

Globethics Repository



Making Pollution Inefficient Through Empowerment

This page was generated automatically upon download from the Globethics Repository. More information on Globethics see <https://www.globethics.net>. Data and content policy of Globethics Repository see <https://repository.globethics.net/pages/policy>.

Item Type	Article
Authors	McBride, Cody
Publisher	UC Berkeley School of Law
Rights	With permission of the license/copyright holder
Download date	2026-07-15 03:15:22
Link to Item	http://hdl.handle.net/20.500.12424/189376

Making Pollution Inefficient Through Empowerment

Cody McBride*

*At its crux, environmental law is about forcing potential polluters to act in ways they would not otherwise. To do this, environmental law attempts to make noncompliance more costly than compliance. Without doing so, potential polluters would pollute regardless of its legality, a theory known as efficient breach of public law. Academics and judges alike have increasingly accepted this theory, resulting in courts struggling to prevent efficient breaches. But that has proven a difficult task. In *Pakootas v. Teck Cominco Ltd.*, the Ninth Circuit sought to prevent efficient breach by barring citizen suits to enforce Environmental Protection Agency penalties, thereby concentrating enforcement power in the Environmental Protection Agency. This Note argues, however, that the Ninth Circuit ruling will generally make efficient breach more likely, even if it ensured compliance in *Pakootas v. Teck Cominco Ltd.* The Environmental Protection Agency has repeatedly failed to protect the environment due to lack of oversight, a lack of resources, or a lack of desire. Citizen suits are powerful tools to counteract the Environmental Protection Agency's failure and should not be uniformly discarded. Contrary to the Ninth Circuit's rule, I argue for a case-by-case approach to determine whether a citizen suit for Environmental Protection Agency penalties would increase or decrease the likelihood of compliance in each particular case. Even beyond the realm of citizen suits, environmental protection powers should be broadly shared among potential enforcers, including the Environmental Protection Agency, citizens, states, and Native American tribes, so that the probability of paying for pollution and the cost of noncompliance both rise.*

Introduction.....	406
I. Efficient Breach of Public Law	408
A. The Theory and Its Acceptance	408
B. Efficient Breach of Environmental Law	413

Copyright © 2012 Regents of the University of California.

* J.D. Candidate, University of California, Berkeley, School of Law, 2013; B.A., History and Political Science, Arkansas Tech University, 2010. Special thanks to Bob Infelise, Holly Doremus, and Jill Jaffe for providing invaluable feedback and guidance during Berkeley's Environmental Law Writing Seminar, as well as to the hardworking editors of *Ecology Law Quarterly* for their insightful edits. Many thanks also to my family, especially my wife, Krisanyia, for unwavering support and encouragement.

II. Creating Inefficiency Through Environmental Law.....	414
A. Penalties	414
B. Citizen Suits.....	416
1. Purposes of Citizen Suits	416
2. Mechanics of Citizen Suits	418
III. The Ninth Circuit's Overcompensation for Efficient Breach:	
<i>Pakootas II</i>	419
A. The Case	419
B. The Reach of <i>Pakootas II</i> and § 9613(h).....	423
C. <i>Pakootas II</i> 's Effect on Teck Cominco and Future Cases	425
IV. Examples and Solutions: Overcoming Efficient Breach	427
A. Empowering the People	427
B. Repowering the Tribes.....	430
1. The State of the Law	430
2. Unfortunate Outcomes	431
3. Proposed Solutions	435
Conclusion	437

If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.¹

INTRODUCTION

Congress designed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to promote the “timely cleanup of hazardous waste sites” by those responsible for contamination.² One obstacle to this goal—and to the success of any environmental law—is the possibility for efficient breach of public law. Advocates of this theory believe people will violate public laws if the benefits of doing so outweigh the costs of the legal consequences, and advocates often encourage such violations.³ Accordingly, members of the ivory tower⁴ and the bench⁵ increasingly assume that people

1. Oliver Wendell Holmes Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

2. *Burlington N. & Santa Fe Ry. Co. v. U.S.*, 129 S. Ct. 1870, 1874 (2009) (citing *Consol. Edison Co. v. UGI Util., Inc.*, 423 F.3d 90, 94 (2d Cir. 2005)).

3. See Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155, 1168 n.36, 1177 n.57 (1982).

4. See *id.*; Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1576 (1995); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 48.

5. See *Luddington v. Ind. Bell Tel. Co.*, 966 F.2d 225, 229 (7th Cir. 1992); *Reyes-Hernandez v. INS*, 89 F.3d 490, 492 (7th Cir. 1996); *Branton v. FCC*, 993 F.2d 906, 908 (D.C. Cir. 1993); *Smith v. Nat'l Transp. Safety Bd.*, 981 F.2d 1326, 1328 (D.C. Cir. 1993); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 282 (1994).

consider economic outcomes when deciding whether to follow the law. Because many lawmakers and judges find efficient breaches of public law morally acceptable when they are efficient and profitable,⁶ others work tirelessly to ensure breaches are inefficient and costly so as to dissuade them.⁷ Inefficiency is thus the key to legal compliance.

In environmental law, attempts to create inefficiency for polluters equal an effort to prevent pollution and achieve quicker and cheaper cleanups once pollution occurs.⁸ But creating inefficiency can be difficult, especially when the full impacts of a decision are not considered. Illustrating this difficulty, the Ninth Circuit recently limited CERCLA citizen suits in an attempt to make efficient breach unattractive for the polluter.⁹ Specifically, the court ruled that only the Environmental Protection Agency (EPA) could bring suits to enforce its penalty orders for noncompliance, arguing that giving the EPA sole control over enforcement matters would result in higher rates of compliance.¹⁰ But in most cases the court's limitation makes it economically attractive for polluters to ignore EPA penalty orders, even if the limitation better ensured compliance in the unique scenario before it.¹¹ The court has unintentionally sacrificed quicker and cheaper cleanups by making EPA penalties less effective; the court's vision was too narrow and its decision too broad.

Instead, environmental protection and enforcement powers should be in the hands of the many, not the few. Specifically, those most harmed by pollution when it occurs—local governments, citizens, and tribes—should also have the power to protect themselves, if for no other reason than they will be more likely than the EPA to do so. As for noncompliance penalties, if there were many different potential enforcers, polluters would be less likely to evade penalties and, thus, to ignore orders to pay. Conversely, because the EPA is the only enforcer for penalties it imposes, there is a greater incentive for polluters to evade or stall cleanup and penalty payment because the EPA may choose to negotiate, as in *Pakootas v. Teck Cominco Ltd.*¹² (*Pakootas II*), or may lack the funds or manpower needed to enforce a compliance order.¹³ If the EPA does enforce the penalty, cleanup is ultimately costlier for polluters who choose to

6. See Easterbrook & Fischel, *supra* note 3, at 1168 n.36, 1177 n.57.

7. See *Pakootas v. Teck Cominco Metals, Ltd.* (*Pakootas II*), 646 F.3d 1214 (9th Cir. 2011).

8. For a discussion on the goals of environmental law, see James L. Huffman, *The Past and Future of Environmental Law*, 30 ENVTL. L. 23, 24 (2000) (environmental law was born out of concerns for public health, conservation, and preservation, all of which require the limitation of pollution and cleanup when it occurs).

9. *Pakootas II*, 646 F.3d at 1221.

10. *Id.* ("The penalties are the EPA's hammer.").

11. *Id.* at 1221–22.

12. *Id.* at 1217–18.

13. See JONATHAN L. RAMSEUR ET AL., CONG. RESEARCH SERV., RL 31410, SUPERFUND TAXES OR GENERAL REVENUES: FUTURE FUNDING ISSUES FOR THE SUPERFUND PROGRAM 8 (2008) (stating that, between 2002 and 2004, "cleanup was delayed at numerous [Superfund] sites because of a lack of funds"). And, given the current political climate, EPA funding problems are unlikely to improve. See Bryan Walsh, *The GOP's Hidden Debt Deal Agenda: Gut the EPA*, TIME, Aug. 2, 2011, <http://www.time.com/time/health/article/0,8599,2086421,00.html>.

wait—and for the society in which those funds could be put to better use—because penalties would accumulate during their noncompliance¹⁴; thus, initial incentives for noncompliance can actually lead to inefficient outcomes for polluters who lose their gamble, regardless of how safe the gamble initially seemed. Even outside the scope of noncompliance penalties, it would be less likely that polluters would escape punishment for their pollution if many different entities were entrusted with environmental protection powers, making it less attractive for polluters to ignore environmental laws.

Part I of this Note discusses efficient breach of environmental law, its acceptance by legal scholars and the bench, and its effect on the path of the law. Part II explores traditional enforcement tools used in environmental law—penalties and citizen suits—and their importance in ensuring environmental protection. Part III addresses *Pakootas II* and its impact on the effectiveness of those tools. Part IV provides examples where overdependence on the EPA resulted in noncompliance by polluters; it then discusses ways in which efficient breach of public law should be addressed—namely, the EPA, states, citizens, and Native tribes should share the responsibility of environmental protection, with adequate power to stop pollution given to those harmed by it.

I. EFFICIENT BREACH OF PUBLIC LAW

A. *The Theory and Its Acceptance*

The “efficient breach of public law theory”¹⁵ states that actors have no moral obligation to avoid violating public law when violations would be economically profitable.¹⁶ A fundamental assumption of the theory of efficient breach of public law is the “law-as-price theory” of compliance.¹⁷ The law-as-price theory holds that the law is to be looked at in terms of the price required to comply, and only if that price is lower than the price of noncompliance is a

14. See 42 U.S.C. § 9606(b)(1) (2006) (“(1) Any person who, without sufficient cause, willfully violates, or fails or refuses to comply with, any order of the President under subsection (a) of this section may, in an action brought in the appropriate United States district court to enforce such order, be fined not more than \$25,000 for each day in which such violation occurs or such failure to comply continues.”); see also 73 Fed. Reg. 75,340, 75,340–46 (Dec. 11, 2008) (setting the maximum monetary penalty amount for noncompliance during Teck Cominco’s noncompliance at \$37,500 per day).

15. Efficient breach is better known in the context of contract law and is advocated by many economists and judges in that field. See *Patton v. Mid-Continent Sys., Inc.*, 841 F.2d 742, 750 (7th Cir. 1988) (Posner, J.) (“Even if a breach is deliberate, it is not necessarily blameworthy. The promisor may simply have discovered that his performance is worth more to someone else. If so, efficiency is promoted by allowing him to break his promise, provided he makes good the promisee’s actual losses.”). But, of course, others disagree with the efficient breach of contract theory. See, e.g., Daniel Friedmann, *The Efficient Breach Fallacy*, 18 J. LEGAL STUD. 1 (1989); Melvin A. Eisenberg, *Actual and Virtual Specific Performance, the Theory of Efficient Breach, and the Indifference Principle in Contract Law*, 93 CALIF. L. REV. 975 (2005).

16. See Easterbrook & Fischel, *supra* note 3, at 1155, 1168 n.36; Cynthia A. Williams, *Corporate Compliance with the Law in the Era of Efficiency*, 76 N.C. L. REV. 1265, 1267–68 (1998).

17. Williams, *supra* note 16, at 1267–68.

person morally required to follow the law.¹⁸ In essence, the theory holds that Congress only intended for its laws to be followed if doing so costs less than the fine or penalty for noncompliance.¹⁹

Most proponents of the law-as-price theory do not claim that people can morally buy their way out of *any* law, however. The theory only applies to regulatory laws (*malum prohibitum*), which cover actions that are wrong only because prohibited by law, not to laws “wrong in their very nature” (*malum in se*).²⁰ This distinction is important because even those who argue that a person can morally breach regulatory laws do not argue that a person can morally “commit murder so long as he does not leave behind proof beyond a reasonable doubt of his act.”²¹ Being inherently wrong, the limits of and punishments for *malum in se* crimes are not seen as the price lawmakers thought appropriate for those crimes to become morally acceptable.²²

While many criticize the efficient breach of public law theory, believers have grown in number, with many being influential professors and judges who are instrumental in shaping the path of the law. The academic community has advocated the theory in depth;²³ more importantly, however, many courts have adopted it, impacting the enforcement and development of the law.

