CITE AS
36 *Energy & Min. L. Inst.* 4 (2015)

Chapter 4

Citizen "Suit Yourself": New (and Very Real) Water Compliance Challenges for Coal Power Utilities

Miranda R. Yost
Patrick J. Fanning
Troutman Sanders LLP
Richmond, Virginia

Synopsis

§ 4.01. Introduction.

Compliance with federal, state, and even local environmental government enforcement initiatives is only the beginning of the story for coal power utilities. Citizen lawsuits to enforce environmental laws impose new and daunting compliance challenges. While citizen lawsuits have long existed, environmental non-governmental organizations (ENGOs) are beginning to utilize them with increasing frequency, often taking innovative approaches to expand their reach. Coal power utilities need to consider compliance not just from an agency perspective, but also with an eye toward deflecting, defending, or minimizing the likelihood of citizen lawsuits. This chapter addresses the rise in citizen suit enforcement and identifies several overarching citizen group initiatives and litigation battlegrounds, with a focus on coal power utility and water compliance. Finally, the chapter outlines several pre-emptive strategies that coal power utilities can use to defend against citizen enforcement actions.

§ 4.02. Background.

Citizen enforcement has not always been an aspect of modern environmental statutes. When Congress was initially passing environmental legislation in the 1960s, most statutes did not include a citizen suit provision. However, in the 1970s, Congress became concerned that federal agencies such as the United States Environmental Protection Agency (EPA) were not sufficiently motivated to enforce environmental statutes. Starting with the Clean Air Act (CAA), Congress added a provision giving the public the opportunity to bring lawsuits under the statute.[1] In short order, Congress added similar provisions to nearly every environmental statute.[2]

---

1 42 U.S.C. § 7604(a)(1).

2 *See, e.g.*, Clean Water Act (CWA), 33 U.S.C. § 1365 (providing that "any citizen" may sue under the Clean Water Act); Toxic Substances Control Act (TSCA), 15 U.S.C.

Generally, the citizen suit enforcement provisions that were added to these statutes provided that "any person" could sue an operator for alleged violations of the statute or its regulations, as well as the EPA for failure to carry out nondiscretionary duties.[3] As described by the Supreme Court in the seminal case *Gwaltney of Smithfield v. Chesapeake Bay Foundation*, citizen suits were designed to *supplement*, not *supplant,* governmental enforcement.[4]

§ 4.03. Rise in Citizen Suits.

Due to a number of factors — including new rulemaking approaches, new technologies, and a ripe cultural environment — environmental citizen lawsuits now account for the vast majority of enforcement suits under environmental statutes.[5] More citizen suits have been filed pursuant to the Clean Water Act (CWA) than any other environmental statute.[6] These suits are increasing both in number and in scope.

[1] — Next Generation Compliance.

Underlying many of the changes that are giving way to increased citizen lawsuits are EPA's Next Generation Compliance policies. EPA describes these policies as "a modern approach to compliance" using five interconnected components.[7] EPA has said that it intends to use new tools,

---

§ 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.

3 *Id*.

4 Gwaltney of Smithfield v. Chesapeake Bay Foundation, 484 U.S. 49, 60 (1987).

5 *See e.g.*, "Now More Than Ever: Trends in Environmental Citizen Suits," at 30, 10 *Wid. L. Symp. J.* 1, 8 ("In the 30 years from 1973-2002, citizens [suits] accounted for more than 1,500 reported federal decisions in civil environmental cases. In the 10 years from 1993-2002, federal courts issued opinions in an average of 110 civil environmental cases a year. Of these, eighty-three a year, that is, roughly three in four (75 percent), are citizen suits.")

6 "Standing in the Ever-Changing Stream: The Clean Water Act, Article III Standing, and Post-Compliance Adjudication," 20 *Stan. Envtl. L.J.* 73, 75-76.

7 U.S. EPA Office of Enforcement and Compliance Assurance, "Next Generation Compliance: Strategic Plan 2014 – 2017" (October 2014), at 1, *available at*: http://

"while strengthening vigorous enforcement" of environmental laws by taking advantage of "the best thinking from inside and *outside* EPA."[8] Importantly, EPA sees an enhanced role of citizens in enforcement as central to its new enforcement strategy.

Each of the five components of EPA's Next Generation enforcement initiative incorporates a public role.[9] The components are:

1. Advanced Monitoring: Use and promote advanced emissions/ pollutant detection technology so that regulated entities, the government, and *the public* can more easily see pollutant discharges, environmental conditions, and noncompliance.
2. Electronic Reporting: Shift toward electronic reporting to help make environmental reporting more accurate, complete, and efficient while helping EPA and co-regulators better manage information, as well as improve effectiveness and *transparency*.
3. Transparency: Expand transparency by making information more accessible to *the public*.[10]
4. Innovative Enforcement: Develop and use innovative enforcement approaches (*e.g.*, publically attainable data analytics and targeting) to achieve more widespread compliance.
5. Regulation/Permit Design: Design regulations and permits that are easier to implement (*e.g.*, relying on citizen enforcement), with a goal of improved compliance and environmental outcomes.

