Defending Against Citizen Suits Under Environmental Laws
Navigating Notice, Standing, Jurisdiction, Settlements and More Under RCRA, CERCLA, CWA and CAA

TUESDAY, JANUARY 6, 2015
1pm Eastern    |    12pm Central    |    11am Mountain    |    10am Pacific

Today’s faculty features:

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Defending Against Citizen Suits
Under Environmental Laws
January 6, 2015

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Overview

• Citizen Suit Basics

• New Trends in Citizen Suit Enforcement
  – RCRA imminent and substantial endangerment
  – New frontiers in Clean Water Act suits
  – Evolving vehicles for Endangered Species Act suits
  – Avoiding penalties despite violations
Citizen Suit Basics

• Nearly all federal environmental laws (except FIFRA) contain a citizen suit provision:
  – Clean Air Act Section 304, 42 U.S.C. 7604
  – Clean Water Act Section 505, 33 U.S.C. 1365
  – Comprehensive Environmental Response, Cleanup and Liability Act Section 310, 42 U.S.C. 9659
  – Safe Drinking Water Act Section 1449, 42 U.S.C. 300j-8
  – Emergency Planning and Community Right to Know Act Section 326, 42 USC 11046
  – Toxic Substances Control Act Section 20, 15 USC 2619
  – Endangered Species Act Section 11(g), 16 USC 1540(g)
Citizen Suit Basics

• Major elements of citizen suit litigation:
  – Notice
  – Diligent prosecution precludes citizen enforcement
  – Continuing violation required – mootness
  – Article III standing must be satisfied
  – Injunctive relief and civil penalties
  – Attorneys’ fees
  – Settlements
RCRA ISE – Diesel Emissions

- *Center for Community Action and Environmental Justice v. BNSF Railway Co.*, 764 F.3d 1019 (9th Cir. 2014)
  - Alleging that DPM emitted by diesel engine locomotives, trucks, and other equipment presented an imminent and substantial endangerment to health and the environment in violation of RCRA.
  - The district court held that the CAA comprehensively regulates diesel exhaust and leaves no room for RCRA regulation.
  - The Ninth Circuit affirmed, but on different grounds—RCRA's definition of "disposal."
  - That definition does not include the act of emitting and includes only conduct that results in the placement of solid waste "into or on any land or water."
  - RCRA "'disposal' occurs where the solid waste is first placed 'into or on any land or water' and is thereafter 'emitted into the air.'"
RCRA ISE – CAFOs

- Community Association for Restoration of the Environment, Inc. v. Cow Palace LLC, No. 13-3016 (E.D. Wash.) (trial set for March 2015)
  - RCRA claims brought against dairy concentrated animal feeding operation (CAFO)
    - Imminent and substantial endangerment (ISE)
    - Open dumping
  - ISE – disposal of manure and pharmaceutical by-products in manure via over-application or leaking through holding areas, causing ground and surface water contamination.
  - Open dumping – solid waste disposal is causing groundwater concentrations to exceed the 40 C.F.R. Part 257, Appendix I standards.
  - Relief requested – synthetic liners for all storage, capture/treat/sequester ground and surface water, nutrient management planning, soil sampling, groundwater monitoring, supply drinking water to residents, surface water sampling, study and remediation of open dumping practices and effects, recordkeeping, attorney’s fees.
Clean Water Act Suits – Targeting Coal

• Coal train as point source – *Sierra Club v. BNSF Railway Company*, No. 13-00967 (W.D. Wash.)
• Conductivity as an NPDES enforceable water quality measure – *Ohio Valley Environmental Coalition v. Elk Run Coal Company*, No. 12-00785 (S.D. W.Va., consent decree filed 12/15/14)
• Coal ash – permit interpretation dispute and hidden camera evidence – *Sierra Club v. Louisville Gas & Electric Co.*, No. 14-00391 (W.D. Ky)
Endangered Species Act Citizen Suits

