Chapter 4

Water Pollution

Roadmap

- Understand how the Clean Water Act controls discharges of pollutants into waters of the United States by requiring persons who cause them to obtain permits.
- Grasp how the Clean Water Act requires states to choose the water quality standards for water bodies within their borders, find out whether those water bodies meet the standards, and then compel additional pollution reductions (if needed) to attain the standards.
- Learn how the Clean Water Act protects certain wetlands from dredging or filling activities through a separate permit system implemented by the U.S. Army Corps of Engineers.
- Understand how the Clean Water Act allows the U.S. Environmental Protection Agency to delegate to states the responsibility to issue, oversee, and enforce permits for discharges of pollutants within their borders.
- See how the Clean Water Act requires operators to also obtain permits to control discharges of pollutants contained in storm water that runs off from their facilities.
- Explore how the Clean Water Act requires immediate reports of spills of pollutants to waters of the United States if they exceed a certain amount within 24 hours.
- Learn how the Clean Water Act relies on a combination of self-reporting, governmental enforcement, and citizen suits to assure compliance with the Act's requirements.

The federal Clean Water Act is one of the most ambitious statutes in U.S. environmental law. When Congress passed the progenitor of the Clean Water Act in 1972, it boldly declared that the statute would restore the quality of the nation's waters by eliminating discharges of pollutants into surface waters. Our legislators went even further by setting an ultimate goal of eliminating *all* discharges of pollutants into the nation's navigable waters. While the Clean Water Act has not yet met its original lofty goals, it remains one of

the central statutes in U.S. environmental regulation and a keystone to the protection of water resources that fall under federal regulatory jurisdiction.

This chapter reviews the Clean Water Act's most important features for the legal options and strategies pursued by industry, environmental advocates, and governmental agencies to protect water quality. Like many federal environmental statutes, the Clean Water Act actually consists of several subprograms within a larger statutory framework. These subprograms include:

(i) a national pollutant discharge elimination system that requires permits or authorizations for discharges of pollutants from point sources (including indirect sources who discharge to treatment facilities);
(ii) ambient water quality standard programs to assure that rivers, lakes, streams, and coastal waters remain suitable for their designated uses by keeping the pollutants they receive from point and non-point sources to less than a total maximum daily load that they can safely sustain;
(iii) a separate permit program under the U.S. Army Corps of Engineers to protect wetlands that fall under federal jurisdiction; and
(iv) a permit program to control discharges of storm water that may come into contact with potential pollutants at facilities that discharge them through point sources.

Our review also explores how the Clean Water Act stitches these subprograms together through an integrated framework that allows states to assume a primary role in issuing permits and enforcing compliance, authorizes EPA to oversee and enforce those standards if states fall short, and empowers citizens to bring their own lawsuits when facilities or governments fail to satisfy their permit conditions or statutory obligations.

I. The National Pollutant Discharge Elimination System Permit Program

The Clean Water Act builds on a simple, yet sweeping, command: it forbids the discharge of any pollutant from a point source into a navigable water without authorization or a permit. This statutory dictate has led to the creation of a comprehensive permitting system that requires every facility that discharges pollutants into U.S. waters to obtain a National Pollutant Discharge Elimination System (NPDES) permit or its equivalent under a state program. The brevity of the Clean Water Act's no-discharge command, however, hides

the complexity of its deceptively simple terms. Each of them—"discharge," "pollutant," "point source," and "navigable water"—is a term of art with an extensive regulatory and caselaw pedigree.

A. The Building Blocks of the No-Discharge Mandate

The Clean Water Act's NPDES permit system relies on jurisdictional gatekeepers that modulate the program's scope and application. Each of those foundational terms requires a deeper examination.

