

NACWA Clean Water Seminar

Consent Decrees 101: What Every Utility Should Know



How the Game Is Played

John Sheehan, Clark Hill, PLC

Seattle, Washington, November 14, 2012

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Overview

- I. Who are the Players, Coaches, Referees, etc.?
- II. Warm-ups – DOJ/EPA come to town
- III. The Game Begins
- IV. What Plays to Call
- V. It's Over
 - Was the Game Fair?
 - Should the Rules be Changed?

Who Are the Players?



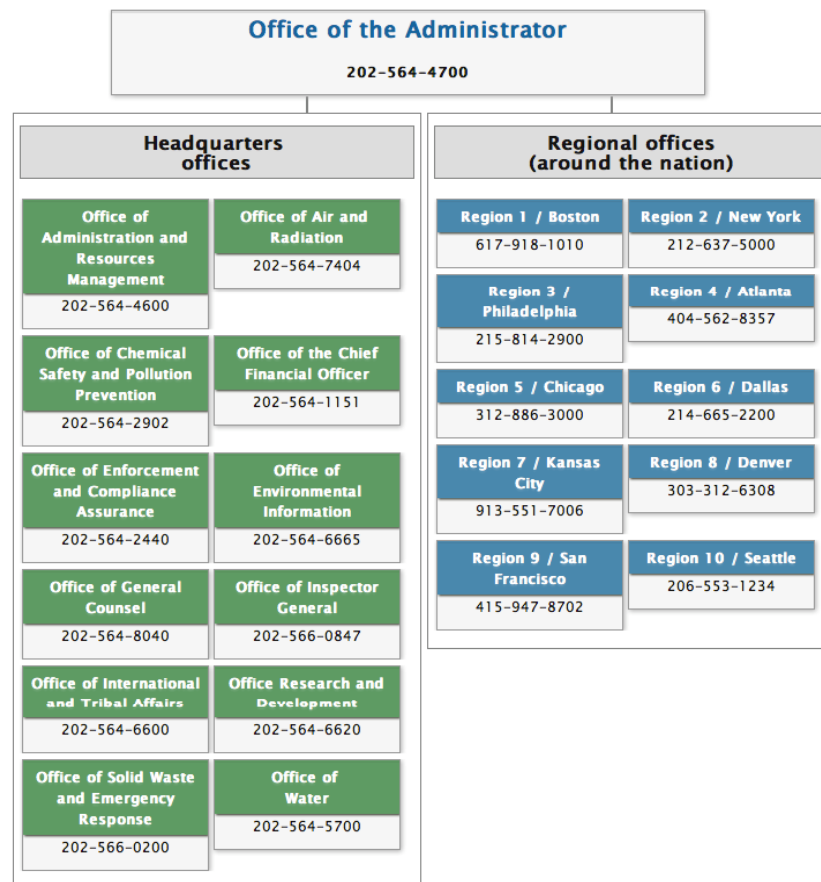
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The Players-The “United” States

