



Chapter IV

CLEAN WATER REGULATION

A. CLEAN WATER ACT

The Federal Water Pollution Control Act (“FWPCA”), 33 U.S.C. §§1251-1387, is the federal statute regulating the discharge of water pollution. FWPCA was originally enacted in 1948, and later amended by the Water Quality Act of 1965, which provided for the adoption of water quality standards for interstate waters. While the Rivers and Harbors Act of 1899, 33 U.S.C. §401, *et seq.*, required a permit for deposit of refuse matter in the navigable waters, use of this provision to regulate pollution discharges did not begin until about 1970.

With growing awareness of environmental degradation in general, and water pollution in particular, Congress revised FWPCA into the Clean Water Act (“CWA” or the “Act”) in 1972. The goals of the Act included that “the discharge of pollution into the navigable waters be eliminated by 1985,” “the discharge of toxic pollutants in toxic amounts be prohibited,” and an “interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and... recreation in and on the water... by July 1, 1983.” CWA §101(a), 33 U.S.C. §1251(a). Extensive amendments were added in 1977 and 1987. The Act is divided into six titles:

Title I	Research and Related Programs
Title II	Grants For Construction of Treatment Works
Title III	Standards and Enforcement
Title IV	Permits and Licenses
Title V	General Provisions
Title VI	State Water Pollution Control Revolving Funds

This discussion will concentrate on Titles III, IV and V.

The Act envisions primary enforcement and administration through the states, provided the state program is at least as stringent as the federal program. CWA §402(b), 33 U.S.C. §1342(b). Most states, including New York, have adopted statutes and regulations to regulate water pollution. New York's preexisting regulatory scheme was substantially revised in 1973 as ECL Article 17, in order to conform to the Clean Water Act, and facilitate delegation of authority for the federal National Pollution Discharge Elimination System ("NPDES") program from EPA to DEC. *See* 33 U.S.C. §1342(b). While the New York State terminology (*e.g.*, including "outlets" as well as "point sources") and scope (encompassing not only surface waters but also ground waters) are broader than under federal law, the programs are substantially parallel. New York water quality regulations set forth at 6 N.Y.C.R.R. Parts 649-758.

1. Direct Dischargers

The primary mechanism to control water pollution is the requirement that direct dischargers obtain a National Pollution Discharge Elimination System permit. CWA §301(a), 33 U.S.C. §1311(a), generally prohibits all discharges of pollutants except in compliance with the Act, while ECL Article 17 contains similar prohibitions on the state level. CWA §402(a), 33 U.S.C. §1342(a), authorizes the issuance of NPDES permits to allow the discharge of pollutants, provided the various standards set by the Act are met. New York has been delegated authority to issue State Pollution Discharge Elimination System ("SPDES") permits, pursuant to CWA §402(b), 33 U.S.C. §1342(b), in lieu of the requirement for federal NPDES permits. *See* ECL Article 17, Title 8. Generally, a SPDES permit is required if three basic elements are present: (1)

a point source (or outlet or disposal system); (2) a discharge of pollutants (or other specified wastes); and (3) receiving waters of the state.

CWA §502(12)(A), 33 U.S.C. §1362(12)(A) defines “discharge of pollutant” as “any addition of any pollutant to navigable waters from any point source.” New York State law regulates “any addition of any pollutant to State waters, waters of the contiguous zone, or the ocean through an outlet or point source.” 6 N.Y.C.R.R. §750.2(a)(9). Thus, the operative words are “point source” (or “outlet”), “pollutant,” and either “navigable waters” or “state waters.”

a. Point Sources

A “point source” is defined as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. The term does not include agricultural storm water discharges and return flows from irrigated agriculture.” CWA §502(14), 33 U.S.C. §1362(14); *see also* ECL §17-0105(16).

This definition is broadly construed to further the intent of the Clean Water Act. *Dague v. City of Burlington*, 935 F.2d 1343 (2d Cir. 1991), *mod.* 505 U.S. 557, 112 S.Ct. 2638 (1992); *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979); *Friends of Sakonnet v. Dutra*, 738 F.Supp. 623, 629 (D.R.I. 1990). Typically, a point source encompasses a direct discharge through a pipe, and it must involve a “discernable, confined and discrete conveyance.” *O’Leary v. Moyer’s Landfill, Inc.*, 523 F. Supp 642, 647 (E.D. Pa. 1981).

