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# Clean Up Your Act

After 10 years of rulings restricting citizen-suit enforcement of environmental laws, the U.S. Supreme Court may be set to force plaintiff groups to pick their cases wisely.

BY ALAN M. RAMO

The original idea behind the citizen-suit concept, found in the federal Clean Air Act, Clean Water Act, Community Right to Know Act and others, was to supplement environmental law enforcement and to save taxpayer money while holding polluters and government regulators accountable.

Defendants frequently claim that citizen suits are disruptive to orderly enforcement because they upset carefully worked out arrangements with environmental agencies. See, e.g., *Citizens for a Better Environment-California v. Union Oil Co. of California*, 83 F.3d 1111 (9th Cir. 1996). Polluters say that enforcement efforts are nothing more than extortion or payoffs to plaintiffs seeking fees and contributions for their allied environmental groups.

The 9th U.S. Circuit Court of Appeals has ruled, however, that such settlements are proper if they achieve the governing act's purposes by protecting the ecosystem the defendant allegedly harmed. *Sierra Club Inc. v. Electronic Controls Design Inc.*, 909 F.2d 1350 (9th Cir. 1990).

In spite of congressional approval of citizen suits and a lengthy record of achievements measured by penalties and pollution abatement, the U.S. Supreme Court has led the charge to curtail citizen-suit filings. Initially, the Supreme Court turned what had been a pre-litigation notice — the so-called 60-day notice of intent to sue — into a formal "mandatory condition precedent for suit."

In *Hallstrom v. Tillamook Cty.*, 493 U.S. 20 (1989), the court dismissed a case years after a judgment find-

ing the defendant had violated the Resource Conservation and Recovery Act because of the failure to send the notice to state and federal environmental authorities in addition to the defendant, as mandated by the act's 60-day notice provisions.

The *Hallstrom* ruling reverberated in lower courts. In *Washington Trout v. McCain Foods Inc.*, 45 F.3d

tailed enough to alert the parties to the substance of the lawsuit. *Southwest Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515 (9th Cir. 1998).

The U.S. District Court for the Eastern District of California found flawed a notice that did not precisely state the date of the violations. *California Sportfishing Protection Alliance v. City of Sacramento*, 905 F.Supp. 792 (E.D. Cal. 1995).

In each case, the plaintiffs would presumably have to file a new 60-day notice, followed by a new complaint. Formalism had its limits, however. A court rejected as frivolous the argument that failing to include "Inc." after a nonprofit corporation's name was inadequate notice to the party. *Natural Resources Defense Council v. Southwest Marine Inc.*, 945 F.Supp. 1330, 1334 (S.D. Cal. 1996).

About the same time as *Hallstrom*, the U.S. Supreme Court began to develop a more far-reaching constitutional limitation on citizen suits — standing. In *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), the plaintiffs argued that the Bureau of Land Management violated various environmental laws when making a broad programmatic decision to reclassify various lands so that they could be subject to mining.

In a 5-4 decision, the court held that the plaintiffs' failure to visit one piece of land among those reclassified meant they did not have standing to sue over the entire re-

classification, as their standing was limited only to decisions about individual parcels where they had some ongoing physical contact.

Two years later, in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the court further chipped away at the notion of injury. While a plaintiff's member had visited a site to see an endangered species — the Nile croco-



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1351 (9th Cir. 1994), the 9th Circuit held that even though a notice was timely filed, its failure to include two additional plaintiffs rendered it fatally defective and deprived plaintiffs of jurisdiction. The 9th Circuit later ruled in another case that a 60-day notice sent to the proper persons in a timely manner with the proper plaintiffs was still insufficient, because it was not de-

dile at the Aswan Dam site in Egypt — the plaintiff could not prove the member would continue to visit the site. Thus, it would not be injured by the building of the dam destroying the crocodile's habitat. A concurring opinion stated that the decision might have been different if plaintiffs' members had plane tickets to visit the site again.

These cases presented barriers, but ones that a careful plaintiff anticipating the rules of standing and notice might still overcome. But they were only a prelude to the U.S. Supreme Court's most direct attack on citizen suits.

In *Steel Co. v. Citizens for a Better Environment*, 118 S.Ct. 1003 (1998), Justice Antonin Scalia led the court in asserting a narrow interpretation of injury as a basis for standing. In *Steel Co.*, the plaintiffs had served a 60-day notice on a company that had failed to file its Community Right to Know Act reports of toxic chemicals used or discharged for a number of years. The company filed the reports after receiving the 60-day notice but before the lawsuit.

