How the Lorax Can Save the Truffula Trees: The Environmental Remedies Available to the Individual

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Recommended Citation
Rhona Lyons, How the Lorax Can Save the Truffula Trees: The Environmental Remedies Available to the Individual, 51 Mo. L. Rev. (1986)
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HOW THE LORAX\textsuperscript{1} CAN SAVE THE TRUFFULA TREES: THE ENVIRONMENTAL REMEDIES AVAILABLE TO THE INDIVIDUAL

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Littering is a commonplace phenomenon that affects every person, almost everywhere. From reports and writings we know that littering defaces mountain trails, alpine meadows, and even our highest peaks. Those in the valleys are often almost inundated with litter. Where a river is polluted and a person is dependent on it for drinking water, I suppose there would not be the slightest doubt that he would have standing in court to present his claim. I also suppose there is not the slightest doubt that where smog settles on a city, any person who must breathe that air or feel that sulphuric acid forming in his eyes, would have standing in court to present his claim. I think it equally obvious that any resident of any area whose paths are strewn with litter, whose parks or picnic grounds are defaced by it has standing to tender his complaint to the courts.\textsuperscript{2}

I. INTRODUCTION

Feeling that his environment is being destroyed and that he can do nothing about it may be one of the most frustrating experiences for a citizen. Adding to that frustration is the fact that frequently the source of the pollution is a large corporation which has far more resources, financially and

\textsuperscript{1} The Lorax is a character in \textit{The Lorax}, by Dr. Seuss. That story is the basis for some of the discussion in this Comment. See infra notes 7-13 and accompanying text.

politically, than the environmentally conscious individual. In this unequal match the federal government has given to the citizen David a slingshot against the polluting Goliath—the federal environmental statutes.

The various federal statutes cannot slay every polluter, however, as written, they provide very comprehensive pollution protection. There are statutes, preventive and remedial, protecting the water, the air, and the land from liquid, solid, gaseous, and noise pollutants. The federal statutes generally provide for citizen involvement at the planning stage of projects and licensing, as well as for citizen suits to remedy pollution violations or to force agency action regarding a pollution issue.

Although the federal statutes are broad in scope, there are some limitations on the jurisdiction of the federal agencies and on the effectiveness of the federal statutes in various situations. Thus, in fighting pollution the citizen may need to seek recourse from the state pollution laws3 and common law theories such as nuisance and trespass.

Environmental law and environmental remedies are large topics.4 This Comment is intended to provide an overview to introduce the general practitioner to environmental law and to aid her in recognizing causes of action and the remedies available. To further this goal I have tried to set out some of the limitations on the usefulness of each remedy so as to illustrate how to utilize the federal statutes most effectively. While much of the discussion deals with these limitations, I do not want to suggest that it is bleak for the citizen. The remedies work, as the number of citizen suits filed annually indicates.5 The first part of this Comment introduces the law and the second part applies the law to a specific hypothetical situation. Because the case law is so voluminous and varied, I have chosen to present some of the discussion in terms of The Lorax, by Dr. Seuss,6 a narrative of an industrialist, the Once-ler, recounting with the benefit of hindsight both the environmentally disastrous results of his actions and the Lorax’s unsuccessful attempts to protect the land.

In The Lorax, By Dr. Seuss,7 the Once-ler describes how he came into a land resplendent with animals, birds, and fish living among lush vegetation, fresh air, and clear, bountiful lakes. This paradise inspired in the Once-ler

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3. Each state’s environmental statutes and agencies vary. Any discussion of state enforcement mechanisms in this Comment will focus on Missouri. See generally Vanderveldon, Is the State Environmental Act an Endangered Species?, CAL. LAW., April 1984, at 45.
5. See Fadil, Citizen Suits Against Polluters: Picking Up the Pace, 9 HARV. ENVTL. L. REV. 23 (1985).
7. Id. The pages in the book are not numbered. Thus this and the following footnotes do not indicate pages.
a vision; a vision of a manufacturing empire based on thneeds produced from the tufts of the Truffula Trees that covered the land. The Once-ler's pursuit of his vision—the building of his factory, the felling of the trees, and the processing of his needs—polluted the land. The Brown Bar-ba-loots, who ate Truffula fruits, were "all getting the crummmies because they [had] gas and no food, in their tummies!"; the "emogulous smoke" was so bad that the "poor Swomnee-Swans . . . why, they [couldn't] sing a note! No one can sing who has smog in his throat"; and the "Gluppity-Blupp" and "Schloppity-Schlopp" was "glumping the pond where the Humming-Fish hummed! [so that] No more [could] they hum, for their gills [were] all gummed."10

The Lorax, who "speak[s] for the trees, for the trees have no tongues,"11 approached the Once-ler several times, attempting to abate the destruction of the environment. But the Once-ler only "yelled at the Lorax, 'Now listen here, Dad! All you do is yap-yap and say, 'Bad! Bad! Bad! Bad!' Well, I have my rights, sir and I'm telling you I intend to go on doing just what I do!'"12 And he did. The Once-ler did not stop until the last Truffula tree was chopped down and there were no more tufts from which to make thneeds. When the Once-ler finished, he had turned an area once alive with vegetation and wildlife into a desolate area where now only "grickle-grass"13 could grow.

II. THE FEDERAL STATUTES

The federal government in the last twenty years has become increasingly involved in legislating protection of the environment.14 The contemporary federal policy of protecting the environment was first expressed in the National Environmental Policy Act of 1969 (NEPA).15 However, the Refuse Act16 in the Rivers and Harbors Act of 189917 has also been used to protect the environment. As expressed in NEPA and the other acts, the purpose of environmental legislation is to "prevent or eliminate damage to the environ-

8. Id.
9. Id.
10. Id.
11. Id.
12. Id.
13. Id.
ment and biosphere and stimulate the health and welfare of man." The environmental statutes designed to preserve the environment include the National Environmental Policy Act of 1969 (NEPA), the Clean Water Act (CWA), the Clean Air Act of 1970 (CAA), the Safe Drinking Water Act, the Toxic Substances Control Act, the Noise Control Act of 1972, the Resource Conservation and Recovery Act of 1976 (RCRA), the Federal Insecticide, Fungicide and Rodenticide Act, the Endangered Species Act of 1973, and the Marine Mammal Protection Act. There are also statutes designed to clean-up those existing residues of pollution that continue to pose a hazard to the environment, such as Superfund and the Surface Mining control and Reclamation Act (SMCRA) for cleaning up abandoned mines.

