

## A NEW SHERIFF IS IN TOWN: EPA ADMINISTRATOR JACKSON

### *Stormwater News*

**EPA construction set to expire in 2010 will be changed to June 30, 2011.**

**EPA has placed online comprehensive reports and data on water quality enforcement in all 50 states.** The information covers federal and state enforcement of non-compliance with NPDES permits.

The majority of facilities covered by the NPDES program are stormwater discharging facilities. Currently, there are about 1,000 large and medium municipal separate storm sewer systems (MS4) permitted with individual permits, and 6,000 small MS4s permitted mostly under general permits. About 95,000 industrial stormwater facilities and 250,000 construction starts are covered by general permits.

**EPA proposed airport deicing numerical limitations.** The effluent guideline is a national standard requiring airports to implement methods to recover a portion of the sprayed deicing fluids.

The proposed rule would require airports that have more than 1,000 annual departures of scheduled commercial jet aircraft and greater than or equal to 10,000 or more annual total departures to comply with recovery requirements in NPDES stormwater permits. The rule is not expected to be finalized for several more years. (Continued on Page 3)

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## California Issues Permit With Numerical Limits

With White House support, EPA Administrator's Lisa Jackson intends to impose more stringent pollution controls on wet weather dischargers.

From the President's Chesapeake Bay Executive Order to California's Water Board's new construction permit, aggressive enforcement actions can be expected.

The previous EPA administrator, Carol Browner now serves President Obama as the Energy and Environmental Czar. No doubt, she was instrumental in writing the Executive order to take aggressive action to clean up the Chesapeake Bay and to direct enhanced enforcement.

The California State Water Resources Board moved quickly to approve a construction general permit with a numerical discharge limit less stringent than that expected from EPA in December.

Finally, the "new Sheriff" has directed the EPA Administrator for Enforcement, Cynthia Giles, to recommend better enforcement with a focus on wet weather flows. Giles began by stopping a large mining permit that would blast the tops of mountains leaving the rubble in six miles of West Virginia streams. \*

# EPA Promise of Enforcement

EPA Administrator, Lisa Jackson, told the U.S. House Transportation and Infrastructure a Committee “The time is long overdue for EPA to reexamine its approach to Clean Water Act enforcement.” At the October 16 hearing Ms. Jackson added that the agency would set strict benchmarks for state regulators, eventually compel companies to submit electronic pollution records so violations could be detected and punished more easily, and “develop more innovative approaches to target enforcement to the most serious violations and the most significant sources.”

One approach will probably include a series of enforcement actions against companies and municipalities that have violated the Clean Water Act, according to people with knowledge of the EPA’s plans who were not authorized to speak publicly according to a New York Times Reporter. His article quoted an Agency official saying “Going forward, if states are falling down on the job, we’re going to reverse the permits they’ve issued, and if they’re not enforcing the law, we’ll step in and do it ourselves.”

Committee Chairman James Oberstar said “Some states and EPA regions have abysmal records of significant noncompliance,” Speaking to Jackson, Oberstar said “I look to you to begin taking the management steps necessary to protect our water, our public health and our environment.”

Tom Porta, president of the Association of State and Interstate Water Pollution Control Administrators told the Committee that States are doing a good job enforcing the Clean Water Act considering the constraints of inadequate budgets for state regulators and an expanding number of polluters that must be policed.

Wade T. Najjum, Assistant Inspector General for Program Evaluation reported that nearly 40 percent of the nation’s assessed waters are not meeting the standards states have set for them.

Najjum said that state enforcement needs to be modified to better address environmental risks, including contaminated runoff. Contaminated runoff, including agricultural and urban runoff, was widely accepted as causing the majority of the nation’s remaining water quality problems.

Eric Schaeffer, previously the EPA Civil Enforcement Director, recommenced an annual polluter fee for states to cover basic program costs without having to rely on general revenues that frequently dry up during fiscal crises.

“Data from the EPA shows that many major facilities with Clean Water Act permits violate their permits over and over again, apparently with no fear of retribution,” said Eddie Bernice Johnson, who chairs the committee's Subcommittee on Water Resources and Environment.

