Clean Water Act Citizen Suit Enforcement of Wastewater Discharges

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Reference: McDowell RJ, CA Pruitt, RA Bahn (eds.), *Proceedings of the 2015 Georgia Water Resources Conference*, April 28-29, 2015, University of Georgia, Athens.

Abstract. The Clean Water Act ("CWA") includes a "citizen suit" provision, which under certain circumstances, permits environmental groups, individuals, and others to enforce the Act. Before the citizen suit provision can be used, however, the Act requires a prospective plaintiff to comply with several pre-notice provisions. In addition to the pre-filing requirements, the Act also includes several defenses to liability. This paper reviews the requirements of the CWA citizen suit provision and evaluates a range of defenses under the Act. Based on this review, the CWA citizen suit is alive and well in Georgia, and it may have become the preferred—and the most successful—route for CWA enforcement throughout the United States.

INTRODUCTION

Under the Clean Water Act, "any citizen" can file a citizen suit against any person who is alleged to be in violation of an effluent standard or limitation under the CWA. 33 U.S.C §1365 (2012). In general, citizen suits attempt to prevent the discharge of a pollutant without a permit or in violation of a permit. For example, if a facility is discharging perchlorethylene in its wastewater, and it either has no National Pollutant Discharge Elimination System ("NPDES") permit issued under the CWA or its NPDES permit does not have a condition for perchloroethylene, an environmental group may sue to stop the discharges. In addition to seeking enforcement, a plaintiff in a CWA citizen suit may also seek certain injunctive relief (e.g., removal of silt from a stream), penalties (e.g., penalties for each day of the violation), and attorney fees and expenses. Practically, by filing a citizen suit, the plaintiff, whether an environmental group, individual, or private company can step into the shoes of the Attorney General and enforce the CWA.

PRE-SUIT NOTICE REQUIREMENTS

Before a citizen suit under the CWA can be filed in court, the Act requires that a "pre-suit" notice be given. Specifically, a Plaintiff can only commence an action after 60-days prior notice to the EPA, the state where the alleged violation occurred and the alleged violator. 33 U.S.C. §1365(b).

Under the Clean Water Act, the pre-suit notice must include "sufficient information to permit the recipient" to identify the following:

- the specific standard, limitation, or order allegedly violated;
- the activity constituting a violation;
- the person(s) responsible for the violation;
- the location of the violation;
- the date(s) of such violation;
- the full name, address and phone number of the person giving notice.

40 C.F.R. §135.3(a) (1973). In addition, the Act requires that certain defendants and other interested parties be given "notice of intent" to sue. For example, the Act requires that the following individuals or entities be served with notice of the intent to sue under the Act:

- the individual or entity being sued;
- EPA Administrator;
- EPA Regional Administrator; and
- Chief Administrative Officer of state water pollution control agency.

40 C.F.R. §135.2.

The purpose of the notice requirement is to allow permittees to achieve CWA compliance without a suit. The 60-day notice period also allows the government to begin prosecution, precluding a CWA suit by another party.

The pre-suit notice is jurisdictional under the CWA—in other words, if the pre-suit notice requirements are not met, the case will be dismissed. For instance, courts have

dismissed claims that did not comply with the 60-day notice requirement. *E.g., Black Warrior Riverkeeper, Inc. v. Black Warrior Minerals*, 734 F.3d 1297, 1298 (11th Cir. 2013); *Altamaha Riverkeepers v. City of Cochran*, 162 F. Supp. 2d 1368, 1373 (M.D. Ga. 2001). Courts have also dismissed claims that did not provide notice that was sufficiently specific of the standard, limitation, or order that was violated. *E.g., Chute v. Montgomery Cnty. Shooting Complex*, No. 3:12-cv-0776, 2013 U.S. Dist. LEXIS 25275, at *6–7 (M.D. Tenn. Feb. 25, 2013). *But see, Carney v. Gordon Cnty.*, No. CIVA 4:06CV36 RLV, 2006 WL 4347048, at *7 (N.D. Ga. 2006). In addition, the notice must be sufficiently specific to inform the alleged violator about what it is doing wrong, so that it will know what corrective actions will avert the lawsuit. *Atl. States Legal Found., Inc., v. Stroh Die Casting Co.*, 116 F.3d 814, 819 (7th Cir. 1997).

