

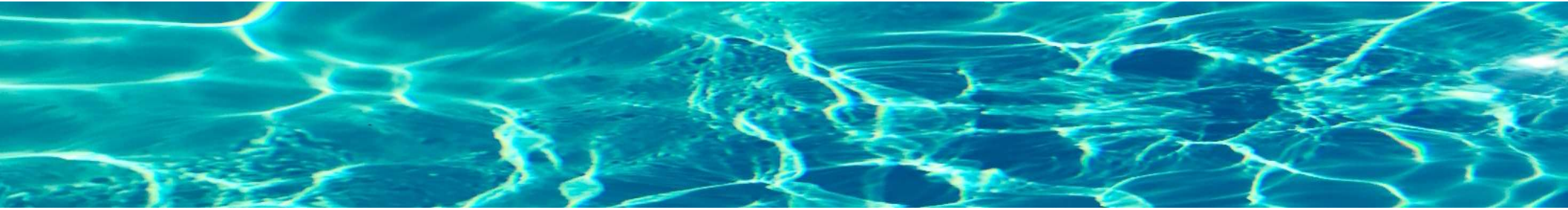


Clean Water Act Citizen Suits: Effective Defense Litigation Strategies

33rd Annual Sustainability & Environmental Health & Safety Symposium

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Citizen Suits

Clean Water Act (33 U.S.C. §1365)

Clean Water Act (33 U.S.C. §1365)

1. Plaintiff
2. Defendant
3. Notice
4. Remedies

Notice of Intent to Sue

1. Owner/Operator.
2. U.S. EPA Administrator.
3. U.S. EPA Regional Administrator.
4. Authorized representative of the state agency with responsibility for water pollution control.

Notice of Intent to Sue/Lawsuit

1. Standing

- a) Injury In Fact.
- b) Liberal construction.
- c) Caselaw.

2. Things to Consider

- a) Careful review of notice.
- b) Lawsuits based upon notice letters that fail to sufficiently provide the requisite information are subject to dismissal.

Notice of Intent to Sue/Lawsuit

3. Is there sufficient information to allow the alleged violator to identify the following:

- a) The specific standard, limitation or order alleged to have been violated;
- b) The activity alleged to constitute a violation;
- c) The person(s) responsible for the alleged violation;
- d) The location of the alleged violation;
- e) The date(s) of such violation; and
- f) The full name, address and telephone number of the person giving notice.

Notice of Intent to Sue/Lawsuit

4. Violation of statute/order/permit?
5. Otherwise barred as a matter of law?
6. Permitted activity?



Should you respond to the Notice of Intent to Sue?

Should you respond to the Notice of Intent to Sue?

1. **Timely Respond.**
2. **Can alleged violations be remedied before the 60 days runs?**
3. **Consent Decrees.**

Potential Pre-Suit settlement negotiations

1. “Compliance” by the defendant;
2. Supplemental environmental project (“SEP”), special project or “mitigation payment”;
3. “Reimbursement” of attorneys’ fees and expenses of litigation;
4. Periodic access or inspections;
5. Future compliance;
6. Accommodation of citizen groups requests?

The Purpose of the 60-Day Delay Period

- 1. To allow the relevant governmental agency to take action.**
- 2. Opportunity for the alleged violator to voluntarily comply or enter into settlement negotiations with the prospective plaintiff.**

Why do we care about the Purpose of the NOI?

1. “diligent prosecution” bar
2. “no ongoing violation”

Diligent Prosecution Bar

- 1. The diligent prosecution defense is set forth in § 309(g)(6) of the CWA and provides that a citizen suit is barred if the EPA or a delegated state agency has commenced and is diligently prosecuting an administrative penalty action against the alleged violator for the same alleged violations or gov't has commenced and is diligently prosecuting a civil or criminal action in a Court of the United States, or a State to require compliance with the standard, limitation, or order.**
- 2. Preemption language.**
 - a) Circuit Split**

Ongoing Violations

- 1. Plaintiff must allege an ongoing violation of the CWA at the time of filing its lawsuit.**
- 2. NPDES permit shield defense.**
- 3. Statute of Limitations.**

Lawsuit is filed in Federal Court, now what?

