

## ***Citizens Group Can Sue Polluter Under Clean Air Act Despite Administrative Enforcement Action***

The United States Court of Appeals for the Fifth Circuit has decided that despite the fact that the state issued an administrative order and assessed penalties against a Texas oil refinery, a citizens group may still sue under the Clean Air Act's citizens suit provision.

For many years, Crown Central Petroleum Corp. (Crown Central) regularly exceeded its sulfur dioxide and hydrogen sulfide permit emissions limits at its Pasadena, Texas refinery. In addition, the refinery allegedly failed to comply with operating and recordkeeping requirements and air emissions permit limitations. In 1995, the Texas Natural Resources Conservation Commission (TNRCC) took enforcement action against Crown Central, entering into an agreed order with the company. The order required the Crown Central to comply with the pollution control law and pay a monetary penalty of \$110,000.

After the order was issued, members of the local community continued to complain about noxious odors emanating from the refinery. The facility repeatedly experienced process upsets that caused releases of hundreds of tons of sulfur dioxide into the atmosphere. In May, 1997, the citizens group Texans United for a Safe Economy Education Fund (Texans United) notified Crown Central and the TNRCC that, because of Crown Central's continuing violations, the group planned to sue Crown Central under the Clean Air Act's citizens suit provisions.

In November, 1997, the TNRCC began an administrative enforcement action against Crown Central for its ongoing violations. In December 1997, Texans United sued the company, demanding that it pay penalties for its violations and install pollution controls. By August of 1998, the TNRCC's administrative action was resolved: Crown Central agreed to an administrative order requiring that Crown Central pay the state over \$1 million in penalties and hire two independent experts to help the company correct its emissions problems. Crown then filed a motion in district court to dismiss the citizens suit, arguing that Texans United did not meet the constitutional requirements to be allowed to sue (i.e., "standing" to sue), and that even if the citizens group met the lawsuit requirements under the constitution, the Clean Air Act does not permit a citizens group to sue once the state has taken enforcement action. The district court granted Crown Central's motion to dismiss based on the company's Clean Air Act argument and did not consider the standing issue.

Texans United appealed the dismissal to the Court of Appeals, arguing that the group met all of the constitutional requirements for standing and that the TNRCC's administrative enforcement action did not justify imposing the Clean Air Act's limitation on citizens' rights to sue. The Court of Appeals Agreed.

### **Standing**

Assuming that a citizens group can legitimately claim that it represents the interests of its members in a lawsuit, the federal courts have established three requirements that must be met before a person has the right to sue:

1. The plaintiff has suffered an actual or threatened injury;
2. The conduct of the defendant is a cause of the plaintiff's injury; and
3. If the plaintiff wins the lawsuit, his injury will be corrected or compensated for.

The court considered Texans United's arguments that their members satisfied these requirements. As to the citizens' injuries, the court noted that members of Texans United had complained of repeated exposure to "overpowering" sulfurous odors in their homes and yards and while driving through the town. Therefore, argued Texans United, its members were injured due to their diminished enjoyment of their surroundings. Moreover, the group pointed out, other courts have held that breathing and smelling polluted air is considered an injury for purposes of the Clean Air Act's citizens suit provisions. The Court of Appeals found these points compelling, and ruled that Texans United had a valid injury claim.

The court then turned to the issue of whether the injuries complained of by the community could be traced to Crown Central's emissions. Texans United produced eyewitnesses who could trace the sulfur pollution that they smelled to direct observations of smoke from the refinery. Also, Crown Central's own employees, having conducted surveys of sulfur odors in the community while the refinery was violating its emissions limits, confirmed the eyewitness accounts. Finally, Texans United presented results of air modeling by an air pollution expert that showed that some of the refinery's releases of sulfur dioxide could have harmed members of the community.

Finally, the court addressed Crown Central's argument that the citizens' alleged injuries would not be resolved as a result of the lawsuit. After all, argued the company, other polluters also contributed to pollution and odors in the community, so the pollution would not go away as a result of the lawsuit. Besides, the TNRCC had already assessed over \$1 million in fines against the refinery and ordered them to fix the odor/pollution problem. The TNRCC's actions were more than enough, argued Crown Central, to relieve the citizens of their injuries. The court, however, disagreed.

Based on prior court decisions by the same court under the Clean Water Act, the court found that it was enough for Texans United to show that Crown Central *contributed* to the pollution in the community. Thus, it was not a necessary prerequisite to Texans United's complaint that the court be able to correct the entire pollution problem in the area. Moreover, Texans United showed that even the TNRCC's remedies would not be able to resolve the refinery's emissions problem without additional pollution controls. Because the TNRCC had not required such controls as part of its enforcement order, Crown Central could not show that it could achieve compliance with the emissions standards. Thus, Texans United showed both that the TNRCC's actions did not make the citizens suit unnecessary and that it was likely Crown Central would continue causing the injuries despite the enforcement order.

## **Clean Air Act Citizen Suit Requirements**

Under the Clean Air Act's citizen suit provisions, a person cannot sue a polluter "if the Administrator [of the U.S. Environmental Protection Agency (EPA)] or a State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation or order." 42 U.S.C. § 7604(b)(1)(B). In the district court, Texans United argued that the terms "civil action" and "court" did not include non-judicial proceedings. Thus, according to Texans United, the Clean Air Act required that the TNRCC or EPA sue Crown Central in a *court* before the citizen suit could be barred by the statute. Moreover, Texans United pointed out that two other circuit courts of appeal, the 2<sup>nd</sup> and 9<sup>th</sup> Circuits, had found that a similar citizen suit provision in the Clean Water Act allowed only *court* actions (and not administrative actions) to preclude citizen suits. The 5<sup>th</sup> Circuit agreed with the 2<sup>nd</sup> and 9<sup>th</sup> Circuits in finding that Clean Air Act citizen suits can still proceed in the face of administrative actions by state agencies.

## **Conclusion**

Because the constitutional standing-to-sue requirements were met by the citizen group's complaint, the court concluded that, if the requirements under the Clean Air Act's citizen suit provision were met, Texans United was allowed to sue the refinery. The TNRCC, in electing to pursue an administrative action under the Clean Air Act against Crown Central rather than sue the refinery in court, left the door open to citizens groups to sue the refinery as well.

***Texans United for a Safe Economy Education Fund v. Crown Central Petroleum Corp., 2000 WL 297728 (5<sup>th</sup> Cir. April 6, 2000)***

This article was prepared by Stuart J. Weiss, an associate in our Environmental Department, and previously appeared in the June, 2000 edition of the Michigan Environmental Compliance Update, a monthly newsletter prepared by the Environmental Department and published by M. Lee Smith Publishers.