

**Chapter 4 Contents:  
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**Every operator  
has a bad day.**



## Chapter 4 Regulatory Overview and Legal Responsibilities

### *Addressing Regulations and Legal Considerations*

#### **Overview**

Governmental efforts to regulate pollution of the waters of the United States date back as far as the Rivers and Harbors Act of 1899. However, the effects of the industrial revolution and rapid population growth on the nation's waterways signaled that more was required to maintain healthy and pure waters, and to restore those that had become impaired.

Today, discharges to the waters of the United States are highly regulated by, among other laws, the Federal Water Pollution Control Act (FWPCA), commonly known as the Clean Water Act. Originally enacted in 1970, FWPCA's intent was to eventually eliminate discharges of pollutants and that all waterways in the United States be fishable and available to swim in by 1985. FWPCA, like many comprehensive environmental laws, contains provisions related to research, grants for construction of treatment works and state water pollution control revolving funds, as well as provisions requiring the establishment of water quality standards and a system to permit the discharge of pollutants to the waters of the United States. That system, the National Pollutant Discharge Elimination System (NPDES), provides the framework within which discharges from municipal, industrial, and other facilities are regulated. Discharges which are not authorized by or are not in compliance with a permit are illegal and subject the owner and operator to possible enforcement and legal liability.

In enacting FWPCA, Congress authorized the United States Environmental Protection Agency (US EPA) to issue detailed regulations to carry out the requirements of the law. Those details are set forth in the Code of Federal Regulations. US EPA implements the NPDES in states and territories where authority has not been delegated to a state or territory.

New York, which has been delegated such authority by the federal government, has demonstrated a long-standing and vigorous commitment to protection of its waters dating back to 1953 and the Department of Health's Pure Waters Program. In 1972, the New York legislature enacted the modern version of the state's Water Pollution Control Act, which is codified in the New York Environmental Conservation Law (ECL). Article 17 of the ECL authorizes the New York State Department of Environmental Conservation (NYSDEC) to implement New York's State Pollutant Discharge Elimination System (SPDES) permitting program. NYSDEC has promulgated detailed regulations which are set forth in Title 6 of the Official Compilation of New York Codes, Rules and Regulations (NYCRR), and has issued written guidance documents known as the Technical & Operational Guidance Series (TOGS).

Virtually all aspects of wastewater treatment in New York are specifically regulated. The initial design and construction of a wastewater treatment plant must be reviewed and approved by NYSDEC before a permit can be issued. The operators of municipal wastewater treatment plants must be certified, and the effectiveness of treatment must be continually monitored and performance results regularly self-reported to NYSDEC. With all federal and state laws, regulations, and guidance documents available online, owners and operators of wastewater treatment plants have instant access to the authorities under which they operate. After more than 35 years of administering the Clean Water Act, federal and state environmental enforcement authorities have no sympathy for public or private owners or operators who feign ignorance of applicable and relevant legal requirements or fail to comply therewith.

#### **Legal Responsibilities**

Owners and operators of wastewater treatment plants face many challenges in complying with the applicable laws and regulations. NYSDEC and other agencies will often work cooperatively with owners and operators of wastewater treatment plants to write appropriate SPDES permits and to achieve compliance with the permits. A plant owner or operator who does not communicate regularly and establish a rapport

with the agency that issues and administers its discharge permit is much more likely to be out of compliance than one who does.

In New York, owners and operators who regularly violate applicable water pollution control laws, regulations, or permits and fail to take appropriate measures to abate such violations will attract the enforcement attention of NYSDEC and the relationship with the agency can rapidly change from cooperative to adversarial. That attention, and the legal proceedings which often follow, can result in civil or criminal prosecution and liability for owners and operators. Municipal bodies which own wastewater treatment plants are not immune from enforcement.

The self-monitoring and reporting conditions of SPDES permits present obvious opportunities and incentives for owners and operators to effect less than full compliance, so a substantial amount of governmental enforcement efforts are focused on improper monitoring and reporting. Through such efforts, enforcement authorities seek to directly punish owners and operators for violations, and deter others from engaging in the same or similar illegal conduct.

