HOW TO PROTECT YOURSELF AGAINST THE "ENVIRONMENTAL AMBULANCE CHASER"

Defending Clean Water Act Citizen Suits

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Citizen suits brought under the Clean Water Act[i] (CWA) against public and private entities related to industrial stormwater discharges and the management and operation of public sewer systems have become common place. The rise in this litigation is fueled by several causes: the departure by federal agencies from the "sue and settle" practice of quickly settling citizen suits by imposing heavy burdens on regulated entities; easy access for potential plaintiffs to public records of water quality monitoring of discharges; the availability of the award to plaintiffs of their attorneys' fees; the lack of government resources dedicated to critically reviewing claims; and the perception among many local governments, businesses or their insurers that these cases are unwinnable or uneconomical to defend and are now a "cost of doing business". This article discusses the burdens the CWA places on citizen suit plaintiffs and gives facility owners and operators a clearer understanding of available defenses that can stop a CWA claim pre-suit, result in an early dismissal of a suit, or make the suit unprofitable, and therefore, undesirable to a plaintiff.

The motives behind the growth in CWA citizen suits was dramatically called into question by a statement filed by the United States Department of Justice (DOJ), criticizing three proposed consent decrees negotiated by a single law firm against three California companies alleging violations of stormwater discharge limits. The DOJ raised concerns that included the volume of CWA cases brought by the firm (over 150), the settlements' inclusion of direct payments to plaintiffs and the vague and unclear allegations in the notices and complaints. In reporting on the DOJ statement *Greenwire*, an Energy and Environment News service, while acknowledging that the CWA citizen suit provision was an important tool in protecting the environment, described law firm abusers of the act as "ambulance chasers".[ii] That same article, although focusing on the aggressive position by DOJ, noted that the DOJ's action was newsworthy precisely because it was highly unusual. *Greenwire* noted that the common response from DOJ to a CWA settlement proposed by a private party is a letter of no objection and that DOJ often doesn't even acknowledge receiving a notice of suit and rarely even looks closely at a notice of violation. It is in part this lack of government oversight and the deferential mindset of the court system that encourages settlements that has contributed to the growth of private CWA litigation.

CWA suits are attractive to plaintiffs and their attorneys because of the near strict liability imposed once a facility owner or operator violates a permit or water quality standard. It is a common misperception that owners or operators have already admitted to violations in monitoring reports submitted to state or federal agencies pursuant to permit requirements. Contrary to this perception, the CWA provides a number of defenses to a citizen suit including several that will even preclude a suit from being filed.

The purpose of this article is to provide local governments and private industries with the knowledge and tools to defend these suits and to understand that simply paying these plaintiffs is neither good public policy nor good business.

Pre-Suit Protection Against CWA Litigation

Under the CWA, any citizen can file a suit against any person who is alleged to be in violation of an effluent standard or limitation under the CWA.[iii] The addition of the citizen suit provision to the CWA was intended to expand the resources available to fight pollution by creating a means to alert a government agency that it needs to take action or to address pollution where the government fails to act. Many watchdog groups, and now law firms in the business of CWA citizen suit litigation, monitor federal and state agency activity for reports of pollution, spills and accidents, permit activity, notices of violations or related enforcement documents. Once a permit number or permitee address is identified, an interested person can pretty much obtain any information in the permit or enforcement file, such as monitoring results or spill reports, over the internet or with a public records request. In general, citizen suits are divided into two categories: a suit asserting a violation of a permit or a suit alleging discharge of a pollutant without a permit. Both classes of potential defendants have opportunities to protect themselves from suit by taking action prior to ever receiving a notice of a potential citizen suit.

