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A COMMON TRAGEDY: THE BREACH OF PROMISES TO BENEFIT THE PUBLIC COMMONS AND THE ENFORCEABILITY PROBLEM

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I. INTRODUCTION

It is hard to jumpstart a wetland. Nevertheless, each day many developers promise to do just that. Moreover, many who promise wetlands creation or protection enhancement breach these promises each day, often without personal, negative consequences to the breaching party. The problem of the dead or dying wetland is merely one example of the enforcement problem in the arena of promises made to benefit the public interest. Many such promises can be found in agency permits of all kinds. The example of the wetland provides an apt vehicle for exploration of the problems inherent in such contracts.

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The public values provided by wetlands is enormous, even when the title to the wetland area is held in private hands. Wetlands provide habitat for fish and wildlife, including endangered species, flood control, remediation of chemical contamination, groundwater recharge, and other benefits that serve the public good.[1] At the time the developer seeks a permit from the U.S. Army Corps of Engineers, optimism prevails. Topographical charts filed with the permit application show the elevation of the site. An artist's rendering envisions the end result, sometimes complete with drawings of the plants that promise to nurture the ecology of the area. Despite the well-laid plans, however, something often goes wrong. The developer fails to remove a levy as promised, in its permit on file with the U.S. Army Corps of Engineers. He may fail to flood the area, or to order the contouring of the designated area, or to pay the nursery for the plants. He may fail to plant the vegetation necessary to establish the wetlands, or to monitor or water the plantings. Or he may fail to invest sufficient funding to perform any of the foregoing activities fully. After the wetland fails, regret replaces optimism as the dominant theme. The anticipated rains do not fall. The seedlings do not sprout. The birds do not nest. Realism emerges in the scenario; everyone notes that the task of wetland creation is more difficult than expected. The reality of the difficulty of making a wetland from a dry land area becomes clear, repeatedly and predictably, after the original wetland is lost to development and the replacement wetland fails.[2] The commons is depleted. Moreover, enforcement of the promise to start a wetland to benefit the public interest often never occurs.[3] It is rarely the object of a suit or other action to enforce the promise because concerned parties lack resources to pursue a legal remedy or the court determines that they lack standing to seek redress for the public. No one requires redress of the broken promise.

The common law may be ill-suited to address breach of a promise to protect the public commons or the public good. Because of its tradi-

1. *See, e.g.*, Alyson C. Flournoy, *Section 404 at Thirty-Something: A Program in Search of a Policy*, 55 ALA. L. REV. 607, 636 (2004) (noting the value of wetlands to "fish and wildlife habitat, essential breeding and nursery areas for many species including economically-important shellfish, and habitat and food for migrating birds; water supply protection through recharge; water quality protection through purification; flood control; erosion and shoreline protection by binding stream banks and absorbing wave energy; outdoor recreation opportunities for hunters and bird and wildlife watchers," and other values).

2. The most dramatic example of waste and failure may be the Florida Everglades Restoration Plan. *See* W. Hodding Carter, Editorial, *A Wetland Dying of Thirst*, N.Y. TIMES, July 15, 2004, at A23 (asserting that the federal Everglades Restoration Plan will cost billions and will not stop the disappearance of America's largest wetland).

3. *See, e.g.*, United States v. Krilich, 209 F.3d 968, 969, 973 (7th Cir. 2000) (finding that the district court had subject matter jurisdiction of a case in which the EPA imposed $1.2 million fine on developer who failed to construct new wetlands within stated time of consent decree with the Environmental Protection Agency (EPA)).

tional focus on resolving disputes between individual parties enforcing specific rights, the common law has not developed effective techniques for dealing with the effects of the contract or its breach on third parties or the public. When changes in technology or society lead to massive third-party effects like pollution, global warming, loss of public lands, or destruction of the commons such as wilderness and wetlands, the common law has been unable to secure the benefits contracted for on behalf of the public.

Neither tort law, nor contract law seems particularly adept at addressing such problems. Courts, legislators, and the public have deemed the common law inadequate as a tool for protecting promises of public benefit, and for protecting the public and the environment from environmental hazards.[4] In part as a result of this perceived failure, legislators have developed protections for public values.[5] Federal and state laws empower agencies to create contractual conditions in permits that allow use of the public commons as a wetland area. Review of the development of statutory protections represented by environmental laws suggests, however, that statutory protections, as currently configured, also fail in large part to protect public expectations in promises for the public good. One of the legal mechanisms employed as a way of protecting the public commons is the inclusion of contractual commitments by developers and others using the commons. The developer seeking a permit often promises to mitigate harm and, additionally, to undertake affirmative duties to enhance a public resource. Thus, the individual who gains the use of public resources often must promise to preserve the commons and protect the public interest. Such promises made by developers and polluters to statutorily created representatives of the public commons often meet the same end—breach and failed enforcement.

Enforcement is a necessary adjunct of any legal right. Without enforcement, law is merely symbolic; the unenforceable right has little purpose or effect in the real world. Considering the area of contracts

4. *See, e.g.*, City of Milwaukee v. Illinois, 451 U.S. 304 (1981) (restricting district court to imposing limitations within federal statutory scheme in suit by Illinois against Milwaukee for sewer discharge into Lake Michigan); Diamond v. Gen. Motors Corp., 97 Cal. Rptr. 639 (Ct. App. 1971) (affirming dismissal of complaint against 293 corporations and municipalities for air pollution in part on basis of complexity of issues and multiplicity of parties); *see also, e.g.*, James R. MacAyeal, *The Comprehensive Environmental Response, Compensation, and Liability Act: The Correct Paradigm of Strict Liability and the Problem of Individual Causation*, 18 UCLA J. ENVTL. L. & POL'Y 217, 217–21 (2000–2001) (noting Congressional view of common law as inadequate to protect third parties from oil spills); Christopher H. Schroeder, *Lost in the Translation: What Environmental Regulation Does That Tort Cannot Duplicate*, 41 WASHBURN L.J. 583 (2002).

5. *See* Kenneth S. Abraham, *The Relation Between Civil Liability and Environmental Regulation: An Analytical Overview*, 41 WASHBURN L.J. 379, 379 (2002) (finding irony in inadequacy of common law as justification for environmental regulation because of failures of regulation).

between private individuals, the law does more than merely declare that commitments have significance. It gives promises power and encourages contracting behavior by allowing the individuals harmed by a breach to sue to secure the benefit of the bargain. Thus, contract law provides for enforcement of bargains by those who have been injured when a commitment has been broken. In the context of promises made to the public, such as the promise to establish a wetland, the issue of enforcement is often unaddressed and unclear. Certainly, the Army Corps of Engineers has the power to enforce the requirement it included as a condition of the issuance of a permit. Nevertheless, the Corps cannot pursue all instances of failure to fulfill such promises. Despite the statutory provisions giving agencies significant enforcement powers and establishing the right of citizens to bring suit under nearly every federal environmental act, the ability of citizens to enforce the protections granted by the statute, or by contracts entered pursuant to the statutes, is questionable. Indeed, modern interpretation of the constitutional requirement of standing often means that unless the agency that required the promise is willing to enforce it, no one can do so.

