Double Jeopardy and More: Citizen Suits Under the Clean Water Act

By Gene Tanaka



Introduction

Early one morning, your wastewater director brings you, the city manager, a certified letter he has just received stating that an environmental group intends to sue the city unless it corrects Clean Water Act (CWA) violations at its sewer plant. The letter gives the city a 60-day deadline and demands payment of the group's legal fees and costs in the amount of $100,000. The notice is based on required reports filed by the city with the state environmental protection agency (State EPA). Those reports reveal that for the last six months, discharges of treated sewage from the plant into the adjacent river have exceeded pollutant standards set by the discharge permit.

The wastewater director had previously explained to you that the violations result from aging sewage treatment equipment that needs to be replaced. Prior to the notice letter, you had reached a tentative agreement with the State EPA to replace the equipment to bring the plant into compliance and to pay a fine for the violations. At your request, the city council had just approved purchasing and installing the replacement equipment.

Nevertheless, after 60 days, the environmental group files the threatened civil lawsuit and seeks an injunction to force compliance with the permit, payment of fines, and payment of the group's attorney's fees and costs, which now total $150,000. Worse, the State EPA, spurred by adverse publicity generated by the notice letter, follows the environmental group. It brings a civil enforcement action against the city for an injunction to force permit compliance, payment of fines and recovery of its own enforcement costs.

As you call your city attorney, you wonder how two different groups can sue the city for the same violations, how the city can be liable for inadvertent violations, and why these suits can be maintained when the city was well on its way to permanently fixing the problem. The answers to these questions lie within the CWA and its citizen suits provisions.

While double jeopardy protects a criminal defendant from being prosecuted a second time for the same crime after an acquittal or conviction, no such protection applies to civil suits under the CWA. As illustrated above, the environmental group may sue the city for alleged violations under the CWA and the State EPA may sue it again for the same violations. The city's civil liability for permit violations is strict, and compliance alone is not sufficient unless it is absolutely clear that the alleged wrongful behavior will not recur.

Given the potential exposure for permit violations and wide reach of the CWA, an understanding of citizen suits and how to defend them is vital for municipalities. The recent United States Supreme Court decision in *Los Angeles County Flood Control District v. Natural Resources Defense Counsel*[1] re-emphasizes the relevance of the CWA. This article will discuss the statutory framework for citizen suits, the constitutional doctrines of standing and mootness, the notice of violation requirement for citizen suits, concurrent citizen suits and enforcement actions, and a checklist to consider in defending a citizen suit.

Statutory Background of Citizen Suits

In 1972, faced with serious and widespread water pollution, Congress passed the Clean Water Act.[2] The CWA sought "to restore and maintain the chemical, physical and biological integrity of the Nation's waters"[3] by prohibiting the discharge of pollutants into navigable waters except as authorized by the CWA. For approved discharges, the United States Environmental Protection Agency (EPA) or authorized states may

issue National Pollutant Discharge Elimination System (NPDES) permits which allow discharges of pollutants subject to limitations and related monitoring and reporting requirements.[4] For cities, sewage treatment facilities and stormwater discharges from public infrastructure are subject to NPDES permits[5] which explain the scope of the CWA and related exposure to citizen suits.

The CWA, like other pollution control statutes passed by Congress in the 1970's and 1980's, authorized multiple enforcers of violations to more effectively achieve compliance.[6, 7] Thus, violations of the CWA are enforceable by the EPA and the state. Specifically, the EPA may enforce violations of a federal NPDES permit, and both the EPA and the state may enforce violations of a state NPDES permit.[8 9]

If the EPA and the state do not enforce violations of NPDES permits, the CWA authorizes citizens to bring suit to stop discharges which violate or lack an NPDES permit, violations of other permit requirements and violations of state-established water quality standards.[10] 33 U.S.C. § 1365(a)(1) states:

> any citizen may commence a civil action on his own behalf - (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation.

