THE STORMWATER QUARTERLY

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EPA INTENTIONALLY VIOLATED COURT ODRER, REQUIRED TO STRENGEHEN PHASE 2 PERMITS

Stormwater News

The EPA pretreatment program will be improved. Plans to develop best management practices for Clean Water Act permit writers and pretreatment coordinators are underway as the EPA responds to a September 2014 report by the EPA Inspector General that criticized the agency for being ineffective at regulating discharges of hazardous chemicals to and from wastewater treatment plants.

The agency also plans to clarify reporting guidelines under 40 C.F.R. 403.12(j) and 403.12(p) that spell out reporting procedures for industrial users that discharge chemicals to treatment plants. Updates to a variety of pretreatment guidance documents including a 1994 manual for industrial users to conduct inspection and sampling at treatment plants is also planned.

NPDES permits have always been considered a permit to pollute. Permittees have been "shielded" from prosecution because of the permit. That may have changed for industrial permit holders. In its updated Clean Water Act Multi-Sector General Permit for industrial permittees issued June 5, EPA has explicitly provided that non-stormwater discharges of any pollutants are not authorized and will either have to be eliminated or covered by a separate individual NPDES permit.

The EPA will update its Phase 2 national regulations for stormwater runoff by November 2016. The EPA agreed to the court ordered deadline after a federal court had first ordered EPA to do so in 2003. **Visit http://www.nrdc.org/media/2015/150916.asp**

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Why Did EPA Refuse to Comply with the Court Order and the Clean Water Act for 12 years?

The Ninth Circuit Court of Appeals, in 2003, found that municipal stormwater permits were issued in violation of the Clean Water Act and ordered EPA to take corrective action. EPA refused to do so and so the Court set December 17, 2015 for EPA to act and take final action by November 17, 2016.

The Court held that the Municipal Phase II Rule created an "impermissible self-regulatory system" because it allowed permittees to decide, without any oversight from the permitting agency, which pollution control measures to include in their permits.

The Natural Resources Defense Council and the Environmental Defense Center filed a lawsuit to force the EPA to comply, more than a decade after a federal court had first ordered EPA to do so.

EPA's current rules allow most communities to set their own pollution control standards without meaningful oversight, resulting in lax pollution control measures that the National Research Council has deemed a failure.

The court order requires EPA to update its stormwater permitting rules with a proposed rule by Dec. 17, 2015 and a final rule by Nov. 17, 2016.

Expect an EPA rule to require states to perform meaningful municipal stormwater plan reviews. This utter disregard of the law reflects poorly on EPA headquarters leadership. Someone should be held accountable. Visit: http://www.nrdc.org/media/2015/150916.asp ✻

EPA Approved the Illegal Permit

Florida Construction General Permit Benefits Permittee . . . Illegally

The Florida Department of Environmental Protection, in collusion with the EPA, issued a construction general permit with significant errors that benefit the construction industry. The permit issued in February 2015 has two major errors: (1) The permit gives the contractor "7 calendar days" instead of requiring stabilization "immediately" after grading, and (2) Improperly stating the national standard for the EPA Effluent Guidelines is for the protection of water quality rather than a technology based standard. This last error intentional makes the permit requirement very difficult enforce. A technology standard is easy to enforce.

The EPA Website defines Effluent Limitations Guidelines (ELG): *Effluent Guidelines are national standards for wastewater discharges to surface waters . . . . The standards are technology-based (i.e. they are based on the performance of treatment and control technologies); they are not based on risk or impacts upon receiving waters.*

The permit, *Florida NPDES Generic Permit for Stormwater Discharge from Large and Small Construction - FDEP Document NO. 62-621-300(4)(a),* on Page 11 reads:

> ***"5.4 Do I have to use Stabilization Measures?***
>
> *You must initiate stabilization measures within 7 calendar days after construction activities have temporarily or permanently ceased for any portion of the site."*

The required permit condition from the EPA promulgated Effluent Limitation Guideline (ELG) for the Construction and Development Industrial Category, reads as follows:

> *Stabilization of disturbed areas must, at a minimum, be initiated immediately whenever any clearing, grading, excavating or other earth disturbing activities have permanently ceased on any portion of the site, or temporarily ceased on any portion of the site and will not resume for a period exceeding 14 calendar days.*

The CWA requires permits issued to non-municipal dischargers to require compliance with a level of treatment performance equivalent to "Best Available Technology Economically Achievable (BAT)" or "Best Conventional Pollutant Control Technology (BCT) by July 1, 1989, for existing sources, and consistent with "New Source Performance Standards (NSPS)" for new sources. The EPA Effluent Guideline (EGL) defines BAT, BCT and New Source Performance Standards.