"In 2005, well over half of all major facilities in this country illegally discharged pollution into our waterways," she said. "These facilities reported almost 25,000 instances of such discharges, which included harmful bacteria, pathogens, and heavy metals, such as mercury and arsenic. Yet there are very few enforcement actions on record for any of these facilities."

In September, a New York Times investigation found that companies and other workplaces had violated the Clean Water Act more than 500,000 times in the last five years, but fewer than 3 percent of polluters had ever been fined or otherwise punished. \*

# Cynthia Giles, EPA's Top Cop

During her confirmation hearing before the Senate Environment and Public Works Committee in April, Giles said, "President Obama and Administrator Jackson have pledged that under their watch the environmental cop will be back on the beat."

Soon after Senate confirmation as EPA's Assistant Administrator for Enforcement and Compliance Assurance Giles began to develop a new enforcement policy.

The change is clear when you hear Giles say that the new EPA administrator, Lisa Jackson, wants the agency to follow three key principles: adherence to the rule of law, sound science and transparency.

In the 1990's, Giles worked for the EPA, where she wrote a white paper on a proposed national direction for environmental enforcement. It was called "Aiming Before We Shoot: A Revolution in Environmental Enforcement." She then became chairwoman of the Sierra Club's Rhode Island chapter.

In 2000, she taught environmental law at the Roger Williams University Law School. And then worked at the Massachusetts Department of Environmental Protection. In 2005, Giles became director of the Conservation Law Foundation's Rhode Island Advocacy Center.

During the Senate conformation hearing, Giles said that environmental enforcement should ensure that companies that do comply with the law are not placed at an economic disadvantage by being forced to compete with businesses that flout the law, she said.

Giles had the EPA budget reflect her intent to increase criminal investigations by hiring 20 additional investigators. \*

## Stormwater News

(Continued From Page 1)

**The Natural Resources Defense Council (NRDC) report, "Testing the Waters: A Guide to Water Quality at Vacation Beaches," confirms that 7% of the Nation's beachwaters are contaminated with human and animal waste.** The highest level of contamination was found in the Great Lakes, where 13% percent of beachwater samples violated public health standards. Nancy Stoner, NRDC Water Program co-director, said the contaminated waters "not only made swimmers sick – it hurts coastal economies."

**The Sixth Circuit Court of Appeals rejected a request by a coalition of agriculture organizations for the entire Sixth Circuit to rehear an earlier decision by the Court regarding pesticide applications near water.** A three-judge panel of the Sixth Circuit ruled in January that pesticide applications in, over, and near water require National Pollutant Discharge Elimination System (NPDES) permits under the Clean Water Act.

**The Florida Department of Environmental Protection is fining Phoenix Construction \$1.7 million for environmental permit violations at the new airport under construction near West Bay.**

The DEP's judgment follows an investigation over runoff violations from heavy rains this spring that already resulted in airport fines of \$250,000 and \$200,000 in fees for an outside environmental consultant.

Phoenix president James Finch on Friday said he would dispute the fine and said the Airport Authority carries the blame for not sodding critical areas.

The DEP calculated that Phoenix cut corners in what the industry calls "Best Management Practices," saving itself \$964,500, according to a DEP investigation conducted by complaints and enforcement manager Jessica Kleinfelter.

**The Tennessee Clean Water Network (TCWN) filed suit in Federal Court** against a group of home builders for violations of the Clean Water Act at the Legends at Washington Pike Subdivision in east Knox County. The complaint charges that water quality violations have continued despite the notice of intent to sue TCWN sent July 29, 2009 \*

## Discharge Quantity Restricted to Pre-Construction Flow

# California Imposes Turbidity on High Risk Construction

The State Water Resource Control Board adopted a new construction general permit with an effective date of July 1, 2010. The Board heard comments on September 2, made several changes and voted 3-1 to approve the staff developed construction permit.

