

Can You Really Go to Jail for Violating a Stormwater Permit?



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A recent criminal enforcement case confirms that the answer to this question is “yes.” In what it acknowledged was one of the first such cases in the country, the **U.S. Department of Justice (USDOJ)** successfully prosecuted a construction contractor for criminal violations of a stormwater construction general permit covering discharges from a commercial development project in **Washington. *United States v. Stowe***, No. CR12-512RBL (W.D. Wash.). As a result, the owner of the contracting company was sentenced to six months in jail and required to pay \$400,000 in fines and community service payments. The contracting company was separately fined \$350,000 and placed on probation for one year, and a company employee was also placed on one year’s probation.

As alleged by the government, the conduct at issue included:

- clearing an area nearly triple the size of the 18-acre development site specified in the Notice of Intent;
- installing a bypass pipe to direct stormwater flows around a sedimentation pond, causing stormwater flows to bypass treatment and turbidity sampling;
- causing three landslides that led to two highway closures, including one that lasted a week;
- refusing to address compliance issues identified during seven site inspections over the course of three years;

- violations of state turbidity standards;
- discharging sediment in an amount that exceeded by 232% what was permitted under the construction general permit; and
- encouraging, if not directing, an employee to falsify reports and sampling data submitted to the government.

It would be hard to dispute the government's contention that these violations "evidenced abject disregard of the regulations" and warranted a significant sanction. While perhaps an outlier, this case however does serve as a reminder that stormwater enforcement under the federal **Clean Water Act** is not limited to civil remedies, as a matter of both law and practice.

This case also serves as a reminder of the federal government's authority to overfile in cases where state agencies with delegated authority have commenced enforcement cases. In this case, the Washington Department of Ecology (DOE) promulgated the construction general permit at issue through its delegated authority under the Clean Water Act. After DOE initiated an administrative enforcement action and levied a \$36,000 penalty against the contracting company, the **U.S. Environmental Protection Agency (USEPA)** commenced a separate administrative enforcement action and referred the matter to its Criminal Investigative Department. When faced with state enforcement cases based on authority delegated under the Clean Water Act, defendants must recognize that USEPA retains the authority to pursue separate enforcement, even in cases with far less egregious facts than the *Stowe* matter.

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