CITIZEN ENFORCEMENT OF ENVIRONMENTAL LAWS

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The U.S. Congress placed citizen suit provisions in virtually all of the federal environmental statutes. *See e.g.*, the citizen suit provisions of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §6972; the Clean Air Act ("CAA"), 42 U.S.C. §7604; and the Clean Water Act ("CWA"), 33 U.S.C. §1365. Ohio law gives citizens the right to enforce waste-related environmental laws and regulations. See R.C. §3734.101.

Once the prerequisites to suit have been met, citizens "stand in the shoes" of regulatory enforcement authorities to enforce the law without any prospect of personal benefit.[1] *See Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517 (9th Cir. 1987). Suffice it to say, citizen suits are counter-intuitive for most lawyers and judges. Causation is usually not an issue, damages cannot be obtained by the citizen-plaintiff, and the citizen-plaintiff is not required to be "harmed," as is a tort plaintiff (however, if a citizen-plaintiff is harmed, he may seek to remedy broader environmental law violations at the same time that he seeks tort damages). In fact, the highest and best purpose of a citizen suit is to prevent environmental harm. For the extra cost and litigation complexity, the citizen-plaintiff's only reward is enforcing the law and having the polluter pay the plaintiff's citizen suit lawyer and pay the costs incurred that are related to environmental law enforcement. At the very least, citizen enforcers supplement the work of government enforcement officials. Quite often, citizen-plaintiffs are the only entities seeking to enforce federal or state law. Under citizen suit statutes, public interest and other lawyers can be awarded attorneys' fees and costs if they achieve the level of litigation success that each statute requires.

In light of the complexity of this kind of litigation, the following represents a mere selection of the issues that must be navigated to achieve success that is in the public interest.

I. ROLES OF CITIZEN SUITS

A. The citizen suit as a stimulus for stagnant federal and state government action

The citizen suit can be an important tool to obtain diligent law enforcement, especially when years of federal and/or state "negotiations" have yielded no results. See *Sierra Club, et. al. v. Bd. of County Comm'r of Hamilton County, et. al.*, No. 1:02-CV-00135 (S.D. Ohio, filed Feb. 27, 2002). *Sierra Club* is a Clean Water Act ("CWA") citizen suit that revolved around Cincinnati's aging and overtaxed sewer system and its capacity-related overflows, which have caused raw sewage and waste water to back up into homes and into rivers and tributaries for decades. In 1992, the Ohio Environmental Protection Agency ("OEPA") issued an order

[1] The pre-requisites include written notice, and in most cases, a 60-90 day waiting period before filing; R.C. §3734.101 requires a 150 day waiting period.

compelling Hamilton County to remedy its illegal sewer overflows. However, *nearly ten years later*, many SSOs remained and sewage backups in basements continued.

In December 2001, the Sierra Club provided a CWA citizen suit notice letter to the requisite parties. The Sierra Club ultimately filed a citizen suit and also intervened in the consolidated state and federal actions against the defendants (Metropolitan Sewer District, Hamilton County Board of County Commissioners, and City of Cincinnati), which were filed at the very end of the citizen suit notice period, in part to attempt to block the Sierra Club's enforcement action.

As the district court found in granting the fee petition filed by the Sierra Club following the litigation, the Sierra Club's efforts in prosecuting its own complaint and in its intervention in the government action were key to obtaining and designing an effective resolution, including the creation of the first-of-its-kind water-in-basement program:

> The [initially proposed consent decree] and the Complaint in this matter were filed at the same time. The Court found the [initially proposed consent decree] illusory in that there were no fixed dates or enforceable rights establishing who would provide relief to those affected. Plaintiffs and Defendants (i.e., those involved in the case not including the Sierra Club) claimed they had been negotiating for approximately ten years about [sewer overflows], and other problems. However, despite ten years of negotiations nothing concrete was accomplished to help those being injured. It was not until the Sierra Club filed its own complaint and ultimately intervened in this matter that positive solutions began to emerge.

