

Hot Topics in Clean Water Law Web Seminars



DECEMBER 16, 2015 | MARCH 16, 2016 | JUNE 15, 2016 | SEPTEMBER 21, 2016
2:00 - 3:30 PM EASTERN

NACWA

SPEAKER PROFILE



ANDREW R. STEWART
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Andrew R. Stewart draws upon his experience as a senior manager at the U.S. Environmental Protection Agency (EPA) and nearly 20 years in environmental law to counsel clients on a broad range of compliance and enforcement matters.

Mr. Stewart's work includes defending government enforcement and citizen suit actions, assisting clients on federal and state permitting requirements, and counseling on other critical environmental obligations. These matters have arisen under all major federal environmental laws, including the Clean Water Act, as well as state laws.

Prior to joining Vinson & Elkins, Mr. Stewart served as an Acting Division Director in the Office of Civil Enforcement at EPA. He managed complex enforcement actions and litigation affecting numerous industrial sectors, including energy, chemical manufacturing, agribusiness, mining, and telecommunications. While at EPA, he also served as a senior attorney in the Water Enforcement Division, handling combined sewer overflow/sanitary sewer overflow and municipal separate storm sewer system cases and policy issues affecting municipalities.

Mr. Stewart currently serves as a Vice Chair on the Environmental Enforcement and Crimes Committee within the ABA Section of Environment, Energy, and Resources. Before coming to EPA, Andrew worked in the environmental practice of another firm in Washington, D.C.

Speaker Profile: Karen M. Hansen, Principal Beveridge & Diamond, P.C.



Karen Hansen's environmental law practice focuses on the Clean Water Act and state programs for regulating and permitting water discharges and water supply/use. She has extensive experience assisting industrial and municipal clients in preparing strategies for and pursuing water permits for ongoing operations, expansions and new operations, including permit challenges. Ms. Hansen also represents clients that must defend CWA and state water law enforcement actions, including claims pursued by governmental as well as third party entities.

She recently led a multi-year, complex negotiation of a consent decree for the San Antonio Water System, which was targeted for sewer overflow reductions under EPA's national "wet weather" enforcement initiative. Ms. Hansen advises clients on business strategies related to increasing water scarcity, and counsels clients on emerging trends in water quality programs, including initiatives such as watershed-based permitting, TMDLs, trading and allocation, and land-based impacts on coastal and ocean resources. She also has extensive experience assisting clients with conducting compliance audits and managing related disclosures, and with developing and implementing management systems for environmental compliance.

Speaker Profile: Fredric P. Andes, Partner Barnes & Thornburg LLP

Fred Andes is a partner in the Chicago and Washington, D.C. offices of Barnes & Thornburg LLP, and is the leader of the firm's water team. Mr. Andes is involved in counseling and litigation on issues arising under various federal and state environmental laws, with a special emphasis on Clean Water Act matters.

Mr. Andes was been involved in numerous activities concerning development and implementation of U.S. Environmental Protection Agency (EPA) policy under the Clean Water Act. He was selected by the EPA to serve on the Federal Advisory Committee on the Total Maximum Daily Load (TMDL) Program. He is serving as coordinator for the Federal Water Quality Coalition, which is a group of municipal and other regulated parties that is participating in EPA's rulemakings and development of guidance on permits, water quality standards, TMDLs and other key Clean Water Act programs. He has also participated actively in the work of the U.S. Conference of Mayors concerning the development of EPA's Integrated Planning Framework.



Speaker Profile: F. Paul Calamita, Chairman AquaLaw, PLC



Paul Calamita co-founded AquaLaw, PLC with Chris Pomeroy. He has been a sewer lawyer for 24 years. Mr. Calamita received a BS in Biology from the College of William and Mary and his JD from the University of Virginia School of Law.

He serves as General Counsel to four statewide associations of POTWs/MS4 utilities as well as the national Wet Weather Partnership. He also represented hundreds of communities nationwide on a wide range of water, sewer, and Stormwater matters. He has extensive administrative and litigation experience and has successfully lobbied environmental and appropriations matters at both the State and federal levels.



