



Alex Basilevsky

Citizen Suits

Inadequate regulatory enforcement prompts private citizens to pursue storm water permit violators

As concerns about storm water discharges increase, many private groups and individuals are taking it upon themselves to file suit against straying facilities. Storm Water Solutions Associate Editor Raissa Rocha recently spoke with attorney Alex Basilevsky, who has represented clients with storm water concerns, about this growing trend.

Raissa Rocha: How would you describe the growing trend of lawsuits alleging National Pollutant Discharge Elimination System (NPDES) storm water permit violations?

Alex Basilevsky: Over the past several years, regulators have seen budgets cut. The result has been that while there is regulatory enforcement of the Clean Water Act's (CWA) permitting requirements, that enforcement has been spotty at best—a fact recognized by U.S. Environmental Protection Agency (EPA) Administrator Lisa P. Jackson in a 2009 memorandum.

Under the CWA, enforcement is not limited to regulators alone. The CWA provides for citizen enforcement of its provisions, assuming certain notice requirements are met. Of great interest is the fact that the provision provides for fee and cost shifting in favor of the prevailing party. And the threat of a suit is bolstered by the penalties the CWA applies—up to \$32,500 per violation per day. Though [these penalties] are paid to the government, they still represent a substantial hammer with which to force a favorable settlement.

It appears that compliance rates in the regulated community have lagged right along with enforcement. This has created an opportunity for private litigation against defendants who either have NPDES permits but are not complying with them, or who need permits but never bothered to get one.

Rocha: What are examples of lawsuits indicating this trend?

Basilevsky: The “prototypical” examples, if it can be said such a thing exists in litigation, is best represented by a series of cases in Massachusetts filed by Clean Water Action, a national environmental group, against a number of small facilities. Most of them are scrap metal recycling or junkyard facilities that lacked the requisite NPDES permit. To the extent it is discernable from the dockets, it appears that each of these cases was resolved relatively quickly.

What should be of concern to business owners is that it is relatively easy for interested parties to identify facilities that are required to have a storm water permit. It is similarly easy to determine whether a facility actually has such a permit. Discharge dates are also easy to determine from historical rainfall data. Depending on the facility in question, it may be relatively easy to identify facilities whose discharges are likely to contain contaminants, even without testing. This makes facilities lacking the requisite permit low-hanging fruit for environmental groups and plaintiffs' attorneys emboldened by the CWA's fee and cost shifting provisions.

Rocha: Where do you think this type of storm water regulatory enforcement is headed?

Basilevsky: From a regulatory standpoint (i.e., EPA or local

Department of Environmental Protection [DEP] enforcement), it is dictated to some extent by which way the political winds are blowing. In recent years, regulatory enforcement on this issue seems to have lagged, though the EPA is now making noises about increasing its enforcement efforts and spurring state DEPs to do the same. Assuming that imperative remains in place, I think we will see greater regulatory enforcement of NPDES permit requirements. This will presumably lead to higher levels of compliance.

On the other hand, the seemingly large number of potential defendants out there who are not in compliance with requirements suggests that this is fertile ground for the plaintiff's bar. If this apparent trend in citizen suit litigation continues and spreads, it will behoove those in the regulated community to bring themselves into compliance or face the prospect of private litigation. **[SWS]**

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