CLEAN WATER ACT: "A CITIZEN'S RIGHT TO LITIGATE"

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> Congress identified public participation rights as a critical means of advancing the goals of the Clean Water Act in its primary statement of the Act's approach and philosophy[1]. EPA has acknowledged that technical issues relating to the issuance of NPDES permits should be decided in "the most open, accessible forum possible, and at a stage where the permitting authority has the greatest flexibility to make appropriate modifications to the permit."[2] On a practical level, public participation yields better environmental decisions because the public often provides valuable information that EPA/DEM or applicant is unaware of and/or does not have access to. Moreover, the public has a right to know how pollution is being regulated in their communities, and what steps are being taken to improve their quality of life.

This article presents a summary of the Clean Water Act, describing the essence of the statute, and brings into focus the Citizen Suit Provision of the Act and its role in allowing citizens to participate in restoring Rhode Island's waters.

Clean Water Act History

The Federal Water Pollution Control Act, popularly known as the Clean Water Act, is a comprehensive statute designed to restore the nation's waters. Enacted originally in 1948, the Act was amended several times until it was restructured and expanded in 1972. Congress made amendments in 1977, revised sections of the law in 1981, and enacted additional amendments in 1987. Prior to the 1987 amendments, programs in the Clean Water Act ("CWA" or "Act") primarily targeted point source pollution[3], i.e., wastes discharged from discrete and identifiable sources, such as pipes and other outfalls. In contrast, except for general planning activities, little focus had been given to nonpoint source pollution (stormwater runoff from agricultural lands, forests, construction sites, and urban areas); despite estimates that it represented a significant source of surface waters pollution problems.[4] As stormwater travels across land surface towards rivers and streams, rainfall and snowmelt runoff picks up pollutants, including sediments, toxic materials, and conventional wastes (e.g., nutrients) that degrade water quality.[5] The 1987 amendments authorized measures to address stormwater pollution.

Clean Water Act Goals

The objective of the Act is to restore and maintain the chemical, physical and biological integrity of the nation's waters.[6] Two goals also were established by the Act: 1) the elimination of the discharge of pollutants into navigable waters by 1985 and, 2) where attainable, the achievement by 1983 of an interim goal of water quality sufficient to provide for the protection and propagation of fish, shellfish, and wildlife and for recreation in and on the water (commonly referred to as the "fishable" and "swimmable" goal). While those dates have passed, the goals remain, and efforts to attain them continue.

To achieve its objectives, the Act established the basic structure for regulating discharges of pollutants into the waters of the United States. The Act made it unlawful for any person to discharge pollutants into navigable waters, unless the discharge is authorized by, and in compliance with, a National Pollution Discharge Elimination System (NPDES) permit issued by the U.S. Environmental Protection Agency (EPA) or by a state under a comparable state program.[7] Rhode Island is authorized under the Act to issue such permits through the Department of Environmental Management's (DEM) Rhode Island Pollution

Discharge Elimination System (RIPDES) program. The RIPDES program must be administered in conformance with the Act and its implementing regulations, 40 C.F.R. §122 et al.[8] Like a NPDES permit, a RIPDES permit contains effluent standards and limitations, and monitoring and reporting requirements.

The Act also requires states to establish designated uses for its waters, and then establish water quality standards to achieve and maintain those uses. At a minimum, the standards must provide for fishable and swimmable conditions. Once those standards are complete, states and/or EPA must identify water bodies that are water quality limited; i.e., waterbodies that are not meeting water quality standards for the designated uses.[9] The Act then requires states or EPA to develop restoration plans for waterbodies failing to meet water quality standards. These plans are known as Total Maximum Daily Loads (TMDL's). States must prioritize and target waterbodies for TMDL's.

NPDES permit, containing effluent limitations on what may be discharged by a source, is the Act's principal enforcement tool. EPA may issue a compliance order or bring a civil suit in U.S. district court against persons who violate the terms of a permit.[10] The penalty for such a violation can be as much as $25,000 per day. Stiffer penalties are authorized for criminal violations of the Act — for negligent or knowing violations — of as much as $50,000 per day, 3 years' imprisonment, or both. A fine of as much as $250,000, 15 years in prison, or both, is authorized for "knowing endangerment"— violations that knowingly place another person in imminent danger of death or serious bodily injury. Finally, EPA is authorized to assess civil penalties administratively for certain well-documented violations of the law. These civil and criminal enforcement provisions are contained in 33 U.S.C. §1319 of the Act.

