
Citizenship: A Discussion of Environmental Citizen Suits

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INTRODUCTION

This essay will discuss citizen suit provisions under federal environmental law with the focus on the application of citizen suits to private party litigation as distinguished from citizen suit litigation undertaken by either local governmental bodies or public interest groups. It has been the author's experience that private party litigation differs significantly from "public interest" environmental litigation.

INITIAL CONSIDERATIONS

The use of citizen suits in environmental litigation, especially as applied to private party litigation, presents a number of unique challenges and considerations which must be carefully weighed. Citizen suit provisions exist under a host of environmental statutes and were designed to essentially deputize "private attorneys general" for the enforcement of environmental laws.¹ Citizen suit provisions within environmental statutes typically provide that "any person" may bring an action against "any person" for the violation of a permit, standard regulation condition requirement, prohibition, order, or for any condition which may present an imminent and substantial endangerment to the health of the environment.²

These suits may name the United States and any other governmental instrumentality or agency as defendants;³ including an action against

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1. See *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483-84 (1996).

2. See Clean Water Act, 33 U.S.C. § 1365(a) (1994); Safe Drinking Water Act, 42 U.S.C. § 300j-8(a) (1994); Resource Conservation Recovery Act, 42 U.S.C. § 6972(a) (1994); Clean Air Act, 42 U.S.C. § 7604(a) (1994); Emergency Planning Community Right to Know Act, 42 U.S.C. § 11046(a) (1994).

3. As with any action against a governmental entity, the restrictions of the Eleventh

the United States Environmental Protection Agency (EPA) for its failure to perform a non-discretionary duty.⁴ Counsel must keep in mind, however, that just because a particular lawsuit is permissible does not necessarily make it advisable. For private parties in general, citizen suits are best undertaken in instances where the alleged violations, which are the subject of the citizen suit, have resulted in damages that are recoverable through pendant state law tort claims. Citizen suits that seek redress of technical permit violations, without attendant damage claims, are typically the province of public interest groups and governmental authorities. Except in unusual circumstances, such violations are not profitably pursued by private parties.

Violations of permit conditions or environmental standards typically result in toxic torts to citizens located near the site of the violation. Due to this proximity, injured parties may make pendant state law claims for trespass,⁵ nuisance,⁶ and strict liability under the doctrine established by *Rylands v. Fletcher*.⁷

The advantage of pleading state law tort claims is three-fold. First, because environmental citizen suit provisions do not provide for the recovery of damages, a successful action results only in injunctive relief.⁸ Pendant state law tort claims, however, allow for the recovery of damages in addition to the injunctive relief provided by the citizen suit provisions. Second, the claims elevate the possibility of a plaintiff's verdict because they present a more compelling case at trial. Finally, the common law damage claims will provide a right to a jury trial, at least as to damage issues, in what would otherwise be considered an equitable

Amendment will curtail the breadth of the lawsuit. See U.S. CONST. amend. XI.

4. See Clean Water Act, 33 U.S.C. § 1365(a)(2) (1994); Safe Drinking Water Act, 42 U.S.C. § 300j-8(a)(2) (1994); Resource Conservation Recovery Act, 42 U.S.C. § 6972(a)(2) (1994); Clean Air Act, 42 U.S.C. § 7604(a)(2) (1994); Emergency Planning Community Right to Know Act, 42 U.S.C. § 11046(a)(1)(B) (1994).

5. See *Longenecker v. Zimmerman*, 267 P.2d 543 (Kan. 1954). In Kansas, airborne pollutants can constitute a trespass if the plaintiff can show actual physical damage to his property. *Maddy v. Vulcan Materials Co.*, 737 F. Supp. 1528 (D. Kan. 1990). See also *Miller v. Cudahy Co.*, 592 F. Supp. 976 (D. Kan. 1984) (holding defendant liable for migration of salt into aquifer); *Binder v. Perkins*, 516 P.2d 1012 (Kan. 1973) (holding defendant liable for airborne spraying of herbicide); *Riddle Quarries, Inc. v. Thompson*, 279 P.2d 266 (Kan. 1955) (holding that failure to remove limestone from plaintiff's property was trespass); *Martin v. Reynolds Metals Co.*, 342 P.2d 790 (Or. 1959) (finding a trespass by fumes and invisible microscopic particles).

