

I. WATER QUALITY

A. Federal Clean Water Act

1. Overview

The Clean Water Act¹ (CWA) is an important federal environmental statute affecting agriculture. The law was originally enacted by Congress in 1972 and has been amended several times since. Its objective is to reduce or eliminate water pollution in the nation's rivers, streams, lakes, and coastal waters. A variety of mechanisms are employed by the CWA to control domestic, industrial, and agricultural pollution. Several types of agricultural activities and practices are regulated under the statute. Direct discharges from feedlots are an example. The U.S. Environmental Protection Agency (EPA) is charged with enforcing the CWA.

2. Water Quality Standards

The CWA requires each state to adopt water quality standards for most water bodies located within the state's borders. Rivers and streams are often divided into segments for this purpose. The water quality standards specify appropriate uses to be achieved and protected for each segment of water, such as public water supplies; protection and propagation of fish, shellfish, and wildlife; recreation in and on the water; agriculture uses such as irrigation or livestock watering; and navigation. Each state's water quality standards also include numerical or narrative criteria that are designed to protect these uses. The standards are then used to establish water quality based treatment controls and strategies to protect the water quality, including requirements for point sources that are placed in permits issued to those point sources. However, there are no federal laws or regulations that require the control of nonpoint sources to achieve water quality standards. In addition, as an anti-degradation policy, water quality standards may also prohibit new waste discharges into waters of exceptionally high quality.

¹ 33 U.S.C. § 1251 *et seq.* (1994).

3. *NPDES Permits*

Discharges of waste from point sources into navigable waters are regulated through a permit system known as the National Pollutant Discharge Elimination System (NPDES). Permits are issued either by EPA or by the state under a program approved by EPA. It is illegal to discharge waste from point sources into navigable waters without a permit or in violation of the terms of the permit. The CWA defines a point source as the following:

The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural storm water discharges and return flows from irrigation.

Navigable waters are defined by the CWA as "waters of the United States." This phrase has been interpreted broadly by EPA regulations and the courts to include most rivers, streams, lakes, and wetlands. Navigable waters do not have to be accessible by boats to meet the definition.

NPDES permits contain effluent limitations specifying the amounts of pollutants which may also be discharged. The permits contain other terms and conditions as well. Operational practices may also be specified. Monitoring, record keeping, and reporting requirements are usually included. If EPA is issuing the permit, a state certification that the permit complies with the CWA and state laws is required. In some cases, a permit may prohibit all discharges into water.

The permit issuance process normally involves the submission of an application, agency review of the application for completeness, a tentative permit decision by the agency, time for public comment or a hearing, and the final permit decision.

Producer Note: Many animal feeding operations and aquatic feeding operations are considered point sources and therefore require permits. If a pollutant discharge into waters of the U.S. occurs and the operation does not have a required permit, an owner or operator may be exposed to serious penalties. Producers may contact state and federal authorities to determine if a permit is required for a particular operation. Generally, an NPDES permit application will request information concerning activities occurring at the facility, including a description of the nature of the business. In addition, the name, address, telephone number, and ownership status of the operation will be required, along with a list of all other environmental permits or construction approvals which have been received or for which application has been made, a topographical map, and whether the facility is located on tribal land.

Concentrated animal feeding operations (CAFOs) are required to obtain an NPDES permit. A facility is a CAFO if it has more than 300 animal units and discharges directly into navigable waters, or if the operation has more than 1,000 animal units. A feeding operation does not need a permit, however, if it only discharges as a result of a 25-year, 24-hour storm event. An animal unit is defined as 1.0 unit per animal for slaughter and feeder cattle, 1.4 units per animal for mature dairy cattle, 0.4 unit per animal for swine, 0.1 unit per animal for sheep, and 2.0 units per animal for horses.²

Generally, 1,000 animal units is the equivalent of 1,000 slaughter and feeder cattle, 700 mature dairy cattle, 2,500 swine which are over 55 pounds, 500 horses, 10,000 sheep or lambs, 55,000 turkeys, 100,000 laying hens or broilers with continuous overflow watering, 30,000 laying hens or broilers with a liquid manure system, or 5,000 ducks. In addition, 300 animal units is the equivalent of 300 slaughter or feeder cattle, 200 mature dairy cattle, 750 swine over 55 pounds, 150 horses, 3,000 sheep or lambs, 16,500 turkeys, 30,000 laying hens or broilers with overflow watering, 9,000 laying hens or broilers with a liquid manure system, or 1,500 ducks.

