

Spring Meeting
May 1-3, 1996
Rick W. Jarvis
Associate Attorney

THE CLEAN WATER ACT: A CITIZEN GROUP'S SECOND FAVORITE ENVIRONMENTAL STATUTE?

A CITY ATTORNEY'S CITIZENS' SUIT SURVIVAL GUIDE

Introduction

A recent trend in Clean Water Act citizen lawsuits against municipalities might make one wonder whether this act is becoming the citizen group's second favorite environmental statute (after CEQA, naturally). The Clean Water Act authorizes citizens to sue any defendant alleged to be discharging a pollutant into a stream, a lake, the ocean, or some other surface water body in violation of the Act's requirements. Citizens can seek injunctive relief and penalties of up to \$25,000 per day per violation, as well as attorney's fees. Cities can be particularly vulnerable to lawsuits challenging discharges from their storm water drainage systems, as well as discharges from municipal sanitary sewer systems and other facilities.

While the federal Clean Water Act does not have the broad applicability of the California Environmental Quality Act ("CEQA"), it nonetheless can be applied in ways CEQA cannot. An action can be brought without the need for any "project approval," which is required as a trigger under CEQA. Actions under the Clean Water Act are not limited to any administrative record and do not require courts to defer to the factual determinations of the City Council. There is even the potential for expensive discovery (although the factual issues in typical Clean Water Act cases are generally straightforward). Finally, the potential for penalties is much more intimidating (and can lead to much more expensive settlements) than the more limited relief available under CEQA.

Further, citizens have been coming up with particularly "creative" theories for using the Clean Water Act to challenge municipal actions. At least two suits have been filed against California cities concerning compliance with relatively new storm water control requirements under the Clean Water Act, which are much different from traditional Clean Water Act requirements. Likewise, there have been cases in which citizens have threatened to bring litigation under the Clean Water Act against municipalities for violation of "State Discharge Requirements" issued pursuant to the California Water Code. However, the Clean Water Act does not appear to authorize such actions in federal court, and it is questionable whether State Discharge Requirements can even be independently enforced in state court absent exhaustion of administrative remedies before the appropriate Regional Water Quality Control Board.

While most city attorneys are familiar with the basic requirements of CEQA, relatively few understand their city's options and potential liabilities when they receive a "sixty-day notice" threatening litigation under the Act. The city attorney needs to be able to distinguish between viable causes of action which may lead to serious liability and more "novel" theories which are probably not actionable. Various strategies need to be immediately considered (such as whether to settle, or to attempt to take corrective action to "moot" the case before the lawsuit can be filed). There are also a number of traps for plaintiffs of which a city defendant may be able to take advantage (such as the technical notice requirements and a special, albeit limited, 120-day "limitations period" for filing their action after serving the 60-day notice). Even if the city attorney contracts the case to outside counsel, an understanding of the Clean Water Act is essential to the city attorney's ability to oversee the case.

This paper provides a "primer" on the citizen suit provisions of the Clean Water Act for city attorneys. The first section identifies the necessary "elements" for a cause of action under the citizen suit provisions of the Clean Water Act. The second section outlines the many defenses which may be available to cities. The paper focuses upon issues of importance to cities, and includes strategies both for avoiding Clean Water Act litigation in the first place, and for handling such litigation once it is threatened or filed.

I. The Elements for a Private Cause of Action Under the Clean Water Act

The Clean Water Act (33 U.S.C. §§ 1251, et seq.) generally prohibits the discharge of pollutants to surface waters, unless the discharge is authorized by, and in compliance with, an "NPDES permit" which, in California, is issued by the Regional Water Quality Control Board ("Regional Board") for the region in question. (See, 33 U.S.C. § 1311(a), 1342, 1362(6),(7),(12).)

The Act authorizes citizens to bring a civil action against any person "alleged to be in violation of . . . an effluent standard or limitation under [the Act]" or of a related order issued by the EPA or a state. (33 U.S.C. § 1365(a)(1).) "Effluent standard or limitation" is defined to include, basically, (a) the prohibition in section 301(a) ¹ against unpermitted discharges, or (b) a condition of an NPDES permit "which is in effect under this chapter." (33 U.S.C. § 1365(f).) ²

The prohibition in section 301(a) provides that "the discharge of any pollutant by any person shall be unlawful" unless the discharge is in compliance with specific requirements of the Act (typically codified in an NPDES permit). (33 U.S.C. § 1311(a).) As with many federal statutes, this simple and straightforward sounding prohibition is subject to certain complicated and counter-intuitive statutory definitions and nuances. For example, the broad term "discharge of any pollutant" really only means "any addition of any pollutant to navigable waters from any point source." (33 U.S.C. § 1362(12).) On the other hand (and as is discussed further below), the term "navigable waters," in turn, embraces just about any surface water body, regardless of whether it is

physically "navigable."

Thus, the "elements" of a Clean Water Act violation include:

- (1). the discharge
- (2). of a pollutant
- (3). to navigable waters
- (4). from a point source
- (5). by any person
- (6). in violation of, or without the authority of, an NPDES or other Clean Water Act permit.

(See, *Committee to Save Mokelumne River v. East Bay Municipal Util. Dist. (hereafter "Mokelumne River")*, 13 F.3d 305, 308 (9th Cir. 1993) [offering a slightly different formulation of this test].) Each of these elements is addressed further in the following sections.

A. Definition of "discharge"

The term "discharge" covers any addition of a pollutant "from the outside world" which is somehow collected and channeled by a person to a "navigable water," and may even include pollutants which would have entered the water body anyway.

A key Ninth Circuit case on this issue is *Mokelumne River, supra*, 13 F.3d 305. In that case, defendants East Bay Municipal Utilities District and the Regional Board for the San Francisco Bay Area jointly constructed a facility to intercept and treat surface runoff contaminated with "acid mine drainage" which had been draining into the Mokelumne River. Some of the polluted drainage diverted by the facility would nonetheless spill into the river, although not nearly as much as would have otherwise flowed into the river if the collection facility had not intercepted such flows. Plaintiffs sued, claiming that such discharges violated the Clean Water Act because defendants had not obtained an NPDES permit for them. Defendants countered that no NPDES permit was necessary, because they were not actually "adding" any pollutants to the Mokelumne River which would not otherwise have flowed into the river via surface runoff. In fact, the facility greatly reduced the amount of pollutants flowing into the river. Disturbingly, the Ninth Circuit rejected this defense, holding that defendants' collection and channeling of the surface runoff brought them within the ambit of the Clean Water Act. (*Id.*, at 308-309.)

