

THE DAILY RECORD

Monday, October 16, 2017 / Volume 109 / Number 199 / \$2.00 • Western New York's trusted source for legal and real estate news

Environmental LAW

The three legs of environmental law enforcement— the EPA, the DEC and citizens

A question frequently asked of environmental lawyers these days is to predict what the Trump administration will do regarding environmental regulation and enforcement. Certainly in relation to regulations intended to slow or stop climate change by eliminating emissions of greenhouse gases, the answer is clear. The Environmental Protection Agency's proposal to repeal the Clean Power Plan and the administrations' plan to withdraw from the Paris Accord leave no one guessing. Nevertheless, removing restrictions on coal-fired power plants will not stop the market forces that have driven power producers to convert to natural gas and renewable energy.

Greenhouse gases are not the whole story. Environmental protection is founded on a series of major environmental laws enacted in the 1970s. The Clean Water Act, Clean Air Act, Solid Waste Disposal Act, the Resource Conservation and Recovery Act, the federal Superfund law, and several others, transformed the environment over just a few decades. No one disputes that the air and water are cleaner today. These laws remain intact and the complex structure of regulations, permits, monitoring, inspection, recordkeeping and penalties they support will not easily be dismantled. Indeed, much of state environmental law and regulation exists to implement these federal laws through a process of delegation of authority from the EPA to the states.

Still, even though the structure remains, is it possible to change what the laws ac-



By RONALD G. HULL
Daily Record
Columnist

complish by scaling back enforcement? We may find out. EPA Administrator Scott Pruitt has proposed substantial cuts to the EPA's compliance and enforcement budget. At the Department of Justice, Attorney General Jeff Sessions is also expected to scale back DOJ enforcement. But will changes at the EPA and DOJ to reduce enforcement actually open the door to increased pollution? In New York, the answer is probably not.

First, most enforcement in Western New York is directed by the Department of Environmental Conservation, and the EPA's reduced activity is unlikely to affect the DEC's commitment to enforcing environmental laws.

Second, almost every major federal environmental law contains provisions authorizing private citizens to bring suit against alleged violators. And numerous environmental organizations have committed to commencing more citizen suits in response to any reduction in EPA enforcement. Although governmental agencies such as the EPA and DOJ were always intended to have the primary responsibility to enforce the laws, Congress incorporated provisions that authorized private citizens to prosecute violations in instances where government has not.

Historically, most citizen suits have

been brought under the Clean Water Act, in part because public accessibility to permits and monitoring reports have made it relatively easy to detect and prove violations. However, there have been increases in the number of citizen suits under the Clean Air Act and a marked uptick in claims under the "imminent and substantial endangerment" provision of the Resource Conservation and Recovery Act, which are not tied to violations of permits or to specific levels of contaminants.

In their current form, these citizen suit provisions contain relatively few limitations on the rights of individuals and associations to enforce environmental laws. Private litigants are required to provide advance notice of their intent to sue, which is intended to give the government time to evaluate the alleged violations and to commence its own enforcement. If the government is diligently prosecuting an enforcement action before the notice period ends, an enforcement action by citizens concerning the same violations may be barred. Citizen suits are intended to supplement, not supplant, the government's authority. However, if the government refuses to act, private litigants are free to proceed and, in most instances, may recover their attorney's fees.

The courts have imposed significant restrictions on private litigants under constitutional limitations that every litigant must have "standing" to bring a particular claim. Standing requires the plaintiff to

Continued on next page

Continued on next page

demonstrate an injury that is: (1) concrete and particularized, and actual or imminent; (2) fairly traceable to the challenged action; and (3) redressable by a favorable ruling. Combined with recently heightened requirements that pleadings must be more than conclusory and formulaic, but state a claim that is plausible on its face, the need to allege an injury that is both concrete and particularized requires careful consideration, otherwise the complaint may be vulnerable to a simple motion to dismiss at the outset of the case.

The citizen suit provisions authorize a parallel system of private enforcement, but are under legislative scrutiny. Bills have been introduced to limit their scope or discourage their use. In addition, one of the steps Sessions has taken is to prohibit the DOJ from directing any settlement

payments to non-governmental agencies that were not directly harmed by a defendant's conduct. The policy is not directly applicable to citizen suits, but could provide a springboard for the DOJ to intervene and object to settlements that do not conform to its new policy.

With the exception of the Oil Spill Law, New York's environmental laws generally do not authorize actions by private litigants. Legislation has been introduced several times to revise the Environmental Conservation Law to authorize citizen suits, but has not been approved by the Legislature. The New York State Business Council strongly opposes the legislation, in part because of the availability of such relief under federal environmental laws. Nevertheless, official DEC policy toward federal citizen suits is that it "welcomes and supports the initiation of citizen suits

to the extent that such lawsuits are consistent with the goals and enforcement policies of DEC and enhance environmental protection."

Changed priorities at the EPA and DOJ appear to be changing the manner in which those agencies will enforce federal environmental laws under the Trump Administration. Reasonable people will differ as to whether those changes are desirable and beneficial. Nevertheless, environmental organizations are alarmed and have promised to intensify private enforcement efforts through citizen suits.

Ronald G. Hull is a senior attorney in Underberg & Kessler LLP's Environmental and Litigation Practice Groups. He has over 25 years' experience in the areas of environmental and municipal law and litigation.