

The remedies matrix: a framework for assessing remedies  
Clean Water Act

**What are the highest-level policy goals of the regime?**

Policy goals

=> To restore and maintain the chemical, physical, and biological integrity of the Nation's waters.

**Deterrence: How does the regime seek to deter bad behavior? Options may include direct punishment (fines), redress of harms (compensation), denial of benefits (disgorgement of profits or other benefits), and cost imposition (e.g., a tax or fee).**

Direct punishment, such as fines paid to the government

=> There are criminal penalties for negligent violations, knowing violations and knowing endangerment.

Redress remedies to individuals (which may include restitution or other money damages)

=> Any citizen may commence a civil action on his own behalf, but monetary damages are not available under Clean Water Act (v. United States EPA, 593 F. Supp. 1311, 22 Env't Rep. Cas. (BNA) 1423, 15 Env'tl. L. Rep. 20028, 1984 U.S. Dist. LEXIS 23258 (M.D. Pa. 1984))

=> Plaintiff can still pursue civil penalties against defendant even though defendant no longer owns and operates source of pollution.

Denial of benefits (such as disgorgement of profits or data deletion)

=> Not available under the Act.

Cost imposition (including taxes or fees)

=> Under the Water Clean Act, there is no systematic and intentional cost imposition. In case of the treatment of data, the Administrator shall collect and make available, through publications and other appropriate means, information pertaining to management practices and implementation methods.

In addition, the Administrator shall establish, maintain, and make available to the public by electronic and other means a national coastal recreation water pollution occurrence database.

Does the regime include a mechanism to hold the bad actors' assets at risk?

=> It is not clear.

Does the regime contemplate the problem of over-deterrence?

=> There are limits on civil penalties.

Is there a market for noncompliance?

=> There are criminal penalties as well as civil penalties.

Are attorney fees available to successful plaintiffs?

=> Yes, whenever the court determines such award is appropriate, the court may award also expert witness fees to any prevailing or substantially prevailing party.

**How does the regime seek to compel good behavior (carrots or sticks)?**

Preapprovals (permits, licenses)

=> Both

### Injunctive relief

=> If awarded by courts. In case of a temporary restraining order or preliminary injunction is sought, the court requires the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

Also, in some cases there is civil enforcement using administrative orders to protect public health, when the President determines that there may be an imminent and substantial threat to the public health or welfare of the United States, including fish, shellfish, and wildlife, public and private property, shorelines, beaches, habitat, and other living and nonliving natural resources under the jurisdiction or control of the United States

### Safe harbors

=> Yes, this includes most settlements. In addition in determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

### **Role of Gatekeepers and Third Parties**

Does the ecosystem for the sector/practice include gatekeepers (e.g., third party service providers) who regulate conduct? How does the regime address third parties who are involved in the underlying unwanted behavior?

=> Any person who knowingly makes any false material statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained or who knowingly falsifies, tampers with, or renders inaccurate any monitoring device or method required to be maintained, shall upon conviction, be punished by a fine of not more than \$10,000, or by imprisonment for not more than 2 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than \$20,000 per day of violation, or by imprisonment of not more than 4 years, or by both.

### **Other Issues**

How does the regime address the problem of guile?

=> They consider the good faith. Also, there are criminal penalties for knowing violations, knowing endangerment and false statements.

How does the regime address collective wrongs (small injuries to many people)?

=>Class certification is permitted

How does the regime address power differentials among victims and wrongdoers?

=>District courts; class action

How does the regime respond to technological change?

=> The Act makes references to the use of the “best available technology” in some subsections.

### **Regulatory Structures**

Is the regime complemented by an agency and what are that agency’s powers?

=> There is a Water Pollution Control Advisory Board, composed of the Administrator or his designee, who shall be Chairman, and nine members appointed by the President. The Board shall advise, consult with, and make recommendations to the Administrator on matters of policy relating to the activities and functions of the Administrator under this chapter.

=>The Administrator of the Environmental Protection Agency upon receipt of evidence that a pollution source or combination of sources is presenting an imminent and substantial endangerment to the health of persons or to the welfare of persons where such endangerment is to the livelihood of such persons, such as inability to market shellfish, may bring suit on behalf of the United States in the appropriate district court to immediately restrain any person causing or contributing to the alleged pollution to stop the discharge of pollutants causing or contributing to such pollution or to take such other action as may be necessary.

Monitoring or investigation?

=> Investigation, audit. Also, EPA works with its federal, state and tribal regulatory partners through a comprehensive Clean Water Act compliance monitoring program to protect human health and the environment by ensuring that the regulated community obeys environmental laws/regulations through on-site visits by qualified inspectors.<sup>1</sup>

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<sup>1</sup> <https://www.epa.gov/enforcement/water-enforcement#cwacompliance>