

Municipal Defense Strategies in Citizen Suits Brought Under Federal Environmental Statutes

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Clean Water Act / Clean Air Act

- **The Clean Water Act**
 - 33 U.S.C. §1251 et seq. (1972)
 - Establishes the basic structure for regulating discharges of pollutants into the waters of the United States and regulating quality standards for surface waters
 - The CWA made it unlawful to discharge any pollutant from a point source into navigable waters, unless a permit was obtained.
 - EPA's National Pollutant Discharge Elimination System (NPDES) permit program controls discharges
- **The Clean Air Act**
 - 2 U.S.C. §7401 et seq. (1970)
 - Comprehensive federal law that regulates air emissions from stationary and mobile sources.
 - Authorizes EPA to establish National Ambient Air Quality Standards (NAAQS) to protect public health and public welfare and to regulate emissions of hazardous air pollutants

Enforcement

- The EPA and the states enforce violations of the CWA and CAA through civil enforcement and criminal prosecution.
- To supplement state and federal enforcement of the statutes, Congress empowered citizens to bring their own lawsuits.
 - Section 505 of the Clean Water Act (33 U.S.C. § 1365)
 - Section 304 (citizen suits against CAA violators), and Section 307 (citizen suits challenging EPA actions made pursuant to the CAA (42 U.S.C. §§ 7604(a) and 7607(d))

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Enforcement

Citizens Can Seek:

- Injunctive relief (court orders prohibiting the violation from continuing)
 - Civil penalties
 - Reimbursement of costs
- AND
- Attorneys' fees

Consent Decree

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Procedural Requirements

- 60-Day Notice of Intent to File Suit
 - Mandatory prerequisite to a citizen suit, and compliance must be pleaded.
 - Sent to the entity with a copy to the state regulatory agency and the U.S. EPA Administrator.
 - Initiates 60-day period in which the violator must come into compliance with its permit or Administrative Order in order to avoid a court case.
 - Suit can only be filed after the 60th day of the period of notification of Intent to Sue, and if the following two actions occurred during the 60-day period:
 - (1) the regulatory agency failed to require a violator's compliance with the Clean Water Act's effluent standards or limitations, or with an Order requiring compliance with these standards or limitations, and
 - (2) the regulatory agency did not begin, and did not continue, to diligently prosecute a civil or criminal action against the violator

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Procedural Requirements

- Notice Content
- Prescribed by regulations
- 40 C.F.R. § 135.3(a) provides:
 - Notice regarding an alleged violation [...] shall include sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the person giving notice [...].
 - The notice shall state the name, address, and telephone number of the legal counsel, if any, representing the person giving the notice.

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Procedural Requirements

- Standing

- The private citizen or plaintiff must have suffered an ‘injury in fact’

- an invasion of a legally-protected interest which is

- (a) concrete and particularized, and

- (b) “actual or imminent, not “conjectural” or “hypothetical”

- NOT injury to the environment but rather, injury to the person

- Do not need to prove environmental degradation or a permit violation to obtain standing

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Procedural Requirements

- Causation

- Causal connection between the injury and the conduct complained of

- the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.

- Do not need to demonstrate that injuries are caused *specifically* by the alleged actions of the defendant

- Redressability

- It must be “likely,” as opposed to merely “speculative,” that the injury will be redressed by a favorable decision

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Procedural Requirements

- “Zone of Interest” Test
 - Injury must fall within the “zone of interests” that the statute was designed to protect.
 - The purpose of the CWA is the “restoration and maintenance of chemical, physical and biological integrity of the Nation’s water.” 33 U.S.C. § 1251.
 - The purpose of the CAA is “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.” 42 U.S.C. § 7401(b).
 - The test is satisfied if the plaintiff establishes that its interests “share a ‘plausible relationship’ to the policies underlying” the statute.

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Subject Matter Jurisdiction

- United States District Courts have jurisdiction
 - Section 309(b) of the CWA, 33 U.S.C. §1319(b)
 - Section 205 of the CAA, 42 U.S.C. § 7524
- Original Jurisdiction
 - Pursuant to 28 U.S.C. §§1331, 1345 and 1355
- Supplemental jurisdiction over state law claims
 - Pursuant to 28 U.S.C. § 1367

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Affirmative Defenses

- Pre-emption in whole or in part by the CWA and/or federal and/or state laws and regulations that govern the operation of the applicable facilities.
- The Court lacks subject matter jurisdiction over the claims because Plaintiff's 60-Day Notice was inadequate.
- Barred in whole or in part by the applicable statute or statutes of limitations.
- Failure to state a claim because the alleged violations are not continuing or ongoing as required for private right of action under the Act.

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Affirmative Defenses

- Failure to state a claim because Plaintiff cannot establish that the Defendant was the source of any of the pollutants allegedly found in surrounding waters.
- Permit imposes no requirements in addition to those established by applicable statutes, regulations, ordinances and other laws, and the Defendant has complied with all such requirements of applicable law.
- The Plaintiff is not entitled to recover penalties or fees because any violations of the Permit that may have occurred are not serious, are not the sole or principal cause of degradation of the waters into which the Defendant discharges processed wastewater and, accordingly, do not have a significant adverse effect on the environment or the public.

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Affirmative Defenses

- The Plaintiff is not entitled to recover penalties and fees because of the economic impact such an imposition of penalties and fees will have on the Defendant's ratepayers due to the level of sewer rates they are required to incur.
- Failure to join parties needed for a full and just adjudication and in whose absence action should not proceed.

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Litigation Strategy

- Shield Defense – In compliance with existing permit
- Household indicator – Costs of improvements exceed reasonable rates to end-users
- Negotiate Consent order with Regulatory Agency (pre-emptions per se)
- Suspend Penalties, Supplemental Environmental Projects.

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“Permit Shield” Defense

- Compliance with a permit shall be deemed compliance. 33 U.S.C. § 1342(k)
- Split Circuits
 - 4th Circuit (*Ohio Valley Environmental Coalition, et al., v. Fola Coal Company, LLC*): Because Defendant’s NPDES permit referred to the general state water quality standards, the 4th Circuit held that it did not comply with its permit by violating the general state water quality standards. Permitting authorities may not issue permits allowing a discharge to cause violations of a relevant water quality standard.
 - 6th Circuit (*Sierra Club v. ICG Hazard, LLC*): NPDES permit set numeric limits on the discharge of several specific pollutants, but only required one-time surface water monitoring for selenium despite the existence of an applicable water quality standard for selenium.
 - Like *Fola* - NPDES permit issued to ICG Hazard incorporated the general state water quality standards.
 - Permit shield applied because the discharger complied with the relevant reporting requirements and the discharge of selenium was within the “reasonable contemplation” of the permitting agency

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Case Study

United States District Court District of Massachusetts

Conservation Law Foundation, Inc., Plaintiff
and

United States of America, Plaintiff-Intervenor

v.

Boston Water and Sewer Commission et al., Defendants
and

Commonwealth of Massachusetts, Nominal Party
required by 33 USC § 1319(e)

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Case Study

VIOLATION

Discharging pollutants into waters of the U.S.
from Municipal Separate Storm Sewer System
("MS4 Permit") in violation of NPDES

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Case Study

Remedial Measures

- Monitoring for illicit discharge
- MS4 and CSO illicit discharge investigations
- Stormwater BMPs and GI/LID
- SSO Reporting
- Capacity Management Operation and Maintenance Corrective Action Plan

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Case Study

Civil Penalty

- \$235,000 penalty, with interest
- Each party bears its own expense, except that, Plaintiff may assert a claim for litigation costs, including attorneys' fees

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Case Study

Governor Weld



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