A. The Rivers and Harbors Act

The Rivers and Harbors Act was designed to insure federal control of the navigable waters of the United States. At the time the Act was passed in 1899, the federal government's interest was in maintaining the navigability of the federal waterways, not in keeping them pollution free. One way that navigability can be hindered is by the blocking or filling of the waterway by refuse, and such actions are prohibited by the Refuse Act, section 13 of the...

20. 33 U.S.C. §§ 1251-1376 (1982). When originally passed, the Act was known as the Federal Water Pollution Control Act (FWPCA), but since the Clean Water Act Amendment of 1977, it has been referred to as the Clean Water Act. For convenience I will refer in this Comment to 33 U.S.C. §§ 1251-1376 (1982) as the CWA.
22. Id. §§ 300F-300J.
25. Id. §§ 6901-6987. "The objectives of this chapter are to promote the protection of health and the environment and to conserve valuable material and energy resources ...." Id. §§ 6902.
28. Id. §§ 1361-1407.
Rivers and Harbors Act.\textsuperscript{32} The literal wording of the Refuse Act prohibits any discharge of refuse into navigable water. Sewerage discharge, however, is expressly exempted. The scope of the prohibition has been extended somewhat by the courts to include, for example, liquid waste\textsuperscript{33} and oil floating in the water.\textsuperscript{34} Consequently, the Act has provided the statutory basis for water pollution complaints.\textsuperscript{35}

For the purposes of the Rivers and Harbors Act the term "navigable waters" is defined by The Daniel Ball\textsuperscript{36} test as those waterways which are navigable in fact, historically or presently, or are susceptible with reasonable improvement to navigation,\textsuperscript{37} and on which that navigability makes interstate travel possible. Thus, isolated bodies of water or those that flow only within one state are not within the scope of the Rivers and Harbors Act.\textsuperscript{38} While the Rivers and Harbors Act can be used against violators, there is no citizen suit provision and there is no private right of action implied on behalf of those injured by violation of the Act.\textsuperscript{39} A private right of action will be implied from a statute only when the plaintiff is a member of the class for whose benefit the statute was enacted, when there was legislative intent to create a private right of action, and when the cause of action is not one traditionally reserved for the states.\textsuperscript{40} The Supreme Court has held that the Rivers and Harbors Act is a general ban with "no implication of an intent to confer rights on" any group.\textsuperscript{41} There is the theoretical possibility of a \textit{Qui Tam} action,\textsuperscript{42} under which the citizen acts as an informant to get the government to bring suit. However, the lower federal courts have consistently

\begin{itemize}
\item \textsuperscript{32} Section 13 is also known as the Refuse Act, 33 U.S.C. § 407 (1982) ("It shall not be lawful to throw, discharge, or deposit . . . any refuse matter of any kind or description . . . into any navigable water of the United States . . . .").
\item \textsuperscript{33} United States v. Republic Steel Corp., 362 U.S. 482 (1960).
\item \textsuperscript{34} United States v. Standard Oil Co., 384 U.S. 224 (1966).
\item \textsuperscript{36} The Daniel Ball, 77 U.S. 557 (1870).
\item \textsuperscript{37} United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940).
\item \textsuperscript{38} 33 U.S.C. § 1344 (1982).
\item \textsuperscript{39} California v. Sierra Club, 451 U.S. 287, 292-98 (1981); City of Evansville v. Kentucky Liquid Recycling, 604 F.2d 1008 (7th Cir. 1979) (no implied right of action under section 10 of the Rivers and Harbors Act.)
\item \textsuperscript{40} Sierra Club, 451 U.S. at 293.
\item \textsuperscript{41} \textit{Id.} at 294.
\item \textsuperscript{42} \textit{Qui tam pro domino rege} is translated as "who sues on behalf of the King as well as for himself." Annotation, \textit{Right of Private Party to Maintain \textit{Qui Tam} or Other Action for Enforcement of Provisions of Rivers and Harbors Act of 1899} (33 U.S.C. § 407, 411) Making it Unlawful to Deposit Refuse in Navigable Waters and Their Tributaries, 15 A.L.R. FED. 636, 640 n.6 (1973).
\end{itemize}
held that as to the Refuse Act the private individual can only inform and not actually bring suit.\(^43\)

If the lake in which the Humming-Fish hummed is an isolated body of water, the Rivers and Harbors Act will not provide a remedy for the Lorax. Relief will be available under section 13 only if the lake is navigable and if the Lorax can convince the Corps of Engineers or Coast Guard\(^44\) to enforce the Act. However, even if the Lorax convinces the federal government to intervene, the continuous dumping will not be stopped under the Rivers and Harbors Act because the CWA has limited the effectiveness of the Refuse Act to incidents of non-continuous one-time dumping, whether deliberate or accidental.\(^45\)

B. NEPA

In comparison to the Rivers and Harbors Act the language of NEPA\(^46\) is broad: "The Congress recognizes that each person should enjoy a healthful environment."\(^47\) To further that goal NEPA requires that an Environmental Impact Statement (EIS) be prepared for "major federal actions\(^48\) significantly affecting" the quality of the human environment.\(^49\) When an EIS is re-

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\(^44\) When first passed, the River and Harbors Act was administered by the Corps of Engineers. Now the Corps retains jurisdiction to issue permits; however, the majority of the other environmental statutes are administered by the Environmental Protection Agency (EPA). See, e.g., 33 U.S.C. § 1251(d) (1983) ("Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency ... shall administer this chapter.").

\(^45\) See 33 U.S.C. § 1371(b) (1982).


\(^48\) A federal action is any action involving the federal government; a major federal action is one that requires substantial planning, time, resources, or money. See, e.g., Natural Resources Defense Council v. Grant, 341 F. Supp. 356 (E.D.N.C. 1972).

\(^49\) In Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972), \textit{cert. denied}, 412 U.S. 908 (1973), the court applied a two-part test of significant action that considers both the extent and absolute qualitative adverse effects of the action on the environment.

