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# From Citizen Suits to Conservation Easements: The Increasing Private Role in Public Permit Enforcement

by Jessica Owley

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## Summary

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The past 40 years have seen an increase in the involvement of private actors in environmental law. One of the best-known (and arguably best-loved) methods for public involvement is the citizen suit. This popular method of public enforcement of environmental permits (among other things) has been joined by the use of conservation easements. Conservation easements are increasingly used to meet permit mitigation requirements. When private nonprofits hold these exacted conservation easements, they assume the role of permit enforcers. It is their job to ensure that conservation easement terms are complied with, giving them oversight and control over one of the pivotal components of environmental permitting regimes. Land-trust-held exacted conservation easements privatize enforcement of environmental law, much as citizen suits do. However, exacted conservation easements differ from citizen suits in that they foreclose public enforcement instead of complement it. Use of exacted conservation easements would improve if we apply lessons about public involvement and information from our citizen suit tradition.

In the 1970s, when state and federal legislatures passed most of our nation's environmental laws, they did not contemplate the need for people power those laws embodied. Our environmental laws involve labor-intensive environmental review and permitting programs. The environmental review and permitting processes have only grown more comprehensive and cumbersome as we have learned more about environmental concerns and the potential impacts of our activities. For example, advances in conservation biology have improved our decisionmaking and environmental outcomes while also increasing the length and detail of things like endangered species permit reviews. The documents are longer, the public comments more numerous, and the need to consult more types of experts intensified. With numerous complicated permitting schemes, enforcement and oversight are vital mechanisms for success.

Several environmental laws led to this state of affairs. The National Environmental Policy Act (NEPA) of 1969<sup>1</sup> led to both intensive environmental review processes and protracted litigation involving agencies seeking to avoid or minimize their environmental review obligations.<sup>2</sup> Pollution control laws—including the Clean Water Act (CWA),<sup>3</sup> the Clean Air Act (CAA),<sup>4</sup> and the Resource Conservation and Recovery Act (RCRA)<sup>5</sup>—created new systems of reporting and permitting that involved studies, monitoring, and inspection of various environmental hazards. The new laws of the 1970s also often required entire new agencies and institutions.<sup>6</sup> We saw the birth of the U.S. Environmental Protection Agency (EPA), the Council on Environmental Quality (CEQ), and the National Oceanic and Atmospheric Administration (NOAA) on the federal level, and even more organizations and offices in state and local governments.

The U.S. Congress enacted these laws because it identified serious concerns with environmental quality, but it did not necessarily understand what the scope of the problem was or the implications of the legal requirements. As EPA explained in the context of municipal and industrial waste: “The RCRA statute, regulations, and programs were created at a time when we did not know how much waste was produced or what happened to it. What we knew for certain was that the waste needed to be safely managed.”<sup>7</sup>

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*Author's Note: Many thanks to K.K. DuVivier for organizing the AALS panel from which this essay emerged and to Jim Olmsted for his helpful comments and perpetual enthusiasm.*

1. 42 U.S.C. §§4321-4370h, ELR STAT. NEPA §§2-209.
2. RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW 68 (2004).
3. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.
4. 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618.
5. 42 U.S.C. §§6901-6992k, ELR STAT. RCRA §§1001-11011.
6. *Id.* at 74.
7. U.S. EPA, 25 YEARS OF RCRA: BUILDING ON OUR PAST TO PROTECT OUR FUTURE i (2002), EPA-K-02-207, available at <http://www.epa.gov/osw/inforesources/pubs/k02027.pdf>.

With the goal of understanding and limiting environmental harm, Congress created comprehensive environmental protection programs that continue to expand to cover more entities and more areas.