"*Discharge.*" The Clean Water Act specifies that the discharge of a pollutant means "any addition" of a pollutant to navigable waters. 33 U.S.C. § 1362(12). While the courts and EPA have construed "discharge" and "addition" broadly, the terms carry important limits. For example, the core meaning of "addition" means that a discharge must introduce a new material into the water body (or increase the amount or variety of materials already present). This limit implies that a facility that simply draws up pollutants via an intake stream and then discharges them back into the same water body will not trigger an NPDES permit requirement. 40 C.F.R. § 403.15; *Los Angeles Flood Control District v. Natural Resources Defense Council,* 568 U.S. 78 (2013). Based on a similar rationale, water discharges from dams do not "add" pollutants even if they damage the temperature or dissolved oxygen to the receiving water body. *National Wildlife Federation v. Consumers Power Co.,* 862 F.2d 580 (6th Cir. 1988). EPA has also clarified this principle through a regulation that excludes "water transfers"—i.e., conveying or connecting waters of the United States without any intervening commercial or industrial use—from regulation under the Clean Water Act. 40 C.F.R. pt. 122.

"*Pollutant.*" The Clean Water Act continues its broad approach by defining "pollutant" to include a broad swath of materials and contaminants, 33 U.S.C. § 1362(6), and the courts have followed suit. The capacious term now includes everything from heat, acidity, and toxicity to virtually any solid substance (including construction debris and animal carcasses). *Natural Resources Defense Council v. EPA,* 859 F.2d 156 (D.C. Cir. 1988).

"*Point source.*" To focus regulatory attention on discharges from specific facilities (rather than general runoff), the Clean Water Act requires NPDES permits only for discharges from "point sources." The statute broadly defines this term to include "any discernable, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). As a result, the NPDES program can apply to almost any natural or man-made conduit through which pollutants may discharge, including ditches, sewers, gullies, channels, pipes, and gutters. Because the statute expressly includes

sources where pollutants "may be" discharged, it includes conveyances that only rarely or intermittently discharge pollutants. The term can even extend to mobile sources such as railcars, trucks, and construction vehicles. *United States v. West Indies Transp., Inc.,* 127 F.3d 299 (3d Cir. 1997). It does not include, however, discharges directly from an individual person (at least for criminal liability under the Clean Water Act). *United States v. Plaza Health Laboratories, Inc.*, 3 F.3d 643 (2d Cir. 1993) (Clean Water Act did not require NPDES permit for person who left vials of medical waste on riverbank to be carried away by the tide).

"*Navigable waters.*" This last prerequisite for Clean Water Act jurisdiction has proven, by far, the most problematic. The statute begins by unhelpfully defining "navigable waters" as simply "waters of the United States." 33 U.S.C. § 1362(7). This definition simply restates the test for federal jurisdiction over interstate waters, which has long spurred controversy and litigation. When EPA and the U.S. Army Corps of Engineers attempted to assert jurisdiction over isolated waterbodies solely within state jurisdiction, or over wetlands not immediately adjacent or connected to traditional navigable waters, the U.S. Supreme Court responded with a series of fractured decisions that yielded an unclear test for determining whether some questionable water bodies fell under federal regulation. For example, in *Rapanos v. United States,* 547 U.S. 715 (2006), the Court issued a plurality opinion by Justice Scalia that limited Clean Water Act jurisdiction to traditional water bodies that contain, or directly connect to, flowing waters. The sole concurrence, by Justice Kennedy, instead allowed regulation of water bodies with a "significant nexus" to traditional waters. EPA and the U.S. Army Corps of Engineers responded with an extensive effort to promulgate a Waters of the United States (WOTUS) Rule to clarify their interpretations of the statutory term. 80 Fed. Reg. 37054, 37104-05 (June 29, 2015). The agencies finalized their WOTUS Rule in 2015, but—after several federal court challenges, the issuance of a stay against the WOTUS Rule, and an intervening election—EPA and the Corps have postponed the effective date of the regulation until February 6, 2020. 83 Fed. Reg. 5200 (Feb. 6, 2018). Both agencies have also announced their intent to withdraw and replace the WOTUS Rule in a future rulemaking. 82 Fed. Reg. 34899 (July 27, 2017). Thus, as discussed further below, at this writing the precise parameters of the phrase "navigable waters" remain uncertain as the term is applied to wetland areas.

