

DIMINISHED ACCESS TO JUDICIAL REVIEW IS AN  
UNACCEPTABLE CONSEQUENCE OF EPA'S  
DELEGATION OF ITS RESPONSIBILITIES TO STATES

BY  
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*The delegation of federal authority over national resources can, in theory, present conservation opportunities, but in fact has entrenched grave pitfalls. This Article explores a significant consequence of federal delegation that has received little serious consideration by courts, agencies, and scholarship: how the Environmental Protection Agency's delegation of federal bedrock environmental laws subverts Congress's intent to empower citizens to enforce these statutes when agencies will not. There are substantial differences between federal and state judicial review, specifically with respect to standing and fee shifting, which effectively limit which kinds of plaintiffs can challenge decisions that impact natural resources. This Article explores the regulatory framework of delegation, and by focusing on the Environmental Protection Agency's recent delegation of 404 permitting to the state of Florida, provides a case study for how delegation can undermine Congress's intent to provide citizens access to judicial review. The analysis presented here, and the recommended remedies, may aid in identifying and addressing similar injustices in other state regulatory frameworks.*

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## I. INTRODUCTION

In 2020, the Environmental Protection Agency (EPA) approved Florida’s application to take over Clean Water Act<sup>1</sup> Section 404<sup>2</sup> permitting from the U.S. Army Corps of Engineers (Corps), making Florida the third state in the history of the Clean Water Act to gain the authority to allow the dredge and fill of waters of the United States.<sup>3</sup> In announcing the approval, EPA encouraged other states to follow

<sup>1</sup> Federal Water Pollution Control Act (CWA), 33 U.S.C. §§ 1251–1388 (2018).

<sup>2</sup> *Florida’s Clean Water Act §404 Permit Program*, U.S. ENV’T PROT. AGENCY, <https://perma.cc/5G6X-CQ2A> (last visited Sept. 26, 2023).

<sup>3</sup> U.S. Env’t Prot. Agency, *EPA Approves Florida’s Request to Administer the Clean Water Act Section 404 Program*, YOUTUBE (Dec. 17, 2020), <https://perma.cc/J4F5-7L5U>.

Florida's lead.<sup>4</sup> While Florida's Republican lawmakers,<sup>5</sup> the National Association of Homebuilders, The Nature Conservancy, and The Everglades Foundation celebrated the promised streamlining of permit applications,<sup>6</sup> other conservation organizations, as well as the Seminole Tribe of Florida and Miccosukee Tribe of Indians of Florida, expressed concern that EPA's delegation would result in significant harm to environmental and cultural resources and strip environmental plaintiffs' access to judicial review.<sup>7</sup>

Florida claimed to want to assume 404 permitting authority in order "to better protect the state's wetlands and surface waters," but also explained that the "assumption of the 404 program provides a streamlined permitting procedure."<sup>8</sup> In the past, the Florida Department of Environmental Protection (FDEP), which manages the state's natural resources,<sup>9</sup> reported that the department lacked the adequate resources to handle the additional workload of Section 404 permitting,<sup>10</sup> and that "the boundaries between navigable and non-navigable waters are not clearly defined in many waters" in Florida, therefore FDEP would "not [be] able to assume the federal program in large portions of the state."<sup>11</sup> Those concerns notwithstanding, and with high stakes and a national audience, FDEP, EPA, and Corps forged ahead, and conservation organizations and federally recognized tribes sued to reverse the decision.<sup>12</sup>

Much is at stake with this delegation. Florida ranks high in wetlands-coverage and biodiversity. More than 10 million acres of wetlands cover 29% of the state, an amount greater than any other state in the coterminous United States.<sup>13</sup> Florida's water resources are a prominent feature of the state's flat topography with karst terrain,

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<sup>4</sup> *Id.*

<sup>5</sup> U.S. Congressmen Mario Diaz-Balart (FL-25), Gus Bilirakis (FL-12), Dan Webster (FL-11), John Rutherford (FL-04), Michael Waltz (FL-06), and Greg Steube (FL-17) joined the press conference announcing the delegation. *EPA Announces Historic Approval of Florida's Request to Administer Clean Water Act Section 404 Program*, U.S. ENV'T PROT. AGENCY (Dec. 17, 2020), <https://perma.cc/NHB5-JRAQ>.

<sup>6</sup> *Id.*

<sup>7</sup> Sandra Hale Schulman, *Florida Tribes "Deeply Appalled" By Wetlands Deal*, INDIAN COUNTRY TODAY (Dec. 24, 2020), <https://perma.cc/KE5N-CXSM>.

<sup>8</sup> *State 404 Program*, FLA. DEP'T OF ENV'T PROT., <https://perma.cc/AT6X-96R8>.

<sup>9</sup> *About Page*, FLA. DEP'T OF ENV'T PROT., <https://perma.cc/L6EY-CAKE> (last visited Sept. 20, 2023).

<sup>10</sup> See Florida Department of Environmental Protection, *Consolidation of State and Federal Wetland Permitting Programs Implementation of House Bill 759* (Sept. 30, 2005) (explaining that Florida could only assume jurisdiction if the program was "procedurally simplified").

<sup>11</sup> *Id.* at 8.

<sup>12</sup> *Miccosukee Tribe of Indians of Fla. v. U.S. Env't Prot. Agency*, Case No. 1:22-cv-22459-KMM (S.D. Fla. filed Aug. 4, 2022); *Ctr. for Biological Diversity v. U.S. Env't Prot. Agency*, Civil No. 21-cv-119 (D.D.C. filed Jan. 14, 2021).

<sup>13</sup> K.H. HAAG & T.M. LEE, U.S. GEOLOGICAL SURV., CIRCULAR 1342, HYDROLOGY AND ECOLOGY OF FRESHWATER WETLANDS IN CENTRAL FLORIDA—A PRIMER 1 (2010).

1,200 miles of coastline, over 7,500 lakes,<sup>14</sup> 33 first-magnitude springs,<sup>15</sup> and roughly 10,000 miles of rivers and streams.<sup>16</sup> Florida also provides habitat for more than 1,000 species of animals<sup>17</sup> and thousands of species of plants.<sup>18</sup> An astounding 134 of those plants and animals are already either endangered or threatened under the federal Endangered Species Act (ESA),<sup>19</sup> primarily due to habitat loss.<sup>20</sup> Of the remaining forty-seven states without assumed wetlands permitting power, several are watching closely as the federal government and Florida explore this new regulatory landscape.<sup>21</sup>

Congress has authorized EPA to determine whether states can assume a variety of federal powers, including the Clean Water Act programs under Section 404 and Section 402,<sup>22</sup> which govern water pollution; the Clean Air Act,<sup>23</sup> which oversees state plans to address air pollution; and the Resource Conservation and Recovery Act (RCRA),<sup>24</sup> which regulates the disposal of waste. This Article examines EPA's delegation of 404 permitting to Florida to spotlight a little-discussed but significant consequence of state assumption of federal permitting: the obstruction of judicial review.<sup>25</sup>

The Article describes some of the perceived and actual consequences of state assumption of federal permitting, explores the impact of EPA delegating the Corps' 404 permitting to Florida, and

<sup>14</sup> *Florida Quick Facts*, FLA. DEP'T OF STATE, <https://perma.cc/RZN6-B7GL> (last visited Sept. 20, 2023) (counting lakes larger than 10 acres).

<sup>15</sup> Joe Follman & Richard Buchanan, *List of First-Magnitude Springs in Florida*, SPRINGS FEVER: A FIELD & RECREATION GUIDE TO 500 FLA. SPRINGS (3d ed. (2018)), <https://perma.cc/L2QN-TEJL>. Springs are classified by the volume of water they discharge. *Id.* A first-magnitude spring is one that produces 100 cubic feet per second, the equivalent of 64.6 million gallons per day. *Id.*

<sup>16</sup> ELIZABETH E. PURDUM, FLORIDA WATERS: A WATER RESOURCES MANUAL FROM FLORIDA'S WATER MANAGEMENT DISTRICTS 49 (2002).

<sup>17</sup> *FWC Overview*, FLA. FISH & WILDLIFE CONSERVATION COMM'N, <https://perma.cc/T3QR-WRWP> (last visited Sept. 26, 2023).

<sup>18</sup> *Atlas of Florida Plants*, INST. FOR SYSTEMIC BOTANY, <https://florida.plantatlas.usf.edu/> (last visited Sept. 20, 2023).

<sup>19</sup> Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2018).

<sup>20</sup> *Listed Species with Spatial Current Range Believed to or Known to Occur in Each State*, U.S. FISH & WILDLIFE SERV., <https://perma.cc/A23Y-F786> (last visited Sept. 20, 2023); see, e.g., Reed F. Noss, *Between the Devil and the Deep Blue Sea: Florida's Unenviable Position With Respect to Sea Level Rise*, 107 CLIMATIC CHANGE 1, 1–16 (2011).

<sup>21</sup> See, e.g., E.A. Crunden, *EPA preps Trump-era Plan to Push Wetlands Permitting to States*, GREENWIRE (May 8, 2023), <https://perma.cc/R2NJ-2PPX> (noting that other Republican-led states are “showing increasing interest in taking over Section 404 permitting”).

<sup>22</sup> Clean Water Act (CWA), 33 U.S.C. §§ 1342, 1344 (2018).

<sup>23</sup> Clean Air Act (CAA), 42 U.S.C. § 7401–7671q (2018); *id.* § 7410 (2018).

<sup>24</sup> Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901–6992k (2018) (amending Solid Waste Disposal Act, Pub. L. No. 89-272, 79 Stat. 992 (1965)); *id.* § 6941 (2018).

<sup>25</sup> See Will Reisinger et al., *Environmental Enforcement and the Limits of Cooperative Federalism: Will Courts Allow Citizens to Pick Up the Slack?*, 20 DUKE ENV'T L. & POL'Y F. 1, 3 (2010) (discussing the failure of cooperative federalism and court-created barriers to citizen enforcement due to the Eleventh Amendment and diligent prosecution).

analyzes the differences between federal judicial review and state judicial review provided under Florida law. The Article argues that Florida's laws relating to judicial review of agency decision-making affecting national natural resources provide substantially less access to justice because they significantly limit the types of plaintiffs that can challenge agency action by narrowing the definition of standing and creating financial barriers to participation through draconian fee-shifting provisions. These differences are relevant first because they restrict access to judicial review for a vital group of plaintiffs that seek to enforce federal environmental statutes to protect natural resources, and second, because Congress has authorized EPA to delegate not just Clean Water Act authority to the states, but virtually every other major federal responsibility over air, water, land, and natural resources. The Article concludes by offering EPA, state legislators, and advocates targeted recommendations to improve access to justice to restore Congress' intent that the public is able to ensure the protection and conservation of national resources through judicial review.<sup>26</sup>

## II. EPA'S DELEGATION OF FEDERAL PERMITTING

Federal delegation, or state assumption of federal responsibilities, refers to the transfer of authority to administer duties Congress has delegated to the federal government.<sup>27</sup> This Part examines state assumption of federal responsibilities generally, reviewing academic and theoretical benefits and drawbacks of delegation. Next, this Part analyzes the Clean Water Act and why Congress has prohibited the dredge or fill of waters of the United States absent a permit. The Part concludes with a review of Florida's assumption of Clean Water Act Section 404 permitting from the Corps, including the litigation brought by conservation organizations and tribes challenging EPA's delegation of 404 permitting to Florida.

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<sup>26</sup> The Article does not deeply analyze the intrinsic benefits or drawbacks of delegation, does not provide a 50-state survey of state laws regarding judicial review, and does not address the Supreme Court's recently decided *Sackett v. U.S. Environmental Protection Agency*, 598 U.S. 651 (2023), or EPA's new WOTUS rule, Revised Definition of "Waters of the United States," 88 Fed. Reg. 61964 (Sept. 8, 2023).

<sup>27</sup> WILLIAM D. RUCKELSHAUS, ADMINISTRATOR, U.S. ENV'T PROT. AGENCY, EPA POLICY CONCERNING DELEGATION TO STATES AND LOCAL GOVERNMENTS 2 (1984) [hereinafter RUCKELSHAUS MEMO] ("Delegation of environmental programs has the same meaning as 'authorization' or 'approval': the assumption by a competent and willing state or local government of operational responsibilities which, in the absence of such action, would rest with the federal government.").

*A. Congress Has Authorized EPA to Delegate Certain Responsibilities to the States*

Congress designed the federal environmental programs to be administered at the state and local levels wherever possible.<sup>28</sup> The clear intent of this design was to use the strengths of federal, state, and local governments in a partnership to protect public health and the nation's air, water, and land.<sup>29</sup>

EPA understands the purpose of this preference is to take advantage of the strengths of states and local governments in implementing the day-to-day operations and the agency's leadership, frameworks, and national standards.<sup>30</sup>

The prevailing argument for delegation has to do with the geographic and political reality that the United States is made up of fifty individual states with their own diverse demographics, natural resources, and economic and political priorities.<sup>31</sup> The theory follows that, because protecting these important, regionally unique resources comes at a financial cost, states are best positioned to decide the value of those resources relative to other competing interests such as jobs and economic development.<sup>32</sup> This argument relies on the presumption that the states are in a better position to address these differing needs and value assessments than the federal government and finds its roots in the Tenth Amendment, which reserves all powers to the states not explicitly delegated to the federal government.<sup>33</sup> Other theories to support state assumption include the idea that federal regulation could disrupt state regulation, which has not proven terribly relevant, and that Congress simply does not want the federal government responsible for regulatory policies that could create political controversy.<sup>34</sup>

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<sup>28</sup> *Id.* at 1.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 2.

<sup>31</sup> See, e.g., Richard L. Revesz, *The Race to the Bottom and Federal Environmental Regulation: A Response to Critics*, 82 MINN. L. REV. 535, 536 (1997) ("[I]t is . . . likely that different regions have different preferences for environmental protection."); John Dwyer, *The Role of State Law in an Era of Federal Preemption: Lessons from Environmental Regulation*, 60 LAW & CONTEMP. PROBS. 203, 227 (1997) ("[I]t is not possible to assign pollution programs wholesale to state governments on the ground that the underlying environmental problem is wholly intrastate."); Edward A. Zelinsky, *Unfunded Mandates, Hidden Taxation, and the Tenth Amendment: On Public Choice, Public Interest, and Public Services*, 46 VAND. L. REV. 1355, 1410 (1993); Reisinger et al., *supra* note 25, at 19 ("[T]he cooperative model makes the enforcement of federal laws dependent on individual states, each with its own unique financial and political circumstances.").

<sup>32</sup> Revesz, *supra* note 31, at 536.

<sup>33</sup> See Joyce M. Martin & Kristina Kern, *The Seesaw of Environmental Power from EPA to the States: National Environmental Performance Plans*, 9 VILL. ENV'T L.J. 1, 3-4 (1998) (discussing this relationship in the context of the National Environmental Performance Partnership System and the Tenth Amendment); Dwyer, *supra* note 31, at 208, 222 (describing the Tenth Amendment as a "plausible source for judicially enforceable federalism").

<sup>34</sup> Dwyer, *supra* note 31, at 218-19.

By contrast, some argue that the failure of states and local governments to adequately address environmental issues led to the federalization of environmental regulation in the first place.<sup>35</sup> At the same time, states have been reluctant to take on delegated responsibility for federal environmental statutes due to cost concerns and political pressures—*i.e.* “the imposition of unpopular restrictions on the politically powerful development community.”<sup>36</sup> One argument opposing the assumption of state control contends that maintaining federal authority over federal public resources like air, land, and water protects against disparate variation in pollution standards, precludes a “race to the bottom” among the states,<sup>37</sup> and safeguards against the creation or growth of “pollution havens.”<sup>38</sup> These federal environmental laws protect public resources, and state governments, which operate at a level much closer to private landowners and citizens of the state, might cave to pressure to cut corners.<sup>39</sup> Therefore, federal oversight has the potential to address “technical complexity, transboundary pollution, and distributive justice” in a way that states, individually and separately, cannot.<sup>40</sup>

Seeking to balance the need for national standards governing public resources and the strong desire to keep oversight at a more local level,<sup>41</sup> Congress has invoked a form of cooperative federalism in molding several bedrock environmental statutes and authorized EPA to delegate federal responsibility over resource management to states and local governments.<sup>42</sup> Each federal statute details the criteria which EPA must follow,<sup>43</sup> but the agency has adopted a presumption of approval on

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<sup>35</sup> *E.g.*, Arnold W. Reitze, Jr., *Federalism and the Inspection and Maintenance Program Under the Clean Air Act*, 27 PAC. L.J. 1461, 1469 (1996).

<sup>36</sup> *Id.* at 1472.

<sup>37</sup> Kirsten H. Engel, *State Environmental Standard-Setting: Is There a “Race” and Is It “to the Bottom”?*, 48 HASTINGS L.J. 271 (1997). *But see* Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1210–12 (1992) (criticizing the race to the bottom theory because competition within industry “can be expected to produce an efficient allocation of industrial activity among states”); Rena I. Steinzor, *Devolution and the Public Health*, 24 HARV. ENV’T L. REV. 351, 373 (2000) (“Studies have shown that the states with environmentally progressive reputations also enjoy the strongest economies, suggesting that companies’ threats to relocate when a state adopts such policies are rarely carried out.”).

<sup>38</sup> *See* Oliver A. Houck, *The Regulation of Toxic Pollutants Under the Clean Water Act*, 21 ENV’T L. REP. 10528, 10543–44 (Sept. 1991).

<sup>39</sup> *See* Oliver A. Houck & Michael Rolland, *Environmental Federalism: Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 MD. L. REV. 1252 (1995) (“[I]n whatever good faith [state agencies] approach wetlands protection, the financial, scientific, political and legal resources they have available to offset development interests may not be up to the job.”).

<sup>40</sup> Steinzor, *supra* note 37, at 372.

<sup>41</sup> Martin & Kern, *supra* note 33, at 10–11.

<sup>42</sup> *Id.* at 11.

<sup>43</sup> *E.g.*, Safe Drinking Water Act, 42 U.S.C. § 300g-2 (2018); Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6926, 6947, 6991c (2018); Coastal Zone Manage-

applications for delegation.<sup>44</sup> While this Article focuses on EPA's delegation of Section 404 of the Clean Water Act to Florida, it is important to reiterate the vast scope of responsibility EPA can and has delegated to the states regarding the preservation of breathable air, drinkable water, thriving biodiversity and healthy ecosystems and communities, and to observe that many of these statutes have similar delegation—and withdrawal—provisions.<sup>45</sup>

*B. Congress Recognized the Importance of Protecting Waters of the United States*

“The swamps, bogs, sloughs, marshes, bottomlands, wet meadows, prairies, ponds, seeps, potholes, dune grasses[,] and seabeds of the American landscape are the primary pollution control systems of the nation's waters, and the primary determinants of their water quality.”<sup>46</sup>

Congress enacted the Clean Water Act to restore and maintain the “chemical, physical and biological integrity” of waters of the United States.<sup>47</sup> “Navigable waters” is further defined to include “waters of the United States,”<sup>48</sup> and until *Sackett v. U.S. Environmental Protection Agency*,<sup>49</sup> and EPA's new conforming rule,<sup>50</sup> typically included most wetlands.<sup>51</sup> In reviewing a Section 404 permit to dredge or fill material into “waters of the United States,” the Corps applies Clean Water Act Section 404(b)(1) Guidelines, which specify where and under what conditions permit holders may lawfully discharge dredged or fill material.<sup>52</sup>

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ment Act (CZMA), 16 U.S.C. §§ 1451–1464 (2018); Clean Air Act (CAA), 42 U.S.C. § 7410 (2018).