## I. The Role of Private Parties in Environmental Enforcement: The Birth of Citizen Suits

After the environmental reviews are complete and permits issued, the work does not (or at least should not) stop for environmental compliance agencies. Permits require ongoing oversight and stewardship. This can include things as varied as on-the-ground assessments to judicial enforcement actions. Numerous studies have demonstrated inadequate monitoring and underenforcement in environmental permitting programs.<sup>8</sup> These problems generally stem from reduced budgets and inadequate staffing.<sup>9</sup>

Whenever government support for environmental protection has flagged, environmentally conscious members of the community have stepped up to fill the gap.<sup>10</sup> In 1970, Joe Sax called on community members to lobby and push for environmental laws and enforcement.<sup>11</sup> From the beginning of the environmental law era, citizens have played important roles in the realization of environmental protection. For example, environmental review and permitting processes have public comment periods where members of the public can participate, giving their opinions and lending their expertise to agency decisionmaking.<sup>12</sup>

An even more important role, however, is that of the citizen enforcer. Citizen prosecution has been called “perhaps the most pervasive, prominent, and continuing innovation in the modern environmental era.”<sup>13</sup> Several environmental laws—including the CAA, the CWA, and the Endangered Species Act (ESA)<sup>14</sup>—have provisions enabling citizens to

enforce parts of the environmental permitting programs.<sup>15</sup> Under these laws, citizens<sup>16</sup> can bring suit against public or private polluters in violation of their environmental permits.<sup>17</sup> The citizen enforcement mechanisms (sometimes called private attorneys general) promote environmental protection and expand the number of eyes on a project.<sup>18</sup> Using these provisions, nonprofit organizations have improved the effectiveness of our environmental laws by essentially adding staff to public environmental enforcement divisions and working to stem potential problems from agency capture.

Congress included citizen suit provisions in our environmental statutes due to concerns with agencies and their structure. There was recognition from the beginning that agencies may not have the capacity or interest in pursuing all permit violations.<sup>19</sup> “Public agencies have limited budgets, respond to local economic conditions, and may be sensitive to regulatory capture.”<sup>20</sup> If government enforcement were complete, there would be no need for private enforcers. Studies demonstrate that in times of reduced government enforcement, private enforcement actions increase.<sup>21</sup> This is one of the reasons why citizen suits did not really blossom until the 1980s, when widespread concerns about lax government enforcement spurred nonprofits and concerned citizens to take matters into their own hands.<sup>22</sup>

The success of citizen suits as an enforcement mechanism is tied to the availability of public information about

8. See, e.g., Peter N. Grabosky, *Counterproductive Regulation*, 23 INT'L J. SOC. L. 347, 350 (1995) (describing many challenges that beset environmental laws including underenforcement); Rebecca L. Kihlslinger, *Success of Wetland Mitigation Projects*, 20 NAT'L WETLANDS NEWSL. 14 (2008); Kelly Chinniers Reiss et al., *Evaluation of Permit Success in Wetland Mitigation Banking: A Florida Case Study*, 29 WETLANDS 907 (2009).

9. Evidence supports this hypothesis, showing slowdowns in federal enforcement when EPA's budget is reduced. Fewer staff members and lower funding levels at EPA mean fewer government enforcement actions. Wayne Naysnerski & Tom Tietenberg, *Private Enforcement of Federal Environmental Law*, 68 LAND ECON. 28, 35 (1992).

10. LAZARUS, *supra* note 2, at 81.

11. JOSEPH L. SAX, *DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION* 234 (1971).

12. While environmental review statutes do not require policymakers to adopt suggestions submitted by members of the public, the agencies do have to consider and respond to any suggestions or comments offered. 40 C.F.R. §1502.9(b); RONALD E. BASS ET AL., *THE NEPA BOOK* 120 (2001).

13. Barton H. Thompson, *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 185 (2000).

14. 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18.

15. Citizen suits can also take the form of trying to force agencies to do their jobs (suing government agencies alleged to have failed to perform discretionary duties); as those do not embody the same type of privatization, I do not discuss them here. For an excellent Article on the scope and success of such cases, see Robert L. Glicksman, *The Value of Agency-Forcing Citizen Suits to Enforce Nondiscretionary Duties*, 10 WIDENER L. REV. 353 (2004).