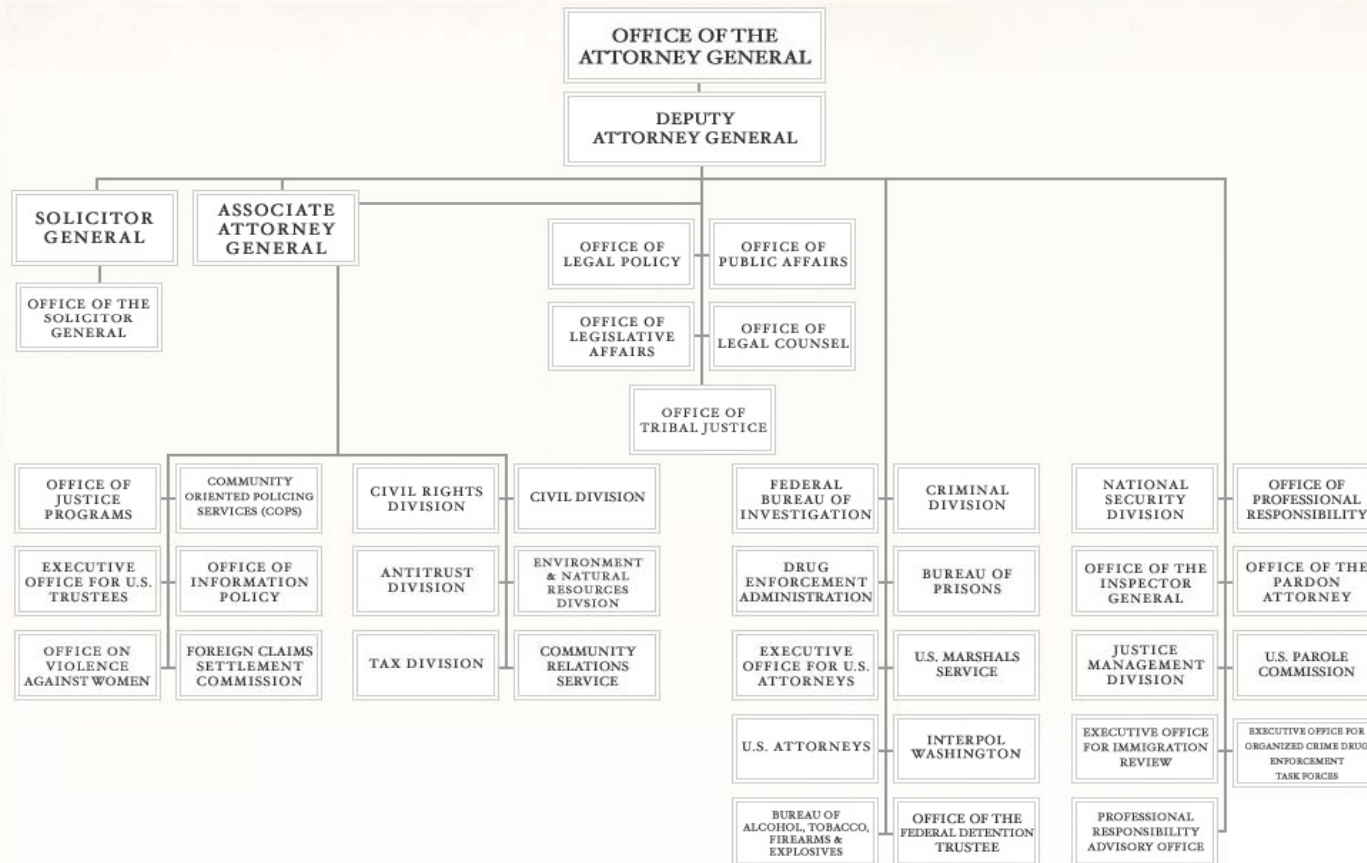


- The Unitary Executive Theory-there is only One United States of America.
- But there are many voices.

EPA Organization Chart



United States Department of Justice



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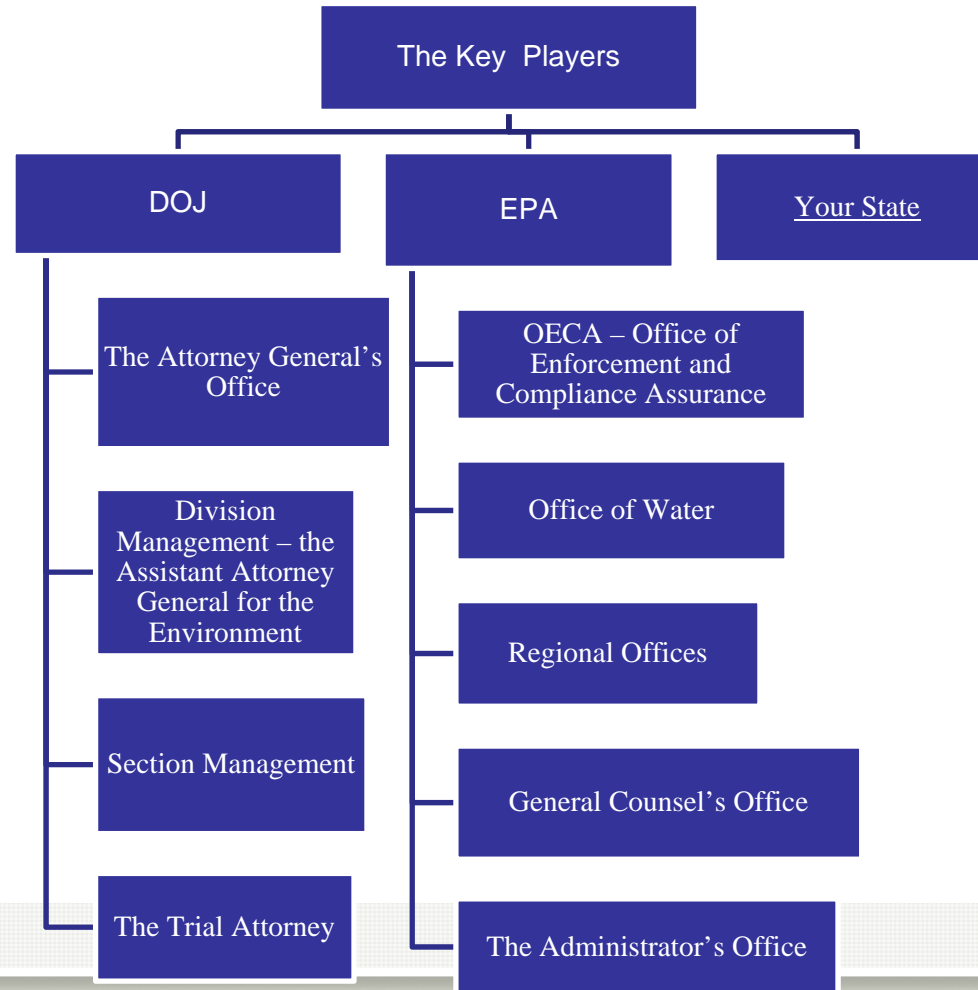
Environment and Natural Resources Division