Concentrated aquatic feeding operations require an NPDES permit if they produce more than 9,090 harvest weight kilograms per year of cold water fish or 45,454 harvest weight kilograms per year of warm water fish. Discharges into aquaculture projects also require a permit. An aquaculture project is a "defined managed water area which uses discharges of pollutants into that designated area for the maintenance or production of harvestable freshwater, estuarine, or marine plants or animals."

4. Wetlands

Producer Note: When agricultural operators conduct dredging and filling activities affecting water sources, these activities may require a permit. Careful attention in these activities is required as the lack of a required permit may expose the operator to serious penalties.

A separate permit, known as the section 404 permit,³ is required by the CWA for discharges of dredge and fill materials into navigable waters. These permits are issued by the U.S. Army Corps of Engineers and are subject to review and approval by EPA and the state. The filling of wetlands and the construction of structures in streams, such as irrigation gates or docks, will often require a section 404 permit.

Although minor wetlands filling activities may be covered by a section 404 EPA General or Nationwide Permit, substantial dredging or filling will usually require an individual permit.

² 40 C.F.R. § 122.23, app. B to Part 122 (1992).

³ 33 U.S.C. § 1344 (1994).

Permits may be denied if the activity causes significant adverse effects on the water body or the surrounding environment and there are practical alternatives available.

There are 36 section 404 General or Nationwide Permits.⁴ In addition, a General Permit for prior converted cropland has been proposed. The following agricultural activities are allowed under the permits:

- Fish and wildlife harvesting, enhancement, and attraction devices and activities (permit #4);
- Wetland restoration activities (permit #27);
- Cranberry production activities (permit #34);
- Emergency watershed protection and rehabilitation (permit #37);
and
- Farm buildings (permit #40).

In addition, a number of permitted activities may relate to a farming operation, including maintenance, utility line backfill and bedding, bank stabilization, road crossing, return water from upland contained disposal areas, minor discharges, minor dredging, oil spill cleanup, headwaters and isolated waters discharges, temporary construction and access, and cleanup of hazardous and toxic waste. On December 13, 1996, the Army Corps of Engineers reissued the existing Nationwide Permits with some modifications and issued two new Nationwide Permits. The two new permits were for moist soil management for wildlife (permit #30), and maintenance of existing flood control facilities (permit #31). In addition, changes to headwaters and isolated waters discharges (permit #26) will cause an increase in review time for some activities and more clearly define the activities allowed under the permit.⁵

Producer Note: All producers are encouraged to check with state and federal environmental officials to determine if a specific farming activity will be covered by a section 404 General or Nationwide Permit, or if the activity needs an individual permit. Should the activity be covered by such a permit, a producer should obtain a copy of the permit for reference and guidance. Copies can be requested from the U.S. Army Corps of Engineers.

⁴ 33 C.F.R. app. A to Part 330 (1996).

⁵ 61 Fed. Reg. 65,874 (1996).

A permit may include either onsite or offsite mitigation requirements. Mitigation requirements include restoring altered wetlands and permanently protecting other wetlands from alteration.

Many normal farming, ranching, and logging practices, such as plowing, seeding, cultivating, minor drainage, and harvesting, are exempt from permit requirements under section 404(f) of the CWA if the activities are already occurring and will be ongoing and continuous.⁶ However, a permit may still be required if major changes to the operation occur.

5. *Nonpoint Source Pollution*

Producer Note: Section 319 of the CWA was enacted in 1987 and guides the states in conducting nonpoint source assessments, developing nonpoint source management programs, and, as of 1990, beginning implementation of those programs. There are no federal regulatory requirements in Section 319.

Nonpoint source pollution is generally caused by runoff or snowmelt from cropland, pastures, barnyards, and impervious surfaces such as roads, parking lots, and roofs. The runoff may carry sediment, pesticides, herbicides, fertilizers, and other chemicals into adjacent waters, causing pollution. The CWA recognizes that cleaning up the nation's waters requires control of nonpoint as well as point source pollution, and regulation of nonpoint source pollution involves cooperative programs with the states.

The plan will generally provide for the development of best management practices (BMPs) as a means of controlling nonpoint sources of pollution. Cost sharing programs to help farmers implement BMPs in their operations are also authorized. To assist states implementing their approved programs, states have received a total of about \$470 million in the years 1990-1996 to implement programs, including cost share for demonstration projects, technical assistance, education, training, and enforcement.

6. *Oil Spill Liability*

The CWA imposes strict liability on the operators of facilities that spill oil or other hazardous wastes into navigable waters. This would include spills from petroleum storage tanks located on farms. The CWA requires that the operator promptly notify EPA of any spill. A failure to give EPA notice of the spill is also a violation of the statute.

⁶ 33 C.F.R. § 323.4 (1995).