Citizen Right to Litigate

In the absence of federal or state enforcement, 33 U.S.C. §1365(a) of the Act grants "any citizen" the right to commence a civil action on his own behalf against "any person" (including the United States and any other governmental instrumentality) who is alleged to be in violation of, among other things, the conditions of a federal or state NPDES permit or a federal or state order. A "citizen" is "a person or persons having an interest which is or may be adversely affected."[11] A "person" is "an individual, corporation, partnership,

association, state, municipality, commission, or political subdivision of a state, or any interstate body."[12] Section 1365 also allows for a citizen to commence a suit against EPA or equivalent state official (where program responsibility has been delegated to the state), where EPA has failed to perform a duty under the Act that is not discretionary.[13] A governor of a state may commence a civil action against the EPA where there is an alleged failure of the EPA to enforce an effluent standard or limitation, the violation of which is occurring in another state and is causing an adverse effect on the public health or welfare in the governor's state, or is causing a violation of any water quality requirement in the governor's state.[14]

Actionable ongoing violations exist when a defendant's violations have continued after the date the plaintiff files suit, or there is a reasonable likelihood that the defendant will violate the Act again in the future. A citizen may not commence a suit under the Act for one-time, or "wholly past," violations.[15]

The relief sought by a citizen plaintiff may include an injunction requiring compliance with a permit limitation, the assessment of civil penalties, and the costs of litigation, including attorney and expert witness fees, where appropriate.[16] No compensatory damages are authorized under the Act. Penalties are paid to the U.S. Treasury; however, settlements between citizen plaintiffs and defendants requiring defendants to pay funds for other purposes are not prohibited. As a result, in settlements of litigation, citizen plaintiffs routinely seek and defendants pay funds for other purposes, including for "supplemental environmental projects" (SEPs) or environmental trust funds administered by an environmental group, as well as attorneys' fees. (SEPs may also be an element of settlements in enforcement cases brought by federal or state regulators.) Suing under the Act shall not restrict any right any person may have under any other statute or common law.[17]

Citizen Suits are Intended to Supplement not Supplant

Sections 1365 and 1319 of the Act set out certain instances where citizen suits are barred. Generally, dismissal of a citizen suit is required where the defendant can demonstrate that either the state or EPA is "diligently prosecuting" a civil or criminal action regarding the same violations. Enforcement actions in a court of law will bar a citizen suit, as will some

administrative enforcement proceedings. A citizen may not bring a citizen suit for violations for which EPA or the state has commenced and is diligently prosecuting an administrative action to assess penalties, or for which either EPA or the state has issued a final order not subject to further judicial review and the alleged violator has paid a penalty assessed under the Act or comparable state law. The determination of what constitutes diligent prosecution of a government enforcement action sufficient to bar a citizen suit is based on a number of factors. These factors include whether compliance has been or will be achieved, whether the enforcement activity has resulted or will result in installation of the necessary pollution control equipment or upgrades, whether the initial enforcement action has been followed up as necessary, and, in some cases, whether penalties were sought or paid.

The U.S. Supreme Court has observed that the bar on citizen suits when government enforcement action has been taken or is under way "suggests that the citizen suit is meant to supplement rather than to supplant governmental action." *Gwaltney of Smithfield v. Chesapeake Bay Foundation*, 484 U.S. 49, 108 S. Ct. 376, 98 L. Ed. 2d 306 (1987). Citizen suits are proper only "if the federal, state, and local agencies fail to exercise their enforcement responsibility." *Id.,* citing S. Rep. No. 92-414, at p. 64 (1971).