Sierra Club v. Board of County Commissioners of Hamilton County, Ohio, 2005 WL 2033708, at *15 (S.D. Ohio)(attached), *affirmed*, 504 F.3d 634 (6th Cir. 2007). In addition, the district court found that:

> The Sierra Club extensively participated in the discovery and development of the final consent decree, despite its not being a signatory to said decree. Its participation resulted in changes and additions (which were improvements) beyond the terms contained in the [initially proposed consent decree]. Without the efforts of the Sierra Club, the affected citizens of Hamilton County would not have benefitted as substantially from this litigation as they did.

Id., at *15.

Thus, used effectively, citizen suits can foster concrete results and public benefits when government action is simply not working. As stated by the Sixth Circuit, "…private citizens provide a second level of enforcement and can serve as a check to ensure the state and federal governments are diligent in prosecuting Clean Water Act violations." *Sierra Club v. Board of County Commissioners of Hamilton County, Ohio*, 504 F.3d 634, 637 (6th Cir. 2007).

B. Citizen suits as a means to prevent contamination and secure remedial measures.

The Resource Conservation and Recovery Act's ("RCRA") imminent and substantial endangerment provision (Endangerment Provision) is a particularly useful, yet often overlooked, tool for securing injunctive relief, including remedial measures. Under the Endangerment Provision, a citizen may commence a civil action:

> against any person, including the United States and any other governmental instrumentality or agency...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.

42 U.S.C. §6972(a)(1)(B) (emphasis added). The Endangerment Provision is not a cost recovery measure and was not designed to be used to seek reimbursement for cleanup or other response costs. *See Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996). Rather, courts have jurisdiction under the Endangerment Provision to "restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both…" 42 U.S.C. §6972(a). Thus, the Endangerment Provision can be used to secure comprehensive cleanups, source identification and elimination, pathway identification and elimination, and other injunctive relief.

There are some frequently misunderstood issues that often plague citizen suits brought under the Endangerment Provision. First, polluters may attempt to insert a requirement of actual harm into the Endangerment Provision. In fact, it is well settled that RCRA, being a preventative statute, does not require a showing of actual harm. *See e.g., Davis v. Sun Oil Co*., 148 F.3d 606 (6th Cir. 1998) (an "endangerment" under RCRA means a threatened or potential harm and does not require proof of actual harm); *Dague v. City of Burlington*, 935 F.2d 1343, 1356 (2nd Cir. 1991), rev'd in part on other grounds, 505 U.S. 557 (1992) (a finding of imminency does not require a showing of actual harm); and, *Price v. United States Navy*, 39 F.3d 1011, 1019 (9th Cir. 1994) (finding that courts have consistently held that "endangerment" does not require proof of actual harm). Rather, the Endangerment Provision was designed to allow citizens to address potentially dangerous situations where actual harm may not be demonstrable, but where the threat to health or the environment is nonetheless real.

Similarly, the imminence requirement of the Endangerment Provision is often misread to limit the provision to emergency-type situations. In fact, an endangerment is "imminent" if "conditions which give rise to it are present, even though the actual harm may not be realized for years, as for example, when present exposure to a toxic substance results in a latent harm which does not become evident for years." *Buchholz v. Dayton International Airport*, 1995 WL 811897, at *23 (see attached excerpts), *citing Lincoln Properties, Ltd. v. Higgins*, 36 E.R.C. 1228, 1240 (E.D. Cal. 1993). To be imminent, a threat must be present now, although the impact of that threat may not be felt until later. *See Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996).

Further, defendants sometimes argue that a claim under the Endangerment Provision must be based on a violation of law. Yet, a subsection (a)(1)(B) imminent danger claim requires no showing of a violation of a permit, standard, or regulation. The argument that RCRA

endangerment claims are not contingent on other violations of law is supported by the plain language of the statute as well as the fact that Congress intended the Endangerment Provision to be a codification of the common law doctrine of public nuisance. *See Cox v. City of Dallas*, 256 F.3d 281, 291-92 (5th Cir. 2001), citing S. REP. No. 96-172, at 5 (1979), reprinted in 1980 U.S.C.C.A.N. 5019, 5023 (finding that the Endangerment Provision is "essentially a codification of common law nuisance remedies").

