A Troubling Trend Needs Reform

Defending Environmental Citizen Suits

By Patrick J. Shea and Richard S. Davis

A primer on CWA citizen suits and the related defenses for good corporate citizens and municipalities endeavoring to comply with the act.

Consider this scenario faced by many American companies every year: an organization begins to expand into a new region and has just acquired a smaller manufacturing, solid waste, or materials handling company. The target company operates under the standard web of regulations and permits under the major federal environmental statutes, including the Clean Water Act (CWA), the Clean Air Act (CAA) and the Resource Conservation and Recovery Act (RCRA). The acquiring organization's due diligence of the company identified this, but it determines that government regulators have brought no recent enforcement actions, and the organization takes comfort from this and the fact that the organization will bring a compliance-oriented management approach.

Unfortunately, the target company's acquisition attracts the attention of local environmental organizations and their increasingly interlinked citizen suit counsel. While the acquiring organization viewed the absence of governmental enforcement as a positive sign, it is about to discover that satisfying government regulators may not insulate the target company from private enforcers who are not bound by agency policy prioritizing noncompliance that causes actual harm over technical, de minimis or debatable violations. Indeed, these privateers often seek out facilities that regulators believe are well-operated or are municipally owned and cannot cease operations without significant effect on public services.

Sure enough, a few weeks after the acquisition's closing, the target company receives a letter styling itself as a notice of intent to bring a citizen suit from a group that neither it nor the acquiring organization has ever heard of. The notice letter alleges a broad spectrum of deficiencies in the company's compliance with its permit. In fact, the letter portrays the target company as an environmental bad actor that bears little resemblance to the business that the organization reviewed during its due diligence.

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After a little digging the acquiring organization's internal counsel makes a grim discovery: the federal statutes regulating its new subsidiary impose strict liability, favor plaintiffs, and generously award attorneys' fees. In addition, settlement typically involves a consent decree with continuing obligations and payments to environmental groups that encourage more citizen suits. The organization has now entered the vortex of the modern environmental citizen suit. What should the acquiring organization and its internal counsel do?

A similar scenario occurred at a solid waste transfer facility owned by a subsidiary of the author's company and led to a settlement with sizeable attorneys' fees, payments to a third-party environmental foundation and capital expenditures for site work mandated by the consent decree. There were no actual environmental harms from the alleged CWA violations at the site. In fact, the spawning salmon in the downstream water body were exceeding state agency goals for health and reproduction. Moreover, structural fixes, though delayed by local zoning requirements, were already in the works when the citizen group appeared. The CWA, however, allowed a small law firm with a practice devoted to citizen suit prosecutions to leverage alleged technical violations to rack up attorneys' fees in a settlement that yielded negligible environmental improvement. In fact the firm's environmental client, a group founded by the firm's senior partner, had a minimal Internet or other public presence and shared a mailing address with the law firm.

This article provides a primer on CWA citizen suits and the related defenses for good corporate citizens and municipalities endeavoring to comply with the act. It also calls for reforms to a mechanism that has lost its laudable moorings as an aid to government enforcement.

Introduction

With the exception of the pesticide act, all federal environmental statutes include a "citizen suit" provision that allows "any citizen" to bring a "civil action on his own behalf" against "any person" who is alleged "to be in violation" of a standard or order issued under the statute. *See, e.g.*, 33 U.S.C. §1365(a)(1) (Clean Water Act). The prevalence of these "citizen suits" has vastly expanded since their creation in 1970, and they have become the primary tool that advocacy organizations use to enforce environmental laws and regulations with one 2006 article estimating that one person receives a notice of intent to sue every day. R. Brogdon & M. McGuffrey, *Recent Trends in CAA Citizen Suits: Managing Risk in the Serengeti*, 20 NR&E 3, 17 (Winter 2006). Experience in the field suggests that that rate has skyrocketed in the last half-dozen years as state enforcement has dwindled along with state budgets. And now, the U.S. Environmental Protection Agency (EPA) Draft Strategic Plan for fiscal years 2014–2018 contemplates a reduction in federal enforcement by as much as 70 percent, setting the stage for citizen suits to proliferate even further. Draft FY 2014–2018 EPA Strategic Plan; Availability, 78 Fed. Reg. 69,412–69,413 (Nov. 19, 2013), https://www.federalregister.gov/articles/2013/11/19/2013-27676/draft-fy-2014-2018-epa-strategic-plan-availability (last visited Feb. 18, 2014).