In a concurring opinion, Judge Fernandez acknowledged the absurdity of the Court's holding that the facility, constructed to protect water from pollutants, would nonetheless "require a permit containing numerous onerous conditions":

"Appellants earnestly argue that the [holding] will not serve the long-term purpose of bettering the aquatic environment. They indicate that it takes no genius or epopt to see what the message will be. Do nothing! Let someone else take on the responsibility.

Let the water degrade, let the fish die, but protect your pocketbook from vast and unnecessary expenditures. ...Perhaps they are correct; I suspect they are. [¶] Nevertheless, we are not policy makers. We must simply apply the law." (*Id.*, at 310.) Other cases hold, logically enough, that there is no actual "discharge" where the pollutant in question is already in the water at the point of the alleged discharge. This issue has come up in the case of dams, where the point of discharge is a spillway or similar opening. In *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C.Cir. 1982), the court rejected plaintiffs' argument that dam-induced water quality changes caused by the impoundment and release of water constituted a "discharge" covered by the Act. In *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988), the court rejected plaintiffs' argument that the destruction of aquatic life by a dam's turbines and the release downstream of the remains were a "discharge." The Ninth Circuit in *Mokelumne River* distinguished these cases on the ground that the alleged pollutants in those cases originated within the "navigable water" in question and thus did not come "from the outside world." (*Mokelumne River, supra*, 13 F.3d at 308.)

B. Definition of "pollutant"

The Clean Water Act broadly defines the term "pollutant" to include:

"dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." (33 U.S.C. § 1362(6).)³

Under this broad definition, about the only substance which has been held not to be a pollutant is pure water itself. (*Bettis v. Town of Ontario, N.Y.*, 800 F. Supp. 1113, 1119 (W.D.N.Y. 1992) [holding that a town's diversion of a stream did not, by itself, constitute a violation of the Clean Water Act].)

C. Definition of "navigable water"

The term "navigable waters" broadly includes the ocean and all streams (intermittent or perennial), rivers, lakes, bays, canals, and other surface water bodies (including wetlands adjacent to such bodies), whether actually navigable or not. The term is defined to "mean[] the waters of the United States, including the territorial seas." (33 U.S.C. § 1362(7); see also, 40 C.F.R. § 230.3(s)(3).)

"In adopting this definition of 'navigable waters,' Congress evidently intended . . . to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." (*United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133, 106 S.Ct. 455 (1985) [upholding regulatory definition of the term as including wetlands adjacent to other water bodies].)

The term "navigable water" has been held not to include artificial ponds. (*Village of*

Oconomowoc Lake v. Dayton Hudson Corporation, 24 F.3d 962, 965 (7th Cir. 1994).)

Importantly, the term "navigable waters" also has been held not to include groundwater. (*Id.*, at 965-966; *Exxon Corp. v. Train*, 554 F.2d 1310, 1325-1329 (5th Cir. 1977); *Town of Norfolk v. Corps of Engineers*, 968 F.2d 1438, 1450 (1st Cir. 1992).) Thus, allegations of groundwater contamination, by themselves, should not be found sufficient to state a cause of action under the Clean Water Act.

However, some district courts have held or suggested that discharges into groundwater are actionable under the Clean Water Act where such discharges indirectly impact navigable waters due to a "hydrological connection" with a nearby surface water body (i.e., where the groundwater migrates into a navigable water). (*Washington Wilderness Coalition v. Hecla Mining Co.*, 870 F. Supp. 983, 989-991 [discussing cases and holding that groundwater pollution is actionable under the Clean Water Act where pollutants can be traced from their source to surface waters]; *McClellan Ecological Seepage Situation ("MESS") v. Weinberger*, 707 F. Supp. 1182, 1196 (E.D. Cal. 1988), reversed on other grounds, *MESS v. Perry*, 47 F.3d 325 (9th Cir. 1995); *Sierra Club v. Colorado Refining Co.*, 838 F. Supp. 1428 (D.Colo. 1993).)

The persuasiveness of such cases is debatable. One who is not directly discharging into a surface water body (or at least into a drainage facility which one should know is discharging into a surface water body) would not be on any notice of the need for an NPDES permit, in the absence of extensive groundwater monitoring. Nor, for that matter, would the EPA or the Regional Board, and the EPA has issued no regulations directly governing the issuance of NPDES permits for discharges into the ground which may impact groundwater (although the EPA has suggested that at least some of its regulations apply to discharges to groundwater hydrologically connected to a surface water (55 Fed. Reg. 47990, 47997 (Nov. 16, 1990)). It does not seem appropriate to subject a discharger to the threat of severe liabilities under the Clean Water Act (not to mention the expense of litigation itself) for discharges which Congress has not chosen to directly regulate and for which Congress has not required the establishment of any control standards or other guidelines.

It should be noted that, under California law, the Regional Boards are far more aggressive in regulating groundwater pollution. Activities which may impact groundwater are generally subject to permits ("waste discharge requirements") issued by the Regional Board. At least one citizens group has threatened cities with Clean Water Act lawsuits for alleged violations of waste discharge requirements which have not been incorporated into any NPDES permit. However, as is discussed in Section II(D), *infra*, it is doubtful that a federal court would find such allegations actionable.

D. Definition of "point source"

The "point source" requirement represents a significant limitation on the scope of the Clean Water Act's discharge limitations. Much (perhaps a majority) of the pollutants in

our nation's waters come from "non-point sources" (such as surface runoff), yet these pollutants have not been nearly as regulated as pollutants discharged by a particular person or entity. (See, *Oregon Natural Resources Council v. U.S. Forest Service*, 834 F.2d 842, 849-850 (9th Cir. 1987).)