NPDES Permit Shield

A major tenet of the CWA is to bring dischargers of pollutants under permit. In 1972, Congress established the regulatory framework for the CWA that essentially exists today. The CWA includes a system of effluent limitations, water quality standards and discharge permits that originate with and are enforced by the Environmental Protection Agency (EPA) but in many cases such regulation and enforcement has been delegated to state government. A business or industry whose operations may be a source of pollution has an incentive to obtain a permit issued under the National Pollutant Discharge Elimination System (NPDES) because such a permit can be a shield to any enforcement action, either brought by a government or a private citizen. Thus, an NPDES permit can protect permit holders from liability, but it also has certain limitations. For example, the holder of the NPDES permit must be acting in compliance with the conditions of the permit and any pollutant discharged must be regulated by the permit.[iv] Therefore, NPDES permit holders must understand and comply with the conditions of their permit in order to prevent a citizen suit. Nevertheless, many permit holders have found themselves the subject of a CWA citizen suit because their discharge contains a pollutant that the EPA or state agency did not specifically identify in a permit limit or condition. Court decisions concerning instances where a discharge contains a pollutant not identified in a permit vary on whether the NPDES permit shield remains intact. A permit holder can take a number of actions to improve the chances that the NPDES permit shield will provide effective protection from suit. When applying for a permit, facility owners or operators should provide more information regarding business operations and potential pollutants in wastewater or stormwater runoff rather than trying to limit disclosure. This disclosure may result in additional limits or conditions, but this is most often a lesser burden or risk than facing a subsequent enforcement suit, even if successfully defended. Similarly a facility owner or operator may consider incurring the greater cost associated with obtaining an individual rather than a general permit that may not be well tailored to a particular business operation and thereby carry a greater risk that the permit will not be an effective shield to a citizen suit.

Reporting Spills or Exceedances

As indicated, a major reason for the explosion of citizen suits is that permit holders are required to monitor their discharge, report any unpermitted discharge, and report the results of water quality testing performed pursuant to a permit. It is important for permit holders to create and maintain a plan of action regarding how they want to report such information and the actions they will take in response to a spill or exceedance. Permit holders can and should address some protections during the application process. Generally, a permit does not identify exceedances of threshold or benchmark numbers as violations. Therefore, permit holders should not report these events as violations. Permit holders should also identify spills or unpermitted discharges in such a way as to encompass an entire event so that only a single discharge is reported when appropriate. In addition, discharges of pollutants only violate the CWA if the pollutant reaches a navigable water body. So, to the extent that contingency plans can be put in place to contain spills or neutralize contaminants before reaching a navigable water body, a violation of the CWA can be avoided. In reporting such a discharge, permit holders should take care to state that no CWA violation occurred and describe the actions taken to prevent or limit contaminants from reaching a navigable water in any report. Finally, if the incident was caused or believed to be caused by a one-time, unforeseeable, non-recurring event, or actions have been taken to correct the cause, the report should contain such statements and information.

If a clear violation or significant unexpected discharge has occurred, permit holders should consider engaging the state agency or EPA early concerning a consent agreement or settlement. An appropriate agreement containing corrective action to prevent future violations and possibly including small fines or penalties can prevent more onerous and costly requirements resulting from a citizen suit enforcement action. If permit holders are unsure as to how to respond to a spill or exceedance, they should contact environmental counsel regarding how to respond. Certainly, if the permit holder is considering pursuing a consent agreement with the EPA or state agency, it is strongly recommended that they work with environmental counsel to insure that the agreement will contain provisions adequate to prevent a citizen suit in the future.

Responding to a Pre-suit Notice

CWA plaintiffs are required to provide a pre-suit notice and must wait 60 days before they can file a court action. [v] The notice must be given to the EPA, the state where the alleged violation occurred and the alleged violator. The rationale for the 60-day notice period is to provide an opportunity for an alleged violator to correct the violation or for the EPA or the appropriate state agency to initiate an enforcement action. It is also an opportunity for the potential defendant to dissuade a party from filing suit, take action to preclude the filing of suit or prepare for the defense of the ultimate lawsuit. The U.S. Supreme Court has made clear that a CWA suit is meant to supplement rather than supplant government enforcement, and therefore if the EPA or a state agency is diligently prosecuting an enforcement action, the citizen suit most likely will be barred.[vi] Upon receipt of a 60-day notice, a potential defendant should take immediate action as the clock is running on the opportunity to resolve the matter in a favorable manner. Naturally, the potential defendant should contact counsel and provide them the notice along with any communications with the regulating agency and internal documents relating to the supposed violation. Potential defendants may take any of the following actions, as appropriate:

- Verify the accuracy of the allegations. Oftentimes, a plaintiff law firm is sending out several notices and is using forms that may include allegations and exhibits that don't even relate to the permittee, property or discharge location of the alleged violation;
- Contact their environmental insurance carrier (maintaining insurance coverage to defend CWA claims and pollution related liability may well be a cost of doing business for many industries or local governments, environmental counsel review of policies, and oversight of insurance defense counsel is advisable as well)[vii];
- Contact agency staff to determine their position on the alleged violation and whether the agency intends to initiate an enforcement action; and/or
- Prepare a letter in response to the plaintiff's counsel denying allegations, pointing out mistakes and inaccuracies and threatening to seek fees if a suit is filed.

This pre-suit notice time is of vital importance and the gathering of documents, critical analysis of allegations and a well written response to the notice has been successful on more than one occasion at resolving a claim. As will be discussed below, pre-suit notice is jurisdictional and if the requirements are not observed any subsequent suit should be dismissed.

Post-Filing Defenses to CWA Citizen Suits

Once a citizen suit is filed in federal court, environmental counsel or insurance counsel will need to prepare a response to the complaint. The complaint will certainly include a claim for attorneys' fees, the lifeblood supporting the existence of much citizen suit litigation. Naturally if a defendant is responsible for a violation, the prospect of paying an attorney to defend a citizen suit **and** pay the attorneys' fees for the plaintiff is not a particularly desirable situation. For this reason, many defense counsel, particularly insurance defense counsel, take the approach of spending little time defending the claim and instead push for early settlement negotiations or mediation. Plaintiff's counsel are likely of two mindsets: if the approach is pure ambulance chaser – sending out form notices to dozens of similarly situated small businesses – they may also be interested in quick settlements, looking to make substantial fees from the large number of settlements obtained. Alternatively, counsel representing genuine environmentally interested organizations or individuals may be interested in obtaining substantial improvements to wastewater or stormwater systems, along with deriving substantial fees, where the defendant has the ability to pay. In either case, defendants may have an incentive to settle quickly to keep costs down and get the matter behind them. This approach is often misguided for multiple reasons. First, as stated, there are numerous defenses that exist that may result in the dismissal or resolution of litigation without an award of fees or a substantial reduction in fees claimed. Second, there is nothing that prevents a plaintiff, and it is in fact a demonstrated approach of some plaintiff's counsel, to engage in repeat litigation against the same defendants, either alleging new discharge violations or violations of the settlement that was negotiated. Such subsequent suits of course come with a new claim for attorneys' fees. Therefore, before pursuing any settlement of a CWA citizen suit, defendants should evaluate the following defenses with their counsel.

Lack of, or Insufficient, Notice

As discussed above, one of the preconditions to bringing a CWA citizen suit is the requirement that the plaintiff give both notice of the alleged violation and of its intention to sue. For notice to be adequate for the filing of a subsequent complaint, it must include sufficient information to permit the recipient to identify the following:

- The specific standard, limitation or order allegedly violated;
- The activity constituting the violation;
- The person(s) responsible for the violation;
- The location(s) of the violation;
- The date(s) of the violation;
- The full name, address and phone number of the person giving notice; and
- A notice of intent to sue and delivery of the notice to the entity being sued, the EPA Administrator, the EPA regional Administrator; and the Chief Administrative Officer of the state water pollution agency. [viii]

In addition, the plaintiff must wait a full 60 days after providing adequate notice to all of the listed recipients before filing a complaint in federal court. Failure to provide adequate notice, notice to all of the listed recipients, or filing too soon are all grounds for dismissal of the lawsuit. While oftentimes dismissal will be without prejudice to the plaintiff correcting the errors and refiling, dismissal provides additional time for the defendant to correct the violation or pursue other listed defenses, such as the initiation of diligent prosecution by EPA or a state agency as discussed below. Further, as with any claim, CWA claims must be brought within the required statute of limitations.