Vinson & Elkins

SEPTEMBER 21, 2016

FEDERAL ENFORCEMENT OUTLOOK FOR MUNICIPALITIES

*NACWA "HOT TOPICS
IN CLEAN WATER LAW"
WEBINAR: PART 4*

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EPA ENFORCEMENT HORIZON

NATIONAL ENFORCEMENT INITIATIVES FOR FY 2017 – FY 2019

- In February 2016, EPA announced its **National Enforcement Initiatives (NEIs) for FY 2017 – FY 2019**
- EPA has expanded current enforcement priorities and added new national priorities
- EPA's **Next Generation Compliance** focus with NEIs
- There are streamlined opportunities for Supplemental Environmental Projects (SEPs) with EPA's 2015 SEP Policy



NATIONAL ENFORCEMENT INITIATIVES FOR FY 2017 – FY 2019

MUNICIPAL DISCHARGES NEI

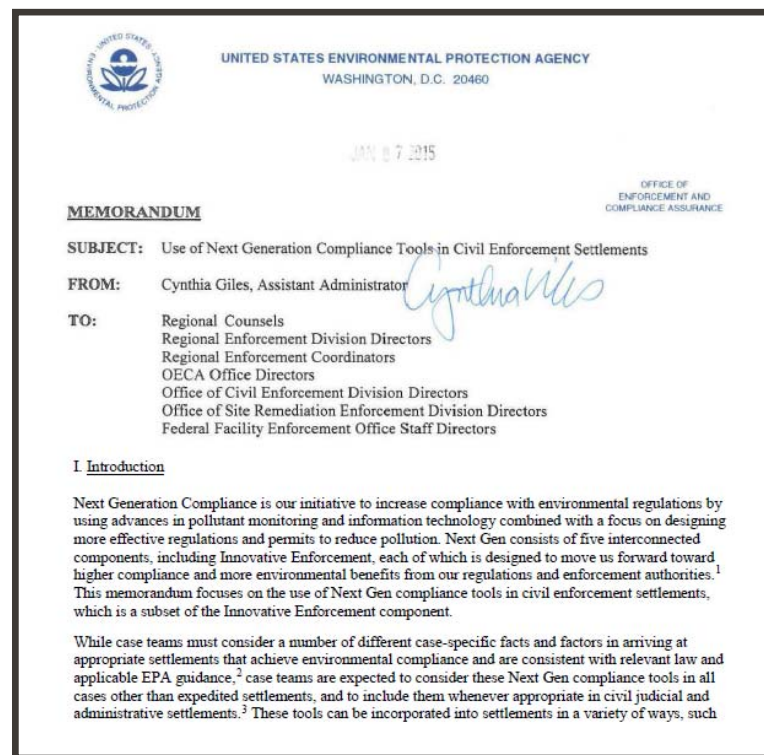
- **Municipal discharges** NEI (MS4s, CSO/SSOs)
 - “Keeping Raw Sewage and Contaminated Stormwater out of Our Nation’s Waters”
- This is mature enforcement priority, and EPA has already addressed substantial part of the universe
- EPA will **monitor current settlement agreements** and look to include green infrastructure practices and newer pollution control technologies
 - Pressure on EPA to address climate risk
- Enforcement teams will also continue to address new CSO/SSO and MS4 violations



NEGOTIATING SETTLEMENTS STEMMING FROM AUDITS

EPA NEXT GENERATION COMPLIANCE INITIATIVE

- EPA is focused on **incorporating Next Gen Compliance tools in enforcement settlements** whenever possible
- Next Gen Compliance tools include:
 - Advanced monitoring (e.g., fenceline monitoring, infrared cameras)
 - Independent third-party verification of the settling party's compliance with settlement obligations
 - Electronic reporting
 - Increased "transparency" of compliance data



EPA NEXT GENERATION COMPLIANCE INITIATIVE

CONCERNS WITH NEXT GEN COMPLIANCE

- Transparency provisions in municipal permits and settlements
- Public is armed with “a little knowledge” – citizen suit risk
- Citizens are now gathering evidence of potential violations using devices such as mobile phones and sharing with regulators
 - “Privatization” of enforcement
 - E.g., Clean Water Act Section 404 federal consent decrees: multi-million dollar penalties and significant injunctive relief
- Remote monitoring in waterbodies will likely expand
- Who your neighbors are, and prior citizen activity near a facility, are particularly important



ENFORCEMENT AFTER THE OBAMA ADMINISTRATION?

