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NOTICE LETTERS AND NOTICE PLEADING: THE FEDERAL RULES OF CIVIL PROCEDURE AND THE SUFFICIENCY OF ENVIRONMENTAL CITIZEN SUIT NOTICE

ROBIN KUNDIS CRAIG [FNa1]

Congress has passed a number of acts designed to protect the environment and/or human health, including the Clean Air Act, [FN1] the Federal Water Pollution Control Act (also known as the Clean Water Act or FWPCA), [FN2] the Endangered Species Act of 1973, [FN3] the Solid Waste Disposal Act, the Resource Conservation and Recovery Act of 1976 (RCRA), [FN4] the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), [FN5] the Safe Drinking Water Act, [FN6] and the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), [FN7] among others. As part of these environmental protections, Congress has allowed citizens to sue alleged violators, ***106** including state and federal agencies, to enforce some or all of these requirements. Such suits are known as environmental citizen suits.

All of the major federal environmental laws contain citizen suit provisions, [FN8] and most of these provisions are modeled after the Clean Air Act, [FN9] the first environmental statute to contain a citizen suit provision. [FN10] Under the Clean Air Act,

> any person may commence a civil action on his own behalf . . . [a]gainst any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation. [FN11]

Citizens also can sue: (1) the Administrator of the EPA if the Administrator fails to perform a mandatory duty under the Act; [FN12] and (2) people who construct major emitting facilities without a permit or in violation of their permit. [FN13] The Act gives the federal district courts jurisdiction over such suits "without regard ***107** to the amount in controversy or citizenship of the parties." [FN14]

However, Congress has not given citizens unlimited ability to bring citizen suits. For example, most environmental statutes include provisions that allow the relevant state or federal agency to preclude a citizen suit through an enforcement action of its own. [FN15] This article focuses on a different limitation: the requirement that the suing citizen give pre-suit notice to several entities, including the alleged violator and the relevant enforcement agency or agencies. [FN16] The article first conducts a historical review of how federal courts have applied the statutory and largely procedural requirements for notice, then discusses the effect of the Supreme Court's decision in Hallstrom v. Tillamook County [FN17] on courts' interpretations of the EPA's regulations governing notice. The article then compares the current requirements for citizen suit notice content with the federal notice pleading standard embodied in Federal Rule of Civil Procedure 8. It notes that while the Supreme Court consistently has upheld the notice pleading standard for federal complaints, the history of judicial interpretation of citizen suit notice requirements is one of increasing strictness and technicality. In the decade since Hallstrom, the Court's opinions have culminated in requirements for content that threaten to supersede Rule 8 as a practical matter. Finally, this article argues that neither the Hallstrom decision, the purposes of notice, nor the EPA's regulations require more than a notice pleading standard for citizen suit notice. However, if courts believe that more stringent notice is necessary, they should impose notice content requirements consciously and in conformity with the accepted analysis for Federal Rule supersession and the Supreme Court's recent decisions in Henderson v. United States [FN18] and Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit. [FN19]

A. The Sixty-Day Notice Requirement and the Savings Clause

The most obvious procedural requirement in environmental statutes' citizen suit provisions is the pre-suit notice timing requirement. In the Clean Air Act, for example, "[n]o action may be commenced" against a person alleged to have violated or to be violating the Act "prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator, (ii) to the State in which the violation occurs, and (iii) to any alleged violator of the standard, limitation, or order . . . ." [FN20] Similar sixty-day notice requirements govern citizen suits brought under: the Toxic Substances Control Act; [FN21] the Columbia River Gorge National Scenic Area Act; [FN22] the Endangered Species Act; [FN23] the Surface Mining Control and Reclamation Act; [FN24] the Deep Seabed Hard Mineral Resources Act; [FN25] the Clean Water Act; [FN26] the Marine Protection, Research, and Sanctuaries Act of 1972 (MPRSA); [FN27] the Deepwater Port Act of 1974; [FN28] the Act to Prevent Pollution from Ships; [FN29] the Safe Drinking Water Act; [FN30] the Noise Control Act; [FN31] the Emergency Policy and Conservation Act; [FN32] the Solid Waste Disposal Act, as amended by RCRA; [FN33] the Powerplant and Industrial Fuel Use Act; [FN34] CERCLA; [FN35] EPCRA; [FN36] the Outer ***109** Continental Shelf Lands Act; [FN37] the Energy Policy and Conservation Act; [FN38] the Ocean Thermal Energy Conversion Act of 1980; [FN39] and the Natural Gas Pipeline Safety Act. [FN40] In fact, every time Congress has included a citizen suit provision in an environmental or natural resources statute, it also has required potential plaintiffs to give pre-suit notice to the potential defendants and to the relevant state and federal government entities.

As with most rules of law, however, there are exceptions to the timing requirement. In the Clean Air Act, for example, there are four exceptions to the sixty-day waiting period, one imposing a longer period and three eliminating the waiting period entirely. If the citizen seeks to sue for unreasonable delay, notice must be given 180 days before the citizen commences the suit. [FN41] However, a citizen may sue immediately after notice for violations of a hazardous pollutant emission standard, limitation, or regulation by an existing source, [FN42] for violations of a hazardous air pollutant standard by a stationary source, [FN43] or for violations of an EPA order requiring a person or state to comply with a State Implementation Plan (SIP). [FN44] Similarly, under the Solid Waste Disposal Act and RCRA, citizens can sue immediately after notice for violations of those acts' hazardous waste managment provisions [FN45] but must wait ninety days after notice to sue generators, transporters, or treatment, storage and disposal facilities if their handling, storage, treatment, transporting or disposal of wastes "may present an imminent and substantial endangerment to health or the environment." [FN46] In all cases, however, notice must be given. Must be given, that is, unless a creative citizen can find a way around the notice requirement.

Soon after Congress began enacting environmental statutes ***110** that allowed citizen suits, citizens who did not meet a "sue immediately" exception nevertheless still sought to avoid the notice requirement and its waiting period. For example, in 1977, the Rhode Island District Court recognized a limited, estoppel-like exception to the notice requirement when the Army Corps of Engineers (Corps), through successive violations of the National Environmental Policy Act (NEPA), [FN47] FWPCA, and the Marine Protection, Research, and Sanctuaries Act of 1972, [FN48] eliminated the plaintiffs' ability to give sixty days' notice before the activity at issue, proposed dredging and dumping, would have already occurred. [FN49] The court noted that:

Congress was also aware that the requirements of these and other Acts made it virtually certain that alert citizens would always be given more than 60 days' notice of actions that might violate FWPCA or MPRSA, so that the statutory waiting period could be satisfied and court action commenced if necessary before the allegedly wrongful act would take place. [FN50]

As a result, the court rejected the government's argument that despite its own violations, which destroyed the citizens' ability to give proper notice, plaintiffs had to give sixty days' notice. "This Court cannot sanction such a transparent attempt to undermine Congressional policies and intention." [FN51] Given the circumstances, the court found that the plaintiffs had constructively complied with the notice requirement by expressing their interest and concern about the project to the Corps more than a year before actually filing suit. [FN52]

Not all citizens, of course, could take advantage of such extreme circumstances to avoid complying with the sixty-day requirement. However, they could and tried to avoid the notice requirement entirely through environmental statutes' so-called "savings clauses." For example, the Clean Air Act provides that nothing in its citizen suit provision "shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the ***111** Administrator or a State agency)." [FN53] Most environmental statutes contain similar clauses.

[FN54]

In early cases, citizen suit plaintiffs who had not complied with the citizen suit notice requirement often argued that they were in fact proceeding under the savings clause. Such plaintiffs argued that the savings clause authorized them to proceed without notice even for violations of the environmental statute containing the savings clause because the savings clause preserved the right to proceed under any statute. [FN55]

***112** Plaintiffs making this argument needed alternative bases for federal court jurisdiction over their suits and attempted to rely on the federal Administrative Procedure Act (APA), [FN56] a private right of action under the environmental statute at issue and federal question jurisdiction pursuant to 28 U.S.C. § 1331, [FN57] the federal Declaratory Judgment Act, [FN58] 42 U.S.C. § 1983, [FN59] and the federal common law of nuisance. [FN60] However, despite this creativity and variety, federal courts generally were not receptive to attempts to avoid the sixty-day notice requirement. In a very early Clean Air Act case, for example, the Central District of California took the position that if the citizen suit provision applied to the case at hand, the savings clause did not. [FN61] As a result, the sixty-day notice requirement applied to the citizen's suit against the EPA Administrator to compel him to prepare a State Implementation Plan (SIP) for California. [FN62] Nevertheless, the ***113** court held that the plaintiffs substantially and constructively complied with the notice requirement, because filing and service of the complaint gave the Administrator actual notice and more than sixty days had passed since the filing without the Administrator correcting the violation. [FN63] In other words, the sixty days that the Federal Rules of Civil Procedure provide to federal defendants to answer a complaint [FN64] could also serve as the sixty-day citizen-suit notice period.

In 1975, the Seventh Circuit rejected both alternative jurisdiction theories based on (1) the Federal Administrative Procedure Act (APA) and 28 U.S.C. § 1331 and (2) sixty-day compliance through FRCP 12 in a Clean Air Act suit where citizens failed to give the EPA Administrator sixty days' pre-suit notice. [FN65] The Court found that Congress "intended to provide for citizens' suits in a manner that would be least likely to clog already burdened federal courts and most likely to trigger governmental action which would alleviate any need for judicial relief" and that eliminating the notice requirement would frustrate this intention. [FN66] As a result, the EPA Administrator was entitled to an additional sixty days' notice besides the time already provided in Rule 12(a). [FN67] Moreover, even if a citizen suit plaintiff asserted jurisdiction under the APA or section 1331, the savings clause "does not have the affirmative effect of removing conditions which existing law imposes upon the exercise of those rights." [FN68] Therefore, according to the Seventh Circuit, any suit based on violations of the Clean Air Act had to comply with the sixty-day notice requirement, no matter what jurisdictional basis was asserted. [FN69]

Four years later, however, the Seventh Circuit recognized one potential use for the savings clause, allowing FWPCA plaintiffs ***114** to pursue interstate water pollution claims pursuant to the federal common law of nuisance without giving notice. [FN70] However, FWPCA claims had to be dismissed because the plaintiffs admitted that they had not complied with the sixty-day notice provision. [FN71]

In the meantime, savings clause arguments found a more receptive audience in the D.C. Circuit in Natural Resources Defense Council v. Train. [FN72] The court allowed plaintiffs alleging violations of FWPCA to maintain their suits under the federal APA and 28 U.S.C. § 1331. [FN73] In allowing these alternative jurisdictional bases, the D.C. Circuit emphasized the integral role Congress had created for citizen plaintiffs in enforcing environmental statutes:

> The citizens suits provision that emerged as section 304 of the Clean Air Act originated in the Senate to "provide citizen participation in the enforcement of standards and regulations established under this Act." It reflects Congress's recognition that "[c]itizens can be a useful instrument for detecting violations and bringing them to the attention of the enforcement agencies and courts alike." It was designed to provide a procedure permitting any citizen to bring an action directly against polluters violating the performance standards and emission restrictions imposed under the law or against the Administrator grounded on his failure to discharge his duty to enforce the statute against polluters.
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> Anyone even remotely familiar with the case law of the period will discern that this provision took broad steps to facilitate the citizen's role in the enforcement of the Act, both in renouncing those concepts that make federal jurisdiction dependent on diversity of citizenship and jurisdictional amount, and in removing the barrier, or hinderance, to citizen suits that might be threatened by challenges to plaintiff's standing. [FN74]

The D.C. Circuit determined that the same reasoning applied to the suit before it because there was no consequential difference between the Clean Air Act's citizen suit provision and that ***115** in FWPCA. [FN75] Moreover, in light of Congress's intent to involve citizens in litigation, the procedural requirements for citizen suits "were not intended as restrictions to curtail federal court jurisdiction over actions that would have been maintainable even in the absence of this special citizen suit provision." [FN76] Thus, the suit could go forward. [FN77]

The D.C. Circuit's largesse was short-lived: two Supreme Court decisions, decided in 1977 and 1981, effectively ended most savings clause arguments. In Califano v. Sanders, [FN78] the Court determined that the federal APA does not independently give federal courts subject matter jurisdiction over suits challenging federal agency actions. [FN79] Although Califano was a social security case, its implications for environmental suits were clear. [FN80]

***116** More directly on point, the Supreme Court specifically addressed the "savings clause" theories in Middlesex County Sewerage Authority v. National Sea Clammers Ass'n. [FN81] In that suit, members of plaintiff Sea Clammers harvested fish and shellfish off the New York and New Jersey coasts. The Sea Clammers Association sued the states of New York and New Jersey and the federal government to prevent damage to those fishing grounds from ocean dumping of sewage and other wastes, seeking $250 million in compensatory damages and $250 million in punitive damages. The issue facing the Supreme Court in National Sea Clammers Association was whether a damages remedy was available under federal common law, FWPCA, MPRSA, or 42 U.S.C. § 1983. [FN82]

The district court found that the plaintiff failed to comply with both FWPCA's and MPRSA's sixty-day notice requirements and dismissed those statutory claims, refusing to allow the plaintiff to proceed under the acts' savings clauses. [FN83] The Third Circuit reversed, holding that failure to comply with the notice requirement did not prevent suit under the savings clauses for violations of the acts. [FN84] Moreover, the Third Circuit found that that a private right of action existed under each act. [FN85]

The Supreme Court reversed the Appeals Court and dismissed the entire suit. The Court found, in light of the elaborate enforcement schemes in both FWPCA and MPSRA, that no implied private rights of action exist under those acts. [FN86] Hence, those acts do not give federal courts jurisdiction over citizen complaints except through their citizen-suit provisions. In any case, the Court added, it was doubtful that Congress intended the savings clause to "include[ ] the very statute in which this statement was contained." [FN87] Moreover, the comprehensive enforcement schemes demonstrated that Congress did not intend for a ***117** remedy to be available under 42 U.S.C. § 1983. [FN88]

Finally, the Court held that FWPCA and MPSRA preempt the federal common law of nuisance. Relying on its decision in Milwaukee v. Illinois, [FN89] the Court noted that it already "held that the federal common law of nuisance in the area of water pollution is entirely pre-empted by the more comprehensive scope of the FWPCA." [FN90] FWPCA's preemptive effect extended to pollution of coastal waters, and "[t]o the extent that this litigation involves ocean waters not covered by the FWPCA, and regulated under the MPRSA, we see no cause for different treatment of the preemption question." [FN91]

Therefore, in Califano v. Sanders and National Sea Clammers Ass'n, the Supreme Court effectively eliminated the savings clauses as a means for avoiding the sixty-day notice requirement for citizen suits based on violations of the environmental statutes themselves. [FN92] Nevertheless, in National Sea Clammers Ass'n the Court did not decide what "compliance" with the sixty- day requirement entailed, because plaintiff Sea Clammers had given no notice whatsoever. [FN93] Therefore, debates on this issue continued for another eight years.

***118** B. Timing of Notice: What Does Sixty Days' Notice Mean?

1. The Pre-Hallstrom Debate

By the time the Supreme Court decided National Sea Clammers Ass'n, a split already existed among the circuits regarding whether the sixty-day notice requirement was procedural or jurisdictional. This issue usually arose as a matter of timing: Did the citizen suit plaintiffs have to wait a full sixty days after giving notice before filing suit, and what should the court do if they did not? The difference in a court's perspective could be critical to plaintiffs who had not strictly complied with the letter of the law because in "procedural" courts, any sixty-day period without active litigation was generally deemed sufficient to meet the notice requirement, while "jurisdictional" courts required absolute compliance on timing; that is, an actual notice letter given to the required entities a full sixty days

before the plaintiff filed its suit.

Courts varied considerably on what could count as sixty days' notice. As noted above, in some courts the sixty days between the filing of a complaint and the day a federal defendant's answer had to be filed was sufficient. [FN94] In others, sixty days between notice and later pleadings could suffice. In a FWPCA citizen suit, for example, the D.C. District Court held that notice was sufficient when the plaintiffs gave notice on May 10, 1973, filed their complaint on June 28, 1973, and filed a supplemental complaint on October 3, 1973 that alleged for the first time that sixty days had passed since notice was given. [FN95]

One year later, that same court held, and the D.C. Circuit agreed, that notice was sufficient in a Clean Air Act citizen suit when the plaintiffs originally filed suit without giving any notice, then filed a second suit raising identical issues after giving the required notice by sending a copy of the first complaint to the parties. [FN96] Holding that the notice requirement "was not intended to bar lawsuits such as the present one, but at most to delay such suits for sixty (60) days in order to allow appropriate officials time to act," [FN97] the D.C. District Court concluded that it was ***119** proper to consolidate the two actions and proceed because dismissal of the first lawsuit would not have barred the plaintiffs from filing the second one. [FN98]

The Second Circuit took an early lead in allowing environmental citizen suits even when the plaintiffs had not technically complied with the sixty-day notice requirement. In a FWPCA citizen suit where plaintiffs sought to enjoin the U.S. Navy's dumping of highly polluted dredged soil in Long Island Sound, the Second Circuit reversed the district court's finding that it lacked jurisdiction when plaintiffs commenced their action less than sixty days after giving notice. [FN99] The Second Circuit found that the purpose of the sixty-day notice requirement, "which is to give the administrative agencies time to investigate and act on an alleged violation," had been served because the plaintiffs gave the EPA and the other agencies notice of the alleged violations and "plaintiffs were informed before this suit was commenced that no action would be taken." [FN100]

Similarly, the Third Circuit adopted a pragmatic approach to the sixty- day waiting period by concluding that as long as the responsible agency had any sixty days in which to act, the citizen suit could go forward. Thus, when citizens gave notice to the EPA Administrator and the Nuclear Regulatory Commission that they intended to sue the Three Mile Island nuclear power facility under FWPCA to prevent it from discharging water contaminated with nuclear waste into a river, filing suit two days later, the Third Circuit allowed the action to proceed. [FN101] The Court of Appeals reasoned that "[a]t the time the district court acted, on the face of the complaint it appeared that NRC had had notice of the alleged violation under consideration for more than sixty days." It concluded that reading the notice requirement "to require dismissal and refiling of premature suits would be excessively formalistic." [FN102] It further observed:

***120** The citizens' suit provision . . . contains its own specification of the degree to which district courts must defer to administrative agencies. Under the plain language of that section, the district courts should defer for sixty days, and at that point determine whether or not the violation has been halted by administrative action or otherwise. If it has not been so halted, the citizen's suit goes forward. It does not wait in what may be a perpetual limbo while the agency decides whether or not to take action. [FN103]

One year later, the Third Circuit explicitly held that the sixty-day notice requirement was procedural. [FN104] Although plaintiffs failed to give any notice before filing their citizen suit, the Third Circuit upheld the district court in correcting this defect by staying the case until plaintiffs filed proper notice and sixty days passed. [FN105]

Courts following this "pragmatic" approach to notice generally allowed citizen suits to go forward if there had been actual notice to the agencies and a sufficient passage of time. Thus, the Eighth Circuit allowed a RCRA suit to proceed when the EPA had known about the alleged problem (a decision to allow a company to go ahead with construction of a hazardous waste facility even though it did not yet have a RCRA permit) [FN106] and had no intention of challenging the deficiencies of notice. [FN107] Acknowledging that the sixty-day requirement existed, the court nevertheless concluded that "the purpose of such notice has long since been satisfied in the instant action." [FN108] Similarly, the Third Circuit reversed a district court's dismissal of a RCRA and a FWPCA citizen suit when the plaintiff sent written notice of the alleged violations on the same day that he amended his RCRA complaint to add the FWPCA claims. The court justified this holding on the fact that both the plaintiff and the county health department had made the EPA and the Pennsylvania Department of Environmental Resources aware of the problems at issue on multiple occasions long before plaintiff filed suit. [FN109]

***121** Other courts decided that strict adherence to the sixty-day requirement was necessary to give the court jurisdiction. Thus, the Western District of Pennsylvania concluded that it had no jurisdiction to hear the suit when a public utility did not give any prior notice before suing the EPA Administrator under the Clean Air Act to prevent the EPA from forcing the utility to install a sulphur emission control device. [FN110]

The Seventh and First Circuits quickly followed suit. As discussed above, the Seventh Circuit considered notice a condition that Congress had imposed on any Clean Air Act suit, no matter what jurisdictional basis the plaintiff asserted. [FN111] Indeed:

> [the Clean Air Act's citizen suit provision's] statutory command plainly states that "[n]o action may be commenced . . . prior to 60 days after the plaintiff has given notice of such action to the Administrator." . . . Plaintiffs made no attempt whatsoever to comply with the notice provision, and their suit therefore could not properly be commenced. [FN112]

The First Circuit demanded absolute compliance with the sixty-day waiting period even when the defendants could not remedy their violations in that time. In a FWPCA citizen suit, the State of Massachusetts sued the U.S. Veterans Administration because a V.A. Hospital had violated its permit conditions and failed to comply with deadlines for a sewer tie-in. [FN113] The ***122** Massachusetts Attorney General mailed notice to the appropriate entities on June 12, 1975 and then filed its complaint forty days later, on July 22, 1975. [FN114] The district court dismissed the case for lack of jurisdiction, [FN115] and the First Circuit affirmed. [FN116] The First Circuit explained:

> The citizens' suit provisions under the FWPCA were designed to supplement and expedite administrative action to abate violations of the Act. Recourse to the courts is appropriate only when the administrative action taken is less than adequate. Therefore, even conceding that no administrative action could cure the failure of the VA to meet past deadlines for planning and construction of the sewer tie-in, increased administrative attention could still expedite the completion of the project. A citizen's suit under § 505(a) could do little more. . . . The district court properly found no jurisdiction under § 505(a) of the FWPCA. [FN117]

As these examples indicate, splitting courts into "jurisdictional" and "procedural" camps oversimplifies the variety of approaches that they actually took regarding the sixty-day timing requirement. Thus, even in circuits that considered proper timing of notice jurisdictional, courts differed considerably regarding what could constitute "proper" timing. For example, even though the First Circuit had clearly held that notice was jurisdictional, the Massachusetts District Court allowed a citizen suit involving the Clean Water Act, RCRA, and CERCLA to go forward on a constructive compliance theory. The plaintiff, a water company, sued the defendant, a dairy, for releasing hazardous materials that leached into the aquifer that the plaintiff used to provide water to two communities. [FN118] The plaintiff admitted that it had not waited sixty days after giving notice before filing suit, [FN119] and the district court concluded that "[a]bsent the curing of the jurisdictional defect by the filing of a supplemental complaint or 'substantial compliance' with the [Clean Water Act's] § 1365(b) notice requirement, this suit must be dismissed." [FN120] The plaintiff had not filed a supplemental complaint, and although it had formally amended its complaint to allege notice, ***123** sixty days had not passed between the date of notice, October 8, 1982, and the date of the amendment to the complaint, December 2, 1982. [FN121] Nevertheless, the court found substantial compliance for all three statutes. Starting with the Clean Water Act, and noting that citizen suits were intended to supplement and expedite administrative enforcement, the court held that the defendant and the state had been aware of the discharges since February 1982 and that the EPA had become aware of them by March 29, 1982. [FN122] Moreover, the EPA had not taken action after receiving the October 8, 1982 notice letter, and more than sixty days had passed by the time the court was deciding whether to dismiss the case for lack of notice. [FN123] Under these circumstances, the court concluded that the plaintiff had sufficiently shown constructive compliance with the sixty-day requirement. [FN124] In addition, the notice requirements for RCRA and CERCLA were "virtually identical," so the plaintiff had constructively complied with the statutes' timing provisions as well. [FN125]

However, the Sixth Circuit was more strict, requiring actual notice. In a class action citizen suit under FWPCA, RCRA, and CERCLA, the plaintiffs alleged that a landfill had contaminated the surrounding environment, including plaintiffs' water supply. [FN126] The court held that compliance with the sixty-day notice requirement is a jurisdictional prerequisite to suits under RCRA and FWPCA [FN127] and noted that "[t]he citizen suit notice provisions were intended to give EPA an opportunity to resolve issues regarding the interpretation of complex environmental standards by negotiation, unhindered by the threat of an impending private lawsuit." [FN128]

Therefore, the plaintiffs' pleadings were insufficient because "[m]ere allegations that the state of Tennessee, the EPA and the private defendants have been on notice for a period of time exceeding sixty days, and that 'further notice would be meaningless' fail to sufficiently set forth the jurisdictional predicate of actual notice." [FN129]

***124** The First Circuit eventually eliminated all avenues of notice except strict compliance with the sixty-day requirement; that is, sending written notice to the appropriate parties and then waiting a full sixty days before filing suit. In a challenge to the construction of a waste disposal facility, plaintiffs added RCRA claims to their complaint after defendant removed the suit to federal court. [FN130] Given this posture, the plaintiffs had not given notice under RCRA before filing suit. Instead, the plaintiffs argued that the purposes of the notice requirement would be satisfied because the government had sixty days to respond under Rule 12(b). [FN131] However, the First Circuit disagreed. Dismissing the case on its own motion, it held that "[t]he notice requirement is not a technical wrinkle or superfluous formality that federal courts may waive at will. We believe that it is part of the jurisdictional conferral from Congress that cannot be altered by the courts." [FN132] Noting that the sixty-day waiting period gives the EPA and the state time to investigate [FN133] and "facilitates extrajudicial settlement of disputes," [FN134] the court concluded that post-complaint adjustments were insufficient:

Permitting immediate suit ignores the possibility that a violator or agency may change its mind as the threat of suit becomes more imminent. After the complaint is filed the parties assume an adversary relationship that makes cooperation less likely. Because a mere adjustment of the trial date or the filing of a supplemental or amended complaint to cure defective ***125** notice cannot restore a sixty-day non-adversarial period to the parties, we would therefore dismiss suits where the complaint is filed less than sixty days after actual notice to the agency and the alleged violators. [FN135]

The Ninth Circuit was one of the last circuits to enter the fray. In Hallstrom v. Tillamook County, [FN136] a RCRA citizen suit alleging that leachate from a landfill was causing bacterial and chemical pollution of surface and ground water, the Ninth Circuit first described the split in the circuits regarding the jurisdictional nature of notice, then elected to follow the First Circuit's "plain language" approach. [FN137] Noting that Congress had created exceptions to the notice requirement when it desired, such as for hazardous waste suits, the Ninth Circuit agreed with the First Circuit that "the underlying policy aims of encouraging non-judicial resolution of environmental conflicts" were better served by requiring a non-adversarial sixty-day period before suit could be filed. [FN138] Therefore, the Ninth Circuit dismissed the case for lack of subject matter jurisdiction because the plaintiffs had failed to give notice to the EPA and the Oregon Department of Environmental Quality until nine months after they filed suit. [FN139]

The Supreme Court granted certiorari to review the Ninth Circuit's decision. The Court's opinion in that case ended the debate about the proper timing of citizen suit notice.