Statute of Limitations

A statute of limitations refers to the statutorily mandated time period within which a cause of action must be filed. The CWA does not contain a provision setting forth the time period applicable to filing a citizen suit. The proper time limit for bringing a claim alleging a violation of the CWA has been the subject of considerable litigation. It is generally held that the time limit for bringing a CWA claim is five (5) years from the date of the violation, which is the default federal statute of limitations for civil penalty matters.[ix] Most CWA cases pursue violations that have recently occurred but there have been instances of claims being pursued related to historic violations. Arguments have been made in such circumstances that the violation is continuing, thereby extending the statute of limitations. Such an example would be in the case of illegal fill, or where a discharge includes silt. Plaintiffs argue that the statute of limitations is tolled when the illegal fill or silt has not been removed and continues to remain in a navigable water. Such arguments have been met with mixed success. Nevertheless, as discussed above, where a suit may be subject to dismissal on other grounds, such as improper notice, a statute of limitations may become important where a plaintiff is forced to restart a CWA suit.

Diligent Prosecution

A very important method to preclude a citizen suit that is unique to CWA litigation is the defense of diligent prosecution. As stated, the purpose of the CWA citizen suit provision is to supplement not supplant government enforcement. Therefore, the U.S. Supreme Court has clearly held that

a citizen suit to enforce an environmental law should be permitted only if the federal, state and local agencies fail to exercise their enforcement responsibility.[x] If a responsible government entity is diligently prosecuting an enforcement action against a defendant, a citizen suit is barred. Unfortunately, if the enforcement action is being prosecuted by a state or local government, plaintiffs have often challenged the adequacy of such prosecution as not being comparable to the federal CWA framework and therefore is not sufficient to preclude a citizen suit. This is a highly litigated question and court decisions have varied and been driven by the facts of individual cases. Therefore, permit holders who enter into a state consent order must ensure that the process is properly documented to meet the federal CWA standard in order to secure protection under the diligent prosecution defense.

No Ongoing Violations

To enforce a violation of the CWA by means of a citizen suit there must be an ongoing violation. As held by the U.S. Supreme Court, the CWA citizen suit provision does not support a suit for wholly past violations.[xi] If the violation was a one-time occurrence with no expectation of recurring, or the cause of the violation has been cured either before the notice of intent was sent or before the 60 day notice period has ended, the violation may not be considered ongoing and a suit may be dismissed. Alternatively, if not dismissed, a violation cured during the 60 day notice period may serve to substantially curtail the relief available to a plaintiff. For example, the court may still allow the plaintiff to pursue fines or penalties (but not injunctive relief), which would affect the level of success of a suit and reduce a potential fee award. Again the question of whether a violation is "wholly past" is a point of much legal dispute. The U.S. Supreme Court standard is whether there is a reasonable likelihood that a past polluter will continue to pollute in the future.[xii] It is therefore advisable for potential defendants to seek environmental counsel's advice to determine the cure that will best satisfy the legal standard of having ended an "on-going" violation.

