

THE CLEAN WATER ACT NPDES PROGRAM: HOW CITIZENS CAN USE THE LAW TO PROTECT THEIR WATERSHED

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Abstract. In 1972, Congress passed the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* (CWA), “to restore and maintain the chemical, physical, and biological integrity of the nation’s waters.”ⁱ In implementing this Act, Congress recognized that a necessary component of achieving the fundamental goal of protecting our nation’s water resources is that of meaningful public participation.ⁱⁱ However, despite Congress’ clear mandate of public participation, the CWA and its processes designed to involve the public remain elusive to many. For example, here in Georgia, the Governor’s Environmental Advisory Council, created by Georgia’s General Assembly, identified lack of meaningful public participation in environmental decision-making as a key concern. This paper discusses the requirements of one program of the CWA – the National Pollutant Discharge Elimination System (NPDES) program – that offers EPD a vehicle for fulfilling the Congressional mandate of meaningful participation in environmental decisionmaking. Through that participation, citizens can ensure that Georgia’s environmental agency implements policies that are fully protective of our state’s precious natural resources.

OVERVIEW OF THE CLEAN WATER ACT NPDES PROGRAM

In order to achieve the objective of protecting and restoring our nation’s waterways, the CWA prohibits the discharge of any pollutants into “waters of the United States” except in accordance with standards promulgated and permits issued under the CWA.ⁱⁱⁱ Pursuant to § 303(c) of the CWA, “[s]uch standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter.”^{iv} The Administrator of the United States Environmental Protection Agency (EPA) is charged with the overall administration of the CWA. In Georgia, however, this permitting authority has been

delegated to the Georgia Environmental Protection Division (EPD) pursuant to § 402 of the Act.^v

The Georgia EPD now issues permits to qualifying persons for discharges into the waters of the State. Under its permitting program, all “point source” discharges are required to obtain and operate under a National Pollutant Discharge Elimination System (NPDES) permit.^{vi} A “point source” is defined under the CWA as any discernible, confined and discrete conveyance of pollution (e.g. a pipe, ditch, etc.).^{vii} Thus, all point sources must receive NPDES permits that contain effluent limitations that cap the amount of discharges of a particular pollutant that a point source may discharge into a waterway.

WHO RECEIVES NPDES PERMITS IN GEORGIA

In Georgia, NPDES permits are typically issued to the following type of facilities: 1) Industries. The manufacturing process for most products results in a wide variety of by-products that must be disposed of in some fashion. Industries typically obtain NPDES permits in order to discharge these by-products – or pollutants – directly into the waterways. For example, a facility may generate heavy metals (zinc, copper, lead, etc.) or other chemicals (e.g. cyanide) and can obtain a permit from EPD to dispose of these materials by discharging into the waters of our state. That same industry may also choose an alternate route, namely it may obtain a permit to become an “indirect discharger.” An indirect discharger may choose to send its waste to a municipal sewage treatment plant. Unfortunately, most municipal wastewater treatment facilities are not designed to treat the type of waste that is generated by many industries (e.g. heavy metals). Therefore, the waste generated by indirect dischargers can potentially “pass through” the treatment facility and end up in our waterways.

2) Municipalities must also obtain NPDES permits for the operation of their municipal sewage treatment plants that collect and treat wastewater from industrial

and residential users. Municipalities discharge either as *direct dischargers* (discharging directly into the water) or they utilize *sludge application* (applying the waste (sludge) to land in the community). Remember, of course, that the content of the municipalities' wastewater may differ dramatically depending on whether the plant accepts waste from *indirect users*.

3) Construction Sites/Industries that generate stormwater must also obtain NPDES permits. Urban storm sewers typically channel polluted runoff from streets, rooftops, parking lots, and other surfaces to water bodies. Controlling this major source of pollution is critical to improving and maintaining water quality in most populated areas of the country. Construction can also generate silt-laden runoff that threatens the quality of our rivers, streams and lakes.

4) Confined Animal Feeding Operations (CAFOs or large-scale animal production facilities) must obtain NPDES permits under Georgia's newly-adopted rules. However, current regulations provide for an exception to the permitting requirement for "dry litter" poultry operations (operations which dispose of their waste through land application and do not utilize a lagoon system). 5) Other Point Sources. Of course, this is not an exhaustive list of those who are subject to the NPDES program as all "point sources" must obtain an NPDES permit before discharging into our waterways regardless of whether they can be described under the aforementioned categories.

