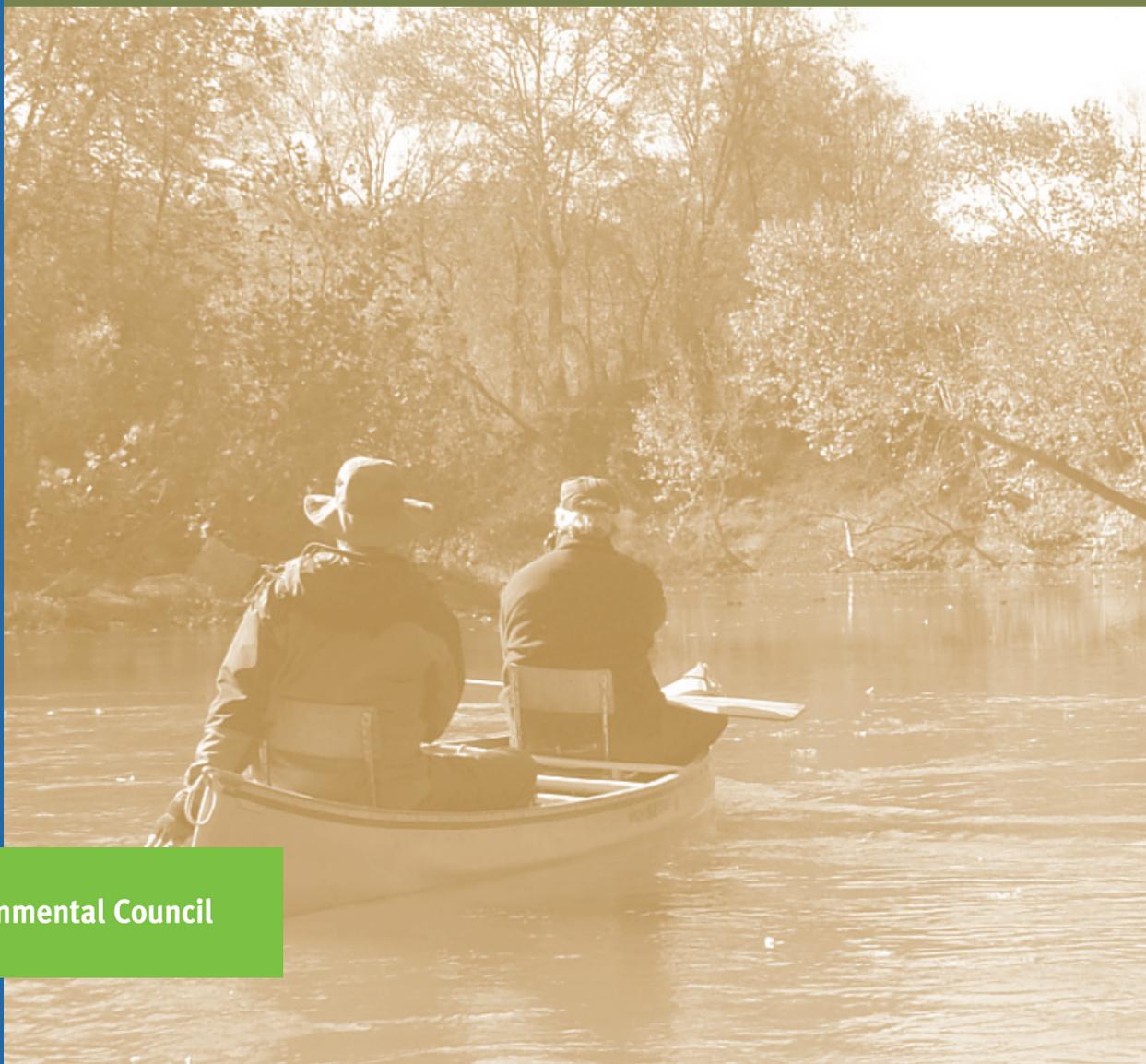




A Citizen's Guide to Clean Water Act Enforcement



Ohio Environmental Council

HOW TO HELP PROTECT CLEAN WATER

The Clean Water Act is considered one of the most successful environmental laws in the United States. But as budgets decrease and government oversight is reduced, citizen enforcement of environmental law is more necessary than ever. Ohioans must embrace the Clean Water Act's "Citizen Suit" provisions and take enforcement of water quality laws into their own hands.