WHAT CAN WE EXPECT AFTER THE NATIONAL ELECTIONS?

- Political transitions have not significantly changed EPA enforcement levels in the past
- **Career staff**, not political appointees, do most enforcement work
- Enforcement priorities are **generally stable** over time
- Obama EPA enforcement numbers are comparable to Bush numbers, and some numbers have even been declining (e.g., case initiations and inspections)



Enforcing Consent Decrees Once the Ink has Dried

NACWA Legal Hot Topics Webinar

Karen Hansen
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September 21, 2016



Enforcement of Consent Decrees

- Stipulated Penalties
 - For failure to meet Consent Decree obligations
- Diligent Prosecution
 - When can third parties enforce?
- Trending Issues

Stipulated Penalties

- Virtually all consent decrees contain stipulated penalties for non-compliance with the consent decree:

XII. STIPULATED PENALTIES

102. City shall be liable for stipulated penalties to the United States for violations of this Consent Decree, upon demand. Stipulated penalties due and owing under this Section shall be paid in the manner specified in Paragraphs 118-119. Stipulated penalties for which a demand has been made shall be paid unless excused under Section XIII (Force Majeure), or by the terms of this Section.

Stipulated Penalties

- Common compliance categories with stipulated penalties include:
 - Failure to timely submit deliverables
 - Failure to meet deadline for completion of remedial requirements
 - SSOs that do/do not reach jurisdictional waters
 - Exceeding effluent limitations in NPDES permits
 - Failure to timely meet SEP requirements

Clean Water Act Citizens' Suits & "Diligent Prosecution"

- CWA 33 U.S.C. § 1365(a)(1):
 - "Except as provided in subsection (b) of this section ..., any citizen may commence a civil action on his own behalf ... against any person ... who is alleged to be in violation of ... an effluent standard or limitation under this chapter."
- CWA 33 U.S.C. § 1365(b)(1)(B):
 - The Act bars a citizen suit if the EPA or State "has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order."

Louisiana Environmental Action Network (“LEAN”) v. Baton Rouge
677 F.3d 737 (5th Cir. 2012)

- Environmental group brought citizens’ suit alleging violations of NPDES effluent standards in permits and 2002 Consent Decree.
- LEAN argued that EPA was not diligently prosecuting the 2002 Consent Decree:
 - Treatment plants had ongoing non-compliant discharges
 - EPA failed to impose stipulated penalties for these violations

Louisiana Environmental Action Network (“LEAN”) v. Baton Rouge
677 F.3d 737 (5th Cir. 2012)

- District court granted Baton Rouge’s motion to dismiss on jurisdictional grounds:
 - 1) CWA “strips courts of subject matter jurisdiction over citizen suits once the EPA has timely commenced judicial or administrative actions.”
 - 2) Baton Rouge’s compliance with the 2002 consent decree addresses LEAN’s grievances, rendering its claims moot.

Louisiana Environmental Action Network (“LEAN”) v. Baton Rouge
677 F.3d 737 (5th Cir. 2012)

- Fifth Circuit reversed the district court on both grounds:
 - District court applied incorrect standard and improperly dismissed LEAN’s citizen suit based on mootness.
 - CWA’s “diligent prosecution” bar **is not** jurisdictional. Therefore, on remand, when evaluating Baton Rouge’s FRE 12(b)(6) Motion to Dismiss, the district court must accept LEAN’s well-pleaded facts as true and view them in the light most favorable to LEAN.

Louisiana Environmental Action Network (“LEAN”) v. Baton Rouge
677 F.3d 737 (5th Cir. 2012)

- Implications of “diligent prosecution” bar as non-jurisdictional:
 - More difficult for defendants to win Motion to Dismiss on “diligent prosecution” defense when court must consider all plaintiff’s allegations as true.
 - Surviving motion to dismiss may force discovery on fact issue of whether state/EPA is “diligently prosecuting.”