WHY FOCUS ON THE NPDES PROGRAM

Permit Renewal

While there are many federal and state programs focused on protecting our natural resources, the CWA's NPDES program provides an excellent opportunity for the public to become involved in meaningful environmental protection. As discussed above, the CWA provides specific mechanisms for public involvement that allow citizens to impact decisions regarding the amount of pollutants that enter our waterways. For example, under both state and federal law, all NPDES permits must be reissued every five years. Each time a permit is issued or reissued, pursuant to Georgia Rule 391-3-6-.06(7), EPD must provide public notice of every complete permit application, must also prepare and circulate that notice in accordance with specific procedures delineated in state regulations and must give the public the opportunity to comment on the proposed permit.^{viii} As stated in the regulations:

Public notice of every complete permit application will be prepared and circulated in a manner designated to inform interested and potentially interested persons of the proposed discharge . . . [.] The EPD shall provide a period of not less than thirty (30) days following the date of the public notice in which interested persons may submit their written views on the tentative determination with respect to the NPDES Permit Application.^{ix}

In other words, the public has the opportunity to voice its concerns.

Most significantly, EPD is not only required to *accept* comments from the public, it is required to actually *consider* and *respond* to those comments. In particular, all comments "shall be responded to in accordance with Federal Regulations, 40 C.F.R. 124.17" and Georgia Rule 391-3-6-.06(7)(b)(1)(iv), which provides that:

At the time that any final permit decision is issued . . . the Director shall issue a response to comments. . . . This response shall . . . [b]riefly describe and respond to all significant comments on the draft permit . . . raised during the public comment period, or during any hearing.^x

Failure to respond to comments is both a violation of federal law and Georgia law.^{xi}

The federal and state requirements that the agency issuing NPDES permits describe and respond to all significant public comments serves many valuable purposes. First, by requiring that the state agency describe and respond to comments submitted by the public, the law ensures that the state agency makes a "reasoned decision concerning a permit's issuance."^{xii} Moreover, this type of requirement provides for meaningful public participation.^{xiii} Merely requiring that an agency *accept* comments from the public would hardly provide for the meaningful public participation contemplated by Congress since an agency could merely collect comments without ever reviewing the contents of those comments. To avoid this result, the law provides a mechanism to ensure that the public's participation is meaningful and that its comments are actually reviewed by the issuing agency. As stated by the D.C. Circuit, "the fundamental purpose of the response requirement is, of

course, *to show* that the agency has indeed considered all significant points articulated by the public.”^{xiv}

Public Access to Information

Another important aspect of the CWA is the requirement that a permittee report whether it has complied with the effluent limitations contained in its NPDES permit. These reports must be submitted to the relevant agency in compliance with federal guidelines which include protocols for preservation techniques, use of sample containers and holding times for samples.^{xv} In Georgia, those reports are submitted to EPD. Consistent with both state law and the CWA’s mandate of citizen involvement in the implementation of the CWA, these monitoring reports are available to the public.^{xvi}

Citizen Enforcement

In addition to creating a comprehensive permitting program, the CWA also contains specific provisions regarding the enforcement of effluent standards contained in NPDES permits. For example, in addition to other enforcement mechanisms, the CWA grants citizens the right to abate pollution that occurs in violation of the Act. Specifically, the Act provides that private citizens may commence a civil action in court against any person or agency who is “in violation of an effluent standard or limitation.”^{xvii} In establishing liability, a citizen may properly rely upon monitoring reports submitted by the permittee.^{xviii}

Strict Liability

Another attractive feature of the NPDES program is the mechanism for establishing liability. Specifically, establishing liability for NPDES permit violations is relatively straightforward as a violation of an NPDES permit constitutes a violation of the CWA.^{xix} In fact, fault is not required to support liability. Instead, enforcement of NPDES permits is based on strict liability.^{xx} In legal terms, a permittee is subject to strict liability and is thus liable regardless of the reason for the unpermitted discharge. Even if the permittee acted in good faith, liability attaches.

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. This type of liability places an affirmative duty on the permittee to protect our resources. Moreover, basing liability on clear effluent limitations furthers the purpose of the CWA.

Specifically, “[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.”^{xxi} Accordingly, in enforcement actions under the NPDES program, “the sole question [is] whether the discharger has exceeded the limitations on discharge of pollutants from a particular point source.”^{xxii}

THE NEED FOR PUBLIC INVOLVEMENT

In 1991, the Georgia General Assembly established the Governor’s Environmental Advisory Council (GEAC) in order to advise the Director of EPD, the Board of Natural Resources, and the Governor “as to the efficacy of the state’s environmental protection programs, the need for legislation relation to the environment, the need for expansion of specific state programs and the need for specific changes in the state’s environmental protection programs.”^{xxiii} After assessing EPD’s programs, the Council recommended that

EPD actively pursue creative ways to ‘build bridges’ to environmental advocacy groups aimed at improving the working relationships between EPD management and these organizations.