The case of the dying wetlands is explored in this Article merely as one example of the need for monitoring and enforcing promises to produce a direct public benefit. Other examples taken from the environmental arena come readily to mind. These include conservation easements, supplemental environmental projects (SEPs), and environmental protections generally. The Hadley Mill itself is a perfect metaphor, or example. The common law handles with facility the question of whether Hadley or Pickfords should pay for the down time of the mill, but it is less effective in dealing with environmental effects, such as discharges from the Mill, the loss of wetlands because of the construction of the mill in the wetlands, and other environmental harms caused by the mill or the loss of the wetlands.[6]

This Article begins an exploration of the possibility of using contract law as a supplement to statutory law that protects the commons. It examines contractual commitments created by governmental agencies as representatives of the public. Part II relates the economic analysis set forth by Garrett Hardin in his famous article, *The Tragedy of the Commons*, and applies this analysis of the cost-benefit ratio that applies to use of a public good (the commons). It also examines the similar incentive problems in relying on individual action for enforcement of promises to protect public benefits such as promises to mitigate harm or enhance environmental values. Part III explores the public purpose of law generally and law that relates specifically to protection of the commons such as wetlands values under the Clean Water Act. It compares the enforcement mechanism of ordinary con-

6. *See* Hadley v. Baxendale, 156 Eng. Rep. 145 (Ex. 1854).

tracts with the enforcement mechanism for promises made to further a public interest. It also speculates that the greater use of enforcement mechanisms from private contract law may enhance enforcement of promises made to the public, taking as an example the possibility of a broader use of the third party beneficiary doctrine to protect the public interest and to supplement the efforts of regulatory agencies. Part IV concludes that despite significant problems enhanced use of contract provisions may significantly supplement statutory protections of the commons.

II. THE TRAGEDY OF INDIVIDUAL INCENTIVES

This Part compares the tragedy originally chronicled by Hardin in the overuse of the commons with the other common tragedies of broken promises to enhance the public good and the failure to enforce such promises. Before it faced the density of population and heavy demand on resources that mark the modern era, society seemed to assume that the resources of the planet were inexhaustible. The advent of the modern industrial world with its burgeoning energy demands and population growth proved that the assumption depended on circumstances, however. In *The Tragedy of the Commons*, Garrett Hardin considered the cost-benefit ratio inherent in use of a public good (the commons). He demonstrated that destruction of the commons is the inevitable result of rational action by individuals who use the public commons.[7] The analysis of *The Tragedy of the Commons* sparked active debate in the area of property law.[8] It has not been the subject of significant inquiry or debate in the area of contract analysis, however, perhaps because of an assumption that property concepts predominate in the analysis. Scrutiny of Hardin's insights indicates that they apply with significant force to another type of analysis of the commons. This analysis considers the issue of express promises to protect and enhance public values. Such promises are often made by parties seeking to obtain the right to use public resources. Considering the expectation of the public in performance of these promises and the incentives against performance and enforcement suggests that

7. *See* Garrett Hardin, *The Tragedy of the Commons*, 163 SCI. 1234, 1244–45 (1968).

8. *See, e.g.*, Abraham Bell & Gideon Parchomovsky, *Of Property and Antiproperty*, 102 MICH. L. REV. 1 (2003); James M. Buchanan & Yong J. Yoon, *Symmetric Tragedies: Commons and Anticommons*, 43 J.L. & ECON. 1 (2000); Reza Dibadj, *Regulatory Givings and the Anticommons*, 64 OHIO ST. L.J. 1041 (2003); Lee Anne Fennell, *Common Interest Tragedies*, 98 NW. U. L. REV. 907 (2004); Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998); Shi-Ling Hsu, *A Two-Dimensional Framework for Analyzing Property Rights Regimes*, 36 U.C. DAVIS L. REV. 813 (2003); Dan Hunter, *Cyberspace as Place, and the Tragedy of the Digital Anticommons*, 91 CAL. L. REV. 439, 509–14 (2003).

Hardin's analysis is relevant in the context of promises to mitigate harm or enhance the commons.

The partial solution Hardin suggested to the problem of destruction of the commons was law, the necessary mutual coercion to preserve the benefit of the commons for society. Obtaining contractual commitments from those who use public resources seems to provide an antidote to the problem Hardin identified. It is one variety of mutual coercion. Nevertheless, the incentives of enforcement present a separate problem similar to that originally identified by Hardin. In a system without effective enforcement, it is unlikely that the public will receive the benefit promised or that the party who breaches his promise to the public will suffer personal negative consequences.

A. *The Tragedy of the Commons*

The central conclusion of Hardin's analysis in *The Tragedy of the Commons* is that the use of the commons without constraint leads to destruction of the public benefit of the commons. Using the example of the commons, a grazing area open to the public for grazing cattle for individual use, Hardin demonstrated that mutual coercion through law is a necessity to preserve the benefit of the commons for society. Hardin's economic analysis demonstrated that this conclusion is inevitable because of the relationship of individual gains from the commons to the fractional individual loss from destruction of the commons.

> As a rational being, each herdsman seeks to maximize his gain. Explicitly or implicitly, more or less consciously, he asks, "What is the utility *to me* of adding one more animal to my herd?" This utility has one negative and one positive component.
>
> 1) The positive component is a function of the increment of one animal. Since the herdsman receives all the proceeds from the sale of the additional animal, the positive utility is nearly +1.
> 2) The negative component is a function of the additional overgrazing created by one more animal. Since, however, the effects of overgrazing are shared by all the herdsmen, the negative utility for any particular decision-making herdsman is only a fraction of -1.[9]

Hardin's example of the commons explains the tragic effects of the divergent interests of the individual and the group when individuals compete for finite resources. Clearly, the utility of gain from use is individual while the loss (negative utility) incident to overuse and depletion of the commons is fractional.[10] Benefits flow to the individual, while the attendant costs flow to all individuals as members of a

9. Hardin, *supra* note 8, at 1244.

10. In a sense this loss is also individual because the ultimate impact of overuse falls on each individual in the group that uses the commons. The phenomenon established by Hardin is, nonetheless, an insight into competitive conduct. The loss to each

group. This economic analysis of this "double bind" revealed the inevitable destruction of group benefits by individuals pitted against each other in the necessarily competitive environment of finite resources.

