

## ENHANCED CLEAN WATER ACT ENFORCEMENT

BY HENRY CHAJET AND SCOTT STEWART, PATTON BOGGS LLP (WWW.PATTONBOGGS.COM)

Strengthening clean water enforcement is a high priority of the Obama administration. On October 15, 2009, the Environmental Protection Agency (EPA) published a roadmap for overhauling and intensifying Clean Water Act (CWA) enforcement. This Action Plan focuses on both EPA and state enforcement efforts and will lead to a significant rise in CWA enforcement. This suggests an urgent need for companies to review their CWA permit status, revisit their compliance programs and take new steps to ensure that their operations are not flagged for enforcement.

### Clean Water Act Enforcement Action Plan Highlights

**Targeted Enforcement**—The EPA plans to move away from its current policy of focusing enforcement on the largest facilities and those with significant noncompliance. Enforcement focus will shift to significant point source violations that adversely affect water quality. Facilities sited on impaired water bodies are in the enforcement cross-hairs.

**Strengthened Oversight**—While 46 states are authorized by the EPA to run the National Pollutant Discharge Elimination System (NPDES) program, the EPA retains responsibility to ensure states protect water quality and consistently apply the law through vigorous enforcement. The EPA will develop and publicize performance metrics to hold EPA and states accountable. If states underperform, the EPA will disapprove permits. For example, the EPA's recent use of its CWA §404(c) power to deny, restrict or prohibit actions under a CWA Section 404 permit previously issued by the U.S. Army Corps of Engineers (Corps) to a coal mining operation is evidence of the EPA's new focus on impacts to impaired waters. In addition, the EPA informed the Corps that it is targeting 79 pending surface coal mining permit applications because they raise "potentially significant water quality and environmental issues." Facilities in states with traditionally lax enforcement will either see stepped-up enforcement by the state or increased federal enforcement.

**Improved Accountability and Transparency**—The EPA believes it lacks nationally consistent and complete information on facilities, permits, pollutant discharges and compliance status of most NPDES-regulated facilities. To address this problem, the EPA will implement electronic reporting across all regulated facilities. Initially, it will encourage voluntary submittal of electronic Discharge Monitoring Reports (DMRs), but will work to develop a rule requiring the practice.

### Significant CWA Enforcement in 2008 and 2009

To settle the United States' claims of wastewater discharge permit violations, in 2008, Massey Energy Co. Inc. paid a \$20 million civil penalty; and then in 2009, Patriot Coal Corp. paid a \$6.5 million civil penalty. Both companies also agreed to substantial and costly injunctive relief.

In 2009, Alaska Gold Co. and NovaGold Resources Inc. paid a civil penalty of \$883,628 to settle alleged violations of a storm water discharge permit. In August 2009, Aggregate Industries-Northeast Region Inc. settled with the United States, agreeing to pay a \$2.75 million civil penalty and implement a regional evaluation and compliance program, resolving numerous alleged CWA storm water violations at 23 of its facilities. To-date, this is the largest civil penalty ever assessed to a nationwide ready-mix concrete company for alleged CWA storm water violations.

### Harvesting Low-Hanging Fruit

The EPA's actions can be predicted by its statements and planning activity. During the 2008-2010 planning cycle, the EPA stated that it

would focus on three main areas of the storm water program including ready mix concrete with crushed stone and sand and gravel operations. Clearly, these industries and the others who fit into similar operational categories should be on notice and take action to reduce their risks.

The EPA will also look for high-profile enforcement actions that are press-worthy and involve large civil penalties, costly injunctive relief, pollution mitigation and expensive supplemental environmental projects. In addition to making a media splash, the EPA believes that these types of enforcement actions reduce the rate of noncompliance.

The EPA will also step up the number of inspections and expedite enforcement of CWA violations, focusing on clusters of facilities whose noncompliance is adversely impacting already impaired waters. If your sites are near impaired waters, you should be on notice of increased EPA enforcement risks.

Finally, the EPA will focus on areas previously targeted under its National Priority program. One of the EPA's National Priorities is the mineral processing and mining sector. While the EPA intended to use the Resource Conservation and Recovery Act (RCRA) as its tool for implementing this enforcement priority, in its most recent Strategy Summary, the EPA indicated it will evaluate other tools, including the CWA, to address environmental risks.

From 2004-2007, the EPA inspected 20 phosphoric acid facilities, 25 other mineral processing facilities and five mine sites. Familiarity with the sector as a result of these inspections, combined with the EPA's belief that the "mineral processing and mining sectors generate more wastes that are corrosive or contain toxic metals than any other industrial sector," indicate that the EPA continues to aim enforcement attention on this sector. We predict that information gleaned from previous RCRA inspections, coupled with the EPA's desire to use the CWA for this purpose, will lead to enhanced CWA enforcement in the industrial minerals industry.

### Mitigating the Risk of Enforcement

Given the increased enforcement risks, target facilities should make every effort to assure compliance with permitting requirements and institute programs to remain in compliance. Operators should engage in a permit compliance assessment, preferably under the direction of counsel, looking back over a minimum of the past five years, in order to gauge the risk of future enforcement action.

Concurrently, operators should evaluate training programs for employees, focusing on permit compliance, risk mitigation and crisis management. Personnel should be trained on interacting with regulators who inspect facilities. Inspections by the EPA or the state should be taken very seriously and responses should be planned to mitigate enforcement exposure.

Finally, should your company face enforcement, it is critical to understand the extent of the liability and ways that it can be eliminated, managed, or reduced. These EPA actions require a strategic defense that addresses the potential liabilities and combines tough litigation, when needed, with cooperative agency negotiations and community and congressional assistance to produce sound financial resolutions, improve agency relations and achieve the goals of environmental protection while protecting good jobs and company value.