

**Follow the Yellow Brick Road:
Citizen's Suits - Notice and Standing and Filing Oh My !**



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Introduction

The Clean Water Act (“CWA”) was originally enacted in 1948 for the control of water pollution, and its enforcement authority was given primarily to the states. Federal Water Pollution Control Act (“FWPCA”), Pub. L. No. 80-845, 62 Stat. 1155 (1948) (current version at 33 U.S.C. §§ 1251 – 1387). Since that time, Congress has amended the CWA on several occasions so that the enforcement authority for keeping our Nation’s waterways clean is shared by the fifty states, the federal government through the Administrator of the Environmental Protection Agency (“EPA”) or Secretary of the Army and private citizens.

In 1972, Congress established the regulatory framework that essentially exists today to protect our Nation’s waters. This legislation established a system of effluent limitations, water quality standards, discharge permits and other regulatory mechanisms to be administered by the federal EPA and the various states in order “to restore and maintain the chemical, physical and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a).

In addition to strengthening the involvement and enforcement authority of the federal government in water pollution control, the 1972 amendments enabled a private citizen, for the first time, to bring a civil action in federal court against any person or government that violated the effluent or limitation requirements of the CWA. FWPCA § 505(a)(1), 33 U.S.C. § 1365(a). By empowering private citizens to assist the federal or state governments in the enforcement of the CWA, Congress expanded the resources available to fight pollution. The addition of the citizen-suit provision struck a balance between government and private enforcement by allowing citizens to bring suits against

polluters. Despite this statutory authority, there are multiple potential obstacles to a suit by a private citizen. This paper offers a brief overview of the CWA citizen suit provision, the requirements which must be met to bring suit and the federal and state claims involved in a typical complaint.

I. Standing to Sue

In order for an individual or group to bring a CWA suit under the citizen suit provision, 33 U.S.C. § 1365(a), that individual or group must have ‘standing to sue.’ Such ‘standing’ is a limitation on federal jurisdiction contained in Article III of the Constitution, and requires the potential plaintiff to meet several tests before standing may be conferred.

a. The *Lujan* Requirements

The Supreme Court articulated three requirements for Article III standing, termed ‘constitutional’ standing, in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

1. Injury-in-fact

The private citizen or plaintiff must have suffered an ‘injury in fact’ – an invasion of a legally-protected interest which is (a) concrete and particularized and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical.’” *Sierra Club v. SCM Corp.*, 580 F. Supp. 862 (1984). Thus, generalized grievances are insufficient. Moreover, it is not the environment that is or would be injured; rather standing refers to the injury to the *person*. *Ecological Rights Foundation v. Pacific Lumber Co.*, 230 F.3d 1141, 1152 (9th Cir. 2000). Consequently, a plaintiff does not need to prove environmental degradation or a permit violation to obtain standing.

Damage to an individual's aesthetic or recreational interest is sufficient to confer standing. It is sufficient if the plaintiff can show that he or she "use[s] the affected area and [is a] person 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Friends of the Earth v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 183 (2000).¹ For example, in *Mt. Graham Red Squirrel v. Espy*, the complaint alleged that the organization and its members derived scientific, recreational and aesthetic benefit and enjoyment from the existence in the wilds of the red squirrel in and around an observatory in the mountains of Southeast Arizona. Specific members of the organization submitted declarations as to their viewing and enjoyment of the squirrel in its natural habitat. The Ninth Circuit Court held that this was sufficient to confer standing on the plaintiffs. *Mt. Graham Red Squirrel v. Espy*, 986 F.2d 1568 (9th Cir. 1992).

In addition, threatened injury in fact – even though "[t]hreatened environmental injury is by nature probabilistic" – is sufficient to confer standing. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 160 (4th Cir. 2000). Thus, the harm does not need to have already occurred; the probability of future harm will suffice.

Standing can be denied, however, if a person's description of his or her injury in fact is too vague or speculative. For example, it is not sufficient for a plaintiff to state that he or she recreationally used and enjoyed land roughly "in the vicinity of" affected areas. *Lujan*, 497 U.S. at 889. Rather, a plaintiff would need to be able to identify the recreational land and demonstrate its proximity to the affected area. That said, there is no rigid requirement that a member live a certain distance from an impacted area or use it a

¹ In *Laidlaw*, the court found sufficient injury for standing in the testimony of the plaintiffs' members that they had ceased use of the river because of their concern that the defendant's discharges were polluting the river and causing a depreciation in the value of one of the members' homes. *Laidlaw*, 120 S. Ct. at 704.

certain number of times. All that is required is “a connection to the area of concern sufficient to make credible the contention that the person’s future life will be less enjoyable – that he or she really has or will suffer in his or her degree of aesthetic or recreational satisfaction if the area in question remains or becomes environmentally degraded.” *Ecological Rights Foundation*, 230 F.3d at 1149. Thus, fishing, hiking, camping, nature studies and other recreational uses have been held sufficient to confer standing. *Sierra Club v. Morton*, 405 U.S. 727 (1972). Geographical proximity and frequency of use are relevant to determining a whether a plaintiff’s injury is vague or speculative, “but are not to be evaluated in a one-size-fits-all, mechanistic manner.”² *Id.*

2. Causation

There must be a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Courts have found that it would be overly burdensome on the plaintiff to require a demonstration that his or her injuries are caused specifically by the alleged actions of the defendant. *SPRIG v. Tenneco Polymers*, 602 F. Supp. 1394 (1984). For example, In *Public Interest Research Group*, the court held that the plaintiffs only need to show that the defendant “(1) discharges some pollutant in concentrations greater than allowed by its permit (2) into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant and that (3) this pollutant causes or contributes to the kinds of

² In *Friends of the Earth v. Laidlaw Environmental Services*, some of the injured members lived within two miles of the affected site, another lived 20 miles away and still others did not specify where they lived. Some stated that they engaged in recreational activities on the river in the past, while others were deterred from such activities by the alleged discharge of pollutants into the river. One member claimed that he had canoed the river some 40 miles downstream from the affected site. The Court stated that all these members had stated injuries to their aesthetic and recreational interests sufficiently specific to allow for standing. *Laidlaw*, 120 S. Ct. 693, 705 (2000).

injuries alleged by the plaintiffs.” *Public Interest Research Group of New Jersey v. Yates Industries, Inc.*, 757 F. Supp. 438, 443 (D.N.J. 1991).

3. *Redressability*

It must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.” In general, this simply means that the injury is capable of being addressed or ‘fixed’ through a remedy the law provides. If the injury is incapable of being remedied at all or by an action the law or a court may take, it is unlikely the plaintiff will meet the ‘redressability’ requirement. Moreover, if there are other contingencies which must be satisfied for the plaintiff’s “injury” to be redressed, he or she may lack standing.