First, though, it is important to note that the underlying principles of the theory are not new. In fact, many influential Americans, including founding fathers, accepted them. For example, Thomas Jefferson once said that “[n]o government can be maintained without the principle of fear as well as duty. Good men will obey the last, but bad ones the former only.”²⁴ Benjamin Franklin agreed, opining that “[l]aws too gentle are seldom obeyed. . . .”²⁵ Likewise, James Madison viewed the constitutional design as a limit on human

18. *Id.* Williams defines the closely related “efficient investment in compliance” theory as suggesting “that the amount of money a firm should invest in law compliance will be determined by the maximum penalties for violations, rather than the substantive standards for conduct that the law sets forth.” *Id.* at 1357. To these theories, compare the “law-as-limit” theory of compliance, which holds that laws morally require compliance even if noncompliance would be profitable. For Williams’s criticism of the law-as-price and efficient investment in compliance theories, as well as an endorsement of the law-as-limit theory, see *id.* at 1267–68.

19. See Easterbrook & Fischel, *supra* note 3, at 1177 n.57 (“[M]anagers do not have an ethical duty to obey economic regulatory laws just because the laws exist. They must determine the importance of these laws. The penalties Congress names for disobedience are a measure of how much it wants firms to sacrifice in order to adhere to the rules; the idea of optimal sanctions is based on the supposition that managers not only may but also should violate the rules when it is profitable to do so.”).

20. Pepper, *supra* note 4, at 1576.

21. See Simon, *supra* note 4, at 48.

22. See Easterbrook & Fischel, *supra* note 3, at 1168 n.36.

23. See, e.g., Easterbrook & Fischel, *supra* note 3, at 1168 n.36; Pepper, *supra* note 4; Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259 (1982); David L. Engel, *An Approach to Corporate Social Responsibility*, 32 STAN. L. REV. 1, 43–45 (1979).

24. Letter from Thomas Jefferson to John Wayles Eppes (June 24, 1813), *reprinted in* THOMAS JEFFERSON, AUTOBIOGRAPHY, NOTES ON THE STATE VIRGINIA, PUBLIC AND PRIVATE PAPERS, ADDRESSES, LETTERS 1285 (1984).

25. BENJAMIN FRANKLIN, POOR RICHARD’S ALMANAC (1756), *as reprinted in* THE PREFACES, PROVERBS, AND POEMS OF BENJAMIN FRANKLIN 251 (Paul Leicester Ford ed., New York, Putnam, 1889).

self-interest, stating that, “[i]f men were angels, no government would be necessary.”²⁶ A century later, Oliver Wendell Holmes asserted that to know the law one must look at it as a “bad man, who cares only for the material consequences his knowledge enables him to predict.”²⁷ Each of these men recognized the proclivity of people to ignore the law when the price to be paid for doing so was low.

More recently, Judge Richard Posner has been a leading proponent of the theory of efficient breach of public law and the underlying law-as-price theory of compliance.²⁸ In *Luddington v. Indiana Bell Telephone Co.*, for example, he said that the “amount of care” people take to avoid civil or criminal liability is directly related to the severity of the sanction involved.²⁹ The case involved a racial discrimination lawsuit, parts of which were dismissed by the district court.³⁰ While waiting for plaintiff’s appeal, Congress enacted the Civil Rights Act of 1991, which, if applicable to plaintiff’s claims, would require his dismissed claims to be reinstated.³¹ Although the “norm of nondiscrimination” was not new, Judge Posner refused to apply the statute to defendants’ actions before they had an opportunity to “readjust their level of care” in consideration of the new legal consequences.³² Keeping with this view, in *Reyes-Hernandez v. Immigration and Naturalization Service*, Judge Posner held that new immigration rules could not be applied retroactively because people consider legal consequences in “planning and conducting” their lives.³³ By accepting that legal consequences—including the amount of penalties—are a valid consideration in choosing whether to comply with a law, Judge Posner implicitly acknowledged that an action’s underlying legality is simply one factor on which to base our behavior.³⁴

Likewise, Judge Douglas Ginsburg of the United States Court of Appeals for the District of Columbia Circuit has penned more than one case echoing tones of the efficient breach of public law theory. In *Branton v. Federal Communications Commission*, a radio station broadcasted evidence used in the trial of John Gotti, an alleged mobster, without censoring Gotti’s repeated use of “the f-word.”³⁵ Although the broadcast was allegedly obscene or indecent in violation of federal law, the FCC decided not to impose penalties.³⁶ A listener sued the FCC for its failure to sanction the radio station, claiming that by not

26. THE FEDERALIST NO. 51 (James Madison), reprinted in *DEBATE ON THE CONSTITUTION: PART TWO* 164 (Bernard Bailyn ed., 1992).

27. Holmes Jr., *supra* note 1, at 459.

28. Williams, *supra* note 16, at 1275.

29. *Luddington v. Ind. Bell Tel. Co.*, 966 F.2d 225, 229 (7th Cir. 1992).

30. *Id.* at 226.

31. *Id.*

32. *Id.* at 229.

33. *Reyes-Hernandez v. INS*, 89 F.3d 490, 492 (7th Cir. 1996). In this case, an immigrant considered the legal consequences in deciding whether to concede their deportability in court. *Id.*

34. *See id.*

35. *Branton v. FCC*, 993 F.2d 906, 908 (D.C. Cir. 1993).

36. *Id.*

doing so it was more likely that radio stations would broadcast such material in the future.³⁷ Judge Ginsburg found that because “radio stations might well decide that the benefits of broadcasting indecent language . . . outweigh the costs of making certain payments to the Government (here in the form of fines rather than of taxes),” the court had no way to predict whether a radio station would decide to efficiently break the law even if the FCC imposed sanctions.³⁸ Thus, the causation and redressibility requirements for standing were lacking and he dismissed the case.³⁹ Importantly, Judge Ginsburg never chastised the radio station’s decision not to comply; rather, he seemed to accept that supply and demand economics apply to compliance with public law just as with consumer goods.⁴⁰ He further explained his view of the law in *Smith v. National Transportation Safety Board*, where he claimed that acting in accordance with the law meant “conforming to the law, but [that] sometimes it means violating the law (or coming close and risking a violation) and accepting the known consequences of doing so—especially where a regulatory rather than a moral or criminal norm is concerned.”⁴¹

Even the Supreme Court has endorsed the underlying theories of efficient breach of public law, stating that the level and type of penalties for a violation of law can determine a person’s compliance efforts.⁴² The case was *Landgraf v. USI Film Products*, and at its heart was the Civil Rights Act of 1991, which amended Title VII of the Civil Rights Act of 1964 to add compensatory and punitive damages for intentional employment discrimination and to allow jury trials.⁴³ Before Congress passed the 1991 amendment, Barbara Landgraf sued her employer for the “inappropriate remarks and physical contact” of her coworker.⁴⁴ The district court dismissed the complaint, finding that although Landgraf had been sexually harassed she was not entitled to equitable relief—the only type of relief available under the original act—because her employment had not been terminated in violation of Title VII; she had instead resigned.⁴⁵ While Landgraf’s appeal was pending, Congress passed the 1991 amendment.⁴⁶ Naturally, Landgraf argued that her case should be remanded for a jury trial with the possibility of damages pursuant to the new act.⁴⁷ The court of appeals and the Supreme Court disagreed.⁴⁸

Writing for the majority, Justice Stevens explained that the amendment “give[s] managers an added incentive to take preventive measures to ward off

37. *Id.* at 909.

38. *Id.* at 911–12 (citation omitted).

39. *Id.*

40. *See id.*

41. *Smith v. Nat’l Transp. Safety Bd.*, 981 F.2d 1326, 1328 (D.C. Cir. 1993).

42. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 282 (1994) (Stevens, J.)

43. *See* 42 U.S.C. § 1981a (2006).

44. *Landgraf*, 511 U.S. at 248.

45. *Id.* at 248–49.

46. *Id.* at 249.

47. *Id.*

48. *Id.* at 249, 286.

discriminatory conduct by subordinates before it occurs.”⁴⁹ To apply those provisions retroactively would be unfair because the defendant would not have an opportunity to respond to that incentive in determining how much to invest in compliance.⁵⁰ Still, the Court acknowledged that the legal standard had not changed—intentional employment discrimination had been illegal for a generation—meaning that fairness concerns were not *as pressing*.⁵¹ Nonetheless, the Court made clear that people have a right to know “[t]he extent of . . . liability,” not just that it is illegal, before deciding whether to comply.⁵² As one legal scholar put it, the Court told us not to expect compliance unless the law carries “a big enough stick [for people] to take it seriously.”⁵³

As mentioned above, the efficient breach of public law theory is not without its critics. One legal scholar, Cynthia Williams, argues that the theory lacks “a sound political and legal foundation,” and that it is wrong about how people actually make decisions.⁵⁴ She further argues that even though regulatory laws cover areas not governed by “obvious moral precepts,” it is in those areas where we need binding law the most to ensure “a level playing field among competitive economic enterprises, so that persons are treated fairly and with respect, and so that industrial practices include considerations of human and environmental health and safety.”⁵⁵ Finally, Williams posits that society, far from being indifferent on whether a statute is enforced, is actually harmed when regulations are ignored, especially where the harm the regulation seeks to prevent is not economic (as with speed limits or environmental laws).⁵⁶ In enacting these laws, society intended for them to be followed, regardless of price, for everyone’s benefit.⁵⁷ Judge Thomas Ellis of the United States District Court for the Eastern District of Virginia has echoed this view: “Congress surely did not intend for employers to perform a cost-benefit analysis to decide whether to engage in or permit illegal discriminatory conduct. Rather, Congress plainly meant that no cost-benefit ratio could justify unlawful discrimination.”⁵⁸

49. *Id.* at 282 n.35.

50. *See id.*

51. *Id.*

52. *Id.* at 283–84.

53. Williams, *supra* note 16, at 1358. In stark contrast and espousing a very different view of the law, Justice Harry Blackmun dissented, arguing that sexual harassment had been illegal for thirty years and that “there is no such thing as a vested right to do wrong.” *Landgraf*, 511 U.S. at 297 (citing *Freeborn v. Smith*, 69 U.S. 160, 175 (1864)) (Blackmun, J., dissenting).

54. Williams, *supra* note 16, at 1267, 1276 n.38. For a list of reasons that people might follow the law regardless of the cost of doing so, specifically in the environmental field, see David B. Spence, *The Shadow of the Rational Polluter: Rethinking the Role of Rational Actor Models in Environmental Law*, 89 CALIF. L. REV. 917, 970 (2001).

55. Williams, *supra* note 16, at 1325–26.

56. *Id.* at 1333.

57. *Id.* at 1336–37.

58. *Jaekel v. Equifax Mktg. Decision Sys., Inc.*, 797 F. Supp. 486, 493 n.14 (E.D. Va. 1992).

