

NPDES PERMITTING COURSE FOR PERMITTEES – PART I

The Importance of Being Proactive in NPDES Permitting

**Clean Water Professionals of Kentucky and
Tennessee**

by

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Hope You are All Staying Safe and Sane During These Unsettling Times!

- <https://www.youtube.com/watch?v=2JnV1va4jO0>

ROLE OF STATE vs. EPA

- **CWA Provides for Approval of State NPDES Permit Programs**
 - **NPDES Permitting (General Permits)**
 - **Pretreatment**
 - **Federal Facilities**
 - **Biosolids**
- **State Programs Must Meet Federal Minimum Requirements. Can be More Stringent. *See* 40 CFR Part 123.**

FEDERAL LAW vs STATE LAW

- **State Must Have Its Own Law and Regulations to Implement Requirements**
- **It's Not a "Delegation" Per Se.**
- **State Permit is Enforceable Under State and Federal Law.**
- **Appeal of State NPDES Permit is Through State Appeal Procedures**

EPA STATE RELATIONSHIP

- **EPA Review and Potential Objection to State Permit.**
- **If Not Timely Resolved, EPA Then Has Authority to Issue the NPDES Permit for That Permittee.**
- **Where EPA is NPDES Permitting Authority, State Submits § 401 Certification Regarding Permit Conditions**

DERIVATION OF PERMIT LIMITS

- **Beware Game of Telephone (Chinese Whispers)**
 - 1. A game in which a message is passed on, in a whisper, by each of a number of people, so that the final version of the message is often radically changed from the original**
 - 2. any situation where information is passed on in turn by a number of people, often becoming distorted in the process**

PROCEDURES: DRAFT PERMIT AND FACT SHEET

- **Be Involved as Early in the Process as Possible. Request Meetings/Pre-Drafts of Permits, as Appropriate.**
- **The Fact Sheet (Permit Rationale) Accompanying the Permit Should Explain the Derivation of the Permit Limits.**
- **If Fact Sheet is Insufficient, Ask Questions and Request an Amended Fact Sheet.**

BE PROACTIVE

- **Pull Together Your Team: Program, Technical and Legal.**
- **If Needed, Request Additional Time**
 - **Provide Additional Information to State (e.g., Testing at Lower Detection Levels, Data to Rebut Assumptions, Etc.)**
- **Generally, the Earlier in the Process, the Easier it Should be to Change a Permit Condition**

OTHER QUESTIONABLE CHANGES IMPOSED IN PERMIT CONDITIONS

- **Region IV Change to Standard Permit Conditions When Issuing Permits in Florida.**
- **EPA Pretreatment Coordinator: “It makes more sense to me.”**
- **Assumptions**
- **Interpretations of Narrative Requirements.**

PERMITTING AND ENFORCEMENT

- **CWA § 509(b)(2)**

Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection [e.g., issuance of an NPDES permit] shall not be subject to judicial review in any civil or criminal proceeding for enforcement.

- Do Not Wait for an Enforcement Action to Complain About Inappropriate Permit Conditions.
- If the Permitting Agency Suggests Enforcement Discretion Would be Warranted, Ask For That to be Put in the Permit.

IMPEDIMENTS TO PERMIT CHANGE

- **CWA 509(b)(2)**
- **Even if you can Meet Permit Limits Now, it may Tie Your Hands on Future Expansion**
- **Anti-Backsliding Hurdle**
- **Antidegradation**
 - **Antidegradation-based Permit Limits?**

ANTIDEGRADATION AND IMPACT ON FUTURE EXPANSION

- **EPA 2015 ANTI-DEG AMENDMENTS:**
 - 40 CFR § 131.12(a)(2)(ii): “The analysis of alternatives shall evaluate a range of practicable alternatives that would prevent or lessen the degradation associated with the proposed activity.”
 - “Practicable” is defined as “technologically possible, able to be put into practice, and economically viable”
 - If Engineers Can Build it and You Can Afford it
- If You Are Being Impacted by This Let Us Know!

ENFORCEMENT IMPLICATIONS

- **Who Can Enforce**
- **Scope of Liability**
- **Defenses**
- **Coronavirus Implications**

ENFORCEMENT RISKS

- **State Regulatory Agencies**
- **USEPA Headquarters/Region Offices**
 - **US Department of Justice**
- **Citizen Suits**

Enforcement Actions-CWA Section 309

Types:

- **Informal (e.g., NOV)**
- **Civil Administrative Actions**
 - Compliance Order
 - Penalty
- **Civil Judicial Actions**
- **Criminal Actions**

Level of response based on:

- **Severity of Violation**
- **Economic Benefit from Noncompliance**
- **Previous Enforcement Actions**
- **Deterrent Effect**

CWA CITIZEN SUITS

- **Citizen Suits**
- **Congress Intended Third Party Suits to Supplement, Not Replace State/EPA Enforcement [*Gwaltney*/S. Rep. No. 92-414 (1971)]**
- **Encourage the State/EPA to Act When Action is Appropriate. If EPA/State Do NOT Act....Third Party Suits Could Provide an Alternate Enforcement Mechanism**

LIMITATIONS ON CITIZEN SUITS

- **60 Day Notice to Agency and Violator**
 - **To Allow Agency [State/EPA] to Step in if Enforcement is Appropriate.**
 - **To Allow Violator to Come into Compliance**
- **“Diligent Prosecution” - Bars Suits When Agency [State/EPA] has Filed and “Diligently” Prosecuting an Action.**
- **That NOV from the State or Compliance Order [Even with Penalty] that you Signed may not be “Diligent” Enough.....**

WHAT IS THE MAXIMUM CIVIL PENALTY UNDER THE CWA PER DAY PER VIOLATION?

