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Clean Air Act Citizen Suits: Defense and Litigation Strategies

TUESDAY, JULY 18, 2017

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Joshua B. Frank, Partner, **Baker Botts**, Washington, D.C.

Seth D. Jaffe, Partner, **Foley Hoag**, Boston

Kent Mayo, Partner, **Baker Botts**, Washington, D.C.

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Clean Air Act Citizen Suits: Defense and Litigation Strategies

Strafford CLE Webinar

July 18, 2017

Joshua Frank, Seth Jaffe, Kent Mayo

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Road Map

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- 2. CITIZEN SUITS AGAINST FACILITY OWNERS**
- 3. RECENT CASE DEVELOPMENTS**
- 4. CITIZEN ENFORCEMENT UNDER OTHER REGIMES**
- 5. PROACTIVE APPROACHES TO CITIZEN SUITS**

What are Citizen Suits?

- Citizen suits are brought by “any person” (but typically citizen groups) against a private party or the government attempting
 - to enforce alleged violations of the law,
 - to stall or eliminate the authorization of regulated activities,
 - or to force regulatory decisions.
- Purpose:
 - Congress authorized citizen suits to abate concerns that the government is not always responsive to or does not always have the resources to address environmental concerns.
 - To “supplement, not supplant”

Types of Citizen Suits:

- There are two basic types of "citizen suits" authorized under the CAA:
 - Mandatory Duty Suits against EPA – 42 U.S.C., s. 7604(a)(2)
 - Citizen Enforcement Actions against facility owners – 42 U.S.C. s. 7604(a)(1), (3)
- Citizens also can significantly impact the regulated community through challenges to agency rules and actions.
- Other alternatives for citizen "enforcement" include citizen suits under state law or nuisance suits.

SECTION 01

CITIZEN ACTIONS AGAINST EPA

Mandatory Duty Suits

- Mandatory Duty Suits - Broad impacts on the regulated community
 - A citizen group sues EPA for failure to perform a mandatory duty
 - that is, a failure to perform any act or duty prescribed by an environmental statute that is not discretionary.
- Examples of Mandatory Duty suits:
 - Notice of Intent to Sue by 14 states to enforce EPA duty to regulate existing sources of methane under CAA s. 111(d)
 - *Murray Energy v. EPA* – Court rejected claims that EPA had non-discretionary duty to evaluate employment impacts of CAA regulations (6/29/17)
 - Deadline suits: Enforcing statutory timelines for setting and review of emissions standards and limits under the CAA.
- “Sue and settle” – still viable in the new Administration?

Citizen Challenges to Regulatory Actions

- Petitions for Review of Agency Actions
 - Citizen group petitions the court to review the legality of an agency action or decision, e.g., the issuance of rules, permits, or emissions standards.
- Change in Administration means change in roles
 - Environmental groups now challenging rather than supporting EPA actions
 - Procedural attacks on delay and repeal
 - Substantive attacks on revisions and replacement
- Key examples
 - *Clean Air Council v. Pruitt* – D. C. Circuit rejected EPA NSPS regulations for methane emissions from oil and gas (7/3/17)
 - Petitions for review of Title V permits under CAA s. 505

Industry Participation in Suits Against EPA

- Suits of general applicability (*e.g.*, regulatory deadlines) – most likely to be handled by trade groups
- Suits in which your client is the real target (permit issuance or renewal or regulatory issue that is largely specific to a small class of companies):
 - Consider opportunities to provide helpful information to agency
 - Potential intervention as a party
 - Participation through amicus briefing
 - What kind of cooperation with EPA/DOJ/State is possible?

