Citizen Suits under the Clean Water Act – Fundamental Changes Underway?

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The Clean Water Act (CWA), like many environmental laws, provides a supplementary enforcement mechanism, allowing citizens to sue any person who is alleged to be in violation of an effluent standard or limitation and seek civil penalties, injunctive and declaratory relief, as well as recover related attorneys' fees.[1] However, there are statutory procedural hurdles a citizen plaintiff must meet prior to filing a citizen suit. First, a citizen plaintiff is required give "notice of the alleged violation" to the alleged violator, the EPA, and the State at least sixty days prior to commencing suit.[2] Second, a citizen suit is barred where EPA or the State (under a comparable regulatory provision) has commenced and is diligently prosecuting an enforcement action for the same violations.[3] Both of these requirements are intended to limit citizen suits when the state or EPA "cannot or will not compel compliance."[4] Courts historically have deferred to state and federal agencies regarding its "diligent prosecution" efforts and whether or not other jurisdictional hurdles have been met.

The past year has seen a bevy of activity regarding the CWA citizen suit provision, with two cases out of the First and Fourth Circuits taking a narrow view of "diligent prosecution," potentially allowing citizen suits to move out of their "supplementary" lane despite evidence of ongoing government enforcement actions. However, the Third Circuit continued to keep the citizen plaintiff's proverbial feet to the fire, dismissing a citizen suit for providing insufficient notice. In addition, two recent district court

decisions ruled on novel CWA issues – one expanding and one contracting the availability of citizen suits.

· **Diligent Prosecution by the State Only Protects the Settling Party from a Citizen Suit Seeking Penalties – Not Injunctive Relief.** The CWA bars citizen suits where EPA or the State (under a comparable regulatory provision) has commenced and is diligently prosecuting an enforcement action for the same violations and is typically thought to bar a citizens' claims for both penalties and injunctive relief. This was the position held by the First Circuit Court of Appeals for thirty years. However, an April 2022 *en banc* decision of the First Circuit Court of Appeals reversed its 30-year precedent, finding that that diligent prosecution by way of a state administrative order only protects a settling party from a citizen suit seeking penalties – not a citizen suit seeking injunctive relief, as well as related attorney fees. *Blackstone Headwaters Coalition, Inc. v. Gallo Builders, Inc.* 32 F. 4th 99 (1st Cir. 2022).[5]

· **A Comprehensive Federal Consent Decree may not be Sufficient to Demonstrate Diligent Prosecution.** Puerto Rico Aqueduct and Sewer Authority is subject to a 2015 federal Consent Decree addressing wide-ranging violations of the CWA associated with the operation of is sewage treatment, collection and conveyance system, including numerous "sanitary sewer overflows" or "SSOs." The District Court dismissed a citizen suit action alleging numerous SSOs flowing into creeks and water bodies on the basis of "diligent prosecution" represented by the 2015 Consent Decree. The First Circuit did not agree and returned the case to the lower court, finding that just the presence of a Consent Decree does not represent diligent prosecution; rather, it must be demonstrated that the government is taking actions to enforce the Consent Decree. *Cebollero-Bertram v. Puerto Rico Aqueduct and Sewer Authority*, 4 F. 4th 63 (1st Cir. 2021).

· **A State Agency's Notice of Violation is not Sufficient to Commence an Action for Diligent Prosecution.** A citizen suit may not be filed if a state government has already begun to prosecute the alleged violation under a state law that is comparable to the CWA. A Petition for Certiorari has been filed with

the U.S. Supreme Court regarding a 2022 Fourth Circuit decision taking a narrow view of what constitutes "comparability" of the state action for "diligent prosecution" to bar the citizen suit. A divided *en banc* panel of the Fourth Circuit Court of Appeal found that a state agency's Notice of Violation was not enough to commence an action comparable to one brought under federal law. Rather, the state action would only trigger the diligent-prosecution bar when it imposed the fine and order against the defendant and allowed public notice and judicial review, requiring what has been characterized as an "exact comparability" test.[6] Several amicus briefs have been filed requesting the Court to review and overturn the Fourth Circuit decision.[7] *Dakota Finance LLC d/b/a Arabella Farm v. Naturaland Trust*, 41 F. 4th 342 (4th Cir. 2022), *petition for cert*., Feb. 6, 2023.

· **The Citizen Suit Sixty-Day Notice must have Sufficient Specificity regarding the Standards or Limitations Violated.** A citizen plaintiff is required give "notice of the alleged violation" to the alleged violator, the EPA, and the State at least 60 days prior to commencing suit. The Third Circuit Court of Appeals rejected a citizen suit for inadequate notice because it did not provide "sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated." The court noted that the notice merely referred to the "entire" CWA and did not cite any specific section of the CWA that had been violated and provided a full page of references to various NJ Statutes and Administrative Code without any additional explanation. *Shark River Cleanup Coalition v. Township of Wall*, 47 F. 4th 126 (3rd Cir. 2022).

· **Citizen Suit is Available to Challenge an Army Corps of Engineers 404 Permit and EPA's Decision Not to Veto the Permit.** A South Carolina District Court rejected the Army Corps of Engineers' Motion to Dismiss a citizen suit filed by an environmental group. The group asserted that the COE breached its "non-discretionary duties" when it did not select the least environmentally damaging alternative for a large housing development on wetlands in Charleston, South Carolina and that EPA failed to properly exercise its 404 authority by not vetoing the Section 404 permit despite potential environmental harms. The District Court ruled that the citizen group could move forward on both

claims. *South Carolina Coastal Conservation League et al. v. United States Army Corps of Engineers, Charleston District*, --F.Supp. 3d --, 2023 WL 2388711 (D. SC March 7, 2023).