However, a point source may involve a natural conveyance such as a ditch, gully, or stream, and need not be constructed by the discharger. *Sierra Club v. Abston Construction Co.*,

620 F.2d 41 (5th Cir. 1980); *United States v. Earth Science, Inc.*, 599 F.2d 1979 (10th Cir. 1979). The term also includes an indirect discharge that is not adjacent to the receiving waters, and is conveyed through a point source, such as ditches or pipes. *U.S. v. Velsicol Chemical Corp.*, 438 F. Supp. 945 (W.D. Tenn. 1976); *O'Leary v. Moyer's Landfill, Inc.*, 523 F. Supp 642, 647 (E.D. Pa. 1981). The collection of spoil piles which, through natural precipitation and gravity, were discharged through ditches, gullies and similar conveyances, *Sierra Club v. Abston Construction Co.*, 620 F.2d 41 (5th Cir. 1980), the spraying or spreading of fields, *Concerned Area Residents For the Environment v. Southview Farm*, 34 F.3d 114 (2d Cir. 1994), *cert. den'd* 514 U.S. 1082, 115 S.Ct. 1793 (1995); *U.S. v. Oxford Royal Mushroom Products*, 487 F.Supp. 852 (E.D. Pa. 1980); *Application of North Adirondack Farms*, DEC Declaratory Ruling 17-07 (1992), and runoff from a construction site, *Kinderhook Lake Corp.*, DEC Declaratory Ruling 17-02 (1980), have been found to be point sources.

Similarly, pollution directly transmitted through ground into surface waters may be a point source. *Friends of Sakonnet v. Dutra*, 738 F.Supp. 623, 629 (D.R.I. 1990); *McClellan Ecological Seepage Situation v. Weinberger*, 707 F. Supp. 1182 (E.D. Cal. 1988); *Mutual Life Insurance Company of New York v. Mobil Corporation*, 1998 U.S. Dist. LEXIS 4513, 1998 Westlaw 10602 (N.D.N.Y. 1998). The discharge may be delayed from the polluter's act. *Werlein v. U.S.*, 746 F. Supp. 887 (D. Minn. 1990). Virtually any container or discrete source of pollutants that eventually enters waters of the United States is a point source, including a container of chemicals, *SED, Inc. v. City of Dayton*, 519 F.Supp. 979 (S.D. Ohio 1981), vehicles, *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983), a manure spreader, *Concerned Area Residents For the Environment v. Southview Farm*, 34 F.3d 114 (2d Cir. 1994),

cert. den'd 514 U.S. 1082, 115 S.Ct. 1793 (1995), and a lagoon. *Concerned Area Residents For the Environment v. Southview Farm*, 834 F. Supp. 1410 (W.D.N.Y. 1993); *Application of North Adirondack Farms*, DEC Declaratory Ruling 17-07 (1992); *Fishel v. Westinghouse Electric Corp.*, 640 F.Supp. 442 (M.D. Pa. 1986).

However, runoff from sources such as farms, lawns and golf courses are generally non-point pollution. *United States v. Plaza Health Laboratories, Inc.*, 3 F.3d 643 (2d Cir. 1993). A human being who tosses pollution into waters is not a point source. *Id.* Nonetheless, there is no general exemption for agricultural activities. *NRDC v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977).

Besides “point sources,” New York also regulates “outlets,” a term in use in New York before the federal NPDES program was created. However, the terms are virtual synonyms. “Outlet” is defined as “the terminus of a sewer system, or the point of emergency of any water-borne sewage, industrial waste or other wastes or the effluent therefrom, into the waters of the state.” ECL §17-0105(11).

b. Pollutants

“Pollutant” is generally defined as “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste.” CWA §502(6), 33 U.S.C. §1362(6); *see also* ECL §17-0105(17).

Typically, pollutants involve chemicals or other industrial waste contained in wastewater discharged from a business or industry. *See Application of North Adirondack Farms*, DEC Declaratory Ruling 17-07 (1992), or sewage from a sewage treatment plant. However, the term

“pollutant,” and the scope of the permitting programs, have been broadly construed. *Natural Resources Defense Council v. Costle*, 564 F.2d 573, 579 (D.C. Cir. 1977).

