Clean Water Act Citizen Suits: What the Numbers Tell Us

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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 suits 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

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its members has been harmed by pollution. In Friends of the Earth, Inc. v. Laidlaw Env’tl Servs., Inc., 528 U.S. 167 (2000), the Supreme Court held that the plaintiffs need not show that the environment was harmed but only that the plaintiffs were harmed by the defendant’s conduct. Post-Laidlaw case law demonstrates that plaintiff groups routinely meet the standing requirement by simply alleging that one or more of their members live near and recreate in water affected by defendant’s discharges and are adversely impacted by the defendant’s conduct. See e.g., Ohio Valley Envt’l Coalition v. Foss Coal Co., LLC, 2017 WL 1276059 (S.D.W. Va. 2017) (plaintiffs had standing to sue where members of organization recreacted in waters affected by mine runoff; “plaintiffs may rely on circumstantial evidence such as proximity to polluting sources, prediction of discharge influence, and past pollution to prove both injury in fact and traceability”). But see, Public Employees for Envt’l Responsibility v. Schroer, 2017 WL 943942 (E.D. Tenn. 2017) (holding, on motion for summary judgment, that plaintiffs had not proved standing where they challenged adequacy of wetlands mitigation project but named plaintiff’s declaration only set out generalized grievance and not actual, individualized harm).

Trade groups have a more difficult path. It is less obvious in many cases how trade group members are harmed by regulations or permits that have often not yet gone into effect. For example, in National Association of Homebuilders v. EPA, 786 F.3d 34 (D.C. Cir. 2015), the court held that issue preclusion barred the trade group from challenging the Corps’ preliminary jurisdictional determination (JD) in Arizona where the trade group failed to cure the defects found in its prior challenge, namely that any of the plaintiffs had been harmed by the issuance of a final JD for their property. The court held that threat of increased likelihood of future regulation is not enough.

A fair number of reported citizen suit standing cases also have been litigated against EPA and the Corps. In the appellate courts, the environmental groups won two and lost none, and, in the district courts, they won only 9 and lost 12. These district court data contrast starkly with the 50-win and 9-loss record in cases against nonfederal defendants. These data suggest that plaintiffs, at least at the district court level, may have a tougher time establishing standing when the federal government is the defendant. Although bias may play a role, this phenomenon likely is indicative of the same hurdle trade groups face: when challenging an EPA or Corps regulatory action, it is harder to show actual harm.

What is the takeaway? Defendants routinely and, it appears, reflexively, move to dismiss on standing grounds, usually trying to prove that the environmental plaintiffs have not established an injury. It is unclear why defendants litigate this issue so aggressively. It may be that many cases involve clear-cut liability, leaving standing as the only chance to knock out the case early in the litigation. But it is clear that Laidlaw established a fairly easy test for showing injury, making it hard for defendants to succeed in challenging citizen standing. The numbers bear this out. In the reported district court decisions, plaintiffs won their standing arguments on roughly a 3:1 basis. If one reads the few cases where plaintiffs failed to establish standing, the picture looks even worse for defendants. In most of those cases the plaintiffs either were pro se, simply made bad arguments, or failed to marshal the basic facts needed to show injury. These days, most environmental groups are sophisticated enough to build a record to support standing.

Department of Justice Data

The data in this next section were derived from a Freedom of Information Act (FOIA) request submitted to the Department of Justice (DOJ) in January 2017, requesting CWA section 505 cases from 2007 to 2016. For that period, the author requested a list of all 60-day notice letters filed, all complaints filed, and all consent decrees entered. Because the database search would have been much more involved, the FOIA request did not request data on APA cases against the government related to government CWA decisions. For purposes of this discussion, the data will be broken into two groups: (1) CWA section 505(a)(1) cases—those filed by citizens against nonfederal government entities (primarily private parties and municipal/state governments)—and (2) cases filed by citizens and industry groups under CWA section 505(a)(2) against EPA and the Corps for failure to exercise a nondiscretionary duty. The second category does not include cases filed solely under the APA, which comprise a significant number of CWA challenges to government-issued permits and rulemakings.

DOJ does not formally track 60-day notices, so this article was not able to address the question of how many 60-day notices turn into cases. Similarly, EPA also does not track the notices carefully. Based on the author’s personal experience working in EPA Region 10, the notices often are reviewed quickly when received, then filed away and forgotten. Unless EPA sees an issue of great importance to the agency, it seldom gets involved in CWA section 505 actions filed by a citizen against a private entity or municipality. The absence of good data on 60-day notices is unfortunate. It would have been interesting to know how many 60-day notices are filed and were never followed through on or were settled without the filing of a complaint.

The DOJ response showed that 573 complaints were filed against nonfederal defendants between 2007 and 2016. DOJ’s database, however, is spotty, especially for the early years of the FOIA request, 2007–2009. (The DOJ FOIA cover letter included many caveats regarding the limitations of the information the department provided in response to the FOIA.) The lack of reported cases in the DOJ database from 2007 to 2009 (1, 0, and 5 cases, respectively) rendered those years useless for observing trends of any kind. For the years 2010–2016, DOJ reported 567 cases (51, 66, 96, 81, 96, 84, and 93, respectively), giving us a much larger sample set to review. Factoring out the first three years of weak data, on average, 80 complaints were filed per year during 2010–2017. The DOJ data showed filed consent decrees for almost all those entries, meaning virtually all 567 cases settled. During that same period, EPA filed 223 CWA complaints, which averages to 32 per year. By contrast, most states do not aggressively enforce under their authorized CWA programs. According to an EPA report, in 2015, 13 states took no enforcement actions and 21 states took fewer than 10. U.S. EPA, Annual Noncompliance Rept. 2015, at 11 (2016). Nine states accounted for 70 percent of all state-led CWA enforcement actions nationwide. Id.

