

5-31-2014

## Four Legs to Stand on: The Unexplored Potential of Civil War Era 'Qui Tam' Suits to Advance Animal Rights in the Federal Judiciary

Michael W. Meredith

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# Four Legs to Stand On: The Unexplored Potential of Civil War Era ‘*Qui Tam*’ Suits to Advance Animal Rights in the Federal Judiciary

Michael W. Meredith<sup>†</sup>

*Animal rights advocates seeking to vindicate the interests of animals in federal court find themselves stuck between a rock and a hard place. Article III, § 2 of the United States Constitution only permits individuals to sue for an injury they themselves have suffered, not an injury suffered by another or a non-human animal. Moreover, most federal law prohibits animals from suing on their own behalf. As a result, a number of landmark environmental cases have been dismissed from federal court due to a lack of standing, and those cases that have been allowed to proceed do so only by adopting the anthropocentric principle that animal suffering can be recognized if, and only if, it is directly tied to human suffering. This article explores a peculiarity in the civil war era ‘False Claims Act’ (31 U.S.C. § 3729 et seq.) legislation whose qui tam enforcement provisions permit a litigant to avoid the question of standing altogether and, therefore, if applied in the areas of environmental and animal rights law, might permit a number of otherwise impermissible suits advancing the interests of animal rights to proceed in federal court while at the same time developing the basis for an anti-anthropocentric jurisprudence in the federal judiciary.*

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<sup>†</sup> Michael Meredith received his Juris Doctorate (J.D.) from the University Of Washington School Of Law and is presently serving as a judicial clerk in the federal district court for the Western District of Texas. Email: meredimw@u.washington.edu.

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## I. INTRODUCTION

When People for the Ethical Treatment of Animals (PETA) filed its famous, ill-fated 2012 lawsuit alleging that Sea World amusement parks had violated the constitutional rights of the animals in their care, they encountered a legal hurdle that has plagued many animal rights activists seeking redress for harm done to non-human animals through the federal court system: human plaintiffs, generally, lack Article III standing to sue on behalf of non-human animals.<sup>1</sup>

If one is able to discard the notion that there is a fundamental difference between human and non-human animals, the basis for PETA’s suit was surprisingly straightforward. PETA’s complaint alleged simply

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1. *Tilikum ex rel. People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Entm’t, Inc.*, 842 F. Supp. 2d 1259, 1261-62 (S.D. Cal. 2012) (“Plaintiffs lack Article III standing to bring this action”).

that whales performing in Sea World's shows "were forcibly taken from their families . . . held captive . . . and forced to perform . . . for [the] Defendants' profit."<sup>2</sup> As such, PETA alleged that Sea World was acting in violation of the Thirteenth Amendment's prohibition of slavery and involuntary servitude.<sup>3</sup>

District Judge Jeffery T. Miller granted Sea World's motion to dismiss PETA's claim, noting that the true plaintiff in PETA's suit was not PETA, either as an organization or on behalf of its individual members. Rather, the court explained that the plaintiffs-in-fact were the whales themselves, "members of the *orcinus orca* or 'killer whale' species, the largest species in the dolphin family."<sup>4</sup> The Court dismissed the case because "[t]he Constitution limits the federal judicial power to 'cases' and 'controversies'" and "[because] orcas . . . are without standing to bring this action, no 'case' or 'controversy' exists . . ."<sup>4</sup> The Court found textual support for its decision in Article III, Section 2 of the United States Constitution which requires, as a prerequisite to invoking the jurisdiction of federal courts, that a plaintiff establish standing. Put most simply, a plaintiff has standing when he can show that he personally has suffered an injury-in-fact.<sup>5</sup> Thus, if a human plaintiff can only establish injury to a non-human animal, he generally will not meet this requirement, even for the most egregious violations of federal law.

Cass Sunstein, a noted constitutional scholar, has explained the manner in which the constitutional standing requirement has functioned in concert with less than zealous enforcement of federal animal rights law to erode many protections extended by statute to non-human animals and the environment:

In the last three decades, the protection of animals has become a pervasive goal of federal statutory law. However controversial the idea of "animal rights" in theory, federal law has begun to recognize a wide range of animal rights in practice. Indeed, Congress has en-

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2. Joanna Zelman, *PETA's SeaWorld Slavery Case Dismissed By Judge*, HUFFINGTON POST (Feb. 9, 2012, 4:33 PM), [http://www.huffingtonpost.com/2012/02/09/peta-seaworld-slavery-\\_n\\_1265014.html](http://www.huffingtonpost.com/2012/02/09/peta-seaworld-slavery-_n_1265014.html).

3. *Id.*

4. *Tilikum ex rel.* 842 F. Supp. 2d at 1261-62.

5. *Id.* (citing *Cetacean Community v. Bush*, 386 F.3d 1169, 1174 (9th Cir.2004) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Svs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000))) ("To satisfy Article III, a plaintiff must show that (1) it has suffered an injury-in-fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision").

acted more than fifty statutes designed to protect the well-being of animals.

Of these, the most prominent is the Animal Welfare Act (AWA), which contains a wide range of safeguards against cruelty and mistreatment, and which creates an incipient bill of rights for animals. If vigorously enforced, the AWA, alongside other enactments at the state and federal levels, would prevent a wide range of abusive practices [suffered by non-human animals]. As so often, however, there is a large gap between statutory text and real-world implementation. Many people have criticized the national government's enforcement efforts under these statutes, contending that the executive branch has violated the law by issuing weak and inadequate regulations, making the relevant statutes symbolic rather than real.<sup>6</sup>

Sunstein's 'gap' theory is exemplified by Judge Miller's order dismissing PETA's complaint, which demonstrates the divide between formal legislative statements asserting a protection and the ability to effectively and pragmatically enforce that protection. Indeed, the Court explicitly indicated in its order that "animals have many legal rights protected under both federal and state laws which provide for . . . humane treatment and criminalizing cruelty to animals."<sup>7</sup> However, the court also noted that "only human beings have standing . . . [and] it is obvious that an animal cannot function as a juridically competent human being."<sup>8</sup>

In PETA's suit against Sea World, the plaintiff's inability to meet Article III's standing requirement proved to be fatal and resulted in the dismissal of the suit for want of federal jurisdiction.<sup>9</sup> However, Article III's requirement has not been universally applied. The classic exception to standing requirements are a type of legal action known as *qui tam* suits. A *qui tam* action is a lawsuit brought by a private citizen against a person or company allegedly violating a government regulation.<sup>10</sup> *Qui tam* suits are exceptional because they are brought on behalf of the "the government as well as the plaintiff."<sup>11</sup> This permits *qui tam* plaintiffs to adopt, simultaneously, the legal attributes of both a private citizen and

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6. Cass R. Sunstein, Standing for Animals (With Notes on Animal Rights), 47 UCLA L. REV. 1333 (2000).

7. *Tilikum ex rel.*, 842 F. Supp. 2d at 1262 n.1.

8. *Id.*

9. *Id.* ("An action brought by a plaintiff who lacks standing is not a 'case or controversy' under Article III, resulting in the court's lack of subject matter jurisdiction to entertain the action").

10. *Qui Tam Action*, THE FREE DICTIONARY, <http://legal-dictionary.thefreedictionary.com/qui+tam+action> (last visited June 4, 2014).

11. *Id.*

the the federal government. Most importantly, for the purposes of the present analysis, *qui tam* suits permit private plaintiffs who have suffered *no* injury themselves to establish standing, within the meaning of Article III, Section 2 of the United States Constitution, based solely upon the harm suffered by a governmental entity due to violations of its laws or regulations.

The following analysis will consider the ways in which *qui tam* suits, especially those authorized by the civil-war era False Claims Act (FCA), are a means of strategically accomplishing two related goals: first, advancing the cause of animal rights in the federal judiciary; and second, reformulating the argument for the protection of animal rights as an independent state interest. In reaching that conclusion, this inquiry will: (I) clearly develop the ‘problem of standing’ faced by those seeking redress in federal court for harm suffered by animals; (II) analyze the history, purpose and function of the FCA; (III) propose methods by which the FCA’s *qui tam* enforcement provisions might be employed to address the problem of animal standing; (IV) propose federal laws that might benefit from enforcement by individual FCA *qui tam* suits; and (V) suggest ways in which *qui tam* suits brought, pursuant to the FCA, can function to develop a body of law that could re-frame the debate over animal rights in the federal judicial system, and provide an ideological challenge to the anthropocentric, or human-centered, jurisprudence that has developed surrounding the law of standing, which this piece will term an anti-anthropocentric jurisprudence.