1. Thorough analysis during the NOI phase.
2. Motions.
3. Ongoing negotiations.
4. Penalties and Fees.



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Clean Water Act - Citizen Lawsuits

NPDES Stormwater Permit Case Study

33rd Annual Sustainability EHS Symposium
March 19, 2024

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Elisabeth Martin – Senior Consultant

- ▶ Joined Trinity May 2017
- ▶ Air permitting/compliance and multi-media support to multiple industries in OH and KY primarily
- ▶ MS – Environmental Engineering, University of Cincinnati
- ▶ BS – Civil Engineering, University of Cincinnati



NPDES Stormwater Background

Background

- ▶ Federal Clean Water Act prohibits certain storm water discharges, unless authorized by a National Pollutant Discharge Elimination System (NPDES) permit
- ▶ Covered facilities that file Notice of Intent (NOI) are granted permission to discharge (subject to compliance with the MSGP or state permit)
- ▶ To discharge industrial stormwater, NPDES program requires:
 - Storm Water Pollution Prevention Plan (SWPPP)
 - Best Management Practices (BMPs)
 - Stormwater Sampling
 - Visual Observations
 - Reporting
 - Recordkeeping
 - Training
- ▶ **Goal** – To reduce industrial pollutants from entering stormwater discharges

Covered Industries

- ▶ Federal Sources / NSPS / 40 CFR Subchapter N
- ▶ **Manufacturing Facilities with Standard Industrial Classifications (SICs) 20XX-39XX, 4221-4225**
- ▶ Hazardous Waste Treatment, Storage, or Disposal
- ▶ Oil & Gas / Mining Facilities
- ▶ Landfills
- ▶ Recycling Facilities
- ▶ Steam Generation
- ▶ Transportation Facilities
- ▶ Sewage and Wastewater Treatment Plants

Three Types of Facilities

Notice of Intent (NOI)

- NOI Form, Fee
- SWPPP, Sampling, Recordkeeping, Training

No Exposure Certification (NEC)

- NEC Form, Fee
- Conditional Exclusion
- Site Map, Annual Certification

No Discharge Facilities (NONA)