\(^50\) 42 U.S.C. § 4332(2)(C) (1982). In relation to this clause, two tests have been employed by the courts: the dual test and the unitary test. The dual test requires both a major federal action and a significant impact; it would not require an EIS in a situation where there was a significant effect but only a minimal federal action. See NAACP v. Medical Center, Inc., 584 F.2d 619 (3d Cir. 1978). The unitary
quired, the agency proposing the major federal action must consider the effect the proposed project will have on the environment.\textsuperscript{51} The environmental factors are not controlling, however, they represent only one part of the analysis.\textsuperscript{52} Still, if an EIS is not done or does not adequately deal with the environmental issues, a citizen can file suit to force compliance with NEPA. For example, in Calvert Cliff’s Coordinating Committee, Inc. \textit{v. United States Atomic Energy Commission},\textsuperscript{53} a suit by a citizens’ group elicited this statement from the court: “Perhaps the greatest importance of NEPA is to require the Atomic Energy Commission and other agencies to consider environmental issues just as they consider other matters within their mandates.”\textsuperscript{54}

Although a proper EIS can be compelled, mere failure to comply with NEPA will only delay, not stop, the proposed project. In his opinion, concurring in part and dissenting in part, in Kleppe \textit{v. Sierra Club}\textsuperscript{55} Justice Marshall notes that the standard remedy for an improper EIS has been an injunction combined with an order to prepare a proper EIS. He argues that “[t]his remedy is insufficient because, except by deterrence, it does nothing to further early consideration of environmental factors. And as with all after-the-fact remedies, a remand for preparation of an impact statement after the basic decision to act has been made invites \textit{post hoc} rationalizations.”\textsuperscript{56}

Because NEPA requires only that the environment be considered, once the agencies learned to write EISs that comply with the literal words of NEPA and withstand procedural challenge, the effectiveness of NEPA as a citizen tool was severely limited. In \textit{Strycker’s Bay Neighborhood Council, Inc. \textit{v. Karlen}},\textsuperscript{57} the Court refused to override an agency decision about the location of low-income housing in Manhattan holding that the purpose of NEPA is

\begin{footnotesize}
\begin{enumerate}
\item 42 U.S.C. § 4332(2)(C) (1982).
\item See generally 40 C.F.R. § 1500 (1985) (procedural guidelines for preparing an EIS).
\item 449 F.2d 1109 (D.C. Cir. 1971).
\item \textit{Id.} at 1112 (emphasis in original).
\item 427 U.S. 390 (1976). In \textit{Kleppe}, the Sierra Club brought suit to compel the Department of the Interior to prepare regional EISs for coal projects on the theory that the Department was considering regional coal development. The Court concluded that NEPA does not require an EIS prior to the time the action is proposed. \textit{Id.} at 398-402.
\item \textit{Id.} at 415-16 (Marshall, J., concurring in part and dissenting in part).
\item 444 U.S. 223 (1980) (agency can select project it desires so long as alternatives are discussed).
\end{enumerate}
\end{footnotesize}
to assure informed agency decision, not to dictate the decision itself.\textsuperscript{58}

The goal of NEPA is to regulate federal sources of pollution. There is no required EIS, for example, within the context of actions taken pursuant to the Clean Air Act of 1970 (CAA) because the CAA is administered by the states and thus is not a federal action. Similarly, actions by private parties like the Once-ler are exempt.\textsuperscript{59} Because NEPA’s focus is procedural, not substantive,\textsuperscript{60} in some situations the underlying requirements of the EIS exist within the mandate of the substantive statute. Thus, for example, the EPA Administrator is exempt from filing an EIS in relation to regulations and permits issued under the Clean Water Act (CWA) because “no action of the Administrator taken pursuant to [CWA] shall be deemed a major federal action significantly affecting the quality of the human environment . . . .”\textsuperscript{61}

Exemptions from the requirement to prepare an EIS have been found under a functional equivalence exception such as in \textit{Texas Comm. on Natural Resources v. Bergland},\textsuperscript{62} where clearcutting was found not to require an EIS. However, compliance with environmental requirements in the substantive legislation does not automatically excuse the agency from preparing an EIS.\textsuperscript{63} There is also no requirement of an EIS within the context of actions taken pursuant to the CAA because the CAA is administered by the states, and thus there is no major federal action. For NEPA to be an effective citizen vehicle for deterring pollution, the EIS or the EIS procedure must be defective, the project must represent a major federal action that has not been

\textsuperscript{58} See Vermont Yankee Nuclear Power Corp. v. Natural Resource Defense Council, Inc., 435 U.S. 519 (1978) (cannot solve environmental issues by challenging procedure); \textit{Kleppe}, 427 U.S. at 415-16 (Marshall, J., concurring in part and dissenting in part) (“[A]s with all after-the-fact remedies . . . preparation of an impact statement after the basic decision to act has been made invites post hoc rationalizations.”); Citizen Advocates for Reasonable Expansion, Inc. (I-CARE) v. Dole, 770 F.2d 423 (5th Cir. 1985) (upon challenge EIS found adequate and decision left to agency discretion).

\textsuperscript{59} NEPA applies to permits granted by the EPA; however, the underlying action may make an EIS unnecessary. See, e.g., Defenders of Wildlife v. Andrus, 627 F.2d 1238 (D.C. Cir. 1980); Winnebago Tribe v. Ray, 621 F.2d 269 (8th Cir.), \textit{cert. denied}, 449 U.S. 836 (1980); Atlanta Coalition on Transp. Crisis v. Atlanta Regional Comm’n, 599 F.2d 1333 (5th Cir. 1979) (EIS not needed as to decision to fund state development plan); Rucker v. Willis, 484 F.2d 158 (4th Cir. 1973) (private nature of marina).

\textsuperscript{60} In Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978), the Court held that it was within agency discretion to deal with the issue of nuclear waste disposal one time rather than for each plant construction permit. \textit{Vermont Yankee} can be read for the proposition that NEPA is a procedural, not a substantive, statute.

\textsuperscript{61} 33 U.S.C. § 1371(c)(1) (1982).

\textsuperscript{62} 573 F.2d 201 (5th Cir.), \textit{cert. denied}, 439 U.S. 966 (1978).

\textsuperscript{63} See, e.g., Foundation for N. Am. Wild Sheep v. USDA, 681 F.2d 1172 (9th Cir. 1982).
statutorily exempted, and the citizen must have standing because there is no citizen suit provision. Just as there are limitations on the actions requiring an EIS, there are restrictions on who may bring suit. In the case of a major federal action in which an EIS is required under NEPA, there are provisions for citizen involvement in agency decisions. Although there is no explicit citizen suit provision in NEPA, many citizen suits to require or question an EIS have been successful when there is a showing of injury in fact. In United States v. Students Challenging Regulatory Agency Procedure (SCRAP), the Supreme Court held that there is standing under NEPA to challenge an agency action as long as there is an allegation of actual present or future harm. This harm need not be economic or physical and does not need to be particular to the plaintiff. Before SCRAP the law of standing for a NEPA action was that enunciated in Sierra Club v. Morton. In Sierra Club the plaintiff, the Sierra club, objected to the development of the Mineral King Valley on the basis of the position that it had in the community, as an environmental group, without alleging individualized harm to any specific person. The Court in Sierra Club held that the complaint failed for lack of standing. In SCRAP, however, the plaintiffs alleged that they used the forests which would be littered and lumbered in the wake of agency actions which would hinder recycling efforts. Thus, the Lorax simply as the spokesman of the trees, would have standing under NEPA to challenge the building of the Once-ler’s factory only as long as he alleged that he used the area and would personally be harmed by the resulting pollution.

