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# RCRA Citizen Suits in a Post-*Cooper* Era

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## 1) Introduction

The United States Supreme Court shook the world of environmental law with its decision in *Cooper Industries Inc. v. Aviall Services Inc*., 125 S.Ct. 577 (2004), holding that a private party that has not been sued by the government under sections 106 or 107 (a) of CERCLA may not bring a contribution claim against other potentially responsible parties under Section 113 (f) (1) to recover voluntary clean up costs. The decision, which reversed the Fifth Circuit's decision, flew in the face of contrary decisions in the Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth and Tenth Circuits. While the Supreme Court declined to rule on the issue of whether a PRP could sue for cost recovery under Section 107--rather than Section 113--and remanded that issue, there is the very real possibility that Section 107 will not be permitted to serve as the vehicle for such contribution actions,[1] prompting environmental law attorneys and their clients to look to alternative strategies.

The post-*Cooper* decision, *City of Waukesha v. Viacom Int'l.*, 362 F. Supp. 2d 1025 (E.D. Wisc. 2005), presents one such alternative. In *Waukesha*, the federal district court held that Waukesha could not assert a Section 107 claim, per *Cooper*. The city's attempt to amend its complaint to assert a Section 113 contribution claim was also barred because there the city's negotiations with the state had not yet resulted in a final, signed administrative order. Thus, was no evidence that the city was being compelled by the government to perform the clean-up at issue. However, the city had one ace up its sleeve: its Complaint also requested relief under RCRA's Citizen Suit provisions, which the court held as still viable.

As discussed in more detail below, a Citizen Suit: permits a grant of injunctive relief to require certain clean-up related activities by a responsible party despite the absence of any governmental action against such party; permits an award of attorney fees; contains a broad definition of what constitutes contamination; and, is a vehicle for asserting state damage claims in federal court. This article focuses on the use of the RCRA Citizen Suit provisions because the topic is not only extremely relevant, but also deserves renewed consideration in light of *Cooper*.

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[1] District courts are badly split on the issue. However, the first federal circuit court to address the issue, post-*Cooper*, held that certain PRPs can assert such a claim. *See Consolidated Edison Co. v. UGI Utilities Inc.*, 2005 LEXIS 19477 (2d Cir. 9/9/05).

2) A RCRA Citizen Suit

The Citizen Suit provisions are set forth in Section 7002 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. Section 6972, where in subpart (a), it states that:

> [A]ny person may commence a civil action on his own behalf – (1)(A) against any person … who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this Act; or (B) against any person … and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.

Thus, where an entity has created an "imminent and substantial endangerment" to "health or the environment" as a result of the disposal of any "solid or hazardous waste," such a claim is permitted. These terms have been liberally interpreted. *See United States v. Conservation Chemical Co.*, 619 F. Supp. 162 (D.C. Mo. 1985) (endangerment need not be immediate to be imminent; specific quantification of the endangerment not required, rather a consideration of all factors is proper based on the unique facts of each case; and, if an error is to be made in applying the endangerment standard, it must be made in favor of protecting the environment); *Paper Recycling, Inc. v. Amoco Oil Co.*, 856 F. Supp. 671, 678 (N.D. Ga. 1993) ("imminent and substantial endangerment" to "health or the environment" requires only a showing that a risk of threatened harm is present, not that actual harm will immediately occur);[2] *see also Kaufman & Broad-South Bay v. Unisys Corp.*, 822 F.Supp. 1468 (N.D. Cal. 1993); *Lincoln Props., Ltd. v. Higgins*, 1993 WL 217429 (E.D. Cal. 1993) (merely need show a risk of threatened harm, not actual injury; remedy is not limited to emergency situations)[3]. The fact that the disposal that created the endangerment happened years ago is of no matter—a claim can still be brought if the endangerment exists. *City of Toledo v. Beazer Materials & Services, Inc.*, 833 F. Supp. 646 (N.D. Ohio 1993); *Gache v. Town of Harrison*, 813 F. Supp. 1037 (S.D.N.Y. 1993); *Nuckols v. National Heat Exchange Cleaning Corporation*, Case No. 4:00CV1698 (N.D. Ohio 2000) (former tenant's contamination on leased property can be the basis of an endangerment claim).

The types of waste covered under the Citizen Suit provisions are not confined to "hazardous waste"; rather, it includes "solid waste", which is very broadly defined. 42 U.S.C. Section 6803 (5) defines "hazardous waste" to include solid hazardous waste which may cause or significantly contribute to an increase in mortality or serious irreversible or incapacitating reversible illness or pose a substantial present or potential hazard to human health or the environment. 42 U.S.C. Section 6803 (27) defines "solid waste" to include "discarded material,

[2] In *Paper Recycling*, the passage of six years of remediation efforts did not bar plaintiff's case because thousands of gallons of gasoline were still contaminating the ground.

