis suggests that the permitting action will disproportionately affect individuals based on race, color, or national origin, it may be necessary to conduct an examination of disparate impacts under the federal non-discrimination laws, including Title VI.\textsuperscript{186} Finally, personnel should develop the capability to improve the integration of environmental justice considerations into the air permitting process, which may involve expanding on the current tools and fostering mutual learning among permitting authorities, the regulated community, and impacted communities through peer-to-peer initiatives.\textsuperscript{187}

The principles outlined in the guidance will be applied differently depending on the type of air permitting action and whether it is administered by the EPA or the state.\textsuperscript{188} If the EPA serves as the permitting authority, it will employ these principles to establish both the content of the permit and the process for reviewing the permit.\textsuperscript{189} This grants the EPA the ability to promote environmental justice in various ways, such as exercising its discretion, within legal limits, to impose specific terms and conditions on the permit that mitigate disproportionate and adverse impacts on marginalized communities.\textsuperscript{190}

Moreover, these principles may have a significant impact on NSR preconstruction permitting.\textsuperscript{191} For example, Section 165(a)(2)
of the CAA provides that the EPA may issue a PSD permit following a public hearing; during this hearing, interested parties, including representatives of the Administrator, are afforded an opportunity to attend and present information regarding the air quality impact of the proposed source, as well as any alternatives, control technology requirements, and other appropriate considerations. 192 In addition to mandating an opportunity for public participation, the language in Section 165(a)(2), specifically the terms “alternatives” and “other appropriate considerations,” could be construed as providing the EPA with the discretion to consider environmental justice factors when issuing NSR permits. 193

The EPA acknowledges, however, that it has never explicitly based an NSR permit condition solely on such discretion, and the precise extent of this discretion is yet to be defined. 194 When states and tribes administer their own air permitting programs, the EPA will have a more supportive role in promoting environmental justice. 195 In these cases, the EPA can comment on individual permits during the public comment period and highlight environmental justice concerns. 196 State permitting authorities, however, are not required to independently consider environmental justice in their permitting decisions. 197

In conclusion, the future role of citizen suits in addressing environmental injustice is limited due to various constraints on their availability and effectiveness. 198 Instead, the executive and legislative branches offer the most promising route in addressing

193. See EPA Legal Tools, supra note 188, at 40 (noting ability to consider environmental justice). Given this, § 165(a)(2) could be construed to provide the EPA with discretion to impose permit conditions on the basis of environmental justice considerations raised in public comments regarding air quality impacts of a proposed source. Id. (explaining potential for EPA discretion). Moreover, the ability to condition a permit on environmental justice considerations would further the purpose of the CAA to “protect public health and welfare from any actual or potential adverse effect . . . from air pollution . . . notwithstanding the attainment and maintenance of all [NAAQS].” See id. (describing how consideration of environmental justice aligns with purpose of CAA); see also Clean Air Act § 160, 42 U.S.C. § 7470 (declaring congressional purpose).
194. See EPA Legal Tools, supra note 188, at 40 (admitting EPA’s discretion to condition permit on such factors has yet to be implemented).
195. See id. at 38-39 (stating how EPA’s role differs when states possess primary permitting authority).
196. See id. (describing actions available to EPA when states possess primary permitting authority).
197. See id. (explaining non-mandatory nature of states to consider environmental justice).
198. For a discussion of the limitation on the availability of citizen suits, see supra notes 69-145 and accompanying text.
environmental injustice under the CAA. Continuation of the Biden Administration’s current efforts to improve access to vital data and increase public involvement is crucial in achieving this goal. Additionally, leveraging the EPA’s discretion to consider environmental justice in the air permitting process is essential to fill the gaps that citizen suits cannot currently address. Despite citizen suits falling short of their potential, determined efforts to address the existing gaps can still bring significant progress. “Never doubt that a small group of thoughtful committed citizens can change the world; indeed, it’s the only thing that ever has.”

Alexandra M. George*

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199. For a discussion of potential avenues for reform, see supra notes 154-96 and accompanying text.
200. For a discussion of potential avenues for reform, see supra notes 154-96 and accompanying text.
201. For a discussion of potential avenues for reform, see supra notes 154-96 and accompanying text.
202. See Bruce, supra note 27 (noting role of citizens in environmental justice movement).

* J.D. Candidate, May 2024, Villanova University Charles Widger School of Law; B.S., Psychology, 2019, University of Pittsburgh. To my family, thank you for your unwavering support and encouragement. To my colleagues at the Villanova Environmental Law Journal, thank you for your diligent assistance in the publication of this Comment.