

THE GRACE PERIOD IS OVER PERMIT COMPLIANCE IS EXPECTED

Stormwater News

Nancy Stoner, EPA's Acting Assistant Administrator for Water, plans to leave the EPA. She has been the Office of Water Acting Administrator since February 2011. Ms. Stoner began her career in environmental policy and law as a trial attorney in the Environment and Natural Resources Division of the U.S. Department of Justice.

Ms. Stoner served as Director of the Office of Policy Analysis in the office of Enforcement and Compliance Assurance at the EPA where she contributed to development of EPA's environmental auditing and self-disclosure policies.

She served as the Co-Director of the Natural Resources Defense Council's (NRDC) Water Program before returning to EPA as the Deputy Administrator of Water. Ms. Stoner is a 1986 graduate of Yale Law School and a 1982 graduate of the University of Virginia.

Idaho prepares to join the other 46 states administering the National Pollutant Discharge Elimination System (NPDES). There is no indication that New Hampshire, Massachusetts and New Mexico will do the same. About half of Idaho's NPDES permit holders are cities or other municipalities; the rest are industrial users, from mines to fish farms to confined animal feeding operations.

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CITIZEN SUITS AIMED AT MS4

Citizen groups are increasingly frustrated by the failure of the EPA Stormwater Program to produce clean water.

The EPA issued stormwater regulations in October 1991, 23 years ago. Where are the success stories? They are not found in our rivers, estuaries or beaches. What we have is an enormous amount of paper production: a million construction permits, 100,000 industrial permits, 8,000 municipal permits.

Environmental organizations are successfully suing polluting industries. Lawsuits against construction activities are met with a counter SLAPP (strategic lawsuit against public participation) suit. Local governments can expect litigation due to the court's decision to hold Los Angeles County accountable for managing their drainage system.

Municipalities have the authority to control all discharges into their drainage system. They do so by writing and enforcing ordinances prohibiting non stormwater and polluted stormwater. Their failure to do so requires treatment and controls to prevent permit violations including water quality standards.

Local governments can protect themselves from citizen suits by evaluating their compliance with their stormwater permit, by a public campaign for citizen support, and sampling discharges from their drainage systems. Municipalities that do a self audit will be prepared to respond to an enforcement action. *

SETTING THE RECORD STRAIGHT

The Jurisdiction of the Clean Water Act

Discharges to Roads and Streets

NPDES Stormwater Permits are issued only when there is a discharge to “navigable waters,” defined in the CWA as ‘waters of the US.’ EPA has proposed a regulation to redefine the waters that are regulated under the jurisdiction of the CWA.

This is in response to the decision by the Supreme Court that wetlands are tributaries to waters of the US if they have a *significant nexus* to downstream waters that are known to be regulated. The tributaries include the drainage systems, including intermittent or ephemeral waters, wetlands and open waters in floodplains.

EPA has a scientific study of hydrological connectivity which asserts that there is a significant nexus between all tributary systems and downstream waters, including intermittent or ephemeral waters, wetlands and open waters in floodplains.

The proposed rule defines several terms: tributary, floodplain and wetland and makes clear that those waters are subject to the Clean Water Act authority.

The municipal separate storm sewer system (MS4) is also a tributary to waters of the US. EPA defines the MS4 as a conveyance or system of conveyances that is designed or used to collect or convey stormwater including storm drains, pipes, ditches, etc. and is not a combined sewer. Is the street and gutter system part of the MS4? How about roads with drainage? Of course they are.

So by definition, a conveyance discharging pollutants to roads and streets with drainage requires an NPDES stormwater permit, otherwise it is an illicit discharge. The EPA makes it clear that ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow are not tributaries to Waters of the US and neither are ditches that do not contribute flow. *

Navigable Means the Nation’s Waters

The use of the term *navigable waters* was clarified in an amendment to the clean water Act (Act) defining navigable waters as “waters of the US.”

The navigable term came from the Refuse Act of 1899, but according to a congressional staffer written the Clean Water Act in 1972 — congressional intent was to give definition of waters subject to the Act “be given the broadest possible constitutional interpretation.”

This is according to Leon Billings. Billings served on Senator Edmund S. Muskie’s staff and was the primary author of the Act in the Senate.

Billings states that Senator Muskie included in the record of debate on that Conference Report the following statement: “One matter of importance throughout the legislation is the meaning of the term ‘navigable waters of the United States.’”

