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## IS CITIZEN SUIT NOTICE JURISDICTIONAL AND WHY DOES IT MATTER?

KARL S. COPLAN\*

With certain limited exceptions, each of the environmental citizen suit provisions includes a requirement for pre-suit notice and delay before commencement of litigation. Early on in the history of environmental citizen suits, courts disagreed about whether to treat the notice requirements as an absolute precondition to commencement of a suit, or whether the notice requirement could be varied by the court. Courts treating the notice requirement as an absolute tended to characterize the requirement as “jurisdictional,” while those that treated the requirement as subject to variation by the court tended to characterize the requirement as “procedural.”

The Supreme Court settled the question of whether notice was mandatory in 1989, in the case of *Hallstrom v. Tillamook County*.<sup>1</sup> Although the *Hallstrom* decision came down firmly on the side of holding that notice is an absolute precondition to commencement of a citizen suit, the Court carefully, and explicitly, stopped short of holding that the notice requirement “is jurisdictional in the strict sense of the term.”<sup>2</sup> Nevertheless, courts applying *Hallstrom* frequently characterize the notice requirement as a jurisdictional requirement, and many cite *Hallstrom* specifically for this proposition, despite the reservation in the Court’s *Hallstrom* decision. More recently, in *Steel Co. v. Citizens for a Better Environment*, the Court had occasion to discuss the jurisdictional nature of other statutory elements of the citizen suit (namely, the ongoing violation requirement), and a majority decided firmly that these statutory elements were not jurisdictional.<sup>3</sup> Nevertheless, this distinction has gone unnoticed by courts considering citizen suit notice issues, and most courts continue to describe the statutory notice element as jurisdictional.

The question of whether notice is jurisdictional or not has important ramifications for citizen suit litigation. The characterization of the notice requirement as “jurisdictional” implicates the proper procedure for raising notice objections, the means of curing notice defects, the question of waiver of notice objections, and the timing of raising notice objections. This article will conduct a brief review of the caselaw concerning the jurisdictional nature (or not) of the notice requirement, a consideration of the as-yet unnoticed impact of *Steel Co.* on the issue, and a discussion of the procedural and litigation ramifications of characterizing the notice element as “jurisdictional.”

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1. 493 U.S. 20 (1989).

2. *Id.* at 31.

3. 523 U.S. 83, at 92-93 (1998).

## I. BACKGROUND OF THE LAW OF CITIZEN SUIT NOTICE

A. *The Statutory Notice Provisions*

Each of the federal environmental citizen suit statutes contains a notice requirement.<sup>4</sup> Typical of these provisions (and perhaps most frequently litigated) is the citizen suit provision in the Clean Water Act (CWA), section 505(b): “Notice. No action may be commenced – . . . (A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order. . . .”<sup>5</sup> The purpose of the notice requirement, according to the legislative history of the original citizen suit provision in the Clean Air Act, is to “trigger administrative action to get the relief that [the citizen] might otherwise seek in the courts.”<sup>6</sup> The Supreme Court has also opined that another purpose of the notice requirement is to permit the violator to come into compliance and avoid litigation.<sup>7</sup>

B. *Case Law Interpreting the Notice Provisions*

A complete review of the development of citizen suit notice jurisprudence is beyond the scope of this article.<sup>8</sup> Notice issues were frequently litigated in the first two decades of citizen suit litigation. A split in the circuits developed between those courts that considered the notice requirement to be absolute, mandatory and jurisdictional, and those that read the notice provision as a procedural requirement that allowed courts to take a more pragmatic, functional approach. The former approach is probably best exemplified by the opinion of Judge Wisdom in *Garcia v. Cecos International, Inc.*<sup>9</sup> In *Garcia*, plaintiffs initially commenced a § 1983<sup>10</sup> action in territorial court against a municipality for illegally disposing of hazardous waste at a landfill, in violation of the Resource Conservation and Recovery Act (RCRA).<sup>11</sup> When the municipality removed the case to federal court, plaintiffs sought to add a RCRA citizen suit claim under

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4. See, e.g., 15 U.S.C. § 2619(b) (2000); 16 U.S.C. § 1540(g)(2) (2000); 33 U.S.C. § 1365(b) (2000); 42 U.S.C. § 300j-8(b) (2000); 42 U.S.C. § 7604(b) (2000); 42 U.S.C. § 9613(f) (2000); 42 U.S.C. § 9659(d)(1) (2000); 42 U.S.C. § 11046(d) (2000).

5. 33 U.S.C. § 1365(b)(1)(A) (2000).

6. 116 CONG. REC. 32,927 (1970).

7. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59-60 (1987).

8. For an excellent, recent review of the development of the law governing notice issues, see Robin Kundis Craig, *Notice Letters and Notice Pleading: The Federal Rules of Civil Procedure and the Sufficiency of Environmental Citizen Suit Notice*, 78 OR. L. REV. 105 (1999).

