

# Recent Trends in CAA Citizen Suits: Managing Risk in the Serengeti

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Having been raised on a steady diet of *Mutual of Omaha's Wild Kingdom*, and later, the *Animal Planet*, it is not surprising that some of the concepts from these programs seeped into our legal practice. For a number of years, we have used an example with our corporate clients to illustrate environmental compliance issues—something we call the “Serengeti Principle.”

For those who skipped biology class, the Serengeti is an enormous grasslands-dominated area in Africa just south of the Tanzanian/Kenyan border. Due to the diversity and number of large mammalian species that inhabit the area—literally millions of wildebeest, zebra, lions, elephants, cheetahs, hyenas, leopards, giraffes, gazelles, among other species—the Serengeti has been the subject of a multitude of studies on animal behavior, especially hunting behaviors of large predators. One might naturally assume that a savannah filled with competing predators and millions of prey targets would be characterized by nonstop chaos and carnage-filled hunts. Not exactly. For the most part, predators and prey animals in the Serengeti coexist rather peacefully; that is, until the hunger drive gets strong enough, or more importantly for purposes of the Serengeti Principle, a suitable target for predation manifests itself. That is, although predators may be content to simply lounge around napping most of the day, even in a sea of ungulates, they can become acutely interested in hunting when they see an easy target—a young, inexperienced gazelle, an impala slowed by age, a limping gnu.

What does the Serengeti have to do with environmental compliance issues and citizen suits? Simply this: Just like lions or leopards, environmental plaintiffs have limited resources to expend on targets, whether the targets are zebra or industrial sources. While environmental enforcement agencies, activist groups, and industry generally exist together in relatively peaceful (if sometimes strained) coexistence, that dynamic can quickly change when a company creates the appearance of vulnerability. Minor chinks in the compliance armor can mean increased scrutiny and risks the unwanted attention of the environmental plaintiff. This article explores the history of citizen suits under the Clean Air Act, discusses recent trends that indicate that citi-

zen suits may be on the rise, and discusses how the Clean Air Act practitioner can attempt to manage those risks.

Over the past five years, citizen suits under the Clean Air Act (CAA) have increased dramatically and have created, for good reason, a great deal of uneasiness for industry. Part of this increase in citizen suit activity is due to new, rather novel legal theories, aided by “credible evidence” rules and the comprehensive permitting regime established by the Title V operating permit program. As environmental citizen groups have grown more sophisticated, they have become more and more adept at taking advantage of these new tools to separate the easy prey from the pack.

Although the CAA contains the first environmental citizen suit provision ever created, such suits were rare in the CAA's early days. Between the enactment of the CAA in 1970 and the CAA Amendments of 1990, there were approximately thirty cases that generated reported opinions, the majority of which dealt solely with procedural issues. Only eight reported cases in that time period reached the underlying merits of CAA citizen suits.

Several factors minimized CAA citizen suit activity prior to 1990. Before the CAA Amendments, citizen suits could only be brought for ongoing violations, could only achieve injunctive relief, and could only be proved through expensive, fairly infrequent stack tests or other U.S. Environmental Protection Agency (EPA) reference methods. These barriers seemed to persuade most environmental groups to stalk other game, namely those sources regulated by the Clean Water Act (CWA), under which self-monitoring and reporting requirements provided readily available evidence of violations.

The 1990 CAA Amendments altered this landscape in several ways. First, the Amendments added Title V, an operating permit program that combined all applicable requirements and emissions limitations for a facility into one document, making it easier for environmental groups to ascertain the emissions limits for each source, and broadening the types of potential violations that may support a citizen suit. Significantly, Title V requires all permittees to submit an annual compliance certification that documents each and every deviation, excursion, or excess emission that occurred over the course of the entire year. Second, the 1990 CAA Amendments adopted new monitoring and reporting requirements. For the first time, the emissions limits listed in each source's Title V permit easily could be compared with actual emissions data in the obligatory compliance reports to determine whether a

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citizen suit is viable. Third, the Amendments authorized citizens to seek not only injunctive relief, but also to seek an award of civil penalties if prevailing in a citizen suit. Even though the civil penalties, if awarded, must be paid to the United States Treasury, the availability of civil penalties as a remedy nevertheless increases the incentive to file citizen suits under the CAA because the penalties can be earmarked for environmental projects of special interest to a particular environmental constituency. Further, the threat of penalties offers additional leverage to persuade companies to settle prior to trial.