> Adding together the component partial utilities, the rational herdsman concludes that the only sensible course for him to pursue is to add another animal to his herd. And another, and another. . . . But this is the conclusion reached by each and every rational herdsman sharing a commons. Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit—in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all.[11]

Hardin's work explains the need for law in the context of the commons. This need for law, "mutual coercion," is distinct from the need for law to keep the peace.[12] The mutual coercion presented by the law is necessary to preserve the commons (the public interest) from inevitable destruction by rational actors maximizing their own individual interest and coincidentally destroying the interest of all members of society. Recognition of the tension between the individual and the group is necessary for the survival of the group and each individual within it. Thus, the destructive effect extends further than the fractional negative utility Hardin noted. The individual's self-interest undermines the group benefit and also undermines the individual's own survival when the commons is destroyed or depleted.

Waste disposal harms the commons as surely as over use of the commons, and both types of activities (use of the commons and pollution of the commons) lead to destruction of the common good, the public interest. Hardin thus applied his ultimate point (that mutual coercion is necessary to prevent actors from exploiting the commons to the extent of destruction) to pollution as well as to use of the public commons. The ratio of individual gain to group loss will result in use of the commons by polluters to externalize the costs of production represented by the disposition of waste into the public commons (the air, water, and soil of the planet). Thus, the individual's self-interest is self-destructive in the long run. This truth is clear from the interaction of theory and the physical reality of a world of finite resources. The destruction of the commons is inevitable if each individual pursues his

individual is long term in comparison with the gain to each herdsman using the commons.

11. Hardin, *supra* note 8, at 1244.

12. For a reference to the peace keeping function of the law, see Joseph M. Perillo, *Misreading Oliver Wendell Holmes on Efficient Breach and Tortious Interference,* 68 FORDHAM L. REV. 1085, 1092–93 (2000) (noting that the "legal system knows what economic science does not know: damages and other legal remedies are substitutes for private warfare").

own self-interest and that destruction harms the individual himself, not simply the individual in his role as a member of society because each individual depends on the physical world for survival. No extended analysis can change this point. Thus, the destructive power of efficiency and individual enterprise holds more than theoretical significance. Limiting the effects of individual enterprise and individual striving for competitive advantage in the contest for finite resources is crucial for the group and the individual. This is the basis for Hardin's solution of mutual coercion for the benefit of all.

B. *The Common Tragedy of Promises for a Public Benefit*

Contracts entered by individuals seeking to utilize a public resource are common. Agencies such as the EPA and the Army Corps of Engineers enter such contracts on behalf of the public and in the public interest. Such agreements seem to be a promising mechanism for mutual coercion. Thus, contract law as authorized by statutes for agency use seems to offer an antidote to overuse and depletion of public resources. By making the commitment to use but not destroy resources, contracts embedded in permits may restrict the destructive aspects of individual enterprise. In the very context chosen by Hardin, grazing on public lands the government has instituted a system of permits to limit use.[13] Nevertheless, the incorporation of contract law to achieve control and balance in use of the commons may be overly optimistic. Scrutiny of promises to the public suggests that such contractual commitments offer little protection unless they are accompanied by effective enforcement. Applying the same sort of analysis that Hardin used to the context of contractual commitments for the public good reveals a similar incentives problem.

Contractual commitments to the public are common and the tragedies that arise from their breach are common tragedies. The commitment occurs when an individual enters a contract with an agency as part of his negotiation to use the public commons. Typically he will need permission from the government to make such use of the commons. Federal, state and local agencies serve as gatekeepers of the public commons. They grant permits to use or pollute the commons, allowing such use and pollution only when the private individual seeking to make use of the commons satisfies prerequisites to use.[14] The prerequisites may include demonstration of a public benefit from the

13. *See* George Cameron Coggins & Margaret Lindeberg-Johnson, *The Law of Public Rangeland Management II: The Commons and the Taylor Act*, 13 ENVTL. L. 1 (1982).

14. *See, e.g.*, 33 U.S.C. § 401; 33 U.S.C. § 404 (2000) (providing that the Secretary of the Army "shall cause to be ascertained the amount of tidewater displaced by any such structure or by any such deposits, and he shall, if he deem it necessary, require the parties to whom the permission is given to make compensation for such displacement either by excavating in some part of the harbor . . . or in any other mode that may be satisfactory to him").

use of the commons as well as promises to minimize harm. They often include promises to provide some separate benefit to the public, such as creation of a new wetland in a dry land area. In seeking a permit to fill a wetland, to pollute a river or the air, the individual (whether a corporation or person) routinely promises to compensate the public for the harm or use allowed by the permit. For example, permits issued by the Corps routinely include conditions to mitigate harm to the public commons and additionally compensate the public for the use or harm by some affirmative duty. The affirmative duty often includes environmental projects to pay society for the right to make use of the commons. Thus, the duty may include construction of a new wetland as payback to the public for the loss of the wetland destroyed for private use. The public agency, in this example, the Corps of Engineers, stands as trustee for the public, contracting with the individual developer. The developer's "take" or benefit from the contract is the right to make use of or destroy the commons (the wetlands' values) for his own benefit. The "take" or benefit to society is the commitment by the developer to give back wetland values by mitigation of harm and, additionally, by construction of the new wetland to replace the destroyed wetland.

In contract terms, each party to the deal has some bargained for benefit. Questions relating to whether the bargain struck is sufficiently protective of the public interest and of the comparative value of the deal to the individual and society inhere in this situation. This discussion ignores problems relating to the effectiveness of the representation of the public interest to focus on incentives problems relating to performance by promissor and enforcement by members of the public. In other words, this discussion assumes that the representative of the public (in this example, the Army Corps of Engineers) effectively represents the public. It negotiates a good deal for the public in this exchange. For purposes of analyzing the failure of enforcement, this inquiry assumes that the representative of the public recognizes and fully protects the public interest at stake. Part of the bargained for exchange is the promise to mitigate harm and to compensate society for what was gained by the individual in the bargain. Use of public resources such as wetlands payback provisions, conservation easements, supplemental environmental projects, and the tragedies that arise from their breach are common tragedies.

