

# WATERSHED WATCHDOG

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## GUIDE TO CLEAN WATER ACT CITIZEN SUITS

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The Ohio Environmental Council works behind the scenes and on the front lines of Ohio's most critical environmental battles. For more than 30 years, citizens across the state have counted on the Ohio Environmental Council to be their voice at the Statehouse and various state agencies—fighting to protect Ohio's environment and vanishing open space. The mission of the Ohio Environmental Council is to inform, unite, and empower Ohio citizens to protect the environment and conserve natural resources. The Ohio Environmental Council relies upon the support of foundations, community groups, and individual members to carry out our work. The Ohio Environmental Council is a 501 (c)(3) charitable organization that neither promotes nor opposes any candidate for public office. With its over 2,930 individual members, 128 Community Supporters and an Eco-Network of over 123 Ohio-based environmental, conservation, and community groups, the Ohio Environmental Council continues to unite Ohio's conservation and environmental community to keep watch of Ohio's air and water quality, take action to better environmental policies, and make change for a greener tomorrow.



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## Why Clean Water Matters

Ohio is a water rich state. From the scenic shores of Lake Erie to the graceful bends in the Ohio River, Ohio is home to more than 23,000 miles of rivers and streams, 500,000 acres of wetlands and marshes, 262 miles of Lake Erie shoreline, and 447 publicly owned lakes. Groundwater and surface water provide vital drinking water to millions of Ohioans. Rivers, streams, and lakes provide opportunities for sport fishing, swimming, canoeing, and other recreational activities. Views of lakes and rivers command higher real estate values and attract tourists, thus fueling local economies. Wetlands provide numerous public benefits, including the purification of polluted and nutrient-laden runoff and the recharge of clean underground drinking water aquifers. Wetlands also serve valuable flood control functions and provide numerous recreational, economic, and ecological benefits. Clean water: everyone needs it.

The Clean Water Act is considered one of the most successful environmental laws in the United States. Thirty years ago, Ohio was the poster child for water pollution in the country: the Cuyahoga River was so polluted with industrial chemicals it caught fire; 25-foot high soap suds graced the shores of Lake Erie due to phosphorus pollution; Ohio's Great Lake was declared dead.

Since Congress passed the Clean Water Act in 1972, many Ohio streams, rivers, lakes, and wetlands have rebounded and improved. Much of the improvement was due to the attention and money the Clean Water Act provided to combat the pollution that comes out of the end of a pipe (industrial and municipal "point-source" pollution). However, nearly two-thirds (242 out of 331 watersheds studied) of Ohio's waterways still do not meet the basic "fishable and swimmable" standards of the Clean Water Act. Ohio's Lake Erie beaches also exhibit "consistent pollution" primarily because of bacterial contamination. Eight of 22 Lake Erie beaches exceed Ohio's bacterial standards for 23-60% of the recreational season on average over the past five years.



# OEC WATERSHED WATCHDOGS

In response to emerging water quality threats, citizen groups are turning towards water protection strategies at the watershed level. Because state agencies do not have the resources to conduct regular water quality monitoring on every water body in Ohio, citizen involvement in monitoring and reporting pollution problems is key to watershed protection. To support these local grassroots efforts, the Ohio Environmental Council created the Watershed Watchdog Program which provides equipment, educational resources such as this guide, and hands-on training to grassroots community and watershed groups who are working to protect and improve water quality in their watershed. Watershed Watchdogs are often able to detect potential water quality problems early, quickly, and thoroughly. Information gathered by Watershed Watchdogs can be utilized to alert state and local agencies of the need for emergency response, enforcement actions, permit requirements, or additional inspections to prevent further contamination.

