Federal Water Pollution Control Act - 33 USC § 1251 et seq.
Natural Resources and Environmental Protection Act
Water Resources Protection - MCL 324.31

Summary:

- The Clean Water Act uses permits with technology-based limits on point-source discharges to the nation’s surface waters, which limits are supposed to get better and better as technology improves, with the goal of making all the nation’s waters fishable and swimmable, and eventually phasing out polluting discharges entirely.

- The CWA has a back-up plan for waters whose designated uses are already impaired by pollution, called total maximum daily loads (TMDLs), which require correlative reductions in discharges among all dischargers on the water body with the goal of restoring the water body to unimpaired status.

- Finally, the CWA primarily uses funding and technical assistance to address pollution from non-point sources, or run-off.

Policy:

§ 1251

Primary policies:
Eliminate discharges to water by 1985.
Reduce discharges to point where all waters will be swimmable and fishable by 1983.
Immediately prohibit discharges of toxic pollutants in toxic amounts.

Secondary policies:
Provide money for publicly owned treatment works (POTWs).
Provide money for research into technology-based effluent limitations (TBELs).
Create programs for reducing nonpoint source discharges.
Recognize states’ primary responsibility to eliminate water pollution, and therefore have states implement the permit programs under sections 1342 (point source discharges) and 1344 (fill, including wetlands) of the CWA. This is referred to as a “federalism” approach.

**Regulating Agency:**

**Environmental Protection Agency:**

Issues NPDES permits

Oversees state’s NPDES permit programs to insure that they comply with the requirements in the CWA and that the state is properly applying and enforcing the requirements of the CWA. § 1342(b).

**Department of Environmental Quality:**

DEQ administers NPDES permit programs in Michigan.

DEQ must compile a list of occurrences of discharges of untreated or partially treated sewage from sewer systems onto land or into waters of the state, post it on their website and annually publish the list.

DEQ must transmit copies of national permits issued by the DEQ, or if a permit is denied, must transmit the denial along with the reasons for the denial.

DEQ must consult with the Department of Agriculture to manage land application of sewage sludge and sewage sludge derivatives.

**Regulated Activity:**

**Clean Water Act**

Elimination of impairment, then elimination of pollution, through a permit process

§ 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

**State Water Resources Protection Act**

A person shall not discharge pollutants into waters of the state without a permit that may damage any of the following - 324.3109
(a) the public health, safety or welfare
(b) domestic, commercial, industrial, recreational or other uses of water
(c) the value or utility of riparian lands
(d) livestock, wild animals, birds, fish, aquatic life, or plants
(e) the value of fish and game

Discharge of raw sewage, or medical waste into waters of the state is evidence of a violation of this act unless authorized by a DEQ permit, order or rule.

The open water disposal of contaminated dredge materials is prohibited.

Any industrial or commercial entity that discharges liquid wastes other than through a public sanitary sewer must have waste treatment or control facilities under the supervision and control of a person certified by the DEQ.

A person doing business within the state who discharges wastes in addition to sanitary sewage to waters of the state or a sewer system must file an annual report to the DEQ containing information about the business and wastewater.

If untreated sewage or partially treated sewage is directly or indirectly discharged from a sewer onto land or waters of the state the person responsible must notify the DEQ and take other action.

Exception - this Act does not apply to copper or iron mining

§ 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

Key definitions

Discharge – any addition of a pollutant to navigable waters from any point source. (1362(12)).

definition of “addition”


Conveying one distinct water body, which carries a higher level of pollutants (phosphorus) into another for irrigation/water projects, is the addition of pollutants to the second water body as long as the two are distinct. South FL Water Mgt Dist v Miccosukee Tribe, 541 US 95 (2004).

EPA is now attempting to repeal this decision by administrative rule. The proposed rule is at:

www.epa.gov/npdes/regulations/water_transfers_finalrule.pdf

Pollutant – 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 discharged into water. (1362(6)).

Navigable waters – waters of the United States, including territorial seas. (1362(7)).


- Does not include ponds not connected to navigable water bodies whose only Federal tie-in is that the ponds serve as habitat for birds protected by international migratory bird treaties. *Solid Waste Agency of Northern Cook County v US Army Corps of Engineers*.

- Only wetlands with a continuous surface connection to streams, oceans, rivers and lakes are navigable waters. *Rapanos v US*, 126 S Ct 2208 (2006).

Point source – any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

Person - is broad and includes business, state and local government, and interstate agencies.

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**Permit Requirements:**

There are two types of pollution limits or standards: technology-based and water quality based.

States set water quality standards. If EPA approves them, they become rules, if EPA does not approve them, EPA can set water quality standards for that state. 1313(a).

Standards are based on designated uses - public water supplies, fish and wildlife, recreation, agriculture & industry, and navigation. 1313(C)(2)(A).

NPDES permits are administered by state. To get a permit, a discharge must

(a) meet TBELs, 1311(b)

TBELs are: the degree of effluent reduction attainable through the application of best (insert the standard) control technology.

