

EPA DROPS THE GREEN BALL

Stormwater News

Six Republican senators circulated a letter to their colleagues last week encouraging opposition to President Obama's nomination of Ken Kopocis to lead EPA's Office of Water, due to his previous work on legislation to expand the scope of waters subject to federal Clean Water Act jurisdiction.

The letter, signed by Sens. John Barrasso (R-Wyo.), David Vitter (R-La.), James Inhofe (R-Okla.), Mike Crapo (R-Idaho), Roger Wicker (R-Miss.) and Deb Fischer (R-Neb.), urges senators to vote against Kopocis on the Senate floor because as a congressional staffer he "was instrumental in failed efforts to remove the term 'navigable' from the CWA's jurisdictional limitation to 'navigable waters.'"

The letter goes on to say Kopocis, who is currently a senior advisor in EPA's water office, would "continue to advance and support EPA's march towards an expanded federal encroachment of private property."

The Senate Environment and Public Works Committee advanced the Kopocis nomination last month on a party-line vote. Democratic Senate leaders have not announced when the full chamber may consider it.

The EPA released an enhanced version of "How's My Waterway," desktop computer. The app and website, <http://www.epa.gov/mywaterway>, uses GPS technology or a user-entered zip code or city name to provide information about the quality of local water bodies.

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EPA Decided Not To Have a National Post Construction Rule

EPA decided to renege on a national rulemaking requiring low impact development (LID) on reconstruction and post construction development.

Why? Was it the inability to make it cost effective or the difficulty of providing flexibility to the various states? Some think EPA decided it would be better to promote LID than to litigate LID. A regulation would be litigated for many years and the outcome is not certain.

So, EPA will let LID survive on its own merits. Local government and design engineers will decide on green development. Many communities have, and LID is popular in some areas, not in other areas.

Municipal stormwater permits have and will likely continue to have a required minimum control measure to address post-construction stormwater runoff from new development and redevelopments that disturb one or more acres.

This includes developing strategies to implement a combination of structural and non-structural practices, an ordinance to address post-construction runoff, and a program to ensure adequate long-term operation and maintenance of BMPs.

Expect EPA to make low interest loans available to encourage municipalities to voluntarily use green infrastructure techniques. EPA's Environmental Financial Advisory Board is finalizing a report that will recommend the agency use the state revolving funds (SRFs) to guarantee municipal bond sales that fund green infrastructure.

As a result, the stormwater permit requirement for enforceable post construction ordinance is not very enforceable.



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No Violation When Local Government Doesn't Enforce the Required Ordinance **Permit Does Not Require MS4 Enforcement**

In April of 2014, a Federal judge dismissed a citizen suit against the Pittsburgh Water and Sewer Authority because the NPDES stormwater permit does not require enforcement of the City's ordinance.

"Looking at the plain language," according to Judge Robert C. Mitchell, "nowhere in the permit does it explicitly say that it is a violation for a failure to enforce an ordinance enacted pursuant to the permit's terms."

Citizens for Pennsylvania's Future argued that because the permit requires Pittsburgh Water and Sewer Authority to implement and enforce certain ordinances, that the failure to enforce the ordinances results in a violation of the permit, and therefore a violation of the CWA.

Citizens did not argue that the permit has been violated, but rather that the ordinances imposed by the permit have been violated.

The City ordinance was written to "provide more protective stormwater volume reduction standards and low impact development" . . . strategies for planning and construction of publically funded development and redevelopment projects.

This ordinance imposed greater restrictions than the previous ordinance by requiring the use of low impact development practices and green infrastructure on publically funded development and redevelopment projects to the "maximum extent technically feasible," as opposed to "whenever practical."

To support a claim that the use of low impact development practices was infeasible, a developer had to provide the opinion of a qualified professional and incorporate that opinion into the stormwater site management plan.

The city received an NPDES construction permit, then a contractor was awarded a government grant to redevelop a large renewal project in Pittsburgh. The contractor's stormwater pollution prevention plan did not conform to the cities ordinances but was accepted by the city.