As water quality improvements taper off and federal and state budget cuts strain the resources of state environmental agencies, the role of Watershed Watchdogs, local watershed groups, and river activists in ensuring the enforcement of the Clean Water Act is critical. The citizen suit provision of the Clean Water Act is an important tool to protect and improve Ohio's rivers, creeks, streams, and wetlands. The Ohio Environmental Council produced this guide to help our members better understand this important part of the Clean Water Act. While it will hopefully provide a general overview and helpful assistance in initiating a Clean Water Act citizen suit, in no way should it substitute for legal advice from a licensed attorney.

*The Mad River runs through West-central Ohio and is a high quality spring-fed stream where pollution-intolerant trout thrive.*



# OVERVIEW OF THE CLEAN WATER ACT

The Clean Water Act of 1977 is actually an amended version of the Federal Water Pollution Control Act Amendments of 1972 that was passed in order to protect, “restore, and maintain the chemical, physical, and biological integrity” of the United States’ surface waters (USC 33 Section 1251). By controlling water pollution, the Clean Water Act attains and maintains a level of water quality that supports the “protection and propagation of fish, shellfish, and wildlife and for recreation in and on the United States’ waters” (USC 33 Section 1251).

## Clean Water Act Authority in Ohio

The Clean Water Act requires that all point source discharges obtain a pollution control permit. The term “point source” refers to any discrete conveyance which includes but is not limited to any pipe, ditch, channel, tunnel, landfill leachate collection system, concentrated animal feeding operation, and spillways which can transport pollutants into waterways. Point sources must obtain Clean Water Act national pollution discharge elimination system (NPDES) permits to legally discharge specific amounts of pollutants into Ohio’s rivers, creeks, and streams. The Ohio Environmental Protection Agency (Ohio EPA) has authority in Ohio to enforce the Clean Water Act as delegated by the U.S. EPA. Ohio EPA currently issues NPDES permits to wastewater treatment plants, factories, and various other point sources. The Ohio Department of Agriculture (ODA) is currently (2004) in the process of seeking legal authority from U.S. EPA to enforce the Clean Water Act and issue permits as they relate to concentrated animal feeding operations (CAFOs). For the purposes of this guide, we will refer to the agencies with this current and future authority collectively as “regulatory agencies.”

## Definition of Point Source

“Point source” refers to any “discrete conveyance” which includes but is not limited to any pipe, ditch, channel, tunnel, landfill leachate collection system, concentrated animal feeding operation, or spillway which can transport pollutants into waterways. Point sources must obtain permits to legally discharge specific amounts of pollutants into Ohio’s rivers, creeks, and streams.

The NPDES permits establish effluent limitations (treated or untreated wastewater from a treatment plant, sewer, or industrial site), monitoring protocols, and reporting requirements aimed at reducing the impact of pollutants to waters of the state. Point source discharges of pollution into Ohio’s waterways without a permit are illegal. Similarly, failure to comply with any NPDES permit discharge limitations, monitoring requirements, and reporting requirements is a violation of the Clean Water Act.



# CLEAN WATER ACT ENFORCEMENT

Violations of the Clean Water Act can be enforced through civil enforcement, criminal prosecution or initiation of citizen suits. More information on these methods is discussed below:

## Civil Enforcement of the Clean Water Act

Regulatory agencies can take civil enforcement actions and/or require corrective actions in order to force violators to comply with the Clean Water Act and assess civil penalties (fines which recover the economic benefits that the violator gained by not complying and account for the appropriate environmental harm caused by the violation) of up to \$25,000 per violation per day. The regulatory agency also has the authority to order the violator to cease its operations until its problems are fully addressed, revoke the discharger's permit, or refuse to renew the permit.

## Criminal Prosecution of Violators of the Clean Water Act

Severe or intentional violations and recalcitrant operators may invite criminal prosecution by the State Attorneys General or even U.S. Attorneys. These cases may involve companies or individuals that knowingly discharge without a permit, fail to use or tamper with pollution control equipment and monitors, or falsify discharge reports.