The Federal Circuit Courts of Appeals are not uniform in determining whether a state's enforcement action and issuance of an enforcement order bars a citizen suit under the Act. The U.S. Court of Appeals for the First Circuit holds a minority view that a state's enforcement action and issuance of an enforcement order bar a Clean Water Act citizen suit. *North and South Rivers Watershed Association v. Town of Scituate*, 949 F.2d 552 (1st Cir. 1991). The *Scituate* Court held that the "focus of the statutory bar to citizen's suits" is "on whether corrective action already taken and diligently pursued by the government seeks to remedy the same violations as duplicative civilian action." "Duplicative enforcement actions add little or nothing to compliance actions already underway, but do divert state resources away from remedying violations in order to focus on the duplicative effort." *Id*. at 556. Duplicative actions "are, in fact, impediments to environmental remedy efforts," "so long as the provisions in the state act adequately safeguard the substantive interests of citizens in enforcement actions." *Id.* The Court's opinion is important because the holding ensures that citizens will continue to have standing to bring enforcement suits for civil penalties when an ongoing violation is alleged.

In *Friends of the Earth v. Laidlaw Environmental Services*, 528 U.S. 167, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) the Supreme Court held that organizations have standing to bring citizen suits for civil penalties payable to the government when an ongoing violation of a National Pollutant Discharge Elimination System (NPDES) permit is alleged. The Court also held that neither a permit holder's post-complaint compliance with permit limits, nor a facility shutdown, will render the action moot absent a showing that the violations could not reasonably be expected to recur.

The Supreme Court has barred citizen suits for lack of standing. In *Laidlaw*, the Court held that the plaintiffs had standing because they demonstrated sufficient injury in fact even though there was no demonstrated harm to the environment, because the relevant injury was the injury to the plaintiffs. The plaintiffs established injury in fact through affidavits alleging that the defendant's ongoing violations and illegal discharges of mercury into the Tyger River reasonably caused the plaintiff's members to curtail their recreational use of the water and caused them economic and aesthetic harm. *Id*. at 181-183.

Conversely, in *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972), the Court held that a mere interest in the affected environment does not provide sufficient standing to allege an injury in fact. The *Sierra Club* Court stated, "The 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured. The alleged injury will be felt directly only by those who use Mineral King and Sequoia National Park, and for whom the aesthetic and recreational values of the area will be lessened by the highway and ski resort. The Sierra Club failed to allege that it or its members would be affected in any of their activities or pastimes by the Disney development. Nowhere in the pleadings or affidavits did the Club state that its members use Mineral King for any purpose, much less that they use it in any way that would be significantly affected by the proposed actions of the respondents." *Id*. at 734-735.

Mechanics of Notice and Filing Suit

Before a citizen can file a citizen suit against any alleged violator, the Act requires citizen plaintiffs to send a 60-day Notice of (their) Intent to File Suit to the entity for its alleged violation, and to copy the state regulatory agency and the U.S. EPA Administrator.[18]

Receipt of this notice initiates the 60-day period in which the violator must come into compliance with its permit or administrative order in order to avoid a court case. This grace period allows a violator to comply or temporarily comply. The 60-day letter must be fairly specific regarding the alleged violation(s). Once the 60-day period of Notification of Intent to File Suit has begun, different provisions under §1365(b) of the Act regulate if and when a citizen can sue a polluter or any regulatory agency for its failure to enforce the Act. Any citizen can file a suit against any violator of the Act, only after the 60th day of the period of Notification of Intent to Sue and if the following two actions occurred during the 60-day period: (1) the regulatory agency fails to require a violator's compliance with the Act's effluent standards or limitations or compliance with an order requiring compliance with these standards or limitations, and (2) the regulatory agency does not begin, and does not continue to diligently prosecute a civil or criminal action against the violator. In cases where regulatory agencies do initiate civil or criminal actions against the violator, citizens may have the right to intervene.[19]

A citizen suit must be filed in the judicial district in which the violation occurred and a copy of the complaint or suit must also be sent to the U.S. EPA Administrator and the U.S. Attorney General.[20] The district court that oversees the citizen suit can enforce the Act by requiring the violator to comply with the effluent standards or limitations, its permit, and any enforcement actions initiated by a regulatory agency. The court may also require the U.S. EPA Administrator and state regulatory agencies to force the violator to comply with the Act if the U.S. EPA Administrator and state regulatory agencies have failed to do so. Section 1365(c)(3) of the Act dictates that if the United States is not directly involved in the citizen suit as a party, then the United States cannot give a consent judgment on the suit until 45 days after the U.S. EPA Administrator and the U.S. Attorney General receive copies of the proposed consent judgment.

