

UNDERSTANDING PERMITS

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A BRIEF OVERVIEW OF THE CLEAN WATER ACT

CWA OVERVIEW

The Federal Water Pollution Control Act, more commonly known as the Clean Water Act (CWA), is the basic federal law for controlling water pollution in the United States. Although the original act dates back to 1948, the Clean Water Act, the source of modern water pollution control law, was largely shaped by 1972 amendments, overhauling the entire water pollution control system.

What the CWA Regulates

In order to protect and restore our nation's waterways, the CWA prohibits the discharge of any pollutants into "waters of the United States" unless the polluter has a permit issued under the CWA. Even if the discharger has a permit, however, the CWA says the conditions of the permit should be strict enough to "protect the public health or welfare" and "enhance the quality of water."

Who Administers the CWA

The United States Environmental Protection Agency (EPA) is charged with the overall administration of the CWA. In Georgia, as in many other states, permitting authority has been delegated to the State. Specifically, the Georgia Environmental Protection Division (EPD), a division of the Department of Natural Resources (DNR), is the agency charged with issuing permits to industries and municipalities in Georgia.

While permitting authority under the Clean Water Act has been delegated from the federal government to the state, both federal and state law apply. Therefore, two sets of laws and two sets of regulations govern the administration of the Act here in Georgia. Water quality permitting is governed by:

- Federal Clean Water Act
- Federal Regulations that have been implemented pursuant to that Act
- Georgia Water Quality Control Act, enacted by the Georgia General Assembly
- Georgia Rules and Regulations for Water Quality, enacted by Georgia's Department of Natural Resources (DNR).

However, the interaction between these laws and regulations can be complex. The best source of information about requirements for Georgia's discharges is the Georgia Rules and Regulations for Water Quality, enacted by the state DNR. This information is available on DNR's website at www.gadnr.org

Where the CWA Fails

With the passage of the Clean Water Act, the United States government finally appeared to be taking a proactive stance on water pollution. Enacted in order "to restore and maintain the chemical, physical and biological integrity of the Nation's water," the Clean Water Act appeared to be the solution to water pollution problems. Unfortunately, almost three decades after its passage, water pollution continues to be a significant problem in this country. While the government and industry may not have fulfilled their end of the bargain in cleaning up our waters, the Clean Water Act has given citizens the tools to achieve that goal through programs such as the National Pollutant Discharge Elimination System program.



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NPDES PROGRAM NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM [NPDES] PERMITS

What is the NPDES Program?

The National Pollutant Discharge Elimination System (NPDES) is a permit-based program designed to regulate the discharge of pollutants into U.S. waters. This program is one of the principal operating mechanisms of the Clean Water Act and the foundation of water pollution prevention and control in the United States.

Section 402 of the Clean Water Act prohibits the discharge of any pollutant from a point source into navigable waters of the United States unless the discharger has a National Pollutant Discharge Elimination System permit, more commonly known as an NPDES permit. A point source is a discernible, confined, and discrete conveyance of pollution (e.g. a pipe, ditch, etc.). Anyone discharging pollutants into the nation's waters without a permit or in violation of a valid permit is breaking the law. The corollary is that it is perfectly legal to discharge pollutants in compliance with a valid permit.

NPDES ENFORCEMENT ENFORCEMENT OF PERMIT CONDITIONS

Strict Liability

Establishing liability for NPDES permit violations is relatively straightforward: A violation of an NPDES permit constitutes a violation of the CWA. In fact, fault is not required to support liability. Instead, enforcement of NPDES permits is based on "strict liability." In other words, even if the permittee did not mean to violate its permit, it is liable for the results. Under the law, in NPDES enforcement actions, "the sole question [is] whether the discharger has exceeded the limitations on discharge of pollutants from a particular point source."

While strict liability may seem unfair to some, it imposes a responsibility on each permittee to ensure that permit limitations are being met. Without such liability, a permittee could avoid any penalty for polluting our waters by merely claiming that he or she was unaware of the problem. Strict liability places an affirmative duty on the permittee to protect our resources. Basing liability on clear effluent limitations furthers the purpose of the CWA. As the courts charged with interpreting the Act have noted, "[s]uch direct restrictions on discharges facilitate enforcement by making it unnecessary to work backward from an overpolluted body of water to determine which point sources are responsible and which must be abated."

Enforcement Methods

When Clean Water Act violations occur, compliance can be enforced in four different ways:

- 1) Self-monitoring
- 2) EPD's civil enforcement actions (including administrative fines)
- 3) Criminal prosecution
- 4) Citizen suits

Enforcement actions may result from a variety of scenarios, including inspections by the regulatory agency, complaints filed by employees or citizens, and monitoring reports submitted by the permittee to the regulatory agency. Under the CWA, self-monitoring is supposed to be the main enforcement method.



Keeping Watch Over Our Waters



UNDERSTANDING PERMITS**ENFORCEMENT OF PERMIT CONDITIONS** CONT'D

NPEDS ENFORCEMENT

Self-Monitoring

The primary responsibility for complying with the Clean Water Act and the terms of a permit rests with the permit holder. The permittee is also responsible for reporting any violations and taking corrective action.

