

Reproduced with permission from Daily Environment Report, 49 DEN B-1, 3/15/17, 03/15/2017. Copyright © 2017 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

**Enforcement****Environment**

An increase in citizen suit enforcement is possible as the Trump administration works to reduce environmental regulations. In this article, Kirsten L. Nathanson, David Chung and Daniel Leff of Crowell & Moring's Environment & Natural Resources Group explain why more of these suits by private citizens, activist groups and others are likely and what steps businesses should take.

**Practitioner Insights: Citizen Suit Enforcement—What to Expect and How to Prepare**

By KIRSTEN L. NATHANSON, DAVID CHUNG AND DANIEL LEFF

*Kirsten L. Nathanson is a partner in Crowell & Moring's Environment & Natural Resources Group, focusing on environmental litigation, enforcement defense, risk assessment and regulatory counseling under the major federal environmental and public lands statutes. David Chung is also a partner in the group, where he focuses on litigation and regulatory counseling involving natural resources development and environmental issues. Daniel Leff, an associate in the group, focuses on environment and natural resources and energy, and litigation, permitting, and counseling under the full range of environmental statutes.*

**A**fter an era of steadily increasing environmental regulation, some business leaders may greet the advent of the Trump administration expectantly. The new president campaigned in large part on a promise to liberate American industry from regulation. Congress already has disapproved one major recent Obama-era environmental regulation (the Department of Interior's Stream Protection Rule) using the Congressional Review Act, and news reports promise more to come. The appointment of Scott Pruitt—who was an active foe of federal environmental regulation when he was attorney general of Oklahoma—as Environmental Protection Agency administrator gives weight to the administration's promise. Moreover, speculation abounds concerning the potential for significant restructuring or downsizing at EPA headquarters and its regional offices.

The promised rollback of regulation, however, will face obstacles even in a single-party government. And any decrease in federal enforcement of existing statutes

and regulations is likely to be filled by a surge of state and private legal action, buoyed both in funding and motive by opposition to the new administration's agenda. It is possible, in fact, that the number of environmental enforcement actions actually could grow in the years to come.

Virtually all the major federal environmental statutes include provisions allowing "citizen suits"—actions by private citizens, activist organizations and others to sue both governmental and private entities for violating environmental laws. Citizen lawsuit enforcement naturally increases during periods of relatively less stringent regulation. The Trump administration's stance toward regulation is likely to spur an even greater increase in such suits. Just a month into the new administration, environmental nongovernmental organizations (ENGOs) have reported record fundraising hauls. New legal theories and easier access to environmental monitoring data will further facilitate an explosion of environmental litigation.

Now more than ever, businesses must stay abreast of environmental regulation and be prepared to fend off potential liability. Extractive industries and major carbon emitters are likely targets of future citizen suits, but any landowner or business with environmental impacts could be hauled into court. Beyond continuing to ensure compliance with applicable regulations and permits, industry leaders should consider proactive steps to forestall costly litigation. Coordination and cooperation with government agencies, ENGOs and community groups may pay off not only in positive public relations but also in reduced legal fees and penalties. Timely intervention in rulemaking proceedings and lawsuits brought by ENGOs also may prove worthwhile in informing agencies and the courts of business-specific considerations. And most important, continued attention to environmental compliance and litigation preparedness will provide the best defenses in the face of such enforcement risk.

**Citizen Suits in the Trump/Pruitt Era** Even with unified Republican control of Congress and the executive branch, and a public commitment by both branches to reducing environmental rules, regulatory reform efforts will take time and will face opposition. The environmental statutes and the Administrative Procedure Act, which governs the process of making regulations, give opponents ample opportunity to challenge such efforts.

Among the easiest steps for the administration to take in pursuing regulatory reform is to unofficially scale back enforcement efforts. For instance, it can exercise greater enforcement discretion over whether to pursue actions, to relax or eliminate Obama-era enforcement priorities, to restructure agency enforcement offices and decision-making, or to reduce budgets and staffing for offices tasked with enforcement. Such reductions could backfire, however, as they are likely to spark an increase in citizen suits and complicate the defense of such suits.

Almost every major federal environmental statute includes a citizen suit provision, which allows any person or entity to sue any other private or public entity for environmental violations, such as emissions exceeding permit limits or the release of hazardous waste. Citizen suits also can be levied against the federal government when it fails to carry out its duty under the law.

Numerous ENGOs in the U.S. are litigious and use citizen suit provisions to great effect. Large, well-established organizations such as the Sierra Club and Earthjustice launch suits across the country and lend support and representation to smaller ENGOs. Even during the Obama administration, those groups filed citizen suits against coal mines and coal-fired power plants and, to a somewhat lesser extent, the petroleum and natural gas industries. The Sierra Club, in particular, touts that its "Beyond Coal" campaign has met with significant success. More recently, the organization launched an initiative called "Beyond Natural Gas" to challenge the rise of the booming gas extraction industry and gas-fired generators. Apart from larger organizations, smaller regional and local ENGOs also have found great success using citizen suits to delay, raise the expense of and defeat projects ranging from mines to shopping centers.

