

C O M M E N T

CITIZEN ENVIRONMENTAL ENFORCEMENT LAWSUITS ARE ALIVE—WHAT IT TAKES TO GO FORWARD

by Howard Learner

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Thank you to the authors for a well put together and provocative article that will be helpful in the field. Their empirical analysis is valuable, and I can add some good news in at least two regions of the country—the Midwest and the Southeast, which are not always viewed as having especially vigorous state-level enforcement or strong environmental programs. In both of these regions, there are a significant number of big-deal, substantive citizen environmental lawsuits that are being filed, and plaintiffs are succeeding. They involve both actions against private parties and actions against governments. Some of these cases may be “retail level,” but many have high-leverage, systemic change value.

For example, in the Midwest, the Great Lakes is widely viewed as a global ecological gem providing a largesse of freshwater supply. There is strong bipartisan public and political support for protecting the Great Lakes in places like Toledo, northwest Indiana, Chicago, and throughout the region. Actually, these are more than “just” bipartisan issues; these are nonpartisan issues. Both Republicans and Democrats in the congressional delegation strongly support protecting the Great Lakes.

So, why are all these environmental citizen suits happening? In both regions, the Midwest and the Southeast, there are sophisticated public interest environmental legal advocacy groups that have the legal capacity, a strong enough financial base, and experienced attorneys who know how to bring these sorts of citizen suits. In the Midwest, it's the Environmental Law and Policy Center, and, also, our colleagues at the Midwest Environmental Advocates, Earthjustice, NRDC, Sierra Club, and other effective

groups. In the Southeast, it's the Southern Environmental Law Center, EDF, South Carolina Environmental Law Project, and a number of other groups. When there's a set of groups that have talented public interest attorneys with legal sophistication, and a reasonably strong financial base so they can take on citizen suits requiring years of litigation against powerful polluters with deep pockets to bank-roll big law firms and hired-gun experts, then you then have the capacity to undertake the types of cases that I will talk about now.

There is indeed a sort of self-regulating component to this. These cases require substantial investments of attorneys' time, experts, and money. Here, at the Environmental Law and Policy Center, we are looking at cases that raise the bar, and have leverage value. We cannot do everything, so one of the questions we always consider is whether this is a one-off case, or a case that will raise the bar for the future and have a ripple effect.

Another aspect of this is explained well by an attorney colleague who is the former managing partner of a major law firm: regulated industry clients want to know that if they do things right in reducing pollution, but their competitors are not doing things right—and that if the federal government in a certain administration is not going after that competitor—that there will be a group like the Environmental Law and Policy Center or Earthjustice who take legal action. Otherwise, their clients are at a competitive disadvantage, and they do not want to be in that situation.

In terms of leverage, no corporate general counsel and CEO of an industrial company wants to be seen on the front page of a newspaper labeled as a Great Lakes polluter. Nobody wants that. That provides some leverage. That is part of effective public interest advocacy when it comes to leveraging citizen suit litigation for environmental protection and progress.

Now, I will turn to some of the current litigation on our docket. Indiana is not well-known for strong environmental programs or enforcement despite some very good

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people working there. The Environmental Law and Policy Center and Hoosier Environmental Council brought a Clean Water Act citizen enforcement lawsuit in the U.S. District Court for the Northern District of Indiana because of excessive ammonia and cyanide discharges from Cleveland-Cliffs' Burns Harbor steel mill into the Little Calumet River and Lake Michigan. The company, then ArcelorMittal (before it was acquired by Cleveland-Cliffs), did not publicly say what happened when the discharges occurred. When 3,000 dead fish showed up in the east arm of the Little Calumet River about 72 hours later, people around Lake Michigan knew something was going on—and the company finally acknowledged the excessive ammonia and cyanide spills into the waterways.