"Point source" is defined as

"any discernable, 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." (33 U.S.C. § 1362(14)).⁴

The *Mokelumne River* case (13 F.3d 305), discussed *supra*, illustrates the distinction between "point sources" and "nonpoint sources." The acid mine pollutants which storm water and other runoff had been carrying into the Mokelumne River were not originally from a "point source," as the flows had not been collected or channeled in any way. (See, *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1372-1374 (4th Cir. 1975) [unchannelled rainfall runoff is not a point source covered by the Clean Water Act].) Despite the severity of such pollution, the Clean Water Act provided no remedy for this pollution. However, as soon as the Regional Board and East Bay Municipal Utilities District started diverting the flows into a treatment facility, any spillage of this same substance from their facility was deemed to be from a "point source" for which they were required to obtain an NPDES permit. Apparently, if the Regional Board and the East Bay Municipal Utilities District to dismantle their diversion system and let the polluted runoff resume flowing into the river unabated, the flows would once again be exempt from the discharge limits in the Clean Water Act, as there would be no individual who could be held responsible for the flows.

E. Definition of "by any person"

The term "person" is broadly defined to include any "individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." (33 U.S.C. § 1362(5).)

An important factor for cities, in particular, to keep in mind when threatened with Clean Water Act litigation is whether they are, in fact, the "person" who actually discharged the pollutant in question. For example, one city has been sued for discharges from storm drain lines, which are not operated by the City, and, while within the city limits, actually belong to the State (they are part of the state highway system) and to private persons. A city may be the most obvious target, but it might not be the correct one.

F. Permitted Discharges

A discharge meeting all of the above elements is unlawful unless it is authorized by, and in compliance with, an NPDES permit issued pursuant to section 402 (33 U.S.C. §

1342) (or another Clean Water Act permit, as discussed in section I(F)(4), *supra*). (See, *Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1374 (D.C. Cir. 1977) ["Congress intended the NPDES permit to be the only means by which a discharger from a point source may escape the total prohibition of § 301(a)."] Conversely, if a discharge does comply with an NPDES permit, it generally must be deemed to be in compliance with the Clean Water Act for the purposes of any citizen's suit. (33 U.S.C. § 1342(k).)⁵

"The purpose of section 402(k) seems to be to insulate permit holders from changes in various regulations during the period of a permit and to relieve them of having to litigate in an enforcement action the question whether their permits are sufficiently strict." (*E.I. du Pont de Nemours & Co. v. Train*, 930 U.S. 112, 138, n. 28, 97 S.Ct. 965, 51 L.Ed.2d 204 (1977).)

While at least one District Court has held that the interpretation of an NPDES permit presents an "issue of law" rather than one of fact (*California Public Interest Research Group v. Shell Oil Co.*, 840 F. Supp. 712, 716 (N.D. Cal. 1993), the Ninth Circuit has recently held that the terms of an NPDES permit are to be interpreted in the same manner as any contract or other legal document, and that, where ambiguous on its face, such interpretation raises issues of fact. (*Northwest Environmental Advocates v. City of Portland*, 56 F.3d 979, 982 (9th Cir. 1995).)

1. Contents of typical NPDES permits

Typical NPDES permits contain "effluent limitations" and reporting and monitoring requirements to ensure that these limitations are met. Traditional effluent limitations are numerical in form (e.g. "Discharger shall discharge no more than X quantity of pollutant Y"). However, such effluent limitations may also merely include strategies to control pollutants where numerical limitations are not feasible. (See, 33 U.S.C. § 1312(a) [defining "effluent limitation" as "including alternative effluent control strategies"]; *Natural Resources Defense Council v. Costle*, 568 F.2d 1369, 1379-1380 (D.C. Cir. 1977).)

NPDES permits are supposed to be designed to ensure that discharges comply with numerous requirements of the Clean Water Act, specifically sections 301, 302, 306, 307, 308, and 403 (33 U.S.C. §§ 1311, 1312, 1316, 1318, 1343). (See, 33 U.S.C. § 1342(a)(1).) These sections generally require implementation of measures which will ensure attainment of state water quality standards adopted by each state pursuant to section 303 (33 U.S.C. § 1313). Such measures are to include (1) "application of the best practicable control technology currently available," (2) secondary treatment, and (3) "any more stringent limitation" necessary to meet state water quality standards. (See, 33 U.S.C. 1311(b)(1); *Oregon Natural Resources Council v. U.S. Forest Service*, 834 F.2d 842, 849-850 (9th Cir. 1987).) The expectation is that, with advances in technology, greater reductions will become feasible over time.

In 1987, Congress amended the Clean Water Act to require states to identify waters for which water quality standards for toxic pollutants were not being met, and to develop "individual control strategies" to attain such standards within a three year period. (33 U.S.C. § 1314(l).) Needless to say, to date, there are still many bodies of water for which such standards have not been met.

Fortunately for states, the Clean Water Act's citizen suit provision is limited to enforcing specific effluent standards, and citizens are not authorized to sue states to attain overall water quality objectives. (See, 33 U.S.C. § 1365(a)(1))

2. Enforceability of water quality standards against permittees

However, a serious problem arises for NPDES permittees (including many cities) when the state includes in the NPDES permit, in addition to specific effluent limitations, an overall requirement that the permittee's discharges shall not cause (or perhaps even contribute to) a violation of the state's water quality objectives. This has been a favorite trick of the California Regional Boards. Such a standard subjects the permittee to a potential lawsuit every time the waters into which it discharges violate water quality standards. An individual permittee usually has no control over the general quality of a "navigable water" (particularly a river or stream which flows through many jurisdictions). Water quality standards are dependent upon many factors, including weather and the discharges of many different persons. The permittee often should ultimately prevail in litigation, as plaintiffs would have great difficulty showing that the permittee's discharges (and not other factors) were the cause of the water quality violation. Nonetheless, the threat of such expensive litigation (not to mention the penalties of \$25,000 per day per violation) will often be enough to coerce the permittee into agreeing to settlement offers which arguably amount to extortion.

Unfortunately, in a troubling case, the Ninth Circuit recently ruled that citizens can sue to enforce generalized requirements in NPDES permits which prohibit causing violations of water quality standards, even if the permittee complies with all of the specific effluent limitations in the permit. (*Northwest Environmental Advocates v. City of Portland*, 56 F.3d 979 (9th Cir. 1995).) The Ninth Circuit recently rejected rehearing en banc (over a strong dissenting opinion signed by four justices), and the City of Portland is now petitioning for writ of certiorari by the United States Supreme Court. Numerous California cities, at the urging of the California League of Cities, are filing an amicus brief in support of this petition.