- Certification by PE

CWA Litigation

Case Example

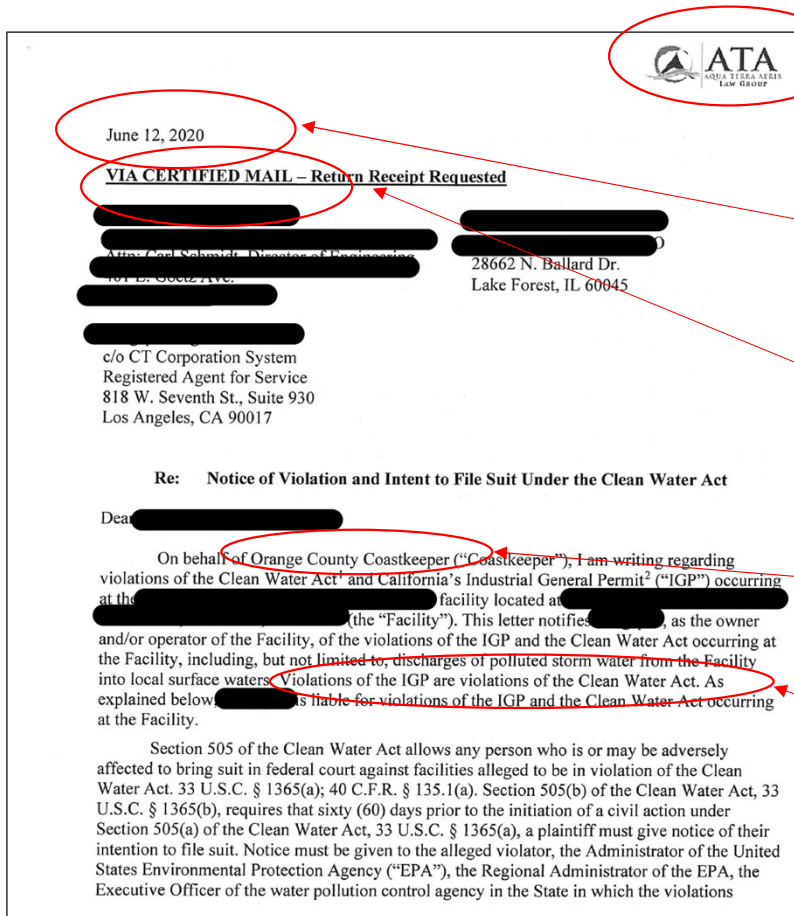
CWA Litigation – 60 Day Notice

- ▶ **Basis for lawsuits** - Plaintiff alleges violations of the state NPDES permit or MSGP are violations of the Clean Water Act
- ▶ **Authority to Sue – Section 505 of CWA**
 - Requires 60-day notice of intent to be served on defendant
 - Notice must also be sent to U.S. EPA and Executive Officer of the state water quality agency must also be notified
- ▶ **Plaintiffs**
 - Plaintiffs can be neighboring facilities, local non-profit citizen groups, community activist or environmental advocates
- ▶ **Jurisdiction**
 - The 60-day notice must allege facts indicating actual harm to the state or federal waters

CWA Litigation – SoCal Case Study

- ▶ **60-Day Notice** – Received in June 2020
- ▶ **Facility** - Small manufacturing facility (< 50,000 square foot bldg)
- ▶ **NPDES Permit** – California Industrial General Stormwater Permit
- ▶ **Receiving Water** – Facility is located within industrial area of Orange County which discharges indirectly to Newport Harbor (Pacific Ocean)
- ▶ **Plaintiffs** – Orange County Coastkeeper, a nonprofit group based in Southern California with mission to protect fresh and saltwater ecosystems.
- ▶ **Lawsuit Representation**
 - Plaintiff represented by outside law firm and hired outside technical consultants
 - Defendant represented by law firm and Trinity Consultants

60 Day Notice Letter - Example



Law firm representing the Plaintiff

Response due in 60 day

Served via certified mail

Plaintiff

General allegations of CWA violations

CWA Litigation – Typical Allegations

▶ **Violations of technology based effluent limitations**

- Exceedances of EPA published “benchmarks” for pollutants
- Exceedance of state specific effluent limits, as applicable

▶ **Violations of Receiving Water Limitations**

- CWA prohibits discharges that exceed applicable Water Quality Standards (WQS) established by state or federal law
- Example - Total Maximum Daily Loads (TMDLs) or Numeric Effluent Limits (NELs) established to address water quality impairments for state or federal receiving waters

▶ **Failure to implement required BMPs**

- If discharges exceed benchmarks or effluent limits, then facility failed to implement minimum or advanced BMPs

CWA Litigation – Allegations (cont'd)

▶ **Failure to implement an adequate SWPPP**

- SWPPP does not include all required minimum elements, including, site map, drainage areas, pollutant sources, etc
- Failure to implement the stated BMPs
- Failure to amend or update the SWPPP

▶ **Failure to conduct required sampling or inspections**

- Impaired waters monitoring (MSGP)
- Sector specific monitoring

▶ **Failure to implement Additional Implementation Measures (AIM) and other corrective actions under permit**

- AIM Level 1 – Technical review of SWPPP and BMPs
- AIM Level 2 - Implement BMPs beyond current SWPPP
- AIM Level 3 - Install structural or treatment BMPs or similar controls

