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# Citizen Enforcement and Sanitary Sewer Overflows in California

## **ONLINE SUPPLEMENT A: FEDERAL LAWS AND REGULATIONS**

Nell Green Nysten, Luke Sherman, Michael Kiparsky, and Holly Doremus

Wheeler Water Institute | Center for Law, Energy & the Environment  
UC Berkeley School of Law

**BerkeleyLaw**  
UNIVERSITY OF CALIFORNIA

Center for Law, Energy &  
the Environment

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## I. Statutory definition of “treatment works”

### 33 U.S.C. § 1292(2)(A). Definitions (in Clean Water Act subchapter addressing construction grants)

The term “treatment works” means any devices and systems used in the storage, treatment, recycling, and reclamation of municipal sewage or industrial wastes of a liquid nature to implement section 1281 of this title, or necessary to recycle or reuse water at the most economical cost over the estimated life of the works, including intercepting sewers, outfall sewers, sewage collection systems, pumping, power, and other equipment, and their appurtenances; extensions, improvements, remodeling, additions, and alterations thereof; elements essential to provide a reliable recycled supply such as standby treatment units and clear well facilities; and acquisition of the land that will be an integral part of the treatment process (including land used for the storage of treated wastewater in land treatment systems prior to land application) or will be used for ultimate disposal of residues resulting from such treatment and acquisition of other land, and interests in land, that are necessary for construction.

*NOTE: Except for amendments in 1977 and 2014 to the language following the final semicolon, this provision has remained unchanged since the CWA’s passage in 1972.*

### 33 U.S.C. § 1362(26). Definitions (in Clean Water Act general provisions)

The term “treatment works” has the meaning given the term in section 1292 of this title.

*NOTE: Added by Water Resources Reform and Development Act of 2014, Pub. L. No. 113-121, 128 Stat. 1193, 1328, tit. V § 5012(b) (codified at 33 U.S.C. § 1362(26)).*

## II. Regulatory definition of “publicly owned treatment works”

### 40 C.F.R. § 122.2. Definitions (in EPA’s NPDES program general provisions)

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POTW is defined at § 403.3 of this chapter. . . .

Publicly owned treatment works is defined at 40 CFR 403.3.

...

### 40 C.F.R. § 403.3. Definitions (in EPA’s General Pretreatment Regulations provisions)

...

(q) The term Publicly Owned Treatment Works or POTW means a treatment works as defined by section 212 [33 U.S.C. § 1292] of the Act, which is owned by a State or municipality (as defined by section 502(4) of the Act). This definition includes any devices and systems used in the storage, treatment, recycling and reclamation of municipal sewage or industrial wastes of a liquid nature. It also includes sewers, pipes and other conveyances only if they convey wastewater to a POTW Treatment Plant. The term also means the municipality as defined in section 502(4) of the Act, which has jurisdiction over the Indirect Discharges to and the discharges from such a treatment works.

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(r) The term POTW Treatment Plant means that portion of the POTW which is designed to provide treatment (including recycling and reclamation) of municipal sewage and industrial waste.

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## III. Standard permit conditions relevant to SSOs

### 40 C.F.R. § 122.41. Conditions applicable to all permits

The following conditions apply to all NPDES permits. Additional conditions applicable to NPDES permits are in § 122.42. All conditions applicable to NPDES permits shall be incorporated into the permits either expressly or by reference. If incorporated by reference, a specific citation to these regulations (or the corresponding approved State regulations) must be given in the permit.

(a) Duty to comply. The permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the Clean Water Act and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or denial of a permit renewal application.

...

- (d) Duty to mitigate. The permittee shall take all reasonable steps to minimize or prevent any discharge or sludge use or disposal in violation of this permit which has a reasonable likelihood of adversely affecting human health or the environment.
- (e) Proper operation and maintenance. The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit. Proper operation and maintenance also includes adequate laboratory controls and appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary facilities or similar systems which are installed by a permittee only when the operation is necessary to achieve compliance with the conditions of the permit.