Notwithstanding the Ninth Circuit's decision in *Northwest Environmental Advocates*, other decisions by both the Ninth Circuit and the U.S. Supreme Court have suggested that water quality standards are not directly enforceable against individual permittees, but rather that they must first be "translated" into specific permit conditions.⁶

PRACTICE TIP:

The most important thing a California city attorney can do to safeguard against a difficult Clean Water Act lawsuit before it is threatened is to prevent the Regional Board from including compliance with water quality standards as a requirement in a city's NPDES permit (e.g. for wastewater or storm water discharges), or to at least include language severely limiting such a requirement. If such a requirement is not specified in the permit, then it clearly would not be enforceable via citizen suit. Unfortunately, the staff of at least some Regional Boards (e.g., in San Francisco) feel very strongly about including such a requirement. As a compromise, cities within Santa Clara County were recently successful in convincing the Regional Board to specify in their NPDES storm water permit that compliance with the effluent limitations was to be deemed compliance with the permit, and that violation of water quality standards would only serve to trigger a reopening and modification of the permit by the Regional Board, and not direct enforcement action.

3. Municipal Storm water NPDES Permits

Regulation of runoff into storm drains raises novel problems not associated with most NPDES permits. Most NPDES permits are issued to parties who actually generate or process the polluting discharge in question and who thus can control with relative precision the amount and constituents of their discharges. (See, 33 U.S.C. §§ 1311(b), 1342(a).) A city, however, has no control over how much rain falls and only limited control over the amount of pollutants within its boundaries which flowing storm water may pick up. It also has only limited control over others who may unlawfully or inadvertently dump pollutants into a storm drain inlet without the city's knowledge. Nonetheless, by virtue of collecting and channeling such runoff, a city assumes responsibility under the Clean Water Act for such pollutants. (See, *Committee to Save Mokelumne River v. East Bay Municipal Utilities Dist.*, 13 F.3d 305 (9th Cir. 1993); *Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1377-1379 (D.C. Cir. 1977).)

In 1987, after years of failed attempts by the EPA to adopt regulations for storm water under the Clean Water Act, Congress enacted section 402(p), establishing special standards for municipal storm water NPDES permits. (33 U.S.C. § 1342(p); see, *Natural Resources Defense Council v. U.S. E.P.A.*, 966 F.2d 1292, 1296-1297 (9th Cir. 1992) [discussing history of federal attempts to regulate storm water].)

Section 402(p)'s standards for municipal storm water control are less strict than most Clean Water Act standards. (See, *Natural Resources Defense Council v. U.S. E.P.A.*, 966 F.2d 1292, 1308 (9th Cir. 1992).) In lieu of specific numerical requirements, section 402(p) merely requires that municipal storm water NPDES permits include

"controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." (33 U.S.C. §

1342(p)(3)(B)(iii).)⁷

Section 402(p) also prohibits "non-storm water discharges into the storm sewers" (33 U.S.C. § 1342(p)(3)(B)(ii)), but EPA's regulations allow for a number of exceptions for certain categories of non-storm water, such as diverted stream flows, landscape irrigation, rising ground waters, foundation drains, lawn watering, car washing, flows from fire fighting, and others. (40 C.F.R. § 122.26(d)(2)(iv)(B)(1).)

PRACTICE TIP: In order to benefit from these exceptions, they must be specifically included in the city's storm water NPDES permit. City staff and legal counsel thus should review storm water permits being issued by the Regional Board to make sure they can take advantage of these exceptions.

4. Other Clean Water Act permits

In addition to NPDES permits, the Clean Water Act provides for other types of permits authorizing discharges. For example, section 404 authorizes the U.S. Army Corps of Engineers to issue "fill" permits for the filling of navigable waters and wetlands (which is generally done for new construction purposes). (33 U.S.C. § 1344.) The citizen suit provision does not appear to authorize lawsuits challenging a permittee's failure to comply with a section 404 fill permit. (See, 33 U.S.C. § 1365(a)(1), (f).)

Further, under section 401, an applicant for a federal license or permit which may result in discharges into navigable waters must obtain a "certification" from the state in which the discharge originates that such discharge will comply with the requirements of the Clean Water Act. (33 U.S.C. § 1341.) Such certification serves a similar function as an NPDES permit. Section 401 gives states broad authority to impose restrictions on federal projects in the form of conditions to such certification, in cases where the state might otherwise be federally preempted from acting. (See, *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, ___ U.S. ___, 114 S.Ct. 1900 (1994) [section 401 authorizes states to impose minimum flow requirements on a federally-approved dam project, where the state found such requirements necessary to maintain its water quality requirements].)

II. Defenses to a Clean Water Act Lawsuit

Both statutes and cases have provided dischargers with numerous defenses and limitations to Clean Water Act lawsuits. The strengths and weaknesses of each are discussed in the sections that follow.

A. The "Gwaltney" defense: Citizens cannot sue for violations which solely occurred in the past and are not ongoing at the time suit is filed

1. In General

The strongest defense to a Clean Water Act lawsuit is that articulated by the Supreme Court in *Gwaltney of Smithfield v. Chesapeake Bay Foundation*, 484 U.S. 49, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987). In this case, the Supreme Court held that a citizen may not bring suit under the Clean Water Act for a "wholly past" violation of the Clean Water Act, i.e., a violation which is not presently ongoing (at least as of the time of the filing of the complaint), whether on a "continuous or intermittent" basis. (*Id.*, 484 U.S. at 64 [holding that section 505 "does not permit citizen suits for wholly past violations," but rather only "confers jurisdiction over citizen suits when the citizen-plaintiffs make a good-faith allegation of continuous or intermittent violation"].) ⁸. As the Court explained, "the interest of the citizen-plaintiff is primarily forward-looking. [¶]...the harm sought to be addressed by the citizen suit lies in the present or the future, not in the past."

Thus, one who is served with a "60-day notice" (discussed in Section II(B), *infra*) threatening a Clean Water Act lawsuit will have at least a short opportunity to take steps to render the challenge moot. (See, *id.*, at 60 ["[T]he purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and thus render unnecessary a citizen suit."].)