Violations of Effluent Limitations

Examples

Effluent Limitations – MSGP/Federal Examples

Table 2-1. Applicable Effluent Limitations Guidelines		
Regulated Activity	40 CFR Part/Subpart	Effluent Limit
Discharges resulting from spray down or intentional wetting of logs at wet deck storage areas	Part 429, Subpart I	See Part 8.A.7
Runoff from asphalt emulsion facilities	Part 443, Subpart A	See Part 8.D.4
Runoff from material storage piles at cement manufacturing facilities	Part 411, Subpart C	See Part 8.E.5
Mine dewatering discharges at crushed stone, construction sand and gravel, or industrial sand mining facilities	Part 436, Subparts B, C, or D	See Part 8.J.9
Runoff from coal storage piles at steam electric generating facilities	Part 423	See Part 8.O.8

Effluent Limitations – MSGP Sector A Benchmarks

MSGP, Sector A –
Timber Products

Benchmark
Monitoring Limits:

COD, TSS, Zinc,
Arsenic, Copper

Table 8.A-1		
Subsector (You may be subject to requirements for more than one sector/subsector)	Parameter	Benchmark Monitoring Concentration
Subsector A1. General Sawmills and Planing Mills (SIC 2421)	Chemical Oxygen Demand (COD)	120.0 mg/L
	Total Suspended Solids (TSS)	100 mg/L
	Total Zinc ¹	Hardness Dependent
Subsector A2. Wood Preserving (SIC 2491)	Total Arsenic	340 ug/L
	Total Copper ¹	Hardness Dependent
Subsector A3. Log Storage and Handling (SIC 2411)	Total Suspended Solids (TSS)	100 mg/L
Subsector A4. Hardwood Dimension and Flooring Mills; Special Products Sawmills, not elsewhere classified; Millwork, Veneer, Plywood, and Structural Wood; Wood Pallets and Skids; Wood Containers, not elsewhere classified; Wood Buildings and Mobile Homes; Reconstituted Wood Products; and Wood Products Facilities not elsewhere classified (SIC 2426, 2429, 2431-2439 (except 2434), 2441, 2448, 2449, 2451, 2452, 2493, and 2499)	Chemical Oxygen Demand (COD)	120.0 mg/L
	Total Suspended Solids (TSS)	100.0 mg/L

Effluent Limitations – MSGP Sector E Benchmarks

MSGP, Sector E – Glass, Clay, Cement, Concrete, Gypsum

Benchmark Monitoring Limits: (1) Total Suspended Solids, and (2) Aluminum

Additional SWPPP Req'ts:

(1) Drainage Area Site Map; and (2) Good housekeeping measures

Table 8.E-1.		
Subsector (You may be subject to requirements for more than one sector/subsector)	Parameter	Benchmark Monitoring Cutoff Concentration
Subsector E1. Clay Product Manufacturers (SIC 3251-3259, 3261-3269)	Total Aluminum	750 ug/L
Subsector E2. Concrete and Gypsum Product Manufacturers (SIC 3271-3275)	Total Suspended Solids (TSS)	100 mg/L

Table 8.E-2 ¹		
Industrial Activity	Parameter	Effluent Limit
Discharges from material storage piles at cement manufacturing facilities	Total Suspended Solids (TSS)	50 mg/L, daily maximum
	pH	6.5 - 9.0 s.u.

¹Monitor annually.