However, do not confuse voluntary cessation of the allegedly unlawful behavior by the defendant for a bar to the plaintiff’s ability to seek continued cessation from the court. Voluntary cessation is generally insufficient to moot a case determining the legality of that behavior. To constitute a bar, the defendant must show that it is reasonably likely that the violations will not and cannot recur. *Laidlaw*, 528 U.S. at 171; *American Canoe Ass’n v City of Louisa Water & Sewer Comm’n*, 389 F.3d 536, 543 (6th Cir. 2004). Hypothetical situations about the likelihood that future violations will not occur do not suffice to show ‘reasonable likelihood.’

b. The “Zone of Interest” Test

In addition to these three constitutional requirements, the courts require that the plaintiff show the injury he or she has suffered falls within the “zone of interests” that the statute was designed to protect. *Lujan*, 497 U.S. at 883. When Congress enacted the CWA, it declared the purpose of the Act to be the “restoration and maintenance of

chemical, physical and biological integrity of the Nation's water." 33 U.S.C. § 1251. Congressional committee meetings and floor debates during the adoption of the CWA provide further illustration of the Legislature's intent. The purpose of the "zone of interests" test is "to exclude those plaintiffs whose suits are more likely to frustrate than to further statutory objectives." *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 397 (1987).

Standing is barred on this ground only if "the interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id.* at 399. The test is satisfied if the plaintiff establishes that its interests "share a 'plausible relationship' to the policies underlying" the statute. *Ocean Advocates v. Corps of Engineers*, 361 F.3d 1108, 1121 (9th Cir. 2004).

c. Other Limits on Standing

The plaintiff must assert his own legal rights and interest, and cannot rest his or her claim to relief on the legal rights or interests of third parties. *Valley Forge Christian College v. American United for Separation of Church and State, Inc.*, 454 U.S. 464, 474-75 (1982). In other words, the plaintiff's interest must be distinguishable from the interests of the general public as a whole in order to acquire standing. If a plaintiff's claims are "of interest only to society at large" and are not grounded on "the personal hurt that alone justifies judicial interference with the execution of the laws," the court will identify the injury as a 'generalized grievance' and find that the plaintiff failed to meet the standing requirements. *Federal Election Comm. v. Akins*, 524 U.S. 11, 23 (1998);

Center for Auto Safety v. National Highway Traffic Safety Administration, 793 F.2d 1322 (D.C. Cir. 1986).

d. Associational Standing

An association or organization may have standing to bring an action in its own right due to injury to itself ('direct standing') or it can act in a representative capacity for its members ('associational standing'). In order to act as a representative of its members, an organization has standing when: 1) its members would have standing in their own right; 2) the interests it is seeking to protect are germane to the organization's purpose and 3) the relief requested does not require the participation of the individual members. *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333 (1977). However, the organization which makes this general allegation must be prepared to identify some of its members whose interests are threatened by the defendant's actions. *Hunt*, 432 U.S. at 342; *Sierra Club v. Andrus*, 610 F.2d 581 (9th Cir. 1979). This does not, however, require production of the organization's membership list or identification of all members who are affected. *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972).

1. Standing in Own Right

The first prong of the associational standing test is that the association's members would have standing in their own right. Members have standing in their own right if the injuries they suffer as individuals establish their standing under the tests referenced above. However, this individual must also be a member in good standing within the organization. For example, he or she must be current on their membership dues and compliant with the organization's bylaws.

2. *Interests are Germane to Organization's Purpose*

The second prong of the associational standing test is that the interests the plaintiff seeks to protect are germane to the association's purpose. Typically, the bylaws or articles of incorporation of an organization state the organization's purpose. Thus, a director or leader of the association may testify or provide an affidavit as to how the citizen's suit is in accordance with and furthers the organization's mission.

3. *Participation by Individual Members*

The third prong of the associational standing test is that the claims asserted and the requested relief do not require participation of the organization's individual members. Generally, this prong is met so long as the organization is not asserting individual claims of damages on behalf of its members.

4. *Organization must be Membership Based*

It must also be shown that the organization has members as opposed to mere supporters and that the organization is acting as a proxy for the will of its members. *American Legal Foundation v. FCC*, 808 F.2d 84, 89 (D.C. Cir. 1987). An organization "lacking a definable membership body whose resources and wishes help steer the organization's course" does not meet the associational standing test. *Id.* Yet, the organization does not need to establish formal membership – it is only necessary for the organization to show 'indicia of membership.' *Hunt*, 432 U.S. at 344; *Friends of the Earth v. Chevron Chem. Co.*, 129 F.3d 111, 119 (3d Cir. 1997). Where 1) the 'contributors' or 'supporters' have control over the organization by participation in the election of the governing body and 2) the purpose for which the organization was formed must be sufficiently related to the interests of the contributors, the courts have found an

‘indicia of membership.’ *Health Research v. Kennedy*, 82 F.R.D. 21, 9 ELR 20183 (D.D.C. 1979). Moreover, ‘indicia of membership’ may be established by bylaws which define the people eligible for membership, describe categories of membership, provide for election of the association’s leaders and require the Board of Directors to assess dues.

II. Notice Requirements for Clean Water Act Action

The Clean Water Act (“CWA”) requires that a citizen give notice of their claims to any person, including the United States, and/or any other governmental entity sixty (60) days before bringing suit against the alleged violator. *See* 33 U.S.C. § 1365(a)(1), (b)(1).³ Compliance with the notice requirement is a mandatory prerequisite to a citizen suit, and such compliance must be pleaded. *National Environmental Foundation v. ABC Rail Corp.*, 926 F.2d 1096 (11th Cir. 1991); *Walls v. Waste Resource Corp.*, 761F.2d 311 (6th Cir. 1985).

a. Purpose

The purpose of the notice requirement of the citizen suit provision of the CWA is two-fold. The primary purpose is to inform federal and state agencies of claimed violations, thereby providing them with opportunity to take their own enforcement and remedial action. *Mancuso v. New York State Thruway Authority*, 909 F. Supp. 133 (1995). An additional purpose is to give the violator an opportunity to bring itself into

³ No action may be commenced (1) under [the CWA’s citizen suit provision] (A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or (B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right. 33 U.S.C. § 1365(b)(1); CWA § 505(b)(1).

complete compliance with the CWA and thus render unnecessary a citizen suit. *Laidlaw*, 528 U.S. 167, 175 (2000).

b. Service of Notice

Notice of a violation of an effluent standard or limitation or order issued by the United States Environmental Protection Agency (“EPA”) or the Georgia Environmental Protection Division (“EPD”) with respect to such standard or limitation must be served on the alleged violator or violators. 40 C.F.R. § 135.2(a). Notice is deemed to have been served on the postmark date, if mailed, or on the date of receipt, if served personally. 40 C.F.R. § 135.2(c).

If the alleged violator is an individual or corporation, service of notice shall be accomplished by certified mail addressed to, or by personal service upon, the owner or managing agent of the building, plant, installation, vessel, facility, or activity alleged to be in violation. 40 C.F.R. § 134.2(a)(1). If the alleged violator is a corporation, a copy of the notice must also be mailed to the registered agent, if any, of the corporation in Georgia if the violation for which notice is given is alleged to have occurred in Georgia. *Id.* If the alleged violator is a federal, state or local agency, service of notice is accomplished by certified mail addressed to, or by personal service upon, the head of such agency. 40 C.F.R. § 134.2(a)(2) & (3).

