DEFENDING CITIZEN SUITS
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Introduction
The major federal environmental statutes enacted between 1970 and 1980 all contain provisions allowing private citizens to bring suit against alleged violators of the statutes.1 Citizen suits against alleged polluters, until recently, were primarily brought

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By way of example, the Clean Air Act’s citizen suit provision, 42 U.S.C. § 7604, on which all of the other statutory citizen suit provisions cited above are based, provides:

(a) Authority to bring civil action; jurisdiction

Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf--

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation,

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator, or

(3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment) or who is alleged to have violated (if there is (...continued)
evidence that the alleged violation has been repeated) or to be in violation of any condition of such permit.

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(b) Notice

No action may be commenced--

(1) under subsection (a)(1) of this section--
(A) prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator, (ii) to the State in which the violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or
(B) if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any person may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to 60 days after the plaintiff has given notice of such action to the Administrator, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of section 7412(i)(3)(A) or (f)(4) of this title or an order issued by the Administrator pursuant to section 7413(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

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(f) "Emission standard or limitation under this chapter" defined

For purposes of this section, the term "emission standard or limitation under this chapter" means--

(1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard,
(2) a control or prohibition respecting a motor vehicle fuel or fuel additive, or
(3) any condition or requirement of a permit under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment), section 7419 of this title (relating to primary nonferrous smelter orders), any condition or requirement under an applicable implementation plan relating to transportation control measures, air quality maintenance plans, vehicle inspection and maintenance programs or vapor recovery requirements, section 7545(e) and (f) of this title (relating to fuels and fuel additives), section 7491 of this title (relating to visibility protection), any condition or requirement under subchapter VI of this chapter (relating to ozone protection), or any requirement under section 7411 (...continued)
under the Clean Water Act because the permitting and self-reporting enforcement mechanisms provided easy pickings for citizen plaintiffs. However, the predominance of the Clean Water Act citizen suit may soon elapse as the Clean Air Act permitting and self-monitoring structure take effect. Moreover, the courts are witnessing an increasing number of injunctive actions brought under the Imminent and Substantial Endangerment section of RCRA’s citizen suit provision. Citizen suits have also served as vehicles to trigger district courts’ supplemental jurisdiction, and are often accompanied by a panoply of common law claims sounding in tort.

or 7412 of this title (without regard to whether such requirement is expressed as an emission standard or otherwise); or
(4) any other standard, limitation, or schedule established under any permit issued pursuant to subchapter V of this chapter or under any applicable State implementation plan approved by the Administrator, any permit term or condition, and any requirement to obtain a permit as a condition of operations.

which is in effect under this chapter (including a requirement applicable by reason of section 7418 of this title) or under an applicable implementation plan.

(g) Penalty fund

(1) Penalties received under subsection (a) of this section shall be deposited in a special fund in the United States Treasury for licensing and other services. Amounts in such fund are authorized to be appropriated and shall remain available until expended, for use by the Administrator to finance air compliance and enforcement activities. The Administrator shall annually report to the Congress about the sums deposited into the fund, the sources thereof, and the actual and proposed uses thereof.

(2) Notwithstanding paragraph (1) the court in any action under this subsection to apply civil penalties shall have discretion to order that such civil penalties, in lieu of being deposited in the fund referred to in paragraph (1), be used in beneficial mitigation projects which are consistent with this chapter and enhance the public health or the environment. The court shall obtain the view of the Administrator in exercising such discretion and selecting any such projects. The amount of any such payment in any such action shall not exceed $100,000.
Citizen suits and the notices of intent to sue that precede them should be given prompt and vigorous attention because they have the potential to cause things to unravel for an unprepared defendant. In addition to the imposition of substantial penalties, injunctive relief and attorneys’ fees, the institution of such suits may bring unwanted attention from embarrassed governmental agencies and concomitant disclosure requirements. As citizen suits enter the 21st Century, a defendant in one of these actions will have access to a relatively well-established body of case law concerning potential defenses. These defenses include challenging a plaintiff’s standing to maintain the suit, examining whether the citizen-plaintiff has fulfilled the statutory prerequisites for notice and, for most citizen suit provisions, asserting that the alleged violations are not “ongoing”.

Other defenses, while also well established in case law, may be less intuitive. The United States Supreme Court has stated that the structure of the citizen suit provisions clearly indicates Congress’ intention for such provisions to “supplement rather than to supplant” the enforcement powers of governmental agencies. That Congressional intent is reflected in the statutory bar against bringing a citizen suit where an agency is “diligently prosecuting” a civil action, or, in more limited cases, an administrative proceeding, against the alleged violator. It is further reflected in the requirement that a potential plaintiff provide the alleged violator, as well as federal and state governmental officials, with detailed notice of any intended claims and wait a prescribed number of days before bringing an action, thus allowing government enforcement to preempt the need for litigation. Courts have additionally applied the “supplement but not supplant”

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dictate beyond strict application of the diligent prosecution bar and notice requirement defense through application of the mootness doctrine and the doctrine of res judicata/collateral estoppel. Thus, even once a citizen suit is commenced, courts often will dismiss it as moot when the defendant can demonstrate that government enforcement has resulted in the cessation and remediation of the alleged violation. In essence, a court in such instances finds that it is unnecessary to provide relief beyond that already effected by a governmental agency.

This article will focus on the defenses – diligent prosecution and mootness – that are tied to actions taken by the government or the alleged violator to remedy the condition or occurrence that forms the basis of the citizen suit. Experience has shown that the defendant who takes proactive measures upon learning of a violation is the defendant who will fare best in defending a citizen suit. Such measures can be taken at any point in the process: before receiving notice of a potential citizen suit, after receiving notice of the citizen suit but before litigation has been commenced, or even after the commencement of litigation. Of course, the earlier remedial measures are put in place the better are one’s chances of successfully defending the citizen suit. However, regardless of when such measures are implemented, if they are effective at remedying the violation, they may be equally effective at averting a citizen suit altogether, or at least result in short circuiting a citizen enforcement effort after it is commenced.

The proactive approaches suggested for heading off citizen suits do not only include unilateral measures by an alleged violator to remedy such violations. They also include working with governmental regulators in order to receive approvals for any suggested remedial measures. This is especially important when the remedy is not