Effluent Limitations – State Examples

California
Industrial General
Permit

State Specific -
Numeric Action
Limits (NALs)

NALs are similar to
federal benchmarks,
but specific to
California

TABLE 2: Parameter NAL Values, Test Methods, and Reporting Units

PARAMETER	TEST METHOD	REPORTING UNITS	ANNUAL NAL	INSTANTANEOUS MAXIMUM NAL
pH*	See Section XI.C.2	pH units	N/A	Less than 6.0 Greater than 9.0
Suspended Solids (TSS)*, Total	SM 2540-D	mg/L	100	400
Oil & Grease (O&G)*, Total	EPA 1664A	mg/L	15	25
Zinc, Total (H)	EPA 200.8	mg/L	0.26**	
Copper, Total (H)	EPA 200.8	mg/L	0.0332**	
Cyanide, Total	SM 4500-CN C, D, or E	mg/L	0.022	
Lead, Total (H)	EPA 200.8	mg/L	0.262**	
Chemical Oxygen Demand (COD)	SM 5220C	mg/L	120	
Aluminum, Total	EPA 200.8	mg/L	0.75	
Iron, Total	EPA 200.7	mg/L	1.0	
Nitrate + Nitrite Nitrogen	SM 4500-NO3- E	mg/L as N	0.68	
Total Phosphorus	SM 4500-P B+E	mg/L as P	2.0	
Ammonia (as N)	SM 4500-NH3 B+ C or E	mg/L	2.14	
Magnesium, total	EPA 200.7	mg/L	0.064	
Arsenic, Total (c)	EPA 200.8	mg/L	0.15	
Cadmium, Total (H)	EPA 200.8	mg/L	0.0053**	
Nickel, Total (H)	EPA 200.8	mg/l	1.02**	
Mercury, Total	EPA 245.1	mg/L	0.0014	
Selenium, Total	EPA 200.8	mg/L	0.005	
Silver, Total (H)	EPA 200.8	mg/L	0.0183**	
Biochemical Oxygen Demand (BOD)	SM 5210B	mg/L	30	

Failure to develop or implement SWPPP

Major Elements of SWPPP

- ▶ Facility Info
- ▶ Pollution Prevention Team
- ▶ Site Map
- ▶ Drainage Areas
- ▶ Discharge / Sampling Locations
- ▶ Pollutant Sources – Technical Assessment
- ▶ Best Management Practices (Minimum and Advanced BMPs)
- ▶ Monitoring / Sampling
- ▶ MSGP – Sector Requirements

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Pollutant Sources – Identify and Evaluate

1. Identify Pollutant Sources

- Areas of Industrial Activity
- Industrial Processes
- Material Handling and Storage Dust Generating Operations
- Spills and Leaks
- Non-storm water Discharges
- Soil Erosion



2. Evaluate Pollutant Sources

- Narrative description / evaluation
- Identify potential pollutants and toxics
- Quantify pollutant loading
- Risk assessment
- Pathways for pollutants
- BMP evaluation

Site Map

- ▶ Facility Boundaries
- ▶ Buildings / Structures
- ▶ Pollutant Sources
- ▶ Industrial Activities
- ▶ Stormwater Flow Direction
- ▶ Drainage Areas
- ▶ Conveyance Structures
- ▶ Discharge Locations
- ▶ Soil Erosion Areas
- ▶ Outdoor Storage Areas
- ▶ Sampling Points
- ▶ Nearby Water Bodies





- Industrial Activities**
1. Trash Bins
 2. Pallet Construction and Storage
 3. Tooling Storage
 4. Miscellaneous Storage
 5. Empty Drums
 6. Covered Dumpster
 7. Intermediate Products
 8. Final Products
 9. Compressed Gas
 10. Metal Scrap Bins
 11. Insulation Board Cutting
 12. Aerosol Spray Touch-Up Area
 13. Compressor, covered

- Legend**
- (B) Blank Sampling Location
 - (★) Sampling Location
 - Surface Run-on
 - Underground Flow
 - Facility Boundary
 - Building Wall
 - Covered Area*
 - Berm
 - Permeable**
 - Industrial Equipment
 - Drainage Area
 - Downspout Filter
 - Clear Creek ISW System
 - Catch Basin
 - Underground Tanks
- * All areas not identified as covered are locations where materials are directly exposed to precipitation.
 ** All areas are impervious unless otherwise identified.