16. Of course, these types of actions are limited to parties with standing, which can be challenging to show in environmental cases (particularly so for ESA cases). Cass Sunstein, *Whose Standing After Lujan? Of Citizen Suits, Injuries, and Article III*, 91 MICH. L. REV. 163 (1992). Suits under the CWA have far less trouble with standing. See, e.g., *Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd.*, 611 F. Supp. 1542, 15 ELR 20663 (1985) (ruling that plaintiff organization only need show either members using the water ways or members adversely affected by potential pollution).

17. State and local governments also use citizen suit provisions or allow public enforcement through other routes.

18. Naysnerski & Tietenberg, *supra* note 9.

19. Naysnerski & Tietenberg, *supra* note 9, at 31.

20. Christian Landpap & Jay P. Shimshack, *Private Citizen Suits and Public Enforcement: Substitutes or Complements?*, 59 J. ENVTL. ECON. & MGMT. 235 (2010) (citing article that explains that the enforcement is lax against plants where they are likely to close in response to an enforcement action); Mary Deily & Wayne Gray, *Enforcement of Pollution Regulations in a Declining Industry*, 21 J. ENVTL. ECON. & MGMT. 260 (1991).

21. Landpap & Shimshack, *supra* note 20, at 237. An alternative story would be that there are just fewer violations to enforce against, but that does not hold true if the private enforcement actions increase.

22. See Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Law*, 34 BUFF. L. REV. 833 (1985); James May, *Now More Than Ever: Trends in Environmental Citizen Suits at 30*, 10 WIDENER L. REV. 1, 2 (2003).

things like pollutant discharges.<sup>23</sup> Without knowledge of the permitting requirements, we would be slower to realize that citizen suits were needed. Such suits, however, are also *limited* by the availability of information. Unlike government officials, nonprofits and private citizens cannot enter private property to conduct on-site inspections. Citizen enforcers are heavily reliant on self-monitoring reports.

Environmental citizen suits appear to have increased the level of environmental protection or at least the level of environmental enforcement.<sup>24</sup> Without citizen suits, key resources would have been polluted, endangered species habitat lost, and creatures threatened. Frankly, our waters and air would be dirtier. Citizen suits also have had two less direct effects.

First, citizen suits offer public entities a glimpse at the power of private organizations. Citizen suits illustrate the public's interest in environmental law along with a willingness and ability to take on environmental enforcement duties. As environmental organizations grow in capacity, they develop skills previously housed in agencies. Sometimes the organizations go even further than the agencies can in hiring staff and developing expertise. One Bureau of Land Management (BLM) employee confessed to me that the Center for Biological Diversity had a better capacity to monitor and assess the needs of endangered species on BLM lands he worked on than he did. The BLM employee explained that he simply waited for the nonprofit (via litigation and letters to the agency) to tell him what he should be working on.

Second, citizen suits empowered nonprofit citizen groups. Long-standing environmental organizations like the Sierra Club hired attorneys and began to actively use the courts to seek improvements to ecosystem health. New organizations emerged in the 1970s, including NRDC (Natural Resources Defense Council) and EDF (Environmental Defense Fund). The newer organization recognized the power they could wield as citizen enforcers early on. Alongside the growth in citizen suits was the growth in the number of nonprofit environmental organizations. This is particularly easy to see with land conservation organizations (called land trusts). In 1970, there were fewer than 300 land trusts, today they number around 1,700.<sup>25</sup>

## II. Increasing Privatization: Are Conservation Easements the New Citizen Suit?

Citizen suits privatize environmental enforcement. While they do not (and indeed cannot) supplant federal enforcement, cases proceed and obtain favorable judgments leading to increased environmental protection. Where citizen groups actively engage in environmental enforcement, public enforcers have reduced burdens. Alongside the flourishing of private enforcement through citizen suits, public agencies began to involve private organizations in other aspects of environmental law. In particular, as private organizations have increasingly become involved in environmental permitting programs, they become enforcers of environmental law in another way. Specifically, land trusts are becoming involved in carrying out one of the main elements of environmental permitting programs: mitigation requirements. As stewards of mitigation, land trusts enforce environmental laws without bringing citizen suits.