The Senator was comfortable with the Senate version of the definition, which limited the law’s application to “the waters of the United States and their tributaries, including the territorial seas.” Billing recently stated that “water moves in hydrologic cycles and it is essential that discharges of pollutants be controlled at the source.”

Finally, the first paragraph of the Act reads: “The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”

The Supreme Court attempted to clarify the law, but could only offer the ‘significant nexus’ judgment. The Court did suggest that Congress has the responsibility the clarify the law.

The 1972 Congress could have better defined the jurisdiction of the Act, and so could have every Congress since then. They have not and are not likely to do so in the foreseeable future. *

States Object to the EPA Plan for the Chesapeake Bay

Taken in part from the
Chesapeake Bay Foundation

The American Farm Bureau Federation and Fertilizer Institute have recruited 21 states from across the country to support their efforts to derail Chesapeake Bay restoration. Together, they are seeking to overturn the recent ruling which declared the science-based pollution limits and the cleanup plan legal.

The 21 states involved are Alabama, Alaska, Arkansas, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Michigan, Missouri, Montana, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia, and Wyoming.

At issue is the Total Maximum Daily Load (TMDL or pollution limits), developed by EPA and the Bay states, which sets the maximum nitrogen, phosphorus, and sediment pollution that the water bodies can withstand and remain healthy. Taken together, those limits and the individual state plans designed to achieve the pollution reduction goals create the Chesapeake Clean Water Blueprint.

Opponents of the Blueprint contend that EPA has usurped the states' authority over land use and development. Those supporting the Blueprint point out that the states and EPA cooperated to develop the pollution limits and that each state developed its own implementation plan. These are exactly the actions called for under the Clean Water Act.

In April of 2014, amici briefs in support of EPA and upholding Judge Rambo's decision were filed by: the states of Virginia, Maryland, Delaware, and the District of Columbia; seven cities including San Francisco; a group of 19 prominent law professors; and 27 environmental organizations from across the country .

According to their amicus brief, these 21 states are concerned that if the Blueprint works here, other watersheds—like the Mississippi River Basin— "could be next." And they have every reason to be concerned. A recent review of the EPA's National Water Quality Assessment Report indicates these states face their own serious water quality issues. *

Stormwater News

(Continued From Page 1)

Ben Lupo, was sentenced to two years and four months in federal prison and fined \$25,000. Lupo ordered two of his employees to dump fracking waste into a storm drain that led to a tributary of the Mahoning River. The oily black ooze ultimately ended up in the river. The clean-up of the tributary and the Mahoning River cost more than \$3 million. The taxpayers will pay the bill.

EPA's Office of Inspector General (IG) is launching a study of the effectiveness of EPA's "municipal stormwater improvement programs." The IG will look at enforcement efforts aimed at municipal combined sewers.

Approximately 772 communities nationwide -- primarily in the Northeast, Great Lakes and Pacific Northwest -- have combined sewers discharging raw sewage during heavy rains. EPA has identified reducing combined sewer overflows (CSOs) as an enforcement priority for several years and has used a variety of methods to encourage municipalities to increase their stormwater capacity. These include both the promotion of green infrastructure as well as pursuing consent decrees with communities.

Gloucester Marine Railways Corporation, a shipyard in Gloucester, MA, has been charged by the EPA for violation of Section 301(a) of the federal Clean Water Act by discharging process water and stormwater without authorization. The proposed penalty is \$20,000 plus implementation of an Environmental Compliance Promotion Supplemental Environmental Project valued at \$30,000.

The Port of Port Angeles (Seattle) settled a lawsuit with an environmental citizens group for \$26,500. "Waste Action Project," a Seattle based non-profit, alleged the Port had violated environmental benchmarks for zinc and copper under the boat yard general permit. The Port will pay \$16,500 dollars in attorney's fees and pay \$10,000 dollars to the Feiro Marine Life Center for use on the Peabody Creek watershed project.

The City of Richmond, Virginia has agreed to pay \$12,000 to settle alleged violations of Clean Water Act regulations that protect waterways from polluted stormwater runoff. The alleged violations include failing to obtain certain required industrial stormwater permits, prevent certain materials from exposure to precipitation, and implement an employee training program.

