

CWA Enforcement: *Perceptions, Policies and Principles*



NACWA Law Seminar

Washington, D.C.

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Alexis de Tocqueville

1805 –1859

“ . . . it is man who makes the monarchies and establishes republics, but the township seems to come directly from the hand of God.”

“ . . . municipal institutions constitute the strength of free nations.”





LaJuana S. Wilcher
English, Lucas, Priest & Owsley

The Federal Water Pollution Control Act Amendments of 1972 (CWA)

- No person may discharge a pollutant into navigable waters except as permitted by the Act - §301(a)
- Administrative enforcement by EPA - §309(g)
- Civil judicial enforcement by EPA/
DOJ - §309 (b)
- Criminal enforcement - §309 (c)
- Citizen suit enforcement §505



CWA § 309)(g)(3)

DETERMINING AMOUNT.—In determining the amount of any penalty assessed under this subsection . . . [EPA] . . . shall take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.



Why do we
have federal
enforcement
of
environmental
laws?



Key EPA CWA Enforcement Guidance Documents



- 2009 CWA Enforcement Action Plan
- Civil Monetary Penalty Inflation Adjustment Rule 2009
- 1979 National Municipal Policy
- 1995 Interim CWA Penalty Policy
- SEP Policies
- Self- Audit Policy
- 1986 Policy Framework for State/EPA Enforcement Agreements

CWA Enforcement Action Plan

October 15, 2009

- **Target enforcement to the most important water pollution problems**
 - “. . . revamp federal and state enforcement to tackle sources posing the biggest threats to water quality *while we intensify vigorous civil and criminal enforcement against traditional end-of-pipe pollution.*”
- **Why?????**

Rivers and Streams

- Ag
- Unknown
- Air Deposition
- Hydromodification
- Natural/wildlife
- Unspecified NPS
- Muni/sewage discharge

Lakes

- Air deposition
- Unknown
- Ag
- Natural/wildlife
- Hydromodification
- Nonspecified NPS
- Other
- Legacy/historic pollution
- Urban Runoff/stormwater
- Municipal Discharges/sewage



English, Lucas, Priest & Owsley

CWA Enforcement Action Plan

October 15, 2009

- **Improve transparency and accountability**
 - “. . . provide more complete, accurate and timely information, . . . enlisting an informed public . . . to press for stronger performance and accountability from the *regulated community*.”

- **Why???????**

CWA Enforcement Action Plan

October 15, 2009

- State enforcement response to serious violations, whether at large or smaller facilities, is not what it should be.
- EPA needs to take prompt actions where a state is not acting to issue protective permits or taking effective enforcement. EPA's goal in taking these actions is to ensure equal protection, to strengthen those state programs, and hold states accountable for needed improvements.

CWA Enforcement Action Plan

October 15, 2009

- **A. Target Enforcement to the Most Important Water Pollution Problems**

- New approaches, policies and procedures to focus enforcement on the most serious violations adversely affecting water quality are long overdue.

- Why????????

CWA Enforcement Action Plan

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- Analysis of sectors will determine whether problems related to water quality are due to regulatory issues, inadequate permits, or compliance related issues.

CWA Enforcement Action Plan

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- Once we have identified significant point source violations across the spectrum of regulated facilities that adversely affect water quality, we will work with state programs to commence appropriate federal and state civil and criminal enforcement actions.

CWA Enforcement Action Plan

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- **B. Strengthen Oversight of Clean Water Enforcement Performance**

- EPA will use the standard set of expectations as a basis for negotiating consistent enforcement agreements with each state

- **Why?????**

CWA Enforcement Action Plan

October 15, 2009

- EPA will also explore the concerns of citizen groups that some state enforcement actions have not been effective in achieving compliance.

- Why???????

CWA Enforcement Action Plan

October 15, 2009

- **C. Improve Accountability and Transparency** – OECA will
 - develop a rule to require NPDES permittees to provide DMRs electronically to EPA or the states, and
 - move immediately toward making additional data that is not enforcement confidential available to the public.

CWA Enforcement Action Plan

October 15, 2009

- Revamp federal and state enforcement to tackle sources posing the biggest threats to water quality while we intensify vigorous civil and criminal enforcement against traditional end-of-pipe pollution.
- Why????

POTWs: A Study in Contrasts



Congress addressed Publicly Owned Treatment Works (POTWs) differently

- TBELS
- 301(i) extensions
- Grants program



CWA and Culture

- POTWs are eligible for relief from enforcement under the Clean Water Act (P.L. 95-217) by the provision in section 301(i)(1) that provides for extensions of the time for compliance until no later than July 1, 1983 if the United States has failed to make financial assistance under this Act available in time

The National Municipal Policy

October, 1979

- “A majority of municipal dischargers, for a variety of reasons, have not complied with the Clean Water Act's July 1, 1977 treatment requirements.”
- “These discharges contribute a substantial pollutant load into the waters of the United States.”

The National Municipal Policy

October, 1979

- The Municipal Referral Priority System (MRPS) is a system for identifying and setting priorities for case referrals to the Department of Justice by EPA and to State Attorneys General by the State.
- This system assumes that enforcement actions short of referral, if appropriate, have been taken and did not achieve the desired results.

Interim CWA Settlement Penalty Policy

March 1995

- Provides the lowest penalty figure which the Federal Government should accept in a settlement
- Where settlement is not possible, the Government reserves the right to seek penalties up to the statutory maximum.

