

You Pollute, And Then You Sue?

Standing up to
polluters can be a risky
business.

by
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Patuxent Riverkeeper

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Did
you
know
you are
being
sued
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I could hardly believe my ears when one of our members told me she had found mention of a lawsuit filed against Patuxent Riverkeeper while doing research on a local judiciary website. I assumed it was a mistake; our organization is sometimes party to various anti-pollution lawsuits and enforcement actions, but generally we are plaintiffs—not defendants! Yet when I looked it up online,

there it was: a local restaurant and tiki bar on the river, Vera's White Sands Beach Club, had filed a lawsuit naming Patuxent Riverkeeper and me personally.

I was amazed at the claims: defamation, injurious falsehood and invasion of privacy. Vera's was seeking hundreds of thousands of dollars for alleged financial losses resulting from a report I had written to the State of Maryland,

and their claim that I influenced their state senator, a past member of Patuxent Riverkeeper, not to intervene on their behalf to scuttle fines imposed by the Maryland Department of the Environment. This was a "SLAPP" suit – a "strategic lawsuit against public participation" – litigation intended to force us to shift away from investigating and reporting pollution to defending ourselves against civil damages. Its purpose was to make us shut up and go away.

My first concern really wasn't about liability, because the case was ridiculous. I worried primarily about its implications for our work on the river. We wouldn't be able to continue our critically important grassroots advocacy in the Patuxent watershed, which drains to Chesapeake Bay, if members or complainants feared being sued for reporting pollution to us or to the government. My second concern was for our insurance rating. We already pay too much for various types of insurance. Would this case drive up our rates? Would it cause our insurer to drop us, and would we be unable to find another insurance company? I had a vision of my board members quitting en masse, fearful they could become liable whenever we challenged a polluter. Perhaps our no-nonsense work would become cautious, even timid. These prospects were maddening.

Vera's White Sands is a popular tropically inspired, rather eccentric

destination, in its heyday a favored haunt for Hollywood luminaries like Robert Mitchum, Frank Sinatra and Arte Johnson. It was once decorated in leopard-print and with *objets d'art* collected by Vera, the original proprietress, during her world-travels. She was such a well-known local character that she would sit at the bar draped in sequins and sign autographs. In later years it held outdoor rock-concerts and bikini contests and accommodated motor-boaters who would stop there for meals and cocktails. Nearby residents had many concerns that did not concern water quality, including heavy traffic, noise, public drunkenness and other disturbances.

Before we were sued, I met with neighbors, made a list of their concerns, and reviewed county and state enforcement files, where I found ongoing governmental legal actions against this business for a wide variety of issues, including operating an unpermitted swimming-beach, waterfront-buffer and sewage violations, an inadequately maintained underground storage tank, and many other problems. I learned the State of Maryland was seeking up to \$300,000 in fines from Vera's, which later had been reduced in a consent decree to \$50,000. When I spoke to county zoning officials and the local health department, I was told repeatedly by inspectors that the owner was aggressive, difficult to deal with and to enforce regulations against. I then

visited the restaurant, met the manager, introduced myself, and told her I was there to assess neighbors' concerns. She conducted me on a tour of the premises, during which I detected several questionable issues – landscaping that could cause sediment to wash into the river, ground-disturbance and excavation beside the river unmitigated by stormwater-management controls, and new construction that appeared impermissible. I saw a maze of pipes and outfalls that seemed to be untreated or unfiltered. The manager proudly informed me that most of the work had been done in-house by the owners.

During the discovery phase of the subsequent litigation, an owner claimed that I had requested a tour of his property under the false pretense of intending to hold a fundraiser there. Afterward, in a raging phone call, he insulted me in foul terms, accused me of trespassing, threatened me with legal action, and demanded to know which neighbors of his had complained to us. When, naturally, I declined to reveal names, he became more gentle and conciliatory, and suggested that he might donate to our organization and even host fundraisers. Then he declared, "I run a great business, but I have lousy neighbors."

That comment only further confirmed my resolve to support these neighbors' battle against an aggressive business owner who clearly prized his profits above their well-being and that of the river. So I wrote a letter to the Maryland Department of the Environment recounting the experiences above, describing the owner's aggressive demeanor and expressing my opinion that only vigorous and determined efforts would bring facts to light and force compliance with the law. I encouraged the state prosecutor who was pursuing the enforcement action to talk to the neighbors to learn more.

This letter would be the only evidence produced by the plaintiffs to claim that I had "defamed" them.

