

HOLDING THE EPA ACCOUNTABLE: JUDICIAL CONSTRUCTION OF ENVIRONMENTAL CITIZEN SUIT PROVISIONS

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What happens when a presidential administration fails or refuses to properly administer our nation's environmental laws? Thanks to the design of our federal environmental statutes, American citizens are armed with a valuable legal tool to hold the Environmental Protection Agency (EPA) accountable: the citizen suit. Environmental citizen suits allow private citizens to sue the EPA to require it to carry out its statutory duties, and can be a valuable mechanism in the face of a presidential administration unsympathetic to environmental protection. Because citizen suit provisions allow citizens to sue the EPA Administrator for failing to perform an action or duty that is nondiscretionary under the statute, the permissibility of lawsuits frequently turns on judicial interpretation of the term "nondiscretionary duty." There is currently a split across the federal courts as to how to construe this term. In fact, the case law on this topic has become somewhat muddled, with disparities arising among district courts and few courts of appeal ruling conclusively on the issue. Some courts have narrowed the term, thereby limiting opportunities for citizen suits. A primary disagreement is whether the presence of the word "shall" in a statutory provision is sufficient to impose a nondiscretionary duty or whether more is required. Some courts have determined that a duty is discretionary unless the provision also includes a "date-certain" deadline, requiring the Administrator to perform the prescribed action by a specific date that appears within that part of the statute. Other courts have resisted adopting a bright-line rule requiring a date-certain deadline before imposing a nondiscretionary duty on the Administrator. The Supreme Court has not spoken on this date-certain deadline rule. This Note will explore how courts have interpreted the term nondiscretionary duty in environmental citizen suit provisions. This Note argues that the federal judiciary as a whole should abandon the date-certain deadline rule and side with courts that construe nondiscretionary duty more broadly. This reading can be supported legally, and will ensure that citizens are able to sue to compel EPA action even when a presidential administration fails to carry out important environmental laws and regulations.

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* Copyright © 2018 by Katherine A. Rouse. J.D., 2018, New York University School of Law; B.A., 2014, Yale University. I would like to thank Professor Richard Revesz for his invaluable guidance, as well as the editorial staff of the *New York University Law Review* for their diligent work in preparing this Note for publication.

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INTRODUCTION

Following the 2016 election of Donald Trump, many American environmentalists feared for the environmental policy, or lack thereof, that the new President had planned. Less than two years into Trump's presidency, these fears have come to fruition. Having run a presidential campaign filled with promises to dismantle the U.S. Environmental Protection Agency (EPA),¹ a just-elected Trump slated Scott Pruitt to serve as the Agency's new Administrator.² Pruitt spent many years of his career as Oklahoma Attorney General, fighting to undo EPA regulations while retaining close ties to fossil

¹ See Oliver Milman, *Republican Candidates' Calls to Scrap EPA Met With Skepticism by Experts*, GUARDIAN (Feb. 26, 2016, 3:19 PM), <https://www.theguardian.com/environment/2016/feb/26/republican-candidates-donald-trump-eliminate-epa-law-experts> (describing Trump's disparaging comments about the Environmental Protection Agency and his promises to severely cut federal funding for environmental protection during a 2016 Republican candidate debate).

² Chris Mooney, Brady Dennis & Steven Mufson, *Trump Names Scott Pruitt, Oklahoma Attorney General Suing EPA on Climate Change, to Head the EPA*, WASH. POST (Dec. 8, 2016), <https://www.washingtonpost.com/news/energy-environment/wp/2016/12/07/trump-names-scott-pruitt-oklahoma-attorney-general-suing-epa-on-climate-change-to-head-the-epa>.

fuel industries.³ During his tenure, Pruitt attempted to drastically roll back existing environmental regulations,⁴ having reversed or attempted to reverse (through delays, stays, and suspensions) over seventy rules in the administration's first year alone.⁵ In July 2018, Pruitt resigned from his post as EPA Administrator amidst a slew of ethics scandals, and his deputy, Andrew Wheeler, became acting administrator of the agency.⁶ Wheeler, a former coal lobbyist, has been equally entwined with fossil fuel interests, while many anticipate he may "be more effective at implementing Trump's anti-environmental agenda than Pruitt was."⁷

Furthermore, for those environmental regulations that remain untouched, the Trump EPA has shown "a more lenient approach" to enforcement against polluters than the EPA under both Barack Obama and George W. Bush.⁸ For Americans who care about envi-

³ See, e.g., Coral Davenport & Eric Lipton, *The Pruitt Emails: E.P.A. Chief Was Arm in Arm with Industry*, N.Y. TIMES (Feb. 22, 2017), <https://www.nytimes.com/2017/02/22/us/politics/scott-pruitt-environmental-protection-agency.html> (discussing the public release of over 6000 pages of email correspondence between Pruitt and members of the fossil fuel industry prior to his confirmation).

⁴ See Alexander C. Kaufman, *Scott Pruitt's First Year Set the EPA Back Anywhere from a Few Years to 3 Decades*, HUFFINGTON POST (Jan. 20, 2018, 8:00 AM), https://www.huffingtonpost.com/entry/pruitt-one-year_us_5a610a5ce4b074ce7a06beb4 ("Former administrators warn that it could take anywhere from a few years to three decades for future administrators to restore the EPA back to where it was a year ago, before the regulatory rollbacks, mass attrition and budget cuts.").

⁵ See Nadja Popovich, Livia Albeck-Ripka & Kendra Pierre-Louis, *76 Environmental Rules on the Way Out Under Trump*, N.Y. TIMES (July 6, 2018), <https://www.nytimes.com/interactive/2017/10/05/climate/trump-environment-rules-reversed.html> (detailing on a rule-by-rule basis the Trump administration's attempt to revoke existing environmental regulations). Much of the EPA's rapid and haphazard regulatory rollback has attempted to end-run the Administrative Procedure Act, and these actions are subject to ongoing legal challenge. See, e.g., Oliver Milman, *'Sloppy and Careless': Courts Call Out Trump Blitzkrieg on Environmental Rules*, GUARDIAN (Feb. 20, 2018, 6:00 AM), <https://www.theguardian.com/environment/2018/feb/20/donald-trump-epa-environmental-rollbacks-court-challenges> ("Many of these legal problems have stemmed from the sheer pace of the rollbacks . . . [And] opponents of the administration . . . believe there is a determination to expunge every vestige of Obama's environmental legacy, regardless of merit.").

⁶ See Coral Davenport, Lisa Friedman & Maggie Haberman, *E.P.A. Chief Scott Pruitt Resigns Under a Cloud of Ethics Scandals*, N.Y. TIMES (July 5, 2018), <https://www.nytimes.com/2018/07/05/climate/scott-pruitt-epa-trump.html>.

⁷ Coral Davenport, *How Andrew Wheeler, the New Acting E.P.A. Chief, Differs from Scott Pruitt*, N.Y. TIMES (July 5, 2018), <https://www.nytimes.com/2018/07/05/climate/wheeler-epa-pruitt.html> ("[Wheeler's] career was built around quietly and incrementally advancing the interests of the fossil-fuel industry, chiefly by weakening or delaying federal regulations.").

⁸ Eric Lipton & Danielle Ivory, *Under Trump, E.P.A. Has Slowed Actions Against Polluters, and Put Limits on Enforcement Officers*, N.Y. TIMES (Dec. 10, 2017), <https://www.nytimes.com/2017/12/10/us/politics/pollution-epa-regulations.html> (observing empirically that enforcement of federal pollution laws in Trump's first year in office lagged significantly behind that of either Barack Obama or George W. Bush).

ronmental protection, these trends are difficult, and even frightening, to watch. But luckily, the American public is armed with a valuable legal tool to hold Trump's EPA accountable for adequate administration of the federal environmental statutes: the citizen suit. Environmental citizen suits allow private citizens to sue the EPA to require it to carry out its statutory duties. This can be a valuable mechanism in the face of a presidential administration unsympathetic to environmental protection.

This Note explores the historical use of citizen suits through an analysis of relevant case law. Because citizen suit provisions allow private citizens to sue the EPA Administrator⁹ for failing to perform an action or duty that is nondiscretionary under the statutes the EPA administers, the permissibility of lawsuits frequently turns on judicial interpretation of the term "nondiscretionary duty." Major federal environmental statutes are filled with numerous provisions that form complex regulatory schemes for pollution control and other environmental protection objectives. These provisions can be categorized into two separate groups: those that impose a nondiscretionary duty on the EPA Administrator, and those that impose a discretionary duty. While nondiscretionary duties are mandatory and must be executed under the statute, discretionary duties are permissive and afford the EPA significant leeway in when and how they are performed.

There is currently a split across the federal courts as to how to construe the term nondiscretionary duty. The case law on this topic has become convoluted, with disparities arising among district courts within the same circuit, and few courts of appeals ruling conclusively on the issue. Some courts have narrowed the term, thereby limiting opportunities for citizen suits. A primary disagreement is whether the presence of the word "shall" in a statutory provision is sufficient to impose a nondiscretionary duty on the Administrator, or whether more is required. Some courts have determined that a duty is discretionary unless the provision also includes a "date-certain" deadline, requiring the Administrator to perform the prescribed action by a specific date that appears within that part of the statute.¹⁰ Other courts

⁹ The terms "EPA" and "Administrator" are often used interchangeably when discussing the environmental statutes. In the statutes, Congress delegates environmental regulatory authority to the EPA, which is led by the Administrator. *See, e.g.*, Clean Air Act, 42 U.S.C. § 7601(a)(1) (2012) ("The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under [the Clean Air Act]."); *id.* § 7602(a) ("When used in this chapter—The term 'Administrator' means the Administrator of the Environmental Protection Agency."). Thus, the statutory provisions often refer to the Administrator as the functional decision-maker of the Agency. For the purposes of this Note the terms are used interchangeably when discussing the statutes.

¹⁰ *See infra* notes 105–30 and accompanying text.

have resisted adopting a bright-line rule requiring a date-certain deadline before imposing a nondiscretionary duty on the Administrator, instead holding that statutory use of the term “shall” is presumptively sufficient to compel EPA action.¹¹ The Supreme Court has not spoken on this issue.

This Note explores how courts have interpreted the term nondiscretionary duty in citizen suit provisions. It argues that the federal judiciary as a whole should abandon the date-certain deadline rule and side with courts that have construed nondiscretionary duty more broadly. This reading can be supported legally, and will ensure that citizens are able to sue to compel EPA action even when a presidential administration fails to carry out important environmental laws and regulations. This Note represents the first academic analysis of the doctrinal split regarding the date-certain deadline requirement, and is also the first in the citizen suit literature to recommend that federal courts stop applying the date-certain deadline rule and instead side with courts that construe nondiscretionary duty more broadly.

Part I of this Note provides an overview of citizen suits in the federal environmental statutes, first by discussing their history, second by providing concrete examples, and third by discussing what gives federal courts jurisdiction to hear citizen suit cases. Part II details the origins of the date-certain deadline rule in environmental citizen suit jurisprudence. Part III provides an overview of the existing doctrine on the date-certain deadline rule, and analyzes which courts and circuits have imposed the rule strictly and which have shown reluctance or refused to impose the rule. Finally, Part IV argues that the federal judiciary as a whole should abandon the date-certain deadline rule and instead side with courts that construe the term nondiscretionary duty more broadly.

I

CITIZEN SUITS IN THE FEDERAL ENVIRONMENTAL STATUTES

This Part summarizes the history of citizen suit provisions in the federal environmental statutes, discusses some real-world examples and implications of citizen suits, and gives an overview of federal jurisdiction in citizen suit cases.

¹¹ See *infra* notes 130–81 and accompanying text.

A. *Origins of the Environmental Citizen Suit*

Most federal statutes aimed at pollution control incorporate a citizen suit provision,¹² allowing citizens to serve as “private attorneys general”¹³ to enforce the environmental laws of the United States.¹⁴ In the environmental law context, these “agency-forcing” provisions, which allow citizens to litigate to force the EPA to act, originated with the passage of the Clean Air Act in 1970.¹⁵ The Clean Air Act was one of Congress’s first major delegations of authority to the EPA to administer the nation’s environmental laws.¹⁶ The legislative history of the Clean Air Act indicates congressional intent to enlist citizens as “useful instrument[s] for detecting violations and bringing them to the attention of the enforcement agencies and courts alike.”¹⁷ The citizen suit provision appears in § 304 of the Clean Air Act, and the relevant portion reads:

- (a) [A]ny person may commence a civil action on his own behalf . . .
- (2) against the [EPA] Administrator where there is alleged a failure of the Administrator to perform any act or duty under [the Act] which is not discretionary with the Administrator¹⁸

¹² See James R. May, *Now More than Ever: Trends in Environmental Citizen Suits at 30*, 10 WIDENER L. REV. 1, 2 n.3 (2003) (identifying statutes).

¹³ The Supreme Court first used the term “private attorney general” in its seminal decision in *Brown v. Board of Education*. See William B. Rubenstein, *On What a “Private Attorney General” Is—And Why it Matters*, 57 VAND. L. REV. 2129, 2130 (2004) (citing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)). The origins of the term in the federal courts can be traced to the Court of Appeals for the Second Circuit, where in 1943 Judge Jerome Frank authored a decision using the term. *Id.* at 2133–34 (citing *Assoc. Indus. of N.Y. v. Ickes*, 134 F.2d 694 (1943)). Judge Frank recognized the right of certain persons, authorized by Congress as private attorneys general, to vindicate a public right or interest in court. *Id.* The citizen suits in the federal environmental statutes serve as this type of authorization.

