

## COURT MAY REQUIRE EPA & STATES TO APPROVE MUNICIPAL STORMWATER MANAGEMENT PLANS

### *Stormwater News*

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The US Congress passed a bill to fund the federal government until October 2015. The bill cuts EPA's budget by \$60 million, providing \$8.1 billion. Also, it will reduce the Agency's staff levels, reported to be the lowest in 25 years.

The law will require the EPA and U.S. Army Corps of Engineers to withdraw their "interpretive rule" issued last March, which clarifies the jurisdiction of the Clean Water Act defining the waters of the US. The interpretative rule is not a rule, it's a three-page memorandum which is guidance.

So what appears to be a significant attack on EPA, it is nothing. Congress left the Proposed Rule on the books, which is the EPA proposal of April 21, 2014, entitled Definition of "Waters of the United States" under the Clean Water Act.

The congressional bill also allows exceptions for agricultural waste, prohibiting the EPA from regulating farm ponds and irrigation ditches. This may not be important because EPA does not regulate irrigation return flows. Ponds could be an important issue.

The Connecticut Department of Energy and Environmental Protection intends to modify proposed permit regulations governing municipal storm water systems to please municipal officials. The permit will relax street sweeping, cleaning of catch basins, management of fallen leaves, and water quality monitoring of storm water discharges.

### STORMWATER PLANS MUST HAVE A MEANINGFUL REVIEW

The Ninth Circuit Court of Appeals, in 2003, ordered EPA to require approval of municipal stormwater management plans. EPA has not, so it is back in the hands of the Ninth Circuit.

Environmental Defense Center, Inc. and the Natural Resources Defense Council have filed what is called a Petition for a Writ of Mandamus to require EPA to comply with the court order.

In 2003, the 9<sup>th</sup> Circuit decided *"that the EPA's failure to require review of NOIs, which are the functional equivalents of permits under the Phase II General Permit option, and its failure to make NOIs available to the public or subject to public hearings contravene the express requirements of the Clean Water Act. We therefore remand these aspects of the Small MS4 General Permit option so that EPA may take appropriate action to comply with the Clean Water Act."*

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 petitioners have asked the court to order the EPA to immediately revise the regulation directing state permit authorities to comply with the 2003 decision and secondly to proposed revised regulation within six months and finalize the rules within a year. \*

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# Mobile, Alabama Declares War Litter

The Mayor of Mobile, Sandy Stimpson said recently, “*Mobile is going to take the appropriate steps and actions to clean up our City, enforce our codes and, together, make Mobile the envy of America's great cities. I hereby declare a War on Blight and Litter!*”

It began with the city council passing a trash & litter ordinance that does the following:

- ◆ Litter receptacles, including cigarette receptacles, are required on commercial premises at entrances, employee smoking areas and common pedestrian transition points.
- ◆ Prohibition of "junk" vehicles kept by owners, tenants and occupants.
- ◆ Properties surrounding multi-family residential premises or places of assembly must be free of litter, just as commercial premises must be free of litter
- ◆ Cigarette butts are now specifically prohibited from being deposited onto city streets, alleys, stormwater structures, ditches or waterways.
- ◆ All dumpsters must now be enclosed.
- ◆ Prohibition of signs on trees or utility poles in the City Rights-of-Way, without exception.
- ◆ Both owners and occupants will be held responsible for a property in question.

This article is taken directly from the new trash ordinance. The city expects voluntarily participation but appears to be willing to take action for intentional non-compliance. The first part of their ordinance is to define trash, garbage, litter, owner, occupant, and nuisance.

*Trash* is non-recycled solid wastes consisting of yard clippings, leaves, wood, tree limbs and trunks, bedding, appliances, paper and cardboard, plastics, wood, wrappings, cans and similar materials.

*Litter* is any garbage, refuse, non-containerized man-made solid waste, including but not limited to paper, plastic, diapers, cigarette butts, bottles, cans, glass, crockery, scrap metal, construction materials, rubbish, disposable packages or containers.

*Junk* includes any vehicle or vehicle parts, junked vehicle, rubber tires, appliances, dilapidated furniture, machinery, equipment, building material or other items which are either in a wholly or partially rusted, wrecked, junked, dismantled or inoperative condition.

## Several Important Requirements

“It shall be a violation of this article for any owner or occupant of private property to fail to keep their

premises free and clear of litter, garbage, trash, junk, high grass and weeds, as defined under public nuisance.”

“All occupants of commercial premises shall: store their trash, garbage or litter in bulk containers; maintain their premises to be clean, neat and sanitary; and shall prevent litter from blowing or washing on to adjacent property, thoroughfares, or into storm drains or waterways. Spillage and overflow around the bulk containers shall immediately be cleaned up as it occurs.”

