

Citizen Suits

How to Avoid Them & To Do If You Can't

- **Common Issues—Tripping Points**
- **Resolution Strategies—**
- **Housekeeping—Compliance**



Citizen Suits?

- Lawsuits filed by third parties to enforce Clean Water Act requirements
- Authorized by federal Clean Water Act ~ 33 USC § 1365
- Violations of NPDES Permits are subject to citizen suits
33 USC § 1365(f)(6)
- What's at stake?
 - Penalties: \$32,500 per day per violation (paid to federal treasury)
 - Injunctive Relief
 - Prevailing party attorney fees

Common Issues – Tripping Points

1. Quarterly Reporting
2. SWPPP
3. Recordkeeping



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Via Certified Mail

RE: NOTIFICATION OF INTENT TO SUE UNDER THE CLEAN WATER ACT AND REQUEST FOR COPY OF STORMWATER POLLUTION PREVENTION PLAN

Dear Managing Agent:

I write on behalf of Columbia Riverkeeper to provide you with sixty days' notice of Columbia Riverkeeper's intent to file a citizen suit against [redacted] and [redacted] under Section 505 of the Clean Water Act (CWA), 33 USC § 1365, for ongoing violations as described below. In addition, as described below, this letter is a request for a copy of the complete and current Stormwater Pollution Prevention Plan ("SWPPP") required for [redacted] under the permit. Any response or correspondence related to this matter should be directed to the undersigned at the furnished address.

[redacted] has violated and continues to violate the CWA (see Sections 302 and 402 of the CWA, 33 USC §§ 1362 and 1367) and the National Pollution Discharge Elimination System Permit issued to [redacted] ("the Permit"), issued by the Washington Department of Ecology on [redacted] effective [redacted] modified on [redacted] and expiring on [redacted] with respect to operations of and discharges of stormwater and pollutants from its facility at [redacted] ("facility"), as described herein.

I. COMPLIANCE WITH STANDARDS

A. Condition 51.F. of the Permit requires that [redacted] discharge not cause or contribute to an excursion of Washington State water quality standards. Furthermore, Condition 51.F. of the Permit prohibits stormwater discharges that cause or contribute to violations of water quality standards in the receiving water. The only data available [redacted] demonstrates that [redacted] discharges exceed state and federal water quality standards. [redacted] has violated Condition 51.F. and 51.G. by discharging stormwater that causes or contributes to a violation of state water quality standards for at least turbidity and zinc each and every time that there is more than a trace amount of precipitation, which causes a stormwater discharge from the [redacted].

Common Issues – Tripping Points

1. Ecology Site Visit
2. It's only Rainwater
3. We're Doing What Ecology Told us



Common Issues – Tripping Points

Counting Violations: How Noncompliance Costs You.

- A Quarterly Violation may constitute a violation for each day of the quarter. (~91 days)
- Failure to comply with each section of the permit may constitute a separate violation.
- Violations carry a maximum penalty of \$32,500.
- A single violation could cost as much as: **\$2,957,000**

Resolution Strategies

1. Come into Compliance
2. Settle with the Citizen Group
3. Agency Enforcement Action
4. Litigate

Resolution Strategies—Settle with the Citizen Group

Generally requires a three part approach:

- Ongoing Compliance
- Payment to Supplemental Environmental Project (“SEP”)
- Payment of Attorney Fees



Resolution Strategies—Agency Enforcement Action

1. Agency Enforcement Generally Preempts Citizen Group Suit.
2. Settlement will require Ongoing Compliance and payment fine.
3. BUT ~ Against Ecology’s Policy



Resolution Strategies—Litigate

1. Defenses

- Wholly Past Violations / Mootness
- Not a pollutant discharge from a point source / Not “navigable waters” (33 USC §1362)
- Failure to meet 60-day Notice requirements

2. Challenging Liability—Strict Liability

3. EPA Penalty Matrix

- Remove economic benefits of noncompliance;
- Reflects the seriousness of the violation; and
- Adjustment or mitigating factors.

What To Do If You Receive a Notice of Intent To Sue Letter?

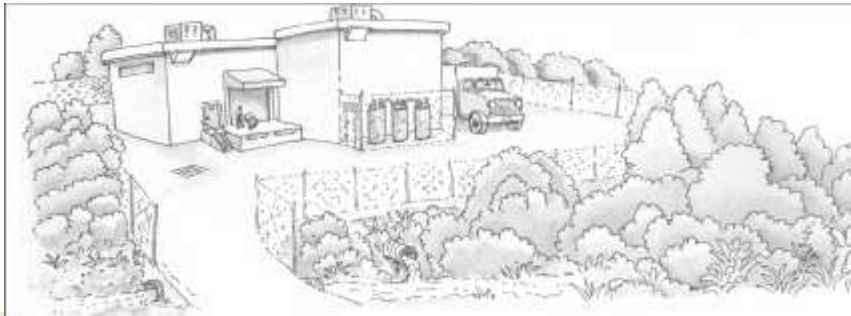
- Review agency files and obtain copies
- Evaluate violations alleged in Notice Letter
 - Determine accuracy of allegation
 - Assess corrective measures and ability to attain immediate compliance
- Develop a Communication Strategy
 - Internal/ External
- Engage Environmental Consultant
- Examine Other Environmental Programs
 - Air Emissions / RCRA



Housekeeping—Compliance

Stormwater runoff from industrial roofs, trucks, parking lots, and yards may flow into storm drains and directly into creeks and rivers. It generally does not receive treatment that would remove pollutants.

The storm drainage system includes storm drains, roadside drainage ditches and all man made and natural water conveyance systems such as channels, creeks, etc.



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Housekeeping—Compliance

Some typical BMPs are:

- Installation and maintenance of on-site storm drain protection.
- Sweep indoor and outdoors areas as often as necessary to prevent sediment or other wastes that may be generated, from being tracked outdoors or offsite.
- Dirty, oily, or rusty junk items should not be left outdoors. Consider properly disposing of these items or placing them in covered locations to prevent stormwater contact. At a minimum, these items should be covered with weighted or fastened tarps.
- Providing secondary containment for stored fluids.
- Covering outdoor dumpsters, tallow bins, etc.
- Properly disposing of pressure washing discharges (see pressure washing).
- Cleaning spills promptly with dry methods (as opposed to hosing spills into a storm drain).
- Dumpster lids should be kept closed when not in use to keep rain out and uncontained liquids should never be placed in a dumpster - they will leak out.
- All Wastes should be contained and managed in a responsible manner that prevents exposure to rainfall or discharge to the storm drainage system.

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Avoiding Citizen Suits & Tips on Compliance

Summary of Compliance Tips:

1. Practice Good Housekeeping
2. Be Aware of Could Get Into Storm Drains
3. Conduct Required Testing
4. Submit Quarterly DMRs
5. Take Appropriate Action
6. Collect Representative Sample