The first aspect of bringing a citizen suit includes filing a 60-day notice letter—which is required under the Clean Water Act, Clean Air Act, and so forth—and spending some time negotiating with the state attorney general, the state environmental protection agency, and the federal agencies. If you do not negotiate with them during the 60-day notice period, you run the risk that, for example, on day 59, the federal or state government will over-file and bring their own enforcement action.

Now, that is not always bad; we want the federal and state governments to do a very good job of enforcement. We also want to make sure, however, that if they are going to take over enforcement, that they then do it well. Negotiating is a matter of making sure that if there is over-filing, there will be vigorous and effective enforcement. If, for whatever reason, the federal or state government is not going to do that, negotiating can help to ensure that they get out of the way so the citizen suit can be brought.

The federal or state government should carry out their enforcement action responsibilities and do them well. When they can't—for example, due to limited resources or political pressures—or they do not, then that is the complementary role of citizen suits under the Clean Water Act, Clean Air Act, and other environmental statutes. This is the public-private partnership intended by the U.S. Congress.

Without going chapter-by-chapter over this citizen environmental lawsuit in northwest Indiana under the Clean Water Act, in short, the plaintiff citizen groups brought the suit, it was on the front pages of the newspapers, and it turned out there were many permit violations.¹ Plaintiffs believed those violations were significant; the Defendants believed they were less significant. Two years into the litigation, the federal and state governments stepped up and decided to move forward.

There is now a consent decree filed with the U.S. District Court by the Plaintiff environmental-citizens groups, the Plaintiff federal and state governments, and the Defendants that includes injunctive relief by which Cleveland-Cliffs is required to: (1) upgrade its steel mill equipment and improve its operations, (2) pay \$3 million in civil pen-

alties, (3) transfer 127 acres of land to a land trust that will restore and subsequently convey the land to expand the adjacent Indiana Dunes National Park, and (4) undertake enhanced water quality monitoring and better public notification when pollution problems occur.² Moreover, Cleveland-Cliffs will pay almost \$1 million in attorney fees and costs to the Environmental Law and Policy Center because of the successful citizen suit action.

This is a big deal case. It has both retail value and high leverage value because when every other industrial facility owner along the Lake Michigan shoreline looks at this case, most don't want to be in Cleveland-Cliffs' position. So, this case has leverage value beyond the one huge Burns Harbor, Indiana, steel mill.

The Environmental Law and Policy Center is bringing cases in other Midwest states as well, and we have some significant recent victories:

- We have filed Clean Water Act lawsuits in the U.S. District Court for the Northern District of Ohio involving the federal government's and agricultural interests' failures to reduce nutrient runoff pollution (fertilizer and manure), which causes severe toxic algae blooms in western Lake Erie almost every summer—that's about as substantive of a case as you can get. Lake Erie is sadly the poster child for severe, recurring toxic algae outbreaks, and this litigation is designed to help clean up Lake Erie over time.
- We have entered into a revised consent decree on a Clean Air Act enforcement lawsuit against AEP involving some of its coal plants in Indiana and Ohio.
- We recently settled a Clean Air Act enforcement suit against BP, which involved its alleged violations of the consent decree governing its Whiting, Indiana, oil refinery in northwest Indiana; the settlement requires a fair number of "fix-its" going forward.
- In Wisconsin, Environmental Law and Policy Center public interest attorneys represent several national and local conservation groups in citizen actions to apply and enforce the laws designed to protect the Upper Mississippi River National Wildlife and Fish Refuge and properly implement the National Environmental Policy Act.
- In Illinois, the Environmental Law and Policy Center, NRDC, and Sierra Club recently prevailed in our Clean Air Act enforcement lawsuits against Vistra for violating opacity standards—due to excessive particulate pollution—at its old Edwards coal plant in Peoria.

1. Environmental Law & Policy Center et al. v. Cleveland-Cliffs Burns Harbor, LLC et al., Case No. 2:19-CV-473-PPS-JPK, U.S. District Court for the Northern District of Indiana (2019).