Report, Introduction. In fact, environmentalists, industry representatives and local governments all gave EPD relatively low ratings with respect to the agency’s ability to involve the public in decision-making processes. Specifically, “more than 45% of local government participants, 60% of business/industry participants, and 80% of environmental group participants rated EPD performance here as poor or fair.”^{xxiv}

RECOMMENDATIONS

Given the need for greater participation by the public, and given that the structure of the CWA is designed to enhance such participation, EPD should follow the recommendation of the GEAC and focus its efforts on improving public relations. While many improvements are needed, an important first step could be to enhance the ability of the public to take advantage of the NPDES program. This objective could be achieved by instituting programs such as launching a campaign to reach out to communities that

might not be aware of opportunities provided by the CWA (e.g. notify communities that information exists using alternative media such as minority newspapers, local organizations, local radio, utility bills, fliers, religious centers, libraries, etc.) EPD could also improve public participation by providing better access to monitoring reports and permits by making these documents available on their web site. Other recommendations include reduction of copying costs, dissemination of understandable documents (e.g. translation of technical information into plain language, consideration of language and cultural differences), and creation of a network of contacts to disseminate information (e.g. maintain community coordinator or hotline that community can utilize to locate information). If serious efforts are undertaken to enhance the ability of the public to participate in environmental decisionmaking, then, and only then, will Georgia's program live up to the federal mandate of truly meaningful public participation. Through that participation, perhaps the CWA's goal of protecting the chemical, physical and biological integrity of our waters can be realized.

ⁱ 33 U.S.C. § 1251(a).

ⁱⁱ As stated by the United States District Court for the D.C. Circuit, "The requirement of public participation in efforts to control water pollution is established in the congressional declaration of policy and goals of the Act. . . . The legislative history of the Act repeatedly echoed the desire 'that its provisions be administered and enforced in a fishbowl-like atmosphere.'" Natural Resources Defense Council v. Environmental Protection Agency, 859 F.2d 156, 175 (D.C.Cir.1988) (quoting 33 U.S.C. § 1251(e) (1982)).

ⁱⁱⁱ 33 U.S.C. §§ 1311(a) and 1311(b)(1)(C).

^{iv} 33 U.S.C. § 1313(c)(2)(a).

^v 33 U.S.C. § 1342.

^{vi} Id.; see also 33 U.S.C. § 1342.

^{vii} 33 U.S.C. § 1362(4).

^{viii} See also 40 C.F.R. § 124.10 (b).

^{ix} Georgia Rule 391-3-6-.06(7) (b); see also 40 C.F.R. § 124.6(e).

^x 40 C.F.R. § 124.17 (a).

^{xi} In re The Conservation Society, Inc. and Terrence D. Hughey, DNR-EPD-WQ-AH 5-92, 10 (Ga. Bd. of Nat. Resources, Sept. 24, 1993).

^{xii} Id.

^{xiii} Cf. Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 109 S.Ct. 1851, 1858 (1989).

^{xiv} Natural Resources Defense Council, 859 F.2d at 188 (emphasis added).

^{xv} See 40 C.F.R. Part 136.

^{xvi} 33 U.S.C. § 1251, et seq.; O.C.G.A. §§ 50-18-70, et seq.

^{xvii} 33 U.S.C. § 1365 (a).

^{xviii} See e.g., Student Public Interest Research Group v. Teneco Polymers, Inc., 602 F. Supp. 1394, 1400 (D.N.J. 1985).

^{xix} Student Public Interest Research Group v. P.D. Oil & Chemical Storage, Inc., 627 F. Supp. 1074, 1087 (D.N.J. 1986) (finding that violations of permit limitations are violations of the law).

^{xx} State of Georgia v. City of East Ridge, Tennessee, 949 F. Supp. 1571, 1579 fn.7 (N.D.Ga. 1996) (recognizing that liability under the CWA is "automatic"); Sierra Club v. Simkins Industries, Inc., 617 F. Supp. 1120, 1128 (D.Md. 1985), aff'd 847 F.2d 1109, cert. denied, 491 U.S. 904 (1989) (holding that to violate an NPDES permit is to violate the CWA) (citing cases).

^{xxi} Proffitt v. Lower Bucks County Joint Municipal Authority, 1987 WL 16674, at *1 (E.D.Pa. 1987) (quoting U.S. Environmental Protection Agency v. State of California, 426 U.S. 200, 204-5 (1976)) (finding a municipality liable based on discharge monitoring reports for violations of limitations including BOD).

^{xxii} Id. at *2.

^{xxiii} *Governor's Environmental Advisory Council, Working Relationships between the Georgia Environmental Protection Division and its Key Constituencies: A Candid Assessment, February 2000.*

^{xxiv} Id. at 7.