It is the thesis of this piece that the development and enforcement of animal rights law and environmental protection legislation can meaningfully benefit, both practically and ideologically, from an application of the FCA’s private enforcement provisions.

## II. DEVELOPING THE PROBLEM OF ANIMAL STANDING IN FEDERAL COURTS

Article III, § 2 of the United States Constitution restricts the power of federal courts to ‘cases or controversies,’ thereby imposing what the Supreme Court has described as the “irreducible constitutional minimum of standing” necessary to proceed in federal court.<sup>12</sup> To establish standing, or a justiciable case or controversy, within the meaning of

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12. *Baur v. Veneman*, 352 F.3d 625, 631-32 (2d Cir. 2003)(quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

Article III, a plaintiff must prove that he or she has sustained an injury-in-fact caused by the actions of the defendant.<sup>13</sup>

It is this constitutional injury-in-fact requirement that has posed a serious impediment to animal rights advocates seeking a judicial remedy for animals or their habitats that have been unlawfully harmed. As the name implies, to establish an injury-in-fact a plaintiff must allege, in part, an “invasion of [a] . . . legally protected interest.”<sup>14</sup> Given this requirement, the challenge facing an attorney seeking to proceed on behalf of an animal who has suffered harm is manifest; the actual human plaintiff has not suffered an invasion of any legally protected interest *him or herself* and, therefore, is unable to establish their constitutional authority, within the meaning of Article III § 2, to bring suit.

What’s more, the majority of federal laws protecting animals and their habitats—for example, the Endangered Species Act (ESA), the Marine Mammals Protection Act (MMPA), and the National Environmental Policy Act (NEPA)—explicitly provide that “individual animals do have standing to sue” to vindicate the protections included in these laws.<sup>15</sup> Therefore, with respect to standing, non-human animals are stuck between ‘a rock and a hard place.’ Individual animals who have experienced injury-in-fact sufficient to confer Article III standing—including abuse, inhumane testing procedures, over-hunting, death, destruction of habitat, and extinction—are unable to proceed in court on their own behalf, but their human advocates who *are* authorized to proceed in court, have not, themselves, been harmed in a manner cognizable by Article III § 2.

To date, this ‘problem of standing’ has been addressed by seeking to link harm suffered by an animal to harm suffered by a human. For example, in *Lujan v. Defenders of Wildlife*, the United States Supreme Court held that “the desire to use *or observe* an animal species, *even for purely esthetic purposes*, is undeniably a cognizable interest for [the] purpose[s] of [establishing] standing.”<sup>16</sup> Thus, according to the Court, the

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13. *Id.* (citing *Bennett v. Spear*, 520 U.S. 154, 162 (1997)).

14. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

15. *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1179 (9th Cir. 2004).

16. *Lujan*, 504 U.S. at 562; *see also* *Animal Legal Defense Fund, Inc. v. Espy*, 23 F.3d 496, 505 (D.C. Cir. 1994) (Williams, J., concurring in part and dissenting in part) (“*Japan Whaling Association and Defenders of Wildlife* clearly recognize people’s affirmative aesthetic interest in viewing animals enjoying their natural habitat”); *Humane Society v. Babbitt*, 46 F.3d 93, 99 n.7 (D.C. Cir. 1995) (quoting *Animal Welfare Institute v. Krepes*, 561 F.2d 1002, 1007 (D.C. Cir. 1997) (recognizing that humans have a cognizable interest in “view[ing] animals free from . . . ‘inhumane treatment.’”); *Humane Society v. Hodel*, 840 F.2d 45, 52 (1988) (finding standing based on a complaint “that the existence of hunting on wildlife refuges forces Society members to witness animal corpses and environmental degradation, in addition to depleting the supply of animals and

problem of standing can be remedied by concluding that the harm suffered by an animal can be said to infringe upon a human's legally protected 'esthetic interest' in observing that animal not being harmed. Similarly, the court in *Japan Whaling Association v. American Cetacean Society* held that the plaintiffs, seeking to enjoin illegal whaling practices, had undoubtedly alleged a sufficient injury-in-fact in that the whale watching and studying of their members will be adversely affected by continued whale harvesting.<sup>17</sup>

In order to find Article III standing based upon the reasoning of *Defenders of Wildlife*, courts have generally required Plaintiffs to establish an individualized and personal connection to the injured animal in question. As the Supreme Court later noted, "[i]t is clear that [only] the person who *observes* or works with a *particular* animal threatened . . . is facing [a] perceptible harm."<sup>18</sup> Thus, "[t]o have standing, a party must demonstrate an interest that is distinct from the interest held by the public at large."<sup>19</sup> Merely asserting a *generalized* appreciation for animal life has been consistently held to be insufficient to confer standing, as the Court went on to explain:

It goes beyond the limit . . . and into pure speculation and fantasy, to say that anyone who observes or works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection.<sup>20</sup>

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birds that refuge visitors seek to view . . . [t]hese are classic aesthetic interest, which have always enjoyed protection under standing analysis"); *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391 (9th Cir. 1992) (finding "that the Fund's members had standing to sue because of the psychological injury they suffered from viewing the killing of the bison in Montana . . . Fund members had been emotionally harmed").

17. *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221 (1986).

18. *Lujan*, 504 U.S. at 566; *see also* *Didrickson v. United States Dep't of the Interior*, 982 F.2d 1332, 1340-41 (9th Cir.1992) (finding standing where plaintiffs "declared that they have observed, enjoyed and studied sea otters in specific areas in Alaska. . . . [T]he [plaintiffs] are concerned with action harming sea otters in Alaska, where [they] live and in particular areas that they frequent, unlike the declarants in *Defenders of Wildlife*." (emphasis added)).

19. *Animal Lovers Volunteer Ass'n Inc., (A.L.V.A.) v. Weinberger*, 765 F.2d 937, 939 (9th Cir. 1985).

20. *Lujan*, 504 U.S. at 567; *see also id.* at 582 & 584 n. 2 (Stevens, J., concurring in the judgment)("In my opinion a person who has *visited* the critical habitat of an endangered species, has a professional interest in preserving the species and its habitat, and intends to revisit them in the future has standing to challenge agency action that threatens their destruction . . . [R]espondents would not be injured by the challenged projects if they had not visited the sites or studies the threatened species or habitat." (emphasis added)); *Animal Legal Defense Fund, Inc. v. Espy*, 29 F.3d 720, 726(D.C.Cir. 1994) ("Had the [plaintiffs] challenging the Secretary's regulations alleged an interest in protecting the well-being of *specific* laboratory animals . . . [plaintiffs] would have had

Indeed, as noted by the Court of Appeals for the D.C. Circuit, the inability to establish a direct relationship between an injured animal and the human bringing suit on that animal's behalf has been the downfall of a number of landmark cases in the area of environmental protection:

In the environmental context . . . plaintiffs must establish that they have actually used or plan to use the allegedly degraded environmental area in question. It is this failure to show such direct use that has resulted in the denial of standing in several high-profile environmental cases.<sup>21</sup>

### III. THE HISTORY AND PURPOSES OF THE FALSE CLAIMS ACT

Federal anti-fraud legislation, and its *qui tam* enforcement provisions, might be usefully applied in the realm of environmental protection to resolve the 'problem of standing' that has plagued so many animal rights activists in federal. Specifically, one unique aspect of the False Claims Act (FCA) is that it allows a plaintiff to proceed in court without establishing Article III standing. Should the FCA's exception to Article III's standing requirement be extended to animal rights protection, a generalized right to bring suit on behalf of the environment as well as a new and productive judicial orientation towards the protection of animal rights might be forged.