---

www2.epa.gov/sites/production/files/2014-09/documents/next-gen-compliance-strategic-plan-2014-2017.pdf.

8 *Id*. (emphasis added).

9 *See generally*, Memorandum from Cynthia Giles, Assistant Administrator, U.S. EPA Re "Use of Next Generation Compliance Tools in Civil Enforcement Settlements" (January 7, 2015).

10 *See also* http://www.washingtonpost.com/politics/federal–goveernment/federal–eye-briefs-foia-distributed-records-to-go-online/2015/07/12/a449tab8-2719-11e5-aae2-6c4759b050aa–story.html.

A recent EPA settlement demonstrates how EPA is using these new strategies. In May 2015, EPA and Tonawanda Coke reached a settlement of Hazardous Air Pollutants (HAPs), CAA, and Resource Conservation and Recovery Act (RCRA) claims.[11] The agreement incorporates several Next Generation Compliance tools. Among other provisions, the settlement provides for the public release of pollution data and for third-party compliance audits.[12] In fact, in the press release for the consent decree, an EPA Regional Administrator praised the efforts of the public in collecting its own data on the company's emissions. "The community did their own air toxic monitoring, which revealed high levels of pollution. This fine example of citizen science spurred government action to protect the community."[13]

[2] — Self-Implementing Coal Combustion Residuals Rule.

The recent self-implementing Coal Combustion Residuals (CCR) Rule is another example of how EPA is not only encouraging, but relying on citizen enforcement. In EPA's words, in response to FAQs on the new CCR Rule:

> Citizens perform a crucial role in the implementation and enforcement of this rule . . . EPA has designed recordkeeping and Internet posting requirements as part of the final rule to help ensure transparency and to assist citizens in playing that role. . . The regulations promulgated today are "self-implementing," . . . EPA has no formal role in implementation nor can it enforce the requirements. Thus, enforcement of these requirements will be by citizen suits (or by States acting as citizens).[14]

Interestingly, while states can implement the CCR rule through state waste laws, such state rules will not bar citizen suits under the federal rule.

---

11 U.S. v. Tonawanda Coke Corp. Consent Decree (May 11, 2015), *available at*: http://www.epa.gov/region02/capp/TCC/tonawanda_consent_decree_with_appendices.pdf.

12 *Id*. at 36.

13 U.S. Department of Justice Press Release, (May 11, 2015), *available at*: http://www.justice.gov/usao-wdny/pr/tonawanda-coke-pay-12-million-civil-penalties-facility-improvements-and-environmental.

14 *EPA Coal Ash Rule Frequently Asked Questions*, *available at*: http://www2.epa.gov/coalash/frequent-questions-coal-ash-rule.

This rule represents a novel form of enforcement of RCRA, placing direct enforcement responsibilities on citizens.[15]

[3] — Limited Agency Budgets/Culture of Citizen Supplementation.

While continuing budget cuts require EPA to identify enforcement priorities and employ new strategies, there is great societal interest in eco-awareness and enthusiasm for improving the environment. For example, environmental stewardship is a hallmark of the Millennials generation.[16] These interconnecting forces are playing a key role in the exponential increase in citizen suits.

§ 4.04. Unique Compliance Challenges.

While citizen enforcement offers EPA and other implementing agencies a cost-effective means to pursue wide-spread enforcement, it also raises significant new challenges for regulated industry. Unlike EPA's clearly identified enforcement priorities, which provide the regulated community a degree of predictability, citizen group enforcement lacks a unified enforcement agenda. Citizen enforcement also involves conflicting interpretations of statutes and regulations, as well as significant data accuracy issues. Finally, citizen enforcement does not pre-empt other environmental group litigation such as tort claims, creating greater uncertainty due to a lack of finality.

[1] — Lack of Unified Citizen Group Enforcement Agenda.

Regulated entities are increasingly facing the challenge of strategically focusing resources to serve compliance and pollution prevention goals, while

---

15 75 Fed. Reg. 35128, 35136 (June 21, 2010) ("EPA has no role in the planning and direct implementation of solid waste programs under RCRA subtitle D."); *accord*, 80 Fed. Reg. at 21302 and 21310 ("EPA has no role in the planning and direct implementation of the minimum national criteria . . . under RCRA subtitle D, and has no authority to enforce the criteria.").

16 *See e.g.*, Boston Consulting Group Perspectives, "How Millennials Are Changing the Face of Marketing Forever," *available at*: https://www.bcgperspectives.com/content/articles/marketing_center_consumer_customer_insight_how_millennials _changing_marketing_forever/?chapter=3.

also minimizing risk of liability to a multitude of discrete citizen groups harboring disparate objectives.

