



FOSTER PEPPER PLLC

Avoiding and Defending Clean Water Act Citizen-Suits

NACWA

Developments in Clean Water Law Seminar

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Overview: What is a Citizen-Suit?

- Citizen-suits are statutorily authorized by the federal Clean Water Act
- Enforcement Actions brought by citizens instead of the agency
- Intended to **supplement**, but not **supplant**, agency enforcement
- Statutory incentives for plaintiffs

What is a “Citizen-Suit”?

- Strict liability for CWA violation
- Penalties can be severe (up to \$37,500 per day), although court must balance seriousness of violation and good faith efforts to comply
- Attorneys’ fees, expert fees, litigation costs

Defenses

- Notice Defense: Defects based on timing and/or adequacy
 - Timing: Must give the notice at least 60 days before filing lawsuit in court
 - Adequacy: Sufficient information to permit recipient to identify alleged violations
- No ongoing violation: Cannot sue for wholly past violations
 - Violations that continue after the date the complaint was filed
 - Intermittent but likely to continue

Defenses (continued)

- Diligent Prosecution: Citizen-suits are supplemental enforcement actions
 - Action filed in court before citizen-suit
 - Administrative enforcement action
- Standing
 - Injury in fact
 - Fairly traceable
 - Capable of being redressed

Municipal Stormwater NPDES Permits: a Target?

- NPDES permits issued for municipal separate storm sewer systems (MS4s) may be target for CWA citizen-suits
- Permits typically require a stormwater management program
- The MS4 Permit programmatic requirements have already been the subject of citizen-suit actions
- More citizen-suits are on the horizon

Avoiding MS4 Permit Citizen-Suits

- Understand the stormwater management program and set up a regular internal review process to ensure continued Permit compliance
- Watch for likely future permit conditions requirements: Low Impact Development standards? Are end-of-pipe standards on the way?

Avoiding and Defending Citizen-Suits

- “An ounce of prevention is worth a pound of cure”
 - Spend time and effort during permit negotiation to do all you can to obtain a permit you can comply with
 - If you receive a permit with terms that you cannot meet, consider filing an appeal, which is typically less expensive than defending against a citizen-suit action
 - Comply with your permit

Avoiding and Defending Citizen-Suits (cont'd)

- When you receive a 60-day notice, act quickly:
 - Attorney-Client Privilege Issues
 - Document creation/retention issues: don't create "bad evidence"
 - Develop a compliance strategy to set up "no ongoing violation" and, if applicable, "diligent prosecution" defenses
 - Create case themes early and avoid "no comment"
 - Consider exploring early settlement discussions

Conclusion

- Avoid becoming a target by planning for and investing now in compliance
- If you do get a 60-day notice, react quickly and strategically