Demolition materials and other materials being recycled as fill, *United States v. Bradshaw*, 541 F.Supp. 880 (D.Md. 1981); *United States v. Weisman*, 489 F.Supp. 1331 (M.D. Fla. 1980); *Hanson v. United States*, 710 F.Supp. 1105 (E.D. Texas 1989), redeposited natural soils, *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983), manure used as fertilizer, *Concerned Area Residents For the Environment v. Southview Farm*, 834 F. Supp. 1410 (W.D.N.Y. 1993); *Carr v. Alta Verde Industries, Inc.*, 931 F.2d 1055 (5th Cir. 1991); *Higbee v. Starr*, 598 F.Supp. 323 (E.D. Ark. 1984), *aff'd* 782 F.2d 1048 (8th Cir. 1985), and even human blood, *United States v. Plaza Health Laboratories, Inc.*, 3 F.3d 643 (2d Cir. 1993), have been found to be pollutants. Likewise, similarly, useful products such as gasoline, *United States v. Hamel*, 551 F.2d 107 (6th Cir. 1977), and chlorine from treated water, *Hudson River Fisherman's Association v. New York City*, 940 F.2d 649 (2d Cir. 1991); *Application of North Adirondack Farms*, DEC Declaratory Ruling 17-07 (1992), are pollutants when they enter regulated waters.

“[E]lements such as nitrogen and phosphorous, entirely natural and harmless under most circumstances, are considered pollutants when added to water because they contribute to biological oxygen demand.” *National Wildlife Federation v. Gorsuch*, 530 F.Supp. 1291, 1310-11 (D.D.C. 1982), *rev. on other grounds*, 693 F.2d 156 (D.C. Cir. 1982). Biological oxygen demand is the process by which organic wastes consume too much oxygen in the process of decomposition thereby depriving fish and other aquatic life of necessary oxygen. Likewise, thermal pollution is a pollutant. *Power Authority of the State of New York v. Williams*, 101

A.D.2d 659, 475 N.Y.S.2d 901 (3d Dep't 1984), *app. den'd* 63 N.Y.2d 605, 481 N.Y.S.2d 1023 (1984).

c. Navigable Waters

CWA §502(7), 33 U.S.C. §1362(6) defines “navigable waters” subject to CWA regulations as “the waters of the United States, including the territorial seas.” EPA had interpreted this term to have the broadest possible meaning allowed under the Commerce Clause of the U.S. Constitution, so that it is not limited to waters that boats actually sail upon, and covers all surface waters which eventually may flow into such waters including wetlands. Courts have found that Congress “intended to assert jurisdiction over the nation's waters to the maximum extent permissible under the Constitution, unlimited by traditional concepts of navigability.” *Utah v. Marsh*, 740 F.2d 799 (10th Cir. 1984). However, in *Solid Waste Agency v. United States Army Corps of Engineers*, 531 U.S. 159, 172, 121 S. Ct. 675, 683 (2001), the Supreme Court held that Congress only intended to give EPA “jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made,” so that there was no jurisdiction over “isolated wetlands” that did not directly flow into waters that were navigable in fact.

The definition of “waters of the state” regulated under New York ECL Article 17 not only includes all navigable waters within the state (“lakes, bays, sounds, ponds, impounding reservoirs... rivers, streams, creeks, estuaries, marshes, inlets, canals, the Atlantic ocean... and all other bodies of surface... water, natural or artificial, inland or coastal, fresh or salt, public or private”), but also encompasses all “bodies of... underground water” (including “springs, wells”). Thus, while CWA only regulates surface waters, a SPDES permit is required under New York

State law for all discharges to both surface and ground waters. Exceptions from SPDES permit requirements include private septic systems for three-family and smaller dwellings. 6 N.Y.C.R.R. §751.3(a).

d. Permit Procedures

Procedures for application for SPDES permits are set forth at Title 8 of ECL Article 17 and 6 N.Y.C.R.R. Parts 752 and 753. A complete application for a SPDES permit should be filed at least 180 days before the discharge is proposed to commence. DEC can require the submission of additional information, as well as a site inspection, before acting on an application. DEC then makes a tentative decision, which would include a draft permit if the decision is favorable. Public notice of the application and the tentative determination are then given in the *Environmental Notice Bulletin* and a local newspaper, and the public is given a comment period to submit written statements, or request a public hearing. DEC's Uniform Procedures under ECL Article 70 apply to a SPDES application, although DEC is also specifically required by ECL Article 17 to hold a public hearing if there is significant public interest. Similar procedures apply on the federal level to NPDES permits. *See* 40 C.F.R. Part 122.