### **Enforcement**

Governmental enforcement of water pollution control laws in New York is almost exclusively by NYSDEC, though US EPA has reserved in its delegation of authority to New York and other states the ability to step in and “overfile,” (i.e., commence a federal enforcement action if US EPA determines that state enforcement is inadequate or insufficient).

Governmental enforcement actions against owners and operators can be initiated in several ways. NYSDEC Division of Water staff identify the majority of violations of water pollution control laws, regulations, and permits. NYSDEC’s Division of Law Enforcement and Bureau of Environmental Conservation Investigations, staffed by fully authorized investigators and law enforcement officers with specialized environmental training, also identify many violations. These uniformed and plain-clothed enforcement officers follow up on referrals from NYSDEC staff and tips from the public, and they have authority to issue Environmental Compliance Appearance Tickets or Consent Orders to violators.

### **Violations and Penalties**

Depending on several factors, including the mental state of the violator and seriousness of a violation, enforcement can be in the form of criminal, civil, and/or administrative prosecution.

When an owner or operator commits a knowing and willful violation of a water pollution control law, regulation, or permit, or commits an act or omission so negligent or extreme, he exposes himself to criminal prosecution and liability. According to NYSDEC, the most common criminal violation committed by owners and operators of wastewater treatment plants is the submission of monthly discharge monitoring reports containing false information concerning the levels of pollutants discharged, the level of treatment achieved, or the operation of the facility.



**Lack of preventive maintenance may cause violations.**

If NYSDEC determines that criminal prosecution of an owner or operator is warranted and appropriate, it can refer the matter to a United States Attorney to commence legal proceedings in Federal District Court, or to the New York Attorney General or District Attorney for prosecution in New York State Courts.

As in all criminal proceedings, where the loss of one’s personal liberty may be at stake, the prosecution bears a high burden and must prove beyond a reasonable doubt that the owner or operator committed the alleged violations. An owner or operator convicted of a criminal violation could face prison, in addition to monetary and other criminal penalties.

If NYSDEC determines that in committing a violation an owner or operator lacked the required knowing and willful mental state, the Department can still initiate civil enforcement proceedings. Civil enforcement can seek correction or abatement of violations, remediation or restoration of environmental damage, as well as monetary penalties. Article 71 of the ECL provides for civil penalties for most violations of water pollution control laws, regulations, and permits of up to \$37,500.00 per day of violation. Civil enforcement also serves to punish violators and deter others from engaging in the same or similar conduct.

NYSDEC often resolves civil enforcement proceedings through Consent Orders. A Consent Order is a legally binding contract between the violator, known as a Respondent, and NYSDEC. In entering into a Consent Order, the Respondent waives his right to the hearing which he is entitled to by law, and agrees to do certain things, typically including the payment of a penalty and the taking of appropriate remedial measures to correct the violation. Violation of the terms of a Consent Order can result in penalties of up to \$37,500.00 per day of violation, and renewed prosecution of the original violations.

### **Administrative Proceedings**

If a violation cannot be resolved in a Consent Order, NYSDEC can initiate an administrative proceeding before an Administrative Law Judge (ALJ) where NYSDEC can seek an order to require compliance, as well as civil penalties. Such an administrative proceeding is commenced by the filing and service of a Notice of Hearing and Administrative Complaint, or a Notice of Motion for an Order Without Hearing. The ALJ, an employee of NYSDEC, conducts a hearing, hears the testimony of witnesses, reviews evidence put forward by NYSDEC staff and the Respondent, and makes a recommendation to the NYSDEC Commissioner.

The Commissioner can adopt the ALJ's report and recommendation, or make his or her own determination. NYSDEC's burden of proof in an administrative hearing is low, and the decisions of the ALJ and Commissioner will be upheld as long as such decisions are not arbitrary or capricious. Penalties imposed after an administrative hearing will often be greater than the original amount sought by NYSDEC in a Consent Order. The penalty normally has a "Payable Amount," and the Consent Order may contain "Stipulated Penalties" for violations of its terms.

