

## EPA PROPOSAL FOR SMALL MUNICIPAL STORMWATER PERMIT

### *Stormwater News*

*Continued on Page Three*

**EPA's biggest court case in 2105 was brought against Duke Energy** for spilling coal ash into local rivers. The company was convicted of violating the Clean Water Act, fined \$68 million and agreed to pay \$34 million for environmental projects in North Carolina and Virginia, according to EPA.

**The Department of Justice lodged two proposed consent decrees with Puerto Rico.** One is against the Puerto Rico Department of Natural and Environmental Resources (DNER) for violations at three of its storm water pump stations in San Juan. The proposed consent decree requires DNER to apply for a permit and implement a Storm Water Management Program.

The other consent decree is against the Puerto Rico Department of Transportation for violations throughout their storm sewer systems located within San Juan. The proposed consent decree has no civil penalties due to financial challenges currently facing Puerto Rico.

**California clean water advocates want to roll back a new requirement that prevents citizen groups from suing cities that are developing stormwater pollution control plans.** The Regional Water Quality Control Board angered environmentalists when they adopted changes to a stormwater pollution permit that keeps cities from being sued while they develop their stormwater pollution control plan.

### A Strong Order, A Weak Proposal

Last month, EPA proposed regulations to make major changes to stormwater permits for small municipalities. EPA responded to a 2003 order of the Ninth Circuit Court of Appeals. The proposal should require permit authorities (EPA and approved states) to issue stormwater permits requiring controls to "reduce the discharge of pollutants to the maximum extent practicable." Current EPA regulations do not.

EPA's proposal is a weak response to the order of the Court. EPA began discussion with the state in 2004 and in August 2015, EPA revealed this proposal to the states. Apparently they prefer a state program rather than a national program. It could create 46 different NPDES stormwater permit programs.

However the law provides for EPA to define maximum extent practicable (MEP) in MS4 permits with states allowed to add "such other provisions as the Administrator or the State determines appropriate." See pages 5 and 7.

Another weakness is the public process. The proposal requires a 30-day public notice and opportunity for a public hearing. But the Clean Water Act (Act), Section 101(e), requires "*public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator . . . shall be provided for, encouraged, and assisted by the EPA and the states.*"

This proposal is a public participation opportunity, so why not participate.

Visit the 2003 Ninth Circuit Court decision at: <http://openjurist.org/344/f3d/832/environmental-defense-center-inc-natural-resources-defense-council-inc-intervenor-v-united-states-en>

### INSIDE THIS ISSUE

Page 2 - EPA Proposed Response to Remand of SMS4

Page 3 - Editor: The Do Nothing EPA

Page 4 - What Happened to Public Participation?

Page 7 - Enforcement of Municipal Permittees

## All MS4 Permits Subject to a Meaningful Review

# PROPOSED STORMWATER PHASE 2 PERMIT PROPOSAL

<http://www.epa.gov/npdes/stormwater-rules-and-notice#proposed>

In 2003 the Ninth Circuit Court of Appeals remanded three parts of the NPDES stormwater program. Twelve years later, the EPA responded with the following proposal on two remands of the issues: (1) to make stormwater permits issued to regulated small municipal stormwater separate sewer systems (sMS4) meet the requirements of the Clean Water Act (Act) and (2) provide for adequate public participation in the development of the sMS4 permits.

The federal register notice on January 6 requests public comments by March 21, 2006. EPA is expected to promulgate the final regulation by November 16, 2016.

EPA proposed three options: (1) the permitting authorities (states) decide the permit requirements, (2) The municipal permittee selects permit condition and the state approves the permit conditions with public input and (3) states select either option or both. The proposed modifications do not change the six minimum control measures.

**Under these options, local governments will not be allowed to decide on measures to achieve compliance without the permitting authority approval and public input to the decision.**

### Option 1

#### **Traditional General Permit Approach**

The small Municipal stormwater separate storm sewer system (MS4) filing of the Notice of Intent (NOI) would no longer include BMPs and measurable goals selected by the permittee. It is the permitting authority's responsibility, and not that of the small MS4 permittee, to establish permit terms that meet the small MS4 regulatory standard and to describe the requirements for implementing the six minimum control measures.

The proposal reiterates that effluent limitations may be in the form of best management practices

(BMPs), and provides examples of how these BMP requirements may appear in the permit. These can be specific tasks, design requirements, performance requirements or benchmarks, schedules for implementation and maintenance, and the frequency of actions.

The small MS4 operator is still required to develop a stormwater management plan (SWMP). However, the stated purpose of the SWMP is clarified to emphasize that it is a tool for describing how the permittee will comply with the permit requirements implementing the six minimum control measures, and does not contain effluent limitations or permit conditions. The role of the SWMP document is to describe in writing how the permittee will comply with the permit requirements

### Option 2

#### **Procedural Approach**

The option does not change to the regulation, it simply adds new procedures once an MS4 operator submits its NOI requesting coverage under the general permit.

