The Nuts and Bolts of Environmental Citizen Suits

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Environmental Citizen Suits
Authorization

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• **Pennsylvania Clean Streams Law**: “[A]ny person having an interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance . . . against any other person alleged to be in violation . . . .” -- 35 P.S. § 691.601(c)
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- **Federal Clean Water Act**: “[A]ny citizen may commence a civil action on his own behalf . . . against any person . . . who is *alleged to be in violation* . . .” -- 33 U.S.C. 1365(a)

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“alleged to be in violation”

“. . . a good-faith allegation of continuous or intermittent violation . . . .” – Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, 484 U.S. 49 (1987)
The Frack ‘n Forth treatment plant in Gasland, PA, has a permit to discharge treated gas drilling wastewater to the Pristine River. One day in February, the facility exceeded its permit limits for Total Dissolved Solids when treatment equipment malfunctioned. The facility repaired the equipment and there hasn’t been a single exceedance of TDS since. Citizen suit?
“alleged to be in violation”

The Frack ‘n Forth drilling site in Gasland, PA, has a permit requiring the implementation of certain stormwater best management practices during construction, including the installation of a silt fence. One day in February, the silt fence came down, allowing sediment-laden stormwater to run off the site and into the Pristine River. Several neighbors of the drilling site have alerted the company and regulatory agencies to the problem, but the silt fence remains down. Citizen suit?
Standing
Standing


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Standing

Constitutional Requirements

"The Judicial Power shall extend to all Cases . . . [and] to Controversies . . .“
--U.S. Const. art. III, § 2, cl. 1

A plaintiff must show:
(1) it has suffered an "injury in fact" that is
   (a) concrete and particularized and
   (b) actual or imminent, not conjectural or hypothetical;
(2) the injury is fairly traceable to the challenged action of the defendant; and
(3) it is likely, as opposed to merely speculative, that the injury will be
   redressed by a favorable decision.
Standing

Environmental Context

1) Injury
   • Aesthetic, conservational, recreational, economic
   • To the plaintiff, not (necessarily) to the environment

2) Causation
   • Don’t need to show to scientific certainty that defendant’s conduct alone caused plaintiff’s injury
   • But must establish causal link between violation and plaintiff’s injury

3) Redressability
   • Focuses on the connection between plaintiff’s injury and the requested remedy
   • Don’t need to show that injury will be completely redressed by the remedy
Standing

Organizational Standing

An association has standing to bring suit on behalf of its members when:
(1) its members would otherwise have standing to sue in their own right;
(2) the interests at stake are germane to the organization’s purpose; and
(3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

“PennFuture works to create a just future where nature, communities and the economy thrive.”
Standing?

1. Vinny, who fishes the Pristine River upstream from the treatment plant?
2. Jenni, who hikes along the now muddy segment of the Pristine River just downstream from the drilling site?
3. Nicole, who lives in Gasland, PA, who just doesn’t like the idea of gas drilling going on in her community?
4. Pauly, who lives in another state but is thinking about taking a rafting trip someday along the Pristine River?
5. Ronnie, who lives on the Pristine River downstream from the treatment plant who alleges that the river smells like agricultural manure?
6. Sammi, who lives downstream from the drilling site and alleges that discoloration of the Pristine River is lowering the value of her waterfront property?
7. Friends of the Pristine River, an organization that does stream restoration work all along the river?
8. Freshco, a drinking water supplier that draws its water downstream from the treatment plant?
Notice Requirement & Diligent Prosecution Bar

- **Federal Clean Water Act:** “No action may be commenced . . . *prior to sixty days after the plaintiff has given notice* of the alleged violation . . . or . . . if [the federal or state regulatory agency] *has commenced and is diligently prosecuting* . . . to require compliance . . . .” – 33 U.S.C. 1365(b)

- **Pennsylvania Clean Streams Law:** “No action . . . may be commenced *prior to sixty days after the plaintiff has given notice* in writing of the violation . . . nor may such action be commenced if the department *has commenced and is diligently prosecuting* . . . to require compliance . . . .” – 35 P.S. § 691.601(e)
Remedy

- **Declarative and Injunctive Relief**
- **Civil Penalties**
  - Up to $37,500 per day for each violation under
  - Paid to United States Treasury
  - Amount based on several factors: seriousness of the violation, economic benefit resulting from the violation, history of violations, good-faith efforts at compliance, economic impact of the penalty on the violator
- **Litigation Costs**
  - Including reasonable attorney and expert witness fees
  - “to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate”