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ENVIRONMENTAL FINANCING LITIGATION

... The total award to plaintiffs for costs and attorneys fees shall, therefore, be \$100,976.14. *NRDC v. Costle*, 12 E.R.C. 1181 (D.D.C. 1978).

The general rule in American courts has been that attorneys fees may not be recovered unless either a specific judicial exception or a statutory provision is applicable.¹ The 1975 United States Supreme Court decision in *Alyeska Pipeline Service Co. v. Wilderness Society*² limited the federal courts' equitable power to award attorneys fees to two circumstances: where the losing party has acted in bad faith and where the litigation creates a common benefit, the cost of which should be shared by all persons benefiting from it. Environmental litigation does not often fall within these judicial exceptions. Environmental plaintiffs seeking to finance the heavy costs of litigation are consequently forced to rely on specific statutory provisions which authorize an award of attorneys fees to the prevailing party.³ One such provision is contained in section 1365 of the Federal Water Pollution Control Act (FWPCA).⁴ Section 1365(a)⁵ grants standing to citizens groups who wish to bring suits mandating the enforcement of, and compliance with, the FWPCA. Section 1365(d)⁶ pro-

1. *Alyeska Pipeline Service Co. v. Wilderness Soc'y*, 421 U.S. 420 at 425 (1975).

2. *Id.*

3. *Save Our Sound Fisheries Assoc. v. Callaway*, 429 F. Supp. 1136 at 1139 (D.R.I. 1977) (SOSF II).

4. 33 U.S.C. § 1251 *et seq.* (1976).

5. 1365. Citizen suits.—(a) Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this Act [33 USCS § §1251-1376] or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act [33 USCS § §1251-1376] which is not discretionary with the Administrator.

6. (d) The Court, in issuing any final order or any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

vides that attorneys fees may be awarded to any party in litigation commenced under 1365(a). Other sections of 1365 set out stringent notice provisions that must be complied with⁷ and preserve the jurisdictional options granted to litigants under the Administrative Procedures Act (APA)⁸ and 28 U.S.C. 1331.⁹

Recorded decisions on the issue of payment of attorneys fees under 1365(d) are scarce.¹⁰ However, two decisions on point illuminate some of the elements of a successful action to recover attorneys fees under 1365(d).¹¹ This case note will explore those elements. Briefly, there are two general requirements. First, the action must have been jurisdictionally grounded in 1365(a), the citizens suit provision of the FWPCA. Second, the award of attorneys fees must serve the purpose intended by Congress in providing for citizen suits in the FWPCA.

JURISDICTIONAL REQUIREMENTS

Meeting the jurisdictional requirements of 1365(a) is a major stumbling block for environmental plaintiffs who wish to recover attorneys fees because the requirements of 1365(a) are much stricter than the jurisdictional requirements under either the APA or 28 U.S.C. 1331. A case on point is *Save Our Sound Fisheries Assoc. v. Callaway* (SOSF II).¹² In an earlier action (SOSF I),¹³ plaintiffs succeeded in enjoining the United States Army Corp of Engineers (Corps) from dumping dredged spoil in coastal waters because the permits required under the FWPCA and the Marine Protection, Research, and Sanctuaries Act¹⁴ (MPRSA) had not been obtained. Plaintiffs later returned to court seeking an award of attorneys fees and costs pursuant to 1365(d) of the FWPCA and a similar provision in the MPRSA.¹⁵

The Corps objected to plaintiffs request for attorney fees on the ground that plaintiffs had failed to meet the jurisdictional requirements of 1365(a) in the earlier action. The same objection had been raised in the earlier action. The Corps challenge then was directed specifically to plaintiff's failure to fulfill the notice requirements of

7. 33 U.S.C. §1365(b) (1976).

8. 5 U.S.C. §551 (1976).

9. 33 U.S.C. §1365(e) (1976).

10. *Id.* at 3 and *N.R.D.C. v. Costle*, 12 E.R.C. 1181 (D.D.C. 1978).

11. *Id.*

12. *Id.* at 3.