¹⁴ See Robert L. Glicksman, *The Value of Agency-Forcing Citizen Suits to Enforce Nondiscretionary Duties*, 10 WIDENER L. REV. 353, 353 (2004) (introducing the legal concept of environmental citizen suits); David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority Is Shared by the United States, the States, and Their Citizens?*, 54 MD. L. REV. 1522, 1576 (1995) (noting that “[l]ocal, regional, and national environmental public interests groups” have assumed the federal pollution enforcement gap “as private attorneys general”).

¹⁵ See Glicksman, *supra* note 14, at 354.

¹⁶ Christopher D. Ahlers, *Origins of the Clean Air Act: A New Interpretation*, 45 ENVTL. L. 75, 117–18 (2015) (“Passed on December 31, 1970, four weeks after the formation of EPA, the 1970 Act granted EPA a central role in the regulation of air pollution.”).

¹⁷ 116 CONG. REC. S32,927 (daily ed. Sept. 21, 1970) (statement of Sen. Muskie).

¹⁸ 42 U.S.C. § 7604(a)(2) (2012). This provision, and similar provisions in other environmental statutes, also provides a legal mechanism for citizens to bring civil suits against polluters themselves. See, e.g., *id.* (a)(1). The scope of this Note is limited to

This statutory language gives citizens the right to sue the EPA for failing to perform a nondiscretionary duty. The Act places exclusive jurisdiction over these citizen suits in the federal district courts.¹⁹

Since the passage of the Clean Air Act, Congress has passed at least fifteen other major environmental statutes with citizen suit provisions modeled after § 304.²⁰ Among these statutes, the Clean Water Act,²¹ the Resource Conservation and Recovery Act (RCRA),²² the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),²³ the Toxic Substances Control Act (TSCA),²⁴ and the Safe Drinking Water Act (SDWA)²⁵ contain citizen suit provisions with language nearly identical to that of § 304 of the Clean Air Act. The remaining environmental statutes are either administered by an agency other than the EPA,²⁶ or are administered

analyzing citizen actions against the EPA Administrator for his failure to perform a nondiscretionary duty under the statute under part (a) of § 304. Furthermore, § 304 imposes requirements preventing plaintiffs from commencing a civil action until sixty days notice of the violation has been given to the Administrator or if the Administrator has already begun “diligently prosecuting” a civil action to require compliance with the Act. *Id.* § 7604(b)(1)(A). For the purposes of this Note, which focuses on judicial interpretation of nondiscretionary duty, the notice and diligent prosecution requirements will not be discussed.

¹⁹ Section 304 of the Clean Air Act vests in the district courts jurisdiction to hear all citizen suits in which a citizen alleges that the Administrator failed to perform a nondiscretionary duty. *Id.* Section 307, on the other hand, gives the courts of appeal jurisdiction to review “final actions” by the Agency. Daniel P. Selmi, *Jurisdiction to Review Agency Inaction Under Federal Environmental Law*, 72 *IND. L.J.* 65, 69 (1996) (describing the provisions of the Clean Air Act). This Note focuses on the former, analyzing the “agency-forcing” citizen suits of statutory provisions like § 304.

²⁰ See May, *supra* note 12, at 1, 2 n.3 (identifying statutes).

²¹ 33 U.S.C. § 1365(a)(2) (2012) (“[A]ny citizen may commence a civil action on his own behalf—against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.”).

²² 42 U.S.C. § 6972(a)(2) (2012) (“[A]ny person may commence an action on his own behalf—against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.”).

²³ *Id.* § 9659(a)(2) (2012) (providing for a private cause of action “against the President or any other officer of the United States (including the Administrator of the Environmental Protection Agency . . .) where there is alleged a failure” to perform a non-discretionary duty).

²⁴ 15 U.S.C. § 2619(a)(2) (2012) (“[A]ny person may commence a civil action—against the Administrator to compel the Administrator to perform any act or duty under this chapter which is not discretionary.”).

²⁵ 42 U.S.C. § 300j-8(a)(2) (2012) (“[A]ny person may commence a civil action on his own behalf—against the Administrator where there is a failure of the Administrator to perform any act or duty under this subchapter which is not discretionary with the Administrator.”).

²⁶ See Endangered Species Act, 16 U.S.C. § 1540(g) (2012) (U.S. Fish and Wildlife Service); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270(a) (2012)

by the EPA, but contain citizen suit provisions that do not explicitly provide a right of action to enforce a nondiscretionary duty.²⁷ Only three of the major federal environmental statutes do not contain any form of citizen suit provision.²⁸

Citizen suit provisions give private citizens a useful legal tool to compel agency action,²⁹ and since the incorporation of the provisions into the federal environmental statutes, citizen suit activity has grown immensely.³⁰ Environmental groups brought most of the early citizen suits,³¹ and today, national environmental impact litigation organizations like the Natural Resources Defense Council (NRDC) continue to be major citizen suit litigators, accounting for much of the private enforcement of federal environmental laws.³² Further, as the legal mechanism has evolved, the parties bringing suits have diversified and now include companies, property owners, industry, and even states.³³

B. *Environmental Citizen Suits in Practice*

Utilization of these citizen suit provisions has played a key role in the evolution of U.S. environmental law and policy.³⁴ For explanatory purposes, in practice, citizen suit provisions provide a “jurisdictional hook,” allowing private plaintiffs to sue the EPA for its failure to perform a nondiscretionary duty that appears in one of the many other

(Department of Interior Office of Surface Mining); Deep Seabed Hard Mineral Resources Act, 30 U.S.C. § 1427(a) (2012) (National Oceanic and Atmospheric Administration); Deepwater Port Act, 33 U.S.C. § 1515(a) (2012) (Department of Transportation Maritime Administration); Energy Policy and Conservation Act, 42 U.S.C. § 6305(a) (2012) (Department of Energy); Powerplant and Industrial Fuel Use Act, 42 U.S.C. § 8435(a) (2012) (Department of Energy); Ocean Thermal Conservation Act, 42 U.S.C. § 9124(a) (2012) (National Oceanic and Atmospheric Administration); Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(a)(1) (2012) (Bureau of Ocean Energy Management).

²⁷ See Marine Protection Research and Sanctuaries Act, 33 U.S.C. § 1415(g)(1) (2012); Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11046(a) (2012).

²⁸ See Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136–136y (2012); Marine Mammal Protection Act, 16 U.S.C. §§ 1361–1421h (2012); National Environmental Protection Act, 42 U.S.C. §§ 4321–4347 (2012); May, *supra* note 12, at 2 n.3 (identifying three statutes).

²⁹ See generally Glicksman, *supra* note 14 (summarizing the ways in which environmental citizen suits “have led to the creation of new regulatory programs, the shift in emphasis of existing regulatory programs, the expansion of existing regulatory programs, or the accelerated implementation of existing regulatory programs”).

³⁰ See, e.g., May, *supra* note 12, at 2 (“The velocity of environmental citizen suit activity has accelerated markedly in the last quarter century.”).

³¹ *Id.* at 3 (“Early on, environmental groups brought nearly all citizen suits.”).

³² See, e.g., *Litigation at NRDC*, NRDC, <https://www.nrdc.org/sites/default/files/litigation-at-nrdc.pdf> (last visited Sept. 6, 2018) (highlighting NRDC’s impact litigation successes).

³³ See May, *supra* note 12, at 3 (describing the expansion of citizen suit litigators).

³⁴ See *id.* at 8 (“[T]he vast majority of the growing jurisprudence interpreting the nation’s environmental laws is attributable to citizen suits.”).

provisions in the statute at issue. The provision containing the nondiscretionary duty provides a substantive “legal hook” for judicial enforcement, assuming jurisdiction exists.

A hypothetical scenario under the Clean Air Act will help illustrate this concept. Section 111(b)(1)(A) of the Act states,

The Administrator shall, within 90 days after December 31, 1970, publish (and from time to time thereafter shall revise) a list of categories of stationary sources. He shall include a category of sources in such list if in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.³⁵

This provision laid the framework for the Clean Air Act’s New Source Performance Standard (NSPS) program, which regulates pollution from new or modified sources of air pollution.³⁶ Under the statute, the Administrator must set nationwide NSPS standards for each of the categories of stationary sources it identifies under § 111(b)(1)(A).³⁷ The EPA Administrator promulgated its first list of five NSPS stationary source categories under § 111(b)(1)(A) on December 23, 1971, and promulgated additional categories in the years following.³⁸ But suppose the Administrator had failed to publish this initial list by the statutory deadline (ninety days after December 31, 1970). Then, the Clean Air Act’s citizen suit provision—§ 304—would function as a jurisdictional hook, allowing a private plaintiff to sue the Administrator to properly carry out § 111(b)(1)(A), alleging that that provision imposed a nondiscretionary duty on the Administrator to publish this list. If the district court found, using interpretive tools discussed *infra*, that this duty was indeed nondiscretionary, it would have jurisdiction to judicially enforce the EPA’s duty to publish the list, using the legal hook in § 111(b)(1)(A).

But this problem doesn’t just arise in theory. Citizen suits can and do compel real agency action. For example, one early successful citizen suit, *NRDC v. Train*,³⁹ caused the EPA to regulate lead as a “criteria pollutant” under the Clean Air Act.⁴⁰ Under § 108 of the Clean

³⁵ Standards of Performance for New Stationary Sources, 42 U.S.C. § 7411(b)(1)(A) (2012).

³⁶ See RICHARD L. REVESZ, ENVIRONMENTAL LAW & POLICY 361 (3d ed. 2015) (describing the NSPS program).

³⁷ *Id.*

³⁸ See M. Dean High, *Federal Regulations for New Source Performance Standards*, 26 J. AIR POLLUTION CONTROL ASS’N 471, 473 (1976) (outlining the implementation of the NSPS).

³⁹ 411 F. Supp. 864 (S.D.N.Y.), *aff’d*, 545 F.2d 320 (2d Cir. 1976).

⁴⁰ See Glicksman, *supra* note 14, at 365–67 (describing the role *NRDC v. Train* played in the EPA’s regulations).

Air Act, the EPA must list certain pollutants as criteria pollutants, and must subsequently issue air quality standards to control the emissions of those pollutants.⁴¹ Specifically, § 108(a)(1) states that,

For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after December 31, 1970, publish, and shall from time to time thereafter revise, a list which includes each air pollutant—

(A) emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare;

(B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and

(C) for which air quality criteria had not been issued before December 31, 1970 but for which he plans to issue air quality criteria under this section.⁴²

While the Administrator was promulgating a regulation under an entirely separate Clean Air Act provision, he made formal findings about lead's potential public health dangers.⁴³ The NRDC sued the EPA under the Clean Air Act's citizen suit provision in § 304, arguing that this formal finding compelled the EPA to regulate lead as a criteria pollutant under § 108.⁴⁴ The District Court for the Southern District of New York found that the EPA had made a finding under § 108(a)(1)(A) that lead emissions "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare,"⁴⁵ and that this imposed a nondiscretionary duty on the EPA to list lead as a criteria pollutant under § 108.⁴⁶ Because § 108(a) imposed a nondiscretionary duty on the Administrator, the court had jurisdiction under § 304, and ordered the EPA to list lead within thirty days.⁴⁷ The Second Circuit affirmed the decision,⁴⁸ and the EPA listed lead and subsequently promulgated air quality standards for the pollutant.⁴⁹ In the decades that followed, lead emissions, and the concentration of lead in the atmosphere, decreased significantly, resulting in

⁴¹ 42 U.S.C. § 7408 (2012).

⁴² *Id.* § 7408(a)(1).

⁴³ See REVESZ, *supra* note 36, at 320 (describing *NRDC v. Train* and contextual background of lead pollution regulation).

⁴⁴ *NRDC v. Train*, 411 F. Supp. at 867 (summarizing NRDC's arguments).

⁴⁵ In addition, subsections (B) and (C) of § 108(a)(1) were satisfied because "presence" of lead "result[ed] from numerous or diverse mobile or stationary sources" and air quality criteria for lead had not been issued before December 31, 1970. § 7408(a)(1)(B)–(C).

⁴⁶ *NRDC v. Train*, 411 F. Supp. at 870–71 (ordering EPA to list lead as a criteria pollutant "in accordance with the mandate of [§] 108").

⁴⁷ Glicksman, *supra* note 14, at 366.

⁴⁸ *NRDC v. Train*, 545 F.2d 320 (2d Cir. 1976), *aff'g* 411 F. Supp. 864 (S.D.N.Y.).

⁴⁹ Glicksman, *supra* note 14, at 366–67.

environmental and public health benefits for Americans.⁵⁰ This victory for NRDC vindicated a public right to air free of dangerous levels of lead pollution, and is one of many examples where citizen suits have allowed for private litigation to enforce important federal environmental laws.⁵¹

C. *What Gives Federal Courts Jurisdiction to Hear Citizen Suit Cases?*

When federal district courts hear citizen suits, they first must assess whether the statutory provision in question contains a nondiscretionary duty, in order to decide whether they have jurisdiction over the case. Congress expressly limited citizen suits against the Administrator to those arising from his failure to perform a nondiscretionary duty.⁵² Courts are careful in their interpretation of what constitutes a nondiscretionary duty. This limitation is grounded in principles of sovereign immunity, a common law doctrine that prevents suits against the “‘sovereign’ United States, unless such immunity is specifically waived.”⁵³ Courts have recognized that citizen suit provisions in the environmental statutes “provide[] a limited waiver of sovereign immunity for claims ‘where there is alleged a failure of the [EPA] Administrator to perform any *act or duty* under [the Act] which is *not discretionary* with the Administrator.’”⁵⁴ Some courts have expressed reluctance to expand the waiver of sovereign immunity too broadly, and thus have fashioned limiting principles for the interpretation of what statutory provisions impose nondiscretionary duties on the EPA Administrator.⁵⁵

⁵⁰ *Id.* (noting that the “average blood lead levels of Americans” improved markedly since ambient air quality standards for lead were issued). Glicksman notes that removal of lead from gasoline under the Clean Air Act likely played a significant role in this decrease in average blood lead levels in Americans. *See id.* at 367 n.102 (“The 1990 [Clean Air Act] amendments made it unlawful for any person to sell or use as fuel in a motor vehicle any gasoline which contains lead or lead additives.” (citing 42 U.S.C. § 7545(n) (2000))). However, “the ambient air quality standard for lead that emanated from the [*NRDC v. Train*] litigation undoubtedly played a role in those reductions as well.” *Id.* at 367.