Description		
Site Map		
Scale	Date	Figure
1" = ~73'	May 2023	4



Failure to implement Best Management Practices (BMPs)

Best Management Practices

Minimum BMPs

- Good Housekeeping
- Preventative Maintenance
- Spill & Leak Prevention Plans
- Material Handling & Waste Management
- Erosion & Sediment Controls
- Employee Training
- Quality Assurance & Recordkeeping

Advanced BMPs

- Exposure Minimization
- Storm Water Containment & Discharge Reduction
- Treatment Control

In CWA lawsuits, Plaintiffs typically argue a facility that exceeds pollutant benchmarks or effluent limitations are failing to adequately implement BMPs or stormwater controls.

BMP Example – Trash Bin Lids



BMP Example – Overhead Protection



BMP Example – Industrial Vacuum



Overspray Barrier

- ▶ Maintain and use plastic curtain during aerosol painting operations to prevent overspray into outdoor areas



BMP Example – Tarps



BMP Example – Dikes / Secondary Containment



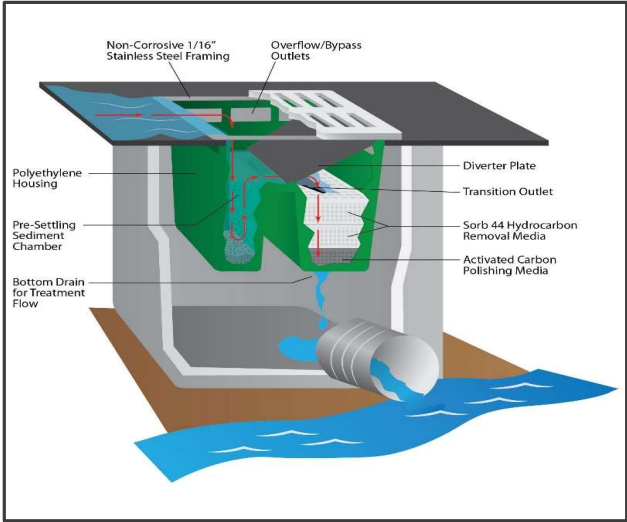
BMP Example – Berms and Wattles



Advanced BMPs – Filters



Downspout Filter



Catch Basin Filter

BMP Example – Infiltration System



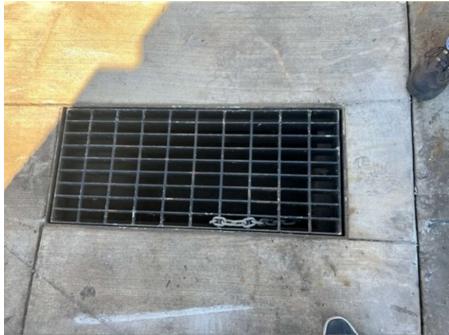
South Infiltration Trench



North Infiltration Trench



Drop Inlet / North Trench



West Catch Basin (1 of 3)

Stormwater Capture and Treatment System

- ▶ Maintain system in accordance with manufacturer's specifications
- ▶ Routine inspection and cleaning of conveyance system for buildup of debris



CWA Litigation Settlements

CWA Litigation – Possible Settlements

- ▶ **SWPPP corrections/changes** – Defendant agrees to modify their SWPPP
- ▶ **BMP Implementations** - Defendant agrees to implement additional BMPs or stormwater controls
- ▶ **Additional Sampling** – Defendant agrees to conduct additional sampling beyond MSGP
- ▶ **3rd Party Audits** – Defendant agrees to be inspected and audited by the Plaintiff or their consultants (typically on annual basis during the term)
- ▶ **Financial Penalties** – Defendant agrees to pay civil penalties and/or donations to the nonprofit organization (typically up to \$100k+)
- ▶ **Reporting** – Defendant agrees to provide routine reports to plaintiff
- ▶ **Agreement Term** – The parties agree to a specified term where the settlement obligations and payments are made (typically 2 to 5 years)

Questions?