Commonly referred to as the "Lincoln Law", the FCA is a piece of federal legislation that imposes civil liability on individuals or companies that seek to defraud the federal government. The Act provides in relevant part that:

[A]ny person who . . . knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval . . . [or] knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim . . . is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000 . . . plus 3 times the amount of

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standing to challenge those regulations for providing insufficient protection to the animals." (emphasis added); *Alternatives Research & Dev. Found. v. Glickman*, 101 F. Supp. 2d 7, 13 (D.D.C. 2000) (finding standing for a psychology student was injured by observing the inhumane treatment of the animals used for testing); *Animal Lovers Volunteer Ass'n Inc., (A.L.V.A.) v. Weinberger*, 765 F.2d 937, 938 (9th Cir. 1985) ("If ALVA showed that the Navy's program would affect its members' aesthetic or ecological surroundings, its position also might be different").

21. *Animal Legal Def. Fund, Inc. v. Glickman*, 154 F.3d 426, 435 (D.C. Cir. 1998).

damages which the Government sustains as a result of the act of that person.<sup>22</sup>

In short, the law imposes a \$5,000-\$10,000 fine upon any individual who seeks to defraud the federal government, and further, holds them civilly liable for treble damages suffered by the government as a result of the fraud.

What makes the Act unique is its *qui tam* enforcement provision. That provision can be found in § 3730, and provides that: “a person may bring a civil action for violation of section 3729 for the person and the United States Government . . . [and] such person shall . . . receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim . . . .”<sup>23</sup> This provision authorizes and provides Article III standing to any person bringing suit on behalf of the United States, even if they have suffered no injury themselves.<sup>24</sup>

The provision authorizing enforcement of the FCA by private citizens was first passed by Congress in March 2, 1863 in order to combat the fraud perpetrated by contractors doing business with the Union army during the civil war. Historical records of the time are replete with examples of “[w]ar profiteers . . . shipping boxes of sawdust instead of guns . . . swindling the . . . Army into purchasing the same cavalry horses several times [or] . . . unloading moth-eaten blankets.”<sup>25</sup> President Abraham Lincoln, recognizing that the nascent federal

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22. 31 U.S.C. § 3729(a)(1) (2006).

23. 31 U.S.C. § 3730(a)(d) (2006).

24. *See e.g., U.S. ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 748 (9th Cir. 1993) (Because the government clearly is capable of establishing injury-in-fact, causation, and redressability, *qui tam* plaintiffs satisfy these Article III requirements as well. Several courts and commentators have embraced this assignment theory); *see United States ex rel. Kreindler & Kreindler v. United Technologies Corporation*, 985 F.2d 1148 (2d Cir.), *cert. denied*, 508 U.S. 973 (1993); *United States Dept. of Housing and Urban Develop. ex rel. Givler v. Smith*, 775 F.Supp. 172, 180–81 (E.D.Pa.1991); *Truong v. Northrop Corporation*, 728 F.Supp. 615, 618–620 (C.D.Cal.1989); Thomas R. Lee, Comment, *The Standing of Qui Tam Relators Under the False Claims Act*, 57 U. CHI. L. REV. 543, 563–70 (1990)). Moreover, this theory comports with federal practice. Federal courts routinely find that fraud claims are assignable. *See AmeriFirst Bank v. Bomar*, 757 F.Supp. 1365, 1370–71 (S.D.Fla.1991) (10b–5 claims assignable); *Federal Deposit Ins. Corp. v. Main Hurdman*, 655 F.Supp. 259, 266–68 (E.D.Cal.1987) (bank actions for fraud and malpractice assignable to FDIC); *In re National Mortg. Equity Corp.*, 636 F.Supp. 1138, 1152–56 (C.D.Cal.1986) (RICO treble damage claims assignable). In addition, federal courts consistently recognize that an assignee of a fraud claim can assert his claim despite being unable to satisfy traditional standing requirements. *AmeriFirst Bank*, 757 F.Supp. at 1370; *Main Hurdman*, 655 F.Supp. at 267. *See also* *National Ass'n of Realtors v. Nat. Real Est. Ass'n.*, 894 F.2d 937, 941 (7th Cir.1990).

25. Phillips and Cohen LLP, *The False Claims Act: The History of the Law*, ALL-ABOUT-QUI-TAM.ORG, available at [http://www.all-about-qui-tam.org/fca\\_history.shtml](http://www.all-about-qui-tam.org/fca_history.shtml) (last visited June 4, 2014).

government lacked the “insider knowledge needed to uncover [the] sophisticated schemes of fraud against the federal treasury,”<sup>26</sup> advocated for the passage of the FCA’s *qui tam* provision seeking to ‘deputize’ any citizen (called ‘relators’ for the purposes of the Act) with the power to sue on behalf of the government.<sup>27</sup> Successful relators were incentivized and rewarded with 50 percent of the damages paid by fraudsters.<sup>28</sup>

In a masterful display of policy-making, Lincoln had provided a zero cost solution to a high cost problem. With the passage of a single piece of legislation, the FCA, the burden of detecting and policing fraud—a task that the underfunded and fledgling federal government was ill-equipped to take on—was shifted from the government to private citizens who were in a better position to collect information regarding fraud in the private sector as they were often employed by, or competing with, companies and contractors that might choose to engage in fraudulent behavior. Moreover, it provided economic incentives, in the form of damages awarded by the court, for those private citizens to diligently detect the fraud. Finally, it provided an efficient method of enforcing the terms of the law. Any citizen who could prove or even suspected fraud against the government was authorized to file a *qui tam* complaint on behalf of the government in any federal court.

A *qui tam* complaint is, in nearly every respect, identical to a complaint brought solely on behalf of a private citizen or corporation. However, there are two noteworthy differences. First, along with the complaint, the plaintiff must disclose all evidence of fraud to the government. This permits the government, if it chooses, to pursue an independent investigation of the matter, to intervene in the suit, move to dismiss the suit, or attempt to settle the suit out of court.<sup>29</sup> Second, the case caption is distinct from a suit brought solely on behalf of a private party—it will include the phrase “*United States of America ex rel*” immediately preceding the plaintiff’s name. *Ex rel* is an abbreviation of the Latin phrase *ex relatione*, meaning “upon being related.”<sup>30</sup> This phrase is intended to indicate that the suit is brought for another, whose

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26. *History of the Federal False Claims Act*, WARREN BENSON LAW GRP., <http://www.warrenbensonlaw.com/history-of-law/> (last visited June 4, 2014).

27. *Id.*

28. *Id.*

29. *How Quit Tam Works*, BAUMAN & RAZOR GRP., <http://www.quitam.com/about-quitam/how-quit-tam-works/> (last visited June 4, 2014).

30. *Ex Rel.*, Cornell Univ. Law School: Legal Info. Inst., [http://www.law.cornell.edu/wex/ex\\_rel](http://www.law.cornell.edu/wex/ex_rel). (last visited June 4, 2014)

interests are ‘related’ to the plaintiffs.<sup>31</sup> It is for this reason that plaintiffs who bring *qui tam* suits are referred to as relators.

In 1943, the power of relators to sue on behalf of the government was dialed back when Congress amended the law to prohibit suit if a “government employee had [already] received a tip about the fraud or . . . any information about the fraud was contained in [any] . . . government file.”<sup>32</sup> As a result of these severe restrictions, the act fell “into almost complete disuse” until the mid-1980s when, again, military contractors engaged systemic fraud to take advantage of the Regan administration’s unprecedented increase in defense spending:

The public was reading a steady stream of stories describing outrageous billing practices, such as the Navy paying \$435 for an ordinary claw hammer and \$640 for a toilet seat. In 1985, the Department of Defense reported that 45 of the largest 100 defense contractors -- including nine of the top 10 -- were under investigation for multiple fraud offenses.<sup>33</sup>

In response to this widespread public scrutiny, the federal government sought to ‘crack down’ on fraud perpetrated by federal defense contractors. However, government agencies entrusted with the anti-fraud effort “complained that their . . . investigat[i]ons . . . were hamstrung by insufficient resources, a lack of adequate legal tools and the difficulty of getting individuals with knowledge of fraud to speak up.”<sup>34</sup> As a result, on October 27, 1986, Congress once again found it necessary to enlist the support of *qui tam* relators and amended the FCA to permit individuals who had already provided government with information concerning fraud to bring a *qui tam* suit.<sup>35</sup>