The Decision and Logic

Judge Mitchell said he must determine whether a violation of the MS4 ordinance enacted pursuant to the

NPDES permit equates to a violation of the NPDES stormwater permit itself. His decision is there is no permit violation.

Furthermore, a stormwater management program, although approved by the state, does not say that a violation of such an ordinance enacted thereunder constitutes a violation of the permit. The judge concludes "the law gives broad discretion to the permitting authority to impose whatever conditions it deems fit to adhere to the CWA, and the permit here is silent."

Also, while the permit provides that its permittees have a continuing responsibility to comply with federal, state and local regulations, it does not provide that a failure to do so constitutes a violation of the MS4 permit nor does it impose any other sanctions on the permittee.

While municipal permittees have inspection responsibilities, they have the authority – and sometimes the obligation – to impose appropriate requirements on property owners to address (1) illicit discharges; (2) construction site runoff control; and (3) post-construction stormwater management in new development and redevelopment.

That was the case in *Citizens for Pennsylvania's Future v. Pittsburgh Water and Sewer Authority*. The city did all three. But the permit does explicitly say that it is a violation for a failure to enforce an ordinance enacted pursuant to the permit's terms.

Enforcing code violations is the job of the inspector and in this case, the city officials. Just like a police officer deciding to give a warning ticket instead of a citation, the inspector will use discretion with respect to enforcement.



Fear or No Fear of EPA

Region 3 Enforcement

Only 16 municipalities in the Mid - Atlantic States have experienced federal penalties for stormwater noncompliance in the last 5 years. The average penalty is \$42,158.

Anne Arundel County	MD	2011	\$75,150
Baltimore City	MD	2011	\$60,000
Harford County	MD	2011	\$27,000
Hampton	VA	2013	\$62,000
Baltimore County	MD	2013	\$47,000
Lynchburg	VA	2013	\$32,000
Charlottesville	VA	2013	\$26,000
Henrico	VA	2012	\$82,000
Chesterfield County	VA	2011	\$46,666
Chesapeake	VA	2012	\$30,000
Newport	VA	2012	\$80,000
Lancaster	PA	2012	\$6,500
Huntington	WV	2012	\$15,000
Manor	PA	2012	\$40,968
York	PA	2012	\$22,640
Lebanon	PA	2012	\$21,600

This information was provided by EPA Region 3 as a result of a Freedom of Information Act (FOIA) request. Similar information has been provided by EPA Region 4 and will be in the next issue of *The Stormwater Quarterly*.

The penalties are relative small, so why should any local government develop a complete stormwater management program? Clearly, EPA's penalties would be much higher if permit violation were serious.

Therefore, expect local governments to use the risk management approach and achieve a moderate level of compliance. Municipalities must file an annual compliance report with measurable goals progress, generally expressed by numbers and a schedule.

There is no rule that requires 100% achievement of either the measurable goals or the schedule. This is where priorities can be explained and justified. Federal and state stormwater permit auditors are looking for good faith efforts to minimize the discharges from their jurisdiction.



Stormwater News

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Although the Supreme Court has held that runoff from logging roads isn't associated with industrial activity, rock crushing, gravel washing, log sorting and log storage facilities are not exempt from the Clean Water Act. So the litigation is not over. At an April 29 hearing, U.S. District Judge Anna Brown denied a motion to dismiss the case. Brown said the plaintiff deserves the chance to propose an amended complaint in the case, which the court could then accept or reject.

The EPA Office of Wastewater Management announced the availability of \$335,000 in technical assistance for communities seeking technical support to develop an integrated planning approach to meet Clean Water Act (CWA) requirements for municipal wastewater and stormwater management.

EPA wants to develop practical examples of how to implement the different steps in developing an integrated plan. EPA anticipates providing assistance to 5 communities. Interested communities should send a "Letter of Interest" by June 27, 2014.