All NPDES/SPDES permits must include effluent limitations that restrict the quantity, quality, rates and concentration of chemical, physical, biological, and other constituents of effluents which are discharged. ECL §17-0809; CWA §402(a), 33 U.S.C. §1342(a); *see also* 6 N.Y.C.R.R. Part 754. These must ensure compliance with applicable technology and water quality-based standards. The permits may also include a compliance schedule when a discharger is not in compliance with applicable standards. Further, the permits generally provide

requirements for monitoring and reporting of discharges, including submission of regular discharge monitoring reports (“DMRs”) which report the discharger's own laboratory testing of its effluent, and various other conditions. ECL §17-0815. Permits may allow exceptions for “upsets.”

Generally, NPDES/SPDES permits are effective for five years, although they can be modified, suspended or revoked for sufficient cause. An application for renewal of a permit must be filed 180 days prior to expiration. Submission of a timely renewal application extends the existing permit until the application is decided. 5 U.S.C. §558(c); SAPA §401(2). Variances for effluent requirements are possible in very limited situations, where a discharger has “fundamentally different factors” presented than others in its industry, and require EPA approval. CWA §301(n), 33 U.S.C. §1311(n).

e. Dredge or Fill

The discharge of dredged or fill material into navigable waters of the United States (including wetlands, discussed in Chapter 18) is prohibited without a permit issued by the U.S. Army Corps of Engineers, pursuant to CWA §404, 33 U.S.C. §1344. However, such permits must comply with EPA regulations, and generally also require water quality certification from EPA. The authority for giving water quality certifications has been delegated in New York from EPA to DEC. Categorical “nationwide permits” have been issued for numerous categories of activities, 33 C.F.R. Part 330, Appendix A, and DEC has issued categorical water quality certifications for many of these.

DEC has a similar regulatory program prescribed by ECL §15-0505, with regulations at 6 N.Y.C.R.R. Part 608, that applies to the filling or alteration of streams or other water bodies. Generally, a joint application is filed for the two permits.

f. Stormwater Discharges

Although formerly exempt, certain stormwater dischargers were subjected (after repeated extensions) to regulation effective October 1, 1994, as set forth at 40 C.F.R. §122.26. Under Phase I of the regulations set a list of types of dischargers requiring permits, including discharges associated with industrial activity (including construction on more than five acres), and stormwater systems of municipalities with populations of 100,000 or more. 40 C.F.R. §122.26(a). Dischargers covered by this provision were required to (a) submit an individual SPDES application, (b) qualify (in the case of municipal systems) as part of a group application, or (c) be covered under a regulatory “general permit.”

Revisions to the regulations published in the *Federal Register* on December 8, 1999, commonly known as Stormwater Phase II, requires permits for stormwater discharges from all “municipal separate storm sewer systems” (“MS4s”) in urbanized areas (*see* 40 C.F.R. §122.32), “small construction activities” disturbing one or more acres, where “controls are needed for the discharge based on wasteload allocations that are part of “total maximum daily loads” (TMDLs) that address the pollutant(s) of concern,” or “contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.” 40 C.F.R. §122.26(a)(9). To implement the law, both EPA and New York State DEC (which has primacy in New York due to delegation of the NPDES program) have issued general permits for small

construction activities. DEC has also issued a general permit for MS4s, and many municipalities have passed local laws to regulate stormwater.

g. Concentrated Animal Feeding Operations

Clean Water Act §502(14), 33 U.S.C. §1362(14) includes “concentrated animal feeding operation” (“CAFO”) within the definition of point source. Thus, all CAFOs must be permitted under the NPDES system, 40 C.F.R. §122.23(a); *Concerned Area Residents for the Environment v. Southview Farm*, 34 F.3d 114 (2d Cir. 1994), *cert. den’d* 514 U.S. 1082, 115 S.Ct. 1793 (1995), unless it is determined to have “no potential to discharge.” 40 CFR §122.23(d).

A CAFO is defined by EPA regulations at 40 CFR §122.23(b) as an “animal feeding operation” (“AFO”) which is either a “large CAFO” due to the number of animal units, depending on the type of livestock (*e.g.* 700 cows), or a “medium CAFO” with a lower threshold of animal units (*e.g.* 200 cows) and a direct discharge of pollutants. In addition, an individual AFO that significantly contributes pollutants can be designated. 40 CFR §122.23(c). In turn, “animal feeding operation,” is defined as a “lot or facility” where:

(i) Animals (other than aquatic animals) have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and

(ii) Crops, vegetation forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

40 C.F.R. §122.23(b)(1). The growth of crops on other areas of a farm does not disqualify an portion of a facility from being classified as an AFO. *Concerned Area Residents for the Environment v. Southview Farm*, 34 F.3d 114 (2d Cir. 1994), *cert. den’d* 514 U.S. 1082, 115 S.Ct. 1793 (1995).

