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Clean Water Act Citizen Suits: Defense Litigation and Settlement Strategies

Navigating Notice, Standing, and Jurisdiction; Interpleading Third Parties Under the CWA

TUESDAY, MARCH 23, 2021

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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CWA CITIZEN SUITS AND 60-DAY NOTICE LETTERS
“THE BASICS AND POTENTIAL DEFENSES”

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Citizen Suits

- One of the Most Unique Concepts of the Federal Environmental Statutes (CWA and other statutes)
- Citizens Step Into Shoes of the Government and Enforce Against Alleged Violators
- Particularly prevalent as Budgets of State Regulatory Agencies Are Limited

Statutory Basics

- CWA § 505(a): “any ***citizen*** may commence a civil action . . . against any ***person*** . . . who is alleged to be in violation of an ***effluent standard or limitation*** [or] an order issued by the Administrator or a State.”
- Supplement but do not supplant govt enforcement; *see e.g.* CWA § 505(b)

Keystone CWA Provisions

- “the discharge of any pollutant by any person shall be unlawful,” except via a permit. CWA § 301(a).
- “discharge of a pollutant” means “any **addition** of any **pollutant** to **navigable waters** from any **point source**” CWA § 502(12).
- **Examples**: construction and industrial stormwater, effluent limits, groundwater, and other issues

Defenses to Citizen Suits

- 60-Day Notice Requirement
- Standing
- Continuing Violation
- Permit Shield
- Diligent Prosecution

60-Day Notice Requirement

- § 505(b) – “No action may be commenced . . . prior to sixty days after the plaintiff has given notice of the alleged violation. . .”
- Opportunity for state/EPA to enforce or facility to correct
- Always consult applicable reg—40 C.F.R. § 135
- Notice sufficiently specific?
- No 60-day period if alleging violation of § 307(a) (toxic discharge)

Standing

- § 505(g)—citizen “means a person having an interest which is or may be adversely affected”
- Based on article III of the U.S. Constitution, which limits the power of the federal courts
- Test—injury in fact, causation, redressability

Continuing Violation

- CWA does not permit citizen suits for wholly past violations—*Gwaltney*, 484 US. 49 (1987)
- No jurisdiction if wholly past violation
- Plaintiff must allege and ultimately show existence of ongoing violations or reasonable likelihood of continuing future violations

Permit Shield Defense

- CWA § 402(k) – “Compliance with a permit issued pursuant to this section shall be deemed compliance” for purposes of govt enforcement and citizen suits

***E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 n.28
(1977)**

- Purpose of § 402(k) is “to insulate [permittees] from changes in various regulations during the period of a permit and to relieve them of having to litigate in an enforcement action the question whether their permits are sufficiently strict.”
- “In short, § 402(k) serves the purpose of giving permits finality.”

Seminal CWA Permit Shield Case

- *Piney Run Preservation Ass'n v. County Comm'r*, 268 F.3d 255 (4th Cir. 2001)—two-part test
 - (1)the permittee must comply with express terms of permit and CWA's disclosure requirements; and
 - (2)no discharge of a pollutant outside “the reasonable contemplation of the permitting authority at the time the permit was granted.”

Role of the Regulatory Agency?

- Obtain reporting and correspondence with agency—from client and from agency via Open Records Act request
- Agency support re client's compliance status?
- Negotiate enforcement “deal” with agency for diligent prosecution bar?

Diligent Prosecution Defense

- § 505(b)(1)(B) – Citizen suits are barred where EPA or State is “diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance.”
- Is relevant state’s statutory scheme roughly comparable to CWA’s enforcement scheme
- Safe harbor—§ 309(g)(6)(B)

Questions?