While three enforcers--the EPA, state and private citizens--may provide more comprehensive enforcement than one, it can lead to duplicative efforts and conflicting proceedings.[11]

To reduce duplication and conflicts, Congress imposed a three-part preclusion protocol on a citizen suit: notice, delay and bar.[12] First, a citizen-plaintiff must send a 60-day Notice of Intent to File Suit to the alleged violator and copy the state regulatory agency and the U.S. EPA Administrator. 33 U.S.C. § 1365(b)(1)(A) provides: "No action may be commenced . . . prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the [EPA] Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation or order." Second, this 60-day delay or "grace period" allows the alleged violator to comply with the CWA or the regulatory agency to begin enforcement.[13]

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Third, a citizen-suit is barred if the regulatory agency has begun and is diligently prosecuting a civil or criminal action to require compliance. 33 U.S.C. § 1365(b)(1)(B) mandates:

> No action may be commenced . . . if the [EPA] Administrator or State 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, but in any such action in a court of the United States any citizen may intervene as a matter of right.

Despite the bar on citizen suits discussed above, parallel prosecutions for the same violation are still possible. Not surprisingly, this has created conflicts.

Liability in citizen suits is based on the following:

- Citizen suits may enforce non-compliance with an NPDES permit or discharges of pollutants without a permit. 33 U.S.C. § 1365(a)(1).
- The statute of limitations for citizen suits is five years from the date of discovery of the violation. 28 U.S.C § 2462; *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 74-76 (3d Cir. 1990), *cert. denied*, 489 U.S. 1109, 111 S.Ct. 1018 (1991).
- Although standard of care and good faith are factors in determining the amount of civil penalties, civil liability for permit violations is strict. *Kelly v. United States Environmental Protection Agency*, 203 F.3d 519, 522 (7th Cir. 2000).
- Liability for citizen suits does not apply to the flow of polluted water between two parts of the same body of water. 33 U.S.C. § 1362(12); *Los Angeles County Flood Control District*, 184 L. Ed. at 551.
- Liability for citizen suits requires the discharge of pollutants into navigable waters from a "point source." 33 U.S.C. §§ 1365(a)(1)(A), 1362(14); *Sierra Club v. Abston Construction Co.*, 620 F.2d 41, 45 (5th Cir. 1980) ("The ultimate question is whether pollutants were discharged from 'discernible, confined, and discrete conveyance(s)'")(parenthesis in original).
- Citizen suits may not enforce Section 404 permits which are issued by the United States Army Corps of Engineers

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for the discharge of dredged or fill material. 33 U.S.C. § 1344; *Atchafalaya Basinkeeper v. Chustz*, 682 F.3d 356, 359-60 (5th Cir. 2012).

Citizen suits may not enforce violations tions that are wholly past and not reasonably likely to continue in the future. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49, 56-63, 108 S. Ct. 376 (1987).

Prevailing citizens are entitled to injunctive relief, civil penalties up to $25,000 per day paid to the U.S. Treasury,[14] and attorney's fees and expert witness fees.[15] Similarly, federal and state regulators are entitled to injunctive relief and civil penalties.[16] Regulators may also obtain criminal penalties and administrative penalties not available in citizen suits.[17]

As our city manager is beginning to appreciate, there is tremendous exposure for NPDES violations. Sorting out which plaintiffs are proper and what cases are moot is surprisingly complex and has generated a great deal of case law.

Standing and Mootness Under the CWA

The citizen-plaintiff's standing and mootness of its claims are often at the heart of citizen suit litigation and have been revisited frequently by the United States Supreme Court. Both concepts arise from the United States Constitution, Article II, Section 2, which extends the jurisdiction of federal courts to "cases" and "controversies."[18] A citizen-plaintiff entitled to sue under the CWA is "a person or persons having an interest which is or may be adversely affected."[19] Standing requires that the plaintiff has suffered an injury. Mootness applies to a citizen suit if succeeding events clearly establish that the alleged wrongful behavior will not recur.