SECTION 02

CITIZEN SUITS AGAINST INDIVIDUAL FACILITY OWNERS

Citizen Suit Enforcement – Summary

- CAA § 304
 - Repeated or ongoing violations are actionable (5-year statute of limitations applies)
 - 60-day pre-complaint notice requirement
 - No citizen suit if government is “diligently prosecuting” claims

Citizen Suits – Remedies

- Citizen suits have similar remedies as EPA enforcement actions, but are often brought for different reasons
- Relief
 - Civil penalties (payable to government)
 - Injunctive relief (compliance, controls)
 - Environmental projects/mitigation
 - Attorneys' fees
- Other goals (publicity, pressure, NGO fund-raising)

Factors that Can Drive Uptick in Citizen Enforcement Suits

- Potential slowdown in government enforcement
- Increased resources for environmental NGOs
- Increasing public availability of emissions data
- Higher penalty maximums
- Response to fossil fuel policies

Citizen Suit "Recipe"

- Common pattern
 - Access Title V or other public reporting
 - Identify self-reported exceedances (ignoring potential defenses)
 - Tie to alleged generic harms
 - Notice letter/complaint based only on company reports
 - Seek broad injunctive relief

Responding to a Notice Letter

- **You've received a notice of intent to sue from a citizen group – now what?**
- Accelerated action during 60-day pre-suit period
- Immediate internal investigation
 - What are the alleged violations?
 - Is the data accurate and applicable?
 - What potential defenses apply?
 - Are the violations continuing?
 - What do the plaintiffs want? (Ask them)
 - Who is the regulator and what is their view of the issues?

Citizen Suit Enforcement Defenses

- **Defenses to consider for partial or full resolution:**
 - Statute of limitations
 - Standing
 - Notice deficiencies
 - Ongoing/repeat violation requirement
 - Diligent prosecution bar
 - Mootness
 - Title V Operating Shield

Statute of Limitations

- Potential defense to civil penalties and injunctive relief in citizen suit
- General federal five-year statute of limitations applies. 28 USC s. 2462
- Discovery rule generally does not apply to s. 2462. *Gabelli v. SEC*, 133 S. Ct. 1216 (2013)
- Statute of limitations is considered tolled during 60-day notice period for citizen suits.
- Is violation a one-time event or a series of continuing violations?
 - NSR/PSD cases turn on this distinction, with new SOL starting each day for continuing violations

Standing Challenges

- **General rule**

- Plaintiff must have constitutional standing to bring suit

- **Federal requirements:**

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)

- Plaintiff must show
 - Injury in fact
 - Fairly traceable to defendant; and
 - Likely to be redressed by a favorable decision

Lujan v. Nat'l Wildlife Federation, 497 U.S. 871, 886 (1990)

- Must provide more than generalized statements about impacts

- **Associations may bring suit independently in certain circumstances**

Government Enforcement as a Defense

Engaging with state or federal regulators is an important step in avoiding or responding to a citizen suit. Potential defenses include:

• **Diligent Prosecution (full preclusion)**

- CAA §304(b)(1)(B) precludes citizen suit where the EPA or State is diligently prosecuting *the same* alleged violations.
- The government action must be filed *before* the civil suit complaint. *See Sierra Club v. Two Elk Generation Partners, Ltd. P'ship*, 646 F.3d 1258 (10th Cir. 2011).
 - It can be filed after notice, but before complaint; however, as a practical matter, courts may be skeptical regarding whether an action filed after notice is really “diligent.”
- Usually interpreted to require *judicial* action or resolution by regulator; administrative resolution is not sufficient for statutory preclusion. *Group Against Smog and Pollution, Inc. v. Shenango, Inc.*, 810 F.3d 116 (3d Cir.) (state consent decree entered into prior to filing of citizen suit barred action).

Government Enforcement as a Defense

- **Mootness (full or partial preclusion)**
 - Any set of circumstances that eliminates actual controversy **after** the commencement of a lawsuit renders that action moot.
 - Where consent decree or regulatory change after citizen suit resolves all violations alleged in the citizen suit. *WildEarth Guardians v. Public Service Co. of Colorado*, 690 F.3d 1174, 1180 (10th Cir. 2012); *Little v. Louisville Gas and Elec. Co.*, 33 F. Supp. 3d 791 (W.D. Ky. 2014).
- **Violation defense/penalty mitigation (partial defense/mitigation)**
 - Even if government action does not preclude citizen suit, regulatory findings can be powerful evidence in judge/jury evaluation of alleged violations, defenses and remedies.
 - Fines and penalties paid to regulators can offset citizen suit penalties.

