



FOLEY & LARDNER LLP

# NACWA

## Developments in Clean Water Law

### Settling for More: Managing an Enforcement Action to Your Agency's Benefit

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# Settlement Considerations

- “No action may be commenced ... if the 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....”
- 33 U.S.C. §1365(b)

# Potential Plaintiffs

- U.S. EPA
- State Enforcement Agencies
- NGOs
  - “Race to the Courthouse”
  - “Diligent Prosecution”
  - Intervention in Litigation
  - Challenge to the Settlement
  - Permitting Proceedings
  - Press, Public Relations

# Diligent Prosecution

- Penalties not always required
- Presumption of diligence
- Courts will examine “diligence” and fairness of settlement
  - *Clean Wisconsin v. WEPCO*, E.D. Wis. 2007
  - *U.S. v. Chevron*, N.D. Cal. 2005

# Settlement Strategies

## ■ Res Judicata

- Government must be diligent
- *Friends of Milwaukee Rivers v. MMSD*, 382 F.3d 743 (7<sup>th</sup> Cir. 2004).
- Need identity of subject matter, not necessarily every claim
- Final judgment on the merits (can include a Stipulated Agreement)

# Settlement Strategies

- Mootness

- Settlement must eliminate risk of recurrence
- *Atlantic States v. Eastman Kodak*, 933 F.3d 124 (2d Cir. 1991).

# Settlement Strategies

- Politics/Motives
  - Citizen groups
    - Fundraising
    - Press
  - Government Agencies
  - Tributary Communities

# Settlement Strategies

- Flexibility
  - Include mechanisms to make changes without having to reopen the Consent Decree.
  - But note, *U.S. v. American Electric Power* (S.D. Ohio, October 2007), “amnesty” provisions for future actions that would otherwise need an air permit criticized.
- Realistic timetable and covenant not to sue during construction.



# Settlement Strategies

## ■ Attorneys' Fees

- Citizen group must be a prevailing party on the merits in order to achieve a fee award.
- *Buckhannon v. West Virginia*, 532 U.S. 598 (2001).
- Prevailing on an initial preliminary injunction is not determinative. *Sole v. Wyner*, 127 S.Ct. 2188 (2007).



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# National Association of Clean Water Agencies

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