Standing

In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130 (1992) the Supreme Court set forth a three-part test for plaintiff's standing:

> First, the 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,'" . . . Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be "fairly. . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." (brackets in original, citations omitted)

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In *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180-81, 120 S.Ct. 693 (2000), the Supreme Court reaffirmed the *Lujan* test but narrowed it:

> The relevant showing for purposes of Article III standing, however, is not injury to the environment but injury to the plaintiff. To insist upon the former rather than the latter as part of the standing inquiry . . . is to raise the standing hurdle higher than the necessary showing for success on the merits in an action alleging noncompliance with an NPDES permit.[20]

In *Laidlaw*, defendant Laidlaw Environmental Services (TOC), Inc. (Laidlaw) owned a waste incinerator facility which included a wastewater treatment plant. Between 1987 and 1995, Laidlaw repeatedly discharged pollutants into the nearby river committing thousands of violations of its NPDES permit. Plaintiffs Friends of the Earth (FOE) and Citizens Local Environmental Action Network, Inc. (CLEAN) sued Laidlaw under the citizen suits provision of the CWA. Laidlaw sought summary judgment against both groups for lack of standing.[21]

FOE and CLEAN successfully established standing by presenting evidence from their members that the river looked and smelled polluted; Laidlaw's discharges caused them to refrain from fishing, camping, swimming, hiking, boating and other recreational activities involving the river. Another member testified that she believed the value of her home was lowered because of Laidlaw's pollution.[22] Writing in dissent, Justice Scalia argued that by ignoring empirical evidence of harm to the environment, the majority based "injury in fact" on "vague, contradictory, and unsubstantiated allegation of 'concern' about the environment. . . ."[23]

Despite *Laidlaw*, the Supreme Court subsequently re-emphasized the injury in fact requirement from *Lujan*. In *Summers v. Earth Island Institute*, 555 U.S. 488, 490, 129 S.Ct. 1142 (2009), plaintiffs environmental groups challenged the United States Forest Service regulations that exempted certain small projects from public comment and challenge. Writing this time for the majority, Justice Scalia acknowledged that organizations can assert the standing of their members, and those members can establish standing if harm to the environment in fact affects their recreational or even esthetic interests.[24]

However, plaintiffs had submitted an affidavit from one of their members, Jim Bensman, which asserted that he had suffered injury in the past from development on Forest Service land, and would visit national forests in the future.[25] Justice Scalia was not persuaded and seized the opportunity to emphasize the importance of a concrete, specific injury: "It is a failure to allege that any particular timber sale or other project claimed to be unlawfully subject to the regulations

will impede a specific and concrete plan of Bensman's to enjoy the national forests."[26]

Based on this line of cases, the environmental group suing our hypothetical city may show standing by: (1) their members; (2) who have personally enjoyed or are likely to enjoy the recreational or esthetic benefits of the environment, and (3) have been prevented from those benefits due to defendant's alleged actions. However, even if the environmental group can prove injury in fact, it must also establish that those injuries have not been mooted by subsequent events.

Mootness

Mootness often arises where the violator settles with the enforcement agency. It then defends against the citizen suit by arguing that it is moot. For lawsuits intended to enforce compliance with the law such as CWA citizen suits, the case is moot "'if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'"[27] The defendant bears the heavy burden of proving mootness.[28]

In *Gulf Restoration Network v City of Hattiesburg*, 2012 U.S. Dist. LEXIS 158908, *2-3 (S.D. Miss. Nov. 6, 2012), the City of Hattiesburg had agreed to orders from the Mississippi enforcement agency requiring the City to pay a penalty for past violations of its NPDES permits, establishing a schedule to fix its water treatment facilities, and imposing further penalties if the City failed to meet the upgrade schedule. However, the court refused to grant the City's motion to dismiss for mootness as premature, because the settlement preceded the citizen suit. If citizen-plaintiffs had no interest in the suit because of the prior settlement, then the doctrine of standing, not mootness, would be implicated.[29] (The court also denied the motion because the City would continue to violate the permits until it completed the upgrades.[30])