The EPA maintains a list of national enforcement initiatives which it publishes approximately every three years.[17] Regulated entities can look to this list and can appropriately direct resources to address issues that fall within EPA's national enforcement initiatives. For example, EPA is currently prioritizing the reduction of air pollution, and specifically hazardous air pollutants, from the largest sources.[18] In the energy extraction realm, EPA is focused on ensuring energy extraction activities are conducted in compliance with environmental laws.[19] For the water sector, EPA is committed to enforcement related to keeping raw contaminated stormwater out of our nation's waters (which affects the mining industry via the decommissioning of coal production facilities) and preventing animal waste from contaminating surface and ground water.[20] Finally, in the hazard chemicals realm, EPA is focused on reducing pollution from mineral processing operations.[21]

Knowing EPA's main initiatives helps industry focus resources on ensuring compliance in high-impact areas, as identified by the agency through informed analysis. But there are no analogous overarching citizen group enforcement initiatives. Citizen groups frequently have varying, constantly evolving, and diverse enforcement goals. This requires regulated entities to devote greater time and resources to ensuring their actions are defensible to challenges from a broad range of citizen groups and interests.

While it is possible to analyze general trends and themes in citizen suit enforcement (as discussed further below), such assessment is by no means comprehensive. It takes time and effort, as well as discretion, to figure out environmental group initiatives — and to then assess resource distribution to address the same. Even then, surprises can occur.

---

17 EPA National Enforcement Initiatives, *available at*: http://www2.epa.gov/enforcement/national-enforcement-initiatives.

18 *Id*.

19 EPA, National Enforcement Initiative: Ensuring Energy Extraction Activities Comply with Environmental Laws, *available at*: http://www2.epa.gov/enforcement/national-enforcement-initiative-ensuring-energy-extraction-activities-comply.

20 *Id*.

21 *Id*.

[2] — Inconsistent Interpretations.

Figuring out what initiatives citizen groups are focused on is a valuable way to appropriately direct resources, but it is not enough. Citizen groups often have differing interpretations, within those bigger picture initiatives, of what constitutes compliance.

The coal ash and coal mining water enforcement context provides a great example of the varied, and often disparate, enforcement priorities of different citizen groups. In the coal context, agency enforcers have actually become potential industry allies where industry and agencies are in agreement, but citizen groups seek to enforce *alternative* interpretations of regulatory requirements.

For example, in a recent CWA citizen suit, several citizen groups alleged a coal company had violated boilerplate provisions in its National Pollutant Discharge Elimination System (NPDES) permits.[22] The case centered on the ENGOs' novel interpretation of a standard permit condition that required compliance with total maximum daily limits (TMDLs) and TMDL implementation plans. The ENGOs insisted that this provision required immediate compliance with TMDLs developed after permit issuance, despite language in the TMDL document itself that the state agency would conduct a phased implementation.[23] In support of its defense, the coal company sought affidavits and assurances from the state agency that it was in compliance with its permits.[24] Based on this agency information, the court granted summary judgment to the coal company, stating:

> "[The company] has produced further evidence of [the agency's] interpretation of the permit language, as well as the opinions of agency officials that [the company] is in compliance with the permit conditions. Plaintiffs do not challenge the fact of the agency's interpretation of the permit conditions or the relevant statutes, but

---

22 Southern Appalachian Mt. Stewards v. Red River Coal Co., 2015 U.S. Dist. LEXIS 48483, *1-3 (W.D. Va. 2015).

23 *Id*.

24 *Id*. at *3.

> merely [the company's] compliance with the permit. Therefore, there is no genuine issue of material fact to preclude summary judgment. I find that [the company] is entitled to summary judgment in its favor."[25]
>
> Coming up with an appropriate defense to alternative ENGO interpretations of environmental laws will be a critical challenge for industry in the coming years. Agencies who do not want to see their own hard work and interpretations undermined by these citizen suits may become important allies.

[3] — Questions about Accuracy of Data.

While industry is generally responsible for producing, verifying, and submitting environmental data to regulators, environmental groups have become increasingly sophisticated at harnessing this raw data to support their own enforcement efforts. It is imperative that industry continue to strive for precision in data production, but also that industry collect and disseminate data in such a way that minimizes opportunities for misinterpretation in the enforcement realm.

Moreover, environmental groups are collecting their own data by using new, unproven, non-standard sources.[26] That data can be compiled on public websites often without prior interpretation and analysis by trained personnel.[27] The very way in which data is generated often creates a recipefor misunderstanding – and potentially misdirected and costly enforcement.

---

25 *Id*. at *4.

26 *See e.g.*, Riverkeeper Citizen Testing Data, http://www.riverkeeper.org/water-quality/citizen-data/; *cf*, EPA Developer Central, http://developer.epa.gov/category/apps/ (last visited July 6, 2015) (describing several apps that utilize EPA data); *see also*, Virginia Department of Environmental Quality Draft 2014 305(b)/303(d) Water Quality Assessment Integrated Report, http://www.deq.virginia.gov/Portals/0/DEQ/Water/WaterQualityAssessments/IntegratedReport/2014/ir14_Integrated_Report_All.pdf (Dec. 15, 2014), at 3 (describing the Agency's screening criteria for using data collected by citizens. "Quality assurance and quality control (QA/QC) continue to be a concern for regulatory use of "outside" data, and DEQ has made a considerable effort to improve the data quality of outside data providers by reviewing monitoring protocols and holding training events.").