[3] A threat, the court noted, can be established even without proof of endangerment to human or other life forms. *Id.*, fn. 30.

including solid, liquid, semisolid, or contaminated gaseous material resulting from industrial, commercial, mining and agricultural operations, and from community activities". *See Connecticut Costal Fisherman's Ass'n. v. Remington Arms Co*. Inc., 989 F. 2d 1305 (2nd Cir. 1993) (discussion of hazardous and solid waste under the Citizen Suit provisions); *Zands v. Nelson*, 779 F.Supp. 1254 (S.D. Cal. 1991); *Paper Recycling*, *supra*. (gasoline included as solid waste); *Southern Fuel Co*. *v. Amoco Oil Co.*, 1994 U.S. Dist. LEXIS 15769 (D.Md. 8/23/94) (analysis of interplay between hazardous and solid waste provisions); *Lincoln*, *supra.*

Causation must ultimately be established between the endangerment and the defendant's acts. *See Agricultural Excess v. ABD Tank & Pump Co*., 878 F. Supp. 1091 (N. Ill 1995) (claim against a UST manufacturer); *First San Diego Properties v. Exxon Co*., 859 F. Supp. 1313 (S.D. Cal. 1994) (no liability for mere "passive" owner of contaminated property). Liability is joint and several unless the defendant can establish that the damages are divisible and that there is a reasonable basis for an apportionment. *Waste, Inc. Cost Recovery Group v. Allis Chalmers Corp*., 51 F. Supp. 2d 936 (N.D. Ind. 1999); *United States v. Conservation Chem. Co.*, *supra.* Liability is strict, as is true under CERCLA, though there is legislative language than can be cited to the contrary. *United States v. Northeastern Pharm. & Chem. Co*., 810 F. 2d 726 (8th Cir. 1986); *see also Cox v. City of Dallas*, 256 F. 3d 281 (5th Cir. 2001) (court cites case law and legislative history supportive of strict liability and cites contrary legislative history)[4].

Jurisdiction over such action is granted to the United States District Court pursuant to that same subpart:

> Any action under paragraph (a)(1) … shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur. Any action brought under paragraph (a)(2) of this subsection may be brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia.

See *Sauers v. Pfiffner*, 29 Env't Rep. Cas (BNA) 1716 (D. Minn. March 23, 1991) (venue proper where violation or endangerment occurs).

The grant of jurisdiction extends to all parties, regardless of the amount at issue or in controversy and regardless of the citizenship of the parties. The court's power is broad, including the power to grant injunctive relief:

> The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both, or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and

[4] *Cox* also presents an excellent overview of the RCRA Citizen provisions.

> to apply any appropriate civil penalties under section 6928(a) and (g) of this title.

The nature of the remedy under a Citizen Suit is injunctive. It may include an order that the defendant is responsible for site investigation, monitoring and testing costs, as well as an order barring further endangerment. Such a claim, however, cannot be brought for money damages, such as plaintiff's past clean up costs. *Mehrig v. KFC Western, Inc.*, 516 U.S. 479 (1996) (CERCLA, not RCRA, provides the framework for recovery of past clean up costs)[5]; *Interfaith Community Organization v. Honeywell Inc.*, 399 F. 3d 248 (3rd Cir. 2005) (defendant ordered to abate the endangerment by removal of the contamination); *Tanglewood E. Homeowner v. Charles-Thomas, Inc*., 849 F. 2d 1568 (5th Cir. 1988) (the remedy package includes civil penalties, injunctive relief and attorney fees); *Walls v. Waste Resource Corp*., 761 F. 2d 311 (6th Cir. 1985) (there is no private cause of action for economic compensation or punitive damages); *Express Car Wash Corp. v. Irinaga Brothers, Inc.*, 967 F. Supp. 1188 (D. Or. 1997) (while declining to issue an injunction requiring plaintiff to pay response costs that may be incurred in the future, the court noted that a request to require defendant to take additional action to address the contamination, including that it take over responsibility for the remediation, would be viable)[6]; *cf. Southern Fuel Co*., *supra*. (cannot transform a claim for damages into one for equitable relief by requesting an injunction that orders the performance of future abatement work because RCRA does not provide for the payment of restoration costs); *Fallowfield Dev. Corp. v. Strunk*, 1993 WL 157723 (E. D. Pa.) (order to remediate the site not permitted under RCRA, where CERCLA remedy was available). Damage claims can be asserted as separate counts with a request that the federal court exercise supplemental jurisdiction, pursuant to 28 U.S.C. Section 1367 (a) and (c), over such claims (such as state common law claims for trespass, nuisance, etc.). *Murray v. Bath Iron Works*, 867 F.Supp. 33 (D.Maine 1994)(claims under state law can be filed in federal court with Citizen Suit claim, as the state claims do not "substantially predominate"); *City of Toledo v. Beazer, supra*.; *Nuckols, supra.* (assertion of state common law claims for nuisance and trespass addressed)**;** ***but see Avondale Federal Savings Bank v. Amoco Oil Company***, 997 F. Supp. 1073 (N.D. Ill., E. Div. 1998) (court declines exercise of supplemental jurisdiction after barring a RCRA Citizen Suit).