6. See *Culwell v. Abbott Constr. Co.*, 506 P.2d 1191 (Kan. 1973); *Sandifer Motors, Inc. v. City of Roeland Park*, 628 P.2d 239 (Kan. Ct. App. 1981). See also W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 87, at 619-20 (5th ed. 1984) (discussing the definition of nuisance).

7. 159 Eng. Rep. 737 (Q.B. 1865), *rev'd*, 1 L.R.-Ex. 265 (Ex. Ch. 1866), *aff'd*, 3 L.R.-E. & I. App. 330 (H.L. 1868). See *Klassen v. Central Kansas Coop. Creamery Ass'n*, 165 P.2d 601, 607 (Kan. 1946) (analyzing strict liability as established by *Fletcher v. Rylands*); *Gilbert v. Davidson Constr. Co.*, 203 P. 1113, 1113-14 (Kan. 1922) (same); *Helms v. Eastern Kansas Oil Co.*, 169 P. 208, 210 (Kan. 1917) (same). *But see Sinclair Prairie Oil Co. v. Stell*, 124 P.2d 255 (Okla. 1942) (rejecting *Fletcher v. Rylands*). See also KEETON ET AL., *supra* note 6, §71, at 513 (discussing inherently dangerous activities).

8. See *Short v. Ultramar Diamond Shamrock*, 46 F. Supp. 2d 1199, 1200 (D. Kan. 1999).

proceeding tried to the bench. While judges will be the final arbitrator of the citizen suit claims, they may make use of the jury for a pseudo advisory opinion for determining the severity of the violations and/or the appropriateness of civil penalties and injunctive relief.

A significant litigation advantage of the citizen suit provisions, in addition to the possibility of an award of attorney and expert witness fees,⁹ is the availability of a federal forum. This forum consideration can be especially weighty in locales where a jury may favor the defendant because it is a local employer or where a jury will be drawn from a historically conservative pool.

The overreaching consideration in citizen suits, like all lawsuits, is counsel's understanding and analysis of the facts. At the very outset, counsel must be satisfied that the technical merits of the case can be clearly established. Based on the author's experience, it is inadvisable to file suit where there is any factual issue as to whether the injury causing violations actually occurred or whether they were caused by the defendant.

Finally, counsel should pay careful attention to the appropriate statutes of limitations for any pendent state law damage claims. In Kansas, these pendent claims are typically tort actions that are governed by a two year statute of limitation following discovery.¹⁰ State statutes of limitation that do not contain a discovery rule will be preempted by the "federally required commencement date[,]"¹¹ which was enacted as part of CERCLA. It may be necessary to file an action in state court to preserve the pendant claims while the federal notice requirements¹² are being satisfied. The state court action may then be dismissed or preferably stayed once the action is commenced in federal court.

INITIAL DETERMINATIONS

I. State Enforcement Bar

Citizen suits are generally barred, under federal environmental statutes, when the state or federal government has commenced—and is diligently prosecuting—an enforcement action against the defendant pertaining to the alleged violations.¹³ This exclusionary mandate requires that the state or federal government be prosecuting "an action"

9. See *infra* Section III.d (discussing available remedies).

10. KAN. STAT. ANN. § 60-513 (1994 & Supp. 1998).

11. 42 U.S.C. § 9658(b)(4)(A) (1994) ("the date the plaintiff knew (or should have known) that the personal injury or property damages . . . were caused or contributed to by the hazardous substance or pollutant or contaminant concerned").

12. See *infra* Section II (discussing notice requirements).

13. See, e.g., Clean Water Act, 33 U.S.C. § 1365(b) (1994).

in court.¹⁴ State administrative proceedings and response actions by regulatory agencies are insufficient to trigger this bar.¹⁵ Although not a bar to the citizen suit, the administrative activity frequently gives grounds for defendants to argue that the court should defer to state action under the doctrines of extension, primary jurisdiction, or mootness.¹⁶

II. Notice Letters

Citizen suit provisions typically require official notice from the prospective plaintiffs to the defendants informing them of their failure to comply with either their permit requirements or other environmental standards.¹⁷ Once the notices have been sent, the filing of suit must be delayed for statutorily prescribed time periods.¹⁸ Notification has been held to be mandatory and failure to comply is a bar to a citizen suit.¹⁹