9. 761 F.2d 76 (1st Cir. 1985).

10. 42 U.S.C. § 1983 (2000).

11. 42 U.S.C. §§ 6901-6992 (2000). See *Garcia*, 761 F.2d at 78.

RCRA § 7002(a)(1)(A).<sup>12</sup> The District Court denied an injunction, and plaintiffs appealed to the First Circuit. The First Circuit raised the notice issue *sua sponte* and dismissed the case, holding that without notice, the District Court lacked jurisdiction.<sup>13</sup> Judge Wisdom's opinion for the court reasoned that

[t]he . . . language of the notice provision . . . is unambiguous: "No action may be commenced" by private plaintiffs without sixty days' notice. The notice requirement is not a technical wrinkle or superfluous formality that federal courts may waive at will. We believe that it is part of the jurisdictional conferral from Congress that cannot be altered by the courts.<sup>14</sup>

The court went on to reject the so-called "pragmatic approach" taken by other courts. The First Circuit's strict jurisdictional treatment of the notice issue is apparent from the fact that it raised the issue on its own motion on the appeal, despite the fact that the defendant, Cecos (apparently interested in preserving the favorable decision below), argued in favor of jurisdiction.<sup>15</sup>

The Third Circuit adopted the "pragmatic approach" that was rejected in *Garcia*. For example, in *Proffitt v. Commissioners, Township of Bristol*,<sup>16</sup> the court allowed a Clean Water Act citizens suit to proceed despite the lack of formal notice where the defendants had actual knowledge of the alleged violations more than 60 days prior to suit.<sup>17</sup> And in *Pymatuning Water Shed Citizens for a Hygienic Environment v. Eaton*, the same Court held that the notice requirement could be satisfied after commencement of the lawsuit as long as litigation was suspended for an equivalent of the 60 day notice period.<sup>18</sup> The Third Circuit reasoned, "This stay allowed them the time contemplated by the statute for taking appropriate action."<sup>19</sup> Thus, plaintiffs were permitted to cure their failure to give proper notice by giving post-complaint notice and suspending the litigation for 60 days. This sort of pragmatic—and distinctly non-jurisdictional—treatment of notice issues was also adopted by the Second, Eighth, and D.C. Circuits.<sup>20</sup>

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12. 42 U.S.C. § 6972(a)(1)(A) (2000). See *Garcia*, 761 F.2d at 78.

13. *Garcia*, 761 F.2d at 78. The Court also rejected the plaintiffs' § 1983 claims as a basis of federal jurisdiction, finding any § 1983 remedy to be supplanted by the RCRA regulatory scheme. *Id.* at 82.

14. *Id.* at 79 (citations omitted).

15. *Id.* at 78-79.

16. 754 F.2d 504 (3d Cir. 1985).

17. *Id.* at 506.

18. 644 F.2d 995, 996-97 (3d Cir. 1981).

19. *Id.* at 997.

20. See *Hempstead County & Nev. County Project v. United States EPA*, 700 F.2d 459, 463 (8th Cir. 1983); *Natural Res. Def. Council, Inc. v. Callaway*, 524 F.2d 79, 83-84 (2d Cir. 1975); *Natural Res. Def. Council, Inc. v. Train*, 510 F.2d 692, 698-703 (D.C. Cir. 1974).

### C. *The Supreme Court's Hallstrom Decision*

This pragmatic approach to notice was ultimately rejected by the Supreme Court in *Hallstrom v. Tillamook County*.<sup>21</sup> In *Hallstrom*, property owners sued Tillamook County, claiming that the landfill violated standards under RCRA, and sought relief from an imminent and substantial endangerment under the RCRA citizen suit provision.<sup>22</sup> The *Hallstrom* plaintiffs also asserted common law nuisance claims under the District Court's pendant jurisdiction.<sup>23</sup> Although the Hallstroms notified the defendant, Tillamook County, of their claims a year before filing suit, the Hallstroms failed to provide written notice to EPA and the Oregon Department of Environmental Quality (DEQ), as required by RCRA section 7002(b).<sup>24</sup> When defendant moved to dismiss on the grounds of lack of notice, plaintiffs immediately sent notice to EPA and the Oregon DEQ.<sup>25</sup> The District Court denied the motion to dismiss, reasoning that EPA's and DEQ's failure to act to remedy the problem within 60 days of receiving the post-complaint notice meant that the pragmatic purposes of notice had been satisfied, and that the case could proceed to trial.<sup>26</sup> After a trial, the Court ordered the County to remediate the violation.<sup>27</sup>