27 *See e.g.*, *Clean Water Can't Wait*, Sierra Club, http://content.sierraclub.org/coal/and-water (last visited July 6, 2015).

[4] — No Preemption of Other Citizen Lawsuits.

While a regulated entity may be defending statutory claims pursuant to environmental law, such claims do not necessarily preempt the filing of tort claims or even separate citizen suits regarding the same issues. Agency enforcement can act as a bar to citizen lawsuits, but a citizen suit does not similarly bar tort claims.[28] Frequently, citizen groups will use a mixture of statutory and tort claims, such as trespass and nuisance-based claims, to broaden the scope of litigation and the potential scope of relief. Similarly, a citizen suit would not statutorily bar a separate citizen lawsuit — for example, where various citizen groups do not agree on a legal interpretation.

In a seminal case, the Supreme Court found that the CWA did not prohibit state nuisance claims.[29] Recently, the Third Circuit similarly held that there is "nothing in the Clean Air Act to indicate that Congress intended to preempt source state common law tort claims."[30] The Supreme Court denied certiorari in the case, leaving the Third Circuit decision intact.[31] Environmental groups continue to use the Third Circuit precedent to bring tort claims under CAA.[32] The law in this area is a fast-moving target and thus particularly hard to defend against liabilities.

§ 4.05. Minimizing Citizen Enforcement Risks.

Given the many challenges associated with citizen enforcement, it is important that industry – particularly those associated with coal power production – try to get ahead of these risks, to the extent possible. The following "Top 10" enforcement initiatives in the water area reflect recent litigation initiatives by citizen groups. Based on these overarching themes, this chapter lays out potential strategies coal power utilities should consider in addressing these themes and minimizing risks associated with such themes.

---

28 C.W.A. §§ 309(6)(A)(iii) and 505(b)(1)(B).

29 International Paper Co. v. Ouellette, 479 U.S. 481, 497-499 (1987).

30 Bell v. Cheswick Generating Station, 734 F.3d 188, 198 (3d Cir. Pa. 2013).

31 GenOn Power Midwest, L.P. v. Bell, 134 S. Ct. 2696 (June 2, 2014).

32 *See e.g.*, Luppe v. Cheswick Generating Station, 2015 U.S. Dist. LEXIS 9791 at **1-2 (W.D. Pa. Jan. 28, 2015).

[1] — Environmental Citizen Group "Top 10" Coal/Water Initiatives Cheat Sheet.

While it is infeasible to capture fully the agendas of all environmental citizen groups, synthesis — with focus on coal power utility and water initiatives — of a variety of citizen groups' messaging reveals a top 10 list of current initiatives for company consideration. These initiatives are being pursued by one or more of various ENGOs, including, for example, the Southern Environmental Law Center, Sierra Club, Clean Water Action, Earthjustice, and various Riverkeeper affiliates, among others. These initiatives demonstrate the multi-faceted attack on coal that is underway — addressing water inputs, waste and water outputs, alterative usages, etc. The following 10 areas have become enforcement priorities for ENGOs:

1. Coal Mining/Mountaintop Removal — focusing on impacts to waterways and eliminating coal as a power production source
2. Coal Ash — focusing on impacts to water ways and removal of ash to lined impoundments away from surface waters
3. Coal Production and Water — focusing on impacts to surface waters from coal power production and waste water discharges
4. Stopping Coal Exports — focusing on elimination of coal exportation (*e.g.*, as an alternative to coal power production in the United States)
5. Water Supply — focusing on protecting water supply and quality (*e.g.*, through involvement in disputes involving power production water sources such as the "Tri-State Water Wars" between Alabama, Georgia, and Florida)
6. Nutrient Pollution — focusing on water impacts from human sources of nitrogen, such as power production
7. Stormwater Pollution — focusing on stormwater impacts, including from industrial sectors (*e.g.*, power production/mining — particularly decommissioning activities) and construction projects (*e.g.*, linear power lines)
8. Toxic Chemicals out of Waterways — focusing on water impacts from toxic chemicals such as those associated with power production

9. Ocean Acidification — focusing on water impacts, such as ocean acidification and warming, resulting from carbon dioxide (such as that associated with coal power production)
10. Project/Area-Specific — focusing on project/area specific impacts (*e.g.*, plant construction, particularly in environmentally-sensitive areas)[33]

[2] — Citizen Lawsuit Battlegrounds.

Across these ENGO enforcement initiatives, common themes and strategies become apparent.

[a] — Narrative Conditions.

Many ENGOs are attempting to enforce narrative permit conditions, typically raising issues of interpretation and proof in such suits. Because narrative limits are not as easily applied as numeric limits where it is as simple as comparing Discharge Monitoring Report (DMR) data to permit limits, ENGOs are attempting to force their own interpretation of what they believe the narrative criteria should actually require via citizen lawsuits.

[b] — "Point Source" Expansion.