Many environmental laws prohibit environmental degradation outright, but then allow for environmentally destructive activities by permit.<sup>26</sup> Permit programs generally require that project proponents avoid, minimize, and mitigate environmental harms arising from the proposed project.<sup>27</sup> For example, under §404 of the CWA, permittees receive permission to alter wetlands in exchange for promises to mitigate harm from that wetland alteration.<sup>28</sup> Similarly, §10 of the ESA creates a permit program for incidental takes of endangered species.<sup>29</sup> Under §10, developers can avoid criminal charges for violations of the take prohibition (i.e., harming individuals of a species or altering species' critical habitat) by creating habitat conservation plans (HCPs) and receiving §10 incidental take permits.<sup>30</sup> The HCP must outline procedures to mitigate negative impacts on listed species.<sup>31</sup>

### A. Land Trusts

Land trusts are nonprofit land conservation organizations.<sup>32</sup> Among their land conservation strategies are holding fee-simple title and conservation easements over property that they have identified as worthy of protection.<sup>33</sup> Some land

23. John C. Dernbach, *Citizen Suits and Sustainability*, 10 WIDENER L. REV. 503, 507 (2004); Robert F. Blomquist, *The Logic and Limits of Public Information Mandates Under Federal Hazardous Waste Law: A Policy Analysis*, 14 VT. L. REV. 559 (1990); Tom Tietenberg, *Disclosure Strategies for Pollution Control*, 11 ENVTL. & RESOURCE ECON. 587 (1998) (detailing the importance of information disclosure in protecting environmental health).

24. May, *supra* note 22, at 3.

25. Nancy McLaughlin, *Increasing the Tax Incentives for Conservation Easement Donations—A Responsible Approach*, 31 ECOLOGY L.Q. 1, 21 (2004); KATIE CHANGE, 2010 NATIONAL LAND TRUST CENSUS 5-7 (Land Trust Alliance & Lincoln Inst. of Land Policy 2011), available at <http://www.landtrustalliance.org/land-trusts/land-trust-census/national-land-trust-census-2010/2010-final-report> (indicating that there may be some leveling off in the number of land trusts, while the number of acres of land protected and number of conservation easements contains to increase).

26. See, e.g., CWA, 33 U.S.C. §§1251 et seq.; CAA, 42 U.S.C. §§7401 et seq.; ESA, 16 U.S.C. §§1531 et seq.; RCRA Regulations Title 40 of the Code of Federal Regulations at parts 239 through 282.

27. See, e.g., 40 C.F.R. §1508.20 (defining mitigation for operations under NEPA); Morgan Robertson & Palmer Hough, *Wetlands Regulation: The Case of Mitigation Under Section 404 of the Clean Water Act*, in WETLANDS 171 (B.A. LePage ed. 2011); Stephen M. Johnson, *Avoid, Minimize, Mitigate: The Continuing Constitutionality of Wetlands Mitigation After Dolan v. City of Tigard*, 6 FORDHAM ENVTL. L.J. 689 (1995).

28. 33 U.S.C. §1344.

29. 16 U.S.C. §1539(a).

30. *Id.* §1539(a)(2)(B).

31. *Id.* §1539(a)(2)(B)(ii) & (v).

32. LAND TRUST ALLIANCE, LAND TRUSTS, <http://www.landtrustalliance.org/land-trusts> (last visited Apr. 11, 2013).

33. See, e.g., Jessica Owley, *Use of Conservation Easements by Local Governments*, in GREENING LOCAL GOVERNMENT 237, 244-46 (Patricia Salkin & Keith Hirokawa eds. 2012).

trusts also work with public agencies to monitor and manage lands that they do not own.<sup>34</sup> An even smaller number operate mitigation banks.<sup>35</sup>

Land trusts often hold conservation easements associated with compensatory mitigation.<sup>36</sup> These exacted conservation easements are created to satisfy mitigation requirements in numerous laws, including local land use ordinances, state laws protecting natural resources, and federal laws like the permitting programs of §404 of the CWA and §10 of the ESA.<sup>37</sup> As holders of exacted conservation easements, land trusts have the task of stewarding an essential element of the environmental regulatory regime. They oversee and have enforcement responsibility for one of the major mitigation methods. Thus, as holders of conservation easements, land trusts enforce environmental laws in a way that can have just as much if not more impact on environmental protection as citizen suits.

