

January
2025

ReMA New England General Counsel Update



Presented by Peter Durning of [Verrill-Law](#)

Entering 2025, there is an expectation that a steadily improving economy will help foster more commercial activity and a corresponding generation of scrap materials and markets. While these general trends are promising, it is possible that there could be some disruption if President-elect Trump's threatened tariffs are implemented, and if those action trigger reactionary countermeasures like the China's National Sword initiative.

While the movements of these global tectonic plates of the economy are hard to read and predict, there are potential events closer to home that scrap metal operators can anticipate and guard against.

As has been widely reported, the in-coming Trump administration has a broad intention to limit agency activity. One agency where this is likely to occur is the Environmental Protection Agency ("EPA"), and more specifically in the agency's administration of the Clean Water Act (CWA").

As we have seen over the years, there is a bit of a yo-yo effect in the interpretation and implementation of the CWA between democratic and republican administrations. In addition to the pendulum swinging back to the right with the re-election of President Trump, a generally more conservative U.S. Supreme Court has enshrined some of the right's preferences and interpretations with respect to the definition of the waters of the United States and thereby the geographic reach of the federal CWA. In particular, the



Supreme Court's decision in *Sackett v. EPA* limited the reach of the CWA to only those wetlands that have a continuous surface connection to a relatively permanent body of water connected to a traditional interstate navigable water. (For an extensive discussion of the *Sackett* decision, see our blog post from June 2023). This more conservative interpretation trend is likely to continue when SCOTUS issues its decision in *City and County of San Francisco v. EPA*. One of the key issues in *SF v. EPA* is the viability of certain narrative generic water quality provisions in CWA permits. Based on the current Supreme Court majority, as expressed in *Sackett*, most observers believe SCOTUS will find that these narrative provisions exceed the agency's mandate under the CWA. This was the first case the Supreme Court heard when the current term

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started on the first Monday in October 2024, and the decision will be released this Spring.

While these trends to limit EPA's geographic reach and authority to impose permit provisions with potentially expansive interpretations may effectively curb agency overreach, scrap metal operators in New England need to remain vigilant against the possibility of citizen-suit enforcement of CWA permits. It is possible, and indeed likely, that in the absence of a robust EPA under the second Trump Administration, public interest groups and in the case of Massachusetts, the Attorney General's Office, will rush into the void and take up the mantle of CWA enforcement.

Though the Trump administration's influence may curb the energy and independence of EPA Region 1, in the past this region, which includes all of New England, has been one of the more progressive and innovative regions within the federal environmental administration. In addition, Massachusetts and New Hampshire remain two of the last states that have not received delegated authority to administer the CWA at the state level.

Even with the presence of a historically more progressive regional EPA administration, New England also has a robust public-interest sector with an astute and well-honed understanding of the CWA and its citizen-suit provisions.

The frequency of citizen-suits in Massachusetts accelerated when the Massachusetts Attorney General's Office hired some of the more seasoned citizen-suit

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practitioners to ply their trade with the backing of the state's highest law enforcement office.

Lastly, as mentioned above, though some Supreme Court decisions may retard the reach of the EPA, the citizen-suit brigades might not curb their behavior to the farther reaches of the revised interpretations. In general, the citizen-suit organizations are advocacy groups that have a commitment to achieving decision that combat and recast a narrow interpretation of the CWA to have broader relevancy. While it may be attractive to push back and fight the public interest group on their failure to appreciate the contours drawn by SCOTUS, it could be a costly venture to fight the citizen-suit shakedown in the courts. Of course, you are at risk because if the citizen-suit party prevails the permit-holder has to pay the citizen-suit organization's legal fees.

Against this backdrop of a likely uptick in citizen-suit enforcement activity in Region 1, what you can do?

The best defense to CWA citizen-suit actions is diligence and attention to your permit requirements. Keeping your permit update to date and completing and filing your quarterly monitoring reports is the best way to stay out of the citizen-suit bullseye.

It is also critical to note that it is our experience that past enforcement actions do

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not inoculate businesses from subsequent citizen-suit actions. If anything, prior enforcement action may just mean that the operation is on the citizen-suit enforcement organization's radar.

Even if you are not in the citizen-suit organization's sites from past enforcement actions, it is still possible to attach the attention of the public interest groups by the slightest infraction. As technology has advanced, all CWA monitoring and reporting is available from the US EPA Echo database. Canvassing the Echo database like a panopticon, the public interest groups can perform a simple desktop review and learn if an operator missed its quarterly reporting or failed to take corrective actions. Staying on top of your monitoring and reporting requirements is the best way to avoid any attention.

In the event that your facility monitoring indicates any exceedances, the current 2021 MSGP provides for an escalating series of corrective actions, including three-levels of "additional implementation measures" that provide opportunities to address and ameliorate issues in facility discharges. While the MSGP provides this off-ramp to avoid enforcement even in the face of exceedances in the discharge, an operator has to be vigilant to document the facilities' efforts at corrective actions. Failure to take advantage of these measures could invite enforcement that could be of a more serious nature since it would be coupled with permit exceedances – not just minor paperwork errors.

Having good internal controls and monitoring procedures under a well-designed

Stormwater Pollution Prevention Plan developed with the help from an excellent stormwater engineering consultant are critical to success in this area.

Of course, if you do receive a Notice of Intent to File Suit letter, which is a procedural requirement before the commencement of an enforcement action, from any citizen suit organization, take prudent steps to bring in legal counsel and outside environmental engineering experts to assess the potential exposure and work toward a prompt resolution before the matter metastasizes into a large and costly action.

2025 may be a year with opportunities, but it may also create optimal conditions for citizen-suit enforcement. Stay on top of your obligations and stay ahead of any potential exposure to CWA enforcement actions.

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