

EPA DEFINES NAVIGABLE WATERS

Stormwater News

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EPA and the Corp of Engineers decided the jurisdictional waters of the Clean Water Act and the 300 page regulation is summarized in the definition section of four pages. Those definitions are printed in this Quarterly on pages 4-7.

Duke Energy pleaded guilty to nine misdemeanor violations of the federal Clean Water Act, accepting a punishment of five years probation and \$102 million in fines and restitution. Last year's 39,000-ton ash spill in Eden's Dan River triggered the investigation and criminal charges. Civil charges against Duke Energy as well as criminal charges against individuals involved in Duke's coal ash spill could happen.

As part of its settlement, Duke will pay a \$68 million fine and \$34 million to environmental preservation and wildlife organizations. The utility will also be subject to regular audits by a court-appointed monitor to ensure compliance in cleaning up its coal ash.

Idaho is one of just four states that doesn't have NPDES primacy. Lawmakers and the governor put in motion a seven-year plan to transition to a state takeover of the program, and authorized hiring three people and spending \$300,000; by the end of the phase-in, the program is expected to need 26 positions and cost \$2.7 million a year.

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DITCHES WITH BED, BANK AND HIGH WATER MARK ARE REGULATED

What's New, Not Much

While the big news may be the jurisdictional waters of the CWA, the important news is implementation of stormwater permit requirements. The EPA re-definition of "waters of the United States" is over until a the court decision. The changes are modest but opponents will litigate. (That's how lawyers make money.) The lower court may withhold the application of the rule until the Supreme Court decides to hear (or not to hear) arguments.

The important news is hidden in recently issued stormwater permits. Municipal permits will focus on compliance with two permit issues: to eliminate illicit discharges and minimize construction impacts. Illicit discharge elimination is a public awareness campaign.

Construction permits will change the focus from managing dirt to managing runoff volume and velocity. Industrial permitting will focus on significant non-compliance and criminal conduct.

Politics will be continue to be important. Several southern states will face citizen suits for being so business friendly they issue stormwater permits that are less stringent than federal standards. California, and Washington State will continue to provide national stormwater permit leadership.

Large corporations and trade associations will contribute political donation to buy senators votes and congressmen with enjoy lunch with lobbyist.

What's new, not much. *

Modification of Future Stormwater Permits

This is a look at future stormwater permits using the California Industrial permit, the EPA Region 6 MS4 permit and EPA Headquarters construction permit.

California Focus on Industrial Sampling

The California industrial permit (288 pages) will become effective July 1 of this year. It is not a multi sector permit, but it retains a group sampling program that is multi sector. The permit structure is no different then the previous permit and the emphasis remains on annual sampling. Sampling results that exceed the numbers in a table will result in more stringent controls.

Every permittees must sample, but belonging to a sample group reduces the number of required samples. Each permittee samples for total suspended solids (TSS), oil and grease (O&G); and pH plus other parameters applicable to specific Standard industrial classification codes (SIC).

EPA has reduced the sampling burden but California continues use extensive sampling. Visit http://www.swrcb.ca.gov/board_decisions_adopied_orders/waterquality/2014wqo2014_0057_dwq_revised.pdf

EPA Region 6 Focus On Permit Clarity

A municipal Phase 1 permit was issued by EPA Region 6 for the Albuquerque, New Mexico area. Here are some new requirements not seen in previous MS4 permits.

For those that think MS4 have only to meet the MEP standard. The permit also requires compliance with WQ standards. “. . . *this permit includes provisions to ensure that discharges from the permit tee’s MS4 do not cause or contribute to exceedances of applicable surface water quality standards, in addition to requirements to control discharges to the maximum extent practicable (MEP)*

Previous permits only require an enforceable ordinance. This permit requires enforcement.

Therefore, some degree of enforcement for each identified violation I required. The permit reads: *“The permittee shall develop, revise, implement, and enforce a program to reduce pollutants in any runoff to the MS4 from construction activities that result in a land disturbance of greater than or equal to one acre.”*

The permit also requires the achievement of 90% of predevelopment hydrology but does not require that it be maintained.... *pre-development hydrology shall be met by capturing the 90th percentile storm event runoff (...) which under undeveloped natural conditions would be expected to infiltrate or evapotranspire on-site and result in little, if any, off-site runoff.”*

<http://www.epa.gov/region6/newsevents/index.html>

EPA Construction Permit

This permit includes the EPA national construction discharge standards called **Effluent Limitations Guidelines**.