Ohio is a Water Rich State

From the scenic shores of Lake Erie to the graceful bends in the Ohio River, Ohio is home to more than 23,000 miles of rivers and streams; 500,000 acres of wetlands and marshes; 262 miles of Lake Erie shoreline; and 447 publicly owned lakes.

Groundwater and surface water provide drinking water to millions of Ohioans. Rivers, streams, and lakes provide opportunities for sport fishing, swimming, canoeing, and other recreational activities. Views of lakes and rivers command higher real estate values and attract tourists, thus fueling local economies.

Wetlands provide numerous benefits, including purifying polluted and nutrient-laden runoff and recharging underground drinking water aquifers. Wetlands also provide valuable flood control and provide recreational, economic, and ecological benefits.

The Clean Water Act (CWA) is considered one of the most successful environmental laws in the U.S. Forty years ago, Ohio was the poster child for water pollution in the country: the Cuyahoga River was so polluted with industrial chemicals it caught fire, and 25-foot high soap suds graced the shores of Lake Erie due to phosphorus pollution. Ohio's Great Lake was declared dead.

Since Congress passed the Clean Water Act in 1972, many Ohio streams, rivers, lakes, and wetlands have rebounded and improved. Much of the improvement was due to the attention

and money that the CWA provided to combat the pollution that comes out of the end of a pipe.

However, the majority of Ohio's waterways still don't meet the basic "fishable and swimmable" standards of the CWA. Lake Erie's beaches also exhibit consistent pollution primarily due to bacterial contamination and harmful algal blooms.

Citizen Enforcement Under the Clean Water Act

Environmental statutes are only effective to the extent that such laws are enforced. Any standard set by statute or regulation, if not enforced, acts merely as a recommendation.

While Congress intended federal and state agencies to be primarily responsible for enforcement, legislators also recognized that enforcing these provisions could be expensive and politically difficult.

The government included provisions in the CWA to allow private citizens the ability to enforce the laws when the government was unwilling or unable to do so. These so-called "citizen lawsuit" (or "citizen suit") provisions, included in every major environmental law, allow citizens to sue violators in federal court.

Congress intended citizen suits to supplement government action, when underfunded or overworked agencies could not ensure that all laws are complied with.

Now is just such a time. State and federal enforcement budgets have been slashed, reducing government oversight and potentially allowing more violations of law to go unpunished. Moreover, political considerations—including interstate competition and pressure from industry to minimize regulation—threaten to further compromise states’ ability to enforce the laws.

As government enforcement becomes increasingly less reliable, citizen enforcement of environmental law is more necessary than ever.

Ohioans must embrace the Clean Water Act’s Citizen Suit provisions and take enforcement of water quality protection into their own hands.

Preliminary Steps Before Initiating a Citizen Lawsuit

(1) Collect information on the suspected violator.

Without trespassing on the alleged violator’s property, the site should be investigated from points of public access such as bridges and roads. Observations and details about the alleged violation should be noted such as the exact location, date, time of day, how the alleged violation is occurring, and what it may be affecting.

If possible, water quality samples should be collected and photographs taken with date imprinting to document any problems such as fish kills, sediment plumes, suspicious foams, strange water colors, and eroding banks.

Note any areas that might be considered special aquatic habitats, scenic areas, fishing access areas, riverside picnic areas, or swimming areas.

There also may be information about the suspected violator online.

Most “point sources”—basically defined as entities (corporations, etc.) that discharge pollutants from the end of a pipe—have permits

to discharge a limited amount of pollutants into the water. These entities are also required to submit reports to the Ohio EPA each month about the amounts of various pollutants discharged.

Records of self-reporting information, along with some information about enforcement history and violation history over the past four years, is compiled by U.S. EPA in its ECHO (Enforcement & Compliance History Online) database, which can be accessed at www.epa-echo.gov/echo/compliance_report_water_icp.html.