Although technical amendments to the bill have been introduced,<sup>36</sup> to date, the *qui tam* provisions have remained largely unchanged. However, the manner in which relators have used the *qui tam* provisions has evolved. As the role of the federal government and the funding it provides has expanded, so too has the reach of the Act. In addition to preventing fraud perpetuated by government contractors, the Act’s *qui tam* provisions have been used by relators to facilitate the development

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31. *Id.*

32. Phillips and Cohen LLP, *supra* note 25.

33. *Id.*

34. *Id.*

35. *Id.*

36. “In 2009, amendments to the False Claim Act were included as section 4 of the Fraud Enforcement and Recover Act [which] . . . clarified terms used in the original law that were not defined in the statute.” *Id.*

of subsidized housing for low income families<sup>37</sup>, police Medicare and Medicaid fraud<sup>38</sup>, restrict the misuse of food stamps<sup>39</sup>, enforce banking and lending regulations<sup>40</sup>, prevent employment discrimination<sup>41</sup>, regulate educational loan providers, enforce prison regulations<sup>42</sup>, prevent the misuse of tribal land and funds<sup>43</sup>, reimburse victims of investment fraud<sup>44</sup>, implement ethnical drug and pharmaceutical testing procedures<sup>45</sup>, regulate energy production<sup>46</sup>, encourage arms control efforts<sup>47</sup>, influence curriculums in publicly-funded schools<sup>48</sup>, and prevent bribery and public corruption.<sup>49</sup>

For the purposes of the present inquiry, it is important to note that each of the above-listed claims were successfully pursued by individuals that, but for the *qui tam* provisions included in the FCA, would have lacked the necessary Article III standing to bring suit in federal court.

#### IV. HOW THE FALSE CLAIMS ACT CAN BE USED TO ADDRESS THE PROBLEM OF ANIMAL STANDING

If, as noted above, a foundational challenge facing animal rights advocates seeking to proceed in court is an inability to establish standing on behalf of animals that they lack a direct or personal relationship with, the attractiveness of pursuing a FCA suit on behalf of injured animals is self-evident. Using the *qui tam* enforcement provision of the Act would

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37. See *e.g.*, *United States v. Polly*, 255 F. Supp. 610 (W.D.N.C. 1966); *United States v. Eghbal*, 475 F. Supp. 2d 1008 (C.D. Cal. 2007) *aff'd*, 548 F.3d 1281 (9th Cir. 2008).

38. See, *e.g.*, *United States v. Krizek*, 859 F. Supp. 5 (D.D.C. 1994) *supplemented*, 909 F. Supp. 32 (D.D.C. 1995) *aff'd in part and remanded*, 111 F.3d 934 (D.C. Cir. 1997); *United States v. Cabrera-Diaz*, 106 F. Supp. 2d 234 (D.P.R. 2000); *Visiting Nurse Ass'n of Brooklyn v. Thompson*, 378 F. Supp. 2d 75 (E.D.N.Y. 2004); *U.S. ex rel. Feingold v. Palmetto Gov't Benefits Adm'rs*, 477 F. Supp. 2d 1187 (S.D. Fla. 2007) *aff'd sub nom. Feingold v. Palmetto Gov't Benefits Adm'rs*, 278 Fed. Appx. 923 (11th Cir. 2008).

39. See, *e.g.*, *United States v. Truong*, 860 F. Supp. 1137 (E.D. La. 1994).

40. See, *e.g.*, *U.S. ex rel. S. Praver & Co. v. Verrill & Dana*, 962 F. Supp. 206 (D. Me. 1997); *United States v. Veneziale*, 268 F.2d 504 (3d Cir. 1959).

41. See, *e.g.*, *Orell v. UMass Mem'l Med. Ctr., Inc.*, 203 F. Supp. 2d 52 (D. Mass. 2002).

42. See, *e.g.*, *Alexander v. Gilmore*, 202 F. Supp. 2d 478 (E.D. Va. 2002).

43. See, *e.g.*, *United States v. Menominee Tribal Enterprises*, 601 F. Supp. 2d 1061 (E.D. Wis. 2009).

44. See, *e.g.*, *Wagner Iron Works v. United States*, 174 F. Supp. 956 (Ct. Cl. 1959).

45. See, *e.g.*, *In re Pharm. Indus. Average Wholesale Price Litig.*, 538 F. Supp. 2d 367 (D. Mass. 2008).

46. See, *e.g.*, *United States v. Sci. Applications Intern. Corp.*, 653 F. Supp. 2d 87 (D.D.C. 2009) *aff'd in part, vacated in part, remanded*, 626 F.3d 1257 (D.C. Cir. 2010).

47. See, *e.g.*, *U.S. ex rel. Hayes v. CMC Electronics, Inc.*, 297 F. Supp. 2d 734 (D.N.J. 2003).

48. See, *e.g.*, *U.S. ex rel. Haskins v. Omega Inst., Inc.*, 11 F. Supp. 2d 555 *decision clarified on reconsideration*, 25 F. Supp. 2d 510 (D.N.J. 1998).

49. See, *e.g.*, *United States v. Cripps*, 460 F. Supp. 969 (E.D. Mich. 1978).

permit a relator to side-step the problem of standing all together. The following section will consider what, if any, goals of animal rights advocates might be pursued within the confines of the FCA.

In order to pursue a *qui tam* action, the FCA requires only that a relator establish that a defendant “knowingly . . . presented, a false or fraudulent claim for payment or approval.”<sup>50</sup> Based upon this language, two meaningful elements can be identified when assessing the viability of a *qui tam* suit brought on behalf of an injured animal: first, whether there has been a ‘claim for repayment or approval’; and second, whether any ‘false or fraudulent claims’ are made against the interests of animals that might be actionable under the FCA.

*A. What constitutes a ‘claim for repayment or approval’ within the meaning of the False Claims Act?*

The courts have provided the following test to determine whether a false claim is made against the United States:

This test as to whether a false claim is made against the United States is whether there is a demand for money or for some transfer of public property or disbursement of public funds. Where the United States actually makes a loan by reason of a false application, there may be a claim under the false claims statute . . . the courts have always rejected the argument that the United States must suffer actual damages before penalties . . . may be collected.<sup>51</sup>

In other words, the FCA is potentially applicable any time that the federal government provides something of value.

Given this test, any individual, institution, or organization receiving federal monies is a potential FCA defendant. This is important because a number of programs that infringe upon the rights of animals receive direct federal funding. For example, a number of animal rights organizations list amongst their top priorities the abolition of vivisection or inhumane laboratory testing on animals. The majority of this type of testing (indeed, most scientific testing) is supported by federal grants issued by the National Institutes of Health (NIH).<sup>52</sup> At least one federal

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50. 31 U.S.C. § 3729(a)(1) (2006).

51. *United States v. Cherokee Implement Co.*, 216 F. Supp. 374, 375 (N.D. Iowa 1963).

52. *Vivisection / Animals in Research*, LAST CHANCE FOR ANIMALS, <http://www.lcanimal.org/index.php/campaigns/class-b-dealers-and-pet-theft/vivisectionanimals-in-research> (last visited June 4, 2014) (“How much money is spent on vivisection? Every year, the U.S vivisection industries spend over \$18 billion on animal experiments. The U.S. National Institutes of Health is the world’s greatest source that funds animal experimentation, with an annual budget of more than \$13 billion.”).

court has noted, as a result of the federal government's financial support for this research, the NIH and institutions receiving government funding for testing on animals are squarely within the scope of the FCA's regulations. Plainly, any institution that receives federal funds is subject to the FCA. Thus, the NIH, which is federally funded, and institutions that receive federal funds from the NIH, are potential defendants in an FCA suit.

Indeed, the only reported case which has sought to use the FCA as a means of advancing the interests of animals was borne of an effort to prevent federal funding for controversial cancer research. The research replicated brain tumors in dogs by injecting cancer cells into beagle pups *in utero*, and euthanizing dogs that did not develop tumors after their birth.<sup>53</sup> Although the case was dismissed due to timeliness (it was brought after the statute of limitations had run), the court noted the plaintiffs would have had standing to challenge the research despite their lack of personal connection to the animals in question.