Interim CWA Settlement Penalty Policy

March 1995

**Penalty = Economic Benefit + Gravity +/-
Gravity Adjustment Factors - Litigation
Considerations - Ability to Pay -
Supplemental Environmental Projects**

Interim CWA Settlement Penalty Policy

March 1995

- For municipalities or other public entities (such as a sewer authority) in which the entity good faith efforts to comply, EPA Agency may mitigate the preliminary penalty amount based on the national municipal litigation consideration (NMLC).
- NMLC is based on economic benefit, environmental impact, duration and size of the facility.

Litigation Risks

- a. Known problems with the reliability or admissibility of the government's evidence proving liability or supporting a civil penalty
- b. The credibility, reliability, and availability of witnesses
- c. The informed, expressed opinion of the judge assigned to the case (or person appointed by the judge to mediate the dispute), after evaluating the merits of the case
- d. The record of the judge in any other environmental enforcement case presenting similar issues.

Litigation Risks (cont).

- e. Statements made by federal, State or local regulators that may allow the respondent or defendant to credibly argue that it believed it was complying with the federal law under which EPA is seeking penalties.
- f. The payment by the defendant of civil penalties for the same violations in a case brought by another plaintiff.
- g. The development of new, relevant case law.
- h. A blend of troublesome facts and weak legal arguments such that the Agency faces a significant risk of obtaining a nationally significant negative precedent at trial.

Final Supplemental Environmental Projects Policy, April 1998

- Environmentally beneficial projects
- Undertaken in settlement of an enforcement action
- The defendant/respondent is not otherwise legally required to perform

Appropriate Penalty Mitigation Credit Under the SEP Policy

April 2000

- To remind staff that the mitigation percentage should not exceed 80% of the SEP cost, with two exceptions
 - Outstanding quality projects for small businesses, government agencies or entities, or not-for profits
 - Outstanding quality projects that prevent pollution

Supplemental Environmental Projects Policy March 2002

- Projects must advance the environmental goals of the statute under which enforcement action was taken
- Adequate nexus between the proposed project and the violation
- Projects that provide only money to a civic or charitable organization are not acceptable

CWA Municipal Settlements and SEPs

November 2005

- Unless special circumstances, limits amount of SEP mitigation available to municipalities and public entities to 40% of penalty when NMLC tables are used
- General SEP policy can be followed when not using NMLC tables - offset up to 75% of penalty (or 90% plus economic benefit of noncompliance, whichever is larger)
- When state is co-plaintiff, any agreement made with state may be considered a penalty

EPA Audit Policy

April 11, 2000

- EPA will waive 100% of gravity-based component of penalties in settlements with facilities that meet all nine specified conditions.
- EPA will waive 75% of gravity-based penalties for facilities that meet all conditions except the requirement that the disclosed violation be discovered through an environmental audit or compliance management system.

EPA Audit Policy

April 11, 2000

- “unless there is potentially culpable behavior that merits criminal investigation . . . [EPA will] generally not recommend criminal prosecution for the disclosing entity” where the conditions of the Policy are satisfied.

EPA Audit Policy

April 11, 2000

- Systematic Discovery
- Voluntary Discovery
- Prompt Disclosure
- Independent Discovery and Disclosure
- Correction and Remediation
- Prevention of Recurring Violations
- No Repeat Violations
- Other Violations Excluded
- Cooperation

Civil Monetary Penalty Inflation Adjustment Rule

December 2008, January 2009

- Effective January 12, 2009
- 40 CFR 19.4
- 309(d) \$37,500
- 309(g)(2)(A) \$16,000/\$37,500
- 309(g)(2)(B) \$16,000/\$177,00
- mandated by the Federal Civil Penalties Inflation Adjustment Act of 1990

Revised Policy Framework for State/EPA Enforcement Agreements

August 1986

- EPA should consider taking enforcement action when
 - a state or local agency requests EPA action
 - a state or local enforcement response is not timely and appropriate
 - national precedents (legal or program) support filing
 - violation of an EPA order or consent decree
 - appropriate to support the broader national interest in deterring noncompliance

Guidelines for Federal Enforcement in CSO/SSO Cases April 2005

- The responsible entity or permittee is not under and in substantial compliance with an appropriate administrative or judicial order that includes:
- (a) a compliance schedule that is consistent with the 1994 CSO Policy and the 1997 CSO Guidance for Financial Capability Assessment and Schedule Development
- (b) complete relief, including: (i) specific injunctive relief with milestones and a clear end date for completion of remedial measures; (ii) a remedy designed to comply with state water quality standards and to protect sensitive areas; and (iii) a remedy that addresses all CSO/SSO violations; and
- (c) an appropriate penalty in light of the violations

Guidelines for Federal Enforcement in CSO/SSO Cases April 2005

- The broader national interest in creating an effective deterrent to noncompliance warrants measures beyond those which a state may need to undertake.
 - (a) Violations have occurred at a large sewer system, as determined by one or more of the following: (i) the cost and complexity of the injunctive relief necessary to correct the violations; (ii) the length of the compliance schedule; (iii) the average daily flow of the system; or (iv) the population served by the system.
 - (b) CSO/SSO violations have occurred that may impact watersheds that cross state or international boundaries.
 - (c) There is a significant environmental impact that has not been addressed.

Can we all get along?



From the Horse's Mouth

- Be forthright, prepared and patient
- Offer injunctive relief
- Identify environmental improvements
- Offer SEPs
- Find out what EPA really wants
- Package your case properly





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