

# Citizen Suits Can Advance Environmental Justice

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**Justice means that circumstances are made fair under the law.** Environmental justice means that environmental impacts, such as pollution, are born evenly by communities regardless of socioeconomic status. Thus, under the concept of environmental justice, it is not fair to place a new landfill, chemical manufacturer, or water treatment plant based on where property values are lowest. Such placement only perpetuates the low prices and the low quality of life for residents there. Instead, environmental impacts should be evenly distributed.

Built into the notions of justice and environmental justice is the ability of people to contest government decisions, to seek a review of an agency determination, and the opportunity to be heard. This is identified as due process. Due process does not guarantee results, only that people affected by a government decision have the ability to have their viewpoints considered.

A step further into environmental justice is the right of people to sue the government when they believe actions are not lawful. This requires a waiver of sovereign immunity, which is the principle that the government cannot be sued for its official actions. Without sovereign immunity, governments could be paralyzed from acting as there will always be someone who objects to something. Therefore, a waiver of sovereign immunity must be explicit: the government must give permission within a law for someone to sue under it for alleged violations or harms.

Environmental statutes, such as those governing pollution and wildlife protection, not only waive the sovereign immunity of the federal government, but they also permit people to act to enforce those laws against businesses and individuals when they believe the government is not acting or is ignoring lawlessness. These statutory provisions are commonly known as citizen suit provisions.

## Federal Laws Allowing Citizen Suits

Some of the environmental laws addressing pollution which contain citizen suit provisions are:

- Comprehensive Environmental Response,

Compensation and Liability Act ([CERCLA](#)), addressing cleanup of hazardous waste sites;

- Resource Conservation and Remediation Act ([RCRA](#)), regulating generators, transporters, users, and disposers of most hazardous substances;
- Clean Water Act ([CWA](#)), improving the quality of waters of the United States; and
- Clean Air Act ([CAA](#)), improving the quality of air in the United States.

The waivers of sovereign immunity in those laws and the authorization for people to act as citizen enforcers – sometimes called private attorneys general – make citizen suits a powerful tool for achieving environmental justice.

The citizen suit provisions in these laws use almost identical language. In general, citizen suit provisions contain language that:

- 1) identifies what violations may form the basis of a suit;
- 2) provides the government the opportunity to step in and correct any enforcement shortcoming instead of the citizens; and
- 3) offers court costs and attorneys' fees depending on the success of the suit.

The structure of those provisions facilitate bringing people together for a common good, another feature of environmental justice. This is because there is no financial gain for bringing a suit; the laws do not authorize money damages for proving somebody violated the law (although the expenses of bringing the suit may be awarded). Citizen suits are limited to what is called injunctive relief, which means the court can force someone to follow the law. For example, a citizen suit under the Clean Water Act may seek to prevent a business from discharging waste into a river, or require the government to revoke a permit that allowed a company to discharge waste into a river. But the plaintiffs will not receive money for having to live near a polluted river. The goal of a citizen suit action is the opportunity to improve the environment and human health under existing law.

## Notice to the Government

Citizen suits require giving notice to the government and the alleged polluter before filing the suit. Without demonstrating that written notice was provided to the right authority, suit will be dismissed.

The time period for that notice is generally 60 days. There are some exceptions to the time periods, such as when the pollution poses an emergency. The 60-day notice period gives the government a chance to do its thing: investigate and/or prosecute. As the U.S. Supreme Court said regarding citizen suits, they are “to supplement rather than to supplant governmental action.”<sup>1</sup> Therefore, a citizen suit is not allowed to move forward if a government, state or federal, is acting to enforce the law. Such enforcement must be more than a show, however. The test is whether the government is “diligently” prosecuting the polluter or cleaning up the contamination, either itself or by having the polluter do it.