EPA has a process and a checklist to review permits prior to being issued. The checklist requires disapproval of any permit that does not include a specific numerical limit (or other requirement) for any pollutant parameter that is part of an ELG applicable to a discharger. The checklist provides for the use of different language, but only if it is consistent with the Construction and Development (C&D) rule language.

It is not consistent. A FDEP representative explained to this editor that an EPA lawyer approved the improper permit language.

The Florida construction general permit fails to meet this standard. The issued general permit is less stringent that the ELG, therefore illegal. Maybe it's something for the EPA Inspector General to investigate. ✻

A Reluctant Attack on the Failure of EPA Managers

By John Whitescarver

As the editor of 142 issues of the *Stormwater Quarterly*, this is the first issue to criticize the EPA. But the time has arrived.

I'm a graduate of EPA. As a charter employee in 1971, I served on the team to develop a discharge permit program that would be enforceable by both civil and criminal federal laws.

Eighteen months later, I sat in the gallery of the US House of Representatives to observe the passage of the law now referred to as the Clean Water Act. The EPA Assistant Administrator awarded each of us on the team - the EPA Bronze Medal for development of the National Pollutant Discharge Elimination System (NPDES).

After 10 years at EPA I returned to flying and I am now a retired American Airlines pilot.

I consulted with EPA on NPDES issues and in 1989 was retained by EPA to conduct nine public hearings on proposed NPDES stormwater discharge permit regulations and developed stormwater runoff guidance materials. Later I was appointed to EPA Advisory Committees on Compliance Assistance and on the Stormwater Phase II proposed rule.

While I view my life's work as an extension of the EPA family, the time has come to look beyond the family to the importance of the NPDES permit program. Many have served at EPA and state NPDES programs and moved on, I have not.

I founded National Stormwater Center which has provided Certified Stormwater Inspector (CSI) training for 15 years. All instructors have enforcement experience, two with EPA NPDES, two are past state water directors and two are retired municipal utility directors.

Our Nation needs EPA Administrators in both the Office of Water and the Office of Enforcement to provide national leadership. They must hold states NPDES and Enforcement Directors accountable for improving their impaired waters. ✻

Stormwater News

(Continued From Page 1)

Washington State has refused to update the state clean water rules. Therefore, EPA is prepared to propose a new clean-water rule for Washington State. The agency posted the proposed rule on its website.

In early August, Washington was on track to adopt a major rewrite of the state's clean water rules, known as the "fish consumption rule." But Gov. Jay Inslee put that rule on hold and directed the state Department of Ecology to reassess its approach. The EPA says it would halt its own process if Washington submits a plan to them.

American Rivers, the Natural Resources Defense Council and Clean Air Council petitioned EPA to ensure control of significant sources of pollution in the Delaware River Basin.

Because the stormwater Permit program will not adequately solve the problem, the petition asks EPA to use other Clean Water Act authority and issue permits under a provision called residual designation authority (RDA).

If EPA determines that a sector or category of stormwater discharge sources are contributing to water quality violations, the agency must exercise its authority under RDA and require those polluters to have permits which will direct steps toward pollution reduction. Controlling polluted stormwater runoff on the site of private commercial, industrial and institutional facilities with large areas of impervious surface will greatly reduce pollution in streams and the burden of clean up for localities.

Rose Acre Farms in Hyde County NC operates an egg farm. They constructed a detention pond to control surface water. The detention pond, located near a hen house, also picks up small amounts of dust, feathers, and manure. While it does not directly discharge into state or federal waters, the detention pond periodically discharges accumulated precipitation and debris into a nearby canal. Therefore, the state environmental agency required the Rose Acre Farms to obtain a National Pollutant Discharge Elimination System ("NPDES") permit under the Clean Water Act.

However, an NPDES permit cannot be issued if the discharge is not to the Waters of the United States. The courts rejected a claim by Rose Acre Farms that the State is wrong regarding the need for and NPDES permit. The court rejected the appeal by Rose Acre Farms on the jurisdiction of the court, not on the merits of their claim.

The North Carolina Department of Environment and Natural Resources needs to get it right. Is it NPDES or not NPDES, it's not that difficult to determine. ✻

CLEAN WATER WINS IN COURT, POLLUTERS LOSE

THE CHEASPEAKE BAY TMDL PROJECT

The Federal Third Circuit Court of Appeals upheld the legality of Chesapeake Bay Project. The July 6, 2015 ruling ensures that efforts to clean up local rivers, streams, and the Chesapeake Bay will proceed in spite of opposition of the farm industry and many states.

Twenty-one states outside of the region joined the litigation opposing the Bay cleanup plan. They justifiably fear that future clean water efforts will impact their state. The next major clean water project may be the Mississippi River. The loosing states are: Missouri, Indiana, Alabama, Alaska. Arkansas, Florida, Georgia, Kentucky, Louisiana, Michigan, Montana, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia and Wyoming.