This was
a "SLAPP"
suit-

a
"Strategic
Lawsuit
Against
Public
Participation"

In need of a strong defense in a troublesome lawsuit, I contacted several local attorneys and legal organizations, including two local law clinics, with whom we had worked in the past. Astonished as I was by the absurdity of the case, all were willing to defend us for free. Ultimately our insurance company assigned the job to an excellent law firm in Virginia, Bancroft, McGavin, Horvath and Judkins, who were frustrated in their initial attempts to get the case dismissed. Early on it became apparent that the other side was mainly interested in forcing me to reveal the names of neighbors or other citizens who had complained to Patuxent Riverkeeper. We had referred to them in court records as citizens A, B, C, etc.

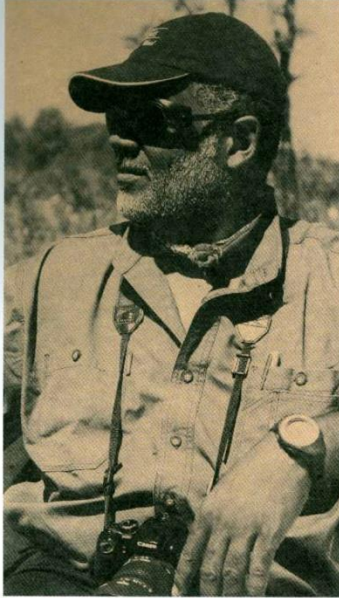
State and county employees, Vera's staff and I were all deposed, and eventually we again filed motions for dismissal, based on what we had learned through our research. After eighteen months of wrangling, the court finally dismissed the case, upholding every one of our legal arguments.

We learned several lessons, which we hope will help others in their advocacy:

First, don't panic. Advocates have been sued before and will be again. We fight rich and powerful opponents who often use their money to get what they want. One of the things that distinguish Waterkeepers from other environmental movements is our resolve to weather these storms. Most of us know full well that our legal system is often defective. But we should know too that the wheels of justice grind slowly. So take a breath and time to develop a plan.

There is a strong movement afoot in many states to deter and restrict SLAPP suits that aim to undermine free speech. The court in our case recognized the owner's attempt to suppress public knowledge of his violations, and our right to communicate with our government. That was the essence of the case. Generally, if you stick to the facts, your right to free speech will protect you.

Do your homework. We did not jump



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to conclusions, and our thoroughness helped our defense. Although we could not directly corroborate all of the citizens' concerns, we provided enough information to warrant the state's investigation and concern about Vera's environmental compliance.

Stand your ground. I learned that not everybody plays fair. Some people, like Vera's owners, just want to win or have things their way. I feel Patuxent Riverkeeper was correct to call them out and I am proud that we stood up to them and declined to name names. Our movement is either tough on pollution or we are not credible.

Get competent legal advice. I am deeply grateful to all the lawyers and advisors who came to our aid when we were in jeopardy. It seems that an attack on free speech is everybody's fight. I cannot thank enough Bancroft, McGavin, Horvath and Judkins – many of whose members, by the way, are lovers of fresh-water fly-fishing. The emotional value of having true warriors on your side is no small matter.

If the government is actually doing its job well, back it up. While I have

often taken issue with how governments do their job of enforcing environmental laws, I cannot fault the Maryland State prosecutors in the Vera's case. They had levied fines and filed administrative complaints against Vera's long before Patuxent Riverkeeper got involved. Once I found the state and county were already prosecuting Vera's, I stopped our Riverkeeper investigation and instead wrote to the state asking them to engage the support and testimony of citizens, as I was concerned the scope of the state's case did not capture all of the overlapping issues raised by the neighbors I had interviewed. Also, in the end, the state provided us with an affidavit that helped us win our case.

Don't let them see you sweat. If you let polluters bully you, you'll never stop them. The opposition tried to bait me, discredit me, and attack my motives while I was under oath. But we gave back more than we took. Stick to your guns and stand tall. Follow the law and tell the truth, which hopefully will prevail.

Never break faith with those you serve. It occurred to me, after being threatened by the other side's lawyer that the court might try to compel me to give up the names of the complainants. Throughout the litigation I considered how Waterkeepers, who accept complaints from citizens almost daily, could be exposed to liability for reporting it. Our lawyers in this case successfully pursued a theory of "absolute privilege," which states that the public interest of our mission and our work conveys a certain immunity from prosecution for defamation when we merely report pollution to the government. And the court agreed that this privilege applies not just to Waterkeepers but also to all citizens.

With the lawsuit behind us, we got back to the daily work of defending our suffering river and building a vigilant citizens' movement to protect it. Recently, I received calls from residents reporting that Vera's had drained a chlorine-laden swimming pool directly into the river. So the fight goes on. **W**