Notably, "navigable waters" have been held not to include groundwater. As a result, discharges into groundwater do not require NPDES permits. State laws and programs, however, frequently include groundwater within waters

of the state protected by permit requirements, and the federal courts have recently emphasized that the Clean Water Act can require NPDES permits (or equivalent state permits) if a discharge to groundwater conveys pollutants to a water of the United States hydraulically connected to the groundwater. *See, e.g., Hawaii Wildlife Fund v. County of Maui,* 886 F.3d 737 (9th Cir. Feb. 1, 2018).

B. NPDES Permits

An NPDES permit essentially gives an operator permission to discharge specific pollutants from particular outfalls into an identified navigable water. While most NPDES permits last for five years, EPA regulations typically extend the operation of an expired NPDES permit while the agency reviews a renewal application or submission for a new permit. This review period can last for years—often exceeding the period of the original NPDES permit itself. However, state agencies issuing their own analogs of NPDES permits under delegated programs may have differing durations and renewal requirements.

To obtain an NPDES permit (or its state equivalent), an operator must first submit a detailed permit application. EPA application forms, for example, seek extensive information about the operator, the facility, the production process that generates the discharge, the likely pollutants that the discharge will contain, how the facility plans to treat the pollutants prior to discharge (if needed), and the nature and quality of the receiving water body. 40 C.F.R. § 122.21. State permit applications under delegated programs must include, at a minimum, the same information. 40 C.F.R. § 123.25(a)(4).

An NPDES permit contains several typical conditions. Most important, the permit will include enforceable limits on the pollutants that it can discharge in its effluent. In addition, the permit will set out reporting requirements for both routine discharges (including discharge monitoring reports, discussed below) and unanticipated spills, and—at some facilities—best management practices that the operator must maintain. Beyond these core requirements, NPDES permits will contain standard provisions that govern routine concerns such as imposing a duty to properly operate and maintain systems, inspection and entry requirements, and defenses for upset and bypass situations that cause discharges that exceed the permit's limits. 40 C.F.R. §§ 122.41–50.

Beyond these standard permit terms, an NPDES permit will set its effluent pollutant limits based on treatment technologies that are feasible and economically achievable for the discharger's industrial sector. These technology-driven limits define the baseline for any discharges from the facility, and the

technology selected will vary based on whether the facility is new or existing, and whether the pollutant is conventional (such as grease, pH, or suspended solids) or toxic. 33 U.S.C. § 1311(b)(1)(A), (2)(A), (2)(E); 33 U.S.C. § 1316. In addition to these technology treatment standards, the permit will frequently require the discharge to test the toxicity of the whole effluent through a biological assay test. Under such a whole effluent toxicity test, the discharger will immerse certain sensitive fish or shrimp in the effluent to see whether it harms or kills them. 40 C.F.R. § 122.44(d)(1)(iv).

To assure that the facility's discharge meets applicable requirements, an NPDES permit will also specify the type and frequency of tests that the operator must perform on the facility's effluent. The data resulting from these tests must be reported to EPA or the relevant state agency in a routine Discharge Monitoring Report, or DMR. An operator must submit a DMR even if its data shows a violation of the permit, and intentional false reports or misrepresentations in a DMR can trigger criminal liability under the Clean Water Act.

While NPDES permits provide the central engine for Clean Water Act compliance, they are not the statute's sole tool. The Clean Water Act also allows EPA and states to use alternative means to authorize discharges that do not require the full panoply of NPDES permitting review. For example, EPA has established streamlined and simplified processes to allow operators with routine and non-threatening discharges to obtain authorization by submitting a notice to the agency or meeting generic standard conditions. These tools can include general permits (which are frequently used for storm water discharges, discussed below), permits-by-rule, and standard permits.