⁵¹ *See infra* Appendix Table I.

⁵² *See supra* notes 18–25 and accompanying text.

⁵³ Randall S. Abate & Carolyn H. Cogswell, *Sovereign Immunity and Citizen Enforcement of Federal Environmental Laws: A Proposal for a New Synthesis*, 15 VA. ENVTL. L.J. 1, 1 (1995).

⁵⁴ *Sierra Club v. EPA*, 475 F. Supp. 2d 29, 31 (D.D.C. 2007) (quoting 33 U.S.C. § 1365(a)(2) (2006)).

⁵⁵ *See, e.g.,* *Wildearth Guardians v. McCarthy*, No. 13-CV-1275-WJM-KMT, 2014 WL 943136, at *3 (D. Colo. Mar. 11, 2014) (“[I]n order for this case to fall within the limited waiver of sovereign immunity, Plaintiff must show that it is seeking to enforce a specific non-discretionary duty with which the EPA failed to comply.”); *see also* *Farmers Union Cent. Exch., Inc. v. Thomas*, 881 F.2d 757, 760 (9th Cir. 1989) (emphasizing that “some

In addition, some suggest that in light of constitutional separation of powers issues related specifically to the Take Care Clause of Article II, courts should not overreach too far into agency decision-making processes.⁵⁶ In *Heckler v. Chaney*, the Supreme Court discussed these concerns, and announced a “presumption of unreviewability” of “an agency’s decision not to prosecute or enforce” as that decision is “generally committed to an agency’s absolute discretion.”⁵⁷

Some commentators have criticized the broad application of *Heckler*, arguing that enforcement discretion should not bar judicial review of agency inaction when a statutory violation is alleged.⁵⁸ Furthermore, as some have noted, although “environmental citizen suits may impact the President’s exercise of prosecutorial discretion and the President’s control of enforcement litigation,” the *Heckler* Court emphasized Congress’s power to limit the “power of the executive branch to exercise prosecutorial discretion.”⁵⁹ Citizen suit litigation does not displace federal enforcement, but rather supplements it.⁶⁰ Environmental citizen suit provisions can therefore be squared with the Constitution, and have helpfully reinforced administration of the environmental laws in the decades since their enactment.⁶¹

courts have stated that only a ‘clear-cut’ nondiscretionary duty gives rise to a § 304 jurisdiction [under the Clean Air Act]”; *Wildearth Guardians*, 2014 WL 943136, at *3 (“Congress thus restricted citizens’ suits to actions seeking to enforce specific non-discretionary clear-cut requirements of the Clean Air Act.” (citing *Mountain States Legal Found. v. Costle*, 630 F.2d 754, 766 (10th Cir. 1980))).

⁵⁶ See U.S. CONST. art. II, § 3, cl. 5 (“[The President] shall take [c]are that the [l]aws be faithfully executed.”); cf. Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 669–70 (1985) (critiquing the argument that courts should not review agency inaction or compel agency action, as doing so would violate the Take Care Clause and the separation of powers doctrine, because the court would undertake enforcement activity, which “is entrusted to the executive, not to the courts”).

⁵⁷ *Heckler v. Chaney*, 470 U.S. 821, 830–31, 833–35 (1985).

⁵⁸ See Sunstein, *supra* note 56, at 669–70 (arguing that if judicial review is based upon an agency’s statutory violation, “review promotes rather than undermines the separation of powers, for it helps to prevent the executive branch from ignoring congressional directives”); see also Stephen M. Johnson, *Private Plaintiffs, Public Rights: Article II and Environmental Citizen Suits*, 49 U. KAN. L. REV. 383, 390 (2001) (“[M]any legal commentators agree with Sunstein’s analysis . . .”).

⁵⁹ Johnson, *supra* note 58, at 397–98.

⁶⁰ *Id.* at 398 (“Citizen enforcement supplements rather than replaces federal enforcement, and the federal environmental laws provide the President with sufficient control over citizen enforcement to ensure that the impacts of citizen litigation on the President’s control of enforcement litigation and exercise of prosecutorial discretion are minimal.”).

⁶¹ *Id.* at 399–400 (discussing the “increasingly beneficial” nature of citizen suits and concluding that limitations on citizen suit provisions “ensure that the laws do not frustrate the purposes of Article II”).

In general, courts find that the plain meaning of the word “shall” connotes a mandatory requirement while “may” connotes a permissive one.⁶² This general practice has been applied in the environmental citizen suit context.⁶³ The courts in some of the federal circuits have taken a more liberal approach when defining nondiscretionary duty, finding “shall” sufficient to confer a mandatory obligation.⁶⁴ In contrast, other courts have worked to constrain the doctrine,⁶⁵ in turn reducing the availability of citizen suits for plaintiffs.⁶⁶ The primary

⁶² See, e.g., *Lopez v. Davis*, 531 U.S. 230, 241 (2001) (“Congress’[s] use of the permissive ‘may’ . . . contrasts with the legislators’ use of a mandatory ‘shall’ in the very same section.”); *United States v. Monsanto*, 491 U.S. 600, 607 (1989) (emphasizing that in using the phrase “‘shall order’ . . . Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applied”); *Pierce v. Underwood*, 487 U.S. 552, 569–70 (1988) (noting that use of “shall” was mandatory language).

⁶³ See, e.g., *Our Children’s Earth Found. v. EPA*, 527 F.3d 842, 842–47 (9th Cir. 2008) (“When Congress specifies an obligation and uses the word ‘shall,’ this denomination usually connotes a mandatory command.”); *Sierra Club v. Train*, 557 F.2d 485, 489 (5th Cir. 1977) (“Use of the word ‘shall’ generally indicates a mandatory intent unless a convincing argument to the contrary is made.” (citing C. DALLAS SANDS, *SUTHERLAND’S STATUTORY CONSTRUCTION* § 25.04 (4th ed. 1973))); *Raymond Proffitt Found. v. EPA*, 930 F. Supp. 1088, 1097 (E.D. Pa. 1996) (finding many instances where the Supreme Court “ha[s] stated that the use of the word ‘shall’ in statutory language means the relevant person or entity is under a mandatory duty” and holding it would “construe Congress’s use of ‘shall’ in § [303(c)(3) of the Clean Air Act] as imposing a mandatory, nondiscretionary duty on the Administrator”).

⁶⁴ See *supra* note 63.

⁶⁵ For example, the principle of enforcement discretion is a common limitation on the use of citizen suits. Courts have found provisions commanding the EPA to take an enforcement action against an individual polluter as discretionary, and root these decisions in prosecutorial discretion. See, e.g., *Amigos Bravos v. EPA*, 324 F.3d 1166, 1171 (10th Cir. 2003) (rejecting environmental group’s suit to compel the EPA to bring an enforcement action against a polluting mine and holding that “[t]he view that § 309(a)(3) [of the Clean Water Act] does not restrict the Administrator’s discretion is in keeping with the Supreme Court’s pronouncement of ‘the general unsuitability for judicial review of agency decisions to refuse enforcement.’” (citing *Heckler v. Chaney*, 470 U.S. 821, 831 (1985))); *Sierra Club v. Whitman*, 268 F.3d 898, 902 (9th Cir. 2001) (denying plaintiff relief by refusing to require the EPA to make specific findings and bring an enforcement action against polluter that had violated the Clean Water Act, and stating that “[f]irst and most important is the traditional presumption that an agency’s refusal to investigate or enforce is within the agency’s discretion, unless Congress has indicated otherwise” (citing *Heckler*, 470 U.S. at 838 (1985))). The nondiscretionary duty cases analyzed *infra* do not include those with holdings based on enforcement discretion.

⁶⁶ Citizen suits have also been constrained through standing doctrine. See *Selmi*, *supra* note 19, at 71 n.26 (“[T]he Supreme Court has held that Congress cannot, consistent with Article III of the [C]onstitution, grant universal standing to citizens under an environmental statute.”). In *Lujan v. Defenders of Wildlife*, the Supreme Court held that the Constitution prevents Congress from using the federal environmental statutes to “convert the undifferentiated public interest in executive officers’ compliance with the law into an ‘individual right’ vindicable in the courts.” 504 U.S. 555, 577 (1992). The Court in *Lujan* further held that, as applied, the citizen suit provision of the Endangered Species Act was unconstitutional because Article III forbids suits based on “generalized

focus of this Note is yet another mechanism through which some courts have attempted to restrain the availability of citizen suits for plaintiffs—the adoption of a date-certain deadline requirement for such suits.

II

ORIGINS OF THE DATE-CERTAIN DEADLINE RULE

This Part summarizes the judicial origins of the date-certain deadline rule within nondiscretionary duty citizen suit jurisprudence. Courts that adopt the date-certain deadline rule refuse to find that the EPA has a nondiscretionary duty unless the statutory provision in question sets forth an explicit date by which the EPA must complete the statutorily prescribed action. Judicial use of this rule in the environmental citizen suit context can be traced to the D.C. Circuit's 1987 decision in *Sierra Club v. Thomas*.⁶⁷ That case appropriated principles first elucidated in another D.C. Circuit case, *NRDC v. Train* (not to be confused with the homonymous Second Circuit case discussed in Section I.B *supra*).⁶⁸ Importantly, *Sierra Club v. Thomas* interpreted a statutory provision that did not contain the term “shall,”⁶⁹ one of several reasons it should be distinguished from other nondiscretionary duty cases. Still, the rule has been used by certain district courts and adopted by several other circuits in the nondiscretionary duty context. The Supreme Court has never spoken on the issue of whether a date-

grievances” about the government. *Id.* at 575; see also Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 197–202 (1992). The party bringing a suit under an environmental citizen suit must still show a concrete and particularized injury in order to demonstrate Article III standing. See *Lujan*, 504 U.S. at 560 (“[T]he irreducible constitutional minimum of standing contains three elements . . . [the first of which is that] the plaintiff must have suffered an injury in fact . . . which is concrete and particularized.”); Sunstein, *supra*, at 202. Almost a decade later, environmental advocates cheered the Court's decision in *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000), which seemed to relax the injury-in-fact and redressability requirements. See Melanie A. Anbarci, *The Laidlaw Decision: Shield or Sword?*, 7 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 143, 150 (2001) (“While [the *Laidlaw* Court's] relaxation of the injury-in-fact requirement was itself quite remarkable, environmental groups were even more pleased by the Court's ruling on redressability.”). Still, environmental plaintiffs must, of course, meet Article III standing requirements before bringing a citizen suit against the EPA. Further discussion of the impact of standing on citizen suits is beyond the scope of this Note, which focuses on the judicial interpretation of the Administrator's duties under the statutes.

⁶⁷ 828 F.2d 783 (D.C. Cir. 1987), *partially abrogated by statute as stated in* *Mexichem Specialty Resins v. EPA*, 787 F.3d 544 (D.C. Cir. 2015). For further discussion of *Mexichem's* impact on the date-certain deadline rule, see *infra* notes 193–201 and accompanying text.

⁶⁸ 510 F.2d 692 (D.C. Cir. 1974).

⁶⁹ 828 F.2d at 784–85 (discussing § 302(j) of the Clean Air Act).

certain deadline is required before a district court finds a nondiscretionary duty in a statutory provision.⁷⁰

In *NRDC v. Train*, the predecessor to *Sierra Club v. Thomas*, the NRDC brought a citizen suit under the Clean Water Act to compel the EPA to fulfill its mandatory duty to publish certain “effluent limitations” under §§ 301 and 402 of the Act.⁷¹ The Clean Water Act relies on a permitting system, called the National Pollutant Discharge Elimination System (NPDES),⁷² to enforce certain water quality standards, which the EPA sets as “effluent limitations,” or specified limits on certain pollutants emitted into waterways. Anyone who intends to emit water pollution must obtain a NPDES permit and meet the permit’s conditions, including compliance with the effluent limitations as set forth by § 301(b).⁷³ When the Clean Water Act was passed, it required under § 402(k) that after December 31, 1974, all pollutant discharges from point sources be made in compliance with a NPDES permit.⁷⁴ Section 304(b) of the Act provided guidelines for implementing effluent limitations, for achievement by July 1, 1977.⁷⁵ Section 304(b)(1)(A) states:

(b) [For the purpose of adopting or revising effluent limitations under this chapter] the Administrator shall . . . publish within one year of enactment of this title, regulations, providing guidelines for effluent limitations and, at least annually thereafter, revise, if appropriate, such regulations. Such regulations shall—

(1)(A) identify . . . the degree of effluent reduction attainable . . . for classes and categories of point sources (other than publicly owned treatment works).⁷⁶

NRDC argued that § 304(b)(1)(A) created a nondiscretionary duty, compelling the EPA to finalize regulations for *all* categories of point sources by October 18, 1973 (one year after enactment), so that the guidelines would apply to all point sources when permits were issued by December 31, 1974.⁷⁷ The EPA argued that § 304 had to be administered in light of § 306, which provides in relevant part:

(b) Categories of sources; Federal standards of performance for new sources

⁷⁰ See *infra* Appendix Table I.