If a violation for which notice is given is alleged to have occurred in Georgia, a copy of the notice to an alleged violator must be mailed to the Administrator of the Environmental Protection Agency (“EPA”), the EPA Regional Administrator for Region IV, and the Director of the Georgia Environmental Protection Division (“EPD.”) 40 C.F.R. § 134.2(a)(1). In addition, a copy of the notice must also be mailed to the

Attorney General of the United States if a violation is alleged against a federal agency.
40 C.F.R. § 134.2(a)(3).

c. Time Limitations

The Supreme Court has held that a party bringing a citizen suit must strictly comply with the time limitations of the applicable notice requirements in order to (1) allow the government to pursue an enforcement action and (2) to give violators the opportunity to come into compliance. *See Hallstrom v. Tillamook County*, 493 U.S. 20, 23-24, 26, 29 (1989) (interpreting the similar notice provision of the Resource Conservation & Recovery Act). The Eleventh Circuit, citing to *Hallstrom*, has specifically held that the 60-day notice requirement is “a mandatory condition precedent to the filing of a citizen suit under the CWA. If a plaintiff fails to comply with this notice requirement where it is applicable, the district court is required to dismiss the action.” *National Environmental Foundation v. ABC Rail Corp.*, 926 F.2d 1096, 1097-98 (11th Cir. 1991).

d. Notice Content

The content of the notice is prescribed by the regulations promulgated by the EPA. 33 U.S.C. § 1365(b); *Cnty. Ass’n for Restoration of the Env’t v. Henry Bosma Dairy*, 305 F.3d 943, 950 (9th Cir. 2002). Accordingly, 40 C.F.R. § 135.3(a) provides:

Notice regarding an alleged violation of an effluent standard or limitation or of an order with respect thereto, shall include sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the person giving notice.... The notice shall state the name, address, and telephone number of the legal counsel, if any, representing the person giving the notice.

While the Eleventh Circuit has never squarely addressed the content of a CWA notice, conflicting authority exists regarding whether 40 C.F.R. § 135.3 requires strict or substantial compliance. The Ninth Circuit has held that “[t]he key language in the notice regulation is the phrase ‘sufficient information to permit the recipient to identify’ the alleged violations.” *Cnty. Ass’n for Restoration of the Env’t v. Henry Bosma Dairy*, 305 F.3d 943, 951 (9th Cir. 2002); *San Francisco Baykeeper, Inc. v. Tosco Corp.*, 309 F.3d 1153, 1155, 1158 (9th Cir. 2002). The Third Circuit has also stressed this language in *Pub. Interest Research Group of N.J., Inc. v. Hercules, Inc.*, 50 F.3d 1239 (3d Cir. 1995), citing to the following legislative history: “[t]he regulations should not require notice that places impossible or unnecessary burdens on citizens but rather should be confined to requiring information necessary to give a clear indication of the citizens’ intent.” *Id.* at 1246, citing S. Rep. No. 92-414 at 80 (1971), 92d Cong. 1st Sess. Likewise, the Second Circuit requires the plaintiff to describe alleged violations with “reasonable specificity” and refuses to “allow form to prevail over substance.” *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 487 (2d Cir. 2001)(emphasis added); see also *CARS (Citizens Against Retail Sprawl), et al. v. U.S. Army Corps of Eng’rs*, 2005 WL 3534178, *1, *5 (W.D.N.Y. Dec. 23, 2005).

However, other authority has required strict compliance with all aspects of the notice requirement. See *Washington Trout v. McCain Foods, Inc.*, 45 F.3d 1351, 1354 (9th Cir.1995) (notice letter was deficient where it failed to include the identities, addresses, and phone numbers of the plaintiffs); *California Sportfishing Protection Alliance v. City of West Sacramento*, 905 F. Supp. 792, 799 (E.D.Cal.1995) (“it will not suffice to give notice of a monitoring violation [under the CWA] by giving notice of an

effluent violation” because monitoring and effluent violations are distinct and the plaintiff must give notice of each and the agency could conclude that the effluent violations also led to monitoring or record keeping violations).

The Seventh Circuit has held that “[i]n practical terms, the notice must be sufficiently specific to inform the alleged violator about what it is doing wrong, so that it will know what corrective actions will avert a lawsuit.” *Atl. States Legal Found., Inc. v. Stroh Die Casting Co.*, 116 F.3d 814, 819 (7th Cir. 1997) (emphasis added). The Northern District of Georgia has adopted this “practical” standard for sufficiency of CWA notice in two recent decisions. In *Carney v. Gordon County, Georgia*, the court concluded that the notice letter at issue was sufficient because the information given therein was adequate to inform the alleged violator as to what it was doing wrong and what corrective action could avoid a lawsuit despite the fact that the letter could have been “more carefully and precisely drawn.” 2006 WL 4347048, *6 (N.D. Ga. 2006) (emphasis added) (citing *Stroh*, 116 F.3d at 819). *See also Purvis v. Douglasville Development, LLC*, 2006 WL 3709610, *5 (N.D. Ga. 2006) (CWA notice letter was sufficient because it provided adequate information to alleged violator to identify the pertinent aspects of the allegations without extensive investigation and gave the alleged violator opportunity to bring itself into compliance with the CWA). Similarly, another district court in the Eleventh Circuit held that “the language of the regulation clearly requires something less than a thoroughly detailed account of every possible allegation.” *Atwell v. KW Plastics Recycling Div.*, 173 F. Supp.2d 1213, 1221 (M.D. Ala. 2001). Instead, the notice must “provide enough information to enable both the alleged violator and the appropriate agencies to identify the pertinent aspects of the alleged violations

without undertaking an extensive investigation of their own,” without foreclosing the possibility that some investigation would be necessary. *Id.* at 1222 (emphasis added).

e. Failure to Comply with Notice Requirements

Failure to give proper notice 60 days before bringing a claim under the CWA is a jurisdictional defect, requiring dismissal. *River Oaks Homeowners Protection Committee, Inc. v. Edington & Associates*, 32 Fed. Appx. 929, 2002 WL 50591 (2002). A CWA action is generally dismissed without prejudice for failure to give sufficient notice so that a plaintiff may correct notice deficiencies and refile the action. *See National Environmental Foundation v. ABC Rail Corp.*, 926 F.2d 1096 (11th Cir. 1991).

f. Post-Notice Violations and Enforcement Actions

The CWA does not permit citizen suits for wholly past violations, but confers jurisdiction over citizen suits when citizen-plaintiffs make a good faith allegation of continuous or intermittent violation. *Natural Resources Defense Council v. Southwest Marine, Inc.*, 236 F.3d 985 (9th Cir. 2000). Therefore, violations will occur in the interim between notice and filing of the CWA suit.

In *PIRG v. Hercules, Inc.*, the Third Circuit determined that where an alleged violator is properly noticed of violations, a potential plaintiff is not required to send another notice letter describing additional violations of the same type already noticed in order to allege them in the complaint. *PIRG v. Hercules, Inc.*, 50 F.3d 1239 (3rd Cir. 1995).