## B. Conservation Easement Basics

Conservation easements are nonpossessory interests in land that have environmental purposes.<sup>38</sup> When a conservation easement burdens land, it either prohibits the landowner from doing something she would have otherwise been permitted to do or enables someone else to do something on her land that she would have been otherwise able to prohibit.<sup>39</sup> Some conservation easements do both—restricting the landowner's behavior and giving the land trust rights or obligations to conduct activities on the land. The rules for conservation easements generally come from state law.<sup>40</sup> These state laws define rules for conservation easements, including acceptable purposes and holders.<sup>41</sup> They also sometimes detail the methods for termination or modification of the agreements.<sup>42</sup> Almost all states allow government agencies and nonprofit organizations with conservation goals (i.e., land trusts) to hold conservation easements.<sup>43</sup>

Conservation easements look like private contracts but are actually servitudes,<sup>44</sup> usually burdening land in perpetuity.<sup>45</sup> They are a favored tool of permit-issuing agencies for preservation components of compensatory mitigation. For example, where a mitigation program requires preservation of existing wetlands, agencies want a guarantee that the preservation will be more than temporary. One way to do this is to use property law tools to restrict potential conflicting land uses on the preserved wetlands. Traditional covenants may work in some jurisdictions and on some properties, but increasingly agencies are requiring conservation easements. These perpetual restrictions can circumscribe the use of land and help to ensure that the wetlands remain wetlands.<sup>46</sup>

## C. Conservation Easements as Private Environmental Enforcement

Like citizen suits, conservation easements can be used to privatize environmental law enforcement. Conservation easements exacted under environmental permitting schemes play a central role in environmental protection. Thus, ensuring the viability and permanence of such conservation easements is a necessary step in meeting environmental protection goals. Enforcement of environmental permits should include monitoring and enforcement of the mitigation associated with the permits. If the mitigation required in exchange for a permit is not meaningful, the permit should not be allowed to remain in operation. Oversight of permits is challenging generally; oversight of the mitigation projects is even more complicated.

Although similar to citizen suits because they put nonprofit environmental organizations in the role of enforcer, conservation easements differ from citizen suits because they impede public enforcement mechanisms. Citizen suit provisions supplement public enforcement. Indeed, if the permitting agency decides to pursue its own enforcement action, the citizen enforcer must step aside. With conservation easements, the structure is quite different. In many cases, the land trust is the sole entity that has the ability to enforce the agreement. It is not clear that the permitting agency has an ability to enforce the terms of the agreement unless it is included in the language of the conservation easement deed as a third-party enforcer.

34. Jessica Owley & Stephen Tulowiecki, *The Future of Private Forests: Conservation Easements and the Forest Legacy Program*, 33 PUB. LAND & RESOURCES L. REV. 47, 71 (2012).

35. See, e.g., THE NATURE CONSERVANCY, MISSISSIPPI: OLD FORT BAYOU MITIGATION BANK, <http://www.nature.org/ourinitiatives/regions/northamerica/unitedstates/mississippi/placesweprotect/old-fort-bayou-mitigation-bank.xml> (last visited Apr. 11, 2013).

36. See, e.g., *Bldg. Indus. Ass'n v. Cty. of Stanislaus*, 118 Cal. Rptr. 3d 467, 478 (2010) (describing role of land trusts in agricultural land mitigation program).

37. Jessica Owley, *Exacted Conservation Easements: The Hard Case of Endangered Species Protection*, 19 J. ENVTL. L. & LITIG. 293 (2004); Jessica Owley, *The Emergence of Exacted Conservation Easements*, 84 NEB. L. REV. 1043 (2006).