A polluter may also argue that it has "cured" the endangerment by providing, e.g., alternate water in the case of groundwater contamination. A provision of alternate water, however, would not cure the endangerment, as the groundwater would still be contaminated and anyone exposed to threat groundwater would still be at risk of harm. Moreover, the public water supply would still be threatened and the environment – including flora and fauna dependent on the groundwater – would still be at risk.

Finally, a polluter may claim that the Endangerment Provision does not apply to its pre-RCRA (i.e., pre-regulation) disposal practices. In fact, the Endangerment Provision reaches any kind of "past or present" conduct that contributed to a condition that "may" amount to an endangerment. Additionally, the Endangerment provision applies to both solid *and* hazardous wastes, eliminating costly and time consuming arguments over whether a particular chemical, act of disposal, or time period was "regulated."

II. COMMON CITIZEN SUIT ISSUES

A. Notice

Each of the major federal environmental citizen suit provisions sets forth notice requirements that must be complied with before a citizen suit may be commenced. For example, section 1365(a)(1) of the CWA allows a citizen who meets standing requirements to bring a suit against any person alleged to be in violation of either an "effluent standard or limitation" or an order issued by the U.S. EPA or a State with respect to such standard or limitation. 42 U.S.C. §1365(a)(1). However, no action under section 1365(a)(1) may be commenced:

> prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the [U.S. EPA] Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order…

42 U.S.C. §1365(b)(1)(A). Notice requirements are intended to provide federal and state governments with the time to initiate their own enforcement actions. *Sierra Club*, 504 F.3d at 637 (6th Cir. 2007). They are also intended to provide the alleged offender time to come into compliance with the law. Immediate suits can be filed in certain circumstances, such as when the alleged violation involves hazardous waste.

The U.S. Supreme Court has found that citizen suit notice and delay requirements "are mandatory conditions precedent to commencing suit under the…citizen suit provision; a district court may not disregard these requirements at its discretion." *Hallstrom v. Tillamook County*, 493 U.S. 20, 31 (1989).

Thus, arguments often arise over the specificity requirements for citizen suit notices. Federal regulations provide guidance. Under the relevant regulation for CWA notice requirements, the notice must "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." 40 C.F.R. §135.3(a)(emphasis added). *See also*, 40 C.F.R. §254.3 (providing similar notice content requirements for RCRA citizen suits).

Courts are in disagreement as to notice specificity requirements under federal regulations such as 40 C.F.R. §135.3(a). However, even courts taking a "strict interpretive approach" to the sufficiency of notice under this regulation recognize the flexibility of the notice regulation. "[T]he language of the regulation clearly requires something less than a thoroughly detailed account of every possible allegation…" *Atwell v. KW Plastics Recycling Division*, 173 F.Supp.2d 1213, 1222 (M.D. Ala. 2001). Rather, the regulation simply requires a plaintiff to provide enough information to enable a notice recipient to "identify the pertinent aspects of the alleged violations without undertaking an extensive investigation of their own." *Id*. Given the flexibility of the notice regulation, courts have found that, e.g.:

- A three-year violation timeframe alleged in a citizen suit notice letter "was sufficient to permit [a defendant] to identify when the violations occurred." *See* J. David L. Bunning's November 26, 2003 Memorandum Opinion and Order, *Cornett v. Welding Alloys (USA), Inc.*, civil action no. 02-42-DLB (E.D. Ky. 2003);