III. ‘Diligent Prosecution’ as a Bar to Citizen Suit

The CWA gives primary enforcement authority to the EPA and state enforcement agencies. Under 33 U.S.C. § 1365(g)(6)(A)(ii), citizen suits may be dismissed for lack of

subject matter jurisdiction when a federal or state agency has commenced and is diligently prosecuting an administrative enforcement action against a polluter. As the Supreme Court stated, “the citizen suit is meant to supplement rather than to supplant governmental action.” *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49, 60 (1987).

a. Exceptions to the Bar

This bar to citizen suits may be most easily overcome by complying with the exceptions provided in 33 U.S.C. § 1365(g)(6)(B):

(B) Applicability of limitation with respect to citizen suits

The limitations contained in subparagraph (a) on civil penalty actions under section 1365 of this title shall not apply with respect to any violation for which –

- (i) a civil action under section 1365(a)(1) of this title has been filed prior to commencement of an action under this subsection, or
- (ii) notice of an alleged violation of section 1365(a)(1) of this title has been given in accordance with section 1365(b)(1)(A) of this title prior to commencement of an action under this subsection and an action under 1365(a)(1) of this title with respect to such alleged violation is filed before the 120th day after the date on which such notice is given.

33 U.S.C. § 1365(g)(6)(B).

“Even if the EPA or the [state agency] does take action after receiving notice but before the suit is filed, the suit may proceed if it is filed after the sixty day notice but within 120 days of the date notice was given. *Altamaha Riverkeepers v. City of Cochran*, 162 F.Supp.2d 1368, 1373 (M.D. Ga. 2001). *See Friends of Milwaukee’s Rivers*, 382 F.3d at 756 (7th Cir. 2004)(finding that proposed consent order and fines that came after citizens’ suit was filed did not bar suit); *Karr v. Hefner*, 475 F.3d 1192, 1198 – 99 (10th

Cir. 2007)(noting that citizen suits are not barred when the government does not act within the sixty-day waiting period and it had not yet filed suit when plaintiffs filed their independent action); *Chesapeake Bay Foundation v. American Recovery Co.*, 769 F.2d 207 (4th Cir. 1985)(finding that verb tenses used in 33 U.S.C.A. § 1365(b) [i.e. “has commenced”] and scheme of statute demonstrate that bar was not intended to apply unless government files suit first). *See also Altamaha Riverkeepers v. City of Cochran*, 162 F.Supp.2d 1368, 1373 (M.D. Ga. 2001)(finding a \$5,000 fine for continuing violations for which EPA could impose a \$10,000 to \$25,000 per day penalty contradicted CWA intent and failed to bar citizen suit).

In short, if a federal or state government agency is pursuing an enforcement action against a violator, the bar may be lifted by 1) giving notice of intent to sue prior to the agency’s commencement of its enforcement action *and* 2) timely filing suit within the requisite 120 days of the date of the notice letter. If either condition has not been met, it is likely the citizen suit will be barred.

b. Diligence is Presumed

“Section 1365(b)(1)(B) does not require government prosecution to be far-reaching or zealous. It requires only diligence.” *Karr v. Hefner*, 475 F.3d 1192, 1197 (10th Cir. 2007). The federal courts’ interpretation of ‘diligent’ has been deferential: the burden of proving the state agency’s prosecution was not diligent is heavy because the enforcement agency’s diligence is presumed. *Id.* at 1198; *see N. & S. Rivers Watershed Ass’n v. Scituate*, 949 F.2d 552, 557 (1st Cir. 1991)(“Where an agency has specifically addressed the concerns of an analogous citizen’s suit, deference to the agency’s plan of attack should be particularly favored”).

c. ‘Diligence’ is Nebulously Defined

What actions constitute ‘diligence’ however, are more nebulous. In *Karr*, the Court found that EPA’s prosecution was diligent because the agency investigated and reached a settlement with the defendants concerning essentially the same violations alleged in the plaintiffs’ complaint. *Karr*, 475 F.3d at 1198. An enforcement order and the defendants’ subsequent compliance with mandatory tasks were considered ‘diligent prosecution’ in *Scituate. N. & S. Rivers Watershed Ass'n v. Scituate*, 949 F.2d 552, 557 (1st Cir. 1991). Courts also recognize that a citizen suit would be inappropriate where the government agreed not to assess penalties on the condition that the violator take “some extreme correction action that it would not otherwise be obliged to take.” *Culbertson*, 913 F. Supp. at 1579 citing to *Gwaltney*, 484 U.S. at 60 – 61. Citizen suits have also been precluded where an administrative action involved the imposition of penalties or other burdens – over and above the compliance required by law – on the defendant. *Culbertson*, 913 F. Supp. at 1579. However, the mere extension of compliance deadlines which enable the defendant to postpone compliance does not constitute ‘diligent prosecution.’ *Culbertson*, 913 F. Supp. at 1579. Moreover, the courts recognize that violations may continue despite everything reasonably possible being done by the government to correct them. Thus, an enforcement action does not lose its ‘diligence’ if violations occur after the action is taken, as long as ‘everything reasonably possible’ is done to correct the violations. *Scituate*, 949 F.2d at 558.

d. Government Enforcement Does Not Need to be Similar to Citizen’s Strategy

An agency’s prosecutorial strategy does not need to coincide with that of the citizen-plaintiff to be considered ‘diligent.’ As expressed by the Sixth Circuit,

“[S]econd-guessing of the EPA's assessment of an appropriate remedy ... fails to respect the statute's careful distribution of enforcement authority among the federal EPA, the States and private citizens, all of which permit citizens to act where the EPA has ‘failed’ to do so, not where the EPA has acted but has not acted aggressively enough in the citizens' view.” *Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 477 (6th Cir. 2004). *See Scituate*, 949 F.2d at 558 (“Merely because the State may not be taking the precise action Appellant wants it to or moving with the alacrity Appellant desires does not entitle Appellant to injunctive relief.”)

e. Government Enforcement Does Not Need to Include Same Citizen Suit Defendants

Nor is an agency required to prosecute the same defendants as those identified in the citizen suit. Rather, the discretion afforded to government agencies also extends to the choice of defendants. “Even a diligent prosecutor may decide that the strategically appropriate course of action is to seek a consent decree against a particular set of parties rather than to pursue further action against all parties alleged to have violated provisions of the CWA.” *Karr*, 475 F.3d at 1199 – 1200.

f. A Bar Includes Both Penalty Action and Injunctive Relief

If a citizen suit is barred, the entire scope of civilian enforcement action under the CWA citizen suit provisions is precluded, including penalty actions as well as those for injunctive relief. *Scituate*, 949 F.2d at 557 – 58. The *Scituate* Court supported its finding by noting that the CWA citizen suit provisions do not differentiate civilian penalty actions from other forms of civilian relief. *Scituate*, 949 F.2d at 557 – 58; *Gwaltney*, 484 U.S. at 58.