President Trump and Administrator Pruitt have unwittingly served as valuable pitchmen for many ENGOs. In the wake of the election, ENGOs have reportedly benefited from a torrent of donations. The Sierra Club, for instance, claims that since Nov. 8, 2016, it has received seven times the amount of money it received during the same period last year. Additional funding, along with the fervent opinions that have driven it, are likely to lead to increased litigation.

Other organizations besides ENGOs will continue to bring citizen suits and also could challenge attempts to loosen regulations. Neighborhood groups and landowners may sue to protect their property or other interests. Some business interests sue either to stymie rivals or to create a more beneficial regulatory environment for themselves at the expense of other sectors of commerce. Provisions allowing lawyers who achieve even partial success against the government in a citizen suit to recoup their legal fees from the government provide motive and opportunity for even those without resources to initiate challenges.

The multitude of ENGOs and other potential citizen suit plaintiffs means that almost any type of industrial or commercial activity can be subject to a citizen suit. It is likely, though, that certain areas will see more attention than others in the near future. Areas that experience the biggest drop-off in enforcement from the Obama administration to the Trump administration, e.g., mining, oil and gas extraction, and climate change, are likely to see the most scrutiny.

**New Tools and Theories for Citizen Suit Litigation** The legal and practical tools available to ENGOs pursuing citizen suits are more numerous than ever before and likely to continue to grow.

On the practical side, the proliferation of inexpensive monitoring technology increases the ability of ENGOs and other potential plaintiffs to detect environmental violations, furnishing evidence to be used in citizen suits. Satellites for hire and inexpensive drones equipped with cameras, for instance, can monitor facilities in ways a person peering through a fence cannot. Affordable infrared cameras can detect certain emissions that cannot be seen with the naked eye. And water sampling equipment has become cheaper and more accessible, allowing ENGOs to test for permit violations downstream from industrial facilities.

The EPA's Next Generation Compliance initiative also has increased the collection and availability of en-

environmental compliance data. Even if the new administration curtails this initiative, the building blocks are in place for citizen activists to pick up the mantle. As previously described, accessible technology dramatically increases the pool of potential environmental enforcement parties and mechanisms. What is not clear, however, is whether these devices and methods will pass admissibility scrutiny in litigation, including Daubert challenges (where a judge must decide whether proposed expert testimony is scientifically valid and can be admitted into evidence). Companies will have to retain knowledgeable technical experts to validate and challenge as necessary the “citizen data” that could be used against them.

On the legal front, litigants are increasingly advancing novel legal theories. Recent suits, for instance, seek to expand the scope of liability under the Resource Conservation and Recovery Act. RCRA limits citizen suits in many circumstances to situations in which the handling of waste presents “an imminent and substantial endangerment to health or the environment.” (42 U.S.C. § 6972(a)(1)(B)). Traditionally, that provision has been read to apply only to recognized hazardous or solid waste products. A plaintiff in Alabama, however, has alleged that chemicals released by a defendant’s manufacturing plant for many years and only recently subject to EPA drinking water health advisories are subject to the law. (*Tennessee River Keeper, Inc. v. 3M Co.*, No. 16-cv-01029 (N.D. Ala.)). In February, the judge in that case refused the defendant’s effort to have it dismissed. Elsewhere in the nation, the Sierra Club sued a group of oil producers under RCRA for disposing of wastewater produced during oil drilling into subterranean wells. Plaintiffs claim the disposal causes earthquakes, placing people and the environment in Oklahoma and Kansas in imminent danger. (*Sierra Club v. Chesapeake Operating LLC*, No. 16-cv-00134 (W.D. Okla.)).

Litigants also may attempt to use new legal theories under federal statutes or traditional common law tort actions to pursue modern complex environmental policies. In particular, climate change promises to continue growing as a salient issue in environmental litigation. President Trump and EPA Administrator Pruitt have staked out a position of skepticism toward the idea of human-caused global warming, guaranteeing a passionate response on the other side of the issue. Not having been traditionally regulated under environmental statutes, climate change and carbon emissions are particularly ripe targets for new legal approaches. For instance, environmental groups already have used RCRA to try to take on climate change. In a Massachusetts case, the plaintiffs argued that Exxon Mobil’s failure to plan for damage to an oil terminal due to rising sea levels attributable to global warming posed a risk of imminent and substantial endangerment. (*Conservation Law Foundation, Inc. v. ExxonMobil*, No. 16-cv-11950 (D. Mass.)).