An additional step would take place in which the permitting authority would review, and the public would be given an opportunity to comment and request a hearing on the merits of the MS4's proposed BMPs and measurable goals for complying with the requirement to reduce discharges to the MEP.

EPA would keep the existing regulatory requirement for the small MS4 to submit an NOI with the BMPs and measurable goals and to develop, implement, and enforce a SWMP. The NOI would continue to serve as the document that describes the BMPs and measurable goals that would be considered to be the enforceable requirements, not the permit.

*Continued on page 6*

## What is the EPA Plan?

The Ninth Circuit Court of Appeals remanded the EPA regulation in 2003. Why did EPA delay 12 years? Why is EPA reluctant to define “maximum extent practical?” By proposing a rule that will be challenged again, it appears that EPA wants another delay, and they may get it.

The tactic of using the courts to avoid compliance with the law is not new. It’s a legal maneuver to do nothing. EPA must know that the proposed rule will be back in court in 2017.

The current regulation allows state NPDES managers to make NPDES permits more stringent than the EPA regulation so as to protect water quality. Also, states develop their own water quality standards, subject to EPA approval. But no former EPA administration has authorized NPDES states to develop minimum permit requirements.

In 1972, Congress gave the federal government control over water quality permitting (using the commerce clause of the constitution). EPA can not give it back. There are states that would be more stringent and those that would be less stringent.

The intent of the 1972 Congress was to have “no havens for polluters” under NPDES. Surely this proposal would allow some states to require very little from municipal dischargers, a violation of congressional intent.

The 46 approved states lack the staff to do what is required by the court. The court stated, “That the Rule allows a permitting authority to review an NOI is not enough; every permit must comply with the standards articulated by the Clean Water Act, and unless every NOI issued under general permit is reviewed, there is no way to ensure that such compliance has been achieved.”

The court held that the lack of review “to ensure that the measures that any given operator of a small MS4 has decided to undertake will *in fact* reduce discharges of pollutants to the maximum extent practicable” also does not comport with CWA requirements.

There should not be 47 different NPDES permit programs. EPA need to request a extension of time to write a better proposal. \*

## Stormwater News

(Continued From Page 1)

**The city of Leavenworth will be required to spend \$85,000 for violating the federal Clean Water Act.** The payments come after the Environmental Protection Agency documented 19 sewer overflows between 2010 and 2015 from the city's water treatment plant near the Missouri River. The overflows sent sewer water into the river. The Topeka Capital-Journal reports the city must pay \$46,200 in penalties and spend \$38,800 for improvements to its storm water system.

**A federal judge in California has ordered auto dismantler Pick-in-Pull to mitigate the discharge of polluted stormwater into Elkhorn Slough and pay \$72,000 to seed a fund for environmental restoration.**

The contaminated stormwater was discovered in December 2014 by volunteers for the Ecological Rights Foundation, who noticed that the gray water emerging from a 12-inch pipe into Elkhorn Slough possessed a powerful hydrocarbon odor and contained an oily sheen.

**EPA recently released a new tool to assist small residential lot builders in developing their required stormwater pollution prevention plan,** for EPA's Construction General Permit (CGP). The Small Residential Lot SWPPP Template is an optional, easy-to-complete document that streamlines SWPPP development and is fully compliant with SWPPP requirements in EPA's CGP.

In Alaska, the Matanuska-Susitna Borough and a Palmer contractor paid about \$18,000 in penalties for federal stormwater permit violations at the new Talkeetna library.

The contractor claims there were no violations of permits required to control stormwater runoff that can pollute waterways. There was no pollution involved, the problem hinged on issues with paperwork that should have been filled out to indicate contractors were following permit requirements. The borough paid about \$4,500 in penalties.

## **EPA PROPOSED PUBLIC PARTICIPATION IS INADEQUATE**

**The court remanded the public participation rule but EPA has failed to fix it. This article looks at the EPA proposal, the court decision, the Act and a recommendation.**

### **EPA Proposal**

EPA did not address the court's remand of the public review and comment issue. There is no change in EPA policy or regulations. The proposed traditional approach would issue permits "which would be subject to public notice and comment and an opportunity to request a hearing."

The proposal does recommend permitting authorities provide "public notice and the minimum 30-day comment period on the draft permit, and the opportunity to request a public hearing, . . ." however, EPA states that "[this] will fulfill the permitting authority review and public participation requirements of the CWA that the court found missing from the Phase II regulations."

This statement is incorrect. The court remanded the same process that EPA is proposing.