“All dumpsters shall be enclosed within a wooden or brick enclosure of at least the height of the dumpster which is being enclosed, but in no case to exceed eight (8) feet in height.”

“The dumpster enclosure may also be equipped with a door or gate constructed of wood or other opaque material that opens outward and which remains closed unless the dumpster is being filled or emptied.”

“The dumpster enclosure must be of sufficient size to allow for placement and removal of the dumpster without causing damage to the enclosure and must be kept in good repair and condition.”

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## 2003 Ninth Circuit Court Decisions

### Decision 1: Stormwater Plans Must be Reviewed

The Ninth Circuit found that Congress's intent was clear in the language of the Clean Water Act (CWA) 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 (MEP)."

When there is no review of the permit application by the permit issuing authority, there is no assurance that the municipal permittee intends to meet the Congressional standard of MEP. Therefore the Ninth Circuit rejected the NOI (application) of the Phase II Rule because it was in opposition to Congress's intent.

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." The Court remand this aspect of the rule back to EPA. But EPA has not responded to the remand that was issued in 2003.

### Decision 2: NOI's are Public Documents

The Court decided that the EPA Stormwater Phase II Rule did not provide public notice or an opportunity to be heard with respect the Notice of Intent (NOI).

The Court stated: "NOIs are functionally equivalent to the permit applications [that] Congress envisioned when it created the Clean Water Act's public availability and public hearing requirements."

Because the current NOI represents no more than a formal acceptance of terms elaborated elsewhere, 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, so the Court vacated the part of the Phase II Rule applicable to issuing NOIs under the general permit option. \*

## Stormwater News

(Continued From Page 1)

**The EPA plans to issue drinking water health advisories** for cyanobacteria, the harmful forms of blue-green algae that contaminated water supplies in Toledo, Ohio, and resulted in a weekend water ban last August. The agency is also working on health advisories for microcystin L-R and cylindrospermopsin. These are scheduled for release in May 2015.

All three forms of harmful algae blooms, release toxins. In particular, freshwater cyanobacterial blooms that produce highly potent cyanotoxins are known as cyanobacterial HABs (cyanoHABs). These species are capable of producing compounds that are hepatotoxic (affect the liver), neurotoxic (affect the nervous system) and acutely dermatotoxic (affect the skin), according to EPA.

**The EPA has published an erosion factor calculator for construction permittees to calculate their rainfall erosivity factor** - the "R" in the Revised Universal Soil Loss Equation (RUSLE). The updated calculator uses data from the Natural Resources Conservation Service's "Revised Universal Soil Loss Equation, Version 2" (RUSLE2) database. A construction stormwater permit is not required when the R value is less than 5. Visit <http://water.epa.gov/polwaste/npdes/stormwater/Welcome-to-the-Rainfall-Erosivity-Factor-Calculator.cfm>

**Just days before leaving Washington for its holiday recess, Congress sent the Howard Coble Coast Guard and Maritime Transportation Act of 2014 to the White House.** President Obama signed it Dec. 18.

The new legislation delays, until at least 2017, the expiring prohibition against the EPA, or any state that administers the NPDES permit program under an agreement with the federal agency, from requiring that fishing boats obtain a permit for any discharge incidental to the normal operation of the vessel. That includes water used to wash down the boat's decks.

**A Georgia man, Patrick Brightwell, was sentenced to 10 months in prison for discharging waste into Potomac River.** He was charged for the discharge of waste into the Potomac River from 2009 through 2011, during the same period he managed the company hired by the National Park Service to clean out the storm water sewer system on the National Mall.

Brightwell pled guilty to one count of violating the Clean Water Act by knowingly discharging a pollutant without a permit and one count of presenting false claims to the United States.

He also was ordered to pay \$270,667 in restitution to the National Park Service, representing the losses for the work that was not properly performed. Brightwell also must pay a forfeiture money judgment totaling \$230,899. \*

# Keeping Trash Out of Waterways

Runoff from rain and snow melt washes trash into our lakes, rivers and beaches only because we dump trash into our drainage system. Now is the time to stop trashing our drainage systems. Local governments have a federal mandate to prevent illegal and illicit discharges.

A recent study of trash in the oceans found that there are 5 trillion pieces of plastic, weighing more than 250,000 tons, floating in water around the world. With a global population of about 7.2 billion, that's nearly 700 pieces per person. One in 10 recreational beaches in the United States are unfit for swimming, according to a report from the Natural Resources Defense Council (NRDC –July 27, 2014).