Subsequently, in *Atlantic States Legal Foundation, Inc. v. Pan American Tanning Corp.*, 993 F.2d 1017, 1019 (2d Cir. 1993), citizen-plaintiffs sued the defendant for discharging pollutants from its pretreatment system that violated permit limits and federal regulations. Thereafter, the Joint Sewer Board entered into a settlement order with the defendant which paid penalties for violations occurring before the citizen suit was filed and made improvements that brought the pretreatment system into compliance. Even though the facility was in compliance, the Court of Appeals reversed the grant of summary judgment for the defendant because "[c]ivil penalties may still be imposed for post-complaint violations and for violations that were ongoing at the time suit was filed."[31]

In our scenario, assuming the tentative agreement between the city and State EPA becomes a formal settlement of the enforcement action, it still will not assure dismissal of the citizen suit. Violations could continue until the new equipment was installed; they would not yet have "irrevocably" ceased. Also, the citizen suit might seek penalties for violations occurring after the settlement or for greater amounts, which are different remedies.

Notice of Violation Requirement for Citizen Suits

The notice of violation is also a jurisdictional requirement. As explained above, a citizen-plaintiff must give 60-days notice to the alleged violator, the EPA and the state prior to filing suit.[32] Requirements for these notices are much more stringent that the requirements for most federal pleadings. EPA regulations explain that CWA notices of violation must 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.[33]

These are mandatory jurisdictional requirements. In *Hallstrom v. Tillamook County*, 493 U.S. 20, 31, 110 S.Ct. 304 (1989), the Supreme Court held that "where a party suing under the citizen suit provisions of RCRA fails to meet the notice and 60-day delay requirements of § 6972(b), the district court must dismiss the action as barred by the terms of the statute."[34, 35]

The United States Court of Appeals for the Ninth Circuit recently addressed the CWA's 60-day notice requirement in *Center for Biological Diversity v. Marina Point Development Co.*, 535 F.3d 1026 (9th Cir. 2008). There, the court strictly interpreted the EPA regulations regarding the CWA notice requirements:

In short, the requirements set forth in 40 C.F.R. § 135.3(a) are not to be looked upon as mere technicalities to be accepted with cold reserve and embraced with velleity. They are to be taken seriously as a means of carrying out important public policies. Our deviations from their precise language have been minor.[36]

In *Center for Biological Diversity*, the first CWA notice of violation claimed that "'Section 404 of the CWA' was being violated by activities that began on June 17, 2003, which activities were placing 'enormous amounts of fill' into the lake and were accompanied by grading below the ordinary high water mark."[37] As the court noted, this did not "give any detail whatsoever regarding just what 'wetlands' were allegedly being affected or how. It also gave no other specific dates."[38] Subsequent notices provided no further detail.[39]

Prior to *Center for Biological Diversity*, the Ninth Circuit found another CWA notice of violation invalid in *ONRC Action v. Columbia Plywood, Inc.*, 286 F.3d 1137, 1141 (9th Cir. 2002). In *ONRC Action*, plaintiffs claimed that defendant's permit was invalid because: (1) the Oregon Department of Environmental Quality (DEQ) could not renew the permit; and (2) even if it could, defendant did not renew its renewal application.[40] Plaintiffs' notice said that defendant's permit was invalid because "the permit renewal application was untimely," a different theory than the two theories presented in court and discussed above.[41]

The Ninth Circuit rejected plaintiffs' notice because it failed to specify what defendant had done wrong:

> ONRC argues that because all of its claims, whether or not they are specified in the 60-day notice, challenge the validity of Columbia Plywood's permit, and could thus have been abated by Columbia Plywood obtaining a new permit, the notice was sufficiently specific to inform Columbia Plywood about what it was doing wrong, so that it knew what corrective action to take. [citation omitted.] We disagree.[42]

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price. The provisions were content-based: they targeted labor-solicitation speech while leaving unaffected other types of street solicitation, thereby undermining an argument that their primary purpose was to promote the broader goal of traffic safety. This purpose was evident in the omnibus immigration bill, S.B. 1070, in which the day labor provisions appeared. It expressly states that the "provisions of this act are intended to work together to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States."