⁷¹ *NRDC v. Train*, 510 F.2d at 695–96.

⁷² The National Pollutant Discharge Elimination System program is set forth in § 402 of the Clean Water Act. 33 U.S.C. § 1342 (2012).

⁷³ 33 U.S.C. § 1311(b) (2012); *NRDC v. Train*, 510 F.2d at 695–96.

⁷⁴ See *NRDC v. Train*, 510 F.2d at 696.

⁷⁵ *Id.*

⁷⁶ 33 U.S.C. § 1314(b)(1)(A) (2012).

⁷⁷ *NRDC v. Train*, 510 F.2d at 696.

(1)(A) The Administrator shall, within ninety days after October 18, 1972, publish (and from time to time thereafter shall revise) a list of categories of sources, which shall, at the minimum, include:

[list of twenty-seven enumerated sources].⁷⁸

The EPA argued that the October 18, 1973 deadline applied only to regulation of the twenty-seven enumerated sources in § 306(b)(1)(A), and that publication dates for additional point source categories were discretionary.⁷⁹

The D.C. Circuit held that the statute clearly imposed a nondiscretionary duty on the EPA to publish guidelines for the twenty-seven enumerated sources, which it called “Group I” sources, by the October 18, 1973 deadline in § 304.⁸⁰ However, the court identified the “Group II” sources (or those not explicitly identified as the twenty-seven § 306 sources), as creating a more difficult question of whether the EPA had a nondiscretionary duty to develop effluent limitation guidelines for the additional sources by the enumerated deadline.⁸¹ The court relied on the legislative history of the Clean Water Act to conclude that the selection of Group II sources was discretionary, and thus the October 18, 1973 deadline did not impose a nondiscretionary duty on the Administrator to promulgate guidelines for these sources.⁸²

Thirteen years after *NRDC v. Train*, the D.C. Circuit first delineated the date-certain deadline concept in the environmental citizen suit context, with the seminal date-certain deadline case *Sierra Club v. Thomas*.⁸³ In *Sierra Club v. Thomas*, the Sierra Club sued the EPA Administrator to compel completion of a proposed rulemaking to include strip mines on a list of pollutant sources regulated as part of the Clean Air Act’s “prevention of significant deterioration” (PSD) program.⁸⁴ There were no clear deadlines or concrete requirements

⁷⁸ 33 U.S.C. § 1316(b)(1)(A) (2012).

⁷⁹ *NRDC v. Train*, 510 F.2d at 697.

⁸⁰ *See id.* at 704 (affirming the district court’s interpretation that guidelines must be set for Group I sources by the October 18 deadline, while noting that the EPA also conceded that this was the correct interpretation).

⁸¹ *Id.* at 705.

⁸² *Id.* at 706 (“The Administrator . . . could conclude that Congress intended [the Group I sources] to receive first priority in the guideline formulation process and that the discretion provided him in delineating additional point sources extended to the publication date of the guidelines for those sources.”).

⁸³ 828 F.2d 783 (D.C. Cir. 1987).

⁸⁴ *Id.* at 784. The prevention of significant deterioration (PSD) program was introduced in the Clean Air Act Amendments of 1977 and applies to air quality regions where the air quality is better than the minimum prescribed standards. *Id.* at 785. The goal of the program is to impose more stringent standards to prevent “significant deterioration” of air quality in these higher air quality regions. *See Prevention of Significant Deterioration Basic*

under the statutory sections that the Sierra Club argued compelled action.⁸⁵ In fact, the provisions at issue in *Sierra Club v. Thomas*—§§ 169(1)⁸⁶ and 302(j)⁸⁷—provided definitions of statutory terms, but did not include the term “shall.” While § 169(1) laid out a definition for “major emitting facilit[ies]” for regulation under the Clean Air Act,⁸⁸ § 302(j) provided:

Except as otherwise expressly provided, the terms “major stationary source” and “major emitting facility” mean any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant (including any major emitting facility or source of fugitive emissions of any such pollutant, as determined by rule by the Administrator).⁸⁹

The crux of the Sierra Club’s argument was that given the overall scheme governing PSD regulations, the EPA had failed to meet its nondiscretionary duty of timeliness in completing by rulemaking its list of “major emitting facilities,” as specified in § 302(j).⁹⁰

The D.C. Circuit rejected this argument, and held that the absence of a date-certain deadline for promulgation of a list of major emitting facilities made the duty to promulgate the list discretionary.⁹¹ Finding for the EPA, the court emphasized that, “[a]lthough a date-certain deadline . . . may or may not be nondiscretionary, it is highly improbable that a deadline will ever be nondiscretionary, i.e., clear-cut, if it exists only by reason of an inference drawn from the overall statutory framework.”⁹²

In *Sierra Club v. Thomas*, the D.C. Circuit referred back to *NRDC v. Train*, indicating that the precedent was informative to its determination of whether the EPA had a nondiscretionary duty under the statute.⁹³ The *Sierra Club v. Thomas* court clarified that the only two holdings in *NRDC v. Train* “were that the mandatory deadline of October 18, 1973, imposed a nondiscretionary duty for promulgating

Information, EPA, <https://www.epa.gov/nsr/prevention-significant-deterioration-basic-information> (last visited Sept. 6, 2018) (describing the Clean Air Act’s PSD program).

⁸⁵ See *Sierra Club v. Thomas*, 828 F.2d at 797 (stating that there were no statutory deadlines imposed by Congress to compel completion of the rulemaking procedure).

⁸⁶ 42 U.S.C. § 7479(1) (2012).

⁸⁷ *Id.* § 7602(j).

⁸⁸ *Id.* § 7479(1).

⁸⁹ *Id.* § 7602(j).

⁹⁰ See *Sierra Club v. Thomas*, 828 F.2d at 787 (explaining that the Sierra Club alleged that the EPA unreasonably delayed promulgating regulations regarding strip mines).

⁹¹ *Id.* at 791.

⁹² *Id.*

⁹³ See *id.* at 787–89 (noting that its prior decision in *NRDC v. Train* “warrant[ed] extended discussion” in analyzing whether the EPA had a nondiscretionary duty).

Group I guidelines, enforceable in district court, and that it did not impose a nondiscretionary duty for promulgating Group II guidelines.”⁹⁴ However, the *NRDC v. Train* court had made clear that it did not hold that the EPA had limitless discretion when it came to promulgation of Group II guidelines.⁹⁵ The *NRDC v. Train* court noted that because all dischargers of pollutants had to obtain an NPDES permit by December 31, 1974, per § 402 of the statute, guidelines for all Group II sources had to be completed by that date.⁹⁶ In *Sierra Club v. Thomas*, the court implied a stricter construction of the date-certain deadline requirement. The *Sierra Club v. Thomas* court stated that “[i]n order to impose a clear-cut nondiscretionary duty, . . . a duty of timeliness must ‘categorically mandat[e]’ that *all* specified action be taken by a date-certain deadline.”⁹⁷ While it left open the door to imposing a nondiscretionary duty of timeliness if a date was “readily-ascertainable” or inferable from “the overall statutory scheme,” it underscored the idea that clear-cut violations of nondiscretionary duties could arise only from a bright line date-certain deadline.⁹⁸

As detailed in Part III, some courts have expressly relied on the rule first laid out in *Sierra Club v. Thomas* to refuse to find a nondiscretionary duty absent a date-certain deadline in the statutory provision in question. On the other hand, other courts have resisted foreclosing citizen suits based on *Sierra Club v. Thomas*’s rigid test. Importantly, even the D.C. Circuit, which originated the date-certain deadline rule, and the U.S. District Court for the District of Columbia have expressed hesitance about the original rule.⁹⁹ For multiple reasons, broad reliance on the date-certain deadline rule is misplaced.¹⁰⁰ This Note argues that the date-certain deadline rule created by the D.C. Circuit is unnecessarily and overly strict, and that federal courts

⁹⁴ *Id.* at 790 (citing *NRDC v. Train*, 510 F.2d 692, 710–11 (D.C. Cir. 1974)).

⁹⁵ *NRDC v. Train*, 510 F.2d at 706 (“While we agree with the Administrator that he has some latitude concerning the date of publication of guidelines for Group II categories, we do not accept the position that this discretion is at large.”).

⁹⁶ *Id.* at 707–08.

⁹⁷ *Sierra Club v. Thomas*, 828 F.2d at 791.

⁹⁸ *Id.* at 790–92.

⁹⁹ *See, e.g.*, *Kingman Park Civic Ass’n v. EPA*, 84 F. Supp. 2d 1, 5 (D.D.C. 1999) (“Purporting to apply *Sierra Club [v. Thomas]*, EPA suggests that because the statute establishes no clear-cut, date-certain deadline that explicitly addresses state inaction, no nondiscretionary duty arises. . . . [But r]efracted through the prism of EPA’s analysis, *Sierra Club [v. Thomas]* and its application to this case assume distorted dimensions.”); *Nat’l Wildlife Fed’n v. Browner*, 127 F.3d 1126, 1129 n.6 (D.C. Cir. 1997) (“We also do not decide whether, as EPA contends, a ‘readily ascertainable deadline’ for agency action is a necessary jurisdictional base for a citizen suit under the [Clean Air] Act.” (citing *Sierra Club v. Thomas*, 828 F.2d at 791)). *See also infra* notes 193–201 and accompanying text.

¹⁰⁰ *See infra* Section IV.A.

should abandon it to instead follow the example of those courts that have construed citizen suit jurisdiction more broadly.

III AN ANALYSIS OF THE DATE-CERTAIN DEADLINE CASE LAW

In order to advance the field's understanding of how some federal courts have used date-certain deadlines to constrain the environmental citizen suit doctrine, I surveyed all relevant case law and have compiled my findings below.¹⁰¹ This Part gives a basic overview of the scope of my research and the methodology I employed.

A. *Scope of the Research*

In evaluating the case law, I focused primarily on cases where the court interpreted whether or not the EPA had a nondiscretionary duty. Within this category, I only analyzed cases where the court grounded its holding on the existence (or lack of) a statutory date-certain deadline.¹⁰² To narrow the scope of my research, I also excluded several other categories of nondiscretionary duty cases that were not relevant to my analysis.¹⁰³

¹⁰¹ See *infra* Appendix Table I.

¹⁰² Using Westlaw's online database with terms and connectors I searched: "adv: E.P.A. environmental-protection-agency /p (no not non +1 discretion!) mandatory /s duty obligat! responsib! requir!" to search all federal cases on the database as of February 2018. I searched within these results to include cases with the terms: "citizen-suit" and either "date-certain" or "deadline."

¹⁰³ My findings do not include cases where the court assumed a nondiscretionary duty existed (or its existence was not contested by the parties) and instead analyzed *whether* that duty had been adequately performed. See, e.g., *Sierra Club v. Browner*, 130 F. Supp. 2d 78, 80–81 (D.D.C. 2001). I did not include cases where the court refused to find jurisdiction because the EPA had statutory enforcement discretion, as grounded in principles elucidated in *Heckler v. Chaney*, 470 U.S. 821, 837–38 (1985). See, e.g., *Sierra Club v. Whitman*, 268 F.3d 898, 901 (9th Cir. 2001) (interpreting § 309(a)(3) of the Clean Water Act and finding that when bringing an enforcement action against someone in violation of permit conditions, both the decision to find a violation and to take an enforcement action are discretionary duties); *Dubois v. Thomas*, 820 F.2d 943, 947–48, 951 (8th Cir. 1987) (same). My analysis did not include cases where the EPA had conceded liability for its failure to perform a nondiscretionary duty, but the plaintiff sought a court ordered deadline for the EPA to perform that duty. See, e.g., *Sierra Club v. McCarthy*, No. 14-CV-05091 YGR, 2015 WL 3666419, at *3–4 (N.D. Cal. May 7, 2015). I also disregarded cases where a plaintiff attempted to use the federal environmental statutes to bring a citizen suit against a state, not the Administrator, for its failure to perform a nondiscretionary duty. See, e.g., *Ringbolt Farms Homeowners Ass'n v. Town of Hull*, 714 F. Supp. 1246, 1254 (D. Mass. 1989) ("Even assuming, without deciding, that § 1319 creates a non-discretionary duty on the part of the Administrator . . . there is no analogous provision in the statute creating a non-discretionary enforcement duty on the part of a *state* regulatory agency."). My research did not include cases where the plaintiff challenged the EPA's failure to comply with its own *regulations*, alleging that the EPA failed a

B. *General Overview of Findings: Splits Within and Across the Circuits*

As a general matter, the case law surrounding nondiscretionary duties in environmental citizen suits is muddled. After assessing the cases as described in Section III.A above, I was left with forty-four cases to analyze, ranging in date from 1974 to 2017.¹⁰⁴ As I read and categorized these cases, it became increasingly clear that there is no one approach to determining whether to impose a date-certain deadline rule, which has resulted in a messy line of case law. Still, certain district courts within certain circuits have demonstrated greater willingness to apply the date-certain deadline rule, while others are reluctant to do so, leaving greater opportunities for citizen enforcement of the federal environmental statutes.