Just as it does not have a citizen suit provision, NEPA does not explicitly authorize citizen intervention in enforcement actions. While the SCRAP test of standing represents an expansive view of standing, for a citizen to intervene in an action brought pursuant to NEPA, he must satisfy the federal rules of civil procedure for intervention, and the “test for intervention be-

64. See supra § II.A in text.
65. 42 U.S.C. § 4369(c) (1982): (“The reports provided for in section 5910 of this title shall be made available to the public for comment.”).
69. SCRAP, 412 U.S. at 686.
70. Id. at 687.
71. 405 U.S. 727 (1972).
72. In both regards, NEPA is far more restrictive than its more substantive counterparts which tend to explicitly provide for both citizen suits and citizen intervention. See supra note 118 and accompanying text.
comes more stringent when the applicant for intervention is a subdivision or citizen of a state and the state is already a party to the suit.”

If the Lorax cannot prevent the pollution under NEPA because the Onceler's factory does not represent a major federal action or because the EIS is proper, then there is the possibility of enjoining the pollution under one of the pollution specific statutes, such as the CAA or the CWA.

C. The Substantive Federal Statutes: CWA, CAA, and RCRA

"The objective of [the Clean Water Act] is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." To obtain this goal Congress has provided for both a federal and a state permitting system. Upon approval by the EPA of the state's plan, the state permitting system will replace the federal system. The majority of states, including Missouri, have EPA-approved clean water acts. The CWA applies to all aspects of water pollution, including water storage for the purpose of regulating stream flow, sewage treatment, oil spills, toxic pollutants, pollution of lakes, and thermal pollution. In dealing with pollution the CWA requires the development of sewerage treatment plants and provides for grants to assist in that goal. Dischargers were originally required to achieve by 1977 a level of clean up designated best practicable control technology (BPCT), but the 1977 amendments to the act granted an extension until 1984. BPCT represents the use of existing technology with a goal of bringing water to a point of potability. However, new sources of pollution are not controlled by the BPCT standards because they are not locked into existing dated technology. Rather they are controlled by the more rigid best available control technology standards (BACT). Generally, the timetable

75. Id. § 1342(a).
76. Id. § 1342(c).
78. 33 U.S.C. § 1252(b) (1982). This does not include the control of dams.
81. Id. § 1317.
82. Id. § 1324.
83. Id. § 1326.
84. Id. § 1281(a).
85. Id. § 1281(g)(1).
86. Id. § 1311(b)(1).
for achievement of BACT was extended in the 1977 amendments to the CWA,\textsuperscript{89} and variances are available for a wide variety of reasons including the cost of compliance and the type of pollution.\textsuperscript{90} Unlike the Rivers and Harbors Act, for some purposes the CWA employs a more expansive definition of navigable waters which encompasses more than just the navigable waters of the United States. For example, under section 404 of the CWA,\textsuperscript{91} the Corps of Engineers has jurisdiction over the dredging and filling of wetlands, areas that were not traditionally considered navigable. Thus, the lake in which the Humming-Fish swim, as a wetland, is covered, and any filling of the lake would have to be in compliance with a federal or state permit. Similarly, if the lake is a public water system within the meaning of the Safe Drinking Water Act, then there is the possibility of the Lorax filing a citizen suit seeking a remedy for the deterioration of the community's drinking water.\textsuperscript{92}

One of the purposes of the Clean Air Act (CAA) is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population ...."\textsuperscript{93} This purpose is necessitated by the congressional finding that the increased "amount and complexity of air pollution brought about by ... industrial development ... has resulted in mounting dangers to the public health and welfare ...."\textsuperscript{94} Congress also found that because of the nature of air pollution, "the prevention and control of air pollution at its source is the primary responsibility of States and local governments ...."\textsuperscript{95} Each state is required to prepare a State Implementation Plan (SIP) which after approval by the EPA is enforced by the state.\textsuperscript{96}

For the EPA to approve the SIP it must be designed to achieve or surpass national ambient air quality standards established by the EPA.\textsuperscript{97} If the state's plan does not get EPA approval, the EPA is required to prepare one for the state.\textsuperscript{98} Thus the federal government is less directly involved with trying to improve air quality than in cleaning up water pollution.\textsuperscript{99} Although the two acts are administered differently vis-à-vis the relationship between the federal

\textsuperscript{89} See American Paper Inst. v. EPA, 660 F.2d 954 (4th Cir. 1981).
\textsuperscript{90} Id. at 962-65.
\textsuperscript{91} 33 U.S.C. § 1344 (1982).
\textsuperscript{92} 42 U.S.C. § 300j-8 (1982).
\textsuperscript{93} Id. § 7401(b)(1).
\textsuperscript{94} Id. § 7401(a)(2).
\textsuperscript{95} Id. § 7401(a)(3).
\textsuperscript{96} Id. § 7410.
\textsuperscript{97} Id. § 7410(a)(2)(D)(i).
\textsuperscript{98} Id. § 7410(c)(1).
\textsuperscript{99} The CAA requires the state to develop a plan (SIP) which will be approved by the EPA but administered by the state. See supra note 96 and accompanying text. The CWA allows for EPA administration of a federal plan unless there is a state plan that has been approved by the EPA. 33 U.S.C. § 1342(c) (1982).
government and the state governments, the options available to the citizen in each are similar. The CAA deals with all aspects of air quality: emission standards for stationary sources\textsuperscript{100} including standards for new stationary sources,\textsuperscript{101} standards for the prevention of significant deterioration (PSD) of existing air quality,\textsuperscript{102} standards for hazardous air pollutants,\textsuperscript{103} standards for ozone protection,\textsuperscript{104} and standards designed for the maintenance of visibility,\textsuperscript{105} emission standards for moving sources,\textsuperscript{106} and standards for noise pollution.\textsuperscript{107} The state government or the Administrator of the EPA can sue to enforce the permits.\textsuperscript{108} If neither the state nor the federal agency takes appropriate action, the CAA provides for the citizen to bring suit.\textsuperscript{109} The "emogulous smog" pouring out of the Once-ler's factory is most likely in violation of the ambient air quality standards set by the EPA, and thus the Lorax, since no government agency has acted, could bring suit to bring the factory within air quality standards. Under the CAA, however, he could not prevent thneed production altogether. RCRA regulates the land disposal of solid and hazardous wastes and imposes penalties for improper disposal.\textsuperscript{110} The definition of solid waste in RCRA is broad, encompassing "garbage, refuse, sludge . . . and other discarded material, including solid, liquid, semisolid, or contained gaseous material . . . .\"\textsuperscript{111} Excluded from this definition are materials in "domestic sewage, . . . irrigation return flows . . . [and] point sources.\"\textsuperscript{112} In addition to regulating solid waste, RCRA deals with hazardous waste management.\textsuperscript{113} There are regulations applicable to generators,\textsuperscript{114} transporters,\textsuperscript{115} and operators of storage and disposal facilities.\textsuperscript{116}

If the Lorax is unable to prevent the Once-ler's factory from exceeding federal and state pollution levels under either the CAA or the CWA, RCRA could be used\textsuperscript{117} if there is disposal of waste and if that waste is hazardous.