B. Efficient Breach of Environmental Law

At its crux, environmental law is about forcing potential polluters to act in ways they would not normally act and that are often against their financial interests.⁵⁹ To this end, lawmakers must make noncompliance more costly than compliance, or else polluters will ignore the rules.⁶⁰ But does the efficient breach of public law theory really apply to environmental laws, making compliance with those laws voluntary in the eyes of the theory's supporters? This depends on whether environmental laws are *malum prohibitum* (regulatory) or *malum in se* (wrong by nature). At least one law-as-price proponent has argued that environmental laws are regulatory because to "discharge .060 grams of ammonia per liter of water effluent in a rural area" is not inherently wrong, even if to do so is against EPA regulations.⁶¹ Although unlawful, such a discharge may not be harmful to others—possibly evidenced by lack of enforcement in rural areas—meaning the discharge is not inherently wrong. In contrast, murder is unlawful, harmful, and inherently wrong.⁶² Thus, some see compliance with EPA regulations as morally voluntary under the law-as-price theory; without a moral obligation to comply, polluters will likely weigh the costs of compliance and noncompliance before acting.⁶³

Further, the traditional rationale underlying environmental law corroborates the claim that environmental law is embedded in the efficient breach of public law realm—despite scholarship in the field lacking language associated with efficient breach. Environmental law's rationale is based on the theory of the "rational polluter" that seeks to maximize its own pecuniary self-interests.⁶⁴ Basically, a rational polluter will pollute unless it is otherwise deterred.⁶⁵ To be deterred, penalties must be set high enough and the regulatory mechanism must maximize the probability of noncompliance detection.⁶⁶

59. Huffman, *supra* note 8, at 25.

60. See Easterbrook & Fischel, *supra* note 3, at 1168 n.36, 1177 n.57.

61. Pepper, *supra* note 4, at 1576. But see Engel, *supra* note 22, at 45 (arguing that even clearly *malum in se* laws are not absolute bars, and penalties for noncompliance should still be considered when determining how many resources to invest in conforming to the law).

62. See Pepper, *supra* note 4, at 1576–77.

63. See *id.* Given recent vilifications of the EPA and the growing sense that EPA regulations are inherently illegitimate or economically harmful, it is even less likely costs of noncompliance will be paid in the future. For such vilification, see John M. Broder, *Bashing E.P.A. Is New Theme in G.O.P. Race*, N.Y. TIMES, Aug. 17, 2011, <http://www.nytimes.com/2011/08/18/us/politics/18epa.html>; Jessica Retig, *EPA Budget and Power Under Attack from Republicans*, U.S. NEWS, July 8, 2011, <http://www.usnews.com/news/articles/2011/07/08/epa-budget-and-power-under-attack-from-republicans>. For an argument that EPA regulations are inherently illegitimate, see *Mountaintop Coal Mining Moves a Step Ahead*, UPI.COM (Oct. 7, 2011), http://www.upi.com/Business_News/Energy-Resources/2011/10/07/Mountaintop-coal-mining-moves-a-step-ahead/UPI-24411318012167/?spt=hs&or=er (quoting the National Mining Association's praise for the rejection of the "illegitimate criteria" used in the EPA's "unlawful" coal permit evaluation process).

64. Spence, *supra* note 53, at 919–20; see cf. Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1244 (1968) (explaining how it is rational for individual herdsmen to increase the size of their herds to the point where the common grazing area is depleted and ruined).

65. Spence, *supra* note 53, at 920.

66. *Id.* at 921.

Really, one must only look at the EPA's enforcement policies and practices to see the efficient breach of public law theory's influence: the EPA's penalty policies say "[i]t is generally the Agency's policy not to settle cases for an amount less than the economic benefit of noncompliance."⁶⁷ Inherent in this policy is the assumption that polluters make choices in consideration of costs rather than blindly complying with the law.

With the efficient breach of public law theory's influence on the legal world, including environmental law, it is undoubtedly an important topic.⁶⁸ As the theory permeates the legal field, people will be more likely to see the penalties of *malum prohibitum* laws as the price of engaging in the regulated activity. Even if the efficient breach theory is confined to legal scholarship without real world adherence by polluters, the mere concern for efficient breach of public law can affect a court's reasoning and shift the direction of an entire legal field, as illustrated by the cases discussed in Part I.A. In environmental law, such a shift has occurred with *Pakootas II*, threatening to inhibit quick and cheap cleanups in the future, as discussed in Part III. First, to set the stage I review traditionally successful tools for minimizing efficient breach of environmental law.

II. CREATING INEFFICIENCY THROUGH ENVIRONMENTAL LAW

A. Penalties

Forcing compliance with government regulations can be difficult in any area of the law.⁶⁹ Like in other fields, penalties and fines are useful enforcement tools in environmental law. For example, CERCLA cleanup orders require polluters to pay the substantial costs incurred from cleanup of hazardous waste sites. CERCLA provides that those who own the land on which pollution occurs and those who cause it to occur are responsible for the total costs of the "removal or remedial action . . . [and] damages for injury to, destruction of, or loss of natural resources."⁷⁰ To force those responsible to comply, CERCLA uses penalties and fines as primary tools to make noncompliance more expensive. Specifically, for polluters who fail to comply with cleanup orders, the EPA may impose fines up to \$25,000 per day of noncompliance.⁷¹ Punitive damages, which are imposed in addition to the cleanup costs themselves, may be three times the cost of cleanup incurred by

67. EPA, RESOURCE CONSERVATION AND RECOVERY ACT CIVIL PENALTY POLICY 29 (2003), available at www.epa.gov/compliance/resources/policies/civil/rcra/rcpp2003-fnl.pdf.

68. Even critics of the theory admit its importance. Williams, *supra* note 16, at 1276 n.38 ("Rather, the law-as-price theory is important as a theory about law compliance, even if it is incorrect about how these decisions are actually made, both because it has started to have an effect on decided cases and because it is illuminating how we as a society (or certain law professors within that society) think about law.").

69. The best approach to tax compliance is hotly debated, for example. See James Andreoni et al., *Tax Compliance*, 36 J. ECON. LITERATURE 818 (1998).

70. 42 U.S.C. §§ 9605, 9607 (2006).

71. *Id.* § 9606(b)(1).

the government,⁷² and the EPA has explicitly affirmed the importance of punitive damages against “recalcitrant parties who fail to comply with administrative orders.”⁷³ Congress included similar penalty provisions in the CAA,⁷⁴ CWA,⁷⁵ RCRA,⁷⁶ Safe Drinking Water Act (SDWA),⁷⁷ Toxic Substances Control Act (TSCA),⁷⁸ Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).⁷⁹

The EPA adopted three main goals in assessing and assigning penalties on polluters breaching environmental law: (1) “deterrence;” (2) “fair and equitable treatment of the repudiated community;” and (3) “swift resolution of environmental problems.”⁸⁰ The first and third purposes directly relate to efficient breach, with the first attempting to prevent it before it occurs and the third attempting to ensure minimal environmental damage afterward. As for deterrence, the EPA stated that:

If a penalty is to achieve deterrence, both the violator and the general public must be convinced that the penalty places the violator in a worse position than those who have complied in a timely fashion. Neither . . . is likely to believe this if the violator is able to retain an overall advantage from noncompliance. . . . For these reasons, it is Agency policy that penalties generally should, at a minimum, remove any significant economic benefits resulting from failure to comply with the law.⁸¹

Going further, the EPA suggested that “deterrence and fundamental fairness” require punitive penalties “to ensure that the violator is economically worse off than if it had obeyed the law.”⁸² Similarly, in discussing swift resolutions of environmental problems, the EPA endorsed two approaches to remedy an existing efficient breach: (1) “providing incentives to settle and institute prompt remedial action” and (2) “providing disincentives to delaying compliance.”⁸³ In other words, the noncompliance penalty should be less if cleanup is initiated quickly but should be higher if delays occur.

Regardless of the underlying goals and rationales, however, penalties are

72. *Id.* § 9607(c)(3).

73. National Oil and Hazardous Substances Pollution Contingency Plan, 55 Fed. Reg. 8666, 8799 (Mar. 8, 1990) (to be codified at 40 C.F.R. pt. 300).

74. *See* 42 U.S.C. § 7413(b) (2006).

75. *See* 33 U.S.C. §§ 1319(g), 1321(b)(6), 1321(b)(7) (2006).

76. *See* 42 U.S.C. § 6928(g) (2006).

77. *See id.* §§ 300g-3(b), 300g-3(g)(3), 300i(b), 300i-1(c), 300j-4(c).

78. *See* 15 U.S.C. § 2615 (2006).

79. *See* 7 U.S.C. § 136l (2006).

80. EPA, POLICY ON CIVIL PENALTIES: EPA GENERAL ENFORCEMENT POLICY 1 (1984), *available at* <http://www.epa.gov/compliance/resources/policies/civil/penalty/epapolicy-civilpenalties021684.pdf>. In addition to these goals, the EPA also uses the penalty provisions of some statutes—such as CERCLA and the CWA—to recover the costs of government cleanups. *See id.* at 2.

81. *Id.* at 3.

82. *Id.*

83. *Id.* at 6.

meaningless unless enforceable.⁸⁴ Citizen suit provisions, to which I now turn, are one of the most essential means of enforcement in environmental law.

B. Citizen Suits

1. Purposes of Citizen Suits

Seeing citizen suit provisions as invaluable tools of enforcement, Congress inserted them into many environmental statutes.⁸⁵ Citizen suits can be brought by environmental organizations, companies, landowners, developers, faith-based organizations, states, or tribal governments, and citizens brought 426 suits between 1995 and 2003—about one lawsuit per week—under the CAA and CWA alone.⁸⁶

Citizen suit provisions reflect “a deliberate choice by Congress to widen citizen access to the courts, as a supplemental and effective assurance that [environmental laws] would be implemented and enforced.”⁸⁷ In other words, Congress enacted citizen suit provisions in anticipation of polluters ignoring environmental regulations; by increasing the likelihood of enforcement, Congress increased the anticipated costs for efficient breach of environmental laws, making polluters more likely to comply. Thus, citizen suit provisions play an important role in preventing pollution and effectuating cleanup.⁸⁸

Congress’s motives for enacting citizen suits can be broken down further, providing a greater understanding of their role in curtailing efficient breach. First, citizen suits act as a check on EPA oversight and bias, working to hold an unelected agency accountable and motivating it to act.⁸⁹ As the Sixth Circuit put it, “private citizens provide a second level of enforcement and can serve as a check to ensure the state and federal governments are diligent in prosecuting . . . violations.”⁹⁰ In the CWA citizen suit that prompted this language, the Sierra Club challenged Cincinnati’s aging and overburdened sewer system and its

84. See National Oil and Hazardous Substances Pollution Contingency Plan, 55 Fed. Reg. 8666, 8799 (Mar. 8, 1990) (to be codified at 40 C.F.R. pt. 300) (commenter claiming that the EPA had failed to use the punitive penalty provision of CERCLA and identifying the problems that would create).

85. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9659 (2006); Resource Conservation and Recovery Act, *id.* § 6972; Clean Air Act, *id.* § 7604; Clean Water Act, 33 U.S.C. § 1365 (2006).

86. James R. May, *Now More Than Ever: Trends in Environmental Citizen Suits* at 30, 10 WIDENER L. REV. 1, 3–4 (2003).

87. *Natural Res. Def. Council v. Train*, 510 F.2d 692, 700 (D.C. Cir. 1974).

88. May, *supra* note 86, at 1.

89. *Id.* at 6. See S. REP. NO. 91-1196, at 36–37 (1970) (“Authorizing citizens to bring suits for violations of standards should motivate governmental agencies charged with the responsibility to bring enforcement and abatement proceedings.”); William L. Andreen, *The Evolution of Water Pollution Control in the United States—State, Local, and Federal Efforts, 1789-1972: Part I*, 22 STAN. ENVTL. L.J. 145, 194–95, 199 (2003) (detailing the failures of state agencies in enforcing state water programs—mostly due to a focus on cooperation with and sympathy for polluters, instead of enforcement—which eventually led to federal intervention in the 1960s).

90. *Sierra Club v. Hamilton Cnty. Bd. of Cnty. Comm’rs*, 504 F.3d 634, 637 (6th Cir. 2007).

capacity-related overflows of raw sewage into homes, streets, and rivers.⁹¹ Although the Ohio Environmental Protection Agency (“OEPA,” which was the governmental power charged with enforcing the CWA) had issued an order compelling remediation of these illegal overflows in 1992, the problem remained ten years later when the Sierra Club filed suit.⁹² The suit eventually forced the county to provide an adequate consent decree outlining the remediation steps it would take.⁹³ According to the lower court, “[i]t was not until the Sierra Club filed its own complaint and ultimately intervened in this matter that positive solutions began to emerge,”⁹⁴ illustrating the power citizen suits have to force action by complacent government agencies.