<sup>44</sup> See EPA Policy Concerning Delegation to States and Local Governments, William D. Ruckelshaus, Administrator, Apr. 4, 1984 (identifying principles for review and approval of delegation applications, including treating the application “as made in good faith”; revising EPA's regulations “as needed to eliminate unnecessary obstacles”; and being “flexible in defining state program equivalence by focusing on results”).

<sup>45</sup> The Clean Water Act contemplates delegation of its Section 404 dredge and fill permitting and Section 402 National Pollution Discharge Elimination System (NPDES) permitting in nearly identical provisions. See CWA, 33 U.S.C. §§ 1342(b), 1344(g)(1) (2018); H.R. CONF. REP. NO. 95-830, at 104 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4424, 4479 (“[Section 402], after which the Conference substitute concerning State programs for the discharge of dredged or fill material is modeled, also provides for state programs which function in lieu of the Federal program . . .”).

<sup>46</sup> Houck & Rolland, *supra* note 39, at 1244–45.

<sup>47</sup> 33 U.S.C. § 1251(a).

<sup>48</sup> 33 U.S.C. § 1362(7).

<sup>49</sup> 598 U.S. 651 (2023); see also Royal C. Gardner, *What the US Supreme Court Decision Means for Wetlands*, 618 NATURE 215, 215 (2023).

<sup>50</sup> Revised Definition of “Waters of the United States,” 88 Fed. Reg. 61964 (Sept. 8, 2023).

<sup>51</sup> Revised Definition of “Waters of the United States,” 88 Fed. Reg. 3004, 3005 (Jan. 18, 2023) (codified at 40 C.F.R. pt. 120).

<sup>52</sup> 40 C.F.R. § 230.10(b) (2022). The 404 Guidelines prohibit the Corps from issuing a permit for the discharge of dredged or fill material if the discharge 1) “[c]auses or contrib-

Wetlands are a dominant feature in Florida's landscape and represent a greater percentage of the land surface in Florida than in any other state in the conterminous United States.<sup>53</sup> Wetlands provide numerous ecosystem services. In the context of biodiversity, even small wetlands are crucial for maintaining regional biodiversity in a number of plant, invertebrate, and vertebrate taxa.<sup>54</sup> A consequence of losing these wetlands is the potential for changes to the remaining wetlands, including a reduction in the number or density of plants and animals dispersing outside an area and an increase in dispersal distances for species among wetlands.<sup>55</sup> A "reduction in wetland density can decrease the probability that a population of plants or animals can be 'rescued' from extinction by a neighboring source population because of lower numbers of available recruits and greater distances between wetlands," and remaining wetlands could face increased probabilities of population extinctions.<sup>56</sup>

In terms of direct anthropocentric benefits, wetlands provide measurable and quantifiable flood protection. A Washington State Department of Ecology evaluation of the economic worth of this single function produced values ranging from \$8,000 to \$51,000 per acre.<sup>57</sup> The study points out that:

[P]olicies which permit wetlands to disappear that are presently contributing little to stem flood protection, but which have the potential to do so in the future, could lead to rapidly rising values for the remaining wetlands for flood protection, as increasingly marginal wetlands are called into service. At some point the "next best" alternatives to enhanced flood protection will not involve wetlands at all, and the purely engineered systems that might have to be built could prove very expensive indeed.<sup>58</sup>

Of course, any analysis that included economic values of the full range of wetland functions, including pollutant removal, flood protection, recreation, species protection, groundwater recharge, and others, would

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utes . . . to violations of any applicable State water quality standard"; 2) "[v]iolates any applicable toxic effluent standard or prohibition under section 307" of the Clean Water Act; 3) would "[j]eopardize[] the continued existence of species listed as endangered or threatened under the Endangered Species Act . . . or result[] in likelihood of the destruction or adverse modification of a habitat which is determined . . . to be a critical habitat under the Endangered Species Act"; or 4) "[v]iolates any requirement imposed by the Secretary of Commerce to protect any marine sanctuary designated under the Marine Protection, Research and Sanctuaries Act." *Id.*

<sup>53</sup> HAAG & LEE, *supra* note 13.

<sup>54</sup> R.D. Semlitsch & J.R. Bodie, *Are Small, Isolated Wetlands Expendable?*, 12 CONSERVATION BIOLOGY 1129, 1129 (1998).

<sup>55</sup> *Id.* at 1131.

<sup>56</sup> *Id.* at 1131–32.

<sup>57</sup> T.M. LESCHINE ET AL., WASH. STATE DEP'T OF ECOLOGY, *THE ECONOMIC VALUE OF WETLANDS: WETLANDS' ROLE IN FLOOD PROTECTION IN WESTERN WASHINGTON* 5 (1997), <https://perma.cc/WRR6-PRRD>.

<sup>58</sup> *Id.* at 6.

obviously derive much higher values.<sup>59</sup> Another study that examined wetland loss through the record of Section 404 permits found that “the number, type, and location of wetland permits are a significant predictor of flood damages.”<sup>60</sup>

Also relevant to Florida water management concerns, wetlands provide significant ecosystem benefits of filtering and storing nutrients that would otherwise end up in waterways contributing to harmful algal blooms. One study examining the St. Johns River watershed in Florida found that wetlands in the area hold 79,873 metric tons of nitrogen annually, with a replacement cost of between \$240 million to \$150 billion per year, and more than 2,400 metric tons of phosphorus, with an annual replacement cost of \$17 to \$497 million.<sup>61</sup>

Thus, when evaluating a permit application, the Corps must evaluate the probable impacts of the proposed activity on the public interest,<sup>62</sup> weighing all relevant factors, including conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, energy needs, safety, and the broader “needs and welfare of the people.”<sup>63</sup> The Corps’ regulations state “the unnecessary alteration or destruction of [wetlands] should be discouraged as contrary to the public interest.”<sup>64</sup> Courts have subsequently upheld permit denials based on findings that wetlands were important within the meaning of 33 C.F.R. § 320.4(b)(2).<sup>65</sup>

### *C. EPA Approved Florida’s Assumption Request Despite Significant Opposition and Questionable Legal Basis*

EPA is lowering the bar to allow a state, for the first time, to run the federal wetlands program without meeting federal standards . . . . Developers have called this the ‘holy grail’ because it would make it easier, faster and cheaper for them to get permits for big projects with less oversight and accountability for environmental impacts.<sup>66</sup>

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<sup>59</sup> *Id.*

<sup>60</sup> Wesley E. Highfield & Samuel D. Brody, *Price of Permits: Measuring the Economic Impacts of Wetland Development on Flood Damages in Florida*, 7 NAT. HAZARDS REV. 123 (2006); see also, e.g., Samuel D. Brody et al., *Examining the Relationship Between Wetland Alteration and Watershed Flooding in Texas and Florida*, 40 NAT. HAZARDS 413, 424–246 (2007) (finding that “federal permits issued to alter a naturally occurring wetland exacerbate flooding events in coastal watersheds along the Gulf of Mexico”).

<sup>61</sup> Sarah Widney et al., *The Value of Wetlands for Water Quality Improvement: An Example From the St. Johns River Watershed, Florida*, 26 WETLANDS ECOLOGY & MGMT. 265, 273 (2018).

<sup>62</sup> 33 C.F.R. § 325.1(f) (2022).

<sup>63</sup> *Id.* § 325.3(c)(1).

<sup>64</sup> *Id.* § 320.4(b)(1).

<sup>65</sup> See, e.g., *Shoreline Assocs. v. Marsh*, 555 F. Supp. 169, 179 (D. Md. 1983).

<sup>66</sup> The News Serv. of Fla., *Florida Environmentalists Challenge Permitting Change for Wetlands*, WFSU PUB. RADIO (Jan. 15, 2021, 10:24 AM), <https://news.wfsu.org/state-news/2021-01-15/florida-environmentalists-challenge-permitting-change-for-wetlands> (quoting

States and tribes may apply to EPA to assume the administration of the Corps' Section 404 permitting program if a state or tribe's program is at least as stringent as the federal program.<sup>67</sup> Of the fifty states and hundreds of tribes, EPA has granted no tribes and only three states the authority to assume 404 permitting.<sup>68</sup>

To assume 404 permitting, the state or tribe must be able to regulate discharges of all dredged or fill material into all of the jurisdictional waters of the United States.<sup>69</sup> The application procedures require that a state seeking assumption submit a description of the state program, which includes permit review criteria and a statement from the state Attorney General affirming that the state's laws provide the authority necessary to carry, implement, and enforce 404 permitting.<sup>70</sup> The state must also secure a Memorandum of Agreement with both EPA and the Corps establishing the state and federal responsibilities.<sup>71</sup>

State-issued 404 permits must comply with the Clean Water Act, and permits may not authorize an activity that would jeopardize endangered or threatened species or would result in the destruction or adverse modification of critical habitat under the ESA.<sup>72</sup> A state 404 permit for an activity "with reasonable potential for affecting endangered or threatened species" must be reviewed by EPA prior to being issued.<sup>73</sup> EPA must also determine whether the state has the authority to "abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement."<sup>74</sup> EPA regulations further specify that the state's mens rea not be greater than the "burden of proof and degree of knowledge or intent" that EPA uses to bring actions under the Clean Water Act.<sup>75</sup> The transfer of 404 permitting authority to a state only becomes effective after EPA publishes notice of the approval in the Federal Register.<sup>76</sup> Once EPA approves a state 404 application, the agency notifies the state

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Tania Galloni, Earthjustice Managing Attorney, explaining that EPA lowering agency standards will also ease the way for developers to obtain permits without as much concern for environmental impacts).

<sup>67</sup> 33 U.S.C. § 1344(h)(1) (2018); 40 C.F.R. § 233.1 (2022).

<sup>68</sup> See 40 C.F.R. § 233.70 (granting Michigan authority as of 1984); *id.* § 233.71 (granting New Jersey authority as of 1994); EPA's Approval of Florida's Clean Water Act Section 404 Assumption Request, 85 Fed. Reg. 83553 (Dec. 22, 2020). A significant hurdle appears to be cost. THE ASS'N OF STATE WETLAND MANAGERS, INC. & THE ENV'T COUNCIL OF THE STATES, CLEAN WATER ACT SECTION 404 PROGRAM ASSUMPTION: A HANDBOOK FOR STATES AND TRIBES 2 (2011).

<sup>69</sup> 40 C.F.R. § 233.1(b) (2022).

<sup>70</sup> *Id.* §§ 233.20–.30; *id.* §§ 233.50–.53; EPA's Approval of Florida's Clean Water Act Section 404 Assumption Request, 85 Fed. Reg. 83553 (Dec. 22, 2020).

<sup>71</sup> 40 C.F.R. § 233.10.

<sup>72</sup> *Id.* § 230.10(b)(3).

<sup>73</sup> *Id.* § 233.51(b)(3).

<sup>74</sup> CWA, 33 U.S.C. § 1344(h)(1)(G) (2018).

<sup>75</sup> 40 C.F.R. § 233.41(b)(2).

<sup>76</sup> *Id.* § 233.15(h).

and the Corps, and the Corps then transfers the review process of the permits covered by the state program.<sup>77</sup>

EPA approved Florida's request to assume 404 federal permitting in 2020,<sup>78</sup> with the Corps retaining waters listed in the Corps' Navigable Waters List, waters subject to the ebb and flow of tide, wetlands within 300 feet of such waters, and those waters within Indian Country covered by the Clean Water Act.<sup>79</sup> Following EPA's approval of Florida's application, the Corps immediately transferred 591 applications to FDEP.<sup>80</sup> Once an applicant submits a 404 permit application, FDEP has thirty days to review the application for completeness.<sup>81</sup> FDEP may issue a ninety-day Request for Additional Information<sup>82</sup> or can invoke subsequent thirty-day completeness reviews and ninety-day Requests for Additional Information until the department finds the application to be administratively complete.<sup>83</sup> FDEP can then issue a public notice within ten days and offer a fifteen or thirty-day comment period, during which the public may request a public meeting.<sup>84</sup> This also triggers EPA's thirty-day review for certain limited instances.<sup>85</sup> EPA can choose not to comment, provide notice of the agency's intent to comment, object to the application, make recommendations regarding the application, or notify FDEP that the agency is reserving the right to object to an application.<sup>86</sup>

On January 14, 2021, the Center for Biological Diversity, Defenders of Wildlife, Sierra Club, Conservancy of Southwest Florida, Florida Wildlife Federation, Miami Waterkeeper, and St. Johns Riverkeeper filed a lawsuit against EPA, U.S. Fish and Wildlife Service (USFWS), and the Corps challenging EPA's approval of Florida's application to administer the Clean Water Act Section 404 permitting program.<sup>87</sup> Plaintiffs argued that EPA unlawfully authorized the state to administer Section 404 because the agency failed to demonstrate how Florida would ensure no jeopardy or adverse modification of species

<sup>77</sup> CWA, 33 U.S.C. § 1344(h)(2)(A).

<sup>78</sup> FLA. STAT. § 373.4146 (2020).

<sup>79</sup> *Public Notices State of Florida 404 Assumption*, U.S. ARMY CORPS OF ENG'RS (Dec. 18, 2020), <https://perma.cc/9MS2-D9JZ>.

<sup>80</sup> Chad Gillis, *Ex-DEP Official: Wetlands Targeted for Development*, NEWS-PRESS, Aug. 17, 2021, reprinted in 2021 WLNR 26704100 (West 2021). FDEP transferred 211 back to the Corps because they fell under the Corps' "Waters of the United States" jurisdiction. *Id.*

<sup>81</sup> *State 404 Program Frequently Asked Questions (FAQ) and Answers*, FLA. DEPT OF ENV'T PROT. [hereinafter *Florida 404 FAQ*], <https://perma.cc/5U3F-EUEP> (Feb. 21, 2023, 3:00 PM).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* (citing FLA. ADMIN. CODE R. § 62-331.052(3) (2020)).

<sup>86</sup> *Florida 404 FAQ*, *supra* note 81.

<sup>87</sup> Complaint at 1–3, Ctr. for Biological Diversity v. U.S. Env't Prot. Agency (*Center v. EPA*), No. 21-cv-119 (D.D.C. Jan. 14, 2021). See generally CWA, 33 U.S.C. §§ 1344(g)–(h) (2018) (subsections addressing EPA approval of a state program).

habitat under the ESA, and because EPA allowed Florida to eliminate criminal liability for permit violations, contrary to the requirements of the Clean Water Act.<sup>88</sup> The State of Florida, Florida Department of Environmental Protection, Florida Chamber of Commerce, and Community Developers Association have intervened in support of the delegation.<sup>89</sup>

### III. EPA'S CLEAN WATER ACT DELEGATION TO FLORIDA HAS CUT OFF ACCESS TO JUSTICE

State assumption of federal authority of our nation's waters threatens to reduce protections of significant national resources in several ways. First, as discussed above,<sup>90</sup> a state that assumes federal management of national resources experiences pressure to shortcut environmental safeguards. Second, many federal safeguards protecting natural resources do not apply to state agency decision-making. And third, state standards of judicial review narrow access to the courts as compared to federal review. Part III of this Article examines that last point.

Since delegating 404 permitting to Florida, EPA has identified several ongoing concerns regarding Florida's assumption, including public participation and access to judicial review, instructing FDEP to ensure the program "provides for access to judicial review and the CWA requirements for public participation."<sup>91</sup> At the same time, Florida's waterways are plagued by toxic algae outbreaks attributable to poor Clean Water Act implementation and enforcement due to state budget cutbacks, FDEP's expedited permitting, and political interference at the state level.<sup>92</sup> Even the former secretary of FDEP criticized the Florida's legislature's eagerness to support delegation of 404 permitting to FDEP, characterizing assumption as "at the behest of the very folks who want

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<sup>88</sup> Complaint, *supra* note 87, at 3–4, 31.

<sup>89</sup> Plaintiffs' motion for Summary Judgment at 33, *Center v. EPA*, No. 21-cv-119 (court granted motion to intervene by the State of Florida and FDEP).

<sup>90</sup> *See supra* Part II.A.

<sup>91</sup> DIV. OF WATER RES. MGMT., FLA. DEP'T OF ENV'T PROT., STATE 404 PROGRAM ANNUAL REPORT app. 1 at 8 (2023). EPA also raises concerns about FDEP's continued use of the vacated Navigable Waters Protection Rule, inconsistent documentation for No Permit Required determinations and of FDEP's joint coordination with the Corps, lack of documentation of correspondence with other resource agencies, and the issuance of after-the-fact permits. *Id.* at app. 2, 4–6, 9.

<sup>92</sup> *See generally* Editorial: *The Rick Scott Record: An Environmental Disaster*, TAMPA BAY TIMES (Sept. 5, 2014), <https://perma.cc/2HP6-TYGA> (discussing state-level interference with FDEP); PUBLIC EMPS. FOR ENV'T RESP., REPORT ON ENFORCEMENT EFFORTS BY THE FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION CALENDAR YEAR 2015 (2015), <https://perma.cc/B7XD-6H8M> (reporting on FDEP's enforcement performance). *See generally*, e.g., Dan Egan & Josh Ritchie, *It's Toxic Slime Time on Florida's Lake Okeechobee*, N.Y. TIMES (July 9, 2023), <https://perma.cc/KN4K-4MPV> ("Conservationists say state rules to control the flow of phosphorus from agricultural lands, by far the largest source of the pollutant, have long been poorly enforced.").

fast and simple permitting to destroy our most fragile natural heritage – our wetlands.”<sup>93</sup> It is no coincidence that EPA’s press release announcing the delegation was joined by development interests and used the word “streamline” six times.<sup>94</sup> The National Association of Home Builders joined that press release and praised EPA’s delegation to Florida as improving the “cumbersome and lengthy process” of permitting.<sup>95</sup>

The purportedly “cumbersome” obligations complained of by the development industry are, to scientists and lawmakers, the priceless safeguards that protect communities from significant environmental harm and ensure species are not driven extinct.<sup>96</sup> When states assume federal decision-making, federal laws, like the National Environmental Policy Act (NEPA)<sup>97</sup> and the ESA, do not apply or do not apply in the same ways. For example, NEPA only applies to major *federal* agency actions and the duty to avoid jeopardy under the ESA applies only to *federal* agencies.<sup>98</sup>

Congress enacted NEPA to integrate the meaningful consideration of environmental and public interest factors into federal decision-making procedures prior to taking action.<sup>99</sup> As such, Congress intended that NEPA promote efforts to prevent or eliminate damage to the human environment.<sup>100</sup> NEPA’s “twin aims” are to ensure that the federal action agency 1) “consider[s] every significant aspect of the environmental impact of a proposed action” and 2) “inform[s] the public that it has indeed considered environmental concerns in its decision-making process.”<sup>101</sup> “Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA”<sup>102</sup> and in protecting the environment. During the review of a 404 permit

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<sup>93</sup> Victoria Tschinkel, Opinion, *Florida’s Treasured Wetlands on the Eve of Destruction—We Cannot Allow It*, ORLANDO SENTINEL (Mar. 9, 2018, 6:45 PM), <https://perma.cc/58HZ-7J4W>.