## Citizen Suits under the Clean Water Act

To supplement state and federal enforcement of the Clean Water Act, Congress empowered citizens to serve as "private attorneys general" and bring their own lawsuits to stop illegal pollution discharges. The citizen suit authority can be found in Subchapter V, General Provisions, Section 505, of the Clean Water Act (USC 33, Section 1365). If a violator does not comply with the Clean Water Act or with the regulatory agency's enforcement actions, then any person or entity that either is or might be adversely affected by any violation has the right to file a citizen suit against the violator. Citizens can seek injunctive relief (court orders prohibiting the pollution from continuing), civil penalties, and reimbursement of legal costs and attorneys' fees. In addition, if a regulatory agency fails to take enforcement actions against a violator of the Clean Water Act or does not get acceptable results from their enforcement actions, citizens have the right to file citizen suits against the state regulatory agency or the U.S. EPA.

In general, regulated industries want to avoid Clean Water Act citizen suits, as they can be much more costly than regulatory agency enforcement actions. In some cases, penalties assessed by regulatory agencies may be less expensive than the economic benefits of not complying with permits.

Many citizen suits never go to trial; citizen plaintiffs more often choose to settle enforcement actions prior to final judgment. Penalties in settlements take two main forms. Penalty funds are either directed to projects that have an environmental benefit or help improve water quality in the impacted river, stream, or wetland. Or, alternatively, dischargers can be credited penalty amounts in exchange for environmental improvement measures such as new pollution control technology installed at their facilities.

## 60-Day Notices of Intent to File Suit

### *60-Day Notices to Polluters*

Before a citizen can file a citizen suit against any alleged violator, the Clean Water Act requires citizen-plaintiffs to send a 60-day Notice of (their) Intent to File Suit to the entity for its alleged violation, and copy the state regulatory agency and the U.S. EPA Administrator. Receipt of this notice initiates the 60-day period in which the violator must come into compliance with its permit or Administrative Order in order to avoid a court case. This "grace period" allows a violator to comply or temporarily comply. The 60-day letter must be fairly specific regarding the alleged violations.

Once the 60-day period of notification of Intent to File Suit has begun, different provisions under

Section 505(b) of the Clean Water Act regulate if and when a citizen can sue a polluter or any regulatory agency for their failure to enforce the Clean Water Act. Any citizen can file a suit against any violator of the Clean Water Act, only 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. In cases where regulatory agencies do initiate civil or criminal actions against the violator, citizens may have the right to intervene. Civil actions would normally involve just the plaintiffs [the regulatory agency], and the defendants [the polluter], but persons with an interest in the suit can seek to become a party in the lawsuit by filing a Motion to Intervene.

A citizen suit must be filed in the judicial district in which the violation occurred and a copy of its complaint or suit must also be sent to the U.S. EPA Administrator and the U.S. Attorney General. The district court that oversees the citizen suit can enforce the Clean Water Act by requiring the violator to comply with the effluent standards or limitations, its permit, and any enforcement actions initiated by a regulatory agency. The court must also require the U.S. EPA Administrator and state regulatory agencies to force the violator to comply with the Clean Water Act if they have failed to do so. Section 505(c)(3) of the Act dictates that if the United States is not directly involved in the citizen suit as a party, then the United States cannot give a consent judgment on the suit until 45 days after the U.S. EPA Administrator and the U.S. Attorney General receive copies of the proposed consent judgments.

Civil penalties may be assessed at up to \$25,000 per day per violation. The amount of the civil penalties levied is determined based on the following factors which are outlined in section 309(g)(3) of the Clean Water Act:

- ◆ how serious the violation was;
- ◆ if, and how much economic benefit the violator gained from the violation;
- ◆ if the violator has violated the Clean Water Act in the past;
- ◆ if the violator showed any efforts to comply with the enforcement action brought upon it by the citizen suit; and
- ◆ how much of an economic impact the civil penalty will have on the violator.