CERTAIN POST-SUIT DEFENSES

In addition to certain fundamental defenses to a citizen suit available under other theories (e.g., standing, mootness, ripeness, causation, etc.), the CWA itself and related case interpretations include other more statutory-driven defenses for a citizen suit defendant. *See Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F. 3d 149 (4th Cir. 2000).

Diligent Prosecution

As the Supreme Court has made clear, a CWA "citizen suit is meant to supplement rather than to supplant governmental action." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987). By its very nature, a citizen suit to enforce environmental laws should be permitted "only if the Federal, State and local agencies fail to exercise their enforcement responsibility." *Id.* (citations omitted).

Under the citizen suit provision of the Clean Water Act, if a federal state government is "diligently prosecuting" an enforcement action against the defendant, the citizen suit is barred. In many states, whether a state consent decree or a state administrative action constitutes "diligent prosecution," can present a challenging legal question. 33 U.S.C. §1319(g)(6) (2012); *see La. Envtl. Action Network v. Sun Drilling Prods. Corp.*, 716 F. Supp. 2d 476, 479–481 (E.D. La. 2010); Jeffrey G. Miller, *Overlooked Issues in the "Diligent Prosecution" Citizen Suit Preclusion*, 10 Wid. L. Symp. J. 63 (2003). For a state enforcement framework to prevent a citizen suit, it must be "comparable" to the enforcement framework under the CWA. 33 U.S.C. §1319(g)(6).

In Georgia, depending on the specific state action, courts have held that Georgia consent order procedures are not roughly comparable to the framework under the Clean Water Act. *See Leakey v. Corridor Materials, LLC*, 839 F. Supp. 2d 1340 (M.D. Ga. 2012). Accordingly, the entry of a consent decree with the Georgia EPD may not constitute "diligent prosecution" if certain other formalities are not followed.

No Ongoing Violations

To enforce a violation of the CWA under the citizen suit provision, there must be an "ongoing" violation. According to the United States Supreme Court, the CWA citizen suit provision does not authorize suits on the basis of wholly past violations. For instance, if the violation has been cured either before the notice of intent to sue was sent, or before the 60-day period, the violation may not be considered "ongoing." *See Gwaltney of Smithfield v. Cheasapeake Bay Found.*, 484 U.S. 49 (1987).

Depending on the facts, it may not be clear what constitutes a "wholly past" violation of the Clean Water Act. For example, if a pollutant such as silt remains in a river, after the failure of a best management practice to stop silt runoff has been corrected, is this still a violation? *See e.g., City of Mt. Park v. Lakeside at Ansley, LLC*, 560 F. Supp. 2d 1288 (N.D. Ga. 2008). The case law is not entirely clear, and many legal battles address this very issue. The Supreme Court requires a "reasonable likelihood that a past polluter will continue to pollute in the future." *Gwaltney*, 484 U.S. at 57.

In considering the ongoing violation issue, if action has been taken to correct the alleged violation, a court may view claims raised in a citizen suit as "moot" and not requiring additional judicial scrutiny. *See Atl. States Legal Found., Inc. v. Eastman Kodak, Co.*, 933 F.2d 124 (2d Cir. 1991); *see e.g. Sierra Club v. Colorado Refining Co.*, 852 F. Supp. 1476, 1483–1484 (D. Colo. 1994).

NPDES Permit Shield

Like many other environmental laws, the CWA includes a "permit shield." Under this provision, the holder of a NPDES wastewater permit is shielded from both agency enforcement and citizen suits, *provided*—and this is the key—the permittee complies with permit terms. Yet the battle is typically not whether a permit condition has been violated. That part of the analysis is relatively straightforward. The real war is over whether a NPDES permit shields a permittee for pollutants actually discharged which are known by agencies to be present in the discharge, but not specifically incorporated into a permit

limit or condition. As explained by the United States Supreme Court, the permit shield's purpose is to protect permit holders from changes in "regulations during the period of a permit and to relieve them of having to litigate . . . whether their permits are sufficiently strict." *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 n.28 (1977).