As a matter of course, plaintiffs prefer to be as vague as possible in most matters, so as to allow maximum flexibility. Within the context of the notice requirement, however, plaintiffs are required to be specific concerning the conduct that has led to the violation of statutory or regulatory provisions or permit conditions. Defendants have argued that by failing to note precisely how a violation occurred, the notice was insufficient to allow claims based on those violations to proceed.²⁰ In general, a notice should include sufficient information to permit recipients of the notice to identify the specific standard limitation or order that has been allegedly violated, the activity alleged to be in 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 and address of the person giving notice.²¹ The purpose of the notice requirement is to give the violator the opportunity to bring itself into compliance and thus render the citizen suit unnecessary.²²

The notice must be served on the violator, the state in which the violation occurred, and the Administrator of the U.S. Environmental Protection Agency²³ by restricted mail, return receipt requested. The

14. See *Morris v. Prime Time Stores of Kansas, Inc.*, No. 95-1328-JTM, 1996 WL 563845, at *3 (D. Kan. Sept. 5, 1996).

15. *Id.* (citing *Toledo v. Beazer Materials & Servs.*, 833 F. Supp. 646 (N.D. Ohio 1993)). See also *Anderson v. Farmland Indus.*, 45 F. Supp. 2d 863, 866 (D. Kan. 1999).

16. See *infra* Section III.b-c.

17. See, e.g., Clean Water Act, 33 U.S.C. § 1365(b).

18. *Id.*

19. See *Hallstrom v. Tillamook County*, 493 U.S. 20, 29-31 (1989); *Public Interest Research Group of New Jersey, Inc. v. Windall*, 51 F.3d 1179, 1189 n.15 (3d Cir. 1995); *Washington Trout v. McCain Foods, Inc.*, 45 F.3d 1351, 1354 (9th Cir. 1995); *Greene v. Reilly*, 956 F.2d 593, 594 (6th Cir. 1992); *National Env'tl. Found. v. ABC Rail Corp.*, 926 F.2d 1096, 1097 (11th Cir. 1991).

20. See *Anderson*, 45 F. Supp. 2d at 865.

21. 40 C.F.R. § 54.3(b) (1999).

22. See *Gwaltney of Smith Field, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987).

23. See, e.g., 42 U.S.C. § 6972(b)(2)(A) (1994).

plaintiff should plead in the complaint that notice was given and attach proof thereof.

III. The Lawsuit

Once the statutory notice period has passed and the lawsuit has been properly filed,²⁴ there are still a number of hurdles that plaintiffs must overcome.

a. Standing as a Threshold Requirement

To meet the constitutional requirement of standing, plaintiffs must show the following: (1) that they have suffered an actual or threatened injury in fact; (2) that there is a causal connection between the injury and the defendant's complained of conduct; and (3) that the injury is redressable by the relief sought.²⁵ The plaintiffs must show that not only are they injured by the defendant's conduct but that the available remedies, including civil penalties typically payable to the United States Treasury and injunctive relief, will in fact redress those injuries.²⁶ This is especially problematic in cases arising entirely out of past violations.²⁷ In *Steel Co. v. Citizens for a Better Environment*,²⁸ the United States Supreme Court held that because the plaintiffs did not allege either continuing violations or the imminence of future violations, injunctive relief would not be available to redress plaintiffs' injuries.²⁹

Therefore, to withstand a motion for summary judgment on this issue, plaintiffs must show specific facts by which a reasonable fact finder could conclude: (1) that the defendant was in fact violating a permit condition or environmental standards at the time the plaintiffs filed their complaint; or (2) that future violations are imminent.³⁰ Plaintiffs must, with regard to each and every violation alleged, demonstrate one of these requirements.³¹

In situations where the defendant is conducting remedial activities pursuant to agency oversight, defendant may claim that the citizen suit will be ineffective in providing plaintiffs with any unique or additional

24. Copies of the complaint must be served on the Attorney General of the United States and the Administrator of the U.S. Environmental Protection Agency. *See, e.g.*, 42 U.S.C. § 6972(b)(2)(F) (1994); 42 U.S.C. § 7604(c)(3) (1994).

25. *Steel Co. v. Citizens for a Better Env't*, 118 S. Ct. 1003, 1016-17 (1998).

26. *Id.* at 1018 (citing *Lujan v. Defenders of the Wildlife*, 504 U.S. 555 (1992)).

27. *See Gwaltney*, 484 U.S. at 67 (holding that citizen suits may not be based wholly on past violations).

