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"Procedures for Agency Responses to Clean Water Act Citizen Suit Activity," dated June 15, 1989.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 15 1988

OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Procedures for Agency Responses to Clean Water Act Citizen Enforcement Suit Activity

FROM: Glenn L. Unterberger
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for Water

TO: Regional Counsels, Regions I-X

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Purpose

The purpose of this memo is to set out the general procedures to be followed by the Environmental Protection Agency, in conjunction with the Department of Justice, in responding to and monitoring citizen enforcement suits brought under Section 505 of the Clean Water Act, 33 USC 1365.

This memo supersedes prior guidance, issued by this office on October 4, 1985, concerning EPA tracking of citizen suits. That guidance is now obsolete in light of recent amendments to Section 505 requiring citizen suit parties to send copies to EPA and DOJ of complaints and proposed settlements, and in light of EPA's new ability to bring administrative penalty actions and pre-empt potential citizen suits for civil penalties.

The guidance defines roles for various EPA and DOJ offices in addressing matters relating to CWA citizen enforcement suits; however, this guidance in no way affects the fact that the Regions remain responsible for deciding whether a federal enforcement action is warranted to address the violations at issue.

Background

Clean Water Act Section 505(a)(1) authorizes any person with standing to sue any person who is alleged to be in violation of certain Clean Water Act requirements, set out in CWA §505(f). In such lawsuits, the district courts have jurisdiction to enforce the Act and to apply appropriate civil penalties under CWA §309(d). Prior to filing enforcement suits under CWA §505(b)(1), however, citizens must give "60-day notice" of the violations to the Administrator, the State, and the alleged violator. These violation notices must be given in the manner prescribed by the Agency's regulations, found at 40 CFR 135, which require that copies of the notices (sent via certified mail to the alleged violator) be mailed or delivered to the Administrator, the Regional Administrator, the State, and the registered agent of corporate violators. Part 135 provides that the date of service of the notice is the date of postmark.

Through Section 505, Congress has fashioned a distinct role for private enforcement under the Clean Water Act. The purposes of the citizen suit provision are to spur and supplement government enforcement. The required 60-day violation notices are designed to provide the Administrator (or the State) the opportunity to undertake governmental enforcement action where warranted, given Agency priorities and finite resource levels. Where the government does not pursue such action, the citizen enforcer with standing may act as a "private attorney general" and bring the lawsuit independently, for civil penalties and injunctive relief.

Historically, in the majority of cases the regions have not initiated federal referrals as a result of citizen notices, and thus the citizens are allowed to serve the role of "supplemental" enforcers. This is reasonable in terms of best use of the Agency's finite resources, and the consistent setting of federal enforcement priorities, which should not necessarily be driven by citizen enforcement priorities.

Experience suggests that private enforcement is useful in helping to achieve Clean Water Act goals and to promote Clean Water Act compliance. However, it is important for the Agency to monitor citizen lawsuits to the extent possible to ensure proper construction of regulatory requirements and avoid problematic judicial precedents. It is also a good idea for the

federal government to support the citizens where feasible, such as by filing amicus briefs in appellate courts, in order to advance our federal enforcement interests. Examples of amicus curiae briefs which have been filed on behalf of citizens so far include those in Sierra Club v. Union Oil Co. (9th Cir.), Sierra Club v. Shell Oil Co., (5th Cir.), and Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd. (4th Cir. and S. Ct.).

Recent CWA Amendments Affecting Citizen Suits

The Water Quality Act (WQA) of 1987 amended the Clean Water Act, effective February 4, 1987, in two ways respecting citizen suit authorities and responsibilities. Generally, the amended CWA requires that the Administrator and the Attorney General receive copies of complaints and proposed consent decrees in citizen enforcement suits. In addition, citizen suits for civil penalties may now be precluded, in some cases, by administrative penalty actions.

WQA §504 provides as follows:

> Section 505(c) is amended by adding at the end thereof the following new paragraph:
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> "(3) PROTECTION OF INTERESTS OF UNITED STATES. - Whenever any action is brought under this section in a court of the United States, the plaintiff shall serve a copy of the complaint on the Attorney General and the Administrator. No consent judgment shall be entered in an action in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator."

OECM-Water Division and the Office of Water are presently working on proposed regulations to govern service of the complaints and consent decrees, which will be published in the Federal Register shortly.

WQA Section 314 amends CWA §309 (governing federal enforcement actions) to add new subsection (g), authorizing federal administrative penalty actions. New CWA §309(g)(6)(A) and (B) provide that citizens may not bring civil penalty actions under Section 505 for the same violations for which (1) the Secretary (Army Corps of Engineers) or the Administrator has commenced and is diligently prosecuting an administrative action under Section 309(g); (2) the State has commenced and is diligently prosecuting an action under a comparable state law; or (3) the Secretary, Administrator or State has issued a final order and the violator has paid a penalty under §309(g) or

comparable state law; unless (a) the citizen's complaint was filed prior to the commencement of the administrative action, or (b) the citizen's 60-day notice was given (in accordance with 40 CFR 135) prior to commencement of the administrative action, and the complaint was filed before the 120th day after the date on which the notice was given.

Thus, under these new amendments, it will be necessary for the Agency to keep track of when citizen notices are served (i.e., postmarked), when complaints are filed, and when proposed consent decrees are received. Moreover, EPA and DOJ need to clarify procedures for deciding how, if at all, to review and respond to citizen enforcement activity. The following sets out the Agency's procedures, in conjunction with DOJ, to implement these responsibilities.

Procedures

(1) Violation Notices

When EPA Headquarters receives a copy of a citizen violation notice, the notice is routed to the Associate General Counsel for Water. That office logs in the notice, files the original, and forwards copies of the notices to the Associate Enforcement Counsel for Water (OECM-Water Division), and the Director of the Office of Water Enforcement and Permits, or the Director of the Office of Wetlands Protection, as appropriate. Under 40 CFR 135, each Regional Administrator must also receive a copy of the notice directly from the citizen; some regions have internal tracking systems, usually handled by the Water Management Divisions. In addition, the Office of Wetlands Protection will forward Clean Water Act §404 notices to their courterparts at the Army Corps of Engineers.

Since late 1983, OECM-Water has kept a region-by-region, chronological log of these citizen notices, recording the name of one notifier and the potential defendant, the location of the facility, and the date on the notice letter. (Recently, OGC has begun recording the "date of postmark," which is the official date of service under the regulations.)

In the regions, the general practice has been for Water Division personnel or Wetlands program personnel to investigate the compliance record of the noticed facility, and to contact the state (if the state runs an approved NPDES program) to inquire what, if any, enforcement action the state intends to take. The program office then makes a determination, with the Office of Regional Counsel, as to whether to initiate a federal enforcement action to address the alleged violations. This memorandum is not intended to change the procedures the regions use to evaluate and respond to the notices.

(2) **Complaints**

As in the case of violation notices, at Headquarters the Complaints are routed through the Office of General Counsel, to OECM-Water Division and the appropriate program office. The Office of Wetlands Protection will forward Clean Water Act §404 complaints to their counterparts at the Army Corps of Engineers. OECM-Water and the Office of Water are currently working together to amend 40 CFR 135 to include requirements relating to service of complaints on EPA and DOJ. We expect these regulatory provisions to require citizen plaintiffs to send copies of complaints to the Regional Administrator in addition to the Administrator and the Attorney General. In the interim, OGC is sending copies to the Regional Counsels. OECM-Water Division keeps a log of the citizen complaints. Attached for your information is a copy of the log which reflects citizen complaint activity through the end of fiscal year 1987.

The regions will retain the authority to recommend whether to initiate a federal enforcement action against the citizen suit defendant (e.g., by intervention in the citizen suit, by filing a separate suit, or by commencing an administrative action) in order to address the defendant's violations. The regions will also normally have the lead on monitoring active citizen suits from notice and filing to conclusion, within their discretion and as resources permit. However, Headquarters will get involved in the citizen enforcement action where national legal or policy issues arise which merit federal attention (other than intervention as a party to address the underlying violations), and each Region is requested to notify OECM-Water Division whenever such an issue comes to the Region's attention.

For example, Headquarters generally will take the Agency lead, working with the Policy, Legislation and Special Litigation (PLSL) Section of the Department of Justice, where issues of national law or policy arise which call for participation as amicus curiae in the district or appellate courts. In such situations, OECM-Water will be responsible for coordinating with PLSL, OGCWater, the appropriate Office of Regional Counsel, and the Office of Water to decide collectively (1) whether government action on a specific issue arising in a citizen suit is warranted, (2) what the government's action should be, and (3) what roles the participating offices will play in pursuing any appropriate action. This type of participation might occur most often in the context of appeals from judgments in citizen suits. However, the Agency will employ the same procedures in deciding whether and how to pursue Federal participation on the District Court level. Examples of issues which the United States has addressed to date in this context include the scope of the upset defense, whether the U.S. can be bound by settlements of suits between private parties, and whether citizens may pursue penalties for wholly past violations.

(3) Consent Decrees

The proposed consent decrees, like the violation notices and the Complaints, are routed through the Office of General Counsel to OECM-Water Division and the appropriate program office. The Office of Wetlands Protection will forward Clean Water Act §404 proposed consent decrees to their counterparts at the Army Corps of Engineers. Until 40 CFR 135 is amended to require that copies be sent to the Regions also, OGC will send copies to the Regional Counsels. OECM-Water Division keeps a log of these proposed consent decrees. Attached for your information is a copy of the log which reflects consent decree activity through the end of fiscal year 1987.

Once a copy of a proposed consent decree is received, the United States has 45 days within which to review the proposed consent decree and submit comments, if any. OECM-Water will solicit comments from the appropriate Office of Regional Counsel, to formulate the Agency's position on any issues which may arise in the citizen consent decree. Unless different arrangements are made (e.g., if Federal intervention is contemplated to obtain further relief), OECM-Water will take the lead for the Agency in coordinating with DOJ to formulate proper action by the United States in response to a proposed consent decree, such as a comment letter to the court, whenever necessary or advisable.

A region will have the opportunity, at its discretion and as resources allow, to offer timely case-specific comments on the adequacy of relief in a proposed citizen suit settlement. OECM-Water will consider comments, if any, from the Region received within 35 days after the date the settlement is logged in by the Administrator's office. In any event, the United States is not obliged to offer any comments to the court. Our position has consistently been that the federal government is not bound by the terms of citizen settlements or judgments, as the U.S. has interests distinct from any private litigants, and cannot be deprived of the opportunity to bring a subsequent action for more complete relief, should circumstances warrant.

PLSL/DOJ will provide copies to OECM-Water and the appropriate Regional Counsel of any correspondence submitted to the court or parties in CWA citizen suits and will work with designated EPA representatives in conducting any follow-up activity which results.

If you have questions regarding this matter, please contact David Drelich of my staff at FTS 382-2949.

Attachments

cc: Regional Water Management Division Directors
OECM-Water Attorneys
Doug Cohen, DOJ
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