

# CWEA Webinar: July 12, 2011

## Clean Water Act Law Suits

### Audience Questions:

## Questions for Bobbi Larson

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**Mandeep Chohan:** what are the chances to get ordered to implement specific programs etc. instead of direct fines?

Our review of published and unpublished federal District Court cases indicates that detailed injunctive relief is rare in Clean Water Act citizen suits. When granted, such relief tends to take the form of requiring future compliance with regulations or applicable permits. See, e.g., *United States Pub. Interest Research Grp. v. Atlantic Salmon of Maine, LLC*, 257 F. Supp. 2d 407 (D. Me. 2003); *The Piney Run Pres. Ass'n v. County Comm'rs. of Carroll County*, 82 F. Supp. 2d 464 (D. Md. 2000). In a few cases, the injunctive relief has been more detailed and prescriptive; "The authority to "enforce" an existing requirement is more than the authority to declare that the requirement exists and repeat that it must be followed." *NRDC v. Southwest Marine*, (9th Cir. 2000) 236 F.3d 985, 1000.

**John Shaffer:** Why haven't there been many more CWA lawsuits concerning SSOs if it is such low hanging fruit for NGOs?

It depends on your view of whether there are many suits ongoing. The SWRCB Citizen Suit Report (May 2011) indicates there are dozens of these cases pending. One reason there are not more may be that there are only a few law firms that bring these cases, and a fair amount of work can be involved to research and work up the cases.

**Rollie Arbolante:** Is there any progress being made in Washington D.C. to address 3rd party lawsuit reform in the CWA?

Yes. The California Association of Sanitation Agencies (CASA) has developed proposed reforms that would address the concerns of public agencies that citizen suits are unfairly burdening local communities and diverting resources from needed programs. Congressman Tom McClintock has indicated that he will introduce legislation this year to restrict citizen suits to certain significant violations.

**Joy Clous:** If you settled w/ an NGO suit does this provide protection from other NGO suits?

There is no guarantee that a settlement will preclude future suits because settlements do not involve payment of monetary penalties to the U.S. Treasury. However, in practice, if the settlement is in the form of a court-ordered consent decree, it is unlikely that another plaintiff could successfully pursue the same claims in a subsequent suit. In addition to standard defenses such as mootness or laches (delay in bringing a claim), there is case law that holds that environmental NGOs that seek to protect the same interest—the protection of clean water for example—are "in privity" with one another such that the subsequent suit could not go forward.

**Javad Ghaffari:** Does CWA require electronic reporting 'CIWQS' or is it a state requirement?

CIWQS is not required by the Clean Water Act. However, USEPA is strongly supporting the move to electronic reporting for permit compliance monitoring reports.

**William Toci:** Should you be proactive with your regional board to assess fines for violations to protect you from NGO's

Maybe. On the one hand, payment of an ACL for specified violations is a defense to subsequent enforcement of the same violations by citizen suit. However, regional boards are not often able to act quickly enough to cut off a citizen suit and some entities have found themselves in the worst position, of having to defend both an administrative enforcement complaint from the regional board and a third party suit. However, if the regional board is investigating and contemplating an enforcement action for a major spill, for example, it is in your interest to seek to cover other SSOs in the same ACL as a global settlement of all past violations.

**Philip Lee:** What is the number of SSOs per hundred miles generally agreed upon?

The goals vary, depending upon whether the agency has responsibility for a portion of the lateral, and whether small volume spills are excluded. However, the spill goals agreed to are typically 5 or 6 SSOs per 100 miles of pipe per year.

**Joy Clous:** What is the logic behind requiring an agency to meet a spill goal and also to specify the programs the agency will have to complete?

There may not be a very strong connection. The theory is that the programmatic and capital improvements agreed to will lead to compliance with the spill goal—but there is no guarantee that they will. In some cases, agencies have agreed to more aggressive spill goals and resisted specific program elements as part of the settlement.

**Susan Halpin:** if failure to report violations of NPDES permit are not addressed by MMP from RB, how frequently are these "violations" addressed in a 3rd party suit?

Citizen suits generally incorporate all violations that can be attributed to a facility, including failure to report or incomplete reports. This can contribute to a very lengthy list of alleged violations. However, the monitoring and reporting violations can generally be cured by agreements to modify practices going forward and do not tend to be the focus of substantive settlement agreements.

**William Toci:** What's the difference between a consent decree and a settlement?

A consent decree is a court ordered settlement. The court retains jurisdiction over the settlement, and in the event that the defendant fails to comply with its terms, the plaintiff can go directly to the federal court to enforce the alleged breach. A settlement agreement is a contract between the parties that is entered with the court. To enforce the settlement agreement, plaintiffs must bring a new lawsuit. Most cases these days are resolved by consent decree.

## Questions for Vicki Caulfield

**Philip Lee:** What CMMS are you using?

Hansen

Who implemented and how many administrators?

Until the layoff occurred in 2008/2009, we had a dedicated division to our CMMS, they printed, scheduled the unscheduled, and closed all work orders district wide. We pushed those duties out to the end users of the program. The field staff know write their own work orders, print them out and close them. In addition they also enter new and revise existing equipment as needed.

**Joy Clous:** You mentioned you were reporting zero volume spills. What is a zero volume spill?

Zero volume spills are spills that we assume have spilled which is noticeable by debris around a clean out; thus we did not visually see any spill.

**Philip Lee:** What were the financial implications of the settlement?

The total costs of the settlement were approximately \$245,000. This does not include the costs of our legal fee's and staff labor which approximately an additional \$70,000.

**Philip Lee:** What version of Hansen?

Version 7.7

**William Toci:** In your reporting, were you including the private laterals?

Yes, we were reporting every spill we were made aware of and that we responded to.

**Javad Ghaffari:** What is EIDs annual CIP budget?

Our 5 year district wide CIP is \$143M, for 2011, its \$20M.

**Susan Halpin:** did the cost of this suit affect your customer rates?

Had we not negotiated the settlement, their initial demands would have affected customer rates.

**Joy Clous:** Did your spill goal include volume exclusion for small SSOs?

Unfortunately not, we did discuss that in negotiations but they were not willing to allow for exclusions of small spills. However we were able to eliminate heavy storm events. I mentioned 100 year storm events however that number is actually a 25 year storm event.

**John Shaffer:** You mentioned that the consent decree caused you to improve your program. Do you believe Water Board enforcement would have done the same thing?

I believe so, sometimes a "nudge" from enforcement can help put goals into perspective. We believed we were performing at due diligence and a pro-active manner. We felt we were compliant with the SSO-WDR general order prior to this suit. The idea of a zero SSO goal can be debated on whether or not that is realistic especially given our terrain, one drop will run down hill; having 64 lift stations says a lot amount that.