C. Permit Shields

One important, and oft-recurring, issue about NPDES permits focuses on how much protection they provide. In particular, if a facility's NPDES permit is silent about a particular pollutant that the operator identified (directly or indirectly) in a permit application, would a discharge containing that unlisted pollutant violate the Clean Water Act's no-discharge prohibition? In short, the federal courts have generally ruled that operators can discharge "pollutants not specifically listed in their permits so long as they comply with the appropriate reporting requirements and abide by any new limitations when imposed on such pollutants." *See, e.g., Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.,* 12 F.3d 353 (2d Cir.), *cert. denied,* 114 S. Ct. 62 (1994). This permit shield, however, does not extend to operators who fail to strictly comply with their disclosure requirements or don't disclose the pollutant to the regulator in their permit applications. Some permits may

also completely prohibit all discharges of any pollutant unless they expressly authorize such pollutant releases.

D. Variances

Given the wide differences in industrial operators and the types of processes they use, it's no surprise that they sometimes cannot meet effluent discharge limits set out by EPA because they don't (or can't) use the pollution control technology selected by the agency. In these circumstances, the Clean Water Act empowers EPA to give variances to operators who face "fundamentally different factors" that would justify a special exemption from technology-based limits (including pretreatment obligations, as discussed below). 33 U.S.C. § 1311(n).

This exemption process, however, has important limitations. For example, EPA cannot allow a variance from limits that assure the receiving water body meets its overall water quality standards. And the variance process requires the applicant to prove that the factors relevant to its facility are fundamentally different from the ones considered in developing the facility's effluent limitations guidelines (e.g., the nature of the pollutants in the discharge, the volume of the discharge, the energy requirements of the treatment technology, the environmental impacts of the control technology, or the age, size, land space, and configuration of the facility). 40 C.F.R. §§ 125.30–32. It is important to note that an operator cannot obtain such a variance simply because the cost of complying would force the facility to shut down. 40 C.F.R. § 125.31. As a result, EPA has infrequently given variances based on an operator's assertion that fundamentally different factors apply to its facility.

E. Indirect Discharges

Not all discharges go directly to water bodies. In fact, some of the largest and most challenging effluent streams go instead to centralized wastewater treatment facilities that have the resources, expertise, and technology needed to properly treat the streams. Most of the largest volume domestic sewage streams from urban areas, for example, go to publicly owned treatment works (POTWs) that treat the wastewater prior to discharging it into rivers or coastal waters. Up to 80 percent of U.S. wastewaters go to POTWs for treatment, and this large share includes significant discharges from industrial users.

The Clean Water Act regulates these indirect discharges under a separate pretreatment program that operates differently from the NPDES program.

Under this pretreatment regime, the POTW enters into a contract with, or issues a permit to, its customer to impose limits on influent streams sent to the POTW. In effect, the POTW directly implements these discharge limits for pretreatment rather than EPA or the relevant state (although these agencies retain ultimate enforcement authority). 33 U.S.C. § 1319; 40 C.F.R. § 403.10(f)(1). The POTW's operator then must obtain an NPDES permit that governs its own effluent discharges resulting from the treatment of its customer's wastewaters. As a result, the POTW may violate its own NPDES permit and incur liability if one of its upstream customers sends it an effluent that disrupts the treatment plant—which gives the POTW a strong incentive to assure that its upstream customers comply with their permits and contracts.

To assure that upstream discharges don't send effluent to POTWs that will disrupt their treatment processes, the Clean Water Act specifically prohibits certain discharges and acts by indirect dischargers. For example, the statute generally prohibits an industrial user from sending any pollutant to a POTW that causes either "pass through" (i.e., conveyance of the pollutant occurs without adequate treatment) or results in an "upset" (i.e., the pollutant disrupts or shuts down the POTW's treatment process). 40 C.F.R. §§ 403.5(a)(1), (k), (p). In addition, EPA's regulations impose eight specific prohibitions that help avoid interference with downstream POTW operations, including discharges that create fire or explosion hazards or damage structures at the POTW via corrosion. 40 C.F.R. § 403.5(b).