1. To minimize erosion the permittee must control stormwater quantity and velocity. This is a shift from controlling dirt to controlling stormwater runoff.
2. Another permit requirement is to initiate stabilization immediately after grading.

Both of these permit requirement must be included in state issued stormwater discharge permits. However, EPA has allowed the issuance of general permit without these permit requirement. That practice will end and permits will be revised to comply the regulations. *

California Statewide Policy: Prohibit Trash Entering Waterways

The new policy California policy would require either the installation of trash-catching devices in storm drains or implementation of equally effective trash control measures.

The trash policy would be implemented through the National Pollutant Discharge Elimination System storm water permits. Each regulated municipality, DOT and industry (including construction) will have a permit requirement to prohibit trash from entering in the drainage system or have a trash collection program.

The policy would apply to all surface waters in the state, except within the jurisdiction of the Los Angeles Regional Water Quality Control Board where the total maximum daily load (TMDL) is no trash.

The cities, industrial facilities and other permit holders would then have 10 years to comply with the policy. The permits will include monitoring and reporting requirements.

Within the high-trash areas, the permittee could opt to install a network of systems to capture trash in storm drains or for an entire industrial facility. Alternatively, permittees could deploy a combination of controls as long as they could demonstrate full capture system equivalency, according to the policy.

Municipalities are expected to begin public information campaigns to reduce trash in public places. Changing peoples behavior may take 10 years.

Visit:

The State Water Resources Control Board's April 7 amendment is available at

http://www.waterboards.ca.gov/board_info/agendas/2015/apr/040715_8_w_draft_res.pdf

More information on the statewide trash policy is available at

http://www.waterboards.ca.gov/water_issues/programs/trash_control/ *

Stormwater News

(Continued From Page 1)

The Maryland Court of Special Appeals issued a significant decision in *Maryland Department of the Environment, et al. v. Anacostia Riverkeeper, et al.*, holding that the Municipal Separate Storm Sewer Permit (MS4) issued by the Maryland Department of the Environment (MDE) to Montgomery County, Md., violated the Federal Clean Water Act (CWA) and state of Maryland law.

The court held that the permit was not specific enough to allow for adequate public comment and did not provide meaningful deadlines to measure compliance with water quality goals. The decision could be reversed or modified by the Maryland Court of Appeals should it decide to review the ruling.

On Jan. 9, 2014 the spill of chemicals from a storage tank located 1.5 miles up West Virginia's Elk River contaminated drinking water for hundreds of thousands of residents. The company, Freedom Industries, is bankrupt and four Freedom officials face three Clean Water Act charges, and one man faces separate bankruptcy fraud charges for trying to hide personal wealth from federal investigators

Environment America released a report titled "Polluting Politics," which establishes a link between some of the nation's largest polluters, and their enormous lobbying expenditures and campaign contributions. While the 10 biggest polluters in the nation alone were found to have dumped over 90 million tons of toxic pollutants in 2012, the report also found that these same polluters spent more than \$53 million on lobbying and \$9.4 million on campaign funding for candidates in 2014. These industries are not just muddling our waters, but they are muddling our politics as well. <http://www.environmentamerica.org/sites/environment/files/reports/Polluting%20Politics%20AME%202.pdf>

The EPA has settled with Supervalu Holdings, Inc., a Minneapolis, MN based national wholesale grocery distributor, for federal stormwater pollution violations. The violations stem from EPA inspections at three Supervalu facilities (two in Tacoma, WA one in Auburn, WA), which documented several Clean Water Act violations at each facility. Supervalu has also agreed to pay a \$120,000 penalty.

In *Hawkes v. Corps*, Minnesota business owners sought permission to harvest a swamp for peat moss used in landscaping. The owners admit the swamp is a wetland by definition. However, under the Supreme Court decision in *Rapanos*, only wetlands that are adjacent to a permanent waterbody, or which have a "significant nexus" with traditional navigable waters, are subject to federal jurisdiction under the Clean Water Act. When the Corps issued a Jurisdictional Determination asserting the swamp was covered by the Act, without demonstrating the requisite connection to traditional navigable waters, the trial court ruled for the government. The decision was appealed to the 8th Circuit of Appeals that reversed the trial court and held that Jurisdictional Determinations are agency actions subject to immediate challenge in court. *