In addition to mandatory civil penalties of up to $37,500 per violation per day, the possibility of injunctive relief and a near-mandatory award of attorneys' fees, these suits may prompt detailed information requests from government regulators. This article focuses on the CWA because it is by far the vehicle under which the most citizen suits are filed, in part due to the generous interpretation that courts have given to its broad presumption that all discharges of pollutants without a permit are illegal and in part due to the increasingly subjective nature of the requirements imposed in CWA permits. Because the language and interpretation of the citizen suit provisions in the CWA so closely parallel those under RCRA and the CAA, many of the observations made here apply to those statutes as well.

Responding to a Notice of Intent: Can a Facility Come into Compliance and Avoid the Lawsuit?

The notice of intent letter from attorneys representing an environmental advocacy group is the opening bell of a citizen suit. 33 U.S.C. §1365(b). Because Congress intended citizen suits to supplement and not supplant enforcement by government regulators, *Hamker v. Diamond Shamrock Chem. Co.*, 756 F.2d 392, 395 (5th Cir. 1985), citizens can only sue for "ongoing violations," and a prospective plaintiff must give at least 60 days' notice to the targeted entity to allow the defendant to come into compliance and render the suit unnecessary. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 174 (2000). Because coming into compliance before a plaintiff files a complaint will preclude a claim outright, successful efforts to resolve as many claims of "ongoing violations" as possible rather than attacking the sufficiency of a notice letter or negotiating a settlement can yield the greatest benefits during the notice period. As with the other suggestions in this article, this approach will work only for nearly compliant, good corporate citizens and not for flagrant violators.

In trying to come into compliance, be aware that the U.S. Supreme Court has broadly interpreted "ongoing violations" to include both continuous violations and intermittent violations with a continuing likelihood of recurrence. As a result, a claim cannot be precluded simply by ceasing the offending operation. *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 484 U.S. 49, 60 (1987). Other courts also have tended to take an expansive view of the "likely to recur" standard, setting it just short of the "moot" standard and narrowing the availability of this defense. Moreover, when coming into compliance requires major structural modifications at a site, such as those requiring local building permits, the 60-day window may not provide enough time to make use of this defense. Compliance achieved before the expiration of the 60-day notice period is the gold standard of citizen suit defenses but is narrowly constrained by both law and real-world feasibility.

The second purpose behind the notice period is to provide time for a regulator to initiate enforcement proceedings against the targeted entity, eliminating the need for the citizen to act as a private attorney general. Thus, the CWA precludes citizen suits when the EPA or the state "has commenced and is diligently prosecuting a civil or criminal action" in federal or state court "to require compliance with the standard, limitation, or order" identified in a notice of intent. 33 U.S.C. §1365(b)(1)(B). To invoke this "diligent prosecution" protection, most courts require a judicial pro-

ceeding and will not give administrative orders a similar preclusive effect. *See, e.g.*, *Jones v. City of Lakeland, Tenn.*, 224 F.3d 518 (6th Cir. 2000).

When there is little question that a violation has occurred, it may be prudent to invite the EPA (or state agency with delegated authority) to initiate a compliance action that resolves the issue quickly rather than remaining exposed to a more motivated advocacy group and its attorneys. But the diligent prosecution provision acts as a "bar" only if a regulator uses it within the rather short notice period and eliciting formal agency action within 60 days is often just as infeasible as achieving compliance within 60 days. Still, even if a citizen suit cannot be completely barred in time, agency intervention, similar to compliance efforts, can be used later to support a mootness argument.

