



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

*The Private Sector Perspective*

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# Private Sector View of Citizen Suits



## Different Suits; Different Responses

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- 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

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

## Some Particular Issues To Note

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- 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

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- 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?