...

- (j) Monitoring and records.
  - (1) Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity.
  - (2) Except for records of monitoring information required by this permit related to the permittee's sewage sludge use and disposal activities, which shall be retained for a period of at least five years . . . , the permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by this permit, and records of all data used to complete the application for this permit, for a period of at least 3 years from the date of the sample, measurement, report or application. This period may be extended by request of the Director at any time.

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- (l) Reporting requirements. —

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- (6) Twenty-four hour reporting.
  - (i) The permittee shall report any noncompliance which may endanger health or the environment. Any information shall be provided orally within 24 hours from the time the permittee becomes aware of the circumstances. A report shall also be provided within 5 days of the time the permittee becomes aware of the circumstances. The report shall contain a description of the noncompliance and its cause; the period of noncompliance, including exact dates and times), and if the noncompliance has not been corrected, the anticipated time it is expected to continue; and steps taken or planned to reduce, eliminate, and prevent reoccurrence of the noncompliance. For noncompliance events related to combined sewer overflows, sanitary sewer overflows, or bypass events, these reports must include the data described above (with the exception of time of discovery) as well as the type of event (combined sewer overflows, sanitary sewer overflows, or bypass events), type of sewer overflow structure (e.g., manhole, combine sewer overflow outfall), discharge volumes untreated by the treatment works treating domestic sewage, types of human health and environmental impacts of the sewer overflow event, and whether the noncompliance was related to wet weather. As of December 21, 2020 all reports related to combined sewer overflows, sanitary sewer overflows, or bypass events submitted in compliance with this section must be submitted electronically by the permittee to the Director or initial recipient, as defined in 40 CFR 127.2(b), in compliance with this section and 40 CFR part 3 (including, in all cases, subpart D to part 3), § 122.22, and 40 CFR part 127. Part 127 is not intended to undo existing requirements for electronic reporting. Prior to this date, and independent of part 127, permittees may be required to electronically submit reports related to combined sewer overflows, sanitary sewer overflows, or bypass events under this section by a particular permit or if required to do so by state law. The Director may also require permittees to electronically submit reports not related to combined sewer overflows, sanitary sewer overflows, or bypass events under this section.
  - (ii) The following shall be included as information which must be reported within 24 hours under this paragraph.
    - (A) Any unanticipated bypass which exceeds any effluent limitation in the permit. (See § 122.41(g).
    - (B) Any upset which exceeds any effluent limitation in the permit.
    - (C) Violation of a maximum daily discharge limitation for any of the pollutants listed by the Director in the permit to be reported within 24 hours. (See § 122.44(g).)
  - (iii) The Director may waive the written report on a case-by-case basis for reports under paragraph (1) (6)(ii) of this section if the oral report has been received within 24 hours.

- (7) Other noncompliance. The permittee shall report all instances of noncompliance not reported under paragraphs (l)(4), (5), and (6) of this section, at the time monitoring reports are submitted. The reports shall contain the information listed in paragraph (l)(6). For noncompliance events related to combined sewer overflows, sanitary sewer overflows, or bypass events, these reports shall contain the information described in paragraph (l)(6) and the applicable required data in appendix A to 40 CFR part 127. As of December 21, 2020 all reports related to combined sewer overflows, sanitary sewer overflows, or bypass events submitted in compliance with this section must be submitted electronically by the permittee to the Director or initial recipient, as defined in 40 CFR 127.2(b), in compliance with this section and 40 CFR part 3 (including, in all cases, subpart D to part 3), § 122.22, and 40 CFR part 127. Part 127 is not intended to undo existing requirements for electronic reporting. Prior to this date, and independent of part 127, permittees may be required to electronically submit reports related to combined sewer overflows, sanitary sewer overflows, or bypass events under this section by a particular permit or if required to do so by state law. The Director may also require permittees to electronically submit reports not related to combined sewer overflows, sanitary sewer overflows, or bypass events under this section.