2. The Consent Decree providing consolidated remedies in the Plaintiff environmental groups' citizen enforcement lawsuit filed in 2019 and the new Complaint filed by the federal and state governments was recently approved by the U.S. District Court in *United States of America and State of Indiana v. Cleveland-Cliffs Burns Harbor, LLC and Cleveland-Cliffs Steel LLC*, Case No. 2:22-cv-00026-PPS-JEM (N.D. Ind., May 6, 2022).

- We have brought actions in Michigan as well, and recently prevailed before the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit in a case involving the U.S. Environmental Protection Agency's (EPA's) improper ozone nonattainment area designations.

These cases are all substantive, and they involve a mix of private parties and governmental defendants. Most of these cases are very publicly visible, which increases the wholesale leverage value beyond the retail case alone. This leads to other defendants and corporate counsels having more concerns when they have similar air and water pollution problems at their plants.

The federal government has a vital and important role to play, but as we have all seen, sometimes EPA and the U.S. Department of Justice are vigorous in exercising their enforcement responsibilities, and sometimes, unfortunately, much less so. We want federal and state governments to be tough, fair, and effective enforcers, but when they are not, or when they cannot take on a particular matter, citizen suits are vitally important. Congress clearly intended this to be a public-private partnership in the Clean Air Act, Clean Water Act, and other federal environmental statutes.

There are some factors the authors should consider. *First*, regarding numbers, how do you value some of the bigger cases that have substantial leverage versus what are generally called "deadline cases" that are much more tactical in terms of moving a required governmental action forward? I do not know quite how to do that based on the data the authors have, but it is important to recognize the differences between the two.

Second, consider resources. Who has the capacity to bring effective, substantive citizen suits that involve private parties as well as government defendants? They tend to be in places where either the main offices of national environmental groups are located, such as in California or Washington, D.C., or in places like the Midwest or Southeast, where groups like the Environmental Law and Policy Center and the Southern Environmental Law Center have skilled experienced litigators, and their main offices. They also tend to be in places where there are good state-based groups like the Minnesota Center for Environmental Advocacy, local Sierra Club chapters, or others with litigation capacity.

Third, these groups must have a strong enough financial base and commitment to bring these citizen suits because attorney fees, alone, will not likely support all of this necessary work going forward. Attorney fees are an important part of the strategy, but actually receiving fees is episodic and somewhat unpredictable if and when they will ever be received. Sometimes, they are vigorously opposed in court, and sometimes not. Sometimes, judges look at attorney fees as being entirely justified, and sometimes judges have a lot of questions about them, including what rate is used, how many hours, and how long you've litigated.

Reforms that make attorney fees more predictable would be important to consider in the authors' analysis, because they provide some incentive for both public interest law organizations and private parties to bring citizen suits. Attorney fees should not be as difficult to obtain as they sometimes are. Furthermore, although prevailing plaintiffs are entitled to "fees on fees" when they need to litigate over attorney fees, there should be a way of resolving these issues with less fees on fees battles.

In short, citizen suits are vitally important for better environmental enforcement and, overall, better environmental performance by regulated industries. Almost all of us recognize that. Citizen suits are especially important when we have, for whatever combination of reasons, federal and state governmental administrations that are not following their legal responsibilities and public obligations when it comes to vigorous and fair enforcement. We need to make the system work better.

The system in some places, though, is perhaps a little more aggressive in terms of substantive, qualitative impacts than the authors' numbers of citizen suits indicate. I understand the limits of their analysis because the D.C. Circuit is where so many cases need to be filed as a matter of law so, of course, the number of cases there is going to be higher. The U.S. Court of Appeals for the Ninth Circuit is, in some ways, a special situation. The authors should consider setting the Ninth Circuit apart, and assessing the data for the differences among the other circuits. In the graph presented by the authors, the other circuits are relatively constant, but are some of those circuits seeing more cases than others, and what types of citizen lawsuits are they?

Thank you for your work on this timely and important topic.