TBELs are meant to reduce and ultimately eliminate discharges through a 5-year permit renewal cycle. § 1331(m)(3). This way, the state and EPA are supposed to review the technology continuously and if there is something better when the permit comes up for renewal it has to be implemented and the effluent limits reduced (i.e., improved).

TBELs are divided into existing sources and new sources:
Existing sources

<table>
<thead>
<tr>
<th>Best practicable technology</th>
<th>the best that is currently available, considering costs vs. benefits, age of equipment, and non-WQ impacts (i.e., energy use). 1314(b)(1)(A).</th>
</tr>
</thead>
<tbody>
<tr>
<td>Best conventional technology</td>
<td>the average of the best. 1314(b)(4)(B).</td>
</tr>
<tr>
<td>Best achievable technology</td>
<td>the best existing. 1314(b)(2)(A)-(B).</td>
</tr>
</tbody>
</table>

New sources

| Best demonstrated          | greatest achievable through technology that is existing or not yet existing but demonstrated will work, including different operating methods, processes, or alternatives, including where practicable zero discharge. 1316(a)(1). |

**Type of pollutant** | **Technology standard**
---|---
conventional | BCT
| toxic | BAT
| non-conventional | BAT

*non-conventional are ammonia, chlorine, color, iron, and phenols, and any other the EPA lists. 1311(g)(1).*

and,

(b) meet state water quality standards. (1311(b)(1)(C)).

An NPDES permit in one state may not allow a discharge that will cause a violation of a downstream state’s WQ standards. 40 CFR 122.4(d); interpretation upheld in *Arkansas v Oklahoma*, 503 US 91 (1992).
and,

(c) get a certification from the state that the discharge meets CWA requirements and any other appropriate requirements of state law. (1341(d)).

“Any other appropriate requirements of state law” is broad, and can include water volume requirements, not just pollution requirements. PUD No 1 of Jefferson County v Washington Dep’t of Ecology, 511 US 700 (1994).

In Michigan, a new or increased discharge must make an antidegradation demonstration. The requirements for an antidegradation demonstration are found in R 323.1098. They include showing that there are no practical alternatives to the discharge, and an evaluation of the benefits that would be foregone if the discharge is not allowed. There are exceptions to this requirement; a common one is a surface water discharge of treated groundwater from a contaminated site.

And possibly,

(d) Meet water quality based effluent limitations – Total Maximum Daily Loads (TMDLs).

1313(d) Identification of areas with insufficient controls; maximum daily load; certain effluent limitations revision

(1)(A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

(C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

(B) and (D) do the same thing with thermal discharges (heat).

TMDLs are like correlative rights - the eastern model of water law. Your rights to discharge are not fixed, but can vary depending on the number of other dischargers and the condition of the water body.

List of water bodies with TMDLs currently in place in Michigan:

www.michigan.gov/deq/0,1607,7-135-3313_3686_3728-12464--00.html
States that choose to administer their own permit program for surface water discharges must submit the program to the EPA for approval, to ensure that it complies with the Federal NPDES program requirements. § 1342 (b).

State Water Resources Protection Act

Permits granted on the condition that the effluent requirements to prevent unlawful pollution are met.

DEQ may not issue a permit with effluent standards without verifying that the permit will not violate applicable water quality standards.

NPDES Permit Types: (DEQ Rule 21)

(1) Permit-by-Rule:

Certain types of more minor discharges are regulated by DEQ's administrative rules, and require a Notice of Coverage instead of a permit.

(2) General Permit - Rules 2191, 2192

Covers permittees with similar operations and/or type of discharge.

General permits contain effluent limitations that protect most surface waters statewide.

Facilities that are covered under a general permit receive a Certificate of Coverage (COC) from the DEQ for individual discharges.

(3) Individual Permits:

These are site specific permits.

Requirements of these permits are based on the discharge type, the amount of discharge, facility operations, and receiving stream characteristics.

CAFO's must apply for individual permits in most cases, or may apply for a COC under a general permit - Rule 2196.

Notice and comments on permits - 1342(a)(1) and Part 31

The DEQ must provide public notice through posting on its website and in local newspapers and maintaining a public notice mailing list (Rule 2119, 2121).

DEQ permit notice website:

http://www.deq.state.mi.us/owis/Page/main/Home.aspx

Any interested party can also be placed on a list to receive copies of all public notices and fact sheets for all permit applications in a drainage area of the state. The request to be put on this notification list must be made annually, in writing, to the DEQ office in Lansing.
There is a 30 day public comment period for public input on a pending permit.

Submitting comments during this period helps establish your interest in the permit and may preserve your right to challenge the permit.

See - Tips for Commenting (p 64) in A Citizen’s Guide to Water Quality Permitting.

R2151 - The DEQ must also prepare a fact sheet on each permit application with information about the proposed discharge, preliminary determinations by the DEQ, information on water quality standards of the receiving waters, and a description of DEQ procedures for making final determinations. Anyone can request, in writing, a copy of the fact sheet which will be mailed to him/her.

Public hearings on permits

Public hearing: opportunity for those making comments on a permit to make them verbally to DEQ staff; they consider those comments in making their decision, but do not respond during the hearing.