Navigable Surface Waters

While the goal of the CWA is "to restore and maintain the chemical, physical and biological integrity of the Nation's waters", the Act is limited to prohibiting a discharge of a pollutant from a "point source" to "navigable water". [xiii] Both of the terms point source and navigable water are limits on the scope of the CWA and potential defenses to a CWA citizen suit. While the Act defines point source broadly to include any discernible confined and discrete conveyance, the term does not include dispersed activities over a large area that are not traceable to a single discrete source.[xiv] The Act's definition of point source also does not specifically include migration into or through groundwater.[xv] Similarly, navigable waters has not been defined to include groundwater. Nevertheless, the question of whether a discharge to a groundwater system, or to groundwater with a direct hydrologic connection to surface water, can violate the CWA, has been the subject of numerous legal challenges. Previously a minority of cases found jurisdiction under, or a violation of, the CWA where a discharge included transmission through groundwater. However, the U.S. Supreme Court has just spoken on the issue and determined that a reading of the CWA that best captures Congress' intent is that a permit is required when a pollutant is discharged from a point source directly into navigable waters or when there is a functional equivalent of a direct discharge.[xvi] The U.S. Supreme Court's new test requires a case-by-case

analysis to determine what is a "functional equivalent" of a direct discharge, looking first at the factors of time and distance, but also considering the nature of the material through which a pollutant travels or the extent a pollutant is diluted or chemically changed as it travels. Another question that has been heavily litigated is whether a discharge to a small water body, such as an isolated wetland, pond or creek, unconnected to a navigable water body may be a CWA violation. The answer to these questions depends upon individual case facts and the identity of the court that is considering the question. Despite these challenges, it remains clear that the CWA is limited to the protection of navigable waters, and a defendant who can demonstrate that an unintended discharge or unpermitted contaminant did not directly reach a navigable water, or the functional equivalent of a direct connection to a navigable water, has an important defense to CWA liability.

NPDES Permit Shield

The holder of an NPDES permit is shielded from both agency action and citizen suits, provided the permittee complies with permit terms. The purpose of the permit shield is to protect permit holders from changes in regulation during the life of the permit and to prevent challenges to the adequacy of the permit conditions.[xvii] While the existence of a valid NPDES permit would seem to be an easy matter of proof, the effectiveness of the permit shield is also a source of substantial litigation. Normally, the dispute surrounds the issue of whether a contaminant not specifically named was within the reasonable contemplation of the agency when the permit was issued. In addition many permits have incorporated performance standards, thresholds or benchmarks for evaluating monitoring results or modifying permit conditions. Plaintiffs have attempted, sometimes successfully, to have courts read exceedances of these standards as permit violations and thus violations of the CWA, but for the most part a CWA suit based only on exceedances of such benchmarks will not be sufficient to demonstrate a violation of the permit or the CWA.

Lack of Standing to Sue

In order for an individual or group to bring a CWA suit, that individual or group must have standing to sue, otherwise, the case will be barred on jurisdictional grounds. This is true for any litigation, but in most cases standing is not in dispute, as a person hit by a car, wrongly terminated from a job, or who had property taken by a government without being compensated clearly has the right to sue for damages. But claiming injury due to the pollution of a navigable water body requires more detailed allegations of standing. Standing comprises a number of criteria that must be met:

- Injury in fact: The plaintiff must demonstrate an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical. Generalized, vague or speculative grievances are not sufficient. It is not injury to the environment that confers standing on a plaintiff but injury to the individual.
- Causation: There must be a causal connection between the injury and the conduct at issue — the allegations must be traceable to the defendant's actions and not those of someone not named in the suit.

- Redressability: It must be likely, not speculative, that the injury is capable of being fixed by the remedy requested, and that the requested remedy is within the power of the court to provide. This requirement is related to the cessation of alleged violation and a demonstration that the violation will not and cannot recur.
- Zone of interest: The plaintiff must show that the injury suffered is within the zone of interest that the CWA was designed to protect — restoration and maintenance of chemical, physical and biological integrity of the nation's water.[xviii]
- Injury personal to the plaintiff: The plaintiff's interest must be distinguishable from the interests of the general public as a whole or society at large. There must be a personal hurt for standing to occur.