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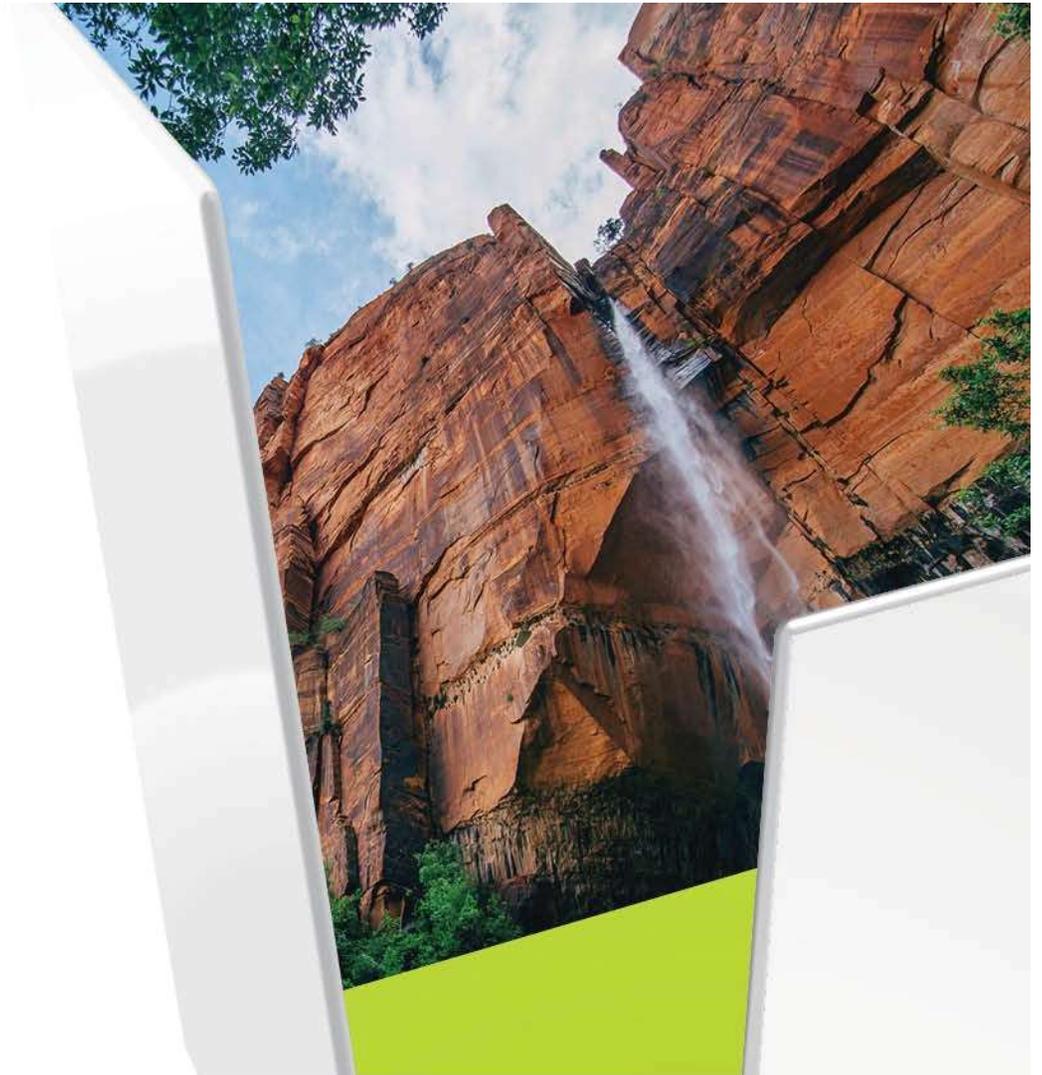


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Clean Water Act citizen suits: Litigation strategies & considerations

