CITIZEN SUITS

The Statutory Power to Abate Environmental Pollution and to Enforce Federal Environmental Statutes as a Private Attorneys General

I. Citizen Suit Provisions in Major Environmental Laws.


1. You must read and understand the particular statute and regulations of the federal environmental program that you are trying to enforce. EPA’s federal regulations are found in the Code of Federal Regulations. You must follow the provisions applicable to citizen suits to the letter.

2. KISS principle applies to citizen suit litigation. There is an inverse relationship between the number of regulatory terms and the odds of gaining jurisdiction and relief in federal court. This means to minimize the complexity of the regulatory language in your citizen suit complaint.

3. Pictures or video-clips of pollution causing activities are worth more than a thousand words to a federal judge and his or her clerk.

4. District court may exercise ancillary jurisdiction to hear non-statutory claims, i.e., state law claims such as nuisance and trespass.

5. Citizen suits are time consuming, very expensive to litigate, and obtaining a fee aware is purely speculative, especially if a citizen suit case goes up on appeal to U.S. Sixth Circuit Court of Appeals.


1. Congress gave citizens the remarkable authority to file federal lawsuits as
“private attorneys general” to enforce the CAA.


3. The legislative history under the CAA is often used to interpret citizen suit provisions in other environmental acts.

4. Prior to 1990, citizens could only sue for injunctive relief against the regulated facility and to force EPA to perform mandatory duties.

II. **Overview of Citizen Suit Provisions in Federal Environmental Statutes.**

A. Definition and purpose of citizen suits

1. A citizen suit is a private self-help remedy to stop pollution when the government is either unable or unwilling to regulate a polluting entity. Like a government enforcer, the citizen plaintiff can seek an injunction to stop conduct causing pollution in continuing violation of an environmental law or regulation.

2. The CWA and CAA also authorize citizens to obtain civil penalties for past violations. In CWA and CAA settlements, some money can go to projects to benefit the environment in lieu of penalties. A successful attorney can get a fee award limited to costs expended and fees for hours worked.

3. A citizen suit requires: (1) prior notice of suit; (2) continuing violation at the time when the suit is filed; (3) an absolute bar on suits in which the government is diligently prosecuting its regulatory program; and (4) potential award of attorney fees.

4. A citizen suit is really a mix of public and private rights. Citizens assert their right to be free of harm from pollutant releases, and injunctive relief is similar to an environmental enforcement agency.

5. Citizen plaintiffs cannot recover damages or other direct monetary compensation. The successful plaintiff’s attorney in a citizen suit cannot recover a share of the penalties obtained.

III. **Basic Elements of a Citizen Suit.**

A. **Plaintiff.** A citizen suit may be brought by “any person” so long as the person has standing to bring suit. You cannot sue if the EPA or state is “diligently prosecuting” a violation of an environmental law or regulation.

1. The definition of “person” is defined in the environmental statutes. For example, under the Clean Water Act any “citizen” may bring suit and citizen is defined as a “person” whose interest is or may be adversely affected. See 33 U.S.C. 1365(g).
2. States may be a Plaintiff.

3. Corporations may be a Plaintiff.

4. Does the Plaintiff have standing? Citizens may only bring citizen suits in federal court if they have "standing to sue."
   i. To establish standing, the courts have required proof of three elements: First, the plaintiff must have suffered an “injury in fact”- an invasion of a legally protected interest which is (a) concrete and particularized and (b) “actual or imminent, not ‘conjunctural’ or ‘hypothetical.’”
   
   ii. Second, there must be a causal connection between the injury and the conduct complained of-the injury has to be “fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.”
   
   iii. Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.” (Lujan v. Defenders of Wildlife, 504 U.S. 555, (1992)).
   
   iv. Some court look to whether the Plaintiff claiming standing to bring a citizen suit is within the specific “zone of interests” that Congress intended to benefit or regulate in the relevant environment statute. The zone of interest requirement for the most part is applied to limit standing of a party with only an economic interest in the dispute.

B. Defendant. Most citizen suit provisions require that the defendant is a “person” who is in violation of a standard, condition, or order issued by EPA or a state authorized environmental program, as well as the head of a specific federal agency failing to carry out a mandatory duty. However, RCRA requires that the defendant be contributing to an imminent and substantial endangerment to human health of the environment.