In other cases, a theory that environmental impact statements mandated under the National Environmental Policy Act (NEPA) must consider indirect effects of greenhouse gas emissions and climate change is starting to gain acceptance in some courts and administrative agencies. Finally, state attorneys general and private groups have started to attack companies under securities regulations and other corporate law for failing to disclose risks related to climate change and other environmental concerns.

With respect to common law theories, plaintiffs continue to invoke the public trust doctrine. That ancient doctrine imputes a duty on the government to protect common resources for the public good—traditionally for common uses such as navigation. Many states have included the right to a clean and healthful environment as a public trust in their constitutions or statutes. A relatively recent case based on Pennsylvania’s constitutional public trust provision prompted the court to invalidate a commonwealth law that would have barred counties and municipalities from regulating hydraulic fracturing in natural gas extraction. (See *Robinson Township v. Pennsylvania*, 83 A.3d 901 (Penn. 2013)). A case in Oregon brought on behalf of a group of children alleging that the federal government has a duty under the public trust doctrine to regulate carbon emissions recently survived a motion to dismiss. (*Kelsey Cascade Rose Juliana v. United States*, No. 15-cv-01517 (D. Or.)). Suits under state public trust statutes in Massachusetts and Washington also have been successful, though the doctrine has suffered some setbacks: The D.C. Circuit Court of Appeals held that the public trust doctrine does not exist in the federal common law. (See *Alec L. ex rel. Loorz v. McCarthy*, 561 F. App’x 7 (D.C. Cir.), cert. denied 135 S.Ct. 774. (2014)).

#### **Effect of Reduced Government Enforcement Resources**

The expected increase in activist groups’ motivation and funding to file citizen suits, combined with the potential downsizing of various agencies, could complicate efforts to defend against such suits. Agencies with reduced staff will be less able to meet a multitude of nondiscretionary statutory requirements, thereby giving rise to citizen suits. Such requirements include, for instance, deadlines to decide whether or not to list certain species as endangered or to approve or disapprove state pollution standards.

A reduction in staffing of the Department of Justice’s Environment and Natural Resources Division (ENRD) would curtail the government’s ability to bring enforcement actions, but could at the same time increase the regulatory and enforcement burden on industry. The same lawyers who prosecute enforcement actions also are responsible for defending citizen suits against the government and for defending regulatory challenges by activist groups.

Reductions at ENRD also could limit or eliminate the ability of citizen suit defendants to invoke statutory “diligent prosecution” defenses, which bar citizen suits where the government is actively pursuing enforcement against the same alleged violation. In many cases, the government may be willing to settle under reasonable terms, whereas an activist group may opt to pursue litigation at all costs. A reduction in government lawyers could jeopardize the availability of this defense.

#### **Mitigating Citizen Suit Risk—Steps to Take**

**Moving** from a system of more active government enforcement to one where private interest groups take on the lion’s share of the regulatory mantle can cause great uncertainty for industry. There are many things businesses can do to limit their exposure, however. The most important action a company can take is to ensure continued focus on environmental controls and strict regulatory compliance, along with having in place a litigation/enforcement preparedness plan. Companies also need to be prepared to evaluate and challenge the new analytical methods and forms of data that could be used

against them as environmental compliance devices become more accessible and allow for direct monitoring of industrial facilities by private citizens.

Businesses also should give thought to proactively engaging with ENGOs and other potential litigants before litigation arises. Industry, ENGOs and regulators can cooperate, for instance, on watershed management plans or on Conservation Candidate Agreements With Assurances, a type of voluntary but enforceable species conservation plan. Such cooperative voluntary efforts could forestall more onerous government action or citizen suits, and build goodwill with local groups and the public.

Businesses receiving notice of a threatened citizen suit should act quickly. All the major citizen suit provisions require plaintiffs to send a notice of intent to sue (NOI) to the defendant 60 or 90 days before actually filing suit, with some limited exceptions. Recipients of such notices should act promptly, not only to organize a legal defense but also to engage with the plaintiff and regulators as appropriate to attempt to head off litiga-

tion. Alternatively, the recipient of an NOI may be able to reach a negotiated compromise with regulators to prevent further private action through the “diligent prosecution” defense.

Finally, businesses subject to environmental regulation should track regulatory trends and proposed regulations (including proposals to rescind current regulations) and consider submitting comments and, potentially, filing briefs to challenge or support rules that affect their businesses.

**In Closing** The regulated community must maintain its vigilant attention to environmental compliance as the enforcement risk shifts from the federal government to private citizens. Novel legal theories, new compliance monitoring technologies and unprecedented ENGO funding create an environment ripe for increased citizen suit litigation. Legal and technical planning and preparedness can help achieve early resolutions and reduce the overall cost and risk of such actions.