



**CITIZEN SUIT ENFORCEMENT UNDER THE
FEDERAL CLEAN WATER ACT
A Snapshot of the California Experience
Based on Notices of Intent to Sue
March 2009 through June 2010**

May 2011

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ATTACHMENT A - 60-DAY NOTICE

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INTRODUCTION AND SUMMARY

The Office of Enforcement (OE) began tracking citizen suit notices under the federal Clean Water Act starting in March 2009. Prior that time, neither the State Water Resources Control Board (Water Board), nor any of the regional water boards tracked these notices on a regular basis. This analysis is prepared for notices received by the Water Boards through June 2010. This report tracks the current status of 60 notices. A summary of these notices is set forth in Attachment A.

In undertaking this project, OE sought to address the question of how citizen suit enforcement under the Clean Water Act affects the enforcement priorities of the Water Boards. Our conclusion, based on this limited sampling, is that citizen suit enforcement generally does not interfere with the enforcement actions sought by the Water Boards enforcement staff. For the most part, citizen suits address violations that the Water Boards do not have the resources to pursue with their own staff.

In some cases, citizens will pursue enforcement even when the Water Boards have initiated an enforcement action for the same violations described in a notice of intent to sue. It remains to be seen whether an independent citizen action in those circumstances provides any material benefits for compliance above those imposed through the Water Boards action.

CITIZEN SUITS ARE ENCOURAGED BY FEDERAL LAW

National Pollution Discharge Elimination System (NPDES) permits establish effluent limitations (treated or untreated wastewater from a treatment plant, sewer, or industrial site), monitoring protocols, and reporting requirements. The United States Environmental Protection Agency (U.S. EPA) and the state's enforce violations of the Clean Water Act through civil enforcement and criminal prosecution. To supplement state and federal enforcement of the Clean Water Act, Congress empowered citizens to 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 (33 U.S.C. § 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. Section 505(b) of the Clean Water Act regulates if and when a citizen can sue a polluter or any regulatory agency for their failure to enforce the Clean Water Act. 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. 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.

THE OFFICE OF ENFORCEMENT TRACKS CITIZEN SUIT NOTICES

The status of the matters is based on information received by OE through December 31, 2010. OE staff contacted the citizen organizations and/or the regulated entities periodically for updates on the status of the actions. Where there was a lawsuit initiated or a settlement filed, we asked for the relevant documents. Some citizen organizations were cooperative, others were less cooperative. OE intends to publish periodic updates regarding the outcomes of those notices that have not yet resulted in a final resolution. OE recognizes that the settlements that are first in time relative to the date of the initial "Notice of Intent to Sue" may reflect the degree of complexity in the violations at issue and may not serve as representative samples of the amount of monetary payments that can be obtained by the citizen action.

AUTHORITY FOR REMEDIES AND THE RECOVERY OF CIVIL PENALTIES AND LITIGATION COSTS

Injunctive relief is available pursuant to Clean Water Act sections 505(a) and (d), 33 U.S.C. sections 1365(a) and (d). In addition, citizen groups often seek declaratory relief as well. For violations occurring between March 15, 2004, and January 12, 2009, civil penalties of up to \$32,500 are available for each separate violation. For violations occurring after January 12, 2009, civil penalties of up to \$37,500 are possible.¹ In addition, citizen groups threaten to recover litigation costs, including attorney fees and expert witness fees pursuant to Clean Water Act section 505(d), 33 U.S.C. section 1365(d).

ANALYSIS

Outcomes of Citizen Enforcement Actions

An overall summary of the status of the 60 Notices of Intent to Sue is set forth in Attachment B. For those Notices of Intent to Sue that were resolved during the report period, summaries of the individual actions are set forth in Attachment C.

Of those sixty (60) notices, we have information on 70 percent of the matters. Eighteen (18) matters settled. An additional twenty-one (21) matters were in active negotiation or litigation. Three (3) notices are not being pursued. Based on the information in the

¹ See sections 505(a) and 309(d) of the Clean Water Act, 33 U.S.C. section 1319(d) and the U.S. EPA Regulation, Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. section 19.4

settlement documents and the Notices of Intent to Sue, we have made some general observations and conclusions regarding citizen enforcement. All of the consent judgments which memorialize the settlements are set forth in Attachment C, and are listed in chronological order.