2.Hallstrom v. Tillamook County

When the Supreme Court decided Hallstrom v. Tillamook ***126** County, [FN140] the split over the meaning of sixty days' notice became a discussion of Congress' purposes in enacting that timing provision. In that RCRA suit, the Hallstroms lived next to a landfill operated by Tillamook County, Oregon. [FN141] Believing that the county was violating RCRA, the plaintiffs sent Tillamook County written notice in April 1981 of their intention to sue. [FN142] A year later, the plaintiffs filed suit and Tillamook County moved for summary judgment because the Hallstroms had not sent notice to the Oregon Department of Environmental Quality (ODEQ), which administers RCRA in Oregon, or to the EPA. [FN143] On March 2, 1983, the day after Tillamook County filed its motion for summary judgment, the Hallstroms notified ODEQ and the EPA of the suit. [FN144]

The Court concluded that strict compliance with the sixty-day timing requirement was mandatory, [FN145] although it expressly refused to decide whether the sixty-day timing requirement was jurisdictional. [FN146] Starting with the plain meaning of RCRA's citizen-suit provision, the Court found that the provision absolutely required citizens to give notice sixty days before they filed suit. [FN147] The Court refused to consider whether a sixty-day stay in a suit already filed was "the functional equivalent of a precommencement delay" [FN148] because such a flexible interpretation "flatly contradicts the language of the statute." [FN149] Noting that under Federal Rule of Civil Procedure 3, a plaintiff commences an action by filing the complaint and that RCRA prohibits the commencement of an action before notice has been given and sixty days have passed, the Court concluded that "[s]taying judicial action once the suit has been filed does not honor this prohibition." [FN150]

Legislative history indicating that Congress intended to encourage citizen suits did not alter the Court's "plain language" analysis, even though prior courts had found that congressional ***127** intent influential. Noting first legislative history is persuasive only when Congress's intent is not clear from the statute, [FN151] the Court also emphasized that "the legislative history indicates an intent to strike a balance between encouraging citizen enforcement of environmental regulations and avoiding burdening the federal courts with excessive numbers of citizen suits." [FN152] Moreover, the Court construed the notice requirement's purposes in light of this congressional compromise:

Requiring citizens to comply with the notice and delay requirements serves this congressional goal in two ways. First, notice allows Government agencies to take responsibility for enforcing environmental regulations, thus obviating the need for citizen suits. [FN153] In many cases, an agency may be able to compel compliance through administrative action, thus eliminating the need for any access to the courts. [FN154] Second, notice gives the alleged violator "an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit." [FN155] This policy would be frustrated if citizens could immediately bring suit without involving federal or state enforcement agencies. Giving full effect to the words of the statute preserves the compromise struck by Congress. [FN156]

Acknowledging that the sixty-day delay could result in more damage to the environment, the Court nevertheless again deferred to the congressional compromise, noting that "this problem arises as a result of the balance struck by Congress in developing the citizen suit provisions." [FN157] Pointing out that Congress had created exceptions to the sixty-day delay when it considered a particular type of violation dangerous enough, [FN158] the ***128** Court reasoned that "it is likely that compliance with the notice requirement will trigger appropriate federal or state enforcement actions to prevent serious damage." [FN159]

Ruling out a sixty-day delay as a remedy, the Court concluded that a court must dismiss an action if the party suing under the citizen suit provision "fails to meet the notice and 60-day delay requirements." [FN160] Moreover, the Court applied this new rule retroactively. [FN161] Ironically, after seven years of litigation, the Court also noted that the Hallstroms could still have their day in court because they "remain free to give notice and file their suit in compliance with the statute to enforce pertinent environmental standards." [FN162]

Although the case was an interpretation of RCRA, Hallstrom, as a practical matter, governs almost all of the environmental statutes. As the Supreme Court itself noted in Hallstrom, most environmental citizen suit provisions are patterned after the Clean Air Act and hence can be interpreted similarly. [FN163] The holding in Hallstrom has been applied by analogy to citizen suits brought under the Endangered Species Act, [FN164] the Clean Water Act, [FN165] the Clean Air Act, [FN166] CERCLA, [FN167] EPCRA, [FN168] and the ***129** Safe Drinking Water Act, [FN169] as well as other RCRA suits. [FN170]

3. Statutory Exceptions to Hallstrom

Soon after the Supreme Court decided Hallstrom, environmental plaintiffs and their lawyers began to find exceptions to that decision. For example, by enunciating the explicit purposes of citizen suit notice, the Supreme Court opened the door for arguments. So long as the plaintiffs had fulfilled the purposes of notice, the timing could be "fudged" a bit. Thus, the Eastern District of Washington was still willing, after Hallstrom, to maintain jurisdiction when various groups sued the U.S. Forest Service and the Columbia River Gorge Commission to compel compliance with the National Forest Management Act and the Columbia Gorge National Scenic Area Act but no notice was sent to the Commission.[FN171] Recognizing Hallstrom's applicability, [FN172] the court nevertheless noted that the plaintiffs had testified before the Commission and had submitted written comments, concluding that "the purpose of the rule has been served" and that judicial efficiency required it to keep the case. [FN173]

The Eastern District of Washington's decision is nearly impossible to reconcile with Hallstrom, where the Supreme Court dismissed the entire citizen suit after seven years of litigation when the plaintiffs failed to send notice to two entities that were required by statute to receive notice. The Second Circuit's recognition of a Hallstrom exception for "hybrid" cases is more defensible. As previously discussed, several environmental statutes allow citizens to sue immediately after giving notice for some types of violations. The most common exceptions involve ***130** hazardous wastes or pollutants. [FN174] Therefore, when a RCRA citizen suit involves only hazardous waste violations, the inapplicability of Hallstrom is obvious, as the Hallstrom Court itself recognized. [FN175] However, the applicability of Hallstrom to the resulting "hybrid" suit is not clear when a citizen gives

notice of several alleged violations that may or may not involve hazardous substances. [FN176]

Nevertheless, the Second Circuit upheld the Vermont District Court in holding that Hallstrom did not apply to a "hybrid" RCRA case where plaintiffs filed suit the day after mailing their notice letters. [FN177] It emphasized that "Congress obviously determined that with hazardous wastes the dangers of delay and the potential for greater damage to public health or the environment outweigh the justifications for the pre-suit delay periods." [FN178] "[A]lthough the Supreme Court's language in Hallstrom leans toward a strict application of the notice and delay requirements, rigid adherence in this case, which involves hazardous wastes, would lean too far, for it would circumvent Congress's intent in enacting these statutes. Hallstrom is therefore distinguishable . . . ." [FN179] However, the Second Circuit qualified its decision by requiring that, "in order to eliminate the delay requirement with a 'hybrid' complaint, the two types of violations would have to be closely related." [FN180] Plaintiffs' claims met this requirement because they "all arose from the operation of a single facility and are based on the same core of interrelated facts." [FN181]

***131** The Second Circuit thus recognized that statutory exceptions to Hallstrom exist. Hybrid suits, however, were not the only statutory issue left.

4. Statutory Expansion of Hallstrom: Tag-Along Plaintiffs

One of the more oblique statutory notice requirements is that no citizen suit can commence until "60 days after the plaintiff has given notice . . . ." [FN182] Even before Hallstrom, defendants occasionally challenged citizen suit notice on the grounds that not all plaintiffs had given notice. Pre- Hallstrom courts adopted a "tag along" rule, refusing to throw out suits, or even plaintiffs, as long as one of the named plaintiffs had given adequate notice. Thus, the South Carolina District Court refused to dismiss a case when several plaintiffs sued the U.S. Army and Army Corps of Engineers under FWPCA to stop construction of one dam and the continuing operation of two others even though the notice letter had not named all of the plaintiffs. [FN183] The court concluded that the plaintiffs had substantially complied with the notice requirement and that omission of some plaintiffs "would in no way fail to put the defendants on notice as to the nature of the suit or the basis on which it was to be brought." [FN184]

Seven years later, the New Jersey District Court followed South Carolina's lead by refusing to dismiss even the non-noticing plaintiff when another plaintiff had given proper notice. [FN185] Two citizens' groups, the Student Public Interest Research Group of New Jersey (SPIRG) and Friends of the Earth (FOE), sued under FWPCA alleging that the defendant had violated its permit conditions. SPIRG had complied with the notice requirement, but FOE had not. Nevertheless, the court upheld notice for both plaintiffs, finding that "while FOE alone did not comply with the notice requirements, the plaintiffs together substantially complied." [FN186]

However, since Hallstrom, courts have split over the issue of ***132** "tag along" plaintiffs. In 1991, the Eastern District of Washington recognized that the Ninth Circuit and Hallstrom demanded strict construction of notice requirements, but it nevertheless refused to dismiss additional plaintiffs in a National Forest Management Act suit when one plaintiff, SDS Lumber, had given proper formal notice to the Forest Service. [FN187] In the court's opinion, "[t]he fact that other plaintiffs have joined in the litigation does not change the fact that the Forest Service was aware of the impending lawsuit and the basis for the claim." [FN188] Similarly, in 1992, the Eastern District of North Carolina allowed notice from two environmental organizations to suffice for three other organizations when all five sued the noticed defendants. [FN189] Although the court relied primarily on pre-Hallstrom decisions regarding this issue, it also explicitly found Hallstrom to be "inapposite," concluding:

In Hallstrom, the Supreme Court held that a single plaintiff's failure to satisfy the notice requirements deprived the Court of jurisdiction to hear the citizen's suit. The Hallstrom Court's ruling, however, did not address whether notice by one plaintiff would satisfy the requirement as to all plaintiffs. The Court's ruling in Hallstrom, therefore, in no way undermined the well- reasoned decisions of the aforementioned district courts. [FN190]

As such, "plaintiffs have collectively complied with the notice requirement" of the Clean Water Act. [FN191]

However, two years after its liberal decision, the Eastern District of Washington faced a situation where Irene Salas had given notice under the Clean Water Act on behalf of herself "and others" but never became a plaintiff in the subsequent litigation. ***133** Instead, various environmental groups that were never named in the notice letter brought the suit in Washington Trout v. Scab Rock Feeders. [FN192] The court decided that the plaintiffs' notice

was insufficient: the district court distinguished its 1991 opinion because "[i]n this case, none of the Plaintiffs in the action gave notice to the Defendant." [FN193] As such, "Defendant has not received notice from the plaintiffs as required by the statute." [FN194]

The Ninth Circuit affirmed the district court decision on the basis of Hallstrom. [FN195] After noting that the purposes of the sixty-day notice are "to allow the parties time to resolve their conflicts in a nonadversarial time period" and to "alert[ ] the appropriate state or federal agency, so administrative action may initially provide the relief the parties seek before a court must become involved," the court concluded that "because neither the EPA nor McCain knew other plaintiffs were involved, they were not in a position to negotiate with the plaintiffs or seek an administrative remedy." [FN196]

In Washington Trout, no plaintiff had actually been named in the notice letter. Nevertheless, several courts have since relied on the Ninth Circuit's opinion to require every plaintiff to be named in an otherwise adequate notice letter, eliminating the "tag along" rule entirely. For example, the Eastern District of Pennsylvania relied on Washington Trout to dismiss one plaintiff because he neither was named in the notice letter nor had sent notice of his own. [FN197] Similarly, the Tenth Circuit relied on the Ninth Circuit's opinion to hold that the "pragmatic view that notice by one plaintiff acts as notice by all . . . is inconsistent with Hallstrom," because "[i]f the defendant and the agencies do not know the parties involved, effective negotiation is not ***134** possible." [FN198]

However, not all federal courts have elected to follow Washington Trout. For example, in 1996, the Southern District of New York refused to dismiss one of two plaintiffs when the defendant admitted that the other plaintiff had given timely notice pursuant to RCRA and the Clean Water Act. [FN199] Although the court cited Hallstrom for the proposition that "a plaintiff must comply with the notice provisions of the relevant statute," [FN200] it also immediately concluded that "[n]otice provided by a single plaintiff in a suit brought by multiple plaintiffs constitutes 'substantial compliance' with the notice requirements of the CWA [FWPCA] and RCRA." [FN201]

Even in the Ninth Circuit, at least one district court was willing to distinguish Washington Trout to allow a very limited version of the tag-along rule. In 1996, the Southern District of California refused to dismiss the Executive Director of San Diego Baykeeper on grounds that he had not been named in the notice letter. In this case, the notice letter was sent on behalf of the Natural Resources Defense Council and San Diego Baykeeper, gave both of their addresses, and was signed by the Executive Director. [FN202] Distinguishing Washington Trout, the court noted that "not only did Moser sign the letter, but he remains Executive Director of San Diego Baykeeper, one of the other plaintiffs in the suit. There can be no doubt about with whom [the defendant] needed to conduct negotiations." [FN203]

After Hallstrom, defendants grew even more technical in their demands and occasionally argued about the adequacy of plaintiffs' self-identifications in their notice letters. However, once a plaintiff has been named in a citizen suit notice, the few courts facing quibbles on the adequacy of the naming have refused to require absolute accuracy. Thus, the Eastern District of Louisiana held that "ACORN" was a proper plaintiff when "Louisiana ACORN" gave notice, because evidence showed that the two organizations ***135** were "one and the same." [FN204] Similarly, the Southern District of California held that a defendant's "argument that the failure to put 'Inc.' after [two plaintiffs' names] constitutes improper notice is patently frivolous." [FN205]

C. Hallstrom and the EPA's Notice Regulations

1. EPA's Regulations Governing Citizen Suit Notice

As the Supreme Court noted in Hallstrom, environmental citizen suit statutes phrase notice to certain entities and the sixty-day waiting period as mandatory conditions to suit. However, beyond these two requirements and the more oblique requirement that the plaintiff give the notice, the statutes contain no specific requirements regarding notice contents or delivery. Instead, in the words of the Clean Air Act, notice must be given "in such manner as the Administrator shall prescribe by regulation." [FN206] Thus, the appropriate federal agency, generally EPA, has the responsibility for articulating what constitutes proper notice. [FN207]

In the EPA's case, these details include both procedural and substantive requirements, and the EPA has made a conscious effort to make the regulations similar for different statutes. [FN208] For example, the EPA's regulations for the Clean Air Act, FWPCA, ***136** the Safe Drinking Water Act, CERCLA, and EPCRA all require the citizen to serve notice on the appropriate entities by certified mail or personal service. [FN209] In a slight variation,

citizens suing under the Solid Waste Disposal Act/RCRA or the Noise Pollution Control Act must serve their notice by registered mail or personal service. [FN210]

Content requirements show similar consistency. For the Clean Air Act, notice of a suit based on the EPA's failure to act or violation of a nondiscretionary duty

shall identify the provisions of the Act which requires such act or creates such duty, shall describe with reasonable specificity the action taken or not taken by the Administrator which is claimed to constitute a failure to perform such act or duty, and shall state the full name and address of the person giving the notice. [FN211]

In contrast, when a citizen sues for a violation of a standard, limitation, or order:

Notices to the Administrator, States, and alleged violators . . . shall include sufficient information to permit the recipient to identify the specific standard, limitation, or order which has allegedly been violated, the activity alleged to be in violation, the person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name and address of the person giving the notice. [FN212]

Nearly identical regulations govern the Clean Water Act, the Safe Drinking Water Act, the Noise Pollution Control Act, the Solid Waste Disposal Act/RCRA, CERCLA, and EPCRA. [FN213] When the EPA requires more information than specified in the Clean Air Act regulations, the two most common additions require ***137** the citizen or citizen group to identify its counsel [FN214] and its telephone number [FN215] as well as its name and address. However, the EPA does not always require the citizen to specify the location of the alleged violation. [FN216]

The EPA first proposed notice regulations on July 8, 1971, for the Clean Air Act. [FN217] By June 1, 1973 regulations also existed for FWPCA. [FN218] Surprisingly, before Hallstrom, challenges to the sufficiency of citizen suit notice based on the applicable regulations were rare and generally ineffective. The District of Columbia District Court was apparently the first federal court that was cognizant of the regulations, in a very early FWPCA citizen suit where two community groups sought to enjoin sewer hookup permits on the grounds that the resulting sewage discharges would contaminate the Potomac River. [FN219] The suit was so early, in fact, that the plaintiffs filed their notices before the act was effective. Nevertheless, the plaintiffs filed supplemental pleadings after the effective date, [FN220] and the court determined that the act covered the case. [FN221] Almost in passing, the court noted that the "notice complied in full with the spirit of the Administrator's June 1st regulations" and was proper. [FN222] Other courts showed a similar passing awareness of the notice regulations but rested their decisions on the statutory provisions. [FN223]

In general, in the few pre-Hallstrom suits where the issue ***138** arose, courts continued to be reluctant to dismiss environmental citizen suits on the basis of the notice letter's content. In particular, defendants' actual knowledge of the problem at issue often eliminated their ability to argue that notice was insufficient under the regulations. Thus, in 1977, the District of Rhode Island discounted defendants' arguments that plaintiffs in a FWPCA citizen suit had failed to comply with the notice regulation, finding that "defendants were aware of the precise violations complained of more than sixty days prior to the filing of this action." [FN224] Similarly, in 1985, the Middle District of Pennsylvania rejected a defendant's argument that the citizen had inadequately identified the specific regulations violated and the dates of violation because "[t]he EPA and the Pennsylvania Department of Environmental Resources (DER) had been conducting investigations of the contaminated sites listed in the notice for many months prior to the date of the notice." [FN225] As a result, the defendant "had sufficient actual notice of the alleged violations to respond in an adequate fashion to plaintiffs." [FN226]

More analytically, the Eastern District of Virginia expressly found in 1986 that RCRA notice was adequate under the relevant regulation when plaintiff had sent a Telex to the defendants stating that the flashpoint of a substance that it believed was a 60% oil/40% water mixture was too low and that plaintiff had "received no warning from anyone as to its hazardous nature." [FN227] The court concluded that, "[w]hile the standard assertedly violated might have been identified with greater specificity, the regulation merely requires that the notice provide sufficient detail for the recipient to identify the violated standard." [FN228] Similarly, the Western District of Michigan held that notice was sufficient under FWPCA's notice regulation when the notice letter declared plaintiff's intent "to file suit against Consumers Power Company under Clean Water Act § 505(a)(1) for discharging pollutants to the navigable waters of the United States without a permit from its Ludington Pumped Storage Plant in violation of ***139** § 301(a) of the Clean Water Act." [FN229] Like the Eastern District of Virginia, the Western District of

Michigan noted that the notice could have been more specific. Nevertheless, the court found that the notice met, or substantially met, both the regulatory and statutory requirements. [FN230]

In 1988, a year before Hallstrom, the Puerto Rico District Court followed the Western District of Michigan's lead and explicitly imposed an "actual knowledge" standard on notice in a Clean Air Act and Clean Water Act case. The court held that notice was adequate even though "plaintiffs implicitly acknowledge that they may not have complied fully with the regulations" because:

The notice letters sent by plaintiffs in this case effectively notify the defendants of the activity alleged to constitute a violation (the release of specified toxic pollutants to the ambient air or Rio Hondo [River]); the standards violated (that these pollutants were released without permits); the person or persons responsible for the violations (the defendants); the location of the alleged violations (the defendants' facilities in Barrio Guanajibo Industrial Park); and the full name and address of the persons giving notice. Although the notice letters may have been incomplete, this Court . . . finds that the plaintiffs have "sufficiently alleged and established the actual notice that the statute and the regulations require. . . ." [FN231]

Similarly, as the Supreme Court was deciding Hallstrom, the Middle District of Pennsylvania found RCRA and CERCLA notice sufficient when the defendant failed to "establish[ ] prejudice from the notice in attempting to resolve this matter before litigation or to meet the allegations in plaintiffs' complaint." [FN232]

Therefore, under these pre-Hallstrom decisions, substantial compliance with the notice regulations was generally sufficient, particularly if the recipients already knew about the problem. However, courts would dismiss environmental citizen suits in one factual situation: when the notice letter completely omitted a ***140** later claim. For example, in 1978, the District of South Carolina dismissed a FWPCA citizen suit for noncompliance with the notice regulations when environmental groups sued the Army and the Army Corps of Engineers to stop construction of one dam and to enjoin the continuing operation of two other dams, but the plaintiffs had mentioned only the Russell Dam in their notice. [FN233] Given the complete omission of the Clark and Hartwell Dams, the court explained that the notice "would not provide defendants with notice sufficient to allow possible administrative resolution of the claims as to those projects." [FN234] As a result, the court decided that it lacked jurisdiction to adjudicate the claims related to the omitted dams. [FN235]

More narrowly focused, the Eastern District of California refused to let Clean Water Act claims go forward when the plaintiff gave no notice of its intent to sue for certain specific pollutant parameters. [FN236] Citing to the Clean Water Act's notice regulation, the court held that the plaintiff's "complete failure to make any reference at all to alleged violations regarding total suspended matter, suspended solids, lead, temperature, turbidity, chlorine, and total cyanide simply cannot satisfy the [notice] requirement." According to the court, "notice of intent to sue [must] include sufficient information to permit the recipient to identify 'the specific standard, limitation, or order alleged to have been violated, the activity alleged toconstitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation [and] the date or dates of such violation." ' [FN237]

Actual knowledge nevertheless could on occasion compensate for even completely deficient notice. For example, the Eastern District of Pennsylvania allowed a RCRA citizen suit to go forward even though the plaintiffs' notice letter made no mention of "hazardous waste," because plaintiffs later filed a supplemental memorandum clearly laying out their hazardous waste theory. [FN238] Thus, prior to Hallstrom, federal courts generally refused to scrutinize a notice letter's contents: if plaintiffs gave properly timed ***141** notice (whatever that might mean to the particular court) and the recipients knew or could determine what the alleged problem was, motions to dismiss based on the notice regulations were universally denied.

2. Post-Hallstrom Approaches to the Notice Regulations

The Supreme Court's decision in Hallstrom interpreted a federal environmental statute to find that citizens must give notice to all of the entities listed in the statute at least sixty days before they file suit; otherwise, the court must dismiss the case. The Court never addressed the adequacy of the notice that Tillamook County received. Indeed, it did not even mention the EPA's notice regulations, which were entirely irrelevant to the Court's focus on the Hallstroms' failure to give any notice to two agencies before filing suit. Nevertheless, most federal courts have assumed that Hallstrom has some influence on their interpretations of the notice regulations. Federal courts have diverged, however, in assessing how much influence Hallstrom should have.

The key language in the notice regulations, at least so far as judging the adequacy of content in actual violation cases is concerned, is the phrase sufficient information to permit the recipient to identify. In effect, the regulatory requirements divide the burden of information between the citizen and the recipients: under the plain language of the regulations, the citizen does not need to actually identify the violation, the dates of violation, the location of the violation, or other information as long as the recipient can figure out each of those details. [FN239] Thus, the EPA's notice regulations are automatically in tension with Hallstrom's strict compliance approach because they do not demand an explicit exegesis of the citizen's proposed case.

The EPA has given little guidance about how much specificity "sufficient information" requires. When the EPA proposed the notice regulations for the Safe Drinking Water Act in 1986, it considered those regulations "straightforward and self-explanatory." [FN240] Similarly, when the EPA modified the Clean Water Act ***142** notice regulations in 1989 to reflect statutory amendments, it commented merely that "[e]xisting procedures for notices of violations are not affected by this proposed rule." [FN241] Even when the EPA overhauled the Clean Air Act (CAA) notice regulations in 1990 "to make CAA citizen notice more straightforward for citizens and for EPA," it detailed what it meant by the entities to be served and the timing and manner of service but said nothing about the contents of notice or the "sufficient information" language. [FN242]

A few interpretive guidelines emerge from the EPA's first comments on its notice regulations in the 1970s. Initially, the Clean Air Act regulations did not require "information on the specific activity alleged to be in violation" but did require the citizen to include additional information if it was known. [FN243] The EPA dropped the latter requirement because "the potential procedural problems outweigh the possible benefit to be gained from the information . . . ." [FN244] Similarly, in the Clean Water Act regulations, the EPA refused to act on comments demanding more information:

Several of the comments asked that the regulations require the citizen to state in the notice the interests which he claimed to be adversely affected. One comment went so far as to ask that the citizen be required to state in his notice a summary of the evidence to be relied upon and the names and addresses of witnesses to be called in support of the citizen's claim, and that he be required to post a bond adequate to cover the direct costs to the owner or operator arising out of a complaint that was later found to be without merit. These suggestions were rejected as being unduly burdensome upon the citizen. [FN245]

Thus, the EPA consciously avoided imposing stringent and procedurally unwieldy informational requirements on citizens giving notice.

In addition, the "sufficient information" language for notice of violations contrasts sharply with the regulatory language governing notice of the Administrator's failure to act. In failure-to-act Clean Air Act and Clean Water Act suits, citizens must "describe ***143** with reasonable specificity" the act that the Administrator failed to take [FN246] and "shall identify the provisions of the Act which requires such act or creates such duty." [FN247] Logically, therefore, "sufficient information" does not require explicit identification of the dates and standard or order at issue.

As noted, the environmental statutes mandate that "[n]otice . . . shall be given in such manner as the Administrator shall prescribe by regulation." [FN248] Given Hallstrom's strict interpretation of such citizen-suit mandates, several post-Hallstrom decisions have expressly held that compliance with the regulatory requirements is a mandatory prerequisite to the filing of an environmental citizen suit. [FN249] Such statements, however, still leave open the question of what "compliance" requires. Federal courts have taken two approaches to the regulatory requirements: some courts emphasize the regulations' "sufficient information" language to impose a more liberal standard on content than Hallstrom's standard for the sixty-day timing, while others read Hallstrom's strict compliance requirement into the regulations, requiring fairly precise information.

Many courts have decided that the notice regulations cannot be as strictly construed as the statutory sixty-day notice requirement. For example, in one of the earliest decisions on this issue, the Southern District of West Virginia emphasized the regulatory "sufficient information" language in a Clean Water Act case to conclude that strict construction of those requirements would be contrary to the EPA's intent:

***144** The Supreme Court [in Hallstrom] did not, however, reach the issue of how much information is sufficient within the meaning of 40 C.F.R. § 135.3(a). Moreover, it should be noted at the outset that the regulation merely requires that the notice "include sufficient information to permit the recipient to identify" the alleged violations, etc. It is a basic rule of statutory construction that all words are included in a statute for a particular purpose. Hence, the

words "sufficient information to permit the recipient to identify" signals that this regulation is not to be construed so as to require that the notice itself expressly identify the alleged violations. [FN250]

In Public Interest Research Group of New Jersey, Inc. v. Hercules, Inc., the Third Circuit provided the most definitive opinion adopting this logic. [FN251] Like the Southern District of West Virginia, the Third Circuit expressly refused to apply Hallstrom's strict approach to regulatory notice requirements, noting that "[t]he Supreme Court's focus in Hallstrom was on the timing of the notice, not on its contents" and that "the Court in Hallstrom saw no need even to refer to the regulation." [FN252] Instead, the court adopted what might be termed an "overall sufficiency" approach, emphasizing that "we must consider whether [plaintiffs'] notice letter served the purpose that Congress intended: To provide the recipient with effective, as well as timely, notice." [FN253] The Third Circuit concluded that "the content of the notice must be adequate for the recipients of the notice to identifythe basis for the citizen's complaint." [FN254] However, "the citizen is not required to list every specific aspect or detail of every alleged violation. Nor is the citizen required to describe every ramification of a violation." [FN255]

Several other courts have embraced a liberal approach to the sufficiency of notice contents. The Seventh Circuit, for instance, recently faced a Clean Water Act citizen suit where the defendant's two water quality permits each governed discharges at several ***145** outfalls. [FN256] Among other violations, the citizen plaintiffs had given notice of specific violations at MMDF outfall 3, but, in the course of the ensuing litigation, the defendant abandoned outfall 3 and rerouted the discharges to MMSD outfall 4. [FN257] The defendant then challenged the sufficiency of notice on the ground that the plaintiffs had never given notice of problems at MMSD outfall 4.

Although the district court accepted the argument and dismissed claims based on the rerouted discharge, [FN258] the Seventh Circuit reversed, adopting a pragmatic rather than a technical approach to notice. "In practical terms, the notice must be sufficiently specific to inform the alleged violator about what it is doing wrong, so that it will know what corrective actions will avert a lawsuit." [FN259] The court explicitly rejected defendant's argument that, under Hallstrom, "notice must specifically identify the point source from which the allegedly offending discharge is emerging before the Act's jurisdictional requirements will be met." [FN260] Noting that Hallstrom "said nothing about the content of the notice," the Seventh Circuit found that the defendant's actions clearly proved that the notice had been sufficient:

The key to notice is to give the accused company the opportunity to correct the problem. Here, there is no question that Atlantic's April 1989 notice sufficiently informed Stroh about Atlantic's claim that its handling of the die casting wastewater did not comply with the statute. Stroh promptly secured a permit that covered exactly these discharges, under the outfall numbered 3 in the first MMSD permit. It began construction of a treatment facility, which it completed in June of 1990 (at least a month after the amended complaint was filed). It then re-routed the very same die casting wastewater to its newly numbered outfall 4. Moreover, it admitted in its May 29, 1990 letter to the MMSD that it was not in compliance and attempted to explain why it missed its deadline for its wastewater treatment system. These are not the actions of a company that has not received enough information for purposes of the statutory notice provisions of the Act. [FN261]

The Eastern District of Texas and Colorado District Court ***146** have also recently embraced this liberal approach. The Texas court followed the Third Circuit's decision in Hercules to conclude that "a strict application of the notice requirement can be procedurally unwieldy for litigants and courts." [FN262] Also following the Third Circuit, the Colorado District Court dismissed arguments for increased detail in a Clean Air Act notice, explicitly refusing to interpret Hallstrom's strict compliance requirement as heightening the standard of specificity for the contents of citizen suit notice. [FN263]

In contrast, in light of Hallstrom's strict compliance standard, the Ninth Circuit and several district courts have imposed heightened specificity standards on regulatory notice requirements. For example, in Washington Trout v. McCain Foods, Inc., [FN264] the Ninth Circuit interpreted Hallstrom as requiring strict construction of the notice regulations as well as the statutory sixty-day waiting period. [FN265] According to that court:

The issue in Hallstrom was whether the notice was sufficient under the regulation's mandate--whether the notice requirement should be strictly construed or liberally applied by the district courts. The Court held the notice requirement under the regulations was to be strictly construed. Therefore, the Hallstrom decision does not stand for the fact that without any notice, there could be no suit. Rather, the Court held that the notice requirements set forth in the regulation must be satisfied before the case may be heard in federal district court. [FN266]

The strict construction approach often leads courts to judge the sufficiency of notice on a requirement-by-requirement basis. For example, in an admittedly extreme case, the Western District of New York determined that pro se citizens had not given proper notice under the Clean Water Act by examining each requirement in the notice regulation. [FN267] The court noted that: (1) "[a]s to the individual and corporate defendants, service was not ***147** made by certified mail or personal service"; [FN268] (2) service on the deputy town clerk was not service "by registered mail or personal service upon the 'head of [the] agency' alleged to be responsible for the violation"; [FN269] (3) service on the local health officer by regular mail was inadequate, especially because "there is no evidence or allegation that the town's health department was responsible for the alleged violation"; [FN270] (4) "most of the defendants in this case were never named in the notices or letters"; [FN271] and (5) "[t]he notices also did not all meet the requirement that they contain 'the full name, address, and telephone number of the person giving notice." ' [FN272]

Nevertheless, the court in this 1992 case also recognized that the letters' problems were larger than these technicalities. The court suggested that compliance did not have to be equally strict for all requirements:

Obviously, not all of these defects are equally serious. In view of [the plaintiff's] pro se status when he wrote to the government agencies seeking help, some of the more technical departures from the Act's requirements could perhaps be forgiven if the notice requirements as a whole had been substantially complied with. The problem is that they were not. Defendants were simply not apprised of any allegation that they had violated CWA. Most of the defendants, in fact, were not apprised of anything at all, since they never received a notice of any kind. [FN273]

Three years later, however, the court affirmed its requirement-by- requirement, strict construction approach, by dismissing a suit brought under the Clean Air and Clean Water Acts. The court reasoned that "[t]he notice letters, sent to Defendants' counsel, do not satisfy the requirement that written notice be served on the alleged violator by certified mail or personal service" and "none of the letters include 'sufficient information to allow the recipient to identify the specific standard, limitation, or order' which has allegedly been violated." [FN274]

***148** In addition, the strict compliance approach has prompted some courts to demand far more specificity for notice content than courts following the more liberal sufficiency approach. As the following discussions show, these differences in approach have led to significant differences in what can qualify as "sufficient" notice.

3. The Sufficiency of Notice Contents: Dates of Violation

The liberal and strict approaches to judging a notice letter's sufficiency contrast sharply when a defendant raises the issue of whether the notice gives sufficient information regarding the dates of violation. In particular, the issue is whether the person giving notice can simply allege that a particular kind of violation was continuous or nearly continuous from a given date or whether the citizen must instead provide exact dates for each violation often depends on the court's view of Hallstrom.

