

SURPRISE: EPA SET TO REVISE SMALL MUNICIPAL STORMWATER PERMIT

Stormwater News

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Ken Kopocis, Deputy Assistant Administrator for EPA's Office of Water, has retired. He was President Obama's nominee to lead the EPA Office of Water. Though never confirmed by the Senate, Ken has worked in various capacities in the water office for several years and took over leadership of the office when Nancy Stoner left in August 2014. He also had a long and distinguished career on Capitol Hill as a key staff person on water issues.

Joel Beauvais, currently serving as an associate administrator in EPA's policy office, will assume the role of Acting Deputy Assistant Administrator for the water office.

The Sixth Circuit Court of Appeals issued a nationwide stay against implementation of the EPA and COE "Waters of the United States" (WOTUS) rule. The Court wanted to avoid irreparable harm should the rule be overturned. On December 8, the 6th Circuit (in Ohio) will hear oral arguments on where the suits should be litigated.

Expect December 17 Announcement

The Ninth Circuit Court of Appeals, in 2003, found that small municipal stormwater permits were issued in violation of the Clean Water Act (Act) and ordered EPA to take corrective action. Finally, EPA might comply with the law this month. Maybe!

The court said that permits issued to small MS4s that do not require a review to determine whether the minimum control measures would actually reduce the discharge of pollutants to the "maximum extent practicable" as required by the Act.

In the past, EPA defined maximum extent practical (MEP) as compliance with the six minimum control measures. EPA needs to provide a pass/fail checklist to permit reviewers. Compliance cannot be subjective and subject to discretion. Also, the court said that the stormwater Phase II Rule did not give the public an adequate opportunity to participate in the stormwater permitting process.

On or before December 17, 2015, EPA must sign for publication in the Federal Register a notice of proposed rulemaking and final rule by November 17, 2016. Also, by May 26, 2016, EPA must give notice as to whether stormwater discharges from forest roads are required to be regulated pursuant to the Act.

A fun proposed rule would have several options that would get the public involved.

See details on page 2.

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COURT TO EPA: REVISE STORMWATER RULES NOW !

In a recent court directed settlement agreement, December 17, 2015 is the date that EPA will propose regulation to require EPA regional office and state NPDES officials to comply with the order of the ninth circuit court of appeals. Read the settlement agreement at:

http://wg.convio.net/site/DocServer/NRDC_EDC_v._EPA_order_Sept_2015.pdf?docID=16604

EPA agreed to change four parts of the Phase II Rule: (1) make review of NOIs mandatory, (2) make the NOIs public, (3) subject NOIs to public hearings, and (4) include forest roads in the Phase II Rule.

In 2003, The Ninth Circuit found that Congress's intent was clear in the language of the Clean Water Act (Act) and that EPA could not issue discharge permits unless the permits contained controls that would "reduce the discharge of pollutants to the maximum extent practicable." Generally, permits were issued to small MS4s without a review to determine whether the measures a small MS4 implemented would actually reduce discharges appropriately.

What is maximum extent practical?

The manpower to comply with the course order is huge. When a state wide general permit is issued, then each regulated small MS4 files a notice of intent to be covered by the permit. The NOI should identify control measures and list milestones for compliance. This is what the state reviewer and the public use to determine if the permittee can achieve the legal standard, to "reduce the discharge of pollutants to the maximum extent practical." So it's not the permit, it's the application (NOI) that must be reviewed.

Virginia's general permit is typical of most states. The City of Richmond has a reasonable plan but they actually state (incorrectly) that they have 5 years to comply. The permit requires annual milestones to be developed.

The NOI should have been rejected by the state.

Also, the court said that Phase II Rule did not give the public notice or opportunity to be heard regarding the NOIs. The Act requires that permit applications and permits issued under the NPDES permit system be available to the public and that there must be an opportunity for a public hearing before permit approval.

The Ninth Circuit noted that Congress clearly required the CWA's public notice and hearing provisions to apply to NOIs because NOIs function as permit applications, subject to these requirements.

The court then considered whether the NOIs were actually available to the public and found that they were not. Although one of the Minimum Measures addressed public participation, dischargers were only required to design a program that complies with state, tribal, and local constraints.

The Ninth Circuit also found the existence of the Freedom of Information Act was not enough to satisfy the public availability requirement because that Act only applies to documents in EPA's possession, not those in the possession of state, tribal, or local authorities.

Likewise, the court found the availability of NOIs under state freedom of information acts insufficient to comply with the CWA because states varied in their public records laws. Holding that certain and uniform availability of NOIs under the Phase II Rule was lacking, the court vacated the part of the Phase II Rule applicable to issuing NOIs under the general permit option.

