

# Avoiding Stormwater Citizen Suits – and Defending Those You Can't

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## Introduction

- ◆ Clean Water Act Overview
- ◆ Avoiding Citizen Suits
  - ◆ Maintaining Permit Compliance
- ◆ Resolving Citizen Suits
  - ◆ Early Settlement v. Litigation
- ◆ Case Studies
  - ◆ Marine Terminal Maintenance Shop
  - ◆ Seafood Processing Plant

## Clean Water Act Overview

- ◆ Two Applicable Laws:
  - ◆ Clean Water Act (“CWA”) and
  - ◆ Washington Water Pollution Control Law (RCW 90.48)
- ◆ Both prohibit unpermitted discharges of “pollutants” into water
- ◆ EPA delegates authority to Ecology to issue permits
- ◆ CWA provides for citizen suits
  - ◆ “Violation of an effluent standard or limitation” = includes all federal and state standards
  - ◆ Broad scope
  - ◆ 60-day notice to permit holder, EPA, and state

## Avoiding Citizen Suits – Obtaining a Permit

- ◆ Permits required for discharges from “point sources”
  - ◆ General Permits – Notice of Intent
  - ◆ Individual Permits – Application to Ecology
- ◆ Industries Covered?
- ◆ Conditional “no exposure” certification
  - ◆ Establish facility will not come into contact with pollutants as a result of industrial activities

## Avoiding Citizen Suits – Maintaining Permit Compliance

- ◆ Ensure discharges within permit standards
- ◆ Prepare Stormwater Pollution Prevention Plan (SWPPP)
  - ◆ Facility Assessment (including site map)
  - ◆ Monitoring Plan
  - ◆ Description of Applicable BMPs
- ◆ Timely perform required sampling
- ◆ Consistently submit Discharge Monitoring Reports (DMRs) to Ecology
  - ◆ Conduct corrective actions (Levels One, Two, and Three)
- ◆ Comply with Permit's recordkeeping conditions

## Avoiding Citizen Suits – Maintaining Permit Compliance

- ◆ Additional Tools for Permit Compliance
  - ◆ Request “Technical Assistance” from Ecology
  - ◆ Retain a consultant to:
    - ◆ Review SWPPP and other documents, and
    - ◆ Provide advice on Permit's technical requirements, including sampling, reporting, and recordkeeping
  - ◆ Engage an attorney for advice on complying with statutory and regulatory requirements

## Resolving Citizen Suits: Early Settlement

- ◆ Advantages of Settlement v. Litigation
  - ◆ Opportunity to take corrective action and reduce violations
  - ◆ Lower transaction costs:
    - ◆ Reduce attorneys' fees associated with litigation (both sides)
    - ◆ Avoid federal court
    - ◆ Avoid Department of Justice involvement
  - ◆ Avoid negative publicity?

## Resolving Citizen Suits: Early Settlement? Better Act Quickly

Response Letter	5 days
Internal Review (BMPs, etc.)	5 days
SWPPP Update/Response	15 days?
Sample/Assess BMPs	20-25 days
Site Visit by "Citizens"	25-30 days
Settlement Negotiations	30-45 days
Select SEP	30-45 days
Draft Settlement	35-50 days
Final Settlement	Within 60 days

## Resolving Citizen Suits: Settlement Components

- ◆ Compliance
  - ◆ Complete missing DMRs, Corrective Actions, etc.
  - ◆ BMP modifications? Facility upgrades?
  - ◆ Enhanced monitoring?
  - ◆ Ongoing record review?
- ◆ Penalties
  - ◆ \$37,500 per “violation”
  - ◆ “Payment in Lieu of Penalty”
- ◆ Litigation Expenses (“Reasonable” Attorneys’ Fees)

## Resolving Citizen Suits: Litigation

- ◆ Defenses
  - ◆ “Diligently Prosecuting”?
    - ◆ Ecology Policy
  - ◆ Standing?
  - ◆ Sufficient “Statutory Notice”?
  - ◆ 5-year Statute of Limitations?
  - ◆ Ongoing Violations?
- ◆ The “Counterweight” = Litigation Costs

## Conclusion

"An ounce of prevention is worth  
a pound of cure."