
Chapter 12

Permit Compliance and Enforcement

12.1 Overview

Achieving and maintaining a high level of compliance with environmental laws and regulations are two of the most important goals of Federal and State environmental agencies. Enforcement provides a powerful incentive for NPDES permittees to comply. How an NPDES permit is written directly affects its enforceability. Each permit must be written clearly and without ambiguities so that compliance with the permit can be tracked effectively and the permit can be enforced in the event that violations occur.

The permit writer may or may not become actively involved with the compliance monitoring and enforcement of the terms and conditions of the NPDES permits that he or she has written. The extent of the permit writer's involvement will usually depend upon the organizational structure of the regulatory agency. Larger, centrally organized agencies will typically have specialized personnel responsible for enforcing the terms of NPDES permits. In other organizations, the individual who writes the permit will also be responsible for such enforcement activities as Discharge Monitoring Report (DMR) tracking, facility inspections, and enforcement recommendations. In the event

of a judicial enforcement action, the permit writer may be called upon to testify regarding the specific requirements of the permit or its basis.

Regardless of the type of organizational structure within a regulatory agency, the permit writer should have an appreciation for the various aspects of a meaningful NPDES compliance enforcement program. The compliance monitoring reviews and inspections, and resulting data entered into the Quarterly Noncompliance Report database which provide the basis for evaluating compliance are addressed in the following section. The chapter concludes with a brief description of the enforcement actions available to facilitate permit compliance.

12.2 Compliance Monitoring

Compliance monitoring is a generic term that includes all activities undertaken by Federal or State regulatory agencies to ascertain a permittee's adherence to a NPDES permit. Compliance monitoring data collected as part of the NPDES Program are used in compliance evaluation and in support of enforcement. The process includes receiving data, reviewing data, entering data into the Permit Compliance System (PCS) data base, identifying violators, and determining an appropriate response.

A primary function of the compliance monitoring program is the verification of compliance with permit conditions, including effluent limitations and compliance schedules. Compliance monitoring may be described as comprising two elements:

- **Compliance Review**—The review of all written reports and other material relating to the status of a permittee's compliance.
- **Compliance Inspections**—Field-related regulatory activities, including sampling, conducted to determine compliance.

12.2.1 Compliance Review

Compliance and enforcement personnel use two primary sources of information to carry out their compliance review responsibilities:

- **Permit/Compliance Files**—These files include compliance schedule reports, compliance inspection reports, DMRs, enforcement actions, and

any other correspondence (e.g., summaries of telephone calls, copies of warning letters). Compliance personnel periodically review this information and use it to determine if enforcement is necessary and what level of enforcement is appropriate.

- **PCS**—PCS is a data management system used to compile all relevant facts about a facility's permit conditions, self-monitoring data, the inspections performed, and any enforcement actions taken. PCS is the national data base for the NPDES Program. As such, PCS promotes national consistency and uniformity in permit and compliance evaluations. To accomplish this goal, all required data are entered into and maintained regularly in PCS.

NPDES permits must be written so that compliance data are capable of being tracked by PCS. There may be situations where permit limits and monitoring conditions are not initially compatible with PCS entry and tracking. In these cases, States should ensure that appropriate steps are taken by the permit writer to identify difficult permits to the person responsible for entering PCS codes (either in the State or the Region) and to mutually resolve any coding issues. To assist PCS coders in accurately interpreting and coding the permit into PCS and to assist enforcement personnel in reviewing permittee self-monitoring data and reports in a timely manner, permit writers should apply the compliance inspection procedures discussed in the next section (Section 12.2.2).

12.2.2 Compliance Inspections

Compliance inspections refer to all field-related regulatory activities conducted to determine permit compliance. Such field activities may include evaluation inspections (nonsampling), sampling inspections, other specialized inspections, and remote sensing. Certain inspections, such as diagnostic inspections and performance audit inspections, aid the regulatory agency in evaluating the facility's problems in addition to providing information to support enforcement action. Biomonitoring inspections are specifically targeted at facilities with effluent suspected or identified as causing toxicity problems that threaten the ecological balance of the receiving waters.

Compliance inspections are undertaken for one or more of the following purposes:

- To establish a regulatory presence to defer violations
- To ensure that permit requirements are being met or to determine if permit conditions are adequate
- To check the completeness and accuracy of a permittee's performance and compliance records
- To assess the adequacy of the permittee's self-monitoring and reporting program
- To determine the progress or completion of corrective action
- To obtain independent compliance data on a facility's discharge
- To evaluate the permittee's operation and maintenance activities
- To observe the status of construction required by the permit.

12.3 Quarterly Noncompliance Reports

EPA Regional Offices and States that have been approved to administer the NPDES Program are required by regulation to report quarterly on major facilities that are not in compliance with the terms and conditions of their permit (i.e., effluent limitations meet the criteria for reportable noncompliance [RNC], schedules, and reporting requirements).