Public meeting: question and answer session; members of the public can ask questions of DEQ staff about pending permits or express other concerns.

DEQ may schedule a hearing if one is requested during the public comment period and they deem it appropriate.

In a request for a public hearing, the person requesting the hearing must include reasons for the request, the person's interest in the discharge and the parts of the permit requiring a hearing.

DEQ must notify the public of a public hearing or meeting on a permit application.

A citizen may request a public meeting at any time for general information about permits in their area, held at the discretion of the DEQ.

To contest a permit, any person may file a petition for a contested case hearing before an Administrative Law Judge (ALJ) within 60 days of permit issuance.

Contested Case Hearing Rules:

DEQ form - petition for contested case hearing:
http://www.deq.state.mi.us/documents/deq-oah-eqp0201.dot

At the hearing the party contesting the permit must present evidence and witnesses on why the permit is flawed, and the other side will present their evidence.
Non-point sources

33 USC § 1329. Non-point source management programs

(a) The Governor of each State shall prepare and submit a report to EPA that identifies:

- navigable waters within the State which, without additional action to control non-point sources, cannot reasonably be expected to attain or maintain applicable water quality standards or the goals and requirements of the CWA;
- the categories of non-point sources causing the problem; and
- a process for identifying best management practices control each category of non-point sources;
- a list of State and local programs for controlling non-point sources.

(b) State management programs

The Governor of each State shall prepare and submit a management program to EPA that includes:

- A list of the BMPs that will be implemented
- A list of programs, such as enforcement, technical assistance, financial assistance, education, training, technology transfer, and demonstration projects, to implement the BMPs
- A schedule for implementing the BMPs
- Legal authority for implementing the BMPs
- Funding sources, including Federal funding

The program is supposed to be developed and implemented on a watershed-by-watershed basis.

If the state does not submit a program or if EPA does not approve it, EPA can develop a program for the state.

Many watersheds in Michigan have either DEQ or EPA approved watershed management programs. The DEQ assists local communities in developing an approvable watershed management program.

For a map of watersheds with approved management programs: [http://www.michigan.gov/deq/0,1607,7-135-3313_3682_3714_4012-95955--,00.html](http://www.michigan.gov/deq/0,1607,7-135-3313_3682_3714_4012-95955--,00.html)
Before issuing an order assessing a civil penalty against a violator the EPA must provide public notice and an opportunity to comment on the proposed order. Any person who comments on the order must be given notice of any hearing, and an opportunity to be heard and present evidence at the hearing. If no hearing is held, any person who commented on the order can petition the EPA to set aside the order and provide a hearing on the penalty assessment. An order is final 30 days after it is issued and then the decision is subject to judicial review. § 1319(g)(4),(5).

§ 1370 gives the states power to enforce the requirements of the CWA and to enforce any standard or limitation regarding discharges of pollutants that they have adopted pursuant to this Act.

The DEQ may request that the attorney general initiate a civil or criminal proceeding for violations of this act.
Citizen enforcement through the Clean Water Act § 1365

Any citizen may commence a civil action against any person, government agency or instrumentality who allegedly violated (a) an effluent standard or limitation or (b) an order with respect to such a standard or limitation.

Any citizen may bring an action against the Administrator of the EPA for failing to perform any act or duty required by the Clean Air Act that is not discretionary.

The citizen suit may seek injunctive relief, civil fines (in a case against a discharger), and costs and attorney fees.

Any person who desires to bring a suit against any person, including a government agency, must give notice to the person they plan to sue at least 60 days before they file suit. See sample 60 day notice of intent to file suit. (There are exceptions for national performance standards and toxics.)

A citizen suit may only be filed against a discharger if the EPA or DEQ has not commenced, or is not diligently prosecuting, a suit to require compliance. “Suit” means litigation, not administrative enforcement action. Jones v City of Lakeland, 224 F 3d 518 (6th Cir 2000).

If the discharger brings the facility into compliance before suit is filed, the case cannot be brought. Gwaltney of Smithfield Ltd v Chesapeake Bay Foundation, 484 US 49 (1987).

If the discharger brings the facility into compliance after suit is filed, the case continues unless the discharger can prove that subsequent events have made it absolutely clear that the alleged wrongful behavior could not reasonably be expected to recur. Friends of the Earth v Laidlaw Environmental Services, 528 US 167 (2000).

Sources of violations

To report potential violations, gather information (such as location of violation, description of activities and dates, and name of owner or facility), and report it to the local DEQ office along with a letter containing this information.

Any NPDES permit holder must monitor the effluent concentrations in their discharges and submit compliance monitoring reports (CMRs) to DEQ. CMRs are public documents, and can be used to prove a permit violation if the reports show exceedances of the effluent limits.

Citizen enforcement through the Michigan Environmental Protection Act.

A violation of an effluent limitation in an NPDES permit can be used to prove the pollution component of a MEPA case. Dwyer v Ann Arbor, 79 Mich App 113; 261 NW2d 231 (1977); rev’d on other grds, 402 Mich 915; 387 NW2d 926 (1978).