Chris Killian
3/2/2018

Clean Water Act Citizen Suits: What the Numbers Tell Us

Mark A. Ryan

Citizen suits have played a major role in environmental law since the early 1970s when Congress passed most of the federal environmental statutes that now make up our environmental law canon. Suits brought by citizens against violators and the government have done much to define modern environmental law. Of the three cornerstone environmental statutes—the Clean Water Act (CWA), the Clean Air Act, and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)—the citizen suit provisions of the CWA have been some of the most heavily litigated and thus provide a good view into the workings of citizen suits generally. This article looks at the data surrounding the numbers and types of CWA citizen suits filed over time as well as who is filing them, and where.

There are four different vehicles for CWA citizen suits: CWA subsections 505(a) and (b), CWA section 509, and the arbitrary and capricious standard under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). This article will focus largely on CWA section 505 citizen suit enforcement, which comprises the bulk of citizen suit actions under the CWA. In the context of section 505 actions, this article will look selectively at standing because it has generated much of the section 505 litigation and serves as a good viewpoint from which to assess CWA citizen suits in general. The second part of this article will look at trends over time with the numbers and types of CWA citizen suit cases. The last section looks at the state of CWA citizen suits. (Section 509 petitions filed in the courts of appeals to seek review of the U.S. Environmental Protection Agency's (EPA's) promulgation or approval of effluent limitations or guidelines will not be covered here.)

Historically, citizen suits have played a central role in the development of the CWA case law. Individuals and nongovernmental organizations (NGOs) rather than the government have brought many of the landmark environmental cases under section 505(a)(1). *See e.g., Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001) (irrigation ditches to which herbicide is applied are "waters of the United States" because they "exchange water with a number of natural streams and at least one lake"). Challenges by citizens or trade groups to government action under the APA, 5 U.S.C. §§ 701–708, also have played an important role in developing a working interpretation of the CWA. *See, e.g., National Mining Assoc. v. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998) (invalidating the *Tulloch* rule on grounds that "statutory term 'addition' cannot reasonably be said to encompass the situation in which material is removed from the waters of the United States and a small portion of it happens to fall back").

Citizen lawsuits continue to be an important part of the case law today, both in substance and in sheer number of cases filed. In 2016, for example, most of the reported federal court CWA cases were citizen suits. Of the 79 CWA reported decisions issued by the federal courts in 2016, 50 listed an environmental group or individual as plaintiff, 19 involved a company or industrial trade group as plaintiff, and only 10 had the United States as plaintiff. And the cases are not all enforcement cases. The United States was the defendant in 41 of those 79 cases (primarily EPA and the United States Army Corps of Engineers (Corps)). We see a similar trend in 2017. Through March 2017, 30 reported federal court decisions addressed the CWA, and only two of those listed the United States as the plaintiff. The EPA or the Corps was the defendant in 12 of those 30 cases. The interesting finding here is that a very large percentage of the citizen suits litigated are against the government, not private parties or municipalities.

There are many sub-issues within CWA citizen suits, but few are litigated as regularly as standing. There are lessons to be drawn from the voluminous jurisprudence on standing. Environmental and trade groups that sue under CWA section 505(a) must prove standing, and standing is frequently challenged. So, the question is, how often do the respective parties prevail when defendants raise lack of standing as a defense?

First, the case law shows that standing often is litigated fruitlessly. The database of CWA standing decisions reviewed for this article included 119 federal district court and courts of appeals cases issued between 1979 and 2016. While this data set was not complete, it was large enough to draw general conclusions regarding large-scale trends. The appellate courts were nearly evenly split on finding standing. In 20 reported cases, the courts found the plaintiffs had standing, and in 17 they did not. Given the relatively low bar for establishing standing, the district courts were not surprisingly much more lopsided: 60 times they found for plaintiffs versus just 22 times for defendants. One would expect a closer ratio in the appellate courts, where the more difficult standing cases are appealed.

The numbers get more interesting upon identification of the defendants and plaintiffs. In the appellate courts, for example, environmental groups prevailed on standing arguments 17 times and lost 12 times, but trade groups lost 5 and won only once. In the district courts, environmental groups won 50 standing arguments and lost only 9, while the trade groups won 1 and lost 1. One could argue court bias here, but the lower success rates by trade groups likely reflect the more difficult task of showing injury. It is relatively easy for an environmental group to show that one of

Mr. Ryan is with the firm of Ryan & Kuehler PLLC in Winthrop, Washington, and is a member of the editorial board of Natural Resources & Environment. *He may be reached at mr@ryankuehler.com*