II. Ambient Water Quality Standards and the Total Maximum Daily Load Process

In addition to technology-based limitations and NPDES permits for specific discharges, the Clean Water Act also establishes a fail-safe to assure that discharges—even if properly permitted—do not overload a water body that receives multiple outfalls. Essentially, the statute requires states to decide the proper use for each water body within its borders. These uses can include common activities such as fishing, recreation, drinking water supplies, industrial, agricultural, or other uses. 33 U.S.C. § 1313(c)(2); 40 C.F.R. § 131.10(a). After setting the water body's uses, the state then identifies the physical, chemical, and biological parameters of the water necessary for it to support those uses. For example, the state may set a water quality standard concentration limit for a particular pollutant that, once exceeded, would render the water unfit for recreation or fishing. These state criteria typically rely on underlying

federal water quality criteria that establish limits for more than 150 pollutants. 33 U.S.C. § 1314(a)(1).

Armed with these water quality standards, EPA or the state then back-calculates how much of a particular pollutant that water body can receive without exceeding the standard—its total maximum daily load (TMDL) of that pollutant. If the water body already fails to meet its water quality standard, the permitting agency then essentially sets (or revises) permit limits for future or ongoing discharges to assure that the water body attains its designated use. 33 U.S.C. § 1313(d). The Clean Water Act requires states or EPA to identify which water bodies are impaired, identify TMDLs for those impaired water bodies, submit the list to EPA for approval, and then assure that permits for discharges to the impaired water body remain collectively under their TMDLs.

The TMDL program has proven enormously controversial. States have generally lagged in identifying impaired water bodies and preparing TMDLs for each of them. This inaction has triggered dozens of lawsuits to force states to move, and EPA's efforts to streamline and implement the program through regulatory revisions have triggered its own firestorm of lawsuits and opposition. Despite efforts by EPA to modernize the program and promote cooperative planning and implementation with states, proposed regulatory revisions have collapsed under litigation challenges (including a final rule to revise its TMDL regulations in 2000 that the agency subsequently withdrew). *Withdrawal of Water Quality Planning and Management Regulation*, 68 Fed. Reg. 13608 (March 19, 2003). As a result, EPA has used essentially the same regulatory framework for implementing TMDLs since 1992—more than a quarter-century ago.

III. Wetlands Permitting

The Clean Water Act's prohibition on unpermitted discharges also bars the placement of dredge or fill material into certain wetlands that fall within the definition of "navigable waters" as part of the waters of the United States. As noted previously, the scope of waters included in this term is hotly contested, and the requirement for a permit to discharge dredge or fill materials into wetlands—which, by definition, may not consist solely of flowing waters—sparks some of the greatest controversy under the Clean Water Act. Some aspects of the definition of "wetland," such as the requirements that they have hydrophytic vegetation, hydric soil, and periodic inundations with

water, do not raise serious objections. The core jurisdiction concept—that the wetland has some connection or proximity to waters of the United States that fall under federal jurisdiction—is far murkier and disputed. EPA passed its Clean Water Rule in 2015 to clarify the definition of "wetlands," but EPA and the U.S. Army Corps of Engineers have proposed to withdraw that rulemaking (as noted above).

If a wetland falls under the jurisdiction of the Clean Water Act, no one can discharge fill or dredge material into the wetland without a permit issued by the U.S. Army Corps of Engineers under section 404 of the Clean Water Act. 33 U.S.C. § 1344. These permits cover only the actual discharge or placement of dredged or fill materials, and as a result they are not required for incidental fallback of dredged materials during wetland dredging operations. Notably, the incidental fallback concept does not exclude from regulation the redeposit of dredged materials into a wetland or other water body, and EPA and the Corps have established a regulatory presumption that any mechanized ditching, channelization, or excavation with discharges greater than incidental fallback will need a Section 404 permit. 33 C.F.R. § 323.2(d)(2)(i); 40 C.F.R. § 232.2(2)(i).

Permits for dredge and fill activities can follow two paths. First, the Corps has established nationwide and general permits for categories of discharges that occur routinely and do not typically significantly injure the environment. These nationwide permits can authorize the construction of minor roads, oil and gas structures, backfilling of utility lines, and certain hydropower projects. To qualify for a nationwide permit, the operator typically must provide notice to the Corps or, for some permits, simply comply with the general conditions of a self-executing nationwide permit.