Arizona's impermissibly disproportionate concern with this type of speech was also evident in its punishment: Whereas conduct that *recklessly* impeded traffic was punishable by 30 days' imprisonment, day labor solicitation that was not reckless carried a penalty of up to six months in prison.

The Ninth Circuit concluded that the day labor provisions were likely unconstitutional restrictions on First Amendment free speech rights by using the four-part test from *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 566 (1980). The Court found that: (1) day labor solicitation was neither misleading nor related to unlawful activity and therefore deserved First Amendment protection; (2) Arizona had shown the requisite substantial governmental interest (in traffic safety); and (3) Arizona had also shown that the day labor provisions did directly advance the State's interest in traffic safety by reducing pedestrians and slow-moving traffic in the streets.

However, Arizona failed the fourth prong of the *Central Hudson* test, because the day labor provisions imposed a greater restriction on a particular species of speech than was necessary to serve the State's general interest in traffic safety. Ironically, the Circuit Court found that the day labor provisions, by targeting only employment-related speech, were actually *underinclusive* if their true intent was to promote traffic safety.
The Ninth Circuit pointed out that Arizona could have advanced its interest in traffic safety directly, without reference to speech. The availability of such obvious and less restrictive alternatives made the day labor provisions constitutionally suspect.

Valle Del Sol Inc. v. Whiting, No. 12-15688 (9th Cir. Mar. 04, 2013).

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In other words, it is not enough to tell defendant what you are challenging generally, and thereby inform defendant how to correct the violation, e.g., obtain a new permit. You must specifically tell defendant what it is doing wrong, e.g., DEQ lacks authority to renew permit and you failed to renew your renewal application.

Concurrent Enforcement Actions by Citizens and Regulators

One of the more frustrating aspects of our hypothetical is the prospect of facing two lawsuits enforcing the same violations. While the CWA bars a citizen suit if the EPA or state is diligently prosecuting a comparable civil or criminal action,[43] a citizen suit may proceed in tandem with an administrative enforcement action in the following circumstances:

- If the EPA or state is not proceeding diligently. 33 U.S.C. § 1365(b)(1)(B); *Friends of the Earth Inc. v Laidlaw Environmental Services (TOC),* Inc., 890 F.Supp. 470 (D.S.C. 1995*), vacated*, 149 F.3d 303 (4th Cir. 1998); *rev'd*, 528 U.S. 167, 120 S.Ct 693 (2000).
- If the EPA or state files a civil or criminal action after the citizen timely files his or her lawsuit. 33 U.S.C. § 1319(g)(6)(B)(i); *Chesapeake Bay Foundation v. American Recovery Co.*, 769 F.2d 207 (4th Cir. 1985); *Atlantic States Legal Foundation, Inc. v. Pan American Tanning Corp.*, 993 F.2d 1017 (2d Cir. 1993).
- If the EPA or state files an administrative action after the citizen serves the notice of violation, and the citizen timely files his or her lawsuit within 120-days of the notice. 33 U.S.C. § 1319(g)(6)(B)(ii); *Black Warrior Riverkeeper, Inc. v. Cherokee Mining, LLC*, 548 F.3d 986, 989, 992 (11th Cir. 2008).

With respect to the first exception noted above, the CWA bar in Section 1367(b)(B) explicitly prohibits citizen suits "if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action. . . ."[44] The District Court in *Laidlaw* considered whether the South Carolina designated agency diligently prosecuted in filing a judicial action against Laidlaw. The complaint was filed on the 60th day of the notice period for FOE and CLEAN, and the consent order resolving Laidlaw's NPDES violations was also lodged on the 60th day and signed and entered by the court the next day.[45]

At the outset, the court noted that citizen-plaintiffs bear a heavy burden to prove the state agency's prosecution was not diligent because courts give great deference to government enforcement agencies. This deference is grounded in the delegation by the CWA of primary enforcement responsibility to designated state and federal agencies.[46] Despite this burden, the court found that the South Carolina was not diligent because procedurally the one day between lodging and entering the consent decree did not provide plaintiffs a chance to exercise their statutory right to intervene. Substantively, the consent order lacked strong enforcement provisions. Most importantly, the DHEC agreed to a penalty of only $100,000 when it could have sought an amount as high as $2,270,000.[47]

