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HR 1179: CHILLING CWA ENFORCMENT

In February 2017, Congressman Tom Rice (SC-07) introduced H.R. 1179, the Discouraging Frivolous Lawsuits Act. Among other things, the bill seeks to amend the Citizen Suit provision[1] of the Clean Water Act (CWA), specifically the section pertaining to litigation costs and fee shifting.[2] Rice and supporting Republican co-signers, argue that under current CWA provisions, special interest groups can easily and unnecessarily delay infrastructure projects for years by filing frivolous CWA lawsuits that end up costing taxpayers millions of dollars.[3] The supporters of the bill claim that the proposed amendment will discourage special interest groups from filing so called frivolous lawsuits if those special interest groups will be forced to pay the other side's attorney's fees.[4] Congressman Rice believes his proposed CWA changes will bring back a standard of reasonableness that will ensure infrastructure projects are completed in an appropriate amount of time and at the lowest cost possible.[5]

While Congressman Rice's amendments may appear well intentioned, many environmental groups, including Environmental Action Center (EAC), view the fee language changes of the amendment as a clear attempt to chill citizen suits filed by environmental groups against CWA polluters. The changes would require a court to award attorney's fees to the party who prevails in the lawsuit for any reason. This means that an environmental group who files a meritorious claim but loses the suit on procedural grounds or for any other legitimate reason would be mandated to pay the attorney's fees of the alleged CWA violator. It also requires citizen plaintiffs to pay a defendant's fees if they have not prevailed on more than half of the claims in the action. That is, if citizen plaintiffs win on a critical or primary issue on one count, but lose on two other lesser counts in the suit, they would be liable for defendant's attorney's fees – a common occurrence in most environmental litigation.

EAC HIGHLIGHTS 2016-2017

- ✓ Stopped a utility from violating its Clean Water Act permit limits for copper, lead, zinc, iron and cadmium;
- ✓ Worked with Anacostia Riverkeeper to find and address pollution sources on the river;
- ✓ Collaborated with NGOs and citizen groups to raise awareness of county, state, and federal requirements that protect public health and the environment from CAFO impacts;
- ✓ Initiated watershed-wide compliance reviews and case investigations.

[1] 33 USC § 1365.

[2] 33 USC § 1365(d).

[3] U.S. Congressman Tom Rice, 'Rice Introduces Legislation to Discourage Frivolous Lawsuits',
Press Release Feb 17, 2017. https://rice.house.gov/media-center/press-releases/rice-introduces-legislation-to-discourage-frivolous-lawsuits. (accessed)

[4] Id.

[5] Id.

CWA Citizen Suit Provisions and Citizen Attorneys General

Citizen plaintiffs often face industry defendants that are back by large corporations, with vast resources to defend their cases. Without permissive fee shifting provisions, citizens often would not have the resources to finance a suit. In cases such as CWA citizen suits, plaintiffs seek only injunctive, not monetary relief.[6] If the proposed amendment is made law, most environmental nonprofits, large and small, would face the daunting prospect of being bankrupted by having to pay attorney's fees to a defendant for losing a well-grounded CWA citizen suit, no matter how strong the case, or how badly enforcement under the CWA is needed. In many cases this will result in the environmental group backing down from their potential challenge because the financial risk would be too high. Congress' intent when drafting the CWA citizen suit and fee shifting provisions was to encourage citizen groups to bring actions against violators of the CWA[7] - this proposed amendment directly contradicts the goals and purpose of the CWA.

The current attorney's fee provision is a crucial tool in the environmental group's toolbox that is necessary for these groups to continue their efforts to reduce pollution of our nation's waterways. The proposed change in the language would almost certainly reduce the number of citizen suits brought by environmental groups and would, consequently, increase the amount of pollution going unchecked. Many environmental groups depend on pro bono attorney representation, where the pro bono attorneys in turn rely on cost recovery through the attorney's fees provision to provide them modest compensation for their work in representing an environmental group that prevails in a case against a CWA violator.

These environmental groups and their attorneys already exercise great discretion in choosing which CWA citizen suits to pursue. These groups do not have the time or resources to commence a citizen suit against every entity violating the CWA, and that is why only the most egregious violators are selected for citizen enforcement. The proposed amendment would only make CWA citizen suits riskier for environmental groups and would certainly chill the amount of citizen prosecution of CWA violations. Citizens have consistently been the predominant mode of CWA enforcement in federal courts because citizens who fish, swim, boat, or hike are the first to notice and report incidents of chemical smells, fish kills, oily sheens, or foamy scum on the water or near the banks.[8] As a result, more citizen suits have been filed under the CWA than any other environmental statute,[9] and twice as many CWA suits are filed by citizens than by the government.[10] These data show the importance of citizen suits and that perhaps, without them there would be little if any enforcement of the CWA.[11]

H.R. 1179 proposes that the court *must* award the costs of litigation to the prevailing party, and provides a definition of "prevailing" that is incongruent with CWA litigation.[12] Further, the proposed bill states that the court "shall award costs of litigation."[13] This differs from the current language which states that the court *may* award the cost of litigation "whenever the court determines such an award is

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[6] Walter B. Russell, III & Paul Thomas Gregory, *Awards of Attorneys' Fees in Environmental Litigation: Citizen Suits and the "Appropriate" Standard,* 18 Ga. L. Rev. 307, 324–25 (1984).

[7] Kerry D. Florio, *Attorney's Fees in Environmental Citizen Suits: Should Prevailing Defendants Recover?* Boston College Environmental Affairs L. Rev. Vol 27 No. 4, 707, 732-733 (2000)

[8] Martin A. McCrory, *Standing in the Ever-Changing Stream: The Clean Water Act, Article III Standing, and Post-Compliance Adjudication*, 20 Stan. Envtl. L.J. 73, 76 (2001).