IV. A Typical CWA Complaint

As stated above, the stated purpose of the CWA is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” FWPCA § 101(a), 33 U.S.C. § 1251(a). The CWA allows citizens to bring an enforcement action “against any person . . . who is alleged to be in violation” of the CWA. *See* FWPCA § 505(a)(1), 33 U.S.C. § 1365(a)(1). Citizens may also seek civil penalties in citizen suits according to FWPCA § 309(g)(6)(A), (B), 33 U.S.C. § 1319(g)(6)(A), (B). The typical citizen suit complaint seeks injunctive relief, civil penalties and damages, including compensatory damages, attorney’s fees and expenses of litigation, and punitive damages. Often, plaintiffs will have ancillary state law claims for damages given that the same alleged violations have given rise to compensable state law causes of actions, such as negligence, nuisance, trespass and interference with riparian rights, to name a few.

a. Statement of Jurisdiction

United States District Courts have jurisdiction over these actions under the provisions of FWPCA § 505(a)(1), 33 U.S.C. § 1365(a)(1) and pursuant to 28 U.S.C. § 1331. The Court’s original jurisdiction is invoked because the claims asserted are founded upon the existence of federal questions arising under laws of the United States. 28 U.S.C. § 1331.

The statement of jurisdiction in a typical CWA citizen suit complaint should not only include citation to the provisions of the CWA and 28 U.S.C. § 1331 (federal question jurisdiction), but also a description of the Notice of Intent Letter and explanation of the supplemental jurisdiction over any state law claims also being raised. Compliance with the notice requirement is a mandatory prerequisite to a citizen suit, and such

compliance must be pled. The date of service of the Notice and copies of the Notice should be included with the complaint, as well as evidence of receipt by the violators and government officials.

Pursuant to 28 U.S.C. § 1367, the Court has supplemental jurisdiction over the other state claims plead because they are related to the federal claims and form part of the same case or controversy under Article III of the United States Constitution.

b. Federal Claims Under the CWA

FWPCA § 301 prohibits discharges of pollutants except in compliance with 33 U.S.C. §§ 1311, 1312, 1316, 1317, 1328, 1342, and 1344. *See* FWPCA § 301(a), 33 U.S.C. § 1311(a). “Every point source discharge is prohibited unless covered by a permit, which directly subjects the discharger to the administrative apparatus established by Congress to achieve its goals.” *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 318 (1981). Under FWPCA § 301(a), “the CWA creates a regime of strict liability for violations of its standards.” *Am. Canoe Ass’n v. Murphy Farms, Inc.*, 412 F.3d 536, 540 (4th Cir. 2005). There are two permits referenced in § 1311 for discharges under CWA which are relevant here: NPDES permits under § 402, 33 U.S.C. § 1342, for the discharge of pollutants into waters of the United States; and permits under § 404, 33 U.S.C. § 1344, for the dredging and filling of wetlands.

1. Violations of the CWA Under § 402

A discharge of pollutants from a point source into waters of the US without a permit is a violation of 33 U.S.C. § 1311. Section 301 prohibits discharges that are not in compliance with FWPCA § 402, 33 U.S.C. § 1342. *See* CWA § 301(a), 33 U.S.C. § 1311(a). Section 402 of the CWA requires permits under the National Pollutant

Discharge Elimination System (“NPDES”) for all discharges of pollutants into waters of the United States from a point source. FWPCA § 402, 33 U.S.C. § 1342. Thus, the five prerequisites to bringing an enforcement action for violations of FWPCA § 402 are (1) a discharge, (2) of a pollutant, (3) into waters of the United States, (4) from a point source, (5) without a NPDES permit. *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1005 (11th Cir. 2004); *State of Georgia et al. v. City of East Ridge, Tn.*, 949 F. Supp. 1571 (N.D. Ga. 1996). Evidence which can be used as proof may include, among other things, testimony from witnesses, photographs and videotapes. *East Ridge*, 949 F. Supp. at 1576-77. The CWA authorizes citizen suits against a person who fails to obtain a NPDES permit or who is violating the conditions of a NPDES permit. *Parker*, 386 F.3d at 1005.

“Pollutant” is broadly defined in CWA § 502 as “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste.” 33 U.S.C. § 1362(6). Moreover, sediment, which is primarily composed of sand and dirt, is a pollutant. *See Driscoll v. Adams*, 181 F.3d 1285, 1291 (11th Cir. 1999); *N.C. Shellfish Growers Ass’n v. Holly Ridge Assocs., LLC*, 278 F. Supp.2d 654, 676 (E.D.N.C. 2003). “When rain water flows from a site where land disturbing activities have been conducted, such as grading and clearing, it falls within this description.” *Hughey*, 78 F.3d at 1525; *Driscoll*, 181 F.3d at 1291; *N.C. Shellfish*, 278 F. Supp.2d at 678. Storm water runoff which enters a tributary stream is considered a discharge into waters of the United States. *Parker*, 386 F.3d at 1009. In addition, wetlands, defined as “inundated or saturated” areas that

support vegetation found in those conditions, are waters of the United States. 33 C.F.R. § 328.3(a)(2), (3), (7); 33 C.F.R. § 328.3(b); 33 C.F.R. § 328.3(c) (including adjacent wetlands).

The Eleventh Circuit has proclaimed that it “interpret[s] the term ‘point source’ broadly.” *Parker*, 386 F.3d at 1009. As such, debris and earth-moving equipment are considered point sources. *Id.* Ditches which collect storm water, improper check dams and sediment traps which are “buried by sediment,” and a development site itself are also point sources. *N.C. Shellfish*, 278 F. Supp.2d at 679-81; *see Sierra Club v. Abston Constr. Co., Inc.*, 620 F.2d 41, 45 (5th Cir. 1980)⁴ (sediment basins and dirt piles are point sources even though material are “carried away from the basins by gravity flow of rainwater”); *see also Residents Against Indus. Landfill Expansion v. Diversified Systems, Inc.*, 804 F. Supp. 1036, 1038 (E.D. Tenn. 1992) (sediment ponds are “clearly point sources”). In addition, bulldozers and backhoes are point sources. *Avoyelles Sportsmen’s League, Inc. v. Marsh*, 715 F.2d 897, 922 (5th Cir. 1983).

Discharges of storm water require NPDES permits. *Hughey v. JMS Dev. Corp.*, 78 F.3d 1523, 1525 (11th Cir. 1996); *see also* 33 U.S.C. § 1342(p). An NPDES permit is required for storm water discharges associated with construction activities, including clearing, grading, and excavation of more than five (5) acres. 40 C.F.R. § 122.26(b)(14)(x). Using the authority delegated to it by FWPCA § 402(b), 33 U.S.C. § 1342(b), and the Georgia Water Quality Control Act, O.C.G.A. § 12-5-20 *et seq.*, Georgia has issued NPDES General Storm Water Permits, *Georgia Environmental Protection Division Authorization to Discharge Under the NPDES, Storm Water*

⁴ All Fifth Circuit cases decided prior to October 1, 1981 are binding precedent in the Eleventh Circuit. *See Bonner v. City of Prichard, Ala.*, 661 F.2d 1296 (11th Cir. 1981).