The case is Environmental Defense Center & Natural Resources Defense Council Inc. v. Environmental Protection Agency, case number 14-80184, in the U.S. Court of Appeals for the Ninth Circuit.

http://wg.convio.net/site/DocServer/NRDC_EDC_v._EPA_order_Sept_2015.pdf?docID=16604 *

NPDES Going Paperless

EPA is requiring NPDES permittees to go paperless. This rule, finalized in late September, requires on line reporting beginning October 2016. This rule requires that NPDES regulated entities electronically submit Discharge Monitoring Reports (DMRs); notice of intent and program reports.

Authorized NPDES programs will also electronically submit NPDES program data to EPA; In Phase 1, EPA will electronically receive reports of inspections, violation determinations, and enforcement actions.

In Phase 2, four years later, state NPDES programs will begin electronically collecting, managing, and sharing the remaining set of NPDES program information including general permit reports, NOI; NOT, No Exposure Certification; Low Erosivity Waiver and Other Waivers from Stormwater Controls; Sewage Sludge/Biosolids Annual Program Report and all other remaining NPDES program reports.

NPDES Electronic Reporting Tool (NeT): NeT is a tool suite developed by EPA to facilitate electronic submittal of data by the regulated community directly to EPA and its partners. It uses commercial "off-the-shelf" software and can support diverse form and data submission formats.

NetDMR is a nationally-available electronic reporting tool, initially designed by states and later adapted for national use by EPA, which can be used by NPDES-regulated facilities to submit discharge monitoring reports (DMRs) electronically to EPA through a secure Internet application over the National Environmental Information Exchange Network

As part of the final rule the EPA will make facility-specific information, like inspection and enforcement history, pollutant monitoring results, and other data required by NPDES permits, accessible to the public through EPA's website. *

Stormwater News

(Continued From Page 1)

A coalition of environmental groups have filed a lawsuit challenging the EPA's Industrial Stormwater Permit, formally known as the Multi Sector General Permit for Stormwater Discharges Associated with Industrial Activity (MSGP).

The permit lacks numeric effluent limits, polluters to monitor for many pollutants that they commonly discharge and denies the public any opportunity to comment on or seek a hearing regarding a polluter's application.

The Rhode Island DOT failed to take appropriate steps to evaluate and address the impact of its highway drainage systems on bodies of water in the state.

The complaint filed by the office of U.S. Attorney alleges that DOT failed to detect and eliminate "illicit connections and discharges of pollutants, including sewage"; failed to inspect, clean and repair its drainage systems, including catch basins; and failed to perform adequate street sweeping to reduce contaminants such as sediment and debris from roadways into waterways. If the consent agreement is approved by a judge, the state will pay a civil penalty of \$315,000

In May, Duke Energy pleaded guilty to federal environmental crimes and agreed to pay \$102 million in fines and restitution for years of illegal pollution leaking from coal-ash dumps at five North Carolina power plants other than the Buck site.

U.S. District Judge Loretta Biggs' rejected dukes request to postpone litigation by environmental groups. The judge expressed doubt that the state Department of Environmental Quality has been diligent in enforcing federal clean water laws over coal ash leaking from Duke Energy storage pits.

Rather than diligently pursuing enforcement against Duke Energy's leaking coal ash basins, the state agency "has been diligently protecting Duke Energy," said Southern Environmental Law Center attorney Frank Hollema.

A settlement signed recently by a company that builds solar power facilities in Massachusetts will remind construction companies that the US Environmental Protection Agency continues to protect the environment from illegal discharges of stormwater.

EPA alleged that Borrego violated its 2012 Construction General Permit by failing to install and maintain erosion controls. EPA alleged that the company failed to: construct adequate stormwater detention basins before construction; construct stormwater detention basins in accordance with good engineering practices; install and maintain silt fencing and other perimeter controls; ensure that discharges to surface waters were treated by an area of undisturbed natural buffer or additional erosion and sediment controls equivalent to a 50-foot natural buffer. *

Is EPA's Stormwater Permit Program Failing?

How to Measure Progress

If NPDES is the most important clean water effort and stormwater is the most important NPDES program, why don't we see cleaner water? Is the water Cleaner? Maybe it is and maybe it isn't.

We don't have a system to measure the progress of NPDES. Maybe the NPDES permit program is working and maybe not.

Let's begin with the failure of EPA to measure progress. That goes back to the beginning of NPDES, the early 1970's. For 20 years, EPA made significant measurable progress in two areas: grants to construct sanitary treatment facilities and enforcement of industrial NPDES wastewater permits.

Cleaner water was obvious but the only measure of water pollution was the US Geological Survey (USGS) in stream measurement called "Storet" meaning storage and retrieval. But, a system to measure that progress through Storet was not established. So today we have a Storet Warehouse that does not measure progress. It's just a warehouse.