Similarly, zoos, common targets of animal rights protests, "rely on government funding for 47% of their operating budget, on average" and therefore, constitute a potential FCA defendant.<sup>54</sup> One need not look far to find potential plaintiffs for such an action. The National Organization to Abolish Zoos, the No Voice Unheard Organization, Responsible Policies for Animals, Inc., the Showing Animals Respect and Kindness Organization, PETA, and countless other animal rights groups,<sup>55</sup> "oppose . . . zoos because cages and cramped enclosures at zoos deprive animals of the opportunity to satisfy their most basic needs."<sup>56</sup>

A number of other institutions that receive federal funding have come under fire from animal rights groups, including: factory farms (which are the recipients of federal subsidies)<sup>57</sup>; gas and oil companies

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53. *U.S. ex rel. Haight v. Catholic Healthcare W.*, 602 F.3d 949 (9th Cir. 2010)(Relators, as animal rights group and officer of group, filed qui tam action, under False Claims Act (FCA), against medical researcher and hospitals, alleging that researcher had engaged in fraud when applying for National Institutes of Health (NIH) grant).

54. Kelli B. Grant, *10 Things Zoos Won't Tell You*, MARKETWATCH.COM (May 31, 2011, 12:39 PM), <http://www.marketwatch.com/story/10-things-zoos-wont-tell-you-1306528026434>.

55. Ashley Navarra, Melissa Yuen, Aaron Tuttle, HANDBOOK OF ORGANIZATIONS FOCUSED ON ANIMALS (Mar. 31, 2009), available at <https://www.aza.org/uploadedFiles/Conservation/Partnerships/OrganizationsFocusedOnAnimals.3rd.pdf>.

56. *Animal Rights Uncompromised: Zoos*, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, <http://www.peta.org/about-peta/why-peta/zoos/> (last visited June 4, 2014).

57. Nathan Runkle, *Obama's Proposed Subsidy Cuts Could Impact Factory Farms*, MERCY FOR ANIMALS (Sept. 26, 2011), <http://www.mfablog.org/2011/09/obamas-proposed-subsidy-cuts-could-impact-factory-farms.html> ("the United States government has spent 16.9 billion in tax dollars to subsidize . . . factory-farmed animals").

(which receive nearly \$41 billion a year from the federal government)<sup>58</sup>; the fishing industry (which receives “\$713 million per year of direct subsidies . . . half of which . . . contribute to overfishing”)<sup>59</sup>; hunters (which receive USDA grants)<sup>60</sup>; and the auto industry (a heavily subsidized sector)<sup>61</sup>. Because each of these organizations and industries directly receive federal funding, relators seeking to use the Act in support of animals’ rights should have no difficulty in identifying potential defendants subject to the provisions of the FCA. What may be more difficult, however, is crafting an actionable claim for fraud or falsity within the meaning of the Act, which is discussed in the following section.

*B. What Constitutes ‘Fraud or Falsity’ Within the Meaning of the False Claims Act?*

There are two major avenues by which a *qui tam* relator might seek to establish a claim for fraud or falsity within the meaning of the FCA: (1) bringing a direct FCA claim based upon false statements found in publicly available records of potentially offending institutions; and (2) seeking to enforce animal rights legislation and environmental protection law through an ‘implied certification’ theory, which does not require an ‘affirmative misrepresentation’ on the part of the offending individual or institution. It is important to note that although direct and implied FCA claims are not two separate causes of action, they are analytically distinct because they rely on two separate theories of liability. Moreover, because a direct FCA claim requires a plaintiff to prove that a false statement has been made to the federal government in order to receive a material benefit and an implied claim requires a plaintiff to prove only that a material benefit has been conferred upon a defendant by the federal government, a plaintiff must consider the evidence they have when determining which type of FCA claim to pursue.

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58. Mark Clayton, *Budget Hawks: Does US Need to Give Gas and Oil Companies \$41 Billion a Year?*, CHRISTIAN SCI. MONITOR (Mar. 9 2011), <http://www.csmonitor.com/USA/Politics/2011/0309/Budget-hawks-Does-US-need-to-give-gas-and-oil-companies-41-billion-a-year>.

59. Jo Knight, *New Study Shows Eliminating Harmful Subsidies Could Improve Health of U.S. Fisheries*, PEW CHARITABLE TRUSTS (Mar. 3, 2009), [http://www.pewtrusts.org/news\\_room\\_detail.aspx?id=49752](http://www.pewtrusts.org/news_room_detail.aspx?id=49752)

60. Ducks Unlimited, *Ducks Unlimited Pleased With ‘Open Fields’ Funding*, DELTA FARM PRESS (Jan 31. 2011), <http://deltafarmpress.com/government/ducks-unlimited-pleased-open-fields-funding>.

61. Bob Moon, *Auto Industry Subsidies Are Piling Up*, MARKETPLACE BUS. (June 11, 2009, 3:23 PM), <http://www.marketplace.org/topics/business/auto-industry-subsidies-are-piling>.

### 1. ‘Direct’ FCA claims: reviewing applications for federal funding for affirmative misrepresentations

Direct FCA claims are claims seeking to remedy an affirmative misrepresentation made to the federal government in an effort to receive federal funds. Consider, for example, a medical testing facility that applied for and was awarded an NIH grant to pursue testing of a medical device on non-human animal subjects who had been appropriately sedated and medicated to reduce unnecessary suffering. Should an FCA relator find that the lab failed to provide the appropriate sedation or medication to their test subjects, a direct FCA claim would be appropriate because the lab had misrepresented the manner in which the testing would occur.

The practical difficulty in bringing a direct FCA claim is that it places the burden on the relator to seek out and provide evidence of a false representation made in the process of applying for federal funding. As a result, direct FCA claims generally require substantive research and a detailed review of government documents prior to bringing suit. However, relators have found a number of legal mechanisms to effectively gain access to the necessary information. One important tool that has been used to gain access to these government documents is the Freedom of Information Act (FOIA).

In the only reported case seeking to use the *qui tam* provisions of the FCA to prevent testing on animals in a laboratory setting, *United States ex rel. Patricia Haight, et al. v. Catholic Healthcare West, et. al.*, the plaintiffs had the benefit of being granted access to the defendant’s application for funding from the National Institutes of Health. Upon review of the application, the plaintiffs found that the defendant had “failed to disclose data showing a high rate of failure in preliminary trials, made false statements about the about the extent of his success with the research . . . and misrepresented another researcher’s involvement with the project.” As a result, the plaintiffs were able to bring an FCA action.<sup>62</sup>

Although a unique situation, future relators can use the *Patricia Haight* case as a model. First, plaintiffs, seeking substantive support that a misrepresentation was made, should file a FOIA request seeking access to documents provided by potential FCA defendants. Animal rights organizations especially should consider such a strategy; courts have consistently recognized that these types of organizations have ‘informational standing’ to seek access, through the FOIA, to

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62. *U.S. ex rel. Haight v. Catholic Healthcare W.*, 602 F.3d 949, 952 (9th Cir. 2010)

applications for federal funding that might provide the basis for a FCA suit.<sup>63</sup> Second, upon receipt of the information requested, plaintiffs should compare any claims made by the defendant in their pursuit of federal funding to their actual practices. Using this model, FCA relators can act as watchdogs for any organizations seeking federal funds and enforce violations of animal rights by filing ‘direct’ FCA claims.

Of course, this model is not universally applicable nor is it foolproof; two potential difficulties facing relators seeking to apply the *Haight* model immediately present themselves. First, potential relators must successfully establish standing and be granted a FOIA request. If the request is denied, the potential relators will only have access to publicly available information. Second, a direct FCA claim can only be successful when the defendant has made an affirmative misrepresentation in their application for federal funding. If no affirmative misrepresentation has been made, potential FCA relators can only proceed with a theory of ‘implied certification.’

## **2. Implied FCA Claims: Enforcing compliance with animal rights legislation through a theory of ‘implied certification’**

Implied FCA claims result when a defendant receives federal funding and engages in illegal behavior, yet no affirmative misrepresentation was made to the government in requesting the federal funding. In such a suit, the plaintiff’s claim rests upon the theory that by accepting federal funding, a defendant impliedly agrees to abide by all federal laws. The implied agreement replaces the affirmative misrepresentation required under the direct FCA suit for the purposes of establishing a defendant’s liability. Consider, once again, the above-described NIH-funded laboratory that engages in animal testing without providing appropriate anesthetizing medication to their test subjects. Even if the lab made no misrepresentations concerning the anesthetizing medication, the failure to medicate may constitute cruelty in contravention of federal animal rights laws, and a FCA relator may pursue an implied FCA claim against the lab as a result.