- Violations alleged in a citizen suit need only be "closely related to" and "of the same type" as the violations specified in a notice letter. *See*, *Comfort Lake Ass'n., Inc. v. Dresel Contracting, Inc.*, 138 F.3d 351, 355 8th Cir. 1998). *Cf. Frilling v. Village of Anna*, 924 F.Supp. 821 (S.D. Ohio 1996) (citizen-plaintiffs bringing suit under the CWA "must provide notice of the specific limitations, standards, or orders alleged to be violated");

- A notice letter that includes violations actually reported by the defendant to the Ohio Environmental Protection Agency as well as "additional" violations of which the defendant has "actual notice, but were not reported to OEPA, as required," contains "sufficient information to allow the defendant to identify all pertinent aspects [of its violations] without extensive investigation." *Sierra Club*, 2005 WL 2033708, at *10. *Cf.*, *Atlantic States Legal Foundation, Inc. v. United Musical Instruments, U.S.A., Inc.*, 61 F.3d 473 (6th Cir. 1995) (notice of intention to hold defendant liable for violations "not yet known" by the plaintiff constituted merely a "vague warning of possible other claims" that failed to provide proper notice to defendant).

Regardless of the flexibility some courts have read into the citizen suit notice requirements, citizen-plaintiffs should provide a detailed notice to ensure that all requirements are met. *See Atwell*, 173 F.Supp. 2d at 1222 (the CWA notice regulation

does not relieve a citizen-plaintiff of his "duty to provide as much information as possible").

B. Diligent government prosecution bar

In addition to requiring pre-suit notice, environmental citizen suit provisions include a "diligent prosecution bar," under which a citizen suit is precluded if government (federal or state) has already "commenced and is diligently prosecuting" an action against the same violations. *See, e.g.* 42 U.S.C. §7604(b)(1)(B); 42 U.S.C. §6972(b)(1)(B); and, 33 U.S.C. §1365(b)(1)(B).

The proper analysis for whether a state court action bars a RCRA citizen suit involves a two-step process. The first step is a comparison of the facts and related violations alleged in a citizen's complaint with those alleged in the state's complaint. One court has found that courts "…must examine each individual count or claim of plaintiffs' complaint…in order to determine whether the state's civil enforcement action sought compliance with the particular standard, limitation or order which provides the basis of that claim." *Frilling v. Village of Anna*, 924 F.Supp. 821, 837 (S.D. Ohio 1996). The second step, the diligent prosecution analysis, is triggered only with respect to matching facts and violations. "Diligent prosecution" is only a bar to a citizen suit for the precise same claims that have been "prosecuted," and is normally determined as of the time of the filing of the complaint.

C. Intervention

Many of the major environmental statutes allow citizens to intervene in a government action "as a matter of right." *See*, e.g., 33 U.S.C. §1365(b)(1)(B); 42 U.S.C. §7604(b)(1)(B); 42 U.S.C. §6972(b). This is one way for citizens to ensure that their interests are protected in government suits. *See Sierra Club* case, section I.A., above, as a recent example of citizen-intervenors working to protect the public interest in a government action. Citizens maintain their statutory right to intervene even when a government action is considered diligent. This is particularly evident in statutes, such as the CWA, which explicitly state immediately following the diligent prosecution bar: "but in any such action in a court of the United States any citizen may intervene as a matter of right." 33 U.S.C. §1365(b)(1)(B)

Unless a court instructs otherwise, intervenors are entitled to litigate fully on the merits. They "assum[e] the same position as the primary litigants in [the] matter and are dealt with…as if they are the primary litigants…" *Sierra Club*, 2005 WL 2033708, at *10. Additionally, if a citizen had filed a citizen suit notice and complaint before intervening in a government action, the citizen-intervenor is "not restricted to the specificity of [his] notice." *See Id., citing Alvarado v. J.C. Penney Co., Inc.*, 768 F.Supp. 769, 774 (D. Kan. 1991). "The intervenor cannot change the issues framed between the original parties, but he is entitled to litigate fully on the merits." *Id.*

In fact, longstanding authority provides that citizen suit notice requirements do not apply to parallel claims brought in the intervention action. "[N]otice of claims already pending would be a pointless act." *U.S. v. Environmental Waste Control, Inc.*, 710 F.Supp. 1172, 1188 (N.D.