For example, the Southern District of West Virginia, which has clearly rejected Hallstrom's strict construction for the notice regulations, [FN275] concluded in a 1991 Clean Water Act case that notice was sufficient when it stated that the defendant "discharged pollutants daily from at least June, 1977, through the present." [FN276] Even though the plaintiff later conceded that the discharges did not in fact start until somewhere between April 1982 and April 1983, the court rejected the defendant's argument that the notice letter had been over-inclusive, concluding that "the dates provided in the January 29, 1990, letter satisfy the notice requirements." [FN277] In addition, the Colorado District Court, which recently followed Hercules' liberality, [FN278] wholeheartedly accepted notice that "violations had occurred 'for at least the past five years' and continued to occur" as sufficient allegations in a ***149** Clean Air Act citizen suit. [FN279] However, the Eastern District of Pennsylvania, which has imposed Hallstrom's strict compliance on the naming of parties, found notice "barely sufficient" when plaintiffs alleged that "violations occurred repeatedly between 1990 and 1994 and are continuing." [FN280]

However, strict compliance courts prefer and sometimes demand that citizens specify exact dates. In the Southern District of New York, for example, a notice letter that identifies violations simply as "continuing" does not "identify the dates on which the alleged violations occurred." [FN281] While the court acknowledged that the plaintiff was "correct in asserting that, under the literal language of the EPA regulation, the specific dates need not themselves be included in the letter," [FN282] it required "at a bare minimum[,] some reasonably specific indication of the time-frame when the alleged violations occurred . . . ." [FN283] More emphatically, the Eastern District of California, which rejected Hercules, [FN284] required that "the date or dates of the violation . . . be stated with

some specificity. Ideally, [the] plaintiff will identify the precise date. But at the least [[the] plaintiff should give a range as to date that is reasonably limited." [FN285] Under this standard, notice was sufficient when it specified three exact dates of violation but was insufficient when the plaintiff stated that the defendant had violated its Clean Water Act permit "'[f]or the previous five years on hundreds of occasions." ' [FN286]

***150** 4. The Sufficiency of Notice Contents: Sufficient Information Regarding the Violation

The biggest post-Hallstrom battles have been over the adequacy of the citizen's description of the alleged violation, particularly in terms of how clearly a citizen must identify the standard, limitation, or order alleged to have been violated. As in pre-Hallstrom cases, courts will not allow claims when the notice regarding the alleged violation is completely silent. Thus, when nothing in the plaintiff's "notice" alerted the defendant that a Clean Water Act violation was alleged, the Western District of New York concluded that the plaintiff had not complied with the regulatory notice requirement. [FN287] Similarly, the Eastern District of Texas reasoned that "[a] plaintiff must do more than state that they [sic] intend to sue violator for 'all violations of permit X." ' [FN288] It thus dismissed Clean Water Act claims that the defendant had violated the temperature parameter in its permit when the plaintiffs had never mentioned temperature in their notice letters. [FN289]

In addition, courts agree that citizens clearly give sufficient notice of the violation if they actually identify a specific statutory, regulatory, or permit provision and explain how the defendant has violated that provision. For example, when citizens sued the State of Louisiana alleging that it had violated the Lead Contamination Control Act, which amended the Safe Drinking Water Act, they quoted and cited two statutory provisions in their notice letter and stated that "[t]he State of Louisiana has failed to distribute the EPA list of water coolers to schools and day care facilities" and that "[t]he State of Louisiana has also failed to implement a remedial action program." [FN290] In the Eastern District of Louisiana's opinion, "the defendants had more than sufficient information to identify the specific requirements allegedly violated," and it held that the plaintiffs had clearly complied with the notice regulation. [FN291]

***151** However, any hint of potential error or confusion can give rise to a battle over the notice letter's sufficiency. Although early cases tended to be generous in reading notice letters, more recent cases have become more demanding. For example, in a 1991 case, the plaintiff had given notice under the Clean Water Act that defendant "violated and continues to violate 'an effluent standard or limitation," ' and that defendant discharged pollutants and fill material into waters of the United States even though it "'does not . . . and has never had a permit to discharge." ' [FN292] The defendant objected on the grounds that the plaintiff had not adequately identified the effluent standard or limitation. However, the Southern District of West Virginia was not convinced. Noting that the Clean Water Act prohibits any discharge of pollutants without a permit, the court concluded that "by alleging in the letter that [defendant] discharged pollutants and fill materials without a permit, [plaintiff] has alleged that [defendant] has and is violating the effluent limitation of zero" found in the Act's general prohibition. [FN293]

Similarly, in a 1993 Clean Water Act suit alleging that a developer illegally discharged pollutants and fill material into Lake Yelenich, the developer challenged the notice on the ground that it never mentioned the lake. [FN294] Concluding that the notice regulation's language did not require the plaintiff to specifically refer to the filling of Lake Yelenich, the Northern District of Illinois rested heavily on the fact that the plaintiff had given notice that the illegal activities had taken place "on the properties owned and controlled by" the developer. [FN295] In the court's opinion:

For this court to rule that Defendants were not given sufficient notice of the violations involving Lake Yelenich would require the court to defy its own common sense. The Defendants' ***152** property borders Lake Yelenich, the vegetation and wildlife surround Lake Yelenich, the activities took place along the shores of Lake Yelenich, and the EPA required Defendants to restore the property on the shores of Lake Yelenich. . . . The navigable waters can only be referring to the waters of Lake Yelenich. Because the notice specifically stated that the violations occurred on property owned or "controlled" by Defendants, it is only reasonable that Defendants were aware that the Clean Water Act violations may also concern their control over Lake Yelenich. [FN296]

More recent cases, however, indicate that federal courts increasingly require citizens to identify the standard, limitation, or order involved with particularity. In 1995, for instance, the Eastern District of Pennsylvania held that notice was sufficient under the Clean Air Act regulations when the notice letter stated that defendant "'violated [t]he Clean Air Act by repeatedly conducting renovations . . . in violation of the National Emission Standard for

Asbestos" '; but only because, "the reference to renovations brings one to the only section in NESA that applies to renovations, 40 C.F.R. § 61.145." [FN297] That same year, the Eastern District of California emphasized that each type of Clean Water Act violation must be mentioned in the notice letter, even if the different violations all arise from the same incident. "[I]t will not suffice to give notice of a monitoring violation by giving notice of an effluent violation." [FN298]

In 1996, in Frilling v. Village of Anna, [FN299] the Southern District of Ohio followed this trend so far that it obliterated the notice regulations' "sufficient information" language. Instead, the court relied on Hallstrom to require citizens to specifically identify the standard or limitation at issue in their notice letters. In this Clean Water Act citizen suit, plaintiffs sued defendant Honda largely to correct problems resulting from Honda's waste discharges into the Village of Anna's publicly-owned treatment works (POTW). Honda's discharges into the POTW were regulated through an indirect discharge permit issued pursuant to the Clean Water Act. Honda also had a different kind of Clean Water Act permit, a National Pollutant Discharge Elimination ***153** System (NPDES) permit, for its unrelated direct discharges into a nearby creek. [FN300] Plaintiffs' notice letter alleged that Honda was in violation of its NPDES permit '"because of the excessive amounts of effluent . . . that Honda routinely discharges into the Village's waste treatment facility, and the Village's inability to adjust to the type of effluent loads that Honda is discharging." ' [FN301]

The court acknowledged that plaintiffs' "intent to sue Defendant Honda for its discharges into the Village's POTW arguably can . . . be inferred from various passages in the letter." [FN302] However, noting that the plaintiffs identified the wrong permit in their letter and never mentioned Honda's indirect discharge permit or two Clean Water Act regulations that formed the basis of three claims, the court concluded that plaintiffs "fail[ed] to identify the specific standard(s), limitation(s), or order(s) alleged to have been violated." [FN303] The issue remaining was

[W]hether Plaintiffs must strictly comply with [the Clean Water Act] statute and regulations, by clearly identifying the specific standard, limitation, or order alleged to have been violated, or whether it is sufficient to give 'notice in fact,' which provides sufficient information to allow the recipient to identify the specific standard, limitation, or order alleged to have been violated, even though the notice does not itself clearly make that identification. [FN304]

Therefore, the court was essentially deciding whether the notice regulations mean what they say: that citizens need only provide "sufficient information," or whether Hallstrom had glossed the regulations so that they required citizens to actually identify the standards at issue. According to the Southern District of Ohio, Hallstrom required the stricter view, [FN305] and it granted summary judgment to Honda on the indirect discharge claims.

This trend toward particularity is not absolute. In 1997, the Colorado District Court explicitly held that the Clean Air Act notice regulations do not require citizens "to cite the specific standard, limitation, or order it alleges defendants violated." [FN306] Thus, notice in that Clean Air Act case was sufficient when plaintiff's ***154** notice letter "informed its recipients of plaintiff's belief that defendants had violated and were in violation of: (1) the standard governing opacity percentages; (2) the standard governing sulfur-dioxide emissions; (3) the standard establishing good air- pollution control practices; and (4) the standard governing the monitoring of air emissions." [FN307] "From plaintiff's allegations, the recipients could determine the specific standards, limitations, and orders at issue." [FN308] Similarly, in 1999, the Kansas District Court explicitly followed both the Seventh Circuit and Hercules to uphold notice in a Clean Air Act case even though that notice did not identify specific pollutants at issue. [FN309]

Nevertheless, since the Hallstrom decision, defendants have increasingly turned to the EPA's notice regulations as a means of dismissing environmental citizen suits against them, and courts have been increasingly willing to impose a strict informational burden on citizen notice. The pre-Hallstrom touchstones for the adequacy of notice, actual knowledge and an ability to respond, are gone. Instead, plaintiffs and defendants battle over the definition of "sufficient information." Given decisions like Frilling v. Village of Anna, citizens wishing to safeguard future lawsuits from dismissals on notice technicalities have little choice but to provide all the details they can.

Endangered Species Act cases since Hallstrom, in which notice regulations do not play a part, present a revealing contrast to cases involving EPA notice regulations. Unlike most environmental citizen suit provisions, the Endangered Species Act does not require notice to be given "in such manner as the Secretary shall by regulation prescribe"; instead, the statute merely states that "[n]o action may be commenced . . . prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator . . . ." [FN310] The "Secretary" can be the Secretary of the Interior, the Secretary of Commerce, or the Secretary of Agriculture, [FN311]

depending on whether terrestrial, marine, or plant species, respectively, are involved. For animals, ***155** the Secretaries of the Interior and of Commerce have delegated their authority to the federal Fish and Wildlife Service and the National Marine Fisheries Service respectively. [FN312] Neither agency has promulgated notice regulations.

Post-Hallstrom Endangered Species Act notice cases follow Hallstrom's strict compliance if a statutory requirement is at issue. Thus, even the Third Circuit felt compelled to dismiss an Endangered Species Act case when the plaintiff failed to give notice to the correct Secretary. [FN313]

However, when the challenge is about notice contents, courts generally have continued to use an actual knowledge or overall sufficiency standard. Thus, in 1996 the Ninth Circuit held that notice was sufficient for a claim under section 7 of the Act, even though most of the five-page letter discussed violations under section 9, which prohibits, inter alia, the "taking" of endangered species. [FN314] In contrast, section 7 requires federal agencies to consult with Fish and Wildlife or NMFS to avoid jeopardizing endangered species. [FN315] The Ninth Circuit noted that the letter referred to both section 7 and section 9.

The section 7 prohibition . . . does not limit the scope of the letter to a notice of suit only under section 7; nor does the reference to the section 9 prohibition limit the scope of the letter to a notice of suit only under section 9. The letter clearly gives notice of an intent to sue under the ESA. Although section 7 was referenced only in one part of the letter, the letter as a whole provided notice sufficient to afford the opportunity to rectify the asserted ESA violations. This was sufficient to satisfy the jurisdictional requirement of notice ***156** under 16 U.S.C. § 1540(g)(2)(A)(i). [FN316]

Similarly, the Arizona District Court held in 1997 that "the language of the Notice is 'sufficiently broad' to encompass stocking of the reservoir with non- native fish as an element of Plaintiff's complaint under the ESA" when citizens gave notice under the Endangered Species Act that stocking non-native fish was a threat to the Little Colorado River Spinedace and cited sections 7 and 9 of the Act in other contexts. [FN317] Finally, the D.C. Circuit upheld Endangered Species Act notice in the form of comments to the Fish and Wildlife Service's decision to expand hunting in wildlife refuges when the plaintiff had stated in those comments that "'[t]hese comments constitute notice of our intent to file suit under the above acts if the proposed hunting programs and special regulations are not withdrawn." ' [FN318]

Procedurally, courts do not feel absolutely compelled to dismiss an ESA case even when the notice contents are insufficient. Thus, when environmental groups brought suit to challenge Forest Service Road development along the Salmon River, the Idaho District Court proceeded to the merits of summary judgment even though it deemed the plaintiffs' notice letter inadequate because the letter challenged NMFS for its failure to prepare a biological opinion, but the plaintiffs were arguing in court against the Biological Opinion that NMFS prepared. Because the motions for summary judgment were "voluminously briefed" and the defendant would not be prejudiced by proceeding to the merits, the court did not dismiss the claim. [FN319]

Thus, courts and defendants have used Hallstrom to read the EPA's regulations strictly, scrutinizing the contents of notice ***157** more carefully than when no notice regulations exist to govern the citizen suit. However, under Hallstrom, notice must be given sixty days before a plaintiff can file a complaint; in other words, two months before the eventual plaintiffs have any right to discovery. In many cases that are governed by the EPA's regulations, defendants have copies of their permits and often must file monitoring reports with a state or federal agency. In turn, state and federal agencies issue the permits and receive the reports. Citizens, however, are out of this informational loop, and while some of the information is available through the Federal Freedom of Information Act [FN320] or state equivalents, other information, such as testing on the future defendant's property, is not. Occasionally, courts have kept this information-access disparity in mind, as the Third Circuit did in Hercules. [FN321] More often, courts have ignored both Congress' and the EPA's desire not to overly burden the plaintiff. "Sufficient information" can thus be the only check on the demand for information in the notice letter, while defendants wield Hallstrom as a suit- destroying sword. No court has yet viewed the notice requirement from the other side, as a pleading problem.

II

Citizen Suit Notice and Notice Pleading

A. Citizen Suit Notice as a Pleading Issue

Practically and legally, citizen suit notice is a pleading issue. At a minimum, failure to comply with the notice requirements results in the dismissal of non-noticed claims in the subsequent suit; noncompliance can easily require the court to dismiss the entire suit. At the same time, there is no way for citizens to pre-test the notice before suit. Instead, the most common means of testing the notice is a Rule 12(b) motion to dismiss, [FN322] normally ***158** used to test the complaint. In essence, therefore, the notice requirement creates a two-step pleading process for environmental citizen plaintiffs, and defendants can challenge two documents, the notice and the complaint, at the Rule 12 stage of federal litigation. [FN323]

Notice also determines the scope of the complaint by defining the number and types of claims that a plaintiff can assert. As a practical matter, neither the citizen's access to information nor the alleged violator's violations necessarily stop once notice is given. Thus, even when a citizen suit plaintiff has clearly identified specific types of violations that occurred on specific dates, questions still arise regarding what a citizen can do about violations that occur between the date of notice and the filing of the ***159** complaint, violations that occur after the complaint has been filed, and violations that occurred before the notice letter but that the citizen discovered only after sending the notice.

Hercules is the leading circuit court case discussing the relationship between notice and after-discovered or after-occurring violations. As has been discussed, the Third Circuit takes a fairly liberal approach toward judging the sufficiency of notice content, and it extended this liberality into the scope of notice. In Hercules, a Clean Water Act suit, the plaintiffs originally gave notice of sixty-eight discharge violations occurring between April 1985 and February 1989. [FN324] The plaintiffs alleged that Hercules had violated its permit conditions "for the parameters of biological oxygen demand, total residual chlorine, chemical oxygen demand, total suspended solids, phenol, fecal coliform, and bioassay at outfall 001 and the parameters of pH, phenol, chemical oxygen demand, and total suspended solids at outfall 002." [FN325] The letter did not allege any monitoring, reporting, or recordkeeping violations. [FN326] Plaintiffs waited the requisite sixty days, then filed suit, attaching a list of eighty-seven discharge violations to their complaint, omitting several of the original noticed violations and including over thirty new ones. [FN327] "[A] majority of the new violations pre-dated the [60- day] notice letter; the remainder post-dated it." [FN328] The plaintiffs continued to supplement their list of violations, so that by the time of summary judgment they were alleging "114 discharge violations, 328 monitoring violations, 58 reporting violations, and 228 recordkeeping violations." [FN329] However, the plaintiffs never sent a new notice letter.

The district court granted Hercules summary judgment as "to all monitoring, reporting and recordkeeping violations" [FN330] because "the notice letter did not notify Hercules, the EPA, or the State of plaintiffs' intent to sue for monitoring, reporting, and recordkeeping violations . . . ." [FN331] The court then divided the alleged discharge violations into three categories: "(1) discharge violations included in both the notice letter and the final list; (2) ***160** pre-complaint discharge violations not included in the notice letter but included in the final list; and (3) post-complaint discharge violations included in the final list." [FN332] Hercules won summary judgment for category two, while plaintiffs won summary judgment only for categories one and three. [FN333]

The Third Circuit affirmed summary judgment for the plaintiffs, but reversed for defendant. It rejected the district court's strict construction of the notice regulations, [FN334] concluding:

Under the district court's construction, the burden is placed on the citizen to identify not only the specific standard, limitation, or order alleged to have been violated but also the "activity," i.e., any aspect of tracking and recording a pollutant discharge that may constitute a violation. The district court also placed the burden on the citizen to identify every pre-complaint date on which there was an excess discharge of a designated pollutant.

While there is no doubt that such detailed information is helpful to the recipient of a notice letter in identifying the basis for the citizen-suit, such specificity is not mandated by the regulation. The regulation does not require that the citizen identify every detail of a violation. [FN335]

Instead, the regulation meant what it said: the citizen need only "provide enough information to enable the recipient[s] . . . to identify the specific effluent discharge limitation that has been violated, including the parameter violated, the date of the violation, the outfall at which it occurred, and the person or persons involved." [FN336]

Next, the court concluded that notice of a discharge violation was notice of any associated monitoring, reporting,

or recordkeeping violations, "because a permit violation occurs through an excess discharge of a pollutant into the water and because compliance with a permit limitation is tracked through monitoring, reporting, and recordkeeping . . . ." [FN337] As such, "[o]nce the discharge violation is noticed, any subsequently discovered monitoring, reporting, or recordkeeping violation that is directly related to the discharge violation may be included in the citizen-suit." [FN338]

***161** Similarly, the notice of some pre-notice violations of one parameter is sufficient information to allow the notice recipient to find other violations that occurred at about the same time. "For example, if a permit holder has discharged pollutant 'X' in excess of the permitted effluent limit five times in a month but the citizen has learned only of four violations, the citizen will give notice of the four violations of which the citizen then has knowledge but should be able to include the fifth violation in the suit when it is discovered." [FN339] The Third Circuit emphasized that both the enforcement agencies and the violator have access to the violator's Daily Monitoring Reports (DMRs) and could "with relative ease, check for other discharge violations of the same type." [FN340]

Finally, the Third Circuit concluded that notice covers post-complaint violations of the same type, relying heavily on the Supreme Court's 1987 decision in Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation. [FN341] In Gwaltney, the Court strictly construed language in the Clean Water Act's citizen suit provision that citizens could sue persons alleged "to be in violation" of that Act to hold that federal courts have jurisdiction over these suits only if "citizen-plaintiffs allege a state of either continuous or intermittent violation--that is, a reasonable likelihood that a past polluter will continue to pollute in the future." [FN342] Given Gwaltney's holding and Hallstrom's strict interpretation of the sixty-day waiting period, the Third Circuit in Hercules concluded that "it is foreseeable that a complaint will include allegations of ***162** more recent violations in an effort to establish 'continuous or intermittent violations." ' [FN343]

In the Third Circuit's view, therefore, a notice letter that adequately identifies a particular violation also covers: (1) all discharge, monitoring, reporting, and recordkeeping violations directly related to the same episode; (2) additional violations of the same type "occurring during and after the period covered by the notice letter"; and (3) post-complaint violations "of the same type as a violation included in the notice letter (same parameter, same outfall)." [FN344] Not all federal courts have been so lenient. In another Clean Water Act suit, the Eastern District of California flatly rejected Hercules, concluding that "it will not suffice to give notice of a monitoring violation by giving notice of an effluent violation. The two violations are distinct and plaintiff must give notice of each." [FN345] The court concluded that precise notice was necessary to fulfill the purposes of notice:

When the notice is precise, sixty days is none too much time for an agency to resolve on a course of action and take necessary steps whether to settle the matter or bring an enforcement action. But if the notice is imprecise, and requires the agency to develop on its own what the scope of the alleged violations are, then it becomes entirely impractical for the notice provision to fulfill its purpose in such a short time period.

The language of the regulation does not suggest that the notice may be good enough if it generally orients the agency or violator as to the type of violation. . . . [T]he recipient of the notice must understand from the notice what the citizen is alleging--not what the citizen could allege if the citizen knew more or cared about other possible transgressions. [FN346]

Nor have other circuits been willing to extend the Third Circuit's "same violation" reasoning to other acts. For example, the Eighth Circuit dismissed a Clean Air Act citizen suit alleging that a landfill/compost site exceeded allowable odor levels when the citizen plaintiffs failed to include three test results in their notice letter. [FN347] The citizens had included four tests from January 31, 1992 and March 18, 1992, that showed that the defendant's landfill ***163** gave off odors exceeding one odor unit. The test results would have shown violations of the landfill's permit if the tests been taken "in a residential, recreational, institutional, retail sales, hotel, or educational zone." [FN348] However, the tests took place in "light industrial" and "highway commercial" zones, which required two odor units before a violation occurred. [FN349]

The Eighth Circuit upheld the district court's grant of summary judgment to the defendant even though the plaintiffs offered three additional test results from March 18, 1992 and March 26, 1992, which reflected 3.16, 2.37, and 2.05 odor units in a "light industrial" zone. These results proved that the defendant had violated its permit at least three times. According to the Eighth Circuit, the plaintiffs' notice letter, which had not included these tests results, was simply inadequate under Hallstrom, even though plaintiffs asserted that the defendant was fully aware of those test results. [FN350]

The Sixth Circuit also refused to bring subsequent violations of the same type within the scope of a notice letter. In an EPCRA suit, the plaintiff had given notice that the defendant failed to file a certain type of required form for the years 1987 through 1990. [FN351] However, when it filed suit the plaintiff's suit alleged that the defendant failed to file the form from 1988 to 1991. [FN352] Citing Hallstrom, the Sixth Circuit concluded that "the district court lacked jurisdiction over the alleged 1991 violation because [plaintiff] failed to provide adequate pre-suit notice of that violation as required by EPCRA," even though the notice letter stated that defendant "may also be responsible for violations not yet known to [plaintiff] of other EPCRA reporting requirements." [FN353]

Depending on the circuit, therefore, a citizen's notice letter may support numerous other claims beyond those expressly noticed. However, the letter may exclude identical violations taking ***164** place a month or year later despite the plaintiff's jurisdictional burden to allege in good faith that violations are continuous or intermittent. Either way, the sufficiency of the complaint is intimately tied to the contents and sufficiency of the notice.

In a very direct and real sense, therefore, the sufficiency of citizen suit notice is a pleading issue. Nevertheless, the connection to pleading and particularly to pleading standards has gone largely unrecognized because federal courts generally address notice issues solely in the context of the citizen-suit statutory and regulatory notice provisions. Given the increasing strictness of courts regarding citizen suit notice after Hallstrom, there is a threat that standards for notice in a citizen suit will increasingly diverge from federal courts' notice pleading standard and place a greater burden on citizens giving notice than plaintiffs filing suit are required to meet.

B. The Notice Pleading Standard under Rule 8

1. In General

With the enactment of the Federal Rules of Civil Procedure in 1938, federal courts became "notice pleading" courts. Rule 8(a) sets the standard for the contents of any pleading:

A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. [FN354]

A complaint's sufficiency can be challenged for lack of any one of the three requirements. [FN355] However, in the context of environmental citizen suit notice, the most common challenges to federal complaints are motions to dismiss for lack of subject matter jurisdiction and failure to state a claim.

In a series of cases in the mid-1950s, the U.S. Supreme Court gave some general guidelines about when a complaint was sufficient ***165** to survive a Rule 12(b)(6) motion for failure to state a claim. In a 1954 Sherman Act decision, United States v. Employing Plasterers Ass'n of Chicago, [FN356] the Court held that "where a bona fide complaint is filed that charges every element necessary to recover, summary dismissal of a civil case for failure to set out evidential facts can seldom be justified." [FN357] According to the Court, if the defendant felt that it needed more facts, it could always use Rule 12(e) to get them. [FN358]

In 1957, the Court also emphasized an element-oriented approach in another Sherman Act case, Radovich v. National Football League. [FN359] Re-adopting its pre-Federal Rules test for Sherman Act complaints, the Court concluded that "[t]he test as to sufficiency . . . is whether 'the claim is wholly frivolous." ' [FN360] Under this standard, the Sherman Act plaintiff only needed to plead an unreasonable restraint of trade that violated the Act and that the plaintiff suffered injury as a result. [FN361] The statute itself was the model for pleading, and in the face of a statutory congressional policy "this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws." [FN362]

However, not until its decision in Conley v. Gibson [FN363] which occurred later in 1957, did the Supreme Court enunciate general principles for federal pleading. First, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." [FN364] The Court further emphasized that all that was required was fair notice:

[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice ***166** of what the plaintiff's claim is and the grounds upon which it rests. . . . Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. . . . The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. [FN365]

Under this standard, the court had no trouble concluding that the plaintiffs, African-American railway workers seeking to ensure that their collective bargaining agent represented them fairly, adequately stated a claim under the Railway Labor Act. The complaint stated that plaintiffs were railroad employees represented by a union; that the union had a contract with the railroad to protect employees from discharge and loss of seniority; that the railroad purportedly abolished forty-five jobs held by blacks in May 1954; that the railroad did not abolish the jobs but filled the positions with white workers; and that the union did nothing to protect its black members in accordance with a plan of discrimination that violated the Act. [FN366]

Conley v. Gibson continues to define the standard for notice pleading, and federal courts continue to cite that case when determining the adequacy of pleadings, even though most courts have realized that, as a practical matter, both courts and defendants need certain facts even before discovery. Federal courts have continued to emphasize "notice" over complete disclosure in pleading, and the Supreme Court emphasized in 1974 that review of pleadings is limited:

When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether the plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that recovery is very remote and unlikely but that is not the test. [FN367]

Despite these pronouncements regarding Rule 8's liberality, some courts imposed heightened pleading requirements in certain ***167** kinds of cases, [FN368] such as civil rights cases under 42 U.S.C. § 1983 [FN369] and CERCLA actions. [FN370] In 1993, the Supreme Court again emphasized that notice pleading was still the standard in Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit. [FN371] Plaintiffs in this section 1983 suit appealed the Fifth Circuit's dismissal of their case for failure to state a claim. The Fifth Circuit had adopted a standard of pleading that "'[i]n cases against governmental officials involving the likely defense of immunity . . . the plaintiff's complaint [must] state with factual detail and particularity the basis for the claim which necessarily includes why the defendant-official cannot . . . maintain the defense of immunity." ' [FN372]

The Supreme Court found it "impossible to square" the Fifth Circuit's pleading requirement "with the liberal system of notice pleading set up by the Federal Rules." [FN373] Citing to Conley v. Gibson, the Court emphasized that Rule 8 "meant what it said." [FN374] Only when Rule 9(b) explicitly governs, in cases of fraud or mistake, can courts require particularity in pleading. Otherwise, "federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later." [FN375]

The Leatherman court did not expressly generalize its holding beyond section 1983 suits. However, nothing in its notice pleading discussion rests on any particularities of that statute. Instead, ***168** Chief Justice Rehnquist's opinion is based on a "plain meaning" distinction between Rule 8 and Rule 9(b). As such, the Leatherman decision should mean that the notice pleading standard governs complaints in environmental suits. Indeed, in 1993, the Southern District of New York disclaimed its prior decisions requiring heightened pleading for CERCLA litigation by holding that, in light of Leatherman, "a heightened pleading standard does not apply to CERCLA cases." [FN376]

2. Surviving Rule 12(b)(6): Adequate Notice to the Defendant

As Conley indicates, the most common procedural means of testing the sufficiency of a complaint's contents is a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6). [FN377] Post-Conley courts continued to grant these motions, often not because the plaintiff supplied too few facts, but because the plaintiff supplied too many. For instance, in 1959, the Fifth Circuit upheld the district court's dismissal of a negligence case on the basis that the Louisiana worker's compensation law preempted an employee's claim of negligence against his employer.

[FN378] Noting that plaintiff pleaded that "'the said accident was caused by the gross and wanton negligence of the agents and employees of defendant company in failing to provide safeguards,' " [FN379] the court refused to accept the plaintiff's argument that a fraud case existed. Plaintiff's assertion "that there must have been fraud because of Esso's not posting lookouts or informing Hoshman of that fact" was "negligence, not fraud." [FN380] Noting that "the Federal Rules do not require a claimant to set out in detail the facts upon which he bases his claim," the court nevertheless concluded that "when the facts, alleged or assumed within the framework of the complaint, show that the claim is without merit, there is no need to go to trial." [FN381] Other courts have similarly held that over-zealous plaintiffs can plead themselves out of court. [FN382]

***169** For complaints challenged as alleging too few facts, however, the standard under Conley for judging the sufficiency of the complaint is whether the defendant received "fair notice of what the plaintiff's claim is and the grounds upon which it rests." [FN383] Thus, just as citizen suit notice is a pleading issue, pleading is a notice issue.