Office of the
Assistant Attorney
General

EES Section
Management

The Trial
Team

The Key Players



How to get Along with the Federal Family

The Family

- They are a family – alliances, history, bitterness, “you always ...” etc.
- If mom says “no” ask dad
- If dad says “no” as a brother or sister or aunt or uncle or anyone who will be your friend

Your Trial Attorney

- He/she is your key – day to day control of case management
- what is his/her background and what are his motivations?
- OECA
 - Office of “Assurance??”

Warm ups: The Pre-game Routine



Warm-ups – DOJ/EPA come to town

- Recall - the government is virtually undefeated
- The Government's Record: 100-0?
- Study the game films - how have other teams fared and what have they been asked/required to do?
- 308 Response
- What else to do?



The 308 Letter

Section 308(a) of the CWA:

- A. The Administrator shall require the owner or operator of any point source to:**
- 1) Establish and maintain such records,**
 - 2) Make such reports,**
 - 3) Install, use, and maintain such monitoring equipment or methods (including where appropriate, biological monitoring methods),**
 - 4) Sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and**
 - 5) Provide such other information as he may reasonably require**

The 308 Letter from EPA

- Usually 60 days to respond
- Civil and criminal penalties possible
- Not just providing information, but reports and sampling often required

The Game Begins



The Game Begins

- First Half - Negotiations
- Who takes the field?
- If it is not over at half-time – Litigation
- Pros and Cons of Litigation



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Negotiating with EPA/DOJ - How to Win

- Relationships are key – get to know the key players
- Personalize your community – government needs to understand impacts on community
- Federal flexibility – is there any?
- Responding to the “we can’t do that” or “management says no”

Negotiating with EPA/DOJ - How to Win

- **Rule – if they have done it before they can do it again**
- **Every case is unique**
- **What does EPA/DOJ really need in the way of a settlement?**
- **What are the pressures on the trial attorney?**

Pros and Cons of Litigation

- While communities usually do not like to be sued, judge may be more reasonable than EPA/DOJ
- Liability is difficult to overcome, though no direct challenge has ever been mounted
- Question -- if a community is largely in compliance with the permit issued to it by EPA, is EPA entitled to a 20 year consent decree for some violations?
- Does the government really want to litigation against the community?

What Plays to Call

- Avoid personal fouls
- Relationships matter and agency lawyers have long memories
- Remember good sportsmanship when walking off the field
- No excessive celebrations



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The Game is Over (You have your Consent Decree)



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Game Over

- Was the game fair?
- Should the rules be changed?
- The Storm Tax (Wall Street Journal)
- Government by Consent Decree
- New York ELI Article



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Election Impact

- **Will the election change anything?**
- **More leverage or less leverage?**
- **What can your elected officials do?**

REVIEW & OUTLOOK

The Obama Storm Tax

Behold the Obama Administration's new public works plan. Sue cities for polluting waterways and then as part of a settlement require them to spend, er, "invest" billions in extraneous sewer improvements. The White House doesn't even need legislation to pour this money down the drain.

The Justice Department and Environmental Protection Agency have taken enforcement actions against 25 cities over the last four years for allegedly violating the Clean Water Act, and there are another 772 on their list. In addition to imposing millions of dollars in penalties, the feds have forced these cities into consent decrees that will cost their local taxpayers \$21 billion. The decrees spell out in detail what capital upgrades they must undertake—everything down to the size of their pipes.

