

Citizen Suit Actions/Clean Water Act: Arkansas and 24 Other State Attorney Generals File Amicus Brief in Support of Writ of Certiorari to U.S. Supreme Court Addressing Scope of Coverage



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The Arkansas and 24 other State Attorney Generals (collectively, “Amici Curiae”) filed on October 28th an Amicus Brief supporting a Petition for a Writ of Certiorari to the United States Supreme Court to address a Clean Water Act issue that arose in *Port of Tacoma; SSA Terminals, LLC; and SSA Terminals (Tacoma), LLC v. Puget Soundkeeper Alliance*, No. 21-35881 (9th Circuit Court of Appeals).

The question the Amici Curiae present in the Petition is framed as:

...Whether Section 505 of the Clean Water Act authorizes citizens to invoke the federal courts to enforce conditions of state-issued pollutant-discharge permits adopted under state law that mandate a greater scope of coverage than required by the Clean Water Act?

The other Attorney Generals supporting the Petition as Amici Curiae include:

- BRENNIA BIRD, Attorney General of Iowa
- STEVE MARSHALL, Attorney General of Alabama.
- TREG TAYLOR, Attorney General of Alaska.
- TIM GRIFFIN, Attorney General of Arkansas.
- CHRIS CARR, Attorney General of Georgia.
- RAÚL R. LABRADOR, Attorney General of Idaho.
- THEODORE E. ROKITA, Attorney General of Indiana.
- KRIS KOBACH, Attorney General of Kansas.
- LIZ MURRILL, Attorney General of Louisiana.
- LYNN FITCH, Attorney General of Mississippi.
- ANDREW T. BAILEY, Attorney General of Missouri.
- AUSTIN KNUDSEN, Attorney General of Montana.
- MICHAEL T. HILGERS, Attorney General of Nebraska.
- JOHN M. FORMELLA, Attorney General of New Hampshire.
- DREW WRIGLEY, Attorney General of North Dakota.
- DAVE YOST, Attorney General of Ohio.
- GENTNER DRUMMOND, Attorney General of Oklahoma.
- ALAN WILSON, Attorney General of South Carolina.

- MARTY JACKLEY, Attorney General of South Dakota.
- JONATHAN SKRMETTI, Attorney General of Tennessee.
- KEN PAXTON, Attorney General of Texas.
- SEAN D. REYES, Attorney General of Utah.
- JASON S. MIYARES, Attorney General of Virginia.
- PATRICK MORRISEY, Attorney General of West Virginia.
- BRIDGET HILL, Attorney General of Wyoming

The Clean Water Act (and almost every federal environmental statute) provides that in certain circumstances, a non-governmental entity or person may bring an action in federal district court seeking various remedies against a violator. The primary source of citizen suit activity has arguably been the Clean Water Act. The Clean Water Act requirement that a facility periodically prepare discharge monitoring reports and submit the results to an agency in a publicly available format ease the difficulties in proving violations.

The Clean Water Act and other federal environmental statutes provide for two potential citizen suit causes of action.

One provision is utilized by individuals or groups to compel federal agency compliance with statutory duties. The other provision is relevant to the referenced Petition.

Citizen suit action may be filed in certain circumstances against an alleged violator of certain Clean Water Act provisions in which the Plaintiffs ask for injunctive relief and/or monetary damages.

The provision providing the authority for citizen suit actions against an alleged violator is found in Section 505 of the Clean Water Act. The language authorizes “any citizen” to bring an enforcement action “against any person...who is alleged to be in violation of an effluent standard or limitation under the *Clean Water Act*.”

The 9th Circuit Opinion in Port of Tacoma addressed a situation in which a Clean Water Act citizen suit was initiated against the Port of Tacoma and two of its tenants by an environmental organization. The environmental organization argued that the Port and the tenants violated the Clean Water Act in certain ways by not having the appropriate stormwater controls in place.

The terminal owned by the Port was subject to a Clean Water Act industrial stormwater general permit (“Permit”) issued by the Washington State Department of Ecology. The Permit had both federal National Pollutant Discharge Elimination System (“NPDES”) permit provisions and provisions derived solely from state law.

The 9th Circuit found that the Permit covered stormwater discharges from the entirety of transportation facilities, not just the portion of such facilities which have vehicle maintenance shops, material handling facilities, equipment cleaning operations, or airport deicing operations. As a result, it included the Port’s wharf even though it did not receive discharges from the referenced activities.

The 9th Circuit rejected the Port’s argument that the Permit conditions regulating stormwater discharges from the wharf were not enforceable in a Clean Water Act citizen suit because such conditions exceeded federal requirements. It stated that any condition in the Permit is federally enforceable regardless of whether it is a state regulation that prescribes a greater scope of coverage than the federal regulations.

The Amici Curiae argue that the 9th Circuit has expanded the Clean Water Act citizen suit on the basis of a “flawed textual interpretation”. They cite the 2nd Circuit for correctly concluding that state regulations that mandate a greater scope of coverage than that required by the Clean Water Act and its implementing regulations are not enforceable through citizen suit. Citing *Atl. States Legal Found., Inc. v. Eastman Kodak Co.*, 12 F.3d 353 (2d Cir. 1993).

The Amici Curiae’s Brief arguments include:

1. COOPERATIVE FEDERALISM PRINCIPLES MUST DRIVE ANY INTERPRETATION OF THE CLEAN WATER ACT.
 1. States possess a vital historical role in water regulation.
 2. The Clean Water Act recognizes the States' water protection role, creating a cooperative federalism regime.
2. FEDERALISM PRINCIPLES UNDERLIE ANY CLEAN WATER ACT INTERPRETATION.
3. THE NINTH CIRCUIT'S RULING DISRUPTS THE COOPERATIVE FEDERALISM BALANCE OF THE CLEAN WATER ACT.
 1. The Ninth Circuit's interpretation undermines federalist principles.
 2. The Ninth Circuit's interpretation stifles State environmental protection efforts.

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