To ensure adequate notice, and to promote pleading's purpose of facilitating a decision on the merits, [FN384] most circuits tie pleading sufficiency to the elements of the cause of action. As such, a complaint is generally sufficient if it states facts that either establish ***170** directly or allow the defendant and the court to infer each element of the cause of action. [FN385] The plaintiff need not correctly name its legal theory or the statute involved, so long as the defendant is not prejudiced by the omission. [FN386] Nor must the plaintiff ***171** plead evidence [FN387] or anticipate legal defenses. [FN388] However, courts will not act on the basis of facts not alleged, [FN389] nor are bare legal conclusions sufficient. [FN390] Finally, the facts pleaded ***172** must give the defendant notice of both the plaintiff's grievance [FN391] and the relief the plaintiff seeks. [FN392]

Under these principles, a complaint for recovery of a five percent commission was sufficient when it stated that demand and alleged:

In . . . August 1957, plaintiff . . . and defendants entered into an oral agreement whereby . . . defendants employed plaintiff to procure a purchaser . . . . [The] plaintiff was to act as the sole and exclusive agent for . . . [renewable periods of 90 days subject to 30-day notice of cancellation] . . . [and] defendants . . . agreed to refer all prospective purchasers . . . to plaintiff, thus granting to plaintiff the exclusive right to sell the properties . . . and . . . agreed to pay to plaintiff as . . . compensation . . . [5%] of the total consideration to be received by them from any sale or transfer of . . . said business . . . negotiated or procured by plaintiff, . . . defendants or any other person during existence of the exclusive agency aforesaid. [FN393]

More generously, the Seventh Circuit upheld a "somewhat unclear and unspecific" complaint of negligence relating to a river accident when the complaint alleged that the defendants were joint venturers in inner-tubing on the river; "that they 'did jointly control the maintenance and use of' the relevant stretch of the Apple River"; that the plaintiff was a customer when he was injured; that plaintiff used due care for his own safety; and that plaintiff was injured "as a result of the defendants' negligence 'in failing to provide for the care and safety and well-being of their patrons and the general public in their maintenance and use of the Apple River.' " [FN394] The court noted that "[t]he function of the complaint under the federal rules is to notify the defendant of ***173** the plaintiff's claim rather than to detail the evidence which if true would show that the plaintiff ought to win his case." [FN395] The Seventh Circuit concluded that the complaint was sufficient, even though the plaintiff had been injured not while inner-tubing but injured when he hit his head on the bottom. In the court's opinion, the "allegation that the defendants controlled 'safety on the river, and other activities and conditions incident to the use of the Apple River near Somerset, Wisconsin, for purposes of innertubing,' was all the allegation that was necessary to plead a cause of action based on control of the site from which [the plaintiff] dove." [FN396]

Conversely, federal courts will dismiss a complaint, or at least require amendment, [FN397] when the complaint fails to allege facts that would give the defendant notice of a particular claim. For example, when a plaintiff sought only lost profits incurred after the defendant allegedly repudiated a contract, the Third Circuit concluded that the defendant did not receive notice of any claim based on underpayment prior to repudiation and disallowed plaintiff from obtaining those damages. [FN398]

Courts will also dismiss a complaint if the defendant cannot discern what conduct allegedly gives rise to a particular claim. For example, the Seventh Circuit dismissed a conclusory allegation against the federal Department of Health, Education, and Welfare (HEW) when the plaintiff alleged that HEW had violated regulations and statutes but the plaintiff failed to identify those provisions and failed to identify which parts of its "extensive factual

allegations" related to that claim. [FN399] Similarly, when ***174** an antitrust plaintiff's amended complaint alleged violations of antitrust laws regarding the effects of a collective bargaining agreement and only generally averred "that the [defendants] have unlawfully combined and conspired by other means," the Ninth Circuit dismissed the complaint for failure to state a claim because the collective bargaining agreement was not actionable and the other allegations were too "broad and vague" to "adequately inform the [defendants] of the [plaintiffs'] claim of a combination or conspiracy" aside from the collective bargaining agreement. [FN400]

3. Notice Enough to Respond: Sufficiency to Withstand Motions for a More Definite Statement

Besides allowing dismissal for failure to state a claim, Rule 12 allows the sufficiency of pleadings to be tested another way: the motion for a more definite statement. Specifically, "[i]f a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading." [FN401]

Nevertheless, courts have been unwilling to allow defendants to use Rule 12(e) to undermine the notice pleading standard in Rule 8. For example, shortly after the Supreme Court decided Conley v. Gibson, the Fifth Circuit noted that "[i]n view of the great liberality of F.R.Civ.P. 8, permitting notice pleading, it is clearly the policy of the Rules that Rule 12(e) should not be used to frustrate this policy by lightly requiring a plaintiff to amend his complaint which under Rule 8 is sufficient to withstand a motion to dismiss." [FN402] As such, Rule 12(e) is not a substitute for discovery or a means of routinely forcing plaintiffs to disgorge more ***175** facts at the pleading stage than notice pleading requires. [FN403] Instead, "it is directed to the rare case where because of the vagueness or ambiguity of the pleading the answering party will not be able to frame a responsive pleading." [FN404]

Moreover, courts have emphasized that the standard for granting the motion for a more definite statement is whether defendant could form a responsive answer, not whether defendant has all the information it needs for trial. [FN405] Thus, when a complaint alleged negligence and the damages sustained by the negligence "sufficiently to allow defendant to file a responsive answer," the defendant was not entitled to an itemization of plaintiff's medical expenses pursuant to Rule 12(e). [FN406] Similarly, when the Secretary of the Department of Labor sued a hospital for violations of the federal Fair Labor Standards Act, the Fourth Circuit concluded that the hospital's Rule 12(e) motion was inappropriate:

The complaint stated the jurisdictional grounds for the claim, identified the sections of the Act that the hospital had allegedly violated, described the nature of the violations, specified the period of time in which they occurred, and notified the hospital of the relief the Secretary sought. The hospital could rely on its records to admit or deny any of the charges. If the hospital did not know whether some of the Secretary's allegations were true or false, Rule 8(b) would permit it to plead ***176** that it lacked sufficient information to form a belief as to the truth of the allegations and would give this plea the effect of a denial. If the hospital thought that the Secretary lacked facts to support his allegations, it could establish by affidavit its compliance with the law and move for summary judgment under Rule 56. If it wanted to discover the facts on which the Secretary based his claim, it could use the discovery devices of Rules 26 to 37. [FN407]

Nevertheless, federal courts have considered Rule 12(e) motions appropriate when the defendant needs more information to discern whether an affirmative defense is available. For example, when a plaintiff sued state officials in a section 1983 civil rights action alleging that those officials had unlawfully distributed photographs of a child rape victim, the defendants sought to dismiss the case on grounds of absolute immunity. [FN408] However, because "[t]he factual allegation does not reveal the identity of the persons to whom the photographs were allegedly distributed; nor does it reveal the purposes to which the photographs were put after having been distributed," [FN409] the Eleventh Circuit could not determine "whether the alleged distribution of the photographs fell within the class of activities protected by absolute immunity." [FN410] Noting that "[t]he policy underlying the doctrine requires that the defendant be able to seek dismissal of the claims against him as early in the litigation as possible," [FN411] the court concluded that, in this situation, "if the defendant has not yet filed an answer, he may move the district court pursuant to Fed.R.Civ.P. 12(e) for a more definite statement." [FN412]

More recently, the Eleventh Circuit has allowed Rule 12(e) motions in response to "shotgun" pleadings. Facing a complaint that alleged six counts, each of which adopted both an initial twenty-four paragraphs of factual allegations and then all of the factual allegations of every previous count, and each of which concluded that the defendant or defendants named in that count ***177** "violated the due process and equal protection clauses of the Fifth and Fourteenth Amendments to the United States Constitution; 42 U.S.C. Section 1983; Article I, Sections 2 and 9 of

the Constitution of the State of Florida, and Rule 6Hx3:8-28 of the Rules of [Central Florida Community College]," [FN413] the Eleventh Circuit concluded that the only proper response was a Rule 12(e) motion. [FN414] In its opinion:

Anderson's complaint is a perfect example of 'shotgun' pleading in that it is virtually impossible to know which allegations of fact are intended to support which claim(s) for relief. Under the Federal Rules of Civil Procedure, a defendant faced with a complaint such as Anderson's is not expected to frame a responsive pleading. Rather, the defendant is expected to move the court, pursuant to Rule 12(e), to require the plaintiff to file a more definite statement. Where, as here, the plaintiff asserts multiple claims for relief, a more definite statement, if properly drawn, will present each claim for relief in a separate count, as required by Rule 10(b), and with such clarity and precision that the defendant will be able to discern what the plaintiff is claiming and to frame a responsive pleading. [FN415]

Although less vehemently, the Ninth Circuit has also approved Rule 12(e) motions as an appropriate response to long, convoluted complaints. [FN416] Facing, like the Eleventh Circuit, a civil rights action in which the complaint was "argumentative, prolix, replete with redundancy, and largely irrelevant," [FN417] the Ninth Circuit noted that "[d]espite all the pages, requiring a great deal of time for perusal, one cannot determine from the complaint who is being sued, for what relief, and on what theory, with enough detail to guide discovery." [FN418] As such, the complaint provided very little notice to either the defendants or the court:

Prolix, confusing complaints such as the ones plaintiffs filed in this case impose unfair burdens on litigants and judges. As a practical matter, the judge and opposing counsel, in order to perform their responsibilities, cannot use a complaint such as the one plaintiffs filed, and must prepare outlines to determine ***178** who is being sued for what. Defendants are then put at risk that their outline differs from the judge's, that plaintiffs will surprise them with something new at trial which they reasonably did not understand to be in the case at all, and that res judicata effects of settlement or judgment will be different from what they reasonably expected. [FN419]

To the extent, then, that a distinction can be drawn, a complaint can survive a Rule 12(b) motion if it informs the defendant, in fairly general outlines, of the plaintiff's grievance, but Rule 12(e) also entitles the defendant to enough information to actually understand its role in the litigation drama. Specifically, the defendant is permitted enough information to identify its affirmative defenses and to ensure that it, the plaintiff, and the court are reading from the same script.

C. Notice Pleading and Notice Letters: A Comparison

Both environmental notice letters and civil complaints governed by Rule 8 are supposed to give notice to the recipients that the citizen or plaintiff thinks a particular legal problem exists. In addition, the notice letter and the complaint each must provide enough information to allow the recipient to respond appropriately: to fix the alleged violation,to pursue administrative enforcement, or to file an answer and assert affirmative defenses.

Neither courts nor the EPA's notice regulations tie citizen suit notice to notice pleading standards; instead, adequacy is judged by the "sufficient information" standard. Nevertheless, leaving aside the Southern District of Ohio's 1996 notice decision in Frilling, the range of specificity that courts require for citizen suit notice has been roughly comparable to what they impose on complaints. Hercules, for example, would be a liberal decision even under Rule 8. Moreover, debates about how precisely a plaintiff must identify the legal standard at issue are similar for both citizen suit notice and federal complaints. [FN420]

Nevertheless, the Southern District of Ohio's decision in Frilling v. Village of Anna illustrates a disturbing difference in approach. Rule 8 notice pleading is a conscious repudiation of pleading battles based on technicalities. Moreover, when lower courts have tried to be more stringent than the Rule 8 standard, the Supreme Court has repeatedly enforced the liberal pleading ***179** standard, reaffirming notice pleading in a series of decisions from the 1950s through the 1990s.

In contrast, the history of citizen suit notice is a history of courts growing more technical about what qualifies as sufficient notice, reinforced by periodic Supreme Court interpretations. After eliminating savings clause evasions of notice, the Supreme Court eliminated anything less than strict compliance with the sixty-day waiting period and notice to all required entities. Federal courts are now hammering out the meaning of "sufficient information" in the EPA's notice regulations, and if this historical trend continues, citizen suit notice will only grow more technical and

formalistic for the acts those regulations govern.

Viewed in a historical perspective, therefore, the Southern District of Ohio's decision in Frilling is the next step in a decades-long process of constriction, a harbinger of things to come. If courts continue to be willing to impose strict content requirements on notice, standards for citizen suit notice will diverge significantly from the Rule 8 standard, despite the intimate connection between notice and pleading.

It could be argued that the purposes of citizen suit notice demand a different standard than Rule 8, based on any of four premises: (1) Hallstrom and the citizen suit statutes impose a greater burden on citizens than Rule 8 would require; (2) the EPA's regulations require more information than the Rule 8 standard; (3) violators need more information from the notice letter for notice to fulfill its purposes than defendants need from a complaint; or (4) the enforcement agencies need more information than a Rule 8 standard would provide. However, none of these arguments clearly stand up.

Neither Hallstrom nor the environmental statutes require a stricter standard than notice pleading for notice letter contents. As discussed, Hallstrom interprets the statutory notice requirements, requiring citizens to strictly comply with the sixty-day waiting period and to give notice to each of the required recipients. However, all that the EPA-enforced statutes say about contents is that the plaintiff must give notice "of the alleged violation" and "in such manner as the Administrator shall prescribe by regulation." [FN421] If the EPA had chosen to promulgate regulations that expressly required citizens to give notice "that ***180** would meet the standard of Rule 8 of the Federal Rules of Civil Procedure," or equivalent language, citizens clearly both could comply with Hallstrom's literal reading of the notice statutes and write their notice letters with reference to the notice pleading standard.

However, the EPA did not adopt such language, and therefore its regulations arguably require more information and specificity for notice letters than Rule 8 demands for complaints. However, the EPA's content regulations are most reasonably read as simply spelling out what qualifies as adequate notice pleading. First, a notice letter must include "sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated." [FN422] As has been discussed, this language does not mean that the citizen actually has to cite to a statute or regulation. Federal courts judging the sufficiency of complaints have similarly held that plaintiffs do not have to identify their legal theory correctly [FN423] but must supply enough facts "to outline or adumbrate the basis of the claim." [FN424]

Second, the notice letter must include "sufficient information to permit the recipient to identify . . . the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, [and] the location of the alleged violation." [FN425] Federal courts have held that complaints are inadequate when similar information is missing. For example, the Seventh Circuit held that a complaint failed to give fair notice when the "extensive factual allegations" did not specify what conduct related to what count. [FN426] More recently, both the Eleventh and Ninth Circuits have allowed motions for more definite statements when a defendant could not reasonably decipher from the complaint who actually did what to whom where. [FN427]

***181** Third, notice must contain "sufficient information to permit the recipient to identify . . . the date or dates of such violation." [FN428] While few circuit courts have addressed the specific issue of dates, a defendant would be entitled to a Rule 12(e) motion to obtain the date of violation in order to ascertain whether it had a statute of limitations defense. [FN429] Moreover, Rule 9 establishes that "[f]or the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter." [FN430]

Finally, citizen suit notice must include "sufficient information to permit the recipient to identify . . . the full name, address, and telephone number of the person giving notice." [FN431] The Federal Rules require parties filing a complaint to "include the names of all the parties" in the caption [FN432] and require the person signing a pleading to state his or her address and telephone number. [FN433]

Thus, nothing in the EPA's regulations inherently or absolutely require more than Rule 8 notice pleading. Moreover, for the violator and eventual defendant, any deviations between the Rule 8 pleading standard and the standard for citizen suit notice are simply irrational. According to the Supreme Court, the purpose of citizen suit notice vis-a-vis the violator is to give "the alleged violator 'an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit.' " [FN434] Thus, the comparison question becomes: does an alleged violator need more information to fix a violation in sixty days than a defendant in a

federal lawsuit is entitled to in the complaint? [FN435]

If we were setting new standards, we might decide that the citizen ***182** suit notice standard should be higher. After all, a defendant can answer a complaint simply by stating that it "is without knowledge or information sufficient to form a belief as to the truth of an averment," [FN436] while the alleged violator must actually be able to do something. On the other hand, a federal defendant must be able to set forth its affirmative defenses in its answer or risk losing them, [FN437] and, like the complaint, the answer must be based on information obtained "after an inquiry reasonable under the circumstances." [FN438] Like the alleged violator, therefore, the federal defendant must have enough information to reasonably assess the alleged problem and to formulate a defensive response.

Absolute need is not the issue, however, even if it could be properly assessed and compared. A pleading standard already exists; the question is whether alleged violators need more. The answer is "No." Rule 8, as defined and enforced through Rule 12 motion litigation, requires that a plaintiff give a defendant sufficient information to enable the defendant to respond to the allegations asserted: the defendant must receive "fair notice of what the plaintiff's claim is and the grounds upon which it rests." [FN439] Thus, in itself, the Rule 8 standard ensures that the violator can identify the violation and fix it.

In addition, the EPA's notice content regulations are essentially the same for all the environmental statutes that it administers: the Clean Air Act, the Clean Water Act, RCRA, CERCLA, and EPCRA. Some of these statutes, however, allow citizens to sue even if the violations are completely past, [FN440] i.e., even if the violator does manage to correct the violation within sixty days. The EPA's regulations thus indicate that alleged violators do not ***183** require more notice than assured defendants because the same standard of notice suffices whether or not a violator can statutorily avoid later litigation.

In contrast, the role of enforcement agencies is arguably more complex. According to the Supreme Court, "notice allows Government agencies to take responsibility for enforcing environmental regulations, thus obviating the need for citizen suits." [FN441] In particular, "[i]n many cases, an agency may be able to compel compliance through administrative action, thus eliminating the need for any access to the courts." [FN442] Thus, the enforcing agency needs not only to be able to identify the violation and possible remedies but also be able to assess the seriousness of the violation. Moreover, unlike the violator who presumably knows its facility and has immediate access to the problem, the enforcement agency may be unfamiliar with the details of the operation, at least on first screening of the notice letter.

The EPA, however, has not distinguished between a violator's and the agencies' informational needs. Under the regulations and in practice, both get the same notice. Moreover, the two courts that have judged notice sufficiency on the basis of the agencies' "need to know" have reached opposite conclusions. The Eastern District of California found that agencies need precise notice in order to be able to act within the sixty-day waiting period. [FN443] In contrast, the Third Circuit in Hercules emphasized that the enforcement agencies could, "with relative ease," check discharge monitoring reports and other information that the violator had to file with the agency to determine whether it would proceed with its own action. [FN444] Thus, the issue of whether federal enforcement agencies' involvement affects the standard of notice is far from settled.

Given that enforcement agencies often have the alleged violator's records at their fingertips, the Third Circuit probably has the better argument. Moreover, even ignoring this access to information, courts other than the Eastern District of California and the Third Circuit have done little to correlate an agency's ***184** "need to know" with the specificity actually demanded. For example, allegations that a permittee had violated its Clean Water Act permit for the previous five years on hundreds of occasions would seem clearly sufficient to signal the EPA that a significant problem exists. On the other hand, an allegation that violations had occurred for at least the past five years and continued to occur leaves the significance issue far more ambiguous. Nevertheless, the Eastern District of California found the former assertion insufficient [FN445] while the Colorado District Court found the latter clearly sufficient. [FN446]

However, even if the Eastern District of California's conclusion that agencies need more information proves to be correct, courts should not remain blind to the resulting effects on notice pleading in imposing a strict notice standard. As the following discussion makes clear, federal courts cannot use statutory requirements to silently undermine the Federal Rules of Civil Procedure.

III

Superseding the Federal Rules of Civil Procedure

A. In General: Conflict and Congressional Intent

Federal courts recognize that other statutes can supersede the Federal Rules of Civil Procedure on occasion: "There is no contest as to the plenary power of Congress to statutorily supersede any or all of the Rules." [FN447] Nevertheless, such supersession is rare. First, Congress has provided that the Federal Rules of Civil Procedure supersede all conflicting laws. [FN448] Second, courts will try to reconcile statutory provisions that seem to be in conflict with the Federal Rules before they decide that supersession is ***185** necessary. Thus, "unless the congressional intent to do so clearly appears, subsequently enacted statutes ought to be construed to harmonize with the Rules, if feasible." [FN449]

One approach courts use to avoid having statutes supersede the Federal Rules is to find that there is, in fact, no conflict. For example, the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act [FN450] provides that no claim brought under its consumer protection provisions is cognizable "if the amount in controversy is less than the sum or value of $50,000 . . . computed on the basis of all claims determined . . . ." [FN451] Plaintiffs in the Fourth Circuit argued that this provision "creates a 'major new substantive right' of joinder which supersedes that found in Fed.R.Civ.P. 20," [FN452] allowing joinder of plaintiffs without regard to the Rule's requirements that claims "aris[e] out of the same transaction, occurrence, or series of transactions or occurrences" and that there be a question of law or fact in common. [FN453] The court disagreed. "All that is certain from [the Act] is that aggregation of claims is contemplated in some cases; it says nothing about what types of cases." [FN454] Language in the Act's legislative history "suggests that the ordinary rules of joinder should apply in such actions," [FN455] and the provision at issue "is a restriction on the exercise of subject matter jurisdiction, and does not even mention 'joinder." ' [FN456]

Similarly, the Eastern District of Pennsylvania found no conflict between the Hague Convention and the Federal Rules of Civil Procedure when a German defendant sought to evade the rules governing discovery. [FN457] Noting that "[t]he Hague Convention provides standard methods for obtaining evidence located within a foreign state without encroaching upon the sovereignty of that state," the district court nevertheless emphasized that ***186** "[i]ts language is . . . permissive, and not mandatory." [FN458] Moreover, "Article 27 of the Convention specifically states that the Convention 'shall not prevent a Contracting State from . . . permitting by internal law or practice, methods of taking evidence other than those provided for in this Convention." ' [FN459] Therefore, the court found that the Convention did not supersede the Federal Rules governing discovery; instead, "[t]he existence of federal jurisdiction over a foreign entity subjects that entity, like any other litigant, to the provisions of the Federal Rules of Civil Procedure." [FN460]

Plaintiffs in shareholder derivative actions have repeatedly argued that provisions of the Investment Company Act of 1940 [FN461] supersede Rule 23.1, which governs derivative actions by shareholders. [FN462] Rule 23.1 requires a derivative action plaintiff to allege with particularity the efforts that the plaintiff has made "to obtain the action the plaintiff desires from the directors or comparable authority." [FN463] However, some courts have held that in some actions under section 36(b) of the Investment Company Act, the futility of demands on directors will be presumed, [FN464] suggesting that the act supersedes the Rule's requirements. Nevertheless, when a plaintiff in a shareholder derivative action conceded that section 36(b) of the Investment Company Act "does not even arguably conflict with Rule 23.1 insofar as it requires verification of the complaint and an assertion that the action is not brought collusively to confer jurisdiction that otherwise would not have existed," [FN465] the Southern District of New York immediately concluded that "no basis exists for a wholesale rejection ***187** of Rule 23.1 in Section 36(b) cases." [FN466]

The Investment Company Act/Rule 23.1 issue has also demonstrated another means of avoiding a finding that a statute supersedes a Federal Rule: the analysis of congressional intent. When plaintiffs seized on the presumption of futility to avoid complying with Rule 23.1, the Massachusetts District Court noted that the presumption of futility "makes the demand requirement of Rule 23.1 an empty formality" and found "no congressional intent to supersede Rule 23.1 in § 36(b) of the Investment Company Act." [FN467] As it explained:

Although the statute meticulously catalogues a variety of procedural provisions, it is silent on Rule 23.1. When Congress has chosen to modify the application of the rule to a statute, it has generally expressed its intention

clearly. To assume that Congress spoke sub silentio would require strong indicia of legislative intent. Here, the pertinent legislative history, while inconclusive, tends to suggest a concern that Rule 23.1 be applied to the statute with customary vigor. [FN468]

Supersession arguments are often tied to pleading requirements. For example, in United States v. Gustin-Bacon Division, [FN469] the most influential case regarding supersession of the Federal Rules, defendants argued that the Civil Rights Act of 1964 requires detailed, factual pleading. The Tenth Circuit found a lack of congressional intent to supersede Rule 8: [FN470]

The Civil Rights Act of 1964 originated in the House, giving the Equal Employment Opportunity Commission authority to investigate, conciliate and, if necessary, initiate civil actions to gain relief from unlawful employment practices . . . . Although it was pointed out during the debates that the complaint must set forth facts pertaining to such pattern or practice, we are able to find nothing in that statement or any other statement made on the Senate floor which serves to elucidate what was intended by the setting forth facts requirement of the section. But construing § 2000e-6(a) as the trial court interpreted it, is to reinstate a type of fact pleading which was eradicated by the current Federal Rules. Rule 8 of the Federal ***188** Rules of Civil Procedure was originally designed to circumvent the morass caused by the code pleading requirement of pleading facts constituting the cause of action . . . . To reinstate this type of pleading, even in the limited circumstances here involved, is to directly contradict the spirit and purpose of Rule 8(a) and the general concept of modern federal pleading. We find no suggestion in the Civil Rights Act of 1964 nor in the debates prior to its enactment, which supports appellees' contention that Congress intended to require the Attorney General to revert to a detailed pleading of evidentiary matters. [FN471]

As these examples demonstrate, when directly confronted with the issue of whether a given statute supersedes the Federal Rules of Civil Procedure, federal courts generally work very hard not to find supersession but instead to find a way to make the rule and the statute work together. Moreover, when federal courts do find that a statute supersedes a Federal Rule, as will be discussed for CERCLA, courts keep the scope of supersession minimal.

B. Supersession by the Back Door: Jurisdiction versus Procedure in the Suits in Admiralty Act

When courts find no conflict between the Federal Rules and a federal statute by actively harmonizing the provisions at issue or by emphasizing a lack of congressional intent to supersede the Federal Rules, they produce workable analyses of apparent conflicts. Thereafter, parties can both use the statute's substantive provisions and know that the standard procedural requirements will apply in their suits. However, courts have also used a far more disingenuous means of finding no conflict to avoid having a statute supersede the Federal Rules. Instead of acknowledging a real conflict with practical effects on litigation, courts will occasionally decide that the allegedly superseding statute governs jurisdiction, rather than procedure. Hence, courts conclude, no conflict arises between the statute and the Federal Rules. The result is usually a de facto supersession of the Rules, creating uncertainty and confusion regarding the jurisprudence that governs conflicts between the Federal Rules and federal statutes.

The recurring example of disingenuous conflict avoidance is courts' treatment of the Suits in Admiralty Act (SAA), [FN472] which requires a plaintiff to serve the federal government "forthwith." [***189** FN473] As judicially interpreted, the "forthwith" requirement conflicts with the Federal Rules' requirement that service be completed within 120 days of filing the complaint. [FN474] As the Fifth Circuit recently explained the dilemma:

At the time [plaintiff] filed his suit, service of process in suits brought under the SAA was governed by two separate timeliness requirements. Rule 4(j) of the Federal Rules of Civil Procedure required that a plaintiff effect service within 120 days after filing the suit. Fed.R.Civ.P. 4(j) (1993) (current version at Rule 4(m)). Under § 742 of the SAA, however, a plaintiff that has brought suit against the United States under the SAA must effect service of process "forthwith." 46 U.S.C. app. § 742. [FN475]

Because Congress enacted the SAA before the Federal Rules took effect, the conflict was the reverse of what has so far been discussed: do the Federal Rules supersede the previously-existing SAA requirements? Nevertheless, the jurisprudential problem is essentially the same: when faced with a statute that apparently conflicts with one of the Federal Rules, how should courts determine which provision governs the case at hand?

Until recently, courts dodged the "forthwith" conflict by holding that that requirement was jurisdictional. For example, in the Fifth Circuit suit, the plaintiff received an extension of time from the district court to comply with the service requirement under Rule 4(j) and argued that, as a result, "he was exempt from § 742's 'forthwith'

requirement" even though he did not complete service on the United States until 148 days after he filed suit. [FN476] The Fifth Circuit found that the "forthwith" requirement still applied because it was jurisdictional:

In United States v. Holmberg, 19 F.3d 1062 (5th Cir.), cert. denied, ---- U.S. ----, 115 S.Ct. 482, 130 L.Ed.2d 395 (1994), we addressed the question of whether the forthwith service requirement in § 742 is procedural and, thus, superseded by the Federal Rules of Civil Procedure. We held that the requirement of forthwith service is a condition of the government's waiver of sovereign immunity and, therefore, a jurisdictional prerequisite. Id. at 1064-65 . . . . Because § 742's forthwith service requirement is a jurisdictional prerequisite, it is not superseded by the Federal Rules of Civil Procedure and could ***190** not have been modified by Rule 4(j). See Holmberg, 19 F.3d at 1064 (holding that Rule 4(j) does not supersede § 742's forthwith requirement). Thus, the district court's decision to grant [plaintiff] fifteen additional days in which to meet the forthwith service requirement of Rule 4(j) did not affect either the court's subject-matter jurisdiction or [plaintiff's] obligations under § 742. [FN477]

These fine legal distinctions, however, ignore the practical reality that a conflict exists: under the Fifth Circuit's rule, a plaintiff in a SAA case cannot take advantage of the Federal Rules' 120-day period for service of process. Thus, the Fifth Circuit silently allowed the act to supersede Rule 4, skipping the thorough analysis of actual conflict that would have prevented it from disguising this result.

In Henderson v. United States, [FN478] the Supreme Court overturned the Fifth Circuit's SAA analysis exactly because the Fifth Circuit ducked the conflict analysis. In so doing, the Court rejected the kind of legal hair-splitting that the Fifth Circuit relied on, creating a more pragmatic test regarding whether a conflict exists between a statutory provision and a Federal Rule. Addressing the specific question of "whether the Act's 'forthwith' instruction for service of process has been superseded by the Federal Rule," [FN479] the Court first held that "the manner and timing of serving process are generally nonjurisdictional matters of 'procedure' controlled by the Federal Rules." [FN480] As such, the Supreme Court indicated that statutory provisions regarding notice are generally procedural.