Second, citizen suits provide an oversight and enforcement method when government funding is scarce.⁹⁵ Studies have found that a lack of resources has shackled EPA monitoring efforts, and that inspections are often performed only once per year.⁹⁶ Even heavily regulated industrial facilities only faced, on average, 3 CAA compliance inspections, 2.4 CWA compliance inspections, and 1.5 RCRA compliance inspections over a two-year period.⁹⁷ Citizen suits, on the other hand, provide numerous possible sources of funding to fill the enforcement gap. With so many watching, it is much more likely someone will notice harmful violations and file suit. Accordingly, the vast majority of legal opinions that interpret environmental statutes are based on citizen-initiated litigation.⁹⁸ Further, environmental statutes give courts discretion to award the fees and costs of bringing citizen suits to plaintiffs,⁹⁹ so lack of funding, while still potentially troublesome since citizens have to finance the litigation until they can be recouped, is somewhat mitigated for citizen suits.

Third, citizen suits allow public participation in government, ensuring those who are wronged by pollution are given a path to obtain remedies.¹⁰⁰

91. *Id.* at 636–37.

92. *Id.* at 638–41.

93. *Id.*

94. *United States v. Bd. of Cnty. Comm’rs of Hamilton Cnty., Ohio*, No. 1:02 CV 00107, 2005 WL 2033708, at *15 (S.D. Ohio Aug. 23, 2005), *aff’d*, *Hamilton Cnty. Bd.*, 504 F.3d 634.

95. May, *supra* note 85, at 5–6; see 136 CONG. REC. S3,183 (daily ed. Mar. 26, 1990) (remarks of Sen. David Durenberger) (“Citizen resources are an important adjunct to governmental action to assure that these laws are adequately enforced. In a time of limited Government resources, enforcement through court action prompted by citizen suits is a valuable dimension of environmental law.”). And, again, EPA funding is especially susceptible today. See Walsh, *supra* note 12.

96. See Spence, *supra* note 53, at 967–68 (citing CLIFFORD S. RUSSELL ET AL., ENFORCING POLLUTION CONTROL LAWS (1986)).

97. The EPA’s SFIP program compiled this data by tracking inspections of 600 state and federal industrial facilities. *Id.* at 968.

98. May, *supra* note 86, at 8. Specifically, between 1993 and 2002, 83 of 110—or 75 percent of—federal court opinions on environmental laws were attributable to civil suits. *Id.*

99. See Clean Air Act, 42 U.S.C. §7604(d) (2006); Clean Water Act, 33 U.S.C. §1365(d); Resource Conservation and Recovery Act, 42 U.S.C. §6972(e); Endangered Species Act, 16 U.S.C. §1540(g)(4). CERCLA, for example, allows courts to award cost recovery “to any party, whenever the court determines such reward is appropriate.” 42 U.S.C. § 9659(f).

100. See May, *supra* note 86, at 6; Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619, 649 (1992) (“If environmental degradation is stopped, it will be stopped by its victims.”). However, Cole ultimately

Public participation in environmental decision making is a right,¹⁰¹ and if designed correctly, public participation can improve environmental protection by optimizing “the link between environmental decisions and those affected by those decisions.”¹⁰² This is in part because those who are most wronged are most likely to fight back¹⁰³—and thus most likely to instigate citizen suits if their resources allow—making payment by polluters more likely and efficient breach less attractive.

Fourth, citizen suits prevent agency and policy “capture.” Under the capture theory, polluters often gain disproportionate influence over policymakers, meaning their interests are overrepresented in the legislative, policymaking, and enforcement processes.¹⁰⁴ For example, some argue that the railroad industry captured the Interstate Commerce Commission around 1900, leading to favorable policies for railroads.¹⁰⁵ By providing remedies for environmental pollution outside the normal political processes, citizen suits act as—and were designed as—a check on polluters capturing agencies and policies.¹⁰⁶

Conversely, some have argued that citizen suits are not as important as they seem¹⁰⁷ or are even detrimental to environmental protection.¹⁰⁸ *Pakootas II*, which I examine in Part III, is a typical example of a court discrediting the importance of citizen suits in enforcement. However, as seen in this Part and with more concrete examples in Part IV, citizen suits are often necessary to prevent environmental harms when the EPA has failed to do so.

2. *Mechanics of Citizen Suits*

CERCLA provides a good illustration of the general mechanics of environmental citizen suit provisions. As for who can bring a citizen suit against whom, CERCLA states that

any person may commence a civil action on his own behalf (1) against any

argues that traditional environmental laws and legal victories are not enough, and vulnerable low-income communities must be empowered outside of the courtroom to be effective. *Id.* at 648–49, 667–68.

101. Neil A.F. Popovic, *The Right to Participate in Decisions that Affect the Environment*, 10 PACE ENVTL. L. REV. 683, 686–88 (1993) (discussing international law to show a degree of international consensus on the right to participate in environmental decision making, although “enforceable obligations in the legal sense” do not exist).

102. *Id.* at 692–96, 709 (arguing that effective public participation requires, among other things, public education on and access to information about environmental issues and hazards, at least in the public hearing format).

103. See Cole, *supra* note 100, at 649.

104. Spence, *supra* note 53, at 925–26.

105. *Id.* at 927.

106. *Id.* at 928.

107. See Jeffrey M. Gaba & Mary E. Kelly, *The Citizen Suit Provision of CERCLA: A Sheep in Wolf's Clothing?*, 43 SW. L.J. 929 (1990).

108. See Matthew D. Zinn, *Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits*, 21 STAN. ENVTL. L.J. 81 (2002) (arguing that citizen suits interfere with “cooperative enforcement”).

person (including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective pursuant to this chapter . . . or (2) against the President or any other officer of the United States (including the Administrator of the Environmental Protection Agency and the Administrator of the ATSDR) where there is alleged a failure of the President or of such other officer to perform any act or duty under this chapter. . . .¹⁰⁹

Regarding remedies, courts are authorized to order corrections of violations and issue applicable penalties for violations.¹¹⁰ There is also a notice requirement, which states that citizens must give notice to the President, the state in which the violation occurs, and the polluter sixty days before bringing suit.¹¹¹ In efficient breach terms, this acts as a warning that the cost of noncompliance is about to rise, and allows polluters to adjust their conduct accordingly.

III. THE NINTH CIRCUIT'S OVERCOMPENSATION FOR EFFICIENT BREACH: *PAKOOTAS II*

This Part discusses *Pakootas II*, the Ninth Circuit's attempt to prevent a specific instance of efficient breach of environmental law. Besides showcasing efficient breach in an environmental context and a court's explicit attempt to deal with it, the case importantly reveals that there is not an easy answer for this difficult problem. What works in some cases might not necessarily work in others, suggesting that discretion on a case-by-case basis is needed to determine whether citizen suits should be allowed, not the blanket rule adopted by the Ninth Circuit. The Ninth Circuit asserted too much faith in and gave too much power to the EPA, largely to the detriment of future enforcement attempts, even if not to the one in *Pakootas II*.

A. *The Case*

Pakootas II provides an example of a court attempting to counter efficient breach of environmental law but instead inadvertently endangering future compliance. The Ninth Circuit barred third parties from bringing citizen suits to enforce penalties included in EPA cleanup orders issued under CERCLA. The court held that CERCLA penalties are a hammer available only to the EPA, and sharing that hammer would upset the congressional scheme of the statute and fundamentally diminish the EPA's ability to ensure cleanup and curtail efficient breach. More specifically, in interpreting 42 U.S.C. § 9613(h), a CERCLA provision, the court held that its jurisdiction excludes "challenges to removal or remedial action" taken under the act, with some exceptions. Citizen suits

109. 42 U.S.C. § 9659 (2006). There are some exceptions to this general citizen suit provision, one of which, 42 U.S.C. § 9613(h), was at issue in *Pakootas II* and I discuss in Part III.

110. *Id.* § 9659(c).

111. *Id.* § 9659(d)(1).

seeking penalty enforcement were not among those exceptions, however.

Sparking the underlying dispute in *Pakootas II*, Teck Cominco Metals Limited (Teck Cominco), a Canadian mining company, dumped slag¹¹² from its lead-zinc smelter in British Columbia into the Columbia River between 1905 and 1995.¹¹³ This pollution flowed ten miles downstream into Washington's Lake Roosevelt.¹¹⁴ In 2003, in response to a petition by the Confederated Tribes of the Colville Reservation, which borders the river and lake, the EPA assessed the environmental contamination and determined that the Upper Columbia River was eligible for inclusion on CERCLA's National Priority List.¹¹⁵ Also known as the "Superfund List," included sites are top priorities for CERCLA-financed cleanup.¹¹⁶

Teck Cominco and the EPA failed to reach a voluntary agreement—partly because of the Canadian government's concerns for its sovereignty—so the EPA issued a unilateral administrative order under CERCLA commanding Teck Cominco to perform a remedial investigation and feasibility study and to implement a cleanup.¹¹⁷ After Teck Cominco failed to comply, however, the EPA took no action to enforce its order.¹¹⁸ In an attempt to do so, two members of the Colville Tribes, Joseph A. Pakootas and Donald R. Michel, sued Teck Cominco under CERCLA's citizen suit provision, seeking: (1) a declaration that Teck Cominco violated the order; (2) an injunction compelling compliance; (3) penalties for Teck Cominco's failure to comply; and (4) attorney's fees and costs.¹¹⁹ Teck Cominco filed a motion to dismiss these charges, arguing the suit was an illegal extraterritorial application of CERCLA.¹²⁰ The district court disagreed and denied the motion, a decision upheld by the Ninth Circuit.¹²¹

In June 2006, before the Ninth Circuit had ruled on the motion to dismiss, Teck Cominco and the EPA had entered into a "contractual agreement" to perform remediation.¹²² In return for "satisfactory performance" of the contract, the EPA promised not to sue for penalties or injunctive relief for the 892 days of noncompliance with its administrative order, which it also

112. The smelting process separates desirable metals from unwanted materials, the leftover byproduct being slag. Until 1995, Teck Cominco dumped up to 145,000 tons of liquid and solid slag into the Columbia River annually; it included "the heavy metals arsenic, cadmium, copper, mercury, lead, and zinc." *Pakootas v. Teck Cominco Metals Ltd. (Pakootas I)*, 452 F.3d 1066, 1069 (9th Cir. 2006).

113. *Pakootas II*, 646 F.3d 1214, 1216 (9th Cir. 2011).

114. *Id.*

115. *Id.*

116. See 42 U.S.C. § 9605(c).

117. *Pakootas II*, 646 F.3d at 1216–17.

118. *Id.* at 1217.

119. *Id.*

120. *Id.*

121. *Id.* Meanwhile, Washington and the Colville Tribes intervened in the litigation, both seeking the anticipated costs of the CERCLA assessment and recovery and declaratory relief regarding the reasonable costs of assessing natural resource damages, claims now proceeding in district court. *Id.*

122. *Id.*

withdrew.¹²³ Additionally, Teck Cominco consented to the district court's jurisdiction "solely for the limited purpose of an action to enforce" designated provisions of the contract.¹²⁴ Accordingly, the EPA has not taken action against Teck Cominco for its noncompliance with the earlier order.¹²⁵ The contractual agreement marks the EPA's successful attempt to prevent efficient breach of its CERCLA order.

After the contractual agreement, plaintiffs amended their complaint, dropping their claims for declaratory and injunctive relief but leaving in the request that Teck Cominco pay penalties for its 892 days of noncompliance with the EPA order in addition to costs and attorney's fees.¹²⁶ Again, Teck Cominco moved to dismiss, which the district court granted, finding it lacked jurisdiction to hear citizen suits seeking enforcement of EPA-cleanup order penalties.¹²⁷ Pakootas and Michel appealed to the Ninth Circuit, which upheld the district court's decision after analyzing 42 U.S.C. § 9613(h), a CERCLA provision, in three steps.