- Used (i) to attempt to stop individual projects and (ii) to force broad regulatory change
- ESA-FIFRA litigation
  - *Center for Biological Diversity v. EPA* (No. 11-00293 N.D. Cal.), on appeal to Ninth Circuit (No. 14-16977) (ESA Mega Suit)
    - Whether continuing authority over registered pesticides constitutes ongoing agency action that triggers the ESA section 7 duty to consult
  - *Center for Biological Diversity v. EPA* (No. 14-00942 D.D.C.) and (No. 14-1036 D.C. Cir.) (Cyantraniliprole litigation)
- Energy project litigation – fossil fuels and renewables
- Importance of intervention
Avoiding Penalties Despite Violations

  - The vast majority of alleged violations were not actionable.
  - Court found no penalty warranted for remaining permit violations:
    - Considered full compliance history and good faith efforts to comply;
    - Found no economic benefit of noncompliance; and
    - Found that no violations were “serious.”

- Denied requests for injunctive relief and for a special master.
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Defending Against Environmental Citizen Suits

January 6, 2015

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Two Topics

> Preventing citizen suits – stopping them before they start.

> Citizen suits as a public policy tool – getting in the game
Preventing Citizen Suits – Don’t Become A Target!

- Comply with the law.
- Implement effective environmental, health and safety compliance and management systems (e.g., based on ISO 14001, Sentencing Guidelines, etc.).
  - Less likely to violate the law.
  - More likely to detect violations early, reducing duration and severity of violations.
  - Enhances ability to execute preventive and corrective action.
  - Increases likelihood of better relationships with regulators, enforcers and stakeholders.
Preventing Citizen Suits – When Things Go Wrong

> Make sure you are the first to know.
> Stop the bleeding: prompt and complete corrective action to stop “continuing” violations before expiration of notice period.
>   – Effective preventive action to avoid claims that violations will be recurring.
> > Is EPA/state enforcement an option if prompt compliance isn’t possible?
>     – Diligent EPA or state enforcement can bar citizen suits, but inviting the enforcers in is a big decision, and not just any enforcement action will do.
>         ▪ *Adkins v. VIM Recycling*, 644 F. 3d 433 (7th Cir. 2011) (enforcement action had to be in play before citizen suit filed, and citizen claims that do not overlap state enforcement permitted to proceed)
>         ▪ *Frey v. EPA*, 751 F.3d 461 (7th Cir. 2014) (allows citizen challenge to discrete and complete portion of Superfund cleanup that are not affected by ongoing cleanup, while barring challenges to ongoing portions of cleanup under § 113(h)(4) of CERCLA)
Citizen Suits and Public Policy
Rulemaking advocacy litigation (mostly in D.C. Cir.) central to formation of environmental policy.

- E.g., the Clean Air Act’s complex PSD program began with a 4-page district court opinion before there was anything in the Clean Air Act or EPA’s regulations. *Sierra Club v. EPA*, 344 F. Supp. 253, aff’d per curiam (D.C. Cir. 1972), aff’d per curiam sub. nom. *Fri v. Sierra Club*, 412 U.S. 531 (1973).

- Decisions on rulemaking petitions can directly affect citizen suits. E.g., *NRDC v. EPA*, 749 F. 3d 1055 (D.C. Cir. 2014) (rejection of EPA regulation allowing an “unavoidable malfunction” affirmative defense in CAA citizen suits, concluding that courts, not EPA, decide the scope and nature of affirmative defenses; the Fifth Circuit upheld a similar provision in an EPA-approved CAA state implementation plan, *Luminant Generation Co., v. EPA*, 714 F. 3d 841 (5th Cir. 2013)).
Citizen Suits and Public Policy

- Citizen suits against individual companies can drive public policy

- Some environmental statutes empower citizens to petition EPA for regulatory action and sue if dissatisfied.
Suing EPA over non-discretionary duties and missing deadlines

- Sometimes the complaints and settlements are filed simultaneously (known by detractors as “sue and settle” cases).
- These cases drive EPA’s agenda and resources in a number of critical programs, particularly under the Clean Air Act, and have been occurring at a record pace.
  - E.g., under the Clinton administration there were 27 CAA “sue and settle” cases, 66 under the eight years of the G.W. Bush administration, and 60 under the first five years of the Obama administration.