Under the second exception, the CWA only bars a citizen's suit when the EPA or state files litigation before the citizen's lawsuit, not after. Section 1365(b)(1)(B) bars a citizen suit "if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action. . . ."[48] The Fourth Circuit followed the language of CWA and refused to bar a citizen suit because an EPA lawsuit was filed after the citizen suit. In *Chesapeake*, the Chesapeake Bay Foundation (Foundation) gave the required 60 day notice to the EPA and State of Maryland. After the 60 days expired, the Foundation filed suit at 12:34 p.m., and the EPA filed suit at 3:52 p.m.[49] The court held that "jurisdiction is normally determined

as of the time of the filing of a complaint."[50]

The third exception under the CWA provides that a timely filed citizen suit is not barred if the EPA or state files an administrative action, as opposed to a civil or criminal action, after service of the citizen suit notice of violation. Specifically, the bar does not apply to any violation for which a citizen suit "notice of an alleged violation of section 505(a)(1) of this Act has been given in accordance with section 505(b)(1)(A) prior to commencement of an [enforcement] action under this subsection and an action [by the citizen] under section 505(a)(1) with respect to such allegation is filed before the 120th day after the date on which such notice is given."[51]

The Eleventh Circuit explained that this section "means that citizen suits are not barred when either the federal EPA or a state is pursuing an administrative enforcement action and the notice and filing requirements of § 1319(g)(6)(B) have been met."[52] In other words, the citizen properly provides the 60-day notice, the enforcement agency files an administrative action after the notice of violation, and the citizen then files suit within 120 days after the expiration of the 60-day notice period.

What to Do

For our city manager (as with most litigation), getting ahead of events is critical. Cities that are subject to NPDES permits have monitoring and reporting requirements that should alert the agency to violations of the CWA. Potential citizen-plaintiffs' notices of violation also provide the municipalities with prior warning of citizen suit litigation. These triggers should spur the city to begin investigating and taking steps to minimize its liability It should challenge plaintiff's standing, attempt to moot the case, invoke the citizen suit bar, attack plaintiff's notice of violation and/or settle the matter.

Our city manager and her attorney should consider the following to defend against the citizen suit:

- Liability – where the alleged liability is based on self-reporting, it will be difficult to assert the city has not violated the CWA. On the other hand, where the city's alleged liability is based on an unpermitted discharge, then there may be a factual defense to liability. In either event, consider whether the discharge is within the same body of water or from a point source, whether the violation is wholly over, and whether any penalties are time barred because the discharges occurred over five years ago. *Supra*, p.7.
- Standing – investigate, informally and formally viadiscovery, where plaintiff's members reside, and the likelihood they will use the affected environment for recreation or esthetic purposes. *Supra*, p. 8.
- Mootness – if possible, settle the violations with the enforcement agency. It may not stop the citizen suit if the remedy is not complete and does not prevent future violations. *Supra*, p.9. Regardless, it will narrow the claims. Similarly, if feasible, take steps to permanently fix the problem so that the violations will be wholly over.
- Bar – consider inviting litigation by the enforcement agency within the 60-day notice period to bar the citizen suit. *Supra*, p.9.
- Notice of Violation – challenge plaintiff's CWA notice in court. As explained above, a proper notice is jurisdictional and requires a detailed explanation of the alleged violations. *Supra*, p.9. If practical, time any motion to dismiss based on the procedural posture of the case or the above defenses to prevent plaintiff from correcting and re-serving the notice.
- Settle – early settlement will save the city's legal fees and plaintiff's fees.

While defenses are limited, the city still has options. An early understanding of the matter will enhance those choices.