...

(m) Bypass—

(1) Definitions.

- (i) Bypass means the intentional diversion of waste streams from any portion of a treatment facility.
- (ii) Severe property damage means substantial physical damage to property, damage to the treatment facilities which causes them to become inoperable, or substantial and permanent loss of natural resources which can reasonably be expected to occur in the absence of a bypass. Severe property damage does not mean economic loss caused by delays in production.

(2) Bypass not exceeding limitations. The permittee may allow any bypass to occur which does not cause effluent limitations to be exceeded, but only if it also it for essential maintenance to assure efficient operation. These bypasses are not subject to the provisions of paragraphs (m)(3) and (m)(4) of this section.

(3) Notice—

- (i) Anticipated bypass. If the permittee knows in advance of the need for a bypass, it shall submit prior notice, if possible at least ten days before the date of the bypass. As of December 21, 2020 all notices submitted in compliance with this section must be submitted electronically by the permittee to the Director or initial recipient, as defined in 40 CFR 127.2(b), in compliance with this section and 40 CFR part 3 (including, in all cases, subpart D to part 3), § 122.22, and 40 CFR part 127. Part 127 is not intended to undo existing requirements for electronic reporting. Prior to this date, and independent of part 127, permittees may be required to report electronically if specified by a particular permit or if required to do so by state law.
- (ii) Unanticipated bypass. The permittee shall submit notice of an unanticipated bypass as required in paragraph (l)(6) of this section (24-hour notice). As of December 21, 2020 all notices submitted in compliance with this section must be submitted electronically by the permittee to the Director or initial recipient, as defined in 40 CFR 127.2(b), in compliance with this section and 40 CFR part 3 (including, in all cases, subpart D to part 3), § 122.22, and 40 CFR part 127. Part 127 is not intended to undo existing requirements for electronic reporting. Prior to this date, and independent of part 127, permittees may be required to report electronically if specified by a particular permit or if required to do so by state law.

(4) Prohibition of bypass.

- (i) Bypass is prohibited, and the Director may take enforcement action against a permittee for bypass, unless:
  - (A) Bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;
  - (B) There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass which occurred during normal periods of equipment downtime or preventive maintenance; and
  - (C) The permittee submitted notices as required under paragraph (m)(3) of this section.
- (ii) The Director may approve an anticipated bypass, after considering its adverse effects, if the Director determines that it will meet the three conditions listed above in paragraph (m)(4)(i) of this section.

- (n) Upset—
- (1) Definition. Upset means an exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.
  - (2) Effect of an upset. An upset constitutes an affirmative defense to an action brought for noncompliance with such technology based permit effluent limitations if the requirements of paragraph (n)(3) of this section are met. No determination made during administrative review of claims that noncompliance was caused by upset, and before an action for noncompliance, is final administrative action subject to judicial review.
  - (3) Conditions necessary for a demonstration of upset. A permittee who wishes to establish the affirmative defense of upset shall demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that:
    - (i) An upset occurred and that the permittee can identify the cause(s) of the upset;
    - (ii) The permitted facility was at the time being properly operated; and
    - (iii) The permittee submitted notice of the upset as required in paragraph (1)(6)(ii)(B) of this section (24 hour notice).
    - (iv) The permittee complied with any remedial measures required under paragraph (d) of this section.
  - (4) Burden of proof. In any enforcement proceeding the permittee seeking to establish the occurrence of an upset has the burden of proof.

## IV. Clean Water Act provisions related to citizen suits

### 33 U.S.C. § 1319(g). Enforcement

(g) Administrative penalties

(1) Violations

Whenever on the basis of any information available—

- (A) the Administrator finds that any person has violated section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or has violated any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by a State, or
- (B) the Secretary of the Army (hereinafter in this subsection referred to as the “Secretary”) finds that any person has violated any permit condition or limitation in a permit issued under section 1344 of this title by the Secretary,

the Administrator or Secretary, as the case may be, may, after consultation with the State in which the violation occurs, assess a class I civil penalty or a class II civil penalty under this subsection.