For many years, both the U.S. Environmental Protection Agency (EPA) and the State of Maine Department of Environmental Protection (DEP) have wrestled with the practical question of how solvent-contaminated wipes should be managed under hazardous waste regulations. In 2013, the EPA finally concluded its rulemaking, adopting conditional exclusions from hazardous waste rules for most solvent-contaminated wipes. The EPA regulation was effective on January 31, 2014.

Under the EPA rule, solvent-contaminated wipes must be managed in accordance with specified minimum requirements, including avoiding free liquids at the time of shipment, a 180-day limit on storage, labeling "excluded solvent-contaminated wipes" and disposal or incineration only using certain incinerators/combustors, landfills, or laundering.

In addition, there are several recordkeeping requirements, including documentation that the 180-day limit is met. Notably, trichloroethylene disposable wipes must be managed as a hazardous waste, and are not subject to the conditional exemption.

An insurance company is suing several large Illinois municipal water districts to recover damages stemming from flooding claims that the insurer says are due to the districts' failure to increase stormwater storage capacity in advance of a flood, despite the municipalities' awareness of increased rainfall detailed in its own climate change studies.

"If local governments fail to get climate ready and storm smart, they open themselves up to legal actions for damages that are ultimately paid by the voters/taxpayers," according to an environmentalist attorney.



THREE LEGAL DECISIONS AFFECTING STORMWATER PERMITTING

Legal Decision 1—Water Transfer Rule is Vacated

A federal judge vacated EPA’s Water Transfers Rule. He stated, “The rule is inconsistent with the Clean Water Act and EPA did not provide a reasoned explanation for its interpretation.

Judge Kenneth Karas, Southern District Court of New York **ruled to vacate and remand EPA’s Regulation to exclude transfer waters from NPDES stormwater permitting.**

EPA’s water transfer regulation read as follows:

The following discharges do not require NPDES permits: . . .

Water transfer means an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use. This exclusion does not apply to pollutants introduced by the water transfer activity itself to the water being transferred.

Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed “navigable” under the classical understanding of that term.

The Court said that EPA failed to consider whether other alternatives—specifically, regulating water transfers under NPDES and adopting a designation-authority option—were consistent with the reasons it gave for excluding water transfers from NPDES regulation. And second, it failed to demonstrate how the option it did choose was consistent with its analysis of congressional intent.

This was a consolidated case [Nos. 08-CV-5606 (KMK)] Plaintiffs: Catskill Mountains Chapter Of Trout Unlimited, Inc., Theodore Gordon Fly Fishers, Inc., Catskill-Delaware Natural Water Alliance, Inc., Federated Sportsmen’s Clubs Of Ulster County, Inc., Riverkeeper, Inc., Waterkeeper Alliance, Inc., Trout Unlimited, Inc., National Wildlife Federation, Environment America, Environment New Hampshire, Environment Rhode Island, And Environment Florida, State Of New York, Connecticut, Delaware, Illinois, Maine, Michigan, Minnesota, Missouri, Washington, and The Government Of The Province Of Manitoba, Canada, vs. United States Environmental Protection Agency.

However, a previous decision by the US Supreme Court made on June 25, 2012, the Court affirmed its holding in *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), that “pumping polluted water from one part of a water body into another part of the same body is not a discharge of pollutants under the CWA.”

So, the Courts have a conflict, meaning that the Supreme Court is likely to review Judge Karas’s decision to remand to EPA the water transfer rule. Or the Supreme Court may just wait for EPA to take an action again. Either way, the water transfer rule is gone for now.

Many have not recognized that water being transferred in an open channel can be contaminated by stormwater runoff and the EPA rule would not provide an exclusion.



More Legal Decisions For Stormwater Permitting

Decision 2: Blaming Others Doesn't Work

The Supreme Court declined Los Angeles County Flood Control District's request to review a Ninth Circuit Court of Appeals ruling finding Los Angeles County liable for untreated stormwater pollution discharged to the Los Angeles and San Gabriel rivers.

In a statement, county officials called the Supreme Court's decision "disturbing" and said it assigns liability without considering the sources of the pollution and without evidence of violations.

