



UNITED STATES MARINE CORPS
MARINE CORPS BASE
CAMP LEJEUNE, NORTH CAROLINA 28542-5001

IN REPLY REFER TO:

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From: Executive Director, East Coast Regional Review Board,
Marine Corps Base, Camp Lejeune, North Carolina 28542
To: Commandant of the Marine Corps (L), Headquarters Marine
Corps, Washington, D.C. 20380

Subj: CITIZEN SUITS FOR CLEAN WATER ACT VIOLATIONS

Encl: (1) CWA Citizen Suit Advisory

1. Citizens and environmental groups have targeted military installations on the East Coast for lawsuits under Clean Water Act provisions that make judgment for the plaintiffs certain, easy, and potentially lucrative. The threat posed by the subject suits was briefed at the October 1990 meeting of the East Coast Regional Review Board. Enclosure (1) summarizes the problem. The Board has made a number of recommendations designed to place Marine Corps installations in a better position to resist or address such suits.

2. Although lawsuits seem to be limited to the East Coast at this time, West Coast installations may face the same threat at any time. An appropriate first step would be to ensure that all commanders are aware of the threat. The Board recommends that CMC (LEL) advise all Marine Corps installation commanders of this threat. Enclosure (1) could be used or adapted for that purpose.

3. The action necessary to correct violations of NPDES permits may vary greatly in terms of time, complexity, and expense. Many installations have aging facilities that will require MILCON projects to achieve compliance. Planning must start early. The Board recommends that CMC (L) be prepared to fund appropriate studies to recommend/justify military construction projects before a history of violation is established. CMC (L) should also be prepared to provide funding as needed to correct short-term deficiencies.

4. Several East Coast installations were discharging effluent under state administrative consent orders when they were notified that an environmental group intended to file lawsuit. The Department of Justice takes the position that such orders do not alter the installation's permit obligations; those orders are merely an agreement by which the state indicates it will not take enforcement action if certain conditions are met. They do not preclude citizen suits. Accordingly, the Board recommends that permit modifications, or possibly even judicial orders, be favored over state administrative orders.

5. Several members of the Board had further recommendations. These recommendations were not formally submitted to the Board for discussion and a vote and are therefore addressed separately

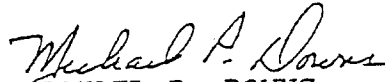
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in this paragraph. Recognizing that there may not be sufficient funding for all projects, some prioritization will be required. Several members expressed the view that the Regional Review Board should recommend priorities for proposed environmental projects. Some members also expressed the view that Congressional action to alleviate the subject threat might be possible.

6. These recommendations are provided to Headquarters, Marine Corps, as the best available means to ensure this threat is recognized, considered, and addressed.


MICHAEL P. DOWNS

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Talking Paper

Subj: CITIZEN SUITS FOR CLEAN WATER ACT VIOLATIONS

1. Problem: Citizens and environmental groups have targeted military installations for lawsuits under Clean Water Act provisions that make judgment for the plaintiffs certain, easy, and potentially lucrative.

2. Discussion:

a. Permit Required. The Clean Water Act prohibits any discharge into the waters of the United States without a permit. Permits are required for wastewater treatment facilities, oil-water separators, or any other point source. It is a federal crime to discharge without such a permit. EPA has granted authority to the states to administer the NPDES (National Pollution Discharge Elimination System) permit program.

b. Citizen Suit Provision. As part of its enforcement scheme, the Clean Water Act authorizes any citizen to file a law suit against any person, including the United States, who is alleged to be in violation of an NPDES permit or an order issued by a state or EPA with respect to effluent standards. (33 U.S.C. §1365).

c. Advantages of Citizen Suits. Citizens filing suit under the Clean Water Act have a number of advantages that make a lawsuit particularly easy to prove. Strict liability applies. If you discharge in violation of the permit, you are liable for the enforcement provisions in the Act. Permittees are also required to submit monthly Discharge Monitoring Reports which report any violation. Both the permit and the monitoring reports are public records that can be obtained under the Freedom of Information Act. A violation can be proved by simply comparing the limitations in the permit and the reports. Moreover, courts will generally not permit the Government to challenge their own reports.

d. Limitations on Citizen Suits. Citizens have some restrictions on filing a complaint: (1) Citizens must provide written notice to an alleged violator 60 days in advance of filing their complaint. This provides 60 days to come into compliance. (2) The citizen must have an interest that is or may be adversely affected. Environmental groups must have a member with such an interest. (3) The violations complained of cannot be wholly in the past. Citizens must establish that violations are continuing or likely to recur. This is usually accomplished by showing that a facility has a history of violations.

e. Bars to Citizen Suits. Citizens are barred from filing a suit if EPA or a state has commenced and is diligently prosecuting a civil or criminal action in a court of the United

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States or a state. Accordingly, one potential way to preclude a citizen suit is for a state to file a lawsuit which the parties resolve through judicial decree.

f. Relief Available. The Clean Water Act provides for civil penalties of up to \$25,000 per day for each violation. A prevailing citizen is also entitled to recover litigation expenses (fees for attorneys and experts). Injunctive relief is possible. Environmental groups have been seeking "contributions" (to environmental groups) as well. The United States currently contests the applicability of the Clean Water Act civil penalties to federal agencies; however, several courts have decided this issue adversely to the Government, and Congress is considering legislation that would specifically make federal facilities liable for such penalties.

g. Recent Targets. During 1990 MCCDC, Quantico, MCAS, Cherry Point, Naval Base, Roosevelt Roads, and Fort Bragg have each received notice that a national environmental group, the Natural Resources Defense Council, headquartered in New York City, intends to file a lawsuit against them. In the case of MCCDC, Quantico, they have now filed a lawsuit. At least three of these installations were operating under state administrative orders which allowed discharges in excess of the permit limits. The Department of Justice advises that such orders do not alter the installation's permit obligation. Those orders amount to an agreement by the state not to enforce the permit if specified conditions are met. These suits have the potential to impact operations by (1) taking O&M funds to pay judgment awards, (2) requiring the curtailment or stoppage of certain operations responsible for violations, or (3) imposing court-ordered expenditures to improve the treatment process.

3. Installation commanders must be aware of the threat of citizen suit when making decisions and setting priorities regarding NPDES permits. Frequently, the solution to NPDES violations requires a military construction project. That means that planning must be long-range and start early. Installations should initiate appropriate studies to recommend/justify military construction projects before a history of violations is established. Where possible, permit modifications should be favored over consensual administrative orders as a means of accomplishing interim compliance.

4. Mr. R. L. Warren at (703) 696-0868 or AV 226-0868 is the point of contact at this Headquarters for further information.

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