A citizen plaintiff can prove an ongoing violation either:

"(1) by proving violations that continue on or after the date the complaint is filed, or (2) by adducing evidence from which a reasonable trier of fact could find a continuing likelihood of recurrence in intermittent or sporadic violations. Intermittent or sporadic violations do not ceased to be ongoing until the date when there is no real likelihood of repetition." (*Chesapeake Bay Foundation v. Gwaltney of Smithfield*, 844 F.2d 170, 171-172 (4th Cir. 1988); on remand from, 484 U.S. 49 (1987); quoted with approval in, *Sierra Club v. Union Oil Co.*, 853 F.2d 667, 671 (9th Cir. 1988).)

Factors for a court to consider include:

"whether remedial actions were taken to cure violations, the ex ante probability that such remedial measures would be effective, and any other evidence presented during the proceedings that bears on whether the risk of defendant's continued violation had been completely eradicated when citizen-plaintiffs filed suit." (*Ibid.*)

2. Two Approaches to the Gwaltney Defense

Strategically, there are two approaches a city can take to moot a Clean Water Act lawsuit. First, obviously, a city can cease the allegedly unlawful activity. Second, a city can seek an NPDES permit (or an amendment to an existing NPDES permit) authorizing the activity.

As to the first approach, courts typically are skeptical of "defendants who seek to evade sanction by predictable protestations of repentance and reform" and require such a defendant to "demonstrate that it is absolutely clear that the allegedly wrongful behavior

could not reasonably be expected to recur." (*Citations omitted; id.*, at 66-67.)

Courts tend to be more receptive to *Gwaltney* defenses predicated on the modification of an NPDES permit relaxing discharge limitations:

"[I]t would appear that where the relevant governmental authorities have relaxed the NPDES standards, a plaintiff's claims for violation of the superseded permit do indeed become moot.... [T]he relaxation of permit limitations is, in effect, a statement by the government agencies that, to an extent, conduct that was impermissible before is now permissible.... [¶]...This is not a situation in which the defendant is merely pleading 'repentance and reform.' [citing *Gwaltney*]." (*Massachusetts Public Interest Research Group v. ICI Americas Inc.*, 777 F.Supp. 1032, 1035 (D.Mass. 1991).)

3.Limitation to the *Gwaltney* Defense: Only Applies to Corrective Action Taken Prior to Filing Suit?

The question often arises whether *Gwaltney* applies if corrective action does not happen until after the lawsuit is filed. The vast majority of cases have held that, while post-complaint corrective action will moot a claim for injunctive relief, a citizen-plaintiff may still seek penalties for any violation which was ongoing at the time the complaint was filed, even if it is subsequently cured prior to judgment. (*Natural Resources Defense Counsel v. Texaco*, 2 F.3d 493, 502-503 (3rd Cir. 1993); *Atlantic States Legal Foundation, Inc. v. Pan American Tanning Corp.*, 993 F.2d 1017, 1018 (2nd Cir. 1993); *Atlantic States Legal Foundation, Inc. v. Tyson Foods Inc.*, 897 F.2d 1128, 1135 (11th Cir. 1990) ["[T]he mooting of injunctive relief does not moot the request for civil penalties as long as such penalties were rightfully sought at the time suit was filed."]; *Chesapeake Bay Foundation v. Gwaltney of Smithfield*, 890 F.2d 690, 696 (4th Cir. 1989); *see also, Carr v. Alta Verde Industries*, 931 F.2d 1055, 1065, n. 9 (5th Cir. 1991) [leaving question undecided].)

However, one district court has specifically held that the issuance of a new permit with relaxed standards after the filing of the complaint does moot claims that the permittee did not comply with the previous, more burdensome standards. (*Massachusetts Public Interest Research Group v. ICI Americas Inc.*, 777 F. Supp. 1032, 1034-1035 (D. Mass. 1991).) The court explained that such a rule would still provide adequate protection for plaintiffs, as "a defendant, faced with a citizen suit under the [Clean Water Act], would have substantial difficulty in obtaining a last-minute relaxation of its permit terms from the government agencies, so as to render such a scenario highly unlikely." (*Id.*, at 1035.) Another district court reached a similar holding, but without directly addressing the issue. (*McClellan Ecological Seepage Situation v. Cheney*, 763 F. Supp. 431, 441-443, n. 8 (E.D. Cal. 1989); vacated and remanded on other grounds, *McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325 (9th Cir. 1995) [finding declaratory relief action moot because a more recent NPDES permit, issued after the complaint was filed, expressly authorized the discharge in question -- the fact that the NPDES permit was issued after the complaint was filed is not disclosed in this opinion, but is

disclosed in a prior published opinion in the same case (see, *McClellan Ecological Seepage Situation v. Weinberger*, 707 F. Supp. 1182, 1185, 1193 (E.D. Cal. 1988)).]

Thus, there is some lower-court authority for the proposition that the post-complaint adoption of new or revised NPDES permit imposing relaxed standards can moot a complaint for penalties as well as injunctive relief. However, there are a number of cases holding that Gwaltney does not provide a defense if the violation is not terminated until after the complaint is filed. (Fortunately, none of these cases specifically addresses a post-complaint amendment to an NPDES permit, so they are distinguishable on this ground from the more favorable district court decision in *Massachusetts Public Interest Research Group v. ICI Americas Inc.*, *supra*.)

B. The 60-Day Notice Requirement

1. In General

At least 60 days before filing suit under the Clean Water Act, a plaintiff must give notice of the alleged violations to the violator, the state, and the EPA. (33 U.S.C. § 1365(b).) The EPA's regulations require that the notice

"shall include sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the person giving notice." (40 C.F.R. § 135.3(a).)

The court lacks subject matter jurisdiction over any Clean Water Act lawsuit filed in violation of these notice requirements. (*Washington Trout v. McCain Foods, Inc.*, 45 F.3d 1351, 1353-1355 (9th Cir. 1995); discussing, *Hallstrom v. Tillamook County*, 493 U.S. 20, 110 S.Ct. 304, 107 L.Ed.2d 237 (1989) [addressing analogous notice requirement under another statute].) The 60-day notice is "a mandatory, not optional, condition precedent for suit." (*Hallstrom, supra*, 493 U.S. at 26.) "[T]he notice requirement under the regulations [is] to be strictly construed." (*Washington Trout, supra*, 45 F.3d at 1354.)