Second, the Supreme Court refused to find that no conflict existed. Noting that the SAA's "forthwith" requirement "has remained unchanged since its enactment in 1920, 18 years before the Federal Rules of Civil Procedure became effective," [FN481] the Court refused to harmonize the two statutes by finding that Rule 4's 120-day provision is "only an outer boundary for timely service" ***191** that could be reduced in particular circumstances. [FN482] Instead, the Court decided that 120 days is the minimal time available for service of process in civil actions, and thus Rule 4's regime "conflicts irreconcilably with [the SAA's] service forthwith instruction." [FN483]

The Court next determined that the "forthwith" requirement is predominantly procedural rather than substantive or jurisdictional, and hence subject to supersession by the Federal Rules. As the Court elaborated:

Service of process, we have come to understand, is properly regarded as a matter discrete from a court's jurisdiction to adjudicate a controversy of a particular kind, or against a particular individual or entity. Its essential purpose is auxiliary, a purpose distinct from . . . substantive matters . . .-- who may sue, on what claims, for what relief, within what limitations period. Instead, the core function of service is to supply notice of the pendency of a legal action, in a manner and at a time that affords the defendant a fair opportunity to answer the complaint and present defenses and objections. Seeing service in this light, and in view of the uniform system Rule 4 of the Federal Rules of Civil Procedure provides, we are satisfied that the service "forthwith" provision of Suits in Admiralty Act, 46 U.S.C. App. § 742, has been displaced by Rule 4, and therefore has no current force or effect. [FN484]

Thus, the Court again emphasized that notice in a federal action is a procedural requirement governed by the Federal Rules. However, five justices, two in a concurrence [FN485] and three in the dissent, [FN486] emphasized that issues of sovereign immunity could make a difference. The concurring justices, for instance, stated that some procedural provisions could be jurisdictional. For example, "[i]t assuredly is within the power of Congress to condition its waiver of sovereign immunity upon strict compliance with procedural provisions attached to the waiver, with the result that failure to comply will deprive a court of jurisdiction." [FN487] Their disagreement with the dissenting justices was only over whether Congress had done so in the SAA: the concurring justices did not believe "the legislative scheme here makes the 'forthwith' service ***192** requirement such a condition," [FN488] while the dissenters considered the requirement "a statutory condition on the Government's waiver of its immunity" that "demands strict compliance and delimits the district court's jurisdiction to entertain suits in admiralty against the United States." [FN489]

Henderson leaves open many questions regarding Federal Rule of Civil Procedure conflicts when federal statutes allow plaintiffs to sue the United States: how do plaintiffs and courts distinguish between jurisdictional requirements and ordinary procedures? Can notice requirements ever be jurisdictional? If a federal statute allows suit against both the federal government and private parties, are requirements that are jurisdictional on the basis of the government's waiver of sovereign immunity still jurisdictional if the government is not a party? However, Henderson's basic point is clear: federal courts cannot ignore real and practical conflicts between statutes and the Federal Rules simply by labeling the statutory requirements "jurisdictional."

C. Federal Rule Supersession by Environmental Statutes: Suing Dissolved Corporations under CERCLA

Unlike the Suits in Admiralty Act, Congress enacted or significantly revamped most of the environmental statutes; the Clean Air Act, the Endangered Species Act, the Clean Water Act, RCRA, and CERCLA, after the Federal Rules of Civil Procedure took effect. In terms of pure temporality, therefore, the question is whether the acts supersede the Rules when conflicts arise. The clearest case of conflict has arisen under CERCLA.

CERCLA [FN490] imposes stringent liability on several categories of persons for the costs of cleaning up hazardous substances released into the environment, including damages for the loss or destruction of natural resources and the costs of certain health assessments. [FN491] For purposes of the act, "person" explicitly includes ***193** corporations, [FN492] and corporate liability under CERCLA has been extensively litigated on several issues, including the liability of parent corporations, successor corporations, and dissolved corporations. The issue of dissolved corporations, in particular, has resulted in some of the clearest and most intellectually honest analysis of when an environmental statute can and should supersede the Federal Rules of Civil Procedure.

Federal Rule of Civil Procedure 17 provides that "[t]he capacity of a corporation to sue or be sued shall be determined under the law under which it was organized." [FN493] As a result, state law applied through Rule 17 usually determines whether a dissolved corporation can be sued in federal court. [FN494] However, CERCLA creates potential problems for two reasons. First, most courts have determined that CERCLA liability applies retroactively, [FN495] imposing liability years and sometimes decades after a party was involved in the particular release of hazardous substances. As a result, the list of potentially responsible parties can easily include one or several corporations that have long since dissolved.

Second, CERCLA imposes its liability "[n]otwithstanding any other provision or rule of law." [FN496] States' corporations laws generally allow plaintiffs to sue dissolved corporations for only a few (one to five) years, and under Rule 17(b) long-dissolved corporations would not be subject to CERCLA liability. Therefore, the question federal courts face regarding long- dissolved corporations is whether Congress intended, through CERCLA's "notwithstanding" language, to supersede Rule 17's application of state-law limitation periods.

***194** The Ninth Circuit became the first circuit to decide Rule 17(b)'s relationship to CERCLA liability in 1987, when it decided Levin Metals Corp. v. Parr-Richmond Terminal Co. [FN497] In Levin Metals, a corporation tried to sue (under CERCLA) a dissolved corporation that was the previous owner of its property. Pursuant to Rule 17(b), the district court applied California law to determine that the dissolved corporation could not be sued. On appeal, the plaintiff argued "that Rule 17(b) should not be followed here because the result [would] be to allow California state law to defeat the assertion of an important federal right." [FN498] In essence, the plaintiffs argued that CERCLA preempts or supersedes Rule 17(b). The Ninth Circuit rejected that argument on the basis of a technical distinction between liability and capacity to be sued:

Levin's preemption argument turns on its characterization of the California law here involved as law limiting imposition of liability. A more accurate characterization is that the law determines capacity to be sued. Levin's interpretation, if followed, would prevent courts fromlooking to state law to determine whether a dissolved corporation could be sued in any case involving a federal cause of action. We reject this reasoning and hold that CERCLA does not preempt California law determining capacity to be sued. [FN499]

More recently, the Ninth Circuit relied on Levin Metals to hold that Washington's corporations law would determine whether a corporation could be sued under CERCLA. [FN500] Thus, in the Ninth Circuit, CERCLA does not supersede Rule 17.

No circuit court has squarely held against the Ninth Circuit, but a split is nevertheless emerging as circuits give

evidence of their inclinations. For example, the Third Circuit has held that CERCLA does not supersede Rule 17(b) for state nonclaim statutes concerning decedents' estates. [FN501] Similarly, the Eighth Circuit ***195** has applied Rule 17(b) in a CERCLA action, finding that a corporation could still be liable only because it had not been dissolved under Delaware law, [FN502] and the Eleventh Circuit has applied state law to determine whether limited partners could be liable under CERCLA. [FN503] In contrast, the Sixth Circuit has found that successor corporations are subject to CERCLA liability, joining the First and Second Circuits "in proclaiming that 'we will not interpret section 9607(a) [of CERCLA] in any way that apparently frustrates the statute's goals, in the absence of specific congressional intent otherwise." ' [FN504]

In addition, the district courts that have directly addressed the dissolved corporation issue have almost universally declined to follow Levin Metals. In United States v. Sharon Steel Corp., [FN505] the Utah District Court became the first district court to reject the Levin Metals court's conclusion, and its reasoning has persuaded several others. In that 1986 suit, the federal government sued a Maine corporation that had been dissolved since 1980. "[U] nder Maine law, the corporation lost the capacity to be sued in 1982, two years after it was dissolved." [FN506] The corporation moved to be dismissed pursuant to Rule 17(b). [FN507]

In finding that the corporation could be sued under CERCLA, the Utah District Court concluded "that CERCLA overrides Rule 17(b) and the applicable state law, whatever that law may be." [FN508] The court began with the now- familiar rules that "Congress has plenary power to supersede any of the Federal Rules of Civil Procedure by statute" [FN509] and that statutes "'ought to be construed to harmonize with the Rules, if feasible," ' but that "if ***196** Congress's intent to supersede a rule 'clearly appears,' the rule must give way to the statute." [FN510] "The court concludes that this is such a case." [FN511]

Noting that in enacting CERCLA's provisions governing the removal of hazardous waste contamination "Congress was especially concerned about abandoned sites," the Utah District Court also noted that "'[w]herever possible, . . . CERCLA places the ultimate financial burden of toxic waste cleanup on those responsible for creating the harmful conditions." ' [FN512] Thus, "[i]f the parties responsible can be identified, they can be held liable for the cleanup costs, up to specified limits and subject only to certain defenses." [FN513]

The court then emphasized that "CERCLA is meant to be both remedial and retroactive" and that "[i]t must be construed broadly and liberally to effect its purposes." [FN514] Moreover, CERCLA provides that "covered persons" are liable for disposal of hazardous substances "'[n]otwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section," ' [FN515] and corporations are expressly included in the Act's definition of "person." [FN516]

In light of this language and Congress's intent to hold responsible parties financially liable, the Utah District Court concluded that:

CERCLA's language . . . clearly expresses Congress's intent to supersede any rule that would otherwise relieve a responsible party from liability. Thus, Rule 17(b) presents no bar to the government's claim against [the dissolved corporation] . . . . The court's conclusion furthers Congress's purpose "by ensuring that liability will be apportioned among parties responsible for the release of hazardous substances whenever possible." [FN517]

According to the court, the Ninth Circuit's analysis in Levin Metals "would allow a state to nullify Congress's intent to hold responsible ***197** parties liable for cleanup costs simply by taking away their capacity to be sued." [FN518] Thus, "[b]ecause the Ninth Circuit's reading of CERCLA would frustrate congressional intent, this court rejects it." [FN519]

Subsequently, several district courts have expressly relied on Sharon Steel to hold that CERCLA supersedes Rule 17. For instance, the Western District of Michigan relied heavily on the Utah District Court's reasoning to deny a defendant corporation's motion to dismiss a CERCLA claim, even though the corporation was dissolved and "under Michigan law a dissolved corporation may not be sued once it has completely wound up its affairs and distributed its assets." [FN520] More recently, when the owners and lessees of contaminated wells in the Virgin Islands sued corporations that had been dissolved for five years, the Virgin Islands District Court denied defendants' motions to dismiss and for summary judgment under CERCLA. The court reached this result even though the corporations laws of Delaware and the Virgin Islands would, under Rule 17(b), impose liability on them for only three years after dissolution. [FN521] Instead, the court viewed the Ninth Circuit's reasoning in Levin Metals as the minority view [FN522] and emphasized that "[t]he majority of courts addressing this issue hold that in order to effectuate

CERCLA's ***198** broad remedial purpose and Congress' intent, the phrase 'notwithstanding any other provision or rule of law' must be read as superseding Rule 17(b) and preempting state statutes that would frustrate CERCLA's purpose." [FN523] As a result, the Virgin Islands District Court joined "with other courts which have held that CERCLA supersedes Rule 17(b) and preempts state capacity statutes" because of "the policies underlying CERCLA, the Third Circuit's precedent in similar contexts, and other cases addressing the identical issue" and the fact "that corporate dissolution is not among the short list of defenses to liability under CERCLA." [FN524]

Thus, in the only environmental context where courts have been willing to let an environmental statute supersede the Federal Rules of Civil Procedure, congressional intent and the statute's purposes have clearly and forcefully been forefront in their analyses. Moreover, these courts found that CERCLA supersedes Rule 17 specifically to effectuate the Act's purposes, not to hinder them.

Conclusion

Hallstrom, Henderson, and Federal Court Interpretations of the EPA's Notice Regulations

Few courts have discussed the relationship between environmental citizen suit notice requirements and Federal Rule of Civil Procedure 8. The easy explanation of why not is obvious: the citizen suit content regulations do not directly govern the complaint or any aspect of federal court litigation, while the Rules have nothing to say about citizen suit notice. Therefore, there is no conflict.

However, under Henderson, this explanation is inadequate because heightened standards for notice letters can, as a practical matter, conflict with Rule 8. Regardless of the technicalities of coverage, a citizen suit plaintiff subjected to a strict and technical ***199** interpretation of the EPA's content regulations has no practical opportunity to take advantage of Rule 8 notice pleading. If courts force plaintiffs to notice environmental violations with factual and legal specificity in order to survive motions to dismiss in the resulting lawsuits, the damage to the notice pleading standard is done. An environmental plaintiff governed by such strict interpretations of the EPA's regulations would have to specify its exact claims, the entire scope of the later complaint, at the notice stage without being allowed to take advantage of discovery and the pre-trial conference. Defendants would not be considered to be on notice of any violation not actually identified sixty days before the complaint was filed, regardless of whether it and every other reasonable person would understand the citizen's allegations. Therefore, as in Henderson, imposing strict requirements on citizen-suit notice letter contents for allegedly jurisdictional purposes can still impermissibly undermine the Federal Rules.

Henderson thus demands that courts wishing to impose specificity requirements on citizen suit notice at least consider and discuss the relationship between citizen suit notice and notice pleading. Moreover, it is unlikely that a court would find any congressional intent to supersede the Rule 8 pleading standard. As the Second Circuit concluded in a 1976 pre-Hallstrom case, "[t]o require that precise formalistic notice be provided is to erect wholly unrealistic barriers to citizen access to the courts as insured by Congress. The citizen would be relegated to a guessing-game reminiscent of strict common- law pleading long ago discarded." [FN525]

Both the environmental statutes the EPA administers and their legislative history indicate that Congress had no intention of superseding Rule 8 notice pleading when it required citizens to give notice of their environmental suits. First, Congress declined to directly set a standard for the contents of notice, instead delegating to the EPA the task of defining how notice should be given. Moreover, the delegation is general, stating only that notice "shall be given in such manner as the Administrator shall prescribe by rule." [FN526] There is no indication in this language that Congress intended to give the EPA the power to supersede any of the Federal Rules of Civil Procedure.

Second, the history of the environmental statutes indicates that ***200** Congress wanted to encourage citizen suits. In general, as the Supreme Court recognized in Hallstrom after reviewing the legislative history for the Clean Air Act, Congress sought to "strike a balance between encouraging citizen enforcement of environmental regulations and avoiding burdening the federal courts with excessive numbers of citizen suits." [FN527] In early interpretations of the Clean Air Act, circuits emphasized that "the citizen suits provision reflected a deliberate choice by Congress to widen citizen access to the courts, as a supplemental and effective assurance that the Act would be implemented and enforced." [FN528] As the Senate Committee on Public Works stated for the same act, "[t]he Courts should recognize that in bringing legitimate actions under this section citizens would be performing a public service and in such instances the courts should award costs of litigation to such party." [FN529]

The CERCLA/Rule 17(b) litigation teaches that Federal Rule supersession should effectuate the purposes of the superseding statute, not hinder them. The overall purpose of environmental statutes is to produce a cleaner environment. Beginning with the Clean Air Act, Congress enacted citizen suit provisions to ensure that the statutes' provisions would be enforced. In this context, the notice requirements should give violators and the enforcement agencies the first opportunity to fix environmental problems. However, the notice requirements should not give violators an arsenal of pleading challenges when neither they nor the relevant agencies have chosen to act within the sixty-day waiting period. The Rule 8 notice pleading standard would ensure that citizen suit notice serves Congress's purposes. Superseding that standard only increases the likelihood that environmental violations will go completely unresolved, a result that Congress expressly sought to avoid in allowing citizens to bring suit.

Finally, legislative history pertaining directly to the EPA's notice regulations indicates that Congress did not intend to give the EPA the power to bar citizen suits. For example, for the Clean Water Act, the Senate advised that

***201** such regulations should reflect simplicity, clarity, and standardized form. The regulations should not require notice that places impossible or unnecessary burdens on citizens but rather should be confined to requiring information necessary to give a clear indication of the citizens' intent. These regulations might require information regarding the identity and location of [the] alleged polluter, a brief description of the activity alleged to be in violation, and the provision of law alleged to be violated. [FN530]

Similarly, the House suggested that the regulations, "although not placing unnecessary or impossible burdens on complainants, should require information regarding the identity and location of the alleged pollutor, a brief description of the activity alleged to be in violation, [and] the provision of law alleged to be violated." [FN531] Like the EPA's eventual regulations, therefore, Congress did not envision overly specific notice letters, only "information regarding" several aspects of the alleged violation.

Therefore, neither the statutes nor their legislative history demonstrate any congressional intent to allow the citizen suit notice requirement to supersede the notice pleading standard. Nor do jurisdictional and sovereign immunity concerns vitiate Henderson's requirement that courts carefully examine a statute's potential conflict with the Federal Rules. The Supreme Court in Hallstrom refused to determine whether citizen suit notice was a jurisdictional requirement, "in the strict sense of the term." [FN532] In any case, under Henderson, the more relevant inquiry is whether the requirement is substantive or procedural, and the Court held that a requirement whose "core function . . . is to supply notice of the pendency of a legal action, in a manner and at a time that affords the defendant a fair opportunity to answer the complaint and present defenses and objections," is procedural. [FN533] Therefore, citizen suit notice would seem to be similarly procedural for purposes of Rule 8 conflicts.

Five justices in Henderson indicated that waivers of sovereign immunity were relevant to the jurisdiction issue, [FN534] and the environmental citizen suit provisions do waive sovereign immunity to ***202** allow suits against the federal government. However, even accepting that Congress can "condition its waiver of sovereign immunity upon strict compliance with procedural provisions attached to the waiver," [FN535] Congress has only required that plaintiffs give notice to all listed entities, wait the requisite period of time before filing suit, and give notice in accordance with the EPA's regulations. Nothing in the statutory notice provisions, therefore, conditions waiver of sovereign immunity on any content requirement that in turn must supersede the Rule 8 notice pleading standard.

In short, in delegating the task of establishing content requirements to the EPA, Congress effectively eliminated any argument that it intended the environmental citizen suit notice statutes to supersede Rule 8. In the absence of clear congressional delegation, the EPA does not have the authority to impose superseding standards on its own, even if it had intended to, which is doubtful. Thus, judicial interpretations of the regulatory notice requirements should not impose a standard more stringent than notice pleading.

More importantly, federal courts should not analyze the contents of notice without cognizance of the fact that overly stringent content requirements will affect, as a practical matter, Rule 8 notice pleading. Moreover, should a court decide that citizen suit notice needs more specificity than Rule 8 would require, it should impose such stringency only in light of Henderson and other cases governing Federal Rule supersession, clearly announcing its conclusions about the existence of a conflict and congressional intent. Simple citations to Hallstrom cannot support the burden of undermining the Federal Rules of Civil Procedure.

[FNa1]. Assistant Professor of Law, Western New England College School of Law; M.A. 1986, The Johns Hopkins University; Ph.D. 1993, U.C. Santa Barbara; J.D. 1996, Lewis & Clark School of Law. The author wishes to thank A.J. Blake for her inspiration and comments.

[FN1]. 42 U.S.C. §§ 7401-7671q (1994).

[FN2]. 33 U.S.C. §§ 1251-1387 (1994). "This Act may be cited as the 'Federal Water Pollution Control Act' (commonly referred to as the Clean Water Act)." Pub. L. 92-500, § 2, 86 Stat. 896 (1972).

[FN3]. 16 U.S.C. §§ 1531-1544 (1994).

[FN4]. 42 U.S.C. §§ 6901-6992k (1994). The Solid Waste Disposal Act received its present form through the Resource Conservation and Recovery Act of 1976, Pub. L. 94-580, 90 Stat. 2796 (1976).

[FN5]. 42 U.S.C. §§ 9601-9675 (1994).

[FN6]. 42 U.S.C. §§ 300f-300j-26 (1994). Congress originally enacted the Public Health Service Act in 1944. 58 Stat. 682 (1944). In 1974, it passed the Safe Drinking Water Act, Pub. L. 93-523, 88 Stat. 1660 (1974), which it further amended in 1986. Pub. L. 99-339, 100 Stat. 642 (1986).

[FN7]. 42 U.S.C. §§ 11001-11050 (1994).

[FN8]. Toxic Substances Control Act, 15 U.S.C. § 2619 (1994); Columbia River Gorge National Scenic Area Act, 16 U.S.C. § 554m(b)(2), (3) (1994); Endangered Species Act, 16 U.S.C. § 1540(g) (1994); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270 (1994); Clean Water Act, 33 U.S.C. § 1365 (1994); Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. § 1415 (1994); Safe Drinking Water Act, 42 U.S.C. § 300j-8 (1994); Noise Control Act, 42 U.S.C. § 4911 (1994); Energy Policy and Conservation Act, 42 U.S.C. § 6305 (1994); RCRA, 42 U.S.C. § 6972 (1994); Clean Air Act, 42 U.S.C. § 7604 (1994); Powerplant and Industrial Fuel Use Act, 42 U.S.C. § 8435 (1994); CERCLA, 42 U.S.C. § 9659 (1994); EPCRA, 42 U.S.C. § 11046 (1994); Outer Continental Shelf Lands Act, 43 U.S.C. § 1349 (1994).

[FN9]. 42 U.S.C. § 7604 (1994) (originally added by Pub. L. 91-604 § 12(a), 84 Stat. 1706 (1970)).

[FN10]. Hallstrom v. Tillamook County, 493 U.S. 20, 28 (1989).

[FN11]. 42 U.S.C. § 7604(a)(1) (1994). The Clean Air Act's citizen suit provision differs from other environmental statutes in one significant respect: it allows citizens to sue when defendants are alleged to "have violated" the Act. Other citizen suit provisions, such as those in the Clean Water Act and RCRA, only allow suits if the defendant is alleged "to be in violation." 33 U.S.C. § 1365(a)(1) (1994); 42 U.S.C. § 6972(a)(1)(A) (1994). The Supreme Court has interpreted this difference to mean that, for environmental statutes lacking the "have violated" language, citizens cannot bring suit for "wholly past" violations. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 56-63 (1987).

[FN12]. 42 U.S.C. §§ 7604(a)(2) (1994).

[FN13]. 42 U.S.C. § 7604(a)(3) (1994).

[FN14]. 42 U.S.C. § 7604(a) (1994).

[FN15]. E.g., Toxic Substances Control Act, 15 U.S.C. § 2619(b)(1)(B) (1994); Endangered Species Act, 16 U.S.C. § 1540(g)(2)(A)(ii), (iii) (1994); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270(b)(1)(B) (1994); Clean Water Act, 33 U.S.C. § 1365(b)(1)(B) (1994); Safe Drinking Water Act, 42 U.S.C. § 300j-8(b)(1)(B) (1994); RCRA, 42 U.S.C. § 6972(b)(1)(B), (2)(B)(i), (2)(C)(i) (1994); Clean Air Act, 42 U.S.C. § 7604(b)(1)(B) (1994); CERCLA, 42 U.S.C. § 9659(d)(2) (1994); EPCRA, 42 U.S.C. § 11046(e) (1994).

[FN16]. E.g., Clean Air Act, 42 U.S.C. § 7604(b) (1994).

[FN17]. 493 U.S. 20 (1989).

[FN18]. 517 U.S. 654 (1996).

[FN19]. 507 U.S. 163 (1993).

[FN20]. 42 U.S.C. § 7604(b)(1)(A) (1994).

[FN21]. 15 U.S.C. § 2619(b)(1)(A), (2) (1994).

[FN22]. 16 U.S.C. § 544m(b)(3)(A)(i), (3)(B) (1994).

[FN23]. 16 U.S.C. § 1540(g)(2)(A)(i), (2)(B) (1994).

[FN24]. 30 U.S.C. § 1270(b)(1)(A), (2) (1994).

[FN25]. 30 U.S.C. § 1427(b) (1994).

[FN26]. 33 U.S.C. § 1365(b)(1)(A), (2) (1994).

[FN27]. 33 U.S.C. § 1415(g)(2)(A) (1994).

[FN28]. 33 U.S.C. § 1515(b) (1994).

[FN29]. 33 U.S.C. § 1910(b)(1) (1994).

[FN30]. 42 U.S.C. § 300j-8(b)(1)(A), (2) (1994).

[FN31]. 42 U.S.C. § 4911(b)(1)(A), (2) (1994).

[FN32]. 42 U.S.C. § 6305(b)(1)(A), (2) (1994).

[FN33]. 42 U.S.C. § 6972(b)(1)(A), (c) (1994). A ninety-day notice requirement applies to suits involving "the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste" that may present an imminent and substantial endangerment to health of the environment. Id. § 6972(b)(2).

[FN34]. 42 U.S.C. § 8435(b) (1994).

[FN35]. 42 U.S.C. § 9659(d)(1), (e) (1994).

[FN36]. 42 U.S.C. § 11046(d)(1), (2) (1994).

[FN37]. 43 U.S.C. § 1349(a)(2)(A) (1994). However, an action may be brought immediately after notification if "the alleged violation constitutes an imminent threat to the public health or safety or would immediately affect a legal interest of the plaintiff." Id. § 1349(a)(3).

[FN38]. 42 U.S.C. § 6305(b) (1994).

[FN39]. 42 U.S.C. § 9124(b) (1994).

[FN40]. 49 U.S.C. § 60121(a)(1)(A) (1994).

[FN41]. 42 U.S.C. § 7604(a) (1994).

[FN42]. 42 U.S.C. § 7604(b) (1994) (referencing 42 U.S.C. § 7412(i)(3)(A)).

[FN43]. Id. (referencing 42 U.S.C. § 7412(f)(4)).

[FN44]. Id. (referencing 42 U.S.C. § 7413(a)). A SIP is a State's plan, adopted as State law and approved by the

EPA, for meeting federal ambient air quality standards. 42 U.S.C. § 7410 (1994).

[FN45]. 42 U.S.C. § 6972(b)(1)(A) (1994).

[FN46]. 42 U.S.C. § 6972(a)(1)(B) (1994).

[FN47]. 42 U.S.C. §§ 4321-4347 (1994).

[FN48]. 33 U.S.C. §§ 1401-1445 (1994).

[FN49]. Save Our Sound Fisheries Ass'n v. Callaway, 429 F. Supp. 1136, 1142-44 (D.R.I. 1977).

[FN50]. Id. at 1143.

[FN51]. Id. at 1144.

[FN52]. Id.

[FN53]. 42 U.S.C. § 7604(e) (1994).

[FN54]. E.g., Endangered Species Act, 16 U.S.C. § 1540(g)(5) (1994)
The injunctive relief provided by this subsection shall not restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief (including relief against the Secretary or a State agency).
Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270(e) (1994).
Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any of the provisions of this chapter and the regulations thereunder, or to seek any other relief (including relief against the Secretary or the appropriate State regulatory authority.)
Clean Water Act, 33 U.S.C. § 1365(e) (1994) ("Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)."); Safe Drinking Water Act, 42 U.S.C. § 300j-8(e) (1994) ("Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any requirement prescribed by or under this subchapter or to seek any other relief."); RCRA, 42 U.S.C. § 6972(f) (1994)
Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or requirement relating to the management of solid waste or hazardous waste, or to seek any other relief (including relief against the Administrator or a State agency).
CERCLA, 42 U.S.C. § 9659(h) (1994)
This chapter does not affect or otherwise impair the rights of any person under Federal, State, or common law, except with respect to the timing of review as provided in section 9613(h) of this title or as otherwise provided in section 9658 of this title (relating to actions under State law).
EPCRA, 42 U.S.C. § 11046(g) (1994) ("Nothing in this section shall restrict or expand any right which any person (or class of persons) may have under any Federal or State statute or common law to seek enforcement of any requirement or to seek any other relief (including relief against the Administrator or a State agency).").

[FN55]. E.g., City of Evansville v. Kentucky Liquid Recycling, Inc., 604 F.2d 1008, 1010, 1012-17 (7th Cir. 1979) (Federal Water Pollution Control Act); City of Highland Park v. Train, 519 F.2d 681, 693 (7th Cir. 1975) (Clean Air Act); Natural Resources Defense Council v. Train, 510 F.2d 692, 701-02 (D.C. Cir. 1975) (Federal Water Pollution Control Act); South Carolina Wildlife Fed'n v. Alexander, 457 F. Supp 118, 123 (D.S.C. 1978) (Federal Water Pollution Control Act); Pinkney v. Ohio Envtl. Protection Agency, 375 F. Supp. 305, 308 (N.D. Ohio 1974) (Clean Air Act); City of Riverside v. Ruckelshaus, 3 E.L.R. 20043, 20043-44 (C.D. Cal. 1972) (Clean Air Act).

[FN56]. Natural Resources Defense Council v. Callaway, 524 F.2d 79, 83- 84 (2d Cir. 1975) (Federal Water Pollution Control Act); City of Highland Park, 519 F.2d at 693 (Clean Air Act); Natural Resources Defense Council v. Train, 510 F.2d at 699, 702 (Federal Water Pollution Control Act); West Penn Power Co. v. Train, 378 F. Supp. 941, 944 (W.D. Pa. 1974) (Clean Air Act). The federal Administrative Procedure Act, 5 U.S.C. §§ 551-706 (1994), allows persons aggrieved by federal agency action to sue for nonmonetary relief. Id. at § 706.

[FN57]. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 6-7, 15-16 (1981) (Federal Water Pollution Control Act); City of Evansville v. Kentucky Liquid Recycling, Inc., 604 F.2d 1008, 1010, 1015-16 (7th Cir. 1979) (Federal Water Pollution Control Act); Natural Resources Defense Council v. Callaway, 524 F.2d at 83-84; City of Highland Park v. Train, 519 F.2d at 693; Natural Resources Defense Council v. Train, 510 F.2d at 699, 702; South Carolina Wildlife Fed'n, 457 F. Supp. at 123.

[FN58]. West Penn Power Co., 378 F. Supp. at 944. The federal Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202 (1994), provides that: "In a case of actual controversy within its jurisdiction, ... any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." Id. at § 2201.

[FN59]. National Sea Clammers Ass'n, 453 U.S. at 19-20. Section 1983 provides that any "person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws ...." 42 U.S.C. § 1983 (1994 & Supp. II) (as amended by Pub. L. 104-317, Title III, § 309(c), 110 Stat. 3853 (Oct. 19, 1996)).

[FN60]. National Sea Clammers Ass'n, 453 U.S. at 21-22; Kentucky Liquid Recycling, Inc., 604 F.2d at 1010, 1017.

[FN61]. City of Riverside v. Ruckelshaus, 3 E.L.R. 20043, 20044 (C.D. Cal. 1972).

[FN62]. Id.

[FN63]. Id.

[FN64]. "The United States or an officer or agency thereof shall serve an answer to the complaint ... within 60 days after the service upon the United States attorney of the pleading in which the claim is asserted." Fed. R. Civ. P. 12(a).

[FN65]. City of Highland Park v. Train, 519 F.2d 681, 690 (7th Cir. 1975).

[FN66]. Id. at 690-91.

[FN67]. Id. at 691.

[FN68]. Id. at 693.

[FN69]. Id. See also South Carolina Wildlife Fed'n v. Alexander, 457 F. Supp. 118, 123 (D.S.C. 1978) (holding that because the Federal Water Pollution Control Act's citizen suit provision provides a waiver of sovereign immunity, it must be construed strictly and the sixty-day notice requirement is mandatory; therefore, the court had no jurisdiction under the savings clause and section 1331 in the face of inadequate notice).

[FN70]. City of Evansville v. Kentucky Liquid Recycling, Inc., 604 F.2d 1008, 1017 (7th Cir. 1979). The plaintiffs were three Indiana municipal corporations that used the Ohio River. They sued Kentucky defendants to recover damages resulting from the defendants' polluting the river upstream in Kentucky. Id. at 1010.