### **The Court**

The court held that failure to require public notice and the opportunity for a public hearing for NOIs under the Phase II rule is contrary to the Clean Water Act. The court went much further with its criticism of the permitting process.

"We conclude that EPA's interpretation of [the ACT] in 33 U.S.C. § 1342(j), as embodied in the provisions of the Phase II Rule providing for the public availability of NOIs, is manifestly contrary to the Clean Water Act, **which contemplates greater scope, greater certainty, and greater uniformity of public availability** than the Phase II Rule provides."

The court considered whether the NOIs were actually available to the public and found that they were not.

Although one of the Minimum Control Measures (MCM) addressed public participation, that MCM

does not apply to the permit issuance. 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.

Holding that 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 CWA**

**Page 2 of the Clean Water Act makes very clear that congress intended the public to be involved in the development, revision and enforcement of NPDES permits.**

*Sect 101 (e) Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this Act shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.*

EPA and the states do not comply with the law by simply requesting public comments and the opportunity to request a public hearing. There is little or no effort to encouraging public participation.

Industrial stormwater permits may have a few public hearings, but it's unlikely that a public hearing for a small municipal separate stormwater sewer system would be approved. There are informal public meetings that don't require a court reporter.

*Continued on the next page*

# Public Participation and NPDES Stormwater Permits

*continued from page 4*

## EPA Regulations

State NPDES programs are regulated under 40CFR123. Public participation is addressed as follows:

*40CFR123.26 (b) (4) Procedures for receiving and ensuring proper consideration of information submitted by the Public about violations. Public effort in reporting violations **shall be encouraged**, and the State Director shall make available information on reporting procedures.*

*40CFR123.27(d) Any State administering a program shall provide for public participation in the State **enforcement process** by providing either: (1) Authority which allows intervention as of right in any civil or administrative action to obtain remedies specified in paragraphs (a)(1), (2) or (3) of this section by any citizen having an interest which is or may be adversely affected; or*

*(2) Assurance that the State agency or enforcement authority will: (i) **Investigate and provide written responses to all citizen complaints** submitted pursuant to the procedures specified in § 123.26(b) (4); (ii) Not oppose intervention by any citizen when permissive intervention may be authorized by statute, rule, or regulation; and (iii) Publish notice of and provide at least 30 days for public comment on any proposed settlement of a State enforcement action.*

*40CFR12335(g) EPA plans to develop a menu of BMPs that will apply in each State or Tribe that has not developed its own menu.*

**Note that states must investigate all citizen complaints.**

## Recommendations by the National Stormwater Center

To comply with the first remand regarding permit conditions, EPA must define the standard required by the Act. What is MEP - “maximum extent practicable” ?

EPA decided not to define MEP so as to provide maximum flexibility for municipalities. That was a EPA first mistake. Congress listed three requirements for the definition: (1) management, (2) controls and methods, and (3) such other provisions. The second EPA mistake not to recognize that MEP is a technology standard and water quality is a consideration by states only as “such other provisions”. The first two are EPA responsibility, the third allows the state to add additional controls. See the exact language on page 7.

EPA should define MEP as runoff management with specific controls and methods. Congress did not list cost as a specific consideration but did require MEP to be practical.

Public participation is difficult when elected municipal officials consider citizen activists as *trouble makers*, (often they are). But governments must follow the law and encourage citizen involvement in all of NPDES.

The Ninth Circuit wrote that EPA’s rules for providing for the public availability of NOIs, is “manifestly contrary to the Clean Water Act, which contemplates greater scope, greater certainty, and greater uniformity of public availability than the Phase II Rule provides.”

Finally, EPA must audit state NPDES programs and hold public meetings in each state with respect to the audit. \*

## **SALT LAKE COUNTY PAYS \$280,000 PENALTY FOR STORMWATER PERMIT NONCOMPLIANCE**

State inspections conducted by the state in 2007 and then by EPA in 2012 found the county had failed to comply with their permit, resulting in inadequate storm water control that likely persisted for several years. Walter Baker, the director of the Utah Division of Water Quality, said the settlement decree will bring an end to what they view as the county's long-running failure.

Baker said the initial, routine inspection in 2007 found numerous deficiencies the county was asked to address. When the EPA came in for a follow-up audit in 2012, Baker said, the original deficiencies were not only still present, but had actually grown worse.

The fact that the county had not responded to the original request for compliance was taken into account when the \$280,000 penalty was calculated, Baker said, resulting in the largest storm water penalty ever assessed in the state of Utah.

If the consent decree is approved after a public comment period set to close Jan. 22, half of the penalty will be paid to the state of Utah directly; the other half will go to the EPA.

The EPA's 67-page audit of the county's storm water operations identifies dozens of shortfalls, including insufficient monitoring and reporting, failure to conduct required site inspections, failure to properly remediate discharges of polluted water, and even one instance of illegal discharge from a county facility. The audit concluded that the county's storm water program lacked sufficient resources, was understaffed, and that the staff on hand lacked adequate training.

