



Increasing Use of Environmental Citizens Suits and Citizen Involvement in Enforcement Actions

The Private Sector Perspective

November 9, 2010

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Private Sector View of Citizen Suits



Different Suits; Different Responses

- Is the Suit About Plain Vanilla Violations?
- Is the Suit Trying to Send a Message to an Industry (and perhaps the agency)?
- Is the Suit Really Seeking a Change in Policy?

Suits About Basic Violations

- More of a Typical Response to Litigation
 - Did I do it?
 - Are there technical issues?
 - What kind of relief is being sought?
- There Are Still Some Differences
 - What is the agency enforcement history?
 - Are you better off negotiating with the agency than with the citizens group?
 - What is necessary to preclude citizen action?

Responding to Message Litigation

- What Is the Message Being Sent?
 - Is this an area that the agency has ignored?
 - Is it a new or emerging area of concern?
 - Is the issue unique to you or common among potential defendants?
- Some Examples
 - Coal ash impoundment at Brayton Point
 - Recent spate of suits by CLF alleging stormwater violations

Suits Seeking Changes in Policy

- Prompt Negotiations with Agency
- Trade Groups May Have a Role – Expand the Negotiations to Match the Plaintiffs

Some Particular Issues To Note

- Standing
- Statutes of Limitations
- Common Law v. Statutory Claims – Permit Shield Issues

Standing

- Federal Law
 - Need to establish plaintiffs' standing
 - Law is fairly well defined, yet still evolving
- State Law
 - Chapter 214, section 7A – Eliminates need to demonstrate standing
 - Participation in adjudicatory hearings is different – No standing to request adjudicatory hearing if not participate in permitting process before agency (*In the Matter of Covanta Pittsfield, LLC*)

Statutes of Limitation

- Are Violations One-Time Events Or Are They Recurring?
- State Law
 - *Town of Canton v. MHD* (455 Mass. 783) – Bright line rule requiring suit within 30 days of issuance of first permit
 - Are plaintiffs actually alleging violations of permits or are they alleging permits were wrongly issued? – *EarthSource v. Burt*

Common Law Claims

- Recent Claims Alleging Nuisance
 - GHG Claims
 - Traditional Clean Air Act Claims
- What is the Role For Common Law Claims Where the Defendant Is In Compliance? (*North Carolina v. TVA*).
- Is There a Permit Shield?