If the CWA suit plaintiff is an association, the association may have standing to bring an action on its own, for its own injuries; but it may also bring suit in a representational capacity on behalf of its own members if: a) an actual member would have standing; b) the interests being protected are germane to the association's purpose; and c) the relief sought does not require the participation of individual members. If an association is suing in its representational capacity, it must be prepared to name some of its members whose interests are effected or threatened by the defendant's actions.

These elements of standing are obviously very fact specific and are the subject of significant litigation. Most experienced CWA plaintiff attorneys will understand the burdens of alleging and proving standing but the reality is that it is always preferable to have the right plaintiff. Courts will expect to see a plaintiff who resides close to an affected waterbody, or an association with members who make actual use of the waterbody. Even though use of a waterbody may be as limited as enjoying its aesthetic beauty. A plaintiff's attorney will normally have to find a plaintiff who resides on or near a waterbody that is receiving the polluted discharge. This is not necessarily an easy task. In fact, one of the DOJ criticisms of some CWA practice was the repeated use of the same plaintiffs.[xix]

Conclusion

While the CWA is a strict liability statute in the sense that a plaintiff need only prove a violation of a permit condition or water quality standard occurred rather than proving the violation resulted in actual degradation of a waterbody, the CWA and common law nevertheless provides several important burdens on a plaintiff that if not satisfied can preclude or limit the likelihood of a plaintiff's success. The CWA's purpose is to insure or improve our nation's water quality, which may be achieved in several ways, but the funding of for-profit citizen plaintiffs is not one of them. Investigating and employing available defenses to CWA citizen suits is the only means to deter environmental ambulance chasing.

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[i] 33 U.S.C. S 1365 (2020)
[ii] LAW: Clean Water 'ambulance chasers'? Firm Raises Eyebrows – Thursday, May 24, 2018 – www.eenews.net
[iii] 33 U.S.C. S 1365 (2020)
[iv] See, Piney Run Preservation Assn. v. County Commissioners, 268 F.3d. 255 (4th Cir. 2001)
[v] 33 U.S.C. S 1365(b)
[vi] See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc. 484 U.S. 49, 60 (1987)
[vii] The subject of obtaining insurance coverage for environmental claims can be the subject of an entire treatise of its own. Specific pollution exclusions, as well as exclusions for violations of law or intentional acts (as opposed to negligence) are just a few of the numerous basis used by comprehensive general liability insurers to deny environmental claims. But even environmental insurance policies purport to have provisions excluding clean water act claims based on assertions the discharge is not a covered pollutant or the discharge is unpermitted and therefore a violation of law that is not covered.
[viii] See 40 C.F.R. S 135.2 and 135.3(a).
[ix] 28 U.S.C. S 2462 (2020)
[x] See, Piney Run Preservation Assn. v. County Commissioners, 268 F.3d. 255 (4th Cir. 2001)
[xi] See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc. 484 U.S. 49, 60 (1987)
[xii] Id., At 57.
[xiii] 33 U.S.C. S 1311 (a) and 1319 (c) (2) (2020). See also Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 629 F.3d 387,390 (4th Cir. 2011)
[xiv] See Ecological Rights Foundation v. Pacific Gas and Electric Co., 713 F.3d 502, 508 (9th Cir.2013)
[xv] See Chesapeake Bay Foundation, Inc. v. Severstal Sparrows Point, LLC, 794 F. Supp. 2d 602 (D. Md. 2011)
[xvi] County of Maui v. Hawaii Wildlife Fund, Case No. 18-260, slip opinion decided April 23, 2020.
[xvii] See E.I. DuPont de Nemours & Co. v. Train, 430 U.S. 112, 138, n. 28 (1977)
[xviii] 33 U.S.C. S 1251.
[xix] See United States' Statement of Concern and Recommendation That Plaintiff File a Motion to Enter the Proposed Consent Decree, in Lares v. Reliable Wholesale Lumber, Inc. U.S. District Court for the Central District of California, filed May 18, 2018.