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**Water Policy Report - 10/08/2012****11th Circuit To Weigh Case Testing CWA Citizen Suit Notice Requirements**

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Environmentalists will soon appeal to the U.S. Court of Appeals for the 11th Circuit a federal district court ruling that rejected their novel bid to evade Clean Water Act (CWA) 60-day notice requirements prior to filing CWA citizen enforcement suits, a key test for whether they can preempt state enforcement actions against industries.

U.S. District Court for the Northern District of Alabama Judge Sharon Lovelace Blackburn's ruling in *Black Warrior Riverkeeper, et al. v. Black Warrior Minerals (BWM)* was not a surprise, says a source close to environmentalists in the suit. "But we think it's a good case for the appeals court to take up. . . . And if the court agrees with us, it would give citizen suit enforcement, we think, an even more important place" in the CWA, the source adds.

The environmentalists have until Oct. 17 to file a notice of appeal with the 11th Circuit, but at press time had not filed. *The opinion is available on InsideEPA.com. (Doc ID: [2412194](#))*

In the case, the environmental group Black Warrior Riverkeeper and others sued BWM, which owns the Fleetwood Mine in Tuscaloosa County, Alabama. Activists claim BWM violated a series of new source protection standards (NSPS) limits on iron, manganese, pH and total suspended solids in discharges to nearby protected waters.

The Riverkeeper group sued specifically over the alleged NSPS violation, rather than over a violation of the mine's National Pollutant Discharge Elimination System (NPDES) permit, arguing that CWA language allows suits over NSPS exceedences to skip the water act's mandate that citizen groups give violators a 60 day notice of intent (NOI) to sue, even when the new source limit has been incorporated into a NPDES permit.

"The discharges are violations of their permit, but they are also violations of the NSPS," a Riverkeeper source told *Inside EPA* in a previous interview. "The law says you can sue immediately because Congress exempted these specific [standards from the NOI requirement], and I think that's what Congress's intent was," the source said (*Water Policy Report*, Feb. 27).

Under the current CWA process environmental organizations and other citizen groups must provide a 60 day NOI to a discharger, which gives states and/or EPA time to pursue their own enforcement action if they choose, or gives the violator an opportunity to address the violation. If the states or EPA take steps to require compliance with the CWA, a pending citizen suit cannot proceed.

But environmentalists are frustrated with the Alabama Department of Environmental Management (ADEM), which the source says has repeatedly preempted citizen suits with its own enforcement actions, but then fails to require reduced discharges or monetary penalties from the offending facilities, effectively allowing violations to continue.

"It's a significant problem in Alabama, where our department of the environment has filed suit to stop citizen enforcement actions, and effectively protect polluters," the source says. If the citizen groups could sidestep the 60-day notice requirement, the source says, "it would shift the balance toward stronger enforcement."

An ADEM spokesman did not respond to a request for comment by press time.

**District Judge Blackburn in her Sept. 17 opinion said that environmentalists' legal theory** on evading the 60-day notice requirement has no support in prior case law and contradicted language in the Supreme Court's 1976 ruling in *EPA v. California*. In that ruling, Justice Byron White wrote that a mine owner's "liability . . . must be determined in light, not of [limitations for new source mines] but of the conditions of [its NPDES] permit."

"The court can find no reported decision of a citizen suit against a permit-holding discharger alleging a violation of a [NSPS]. Given the language of the Supreme Court that a citizen suit against a permitted discharger must proceed under [NPDES], this court is bound to find that the notice and delay provisions" apply, Blackburn wrote.

But the Riverkeeper source says White's mention of NPDES primacy in the *California* case should be read as non-binding "dicta," and that the 11th Circuit's 1991 decision in *National Environmental Foundation v. ABC Rail Corp.* should inform the appeals court's decision as it considers the case.

In that case, the court said in a footnote that, "While the notice requirement contained in [the CWA] is mandatory, there are two exemptions recognized in the statute," including suits alleging NSPS violations.

Under Section 505 of the water law, any citizen or citizen group planning a civil suit over an alleged violation of effluent limits, or of EPA-authorized discharge permits, must provide 60 days' notice to the defendant, EPA and the government of the state where the alleged violation occurred. If, by the end of the 60 days, either EPA or the state "has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order," the citizen suit cannot go forward, although the citizens may still join the government's enforcement action as intervenor plaintiffs, the law says.

However, Section 505 also waives the 60-day notice for suits which allege violations of NSPS limits. In *Black Warrior*, activists are claiming that even though NSPS restrictions were incorporated into the mine's NPDES permit, any alleged violation of those restrictions still allows for immediate citizen suits. -- *David LaRoss*

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