In addition to civil penalties, the court may also order any violator to undertake a supplemental environmental project which helps protect or restore the site of the violation and other waters in the state or region. If a temporary restraining order or preliminary injunction is sought, the court may also require the polluter to file a bond or equivalent security in accordance with the Federal Rules of Civil Procedure or establish a fund that will pay for public acquisition of environmentally sensitive lands along one or more water bodies. When issuing any final order for any enforcement action taken under Section 505, the court can, if it deems appropriate, require the violator-defendant to pay for the citizen-plaintiff's litigation costs which include reasonable attorney and expert witness fees.

### *60-Day Notices to Regulatory Agencies*

Similarly, in cases where a citizen can file a suit against a state environmental agency or the U.S. EPA for their failure to enforce the Clean Water Act, a citizen's attorney must send its state environmental agency or the U.S. EPA a 60-day Notice of (their) Intent to Sue them.



# EXAMPLE OF A CITIZEN LAWSUIT IN OHIO

## Friends of Blacklick Creek and the Rocky Fork Creek Protection Task Force versus Central Ohio developers

In the late 1990's two Central Ohio watershed groups, Friends of Blacklick Creek and the Rocky Fork Creek Watershed Protection Task Force, filed a series of 13 separate 60-day notices of Intent to Sue commercial and residential development companies under the citizen suit provision of the Clean Water Act. The 60-day notices alleged that the developers had failed to comply with their special NPDES general permits for stormwater runoff at construction sites by failing to



perform certain tasks, such as sediment sensing. The developers' failure to install and maintain stormwater controls allowed polluted runoff, such as dirt, mud, and silt to enter local creeks. This sediment pollution can smother bottom-dwelling plants and animals and can carry toxic chemicals or nutrients that lead to water quality impairment.

During the 60-day period, the watershed groups held a press conference to present evidence of the Clean Water Act violations. Each of the developers came into compliance with their permits by the 58th or 59th day of the 60-day notice period. Thus, the watershed groups never had to actually file a citizen suit or take the violators to court and the pollution problem ceased. The developers complied with their permits because they did not want to go to court and hoped to avoid more press coverage during a court case that would ruin their reputation and business and to avoid possibly paying for the citizen-plaintiff's litigation fees of attorney and expert witness fees.



# DO YOUR HOMEWORK

It is important for individuals (or citizen groups) to do their homework before initiating a Clean Water Act citizen suit. It is also suggested that they seek the advice of a licensed attorney. The following links can provide useful information and background information beyond that which is contained in this citizen guide.

## Clean Water Act

The Clean Water Act is available on-line at [www.law.cornell.edu/uscode/33/ch26.html](http://www.law.cornell.edu/uscode/33/ch26.html) or from a government printing office in most major cities. Visit [www.epa.gov/region5/defs/html/cwa.htm](http://www.epa.gov/region5/defs/html/cwa.htm) for a summary of the Clean Water Act. A copy of the Clean Water Act's Implementing Regulations from the Code of Federal Regulations is available on-line at [www.access.gpo.gov/nara/cfr/index.html](http://www.access.gpo.gov/nara/cfr/index.html) (go to Title 40, Protection of the Environment).

## Ohio's 305(b) Report

The 305(b) report refers to the section of the Clean Water Act that requires states to list water resource inventories that assess progress in achieving the objectives of the Act. The report serves as a sort of report card on the progress that Ohio is making toward achieving the goals of the Clean Water Act. This classification will provide important information on the relative health of your river, creek, or stream. Visit [www.epa.state.oh.us/dsw/tmdl/2002IntReport/Ohio2002IntegratedReport\\_100102.pdf](http://www.epa.state.oh.us/dsw/tmdl/2002IntReport/Ohio2002IntegratedReport_100102.pdf) to download the 2002 Integrated Water Quality Monitoring and Assessment 305(b) Report. Visit [www.epa.gov/305b](http://www.epa.gov/305b) and [www.epa.state.oh.us/dsw/tmdl/2002IntReport/2002OhioIntegratedReport.html](http://www.epa.state.oh.us/dsw/tmdl/2002IntReport/2002OhioIntegratedReport.html) for additional information on Section 305(b) of the Clean Water Act.