Discharges Associated with Construction Activity for Stand Alone Construction Projects, General Permit No. GAR 100001 (effective August 1, 2008 until August 12, 2013) (hereinafter “GAR 100001”), *Georgia Environmental Protection Division Authorization to Discharge Under the NPDES, Storm Water Discharges Associated with Construction Activity for Infrastructure Construction Projects, General Permit No. GAR 100002* (effective August 1, 2008 until August 12, 2013) (hereinafter “GAR 100002”) and *Georgia Environmental Protection Division Authorization to Discharge Under the NPDES, Storm Water Discharges Associated with Construction Activity For Common Developments, General Permit No. GAR 100003* (effective August 1, 2008 until August 12, 2013) (hereinafter “GAR 100003”) (hereinafter “GAR 100003”), to regulate the discharge of storm water from development and construction sites in Georgia. GAR 100001, GAR 100002 and GAR 100003 (the “General Permits”) are applicable to land disturbance activities on one (1) acre or more or tracts of less than one (1) acre that are part of a larger overall development with a combined disturbance one (1) acre or greater (i.e., common plan of development). More than minimal discharge of storm water and sediment into waters of the United States without following Best Management Practices (“BMPs”) or obtaining a permit is a violation of 33 U.S.C. § 1311.

2. *Violations of the CWA Under § 404*

Section 301 also prohibits discharges that are not in compliance with FWPCA § 404, 33 U.S.C. § 1344, which regulates dredge and fill material. FWPCA § 301(a), 33 U.S.C. § 1311(a). A discharge of dredge or fill material into navigable waters requires a permit from the United States Army Corps of Engineers. FWPCA § 404(a), (d), 33 U.S.C. § 1344(a), (d). Compliance with the conditions of the dredge and fill permit is

also required. FWPCA § 404(p), 33 U.S.C. § 1344(p). Navigable waters are defined as “waters of the United States.” FWPCA § 502(7), 33 U.S.C. § 1362(7). The discharge of dredge includes additions to water “incidental to any activity, including mechanized landclearing, . . . or other excavation.” 33 C.F.R. § 323.2(d)(1)(iii); *see* 33 C.F.R. § 323.2(d)(2)(i) (including “earth-moving activity”). Furthermore, fill material is that which has the effect of “[r]eplacing any portion of a water of the United States with dry land” or “[c]hanging the bottom elevation of any portion of a water of the United States.” 33 C.F.R. § 323.2(e)(1)(i)-(ii); *see* 33 C.F.R. § 323.2(f) (broadly defining the discharge of fill). Fill material includes “rock, sand, soil, [and] . . . construction debris.” 33 C.F.R. § 323.2(e)(2).

The CWA defines a pollutant as “. . . dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water.” 33 U.S.C. § 1362(6). Redeposited vegetation and sediment are also pollutants because they are dredged spoil. *U.S. v. M.C.C. of Florida, Inc.*, 772 F.2d 1501, 1505-06 (11th Cir. 1985).

It is a well established that unremediated discharges of pollutants, including sediment, into wetlands are a continuous violation. *See City of Mountain Park, Ga. v. Lakeside at Ansley, LLC*, 560 F.Supp.2d 1288, 1296-1297 (N.D.Ga. 2008) (No. 1:05-CV-2775-CAP)(holding that the continuing presence of illegally discharged fill material can constitute an ongoing violation); *Sasser v. EPA*, 990 F.2d 127 (4th Cir. 1993) (holding that “each day the pollutant remains in the wetlands without a permit constitutes an additional day of violation.”); *United States v. Reaves*, 923 F. Supp. 1530 (M.D. Fla.

1996)(holding that defendant's unpermitted discharge of dredged or fill materials into wetlands on the site is a continuing violation for as long as the fill remains).

A citizen suit for violations of FWPCA § 404 is appropriate when the defendant's conduct introduces sediment into water of the United States. *Greenfield Mills, Inc. v. Goss*, 2005 WL 1563433 (N.D. Ind. June 28, 2005). Furthermore, "where dredged materials [such as sediment in a river] remain, a continuing violation is established." *Id.* at *3, *4 (finding that at least 180 cubic yards of sediment remained in the river); *see Sasser v. Adm'r, United States Env'tl. Prot. Agency*, 990 F.2d 127, 129 (4th Cir. 1993); *see also Atlantic States Legal Found., Inc. v. Hamelin*, 182 F. Supp.2d 235, 248 n.20 (N.D.N.Y. 2001); *Informed Citizens United, Inc. v. USX Corp.*, 36 F. Supp.2d 375, 377 (S.D. Tex. 1999); *United States v. Reaves*, 923 F. Supp. 1530, 1534 (M.D. Fla. 1996); *United States v. Cumberland Farms of Conn., Inc.*, 647 F. Supp. 1166, 1183 (D. Mass. 1986); *United States v. Ciampitti*, 669 F. Supp. 684, 700 (D.N.J. 1987). "Treating the failure to take remedial measures as a continuing violation is eminently reasonable" because the injury caused by violations of the CWA is based upon "the *consequences* of the discharge in terms of lasting environmental degradation." *N.C. Wildlife Fed'n v. Woodbury*, 1989 WL 106517, *1, *2 (E.D.N.C. 1989) (italics in original).

3. *Civil Penalties*

Eleventh Circuit precedent requires that civil penalties be entered against the defendant, for "once a violation [of the CWA] has been established, some form of penalty is required. . . . Civil penalties are to be assessed . . . as a matter of law." *Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1142 (11th Cir. 1990). The court must consider the factors delineated in 33 U.S.C. § 1319(d). These factors include

(1) the seriousness of the violation(s), (2) the economic benefit (if any) resulting from the violation, (3) any history of such violations, (4) any good-faith efforts to comply with applicable requirements, (5) the economic impact of the penalty on the violator and (6) such other matters as justice may require. 33 U.S.C. § 1319(d). For the purposes of imposing a fine, “a day of violation constitutes not only a day in which Cumberland was actually using a bulldozer or backhoe in the wetland area, but also every day Cumberland allowed illegal fill material to remain therein.” *United States v. Cumberland Farms of Connecticut*, 647 F. Supp. 1166, 1183-84 (D. Mass.1986) [quoting *United States v. Tull*, 615 F. Supp. 610, 626 (4th Cir. 1983)].

4. *Injunctive Relief*

“If on or after the date the suit is filed, the defendant continued to violate the Act, the plaintiff may request both injunctive relief and civil penalties under the Act.” *State of Georgia v. City of East Ridge*, 949 F. Supp. 1571, 1579 (N.D. Ga. 1996). To determine the appropriateness of a restorative injunction, the court must take “a comprehensive evaluation of the environmental factors involved and the practicalities of the situation” based on the factual record. *Weiszmann v. District Engineer, U.S. Army Corps of Engineers*, 526 F.2d 1302, 1304 (5th Cir. 1976); *U.S. v. Context-Marks Corp*, 729 F.2d 1294, 1297 (11th Cir. 1984).