38. ELIZABETH BYERS & KARIN MARCHETTI PONTE, *THE CONSERVATION EASEMENT HANDBOOK*, 14-15 (2d ed. 2005).

39. 4-34A POWELL ON REAL PROPERTY §34A.01

40. *Id.*

41. *Id.* §34A.03[1]; Todd D. Mayo, *A Holistic Examination of the Law of Conservation Easements*, in *PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE* 26, 27-31, 35-40 (Julie Ann Gustanski & Roderick H. Squires eds. 2000).

42. Mayo, *supra* note 41, at 42-45.

43. California and Oregon add recognized tribes to the list, while Arizona does not recognize the ability of government entities to hold conservation easements.

44. RESTATEMENT 3D OF PROPERTY: SERVITUDES, §1.1 (cmt. d).

45. Mayo, *supra* note 41, at 40-42.

46. Perhaps this is overstating the ability of conservation easements. They can seek to prevent land uses that would conflict with wetlands, but few conservation easements include affirmative obligations or active management. See Jessica Owley, *Conservation Easements at the Climate Change Crossroads*, 74 LAW & CONTEMP. PROBS. 199 (2011). Where wetlands are at risk due to climate change or off-site actions, conservation easements will not be able to ensure that the wetland remains a wetland, only that property owners do not drain or fill the wetland directly. Similarly, conservation easements for species habitat mitigation prevent incompatible uses, but do not guarantee the persistence of the species on the property. See Adena R. Rissman, *Evaluating Conservation Effectiveness and Adaptation in Dynamic Landscapes*, 74 LAW & CONTEMP. PROBS. 145, 153 (2011).

#### D. *Uncertainty Regarding Land Trust Enforcement Capacity*

There are no specific requirements for land trusts holding exacted conservation easements. State conservation easement laws detail what types of organizations are permissible holders, but these standards are broad and it is not even clear that they would apply to land trusts operating under a federal scheme.<sup>47</sup> There is no specification as to size, capacity, or experience of the land trust.<sup>48</sup> There are no regulations requiring them to follow certain procedures.

The Land Trust Alliance has created an accreditation program for land trusts and has its own standards and practices that it urges land trusts to follow.<sup>49</sup> Accreditation, a form of private standard setting, is voluntary, and the Alliance is limited in the number of accreditation applications it can process each year.<sup>50</sup> Public agencies governing the mitigation processes have not required accreditation.

When it comes to stewardship of conservation easements used for mitigation, there are no requirements for monitoring reports or continued public oversight. The land trusts appear to have a free hand in amending, terminating, and enforcing the conservation easements. While accreditation repercussions or obligations related to tax or charitable trust law maintain checks on the land trusts, the environmental laws (and the environmental permitting agencies) do not have a voice in key decisions regarding the conservation easements. Land trust power to shape conservation easement boundaries and rules means that these private organizations have the power to shape mitigation policy. Their role as holder of conservation easements places them in the role of private enforcer of environmental permitting laws, even though they do not have a direct connection to the permit document or permit issuance.

#### E. *Challenges to Conservation Easement Enforcement*

The citizen suit provisions of environmental law do not appear to extend to enforcing conservation easements. While citizens can bring actions for permit violations, what route for relief do they have where the conservation easement associated with the permit is violated? State law generally limits enforcement of conservation easements to the parties to the agreement (with some exceptions for adjoining landowners, attorneys general, and a few specified state agencies). If a conservation easement is violated, arguably the permit is violated. This should enable a cause of action against the permit holder, but the remedy may be unsatisfying. The permit holder may have little connection to the conservation easement and no control over it.

Revocation of the permit may not obtain the sought-after environmental benefit.

To even get to the point where a citizen considers bringing suit however, the citizen would have to be able to learn about the conservation easement. This is no simple task.<sup>51</sup> It is common for permits to require conservation easements without detailing where the conservation easement will be, who will hold it, or what its terms will be. Public agencies rarely maintain a legal interest in the conservation easements (by becoming co-holders or third-party enforcers, for example).