Many environmental groups have also pushed for continued expansion of the scope of what is considered a "point source" under the CWA. For example, in *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, a citizen group claimed that stormwater running off of defendants' utility poles washed a wood preservative chemical from the poles to surface waters and alleged that such discharge established the power poles as point source dischargers.[34] The Ninth Circuit found that the power poles were not point sources because the generalized stormwater runoff from the poles did not represent a discretely collected and conveyed system discharging to waters

---

33 *See generally*, Southern Envtl. Law Center. https://www.southernenvironment.org/our-programs; Sierra Club, www.sierraclub.org/about; Clean Water Action, www.cleanwateraction.org/about; Earth Justice, earthjustice.org/our_work; River Keepers, www.riverkeepers.org/index.php/base/page/about_us.

34 Ecological Rights Found. v. Pac. Gas & Elec. Co., 713 F.3d 502, 504 (9th Cir. Cal. 2013).

of the United States and that such runoff was in compliance with the CWA.[35] In another example, *Decker v. Northwest Environmental Defense Center*, the Supreme Court considered whether EPA's industrial stormwater regulations applied to stormwater from logging roads channeled into ditches, culverts, and channels that discharged into nearby rivers and streams.[36] The Court found that EPA reasonably interpreted its own regulations in excluding the type of stormwater discharges from logging roads at issue in the case and afforded EPA deference in its interpretation.[37]

[c] — Expansive WOTUS Definition.

Another battleground for citizen lawsuits is the scope of the definition of "waters of the United States" (WOTUS), the basis for CWA applicability.[38] This battle is being waged on various fronts, including groundwater, groundwater hydrologically-connected to surface water, and in EPA's new WOTUS Rule. For example, in *Cape Fear River Watch, Inc. v. Duke Energy Progress, Inc.*, the court considered CWA applicability to hydrologically-connected groundwater and held "that Congress did not intend for the CWA to extend federal regulatory authority over groundwater, regardless of whether that groundwater is eventually or somehow 'hydrologically connected' to navigable surface waters."[39] Similarly, in *Chesapeake Bay Found., Inc. v. Severstal Sparrows Point, LLC*, the court concluded that "discharge from migrations of groundwater . . . is not point source pollution, however, but nonpoint source pollution. . . . There is no basis for a citizen suit for nonpoint source discharges under the CWA."[40] However, there is conflicting law on this topic, in great part due to conflicting interpretations asserted in citizen

---

35 *Id.* at 509-510.

36 Decker v. Northwest Envtl. Defense Ctr., 133 S. Ct.1326, 1330-1331 (Mar. 20, 2013).

37 *Id.*

38 80 Fed. Reg. 37054 (June 29, 2015).

39 Cape Fear River Watch, Inc. v. Duke Energy Progress, Inc., 25 F. Supp. 3d 798, 810 (E.D.N.C. 2014).

40 Chesapeake Bay Found., Inc. v. Severstal Sparrows Point, LLC, 794 F. Supp. 2d 602, 619-20 (D. Md. 2011).

suits.[41] Similarly, through EPA's recent WOTUS rulemaking and associated proceedings, citizen groups are pushing for an ever-broadening scope of what constitutes a "water of the United States."[42]

[d] — Compliance Demonstration.

Another area of significant legal development in citizen suits relates to case dismissal where there has been no prior agency enforcement due to agency finding of compliance. Under existing law, the CWA provides a 60-day waiting period following a citizen giving notice of its intent to sue.[43] This period is designed to give EPA and/or the state an opportunity to step in and commence its own enforcement action. However, the CWA does not provide a mechanism for EPA to demonstrate its finding that no enforcement is appropriate. An example of this can be found in the *Red River* case where, as discussed above, the agency deemed the company in compliance with the requirements that the citizen group alleged as violated.[44] Ultimately, the company successfully defended against citizen suit by filing with the court agency affidavits/declarations of compliance.[45]

[e] — Residual Liability.

ENGOs are also looking to expand residual liability — *i.e.*, redress for the impacts of wholly past violations, even when alleged violations have been addressed. *Gwaltney* firmly established that citizen suits do not provide relief for "wholly past" violations. [46] However, since *Gwaltney*, there has

---

41 *See e.g.,* Friends of Santa Fe County v. LAC Minerals, Inc., 892 F. Supp. 1333 (D.N.M. 1995).

42 80 Fed. Reg. 37054, 37095-37096 ("Several commenters supported the approach that the single point of entry watershed was an appropriate scale to use to measure effect on traditional navigable waters, interstate waters, or the territorial seas. Other commenters felt the single point of entry watershed was too small to capture all the benefits that waters that do not meet the definition of adjacency contribute."); ("[c]ommenters suggested additional subcategories of waters be considered as jurisdictional or as similarly situated by rule, such as playa lakes, kettle lakes, and woodland vernal pools.")

43 33 U.S.C. § 1365(b).

44 Southern Appalachian Mt. Stewards v. Red River Coal Co., 2015 U.S. Dist. LEXIS 48483, *1-3.

45 *Id*.