These changes effectively evened the score between CAA and CWA citizen suits by removing the barriers to CAA suits that previously had rendered them less attractive in the eyes of often resource-limited environmental groups. However, the CAA Amendments did not stop there—in addition to the changes listed above, the Amendments also authorized citizens to sue for past repeated violations. Because CWA citizen suits remain limited to circumstances involving ongoing violations, sources regulated by the CAA now appear to be the more tantalizing herd to those in search of easy prey.

The 1990 Amendments also enabled a final change to the CAA regulatory regime that perhaps would have the greatest impact on the viability of citizen suits. More particularly, Congress inserted the words “any credible evidence” into the provision of the CAA that lists the specific factors that may be considered in assessing penalties. Inspired by this new provision, EPA extended the application of this phrase in 1997 by endorsing the use of “any credible evidence” to prove emissions violations in what has become the “credible evidence rule.” Although EPA insisted that the new rule merely refined an “evidentiary issue” and therefore did not materially affect the stringency of existing emissions limits, the credible evidence rule reversed the twenty-five-year practice of relying solely on “reference test methods” as valid and appropriate evidence of CAA violations.

Despite EPA’s beliefs, many commentators and industry representatives have pointed out that such a drastic change in the rules regarding admissible evidence inevitably will have a substantial impact on the effective stringency of existing standards, particularly in light of the fact that the existing standards were set based on data originating from reference tests and on the assumption that those tests would be used to determine compliance. However, when Industry groups formally challenged the credible evidence rule, the D.C. Circuit held that in the absence of an underlying enforcement action, the issue of whether the

rule increased the stringency of existing standards was not ripe for review. See *Clean Air Implementation Project v. EPA*, 150 F.3d 1200, 1205 (D.C. Cir. 1998) (stating that until an enforcement action is brought on the basis of credible evidence, “there are too many imponderables . . . [making it] impossible for us to decide now what impact the rule will have.”).

The rule also has the potential to alter the burden of proof in CAA enforcement actions. Prior to the credible evidence rule, EPA and citizen plaintiffs were required to prove a source’s noncompliance by producing the results from the uniform and scientifically proven reference tests. With the credible evidence rule in place, however, plaintiffs can simply present virtually any conceivable indication of noncompliance (be it parametric data, computer modeling, continuous monitoring reports now required in most Title V permits, or even visible observations) and attempt to shift the burden to the defendant source to prove that such evidence is not credible. For example, sources will now be forced to explain away anomalies in operational performance if an environmental plaintiff can formulate an argument that such variation indicates increased levels of emissions.

The credible evidence rule also has the potential to dramatically reduce the level of certainty a source can enjoy with respect to its compliance. Under the old reference test regime, compliance with the applicable reference test generally assured a source that it was in compliance with its emission limits and shielded from any enforcement action. In contrast, the credible evidence rule now allows environmental plaintiffs to allege noncompliance in an increasingly large number of ways—if one type of evidence indicates a source is in compliance with its limits, the would-be plaintiff simply can switch to another type of evidence and try again. Under the credible evidence regime, all emissions data can become “fair game” in a lawsuit.

Moreover, recent technological advances have also expanded the types of evidence now available to plaintiffs under the credible evidence rule. For instance, the development of continuous emissions monitoring systems (CEMS) that record sources’ compliance on a continual basis provides much more potential evidence than the relatively infrequent monitoring programs that were the standard only a few years ago. Technological advances have increased the risk to sources in a variety of other ways. The arrival and expansion of the Internet, for example, has greatly facilitated the task of obtaining, analyzing, and distributing compliance information, reducing the cost of obtaining the evidence necessary to pursue a citizen suit.