Similarly, in cases where a citizen can file a suit against a state environmental agency or the U.S. EPA for their failure to enforce the Act, a citizen's attorney must send its state environmental agency or the U.S. EPA a 60-day Notice of (their) Intent to Sue them.

Causal Links and Connecting the Dots

Although the ultimate goals of the original Act have yet to be fully realized, there is reason for optimism. Throughout the nation and Rhode Island, local watershed groups, students, and seniors are actively conducting water quality monitoring. Municipalities are taking creative proactive steps to protect water from stormwater pollution. Citizen groups are using Clean Water Act citizen suits and 60-day notices to force clean up of their favorite rivers, streams lakes and bays.

Suppose you are approached by a citizen's group concerned that their local river frequently emits a foul smell, or a facility is bypassing a treatment works and befouling their local embayment. How might an attorney begin to assess the viability of a citizen suit without depleting the meager coffers of a grassroots organization? Unlike most civil litigation where defendants rarely provide culpable evidence willingly and often not until discovery ensues, the NPDES program requires permittees to admit their guilt by submitting monthly and quarterly discharge monitoring reports (DMRs) and compliance reports to EPA and DEM. The reporting is available electronically through DEM, and on-line through EPA's website. A perusal of the reporting information can reveal violations of permit effluent limitations and compliance conditions. Copies of permits can be obtained at reasonable cost, and some state and federal agencies may forward electronic copies for free. The existence of agency enforcement action(s) for the violating permittees can also be obtained on-line, or with a FOIA request.

In some instances, a client may be concerned about a particularly dirty industrial activity on the banks of their local river, but there are no DMRs available. Fortunately, the Act is fairly clear about what types of industrial activities require a NPDES permit. Equally fortunate, is the access to an electronic list of permitted facilities. If a regulated facility does not have a permit, they can be exposed to dozens of individual violations of the Act, over several years, and each individual violation translates to a penalty of $25,000 per day!!!

Once it is established that the violating facility is exceeding its effluent discharge limits the causal link can be taken once step further to demonstrate injury to the users of the water. As part of the Act's requirement, states must produce two documents that describe the

condition of the state's waters 1) The 303(d) List[21] aka "List of Impaired Waters" and 2) The "State of the States Waters" also referred to as the 305(b) Report[22]. The 303(d) List identifies those waters within a state's boundaries that are impaired for one or more pollutants and therefore do not meet one or more water quality standards. Impaired waters are identified through assessment and monitoring programs conducted by DEM personnel, volunteer networks and other local, state and federal agencies. The 305(b) Report provides information on the quality of all assessed waters in the state relative to their designated uses and the criteria established in the state's water quality regulations. Any waterbody that is assessed as not meeting its water quality standards (designated uses and criteria) under the 305(b) assessment process is placed on the 303(d) List of Impaired Waters. Traditionally, these documents provide valuable information about the sources of contamination to a particular waterbody of concern. The causes/sources of impairment se causea concerned citizens

In order for all of Rhode Island's waters to be swimmable, and fishable, the status quo cannot remain. Too many rivers and portions of Narragansett Bay are unfishable and unswimmable, excessive bacteria from sewage treatment facilities and stormwater discharges cause beach and shellfish closures, and widespread fish consumption advisories and mercury warnings scare consumers and adversely affect the commercial and recreational fishing industries. The problem manifested itself in the summer of 2003, when Greenwich Bay - the crown jewel of Narragansett Bay - was besieged by anoxic conditions (low oxygen levels) causing an ecological disaster with millions of dead fish and our shellfish and fishery economy placed at serious risk. Unfortunately, the Bay's 2006 summer data again revealed dangerously low oxygen levels and high bacteria levels, and beach closures and clam kills continued.