(2) **Solidify standing.** A person can’t sue if he/she doesn’t have “standing”—a particular injury that was caused by the violation and that a judicial action could help remedy.

Standing to sue may be a contentious issue, especially if an organization is suing on behalf of one of its members. It is crucial to have documentation and evidence of how the violation or alleged violation will have a specific adverse impact on the person who is going to file suit—the complaining party.

For example, gather evidence that the complainant has used the water for swimming or fishing, or that he/she frequently walks near the river and would prefer to enjoy its beauty unpolluted.

(3) Find out whether the State or the EPA is already prosecuting the suspected

violator. If the government has already begun or is diligently pursuing legal action in court in order to require compliance with the Clean Water Act, a citizen cannot sue independently. The citizen may, however, still be able to file a motion to intervene in that case.

First, check the ECHO database at the aforementioned website to see if there have been any recent enforcement actions. In Ohio, the Ohio EPA has primary responsibility for enforcement activities.

Private citizens have the ability to enforce clean water laws when the government is unwilling or unable to do so.

For the most current information about enforcement actions taken against a particular facility, contact the person listed on the Enforcement Section of the Ohio EPA Division of Surface Water website (www.epa.ohio.gov/dsw/contacts.aspx). For compliance information, contact the Permits and Compliance Section.

How to Initiate a Citizen Suit

Before filing suit in court, a citizen plaintiff is required by the Clean Water Act to send a 60-day Notice of Intent to File Suit to the entity for its alleged violation, and copy the state regulatory agency (in Ohio, the state agency is the Ohio EPA) and the U.S. EPA Administrator.

The violator has 60 days after receiving the notice to comply with the permit or Administrative Order that states its discharge requirements. This “grace period” allows a violator to comply or temporarily comply. The Notice of Intent must be fairly specific regarding the alleged violations.

Any citizen can file a suit against any violator of the Clean Water Act after the end of the 60-day period and:

- (1) the regulatory agency failed to require a violator’s compliance with the Clean Water Act’s effluent standards or limitations or with an Order requiring compliance with these standards or limitations, and
- (2) the regulatory agency did not begin, or did not continue to diligently prosecute, a civil or criminal action against the violator.

In a case where a regulatory agency initiates civil or criminal actions against the violator, citizens may have the right to intervene. Civil actions would normally involve just the plaintiff [the regulatory agency], and the defendants [the polluter], but a person with an interest in the suit can seek to become a party in the lawsuit by filing a Motion to Intervene.

A citizen suit must be filed in the judicial district in which the violation occurred and a copy of its complaint or suit must also be sent to the U.S. EPA Administrator and the U.S. Attorney General.

Why to Include a 60-Day Notice

The 60-Day Notice is intended to put the possible violator and the EPA on notice for why they might be sued, so that the violator can (hopefully) work to fix the problem.

The Notice should identify the possible violator and indicate what problem they are causing.

Thus, the Notice might indicate the types and amounts of pollutants that are being discharged, or what kinds of impacts the discharges are having to water quality. The Notice should also indicate how the discharge has harmed the person who would file suit.

While not all 60-Day Notices look alike, there is a sample Notice at the end of this booklet.

Who to Sue

A citizen suit may be brought against any person or entity, including the United States, for causing injury. In addition to suing parties for causing injuries, suits may be brought against the administrator of the relevant government agencies (U.S. EPA or Ohio EPA) for failing to perform any duty required under the Clean Water Act.

The injury suffered can be physical harm, or harm to an aesthetic, conservational, or recreational interest, as long as the injury is traceable to the defendant’s violation of the Clean Water Act.



Where to File

The suit must be brought in the federal district court that has jurisdiction over the “source” of the pollution.

When It’s Over

If the violator has failed to comply with enforcement actions initiated by the regulatory agency, the court can require the violator to comply. If neither the U.S. EPA or Ohio EPA have taken any action to force the violator to comply with the Clean Water Act, the court can require the violator to comply.

The court can also assess penalties up to \$25,000 per day per violation. The amount of the civil penalty is determined based on the following factors:

- how serious the violation was;
- how much economic benefit the violator gained from the violation;
- if the violator has violated the Clean Water Act in the past;
- if the violator showed any efforts to comply with the enforcement action brought upon it by the citizen suit; and
- how much of an economic impact the civil penalty will have on the violator.