March 2021

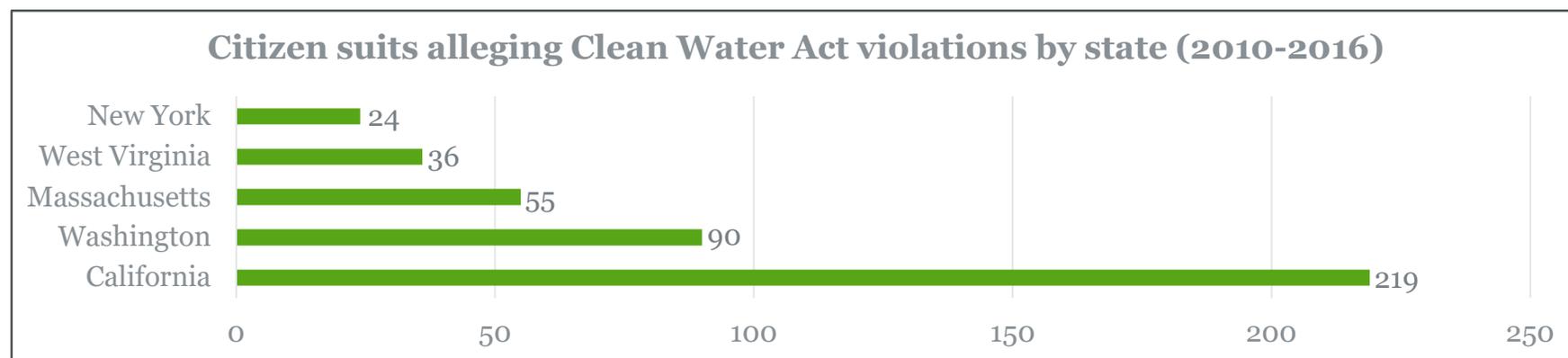
Tom Boer, Partner
Hogan Lovells



Litigation strategies & considerations

- Trends
- Document holds
- Expert witnesses
- Attorneys' fees and costs
- Litigation options and pathway to resolution

Clean Water Act 60-day notice letter trends



Source: California Coastkeeper Alliance

“Of the 79 Clean Water Act reported decisions issued by the federal courts in 2016, 50 were brought by environmental citizen groups, while only 10 were brought by the United States.”

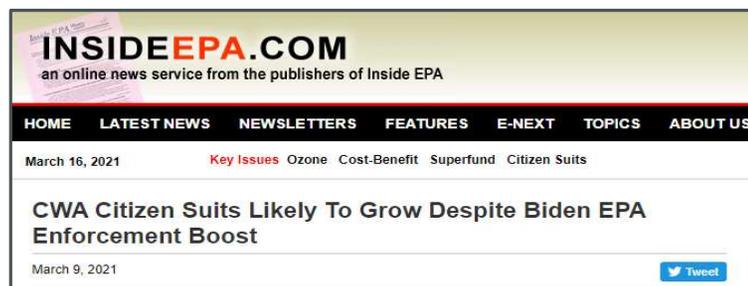
– *California Coastkeeper Alliance*

Clean Water Act 60-day notice letter trends

Year	Number of CWA notice letters for California
2015	181
2016	108
2017	63
2018	44
2019 (as of April)	2 (partial year)

Source: ABA NR&E Magazine June 2019

Clean Water Act citizen suit letter trends: looking forward



Renewed eNGO focus

County of Maui v. Hawai‘i Wildlife Fund, 590 U.S. ___ (2020)
(the Clean Water Act “require[s] a permit if the addition of the pollutants through groundwater is the functional equivalent of a direct discharge from the point source into navigable waters.”)

Regulatory agencies do not prioritize CWA stormwater enforcement actions

Historically, according to the California Coastalkeeper Alliance, in California, citizen suits are more than 80% of stormwater cases

California State Water Board has recognized citizen suit cases as generally beneficial

“For the most part, citizen enforcement does not conflict with the enforcement priorities of the regional water boards but instead acts as an independent complement to the enforcement activities of the Water Boards.” May 2011 State Water Board Report

California Senate Bill 205 – Business License Requirements

Prior to issuance or renewal of a business license, an entity must demonstrate enrollment in the NPDES storm water permit program (if applicable)

Litigation strategies & considerations



Litigation strategies & considerations

- Institute Document Hold Upon Receipt of 60-Day Notice
 - Avoid spoliation, i.e., the willful destruction or significant alteration of evidence or failure to preserve property as evidence in pending or reasonably foreseeable litigation. *See U.S. v. Kitsap Physicians Svs.*, 314 F.3d 995 (9th Cir. 2002).
 - As soon as a potential claim is identified, a party is under a duty to preserve evidence which it knows or reasonably should know is relevant to the action. *In re Napster, Inc. Copyright Litigation*, 462 F.Supp.2d 1060, 1067 (N.D. Cal. 2006).
 - Consider FRCP 37(e) obligations for preserving electronically stored information (ESI)
 - Remedies for spoliation: additional discovery, monetary sanctions, rebuttable or mandatory inferences, exclusion of evidence, striking defenses, dismissal, civil contempt

Litigation strategies & considerations

- Assess litigation options and develop trial strategy
 - Priorities and goals of Client
 - What disputed issue will lead to victory in litigation balanced against costs
 - Cost of litigation; where can success be achieved?
- Opposing Requests for immediate injunctive relief – TRO or PI
 - Standard: (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest.
 - If TRO or PI is suspected: prepare in advance
- Motion to Dismiss | FRCP 12(b)(1) | Lack of Subject Matter Jurisdiction
 - Does the complaint sufficiently allege subject-matter jurisdiction
 - Assesses the legal feasibility of complaint, not whether plaintiff will prevail
 - Potential options for 12(b)(1) motion: no unauthorized discharge or no CWA applicability

