OCEAN & COASTAL LAW ENFORCEMENT:

Part III: Enforcing Ocean Water Quality Standards

Environmental Law Institute, Washington, DC

September 13, 2012

SEMINAR SUMMARY

In the final installment of a three-part focus series on Ocean and Coastal Law Enforcement, this seminar explored the enforcement of ocean water quality standards. The ocean is the ultimate receptacle for myriad sources of land-based pollution – regardless of their point of origin, contaminants ranging from heavy metals and petroleum products to fertilizers and pharmaceutical compounds enter terrestrial watersheds and find their way to the sea. Once in the ocean, these harmful pollutants contribute to algal blooms and dead zones, ocean acidification and coral reef die-off, and the accumulation of massive garbage patches in ocean gyres around the globe. To successfully combat these far-reaching impacts, effective enforcement of water quality laws and regulations is crucial.

This panel convened experts to discuss existing challenges, opportunities, and successes in enforcing water quality standards in the marine environment.

MODERATOR:

- **Bruce Myers**, Senior Attorney, Environmental Law Institute

PANELISTS:

- **Richard S. Davis**, Principal, Beveridge & Diamond, PC
- **Loren Denton**, Chief, Municipal Enforcement Branch, Water Enforcement Division, U.S. Environmental Protection Agency (EPA)
- **George Hawkins**, General Manager, DC Water and Sewer Authority
- **Christopher M. Kilian**, Vice President and Director, Conservation Law Foundation Vermont; Director, Clean Water and Healthy Forests

Mr. Hawkins began the panel by reviewing his broad experience in clean water and his relevant background. As a child, Mr. Hawkins visited steel mills along the Cuyahoga River in Cleveland and observed the toxic air and water pollution they produced. Industrial waste ignited the Cuyahoga River on several occasions, including the infamous fire that lasted a week in June 1969.

Mr. Hawkins went on to discuss how, in response, the 1972 Clean Water Act (CWA) Amendments established regulations for point source discharges into water bodies. The CWA sets stringent and uniform pollutant and best available technology standards under the National Pollution Discharge Elimination System (NPDES). Mr. Hawkins also noted that today's water quality challenges center on nonpoint sources (including, for example, agricultural runoff). Nonpoint sources are currently addressed under the CWA Total Maximum Daily Load (TMDL) program, which requires the attainment of a specific water quality for the receiving water body.

Mr. Hawkins highlighted some weaknesses of the NPDES program using DC Water's Blue Plains Advanced Wastewater Treatment Plant, the largest advanced wastewater treatment plant in the world, as an example. DC Water has successfully met every pollutant reduction standard mandated by NPDES; however, reducing nutrient concentrations by an additional 1 milligram per liter at the margin will cost Blue Plains and ratepayers $1 billion. Mr. Hawkins explained that DC Water allocates $1.1 billion annually for expenditures and receives between $15 to 20 million from EPA's Safe Drinking Water Act Revolving Fund. Consequently, the financial resources needed to meet newly mandated discharge requirements prevent DC Water from renovating and restoring fundamental sanitation infrastructure, such as sewer systems. As his final remark, Mr. Hawkins suggested using cash disbursements to reduce and mitigate nonpoint source pollution instead of focusing on marginal NPDES reductions of point sources.

Mr. Denton continued by describing the responsibilities of the Municipal Enforcement Branch of the U.S. EPA Water Enforcement Division. The Municipal Enforcement Branch assists noncomplying municipalities in meeting their NPDES requirements, enhances consistency among the EPA regions, and ensures internal consistency with other EPA policy and enforcement offices. Mr. Denton highlighted two Municipal Enforcement Branch initiatives that affect water quality in coastal and ocean environments: (1) Combined Sewer Overflow (CSO), and (2) Concentrated Animal Feeding Operations (CAFOs).

Mr. Denton stated that during settlements, the Municipal Enforcement Branch can require municipalities to allocate funds to green infrastructure. A recent settlement with Cleveland requires the city to invest $40 million in infrastructure like permeable surfaces, which help prevent stormwater from overflowing sewer systems and bringing surface pollutants directly into waterways. Several metropolitan areas have already begun to advocate for green infrastructure, including Chicago and Philadelphia, which have incorporated green infrastructure into a "triple bottom line." Mr. Denton recommended reviewing EPA settlements with the Massachusetts cities of Boston, Suffolk, and Gloucester for coastal examples.

Mr. Denton went on to discuss EPA water quality efforts on a national scale, including homebuilder settlements requiring stormwater controls and the Vessel General Permit (VGP) regulating discharges of vessels docking at U.S. ports. EPA has a Memorandum of Understanding with the U.S. Coast Guard to enforce VGPs at sea.

Mr. Denton concluded by discussing efforts to address force main breaks in Miami and to help municipalities meet secondary wastewater treatment standards in Honolulu. The Municipal Enforcement Branch is also helping to develop and implement secondary wastewater treatment in Juneau, Alaska, which is a unique case because its population doubles during the summer months and it is home to many fish processing plants that discharge waste into coastal waters.