\textsuperscript{100}42 U.S.C. §§ 7401-7449 (1982).
\textsuperscript{101}Id. § 7411.
\textsuperscript{102}Id. §§ 7470-7479.
\textsuperscript{103}Id. § 7412.
\textsuperscript{104}Id. §§ 7450-7459.
\textsuperscript{105}Id. § 7491.
\textsuperscript{106}Id. §§ 7521-7574.
\textsuperscript{107}Id. § 7641.
\textsuperscript{108}Id. § 7411(e).
\textsuperscript{109}Id. § 7604.
\textsuperscript{110}Liquid waste disposal into the water is covered by the CWA. 33 U.S.C. §§ 1251-1376 (1982).
\textsuperscript{112}Id.
\textsuperscript{113}Id. §§ 6921-6934.
\textsuperscript{114}Id. § 6922.
\textsuperscript{115}Id. § 6923.
\textsuperscript{116}Id. § 6924; see, e.g., Environmental Defense Fund, Inc. v. Lamphier, 714 F.2d 331 (4th Cir. 1983).
\textsuperscript{117}See Environmental Defense Fund, 714 F.2d 331.
From what the "gluppity-glupp" did to the gills of the Humming-Fish, it can be hypothesized that it is hazardous waste.

Procedurally, the substantive environmental statutes are similar to each other. Unlike the Rivers and Harbors Act and NEPA, most of the more recent pollution-oriented statutes contain explicit citizen suit provisions. These citizen suit provisions are very similar, providing that any person can bring suit against any other person as long as the Administrator has not initiated an action and the notice requirements are satisfied. Under the citizen suit provisions, the Lorax would have standing to bring an action if the regulations for protecting the air or the water have been violated by the Once-ler because the "citizen suits provision reflected a deliberate choice by Congress to widen citizen access to the courts, as a supplemental and effective assurance that the act would be implemented and enforced."

The citizen suits provide that "any person may commence a civil action on his own behalf" against any person . . . who is alleged to be in violation" of either the pollution limitations set by the statute or of an order issued by the Administrator or State. A citizen may also bring suit against the "[A]dministrator where there is alleged a failure of the Administrator to perform any act or duty . . . which is not discretionary." Federal district courts have jurisdiction over these actions to correct violations of the statute, while federal circuit courts have jurisdiction over actions seeking review of any Administrator's actions.


124. The CWA, 33 U.S.C. § 1369(b)(1) (1982), reads “Review of the Administrator's action . . . may be had by any interested person in the Circuit Court of Appeals of the United States . . .”. The CAA, in the comparable section, 42 U.S.C. § 7607 (1982), indicates only which court has jurisdiction, not who may bring suit; however, the cases have interpreted the CAA to allow individuals to bring suit for review of agency action. See, e.g., Council of Commuter Orgs. v. Metropolitan Transp. Auth., 683 F.2d 663 (2d Cir. 1982) (review of agency action).
A citizen is defined in the CWA as "a person or persons having an interest which is or may be adversely affected," and some cases have interpreted both statutes as allowing citizen suits by any person. Others have equated the citizen suit language requiring the plaintiff to have an "interest which is or may be adversely affected" with the requirements in *United States v. SCRAP* for standing. Although any citizen can have standing to maintain the suit, there must still be an allegation of a violation of the Act. To bring suit the Lorax need only allege that the standards of the CAA or the CWA have been violated and that he breathed the air or drank the water. The purpose of the notice requirement is to allow the administrator or the state agency to take action against the violation. Because the purpose of the citizen suit has been held to be "to both goad the responsible agencies to more vigorous enforcement of the anti-pollution standards and, if the agencies remained inert, to provide an alternative enforcement mechanism," if there is official action, there is no need for a solely private action. The citizen suits require that "[n]o action may be commenced . . . prior to sixty days after the plaintiff has given notice of the violation" to the administrator, the state, and the violator. The courts are split as to whether defective notice is fatal. At one end of the spectrum is a holding that "[t]he notice requirement is not a technical wrinkle or superfluous formality . . . [but is] . . . part of the jurisdictional conferral from Congress . . . ." At the other is the opinion that "excessively restrictive construction . . . is completely at odds with the announced purpose of the statute, which looks to

125. 33 U.S.C. § 1365(g) (1982).
substance . . . [not form] . . . to facilitate citizen involvement."

Because the purpose of the citizen suit is to elicit action from somnambulant agencies, the citizen suit is barred "if the Administrator or State has commenced and is diligently prosecuting a civil action . . . to require compliance . . ." The Administrator's action will bar the private action if it is "in a court of the United States or a State." But "court" as used in the citizen suit provision has been held not to include administrative tribunals because they do not have the "power to accord relief which is the substantial equivalent to that available to the EPA in federal court . . ." Although the individual cannot bring a new action in the face of one by the Administrator, the Act provides that "in any such action . . . any person may intervene as a matter of right." Even though the citizen can intervene, he no longer needs to do so to insure that there is a suit, and thus his right to attorney fees has been held to require a clear showing of a unique contribution to the legal issues presented. Just as a citizen can intervene in an action brought by the Administrator, the Administrator can, as a matter of right, intervene in any citizen suit.

The Lorax speaks for the trees, but environmental advocates have asked why the trees cannot speak for themselves. In Palila v. Hawaii Department of Land and Natural Resources, the Sierra club brought suit under the Endangered Species Act in the name of the endangered species, the Palila bird. The action to enjoin the use of the Palila's habitat for the grazing of goats and sheep was successful because, under the ESA, harm includes degradation of habitat and is considered an unlawful taking. But under the


139. Alabama Power Co. v. Gorsuch, 672 F.2d 1, 4 (D.C. Cir. 1982).


142. 639 F.2d 495 (9th Cir. 1981).