The initial decision by Ninth Circuit court made it clear that the municipal permittee has the legal authority to prevent pollution from entering the storm sewer system. Failing to regulate these discharges, the municipality (MS4) becomes the "superintendent" of their drainage system.

The Court said that the language of the Permit is clear. The data collected at the Monitoring Stations is intended to determine whether the permittees are in compliance with the Permit. The District's monitoring data shows that the level of pollutants in federally protected water bodies exceeds those allowed under the Permit. Thus, the County is liable for Permit violations.

Los Angeles officials said the decision would be costly and it could force municipalities to redirect limited public funds from other critical services to spend on controlling pollution from private and other sources who, they believe are the responsible parties.

County lawyers had argued the county was not responsible for the polluted runoff because it comes from multiple sources and various property owners and cities upstream. However, the courts have spoken.

Local governments drafting annual budgets usually base their decisions on their perceived priorities. Clean water will now have a higher priority in Los Angeles.

EPA's authority to mandate volume of discharged stormwater, rather than pollutants. Both parties have "stayed" their appeals in this case indicating EPA will likely modify the stormwater permit. (See Buckley Air Force Base Municipal Separate Storm Sewer System.)

Despite a landmark ruling, *Virginia Department of Transportation (VDOT), et al. v. EPA*, where the U.S. District Court for the Eastern District of Virginia held that stormwater is not a "pollutant" subject to CWA cleanup plans, the agency argues the CWA allows it to regulate the volume of discharged stormwater, rather than the discharge's pollution content, in MS4 permits.

EPA contends that in contrast to the provision at issue in VDOT, the section of the CWA that deals with MS4 permits "specifically authorizes -- indeed requires -- [National Pollutant Discharge Elimination System (NPDES)] permits for certain "discharges composed entirely of stormwater," recognizing that all stormwater contains pollutants.

The issues are:

1. May the EPA make the management of stormwater, based on pre-development hydrology, an absolute requirement in a NPDES permit without consideration of whether such requirement reduces the discharge of pollutants to the maximum extent practicable?
2. May the EPA enforce requirements under Section 438 of the Energy Independence and Security Act through a NPDES permit issued under the Clean Water Act?
3. May the EPA mandate stormwater retention standards in a NPDES permit for a small Municipal Separate Storm Sewer System ("MS4") that conflict with EPA's Phase II Rule?
4. May the EPA impose new regulatory requirements in a NPDES permit that were not promulgated during rulemaking under the Administrative Procedures Act?
5. Can federal facilities be required to attain different or more stringent standards than non-federal facilities under a NPDES permit?

This litigation threatens EPA's authority to require stormwater retention in MS4 permits.

Decision 3: Post Construction Challenged

The Department of Defense (DOD) has challenged



EPA Region 1 uses their authority to issue stormwater permit to polluters

WHAT IS RESIDUAL DESIGNATION AUTHORITY (RDA)?

Almost a year ago, environmental groups filed petitions for EPA to exercise NPDES stormwater permits where discharges contribute to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

The petitions ask EPA to regulate all non-deminimis point source stormwater discharges from commercial, industrial and institutional sites that are not currently subject to Clean Water Act permitting requirements and are within impaired watersheds in EPA Region 1, 3 and 9. Such sites may include these groups:

1. malls, shopping centers, strip commercial areas, neighborhood stores, office buildings, hotels, gas stations, restaurants, parking lots and garages, mixed use developments, and other businesses, including associated yards and parking areas;
2. buildings, equipment, and parking areas associated with light or heavy industry;
3. schools, colleges, hospitals, museums, prisons, town halls or court houses, police and fire stations, including parking lots, dormitories and university housing.

EPA Response to the Petitions

EPA Region 1 is using this authority selectively. Regions 3 and 9 rejected the petitions' request because the petitioners had not provided enough data to justify such determinations. Region 1 is looking at the Charles River near Boston; the Long Creek watershed in Portland, ME; and five watersheds near Burlington, VT.

In addition, Vermont regulators -- under EPA oversight -- are currently proposing to exercise the authority to address impairments as part of its TMDL for phosphorous in the Lake Champlain watershed.