<sup>94</sup> *EPA Announces Historic Approval of Florida’s Request to Administer the Clean Water Act Section 404 Program*, U.S. ENV’T PROT. AGENCY (Dec. 17, 2020), <https://perma.cc/B42Y-Q8SN>.

<sup>95</sup> *Id.*

<sup>96</sup> *Compare id.* (discussing the “the cumbersome and lengthy permitting process”), with Tschinkel, *supra* note 93 (discussing the loss of protections required by federal environmental laws).

<sup>97</sup> National Environmental Policy Act of 1969, 42 U.S.C.A. §§ 4321–4370h (West 2023).

<sup>98</sup> *Id.* § 4332(C); 16 U.S.C. § 1536(a)(2).

<sup>99</sup> *See* NEPA, 42 U.S.C.A. § 4332 (describing the federal government’s duty to “ensure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making”); 40 C.F.R. § 1501.2 (2022) (applying this same language to each agency through the CEQ’s regulations); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348–49 (1989) (describing how the public plays a role in an agency’s consideration of environmental impacts).

<sup>100</sup> NEPA, 42 U.S.C.A. § 4321.

<sup>101</sup> *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 97 (1983) (quoting *Vt. Yankee Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 553 (1978)).

<sup>102</sup> 40 C.F.R. § 1500.1(b) (2023).

application, the Corps must also conduct an analysis of the impact of the proposed project on the human environment.<sup>103</sup>

Congress created the ESA not just to halt, but to “reverse the trend toward species extinction, whatever the cost.”<sup>104</sup> If a federal action may affect a listed species,<sup>105</sup> the federal agency taking the action must “consult” with federal wildlife management agencies to determine whether and how much the project will impact listed species and their habitat.<sup>106</sup> The Corps’ review of a 404 permit application is a federal agency action triggering the need to consult with the federal wildlife management agencies to determine whether the proposed project will impact the species and their habitat, and as required by law, mitigate or avoid those impacts.<sup>107</sup>

In general, plaintiffs may bring claims for alleged violations of the Clean Water Act, NEPA, and the ESA under federal law and challenges are reviewable by a federal district court. Such lawsuits benefit from federal laws regarding organizational standing and fee and cost recovery.<sup>108</sup> But, when a state assumes federal permitting, the state agency is not required to comply with NEPA or the consultation provision of the ESA and plaintiffs can only bring their claims pursuant to state law.<sup>109</sup> In the case of Florida, delegation deprives citizens of the right to enforce these laws the way Congress intended due to a cramped interpretation of standing and draconian reading of fee shifting. This Part looks at the situation in Florida to highlight Congressional endorsement of citizen suit provisions and compares the federal and

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<sup>103</sup> 33 C.F.R. § 325.1 (2020).

<sup>104</sup> *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978) (discussing how Congress intended for the ESA to halt the extinction of endangered species by any means necessary).

<sup>105</sup> “Action” includes those that directly or indirectly cause “modifications to the land, water, or air.” 50 C.F.R. § 402.02.

<sup>106</sup> ESA, 16 U.S.C. § 1536(a)(2) (2018).

<sup>107</sup> *See* 16 U.S.C. § 1536(b)(1)(B) (including permit applications in the statute’s discussion of agency actions requiring consultation).

<sup>108</sup> *See, e.g.* CWA, 33 U.S.C. § 1365(d) (2018) (giving courts the discretion to award costs and fees “to any prevailing or substantially prevailing party”); *Friends of the Earth, Inc. v. Laidlaw Env’t Serv. (TOC), Inc. (Laidlaw)*, 528 U.S. 167, 181 (2000) (noting that plaintiffs may obtain organizational standing citizen suits).

<sup>109</sup> *See* *District of Columbia v. Schramm*, 631 F.2d 854, 863 (D.C. Cir. 1980) (holding that “[b]y requiring states to maintain or create sufficient legal and equitable rights and remedies to deal with violations of state permits in order to exercise permit-granting powers under the Act, Congress must have intended that states apply their own law in deciding controversies involving state permits”); *Rose Acre Farms, Inc. v. N.C. Dep’t of Env’t & Nat. Res.*, 131 F. Supp. 3d 496, 507 (E.D.N.C. 2015) (“Here, the court declines to exercise subject-matter jurisdiction under 28 U.S.C. § 1331 over Rose Acre’s claim because doing so would upset the congressionally-approved balance of responsibilities between federal and state courts with respect to the CWA’s NPDES permitting scheme.”); *see also* *Nat. Res. Def. Council, Inc. v. Outboard Marine Corp.*, 702 F. Supp. 690, 694 (N.D. Ill. 1988); *Peters v. Harper Grp., Inc.*, No. 00-A-88-S, 2000 U.S. Dist. LEXIS 20763, at \*11-12 (M.D. Ala. Mar. 10, 2000); *Chesapeake Bay Found., Inc. v. Va. State Water Control Bd.*, 495 F. Supp. 1229, 1234 (E.D. Va. 1980); Jeffrey Gaba, *Generally Illegal: NPDES General Permits Under the Clean Water Act*, 31 HARV. ENV’T L. REV. 409, 428 (2007).

Florida standards for judicial review, with a focus on standing and fee-shifting.

*A. Congress Recognized the Need to Grant Citizens Standing to Access Courts to Enforce Federal Statutes*

Congress made clear that citizen groups are not to be treated as nuisances or troublemakers but rather as welcomed participants in the vindication of environmental interests. Fearing that administrative enforcement might falter or stall, “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.”<sup>110</sup>

Citizen suits are essential to the effective implementation and enforcement of federal environmental statutes.<sup>111</sup> Congress recognized that the government may not always choose to enforce these important laws and, because their implementation and enforcement is so critical to the preservation of the environment, created provisions that allow individuals and organizations the ability to enforce the law as mini-attorneys general.<sup>112</sup> Citizen suits play a vital role in an environmental statute’s enforcement scheme.<sup>113</sup> Congress designed them to “motivate government agencies” to take action and to make citizens partners in the enforcement of federal environmental laws.<sup>114</sup> Citizens are “a supplemental and effective assurance” that environmental statutes are “implemented and enforced.”<sup>115</sup> In sum, they allow citizens to step into

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<sup>110</sup> See *Friends of the Earth v. Carey*, 535 F.2d 165, 172 (2d Cir. 1976) (quoting *Nat. Res. Def. Council, Inc. v. Train*, 510 F.2d 692, 700 (1975)) (discussing citizen suit provision of the Clean Air Act).

<sup>111</sup> Citizen suits include private enforcement of federal statutes enabled by the statutes themselves and lawsuits against agencies for noncompliance with nondiscretionary requirements under the Administrative Procedure Act. 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2018); see, e.g., ESA, 16 U.S.C. § 1540(f); CAA, 42 U.S.C. § 7604(a) (2018); RCRA, 42 U.S.C. § 6972(a) (2018); Comprehensive Environmental Response, Compensation, and Liability (CERCLA), 42 U.S.C. § 9659(a) (2018); Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. § 11046(a)(1) (2018); Toxic Substances Control Act (TSCA), 15 U.S.C. § 2619(a) (2018); SDWA, 42 U.S.C. § 300j-8(a) (2018). See generally Phillip M. Bender, *Slowing the Net Loss of Wetlands: Citizen Suit Enforcement of Clean Water Act 404 Permit Violations*, 27 ENVTL. L. 245 (1997) (explaining Congress’s affirmative intent in allowing citizen suits when agencies charged with the primary enforcement responsibilities fail to exercise them).

<sup>112</sup> Jeffrey G. Miller, *Theme and Variations in Statutory Preclusion Against Successive Environmental Enforcement Actions by EPA and Citizens: Part One: Statutory Bars in Citizen Suit Provisions*, 28 HARV. ENV’T L. REV. 401, 408–09 (2004).

<sup>113</sup> *Wilder v. Thomas*, 854 F.2d 605, 613 (2d Cir. 1988) (explaining citizen suits are an important aspect of Clean Air Act enforcement).

<sup>114</sup> *Id.* (quoting S. Rep. No. 91-1196); see also *Friends of the Earth v. Consol. Rail Corp.*, 768 F.2d 57, 63 (2d Cir. 1985) (holding that citizen suits will only be precluded if EPA or the state has initiated and is diligently prosecuting an action in state or federal court).

<sup>115</sup> *Carey*, 535 F.2d 165, 172 (2d Cir. 1976) (“Fearing that administrative enforcement might falter or stall, ‘the citizen suits provision reflected a deliberate choice by Congress to

the shoes of the government to ensure the enforcement or compliance with these federal statutes when the agencies themselves cannot or will not take action<sup>116</sup> and provide a check on rogue agency discretion inconsistent with Congress' intent.<sup>117</sup> That these federal environmental statutes are intended to protect the public from environmental harm is precisely why Congress has afforded the public the right to have a role in their enforcement.<sup>118</sup>

However, when EPA delegates permitting authority to a state, the agency deprives the federal court of subject matter jurisdiction to review future state agency action.<sup>119</sup> When a plaintiff suffers an injury traceable to a defendant, many factors influence the decision to litigate the matter, including how the plaintiff will demonstrate standing, the likelihood of success, the potential for making bad precedent, the risk of exposure to harassment, liability, or strategic lawsuits against public participation, known as SLAPP suits,<sup>120</sup> and the cost of hiring an attorney and, if necessary, experts.<sup>121</sup> The results of this analysis depend on the jurisdiction, and litigation over federal agency action differs greatly from litigation over state agency action.<sup>122</sup>

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widen citizen access to the courts . . .” (quoting *Train*, 510 F.2d 692, 700 (D.C. Cir. 1975)).

<sup>116</sup> Citizen suit provisions “serve only as a backup, permitting citizens to abate pollution when the government cannot or will not command compliance.” *S. Side Quarry, LLC v. Louisville & Jefferson Cnty. Metro. Sewer Dist.*, 28 F.4th 684, 690 (6th Cir. 2022) (quoting *Askins v. Ohio Dep’t of Agric.*, 809 F.3d 868, 875 (6th Cir. 2016)); see also *Sierra Club v. Hamilton Cnty. Bd. of Cnty. Comm’rs*, 504 F.3d 634, 637 (6th Cir. 2007) (“Although the primary responsibility for enforcement rests with the state and federal governments, private citizens provide a second level of enforcement and can serve as a check to ensure the state and federal governments are diligent in prosecuting Clean Water Act violations.”).

<sup>117</sup> David E. Adelman & Robert L. Glicksman, *Reevaluating Environmental Citizen Suits in Theory and Practice*, 91 U. COLO. L. REV. 385, 393 (2020).

<sup>118</sup> Reisinger et al., *supra* note 25, at 15–16.

<sup>119</sup> See, e.g., *Schramm*, 631 F.2d 854, 862 (D.C. Cir. 1980) (holding that EPA’s decision not to veto a state NPDES permit for wastewater treatment plant is not reviewable in federal district court).

<sup>120</sup> *Stubbs v. Strickland*, 297 P.3d 326, 329 (Nev. 2013) (“A SLAPP suit is a meritless lawsuit that a party initiates primarily to chill a defendant’s exercise of his or her First Amendment free speech rights.” (quoting *John v. Douglas Cnty. Sch. Dist.*, 219 P.3d 1276 (Nev. 2009)); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (holding that “a plaintiff must demonstrate standing separately for each form of relief sought” (quoting *Laidlaw*, 528 U.S. 167, 185 (2000))); *Allina Health Servs. v. Sebelius*, 756 F. Supp. 2d 61, 65–66 (D.D.C. 2010) (holding that “in order to justify intruding into the ordinary litigation process by issuing a preliminary injunction, it is critical that a movant 1) make a substantial showing of likelihood of success on the merits and 2) make a showing of at least some injury” (quoting *CityFed Fin. Corp. v. Off. of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995))).

<sup>121</sup> Jaime L. Loos, *The Effect of a Loser-Pays Rule on the Decisions of an American Litigant*, MAJOR THEMES IN ECONOMICS, Spring 2005, at 34–36.

<sup>122</sup> Joel Beauvais et al., *Judicial Challenges to Federal Agency Action*, in ENVIRONMENTAL LITIGATION: LAW AND STRATEGY 1, 2 (Kegan A. Brown & Andrea M. Hogan, eds., 2d ed. 2019), <https://perma.cc/Q54F-J2G8>.

For example, a plaintiff injured by the Corps' decision to issue a 404 permit could bring an action in federal district court sometime before the project commenced but at least no later than six years following the permit issuance.<sup>123</sup> The court would review the decision under the Clean Water Act and federal Administrative Procedure Act (APA) (and possibly NEPA and the ESA) to determine whether the action was arbitrary or capricious or otherwise not in accordance with the law.<sup>124</sup> The court's review would likely be restricted to an administrative record prepared by the federal agency.<sup>125</sup> And generally, the parties would not engage in discovery, would not offer expert testimony, and the plaintiff would submit written declarations from their members to establish standing.<sup>126</sup> The court would resolve the case on motions to dismiss or motions for summary judgment.<sup>127</sup> The court may or may not grant a hearing on the motions.<sup>128</sup> If successful, the plaintiff would likely be entitled to the recovery of attorneys' fees and costs from the defendant, but if the plaintiff loses, would likely not be required to pay the defendant's costs and fees unless the court determined the lawsuit was frivolous.<sup>129</sup> The decision of the lower court would be subject to appeal but also has the immediate force of law.<sup>130</sup> The court could enjoin the agency and vacate and remand the action agency's decision, in addition to declaring the decision unlawful.<sup>131</sup>

None of the foregoing apply when challenging a 404 permit decision where EPA has delegated that responsibility to the state. In Florida, one injured by FDEP's decision to issue a 404 permit would have only twenty-one days to file a petition with FDEP requesting a hearing before the Division of Administrative Hearings (DOAH).<sup>132</sup> FDEP, the

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<sup>123</sup> 58 AM. JUR. 3D, *Proof of Facts* § 22 (2000) (noting that "courts have applied a six-year statute of limitations, both to federal district court actions challenging the reasonableness of a Section 404 permit decision, and Court of Federal Claims actions asserting regulatory takings claims based on the denial of a Section 404 permit").

<sup>124</sup> 5 U.S.C. § 706(2)(A).

<sup>125</sup> *Id.* § 706.

<sup>126</sup> *Id.*

<sup>127</sup> See, e.g., Barry Boyer and Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFF. L. REV. 833, 921 (1985) (noting that a number of suits brought under federal environmental laws resolve on motions to dismiss or summary judgment, since these cases "rely on agency records" rather than a "protracted" collection of facts).

<sup>128</sup> See, e.g., D. Mass. R. 7.1(e) (noting that "[a]ny party making or opposing a motion who believes that oral argument may assist the court...shall include a request for oral argument" and that the court may "conclude[] that there should be a hearing on a motion").

<sup>129</sup> See, e.g., CAA, 42 U.S.C. § 7604(d); ESA, 16 U.S.C. § 1540(g); RCRA, § 7002(e), 42 U.S.C. § 6972(e).

<sup>130</sup> Courts may "set aside" agency actions contrary to law, 5 U.S.C. § 706(2), but federal courts of appeals will have jurisdiction to hear appeals from all final decisions of U.S. district courts, 28 U.S.C. § 1291.

<sup>131</sup> 5 U.S.C. § 706(2).

<sup>132</sup> For a comprehensive explanation of the administrative adjudication process for challenging state agency decisions, see Sidney C. Bigham, *Administrative Adjudication: Decisions Affecting Substantial Interests*, FLORIDA ENVIRONMENTAL AND LAND USE LAW

putative respondent/defendant, would decide whether to reject the petition or refer the petition to DOAH for a hearing.<sup>133</sup> The parties would engage in discovery and likely offer expert testimony, and organizational plaintiffs would likely need one or several members to give depositions and provide in-court testimony to establish standing.<sup>134</sup> The DOAH administrative law judge (ALJ) would conduct a bench trial with opening and closing statements, testimony, and cross-examination.<sup>135</sup> Members of the public can attend, and participate in, the hearing, offering testimony subject to rebuttal or cross-examination, though this is a rare occurrence.<sup>136</sup>

The ALJ would apply a preponderance of the evidence standard to questions of fact and analyze legal issues *de novo* to determine whether the agency approved the permit lawfully.<sup>137</sup> The parties may submit proposed orders for the ALJ's consideration.<sup>138</sup> After the ALJ issues their recommended order, the parties may then submit "exceptions" highlighting the errors of the ALJ to the agency.<sup>139</sup> Then the agency adopts a "final agency action" and the petitioner-plaintiff has thirty days to appeal the decision to a Florida district court of appeal, the lowest appellate level state court.<sup>140</sup> The court reviews the ALJ's findings of facts to determine whether they were supported by competent, substantial evidence and reviews the ALJ's issue conclusions *de novo*.<sup>141</sup> Agencies often reject, modify, or reverse an ALJ's findings, in which

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TREATISE, Chapter 4.5 (May 2021); *see also* FLA. ADMIN. CODE R. 28-106.111(4) (2023); FLA. STAT. § 120.56 (2023) ("Within 10 days after receiving the petition, the division director shall, if the petition complies with paragraph (b), assign an administrative law judge who shall conduct a hearing within 30 days thereafter . . ."). *Cf. McAbee v. City of Fort Payne*, 318 F.3d 1248, 1257 (11th Cir. 2003) (noting it was "particularly troubled" that Alabama law only provided 15 days to request a hearing on an agency decision).

<sup>133</sup> FLA. ADMIN. CODE R. 28-106.21(3).

<sup>134</sup> FLA. STAT. § 120.569(2)(f) (2023).

<sup>135</sup> *See Fla. Dep't of Transp. v. J.W.C. Co.*, 396 So. 2d 778, 785 (Fla. Dist. Ct. App. 1981) (noting that "in the event of a new application and another Section 120.57(1) hearing, DER would request that the same DOAH hearing officer who conducted the proceeding below be assigned to hear the new application"); *R.N. Expertise, Inc.*, No. 01-2663BID, 2002 WL 185217, at \*14 (Fla. Div. Admin. Hrgs. Feb. 4, 2002); Bigham, *supra* note 132, at 18.

<sup>136</sup> FLA. STAT. § 120.57(1)(b) (2023); *e.g.*, *Marion Cnty. v. Priest*, 786 So. 2d 623, 626–27 (Fla. Dist. Ct. App. 2001) (finding ALJ may base a decision on a member of the public's fact-based testimony), *reh'g denied*, 807 So. 2d 655 (Fla. 2002).

