

**The Consent Decree Process:
Who the Key Federal Players are and How to
Achieve Success**

**NACWA
2014 Wet Weather Consent Decree Workshop**

**John Sheehan, Clark Hill, PLC
Chicago, April 30, 2014**

Overview

- Enforcement Trends
- The Federal Family
- The Consent Decree Process
- Negotiations and Litigation
- Keys for Success
- Other Considerations

Enforcement Trends

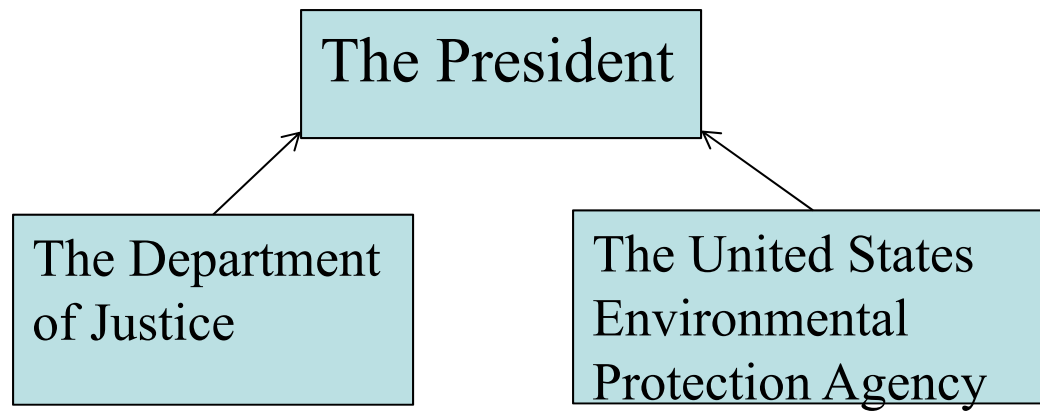
- **EPA has brought enforcement actions most major CSO/SSO community targets**
- **700+ CSO communities**
 - 70% with fewer than 10,000 service population
- **Stormwater enforcement appears to be almost 50% of EPA's CWA enforcement resources**
 - Started with national developers addressing construction site violations
 - Developers (e.g., Centex)
 - Big Box Stores (e.g., Walmart)

Enforcement Trends

- **EPA needs new targets**
 - Approx. 1,000 Phase I MS4 communities
 - Approx. 7,000 Phase II MS4 communities
 - This number will increase
- **EPA moving aggressively to MS4s**
 - Hundreds of EPA MS4 Inspections
 - Dozens and dozens of MS4:
 - Information requests
 - Administrative Orders
 - Penalty Orders

The Federal Family

The “United” States



The “United” States

- The Unitary Executive Theory: there is only One United States of America.
- EPA, for example, cannot sue DOD no matter what environmental laws they may have violated
- There may be only one “United States,” but there are many voices.

EPA

Office of the Administrator

Headquarters Office

Office of Administration and
Resources Management

Office of Air and Radiation

Office of Chemical Safety and
Pollution Prevention

Office of the Chief Financial
Officer

Office of Enforcement and
Compliance Assurance

Office of Environmental
Information

Office of General Counsel

Office of Inspector General

Office of International and
Tribal Affairs

Office Research and
Development

Office of Solid Waste and
Emergency Response

Office of Water

Regional Offices (Around the Nation)