Russ Wall, director of public works for Salt Lake County, said most of the deficiencies identified by the state and by the EPA were related to record-keeping. "We had been complying," he said. "But we hadn't been documenting everything we were doing, so there was no proof of what we had been doing."

In addition to levying a fine, the consent decree requires the county to hire more staff and ensure they are properly trained to conduct routine inspections and improve storm water monitoring.

Russ Wall, making an excuse for noncompliance said the county had not been aware of the EPA's record-keeping requirements but has since hired additional clerical staff to keep records and to help with monitoring and inspections.

"We have an obligation to monitor every single gutter and ditch, and that takes a lot of time and effort," Wall said. Wall said the state's waterways were never in any real danger.

"I think that there was probably some misunderstanding of their state and EPA expectation, and when they came in and audited us ... we didn't understand fully what they were asking for," Wall said. "We believe that they could have given us better explanations of what their expectations were."

The county's storm water program oversees only unincorporated areas — municipalities, including Salt Lake City, have their own storm water programs — but Salt Lake County still represents one of the four largest storm water management areas in the state, with more than 300 miles of waterways under its jurisdiction.

# PROPOSED STORMWATER PHASE 2 PERMIT PROPOSAL

continued from page 2

## Option 2 *Continued from page 2*

Following the receipt of an NOI for permit coverage, the permitting authority would review the NOI to assess whether the proposed BMPs and measurable goals meet the requirements to reduce pollutants to the MEP. If not, the permitting authority would request supplemental information or revisions as necessary to ensure that the submission satisfies the regulatory requirements. Once satisfied with the submission, the Procedural Approach would require the permitting authority to provide public notice of the NOI and an opportunity to request a hearing on the NOI.

When a change to BMPs is “substantial” it requires a full public participation process. If “not substantial” the change would be subject to public notice but not public comment.

## Option 3 State Choice Approach

Authorized states would choose either or both option 1 or option 2. They would need to revise their approved programs to include the option(s) chosen and to establish the public notice and comment, hearing request procedures necessary to implement the chosen option(s).

## Editor

The court found that “under the Phase II Rule, nothing prevents the operator of a small MS4 from misunderstanding or misrepresenting its own stormwater situation and proposing a set of minimum measures for itself that would reduce discharges by far less than the maximum extent practicable.”

None of the options proposed by EPA will encourage local governments to reduce pollutants to the maximum extent practical. Compliance is the responsibility of elected officials and they do respond to the voting public.

## THOUGHTS

**The Act defined the standard and the Court documents the EPA problem. Is the EPA proposal sufficient or will it go back to the court?**

## The CWA STANDARD for SMS4s

**(B) Municipal discharge:** Permits for discharges from municipal storm sewers—may be issued on a system- or jurisdiction-wide basis;

(i) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(ii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable including

(a) management practices,

(b) control techniques and system, design and engineering methods, and

(c) such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

## THE COURT WROTE:

. . . stormwater management programs that are designed by regulated parties must, in every instance, **be subject to meaningful review** by an appropriate regulating entity to ensure that each such program reduces the discharge of pollutants to the maximum extent practicable. . . . Congress identified public participation rights as a critical means of advancing the goals of the Clean Water Act in its primary statement of the Act's approach and philosophy. \*

**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 Environmental Practice

**2015-2016 Training Schedule**  
**Certified Stormwater Inspector**

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
Mar 30-Apr 1	Portland/Vancouver
Apr 4-5	Columbia, SC
Apr 7-8	Atlanta, GA
Apr 11-12	Denver, CO
Apr 14-15	Kansas City, KS
Apr 19-19	Pittsburgh, PA
Apr 21-22	Charleston, WV

Be sure to see our website for our full training and events schedule at **[www.NPDES.com](http://www.NPDES.com)**

**Email for more information:**  
**[info@npdes.com](mailto:info@npdes.com)**

**Fair Use Notice**

The *Stormwater Quarterly* contains copyrighted material which may not always be specifically authorized by the copyright owner. "Fair Use" of copyrighted material is provided for in Section 107 of the U.S. Copyright Law. We distribute some material, without profit, to those who express a prior interest in receiving information for research and educational purposes. The information in the publication is for informational purposes only.

**National Stormwater Center Also Offers:**

- ◆ Certified Inspector Training Courses
- ◆ SWPPP Templates
- ◆ Analytical Sampling Assistance
- ◆ Compliance Tracking
- ◆ Online Training for Industry
- ◆ Online Training for MS4s

**Call us for information at 888-397-9414**



*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.*

National Stormwater Center  
107 F East Broadway Street  
Bel Air, MD 21014