Several defenses are particularly appropriate in a motion to dismiss a citizen suit. These include lack of notice, standing, and mootness.

The Complaint Is Filed: Settle or Try to Shave Claims?

Assuming that you cannot stop a citizen suit by bringing a company into full compliance or prompting a government enforcement action within 60 days, consider the plaintiff organization's motives for bringing an action in deciding whether to pursue settlement negotiations or prioritize the paring down of claims through a motion to dismiss.

Some complaints are brought by large, national organizations or small entities formed to respond to a discrete event and exist solely to resolve that perceived violation. While sometimes national organizations bring citizen suits to force national policy changes, these cases tend to be motivated by the merits of the claim and a swift settlement that involves an environmentally beneficial compromise will often be agreeable to all parties. In contrast, other entities exist solely for the purpose of bringing citizen suit actions with a focus on securing a settlement that provides a bump in publicity for the organization and an attorneys' fee award that enriches its counsel. These entities, and their associated counsel, have a unique incentive to drive up the cost of litigation to maximize fees. When faced with a plaintiff primarily motivated by attorneys' fees, a motion that seeks dismissal of a substantial set of the plaintiff's claims may be the only way to derail the fee train and bring the plaintiff and its attorneys to the negotiating table.

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Notice of Specific CWA Violations Is Required

The U.S. Supreme Court has held that the notice requirements found in citizen suit provisions are "mandatory conditions precedent to commencing suit" and a failure to comply strictly with them requires dismissal. *Hallstrom v. Tillamook County*, 495 U.S. 20, 31 (1989) (construing RCRA); *Washington Trout v. McCain Foods*, 45 F.3d 1351 (9th Cir. 1994) (applying *Hallstrom* to the CWA); *Monongahela Power Co. v. Reilly*, 980 F.2d 272 (4th Cir. 1992) (same for the CAA). The notice provisions have both substantive and procedural requirements and require that notice "must be sufficiently specific to inform the alleged violator about what it is doing wrong, so that it will know what corrective actions will avert a lawsuit." *Atl. States Legal Found., Inc. v. Stroh Die Casting Co.*, 116 F.3d 814, 819 (7th Cir. 1997).

The requirement that a notice of intent letter alert a defendant to specific CWA violations is more demanding than notice pleading requirements under the Federal Rules of Civil Procedure, and this mismatch in standards often provides a solid argument for dismissal—for example, when a subsequent complaint is more detailed than a notice letter. Moreover, even when minimal notice pleading is practiced in a complaint, failure to allege violations carefully or specifically in a notice letter can stand as a jurisdictional bar to a broad reading of a subsequent complaint.

CWA notice of intent letters must include "sufficient information to permit the recipient to identify" seven things: the specific standard allegedly violated, the activity alleged to constitute a violation, and the date, location and person(s) responsible for the alleged violation, along with the contact information for the plaintiffs giving notice and their legal counsel if they have counsel. 40 C.F.R. §135.3(a) & (c).

When a defendant holds no CWA permit, a plaintiff can easily satisfy the notice requirement by citing the general prohibition against discharges without a permit. 33 U.S.C. §1311(a). In the more common situation in which a defendant *does* hold a permit, however, there is greater need for a plaintiff to specify the permit components at issue. Notice of intent letters that are too general or list some but not all of the pollutant parameters have been held insufficient. *See, e.g.*, *Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 487 (2d Cir. 2001) (dismissing claims related to thermal discharges because the parameter was not specifically identified in the notice letter). Similarly, notice must identify the date and the location of the alleged violations with reasonably specificity. These can be particularly challenging requirements when a plaintiff attempts to capture all *possible* violations within the statute of limitations—five years and 60 days before filing the complaint. In one recent case, the court found inadequate a notice letter alleging violations from multiple mining operations scattered across 1.8 million acres during a two-year period. *Klamath Siskiyou Wildlands Ctr. v. MacWorter*, 2013 U.S. Dist. Lexis 57721, at *6 (D. Or. Apr. 23, 2013) (allowing the plaintiff to "notify in generalities and plead in specifics [would] eliminat[e] the purpose underlying the notice requirement."). Similarly, in another case a court dismissed a suit based on a notice letter stating that "[f]or the previous five years on hundreds of occasions you have violated your [CWA] permit." *Cal. Sportfishing Prot. Alliance v. City of Sacramento*, 905 F. Supp. 792, 797 (E.D. Cal. 1995).

