

Pretreatment Enforcement Discretion/Clean Water Act: Federal Court Addresses Massachusetts Water Utilities Motion to Dismiss



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The United States District Court of Massachusetts (“Court”) addressed in a February 17th Memorandum and Order (“Memorandum”) an issue arising out of a Clean Water Act citizen suit action. See *Conservation Law Foundation, Inc., v. Massachusetts Water Resources Authority*, Civil Action No. 22-10626-RGS.

At issue was whether a citizen suit action could address an alleged failure by a wastewater utility to enforce its pretreatment program.

The Massachusetts Water Resources Authority (“MWRA”) is described as an independent agency of the Commonwealth of Massachusetts. It provides drinking water and wastewater treatment services to Eastern and Central Massachusetts.

The MWRA operates a sewage treatment plant (Deer Island) which has a capacity to process as much as 1.35 billion gallons of wastewater per day. The sewage it receives includes wastewater discharged by industrial users.

MWRA was previously ordered by a federal judge as part of the cleanup of Boston Harbor to implement an Industrial Pretreatment program. This program was required to include a U.S. Environmental Protection Agency (“EPA”)-approved Enforcement Response Plan (“ERP”). The ERP outlines the criteria by which MWRA is to investigate and respond to discharging violations by industrial users.

The Conservation Law Foundation, Inc., (“CLF”) filed a Clean Water Act citizen suit against MWRA alleging non-enforcement of industrial user violations. CLF alleged that MWRA was in violation of 1311(a) of the Clean Water Act because of a failure to comply with the conditions of its Clean Water Act National Pollutant Discharge Elimination System (“NPDES”) permit. The complaint also alleged a violation of MWRA’s ERP.

The citizen suit complaint argues that the NPDES permit/ERP requires that MWRA:

- Undertake an enforcement action whenever an industrial user violates its discharge (pretreatment) permit
- Penalties assessed must be commensurate in severity to the gravity of the violation

Specific allegations included:

- Failure to take an enforcement action following Industrial User noncompliance at last 70 times

- Failure to take the required level of enforcement action following significant noncompliance by an Industrial User at least 83 times during the past five years
- Frequent failure to escalate enforcement actions for repeated Industrial User violations
- Failure to issue penalties to Industrial Users consistent with the requirement of the ERP

MWRA filed a motion to dismiss the CLF complaint.

Arguments put forth by MWRA in support of its motion to dismiss included:

1. Absence of Statutory Authorization to Sue.

MWRA argued that sovereign immunity bars suits against government agencies and their officials. However, Congress was noted to have waived immunity under the Clean Water Act by providing that any citizen was authorized to bring a civil action against any person:

... who is alleged to be in violation of an effluent standard or limitation under this chapter.

CLF responded that MWRA's alleged failure to comply with its ERP/NPDES permit is a violation of 33 U.S.C. §§ 1311(a) and 1342(k). Both statutory sections are encompassed by the citizen-suit provision.

MWRA's counterargument was that the United States Congress specifically vested discretionary right of review in the EPA Administrator. A parallel right was noted to have not been granted to private citizens.

Consequently, the utility argued that citizen suits seeking to enforce the provisions of an ERP were precluded. This view was challenged by CLF stating that Congress included bars to citizen suits in the Clean Water Act but these did not encompass challenges to a public owned treatment works' ("POTW") implementation of its ERP (among other provisions).

The Court acknowledged that neither Section 1365 nor 1319(f) explicitly state that the EPA Administrator's right to review a POTW's ERP is exclusive. In addition, no legislative history was identified addressing this issue. Therefore, the Court utilized what it described as "external considerations."

First, the Court stated that:

... despite decades of litigation involving the citizen-suit provision of the CWA, CLF can point to no precedential opinion authorizing a citizen suit under section 1319(f).

The Decisions cited by CLF were distinguished by the Court as not including the right to privately enforce an ERP.

The Court noted stated that citizen-suit actions do not supplant the discretionary authority of the EPA Administrator. This was held to be particularly true in areas such as the enforcement of an ERP (where consistency of purpose and predictability of result are the desirable outcomes).

Also cited was Clean Water Act language which indicated that the EPA Administrator:

- May notify a POTW of the wrongful discharge of pollutants into its treatment works
- May commence a civil action for appropriate relief if the POTW does not commence appropriate enforcement action within 30 days of notification

As a result, the Court concluded that a plain reading of the statute indicates Congress intended that the EPA Administrator have sole discretion to determine which violations were sufficiently serious to warrant notification/judicially-ordered remediation.

Four public policy concerns cited by the Court regarding the appropriateness of an ERP citizen-suit enforcement action included:

- Creating a flood of litigation challenging the failure of POTWs to undertake adequate enforcement
- Potential for inconsistent actions and remedies resulting in POTWs not having definitive guidance in implementing their ERPs

- Citizen groups largely lack the engineering and systems expertise to ensure remedial action of appropriate
- As opposed to the public, the EPA Administrator is a politically appointed official answerable to the President, Congress, and the public

2. Permit Obligations

The Court also found that MWRA is not in violation of its NPDES permit because neither it nor its ERP required that it take enforcement action every time an Industrial User commits a violation.

Language quoted from the document included:

This document is intended as guidance solely for the use of MWRA personnel. Nothing herein is intended to create legal rights or obligations or to limit the enforcement discretion of the Authority.

Certain sections of the MWRA NPDES permit cited by CLF as requiring an enforcement action be taken were deemed inapplicable or rejected.

The Court also rejected CLF's argument that MWRA had a nondiscretionary duty to meet every violation with an enforcement action because of the language found in 40 C.F.R. § 403.8(f)(5) which states:

. . . [t]he POTW shall develop and implement an enforcement response plan.

The regulatory language was held by the Court to merely direct the POTW to refer to its ERP in deciding upon the nature and breadth of an appropriate response.

The Court grants MWRA's motion to dismiss.

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