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The combination of these two technological developments now allows environmental groups to gain access to actual emissions data, analyze it quickly for any potential violations, and then share it with the rest of the world at will and at very little expense. Moreover, the legal documents necessary for pursuing such claims, such as complaints, other pleadings, and depositions, can also be shared with other environmental groups around the country to facilitate the filing of identical claims in other jurisdictions. In other words, the complaint from a successful suit filed in California can now be downloaded, e-mailed, slightly edited, and filed in New York against a completely different defendant by a completely different plaintiff, all for the cost of the paper, filing fees, and the extra ink required to change the names on the complaint.

Certainly, many would argue that these changes are generally for the better; a more involved citizenry, equipped with more accurate and readily available information, will be able to aid governmental agencies in maintaining a cleaner environment for the benefit of this generation and those to come. Nevertheless, the new powers available to today's environmental plaintiff can be, and on occasion have been, abused. Regardless of the motives or merits behind individual citizen suits, regulated sources must be aware of the increased risk and variety of such suits to avoid becoming the easy target, the limping gnu.

### *New Hunting Grounds*

As citizen suits have become easier to file and cheaper to litigate, environmental groups have been able to file more suits more often. Currently, a new "notice of intent" to file a citizen suit (a procedural prerequisite for filing a citizen suit in court) is filed every day, and three out of every four reported environmental decisions begin as a citizen suit. Environmental groups today also are filing more suits in which environmental agencies have reviewed the emissions data submitted by an industrial source and affirmatively decided that no enforcement actions are warranted. This approach is in stark contrast to early suits which generally were filed merely to supplement the enforcement activities of state or federal environmental agencies. And, citizen suits are also becoming more common at the local level.

This increased volume and reduced per-suit cost also has produced a great deal of diversity in the causes of action alleged in modern citizen suits. The types of actions filed by environmental groups have begun to expand, now reaching well beyond the traditional suit for enforcement of established emissions limits. Significantly,

rather than focus on emissions of regulated pollutants, many environmental groups have begun concentrating on surrogates of pollution, such as opacity (which measures the degree to which emissions reduce the transmission of light and obscure the view of an object in the background), especially where those surrogates are continually monitored. For, example, to ensure compliance with opacity limits, many sources operate continuous opacity monitor systems (COMS), which are a type of CEMS, and measure opacity in six-minute increments. The resulting stream of information on opacity levels is then transmitted to the local environmental agency and available to the public upon request.

Unfortunately, COMS are not always accurate. Specks of dirt clinging to the lens of the monitor, the condensation of water vapor in exhaust gases, stuck shutters, or calibration problems can dramatically affect whether the reading on any given six-minute interval accurately reflects the amount of pollution being emitted from the source. Even so, under the credible evidence rule, such readings may now be accepted as evidence of a violation of an opacity standard by regulatory agencies and in courts of law.

The following four-step hunting technique has been adopted by environmental groups across the country in their ongoing efforts to force the installation of new pollution controls at industrial sources. Step One: obtain the publicly available excess emissions reports for a plant. Step Two: locate the high opacity measurements that are certain to have occurred (either accurately through normal variation in a source's operations, or inaccurately

through malfunctions such as those described above). Step Three: staple the printout to a complaint citing the citizen suit provision of the CAA (and file corresponding press release). And, finally, Step Four: move for summary judgment and/or seek a settlement.

Successful or not, execution of this procedure brands the unlucky target as "dirty," regardless of how well a plant is operated or how careful a source is in monitoring and controlling its emissions. For example, a coal-fired electric utility recently was sued by an environmental group for exceedances of its opacity limit that amounted to less than 1 percent of its operating time. In fact, the percentage of exceedances dropped to one-tenth of 1 percent once the exemptions in the source's permit (excess emissions that occurred during startup, shutdown, or malfunction) were factored in. To put this level of performance in perspective, EPA (and most states) generally do not consider enforcement of opacity exceedances to be a priority until the exceedances represent more than 5 percent of operat-

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ing time after taking into account all applicable exemptions, and even then only if the exceedances surpass the applicable standard by 15 percent or more. Although EPA's enforcement policy is manifested in a comprehensive written guidance document that acknowledges that a certain *de minimis* number of opacity exceedances are normal, even at very well-run plants, most Title V permit conditions do not contain a defined *de minimis* exemption for such exceedances. As such, the environmental plaintiff is not bound by these enforcement policies.

