

Elements of NYSDEC SPDES Order on Consent

by Scott W. Crisafulli

This article presents information about the New York State Department of Environmental Conservation's (NYSDEC) typical response for an administrative Order on Consent when addressing violations of a State Pollutant Discharge Elimination System (SPDES) permit. New York's SPDES permit program has been approved by EPA in accordance with the federal Clean Water Act. The NYSDEC is the responsible permitting and enforcement agency for water matters in New York State. The SPDES permits are issued under Article 17, Title 8, of the New York State Environmental Conservation Law (ECL). ECL Article 17 provides that it shall be illegal to discharge a pollutant from a point source to the waters of New York without a SPDES permit, or not in accordance with the terms of a SPDES permit.



Photo courtesy of NYSDEC-Facility Operations Assistance Section

Solids were not removed from this chlorine contact chamber – an example of poor or lack of maintenance. Out-of-service here, growth is occurring in the accumulated solids.

Methods of Enforcement

When violations of SPDES permits, or the ECL and/or accompanying regulations occur, NYSDEC has several mechanisms it uses to enforce the regulation. Sometimes minor violations can be resolved. When violations become more serious, NYSDEC takes increasingly formal enforcement actions. The majority of NYSDEC's enforcement is done through four mechanisms:

1. Informal enforcement such as verbal directive or written Notice of Violation (NOV)
2. Administrative Order on Consent – a typical formal response to noncompliance when NYSDEC and the regulated entity agree to a negotiated settlement of the violations and court action is not pursued.
3. Administrative Notice of Hearing and Complaint – usually is employed when an entity refuses to sign an Order on Consent. The NYSDEC files a formal Complaint and sues the entity in an administrative forum before an Administrative Law Judge. It is very similar to a judicial action before a court of law.
4. Referral to the Office of the Attorney General – the NYSDEC asks the Attorney General to commence an action before a court of law and prosecute the violations. Typically, the most severe or egregious matters get referred to the Office of the Attorney General.

NYSDEC guidance on the elements of an Order on Consent are found in the Commissioner's Order on Consent Enforcement Policy (DEE #2), a copy of which can be found at <http://www.dec.ny.gov/regulations/2379.html>.

Administrative Order on Consent: The bulk of NYSDEC's enforcement actions are resolved in this manner. The NYSDEC and regulated entity negotiate and NYSDEC agrees not to pursue violations in court action in exchange for the regulated entity waiving its right to a hearing, and performing certain actions. Orders must be signed by a responsible official, either municipal or industrial, who can bind the regulated entity. The main elements of an Order on Consent are as follows:

Penalties (three types – payable; suspended/stipulated; mitigated): Orders on Consent contain a payable penalty to resolve the violations. NYSDEC has a preference to resolve all outstanding violations in an order. Pursuant to ECL Section 71-1929, the maximum penalty amount is \$37,500 per day, per violation. The actual penalty amount for each case varies depending on the severity and duration of the violations. In calculating SPDES penalties, NYSDEC relies on its Civil Penalty Policy (DEE #1 – for information go to: <http://www.dec.ny.gov/regulations/2379.html>) and the Division of Water Enforcement TOGS (Technical and Operational Guidance Series (on same website). (*Also see TOGS article on page 22.*) In certain cases, payable penalties may be paid out over several installments.

Suspended penalties involve holding part of the penalty for the past violations in abeyance, provided that the entity complies with the terms of the consent order. If any term of the consent order is violated, some or all of the suspended penalty must be paid. Orders also may contain stipulated penalties.

Stipulated penalties are penalties for future violations of the terms of an order, and are frequently assessed on a daily basis for each day on which an order obligation is missed.

Mitigated penalties may be mitigated by the performance of an Environmental Benefit Project (EBP). EBPs allow funds that would normally be paid as penalties, to be used for projects that contain some sort of benefit to the effected community. These projects would be something a respondent would normally not be legally obligated to do. Examples of EBPs include: construction of bike trails, putting solar panels in a school district, planting trees, fish mapping and shoreline cleanup.

For NYSDEC's EBP Policy (CP #37), see <http://www.dec.ny.gov/regulations/2379.html>, which governs how EBPs are applied.

Compliance Schedule: Orders on Consent contain schedules for the actions needed to remedy any outstanding violations. The schedule outlines enforceable milestones for bringing a regulated entity into compliance. Schedules vary in length from very short, to multi-year upgrades to waste disposal systems requiring upgrades to the SPDES permitted discharge facilities and the submission of engineering plans certified by a professional engineer. NYSDEC is now looking at green infrastructure solutions to some SPDES issues, and may incorporate these types of remedies into future Orders on Consent.

Interim Limits: Orders on Consent often contain interim limits.

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These are temporary discharge limits that allow a facility to discharge above its normal limits and usually remain in effect until the upgrades required by the order are complete, allowing the order to serve as a “bridge to compliance” with a SPDES permit. Interim limits are necessary because most wastewater treatment facilities must continue to operate and treat sewage while performing the needed upgrades.

Environmental Audits: Orders on Consent may require facilities to perform environmental audits. Environmental audits involve hiring a third party to audit the facility and determine if there are any violations of statutes, regulations or permits. Audits are also a useful tool for reviewing things like asset management and operation/maintenance requirements. The respondent submits an approvable schedule for remediating violations identified by the auditor. Subject to some exceptions, if a respondent remediates the violations in accordance with the approved schedule, NYSDEC will forgive penalties for the audited violations.

Standard Language: There are other standard provisions in NYSDEC Orders on Consent. These include providing NYSDEC staff access to the facility, reservations of certain rights of the NYSDEC, indemnification of any injuries incurred to NYSDEC in implementing the order, and certain reporting obligations. Most of these types of provisions are boilerplate in all NYSDEC Orders on Consent.

NYSDEC takes implementation of the activities required by an order very seriously. After execution of an Order on Consent, NYSDEC staff track progress on the implementation of the activities required by the order. This is done by inspections, written reporting or progress meetings. Any failure to comply with the terms of an order can lead to further enforcement including the collection of

a suspended or stipulated penalty, filing of an administrative complaint, or referral to the Office of the Attorney General. Therefore, any facility that enters into an Order on Consent with NYSDEC would be well advised to follow the terms of the order.

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