Under the EPA and the U.S. Department of Agriculture Unified National Strategy for Animal Feeding Operations, general permits will be issued for CAFOs that “require facilities to develop and implement CNMPs [Comprehensive Nutrient Management Plans] on a schedule identified in the permit, develop record keeping procedures, routinely monitor, and otherwise report on the implementation of the CNMP and compliance with the permit,” and also allow public access to information, while individual permits will be issued “for exceptionally large operations, new operations or those undergoing significant expansion, operations with historical compliance problems, or operations with significant environmental concerns.” EPA has finalized revisions to NPDES permitting requirements and Effluent Limitations Guidelines for CAFOs. The final rule was published in the Federal Register on November 20, 2008. 73 FR 70418.

New York DEC issued a general permit for CAFOs qualify for a general permit, which was renewed effective from July 1, 2004 to June 30, 2009. It prohibits any discharge except in the case of the “25-year 24-hour storm,” imposes a number of generic best management practices, requires a CNMP certified by a certified planner. DEC can require individual permits for specific CAFOs.

2. Effluent Standards

Under the Act, effluent standards are based either upon available technology, as prescribed by EPA, or state water quality standards. These standards are incorporated on an individual basis into NPDES/SPDES permits. CWA §401(a), 33 U.S.C. §1341(a).

a. Technology-Based Standards

The EPA has broad discretion in setting technology standards on an industry-by-industry basis. Under the Act, dischargers were required to implement “best practicable control technology currently available” (“BPT”) by July 1, 1977, CWA §301(b)(1)(A), 33 U.S.C. §1311(b)(1)(A), except that more stringent BPT regulations established after 1981 did not have to be met until March 31, 1989. §301(b)(3), 33 U.S.C. §1311(b)(3). BPT has been interpreted as the “average of the best” existing treatment performance, considering “the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application.” While cost is a factor to be considered, courts look at whether costs are wholly disproportionate to the benefits to be achieved.

The Act also required the achievement of “best available technology economically achievable” (“BAT”) for “toxic pollutants” and “nonconventional pollutants” by March 31, 1989. CWA §301(b)(2), 33 U.S.C. §1311(b)(2). BAT is defined by EPA as the best existing technology performance in an industry category, “tak[ing] into account... the cost of achieving.” It is designed to force new technology. By the same deadline, “best conventional pollutant control technology” (“BCT”) was required for conventional pollutants, such as total suspended solids, BOD, pH, oil and grease. CWA §301(b)(2)(E), 33 U.S.C. §1311(b)(2)(E). In setting BCT, EPA may consider the reasonableness of costs, but there is no requirement that it balance costs and the benefits of effluent reduction. It has been interpreted to be equal to BPT, or between BPT and BAT.

New sources are made subject to “new source performance standards” (“NSPS”), “which reflect the greatest degree of effluent reduction which the Administrator determines to be

achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives.” CWA §306, 33 U.S.C. §1316. Generally, these standards are set by EPA at BAT levels. The ability of owners to comply with standards is not a consideration in NSPS permits and variances are not allowed because new source standards are intended to be “absolute prohibitions” as to insure national uniformity. *E.I. Du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 97 S.Ct. 965, 980 (1977).

In many cases, EPA has missed statutory deadlines to promulgate effluent limitations. However, lawsuits by environmental groups and statutory amendments have forced EPA to make progress.

If a discharger emits effluent into the same body of water from which it is drawn, the discharger may qualify for “net” effluent limitations. In such a case, the discharger receives a “credit” for pollutants contained in the intake water. 40 C.F.R. §122.45(g).

b. Water Quality Standards

A water quality standard is established by designating the use of water (*e.g.* public drinking water, swimming or fishing), and setting limits for various constituents that protect that use. Generally, these are set by the state, in order to reflect local ecological conditions, subject to EPA review. CWA §303, 33 U.S.C. §1313. New York State has classified the various surface waters of the state by regulations set forth at 6 N.Y.C.R.R. Parts 800-941, and prescribed various maximum contaminant levels and other parameters for each class of surface and ground water. 6 N.Y.C.R.R. Parts 700-705. Effluent standards set in NPDES/SPDES permits must ensure that these standards will be achieved for the receiving waters.