Litigation strategies & considerations

- Motion to Dismiss | FRCP 12(b)(6) | Failure to state a claim upon which relief may be granted
 - Plaintiffs must allege facts that “state a claim to relief that is plausible on its face,” i.e., facts that “have nudged their claims across the line from conceivable to plausible.” *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007).
 - A claim is plausible if the complaint contains “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged,” and if there is “more than a sheer possibility that a defendant has acted unlawfully.” *Ashcraft v. Iqbal*, 556 U.S. 662 (2009).
 - Extrinsic evidence generally not considered unless it was integral to, and explicitly relied on in the complaint.
- Limitations on what can be achieved by motion to dismiss
 - Limited options to pursue dismissal
 - Often disfavored by trial court in this context because entirely terminates case
 - If dismissal is granted, will often be without prejudice (allowing an amended complaint)
 - Plaintiffs will likely re-file (and may do so in lieu of opposing)

-
- Case Management: Joinder of Regulatory Agencies
 - *Hammersley v. Totten Inlets*, 299 F.3d 1007 (9th Cir. 2002) (“We fully agree with other federal circuits that, without exception, have held, as Taylor acknowledges as a "general rule" in its supplemental briefing, that federal and state agencies administering federal environmental laws are not necessary parties in citizen suits to enforce the federal environmental laws.”).
 - Examples in other circuits: *Friends of the Earth v. Carey*, 535 F.2d 165, 173 (2nd Cir. 1976); *Metro. Wash. Coalition for Clean Air v. District of Columbia*, 511 F.2d 809, 814-15 (D.C. Cir. 1975) (Clean Air Act citizen suit).
 - Potential exceptions: enforce terms in existing NPDES permit vs. statutory requirements of the CWA

Litigation strategies & considerations

- Case Management: Bifurcation

- FRCP 42(b) provides that: “[f]or convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third party claims.”
 - “Only one of Rule 42(b)’s requirements must be satisfied for the court to bifurcate a trial.”
Pinal Creek Grp. v. Newmont Mining Corp., 218 F.R.D. 652, 654 (D. Ariz. 2003).
- Manual for Complex Litigation, Fourth, § 11.34 (recognizing bifurcation as a preferable alternative to proceeding with multiple issues at one time), § 34.34 (recognizing benefit of bifurcating similar, complex environmental matters).
- Consider bifurcation of liability vs. remedy, or bifurcation between CWA issues and other issues
 - *San Bruno Mountain Watch v. Cypress Amloc Land Co.*, No. C-04-03385 EDL, 2005 WL 8177591 (N.D. Cal. Nov. 3, 2005) (bifurcating liability and remedy and deferring discovery on remedy, explaining that “[i]f the trier of fact concludes that Defendants have no liability, there will be no need to conduct discovery or hear evidence on purely remedial issues, which are likely to be complex in this environmental case”).

Litigation strategies & considerations

- Discovery Considerations
 - Facility Inspections
 - Dry vs. Wet Weather
 - Document Requests
 - Interrogatories and Requests for Admissions
 - Depositions
 - Percipient Witnesses
 - PMK
 - Third-Party Subpoenas
- Narrowing issues in contention
 - Answer
 - Stipulation of Uncontested Facts

Litigation strategies & considerations

- Use of Experts in CWA Litigation
 - Consulting expert: work product generally remains confidential
 - Testifying expert: produce an expert report and testify
 - Governed by FRE 702: A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
 - the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
 - the testimony is based on sufficient facts or data;
 - the testimony is the product of reliable principles and methods; and
 - the expert has reliably applied the principles and methods to the facts of the case.
 - Considerations:
 - When to hire experts
 - Whether to use existing experts retained by client (stormwater consultants, NPDES permit experts)
 - *Daubert* challenge as to the validity and admissibility of expert testimony by opposing party

Litigation strategies & considerations

- Motion for summary judgment | FRCP 56
 - Standard: court shall grant *summary judgment* if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to *judgment* as a matter of law.
 - A court must view the evidence “in the light most favorable to the opposing party.”
 - *Battle of the experts* – a competent plaintiff will make prevailing on summary judgment difficult.
 - A true “battle of the experts” generally necessitates a trial. *See, e.g., Gicla v. United States*, 572 F.3d 407, 414 (7th Cir. 2009) (explaining that “classic battle of the experts” requires “the factfinder to determine what weight and credibility to give the testimony of each expert ...”).
 - Challenge to standing – uncommon to find unprepared plaintiff