The second path, for dredge and fill operations that do not qualify for nationwide or general permits, requires the operator to obtain an individual permit for its specific discharge. The standards for an individual permit can be very demanding. For example, the Corps will typically assess a permit application to evaluate its probable impacts on the public interest and the environment (including balancing of "conservation, economics, aesthetics, general environmental concerns, wetlands,") and numerous other values. The Corps cannot reject a permit solely based on its economic effects unrelated to environmental impacts. It will only authorize the discharge (per EPA guidelines) if the applicant proves that there is no "practical alternative to the proposed discharge which would have less adverse impact on the aquatic system." 40 C.F.R. § 230.10(a). EPA has the authority to veto a proposed permit under Section 404(c) of the Clean Water Act. 33 U.S.C. § 1344(c).

Once an applicant has taken all practicable steps to minimize the harm caused by the proposed filling or dredging, it must then mitigate any remaining damage. Pursuant to the no-net-loss policy followed by EPA and the Corps, the Corps must determine whether the applicant has avoided potential impacts to the maximum extent practicable. After that, the remaining unavoidable impacts must have been mitigated "to the extent appropriate and practicable," which can obligate the applicant to compensate financially for lost environmental values in the wetlands and/or offset the harms through wetlands restoration or creation through compensatory mitigation. U.S. Army Corps of Engineers and U.S. Environmental Protection Agency, *Compensatory Mitigation for Losses of Aquatic Resources*, 73 Fed. Reg. 19594 (April 10, 2008).

IV. Storm Water Discharges

Discharges of storm water—capricious, voluminous, hard to control—have posed special challenges for the Clean Water Act. Congress has set out separate requirements to handle them. As you will remember, the Clean Water Act requires permits only for discharges of pollutants to navigable waters through point sources. If a rainfall generates storm water that does not contain a pollutant, or that does not discharge from a point source such as a ditch, gulley, or culvert, the statute does not require the facility operator to obtain a permit. However, if rainfall comes into contact with open industrial operations or contaminants, and discharges through a point source, the facility operator will typically need to obtain a storm water permit.

Given that virtually every industrial facility will likely have some storm water that arguably could trigger jurisdiction under the Clean Water Act, the statute and regulations set out two pathways to authorize discharges. First, a discharger can apply for coverage under a general permit designed to cover broad swaths of industrial sectors with minimal individual information or paperwork requirements. For example, EPA has issued a multisector general storm-water permit that covers 29 industrial sectors. Other baseline general permits protect other industrial categories and operations. These permits generally impose less stringent requirements and less burdensome disclosure requirements than tailored individual permits.

Second, a facility that does not qualify for the general permit can seek an individual storm water permit. These permits may require detailed disclosures about the facility, data collection and analysis of its discharges, and

sampling during storm events. As a result, preparation of an individual storm water permit application can prove costly, burdensome, and slow. 40 C.F.R. § 122.26(c).

V. Spill Reporting and Responses

As part of its overall purpose to prevent discharges of pollutants into waters of the United States, the Clean Water Act sets out separate requirements that focus specifically on accidental or unanticipated spills and releases. In particular, the Act tackles the problem of accidental pollution with three tools: mandated prevention and contingency planning to keep spills from happening in the first place, reporting obligations to alert the appropriate authorities and assure a speedy response, and liability for spills to assure that responsible parties undertake remediation and shoulder the costs of response.

Any facility that manages or stores more than 13,200 gallons of oil above ground, or 42,000 gallons underground, is required by the Clean Water Act to prepare a Spill Prevention Control and Countermeasure (SPCC) Plan so long as the facility can reasonably be expected to discharge oil in harmful quantities into or upon navigable waters because of its location. 33 U.S.C. § 1321(b)(1); 40 C.F.R. § 112.1(b)–(d)(1). A SPCC Plan typically identifies the employees responsible for spill prevention who will report to facility management, recount recent prior spills, and specify the types of spill control strategies and containment structures that will contain any releases. Facility operators must prepare, submit to EPA, and implement a SPCC Plan within six months after beginning operations. They must also update the plan when the facility's design, operation, or maintenance changes in a way that materially affects the facility's potential to discharge oil. 40 C.F.R. §§ 112.3(b), 112.5.