The regulations in 40 CFR 123.45 established requirements for listing facility violations and resulting regulatory enforcement action or quarterly noncompliance reports (QNCRs). This regulation established reporting requirements for violations that meet specific, quantifiable reporting criteria, as well as for violations that are more difficult to quantify but are of sufficient concern to be considered reportable. The regulation also specifies the format that the reports must follow and the schedule for their submission.

Only major facilities that meet RNC criteria must be reported on the QNCR. RNC consists of five general types of violations:

- **Violation of Monthly Average Effluent Limits**—Data that exceeds or equals the limit times the Technical Review Criteria (TRC) for 2 months during a 6-month period, where the TRC is 1.4 for Group I pollutants and

1.2 for Group II pollutants (Appendix A to 40 CFR Part 123 contains a list of Group I and II pollutants); and data that exceeds the limit for 4 months during a 6-month period.

- **Interim Effluent Limits Set Forth in a Formal Enforcement Action**—Any violation of any magnitude.
- **Schedule**—Missing a compliance schedule milestone date by 90 days.
- **Reporting**—Missing a report due date by 30 days.
- **Single Event**—A violation of any magnitude considered to have an adverse effect on water quality or public health (e.g., unauthorized bypass, unpermitted discharge, frequent discharges of a variety of pollutants).

A subset of instances of RNC that appear on the QNCR may be noted as significant noncompliance (SNC). This distinction is used solely for management accountability purposes as a means of tracking trends in compliance and evaluating relative timeliness of appropriate enforcement response toward priority violations. The definition of SNC is not regulatory and may change as the NPDES Program changes to encompass new initiatives. Generally, the designation of SNC indicates a violation is of sufficient magnitude and/or duration to be considered among the Agency's priorities for regulatory review and/or response. The categories of SNC are:

- Violation of enforcement action requirements (i.e., administrative effluent limits, key compliance schedule milestones, and key reports)
- Violation of permit effluent limits
- Violation of key compliance schedule milestones contained in a permit
- Violation of key reporting requirements in a permit
- Any unauthorized discharge or bypass considered significant by the NPDES Program director
- Violations associated with water quality or health impacts.

The Regions and NPDES States are expected to prioritize rapid enforcement action against all SNC violations by the time they appear on the first QNCR. Prior to a permittee appearing on the subsequent QNCR for the same instance of SNC, the permittee should either be in compliance or the administering agency should have initiated an appropriate formal enforcement action to achieve final compliance. If the facility is still considered SNC after two quarters and no formal enforcement action has been taken, the facility is placed on the Exceptions List. Although there are some legitimate justifications for facilities appearing on the Exception List, the Exceptions

List generally indicates facilities for which the administering agency failed to handle enforcement in a timely and appropriate manner.

Regulatory Update

In September 1995, EPA revised the definition of SNC to include violations of non-monthly average permit limits by major facilities. A large percentage of NPDES majors are lacking the required monthly average limits in their permit thus escaping detection as SNC and scrutiny for formal enforcement action. The new definition was effective on October 1, 1996 and is expected to result in better targeting of limited enforcement resources to violations posing the greatest risk to the environment and public health.

12.4 Enforcement

Specific enforcement actions are focused on a small subset of the total number of violators—violators at sites where frequent or serious violations have occurred. However, these actions have the effect of fostering compliance by an entire industry of facilities across the nation. By choosing the appropriate enforcement response to violations, EPA tries to achieve several goals:

- Correction of the violation as soon as possible
- Deterrence of future violations by the same permittee or other permittees
- Equal treatment of the regulated community through use of a uniform approach to selecting enforcement responses (i.e., similar violations are treated similarly)
- Punishment of serious violations
- Effective use of enforcement resources by achieving protection of human health and the environment with the least amount of staff time and funds.

Once a facility has been identified as having apparent permit violations, the EPA or the NPDES State or Tribal organization will review the facility's compliance history. Such a review includes an assessment of the magnitude, frequency, and duration of violations. Significant permit violations are identified and a determination of the appropriate enforcement response is made.

Section 309 of the Act authorizes the Agency to bring civil or criminal action against facilities which violate their NPDES permit conditions. EPA Regions and authorized States have specific procedures for reviewing self-monitoring and inspection data and for deciding what type of enforcement action is warranted. EPA

recommends an escalating response to continuing noncompliance. Typical types of enforcement actions include:

- Inspection debriefing, calling attention to deficiencies
- Telephone call
- Letter of violation
- Notice of violation
- Administrative order
- Administrative fine of up to \$125,000 per proceeding
- Civil lawsuit
- Criminal prosecution.

Considerations when making determinations on the level of the enforcement response include (1) the severity of the permit violation, (2) the degree of economic benefit obtained through the violation, (3) previous enforcement actions taken against the violator, and (4) the deterrent effect of the response on similarly situated permittees. Equally important are considerations of fairness and equity, national consistency, and the integrity of the NPDES Program.

