

# Citizen Suit Action/Clean Water Act: Federal District Court Addresses Developers' Argument for Dismissal



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The United States District Court for the Eastern District of Pennsylvania ("Court") addressed in a June 15th memorandum issues arising out of a Clean Water Act ("CWA") citizen suit ("Citizen Suit") action. See *Michael D. Moss v. Sal Lapio, Inc., et al.*, 2020 WL 3259983.

The action involves two developers of a residential subdivision that allegedly violated the CWA by discharging sediment-laden storm water runoff into a creek and its tributaries.

A resident of the subdivision ("Plaintiff") sued Sal Lapio, Inc. ("Lapio") and Schlouch, Inc. ("Schlouch") alleging that they violated the CWA by ignoring specific requirements of a National Pollution Discharge Elimination System ("NPDES") permit.

The alleged violations are stated to have caused sediment-laden storm water runoff into a nearby creek and its tributaries. Lapio allegedly failed to install the erosion and sedimentation ("E&S") controls that the permit required. This is alleged to have caused silt and sediment-laden storm water to runoff into the creek.

Both developers asked the court to dismiss the lawsuit, arguing:

1. The Court lacked jurisdiction under the CWA because alleged violations are "wholly past"; and
2. Plaintiff fails to state a claim because a state enforcement action had been filed and the violations had been remedied

Lapio argued that the individual could not file a Citizen Suit for CWA violations that occurred in the past. Further, it argued that the Pennsylvania Department of Environmental Protection (DEP) action constituted diligent prosecution barring prosecution of the Citizen Suit.

CWA citizen suits may only be brought for "continuous or intermittent" violations. Violations of the CWA are considered ongoing where the pollutants discharged without a permit or in violation of a permit remain in the waterway.

The Court found that the Plaintiff made a good faith allegation that Lapio's and Schlouch's violations were ongoing because the DEP's enforcement action only required "costs and fees associated with correcting conditions." It did not remediate the discharge.

The Court also found that the Plaintiff was not barred from bringing the Citizen Suit because of a prior DEP enforcement action. It did not involve civil or criminal enforcement in a court. Citizen suits are only barred when a state or federal agency has filed a civil or criminal action in a court. DEP only assessed fines. Therefore, the Plaintiff could still bring a Citizen Suit against the developers for violation of the CWA.

Schlouch also argued that the suit should be dismissed because a Citizen Suit is barred when civil penalties are assessed in conjunction with a prior enforcement action. However, a Citizen Suit is not barred so long as “notice has been given prior to the commencement of an enforcement action and the citizen-plaintiff files suit within 120 days of the notice.”

The Court found that the “notice of intent to commence a Citizen Suit was sent to the required parties prior to commencement of the enforcement action. Also, Plaintiff’s Citizen Suit was filed within 120 days of the notice.”

The CWA does not define “commencement of an action.” However, the Court held that “an enforcement action is not commenced at the initial inspection but instead when a specific penalty is issued.” The Plaintiff provided notice to the parties before the DEP initiated an enforcement action. In addition, he filed suit within 120 days of providing that notice. Therefore, the Plaintiff was not barred from bringing a Citizen Suit.

The Motion to Dismiss was denied.

A copy of the Opinion can be downloaded [here](#).