The debate on the cause of the conditions also continues, but a consensus seems to have emerged; sewage treatment plants and stormwater runoff are the primary culprits for the Bay's demise. As for our lakes and streams, stormwater is the primary source of excessive heavy metals, nutrients, bacteria, low biodiversity, low dissolved oxygen, erosion and sedimentation. The debate left unresolved is how we can prevent these disastrous conditions from reoccurring and achieve the goals of the Clean Water Act of "fishable and

swimmable" by 1983. The Greenwich Bay Initiative costing hundreds of thousands of dollars, the Warwick sewer bond initiative investing millions of dollars, recent development of the Greenwich Bay Special Area Management Plan and nitrogen reductions from sewage treatment plants seem to be steps in the right direction, yet the Bay's water quality continues to deteriorate.

One singular and tangible way to achieve the Act's goals is to utilize the Citizen Suit Provision to insure that the Federal Clean Water Act is fully enforced in Rhode Island.[23] Over the past 10 years as an environmental scientist and attorney, I have undertaken a comprehensive evaluation of RIPDES stormwater and point source discharge compliance throughout the State using publicly available data from EPA, DEM, and water quality monitoring results from local watershed groups. The results are alarming. Countless private facilities, quasi-state agencies and municipalities that have RIPDES permits habitually violate permit conditions. Industrial facilities that should have RIPDES permit coverage do not, and permits are issued allowing facilities to be built and expanded around the Bay, further exacerbating the Bay's wounds. As this article is written, municipalities are testing the efficacy of the Act's most recent attempt to improve water quality – the Phase II stormwater regulations. Amongst numerous criticisms, municipalities claim Phase II is too costly to implement, and there is no doubt that municipalities will incur great cost to comply with this new law. These observations are not meant to slight DEM for they are not wholly to blame for the Act's noncompliance. For years, the DEM has been understaffed and underfunded; in fact, the State's program that implements the Act (RIPDES) dodged a bullet when the General Assembly's FY04 budget proposed to defund the RIPDES program.

As an attorney and environmental scientist, I believe it is clear that a vital tool to solve our water quality problems is the underutilized Clean Water Act Citizen Suit provision. This suggestion is not novel or pie in the sky; in fact, the Act and its legislative history clearly anticipated the need for citizens to "supplement" the enforcement responsibilities of the EPA and the State.[24] Congress understood that to achieve the Act's goal, public participation would be indispensable. They knew that when elected officials and our government agencies fail to abide by the law or are incapable of enforcing the law, the Act provides concerned citizens with the necessary tools to become private attorneys general,

and to force those responsible for despoiling our waters to cease their actions, and force those responsible for enforcing the law to carry out their charge.

Citizen suits are not the only vehicle available to the public for effectuating positive change in their environment.[25] However, the Citizen Suit provision is one of the few means to recover attorney fees for a prevailing party.[26] By providing attorney fees, the barriers to legal representation are lowered because the incentive for attorney participation is increased. The confluence of dire environmental conditions and documented violations presents a unique opportunity for citizens and their attorneys to improve the state of our State's waters.