46 *Gwaltney*, 484 U.S. 49 at 64.

been significant litigation attempting to impose residual liability, even after the cessation of allegedly unlawful activity, for penalties, injunctive relief, or other issues. For example, some courts have found they lack jurisdiction over citizen claims for civil penalties for wholly past violations of the CWA, but others have allowed claims for civil penalties even where violations have been resolved.[47]

[f] — Multiple Regulatory Frameworks.

Citizen groups are also challenging impacts regulated under one statutory framework under a separate agency framework. This presents unique situations for demonstrating compliance. For example, in recent coal ash litigation, the ENGO petitioner alleged CWA violations from a coal ash landfill rather than bringing RCRA claims.[48] The reverse, where an ENGO petitioner has brought RCRA claims based on impacts regulated under the CWA, has also occurred.[49] In yet another case, citizens asserted claims under the CWA for alleged impacts of air borne fugitive dust from rail cars.[50]

[g] — Permit Shield.

Another area of common attack is the scope of the CWA's Permit shield.[51] The CWA Permit shield provides that "[c]ompliance with a permit issued pursuant to this section shall be deemed compliance" for purposes of enforcement and citizen suits involving certain effluent limits, performance standards, and ocean discharges, but not toxic pollutants.[52] The permit shield's purpose is "to insulate permit holders from changes in various regulations during the period of a permit and to relieve them of having to

---

47 *See e.g.*, Dubois v. United States Dep't of Agric., 20 F. Supp. 2d 263, 270 (D.N.H. 1998); *but see In re* Southdown, Inc., Litig., 2000 U.S. Dist. LEXIS 6220 at *24 (D. Ohio 2000).

48 *See e.g.*, Complaint at 17-18, Sierra Club v. Virginia Elec. and Power Co., 2:15-cv-112 (E.D.V.A 2015).

49 Goldfarb v. Mayor & City Counc. of Baltimore, 791 F.3d 500, 502 (4th Cir. Md. July 1, 2015).

50 Alaska Community Action v. Aurora Energy Servs., 940 F. Supp. 2d 1005, 1009 (D. Alaska 2013), *rev'd and remanded* 765 F. 3d 1169 (9th Cir. 2014).

51 *See e.g.*, OVEC v. Alex Energy, Inc., 12 F. Supp. 3d 844, 856 (S.D.W. Va. Mar. 31, 2014); OVEC v. Fola Coal Co., 2013 U. S. Dist. LEXIS 178319, at ** 10-11 (S.D.W. Va. Dec.19, 2013); OVEC v. Elk Run Coal Co., 2014 U.S. Dist. LEXIS 509 , at *7 (S.D.W. Va. Jan. 3, 2014).

52 33 U.S.C. § 1342(k).

litigate in an enforcement action the question whether their permits are sufficiently strict."[53]

The Fourth Circuit crafted a legal test defining the availability of the CWA permit shield.[54] In *Piney Run*, the Fourth Circuit held that a NPDES permit will shield subsequent enforcement if: (1) the permit holder complies with the express terms of the permit and the CWA's permit application requirements and (2) the permit holder's discharges were within the "reasonable contemplation" of the agency when the permit was issued.[55]

In recent years, the Fourth, Sixth, Seventh, and Ninth Circuits have issued opinions interpreting the scope of the permit shield, and in many cases limiting the permit shield or at least complicating its application. For example, a recent decision of the Sixth Circuit reinforces the importance of full disclosure to the permitting agency.[56] The Sixth Circuit found a coal company was shielded from CWA liability for discharges exceeding state water quality standards by a state NPDES general permit.[57] The decision stands in stark contrast to another prior Fourth Circuit decision — *Southern Appalachian Mountain Stewards v. A&G Coal Corp.* — with the primary difference being what was disclosed to, and within the reasonable contemplation of, the state when it issued the permit.[58]

The Seventh and Ninth Circuits have also addressed the permit shield. The Seventh Circuit held that Wisconsin's decision to regulate stormwater discharges through a mining permit (rather than through a separate NPDES permit) still allowed the permittee to invoke the protections of the permit shield, deferring to the state to determine which permit was appropriate for compliance.[59] In *Alaska Community Action on Toxics v. Aurora Energy*

---

53 E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112, at n. 28 (1977).

54 Piney Run Pres. Ass'n v. Cnty. Comm'r, 268 F.3d 255, 259 (4th Cir. 2001).

55 *Id*., *see also*, *In Re* Ketchikan Pulp Co., 7 E.A.D. 605, 621 (EAB May 15, 1998) (holding that when a permittee makes "adequate disclosures" in a NPDES permit application, unlisted pollutants may be shielded even if they are not specific permit conditions.).

56 Sierra Club v. ICG Hazard, LLC, 781 F.3d 281, 286 (6th Cir. Jan. 27, 2015).

57 *Id*. at 288-289.

58 Southern Appalachian Mt. Stewards v. A&G Coal Corp., 758 F.3d 560, 565-567 (4th Cir. 2014).

59 Wisconsin Resources Protection Counc. v. Flambeau Mining Co., 727 F.3d 700, 704, 711 (7th Cir. 2013).

Services, the Ninth Circuit held that the "plain terms" of a general permit prohibited defendant's non-stormwater discharge of coal.[60] This litany of litigation over the scope of the CWA's permit shield illustrates just how active citizen groups are becoming on further refining CWA jurisprudence.

