HAZARDOUS WASTE AND TOXIC TORTS

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Judicial Analysis

Citizen Suit Considerations Under the Clean Water Act

By Larry Schnapf

Despite a U.S. Supreme Court decision that seemed to restrict the right of citizens to file suit under the federal Clean Water Act, citizen suits remain a potent weapon against industrial and municipal polluters with a history of permit violations.

This litigation is appealing to citizen plaintiffs because the self-monitoring and reporting requirements of the Clean Water Act shift the burden of proof of compliance to the permit holder. By simply relying on the Discharge Monitoring Reports (DMRs) that the permit holder is required to file, the plaintiff can prove the existence of permit violations. Since a permit holder is strictly liable for permit violations and cannot challenge the accuracy of the DMRs, these cases can often be resolved by summary judgment even when the violations involve technical infractions from inevitable equipment malfunctions that do not pose a serious threat to the environment.

Citizen suits are particularly troublesome to permittees who discharge toxic pollutants. Most states have not established numeric criteria for toxic pollutants, but instead issue permits with narrative standards that prohibit "toxics in toxic amounts." Because of the lack of standards and inadequate data on the impact of toxic pollutants on water quality beyond the mixing zone of the point source, state agen-

Continued on Page 5

Regulatory Analysis

Calif. Superior Court Rejects Fear of Cancer Claims

By John J. Lyons

In one of the first opinions to address the issue, a California Superior Court judge has held that, absent proof of physical injury from exposure to a chemical, a fear of cancer claim may not be presented to a a jury unless the plaintiff can establish that the chemical in question has been shown to be a human carcinogen.

In *Ackerson v. Dow Chemical, et al.,* San Francisco Co., No. 808161, Judge Daniel Weinstein held in an unpublished "Memorandum Opinion in Support of Order Dismissing Claims for 'Fear of Cancer' " that fear of cancer claims brought by plaintiffs (who had not established medically verifiable physical injuries resulting from a chemical exposure) could only be sent to a jury when the claim was supported by adequate indicia of genuineness. The court ruled that the fear of cancer claims presented by the plaintiffs did not meet the "genuineness" requirement because insufficient evidence was presented to indicate that the chemical in question was a human carcinogen.

Background

The *Ackerson* suit was brought by current and former employees of a manufacturing facility in Lathrop, Calif., that had formulated and used the pesticide DBCP (1-2-dibromo-3-chloropropane). Plaintiffs sought

Continued on Page 4

Inside

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Citizen Suit Considerations Under Clean Water Act

Continued from Page 1

cies rarely bring enforcement actions based solely on toxicity. However, citizen plaintiffs are not as constrained by this scientific uncertainty and may bring suits when trace quantities of toxic pollutants are detected, especially carcinogens.

Sec. 505 of the Clean Water Act provides that any citizen may commence a civil action in the federal district courts against any person who is "alleged to be in violation (a) of an effluent limitation or standard under this Act or, (b) an order issued by the Administrator or a State with respect to such standard or limitation." The suits must be brought in the judicial district where the violation is alleged to have occurred by citizens "having an interest which is or may be adversely affected."

The suit may seek injunctive relief ordering the defendant to comply with the applicable effluent standards, limitations or administrative orders. Sec. 505 also allows courts to impose civil penalties and to award costs, including attorneys fees, to a prevailing plaintiff.

Explosive Issue

A citizen suit cannot be commenced until the plaintiff has given 60 days written notice of the alleged violation to the EPA, the state where the violation has occurred, and to the alleged violator. The citizen suit will be barred, however, if the EPA or the state is "diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation or order" for which enforcement is sought.

The most explosive issue involving citizen suits has been whether federal jurisdiction may be conferred for citizen suits seeking redress for wholly past violations.

In *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation Inc.*, 484 U.S. ___, 98 L. Ed 2d 306, 108 S. Ct. 376 (1987), the Supreme Court ruled that a citizen suit may not be brought for wholly past violations. Justice Thurgood Marshall, writing for the majority, concluded that as a jurisdictional prerequisite, citizen plaintiffs must "allege either a state of continuous or intermittent violation — that is, a reasonable likelihood that a past polluter will continue to pollute."

Marshall said that the purpose of the 60-day notice requirement was to allow the alleged violator to bring itself into compliance and to allow citizen plaintiffs to file suit for past violations, thus rendering the notice requirement superfluous. Expressing concern over "chronic violators" who might not be in violation at the precise time the complaint was filed, the Court also said Sec. 505 does not require that the citizen plaintiff prove that the defendant was in violation at the time the suit is brought for jurisdiction to confer, but simply that citizen plaintiffs make a good-faith allegation of continuous or intermittent violations.

The court also warned potential violators that the mere voluntary cessation of allegedly illegal conduct would not moot a case. The court emphasized that it must be "absolutely clear" that the allegedly wrongful behavior could not reasonably be expected to recur.

Associate Justice Antonin Scalia, concurring in part with Justices Sandra Day O'Connor and John Paul Stevens, found that the "to be in violation" language suggested a state rather than an act and that a "good or lucky day is not a state of compliance." He also noted that when a company has violated an effluent limitation or standard in the past, it remained in violation for purposes for Sec. 505 until remedial measures were in place that would clearly eliminate the cause of the violation.

With the entrance to the court door left open by the Supreme Court, several federal courts applying *Gwaltney* have allowed citizen plaintiffs to maintain actions. In one of the first cases decided after *Gwaltney*, the district court for New Jersey ruled in *Student Public Interest Research Group of New Jersey Inc. v. Monsanto*, No. 83-2040, S.N.J., March 24, 1988, that civil penalties could not be granted in citizen suit actions for pre-complaint violations but that those pre-complaint violations would be considered in fashioning an overall penalty.