13. *Save Our Sound Fisheries Assoc. v. Callaway*, 387 F. Supp. 292 (D.R.I. 1974) (SOSF I).

14. 33 U.S.C. §1401 *et seq.* (1976).

15. 33 U.S.C. §1415(4) (1976).

1365(b) which requires sixty days notice to both the Environmental Protection Agency and the polluter before suit is filed. In SOSF I, the court avoided this issue by finding that jurisdiction was proper under either the APA or 28 U.S.C. § 1331.

In SOSF II, the court recognized the necessity of having to make a decision on the jurisdictional issue. It first ruled that SOSF I had not dispositively rejected jurisdiction under 1365(a), noting although that the issue had been properly presented to the court in that case.¹⁶ The court next found that it was necessary to decide whether the strict notice requirements of 1365(b), which had not been complied with in SOSF I, presented an insurmountable jurisdictional bar to the suit for attorneys fees under 1365(d). Neither of the two statutory exceptions to the sixty days notice requirement applied.¹⁷ The court found that the notice requirement was jurisdictional, but that in this case the requirement was satisfied for two reasons. First, had the defendants complied with the requirements of the FWPCA, the MPRSA, or the National Environmental Policy Act,¹⁸ the plaintiffs would have known of defendants' proposed actions in advance so as to have enabled them to give notice of their intention to file suit without risking damage to the environment in the interim.¹⁹ Second, the plaintiffs' continuing interest in the project dating from 1972 constituted a form of constructive compliance with the notice requirements.²⁰

It seems clear that the notice requirements of 1365(b) are indeed jurisdictional.²¹ Even if a court finds jurisdiction to hear the environmental case under another statute, the notice requirements of 1365(b) must be met one way or another, or attorneys fees will not be awarded. Courts have, however, allowed supplemental pleadings filed 60 days after notice was given to fulfill the requirements of 1365(b), although the original complaint had been filed too soon.²²

There are two other jurisdictional requirements contained in 1365. First, if the suit is brought against a private polluter, the defendant must be allegedly in violation of an *effluent standard or limitation*.²³ The definition of an effluent standard or limitation for the purpose

16. *Id.* 3 at 1140 and 1141.

17. *Id.* 3 at 1141 and 33 U.S.C. § 1365(b)(2) (1976).

18. 42 U.S.C. § § 4321-47 (1973).

19. *Id.* 3 at 1143.

20. *Id.* 3 at 1144.

21. *N.R.D.C. v. Train*, 510 F.2d 692 (D.C. Cir. 1972); *Mass v. U.S. Veterans Administration*, 541 F.2d 119 (1st Cir. 1976); *But see Conservation Soc'y of S. Vermont v. Secretary of Transp.*, 508 F.2d 927 (2nd Cir. 1974).

22. *Montgomery Environmental Coalition v. Fri.*, 366 F. Supp. 261 (D.D.C. 1973).

23. 33 U.S.C. § 1365(a)(i)(A) (1976).

of 1365 is contained in 1365(f) which defines "effluent standard or limitation" as being one of the following:

1. The general prohibition on discharges unless specifically permitted by some provision in the FWPCA.²⁴
2. The basic limitations on discharges which constitute the heart of the FWPCA.²⁵
3. Pretreatment and toxic pollutant standards.²⁶
4. Requirements which individual states may impose as a condition of certifying an NPDES permit.²⁷
5. Other conditions or limitations which the NPDES permit may carry.

These are the only sections of the FWPCA which, when violated, will support the jurisdictional requirements of a citizens suit under 1365.

Second, if the action is brought against the Environmental Protection Agency (EPA) itself, the action must be based on a failure of the Administrator of the EPA (Administrator) to perform a *nondiscretionary* duty under the FWPCA.²⁸ The definition of a nondiscretionary duty is problematical. A decision to omit a compound from the toxic substances list is discretionary,²⁹ as is the Administrator's decision not to invoke his emergency powers under section 1364 of the FWPCA.³⁰ Enforcement of record-keeping and monitoring requirements under 1318(a)(A) and the directive in 1255(d) to develop better waste treatment methods have also been held to be discretionary.³¹ Whether the Administrator's enforcement duties under 1319(a)(3) are discretionary appears to be a matter of some dispute, but the better view is that the word "shall" in this section creates a mandatory, non-discretionary duty.³²

Finally, when the issue is not the Administrator's failure to perform a nondiscretionary duty but a citizen challenge to an affirmative agency action, the court will not entertain a suit under 1365.³³

24. 33 U.S.C. § 1311(a) (1976).