C. Jurisdiction and Venue. Jurisdiction is granted to the U.S. district courts and venue is where the source of violation is located or where the violation occurs.

D. Enforceable provisions. Environmental statutes vary considerably on the range of regulatory requirements that a citizen may enforce. Except for the Clean Air Act, all citizen suit provisions require that the defendant be “in violation” at the time the suit is filed.

1. Ripeness doctrine requires courts to consider only actual cases and controversies. Abbott Laboratories v. Gardener, 287 U.S. 136 (1967) established a two-prong test for determining ripeness: (1) is the issue fit for judicial review? and (2) Will withholding judicial review cause hardship to one of the parties?
2. A citizen suit is barred if all of the defendant’s violations predate the complaint and there is no risk of future violations at the time the complaint is filed.

3. A defendant can therefore avoid liability if it cures its violations during the 60-day pre-suit notice period. Defendants often move to dismiss on this ground and claim they are in compliance, before discovery can take place.

E. **Notice letter.** With only a few limited exceptions, a citizen suit can only be brought if the defendant is notified of suit before it is filed.

   1. The primary purpose of notice is to allow the government an opportunity to enforce the law itself.

   2. A secondary purpose is to allow the defendant to come into compliance before suit is brought.

   3. EPA regulations (found in the Code of Federal Regulations) define what a notice letter must contain, to whom it must be sent, and how it must be sent.

   4. EPA has defined these requirements differently for each statute. See 40 CFR Part 135 (CWA), Part 54 (CAA), Part 254 (RCRA); 30 CFR 700.13 (SMCRA).

   5. Some court decisions interpret these requirements inflexibly and dismiss a citizen suit if any required element of the notice letter is missing or if the letter is not sent to all of the required recipients by the proper method.

   6. The notice letter requirement can be a trap for the unwary, but problems can be avoided if the attorney follows the requirements in the applicable federal regulations.

   7. Notice letter is different than typical notice pleading required for a complaint under the Federal Rules of Civil Procedure. Much more detail is required.

   8. Notice letter is time to demonstrate your technical knowledge of environmental law, environmental regulations, and facility operations.

   9. Write for your audience, i.e., a facility’s environmental manager, environmental attorney, and U.S. EPA staff.

F. **Diligent prosecution.** If EPA or a state is “diligently prosecuting” against a defendant for a violation of an environmental regulation, a citizen suit is normally barred.

   1. The language of the statutory bar to filing a citizen suit varies from program to program. Each federal statute has different rules on when a government administrative or judicial action precludes a citizen suit.

   2. For example, the Clean Water Act (CWA at §309(g)) allows preclusion by both administrative and judicial actions, while the Clean Air Act allows preclusion by only judicial actions. Some of the statutory rules are quite narrow and allow some overlap between government and citizen actions. But most courts have interpreted the rules broadly to mean that no duplication between government and citizen enforcement is possible.

   3. In the Clean Air Act, Congress has provided an express statutory exception to res
judicata principles. That Act only bars commencement of a citizen suit when a state or the United States has “diligently prosecuted” the same violations in court. 42 U.S.C. § 7604(b)(1)(B); Premium Standard Farms at *11-14; Glazer v. American Ecology Environmental Services, 894 F.Supp. 1029, 1034-37 (E.D.Tex. 1995). In effect, this language means that citizens are the same party as the federal government “only as to that which the [federal government] has diligently prosecuted.” Premium Standard Farms at *11.


5. “The purpose of the citizen suit provision is to stop violations of the Clean Water Act that are not challenged by appropriate state and federal authorities.” Atlantic States Legal Foundation v. Eastman Kodak, 933 F.2d 124, 127 (2d Cir. 1991). Citizens can prosecute such a suit, notwithstanding a government consent decree, if the violations continue. Id. at 128.

G. Ongoing Violations of Law. The defendant must be in “ongoing” violation of the law. On a motion to dismiss, violations are ongoing if there are allegations of the likelihood of reoccurrence of the violations. At the trial stage, violations are ongoing if there is evidence from which a reasonable trier of fact could find the likelihood of a reoccurrence of a violation. A reoccurrence of even intermittent or sporadic violations should be sufficient to meet this requirement. But don’t bet on it.

1. Ongoing violation requirement is really a “mootness” issue. Mootness is a jurisdictional issue and so may be raised at any time in the proceeding. A court may raise it sua sponte, but normally the defendant has the burden of proving that the case is moot.