The Ninth Circuit reversed, holding that the notice requirement was mandatory and jurisdictional and adopting the reasoning of Judge Wisdom in the First Circuit *Garcia* decision.<sup>28</sup> The United States Supreme Court granted certiorari to resolve the conflict among the circuits and affirmed the Ninth Circuit, emphatically holding that notice was a mandatory requirement prior to the commencement of a citizen suit.<sup>29</sup> The Court resolved the issue specifically in reliance on the language of the statute that "[n]o action may be commenced under paragraph (a)(1) of this section . . . prior to sixty days after the plaintiff has given notice of the violation."<sup>30</sup> According to the Court: "Because this language is expressly incorporated by reference into § 6972(a), it acts as a specific limitation on a citizen's right to bring suit. Under a literal reading of the statute, compliance with the 60-day notice provision is a mandatory, not optional, condition precedent for suit."<sup>31</sup> The Court explicitly stopped short of deciding whether this "condition precedent" was in fact a jurisdictional requirement: "In

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21. 493 U.S. 20 (1989).

22. *Id.* at 23-24.

23. *See* *Hallstrom v. Tillamook County*, 844 F.2d 598, 599 (9th Cir. 1987).

24. *Hallstrom*, 493 U.S. at 24; *see also* 42 U.S.C. § 6972(b)(1).

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 31.

30. *Id.* at 25 (quoting 42 U.S.C. § 6972(b)(1) (1982)).

31. *Id.* at 26.

light of our literal interpretation of the statutory requirement, we need not determine whether § 6972(b) is jurisdictional in the strict sense of the term.”<sup>32</sup>

Justice Marshall dissented in *Hallstrom* and noted the importance of this reservation of the jurisdiction issue.

The Court might be read to suggest that failure to comply with the 60-day notice provision deprives the court of subject-matter jurisdiction, thereby obligating a court to dismiss a case filed in violation of the notice provision no matter when the defendant raises the issue – indeed, regardless of whether the defendant does so. As there is no dispute in this case that respondent timely raised the claim that petitioners had not complied with the notice provision, the question whether a defendant may waive the notice requirement is not before the Court, and any “resolution” of the question is necessarily dictum. In any event, I do not understand the Court to express any view on whether the notice requirement is waivable.<sup>33</sup>

Justice Marshall thus points out the most critical ramification of characterizing notice as “jurisdictional.” If the issue is indeed jurisdictional, it cannot be waived by the defendant and, indeed, could be raised for the first time after an adverse judgment or even on appeal.

In *Hallstrom*, the plaintiffs were sent back to refile their case after seven years of litigation and a favorable judgment after trial. The *Hallstrom* plaintiffs were at least informed of defendants’ notice defense early in the litigation and had the option of refiling their case at that time to cure the notice defect. If notice were indeed jurisdictional, then an environmental citizen plaintiff could, in theory, have their case dismissed after years of litigation when the defendant raises the notice issue for the first time on appeal, long after any opportunity to cure the defect has passed. The issue becomes even stickier when the plaintiff has given some form of notice to the proper parties, but the defendant challenges the sufficiency of that notice late in the litigation.

#### D. *Post-Hallstrom Cases on Notice*

Since *Hallstrom* was decided, notice issues continue to be actively litigated. As the citizen suit plaintiff bar has become aware of the notice requirement, fewer cases deal with failure to give any notice and instead address disputes over the adequacy of the notice given to describe the violations sued upon, proper service and naming of the notice recipient.<sup>34</sup> Most courts considering notice defenses

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32. *Hallstrom*, 493 U.S. at 31.

33. *Id.* at 34 n.\* (Marshall, J., dissenting) (citations omitted).

34. *See, e.g.*, *Southwest Ctr. for Biological Diversity v. United States Bureau of Reclamation*, 143 F.3d 515, 520-21 (9th Cir. 1998) (addressing a failure to describe specific activities complained of); *Hawksbill Sea Turtle v. Fed. Emergency Mgmt. Agency*, 126 F.3d 461, 464 (3d Cir. 1997) (involving notice served on Secretary of Interior instead of Secretary of Commerce in Endangered Species Act case concerning marine species); *Atl. States Legal Found., Inc. v. Stroh Die Casting*

since *Hallstrom* continue to describe the notice issue as “jurisdictional,”<sup>35</sup> and, despite the Supreme Court’s explicit reservation of the question in *Hallstrom*, some courts cite *Hallstrom* for the proposition that notice is a jurisdictional requirement.<sup>36</sup> In one unusual post-*Hallstrom* case, the Fifth Circuit explicitly rejected an attempt to raise a notice defense for the first time on appeal, and held that the notice requirement was not jurisdictional.<sup>37</sup>

## II. THE LITTLE NOTICED JURISDICTIONAL HOLDING OF *THE STEEL COMPANY CASE*

*Steel Co. v. Citizens for a Better Environment*<sup>38</sup> is not a case about the notice requirements of the federal environmental statutes. Nevertheless, the *Steel Co.* majority opinion contains an extensive discussion of the distinction between statutory citizen suit elements and jurisdictional requirements that bears directly on the jurisdiction nature of notice requirements.<sup>39</sup> The case is noteworthy (or notorious, depending on one’s perspective) in citizen suit circles as the watershed case in Justice Scalia’s Article III standing jurisprudence. In *Steel Co.*, the Supreme Court extended the continuing violation requirement that it adopted as a matter of Clean Water Act statutory construction in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*<sup>40</sup> to be an essential element of an Article III case or controversy.<sup>41</sup>

