

# Environmental Citizen Suits: Overview and Current Trends

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# Overview of Citizen Suits

- Authorized in most federal environmental statutes (CWA, CAA etc.)
- Remedies include civil penalties, injunctive relief, attorneys' fees (no damages)
- Significant barriers exist:
  - Constitutional: standing, mootness, etc.
  - Pre-suit notice
  - Diligent prosecution = prior govt enforcement

# Citizen Suit Elements: Clean Water Act § 505

Suit may be filed:

- Against any person
- Alleged to be in violation
  - *Gwaltney v. CBF*, 484 U.S. 49 (1987): not for “wholly past” violations, but can sue over a “state of noncompliance”
- Of an “effluent standard or limitation” - § 505(f)
  - Includes EPA- or State-issued NPDES permit conditions
  - Discharges without a permit (unlawful per § 301(a))
  - Does not include § 404 permit conditions

Comparable provisions in CAA, RCRA, etc.

# Barriers to Citizen Suits

## 1) 60-day Notice to defendant, agencies: § 505(b)(1)(A)

- *Hallstrom v. Tillamook Co.*, 493 U.S. 20 (1989)
- *S.F. Baykeeper v. Tosco Corp.*, 309 F.3d 1153 (2002)

## 2) Diligent prosecution bar: §§ 505(b)(1)(B) / 309(g)(6)

- No suit where EPA or State “has commenced and is diligently prosecuting” a civil action for the same violations
- *CBE v. Union Oil*, 83 F.3d 1111 (9<sup>th</sup> Cir. 1996):
  - 309(g)(6)(a)(ii) – Ongoing State admin. enforcement bars citizen suit if under “comparable” state law = penalties are available
  - 309(g)(6)(a)(lii) – Past State admin. enforcement bars citizen suit if under “comparable” state law, and a penalty was paid

# “Diligent Prosecution”

- CWA §§ 505(b)(1)(B) / 309(g)(6): No suit where EPA or State “has commenced and is diligently prosecuting” a civil action for the same violations
- *CBE v. Union Oil*, 83 F.3d 1111 (9<sup>th</sup> Cir. 1996):
  - 309(g)(6)(a)(ii) – Ongoing State admin. enforcement bars citizen suit if under “comparable” state law = penalties are available
  - 309(g)(6)(a)(iii) – Past State admin. enforcement bars citizen suit if under “comparable” state law, and a penalty was paid
  - 40 C.F.R. § 22.13 – action is “commenced” upon filing of admin. complaint or consent agreement.
- *Cal. Sportfishing v. Chico Scrap Metal*, 728 F.3d 868 (9<sup>th</sup> Cir. 2013)
  - § 505(b)(1)(B) requires State action to be in a court, addressing the same CWA violations as the citizens

# What is a “Diligent” Prosecution?

- Courts will generally not second guess an ongoing State or Federal enforcement action – presumed “diligent”
- *FMR v. MMSD*, 382 F.3d 743 (7<sup>th</sup> Cir. 2004) – a State action must be “capable of requiring compliance” and “calculated to do so.” (cited approvingly, in dicta, by the 9<sup>th</sup> in *Cal. Sportfishing*). Eventual compliance is key.
- *Laidlaw* – issue not decided by lower courts or the Supreme Court, but note facts:
  - Laidlaw approached the State after receiving notice; invited civil enforcement in order to bar citizen suit
  - Laidlaw’s counsel drafted complaint and consent order, paid filing fee, obtained State signatures, and filed on behalf of State
  - D.Ct. noted State policy not to file actions just to bar citizen suit
- Note, even a later State settlement can preclude citizen suit – See FMR:
  - Citizens may be deemed to be in privity with the State, if the State’s action was diligent

# Art. III Standing

- Three prongs (e.g., *Defenders of Wildlife*):
  - Injury in fact
  - Causation / “fairly traceable”
  - Redressability
- Injury = typically aesthetic, recreational, health:
  - Altered behavior (e.g., *Laidlaw* – avoid the river)
  - Diminished aesthetic enjoyment
  - Exposure, or risk of exposure, to pollutants
- Causation / Redressability
  - Multi-discharger scenario (e.g., *Mass. v. EPA*)
  - Pollutants capable of causing the precise harm alleged
- Typically suits are filed on behalf of organizations
  - *Hunt v. Wash. Apple Adver. Comm’n*

# Building and Filing a Citizen Suit

- Case Investigation
  - Use of monitoring reports (DMRs, EERs, etc.)
  - Evidence of unpermitted discharge, construction, etc.
  - History of EPA/State involvement, if any
  - History of facility compliance efforts
  - Expert review
- Send Notice Letter
  - Proper scope, recipients, etc.
  - Invitation to discuss
- File Complaint
  - Good-faith allegations of ongoing violations
  - Factual basis for standing (declarations come later)



# Prosecuting a Citizen Suit

- Use of Expert Witnesses:
  - Harm to the resource – aquatic species, public health, etc.
  - Harm to standing witnesses?
  - Root cause of the violations
  - Technological fix available, economically feasible
  - Civil penalty calculation – economic benefit, etc.
- Bifurcate liability from remedies?
  - Strict liability, self-reported violations = SJ
- Discovery Plan / ESI
  - Confidentiality agreement

# Remedies

- Injunctive Relief
- Civil Penalties – \$37,500 per violation, per day
  - CWA § 309(d) – mandatory civil penalty factors
  - Whose burden?
- SEPs – often preferable to penalties
- Stipulated future penalties
- Atty Fees and Costs available
  - CWA: “prevailing or substantially prevailing party”
  - CAA: “whenever appropriate”
  - To defendants only where frivolous, bad faith, vexatious