[FN71]. Id. at 1014.

[FN72]. 510 F.2d 692 (D.C. Cir. 1975).

[FN73]. Natural Resources Defense Council v. Train, 510 F.2d 692, 702 (D.C. Cir. 1975).

[FN74]. Id. at 699-700.

[FN75]. Id. at 702.

[FN76]. Id. at 701.

[FN77]. Id. The District of Rhode Island also allowed that the savings clause "makes possible suits under the Administrative Procedure Act and 28 U.S.C. § 1331"; however, plaintiffs relying on these alternative grounds for jurisdiction were stuck with "the normal American rule on attorneys' fees" and could not make use of the attorney fee provisions for citizen suits. Save Our Sound Fisheries Ass'n v. Callaway, 429 F. Supp. 1136, 1141 (D.R.I. 1977).

[FN78]. 430 U.S. 99 (1977).

[FN79]. Id. at 105. The Court's decision rested primarily on Congress's 1976 amendment of 28 U.S.C. § 1331, the statute defining federal question jurisdiction, to eliminate any amount in controversy requirement from such jurisdiction. Id. at 104-07.

[FN80]. See, e.g., Tucson Airport Auth. v. General Dynamics Corp., 136 F.3d 641, 645 (9th Cir. 1998) (citing Califano in a CERCLA suit for the principle that "the APA does not provide an independent basis for subject matter jurisdiction in the district courts," although it can serve as a waiver of sovereign immunity in suits against the federal government); Rueth v. U.S.E.P.A., 13 F.3d 227, 231 (7th Cir. 1993) (disallowing judicial review and citing Abbott Laboratories v. Gardner, 387 U.S. 136, 139-40 (1967), for the reasoning that "the Clean Water Act provides for judicial review only when the agency is seeking judicial enforcement of a compliance order or the agency is seeking administrative penalties. Since neither of these requirements are met, the CWA precludes judicial review and accordingly the APA also precludes judicial review."). But see Conservation Law Found., Inc. v. Town of Newington, 79 F.3d 1250, 1260-61 (1st Cir. 1996) (refining Califano in a Clean Air Act suit to hold that when the Act's citizen suit provision does not allow suit regarding the particular violation at issue, suit is possible pursuant to the APA and 28 U.S.C. § 1331); Friends of the Crystal River v. U.S.E.P.A., 35 F.3d 1073, 1077 & n.10 (6th Cir. 1994) (holding in a Clean Water Act suit that EPA's withdrawal of its objections to the state's issuance of a permit allowing wetlands to be filled was reviewable under the APA, because "[a] lthough the Supreme Court has found that the Administrative Procedure Act does not itself create jurisdiction, see Califano v. Sanders, 430 U.S. 99 ... (1977), the Court has stated that the federal courts have jurisdiction under the federal question statute to review agency action 'regardless of whether the APA of its own force may serve as a jurisdictional predicate'. Id. at 105."); Oregon Natural Resources Council v. U.S. Forest Service, 834 F.2d 842, 851 (9th Cir. 1987) (holding that an organization could bring its Clean Water Act claims pursuant to the judicial review provisions of the APA because they could not enforce state water quality standards with respect to nonpoint sources pursuant to the Act's citizen suit provisions but emphasizing that a citizen suing under the citizen suit provisions would have to comply with the notice requirements).

[FN81]. 453 U.S. 1 (1981).

[FN82]. Id. at 4. The MPRSA is codified at 16 U.S.C. §§ 1431- 1445b (1994).

[FN83]. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 6-7 (1981).

[FN84]. Id. at 8.

[FN85]. Id. at 9.

[FN86]. Id. at 13-15.

[FN87]. Id. at 15-16.

[FN88]. Id.

[FN89]. 451 U.S. 304 (1981).

[FN90]. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 21-22 (1981).

[FN91]. Id. at 22. Specifically, "[t]he regulatory scheme of the MPRSA is no less comprehensive, with respect to ocean dumping, than are analogous provisions of the FWPCA." Id.

[FN92]. Plaintiffs still occasionally attempt to rely on the savings clause. See, e.g., Western Neb. Resources Council, Inc. v. Wyoming Fuel Co., 641 F. Supp. 128, 137 (D. Neb. 1986) (attempting to rely on the federal APA instead of EPCRA's citizen suit provision; the court found that "the requirements for [EPCRA's citizen suit provision] must be satisfied to provide the district court with review jurisdiction where the statutes advanced do not grant an independent basis for subject matter jurisdiction."). More effectively, however, plaintiffs use the savings clause to preserve rights arising from sources other than the environmental statute at issue. See, e.g., California Tahoe Reg'l Planning Agency v. Jennings, 594 F.2d 181 (9th Cir. 1979), (holding that plaintiffs could bring nuisance suits pursuant to the Clean Water Act's savings clause); Conservation Law Found. of New England, Inc. v. Browner, 840 F. Supp. 171, 177 (D. Mass. 1993) (relying on the savings clause to conclude that CERCLA litigants retain their class action rights); Washington Suburban Sanitary Comm'n v. CAE-Link Corp., 622 A.2d 745 (Md. 1993) (holding that plaintiffs could bring nuisance suits based on the law of the affected state through the Clean Water Act's savings clause).

[FN93]. National Sea Clammers Ass'n, 453 U.S. at 6-7.

[FN94]. City of Riverside v. Ruckelshaus, 3 E.L.R. 20,043, 20,044 (C.D. Cal. 1972).

[FN95]. Montgomery Envtl. Coalition v. Fri, 366 F. Supp. 261, 266 (D.D.C. 1973).

[FN96]. Metropolitan Wash. Coalition for Clean Air v. District of Columbia, 373 F. Supp. 1089, 1092 (D.D.C. 1974), rev'd on other grounds, 511 F.2d 809 (D.C. Cir. 1975).

[FN97]. Id. See also Conservation Soc'y of S. Vt., Inc. v. Secretary of Transp., 508 F.2d 927, 938 (2d Cir. 1974), vacated on other grounds, 423 U.S. 809 (1975) ("After careful consideration we are not persuaded that Congress intended the sixty-day notice provision to erect an absolute barrier to earlier suit by private citizens under the FWPCA.").

[FN98]. Metropolitan Wash. Coalition for Clean Air, 373 F. Supp. at 1092.

[FN99]. Natural Resources Defense Council, Inc. v. Callaway, 524 F.2d 79, 83 (2d Cir. 1975). Plaintiffs gave notice on July 15, 1974 and filed suit on September 3, 1974, fifty days later. Id.

[FN100]. Id. at 84 n.4.

[FN101]. Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor, 619 F.2d 231, 243-44 (3rd Cir. 1980).

[FN102]. Id. at 243.

[FN103]. Id. at 244.

[FN104]. Pymatuning Water Shed Citizens for a Hygienic Env't v. Eaton, 644 F.2d 995, 996 (3rd Cir. 1981).

[FN105]. Id. at 996-97.

[FN106]. Hempstead County & Nev. County Project v. U.S.E.P.A., 700 F.2d 459, 461 (8th Cir. 1983).

[FN107]. Id. at 463 n.5.

[FN108]. Id. at 463.

[FN109]. Proffitt v. Commissioners Township of Bristol, 754 F.2d 504, 505-06 (3rd Cir. 1985).

[FN110]. West Penn Power Co. v. Train, 378 F. Supp. 941, 942, 944 (W.D. Pa. 1974), aff'd, 522 F.2d 302 (3rd Cir. 1975). See also Reeger v. Mill Serv., Inc., 593 F. Supp. 360, 361 (W.D. Pa. 1984) (holding that the court had no jurisdiction to hear a citizen suit based on the Clean Air Act and RCRA when plaintiffs failed to give the statutory notice, even though they had made oral complaints to the Pennsylvania Department of Environmental

Resources and EPA).

The court's decision in West Penn Power depended heavily, however, on the facts that the suit was against a federal agency and that the Clean Air Act's citizen-suit provision operated as a waiver of sovereign immunity. Congress, it concluded, "can specify in legislation terms upon which the government consents to be sued and such terms must be strictly followed." West Penn Power Co., 378 F. Supp. at 944. The District of South Carolina also relied on the waiver of sovereign immunity as a reason for strictly construing citizen-suit notice requirements, this time for the FWPCA. South Carolina Wildlife Fed'n v. Alexander, 457 F. Supp. 118, 123 (D.S.C. 1978). However, although it concluded that notice was jurisdictional, it also allowed for substantial compliance, at least so far as naming the proper parties was concerned. Id. at 124.

[FN111]. City of Highland Park v. Train, 519 F.2d 681, 693 (7th Cir. 1975).

[FN112]. Id. at 691. See also City of Evansville v. Kentucky Liquid Recycling, Inc., 604 F.2d 1008, 1014 (7th Cir. 1979) ("Plaintiffs' failure to comply with the notice requirement precludes reliance on § 505(a) [of the FWPCA] as a basis for the action.").

[FN113]. Massachusetts v. United States Veterans Admin., 541 F.2d 119, 120-21 (1st Cir. 1976).

[FN114]. Id. at 121.

[FN115]. Id.

[FN116]. Id. at 122.

[FN117]. Id. at 121-22.

[FN118]. Dedham Water Co. v. Cumberland Farms Dairy, Inc., 588 F. Supp. 515, 516 (D. Mass. 1983).

[FN119]. Id.

[FN120]. Id.

[FN121]. Id.

[FN122]. Id.

[FN123]. Id. at 517.

[FN124]. Id.

[FN125]. Id.

[FN126]. Walls v. Waste Resource Corp., 761 F.2d 311, 314 (6th Cir. 1985).

[FN127]. Id. at 316.

[FN128]. Id. at 317.

[FN129]. Id. Other courts have been less demanding regarding the pleading of jurisdiction. The Eastern District of Virginia, for example, refused to give credence to an argument that a citizen suit plaintiff proceeding under RCRA and CERCLA had failed to affirmatively plead notice. Starting "from the proposition that pleadings are to be construed so as to do substantial justice, Fed. R. Civ. P. 8(f), and when ruling on a Fed. R. Civ. P. 12(b) motion, in the light most favorable to the plaintiff," the court continued that:

Where the facts necessary to [the court's] jurisdiction are alleged, the recitation of some special incantation is unnecessary. The allegation that the defendants refused to allow [plaintiff] to return the product carries with it, by necessity, the unspoken assertion that the plaintiff asked them to take it. Any other reading of the facts actually alleged in the complaint is untenable. Even if the Court were to assume that notice is jurisdictional, granting [defendant's] motion to dismiss on this ground would be to sacrifice substance on the altar of form. This the Court

will not do.
Allied Towing Corp. v. Great E. Petroleum Corp., 642 F. Supp. 1339, 1347 (E.D. Va. 1986).

[FN130]. Garcia v. Cecos Int'l, Inc., 761 F.2d 76, 78 (1st Cir. 1985).

[FN131]. Id. at 81.

[FN132]. Id. at 79.

[FN133]. Id. at 81.

[FN134]. Id. at 82.

[FN135]. Id. The New Jersey District Court had taken this position a decade earlier. In a FWPCA citizen suit, the plaintiffs did not give notice before filing their complaint, although they did give notice to the Regional Director of the EPA more than sixty days before filing their amended complaint. Loveladies Property Owners Ass'n v. Raab, 430 F. Supp. 276, 278-79, 281 (D.N.J. 1975). The court nevertheless dismissed the case, holding that it was "not at liberty to ignore the requirements of federal statutes and regulations--'technical' though they may appear to be. Where Congress provides a statutory method for obtaining review of administrative decisions, that method must be strictly adhered to." Id. at 281 (citing Weinberger v. Salfi, 422 U.S. 749 (1975); United States v. Ruzicka, 329 U.S. 287 (1946); SEC v. Andrews, 88 F.2d 441 (2d Cir. 1937)).

[FN136]. 844 F.2d 598 (9th Cir. 1987).

[FN137]. Id. at 599-600.

[FN138]. Id. at 601.

[FN139]. Id. See also Save the Yaak Comm. v. Block, 840 F.2d 714, 721 (9th Cir. 1988) (dismissing an Endangered Species Act citizen suit because the alleged notice letters did not give notice of a violation or of an intent to sue, the letters were not sent to the Secretary of the Interior, as required, and actual notice of the intention to sue was sent only 38 days before the plaintiffs filed their complaint).

[FN140]. Hallstrom v. Tillamook County, 493 U.S. 20 (1989).

[FN141]. Id. at 23.

[FN142]. Id. at 23-24.

[FN143]. Id.

[FN144]. Id. at 24.

[FN145]. Id. at 26.

[FN146]. Id. at 31.

[FN147]. Id. at 26.

[FN148]. Id.

[FN149]. Id.

[FN150]. Id.

[FN151]. Id. at 28.

[FN152]. Id. at 29 (citing 116 Cong. Rec. 32,927 (1970) (comments of Sen. Muskie); Note, Notice by Citizen

Plaintiffs in Environmental Litigation, 79 Mich. L. Rev. 299, 301-07 (1980)).

[FN153]. See Gwaltney of Smithfield, Inc. v. Chesapeake Bay Found. Inc., 484 U.S. 49, 60 (1987) ("The bar on citizen suits when governmental enforcement action is under way suggests that the citizen-suit is meant to supplement rather than to supplant governmental action").

[FN154]. See 116 Cong. Rec. 33,104 (1970) (comments of Sen. Hart).

[FN155]. Gwaltney, 484 U.S. at 60.

[FN156]. Hallstrom v. Tillamook County, 493 U.S. 20, 29 (1989).

[FN157]. Id. at 30.

[FN158]. Id. at 30 (citing the Clean Water Act, 33 U.S.C. §§ 1365(b), 1317(a) (1982) (citizen suits may be brought immediately in cases involving violations of toxic pollutant effluent limitations); the Clean Air Act, 42 U.S.C. § 7604(b) (1982) (citizen suits may be brought immediately in cases involving stationary-source emissions standards and other specified compliance orders)).

[FN159]. Id.

[FN160]. Id. at 33.

[FN161]. Id. at 32.

[FN162]. Id.

[FN163]. Id. at 22-23 & n.1 (1992) (including RCRA, the Clean Water Act, CERCLA, the MPRSA, the Noise Control Act, the Deepwater Port Act of 1974, the Surface Mining Control and Reclamation Act, the Toxic Substances Control Act, the Endangered Species Act, the Outer Continental Shelf Lands Act, the Act to Prevent Pollution from Ships, the Deep Seabed Hard Mineral Resources Act, EPCRA, the Energy Policy and Conservation Act, the Natural Gas Pipeline Safety Act Amendments of 1976, and the Ocean Thermal Energy Conversion Act of 1980 in its analogizing). See also Gwaltney of Smithfield, Inc. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 57 (1987) (analogizing the citizen suit provisions of the Clean Air Act, RCRA, and the Toxic Substances Control Act).

[FN164]. American Rivers v. National Marine Fisheries Serv., 126 F.3d 1118, 1124-25 (9th Cir. 1997) (dismissing claims that could only be brought under the ESA for failure to give the sixty-day notice).

[FN165]. Public Interest Research Group of N.J., Inc. v. Hercules, Inc., 50 F.3d 1239, 1246 (3rd Cir. 1995) (applying Hallstrom's principles to the Clean Water Act); Bettis v. Town of Ontario, N.Y., 800 F. Supp. 1113, 1118 (W.D.N.Y. 1992) (dismissing a Clean Water Act citizen suit for failure to comply with the notice requirement).

[FN166]. Coalition Against Columbus Ctr. v. City of New York, 750 F. Supp. 93, 94-95 (S.D.N.Y. 1990) (applying Hallstrom to dismiss a Clean Air Act suit when plaintiffs did not wait sixty days before filing). However, the court dismissed without prejudice and noted that "[b]ecause sixty days have now passed since plaintiffs gave notice to the relevant parties, plaintiffs may, and this Court is given to understand that they will, refile immediately." Id. at 95. As such, the court effectively eliminated the sixty-day non- adversarial period.

[FN167]. Fried v. Sungard Recovery Servs., Inc., 900 F. Supp. 758, 764- 65, 767 (E.D. Pa. 1995) (applying the principles of Hallstrom to notice under the Clean Air Act and CERCLA).

[FN168]. Atlantic States Legal Found., Inc. v. United Musical Instruments, U.S.A., Inc., 61 F.3d 473, 478 (6th Cir. 1995) (relying on Hallstrom to dismiss one EPCRA claim).

[FN169]. ACORN v. Edwards, 842 F. Supp. 227, 232 (E.D. La. 1993) (applying Hallstrom's holding to the Safe Drinking Water Act).

[FN170]. Agricultural Excess & Surplus Ins. Co. v. A.B.D. Tank & Pump Co., 878 F. Supp. 1091, 1100-01 (N.D. Ill. 1995) (dismissing a RCRA action pursuant to Hallstrom when plaintiffs failed to wait the requisite ninety days).

[FN171]. Klickitat County v. Columbia River Gorge Comm'n, 770 F. Supp. 1419, 1423-24 (E.D. Wash. 1991).

[FN172]. Id. at 1424.

[FN173]. Id.

[FN174]. E.g., 33 U.S.C. §§ 1365(b), 1317(a) (1994) (allowing citizens to bring suit immediately under the Clean Water Act for violations of toxic pollutant effluent limitations); 42 U.S.C. § 6972(b) (1994) (allowing immediate suit under RCRA for hazardous waste claims); 42 U.S.C. § 7604(b) (1994) (allowing immediate suit under the Clean Air Act for stationary- source emission standards violations and other specified compliance orders).

[FN175]. Hallstrom, 493 U.S. at 30 (discussing statutory exceptions to the notice and delay requirement). See also City of Detroit v. A.W. Miller, Inc., 842 F. Supp. 957, 964 (E.D. Mich. 1994) (holding as a matter of statutory provision that CERCLA's notice requirement does not apply to suits seeking contribution for cleanup costs and citing 42 U.S.C. §§ 9659(a), (d), 9613(f)).

[FN176]. See Dague v. City of Burlington, 935 F.2d 1343, 1350-51 (2d Cir. 1991) (discussing the issue at length).

[FN177]. Id.

[FN178]. Id.

[FN179]. Id. at 1352.

[FN180]. Id.

[FN181]. Id. See also AM International, Inc. v. Datacard Corp., 106 F.3d 1342, 1350-51 (7th Cir. 1997) (following the Second Circuit's decision to hold that RCRA plaintiffs did not have to wait 90 days before filing their "hybrid" suit).

[FN182]. E.g., Clean Air Act, 42 U.S.C. § 7604(b)(1)(A) (1994) (emphasis added).

[FN183]. South Carolina Wildlife Fed'n v. Alexander, 457 F. Supp. 118, 121, 123-24 (D.S.C. 1978).

[FN184]. Id. at 123-24.

[FN185]. Student Pub. Interest Research Group of N.J., Inc. v. Tenneco Polymers, Inc., 602 F. Supp. 1394, 1396 (D.N.J. 1985).

[FN186]. Id. at 1396 (relying on South Carolina Wildlife Fed'n v. Alexander, 457 F. Supp. 118, 123-24 (D.S.C. 1978). See also Allied Towing Corp. v. Great E. Petroleum Corp., 642 F. Supp. 1339, 1347 (E.D. Va. 1986) (refusing to dismiss, on the basis of South Carolina Wildlife Fed'n, when notice in a RCRA/CERCLA citizen suit was sent to the wrong person but the defendants received actual notice and were not prejudiced by the mistake).

[FN187]. Klickitat County v. Columbia River Gorge Comm'n, 770 F. Supp. 1419, 1424 (E.D. Wash. 1991).

[FN188]. Id.

[FN189]. Environmental Defense Fund v. Tidwell, 837 F. Supp. 1344, 1352- 53 (E.D.N.C. 1992).

[FN190]. Id. (citing Student Pub. Interest Research Group, Inc. v. AT&T Bell Lab., 617 F. Supp. 1190, 1194 (D.N.J. 1985), rev'd in part on other grounds, 842 F.2d 1436 (2d Cir. 1988); Student Pub. Interest Group, Inc. v. Tenneco Polymers, Inc., 602 F. Supp. 1394, 1396 (D.N.J. 1985); South Carolina Wildlife Fed'n v. Alexander, 457

F. Supp. 118, 123-24 (D.S.C. 1978)).

[FN191]. Id. at 1353; see also ACORN v. Edwards, 842 F. Supp. 227, 232-39 (E.D. La. 1993) (finding Hallstrom "inapposite" to this issue and refusing to dismiss because two other plaintiffs had given adequate notice and "thus ACORN is deemed to have 'substantially complied' with the statutory requirements of notice").

[FN192]. Washington Trout v. Scab Rock Feeders, 823 F. Supp. 819, 820 (E.D. Wash. 1993).

[FN193]. Id. at 820-21.

[FN194]. Id. at 820.

[FN195]. Washington Trout v. McCain Foods, Inc., 45 F.3d 1351, 1354 (9th Cir. 1995).

[FN196]. Id. In so deciding, the Ninth Circuit expanded notice's purposes beyond those recognized in the Hallstrom decision, effectively adding settlement with potential plaintiffs to the more limited (as far as parties involved are concerned) goals of resolving the environmental problem and of allowing for administrative enforcement. Strictly speaking, a defendant does not need to know who is going to sue it in order to fix an adequately-described violation, nor do state and federal agencies need to consult with citizens when taking enforcement actions.

[FN197]. Fried v. Sungard Recovery Servs., Inc., 900 F. Supp. 758, 765 n.5 (E.D. Pa. 1995).

[FN198]. New Mexico Citizens for Clean Air & Water v. Espanola Mercantile Co., 72 F.3d 830, 833 (10th Cir. 1996).

[FN199]. Long Island Soundkeeper Fund, Inc. v. N.Y. Athletic Club, 1996 WL 131863, at *3 (S.D.N.Y. Mar. 22, 1996).

[FN200]. Id. (citing Hallstrom, 493 U.S. at 26).

[FN201]. Id. (citing Student Pub. Interest Research Group of N.J., Inc. v. AT&T Bell Lab., 617 F. Supp. 1190, 1193-94 (D.N.J. 1985)).

[FN202]. Natural Resources Defense Council, Inc. v. Southwest Marine, Inc., 945 F. Supp. 1330, 1333-34 (S.D. Cal. 1996).

[FN203]. Id. at 1334.

[FN204]. ACORN v. Edwards, 842 F. Supp. 227, 233 (E.D. La. 1993).

[FN205]. Natural Resources Defense Council, Inc. v. Southwest Marine, Inc., 945 F. Supp. 1330, 1334 (S.D. Cal. 1996).

[FN206]. 42 U.S.C. § 7604(b)(2) (1994).

[FN207]. See, e.g., RCRA, 42 U.S.C. § 6972(c) (1994) (providing that notice "shall be given in such manner as the Administrator shall prescribe by regulation."). A major exception is the Endangered Species Act, which the Secretaries of the Interior (terrestrial species) and of Commerce (marine species) administer through the federal Fish and Wildlife Service and National Marine Fisheries Service. 16 U.S.C. § 1533(a) (1994). To date, however, neither agency has promulgated regulations governing notice letters.

[FN208]. See 58 Fed. Reg. 7,870, 7,871 (1993) (taking "the opportunity to update 40 CFR part 54 by clarifying the notice requirements for the various types of citizen suits and by conforming [Clean Air Act] citizen suit notice practice more closely to the practice under other, more recent EPA citizen suit notice regulations, most notably the Clean Water Act (CWA) notice regulation ..."); 54 Fed. Reg. 20,770, 20,770 (1989) (modifying the proposed regulations for the Safe Drinking Water Act to require that the state agency be notified, which "parallels the citizen suit regulations for CWA and RCRA"); 51 Fed. Reg. 29,426, 29,426 (1986) ("The citizen suit provision of the

[Safe Drinking Water Act] is similar to those in the Resource Conservation and Recovery Act (RCRA) and the Clean Water Act (CWA). Therefore, the proposed regulations are similar to those already promulgated for RCRA at 40 CFR Part 254 and for the CWA at 40 CFR Part 135.").

[FN209]. 40 C.F.R. § 54.2(a), (b), (c) (1997) (Clean Air Act); 40 C.F.R. § 135.2(a), (b) (1997) (Clean Water Act); 40 C.F.R. § 135.11(a), (b) (1997) (Safe Drinking Water Act); 40 C.F.R. § 374.2(a), (b) (1997) (CERCLA and EPCRA). EPA has explained, for CERCLA at least, that it requires certified mail because "it is important for those bringing citizen suits to have a record of the date of receipt for each entity and proof that notice was served as prescribed by the statute." 57 Fed. Reg. 55,038, 55,039 (1992).

[FN210]. 40 C.F.R. § 210.2(a), (b) (1997) (Noise Pollution Control Act); 40 C.F.R. § 254.2(a), (b) (1997) (Solid Waste Disposal Act/RCRA).

[FN211]. 40 C.F.R. § 54.3(a) (1997).

[FN212]. 40 C.F.R. § 54.3(b) (1997).

[FN213]. 40 C.F.R. § 135.3 (1997) (Clean Water Act); 40 C.F.R. § 135.12 (1997) (Safe Drinking Water Act); 40 C.F.R. § 210.3 (1997) (Noise Pollution Control Act); 40 C.F.R. § 254.3 (1997) (Solid Waste Disposal Act/RCRA); 40 C.F.R. § 374.3 (1997) (CERCLA and EPCRA).

[FN214]. 40 C.F.R. § 135.3(c) (1997) (Clean Water Act); 40 C.F.R. § 135.12(c) (1997) (Safe Drinking Water Act); 40 C.F.R. § 210.3(c) (1997) (Noise Pollution Control Act); 40 C.F.R. § 254.3(c) (1997) (Solid Waste Disposal Act/RCRA); 40 C.F.R. § 374.3(c) (1997) (CERCLA and EPCRA).

[FN215]. 40 C.F.R. § 135.3(a), (b) (1997) (Clean Water Act); 40 C.F.R. § 135.12(a), (b) (1997) (Safe Drinking Water Act); 40 C.F.R. § 210.3(a), (b) (1997) (Noise Pollution Control Act); 40 C.F.R. § 254.3(a), (b) (1997) (Solid Waste Disposal Act/RCRA); 40 C.F.R. § 374.3(a), (b) (1997) (CERCLA and EPCRA).

[FN216]. Notice for CERCLA and EPCRA citizen-suits must contain "the name and address of the site and facility alleged to be in violation, if known ...." 40 C.F.R. § 374.3(a) (1997). Moreover, the regulations governing citizen suits pursuant to SWDA/RCRA do not require information as to location. 40 C.F.R. § 254.3(a) (1997).

[FN217]. 36 Fed. Reg. 12,866 (1971). The EPA adopted these regulations on December 6, 1971. 36 Fed. Reg. 18,006 (1971).

[FN218]. Montgomery Envtl. Coalition v. Fri, 366 F. Supp. 261, 266 (D.D.C. 1973) (citing 40 C.F.R. § 135 (1973), the notice regulations for the FWPCA).

[FN219]. Id. at 263.

[FN220]. Id. at 265-66.

[FN221]. Id. at 266.

[FN222]. Id.

[FN223]. E.g., Loveladies Property Owners Ass'n v. Raab, 430 F. Supp. 276, 280-81 (D.N.J. 1975) (holding that it could not ignore non-compliance with the regulations but resting its decision to dismiss on plaintiffs' non-compliance with the statutory requirements).

[FN224]. Save Our Sound Fisheries Ass'n v. Callaway, 429 F. Supp. 1136, 1144 n. 11 (D.R.I. 1977).

[FN225]. Fishel v. Westinghouse Elec. Corp., 617 F. Supp. 1531, 1536 (M.D. Pa. 1985).

[FN226]. Id.

[FN227]. Allied Towing Corp. v. Great E. Petroleum Corp., 642 F. Supp. 1339, 1345 n.4 (E.D. Va. 1986).

[FN228]. Id. at 1346.

[FN229]. National Wildlife Fed'n v. Consumers Power Co., 657 F. Supp. 989, 998 (W.D. Mich. 1987).

[FN230]. Id.

[FN231]. Comite Pro Rescate De La Salud v. Puerto Rico Aqueduct & Sewer Auth., 693 F. Supp. 1324, 1333-34 (D.P.R. 1988) (citing and quoting National Wildlife Fed'n v. Consumers Power Co., 657 F. Supp. 989, 998 (W.D. Mich. 1987)).

[FN232]. Lutz v. Chromatex, Inc., 718 F. Supp. 413, 424 (M.D. Pa. 1989). The court concluded that "defendant 'had sufficient actual notice of the alleged violations to respond in an adequate fashion to plaintiffs." ' Id. (quoting Fishel v. Westinghouse Elec. Corp., 617 F. Supp. 1531, 1536 (M.D. Pa. 1985)).

[FN233]. South Carolina Wildlife Fed'n v. Alexander, 457 F. Supp. 118, 124 (D.S.C. 1978).

[FN234]. Id.

[FN235]. Id.

[FN236]. McClellan Ecological Seepage Situation v. Weinberger, 707 F. Supp. 1182, 1202, 1203 n.11 (E.D. Cal. 1988).

[FN237]. Id. at 1203 n.11 (quoting 40 C.F.R. § 135.3).

[FN238]. O'Leary v. Moyer's Landfill, Inc., 523 F. Supp. 642, 651 (E.D. Pa. 1981).

[FN239]. The "sufficient information ... to identify" language is not the most liberal language the EPA could have used. In the Secretary of the Interior's notice regulations for the Surface Mining Control and Reclamation Act, for example, citizens need only provide specific information "to the extent known." 30 C.F.R. § 700.13(e), (f) (1997).

[FN240]. 51 Fed. Reg. 29,426 (1986); see also 54 Fed. Reg. 20,770 (1989) (retaining the "straightforward" language for the final rules); 54 Fed. Reg. 36,020 (1989) (noting that proposed changes to the Clean Water Act notice regulations were "straightforward").

[FN241]. 54 Fed. Reg. 36,020 (1989).

[FN242]. 58 Fed. Reg. 7,870, 7,871-72 (1993).

[FN243]. 36 Fed. Reg. 18,006 (1971).