A conservation group based in Winston-Salem has filed a lawsuit against the City of Thomasville, NC saying that the city has repeatedly violated federal clean water laws. More than 20 million gallons of sewage containing fecal coliform, viruses and disease-causing bacteria have been dumped by the City of Thomasville into streams flowing to the Yadkin River and High Rock Lake, said Dean Naujoks, the executive director of the Yadkin Riverkeepers. *

Survey of Municipal Stormwater Permittees

Elected Officials Aren't Afraid of Stormwater Permit Fines

A survey of municipal separate storm sewer system (MS4) operators in the US found compliance with the Stormwater permit is a low priority. A total of 249 MS4 representatives from 26 states responded to the survey.

Most of the respondents reported insufficient funding and staff time. This is a clear message that elected officials aren't interested in funding compliance or hiring sufficient staff.

This tracks with the 16% reporting a lack of political and public support. The 17% reporting too many competing requirements tracks with insufficient staff time.

Therefore, 86% of respondents tell us that elected officials see compliance with the stormwater permit to be a low priority.

Although 55% of the respondents were Phase II permittees, 37% had a population of less than 50,000. About 43% had a stormwater program budget of less

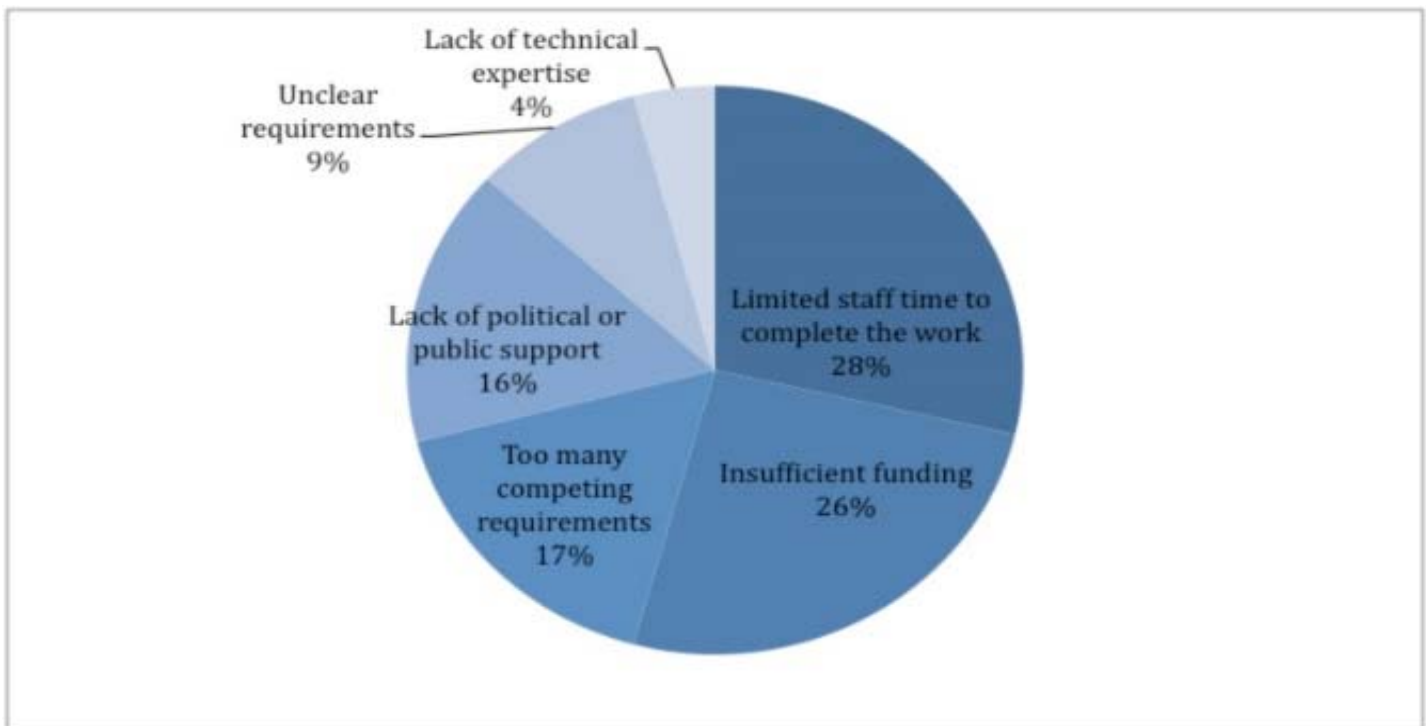
than \$500,000. Eighteen percent had budgets between \$500,000 and \$9.9 million.