Given the wide-ranging disparities across the circuits and the district courts, the following sections provide an analysis of several informative examples of cases within the date-certain deadline doctrine, first detailing those courts that have applied the rule strictly, and then detailing those that have refused to apply the rule in a bright-line way. The cases highlighted were selected because of their detailed analysis of the rule.

nondiscretionary regulatory duty rather than a nondiscretionary statutory duty; it is not clear in the doctrine whether the EPA's own regulations can impose a nondiscretionary duty, thereby conferring jurisdiction under the environmental citizen suit provisions. *See, e.g.,* *Sierra Club v. Leavitt*, 355 F. Supp. 2d 544, 549 (D.D.C. 2005) (finding that an EPA regulation requiring a hazardous air pollutant rulemaking imposed a nondiscretionary duty on the Administrator). *But see Nat'l Wildlife Fed'n*, 127 F.3d at 1128–29 n.5 (D.C. Cir. 1997) (finding an “issue of first impression in the federal courts” on whether statutory duties alone can support citizen suit jurisdiction). Finally, I omitted cases where the court made no binding determination about the existence of a nondiscretionary duty, but rather, for example, assessed an attorneys' fee award or approved a settlement consent decree between the parties. *See, e.g.,* *Ctr. for Biological Diversity v. EPA*, No. C 17-00720 WHA, 2017 WL 6761932, at *10 (N.D. Cal. Dec. 4, 2017). My research did account for three relevant district court decisions that were ultimately vacated or reversed by the court of appeals. *See infra* Appendix Table I. However, I used these to analyze only how certain courts discussed the date-certain deadline rule and did not incorporate them into my analysis of the overall state of the doctrine. While these cases were reversed and thus do not elucidate good law, it is still interesting to see how these district courts attempted to analyze the date-certain deadline rule given the lack of doctrinal clarity across the entire federal judiciary.

¹⁰⁴ Table I of the Appendix attached *infra* contains a general overview of these cases.

1. Courts Imposing the Date-Certain Deadline Rule

Among the federal courts that have picked up on the date-certain deadline rule, the Eastern District of Louisiana recently used the rule to reject a citizen suit in *Zen-Noh Grain Corp. v. Jackson*.¹⁰⁵

In *Zen-Noh Grain*, the plaintiff sued the EPA for its failure to terminate, modify, or revoke Clean Air Act permits issued to Nucor, an iron manufacturer. The Clean Air Act establishes a national permitting system for facility operators like Nucor, and under Title V of the Clean Air Act, it is “unlawful to operate major sources of air pollution ‘except in compliance with a permit issued by a permitting authority.’”¹⁰⁶ The states are responsible for establishing a permitting program, which the EPA approves, giving the state jurisdiction to serve as a permitting authority.¹⁰⁷ In Louisiana, where Nucor’s facility operated, the EPA had authorized the Louisiana Department of Environmental Quality (LDEQ) to function as the state permitting authority.¹⁰⁸ Authorized state permitting authorities are responsible for issuing permits, but the EPA retains authority under § 505 to review and object to proposed permits if they are not in accordance with the Clean Air Act.¹⁰⁹

Section 505 also provides a process for citizens to petition the EPA to object to a proposed permit issued by a state permitting authority if the EPA does not object independently.¹¹⁰ Under § 505(b)(2), “[t]he Administrator shall issue an objection within such period if the petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of th[e Clean Air Act].”¹¹¹

Plaintiff Zen-Noh petitioned the EPA in 2010 to object to Nucor’s permit.¹¹² Before the EPA brought an objection against the

¹⁰⁵ 943 F. Supp. 2d 657 (E.D. La. 2013). Of note, the Fifth Circuit Court of Appeals has not spoken on the date-certain deadline rule. One additional Fifth Circuit district court, the Northern District of Texas, declined to answer the question of whether a date-certain deadline rule applied in the citizen suit context, finding that the EPA had no nondiscretionary duty on other grounds. *See Cross Timbers Concerned Citizens v. Saginaw*, 991 F. Supp. 563, 568–69 (N.D. Tex. 1997) (describing the *Sierra Club v. Thomas* date-certain deadline rule with some apprehension, refusing to pass on the validity of the rule, and finding on other grounds that no mandatory duty existed under the provision in question).

¹⁰⁶ *Zen-Noh Grain*, 943 F. Supp. 2d at 660 (quoting 42 U.S.C. § 7661a(a) (2012)).

¹⁰⁷ *Id.* (citing § 7661(4)).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* (citing § 7661d(a)(1), (b)(1)).

¹¹⁰ *Id.* (citing § 7661d(b)(2)).

¹¹¹ 42 U.S.C. § 7661d(b)(2) (2012).

¹¹² *Zen-Noh Grain*, 943 F. Supp. 2d at 657.

permit, LDEQ made modifications to the permit.¹¹³ Zen-Noh, still disagreeing that Nucor's permit complied with the Clean Air Act, once again petitioned the EPA to object to the revised permit.¹¹⁴ The EPA granted Zen-Noh's petition in March 2012.¹¹⁵ In June 2012, LDEQ responded to the EPA's objection, but at the time of the lawsuit LDEQ had not revised the permit and the EPA had taken no action to terminate, modify, or revoke the Nucor permit.¹¹⁶

Because LDEQ had already issued the Nucor permit before receiving any objection from the EPA, § 505(b)(3) and § 505(c) of the Clean Air Act applied.¹¹⁷ These provisions state:

(b)(3) Upon receipt of an objection by the Administrator under this subsection, the permitting authority may not issue the permit unless it is revised and issued in accordance with subsection (c) of this section. If the permitting authority has issued a permit prior to receipt of an objection by the Administrator under paragraph (2) of this subsection, the Administrator shall modify, terminate, or revoke such permit and the permitting authority may thereafter only issue a revised permit in accordance with subsection (c) of this section.¹¹⁸

(c) If the permitting authority fails, within 90 days after the date of an objection under subsection (b) of this section, to submit a permit revised to meet the objection, the Administrator shall issue or deny the permit in accordance with the requirements of this subchapter. No objection shall be subject to judicial review until the Administrator takes final action to issue or deny a permit under this subsection.¹¹⁹

The EPA's own regulations supplement these statutory provisions, providing that if a permitting authority issues a permit before the EPA objects, the authority has ninety days to resolve the objection once it is made.¹²⁰ Furthermore, the EPA's regulations state that the Administrator "will terminate, modify, or revoke and reissue the permit' after providing 30 days' notice to the permittee and providing the permittee an opportunity to comment on the Administrator's proposed action 'and an opportunity for a hearing.'"¹²¹

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 660–61.

¹¹⁸ 42 U.S.C. § 7661d(b)(3) (2012).

¹¹⁹ § 7661d(c).

¹²⁰ *Zen-Noh Grain*, 943 F. Supp. 2d at 661 (citing 40 C.F.R. § 70.7(g)(4) (1992)).

¹²¹ *Id.* (quoting § 70.7(g)(5)).

Zen-Noh argued that § 505(b) and § 505(c) imposed nondiscretionary duties on the EPA “to modify, terminate, or revoke [Nucor’s] permit.”¹²² The court rejected this idea.¹²³ Although the Eastern District of Louisiana noted that “[t]he Fifth Circuit has not affirmatively adopted” the *Sierra Club v. Thomas* date-certain deadline rule, it cited that case to adopt the rule and dismiss Zen-Noh’s claims under the Clean Air Act citizen suit provision.¹²⁴ The *Zen-Noh Grain* court found an absence of any “explicit or readily ascertainable deadline” in § 505(b) or § 505(c), stating that the statute “require[d] the Administrator to revoke, terminate, or modify the permits,” but that it “d[id] not say when.”¹²⁵ Despite the other clear deadlines and intervals in the statute, such as the requirement that the permitting authority respond to the EPA’s objection within ninety days to avoid the Administrator’s modification, revocation, or termination of a permit,¹²⁶ the court dismissed Zen-Noh’s claim for lack of subject matter jurisdiction.¹²⁷ In doing so, the court afforded the Administrator significant discretion, while depriving Zen-Noh and other similarly situated plaintiffs of any mechanism to compel the EPA to make a determination on a permit not in compliance with the Clean Air Act.

The *Zen-Noh Grain* court is not alone in construing and applying the *Sierra Club v. Thomas* date-certain deadline rule strictly. Among the other cases I analyzed that explicitly discussed the date-certain deadline rule, two have come down along the same lines as *Zen-Noh Grain*, using the date-certain deadline rule strictly to reach their holding.¹²⁸ Others discussed the rule¹²⁹ and held that the EPA did not have a nondiscretionary duty absent a date-certain deadline, while

¹²² *Id.*

¹²³ *See id.* (finding that the duties at issue are discretionary).

¹²⁴ *Id.* at 662 (“In *Sierra Club*, the Court held that: ‘In order to impose a clear-cut nondiscretionary duty, we believe that a duty of timeliness must “categorically mandat[e]” that all specified action be taken by a date-certain deadline.’” (quoting *Sierra Club v. Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987))).

¹²⁵ *Id.* at 663.

¹²⁶ 42 U.S.C. § 7661d(b)(3), (c) (2012).

¹²⁷ *Zen-Noh Grain*, 943 F. Supp. 2d at 666.

¹²⁸ *See* *Maine v. Thomas*, 874 F.2d 883, 888 (1st Cir. 1989) (relying on the date-certain deadline rule to hold that the EPA had no nondiscretionary duty under the Clean Air Act to promulgate air pollution regulations for regional haze (citing *Sierra Club v. Thomas*, 828 F.2d at 791)); *Def. of Wildlife v. Browner*, 888 F. Supp. 1005, 1008–09 (D. Ariz. 1995) (stating that the “sole question before a district court in a citizen suit . . . is whether the agency failed to comply with a date-certain statutory deadline” and holding that the lack of a date-certain deadline meant the EPA did not have a nondiscretionary duty under the Clean Water Act to publish water quality standards for Arizona).

¹²⁹ *See infra* Appendix Table I.

limiting the holding by refusing to adopt the date-certain rule outright or pass on its general applicability.¹³⁰

2. *Courts Construing Nondiscretionary Duty as Not Requiring a Date-Certain Deadline*

Some district courts have demonstrated reluctance to impose a bright line date-certain deadline rule. This section will cover two such examples. The first example is the Eastern District of Pennsylvania case *Raymond Proffitt Foundation v. EPA*,¹³¹ where the court expressly distanced itself from *Sierra Club v. Thomas*.¹³² *Raymond Proffitt* has been relied on in the jurisprudence of other courts that denounce the rule.¹³³ The second example is *Sierra Club v. Johnson*, a more recent Northern District of Illinois case that similarly rejected the date-certain rule.¹³⁴

The plaintiff in *Raymond Proffitt* sued the EPA for failing to “promptly prepare and publish” a Clean Water Act water quality standard for Pennsylvania.¹³⁵ Under the Clean Water Act, the EPA shares the task of some of its statutory enforcement with the states.¹³⁶ Under § 303 of the Act, each state must submit to the EPA its own statutorily compliant water quality standards.¹³⁷ The EPA must then approve the state’s water quality standard.¹³⁸ However, if the Administrator determines that certain aspects of the water quality standard are not in accordance with the Clean Water Act, he may either specify certain changes the state must make, or promulgate a new standard that the state must follow.¹³⁹ The Clean Air Act also

¹³⁰ See, e.g., *Cross Timbers Concerned Citizens v. Saginaw*, 991 F. Supp. 563, 568 (N.D. Tex. 1997) (casting doubt on *Sierra Club v. Thomas* and determining that it “need not finally decide applicability of EPA’s ‘date-certain’ test to the [Clean Water Act] . . . because no mandatory EPA duty arises by any analysis under the circumstances of this case”).

¹³¹ 930 F. Supp. 1088 (E.D. Pa. 1996).

¹³² See *id.* at 1100–02 (declining to follow *Sierra Club v. Thomas*).

¹³³ See, e.g., *Defs. of Wildlife v. Jackson*, 284 F.R.D. 1, 4 (D.D.C. 2012) (“While ‘[t]he court does not know exactly what Congress meant’ in directing the EPA to revise [the effluent limitation guidelines] ‘if appropriate,’ even the EPA concedes that 28 years ‘is clearly too long when matched with [the CWA’s] stated deadlines and . . . provisions for review.’” (quoting *Raymond Proffitt*, 930 F. Supp. at 1099–100)); *Nw. Env’tl. Advocates v. EPA*, 268 F. Supp. 2d 1255 (D. Or. 2003) (“[D]eclining to announce any bright-line rule, other courts applying § 303(c)(4)(A) have found that delays of seven and 19 months were not prompt.” (citing *Raymond Proffitt*, 930 F. Supp. at 1097)).

¹³⁴ 500 F. Supp. 2d 936, 941 (N.D. Ill. 2007).

¹³⁵ *Raymond Proffitt*, 930 F. Supp. at 1090 (quoting 33 U.S.C. § 1251 (1994)).

¹³⁶ See *id.* (explaining that the EPA must establish and enforce the states’ limitations on discharges into navigable waters).

¹³⁷ *Id.* (citing 33 U.S.C. § 1313(a)(3)(A) (1994)).

