Enviro Settlements Offer Solution To Growing Citizen Suit Risk

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Like everything else, environmental compliance and enforcement have been impacted by COVID-19. During the pandemic, the U.S. Environmental Protection Agency and state environmental agencies have issued enforcement discretion policies that many argue are an abdication of federal and state enforcement obligations, and that are currently face legal challenges.[1]

Last month, President Donald Trump issued an executive order covering so-called "regulatory relief to support economic recovery," which contains provisions directing federal agencies to prioritize economic recovery over civil enforcement where circumstances permit.[2] But even before COVID-19 spurred a potential decrease in enforcement, there was a downward trend in federal environmental enforcement.

According to a March report from the EPA's inspector general, the number of environmental enforcement cases initiated and concluded from 2006 to 2018 dropped 51% and 52%, respectively.[3] All of these developments have created more impetus for environmental citizen suits.

The environmental citizen suit is intended to supplement rather than supplant government enforcement.[4] It has been a powerful sword for individual citizens, environmental interest groups and the plaintiffs bar to address perceived state and federal environmental enforcement gaps since provisions allowing these suits were passed in the 1970s.[5]

Recent social, political and economic events may make wielding the citizen suit sword even more common. This means it is more important than ever for defense counsel and the regulated community to be prepared with proactive, clear and cost-effective strategies.

While the risk of receiving a citizen suit notice of intent to sue may increase, that does not mean civil litigation of these claims must also surge. For example, we successfully managed and mitigated the impact of a potential Clean Water Act, or CWA, citizen suit by employing settlement strategies that avoided the courthouse, reduced defense fees, citizen groups' attorney fees and expert fees, and prevented a public trial with the attendant negative publicity.

Most importantly, the framework improved the company's manufacturing process and wastewater treatment system, resulting in long-term benefits.

CWA Citizen Suit Notice of Intent 101

Nearly all environmental statutory regimes have citizen suit provisions, and the prefiling notice requirements are similar under the various federal statutes. This article focuses specifically on the CWA, which authorizes citizens to enforce compliance with effluent standards or limitations and orders issued by the EPA or a state.[6]

At least 60 days prior to filing suit in federal district court, a prospective plaintiff must issue a written notice of intent, or NOI, to the alleged violator, the EPA and the state in which the alleged violations occur. The NOI must include sufficient information to permit the recipient to identify:

- The specific standard, limitation or order alleged to have been violated;
- A description of the activity alleged to constitute a violation;
- The name(s) of the person(s) responsible for the alleged violation;
- The location of the alleged violation;
- The date(s) of the violation; and
- Detailed contact information for the person giving notice.[7]

There are two primary policy reasons for the presuit notice period. First, the notice gives the agencies an opportunity to take their own enforcement action,[8] because, similar to other federal citizen suit provisions, the CWA prohibits citizen suits where the EPA or the state has "commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order."[9]

Whether a citizen suit demand is subject to the "diligent prosecution" bar is a critical legal issue to evaluate upon receipt of an NOI. Case law on this subject is well-developed, but varies by jurisdiction, and should be evaluated if the recipient believes the alleged violation may already be subject to enforcement or a civil action.

Second, the NOI is supposed to provide the recipient with enough information to evaluate the allegation — and to determine whether to contest its validity or take prompt action to return to compliance (or some variation of both), if it is clear that remedial actions are required.[10]

Taking remedial measures before a suit is filed increases the likelihood of rendering moot the need or ability to file suit (mootness being a separate important citizen suit legal concept), but can also serve as an admission of wrongdoing. The key is to take the NOI seriously, evaluate the allegation and develop an early strategy to avoid the courthouse.

Evaluating a Prefiling Settlement Strategy: The Framework Agreement

After analyzing the NOI and determining that the claim has legal and factual merit, the notice requirements have been met, the potential plaintiff has standing and there are no immediate defenses (e.g., a prevailing consent decree), there are two paths forward. A company can take its chances in federal court, or it can attempt to agree on a framework that may ultimately achieve an out-of-court settlement.

Why avoid the courthouse for a citizen suit? Other than the obvious goal of reducing defense counsel fees, it is important to understand that under the CWA, courts have the power to award various forms of monetary damages — namely, penalties and attorney and expert fees, if the plaintiff substantially prevails.[11]

Additionally, court actions will result in a court-enforceable consent decree that involves public notice and comment. Perhaps most significantly, the court may order injunctive relief that can be very broad in both scope and duration, hindering a company's ability to control various aspects of its operations.

An effective, easy-to-implement framework agreement is intended to address the alleged violations, prevent future violations and settle the monetary damages components of the claims. This approach provides upfront certainty for the company, while limiting the scope of remedial actions to be taken, the costs to be incurred and the timeframe in which to take each of the requisite steps — all while keeping the case out of court.

The framework agreement guiding the settlement process is a negotiated document setting forth the process of achieving resolution, including:

- Using experts to evaluate and resolve the technical issues and reach agreed recommendations for implementation;
- Capping the company's payment of attorney and expert fees;
- Tolling the statute of limitations; and
- Setting a limit or a range for a future payment toward a supplemental environmental project, or SEP, in lieu of a civil penalty.

