

Guide to Citizen Enforcement Options (So I Found a Violation, Now What)

Informal Complaint to Agency

What it is: Phone call, email, or letter to someone at the relevant agency with the authority to address your problem.

Advantages: It is very simple and straightforward. It may bolster relationship with the agency and personnel. This is a good way to become acquainted with an issue and learn about agency policy toward it without necessarily putting the agency in a defensive stance. It is a good place to start if you feel unsure about the legal or factual foundation of your problem or it is your first time dealing with any similar issue. It may quickly lead to additional resources to help you with your problem.

Disadvantages: The agency is not required to do anything to follow-up with you or take action on your complaint. It may be difficult to find the right person to talk to; if you don't know from the outset it's easy to be given the run-around. Even if you get a good answer it can be a long time before the agency gets around to doing anything.

Recommendations: Use this to help you get started, but don't let up once you've begun. If you don't know where to start try the environmental advocate's office at West Virginia DEP and ask them for direction. You can also contact me, Mike Becher, for advice on who might be helpful. Try to learn as much as possible about your issue before you make contact so you can get the most out of it and so it is harder for someone to dismiss your concerns.

Formal Complaint to Agency

What it is: It depends upon the nature and target of your complaints.

Mining Issues: You can write a letter to either the WV DEP, OSM or both if you know of a violation of the permit or of the applicable state or federal Act. They are then required to respond to you, within 10 days, to let you know how they plan to follow-up. If they conduct an onsite inspection then they are required to take you along. Whether or not you accompany the inspector onsite you have the right to obtain an inspection report as a follow up to your complaint.

Water Issues: Water and Waste, and Oil and Gas both accept both anonymous tips as well as personal complaints. You can call, write, or email through an online complaint filing system. Unlike the situation with mining, there does not appear to be a citizen complaint process imbedded within the statute or regulations. There are however internal policies. Spills and other imminent hazards to water quality are given immediate

attention by agency staff. Other violations will be less of a priority. Anonymous tips are given less priority than those with a contact. As a matter of internal policy Oil and Gas tries to respond to any citizen complaint within 24 hours. If an inspection is conducted then you have the right to the inspection report. It may require a FOIA, or you may be able to obtain it just by asking.

Advantages: A more formal method which is likely to result in an enforcement action by an inspector. DEP and OSM monitor the frequency of these complaints. You should receive some follow-up and a copy of an inspection report. This is a good way to handle egregious violations which are fairly simple and straightforward (rather than programmatic). It is cheap and easy because you hand off enforcement to the agency. If it is a mining problem you may get to go onsite and see for yourself what is going on.

Disadvantages: If you start this way it may put the agency as well as the company on the defensive, which can impact their ability and willingness to help get other resources. This is not a good tool to use for policy type issue, as it has to be a violation of a permit or law that the inspector can easily point out. Although it is cheap and easy you are handing over enforcement to the agency, DEP generally gets first crack at the problem.

Recommendations: I think this is a good tool to use for violations of mining permits and regulations as well as for spills and other emergency type water quality violations. I think it is less useful for violations of WV/NPDES permits and definitely for any issue that is going to be controversial to enforce. It is also worth noting that in some instances you may want to be careful not to tip your hand to the enforcement agency too early. When filing a complaint to the DEP's Division of Mining and Rec or to OSM make sure to try and be specific as possible about the violation and point to the section of the permit or the law that you are relying on. Letters, or phone calls followed up by letters seem to carry the most weight as they are kept as a record of your complaint.

Administrative Actions:

What it is: An action challenging a decision of the agency, within its discretion. Generally orders of the agency and permits must be challenged this way, to the fullest extent, before any other legal action can take place. The easiest way to participate in the process is by submitting comments during the comments period. Any issuance of a permit, major order, or major modification of a permit is going to have notice requirements and allow for a response by anyone interested. Appeals of orders, major modifications, or permits in front of the Environmental Quality Board, Surface Mine Board, or Air Quality Board can be brought by anyone "adversely affected" by a permit. The appeal is like a lawsuit but before an administrative board rather than a judge.

Advantages: This is really the only way to challenge a decision committed to the agency discretion. Commenting on an action really gives you free reign to point out deficiencies and the agency is legally required to take these into account before issuing its final decision. An appeal of the permit allows the opportunity to present a case before a neutral arbitrator, who is independent of the agency. The members of the various boards have a fair amount of experience with the issues and laws they are dealing with. Despite the fact that this is a formal hearing the rules tend to be a bit more relaxed than in either state or federal court.

Disadvantages: While the agency is required to “consider” your comments they are free to consider and then dismiss them and do what they planned to do anyway. To comment effectively you need to be pretty well versed with the decision itself as well as with the laws and regulations the decision is based upon. An appeal can be intimidating as it does require a hearing. To be successful at the hearing it is essential that you be very well versed in the facts and laws of the case. Although the rules are more lax than in court, you will still be required to follow some standards of procedure and evidence. The defense will almost certainly have professional legal staff.

