

3rd Circ. Decision Highlights Enviro Law Notice Requirements

By **Charles Dennen** (September 22, 2022)

On Aug. 24, the U.S. Court of Appeals for the Third Circuit affirmed the dismissal of Shark River Cleanup Coalition v. Township of Wall, a complaint filed pursuant to the Clean Water Act's citizen suit provision for failure to comply with statutorily mandated notice requirements.[1]

Although the Third Circuit's decision may not appear to be significant on its face, it serves as a cautionary tale, highlighting an important but often overlooked aspect of many environmental statutes: Failure to comply with statutory notice requirements can have significant consequences.



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Notice requirements exist under both federal and state environmental statutes, and do not only apply to citizen suits. The requirements also do not apply only to industry, the government or concerned citizens — they can apply to all of the above.

This article addresses some of the circumstances in which these notice requirements arise, and what can result if the notice requirements are not strictly adhered to.

Clean Water Act

One of the most critical aspects of the Clean Water Act is that it allows citizens to sue for violations of the act.[2] However, before a citizen suit can be commenced under the CWA, the plaintiff must give notice of the alleged violation to the alleged violator, as well as to the U.S. Environmental Protection Agency and the state in which the alleged violation occurred.[3]

After providing the requisite notice, the plaintiff must wait 60 days before filing suit.[4] The 60-day period following the notice provides the alleged violator a chance to comply with the CWA, and thereby render the citizen suit unnecessary.[5]

However, if the alleged violation continues after the expiration of the 60-day notice period, the CWA empowers citizens to file suit in order to bring about compliance with the act.[6]

These notice requirements cannot simply be ignored, or given minimal attention, without the risk of serious fallout. Indeed, the consequences of not strictly complying with the notice requirement were highlighted by the Third Circuit's decision in Shark River Cleanup Coalition.

There, the plaintiff alleged that the defendants violated the CWA by allowing an underground sewer line to be released into a tributary of the Shark River. The parties to the citizen suit did not dispute whether the plaintiff provided a notice of the alleged violation of the CWA.

Instead, the defendants contested whether the contents of the notice satisfied the requirements provided for in the corresponding EPA regulation. Under the applicable regulation, the notice had to provide "sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated," in addition to other information.[7]

On appeal, the Third Circuit affirmed the U.S. District Court for the District of New Jersey's

dismissal of the plaintiff's complaint. The appeals court first found that the district court erred under Third Circuit precedent by requiring that the plaintiff provide more information than would be sufficient to permit the defendants to identify the location of the alleged violation, because the notice sufficiently identified the easement for the sewer line.[8]

However, the Third Circuit determined that the plaintiff's notice did not properly identify "the specific standard, limitation, or order alleged to have been violated." [9] This is because the notice not only failed to make specific reference to the applicable provision of the CWA, but it also referenced many other unrelated New Jersey statutes and regulations.[10]

In other words, the notice did not provide the defendants with enough information to allow them to understand what particular provision of the CWA the plaintiff was alleging had been violated. As a result, the Third Circuit affirmed the district court's dismissal of the citizen suit complaint — albeit on a different ground than the district court.

As the Third Circuit explained:

If the Cleanup Coalition's Notice "contain[ed] individual sentences ... that g[a]ve Defendants some appropriate information" that would have permitted them to identify the alleged violation, those sentences were "deeply buried" within a plethora of references to New Jersey statutes and regulations bearing no relevance to the Cleanup Coalition's case.[11]

The Shark River Cleanup Coalition opinion should serve as a lesson that a presuit notice under the CWA cannot merely be generic, but must truly contain enough information for a defendants to understand what particular violation is being alleged.

But the CWA is by no means the only environmental statute with such a notice requirement.

Resource Conservation and Recovery Act

Similar to the CWA, the Resource Conservation and Recovery Act allows any person to commence a civil suit on his own behalf for (1) violation of a specific RCRA requirement[12] or (2) activities that "may present an imminent and substantial endangerment to health or the environment." [13]

However, before a citizen suit can be brought under the RCRA, notice to potential defendants and the government — both the state and the EPA — must be provided.[14]

Requisite notice must be provided 60 days prior to suit brought under Section 6972(a)(1)(A)[15], and 90 days prior to suit brought under Section 6972(a)(1)(B).[16] Title 40 of the Code of Federal Regulations, Part 254, provides the specifics for the RCRA's notice requirement, including service and contents.

The U.S. Supreme Court explained the purpose of the notice requirements in its 1988 decision in *Hallstrom v. Tillamook County*:

First, notice allows Government agencies to take responsibility for enforcing environmental regulations, thus obviating the need for citizen suits. ... Second, notice gives the alleged violator "an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit." [17]

Compliance with the RCRA's notice provision, the high court emphasized, is a "mandatory, not optional, condition precedent for suit." [18] As a result, if timely and proper notice is not

given, the case will be dismissed.

This came to fruition in *Brod v. Omya Inc.* in 2011, where the U.S. Court of Appeals for the Second Circuit affirmed the U.S. District Court for the District of Vermont's dismissal of an RCRA citizens' suit, because the plaintiffs' notice of intent to sue did not set forth the with sufficient specificity the identity of the chemicals allegedly released by the defendant.[19]

The Second Circuit determined that the applicable regulation requiring that the notice provide "sufficient information to permit the recipient to identify ... the activity alleged to constitute a violation"[20] had not been met.[21]

The takeaway from *Brod* and other cases like it is that RCRA presuit notices cannot be generic — they must include enough specific for defendants to be fairly apprised of the contamination at issue, and what caused the alleged contamination.