Regardless of actual performance, an opacity citizen suit paints an industrial source as a "dirty plant," forces the owner to engage in extensive, complex environmental litigation and, potentially, leaves the owner liable for civil penalties of up to \$32,500 per day, per violation. The penalties associated with opacity claims can add up fast. For a source whose COMS register high-opacity readings for 3 percent of its operating time during a year, the maximum civil penalty available in a citizen suit could theoretically (based on the per exceedance legal theory advanced by many environmental plaintiffs), amount to as much as \$85,410,000, even though EPA's enforcement policy suggests that such performance does not warrant any enforcement action. Moreover, such a source also will be responsible for attorneys' fees—both those hired by the source in its defense and those hired by the plaintiff in pursuit of the source—because the CAA authorizes the environmental plaintiff to recover its fees if successful.

The ultimate injury, however, often comes in the form of injunctive relief to reduce the surrogate for pollution (opacity) that may or may not have any correlation to the actual amount of pollution being emitted. Such injunctive relief may even result in an incentive to increase emissions of actual pollutants. For instance, for coal-fired electric utilities, many high COMS readings are simply a result of condensed water vapor (steam) that is introduced into the gas stream by other pollution control equipment known as "scrubbers," which are designed to reduce emissions of SO<sub>2</sub>, a regulated pollutant. In order to comply with a demand that all high COMS readings be avoided, even those caused solely by steam, a source that is under its SO<sub>2</sub> limit may find it necessary to reduce operation of the scrubber to reduce the production of steam that could lead to high COMS readings—essentially trading emissions of a regulated pollutant for reductions in steam, all in the name of ensuring that measurements of a surrogate of pollution do not inaccurately indicate an exceedance.

Another variety of citizen suit that transcends traditional enforcement of emissions limits can be seen in the

recent attempts by various environmental groups to join EPA in filing lawsuits under the CAA's New Source Review (NSR) program. In the late 1990s, EPA began its NSR Enforcement Initiative against various industries, including wood products, petroleum refineries, and coal-fired electric utilities. The initiative began with the request for millions of pages of documents under CAA § 114, which the agency then boiled down into allegations that certain projects should not have been initiated without first obtaining preconstruction permits and installing expensive "best available control technologies." EPA's initiative met with some success. For example, in the coal-fired utility sector alone, EPA spurred nine utilities into settlements that together exceeded \$5.5 billion. Although recent court decisions have cast doubt on the

merit of EPA's litigation claims, environmental groups continue to ride on the coattails of EPA's analysis, filing citizen suits that make nearly identical allegations to those claimed by EPA as part of its NSR Enforcement Initiative.

Another avenue of pursuit used recently by environmental groups is to attack either the siting of a source before it is constructed, or the permitting of a source before it has begun operations. In other words, instead of relying on the citizen suit provision of the CAA to allege various past violations, the environmental group will seek to delay or prevent future action such as the construction or operation of a new emissions source. Environmental groups begin by joining in the public participation

or "notice and comment" process that almost always accompanies the permitting agency's approval process for siting or permitting of a new emissions source. Then, if the environmental group disagrees with the decision of the agency as to where a source will be located or what limitations a source's permit will contain, the environmental group can file suit against the agency to block the proposed action.

Even if a citizen suit challenge is unsuccessful, it generally leads to significant delays in the construction or operation of the source. Making matters even more difficult are the sheer numbers of opportunities environmental groups have to challenge future industry plans. For example, a representative of the Sierra Club recently remarked with regard to the siting of a new power plant that the company "needs approvals and favorable court decisions on everything that is either being challenged or decided," but that "[f]or the opponents of those power plants, we only need to win on one." These "kitchen sink" challenges are becoming increasingly popular as environmental groups continue to exploit new information and commu-

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nication technologies to become ever more involved in local regulatory activities.