There are many reason why trash ends up in our drains:

- ◆ The lack of trash cans in public areas, especially where single use food and drink items are sold
- ◆ Recycling opportunities are limited (not all areas have curb side pickup drop-off recycling facilities)
- ◆ Beverage distributors have historically fought bottle bills
- ◆ Water quality standards for floatables are not well defined
- ◆ Curb inlets are designed and installed with a wide opening to receive trash
- ◆ Economic incentives to manage materials sustainably are lacking. Trash has little, if any, economic value
- ◆ Dumping of house hold trash (plastic bags filled with trash) near bridges and undeveloped land
- ◆ Trash "hot spots" tend to occur near convenient stores, grocery stores, parking lots,
- ◆ People are more likely to litter in an area that already has litter

## **Control of Trash**

There are 7,593 local governments with stormwater permits that now have (or should have) an enforceable ordinance requiring only "entirely stormwater" in the drainage system. Trash in the storm drain is not "entirely stormwater."

Control of pollutants at their source is the best low cost solution to pollution. And it works! Municipalities should implement a low cost plan with proven success. Convince residents, businesses, tourist, and the construction industry to keep waste out of the public streets and water ways.

Municipal leaders often are reluctant to enforce an pollution law, but they need not. They can promote a clean community by encouraging the residents to keep pollutants out of the streets, because it is the right thing to do. Residents respond to keeping their city clean.

This approach uses public information and citizen volunteers to get it done. A proactive pollution prevention program should create a theme and use a variety of media sources for promotion. Consider using these themes:

### **Save the Bay**

### **Keep Our City Beautiful**

### **Only Rain in the Storm Drain**

Implementation of an effective public relations program would engage the entire community. All residents must become informed of the problem and be asked to participate in keeping trash, grass, leaves, dirt and waste water out of streets and drainage system.

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# TRASH CONTROL

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## What is an illegal discharge?

The Clean Water Act requires regulated local governments to “effectively prohibit non-stormwater discharges into the storm sewers.” Permits issued to local governments require implementation of an ordinance to control illicit discharges and illegal dumping. The difference is illegal dumping is knowing that the discharge is illegal and knowingly discharging pollutants into a drainage system,

The permits define illicit discharge as “**any discharge to the municipal separate storm sewer system (MS4) that is not entirely stormwater.**” That would include any non stormwater unless it is one of the exceptions. An illicit discharge is also rain water that is contaminated with waste, making it waste water, not “entirely stormwater.”

It’s important for the public to understand that the drainage system (MS4) is not just the inlets in the street, it’s the entire street or road that has a ditch. So sweeping sidewalk litter into the street is illicit. Then so is dirt, leaves, grass, and cigarette butts. So is discharge pollution of washing using detergents. That includes vehicles, boats, and trash collection areas.

## Implementation

Implementation of an effective trash program would engage the entire community. All residents must become informed of the problem and be asked to participate in keeping trash out of the streets and drainage. There are several important steps to take: (1) Lead by example by conducting a municipal pollution prevention program. (2) Do a public relations campaign by selling the value of clean streets, clean community, clean water. (3) Have a plan for volunteers with training and reporting.

## Lead by Example:

### Municipal Pollution Prevention

Municipalities are required by their stormwater permit to have a pollution prevention program for all municipal activities. This includes storm drain cleaning, motor pool operations, storage building waste management, parks and parking lot maintenance.

This requires a training program for employees. Municipal employees should conduct pollution prevention in their activity but recognize and report when observed outside their activity. Frequent inspections of facilities and activities.

### Public Information

Decide on a message, how to deliver it, and how to measure its effectiveness. Sending information to residents, marking storm drains, and conducting briefings to groups can be effective. Prepare for opposition to a “rain tax.” Storm drains are a necessary duty of government. When polluters dump into storm drains, the polluter doesn’t pay the disposal cost, the tax payer does. The message must be clear, such as: *Only rain in the storm drain.*

### Public Participation

The solution is also clear...ask residents to do their part to stop polluting and to report trash pollution.

Do this at meetings of civic clubs, homeowner associations, and schools. There are several ways to recruit volunteers. The most obvious is to speak to the leaders of organized environmental groups. Civic groups and home owner associations look for government leaders on issues affecting their taxes.

\*

## Clean Water Act Criminals

A **mining company in Alaska** and its five executives have been criminally indicted under the federal Clean Water Act for allegedly dumping toxic waste into the Salmon River in the western part of the state.

Officials at XS Platinum Inc. not only conspired to dump waste from the company's platinum mine but also created false records to hide the deed, according to the indictment. The five executives involved knew that polluted water was being discharged from the Platinum Creek Mine.

The case started in 2011, when a fisheries biologist working for the Togiak National Wildlife Refuge, discovered murky water that should have been teeming with salmon as he conducted a routine flyover. The 400 photos he took "showed new mining work with turbid ponds, as he describes them, flowing into the river system."