The EPA says this extraordinary intrusion on local sovereignty is justified because cities are discharging waste into waterways during heavy rains. Many older wastewater systems include a safety valve that releases untreated stormwater and sewage into lakes and rivers when underground tunnels are flooded. This is to prevent waste from backing up in basements. The EPA has ordered cities to limit such wet weather overflows to four per year, regardless of how much rain they receive or how little muck they discharge.

Many cities have already taken concrete steps to reduce such overflows by developing "green infrastructure" (i.e., permeable pavements, rain gardens, catch-basins) that soaks up and diverts stormwater. Such solutions are easier and less expensive to implement than reconstructing their underground systems as the EPA wants them to do.

The U.S. Conference of Mayors says the EPA's heavy-handed management can't be justified by the supposed environmental or economic benefits. George Hawkins, the general manager for Washington D.C.'s Water and Sewer Authority, told Congress in July about "the growing cost of additional regulatory re-

quirements in order to achieve ever-decreasing water quality gains" and that "communities are being forced to invest more but are increasingly getting less return on these investments."

Fossil fuel CEOs couldn't have said it better.

Cities are spending twice as much on water treatment as they did in 1995 and have reduced the contaminants they discharge into waterways during dry weather by 85%. Even so, the EPA says they need to spend at least \$300 billion more on maintenance and upgrades to meet the agency's ever-stricter standards.

Since cities don't have that much spare change, they've been making improvements incrementally. But the EPA is demanding that they accelerate their work, which means they'll have to issue bonds as well as raise residents' water and sewer rates. David Berger, the Democratic mayor of Lima, Ohio—which has a median household income of \$26,000—told Congress this summer that the EPA's consent decree could raise the average resident's \$333 annual sewer bill by \$539. Call the surcharge the Obama storm tax.

By the way, that was a month *after* the EPA announced it would try to offer cities more flexibility. Mr. Berger noted in his testimony that the detente "remains, at this point, a promise, not a reality." He told us last week that cities continue to have difficulty dealing with the EPA's regional offices, which is putting it nicely.

New York City's deputy mayor for operations Cas Holloway is less charitable. The EPA, he wrote in "The Environmental Forum" journal this month, is "treating cities as it might have treated Standard Oil early last century." The agency is "imposing billions of dollars of unfunded mandates without a clear scientific and public health basis for doing so."

Perhaps by targeting cities the EPA is merely trying to show that it's an equal opportunity harassing regulator. To adapt one of the President's favorite phrases, everyone deserves a fair shakedown.

The Environmental F O R U M

The Solution, Not the Problem

“By treating cities as it might have treated Standard Oil a century ago, EPA's approach to clean water infrastructure threatens its overall urban agenda.”

By: CAS HOLLOWAY AND CARTER P. STRICKLAND

*Deputy Mayor for Operations, New York City, and Commissioner of the NYC Department of
Environmental Protection*

Nov. 12, 2012

We'd Like to Write Rosy EPA Letters

The Massachusetts Coalition for Water Resources Stewardship was formed out of frustration with Environmental Protection Agency, Region 1 New England, and its implementation of the Clean Water Act. The Oct. 30 letters from Mayor Michael Nutter of Philadelphia and William Walker from DC Water have us wondering whether their EPA is in any way related to EPA Region 1.

Their EPA is an agency of common sense, partnership and sensitivity to economic realities. Region 1 brings us bureaucratic tunnel vision, disregard for financial concerns and a "my way or the highway" approach. We long to work with an agency described by Mayor Nutter that "understands that the path to clean water is through collaboration and partnership and by investing limited resources wisely." However, in the New England states the EPA routinely oversteps its bounds, issuing permits without appropriate sci-

entific basis and with no consideration of affordability. Communities get permits that mandate squandering limited local resources on actions producing inconsequential environmental results while aging infrastructure continues to crumble due to lack of funding.

Affordability, cost benefit and good science must guide permitting decisions. We seek an EPA that understands that the public's money needs to be spent wisely. We seek an EPA that will evoke praise from not just the mayor of Philadelphia but from mayors across the country. Finally, we seek an EPA that works in partnership with cities rather than against them, that views cities as environmental stewards and not environmental plunderers and that is sensitive to financial hardships of cities and their ratepayers.

PHILIP D. GUERIN
President

*Massachusetts Coalition for
Water Resources Stewardship
Worcester, Mass.*

Questions ? ? ?



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