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## ENVIRONMENTAL CITIZEN SUITS AND GOVERNMENT ENFORCEMENT

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### SUMMARY

Citizen suits play a significant role in the enforcement of federal law in the United States. This article introduces citizen suits as a supplement to government enforcement and identifies the relationship that these suits have to government enforcement.

### 1 CITIZEN SUITS AS A SUPPLEMENT TO GOVERNMENT ENFORCEMENT

Citizen suits are actions filed by private parties seeking to abate ongoing violations of environmental laws. This paper will discuss these suits, the legal provisions that apply, and governmental oversight of citizen litigation. The environmental laws also have provisions allowing citizens to bring suit against the government; such suits are an Environmental Protection Agency rate topic and will not be addressed in this paper.

The Environment and Natural Resources Division of the U.S. Department of Justice (together with the Environmental Protection Agency) monitors citizen enforcement of federal environmental statutes. Citizen enforcement can be an important component of environmental enforcement, as the government has only limited resources with which to bring its own enforcement actions. From 2000 to 2007, Environment and Natural Resources Division received, on average, eleven Clean Air Act and 53 Clean Water Act citizen suit complaints per year.

The U.S. Congress enacted the first citizen suit provision in the Clean Air Act of 1970 (*see* 42 U.S.C. 7604). Since then, citizen suit provisions have been a component of every major environmental statute with the exception of the Federal Insecticide, Fungicide, and Rodenticide Act. In addition to the Clean Air Act and Clean Water Act, statutes that contain citizen suit provisions include the Safe Drinking Water Act, the Resource Conservation and Recovery Act, the Toxics Substances Control Act, and the Endangered Species Act. Citizen plaintiffs may seek injunctive relief (an order to comply with the law), civil penalties, and attorney fees.

Congress intended to create an incentive for regulated entities to comply with the law by empowering those most affected by pollution to ensure compliance with environmental protection laws when federal or state governments do not do so. The legislative history of these provisions reflect tensions between those who wanted to provide a safety valve when citizens were harmed by pollution and those who feared the courts would be flooded with litigation. These tensions led to safeguards including a requirement for prior notice of suit to the defendant and the government, a bar on suit in cases in which there is prior government enforcement action, and federal government oversight of suits and settlements.

There have been a number of significant citizen suits, and citizen groups often attain substantial relief in citizen suit cases. To cite a recent high-profile example, in 2007, the Supreme Court issued a ruling in *Duke Energy*, a case in which there were both a federal government claim and a claim by a citizen's group against the same defendant, a power company, relating to violations of the Clean Air Act (the Supreme Court had accepted review of the case following a request by the citizen's group). Citations to other notable citizen suit cases may be found in the bibliography, below.

## **2 FEDERAL OVERSIGHT OF CITIZEN SUITS AND THEIR RELATIONSHIP TO GOVERNMENT ENFORCEMENT**

The citizen suit provisions include elements to allow governmental oversight of citizen litigation. These elements include:

### **2.1 Notice**

The citizen suit provisions of the major environmental statutes require citizens to notify the agency with enforcement authority prior to bringing suit. *See* 33 U.S.C. 1365(b) (60-day notice requirement of the Clean Water Act). According to the legislative history, the purpose of the required notice is to allow the government to have an opportunity to enforce. Such notification alerts federal and state agencies to the alleged violations, thus enabling them to take enforcement action. The defendant must also receive notice; this allows the violator to come into compliance, which may enable the potential defendant to avoid suit altogether, to reduce its liability and limit the number of days in violation, or allow the parties to discuss settlement before litigation ensues.

### **2.2 Government Intervention**

The United States does not routinely intervene in citizen suits, but it can and does do so, when appropriate. The citizen suit provisions allow the federal government to intervene as a matter of right.

### 2.3 Diligent Prosecution

As previously noted, if the United States is diligently enforcing against a violation, a citizen suit against the same violation may be barred. The statutory bar varies from provision to provision, with some bars applying only to governmental enforcement actions in court and others applying equally to administrative enforcement actions.

### 2.4 45-Day Comment Period

The Clean Water Act, section 505(c)(3), and Clean Air Act, section 304(c)(3), require both complaints and proposed consent decrees to be served on the Environmental Protection Agency and the Attorney General. Once the parties have served the proposed consent decree on the Environmental Protection Agency and the Attorney General, the court is required to wait at least 45 days before it can adopt the proposed consent judgment. The Clean Air Act 45-day notice provision specifies that the Government “may submit its comments on the proposed consent judgment to the court and parties or may intervene as a matter of right” during the reserved comment period (see 42 U.S.C. 7604(c)(3)). Clean Water Act legislative history suggests that the 45-day notice provision was intended to protect the public against, “abusive, collusive or inadequate settlements,” and to “maintain the ability of the government to set its own enforcement priorities” (see remarks of Senator Chafee, *Legislative History of the Water Quality Act of 1987* at 1351).