From 2010 to 2016, the data did produce some interesting results. First, the distribution of cases across the country was extremely uneven. With 219 cases, California ran away with the lead in citizen suits alleging CWA violations. The top 12 states by filing of complaints were California (219), Washington (90), Massachusetts (55), West Virginia (36), New York (24), Tennessee (19), Georgia (17), New Hampshire (13), Connecticut (13), Oregon (11), Alabama (10), and North Carolina (7).
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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
percentage of all CWA section 505(a)(1) cases fit that latter category. It is doubtful that Congress would make amendments that effectively would deprive local groups of their right to protect their home turf from pollution.

Given the sea change currently underway at the EPA under the Trump administration, it is worth highlighting how those changes may play out in the context of CWA citizen suits. The Pruitt-led EPA has telegraphed that it would like to cut EPA funding by as much as 30 percent, reduce staff, eliminate programs, give more deference to the states, de-emphasize enforcement, and repeal regulations. If that happens, what effect, if any, will it have on the number and types of citizen suits being filed?

First, plaintiffs currently are barred under CWA section 505(b)(1)(B) from filing actions where EPA or the state has commenced and diligently prosecuted a case against the same defendant. Section 505(b)(1)(B) has for years provided cover to the regulated community from citizen suits when EPA or the state has already begun an enforcement action. See, e.g., Black Warrior Riverkeeper, Inc. v. Southeastern Cheese Corp., 2017 WL 359194 (S.D. Ala. 2017) (citizen suit filed while consent decree is still open from prior state enforcement action is barred because the state had commenced and was diligently prosecuting an action under state law). If EPA pulls back on enforcement and grants greater autonomy to the states, some states may step up their enforcement, but others may retreat. A large part of most state environment enforcement budgets comes from EPA (in Idaho, it is over 50 percent), and the Trump administration has proposed slashing funds provided to states. If that happens, expect to see reduced resources for state enforcement actions. And, as the 2015 EPA Report showed, most states already take few enforcement actions.

Where states pull back, environmental groups and private citizens will fill some of that void. However, without the ability to conduct inspections, or ask for documents from private parties outside of litigation, citizen groups never will have the evidence necessary to bring as many cases as the government. Citizen groups frequently seek larger penalties and more comprehensive injunctive relief than EPA or the states. Plaintiffs suing under section 505(a) are entitled to fees under section 505(d) if they substantially prevail. EPA and the states generally do not recover attorney fees when they enforce.

An analysis the author conducted in 2014 looking at EPA CWA enforcement cases in Idaho during 2000–2013 showed very little variation in the number of cases filed during the Clinton, Bush, and Obama administrations. That consistency arguably has allowed the regulated community to understand what the regulatory environment is and to plan accordingly. With an EPA retreat from enforcement, the regulated community may face more uncertainty in the form of an increased number of citizen suits. In sum, if EPA and the states pull back on enforcement, we likely will see more citizen suits, larger fines, payment of attorney fees, and less certainty for business.

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). The DOJ data cited above show that 48 of the 77 section 505 cases filed against the government were against EPA under section 505(a)(2) for failure to exercise a nondiscretionary duty. If EPA under the Trump administration stops or slows down implementation of nondiscretionary duties under the CWA, citizen groups certainly will increase the number of challenges they bring against EPA. Defensive cases already consume a significant percentage of EPA’s and DOJ’s resources. Some of those resources now are devoted to industry challenges, and those would be expected to decrease under this administration. The number of section 505(a)(2) cases, however, in net likely will increase. When EPA loses section 505(a)(2) cases, it frequently is ordered to engage in rulemakings with specific results mandated by the courts. The downside of EPA inaction for the regulated community is often new, stricter regulations put in place subject to a court order rather than regulations that are established pursuant to agency discretion.

Citizen suits are not spread evenly across the country, but are concentrated largely in a handful of states that are a mix of red and blue, and are dominated by local or regional groups rather than the large national environmental groups that one often identifies with citizen suits.

In conclusion, the data show citizens play a major role in CWA enforcement and in forcing the government to do what it is obligated to do statutorily. Although not all citizen suits are successful, they enjoy a relatively high success rate, suggesting that they are doing what Congress intended them to accomplish, especially considering the weak state agency enforcement numbers. The data tell us that the suits are not spread evenly across the country, but are concentrated largely in a handful of states that are a mix of red and blue, and that citizen suits are dominated by local or regional groups rather than the large national environmental groups that one often identifies with citizen suits. We also have learned that a large percentage of the reported CWA citizen suits are against EPA or the Corps and not against private parties or municipalities, which dispels the common notion that these cases primarily target alleged permit violators for penalties. The status quo that has been in place since 1972 appears to be serving the purpose Congress intended, and the data do not appear to support a move to make any significant changes to the CWA’s citizen suit provisions.