First, the court ruled that § 9613(h) constitutes a limitation on jurisdiction, not just timing.¹²⁸ This section, titled "Timing of review," provides that "[n]o Federal court shall have jurisdiction . . . to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title. . . ."¹²⁹ The court followed *Arbaugh v. Y & H Corp.*, a Supreme Court case that adopted a "readily administrable bright[-]line" test: "If the Legislature clearly states that a threshold limitation on the statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. If not, then the restriction is not jurisdictional."¹³⁰ Essentially, if the word "jurisdiction" is used in the controlling part of the statute—as it is in § 9613(h) ("[n]o Federal court shall have *jurisdiction*")—then the statute sets jurisdictional limits on the court.¹³¹

Second, the court determined that the jurisdiction limiting provision, which only applies to "challenges to removal or remedial action," was applicable to suits brought to enforce penalties. To protect Congress's plan of preventing lawsuits that might interfere with cleanup orders, the court followed *McClellan Ecological Seepage Situation v. Perry* in holding that a citizen suit is a challenge if it "seeks to improve on [an already negotiated] CERCLA

123. *Id.* at 1218.

124. *Id.* at 1217–18.

125. *Id.* at 1218.

126. *Id.*

127. *Id.*; see FED. R. CIV. P. 12(b)(1). The court's decision only applied to Pakootas and Michel's claims, not claims made by Washington and the Colville Tribes for response costs, which are still pending. *Pakootas II*, 646 F.3d at 1218.

128. *Pakootas II*, 646 F.3d at 1218–19.

129. 42 U.S.C. § 9613(h) (2006).

130. *Pakootas II*, 646 F.3d at 1219–20 (internal quotation marks omitted).

131. See *id.*; 42 U.S.C. § 9613(h) (emphasis added).

cleanup because it wants more” than was negotiated.¹³² Here, the court held, Pakootas and Michel wanted “more” because they wanted the EPA to enforce its noncompliance penalties.¹³³ Further, the court pointed to § (h)(2), which provides an exception to the “challenge” bar allowing the EPA to enforce its penalties.¹³⁴ The court reasoned that if penalty enforcement was not a challenge, Congress would not need to make an exception for it.¹³⁵

The court also focused on policy considerations in favor of giving the EPA sole power to swing the “hammer” of noncompliance penalty enforcement. The contractual agreement between the EPA and Teck Cominco was based on the EPA’s promise not to sue for noncompliance penalties.¹³⁶ If the EPA did not have its hammer, it could not compel performance; if Teck Cominco was forced to pay noncompliance penalties prematurely, it might stop its cleanup, which the court called an efficient breach of its contract.¹³⁷ The EPA, therefore, had made compliance cheaper than noncompliance by negotiating, something Pakootas and Michel’s suit would have reversed. Further, if either the EPA or Pakootas and Michel tried to enforce the penalties, all the hazards of litigation created by extraterritorially concerns—what the EPA was trying to avoid by contracting in the first place—would resurface.¹³⁸ Finally, if forced to pay noncompliance penalties—here, \$24 million dollars—polluters might not be able to pay for cleanup afterward.¹³⁹ Accordingly, the court held giving citizens such a weapon would actually prevent cleanup.

Third, although the jurisdiction-limiting provision applied, the court still had to determine if the suit fell under any of the exceptions outlined in § 9613(h). The court ruled it did not.¹⁴⁰ The first possible exception was § (h)(2), which allows courts to hear “[a]n action to enforce an order issued under section 9606(a) of this title or to recover a penalty for violation of such order.”¹⁴¹ The court, however, focused on the meaning of the word “recover,” which in this context the court defined as “to get money.”¹⁴² Because Pakootas and Michel would not “recover” the penalties themselves, which would instead be paid to the EPA’s Superfund account, the exception did not apply.¹⁴³ Section (h)(2), therefore, only applies to suits brought by the EPA, allowing it “to enforce its orders and recover penalties . . . even when a cleanup is

132. *Pakootas II*, 646 F.3d at 1220 (quoting *McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 330 (9th Cir. 1995)) (internal quotation marks omitted).

133. *Id.*

134. *Id.* at 1222; see 42 U.S.C. § 9613(h)(2).

135. *Pakootas II*, 646 F.3d at 1222.

136. *Id.* at 1221.

137. *Id.*

138. *Id.*

139. *Id.* at 1222.

140. *Id.* at 1224–25.

141. 42 U.S.C. § 9613(h)(2) (2006).

142. *Pakootas II*, 646 F.3d at 1223.

143. *Id.*

ongoing.”¹⁴⁴

The court also held that the separate citizen suit exception, § (h)(4), bolstered its reading of § (h)(2). Section (h)(4) allows citizen suits “for claims that the remediation itself violates the statute” except “where remedial action is to be undertaken at the site”—as was the case here, so § (h)(4) did not apply.¹⁴⁵ Going further, the court found that an exception for citizen suits in § (h)(4) implied that citizen suits were not included in § (h)(2).¹⁴⁶ And because the exceptions in § (h)(2) and § (h)(4) did not apply, § 9613(h) barred Pakootas and Michel’s suit.¹⁴⁷

B. *The Reach of Pakootas II and § 9613(h)*

Before discussing the true effect of *Pakootas II*, one must determine the extent to which the case will control future CERCLA citizen suits. Overall, the Ninth Circuit’s limitation on citizen suits is *not* confined to EPA-polluter contracts, to interruptions in EPA-polluter negotiations, or to penalty-enforcement suits, and the ruling makes it more likely for citizen suits to be classified as “challenges,” which precludes them during cleanups. These conclusions come from the legislative history of § 9613(h), which reveals what Congress meant by the phrase “challenges to removal or remedial actions” and why the court labeled the suit a challenge here. Ultimately, it seems the court’s ruling fits the general trend of interpreting “challenges” broadly to limit citizen suits. Given that the court’s holding is in line with the statute’s precedent, and assuming this is the correct interpretation of the law, Congress itself is the origin of this misguided policy.¹⁴⁸

With that said, Congress likely enacted § 9613(h) and limited citizen suits to codify the Third Circuit’s ruling in *Lone Pine Steering Committee v. EPA*,¹⁴⁹ which held that it would be contrary to the congressional intent of CERCLA to allow challenges to incomplete cleanups.¹⁵⁰ The court explained that Congress intended “to promptly eliminate the sources of danger to health and environment” by forcing cleanup through an administrative or court order, or by performing cleanup itself and suing the responsible party later.¹⁵¹ The court explained that citizen suits during cleanup might delay the cleanup process,

144. *Id.* at 1224.

145. *Id.* at 1224–25; see 42 U.S.C. § 9613(h)(4).

146. *Pakootas II*, 646 F.3d at 1224–25.

147. *Id.* at 1225.

148. The Ninth Circuit speaks to the origins of the policy in *McClellan*, stating that, although limiting citizen suits may “result in irreparable harm to . . . important interests” (like the ability to ever bring suit), the decision is for Congress, who the court presumed to have balanced all concerns. *McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 329 (9th Cir. 1995).

149. *Lone Pine Steering Comm. v. EPA*, 777 F.2d 882 (3d Cir. 1985), *cert. denied*, 476 U.S. 1115 (1986).

150. See Elizabeth Williams, *What Claims Fall Within Limitation Imposed by § 113(h) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)* (42 U.S.C.A. § 9613(h)) on Judicial Review of Cases Arising Under CERCLA, 116 A.L.R. FED. 69, § 2(a) (1993).

151. See *Lone Pine Steering Comm.*, 777 F.2d at 886.

allowing a threat to turn into actual harm.¹⁵²

In past case law, courts have applied the “challenges to removal or remedial actions” language broadly so as to include citizen suits. As mentioned above, the Ninth Circuit classified Pakootas and Michel’s citizen suit as a “challenge” largely based on *McClellan*’s language, specifically that challenges include citizen suits that “interfere with remedial actions selected” and seek “to improve on the CERCLA cleanup” because the petitioner “wants more.”¹⁵³ In *McClellan*, *McClellan Air Force Base (McClellan)* was following an “Interagency Agreement” between the Air Force, the EPA, and California to clean up toxic and hazardous waste on its property.¹⁵⁴ *McClellan Ecological Seepage Situation (MESS)* brought suit, alleging *McClellan*’s cleanup violated several environmental statutes. MESS requested “declaratory relief, civil penalties, and an injunction against any further treatment, storage, discharge or disposal of hazardous wastes at *McClellan* until all federal and state hazardous waste requirements were met.”¹⁵⁵ Thus, the petitioner sought to improve the Interagency Agreement, which clearly constituted a challenge as the court defined it.¹⁵⁶

The *McClellan* court did acknowledge a limit to what constitutes a challenge, admitting that simply adding to costs of cleanup was not enough.¹⁵⁷ The court’s hypothetical non-challenge included citizen suit enforcement of a minimum wage law that increased “the cost of cleanup” and diverted “personnel from cleanup duties.”¹⁵⁸ Such a suit would not be a challenge because it would not be “directly related to the goals of the cleanup itself.”¹⁵⁹ Likewise, *ARCO Environmental Remediation, L.L.C. v. Department of Health and Environmental Quality*—a case that plaintiffs in *Pakootas II* unsuccessfully used for support—distinguished a citizen suit from the broad definition of challenges because it was unrelated to the “goals of the cleanup.”¹⁶⁰ Sparking the case, ARCO brought a state law Freedom of Information Act claim against the Montana Department of Health and Environmental Quality to obtain documents about a specific Superfund site.¹⁶¹ The Ninth Circuit interpreted “challenges to removal or remedial action” to not include suits seeking public access to information about cleanups, because they

152. See *id.* at 886–87.

153. *McClellan*, 47 F.3d at 330.

154. *Id.* at 327.

155. *Id.*

156. See *id.* at 330. Other citizen suits found to be challenges include: *Hanford Downwinders Coal, Inc. v. Dowdle*, 71 F.3d 1469, 1482 (9th Cir. 1995) (seeking to dictate specific remedial actions); *Fort Ord Toxics Project, Inc. v. Cal. EPA*, 189 F.3d 828, 831 (9th Cir. 1999) (seeking to postpone cleanup); *Razore v. Tulalip Tribes of Wash.*, 66 F.3d 236, 239 (9th Cir. 1995) (seeking to alter the method and order of cleanup).

157. *McClellan*, 47 F.3d at 330.

158. *Id.*

159. *Id.*

160. *ARCO Env'tl. Remediation, L.L.C. v. Dep't of Health and Env'tl. Quality of the State of Mont.*, 213 F.3d 1108, 1115 (9th Cir. 2000).

161. *Id.* at 1112.

do not “alter cleanup requirements or environmental standards,” nor “terminate or delay” cleanups.¹⁶² Moreover, even if defendants’ claims that the information may “lead to a reduction to the extent of cleanup required” or “disrupt the CERCLA cleanup process” were true, “an incidental effect on the progress of a CERCLA cleanup” does not make a lawsuit a challenge.¹⁶³ Nevertheless, most environmental citizen suits to enforce environmental regulations or EPA penalties would be directly related to the goals of cleanup if they seek to alter requirements of the cleanup order, and thus most would not fall under this exception.

More important than affirming the broad meaning of “challenges,” *Pakootas II* also narrowed the exceptions that previously softened § 9613(h)’s ban. Specifically, it limited the exception in § (h)(2), which it held only applied to suits brought by the EPA to enforce its own orders or recover penalties, thus closing a back door for citizen challenges.¹⁶⁴ But EPA suits, like citizen suits, could cause cleanup delays, obstructing the policy goal behind § 9613(h) and originated in *Pine Steering Committee*.¹⁶⁵ Further, citizen suits often remedy other sources of delay, like the EPA’s bias or lack of funds.¹⁶⁶ Apparently, Congress considered EPA-initiated delays acceptable, but not others. However, picking and choosing acceptable delays brings the true underlying goals of § 9613(h) into question, and is especially troublesome when allowing citizen suits would often better effectuate compliance and prevent delay.

