

WAYS TO HELP BULLET- PROOF YOUR COMPANY FROM THIRD PARTY LAWSUITS

2016 Missouri Water Seminar

REGFORM

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I. Proactively Engage Your Potential Adversary

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A. Public Outreach

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A. Public Outreach

1. Information, Information, Information

I. Proactively Engage Your Potential Adversary

A. Public Outreach

1. Information, Information, Information

Elected officials, media, general public

I. Proactively Engage Your Potential Adversary

A. Public Outreach

1. Information, Information, Information

Elected officials, media, general public

Affected parties

II. Transparency

II. Transparency

A. No One Likes Surprises

II. Transparency

A. No One Likes Surprises

B. Hiding Your Weakness Can Backfire

III. Cultivate Support From Your Potential Adversary

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A. Their Interests Are Your Interests

III. Cultivate Support From Your Potential Adversary

A. Their Interests Are Your Interests

1. Environmental Project

III. Cultivate Support From Your Potential Adversary

A. Their Interests Are Your Interests

1. Environmental Project

2. Appropriate Contributions/Donations

IV. Avoiding and Defending Citizen Suits

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A. Typical Provisions

Citizen suit provisions generally authorize enforcement actions against polluters who are in violation of statutory or administrative requirements. They also authorize actions to compel federal agencies to perform nondiscretionary duties.

IV. Avoiding and Defending Citizen Suits

B. Typical Plaintiffs

National NGOs

State NGOs

Site-Specific NGOs

IV. Avoiding and Defending Citizen Suits

C. Favorable Fact Patterns

Harm to Public Health

Harm to the Environment

National Enforcement Initiatives

IV. Avoiding and Defending Citizen Suits

D. Fending Off the Suit

IV. Avoiding and Defending Citizen Suits

D. Fending Off the Suit

60-Days Notice

IV. Avoiding and Defending Citizen Suits

D. Fending Off the Suit

Diligent Government Enforcement

Some courts have held that a citizen's claims, brought before the filing of an EPA suit, are properly dismissed when a consent decree is entered in the later filed EPA action. *See, e.g., United States v. City of Green Forest*, 921 F.2d 1394 (8th Cir. 1990).

IV. Avoiding and Defending Citizen Suits

D. Fending Off the Suit

Wholly Past Violations

The loose “6 months rule”

IV. Avoiding and Defending Citizen Suits

E. Remedies

Injunctive Relief

IV. Avoiding and Defending Citizen Suits

E. Remedies

Civil Penalties

A court cannot order a defendant in a citizen suit to make payments to an organization other than the U.S. Treasury. *See, e.g., Public Interest Research Group of New Jersey v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 82 (3d Cir. 1990)

Parties may agree in settlement to channel monetary payments to environmental projects. *See, e.g., Sierra Club, Inc. v. Electronic Controls Design, Inc.*, 909 F.2d 1350 (9th Cir. 1990) (district court abused its discretion by failing to enter a proposed consent decree that provided for payments to private environmental organizations).

IV. Avoiding and Defending Citizen Suits

E. Remedies

Attorneys Fees

Most citizen suit provisions authorize courts to award costs of litigation to any party, including reasonable attorneys fees, when appropriate. *See, e.g.*, 33 U.S.C. § 1365(d) (prevailing or substantially prevailing party).

IV. Avoiding and Defending Citizen Suits

E. Remedies

No Damages

Questions

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