However, all penalties levied under a citizen suit are payable to the government. Citizen-plaintiffs may not personally recover any money damages from the citizen suits. The court can, if it deems appropriate, require the violator pay for the citizen-plaintiff’s litigation costs, including reasonable attorney and expert witness fees.

In addition to civil penalties, the court may also order the violator to undertake a supplemental environmental project to help protect or restore the site of the violation and other waters in the state or region.

The 60-day notice is intended to give the violator or EPA a chance to first fix the problem.

If a temporary restraining order or preliminary injunction is sought, the court may also require the polluter to file a bond or establish a fund that will pay for public acquisition of environmentally sensitive lands along one or more water bodies.

How to Receive Money for Claims

Suing under the Clean Water Act does not restrict any right a person may have under any other law. For example, if someone contaminated a stream that a person uses near his/her property, it could be a violation of both the CWA and the Ohio Constitution’s right to reasonable use of water.

A citizen suit could then be filed under the Clean Water Act and a separate lawsuit filed for the Constitutional issue in the local County Court of Common Pleas. If the plaintiff won on the constitutional claim, he/she could be awarded monetary damages.

Learn More

The River Network has created an online Clean Water Act course for further understanding of the Clean Water Act. Visit www.rivernetwork.org/rn/cwa/home.

How the OELC Can Help

While they are called “citizen suits,” an attorney can be very helpful.

To find an attorney, first call the state or local Bar Association. In Ohio, contact:

Ohio State Bar Association
P.O. Box 16562
Columbus OH, 43216-6562
(800) 282-6556
www.ohiobar.org
osba@ohiobar.org

A staff attorney at the Ohio Environmental Council may also be able to help. If not, we will do our best to find someone who can.

SAMPLE NOTICE OF INTENT

VIA CERTIFIED MAIL. RETURN RECEIPT REQUESTED

VIOLATOR
PO BOX 1
123 COUNTY RD.45
SOMEWHERE, OH 43000

October 29, 2010

Dear Messrs. & Mmes.:

The undersigned attorneys represent Ohio Environmental Council (“OEC”), and write in regard to past and on-going violations of the Federal Water Pollution Control Act, commonly known as the Clean Water Act (“CWA”) by CWA Violator (“Violator”). Pursuant to authorization provided by section 505(a)(1) (33 U.S.C. 1365(a)(1)), the OEC hereby provides notice that it intends to file a civil action in federal district court against Violator for discharging pollutants from a point source to Big River via an unnamed tributary in exceedence of its National Pollution Discharge Elimination System (“NPDES”) Permit in violation of CWA 301 (a), 33 C.F.R. 1311 (a) and CWA 402, 33 U.S.C. 1342.

Upon the expiration of the 60 day statutory waiting period, the proposed plaintiff will file a citizen suit in federal district court.

BACKGROUND

Violator applied for, and received, an NPDES permit from the Ohio Environmental Protection Agency (“OEPA”), issued on January 1, 2009, effective January 1, 2009, and with expiration date of December 31, 2014. According to that permit, Violator was granted the authority to discharge from the Violator waste water treatment works located at 123 County Road 45 in Cleanwater Township, Watershed County, Ohio. Said permit allows such discharge into an unnamed tributary of Ditch Creek, and ultimately to downstream Big River. According to Ohio EPA, that tributary of the Big River is already listed as impaired pursuant to CWA Section 303(d), 33 U.S.C. Section 1313(d).

According to the permit, the company has numerical effluent limitations set upon it by OEPA for the following pollutants: Dissolved Oxygen, pH, Total Suspended Solids; Nitrogen, Ammonia (NH₃); Fecal Coliform; and CBOD.

On the basis of the best information currently available, we believe that Violator has violated and is engaged in ongoing violations of the Clean Water Act by exceeding the effluent limitations in its permit.