The greatest numbers of citizen notices were filed in the jurisdictions of the Central Valley Regional Water Board (Region 5) and the San Francisco Bay Regional Water Board (Region 2). Citizen actions were not initiated in four regions during the reporting period: the Central Coast Regional Water Board (Region 3), the Lahontan Regional Water Board (Region 6), the Colorado River Regional Water Board (Region 7), and the San Diego Regional Water Board (Region 9).

Who are the Organizations Filing These Notices?

Orange County Coastkeeper
Northern California River Watch
California Sportfishing Protection Alliance
San Francisco Baykeeper
Global Community Monitor
Santa Monica Baykeeper
Communities for a Better Environment
Ecological Rights Foundation
Environmental World Watch
Our Children's Earth Foundation
TEAM Enterprises
Wild Equity Institute
Wishtoyo Foundation
Ventura Coastkeeper
John and Pauline Loades

Which Firms Represent these Citizen Organizations?

Lawyers for Clean Water, Inc.
The Law Office of Jack Silver
The Law Offices of Andrew Packard
Environmental Advocates
Lozeau Drury LLP
Greiben & Associates
Kershaw, Cutter & Ratinoff, LLP
Klamath Environmental Law Center
Law Office of Suma Peesapati

What are the Remedies Sought by Citizen Organizations?

Each of the consent judgments obtained during the review period indicates that the citizen organizations obtain two general types of relief: injunctions and monetary

payments. The more prolific citizen organizations appear to have a “standard” set of requirements that are used as a template by that organization for structuring the desired relief. In addition, some citizen groups have a public initiative that they are pursuing which provides context and guidance for their actions.²

These actions stand in contrast to the current enforcement culture of the Water Boards which tends to segment enforcement remedies into separate enforcement activities with penalties or liabilities addressed with one distinct action (i.e., administrative civil liability actions), and injunctive or remedial relief in a separate action (i.e., cleanup and abatement orders, cease and desist orders, or time schedule orders).

Injunctive Relief

The injunctive relief obtained is tailored to the violations alleged. For example, injunctions related to sanitary sewer overflow violations are different from those arising out of storm water violations. All injunctions require compliance with the permit at issue or a process for achieving compliance.

Most injunctions add the citizen organization as an additional, overseeing “regulatory” entity by requiring the submission of reports and plans to that organization.

The length of the injunctive provisions varies, but no injunction appears to last longer than five (5) years.

Monetary Relief

While the citizen organization could obtain the payment of civil penalties, none of the consent judgments OE reviewed contained any civil penalties. This is likely due to the fact that any civil penalties assessed would be paid by the United States Treasury and would not directly benefit the citizen organization, or even water quality, generally. The threat of civil penalties is leveraged to obtain monetary payments for project and activities of direct interest to the citizen organization.

Instead of penalties, the payments usually fall into several general categories:

- 1) Reimbursement of the costs of enforcement, including legal fees,
- 2) Environmental Project funding, and
- 3) Payments for future compliance monitoring and oversight.

In addition, some consent judgments contain provisions for stipulated penalties to be paid in the event that the Discharger fails to comply with one or more terms of the consent judgment, usually for missing deadlines.

² For example, one group is bringing its actions to address sewage spills under a general campaign entitled “Sick of Sewage.” See: <http://baykeeper.org/priorities/sick-sewage-campaign>.

Do Citizen Notices Overlap with Regional Board Enforcement Priorities?

Citizen suits are not authorized until regulatory agencies have the opportunity to evaluate the information in the notice. If the regulatory agency acts on the alleged violations prior to the expiration of the 60-day notice period, the citizen organization may be precluded from pursuing some of the remedies sought.

OE found that only a few of the citizen suit notices addressed violations that the regional boards³ determined to address with their own enforcement actions. For the most part, the regional enforcement staff evaluated the information in the notices and affirmatively determined that the potential citizen lawsuit would not adversely impact their regulatory or enforcement goals.