In the seminal case, *Piney Run*, the Fourth Circuit crafted the legal test defining the availability of the CWA permit shield. *See Piney Run Pres. Ass'n v. Cnty. Comm'r*, 268 F.3d 255 (4th Cir. 2001). In considering whether a permit holder may continue to discharge an unlisted pollutant, Piney Run held that an NPDES permit will shield subsequent enforcement if (1) the permit holder complies with the express terms of the permit and the CWA's permit application requirements and (2) the permit holder does not make a discharge not within the "reasonable contemplation" of the agency when the permit was issued. *Id.* at 259.

Accordingly, in the context of citizen suits, if the discharge alleged to be a violation in the complaint is included in the NPDES permit application, the citizen suit may barred under the "permit shield" defense. See Douglas A. Henderson, E. Fitzgerald Veira & Brooks M. Smith, *The Clean Water Act Permit Shield – Recent Battles, 29 A.B.A. Natural Res. & Env't, 56* (2014).

Applicability to Surface Waters

The Clean Water Act prohibits the discharge of a pollutant from a "point source" to "navigable waters" without a valid NPDES permit. See 33 U.S.C. §§1311(a), 1319(c)(2)(A), 1342, 1362(7), 1362(12), 1262(14) (2012); *see also Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 629 F.3d 387, 390 (4th Cir. 2011). The term "point source" means "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, [or] rolling stock . . . from which pollutants are or may be discharged." 33 U.S.C. §1362(14). The term does not include the "type of pollution that arises from many dispersed activities over large areas, and [which] is not traceable to any single discrete source." *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 508 (9th Cir. 2013). Nor does it include migration into or through groundwater. *Chesapeake Bay Found., Inc. v. Severstal Sparrows Point, LLC*, 794 F. Supp. 2d 602, 619–20 (D. Md. 2011). Neither Congress nor EPA has ever defined or interpreted "navigable waters" or "waters of the United States" to include groundwater.

Likewise, the majority of the Courts of Appeal have explicitly held that groundwater is not within the jurisdiction of the Clean Water Act. For instance, in *Village of Oconomowoc Lake v. Dayton Hudson Corp.* 24 F.3d 962, 963-65 (7th Cir. 1994), the Seventh Circuit held that the CWA did not cover discharges of contaminated water from a 6-acre artificial pond that "seeps into the ground." While the "ground water eventually reach[ed] stream, lakes, and oceans," it did not constitute waters of the United States "just because [the groundwater] may be hydrologically connected with surface waters." *Id.* at 963–965. At the same time, a few courts have held that Congress intended the CWA to regulate discharges to groundwater with a direct hydrologic connection to surface water, *see e.g., Hernandez v. Esso Std. Oil Co.*, 599 F.Supp. 2d 175, 179–81 (D.P.R. 2009).

The Seventh Circuit's position has been widely accepted by other Circuits. *See, e.g., Rice v. Harken Exploration Co.*, 250 F.3d 264, 269 (5th Cir. 2001) ("The law in this Circuit is clear that ground waters are not protected waters under the CWA."); *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 223 n.6 (2nd Cir. 2009) (recognizing authority for the assertion that the CWA does not apply to ground water without reaching the issue). A minority of courts conclude that, under certain conditions and depending on the facts, certain discharges to certain groundwater systems may violate the CWA. *See e.g., Wash. Wilderness Coal. v. Hecla Mining Co.*, 870 F. Supp. 983, 989–991 (E.D. Wash. 1994); *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1179–81 (D. Idaho 2001).

Time Limits

The CWA contains no provision for a limitations period applicable to citizen suits brought against NPDES permit violators. However, many federal courts that have confronted the issue embrace and employ the default federal statute of limitations for civil penalties matters, 28 U.S.C. §2462 (2012). This general federal statute of limitations reads, in relevant part: "Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued . . ." *Id.*

While the Eleventh Circuit Court of Appeals has yet to confront this issue, several circuit court of appeals have held that citizen enforcement actions, which are brought under the authority of §505 of the CWA, are subject to the five-year limitations period under §2462. *See e.g. Pub. Interest Research Grp. v. Powell Duffryn Terminals, Inc.*,

913 F.2d 64, 74 (3d Cir. 1990); *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1522 (9th Cir. 1987).

Two district court decisions in the Eleventh Circuit have recognized that the §2462 limitations period applies in CWA enforcement actions brought by the government. *See United States v. Reaves*, 923 F. Supp. 1530 (M.D. Fla. 1996); *United States v. Windward Properties, Inc.*, 821 F. Supp. 690 (N.D. Ga. 1993). However, the two district courts disagree on when the claims first accrued.