¹³⁸ See *id.*

¹³⁹ 33 U.S.C. § 1313(a)(3)(B)–(C).

requires all states to undergo a “triennial review” of their water quality standards, including holding public hearings to determine whether the standard continues to comply with the Act, or whether a new or modified standard should be adopted.¹⁴⁰ After each triennial review, the state must submit the results of its review to the EPA, which can once again choose to approve the new or modified standard, specify requisite changes to the new standard, or promulgate a new federal standard in its place that the state must meet.¹⁴¹

Pennsylvania first adopted a Clean Water Act water quality standard in 1971. The EPA approved Pennsylvania’s standard, and Pennsylvania subsequently engaged in two triennial water quality reviews in 1979 and 1985.¹⁴² From 1989 to 1994, the EPA informed Pennsylvania continually that its water quality review was insufficient because not all of its policies complied with the federal standards in place.¹⁴³ In 1994, Pennsylvania submitted a triennial review, and the EPA rejected certain aspects of the new standard, finding that the state’s policy did not meet federal regulatory standards governing water quality.¹⁴⁴ Over the next several years, after continual back and forth between the EPA and the Pennsylvania state water regulator, it became increasingly clear that Pennsylvania’s water quality standard was not sufficient.¹⁴⁵ By the time *Raymond Proffitt* was brought in federal court, Pennsylvania still had a noncompliant water quality standard and the EPA had not taken significant action to promulgate a standard for the state.¹⁴⁶

In 1994, Raymond Proffitt Foundation, a Pennsylvanian nonprofit environmental group, filed a citizen suit against the EPA to compel it to promulgate a water quality standard for the state.¹⁴⁷ Raymond Proffitt argued that the EPA had failed to perform a nondiscretionary duty as created by § 303 of the Act,¹⁴⁸ which provides in pertinent part:

(c) Review; revised standards; publication

¹⁴⁰ See *Raymond Proffitt*, 930 F. Supp. at 1090–91.

¹⁴¹ *Id.*

¹⁴² *Id.* at 1092.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ See *id.* at 1093–95 (describing in detail the timeline of Pennsylvania’s negotiations with the EPA regarding its insufficient state water quality standard).

¹⁴⁶ *Id.* at 1094–95.

¹⁴⁷ *Id.* at 1095 & n.9 (“[Raymond] Proffitt [Foundation] is a non-profit based in Media, Pennsylvania, that represents persons who have suffered adverse effects related to their environmental, recreational, and aesthetic uses of Pennsylvania waters.”).

¹⁴⁸ See *id.* at 1095.

(3) . . . If the Administrator determines that any such revised or new standard is not consistent with the applicable requirements of this chapter, he shall not later than the ninetieth day after the date of submission of such standard notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standard pursuant to paragraph (4) of this subsection.

(4) The Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved—

(A) if a revised or new water quality standard submitted by such State under paragraph (3) of this subsection for such waters is determined by the Administrator not to be consistent with the applicable requirements of this chapter, or

(B) in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this chapter.¹⁴⁹

The court first noted that both the Supreme Court and the Third Circuit “have repeatedly stated that [in interpreting a statute] a court should first look to the plain meaning of the statutory language,” and next emphasized that the court “must look to the language and design of the statute as a whole.”¹⁵⁰ Next, the court underscored that both the Supreme Court and Third Circuit have also frequently emphasized that “use of the word ‘shall’ in statutory language means that the relevant person or entity is under a mandatory duty.”¹⁵¹ The court then held that § 303(c)(3) imposed a nondiscretionary duty on the Administrator. While § 303(c)(3) does include two ninety-day statutory “deadlines,” the statute provides no date by which the Administrator “shall promulgate” standards if a state fails to take action.¹⁵² The court held that the existence of the word “shall” in this provision was sufficient to impose a nondiscretionary duty on the Administrator.¹⁵³ The court was also persuaded by an earlier Ninth Circuit case, *Idaho Conservation League, Inc. v. Russell*, which did not discuss the date-certain deadline rule but did highlight that “[t]here is no case law suggesting [§ 303(c)] leaves the Administrator any discretion to deviate from this apparently mandatory course.”¹⁵⁴

¹⁴⁹ 33 U.S.C. § 1313(c)(3)–(4) (2012).

¹⁵⁰ *Raymond Proffitt*, 930 F. Supp. at 1097 (internal citations omitted).

¹⁵¹ *Id.* (internal citations omitted).

¹⁵² See *supra* note 149 and accompanying text.

¹⁵³ See *id.* (“[T]he court will construe Congress’s use of ‘shall’ in § [303](c)(3) as imposing a mandatory, nondiscretionary duty on the Administrator.”).

¹⁵⁴ *Id.* (quoting *Idaho Conservation League, Inc. v. Russell*, 946 F.2d 717, 720 (9th Cir. 1991)). In *Idaho Conservation League*, the Ninth Circuit Court of Appeals addressed the

Once the *Raymond Proffitt* court determined that § 303(c)(3) imposed a nondiscretionary duty on the Administrator to promulgate a water quality standard pursuant to subsection (4), the court proceeded to analyze whether § 303(c)(4) imposed any additional nondiscretionary duties on the Administrator.¹⁵⁵ The court concluded that § 303(c)(4) did indeed impose a nondiscretionary duty to prepare and publish a water quality standard for Pennsylvania.¹⁵⁶

In construing § 303, the *Raymond Proffitt* court relied heavily on the plain meaning and statutory purpose of the Clean Water Act. The court referred to the Clean Water Act's statement of purpose, which includes the goals to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" and to attain "water quality which provides for the protection and propagation of fish, shellfish, and wildlife."¹⁵⁷ In concluding that the EPA had a nondiscretionary duty to promulgate a Pennsylvania water quality standard, the court took a purposivist approach, highlighting that the stated congressional goals could not "be satisfied when neither the EPA nor the state ha[d] promulgated a water quality standard that complies with federal law."¹⁵⁸

The *Raymond Proffitt* court rejected the date-certain deadline rule first advocated by *Sierra Club v. Thomas*.¹⁵⁹ Discussing the origins of the rule through a summary of both *NRDC v. Train* and *Sierra Club v. Thomas*, the *Raymond Proffitt* court recognized other cases where district courts adopted the date-certain deadline rule, including to reject a citizen suit under the same provision at issue, § 303(c)(4).¹⁶⁰ The three main reasons it cited for refusing to apply the date-certain deadline rule were (1) the rule was first created to resolve a bifurcated jurisdictional scheme under the Clean Air Act which did not exist in

lower court's award of attorneys' fees to plaintiff environmental group following a successful citizen suit under § 303(c) of the Clean Water Act. 946 F.2d at 718–19. The Ninth Circuit, in evaluating the propriety of the district court's decision-making, endorsed with dicta the nondiscretionary nature of that provision. *See id.* at 720. Subsequent cases in the Ninth Circuit further reflect this result. *See, e.g.,* Nw. Evtl. Advocates v. EPA, 268 F. Supp. 2d 1255, 1260–61 (D. Or. 2003) (following the result in *Idaho Conservation League* and *Raymond Proffitt* to hold that the EPA had a nondiscretionary duty to promulgate water quality standards for the Willamette River under § 303(c)(4)).

¹⁵⁵ *See Raymond Proffitt*, 930 F. Supp. at 1097.

¹⁵⁶ *See id.* ("The language and design of the Clean Water Act as a whole supports the court's conclusion that the duty imposed on the Administrator under § [303](c)(4) is nondiscretionary.")

¹⁵⁷ *Id.* (quoting 33 U.S.C. § 1251(a), (a)(2) (1994)).

¹⁵⁸ *Id.* at 1097.

¹⁵⁹ *See id.* at 1099–101.

¹⁶⁰ *See id.* at 1098–99 ("The court notes that another district court has held that § [303](c)(4) does not impose a mandatory duty on the Administrator.") (citing *Defs. of Wildlife v. Browner*, 888 F. Supp. 1005, 1008–09 (D. Ariz. 1995)).

the Clean Water Act context;¹⁶¹ (2) application of the date-certain deadline would directly contravene the goals and purpose of the Act, as well as § 303(c)'s express procedures for promulgation of water quality standards; and (3) the Third Circuit had not adopted or followed the date-certain deadline rule and therefore it was not binding on the district court.¹⁶²

The *Raymond Proffitt* court found a nondiscretionary duty in the words “‘shall promptly’ prepare” absent a date-certain deadline, holding that the deadline was “[i]nferable” given the EPA’s undue delay in promulgating the Pennsylvania standard.¹⁶³ While recognizing that “‘shall promptly’” was not a “‘bright-line’ or ‘date-certain’ deadline that would create a nondiscretionary duty under the [*NRDC v.*] *Train* and *Sierra Club v. Thomas*] cases,” it held that “Congress unquestionably intended the Administrator to prepare and publish regulations” and that “[b]y using the word ‘promptly,’ Congress expected the Administrator to begin preparing and publishing the regulations without undue delay.”¹⁶⁴ Because the Administrator had failed to prepare a water quality standard for Pennsylvania for 588 days, the court held that “the EPA must begin to prepare and publish a water quality standard for Pennsylvania now.”¹⁶⁵ In essence, the *Raymond Proffitt* court engaged in a reasonableness analysis, finding that the EPA’s failure to act for 588 days was unreasonable in light of the other statutory provisions. The court held that the EPA delayed unreasonably long in performing its statutorily-mandated duty.

Like the court in *Raymond Proffitt*, a district court within the Seventh Circuit found a nondiscretionary duty absent a date-certain deadline. Although again, the Seventh Circuit has not spoken directly on the date-certain deadline issue, the Northern District of Illinois did so in its 2007 case *Sierra Club v. Johnson*,¹⁶⁶ deciding an issue similar to that which the Eastern District of Louisiana decided in *Zen-Noh Grain*. Taking the stance opposite of the *Zen-Noh Grain* court, the *Sierra Club v. Johnson* court found that the EPA had a nondiscretionary duty under § 505 of the Clean Air Act, absent a statutory date-certain deadline.¹⁶⁷

¹⁶¹ For elaboration on the interpretive impacts of the Clean Air Act’s bifurcated jurisdictional scheme, see *infra* notes 193–97 and accompanying text.

¹⁶² See *Raymond Proffitt*, 930 F. Supp. at 1098.

¹⁶³ *Id.* at 1099–100.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 1100, 1102.

¹⁶⁶ 500 F. Supp. 2d 936 (N.D. Ill. 2007).

¹⁶⁷ *Id.* at 940–41.

In *Sierra Club v. Johnson*, plaintiffs Sierra Club and American Bottom Conservancy brought a citizen suit against the EPA to issue or deny an operating permit to polluter Onyx Facility, a major stationary source that required a permit under Title V of the Clean Air Act.¹⁶⁸ While Onyx applied for a Title V permit in 1995, the Illinois state permitting authority, Illinois Environmental Protection Agency (IEPA), failed to forward it to the EPA, as required by federal regulations, until 2003.¹⁶⁹ Several months after the permit was finally submitted to the EPA, plaintiffs petitioned the EPA for an objection to IEPA's proposed Onyx permit.¹⁷⁰ The EPA failed to grant or deny plaintiffs' petition within sixty days, as required by § 505(b)(2) of the Clean Air Act, and plaintiffs subsequently brought an initial suit against the Administrator.¹⁷¹ The EPA settled with plaintiffs and issued objections to the IEPA permit on February 1, 2006, but IEPA again failed to revise and submit a new permit within ninety days as statutorily prescribed.¹⁷² Plaintiffs then brought another citizen suit against the EPA, and on the day the suit was filed, the Administrator wrote a letter to Onyx instructing the company to submit a federal Title V operating permit application and claimed he was "initiating the process to issue or deny a Title V permit."¹⁷³ The Administrator then argued that his duty to issue or deny a permit under § 505(c) of the Clean Air Act was not nondiscretionary because the provision did not contain a date-certain deadline by which he had to make the permitting decision.¹⁷⁴

The court quoted § 505(c) of the Clean Air Act, which reads as follows,

If the permitting authority fails, within 90 days after the date of an objection under subsection (b) of this section, to submit a permit revised to meet the objection, the Administrator shall issue or deny the permit in accordance with the requirements of this subchapter. No objection shall be subject to judicial review until the Administrator takes final action to issue or deny a permit under this subsection.¹⁷⁵

The EPA argued that its initiation of the federal permitting process satisfied the requirements of § 505(c) and claimed the court lacked jurisdiction under the Clean Air Act citizen suit provision

¹⁶⁸ *See id.* at 937–38.

¹⁶⁹ *Id.* at 938.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 938–41 (citing 42 U.S.C. § 7661d(b)(2) (2006)).

¹⁷² *See id.* at 938.

¹⁷³ *Id.* at 938–39.

¹⁷⁴ *Id.* at 940.

¹⁷⁵ *Id.* at 940 (quoting § 7661d(c)).

because § 505(c) “does not include a duty to act by a ‘date certain,’ a specific date or time frame by which he must complete the Title V permit process.”¹⁷⁶

The Northern District of Illinois disagreed and held that § 505(c) indeed imposed a nondiscretionary duty on the Administrator to issue or deny a permit to Onyx.¹⁷⁷ The court determined it would be illogical for Congress to impose multiple other deadlines in § 505¹⁷⁸ if it intended “the Administrator to begin again the entire lengthy [permitting] process if the state misse[d] its deadline.”¹⁷⁹ Further, the court implied that the EPA’s interpretation would contradict the purpose of the Clean Air Act, “unnecessarily complicat[ing] an already complex statute, mak[ing] a long process longer, and undermin[ing] attaining the goal of cleaner air.”¹⁸⁰ Ultimately, the court found that the EPA had a nondiscretionary duty under § 505(c) to make the decision to issue or deny the Onyx permit, relying on the overall purpose of the statute and inferring a deadline from the other explicit deadlines in § 505.¹⁸¹

The above discussions highlight the interpretive split in existing citizen suit jurisprudence. Despite opportunities to do so, no circuit has categorically adopted the date-certain deadline rule.¹⁸² To exemplify the overall disparate and disorganized nature of the case law across the circuits and district courts, ten cases overall found a nondis-

¹⁷⁶ *Id.* at 940.

¹⁷⁷ *Id.* at 940–41.

