

MOG Notes: Clean Water Act Background

HFWR Act 64 Review

A. Water Quality Generally

- The federal Clean Water Act (CWA) is the principal law governing prevention and cleanup of pollution in the nation's surface waters.
- The CWA imposes multiple requirements on States and property owners to control pollution to waters and improve the quality of polluted waters.
- The CWA has two major parts: 1) financial assistance to states for municipal wastewater treatment; and 2) regulatory programs to prevent pollution of waters or to require cleanup.
 - The regulatory program itself has two components—one to require permits for specific activities, one to establish standards and cleanup to maintain water quality.
- U.S. EPA is the federal agency with authority over implementation of the CWA.
- EPA may delegate a state agency as the permitting and enforcement authority in the state.
 - States must meet minimum requirements for delegation, including statutory and regulatory authority and commitments to implement and enforce.
 - In 1974, EPA delegated ANR as the CWA permitting authority for Vermont.
 - EPA retains oversight over permit issuance and may make recommendations and require conditions for federally required permits such as wastewater permits.
- In addition to enforcement by EPA or ANR, CWA § 505 authorizes any citizen to commence a civil action on his or her own behalf against any person, including a federal, state, or municipal government instrumentality, who is alleged to be violating the CWA.
 - Prior to filing a citizen suit, a person must notify EPA, ANR, and the alleged violator.
 - Citizen suits may not be brought if EPA or ANR is “diligently prosecuting” the violation.

B. Clean Water Act Regulatory Requirements—Permits

- A discharge permit is required for all discharges of pollutants from a point source to a navigable water—wastewater treatment plants, industrial discharges, etc.
- A stormwater permit is required in order to disturb more than one acre land.
- Certain SIC classified industries must implement stormwater controls under a general permit called the Multi-sector General Permit.
- Certain municipalities must implement stormwater controls under a permit called the Municipal Separate Storm Sewer (MS4) Permit.
- A permit is required for Concentrated Animal Feeding Operations that have an actual discharge or are proposing an actual discharge.

C. Clean Water Act Regulatory Requirements—Water Quality

- The CWA establishes effluent limits for discrete discharges, and the State can adopt more stringent standards under State law.
- CWA § 303 requires all states to adopt water quality standards, which are the limits, uses, or criteria to evaluate and protect water quality from pollutants.
- CWA § 303(d) requires States to review all waters every three years to determine if the water meets the State water quality standards.
- If a water does not meet the State water quality standards, it is listed as “impaired.”
- If a water is listed as impaired, the State is required to establish a cleanup goal, known as a total maximum daily load (TMDL) plan for the pollutants that caused the impairment.
 - A TMDL is a target or goal that, when reached, should result in the cleanup of the water so that it meets the State water quality standards and is no longer impaired.
 - A TMDL is not the actions that the State must take to clean up a water.
- Actions necessary to clean up a water are included in a separate implementation plan. An implementation plan can include a suite of activities to remediate the water.

D. Lake Champlain TMDL Implementation

- Lake Champlain is impaired due to phosphorus—i.e. it does not meet State water quality standards for use—i.e. recreation, aesthetics, and aquatic biota.
- In 2002, EPA approved a joint TMDL between Vermont and New York for the Lake.
- In 2008, CLF petitioned EPA to disapprove the Vermont portion of the Lake TMDL.
- CLF argued the TMDL was flawed, because it included insufficiently stringent wasteload allocations, lacked reasonable assurances, and lacked an adequate margin of safety.
- In 2011, EPA disapproved the Vermont portion of the Lake Champlain TMDL.
- When EPA disapproves a State TMDL, the CWA requires EPA to issue the new TMDL within 30 days of disapproval—i.e. EPA will issue the new TMDL, not ANR.
- Since 2011, EPA has been working with ANR to design the TMDL for the Lake—i.e. the target goal for bringing the Lake back into compliance.
- Once the target was established, it was broken down according to the contributors of phosphorus to the Lake.
 - These wasteload allocations are based on sector—development, agriculture, forestry, etc.—and are the targets for those sectors.

- The State must develop an implementation plan—the actions to be taken to achieve the TMDL goal—see Phase I Implementation plan.
- Many of these actions required legislative act. Act 64 enacted most, if not all of the authority for these actions, including small farm certification, nutrient application, stormwater, impervious surface retrofits, and funding.
- TMDL and implementation plan needs to provide reasonable assurances that the nonpoint source measures will achieve the required load reductions.
 - In order to allocate loads among both point and nonpoint sources, there must be reasonable assurances that nonpoint source loads will in fact be achieved.
 - Where there are not reasonable assurances, under the CWA, the entire load reductions must be assigned to point sources.”
- If the State implementation plan is not to EPA’s satisfaction—e.g. it does not provide reasonable assurances it will meet the goal—EPA may exercise the authority it has under the Clean Water Act to attempt to achieve the wasteload allocations and the TMDL itself.
 - For example, EPA retains authority over direct discharge permits. EPA could require direct dischargers of phosphorus—wastewater treatment plants—to lower discharge standards, which would be costly and may not lead to significant benefits for the Lake as a whole.

E. Vermont Agricultural Water Quality Requirements

- “Animal feeding operation” (AFO) means a lot or facility where livestock or domestic fowl 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 crops, vegetation, or forage growth are not sustained in the normal growing season over any portion of the lot or facility.
 - A large AFO has 700 or more mature dairy cows;
 - A medium AFO has between 200 and 699 mature dairy cows; and
 - A small AFO has less than 200 mature dairy cows.
- Farms in Vermont currently are not required to obtain CAFO permits.
 - CAFO permits are required for “actual discharges” to waters.
 - Vermont law prohibits any farm from discharging to waters.
- Vermont farms instead either must obtain a state permit or comply with required agricultural practices (RAPs) to address water quality.
 - Large farms must obtain a Large Farm Operation (LFO) permit.
 - Medium farms must seek coverage under a Medium Farm Operation (MFO) general permit.
 - Small farms must comply with the RAPs, but currently do not need a permit.

- LFO permits, MFO permits, and the RAPs all include conditions or requirements intended to prevent agricultural runoff/discharges to state waters.
- The Agency of Agriculture, Food and Markets (AAFM) implements and enforces the LFO, MFO, and RAP programs.
- ANR enforces discharges to state waters and would implement and enforce a CWA CAFO if required for a farm in Vermont.
- ANR and AAFM have a memorandum of understanding (MOU) regarding how the agencies will respond to agricultural water quality issues and when issues will be referred to ANR for enforcement under ANR's authority.
- AAFM also has a financial assistance program that provides farms in Vermont with financing to implement or improve water quality practices on the farm. The program is referred to as EQIP or the BMP program.
 - Much of the state financial assistance is used as cost share to draw down federal money from the U.S.D.A. Natural Resources Conservation Service (NRCS).
 - The Capital Bill includes the funding for the EQIP/BMP program.