C. *Pakootas II’s Effect on Teck Cominco and Future Cases*

The Ninth Circuit likely hastened cleanup in the extremely narrow scenario put before it, where the defendant possessed a convincing legal claim that potentially allowed it to avoid environmental cleanup entirely.¹⁶⁷ Teck Cominco’s extraterritoriality claim made its situation unique and worrisome for the court. Without this unique situation, the possibility of escaping penalties in the courtroom drops considerably. With it, Teck Cominco was able to counter the EPA’s penalty “hammer” with a weapon of its own—the weapon of efficient breach. Teck Cominco only agreed not to breach in exchange for the EPA’s promise not to attempt enforcement of already-ordered noncompliance

162. *Id.* at 1115.

163. *Id.*

164. *Pakootas II*, 646 F.3d 1214, 1222–23 (9th Cir. 2011). In this ruling, the court agreed with *Fairchild Semiconductor Corp. v. EPA*, 984 F.2d 283 (N.D. Cal. 1991), and rejected *M.R. (Vega Alta), Inc. v. Caribe General Electric Products, Inc.*, 31 F. Supp. 2d 226, 233 (D. Puerto Rico 1998). *Id.* at 1225.

165. *See Lone Pine Steering Comm. v. EPA*, 777 F.2d 882, 886–87 (3d Cir. 1985), *cert. denied*, 476 U.S. 1115 (1986); Williams, *supra* note 150, at § 2(a).

166. *See supra* Part II.B.

167. For a discussion of the extraterritoriality claim and just how viable the argument was, see Jordan Diamond, *How CERCLA’s Ambiguities Muddled the Question of Extraterritoriality in Pakootas v. Teck Cominco Metals, Ltd.*, 34 *ECOLOGY L.Q.* 1013 (2007) (arguing that extraterritorial application of CERCLA was legal).

penalties.¹⁶⁸ If the contractual agreement soured, for whatever reason, and Teck Cominco decided to take its chances with litigation, cleanup would be prolonged regardless of whether Teck Cominco won in court.¹⁶⁹ Of course, the situation would be even worse if it did win, as it would have stalled cleanup or forced the EPA to pay for cleanup without reimbursement. Accordingly, the EPA turned to negotiations and contractual agreements only to avoid litigation, the worst option for everyone, including those harmed by the pollution.¹⁷⁰

All parties preferred the contract to litigation, so why would the contract sour? A likely cause would be a citizen suit intervening to force Teck Cominco to defend against and possibly pay the noncompliance penalties it was trying to avoid in the first place.¹⁷¹ With these concerns in mind, the court understandably—and explicitly—feared that Teck Cominco would find it financially advantageous to breach its contract if it allowed Pakootas and Michel's suit.¹⁷² Litigation, instead of a brokered cleanup, would ensue.

Outside the *Pakootas II* scenario, the court's reasoning becomes unsound. When the unique extraterritoriality defense is taken away, so are the incentives for efficient breach and the leverage to force negotiations with the EPA. Thus, when the polluter has no legal claim to avoid environmental laws, limiting the reach of citizen suits makes no sense. In fact, the court's decision works against its intentions of preventing efficient breach, because the threat of citizen suits generally plays that role.¹⁷³ Overall, *Pakootas II* has dulled two important weapons in the battle for compliance to environmental laws: penalty payments and the citizen suits key in enforcing them. It is more likely that polluters escape the legal consequences of their pollution when there is only a single enforcer—that is, when citizen suits are not allowed.¹⁷⁴ Likewise, when the probability of facing legal consequences is lowered, the anticipated costs of noncompliance also decrease, making efficient breach more likely. Noncompliance penalties—which were at issue in *Pakootas II*¹⁷⁵ and are vitally important to overall compliance efforts¹⁷⁶—illustrate this argument. Obviously, if no one enforces noncompliance penalties, costs of noncompliance go down. If costs of noncompliance go down and profits from noncompliance are adequate, noncompliance becomes economically attractive, and polluters will be more likely to efficiently breach.¹⁷⁷

To better deal with the many different scenarios that might require many different approaches, I propose a different rule than the blanket rule against

168. See *Pakootas II*, 646 F.3d at 1217–18.

169. Win or lose, litigation in U.S. courts can be a long, slow process. See Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 1 (1984–1985).

170. See *Pakootas II*, 646 F.3d at 1217–18.

171. See *id.*

172. See *id.* at 1221.

173. See *supra* Part II.B.

174. See *id.*

175. *Pakootas II*, 646 F.3d at 1218.

176. See *supra* Part II.A.

177. See Easterbrook & Fischel, *supra* note 3, at 1168 n.36, 1177 n.57.

citizen suits adopted by the Ninth Circuit (which, as explained in Part III.B., seemed to correctly interpret § 9613(h), meaning a statutory change is needed). In large part, the problem with the Ninth Circuit's rule stems from the EPA's failings and inability to achieve compliance (a problem I detailed in Part II.B). Environmental citizen suit provisions intend to—and largely do—remedy many of these failings, but as seen in *Pakootas II*, the need for a more guided approach can sometimes arise. Thus, instead of the Ninth Circuit's rule, a case-by-case approach would be more effective at ensuring compliance. If the polluter is *less* likely to comply when citizen suits are allowed—which will likely be rare—then courts should be allowed to bar citizen suits. If, on the other hand, the polluter is *more* likely to comply when citizen suits are allowed, then courts should let citizen suits go forward. This would largely be a discretionary test, and would be open for abuse or mistake by courts, but it would be better than the already codified mistake of a general, indiscriminate ban on citizen suits. The case-by-case rule would preserve the threat of citizen suits, which in itself can incentivize compliance, while creating an avenue for the EPA to take the reins if needed.

IV. EXAMPLES AND SOLUTIONS: OVERCOMING EFFICIENT BREACH

Again, the problem with *Pakootas II*'s holding is its forced overdependence on the EPA for protection and penalty enforcement. With several possible enforcers policing noncompliance, including the citizens directly and adversely affected by the pollution, there would be a much higher probability that the polluter would pay for its pollution. Thus, efficient breach would be less attractive, meaning polluters would be more likely to choose compliance initially. In turn, initial compliance would make cleanups faster and cheaper, because EPA noncompliance penalties would be unnecessary. To further illustrate these points, below I examine examples of problematic overdependence on the EPA, or other government departments charged with protecting the environment, that largely stem from overconcentration of protection powers in one agency.

A. *Empowering the People*

Examples abound that illustrate the government's failure to protect citizens and communities from environmental harms. Often, the harm falls squarely on low income, minority communities. The most effective way to ensure environmental protection for these communities is to empower them to protect themselves through citizen suits and other means of environmental justice.¹⁷⁸ By raising both the likelihood that polluters will be penalized,

178. See Cole, *supra* note 100, at 661–63. Cole also stresses the importance of group representation (“representing an organized group rather than an individual client or unaffiliated clients”) and making law a “means, not an end.” *Id.* at 663–68. Environmental justice tools fall into four categories: (1) traditional environmental laws; (2) local administrative processes; (3) civil rights laws (Title VI of the

empowerment addresses the core concept of efficient breach of public law by ensuring noncompliance is more costly than compliance.

Kettleman City's fight against the nearby construction of a proposed toxic waste incinerator shows how communities can protect themselves against the harmful effects of an efficient breach of public law when standard institutional protections are ineffective. Kettleman City, a farming community of 1,100 residents in California, is 95 percent Latino, with 70 percent "speak[ing] Spanish in the home."¹⁷⁹ In 1988, Chemical Waste Management (CWM) proposed to build an incinerator at the toxic waste landfill it was already operating in the community.¹⁸⁰ As required by the California Environmental Quality Act (CEQA),¹⁸¹ the Kings County Planning Department issued an Environmental Impact Report (EIR) that detailed, albeit inadequately, the proposed incinerator's environmental impacts.¹⁸² However, the Planning Department refused to translate the 1,000-page document into Spanish, effectively shutting the local community out of the public involvement stage of EIR preparation.¹⁸³

To protect their "health, home, and livelihoods," the community residents organized a community group ("El Pueblo para el Aire y Agua Limpio"¹⁸⁴), held demonstrations, pressured their local officials to stop the incinerator, and hired legal representation from the California Rural Legal Assistance Foundation (CRLAF).¹⁸⁵ CLRAF encouraged regular meetings in community homes and organized a letter-writing campaign to comment on the EIR—with almost all of the letters being written in Spanish.¹⁸⁶ Although the Kings County Board of Supervisors approved the incinerator proposal, a state trial court ruled it a violation of the legal requirement for adequate EIRs, partly because of the "County's exclusion of Spanish-speakers."¹⁸⁷ The strategies developed ultimately empowered community members with the skills needed to successfully fight the proposal in court, stopping the incinerator.¹⁸⁸ In other words, community members added inefficiency to an otherwise efficient breach by becoming an enforcer of EIRs; importantly, they also made future breaches

Civil Rights Act of 1964, 42 U.S.C. §§ 2000d–2000d-7, and the Fair Housing Act of 1968, *Id.* § 3604(b)); and (4) common law (nuisance).

179. *Id.* at 674.

180. *Id.*

181. CAL. PUB. RES. CODE §§ 21000–21177 (2012).

182. Cole, *supra* note 100, at 674.

183. *Id.* at 674–75. Even more suspicious, CWM's attempt to place the incinerator in a minority community followed a "broader pattern of discriminatory siting"; its other incinerators are in neighborhoods featuring 83, 73, and 50 percent minority populations. See Miles Corwin, *Unusual Allies Fight Waste Incinerator Hazards: Grower and Farm Workers, Fearing Pollution and Health Problems, Oppose Plan to Put State's First Such Commercial Plant in Kings County*, L.A. TIMES, Feb. 24, 1991, http://articles.latimes.com/1991-02-24/news/mn-2788_1_chemical-waste.

184. "People for Clean Air and Water."

185. Cole, *supra* note 100, at 674.

186. *Id.* at 675–76.

187. *Id.* at 678.

188. *Id.*

of the EIR legal requirements, and the potential for environmental harm that comes with it, less likely.

A similar example is found in San Francisco's Bayview-Hunters Point community, which throughout its history has served as the dumping ground for the city's undesirable land uses.¹⁸⁹ Unsurprisingly, around 90 percent of the roughly 28,000 people who live in the neighborhood are minority, with 30 percent living in poverty.¹⁹⁰ In July 1994, San Francisco Energy Company (SF Energy) proposed Bayview-Hunters Point as the site of what would have been one of the largest fossil-fuel power plants in California.¹⁹¹ It also would have been within one mile of San Francisco's two existing power plants, meaning the community would have had "more power plants than any area its size in the nation."¹⁹² The plant's emission of up to 300 tons of air pollutants each year would have contributed to the neighborhood's already troublingly high rates of illness and death from asthma, chronic bronchitis, and cardiovascular disease, and would have likely worsened existing violations of state law and the CAA's ozone standard.¹⁹³ It also would have emitted several carcinogens and "require[d] the transport of sizeable amounts of hazardous waste to and from the facility."¹⁹⁴ Despite all of this, the California Energy Commission (CEC)—which had jurisdiction over the power plant's siting and authority to provide "all needed approvals without the need for separate local land use and environmental review," albeit while considering the public interest¹⁹⁵—voted to approve the project in March 1996.¹⁹⁶

After the system failed them, community members took matters into their own hands. With help from the Golden Gate University's Environmental Law & Justice Clinic, the Environmental Law Community Clinic, and the San Francisco Lawyers Committee for Civil Rights Under Law, the community members "developed a profile of toxic sites in the community," which led the

189. See Clifford Rechtschaffen, *Fighting Back Against a Power Plant: Some Lessons from the Legal and Organizing Efforts of the Bayview-Hunters Point Community*, 14 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 537, 538 (2008). In the past, Bayview-Hunters Point has been the designated area for slaughterhouses, wrecking yards, steel manufacturing, materials recycling, power generation facilities, and the Hunters Point Naval Shipyard. *Id.*

190. See *id.* at 538–39. These numbers are especially significant when compared to the demographics of other neighborhoods in the city: Bayview-Hunters Point's "median income is approximately \$20,000 less than that of residents citywide." See *id.* at 538.