· **Citizen Suit Not Available with regard to a POTW's Enforcement of its Pretreatment Program.** A Massachusetts District Court dismissed a CWA citizen suit action against a publicly owned treatment works (POTW). The citizen group claimed that the POTW had violated its NPDES Permit by not taking enforcement action against industrial users under the POTW's pretreatment program. The Court found that EPA is the sole authority authorized to take action against a POTW for failure to pursue enforcement of the POTW's pretreatment program and further that a POTW's NPDES Permit and related Enforcement Response Plan does not require it to take enforcement action every time an industrial user violates its pretreatment permit. *Conservation Law Foundation v. Massachusetts Water Resources Authority*, 2023 WL 2072429 (slip op) (D.Mass. February 17, 2023).

The next question is what does all this mean? What are the "tea leaves" telling us (if anything) about the future of CWA Citizen Suits?

· *What are the practical impacts of the First Circuit Blackstone and Fourth Circuit Arabella Farm Decisions on Diligent Prosecution?* Both of these rulings involved state administrative actions versus judicial actions and it is likely that a different ruling would hold for judicial actions. As a result, these decisions sow uncertainty regarding the finality and practicality of administrative orders. The common assumption is that an agreed administrative order is preferable to a court action, providing more room for negotiation and creative solutions. The absence of the protection from duplicative citizen suits and lack of finality may compel a different conclusion. Further, state governmental agencies may prefer to follow the judicial route if they find that their administrative orders can be undermined by a citizen suit.

· *Will the Supreme Court get involved?* A petition for certiorari has been filed in the U.S. Supreme Court, seeking review of the Fourth Circuit's *Arabella*

Farms decision, with numerous *amici* petitions filed by business interests urging the Supreme Court to rule on the matter. Although the Supreme Court is difficult to predict, it is possible that a conservative court will not agree with the Fourth Circuit, finding that a defendant should not be subject to duplicate and overlapping enforcement actions. Additional review was not sought with regard to the First Circuit *Blackstone* decision, which was returned to the lower court.

· *Beyond the high profile First Circuit Blackstone and Fourth Circuit Arabella Farm cases, what are other lessons conveyed by the recent activity?* CWA citizen suit activity is alive and well and such actions are likely to accelerate in what might be viewed a favorable environment for such cases, with plaintiffs taking their chances on what might be seen as questionable claims. For instance, it is unlikely that anyone predicted that EPA's decision to "not" veto an NPDES permit would lead to a citizen suit action. Further, the *Puerto Rico Aqueduct and Sewer Authority* case shows that simply having a comprehensive federal Consent Decree is not necessarily enough to act as a shield from citizen suits.

· *But a review by the full Fifth Circuit Court of Appeals on standing in a Clean Air Act case might clip citizen plaintiff wings.* Whether a citizen plaintiff has standing is taking center stage following the Supreme Court's 2021 ruling on standing in *TransUnion LLC v. Ramirez*, a consumer credit reporting case. The *TransUnion* Court held that standing be established for each and every violation cited by the plaintiff with both harm to the plaintiff and traceability to the company's conduct be established for each violation. On February 17, 2023, the full Fifth Circuit Court of Appeals announced that it would review a $14.25 million Clean Air Act penalty assessed against ExxonMobil in light of the *TransUnion* Supreme Court ruling.[8] A ruling on behalf of ExxonMobil could have significant impacts on the viability of citizen suits in the Fifth Circuit under the CAA and other environmental statutes, including the CWA. Such a ruling would also conflict with other Courts of Appeals and potentially head to the Supreme Court for resolution. Stay tuned for more information and analysis as this case develops.

[1] Section 505 provides that "any citizen may commence a civil action on his own behalf against any person … who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator [of U.S. Environmental Protection Agency] or a State with respect to such a standard or limitation."

[2] The primary purpose of the 60-day notice letter is to provide federal and state agencies the opportunity to take their own enforcement action and to give the violator an opportunity to come into compliance or enter into a settlement agreement with the citizen plaintiffs.

[3] The Supreme Court had held that citizen suits are intended to supplement, to supplant, federal or state enforcement actions. *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49, 60 (1987).

[4] *Id.*

[5] See KT's previous blog post providing an in-depth analysis of the Blackstone ruling. The *Blackstone* ruling continues to reinforce a split in the circuits with the 8th Circuit holding that diligent prosecution bars both actions for penalties and injunctive relief while the 10th Circuit has agreed with this new 1st Circuit *en banc* decision.

[6] The defendants note in their Petition for Certiorari that the First and Eighth Circuits apply a deferential "overall comparability" test, while the Tenth and Eleventh Circuits employ a stricter "rough comparability" test, with still other Circuits applying variants of the two but none apply the new "exact comparability" test developed by the split *en banc* panel.

[7] These briefs include filings by a group of twenty Republican State Attorneys General; an industrial coalition including National Association of Home Builders, American Farm Bureau Federation, National Federation of Independent Business Small Business Legal Center, Inc., National Apartment Association, and Associated General Contractors of America; Conservative think tanks (the Cato Institute and the Buckeye Institute); and the Southeastern Legal Foundation, a conservative non-profit law firm.