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When a Private CERCLA Plaintiff Does Not Give Notice to the Government

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Section 113(*l*) of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. Section 9613(*l*), requires a private CERCLA plaintiff to serve a copy of the complaint upon the Attorney General and the administrator of the Environmental Protection Agency. What happens if the plaintiff fails to do so? A district court in Indianapolis considered that question last month in *Graymor Properties v. Battery Properties,* No. 1:23-cv-754 (S.D. Ind. May 20, 2026).

Section 113(*l*) applies to private actions under the federal Superfund statute. Overwhelmingly, those will be claims to reallocate among jointly and severally liable parties the costs of addressing a contaminated site. They may be claims for cost recovery under Section 107(a)(1-4)(B) of the statute, claims for contribution during or following an enforcement case under Section 113(f)(1), claims for contribution by a settling party under Section 113(f)(3)(B), or subrogation claims under Section 112.42 U.S.C. Sections 9607(a)(1-4)(B), 9613(f)(1), 9613(f)(3)(B), 9612.

Section 113(*l*) differs from the pre-complaint notice that citizen suit plaintiffs must provide to the prospective defendant and to the Attorney General and administrator. To stay within the CERCLA context, little-used Section 310, 42 U.S.C. Section 9659, generally parallels the citizen suit provisions of the Clean Water Act, Resource Conservation and Recovery Act or Clean Air Act. Under Section 310(a)(1), a private plaintiff may sue any other person alleged to have violated a requirement of CERCLA, such as failing to comply with an administrative order. Under Section 310(a)(2) a private plaintiff may sue a government official when the official is alleged to have failed to perform a non-discretionary duty under the statute. In either case, "no action may be commenced" until 60 days following notice from the plaintiff of the plaintiff's intention to sue. While courts have crafted mechanisms to allow citizen suit plaintiffs to cure a failure to provide prior notice, the statutory language under the various citizen suit provisions would imply that an action commenced before the plaintiff complied with the prior notice provision should be dismissed.

But Congress used different language in Section 113(*l*): "Whenever any action is brought under this chapter in a court of the United States by a plaintiff other than the United States, the plaintiff shall provide a copy of the complaint to the Attorney General of the United States and to the administrator of the Environmental Protection Agency." Notice occurs *after* commencement of the action and consists of provision of the entire complaint, not just a 60-day notice letter.If a plaintiff fails to comply, must the court dismiss the complaint?

As the court in *Graymor* pointed out, while not an issue of first-impression, the sanction for failure to comply with Section 113(*l*) has not been litigated frequently. See *Aviall Services v. Cooper Industries,* 572 F. Supp. 2d 676, 686-89 (N.D. Tex. 2008); *SPPI-Sommersville v. TRC*, No. C 04-2648 (N.D. Cal. Aug. 21, 2009). In each of those prior cases, the district courts noted that Section 113(*l*) includes no deadline for providing the complaint to the Attorney General and the administrator, suggesting that dismissal was not an appropriate sanction.

The *Aviall Services* court further observed that prior notice of a citizen suit against a regulated entity alleged to be in violation allows the regulator to decide itself to bring an enforcement action. An enforcement action, if diligently prosecuted, bars the citizen suit. Section 113(*l*) serves no such purpose. Perhaps, the *Aviall Services* court speculated, Section 113(*l*) merely facilitates recordkeeping so that the government can keep track of CERCLA claims.

In *Graymor Properties*, the defendant alleged that the EPA had reasons to take its own enforcement actions in light of the private lawsuit brought by Graymor Properties, and as a result of the EPA not having received notice, the defendant was at risk of having to over-spend. So, at least some of the time, it may be that Section 113(*l*) serves more than just a recordkeeping function.

Indeed, although none of the courts to have ruled on a motion to dismiss for failure to comply with Section 113(*l*) has mentioned it, private CERCLA litigation can have important implications for the government's enforcement effort.

The government uses CERCLA when it can to obtain a complete response to a release of a hazardous substance funded by the responsible parties. The government, of course, will also seek reimbursement of any costs it may have incurred. The government seeks to obtain 100% of response actions and response costs; it cannot recover more and endeavors not to recover less.

On a simple site or a site with only one or two responsible parties, the government task may prove straightforward. The EPA issues a "special notice" letter for the full remedial action and someone agrees to implement that cleanup.In that straightforward situation, private litigation only assists the EPA's efforts. The existence of private rights of action for cost recovery or contribution makes an agreement with one or a few responsible parties to implement the whole of the cleanup more likely.

However, on more complicated sites with many parties, multiple response actions, and long timelines, recovering 100% can prove more challenging. The EPA may pursue separate response actions separately, and not necessarily from the same parties. For example, parties along a contaminated sediment site may face demands that they clean up the portion of the waterway closest to their outfalls. When the number of parties makes agreement difficult, the EPA may seek to cash out de minimis parties or even non-de minimis "peripheral" parties. Done correctly, those parties pay a premium and over-fund their shares of the complete cleanup but get out of the way of the global settlement and implementation of the cleanup project.

In a more complicated situation, private litigation can facilitate the ultimate goal of recovering 100% of costs and work, or it can frustrate achievement of that goal. It matters whether the private plaintiff has done or has committed to do all of the work or whether it is using litigation over a relatively small part of the whole to support negotiations over funding other, larger, actions. It matters whether a party that agrees to clean up "its" portion a site seeks to reallocate those costs without regard to netting others' work in "their" parts of a site. It matters whether the private plaintiff has settled with the United States or whether it is proceeding under a unilateral administrative order.

In these more complicated settings, Section 113(*l*) can—which is not to say that it does—allow the government to craft its enforcement strategy more efficiently to recover 100% even in the face of private litigation.In effect, filing a lawsuit may count as "cooperation" or "lack of cooperation" with the response action for purposes of applying the Gore factors in an ultimate allocation of costs. Failing to give notice to the Attorney General and the administrator similarly can count as a "lack of cooperation."

And that is creative suggestion of the court in *Graymor Properties*. The appropriate sanction for failure to comply with Section 113(*l*) at least some of the time may be an enhancement of plaintiff's share in the ultimate allocation among the parties.

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