Deadline litigation not solely the province of environmental groups.

- E.g., on 12/1/14, industry trade associations sent EPA notices of intent to sue over its failure to timely promulgate renewable fuels standards under the Clean Air Act
Citizen Suits and Public Policy – Get In The Game

> Keep an eye on what is going on

> Seek opportunities to intervene

– Conservation Northwest, et al. v. Harris Sherman, et al., 715 F.3d 1181 (9th Cir. 2013) (intervenor successfully challenged “sue and settle” consent decree on grounds that the decree substantively modified a rule).

– Demonstrate direct substantive interests in order to meet both intervention (F. R. Civ. P. 24) and standing requirements. See, e.g., National Parks Conservation Association v. EPA, 759 F. 3d 969 (8th Cir. 2014); Trumpeter Swan v. EPA, No. 13-5228 (D.C. Cir., December 23, 2014)(industry intervened in litigation over EPA’s denial of a TSCA rulemaking petition).

– D.C. Circuit has curtailed industry’s ability to intervene in pure deadline cases on standing grounds. See, e.g., Defenders of Wildlife v. Perciasepe, 714 F.3d 1317 (D.C. Cir. 2013); In re Endangered Species Act Section 4 Deadline Litig., 704 F.3d 972 (D.C. Cir. 2013).

> Participate as (or get help from) amici

– Summit Petroleum v. EPA, 690 F.3d 733 (6th Cir. 2012)(6th Cir. relied on arguments of industry amici in rejecting EPA’s Clean Air Act permitting “aggregation” policy).

Conclusions

> Best defense is a good offense – Part One
  – Comply
  – Effective compliance systems
  – Immediate corrective and preventive action

> Best defense is a good offense – Part Two
  – Citizen litigation aimed at setting policy, whether through rulemaking litigation or “sue and settle” cases, can have a bigger impact than citizen suits aimed at specific facilities or non-compliance
  – There are many options for getting in the game and making your voice heard
Thank You!

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Deterring Citizen Suits: Remedies for Unsubstantiated Claims

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THE HORN OF A DILEMMA

- Defendants who prevail against inadequately substantiated citizens suits do not commonly seek attorneys fees or costs. Of course, if all parties and counsel strive to litigate responsibly, such claims \textit{should} be rare.

- But the controlling statutes and cases plainly authorize remedies under the appropriate circumstances, and counsel is obliged to consider seeking relief if the record justifies relief.

- At times, professionalism and duties owed to courts and clients may converge to require actions that compensate defendants for defending such lawsuits. However exceptional such instances may be, they are worthy of study.
ROWING UPSTREAM:
Fee Shifting in Environmental Litigation

• A “heightened standard” is applicable in determining whether a fee award is appropriate when a defendant prevails because of the “public policy importance” for plaintiffs with “legitimate, but not airtight, claims” to not be “discouraged from pursuing such claims.”


• In practice, this standard may be indulged even more liberally when citizens and their organizations are involved.

• Nevertheless, precedent exists to support such awards under the right circumstances.
ROWING UPSTREAM: Fee Shifting in Environmental Litigation

- CAA Section 307(d), 42 U.S.C. § 7604(d), provides for an award of the costs of litigation "to any party, whenever the court determines such award is appropriate."

- *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978), which permits a fee award to prevailing defendants if the plaintiff's claims were "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so."

- 28 U.S.C.§ 1927, which permits a fee award against an attorney who "multiplies the proceedings in any case unreasonably and vexatiously."