The 60-day notice requirement (along with other citizen suit provisions in section 505) is patterned after a similar requirement in the Clean Air Act (42 U.S.C. § 7604). Indeed, many of the federal citizen suit statutes, particularly in the environmental law area, are patterned after one another, and cases construing a notice requirement in one statute can be helpful in interpreting an analogous requirement in another statute. (See, *Hallstrom, supra*, 495 U.S. at 23, n. 1; *Washington Trout, supra*, 45 F.3d at 1353, n. 3.)

2. Three Purposes of the Notice Requirement

Courts have identified three purposes of the notice requirement. First, and most

importantly, the Supreme Court explained that "the purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and thus . . . render unnecessary a citizen suit." (*Gwaltney I, supra*, 484 U.S. at 60.) A second purpose of the notice requirement (identified by the Ninth Circuit) "is to allow the parties time to resolve their conflict in a nonadversarial time period. Once the suit is filed, positions harden and compromise is less likely." (*Washington Trout, supra*, 45 F.3d at 1354.) Finally, a third purpose of the notice requirement is to give the State and the EPA notice of the alleged wrongdoing, allowing them the opportunity to commence action themselves, avoiding any need to involve the court. (*Gwaltney I, supra*, 484 U.S. at 59-60; *Washington Trout, supra*, 45 F.3d at 1354.) As is discussed further in section II(C), *infra*, courts have often stressed that the citizen suit is only intended to serve a "supplementary role" to official action by state and federal public agencies. (*Gwaltney I, supra*, 484 U.S. at 60.)

3. Grounds for Challenging the Adequacy of a 60-Day Notice

Oftentimes, disgruntled citizens serve 60-day notice letters containing only generalized allegations of wrongdoing without specifically identifying what activity constitutes the violation or the specific dates on which the violation occurred. A strong argument can be made that such a notice is insufficient to allow a citizen-plaintiff entry into court to use discovery to conduct a "fishing expedition" for more specific grounds.

A useful articulation of this test is provided by the court in *Public Interest Research Group of New Jersey, Inc. v. Hercules, Inc.*, 50 F.3d 1239, 1249 (3rd Cir. 1995). That court explained that, in assessing the adequacy of a plaintiff's 60-day notice, a court

"must consider whether their notice letter served the purpose that Congress intended: To provide the recipient with effective, as well as timely notice....[T]he content of the notice must be adequate for the recipients of the notice to identify the basis for the citizen's complaint. [¶]...In deciding whether to initiate an enforcement action, the EPA and the state must be provided with enough information to enable them intelligently to decide whether to do so. At the same time, the alleged violator must be provided with enough information to be able to bring itself into compliance." (*Ibid.*)

Unfortunately, there is little published caselaw addressing the substantive adequacy of such notices. Courts have rejected notices on such technical grounds as failure to serve the state and the EPA (*Hallstrom, supra*, 493 U.S. 20) and failure to identify the plaintiffs (*Washington Trout, supra*, 45 F.3d 1351).

Courts have split on whether the notice must specifically identify every violation, or whether the identification of a particular violation will be sufficient to challenge related violations in the complaint. In *Atlantic States Legal Foundation, Inc. v. United Musical Instruments, U.S.A., Inc.*, 61 F.3d 473, 478 (6th Cir. 1995), the court held that a notice identifying some violations of a particular filing requirement did not cover an identical violation occurring later in time. Similarly, in *California Sportfishing Protection Alliance*

v. City of West Sacramento, 905 F.2d 792, 796-800 (E.D. Cal. 1995), the Court held that notice of an effluent violation is not sufficient to provide notice of a related monitoring violation.

However, the *Hercules* court took a less demanding approach. In that case, while the notice had identified many specific permit violations, the complaint alleged even more. Many of these added violations were of the same type as those alleged in the notice, but either occurred on different days or involved violations closely related to those identified in the notice. The court upheld the adequacy of the notice as to most of the added allegations. The court emphasized the fact that the regulation quoted above only requires that the notice include sufficient information to allow the recipient to identify the particulars of the violation and does not require the notice itself to contain all such particulars. (*Hercules, supra*, 50 F.3d at 1247-1248.)

The *Hercules* court thus upheld two types of Clean Water Act allegations against a challenge that they were not specifically included in the 60-day notice:

1. A violation of the same type (i.e. same pollutant parameter, same outfall, same time period) as others listed in the notice letter, whether the violation occurred before or after service of the notice letter (*Id.*, at 1248, 1250-1251, 1253);⁹

2. A violation "directly related" to a violation included in the notice letter.

The court deemed violations of monitoring, reporting, and record-keeping requirements for a particular pollutant parameter to be "directly related" to the actual discharge limitations for that pollutant. Thus, a 60-day notice of a violation of one of these requirements for a particular pollutant would encompass violations of all such requirements for said pollutant. (*Id.*, at 1248, 1251-1252.)¹⁰

Other courts have split on whether to follow this holding. (Compare, *California Sportfishing Protection Alliance v. City of West Sacramento*, *supra*, 905 F. Supp. at 799 [rejecting *Hercules*]; *Friends of the Earth, Inc. v. Chevron Chemical Co.*, 900 F. Supp. 67, 77 (E.D.Tex. 1995) [following *Hercules*].)

4. Strengths and Limitations to Using the 60-Day Notice Requirement as a Defense

By itself, the 60-day notice requirement is of limited use as a procedural defense. If a court finds a notice to be inadequate, the plaintiff can simply send a new notice and file a new complaint 60 days later based upon it. In some cases, such a defense may serve to delay or discourage a plaintiff, or to cut off a lawsuit before extensive discovery is conducted. In general, however, notice deficiencies often can be easily remedied.