Vermont regulators were first forced to exercise RDA authority in five brooks near Burlington when the Conservation Law Foundation (CLF), one of the petitioning groups won a series of rulings in state courts that forced officials to reconsider their previous rejection of the group's request. CLF then broadened its efforts to watersheds in Massachusetts, where Region 1 is the permitting entity.

Clean Water Act Definition of RDA

40 C.F.R. §122.26(a) provides that a NPDES permit may also be required if:

- (9)(i)(C) The Director, or in States with approved NPDES programs, either the Director or the EPA Regional Administrator, determines that stormwater controls are needed for the discharge based on wasteload allocations that are part of “total maximum daily loads” (TMDLs) that address the pollutant(s) of concern; or
- (D) The Director, or in States with approved NPDES programs, either the Director or the EPA Regional Administrator, determines that the discharge, or category of discharges within a geographic area, contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

Editor Comment

EPA Regions 3 and 9 erred by rejecting the petitions. The law is clear. EPA has a responsibility under law to prevent pollution using the authority found in the Clean Water Act.

Granted that compliance with the law would result in massive new permitting burdens.

The RDA authority has been exposed by the environmental groups. If EPA regional authorities and NPDES authorized states would use the authority, it would be a major step toward improving impaired water ways.

Government officials are rightly concerned about the regulatory costs of issuing NPDES permits to polluters. But these are polluters that clearly contribute to the impairment of public waters. The solution to the cost issue is simple, set your priorities on the worst polluter.



Business Owner Gets 27 Months for Illegal Sewage Dumping and Must Pay \$635,000 In Restitution

Ray Caldwell, owner of All-Out Sewer, a septic cleaning service in Longview, WA was convicted of pumping septic waste from his collection trucks directly into the city sewer system on 25 different dates in 2012 to avoid disposal fees of 10 to 25 cents per gallon. He also was accused of underreporting by hundreds of thousands of gallons the amount of septage he collected from customers. Caldwell will serve 27 months in prison and pay \$635,000 in restitution. All-Out Sewer co-owner, Randy Dingus, received 30 days in jail and a \$15,000 fine.

EPA agents say they witnessed Caldwell in the early morning hours of Aug. 3 pumping waste from seven All-Out trucks into a hole cut into the city sewer behind his building on Washington Way, according to court records. After obtaining a search warrant, EPA agents searched the business and seized the outdoor video surveillance system. Archived video footage shows apparent dumping activity by Caldwell on several other occasions in the early morning hours, court records say.

The judge told Caldwell to participate in a “moral recognition” program to learn to make moral decisions. “I feel bad for what I have done. I didn’t think I was hurting the environment,” Caldwell, 60, told the judge in the Tacoma courtroom. “I do know it’s wrong. I’d like to apologize to everyone for the embarrassment and the hurt that I’ve caused, especially my daughter.”

The sentence, which was considerably lighter than the 42 months in prison and \$650,000 fine the government had recommended, took into account the positive contributions Caldwell had made to the community with his involvement in various charities.

U.S. District Court Judge Benjamin Settle acknowledged he had received numerous letters from community members touting Caldwell’s big heart. Although the financial donations were commendable on the surface, “When one considers the source of your income was ill-gotten, it takes a little bit of the shine off of that,” Settle said.

Calling the case “very troubling,” Settle said it was more serious than just environmental non-compliance because it involved fraud. “This is a tale of two men,” Settle said, describing Caldwell simultaneously as a devoted family man and community volunteer, and as a greedy businessman lacking integrity. He wondered if Caldwell’s letter-writing supporters fully understood that their friend had deprived public entities of money they were entitled to receive.

“I want to encourage you to really level with all of these people, especially your daughter, and say, ‘I’ve had to look inside myself and say what I’ve done warranted the government coming after me, and I’m not an innocent man,’” Settle said. “You knew what you were doing was wrong.”

Editor’s Comment: If you decide to dump waste illegally, offset your jail time by being a good family man and a community contributor.

**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

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