5. *Attorney’s Fees: Only Need to Substantially Prevail.*

The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing party or substantially prevailing party, whenever the court determines such award is appropriate. 33 U.S.C. § 1365(d).

c. State Law Claims

I. Nuisance

A nuisance is anything that causes hurt, inconvenience, or damage to another. The rights of a property owner include the right to use and enjoy his property. Any unreasonable interference with this right constitutes a nuisance. O.C.G.A. § 41-1-1; *Duffield v. DeKalb County*, 242 Ga. 432, 434 (1978); *Miller v. Coleman*, 213 Ga. 125 (1957); *Cannon v. City of Macon*, 81 Ga. App. 310, 320 (1950); *City of Macon v. Cannon*, 89 Ga. App. 484, 492 (1954); *Tyler v. Lincoln*, 272 Ga. 118, 119-120 (2000). Where two lots adjoin, the owner of the upper lot can do nothing to increase the natural water flow onto the lower lot. *Baumann v. Snider*, 243 Ga. App. 526, 528 (2000). Photographs are sufficient evidence to demonstrate damage from surface water runoff. *Tyler v. Lincoln*, 272 Ga. 118, 119-121 (2000); *Hogan v. Olivera*, 233 S.E.2d 428, 431 (1977).

Plaintiffs are entitled to recover for damages to the person and for damages to the property. Damages to the person include inconvenience, unhappiness, and annoyance caused by the Defendant's actions. Such damages are to be determined by the enlightened conscience of the jury. *City of Atlanta v. Murphy*, 194 Ga. App. 652 (1990); *Arvida/JMB Partners, L.P.-II v. Hadaway*, 227 Ga. App. 335 (1997); *Bedingfield v. Brewer*, 270 Ga. 453 (1964); *Baumann v. Snider*, 243 Ga. App. 525 (2000). Damages for inconvenience, unhappiness, and annoyance caused to plaintiffs are separate and distinct from damages to the value of their property and do not constitute a double recovery. Damages for a continuing nuisance or trespass are not limited to those that have occurred

prior to filing suit but may also be awarded for damages incurred during the pendency of the case. *Raymar, Inc. vs. Peachtree Golf Course*, 161 Ga. App. 336 (1982).

2. *Trespass*

A trespass is an unauthorized entry on another's property, without the consent of the owner of the property on which the alleged trespass is committed. A trespass occurs when a defendant grades his property, thereby altering the natural contour of the land, and causing dirt to be deposited onto another's property. *Webster v. Snapping Shoals Electric Membership Corp.*, 176 Ga. App. 265, 266 (1985), *citing* 27A EGL 255, Trespass, Sec. 6 (1985 Rev.); *Saheen v. G & G Corp.*, 230 Ga. 646, 648 (1973). The owner of land through which streams flow is entitled "to have the water in such streams come to his land in its natural and usual flow, subject only to such detention or diminution as may be caused by a reasonable use of it by other riparian proprietors . . . [T]he polluting thereof so as to lessen its value to the owner of such land shall constitute a trespass upon the property." O.C.G.A. § 51-9-7.

Excessive storm water and sediment discharge caused by the development of neighboring property can constitute trespass. *Ellis v. Gallof*, 220 Ga. App. 518 (1996); *Shaheen v. G & G Corp.*, 230 Ga. 646 (1973). Any increase in volume of water flow caused by an upstream land owner constitutes a trespass. *Gill v. First Christian Church, Atlanta, Georgia, Inc.*, 216 Ga. 454 (1960).

Evidence that a trespass was committed upon property which the defendant knew belonged to another is sufficient to prove that the trespass was willful for the purpose of awarding punitive damages. *Dalon Contracting Co. v. Artman*, 101 Ga. App. 828 (1960). "A willful repetition of a trespass will authorize a claim for punitive damages. *Teague v.*

York, 203 Ga. App. 24, 25 (1992). So too, will a claim of continuing nuisance. *CSX Transp. v. West*, 240 Ga. App. 209, 210 (1999); *See, Tyler v. Lincoln*, 272 Ga. 118, 119 (2000).

3. *Negligence*

Negligence is: (1) a legal duty to conform to a standard of conduct raised by the law for the protection of others against unreasonable risks of harm; (2) a breach of this standard; (3) a legally attributable causal connection between the conduct and the resulting injury; and (4) some loss or damages flowing to the plaintiff's legally protected interest as a result of the alleged breach of the legal duty. *Galanti v. United States*, 709 F.2d 706, 708-09 (11th Cir. 1983) (citing *Bradley Center v. Wessner*, 250 Ga. 199, 200 (1982); *Post Properties, Inc. v. Doe*, 230 Ga. App. 34, 37 (1997)). The duty and breach of duty elements can be established by a showing of negligence per se. Under Georgia law the violation of a valid statute constitutes negligence per se. *Decker v. Gibson Products Co.*, 679 F.2d 212, 214 (11th Cir. 1982); *Central Anesthesia Assoc. P.C. v. Worthy*, 173 Ga. App. 150, 152-53 (1984).

In determining whether the violation of a statute or ordinance is negligence per se as to a particular person, it is necessary to examine the purposes of the legislation and decide (1) whether the injured person falls within the class of persons it was intended to protect and (2) whether the harm complained of was the harm it was intended to guard against. *Central Anesthesia Assoc. P.C. v. Worthy*, 173 Ga. App. 150, 152-53 (1984); *Decker v. Gibson Products Co.*, 679 F.2d 212, 214 (11th Cir. 1982).

4. *Violations of the Georgia Erosion and Sedimentation Act*

The Georgia Erosion and Sedimentation Act requires that land disturbing activities be conducted in accordance with BMPs which reduce erosion and prevent sediment runoff from a construction site. O.C.G.A. § 12-7-6.

5. *Violations of the Georgia Water Quality Control Act*

The Georgia Water Quality Control Act regulations specify that “All waters shall be free from turbidity which results in a substantial visual contrast in a water body due to a man-made activity...For land disturbing activities, proper design, installation, and maintenance of BMPs and compliance with issued permits shall constitute compliance with [this requirement].”

- Ga. Comp. R. & Regs. § 391-3-6-.03(5)(d). Ga. Comp. R. & Regs. 391-3-6-.03(5)(c) requires that all waters shall be free from material related to municipal, industrial or other discharges which produce turbidity, color, odor or other objectionable conditions which interfere with legitimate water uses.
- Ga. Comp. R. & Regs. 391-3-6-.03(5)(b) requires that all waters shall be free from floating debris in amounts sufficient to be unsightly or that interfere with legitimate water uses.
- Ga. Comp. R. & Regs. 391-3-6-.15(4)(a) requires that all pollutants shall receive such treatment or corrective action so as to ensure compliance with effluent limitations established by the EPA pursuant to the Clean Water Act.
- Ga. Comp. R. & Regs. 391-3-6-.15(4)(b) requires that all pollutants shall receive such treatment or corrective action so as to ensure compliance with BMPs established by the EPA pursuant to the Clean Water Act.