191. *Id.*

192. *Id.* at 537 (citing Clarence Johnson, *Disputed S.F. Power Plant Expected to Get 1st OK, Neighbors Worry About Health Issues*, S.F. CHRON., Mar. 4, 1996, at A13).

193. *Id.* at 542.

194. *Id.* at 543.

195. *Id.* at 540–41. CEC employees are required to "represent[] the public interest" in each case by participating as an independent party before the Energy Commissioners, who have final power to approve or deny. *Id.* at 541. Because the Commissioners were forced to consider the public interest, coupled with the fact it was the final stop for *all* permits, including environmental review, the CEC at least implicitly had a duty to protect the community from harmful projects. See *id.* at 540–41.

196. *Id.* at 543. Under California law, the CEC provides "one-stop licensing" for power plant sites that, like the plant here, "generate more than 50 megawatts of electricity." *Id.* at 540.

city to do the same and provide a health assessment.¹⁹⁷ Community members also “pressed for a moratorium on the siting of new polluting facilities in Bayview-Hunters Point,” which gave the city an opportunity to examine SF Energy’s proposal and the “inequitable environmental conditions.”¹⁹⁸ Their efforts paid off in June of 1996, when the San Francisco Board of Supervisors unanimously instructed all city agencies to “turn down any attempt to site the plant on City-owned land,” as was the case for the original proposal.¹⁹⁹ Although SF Energy could still build on privately owned land, community members have successfully fought off the plant to this day, and have even shut down one of the other two in the area (which was one of the dirtiest in the state).²⁰⁰ Bayview-Hunters Point residents protected their community while the government agency charged with doing so, the CEC,²⁰¹ did nothing. If all enforcement power had been concentrated within the CEC without separate enforcement methods for the people, Bayview-Hunters Point likely would have three power plants, more illness, and more death. Yet this is the direction in which *Pakootas II* steps for the analogous EPA.

B. Repowering the Tribes

Native tribes have a unique role in federal environmental law, but that role does not always allow adequate protection of the environment upon which they depend. Once again, this problem can be attributed to the efficient breach of public law theory and the inability of tribes to ensure that polluters pay for polluting their land and resources. Fixing this broken system by empowering tribes would better ensure that environmental cleanup occurs.

1. The State of the Law

Congress and the EPA have given tribes major responsibilities in federal environmental law, amounting to an unprecedented statement of support for tribal self-determination.²⁰² In large part, tribes are treated as states. Congress may impose obligations of federal environmental law on the tribes just as it can states.²⁰³ Tribes, seen as the appropriate local government, are also given substantial enforcement authority to achieve federal environmental standards in

197. *Id.* at 548, 571.

198. *Id.*

199. *Id.* at 572.

200. See Charlie Goodyear, *PG&E to Shutter Hunters Point Power Plant Early—Possibly Next Month*, S.F. CHRON., Mar. 3, 2006, at B-2, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/03/03/BAGFQHHR201.DTL>; *Hunters Point Power Plant Closure and Cleanup*, PG&E, <http://www.pge.com/about/environment/taking-responsibility/power-plants/> (last visited Apr. 6, 2012).

201. See *supra* note 195.

202. James M. Grijalva, *The Origins of EPA’s Indian Program*, 15 KAN. J.L. & PUB. POL’Y 191, 292 (2006).

203. Michael P. O’Connell, *Citizen Suits Against Tribal Governments and Tribal Officials Under Federal Environmental Laws*, 36 TULSA L.J. 335, 335–36 (2000).

Indian Country, and are eligible for funding and regulatory authority under many acts, including the CAA, RCRA, and CERCLA.²⁰⁴ Tribes also have retained inherent authority to set up their own environmental programs, outside of the federal environmental structure, for their reservations.²⁰⁵ Thus, tribes may enact tribal environmental codes and permit requirements within their borders to be enforced in tribal courts.²⁰⁶

For all of this unprecedented power, tribes are still largely powerless to deal with many environmental harms, especially those that originate off the reservations. However, there are some exceptions where tribes do have limited extraterritorial power. For example, tribes, being treated as states, may establish extraterritorially enforceable environmental standards while implementing the CWA that are enforced by both the tribe and the United States as the tribes' trustee;²⁰⁷ however, this only occurs after EPA approval of those standards,²⁰⁸ leaving the tribe dependent on the EPA and ultimately on Congress to bestow the power to the tribe. Further, even tribes' inherent authority to set up environmental programs within their borders is severely limited when it comes to the activities of nonmembers.²⁰⁹ Tribes may assert authority over nonmembers' activities on tribal land only if Congress has authorized it or if those activities implicate one of two exceptions created in *Montana v. United States*.²¹⁰ The first exception is consent by the nonmember.²¹¹ The second is nonmembers' activities that impact core tribal government interests, such as "conduct that threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe."²¹² Although perhaps easier to meet the second exception in environmental law than in other areas, tribes must still jump through these prohibitive legal hoops to address serious environmental harms created by nonmembers, even if those harms originated on the reservation.

2. *Unfortunate Outcomes*

The current regulatory system has failed to protect tribes and tribal land from environmental harms. Left powerless and reliant on a disconnected and

204. CHARLES WILKINSON, AM. INDIAN RES. INST., INDIAN TRIBES AS SOVEREIGN GOVERNMENTS 69 (2004). The legal term "Indian Country," defined by federal statute, includes "all land within the limits of any Indian reservation . . . , all dependent Indian communities within the borders of the United States . . . , and . . . all Indian allotments, the Indian titles to which have not been extinguished" 18 U.S.C. § 1151 (2006).

205. AM. BAR ASS'N, THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS 203–04 (Michael B. Gerrard & Sheila R. Foster eds., 2008).

206. *Id.*

207. *City of Albuquerque v. Browner*, 97 F.3d 415, 429 n.20 (10th Cir. 1996) (ruling that the EPA's approval of the Isleta Pueblo's stringent CWA water quality standard was enforceable against upstream municipality).

208. *See id.*

209. AM. BAR ASS'N, *supra* note 205, at 203.

210. *Id.*

211. *Montana v. United States*, 450 U.S. 544, 565 (1981).

212. *Id.* at 566.

unresponsive EPA for protection, tribes have suffered at the hands of outsiders promising economic benefits. Environmental harms and the ability of Native tribes to deal with them can be divided into two distinct categories: (1) environmental harms on the reservation and (2) environmental harms off the reservation that still impact the health, safety, and wellbeing of the tribe.

A prominent source of environmental harm on the reservation is resource exploitation, the ills of which disproportionately affect Natives. Previously undesirable land that Natives were forced onto happened to conceal 5 percent of U.S. oil and gas reserves, 30 percent of strippable and low-sulfur coal, and 50 to 60 percent of uranium.²¹³ Although seemingly an economic boon for tribes—and some profited at first²¹⁴—it actually came at great expense. In fact, Natives bear the brunt of the economic and environmental costs of mineral extraction, while much of the gain lines the pockets of outsiders.²¹⁵

Consider the case of uranium mining on the Navajo Reservation. The Navajo Nation—located in Arizona, New Mexico, and Utah—is the world's largest reservation and home to 168,000 of the 255,000 enrolled Navajo members.²¹⁶ It also contains a large uranium reserve,²¹⁷ for which World War II and the birth of the nuclear age created a large demand.²¹⁸ With the Navajo Nation struggling economically, Navajos were eager for work, and mining booms erupted in the area.²¹⁹ Inexplicably, the federal government and mining companies failed to warn Navajo miners and communities of the long-term dangers of uranium mining, even after the Federal Security Agency's 1952 Health Report of the Uranium Mines and Mills showed high mortality rates among uranium miners.²²⁰ Natives slowly realized the danger after witnessing numerous deaths from radiation-related illnesses, mostly cancer—previously an extremely rare disease on the reservation.²²¹ Making matters worse, the government and mining companies failed to dispose of leftover waste, called

213. WILKINSON, *supra* note 204, at 73.

214. See Jace Weaver, *Editor's Introduction to Justine Smith, Custer Rides Again—This Time on the Exxon Valdez*, in *DEFENDING MOTHER EARTH: NATIVE AMERICAN PERSPECTIVES ON ENVIRONMENTAL JUSTICE* 59 n.2 (Jace Weaver eds., 1996) (explaining that petroleum discoveries made the Osage “the richest people per capita in the world,” which led to “social dislocation” and tribal members being “cheated and murdered for their holdings by non-Natives”).

215. See Norma Kassi, *A Legacy of Maldevelopment: Environmental Devastation in the Arctic*, in *DEFENDING MOTHER EARTH: NATIVE AMERICAN PERSPECTIVES ON ENVIRONMENTAL JUSTICE*, *supra* note 215, at 78 (“Much of the Yukon has been a toxic dump since the Gold Rush of 1898.”).

216. Esther Yazzie-Lewis & Jim Zion, *Leetso, the Powerful Yellow Monster: A Navajo Cultural Interpretation of Uranium Mining*, in *THE NAVAJO PEOPLE AND URANIUM MINING* 1 (Doug Brugge & Esther Yazzie-Lewis eds., 2006).

217. Barbara Rose Johnston et al., *Uranium Mining and Milling: Navajo Experiences in the American Southwest*, in *THE ENERGY READER* 134 (Laura Nader ed., 2010).

218. Doug Brugge et al., *So a Lot of the Navajo Ladies Became Widows*, in *THE NAVAJO PEOPLE AND URANIUM MINING*, *supra* note 216, at xvi-xvii.

219. *Id.*

220. *Id.* at xvii; Bradford D. Cooley, *The Navajo Uranium Ban: Tribal Sovereignty v. National Energy Demands*, 26 J. LAND RESOURCES & ENVTL. L. 393, 396–97 (2005–2006).

221. Doug Brugge & Rob Goble, *A Documentary History of Uranium Mining and the Navajo People*, in *THE NAVAJO PEOPLE AND URANIUM MINING*, *supra* note 217, at 36.

“tailings,” instead leaving the enormous piles of radioactive dust and rock next to depleted mines.²²² Exposed tailings piles grew as big as one mile long and seventy feet high, and the wind scattered the radioactive dust to reservation towns and water supplies.²²³ Many Navajo even used contaminated tailings as concrete mix, unknowingly building and living in radioactive homes for decades.²²⁴ Add to the story the largest radioactive accident in U.S. history—the 1979 Church Rock Spill²²⁵—and it is hard to imagine a larger public health and environmental disaster.

For years, the EPA failed to act. As early as 1982, the Navajo government sought cleanup of tailings, spills, and the more than one thousand abandoned mines through failed litigation against the federal government.²²⁶ The tribes considered suing the mining companies, too, but were advised that victory was unlikely because the government had approved the mining activities.²²⁷ In 1990, Navajo lobbying efforts produced the Radiation Exposure Compensation Act, which treats the symptoms by providing payments for certain illnesses caused by uranium mining or atmospheric nuclear weapons testing.²²⁸ Clearly the problems were well known, but the pollution remained. Beginning around 1990, the EPA’s approach was to clean one mine at a time under Superfund, requiring the tribe to document pollution at each site.²²⁹ Navajos complained, but were bogged down in the Superfund system, which based the priority of cleanup sites on the surrounding population, an unfavorable approach given the reservation’s low population density.²³⁰

For example, in 1989 Navajo inspectors found uranium pollution at King Tutt Mesa—the location of about 200 mines—and then filed a Superfund application.²³¹ Seven years later, federal officials finally decided King Tutt Mesa met Superfund cleanup criteria.²³² Even then, the low population surrounding the mine made its inclusion on the national priority list unlikely, and King Tutt Mesa is still contaminated today.²³³ Not until 2008 did the EPA

222. Cooley, *supra* note 220, at 396.

223. *Id.*

224. Dan Frosch, *Uranium Contamination Haunts Navajo Country*, N.Y. TIMES, July 27, 2009, <http://www.nytimes.com/2009/07/27/us/27navajo.html>.