<sup>137</sup> *See J.W.C. Co.*, 396 So. 2d at 785 (stating that the petition for a formal hearing in the case commences a *de novo* proceeding); *R.N. Expertise, Inc.*, 2002 WL 185217, at \*2, 14–15 (clarifying that R.N. must sustain its burden of proof by preponderance of the evidence and that the purpose of the "de novo proceeding" was to review prior agency action for correctness).

<sup>138</sup> *R.N. Expertise, Inc.*, No. 01-2663BID, at \*4.

<sup>139</sup> FLA. STAT. § 120.57(1)(b) ("All parties shall have an opportunity . . . to file exceptions to the presiding officer's recommended order . . .").

<sup>140</sup> *Id.* § 120.68(2)(a).

<sup>141</sup> *Id.* § 120.68(7)(b); *Pauline v. Lee*, 147 So. 2d 359, 363 (Fla. Dist. Ct. App. 1962) (stating that agency findings will only be overturned due to lack of support by substantial competent evidence).

case, the party that prevailed before the ALJ will appeal the final agency action.<sup>142</sup>

As detailed below, in addition to the extra and laborious process state law creates, proceeding through state judicial review erects significant obstacles to citizen participation by narrowing the class of plaintiffs who can sue and punishing plaintiffs who try with attorney fee shifting. In delegating permitting authority to Florida, EPA possibly crippled the adequate implementation and enforcement of the Clean Water Act as compared to when the Corps retained oversight and deprived citizens of opportunity to enforce the law as well.

### *1. Standing for U.S. Federal Judicial Review*

A court must have jurisdiction to decide the merits of any case arising under federal environmental statutes. Thus, a plaintiff must demonstrate standing to protect communities and the environment from harm under the citizen suit provision of the law or, where the statute does not create a private right of action, under the APA.

By their second semester, every first-year law student should be familiar with the irreducible standards for Article III standing provided by the United States Constitution: a plaintiff must demonstrate an “injury in fact” that is “fairly traceable” to the alleged conduct of the defendant and is likely redressable by the court.<sup>143</sup> Whether a plaintiff is entitled to have the court hear the merits of a case rests somewhere between this floor for Article III standing and the prudential ceiling established by federal courts to limit their jurisdiction.<sup>144</sup> Plaintiffs can meet their constitutional minimum by alleging a live “case or controversy” with the defendant.<sup>145</sup> But the Supreme Court and Congress have gone beyond the bare bones of the Constitution and further described the doctrine of standing to require more than a mere “generalized grievance,”<sup>146</sup> requiring instead that a plaintiff demonstrate “a sufficient stake in an otherwise justiciable controversy.”<sup>147</sup>

In *Association of Data Processing Service Organizations, Inc. v. Camp*<sup>148</sup> and *Barlow v. Collins*,<sup>149</sup> the Supreme Court held that

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<sup>142</sup> FLA. ADMIN. CODE R. 28-106.216(1) (2023); FLA. STAT. §120.57(1)(I). The agency may not reverse the ALJ’s findings of fact unless it determines that they are not based on competent substantial evidence. *Id.*

<sup>143</sup> *Lujan v. Nat’l Wildlife Fed’n (Lujan v. NWF)*, 504 U.S. 555, 560–61 (1992) (outlining the three elements contained in the “irreducible constitutional minimum of standing”).

<sup>144</sup> See *Warth v. Seldin*, 422 U.S. 490, 498–99 (1975) (discussing the roles of constitutional and prudential limitations on standing).

<sup>145</sup> *Id.*

<sup>146</sup> *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 217 (1974).

<sup>147</sup> *Sierra Club v. Morton*, 405 U.S. 727, 731–32 (1972) (citing *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

<sup>148</sup> *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150 (1970).

<sup>149</sup> *Barlow v. Collins*, 397 U.S. 159 (1970).

plaintiffs have standing where they allege a challenged action causes them an economic “injury in fact.”<sup>150</sup> This case expanded the jurisdiction of the court beyond only hearing cases where the plaintiff alleged a violation of a right recognized by law but to also include plaintiffs with alleged actual injuries.<sup>151</sup> Two years later in *Sierra Club v. Morton*, an environmental case, the Supreme Court further refined “whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution” in holding that, while “[a]esthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process,” plaintiffs that alleged mere economic injury did not sufficiently allege facts demonstrating they were among the injured.<sup>152</sup>

Through the lens of cases involving environmental issues, federal courts have traditionally been reluctant to expand standing to plaintiffs alleging non-economic injuries. Indeed, of the four seminal Supreme Court cases defining standing, three have denied standing to environmental plaintiffs.<sup>153</sup> The first Supreme Court case to address standing under a citizen suit provision was *Lujan v. Defenders of Wildlife*, which established the criteria that plaintiffs must demonstrate to show they have met the irreducible constitutional minimum for standing.<sup>154</sup> First, plaintiffs must demonstrate they have or will soon suffer an “injury in fact” that is concrete, particularized, and actual or imminent as opposed to hypothetical.<sup>155</sup> Second, plaintiffs must show that the alleged injury is “fairly traceable” to the defendant’s action or inaction.<sup>156</sup> And third, the injury must be redressable by the court.<sup>157</sup>

Importantly, the Supreme Court clarified that the citizen suit provision does not—and cannot—confer standing, but rather plaintiffs must also still demonstrate they have met the constitutional minimum.<sup>158</sup> While the plaintiffs in *Lujan v. Defenders of Wildlife* were

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<sup>150</sup> *Id.* at 152.

<sup>151</sup> *Id.* at 154 (noting that interests may also include “aesthetic, conservational, and recreational”).

<sup>152</sup> *Sierra Club v. Morton*, 405 U.S. 727, 731–35 (1972).

<sup>153</sup> *Lujan v. NWF*, 497 U.S. 871, 898–99 (1990); *Lujan v. Defs. of Wildlife (Lujan v. DOW)*, 504 U.S. 555, 571 (1992) (finding that plaintiffs had no standing); *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 108–10 (1998) (finding that plaintiffs failed the redressability requirement of standing). Others have granted standing to plaintiffs asserting economic injuries or states. *See Bennett v. Spear*, 520 U.S. 154, 165–66 (1997) (the broad language of the Endangered Species Act allows that, “any person may commence a civil suit”); *Massachusetts v. U.S. Env’t Prot. Agency*, 549 U.S. 497, 526 (2007) (finding that Massachusetts can meet the standing requirements without redressability and immediacy).

<sup>154</sup> *Lujan v. DOW*, 504 U.S. at 556–67.

<sup>155</sup> *Id.* at 560–61.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 576.

unsuccessful in convincing the Court they had standing to bring their ESA claims, the Court recognized that “the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing,”<sup>159</sup> without first—or ever—resolving whether plaintiffs even had a right to use or observe the animals. The significance is that a court should evaluate whether a plaintiff has standing before and apart from whether the plaintiff will be successful on the merits of their claim.<sup>160</sup>

*a. Associational Standing for Federal Judicial Review*

Organizations or associations, as opposed to individuals, bring the vast majority of lawsuits challenging action under federal environmental laws.<sup>161</sup> That is likely because organizations may have access to expertise and funding where individuals may not. Organizational challenges also promote judicial economy by having a single lawsuit brought by a single plaintiff—an organization—rather than multiple, disparate lawsuits brought by individual plaintiffs.<sup>162</sup> In *Hunt v. Washington State Apple Advertising Commission*,<sup>163</sup> the Supreme Court reaffirmed the test for organizational standing, holding that 1) at least one member of the organization must have standing to sue; 2) the interests the organization seeks to protect are germane to the organization’s mission; and 3) the lawsuit does not require the individual’s participation to assert the claim or obtain relief.<sup>164</sup>

Federal courts do not require a plaintiff to show more than one member with standing.<sup>165</sup> Many courts do not even require a plaintiff to

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<sup>159</sup> *Id.* at 562–63.

<sup>160</sup> See *Pub. Citizen v. U.S. Dep’t of Just.*, 491 U.S. 440, 451 (1989) (“Whatever the merits of [appellants’] claims . . . they certainly show, as appellants contend, that appellants might gain significant relief if they prevail in their suit. Appellants’ potential gains are undoubtedly sufficient to give them standing.”); *Warth*, 422 U.S. 490, 500 (1975) (“Although standing in no way depends on the merits of the plaintiff’s contention that particular conduct is illegal, it often turns on the nature and source of the claim asserted.” (internal citation omitted)).

<sup>161</sup> Specifically, organizations bring the most suits in which the plaintiff is not the permittee or permit applicant. LETTIE M. WENNER, *THE ENVIRONMENTAL DECADE IN COURT* 58–59 (1982); ANNE-MARIE ALDEN & PAUL V. ELLEFSON, *NATURAL RESOURCE AND ENVIRONMENTAL LITIGATION IN THE FEDERAL COURTS: A REVIEW OF PARTIES, STATUTES, AND CIRCUITS INVOLVED* 8–10 (Dep’t of Forest Res., Univ. of Minn., Staff Paper Series No. 125, 1997) (showing that organizations brought over 80% of the environmental lawsuits studied, whereas individual citizen suits were least common).

<sup>162</sup> *Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Brock*, 477 U.S. 274, 289 (1986) (discussing why parties may use associational standing as opposed to Rule 23 class actions).

<sup>163</sup> *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333 (1977).

<sup>164</sup> *Id.* at 343; see also *United Food & Com. Workers Union Loc. 751 v. Brown Grp. (UFCW Local 751)*, 517 U.S. 544, 555–57 (1996) (explaining the constitutional and practical underpinnings of *Hunt*’s test for organizational standing).

<sup>165</sup> *UFCW Local 751*, 517 U.S. at 555.

name a specific member or members in their complaint.<sup>166</sup> Instead, most courts allow plaintiffs to prove they have standing via written declarations submitted to the court either at the motion to dismiss or motion for summary judgment phase of litigation.<sup>167</sup>

*b. Alternative Theory of Organizational Standing for Federal Judicial Review*

In addition to associational standing, a court can have jurisdiction to hear matters raised by a plaintiff organization where the plaintiff has alleged an injury to the organization itself.<sup>168</sup> The Supreme Court in *Havens Realty Corp. v. Coleman* held that, where a plaintiff organization has alleged the defendant's action has caused the organization to divert resources to address the action, the organization has alleged "such a personal stake in the outcome of the controversy as to warrant invocation of federal-court jurisdiction."<sup>169</sup> The Court found that a "concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests."<sup>170</sup> Subsequently, many courts have held that organizations demonstrating the need to expend resources addressing violations of law, impacting their ability to realize their vision, have standing to sue on their own behalf.<sup>171</sup> Therefore, *Havens* standing is another avenue organizations can pursue to establish standing, without

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<sup>166</sup> Bldg. & Const. Trades Council of Buffalo v. Downtown Dev., Inc., 448 F.3d 138, 145 (2d Cir. 2006).

<sup>167</sup> See Am. Library Ass'n v. Fed. Commc'ns Comm'n, 401 F.3d 489, 494 (D.C. Cir. 2005) ("Depending on the circumstances of the case, the court may allow petitioners to support their standing in their reply brief, in affidavits submitted along with the reply brief . . . or through additional briefing or affidavits submitted to the court after oral argument."). *But see* Prairie Rivers Network v. Dynegy Midwest Generation, L.L.C., 2 F.4th 1002, 1012 (7th Cir. 2021) (refusing to consider appellant's supplemental affidavit at the motion to dismiss stage when the organization's complaint failed to establish associational standing).

<sup>168</sup> *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–79 (1982).

<sup>169</sup> *Id.* at 378–79.

<sup>170</sup> *Id.* at 379.

<sup>171</sup> See *Common Cause Ind. v. Lawson*, 937 F.3d 944, 950–51 (7th Cir. 2019) (holding that imminent injury to organization is sufficient to establish standing); *Moya v. U.S. Dep't of Homeland Sec.*, 975 F.3d 120, 130 (2d Cir. 2020) (holding that "perceptible impairment" is sufficient to establish injury in fact); *E. Bay Sanctuary Covenant v. Barr*, 964 F.3d 83, 84 (9th Cir. 2020) (revamping organizational practices can be sufficient to establish standing); *Am. Anti-Vivisection Soc'y v. U.S. Dep't of Agric.*, 946 F.3d 615, 618–619 (D.C. Cir. 2020) (other plaintiff's ability to establish standing by devotion of resources was sufficient to establish plaintiff's standing by association). *But see* *Shelby Advocs. for Valid Elections v. Tre Hargett*, 947 F.3d 977, 982 (6th Cir. 2020) (allocation of funds towards an organization's core mission does not establish standing); *Lane v. Holder*, 703 F.3d 668, 675 (4th Cir. 2012) (holding that an organization cannot bootstrap standing simply by expending resources); *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1250 (11th Cir. 2020) (failure to show a concrete cause to allocation of resources is insufficient to establish standing).

demonstrating any of their individual members have standing to sue, in challenging violations of federal environmental law in federal courts.<sup>172</sup>

Florida standards for judicial review, however, depart from this Supreme Court precedent and the U.S. Constitution and create difficult and uncertain obstacles for citizens who seek to fulfill the vital role Congress contemplated, especially for organizations.

## 2. Standing for Florida's State Judicial Review

In Florida, Chapter 120 of Florida Statutes governs challenges to agency action.<sup>173</sup> Section 120.57 provides that anyone aggrieved by an unfavorable agency determination may petition for an administrative hearing, and a plaintiff wishing to challenge final action of FDEP *must* petition the DOAH for an administrative hearing to seek relief, meaning a lawsuit filed directly in state or federal court before exhausting this administrative remedy will be subject to dismissal.<sup>174</sup> A plaintiff must be aware of the fact that they may need to satisfy two different standing standards in order to seek relief from a single agency action. First, a plaintiff wishing to challenge a FDEP permit issuance must, within twenty-one days of notification, petition the agency for an administrative hearing at DOAH.<sup>175</sup> A DOAH challenge requires the plaintiff to show that the final agency action could affect their *substantial interests*.<sup>176</sup> If the plaintiff loses the DOAH challenge, they may then file an appeal to the district court of appeals, where they must show they have been *adversely affected* by the final agency action.<sup>177</sup>

The Florida Administrative Procedure Act (“Florida APA”)<sup>178</sup> describes the standing requirements for plaintiffs petitioning for a Florida DOAH hearing, explaining that “[t]he provisions of this section

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<sup>172</sup> See *People for the Ethical Treatment of Animals v. U.S. Dep’t of Agric.*, 797 F.3d 1087, 1093 (D.C. Cir. 2015) (a need for an organization to expend funds to support its cause is not a mere setback); *Animal Legal Def. Fund v. Reynolds*, 297 F. Supp. 3d 901, 913 (S.D. Iowa 2018) (showing a deflection of resources is sufficient to establish standing); *People for the Ethical Treatment of Animals v. Miami Seaquarium*, 189 F. Supp. 3d 1327, 1339–1340 (S.D. Fla. 2016) (engaging in litigation does not rule out standing); *People for the Ethical Treatment of Animals v. Perdue*, 464 F. Supp. 3d 300, 308 (D.D.C. 2020) (holding that, to establish standing, an organization must demonstrate it “suffered a concrete and demonstrable injury to its activities . . . constituting more than simply a setback to the organization’s abstract social interests” (quoting *Nat’l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1433 (D.C. Cir. 1995))).

<sup>173</sup> FLA. STAT. § 120.57 (2023).

<sup>174</sup> *Legal Env’t Assistance Found. v. Clark*, 668 So. 2d 982 (Fla. 1996); see also FLA. STAT. § 120.68(1) (“A party who is adversely affected by agency action is entitled to judicial review.”).

<sup>175</sup> FLA. STAT. § 120.56(2)(a) (2016).

<sup>176</sup> *Id.* § 120.56(1)(c).

<sup>177</sup> *Id.* §§ 120.68(1)(a), (2)(a) (emphasis added). For both standards, a plaintiff is considered a “party.” *Id.* § 120.52(13).

<sup>178</sup> *Id.* § 120.51.

apply in all proceedings in which the *substantial interests* of a party are *determined by an agency*.<sup>179</sup> “Parties” are:

Specifically named persons whose substantial interests are being determined in a proceeding [or] [a]ny other person who, as a matter of constitutional right, provision of statute, or provision of agency regulation, is entitled to participate in whole or in part in the proceeding, or whose *substantial interests will be affected* . . . .<sup>180</sup>

Because environmental plaintiffs’ interests are often in challenging the issuance of permits, and are not themselves subject to permitting decisions, they must demonstrate they have affected substantial interests. The Florida Statutes do not define the term “substantial interests,” giving Florida courts leave to define the term.

The Second District Court of Appeal in *Agrico Chemical Company v. Department of Environmental Regulation (Agrico)*<sup>181</sup> provided the seminal two-part test to determine whether a petitioner meets the “substantial interests” requirement under Section 120.569.<sup>182</sup> The court looked to the Florida APA’s definition of party<sup>183</sup> and determined that:

[B]efore one can be considered to have a substantial interest in the outcome of the proceeding he must show 1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a Section 120.57 hearing, and 2) that his substantial injury is of a type or nature which the proceeding is designed to protect.<sup>184</sup>

The court found that the potential economic injury alleged by two companies in competition with the owner of the permit at issue was not the kind intended to be protected by the permitting process.<sup>185</sup> The two-prong test established by *Agrico* became the basis for the standing standard for plaintiffs in a DOAH proceeding.<sup>186</sup>

If that were the end of it, the standards for standing in federal district court and before DOAH would be very similar; however, the majority of cases filed by non-permittee plaintiffs harmed by agency decision making are environmental organizations, and the state’s test

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<sup>179</sup> *Id.* § 120.569(1) (emphasis added).

<sup>180</sup> *Id.* §§ 120.51–.82 (emphasis added).

<sup>181</sup> *Agrico Chem. Co. v. Dep’t of Env’t Regul. (Agrico)*, 406 So. 2d 478, 482 (Fla. Dist. Ct. App. 1981).

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 481–82 (quoting FLA. STAT. § 120.52(13)(b)) (emphasis added).

<sup>184</sup> *Agrico*, 406 So. 2d at 482; *see also* *Vill. Park Mobile Home Ass’n, Inc. v. Dep’t of Bus. Regul.*, 506 So. 2d 426, 430 (Fla. Dist. Ct. App. 1987) (holding that, under the *Agrico* two-prong test, mobile park residents failed to demonstrate a substantial interest in administrative agency’s prospectus review procedures).

<sup>185</sup> *Agrico*, 406 So. 2d at 482.

