

# The Basics of Environmental Citizen Suits in Major Federal Environmental Statutes

# Presentation Structure

- Description and purpose of citizen suits.
- Prerequisites to citizen suits.
- Common violations.
  - General prohibitions.
  - Permit violations.
- Common defenses to citizen suits.
- Relief and potential outcomes.

# What is a citizen suit?

- Section in most federal environmental statutes that allows private plaintiffs to enforce statutory and regulatory standards, and orders issued by agencies pursuant to the statute's authority.
  - May be brought by "any person." Includes landowners, companies, states, and environmental groups who are adversely affected.
  - Against "any person." Includes individuals, corporations, and governments.
  - Jurisdiction in Federal District Courts where alleged violation occurred or where source of the violation is located.
- Federal statutes also allow private plaintiffs to sue the EPA for failure to perform a non-discretionary duty.
- Can typically seek penalties, injunctive relief, and attorneys fees and costs (including expert costs) of the litigation.

# Purpose

- Diligent enforcement of environmental laws; compliance.
- Prevent contamination or illegal pollution.
- Remediation (RCRA and CERCLA).
- Remedies do not include personal damages such as property damage and personal injury damages.
  - BUT can bring related common law claims in the same suit.

# Major Statutes: Federal

- **Clean Air Act, 42 U.S.C. § 7604**
- **Clean Water Act, 33 U.S.C. § 1365**
- **Resource Conservation and Recovery Act, 42 U.S.C. § 6972**
- **Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9659**
- **Endangered Species Act, 14 U.S.C. § 1540**
- **Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270**

# General Prerequisites

- Notice to the violator, the EPA and other required parties.
  - Usually 60 or 90 days.
  - Notice must allege a violation of a standard, limitation, condition, or order under the relevant statutory scheme.
- That there is not, or has not been, “diligent prosecution” by the government to require compliance with the same violations.

# Ex: Clean Air Act

- **(a) Authority to bring civil action; jurisdiction**  
Except as provided in subsection (b), any person may commence a civil action on his own behalf—
- **(1)** against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of **(A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation,**
- **(2)** against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator, or
- **(3)** against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I (relating to significant deterioration of air quality) or part D of subchapter I (relating to nonattainment) or who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of any condition of such permit.

# Clean Air Act Cont.

- **b) Notice** No action may be commenced—
- **(1)** under subsection (a)(1)—
- **(A)** prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator, (ii) to the State in which the violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or
- **(B)** if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any person may intervene as a matter of right.[1]
- **(2)** under subsection (a)(2) prior to 60 days after the plaintiff has given notice of such action to the Administrator,



# Ex: Resource Conservation and Recovery Act

- (a) In general. Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf—
- (1) (A) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this Act [42 USCS §§ 6901 et seq.]; or
- (B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment; or
- (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act [42 USCS §§ 6901 et seq.] which is not discretionary with the Administrator

# Resource Conservation and Recovery Act Cont.

- (b) Actions prohibited.
- (1) No action may be commenced under subsection (a)(1)(A) of this section--
- (A) prior to 60 days after the plaintiff has given notice of the violation to--
- (i) the Administrator;
- (ii) the State in which the alleged violation occurs; and
- (iii) to any alleged violator of such permit, standard, regulation, condition, requirement, prohibition, or order, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subtitle C of this Act [42 USCS §§ 6921 et seq.]; or
- (B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance with such permit, standard, regulation, condition, requirement, prohibition, or order...
- (2) (A) No action may be commenced under subsection (a)(1)(B) of this section prior to ninety days after the plaintiff has given notice of the endangerment to--

# Notice Periods

- Notice to alleged violator and other required entities
  - Gives government a chance to enforce. Citizen suits are not supposed to supplant government enforcement.
  - Gives the violator a chance to come into compliance.
    - Some statutes may require continuing violations, i.e. the CWA.
    - CAA requires the violation to be repeated.
    - Suit may be moot if there is no longer a violation.
- Details of the Notice are usually defined by regulation.

# Clean Air Act Notice: Service

- 40 C.F.R. § 54.2 Service of notice.
- **(a) Notice to Administrator:** Service of notice given to the Administrator under this part shall be accomplished by certified mail addressed to the Administrator, Environmental Protection Agency, Washington, DC 20460. Where notice relates to violation of an emission standard or limitation or to violation of an order issued with respect to an emission standard or limitation, a copy of such notice shall be mailed to the Regional Administrator of the Environmental Protection Agency for the Region in which such violation is alleged to have occurred.
- **(b) Notice to State:** Service of notice given to a State under this part regarding violation of an emission standard or limitation, or an order issued with respect to an emission standard or limitation shall be accomplished by certified mail addressed to an authorized representative of the State agency charged with responsibility for air pollution control in the State. A copy of such notice shall be mailed to the Governor of the State.
- **(c) Notice to alleged violator:** Service of notice given to an alleged violator under this part shall be accomplished by certified mail addressed to, or by personal service upon, the owner or managing agent of the building, plant, installation, or facility alleged to be in violation of an emission standard or limitation, or an order issued with respect to an emission standard or limitation. Where the alleged violator is a corporation, a copy of such notice shall be sent by certified mail to the registered agent, if any, of such corporation in the State in which such violation is alleged to have occurred.
- **(d) Notice served in accordance with the provisions of this part shall be deemed given on the postmark date, if served by mail, or on the date of receipt, if personally served.**