CWA or the CAA it is questionable whether the Lorax could bring suit in the name of the Truffula Trees, Brown Bar-ba-loots, Swomme-Swans, or Humming-Fish because they are not persons.

D. **Federal Cleanup Statutes: Superfund and SMCRA**

The CAA, CWA, and the other statutes dealing with specific pollutants are directed at present regulation of pollution sources, not at the clean-up of existing waste. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980,\(^\text{144}\) also known as Superfund, is the federal response to the pouring of "Gluppity-Glupp" onto the ground, providing a mechanism for insuring clean-up. By congressional order the EPA has established a list of areas to be cleaned up, such as Times Beach, Missouri. Unfortunately, the discovery of dump sites, now close to five hundred, is proceeding at a rate far in excess of the clean-up rate. The polluter can also be made to do the clean-up or at least pay for it. In *United States v. Northeastern Pharmaceutical and Chemical Co.*,\(^\text{145}\) the clean-up of the dioxin in Verona, Missouri, was litigated, and under a strict liability standard, the defendants, including past and present owners of the site, were required to reimburse clean-up costs.

Under the Surface Mining Control and Reclamation Act (SMCRA),\(^\text{146}\) mining is strictly regulated. Mine operators are required to return the land to the condition it was in before mining, some types of mining are prohibited, and money is set aside to reclaim old mines. While clean-up is a possible avenue of recourse, the Lorax, as a citizen concerned for his environment, undoubtedly prefers to prevent the destruction of the environment rather than to try to repair it once it has been destroyed.

III. **Missouri Environmental Statutes**

The CAA mandates that each state establish a State Implementation Plan (SIP). In Missouri there is the Missouri Air Conservation Law\(^\text{147}\) which states:

> It is the intent and purpose of this chapter to maintain purity of the air resources of the state to protect the health, general welfare and physical property of the people, maximum employment and the full industrial development of the state . . . through the prevention, abatement and control of air pollution by all practical and economically feasible methods.\(^\text{148}\)


\(^{148}\) Id. § 643.030.
To meet these goals the "Missouri air conservation commission shall have the authority to . . . establish standards and guidelines to insure that the state of Missouri is in compliance with the provisions of the federal 'Clean Air Act' (42 U.S.C. section 7401 et seq.)."149 State SIPs must meet the federal standards, but those standards represent a minimum and nothing prevents the states from imposing more stringent standards.150 In Missouri, however, the "standards and guidelines . . . established [by the air conservation commission] shall not be any stricter than those required under the provisions of the federal Clean Air Act."151

Although the Air Conservation Law preserves other existing remedies and penalties,152 it is more restrictive than the CAA in that it explicitly denies any private citizen suits.153 The courts, however, have granted standing to private parties. For example, in Citizens for Rural Preservations, Inc. v. Robinett,154 the court held that a voluntary association had standing to challenge the quarrying of rock without a permit in Franklin County when the resulting dust was contaminating the air. The court stated that the organization would have standing if seeking to vindicate its own rights or those of its members.155

The Missouri Clean Water Law156 established that "the public policy of this state [is] to conserve the waters of the state and to protect, maintain, and improve the quality thereof for public water supplies . . . [and] . . . to provide that no waste be discharged into any waters of the state without first receiving the necessary treatment."157 This scope, as set out in the purpose clause, has been limited somewhat by the definition given to discharge. In State ex rel. Ashcroft v. Union Electric Co.,158 an action to enjoin Union Electric from discharging cooling water in a manner that resulted in downstream dissolved oxygen levels below required levels was dismissed for failure to state a cause of action, the court holding that too little dissolved oxygen was not a discharge under the Clean Water Law.159 As with Missouri's Air Conservation Law, there is no explicit citizen suit provision in the Clean

149. Id. § 643.055.
152. Id. § 643.170.
153. Id. § 643.170(2).
154. 648 S.W.2d 117 (Mo. Ct. App. 1982).
155. Id. at 133.
157. Id. § 649.011.
158. 559 S.W.2d 216 (Mo. Ct. App. 1977).
159. Id. at 223. It should also be noted that this type of "discharge" is not covered by the federal CWA either. See Mississippi Comm'n on Natural Resources v. Costle, 625 F.2d 1269 (5th Cir. 1980).
Water Law. However, unlike the Air Conservation Law, there is no explicit denial of private citizen suits. Other private nonstatutory remedies are not abridged by the Clean Water Law,¹⁶⁰ though the Clean Water Commission has no power to consider those rights. In Curdt v. Missouri Clean Water Commission,¹⁶¹ a landowner seeking review of a Commission order permitting a utility's water purification lagoon argued unsuccessfully that allowing the discharge from the lagoon was tantamount to allowing a tort. The court wrote, "[i]f Terre du Lac [the utility] is indeed violating the Curdts' alleged riparian rights, then, Terre du Lac is not absolved from liability by its clean water permit."¹⁶² The court went on to hold that while there might be liability, the Commission has no authority to determine if riparian rights will be violated by a purification system.¹⁶³

In the area of water pollution there are also on the books in Missouri older public nuisance laws such as the Contamination of Streams Act,¹⁶⁴ the Contamination of Water Supply Act,¹⁶⁵ and the Stream Pollution Act,¹⁶⁶ all of which could potentially be used in innovative ways. Additionally, Missouri has a statute designed to preserve open spaces in counties with populations greater than 200,000,¹⁶⁷ and one dealing with smoke emissions as nuisances,¹⁶⁸ neither of which has a citizen suit provision. Thus, if the Lorax is in Missouri, he will have as much, if not more, protection than he has from the federal statutes alone.

IV. Common Law

In City of Milwaukee v. Illinois¹⁶⁹ the Supreme Court held that there is not a federal common law of public nuisance¹⁷⁰ in the area of water pollution because there is a federal statute, the CWA, under which a remedy is available.¹⁷¹ On this issue, City of Milwaukee v. Illinois is distinguishable from the Court's earlier opinion on the same facts in Illinois v. City of Milwaukee, where the court held that there was a federal common law of nuisance.¹⁷²

¹⁶¹ 586 S.W.2d 58 (Mo. Ct. App. 1979).
¹⁶² Id. at 60.
¹⁶³ Id.
¹⁶⁵ Id. § 577.150.
¹⁶⁶ Id. § 250.230.
¹⁶⁷ Id. §§ 67.870-.875.
¹⁶⁸ Id. § 71.760.
¹⁷⁰ Id. (no federal common law remedy of public nuisance available to plaintiff on parts of case); see Annotation, Federal Common Law of Nuisance as Basis for Relief in Environmental Pollution Cases, 29 A.L.R. Fed. 137 (1976).
¹⁷¹ 451 U.S. at 317-32.
¹⁷² 406 U.S. 91 (1972).
The Court, which had earlier found a federal common law even in the face of Erie,173 wrote in City of Milwaukee v. Illinois: "[W]hen Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears."174 The converse can be inferred: in the absence of congressional guidance the federal common law suggested in Illinois v. City of Milwaukee exists. In the area of air pollution the Second Circuit in New England Legal Foundation v. Costle175 dismissed an air pollution action grounded in the federal common law of nuisance, reasoning that there was an adequate remedy at law (CAA) and thus no equity jurisdiction.