A brief digression into the continuing violation element of citizen suits is necessary to understand the implications of *Steel Co.* for notice issues. A decade earlier, in *Gwaltney*, the Supreme Court held, as a matter of statutory construction under the Clean Water Act, that an allegation of an ongoing violation was a

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Co., 116 F.3d 814, 820 (7th Cir. 1997) (rejecting challenge to suit based on effluent redirected to different outfall than that identified in notice letter); Pub. Interest Research Group of N.J., Inc. v. Hercules, Inc., 50 F.3d 1239, 1248 (3d Cir. 1995) (finding that notice need not specifically identify each violation at issue); Wash. Trout v. McCain Foods, Inc., 45 F.3d 1351, 1352, 1354-55 (9th Cir. 1995) (holding that notice given by parties other than plaintiff was not sufficient); Hudson Riverkeeper Fund, Inc. v. Putnam Hosp. Ctr., Inc. 891 F. Supp. 152, 155 (S.D.N.Y. 1995) (dismissing for failure to give notice identifying specific dates of violations).

35. See, e.g., *Southwest Ctr. for Biological Diversity*, 143 F.3d at 520; *Hawksbill Sea Turtle*, 126 F.3d at 471; *Atl. States Legal Found., Inc.*, 116 F.3d at 820; *Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1072 (9th Cir. 1996); *Wash. Trout*, 45 F.3d at 1355; *Hudson Riverkeeper Fund, Inc.*, 891 F. Supp. at 155 (granting motion to dismiss for lack of jurisdiction).

36. See, e.g., *AM Int’l, Inc. v. Datacard Corp.*, 106 F.3d 1342, 1353 (7th Cir. 1997) (Ripple, J., concurring); *Pub. Interest Research Group of N.J., Inc. v. Windall*, 51 F.3d 1179, 1189 (3d Cir. 1995).

37. *Sierra Club v. Yeutter*, 926 F.2d 429, 437 (5th Cir. 1991).

38. 523 U.S. 83 (1998).

39. *Id.* at 89-93.

40. 484 U.S. 49 (1987).

41. *Steel Co.*, 523 U.S. at 109.

necessary element of a citizen suit.<sup>42</sup> The Court focused on the present-tense “alleged to be in violation” language of section 505(a)(1) of the CWA to hold that such a suit was available only where plaintiffs could make a good faith allegation that the violations were continuing as of the date suit commenced.<sup>43</sup> In reaching this conclusion, the Court couched the question in “jurisdictional” terms: “In this case, we must decide whether § 505(a) of the Clean Water Act . . . confers federal jurisdiction over citizen suits for wholly past violations.”<sup>44</sup>

A student of the *Gwaltney* opinion might be excused, therefore, for understanding the “continuing violation” requirement to be a jurisdictional element of a citizen-plaintiff’s case. By extension, other similar statutory citizen suit elements might also be understood to be “jurisdictional.” But in *Steel Co.*, the Court unequivocally and emphatically rejected a reading of the statutory citizen suit elements as being “jurisdictional.”<sup>45</sup>

*Steel Co.* addressed the exact same “continuing violation” element of a citizen suit as *Gwaltney* did, only this time the question arose under the Emergency Planning and Community Right-to-Know Act (EPCRA).<sup>46</sup> Unlike the CWA’s “alleged to be in violation” provision, EPCRA’s citizen suit provision allows an action “against . . . [a]n owner or operator of a facility for failure to . . . [c]omplete and submit an inventory form under section 11022(a) of this title . . . [or] [c]omplete and submit a toxic chemical release form under section 11023(a) of this title.”<sup>47</sup> So there was at least some question of whether, as a matter of statutory interpretation, the EPCRA citizen suit required a continuing violation the same way as the CWA’s more emphatically present-tense “alleged to be in violation” language did.

A majority of the Supreme Court skipped over the statutory interpretation question in *Steel Co.* and went straight to the Article III jurisdictional question of whether a citizen could satisfy the redressability element of standing where no violations existed at the time she commenced suit. The Court ultimately held that the citizen plaintiff could not.<sup>48</sup> Justice Stevens concurred in the judgment, however, in an opinion that seriously questioned the majority’s Article III analysis. Justice Stevens preferred to avoid the constitutional question and would have resolved the issue by extending the *Gwaltney* holding to EPCRA as a matter of statutory interpretation.<sup>49</sup> Justice Stevens reasoned that since the Article III standing inquiry and the statutory interpretation question were both

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42. 484 U.S. at 59-60.