25. 33 U.S.C. §§ 1311, 1312 (1976).

26. 33 U.S.C. § 1317 (1976).

27. 33 U.S.C. §§ 1341, 1342 (1976).

28. 33 U.S.C. § 1365(a)(2) (1976).

29. *N.R.D.C. v. Train*, 519 F.2d 287 (D.C. Cir. 1975).

30. *Comm. For Consideration of Jones Falls Sewage System v. Train*, 387 F. Supp. 526 (D. Md. 1975).

31. *Id.*

32. *Sierra Club v. Train*, 557 F.2d 485 (5th Cir. 1977), discretionary; *Ill. ex. rel. Scott v. Hoffman*, 425 F. Supp. 71 (D. Ill. 1977), nondiscretionary; *S.C. Wildlife Fed'n v. Alexander*, 457 F. Supp. 118 (D.S.C. 1978), issuing an order of compliance—nondiscretionary, but bringing a civil suit—discretionary.

33. *Sun Enterprises Ltd. v. Train*, 394 F. Supp. 211 (D.N.Y. 1975) *aff'd* 532 F.2d 280 (2nd Cir. 1976).

Plaintiff may seek review under 1369 of the FWPCA, which provides for judicial review of agency actions in the various United States Court of Appeals, but a claim for attorneys fees will not lie under 1369.

It should be evident that the jurisdictional requirements of 1365 are formidable. They limit the contexts in which an environmental plaintiff may bring suit unless he is able to independently finance the litigation. Although 1365(e) preserves his jurisdictional options under the APA and 28 U.S.C. 1331, only under 1365 can he recover attorneys fees. The jurisdictional requirements of 1365 can be summarized as follows:

1. Notice must be given to all parties 60 days prior to the filing of the suit. Filing a supplemental pleading after the 60 days have run may serve to fulfill the notice requirement.
2. If the suit is against a private polluter, he must be in violation of an effluent standard or limitation described in 1365(f).
3. If the suit is against the Administrator, it must be to compel the performance of a non-discretionary duty.

JUDICIAL DISCRETION

Once the jurisdictional requirements of 1365(a) and (b) have been met, the statute provides only the vague further suggestion that the court may award attorneys fees whenever "the court determines that such an award is appropriate."³⁴ A recent case, *Natural Resources Defense Council v. Costle*,³⁵ clarifies some of the factors that the courts are willing to take into account in awarding attorneys fees.

The case originated when environmental plaintiffs sought to compel the Administrator to perform certain non-discretionary duties under the pretreatment and toxic discharges section of the FWPCA.³⁶ A settlement agreement was ultimately reached which proved to be of importance in the subsequent administration of the FWPCA. There was no disagreement by either party as to the court's jurisdiction under 1365.

Subsequently, both the environmental plaintiffs and industrial intervenors returned to court seeking attorneys fees under 1365(d). The court was forced to consider the propriety of awarding attorneys fees in several different contexts.

The court rejected the claims of industrial interventors. These intervenors included the American Mining Congress, Firestone, and

34. *Id.* at 4.

35. 12 E.R.C. 1181 (D.D.C. 1978).