Recommendations: Realize that to be effective, this type of action will take a lot of time. The better you know your subject the more likely it is you will be able to make a difference. If you come across as someone who is not familiar with the governing laws and regulations it will be easier for the agency to dismiss your input. It would be useful to talk with someone who has submitted comments or participated in an appeal before. You do not have to comment to pursue an appeal, but if you are going to participate in one on your own the comments are probably a good exercise to familiarize yourself with the issues. If you go in front of a board do not be afraid to ask the board’s clerk or the board’s lawyer for help keeping up with deadlines and making sure that you are on board with the applicable rules. Do remember that this stuff is not rocket science, the biggest advantage a lawyer will have over you is their knowledge of the rules and procedures. The board will probably cut you some slack in this area, and if you’ve put in the time you’re likely to know way more about the facts of the situation than opposing counsel.

State and Federal Lawsuits

What it is: A court proceeding against a violator of state law or federal law. This might be a company or individual polluter or it might be against the agency for the violation of a non-discretionary duty. The rules of procedure and evidence here are likely to be more stringently enforced than in an administrative hearing. This action is not available for agency actions that are committed to their discretion.

Proceedings: A Guide/Timeline to Court Proceedings

- 1) Notice of Intent to Sue: All state and federal environmental statutes (of which I am aware) require 60 days notice to be given to the alleged violator, the state agency and the federal agency. This is supposed to be a non-adversarial period where the parties work towards resolution without litigation. If a violation is fixed during this period then you lose your right to sue. If the state or federal agency sues the violator during this period of time then you lose your right to sue.
- 2) The Complaint: The complaint is a preliminary statement of the plaintiff's case. It will contain the facts alleged as well as the legal basis for the lawsuit and request specific relief. It is the document that formally initiates the lawsuit in court.
- 3) Answer/Motion to Dismiss: The defendant must respond after being served with a complaint. The first action may be an answer, where they respond directly to the allegations in the complaint and may present a counter-claim of their own. The defendant might also respond with a motion to dismiss. A motion to dismiss is a legal challenge to the complaint. It will usually take the position either that there is no case even if everything said in the complaint is taken as true for the sake of argument. This is usually the initial legal hurdle to get past in the life of a case.
- 4) Discovery Period: This is the time in which both sides have the right to find out about each other's cases. Witnesses may be interviewed ("deposed") documents are exchanged and, in an environmental case, experts are likely to be hired. This period of time can extend for months. This is what most lawyers spend most of their time doing.
- 5) Motion for Summary Judgment: At or near the end of discovery, the parties are allowed to file motions for summary judgment. This is a purely legal motion and cannot be granted if there are disputed facts. Basically one or both sides make the following argument: "based on what we know to be true, the law is in our favor." These can be pretty complicated as they are often the presentation of the initial case.
- 6) Trial: The final presentation of the case to the judge or jury. Facts and law are disputed here. In a jury trial the jury decides the facts based on the law that the judge decides and then gives to them. Most cases don't get this far, but environmental cases seem more likely to go to trial than almost any other type.
- 7) Appeal: If a party loses they may appeal to a "higher court" based on alleged errors or mistaken application of the law by the trial court. In the state system appeals are made directly to the West Virginia Supreme Court. In the federal system appeals are made to the Fourth Circuit Court of Appeals. If a party

loses in front of the Fourth Circuit they may appeal to the Supreme Court of the United States (although these appeals are rarely heard). Getting to summary judgment/trial stage often takes at least a year or so. Appeals may take this long again.

Important Legal Concepts:

Jurisdiction: The ability of a court to hear a case. Environmental statutes grant jurisdiction to certain courts to hear citizen suits brought under the Act. The case must be brought in the right court for it to be heard. This means the right location as well as the right choice between state and federal court.

Standing: Constitutionally required (by both the U.S. Constitution and West Virginia's) before a court can hear a case. Environmental plaintiffs can't simply sue on behalf of the environment, there must be a real live person who is affected. If there is a real live person who is affected and they are the member of an organization dedicated to those issues, then that organization can be a plaintiff. The person though will probably still be called upon to make some demonstration of how they are affected.

Statutes: Laws passed by Congress or the state legislature. Deference is given to an agency in how it interprets a statute it is required to implement, but not as much deference is given than for a regulation.

Regulations: Laws (or quasi-laws) passed by the agency in the course of its duties to implement a statute. Agencies must be authorized by Congress or the legislature to issue regulations. When a new regulation is issued or when a regulation is changed there must be public notice and the opportunity for a public hearing.

Common Law: Legal principles that have developed through years of decisions by courts on similar issues. Typically when someone refers to "common law" they are referring to law that is not tied to a statute or regulation. The most common example is a tort claim.

Injunctions: A court mandate to do something or stop doing something in order to comply with the law.

Civil Penalties: Penalties which a violator must pay to the United States or to the state for violation of the law.

Damages: Money which is paid to an individual (or organization) to make up for harm they have suffered.