Although there is not a federal common law of nuisance, most of the statutes explicitly do not abridge any existing rights such as the state common law of public and private nuisance, trespass, and negligence.176 A trespass can be defined as anything that interferes with the plaintiff's possessory interest in his property.177 A nuisance can be defined as an annoying, unpleasant or obnoxious thing or practice,178 or a nontrespassory interference with use or enjoyment of another's property. A negligence action arises if

175. 666 F.2d 30 (2d Cir. 1981); see also Reserve Mining Co. v. EPA, 514 F.2d 492 (8th Cir. 1975).
176. Section 7604(e) of the CAA and section 1365(e) of the CWA both state: "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent [emission] standard or limitation or to seek any other relief [including relief against the Administrator or a State agency]." 42 U.S.C. § 7604(e) (1982); 33 U.S.C. 1365(e) (1982); see Belsky, supra note 14, at 6-8 (discussing tort remedies).
178. See, e.g., State ex rel. Renkin v. Harvey Aluminum, 226 F. Supp. 169 (D. Or. 1963) (fluorine from aluminum reducing plant damaged apple orchard); Dresser Indus. v. Ruddy, 592 S.W.2d 789 (Mo. 1980) (en banc) (rupture of waste settling basin polluted plaintiff's water supply); see Annotation, Right to Maintain Action to Enjoin Public Nuisance as Affected by Existence of Pollution Control Agency, 60 A.L.R.3D 665 (1974) (annotation dealing with enjoining public nuisances); Annotation, When Statute of Limitation Begins to Run as to Cause of Action for Nuisance Based on Air Pollution, 19 A.L.R.4TH 465 (1982); Annotation, Modern Status of Rules as to Balance of Convenience or Social Utility as Affecting Relief from Nuisance, 40 A.L.R.3D 601 (1971); Davis, Groundwater Pollution: Case Law Theories for Relief, 39 Mo. L. REV. 117 (1974); Davis, Wells and Streams: Relationship at Law, 37 Mo. L. REV. 189 (1972); Davis, Theories of Water Pollution Litigation 1971 Wis. L. REV. 738.
the alleged polluter has not acted as a reasonable person would have.  

Nuisance actions brought by the individual can be private or public nuisance actions. In public nuisance actions the only possible plaintiff is usually a public official. For a private plaintiff to bring a public nuisance action, he must allege not only the elements of the nuisance, but also that he was harmed in a manner distinct from the general public, such as by sustaining some personal injury or a distinct kind of property damage. Some cases have also held that before a plaintiff can bring a public nuisance suit, he must exhaust all administrative (legal) remedies. In a private nuisance action the plaintiff must allege that the defendant has caused the annoying act and that there is substantial economic harm to the plaintiff.

Under the private nuisance theory, plaintiffs have been able to recover for groundwater pollution, airborne odors, and other air and noise pollutants.

A nuisance can cause either temporary or permanent damages. The type of damages will determine when the statute of limitations begins to run and the type of damages recoverable. A permanent nuisance is one that arises from a permanent structure and permanently reduces the value of the property, while a temporary nuisance is defined as one that is not constant or unavoidable. In establishing a remedy for a permanent nuisance, the courts


180. Diamond v. General Motors Corp., 20 Cal. App. 3d 374, 97 Cal. Rptr. 639 (1971). In that it requires the plaintiff to demonstrate a harm different from that of the general public, a public nuisance action is more difficult to prove than an action under NEPA in which standing is not denied just because many people suffer the same harm. United States v. Students Challenging Regulatory Agency Procedure (SCRAP), 412 U.S. 669 (1973). See generally Annotation, Right to Maintain Action, supra note 178.


185. See Annotation, When Statute of Limitations Begins to Run, supra note 178. (air pollution and nuisance actions).


often apply the comparative convenience doctrine, weighing the harm caused by the nuisance against the harm in abating it.188

In State ex rel. Dresser Industries Inc. v. Ruddy,189 the Missouri Supreme Court specifically held that the Missouri Clean Water Law does not preempt nuisance actions, and that the pollution of the waters of the state constitutes a public nuisance.190 In that case the rupture of a dam in a settling basin in Audrain County was held to be an actionable nuisance when the basin’s contents contaminated Buss Basin, Mill Creek, Big River, and Meramec River.

However, without evidence that he owns property that is affected by the pollution caused by the Once-ler’s factory, the Lorax will be unable to sustain a private action in trespass or nuisance. Absent any evidence that he was injured in a manner different from the general public, the Lorax’s best hope, in the context of a common law remedy, would be to convince the local government to bring a public nuisance suit.

V. RELIEF

The best avenue available to the citizen wishing to prevent the construction of a polluting source is through the administrative agencies. When there is a major federal action for which an EIS is required,191 NEA provides for citizen involvement in the agency decision.192 Citizen groups have succeeded in halting or completely preventing some projects because of defective or nonexistent EISs. However, the effectiveness of NEPA as a tool for cleaning up the environment is limited by its procedural nature,193 which requires that the environment be considered, but not be the controlling factor in an agency decision. NEPA’s effectiveness is further limited in that actions under the CWA, the CAA, and other substantive statutes are not covered,194 and by the discretion given to the agencies.195

Although NEPA does not provide a vehicle by which pollution regulation can be challenged, the substantive statutes provide for public comment about proposed regulations.196 There is even the opportunity for a public hearing

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188. See Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970) (operator of cement plant allowed to stay in business and buy out those to whom it was a nuisance).
189. 592 S.W.2d 789 (Mo. 1980) (en banc).
190. Id. at 792-93.
191. See supra notes 50-52 and accompanying text.
192. See supra notes 52-54 and accompanying text.
193. See supra notes 57-78 and accompanying text.
194. See supra notes 59-61 and accompanying text.
before the issuance of a permit to engage in a controlled act such as the discharge of a pollutant into the water.\textsuperscript{197} Assuming that the Once-ler’s factory is located in an area in which the CWA is in effect and where there was already an approved SIP once the factory was contemplated, it might be too late to influence the regulations, although they can always be revised. If the permit issued to the Once-ler violates the statutory standards, then a suit seeking review of the agency action would be possible. Such a suit is brought in federal circuit court rather than district court, since it is a challenge to the Administrator’s action, not an attempt to compel him to act.\textsuperscript{198}