NYSDEC has issued qualifications for operators of wastewater treatment plants which are set forth at 6 NYCRR Part 650. Pursuant to this regulation, NYSDEC is authorized to issue a certification to an operator who satisfies those qualifications. If NYSDEC determines that an operator certification was issued by mistake or as a result of fraud, or if NYSDEC determines that an operator was negligent, or practiced fraud or deceit in the performance of his or her duties, NYSDEC can commence an administrative proceeding before an ALJ to revoke the operator's certification.

Owners and operators should understand that criminal prosecution of violations of water pollution control laws, regulations, and permits does not preclude simultaneous or subsequent civil and administrative enforcement, and vice versa. As such, a single violation of a water pollution control law, regulation, or permit could result in a scenario where an operator faces criminal prosecution by a United States Attorney and is subject to an administrative proceeding concerning the revocation of his or her certification, while the owner of the facility, which could be a municipal body, faces a civil enforcement action which could result in civil penalties and expensive corrective action.

If a violation is particularly egregious and the Commissioner of NYSDEC determines that a condition or activity presents an imminent danger to the health or welfare of the people of the state or is likely to result in irreparable damage to natural resources, the Commissioner can issue a Summary Abatement Order requiring the immediate cessation of such condition or activity. Because this remedy is considered drastic, an administrative hearing must be provided within 15 days of the issuance of the Commissioner's Summary Abatement Order.

Because Congress recognized that the federal and state governments could not effectively monitor compliance of all discharges and enforce all violations, it included in FWPCA a "Citizen Suit" provision which

allows any citizen to act as a “private attorney general” to commence civil enforcement proceedings in Federal District Court to enforce compliance with FWPCA and violations of NPDES and SPDES permits. Since citizen suits may not be maintained for wholly past violations or where the federal or state government is diligently prosecuting such violations, it is in owners’ and operators’ best interest to immediately abate the violation if possible, and it may be advisable to seek the initiation of government enforcement activities so as to preempt a citizen suit.

### **Conclusion**

Wastewater treatment is highly regulated at the federal, state, and sometimes even the regional and local level. Given that criminal violations of water pollution control laws, regulations, and permits can result in incarceration and civil penalties as high as \$37,500.00 per day, and given that an operator’s certification and source of livelihood can be revoked for cause, there is simply no substitute for compliance. Compliance requires proper planning by the owner, proper monitoring and maintenance by the operator, and cooperation and assistance by the relevant regulatory authority. Though non-compliance may appear in certain instances to provide some illusory short-term savings, compliance is, over the long term, a much more cost effective strategy.

### **Useful Resources**

From the Local Government Environmental Assistance Network entitled: *The Primer for Local Governments on Environmental Liability*, [www.legean.org/documents/primer.pdf](http://www.legean.org/documents/primer.pdf).

## ***State Pollutant Discharge Elimination System and Discharge Report Monitoring***

NYSDEC has a program that has been approved by the US Environmental Protection Agency (US EPA) for the control of wastewater and storm water discharges. Under New York State law, the program is called the State Pollutant Discharge Elimination System and is commonly referred to as SPDES. The program controls point source discharges to ground waters and surface waters (see glossary for definitions if necessary).

### **Special Conditions of Permits**

*For your assistance, a sample SPDES Permit is included in Appendix B.*

The Special Conditions (Part 1) of the Permit includes some basic information on the wastewater facility, such as the permittee, facility name, mailing address, and location. It also includes information on the drainage basin, receiving water, and SPDES Number and expiration date. Located on page 1 of the permit is the Discharge Monitoring Report (DMR) mailing address. Page 2 of the permit includes the “Effluent Limitations and Monitoring Requirements.” Effluent limitations are the maximum allowable concentrations or ranges for various physical, chemical, and/or biological parameters. Limitations are also specified for flow (million gallons per day) and mass loadings (pounds per day). Monitoring requirements are noted in terms of frequency of collection, sample type (composite vs. grab), and sample location (influent or effluent). Recording, reporting and additional monitoring requirements are shown on Page 4 of Part 1.