- CWA § 309(d) – “not to exceed \$25,000 per day for each violation”
- BUT:
 - *See* 40 C.F.R. Part 19 – Adjustment of Civil Monetary Penalties for Inflation
- \$55,800 for Violations that Occurred after November 2, 2015, Where Penalties are Assessed on or After January 13, 2020

EFFLUENT DISCHARGE VIOLATIONS

Case Law Potentially Allows for the Following:

-Monthly Average Violation for May

31 Days X \$55,800/Day = \$1,729,800 Liability

-Weekly Average Violation

7 Days X \$55,800/Day = \$390,600 Liability

CWA PENALTY CALCULATION

- **Seriousness of the Violation**
- **Economic Benefit (if any) Resulting from the Violation**
- **Any History of Violations**
- **Any Good-Faith Efforts to Comply with the Applicable Requirements**
- **Economic Impact of the Penalty on the Violator**
- **Such other Matters as Justice may Require**

How Are Penalties Calculated?

- **Top Down Approach**
- **Bottom Up Approach**
- **Economic Benefit**

DEFENSES

- **UPSET**
- **SINGLE OPERATIONAL UPSET**
- **BYPASS**
- **OTHER?**
- **SETTLEMENT CONTINGENT UPON PERMIT
CHANGE OR OTHER PERMIT-RELATED ACTIONS**

CORONAVIRUS

- **EPA March 26, 2020, Memorandum from Susan Bodine Re COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program**
- **"EPA will exercise enforcement discretion specified below for noncompliance covered by this temporary policy and resulting from the COVID-19 pandemic."**
- **Applies Retroactively as of March 13, 2020.**
- **Not a Free Ride: Must Make Every Effort to Comply**
- **If Cannot Comply (a) Act Reasonably to Minimize Effects/Duration, (b) Identify Nature and Dates of Noncompliance, (c) Identify How COVID-19 Was the Cause, (d) Return to Compliance ASAP, and (e) Maintain Documentation.**

CORONAVIRUS – EPA OECA MEMO (Cont.)

- **Routine Compliance Monitoring and Reporting:** “EPA does not expect to seek penalties for violations of routine compliance monitoring, integrity testing, sampling, laboratory analysis, training, and reporting or certification obligations in situations where the EPA agrees that COVID-19 was the cause of the noncompliance and the entity provides supporting documentation to the EPA upon request.”
- **Does Not Expect Post-Corona “Catch-Up” With Missed Monitoring or Reporting if the Requirement Applies to Intervals of Less than 3 Months.**
- **Will Accept E-mailed Submissions Even if Paper Original is Required.**

CORONAVIRUS – EPA OECA MEMO (Cont.)

- **If On-Line Training is Not Available for Certified Operators, it is More Important to Keep Experienced Trained Operators Even if Training/Certification is Missed.**
- **Consent Decree/Settlement Agreements: Use Notice Procedures from those Documents, Including Force Majeure, as Applicable.**
- **Consent Decrees: EPA Will Coordinate with DOJ and Other Parties Regarding Stipulated Penalties. Courts May Exercise Their Own Authority.**
- **Steps Taken to Minimize the Effects and Duration of any Noncompliance Caused by COVID-19.**

CORONAVIRUS – EPA OECA MEMO (Cont.)

- **Facility Operations: Contact State/EPA if Impacted Facility Operations May Create an Acute Risk or Imminent Threat to Human Health or the Environment.**
- **If Failure of Treatment Systems or Other Equipment Results in Exceedances Notify Implementing Authority (State) as Quickly as Possible.**

CORONAVIRUS

- **EPA Administrator Andrew Wheeler Mar. 27, 2020 letter to Governors identifying Water and Wastewater Workers (Including Suppliers) as Critical Infrastructure Workers.**
- **EPA Water Utility Template: COVID-19 Pandemic (DOCX) April 3, 2020**
 - **Operational Staff**
 - **Repair, Sampling/Monitoring**
 - **SCADA Control Systems Staff/Support**
 - **Maintaining Digital Systems Infrastructure**

CORONAVIRUS (Cont.)

- **Water and Wastewater Agency Response Networks (WARN)**
- <https://www.epa.gov/coronavirus/coronavirus-and-drinking-water-and-wastewater>
- **States Should Have Coronavirus Policies. See, e.g., TDEC Division of Water Resources Recommendations for Drinking Water and Wastewater Systems Relative to Coronavirus (COVID-19). Suggested Contingency Plans to Address:**
 - **Absenteeism of Staff Overseeing Treatment Process and Distribution System Maintenance**
 - **Supply Chain Disruption of Critical Chemicals and Supplies**
- **Communication! TDEC_DWR.Emergency_Services@tn.gov**

CONCLUSION

- **NPDES Permit is the Key. Negotiate Permit Conditions to Assure That Permit Conditions Are Appropriate (and Achievable)**
- **Permit Limits May Impact Future Expansion.**
- **Do Not Violate NPDES Permit!! You Can't Bank On "Enforcement Discretion"**
- **Maintain Documentation for Defenses**

FOR ADDITIONAL INFORMATION

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