LEGAL STANDARDS & VIOLATIONS

Congress enacted the CWA “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” CWA Section 301(a), 33 U.S.C. Section 1311(a), prohibits the discharge of pollutants into waters of the United States except when authorized by a NPDES permit. “Waters of the United States” are defined by federal regulation as:

- (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (2) All interstate waters including interstate wetlands;
- (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters: (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (iii) Which are used or could be used for industrial purposes by industries in interstate commerce;
- (4) All impoundments of waters otherwise defined as waters of the United States under this definition;
- (5) Tributaries of waters identified in paragraphs (s)(1) through (4) of this section;
- (6) The territorial sea;
- (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (s)(1) through (6) of this section; waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other

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This guide was made possible in part by a grant from the Ohio State Bar Foundation. The views expressed herein do not necessarily represent those of the Ohio State Bar Foundation.



than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.

Waters of the United States do not include prior converted cropland.

Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

Violator is in has been permitted for less than two years, yet its exceedences have been severe in such a short period of time. According to US EPA's Detailed Facility Report (attached), Violator has been in non compliance for each of the quarters of life of this permit.

Permit Violation 1: Nitrogen, Ammonia (NH₃)

For the regulated pollutant NH₃, Violator has exceeded the permit by 82,487% in reporting quarter April-June 2009 to by 84,025% in reporting quarter July- September 2009, and only slightly lowered their pollution discharge to a still staggering 76,275% and 73,475% in the last quarter of 2009 and first quarter of 2010 respectively.

Permit Violation 2: Total Suspended Solids

Violator has discharged in excess of its permit limitations for Total Suspended Solids in amounts ranging from 33,917% to 93,233%. Over the life of the permit, Violator has routinely and repeatedly exceeded limits for this pollutant by thousands of times the permitted limit.

Permit Violation 3: CBOD

Violator has discharged in excess of its permit limitations for CBOD in amounts ranging from 23,650% to 96,775%. Over the life of the permit, Violator has routinely and repeatedly exceeded limits for this pollutant by thousands of times the permitted limit.

These incidents of effluent exceedences demonstrate a continuing likelihood that such violations will recur for the life of the permit unless dealt with quickly and appropriately.

Thus, OEC intends to commence a civil action in sixty days to prosecute these incidents and similar or related violations, including all violations which occur or continue to occur after service of this notice and all other violations revealed in the course of discovery process. We reserve the right to modify the descriptions of the incidents described in this letter either upon the commencement of the civil action or afterwards, depending upon revelations that may occur in the course of the litigation discovery process.

RELIEF SOUGHT

Upon completion of the sixty (60) day notice period, the OEC initiate a citizen suit pursuant to CWA Section 505(a), 33 U.S.C. 1365(a). The OEC demands that Violator immediately cease all discharges in exceedence of its NPDES permit. If permit violations do not immediately cease, the OEC will seek damages and reasonable costs, attorney and expert fees, and any other relief deemed just and appropriate by the Federal District Court for the Northern District of Ohio pursuant to 33 U.S.C. 1365(d).

PARTY GIVING NOTICE

The Ohio Environmental Council is a non-profit organization dedicated to securing healthy air, land, and water for all who call Ohio home. Founded in 1969, OEC is a not-for-profit environmental and conservation organization, organized under the laws of the State of Ohio. OEC is comprised of over 100 member environmental and conservation organizations, and thousands of individual members throughout the state. Many of these members live, work, and/or recreate within or downstream from the Big River watershed. Accordingly, OEC is a "citizen" within the meaning of section 505 (g) of the CWA, and has standing to bring the suit noticed herein. The full name, address and telephone number of the party providing notice is:

Ohio Environmental Council
1207 Grandview Ave., Suite 201
Columbus, OH 43212,
614-487-7506

Sincerely,

Trent A. Dougherty
Attorney for the Ohio Environmental Council

NOTICE PROVIDED TO
Copies by certified mail:

Lisa Jackson, Administrator
U.S. Environmental Protection Agency
Ariel Rios Building, 1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Chris Korleski, Administrator
Ohio Environmental Protection Agency
P.O. Box 1049
Columbus, Ohio 43216-1049

VIOLATOR
PO BOX 1
123 COUNTY RD.45
SOMEWHERE, OH 43000



[UNLEASHING THE POWER OF GREEN]

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