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[1] *See* 33 U.S.C. § 1251(e); *see also* Costle v. Pacific Legal Found., 445 U.S. 198, 216, 100 S.Ct. 1095, 63 L.Ed.2d 329 (1980) (noting the "general policy of encouraging public participation is applicable to the administration of the NPDES permit program").
[2] 44 Fed. Reg. 32,854, 32,885 (June 7, 1979).
[3] See 33 U.S.C. §§ 1311, 1362(14).
[4] The National Water Quality Inventory: EPA 1984 and 2000 Report to Congress identified urban runoff as one of the leading sources of water quality impairment in surface waters. Even more alarming is the northeast coast has the nation's poorest marine water quality, and stormwater is rated as the number one cause of that pollution. EPA' National Coastal Condition Report II (2005).
[5] In fresh water, pollution, erosion and siltation from stormwater and runoff account for three of the top four causes of impairment of our lakes and rivers. See U.S. EPA. 2000. *The National Water Quality Inventory, 2000 Report to Congress*, Office of Water, Washington, D.C. EPA -841-R-02-00
[6] 33 U.S.C. §1251.
[7] 33 U.S.C §1342(a)(b).
[8] 40 CFR §123.25, and RIPDES Rules 5(d), 6(a), and 60
[9] 33 U.S.C. 1313.
[10] Similarly, DEM can commence an administrative enforcement action, which can be appealed to DEM's Administrative Adjudication Division and Rhode Island Superior Court.
[11] 33 U.S.C. §1365(g).
[12] 33 U.S.C. §1362(5).
[13] 33 U.S.C. §1365(a).
[14] 33 U.S.C. §1365(h).
[15] 33 U.S.C. §1365(a)(1); See, Gwaltney of Smithfield v. Chesapeake Bay Foundation, 484 U.S. 49 108 S. Ct. 376, 98 L. Ed. 2d 306 (1987). .
[16] 33 U.S.C. §§1309 and 1365(d).
[17] 33 U.S.C. §1365(e).
[18] 33 U.S.C. 1365(b).
[19] 33 U.S.C. §1365(b)(1)(B).
[20] 33 U.S.C. §1365(a)(c).
[21] 33 U.S.C. §1313(d)
[22] 33 U.S.C. §1315(b)
[23] The Administrative Procedures Act (APA) also provides citizens redress for ill conceived and unlawful acts or omissions by EPA and state agencies. In Friends of the Wild Swan, Inc. v. United States EPA, 130 F. Supp. 2d 1207 (D.M.T. 2000). The Court's order imposed a remedy that was designed to redress the Environmental Protection Agency's longstanding failure to reject the State of Montana's submission of an inadequate number of total maximum daily load calculations which had impaired the State's ability to ensure water quality for over twenty years. Plaintiffs were granted summary judgment on their claim that the Administrative Procedures Act (APA), as codified at 5 U.S.C.S. § 706(2)(A), was violated. The court found that the Environmental Protection Agency (EPA) acted arbitrarily and capriciously when it did not disapprove Montana's feeble submission of 130 total maximum daily load calculations (TMDLs) out of the 900 water quality limited segments (WQLSs) the State had identified. The court entered an order which stated that neither the State nor the EPA could issue new or broader NPDES permits that might have impaired water quality before all necessary TMDL's were developed.

The Act and DEM's RIPDES regulations also provide citizens the opportunity to petition the EPA/DEM to require the issuance of NPDES/RIPDES permits for specific pollution sources where the regulations would otherwise exempt these sources from the NPDES provision of the Act.

[24] Most of the federal environmental laws also specifically empower citizens to bring a civil action to enforce compliance with the statute. Such citizen suit provisions occur in the Clean Water Act (CWA), 33 U.S.C. sec. 1365; Safe Drinking Water Act (SDWA), 42 U.S.C. sec. 300j-8; the Clean Air Act(CAA), 42 U.S.C. sec. 7604; RCRA, 42 U.S.C. sec. 6972; Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. sec. 9659.

[25] Most environmental statutes provide the public certain specific rights to participate in permitting procedures. For example, the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. sec. 6974(b), requires notice of any proposed permit be published in a local newspaper and that the public be allowed to comment and attend a public hearing. Several environmental statutes provide explicit procedures for allowing the public to review and comment on settlements of a dispute that could affect public health. For example, the public must be informed and provided an opportunity to comment on settlements under the RCRA imminent hazard provisions. 42 U.S.C. sec. 6973(d). Under some federal environmental statutes, citizens are given specific rights to petition for agency action. Under the Toxic Substances Control Act (TSCA), for example, citizens can petition EPA to issue a rule regulating a specific chemical. 15 U.S.C. sec. 2619. EPA must grant or deny the petition within 90 days. The petitioner can seek judicial review of any denial of the petition. RCRA provides another example; it specifically allows any person to petition EPA to promulgate, amend, or expel any regulation. 42 U.S.C. sec. 6974. Many federal environmental statutes provide specific standards allowing citizens to seek judicial review of agency actions under the statute. See, e.g., CAA, 42 U.S.C. sec. 7607; RCRA, 42 U.S.C. sec. 6976; Toxic Substances Control Act (TSCA), 15 U.S.C. sec. 2618. In the absence of any specific statutory review procedures, the Administrative Procedures Act grants citizens a general right of judicial review of any final agency action adversely affecting them.

[26] In addition to obtaining attorney fees under the section 1365 of the Act, any prevailing party in a suit brought by or against the United States can receive reasonable attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. §.2412.