CWA §303(d)(1)(C) and regulations at 40 C.F.R. §130.7 require states to identify those waterbodies that do not meet water quality standards after application of the technology-based effluent limitations required by the Act. The states are then required to develop a Total Maximum Daily Load (“TMDL”) analysis for the pollutants that are not meeting water quality standards in those waterbodies.

A TMDL specifies the allowable pollutant loading from all contributing sources (including point sources, nonpoint sources, and natural background) at a level necessary to attain the applicable water quality standards with seasonal variations and a margin of safety that takes into account any lack of knowledge concerning the relationship between the sources of the pollutant and water quality. Many states, including New York, are currently in the process of implementing this program.

3. Indirect Discharges

CWA §307(b), 33 U.S.C. §1317(b), requires EPA to set categorical standards for indirect discharges to publicly-owned treatment works (“POTWs”) which are “not susceptible to treatment” by POTWs, or which would “interfere with the operation” of POTWs. EPA generally has set the level of pretreatment at BAT levels. Likewise, “pre-treatment standards for new sources” (“PSNS”) are generally set at the same BAT levels as the NSPS standards for new direct dischargers.

EPA pretreatment standards are directly applicable to indirect dischargers. CWA §302(b), 33 U.S.C. §1312(b). However, a discharger may be able to obtain credit for the treatment capabilities of its POTW, including the ability of the POTW to remove toxics, provided the sewage sludge can be properly disposed of. As with direct dischargers, variances

may be available if a discharger can show “fundamentally different factors,” and a credit may be available for pollutants contained in intake water if the POTW discharges to that same body of water. Further, EPA regulations require that various reports be submitted to show compliance with the standards.

Besides the applicable categorical standards, EPA regulations set forth certain general prohibitions directly applicable to indirect dischargers, including pollutants which create a fire or explosion hazard, cause corrosive structural damage or have a pH below 5.0, solid or viscous pollutants which would cause obstructions, any pollutant released in a quantity that will cause “interference” with operations of the POTW, and heat that will interfere with biological processes at the POTW resulting in interference or causing the temperature to exceed 40°C. 40 C.F.R. §403.5(b).

Individual POTWs with a design flow greater than 5 million gallons per day (mgd) that receive pollutants which might interfere with or pass through the POTW must develop a POTW program, subject to EPA approval. 40 C.F.R. §403.8(a). Such plans must provide a legal mechanism to ensure that the pretreatment standards are met, and that the POTW meets its own NPDES/SPDES permit. A substantial portion of the CWA is devoted to financing POTWs, initially through grants (Title II), and more recently, since the 1987 Amendments, through revolving state loan funds (Title VI).

Generally, a POTW program will involve a local law or ordinance enacted by the municipality which sets limitations on emissions, prescribes reporting and monitoring, and requires permits with effluent limitations for large dischargers. For example, in Monroe County, New York, this has been accomplished by the Monroe County Sewer Use Law, Local Law No. 3

of 1988, and rules and regulations set forth in accordance with that law. The Monroe County law requires permits for certain dischargers of industrial or other wastes.

Non-point sources are not subject to regulations under either the direct discharger or pretreatment programs. However, under CWA §208, 33 U.S.C. §1288, states are required to submit Areawide Waste Treatment Management Plans for EPA approval to control such sources. While this program has had limited success, greater efforts are now being made to address nonpoint sources.

4. Other New York State Requirements

New York also has provided for direct enforcement of water quality standards, which do not necessarily depend on whether a source is “point” or “nonpoint.” State statute provides that it is “unlawful for any person, directly or indirectly, to throw, drain, run or otherwise discharge into such waters organic or inorganic matter that shall cause or contribute to a condition in contravention of” DEC water quality standards. ECL §17-0501. A leaking petroleum distribution system, *Doralee Estates, Inc. v. Cities Service Oil Co.*, 569 F.2d 716 (2d Cir. 1977), and a ditch that discharged runoff from a sand and gravel pit that increased turbidity and sediment in a river, *Colella v. DEC*, 196 A.D.2d 162, 608 N.Y.S.2d 361 (3d Dep’t 1994), were violations of this prohibition, but it has been deemed inapplicable to the leaching of chemicals into waters, because it requires “some active human conduct, as opposed to mere seepage over the course of time.” *State v. Schenectady Chemicals, Inc.*, 103 A.D.2d 33, 479 N.Y.S.2d 1010 (3d Dep’t 1984); *State v. General Electric Co.*, 103 A.D.2d 985, 479 N.Y.S.2d 1008 (3d Dep’t 1984). Further, state law prohibits pollution injurious to fish and shellfish in the marine district (the Atlantic Ocean and tidal waters except the Hudson River north of the south end of

Manhattan Island), ECL §17-0105(3), and in any waters of Long Island or tributary to the marine district. ECL §17-0503. These substantive provisions do not apply to actions of the federal government. *State of New York v. United States*, 620 F. Supp. 374 (E.D.N.Y. 1985).