1. Enforcement of Promises for a Public Benefit

Absent effective enforcement, contractual commitments to preserve the common good are ineffective and, thus, essentially symbolic in nature. Moreover, consideration of the incentives operating on the individual who might consider pursuing enforcement reveals strong incentives against performance and enforcement of such promises. The failure of the common law to enforce promises to benefit the pub-

lic interest may flow from the same type of problem identified by Hardin in *The Tragedy of the Commons.* In *The Tragedy*, Hardin described the effect of the ratio of the utility of the individual using public resources compared to the fractional loss or burden the individual suffers from destruction of the public resource. The comparison of utilities in the enforcement context presents a similar imbalance and disincentive against protection of the public commons.

In the context of enforcement, the individual who would seek to protect the public value by enforcing a promise made to the public incurs significant enforcement costs. These include not only his time but also his money in securing legal representation.[15] Thus, the individual who considers taking up the burden of enforcement of a public right incurs personal costs while the benefits received if plaintiff is successful are public, as opposed to personal. In this context, the ratio of cost to benefit presents the converse to the relationship noted by Hardin in his chronicle of competition for public resources. The benefit side of the equation for the individual considering enforcement is fractional while the cost side is entire. Remember, the cost to the herdsman of depleting the commons was fractional while the benefit to him was entire (a unit of +1). In the enforcement arena, the individual who considers acting to protect the public interest incurs an entire cost of -1, but can anticipate only a fractional benefit in the event his enforcement action prevails. The utility-cost ratio flips the interests presented in the context of competition for resources. The negative component is the cost of enforcing the obligation. The individual who wishes to enforce a contract in the public interest, or a law protective of a public asset, must incur the full cost of enforcement but will reap only a fractional benefit of his investment, assuming success.[16]

To paraphrase Hardin: As a rational being, one considering enforcement of a promise made to protect a public benefit explicitly or implicitly asks himself: "What is the utility to me of protecting the rights of the public?"[17] Because the individual incurs all of the costs

15. The individual may also incur the cost represented by the risk that he may be attacked personally for his advocacy on behalf of the public. *See, e.g.*, John C. Barker, *Common-Law and Statutory Solutions to the Problem of SLAPPs*, 26 LOY. L.A. L. REV. 395 (1993); Phillip S. Berry, *The "Environmental" SLAPP*, *in* ALI-ABA COURSE OF STUDY MATERIALS: SLAPPs: STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION IN GOVERNMENT 61 (1994); Robert R. Kuehn, *Shooting the Messenger: The Ethics of Attacks on Environmental Representation*, 26 HARV. ENVTL. L. REV. 417 (2002) (noting the personal risks to individuals who bring environmental suits); Jennifer E. Sills, Comment, *SLAPPs (Strategic Lawsuits Against Public Participation): How Can the Legal System Eliminate Their Appeal?*, 25 CONN. L. REV. 547 (1993).

16. In some cases, the enforcing party is a public interest group. Individual members of the group share a fractional cost of enforcement. The group bears the full costs and receives a fractional gain if its suit is ultimately successful.

17. Hardin, *supra* note 8, at 1244.

of enforcement, the negative utility is nearly -1. The positive component is a function of the benefit of securing the promise for the public. Because, however, the effects of this benefit are shared by all members of society, the positive utility for the individual decision-maker considering an action in enforcement is only a fraction of +1.[18] Hardin demonstrated that the individual's utility of overuse of the commons makes overuse inevitable. In the same way, the costs of enforcement make under-enforcement of the law virtually inevitable. The benefit of enforcement to the individual is outweighed by cost of enforcement imposed on the individual. The cost-benefit ratio thus militates against investment by the individual on behalf of the group. This analysis makes clear the unlikely nature of enforcement of contractual commitments to benefit the public. Indeed, considering the disincentives to bringing suit, the role that citizen suits have played in prompting judicial review of violations of environmental laws is remarkable.[19]

2. Performance of Promises for a Public Benefit

The incentive structure applicable to the promissor who makes a promise to protect a public benefit such as a wetland makes performance unlikely. Absent effective enforcement, contractual commitments to preserve the common good are ineffective. Breaches by developers and others who make promises to protect the public interest flow from the same type of problem identified by Hardin in *The Tragedy of the Commons.* Hardin described the effect of the ratio of the utility of the individual using public resources compared to the fractional loss or burden the individual suffers from destruction of the public resource.

Likewise, the comparison of utilities of the developer's decision to perform or breach promises to the public presents a similar problem. In the context of this decision, the individual promissor may have a sense of duty to the public and may even genuinely desire to benefit the public value. Nevertheless, his own self-interest in gaining a benefit at the lowest cost militates against performance. He will be investing his own money to secure the benefit for the public. Certainly he owes the benefit as the corollary to the gain he received under the contract. Nonetheless, if he can secure the gain without the cost then, as a rational actor, that is the logical choice. Like the herdsman in Hardin's story, the individual developer who promises a public good considers his own self-interest. In deciding whether to breach or perform a contract for the public good, the developer will note that by

18. *Id.*

19. *See, e.g.*, James R. May, *Now More Than Ever: Trends in Environmental Citizen Suits at 30*, 10 WIDENER L. REV. 1, 3 (2003) (reporting the rise of citizens suits, including suits by "nontraditional citizens, including companies, landowners, developers, industry, and, ever more frequently, states and faith-based organizations").

performing he obtains only a fractional gain while incurring the entire cost of performance. The developer is also a rational being seeking to maximize gain. His calculation of the utility of performing his contract includes a negative and a positive component. The positive component of performing his promise to establish a wetland is fractional. It is the function of the incremental value obtained by the addition of wetland to the public commons. As a member of the public, the developer attains the fractional benefit of protecting the public commons. The beneficial effect of protecting the public commons is shared with all the users of the commons. Thus, the benefit is only a fraction of +1. This fractional benefit to the developer as a member of society is outweighed by the personal cost to him of performing the contract, however. The negative component is the full cost of implementing the wetland mitigation. Because the developer incurs all the costs of performance, the negative utility of performing is nearly -1. Thus, the developer is unlikely to perform his promise unless he is convinced that he will suffer consequences from his breach. If the developer knows of the unlikely nature of enforcement, this heightens the likelihood of breach. The ratio of cost to benefit to the developer leads to the likely conclusion to breach.