<sup>186</sup> *See, e.g., Mid-Chattahoochee River Users v. Fla. Dep’t of Env’t Prot. (Mid-Chattahoochee)*, 948 So. 2d 794, 797–99 (Fla. Dist. Ct. App. 2006) (holding that economic injuries alone do not satisfy the test for standing to challenge a FDEP permit decision).

for organizational or associational standing departs from the federal test.<sup>187</sup> There are two statutes authorizing an organization's challenge to a state-issued environmental permit. First, the Florida legislature enacted the Florida Environmental Protection Act of 1971<sup>188</sup> to specifically provide standing in permitting cases affecting the environment but amended the law in 2002 to restrict organizational access to court, only providing access to:

Any Florida corporation not for profit which has at least 25 current members residing within the county where the activity is proposed, and which was formed for the purpose of the protection of the environment, fish and wildlife resources, and protection of air and water quality, may initiate a hearing pursuant to s. 120.569 or s. 120.57, provided that the Florida corporation not for profit was formed at least 1 year prior to the date of the filing of the application for a permit, license, or authorization that is the subject of the notice of proposed agency action.<sup>189</sup>

Prior to the amendments, the statute afforded any citizen the right to challenge an action where the action would have "the effect of impairing, polluting, or otherwise injuring the air, water, or other natural resources of the state," requiring only a verified petition.<sup>190</sup>

The limitations and inconsistencies with federal judicial review of the amendments are that: 1) the organization must have at least twenty-five members in the county of the proposed activity, which raises the bar from at least one member to at least twenty-five members impacted; 2) the founding purpose of the organization must be one of those enumerated by the statute, which precludes other organizations with slightly different original purposes or whose purposes have changed over time; and 3) the organization must have been formed at least one year prior to the filing of the application for the permit, which prevents individuals from forming a nonprofit organization to respond to a threat.<sup>191</sup> Few organizations will be able to meet this test and are instead at the mercy of the state's unreasonably constrained requirements for associational standing.

The second standard, not arising under the Florida Environmental Protection Act, is arguably broader but still precludes judicial review for many organizations who would otherwise have standing in federal judicial proceedings.

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<sup>187</sup> See generally *NPDES State Program Withdrawal Petitions*, U.S. ENV'T PROT. AGENCY, <https://perma.cc/Y6UL-SDWG> (last updated Aug. 18, 2023) (EPA database demonstrating that most non-permittee plaintiffs who filed NPDES withdrawal petitions from 1989–2021 were environmental organizations).

<sup>188</sup> FLA. STAT. §§ 403.011–403.4155 (2021).

<sup>189</sup> *Id.* § 403.412(6); see Act of July 1, 2002, ch. 2002-261, § 9, 2002 FLA. LAWS 261 (amending FLA. STAT. § 403.412(6) (1997)).

<sup>190</sup> FLA. STAT. § 403.412(6) (1997).

<sup>191</sup> FLA. STAT. § 403.412(6) (2023).

*a. Associational Standing for State Judicial Review*

Unlike federal law, which requires only one member of an organization to demonstrate organizational standing,<sup>192</sup> Florida requires an organization to demonstrate that a “substantial number” of members have a substantial interest harmed by the agency action.<sup>193</sup> This presents the most significant obstacle for organizations wishing to challenge FDEP’s issuance of a 404 permit. Therefore, the two-prong substantial interest test for DOAH hearings includes a third step for organizations challenging FDEP final actions.<sup>194</sup>

A year after the Second District Court of Appeal decided *Agrico*, the Florida Supreme Court held in *Florida Home Builders Association v. Department of Labor and Employee Security (Florida Home Builders)* that “a trade association, which is not itself affected by an agency rule but some or all of whose members are substantially affected by the rule” have standing to bring a challenge.<sup>195</sup> The lower court found the trade association plaintiff-petitioner did not have standing, but the Supreme Court reversed, finding that the Florida APA sought to expand public access to agency actions denying associations the right to represent substantially affected members undermined that purpose.<sup>196</sup> Notably, the Court reasoned that federal courts permit this type of standing,<sup>197</sup> but then departed from those cases by concluding that organizations demonstrate associational standing where “a substantial number of its members, although not necessarily a majority, are ‘substantially affected’ by the challenged rule,” “the subject matter of the rule is within the association’s general scope of interest and activity,” and “the relief requested must be of the type appropriate for a trade association to receive on behalf of its members.”<sup>198</sup>

*Florida Home Builders* specifically addressed rule challenges arising under Section 120.56, but just a few months later, the First District Court of Appeals held that challenges to final agency action arising under Section 120.57—the same section that provides a cause of action for challenging a FDEP-issued 404 permit—demand the same test for associational standing that the Florida Supreme Court established in *Florida Home Builders*.<sup>199</sup>

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<sup>192</sup> See, e.g., *Sierra Club v. Johnson*, 436 F.3d 1269, 1279 (11th Cir. 2006) (finding that the Sierra Club has associational standing on behalf of one of its members).

<sup>193</sup> See *Fla. Home Builders Ass’n v. Dep’t of Lab. & Emp. Sec.*, 412 So. 2d 351, 353 (Fla. 1982).

<sup>194</sup> Compare *id.*, with *Mid-Chattahoochee*, 948 So. 2d 794, (Fla. Dist. Ct. App. 2006) (requiring, at prong one, that a “petitioner . . . suffer an injury in fact that is of sufficient immediacy to entitle him or her to a section 120.57 hearing” while an organization must demonstrate a “substantial number” of its members were injured).

<sup>195</sup> *Fla. Home Builders Ass’n*, 412 So. 2d at 352.

<sup>196</sup> *Id.* at 352–53.

<sup>197</sup> *Id.* at 353 (citing *Warth*, 422 U.S. 490, 511 (1975); *Hunt*, 432 U.S. 333, 343 (1977)).

<sup>198</sup> *Id.* at 353–54.

<sup>199</sup> *Farmworker Rts. Org., Inc. v. Dep’t of Health & Rehab. Servs.*, 417 So. 2d 753, 754–55 (Fla. Dist. Ct. App. 1982).

Although some ALJs and judges have not required a specific number or percentage of members to satisfy standing,<sup>200</sup> some say that there must be more than one member,<sup>201</sup> and many have instead required significantly more than one member. For example, in *Protect Key West and the Florida Keys, Inc. v. Monroe County*,<sup>202</sup> an ALJ determined that, even where thirteen out of 230 members had standing, the organization did not have associational standing to challenge the agency's decision.<sup>203</sup> In *Lambou v. Department of Environmental Protection*,<sup>204</sup> an ALJ similarly determined that an organization did not have associational standing to bring a challenge to agency action despite the fact that four members had individual standing.<sup>205</sup> Likewise, in *Florida Wildlife Federation v. Florida Department of Environmental Protection*,<sup>206</sup> an ALJ determined that an organization did not demonstrate associational standing because, although nineteen members had individual standing, nineteen members was not a "substantial number" of members in the context of Petitioner's total membership of 12,000.<sup>207</sup>

*b. Alternative Theory of Organizational Standing for State Judicial Review*

No established alternative theory of organizational standing similar to *Havens* standing in federal review exists in state judicial review in Florida; however, on December 22, 2022, the First District Court of Appeals held that the Department of Management Services had *Havens* standing under Fla. Statute 120.569 to appeal a final order of the Public Employee Relations Commission.<sup>208</sup> The court did not analyze the traditional *Havens* factors for establishing standing, but rather found that the Department had standing to challenge the decision as an employer entitled to participate in the proceedings and pursuant to

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<sup>200</sup> See *Manasota-88, Inc. v. Dep't of Health & Rehab. Servs.*, No. 85-2813RP, 1985 WL 306520, at \*8 (Fla. Div. Admin. Hrgs. Dec. 20, 1985) ("Absent evidence of how many persons are involved, there is insufficient evidence . . . that a 'substantial' number of members be affected."); *Hollywood Lakes Section Civic Ass'n, Inc.*, OGC No. 92-0704, DOAH No. 92-3748, 1993 WL 206801, at \*3 (Fla. Dep't Env't Reg. Feb. 12, 1993) (finding specific percentage of members affected irrelevant); *Friends of the Everglades, Inc. v. Bd. of Trs. of Internal Improvement Tr. Fund*, 595 So. 2d 186, 188 (Fla. Dist. Ct. App. 1992); *Rosenzweig v. Dep't of Transp.*, 979 So. 2d 1050, 1054 (Fla. Dist. Ct. App. 2008).

<sup>201</sup> *Rosenzweig*, 979 So. 2d at 1054.

<sup>202</sup> *Protect Key West & the Fla. Keys, Inc.*, No. 08-3823, 2009 WL 1097830 (Fla. Div. Admin. Hrgs. Apr. 20, 2009).

<sup>203</sup> *Id.* at \*23.

<sup>204</sup> *Lambou*, No. 02-4601, 2003 WL 21467299 (Fla. Div. Admin. Hrgs. June 24, 2003; F.O. Sept. 22, 2003).

<sup>205</sup> *Id.* at \*25.

<sup>206</sup> *Fla. Wildlife Fed.*, No. 12-3219, 2013 WL 1624300 (Fla. Div. Admin. Hrgs. Apr. 11, 2013).

<sup>207</sup> *Id.* at \*26.

<sup>208</sup> *Dep't of Mgmt. Servs. v. AFSCME Fla. Council 79*, 353 So. 3d 1237, 1240-41 (Fla. Dist. Ct. App. 2022).

another statute that included the department in the definition of “person.”<sup>209</sup> The court appeared to apply *Havens* to the plaintiff as more of a corporation or other entity rather than as a membership organization and as a result, whether future Florida courts would rely on this case as precedent to recognize associational standing under *Havens* for conservation organizations or would instead prescribe the well-established Florida test requiring a substantial number of members with standing is unclear.

*c. Standing to Appeal DOAH Decisions*

While the standing requirement to petition for a DOAH hearing is in Fla. Stat. 120.569, the standing requirements to *appeal* a DOAH decision are different and arise under Section 120.68 of the Florida APA, which states that “a party who is *adversely affected* by final agency action is entitled to judicial review.”<sup>210</sup>

In *Legal Environmental Assistance Foundation, Inc. (LEAF) v. Clark*,<sup>211</sup> the Florida Supreme Court established four requirements for seeking judicial review of a final agency decision after DOAH review: “(1) the action is final; (2) the agency is subject to provisions of the act; (3) the person seeking review was a party to the action; and (4) the party was adversely affected by the action.”<sup>212</sup> In the view of the *LEAF* court, there was “a much broader zone of party representation at the administrative level than at the appellate level.”<sup>213</sup> The court found *LEAF*’s interest in the case as a public advocacy organization seeking to “protect its members’ use and enjoyment of Florida’s natural resources by seeking to avoid unneeded new power plants and obtaining lower energy costs to customers”<sup>214</sup> consistent with the policy rationale behind the challenged statute, thus *LEAF*’s interest could not be adversely affected by the statute’s passage.<sup>215</sup>

In *Florida Chapter of the Sierra Club v. Suwanee American Cement Company*,<sup>216</sup> the First District Court of Appeals held the Sierra Club did not have standing to appeal a FDEP-issued permit.<sup>217</sup> The court determined that only an adversely affected party could seek judicial review of an agency’s final order, a markedly narrower standard than that of an administrative proceeding.<sup>218</sup> To the court, the Sierra Club

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<sup>209</sup> *Id.* at 1240.

<sup>210</sup> FLA. STAT. § 120.68 (2023) (emphasis added).

<sup>211</sup> *Legal Env’t Assistance Found., Inc. v. Clark (LEAF)*, 668 So. 2d 982 (Fla. 1996).

<sup>212</sup> *Id.* at 986. See FLA. STAT. § 120.68(1)(a) (“A party who is adversely affected by agency action is entitled to judicial review.”).

<sup>213</sup> *LEAF*, 668 So. 2d at 987.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Fla. Chapter of the Sierra Club v. Suwanee Am. Cement Co.*, 802 So. 2d 520 (Fla. Dist. Ct. App. 2001).

<sup>217</sup> *Id.* at 522.

<sup>218</sup> *Id.* at 521.

was not adversely affected where members used rivers that would allegedly be impacted by the mercury pollution from the new factory in the absence of specific allegations of adverse effects for individual members.<sup>219</sup>

In *Martin County Conservation Alliance v. Martin County (Martin County)*,<sup>220</sup> an organization appealed FDEP's final order adopting the ALJ's recommendation, which found that amendments to a county's comprehensive growth management plan were not vague or unpredictable.<sup>221</sup> The court held that, to establish standing under the Florida APA, plaintiffs must demonstrate "a reasonable possibility that the plan amendments, as interpreted, will lead to increased density, environmental degradation, or some other relevant, concrete evidence of harm that could adversely affect them."<sup>222</sup> Because the ALJ made findings of fact that the challenged changes would not cause harm to the plaintiffs, *Martin County* found that the appellants did not assert past or present harm, despite the fact that they had individual members who alleged they would be harmed by these changes.<sup>223</sup> Specifically, during the DOAH hearing, the plaintiffs should have established facts necessary to demonstrate both the broad standard for standing for administrative hearings and the narrower standard for appellate review.<sup>224</sup>

The weight of these cases demonstrate that the standard for standing is higher at the state appeals court level than the administrative DOAH level, that the plaintiff or petitioner has the burden to meet both standards during the DOAH administrative hearing in order to appeal to a state court, and that even where a petitioner is successful, achieving a ruling in which the plaintiff has standing often takes three steps of litigation and significant expense.

*B. Congress Appreciated the Need to Allow for Citizen Enforcement of Federal Statutes Without Threats of Harsh Financial Penalties*

The judiciary is an indispensable part of the operation of our federal system. With the growing complexities of government it is often the one and only place where effective relief can be obtained . . . . But where wrongs to individuals are done . . . it is abdication for courts to close their doors.<sup>225</sup>

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<sup>219</sup> *Id.* at 522.

<sup>220</sup> *Martin Cnty. Conservation All. v. Martin Cnty. (Martin Cnty.)*, 73 So. 3d 856 (Fla. Dist. Ct. App. 2011), *review denied*, 122 So. 3d 243 (Fla. 2013) (per curiam).

<sup>221</sup> *Id.* at 860–61.

<sup>222</sup> *Id.* at 861.

<sup>223</sup> *Id.* at 861–62.

<sup>224</sup> *Id.* at 858.

<sup>225</sup> *Flast v. Cohen*, 392 U.S. 83, 111 (1968) (Douglas, J., concurring).

In ensuring that citizens can enforce federal statutes,<sup>226</sup> Congress included fee shifting provisions in many environmental statutes so that the cost of a lawsuit would not impede less-wealthy plaintiffs from bringing actions in the public interest.<sup>227</sup> The ability to recover fees, and the possibility that the court will award fees and costs against them if their claim is unsuccessful, can be a dispositive factor in a plaintiff's decision to bring a case.

### *1. Federal Standard for Attorney's Fees & Costs Award*

The general rule in American law is that each side pays their own attorney's fees and costs absent a statute that provides for fee shifting.<sup>228</sup> But Congress, in underscoring the importance of giving citizens access to justice,<sup>229</sup> carved out exceptions allowing for the payment of reasonable fees and costs to a party who "substantially prevails" in litigation.<sup>230</sup> Some federal environmental statutes also allow a court to award costs and fees where "such award is appropriate."<sup>231</sup> Furthermore, in cases brought under the federal APA<sup>232</sup> to review federal final agency action, the Equal Access to Justice Act<sup>233</sup> (EAJA) applies and allows a judge to award fees and expenses to the prevailing party in a civil action brought against a federal agency.<sup>234</sup> To recover fees under EAJA, a plaintiff must satisfy four elements: 1) "the petitioner must be a prevailing party in a suit over which the court had jurisdiction"; 2) "the government's legal position cannot have been substantially justified"; 3) "the . . . fee motion must be timely"; and 4)

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<sup>226</sup> Reisinger et al., *supra* note 25, at 12–14.

<sup>227</sup> Kerry D. Florio, Comment, *Attorneys' Fees in Environmental Citizen Suits: Should Prevailing Defendants Recover?*, 27 B.C. ENV'T AFFS. L. REV. 707, 715–16 (2000).

<sup>228</sup> *Arcambel v. Wiseman*, 3 U.S. 306, 306 (1796); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257–59 (1975) (explaining the exception for bad faith or frivolous lawsuits); *see also* *Haustein v. Lynham*, 100 U.S. 483, 491 (1880) (prohibiting either side's legal fees from being paid out of the fund in dispute); *Stewart v. Sonneborn*, 98 U.S. 187, 197 (1879) (excluding attorney's fees from damages awarded to a prevailing plaintiff).

<sup>229</sup> *See, e.g.*, CAA, 42 U.S.C. §§ 7604(d), 7607(f), 7622(e)(2) (2018) (citizen suit provision allowing court to award fees and costs to prevailing parties); CWA, 33 U.S.C. § 1365(d) (2018) (same); CERCLA, 42 U.S.C. § 9659(f) (2018) (same); ESA, 16 U.S.C. § 1540(g)(4) (2018) (same); RCRA, 42 U.S.C. § 6972(e) (2018) (amending Solid Waste Disposal Act, Pub. L. No. 89-272, 79 Stat. 992 (1965)) (same); TSCA, 15 U.S.C. § 2618(d) (2018) (same).

<sup>230</sup> *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 681 (1983); *see also* FED. R. CIV. P. 54(d)(1) (providing that in federal judicial review, the prevailing party may be entitled costs and fees provided that a statute, rule, or other grounds entitle the prevailing party to fees).

<sup>231</sup> CAA, 42 U.S.C. § 7604(d); CWA, 33 U.S.C. § 1365(d) (limiting the award of litigation costs to any "prevailing" or "substantially prevailing" parties); CERCLA, 42 U.S.C. § 9659(f) (limiting the award of litigation costs to the "prevailing" or "substantially prevailing" party).

<sup>232</sup> APA, 5 U.S.C. § 704 (2018).

<sup>233</sup> Equal Access to Justice Act (EAJA), 5 U.S.C. § 504; 28 U.S.C. § 2412 (2022).

<sup>234</sup> 28 U.S.C. §§ 2412(a)(1)–(f).

“there can be no special circumstances that would render an award of fees unjust.”<sup>235</sup>

Most courts have declined to award fees to a prevailing defendant, finding that “courts apply a more rigorous standard when a prevailing defendant seeks its fees. In such cases, the court may only award attorney’s fees upon a finding that the plaintiff’s action was frivolous, unreasonable, or without foundation.”<sup>236</sup> Therefore, the standard typically applied for awarding fees against an environmental plaintiff is the heightened “frivolous” standard.

Meanwhile, as to costs, the judge in federal APA cases typically makes decisions based on an administrative record prepared by the federal agency, and parties do not engage in discovery or submit expert testimony. Thus, actual costs are often minimal and may only include a filing fee, costs for service of process, and perhaps travel for hearings.<sup>237</sup> Courts award costs using the same standard as attorney’s fees.<sup>238</sup> As a result, costs associated with most federal lawsuits challenging federal agency action—win or lose—are generally not a bar to participation.