### 2.5 The United States Not Bound by Citizen Suits

Citizen suit settlements do not bind the United States. The case law is clear that the United States is not bound by any settlement of an action brought under an environmental citizen suit. See, e.g., *Hathorn v. Lovorn*, 457 U.S. 255, 268, n.23 (1982) (Attorney General is not bound by cases to which he was not a party); *Sierra Club v. Electronic Controls Design*, 909 F.2d 1350, 1356 n.8 (9th Cir. 1990) (United States is not bound by consent judgment in Clean Water Act citizen suit and can bring its own enforcement action at any time). Thus, the United States remains free at all times to bring its own enforcement action.

## 3 ELEMENTS OF CITIZEN SUIT SETTLEMENTS

Proposed settlements in Clean Air Act and Clean Water Act citizen suits are generally reviewed by Environment and Natural Resources Division and the Environmental Protection Agency. Environment and Natural Resources Division attorneys take an active role in the review of proposed settlements and may negotiate changes to a proposed settlement, may file comments on a proposed settlement, or may object to entry.

### **3.1 Consent Decrees**

Most environmental citizen suits are resolved by consent decrees. Consent decrees typically include civil penalties paid to the U.S. Treasury, injunctive relief, mitigation projects, or a combination of these remedies. Consent decrees often have a termination date or formula for determining a termination date, with the termination date set sufficiently far in the future to allow for continued compliance.

### **3.2 Relief**

Environment and Natural Resources Division reviews each proposed consent decree under standard criteria. As a reflection of the overarching purposes of the Acts, each proposed consent judgment is reviewed for injunctive relief and stipulated penalties sufficient to bring the defendant into compliance.

### **3.3 Civil Penalties and Stipulated Penalties**

Civil penalties resulting from court order or settlement are paid to the United States Treasury. Civil penalties are imposed for past violations; stipulated penalties are prescribed to ensure future compliance with the consent decree. Stipulated penalties fix a penalty amount on a per day and per violation basis. Most statutes specify maximum penalty amounts and factors for courts to take into account in assessing civil penalties (*see* 33 U.S.C. 1365(a) (Clean Water Act) and 42 U.S.C. 7604(a) (Clean Air Act) (as amended in 1990)). The Environmental Protection Agency developed a civil penalty policy under which it seeks penalties by calculating and recovering the economic benefit the violator has achieved from delayed compliance and adjusting it against other factors, such as the gravity of the violation and good faith efforts of the violator to comply.

### **3.4 Supplemental Environmental Projects**

Citizen suit resolutions at times also incorporate Supplemental Environmental Projects, which are environmentally beneficial projects that defendants agree to undertake in settlement of an enforcement action, and which the defendant would not otherwise perform. Supplemental Environmental Projects include a variety of projects that range from pollution reduction to prevention projects that address the resource that has been affected by a violation. Unlike government enforcement cases where mitigation projects are implemented by the defendant, some projects may be implemented by environmental non-profits, community organizations, or land trusts active in the area where the violation occurred. The United States reviews Supplemental Environmental Projects for their appropriateness and on other criteria.

### 3.5 No Self-Dealing

A plaintiff cannot obtain damages or other awards in settlement of citizen suit claims. Environmental citizen suits are intended to enable citizens to obtain relief from violations of the environmental laws, and to deter future violations, not to compensate the plaintiff for any losses suffered as a result of the violations. Except for reasonable attorney's fees and litigation costs, which are authorized in citizen suit provisions, a settlement of citizen suit claims should not involve a direct or indirect payment from the defendant to the plaintiff.

## 4 REFERENCES

<sup>1</sup> Haag, Mark. *The Department of Justice's Role in Monitoring Environmental Citizen Suits*. American Bar Association, Section of Natural Resources, Energy and Environmental Law. October 17, 1997.

<sup>2</sup> Lloyd, Edward. *Citizen Suits and the Defenses Against Them*. American Law Institute - American Bar Association Continuing Legal Education. June 27-30, 2007.

<sup>3</sup> Axline, Michael. *Environmental Citizen Suits*. Butterworth Legal Publishers. 1995.

## 5 BIBLIOGRAPHY

Environmental Protection Agency, *Final Supplemental Environmental Projects Policy* (April 10, 1998) available at [http://www.EnvironmentalProtectionAgency.gov/compliance/resources/policies/civil/Supplemental Environmental Projects /fnlsup-hermn-mem.pdf](http://www.EnvironmentalProtectionAgency.gov/compliance/resources/policies/civil/SupplementalEnvironmentalProjects/fnl-sup-hermn-mem.pdf)

Environmental Protection Agency, *Policy on Civil Penalties*, 41 Env't Rep. (BNA) (Fed. Laws) 2991 (1984).

Lloyd, Edward, "Supplemental Environmental Projects Or Supplemental Environmental Projects Have Been Effectively Used in Citizen Suits to Deter Future Violations as well as to Achieve Significant Supplemental Environmental Benefits." 10 Widener Law Review 2, 413 (2004).

*Environmental Defense v. Duke Energy Corp.*, 127 S.Ct. 1423 (2007).

*Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 538 U.S. 167 (2000).

*Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49, (1987).

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