State reports to the Congress resulted in a 1987 amendment to the Clean Water Act (Act) to focus on stormwater runoff. The rules and permits have been implement for 25 years, yet no measurement of progress exists.

However, states continue to monitor the quality of their waterbodies and feed the data into a data base used to determine if waterbodies exceed state water quality standards. So we do have lists of impaired water bodies for each state. That list, required by section 303(d) of the Act, is now how we will measure progress.

Each state can be held accountable for improving the water bodies and the evidence of state performance will be the reduction of impaired waters. There must be a REPORT CARD for each state.

States are required to submit their impaired waters lists by April 1 of even-numbered years. Many states don't report when they should. The following information in the table on the next page is from EPA's Web Site: http://iaspub.epa.gov/tmdl_waters10/attains_index.home

... note that state detailed reports are on this site. Getting states to do their job will require penalties in the form of grant reductions.

All states receive grants to operate NPDES under section 106 of the Act. The formula cannot be modified to reduce grant amounts when states fail to perform. So EPA should put poor performance states on probation with a threat to their NPDES authority, or a portion of it. That process will result in a public hearing and bad publicity.

While we wait to measure state progress, there is weakness in NPDES that can be remedied. EPA headquarters must improve national NPDES leadership. Seven years without a confirmed Office of Water Administrator is not good.

EPA Headquarters continues to approve flawed state NPDES permits. The previous Stormwater Quarterly identified Florida's Stormwater Construction general permit that was approved by EPA with several significant errors. Florida DEP incorrectly stated that Effluent Guideline Categorical standards were water quality based. They are technology based and easy to enforce. That is, unless EPA allows the state permittee to call them water quality based. Now technology based standard are not enforceable. Finally, EPA headquarters defied a direct order of the 9th circuit court of appeals for twelve years. National NPDES leadership is necessary.

The current impaired list of state numbers is on the next page. Some will agree that the number are not valid. If so, they should be fixed. It's the most important tool to measure progress.

NUMBERS OF IMPAIRED WATERS

http://iaspub.epa.gov/tmdl_waters10/attains_index.home

State	Impaired	Report
Alabama	220	2014
Alaska	35	2010
Arizona	90	2010
Arkansas	225	2008
American Samoa	45	2014
California	1,052	2012
Colorado	293	2012
Connecticut	286	2014
Delaware	101	2006
District of Columbia	36	2014
Florida	2,292	2010
Georgia	242	2012
Guam	47	2010
Hawaii	352	2014
Idaho	741	2012
Illinois	1,057	2006
Indiana	1,836	2008
Iowa	480	2012
Kansas	1,372	2014
Kentucky	1,433	2012
Louisiana	236	2012
Maine	113	2012
Maryland	337	2012
Massachusetts	720	2012
Michigan	2,584	2010
Minnesota	1,592	2012
Mississippi	229	2012
Missouri	270	2014

Montana	480	2014
N. Mariana Islands	24	2014
Nebraska	342	2014
Nevada	210	2012
New Hampshire	1,449	2010
New Jersey	710	2012
New Mexico	237	2014
New York	1,543	2012
North Carolina	1,152	2014
North Dakota	217	2014
Ohio	267	2008
Oklahoma	635	2014
Oregon	1,397	2006
Pennsylvania	6,957	2004
Puerto Rico	195	2014
Rhode Island	121	2014
South Carolina	907	2012
South Dakota	166	2014
Tennessee	1,012	2012
Texas	719	2010
Utah	156	2010
Vermont	104	2012
Virgin Islands	87	2012
Virginia	1,490	2012
Washington	2,420	2008
West Virginia	1,097	2010
Wisconsin	663	2008
Wyoming	107	2012
Total	43,180	

A pre-distribution reader’s comment: *“of the universe of impairments that result from presently regulated sources - like sewer overflows and municipal stormwater - states need to show real progress or explain to EPA and more importantly their public why that is.”* This comment fits with the suggested NPDES probation and a public hearing.

Improving the Stormwater Permit Program

If NPDES is the most important clean water effort and if stormwater permitting is the most important NPDES program, then illicit discharge elimination is the most important stormwater permit requirement.

A review of municipal stormwater compliance reports generally shows very little effort, some annual reports identify only a minimum number of illicit discharges removed each year. Discussions with several hundred municipal inspectors indicate a low understanding of the requirement and little interest in enforcement of the required illicit elimination ordinance.

Illicit Discharge Elimination

States tend to downplay the illicit requirement by calling it a non stormwater requirement rather than an illicit discharge requirement. Many states fail to explain that waste or wastewater in a drainage system (a street or a road with a ditch) is an enforceable illicit discharge. During a rain event when waste is mixed with runoff, the result is an illicit discharge.

