

CLEAN WATER ACT OVERVIEW

SPOTLIGHT ON STORMWATER (CWA Section 402)

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1972 Clean Water Act Objective

“The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter

- (1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985. . . .
- (3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited. ”

101(a) of the CWA, [33 U.S.C. § 1251](#)(a)

Background

The 1972 Clean Water Act, largely supplanted the 1970 Water and Environmental Quality Improvement Act by replacing water quality standards with point source effluent limitations.



The Regulatory Scheme

The Act prohibits the discharge of any pollutant from a point source by any person into a water of the United States unless it complies with the Act, including Section 402, 33 U.S.C. § 1342 [i.e., a NPDES permit].

Section 301(a) of the Act, 33 U.S.C. § 1311(a)



“Pollutant”

“dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.”

33 U.S.C. section 1362(6).



“Pollutant” v “Fill”

- EPA does not issue permits for fill material that fall under the Corps’ permitting authority under Section 404 of the Act.
- Dredged or fill material.
- “Fill material” – material that changes the bottom elevation of water, e.g., pad fill, slurry, tailings.
- *Coeur Alaska* case, 129 S.Ct 2458 (2009)

Point Sources

“[D]iscernible, confined and discrete conveyances” such as a pipe, ditch, or machine.

33 U.S.C. § 1362.



Nonpoint Sources

Nonpoint source pollution is not regulated directly by the Act.

e.g., runoff from agriculture (pesticides), animal grazing, logging.

Humans and grazing animals are *not* point sources.

Oregon Natural Desert Ass'n v. Dombeck, 172 F.3d 1092 (9th Cir. 1989).

But CAFOs *are* point sources. 40 CFR § 122.23(e)

Industrial Activity is Regulated

Facilities engaged in industrial activity, as defined by 40 C.F.R. § 122.26(b)(14), must obtain NPDES permit authorization (individual or general) if they discharge or propose to discharge storm water into waters of the United States.

E.g., landfills - 40 C.F.R. § 122.26(b)(14)(v)
construction - 40 C.F.R. § 122.26(b)(14)(x)

“Industrial activity” classified by SIC Codes.

Permit Coverage for Industrial Activity

All facility operators seeking coverage under the General Permit must submit a *Notice of Intent to Comply with the Terms of the General Permit for Storm Water Discharges Associated with Industrial Activity* (“NOI”) to EPA or Tribal EPA generally within 14 days prior to commencing industrial operations.

Section 308(a) of the Act, 33 U.S.C. § 1318(a)

Point Source Permit Program

- 2008 NPDES Stormwater Multi-Sector General Permit for Industrial Activities (MSGP)

<http://cfpub.epa.gov/npdes/stormwater/msgp.cfm>



Point Source Permit Program

➤ 2008 NPDES General Permit for Storm Water Discharges From Construction Activities.

- http://www.epa.gov/npdes/regulations/cgp2008_finalfrnotice.pdf
- Covers clearing, grading, and excavation resulting in land disturbance of **1** acre or more.
 - 40 C.F.R. § 122.26(b)(14)(x) and (15)


General Permits

- The Construction General Permit and Multi-Sector General Permit apply only in areas where EPA is the permitting authority.
 - E.g., Indian Country within the State of Arizona, as well as Navajo Reservation in New Mexico and Utah.
 - Permit Number: AZR100001
- Most states have been authorized to implement the NPDES stormwater program. No Tribes in Region 9 have yet been authorized.

Permit Requirements

Every NPDES permit is statutorily required to set forth, at the very least, "effluent limitations," that is, certain "restrictions ... on [the] quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters."

S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, (2004) ("Generally speaking, the NPDES requires dischargers to obtain permits that place limits on the type and quantity of pollutants that can be released into the Nation's waters.").



Permit Requirements

The specific effluent limitations contained in each individual NPDES permit are dictated by the terms of more general "effluent limitation guidelines" ("ELGs"), which are separately promulgated by the EPA.



Permit Requirements

ELGs, effluent limitations, are technology-based restrictions on water pollution. that vary depending upon type of pollutant, discharge and whether the point source in question is new or already existing.

Technology standards for **already existing** point sources include:


- (1) best available technology economically achievable (“BAT”)
- (2) best conventional pollutant control technology (“BCT”)
- (3) best practicable control technology currently available,

The technology standard for **new** point sources, which is commonly referred to as a new source performance standard (“NSPS”), is based on the best available demonstrated control technology.

Permit Requirements

In general, the General Permit requires facility operators to develop and implement a storm water pollution prevention plan (“SWPPP”) prior to commencing industrial operations.


The SWPPP includes obligations to identify sources of industrial storm water pollution and to identify site-specific best management practices (“BMPs”).



Permit Requirements

Reduce or prevent pollutants associated with industrial activity in storm water discharges and authorized non-storm water discharges by implementing BAT for toxic and non-conventional pollutants and BCT for conventional pollutants.

Development and implementation of a SWPPP that complies with the General Permit and that includes BMPs that achieve BAT/BCT constitutes compliance with this requirement.



Effluent Limits

- Numerical effluent guidelines for construction storm water proposed in 2008.



Point Source Permit Program

EPA published its final rule on treating tribes like states for the NPDES permit program in 1993.

[58 Fed. Reg. 67966](#) (Dec. 22, 1993).

(codified in 40 C.F.R. pts. 122-124, and 501).



Permit Limits

- Tribes treated as States must develop water quality standards (WQS) for all waters of U.S.
 - CWA § 303.
 - Region 9 has approved three Tribal WQS programs:
 - White Mountain Apache
 - Hoopa Valley Tribe
 - Hualapai Tribe

CWA 401 Certification

- Section 401 provides that no license or permit (e.g., NPDES) shall be granted until a 401 certification has been obtained.
 - 33 U.S.C.S. § 1341(a).
- Tribe has opportunity to certify whether that the discharge would result in a violation of the Tribe's WQS *if* the tribe is the certifying agency; otherwise, it is EPA.
- If Tribe determines that a violation will occur, it can veto the permit, or impose conditions designed to ensure that a violation of WQS will not occur.

Enforcement

EPA is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, when any person is in violation of the CWA, including NPDES permits.

Section 309 (b) of the Act, 33 U.S.C., § 1319(b).



Citizen Suits

- The Act provides that any citizen may bring a civil action against an agency alleged to be in violation of an effluent standard or limitation.
 - [33 U.S.C. § 1365\(a\)](#).
- "Effluent standard or limitation" is defined to include 401 Certifications



Jurisdiction

“Waters of the U.S.”

- Defined in Section 502(7) of the Act, 33 U.S.C. § 1362(7), and EPA’s implementing regulations at 40 C.F.R. § 122.2.
- Section 502(7): “navigable waters” means waters of the United States.



Rapanos

Rapanos v. Carabell v. United States
126 S. Ct. 2208 (2006).

EPA *Rapanos* Guidance:

<http://www.epa.gov/EPA-WATER/2007/November/Day-28/w5867.htm>

<http://www.epa.gov/owow/wetlands/guidance/CWAwaters.html>

Jurisdiction

EPA Administrator Lisa Jackson is for the first time calling for a legislative clarification CWA) jurisdiction.

S. 787 largely retains language allowing EPA and the Corps to regulate waters “to the maximum extent” they are subject to Congress’ legislative authorities under the Constitution, while eliminating the law’s current application to “navigable” waters.