Courts have recognized that when the federal government provides federal monies or a grant to a private organization, it seeks to have that funding used in furtherance of—not in contravention of—its statutorily defined goals. Thus, upon receipt of payment, such an organization is presumed by many courts to have impliedly consented to the terms and

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63. *Am. Soc. for Prevention of Cruelty to Animals v. Feld Entm’t, Inc.*, 659 F.3d 13, 22 (D.C. Cir. 2011)

conditions of any relevant federal laws. Should such an organization violate those laws, therefore, they may be subject to an implied FCA action.

However, courts have also noted that the FCA should not be considered a blunt instrument for enforcing all violations of all federal law, meaning that, although the FCA has broad applicability, it should not be used as a means of avoiding the nuances and requirements included in federal laws and, instead, should only be used to when violations of the core principles of federal law are achieved through federal funding.<sup>64</sup> In order to ensure that the Act is used as a precision tool, as opposed to a blunt instrument, courts have developed a materiality test for implied certification. The materiality test permits an implied FCA claim to be brought to enforce federal law if, and only if, “the regulatory violation is clearly central to the program involved.”<sup>65</sup> Although there is no clear definition of what constitutes centrality within the meaning of the materiality test, federal courts have provided a few examples of when implied certification claims are permitted: (1) enforcement of the Small Business Administration Minority-Owned Business Program (where a defendant entered into a co-management agreement with a non-minority-owned business)<sup>66</sup>; (2) enforcement of Medicaid regulations which “require health care providers to meet quality of care standards” (where a defendant failed to provide a safe environment for children in psychiatric care)<sup>67</sup>; and (3) enforcement of Medicare regulations which required services to be provided economically (where a defendant ordered a test “solely to increase the Medicare payout,” which the court found was clearly contrary to the central purpose of the regulations).<sup>68</sup> Given the far-reaching applicability of the implied certification theory, there is no principled reason that it could not be applied to enforce federal environmental protection or animal rights laws as well. The following section will outline the manner in which the FCA might function to

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64. See, e.g., *U.S. ex rel. Wright v. Comstock Resources, Inc.*, 2011 WL 6259893 (5th Cir. 2011).

65. Claire M. Sylvia, *The False Claims Act: Fraud Against the Government* § 4:33 (2d ed. 2010).

66. *Ab-Tech Const., Inc. v. U.S.*, 31 Fed. Cl. 429, 434, 39 Cont. Cas. Fed. (CCH) ¶76668 (1994), *aff'd*, 57 F.3d 1084 (Fed. Cir. 1995) (The court viewed the defendant's requests for payment pursuant to the program as “implied certification by Ab-Tech of its continuing adherence to the requirements for participation in the [minority-owned business] program.”).

67. *U.S. ex rel. Aranda v. Community Psychiatric Centers of Oklahoma, Inc.*, 945 F. Supp. 1485, 52 Soc. Sec. Rep. Serv. 371 (W.D. Okla. 1996).

68. *U.S. ex rel. Kneepkins v. Gambro Healthcare, Inc.*, 115 F. Supp. 2d 35 (D. Mass. 2000).

permit standing to enforce some of the most hailed pieces of environmental law.

#### V. WHAT ENVIRONMENTAL LAW OR ANIMAL RIGHTS LEGISLATION MIGHT BE ENFORCED THROUGH THE FCA'S 'QUI TAM' PROVISIONS?

The federal courts have spoken clearly to plaintiffs seeking to enforce a piece of federal law through an application of the FCA's *qui tam* provisions, explaining that a successful plaintiff cannot use the FCA as a blunt instrument. As such, plaintiffs must carefully consider what federal laws are truly amenable to enforcement via a *qui tam* claim. It is the aim of this section to provide some guidance as to what pieces of environmental or animal rights law might be appropriate for enforcement via the FCA's *qui tam* provisions.

To briefly summarize the above analysis, it has been argued that, as an empirical and philosophical matter, a fundamental problem for animal rights activists seeking to protect the environment or the rights of animals through the federal judiciary is their inability to maintain Article III standing. Further, it has been suggested that, given the extent to which federal funding been used to subsidize individuals and industries which contribute to animal suffering and the degradation of the environment, the FCA—which seeks ensure that federal monies are not spent in violation of federal law and permits a litigant to avoid the question of standing—might allow the enforcement of environmental protection or animal rights legislation through individual relator-suits. Supposing the validity of these initial propositions, the remaining question is what pieces of federal law are most strategically suited to enforcement via an FCA claim.

Although nearly any piece of federal environmental legislation or animals rights law could, in theory, be enforced through an innovative application of the FCA, the following section will classify some of the most well-recognized federal environmental protections into four analytically distinct categories: (1) laws that include a citizen enforcement provision and affirmatively contemplated enforcement by individuals; (2) laws that lack a citizen enforcement provision, but require that affirmative representations be made to a federal agency by potential violators; (3) laws that rely on permitting procedures as a means of environmental management; and (4) laws that merely prohibit certain environmentally dangerous actions, but do not require that an affirmative pledge be made to the federal government to refrain from those actions.

It is argued that the first three categories of federal law are amenable, in varying degrees, to enforcement via a direct FCA claim. However, the final category is amenable only to an FCA claim brought pursuant an implied certification theory. It is important to note that the particular pieces of legislation discussed are not intended to be an exhaustive list of laws that might be enforced via a FCA suit. Rather, they are meant only to be illustrative examples or ideal types of categories described above. In other words, these categories provide practitioners with categories that may serve as an analytical tool to classify any federal law and, thereby, consider what potential FCA claims might exist to enforce its provisions.

*A. Enforcing Laws that Include ‘Citizen Enforcement Provisions’: The Case of the Endangered Species Act (ESA)*

No serious discussion of strategic, citizen-based enforcement of federal environmental law can avoid a consideration of the Endangered Species Act (ESA). Enacted in 1973, the ESA established a scheme whereby “endangered” or “threatened” animal species could be protected from “private and governmental actions that may jeopardize their survival and recovery.”<sup>69</sup>

Without considering the FCA, an individual seeking to bring a suit to protect a threatened or endangered animal population would likely turn to the ESA as a enforcement mechanism because it includes, at Section 11(g), a “citizen suit” provision that allows “any person” to commence a civil suit in federal district court on his or her own behalf to force compliance with the ESA’s mandates.<sup>70</sup>

On its face, Section 11(g) appears to provide the necessary authority for anyone to enforce the law against any entity threatening an endangered or threatened animal population and, therefore, obviates the need for an application of the FCA. However, as federal courts have consistently maintained:

[t]he ESA does not provide Article III standing. Plaintiffs in ESA citizen-suit actions must satisfy the following requirements: an injury-in-fact, to a cognizable interest fairly traceable to the alleged violation, [and] likely to be redressed by the relief sought.<sup>71</sup>

It is because of this constraint that successful suits brought pursuant to Section 11(g) have been few and far between.

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69. Publisher’s Editorial Staff, 89 Am. Jur. Proof of Facts 125 (3d. 2006).