While specificity in a notice of intent letter is required, the primary vulnerability of defendants in CWA citizen suits is

that their discharge data, which is posted online and certified as accurate in Discharge Monitoring Reports (DMRs), can be conclusive proof of violations. *See U.S. v. Allegheny Ludlum Corp.*, 366 F.3d 164, 172 (3d Cir. 2004) (challenging accuracy of data in DMRs is rarely successful). Accordingly, violations captured in DMRs and other self-reporting mechanisms will require less specificity in a notice because a permittee can reasonably be expected to know the contents of its own reports. *S.F. BayKeeper, Inc. v. Tosco Corp.*, 309 F.3d 1153, 1155 (9th Cir. 2002) (the notice "does not need to describe every detail of every violation," it need only "provide enough information that the defendant can identify and correct the problem."). When a state's website contains erroneous information for a discharger—an alarmingly common occurrence—the exercise becomes one of disputing the veracity of the Internet by presenting the actual DMRs to a citizen plaintiff. If done before filing, this can undercut a plaintiff's ability to file those claims in good faith.

Vagueness or overbreadth in a notice of intent letter can make it difficult or impossible to determine the particular violations for which a targeted entity will be sued. In these cases, demonstrating the practical ways in which a notice letter fails to inform will refocus a court on the overall fairness aspect of the notice requirement. *Ctr. for Biological Diversity v. Marina Point Dev. Co.*, 566 F.3d 794, 801 (9th Cir. 2009) ("we have never abandoned the requirement that there be a true notice that tells a target precisely what it allegedly did wrong, and when. The target is not required to play a guessing game in that respect.").

Citizen Suit Plaintiffs Must Show Standing

The requirements for constitutional standing in federal court (injury-in-fact, causation, and redressibility) are well developed under the major environmental statutes. Experienced plaintiffs will often include key allegations at least in a complaint if not in a notice of intent letter itself. In addition, the U.S. Supreme Court has made the injury-in-fact prong fairly easy to satisfy by allowing plaintiffs to assert an injury to their own aesthetic value derived from a particular area as opposed to some injury to the environment. *Laidlaw*, 528 U.S. at 181. When recreational use of an area is clearly asserted, courts generally find standing even if an injury is simply curtailment of use based on a belief that water is contaminated. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 154–57 (4th Cir. 2000).

There are some limitations to this broad principle, however. The Second Circuit, for example, affirmed a decision that denied standing to plaintiffs who had only travelled to the location at issue to obtain evidence for their lawsuit. *Mancuso v. Consolidated Edison Co. of New York, Inc.*, 2002 U.S. App. Lexis 211 (2d Cir. Jan. 2, 2001).

A more fruitful challenge to citizen standing can be on the causation element, which requires injured plaintiffs to connect their harm to a defendant's CWA violation. While neighboring property owners who bring a citizen suit to fix an observed environmental problem will often have a close connection to the facts in the case, regional entities that repeatedly bring similar actions against a variety of defendants may find their go-to standing allegations insufficiently specific. As the U.S. Supreme Court has stated, a plaintiff cannot simply aver that "one of [its] members uses unspecified portions of an immense tract of territory, on some portions of which [the challenged] activity has occurred or probably will occur[.]" *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990). For example, if an organization simply alleges that its members canoe in a particular river, that river "may be so large that plaintiffs should rightfully demonstrate a more specific geographic or other causative nexus in order to satisfy the 'fairly traceable' element of standing." *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 558 n.24 (5th Cir. 1996) (citations omitted). The fact that a defendant's facility is located upstream to that of someone who belongs to the plaintiff organization who observes pollutants in a river may similarly be insufficient to show standing because a court cannot "assume that an injury is fairly traceable to a defendant's conduct solely on the basis of the observation that water runs downstream." *Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp.*, 95 F.3d 358, 361 (5th Cir. 1996). *See also Puerto Rico Campers' Ass'n v. Puerto Rico Aqueduct and Sewer Auth.*, 219 F. Supp. 2d 201 (D.P.R. 2002) (standing too attenuated where organization alleged that its members recreated "near" but not directly on the water body in which the defendant discharged).