28. 118 S. Ct. 1003 (1998).

29. *Steel Co.*, 118 S. Ct. at 1016-18.

30. *Anderson v. Farmland Indus.*, 45 F. Supp. 2d 863, 871 (D. Kan. 1999) (citing *Steel Co.*, 118 S. Ct. at 1019). *See also Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 486 (1996) ("this language 'implies that there must be a threat which is present now, although the impact of the threat may not be felt until later'" (quoting *Price v. United States Navy*, 39 F.3d 1011, 1019 (9th Cir. 1994))).

31. *See Sierra Club v. Simkims Indus.*, 847 F.2d 1109, 1114-15 (4th Cir. 1988); *Anderson v. Farmland Indus.*, No. 98-2499-JWL, 1999 WL 973486, at *4 (D. Kan. Sept. 22, 1999).

relief. In response, the District Court of Kansas has placed the burden upon the *defendant* to show that there is no additional relief that could be obtained by the citizen suit above that which will be obtained as a result of the defendant's remedial conduct.³²

In the context of a motion to dismiss, mere allegations of facts are presumed to be sufficient to support plaintiff's standing. This presumption, however, no longer applies in the context of a motion for summary judgment.³³ Therefore, plaintiff must be able to produce evidence establishing each of the standing elements.

b. Mootness

The related argument, tied to the issues of redressability and the consideration of state action, is the doctrine of mootness. The mootness doctrine requires that an actual controversy be extant at all stages of review; not merely at the time the complaint is filed.³⁴ Typically, this argument is raised in two contexts. The first context is when the defendant is conducting a remedial activity at the direction of a state or federal agency. The second is when a defendant has voluntarily ceased the alleged violation at some point after the plaintiffs have filed their complaint. To prevail under the first context, the defendant must show that any court order issued in accordance with the citizen suit will be duplicative and ineffective because of the on-going remediation.³⁵ To succeed in the second context, defendant must show that the alleged violation has ceased *and* that there is no reasonable expectation that the wrong will be repeated.³⁶

c. Primary Jurisdiction and Abstention

The primary jurisdiction and abstention doctrines concern the relationship between federal courts and the states. The primary jurisdiction doctrine allows a federal court to defer, on "a matter extending beyond the conventional experiences of judges or falling within the realm of administrative discretion, to an administrative agency with more specialized experience, expertise, and insight."³⁷ The abstention doctrine holds that:

Where timely and adequate state-court review is available, a federal court

32. *Morris v. Prime Time Stores of Kansas, Inc.*, No. 95-1328-JTM, 1996 WL 563845, at *3 (D. Kan. Sept. 5, 1996).

33. *See* *Davies v. National Coop. Refining Ass'n*, No. 96-1124-WEB, 1996 WL 529208, at *7 (D. Kan. July 12, 1996) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)).

34. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64-65 (1997).

35. *Morris*, 1996 WL 563845, at *3.

36. *See* *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953); *City of Albuquerque v. Browner*, 97 F.3d 415, 420 (10th Cir. 1996), *cert. denied*, 118 S. Ct. 410 (1997); *Anderson v. Farmland Indus.*, 45 F. Supp. 2d 863, 872 (D. Kan. 1999).

37. *Williams Pipeline Co. v. Empire Gas Corp.*, 76 F.3d 1491, 1496 (10th Cir. 1996).

sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar[;]" or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."³⁸

The doctrine may also apply when the exercise of federal review over the particular case and similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.³⁹ Courts across the nation are divided concerning the appropriateness of abstention and primary jurisdiction in the context of citizen suits.⁴⁰

The application of these doctrines is extremely fact specific. The key consideration, however, is whether any effective remedy is available to the plaintiffs from a state or local administrative agency. Many times state administrative remedies can be shown to be ineffective at alleviating the problems in a reasonable or even definable time-frame.⁴¹

d. Remedies Available

In a citizen suit, the court is granted the authority, without regard to the amount in controversy or citizenship of the parties, to enforce any permit, standard regulation, condition, requirement, prohibition, or order.⁴² The court may further issue an injunction to restrain any person who has contributed or is contributing to such violation and to order such person to take any other action as may be necessary under the circumstances.⁴³ The United States Supreme Court, however, has held that the relief available under citizen suits is limited to prospective remedies; a defendant may not be ordered to repay the costs of a past clean-up effort.⁴⁴ In addition to injunctive relief, the court may grant to the prevailing or substantially prevailing party the costs of litigation, including reasonable attorney and expert witness fees, whenever the court determines such an award is appropriate.⁴⁵

38. *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 361 (1989) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976)).