# Clean Air Act Notice: Content

- 40 C.F.R. § 135.3 Contents of notice.
- **(a)** Violation of standard, limitation or order. Notice regarding an alleged violation of an effluent standard or limitation or of an order with respect thereto, shall include sufficient information to permit the recipient to identify **the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation**, and the full name, address, and telephone number of the person giving notice.
- **(b)** Failure to act. Notice regarding an alleged failure of the Administrator to perform any act or duty under the Act which is not discretionary with the Administrator shall identify the provision of the Act which requires such act or creates such duty, shall describe with reasonable specificity the action taken or not taken by the Administrator which is alleged to constitute a failure to perform such act or duty, and shall state the full name, address and telephone number of the person giving the notice.
- **(c)** Identification of counsel. The notice shall state the name, address, and telephone number of the legal counsel, if any, representing the person giving the notice

# Violations: The Basic Prohibition; CWA

- “Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act [33 USCS §§ 1312, 1316, 1317, 1328, 1342, 1344], the discharge of any pollutant by any person shall be unlawful.”  
33 U.S.C. § 1311
- Except in compliance with a National Pollution Discharge Elimination System Permit, the discharge of a pollutant from a point source into navigable water is unlawful.
  - “pollutant” “point source” and “navigable water” are all defined broadly under the Act. 33 U.S.C. § 1362.

# RCRA Prohibition Example

- ...any solid waste management practice or disposal of solid waste or hazardous waste which constitutes the open dumping of solid waste or hazardous waste is prohibited, except in the case of any practice or disposal of solid waste under a timetable or schedule for compliance established under this section. The prohibition contained in the preceding sentence shall be enforceable under section 7002 [42 USCS § 6972] against persons engaged in the act of open dumping. 42 U.S.C. § 6945.
  - Open dump is any site where solid or hazardous waste is disposed without proper government permitting.
  - Solid and hazardous waste defined in the act and regulations. See 42 U.S.C. § 6903
- However, more common to bring a citizen lawsuit under the imminent and substantial endangerment provision of RCRA.

# Common Violations: Permit Standards

- NPDES Permits contain effluent standards and require regular monitoring and reporting.
  - Typically reported through Discharge Monitoring Reports (DMRs).
- CAA Permits contain air emissions standards and require regular monitor and reporting.
  - Typically reported through quarterly reports, including quarterly “Excess Emissions Reports.”
- Excess Emissions in reports are prima facie evidence of violations.
  - Limited exceptions for “upsets” or “malfunctions” for many standards.



# Enforcing Ohio Environmental Statutes

- Most permits and environmental regulations in Ohio reference Ohio law.
  - Ohio Water Pollution Control Act, R.C. § 6111; Ohio Air Pollution Control, R.C. § 3704; Solid and Hazardous Wastes, R.C. § 3734.
- Citizen suit available in O.R.C. 3734 at 3734.101, violations of solid and hazardous waste laws.
  - Notice period is 150 days
  - Court of Common Pleas Jurisdiction
- No citizen suit provision in Ohio's air and water pollution control statutes.

# Enforcing Environmental Statutes: State Plans

- EPA approved permit programs allow states to take primary responsibility over environmental permitting. State permit conditions are generally federally enforceable under CAA, CWA, and RCRA citizen suits.
- The CAA allows each state to submit a program for approval to the US EPA, known as a State Implementation Plan (SIP). 42 U.S.C. § 7410(a).
  - Once approved the contents of a SIP become federal law, enforceable as a standard or limitation under the federal statute by the EPA, the state, and citizens. Goes beyond permit conditions.
  - Ohio's SIP is found at 40 C.F.R. Part 52, Subpart KK

# Violations: Where to look

- General prohibitions are fact based.
  - Was there a discharge of pollution into a stream?
  - Was there generation or handling of solid or hazardous waste without a permit?
  - Has there been stationary hazardous air pollutant emissions in levels above state and federal standards without a permit?
  - Can be difficult to prove but complaints to agencies may create a record.
  - Violations are typically a per day standard. Violation every day a permit was not obtained.

# Violations: Where to Look

- Permit violations
  - Emissions and reports are public records
    - FOIA and Ohio's "sunshine laws"
      - Ohio EPA file review process allows easy access to permit files and other records.
    - Self reported emissions and effluent exceedances are prima facie evidence of violations.
  - Notices of Violations (NOVs)
    - Agencies issue Notices of Violations from inspection and when violations are noted in reports.
    - NOVs by themselves are not diligent prosecution
    - NOVs are on EDOCs at:  
<http://edocpub.epa.ohio.gov/publicportal/edochome.aspx>
    - FOIA online:  
<https://foiaonline.regulations.gov/foia/action/public/home>

# NOV Example

compliance, we recommend promptly addressing this violation within the timeframes outlined in this letter.

