

CLEAN WATER ACT – WHEN THINGS GO WRONG

Legal remedies for bad agency
decisions and violations of law

(For River Rally 2016)

Life can be imperfect



The CWA has been very successful but:

- Goal of eliminating discharger of pollutants by 1985 definitely not attained. (CWA Section 101(a)(1))
- Goal of making our waters fishable and swimmable by July 1, 1983 (CWA Section 101(a)(2)) was definitely not met

Bad things that happen

- State Agencies write bad water quality standards that fail to protect uses and U.S. EPA sometimes approves them
- State Agencies write weak National Pollutant Discharge Elimination System (NPDES) permits
- State Agencies go totally outlaw in issuing NPDES permits or fail to issue permits
- Polluters discharge without a permit or violate permit conditions

Legal Remedies are available

- But they are generally imperfect
- If the state is determined to have polluted water, U.S. EPA is weak, and the people do not rise up, the legal remedies are not likely to cure the problem
- There are legal remedies, though, that can prod the situation in the right direction and bring water quality improvements.

Water Quality Standards Are important

- Effluent limits in permits are supposed to be set as the **more** stringent of technology based effluent limits (TBELs) or water quality standard based limits. 33 USC 1311(b)(1)(C). (water quality based effluent limits = WQBELs)
 - This is a hard concept for many dischargers and state officials who want to have permits based on the **less** stringent of the TBELs and the WQBELs.

How Water Quality Standards Are Made

- Water quality Standards - States generally develop water quality standards but they must be approved by U.S. EPA. CWA 303(c). Water quality standards consist of designated uses (e.g. swimming, aquatic life, cold water fishery), 40 CFR §131.2 and criteria to protect those uses. States are supposed to designate all the uses that are attainable and there is a presumption of attainability. *Kansas Natural Resources Council, Inc. v. Whitman*, 255 F.Supp. 2d 1208 (D. Kan. 2003).

How things should work

- The criteria should be based on a “sound scientific rationale” and be protective of the designated uses including “the most sensitive use.” 40 CFR §131.11(a). The criteria should not take into account economic factors. *Mississippi Commission on Natural Resources v. Costle*, 625 F.2d 1269, 1277 (5th Cir. 1980). Other parts of the regulatory process do make allowances for economic factors including use designations, 40 CFR §131(g)(6), variances, 40 CFR §131.14 and compliance schedules, 40 CFR §122.47.

U.S. EPA approval of bad standards can be challenged

- Water quality standards are crucial both in driving NPDES permit limits and in setting the targets for total maximum daily load calculations done under Section 303(d).
- Water quality standards are not effective until approved by U.S. EPA. 33 U.S.C. §1313(c) (=CWA 303(c))

U.S. EPA decisions can be challenged

- Administrative Procedure Act, 5 U.S.C. § 706 (2)(A), allows federal agency decisions to be overturned by U.S. District Court if Court finds decision was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

Successful cases

- Many successful cases have been brought challenging U.S. EPA approval of water quality standards. E.g. *Ky. Waterways Alliance v. Johnson*, 540 F.3d 466 (6th Cir. 2008); *Fla. Pub. Interest Research Group v. EPA*, 386 F.3d 1070, 1088-90 (11th Cir. 2004); *NW Env'tl. Advocates v. U.S. EPA*, 268 F.Supp. 2d 1255 (D.Ore. 2003).

Remedy

- Matter goes back to U.S. EPA and states to write new standard or at least create a better explanation for what they did.

U.S. EPA could >

- U.S. EPA has authority to establish standards for states when they fail to do so, 33 USC §1313(c)(4)(B), but it has been very reluctant to use this authority.
- EPA did draft numeric nutrient criteria for Florida, which were not great, and later EPA approved weak Florida standards and withdrew its standards.

NPDES and 404 permit decisions

- Rubber meets the road for point sources and fills in the permits.
- State agencies (e.g. Alabama Dept. of Environmental Management, Ohio EPA, Wisconsin DNR) generally write NPDES permits for state under delegated programs.
- U.S. Army Corps of Engineers writes permits for fills of wetlands and other waters under Section 404 of the CWA. 33 U.S.C. §1344.

State Issued NPDES permits can be challenged

- Generally, you have to have commented on permit and pointed out how it was wrong during the public comment period.
- States are required to give public notice of draft NPDES permits and allow public comment. 40 CFR §124.10

- Review of State Agency issued NPDES permits

- States and tribes are required to allow members of the public to appeal the issuance of NPDES permits without requiring a stringent showing for standing. 40 CFR §123.30.
- States differ on their procedures for appeal.
- Time for filing an appeal can be very short (e.g. 30 days)

Where to go

- NPDES permit appeals are taken to Environmental Appeals Board if U.S. EPA issued the permit but generally it is a state that issues the permit and the appeals are handled through state procedures. Often there is some sort of state body (e.g. the Alabama Environmental Management Commission or Illinois Pollution Control Board) that considers appeals and a party unhappy with the result in the state appeals agency can seek review in the state court system. See, *Alabama Dept. of Environmental Management* 14 So. 3d 853.
- In some states (e.g. Iowa), appeals of NPDES permits are taken directly to court.

Some successful permit appeals

- *Alabama Dept. Environmental Management 14 So. 3d 853, 859 (Ala. Ct. Civ. App. 2007).*- Agency failed to limit pollution to impaired water bodies.
- *Prairie Rivers Network v. Illinois Pollution Control Board, 2016 IL App (1st) 150771.*- Agency failed to limit phosphorus pollution to prevent violation of water quality standards
- *Iowa Environmental Council v. Iowa Dept. of Natural Resources (2016)* – Agency misapplied Iowa antidegradation regulations.

Remedy on NPDES cases

- Permit is generally sent back to the same agency that goofed it up the first time.
- Still agency often does better and the decision forces changes in agency practice.

U.S. EPA powers

- U.S. EPA has the power to object to NPDES permits issued by the states and tribes, *American Paper Institute, Inc. v. U.S. EPA*, 890 F2d 869 (7th Cir. 1989); 40 CFR 123.44, but only very rarely uses this authority.

404 Permits

- U.S. Army Corps permit decisions are subject to review under Administrative Procedure Act if arbitrary, capricious or contrary to law.
- Corps also must comply with National Environmental Policy Act (NEPA), 42 U.S.C. §§4321 to 4370(f) and either write a good environmental impact statement (EIS) or explain why action is not significant in a finding of no significant impact (FONSI)
- If record does not support Corps' decision or EIS or FONSI is defective, the court should remand the decision.

Many Corps permit decisions have been overturned.

- *O'Reilly v. U.S. Army Corps of Engineers*, 477 F.3d 225 (5th Cir. 2007) and *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664 (7th Cir.) are a few examples.
- Projects stopped on the basis of a bad EIS are often never built or are substantially modified, but only if people opposed to damaging and/or dumb project fight on using political tools.

State Programs Are subject to Petitions for Corrective Action

- 33 U.S.C. § 1342(c)(3) and 40 CFR §123.63 allow for petitions to correct state NPDES programs that are really off course.
- Issuing bad permits and failing to require permits are grounds for U.S. EPA to take back a delegated NPDES program or “de-delegate” it.
- U.S. EPA has power and procedure for withdrawal of state NPDES programs, 40 CFR §123.64, but has never done so. It has gotten close before a state backed down and made corrections.

Big Problem is

- U.S. EPA takes forever to decide.
- After a few years, one can seek to force a decision under Administrative Procedure Act that allows action to compel action unreasonably delayed. 5 U.S.C. §706 (1)
- Unfortunately, courts are often receptive to U.S. EPA officials excuses that they are overworked and very tired.

The normal result of a petition

- The state makes some improvements over a number of years and promises to do better.
- U.S. EPA denies the petition for corrective action on the basis that the problems that the petitioners identified no longer exist.
- Tough on pride in that petition is denied, but it generally means that the petition worked in that the state program got better.

NPDES Permit Enforcement

- Permit limits are generally enforced through self-monitoring. The permits are supposed to spell out the monitoring required. 40 CFR §122.48. The permit holders are to collect samples and file monthly discharge monitoring reports on the levels of pollution in their discharge.
- Obviously, this system provides incentives for permit holders to monitor inaccurately or at least to monitor at times in which it is less likely that a permit violation will be found. There are, however, some checks on self-reporting, including facility inspections and ambient water quality monitoring. Unfortunately, unreported violations are also discovered through fish kills and other obvious environmental damage.

Citizen Suits

- U.S. EPA, states and, citizens may bring suit to enforce permit limits. 33 U.S.C. §§ 1319, 1365, See also, *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.* 528 U.S. 167 (2000). Citizen enforcement, though, is limited by a number of factors.
- Citizen suits can only be filed after giving 60 days' notice.
- Regulation for how to give notice properly is at 40 CFR §135.3. The idea is to give dischargers a chance to correct problems or for federal or state enforcers to sue first.

Citizen Frustration

- If federal or state officials sue first and prosecute in good faith, citizens' suits are preempted although they may be able to intervene in government suit.
- Even if citizens sue first, their suit may be blocked if federal or state officials reach a good faith settlement with the discharger that takes care of the problem. *Friends of Milwaukee River v. Milwaukee MSD*, 382 F.3d 743 (7th Cir. 2004)
- Citizens, though, must have a reasonable opportunity to object to a weak settlement for their suit to be preempted by government action. *Jones v. City of Lakeland*, 244 F.3d 518 (6th Cir. 2000)

What can be won through citizen suits

- Civil penalties – not much help to environment. Money goes to the U.S. Treasury
- An order to stop the violation is what is really desired and that can happen.
- Attorney's fees given at market rates

SEPs

- Supplemental Environmental Projects that attempt to mitigate the damage done by the violations are often very helpful. *Sierra Club, Inc. v. Elec. Controls Design, Inc.*, 909 F.2d 1350, 1354-56 (9th Cir. 1990) (“The provisions of the Act provide no limitation on the type of payments to which parties to citizens' suits can agree in a settlement. There is no indication that where a defendant agrees to a settlement it must also agree to pay penalties to the treasury. Likewise, the Act's legislative history reveals no Congressional intent that private parties be precluded from entering into settlements which do not require the defendant to tender civil penalties to the United States.”)

Enforcement of 404 permits

- Enforcement of §404 is problematic. Corps is supposed to enforce against fills without a 404 permit and to enforce against violations of 404 permit conditions but enforcement is spotty at best. *Atchafalaya Basinkeeper v. Chutz*, 682 F.3d 356 (5th Cir. 2012) held that citizens cannot sue to enforce conditions in 404 permits.

What you can do

- There are cases holding that citizens can bring suit regarding fills that have no permit or that violate conditions of state 401 certifications.
Stillwater of Crown Point Homeowner's Assn v. Stiglich, 999 F.Supp. 2d 1111 (N.D. Ind. 2014);
Love v. N.Y. State Dept. of Env. Conservation, 529 F. Supp. 837 (S.D.N.Y. 1981)

And of course

- You can always ask the state agencies, the state attorney general and Corps officials to do their jobs.
- Good luck!

Albert Ettinger

Ettinger.Albert@gmail.com

www.albertettinger.com