

# Clean Water Act Citizens Suits: Bringing Scofflaws to Justice or a Shakedown for Fees

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# Clean Water Act Citizen Suit Provision (or, the *any citizen can sue any person* law)

Section 505 of the federal Clean Water Act allows any citizen to sue any person alleged to be in violation of an effluent standard or limitation or an order issued by the Administrator or a State with respect to such a standard or limitation

Purpose is to supplement state and federal enforcement of Clean Water Act—where EPA and states have failed to act.

# Why Should You Care?

**\$52,514.00**

Penalty for Single Exceedance of Effluent Limitation  
Expressed as Daily Maximum

**\$1,624,834.00**

Penalty for Single Exceedance of Effluent Limitation  
Expressed as Monthly Average

# Why Should You Care?

**\$5,241,400.00**

Penalty for Chronic WET Test Failure  
Next Passed Test Occurred 100 Days After Failure

**\$573,510,000.00**

Penalty Demanded by Citizen Suit Plaintiffs  
*Env't. Texas v. ExxonMobil*, U.S. Dist. LEXIS 72213  
(Judge Imposed Penalty of **\$21,373,910.00**)

# How Does It Start?

## **60 Day Notice of Intent to Sue**

Section 505(b) requires citizen serve notice on alleged violator giving 60 days to cease violations

Suit cannot be filed until after the 60 day period passes

If violations cease, citizen cannot sue for wholly past events  
(But citizen can alleged in complaint intermittent or ongoing violations and survive motion to dismiss)

# How Does It Start?

*Citizen* advocacy organizations will usually issue a press release claiming that they must use the CWA citizen suit process since state and federal officials are doing nothing to bring the industry scofflaw to justice.

Often on the courthouse steps and timed after 60 day period so members can claim they walked into the courthouse and filed suit (but actually filed electronically).

# What Happens Next?

*Citizen*, now Plaintiff, files complaint in federal district court against person, now *Defendant*, alleging violations of permit and or Clean Water Act

Defendant will likely file motion to dismiss alleging wholly past violations—Plaintiff will respond alleging violations are likely to occur again—intermittent or ongoing in nature

# What Is Alleged?

If an end-of-pipe facility, the Plaintiff will have gone onto Oculus or filed a public records request to obtain Discharge Monitoring Reports (DMRs)

For stormwater permits, Plaintiff will have looked at any required monitoring, MS4 annual reports, TMDL requirements.



# What Is Alleged?

Plaintiff will allege that each exceedance of each permit limit or condition is a violation of CWA entitling Plaintiff to pursue penalties of \$52,414.00 per violation.

CWA says \$25,000.00 but EPA rule adjusts for inflation;  
40 C.F.R. Part 19

# What Is Alleged?

\$52, 414.00 per violation is the maximum; Plaintiff will calculate all exceedances at maximum; a single violation of an effluent limitation expressed as monthly average can put penalties over \$1,000,000.00.

$\$52,414.00 \times 31 \text{ Days} = \mathbf{\$1,624,834.00}$

Penalties go to U.S. Treasury not Plaintiff.

# What Is Alleged?

Plaintiff will also seek court order (injunction) directing Defendant to cease violations *and*.....(wait for it)....

## ***Attorneys Fees and Costs!***

Plaintiff will claim attorneys fees at private firm hourly rates.

# But DEP Already Issue a Consent Order, We're Protected Right?

Not always! CWA diligent prosecution/litigation bar provisions are very specific with numerous exceptions.

DEP may have not enumerated each violation or may have imposed nominal penalty and interim limits allowing time to come back into compliance.

Interim limits are exercise of DEP enforcement discretion and *no protection against citizen suit*.

# And Did I Mention the CWA is a Strict Liability Statute?

If exceedances are reflected in DMRs, Defendant has admitted liability and there is no defense (unless wholly past events). Other permit violations, CWA violations may be basis of liability.

Issue now become penalties—but the game is not totally over—Defendant must still defend against citizen Plaintiff's demand for penalties.

# Guilty By DMR/Public Record – So What Are the Penalties Going to Be?

Strict liability provides Plaintiff with leverage—they can demand maximum penalties and pursue detailed discovery running up huge fees and costs to try to justify large penalties.

Becomes a high-stakes game of chicken for Defendant!

Defendant has to consider cost of defense and likelihood federal Judge will impose no or greatly reduced penalties versus cutting a deal and stopping the bleeding.

# Inflicting Pain Through E-Discovery (Continuing the Bleeding)

Federal Rules of Civil Procedure regarding discovery of electronic documents designed to discourage costly discovery and abusive requests for document production.

In practice, citizen Plaintiffs pursue exhaustive requests for production forcing Defendant to spend immense sums of money on reviewing and redacting emails and even buying software to convert the documents to searchable form.

# Inflicting Pain Through E-Discovery

For public entities, public records request and discovery requests.

Not unusual for emails produced to reach tens of thousands or millions.

Very common now to retain outside experts just to search, redact and organize emails and then convert to Plaintiff can search, review.



# Court Ordered Mediation

Most federal District Court Judges will order parties to mediate the dispute.

Often results in settlement agreement parties submit to Court as basis for Court to enter as Consent Decree.

Consent Decree enforceable order from federal District Court.

# Court Ordered Mediation

Definition of a Good Mediation: Everyone leaves angry that they did not get their way but relieved it is over!

Citizen Plaintiff will be disappointed that industry scofflaw was not more severely punished; will issue statement declaring victory and how they saved the environment from polluter and do-nothing state and federal agencies.

# Court Ordered Mediation

Defendant will have stopped the bleeding as far as continued litigation costs and will have at least identified the out limits of its financial liability.

Court will retain jurisdiction to enforce Consent Decree but active case will be closed.

Many Consent Decrees included post settlement reports to Judge.

# So You're Telling Me I Should Just Give Up if Sued?

Absolutely not! But....

Recent increases in maximum penalties have created a cottage industry in citizen suits.

Huge potential maximum penalties, strict liability, and almost guaranteed attorneys fees and costs have turned CWA citizen suits into the environmental equivalent of personal injury cases. *Sue, settle and collect fees.*

# So You're Telling Me I Should Just Give Up if Sued?

If there is no permit or CWA violation there is no suit. The three rules to avoiding a citizen suit are:

1. fix the problem;
2. fix the problem; and,
3. fix the problem.

Many facilities set themselves up by failing to take appropriate corrective action when issues first arise and rely on state environmental agencies “working with them” through generous Consent Orders with interim limits.

# If You Receive a 60-Day Letter

Contact your legal counsel.

Verify the alleged violation—not all allegations are timely or accurate.

Apply the 3 rule—Fix The Problem x 3

# Bringing Scofflaws to Justice or a Shakedown for Fees?

The purpose of citizen suits are to supplement not supplant enforcement by state and federal environmental agencies. ***Extreme examples on both sides.***

IMO—too many citizen suits are the result of sitting an intern in front of a computer to search agency databases for DMRs with exceedances, cranking out a 60-day letter and then filing suit and piling on discovery until an offer of attorneys fees is made.

# Questions, Comments?

(or do you just want to get out of here?)