Region 1/ Boston

Region 2/ New York

Region 3/ Philadelphia

Region 4/ Atlanta

Region 5/ Chicago

Region 6/ Dallas

Region 7/ Kansas City

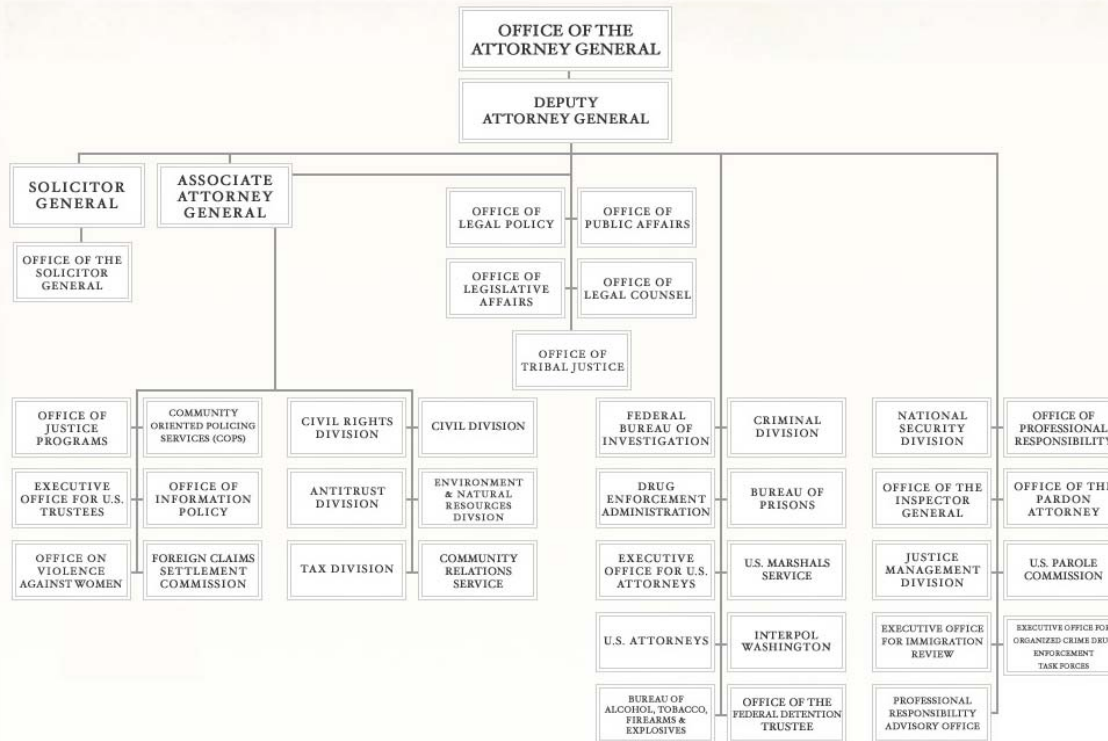
Region 8/ Denver

Region 9/ San Francisco

Region 10/ Seattle

CLARK HILL

United States Department of Justice



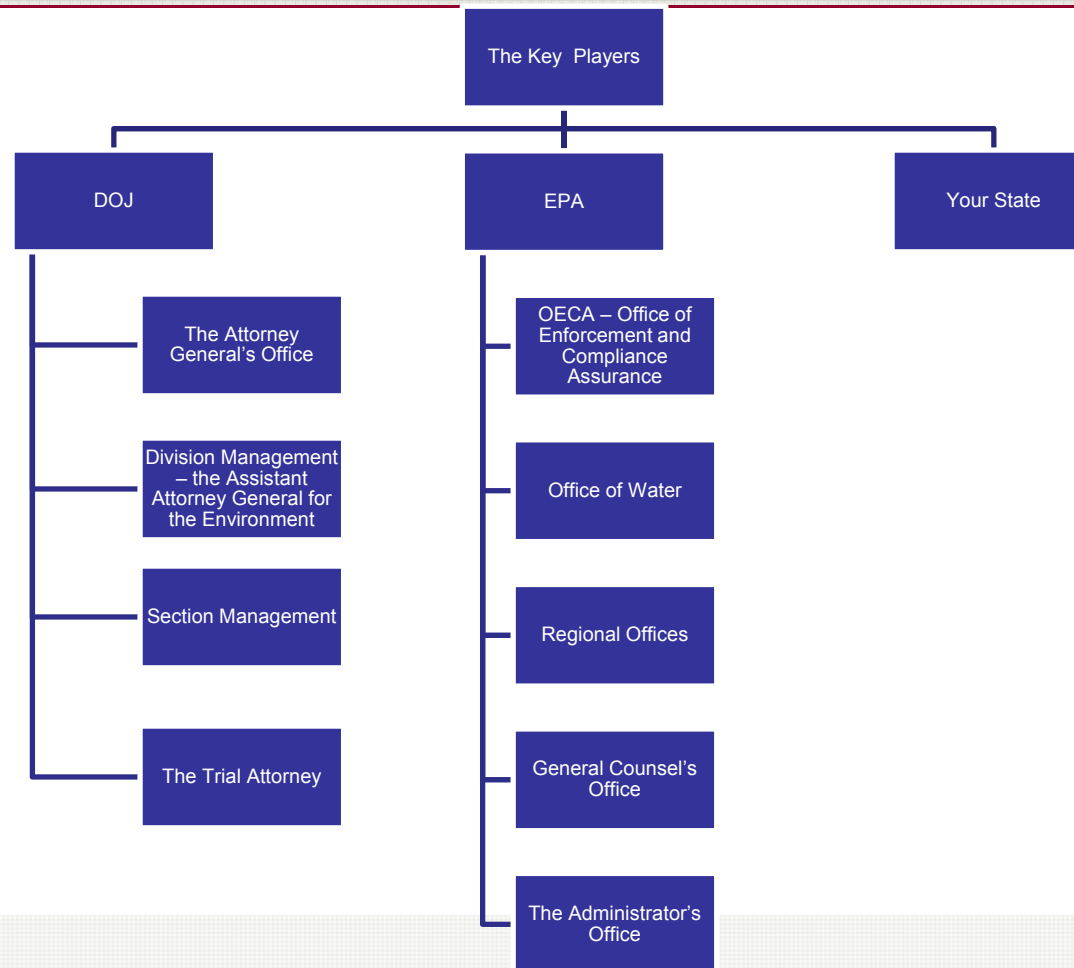
DOJ Environment and Natural Resources Division

Office of the
Assistant Attorney
General

EES Section
Management

The Trial
Team

The Key Players



Getting Along with the Federal Family

- The Federal family is like any family: alliances, history, bitterness
- They may appear United, but there may be strong differences of opinion
- 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 ally

Getting Along with the Federal Family

The Trial Attorney

- He/she is your key – has day to day control of case management
- What is his/her background?
- What are his/her motivations?
- Trying to make news or move to the next case?

The Consent Decree Process

DOJ/EPA Come to Town

- Often begins with the 308 Letter
- Recall - the government is virtually undefeated
- The Government's Record: 100-0?
- Know the landscape- how have other communities 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:

- 1. The Administrator shall require the owner or operator of any point source to:**
- 2. Establish and maintain such records,**
- 3. Make such reports,**
- 4. Install, use, and maintain such monitoring equipment or methods (including where appropriate, biological monitoring methods),**
- 5. Sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and**
- 6. 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**
- **Extensions normally granted**

Negotiations and Litigation

Negotiating with EPA/DOJ

- EPA/ DOJ must negotiate first
- 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

- 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?

Litigation

- While communities usually do not like to be sued, a federal 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 sue the community?

Tips

- **Avoid personal fouls**
- **Relationships matter and agency lawyers have long memories**
- **Remember good sportsmanship**
- **No excessive celebrations (or industry presentations about how you beat EPA)**

Other Considerations

Other Considerations

- **Citizen's Suits**
- **Judicial Challenges to Proposed Consent Decrees**
- **Public Officials**
- **Communication Plans**

Questions ? ? ?


Contact Information



John Sheehan
Member

Phone: (202) 572-8665
Fax: (202) 572-8687

Email: jsheehan@clarkhill.com
Office: Washington DC

 Save vCard