Trending Issues

- Since 2013:
 - Few CDs incorporating “Diligent Prosecution” language:
 - SSO CDs – Baltimore, MD; Waterloo, IA; East Bay MUD, CA
 - CSO/SSO CDs – Seattle/King County, WA
 - The Baltimore and East Bay MUD CDs were modifications/amendments. The “Diligent Prosecution” language was also included in the original CDs.
 - Seeing more full collection of stipulated penalties in early years of consent decrees

Enforcing Consent Decrees Once the Ink has Dried

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NGO Activities on Municipal CWA Issues

Fred Andes
Barnes & Thornburg LLP

NACWA Legal Hot Topics Webinar
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CWA Issues with NGO Activity

- CSO consent decrees
- General permits for stormwater
- Variances
- Nutrient limits in POTW permits
- Antidegradation review
- Permit violations

Specific Activities on NGO Issues

- Intervene and challenge decrees (MWRDGC)
- Sue EPA on issuance of general permits (MSGP, MS4 in MA)
- Sue EPA on approval of State-issued variances (MT on nutrients)
- Appeal permit (from EPA/State) on nutrient limits in permits - or lack thereof (MA and IL permits)
- Sue permitting agency on failure to conduct proper antideg review (New Lenox, IL)
- File citizen suits against stormwater dischargers for not complying with general permit conditions (WA)

Questions?

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How Far Out on the Compliance Limb Has Your Certification Statement Put You?

AQUALAW

Paul Calamita
Justin Curtis

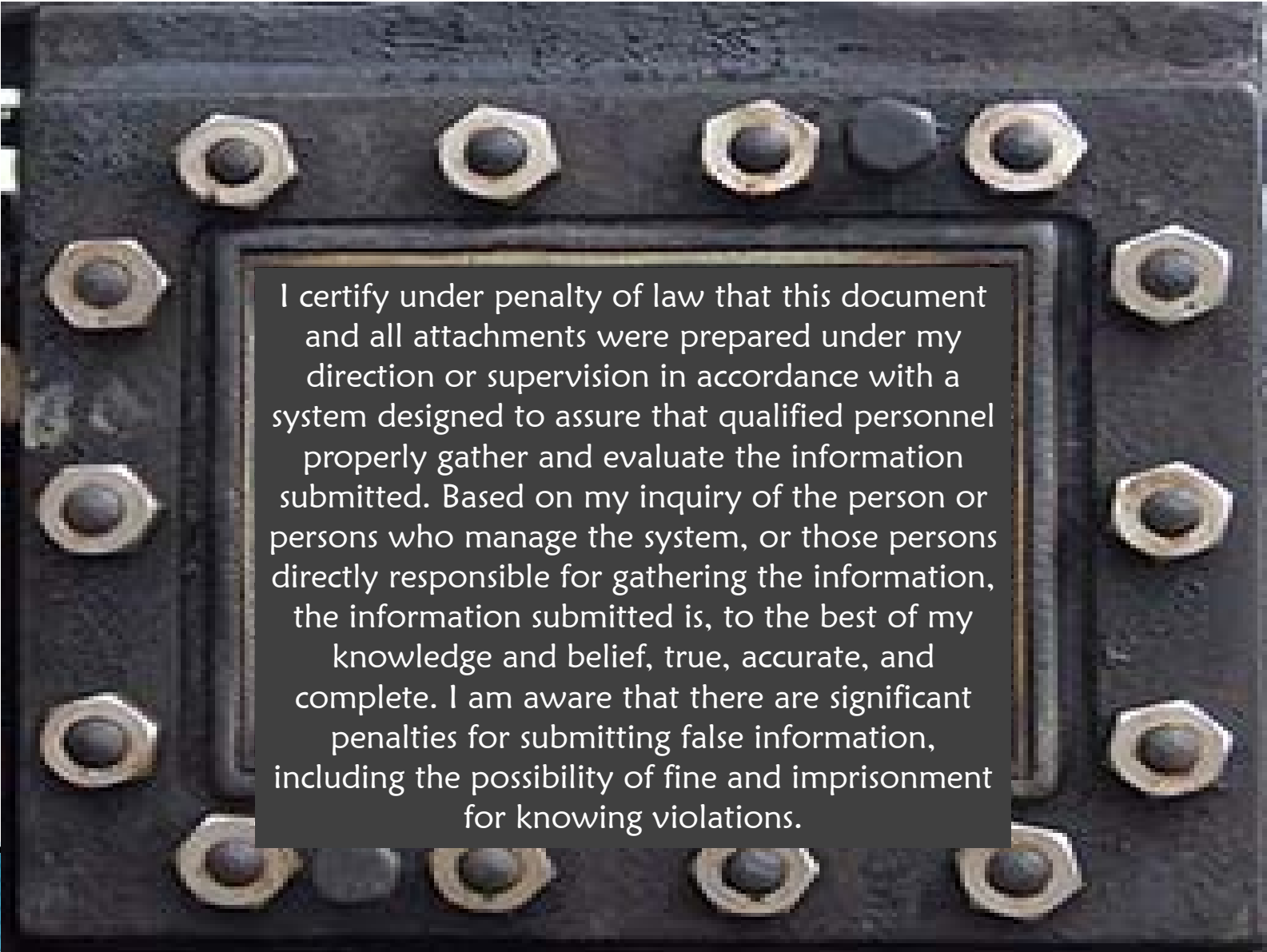
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40 C.F.R. 122.2