The most common funding source for the program was the general tax revenue (52%), followed by stormwater utility fees (39%), grants (24%) and permitting and other fees (19%).

Sixteen percent of respondents indicated "other" sources of funding, which included sources such as road funds, other utility fees and rental income as well as unique sources such as Montgomery County, Maryland's plastic bag fee.

The survey was conducted by the Center for Watershed Protection. The goal of the survey was to collect information on the current status of stormwater programs across the country, the most pressing needs of MS4s, and future trends so that we can improve and better tailor our national guidance and locally applicable tools. *

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San Diego & Mobile Agree to Enforce Stormwater

The City of San Diego has accepted a compliance settlement for stormwater that will bring 142 private projects and 8 public projects into compliance.

The private list includes apartments and condominiums, industrial facilities, business parks, restaurants, hospitals and medical offices, colleges, and even private residences.

Permit enforcement by the Regional Board found the treatment controls at those private and public development sites were either missing or designed and installed incorrectly resulting in storm water runoff that received little or no treatment before being discharged to local creeks, bays, and the Ocean. These permit requirements have been in place for 14 years.

The City will begin implementing a Compliance and Reporting Plan that describes the City's process for bringing all projects with missing and ineffective BMPs into compliance with MS4 permit requirements. Also the City will issuance of Civil Penalty Notices to all private noncompliant projects. The City agrees to achieve compliance at all private and public projects within a year.

To resolve the alleged violations without formal enforcement proceedings, the City agreed to pay a civil penalty in the amount of \$949,634 but one-half of the total will be an Enhanced Compliance Action to mitigate water quality impacts and enhance water quality treatment at six City-owned facilities.

Upon completion of the Enhanced Compliance Action, the allocated portion of the civil penalty will be dismissed, but if the City fails to fully implement the Enhanced Compliance Action by August 15, 2016, the full penalty must be paid. *

The City of Mobile Alabama has entered into a consent decree with the State. The City has agreed to pay the State a fine of \$135,000 and comply with a new stormwater permit. The City will purchase one or more litter boats in 2015 to address the flow of litter in its waterways and install a large litter trap on a tributary to Dog River.

Mayor Sandy Stimpson said the City was committed to control pollution into its storm drains and waterways. Simpson added "Our goal is to become a national model for great stormwater management, and this agreement is an important milestone on that path."

The City adopted a comprehensive Stormwater ordinance and has developed a website focused on public education. The City organized and participated in several community clean-up campaigns at targeted locations throughout Mobile.

The revised ordinance has the following rules:

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

Editor' Note: The National Stormwater Center will be in Mobile on November 18-19 to conduct a training class called "Only Rain in the Storm Drain."

The Politics of Pollution

Duke Energy had a major coal ash spill on Feb. 2, 2014. In one of the worst coal ash spills in U.S. history, up to 27 million gallons of contaminated water and 82,000 tons of coal ash spilled into North Carolina's Dan River after a pipe burst underneath a waste pond.

The traditional investigation resulted in an agreement to clean it up. But what was promised was a criminal investigation ... that is either dead or dying.

The key players are North Carolina Gov. Pat McCrory, previously a 28-year employee of Duke Energy, and John Skvarla, Secretary of the Department of Environment and Natural Resources (DENR). Since the spill, federal prosecutors have issued at least 23 grand jury subpoenas to Duke and state officials.

Duke Energy's political action committee, executives and their immediate families have donated at over \$1.0 million to Pat McCrory's successful campaign for governor in 2012. He appointed John Skvarla, who describes his agency's role as being a "partner" to those it regulates and whom he refers to as "customers."

Amy Adams was a regional director at the state environmental agency in charge of enforcing surface water standards for 21 North Carolina counties before she resigned in protest November of 2013. A nine-year veteran of the agency, she said she was directed in her last months to help polluters meet compliance standards, rather than issue violations or fines.

DENR's own data, collected from 2011–2013, show that the groundwater near Duke Energy's Dan River plant had been contaminated with toxic coal ash but the agency did nothing about it. Meanwhile, it used legal maneuvers to prevent citizens groups from suing the utility.

"They could have let us file and we could have worked together but he scrambled to prevent us from bringing our own lawsuit," said Frank Holleman, an attorney with the Southern Environmental Law Center, which tried to sue Duke Energy under the Clean Water Act three times, only to be thwarted by DENR. "They did everything they could to hinder our ability to be effective."