3. Other Enforcement Problems in the Context of Promises for a Public Benefit

The foregoing analysis of the performance and enforcement of promises to benefit the public demonstrates two dismal truths. First, negative consequences to a breaching developer are unlikely because enforcement actions by representatives of the public are unlikely. Second, because enforcement is unlikely and the burdens of performance outweigh the benefits, performance is also unlikely. Setting aside the incentive problems discussed above, other enforcement issues present obstacles to securing benefits promised to the public. These can be seen by scrutinizing two other dynamics at work in this area: (1) enforcement by agencies as representatives of the public and (2) limitations on citizen enforcement.

a. Limitations of Agency Resources and the Use of Contract Law

The reality that agencies often lack sufficient resources to fully enforce the thousands of commitments they secure is established by other scholarship.[20] In the case of enforcement and monitoring of wetlands mitigation and conservation easements, for example, the in-

20. *See, e.g.*, Richard N.L. Andrews, *Long-Range Planning in Environmental and Health Regulatory Agencies*, 20 ECOLOGY L.Q. 515 (1993) (noting vulnerability of agencies to organizational failure by capture "bureaucratic imperialism" and turf struggles, inertia, and other problems); Patricia M. Wald, *Regulation at Risk: Are Courts Part of the Solution or Most of the Problem?*, 67 S. CAL. L. REV. 621, 625–29 (1994) (identifying burdens of judicial oversight and shortfalls in agency efficiency).

dividual agency employee who monitors the commons incurs a unit of cost for his efforts but is repaid with only a fractional gain—because he has no particular benefit from the successful project. Agencies recognize the difficulty of monitoring promises in the public interest.

> The Army NEPA regulation defines monitoring as either enforcement monitoring or effectiveness monitoring. Enforcement monitoring is basically designed to ensure that mechanisms are built into contracts and agreements with those entities that will actually perform the mitigation. An example of enforcement monitoring is a penalty clause written into a contract for the performance of mitigation measures. This form of enforcement is important, considering that much of the Department of Defense's environmental work is actually performed by contract with private entities.[21]

Similarly, the agencies charged with oversight of the project (Corps of Engineers and EPA) experience incentives and disincentives in their work. Diminished resources for monitoring and overwhelming demands on the time of individuals in these agencies affect the efforts they invest in past deals as opposed to future deals. Incentives for agency personnel to invest time in monitoring are minimal. Shifts in policy judgments and initiatives by different administrations, capture of agency policy by regulated industry groups, and other difficulties of agency enforcement are the subject of a substantial body of empirical study and scholarly inquiry.[22] Such effects heighten the need for effective enforcement of laws by citizens.

b. Barriers to Citizen Enforcement

Legal doctrines impose additional limitations on the members of the public to enforce commitments to the public. For example, the purpose of conservation easements is generally to preserve a benefit for the public. Nevertheless, the right to enforce such easements is typically restricted to charitable institutions or public officials.[23] Most

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21. Lieutenant Colonel Tozzi, *Mitigation Measures in Analyses Under the National Environmental Policy Act (NEPA)*, ARMY LAW. 44, 46–47 (Sept. 2002) (footnotes omitted).

22. *See, e.g.*, John D. Echeverria & Julie B. Kaplan, *Poisonous Procedural "Reform": In Defense of Environmental Right-to-Know*, 12 KAN. J.L. & PUB. POL'Y 579, 589 (2003) (noting a "tendency over time for regulatory agencies to turn into servants of the interests they are supposed to be regulating"); Michael I. Jeffery, *Intervenor Funding as the Key to Effective Citizen Participation in Environmental Decision-Making: Putting the People Back into the Picture*, 19 ARIZ. J. INT'L & COMP. L. 643, 649 (2002) (discussing citizen claims under Administrative Procedures Act); Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903, 908 (2002) (suggesting use of NEPA to monitor agency performance and counteract agency capture); Bradford C. Mank, *Superfund Contractors and Agency Capture*, 2 N.Y.U. ENVTL. L.J. 34 (1993); Matthew D. Zinn, *Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits*, 21 STAN. ENVTL. L.J. 81 (2002).

23. *See* Adam E. Draper, Comment, *Conservation Easements: Now More Than Ever—Overcoming Obstacles to Protect Private Lands*, 34 ENVTL. L. 247, 249 (2004).

statutory provisions indicate that enforcement may be brought by a charitable organization named in the easement.[24] The development of the law of conservation easements has not provided significant enforcement rights to citizens.[25] Some statutes provide a basis for recognizing the right of members of the public to enforce a conservation easement. For example, the Court of Appeals in Tennessee reversed a chancellor's decision that limited the right to enforce a conservation easement to the government entity named in the easement.[26] In *Tennesee Environmental Council, Inc. v. Bright Par 3 Assocs.*, the court held that any citizen of the state of Tennessee could enforce the easement.[27]

Despite enforcement difficulties, the existence of federal and state citizen suit provisions are a clear indication of the congressional recognition of the public as stakeholder in environmental and natural resource assets. Congress clearly recognized the problem of enforcement in the environmental area. For example, most federal and many state environmental statutes include citizen suit provisions.[28] By the creation of such citizen suit provisions, Congress and state legislators enhanced the likelihood of enforcement and, as a consequence, enhanced compliance with environmental laws. Authorizations of citizen suits acknowledged the pervasiveness of activities that can result in pollution and the overwhelming task of enforcement

24. *See, e.g.*, ALA. CODE §§ 35-18-1, 35-18-3(a) (Supp. 2004); ALASKA STAT. §§ 34.17.020(a), 34.17.060 (LEXIS 2004); ARIZ. REV. STAT. ANN. §§ 33-271, 33-273(A) (West 2000); ARK. CODE ANN. §§ 15-20-402, 15-20-409(a) (LEXIS 2003); CAL. CIV. CODE §§ 815, 815.3, 815.7 (West 1982 & Supp. 2005); COLO. REV. STAT. §§ 38-30.5-104(2), 38-30.5-108 (2004); DEL. CODE ANN. tit. 7, §§ 6901, 6903(a) (2001); D.C. CODE ANN. §§ 42-201, 42-203(a) (2001); FLA. STAT. ANN. § 704.06 (West 2000); GA. CODE ANN. §§ 44-10-2, 44-10-4(a) (2002); TENN. CODE ANN. §§ 66-9-305(a), 66-9-307 (2004); TEX. NAT. RES. CODE ANN. §§ 183.001, 183.003(a) (Vernon 2001); UTAH CODE ANN. §§ 57-18-3, 57-18-6 (2000); VA. CODE ANN. §§ 10.1-1009, 10.1-1013 (Michie 1998); W. VA. CODE ANN. §§ 20-12-3, 20-12-5(a) (Michie 2002); WIS. STAT. ANN. § 700.40(1), (3) (West 2001).