Under the Clean Water Act (CWA) even if the government is diligently prosecuting the alleged polluter, a citizen suit may continue if the plaintiff has filed suit within 120 days of giving notice.<sup>2</sup>

One Alabama case illustrates how a citizen suit can prevail even where the government was pursuing the alleged polluter. That case involved claims that a coal company was discharging waste into the Black Warrior River. The plaintiffs had complied with both provisions of the CWA, waiting more than 60 days from giving notice on May 16 to file suit in federal court on July 27 which was within 120 days of the notice. However, on July 20, the Alabama Department of Environmental Management (ADEM) began investigating and ordered the coal company to pay a \$15,000 fine, which the coal company agreed to. The coal company tried to have the federal suit dismissed, but the trial court refused. The 11th Circuit Court of Appeals upheld the trial court.<sup>3</sup> The court of appeals held that where a citizen suit meets both timing provisions in the statute – giving notice before state or federal action is commenced, and filing suit within 120 days of the notice – a federal suit under the citizen suit provision cannot be dismissed even if the state commenced investigation prior to suit.

## Right to Intervene

Although a citizen suit may not be allowed when the government already has initiated a lawsuit, common language in citizen suit statutes generally authorizes people outside of

the government and the defendants to participate in the suit. That authorization is known as the right to intervene. For example, the Environmental Protection Agency (EPA) and a county board of health filed suit against a coal company in Alabama for violations of the CAA.<sup>4</sup> A citizen group sought to intervene in the case. All three parties – the EPA, the board of health, and the coal company – tried to limit the citizen group’s role in the litigation, but the court said that based on precedent, intervenors are to be treated as original parties, except they cannot expand the scope of the litigation.

## When the Court Has Jurisdiction

While the waivers of sovereign immunity in citizen suits are broad, not all actions are allowed. For example, a person sued the Mississippi Department of Environmental Quality and the owner of a silicon plant under the Clean Air Act (CAA) citizen suit provision. The plaintiff wanted to stop construction of the plant, claiming the CAA permit issued for emissions from the plant’s operations did not follow the law. The court held there was no provision in the CAA for a citizen to bring a suit where a facility has the proper permit or is in the process of getting one. That meant the court lacked jurisdiction to hear the dispute, and it dismissed the suit.<sup>5</sup>

Another dismissal of a citizen suit for lack of jurisdiction occurred in Alabama regarding a leaking pipeline.<sup>6</sup> In that case, a landowner discovered gasoline leaking onto its property. It notified the pipeline company, which stopped the leak. A citizen suit was brought under the CWA and the Resource Conservation and Recovery Act (RCRA). According to the court, the CWA claim failed because it authorizes only injunctive relief – asking the court to stop an ongoing violation – and the landowner failed to show the leak was ongoing. In other words, without an ongoing violation to enjoin – a pipe that was still leaking – the court lacked jurisdiction under the CWA. However, the other basis for the citizen suit, RCRA, allows lawsuits for past actions if the disposal of the hazardous waste is a present threat to health or the environment. Nonetheless, the court dismissed the RCRA citizen suit because it found no evidence that the gasoline spill, which had been remediated, still posed a threat to humans or the environment. Dismissal did not mean the polluter got off scot-free. The court noted that the pipeline company spent years working with ADEM to clean up the gasoline and improve conditions in the area.

### Court Costs and Attorneys' Fees

One way that citizen suits aid environmental justice is that they provide for attorneys' fees and costs if the suit has some measured success. This allows residents without deep pockets to challenge the system, as litigation can take years and is very expensive.

Fees are not awarded just for bringing a case, however. The plaintiffs have to win. On the other hand, the plaintiffs do not necessarily have to win it all in order to be eligible for fees and costs. The general language of citizen suit provisions regarding when a plaintiff is eligible to collect attorneys' fees and court costs (such as filing fees, expert witness fees, and copying costs) fall into two camps. One, found in RCRA and CERCLA, is that plaintiffs must prevail or substantially prevail in the action. The CAA and CWA use different language, authorizing judges to award attorneys' fees and court costs "when appropriate." Both versions leave it up to the judge to decide whether to award fees and costs, by saying the court "may award" such expenses. Additionally, the amount is also up to the court and is based on rates for that expertise where the violation is being enforced. For example, if a New York counsel whose rates are \$950 an hour at home, is brought to Alabama to litigate the suit, she will get paid based on rates where the claim is brought.