[h] — Other Procedural Grounds.

Standing and abstention are two additional areas — often asserted in defense of citizen suits — that are ripe grounds for argument in citizen lawsuits. Standing generally requires demonstration of injury in fact, fairly traceable to the actions of the defendant, and likely to be redressed by the court.[61] Courts have traditionally taken a broad view of standing.[62] As more and more citizen suits are filed, often where the harm to the plaintiff is much attenuated from the act carried out by the defendant, citizen groups continue to push for a broader interpretation of standing.

Similarly, abstention is frequently asserted in citizen suit defense. Under *Burford v. Sun Oil Co.,* federal courts should abstain from asserting jurisdiction over cases that primarily concern issues of state law where timely and adequate state-court review is available.[63] *Burford* abstention is proper if a case: (i) presents difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result then at bar, or (ii) if its adjudication in a federal forum would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.[64] The Fourth Circuit exercised its *Burford* abstention authority in the context of a citizen suit brought under the CAA. In *Sugarloaf Citizens Ass'n v. Montgomery County, Md.,* the court upheld a district court's decision to abstain from hearing a case in which an environmental group challenged the decision of a state environmental agency

---

60 Alaska Cmty. Action on Toxics v. Aurora Energy Servs., LLC, 765 F.3d 1169, 1172 (9th Cir. 2014)..

61 Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180-181 (2000).

62 *See e.g., id.*

63 Burford v. Sun Oil Co., 319 U.S. 315, 317-318 (1943).

64 New Orleans Pub. Serv. Inc. v. Council of New Orleans, 491 U.S. 350, 361 (1989) (quoting Colo. River Water Conservation Dist. v. U.S., 404 U.S. 800, 814 (1976)).

to grant certain construction and disposal permits to the defendants.[65] The plaintiffs in *Sugarloaf* couched their claims as arising under a citizen suit provision of federal environmental law.[66] After analyzing the complaint, however, the Fourth Circuit held that the citizen suit "did nothing more than resurrect in a different forum objections to a proposed" state permit.[67]

§ 4.06. Defense Strategies.

With this list of citizen suit enforcement trends in mind, there are actions that companies can take now that could minimize risk of liability arising from citizen lawsuits.

[1] — Comprehensive Permit Applications/Conditions.

Coal power utilities should develop permit applications with an eye toward potential future citizen enforcement. The permit application process is when a utility begins building the administrative record that will serve as the basis for defense against citizen suits subsequent to permit issuance. Therefore, it is critical to fully disclose all material facts in permit applications. As discussed above, full disclosure is also vital to a permit shield defense.[68] Also, utilities should beware of overly broad "boilerplate" conditions.[69] Another good idea is to cross-reference to coverage of impacts under separate regulatory programs to shore up later defense.[70]

---

65 Sugarloaf Citizens Ass'n v. Montgomery County, Md., 1994 U.S. App. LEXIS 21985, at *2 (4th Cir. 1994).

66 *Id*. at *4.

67 *Id*. at 24; *see also* Jamison v. Longview Power, LLC, 493 F. Supp. 2d 786, 791 (N.D. W. Va. 2007) (dismissing Clean Air Act suit under *Burford* abstention as collateral attack on West Virginia permit); *see also*¸ S. Alliance for Clean Energy v. Duke Energy Carolinas, LLC, 2009 U.S. Dist. LEXIS 56733, at *16 (W.D.N.C. 2009) (abstaining from case and instead deferring to state administrative review of air permits).

68 Southern Appalachian Mt. Stewards, 758 F.3d at 564. (4th Cir. 2014).

69 *See e.g*., Attachment 4 to Duke Energy Carolinas, LLC's Motion to Dismiss in Yadkin Riverkeeper Inc. v. Duke Energy, Case No. 1:14-cv-00753-LCB-JEP (N.C. M.D. 2015) (NPDES permit for the Buck Steam Station, which states: "The permittee shall conduct groundwater monitoring to determine the compliance of this NPDES permitted facility with the current groundwater Standards found under 15A NCAC 2L .0200. The monitoring shall be conducted in accordance with the Sampling Plan approved by the Division."); *see also*, Cape Fear River Watch, Inc. v. Duke Energy Progress, Inc., 25 F. Supp. 3d 798 (E.D.N.C. 2014) (bringing claims under the same provision).

70 *See e.g*., Complaint at 17, Sierra Club v. Virginia Electric and Power Co., 2:15-cv-112-RAJ-DEM (E.D.V.A 2015); *see also*, *Goldfarb*, 791 F.3d at 510-511 (4th Cir. Md. July 1, 2015)

[2] — Think Ahead About Potential Diligent Prosecution Bars.