Discharges of radiological, chemical or biological warfare agents or high-level radioactive waste, and discharges that the Army Corps of Engineers determines would impair anchorage and navigation, are prohibited. ECL §17-0807(1,2,3); 6 N.Y.C.R.R. §751.2(a,b,c). Also prohibited are discharges that violate plans under Clean Water Act §208, 33 U.S.C. §1288, to control “areawide” sources. 6 N.Y.C.R.R. §751.2(d).

5. Spills of Hazardous or Toxic Substances

CWA §311(b)(4), 33 U.S.C. §1321(b)(4), authorizes EPA to prescribe “those quantities of oil and any hazardous substances the discharge of which may be harmful to the public health or welfare.” Accordingly, EPA has listed various hazardous substances and their “reportable quantities.” 40 C.F.R. Part 116. For oil, this has been determined to be a discharge that violates applicable water quality standards, or causes a film or sheen upon or discoloration of the water or shore, or causes a sludge to be deposited. 40 C.F.R. §110.3.

Under the statute, the responsible person is required to notify the appropriate federal agency “as soon as he has knowledge of any discharge of oil or hazardous substances” in reportable quantities into the navigable waters. CWA §311(b)(5), 33 U.S.C. §1321(b)(5). This is accomplished by calling the National Response Center.

EPA is authorized to take action in accordance with the National Contingency Plan to “remove or arrange for disposal of such oil or substance,” §311(c), 33 U.S.C. §1321(c), and to “mitigate the damage to public health or welfare.” §311(b), 33 U.S.C. §1321(b). The owner or

operator of the vessel or facility from which the discharge originated is liable for the actual cleanup costs incurred. §311(c), 33 U.S.C. §1321(c). While liability is strict, an owner or operator can raise as affirmative defenses the fact that the discharge was caused solely by acts of war or God, negligence on the part of the United States, or act or omission of a third party. Further, the owner or operator of an on-shore facility who did not act negligently or willfully cannot be liable for costs above \$50 million.

Facilities which could reasonably be anticipated to spill oil in harmful quantities must prepare and implement Spill Prevention Control and Countermeasures (“SPCC”) plans. 40 C.F.R. Part 112. Recently, EPA imposed revised requirements for SPCC plans which must be implemented by August 18, 2006. Further, EPA can require facilities to comply with Best Management Practices (“BMP”) to prevent spills of toxic or hazardous pollutants.

6. Enforcement

Pursuant to CWA §308, 33 U.S.C. §1318, EPA may require dischargers to establish and maintain records, use and maintain monitoring equipment, and sample effluents. Generally, such provisions are included as NPDES/SPDES permit conditions, such as the requirement to submit DMRs. EPA is also authorized to enter premises to examine and copy records, inspect monitoring equipment, and sample effluents. DEC has similar authority under ECL §17-0829. Nonetheless, an owner or operator may be able to refuse entry without a search warrant, pursuant to the Fourth Amendment to the U.S. Constitution (except where consent has already been granted, such as by permit, or an emergency exists). *Marshall v. Barlow’s, Inc.* 436 U.S. 307, 98 S. Ct. 1816 (1978).

Liability for violation of the Clean Water Act is strict, so that intent is not necessary, and even accidental discharges in violation of permit requirements are illegal. *U.S. v. Texas Pipeline Co.*, 611 F.2d 345, 347 (10th Cir. 1979); *SPIRG v. Tenneco Polymers, Inc.*, 602 F. Supp 1394, 1400 (D.N.J. 1985). EPA has three avenues of enforcement activity -- administrative, civil, and criminal -- against violators of the Act.

Pursuant to CWA §309(a)(3), 33 U.S.C. §1319(a)(3), EPA can issue an administrative order to require compliance. Administrative penalties for violations can be up to \$10,000 per violation up to a maximum of \$25,000 (Class I penalties) when an informal administrative hearing is held, and up to \$10,000 per day of violation up to a maximum of \$125,000 (Class II penalties) if a formal hearing is held under the EPA. CWA §309(g), 33 U.S.C. §1319(g). If EPA or a state is diligently prosecuting a violator in an administrative proceeding, or has already done so, judicial enforcement action is precluded. CWA §309(g)(6), 33 U.S.C. §1319(g)(6).