The court opined that there was no standing, reasoning that neither penalties, attorney fees nor even a claim for injunctive relief is sufficient. If a company comes into compliance, and there are no allegations indicating a continuing or imminent violation, then the company can presumably escape penalties, avoid an injunction and not pay the plaintiffs for their trouble in getting the violation remedied.

Many environmentalists believe *Steel Co.* has eliminated effective citizen enforcement of the Community Right to Know Act. Why would an environmental group go to the expense of investigating violations and issue a 60-day notice if a violator can escape paying a penalty or fees by complying prior to the lawsuit?

At least one commentator argued that *Steel Co.* may

be a blessing in disguise, forcing environmentalists to pick better cases, ones which are serious and directly affect their members. Ann E. Carlson, "Standing for the Environment," 45 UCLA L. Rev. 931 (April 1998).

Two of the five justices in the *Steel Co.* majority emphasized in a concurring opinion that standing would be appropriate if there were allegations of a continuing violation or an imminent threat at the time of filing suit. That emphasis, resulting in injunctive relief, has allowed at least two citizen suit cases in California to survive motions to dismiss requests for penalties and fees. *San Francisco Baykeeper v. Vallejo Sanitation & Flood Control Dist.*, 36 F.Supp.2d 1214 (E.D. Cal. 1999); *Natural Resources Defense Council v. Southwest Marine Inc.*, 28 F.Supp.2d 584 (S. D. Cal. 1998).

However, many environmentalists fear *Steel Co.* is not the end of citizen-suit restrictions and they may be right. In *Friends of the Earth v. Laidlaw*, 149 F.3d 303 (4th Cir. 1998), cert. granted, 143 L.Ed.2d 107 (1999), an environmental group sued a company for violating the Clean Water Act.

The court ruled the polluter did emit pollutants exceeding its permit and would be fined. However, the court also ruled that since the company's permit violations had not harmed the environment, and there were no permit violations for a number of years by the time the case went to trial, injunctive relief was not appropriate.

On appeal, the 4th Circuit reversed the judgment for penalties and fees. The court noted since the plaintiffs had not appealed the injunction denial, the only remedies at issue were penalties and fees.

Relying on *Steel Co.*, the court found neither of these a redressable injury, mooted the case. It further ruled that if a case is moot, then the plaintiffs had not prevailed and were not entitled to fees. Since then, the defendant has shut down the facility, apparently perma-

nently, removing equipment and ceasing all industrial activity.

The 4th Circuit later answered the unanswered question in *Laidlaw*: If there is no proven harm from the increased pollution to begin with, there is not even standing, even if a permit is violated. *Friends of the Earth v. Gaston Copper Recycling Corp.*, 179 F.3d 107 (4th Cir. 1999); see also *Contra Ecological Rights Found. v. Pacific Lumber Co.*, 1999 U.S. Dist. Lexis 13518 (N.D. Cal. 1999) at 41.

A case better designed for making bad case law for citizen-suit plaintiffs can hardly be imagined. Yet the U.S. Supreme Court accepted the *Laidlaw* plaintiffs' appeal. Oral arguments are scheduled this month. Some environmentalists believe that the court's review of *Laidlaw* bodes well for the environmentalists. Others argue that a majority looking to further restrain citizen suits could not resist taking the case to further expand upon its decades-long attack.

A sweeping U.S. Supreme Court decision upholding *Laidlaw* would be a blow to citizen suits, but not necessarily an end to citizen enforcement. The fact that a number of these cases are successful demonstrates that administrative agencies cannot do the job. The environmental movement is too far along to simply stand by when permits are violated. Environmentalists are increasingly looking at state remedies, such as California Business and Professions Code Section 17200 (unfair trade practices). See *Citizens for a Better Environment v. Union Oil*, 996 F.Supp. 934, 936 (N.D. Cal. 1997).

Efforts may be made to bring federal causes of action in state court, where standing requirements are less stringent. Increasingly, tort law is seen as an aid to remedy environmental hazards. Permit holders may fondly look back on the time when environmentalists sued for statutory penalties and injunctive relief instead of large tort penalties for pollution left unabated.