Ind. 1989) (finding that a citizen-intervenor is not required to give pre-filing notice of its claims to the extent those claims did not exceed the scope of the EPA's claims). *See also*, *Lykins v. Westinghouse Electric*, 1988 WL 114522, at*31 (E.D. Ky. 1988) (finding, where state intervened in citizen suit and alleged same violations as the plaintiffs, that notice is not a prerequisite to bringing a CWA claim where intervention is sought). This is because notice requirements are designed to allow government agencies to take action and to let the alleged violator cure the violation. Such considerations are immaterial when a citizen intervenes in a pre-existing action, where the defendant has not cured the violation and the government has taken action (even if such action is not diligently prosecuted). Still, to head-off any argument to the contrary, it is better practice for citizen-plaintiffs to send a notice letter before intervention so long as doing so will not delay the intervention and extinguish the citizen-plaintiff's intervention rights.

Additionally, it is important to remember that intervention rights are not just for citizens. The U.S. Environmental Protection Agency Administrator ("U.S. EPA") (represented by the U.S. Department of Justice) can intervene as a matter of right in most federal environmental citizen suits. *See*, e.g. 42 U.S.C. §7604(c)(2)("In any action under this section, the Administrator, if not a party, may intervene as a matter of right at any time in the proceeding…"). *See also*, 42 U.S.C. §6972(d) and 33 U.S.C. §1365(c)(2). *Fisher v. Perma-Fix of Dayton, Inc.*, 3:04-CV-00418 (S.D. Ohio, filed December 2, 2004) is a recent example of a cooperative relationship between a citizen-plaintiff and the Department of Justice. In *Perma-Fix*, the U.S. Department of Justice intervened in a Clean Air Act citizen suit. In that joint enforcement action, the citizens and government plaintiffs coordinated their discovery and negotiation efforts and ultimately obtained a federal consent decree under the CAA. The citizen plaintiff also obtained a supplemental agreement providing for citizen oversight of that consent decree. Thus, citizens as well as U.S. EPA can take advantage of intervention provisions to work together to ensure that all public interests are protected.

D. Fees and costs

Under the "American Rule," each party in a lawsuit bears its own attorneys' fees unless there is "express statutory authorization to the contrary." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) In an exception to the American Rule, each of the major federal environmental statutes gives court the authority to award costs of litigation (including reasonable attorney and expert witness fees) to any party to a citizen suit, provided that the requirements set forth in the fee provision are met. For example, the Clean Air Act ("CAA") states that:

> The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, *whenever the court determines such award is appropriate*…

42 U.S.C. §7604(d) (emphasis added). *See also* 42 U.S.C. §7604(d)(CERCLA's citizen suit fee provision, allowing cost recovery "to any party, whenever the court determines

such award is appropriate…") and 16 U.S.C. §1540(g)(4) (Endangered Species Act citizen suit fee provision, allowing cost recovery "to any party, whenever the court determines such award is appropriate").

By contrast, fee provisions in other environmental statutes, such as the CWA, state that:

> The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to *any prevailing or substantially prevailing party*, *whenever the court determines such award is appropriate*.

33 U.S.C. §1365(d)(emphasis added). *See also*, 42 U.S.C. §6972(e)(RCRA's citizen suit fee provision, allowing cost recovery "to the prevailing or substantially prevailing party, whenever the court determines such an award is appropriate…").

