California Water Environment Association

Protecting our water environment through education and training.

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It Could Happen to You: A Few Things You Should Know About Clean Water Act Laws

Tuesday, July 12th
8:30 am-10:00 am
Today’s Presenters

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El Dorado Irrigation District
It Could Happen to You: A Few Things You Should Know About Clean Water Act Lawsuits

Bobbi Larson
Somach Simmons & Dunn
Citizen Suits Under the Clean Water Act

- CWA expressly provides the right for private citizens to enforce the Act: 33 USC § 1365
  - Citizen role is intended to “supplement, not supplant” state and EPA enforcement
  - Can sue for:
    - violations of federal NPDES permits
    - Illegal (unpermitted) discharges of pollutants to waters of the United States
  - Must first provide notice of intent to sue (60 day notice letter)
Citizen Suits Under the Clean Water Act

• **Limitations:**
  - Can’t sue where state has already enforced (and a penalty has been paid)
  - Can’t sue for wholly past violations
  - Can only go back 5 years (statute of limitations)
  - Must have standing to sue (not a high threshold)

• **If the citizen suit is successful:**
  - Plaintiff may recover attorneys fees
  - The defendant may be ordered to pay penalties of up to $37,500 per violation per day to the U.S. Treasury
  - The defendant may be ordered to implement specific programs, improvements, etc.
Are there any defenses?

- **CWA is a strict liability statute; defenses are limited**
  - A monetary penalty has already been paid to state/EPA
  - The violations have been corrected/are not continuing
  - The 60 day notice letter was defective (can be cured and re-filed)
  - Plaintiff doesn’t have standing to sue
Questions?
What kinds of violations are usually claimed?

- This has evolved over time... 10 years ago, cases focused on exceedances of effluent limitations
- Current citizen suit priorities
  - Violations of industrial and municipal stormwater permits
  - Sanitary Sewer Overflows:
    - SSOs to waters
    - SSOs to storm drain
    - SSOs that don’t reach waters
How Are Agencies Targeted?

- **No “formula”; many factors:**
  - Community size/perceived ability to pay
  - Geography
  - Relatively large number of SSOs on CIWQS
  - Publicity/high profile activity (large SSO, contested permit)
  - Citizen activists/disgruntled residents
Why don’t agencies fight back?

- Nobody’s perfect...
- If the plaintiff succeeds on even a portion of the alleged violations, it will be considered a “prevailing party” entitled to attorneys fees
- Settlement is often a better business decision for the community.
Questions?
What are the common elements of settlements?

- Numeric spill goal/timeframe
- Agreement to implement specific programs (e.g. FOG, cleaning, root control, laterals)
- Payment of funds to a nonprofit “in lieu of” civil penalties
- Payment of plaintiff’s attorneys fees
- Some agreements also include
  - Stipulated penalties
  - Ongoing monitoring costs for plaintiff
What Can I do to Improve My Agency’s Position?

• **Comply with your NPDES permit, SSO WDR**
  - Control the controllable—meet deadlines, etc.
  - Implement your program as aggressively as possible within the constraints of staffing and budget

• **Show that you have your act together**
  - e.g. Make sure that field sheets match up with online reporting

• **Maintain strong community relations**

• **If regional board takes enforcement action for a single large SSO, consider a broader settlement.**
What Should I do if I receive a Notice Letter or PRA request?

- In many cases, the first sign of a CWA citizen suit is a Public Records Act Request.
- If you receive either a 60 day notice letter or a PRA request, consult with your city attorney or general counsel immediately.
  - They can evaluate the agency’s exposure and decide when/whether to bring in special counsel or expert assistance
  - Do not engage with the NGO about the request except as directed by counsel
  - What about the media?
Questions?
How Will the Proposed SSO WDR Revisions Affect Future Lawsuits?

• **Legal Claims**
  - Definition of SSO
  - Enforcement of WDR violations via state law/local ordinance
  - Standing

• **Settlements**
  - More prescriptive, detailed and costly requirements under proposed revised order

*Changing Times*
Thank you!