Sometimes a plant upgrade is needed to maintain SPDES compliance. (Lake Placid)

Part 750 of the Official Compilation of Codes, Rules, and Regulations of the State of New York (NYCRR) provides the statutory authority for requiring a SPDES Permit and operating in accordance with a SPDES Permit.

The complete regulation can be found at the following website:

[www.dec.state.ny.us/website/dow/part750.pdf](http://www.dec.state.ny.us/website/dow/part750.pdf)

Some important sections of Part 750 include:

- Public Notification of Discharges (750-1.12) requires that a sign be erected or posted where waste-waters are discharged to surface waters.
- Modification of SPDES Permits (750-1.18) provides the grounds for Permit changes.
- General Provisions of a SPDES Permit (750-2.1) indicates that any Permit noncompliance constitutes a violation of the Environmental Conservation Law (ECL) and the Clean Water Act.
- Inspection and Entry (750-2.3) allows for the NYSDEC to enter onsite, inspect, sample, request various records, etc.
- Operator and Permittee Liability (750-2.4) clearly outlines the possible criminal and administrative liabilities to the operator and/or the owner.
- Routine Monitoring, Recording, and Reporting (750-2.5) discusses the kinds of records that must be maintained, the testing and analytical procedures required, and the need to submit Discharge Monitoring Reports (DMRs).
- Incident Reporting (750-2.7) outlines the procedures for reporting of a bypass, upset, or other incident.
- Disposal System Operation and Quality Control (750-2.8) requires that the plant have preventive and corrective maintenance programs and must also have written procedures for O&M, training new operators, and laboratory QA/QC. The system shall not receive wastes beyond design capacity. The plant will have sufficient staff to satisfactorily operate and maintain the treatment works.
- National Pretreatment Standards (750-2.9) requires the plant to develop a pretreatment program to monitor and control industrial users. This section also requires that excessive infiltration and inflow be identified and removed.

For questions and clarification of these regulations, contact the Regional Water Engineer in your area or visit the website listed above.

## Discharge Report Monitoring

SPDES requires that wastewater facilities complete and submit Discharge Monitoring Reports (DMRs). DMRs are a legal document and any falsification of data can result in legal implications. Failure to submit the DMR is a violation of the SPDES Permit, Article 17 of the NYS Environmental Conservation Law, and the Federal Clean Water Act. Records must be kept for five (5) years.

*For your assistance, a sample DMR is shown in Appendix C.*

Across the top of the DMR is the mailing information about the facility, the SPDES permit number, and the monitoring period. Monitoring can take place monthly, quarterly, semi-annually or annually. The parameters and the monitoring locations are listed down the left side of the DMR and may require several pages. These parameters and monitoring locations correspond with the SPDES permit limits. Data is entered in the open “Sample Measurement” boxes. On the righthand side of the DMR, there is a column “No. Ex.” This is a summary of the Number of Excursions (violations) and is tracked by the Compliance Coordinator.

Across the bottom of the DMR is the signature information. The name/Principal Executive Officer (PEO) is the person who must authorize. By signing the DMR, the PEO concedes that the data on the DMR is true, accurate, and complete to the best of his or her knowledge. Importantly, changes in the authorized signer must be made in writing to the NYSDEC.

Appendix C also has the *Discharge Monitoring Report Signature Authorization Form* that must be submitted to the NYSDEC.

