

Holland & Knight

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Developments in Clean Water Law Seminar
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**EPA's Clean Water Act Enforcement Initiative
How Will The New Enforcement Climate Impact Water
Agencies?**

Lawrence Liebesman

Holland & Knight LLP
2099 Pennsylvania Avenue, N.W.
Washington, DC 20006
lawrence.liebesman@hklaw.com

202.955.3000

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Clean Water Act Overview

- 1972 Federal Water Pollution Control Act (EPA, Corps, States)
- 1977 Clean Water Act Amendments
- 1988 Water Quality Act
- 1994 EPA CSO Policy – Principles are:
 - Provide clear levels of controls presumed to meet health and environmental objectives
 - Provide sufficient flexibility to municipalities
 - Allow phased approach to implement CSO controls considering community financial capabilities
 - Review and revise water quality standards and implementation developing CSO control plans to reflect site specific CSO impacts
 - Sets forth nine minimum controls
- 2000 Section 402(q) codifies CSO Policy for permits, orders or decrees issued after December 21, 2000

CWA Enforcement Authority

- Administrative Orders, Injunctive relief, Civil and Criminal penalties
- EPA Administrative Penalties Class I (\$11,000 per violation up to max of \$32,500); Class II (\$11,000 per day of violation up to max of \$125,000); Corps- Up to \$32,000 per day of violation
- Civil Judicial Penalties Up to \$32,000 per day of violation - Five Year Statute of Limitations for penalties, no SOL for injunctive relief
- (negligent violation \$2500 to \$25,000 per day of violation); (knowing violation \$5000 to \$50,000 per day of violation and imprisonment up to 3 years); (knowing endangerment-up to \$250,000 per violation imprisonment for up to 15 years) (False Statement violations - Up to \$10,000 per violation and imprisonment for two years)
- Citizen Suit Authority

EPA Water Quality Data

- New EPA Leadership Strong on Enforcement - Administrator Lisa Jackson former NJ Environment Chief and AA for Enforcement Cynthia Giles formerly with Conservation Law Foundation of New England
- Clean Water Act Enforcement Lapses detailed in NY Times study - ("Clean Water Laws Are Neglected, at a Cost in Suffering" 9/12/09)
- Total US Stream Miles: 84% not assessed; 16% assessed - of those assessed, 44% impaired
- Top Seven reported causes of impairment (Pathogens 28%, Habitat modification 24%, oxygen depletion 18%, impaired biota 16% and nutrients 16%, Metals 14% Sediment 14%)
- Top Reported Sources of impairment (Ag 38%; dams and diversions, 26%; unknown, 21%, habitat alteration 17%; Natural Wildlife 16%; municipal sewer discharges 15%; nonpoint sources 14%; atmospheric deposition, 12%. Resource extraction 9%, urban storm water runoff, 9%)

(Note - Data from 2004 National Water Quality Inventory Report to Congress as presented by Cynthia Giles at and the NACWA Clean Water Seminar, Nov. 2009)

EPA's Clean Water Act Action Plan (10/15/09)

- Target Enforcement to Most Important Water Pollution Problems
- Strengthen Oversight of State Clean Water Enforcement Performance
- Improve Accountability and Transparency

Targeting Enforcement

- CSOs/SSOs; CAFOs; Storm Water
- EPA National Enforcement Initiatives for FY 2011 - 2013
Top two targets are (1) Keeping Raw Sewage and Contaminated SW out of nation's waters and (2) Preventing animal waste from contaminating surface and ground waters
- CSOs - Estimated 850 billion gallons of untreated wastewater released annually
- SSOs - Estimated 23,000 to 75,000 occurrences annually
- CAFOs - 233,000 animal feeding operations

Targeting Enforcement Cont.

- Focus on Four Areas - Homebuilding, Big Box Store Construction, Ready Mix Concrete, Municipal Separate Storm Sewer Systems
- Effluent Limitations Guidelines for the Construction Industry
 - Issued in November 2009 but recently remanded by Seventh Circuit (Wisc. Builders Assoc. v. EPA in August 2010) to address certain data deficiencies
- EPA to initiate National Rulemaking for comprehensive program to reduce storm water from new development and redevelopment

Selection Criteria

- Severity and human health risk
- Pattern of non-compliance
- Whether federal effort justified based on scope and severity of non compliance