25. *See* Michael R. Eitel, Comment, *Wyoming's Trepidation Toward Conservation Easement Legislation: A Look at Two Issues Troubling the Wyoming State Legislature*, 4 WYO. L. REV. 57 (2004) (examining both common law and statutory conservation easements and focusing development of law of conservation easements in Wyoming); Melissa K. Thompson & Jessica E. Jay, *An Examination of Court Opinions on the Enforcement and Defense of Conservation Easements and Other Conservation and Preservation Tools: Themes and Approaches to Date*, 78 DENV. U.L. REV. 373 (2000) (noting general lack of success of third party enforcement of easements). *See generally* Ian Bowles, David Downes, Dana Clark & Marianne Guérin-McManus, *Economic Incentives and Legal Tools for Private Sector Conservation*, 8 DUKE ENVTL. L. & POL'Y F. 209 (1997) (studying programs in other countries).

26. *See* Tenn. Envtl. Council, Inc. v. Bright Par 3 Assocs., No. E2003-01982-COA-R3-CV, 2004 WL 419720, at *1 (Tenn. Ct. App. Mar. 8, 2004).

27. *Id.*

28. *See, e.g.*, 42 U.S.C. § 6972(a) (2000) (authorizing citizen suits against RCRA violators and against agencies for failure to fulfill a nondiscretionary duty under RCRA); 42 U.S.C. § 7604 (2000) (authorizing citizen suits under the Clean Air Act against agencies and polluters).

placed on regulatory agencies. Policing all potential polluting activity is virtually impossible. Accordingly, citizen suits provisions provide an important supplement to the enforcement of state and federal agencies. The provisions also inherently recognize that the public has a real stake in policing and reducing the impacts of pollution and other hazards on natural resources and the environment. Citizens may bring actions against individuals, corporations, other entities, and governmental agencies, including the agencies that administer the environmental statutes.[29] In most cases, citizens must provide notice to the appropriate agency before commencing suit against the agency or others.[30] Citizens seeking to enforce federal mandates under citizen suit provisions have met a variety of legal hurdles, including a rigorous and malleable standing tests and narrow reading of citizen suit statutory provisions.[31] Although the legal issue of enforcement of the conditions of Section 404 permits is arguably not a settled question,[32] courts have rejected the citizen suits seeking to enforce conditions of permits.[33]

Because of the pervasive nature of the use of public resources and the pollution of the public commons, Congress noted the limited nature of agency resources to enforce environmental laws. It thus sought to enhance enforcement by the private attorney general concept. Although Congress sought to empower members of the public to act as a private attorney general in enforcing environmental laws, the likelihood of enforcement is reduced by the Supreme Court's use

29. *See, e.g.*, 16 U.S.C. § 1540(g)(1) (2000).

30. *See, e.g.*, 16 U.S.C. § 1540(g)(2).

31. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 571–78 (1992) (holding that for standing a plaintiff must show a concrete injury in fact with a fairly traceable causal connection between the injury and the conduct complained of and that a favorable decision will likely redress the injury); *see also* David Milton Whalin, *The Polluter's Court: Expanding Polluter Rights While Limiting Pollutee Rights*, 12 FORDHAM ENVTL. L.J. 329 (2001) (surveying barriers to citizen suits).

32. *See* WILLIAM L. WANT, LAW OF WETLANDS REGULATION § 8:11 (2004) (asserting that the Clean Water Act allows suits against private violators of § 404); Michael D. Montgomery, Note, *Raising the Level of Compliance with the Clean Water Act by Utilizing Citizens and the Broad Dissemination of Information to Enhance Civil Enforcement of the Act*, 77 WASH. U. L.Q. 533, 540–42 (1999).

33. *See* Pres. Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Eng'rs, 87 F.3d 1242, 1250 (11th Cir. 1996) (rejecting plaintiffs' argument that the Clean Water Act's citizen suit provision applies to § 404, on the basis that the Supreme Court has stressed the limited role of courts in interpreting a statute); N.W. Envtl. Def. Ctr. v. U.S. Army Corps of Eng'rs, 118 F. Supp. 2d 1115 (D. Or. 2000) (holding Clean Water Act does not authorize citizen suit against private defendants, and sovereign immunity protects Corps against citizen suit under CWA); Nat'l Wildlife Fed'n v. Adamkus, 936 F. Supp. 435 (W.D. Mich. 1996) (rejecting plaintiff's claim that failure of EPA to respond to public comment was not reviewable under Administrative Procedure Act); *see also* Phillip M. Bender, *Slowing the Net Loss of Wetlands: Citizen Suit Enforcement of Clean Water Act § 404 Permit Violations*, 27 ENVTL. L. 245 (1997) (presenting rationale for supplementary role of citizen suits under § 505 to increase compliance with § 404 permits).

of standing to limit access to the courts to achieve such enforcement, as well as the inherent incentives and disincentives discussed above.[34]

III. The Public Purpose of Law

The law establishes and mediates the rights of individuals vis a vis each other and vis a vis society. The transcendent purpose of the law is the protection of society as a whole and the individual members of society.[35] Both statutes and the common law seek to minimize unreasonable risks posed by self-interested rational action. Tort law also arises from strong public norms. Evidence of the transcendent importance of the public good is found in all areas of law. Criminal law presents norms of such importance that the law is willing to deprive violators of property, liberty, and even life to punish and minimize such conduct. The strength of these norms is clear from the fact that the law will impose punitive damages on the tortfeasor whose conduct is deemed outrageous.[36] Although contract law may present weaker norms than criminal or tort law, the public purpose of the private ordering of contract law is clear from the effects of contract enforcement. Providing enforcement for the breach of private promises creates an incentive for the parties to perform their promises because society takes such promises seriously and will give effect to the promises when the promisor breaches.[37] This public benefit of private contracts between individuals is significant to society. The benefits that inhere in promises made to governmental agencies to protect the public good are also of great significance. Nevertheless, such contracts lack the basic enforcement default of ordinary contracts between individuals. The diffuse nature of the benefit and the

34. *See Lujan*, 504 U.S. at 571–74.

35. This purpose is clearest in criminal law where the public norms protected are strongest. It is arguably weakest in contract law where the norms function loosely to set the stage for private ordering. Nonetheless, social ordering is an undeniable goal of contract law. This social ordering can be described as the goal of certainty of obligation protected by contract law.

36. Restatement (Second) of Torts § 908 (1979).

> (1) Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.
>
> (2) Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.

Id.

37. Additionally, courts may apply significant sanctions for breach of contract, and they may refuse enforcement of a contract on the ground that the contract violates public policy.

unlikelihood of enforcement by either the agency or individuals make the achievement of the protection less likely.