Violation of the Permit

In *Sierra Club v. Simkins Industries*, 847 F.2D 1109, 4th Cir. (1988), the defendant failed to sample and file quarterly DMRs for over two years in violation of its National Pollutant Discharge Elimination System (NPDES) permit. The Sierra Club filed a citizen suit seeking injunctive and declaratory relief and civil penalties. The defendant attempted to distinguish between substantive violations of effluent limitations and mere reporting requirements. However, the court ruled that the reporting requirement was a condition of the permit and the plaintiff had proved an on-going violation of the permit. The court also said a defendant cannot be allowed to successfully argue against an enforcement action by not providing the data required under the Clean Water Act.

Indeed, the *Gwaltney* decision proved to be Phyrric victory for the petitioner itself. The Supreme Court remanded the case to determine whether the plaintiff had made a good faith allegation of on-going violations. Although Gwaltney had taken remedial measures to control discharge, the district court nevertheless reinstated the $1.2 million civil penalty because it found that the plaintiff had

Continued on Page 6

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States May Be Liable for CERCLA Cleanup Costs

Continued from Page 8
decisions concerning Congress' plenary authority under the Commerce Clause indicated "... a trail unmistakably leading to the conclusion that Congress may permit suits against States for money damages." The power to override a states' sovereign immunity, given to Congress by the states when they ratified the Constitution, is limited, Brennan wrote, only by the requirement that it "unequivocally expresses its intent..." Having already found the statutory language sufficient, Brennan's result was inevitable.

While Justice Scalia joined the majority on the sufficiency issue, he stood with the dissenters, Chief Justice William H. Rehnquist and Justices Anthony Kennedy and Sandra Day O'Connor, who determined that Congress did not have the constitutional power to effectuate its intent.

Although the Court failed to achieve a clear majority on either the statute's intent, or on Congress' power to pass a law abrogating the states' immunity, there is no question that the decision will have a dramatic impact. The decision, which is in keeping with the broad and liberal construction consistently given CERCLA, has done more than merely uncover a "deep pocket." It also should pave the way for faster responses and more cost-efficient cleanup operations. States are necessarily involved in virtually every hazardous waste cleanup effort and form a significant class of owners and operators of hazardous waste sites. Certainly, if the state may find itself financially responsible, it will actively oversee the reasonableness of its expenditures.

Citizen Suit Considerations Under the Clean Water Act

Continued from Page 5
presented "clear and unrefuted" evidence of intermittent violations prior to the suit and that there was a reasonable likelihood of continued violations sufficient to confer jurisdiction. *Chesapeake Bay Foundation Inc. v. Gwaltney of Smithfield, Ltd.*, No. 84-0366-R (E.D. Va. July 18, 1988).

The *Gwaltney* line of authority provides defense counsel with an arsenal of procedural weapons if the complaint does not make an adequate good-faith allegation of on-going violations or the claim has been rendered moot by recent compliance. Since the Supreme Court did not define how much time must pass for violations to lose their intermittent character, it may be that the *Gwaltney* decision provides a great incentive to defendants to prolong trial as much as possible so that they can come into compliance and transform an intermittent violation to a sporadic one.

Furthermore, in order to make good-faith allegations of on-going violations, the plaintiff will not be able to aggregate the violations of effluent limitations for different pollutants or from different outfalls within the same facility. Moreover, since even the most sophisticated treatment system suffers occasional failure, plaintiffs will have the burden of proving that the isolated permit violation is a result of systematic neglect or inadequate pollution control facilities to establish a reasonable likelihood of on-going violations. *Sierra Club v. Shell Oil*, 817 F. 2d at 1169, 1173-74 (5th Cir. 1987). The decision may have little practical benefit for truly chronic polluters since the operational or engineering changes that must be made to remedy such violations will likely create a presumption of a reasonable likelihood of on-going violations.

Reasonable Person

Plaintiffs can minimize the effects of *Gwaltney* by carefully reviewing the most recent DMRs prior to filing the complaint since the defendants will attempt to demonstrate during the 60-day period that a reasonable person could not believe in good faith that a problem is continuing. Finally, the timing of plaintiff's action is crucial since time delays may enable the defendant to install or upgrade pollution control equipment.

If the defendant elects to settle the matter, the plaintiff will often demand as part of the settlement that the defendant in essence subsidize the plaintiff by either contributing funds directly to the plaintiff or to an environmental project favored by that organization. One serious restriction on plaintiffs is the requirement under the Clean Water Act that all civil penalties must be paid to the United States Treasury. Such a settlement may be difficult to accomplish. Plaintiffs have tried to ingeniously circumvent this requirement, but with only moderate success. In a recent federal district court decision, *Sierra Club Inc. v. Electronic Controls Design Inc.*, 703 F. Supp. 875 (D. Or. 1989), the Court refused to approve a consent judgment in which the plaintiff, a private environmental organization, was to be designated the sole recipient of civil penalties.

Given this restriction on payments to private organizations, private plaintiffs may seek to aggressively pursue citizen suits under statute other than the Clean Water Act.

Defendants who are the targets of a citizens suit might also consider initiating negotiations with state environmental authorities that could lead to execution of a consent decree within the 60-day notice period. This would not only bar the citizen action or the collection of any attorney's fees by the plaintiff, but may also result in a less costly settlement, since state agencies often agree to penalties that are substantially lower than those sought by environmental organizations.