For example, if the following are in a road with draining or in a street, they are illicit discharges: waste from dumpsters and roll-offs, pressure washing, grass and leaves, trash, dirt from construction track-out, deicing salt/sand waste, household waste and any other discharge that is not entirely wastewater.

All municipal stormwater permits define illicit discharge as: “any discharge to a municipal separate storm sewer that is not entirely composed of storm water, except discharges authorized under an NPDES permit and discharges resulting from firefighting activities.”

“Entirely stormwater” doesn’t mean zero pollutants. Common sense would say that pollutants in the stormwater runoff that are *incidental* to the runoff is “entirely stormwater.”

Another View Point

In a presentation by Paul Davis (Tennessee Water Management Director for 22 years, retired) to the Association of Clean Water Administrators, he identified stormwater program weakness. He suggested the state NPDES administrators do the following:

- Focus on key permit conditions;
- Make reporting useful to the regulatory agencies, public and the permittee;
- Define measurable goals;
- Do Public participation;
- Require illicit discharge enforcement;
- Make better use of technology to manage stormwater runoff;
- Require Inspection of low impact development (LID);
- Identify good sources for assistance including stormwater associations.

In the absence of EPA leadership the Association of Clean Water Administrators, is ideally situated to improve the stormwater program. EPA should consider funding them to train state and EPA NPDES stormwater coordinators. Such training must be continuous and focus on discharges to impaired waters. Visit

<http://www.acwa-us.org>

The Public

There are three roles for the public: (1) comment on pollution prevention plans (2) report illicit discharges and (3) sue the municipality for permit noncompliance.

Revised rules (page 2 article) will open the door for residents, environmental groups and citizen activists to put the comments on the record and to know their comments were considered.

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More Stormwater Permitting Improvements

The National Stormwater Center has trained and certified 3,500 municipal, construction and industrial inspectors. Their names are listed at NPDES.com. Their instructors report the need for state stormwater coordinators and municipal stormwater administrators to:

1. Better understand how to comply with each permit requirement
2. Produce better annual reports that are helpful to the public
3. Understand that “measurable goals” are to evaluate program effectiveness
4. Make presentations to community groups
5. Form a stakeholder group to edit a draft stormwater management plan
6. Meet with developers to define active construction and post construction controls.

Small municipal permits are not complex, there are only six minimum control measures. It’s not difficult to understand that wastewater in the streets violates the local ordinance. Finding only several illicit discharges a year completely undermines the specific requirement of the Clean Water Act and the intent of Congress. State stormwater coordinators must do their job—require permit compliance.

Annual reports are not very good. Generally, they are vague and not useful to either the state or the public. State stormwater coordinators need to evaluate each municipal annual report. The evaluation report goes to the municipality for clarification as necessary.

States have allowed municipal permittees to report measurable goals just to have a number. The purpose of a measurable goal is to measure the specific effectiveness of a control measure. The sum of the goals should reflect total program effectiveness. EPA region 6 has a useful municipal stormwater self audit. Every regulated stormwater municipality should be directed to do a self audit report which should be publicly available.

The permit public information requirement is designed to provide useful information to the public so they understand the impacts of storm water discharges on water bodies and the steps that the public can take to prevent pollution. There are a variety of media for communication other than the internet. The permit requires the municipality to determine the best use of the media to communicate with the public. Determining a specific message for each of the different audiences requires an analysis of cost and effectiveness.

Public involvement is required by the Clean Water Act. Section 104 states: “EPA and states [are] to encourage and assist the public to participate in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program.” This requires EPA and the states to do what they have refused to do - provide for citizen suits, public comments and opportunity for a public hearing.

Finally, municipal inspectors have a problem getting construction contractors to remove dirt in the street at construction exits. It is enforceable under both the state issued stormwater construction permit and the municipal stormwater permit. Inspectors may want to consider their personal liability for a fatal accident due to dirt in the street that they failed report. *

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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Certified Stormwater Inspector

Dec 7-8	Raleigh, NC
Dec 14-15	Dallas, TX
Jan 11-14	Online
Jan 21-22	New Orleans, LA
Jan 25-26	San Diego, CA
Jan 27-28	LAX, CA
Feb 8-9	Phoenix, AZ
Feb 11-12	Albuquerque, NM
Feb 17-18	San Antonio, TX
Feb 17-18	Gainesville, FL
Feb 22-23	Savannah, GA
Feb 25-26	Charleston, SC
Mar 7-8	San Jose, CA
Mar 10-11	Oakland, CA
Mar 14-15	Houston, TX
Mar 17-18	Dallas, TX
Mar 28-29	Seattle, WA

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

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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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