"Notes on Section 505 CWA Citizen Suits," dated February 3, 1986.

ECDIC

Notes on Section 505 CWA Citizen Enforcement Suits, February 3, 1986

I. Statutory Framework

A. Citizens may sue any person violating a CWA "effluent standard or limit," or an AO. (Note that RCRA and proposed CERCLA provisions differ significantly insofar as they authorize citizen suits in response to imminent and substantial endangerments, a standard which arguably does not clearly specify what behavior by a regulated party can keep him out of trouble with citizens).

B. Federal courts may enforce the standard or limit and apply civil penalties for violations of standards, limits or orders.

C. Citizens may not sue if EPA or a State is "diligently prosecuting" a case in court, but may intervene as a matter of right.

D. A court may award the costs of litigation to any party where appropriate.

E. Citizens also may sue EPA to perform any nondiscretionary act or duty. (Note that courts are split on whether CWA enforcement by EPA is discretionary).

F. Pending CWA legislative amendments:

- o a Federal administrative penalty action would bar a citizen suit, but citizens would have the right to participate in an administrative hearing.

- citizen plaintiffs must provide copies of filed complaints to the Administrator and the Attorney General.

- citizen suit settlements could not be entered until 45 days after the Administrator and Attorney General receive copies.

- citizen suits to which the U.S. is not a party may not bind the U.S.

II. Numbers: Notices and Suits

A. Total Notices of Intent to Sue (NOIS): 380 (270: 2/85).

B. By NRDC: 95 (68: 2/85) (25% of Total).

C. By Sierra Club: 115 (82: 2/85) (30% of Total).

D. Against Municipalities: 50 (38: 2/85). Remainder against industrial direct dischargers. No notices for pretreatment violations, to our knowledge.

E. Most in Regions I, II, VI:

Region I: 89 (72: 2/85)

Region II: 73 (44: 2/85)

Region VI: 67 (50: 2/85)

F. About 30% - 40% of the NOIS result in Court actions by citizens. (The total number of active CWA citizen suits is about half of the number of active EPA CWA suits.)

G. Less than 1% of NOIS are dropped due to government enforcement.

H. A few suits have been finally concluded, although many have resulted in partial S.J. on liability. The majority of CWA enforcement cases resulting in new case law are now citizen suits.

III. EPA Responses

A. Upon receiving NOIS, Region reviews to determine if enforcement is underway or appropriate. Generally the Regional Counsel's Office is notified of the determination.

B. If EPA receives a proposed Consent Decree, there is apparently no consistent Agency response pattern.

IV. Legal Issues Arising in Context of Citizen's Suits

A. Standing - What must citizens allege? Basically, alleging that defendant's violating discharges affect a waterbody which a member of the plaintiff citizen group uses is enough.

B. A.O.s - Do they bar citizens' suits? Majority of courts holding no, that only a government action in court, or an administrative action "equivalent" to a court action, can bar a citizen suit.

C. May citizens sue (and impose penalties) solely based on past violations? One circuit court says no, most district courts say yes. Government has said that citizens must allege ongoing violation in good faith, but that potentially intermittent or recurring violation constitutes an ongoing violation.

D. Settlement - Does it bar subsequent Government enforcement for same violations? The Government believes not, but the courts have not decided this issue.

E. DMR's - Are they irrefutable admissions in support of Motion for S.J.? Most courts have held that defenses raised have been insufficient to preclude summary judgment on liability against defendant based on violations reported in DMRs.

F. Can money paid in settlement of a citizen suit go anywhere other than to U.S. Treasury? DOJ strongly believes the answer is no, but the courts have not directly ruled on this issue. Many citizen suit settlements provide for defendant to pay money to some environmental fund not directly associated with the plaintiff.

V. Other General Conclusions

A. Citizen suits are much more numerous under CWA than other statutes because:

- o civil penalties are available
- o DMRs are easily available to help identify violations
- o there are few defenses available to permit violations

B. No indication that EPA is not taking appropriate enforcement action, responding to priority problems. Citizen suit notices have prompted EPA court action in only a small number of cases.

C. No indication to date that Section 505 actions interfere with EPA actions.

D. Possible resource implications:

- o Citizen review of Agency files.
- o Agency review of noticed facilities and files.

- Plaintiff and or Defendant requesting Agency assistance.

E. With a few notable exceptions, citizens are winning the cases which are litigated.

F. On the whole, citizen suit settlements do not appear to result in penalties greater than those the government typically obtains. These settlements also typically award attorneys fees to citizens.

G. Regulatees suggest they will agree on less in permitting process and consent AO's if they are not protected from citizens' suits.

H. Agency needs better tracking of citizens' suits, from NOIS through conclusion, particularly because case law developed by citizen suits affects government enforcement. We expect to be asking cooperation from citizen plaintiffs to keep government better informed of filings and developing legal issues.