

ENVIRONMENTAL CITIZEN SUIT LITIGATION
IN THE UNITED STATES

Michael E. Wall, Senior Attorney
mwall@nrdc.org

Alex L. Wang, Senior Attorney
Director, China Environmental Law Project
awang@nrdc.org

There has been significant interest in establishing a “public interest litigation” system for environmental protection in China, particularly since the State Council issued its “Decision on Enhancing Environmental Protection under the Concept of Scientific Development” in December 2005. That Decision specifically designated public interest litigation as one of the key measures for long-term improvement to China’s environmental protection system. Officials, scholars, lawyers and NGOs in China have been debating what form such a system might take. One specific mechanism that has garnered particular interest in China is the “citizen suit” system of environmental litigation in the United States that allows members of the public and public interest groups to use the courts to enforce violations of environmental laws by polluters and by government.

Citizen suits were in part a recognition in the U.S. that government could never possibly have enough enforcement resources to monitor every single pollution source in the country and that citizens living near pollution sources would often be the most efficient and effective monitors of illegal pollution. In the United States, citizen suits have been extremely important to improving environmental enforcement, and, despite the concerns of some, the number of such suits has not skyrocketed, nor have citizen suits overburdened the courts with frivolous litigation. Moreover, in many instances, citizen suits serve as a mechanism for citizens to work together with the government to enforce violations of environmental law.

CITIZEN ENFORCEMENT OF U.S. ENVIRONMENTAL LAWS

1. Role of Citizen Suits in Enforcing U.S. Environmental Laws

In the United States, federal and state environmental agencies have the lead responsibility for enforcing federal environmental laws. However, the government often lacks the resources to bring cases against violators. In addition, in some instances, the government may lack the will to enforce because of the discharger's political or economic power.

Recognizing these limitations on governmental enforcement, Congress authorized private "citizen suits" to halt violations of many environmental laws. Citizen suits allow the people most directly harmed by the pollution – those who live, work, or play downwind or downstream from the violation – to protect themselves, their families, and their communities when the government does not act.

2. Legal Authority for Citizen Suits

Many U.S. federal environmental statutes are enforceable through citizen suits. Although the specific provisions of these statutes vary, they share three basic features. First, these statutes generally authorize two very different types of lawsuits:

- One type of lawsuit is an action against a polluter to enforce limits established by a regulatory agency on the defendant's pollution.
- The other type of litigation is a suit against the relevant federal environmental agency for failing to carry out a nondiscretionary duty under the environmental statute.

Second, there are important statutory limitations on citizen suits, which effectively ensure that governmental agencies can play the lead enforcement role and that private citizens cannot abuse law enforcement powers for inappropriate private gain:

- A private plaintiff generally may not bring an enforcement action against a polluter if the federal or state government has already brought, and is diligently prosecuting, an enforcement suit of its own. However, a private plaintiff may intervene where the federal or state enforcement action is still underway.

- A private plaintiff must generally provide written notice to the defendant, the federal government, and the state government before filing suit. The notice requirement allows agencies to decide whether to litigate the case themselves and also allows the parties to negotiate (and the defendant to try to achieve compliance) in advance of litigation.
- Under several of the statutes, advance notice of any judicial settlement of a citizen suit must also be provided to the federal government.
- Private plaintiffs generally cannot recover compensatory damages. Instead, civil penalties must be paid to the federal Treasury.

Third, the U.S. Constitution also imposes separate “standing” limitations on private enforcement of environmental laws.

4. Citizen Suits Have Proved to Be an Important Supplement to Governmental Enforcement of Environmental Laws

Citizen suits make up a relatively small proportion of total environmental enforcement litigation in the United States. From 1995 through 1998, for example, citizen suitors filed 216 complaints under the Clean Water Act (an average of 54 per year) and 12 complaints under the Clean Air Act (an average of 3 per year) across the United States.

Nevertheless, citizen enforcement plays an important role in ensuring that U.S. environmental laws are firmly and consistently enforced when the government fails to act. Between January 20, 1993, and May 5, 1995 – the most recent period for which data are available – Clean Water Act citizen suits resulted in \$3 million in civil penalties payable to the U.S. Treasury, \$10 million in penalties payable to state governments, \$61 million in quantified injunctive relief to address environmental harms, and additional injunctive relief that, while probably far greater in magnitude, was never quantified.

CASE STUDY: *FRIENDS OF THE EARTH v. LAIDLAW*

Laidlaw owned and operated a hazardous waste incinerator located in Roebuck, South Carolina. As part of its operations, Laidlaw discharged treated wastewater from its incinerator into the North Tyger River. Laidlaw had a Clean Water Act permit that governed these discharges. That permit limited Laidlaw's discharge of antimony, arsenic, cadmium, chromium, copper, lead, mercury, nickel, total organic carbon, total dissolved solids, total suspended solids, and zinc. The permit also regulated the flow, temperature, toxicity, and pH of Laidlaw's effluent, and imposed monitoring and reporting requirements on Laidlaw to ensure that it complied with these requirements.