SECTION 03

RECENT CASE DEVELOPMENTS

Environment Texas v. Exxon

- **Environment Texas v. Exxon:** Plaintiffs filed their original complaint in December of 2010, alleging that the defendant violated the Clean Air Act by the collected emissions events, Title V deviations and emissions limit exceedances over an eight-year period at its Baytown facility.
- **The district court declined to impose any penalty based on the statutory factors:**
 - Large size weighs **in favor** of penalties
 - Good compliance history and good faith efforts weigh **against** penalties:
 - Some violations exceeded one day; majority were short. Duration weighed **neither for nor against** penalties;
 - Fewer serious violations. Seriousness weighed **against** imposing a penalty.
 - The court found **no economic benefit** of noncompliance:
 - The court did not credit testimony linking voluntary projects to violations
 - The court also found that the projects were not required by law
- *"[E]ven if the Court had found every Event and Deviation in this case actionable, the Court would still find [defendant] should not be penalized."*

Environment Texas: 5th Circuit Decision

Errors in the District Court opinion

- **Number of violations:**

- The district court had conflated violations of hourly emission limits with violations of permit conditions addressing excess emissions during upset events.
- The district court had erroneously concluded that violations of emissions limits that changed over time were not repeat violations.
- Corroboration of violations is not required for violations that are undisputed.

- **Penalty calculation:**

- The district court inappropriately offset longer and more serious with shorter and less serious violations.
- The district court must reconsider the economic benefit considering every benefit received, without requiring a showing that the projects were specifically tied to prevention of a violation.

5th Circuit Instructions on Remand

- **Violations are pollutant-specific, not event-specific:**
 - "[L]imits on emissions of specific pollutants from specific emissions points (or groups of emission points in flexible permits) should constitute permit 'emission standards or limitations' that may be violated repeatedly."
- **"Upsets not Authorized" special condition violations:**
 - Special conditions that "do not authorize" pollutants during MSS represent an "emission limitation."
- **Affirmative defenses:**
 - "Reliance on the TCEQ's determination is not sufficient" to meet the burden to demonstrate that all eleven affirmative defense criteria were met.
- **No violations based solely on Title V deviation reports**
 - "We see no error in the district court's conclusion that the Count VII deviation reports alone were insufficient to meet Plaintiffs' ultimate burden of proving actionable violations."

District Court Remand - Repeated or Ongoing Violations

- **Plaintiffs need show only one of three approaches:**
 - (1) A repeated violation of the same emission standard or limitation *before the complaint was filed*.
 - (2) A violation of the same emissions standard or limitation *both before and after* the complaint was filed.
 - (3) A continuing likelihood of recurrence.
- **Recurring root cause or recurring limitation violation?**
 - Evidence that violations involve the same equipment, emissions point, and root cause only bears on showing option (3)--a continued likelihood of recurrence.
 - Plaintiffs need only show a violation of the same limitation or standard for options (1) and (2).
- **Numerical changes in a limit through renewal or amendment do not create new limits.**

Penalty Calculations on Remand

- **Duration and seriousness**

- The district court abandoned the individual duration approach and instead considered the overall time period over which all violations occurred.

- **Economic benefit calculation: "general correlation standard"**

- The district court found that Plaintiffs had carried their burden of proof in showing the capital projects in question were "necessary to correct" the violations "at a high level of generality."

- **Penalty assessment**

- The court rejected the top-down approach--i.e., starting with the maximum allowable CAA penalties (\$573MM) and adjusting downward.
- The district court adopted plaintiffs' suggested bottom-up approach, starting with the economic benefit of noncompliance and adding 50 percent penalty enhancement.
- Approximately \$21 million plus potential attorneys' fees

Environment Texas Decision Takeaways

- The availability of public records makes citizen suits possible even in cases that seem extremely complicated. If a citizen group cares enough, no case is too big.
- Complex permits with hundreds or even thousands of separate provisions does not excuse non-compliance. There is no “too big to comply” defense.
- Contemporaneous reporting and record-keeping is important to better support future citizen suit defenses.
- Governmental resolutions that are not judicially approved may provide limited relief from citizen suits
- Nonetheless, good faith efforts to comply do matter, particularly in the penalty calculation.