When a spill occurs, the Clean Water Act requires a person in charge of the facility to report a release to navigable waters or adjoining shorelines of a pollutant that exceeds a reportable quantity. EPA has designated reportable quantities for more than 300 substances, and both EPA and the Corps have defined a reportable quantity of oil as any amount that causes a film or sheen on the receiving waters or that violates an applicable water quality standard. 40 C.F.R. § 110.3. While the person in charge must use a rolling 24-hour period to determine whether the spill exceeds a reportable quantity, once the spill crosses that threshold it must be reported immediately. Failure to report such a spill is a criminal act potentially punishable by up to five years in prison. 33 U.S.C. § 1321(b)(5).

Finally, if a spill occurs, the owners or operators of a facility that releases the oil into waters of the United States or adjoining shorelines face strict liability for penalties, the costs of responding to the spill, and any natural resources damages caused by the spill. Civil judicial penalties can reach up to either $46,192 per day per violation, or up to $1,848 per barrel of discharged oil. If the spill resulted from gross negligence or willful misconduct, the penalties escalate to $184,767 per day per violation and $5,543 per barrel of oil. 33 U.S.C. §§ 1321(b)(7); 40 C.F.R. § 19.4. However, facility owners or operators can avail themselves of some limited statutory defenses to liability such as act of God, act of war, negligence on the part of the United States, or an act or omission of a third party. 33 U.S.C. § 1321(f)(2).

VI. Delegation, Enforcement, and Citizen Suits

The Clean Water Act, like other federal environmental statutes, allows states to take a lead role in implementing and enforcing its requirements. If a state wishes to apply for delegation to take primacy for NPDES permits issued within its borders, it must first submit a demonstration to EPA that its laws, program, agency, resources, and enforcement authorities roughly equate to EPA's authorities. In particular, the state must show that it has a viable and functioning civil and criminal enforcement program and a well-developed administrative enforcement system. 33 U.S.C. § 1321(b)(7); 40 C.F.R. § 123.27(a). While the state's environmental program does not have to duplicate EPA's regulatory requirements, it must meet minimum requirements imposed by the federal program. States can, however, impose more stringent or broader requirements beyond EPA's standards.

Given the overlapping enforcement and jurisdictional authorities between federal and state agencies when EPA has delegated primacy for a water permitting program to the state, enforcement can prove complicated. In states with delegated programs, EPA retains the right to initiate enforcement even if the state has chosen not to enforce. To do so, EPA must first give prior notice to the state and then allow the state 30 days to bring its own enforcement action. Once these conditions are met, EPA can initiate its own "overfiling" on state enforcement action (or inaction). The state and EPA can each bring their own parallel enforcement actions, but EPA generally cannot bring a duplicate enforcement action once the state has obtained a final judgment to resolve the action. If a state routinely and consistently fails to enforce against permit violations, EPA can take over enforcement within the state until the state agency

begins to adequately enforce its permit program again. EPA can also seek to revoke the state's delegation of enforcement authority in egregious cases.

Beyond the conventional enforcement tools of civil, criminal, and administrative actions, the Clean Water Act authorizes citizens to bring their own enforcement actions as "private attorneys general." Under Section 505 of the statute, any person with "an interest which is or may be adversely affected" can sue any other person for violation of an effluent standard, limit, or order (including permit discharge limits). 33 U.S.C. § 1365. The statute also empowers citizens to sue EPA if it fails to perform a nondiscretionary duty.