Environmental groups also have begun looking beyond the traditional CAA regulatory framework for opportunities to block the siting of new industry or force the installation of additional pollution controls. The common law of nuisance, for instance, has proved a fertile ground for the pursuit of environmental litigation due to its amorphous definition, which according to the *Restatement of Torts* generally includes “almost anything unpleasant, harmful, or disagreeable.” Using this very flexible area of tort law, environmental plaintiffs have even filed suit for emissions that are not regulated by the CAA at all, such as odors or carbon dioxide. Moreover, when the law of nuisance is combined with statutory claims under the CAA citizen suit provision (such as an opacity suit based on COMS readings), the resulting chimera can be particularly unpredictable. In such a suit, COMS reports conceivably could become the evidence of the nuisance, forcing the source to either contradict its own reports or argue that opacity is not “unpleasant” or “disagreeable.”

Bypassing the CAA confers certain benefits on the environmental plaintiff. By asserting claims outside of the CAA, environmental groups may also obtain remedies for damages that are not provided under the CAA. Under a traditional CAA citizen suit, a citizen can only seek injunctive relief or civil penalties payable to the United States Treasury. In common law nuisance claims, however, a citizen can request that actual and punitive damages be awarded directly to the citizen, typically, an adjacent landowner. For example, a district court in Alabama recently awarded \$20 million to landowners complaining of damage to property from air pollution, \$17 million of which were punitives. These types of successful hunts certainly will draw the attention of environmental groups looking for ways to obtain additional resources to fund additional lawsuits.

### *No More “Hakuna Matata”*

In a recent environmental newsletter issued by Business and Legal Reports, environmental groups advised that over the next several years, “litigation will be the tool of choice” and that “industry leaders should brace themselves for increased litigation and citizen involvement in permit issues.” Although perhaps daunting to corporate leaders, this is sound advice. First and foremost in dealing with the increasing risk of citizen suits is to recognize that such suits are on the rise and to take that risk seriously in the daily operation of any plant that emits anything that might be considered air pollution. It is important to remember that

the greater the visibility, the easier the target and the greater the prize for environmental groups seeking to make a statement to an industry or to appease its constituency.

Once the risk is understood, there are several ways to reduce the chances of falling prey to a CAA citizen suit. For example, it is extremely important to know your permits inside and out—every owner/operator of an emissions source should continually evaluate and track the applicable limitations in environmental statutes, regulations, and individual permits. It is important for employees to understand these limits and to recognize how their performance will affect the source’s ability to comply with those limits. Likewise, knowing the available exemptions to these limits is equally important to ensure such exemptions are only

relied upon when applicable and legally defensible. In today’s litigious climate, companies also must recognize that assurances by state environmental agencies that a source’s emissions performance is excellent, or even written EPA guidance that confirms those assurances, provides little or no deterrence to the environmental plaintiff.

Because periodic emissions reports now provide the backbone of evidence supporting future lawsuits, companies must exercise extreme care to ensure that the reports are accurate, and that any applicable exemptions are clearly presented. Furthermore, it is essential to build a record by augmenting required monitoring and reporting requirements with additional information that can be used to explain excess emissions events. For

example, should a source be faced with a COMS report that indicates several excess opacity events, data/log books indicating that those events were caused by a malfunction of the COMS could mean the difference between winning a citizen suit or paying millions of dollars for losing one.

Finally, to cope with citizen suits regarding future activities, such as siting or permitting a new plant, sources should investigate the possible delays such citizen involvement may cause and incorporate additional time into the planning and implementation process. Taking into account the delays likely to result from permit appeals can help businesses make better decisions when considering whether to construct a new emissions source, and can also ease the often tense relationship such projects may create with neighboring property owners and local activist groups.

At the end of the day, it is important to remember that, like the Serengeti, regulated industries and the environmental plaintiff can peacefully coexist and that the natural tension between these entities can help ensure a healthy environment. But for each individual source, it is important to avoid becoming the bottom of the food chain by appearing vulnerable in the sight of ever more sophisticated predators. 🌳

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