(b) All reports required by permits, and [other information requested by the Director](#) shall be signed by [an appropriate person] . . .

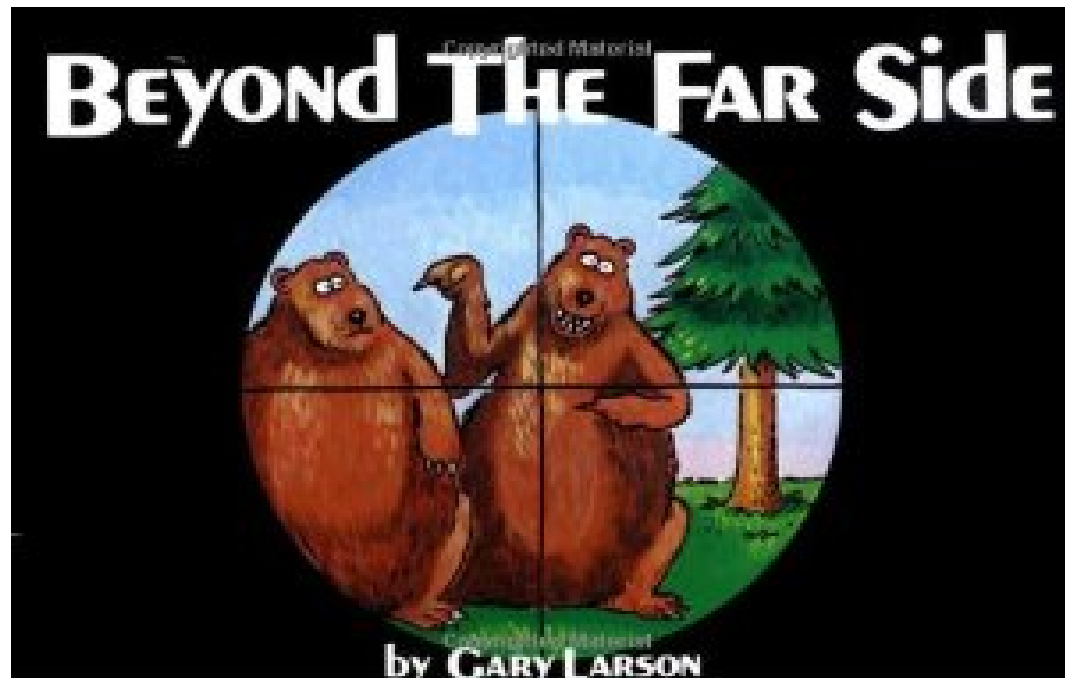
. . . .

(d) ***Certification.*** Any person signing a document under . . . this section shall make the following certification . . .