Given the limited resources available to state environmental programs and the potential for political controversy, the engine of citizen suits has allowed numerous enforcement actions that might otherwise not have gotten to court. If a citizen or environmental group can meet federal standing requirements (typically by showing an ongoing violation that directly affects its personal, physical, economic, or aesthetic interests), it can often sue a facility operator for exceeding permit limits by using the facility's own discharge monitoring reports to the state or EPA as evidence of a violation. To initiate a citizen suit, however, the citizen must give the alleged violator and the state agency or EPA prior notice of the lawsuit, and the state is authorized take over the lawsuit by initiating its own diligent prosecution of the violation. 33 U.S.C. § 1365(b).

Checkpoints

- The Clean Water Act prohibits any discharge of a pollutant to navigable waters through a point source.
  - Any owner or operator of a facility that wants to discharge wastewaters into a water body under federal jurisdiction must first obtain an NPDES permit from EPA or a state agency in delegated states.
  - All of these terms — "discharge," "pollutant," "point source," and "navigable waters" — have specific regulatory definitions that mirror the broad statutory definition for each term, but that incorporate important exceptions.
    - NPDES permits are not required for discharges that simply move water within a water body without adding pollutants, or that go to isolated water bodies that do not constitute "navigable waters."
    - NPDES permits also are not needed for discharges vented solely to groundwater unconnected with navigable waters.
  - NPDES permits establish specific limits for pollutants in the discharge based on both technology standards set by EPA and on whether the receiving water is clean enough for its selected use, as reflected in state water quality standards and total maximum daily loads.
  - NPDES permits typically last for five years, and they must be renewed if the discharge continues past that time.
- If a facility does not discharge its effluent directly into navigable waters and instead sends it off-site to a centralized wastewater treatment plant or publicly owned treatment works (POTW), it must first satisfy pretreatment standards.
  - The POTW operator will give the facility operator a permit or contract that spells out the specific contaminants (and concentrations of them) that the facility's effluent can contain.
  - In addition, the effluent cannot disrupt the POTW's operations by creating either a bypass (where the pollutants pass through untreated) or upset (where the pollutants impair or shut down the POTW's treatment process).
  - The POTW operator discharges under its own NPDES permit for its treatment process. If a facility's effluent causes the POTW operator to violate its permit, the POTW may either bring an enforcement action or initiate a breach of contract lawsuit against the facility if its discharges violated the POTW's pretreatment agreement or order.
- In addition to setting discharge limits on a site-by-site basis, the state must also identify whether the receiving water body is already impaired by other discharges and pollution.
  - If that water body is impaired because its current pollution levels make it unfit for its designated use, the state must determine how much pollution that water body can safely absorb on a daily basis. The state then uses this

number to set the Total Maximum Daily Load (TMDL) limit for the water body.

  - EPA or the state will then back-calculate how much additional pollution a discharging facility will need to remove from an effluent stream to bring the water body into compliance with the applicable water quality standard. This can require additional reductions beyond the existing NPDES permit's treatment requirements.

- The Clean Water Act also restricts the placement of dredge and fill materials into wetlands under federal jurisdiction.
  - These permits, authorized under Section 404 of the Clean Water Act, are issued by the U.S. Army Corps of Engineers. But EPA retains authority to veto proposed Section 404 permits that do not meet environmental standards.
  - Determining whether a wetland falls within "navigable waters" regulated under the Clean Water Act is often a difficult task, and it has generated heated and lengthy controversy in rulemaking proceedings as well as frequent litigation.
- Owners or operators of facilities or vessels must report a spill or release of a pollutant or oil to navigable waters under the Clean Water Act. Spills become reportable if they exceed a reportable quantity within a 24-hour period (although an operator must report a spill immediately once it exceeds the regulatory threshold). EPA has set reportable quantities for more than 300 chemicals by regulation; and (as noted above) a spill of oil to waters must be reported if it creates a sheen or slick on the water.
- In addition to enforcement actions by the state agency, operators who violate their NPDES permits may face administrative actions or lawsuits from EPA or citizen suits. The Clean Water Act authorizes citizens to sue permit holders for violating their permit's terms. Citizens may also sue EPA for failure to perform a nondiscretionary duty under the statute.