225. Doug Brugge et al., *The Sequoyah Corporation Fuels Release and the Church Rock Spill: Unpublicized Nuclear Releases in American Indian Communities*, 97 AM. J. PUB. HEALTH 1595 (2007).

226. Judy Pasternak, *Blighted Homeland: Navajo’s Desert Cleanup No More than a Mirage*, L.A. TIMES, Nov. 21, 2006, <http://www.latimes.com/news/nationworld/nation/la-na-navajo21nov21,0,6565476.story?coll=la-home-> (explaining that the judge called the pollution and health effects merely “speculative”).

227. *Id.*

228. Johnston et al., *supra* note 217, at 142–43.

229. Pasternak, *supra* note 226.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

begin a comprehensive cleanup program.²³⁴ Today, that program has resulted in the cleanup of only one high-priority site, and more than 500 polluted mines remain.²³⁵ With more direct power and funding, the tribe could have protected itself and begun the cleanup much sooner; instead, it was busy trying to get the EPA's attention while the polluting mining companies escaped penalties.

As an initial example of tribes' powerlessness to stop pollution near but not on the reservation, consider *Pakootas II*. The Upper Columbia River basin—which includes the Columbia River and Lake Roosevelt, the bodies of water polluted by Teck Cominco—has been occupied and used by the tribes “since time immemorial.”²³⁶ The entire Columbia River was initially included in the tribes' reservation, but is now the reservation's east and south borders.²³⁷ The tribes maintain hunting and gathering rights as well as fishing and boating rights, however.²³⁸ These waters have been and still are essential to the tribes' “subsistence, culture, and . . . well-being.”²³⁹ But, when proof of Teck Cominco's pollution emerged, they were powerless to clean it up. Instead, the tribes' only option was to petition the EPA to conduct a preliminary assessment under CERCLA.²⁴⁰ After a three-year delay, the EPA finished its report in 2002 and began negotiating with Teck Cominco to pay for cleanup in 2003.²⁴¹ The tribes were forced to wait for the EPA to protect its historic waterways, and after the EPA stepped in, they were shut out of the process.

The drama surrounding Gregory Canyon in San Diego County, California, is another example of off-reservation harms affecting tribes. The canyon is on private land and has been proposed as a landfill site for the last twenty years.²⁴² However, it is also home to historical sacred religious sites of the local Pala Band of Mission Indians, is within one-thousand feet of the San Luis Rey River, and is directly on top of an aquifer that provides water to a large percentage of San Diego County.²⁴³ Despite assurances from proponents, the landfill will eventually leak (or at least presents that risk), which would result

234. *Addressing Uranium Contamination in the Navajo Nation*, EPA, <http://www.epa.gov/region9/superfund/navajo-nation/> (last updated Dec. 28, 2011). The five-year plan focuses on cleaning abandoned mines, contaminated water, and contaminated buildings. *Id.*

235. Manuel Quinones, *Uranium: As Cold War Abuses Linger, Navajo Nation Faces New Mining Push*, GREENWIRE (Dec. 13, 2011), <http://www.eenews.net/public/Greenwire/2011/12/13/4>.

236. Richard A. Du Bey & Jennifer Sanscrainte, *The Role of the Confederated Tribes of the Colville Reservation in Fighting to Protect and Clean-up the Boundary Waters of the United States: A Case Study of the Upper Columbia River and Lake Roosevelt Environment*, 12 PENN ST. ENVTL. L. REV. 335, 342 (2004).

237. *Id.*

238. *Id.* at 343.

239. *Id.* at 342.

240. *Id.* at 359.

241. *Id.* at 359–60.

242. Pam Slater-Price, *The Gregory Canyon Landfill Plans Should Be Dumped*, L.A. TIMES, July 10, 2010, <http://articles.latimes.com/2010/jul/10/opinion/la-oe-0712-price-landfill-20100710>.

243. *Id.*

in the contamination of these water sources for future generations.²⁴⁴ It is one of the worst possible places to put a landfill; accordingly, after failing seven of eight suitability requirements, it is ranked at the bottom of a government list for potential landfill sites.²⁴⁵ Eighteen other federally recognized tribes and at least four local cities—all of which depend on the river and aquifer as rare sources of water—have joined the Pala in formal opposition.²⁴⁶ Yet all they can do is lobby for a legislative fix or convince an agency not to issue a requisite permit, both of which have failed so far.²⁴⁷ The normal channels for environmental protection are lacking; with stronger protections spread amongst more sources—local governments and tribes—the problem likely could have been solved long ago.

3. *Proposed Solutions*

I propose two solutions to these tribal difficulties. First, a Superfund-like program, “Tribal Superfund,” should be set up for tribes, where tribes can automatically take funds up to a certain amount for the exclusive purpose of pollution cleanup. This system would allow tribes to clean up pollution when they otherwise could not pay for it, and then go after the polluter to recoup their costs.²⁴⁸ This would also allow tribes to bypass population issues with the national priority list, which kept the EPA from cleaning mines on the Navajo reservation.²⁴⁹ Further, after a Tribal Superfund cleanup, tribes would need an incentive to go after the polluter and replenish the fund, or else tribes might simply be content with clean land. Thus, any reimbursement paid by the polluter should be split between the tribe and the EPA, partly reimbursing Tribal Superfund and partly giving the tribe a profit after legal fees.²⁵⁰ Finally, Tribal Superfund could apply both on and off the reservation, giving tribes a remedy for pollution that they otherwise might not have jurisdiction over but

244. Patsy Fritz, *The Liner that Couldn't Leak*, N. CNTY. TIMES, Sept. 29, 2011, http://www.nctimes.com/news/opinion/commentary/article_d46a0d2d-2a56-57e2-8cad-808085e2c9cc.html.

245. Slater-Price, *supra* note 242.

246. *Id.*

247. See Gary Warth, *Governor Vetoes Bill to Stop Gregory Canyon Dump*, N. CNTY. TIMES, Oct. 10, 2011, http://www.nctimes.com/news/local/sdcounty/article_013570a1-6ce9-5e70-a4d5-65553330e126.html.

248. This would mirror the CERCLA process, where private parties that clean up hazardous substances can bring an action against the polluter to recover costs of the cleanup if the cleanup was consistent with EPA standards.

249. See Pasternak, *supra* note 226.

250. This rule means the federal government will lose part of the money it invests in the Tribal Superfund, seemingly making it unlikely for such a proposal to be implemented. However, I would argue that the status quo of long delays by the EPA violates the trust relationship between tribes and the federal government. See *Worcester v. Georgia*, 31 U.S. 515 (1832); *United States v. Sioux Nation*, 448 U.S. 371 (1980). The federal government owes a fiduciary duty to tribes, and adequate environmental protection should be part of that. This is especially true where the U.S. government is largely responsible for the environmental harm, as with uranium mining on Navajo land (the U.S. government was the sole purchaser of the mined uranium).

that still negatively affects their members. It would be up to the tribes to decide how to spend their limited funding, and if they felt it was worth cleaning pollution outside of their boundaries, the EPA or states would have no reason to protest. A Tribal Superfund system would allow faster environmental cleanups for tribes and make efficient breach of environmental law less likely. With the tribe as another potential enforcer, polluters would be less likely to escape penalties, raising the overall anticipated costs of pollution and noncompliance.

Second, to further fight off-reservation harms I propose limited expansions of tribal power outside of reservation boundaries. As discussed, this power exists now, but not to the degree needed to ensure tribal self-protection, as the Gregory Canyon example makes clear. The key to this proposal, at least for the Pala's fight over Gregory Canyon, might be to strengthen tribal powers over traditionally sacred sites. Currently, tribes can designate a site for protection under a 1992 amendment to the National Historic Preservation Act of 1966.²⁵¹ If Congress simply gave tribes stronger powers to protect sacred sites under that statute, the likelihood of realizing environmental protection would rise. Likewise, states could enact statutes to protect sacred sites.²⁵² Even if stronger sacred site protection results in environmental protection in only a few scenarios, it would make efficient breach of public law less likely overall.

Expansion of tribal power where cultural sites are not at issue would be more difficult, as the argument for intruding on the surrounding state's sovereignty would diminish. However, I think a compelling argument exists to allow tribal regulation, to be enforced in tribal courts, of environmental pollution originating off-reservation if it actually harms tribal members or resources. Essentially, this would be the same argument advocated by the United State in *Pakootas II*, where it sought to enforce CERCLA against a Canadian polluter. Although it was unclear whether Congress actually intended for CERCLA to apply extraterritorially,²⁵³ the Supreme Court has ruled that Congress had the authority to do so if it wanted.²⁵⁴ As sovereign nations, tribes should be able to protect themselves in the same way.

251. 16 U.S.C. § 470(a) (2006).

252. In fact, the California legislature tried to enact a bill protecting sacred sites as a response to public outcry and Native-led opposition to mining in Indian Pass, the ancestral homeland of the Quechan Indian Nation. See LYUBA ZARSKY, *IS NOTHING SACRED? CORPORATE RESPONSIBILITY FOR THE PROTECTION OF NATIVE AMERICAN SACRED SITES*, SACRED LAND FILM PROJECT 20, 24 (Christopher McLeod & Roz Dzelzitis eds., 2006). For the Quechan and other nearby tribes, the area is "integral to contemporary religious ceremonies and pilgrimages." *Id.* at 20. Unfortunately, Governor Gray Davis vetoed the comprehensive bill, "bowing to pressure from developers and business groups." *Id.* at 24. Fortunately, another bill requiring restoration of mining sites to pre-mining conditions also passed and was signed, at least protecting the Quechan sacred site. *Id.*

253. The Ninth Circuit ruled that no extraterritorial application occurred, avoiding the question of whether it was intended or allowed. *Pakootas I*, 452 F.3d 1066, 1082 (2006).

254. See *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) ("Congress has the authority to enforce its laws beyond the territorial boundaries of the United States . . .").

CONCLUSION

By its very nature, environmental law is linked to the efficient breach of public law theory. Environmental law's ultimate goal is to force companies to behave in ways they normally would not, which requires noncompliance and pollution to be more costly than compliance—which is the very definition of preventing efficient breach.

Many courts have attempted to make noncompliance unattractive by increasing its costs. The Ninth Circuit, in its recent attempt, misunderstood the consequences of its ruling. Citizen suits, which the court limited, are key tools in preventing efficient breach of public law. While perhaps making it less likely that Teck Cominco would breach, the ruling makes future breaches more likely because Teck Cominco's situation was unique. Teck Cominco possessed a weapon most polluters will not have—a compelling legal defense that threatened to prevent the EPA from collecting noncompliance penalties altogether. With any attempt at enforcing those penalties—by the EPA or others—instead of the voluntary agreement, Teck Cominco might have hid behind its defense, possibly allowing it to escape liability altogether. Thus, in this situation, it was important and good policy for the court to dismiss the citizen suit. But as demonstrated, it can also be equally important and correct for courts to allow citizen suits in different scenarios.

Thus, instead of the Ninth Circuit's blanket ban on citizen suits being used to enforce noncompliance penalties, a discretionary case-by-case approach would better ensure compliance. Courts could choose between EPA guidance and citizen suit enforcement depending on the specific situation, preserving the threat of citizen suits while giving the EPA control when necessary (even if such a need is rare).

While important, the case-by-case approach to citizen suits is simply one method of accomplishing the broader goal: making penalties for violating environmental laws more certain by broadly distributing enforcement powers. Other methods include empowering local communities through organization and education, and empowering tribes through increased funding and statutory expansion of jurisdiction.

The efficient breach problem in environmental law largely stems from overdependence on one source for enforcement and regulation—the EPA. With only one enforcer, vulnerable people, communities, organizations, and tribes are forgotten, and polluters that break the law go unpunished. The key to making pollution inefficient is to empower the vulnerable, creating many potential enforcers of environmental law. The power to create inefficiency is stronger when in the hands of the many, not the few.