70. *Id.*

71. *Id.*

While there is no guarantee against similar restrictions imposed upon *qui tam* suits, the ability of FCA to permit plaintiffs to “side-step” the Article III standing requirement holds the potential to re-invigorate the ESA’s “citizen-enforcement” and accomplish what Section 11(g) could not—providing effective federal protection to ‘endangered’ or ‘threatened’ species and their habitats. Further, because the ESA includes a number of mandatory reporting requirements, FCA relators seeking to enforce the Act through a ‘direct’ FCA claim will be afforded ample material with which to establish the ‘false claim of compliance’ necessary to bring suit directly under the Act.<sup>72</sup>

*B. Enforcing Laws that Require Affirmative Certifications or Representations to the Federal Government: the National Environmental Policy Act (NEPA)*

The second analytically useful category of federal environmental law are pieces of legislation that do not explicitly include an ESA-style citizen enforcement provision, but do require affirmative representations be made to the federal government. An affirmative representation or certification is any statement made to the federal government that is a necessary pre-requisite to gaining federal funding. As long as the law requires that such a statement be made, it is a potential candidate for enforcement via a direct FCA suit. Consider, for example, the National Environmental Policy Act (NEPA). NEPA, often considered the “first of the modern environmental statutes,”<sup>73</sup> requires that any individual, institution or corporation undertaking “major activities [on behalf of] . . . or *funded* by the federal government”<sup>74</sup> submit an environmental impact assessment to the federal Council on Environmental Quality.<sup>75</sup> Although NEPA was widely considered to be a massive step forward in environmental law by requiring an explicit consideration of the risks that

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72. Indeed, according to the U.S. Fish & Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS), who are tasked with implementing the ESA, “any action [that] might harm a threatened or endangered species” requires application for a “permit [that certifies ESA compliance] . . . from the . . . (USFWS) or . . . (NMFS), under Section 10 of the ESA.” See *Procedures for Endangered Species Act Compliance*, URBAN DRAINAGE AND FLOOD CONTROL DIST., [http://www.udfcd.org/recent\\_news/pdf/Endangered%20Species%20Act%20Procedures%20Final%2010252010.pdf](http://www.udfcd.org/recent_news/pdf/Endangered%20Species%20Act%20Procedures%20Final%2010252010.pdf) (last visited Nov. 5, 2013).

73. *Environmental Laws & Treaties*, NAT. RESOURCES DEF. COUNS., <http://www.nrdc.org/reference/laws.asp> (last visited Nov. 5, 2013).

74. *Id.* (emphasis added).

75. *Id.*; see also 42 U.S.C. 4332 (2)(c) (2006) (“Congress . . . directs that . . . Federal actions [include] . . . a detailed statement . . . on . . . the environmental impact of the proposed action . . . [c]opies of such statement . . . shall be made available to the President, the Council on Environmental Quality and to the public”).

governmental projects and actions pose to the environment, it fails to specify any penalty if an environmental impact assessment turns out to be inaccurate. Rather, it seeks only to provide the government with relevant environmental data. FCA relators, however, may be able to provide much needed teeth to NEPA by bringing direct FCA suits following the submission to the federal government of any false or misleading information submitted as part of an environmental impact assessment.

*C. Enforcing Laws that Rely on Permitting as a Means of Environmental Management: the Marine Mammals Protection Act*

Direct FCA claims—FCA claims brought based upon affirmative misrepresentations made to the federal government—might also be brought to enforce any federal permitting process, a system used to manage many federal environmental policies. Consider, for example, the Marine Mammals Protection Act (MMPA). The MMPA “prohibits, with certain exceptions, the ‘take’ marine mammals in U.S. waters and by U.S. citizens on the high seas, and the importation of marine mammals and marine mammal products into the U.S.”<sup>76</sup> Authorization for a ‘take’ of marine mammals within the meaning of the MMPA comes from permits issued by the National Marine Fisheries Service’s Office of Protected Resources that may be issued for scientific research, public display, and the importation/exportation of marine mammal parts and products upon determination by the Service that the issuance is consistent with the MMPA’s regulations.<sup>77</sup>

Although largely deemed a success in the protection of marine mammals, there are widespread reports of fraudulent or incomplete applications submitted to and approved by the NMFS that have limited the Act’s potential to protect threatened marine life.<sup>78</sup> Both fraudulent and incomplete applications pose a danger to the effectiveness of the MMPA, but in somewhat different ways. Outright fraud in the application process (e.g., falsely affirming that a take is for an MMPA-approved purpose) directly contributes to, and indeed sanctions, the unnecessary death of marine mammals, many of which are at risk of extinction. Incomplete applications, although less pernicious than

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76. *Marine Mammal Protection Act (MMPA)*, NOAA FISHERIES, <http://www.nmfs.noaa.gov/pr/laws/mmpa/> (last updated June 14, 2013).

77. *See id.*

78. *NOAA-NMFS Failures in Marine Mammal Inventory Management for Killer Whales*, ORCA PROJECT (Mar. 18, 2011), <http://theorcaproject.wordpress.com/2011/03/18/noaa-nmfs-marine-mammal-inventory-report-deficiencies/>.

outright fraud, can still threaten to undermine the goals of the MMPA. If regulators issue permits based upon incomplete information included in these applications, their ability to manage and protect marine mammal populations will not be effective as it otherwise could be.

This failing in the Act's implementation and enforcement could be effectively addressed by strategic use of the FCA. The FCA permits relators to bring direct FCA suits for any false statements included in these applications, and enjoins any illegal or unnecessary takings of marine mammals that fall within the protections of the Act. Similar suits might also be brought to enforce the terms of any other federal law that relies on the issuance of permits to individuals seeking to engage in environmentally dangerous activities.

*D. Laws that Prohibit Environmentally Dangerous Activities but Require No Affirmative Pledge be made to the Federal Government.*

Even if a federal environmental law does not include a permitting or certification process that might be amenable to enforcement through a direct FCA suit, nearly any federal law that prohibits environmentally dangerous activities might be enforced through application of an implied FCA action.

Indeed, in one of the few reported cases that considered the potential for the FCA to be used as a means to enforce federal environmental law, the “Supreme Court . . . determined that regulatory approvals are conditions precedent to extracting oil and gas,”<sup>79</sup> and therefore, oil and gas corporations are subject to implied certification FCA claims—claims based upon the theory that when an individual or organization accepts federal funds they ‘impliedly certify’ that those funds will not be used in contravention of federal law. This holding is a strategic boon to potential FCA claimants seeking to enforce federal laws protecting coastlines from the ravages that often accompany oil and gas drilling operations, such as the Federal Water Control Act, the Act to Prevent Pollution from Ships, the Oil Pollution Act of 1990, and the Outer Continental Shelf Lands Act, because it obviates the need for a potential relator to establish that a polluter has, in addition to polluting, also lied about it to the government as would be required in a direct FCA claim.

The case of *U.S. ex rel. Marcy v. Rowan Companies, Inc.*<sup>80</sup> provides an example of such a plaintiff. *U.S. ex rel. Marcy* concerned an oil

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79. *Abbott v. BP Exploration & Prod. Inc.*, 781 F. Supp. 2d 453, 463 (S.D. Tex. 2011)

80. *U.S. ex rel. Marcy v. Rowan Companies, Inc.*, 520 F.3d 384, 389 (5th Cir. 2008)

company employee who alleged that “while employed on [an] offshore drilling unit, he was ordered to illegally dump hazardous substances into Gulf of Mexico at night [and, in response to these orders,] brought a *qui tam* action on behalf of United States under the False Claims Act.”<sup>81</sup> The court concluded that:

[W]hen “the government has conditioned payment of a claim upon a claimant’s certification of compliance with, for example, a statute of regulation, a claimant submits a false or fraudulent claim when he or she falsely certifies compliance with that statute or regulation.” These “false certification of compliance create liability under the FCA when certification is a prerequisite to obtaining a government benefit.”<sup>82</sup>

In this way, the Court’s finding grants standing to any individual who merely observes illegal pollution, and allows them to initiate a FCA claim to enjoin the behavior.

#### VI. THE FALSE CLAIMS ACT AND THE RECONCEPTUALIZATION OF THE ROLE OF ANIMALS IN THE AMERICAN JUDICIARY

The False Claims Act provides immediate pragmatic benefits to those seeking to pursue a claim on behalf of the environment or animal rights; it allows them to avoid the difficult problem of establishing a basis upon which animals can claim the Article III standing necessary to proceed in federal court. In addition to that functional benefit, the resurrection of the Act’s *qui tam* provisions in the service of animal rights also holds the potential to reframe the debate of the proper role of animals in the judicial system as a whole. The present articulation of the standing doctrine with respect to animals already ‘gives up the debate’ on some fundamental issues with respect to animal rights, as it explicitly requires that a litigant seeking to protect animals through the judiciary do so only to protect the *litigant’s* interests, not the interests of the animals themselves.

Nowhere is this more terrifyingly clear than in the D.C. court’s analysis of the standing with respect to animal cruelty, noting that animals do not have a judicially recognizable interest in being free from inhumane treatment; however, “people have a cognizable interest in ‘view[ing] animals free from . . . inhumane treatment.’”<sup>83</sup> This reasoning

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81. *Id.*

82. *Id.* (citing *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 902 (5th Cir.1997)).