Citizen suits for enforcement are built on the availability of information about environmental permits. That information is lacking with conservation easements. Although both the permits and conservation easements are public documents, they are not easy to obtain or track down. Where one can obtain a permit, it may be difficult to also get a copy of the conservation easement that embodies the mitigation required in the permit. The mitigation details, the very elements we want to enforce, may thus be hidden from view. For example, I examined the \$10 ESA permit for San Bruno Mountain in San Mateo County, California.<sup>52</sup> Examining the associated HCP revealed references to the developers' intention to use habitat easements to meet mitigation needs.<sup>53</sup> The plan did not explain in any detail what the conservation easements would look like, where they would be located, or who would hold them.<sup>54</sup> Tracking down those conservation easements was challenging. Repeated phone calls and e-mails to the public agencies, consultants, and developers only yielded one conservation easement (even though many acknowledged that conservation easements were used pervasively in the project).<sup>55</sup> Thus, even where I knew conservation easements were operating, I could not locate copies of them or learn who held them. Citizen enforcers are likely to face similar challenges.<sup>56</sup>

Beyond locating permits and associated mitigation documents, it can be difficult to determine when permit violations occur. First, if we can't find the documents, we have no way of knowing whether the mitigation programs are being carried out correctly (if at all). Under the ESA, citizens can bring suit against permit violators (or indeed

47. See Jessica Owley, *Exacted Conservation Easements: Emerging Concerns With Enforcement*, PROBATE & PROPERTY 51, 54 (Jan./Feb. 2012).

48. See Owley & Tulowiecki, *supra* note 34, at 89-90.

49. LAND TRUST ALLIANCE, ACCREDITATION, <http://www.landtrustalliance.org/training/accreditation> (last visited Apr. 11, 2013).

50. LAND TRUST ACCREDITATION COMMISSION, GETTING ACCREDITED, <http://www.landtrustaccreditation.org/the-process> (last visited Apr. 11, 2013).

51. See Amy Wilson Morris & Adena R. Rissman, *Public Access to Information on Private Land Conservation: Tracking Conservation Easements*, 2009 WIS. L. REV. 1237 (2009).

52. JESSICA OWLEY, EXACTED CONSERVATION EASEMENTS 146-48 (Ph.D. Dissertation, Univ. of California at Berkeley 2005).

53. SAN BRUNO MOUNTAIN HABITAT CONSERVATION PLAN, I-3, SAN BRUNO MOUNTAIN HABITAT CONSERVATION PLAN IMPLEMENTATION AGREEMENT, §V. See OWLEY, *supra* note 52 at 148-49.

54. See OWLEY, *supra* note 52 at 150-55.

55. OWLEY, *supra* note 52 at 146-48.

56. This is not to say, however, that there are no ongoing efforts to catalog and locate conservation easements. By far, the largest such effort is the National Conservation Easement Database whose goal is "providing a comprehensive picture of the estimated 40 million acres of conservation easement lands," <http://www.conservationeasement.us/>. For a comprehensive discussion of the need for transparent and easy to use conservation easement databases and recording systems, see James L. Olmsted, *The Invisible Forest: Conservation Easement Databases and the End of the Clandestine Conservation of Natural Lands*, 74 LAW & CONTEMP. PROBS. 51 (2011).

any violators of the statute).<sup>57</sup> But the struggle of finding the information makes it challenging to learn when permit violations occur. Furthermore, because conservation easements burden private land, access to the property to assess compliance is limited to those parties recognized in the conservation easement deed.

Capacity and oversight concerns merge with the issue of enforcement. Repercussions for lack of enforcement are unclear. What do we do when private groups are not good at environmental protection? There are lots of flaws with public actors, but avenues for recourse against public actors are a bit clearer. We have a general sense of what our legal and political options are when we do not think that a public agency is doing the right thing, but this gets harder when we are looking at the actions of a private party. What happens when the land trust does not enforce the conservation easement? This may happen by mistake (the land trust does not realize that there is a violation) or quite consciously. The land trust may decide that the infractions are not worth the expense of enforcement and litigation. The land trust may determine that the property is not really that valuable.<sup>58</sup> Thus, whether the decision not to enforce is due to a lack of capacity or is strategic, it is not clear what recourses are available when enforcement does not occur.