## 2. State Standard for Attorney’s Fees & Costs Award

While some states have created some form of generic fee shifting that supplants the traditional American rule,<sup>239</sup> most states have not. In Florida, the Florida Environmental Protection Act of 1971 now requires the losing party to pay the other sides’ costs and fees.<sup>240</sup> For cases not arising under the Florida Environmental Protection Act, Florida has the Florida Equal Access to Justice Act,<sup>241</sup> but, unlike its federal counterpart, the state law does not actually provide “equal access.” Florida Statute 57.111 requires an award of attorneys’ fees and costs to a “prevailing small business party” against a state agency action adversely affecting the small business party’s substantial interests “unless the actions of the agency were substantially justified.”<sup>242</sup> The so-called Florida EAJA only applies where a state agency’s action

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<sup>235</sup> United States v. Gardiner, 512 F. Supp. 2d 1270, 1272 (S.D. Fla. 2007).

<sup>236</sup> Christiansburg Garment Co. v. Equal Emp. Opportunity Comm’n, 434 U.S. 412, 421 (1978); Nat’l Wildlife Fed. v. Consumers Power Co., 729 F.Supp. 62, 64 (W.D. Mich. 1989); Marbled Murrelet v. Babbitt, No. 96-3261, 1998 U.S. Dist. LEXIS 4266, \*11–12 (N.D. Cal. Mar. 30, 1998).

<sup>237</sup> See, e.g., Robinette v. Comm’r of Internal Revenue Serv., 439 F.3d 455, 459 (8th Cir. 2006).

<sup>238</sup> Tunison v. Cont’l Airlines Corp., 162 F.3d 1187, 1190 (D.C. Cir. 1998).

<sup>239</sup> E.g., CAL. CIV. PROC. CODE § 1021.5 (West 2023); N.Y. C.P.L.R. 8601 (McKinney 2023). See, e.g., Hellar v. Cenarrusa, 682 P.2d 524, 531 (Idaho 1984) (referencing state law allowing fee shifting); Watkins v. Lab. & Indus. Rev. Comm’n, 345 N.W.2d 482, 485 (Wis. 1984) (same).

<sup>240</sup> FLA. STAT. § 403.412(2)(f) (2023) (providing that “the prevailing party or parties shall be entitled to costs and attorney’s fee” in actions “other than an action involving a state NPDES permit”).

<sup>241</sup> Florida Equal Access to Justice Act (Florida EAJA), FLA. STAT. § 57.111 (2023).

<sup>242</sup> *Id.* § 57.111(4)(a).

adversely affects either a sole proprietor of a corporation or an unincorporated business with less than twenty-five full-time employees and a net worth less than \$2 million, and the so-called “small business party” prevails in showing the agency action was not justified in a proceeding against that party.<sup>243</sup> In practice, Florida’s EAJA serves to shift attorney’s fees to protect business interests, not the public interest.

Florida Statutes Section 57.105 also provides for attorney’s fees where the plaintiff brings a claim not supported by facts or existing law and has been used to punish plaintiffs where the DOAH ALJ determined they did not have standing.<sup>244</sup> In *Martin County*, the First District Court of Appeals imposed sanctions against appellants and their counsel for filing an appeal where the plaintiffs did not have standing.<sup>245</sup> As discussed above, the court found that the ALJ’s findings of fact disputed the plaintiff’s claim that the challenged changes would harm the plaintiff.<sup>246</sup> But the court did not stop there.

The appellants, environmental non-profits, moved for a rehearing.<sup>247</sup> The court took that opportunity to, *sua sponte*, sanction the appellants under Florida Statutes Section 57.105.<sup>248</sup> Section 57.105(1) provides for the award of attorney’s fees in administrative appeals where “the losing party’s attorney knew or should have known that a claim or defense was not supported by the material facts necessary to establish the claim or defense; or would not be supported by the application of then-existing law to those material facts.”<sup>249</sup> The court held that the statute “does not require a finding of frivolousness to justify sanctions, but only a finding that the claim lacked a basis in material facts or then-existing law.”<sup>250</sup> *Martin County* found that “[a]ppellants and their counsel filed a meritless appeal, able to assert only that the amendment *might* lead to negative results *if* a different decisionmaker reads the amendments in an absurd and literal manner, different than now interpreted, and such a decision *can* be adverse to Appellants’ environmental mission.”<sup>251</sup>

The dissent argued that “this case is not close to providing a basis to impose sanctions,” finding that the record showed “more than

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<sup>243</sup> *Id.* § 57.111(3)(b)(1)–(3). Individuals with a net worth under \$2 million also qualify as a “small business party.” *Id.*

<sup>244</sup> FLA. STAT. § 57.105(1)(a)–(b) (2023).

<sup>245</sup> *Martin Cnty.*, 73 So. 3d 856, 858 (Fla. Dist. Ct. App. 2011).

<sup>246</sup> *Id.* at 861.

<sup>247</sup> *Id.* at 857.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 864 (citing FLA. STAT. § 57.105 (2023)). In 2003, the Florida legislature passed subsection (5) of Section 57.105 of the Florida Statutes, which provides that “an administrative law judge shall award a reasonable attorney’s fee and damages to be paid to the prevailing party . . . a voluntary dismissal by a nonprevailing party does not divest the administrative law judge of jurisdiction to make the award.” John Rimes, *What Price Frivolity? Section 57.105 Comes to the APA*, THE FLORIDA BAR (January 2008), <https://perma.cc/XV4L-ZXLW>.

<sup>250</sup> *Martin Cnty.*, 73 So. 3d at 858.

<sup>251</sup> *Id.* at 864.

sufficient” information demonstrating standing and imposing sanctions would “severely chill” environmental non-profit organizations from appellate advocacy.<sup>252</sup> The dissent noted that “[t]he sanction order here essentially holds that an appeal which lacks standing warrants sanctions as a matter of course” and “[t]he standard imposed by the sanction order is essentially a ‘meritless’ standard—that is, the party sanctioned has simply lost on the merits or on standing . . . .”<sup>253</sup> The court predicted that:

[A]ttorneys will not accept close cases, access to the courts will be restricted, and wrongs will not be addressed. . . . Such a liberal use of section 57.105 will lead to the intolerable development that only those with deep pockets, who can run the risk of sanctions if they lose, will seek appellate redress. . . . [All others] could be coerced into forgoing an appeal because they would be unable to risk their financial existence to potential sanctions. . . . [S]uch a chilling effect will not only reduce the ability of citizens to challenge environmentally adverse real estate development, but may constitute a denial of the guarantee of access to courts provided in Article 1, section 21 of our States’ Constitution.<sup>254</sup>

The majority was unpersuaded and countered that the “Florida Supreme Court has recognized that courts will not adversely affect legitimate advocacy by imposing sanctions under section 57.105 . . . but instead will emphasize that counsels’ obligations as officers of the court override their obligations to zealously represent their clients.”<sup>255</sup> An amicus brief from the Florida Wildlife Federation pleaded that the court’s sanction “impede[s] access to Florida courts by the threat of sanctions against litigators and their attorneys if they lose their appeal.”<sup>256</sup> The amicus brief from the American Planning Association warned that “the opinion below and the low threshold adopted therein for imposing sanctions create substantial uncertainty and impose significant financial risks.”<sup>257</sup>

The Florida Supreme Court declined to hear the case<sup>258</sup> and *Martin County* has indeed had a significant impact on environmental organizations’ decisions to litigate final agency action. And, as argued above, the number of agency actions just expanded significantly with EPA’s delegation of 404 authority to FDEP, depriving environmental organizations that may not have a “substantial number” of members substantially affected access to courts for fear of significant financial

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<sup>252</sup> *Martin Cnty.*, 73 So. 3d at 866 (Van Nortwick, J., dissenting).

<sup>253</sup> *Id.* at 867 (Van Nortwick, J., dissenting).

<sup>254</sup> *Id.* at 872 (Van Nortwick, J., dissenting).

<sup>255</sup> *Martin Cnty.*, 73 So. 3d at 858.

<sup>256</sup> Brief for Florida Wildlife Federation as Amici Curiae Supporting Petitioners at 5, *Martin Cnty.*, 122 So. 3d 243 (Fla. 2013) (No. SC11-2455), 2012 WL 11981966.

<sup>257</sup> Brief for American Planning Association, Florida Chapter as Amici Curiae Supporting Petitioners at 10, *Martin Cnty.*, 122 So. 3d 243 (No. SC11-2455), 2012 WL 3077980.

<sup>258</sup> *Martin Cnty.*, 122 So. 3d at 243.

harm if a court determines that the plaintiff should have known they did not have standing under this cramped interpretation. National and regional groups, typical heavy-hitters in federal courts, will be wary and likely avoid challenging state-issued 404 permits even where they inflict the same harm to their members as permits issued by the federal agency.

EPA has reckoned with the issue of unequal fee shifting provisions in state delegation in the past. The Ninth Circuit Court of Appeals held EPA did not abuse agency discretion in approving Alaska's water program even though Alaska's fee shifting provision did not mirror the federal dual standard.<sup>259</sup> Native tribes and conservation organizations argued Alaska's fee shifting provision allowed fees to be awarded to any prevailing party, which is contrary to the federal standard for the award of attorney's fees in public interest lawsuits.<sup>260</sup> The court found that the dual standard for attorney's fees does apply to actions brought under Section 509 to enforce the Clean Water Act.<sup>261</sup> However, the court also noted that Alaska's "loser pays" system of fee shifting was in flux and did not necessarily result in unsuccessful public interest plaintiffs paying fees because the relevant law required the court to balance the reasonableness of the claims, bad faith conduct, "the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts," and "other equitable factors deemed relevant."<sup>262</sup> The court was also persuaded that Alaska submitted a declaration that the state would only seek attorney's fees where challenges were frivolous or for delay as part of the state's application for assumption.<sup>263</sup>

Unlike the cost scenario in federal APA cases, the actual costs for state proceedings are significant and include potential posts for discovery, expert testimony, and depositions. To award costs, state courts utilize a different standard than the federal standards for awarding attorney's fees, having the effect of penalizing plaintiffs who are ultimately unsuccessful in demonstrating standing. These costs associated with state proceedings can be an insurmountable bar to participation.

#### IV. EPA SHOULD REVIEW AND WITHDRAW DELEGATION TO STATES THAT RESTRICT PLAINTIFFS' ACCESS TO JUSTICE

This Article has examined the effect delegation can have on plaintiffs' access to courts. In Florida, EPA's delegation of federal authority has closed the courtroom doors to organizations who cannot meet the state's impermissible definition of associational standing or

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<sup>259</sup> *Akiak Native Cmty. v. U.S. Env't Prot. Agency*, 625 F.3d 1162, 1164 (9th Cir. 2010).

<sup>260</sup> *Id.* at 1166.

<sup>261</sup> *Id.* at 1167.

<sup>262</sup> *Id.* at 1168–69 (citing AL. FED. R. CIV. P. 82(b)(3)).

<sup>263</sup> *Id.* at 1170.

who fear the court will levy harsh penalties against them just for trying, depriving organizations in the state of the ability to challenge arbitrary agency action. Federal law provides a process for EPA to withdraw or revoke agency delegation of federal authority to states.<sup>264</sup> Numerous petitioners in dozens of states have asked EPA to revoke agency delegation of the Clean Water Act, the Clean Air Act, and the Resource Conservation and Recovery Act (RCRA) to their state.<sup>265</sup> But despite occasionally finding cause to do so, EPA has, at the time of publication, never withdrawn agency delegation. However, EPA has recently proposed a major revision of its regulations regarding state assumption, echoing many of the concerns outlined in this Article, including proposing to require that states provide for judicial review for permit decisions by disallowing fee shifting and greater restrictions on associational standing than federal courts.<sup>266</sup> This Article, submitted for publication in February 2023, has shown that delegation can restrict access to justice and worsen the challenges already inherent in assumption. This Part describes how EPA can and must reevaluate the agency's delegation programs and ensure states provide the same access to judicial review that is afforded by the U.S. Constitution.

*A. EPA Must Withdraw Agency Delegation of Federal Authority when EPA Finds the State is no Longer Complying with Federal Law*

Ultimately, EPA is authorized to take back a delegated program in case of clearly unacceptable performance by a state, which shows a lack of good faith or capacity on the part of the state to correct the problems.<sup>267</sup>

Anyone can petition EPA under the federal APA to request the agency withdraw a state's assumption of federal authority.<sup>268</sup>

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<sup>264</sup> See, e.g., 33 U.S.C. § 1342(c)(3) (2018) (providing that EPA can revoke a state's delegation of federal authority under the CWA).

<sup>265</sup> Kan. Nat. Res. Council, *Petition by Kansas Natural Resources Council Commencing Proceedings to Withdraw Approval of State of Kansas Program for Administration of National Pollution Discharge Elimination System of the Clean Water Act* (Sept. 12, 1989); Leg. Env. Ass. Fnd., *Petition for Issuance of Order Commencing Proceedings to Withdraw Approval of National Pollutant Discharge Elimination System Permit Program for Alabama* (July 10, 1995); *Petition to Correct Deficiencies or Withdraw EPA Clean Water Act Authority*; Nat. Res. Def. Council, *Petition to Correct Deficiencies or Withdraw EPA Approval; Delegated Clean Water Act Authority; Storm Water, Los Angeles Regional Water Quality Control Board* (40 CFR § 123.64) (Feb. 23, 2000); Wyo. Outdoor Council & Powder River Basin Res. Council, *Petition for Corrective Action or Withdrawal of the State of Wyoming's Authority to Administer the Clean Water Act's National Pollution Discharge Elimination System Program* (March 5, 2001); EnviroWatch, *Petition to Withdraw Hawaii Certification* (April 15, 2001).

<sup>266</sup> Clean Water Act Section 404 Tribal and State Program Regulation, 88 Fed. Reg. 55276, 55298–300 (Aug. 14, 2023).

<sup>267</sup> RUCKELSHAUS MEMO, *supra* note 27, at 11.

<sup>268</sup> See Administrative Procedure Act, 5 U.S.C. §§ 553(e), 555(e) (2018) (provisions allowing for petitions for rulemaking).

Petitioners may also bring specific Clean Water Act withdrawal requests under Section 402 of the statute.<sup>269</sup> EPA “*shall*” withdraw agency delegation of Section 402 authorization to a state if the agency makes a determination that the state is no longer complying with federal law.<sup>270</sup> Importantly, withdrawal can only happen once EPA “determines after public hearing” that a state is not complying with federal law.<sup>271</sup> There are similar provisions applicable to other EPA-delegated federal authority:

- EPA *shall* withdraw its approval of a state hazardous waste program when [...] EPA “determines after public hearing” that a state is not administering it in accordance with federal law.<sup>272</sup>
- EPA *shall* withdraw its approval of a state underground storage tank program if it “determines after public hearing” that a state is not complying with federal law.<sup>273</sup>
- EPA *shall* initiate withdrawal proceedings where it “determines after public hearing” that the state no longer complies with federal law regarding Clean Water Act Section 404.<sup>274</sup>

Despite the consistent use of the word “shall” in these provisions, several courts have determined that EPA’s obligation to withdraw an unlawful program is discretionary. In 2019, the Eleventh Circuit Court of Appeals held that EPA’s decision not to withdraw a state’s water pollution program delegation was discretionary.<sup>275</sup> Years earlier, conservation organizations petitioned EPA to withdraw agency delegation to Alabama based on twenty-six alleged violations of law.<sup>276</sup> EPA responded to the petition a few years later, declining to commence withdrawal proceedings on twenty of the violations and deferring action on the remaining six alleged violations.<sup>277</sup> Because EPA had previously found some of Alabama’s procedures out of compliance with the Clean Water Act, the conservation organizations challenged EPA’s refusal to initiate withdrawal proceedings as arbitrary or capricious.<sup>278</sup> The court held that 40 C.F.R. § 123.63, which states that EPA *may* withdraw assumption when a state program does not comply with the federal law, means that EPA “*may* withdraw authority under certain conditions but

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<sup>269</sup> CWA, 33 U.S.C. § 1342(c)(3) (2018).

<sup>270</sup> *Id.* § 1342(c)(1) (emphasis added).

<sup>271</sup> *Id.* § 1342(c)(3).

<sup>272</sup> RCRA, 42 U.S.C. § 6926(e) (2018).

<sup>273</sup> *Id.* § 6991c(e).

<sup>274</sup> 33 U.S.C. § 1344(i).

<sup>275</sup> *Cahaba Riverkeeper v. U.S. Env’t Prot. Agency*, 938 F.3d 1157, 1166 (11th Cir. 2019).

<sup>276</sup> *Id.* at 1161.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

is not compelled to do so.”<sup>279</sup> The court declined to “pinpoint the precise conditions under which [...] EPA should exercise its discretion to initiate withdrawal proceedings,” noting that “[i]t is enough to observe that [...] EPA is not required” to do so for “any single violation.”<sup>280</sup> In dictum, the court acknowledged that “EPA *must* withdraw a state’s authorization . . . if it determines, after conducting withdrawal proceedings . . . that the program has fallen out of compliance.”<sup>281</sup>

The majority of courts have similarly held that EPA’s decision to withdraw delegation is discretionary.<sup>282</sup> In *Save the Valley, Inc. v. U.S. Environmental Protection Agency*,<sup>283</sup> a conservation organization sued EPA for the agency’s failure to initiate proceedings to withdraw Indiana’s Clean Water Act enforcement authority.<sup>284</sup> EPA moved to dismiss, arguing that the court lacked subject matter jurisdiction because the decision to initiate withdrawal proceedings is discretionary.<sup>285</sup> The court held that the language of 33 U.S.C. § 1342(c)(3), which states that EPA *shall* withdraw approval of the program when the agency “determines” the state is no longer

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<sup>279</sup> *Id.* at 1166.

<sup>280</sup> *Id.* at 1167.

<sup>281</sup> *Id.* at 1161 (emphasis added).

<sup>282</sup> *Altman v. United States*, No. 98-CV-237E(F), 2004 U.S. Dist. LEXIS 28215, at \*7–8 (W.D.N.Y. Dec. 30, 2004) (holding EPA’s decision to withdraw as discretionary because the statute does not compel EPA to hold a hearing or make a determination by a specific time); *Weatherby Lake Improvement Co. v. Browner*, No. 96-1155-CV-W-8, 1997 U.S. Dist. LEXIS 14741, at \*3–4 (W.D. Mo. Apr. 17, 1997) (holding the Clean Water Act does not compel the EPA to initiate withdrawal proceedings based on complaints); *Del. County Safe Drinking Water Coal. v. McGinty*, No. 07-1728, 2007 U.S. Dist. LEXIS 88021, at \*14–15 (E.D. Pa. Nov. 27, 2007) (holding that even though “[the relevant] provisions state that the EPA shall initiate proceedings to withdraw the state program if the EPA finds that the state is not appropriately implementing the CWA” they do not create a non-discretionary duty); *Johnson Cnty. Citizen Comm. For Clean Air & Water v. U.S. Env’t Prot. Agency*, No. 3:05-0222, 2005 U.S. Dist. LEXIS 33190, at \*10–11 (M.D. Tenn. Sept. 9, 2005) (holding “whether to hold a public hearing and whether to make a subsequent determination that a state was not administering its NPDES program in accordance with the CWA were wholly discretionary exercises of the EPA’s authority”). *But see Sierra Club v. U.S. Env’t Prot. Agency*, 377 F. Supp. 2d 1205, 1209 (N.D. Fla. 2005) (holding that review the EPA’s unreasonable delay in making its discretionary decision to withdraw delegation was reviewable by the circuit court of appeals); *City of Highland Park v. U.S. Env’t Prot. Agency*, No. 2:16-cv-13840, 2018 U.S. Dist. LEXIS 168565, at \*14 (E.D. Mich. Sept. 29, 2018) (holding that the EPA has not violated any discretionary duties that would result in a waiver).