Rendering Injunctive Relief Moot Through Compliance

The distinction between statutory standing and mootness is primarily one of timing and burden of proof. As discussed above, eliminating all violations before the expiration of the 60-day notice period will *preclude* a suit by denying plaintiffs the statutory standing required by the CWA. Mootness, in contrast, depends not on whether there are "ongoing violations" at the time that the complaint is filed, but on a continuing case or controversy. While it is certainly better to preclude a suit before it starts by eliminating all ongoing violations, it may still be beneficial to pursue operational modifications after suit is commenced to moot the element of redressability.

The difficulty of demonstrating mootness changes depending on the type of relief sought. When a facility successfully eliminates all likelihood of recurring violations at the facility, a court may find that claims for *injunctive* relief are rendered moot because effective relief can no longer be granted. *Headwaters, Inc. v. Bureau of Land Mgmt., Medford Dist.*, 893 F.2d 1012, 1015 (9th Cir. 1990). Whether the likelihood of recurrence has, in fact, been eliminated is the key issue and depends largely on the facts on the ground and the thoroughness of the curative action. *Compare Alt. States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128 (11th Cir. 1990) (because water treatment system installed after the commencement of suit "can be expected to operate in the future, we find that 'the allegedly wrongful behavior could not reasonably be expected to recur.'"), *with Save our Bays & Beaches v. City & County of Honolulu*, 904 F. Supp. 1098, 1121 (D. Haw. 1994) (treatment plant not yet fully functional, had not been proven to solve all past problems, and therefore could not assure the court of future compliance).

Mooting claims for civil penalties was made harder after *Laidlaw* because the Supreme Court generally observed that the imposition of civil penalties, even when unconnected to injunctive relief, redress

a plaintiff's injury by deterring future violations. *Laidlaw*, 528 U.S. at 185. But the Court left open the possibility that the deterrent effect could become "so remote that it cannot support citizen standing." *Id.* at 186. *Accord Miss. River Revival, Inc. v. City of Minneapolis*, 145 F. Supp. 2d 1062, 1065 (D. Minn. 2001), *aff'd* 319 F.3d 1013 (8th Cir. 2003) (civil penalties redress plaintiff's injuries "only to the extent that [they] encourage defendants to discontinue current violations and deter them from committing future ones."). This admittedly is a high bar to meet. In *Laidlaw*, complete deconstruction of the facility was insufficient to moot the claim for civil penalties in part because the defendant retained its CWA permit and thus retained an "order" that could be violated in the future. Query whether a facility that alters its operations and terminates a permit entirely would have anything left to violate.

Even if a citizen suit cannot be completely barred in time, agency intervention, similar to compliance efforts, can be used later to support a mootness argument.

Regardless of the type of relief sought, immediate and sustained action to correct problems will have the added benefit of limiting later, repeat violations that otherwise can be tacked on to a complaint without further notice. *Pub. Interest Research Group v. Hercules, Inc.*, 50 F.3d 1239, 1248 (3d Cir. 1995). And, to the extent that you successfully eliminate claims at an early stage of a case, you may be able to persuade a plaintiff to reconsider whether to file suit and to seek easier prey elsewhere.