ATTORNEY FEES

Under the CWA, a court may award costs of litigation "to any prevailing or substantially prevailing party, whenever the court determines such an award is appropriate." 33 U.S.C. §1365(d). The two considerations relevant to determining a fee award under the CWA are "(1) whether the party seeking fees is a prevailing party or substantially prevailing party and (2) whether the fees requested are reasonable." *Am. Canoe Ass'n v. EPA*, 138 F. Supp. 2d 722, 732 (E.D. Va. 2001). The bulk of attorney fee case law comes from claims under 42 U.S.C. §1988(b), the statute for attorney fees in civil rights actions. The Supreme Court has applied those same standards to attorney fees in environmental law cases. *See City of Burlington v. Dague*, 505 U.S. 557, 561-62 (1992).

For a plaintiff to be a prevailing party, the key factor is whether they "advanced the goals of the CWA." *S. Appalachian Mt. Stewards v. A & G Coal Corp.*, No. 2:12CV00009, 2014 U.S. Dist. LEXIS 140207, at *4-5 (W.D. Va. Oct. 2, 2014). An example is where a plaintiff seeks and successfully establishes that a defendant is in violation of one or more provisions of the CWA. *Id.* Plaintiffs may be considered "prevailing parties" for fee purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit. Even when the litigation is settled but nevertheless prompts a defendant to change its policies, a plaintiff may be found to have prevailed. *Atl. States Legal Found., Inc. v. Onondega Dep't of Drainage and Sanitation*, 899 F. Supp. 84, 87 (N.D.N.Y. 1995).

When a defendant prevails, different equitable considerations determine whether a fee award is appropriate. Fees cannot be awarded simply because the plaintiff lost at trial. To obtain an award of fees, a prevailing defendant must show that the civil action was "frivolous, unreasonable, or without foundation," or that the plaintiff continued to litigate "after it clearly became so." *Sierra Club v. Cripple Creek & Victor Gold Mining Co.*, 509 F. Supp. 2d 943, 950 (D. Colo. 2006) (citing *Christianburg Garment Co. v. E.E.O.C.*, 434 U.S. 412, 419–22 (1978)); *Waterkeeper Alliance, Inc. v. Hudson*, Civil Action No. WMN-10-487, 2013 U.S. Dist. LEXIS 121500, at *5 (D. Md. Aug. 27, 2013).

INJUNCTIVE RELIEF AND PENALTIES

In addition to permitting injunctive relief (e.g., the requiring of certain action or a prohibition on certain action), the CWA authorizes civil penalties to be assessed against CWA violators in the maximum amount of $37,500 per violation per day. 33 U.S.C. §§1319(d), 1365(a) (2012); *Georgia v. City of East Ridge*, 949 F. Supp. 1571 (N.D. Ga. 1996); Civil Monetary Policy Inflation Adjustment Rule, 74 Fed. Reg. 626 (Jan. 7, 2009).

In determining the amount of a civil penalty, a court must consider the following factors:

- the seriousness of the violation or violations;
- the economic benefit (if any) resulting from the violation;
- any history of such violations;
- any good-faith efforts to comply with the applicable requirements;
- the economic impact of the penalty on the violator, and
- such other matters as justice may require.

33 U.S.C. §1319(d). Any fines that are levied are payable to Government and not to a plaintiff. *Sierra Club v SCM Corp.*, 580 F. Supp 862, 863 n.1 (W.D.N.Y. 1984).

CONCLUSION

The Clean Water Act citizen suit offers an effective tool for enforcement of certain provisions of the Act. But like any legal tool, it comes with certain legal requirements, and it is not appropriate for all situations and fact patterns.

Disclosure: This paper does not provide legal advice on the Clean Water Act. The application of the law will depend on the facts and circumstances of each matter.

REFERENCES

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