<sup>283</sup> *Save the Valley, Inc. v. U.S. Env’t Prot. Agency (Save the Valley I)*, 99 F. Supp. 2d 981 (S.D. Ind. 2000).

<sup>284</sup> *Id.* at 982; *see also Rivers Unlimited v. Costle*, No. C-2-78-48, 1978 U.S. Dist. LEXIS 20429, \*9–10 (S.D. Ohio May 3, 1978) (holding that “[t]he language of 33 U.S.C. 1342(c)(3) also appears on its face to impose a mandatory duty upon the Administrator. The Court is aware of no reason or authority which would support an interpretation of 1342(c)(3) in a fashion other than that apparent from the face of the statute.”); *Save the Bay, Inc. v. U.S. Env’t Prot. Agency*, 556 F.2d 1282, 1289–90 (5th Cir. 1977) (stating in dictum that “[w]e by no means suggest that administrative inaction cannot constitute reviewable agency action” and acknowledging that the failure to respond to a petition to revoke might also be reviewable as a failure to perform a nondiscretionary duty under Section 505 of the APA).

<sup>285</sup> *Save the Valley I*, 99 F. Supp. 2d at 982.

administering the program in accordance with federal law, creates a mandatory duty to initiate withdrawal proceedings.<sup>286</sup> EPA had argued that, to get to that non-discretionary duty, the agency would first have to make a determination or finding of a violation and that the agency has discretion in deciding what constitutes a determination or finding.<sup>287</sup> The court could not grant EPA deference because the agency's interpretation would "frustrate citizen enforcement of the CWA merely by refusing to issue a finding or determination," which would contravene the statute's purpose.<sup>288</sup>

Two years later, the same court granted a conservation organization-plaintiff's motion for summary judgment.<sup>289</sup> EPA again claimed the court did not have subject matter jurisdiction, arguing that the plaintiff's claims did not arise under Section § 1365(a)(2) of the Clean Water Act, which allows district court review of non-discretionary duties, and instead arose under a different provision requiring review by circuit courts of appeal.<sup>290</sup> Finding the state in fact in violation of federal law, the court ordered EPA to conduct a public hearing and to withdraw approval of the state's water program if the state was still out of compliance.<sup>291</sup>

There are a handful of cases covering RCRA and Clean Air Act withdrawals of delegation, but only a singular case regarding EPA's refusal to withdraw state assumption of 404 permitting. In *National Wildlife Federation v. Adamkus*,<sup>292</sup> the Federal District Court for the Western District of Michigan found EPA had no mandatory duty to withdraw state assumption.<sup>293</sup> Conservation organizations sent EPA several letters requesting the agency undertake a formal review of proposed changes to Michigan state law.<sup>294</sup> Conservation organizations submitted comments in response to EPA's notice in the Federal Register requesting feedback from the public on whether the changes impacted Michigan's wetlands program.<sup>295</sup> EPA determined the changes were not inconsistent with federal law and the agency would continue to review conservation organizations' remaining concerns.<sup>296</sup> The court in

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<sup>286</sup> *Id.* at 984 ("It is a well-accepted rule of statutory construction that a legislature's use of the word "shall" is generally interpreted as imposing a mandatory duty." (quoting *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998))); CWA, 33 U.S.C. § 1342(c)(3) (2018).

<sup>287</sup> *Save the Valley I*, 99 F. Supp. 2d at 985.

<sup>288</sup> *Id.* (finding that "Congress intended that the public be permitted to seek enforcement of the CWA through citizen suits when state and federal agencies fail to exercise their enforcement responsibility").

<sup>289</sup> *Save the Valley, Inc v. U.S. Env't Prot. Agency (Save the Valley II)*, 223 F. Supp. 2d 997, 999 (2002).

<sup>290</sup> *Id.* at 1000; 33 U.S.C. § 1365(a)(2) (2018).

<sup>291</sup> *Save the Valley II*, 223 F.Supp.2d at 1013–14.

<sup>292</sup> *Nat'l Wildlife Fed. v. Adamkus*, 936 F. Supp. 443 (W.D. Mich. 1996).

<sup>293</sup> *Id.* at 440.

<sup>294</sup> *Id.* at 438.

<sup>295</sup> *Id.* at 438.

<sup>296</sup> *Id.* at 438–439.

*National Wildlife Federation* found that the Michigan law only “trigger[ed] a nondiscretionary duty to withdraw approval once EPA has determined after public hearing that the state’s administration of the program fails to comply with the CWA” but that the law “does *not* explicitly require EPA to hold public hearings . . . in the first instance to determine whether a State is administrating a program” even in response to a petition from the public.<sup>297</sup> The conservation organizations brought a claim against EPA for failing to respond directly to their comments in violation of the Clean Water Act and APA.<sup>298</sup> Although EPA had a non-discretionary duty to “respond in writing to any petition to commence withdrawal proceedings,”<sup>299</sup> the court dismissed the Clean Water Act claim because the Clean Water Act does not provide a deadline for responding and noted in dictum that “whether EPA has delayed unreasonably in responding” to conservation organizations’ concerned is properly reviewed under the APA.<sup>300</sup>

The weight of the authority suggests that, in order to get to the mandatory duty to initiate withdrawal proceedings, EPA must first conduct a hearing and make a determination of a violation—both of which are discretionary actions.<sup>301</sup> And while the duties to initiate the hearing and issue the determination are reserved for agency discretion, any failure to issue those decisions is reviewable under the APA in the circuit courts of appeals.<sup>302</sup>

*B. There is Precedent for EPA to Revoke Agency Delegation of Federal Authority*

Denying citizens the opportunity to challenge executive decisions in court compromises their ability to influence permitting decisions through other required elements of public participation, such as through public comments and hearings on proposed permits. If citizens perceive that a state is not addressing their concerns about permits because the citizens have no recourse to an impartial judiciary, that perception also

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<sup>297</sup> *Id.* at 440.

<sup>298</sup> *Id.* at 442.

<sup>299</sup> *Id.*

<sup>300</sup> *Id.* at 443.

<sup>301</sup> *Askins v. Ohio Dep’t of Agric.*, 809 F.3d 868, 877 (6th Cir. 2016) (“While the Clean Water Act *does* require the U.S. EPA to withdraw approval of a state-NPDES program after a hearing, notice, and time to cure, it does *not* require the U.S. EPA to hold a hearing in the first place. Accordingly, the non-discretionary action does not kick in until *after* the hearing, but the hearing itself is discretionary.” (internal citations omitted)).

<sup>302</sup> *Ohio Valley Env’t Coal. v. McCarthy*, No. 15-0277, 2015 U.S. Dist. LEXIS 79630, at \*5–7, \*9–10 (S.D.W. Va. June 19, 2015); *see also* *Sierra Club v. U.S. Env’t Prot. Agency*, 377 F.Supp.2d 1205, 1208 (N.D. Fla. 2005) (noting that “neither the statute nor the regulations impose any prescribed method by which, or specific time within which, the EPA must evaluate . . . evidence of a state’s noncompliance”).

has a chilling effect on all the remaining forms of public participation in the permitting process.<sup>303</sup>

After EPA tightened drinking water standards in the 1990s, the agency initiated withdrawal proceedings against eight states that had not come into compliance.<sup>304</sup> Since 1989, EPA has received fifty petitions to withdraw delegation.<sup>305</sup> EPA has “resolved” most of the petitions, meaning the agency has ultimately denied the petition, while some petitions have been withdrawn and others are considered “partially resolved” while the agency continues to work on resolving the issues raised in the petition.<sup>306</sup> The pending petitioners are for delegated programs in California, Delaware, Kentucky, Louisiana, Illinois, Indiana, Minnesota, Texas, Virginia, West Virginia, Wisconsin, and Wyoming.<sup>307</sup> EPA has not withdrawn any state programs based on a citizen petition.

The Clean Water Act requires states administering the program to “provide an opportunity for judicial review in State Court . . . that is sufficient to provide for, encourage, and assist public participation in the permitting process.”<sup>308</sup> EPA regulations clarify that the state will meet this standard where it “allows an opportunity for judicial review that is the same as that available to obtain judicial review in federal court of a federally-issued” National Pollutant Discharge Elimination System (NPDES) permit and “will not meet this standard if it narrowly restricts the class of persons who may challenge the approval or denial of permits.”<sup>309</sup> The Clean Air Act requires an opportunity for state judicial review of state-issued permits on par with federal judicial review standards as well.<sup>310</sup>

However, EPA’s oversight policy is to give the state the benefit of the doubt in addressing problems and to exercise every possible

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<sup>303</sup> Amendment to Requirements for State Permit Programs Under Section 402 of the Clean Water Act, 60 Fed. Reg. 14588, 14589 (Mar. 17, 1995) (codified at 40 C.F.R. pt. 123).

<sup>304</sup> Reitze, *supra* note 35, at 1471.

<sup>305</sup> Petitions to withdraw delegation are for Alabama, California, Delaware, Florida, Georgia, Hawaii, Kansas, Kentucky, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Michigan, Minnesota, Missouri, Nevada, Ohio, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. *NPDES State Program Withdrawal Petitions*, *supra* note 187. EPA has received more than one petition for some states. *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> *Id.*

<sup>308</sup> 40 C.F.R. § 123.30 (2021) (emphasis added); *see also* CWA, 33 U.S.C. § 1369(b)(1) (2018) (providing for judicial review of the Administrator’s actions).

<sup>309</sup> 40 C.F.R. § 123.30; *see also* Amendment to Requirements for Authorized State Permit Programs Under Section 402 of the Clean Water Act, 61 Fed. Reg. 20772, 20780 (May 8, 1996) (codified at 40 C.F.R. pt. 123).

<sup>310</sup> *See, e.g.*, Approval and Promulgation of Air Quality Implementation Plans; Commonwealth of Virginia—Prevention of Significant Deterioration Program, 61 Fed. Reg. 1880, 1882 (Jan. 24, 1996) (codified at 40 C.F.R. pt. 52) (proposing denial of Virginia’s state implementation plan because state law standing requirements limited judicial review).

alternative prior to revoking delegation.<sup>311</sup> Consequently, the agency has never revoked delegation despite finding a state was not providing the same protection provided under federal law, but EPA has come close to doing so. Those instances provide a roadmap for those wishing to restore access to justice in states where delegation has restricted access to judicial review.

Several petitions submitted to EPA raising the issue of inadequate access to justice have ultimately resulted in the states themselves amending their laws to restore access to state courts. In 1993, EPA received a petition to withdraw Virginia's Water Pollution Control Program alleging that a change in Virginia law and new judicial interpretation of the Virginia Administrative Process Act removed a basis for judicial review of agency decisions for environmental organizations.<sup>312</sup> As a result, only "aggrieved owners" had a right to litigate NPDES permit actions.<sup>313</sup>

Before EPA acted on the petition, the Fourth Circuit Court of Appeals in *Virginia v. Browner*<sup>314</sup> upheld EPA's denial of Virginia's proposed program for issuing air pollution permits based in part on the fact that Virginia did not provide required rights to judicial review.<sup>315</sup> Virginia's law restricted judicial review to people who provided public comments and established "an invasion of an immediate, legally protected, pecuniary and substantial interest which is concrete and particularized."<sup>316</sup> *Virginia v. Browner* held that "[a] plaintiff need not show 'pecuniary' harm to have Article III standing; injury to health or to aesthetic, environmental, or recreational interests will suffice."<sup>317</sup> The court found that Congress prioritized broad judicial review "to ensure that the required public comment period serves its proper purpose. The comment of an ordinary citizen carries more weight if officials know that the citizen has the power to seek judicial review of any administrative decision harming him."<sup>318</sup> Critically, the court noted that "EPA

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<sup>311</sup> RUCKELSHAUS MEMO, *supra* note 27, at 2.

<sup>312</sup> See Petition by Chesapeake Bay Found. & Env't Def. Fund, Petition for Corrective Action, an Order Commencing Withdrawal Proceedings, & Other Interim Relief with Respect to Virginia's Water Pollution Control Program 14–16, 43 (Nov. 5, 1993) [hereinafter Virginia Petition for Corrective Action], <https://perma.cc/89P7-ZJCG>; Letter from Katherine Slaughter, S. Env't L. Ctr. to Carol Browner, U.S. Env't Prot. Agency (Aug. 10, 1993) (on file with author) [hereinafter S. Env't L. Ctr. Letter] (attaching petition for the EPA to commence withdrawal proceedings on Virginia's NPDES program because the program impermissibly limits judicial review to only dischargers).

<sup>313</sup> Virginia Petition for Corrective Action, *supra* note 312, at 15 (citing Env't Def. Fund v. Va. State Water Control Bd., 404 S.E.2d 728, 732–35 (Va. Ct. App. 1991), *cert. denied*, Record no. 911045 (Jan. 28, 1992)); Town of Fries v. State Water Control Bd., 409 S.E.2d 634, 636 (Va. Ct. App. 1991); Citizens for Clean Air v. State Air Pollution Control Bd., 412 S.E.2d 715, 721 (Va. Ct. App. 1991)).

<sup>314</sup> *Virginia v. Browner*, 80 F.3d 869 (4th Cir. 1996).

<sup>315</sup> *Id.* at 872–73.

<sup>316</sup> *Id.* at 876.

<sup>317</sup> *Id.* at 879.

<sup>318</sup> *Id.* at 879–80.

interprets the statute and regulation to require, at a minimum, that states provide judicial review of permitting decisions to any person who would have standing under Article III of the United States Constitution.”<sup>319</sup>

Virginia’s General Assembly amended the judicial review provisions of the Virginia Waste Management Act<sup>320</sup> later that year to expand judicial review to be fully consistent with Article III standing, *i.e.*, to grant standing to individuals other than aggrieved permit holders.<sup>321</sup> In 2007, the Virginia Supreme Court held those amendments granted representational standing as well.<sup>322</sup> As a result, the petitioners withdrew their water pollution petition.<sup>323</sup>

Likely because of the assumption issues in Virginia, EPA amended the requirements for state assumption to require states with delegated programs to “provide an opportunity for judicial review in State Court of the final approval or denial of permits by the State that is sufficient to provide for, encourage, and assist public participation in the permitting process,” and states that “narrowly restrict[] the class of persons who may challenge the approval or denial of permits” will not meet this standard.<sup>324</sup>

In 2008, EPA received a petition requesting the agency revoke Vermont’s federal authorization to implement the Clean Water Act’s NPDES program.<sup>325</sup> The petition argued that the state’s public participation requirement was inconsistent with the Clean Water Act.<sup>326</sup> EPA notified the state and the Vermont legislature corrected the deficiency.<sup>327</sup> The same thing happened when EPA received a petition requesting the withdrawal of Nevada’s authorization to implement the Clean Air Act and Clean Water Act. According to the petition, a change in Nevada law restricted public access to administrative proceedings to only those with a direct financial interest in the matter, which limited who could seek review of a challenged action under the state’s

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<sup>319</sup> *Id.* at 876.

<sup>320</sup> Virginia Waste Management Act, VA. CODE §§ 10.1-1400 to 1458 (2023).

<sup>321</sup> 1996 Va. Acts 2526; VA. CODE § 10.1-1457.

<sup>322</sup> Philip Morris USA, Inc. v. Chesapeake Bay Found., 643 S.E.2d 219, 225 (Va. 2007).

<sup>323</sup> Letter from Jon A. Mueller, Dir. of Litig. at Chesapeake Bay Found., to Stephen L. Johnson, Adm’r, U.S. Env’t Prot. Agency (Aug. 20, 2007), <https://perma.cc/F3R4-UZHN>.

<sup>324</sup> Amendments to Requirements for Authorized State Permit Programs Under Section 402 of the Clean Water Act, 61 Fed. Reg. 20772, 20780 (May 8, 1996) (to be codified at 40 C.F.R. pt. 123.30).

<sup>325</sup> Letter from Davis Mears, Interim Dir. at Vt. L. Sch., Petitioning for Withdrawal of the National Pollutant Discharge Elimination System Program Delegation from the State of Vermont, to Ira W. Leighton, Acting Reg’l Adm’r, U.S. Env’t Prot. Agency Region 1, at 3 (Feb. 26, 2009), <https://perma.cc/V3T2-PNYX>.

<sup>326</sup> *Id.* at 1.

<sup>327</sup> Letter from H. Curtis Spalding, EPA Region 1 Adm’r, to Laura Murphy, Vt. L. Sch., Anthony Iarrapino, Conservation L. Inst., Replying to Petition to Withdraw Approval for Vermont to Administer the NPDES program (Dec. 13, 2013), <https://perma.cc/P7YV-NK48>.

Administrative Procedure Act.<sup>328</sup> After EPA notified Nevada, the legislature changed the law to remedy the issue.<sup>329</sup>

In 2016, EPA received a petition to withdraw Texas' authorization to implement the Clean Water and Clean Air Acts because revisions to Texas law restricted access to judicial review.<sup>330</sup> The petition argued that the Texas legislature narrowed the class of persons who could participate in administrative challenges to agency action to only "affected persons" and, because state law required exhaustion of administrative remedies, this change would prevent individuals who did not qualify as "affected" from challenging the action in state court.<sup>331</sup> The petition posits that, even when a person suffers a recreational, aesthetic, or environmental harm, a person is not "affected" under the Texas standard.<sup>332</sup> This petition is still pending.

In 2017, EPA received a petition to withdraw Utah's Clean Water Act Section 402 authority.<sup>333</sup> The petition argued that Utah's program no longer complied with the judicial review requirement of the Clean Water Act because the state legislature passed a law that restricted access to the courts.<sup>334</sup> After receiving the petition to withdraw, EPA worked with the state to pass a subsequent law to address the access to justice concerns raised in the petition.<sup>335</sup>

However, this approach has not always been successful. For example, EPA received a petition to withdraw delegation of Clean Water Act and Clean Air Act authority to Oregon because Oregon's APA does not allow for associational standing.<sup>336</sup> The petition argued that the Oregon Supreme Court determined in *Local 290 v. Department of Environmental Quality*<sup>337</sup> that Oregon's APA did not acknowledge representational standing, thus the state could not provide the same

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<sup>328</sup> Petition from W. Mining Action Project, Petition to EPA to Revoke Nevada's Clean Air Act and Clean Water Act Programs 1–2 (July 7, 2006), <https://perma.cc/UJL7-QCES>.