Prevailing Plaintiffs in Citizen Suits Recover Attorneys' Fees

Most environmental statutes include a fee-shifting provision authorizing a court to award costs of litigation, including attorneys' fees, to the prevailing party. *See, e.g.*, 42 U.S.C. §6972(e) (RCRA). Because of the "presumption in favor of awarding prevailing plaintiffs attorney's fees," *Browder v. City of Moab*, 427 F.3d 717, 721 (10th Cir. 2005), every citizen suit defendant must consider not only its own fees and costs, but also the fees and costs that a plaintiff will incur and seek to recover from the defendant. This presents a dynamic that is very different from the normal civil action, in which a forceful defense may serve as the most effective means of bringing a frivolous plaintiff to heel.

Plaintiffs Can Easily Open the Door to Fees

Under the CWA, to award attorneys' fees, a court must find that the fee applicant is a "prevailing or substantially prevailing party" and that the award is "appropriate." 33 U.S.C. §1365(d). The threshold for prevailing party status is low and courts apply the same precedent from civil rights actions arising under 42 U.S.C. §1983 to citizen suit cases. As the U.S. Supreme Court has held, "[i]f the plaintiff has succeeded on any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit, the plaintiff has crossed the threshold to a fee award of some kind." *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791 (1989). This would include an award even for nominal damages because a judgment "in any amount… modifies the defendant's behavior for the plaintiff's benefit…." *St. John's Organic Farm v. Gem County Mosquito Abatement Dist.*, 574 F.3d 1054, 1059 (9th Cir. 2009).

As described in *St. John's Organic Farm*, the standard for "appropriate" varies by circuit. The First Circuit has no standard and simply gives district courts wide discretion; the Third Circuit has eliminated the word "appropriate" from consideration, looking only to the prevailing party status; the Fourth and Fifth Circuits consider whether a suit has advanced the goals of the statute; the Ninth awards fees to the prevailing parties unless "special circumstances" would render the award unjust; and the Eleventh requires "good cause" to deny the award. *Id.* at 1061–62 (collecting cases). In practice none of these standards offers much protection because proof of a single violation secures prevailing party status for a plaintiff. If, because of public records, a plaintiff knows this upon filing a complaint, then it has little incentive to settle and instead can rack up attorneys' fees with minimal downside risk. Moreover, as with civil rights cases, prevailing party status is rarely granted to defendants because courts deem a fee award to defendants as contrary to the intent of the statutes. *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978).

Exposure to a plaintiff's attorneys' fees makes discovery and expert work particularly risky in two distinct ways. First, a plaintiff will have an incentive to propound extensive discovery to drive up fees. Second, any additional violations revealed through discovery will expand the foundation of civil penalties against which a court will later gauge the reasonableness of the fees demanded. In environmental enforcement cases, discovery can be broad because permits and agency guidance often contain vague requirements. For instance, CWA permits impose ambiguous, narrative, water quality standards such as "no adverse impact" and, more recently, permits have required permit holders to select and to defend the adequacy of their control technologies to meet the amorphous standards of "best available technology" and "best conventional technology." These requirements make it difficult to argue that a discovery request has become an inappropriate fishing expedition. This risk highlights the importance of eliminating claims, especially before filing an answer. Not only does this reduce the allegations on which a plaintiff might prevail, it also helps limit discovery and its attendant expenses.

Federal Rule 68 Offers May Have a Role in Citizen Suits

The ability to push back against excessive attorneys' fees in environmental citizen suits is limited, but the Third Circuit recently vindicated an important tool: an offer of judgment under Federal Rule of Civil Procedure 68. A Rule 68 offer is an offer to allow judgment to be entered against a defendant on specified terms,

along with the costs accrued by a plaintiff to date, thereby ending a case. While Rule 68 "costs" generally include attorneys' fees only when specified in the underlying statute, Section 505(d) of the CWA defines "costs of litigation" to include reasonable attorney and expert witness fees. 33 U.S.C. §1365(d). The potential benefit to a defendant, aside from immediately resolving a matter, lies in the effect of the plaintiff's rejection of the offer. If a plaintiff rejects an offer and prevails in a trial *but* obtains a judgment that is "not more favorable than the unaccepted offer," the plaintiff must "pay the costs incurred after the offer was made." Fed. R. Civ. P. 68(d).