6. *Riparian Rights*

O.C.G.A. § 44-8-1 mandates that “[r]unning water belongs to the owner of the land on which it runs; but the landowner has no right to divert the water from its usual channel nor may he so use or adulterate it as to interfere with the enjoyment of it by the next.” O.C.G.A. § 44-8-1. Under Georgia law, every riparian owner is entitled to a reasonable use of the water in a stream. *Pyle v. Gilbert*, 245 Ga. 403, 406 (1980). This

right is equal to the right of other riparian owners, and the right of each qualifies the rights of the others. *Id.*; see 1980 Ga. Op. Att’y Gen. 275, 1980 WL 25806, *2-*3 (1980). Georgia law entitles landowners that live on a stream to certain riparian rights, including the right to have water flow in its natural state free from adulteration. O.C.G.A. § 44-8-1; *Kingsley Mill Corp. v. Edmonds*, 208 Ga. 374 (1951). The owners of land through which streams flows are entitled to have the water in such streams come to their land in its natural flow, subject only to the reasonable use by other landowners. The polluting of a stream so as to lessen its value to a landowner shall constitute a trespass upon the property. O.C.G.A. § 51-9-7. Where two lots adjoin, the owner of the upper lot can do nothing to increase the natural water flow onto the lower lot. *Baumann v. Snider*, 243 Ga. App. 526, 528 (2000). Any increase in volume of water flow caused by an upstream land owner constitutes a trespass. *Gill v. First Christian Church, Atlanta, Georgia, Inc.*, 216 Ga. 454 (1960).

7. *Injunctive Relief*

Injunctive relief is appropriate to enjoin a continuing and abatable nuisance or trespass. ‘Enjoin’ means to require a person to abstain from some act. *DeKalb County v. McFarland*, 231 Ga. 649 (1974); *Lanier v. Ocean Pond Fishing Club, Inc.*, 253 Ga. 494 (1984); *Bridges v. Henson*, 216 Ga. 423 (1960); *Kingsley Mill Corp. v. Edmonds*, 208 Ga. 374 (1951).

8. *Punitive Damages*

Georgia law allows punitive damages when there is a finding of “willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of a conscious indifference to consequences.” *Roboserve*,

Ltd. v. Tom's Foods Inc., 940 F.2d 1441, 1456 (11th Cir. 1991), *citing Associated Health Systems, Inc. v. Jones*, 185 Ga. App. 798, 802, (1988). It is not essential to a recovery for punitive damages that the defendant be guilty of willful and intentional misconduct. It is sufficient that the act be done under such circumstances as evidences an entire want of care and a conscious indifference to the consequences of the act.

A conscious indifference to the consequences may be found where a Defendant fails to correct a storm water runoff problem after being notified of the problem. O.C.G.A. § 51-12-5.1; *Ponce de Leon Condominiums v. DiGirolamo*, 238 Ga. 188, 189 (1977); *Raymar v. Peachtree Golf Club Inc.*, 161 Ga. App. 336, 337 (1982). “[T]hat entire want of care which would raise the presumption of a conscious indifference to consequences...relates to an intentional disregard of the rights of another, knowingly or willfully disregarding such rights.” *DiGirolamo*, 238 Ga. at 190, *citing Gilman Paper Co. v. James*, 235 Ga. 348, 351 (1975). “While it may be true that the burden is upon the plaintiffs to prove that the trespass was willful, evidence that the trespass was committed upon property which the defendant knew belonged to another would be sufficient for this purpose.” *Dalon Contracting Co. v. Artman*, 101 Ga. App. 828 (1960); *Tyler v. Lincoln, et. al.*, 272 Ga. 118 (2000).

According to Devitt and Blackmar’s Federal Jury Practice and Instructions, intent ordinarily may not be proved directly because there is no way of fathoming or scrutinizing the operations of the human mind. E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 72.14 (1987). However, Devitt and Blackmar’s further states that a person’s intent may be inferred from the surrounding circumstances. A jury may consider any statement made or act done or omitted by a party whose intent is in issue,

and all other facts and circumstances which indicate his or her state of mind. A jury may also consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. It is for a jury to decide what facts have been established by the evidence. *Id.* Evidence that a trespass was committed upon property which the Defendant knew belonged to another is sufficient to prove that the trespass was willful for the purpose of awarding punitive damages. *Dalon Contracting*, 101 Ga. App. at 837.

“Punitive damages may be recovered if the circumstances are such from which an *inference* of conscious indifference to the consequences and to the legal rights of others, or to the ordinary obligation of society might be drawn.” *Dow Chemical Co. v. Ogletree, Deakins, Nash, Smoak & Stewart*, 237 Ga. App. 27 (1999)(emphasis in original).

9. *Attorney Fees*

O.C.G.A. § 13-6-11 allows the jury to award the expenses of litigation, including attorneys’ fees, “where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense.” *Georgia Dep’t of Transportation v. Edwards*, 267 Ga. 733, 737 - 38 (1997). The term bad faith, as it is used in this section, means bad faith connected with the transactions and dealings out of which the cause of action arose. *Brown v. Baker*, 197 Ga. App. 466, 467 (1990).

Every intentional tort invokes a species of bad faith that entitles a person wronged to recover the expenses of litigation, including attorney's fees. Thus, an award of damages for trespass, an intentional tort, supports a claim for expenses of litigation, including attorney’s fees, under the theory that the intention evokes the bad faith necessary for recovery of attorney’s fees. *Id.*; *DiGirolamo*, 238 Ga. 188, 190 (1977);

DeKalb County v. McFarland, 231 Ga. 649, 651 (1974); *Tanner v. Gilleland*, 186 Ga. App. 377, 378 (1988).

Conclusion

The initial hurdles to bringing a citizen suit under the CWA involve ‘standing to sue’ issues, meeting the notice requirements and avoiding a suit when the government is already diligently prosecuting the violator. To withstand any challenge to the ability to bring a citizen suit, a plaintiff must be prepared to show that he or she meets all of the standing requirements - injury-in-fact, causation, redressibility – and the ‘zone of interests’ test. Furthermore, the 60-day notice letter must meet the purpose, service, content and time limitation defined by law or the suit may be ultimately dismissed for lack of subject matter jurisdiction. A potential plaintiff must also send an effective notice letter to the alleged violator prior to any ‘diligent prosecution’ by a government agency, and then follow-up by filing suit within 120 days of the date on the notice letter.

If a plaintiff meets the initial hurdles, he or she should include both federal and state law claims in the complaint in order to bring an effective, comprehensive suit. Typically, the federal claims include counts under FWPCA §§ 402 and 404, injunctive relief and attorney’s fees, as provided in the CWA. The typical CWA suit scenario may also encompass state law counts for nuisance, trespass, negligence, riparian rights and violations of the Georgia Erosion and Sedimentation Act and Water Quality Control Act. However, the claims which are alleged should be tailored to the situation at hand. In addition to those claims, state law also provides for injunctive relief, punitive damages and attorney’s fees in certain situations.

Thus, an effective citizen suit under the CWA is a two part process. A prospective plaintiff must meet all the requirements to bring suit, and then compose a complaint which draws effectively on both federal and state law claims.