Costs, including attorney and expert fees, may be awarded to the prevailing or substantially prevailing party pursuant to 42 U.S.C. Section 6972 (e):

> The court may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party, whenever the court determines such an award is appropriate.

*See Browder v. Moab*, 2005 LEXIS 22200 (10th Cir. 10/14/05) (court, after noting the dearth of case law construing the statute, reversed the trial court's denial of attorney fees, noting, on remand, that while such award is discretionary, where a party has prevailed on at least one count, thereby changing the legal relationship between the parties, that prevailing party qualifies for

[5] The court held that a RCRA Citizen Suit authorizes issuance of a mandatory injunction requiring the responsible party to "take action" by attending to the clean-up proper and disposal or a prohibitory injunction that restrains that party from any further violations of RCRA.

[6] The court provides a comprehensive analysis of the limits to the injunctive relief that may be granted under the RCRA Citizen Suit provisions.

consideration of an award of fees); Environmental *Defense Fund v. EPA*, 1 F. 3rd 1254 (D.C. Cir. 1993) (fees granted to "prevailing" party, with excellent discussion of that term and how request for fees should be analyzed); *Fallowfield Dev. Corp., supra*. (fee request denied, noting court's granting of such claims have done so where, unlike here, the suit was brought to benefit a community, rather than an individual property).

Before a Citizen Suit can be filed, notice to potential defendants and the government (state and US EPA) must be provided, pursuant to subpart (b). The notice must be provided 60 days before suits brought pursuant to (a)(1)(A) and 90 days for suits brought pursuant to (a)(1)(B). *Hallstrom v. Tillamook County,* 493 U.S. 20 (1988) (promotes goal of resolving disputes without court involvement by providing both potentially responsible defendants and the government an opportunity to address the problem)[7]; *Supporters to Oppose Pollution, Inc. v. Heritage Group*, 973 F. 2d 1320 (7th Cir. 1992) (en banc); *Portsmouth Redevelopment & Housing Auth.v. BMI Apartments Assocs.*, 857 F. Supp. 1427 (D. Or. 1994). Interestingly, the filing of an amended complaint after the 90 day period may cure an original violation of the 90 day requirement). *Buggsi v. Chevron*, supra. (court retains jurisdiction because amended complaint was filed after expiration of 90 day period). Specifics about the notice (content, service of copies on the appropriate public officials, etc.) are set forth in 40 C.F.R., Part 254.

Once the notice period has expired, the United States Attorney General and Director of the EPA must be served with the Complaint, where the claim is asserted pursuant to subsection (a)(1)(B). 42 U.S.C. Section 6972 (b) (2) (F). *Murray v. Bath Iron Works Corp*., supra. (no deadline for such service); *Petropoulos v. Columbia Gas of Ohio, Inc*., 840 F. Supp. 511 (S.D. Ohio 1993)

A Citizen Suit claim cannot duplicate government action, provided such action is already commenced and is being diligently prosecuted to resolve the endangerment. 42 U.S.C. Section 6972 (b) (1) (B), (b) (2) (B) and (b) (2) (C); *Meghrig, supra*.; *Supporters to Oppose Pollution, supra*. (EPA's actions precluded private RCRA claim; despite claim that such action had not, in fact, been successful in resolving the risk; collateral attack on the agency's strategy or tactics is not permitted); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F. 2d 1146 (1st Cir. 1989); City *of Heath v. Ashland Oil, Inc*., 834 F. Supp. 971 (S.D. Ohio 1993); *Paper Recycling, supra*. (no bar to RCRA Citizen Suit where neither the federal nor state government had acted to remedy the contamination).

There is no statute of limitations set forth in the Citizen Suit provisions for claims by one private party against another; however, at least two circuit courts have held the five year statute of limitations set forth in 28 U.S.C. Section 2462[8] applies. *See Public Interest Research Group of N.J. v. Powell Duffryn Terminals, Inc.*, 913 F. 2d 64 (3d Cir. 1990), *cert. denied*[9]; *Sierra Club v. Chevron U.S.A., Inc*., 834 F. 2d 1517 (9th Cir. 1987); *But see Public Interest Research Group of New Jersey v. U.S. Metals Refining Co*., 681 F. Supp. 237 (D.N.J. 1987) (no applicable statute of limitations).

[7] The court held that unlike a statute of limitations, RCRA's 60 day notice provision is not triggered by the violation giving rise to the action. Rather, plaintiff has full control as to when to send the notice. The court further discussed the limited exceptions to notice requirements.

[8] The five year period in 28 U.S.C. Section 2462 utilizes an "accrual" trigger for commencement.

[9] The court also held that the statute of limitations is tolled during the notice period.

There is no right to a jury trial of the RCRA Citizen Suit claims; however, a jury can be requested for pendant and other claims. *Southern Fuel, supra*. (RCRA claims can be tried to judge and others to a jury).

3) Conclusion

A RCRA Citizen Suit can be an effective tool in addressing contamination of a client's property, particularly in light of the present uncertainty about the assertion of CERCLA contribution claims as a result of the Supreme Court's decision in *Cooper*.