¹⁷⁸ As the court noted, § 505(b)(2) imposes a 60-day deadline for citizens to petition for the EPA’s objection. *Id.* at 938; *see also* § 7661d(b)(2). Once the EPA receives the petition, it has sixty days under § 505(b)(2) to grant or deny that petition. *Id.* And, as above, § 505(c) gives a state ninety days to correct a permit following the EPA’s objections, otherwise the EPA will issue or deny the permit. *Id.*; *see also* § 7661d(c).

¹⁷⁹ *Sierra Club v. Johnson*, 500 F. Supp. 2d at 940–41.

¹⁸⁰ *Id.* at 941.

¹⁸¹ *See id.* at 940–41 (noting that “it doesn’t seem logical” that Congress would impose deadlines elsewhere in the statute if the EPA had a nondiscretionary duty).

¹⁸² *See, e.g.,* *Sierra Club v. Johnson*, No. C 08-01409 WHA, 2009 WL 2413094 (N.D. Cal. Aug. 5, 2009) (refusing to adopt “a bright line rule that only duties with date-certain deadlines are nondiscretionary for the purpose of citizen suits under CERCLA” and noting that “[t]he Ninth Circuit has not yet addressed this issue and . . . courts are split on the classification of duties as nondiscretionary for citizen suits under other environmental laws”); *Cross Timbers Concerned Citizens v. Saginaw*, 991 F. Supp. 563, 568 (N.D. Tex. 1997) (rejecting defendants’ “broad reading of the D.C. Circuit’s opinion in *Sierra Club v. Thomas* . . . [because] the question remains open whether a date-certain deadline is required for a mandatory EPA duty to arise under the Clean Water Act” and noting that the Fifth Circuit’s own precedent prior to *Sierra Club v. Thomas* approached the issue from a “different standpoint”); *Raymond Proffitt Found. v. EPA*, 930 F. Supp. 1088, 1101 (E.D. Pa. 1996) (“The Third Circuit has neither adopted nor followed [the date-certain deadline] rule, and this court believes its application to the facts of this case is inappropriate.”).

cretionary duty absent a date-certain deadline, fifteen found a nondiscretionary duty with a date-certain deadline, seventeen found no nondiscretionary duty absent a date-certain deadline, and two found no nondiscretionary duty despite the presence of a date-certain deadline.¹⁸³ In general, there is no clear direction on the date-certain deadline rule.

IV

THE FEDERAL JUDICIARY SHOULD ABANDON THE DATE-CERTAIN DEADLINE REQUIREMENT AND SIDE WITH COURTS CONSTRUING NONDISCRETIONARY DUTY MORE BROADLY

This Part explains why the date-certain deadline rule is too strict from both a statutory and policy standpoint, and argues that the federal judiciary as a whole should abandon the rule and instead align with courts that have construed nondiscretionary duty more broadly.

A. *Why the Date-Certain Deadline Rule Is Too Strict*

Today, certain federal courts are still relying on the *Sierra Club v. Thomas* rule, which is unnecessarily restrictive and ill-fitted for modern day citizen suit jurisprudence. Others, including the D.C. Circuit, have questioned the rule's vitality.¹⁸⁴ In addition to existing judicial reluctance to adopt the date-certain deadline rule in a bright-line manner, there are three reasons that the date-certain deadline rule is too narrow a test. The rule (1) is too stringent from a statutory-interpretation standpoint, (2) contravenes the goals of the federal environmental statutes, and (3) has no place beyond the Clean Air Act context, or even within the Clean Air Act context after its 1990 Amendments.

First, the date-certain deadline rule is too restrictive when assessed against principles of statutory interpretation in other areas of the law. Courts usually interpret the word “shall” in statutes as imposing a mandatory duty on an agency or other specified actor, while statutory use of the word “may” is considered permissive.¹⁸⁵ The

¹⁸³ See *infra* Appendix Table II.

¹⁸⁴ See *supra* note 182; *infra* notes 192–201 and accompanying text.

¹⁸⁵ See, e.g., *United States v. Monsanto*, 491 U.S. 600, 607 (1989) (noting that in using the words “shall order” forfeiture . . . Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applied”); *Pierce v. Underwood*, 487 U.S. 552, 569–70 (1988) (noting that congressional use of the word “shall” was mandatory language); *Crestwood Farm Bloodstock v. Everest Stables, Inc.*, 751 F.3d 434, 445 (6th Cir. 2014) (noting that in the context of contract law, the word “shall” is mandatory); *North v. Cummings*, 355 F. App'x 133, 142 (10th Cir. 2009) (“The word ‘shall’ is mandatory, not discretionary.”); *United States v. Troup*, 821 F.2d 194, 198 (3d Cir. 1987)

broad application of the date-certain deadline rule deviates from this well accepted principle of statutory interpretation, foreclosing citizen suits brought to compel nondiscretionary duties, even when the provision in question contains the word “shall.” Also of importance, the provision in question in *Sierra Club v. Thomas* did not use the term “shall,”¹⁸⁶ further calling into question the broader applicability of the date-certain deadline rule. Courts that have rejected the rule imply that judges should accord more weight to mandatory “shall” language.¹⁸⁷

Second, strict application of the date-certain deadline rule contravenes the goals of the federal environmental statutes and improperly forecloses potentially meritorious citizen suits against the EPA. The federal environmental statutes were passed in direct response to the burgeoning environmental movement of the 1970s, led in large part by citizen activists.¹⁸⁸ The legislative history demonstrates that Congress specifically drafted the citizen suit provisions to enable citizens to use litigation to supplement the EPA’s administration of federal environmental laws.¹⁸⁹ Tellingly, there is no explicit basis in the congressional record compelling courts to require a date-certain deadline before

(describing “shall” as mandatory language); *WildEarth Guardians v. Jackson*, No. 11-CV-00001-CMA-MEH, 2011 WL 4485964, at *7 (D. Colo. Sept. 27, 2011) (“‘Shall’ means shall.” (quoting *Forest Guardians v. Babbitt*, 164 F.3d 1261, 1268 (10th Cir. 1999))); see also Bryan A. Garner, *Shall We Abandon Shall?*, 98 A.B.A. J., Aug. 2012, at 26, 26 (noting the existence of statutes “enshrining” the linguistic principle “that *shall* is ‘mandatory’ and *may* is ‘permissive’”); *id.* at 27 (defining “shall” as “[h]as a duty to; more broadly, is required to” and emphasizing that “[i]his is the mandatory sense that drafters typically intend and that courts typically uphold” (citing *Shall*, BLACK’S LAW DICTIONARY (9th ed. 2009))).

¹⁸⁶ See *supra* notes 86–89 and accompanying text.

¹⁸⁷ For example, in *Raymond Proffitt*, the court found that use of the term “shall promptly” left the EPA Administrator “no discretion to deviate from this apparently mandatory course” created by the language. 930 F. Supp. at 1097 (quoting *Idaho Conservation League, Inc. v. Russell*, 946 F.2d 717, 720 (9th Cir. 1991)).

¹⁸⁸ See Cary Coglianese, *Social Movements, Law, and Society: The Institutionalization of the Environmental Movement*, 150 U. PA. L. REV. 85, 95–103 (2001) (summarizing the growing public demand for federal environmental policy, and the resulting passage of major environmental statutes including the Clean Air Act, Clean Water Act, National Environmental Policy Act, and Comprehensive Environmental Response, Compensation and Liability Act).

¹⁸⁹ See Stephen Fotis, Comment, *Private Enforcement of the Clean Air Act and the Clean Water Act*, 35 AM. U. L. REV. 127, 134–37 (1985) (describing citizen suit provisions as Congress’s express invitation to citizens to serve as “private attorneys general,” providing both supplementary enforcement of the environmental laws and “an effective check on the ‘fourth branch’ of the federal government—administrative agencies like EPA”); see also, e.g., May, *supra* note 12, at 9 (“Congress expected federal courts ‘should recognize that in bringing legitimate actions under [the citizen suit provision] citizens would be performing a public service.’” (quoting S. REP. NO. 92-414, at 81 (1972), reprinted in A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 1499 (1973))).

allowing a nondiscretionary-duty citizen suit to proceed. Most of the courts that reject the date-certain deadline rule provide this purposivist rationale, and find that a strict bright-line application of the rule would unreasonably interfere with the clear goals Congress intended with the passage of our nation's environmental laws.¹⁹⁰

Furthermore, the proper administration of federal environmental laws becomes paramount when the executive branch fails to take its required action under the statutes. An overly narrow construction of the term nondiscretionary duty would allow the EPA to continue evading its statutory obligations. As a matter of policy, the federal judiciary can hold a delinquent EPA accountable for the administration of environmental laws that Congress delegated to it with a rigorous and detailed statutory structure. If the federal courts apply a date-certain deadline rule, American citizens will lose their opportunity to supplement enforcement of the environmental laws as Congress intended, a power that will likely become increasingly indispensable under the Trump Administration's EPA.¹⁹¹

Third, the *Sierra Club v. Thomas* date-certain deadline rule was developed in the Clean Air Act context, before Congress amended the statute in 1990.¹⁹² It has no place beyond the Clean Air Act because of that Act's unique structure, and even within the Clean Air Act context, the 1990 Clean Air Act Amendments call its validity into question. Yet even since 1990, federal courts have continued to appropriate the rule, using it to prevent citizens from bringing citizen suits under various environmental statutes.

Prior to the 1990 Amendments, the Clean Air Act citizen suit provision contained a unique bifurcated jurisdictional scheme, which gave district courts jurisdiction over nondiscretionary duty claims, and courts of appeal jurisdiction over citizen suits alleging the EPA had "unreasonably delayed" in enforcing the statutes.¹⁹³ In formulating the date-certain deadline rule, the *Sierra Club v. Thomas* court determined that a date-certain deadline was required to bring a nondiscre-

¹⁹⁰ See, e.g., *Raymond Proffitt*, 930 F. Supp. at 1097 (determining that clearly stated congressional goals in the Clean Water Act's statement of purpose could not be reached if this citizen suit was foreclosed under the date-certain deadline rule).

¹⁹¹ Trump has previously stated his belief that environmental protection is a waste of the federal government's resources and has proposed action as radical as completely abolishing the EPA, without any acknowledgement of the complex environmental regulatory scheme Congress designed and enacted for the Agency to administer. See Milman, *supra* note 1.

¹⁹² Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (codified as amended at 42 U.S.C. § 7401 (1990)).

¹⁹³ *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 553 n.6 (D.C. Cir. 2015) (describing earlier bifurcated scheme).

tionary duty claim in the district court.¹⁹⁴ It held that absent a date-certain deadline in the statute, plaintiffs could only argue that the EPA had unreasonably delayed required action under the statute in question in litigation that belonged in the court of appeals, not a district court.¹⁹⁵ Only as recently as 2015, twenty-five years after the 1990 Clean Air Act Amendments were passed, did the D.C. Circuit expressly recognize that the Amendments partially abrogated the holding of *Sierra Club v. Thomas*.¹⁹⁶ In *Mexichem Specialty Resins v. EPA*, the D.C. Circuit emphasized in a footnote that the Amendments altered the Clean Air Act's citizen suit provision, giving district courts the power to compel the EPA to perform a nondiscretionary duty unreasonably withheld.¹⁹⁷ *Mexichem* did not discuss the implications of the Amendments for the date-certain deadline rule.¹⁹⁸ However, a 2016 D.C. Circuit case implied that the 1990 Amendments might also have abrogated the date-certain deadline rule.¹⁹⁹ In *Humane Society v. McCarthy*, the court indicated in dicta that, after the 1990 Amendments, the district courts have "the power to compel EPA to act."²⁰⁰ The court's dicta also cast doubt on *Sierra Club v. Thomas* and its foreclosure of a citizen suit to compel action unreasonably withheld because of a lack of a date-certain deadline.²⁰¹

Regardless of this recent D.C. Circuit dicta, courts in many circuits have continued to apply the three-decade-old date-certain deadline rule to prevent citizens from using environmental citizen suit provisions, and have extended its application beyond the context of the Clean Air Act. The recent doubt that the D.C. Circuit has cast on this doctrine provides further evidence that the federal judiciary should abandon the rule, and instead align with courts that construe

¹⁹⁴ *Sierra Club v. Thomas*, 828 F.2d 783, 791–94 (D.C. Cir. 1987) (describing jurisdictional issues resulting from pre-1990 bifurcated scheme).

¹⁹⁵ *See id.* at 192–93 ("Jurisdiction over *Sierra Club*'s claim alleging unreasonable delay, therefore, does not lie with the district court under section 304(a)(2).").

¹⁹⁶ *Mexichem*, 787 F.3d at 553 n.6 ("Congress has partly abrogated *Sierra Club v. Thomas*, but its analytical framework for determining whether EPA's delay was unreasonable remains applicable.").

¹⁹⁷ *Id.* (noting that the "1990 Amendments to the Clean Air Act abrogated [*Sierra Club v.*] *Thomas*'s jurisdictional holding and shifted to the district court the power to compel EPA to act").

¹⁹⁸ *Mexichem* involved a challenge to an existing EPA regulation—not a nondiscretionary duty claim—and thus did not evaluate the date-certain deadline rule. *See id.* at 300.

¹⁹⁹ *See Humane Soc'y of the United States v. McCarthy*, 209 F. Supp. 3d 280, 284 (D.C. Cir. 2016) ("[I]f the current dispute had taken place pre-1990, this court would lack subject matter jurisdiction because [the provision in question] gives no specific deadline for when the EPA must conclude rulemakings . . .").

²⁰⁰ *Id.* at 286 (quoting *Mexichem*, 787 F.3d at 553 n.6).

²⁰¹ *See id.* at 285–86.

nondiscretionary duty more broadly, without this outdated and unnecessarily restrictive device.