7. *Enforcement and Judicial Review*

Persons who violate the regulatory requirements of the CWA face substantial penalties. These include both civil and criminal fines. Incarceration is possible for severe violations. EPA or the state can enjoin or stop producers' activities in order to force compliance with the statute. The CWA allows citizens to file suits to enforce CWA requirements in certain circumstances. However, if a producer disagrees with the way CWA requirements are applied to an operation, opportunities for both administrative and judicial review of EPA and state decisions are available.

Producer Note: In order for producers to maintain compliance with water quality legislation, they must be aware of state water quality standards, NPDES permit requirements, state and local nonpoint source pollution programs, wetlands permits, oil spill liability, and whether there are waters requiring special protection in the area. The states take active roles in ensuring that producers comply with these requirements.

B. State Water Quality Laws and Regulations

Most states have enacted clean water legislation. Many of these state statutes contain similar requirements to the CWA, but some impose more restrictive requirements than the federal law. The CWA authorizes EPA to delegate the NPDES permit program to individual states. However, where states have this responsibility, EPA requires enactment of statutes closely tracking the CWA. In these states, CWA enforcement requirements often come through state statutes and procedures, and states can also pass their own special state water quality legislation. State administrative agencies promulgate regulations to implement the state laws. These regulations usually contain provisions similar to those found in the parallel federal regulations, but there may be significant differences.

Caution: Because environmental laws and regulations change frequently, all producers must stay in contact with both state and federal officials in order to remain aware of and in compliance with changes in the law.

The South Dakota legislature has declared that the state's public policy regarding water pollution and beneficial uses is one of conservation of resources and protection and improvement of water quality. The state's policy also is not to allow discharges of untreated waste into the state's waters.⁷

The state, through the Department of Environmental and Natural Resources (DENR), assumed administration of the NPDES program of the federal CWA on December 30, 1993.

⁷ S.D. CODIFIED LAWS ANN. § 34A-2-1 *et seq.* (1992 & Supp. 1996).

The state regulates discharges of pollutants into surface waters through surface water discharge (SWD) permits, and no person may discharge pollutants into surface waters without one.⁸

Producer Note: The state's jurisdiction over Indian Reservations for the purpose of this program has not yet been established, and it is expected that administration by EPA or its delegates will continue unless South Dakota jurisdiction is established. Those who are unsure concerning which agency has jurisdiction over their operations are advised to consult DENR, EPA, the Bureau of Indian Affairs, and tribal government authorities.

1. SWD Permit Programs

As a condition of issuance of an SWD permit, the state requires an operation to meet the effluent limits of the federal CWA and all state rules, if more stringent. The state may attach conditions to issuance of the permit and set out or revise a schedule for compliance with a permit, and the permit must clearly state any imposed limits relating to the discharges allowed. Point sources which are regulated under the program include, but are not limited to:

- Concentrated animal feeding operations;
- Concentrated aquatic animal production facilities;
- Discharges into aquacultural projects; and
- Silvicultural point sources.

Producer Note: Point sources which had previously obtained EPA authorization to operate under the federal NPDES program are considered as holding a state SWD permit.

2. Revocation, Suspension, or Modification

Any ground or surface water discharge permit issued may be revoked, suspended, or modified for cause, including violations, misrepresentation, less than full disclosure, or a change in conditions which requires a temporary or permanent reduction or halt in the discharge. Such grounds include substantial alterations to the facility, a request for a variance, noncompliance with permit conditions, a danger to human health or the environment, and a failure to disclose fully relevant facts on the permit application. If a permit is changed or a denial is recommended, a hearing must be held within thirty days on written request of the person affected.

⁸ S.D. ADMIN. R. 74:03:17:02 (1993).

Producer Note: Since the circumstances that can trigger adverse certificate action may change rapidly, a good working relationship with concerned administrative agencies and their key people is useful.

3. *Permit Violations*

Those who violate permits may be subject to injunctions and misdemeanor criminal penalties, including jail time and fines of not more than \$10,000 per day of violation. Permit violators are also liable for civil penalties not to exceed \$10,000 per day of violation. Violators are also liable for the costs of cleaning up or repairing environmental damage caused by their permit violations. They may also have to pay the legal costs of enforcing the permit. The same penalties apply to those who make false statements or certifications, or who tamper with any monitoring equipment.

4. *Public Access to Information*

All data submitted to the state by an operation with a permit is available for public inspection, except if the information would reveal trade secrets or processes. In these cases, the information may be treated as confidential. Persons holding trade secrets may request confidentiality if they can show that records or information, except for effluent data, permit applications, or permits, would divulge that person's trade secrets. However, this information may be disclosed to other concerned state and federal agencies and their employees or in any relevant permit or judicial proceeding.