## NPDES permit information

Under Ohio's public record law, citizens can request fact sheets, copies of recent Discharge Monitoring Reports, enforcement summaries, or other information from regulatory agencies related to NPDES permits or dredge and fill permits (commonly called 401 permits) issued for your river or stream. Note: To obtain information from U.S. EPA, citizens may need to make a Freedom of Information Act (FOI) request. Visit [www.rcfp.org/foi\\_lett.html](http://www.rcfp.org/foi_lett.html) for more details on this process and to view a sample letter.

## The Clean Water Act: An Owner's Manual

This down-to-earth, information-packed book by River Network explains crucial sections of the Clean Water Act, points out how to get involved in regulatory decisions, and tells the stories of others who have done so. Full of references, web sites, and other resources, this manual turns legalese and scientific terminology into language you can use. Visit [www.rivernetwork.org](http://www.rivernetwork.org) for a copy.



# FREQUENTLY ASKED QUESTIONS

## Who can sue under the Clean Water Act?

Any citizen with “standing” may sue under the Clean Water Act. To have standing you must be able to prove that you have been someone with an interest which is or may be adversely affected. Exception: You cannot sue if the EPA or the state has already sued the alleged violator.

## Who can suit be brought against?

Suit may be brought against any person (including the United States) for causing injury. In addition to suing parties for causing injuries, suits may be brought against the administrator of the relevant government agency for failing to perform any duty required under the Clean Water Act.

## What injuries can you sue for?

The injury suffered can be aesthetic, conservational, recreational, or physical.

## When can the suit be brought?

Suit can be brought after giving a 60-day notice to (1) the administrator of the relevant government agency, (2) the state in which the alleged violation occurs, and (3) the alleged violator. The notice must be for a harm already suffered or a harm that is imminent.

## Where can the suit be brought?

The suit must be brought in the federal district court that has jurisdiction over the “source” of the pollution.

## What damages can plaintiffs hope to win?

- ◆ Plaintiffs can sue to have the violator fined (up to \$25,000 per day) under the Clean Water Act. However, all fines awarded by a court are payable to the government and not to the plaintiff. There is no right to monetary damages for plaintiffs under the Clean Water Act.
- ◆ Plaintiffs can be awarded injunctions to stop the action that caused the violation.
- ◆ Plaintiffs can be awarded attorney’s fees.

## Does suing under the Clean Water Act bar seeking other remedies?

No. Suing under the Clean Water Act shall not restrict any right any person may have under any other statute or common law.

## What steps should you take if you decide to initiate a citizen suit?

**1. Collect information on the suspected violator.** Without trespassing on the alleged violator’s property, investigate the site from points of public access such as bridges and roads. Record your observations and details about the alleged violation such as the exact location, date, time of day, how the alleged violation is occurring, and what it may be affecting. If possible, collect water quality samples and take photographs with date imprinting to document any problems such as fish kills, sediment plumes, suspicious foams, strange water colors, and eroding banks. Be sure to take note of any areas that might be considered special aquatic habitats, scenic areas, fishing access areas, riverside picnic areas, or swimming areas.

**2. Contact an attorney to draft a 60 day notice.**

# CONCLUSION

Ohio faces many water pollution challenges. Too many rivers are unfishable and unswimmable. Beach closings hurt local tourist economies. Widespread fish consumption advisories and nitrate warnings scare consumers. Although the ultimate goals of the original Clean Water Act have yet to be fully realized, there is reason for hope. Local watershed groups, students, and seniors are actively conducting water quality monitoring. Municipalities are taking creative proactive steps to protect their drinking water from pollution. And citizen groups are using Clean Water Act citizen suits and 60-day notices to force clean up of their favorite rivers and streams. In order for Ohio's waters to ever be swimmable, fishable, and drinkable, it will take all of these efforts—and more—because everybody needs clean water.



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