Other Ongoing Actions

- ***NRDC v. Illinois Power Resources*** (C.D. Ill.)
 - Alleged more than 2000 opacity exceedances at electric generating units
 - Summary judgment granted to NRDC on most exceedances
 - Found standing based on fear of health effects
 - Refused to consider PM compliance as defense to opacity violations unless corroborated by contemporaneous stack test
 - Denied startup/malfunction defense where no notice was given, even though state agency agreed that notice was not necessary
 - Opacity limits apply even when unit is not operating
 - Remedy phase in progress

Monitoring Issues

- ***WildEarth Guardians v. Colorado Springs Utilities Board***
(D. Colo.)
 - Allegations solely based on monitor downtime issues; no specific allegations of emissions exceedances
 - Failure to “continuously monitor” opacity from electric generating units under Part 75
 - No “safe harbor” – battle over individual events
 - How will absence of environmental impact be considered in context of penalty arguments

SECTION 04

CITIZEN ENFORCEMENT UNDER OTHER REGIMES

State Citizen Suit Litigation

- State law may also provide the basis for citizen suit claims.
 - States may have own citizen suit provisions (e.g., Chapter 214, s. 7A under Massachusetts law). It's important to understand state laws and how they may differ from the CAA.
 - State nuisance or public trust law may provide a basis for claims
 - Nuisance claims alleging harms at level below NAAQS (like those filed in *North Carolina v. TVA*).
 - Public trust claims most likely to be asserted in connection with climate changes issues
 - As under federal law, claims may be asserted against state environmental agencies that may be of particular interest to specific regulated entities
 - Allegations that state agency has violated non-discretionary duty, particularly missing regulatory deadlines
 - Public trust allegations under state common law.

Public Trust Litigation

- Involve claims that the government has violated constitutional rights to life, liberty, and property, or has failed to protect essential public trust resources.
- Cases thus far restricted to climate change, but not doctrinally limited.
 - *Kelsey Cascade Rose Juliana v. United States (D. Or.)*: Question is whether the United States has violated a public trust obligation it owes to U.S. citizens to protect the atmosphere from climate change
 - Seeks order requiring EPA to regulate CO2 emissions.
 - Motion to dismiss denied; Plaintiffs have standing to sue; public trust doctrine not limited to states
 - Request for interlocutory appeal by the U.S. denied
 - The United States filed a writ of mandamus seeking 9th Circuit review on June 9, 2017, requesting that the 9th Circuit order dismissal of the case.

Nuisance and Toxic Tort Litigation

- Tort: An act (or omission) that causes harm to another and for which courts may impose civil liability.
- Typical environmental tort claims:
 - Based on state common and statutory law.
 - Nuisance, negligence, and trespass.
- Harms may include: personal injury and property damage
 - including interference with use and enjoyment or diminution of property values.
- Claims may relate to one-time incidents or to ongoing operations.
- Damages sought may include money damages (including punitive damages) and injunctive relief.
- Likely to be brought as a class action.

Nuisance and Toxic Tort Litigation

- **Typical factual situations** related to ongoing operations:
 - *Bell v. GenOn Power Midwest*: individuals living near coal-fired power plant complaining about ash and contaminants on their property.
 - *Little v. Louisville Gas & Electric Co.*: individuals living near coal-fired power plant complaining about dust and coal ash from the plant's stack, sludge plant and landfill.
 - *Freeman v. Grain Processing Corporation*: individuals living near corn wet milling plant complaining about smoke, odor and haze impacting the use and enjoyment of their property.
 - *Merrick v. Diageo Americas Supply, Inc.*: individuals living near whiskey warehouses complained that fugitive ethanol emissions caused growth of whiskey fungus on their properties.

Preemption Defense is Mostly Dead

- | | |
|--|---|
| <ul style="list-style-type: none">• <i>NC v. TVA</i>, 615 F.3d 291 (4th Cir. 2010) = CAA preempted non-source state nuisance claims• <i>International Paper Co. v. Ouellette</i>, 479 U.S. 481 (1987) = CWA preempts non-source state claims, but not source state claims | <ul style="list-style-type: none">• <i>Bell v. Cheswick Generating Station</i>, 734 F.3d 188 (3d Cir. 2013) = no CAA preemption for source-state claims• <i>Freeman v. Grain Processing Corp.</i>, No. 13-0723 (Iowa June 13, 2014) = no CAA preemption• <i>Merrick v. Diageo</i>, 805 F.3d 685 (6th Cir. 2015) = no CAA preemption |
|--|---|

Supreme Court has declined to address CAA preemption issue.