Strengthen State Oversight

- 46 states have NPDES authority - State programs vary in terms of permitting and enforcement
- EPA To Define and clarify expectations of state permitting and enforcement programs
- EPA to Develop formal planning process to review State progress
- EPA to poll results to determine if states meeting expectations
- EPA will disapprove permits not protective of water quality and initiate federal enforcement

Improve Accountability and Transparency

- Electronic Reporting of DMRs (NetDMR)
- EPA and States to Make permitting and Enforcement data available to the Public if not enforcement confidential
- Clear Understandable Information for Public

EPA IMPLEMENTATION

- EPA to set up six action teams –
 - New Approaches
 - Short Term Oversight
 - Electronic Reporting
 - Public Access
 - Data Analysis
 - Outreach
- Teams to be overseeing Steering Committee and staff from EPA Environment Council of States (ECOS) and the association of State and Interstate Water Pollution Control Administrators (ASIWPCA)
- Prioritizing Enforcement by establishing tiers of noncompliance based on actual impact to water quality
- Integrating permit and enforcement reviews in coordination with States

Wetlands and Watersheds

- EPA Reports that CWA Enforcement Hampered by Jurisdictional “Quagmire” of Supreme Court Decisions in SWANCC and Rapanos Cases. Affects both 402 and 404 programs
- Chesapeake Bay (EO 13508)
 - EPA to set TMDL by 12/31/10 with limits for phosphorus, nitrogen and sediments
 - TMDL combination of 92 smaller TMDLs for individual segments
 - Covers 6 states and D.C.
 - Encompasses 64,000 sq. miles of land
 - State watershed implementation plans currently under EPA review
- Great Lakes Restoration Program – EPA announce action plan (2/22/10) to reduce runoff from urban, suburban and agriculture sources and clean up toxic hotspots

Examples of Municipal Settlements in 2009 and 2010

- Hampton Roads, Va. Sanitation District - \$900,000 civil penalty and corrective action to reduce SSOs discharging into Chesapeake Bay
- Duluth Minn and Western Lake Sanitary District--- \$400,000 civil penalty and improvements to system (est. cost of \$230M)
- City of Independence Mo - civil penalty of \$255,000 and SEP of \$450,000 to enhance Mo. River Watershed
- City of Akron Ohio - civil penalty of \$500,000 and SEP of \$900,000 to remove Dam to improve water quality in the Cuyahoga River. Major upgrades to treatment plant, sewer separation projects and program to inspect and repair sewer lines
- City of Honolulu, Hawaii to pay \$1.6 million penalty and to upgrade City's collection and treatment system
- Kansas City, MO – 25 year consent decree at estimated cost of \$2.5 billion with civil penalty of \$600,000 includes green infrastructure pilot project
- Former Rochester Indiana WWT plant supervisor sentenced to one year in federal prison for falsifying DMRs

Emerging Issues

- Stormwater
- New Source Discharges Into Impaired Waters - Impact of Friends of Pinto Creek vs. EPA
- NPDES Permits and Interstate Waster Transfers - 2008 EPA Rule and Friends of Everglades Case – Sup. Ct. cert. pet. pending
- EPA “Blending Policy”
- Proposed Nutrient Standards for Florida Waters
- Chesapeake Bay TMDL

Shortcomings of CWA Enforcement

- Too much focus on quantity of fines and number of enforcement actions rather than actual water quality benefits
- Lack of Flexibility in considering ability of municipalities to pay for improvements to sewer system especially in tough economic times
- Unfunded mandates - Little or no federal help to pay for expensive clean ups
- Wrong Enforcement Priorities - insufficient focus on greatest sources of impairment such as agriculture
- Failure to adequately assess the true incremental benefits of level of controls mandated by settlements
- Corps and EPA inconsistency and confusion in defining “Waters of United States” following Rapanos and SWANCC cases

Strategies for Responding to SSO/CSO Federal Enforcement Actions

- Develop legal and technical arguments to counter alleged violations
- Challenge affordability claims of EPA
- Facilitate public review, especially regarding rate increases
- Research other consent decrees to support flexibility on costs, penalties and schedules
- Consider green infrastructure alternatives
- In light of economic realities, push for longer compliance schedules than 20 years EPA usually allows
- Consider supplemental environmental projects (SEPs) to reduce civil penalty
- Ensure close coordination between legal and technical teams
- Negotiate consent decree in advance of DOJ filing suit to lessen risk of judicial “policing”



QUESTIONS?