The project uses the authority of the Clean Water Act known as a Total Maximum Daily Load (TMDL) to require the states with tributaries to the Bay to develop individual plans on how to achieve those specific limits and to commit to two-year milestones that outline the actions they will take to achieve those limits. EPA promised consequences for failure. The limits, plans, and milestones make up the Chesapeake Clean Water Blueprint.

It is now up to the Bay state Governors to implement the Blueprint. Also, the U.S. Department of Agriculture will need to provide additional financial assistance to the states, specifically to Pennsylvania to reduce pollution from agriculture.

For decades, suspended solids, nitrogen and phosphorus pollution are responsible for the dead zones, fish kills, and harmful algal blooms that annually plague the Chesapeake Bay. The Bay TMDL requires that all pollution control measures needed to fully restore the Bay and its tidal rivers must be in place by 2025, with at least 60 percent of the actions completed by 2017.

In the lower court, Judge Sylvia Rambo ruled for the EPA project by rejecting each of the plaintiffs' complaints, affirmed the Blueprint's sound legal standing, and complimented the "cooperative federalism" the states and EPA exhibited in developing the Blueprint.

The winners are environmental groups, the states that border the Bay, tourists, fishermen, municipal waste water treatment works, and urban centers. The losers are rural counties with farming operations, nonpoint source polluters, the agricultural industry, and those states that would prefer the project to die

Other than the 21 states, the losers are The American Farm Bureau Federation, Pennsylvania Farm Bureau, The Fertilizer Institute, National Chicken Council, U.S. Poultry & Egg Association, National Pork Producers Council, National Corn Growers Association, National Turkey Federation, National Association of Home Builders, and American Farm Bureau Federation..

The losers are expected to appeal their case to the US Supreme Court. ✻

What is the Jurisdiction of the Clean Water Act ?(CWA)

Decided: Waters of the United States

The CWA was written to give Federal authority to regulate the "Nations Waters." This is called the jurisdictional waters of the Act. The 1972 law used the words "navigable waters" but congressional intent was to give the jurisdictional waters the *broadest possible definition*, and the courts have agreed. In 1987, the Congress defined navigable waters to mean the "Waters of the United States." After two Supreme Court decisions, the EPA regulation defining Waters of the US (WOTUS) became final on August 28, 2015 except in 13 states that won a federal court hold on the rule within their states.

Stormwater managers and inspectors need to understand what waters, tributaries, ditches, swales, estuaries are regulated and require NPDES stormwater permits. But first, the judicial decision.

Hours before it took effect Friday, U.S. District Court Judge Ralph Erickson of North Dakota granted a request from 13 states to temporarily block the regulation. Then, the EPA said it would continue to enforce it in the 37 other states not affected by the suit.

The North Dakota judge concluded that the definition advanced by the WOTUS rule "includes vast numbers of waters that are unlikely to have a nexus to navigable waters within any reasonable understanding of the term," thereby exceeding the agencies' jurisdiction.

Additionally, *North Dakota* found that plaintiffs were likely to succeed on the issue of whether the WOTUS rule was arbitrary and capricious on several different bases. First, the court found that the WOTUS rule asserts jurisdiction over waters that are remote and intermittent waters, and that "no evidence actually points to how these intermittent and remote wetlands have any nexus to a navigable -in-fact water." Agency action is arbitrary and capricious under the Administrative Procedure Act (APA) whenever, and the court found here, the agencies "have failed to establish a 'rational connection between the facts found' and the Rule."

The court further found that "The Rule also arbitrarily establishes the distances from a navigable water that are subject to regulation" and notes that an ex-record Engineers' memorandum complained that an adopted 4000-foot boundary distance was, in some instances, under-inclusive.

The court noted that a "bright line" 4000-foot boundary is not necessarily arbitrary, but this confuses the two elements. "Numbers" are inherently arbitrary (i.e. not 4000-foot-one-inch), but whether the agency has established the requisite rational connection between the facts found in the record and its regulatory decision goes to whether the number is *capricious*. Arbitrary versus capricious is not an uncommon misunderstanding.

Third, the court found that: The definition of "neighboring" under the final rule is not likely a logical outgrowth of its definition in the proposed rule. The final rule greatly expanded the definition of "neighboring" such that an interested person would not recognize the promulgated Rule as a logical outgrowth of the proposed rule.

Continued on the next page.

Decided: Waters of the United *continued*

The court then turned to the States' plea of irreparable harm – a higher than standing injury-in-fact doctrine requirement of certain and great harm of such imminence that there is a clear and present need for equitable relief because post-judgment relief would be ineffective.