On April 10, 1992, two environmental organizations, Friends of the Earth (FOE) and Citizens Local Environmental Action Network (CLEAN), sent a letter to Laidlaw, the U.S. Environmental Protection Agency, and South Carolina's environmental agency stating that FOE and CLEAN intended to sue Laidlaw under the Clean Water Act for violating its permit. In May, after receiving this letter, the state agency required Laidlaw to confer with the state. Because Laidlaw was concerned about the imminent citizen suit, it asked the South Carolina environmental agency to bring a preemptive suit. Cognizant that the Clean Water Act precludes independent citizen enforcement when the government is diligently prosecuting a suit (and apparently believing the state agency would be more lenient on it than the injured downstream plaintiffs), Laidlaw wanted the South Carolina environmental agency to sue Laidlaw and settle before the sixty-day notice period had expired. The state environmental agency agreed to do this. On June 9, 1992, Laidlaw filed a judicial complaint against itself, on behalf of the state agency. Laidlaw had drafted the judicial complaint naming itself as a defendant and even paid the state's filing fees. On June 10, 1992, a state judge approved a settlement between Laidlaw and the state agency, under which Laidlaw paid the state a \$100,000 penalty. This penalty amount was negotiated without any specific evaluation of the seriousness of Laidlaw's violations or any calculation of the economic benefit that Laidlaw had received by delaying implementation of necessary pollution controls until 1995.

Two days later, on June 12, 1992, FOE and CLEAN filed suit. Laidlaw promptly moved to dismiss, arguing that the prior, completed state enforcement action barred the citizen litigation. The district court disagreed, concluding after seven days of trial that the state had not “diligently prosecuted” its suit and therefore had not precluded independent citizen enforcement. The district court was particularly troubled that the penalty amount assessed by the state was insufficient to take away Laidlaw’s economic benefit from noncompliance (*i.e.*, insufficient to remove Laidlaw’s incentive to violate the law).

The U.S. Department of Justice, representing the federal Environmental Protection Agency, supported the district court’s conclusion that South Carolina had not diligently prosecuted its collusive lawsuit against Laidlaw. The Justice Department’s brief stated that “resource limitations do not allow the government to pursue all violations that warrant enforcement,” and therefore the United States perceived “a strong interest in ensuring that citizens may enforce the [Clean Water] Act to the full extent intended by Congress and allowed by the Constitution.”

Following a further trial, the district court found that, between 1987 and 1995, Laidlaw had violated its permit limit for mercury on 489 days. (On most of these days, Laidlaw exceeded its permit limit for mercury by 100 percent; on some days, Laidlaw exceeded the mercury limit by as much as 1000 percent. Although Laidlaw gradually added additional pollution control equipment and reduced its mercury feed rate, the facility did not consistently comply with its mercury limit until 1995.) The district court also found that Laidlaw had violated the permit’s monitoring requirement 420 times and reporting requirement more than 500 times. A failure to monitor can be particularly serious, because it may mask additional discharge violations.

The district court imposed a \$405,800 civil penalty. The court reasoned that Laidlaw had benefited economically from its violations and that a penalty of this amount was sufficient to deter Laidlaw from future violations. However, the Court declined to enjoin Laidlaw from future violations, reasoning that the plaintiffs had not shown any “significant harm” to the environment and that Laidlaw had already achieved substantial compliance.

On appeal, the U.S. Court of Appeals for the Fourth Circuit questioned whether Laidlaw's compliance, after 1995, eliminated the plaintiffs' standing or rendered the case moot. In its brief, the United States asserted that a defendant's voluntary cessation of illegal activity, in response to the filing of a complaint, could not render a plaintiff's lawsuit moot unless the defendant could prove that it was "absolutely clear" its illegal conduct could not reasonably be expected to recur. The court of appeals, however, rejected this analysis, concluding that the case was moot because the prerequisites for standing – an injury caused by the defendant and redressable by the Court – did not persist once Laidlaw achieved substantial compliance. The Court reasoned that an award of civil penalties, payable to the U.S. Treasury, would not redress the plaintiffs' injury from what were, in the court's view, entirely past violations. Because the Court found the case moot, it also denied the plaintiffs' claim for attorneys fees.

The practical implication of the Fourth Circuit's ruling would have been to remove the defendant's incentive to comply fully with the law until the eve of judgment. Late compliance would still be sufficient to moot a citizen enforcement lawsuit. The Fourth Circuit's ruling would also have compromised the ability of private organizations such as FOE and CLEAN to bring citizen suits, because doing so requires substantial resources. If, as the Fourth Circuit held, a defendant's post-complaint compliance could render a lawsuit moot, including a claim for attorney fees, plaintiff organizations could be forced to finance such ultimately unsuccessful cases out of their own pockets, with little or no hope of recovering attorney fees for this work..

The Supreme Court agreed to hear the case on petition for certiorari and promptly reversed. Addressing standing first, the Supreme Court held that the plaintiffs' members – who lived near the river and would have used it but for pollution – had shown a sufficient injury to support standing even though the plaintiffs had not proven that Laidlaw's discharges actually harmed the environment. The "relevant inquiry," the Court held, was injury to the plaintiffs, not to the environment, and there was "nothing 'improbable' about the proposition that a company's continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms." Next, addressing mootness, the Court adopted the "voluntary cessation" analysis that the Justice Department had proposed to the Court of

Appeals. The Supreme Court thus concluded that, before the case became moot, Laidlaw would have to show that it was “absolutely clear” that its violations “could not reasonably be expected to recur.” The court also concluded that the prospect of future violations could be redressed by the deterrent effect an award of civil penalties would have on Laidlaw. Because the Court reversed on these issues, it had no occasion to decide FOE and CLEAN’s entitlement to attorney fees and left that issue for the lower court to address on remand.

Laidlaw illustrates several important principles of citizen litigation, including both the need for and some of the limitations on citizen suits. Laidlaw also reflects the recognition by the federal government that citizen suits are a critical element of a robust and even-handed enforcement program. The Supreme Court’s decision answered a number of additional, lingering questions regarding the appropriate scope of citizen enforcement as well.