However, the 60-day notice requirement can provide a much stronger defense in conjunction with *Gwaltney*. As already discussed, most courts have held that the *Gwaltney* defense does not bar the pursuit of civil penalties for violations which were

ongoing at the time the complaint was filed, even if corrective action is later taken to moot any claim for injunctive relief. However, if the notice was deficient as to a particular violation, and the violation is later remedied after the complaint is filed, a strong argument can be made that *Gwaltney* would bar any penalties for said violation. As already mentioned, the Supreme Court in *Gwaltney* explained that one of the purposes of the notice requirement "is to give [the alleged violator] an opportunity to bring itself into complete compliance with the Act and thus render unnecessary a citizen suit." (*Gwaltney I*, 585 U.S. at 60.) If the notice did not adequately inform the defendant of plaintiff's grounds for the suit, the defendant then was deprived of this opportunity and should still be entitled to an opportunity to render moot a penalty action once the defendant finally learns what it is that plaintiff is, in fact, contesting. This approach should be particularly useful when a plaintiff merely files a generalized complaint with the intent of using discovery to conduct a fishing expedition for actual violations.

C. Prior penalty action by the EPA or the State (the Regional Board) can prevent a citizens' suit for civil penalties

The Clean Water Act prohibits citizens from bringing an action against Clean Water Act violations for which either the EPA or the Regional Board has already assessed penalties, or has initiated administrative proceedings to do so. Section 309(g)(6)(A) of the Act provides:

"[A]ny violation—

"(i) with respect to which the [EPA] has commenced and is diligently prosecuting an action under this subsection,

"(ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, or

"(iii) for which the Administrator, the Secretary, or the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be,

"shall not be the subject of a civil penalty action under subsection (d) of this section or section 1321(b) of this title or section 1365 of this title." (33 U.S.C. § 1319(g)(6)(A).)¹¹

By its terms, this defense appears only to apply to actions by the EPA or the state for administrative penalties, and not when the EPA or the state merely issues a compliance order or even seeks criminal penalties. The reference to "this subsection" is, of course, subsection (g) of section 1319, entitled "administrative penalties." Section 1319 provides for other means of enforcement, including compliance orders (subsection (a)), civil actions for an injunctive relief (subsection (b)), and criminal penalties (subsection (c)). The Ninth Circuit has held that the issuance of a compliance order by the EPA

pursuant to subsection (a) does not bar a citizen suit for civil penalties. (*Washington Public Interest Research Group v. Pendleton Woolen Mills*, 11 F.3d 883, 885-887 (9th Cir. 1993).)

The Ninth Circuit is soon expected to issue a decision on the extent to which "Cease and Desist Orders" ("CDOs") issued by the Regional Board (pursuant to section 13301 of the California Water Code) is a "comparable State law" which would bar a citizen suit. The Ninth Circuit will be reviewing the decision of the District Court in *Citizens for a Better Environment—California v. Union Oil Co. of California*, 861 F. Supp. 861, 904-913 (N.D.Cal. 1994), which had held that such CDOs do not bar citizen's suit, because section 13301 does not authorize penalties. In that case, pursuant to a settlement agreement with the Regional Board, the defendant oil company had stipulated to the issuance of a CDO and payment of \$2 million to compensate for certain NPDES permit violations. Placing labels over substance, the District Court held that citizens could sue for penalties over the same violations, because the Regional Board did not formally initiate an action for administrative penalties (pursuant to section 13385 of the Water Code) and because the parties did not officially label the \$2 million payment a "penalty." This holding conflicts with other decisions holding that state enforcement actions can be "comparable" even if they do not seek penalties. (See, *North and South Rivers Watershed Assn. v. Scituate*, 949 F.2d 552 (1st Cir. 1991); *Arkansas Wildlife Federation v. ICI Americas, Inc.*, 29 F.3d 376 (8th Cir. 1994).) The League of California Cities has sponsored the filing of an amicus brief with the Ninth Circuit seeking the reversal of this decision. The matter has been fully briefed, and the Ninth Circuit has scheduled oral argument for early April.

In order to bar a citizen suit, the administrative penalty action must be initiated before service of the 60-day notice or the filing of the complaint. (33 U.S.C. § 1319(g)(6)(B).) Service of the 60-day notice gives the plaintiff an 120-day window in which to file a civil action, regardless of whether the EPA or the State has initiated an administrative action pursuant to section 1319(g) or a comparable state law. However, if the complaint is not filed within this 120-day window, and the Regional Board or the EPA initiates (and diligently pursues) such an action in the meantime, the complaint should be found time-barred.

D.Actions beyond the scope of the Clean Water Act

An alleged Clean Water Act violation should only be found actionable if it meets all of the elements of a cause of action set forth in section I, *supra*. If it does not, plaintiffs should not be allowed to pursue such a claim in federal court.

In some instances, plaintiffs have threatened Clean Water Act litigation against municipalities for allegedly violating "State Discharge Requirements" issued by a Regional Board under California law. Except in cases where these State Discharge Requirements also function as an NPDES Permit, such alleged violations should not be found actionable.

Under California law, the Regional Board regulates "discharges," (including discharges outside the scope of the Clean Water Act) through its State Discharge Requirements pursuant to section 13260 *et seq.* of the California Water Code. California law is far broader than the Clean Water Act in its regulation of water quality. However, unlike the Clean Water Act, California law does not authorize citizen suits to enforce the Regional Board's regulatory requirements. Although there are no California cases on this issue, citizens should be found limited to seeking administrative redress from the Regional Board itself for violation of a Regional Board's requirements. The Water Code provides for administrative remedies before the Regional Board, an right of appeal to the State Water Quality Control Board, and (only then) judicial review of the State Board's decision. (Water Code, §§ 13263(e), 13320, 13323-13325, 13330.)¹²

Where the Regional Board includes a requirement in an NPDES permit which is outside the scope of the Clean Water Act, such a requirement should not be found enforceable in federal court. Section 505, by its plain terms, only authorizes enforcement of conditions of NPDES permits "which [are] in effect under this chapter." (33 U.S.C. § 1365(f)(6).) Likewise, section 309(d) only authorizes civil penalties against persons who violate certain sections of the Clean Water Act or "any [NPDES] permit condition or limitation implementing any of such sections." (Emphasis added; 33 U.S.C. § 1319(d); see also, § 1365(a) [cross referencing § 1319(d)].) EPA's regulations provide: "If an approved State [NPDES] program has greater scope of coverage than required by Federal law the additional coverage is not part of the Federally approved program." (Emphasis added; 40 C.F.R. § 123.1(i)(2).) Citing to these regulations, the Second Circuit has specifically held that state-imposed NPDES permit requirements "which mandate a greater scope of coverage than that required by the federal CWA and its implementing regulations are not enforceable through a citizen suit under 33 U.S.C. § 1365." (*Emphasis added; Atlantic States Legal Foundation v. Eastman Kodak Co.*, 12 F.3d 353, 359 (2nd Cir. 1993).)