In a few cases (not necessarily cases arising from citizen suit notices covered by this report) there are situations where the regional enforcement staff has affirmatively decided to rely on a proposed citizen action to bring about comprehensive compliance at a regulated facility rather than undertake that enforcement itself. This reliance exists even where the consent judgment or settlement agree expressly notes that the settlement does not warrant or guarantee that the defendant's compliance with the agreement will result in compliance with any federal or state law or regulation. The determination has been based on an evaluation of workload versus resources and a confidence in the enforcement abilities of the citizen group, including a reliance on the citizen organization to monitor and enforce ongoing mandatory injunctive provisions. The regional boards' enforcement personnel continue to develop and refine their prioritization guidance for determining which enforcement cases to undertake and such prioritization will guide the response to future citizen suit notices.

The opportunity for regulatory conflicts and overlap exists, however, when a regional board initiates an administrative enforcement action for violations covered by a Notice for Intent to Sue. Specifically, when the citizen organization chooses to continue to pursue a federal lawsuit after a regional board initiates an administrative civil liability enforcement action for alleged violations covered by the Notice of Intent to Sue.⁴ As a consequence, this means that the discharger faces two enforcement actions for the same violations, one from the Regional Water Board, and one from the citizen organization. Although the compliance goals are not materially different between the two enforcement actions, where the citizen organization insists on pursuing its action even in the face of the regional board's enforcement efforts, the transactions costs and the resolution time can significantly increase as the discharger negotiates with both the regional water board enforcement team and the citizen organization.

³ While the State Water Resources Control Board has the legal authority to respond to a 60-day notice, the enforcement structure of the Water Boards and the allocation of resources empower the regional water boards with the primary enforcement responsibility for NPDES violations.

⁴ This potential for regulatory conflict and overlap also exists in a situation where the regional board begins an administrative enforcement action after a federal citizen suite has been filed.

On rare occasions, the Water Boards themselves will utilize citizen suit provisions to pursue enforcement actions against particular defendants or to intervene in an existing citizen lawsuit to work with a citizen organization to obtain remedies of mutual interest. In one case, attorneys with OE, along with attorneys in the Attorney General's Office, represented the San Francisco Bay Regional Board in negotiations with the U.S. Maritime Administration (MARAD) regarding the resolution of water quality violations caused by discharges from the Mothball Fleet in Suisun Bay. These violations, and other hazardous waste claims, were the subject of a citizen's lawsuit brought by ARC Ecology, San Francisco Baykeeper and the Natural Resources Defense Council. The San Francisco Bay Regional Water Board) intervened as a plaintiff and the matter ultimately settled.⁵

CONCLUSION

The limited information collected for this report indicates that citizen suit enforcement in California fulfills the role contemplated by the Clean Water Act. For the most part, citizen enforcement does not conflict with the enforcement priorities of the regional water boards but instead acts as an independent complement to the enforcement activities of the Water Boards. Citizen enforcement addresses violations that the regional boards can not pursue due to resource constraints. However, there is a legitimate issue regarding the appropriateness of the regional enforcement staff's reliance on citizen action to enforce post-judgment compliance where the noncompliance (i.e., continued, significant sanitary sewer overflows) indicates in new violations of Water Board permits or requirements.

Should citizen enforcement be expanded to address other water quality violations beyond those regulated under the federal Clean Water Act? The information collected by this report suggests that empowering citizens to protect waters of the State of California will not adversely affect the regulatory programs so long as the standards developed by the Water Boards subject to citizen enforcement are clear and unambiguous. Waste discharge requirements containing numeric effluent limitations are an example of the type of permit limitation that could be easily enforced by citizen action. If the expansion of citizen suit authority to enforce non-NPDES provisions of the Porter-Cologne Water Quality Control Act is seriously considered, there should be a thorough evaluation of the benefits and costs as there are significant issues not addressed by the information in this report, including the potential for abuse of citizen enforcement.

⁵ Fifty-two (52) ships are addressed by the settlement. These rusting vessels will be removed and cleaned up locally before they are sent to another location where they will be scrapped. The 25 worst vessels will be addressed within two years and the remainder must be removed by September 2017. In addition, MARAD, within four months of the entry of judgment, will remove hazardous paint chips from vessel decks, will clean the surfaces of the remaining ships every 90 days until the ships are removed to keep paint from dropping into the bay, inspect the ships monthly, and collect runoff samples for testing.