Mr. Kilian followed by describing the efforts of the Conservation Law Foundation (CLF), a regional legal advocacy group that uses citizen suit enforcement to augment government enforcement. Coastal and ocean water quality is critical in New England because a significant portion of the population resides on the coast.

Mr. Kilian explained that CLF focuses on egregious violations by facilities that are chronically noncompliant or that harm human health. CLF pursues non-litigation strategies and collaborative opportunities with government agencies. CLF attorneys regularly utilize the 60-day waiting period within the CWA citizen suit provision to encourage the alleged violator to voluntarily comply or to allow the government to enforce. Every consent decree CLF negotiates is reviewed by the regional EPA Office or the Department of Justice.

Mr. Kilian provided an overview of CLF's three enforcement priorities: Boston Water and Sewer System, severely impaired estuary systems, and priority pollutants (e.g., toxics, nutrients, pathogens). Nutrients have gained greater prioritization because of increasing eutrophication events and dead zones in coastal New England waters.

Mr. Kilian also discussed CLF enforcement efforts in marinas and scrap metal facilities. New England has thousands of marinas; Massachusetts alone has 350, of which only 60 have ever applied for discharge permits. In addition to general waste discharge, marinas frequently discharge runoff from vessel pressure-washing, which contains remnants of the toxic antifouling paint that coats boat hulls. CLF has given notices of intent to eight marinas. Mr. Kilian also described CLF enforcement efforts at scrap metal facilities along the tidal Mystic River, which is bordered by low-income minority communities that face environmental justice issues, including Somerville, Chelsea, and East Boston. CLF has brought cases against five unpermitted scrap facilities. Mr. Kilian went on to describe CLF efforts to enforce permits for Municipal Separate Storm Sewer Systems (MS4s). MS4 permits cover large drainage systems that often discharge into waterways and coastal waters. CLF often encourages shifts to progressive green infrastructure when negotiating consent decrees.

Mr. Kilian highlighted CLF efforts to address water pollution and eutrophication under TMDLs, specifically in Cape Cod. CLF chose to use TMDL enforcement to address nutrient pollution, rather than bringing many individual cases against point source discharges. Many obstacles inhibit CLF's TMDL case, including the myriad sources of nonpoint source pollution and the unclear interactions between pollution factors.

Mr. Kilian concluded by highlighting the challenge in encouraging and leveraging public participation. Mr. Kilian argued that public involvement remains limited because the public does not have adequate access to coastal waters and tributaries, as they are blocked along much of the coast by industrial and commercial infrastructure.

Mr. Denton followed by defining "SEP" as a supplemental environmental project.

Mr. Davis focused his remarks on offshore oil spills and the effectiveness of using the NPDES program to address spills. NPDES permits are required when pollutants are added to the water through a point source. Offshore oil facilities initially do not have NPDES permits because they do not intentionally add pollutants to the water. Oil discharges generally become an issue when a storm blows over offshore oil platforms, causing pipelines break off below the seafloor and allowing oil to escape.

Mr. Davis explored some of the jurisdictional issues pertaining to NPDES permits and considered whether offshore oil platforms are required to have them. He first explained defense attorneys' interpretation of "pollutant." Defense attorneys representing offshore oil have successfully argued that oil from offshore oil platforms is not a pollutant, but rather a product. Following the 2010 *Deepwater Horizon* Oil Spill, BP tried to capture and sell the released oil as a product. If a pollutant, BP would likely treat or dispose of the oil.

Mr. Davis then examined whether a broken oil pipe constitutes a point source. Defense attorneys have argued that broken pipelines do not, because broken pipelines are buried deep underground and do not discharge oil directly into the water. Mr. Davis recognized the weakness in the defense argument given that courts have held that coal pits are a point source. Defense attorneys also argue that a broken pipeline or well may not be the discharging point source given that the seafloor naturally releases oil.

Mr. Davis went on to discuss whether it is the owner or operator of the well that would be required to obtain the NPDES permit. Permit holders are those persons or entities that exercise control over a point source. In the case of offshore oil, the operator exercises control. A damaged well, however, does not have an operator that can exercise control over it. When an operator cannot be determined, the owner is required to obtain a permit. Mr. Davis pointed out that the United States is the owner of sub-seabed minerals under the Outer Continental Shelf Lands Act, and it is not practical to require the United States to obtain the permit.

In addition to CWA permits, Mr. Davis explained that offshore oil owners and operators must fulfill contractual obligations with the Bureau of Ocean Energy Management and the Bureau of Safety and Environmental Enforcement (BSEE) to obtain the offshore lease. Often these contractual obligations duplicate NPDES requirements. By way of example, BSEE's contractual requirement for closure of broken or unused wells is similar to the NPDES requirement to plug leaking wells. Similar to CWA suits, remedies to violations of contractual obligations include injunctive relief, civil damages, and attorneys' fees. Contractual obligations, however, do not incorporate water quality concerns. Mr. Davis recommended that Congress devise a separate way to incorporate water quality information.