Tort Law = Additional Layer of Regulation

- **Companies with potential exposure to nearby communities must be aware of local tort law:**
 - To avoid preemption, plaintiffs' claims must be brought using source-state law.
 - Companies must understand risks from, and protections offered by, local tort law.
 - Opportunities may exist to enact state legislation to override common law torts.
 - *E.g.*, statutory nuisance exemptions or limitations on damages.

SECTION 05

PROACTIVE APPROACHES TO CITIZEN SUITS

Before You Are Targeted: Assess Risk

- **At risk:**
 - Upset events
 - Emissions limit exceedances
 - Non-emissions issues (e.g., monitor downtime)
 - General duty claims
- **Actionable event emissions are:**
 - Unauthorized
 - Repeated
 - Have a “reasonable prospect of recurrence”
 - Lack the affirmative defense
- **Events may require multiple defensive strategies, e.g.:**
 - Permit revisions
 - Strengthened affirmative defense claims
 - Credible order resolutions

Before You Are Targeted: Prepare Defense Strategies

- **Inventory repeat violations**
 - Map out equipment, pollutant, cause, corrective action
 - Identify combinations at greatest risk
- **Strengthen permits**
 - Consider changes to permits to include authorizing emission activities
 - Address/defined generalized conditions
- **Strengthen affirmative defenses**
 - Accurate and timely reporting
 - Memorialize agency confirmation of affirmative defense
 - Develop support for claim (independent of agency's call)
- **Strengthen agency resolutions**
 - Credible resolutions of repeat issues
 - Where available, structure pre-suit judicial resolutions

Before You Are Targeted: Understand Sources of Information

- **Be aware of your public information:**
 - Plaintiffs have more ready access to facility information for use in suits.
 - Compliance records, emissions data, fence line monitoring and ambient data (available through state and federal regulators).
 - Next generation air monitoring: smaller sensors, community and individual collected data, use of apps
- **Be aware of your non-public information and potential "bad documents."**
 - Assess privilege issues
 - Comply with document retention policies
- **Be aware of your public profile:**
 - Know what environmental advocates are saying about you.
 - Maintain good community relations.
 - Be proactive with the community, especially in advance of big decisions.

After Contact and Before Suit Is Filed

- **Can litigation be avoided?**
 - Work with state and/or EPA to resolve potential issue of non-compliance
 - Create basis for diligent prosecution bar or mootness in the event citizen suit is ultimately filed
- **Evaluate potential for early resolution, including pre-suit**
 - Plaintiffs typically focused on injunctive relief, may waive penalties
 - Consider potential for release from plaintiffs broader than claims and extending to other areas of dispute (e.g., Title V process)
 - Certain settlements will require comment period for Government

After Suit is Filed

- **Conducting citizen suit litigation**
 - Asserting defenses - motion to dismiss/motion for summary judgment
 - Utilizing resource advantages (expert testimony)
 - Challenge discovery requests as “disproportionate” to the needs of the case pursuant to amended Rule 26
 - Challenging your own (self-reported) data
 - “External” pressures (public relations issues)
 - Business planning
 - “Winning” on remedies
 - Setting up attorney fee challenges
 - Parallel settlement evaluation

Parting Thoughts....

- Citizen Suits – Increasing Threat?
- Be proactive – be ready to respond before you are targeted
- Engage with citizen groups to understand their requests
- Challenge allegations and press advantages in litigation
- Think creatively about resolutions that can further company goals

Questions?

- Joshua Frank | 202-639-7748 | joshua.frank@bakerbotts.com | <http://www.bakerbotts.com/people/f/frank-joshua-b>
- Seth Jaffe | 617-832-1203 | sjaffe@foleyhoag.com | <http://www.foleyhoag.com/people/jaffe-seth>
- Kent Mayo | 202-639-1122 | kent.mayo@bakerbotts.com | <http://www.bakerbotts.com/people/m/mayo-kent>

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