- Sierra Club sued power plant owner/operator alleging that facility violated Sections 304 and 505 of the Clean Air Act (CAA).

- Suit filed despite TCEQ findings that plant did not violate its Title V permit.

- Suit claimed that plant’s emissions had violated the opacity and particulate matter (PM) limits in the Texas State Implementation Plan ("SIP“), the plant's Title V Permit, and the CAA.
Court then held a bench trial on the opacity issues in February 2014 and agreed that no violations occurred.

Held that CAA and the Title V permit allowed opacity events under certain circumstances and permitted the events that occurred at the plant, including as emissions during startup, shutdown, maintenance, or malfunctions.

Despite the “heightened standard,” court determined that an award of the costs of litigation, including attorney's fees, was appropriate under CAA Section 307(d), and Christianburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978), and Pennsylvania v. Del. Valley Citizens Council for Clean Air, 478 U.S. 546 (1988) because the plaintiff's claims were "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after they clearly became so."

Awarded $6,446,019.56 in fees and costs to defendants.
TCEQ determined that no CAA violations occurred and Defendants successfully defended against all of Sierra Club's claims.

Sierra Club failed to show a prima facie PM violation.

Sierra Club’s knew plant’s Title V permit allowed certain opacity-producing activities, rendering the opacity claim meritless.

At trial, Sierra Club failed to prove either causation or injury-in-fact for its sole standing witness or any other person.

Sierra Club insisted on retaining one defendant, even though it knew it had no role in plant ownership or operations.

Sierra Club admitted that it failed to analyze or investigate TCEQ's investigation reports before filing suit.

Sierra Club's suit had caused "immense discovery, expense, and use of judicial resource."
ROWING UPSTREAM – AND WINNING

To settle the attorney fee award, Sierra Club agreed:

- To drop all current and currently threatened lawsuits against the defendants.

- To withdraw its pending petition to EPA asking the agency to object to the renewal of several of Luminant's operating permits, to dismiss its suit against EPA alleging failure to timely respond to that petition, and to release all past claims against EFHC occurring prior to and through the effective date of the settlement.

- To withdraw a FOIA request to EPA seeking documents produced by Luminant concerning a New Source Review case in consideration of the company’s agreement to provide documents under seal or protective order.

- Defendants agreed, subject to negotiated limits, not to object to Sierra Club's intervention in the EPA's 2013 suit alleging CAA violations at the facilities.
LESSONS LEARNED?

• Even with “heightened standards” and greater judicial tolerance, citizen suit plaintiffs must still meet the fundamental obligations of all litigants.

• In “high stakes” environmental citizens suits, where defense costs may total millions of dollars, courts may (and should) insist that citizens meet the inquiry, pleading, disclosure, discovery and proof requirements commonly applicable to all parties.

• When established, well-funded, and well-known citizens’ groups are plaintiffs, they may (and should) be expected to conform to the identical standards of practice required of defendants.

• Although these developments may not yet be a “trend,” it’s reasonable to anticipate stricter scrutiny of claims, not only by opponents, but also by the courts.

• Sometimes “winning” requires something different than absolute victory – such as trading an uncertain judgment for a dependably advantageous settlement.
COMMON LAW CITIZEN’S SUITS: PUBLIC NUISANCE CASES

- Public nuisance claims under state common law are being used to redress a variety of pollution issues.

- Some federal and state courts have approved their use – others have not. Most cases have involved whether the CAA preempts state nuisance suits.

- The Supreme Court has denied certiorari in two cases, but the controversy isn’t over.

- A controversy in Kentucky state and federal courts may reinforce an existing circuit split to justify Supreme Court review.

- Whatever happens, citizens, industries and their counsel should be aware of the opportunities and risks.
COMMON LAW CITIZEN’S SUITS: PUBLIC NUISANCE CASES

- Recent references on CAA preemption of public nuisance litigation under state common law:

