Clean Water Act Enforcement

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Roadmap for Today

- Clean Water Act overview
- Opportunities for public participation
- Citizen suit enforcement
- What makes a good case?
- Questions/Discussion

Photo courtesy of the Chesapeake Bay Program

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“Can we afford clean water? Can we afford rivers and lakes and streams and oceans which continue to make life possible on this planet? Can we afford life itself?” - Senator Muskie
Clean Water Act Goals

- Restoration of the “chemical, physical, and biological integrity of the Nation’s Waters.”
- Fishable swimmable water quality by 1983.
- Eliminate the discharge of pollutants into the navigable waters by 1985.
Clean Water Act
Permitting Framework

- Premise: discharging pollutants into waters of the U.S. is prohibited
- Establishes permitting scheme
- Civil and criminal penalties
- Public participation
- Public enforcement
Alphabet Soup

- NPDES = National Pollution Discharge Elimination System (Permit)
- WOTUS = Waters of the United States
  - Maui v. Hawaii Wildlife Fund
  - WOTUS Rule
- TMDL = Total Daily Maximum Load
- DMR = Discharge Monitoring Report
- ECHO = EPA’s “enforcement and compliance history online” database
  [https://echo.epa.gov/](https://echo.epa.gov/)
- FOIA = Freedom of Information Act
United States Congress Passed Federal Statute the Clean Water Act

U.S Environmental Protection Agency promulgates regulations to administer the statute and approves water quality standards

States set water quality standards; TMDLs; Issue and enforce permits
Prohibits the discharge of pollutants by a point source into waters of the United States without a NPDES Permit.

**Point Source**
- “Any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.”
  CWA § 502 (14)
- Does NOT include agricultural stormwater discharges and return flows from irrigated agriculture.

**Permit Areas**
- Animal Feeding Operations (AFOs)
- Industrial Wastewater
- Municipal Wastewater (sewage)
- Construction Stormwater
- MS4
NPDES Permit Types

**General Permit**
- Most facilities fall under this category
- Permit sets standard requirements for particular types of facilities
- Harder to enforce

**Individual Permit**
- Specific facility based on location and pollutant
- Usually site and/or the pollutants involved are too complicated to be covered under the general permit
“Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan or program established by the [EPA] Administrator or any State under this Act shall be provided for, encouraged, and assisted by the Administrator and the States.”
CWA § 101 (e)
Example of Permitting Process

1. Application Received; Public Notified
   - Get on Notified parties list; COVID delays

2. Permit Drafted; Informational Meeting Held Upon Request
   - Public Meeting limitations w/COVID

3. Draft Permit Released; Public Comment Accepted; Public Hearing Held Upon Request
   - Written Comments build Admin Record; public hearing changes w/COVID

4. Public Comments Considered; Final Determination and Permit Issued

5. Challenges to Final Permits
Permitting Process

Step 1 →
Receive Application
Publish Notice of Application

Step 2 →
Hold Information Meeting (if Requested)
Develop Limits and Draft Permit

Step 3 →
Publish Notice for Public Comment
Hold Public Hearing (if Requested)
Public Comments received

If NO Substantive Comments
Substantive Comments Received

Step 4 →
Permit Issued
Final Determination Published
Permit Issued

Step 5 →
Judicial Review (if Requested)
“Citizen Suit” provision

[A]ny citizen may commence a civil action on his own behalf--
(1) against any person (including (i) the United States, and (ii) any
other governmental instrumentality or agency to the extent
permitted by the eleventh amendment to the Constitution) who is
alleged to be in violation of (A) an effluent standard or limitation
under this chapter or (B) an order issued by the Administrator or a
State with respect to such a standard or limitation, or
(2) against the Administrator where there is alleged a failure of the
Administrator to perform any act or duty under this chapter which
is not discretionary with the Administrator. 33 USC § 1365(g)

Here “citizen” is defined as: a person or persons having an interest which is or may be
adversely affected.” 33 USC § 1365(g)
Types of Cases

- Challenges to the NPDES Permit (renewed every 5 years)
- Ensuring facilities are complying with permit requirements
- Ensuring facilities have a permit
Information Gathering Basics

- Essential to both Public Participation and Public Enforcement
- Right to access/review public permitting, compliance, and enforcement records

**Public Participation** information gathering supports:
  - Public comment drafting
  - Public engagement and grassroots effort
  - Ensuring public comments cover all bases for permit challenge

**Public Enforcement** information gathering supports:
  - Evidence to corroborate factual and legal claims
  - Evaluating strength of legal claims, citizen suits, and enforcement actions
Federal Resources

- ECHO https://echo.epa.gov/
  - Great starting point for specific facility research and information gathering
  - DFR and Links to Related Reports
  - States have varying levels of available info
  - Different types of permit have different levels of information, biggest discrepancy is with individual v. general permits

- EPA EJSCREEN https://www.epa.gov/ejscreen
  - Combination of demographic and environmental information that provides a score for a given location

- CDC Social Vulnerability Index
  - https://svi.cdc.gov/
State Resources

Maryland
- Wastewater Permits Interactive Search Portal
- Notices for Stormwater Associated with Construction Activity
- Permit Application Database Search

Virginia
- VPDES Permits Webpage
- Consent Orders
- Water Public Notices, Public Notice Master List

Pennsylvania
- eDMR
- Reports and Wastewater Reports

Delaware
- Department of Natural Resources and Environmental Control - Public Notices

Washington DC
- Department of Energy and Environment - Public Notices

Other States: Links to State CWA permitting agencies
FOIA and State Equivalents

Federal - FOIA Online

Maryland - Public Information Act & Online Request Form

Virginia - Freedom of Information Act & Online Request Form

Pennsylvania - Right to Know Law and Department of Environmental Protection & Online Request Form

Delaware - Freedom of Information Act & Online Request Form

Washington DC - Freedom of Information Act & Online Request Form

Spring Peeper, Photo courtesy of the Chesapeake Bay Program
What Makes a Good Case?

- No catch all formula or solution - be flexible and creative
- Three categories of records typically necessary:
  - DMRs, Compliance, Permitting
- Diligent prosecution
  - If state/federal govt are actively enforcing the same violations; opportunity may be precluded
  - Broad standard
  - Nuances re what type of Gov’t action precludes citizen suit

- Ongoing and continuous violation
  - Cannot bring a suit for “wholly past violations”
  - Must allege ongoing and continuous or substantial likelihood of ongoing and continuous in your complaint

- Standing
  - Must show Harm, Causation, Redressability
- Individual permits v. general permits
  - Enforcement problems with general permits
Questions?

How can we help you?
www.chesapeakelegal.org/help/