43. *Id.*

44. *Id.* at 52.

45. *Steel Co.*, 523 U.S. at 89-90.

46. 42 U.S.C. §§ 11001-11050 (2000).

47. 42 U.S.C. § 11046(a)(1)(A)(iii)-(iv) (2000).

48. *Steel Co.*, 523 U.S. at 109.

49. *Id.* at 132-33 (Stevens, J., concurring).



jurisdictional, the Court should avoid reaching an unnecessary constitutional holding and resolve the case on statutory grounds.<sup>50</sup>

The majority answered Justice Stevens's opinion with an emphatic rejection of his assumption that the statutory requirements of a citizen suit were jurisdictional in nature. Although the Court's discussion of the jurisdictional nature *vel non* of statutory citizen suit elements focused on the continuing violation element, its reasoning ought well apply to the notice requirement. In rejecting the jurisdictional character of the continuing violation requirement, the majority held:

It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case. As we stated in *Bell v. Hood*, "[j]urisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover." Rather, the district court has jurisdiction if "the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another," unless the claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." Dismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy."<sup>51</sup>

The majority went on to reject Justice Stevens's reading of *Gwaltney* as a jurisdictional holding, going so far as to refer to that decision as a "drive-by" jurisdictional discussion without any precedential value:

Justice Stevens relies on our treatment of a similar issue as jurisdictional in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, . . . .

[T]he *Gwaltney* opinion does not display the slightest awareness that anything *turned upon* whether the existence of a cause of action for past violations was technically jurisdictional – as indeed nothing of substance did. The District Court had statutory jurisdiction over the suit in any event, since continuing violations were also alleged. It is true, as Justice STEVENS points out, that the issue of Article III standing which is addressed at the end of the opinion should technically have been addressed at the outset if the statutory question was not jurisdictional. But that also did not really matter, since Article III standing was in any event found. The short of the matter is that the jurisdictional character of the elements of the cause of action in *Gwaltney* made no substantive difference (nor even any procedural difference that the Court seemed aware of), had been assumed by the parties, and was assumed without discussion by the Court. We have often said that drive-by

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50. *Steel Co.*, 523 U.S. at 133.

51. *Id.* at 89 (alteration in original) (citations omitted).

jurisdictional rulings of this sort (if *Gwaltney* can even be called a ruling on the point rather than a dictum) have no precedential effect.<sup>52</sup>

*Steel Co.* thus rejected the notion that citizen suit elements became “jurisdictional” simply because the statute goes on to say that “[t]he district court shall have jurisdiction in actions brought under subsection (a) of this section.”<sup>53</sup> The majority’s reasoning did not turn on any distinction between the negative “no action may be commenced” language of the notice requirements and the more affirmative “any person may commence an action” language of the citizen suit. Taken at face value, at least, the majority opinion in *Steel Co.* would suggest that notice, like a continuing violation, is not a jurisdictional requirement in a citizen suit.

### III. POST-STEEL CO. NOTICE DECISIONS

Despite the Supreme Court’s reasoning in *Steel Co.* that statutory elements of a citizen suit are decidedly nonjurisdictional in nature, the lower federal courts continue to describe notice as a “jurisdictional” issue.<sup>54</sup> Indeed, a LEXIS search fails to reveal any reported decision in which *Steel Co.* is even discussed or cited in connection with a discussion of the jurisdictional nature of notice issues.<sup>55</sup>

Despite this lack of judicial reaction to *Steel Co.*, it is hard to find a rational distinction between the ongoing violation requirement found to be emphatically non-jurisdictional in that case and the notice requirement still described as jurisdictional by the vast majority of reported decisions. Both are statutory elements of a citizen suit claim for relief. While the ongoing violation phrase is preceded by “any person [or citizen] may commence a civil action,”<sup>56</sup> and the notice provisions are prefaced “[n]o action may be commenced,”<sup>57</sup> it is hard to draw a jurisdictional distinction between the positive and negative phrasings.<sup>58</sup>

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52. *Steel Co.*, 523 U.S. at 90-91 (citations omitted). The majority also suggested the possibility that a difference in the language of the citizen suit grant in the CWA and EPCRA might justify a distinction in determining the “jurisdictional” nature of the citizen suit elements under each statute. *Id.*

53. 42 U.S.C. § 11046(c) (2000).

54. *See, e.g.*, *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 489 (2d Cir. 2001); *Bd. of Trustees v. City of Painesville*, 200 F.3d 396, 400 (6th Cir. 1999); *Southwest Ctr. for Biological Diversity v. United States Bureau of Reclamation*, 143 F.3d 515, 522 (9th Cir. 1998); *Friends of Frederick Seig Grove #94 v. Sonoma County Water Agency*, 124 F. Supp. 2d 1161, 1164 (N.D. Cal. 2000).

