

NYT, June 5, 1999

Citizen Suits, Once a Weapon Against Polluters, Are Losing Their Power



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A quarter century after Congress gave citizens broad powers to enforce environmental laws through private lawsuits, judges across the country are cutting back so sharply on those suits that environmental groups have lost much of their power in court, legal experts on both sides of the issue say.

Rulings from the Supreme Court and judges across the country in recent years have limited when citizens and environmental organizations can sue to punish violators of pollution laws. The trend, some legal experts say, represents one of the least noted but most profound setbacks for the environmental movement in decades.

The idea that Americans could enforce environmental laws through "citizen suits" was one of the bedrock principles of the sweeping **antipollution** laws that were passed in the heyday of the environmental movement. Congressional sponsors in the early 1970s said regulators often became too close to the industries they regulated, and lacked the aggressiveness that concerned individuals would bring to the lawsuits.

Since the laws were passed, hundreds of citizen suits have been filed by environmental groups across the country, bringing millions of dollars in penalties to the government and scores of court orders to stop pollution. Environmentalists credit the suits with helping limit air pollution in the Tennessee Valley and cleaning up waterways from Santa Monica Bay on the West Coast to Chesapeake Bay on the East Coast.

"Now, 25 years later, it is harder and harder for those citizen suits to get into court," said John D. Echeverria, director of the Environmental Policy Project at Georgetown University Law Center in Washington. "In effect, the courts are invalidating congressional provisions granting citizens the right to enforce the environmental laws."

Unlike conventional civil suits by people seeking damages to be paid to them personally, the citizen suit provisions of the Clean Water Act, the Clean Air Act and other environmental laws authorized people to be "private attorneys general" to protect the environment.

The laws permit citizens to, in essence, stand in for the Environmental Protection Agency seeking injunctions to stop pollution and penalties from polluters to be paid to the U.S. Treasury.

Under these laws, it did not matter whether the plaintiff was physically harmed. For years, courts said it was enough, for instance, for a bird watcher to complain that

pollution would damage wetlands he used recreationally. But in recent years conservative judges have been saying that, even though the laws gave citizens the power to sue, many of the citizens who actually filed suits did not have enough of a stake in particular controversies to satisfy the Constitution.

The courts have gradually increased the legal tests for when such suits are permitted, often relying on a requirement in the Constitution that courts should resolve suits only when there are "cases" and "controversies." That requirement has long been interpreted as giving people legal standing to bring suits only when a plaintiff has a stake in a real dispute.

Lawyers for many businesses say the suits have given environmentalists the power to harass industry with the threat of large penalty assessments for highly technical violations of the environmental laws when the citizens had no real interest. Critics say environmentalists have used the suits to push the courts toward what they see as unwarranted activism.

The reversal of course has drawn little public notice. It has occurred gradually, but has been accelerating lately and influenced by a series of Supreme Court decisions since 1990 written by Justice Anthony Scalia. Some environmentalists now say a law review article he wrote before he was appointed to the court was a blueprint for erosion of the environmental laws. It called for limitations on when citizen suits would be permitted.

The latest case on the issue, which began here in the Piedmont section of South Carolina, will be considered by the justices this fall. Some experts say the case could bring the most far reaching test of the citizen suits yet.

The case involves a hazardous waste incinerator that released mercury into the North Tyger River here. The incinerator was assessed a penalty of \$405,800 by a federal district judge in Columbia, Joseph F. Anderson, Jr., who found that Laidlaw had violated its permit limiting the amount of mercury it could release 489 times. Anderson found that the permit limits on Laidlaw's release of mercury were low and concluded there had been no harm to the environment, but he assessed the fine because the company had released mercury in excess of the legal limit. 