39. *Id.*

40. *See Coalition for Health Concern v. LWD, Inc.*, 60 F.3d 1188, 1193-94 (6th Cir. 1995) (abstention appropriate); *Davies v. National Coop. Refinery Ass'n*, 963 F. Supp. 990, 997 (D. Kan. 1997) (same); *Space Age Fuels, Inc. v. Standard Oil Co. of California*, Civ. No. 95-1637-JE, 1996 WL 160741, at *2-5 (D. Or. Feb. 29, 1996) (same); *Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1348 (D.N.M. 1995) (same). *But cf. PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 619 (7th Cir. 1998) (doctrines not applicable); *Sierra Club v. Tri-State Generation and Transmission Ass'n*, 173 F.R.D. 275, 283-84 (D. Colo. 1997) (same).

41. *See Morris v. Prime Time Stores of Kansas, Inc.*, No. 95-1328-JTM, 1996 WL 563845, at *4 (D. Kan. July 12, 1996).

42. *See supra* note 2.

43. *See id.*

44. *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 484 (1996).

45. *See, e.g., Clean Water Act*, 33 U.S.C. § 1365(d) (1994).

The United States Supreme Court has ruled that even though the award of fees is discretionary, it is important for the court to provide a concise but clear explanation of its reasons for the fee award.⁴⁶ The Tenth Circuit has stated, accordingly, that the district court should afford enough detail concerning fee awards to provide an adequate basis for review.⁴⁷ Typically, the court begins with the calculation of the lodestar amount, which is generally defined to be all reasonable attorney fees calculated as the product of reasonable hours billed times the legal community's reasonable rate.⁴⁸ The court, however, may consider the relationship between the amount of fees awarded and the results obtained.⁴⁹ Additionally, the court may not allow legal billing rates to be applied to tasks that are easily delegable to non-professional assistants.⁵⁰ Furthermore, the court may consider potential duplication of effort as a means of reducing the amount of fees awarded.⁵¹

Even in the absence of a judicial determination on the merits of a citizen suit, the plaintiff may be entitled to an award of attorney fees. If some degree of success can be shown by proving that the lawsuit was causally linked to securing the relief obtained and that the defendant's conduct in response to the lawsuit was required by law, then the court may grant the award.⁵² Generally, plaintiffs should be able to recover their litigation costs even in cases where they do not fully prevail on the merits or where the case is settled prior to the court's determination of the merits.

CONCLUSION

Citizen suits under the federal environmental statutes are an extremely powerful tool for the redress of environmentally related injury. In the context of private party civil litigation, however, care should be taken at the outset to avoid pitfalls. Because this type of litigation can be extremely expensive, special care should be exercised. Counsel must be confident of the answers to the issues raised in this essay and explore all of the fact specific issues of their individual case. When properly undertaken, citizen suits can be extremely rewarding.

46. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

47. *Ramos v. Lamm*, 713 F.2d 546, 552 (10th Cir. 1983).

48. *Hensley*, 461 U.S. at 433.

49. *Id.* at 437.

50. See *New Mexico Citizens for Clean Air and Water v. Espanola Mercantile Co.*, 72 F.3d 830, 835 (10th Cir. 1996); *Halderman ex rel. Halderman v. Penhurst State Sch. and Hosp.*, 49 F.3d 939, 942 (3d Cir. 1995); *Ursic v. Bethlehem Mines*, 719 F.2d 670, 677 (3d Cir. 1983).

51. *Espanola Mercantile*, 72 F.3d at 835.

52. See *Powder River Basin Resource Council v. Babbitt*, 54 F.3d 1477, 1486 (10th Cir. 1995); *J & J Anderson, Inc. v. Town of Erie*, 767 F.2d 1469, 1473 (10th Cir. 1985); *Olde Timer, Inc. v. Blackhawk-Central City Sanitation Dist.*, 51 F. Supp. 2d 1109, 1119-20 (D. Colo. 1999); *Colorado Envtl. Coalition v. Romer*, 796 F. Supp. 457, 459-61 (D. Colo. 1992).