The Lorax might be able to stop the building of the factory by convincing the local zoning board to re-zone the land as noncommercial, or by persuading the local government to promulgate more restrictive pollution measures. Zoning as a method of environmental control has been discussed on a theoretical level, but its practical utility is probably limited.\textsuperscript{199} Zoning and the promulgation of stricter pollution laws on the local, state, or federal level might serve to prevent the building of a polluting edifice simply because the better pollution devices required might make the project economically unattractive. In addition to negotiating with government agencies the Lorax can try to reach an agreement with the potential or existing polluter.\textsuperscript{200} Through environmental mediation it might be possible for a mutually acceptable situation to be developed whereby the impact on the environment is minimized, while the economic efficiency of the thneed business is maximized.

Once a source of pollution exists, NEPA is of no help. If the emission violates, for example, RCRA, the CWA, or the CAA,\textsuperscript{201} then an individual can bring suit under the citizen suit provisions of the applicable act.\textsuperscript{202} In bringing the suit the individual acts as a private attorney general and “Congress made clear that citizen groups are not to be treated as nuisances or troublemakers but rather as welcome participants in the vindication of environmental issues.”\textsuperscript{203} The citizen’s actions can be directed at the polluter to stop a violation of an environmental standard or of a permit issued pur-

\textsuperscript{198} See supra note 124 and accompanying text.
\textsuperscript{201} This includes violation of the state SIP for air pollution or violation of an approved state clean water act.
\textsuperscript{202} See supra notes 118 and accompanying text.
\textsuperscript{203} Friends of the Earth v. Carey, 535 F.2d 165, 172 (2d Cir. 1976).
suant to one of the environmental statutes, or against the Administrator to compel him to perform his nondiscretionary duties. The courts have consistently held that the citizen's right under the citizen suit provisions of the CWA and the CAA is to enforce the act, not to recover damages under it.204 Although the individual cannot recover damages in a citizen suit, the statutes do provide for reasonable costs, and witness and attorney fees.205 The citizen, however, must prevail on the merits.206 The statutes specify only that costs can be awarded in the context of the citizen suit. Because of the underlying policy similarities, however, attorney fees have been awarded for challenges to Administrator actions.207

In addition to creating air and water pollution, the Once-ler's acts are deleterious to the environment in other ways. Although the cutting of trees on private land is not prohibited by any federal statutes, if the area into which the Once-ler has come is federal land, then the Multiple Use Sustained Yield Act of 1960208 or the Forest and Rangeline Resource Planning Act of 1974209 might be applicable. The Forest Service and the Bureau of Land Management control lumbering on federal land, and the Once-ler's decision to cut down the Truffula Forest would be a major federal act necessitating an EIS. If the Brown Bar-ba-loots, Swommee-Swans or Humming-Fish are endangered species with no place else to go, the Endangered Species Act210 will apply, and an EIS is required if their existence is threatened by a federal action.211 Additionally, the noise being made by the factory can trigger the Noise Control Act,212 or subchapter IV of the CAA, which deals with noise pollution, while the toxic quality of the waste213 is dealt with under the Toxic Substance Control Act.214

207. Roosevelt Campobello Int'l Park Comm'n v. United States, 711 F.2d 431, 436 (1st Cir. 1983) (court relied on purpose of the acts and congressional intent to reject the American rule of no attorney fees).
209. Id. §§ 1600-1687.
210. Id. §§ 1531-1543.
214. 15 U.S.C. § 2601-29 (1982). Under the TSCA, the toxic waste is registered and monitored while the RCRA regulates transport, storage, and disposal.
If the statutory remedies are ineffective, the individual can bring suit for a common law remedy. It is in stopping an existing source of pollution that the common law remedies of nuisance and trespass are most effective because when the pollution exists, the harm, source of the harm, and damages can be proven and not just hypothesized.215 Although the common law actions are largely curative and not preventive, their advantage is that it is possible to get both an injunction to stop the pollution and monetary damages.216

VI. Conclusion

It is in trying to prevent offending pollution that a citizen, such as the Lorax, feel the most frustrated. The Lorax ranted and raved at the Once-ler and finally with a "very sad, sad backward glance . . . he lifted himself by the seat of his pants . . . and took leave of this place, through a hole in the smog, without leaving a trace."217 Other concerned citizens have been known to picket, engage in acts of violence, and even to send dead fish to corporate executives. But while self-help may seem to be the only course available to the citizen, there are other remedies depending upon the type of pollution, status of the polluter, and status of the citizen. In the case of navigable interstate waterways, the Corps of Engineers has jurisdiction under the Rivers and Harbors Act, while the Clean Water Act and state clean water statutes regulate the quality of the water and of pollution that could jeopardize that quality. The Clean Air Act requires the states to regulate and control air pollution towards the goal of cleaning the air, and there are statutes directed at other aspects of environmental quality. The Lorax as a concerned citizen has standing to enforce the Clean Air Act or the Clean Water Act, and if he or his property is damaged by the pollution, he might have a common law action for damages based upon a nuisance or trespass theory.

The environment is something that most people, including elected officials, feel very strongly about,218 and the assurances of citizen involvement in the procedures mandated by the environmental statutes reflect that. While there are remedies for abating or cleaning up pollution, they are minimized

215. Whether an injunction is issued is determined by a balancing of interests. The interests of the individual trying to enjoin a polluter will be more compelling if the evidence of the pollution is more than theoretical. There is, however, always the possibility of enjoining an anticipatory nuisance.
216. Under the American rule, attorney fees generally will not be awarded unless there is a statutory basis or strong evidence of congressional intent for that award, such as is in the CWA and CAA.
218. See Fadil, supra note 5; Sagoff, We Have Met the Enemy and He is Us, Or conflict and Contradiction in Environmental Law, 12 ENVTL. LAW 283 (1982) (discussion of how even those who personally prefer development want the environment protected).
by jurisdictional and other requirements. Consequently, the best way for the Lorax to have protected the environment would have been through political and administrative channels, making sure that the regulations were stringent and that they were enforced.\[219\]

‘‘But now,’’ says the Once-ler,
Now that you’re here,
the word of the Lorax seems perfectly clear.
UNLESS someone like you
cares a whole awful lot,
nothing is going to get better.
It’s not.\[220\]

**Rhona Lyons**

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