Civil Enforcement

Unfortunately, many permittees do not comply with their permit limits and, unless faced with a penalty, fail to take corrective action. Once a permittee fails to comply with its permit, EPD has the primary responsibility for enforcing that permit. If EPD documents a violation, it typically issues a notice of noncompliance to the violator. The most common tool for civil enforcement is the issuance of a civil penalty or fine. The Clean Water Act provides for penalties of up to \$27,500 per violation per day. In addition to imposing fines, EPD may also:

- require immediate actions to correct the violation(s) (For example, replacing or repairing defective equipment or taking other corrective measures to prevent further illegal discharges);
- order facility operators to cease operations until the problems are fully addressed;
- revoke the discharger's permit;
- refuse to renew a permit.

While EPD has a range of options at its disposal, many of these options are rarely taken. For example, EPD rarely (if ever) assesses fines at the statutory maximum choosing instead to assess fines well below \$27,500 per violation. Of course, in each of those actions, the permittee presumably violated the permit numerous times. As such, the amount of the penalty is typically very small and frequently ranges from a few dollars to a few hundred dollars per violation, pocket change for most businesses. Remember, fines serve a valuable purpose in deterring future violations. If the fines are significantly less than the cost of fixing the problem, then the violator has an incentive to just continue discharging harmful pollutants into the river.

Also, instead of requiring immediate action, EPD will typically require a violator to enter into a consent order which describes measures which must be taken, such as upgrading equipment or providing operator training, with a schedule for achieving compliance. Sometimes these compliance schedules allow the permittee two or three years to achieve compliance. Rarely, if ever, does EPD deny or revoke a permit or refuse to renew a permit based on failure to comply with permit limitations.

EPD has a searchable database of all enforcement actions available on the web at <http://www.ganet.org/dnr/environ/>. Mail subscriptions to these notices are available at a cost of \$50 per year. That fee provides the subscriber with all notices of proposed and executed orders issued from July 1 through June 30 of the following year. For information about subscriptions, call EPD at 404.657.5947 inside Atlanta local dialing area or toll-free within Georgia at 888.373.5947.

If you think that EPD did not do its job and is not preventing future violations, it is possible to bring a citizen suit against the polluter to have stronger restrictions imposed to protect water quality.



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NPDES ENFORCEMENT **ENFORCEMENT OF PERMIT CONDITIONS** CONT'D

Criminal Prosecution

The CWA and state water quality statutes also contain criminal penalties for certain violations. Criminal prosecution is extremely rare and is typically reserved for severe violations. Criminal violations are prosecuted by United States attorneys, State attorneys general, or local district attorneys in the county in which the violation occurred. Criminal prosecutions are not based on strict liability. Instead, prosecutors generally base their decision on whether the violation was committed intentionally or negligently.

The most common criminal cases involve discharging without a permit, bypassing pollution control equipment, or falsifying discharge monitoring reports. Criminal penalties may include substantial monetary fines as well as significant terms of imprisonment for individuals found guilty.

Citizen Suits

Unfortunately, there are many occasions when a facility will continuously violate its permit limits yet EPD fails to take any enforcement action against the facility, or EPD will take an action ordering the facility to take certain measures to protect water quality, but then continuously extend the time period in which the facility must comply with its permit. Fortunately, the Clean Water Act gives citizens the power to do something about that through citizen suits. Basically, when a polluter continually violates the Clean Water Act and the state fails to “diligently prosecute”¹ the violator, a citizen or group can file suit in federal court to enforce compliance with the permit terms.

The Clean Water Act provides specific procedures for filing a citizen suit. After documenting a violation, citizens are required to provide a 60-day advance notice of their intent to sue. This notice must be sent to the polluter, EPD, EPA Region IV (Atlanta headquarters), EPA Main Office (Washington, D.C.), and the U.S. Attorney General. If these government officials fail to take action and the polluter fails to achieve compliance within sixty days, then the citizen can file a lawsuit. As a result of citizen suits, the violator may be:

- Assessed penalties of up to \$27,500 per day per violation (payable to the U.S. Treasury)
- Ordered to comply with the terms of its permit and perform other types of “injunctive relief.” Injunctive relief is when the court orders the polluter to take certain actions such as implementing pollution control measures, replacing equipment, undergoing training, and other measures necessary to prevent further violations.
- Required to undertake “supplemental environmental projects” or “SEP.” A supplemental project is typically a project implemented by the violator that benefits the community impacted by the illegal dischargers. For example, these projects may include adopt-a-stream programs, streambank restoration projects and the purchase of conservation easements. A SEP cannot be something that the violator is already under a legal obligation to do. The United States Environmental Protection Agency has developed guidelines on appropriate SEPs. Visit EPA’s web page for more information: <http://es.epa.gov/oeca/sep/sepfinal.html> ☞



Keeping Watch Over Our Waters

¹ Diligent Prosecution is a legal term to describe whether an enforcement action by the state – in this case, EPD – is sufficient. A citizen can bring an action to require compliance with NPDES permit limits whenever EPD is not “diligently prosecuting” the offender. If EPD has taken no action or has not taken an action that requires compliance, then there has not been diligent prosecution. In other cases, EPD may have taken action but that action seems very weak (e.g. granting several years for the permittee to comply with its permit). In those cases, a court will decide whether EPD has diligently prosecuted the violator.