(2) Classes of penalties

- (A) Class I . . .
- (B) Class II . . .

(3) Determining amount

In determining the amount of any penalty assessed under this subsection, the Administrator or the Secretary, as the case may be, shall take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

- (4) Rights of interested persons . . .
- (5) Finality of order . . .

(6) Effect of order

(A) Limitation on actions under other sections

Action taken by the Administrator or the Secretary, as the case may be, under this subsection shall not affect or limit the Administrator's or Secretary's authority to enforce any provision of this chapter; except that any violation--

- (i) with respect to which the Administrator or the Secretary has commenced and is diligently prosecuting an action under this subsection,
- (ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, or
- (iii) for which the Administrator, the Secretary, or the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be,

shall not be the subject of a civil penalty action under subsection (d) of this section or section 1321(b) of this title or section 1365 of this title.

(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 section 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.

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### 33 U.S.C. § 1362(5). Definitions

The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.

### 33 U.S.C. § 1365. Citizen suits

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf--

- (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
- (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

(b) Notice

No action may be commenced--

- (1) under subsection (a)(1) of this section--
  - (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.

- (2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316 and 1317(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) Venue; intervention by Administrator; United States interests protected

- (1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located.
- (2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.
- (3) Protection of interests of United States

Whenever any action is brought under this section in a court of the United States, the plaintiff shall serve a copy of the complaint on the Attorney General and the Administrator. No consent judgment shall be entered in an action in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator.

(d) Litigation costs

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 or substantially prevailing party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Statutory or common law rights not restricted

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

(f) Effluent standard or limitation

For purposes of this section, the term "effluent standard or limitation under this chapter" means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 1311 of this title; (2) an effluent limitation or other limitation under section 1311 or 1312 of this title; (3) standard of performance under section 1316 of this title; (4) prohibition, effluent standard or pretreatment standards under section 1317 of this title; (5) certification under section 1341 of this title; (6) a permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter (including a requirement applicable by reason of section 1323 of this title); or (7) a regulation under section 1345(d) of this title,.

(g) "Citizen" defined

For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

(h) Civil action by State Governors

A Governor of a State may commence a civil action under subsection (a) of this section, without regard to the limitations of subsection (b) of this section, against the Administrator where there is alleged a failure of the Administrator to enforce an effluent standard or limitation under this chapter the violation of which is occurring in another State and is causing an adverse effect on the public health or welfare in his State, or is causing a violation of any water quality requirement in his State.

## V. Regulations related to citizen suits under the Clean Water Act

### 40 C.F.R. § 135.2. Service of notice

- (a) Notice of intent to file suit pursuant to section 505(a)(1) of the Act shall be served upon an alleged violator of an effluent standard or limitation under the Act, or an order issued by the Administrator or a State with respect to such a standard or limitation, in the following manner:
- (1) 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. A copy of the notice shall be mailed to the Administrator of the Environmental Protection Agency, the Regional Administrator of the Environmental Protection Agency



for the region in which such violation is alleged to have occurred, and the chief administrative officer of the water pollution control agency for the State in which the violation is alleged to have occurred. If the alleged violator is a corporation, a copy of such notice also shall be mailed to the registered agent, if any, of such corporation in the State in which such violation is alleged to have occurred.