But as with everything, there are limits as to what is required. As the U.S. Court of Appeals for the Ninth Circuit explained in 2002, in *Community Association for Restoration of the Environment Inc. v. Henry Bosma Dairy*:

Although the notice must be sufficiently adequate so that the recipients can identify the basis for the complaint, the citizen is not required to list every specific aspect or detail of ever alleged violation. Nor is the citizen required to describe every ramification of a violation.[22]

Superfund and New Jersey Spill Act

Statutory notice requirements do not exist only as conditions precedent to initiating a citizen suit under statutes like the RCRA or the CWA. They can also apply in the context of public participation in a settlement with the government.

For example, Section 122(i) of the Comprehensive Environmental Response, Compensation and Liability Act, or CERCLA — also known as the Superfund law — requires notice of a proposed settlement involving the EPA to be published in the Federal Register at least 30 days before the settlement can become final.[23]

Publication in the Federal Register triggers a 30-day public comment period, where citizens are able to weigh in on the proposed settlement. The EPA is required to consider to any and all comments received during that period in determining whether or not to go forward with the settlement.

Similarly, New Jersey's Spill Compensation and Control Act contains a requirement that notice of any proposed settlement involving the New Jersey Department of Environmental Protection pursuant to the Spill Act must be published in the New Jersey Register, and on the NJDEP's website, at least 60 days before it can become final.[24]

The notice must contain, at a minimum, "the name of the case, the names of the parties to the settlement, the location of the property on which the discharge occurred, and a summary of the terms of the settlement, including the amount of any monetary payments made or to be made." [25] As is the case with CERCLA, publication of a proposed settlement under the Spill Act triggers a public comment period.

While both CERCLA and the Spill Act require public notice to be provided by the government, potentially responsible parties who are on the other side of these proposed

settlements have just as much incentive to ensure proper notice is given.

Indeed, failure to not only publish a notice, but also to include the contents that the respective statutes require, may result in the settlement being nullified, and the parties having to restart the entire process.

Conclusion

A common theme in the Shark River Cleanup Coalition and Brod opinions, and others like them, is that the courts were not concerned with whether a statutorily mandated notice had been sent, but with what the notices actually gave notice of.

Presuit notice requirements exist under statutes like the CWA and the RCRA to (1) provide alleged violators with enough information to allow them to cure the alleged violation, and (2) give the government an opportunity to act, if it so chooses. Notices of proposed settlements exist to provide transparency, and to ensure that the government is giving proper consideration to all relevant issues and concerns before a settlement becomes final.

Courts take these requirements seriously, and have demonstrated time and again that they will scrutinize the contents of the required notices to ensure the statutes have been adhered to — and will not hesitate to take swift and decisive action if the notices do not pass scrutiny.

An important point to keep in mind is that, while failure to adhere to the statutory notice requirements may result in a lawsuit being dismissed or a proposed settlement being nullified, it can be cured by providing a proper notice. However, that failure will cost parties needless time and expense that could have been avoided by properly adhering to the notice requirements the first time.

Concerned citizens, potentially responsible parties, the government and counsel representing any of the above are all encouraged to be familiar with — and take seriously — the statutory notice requirements.

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[1] Shark River Cleanup Coal. v. Twp. of Wall, --- F.4th ---, 2022 WL 3642115 (Aug. 24, 2022).

[2] 33 U.S.C. § 1365(a)(1).

[3] 33 U.S.C. § 1365 (b)(1)(A).

[4] Id.

[5] Shark River Cleanup Coal., 2022 WL 3642115, at *1 (quoting Public Interest Research Group Of N.J. Inc. v. Hercules Inc., 50 F.3d 1239, 1246 (3d Cir. 1995)).

[6] *Id.*

[7] 40 C.F.R. § 135.3(a).

[8] *Shark River Cleanup Coal.*, 2022 WL 3642115, at *2, *6.

[9] *Id.* at *2, *8.

[10] *Id.* at *8.

[11] *Id.* at *8 (citing *Karr v. Hefner*, 475 F.3d 1192, 1206 (10th Cir. 2007)).

[12] 42 U.S.C. § 6972(a)(1)(A).

[13] 42 U.S.C. § 6972(a)(1)(B).

[14] 42 U.S.C. § 6972(b).

[15] 42 U.S.C. § 6972(b)(1)(A).

[16] 42 U.S.C. § 6972(b)(1)(B).

[17] *Hallstrom v. Tillamook County*, 493 U.S. 20, 29 (1988) (citing and quoting *Gwaltney of Smithfield Inc. v. Chesapeake Bay Foundation Inc.*, 484 U.S. 49, 60 (1987)).

[18] *Id.* at 26.

[19] *Brod v. Omya Inc.*, 653 F.3d 156 (2d Cir. 2011).

[20] 40 C.F.R. § 254.3.

[21] *Brod*, 653 F.3d at 168-69.

[22] *Community Ass'n for Restoration of the Environment v. Henry Bosma Dairy*, 305 F.3d 943, 951 (9th Cir. 2002).

[23] 42 U.S.C. § 9622(i).

[24] N.J.S.A. § 58:10-23.11e2.

[25] *Id.*