

Citizen Suit Enforcement/Clean Water Act: Federal Court Addresses Statute of Limitations



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A United States District Court (N.D. California) (“Court”) addressed in an April 22nd Order whether the statute of limitations (“SOL”) barred a Clean Water Act (“CWA”) citizen suit action. See *Clarke v. Pacific Gas & Electric Company, et al.*, 2021 WL 1580829.

The SOL for a CWA action is five years.

The question addressed was whether the series of wastewater discharges constituted one CWA violation that first accrued years ago.

Dan Clarke (“Clarke”) alleged that Pacific Gas & Electric Company (“PG&E”)(and its predecessors) deposited hazardous waste from the Cannery manufactured gas plant (“MGP”). The MGP is stated to have been in operation from 1898 until at least 1906. It has been inactive since 1906.

The MGP site is currently owned by the National Park Service (“NPS”). NPS took soil samples in 1985/1986 which indicated significant contamination of soil and groundwater at the MGP site and in the vicinity. Clarke alleged that PG&E never performed any additional testing or remediation.

Clarke further alleged in an Amended Complaint that repeated and discrete discharges from the MGP have occurred and will likely occur periodically in the future. In response, PG&E argued that the series of discharges amounted to a single CWA violation. Further, PG&E argued that the violation accrued many year ago when the MGP was operational.

A CWA violation requires that a plaintiff allege:

1. Ongoing addition
2. of a pollutant
3. to the navigable waters of the United States
4. from a point source
5. without a permit (or in violation of a permit)

Clarke alleged that contaminants from the MGP were:

. . . repeatedly and intermittently discharged by groundwater passing through the Cannery MGP site.

The PG&E waste is stated to include certain chemicals highly toxic to marine life which are deposited into groundwater. Those chemicals are stated to separate from the MGP waste and are then transported via groundwater that flows into a Bay whose elevation is approximately 240 feet lower than the MGP site.

PG&E argued in a Motion to Dismiss that Clarke:

1. failed to allege an ongoing discharge by a person
2. failed to allege an ongoing discharge from a point source
3. did not provide an adequate notice of the claim

The Order describes the MGP site and groundwater transportation as a highly complex system influenced by a variety of factors such as the season, tide, and other factors. Such conditions are further described as interacting with one another and causing intermittent (rather than constant) release of groundwater from upland areas (including the MGP site) to tidal surface water of the Bay.

Clarke contended that this process “repeats itself” to cause ongoing and intermittent discharge of toxic pollutants into the Bay (including within five years preceding the filing of the CWA citizen suit action).

The Court concludes that the CWA claim as pleaded is sufficient for SOL purposes at this early stage of the proceeding. It notes:

. . . [t]he application of the statute of limitations to the circumstances of the case often must be done at the summary judgment stage and may require expert testimony as to the cause or source of the violation(s).

PG&E next argued that the Amended Complaint alleged that several natural factors caused the discharges (as opposed to activity by the company itself). In other words, its theory was that passive migrations of pollutants on a defendant’s property is not subject to CWA permitting requirements because they were not associated with a person.

Clarke responded that the natural processes encompassed by PG&E’s repeated discharges of pollutants did not change the subject of the allegations (i.e., but for PG&E’s actions, no pollutants would have been discharged from the MGP). PG&E argued that to the extent the discharges occurred within the last five years they were caused by an interplay of natural processes as opposed to its own action.

The Court responded to these arguments by holding that factual disputes about what or who caused the discharges and whether they amounted to mere passive migration of pollutants not subject to CWA permitting requirements could not be resolved on the pleadings.

PG&E also argued that Clarke had not sufficiently alleged discharges of pollutants from a point source. This was based on its argument that the Amended Complaint alleged that the pollutants are drawn by groundwater from portions of the MGP site and alleged site-wide releases amounting to discharges from a nonpoint source.

The Court notes that Clarke has alleged that the PG&E discharges occurred from groundwater passing through a “discernable, confined and discrete conveyance” (the demolished MGP at the site). He describes the demolished MGP as consisting of multiple different component that are themselves identified conveyances and sources of contaminants constituting a discharge. Cited as an example is the reference to:

. . . “a coal wharf existed along [the] northern edge” of the Cannery MGP, and “similar wharfs of the [Marina MGPs]. . . are locations of large quantities of MGP Wastes.”

The level of specificity is deemed sufficient at the pleading stage in light of what the Court describes as the “extremely broad” statutory definition of a “point source.”

PG&E also argued that Clarke's CWA Notice of Intent to Sue ("NOI") did not provide adequate notice of the referenced theory of discrete discharges. The company specifically cited the NOI's alleged failure to identify the activities that violate the CWA, location of the violations, and dates of the violations.

In response, the Court holds that Clarke's NOI sufficiently identified the location of the PG&E discharges. It references the NOI's indication that the violations had occurred and continue to occur at the former location of the MGP, including its location.

The Court, therefore, denies PG&E's Motion to Dismiss.

A copy of the Order can be downloaded [here](#).