55. The only such reference appears in *Nat’l Parks Conservation Ass’n v. Tenn. Valley Auth.*, 175 F. Supp. 2d 1071, 1077 (E.D. Tenn. 2001), where the Court assumes that notice is jurisdictional and cites *Steel Co.* for the proposition that the plaintiff has the burden of proving subject matter jurisdiction.

56. 42 U.S.C. § 11046(a)(1) (2000).

57. 42 U.S.C. § 11046(d) (2000).

58. In *Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991), the Fifth Circuit points out that the

Justice Scalia's opinion in *Steel Co.* suggested a possible distinction between the Clean Water Act jurisdictional grant, which specifically states that jurisdiction shall be "without regard to the amount in controversy or the citizenship of the parties,"<sup>59</sup> and the jurisdictional grant of EPCRA, which omits this language.<sup>60</sup> Nevertheless, it is hard to see why this language, which seems only to suggest that federal question jurisdiction was contemplated rather than diversity jurisdiction, converts the statutory elements of the Clean Water Act citizen suit to jurisdictional requirements, while leaving them non-jurisdictional in the other environmental citizen suits. Moreover, even if such a distinction were valid, notice should be considered non-jurisdictional under the statutes that omit the Clean Water Act's citizenship and amounts in controversy language.

Post-*Steel Co.* courts have drawn no such distinction and seem to be simply unaware that the Supreme Court has answered the question it left open in *Hallstrom*: namely, whether citizen suit elements such as notice are "jurisdictional in the strictest sense of the word."<sup>61</sup> Under *Steel Co.* they are not. Presumably, the courts will reach this conclusion once the citizen suit bar begins to point the *Steel Co.* holding out to them.

#### IV. WHY DOES IT MATTER WHETHER NOTICE IS JURISDICTIONAL OR NOT

One reason courts have not paid very close attention to the jurisprudence of jurisdiction when deciding notice issues is that in the vast majority of cases, it does not matter. Notice issues are usually raised at the very outset of the citizen suit. If the court determines that notice was proper, the case proceeds. If the court determines notice was not properly given, under *Hallstrom*, the court has no choice but to dismiss. For this reason, courts have rarely had to consider closely the jurisdictional characterization of notice issues.

This situation changes where a defendant fails to raise notice issues at the outset of litigation. If notice is truly a jurisdictional issue, then a defendant cannot waive a notice objection, even if the issue is raised for the first time on appeal. Indeed, the Court may (and should) address jurisdictional issues on appeal even if the parties fail to raise them. Whether notice is jurisdictional or not also affects the appropriate means of raising notice defects and of curing a notice defect once it has been raised.

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same "no action shall be commenced" language incorporates the defense of diligent prosecution, and that the diligent prosecution defense does not incorporate the kind of "bright-line" factual determinations normally associated with a truly jurisdictional requirement. *Id.* at 437.

59. 33 U.S.C. § 1365(a)(2) (2000).

60. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998).

61. *See supra* notes 1-2 and accompanying text.

### *A. Waiver by Defendant*

If notice were jurisdictional in the strictest sense of the word, then the issue could not be waived by the defendant, intentionally or unintentionally, and indeed, an appellate court would have the obligation to raise the issue even if the parties did not.<sup>62</sup> This strictly jurisdictional, non-waivable approach is precisely the approach taken by the First Circuit Court of Appeals in its pre-*Hallstrom Garcia* decision. In that case, the Court apparently raised the notice issue *sua sponte* on the appeal and dismissed RCRA claims for failure to give the requisite notice.<sup>63</sup> Conversely (and more recently), the Fifth Circuit specifically considered the issue of waiver in *Sierra Club v. Yeutter*.<sup>64</sup> The Fifth Circuit held that notice was not strictly jurisdictional and was therefore waived for failure to raise the issue at all before the trial court.<sup>65</sup>

If, as *Steel Co.* implies, notice is non-jurisdictional, then it is waivable. The next question is: under what circumstances has a citizen suit defendant waived a notice defense? Clearly, under *Yeutter*, a defendant who fails to raise the issue at all before the trial court has waived the issue. But can waiver occur earlier in the proceedings? Federal Rule of Civil Procedure Rule 9, which requires particularity for pleading denials of a condition precedent,<sup>66</sup> may have some bearing on this issue.

#### 1. Rule 9 and Pleading of Conditions Precedent

Recall that in *Hallstrom*, the Supreme Court held that notice is a mandatory “condition precedent” to the commencement of an environmental citizen suit.<sup>67</sup> Federal Rule of Civil Procedure Rule 9 has something to say about pleading requirements for conditions precedent: “In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. *A denial of performance or occurrence shall be made specifically and with particularity.*”<sup>68</sup> At least at face value, if notice is a non-jurisdictional “condition precedent” to a citizen suit, a citizen plaintiff need only plead generally that all conditions precedent to suit have occurred, and the onus is on the defendant to plead “specifically and with particularity” the manner in which it claims conditions precedent were not met.

