

# TOGS 1.4.2: Tool for Compliance and Enforcement of SPDES Permits

by Meredith Streeter

The New York State Department of Environmental Conservation's (NYSDEC) Division of Water (DOW) has established the Technical and Operational Guidance Series (TOGS) of memos to provide staff with guidance on how to ensure compliance with statutory and regulatory requirements including case law interpretations, and to promote consistent treatment of similar situations. This is not a policy and procedures manual system, but rather, a series of documents which provide timely, detailed guidance to NYSDEC staff.

The draft TOGS also addresses some of the findings of the 2006 US Environmental Protection Agency (EPA) review under the State Review Framework (SRF). Specifically, the EPA was concerned with how statewide consistency and penalty assessments were handled by NYSDEC enforcement programs. The draft TOGS provides clear direction to NYSDEC DOW staff on how to handle compliance and enforcement issues and how to assess penalties for settlement purposes. The EPA SRF review was made available to the public and posted on the EPA website in the fall of 2009.

## Guidance Tool

TOGS 1.4.2, Compliance and Enforcement of State Pollutant Discharge Elimination System (SPDES) permits, establishes NYSDEC's guidance on compliance and enforcement activities related to the SPDES program. The goal is to ensure consistent statewide understanding and implementation of the SPDES compliance and enforcement program in order to protect public health and the intended best use of the waters of the state. The document provides NYSDEC staff with enforcement options, penalty structure and operating guidelines to implement the compliance component for all SPDES permits.

In May 2007, DOW staff began the process of updating and revising TOGS 1.4.2. The original TOGS, finalized in September 1988, pre-dates the current SPDES general permits for stormwater (discharges from construction activity, industrial activity and municipal separate storm sewer systems (MS4) and concentrated animal feeding operations (CAFOs). These programs, as well as combined sewer overflows (CSOs) and sanitary sewer overflows (SSOs), have been added to the draft TOGS 1.4.2, with the appropriate enforcement responses and penalties.

The NYSDEC's SPDES permit compliance program relies on periodic self-reporting, NYSDEC and partners inspections, and citizen complaints to evaluate the compliance status of any regulated facility. Information gathered from these sources determines whether violations constitute significant non-compliance (SNC, *see page 10.*) or are water priority violations. Water priority violations are defined in TOGS 1.4.1 WICSS Integrated Compliance System Strategy, which was developed to ensure a consistent approach to addressing priority violations.

The primary goal of enforcement is for the violator to return to

compliance and to deter the occurrence of violations. TOGS 1.4.2 outlines the response NYSDEC staff should follow once non-compliance in the form of water priority violations has been detected. NYSDEC staff will use its best professional judgment to determine the appropriate enforcement response, using the SPDES Compliance and Enforcement Response Guide. This guide contains the DOW minimum compliance and enforcement response to violations of the Clean Water Act (CWA), the Environmental Conservation Law (ECL) and 6 New York Codes, Rules, and Regulations (NYCRR) Part 750.

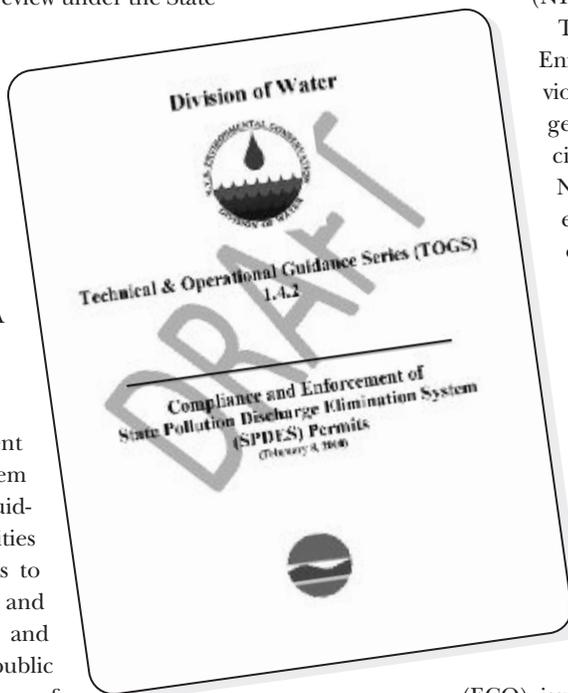
The SPDES Compliance and Enforcement Response Guide lists specific violations for all current individual and general permit programs, particular circumstances and the appropriate NYSDEC response to the violations. This enforcement response may be informal or formal in nature. Informal enforcement is used to promote voluntary compliance with the regulations and permit requirements and includes phone calls, warning letters and Notices of Violation (NOVs). Formal enforcement is used when a voluntary return to compliance is not achieved (though a return to compliance does not inhibit NYSDEC from pursuing formal enforcement), or as other conditions may warrant. Formal enforcement includes Environmental Conservation Officer

(ECO) issued tickets, Orders on Consent, Cease and Desist Directives, Notice of Hearing and Complaint and referral to the Attorney General's Office.

*For more information on these formal and informal enforcement tools or to see the complete list, please refer to the draft TOGS 1.4.2 document located on the NYSDEC website at: <http://www.dec.ny.gov/chemical/62557.html>.*

When non-compliance leads to formal enforcement and a penalty needs to be developed for settlement purposes, DOW staff are expected to follow the penalty guidance in TOGS 1.4.2. The guidance provides a consistent method to determine penalties to deter additional violations, eliminate any unfair economic advantage gained and consider the unique characteristics of each case.

The total penalty is calculated by using a base penalty for each violation, adjustments for case specific factors and an economic benefit component. Appendix C of TOGS 1.4.2 contains tables which list base penalty rates for specific violations. Adjustment factors are provided to allow flexibility and fairness in penalty calculation. The following adjustment factors are used in this guidance: culpability, cooperation, history of non-compliance, ability to pay and other unique factors. These factors and their recommended ranges are



defined in Appendix D of TOGS 1.4.2. If the situation warrants, NYSDEC staff may choose to forgo the base penalty rate and adjustment factors and go directly to the statutory maximum penalty.

In February 2010, public notice of the draft TOGS 1.4.2 Compliance and Enforcement of SPDES permits was published in the Environmental Notice Bulletin (ENB). During the public notice period, NYSDEC staff conducted three information sessions across the state to educate the public on the document and answer any questions. The public notice period ended in late March 2010 and the revision team is currently reviewing comments, making changes to the draft TOGS as necessary and preparing a responsiveness summary. Once finalized, the TOGS and responsiveness summary will be posted on the ENB and NYSDEC staff will begin implementing the document.

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