5. *Concentrated Animal Feeding Operations*

South Dakota defines an animal feeding operation as a lot or facility where animals are confined or fed 45 days or more in any 12-month period and where crops and vegetation are not sustained in the normal growing season over any portion of the facility.⁹

The state further defines a concentrated animal feeding operation (CAFO) as one which contains more than 1,000 slaughter or feeder cattle, 700 mature dairy cattle, 2,500 swine over 25 kg, 500 horses, 10,000 sheep or lambs, 55,000 turkeys, 100,000 hens or broilers if the facility has continuous overflow watering, 30,000 hens or broilers if the facility has a liquid manure handling system, or 5,000 ducks, or 1,000 animal units.

If pollutants are discharged into surface waters through a manmade device or they pass over, across, or through the facility or come in contact with the animals, facilities containing 300 slaughter or feeder cattle, 200 mature dairy cattle, 750 swine over 25 kg, 150 horses, 3,000 sheep or lambs, 16,500 turkeys, 30,000 hens or broilers if the facility has continuous overflow

⁹ S.D. ADMIN R. 74:03:18:21 *et seq.* (1993).

watering, 9,000 hens or broilers if the facility has a liquid manure handling system, 1,500 ducks, or 300 animal units are considered CAFO's for the purposes of the SWD permit process.

An animal unit is determined by applying the following multipliers to the number of animals found on the facility: 1.0 x number of slaughter and feeder cattle, 1.4 x number of mature dairy cattle, 0.4 x number of swine over 25 kg, 0.1 x number of sheep, and 2.0 x number of horses.

DENR may also designate a facility as a CAFO if it determines that the facility is a significant contributor to water pollution. In making that determination, DENR considers the facility's size, location, animal waste conveyance, wastewater processing methods, slope, vegetation, rainfall, and other factors which could affect the likelihood or frequency of discharges into the state's waters.

Producer Note: Before a small feeding operation is required to apply for a permit, an on-site inspection must be conducted to determine whether the operation should be regulated. In addition, two or more CAFOs under common ownership are considered a single unit for permit purposes if they utilize a common waste handling system.

6. *General Permit Programs*

A general permit may be issued for a readily identifiable class of similar operations, subject to terms and conditions that are necessary to protect adequately public health, safety, welfare, and the environment. Examples of facilities which can operate under a general permit are stormwater point sources, CAFO's, and categories of similar operations that require the same type of monitoring and which are most appropriately dealt with under general permit rules.

However, an individual permit may still be required if the discharge is a significant contributor to water pollution, or if it is a health hazard, if the discharger is not in compliance with the general permit, if effluent guidelines are set for facilities operating under a general permit, or if a water quality management plan containing requirements applicable to such point sources is approved.

7. *Exclusions*

DENR does not require SWD permits for the following agriculturally-related discharges:

- Return flows from irrigated agriculture; and
- Pollutants from nonpoint source agricultural activities, including runoff from orchards, crops, pastures, rangeland, and forest land.

8. *Nonpoint Sources of Pollution*

Even if an operator is not required to obtain an SWD permit, the state's permit process for discharges of waste into groundwater imposes a permit requirement on nonpoint sources which is administered through DENR. In addition, DENR approval of plans and specifications is required for all operations involving:

- Installation, extension, additions to, or operation of any waste disposal system or part of a waste disposal system;
- A change in volume or strength of the discharge over an existing limit;
- Construction, installation, operation, or modification of any waste discharge apparatus which would increase discharge of waste or would illegally alter the physical, chemical, or biological properties of groundwater into which it discharges; and
- Construction or use of a new outlet for discharge into the state's water.

Producer Note: Since South Dakota's program of water quality regulation is comprehensive in nature, producers should determine their potential need for permits before undertaking construction or modifications that could substantially change their operations.

9. *South Dakota Wetlands Law*

South Dakota law defines a wetland as "an area inundated or saturated by surface or groundwater and on which a prevalence of vegetation typically adapted for life in saturated soils exists."¹⁰ As a result, wetlands are waters of the state. Discharges of pollutants from any source into a wetland, including fill, are prohibited except when permitted under §404 of the federal Clean Water Act. (See page SD-3) No solid waste facilities are permitted to be established in defined wetlands.

Producer Note: Often the specifics of environmental laws are found in agency regulations. In addition, regulations are likely to be amended frequently. As a result, a producer must keep in contact with offices administering specific programs in order to keep up with all of the changes which may occur in a particular program.

¹⁰ S.D. ADMIN. R. 12:56:01:01 (1991).