There is no reported decision addressing the question of whether citizen suit notice is the sort of “condition precedent” subject to Rule 9(c). In general,

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62. *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).

63. *See Garcia v. Cecos Int'l, Inc.*, 761 F.2d 76 (1st Cir. 1985).

64. 926 F.2d 429 (5th Cir. 1991).

65. *Id.* at 434-37.

66. *See infra* note 68 and accompanying text.

67. *See supra* notes 1-2 and accompanying text.

68. FED. R. CIV. P. 9(c) (emphasis added).

jurisdictional allegations have been held not to be subject to Rule 9(c), while non-jurisdictional conditions precedent are.<sup>69</sup> So, if *Steel Co.* indeed establishes that notice is not a jurisdictional issue, Rule 9(c) ought to apply. A line of Court of Appeals cases considering employment discrimination claims under Title VII of the Civil Rights Act makes clear that the Rule 9(c) pleading requirements apply to statutory as well as contractual conditions precedent.<sup>70</sup> This line of cases suggests that Rule 9(c)'s requirement of particularity of denials of conditions precedent should apply to citizen suit notice issues.

A defendant's failure to deny a condition precedent with particularity is grounds to exclude any evidence presented by defendant on the issue.<sup>71</sup> Failure to deny satisfaction of a condition precedent with particularity has also been held to constitute a waiver of the issue by a defendant.<sup>72</sup> Accordingly, a defendant who fails to assert a notice defense specifically and with particularity in its answer should be held to have waived the issue.

## 2. Method of Raising Issue—12(b)(1) or Rule 56

The non-jurisdictional character of notice issues also affects the proper manner of resolving notice objections prior to trial. The proper method of raising a jurisdictional objection is a motion pursuant to the Federal Rules of Civil Procedure Rule 12(b)(1), and indeed, the same courts that have reflexively treated the notice issue as "jurisdictional" have routinely resolved the issue in the context of a 12(b)(1) motion.<sup>73</sup> A motion under Rule 12(b)(1) allows a court to consider matters outside the pleadings.<sup>74</sup>

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69. *EEOC v. W. Elec. Co.*, 364 F. Supp. 188, 190 (D. Md. 1973); *EEOC v. Griffin Wheel Co.*, 360 F. Supp. 424, 425-26 (N.D. Ala. 1973); *EEOC v. Guar. Sav. & Loan Ass'n*, 369 F. Supp. 36, 37 (N.D. Ala. 1973).

70. *See, e.g.*, *Stearns v. Consol. Mgmt., Inc.*, 747 F.2d 1105, 1111-12 (7th Cir. 1984); *EEOC v. Klingler Elec. Corp.*, 636 F.2d 104, 106 (5th Cir. 1981); *EEOC v. Times-Picayune Publ'g Corp.*, 500 F.2d 392 (5th Cir. 1974) (per curiam), *cert. denied*, 420 U.S. 962 (1975); *EEOC v. Standard Forge & Axle Co.*, 496 F.2d 1392, 1393 (5th Cir. 1974), *cert. denied*, 419 U.S. 1106 (1975); *EEOC v. Wah Chang Albany Corp.*, 499 F.2d 187, 190 (9th Cir. 1974).

71. *McKee-Berger-Mansucto, Inc., v. Bd. of Ed.*, 626 F.2d 559, 562 (7th Cir. 1980).

72. *Brooks v. Monroe Sys. for Bus., Inc.*, 873 F.2d 202, 205 (8th Cir. 1989), *cert. denied*, 493 U.S. 853 (1989).

73. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d at 481, 485 (2d Cir. 2001); *Atl. States Legal Found., Inc. v. Stroh Die Casting Co.*, 116 F.3d 814, 820-21 (7th Cir. 1997); *Friends of Frederick Seig Grove #94 v. Sonoma County Water Agency*, 124 F. Supp. 2d 1161, 1164, 1169 (N.D. Cal. 2000); *Hudson Riverkeeper Fund, Inc. v. Putnam Hosp. Ctr., Inc.*, 891 F. Supp. 152, 153, 155 (S.D.N.Y. 1995).

74. *See, e.g.*, *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995); *Calvert v. Sharp*, 748 F.2d 861, 862-63 (4th Cir. 1984), *cert. denied*, 471 U.S. 1132 (1985); *Grafon Corp., v. Hausermann*, 602 F.2d 781, 783 (7th Cir. 1979).