[FN244]. Id.

[FN245]. 38 Fed. Reg. 15,040 (1973).

[FN246]. 40 C.F.R. § 54.3(a) (1997) (Clean Air Act); 40 C.F.R. § 135.3(b) (1997) (Clean Water Act).

[FN247]. Id.

[FN248]. See, e.g., Clean Air Act, 42 U.S.C. § 7604(b) (1994).

[FN249]. See, e.g., Save Our Health Org. v. Recomp of Minn. Inc., 37 F.3d 1334, 1337-38 (8th Cir. 1994) (holding that under Hallstrom, failure to comply with the regulatory notice requirements requires dismissal of a Clean Air Act suit); Sierra Club v. Tri-State Generation & Transmission Ass'n, 173 F.R.D. 275, 282 (D. Colo. 1997) (holding that the regulatory notice requirements are "mandatory conditions precedent to a citizen suit under the Clean Air Act" and citing Hallstrom, 493 U.S. at 31); Fried v. Sungard Recovery Servs., Inc., 900 F. Supp. 758, 764, 767 (E.D. Pa. 1995) (citing Hallstrom, 493 U.S. at 31, for the conclusion that "[a] plaintiff must comply

with the [regulatory] notice provisions before there is subject matter jurisdiction over the action" and dismissing an entire CERCLA claim because plaintiffs had not given notice to two of the four entities listed in the regulation); Frys v. General Motors Corp., 1995 WL 322585, at *5 (W.D.N.Y. 1995) (holding that failure to comply with the regulatory notice requirements for the Clean Air Act and the Clean Water Act requires dismissal pursuant to Hallstrom, 493 U.S. at 26, 31).

[FN250]. Highlands Conservancy v. E.R.O., Inc., 1991 WL 698124, at *2 (S.D.W. Va. 1991).

[FN251]. 50 F.3d 1239 (3rd Cir. 1995).

[FN252]. Hercules, 50 F.3d at 1249. The Third Circuit has recently emphasized that Hercules is applicable only to notice letter contents, not to statutory requirements, where Hallstrom controls. Hawksbill Sea Turtle v. Federal Emergency Management Agency, 126 F.3d 461, 472 (3rd Cir. 1997) (finding Endangered Species Act notice insufficient under Hallstrom when the plaintiffs did not give notice to the Secretary of Commerce).

[FN253]. Hercules, 50 F.3d at 1249.

[FN254]. Id.

[FN255]. Id. at 1248.

[FN256]. Atlantic States Legal Found. Inc., v. Stroh Die Casting Co., 116 F.3d 814, 816 (7th Cir. 1997).

[FN257]. Id. at 816-17.

[FN258]. Id. at 816.

[FN259]. Id. at 819.

[FN260]. Id.

[FN261]. Id. at 819-20.

[FN262]. Friends of the Earth, Inc. v. Chevron Chem. Co., 900 F. Supp. 67, 76-77 (E.D. Tex. 1995).

[FN263]. Sierra Club v. Tri-State Generation & Transmission Ass'n, 173 F.R.D. 275, 283 (D. Colo. 1997) (citing 40 C.F.R. § 54.3(b); Hercules, 50 F.3d at 1248).

[FN264]. 45 F.3d 1351 (9th Cir. 1995).

[FN265]. Id. at 1354-55. See also California Sportfishing Protection Alliance v. City of W. Sacramento, 905 F. Supp. 792, 799 (E.D. Cal. 1995) (concluding that the Ninth Circuit's logic "appears most consistent with the purpose of the notice provision, the language of the regulation, and the structure of the statute").

[FN266]. Washington Trout, 45 F.3d at 1354.

[FN267]. Bettis v. Town of Ontario, N.Y., 800 F. Supp. 1113, 1118 (W.D.N.Y. 1992).

[FN268]. Id. at 1117 (citing 40 C.F.R. § 135.2(a)(1)).

[FN269]. Id. at 1118 (quoting 40 C.F.R. § 135.2(a)(2)).

[FN270]. Id.

[FN271]. Id.

[FN272]. Id. (quoting 40 C.F.R. § 135.2(a)(2)).

[FN273]. Id.

[FN274]. Frys v. General Motors Corp., 1995 WL 322585, at *5 (W.D.N.Y. 1995). Similarly, the Eastern District of Pennsylvania dismissed an entire CERCLA claim because "[t]he regulation clearly provides that each person listed must be notified before a suit may be commenced" and "two of the four people listed in the regulation did not receive a sixty-day pre-suit notice." Fried v. Sungard Recovery Servs., Inc., 900 F. Supp. 757, 765 (E.D. Pa. 1995).

[FN275]. Highlands Conservancy v. E.R.O., Inc., 1991 WL 698124, at *2 (S.D.W. Va. 1991).

[FN276]. Id.

[FN277]. Id. Similarly, in a failure-to-act case, the Eastern District of Louisiana accepted an allegation that defendants' violation of the Safe Drinking Water Act was "continuing" when various Louisiana officials had failed to comply with the Act's school water cooler requirements by the dates specified in the Act. ACORN v. Edwards, 842 F. Supp. 227, 232 (E.D. La. 1993). There was "no question that plaintiffs' 60-day notice letter accurately identifies the dates of the alleged violations ...." Id.

[FN278]. Sierra Club v. Tri-State Generation & Transmission Ass'n, Inc., 173 F.R.D. 275, 283 (D. Colo. 1997).

[FN279]. Id. According to the Colorado District Court, this statement "informed the recipients that plaintiff claimed defendants were and had continuously been in violation of the Clean Air Act." Id.

[FN280]. Fried v. Sungard Recovery Servs., Inc., 900 F. Supp. 758, 765 (E.D. Pa. 1995).

[FN281]. Hudson Riverkeeper Fund, Inc. v. Putnam Hosp. Ctr., Inc., 891 F. Supp. 152, 153 (S.D.N.Y. 1995).

[FN282]. Id. at 154 (citing Public Interest Research Group of N.J. v. Hercules Inc., 50 F.3d 1239 (3rd Cir. 1995); California Pub. Interest Research Group v. Shell Oil Co., 1994 U.S. Dist. LEXIS 18999 (N.D. Cal. 1994); York Ctr. Park Dist. v. Krilich, 1993 WL 114628 (N.D. Ill. 1993); Highlands Conservancy v. E.R.O., Inc., 1991 WL 698124 (S.D.W. Va. 1991)).

[FN283]. Hudson River Fund, 891 F. Supp. at 154. Such a requirement was consistent with Congress's intent "to 'strike a balance" ' between providing notice recipients with sufficient information and not unduly burdening citizens, because requiring plaintiffs "to specify at the very least a discrete, specific time-frame is not an undue burden--if [plaintiff] was able to identify the violations in the first place, then it must necessarily be aware of when the alleged violations took place."

[FN284]. California Sportfishing Protection Alliance v. City of W. Sacramento, 905 F. Supp. 792, 799 (E.D. Cal. 1995).

[FN285]. Id.

[FN286]. Id. at 799-800.

[FN287]. Bettis v. Town of Ontario, N.Y., 800 F. Supp. 1113, 1118 (W.D.N.Y. 1992) ("The problem is not merely that the notices did not cite the specific statutes in question--which is not actually required by the regulation--but that they gave no indication that any CWA violation was being alleged.").

[FN288]. Friends of the Earth, Inc. v. Chevron Chem. Co., 900 F. Supp. 67, 78 n.7 (E.D. Tex. 1995).

[FN289]. Id. at 78.

[FN290]. ACORN v. Edwards, 842 F. Supp. 227, 230-31 (E.D. La. 1993).

[FN291]. Id. at 231. See also Friends of the Earth, 900 F. Supp. at 78 (holding that notice was sufficient when it identified the Clean Water Act permit at issue and a list of six specific kinds of parameter violations); City of New York v. Anglebrook Ltd. Partnership, 891 F. Supp. 900, 907 (S.D.N.Y. 1995) (holding that a notice letter

adequately identified the violation "because it identified five specific categories of standards required under the permit and allegedly violated").

[FN292]. Highlands Conservancy v. E.R.O., Inc., 1991 WL 698124, at *1-*3 (S.D.W. Va. 1991).

[FN293]. Id. at *3. See also Long Island Soundkeeper Fund, Inc. v. N.Y. Athletic Club, 1996 WL 131863, at *4 (S.D.N.Y. 1996) (holding that Clean Water Act plaintiffs had sufficiently identified the standard violated when their notice letter stated that skeet and trap shooting platforms discharged lead shot into the harbor in violation of § 301(a) of the Act, 33 U.S.C. § 1311(a)).

[FN294]. York Ctr. Park Dist. v. Krilich, 1993 WL 114628, at *2 (N.D. Ill. 1993).

[FN295]. Id. at *2-*3.

[FN296]. Id. at *3.

[FN297]. Fried v. Sungard Recovery Servs., Inc., 900 F. Supp. 758, 765 (E.D. Pa. 1995).

[FN298]. California Sportfishing Protection Alliance v. City of W. Sacramento, 905 F. Supp. 792, 799 (E.D. Cal. 1995). But see Public Interest Research Group of N.J. v. Hercules, 50 F.3d 1239, 1251-52 (3rd Cir. 1995) (discussed above and below).

[FN299]. 924 F. Supp. 821 (S.D. Ohio 1996).

[FN300]. Id. at 831-32.

[FN301]. Id. at 831.

[FN302]. Id. at 832.

[FN303]. Id.

[FN304]. Id.

[FN305]. Id. at 832-33.

[FN306]. Sierra Club v. Tri-State Generation & Transmission Ass'n, Inc., 173 F.R.D. 275, 283 (D. Colo. 1997).

[FN307]. Id.

[FN308]. Id.

[FN309]. Anderson v. Farmland Indus., Inc., 45 F. Supp. 2d 863, 865-66 (D. Kan. 1999). See also Upper Chattahoochee Riverkeeper Fund, Inc. v. City of Atlanta, 986 F. Supp. 1406, 1421 (N.D. Ga. 1997) (holding that notice in a Clean Water Act citizen suit was broad enough to cover all later claims except one).

[FN310]. 16 U.S.C. § 1540(g)(2)(A)(i) (1994).

[FN311]. 16 U.S.C. § 1532(15) (1994).

[FN312]. Reorganization Plan Numbered 4 of 1970, 35 Fed. Reg. 15,627 (1970) made applicable through 16 U.S.C. § 1532(15) (1994).

[FN313]. Hawksbill Sea Turtle v. Federal Emergency Management Agency, 126 F.3d 461, 471-72 (3rd Cir. 1997); see also Save the Yaak Comm. v. Block, 840 F.2d 714, 721 (9th Cir. 1988) (relying on the Ninth Circuit's decision in Hallstrom to dismiss an Endangered Species Act suit in part because the purported notice had not been sent to the Secretary); Building Indus. Ass'n of So. Cal., Inc. v. Lujan, 785 F. Supp. 1020, 1021-22 (D.D.C. 1992) (holding that Hallstrom requires dismissal of an Endangered Species Act citizen suit when plaintiffs had

given no notice); Citizens Interested in Bull Run, Inc. v. Edrington, 781 F. Supp. 1502, 1509 (D. Or. 1991) (holding that the court lacked jurisdiction over an Endangered Species Act case when plaintiffs conceded that they had not met the sixty-day notice requirement); Protect Our Eagles' Trees v. City of Lawrence, 715 F. Supp. 996, 998 (D. Kan. 1989) (holding that the court lacked jurisdiction over Endangered Species Act claims when the plaintiffs waited only sixteen days after giving notice to file suit).

[FN314]. 16 U.S.C. § 1538(a) (1994).

[FN315]. 16 U.S.C. § 1536 (1994).

[FN316]. Marbled Murrelet v. Babbitt, 83 F.3d 1068, 1073 (9th Cir. 1996). But see Southwest Ctr. for Biological Diversity v. United States Bureau of Reclamation, 143 F.3d 515, 520-22 (9th Cir. 1998) (dismissing an Endangered Species Act citizen suit because each of three notice letters sent at least sixty days prior to suit failed to adequately inform the Bureau of Reclamation that the citizens would claim that the Bureau's operations of the Hoover Dam jeopardized the Southwestern Willow Flycatcher).

[FN317]. Southwest Ctr. for Biological Diversity v. Federal Energy Regulatory Comm'n, 967 F. Supp. 1166, 1177-78 (D. Ariz. 1997) (citing Marbled Murrelet v. Babbitt, 83 F.3d 1068, 1074 (9th Cir. 1996)).

[FN318]. Humane Soc'y of the United States v. Hodel, 840 F.2d 45, 61 n.28 (D.C. Cir. 1988).

[FN319]. Forest Conservation Council v. Espy, 835 F. Supp. 1202, 1210 (D. Idaho 1993). The court emphasized, however, "that this ruling is in no way intended to serve as precedent with respect to the mandatory sixty-day notice provision of the Endangered Species Act." Id. at 1210 n.13.

[FN320]. 5 U.S.C. § 552 (1994).

[FN321]. Public Interest Research Group of N.J. v. Hercules, 50 F.3d 1239, 1248-49 (3rd Cir. 1995).

[FN322]. See, e.g., Southwest Ctr. for Biological Diversity v. Federal Energy Regulatory Comm'n, 967 F. Supp. 1166, 1172, 1177-78 (D. Ariz. 1997) (denying a Rule 12(b)(1) motion to dismiss an Endangered Species Act suit in part because notice was sufficient); Sierra Club v. Tri-State Generation & Transmission Ass'n, Inc., 173 F.R.D. 275, 281 (D. Colo. 1997) (deciding the sufficiency of notice by treating a Rule 12(b)(6) motion as a motion for summary judgment); Natural Resources Defense Council, Inc. v. Southwest Marine, Inc., 945 F. Supp. 1330, 1331 (S.D. Cal. 1996) (deciding a challenge to Clean Water Act notice through defendant's motion to dismiss for lack of subject matter jurisdiction); Idaho Sporting Congress v. Computrol, Inc., 952 F. Supp. 690, 691 (D. Idaho 1996) (deciding defendant's Rule 12(b)(1) and 12(b)(6) motions); Hudson Riverkeeper Fund, Inc. v. Putnam Hosp. Ctr., Inc., 891 F. Supp. 152, 153 (S.D.N.Y. 1995) (deciding defendant's Rule 12(b)(1) challenge to Clean Water Act notice); Frys v. General Motors Corp., 1995 WL 322585, at *1 (W.D.N.Y. 1995) (grantingdefendants' Rule 12(b)(6) motion to dismiss Clean Air Act and FWPCA claims on the basis of notice); Agricultural Excess & Surplus Ins. Co. v. A.B.D. Tank & Pump Co., 878 F. Supp. 1091, 1093-94 (N.D. Ill. 1995) (deciding a Rule 12(b)(6) challenge to RCRA notice); City of New York v. Anglebrook Ltd. Partnership, 891 F. Supp. 900, 901 (S.D.N.Y. 1995) (deciding Rule 12(b)(1) and 12(b)(6) challenges to notice); ACORN v. Edwards, 842 F. Supp. 227, 228, 230-33 (E.D. La. 1993) (denying defendants' motion to dismiss for lack of subject matter jurisdiction because notice was sufficient); York Ctr. Park Dist. v. Krilich, 1993 WL 114628, at *2-3 (N.D. Ill. 1993) (denying defendant's motion to dismiss on the basis of insufficient notice); Forest Conservation Council v. Espy, 835 F. Supp. 1202, 1205 (D. Idaho 1993) (deciding defendant's motion to dismiss for lack of subject matter jurisdiction based on notice); Washington Trout v. Scab Rock Feeders, 823 F. Supp. 819, 819-21 (E.D. Wash. 1993), aff'd, 45 F.3d 1351 (9th Cir. 1995) (granting defendant's motion to dismiss for lack of proper notice); Environmental Defense Fund v. Tidwell, 837 F. Supp. 1344, 1348 (E.D.N.C. 1992) (denying defendant's Rule 12(b)(1) and 12(b)(6) challenges to notice); Bettis v. Town of Ontario, 800 F. Supp. 1113, 1114 n.1 (W.D.N.Y. 1992) (treating defendants' four Rule 12(b) motions as motions for summary judgment); Klickitat County v. Columbia River Gorge Comm'n, 770 F. Supp. 1419, 1423-24 (E.D. Wash. 1991) (denying defendants' motion to dismiss for insufficient notice); Highlands Conservation v. E.R.O. Inc., 1991 WL 698124, at *2-3 (S.D.W. Va. 1990) (denying defendant's Rule 12(b) motion challenging the sufficiency of notice); Dague v. City of Burlington, 733 F. Supp. 23, 24 (D. Va. 1990), aff'd, 935 F.2d 1343 (2d Cir. 1991) (deciding a challenge to RCRA and Clean Water Act notice pursuant to Rules 12 and 56); Coalition Against Columbus Ctr. v. City of New York, 750 F. Supp. 93, 95, 97 (S.D.N.Y. 1990) (dismissing a Clean Air Act case pursuant to Rule 12(h) because of notice); Fishel v.

Westinghouse Elec. Corp., 617 F. Supp. 1531, 1533 (M.D. Pa. 1985) (deciding the sufficiency of notice by treating a Rule 12(b) motion as a motion for summary judgment).

[FN323]. See, e.g., Sierra Club, 173 F.R.D. at 281-83 (deciding both defendants' Rule 12(b)(6) challenge to Clean Air Act notice and their Rule 12(f) motion to strike various parts of the complaint); Fishel, 617 F. Supp. at 1533, 1535-38 (deciding Rule 12(b) challenges to both the RCRA notice and the RCRA claim).

[FN324]. Hercules, 50 F.3d at 1241.

[FN325]. Id. at 1243.

[FN326]. Id.

[FN327]. Id.

[FN328]. Id.

[FN329]. Id.

[FN330]. Id. at 1241.

[FN331]. Id. at 1244.

[FN332]. Id.

[FN333]. Id.

[FN334]. Id. at 1247.

[FN335]. Id.

[FN336]. Id. at 1248.

[FN337]. Id.

[FN338]. Id.

[FN339]. Id.

[FN340]. Id. at 1248-49.

[FN341]. 484 U.S. 49 (1987).

[FN342]. Id. at 56-57 (interpreting Clean Water Act, 33 U.S.C. § 1365(a) (1982)). As the Supreme Court noted in Gwaltney, "Congress has demonstrated in yet other statutory provisions that it knows how to avoid this prospective implication by using language that explicitly targets wholly past violations" and offered the Solid Waste Disposal Act, 42 U.S.C. § 6972(a)(1)(B) (1982 & Supp. III), as an example. Gwaltney, 484 U.S. at 57; id. at n.2.
However, this distinction between being able to sue for wholly past violations or only for continuing violations as a statutory matter is now probably academic. In Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998), the Supreme Court held that citizen plaintiffs lack standing to pursue citizen suits for wholly past violations because there is no way for the court to redress the injury: injunctive relief is moot if the violation no longer exists and civil penalties go to the U.S. Treasury, not to the plaintiffs. Steel Co., 523 U.S. at 96-98. As a result, the existence of continuing violations is now a constitutional--if not statutory--necessity, as the Fourth Circuit recently emphasized by requiring citizen suits to be dismissed any time the claim for injunctive relief becomes moot. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 149 F.3d 303, 306 (4th Cir. 1998).

[FN343]. Hercules, 50 F.3d at 1251. See also Idaho Sporting Congress v. Computrol, Inc., 952 F. Supp. 690, 693 (D. Idaho 1996) (finding plaintiffs' EPCRA notice broad enough to encompass ongoing violations).

[FN344]. Hercules, 50 F.3d at 1250-51.

[FN345]. California Sportfishing Protection Alliance v. City of W. Sacramento, 905 F. Supp. 792, 799 (E.D. Cal. 1995).

[FN346]. Id.

[FN347]. Save Our Health Org. v. Recomp of Minn., 37 F.3d 1334, 1335 (8th Cir. 1994).

[FN348]. Id. at 1336-37.

[FN349]. Id. at 1337.

[FN350]. Id. at 1337-38. More recently, the Eighth Circuit has emphasized that "[a] citizen suit [under the Clean Water Act] is limited to violations that are closely related to and of the same type as the violations specified in the notice of intent to sue." Comfort Lake Ass'n, Inc. v. Drasel Contracting, Inc., 138 F.3d 351, 355 (9th Cir. 1998) (citing Hercules, 50 F.3d at 1250, and 40 C.F.R. § 135.3).

[FN351]. Atlantic States Legal Found. v. United Musical Instruments, U.S.A., Inc., 61 F.3d 473, 474 (6th Cir. 1995).

[FN352]. Id.

[FN353]. Id. at 478.

[FN354]. Fed. R. Civ. P. 8(a) (1998).

[FN355]. See, e.g., Marino v. Classic Auto Refinishing, Inc., 37 F.3d 1354, 1357 (9th Cir. 1994) (holding that a series of filings with the court could not constitute a complaint under Rule 8(a) for purposes of relation back because none of the papers filed included a demand for judgment for relief).

[FN356]. 347 U.S. 186 (1954).

[FN357]. Id. at 189.

[FN358]. Id. Rule 12(e) provides that "[i]f a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading." Fed. R. Civ. P. 12(e).

[FN359]. 352 U.S. 445 (1957).

[FN360]. Id. at 453 (quoting Hart v. B.F. Keith Vaudeville Exchange, 262 U.S. 271, 274 (1923)).

[FN361]. Id.

[FN362]. Id. at 454.

[FN363]. 355 U.S. 41 (1957).

[FN364]. Id. at 45-46.

[FN365]. Id. at 47-48.

[FN366]. Id. at 42-43. The complaint "concluded by asking for relief in the nature of declaratory judgment, injunction, and damages." Id. at 43.

[FN367]. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

[FN368]. See Richard L. Marcus, The Revival of Fact Pleading Under the Federal Rules of Civil Procedure, 86 Colum. L. Rev. 433, 446-51 (1986) (discussing these cases).

[FN369]. Compare Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 954 F.2d 1054, 1057-58 (5th Cir. 1992) (adopting a heightened pleading standard) with Karim-Panahi v. Los Angeles Police Dep't, 839 F.2d 621, 625 (9th Cir. 1988) (requiring only notice pleading).

[FN370]. E.g., Ascon Properties v. Mobil Oil Co., 866 F.2d 1149, 1154 (9th Cir. 1989); McGregor v. Indus. Excess Landfill, Inc., 856 F.2d 39, 42- 43 (6th Cir. 1988); Barnes Landfill, Inc. v. Town of Highland, 802 F. Supp. 1087, 1088 (S.D.N.Y. 1992); Cash Energy, Inc. v. Weiner, 768 F. Supp. 892, 900 (D. Mass. 1991); Merilyn v. Rockwell Int'l Corp., 755 F. Supp. 1468, 1473 (D. Colo. 1991); Bradley Indus. Park v. Xerox Corp., 1991 WL 20008 (S.D.N.Y. Feb. 4, 1991). See also Carl W. Tobias, Elevated Pleading in Environmental Litigation, 27 U.C. Davis L. Rev. 357, 361-68 (1994) (discussing elevated pleading standards in environmental cases, especially CERCLA cases).

[FN371]. 507 U.S. 163 (1993).

[FN372]. Id. at 167 (quoting Elliott v. Perez, 751 F.2d 1472, 1473 (5th Cir. 1985), and citing Palmer v. San Antonio, 810 F.2d 514 (5th Cir. 1987)).

[FN373]. Id. at 168.

[FN374]. Id.

[FN375]. Id. at 168-69.

[FN376]. Warwick Admin. Group v. Avon Prods., Inc., 820 F. Supp. 116, 121 (S.D.N.Y. 1993). See also Carl W. Tobias, Elevated Pleading in Environmental Litigation, 27 U.C. Davis L. Rev. 357, 367-74 (1994) (discussing Leatherman's implications for environmental cases).

[FN377]. Fed. R. Civ. P. 12(b)(6) (1998).

[FN378]. Hoshman v. Esso Standard Oil Co., 263 F.2d 499, 502 (5th Cir. 1959).

[FN379]. Id. at 501.

[FN380]. Id.

[FN381]. Id. at 502 (citing Dunn v. Gazzola, 216 F.2d 709, 712 (1st Cir. 1954)).

[FN382]. See Bartholet v. Reishauer A.G., 953 F.2d 1073, 1078 (7th Cir. 1992) (noting that "[p]laintiffs can plead themselves out of court" and dismissing an ERISA case when plaintiff alleged that a promise was oral, because "ERISA does not allow oral variances on pension plans"); American Nurses' Ass'n v. Illinois, 783 F.2d 716, 724 (7th Cir. 1986) ("A plaintiff who files a long and detailed complaint may plead himself out of court by including factual allegations which if true show that his legal rights were not invaded.") (citing Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1050 (5th Cir. 1982)); Orthmann v. Apple River Campground, Inc., 757 F.2d 909, 915 (7th Cir. 1985) (dictum); 5 Wright & Miller, Federal Practice & Procedure § 1357, at 604 (1969); Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1050 (5th Cir. 1982) (holding that "a complaint that shows relief to be barred by an affirmative defense, such as the statute of limitations, may be dismissed for failure to state a cause of action" (citing United Transp. Union v. Fla. E. Coast Ry. Co., 586 F.2d 520, 527 (5th Cir. 1978); Joe E. Freund, Inc. v. Ins. Co. of N. Amer., 370 F.2d 924, 926 (5th Cir. 1967); J.M. Blythe Motor Lines Corp. v. Blalock, 310 F.2d 77, 78 (5th Cir. 1962); Herron v. Herron, 255 F.2d 589, 593 (5th Cir. 1958)); Associated Builders, Inc. v. Alabama Power Co., 505 F.2d 97, 100 (5th Cir. 1974) (dismissing a complaint when an attached prospectus revealed that there had been no misrepresentation, as alleged).

[FN383]. Conley v. Gibson, 355 U.S. 41, 47-48 (1957); see also Rogers v. Lincoln Towing Serv., Inc., 771 F.2d

194, 198 (7th Cir. 1985) ("Even the liberal notice pleading allowed by the federal rules requires the complaint to include the operative facts upon which a plaintiff bases his claim." (citing Conley v. Gibson, 355 U.S. 41, 47 (1957))); Universe Tankships, Inc. v. United States, 528 F.2d 73, 75-76 (3rd Cir. 1975) (at a minimum, the pleader must "'disclose adequate information as the basis of his claim for relief" 'and give the defendant "'fair notice of what the plaintiff's claim is and the grounds upon which it rests" ' (quoting 2A J. Moore, Federal Practice P8.01(3) (2d ed. 1974); Conley v. Gibson, 355 U.S. 41, 47 (1957))); Joiner Sys., Inc. v. AVM Corp., 517 F.2d 45, 47 (3rd Cir. 1975) ("The complaint should give the defendant fair notice of the claim asserted."); Roberts v. Acres, 495 F.2d 57, 58-59 (7th Cir. 1974) ("The complaint is designed to apprise the defendant of the incident out of which a cause of action arose and the general nature of the action. The relevant facts may be determined by discovery ....")

[FN384]. Friedlander v. Nims, 755 F.2d 810, 813 n.3 (11th Cir. 1985) ("The federal rules governing pleading were designed to 'reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits" ' (quoting Conley v. Gibson, 355 U.S. 41, 48 (1957))); Roberts v. Acres, 495 F.2d 57, 59 (7th Cir. 1974); Hughes v. Noble, 295 F.2d 495, 496 (5th Cir. 1961).

[FN385]. See, e.g., Panaras v. Liquid Carbonic Indus. Corp., 74 F.3d 786, 792 (7th Cir. 1996) ("in order to resist a motion to dismiss, the complaint must at least set out facts sufficient to 'outline or adumbrate' the basis of the claim."); Sutliff, Inc. v. Donovan Cos., 727 F.2d 648, 654 (7th Cir. 1984) ("the pleader must 'set out sufficient factual matter to outline the elements of his cause of action or claim, proof of which is essential to his recovery," ' and "'the complaint must contain either direct allegations on every material point necessary to sustain a recovery on any legal theory, even though it may not be the theory suggested or intended by the pleader, or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial." ' (quoting 5 Wright & Miller, Federal Practice & Procedure § 1216, at 121-23 (1969))); Quality Foods de Centro Am. v. Latin Am. Agribusiness Dev. Corp., 711 F.2d 989, 995 (11th Cir. 1983) ("enough data must be pleaded so that each element of the alleged antitrust violation can be properly identified," but "the alleged facts need not be spelled out with exactitude, nor must recovery appear imminent"); In re Plywood Antitrust Litig., 655 F.2d 627, 641 (5th Cir. 1981) ("Despite the liberality of modern rules of pleading, a complaint still must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory."); Uptown People's Community Health Servs. Bd. of Directors v. Board of Comm'rs of Cook County, 647 F.2d 727, 733 (7th Cir. 1981) (dismissing a claim under 42 U.S.C. § 1985(3) because the "complaint does not remotely allege a class affected," which is an element of a § 1985(3) claim); Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919, 924 (9th Cir. 1980) (tying proper pleading of a monopolization claim to its elements); Quinonez v. National Ass'n of Sec. Dealers, Inc., 540 F.2d 824, 828 (5th Cir. 1976) (holding that the complaint need only allege prima facie case); Roberts v. Acres, 495 F.2d 57, 59 (7th Cir. 1974) (holding that the "'only elements which need to be present in order to establish a claim for damages under the Civil Rights Act are that the conduct complained of was engaged under color of state law, and that such conduct subjected the plaintiff to the deprivation of rights, privileges, or immunities secured by the Constitution of the United States" ' (quoting Marshall v. Sawyer, 301 F.2d 639, 646 (9th Cir. 1962))); Brett v. First Fed. Savings & Loan Ass'n, 461 F.2d 1155, 1158 (5th Cir. 1972) ("Although plaintiffs may be unable to allege specific facts proving actual acts of agreement or conspiracy, the pleadings are sufficient if they set forth facts from which an inference of unlawful agreement can be drawn.... Plaintiffs cannot be required to plead with specificity the very facts which can only be proven by circumstantial evidence.").

See also Scotch Whiskey Ass'n v. United States Distilled Prods. Co., 952 F.2d 1317, 1319 (Fed. Cir. 1991) (holding that in an action under the Trademark Act, a plaintiff need not plead a fact that is not an element of the legal claim).