Mr. Myers asked for reactions and comments from panelists.

Mr. Denton reiterated the importance of addressing nonpoint source pollution, and highlighted that water quality enhancement can still be achieved through NPDES permits. Many point sources are not monitored because they do not hold a permit and are unaware that their discharges require one. The Municipal Enforcement Branch works to enhance public communication and education on point source discharges and requirements. Other innovative approaches are also being considered to enhance water quality, including trading mechanisms and e-reporting.

Mr. Kilian emphasized the progressive resources available to monitor and bring cases against violators, including Google Earth and Geographical Information Systems (GIS). Google Earth and GIS provide high-quality images and information about point source facility infrastructure. Mr. Kilian also responded to Mr. Davis's remarks examining whether offshore oil owners and operators are required to obtain permits for accidental discharge. Whether a permit is required is not a contentious issue because the CWA states that any person who pollutes must have a permit. Mr. Kilian argued the question is whether the discharge was lawful.

Mr. Davis emphasized the policy concerns of the CWA using civil and criminal penalties for no-fault mistakes by a critical industry. Mr. Davis explained the TMDL program issues facing point source dischargers, such as Blue Plains. The Chesapeake Bay states (Delaware, Maryland, New York, Pennsylvania, Virginia, and West Virginia) and the District of Columbia established the historic Chesapeake Bay TMDL. Under the TMDL, the parties are required to achieve receptive water body standards. Parties must be creative and make either point source or nonpoint source discharge reductions. Mr. Davis agreed with Mr. Hawkins that point sources, such as Blue Plains, are easily identifiable. State TMDL programs can target point sources by driving pollutants to zero and making compliance infinitely expensive. Mr. Davis emphasized the success of green infrastructure, particularly the City of Chicago which spent approximately $10 million on green infrastructure to capture stormwater.

QUESTIONS AND ANSWERS

What drives the ratcheting down of discharges from point sources? Is there a defined endpoint for discharge reductions? Is cost-benefit analysis incorporated into determining permitted discharges?

Mr. Hawkins answered that the NPDES program drives reductions in discharged pollutants and nutrients, and the endpoint for pollutant reductions is zero. Best available technology requirements are becoming more stringent, although there is some cost consideration when setting discharge and technology standards.

Mr. Hawkins emphasized focusing on nonpoint source pollution to enhance water quality and cautioned against using the TMDL program. Under the current TMDL program, states may impose more stringent discharge requirements on identifiable point sources regardless of whether the technology is available.

Mr. Hawkins suggested a need for Congressional amendments to the CWA, asserting that its core provisions do not effectively address nonpoint source pollution.

Are there offshore water monitoring networks in place?

Mr. Kilian answered that coastal and estuarine environments are extensively monitored. Mr. Davis stated that NOAA continues to build and develop offshore monitoring programs through its remote sensing work, and a current NOAA database is under construction. Mr. Denton added that the Municipal Enforcement Branch encourages monitoring and incorporates monitoring requirements into settlements with the aim of creating a national monitoring network.

How does the CWA prevent solid waste, such as plastic, from polluting coastal and ocean environments?

Mr. Denton answered that trash is removed from municipal waste streams through primary stormwater treatment and best management practices. Many larger cities have catch basins to capture and prevent trash from entering the wastewater stream. Mr. Davis stated that permits with narrative water quality standards often incorporate trash removal requirements.

Mr. Kilian highlighted NRDC's extensive involvement in trash removal from municipal wastewater and stormwater streams and efforts to require MS4 permit enforcement in California. Mr. Denton mentioned that Municipal Enforcement Branch settlement agreements often require street sweeping and other trash removal strategies.

Given the cost of additional pollutant discharge reductions, have wastewater facilities, such as Blue Plains, considered trading mechanisms with agriculture or other steps to mitigate costs?

Mr. Kilian answered that wastewater treatment facilities would likely utilize trading programs if available. Mr. Kilian highlighted CLF's work with the State of Vermont on developing its phosphorous trading program, and noted that CLF frequently refers to the extensive TMDL trading work by the National Wildlife Federation in trading cases. TMDL trading programs are still in their infancy, but are part of an evolving dialogue.

Mr. Davis agreed that Blue Plains and other wastewater treatment facilities would likely find TMDL trading programs beneficial. Blue Plains itself would benefit more if it were located on a waterway with extensive agriculture upstream, such as the Susquehanna River. Mr. Davis identified policy concerns over TMDL trading and wealth transfers generally, noting that pricing in wealth transfers is often skewed. Buyers such as Blue Plains have a stronger interest in trading than would farmers, which can increase demand and cause prices to soar.

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