But the U.S. Court of Appeals for the Fourth Circuit overturned the ruling, noting that the incinerator owner had stopped releasing excess mercury after the suit was filed. The court said the fact that any pollution had ceased meant the citizens had no injury that should be redressed by the courts. Penalties paid to the government, the appeals decision said, "cannot redress any injury suffered by a citizen plaintiff." Environmentalists say such decisions give industry a "license to pollute" because all managers must do to avoid paying penalties is stop polluting after they have been caught. But the company involved, Laidlaw Environmental Services, says the decision exposed the absurdity of companies spending years in court battles over technical violations that have long since ended. The incinerator here is no longer operating. 

"A lot of these lawsuits are brought without ascertaining whether there's a serious environmental problem, and this is a classic case," said Donald A. Cockrill, a Greenville, S.C. lawyer for Laidlaw.

But people who live here say they worried for years about acrid or supersweet odors from the site, and chemicals in the North Tyger. Some of them say the appeals court ruling meant that ordinary Americans lost their voice in environmental battles.

"If people who live in these places cannot have a say in what's going on, then everything and everybody in this country is in trouble," said Judy Pruitt, a resident here who fought the incinerator for years.

Some conservatives say the trend of limiting environmental suits is a needed correction after years of what they say amounted to blackmail in suits against businesses. M. Reed Hopper, an environmental law specialist at the conservative Pacific Legal Foundation, said, courts have grown hostile to what he called legal "terrorism" in the citizen suits. "In some cases the citizen suits are putting a small business at risk of a multimillion dollar judgment for a technical violation," Hopper said. 

Beginning in 1990, the Supreme Court has restricted the environmental suits. Federal trial and appeals courts across the country have extended those decisions. Rulings in Texas, Pennsylvania, New Hampshire, California and other states have imposed various limits on the suits and, in some cases, dismissed them entirely.

Some judges have said the citizen suit provisions improperly expand the role of the courts. "The federal judiciary is not a back-seat Congress nor some sort of super-agency," David B. Sentelle, a conservative judge on the U.S. Court of Appeals for the District of Columbia, said in a majority opinion in a suit involving wetlands pollution.

In a forthcoming academic article on the increasing hurdles to citizen suits, Professor Echeverria and a colleague, Jon T. Zeidler, say the erosion of the citizen suits has occurred in such "small, almost imperceptible increments" that even many environmentalists have not noticed it.

The article, in *The Environmental Law Forum* this summer, argues, however, that Justice Scalia laid down what amounted to a plan for the change in a law review article he wrote in 1983, three years before he was appointed to the Supreme Court. In the article in the *Suffolk University Law Review*, Scalia described "the judiciary's long love affair with environmental litigation." He suggested that the constitutional cases-and-controversies requirement meant courts should screen out more citizen suits.

In the article, he talked about one of the first modern environmental suits, in 1971, in which a liberal Judge, Skelly Wright, had said that the goal of the new pollution suits was to assure that important congressional intentions to reduce pollution not be "lost or misdirected in the vast hallways of the federal bureaucracy."

In his article a dozen years later, Judge Scalia asked whether his proposal meant that such goals "can be lost or misdirected" ? He answered his own question: "Of **course** it does," he wrote, "and a good thing too."

Last year in the case here, the appeals court reversed the penalty saying that, since the mercury discharges had ended, penalties "cannot redress any injury suffered by a citizen plaintiff."

Then, in what environmental lawyers say was a special blow to citizen suits, the court said that the law firm representing the plaintiffs could not recover any attorneys fees. Lawyers' fees, environmental activists say, have been a powerful weapon against polluters. Environmental law firms have used assessments paid by polluters to finance later suits against other polluters, they say.

Attorneys fees are permitted to the winners of some suits under the environmental laws. In the case here involving the incinerator, the appeals judges said, the lawyers were entitled to nothing because they had not won their case.

Carolyn Smith Pravlik, a Washington lawyer for the citizens' groups here, said the ruling was part of the trend undermining the power of citizens in environmental suits.

"They are trying to close the courthouse doors," she said. "It means fewer and fewer cases will be brought and you will have more and more environmental problems because the government cannot -- and in some instances will not -- pick up the slack."