Unfortunately, notwithstanding all of this authority to the contrary (and without even acknowledging such contrary authority), the Ninth Circuit recently suggested that "[t]he plain language of CWA § 505 authorizes citizens to enforce all permit conditions." (*Northwest Environmental Advocates v. City of Portland*, *supra*, 56 F.3d at 985.) In support of this assertion, the Ninth Circuit quoted a portion of section 505(f)(6), which authorizes citizens to sue to enforce "a permit or condition thereof..." but overlooked the limiting language following that authorization ("which is in effect under this chapter"). However, this statement is dicta, since the Ninth Circuit held that the permit condition at issue in that case (prohibiting discharges which cause a violation of water quality standards) was within the scope of the Clean Water Act. As already noted, the City of Portland is petitioning the Supreme Court for certiorari review of this decision, and the League of California Cities is sponsoring an amicus brief in support of the petition.

Conclusion

At least some citizen groups have been developing an increasing interest in using the Clean Water Act as a vehicle to challenge municipal action. Legal actions presenting expansive interpretations of the Act have been both threatened and filed. When faced with such an action, a city attorney should scrutinize whether these often novel theories can clear all the hurdles necessary to state a legitimate cause of action under the Clean Water Act. It is hoped that the information in this paper will provide useful guidance for making such an assessment.

¹ For those who are not especially familiar with federal statutes, the Clean Water Act's sections are subject to two different sets of numbers, either of which may be used by any given court. For example, *Section 301* of the Clean Water Act is codified at 33 U.S.C. § 1311.

² Of course, the actual statutory definition of "effluent standard or limitation" is more complicated than that, including numerous subparts, but this summary really catches the essence of it. Basically, if someone discharges without an NPDES permit, they are in violation of the Act. Conversely, if someone has an NPDES permit, the only issue is whether the person is complying with the permit -- if so, the person is generally deemed to be in compliance with the Act. (See, 33 U.S.C. § 1342(k).)

³ The definition includes narrow exceptions for "sewage from vessels" (which are otherwise regulated under 33 U.S.C. § 1322) and "water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well," where approved by the State. (33 U.S.C. § 1362(6).)

⁴ The definition also includes a special exception for "agricultural storm water discharges and return flows from irrigated agriculture." (*Ibid.*)

⁵ Section 402(k) includes exceptions for failure to comply with regulations of certain toxic pollutants pursuant to section 307 (33 U.S.C. § 1317), in which case an NPDES permittee can be found in violation of the Clean Water Act even if it *is* in compliance with the permit. Also, Congress amended the citizen suit provision in 1987 to authorize suit to directly enforce sewage sludge regulations promulgated pursuant to section 405(d) (33 U.S.C. § 1345(d)), but did not specifically amend section 402(k) to state whether compliance with an NPDES permit should be deemed to be compliance with these new regulations. (33 U.S.C. § 1365(f)(7).)

⁶ See, e.g., *PUD No. 1 of Jefferson County v. Washington Department of Ecology* ("Jefferson County"), ___ U.S. ___, 114 S.Ct. 1900, 1911 (1994) [explaining that "open-ended criteria" in a state's water quality standards "must be translated into specific limitations for individual projects"]; *E.P.A. v. California*, 426 U.S. 200, 204-205 (1976) [explaining that "a discharger's performance is now measured against strict technology-based effluent limitations—specified levels of treatment—to which it must conform,

rather than against limitations derived from water quality standards to which it and other polluters must collectively conform," with the standards serving only "as a supplementary basis" authorizing states to impose "further regulat[ions]" where necessary to meet the standards]; *Oregon Natural Resources Council v. United States Forest Service*, 834 F.2d 842, 850 (9th Cir. 1987) ["[I]t is not the water quality standards themselves that are enforceable in section 1311(b)(1)(C), but it is the 'limitations necessary to meet' those standards, or 'required to implement' the standards."].

⁷. The regulations specifically distinguish between NPDES storm water permits for municipal and industrial discharges. Permits for industrial storm water discharges do not benefit from the relaxed standards for municipal discharges, but rather are subject to the same provisions as typical NPDES permits, including numerical effluent limitations. (33 U.S.C. § 1342(p)(3)(A).)

⁸. However, the EPA and the state *do* have the authority to assess penalties for past violations. (*Id.*, at 58-59.)

⁹. The court explained that "if a permit holder has discharged pollutant 'x' in excess of the permitted effluent limit five times in a month but the citizen has learned only of four violations, the citizen will give the notice of the four violations of which the citizen then has knowledge but should be able to include the fifth violation in the suit when it is discovered. Whether the agency or the permit holder is informed of four or five excess discharges of pollutant 'x' will probably make no difference in a decision to bring about compliance." (*Id.*, at 1248.)

¹⁰ The court explained "that a monitoring, reporting and record keeping violation, which is an aspect of the permit requirement involved in a noticed discharge violation, should be an element of that same overall episode. Once the discharge violation is noticed, any subsequently discovered monitoring, reporting or record keeping violation that is directly related to the discharge violation may be included in the citizen suit. [¶]...We come to this determination because, in investigating one aspect of a parameter violation, such as a discharge, the other aspects of that violation, for instance monitoring, reporting, and record keeping requirements for that parameter, will of necessity come under scrutiny. We find that notice of one facet of an effluent infraction is sufficient to permit the recipient of the notice to identify the other violations arising from the same episode." (*Id.*, at 1248.)

¹¹. There is a similar defense which applies if either the EPA or the State has filed an action in court, but any plaintiff may intervene in such an action. (33 U.S.C. § 1365(b)(1)(B).)

¹². Disturbingly, the Water Code *does* appear to authorize a court to exercise its independent judgment when reviewing a decision of the State Water Quality Control Board, and does not appear to require deference to the State Board's expert determinations. (Water Code, § 13330(b).)