Litigation strategies & considerations

- Jury trial – Do you want it and/or can you avoid or limit it?
 - Right to a jury trial exists to determine liability under the CWA.
 - No right to a jury trial for CWA penalties or other remedies.
 - *See U.S. v. Toll*, 481 U.S. 412 (1987)



Litigation strategies & considerations

Attorneys' Fees and Costs

- CWA authorizes award of attorneys' fees and costs in a citizen suit to “any prevailing or substantially prevailing party, whenever the court determines that such award is appropriate.” 33 U.S.C. § 1365(d)
- “Prevailing or substantially prevailing” parties include parties who:
 - achieve some of the benefits sought by bringing suit
 - prevailed in what the lawsuit originally sought to accomplish
 - advance the goals of the CWA
- Being a “catalyst” for change as a result of the suit is arguably enough for plaintiff to collect fees. Conflicting case law?
 - *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983) (fees recoverable in CAA actions where suit “forced defendants to abandon illegal conduct, although without a formal court order.”)
 - *Cf. Buckhannon Board and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598 (2001) (consent decree or judgment necessary for recovery of fees – arguably interpreting a more narrow statutory provision lacking “substantially” prevailing party).

Litigation strategies & considerations

Attorneys' Fees and Costs (continued)

- Fees are awarded using a lodestar calculation. See, e.g., *Hensley v. Eckerhart*, 461 U.S. 424 (1983).
- Practice tip: in substantial cases consider a fee expert.
- Do not let fees hold up resolution: Consider independent litigation on fees, if needed
- Government intervention on fee demands? Unlikely... but not impossible.
 - In 2018, US Department of Justice filed statements with the court in three lawsuits brought against California companies alleging violations of stormwater discharge limits.
 - DOJ asked the U.S. District Court for the Central District of California to require the firm to justify attorneys' fees.
 - Ultimately, Consent Decrees were still entered in the cases.

number of hours reasonably
expended (potentially modified, at
court's discretion, by extent of
success)

X

reasonable hourly rate equal to the
prevailing rate for similar work in the
community.

Questions?



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Clean Water Act Citizen Suits: Defense Litigation and Settlement Strategies

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Citizen Suits Avoidance



- Compliance
- Perception
- Everything is Public
 - Compliance History
 - Analytical Data
 - Annual Reports
 - [Stormwater Pollution Prevention Plan (SWPPP)]

Avoiding Citizen Suits/Enforcement – Maintaining Permit Compliance

- If a permit is required; obtain coverage and maintain compliance
- Ensure discharges within permit standards
- Prepare a SWPPP
 - Facility Assessment (including site map)
 - Monitoring Plan
 - Description of Applicable Best Management Practices (BMPs)
- Timely perform required sampling
- Consistently submit Discharge Monitoring Reports (DMRs)
 - Conduct corrective actions
- Comply with Permit’s recordkeeping conditions

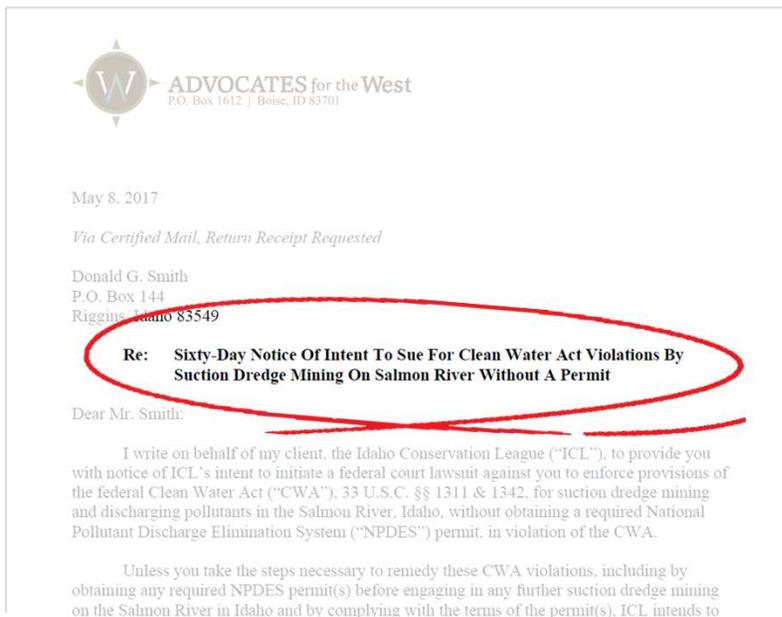


Avoiding Citizen Suits/Enforcement – Maintaining Permit Compliance (cont'd)