[9] Id.

[10] Michael S. Greve. *The Private Enforcement of Environmental Lm*. 65 TUL. L. REv. 339, 353 (1990).

[11] McCrory, supra note 6.

[12] H.R. 1179, 115th Cong. (2017-2018).

[13] *Id.*

appropriate."[14] Currently, the CWA permits a Court to award attorney's fees to the prevailing or substantially prevailing party. This usually results in a prevailing environmental group (plaintiff) recovering attorney's fees from a polluter who the court found violated the CWA.

However, the current language does not prevent a court from awarding fees to an alleged polluter (defendant) who prevailed in the case and was found not to have violated the CWA. That is, the current language leaves it up to the judge's discretion whether fees are awarded to the prevailing plaintiff or defendant. In fact, there is extensive federal case law that supports the notion of awarding attorney's fees to a prevailing defendant. This case law is predicated on the rule that fees awarded to a prevailing defendant are appropriate if the defendants can show that the action brought by the plaintiff was "frivolous, unreasonable, or without foundation," or that the plaintiff continued to litigate "after it clearly becomes so."[15] This shows that Federal Courts already do the very thing that Congressman Rice wants out of his proposed amendments; punish a special interest environmental group for bringing a frivolous lawsuit under the CWA. Furthermore, Federal Courts have cautioned against requiring fees be paid by plaintiffs merely because they lost at trial. Having statute or case law that requires mandatory fee shifting will discourage plaintiffs with legitimate, even airtight claims from pursuing them.[16] In the context of CWA citizen suits, citizen-plaintiffs are not seeking monetary relief for themselves, but are acting to protect the public interest.[17] A permissive fee shifting provision that is liberally construed in favor of plaintiffs supports Congress' intent to use citizen-plaintiffs to "vindicate a policy that Congress considered of the highest priority".[18]

Not only does Federal case law support Congressman Rice's desire to have prevailing defendants compensated for defending against frivolous CWA citizen suits, the Federal Rules of Civil Procedure Rule 11 also provides safeguards to prevent frivolous lawsuits. Under Rule 11, sanctions can be imposed upon any attorney, law firm, or party for bringing suit for an improper purpose. Rule 11 states in clear language the court's ability to discourage and punish frivolous lawsuits reading;

> "[a] sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated… [the court may] order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation."[19]

Defendants in CWA citizen suits, therefore, already have two existing mechanisms to recover attorney's fee from special interest groups who file and pursue frivolous lawsuits. These two mechanisms combined with the intimidating prospect of bringing a citizen suit against a CWA violator who has the resources to hire big-firm attorneys is more than enough to make citizen plaintiffs pick and choose their cases very carefully. Citizen plaintiffs do not need more discouragement from commencing civil actions to enforce CWA violations. Congressman Rice's bill imposes an unnecessarily harsh punishment on special interest groups, particularly when Federal case law and Rule 11 sanctions already sufficiently address the issue at hand.

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[14] 33 U.S.C. § 1365(d).

[15] See, *Sierra Club v. Cripple Creek and Victor Gold Mining Co.,* 509 F.Supp. 2d 943, (D. Colo. 2006) (quoting *Christiansburg Garment Co. v. E.E.O.C.,* 434 U.S. 412, 419-22.*)*

[16] *Sierra Club v. Cripple Creek and Victor Gold Mining Co*., 509 F.Supp. 2d 942, 950

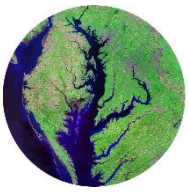
[17] *Id.*

[18] *Sierra Club v. Cripple Creek and Victor Gold Mining Co.,* 509 F.Supp. 2d 943, (D. Colo. 2006) (quoting *Christiansburg Garment Co. v. E.E.O.C.,* 434 U.S. 412, 418.*)*

[19] Fed. R. Civ. P. 11(4).

Discouraging frivolous lawsuits is hardly the goal of this proposed legislation. Rather, the underlying goal of this legislation is to deter and have a chilling effect on valid lawsuits brought by special interest groups genuinely concerned about the health of waterways throughout the country. The bill's proposed language is suggestive that frivolous lawsuits are a significant issue with zero oversite. Furthermore, Rice's arguments are moot considering the clear language on Rule 11 sanctions and Federal case law decisions allowing for prevailing defendants to recover attorney's fees. With these safeguards against frivolous litigation already in place, this bill is wholly unnecessary. If passed, H.R. 1179 will allow polluters to damage U.S. waterways without being held accountable for their actions. Public interest groups will no longer be able to take legal action to protect waterways without significant risk to the wellbeing of their organizations. The bill is still in committee; it was referred to the Subcommittee on Water Resources and Environment in February 2017.[20] [21] [22]

LOOKING FORWARD TO 2018



The EAC continues its water quality program by working with Riverkeeper partners and local groups to challenge facilities in violation of their CWA permits. In 2018, the EAC will expand its reach beyond Maryland to address pollution discharges in Pennsylvania, Virginia, New Jersey, and Florida. Bringing pressure on facilities in violation of the CWA across the Mid-Atlantic and down the East Coast will provide a tool for regional environmental protection and will ensure that in the current political climate, polluters do not rise above the law.

[20] https://www.congress.gov/bill/115th-congress/house-bill/1179

[21] "H.R. 1179 — 115th Congress: Discouraging Frivolous Lawsuits Act." www.GovTrack.us. 2017. October 24, 2017 <https://www.govtrack.us/congress/bills/115/hr1179>

[22] The bill has a 12% chance of being enacted. Predictions are by Skopos Labs.