**Freedom Industries of West Virginia** and six of its owners, managers and employees with criminal violations of the Clean Water Act related to the January 2014 chemical leak that contaminated the drinking water of 300,000 people in Charleston and surrounding communities.

Freedom's tank farm along the Elk River, the Etowah River Terminal, leaked about 10,000 gallons of coal-cleaning chemicals into the river. The primary leaked chemical was 4-methylcyclohexanemethanol, or [MCHM](#).

The charges against Farrell, 58, of Charleston; Tis, 60, of Verona, Pennsylvania; Herzing, 63, of McMurray, Pennsylvania; and Southern, 53, of Marco Island, Florida, were spelled out in a 37-page indictment handed up by a federal grand jury. If convicted, Farrell, Tis and Herzing face a maximum

of three years in prison. Southern, who was charged with 10 other crimes, faces a maximum sentence of 68 years in prison

A **Western New York demolition company** and two of its project managers face sentencing in federal court for illegal dumping of toxic materials into the Susquehanna River. *Crane-Hogan Structural Systems* of Spencerport, and employees Mark Pullyblank and William Clements pled guilty to Clean Water Act violations for ordering workers to discharge a slurry of industrial waste directly into the river and into the Binghamton-Johnson City sewage treatment facility.

The pollutants washed downstream along the Susquehanna River "sadly before any cleanup could occur," he said. "We had literally a cemented riverbank and bottom of the river. The next hard rain raised the water level and washed it out." Wastewater from Crane-Hogan's hydro-demolition process contained concrete residue with highly caustic pH and suspended solids, both of them considered pollutants under federal law.

The hydro-demolition process uses large amounts of high-pressure water to remove concrete from structures such as dams, bridges, parking lots and garages before they are resurfaced, the prosecution said.

Pullyblank, who pled guilty to a felony, faces up to three years in prison and a \$700,000 fine. Hogan pled guilty to a misdemeanor and could receive a maximum one-year jail term and \$350,000 fine. In court, the company admitted committing a felony and agreed to pay a \$500,000 fine and to be placed on probation for up to five years. \*

# Mobile, Alabama Trash Ordinance

*(continued from page 2)*

It shall be a violation of this article to blow, sweep or push litter, junk or trash, including yard clippings, leaves or grass or cigarette butts, onto the city streets, alleys, stormwater structures, ditches or waterways. All litter and trash shall be deposited into a garbage cart, garbage can, bag or box, cigarette litter receptacle, or litter receptacle tightly covered and secured to prevent scattering before pickup.

Disposal of household solid waste. In all areas of the city in which the city collects garbage and litter through its automated garbage collection system, a garbage cart is the only permitted container for litter and garbage. In those parts of the city where the city does not provide automated garbage collection, litter and garbage shall be placed in a garbage can. All household solid waste shall be stored in tightly closed metal, rubber or plastic cans, in heavy duty plastic garbage bags, or in recycling containers, constructed so as to prevent such material scattering of garbage by wind, water, traffic or scavenging animals.

It shall be a violation of this article for any person in a vehicle to drop, deposit, discard or otherwise dispose of litter in or upon any public or private property within the city including but not restricted to, any street, median, right-of-way, sidewalk, park, vacant or occupied lot, body of water, except in litter receptacles, or in an area designated by the Alabama Department of Environmental Management as a permitted disposal site.

It shall be a violation of this article for any person to discard or dump any litter, garbage, trash or junk on any private or public property unless disposed of in receptacles provided for public use that comply with the requirements of this ordinance or in an area designated by the Alabama Department of Environmental Management as a permitted disposal

site.

For the purposes of this section, items found in an accumulation of garbage, trash, or other discarded material including, but not limited to, bank statements, utility bills, bank card bills, and other financial documents, clearly bearing the name of a person shall constitute a rebuttable presumption that the person whose name appears thereon knowingly deposited the litter.

It shall be the duty of every occupant of any commercial premises, multi-family residential premises, or places of assembly in the city limits to keep the adjacent and surrounding area clear and free of litter, high grass and weeds, as defined under "public nuisance,"

All persons performing construction and demolition work, or occupants of commercial premises shall provide on-site receptacles for loose debris, paper, building materials waste, scrap building materials and other litter products to prevent scattering of such materials by wind or rain if such materials are not otherwise properly disposed of on a daily basis.

## **Enforcement**

*Any person who pleads guilty or is found guilty of a violation of this ordinance after appearing in municipal court may be punished by a fine of not less than two hundred fifty dollars (\$250.00) and not more than five hundred dollars (\$500.00), by imprisonment for not more than six (6) months, or may be sentenced to perform community service as directed by the judge or to take other remedial action to comply with the terms of this ordinance in lieu of a fine or imprisonment. Each day a violation of this ordinance is committed or permitted to continue shall constitute a separate offense. \**

**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*

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