Conclusion

What does this all mean? Clearly, the price for non-compliance with the CWA can be very steep. In a perfect world, your city will never violate the CWA. However, operator-error and equipment failure are inevitable, as are follow-on citizen-suits. Therefore, understanding the law and a proactive approach to the litigation are key to reducing your risk and exposure.

Notes

1. 184 L. Ed. 2d 547 (Jan. 8, 2013).
2. 33 U.S.C. §§ 1250 - 1387.
3. 33 U.S.C. § 1251(a).
4. Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 174, 129 S.Ct. 693 (2000); 33 U.S.C. §§ 1342(a), (b).
5. Natural Resources Defense Council v. Southwest Marine, Inc., 236 F.3d 985, 991-92 (9th Cir. 2000) (stormwater permit enforcement action); Driscoll v. Adams, 181 F.3d 1285, 1288-1290 (11th Cir. 1999) (liability for stormwater discharge even when permit not available).
6. E.g., Clean Air Act (CAA), 42 U.S.C. § 7604; Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6972; Comprehensive Environmental Compensation and Liability Act (CERCLA), 42 U.S.C. § 9659.
7. Jeffrey G. Miller, Theme and Variations in Statutory Preclusions Against Successive Environmental Enforcement Actions by EPA and Citizens, 28 Harv. Envtl. L. Rev. 401 (2004).
8. 41 U.S.C. §§ 1319, 1342(b).
9. 33 U.S.C § 1365(a)(2) also authorizes citizen suits against the EPA to require it to perform a nondiscretionary duty. This article does not discuss that type of citizen suit.
10. 33 U.S.C. §1365; Northwest Environmental Advocates v. City of Portland, 56 F.3d 979, 982 (9th Cir. 1995) (citizen suit to enforce state standards), *cert. denied*, 518 U.S. 1018, 116 S.Ct. 2550 (1996).
11. Miller, Theme and Variations, *supra*, at 402.
12. *Id.*
13. Cal. Water Boards, Citizen Suit Enforcement Under the Federal Clean Water Act, 2-3 (2011).
14. 33 U.S.C. §§ 1319(d) ($25,000 per-day penalties), 1365(a) (citizen suit penalties); 40 C.F.R. § 19.4 (increasing $25,000 per-day for inflation); *Laidlaw, supra*, 528 U.S. at 175 (penalties payable to U.S. Treasury).
15. 33 U.S.C. §§ 1365(a), (d), 1319(d), 1365(a).
16. 33 U.S.C. §§ 1319(a), (d), (g), 1342(b).
17. 33 U.S.C. §§ 1319(c), (g).

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18. Lujan v. Defenders of Wildlife, 504 U.S. 555, 559, 112 S.Ct. 2130 (1992).
19. 33 U.S.C. § 1365(g).
20. *Laidlaw*, 528 U.S. 181.
21. *Id.* at 176-77.
22. *Id.* at 181-83.
23. *Id.* at 201.
24. *Id.* at 494.
25. *Id.*
26. *Id.* at 495.
27. *Laidlaw*, at 189.
28. *Id.*
29. *Id.* at *7-8.
30. *Id.*
31. *Id.* at 1021.
32. 33 U.S.C. § 1365(b).
33. 40 C.F.R. § 135.3(a).
34. *Hallstrom, supra*, 493 U.S. at 33.
35. The United States Court of Appeals for the Ninth Circuit has repeatedly stated that the 60-day notice requirement is jurisdictional. Center for Biological Diversity v. Marina Point Development Co., 535 F.3d 1026, 1031 (9th Cir. 2008) ("the giving of a 60-day notice is not simply a desideratum; it is a jurisdictional necessity"); Waterkeepers Northern California v. A.G. Industrial Manufacturing Inc., 375 F.3d 913, 916 (9th Cir. 2004) ("In our circuit, compliance with this notice provision is required for jurisdiction").
36. *Center for Biological Diversity, supra* at 1033-34.
37. *Id.* at 1034.
38. *Id.*
39. *Id.* at 1034-35.
40. *Id.* at 1142.
41. *Id.* at 1143.
42. *Id.*
43. 33 U.S.C § 1319(g)(6)(A)(ii).
44. 33 U.S.C. § 1365(b)(1)(B) (emphasis added).
45. *Laidlaw, supra*, 890 F. Supp. at 478-79.
46. *Id.* at 486-87.
47. *Id.* at 489-90, 490-92.
48. 33 U.S.C. § 1365(b)(1)(B) (emphasis added).
49. *Chesapeake, supra*, 769 F.2d at 208.
50. *Id.*
51. 33 U.S.C. § 1319(g)(6)(B)(ii) (brackets added).
52. *Black Warrior Riverkeeper, supra*, 548 F.3d at 991. ML