Visit the following website for the *DMR Manual* that explains how to complete the DMR, for Frequently Asked Questions, and for various forms that may not be available in this manual:

[www.dec.state.ny.us/website/dow/bwcp/dmrmanual.html](http://www.dec.state.ny.us/website/dow/bwcp/dmrmanual.html)

<b>NAME/TITLE PRINCIPAL EXECUTIVE OFFICER</b>	I Certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.	
<b>TYPED OR PRINTED</b>		<b>SIGNATURE OF PRINCIPAL EXECUTIVE OFFICER OR AUTHORIZED AGENT</b>
COMMENTS AND EXPLANATION OF ANY VIOLATIONS ( <i>Reference all attachments here</i> )		

### Certification on the Discharge Monitoring Report

I certify under penalty of the law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

\_\_\_\_\_

Signature of Principal Executive Officer or Authorized Agent
Date

The Monthly Operating Report is also a very legal document.

**Questions regarding DMRs should be directed to:**

SPDES Compliance Information System  
NYSDEC  
625 Broadway  
Albany, NY 12233-3506  
Phone: 518-402-8154

**NYSDEC's SPDES Compliance System and You**

Wastewater treatment facilities are monitored by NYSDEC to verify compliance with the SPDES Permit using a combination of approaches including Discharge Monitoring Reports (DMRs), onsite inspections and reconnaissance, and effluent sampling/analyses. NYSDEC responses to violations of the SPDES Permit may include:

- Phone Call from the Regional Inspector
- Onsite Inspection
- Technical Assistance
- Warning Letter from the Regional Inspector
- Compliance Conference
- Notice of Violation (NOV)
- Sewer Moratorium
- Penalties
- Order on Consent
- Notice of Hearing and Complaint (NOHC)
- State or Federal Prosecution
- SPDES Permit Modification



**Technical assistance is one of several compliance tools.**

The level of NYSDEC response is a function of several factors including the number, severity, duration of violations, and the extent of cooperation by the community. Noncompliant wastewater facilities are tracked by a US EPA system called the Significant Noncompliance Action Program (SNAP). Facilities are included in the SNAP indices as a result of effluent violations, which can include missing deadlines for construction upgrades or non-filing of the DMR. The US EPA and NYSDEC meet quarterly to discuss appropriate compliance strategies to achieve SPDES Permit limits. If violations continue, the US EPA requires that NYSDEC use their enforce mechanisms, or else the US EPA will execute an enforcement action of their own, called an “Overfile.”

As an operator and local official, it is important to note that like most agency information, the public has access to the US EPA compliance database, under the “Enforcement and Compliance History Online (ECHO) provision.” Anyone can have access to up to 800,000 facilities nationwide and can review up to two (2) years of data for a center. You can visit the following website to check if your community’s wastewater treatment facility is compliant:

[www.epa.gov/echo/index.html](http://www.epa.gov/echo/index.html).

“Envirofacts Data Warehouse” is another US EPA database that can be searched to check for violations and compliance records specific to treatment plants. The “Water Discharge Permits Query Form” allows for the retrieval of selected data from the Permit Compliance System (PCS) that includes the National Pollutant Discharge Elimination System (NPDES). You can access this information on the following website: [www.epa.gov/enviro](http://www.epa.gov/enviro).



Compliance, staying off SNAP, and avoiding possible legalities brought by public interest groups involves good management and operation procedures. The following list is just a few suggestions in order to maintain compliance:

- Meet SPDES Permit Limits
- Comply with Part 750
- Meet Deadlines in Orders and Permits
- Work with your NYSDEC Inspector
- Report Sampling and Monitoring Results Honestly
- Renew Operator Certifications On Time
- Establish an Adequate O&M Budget
- Revisit Sewer Rates
- Capital Improvement Plan and Reserve
- Preventive Maintenance and Process Control Systems
- Attend Ongoing Operator Training
- Train and Retain Good Staff

### **Additional Resources**

*SPDES Permit Regulations – 6 NYCRR PART 750*

**NYSDEC**

**Bureau of Water Permits**

625 Broadway

Albany, NY 12233-3505

Phone: 518-402-8111

*Manual for Completing the Discharge Monitoring Report for the State Pollutant Discharge Elimination System*

**NYSDEC**

**Bureau of Water Compliance Programs**

625 Broadway

Albany, NY 12233-3506

Phone: 518-402-8154



**Ongoing training of operators is good business.**