Importantly for both sides, the framework agreement establishes a detailed schedule for each step in the process. This can help assure the plaintiffs of the company's commitment to the process, and allow the parties to mutually agree to reasonable extensions.

Using Mutual Experts to Facilitate Remedial Recommendations

The true key to resolving the matter using the framework agreement is for both parties to retain qualified experts to provide recommendations on how the facility can correct the issues that serve as the basis for the NOI and potential suit, and prevent future violations. The technical nature of the claims often mandates an expert-facilitated process.

Rather than engaging in time-consuming and expensive expert reports and depositions, Daubert motions and trial testimony — the proverbial battle of the experts — the framework agreement permits the parties' respective experts to engage in a constructive and cooperative process that generates agreed-upon remedial measures that benefit the facility's operations and assist with future compliance.

In our case, the process included a focused site visit, the generation of streamlined expert recommendations by the company's expert with review and input by the citizens group's expert, and several phone conferences to discuss questions and reach an overall joint recommendation that was then memorialized in a final settlement agreement.

As part of the expert process, the company also agreed to share relevant data and other

records, subject to a nondisclosure agreement, which eliminated prolonged and expensive discovery, but offered enough information — after some negotiation among the parties — so the expert recommendations could be evaluated properly.

The parties also mutually agreed that retention of their respective experts was subject to the attorney work product and attorney-client privileges, and that neither side was required to provide any communications among their own counsel and the experts, except for the final written expert recommendations.

Importantly, the parties agreed that neither would be bound by any of the work conducted and discussed if they could not reach a resolution and the matter proceeded to court. Once an agreement was reached on the resolution, however, the final settlement agreement set forth the ongoing obligations for the facility to implement, and the future rights of limited enforcement by the citizens group.

Cap on Citizens Groups' Fees and Penalty Payments

Because a court could award full attorney and expert fee reimbursement, the framework agreement should also include reasonable caps on these fees, regardless of how much the citizens group ultimately incurs. Caps provide certainty for the company and help deter plaintiffs from running up attorney or expert fees in the hope of an unreasonable payout.

By the time we reached a final settlement in our matter, the capped plaintiff attorney and expert fees were well below the fees actually incurred. The tradeoff in this area is that the company is committed to pay these fees, even if settlement cannot be reached.

Since the CWA's citizen suit provisions allow for the imposition of civil penalties,[12] it may also be necessary to include in the framework agreement a limited range of monetary contributions to fund an SEP — although it may be possible to avoid this component.

The parties may expressly agree that the ultimate payment amount is based on several factors: for example, the parties' commitment to reach a prompt resolution, capital costs incurred at the facility as part of the settlement, environmental benefits of any actions the company agrees to take, and the company's responsiveness throughout the process. Thus, the final SEP amount is largely within the control of the company and the defense counsel from the beginning of the process.

Conclusion: A Framework for Future Citizens Group Claims

With the possible rise in citizen suits, companies may find themselves in court facing significant potential liability, even for minor allegations without early intervention. The presuit NOI requirement provides an opportunity to develop a creative early resolution process through a negotiated settlement framework agreement, which can result in a streamlined, clear and efficient process for both sides to follow.

From the NOI recipient's standpoint, this alternative to litigation can limit monetary damages, attorney's fees and expert costs, and provide more control over the ultimate resolution, while avoiding the publicity of a court filing.

With the support of experienced subject matter experts, a company willing to invest in remedial measures, experienced and reasonable environmental counsel for the plaintiffs, and some creativity along the way, both sides can walk away with a fair, final settlement.

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[1] See, e.g., EPA Policy, "COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program" (March 26, 2020), available at https://www.epa.gov/sites/production/files/2020-03/documents/oecamemooncovid19implications.pdf (last visited May 28, 2020).

[2] https://www.whitehouse.gov/presidential-actions/executive-order-regulatory-relief-support-economic-recovery/ (last visited May 28, 2020).

[3] EPA Inspector General Report, "EPA's Compliance Monitoring Activities, Enforcement Actions, and Enforcement Results Generally Declined From Fiscal Years 2006 Through 2018" (March 31, 2020), available at https://www.epa.gov/sites/production/files/2020-04/documents/_epaoig_20200331_20-p-0131.pdf (last visited May 28, 2020).

[4] Gwaltney of Smithfield v. Chesapeake Bay Found., 484 U.S. 49, 60 (1987).

[5] Most federal environmental statutes contain similar citizen suit provisions. See, e.g., Clean Water Act, 33 U.S.C. § 1365; Toxic Substances Control Act, 15 U.S.C. § 2619; Endangered Species Act, 16 U.S.C. § 1540(g); Solid Waste Disposal Act, 42 U.S.C. § 6972(a)(1)(B); Resource Conservation and Recovery Act of 1976 § 7002); Clean Air Act, and 42 U.S.C. § 7604, Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9659.

[6] 33 U.S.C. § 1365.

[7] 40 C.F.R. § 135.3(a).

[8] Mancuso v. New York State Thruway Authority, 909 F. Supp. 133 (1995).

[9] 33 U.S.C. § 1365(b)(1).

[10] Friends of the Earth v. Laidlaw Environmental Services Inc., 528 U.S. 167, 175 (2000).

[11] 33 U.S.C. § 1365(d).

[12] 33 U.S.C. § 1365(a)(2).