H. Right of Federal Government’s Intervention into Citizen Suit Litigation.

1. The United States has an absolute right of intervention at any time or state of citizen suit litigation under all statutes granting a right to file a citizen suit.

2. Unlikely to happen; instead the government will file its own suit if it is interested in the regulatory issues giving rise to the citizen suit litigation.

I. Citizen’s Right to Intervene in U.S. Department of Justice’s Suit Filed in Federal Court.

1. Using FRCP 24, a citizen may intervene in federal or state civil or criminal enforcement actions in federal court. See:


iii. SDWA, 42 U.S.C. §300j-8(b)(1)(B)


vi. CERCLA, 42 U.S.C. §9659(g).

2. Intervention is limited to parties seeking to be co-plaintiff, rather than to be a co-defendant. Thus, an Intervenor cannot seek to help the defendant.

3. In U.S. v. LTV Steel Co., Inc., 187 F.R.D. 522, 524-25 (E.D. Pa. 1998), the court held citizens have an unconditional right to intervene in a civil action by the United States to enforce emission standards under the Clean Air Act. Similarly, in U.S. v. Metropolitan St. Louis Sewer District, 883 F.2d 54, 56 (8th Cir. 1989), the court held that the identical language in the Clean Water Act gives citizens an unconditional right to intervene in a civil action by the United States to enforce effluent standards under that Act. Accord, EPA v. City of Green Forest, 921 F.2d 1394, 1402 (8th Cir. 1990). An

4. Intervention is subject to the standard requirements of FRCP 24.

5. U.S. Department of Justice policy requires the agency to provide public notice and an opportunity to comment on a proposed consent decree settling an environmental enforcement action when the decree is lodged with the court.

i. U.S. DOJ normally files its complaint in a civil case when it lodges the consent decree. This tactic substantially narrows the procedural and substantive rights to an intervenor.

ii. U.S. DOJ makes the public’s comments to the consent decree known to the judge. U.S. DOJ must respond to comments. The federal government always reserves the right to withdraw the decree as a result of the public comments. 28 CFR § 50.7.

6. Intervene to seek further or additional relief. “Where an order or decree has not been carried out in accordance with its intended effect, the court may change the order ‘upon an appropriate showing’ if the ‘purposes’ of the order ‘have not been fully achieved.’” Olle v. Henry & Wright Corp., 910 F.2d 357, 365 (6th Cir. 1990) (quoting United States v. United Shoe Corp., 391 U.S. 244, 248 (1968). Modification of an injunction “is proper if the original purposes of the injunction are not being fulfilled in any material respect.” 12 Wright Miller & Kane Federal Practice & Procedure, § 2961, p. 397 (2d ed. 1995).

J. Remedies.

1. Injunctions. To obtain an injunction under an environmental statute, you must follow traditional considerations: (a) whether there is an adequate remedy at law; (b) whether the activity sought to be enjoined causes irreparable harm to the plaintiff; (c) whether an injunction will cause irreparable harm to the defendant; and (d) protecting the public’s interest. The Supreme Court has instructed the courts to apply "traditional equitable principles" when deciding to grant injunctive relief for violations of the federal environmental statutes. Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982); Amoco Production Co. v. Village of Gambel, 480 U.S. 531, 545 (1987). The court may grant such relief only after a showing of irreparable injury and a balancing of competing claims of injury and the public interest. Weinberger, 456 U.S. at 312; Amoco, 480 U.S. at 544-547; NRDC v. Texaco, 906 F.2d 934, 941 (3d Cir. 1990).

2. Civil Penalties. Once the court finds a violation of an environmental statute, it must assess a civil penalty. The court must consider the penalty factors specified in the statute to determine the penalty amount. Court must understand that civil penalties are paid to the U.S. Treasury and not to the Plaintiff.

K. Settlements. Most citizen suits are settled rather than litigated to judgment.

1. Supplemental Environmental Projects or SEPs. SEPs are an off-set or alternative
to civil penalties paid to the U.S. Treasury.

2. Section 204(d) of the Clean Air Act (42 U.S.C. §7604) and Section 505(c)(3) of the Clean Water Act (33 U.S.C. §1365) require the consent decree be sent to U.S. EPA and the Department of Justice prior to entry.