Some district courts previously had held that Rule 68 offers were "incompatible with the purposes" of CWA citizen suits. *See, e.g., N.C. Shellfish Growers Ass'n v. Holly Ridge Assocs., LLC*, 278 F. Supp. 2d 654, 668 (E.D.N.C. 2003). But the Third Circuit recently reversed a similar decision and ruled that there "is nothing incompatible" with Rule 68, which encourages settlement, and the fee-shifting provisions of RCRA, which "encourage plaintiffs to bring meritorious suits to enforce environmental laws." *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 719 F.3d 281, 289 (3d Cir. 2013). Rule 68 offers are clearly back on the table for RCRA citizen suit defendants, and the Third Circuit's rationale *should* apply to other federal environmental citizen suit provisions, but the issue remains unresolved.

To have any practical effect, a Rule 68 offer must be sufficiently high to entice a plaintiff's acceptance *and* exceed what you reasonably estimate a plaintiff could receive at trial. This requires disclosing a settlement figure to a plaintiff that approaches an objectively fair assessment of a case's value. Still, as there are no penalties if a Rule 68 offer fails, there is little risk in trying. By serving a Rule 68 offer on the heels of a motion for summary judgment, you may be able to increase the attractiveness of the offer by raising the specter of significant time and effort—and the risk of losing the ability to recover attorneys' fees and costs—if your opponent rejects the offer.

Thinking About the Next One: Bringing a Citizen Suit Will Only Get Easier

Whether an organization wishes to avoid a future lawsuit or to recover from the recent resolution of one, it should give serious thought to how evolving recordkeeping and reporting requirements may affect the ability to defend against citizen suits. Information self-reported by regulated entities has long been the main source of proof in citizen suits, and accessing that information continues to become increasingly easier. For example, the EPA expects to finalize an electronic reporting rule under the CWA permitting system by June 2014; soon the agency will require electronic submission of compliance reports under several CAA rules; it has already proposed a new storm water permit requiring electronic submission of annual reports, pollution prevention plans, and other notices; the agency has started exploring e-permitting options under RCRA; and as of 2012 the EPA required all Toxic Substances Control Act §5 submissions to be filed electronically. This is a major component of EPA's Next Generation Compliance recently described by the agency's enforcement chief, Cynthia Giles. *See* http://www2.epa.gov/sites/production/files/2013-08/documents/giles-next-gen-article-forum-eli-sept-oct-2013.pdf (last visited March 25, 2014).

In lieu of scanned e-mail attachments of handwritten documents, these new regulatory requirements incorporate a database known as the Central Data Exchange (CDX), which processes information and makes it publicly available in an easy-to-search format. No longer will access to information or the need to read it thoroughly pose an obstacle to environmental advocacy groups. By design, the public face of the CDX will make data, which becomes proof of a citizen plaintiff's prima facie case, easy to find and to share.

More globally, there are many public benefits to making environmental monitoring data widely available, and using self-reported data judiciously to hold serious offenders accountable and to reduce actual harm to the environment is consistent with Congress' original objectives in creating the citizen suit provisions. Congress designed the citizen suit provisions to *assist* the EPA in its enforcement duties if the agency has failed to take action and specifically removed all financial incentive by directing all civil penalties to the U.S. Treasury and not to plaintiffs. *Envtl. Conservation Org. v. City of Dallas*, 539 F.3d 519, 530–31 (5th Cir. 2008); 118 Cong. Rec. 33693, 33717, 1 Leg. Hist. 221 (1972).