Many environmental statutes include provisions that prohibit citizen suit enforcement when an agency is diligently prosecuting the permittee for the violations. The CWA diligent prosecution bar states that "No action may be commenced . . . if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action . . ."[71] The diligent prosecution bar applies where EPA or the state has issued a final order under the CWA or a comparable state law.[72]

If a company finds itself as the unfortunate subject of civil or administrative prosecution, it should seek clear documentation of aspects of the enforcement *(e.g.,* penalties and other jurisdiction-specific factors) that will later help demonstrate that the state law is "*comparable*" to the CWA. This might later preserve a diligent prosecution bar against citizen lawsuits. For example, in a Maryland citizen suit alleging RCRA and CWA claims, the Fourth Circuit held that EPA and the state were diligently prosecuting the defendant and that "the CWA citizen suit provision 'does not require government prosecution to be far-reaching or zealous. It requires only diligence.' Thus, a citizen-plaintiff cannot overcome the presumption of diligence merely by showing that the agency's prosecution strategy is less aggressive than he would like or that it did not produce a completely satisfactory result."[73]

[3] — Maintain Good Relationships with Agencies.

More than ever, maintaining a good relationship with agencies is critical given the precipitous increase in citizen suits. As discussed above, agencies play a key role in developing usable diligent prosecution positions, as applicable. Even without enforcement, agency confirmation of compliance (without prosecution) could become key evidence in subsequent citizen

---

(addressing cross-referenced requirements under RCRA and CWA permits and interpreting conflicting requirements between the two permits).

71 33 U.S.C. § 1365(b).

72 33 U.S.C. § 1319(g)(6)(A).

73 Chesapeake Bay Found., Inc. v. Severstal Sparrows Point, LLC, 794 F. Supp. 2d 602, 614, (D. Md. 2011) (*quoting* Piney Run Pres. Ass'n v. County Comm'rs, 523 F.3d 453, 459, (4th Cir. Md. 2008).

action, and permit application/condition negotiations with agencies are key to subsequent permit shield-based defense.

[4] — Set the Record Straight.

If a company is unlucky enough to receive a notice of intent to sue under an environmental citizen suit provision, the company should document inaccuracies in the allegations. One effective way to do this is to draft a formal written response before the 60-day notice period runs. If the citizen group proceeds, this could allow for later fee recovery.[74]

[5] — Consider Multi-Media Compliance Implications.

Even where compliant under one regulatory framework, coal power utilities should consider potential implications under alternative regulatory schemes (*e.g.*, state and federal, water and waste). For example, citizens have brought RCRA citizen suit claims based on impacts regulated under the water program, as well as CWA citizen suit claims based on impacts regulated under the waste program.[75] These cases illustrate the innovative, multi-media approaches ENGOs are taking to allege violations under alternative regulatory schemes.

[6] — Track Citizen Campaigns/Lawsuits.

As discussed above, EPA's enforcement initiatives are useful roadmaps for coal power utilities in allocating resources, but it is more difficult to identify citizen group priorities and tailor compliance efforts in the same way. Still, to the extent feasible, companies should seek to identify potentially applicable ENGO priorities by diligently tracking citizen group campaigns and lawsuits. Often citizen groups undertake systematic approaches to bringing cases that can provide some insight into future targets. For example,

---

74 *See e.g.*, Sierra Club v. Energy Future Holdings Corp. and Luminant Generation Co., Case No. 12-CV-108 ¶¶ 7, 67-70, Memorandum Opinion and Order, , Final Order (W.D. Tex. Mar.28, 2014).

75 *See e.g.*, *Goldfarb*,791 F.3d at 502; Complaint at ¶¶ 12-13, Sierra Club v. Virginia Elect. and Power Co., 2:15-cv-112-RAJ-DEM (E.D.V.A 2015).

citizen groups have been systematically bringing stormwater citizen lawsuits through various industries and locations.[76]

Similarly, impacts from impoundments across various industries (*e.g.*, coal ash, but also those associated with mineral processing/fertilizer production) have been a recent focus of enforcement. There are lessons from these efforts that could be applied to other types of impoundments. Tracking current litigation efforts by ENGOs can provide insight into potential future citizen group enforcement priorities.

[7] — Coordinate on Defense.

Finally, just as environmental groups frequently form ad hoc coalitions to target particular issues of mutual interest, industry should consider coordinating its own defense of these same issues. Such an approach allows for a stronger and more unified voice of industry, sharing of insights, and pooling of resources. The industry's best defense will be a coordinated effort.

§ 4.07. Conclusion.

The coal industry is under attack from environmental groups. Compliance with agency requirements is no longer enough. Coal power utilities need to take a proactive approach to reducing the likelihood of citizen lawsuits by ENGOs. Early preparation during the permit application process, continuing to build good relationships with agency officials, and improving data accuracy are important early steps. However, other pre-emptive strategies such as tracking the enforcement agendas that ENGOs are carrying out, preserving compliance and due diligence demonstrations, and mounting a coordinated defense to these agendas are becoming increasingly necessary. Taking these steps will help better position coal power utilities for defending citizen lawsuits.

---

76 *See e.g.*, Enforcement News & Archives, California Sportfishing Protection Alliance, http://calsport.org/news/category/campaigns/enforcement/ (last visited July 6, 2015).