A. *Contract Enforcement in Private Contracts and Public Contracts*

The public purpose in enforcing contracts is clear. A society in which contracts are secure is one in which markets flourish, maximizing wealth as well as robust exchanges. Society's desire for certainty of obligation comes from the need of a commercial society to encourage contracts for future performance as opposed to instantaneous transfers. Thus, to make parties secure in contracting, the law enforces promises by respecting the allocated benefit of the deal. By recognizing the right to expectancy damages for a party injured by a breach, contract law creates incentives for people to make promises of future performance. In the same way, contract law creates incentive for people to enforce promises. Its default principle of expectancy damages secures to the injured party the right to substitution damages, neutralizing to a significant extent the effects of breach and lessening to a significant extent the likelihood of breach. Contract law draws on the mechanism of commitment to further the public good through contracting. Thus, individuals in society can reasonably rely on contractual commitments.[38] The payoff for society is not the enhanced wealth of a particular transaction, but rather, the reliability of commitment and the enhanced wealth that flows from flourishing markets.

When a private party to a contract breaches his obligation to another, the law depends on the injured party to enforce his own rights, and thus to protect not only his own interest, but also the incentives of all to contract and to perform their contractual commitments. In this way, each lawsuit to enforce a contract is a citizen suit for the benefit of society to re-establish the certainty of contractual commitment. If Seller refuses to deliver the goods contracted for, the injured party buyer (Buyer) has the right to obtain the goods from another seller (cover) and sue for damages based on the cover price.[39] If Buyer covers, he obtains substitute goods at the original price set by the contract

38. As every law graduate should know, "expectation" is not a synonym for "expected profit." The term "expectancy" refers to the contract principle that enforcement of a contract will give the injured party damages that put him in the place he would have been in had the contract been performed. This measure does not speak to what was "expected" by the injured party at the time of contracting, but rather, what is necessary based on the market to put him in the position of performance at the time set for performance.

39. The measure of damages often does not fully compensate injured party because it fails to include the transaction costs of collecting damages. For example, the injured party must pay for the attorney's fees incurred as a result of pursuing damages against the breaching party. Thus, as a practical matter the UCC regime under-compensates plaintiffs. Other works establish the failure of the UCC measure to compensate injured party buyer fully.

under UCC 2-712. Buyer also has the option of suing under UCC 2-713 for theoretical cover. The breaching party must also take the risk that the injured party's rights under the contract may include specific performance. Thus, the breaching party (here the Seller) incurs the risk that the market conditions that influenced his desire to be free of the contract may also affect injured party's access to substitute goods.

When a party considers breach in the context of private agreements, he faces a strong likelihood of enforcement. This is because the injured party incurs the losses of the breach directly and individually. Unlike Hardin's herdsman and unlike the individual seeking to enforce a public benefit, the gain to the injured party who enforces a private contract is not fractional. The injured party receives the benefit of the bargain, at least as a theoretical matter.[40] Thus, the injured party is a good surrogate for the public interest in contracting. The likelihood that the breaching party, the Seller, will profit from the breach is small. Additionally, at the time Seller assesses his interests in performing or breaching, he cannot fully know the extent of damages to the injured party. This is because the UCC protects the injured party's bargain by the expectancy measure and provides the injured party time to consider whether to cover or seek theoretical damages. Contract rules thus protect not only the injured party but also the general incentives of parties to enter contracts. The tragedy of the commons is not present because the only effect on the commons is the derivative effect from private enforcement. Thus, contract law draws on the mechanism of commitment to protect the public good of contracting. To make parties secure in contracting, the law enforces promises by respecting the allocated benefit of the deal.

In this way, contract law encourages the parties to enter contracts. The advantage or "take" to the contracting parties is the surplus of value (each party values the exchanged performance he receives more than the exchanged performance renders). The advantage or "take" of the contract for society is the surplus of value created by the transaction and in the market at large by increased economic activity that results from giving individuals sufficient security to make contracts for future performance.[41] Contract law protects individual rights in promises of future exchanges. In doing so, it protects society's interest in encouraging contracts. The benefit to the public is diffuse and derivative from the benefit to the individual plaintiff who obtains enforcement of the private agreement. The derivative nature of this benefit does not mean that it is not a significant benefit to the public.

40. Scholars note that the plaintiff often is under-compensated for damages. *See e.g.*, Daniel A. Farber, *Reassessing the Economic Efficiency of Compensatory Damages for Breach of Contract*, 66 VA. L. REV. 1443, 1443–48 (1980); Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271, 274–78 (1979).

41. Specific performance secures transfer of the property itself when expectancy cannot be adequately protected by a substitute.

The individual who sues to protect his own immediate interest also protects the group interest in contracting and the strong economy that contracting encourages. Enforcement of private contract produces a derivative effect of belief in the power of contracts and, thus, a robust economy. Promises directly to benefit the public good may present an equally significant impact on the public good, such as the promise to create a wetland, or perhaps even a more direct impact on the public good. Nevertheless, such promises for the public good receive less protection than private contracts and are thus less likely to be performed or enforced.[42]

B. *Protection of the Public Good*

The foundational importance of a livable environment means that the public good is directly implicated in environmental issues. In cases where individuals make promises to the public as a whole, the public purpose is real and, in a sense, of greater significance than contracts between two individuals. Nevertheless, the promise to the public is less likely to be enforced and less likely to be performed than promises between two individuals. The personal interest of any member of the public in the public promise is limited. Additionally, enforcement mechanisms are diluted in the context of individual action to address breaches to the public trust. Part of the statutory fix in this area is the use of contracts between private parties and governmental entities for the protection of the environment and natural resources.

Both common law and statutory laws seek to protect the public good.[43] Nevertheless, protection of the public good (the commons) seems to present difficulties in excess of the difficulties of protecting individual interests through individual contracts. Environmental law provides a literal example of the public good as the commons. The canon of environmental laws of the United States seeks to further that purpose. Both federal law and federal statutes rely on the public interest in natural resources, recognizing members of the public as

42. It may be that because the benefit to the individual actor is less direct, the law respects his right to speak for the group with skepticism and thus gives less protection for the individual actor.

43. Numerous authorities declare or imply the principle of the public interest in the common law and statutes. Principles of international human rights, statutes, and the constitutions of some states declare the right of individuals to a livable environment. *See, e.g.*, John L. Horwich, *Montana's Constitutional Environmental Quality Provisions: Self-Execution or Self Delusion?*, 57 MONT. L. REV. 323 (1996).

> [Montana's] new constitution proclaimed that all persons have an inalienable right to a clean and healthful environment; it obligated the state and each person to maintain and improve that clean and healthful environment for present and future generations; and it pledged to protect the environment from degradation and unreasonable depletion.

Id. at 323–24 (footnotes omitted) (citing MONT. CONST. art. II § 3, IX § 1).

stakeholders in public waters and other resources.[44] The significance of the public interest is particularly clear in the environmental area because it is clear that humans and other forms of life depend on the commons of air, water, and soil for their existence. Statutory law provides dramatic sanctions for violation of the laws intended to protect the environment and the public.