I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

Certification Designed by Feds to Facilitate Prosecuting **YOU**



Certification Designed by Feds to Facilitate Prosecuting YOU

- ▶ Language is designed to:
 - Bring home to you the responsibility to conduct an inquiry about what you are submitting
 - Put you on written, acknowledged (by your signature), notice of penalties for falsifications of what is being submitted
- ▶ Numerous rulemakings over several decades resulting in several certification versions (some more favorable than others for individuals signing)
- ▶ Final “boilerplate” version on earlier slide

Final Version

- ▶ This is a rule
- ▶ Applies to all reports required by your permits and other information requested by the Director
 - We think this covers just about everything

Where Used

- ▶ NPDES permits
- ▶ 308 Information requests
- ▶ Administrative orders
 - Unilateral and consent
- ▶ Consent decrees

What's the Beef

- ▶ Need to be vigilant because some agency personnel stray from the promulgated version
- ▶ When they stray, it has never been to your benefit....

Why are some at EPA straying from their own express rule?

It is inevitable that in negotiating consent agreements, counsel for respondents will seek to insert language in the certification statement as to the truth of the submissions to be the "best information" or to the "fullest understanding" or "belief" of the certifier. Such qualifiers should not be incorporated, since the provisions of 18 USC Section 1001 provide for prosecution for making false statements knowingly and willfully--not for forming erroneous beliefs, etc.

–EPA, *Guidance on Certification of Compliance with Enforcement Agreement* (July 25, 1988)

- **Answer:** The promulgated rule is inconvenient with EPA enforcement against YOU?

EPA Region 5 Consent Decree

I certify under penalty of law that I have examined and am familiar with the information submitted in this document and all attachments and that this document and its attachments were prepared either by me personally or under my direction or supervision in a manner ~~accordance with a system~~ designed to ensure that qualified and knowledgeable personnel properly gathered and presented ~~evaluate~~ the information contained therein ~~submitted~~. I further certify, Based on my personal knowledge or upon my inquiry of the person or persons who manage the system or those individuals immediately directly responsible for ~~obtaining~~ gathering the information, that the information ~~submitted~~ is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing ~~violations~~ and willful submission of materially false statements.

*~~Strikethrough~~ text was deleted from § 122.22(d) certification;
Underline text is not found in § 122.22(d).

EPA Region 2 CD and AO

- ▶ I certify under penalty of law that **I have examined and am familiar with the information submitted in this document and all attachments** and that this document and its attachments were prepared under my direction or supervision in a manner designed to ensure that qualified and knowledgeable personnel properly gather and present the information contained therein. I further certify, **based on my inquiry of those individuals immediately responsible for obtaining the information**, that **I believe that the information is true, accurate and complete**. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment.

EPA Region III 308 Letter

- ▶ I certify that the information contained in this submission is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations. I certify as having responsibility for the persons who, acting under my direct instruction, made the verification that this information is true, accurate, and complete.

Region 9 Federal Court Stipulation

I certify under penalty of law that this document and its attachments were prepared either by me personally or under my direction or supervision in a manner designed to ensure that qualified and knowledgeable personnel properly gathered and presented the information contained therein. I further certify, based on my personal knowledge or on my inquiry of those individuals immediately responsible for obtaining the information, that to the best of my knowledge and belief the information is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing and willful submission of a materially false statement.

2015 CA Water Board Order

“I certify under penalty of law that I have personally examined and am familiar with the information submitted in this document and all attachments and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment.”



Caught in the Cookie Jar

- ▶ Typically, EPA will agree to accept the 40 CFR language when caught proposing doctored certification language.
- ▶ Typically EPA will agree to accept 40 CFR language when doctored certification language is found in an issued document
- ▶ Not Region 5 in an ongoing federal CD

What Cookie Jar?

- ▶ **EPA:** We can put whatever certification requirement we want in an enforcement document.
- ▶ City forced to bring motion to modify CD to correct certification language
- ▶ EPA/DOJ aggressively briefed the matter
 - DOJ settled an hour before the parties were scheduled to talk with the federal magistrate
- ▶ CD modified to incorporate proper language.
- ▶ Excellent precedent if you need it