WATERS OF THE UNITED STATES

SIGNED MAY 26, 2015

(a) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et. seq.* and its implementing regulations, subject to the exclusions in paragraph (b) of this section, the term “waters of the United States” means:

(1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters, including interstate wetlands;

(3) The territorial seas;

(4) All impoundments of waters otherwise identified as waters of the United States under this section;

(5) All tributaries, as defined in paragraph (c)(3) of this section, of waters identified in paragraphs (a)(1) through (3) of this section;

(6) All waters adjacent to a water identified in paragraphs (a)(1) through (5) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(7) All waters in paragraphs (i) through (v) of this paragraph where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section. The waters identified in each of paragraphs (i) through (v) of this paragraph are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section. Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.

(i) *Prairie potholes*. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(ii) *Carolina bays and Delmarva bays*. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(iii) *Pocosins*. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(iv) *Western vernal pools*. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(v) *Texas coastal prairie wetlands*. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(8) All waters located within the 100-year floodplain of a water identified in (a)(1) through (3) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in (a)(1) through (3) of this section or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required. *

THE FOLLOWING ARE NOT “WATERS OF THE UNITED STATES” Signed May 26, 2015

Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States.

(2) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(3) The following ditches:

- (i) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.
- (ii) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.
- (iii) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (3) of this section.

(4) The following features:

- (i) Artificially irrigated areas that would revert to dry land should application of water to that area cease;
- (ii) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;
- (iii) Artificial reflecting pools or swimming pools created in dry land;
- (iv) Small ornamental waters created in dry land;
- (v) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;
- (vi) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and
- (vii) Puddles.

(5) Groundwater, including groundwater drained through subsurface drainage systems.

(6) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(7) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling. *

40 CFR 122.2 Definitions

Signed May 26, 2015

(1) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (a)(1) through (5) of this section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (a)(1) through (5) of this section. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (a)(1) through (5) or are located at the head of a water identified in paragraphs (a)(1) through (5) of this section and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(2) *Neighboring*. The term *neighboring* means:

(i) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(ii) All waters located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (5) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(iii) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (a)(1) or (a)(3) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

Tributary and *tributaries*. The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (a)(4) of this section), to a water identified in paragraphs (a)(1) through (3) of this section that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (b) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (a)(1) through (3) of this section.

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40 CFR 122.2 Definitions

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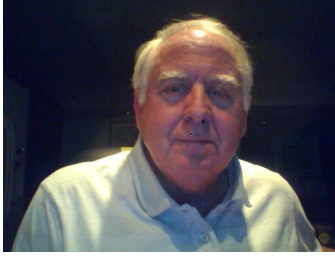
(4) *Wetlands*. The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(5) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream (a)(1) through (3) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (A) through (I) of this paragraph. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (a)(1) through (3) of this section. Functions relevant to the significant nexus evaluation are the following:

- (i) Sediment trapping,
- (ii) Nutrient recycling,
- (iii) Pollutant trapping, transformation, filtering, and transport,
- (iv) Retention and attenuation of flood waters,
- (v) Runoff storage,
- (vi) Contribution of flow,
- (vii) Export of organic matter,
- (viii) Export of food resources, and
- (ix) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (a)(1) through (3) of this section.

(6) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas. *

John Whitescarver
Executive Director
National Stormwater Center



- ⇒ Served on team that organized US EPA and wrote Clean Water Act rules; National Expert in Municipal Permitting Policy;
- ⇒ Awarded EPA Bronze Medal for NPDES Development
- ⇒ Appointed to EPA Advisory Committee on Compliance Assistance and Stormwater Phase II
- ⇒ Appointed by Small Business Administration to EPA committee for streamlining Phase II stormwater rules.
- ⇒ Instructor for Florida DEP Erosion & Sediment Control Inspector Course
- ⇒ *Qualified Environmental Professional* by the Institute of Professional

2015 Training Schedule
Certified Stormwater Inspector

Feb 2-3 Nashville, TN
Feb 5-6 Little Rock, AR
Feb 10-11 Charlotte, NC
Feb 23-24 Phoenix, AZ
Feb 26-27 Albuquerque, NM
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Apr 15-AM IDDE
Apr 15 -PM Bacteria
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Our Nation's waters are a valuable resource that ought to be protected from illegal pollution. We support compliance with the Federal Clean Water Act by providing training and services to government and business.

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