### III. Lessons Conservation Easements Can Learn From Citizen Suits

Current market problems have led to cash-strapped environmental enforcement agencies. Public agencies without funding to support desired levels of environmental enforcement may rely on citizen suits to guide enforcement actions. Moreover, agencies might view conservation easements as an attractive option for environmental protection generally, and for permit mitigation requirements specifically. Land-trust-held and administered conservation easements have the power to improve environmental health without requiring cumbersome public oversight and involvement. Yet, as articulated above, conservation easements as a mode of public enforcement leave much to be desired in terms of public information and accountability.

The nontrivial concerns raised above concerning conservation easements indicate a need to change the current structure of private enforcement efforts. One approach would be to limit the role of conservation easements. If the structure of conservation easement deeds is such that improving oversight and involving others in enforcement will degrade the strengths of the tool, perhaps conservation easements should not play a role in environmental permitting schemes. Alternatively, perhaps there are ways to treat the private actors (land trusts) more like public actors, applying public information and account-

ability laws to these entities. If we think of stewardship of exacted conservation easements (or mitigation conservation easements) as a type of private enforcement of environmental laws, perhaps citizen suits can offer some guidance for improvement.

Citizen suits thrive on information. Increasing the availability of information about conservation easements can foster improved environmental protection. Simply increasing public scrutiny often results in improved environmental compliance from regulated entities. A similar effect may be present with land trusts. Public attention to land trust activities may improve environmental protection outcomes. Clearly, associating conservation easements with the underlying permits can also work to help members of the public (and even agencies themselves) track mitigation programs.

Adding some level of review of land trust actions would go even further. This can be as simple as including permitting agencies as third-party enforcers (or making them co-holders of the conservation easements). Such agency involvement could provide an avenue for enforcing these permit obligations through agency-forcing actions (e.g., bringing suit against an agency for failing to properly monitor or enforce conservation easements). Adding explicit judicial review to the mix could also improve environmental protection outcomes. While parties to conservation easements can bring judicial actions regarding enforcement or to challenge terms, there are no clear mechanisms for agencies or members of the public to do so—not even the permit holder or permit issuer.<sup>59</sup> Uncertainty in standing requirements, along with a lack of citizen suit provision for conservation easements, hampers enforcement challenges by anyone other than the signatories to the agreement.<sup>60</sup>

As understanding of environmental ills increases, so too does the need for a public response to those problems. To meet this growing need in an era of shrinking budgets, public agencies are turning to nonprofit environmental organizations and other community members for help. Not all private options are created equal. When private enforcers supplant instead of complement public programs, we should be increasingly suspect. By examining two types of private enforcement of environmental laws, this Article highlights why programs like citizen suits that involve the private citizens but do not crowd out public enforcers are democracy-enhancing and likely to lead to improved environmental health. Programs using land trusts to enforce permit mitigation requirements, on the other hand, hide information from public eyes and may complicate efforts at environmental protection.

57. 16 U.S.C. §1540(g).

58. I do not mean to convey that this is something that would happen commonly. Land trusts tend to be watchful diligent enforcers. In fact, they are likely better at overseeing conservation easements than public holders are. The point here is that it is not clear what to do when a land trust does not live up to this ideal.

59. There are, however, cases where courts have deemed private actors to be so agency-like that the courts impose the same review mechanisms on them as public agencies would be subjected to. These cases have mostly emerged in British courts with a reluctance to follow them by American courts. Compare *Regina v. Panel on Take-Overs and Mergers*, 1 Q.B. 815, 820-22 (1987) (self-regulatory panel subject to judicial review), with *Jackson v. Met. Edison Co.*, 419 U.S. 345, 352 (1974) (holding that utility was not subject to state action doctrine).

60. Carol Nicole Brown, *A Time to Preserve: A Call for Formal Private-Party Rights in Perpetual Conservation Easements*, 40 GA. L. REV. 85, 109 (2005).