83. *E.g.*, *Animal Legal Defense Fund, Inc. v. Glickman*, 154 F.3d 426, 433 (D.C. Cir.1998) (quoting *Humane Society v. Babbitt*, 46 F.3d 93, 99 n.7 (D.C. Cir 1995)).

is alarming because it makes clear the presumption, at least in the area of federal standing law, that non-human animals are only valuable inasmuch as they serve the needs of humans. In this mode of thinking, as was made clear by the court's reasoning, even the suffering of non-human animals is cognizable to the federal courts only inasmuch as that suffering is difficult for humans to watch. Such a view gives up the game of productively framing the debate over advancing animal rights before it even begins. It precludes, for example, an articulation of animal rights rooted in an understanding that non-human animals have inherent value as sentient beings. As noted by ethicist, philosopher, and animal rights advocate Professor Warwick Fox, the Court's "arguments . . . betray anthropocentric assumptions . . . [as it] argue[s] that the nonhuman world should be conserved or preserved because of its use value to humans (e.g., its scientific, recreational, or aesthetic value) rather than for its own sake or for its use value to nonhuman beings."<sup>84</sup> Such an "anthropocentric value system that only regards natural processes as important for human survival cannot serve as the basis of a comprehensive environmental policy. . . . [Indeed] anthropocentrism . . . has been the primary force in the creation of the environmental crisis"<sup>85</sup> by ensuring the "elimination or overexploitation of those things that are not considered of sufficient instrumental value for human beings."<sup>86</sup> Put another way, one of the dangers of anthropocentric systems of thought is that they provide ideological justification for destroying those parts of the environment that do not provide an immediately recognizable benefit to humanity. Such a view not only places the lives of non-human animals at risk, but also poses a threat to human life as many environmental systems are extraordinarily complex and interconnected, such that even those aspects of the environment that may appear initially superfluous might later prove to serve an important role in the health and survival of humanity as well.

The FCA's *qui tam* enforcement provisions, however, permit an alternative and non-anthropocentric vision of 'standing' for animals. *Qui tam* relators do not bring suit or seek standing on behalf of themselves or to vindicate their own interest. Rather, as courts have explicitly noted, "[i]t is clear . . . that in a *qui tam* action, the government is the real party in interest."<sup>87</sup> "When a legislative body enacts provisions enabling *qui*

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84. Warwick Fox, *Towards a Transpersonal Ecology: Developing New Foundations for Environmentalism* 10 (1995).

85. Eric Katz, *Nature As Subject: Human Obligation and Natural Community* 166 (1997).

86. Robin Attfield, *The Ethics of the Global Environment* 104 (1988).

87. *United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 720 (9th Cir. 1994);

*tam* actions, that act carries with it an understanding that in such suits it is the government, and not the individual relator, who has suffered the injury resulting from the violation.”<sup>88</sup> In this way, FCA suits brought on behalf of individual animals invite them, at least as a judicial matter, into the general body politic as an entity that the government has an independent interest in preserving. It is this same interest that the government has identified in protecting its own citizens or the unborn.<sup>89</sup>

Recognition by the courts of the state’s interest in animal life is not without consequence as it presents a legal and institutional challenge to an “attitude [that] is integral to the present ecological crisis,” a “hierarchical structure of thinking which presumes that . . . human related characteristics are morally more important than the rest of the living entities . . . in nature”; that “the natural world is merely a surround, backdrop or setting for the main attraction: us.”<sup>90</sup>

Some purists might argue that a FCA suit brought on behalf of the government to vindicate the interests of animals, as opposed to granting animals standing to sue on their own behalf, re-entrenches an anthropocentric mindset. However, as noted by legal scholar Cass Sunstein, “this type of proceeding is hardly foreign to our law; consider suits brought on behalf of children or corporations.”<sup>91</sup> Thus, FCA proceedings in which a relator and the federal government assume certain “guardian-like” obligations on behalf of individual animals should not be considered as exclusive to animals as the same procedure has been adopted for human animals and their most revered institutions.

In sum, the ‘problem of animal standing’ has plagued those seeking to advance the cause of animal rights through the federal judiciary because animals, who have suffered injury, are statutorily precluded from proceeding in court on their own behalf and their human representatives have not been injured in a manner that is sufficient to grant them standing. *Qui tam* suits can function to address this ‘problem of animal standing’ by permitting the federal government to serve as the injured party for the purposes of establishing Article III standing, and,

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88. *Humphry v. Viacom*, No. 06-2768 (DMC), 2007 U.S. Dist. LEXIS 44679, at 9-10; *see also United States ex rel. Kreindler v. United Technologies*, 985 F.2d 1148, 1154 (2d Cir.) (“the government remains the real party in interest . . . in the *qui tam* suit), *cert. denied*, 125 L. Ed. 2d 663, 113 S.Ct. 2962 (1993); *United States ex rel. Milam v. Univ. of Tex. M.D. Anderson Cancer Center*, 961 F.2d 46, 48 (4th Cir. 1992) (“the United States must be the real plaintiff in this suit”).

89. *Planned Parenthood v. Casey*, 505 U.S. 833, 873 (1992) (“the State has an interest in protecting the life of the unborn.”)

90. Patrick Curry, *Ethological Ethics: A Critical Introduction* 6 (2011).

91. Cass R. Sunstein, *A Tribute to Kenneth L. Karst: Standing for Animals* (with Notes on Animal Rights), 47 *UCLA L. REV.* 1333, 1359 (2000).

statutorily, assign the right to redress that injury to individual *qui tam* relators.

Permitting the federal government to serve as the injured party provides a pragmatic benefit to those seeking to protect animal rights through the federal judiciary because it permits suit to proceed beyond the filing of a motion to dismiss for lack of standing. However, it also provides an important ideological benefit. *Qui tam* suits brought to enforce animal rights laws allow the government to assert it has sustained harm when laws that protect animal life are violated; this mirrors the manner in which the government asserts a right to proceed with suits against criminals because they have injured the government by violating its criminal laws. Just as the government has an interest in the health and safety of human life—achieved through the enforcement of its criminal legislation—the government should have an equal interest in the health and safety of animal life through the enforcement of its environmental and animal rights laws.

It is important to recognize that merely bringing *qui tam* suits to vindicate animal rights in federal court will not instantly amount to landmark changes. However, the decisions that result from *qui tam* suits brought by animal rights organizations can serve as the ideological basis and judicial precedent for broader federal protection of animal rights in the future.

## VII. CONCLUSION

By allowing litigants to avoid the question of standing, the FCA provides animal rights advocates a unique and powerful mechanism to advance the interests of animals in federal courts. Nevertheless, because it was passed as a means to rein in fraud perpetrated against the government by defense contractors, the FCA has been largely ignored and underused in the context of environmental lawsuits. However, as the role of the federal government continues to expand, so does the reach of the FCA, and it should be re-engaged in the modern era as a potentially revolutionary legal tool. Because federal law is becoming increasingly conservative with respect to the protection of animal rights, animals and their habitats are in desperate need of lawyers willing to make creative use of laws, such as the FCA, that are already on the books.

The FCA can be effectively employed by relators to ‘fill the gaps’ in currently existing environmental policy. For nearly every criticism that might be lodged against the current federal environmental protection scheme, the FCA provides a potential solution. Three examples have been identified in support of this contention. First, the National

Environmental Policy Act, which requires the reporting of potential harm to the environment but includes no enforcement or sanction should that harm come to pass, can be enforced through the FCA as it permits individual relators to seek sanctions in the form of damages and injunctions. Second, the Marine Mammals Protection Act, which has failed largely due to lack of oversight or mismanagement, can be revitalized through the FCA, which ‘deputizes’ every lawyer in the United States to enforce its monitoring provisions. Finally, the Endangered Species Act, which seeks, without success due lack of standing, to provide the authority for individual citizens to enforce its provisions, can avoid its standing problem through the FCA, which provides a mechanism to side-step the question of standing altogether.

Therefore, regardless of its original intent, the civil war era False Claims Act can and should be adopted, by environmental lawyers and environmental activists, into the canon of landmark environmental legislation.

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