



By Richard Lazarus

## Loss of the Law's Foremost Stewards

Last March, environmental law lost two of its greatest champions: Joe Sax and David Sive. They were clearly our founding fathers. Each had a different professional focus. Joe practiced some, but he was primarily a brilliant legal scholar and teacher. David wrote and taught some, but he was primarily a private sector lawyer. Joe was our first environmental law professor. David formed the country's first boutique environmental law firm.

Notwithstanding their distinct professional roles, they shared a strong belief in the essential role of citizen suits in environmental law. Joe provided citizen suits with their necessary theoretical grounding with path-breaking scholarship. David served as co-counsel for the plaintiffs in the 1960s *Scenic Hudson* litigation, the nation's first significant environmental citizen suit.

The Clean Air Act and the Clean Water Act borrowed from their examples in establishing citizen suit provisions that have proven indispensable to each law's successes. The courts effectively did the same for the National Environmental Policy Act. NEPA lacked even a bare hint of a citizen suit provision in its language or its legislative history. Yet, Judge Skelly Wright of the D.C. Circuit understood what Joe and David knew, which was that environmental law's promise could never be realized absent effective citizen suit enforcement.

The theory is simple, as Joe explained, and David demonstrated in practice. Absent the availability of citizen enforcement in litigation, the ambitious requirements of the nation's pollution control and resource conservation laws would be doomed to fail. Federal and state governments would never possess the resources necessary for full and effective enforcement of environmental protection requirements, let alone the unbending political will necessary to overcome the powerful pressures arising from elsewhere within government and from private sector interests naturally concerned about immediate compliance costs.

Environmental law's history bears witness to Joe's and David's wisdom. The federal and state reporters are littered with not just hundreds, but thousands of successful citizen suits enforcing pollution control and natural resource laws, including those already mentioned and especially the Endangered Species Act. Cases against the federal government, state and local governments, and private parties have resulted in thousands of settlement and court-ordered injunctions requiring compliance with statutes and regulations — and recovery of millions of dollars of penalties payable to federal and state coffers. Citizen suits have proven to be no less than one of environmental law's signature strengths.

But that is also why a ruling by a federal district court in Texas this past August is troubling. The judge did not just rule in *Sierra Club v. Energy Future Holdings* that the plaintiff's Clean Air Act citizen suit lacked merit. The judge ruled that the suit was so lacking in merit as to be "frivolous, unreasonable, or groundless" and therefore the defendants were entitled to attorney's and expert fees. The court, accordingly, ordered the club to pay the coal-fired power plant defendants \$6,446,019.56.

An attorney's fee award against an environmental citizen suit plaintiff is

not wholly without precedent, but still exceedingly rare. It has happened only a handful of times at least in published opinions in more than four decades. And no prior award, to my knowledge, has been remotely as high.

To be sure, environmental plaintiffs who abuse the public trust presumed by the citizen suit provisions by bringing wholly baseless actions should not be immune from attorney's fee awards. What is troubling about the Texas ruling is that the opinion on its face lacks the kind of detailed findings one would expect to be necessary to justify such an extraordinary action. For instance, the judge faulted the club for filing suit without any basis for questioning the investigative reports of the Texas Commission on Environmental Quality that the defendant's plant was in full compliance. In particular, "Defendants informed [the Sierra Club] that these reports cannot be undermined."

But citizen suits routinely challenge the validity of federal and state findings of compliance, and successfully. That is their central purpose: to question government when environmental harms loom. Whether or not these particular state reports warranted deference, the court's readiness to assume that a challenge is not only lacking in merit but so groundless as

to warrant an award to the defendant seems unduly conclusive, and in this respect to fall far short of the extreme circumstances warranting such a massive award. That seems especially so where, as here, the judge had initially denied much of the defendants' motion for summary judgment.

By championing citizen suits, Joe Sax and David Sive were far more than environmental law's founding fathers. They were its stewards as well.

Their voices are missed.

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