Although courts have increasingly used the Rule 12(b)(1) motion to cover a larger universe of defenses,<sup>75</sup> if notice, like an ongoing violation, is merely a statutory element of a cause of action, then a motion under Rule 12(b)(6) would be the more appropriate means of challenging the legal sufficiency of the complaint with respect to notice issue. Of course, if the 12(b)(6) motion requires reference to matters outside of the pleadings (for example, if the complaint does not attach the notice letter, or the defense of lack of notice is based on a failure properly to serve the notice on the proper parties), then the Court would convert the motion into one for summary judgment under Rule 56.<sup>76</sup>

As a practical matter, it ordinarily makes little difference whether the motion proceeds as one under Rule 12(b)(1) or one under Rule 56, as the parties will have an opportunity to submit evidence on the notice issue in the form of affidavits, and the Court will ultimately make a determination whether a factual hearing is required to resolve the issue. However, where a genuine factual issue exists concerning the service of notice, the means for resolving this issue may differ depending on whether the issue is treated as one of subject matter jurisdiction under Rule 12(b)(1) or a matter of the merits. Indeed, the notice issue could conceivably be an issue for a jury trial if it is a merits issue,<sup>77</sup> while the Court has the option of resolving the issue itself if it is an issue of subject matter jurisdiction.<sup>78</sup>

### B. *Correction by Amendment of Complaint?*

The characterization of notice as jurisdictional also affects the appropriate means of curing a notice defect once raised by the defendant or ruled on by the Court. As notice defects are usually easily cured, a plaintiff confronted with a notice objection will often simply re-notice the case and wait out the sixty or ninety days to cure the defect. Plaintiffs are tempted simply to amend the original complaint at the end of the new waiting period. This procedure is clearly insufficient to cure a notice defect if notice is jurisdictional and may still be problematic even if notice is considered “procedural” but “mandatory” under *Hallstrom*.

Subject matter jurisdiction is usually measured as of the time of filing of the complaint, and subsequent events will not ordinarily cure a jurisdictional defect that existed at the time of filing.<sup>79</sup> Accordingly, if notice were considered

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75. See 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1350 (2d ed. 1990 & Supp. 2003).

76. Cf. *Sierra Club v. Shell Oil Co.*, 817 F.2d 1169, 1172 (5th Cir. 1987), cert. denied, 484 U.S. 985 (1987).

77. See *Tull v. United States*, 481 U.S. 412 (1987).

78. See generally WRIGHT & MILLER, *supra* note 75, at § 1350.

79. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 569 n.4 (1992); *Friends of the Earth, Inc. v. Chevron Chem. Co.*, 919 F. Supp. 1042 (E.D. Tex. 1996), *rev'd on other grounds*, 129

jurisdictional, filing an amended complaint after the waiting period expired would never suffice to restore subject matter jurisdiction that was lacking at the time of the original complaint. Even if notice is considered non-jurisdictional, the holding of *Hallstrom* casts serious doubt on simple amendment of the original complaint. In *Hallstrom*, the Court required dismissal of a case filed before proper notice was given, and specifically rejected the district court's approach of allowing the original case to proceed after waiting the requisite notice period. Given the Court's reliance on a strict literal reading of the "[n]o such action may be commenced" language of the notice provision, reliance on an amended complaint in an action that was commenced prior to satisfaction of notice requirements is risky. The *Hallstrom* Court noted that the proper way to cure the defect would be for plaintiff to commence a new action once the notice and delay period had expired.<sup>80</sup>

Several courts have endorsed the procedure of filing a new case after the new notice period has expired in order to cure a notice defect. These courts have specifically endorsed a separate action and a motion to consolidate with the previously filed case where the notice objection goes to some, but not all of plaintiffs' claims.<sup>81</sup>

## V. CONCLUSION

Courts continue to characterize the citizen suit notice requirements as a question of subject matter jurisdiction. The Supreme Court in *Hallstrom v. Tillamook County* expressly declined to characterize notice as being jurisdictional in the "strict[est] sense of the term." More recently, the Supreme Court determined in *Steel Co.* case that the ongoing violation element of a citizen suit is decidedly not jurisdictional. This determination strongly suggests that the notice element of a citizen suit is likewise non-jurisdictional in nature. If notice is non-jurisdictional, then under Rule 9(c) plaintiffs need only plead generally for satisfaction of conditions precedent to suit, and the onus is on the defendant to deny proper notice specifically and with particularity. Failure of the defendant to so plead would constitute a waiver of notice objections. If notice is not a jurisdictional issue, then the appropriate means to resolve a notice objection is through a motion under Rule 12(b)(6) for failure to state a claim upon which relief can be granted, or a motion for summary judgment under Rule 56. In any event, the proper way for a plaintiff to cure a potential notice defense is to give proper notice and file a new complaint after the waiting period expires, rather than to amend the pending complaint.

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1:3d 826 (5th Cir. 1997).

80. *Hallstrom v. Tillamook County*, 493 U.S. 20, 32 (1989).

81. *See, e.g.*, *Hawksbill Sea Turtle v. Fed. Emergency Mgmt. Agency*, 126 F.3d 461, 473 (3d Cir. 1997); *Coalition Against Columbus Ctr. v. City of New York*, 750 F. Supp. 93, 96 (S.D.N.Y. 1990).