EPA can bring a civil suit for violators of the Act seeking penalties of \$25,000 per day per violation. CWA §309(d), 33 U.S.C. §1319(d). EPA has a “Civil Penalty Policy” which acts as a guide in setting or determining the amounts of penalties, based upon various factors. Further, under CWA §309(c), 33 U.S.C. §1319(c), criminal actions can be brought against responsible persons for willful or negligent violations of the Act, or any permit or order. Negligent violations are punishable by fines of between \$2,500 and \$25,000 per day and/or one year in prison, while knowing violations are punishable by fines of \$5,000 to \$50,000 and up to three years in jail.

ECL §71-1929 (civil) and §71-1933 (criminal) provide similar remedies penalties under state law, and DEC may also proceed administratively. *See* 6 N.Y.C.R.R. Part 621. Even though

DEC has primary authority with respect to the NPDES/SPDES program, EPA can still use its enforcement powers in an “oversight” role to enforce state SPDES permits.

CWA §505(a), 33 U.S.C. §1365(a), expressly authorizes citizens to bring suit in federal district court against violators of either an effluent standard or limitation, or an administrative order issued by EPA or a state. The court is authorized to award civil penalties under section 309(d) of the Act, 33 U.S.C. §1319(d), as well as costs of litigation (including attorney's fees), §505(d), 33 U.S.C. §1365(d), and order compliance with the Act. Environmental groups have effectively enforced the Act through use of this provision. *See, e.g., Northwest Environmental Advocates v. City of Portland*, 56 F.3d 979 (9th Cir. 1995). Attorneys’ fees may even be recovered if the polluter comes into compliance following commencement of suit. *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 933 F.2d 124 (2d Cir.1991).

Case law has held that only citizens with sufficient nexus to the pollution have “standing” to bring such cases. *Sierra Club v. SCM Corp.*, 747 F.2d 99 (2d Cir. 1984). In order to proceed, the citizens must give 60 days’ advance notice of intent to sue. CWA §505(b), 33 U.S.C. §1365(b). If a judicial government enforcement action is commenced and being diligently prosecuted, a citizen cannot file suit. CWA §505(b), 33 U.S.C. §1365(b). The similar bar to judicial action if a prior administrative enforcement action is diligently prosecuted under CWA §309(g)(6), 33 U.S.C. §1319(g)(6) also applies to citizen's suits. Citizens can only sue if the polluter is “in violation,” CWA §501(a), 33 U.S.C. §1365(a), meaning that the violation must be continuing, or at least intermittent, and not wholly past. *Gwaltney v. Chesapeake Bay Foundation*, 484 U.S. 49, 108 S.Ct. 376 (1987).

2. DRINKING WATER

The Safe Drinking Water Act of 1974 (“SDWA”), 42 U.S.C. §§300f-300j-26 (Title XIII of the Public Health Service Act), gives EPA authority to ensure the safety of public drinking water supplies. Pursuant to SDWA §1412, 42 U.S.C. §300g-1, EPA has set maximum contaminant levels for specified substances. 40 C.F.R. Parts 141, 143. Similarly, pursuant to authority under the Public Health Law, the New York State Department of Health regulates public water systems, and also sets maximum contaminant levels at 10 N.Y.C.R.R. §5-1.52. Often, these standards are used as a guideline for even private wells. EPA has also required the filtration of surface water supplies. SDWA §1412(7)(C), 42 U.S.C. §300g-1(7)(C). The law includes a new revolving loan fund, and sets disclosure requirements for public water systems.

SDWA applies to “public water systems,” defined to include systems providing water for human consumption with at least 15 connections, or serving at least 25 individuals. SDWA §1401(4), 42 U.S.C. §300f(4). New York State regulations apply to systems with five or more service connections, as well as those serving 25 individuals at least 60 days per year. 10 N.Y.C.R.R. §5-1.1(ay). While these rules apply to both public and private systems, a system below the thresholds, such as an individual private well that supplies an individual household, is exempt.

New water supplies in New York require permits from DEC, pursuant to ECL Article 15, Title 15, as well as the New York State Department of Health. Furthermore, diversions from the Susquehanna River Basin (including a large portion of the “Southern Tier” of New York) must be permitted by the Susquehanna River Basin Commission, an organization formed by the Susquehanna River Basin Compact. ECL Article 21, Title 13.