There is a troubling trend in this area, however. It strains the principle of the disinterested private attorney general when for-profit law firms rely on the direct benefit of attorneys' fees from citizen suits to sustain their business models. When a regulatory agency has elected not to sue a regulated entity, allowing financially motivated attorneys to bring a citizen suit on behalf of a closely linked "client" group does not serve the purposes of supplementing government oversight. S. Rep. No. 92-414, p. 64 (1971) (citizen suits are proper only "if the Federal, State, and local agencies fail to exercise their enforcement responsibility."). Rather, it hijacks the process and enables citizen suits even when the responsible regulatory agencies have consciously determined that an enforcement action is unnecessary.

A more fruitful challenge to citizen standing can be on the causation element, which requires injured plaintiffs to connect their harm to a defendant's CWA violation.

There are several commonsense reforms that would minimize these and other abuses of citizen suit authorizations.

Suggested Reforms to Environmental Citizen Suits

With respect to eliminating the perverse incentive to drive up attorneys' fees, several fixes are available. As an easy first step, the EPA should provide clarification by regulation that Rule 68 offers apply not just in RCRA actions, but in any citizen suit brought under an environmental statute administered by the agency. While the courts might ultimately require a change in the Federal Rules themselves, such an

interpretation by the primary enforcement agency might foster that objective.

Harder to achieve but having more effect, fees should be linked to the amount of civil penalties obtained by a plaintiff. Currently, a nominal penalty of $1 can be the basis for a six-figure fee award, and a district court has no discretion to align a fee award with the underlying civil penalty. *Resurrection Bay Conservation Alliance v. City of Seward*, 640 F.3d 1087, 1094–95 (9th Cir. 2011). Such an award is hardly justified when a court determines that no civil penalty is warranted.

Whether an organization wishes to avoid a future lawsuit or to recover from the recent resolution of one, it should give serious thought to how evolving recordkeeping and reporting requirements may affect the ability to defend against citizen suits.

Effective reforms related to financial incentives may also include (1) differentiating between technical violations and violations that cause harm to the environment by setting a different penalty cap for the technical violation category, and (2) limiting citizen suit penalties to violations of objective, numeric limitations rather than subjective, narrative standards.

With respect to preclusion, the most basic and uncontroversial improvement would be to extend the notice period beyond the current 60 days. Regulatory agencies, particularly in their current resource-constrained environment, cannot review every notice of intent letter and initiate formal actions even if they wanted to do so within two months. Moreover, even the most motivated prospective defendant will find it difficult to satisfy the interlocking local, state, and other federal requirements that often precede operational modifications that would allow it to come into full compliance within 60 days.

In a related area, the second-class treatment of administrative compliance orders as insufficient to preclude a citizen suit no longer withstands the test of reason. Agencies increasingly rely on faster, less expensive administrative compliance orders, and the "diligent prosecution" bar should be modified to recognize these orders as the proper exercise of regulatory oversight, not ignored simply because an agency initiates one after a notice letter is served. Such a change is entirely consistent with the principle of agency primacy in the enforcement arena.

Finally, the current system lacks a mechanism by which a regulator can inform a court of its position on the allegations before a court adjudicates a dispositive motion or trial. This concept, which borrows aspects of the U.S. Supreme Court's call for the view of the Solicitor General in certain cases and the requirement under CAA §113(d) that the EPA obtain from the U.S. Department of Justice a waiver to proceed with administrative enforcement actions, would be an instructive yet nonbinding way to present the opinion of the agency about a citizen suit, which would adhere to the original congressional intent that a citizen suit *supplement* the agency actions.

Short of working collaboratively to enact these reforms into law, the best approach for a regulated entity is to understand its reporting requirements, keep track of its performance carefully, take corrective action before a pattern of problems emerges, and maintain a working relationship with the regulatory authority. Because of the ease with which citizen suit plaintiffs can prevail, notices of intent to sue letters should be taken seriously and acted upon promptly. Understanding the nature of the abuses taking place and the few strategies available to defendants will helpfully inform and prioritize the actions that law-abiding companies and municipalities take upon receiving a notice of intent to sue letter.