

In For a Penny...

Introduction to Injunctive Relief in Clean Water Act WWTP Enforcement Actions

National Association of Clean Water Agencies
Wet Weather Consent Decree Workshop
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TURNING UP THE HEAT ON CSOs/SSOs

- CSO Policy
- Three Main Policy Objectives:
 - Ensure that if CSOs occur, they are only as a result of wet weather;
 - Bring all wet weather CSO discharge points into compliance with the technology and water quality based requirements of the Clean Water Act;
 - Minimize the impact of CSOs on water quality.
- Tools to Achieve CSO Policy
 - Nine Minimum Controls
 - Long Term Control Planning
 - CSO Permitting

TURNING UP THE HEAT ON CSOs/SSOs (Con't)

- SSO Policy
- Many avoidable SSOs are caused by inadequate or negligent operation or maintenance, inadequate system capacity, and improper system design and construction. These SSOs can be reduced or eliminated by:
 - Sewer system cleaning and maintenance
 - Reducing infiltration and inflow through system rehabilitation and repairing broken or leaking service lines.
 - Enlarging or upgrading sewer, pump station, or sewage treatment plant capacity and/or reliability.
 - Construction of wet weather storage and treatment facilities to treat excess flows.
- Communities also should address SSOs during sewer system master planning and facilities planning, or while extending the sewer system into previously un-sewered areas.

RECENT FEDERAL STATEMENTS ABOUT ENFORCEMENT

■ EPA Region 2 Statement

- Sources that discharge to waters of the United States must comply with the Clean Water Act's technology-based and water quality-based requirements. EPA will continue to focus its enforcement efforts on reducing discharges of raw sewage and contaminated stormwater into our nation's rivers, streams and lakes. The Clean Water Act requires municipalities to treat sewage before it is discharged and to control contaminated stormwater discharges, but many municipalities are not in full compliance with these requirements. The Clean Water Act also requires municipalities to meet water quality standards and protect the designated uses for a water body before sewage is discharged.
- In recent years, EPA's enforcement efforts have resulted in agreements with many cities. An EPA National Enforcement Initiative for 2010 - 2013 focuses on the reduction of discharges from combined sewers, sanitary sewers, and municipal storm sewer systems, by obtaining commitments from municipalities to implement timely, comprehensive solutions to these problems, including increased use of green infrastructure as appropriate.

RECENT FEDERAL STATEMENTS ABOUT ENFORCEMENT

- U.S. Department of Justice

- The goal of environmental justice, a major priority of the Department of Justice and the EPA, is to provide all Americans – regardless of their race, ethnicity or income status – full protection under the nation's environmental laws and protection from pollution, hazardous waste and toxic substances.

RECENT FEDERAL STATEMENTS ABOUT ENFORCEMENT

- “The people of [your state here] understand the critical importance of environmental protection, and the real world consequences of industrial pollution. By enforcing the nation’s environmental laws in a fair and even-handed way, we are taking steps to ensure that we achieve environmental justice. We are listening to communities and giving voice to those that have too frequently suffered an unfair burden from pollution in America.”
 - Ignacia S. Moreno, Former Assistant Attorney General, USDOJ Environment and Natural Resources Division

RECENT FEDERAL STATEMENTS ABOUT ENFORCEMENT

- “Low income communities across the country have historically shouldered a heavy pollution burden. Just because someone lives in a low income neighborhood, they should not be exposed to air pollution, toxic chemicals, degraded water quality or have less access to parks and open space. The EPA is committed to protecting public health and environmental quality in every part of the country. With improved environmental quality should also come opportunities for job creation.”
 - Judith A. Enck, Regional Administrator, EPA Region 2

RECENT FEDERAL STATEMENTS ABOUT ENFORCEMENT

- “Enforcement is a powerful tool in advancing environmental justice and deterring illegal pollution. We are aggressively going after pollution problems that make a difference in communities, like keeping raw sewage and contaminated stormwater out of our nation’s waters and cutting toxic air pollution that affects communities’ health.”
 - Cynthia Giles, Assistant Administrator for the EPA
Office of Enforcement Compliance Assurance

WHAT THE SPIN MEANS

<u>Location</u>	<u>Approximate Population</u>
■ West Haven, CT	53,000
■ Shreveport, LA	201,000
■ Columbia, SC	130,000
■ San Antonio, TX	1.3 Million
■ Cape Fear, NC	263,000
■ Miami-Dade County, FL	800,000
■ Seattle & King County, WA	1.5 Million
■ Scranton, PA	30,000
■ Jackson, MS	173,000
■ Fitchburg, MA	39,000
■ Chattanooga, TN	167,000
■ Memphis, TN	655,000
■ South Bend, IN	101,000
■ MWRD Chicago, IL	5.25 Million
■ Metro St. Louis Sewer District, MO	1.3 Million

WHAT THE SPIN MEANS

<u>Location</u>	<u>Date</u>	<u>Approximate Cost</u>	<u>Time Period</u>
West Haven, CT	December 2013	\$17,100,000	5 Years
Shreveport, LA	November 2013	\$350,000,000+	12 Years
Columbia, SC	September 2013	\$750,000,000	12 Years
San Antonio, TX	July 2013	\$1,100,000,000	10-12 Years
Cape Fear, NC	July 2013	\$40,000,000	Phase 1 – 2 Years
Miami-Dade County, FL	June 2013	\$1,800,000,000	15 Years
Seattle & King County, WA	April 2013	\$600,000,000 / \$860,000,000	11 Years/16Years
Scranton, PA	December 2012	\$140,000,000	25 Years
Jackson, MS	November 2012	\$400,000,000	18 Years
Fitchburg, MA	August 2012	\$100,000,000	27 Years
Chattanooga, TN	July 2012	\$250,000,000	15 Years
Memphis, TN	April 2012	\$250,000,000	15 Years
South Bend, IN	December 2011	\$509,500,000	20 Years
MWRD Chicago, IL	December 2011	\$3,000,000,000+	18 Years
Metro St. Louis Sewer District, MO	August 2011	\$4,700,000,000	23 Years