12.5 Public Participation

Citizens can participate in the enforcement process in a number of ways. Under the Freedom of Information Act, citizens have the right to request certain facility-specific compliance information from EPA's PCS database. Interested citizens can intervene in any Federal civil action to enjoin any threatened or continuing violation of any program requirement or permit conditions, and to recover civil penalties in court. Citizens also have the opportunity to review and comment on any proposed consent decree to resolve a State or Federal civil judicial enforcement action.

Section 505 of the Clean Water Act allows any citizen to commence a civil judicial enforcement action on his own behalf against: (1) any person (including the United States or any government agency) who is alleged to be in violation of an effluent standard or limitation or an enforcement order issued by EPA or a State, or (2) against EPA or the State where the regulatory authority is alleged to have failed to take appropriate action. Citizens may not commence suit if EPA or the State is

diligently prosecuting a civil or criminal action. Citizens must also give EPA, the State, and the alleged violator sixty days' notice of the alleged violation prior to commencing a citizen suit.

12.6 Compliance Assistance and Voluntary Compliance Policies

On June 8, 1994, EPA established a new Office of Enforcement and Compliance Assurance (OECA), consolidating a number of functions formerly shared among different programs at EPA. One of several new offices in OECA is the Office of Compliance (OC). The overriding mission of the Office of Compliance is to improve compliance with environmental laws. To do this, OC sets national compliance assurance and enforcement priorities through strategic planning and targeting; collects and integrates compliance data; develops effective compliance monitoring programs to support inspections and self-reporting; builds the capacity for more effective compliance assistance to the regulated community; works with Regions, States, municipalities, citizens groups and industry, and supports enforcement activity. Three of the divisions in OC are organized by economic sector (SIC Code).

As part of President Clinton's 1995 regulatory reform initiative, EPA's Office of Enforcement and Compliance Assurance issued three policies to provide incentives for voluntary compliance. The first is "Incentives for Self-Policing: Disclosure, Correction and Prevention of Violations" (hereafter referred to as the "self-audit policy"), which was issued on December 22, 1995. This policy offers incentives in the form of elimination of gravity-based penalties to companies that find violations through an environmental audit or efforts that reflect due diligence, and promptly disclose and correct those violations. It also offers a 75% reduction in gravity-based penalties for violations that are voluntarily discovered and disclosed even if not found through an audit or the exercise of due diligence. The self-audit policy contains important safeguards to protect public health such as: excluding violations which may present an imminent and substantial endangerment or have resulted in serious actual harm; retaining the right to recover any significant economic benefit gained by the violator; requiring the company to remedy any environmental harm; and, excluding repeat violations.

The second policy is EPA's "Policy on Compliance Incentives for Small Businesses" (hereafter referred to as the "small business policy") which became

effective on June 10, 1996. The purpose of this policy is to promote compliance among small businesses by providing them with special incentives to participate in compliance assistance programs or to conduct environmental audits, and then to promptly correct violations. Under the small business policy, a “small business” is a person, corporation, partnership, or other entity who employs 100 or fewer individuals across all its facilities and operations. EPA will eliminate the entire civil penalty if a small business satisfies all four of the following criteria: (1) the business has made a good faith effort to comply as demonstrated by either receiving on-site governmental compliance assistance or conducting a voluntary environmental audit and promptly disclosing in writing all violations discovered as part of the audit; (2) in past three years, the business was not subject to an action for the current violation and in the past five years the small business has not been subject to two or more enforcement actions for environmental violations; (3) the business corrects the violation and remedies any harm associated with the violation within six months of discovery; and (4) the violation has not caused or does not pose actual serious harm and has not involved criminal conduct.

If the small business meets all of the above criteria except that it needs a longer corrections period or if it has obtained a significant economic benefit from the violations, EPA will waive up to 100% of the gravity component of the penalty but may seek the full amount of any economic benefit associated with the violations.

The third new policy is the “Policy on Flexible State Enforcement Responses to Small Community Violations,” which was issued on November 22, 1995 (hereinafter referred to as the “small community policy”). The small community policy assures States that they have, within appropriate limits, the flexibility to design and use multi-media compliance assistance and compliance prioritization measures as alternatives to traditional enforcement responses when addressing a small community’s environmental violations. Under the small community policy, State small community environmental compliance assistance programs provide (1) an adequate process to return a small community to environmental compliance; and (2) an opportunity to correct violations. States electing to provide small community environmental compliance assistance should establish and follow an adequate process for determining which communities can participate, assessing a community’s good faith and environmental compliance status, determining a community’s administrative,

technical, and financial capacity to comply, weighting the comparative risks associated with competing environmental mandates, and entering into an enforceable agreement establishing a risk-prioritized schedule that requires compliance with all environmental mandates as quickly as is reasonable.

A State can waive part or all of the noncompliance penalty if the community is working diligently and in good faith to achieve compliance. The small community policy does not apply to criminal violations. EPA also reserves the right to take immediate action where the community's actions create an imminent and substantial endangerment to public health and the environment.