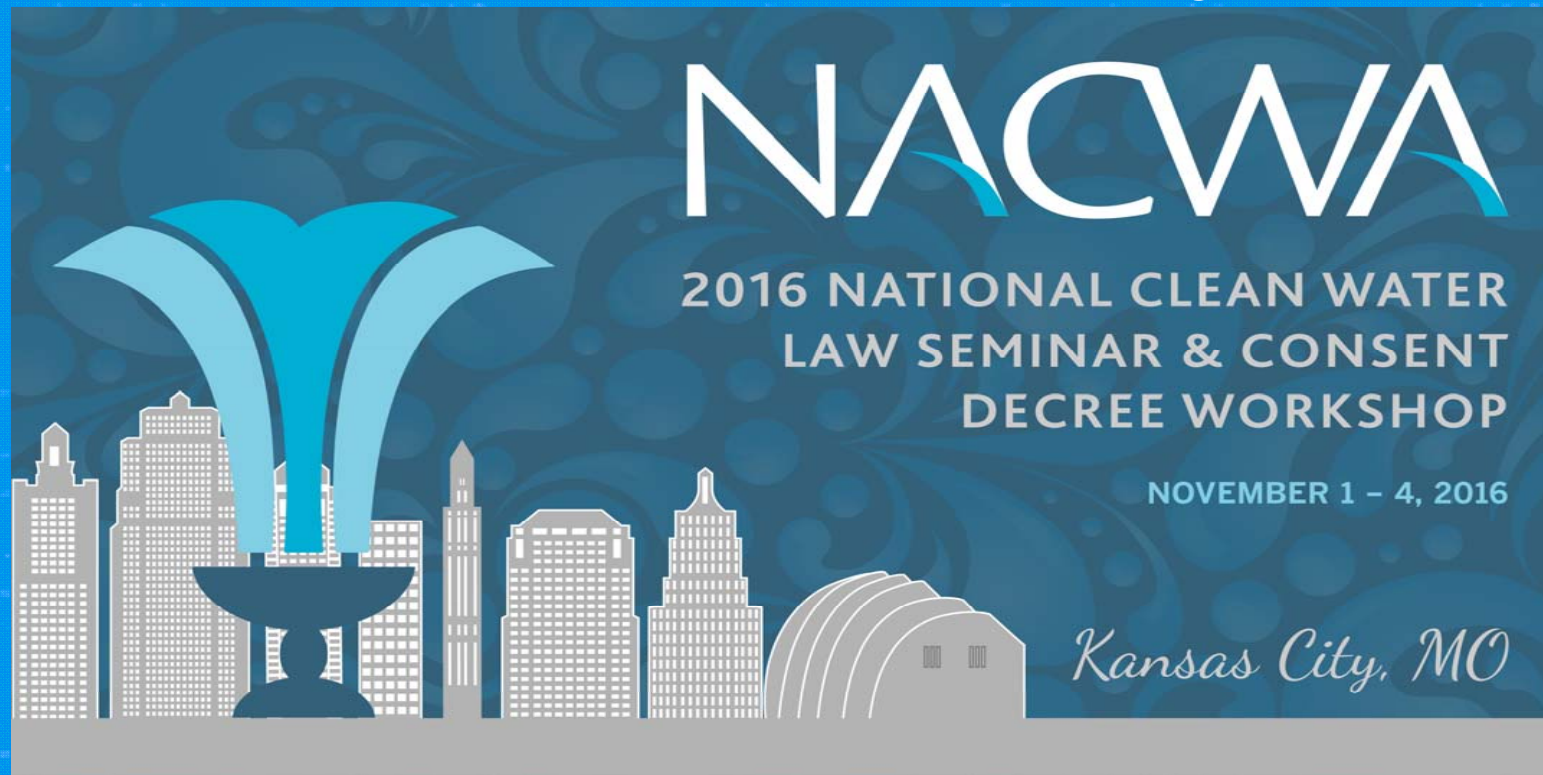
Proper Certification

- ▶ Appropriate individual to sign
- ▶ What is your inquiry of those who manage the system to ensure true, accurate and complete data?
 - DMR Day
 - Interim DMRs
 - Other, documented, approach which works for your system

Takeaways

- ▶ Insist on the correct certification language and litigate for it if necessary – watch every document which imposes a certification requirement (State and Federal)
- ▶ Make sure your organization has an appropriate individual signing after conducting an appropriate and documented inquiry of the people managing the data compliance system

Join Us in Kansas City!



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Hot Topics in
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Web Seminar



Save the Date for our Next Webinar

December 7, 2016

2:00 – 3:30 PM Eastern

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