SECTION 308

Clean Water Act, Section 308 Inspections Monitoring, Entry

■ (a) Maintenance; monitoring equipment; entry; access to information

Whenever required to carry out the objective of this chapter, including but not limited to (1) developing or assisting in the development of any effluent limitation, or other limitation, prohibition, or effluent standard, pretreatment standard, or standard of performance under this chapter; (2) determining whether any person is in violation of any such effluent limitation, or other limitation, prohibition or effluent standard, pretreatment standard, or standard of performance; (3) any requirement established under this section; or (4) carrying out sections 305, 311, 402, 404 (relating to State permit programs), 405, and 504 of this title -

■ (A) the Administrator shall require the owner or operator of any point source to (I) establish and maintain such records, (ii) make such reports, (iii) install, use, and maintain such monitoring equipment or methods (including where appropriate, biological monitoring methods), (iv) sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and (v) provide such other information as he may reasonably require; and (B) the Administrator or his authorized representative (including an authorized contractor acting as a representative of the Administrator), upon presentation of his credentials -

■ (i) shall have a right of entry to, upon, or through any premises in which an effluent source is located or in which any records required to be maintained under clause (A) of this subsection are located, and (ii) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under clause (A), and sample any effluents which the owner or operator of such source is required to sample under such clause.

Section 308 – Interim Measures

■ Key Concepts

- Authority to obtain information under §308 is extremely broad and almost unlimited.
- A POTW can be “required to establish and maintain such records, (ii) make such reports, (iii) install, use, and maintain such monitoring equipment or methods (including where appropriate, biological monitoring methods), (iv) sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and (v) provide such other information as he may reasonably require.”

Injunctive Relief – EPA Helping You to Help Yourself

- Generally, injunctive relief is action ordered of a Defendant by a federal District Court Judge. This relief may be ordered either as a term of an order consented to by the parties in a lawsuit (where the parties file a "Consent Decree") or after a contested trial before the Judge.
- **“The federal environmental laws also empower EPA to issue administrative orders that require a regulated entity to perform, or refrain from performing, some designated action, and to come into, and maintain, compliance with those environmental laws.”**
- EPA may obtain injunctive relief even in a case which is settled; it is simply that the regulated entity agrees to execute certain actions (e.g. updating existing control technology or implementing **interim** controls or measures).

THE BIG TALK

- Sitting Down with Your Boss

- Advise that you may need additional staffing
- Advise that you WILL need additional funding
- Advise that there could be significant penalties for delay:
 - Failure to comply in all respects just with an RFI within the time specified may result in the initiation of an enforcement action under Section 309 of the CWA, under which injunctive relief and penalties may be sought. Such an enforcement action may include the assessment of penalties of up to \$37,500 per violation, for each day of continued non-compliance.
 - “We appreciate your cooperation and prompt attention to this matter.”

Common Injunctive Relief Requests

- Flow Maximization Study
- Flow Treatment Study
 - Stress Test for Peak Hydraulic Flows
- Evaluation and Overhaul of O&M Manuals and SOPs
- Maintenance Management – CMOM
 - System Problems v. Capacity Problems
- Review of SIU contributions to system during wet weather
- Completion of current ongoing construction projects
- I/I Studies
- Wet Weather Flow Storage Alternatives
- Green Infrastructure
- Monitoring of CSOs – duration and volume
- Massive Document Production

CAN EPA REALLY MAKE US DO THIS?

■ A. Format of Responses to be Provided

- § 308 does not specifically authorize the EPA to demand that an entity compile or synthesize data or information into a particular format – the plain language simply requires an entity to produce or make the requested information or documents available.
- It may be reasonable for the EPA to demand that a company turn over specific information, reports or data, it may not be reasonable to require an entity to analyze or conform the data for the EPA in a specific format or spreadsheet. It could be easily argued that an entity should only be required to turn over the data it maintains in the ordinary course of business.
- This argument, however, has not been considered by any court, so a responding entity will have to weigh the costs of complying with the EPA request against the risk of litigation over whether the EPA has surpassed § 308's limit on reasonableness.

■ B. Time Period in Which to Comply

- Similarly, no court has specifically set any guidelines regarding the timeframe in which EPA may require compliance to be completed. In U.S. v. Hartz Const. Co., 2000 WL 1220919, 4 (N.D. Ill. 2000), the court considered a challenge to a 30-day response deadline set by the EPA for a § 308 request. The responding entity objected to the deadline, arguing that § 308 does not specify a response period and precluded the EPA from determining whether a response was considered “late” if it was submitted after the 30 days. The court held that the EPA is not precluded “from setting a *reasonable* deadline for responses merely because the statute itself does not provide for such a deadline. Obviously, the factual circumstances will dictate what is a reasonable time period in which a response can be expected in a given case.” Id. at *4.

GET ORGANIZED

- Interim/Injunctive Relief:

- What kind of relief is being “requested”?
 - Information/studies v. sampling or monitoring v. building
 - Current Problems vs. Long Term Issues
 - Does it fit with what your are being accused of having done wrong.
 - When does it end?
- <http://www.epa.gov/compliance/monitoring/programs/cwa/csos.html>
- <http://www.epa.gov/compliance/resources/policies/state/srf/sncpolicy-attach1.pdf>

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