<sup>329</sup> Wayne Nastri, Regional Adm'r, U.S. Env't Prot. Agency, EPA Response to Western Mining Action Project's Petition to Revoke Nevada's Clean Air Act and Clean Water Act Programs 1 (Dec. 9, 2008), <https://perma.cc/BB8F-NKFFH>.

<sup>330</sup> Petition from Env't Def. Fund and Caddo Lake Inst., Petition to EPA for Admin. Action 1, 4 (Jan. 11, 2016), <https://perma.cc/Y77M-RD46>.

<sup>331</sup> *Id.*

<sup>332</sup> *Id.*

<sup>333</sup> Petition from W. Res. Advocs., Petition to EPA for Admin. Action 1 (May 5, 2016), <https://perma.cc/EP5J-H9QN>.

<sup>334</sup> *Id.* at 6–7.

<sup>335</sup> Letter from U.S. Env't Prot. Agency, Response to W. Res. Advocs.' Petition to Withdraw Utah's Authorization to Implement the Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) Program 3–5 (Oct. 4, 2017), <https://perma.cc/2NQC-524M>.

<sup>336</sup> Petition from Nw. Env't Def. Ctr., Or. Trout, and Sierra Club, Petition to Env't Prot. Agency to Request for Revocation of Oregon DEQ Air and Water Programs 1–2 (Aug. 1, 1996), <https://perma.cc/X2PT-LFTU>; Letter from Env't Prot. Agency, Response to Northwest Environmental Defense Center, Oregon Trout, and Sierra Club's Petition Requesting Withdrawal of Oregon's National Pollutant Discharge Elimination System (NPDES) Permit Program (Mar. 27, 2007), <https://perma.cc/7FHS-8R6Y>.

<sup>337</sup> Loc. No. 290 v. Dept. of Env't Quality, 323 Or. 559, 563–64 (Or. 1996).

rights to public interest groups as provided by federal law.<sup>338</sup> After receiving the petition, EPA initiated an informal investigation, held informal hearings, and “sent several letters to Oregon emphasizing the importance of representational standing to public participation,” but concluded that Oregon’s program was likely deficient based on the state’s failure to recognize representational standing.<sup>339</sup> Then, in 2000, an Oregon trial court held that an organization challenging an NPDES permit had organizational—as opposed to associational—standing as a “person” representing the public interest.<sup>340</sup> Although Oregon’s APA did not recognize associational standing, EPA determined that Oregon’s APA did not render the state’s program deficient because the law allowed for organizational standing, judicial review where the organization was party to an agency proceeding, and judicial review if at least one other party to the proceeding had standing to challenge and raised the same issues as the organization.<sup>341</sup>

No court has directly ruled on whether Florida’s laws unlawfully restrict access to justice. In 2004, the Sierra Club notified EPA of the organization’s intent to sue under the Clean Water Act for EPA’s failing to withdraw the agency’s 1995 delegation of Section 402 permitting authority to Florida<sup>342</sup> on the grounds that “Florida inappropriately limit[ed] standing to seek judicial review of state-issued NPDES permits.”<sup>343</sup> The Sierra Club alleged that Florida’s program violated 40 C.F.R. § 123.30 because FDEP, DOAH, and Florida state courts’ interpretation of state law precluded Sierra Club from challenging FDEP’s implementation of Section 402 in administrative or state proceedings.<sup>344</sup> The organization argued that administrative law judges’ and state courts’ interpretation of standing to sue over an NPDES permit adopted an impermissibly strict standard inconsistent with federal standards.<sup>345</sup> To support this argument, Sierra Club contended that the DOAH, ALJ, and state court found that the organization did

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<sup>338</sup> *Id.*; Nw. Env’t Def. Ctr., Or. Trout, and Sierra Club, Petition to Env’t Prot. Agency, Request for Revocation of Oregon DEQ Air and Water Programs 1–2 (Aug. 1, 1996), <https://perma.cc/V2YR-3RWT>.

<sup>339</sup> Letter from U.S. Env’t Prot. Agency, Response to Nw. Env’t Def. Ctr., Or. Trout, and Sierra Club’s Petition Requesting Withdrawal of Oregon’s National Pollutant Discharge Elimination System (NPDES) Permit Program (Mar. 27, 2007) [hereinafter EPA’s Response to Nw. Env’t Def. Ctr.’s Petition], <https://perma.cc/M97X-72RE>.

<sup>340</sup> Nw. Env’t Def. Ctr. v. Or. Dept. of Env’t Quality, No. 9905-05144, 2000 WL 35562955, at \*21 (Or. Cir. Ct. Oct. 19, 2000).

<sup>341</sup> EPA’s Response to Nw. Env’t Def. Ctr.’s Petition, *supra* note 339, at 4–5.

<sup>342</sup> Petition from Sierra Club to U.S. Env’t Prot. Agency to Withdraw Florida’s Authorization to Administer the Clean Water Act’s NPDES Program 1 (Mar. 19, 2004) [hereinafter Petition from Sierra Club], <https://perma.cc/4H7W-CQJV>.

<sup>343</sup> Letter from U.S. Env’t Prot. Agency, Response to Nat. Res. Def. Council’s Petition to Withdraw Approval of Florida’s National Pollutant Discharge Elimination System Authority, Enclosure A at 24 (Oct. 31, 2008) [hereinafter EPA’s Response to NRDC’s Petition], <https://perma.cc/6T9N-J2XS> (EPA re-articulating Sierra Club’s argument).

<sup>344</sup> Petition from Sierra Club, *supra* note 342, at 12–13.

<sup>345</sup> *Id.* at 13–14.

not have standing because the challenged permit would provide a “net environmental benefit.”<sup>346</sup>

EPA determined that the Sierra Club misstated the findings and therefore the allegations were unsupported.<sup>347</sup> In its response, EPA noted the provision of Florida’s Environmental Protection Act permitting a citizen of the state to initiate an administrative proceeding in a matter pertaining to delegation “if the citizen meets the standing requirements for judicial review of a case or controversy pursuant to Article III of the United States Constitution.”<sup>348</sup> EPA interpreted the ALJ’s finding of law to be that the plaintiff did not establish an injury-in-fact, which mirrors the federal standard.<sup>349</sup> And even if the plaintiff had in fact established injury-in-fact, EPA concluded that “[o]ne erroneous application of law in a state administrative proceeding does not constitute grounds for EPA to withdraw a state NPDES program.”<sup>350</sup>

Courts in Florida had not yet decided many of the cases denying associational standing<sup>351</sup> or *Martin County*, when Sierra Club petitioned EPA to withdraw delegation of Section 402 permitting authority. Sierra Club also did not raise the issue of the heightened standing standard for associational standing.<sup>352</sup>

### C. EPA and State Legislators must Restore Access to Justice

EPA remains responsible for the adequate enforcement of federal statutes and is accountable to the President, Congress, and the public for the advancement of national environmental goals. Thus, EPA has the responsibility to oversee the conduct of delegated, inter-governmental programs to enable excellence in the delivery of environmental protection services in the field.<sup>353</sup>

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<sup>346</sup> *Id.* at 13 (citing *Linda Young v. Georgia-Pacific Corp.*, 825 So. 2d 1044, 1045 (Fla. Dist. Ct. App. 2002)).

<sup>347</sup> EPA’s Response to NRDC’s Petition, *supra* note 343, at 26. The Sierra Club challenged EPA’s failure to withdraw agency delegation of NPDES in Florida and the court held that the EPA does not have a mandatory duty to initiate withdrawal proceedings. *Sierra Club v. U.S. Env’t Prot. Agency*, 377 F. Supp. 2d 1205, 1209 (N.D. Fla. 2005) (but finding that plaintiffs could challenge EPA’s unreasonable delay in responding to their petition to withdraw in the Eleventh Circuit Court of Appeals). Unfortunately, EPA missed several additional cases where plaintiffs or petitioners were found to lack standing where the agency was supposedly improving the environment. See *Still v. Fla. Dep’t of Env’t Prot.*, No. 18-1061 (Fla. Dep’t Env’t Prot., Aug. 20, 2018) (order dismissing petition); *Greenhalgh v. Fla. Dep’t of Env’t Prot.*, No. 17-1165 (Fla. Dep’t Env’t Prot., Aug. 20, 2018) (order dismissing petition).

<sup>348</sup> EPA’s Response to NRDC’s Petition, *supra* note 343, at 25 (citing FLA. STAT. § 403.412(7) (2023)).

<sup>349</sup> *Id.* at 26.

<sup>350</sup> *Id.* at 27.

<sup>351</sup> Discussed *supra* Part III.2.

<sup>352</sup> See Petition from Sierra Club, *supra* note 342 (petition does not reference heightened standing standard for associational standing).

<sup>353</sup> RUCKELSHAUS MEMO, *supra* note 27, at 1.

EPA delegated Clean Water Act Section 402 authority to forty-seven states and the U.S. Virgins Islands,<sup>354</sup> and two states have assumed Clean Water Act Section 404 authority.<sup>355</sup> States bear a substantial amount of responsibility to protect our nation's waters, but the results are substandard. Nutrient pollution, regulated under Section 402, has overrun many of our nation's waters, resulting in harmful algal blooms which cause significant environmental damage, harm human health, and hamstring local economies.<sup>356</sup> In nearly every state with delegated authority, concerned citizens have asked EPA to take back federal control due to state and local government failures to adequately apply and uphold federal environmental laws.<sup>357</sup> Perhaps EPA should start taking the matter more seriously.

In regulations amending the requirements for state delegation of Section 402 authority, EPA noted that “the lack of adequate public participation increases the likelihood that States may issue permits with limits and conditions that are inadequate to protect the environment because permit writers will not have the benefit of valuable insights and information provided by public participants” who do not feel they have access to judicial review.<sup>358</sup> EPA also claimed that as much as the agency believes states should have the authority over their water programs, “EPA just as firmly believes that the opportunity for citizen participation is a vital component of a State” program.<sup>359</sup> However, EPA has never systematically, independently investigated whether states are complying with the requirement to provide access to judicial review on par with what federal judicial review provides.

At this juncture, EPA must address two separate matters. First, the agency must put meaning back into the petition process by setting specific timelines, taking responsibility for investigations, and resolving allegations of inadequacy. EPA could issue new regulations to clarify the conditions under which the agency must make a finding, thereby creating a nondiscretionary trigger for determining whether the agency must initiate withdrawal proceedings. EPA “*shall*” withdraw agency delegation to a state where EPA makes a determination that the state is

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<sup>354</sup> *NPDES State Program Withdrawal Petitions*, *supra* note 187.

<sup>355</sup> STATE OR TRIBAL ASSUMPTION OF THE CWA SECTION 404 PERMIT PROGRAM, U.S. ENV'T PROT. AGENCY, <https://perma.cc/S98H-B7FP> (last updated Nov. 21, 2022).

<sup>356</sup> See generally Jason Totoiu & Jaclyn Lopez, *Holding States Accountable for Harmful Algal Blooms: Florida's Water Crisis in Focus*, 33 U. FLA. J. L. & PUB. POL'Y 1, 7, 24, 33 (2022).

<sup>357</sup> Petitions have been filed to withdraw delegation in Alabama, California, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Missouri, Nevada, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. *NPDES State Program Withdrawal Petitions*, *supra* note 187.

<sup>358</sup> Amendment to Requirements for Authorized State Permit Programs Under Section 402 of the Clean Water Act, 61 Fed. Reg. 20772, 20773–74 (May 8, 1996) (codified at 40 C.F.R. pt. 123).

<sup>359</sup> *Id.* at 20774.

no longer complying with federal law.<sup>360</sup> But, as discussed *supra* in Part IV.A, withdrawal can only happen once the agency “determines after public hearing” that a state is not complying with federal law, and courts have largely interpreted the decision to hold a public hearing as discretionary.<sup>361</sup> Congress could amend that language to include an additional “shall,” or new EPA regulations could specify that, when EPA receives a petition that meets certain criteria, the agency “shall” make a determination. Using 40 C.F.R. § 123.64 as an example, EPA could improve regulations in the following way:

- (b) The following procedures apply when the Administrator orders the commencement of proceedings to determine whether to withdraw approval of a State program.
- (1) Order. The Administrator may order the commencement of withdrawal proceedings on his or her own initiative. If the Administrator receives or in response to a petition from an interested person alleging failure of the State to comply with the requirements of this part as set forth in § 123.63 (or, in the case of a sewage sludge management program, § 501.33 of this chapter), the Administrator shall make a determination on any petition to commence withdrawal proceedings within six months of receipt of the petition. The Administrator will respond in writing to any petition to commence withdrawal proceedings. He may conduct an informal investigation of the allegations in the petition to determine whether cause exists to commence proceedings under this paragraph. The Administrator’s order commencing proceedings under this paragraph will fix a time and place for the commencement of the hearing and will specify the allegations against the State which are to be considered at the hearing. Within 30 days the State must admit or deny these allegations in a written answer. The party seeking withdrawal of the State’s program will have the burden of coming forward with the evidence in a hearing under this paragraph.

Second, EPA must ensure that all states with delegated authority provide the same access to judicial review as that provided by the federal process. EPA should initiate proceedings to ensure that states are complying with the obligation to provide access to judicial review and ask all states with delegated authority to evaluate their laws and provide an update to the agency. At the same time, EPA should publish a request for public comment to help identify which states may be falling short. Since EPA is unlikely to take on the matter itself, one could petition EPA to evaluate the delegation program to determine whether states are providing lawful access to judicial review. A petition to EPA to withdraw delegated authority to specific states with state laws known to be inconsistent with federal laws is another possibility. This approach would be piecemeal and limited but could be a helpful

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<sup>360</sup> *E.g.*, CWA, 33 U.S.C. § 1342(c)(3) (2018) (emphasis added); *id.* § 1344(i); RCRA, 42 U.S.C. § 6926(e) (2018) (emphasis added); *id.* § 6991c(e) (emphasis added).

<sup>361</sup> *E.g.*, 33 U.S.C. § 1342(c)(3).

starting point to encourage EPA to inspect the compliance of certain states. In the cases of Nevada, Utah, Vermont, and Virginia, this approach has resulted in changes to state law and expanded access to the courts for plaintiffs.

States themselves could proactively review and improve state laws to ensure adequate access to state courts. In Florida, the state legislature could amend the Florida Environmental Protection Act to remove the requirement that associations have at least twenty-five members in a county:

Any Florida corporation not for profit ~~which has at least 25 current members residing within the county where the activity is proposed, and~~ which was formed for the purpose of the protection of the environment, fish and wildlife resources, and protection of air and water quality, may initiate a hearing pursuant to s. 120.569 or s. 120.57, provided that the Florida corporation not for profit was formed at least 1 year prior to the date of the filing of the application for a permit, license, or authorization that is the subject of the notice of proposed agency action.<sup>362</sup>

The Florida legislature could also amend Florida Statutes Chapter 120 to remove the judicially imposed requirement that associations have a “substantial number” of their members substantially affected. Chapter 120 relies on Chapter 1, which defines “person” to include “firms, associations . . . corporations, and all other groups or combinations.”<sup>363</sup> Strictly construed, that should be the end of the matter, but courts have not treated all persons the same for the purposes of determining substantial interests. The legislature could amend Chapter 120.52 to make clear that membership organizations enjoy the same standing standard as all other persons defined under Chapter 1. Chapter 120.52 defines party to include “[a]ny other person . . . whose substantial interests will be affected by proposed agency action, and who makes an appearance as a party.”<sup>364</sup> The legislature could add a definition of “substantial interest,” mirroring that provided by *Agrico*, but clarifying that the definition applies equally to all types of “person”:

“Substantial interest” means that (1) the person will suffer injury in fact which is of sufficient immediacy to entitle them to a section 120.57 hearing; and (2) that the substantial injury is of a type or nature which the proceeding is designed to protect. This standard applies equally to all types of “person” as defined by section 1.01.

The Florida legislature would likewise need to amend Chapter 57 to address the Florida Supreme Court’s ruling in *Martin County* and clarify that the standard for sanctions is still frivolous and not merely meritless:

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<sup>362</sup> FLA. STAT. § 403.412(6) (2023) (strike-through added).

<sup>363</sup> *Id.* § 1.01(3).

<sup>364</sup> *Id.* § 120.52(a)–(b).

57.105 Attorney's fee; sanctions for raising unsupported claims or defenses; exceptions; service of motions; damages for delay of litigation.—

- (1) Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee, including prejudgment interest, to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney ~~knew or should have known that a claim or defense when initially presented to the court or at any time before trial:~~
  - (a) Was unequivocally not supported by the material facts necessary to establish the claim or defense; or
  - (b) Would not be supported by the application of ~~then-existing~~ law to those material facts.
- (2) At any time in any civil proceeding or action in which the moving party proves by a preponderance of the evidence that any action taken by the opposing party, including, but not limited to, the filing of any pleading or part thereof, the assertion of or response to any discovery demand, the assertion of any claim or defense, or the response to any request by any other party, was taken ~~primarily~~ solely for the purpose of unreasonable delay, the court shall award damages to the moving party for its reasonable expenses incurred in obtaining the order, which may include attorney's fees, and other loss resulting from the improper delay.
- (3) Notwithstanding subsections (1) and (2), monetary sanctions may not be awarded:
  - (a) Under paragraph (1)(b) if the court determines that the claim or defense was ~~initially~~ presented to the court as a good faith or colorable argument for the extension, modification, or reversal of existing law or the establishment of new law, as it applied to the material facts, ~~with a reasonable expectation of success.~~
  - (b) Under paragraph (1)(a) or paragraph (1)(b) against the losing party's attorney if he or she has acted in good faith, based on the representations of his or her client as to the existence of those material facts.
  - (c) Under paragraph (1)(b) against a represented party.
  - (d) On the court's initiative under subsections (1) and (2) unless sanctions are awarded before a voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

Given that these issues exist in many other states with delegated federal authority besides Florida, EPA could alternatively create new regulations—*sua sponte* or via petition—providing specific language for states to adopt regarding standing and fee shifting. For example, EPA could amend 40 C.F.R. § 123.30 covering judicial review of approval or denial of permits:

All States that administer or seek to administer a program under this part shall provide an opportunity for judicial review in State Court of the final approval or denial of permits by the State that is sufficient to provide for, encourage, and assist public participation in the permitting process. A State will meet this standard if State law allows an opportunity for judicial review that is the same as that available to obtain judicial review in federal court of a federally-issued NPDES permit (see § 509 of the Clean Water Act). A State will not meet this standard if it narrowly restricts the class of persons who may challenge the approval or denial of permits (for example, if only the permittee can obtain judicial review, if persons must demonstrate injury to a pecuniary interest in order to obtain judicial review, if persons that are membership organizations must meet a standard higher than that required of federal judicial review, or if persons must have a property interest in close proximity to a discharge or surface waters in order to obtain judicial review.) This requirement does not apply to Indian Tribes.

#### V. CONCLUSION

The gaping regulatory holes explored in this Article have tied the hands of advocates who are desperate for a more functional, protective regulatory system that could keep ecosystems and communities healthy. Until action is taken to address access to state judicial review and EPA's inadequate oversight efforts, the nation's natural resources remain at risk of degradation.