- Additional Tools for Permit Compliance
 - Request “Technical Assistance” from state and federal environmental agencies
 - Retain a consultant to:
 - Review SWPPP and other documents, and
 - Provide advice on Permit’s technical requirements, including sampling, reporting, and recordkeeping
 - Engage an attorney for advice on complying with statutory and regulatory requirements



Notice of Violation – 60-day Response Period



- Hire Attorney
 - Attorney-Client Privilege/ Attorney Work Product
 - Engage citizen enforcer
- Hire Consultant
- Litigation Hold - Keep Records
- Eliminate potential ongoing violations
- Evaluate liability and strengths/weaknesses of claims
- Evaluate cost/benefits of settlement

Litigation v. Settlement

- Business Decision
 - Majority of claims settle
- Litigation is expensive and time consuming
 - What is your exposure to liability?
 - Potential penalties – up to \$56,460 per day, per violation
- What are the settlement costs and terms
 - Citizen group involvement in stormwater program?
 - Requirements beyond permit conditions?
 - Flexibility on BMPs and financial terms?



Resolving Citizen Suits: Early Settlement? Better Act Quickly

Response Letter	5 days
Internal Review (BMPs, etc.)	5 days
SWPPP Update/Response	15 days?
Sample/Assess BMPs	20-25 days
Site Visit by “Citizens”	25-30 days
Settlement Negotiations	30-45 days
Select SEP “Project”	30-45 days
Draft Settlement	35-50 days
Final Settlement	Within 60 days

Consequences of Litigation

- Litigation costs – including attorneys' fees
- Potential negative publicity
 - Regulatory scrutiny
- Diversion of resources to fight claims and respond to discovery
- Ultimate Settlement?



Civil Liability and Attorneys' Fees

- Prevailing plaintiff entitled to attorneys fees and expert fees
- Liability – up to \$56,460 per day, per violation
- Factors Court considers:
 - Seriousness of violation
 - Economic benefit of violator
 - History of violations
 - Good faith efforts
 - Economic impact of penalty



Litigation



- Discovery
 - Facility Inspections
 - Dry and Rainy Weather
 - Document Requests
 - Interrogatories and Requests for Admissions
 - Depositions of Knowledgeable People
- Expert Discovery – Consultants and Engineers

Resolving Citizen Suits: Early Settlement

- Advantages of Settlement v. Litigation
 - Opportunity to take corrective action and reduce violations
 - Lower transaction costs:
 - Reduce attorneys' fees associated with litigation (both sides)
 - Avoid federal court
 - Avoid Department of Justice involvement
- Avoid negative publicity?



Typical Settlement Terms

- In Court or out of Court settlement?
- Two general types of relief:
 - Injunctions
 - Monetary payments
- Operational changes



Injunction Settlement Terms

- Citizen group oversight – up to five years
- Regular reports to the citizen group
- Facility Inspections

OVERSIGHT

REPORT

INSPECTION

Typical Settlement Terms – Operational Compliance



- Update/amend operations/SWPPP
- Install additional BMPs
- Expensive technology or structural improvements
- Testing of more storm events, additional sample locations, and more constituents than required under permit
 - Compare sample results against “triggers”

Resolving Citizen Suits: Settlement Components

- Compliance
 - Complete missing DMRs, Corrective Actions, etc.
 - BMP modifications? Facility upgrades?
 - Enhanced monitoring?
 - Ongoing record review?
- Penalties
 - \$56,460 per “violation”
 - “Payment in Lieu of Penalty”
- Litigation Expenses (“Reasonable” Attorneys’ Fees)

Settlement Tips

- Be prepared to negotiate, *with confidence*
- Pick your battles
 - There will be compromises
- Get input from qualified professionals
- Keep as close to permit terms as possible
- Leave operational flexibility/BMP implementation through the term of the settlement
 - Iterative process
 - Performance based standards





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