3. The federal government is not bound by the terms of a private party consent decree, if it is not a party. See e.g., Section 204(c)(2), 42 U.S.C. 7604(c)(2) of the CAA.

4. The U.S. lodging of a consent decree normally bars a Plaintiff from filing a citizen suit.

5. FRCP 68 is inapplicable to a citizen suit.

L. Attorney fees and cost. In an effort to encourage citizen suits, Congress included provisions for awards of attorneys’ fees in virtually all authorizing legislation. Thus, a district court may award reasonable attorney fees to a prevailing party or a substantially prevailing party.

1. Normally, requires a material alteration of the legal relationship between the parties. That normally means an injunction, final order, or a judgment against the defendant.

2. The U.S. Sixth Circuit has held that “[w]hen claims are based on a common core of facts or are based on related legal theories, for the purpose of calculating attorney fees they should not be treated as distinct claims, and the cost of litigating the related claims should not be reduced.” Thurman v. Yellow Freight Systems, Inc., 90 F.3d 1160, 1169 (6th Cir. 1996).

Other Circuits have used the same formulation. “When the issues are intertwined factually, a fully compensatory fee award is justified even where a plaintiff does not prevail on all his claims or obtain all relief requested in his complaint.” Dague v. City of Burlington, 935 F.2d 1343, 1358-59 (2d Cir.), rev’d on other grounds, 112 S.Ct. 2638 (1991). See also Tomlinson v. City of Omaha, 63 F.3d 786, 791 (8th Cir. 1995) (relief sought on basis of three separate claims; obtains relief on only one claim; no deduction for hours spent on two losing theories, particularly since claims were interrelated); Jane L. v. Bangert, 61 F.3d 1505, 1512 (10th Cir. 1995) (“If claims are related, failure on some claims should not preclude full recovery if plaintiff achieves success on [an] ... interrelated claim”); Cabrales v. County of Los Angeles, 935 F.2d 1050, 1053 (9th Cir. 1991) (same); American Canoe Ass’n, Inc. v. U.S. E.P.A., 138 F. Supp.2d 722, 738-740 (E.D. Va. 2001) (same). Even if a lawyer abandons an alternative theory, she is still entitled to compensation for that time if she is successful on the main claim. See Finkelson v. Bergna, 804 F. Supp. 1235, 1249 (N.D. Calif. 1992).

3. Calculation of potential fee. Courts in the U.S. Sixth Circuit use the “lodestar” method of determining a reasonable attorneys’ fee under fee-shifting statutes. Granzeier v. Middleton, 173 F.3d 568, 577 (6th Cir. 1999). A lodestar fee, commonly defined as “the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate,” is the “starting point” for determining an appropriate fee award. Id.; Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). The court can then adjust this figure to reflect the degree of success obtained. Granzeier, 173 F.3d at 577; Hensley, 461 U.S. at 433-34. “Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation . . . .” Hensley, 461 U.S. at 435.
CONCLUSION

Citizen suit litigation is neither for the faint of heart nor one lacking the requisite litigation skills and experience in environmental law. A complex citizen suit can require a financial investment of hundreds of thousands of dollars and many thousands of hours of work. One can expect a “take no prisoner” litigation strategy by defense counsel. As the district court remarked in *Ellis v. Gallatin Steel*, which was litigated in the district court for the Eastern District of Kentucky,

> Although the evidence here shows they well knew that they had a nuisance on their hands, they caused the plaintiffs and taxpayers needless expense by raising all sorts of legal obfuscation, made denials that any nuisance existed or that the plaintiffs were affected by the nuisance, raised procedural objections that caused the plaintiff[s] to have to file three or four different lawsuits; and, basically, the defendants defended every inch of turf to the death. And the Court finds that they did not act in good faith. Until forced to do so, they didn’t make any effort to deal with this nuisance. They’re still doing as little as they think they can get away with, and the Court finds that this applies only up to the implementation of the remedial measures. They have taken some effort since then but they’re still doing as little as they can, but they are doing something. So at least up to that time, they have acted willfully, wantonly and oppressively under the Kentucky statute.


In practicing law each of us may be called upon to do the right thing. When called, I ask that you take a stand and take up the good fight and work to stop a corporate polluter from preying on those less fortunate in our great society. The citizen suit provisions in our federal environmental statutes are powerful tools that give an even footing to fight such a predator in our society in a federal court of law.