Overview of Clean Water Act Section 303 Litigation

There are basically two types of litigation that will arise under section 303: **(1) mandatory duty litigation and (2) challenges to final agency action.**

1. <u>Mandatory (or nondiscretionary) duty litigation:</u> Clean Water Act section 505(a) gives **district courts jurisdiction** over any case by a person who alleges that the Administrator has failed to perform any duty under the Act that is not discretionary. The statute must impose a specific deadline to trigger a nondiscretionary duty. (Examples: section 303(c) (4) – the administrator "shall promulgate...not later than ninety days after he publishes such proposed standards. Such allegations made in many notices and cases including Kansas and Missouri).

- **Clean Water Act Section 505(b)** provides that no person may commence mandatory duty litigation until they provide the Administrator with a **notice of intent to file suit.** Such notice shall be filed at lease **60 days** prior to filing of a **complaint (also called a "lawsuit").**

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- When a **complaint** is filed, EPA has **60 days** to file an **answer** (generally for each allegation in the complaint, we must admit, deny, or say a response is unnecessary).

- Following the answer, the parties may conduct **discovery** (which may include **interrogatories** and /or **depositions**).

- Following any discovery, the **plaintiff** will file its **brief** (usually a **motion for summary judgment**). EPA (**the defendant**) would then file its **response and cross motion for summary judgment**. Plaintiffs would file a response to EPA's motion and EPA would file a reply.

- Prior to summary judgment briefing, EPA might also file a **motion to dismiss** if we believe the case should be dismissed because the court lacks **jurisdiction** or the plaintiffs have failed to **state a claim**.

- The parties may also file **declarations or affidavits** attesting to facts or statements set forth in the brief if those facts or statements are not contained in an **administrative record**. The person that signs the declaration or affidavit swears **under penalty of perjury** that the statements they are making are true to the best of their knowledge.

- After all briefs are filed, the court may hold a **hearing** or a **trial** and then issue a **decision (also may be called memorandum opinion) and an order**. The court will **grant or deny** the parties motions for summary judgment. If the court denies plaintiff's motion, the court would **dismiss the case**. If the court grants plaintiff's motion, the court will probably issue a **remedy order** in which the court will order the Administrator to carry out the mandatory duty by a specific date. We received such orders in Arizona, Idaho and Pennsylvania.

- If either party is dissatisfied they may **file a notice of appeal with the court of appeals**.

2. ***Challenges to final agency actions:*** Such actions are brought under the **Administrative Procedure (APA).** Under the APA, persons can challenge any **final agency action** on the grounds that the action was **arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.** (Example: EPA's approval of Iowa's TDS criteria)

- The APA also allows challenges to **compel agency action unlawfully withheld or unreasonably delayed**. EPA argues that this should be the type of case brought to compel the Agency to "promptly propose: after a disapproval because there is no specific deadline for action.

- There is no requirement that a person send a **notice of intent to file suit** before filing a **complaint** under the APA.

- Since the person is challenging a decision that has been made, after EPA files an **answer within 60 days**, EPA then will file the **administrative record**. The administrative record contains all the documents that EPA relied on in making the challenged decision.

- The briefing phase of the case will proceed much in the same manner as a mandatory duty case.

- If the district court finds the EPA's decision with arbitrary or capricious, the court is to **remand to the agency to make a new decision**.

- Either party may appeal the district court's decision to the court of appeals.

3. ***Consent decrees and settlement agreements***: EPA may engage in **settlement negotiations** with plaintiffs to explore whether the parties can reach an agreement how to resolve the case without a decision by the court. While the parties are negotiating, the court may **stay the litigation** or **hold the case in abeyance** which means that the parties will not be filing briefs.

- A **consent decree** is a document that outlines commitments that EPA makes in order to settle the litigation. The decree will be signed by the parties and filed with the court and **entered as a court order**. Failure to comply with a deadline in a consent decree is a **violation of a court order**. In such an event, the court could impose sanctions on the agency. The agency's policy is never to violate a court order. If EPA believes it will be unable to meet a deadline in a consent decree, the Agency must attempt **to negotiate an extension with the plaintiffs or file a motion with the court for an extension.**

- A **settlement agreement** differs from a consent decree because it is not judicially enforceable. Nevertheless, the Agency treats any commitments in a settlement agreement as promises that agency must meet. If the Agency is unable to meet any commitment the Agency needs to go back to the plaintiffs and renegotiate the agreement.

4. ***Appeals:*** A party that is dissatisfied with a district court decisions may file a notice of appeal with the appropriate **court of appeals**. When EPA receives an adverse decision, if EPA wants to appeal the decision, EPA's **General Counsel** must send a letter to the **Assistant Attorney General for Lands and Natural Resources at the Department of Justice** recommending appeal.

- In an appeal, the party bringing the appeal is the **petitioner** and the opposing party is the **respondent.** (Example: Montana). If the court is reviewing a decision by EPA, EPA will file the **administrative record** with the court of appeals. The court will set a briefing schedule. The petitioner files their **opening brief**, the respondent then files a **response brief**, and the petitioner then files a **reply brief**. The court will hold an **oral argument** before a **three-judge panel**. In preparation for the argument, we generally attend a **moot court** with the attorney who will present EPA' argument to the court.

- After the court of appeals issues its decision, a dissatisfied party may file a **motion for panel rehearing or rehearing en banc**. When such a motion is filed, that **stays the issuance of the mandate by the court of appeals.**

- If the court of appeals denies rehearing, a party can file a **writ of certiorari** with the U.S. Supreme Court.

5. ***Names of cases:*** Here are examples of how case names appear: American Canoe Ass'n, et al. v. EPA, et al… No. 99-6279 (E.E. Pa.); City of Albuquerque v. Browner, 865 F. Supp. 733 (D. N. M. 1993) aff'd, 97 F.3d 415 (10th cir. 1996); Arkansas v. Oklahoma, 503 U.S. 91 (1992).

6. ***Courts***: There are federal **district courts** in all states. Many states are divided into judicial districts (e.g., Northern District of Iowa (N.D. Ia)). There are federal **courts of appeals** divided into 12 circuits (they are cited as 1st Cir. through 11th Cir. and there also is a D.C. Cir.). There is the Supreme Court. The United States generally does not appear in state courts.

7. ***Jurisdiction:*** Often, EPA's briefs include arguments that plaintiff's case should be dismissed because the court lacks jurisdiction. Federal courts only have jurisdiction to adjudicate actual "cases" or "controversies." Generally these arguments challenge whether the plaintiff has standing to bring a case or whether the plaintiff's case is **ripe for judicial review**.

- **Standing**: Standing raises questions whether the plaintiff has suffered an injury caused by the challenged conduct.

- **Ripeness**: Agency action being challenges must be final and such final decision must have a sufficient impact on plaintiffs.

8. ***Government lawyers***: There are government lawyers in a number of different organizations and they have different responsibilities. **EPA's Office of General Counsel (OGC)** provides legal advice (counseling) to agency decisions makers and is responsible for **defensive litigation**. **EPA's Office of Enforcement and Compliance Assurance (OECA)** is responsible for **enforcement litigation**. **EPA's Offices of Regional Counsel (ORC's)** provide

legal counseling and are responsible for defensive and enforcement cases involving their respective regions. **The Department of Justice's Environment and Natural Resources Division** represents the Agency in court. We generally deal with the **Environmental Defense Section, the Wildlife Section, and the Appellate Section.** When cases are appealed, we also deal with the **Solicitor General's Office.**