

**UPDATE**  
**ELN OBTAINS DISMISSAL OF**  
**CLEAN WATER ACT CITIZEN SUIT**  
**August 2017**



*Gwaltney Lives!*

Environmental Law Northwest (ELN) won dismissal of a Clean Water Act citizen suit against Fruhling Sand & Topsoil after Fruhling achieved complete compliance with its discharge permit, making the suit moot.<sup>1</sup> When Waste Action Project filed the mandatory 60-day notice letter, ELN orchestrated an intensive period of permit review, site improvements and compliance monitoring by the client. This effort formed the basis for a Motion to Dismiss, relying on the Clean Water Act jurisdictional language authorizing citizen suits only for current and ongoing noncompliance. Judge Ricardo Martinez agreed, citing to Plaintiff's own briefing that it needed discovery to produce evidence of any violations on and after the date of the complaint, and dismissing the case as moot.

The Clean Water Act provides only limited opportunities for citizen enforcement, and the criteria for jurisdiction provide opportunities to avoid the expense of litigation. First, a potential citizen plaintiff must provide 60 days' notice identifying with specificity the alleged violations. Second, the notice requirement allows for "diligent" prosecution by a state or EPA. Third, the notice requirement allows the discharger an opportunity to come into complete compliance. Upon diligent prosecution or achieving a state of complete compliance, the law forbids a citizen suit. These statutory criteria were analyzed in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.* which remains a valid and powerful defense to a citizen suit.<sup>2</sup>

Understanding NPDES permit applicability issues, obtaining the correct permit, implementing correct and effective compliance strategies, and knowing how to manage compliance issues are critical to avoiding and managing potentially significant liabilities to dischargers. ELN has significant experience in these areas to bring to bear on your issues. ELN acknowledges the great team achieving this outcome: Denise Ashbaugh of [Yarmuth Wilsdon](#), Stacy Patterson of [Farallon Consulting](#) and Benjamin Premack of ELN.

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<sup>1</sup> *Waste Action Project v. Fruhling Sand & Topsoil, Inc.*, No. C17-0498RSM, 2017 WL 3172841 (W. Dist. Wash. July 26, 2017), available [here](#).

<sup>2</sup> 484 U.S. 49 (1987)