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63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* at 766-767.
69. *Id.* at 765 & 767-771.
70. *Id.* at 767-768.
71. *Id.* at 768.
72. *Id.*
73. *Id.* (internal quotation marks omitted).
74. Hartman v. Arlington County, 720 F.Supp. 1227, 1228 (E.D. Va. 1989).
75. *Id.* at 1229.
76. *Id.*
77. *Id.*
78. *Id.*
79. Anunobi v. Eckerd Corp., No. SA-02-CV-0820-XR, 2003 WL 22368153, 2003 U.S. Dist. LEXIS 18535, at *5 (W.D. Tex. Oct. 17, 2003).
80. *Id.* at 2003 U.S. Dist. LEXIS 18535, at *1.
81. *Id.*
82. *Id.* at *2-*17.
83. *Id.* at *5.
84. *Id.*
85. *Id.* at *9.
86. *Id.*
87. *Id.* at *10.
88. *Id.* at *12-13.
89. *Id.* at *5.
90. *Id.*
91. D.O.L. Wage & Hour Division Opinion Letter, 1997 WL 998013 (March 17, 1997).
92. *Id.* (emphasis in original). ML

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16. In the author's opinion, "etc." in an ordinance is universally a bad idea. It creates no boundaries or limits.
17. Cosmopolitan Nat'l Bank of Chicago v. City of Chicago, 27 Ill. 2d 578 (1963).
18. This is a fairly standard provision in many state laws, stemming from the Standard Zoning Enabling Act. Sometimes local regulations refer to a "final recommendation" which may require more than a "report." This leads to lively city attorney discussions about what constitutes a recommendation: Is a memo from a planning commission that states, "we have no recommendation (but please get this off our plates)" sufficient? What about a tie vote?
19. Walter Dellinger, Assistant Attorney General, "The Legal Significance of Presidential Signing Statements," Memorandum for Bernard N. Nussbaum, Counsel to the President (November 3, 1993).
20. *See, e.g.*, Berry v. Dept. of Justice, 733 F.2d 1343 (9th Cir. 1984) (citing President Lyndon Johnson' signing statement regarding the Freedom of Information Act, Public Law 89-487 on July 4, 1966.). It is not clear that the Supreme Court would give any weight to such statements; there are five opinions that reference signing statements, perhaps the most interesting being Justice Scalia's mention in his concurrence in Hamden v. Rumsfeld, 548 U.S. 547, at 666 (2006), where he appears to chastise the majority for not considering it part of the legislative history. ML

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Held - The appeal was allowed.

The defence of qualified privilege applies to the occasion when a defamatory statement is made and not to the statement itself. In this case, a response to a community activist about an issue of municipal taxation, in the context of an ongoing public debate on the issue, fell squarely within the ambit of qualified privilege for an elected municipal official. For qualified privilege to apply, a defendant must have some interest in making the statement and those to whom the statement is made must have some interest in receiving it. The trial judge considered that qualified privilege did not apply because the communication itself was malicious.

This was not the correct analysis. The first step in the analysis is to determine whether the occasion in which the statement is made is one in which qualified privilege applies. If it does, then the court must decide whether the defence of qualified privilege is defeated because the impugned words are published maliciously. The trial judge's factual findings were not sufficient to enable the court to apply the correct law to the facts to arrive at a judgment. This necessitated a new trial to determine whether the council member's