



An Overview of Citizen Suits Affecting the Mineral and Energy Industries

Timothy W. Gresham¹

Eric R. Thiessen²

Penn, Stuart & Eskridge

Abingdon, Virginia

Synopsis

Table listing sections from § 7.01 to § 7.05 with corresponding page numbers, including sub-sections like [1] — Constitutional Requirements and [a] — Standing.

1 Shareholder, Penn, Stuart & Eskridge; B.A., Morehead State University; J.D., University of Tennessee.

2 Associate, Penn, Stuart & Eskridge; B.A., Washington and Lee University; J.D. with Honors, Drake University Law School.

§ 7.06. Additional Limitations 250
 [1] — Notice and Delay Requirements 250
 [2] — Preemption 252
 [a] — Government Preemption 253
 [b] — Administrative Proceedings 253
 [c] — Timing 255
 [d] — Administrative Exhaustion 255

§ 7.07. Intervention 256
 [1] — Statutory Citizen Intervention 256
 [2] — Government Intervention 257
 [3] — Other Parties 258

§ 7.08. Remedies 258
 [1] — Injunctions 258
 [a] — Preliminary Injunction 258
 [b] — Permanent Injunction 260
 [2] — Civil Penalties 260
 [3] — Damages 262
 [a] — SMCRA 262
 [b] — Response Costs 263
 [4] — Attorney’s Fees 264
 [5] — Alternatives to Citizen Suits 265

§ 7.09. Additional Defenses 265
 [1] — Statute of Limitations 266
 [2] — Issue and Claim Preclusion 267

§ 7.10. Conclusion 268

§ 7.01. Introduction.

Since the late 1960s, Congress has enacted numerous statutes mandating strenuous and pervasive environmental obligations respecting all aspects of business. The mineral and energy industries have not been excepted from such regulation. Today they are among the most regulated sectors of the United States economy. For the mineral and energy industries, environmental laws and regulations require the permitting of operations and facilities; require the control, monitoring and reporting of air and water discharges; and impose strict limitations on the generation, use and disposal of solid wastes. Failure to comply with these requirements can result in the enforcing federal or state agency bringing actions for injunctive relief and for administrative, civil and criminal remedies and penalties.

Concerned that federal agencies were insufficiently motivated to enforce existing environmental laws, in 1970 Congress enacted as part of

the Clean Air Act (CAA),³ a provision allowing “any person” to sue an operator alleged to be in violation of CAA’s emission standards.⁴ The provision also permitted suit against the Administrator of the Environmental Protection Agency (EPA) for failure to carry out any duties under the CAA, which are not discretionary.⁵ Congress intended this “citizen suit” provision to motivate the governmental agencies to bring enforcement and abatement proceedings.⁶ Congress was apparently pleased with the citizen suit provision, as it included a virtually identical provision in the next major environmental statute it enacted,⁷ the Federal Water Pollution Control Act.⁸ Since then Congress has included a citizen suit provision in virtually every federal environmental protection statute.⁹

This chapter provides a general overview of citizen suits. Not every environmental statute discussed in this chapter directly regulates the mineral and energy industries, but courts have interpreted the citizen suit provisions of these statutes similarly. Therefore, judicial interpretation of a provision in one statute is likely to apply to another. The chapter is intended to serve as a sort of primer for the mineral and energy or environmental lawyer’s defense of such a case, should one be threatened or filed. The chapter first explains the basic scheme of citizen suit statutes, comparing and contrasting them to the provisions of the Administrative Procedures Act (APA).¹⁰ It next identifies and explains the requirements for bringing and maintaining citizen suits in federal court, as constitutional and prudential issues have

³ 42 U.S.C. §§ 7401-7671q.

⁴ 42 U.S.C. § 7604(a)(1).

⁵ 42 U.S.C. § 7604(a)(2).

⁶ See S. Rep. No. 91-116, at 35-36.

⁷ *Friends of the Earth v. Carey*, 535 F.2d 165, 172 (2d Cir. 1976).

⁸ 33 U.S.C. §§ 1251-1356. Today this Act is more commonly referred to as the Clean Water Act (CWA).

⁹ See, e.g., Toxic Substances Control Act (TSCA), 15 U.S.C. § 2619; Endangered Species Act (ESA), 16 U.S.C. § 1540(g); Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. § 1270; Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6972; Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9659; Emergency Planning and Community Right to Know Act (EPCRA), 42 U.S.C. § 11046.

¹⁰ See discussion *infra* §§ 7.02-7.03.

been at the forefront of many citizen-initiated environmental enforcement suits.¹¹ As citizen suits have resulted in several decisions dealing specifically with the issue of constitutional standing, the chapter discusses it in depth.¹²

Many articles already have been written concerning standing issues in a general context. This chapter does not provide a detailed annotation and analysis of each Supreme Court decision on standing, but rather attempts to distill the important principles this line of authority has defined, and discusses how the practitioner may apply these principles as potential defenses in citizen suit actions. This area of the law remains somewhat in flux, and the Supreme Court and circuit courts of appeal will continue to further refine the parameters of citizens' standing to bring environmental actions. Finally, the chapter examines the statutory prerequisites to filing citizen suits and explains other procedural defenses that apply to such suits.¹³

§ 7.02. The Scheme of Citizen Suit Statutes.

Congress enacted citizen suit provisions to encourage public participation and to provide the public with a role in the enforcement of environmental protection laws.¹⁴ However, they are designed to supplement, not supplant governmental enforcement.¹⁵

While citizen suit provisions vary in language, most have an identical structure and provide for an analogous procedure.¹⁶ They typically provide

¹¹ See discussion *infra* § 7.04.

¹² See discussion *infra* § 7.04[1][a], [b].

¹³ The authors have limited discussion to federal citizen suit provisions and cases interpreting them. Many states have enacted equivalent or analogous provisions. For example, SMCRA requires primacy states to have a citizen suit provision "in accordance with" SMCRA. 30 U.S.C. § 1253(a)(1); 44 *Fed. Reg.* 14965 (March 13, 1979); 47 *Fed. Reg.* 17269 (April 21, 1982); *In re Permanent Surface Mining Reg. Litig.*, 14 *Env't Rep. Cas.* (BNA) 1083, 1088 (D.D.C. 1980). While some states may interpret their statutes similarly, one should consult the pertinent state's constitution, statutes and cases.

¹⁴ *Friends of the Earth v. Carey*, 535 F.2d 165, 172 (2d Cir. 1976).

¹⁵ *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49, 60 (1987).

¹⁶ The citizen suit provision of the CWA is typical:
any citizen may commence a civil action on his own behalf (1) against any person (including (i) the United States, and (ii) any other governmental