In an attempt to preempt more citizen filings, DENR filed suit against Duke on the utility's 11 remaining coal ash ponds in North Carolina. One of them was the Dan River site.

A federal judge overruled a recommendation that a lawsuit against Duke Energy over coal ash contamination on Charlotte's water source be dismissed.

Such "citizen suits" are allowed under the federal Clean Water Act unless state authorities are taking enforcement actions on the same grounds. The Riverkeeper's attorneys from the Southern Environmental Law Center argued that the foundation's claims are different from those brought by the state.

A federal magistrate judge recommended the Riverkeeper lawsuit be dismissed. However, U.S. District Judge Max Cogburn, Jr. overruled that recommendation.

Duke Energy has 33 ash dumps at 14 power plants in North Carolina, which are located along rivers and lakes that cities and towns rely on for drinking water. State environmental officials say all of Duke's unlined waste pits, which contain more than 100 million tons of ash, are contaminating groundwater.

Stormwater permitting has become political at all levels of government. What happened in North Carolina has happened in Florida, Louisiana, Tennessee, and Kentucky. Why southern states? That's Just Politics! *

States Must Control Agriculture Runoff

It happened in Toledo, Ohio. Over 400,000 residents went days without water after an algae bloom turned the waters of Lake Erie into a toxic soup, unsafe for human consumption, even if boiled, even for bathing or cleaning dishes. The toxin microcystin was produced by a blue-green algae in Lake Erie.

This type of algae needs warm temperatures, nitrogen and phosphorus to grow. Nitrogen and phosphorus arrive in lake waters via sewerage overflows, agricultural runoff and residential fertilizers.

Apparently, the large amount of blue-green algae covering parts of Lake Erie was allowed to overtake the intake for Toledo's water Supply.

Agricultural runoff from manure and fertilizer pours into the lake and feeds the algae along with the hot summer sun. Sewage treatment plants and combined sewer runoff drains in aging cities and runoff from fertilized residential lawns along the lake also fuel the toxic brew.

The US EPA's has published a proposed regulation to clarifying which waters fall within their jurisdiction under the Clean Water Act. Agriculture is exempted but wetland and ditches are not.

The American Farm Bureau Federation has been using social media to argue that the rule represents a dramatic overreach of power by the federal government, with their president even calling it "the biggest federal land grab" to date.

The agriculture lobbyists contributed to the Toledo problem and they are creating the same through the Nation.

The federal Clean Water Act is intended to limit pollution from fixed points such as industrial outfalls and sewer pipes, not non point runoff like the troublesome phosphorus carried into waterways like Lake Erie.

Also, the US Congress in 1972 and each congress since then has elected to exclude agriculture runoff from the Clean Water Act requirement, making federal enforcement impossible with only one exception, large animal feedlots, frequently call factory farms.

Addressing nonpoint pollution is left to the states, and in many cases, the states have chosen not to act.

Poisonous algae are found in polluted inland lakes from Minnesota to Nebraska to California, and even in the glacial-era kettle ponds of Cape Cod in Massachusetts. Algae fed by phosphorus runoff from mid-America farms helped create an oxygen-free dead zone in the Gulf of Mexico last summer that was nearly as big as New Jersey. The Chesapeake Bay regularly struggles with a similar problem.

The principal industry lobby, [the Fertilizer Institute](#), is part of a coalition of industry and agricultural interests that are opposing federal efforts.

Because states are not likely to resist political pressure any more than the US Congress, the only solution is citizen law suits.

The Clean Water Act does allow citizens to sue polluters, states, and municipalities for non compliance and failing to exercise the requirements of law. *

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

2014 Training Schedule
Certified Stormwater Inspector

Sept 16-17 Seattle, WA
Oct 15-16 Northern VA
Oct 15-16 Hilton Head, SC
Oct 15-16 Charleston, WV
Oct 20-21 Miami, FL
Oct 23-24 Jacksonville, FL
Oct 23-24 San Juan, PR
Oct 23-24 Austin, TX
Nov 4-5 Naples, FL
Nov 4-5 Atlanta, GA
Nov 17-18 Vancouver, WA
Nov 18-19 Mobile, AL
Dec 1-2 Lafayette, LA
Dec 4-5 Beaumont, TX

2014 Online MS4 Webinars

Sept 24-25 Self Audit Preparation
Oct 7-10 CSI Industrial for MS4s only
Oct 28 Recertification for CSI Graduates
Dec 1-4 CSI for MS4s only

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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