The differing language is a source of conflict concerning when a citizen plaintiff is entitled to fees, particularly in light of the Supreme Court's decision in *Buckhannon Bd. And Care Home, Inc. v. West Virginia Dep't of Health and Human Res.*, 532 U.S. 598 (2001). In *Buckhannon*, the Supreme Court addressed the "catalyst theory" as applied by the majority of circuit courts for the purposes of awarding plaintiffs prevailing party status under fee-shifting provisions. *Id.* Under the catalyst theory, a plaintiff who is the "impetus for 'voluntary change in a defendant's conduct' could be considered a prevailing party in fee-shifting statutes." *See Sierra Club*, 2005 WL 2033708, at * 2, citing *Payne v. Bd. of Educ., Cleveland City Schools,* 88 F.3d 392, 397 (6th Cir.1996).

The *Buckhannon* Court rejected the catalyst theory to the extent that it would allow a party to recover attorneys' fees without obtaining court-ordered or court-sanctioned relief (i.e. a "judicial imprimatur"). *Id.* Relying on *Buckhannon*, defendants often argue that the catalyst theory is no longer available under the fee-shifting provisions of environmental statutes that expressly use the "prevailing or substantially prevailing party" language (see, e.g., the CWA and RCRA fee provisions, above). With respect to this argument, parties should consider:

(1) The plain language of the fee-shifting provision at issue. The *Buckhannon* Court did not address statutes containing the "prevailing or substantially prevailing" or "whenever…appropriate" standards set forth in environmental statutes. Courts are obligated to "give effect, if possible, to every word Congress used." *U.S. v. Menasche*, 348 U.S. 528 (1955);

(2) Noting the *Buckhannon* decision, the Sixth Circuit has found that "it is an open question whether the catalyst theory remains viable in the context of environmental statutes like the CWA that limit attorneys' fees to a prevailing party or *substantially prevailing party*." *Ailor v. City of Manardville, Tennessee*, 368 F.3d 587, 601, n.6 (6th Cir. 2004);

(3) Legislative history. Many courts have looked to legislative history when analyzing whether *Buckhannon* applies to a particular fee provision. *See Sierra Club*, 2005 WL 2033708, at *5 (citing various cases);

(4) In the *Sierra Club* case (see section I., above), both the district court and the Sixth Circuit found that, even under *Buckhannon*, an intervening citizen who was not a signatory to a final consent decree can be a prevailing party for purposes of the CWA's fee-shifting provision. Specifically, the Sixth Circuit held that, "[t]he Sierra Club may not have been a signatory to the final consent decree in this case, but it is abundantly clear on the record that without the Sierra Club's active intervention in the litigation, the less-than-adequate interim consent decree would not have been withdrawn and a fully adequate consent decree would not have been entered in its place. Likewise, the imprint of the Sierra Club's involvement is obvious from the district court's decision to appoint an ombudsman, to whom the citizens of Hamilton County may carry their complaints in the future." *Sierra Club v. Board of County Commissioners of Hamilton County, Ohio*, 504 F.3d 634, 643-44 (6th Cir. 2007)

The "catalyst theory" is viable under the Clean Air Act and the Endangered Species Act, both of which lack the "prevailing party" language. See e.g., *Loggerhead Turtle v. County Council of Volusia County, Florida*, 307 F.3d 1318 (11th Cir. 2002); *Sierra Club v. EPA*, 322 F.3d 718 (D.C. Cir. 2003).

Additionally, when arguing whether a citizen-plaintiff has prevailed for purposes of obtaining fees, parties should consider:

(1) Claim tracing is not generally required. Under *Hensley*, 461 U.S. at 465, a party is not required to trace its hours billed back to specific claims. Rather, *Hensley* states that, "[i]n [some] cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation."

(2) Similarly, "[w]here a lawsuit consists of related claims, a Plaintiff who has won substantial relief should not have his fees reduced simply because the district court did not adopt each contention raised." *Id.*, at 440.

(3) The standard for determining whether a party prevails is a "generous formulation" which is met "… if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Id.* at 433.

During a time of shrinking regulatory budgets, little independent government-funded research, reluctance of government to exercise its police power, and scarce resources for individuals to protect their health and property, citizen suits play an increasingly vital role in the environmental protection network.