Here the States represent a unique litigant because WOTUS would preempt their traditional purview over land and water use. The court found that the loss of sovereignty, even temporarily, to be sufficient harm: "Immediately upon the Rule taking effect, the Rule will irreparably diminish the States' power over their waters."

The court found also that the States would suffer economic harm because WOTUS imposed subsidiary regulatory requirements and costs on the States' regulation of other economic processes. The court summarily found that the balance of harms favored the States and the public interest lay in issuing the preliminary injunction. Much more could be said on these often merged points – but in regulatory litigation, the balance of the harm is more critical because the public interest in agency compliance with the law is a given.

EPA and the COE successfully argued that the preliminary injunction should be limited to the 13 plaintiff States. The Fourth Circuit and the Eleventh Circuit dismissed and denied petitions to delay the regulation. The DOJ is expected to appeal the North Dakota decision use the decision of the other courts to support a petition to reverse the North Dakota decision.

Therefore, until the courts rule differently, EPA and the Army Corps of Engineers will implement the prior regulation in the following States: Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, and Wyoming. In all other states, the rule became effective on August 28, 2015.

For stormwater inspectors, the issue is often what are the regulated tributaries of the waters of the United States. The new rule states that a regulated tributary must have a bed, bank and 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. 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.

The following ditches ate not regulated:

(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. ✻

The End

Chemical Spill in West Virginia

Prosecution of Spill Managers is a Wake-Up Call

In West Virginia, the court will soon sentence the owners and managers of Freedom Industries for the massive chemical spill into the Elk River in January 2014. The spill affected the water supply of more than 300,000 people for almost a week.

Former Freedom Industries President Gary Southern pleaded guilty in federal court in Charleston to three counts of a 15-count indictment in connection with the West Virginia chemical spill. He faces 30 days to three years in prison when he is sentenced at 2 p.m. Dec. 16. He also could face several hundred thousand dollars in fines and up to a year of supervised release. He remains free on bond. Southern pleaded guilty to negligent discharge of a pollutant, unlawful discharge of refuse matter and negligent violation of a permit condition. U.S. Attorney Booth Goodwin said following the guilty plea that "**this should serve as a "wakeup call to those who operate chemical storage facilities near our precious water resources**."

"If you place our water at risk, you face prison time," Goodwin said. "As I said when these individuals were charged, this spill, which was completely preventable, happened to take place in this district, but it could have happened anywhere. If we don't want it to happen again, we need to make it crystal clear that those who engage in this kind of criminal behavior will be held accountable. That's exactly what we have done through these prosecutions."

Dennis P. Farrell, 58, a former Freedom president and owner, pleaded guilty to violating the federal Refuse Act and failing to have a pollution prevention plan. Freedom and four other Freedom officials previously pleaded guilty to environmental crimes in March 2015. **Farrell faces a mandatory minimum of 30 days and up to two years in federal prison when he is sentenced Dec. 14.**

Federal prosecutors said Southern and Farrell's criminal conduct included:
Failure to properly maintain the containment area surrounding the tanks at Freedom's Elk River facility and to make necessary repairs to ensure the containment area would contain a chemical spill.
Failure to properly inspect a tank containing the chemical MCHM.
Failure to develop and implement a spill prevention, control and countermeasures plan.
Failure to develop and implement a stormwater pollution prevention plan and groundwater protection plan, both requirements of a National Pollutant Discharge Elimination System Permit.

William E. Tis of Verona, Pa., and Charles E. Herzing of McMurray, Pa., former owners of Freedom, each pleaded guilty in March 2015 to one count concerning the negligent discharge of refuse matter in violation of the federal Refuse Act. **They each face a mandatory minimum of 30 days and up to a year in federal prison.** Tis is set to be sentenced Dec. 2. Herzing is set to be sentenced Dec. 3.

Freedom environmental consultant Robert J. Reynolds of Apex, N.C., and tank farm plant manager Michael E. Burdette of Dunbar were charged separately with violating the federal Clean Water Act. They each pleaded guilty to those charges in March 2015. **They each face up to one year in prison**. Reynolds is set to be sentenced Dec. 7. Burdette's sentencing is set for Dec. 9. ✻

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

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2015 Training Schedule
Certified Stormwater Inspector

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Oct 14-15	Melbourne, FL
Oct 15-16	San Jose, CA
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Nov 5-6	San Antonio, TX
Nov 9-10	San Juan, PR
Nov 9-10	Charleston, WV
Nov 9-10	Seattle, WA
Nov 12-13	Pittsburgh, PA
Nov 16-17	Denver, CO
Dec 7-8	Savannah, GA
Dec 7-8	Raleigh, NC
Dec 14-15	Dallas, TX

Be sure to see our website for our full training and events schedule at **www.NPDES.com**

Email for more information:
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