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Non-Governmental Organization Suits
An Agency Perspective

El Dorado Irrigation District
Vickie Caulfield
El Dorado Irrigation District

- Water, Wastewater, Recycled Water Recreation, Hydroelectric Power,
- 220 square mile service area
- 500 feet to 8000 feet elevation
- 42,000 water accounts
- 21,000 sewer accounts
- 4000 recycled water accounts
Wastewater and Collection Systems

- **561 miles of pipeline**
  - Gravity and force main
  - 77 square mile service area
  - 64 lift stations

- **5 Wastewater Treatment Facilities**
  - 2 NPDES permitting
  - 3 WDR’s
Collection System Management

- **Sewer System Management Plan**
  - Completed July, 2009

- **SSO Reporting Protocol**
  - Historically reported all sso’s including zero volume

- **System Maintenance**
  - Computerized maintenance management system
  - Routine pm activities
  - Lift station maintenance
  - Sewer line cleaning
  - Root cutting and chemical application activities
  - CCTV inspections
So What Happened?

- Mid-Summer 2009 received Public Request Act notice
- Received Citizen Suit, January 2010
  - Injunctive and Monetary Relief
  - Civil Penalties
- Charges included
  - Numerous SSO’s in last five years
  - Under-reporting
  - Recycled water spills
  - Various effluent discharge allegations for NPDES waste treatment and recycled water facilities
Final Settlement

• **Objectives**
  o Improve means and methods to prevent sso’s
  o Continue to improve means and methods to the prevention of violations with applicable laws and regulations related to sso’s

• **Injunctive Relief**
  o SSO Reduction Performance Standards
    • Ultimate goal of 5 SSO’s per 100 miles of conveyance
    • Annual Reporting for SSO
  o Five year oversight
    • Two consecutive years demonstrating compliance of 5 SSO’s will terminate agreement
  o Monetary Relief
    • Reimbursement of enforcement and legal fees over the life of the agreement
    • Environmental project fund
Knowledge gained, tips and helpful hints

- Avoid the suit if you can
- Settle fast—don’t agree to settle stronger claims (e.g. recycled water)
- Defend the suit if necessary
- Document, document, document
  - Most claims were easily justified
- Are you meeting compliance with all permits?
  - Due diligence helps but doesn’t protect
Current Management Strategy

- **Maintenance goals and targets**
  - 5 SSO’s/100 miles 2011
  - 3 SSO’s/100 miles 2012

- **Staff appropriately**
  - Re-organized operations and maintenance of lift stations
    - Operations is now performed by wastewater operators

- **Plan appropriately**
  - Target “hot spots”
  - Revise SSMP annually
  - Set pipe cleaning and chemical application targets
    - Daily, weekly, and monthly goals
  - Set productivity goals
    - ft cleaned per employee
    - ft cleaned per gross labor hours
Current Management Strategy

• **Computerized Maintenance Management Systems**
  - Up to date information, monitored monthly
    - SSO Data, service and repair history, root control, pipe cleaning, customer complaints

• **Monitoring and reporting of SSO’s**
  - Revised reporting protocols
  - Enhanced training
    - Spill Estimations

• **SSMP Reviews**
  - On-going
Current Management Strategy

- **Rehabilitation and Replacement Program**
  - Capitol Assessment Planning
    - Driven by Key Performance Indicators (KPI’s)
      - SSO’s listed by location, cause, pipeline cleaning stats, (i.e. location and length of pipe), lift station maintenance, completed repairs and rehabilitation projects, grease interceptor inspections
      - Prioritized system deficiencies
        - Facility condition ratings
          - Poor to Excellent with expected life time frames
  - Capitol Improvements
    - 5 year plan
The Pay-Off

SSO per 100 miles

- 2006: 12.0
- 2007: 12.0
- 2008: 11.0
- 2009: 9.0
- 2010: 4.0
Questions?