

# Client Alert

Tort Litigation & Environmental Practice Group

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## Environmental Citizen Suits—A Growing Trend Under the Trump Administration

In his first year in office, President Trump has begun to deliver on his campaign promise of rolling back environmental regulations—from the waters of the United States rulemaking to the Clean Power Plan. He has also proposed steep cuts to the U.S. Environmental Protection Agency’s budget. While decreased environmental regulation and enforcement by U.S. EPA may be beneficial for the bottom line of many businesses, any potential gains may be offset by increased litigation and enforcement by nonprofit and citizen groups.

Most of the major environmental acts allow citizens to directly enforce environmental requirements against businesses. Following Trump’s election, many environmental nonprofit groups saw a sharp increase in donations<sup>1</sup> and these groups are ramping up their enforcement of environmental laws against businesses using so called “citizen suit” provisions.<sup>2</sup> By initiating a citizen suit, an environmental organization can directly enforce environmental regulations against a company without the federal or state governments’ involvement.

Successfully defending against a potential citizen suit requires quick action as soon as notice of alleged violations is received. Environmental groups must give advance notice before filing suit, which typically gives companies a short time window (e.g., 60 days) to prevent the suit from being filed. Businesses must, therefore, have a strategy in place for investigating and responding to alleged environmental violations identified by environmental groups.

### Environmental Citizen Suits

Nearly all of the major environmental acts, including the Clean Water Act, Clean Air Act, and the Resource Conservation Recovery Act, include “citizen suit” provisions. These laws allow individuals and groups to act as private attorneys general by enforcing environmental requirements against alleged violators. The potential penalties from a citizen suit are the same as for enforcement actions initiated by the government. Plus, successful citizen suit plaintiffs can recover attorneys’ fees and litigation costs.

To initiate a citizen suit, an individual or group must typically provide 60-days’ notice to U.S. EPA, the state where the violation is allegedly occurring,

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and the individual or business alleged to be in violation. The notice must include sufficient information to allow the individual or company to identify the alleged violation. Further, a potential citizen suit plaintiff can only enforce continuing violations of environmental laws.<sup>3</sup> The potential plaintiff is also barred from bring a suit for alleged violations that are already being “diligently prosecuted” by the federal or state government.

## **Potential Defenses and Strategies for Responding to an Environmental Citizen Suit**

One of the most effective defenses to a potential citizen suit is to correct any alleged deficiencies during the 60-day notice period. Citizen suits may only be initiated for continuing, not past, violations. Therefore, if a company is able to correct any alleged deficiencies during the 60 days before the individual or group is authorized to file suit, the company can, in essence, moot the citizen suit.

Another potential defense is to reach out to EPA or the state environmental agency to settle the alleged violation before the citizen suit is filed. Because potential citizen suit plaintiffs are barred from bringing a case for alleged violations that are being “diligently prosecuted” by the government, working with the government to settle alleged violations can stop the citizen suit before it starts. Furthermore, Negotiating directly with the government is typically more predictable and can provide greater protection from other potential environmental claims than defending against a citizen suit.

Other potential defenses and strategies include challenging the sufficiency of the citizen suit notice, raising standing or statute of limitations defenses, or negotiating directly with the citizen group to settle the case. But regardless of how a company ultimately responds to a notice of alleged violations, it is imperative that the company acts quickly to assess the validity of the claim, including the underlying data, and develop a strategy for defeating the claim.

Overall, it is likely that the trend of increased citizen enforcement of environmental laws is only going to continue. King & Spalding has significant experience in defending environmental enforcement actions and litigation, including citizen suits and enforcement initiated by federal and state agencies. If you have questions about how citizen suits or environmental compliance may affect you and your business, please contact any of our lawyers noted in the contact section on the first page.

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*This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice. In some jurisdictions, this may be considered “Attorney Advertising.”*

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<sup>1</sup> Ben Wolfgang, *Trump Helps Drive Donations to Environmental Groups*, Wash. Times, Feb. 9, 2017; Lydia O’Connor, *Environmental Orgs See Surge in Donations, Volunteers Following Trump’s Win*, Huffington Post, Nov. 11, 2016; Jennifer Bissell, *Donations to Charitable Groups Surge after Trump Victory*, Financial Times, Nov. 11, 2016.

<sup>2</sup> Edward C. Lewis and H. Joseph Drapalski, *The New Wave of Citizen Suits: The RCRA, Endangerment, and Climate Change*, American Bar Association, Aug. 28, 2017.

<sup>3</sup> *Gwaltney v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987).