The Seventh Circuit has also tied the sufficiency of a complaint to issue and claim preclusion, holding that "[t]he complaint would have to indicate the nature of the plaintiff's claim with only enough specificity to enable the parties to determine the preclusive effect of a judgment disposing of the claim ('a short and plain statement of the claim showing that the pleader is entitled to relief,' Rule 8 (a)(2))." American Nurses' Ass'n v. Illinois, 783 F.2d 716, 723 (7th Cir. 1986).

[FN386]. Luckett v. Rent-a-Center, Inc., 53 F.3d 871, 873 (7th Cir. 1995) ("Complaints need not plead legal theories."); Labram v. Havel, 43 F.3d 918, 920 (4th Cir. 1995) (holding that "[l]egal labels characterizing a claim cannot, standing alone," determine whether the complaint fails to state a claim and refusing to dismiss a claim for "sexual molestation," which Nevada does not recognize, when the complaint clearly stated a claim for common-law battery and there was no prejudice to the defendant); A.A. Poultry Farms, Inc. v. Rose Acre Farms, 881 F.2d 1396, 1399 (7th Cir. 1989) ("Under a system of notice pleading, a party may prevail by establishing that its legal rights

have been violated, whether or not it names the right statute."); Donaldson v. Clark, 819 F.2d 1551, 1561 (11th Cir. 1987) (Rule 8 does not require "the exact articulation of the legal theories upon which the case will be based."); Sutliff, Inc. v. Donovan Cos., 727 F.2d 648, 654 (7th Cir. 1984) (citing 5 Wright & Miller, Federal Practice & Procedure § 1216, at 121-23 (1969)); Dussouy v. Gulf Coast Inv. Corp., 660 F.2d 594, 604 (5th Cir. 1981) ("The form of the complaint is not significant if it alleges facts upon which relief can be granted, even if it fails to categorize correctly the legal theory giving rise to the claim."); Rohler v. TRW, Inc., 576 F.2d 1260, 1264 (7th Cir. 1978) (noting that "it is not necessary that the plaintiff set forth the legal theory on which he relies if he sets forth sufficient factual allegations to state a claim showing that he is entitled to any relief which the court may grant" (citing Hostrop v. Board of Junior College Dist. No. 515, 523 F.2d 569 (7th Cir. 1975)); 2A Moore's Federal Practice & Procedure 8.14). But see Uptown People's Community Health Servs. Bd. of Directors v. Board of Comm'rs of Cook County, 647 F.2d 727, 739 (7th Cir. 1981) (holding that failure, in a complaint against the Department of Health, Education, and Welfare (HEW), to specify the statutes and regulations that HEW violated failed to apprise the defendant "of the substance of the allegations," especially when "even the extensive factual allegations in the Complaint do not shed light on which aspects of HEW's conduct relate to" that count).

[FN387]. American Nurses' Ass'n v. Illinois, 783 F.2d 716, 727 (7th Cir. 1986) ("A plaintiff does not have to plead evidence."); Maclin v. Paulson, 627 F.2d 83, 86 (7th Cir. 1980) ("Evidentiary matters need not be pleaded.") (citing Rohler v. TRW, Inc., 576 F.2d 1260, 1264 (7th Cir. 1978)); Quinonez v. National Ass'n of Sec. Dealers, Inc., 540 F.2d 824, 828 (5th Cir. 1976) (parties need not plead with "evidentiary specificity" the acts complained of); St. Louis-San Francisco Ry. Co. v. Neely, 496 F.2d 1122, 1123 n.1 (8th Cir. 1974) ("Federal pleading is notice pleading and evidence is not required to be pled.").

[FN388]. Luckett v. Rent-a-Center, Inc., 53 F.3d 871, 873 (7th Cir. 1995).

[FN389]. Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters, 459 U.S. 519, 526 (1983) ("[W]e must assume that the Union can prove the facts alleged in its amended complaint. It is not, however, proper to assume that the Union can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged."); Quality Foods de Centro Am. v. Latin Am. Agribusiness Dev. Corp., 711 F.2d 989, 995 (11th Cir. 1983).

[FN390]. Panaras v. Liquid Carbonic Indus. Corp., 74 F.3d 786, 792 (7th Cir. 1996); Sutliff, Inc. v. Donovan Cos., 727 F.2d 648, 653 (7th Cir. 1984) (noting that if plaintiff "claims an antitrust violation, but the facts he narrates do not at least outline or adumbrate such a violation, he will get nowhere merely by dressing them up in the language of antitrust."); Associated Builders, Inc. v. Alabama Power Co., 505 F.2d 97, 99 (5th Cir. 1974) ("Conclusory allegations and unwarranted deductions of fact are not admitted as true, especially when such conclusions are contradicted by facts disclosed by a document appended to the complaint.").

[FN391]. See Uptown People's Community Health Servs. Bd. of Dir. v. Board of Comm'rs of Cook County, 647 F.2d 727, 739 (7th Cir. 1981) (holding that fair notice was lacking when plaintiff alleged several counts against a federal defendant but the "extensive factual allegations" did not specify what conduct related to what count); Joiner Sys., Inc. v. AVM Corp., 517 F.2d 45, 47-48 (3rd Cir. 1975) (holding that a complaint seeking lost profits subsequent to the repudiation of a contract did not give the defendant fair notice of claims based on underpayment prior to repudiation).

[FN392]. In re Marino, 37 F.3d 1354, 1357 (9th Cir. 1994) (refusing to qualify a purported pleading as a complaint, for statute of limitations purposes, when the document contained no "demand for judgment for the relief the pleader seeks," because "the policy of construing pleadings liberally does not justify the conclusion that any document filed in a court giving some notice of a claim satisfies the requirements of the Federal Rules.").

[FN393]. Arthur H. Richland Co. v. Harper, 302 F.2d 324, 326 (5th Cir. 1962) (quoting the complaint).

[FN394]. Orthmann v. Apple River Campground, Inc., 757 F.2d 909, 915 (7th Cir. 1985).

[FN395]. Id.

[FN396]. Id.

[FN397]. Under Rule 15, courts are to be liberal in allowing amendment of deficient pleadings. Fed. R. Civ. P.

15.

[FN398]. Joiner Sys., Inc. v. AVM Corp., 517 F.2d 45, 47-48 (3rd Cir. 1975). See also Jimenez v. Tuna Vessel "Granada," 652 F.2d 415, 421 (5th Cir. 1981) (refusing to allow a plaintiff to try unpled issues because the introduction of its evidence "gave this defendant no fair notice that new issues were thereby entering the case, issues that it must meet or suffer an adverse judgment.").

[FN399]. Uptown People's Community Health Servs. Bd. of Dir. v. Board of Comm'rs of Cook County, 647 F.2d 727, 739 (7th Cir. 1981). See also Panaras v. Liquid Carbonic Indus. Corp., 74 F.3d 786, 792-94 (7th Cir. 1996) (dismissing an ERISA claim when the plaintiff's "allegation of bad faith is entirely conclusory," accusations "of intentional concealment rest on thin air" and do not "even go so far as to inform [defendants] what information they have purportedly concealed from whom," and the plaintiff failed to inform either the defendant or the court what harm he purportedly suffered).

[FN400]. California Dump Truck Owners Ass'n v. Associated Gen. Contractors of Amer., San Diego Chapter, Inc., 562 F.2d 607, 614-15 (9th Cir. 1977).

[FN401]. Fed. R. Civ. P. 12(e).

[FN402]. Mitchell v. E-Z Way Towers, Inc., 269 F.2d 126, 132 (5th Cir. 1959). See also Hodgson v. Virginia Baptist Hosp., Inc., 482 F.2d 821, 822- 23 (4th Cir. 1973) ("Rule 12(e), which authorizes the motion for a more definite statement, must be read in conjunction with Rule 8, which establishes the general rules for pleading."); Schaedler v. Reading Eagle Publication, Inc., 370 F.2d 795, 798 (3rd Cir. 1967) (discussing Rule 12(e) motions in the context of general pleading requirements and holding that such motions are only rarely appropriate); CMAX, Inc. v. Hall, 290 F.2d 736, 738 (9th Cir. 1961) (reviewing vagueness and ambiguity "in view of the principles of pleading set up by the rules of civil procedure, which established a system of pleading with simplified and brief forms of complaint.").

[FN403]. United States v. Guston-Bacon Div., Certain-Teed Prods. Corp., 426 F.2d 539, 543 (10th Cir. 1970) (holding that a Rule 12(e) motion was inappropriate when it was "an attempt to discover evidentiary matters;" instead, "discovery ought to proceed in conformity with Rules 26-37"); CMAX, Inc. v. Hall, 290 F.2d 736, 738 (9th Cir. 1961) (holding that a 12(e) motion was inappropriate when it in essence sought an order for a bill of particulars and "[t]he matters there sought to be produced were evidentiary in character and not necessary or appropriate for pleading"); Mitchell v. E-Z Way Towers, Inc., 269 F.2d 126, 132 (5th Cir. 1959) ("It is to be noted that a motion for more definite statement is not to be used to assist in getting the facts in preparation for trial as such. Other rules relating to discovery, interrogatories and the like exist for this purpose.").

[FN404]. Schaedler v. Reading Eagle Publication, Inc., 370 F.2d 795, 797 (3rd. Cir. 1967).

[FN405]. Until 1948, when amendments adopted in 1946 took effect, Rule 12(e) allowed a motion either for a more definite statement or for a bill of particulars. Moreover, the request for a bill of particulars could be made "to prepare for trial," with the result that a defendant had a much better chance of forcing the plaintiff to disgorge information early in the lawsuit. Advisory Committee on Rules for Civil Procedure, Report of Proposed Amendments, 5 F.R.D. 433, 444 (1946); Charles E. Clark, The Amended Federal Rules, 15 Brooklyn L. Rev. 1, 8 (1948); see also Hodgson v. Virginia Baptist Hosp., Inc., 482 F.2d 821, 823 (4th Cir. 1973) (discussing the change); Mitchell v. E-Z Way Towers, Inc., 269 F.2d 126, 132 (5th Cir. 1959) (discussing the change).

[FN406]. Franklin v. Shelton, 250 F.2d 92, 95 (10th Cir. 1957).

[FN407]. Hodgson v. Virginia Baptist Hosp., Inc., 482 F.2d 821, 823-24 (4th Cir. 1973). The court went on to conclude that "when the complaint conforms to Rule 8(a) and it is neither so vague nor so ambiguous that the defendant cannot reasonably be required to answer, the district court should deny a motion for a more definite statement and require the defendant to bring the case to issue by filing a response within the time provided by the rules." Id. at 824.

[FN408]. Marx v. Gumbinner, 855 F.2d 783, 786 (11th Cir. 1988).

[FN409]. Id. at 792.

[FN410]. Id.

[FN411]. Id.

[FN412]. Id.

[FN413]. Anderson v. District Bd. of Trustees of Cent. Fla. Community College, 77 F.3d 364, 365-66 (11th Cir. 1996).

[FN414]. Id. at 366.

[FN415]. Id. (citations and footnotes omitted). The court also observed that "[o]n examining those pleadings, the [district] court, acting sua sponte, should have struck the plaintiff's complaint, and the defendant's answer, and instructed plaintiff's counsel to file a more definite statement." Id. at 367 n.5.

[FN416]. McHenry v. Renne, 84 F.3d 1172, 1179-80 (9th Cir. 1996).

[FN417]. Id. at 1177.

[FN418]. Id. at 1178.

[FN419]. Id. at 1179-80.

[FN420]. Compare discussion supra Part II.C.4 with footnotes 376 to 384 and accompanying text.

[FN421]. E.g., Clean Water Act, 33 U.S.C. § 1365(b)(1) (1994).

[FN422]. See, e.g., 40 C.F.R. § 135.3(a) (1997) (Clean Water Act).

[FN423]. Luckett v. Rent-a-Center, Inc., 53 F.3d 871, 873 (7th Cir. 1995); Labram v. Havel, 43 F.3d 918, 920 (4th Cir. 1995); Donalson v. Clark, 819 F.2d 1551, 1561 (11th Cir. 1987); Dussouy v. Gulf Coast Inv. Corp., 660 F.2d 594, 604 (5th Cir. 1981).

[FN424]. Panaras v. Liquid Carbonic Indus. Corp., 74 F.3d 786, 792 (7th Cir. 1996); see also Quality Foods de Centro Am. v. Latin Am. Agribusiness Dev. Corp., 711 F.2d 989, 995 (11th Cir. 1983); In re Plywood Antitrust Litig., 655 F.2d 627, 641 (5th Cir. 1981); Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919, 924 (9th Cir. 1980).

[FN425]. See, e.g., 40 C.F.R. § 135.3(a) (1997) (Clean Water Act).

[FN426]. Uptown People's Community Health Servs. Bd. of Dir. v. Board of Comm'rs of Cook County, 647 F.2d 727, 739 (7th Cir. 1981).

[FN427]. Anderson v. District Bd. of Trustees of Cent. Fla. Community College, 77 F.3d 364, 365-66 (11th Cir. 1996); McHenry v. Renne, 84 F.3d 1172, 1179-80 (9th Cir. 1996).

[FN428]. See, e.g., 40 C.F.R. § 135.3 (1997) (Clean Water Act).

[FN429]. See Marx v. Gumbinner, 855 F.2d 783, 786 (11th Cir. 1988) (indicating that Rule 12(e) motions are appropriate when a defendant needs more information to determine whether a defense is available).

[FN430]. Fed. R. Civ. P. 9(f).

[FN431]. See, e.g., 40 C.F.R. § 135.3(a) (1997) (Clean Water Act).

[FN432]. Fed. R. Civ. P. 10(a).

[FN433]. Fed. R. Civ. P. 11(a).

[FN434]. Hallstrom v. Tillamook County, 493 U.S. 20, 29 (quoting Gwaltney of Smithfield, Inc. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 60 (1987)).

[FN435]. Under the Federal Rules, defendants generally have only 20 days to answer the complaint. Fed. R. Civ. P. 12(a)(1)(A). However, if the defendant waives the service of summons, it has 60 days to respond if it was addressed within a judicial district of the United States. Fed. R. Civ. P. 12(a)(1)(B). Federal defendants always have 60 days to answer. Fed. R. Civ. P. 12(a)(3).

[FN436]. Fed. R. Civ. P. 8(b).

[FN437]. Fed. R. Civ. P. 8(c).

[FN438]. Fed. R. Civ. P. 11(b).

[FN439]. Conley v. Gibson, 355U.S. 41, 47 (1957).

[FN440]. In the clearest example, Congress amended the Clean Air Act after the Supreme Court's decision in Gwaltney expressly to allow citizen suits for wholly past violations. See 42 U.S.C. § 7604(a) (1994). Moreover, courts have interpreted EPCRA as allowing suit for wholly past violations. Idaho Sporting Congress v. Computrol, Inc., 952 F. Supp. 690, 691-92 (D. Idaho 1996); Atlantic States Legal Found., Inc. v. Whiting Roll-Up Door Mfg. Co., 772 F. Supp. 745, 752 (W.D.N.Y. 1991). See also discussion of the constitutional limitations recently imposed on such suits supra note 342. But see Atlantic States Legal Found., Inc. v. United Musical Instruments, U.S.A., Inc., 61 F.3d 473, 476-77 (6th Cir. 1995) (rejecting this reading of EPCRA).

[FN441]. Hallstrom, 493 U.S. at 29 (citing Gwaltney of Smithfield, Inc. v. Chespeake Bay Found., Inc., 484 U.S. 49, 60 (1987)).

[FN442]. Id. (citing 116 Cong. Rec. 33104 (1970)).

[FN443]. California Sportfishing Protection Alliance v. City of W. Sacramento, 905 F. Supp. 792, 799 (E.D. Cal. 1995).

[FN444]. Public Interest Research Group of N.J. v. Hercules, 50 F.3d 1239, 1248-49 (3rd Cir. 1995).

[FN445]. California Sportfishing Protection Alliance v. City of W. Sacramento, 905 F. Supp. 792, 799-800 (E.D. Cal. 1995).

[FN446]. Sierra Club v. Tri-State Generation & Transmission Ass'n, Inc., 173 F.R.D. 275, 283 (D. Colo. 1997).

[FN447]. United States v. Gustin-Bacon Div., Certainteed Prods. Corp., 426 F.2d 539, 542 (10th Cir. 1970); see also Markowitz v. Brody, 90 F.R.D. 542, 549 (S.D.N.Y. 1981) (citing Gustin-Bacon Div., 426 F.2d at 542); Untermeyer v. Fidelity Daily Income Trust, 79 F.R.D. 36, 45 (D. Mass. 1978) (also citing Gustin-Bacon, 426 F.2d at 542).

[FN448]. 28 U.S.C. § 2072(b) (1994) ("all laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."); see also Libby v. United States, 840 F.2d 818, 820 (11th Cir. 1988).

[FN449]. United States v. Gustin-Bacon Div., Certainteed Prods. Corp., 426 F.2d 539, 542 (10th Cir. 1970); see also Markowitz v. Brody, 90 F.R.D. 542, 549 (S.D.N.Y. 1981) (citing Untermeyer v. Fidelity Daily Income Trust, 79 F.R.D. 36, 45 (D. Mass. 1978)); Untermeyer v. Fidelity Daily Income Trust, 79 F.R.D. 36, 45 (D. Mass. 1978), vacated on other grounds, 580 F.2d 22 (1st Cir. 1978) (citing 2 Moore's Federal Practice & Procedure § 86.05, at 86-22).

[FN450]. 15 U.S.C. §§ 2301 et seq. (1994).

[FN451]. 15 U.S.C. § 2310(d)(3)(B) (1982).

[FN452]. Saval v. BL Ltd., 710 F.2d 1027, 1030 (4th Cir. 1983).

[FN453]. Fed. R. Civ. P. 20.

[FN454]. Saval v. BL Ltd., 710 F.2d 1027, 1030 (4th Cir. 1983).

[FN455]. Id.

[FN456]. Id.

[FN457]. Lasky v. Continental Prods. Corp., 569 F. Supp. 1227, 1228 (E.D. Pa. 1983).

[FN458]. Id.

[FN459]. Id.

[FN460]. Id.

[FN461]. 15 U.S.C. §§ 80a-1 et seq. (1994).

[FN462]. Fed. R. Civ. P. 23.1. Rule 23.1 requires, for instance, that derivative actions complaints be verified and allege that the plaintiff be a shareholder or member at the time of the transaction complained of, allege that the action is not collusive, and state with particularity the efforts plaintiff has made to achieve resolution of the problem. Id.

[FN463]. Fed. R. Civ. P. 23.1.

[FN464]. See, e.g., Boyko v. Reserve Fund, Inc., 68 F.R.D. 692, 696 (S.D.N.Y. 1975) (holding that "where there is at least one affiliated or interested director on the board of a mutual fund, the futility of making a demand on the entire board in an action brought by a shareholder pursuant to Section 36(b) [of the Investment Company Act] will be presumed.").

[FN465]. Markowitz v. Brody, 90 F.R.D. 542, 549 (S.D.N.Y. 1981).

[FN466]. Id.

[FN467]. Untermeyer v. Fidelity Daily Income Trust, 79 F.R.D. 36, 45 (D. Mass.), vacated on other grounds, 580 F.2d 22 (1st Cir. 1978).

[FN468]. Id. (citing 15 U.S.C. § 80a-35(b)(1-3) (1976); 15 U.S.C. § 78p(b) (1976); Hearings on H.R. 11995, S. 2224, H.R. 13754 and H.R. 14737, before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce, 91st Cong., 1st Sess. 201 (1969)).

[FN469]. 426 F.2d 539 (10th Cir. 1970).

[FN470]. Id. at 542-43.

[FN471]. Id.

[FN472]. 46 U.S.C. app. § 741 et seq. (1994).

[FN473]. Suits in Admiralty Act, 46 U.S.C. app. § 742 (1994).

[FN474]. Fed. R. Civ. P. 4(m).

[FN475]. Henderson v. United States, 51 F.3d 574, 575 (5th Cir. 1995), rev'd and remanded, 517 U.S. 654 (1996).

[FN476]. Id. at 576.

[FN477]. Id. Accord, Libby v. United States, 840 F.2d 818, 820-21 (11th Cir. 1988) (concluding "that the forthwith service requirement of section 742 is jurisdictional, that it involves the substantive rights of the parties, and that it was not superseded by Rule 4(j)."); Amella v. United States, 732 F.2d 711, 713-14 (9th Cir. 1984); Battaglia v. United States, 303 F.2d 683, 685-86 (2d Cir.), cert. dismissed, 371 U.S. 907 (1962). But see Jones & Laughlin Steel, Inc. v. Mon River Towing, Inc., 772 F.2d 62, 64-66 (3rd Cir. 1985) (holding forthwith service requirement to be procedural).

[FN478]. 517 U.S. 654 (1996).

[FN479]. Id. at 656.

[FN480]. Id.

[FN481]. Id. at 659.

[FN482]. Id. at 661.

[FN483]. Id. at 665.

[FN484]. Id. at 671-72 (emphasis added).

[FN485]. Justices Scalia and Kennedy. Id. at 672-73.

[FN486]. Justices Rehnquist, Thomas, and O'Connor. Id. at 673-74.

[FN487]. Id. at 672-73.

[FN488]. Id.

[FN489]. Id.

[FN490]. 42 U.S.C. §§ 9601-9661 (1994).

[FN491]. 42 U.S.C. § 9607(a) (1994). CERCLA defines "hazardous substance" through reference to several other environmental acts, see 42 U.S.C. § 9601(14) (1994), and the resulting list includes almost every kind of known toxin, carcinogen, or otherwise hazardous (flammable, caustic) substance. The categories of potentially liable parties include the owners or operators of a vessel or facility; "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of"; "any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person"; and "any person who accepts or accepted hazardous substances for transport to disposal or treatment facilities." 42 U.S.C. § 9607(a)(1) to (4) (1994). Defenses are limited to acts of God, acts of war, and acts of third parties who are not the defendant's agents or employees if the defendant used due care and took precautions against all foreseeable problems. 42 U.S.C. § 9607(b) (1994).

[FN492]. 42 U.S.C. § 9601(21) (1994).

[FN493]. Fed. R. Civ. P. 17(b).

[FN494]. See, e.g., Levin Metals Corp. v. Parr-Richmond Terminal Co., 817 F.2d 1448, 1451 (9th Cir. 1987) (citing 6 C. Wright & A. Miller, Federal Practice & Procedure § 1563 (1971)).

[FN495]. Levin Metals Corp. v. Parr-Richmond Terminal Co., 817 F.2d 1448, 1450 (9th Cir. 1987); United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 732-34 (8th Cir. 1986); United States v. Dickerson, 640 F. Supp. 448, 452 (D. Md. 1986); United States v. Shell Oil Co., 605 F. Supp. 1064, 1069-73 (D. Colo. 1985).

[FN496]. 42 U.S.C. § 9607(a) (1994).

[FN497]. 817 F.2d 1448 (9th Cir. 1987).

[FN498]. Id. at 1451.

[FN499]. Id. (citing Northeastern Pharmaceutical & Chem. Co., 810 F.2d at 746; Missouri v. Bliss, 23 E.R.C. 1978, 1982 (E.D. Mo. 1985)). But see Columbia River Serv. Corp. v. Gilman, 751 F. Supp 1448, 1450-54 (W.D. Wash. 1990) (criticizing the Ninth Circuit's decision).

[FN500]. Louisiana-Pacific Corp. v. Asarco, Inc., 5 F.3d 431, 433-34 (9th Cir. 1993). The court also noted, however, that "in Washington, as in manystates, this problem is mitigated by the opportunity to file a CERCLA action against a dissolved corporation for a considerable time after dissolution." Id. at 434.

[FN501]. Witco Corp. v. Beekhus, 38 F.3d 682, 689-90 (3rd Cir. 1994). Nevertheless, two district courts within the Third Circuit have held that CERCLA and not Rule 17 and state law governs whether corporations can be sued. AM Properties Corp. v. GTE Prods. Corp., 844 F. Supp. 1007, 1011-12 (D.N.J. 1994); In re Tutu Wells Contamination Litig., 846 F. Supp. 1243, 1275-77 (D.V.I. 1993).

[FN502]. United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726, 746-47 (8th Cir. 1986).

[FN503]. Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 1500-01 (11th Cir. 1996).

[FN504]. Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240, 1247 (6th Cir. 1991) (quoting New York v. Shore Realty Corp., 759 F.2d 1032, 1045 (2d Cir. 1985), and citing Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986)).

[FN505]. 681 F. Supp. 1492 (D. Utah 1987).

[FN506]. Id. at 1494.

[FN507]. Id.

[FN508]. Id. at 1495.

[FN509]. Id. (citing United States v. Gustin-Bacon Div., Certain-Teed Prods. Corp., 426 F.2d 539, 542 (10th Cir. 1970).

[FN510]. United States v. Sharon Steel Corp., 682 F. Supp. 1491, 1495 (D. Utah 1987) (quoting Guston-Bacon, 426 F.2d at 542).

[FN511]. Id.

[FN512]. Id. (citing H.R. Rep. No. 1016, 96th Cong., 2d Sess., pt. 1 at 20 (1980), reprinted in 1980 U.S.C.C.A.N. 6119, 6123, and quoting Artesian Water Co v. Government of New Castle County, 659 F. Supp. 1269, 1276 (D. Del. 1987)).

[FN513]. Id.

[FN514]. Id. (citations omitted).

[FN515]. Id. at 1496 (quoting 42 U.S.C. § 9607(a)).

[FN516]. Id. (citing 42 U.S.C. § 9601(21)).

[FN517]. Id. at 1496 (citing Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986)).

[FN518]. Id. at 1498.

[FN519]. Id.

[FN520]. Traverse Bay Area Intermediate Sch. Dist. v. Hitco, Inc., 762 F. Supp. 1298, 1300 (W.D. Mich. 1991). The court concluded that "congressional intent is clear" and "Rule 17(b) is superseded and CERCLA actions against dissolved corporations must be permitted to proceed." Id. at 1301.

[FN521]. In re Tutu Wells Contamination Litig., 846 F. Supp. 1243, 1275- 77 (D.V.I. 1993).

[FN522]. Id. at 1276 (discussing Levin Metals Corp. v. Parr-Richmond Terminal Co., 817 F.2d 1448 (9th Cir. 1987), and Joslyn Mfg. Co. v. T.L. James & Co., 893 F.2d 80 (5th Cir. 1990)). Compare Idylwoods Assocs. v. Mader Capital, Inc., 915 F. Supp. 1290, 1303-04 (W.D.N.Y. 1996), reconsidered on other grounds, 956 F. Supp. 410 (W.D.N.Y. 1997); Hillsborough County v. A&E Road Oiling Serv., 877 F. Supp. 618, 621-22 (M.D. Fla. 1995); Chatham Steel Corp. v. Brown, 858 F. Supp. 1130, 1150-51 (N.D. Fla. 1994); AM Properties Corp. v. GTE Prods. Corp., 844 F. Supp. 1007, 1011-12 (D.N.J. 1994); Barton Solvents Inc. v. Southwest Petro-Chem, 836 F. Supp. 757, 760- 61 (D. Kan. 1993); BASF Corp. v. Central Transp., Inc., 830 F. Supp. 1011, 1012-13 (E.D. Mich. 1993); City & County of Denver v. Adolph Coors Co., 813 F. Supp. 1471, 1474-75 (D. Colo. 1992); Stychno v. Ohio Edison Co., 806 F. Supp. 663, 668-69 (N.D. Ohio 1992); Traverse Bay Area Intermediate Sch. Dist. v. Hitco, Inc., 762 F. Supp. 1298, 1301 (W.D. Mich. 1991); United States v. Distler, 741 F. Supp. 643, 645-46 (W.D. Ky. 1990); United States v. Sharon Steel Corp., 681 F. Supp. 1492, 1496 (D. Utah 1987), which all held that CERCLA supersedes Rule 17(b), often expressly rejecting Levin Metals. Even the Western District of Washington has criticized the Ninth Circuit's decision in Levin Metals. Columbia River Serv. Corp. v. Gilman, 751 F. Supp. 1448, 1453 (W.D. Wash. 1990).

[FN523]. In re Tutu Wells Contamination Litig., 846 F. Supp. at 1276 (citing United States v. Sharon Steel Corp., 681 F. Supp. 1492 (D. Utah 1987); Columbia River Serv. Corp. v. Gilman, 751 F. Supp. 1448 (W.D. Wash. 1990); Soo Line R.R.Co. v. B.J. Carney & Co., 797 F. Supp. 1472, 1481 (D. Minn. 1992); Traverse Bay Area Intermediate Sch. Dist. v. Hitco, Inc., 762 F. Supp. 1298, 1301 (W.D. Mich 1991)).

[FN524]. In re Tutu Wells Contamination Litig., 846 F. Supp. at 1277.

[FN525]. Friends of the Earth v. Carey, 535 F.2d 165, 176 (2d Cir. 1976).

[FN526]. E.g., Toxic Substances Control Act, 15 U.S.C. § 2619(b) (1994).

[FN527]. Hallstrom v. Tillamook County, 493 U.S. 20, 29 (1989) (citing 116 Cong. Rec. 32927 (1970); Note, Notice by Citizen Plaintiffs in Environmental Litigation, 79 Mich. L. Rev. 299, 301-307 (1980)).

[FN528]. Natural Resources Defense Council, Inc. v. Train, 510 F.2d 692, 700 (D.C. Cir. 1974); see also Friends of the Earth v. Carey, 535 F.2d 165, 176 (2d Cir. 1976).

[FN529]. S. Rep. No. 91-1196, at 38 (1970).

[FN530]. S. Rep. No. 92-414, at 80 (1971), reprinted in 1972 U.S.C.C.A.N. 3668, 3745 (1972).

[FN531]. H. Rep. No. 92-911, at 133 (1972), reprinted in 1 Legislative History of the Water Pollution Control Act Amendments of 1972, at 820 (1973).

[FN532]. Hallstrom, 493 U.S. at 31.

[FN533]. Henderson v. United States, 517 U.S. 654, 669-672 (1996).

[FN534]. Id. at 673.

[FN535]. Id. at 672.