It is not always clear when a citizen-suit plaintiff has substantially prevailed. For example, many lawsuits settle long before a court reaches a decision. In one case in Alabama, the lawsuit claimed runoff from a landfill was polluting rivers in Alabama.<sup>7</sup> After the suit was filed, the landfill defendant agreed to a consent order with ADEM that would change landfill operations to prevent runoff. The defendant paid the plaintiff's attorneys' fees at that point. However, instead of complying with the order, the defendant decided to close the landfill, which would involve several of the steps from the consent order such as stabilizing the slopes of the landfill and building a runoff control system. When none of those steps were in place after three years, the plaintiff moved to enforce the order, and defendants submitted a new closure plan. Eighteen months later, when the landfill was still operating, the plaintiff returned to court to enforce the plan.

The defendant argued it did not owe the plaintiff attorneys' fees for enforcing a consent order to close the landfill as that was not the goal of the plaintiff's original litigation. The court said the defendant's theory was too narrow, noting that precedent held that attorneys' fees were

allowed for monitoring compliance with consent orders. The court awarded \$250 an hour for each hour the attorneys spent on the case, not counting the time they spent trying to get those attorneys' fees.

When a *defendant* prevails in a citizen suit case, they may be entitled to attorneys' fees. Under the CAA and CWA, courts are authorized to award fees to any party "whenever the court determines such an award is appropriate." After dismissal of the Mississippi CAA case discussed above involving a permit for a silicone plant, the defendant sought attorneys' fees for having to spend time defending itself. The court held that because the court lacked subject matter jurisdiction over the suit under the CAA, that same law could not be used to justify attorneys' fees, and denied the motion.<sup>8</sup>

### Conclusion

Thus, pollution statutes can be a useful method to equalize environmental impacts by pushing back when things are not working. When a government might not be aware of or chooses not to respond to a harm affecting human health and the environment, people can file suit to make things change. And by allowing reimbursement for meritorious actions, lower income plaintiffs have less of a barrier to access justice. 🦋

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### Endnotes

1. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987).
2. 33 U.S.C. § 1319(g)(6)(B)(ii). Other laws not discussed in this article contain a similar provision. *See, e.g.*, 42 U.S.C. § 300h-2(c)(5)(B).
3. *Black Warrior Riverkeeper, Inc. v. Cherokee Mining, Inc.*, 548 F.3d 986 (11th Cir. 2008). In a subsequent decision, the trial court held that the ADEM settlement with the mining company meant that the citizen suit was moot – there was no relief the court could offer because the consent order meant that the company was already paying for the violations and stopping the discharges. *Black Warrior Riverkeeper, Inc. v. Cherokee Mining, Inc.*, 637 F. Supp. 2d 983 (N.D. Ala. 2009).
4. *United States v. Drummond Co., Inc.*, 2020 WL 5110757 (N.D. Ala. Aug. 31, 2020).
5. *16 Front Street LLC v. Mississippi Silicon, LLC*, 886 F.3d 549 (5th Cir. 2018).
6. *Day, LLC v. Plantation Pipe Line Co.*, 315 F. Supp. 3d 1219 (N.D. Ala. 2018).
7. *Black Warrior Riverkeeper, Inc. v. Metro Recycling, Inc.*, 2014 WL 10920350 (N.D. Ala. Sept. 15, 2014).
8. *16 Front Street LLC v. Mississippi Silicon, LLC*, 162 F. Supp. 2d 558 (N.D. Miss. 2016).