



Citizen Environmental Lawsuits

I. Introduction to Citizen Suits

A. *Purpose: Provide for citizen involvement in environmental enforcement.*

1. Congress made clear that citizen groups are not to be treated as nuisances or troublemakers but rather as welcomed participants in the vindication of environmental interests. Fearing that administrative enforcement might falter or stall, citizen suit provisions reflected a deliberate choice by Congress to widen citizen access to the courts as a supplemental and effective assurance the Act (Clean Air Act) would be implemented and enforced. See *Friends of the Earth v Carey*, 535 F.2d 165 (2nd Cir. 1976).

B. *“Private Attorney Generals”*

The citizen can initiate a lawsuit in federal district court for injunctive relief (in order to correct or halt the violating activity) and civil penalties.

C. *Citizen suit provisions exist in major federal environmental statutes*

Clean Air Act (CAA); the Clean Water Act (CWA); the Resource Conservation and Recovery Act (RCRA) and the Comprehensive Environmental Response Compensation and Liability Act (CERCLA).

II. Federal Clean Water Act (CWA)

A. *Citizen lawsuit provision: 33 U.S.C. § 1365 (Section 505 of the Federal Water Pollution Control Act) - “505 suite.”*

B. *Basic CWA Structure.*

1. You must have a National Pollutant Discharge Elimination System (NPDES) permit to discharge pollutants from a point source to navigable waters of the U.S.
2. The NPDES permits sets forth the requirements including effluent standards or limitations regulating the discharge. The permit might also include monitoring and reporting requirements and implementation of best management practices (BMPs).
3. For Concentrated Animal Feeding Operations (CAFOs), the effluent limitations are cited at 40 CFR Part 412 - which requires “no discharge” except when catastrophic storm events cause an overflow from a CAFO facility designed, constructed and operated to hold process wastewater plus runoff from a 25-year, 24-hour storm event.
4. Violation of the effluent limitations or the NPDES permit requirement is a violation of CWA.

III. CWA Citizen Suite Fundamentals

A. *Standing*

1. Any citizen may commence a civil action on his own behalf. 33 U.S.C. § 1365 (as). “Citizen” means a person or persons having an interest which is or may be adversely affected. 33 U.S.C. § 1365 (g).
2. To establish standing, the citizen must allege injury in fact due to defendant’s violations. Citizens usually allege they are being or will be adversely affected by the violating discharges with regard to their health, economic, recreational, aesthetic or environmental interests. It is typical for a plaintiff to regularly use the affected water or to reside near or recreate near the affected water.

B. *Notice*

1. Before starting a lawsuit, citizens must give notice to the alleged violator, the U.S. Environmental Protection Agency (EPA) and the MPCA. U.S.C. § 1365 (b).
2. Notice procedure are set out at 40 C.F.R. Part 135.1-135.3.
3. Plaintiff must give alleged violator at least sixty (60) days of notice before the lawsuit is started.

C. *Statute of Limitations*

1. Five-year statute pursuant to 28 U.S.C. § 2462 (limitation on time period for court imposition of civil penalties).

D. *Lawsuit on 60th Day*

1. CWA does not confer jurisdiction on federal courts to entertain citizen suites to enforce against “wholly past

violations.” Gwaltney of Smithfield Ltd. Chesapeake Bay Foundation, Inc. 108 S. Ct. 376 (1987).

2. Violations must be “ongoing” at time lawsuit is started.
3. Plaintiff citizen must make a good-faith allegation of continuous or intermittent violation. Heavy burden on alleged violator to demonstrate that it is “absolutely clear” that the alleged wrongful behavior could not reasonably be expected to recur. Gwaltney.
4. Failure of a CAFO (as a point source) to have a NPDES permit has been found to be a continuing state of violation. Carr v. Alta Verde Industries, Inc. 931 f.2d 1055 (5th Cir. 1991).
5. Evolving case law appears to support proposition that the presence of any credible evidence that violations continued after the complaint was filed or that the risk of further violation exists will confer jurisdiction.

Query: Is there a reasonable likelihood of recurrence of violations?
6. Citizen lawsuit cannot be initiated if EPA or MPCA is diligently prosecuting a civil or criminal action “in a court” to require compliance. 33 U.S.C. § 1365(b)(1)(B).

- a. Courts have generally indicated that any state administrative enforcement proceeding must provide the public with notice and an opportunity to participate in the assessment of fine and penalties. Administrative procedures must be functional equivalent of court procedures.

E. Lawsuit Resolution

1. Penalties: \$25,000/day for a violation. 33 U.S.C. § 1319(c). In determining civil penalties, the court will consider:
 - (a) seriousness of the violation;
 - (b) economic benefit derived as a result of the violations;
 - (c) good-faith efforts to achieve compliance;
 - (d) economic impacts on violator; and,
 - (e) such other matters as justice may require.
2. Penalties go to U.S. Treasury as a result of court judgment. If a settlement occurs, courts appear willing to accept that some settlement monies can be diverted to environmental projects related to CWA objectives.
3. Costs: Court may award to Plaintiff citizen the costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party. 33 U.S.C. § 1365(d). Attorney fees are usually based on going market rates.
4. Consent Decree: Most cases are resolved with a consent decree, a stipulated settlement that is entered with the court. Customary terms include:
 - (a) compliance schedule;
 - (b) civil penalty to U.S. Treasury;
 - (c) monetary payment to environmental project; and

- (d) attorney fees and costs.

1. U.S. government must receive at least 45 days notice before court entry of settlement. 33 U.S.C. § 1365(c)(3). Service procedures of 45 day notice are set out at 40 C.F.R. Part 135.5.
5. In deciding whether to approve the settlement, courts assess whether consent decree settlement is fair, reasonable, equitable and does not violate public policy.

IV. Conclusions and Recommendations

This outline contains portions of an outline prepared by Charles N. Nauen, an attorney with Schatz & Paquin, P.A., Minneapolis, in April 1991 for a presentation to the Hennepin County Bar Association's Environmental Law Committee. Mr. Nauen practices in the environmental law area and he has extensive knowledge of citizen environmental lawsuits.

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