The numbers fall off quickly after North Carolina. Surprisingly, DOJ reported heavily industrialized states like Michigan and New Jersey had zero and one case respectively. It is unclear why there are so few cases where one would expect more. DOJ staff informed the author that these data reflect their experience tracking these cases—that there is an uneven spread of citizen suit litigation across the country. Citizen groups in some areas of the country, they report, are much more active than others. These wildly diverse numbers are roughly consistent with the case law, which shows more cases from California, Washington, and West Virginia (the latter primarily coal-mining related) than other states. It is worth noting that Massachusetts is the only nonauthorized state (EPA runs the NPDES program rather than the state agency) in the top 12 list. Finally, although the top 3 states are all blue, the top 12 most active states are an even mix of blue and red states, suggesting that citizen suit activity is not necessarily defined by state politics.

The large number of citizen suits filed—and the relatively high success rate of those suits—indicates that the suits are serving their intended purpose of enforcing the law where the government has either failed or opted not to enforce.

The DOJ database shows that regional rather than large national environmental groups file most of the cases. Names like Puget Soundkeeper Alliance, California Sportfishing Protection Alliance, Northwest Environmental Defense Center, and Ohio Valley Environmental Coalition predominate. There also are many individual plaintiffs on the list, showing that neighbors of violators and small local associations frequently exercise their right to enforce the CWA through section 505.

The cases against the federal government (primarily EPA and the Corps) under CWA section 505(a)(2) are an important but much smaller part of the picture. To be clear, those cases would not include cases filed exclusively under the APA, which probably comprise the bulk of the cases filed against the government. Challenges to Corps-issued CWA section 404 permits, for example, are brought under the APA. The author's database of reported 404 permit challenges includes 74 cases between 1998 and 2017. (Interestingly, the Corps won 53 of those 74 permit challenges.)

The DOJ list of complaints filed against the United States under section 505(a)(2) came with fewer caveats than the list of cases against nonfederal-government defendants, but it was also a significantly smaller list. Section 505(a)(2) allows citizens to sue EPA "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." 33 U.S.C. § 1365(a)(2). For the period 2007–2016, DOJ showed 48 complaints filed against EPA under section 505(a)(2) of the CWA (as opposed to 573 filed against nonfederal-government defendants).

The geographic distribution of these section 505(a)(2) cases roughly mimics those against nonfederal defendants. The leading states for filing these actions were Florida (8, likely water nutrient quality standards fights over the Everglades), Washington and Massachusetts (6), West Virginia (4), and Oregon and California (3 each). Fifteen other states had one or two cases each. Plaintiffs in this group were a mix of national, regional, and local environmental groups as well as industries and trade groups.

The State of Citizen Suits

All laws should be reevaluated from time to time, and CWA citizen suit provisions should not be an exception. This premise frames two obvious questions: (1) what would the environmental legal landscape look like if citizen suits were either abolished or strongly curtailed; and, conversely, (2) how would it look if we enhanced citizen suit authorities. Status quo is the default option should the first two questions yield unwanted likely results. We now have 40 years of experience with citizen suits under the CWA. Is it time to rework the equation, or is the statute working as intended?

Citizen suits are designed to be a supplement to government enforcement. See S. Rep. No. 50, 99th Cong., 1st Sess. 28, (1985) ("Citizen suits . . . operate as Congress intended—to both spur and supplement government enforcement actions."). Neither the federal nor state governments have the resources to pursue all violators, or even all big violators. The 567 federal court cases filed over seven years dwarf the 223 federal court cases filed by EPA during that same period. EPA, however, files most of its CWA enforcement cases administratively. Since citizens can file only in federal court, comparing the citizen suit federal court lawsuits against the number of EPA-filed federal court enforcement actions is of limited value. While some defendants likely would argue that the cases against them are unwarranted, the large number of citizen suits filed—and the relatively high success rate of those suits—indicates that the suits are serving their intended purpose of enforcing the law where the government has either failed or opted not to enforce.

For those opposed to citizen suits in their current form, one way to reign them in would be to remove the attorney fees provision in CWA section 505(d) or modify the statute to require the nonprevailing party (be it the plaintiff or the defendant) to pay all costs and fees. Either change would alter dramatically the number of smaller cases brought but probably would have little effect on the larger organizations' efforts. The large national environmental groups and trade groups can afford to fund their own litigation. Those groups typically are litigating with some broad policy goal in mind, and they have grants or corporate funding to support their advocacy. The smaller regional groups or individual plaintiffs that bring cases usually aim to remedy a specific environmental problem. Those groups likely would curtail their enforcement efforts if they could not recover their fees or if they were faced with the prospect of paying defense fees and costs should they lose. A significant