- (2) If the alleged violator is a State or local agency, service of notice shall be accomplished by certified mail addressed to, or by personal service upon, the head of such agency. A copy of such notice shall be mailed to the chief administrative officer of the water pollution control agency for the State in which the violation is alleged to have occurred, the Administrator of the Environmental Protection Agency, and the Regional Administrator of the Environmental Protection Agency for the region in which such violation is alleged to have occurred.
  - (3) If the alleged violator is a Federal agency, service of notice shall be accomplished by certified mail addressed to, or by personal service upon, the head of such agency. A copy of such notice shall be mailed to the Administrator of the Environmental Protection Agency, the Regional Administrator of the Environmental Protection Agency for the region in which such violation is alleged to have occurred, the Attorney General of the United States, and the Chief administrative officer of the water pollution control agency for the State in which the violation is alleged to have occurred.
- (b) Service of notice of intent to file suit pursuant to section 505(a)(2) of the Act shall be accomplished by certified mail addressed to, or by personal service upon, the Administrator, Environmental Protection Agency, Washington, DC 20460. A copy of such notice shall be mailed to the Attorney General of the United States.
  - (c) Notice given in accordance with the provisions of this subpart shall be deemed to have been served on the postmark date if mailed, or on the date of receipt if served personally.

#### **40 C.F.R. § 135.3. Contents of notice**

- (a) Violation of standard, limitation or order. 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.
- (b) Failure to act. Notice regarding an alleged failure of the Administrator to perform any act or duty under the Act which is not discretionary with the Administrator shall identify the provision of the Act which requires such act or creates such duty, shall describe with reasonable specificity the action taken or not taken by the Administrator which is alleged to constitute a failure to perform such act or duty, and shall state the full name, address and telephone number of the person giving the notice.
- (c) Identification of counsel. The notice shall state the name, address, and telephone number of the legal counsel, if any, representing the person giving the notice.

#### **40 C.F.R. § 135.4. Service of complaint**

- (a) A citizen plaintiff shall mail a copy of a complaint filed against an alleged violator under section 505(a)(1) of the Act to the Administrator of the Environmental Protection Agency, the Regional Administrator of the EPA Region in which the violations are alleged to have occurred, and the Attorney General of the United States.
- (b) The copy so served shall be of a filed, date-stamped complaint, or shall be a conformed copy of the filed complaint which indicates the assigned civil action number, accompanied by a signed statement by the plaintiff or his attorney as to when the complaint was filed.
- (c) A citizen plaintiff shall mail a copy of the complaint on the same date on which the plaintiff files the complaint with the court, or as expeditiously thereafter as practicable.
- (d) If the alleged violator is a Federal agency, a citizen plaintiff must serve the complaint on the United States in accordance with relevant Federal law and court rules affecting service on defendants, in addition to complying with the service requirements of this subpart.

#### **40 C.F.R. § 135.5. Service of proposed consent judgment**

- (a) The citizen plaintiff in a citizen enforcement suit filed against an alleged violator under section 505(a)(1) of the Act shall serve a copy of a proposed consent judgment, signed by all parties to the lawsuit, upon the Administrator, Environmental Protection Agency, Washington, DC 20460, and the Attorney General, Department of Justice, Citizen Suit Coordinator, Room 2615, Washington, DC 20530. The plaintiff shall serve the Administrator and the Attorney General by personal service or by certified mail (return receipt requested.) The plaintiff shall also mail a copy of a proposed consent judgment at the same time to the Regional Administrator of the EPA Region in which the violations were alleged to have occurred.

- (b) When the parties in an action in which the United States is not a party file or lodge a proposed consent judgment with the court, the plaintiff shall notify the court of the statutory requirement that the consent judgment shall not be entered prior to 45 days following receipt by both the Administrator and the Attorney General of a copy of the consent judgment.
  - (1) If the plaintiff knows the dates upon which the Administrator and the Attorney General received copies of the proposed consent judgment, the plaintiff shall so notify the court.
  - (2) If the plaintiff does not know the date upon which the Administrator and Attorney General received copies of the proposed consent judgment, the plaintiff shall so notify the court, but upon receiving such information regarding the dates of service of the proposed consent judgment upon the Administrator and Attorney General, the plaintiff shall so notify the court of the dates of service.