1. Ohio Revised Code (ORC) 3704.05(J)(2): *"No person shall...violate any applicable requirement of a Title V permit or any permit condition..."*

Title V permit P0108372, sections C.5.b)(1)a. and C.5.b)(2)f.: *"Hydrocarbon emissions from the stack shall not exceed 10 parts per million by volume, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis, corrected to 7 percent oxygen, reported as propane..."*

40 CFR Part 63, Subpart EEE, section 63.1219(a)(5)(ii): *"You must not discharge or cause combustion gases to be emitted into the atmosphere that contain hydrocarbons in excess of 10 parts per million by volume, over an hourly rolling average (monitored continuously with a continuous emissions monitoring system), dry basis, corrected to 7 percent oxygen, and reported as propane."*

The terms and conditions of Title V permit P0108372, and the requirements of 40 CFR Part 63, Subpart EEE, establish a THC emissions limitation of 10 parts per million by volume (ppmv), over an hourly rolling average.

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epa.ohio.gov • (330) 963-1200 • (330) 487-0769 (fax)

# NOV Example Continued

(a) *Violation:*

The quarterly report submitted on April 28, 2017, identified the measured THC emissions rates above the emissions limitation on March 25, 2017, from 11:23 a.m. to 12:20 p.m., with values ranging from 12.15 to 12.78 ppmv, as an hourly rolling average.

An exceedance of the THC emissions limitation, as identified above, is considered a violation of the terms and conditions of P0108372 and ORC 3704.05(J)(2).

(b) *Requested action:*

Within 30 days of receipt of this letter, Heritage Thermal Services shall submit a compliance plan to Ohio EPA which will identify how the facility will address the emissions exceedance identified above and how exceedances of this type will be prevented in the future.

**Conclusion**

The Ohio EPA requests that Heritage Thermal Services promptly undertake the necessary measures to return to compliance with Ohio's environmental laws and regulations. **Within 30 days of receipt of this letter**, please provide documentation to Ohio EPA of the actions taken to resolve the violations cited above. Documentation of steps taken to return to compliance includes written correspondence, updated policies, and photographs, as appropriate, and may be submitted via the postal service or electronically by email to the email address below.

Failure to comply with Chapter 3704. of the Ohio Revised Code and rules promulgated thereunder may

# Common Defenses

- Deficient Notice. Notice provisions must be strictly followed.
  - Notice must include sufficient information to allow the recipient to identify the specific standard or limitation, date(s) of the violations and the location of the violations. *See e.g.* 40 C.F.R. part 135.
  - Allegations in the Complaint should match the Notice letter.

# Common Defenses Cont.

- Diligent Prosecution
  - Has the EPA or the State commenced and are they diligently prosecuting an action in a court of the United States to require compliance with the same violations?
    - Agencies or states may file a complaint and quickly enter a consent decree. Consent decree has a comment period.
  - Some environmental statutes only require administrative enforcement. *See e.g. 16 U.S.C. § 1540(g) (ESA)*
  - In general, administrative proceedings that do not include public notice and public participation do not satisfy the requirements of diligent prosecution. *Milwaukee's Rivers v. Milwaukee Metro. Sewage Dist.*, 382 F.3d 743 (7th Cir. 2004).



# Common Defenses Cont...

- Standing
  - Injury for environmental cases can be based on recreational, aesthetic, and economic interests. *Friends of the Earth v. Laidlaw Env'tl. Servs. (TOC) Inc.*, 528 U.S. 167 (2000).
  - Injury still must be fairly traceable to the alleged illegal conduct.
- For CWA: Is the violation continuing?
  - Did the Violator come into compliance during the Notice period?
  - Even after, the Notice period, is the action now moot if violations have been corrected?
    - Can sue for penalties to deter future violations. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987).

# Relief and Outcomes

- Injunctive relief
  - Compliance with statute, regulation, or permit violation.
- Civil penalties
  - Available for deterrence of future behavior even where violations have ceased.
  - Per day per violation; adjusted for inflation at 40 C.F.R. § 19.4 (\$37,500 per day for CWA, CAA, and RCRA)
- Attorneys fees and litigation costs
  - “Prevailing party”
    - Can be awarded to defendants but typically for frivolous litigation or litigation brought without foundation.
  - Catalyst theory for Plaintiffs who are “the impetus ‘for voluntary change in a defendant’s conduct’” *Buckhannon Bd. And Care Home, Inc. v. West Virginia Dep’t of Health and Human Res.*, 532 U.S. 598 (2001).

# Potential Relief In Settlement

- Courts **can not** award monetary relief other than penalties to the U.S. treasury outside of settlements. *See Gwaltney v. Smithfield*, 484 U.S. 49 (1987).
- However, when a suit is settled by negotiation parties can agree that the alleged violator fund a supplemental environmentally beneficial project, so long as it relates to the violations alleged in the lawsuit.
  - Examples include stream restoration projects and funding for projects that reduce air emissions.

# Thank You For Coming!

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