36. *Id.*

Union Carbide. The court agreed that under 1365(d) the court had broad discretion to award fees to any party "whenever the court determines such award is appropriate."³⁷ However, the court recognized that the legislative history of the FWPCA provides some guidelines. Specifically, the court quoted committee reports³⁸ stating that defendants in citizens suits actions under the FWPCA could be awarded costs where the actions were brought against them were either frivolous or for purposes of harassment. So, although the court's discretion to award attorneys fees is generally broad, an award of attorneys fees to defendants must be predicated on a finding that the defendants were the victims of a harassing or frivolous action.³⁹

The industrial intervenors advanced a second, also unsuccessful, argument. They suggested that 1365(d) represented a statutory recognition of the judicially created "common benefit" rule for attorneys fees awards. Essentially, this claim was an effort by defendants to evade the confines of the "victim of a frivolous or harassing suit" requirement. The court did not rule on the potential of 1365(d) as a statutory common benefit rule. But it found that even if that construction was to be accepted as valid, defendants did not meet the other jurisdictional requirements of 1365 because their attorneys fees were largely accrued during their attempts to intervene in the action. The court held that the Administrator's decision on whether or not to allow intervention in a case is not covered by the FWPCA and, consequently, no attorneys fees could be awarded under the FWPCA.⁴⁰

With regard to the environmental plaintiffs, the court tacitly agreed that the action had been in the public interest.⁴¹ The court then proceeded to engage in a meticulous examination of the billing statements presented by the four environmental lawyers. A significant portion of the time claimed by plaintiffs attorneys was spent in opposing the motions for intervention made by members of the industry.⁴² EPA also opposed intervention by members of the industry. In the suit for attorneys fees, EPA objected to the payment of attorneys fees for the redundant opposition to intervention made by plaintiffs. The Administrator's position was that in opposing these motions after EPA had already opposed them, plaintiffs were no longer acting out of public concern.⁴³ The court again turned to

37. *Id.* at 1182.

38. *Id.* at 1185, 1186.

39. *Id.*

40. *Id.* at 1186.

41. *Id.* at 1182.

42. *Id.* at 1183.

43. *Id.*

congressional intent in order to resolve the issue. It found that in allowing the payment of attorneys fees in citizen suits, Congress had had two purposes:

First, Congress sought to encourage the use of the citizen suit as a means of direct enforcement of the Act (FWPCA). Second, Congress felt that the existence of the attorneys fees provision would serve as a dis-incentive to the filing of frivolous or harassing suits.⁴⁴

The court then held that permitting the payment of attorneys fees for the opposition of industry intervenors did not serve the purposes of the FWPCA, since the federal government had also opposed intervention.⁴⁵ In other words, the court found, plaintiffs' opposition was no longer relevant to the enforcement of the FWPCA.

The court next considered whether the hourly rate charged by each of the lawyers was reasonable. The rates ranged from \$40 to \$80 an hour. The court found these rates to be within the usual rates charged in the District of Columbia area and, therefore, acceptable.⁴⁶ In SOSF II the court there ultimately reached this same conclusion, although it had wrestled with the issue in more detail.⁴⁷ The court also found that time spent on phone calls and conferences would be accorded less weight than time spent on research and drafting.⁴⁸ The court refused to compensate two of the attorneys for large amounts of time spent on one project because it felt that an award which included those blocks of time would not be reasonable.⁴⁹ And the court decided that affidavits of reconstructed time submitted by staff attorneys would be accepted in the absence of evidence impugning their validity.⁵⁰ Finally, time spent on the fee application could be compensated at one-half the requested hourly rate.⁵¹

CONCLUSION

Environmental plaintiffs who proceed under the citizen suit provisions of the FWPCA may seek an award of attorneys fees. They must comply with the strict jurisdictional requirements of 1365. Those requirements include giving 60 days notice to all parties before filing suit and confining the suit to certain violations by polluters or

44. *Id.*

45. *Id.* at 1184.

46. *Id.* at 1183.

47. 429 F. Supp. at 1146.

48. 12 E.R.C. at 1184.

49. *Id.*

50. 12 E.R.C. at 1185.

51. *Id.*

nondiscretionary omissions by the Administrator of the Environmental Protection Agency. When the jurisdictional requirements of 1365 have been met, a court has wide discretion in determining who will receive an award. Defendants will not generally receive attorneys fees unless they can demonstrate that they were the victims of a harassing or frivolous action. Plaintiffs must demonstrate that their action was in the public interest and that it served the purpose as intended by Congress of the citizen suit provision in the Federal Water Pollution Control Act.

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