

Alabama Utility Company Loses Motion to Dismiss Clean Water Act Citizen Suit

Kristina Alexander

In a country that values law and order, it should be no surprise that if the government breaks the law, it can be stopped. Many U.S. laws, particularly those involving pollution, allow anybody that is harmed when a law is broken to sue the violator, even if the violator is the government. This authority is known as a citizen suit, although citizenship is not required.

Citizen suit provisions are common in pollution statutes, such as the Clean Water Act (CWA). The law allows “any citizen” to act as a plaintiff to sue “any person” for violating the act. Citizen is defined broadly to allow any person or persons whose interests may be or are being harmed by the pollution to file suit. And those plaintiffs can sue any alleged polluter, even federal, state, and local government entities. A successful citizen suit will result in the violation being stopped; there is no monetary reward for the plaintiff nor any criminal punishment or fine for the defendant, although the plaintiff may be entitled to recoup its out-of-pocket expenses for bringing the suit.

Wastewater discharges by the Oxford Water Works and Sewer Board (“Oxford Water”) of Oxford, Alabama, were the subject of a citizen suit brought by Coosa Riverkeeper, Inc. (“Riverkeeper”).¹ Riverkeeper argued that Oxford Water was polluting the Choccolocco Creek by dumping more e. coli, chlorine, and formaldehyde than allowed by its CWA discharge permit.

In addition to denying that it was polluting, Oxford Water claimed that Riverkeeper’s citizen suit should be dismissed because the Alabama Department of Environmental Management (ADEM) was already enforcing CWA matters in state court on behalf of the

State of Alabama. The CWA prevents defendants from being sued by citizens and the government for the same claims. In addition to insulating the defendant from the difficulties of defending on multiple fronts, this provision avoids the risk of having conflicting judicial decisions from different courts.

Under the CWA, if the Environmental Protection Agency or a state is “diligently prosecuting” that defendant, no citizen suit is allowed. The U.S. Supreme Court described the bar as “mandatory, not optional,”² so if there are two suits to ensure compliance on the same issues, the citizen suit cannot continue. Instead, the citizen may join the other lawsuit.

The court compared the complaint brought by Riverkeeper in federal court to the one brought by ADEM in state court. Riverkeeper had three main arguments: that Oxford Water had violated its permit by discharging more e. coli and chlorine than its permit allowed; that Oxford Water had not reported the discharges as required; and that Oxford Water was discharging formaldehyde into the water and did not have a permit to do so. ADEM’s suit claimed that Oxford Water had not monitored or reported as required, and that it made unpermitted discharges into the creek, such as ammonia and fecal coliform.

In its review, the court agreed with Oxford Water that ADEM was diligently prosecuting the claim that Oxford Water failed to report its permit violations as required. However, the court found that the other two claims brought by Riverkeeper were not being pursued by the state. The fact that both suits were based on violating the same CWA permit by polluting



The Choccolocco Creek watershed. Photograph courtesy of G-S-M Media.

Choccolocco Creek was not enough – they would have to have the same precise purpose. They did not. According to the court, “Nowhere does [ADEM’S] complaint allege that Oxford violated its permit discharge limitations for e. coli or chlorine.”³ Therefore, if ADEM won, the discharges of e. coli and chlorine may not be abated. Because the complaints addressed different pollutants, the court held that “the state court action is not adequate” to fix those alleged violations.⁴

Additionally, the court addressed Oxford Water’s claim that because ADEM had renewed its permit after those discharges purportedly occurred, it had a complete defense. This argument is known as the “permit defense shield.” The theory is that the state should know about the activity of the permittee when reviewing a permit application or renewal, and by granting the permit, the state has in essence found that the violations did not matter. One action is indispensable to establish this defense: disclosing the violations. In this case, the court found that Oxford Water had not disclosed its formaldehyde releases to ADEM in its permit renewal application. Therefore, the permit defense shield failed because

Oxford Water could not show that ADEM knew about the illegal discharges when it issued the permit.

Accordingly, Oxford Water will defend claims of discharging amounts of e. coli and chlorine above what its permit allowed, and claims that it discharged formaldehyde without any permit, in the federal court that decided this action. And Oxford Water will defend other claims regarding permit violations – such as excessive ammonia, total suspended solids, and fecal coliform – in state court. 🐼

Kristina Alexander is a Research Counsel II at the Mississippi-Alabama Sea Grant Legal Program at the University of Mississippi School of Law.

Endnotes

1. *Coosa Riverkeeper, Inc. v. Oxford Water Works and Sewer Board*, No. 2:16-CV-01737, 2017 U.S. Dist. LEXIS 92938 (N.D. Ala. June 16, 2017).
2. *Hallstrom v. Tillamook Co.*, 493 U.S. 20, 26 (1989).
3. *Coosa Riverkeeper*, 2017 U.S. Dist. LEXIS 92938 at *23.
4. *Coosa Riverkeeper*, 2017 U.S. Dist. LEXIS 92938 at *31.