B. Resource Concerns Cannot Excuse the EPA from Its Legal Duties Under the Environmental Statutes

In response to nondiscretionary citizen suits, the EPA has sometimes argued it should be excused from its statutory duties because of resource constraints.²⁰² But a lack of resources does not change my legal analysis or recommendation. As Cass Sunstein has emphasized, “[t]he problem of limited resources does not justify a broad rule immunizing inaction from judicial review.”²⁰³ A mandatory duty under a statute creates a legal obligation on the part of the EPA.²⁰⁴ Once this duty attaches, courts have authority to analyze whether or not the EPA’s performance of its mandatory duty has been withheld for an unreasonable period of time.

Some might also argue that absent a clear date-certain deadline, it is difficult to assess *when* a nondiscretionary duty attaches under the statute. But this concern is not relevant to whether Congress intended a nondiscretionary duty to attach in the first place. Again, Congress drafted the federal environmental statutes with the intention of imposing nondiscretionary duties on the EPA to carry out those statutes, and gave private citizens a right of action to promote that outcome.²⁰⁵ Judges can further Congress’s intent by presuming that the word “shall” in statutory language creates a nondiscretionary duty and by guiding their statutory interpretation with a reasonableness analysis. The *Raymond Proffitt* court, for example, held that “shall promptly” created a nondiscretionary duty after the EPA failed to act for 588 days, which the court inferred was unreasonable.²⁰⁶ In interpreting the federal environmental statutes in the citizen suit context,

²⁰² See, e.g., *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1191 (10th Cir. 1999) (“The Secretary concedes that he failed to perform a non-discretionary duty, but urges us to excuse his failure on the basis of resource limitations and the impossibility of compliance . . .”).

²⁰³ See Sunstein, *supra* note 56, at 675.

²⁰⁴ Many courts have recognized this principle, refusing to release the EPA from a statutory duty despite the EPA’s argument that it was unable to perform it. See, e.g., *Forest Guardians*, 174 F.3d at 1181 (holding that the EPA had a clear, statutorily imposed nondiscretionary duty regardless of the EPA’s plea of impossibility based on resource constraints); *New York v. Gorsuch*, 554 F. Supp. 1060, 1065 (S.D.N.Y. 1983) (refusing to grant the EPA leeway based on an “impossibility” argument and stating that “[t]o do so would be to grant [the Administrator] unbridled discretion to administer the Clean Air Act according to her own time schedule, regardless of specific congressional directions to the contrary”).

²⁰⁵ See *supra* note 189.

²⁰⁶ See *Raymond Proffitt Found. v. EPA*, 930 F. Supp. 1088, 1097 (E.D. Pa. 1996).

courts should read provisions that contain the word “shall” as imposing a nondiscretionary duty on the EPA to carry out that provision within a reasonable period of time.

Furthermore, even if the EPA is constrained by resources and unable to perform a nondiscretionary duty with timeliness, successful citizen suits have societal value in that they bring public awareness to the EPA’s failure to properly carry out the laws. This public awareness can improve the democratic process, as the executive is held accountable for his prioritization of existing resources and proper administration of environmental laws.²⁰⁷ Theoretically, increased citizen suit activity could even lead Congress to appropriate more funds for the administration of federal environmental law and policy, depending on how awareness of the EPA’s inactivity takes form. The EPA cannot be excused from its statutory duties because of resource constraints, and citizen suits allow private plaintiffs to both vindicate important public rights and bring public attention to the importance of environmental protection.

CONCLUSION

Faced with an EPA attempting to severely reduce and even suspend its administration of our nation’s environmental laws, the environmental citizen suit has become critically important. Over the past several decades, some federal courts have sought to restrain private citizens from bringing citizen suits to compel the EPA to fulfill its nondiscretionary duties under the federal environmental statutes. The date-certain deadline rule, first articulated by the D.C. Circuit in its 1987 case *Sierra Club v. Thomas*, is outdated and is too restrictive from both a legal and a policy perspective. It forecloses important environmental citizen suits, allowing the EPA to shirk its statutory duties. The federal judiciary should discontinue application of the date-certain deadline rule, and instead should construe nondiscretionary duty more broadly. The statutory presence of the word “shall” should create a presumption that a duty is nondiscretionary, and courts should require the EPA to carry out that legal duty within a reasonable period of time. This can be squared with the existing doctrine, will achieve the underlying purposes of the U.S. environmental statutes, and will hold the EPA accountable for the protection of our nation’s environment.

²⁰⁷ See Adam Babich, *Citizen Suits: The Teeth in Public Participation*, 25 ENVTL. L. REP. 10141, 10141–42, 10151 (1995) (detailing how environmental citizen suits give citizens a voice in the political process and in turn strengthen the democratic system).

APPENDIX

TABLE I. OVERVIEW OF CASES ANALYZED

Case	Cir.	Statute	Nondiscretionary Duty Found	“Shall” Language in Statute	Date-Certain Deadline in Provision	Case Discussed Date-Certain Deadline Rule
Maine v. Thomas, 874 F.2d 883 (1st Cir. 1989)	1	CAA	No	Yes	No	Yes
Altman v. United States, No. 98-CV-237E(F), 2004 WL 3019171 (W.D.N.Y. Dec. 30, 2004)	2	CWA	No	No	No	No
Cronin v. Browner, 898 F. Supp. 1052 (S.D.N.Y. 1995)	2	CWA	Yes	Yes	No	Yes
NRDC v. Fox, 909 F. Supp. 153 (S.D.N.Y. 1995)	2	CWA	Yes	Yes	Yes	Yes
NRDC v. N.Y. State Dep’t of Env’tl. Conservation, 700 F. Supp. 173 (S.D.N.Y. 1988)	2	CAA	Yes	Yes	Yes	Yes
Env’tl. Def. Fund v. Thomas, 870 F.2d 892 (2d Cir. 1989)	2	CAA	Yes	Yes	Yes	Yes
Raymond Proffitt Found. v. EPA, 930 F. Supp. 1088 (E.D. Pa. 1996)	3	CWA	Yes	Yes	No	Yes
Murray Energy Corp. v. EPA, 861 F.3d 529 (4th Cir. 2017)	4	CAA	No	Yes	No	No
Ohio Valley Env’tl. Coal. v. McCarthy, No. 3:15-0277, 2015 WL 3824255 (S.D. W. Va. June 19, 2015)	4	CWA	No	Yes	No	No
Am. Canoe Ass’n v. EPA, 30 F. Supp. 2d 908 (E.D. Va. 1998)	4	CWA	Yes/No/No	Yes/Yes/No	Yes/No/No	Yes
Consol. Env’tl. Mgmt., Inc. v. McCarthy, No. 16-1432, 2016 WL 6876647 (E.D. La. Nov. 22, 2016)	5	CAA	No	Yes	No	No
Zen-Noh Grain Corp. v. Jackson, 943 F. Supp. 2d 657 (E.D. La. 2013)	5	CAA	No	Yes	No	Yes
Cross Timbers Concerned Citizens v. Saginaw, 991 F. Supp. 563 (N.D. Tex. 1997)	5	CWA	No	No	No	Yes

Case	Cir.	Statute	Nondiscretionary Duty Found	"Shall" Language in Statute	Date-Certain Deadline in Provision	Case Discussed Date-Certain Deadline Rule
Sierra Club v. Johnson, 500 F. Supp. 2d 936 (N.D. Ill. 2007)	7	CAA	Yes	Yes	No	Yes
Save the Valley, Inc. v. EPA, 99 F. Supp. 2d 981 (S.D. Ind. 2000)	7	CWA	Yes	Yes	No	No
Scott v. City of Hammond, 741 F.2d 992 (7th Cir. 1984)	7	CWA	Yes	Yes	Yes	No
Citizens for a Better Env't v. Costle, 515 F. Supp. 264 (N.D. Ill. 1981)	7	CAA	Yes	Yes	No	No
Sierra Club v. Johnson, No. C 08-01409 WHA, 2009 WL 2413094 (N.D. Cal. Aug. 5, 2009)	9	CERCLA	No	Yes	No	Yes
NRDC v. EPA, 542 F.3d 1235 (9th Cir. 2008)	9	CWA	Yes	Yes	Yes	Yes
NRDC v. EPA, 437 F. Supp. 2d 1137 (C.D. Cal. 2006)	9	CWA	Yes	Yes	Yes	Yes
Nw. Env'tl. Advocates v. EPA, 268 F. Supp. 2d 1255 (D. Or. 2003)	9	CWA	Yes	Yes	No	Yes
S.F. Baykeeper, Inc. v. Browner, 147 F. Supp. 2d 991 (N.D. Cal. 2001)	9	CWA	No	Yes	Yes	No
Idaho Conservation League v. Browner, 968 F. Supp. 546 (W.D. Wash. 1997)	9	CWA	Yes	Yes	No	No
Defs. of Wildlife v. Browner, 888 F. Supp. 1005 (D. Ariz. 1995)	9	CWA	No	Yes	No	Yes
Am. Lung Ass'n v. Browner, 884 F. Supp. 345 (D. Ariz. 1994)	9	CAA	Yes	Yes	Yes	Yes
Coal. for Clean Air v. S. Cal. Edison Co., 971 F.2d 219 (9th Cir. 1992)	9	CAA	Yes	Yes	Yes	No
Alaska Ctr. for the Env't v. Reilly, 796 F. Supp. 1374 (W.D. Wash. 1992)	9	CWA	Yes	Yes	Yes	No
Alaska Ctr. for the Env't v. Reilly, 762 F. Supp. 1422 (W.D. Wash. 1991)	9	CWA	Yes	Yes	No	No

Case	Cir.	Statute	Nondiscretionary Duty Found	“Shall” Language in Statute	Date-Certain Deadline in Provision	Case Discussed Date-Certain Deadline Rule
WildEarth Guardians v. Jackson, 885 F. Supp. 2d 1112 (D.N.M. 2012)	10	CAA	No	Yes	No	Yes
WildEarth Guardians v. Jackson, Nos. 11-CV-00001-CMA-MEH, 2011 WL 4485964 (D. Colo. Sept. 27, 2011)	10	CAA	Yes	Yes	Yes	Yes
Stephens v. City of Anadarko, No. CIV-06-1357-L, 2008 WL 896172 (W.D. Okla. Mar. 28, 2008)	10	RCRA	No	Yes	No	Yes
Hayes v. Browner, No. 98-CV-145-BU, 1998 WL 34016834 (N.D. Okla. Oct. 29, 1998)	10	CWA	Yes	Yes	No	Yes
Sierra Club v. EPA, 377 F. Supp. 2d 1205 (N.D. Fla. 2005)	11	CWA	No	Yes	No	Yes
Appalachian Voices v. McCarthy, 989 F. Supp. 2d 30 (D.D.C. 2013)	D.C.	RCRA	Yes	Yes	Yes	Yes
Friends of the Earth v. EPA, 934 F. Supp. 2d 40 (D.D.C. 2013)	D.C.	CAA	No	Yes	No	Yes
Defs. of Wildlife v. Jackson, 284 F.R.D. 1 (D.D.C. 2012)	D.C.	CWA	Yes	Yes	Yes	Yes
Sierra Club v. EPA, 850 F. Supp. 2d 300 (D.D.C. 2012)	D.C.	CAA	Yes	Yes	Yes	Yes
Ctr. for Biological Diversity v. EPA, 794 F. Supp. 2d 151 (D.D.C. 2011)	D.C.	CAA	Yes/No	No/Yes	No/No	No
Sierra Club v. Jackson, 724 F. Supp. 2d 33 (D.D.C. 2010)	D.C.	CAA	No	Yes	No	Yes
Sierra Club v. EPA, 475 F. Supp. 2d 29 (D.D.C. 2007)	D.C.	CWA	No	No	No	No
Kingman Park Civic Ass’n v. EPA, 84 F. Supp. 2d 1 (D.D.C. 1999)	D.C.	CWA	Yes	Yes	Yes	Yes
Nat’l Wildlife Fed’n v. Browner, 127 F.3d 1126 (D.C. Cir. 1997)	D.C.	CWA	No	No	No	No

Case	Cir.	Statute	Nondiscretionary Duty Found	“Shall” Language in Statute	Date-Certain Deadline in Provision	Case Discussed Date-Certain Deadline Rule
Sierra Club v. Thomas, 828 F.2d 783 (D.C. Cir. 1987)	D.C.	CAA	No	No	No	Yes
NRDC v. Train, 510 F.2d 692 (D.C. Cir. 1974)	D.C.	CWA	No	Yes	Yes	No
Reversed / Vacated Cases Reviewed for Analytical Purposes						
Murray Energy Corp. v. McCarthy, No. 5:14-CV-39, 2016 WL 6083946 (N.D. W. Va. Oct. 17, 2016), <i>vacated and remanded</i> , 861 F.3d 529 (4th Cir. 2017)	4	CAA	Yes	Yes	No	Yes
Murray Energy Corp. v. McCarthy, No. 5:14-CV-39, 2014 WL 4656221 (N.D. W. Va. Sept. 16, 2014), <i>order vacated</i> , 861 F.3d 529 (4th Cir. 2017)	4	CAA	Yes	Yes	No	Yes

TABLE II. CASES BREAKDOWN: EXISTENCE OF STATUTORY DATE-CERTAIN DEADLINE AND WHETHER THE COURT SUBSEQUENTLY FOUND A NONDISCRETIONARY DUTY

	Date-Certain Deadline	No Date-Certain Deadline
Nondiscretionary Duty Found	15	10
No Nondiscretionary Duty Found	2	17