

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 The law was originally enacted by Congress in 1972 and has been amended several times since.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; agricultural 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 treatment controls and strategies to protect the water quality, and may include specific requirements placed in permits issued to 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 stormwater 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 which affect water sources, these activities may require a permit. Careful attention to 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 General or Nationwide Permit, substantial dredging or filling will usually require an individual permit.

² 40 C.F.R. § 122.23, app. B to pt. 122 (1996).

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.⁵ 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.

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 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 pt. 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 and ranchers implement BMPs on 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 a violation of the statute.

⁶ 33 C.F.R. § 323.4 (1996).

7. *Enforcement and Judicial Review*

Persons who violate the regulatory requirements of the CWA may 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 their 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 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.

1. *Water Quality Act*

In Idaho, the water quality program is managed by the Department of Health and Welfare's Division of Environmental Quality (DEQ).⁷ DEQ holds the primary responsibility for implementation and adoption of water quality standards within the state. According to the Idaho legislature, the water policy of the state includes the following:

⁷ IDAHO CODE § 39-3601 *et seq.* (Supp. 1996).

- ! To protect surface water by monitoring and controlling water pollution;
- ! To support and aid technical and planning research leading to the control of water pollution; and
- ! To provide financial and technical assistance to municipalities, soil conservation districts, and other agencies in the control of water pollution.

The Idaho Water Quality Act is intended to allow full implementation of the federal Clean Water Act so long as the rules promulgated under the act do not impose more stringent requirements than the Clean Water Act.

Producer Note: Generally, Idaho has an antidegradation policy. This means that all existing instream beneficial uses and water qualities will be protected. Where the water quality exceeds the minimum level necessary for the propagation of fish, shellfish, wildlife, and recreation, that quality will be maintained unless DEQ determines that the water quality must be lowered to accommodate important economic or social development in the area where the waters are located. However, water quality must remain adequate for the full protection of existing uses.

DEQ designates instream beneficial uses of surface waters by determining the beneficial use which the water body can reasonably be expected to support, whether or not that use is fully supported at the time of the designation. Current uses must be fully supported by the designation of instream uses, and the designation will be reviewed as necessary and revised when physical, chemical, or biological measures indicate the need to do so.

Persons who conduct nonpoint source activities or who conduct operations on waters that are not able to support all beneficial uses pursuant to an NPDES permit are not required to meet water quality criteria other than those necessary for the full support of the existing beneficial use.

In the event that designated beneficial uses are not fully supported, DEQ will place a water body into one of the following priority classifications:

- ! High) Definitive and generally accepted water quality data indicate that unless remedial actions are taken in the near term there will be significant risk to designated or existing beneficial uses of a particular water body;
- ! Medium) Water quality data indicate that unless remedial actions are taken there will be risks to designated or existing beneficial uses; and

- ! Low) Limited or subjective water quality data indicate designated uses are not fully supported, but that risks to human health, aquatic life or the recreational, economic, or aesthetic importance of a particular water body are minimal.

High classification waters will have a total maximum daily load (TMDL) designated. Medium classified waters will have changes in permitted discharges from point sources or changes to the best management practices (BMPs) for nonpoint sources as necessary to prohibit further impairment of the designated or existing beneficial uses. Finally, low classification waters will have changes in permitted discharges from point sources or changes to the BMPs for nonpoint sources which are necessary to prevent further impairment of the designated or existing beneficial use.

Producer Note: No agency action may be taken which requires best management practices for agricultural operations other than those adopted on a voluntary basis.

The total maximum daily load determination is developed by DEQ to control point source and nonpoint sources of pollution on the water body. If water bodies have not obtained an applicable water quality standard due to impacts that occurred prior to 1972, no further restrictions will be placed on a point source discharge unless the point source contributes more than 25 percent of the total load for that pollutant. Existing uses will be maintained.

Outstanding resource waters are also created by the water quality act, and these waters are granted special protections. As a result of the designation, no new or substantially modified nonpoint source activity is allowed if it can reasonably be expected to lower the water quality. Although existing activities may continue, they must be conducted in a manner that maintains and protects the current water quality of an outstanding resource water.

No person may conduct a new nonpoint source activity on or affect an outstanding resource water without approval by DEQ. Within six months of designation of an outstanding resource water, DEQ will develop best management practices (BMPs) for reasonably foreseeable nonpoint source activities, and those BMPs are monitored by DEQ for their effect on water quality. In addition, DEQ may institute a civil action for an immediate injunction if a person fails to obtain approval for a new nonpoint source activity or fails to implement approved BMPs and water quality is lowered.

Producer Note: Although BMPs are not required of agricultural operations, an operation may be held liable for lowered water quality if BMPs are not implemented.

2. *Watershed Protection and Flood Prevention*

Because erosion, floodwater, and sediment damages in the watersheds of Idaho rivers and streams are considered a menace to the welfare of the citizens of Idaho, the state cooperates with all applicable public and private entities for the purpose of preventing floods and protecting watersheds.⁸

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 changes which may occur in a particular program.

⁸ IDAHO CODE § 42-3601 *et seq.* (1996).

⁹ 42 U.S.C. § 300g-1 *et seq.* (1996).

¹⁰ Safe Drinking Water Act Amendments of 1996, P.L. 104-182.