The enforcement component of the laws is crucial to furtherance of the purpose of those laws. In the environmental area, enforcement is expressly provided within the laws. Environmental laws grant enforcement power to the public agencies and, additionally to individuals as representatives of the public through citizen suits. Most federal environmental acts empower citizens to sue individual violators of the acts and, additionally, governmental agencies that fail to fulfill mandatory duties under the acts. Despite the express declaration of the right to private citizen suits in such statutes, however, enforcement of the contracts for the public good is less likely than enforcement of purely private agreements because the benefit of such enforcement is outweighed by the cost of enforcement.

Before it issues a permit for development, the Corps must assess the public interest in dedicating wetland resources to the proposed project, even when the developer owns the wetlands areas. The interlocking nature of environmental laws and private agreement is clear. For example, easements often refer to Section 404 of the Clean Water Act as recognition of the public interest and to memorialize the fact that a developer is seeking a permit from the United States Army Corps of Engineers for activities affecting the waters of the United States. Parties seeking to develop natural areas that fall within the jurisdiction of the Clean Water Act frequently enter conservation easements and other contracts as part of the Section 404 permit process. Nevertheless, mechanisms for protecting the public commons are vulnerable to breach without remedy. For example, if the wetland is not maintained, the wildlife is not protected, the forest is cut in violation of a provision of a conservation easement, a river is dammed, a lake is drained or polluted, or any number of other degradations of the environment violate commitments made by private parties to agencies and by agencies to each other. A public resource is dimin-

44. *See* Ill. Cent. R.R. v. Illinois, 146 U.S. 387 (1892); Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709 (Cal. 1983). For a look at the history of the Mono Lake case and insights into the lessons of environmental activism, see Craig Anthony (Tony) Arnold, *Working Out an Environmental Ethic: Anniversary Lessons from Mono Lake*, 4 WYO. L. REV. 1 (2004); Craig Anthony (Tony) Arnold & Leigh A. Jewell, *Litigation's Bounded Effectiveness and the Real Public Trust Doctrine: The Aftermath of the Mono Lake Case*, 8 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 1 (2001); Michael C. Blumm & Thea Schwartz, *Mono Lake and the Evolving Public Trust in Western Water*, 37 ARIZ. L. REV. 701 (1995); Cynthia L. Koehler, *Water Rights and the Public Trust Doctrine: Resolution of the Mono Lake Controversy*, 22 ECOLOGY L.Q. 541 (1995).

ished or destroyed, and, thus, the public interest is eroded. This erosion often will have more dramatic consequences than the breach of one commercial contract. Such commercial contracts are more likely to be enforced, however, because of the direct benefit of enforcement to the injured party. While the beneficial public effect of the contract may be more localized than promises to benefit the public commons, a breach of public commitments is less likely to be enforced than the ordinary contract. It fits Hardin's model of incentives and disincentives. Possible solutions to the problem such as third party beneficiary law and broader rights under citizen suits provisions of environmental laws.[45] Some examples of enforcement of contract obligations undertaken in permits or other contracts with government agencies exist.[46] Such cases are rare, however, and this line of enforcement seems to be largely overlooked. Further analysis of strategies and incentives is essential to understand and secure the public benefits bargained for in agency contracts on behalf of the public.

IV. CONCLUSION

The significance of the public interest in maintaining a livable environment provides a realistic context for studying the public good in contractual commitments to the public. This Article explores the disjuncture between enforcement of ordinary contract obligations between individuals and contracts entered by agencies as representative of the public. Numerous authorities declare or imply the principle of the public interest in statutes and in the common law. Wetlands mitigation is merely one example of the type of contract obligations undertaken by individuals as necessary to secure some benefit such as a permit to develop wetlands.[47] Absent a realistic possibility of enforcement, all commitments are essentially symbolic in nature. This truth relates to contracts entered with agencies as representatives of the public as well as to other commitments and other laws. Private con-

45. *See* RESTATEMENT (SECOND) OF CONTRACTS § 304 (1993) (noting enforceability of promises by third party beneficiaries); *see also* Ratzlaff v. Franz Foods, 468 S.W.2d 239 (Ark. 1971). For an excellent analysis of third party beneficiary law in the context of public rights, see Justin Massey, *Applying the Third Party Beneficiary Theory of Contracts to Enforce Clean Water Act section 404 Permits: A California Case Study*, 18 J. ENVTL. L. & LITIG. 129 (2003) (assessing California third party beneficiary law and applying it to the Section 404 context), and Anthony Jon Waters, *The Property in the Promise: A Study of the Third Party Beneficiary Rule*, 98 HARV. L. REV. 1109 (1985) (noting the "link between the third party beneficiary rule and public law" and exploring private actions to secure "an individual's access to some beneficial interest" in a variety of statutory and contract contexts).

46. *See, e.g.*, Zigas v. Superior Court, 174 Cal. Rptr. 806 (Cal. Ct. App. 1981) (holding that the tenants of the defendant landlord, who had contracted with HUD to secure a federally insured mortgage, had standing as third party beneficiaries to bring an action alleging that the landlord was charging excessive rent in violation of the contract between the landlord and HUD).

47. The entire canon of environmental laws of the United States seeks to further that purpose.

tract law presents a realistic regime of enforcement because of the direct injury from a breach and the high likelihood of enforcement by the injured party. The contracts entered by agencies for wetlands mitigation and other public benefits have the direct goal of securing a benefit for the public and in the public interest.

Enforcement of typical contracts between individuals is clearer and more likely than enforcement of promises to benefit the public interest. The dependence of our system of justice on agencies to enforce promises made to the public leaves the public interest vulnerable to fluctuating policy judgments by the administration in power and the problem of overburdened regulatory agencies and individual agency employees who lack the time to pursue enforcement of obligations to the public. Although the mandates of environmental laws and the citizen suit provisions included in those laws provide legal recognition of the rights of the public, such recognition is limited to symbolic significance when citizen suits are restricted and agency resources are not equal to the task of consistent enforcement. Use of contract law to remedy the structural problems of inadequate remedies at law may serve as a supplement to current enforcement through agency action. Such a response has drawbacks and uncertainties. Notable among the drawbacks is the fact that the fix depends on vigilance and action by members of the public and the likelihood that rational actors will not pursue such actions when the benefit to them is merely the benefit to them as members of the public rather than as individuals. The analysis presented in this Article suggests that the contractual commitments in agency documents may produce more powerful protection of the public interest if they include express contractual provisions for public participation and enforcement.