Expect the staff to turn their attention to revising the multi-sector industrial stormwater general permit that expired on April 17, 2003, but the permit was extended for existing permittees.

### **Risk Levels**

The State developed risk levels based on sediment transport risk and receiving water risk. The factors that define the risk levels are:

- \* proximity to receiving waters
- \* size of the project,
- \* soil type,
- \* rainfall erosion potential.

All regulated construction projects are in one of three levels with progressively more stringent requirements (BMP's, BMPs plus site runoff monitoring, BMPs plus site runoff monitoring and receiving water monitoring) based on the determined risk level. All existing permits ARE grand-fathered for two years at a risk level 1.

### **Numeric Effluent Limits (NELs)**

A controversial issue was the numeric effluent limits. The limits will apply to the highest risk level or where advance sediment treatment systems (ATS) are necessary.

The NEL's for Risk Level 3 are 6-9 for pH and 500 NTU (nephelometric turbidity unit) for turbidity. The NEL applies to any rain event less than the 5-year, 24-hour storm.

The NEL's for ATS are 10 NTU average or 20 NTU for any single sample less than the 10-year, 24-hour storm event.

### **Numeric Action Levels (NALs)**

NAL's are required for risk level of 2 or 3 but unlike NELs, NALs are not directly enforceable rather they require the site operator to take actions to improve BMP performance. The NAL for pH is 6.5-8.50. The turbidity NAL is 250 NTU

### **Monitoring**

Sites which are at a risk level 2 or 3 must monitor runoff for both pH and turbidity, plus pollutants required by the Regional Board. If a risk level 3 site is more than 30 acres, bioassessment monitoring in the receiving water must be performed. In addition, risk level 3 sites must conduct monitoring within the downstream receiving water in the case that NELs are exceeded

### **Other Permit Conditions**

The California Water Code has a mandatory minimum penalty of \$3,000 assessed by the Regional Board for each serious violation. Penalties apply to any waste discharge that exceeds the effluent limitation by 40 percent or for the failure to submit a compliance self monitoring report.

During the grading and land development phase the permittee must regularly prepare a Rain Event Action Plan (REAP).

The Permit requires Low Impact Development (LID) site design strategies so that post-construction runoff matches pre-construction hydrology for areas not within Phase I or Phase II MS4 systems

This will be a paperless system. All documents must be filed electronically in the Storm Water Multi-Application, Reporting, and Tracking System (SMARTS). \*

# Chesapeake Bay Restoration

The Chesapeake Bay Ecosystem Reauthorization Act of 2009 was introduced in the Senate to amend section 117 of the Clean Water Act, which governs the EPA Chesapeake Bay Program. The bill codifies President Obama's Chesapeake Bay Executive Order, which requires annual Federal Action Plans across all federal departments to restore the Bay.

The legislation gives the states of the Chesapeake Bay strong new tools to restore the Bay and for the first time sets a firm deadline of 2020 for all restoration efforts to be in place. Unlike earlier, missed deadlines, this one will become a legally binding part of the Clean Water Act.

The bill also significantly expands federal grants. The Bay Restoration bill authorizes a new \$1.5 billion grants program to control urban/suburban polluted stormwater, the only pollution sector that is still growing.

Grants to the states, small watershed organizations, and for comprehensive monitoring programs are all newly created or expanded in the draft bill.

Under the proposal, EPA would get new power to impose sanctions on states that fail to meet cleanup targets. These could include bans on new development - the suspension of authority to issue new hookups to public wastewater systems and the ability of local governments to issue building permits.

The Senate also is likely to consider a water pollutant-trading program for the bay, modeled after a 1990 law that created a cap-and-trade system to reduce acid rain from coal-fired electric plants. The new plan would be aimed primarily at the politically sensitive

problem of reducing agricultural runoff, blamed for an estimated 40 percent of overall bay pollution.

## **EPA Strategy Document**

On November 9, a draft strategy will be released that integrates seven reports on expanded use of regulatory authorities to address pollution control over Chesapeake Bay. The information in these reports, written by five federal agencies that are a part of the Federal Leadership Committee created by President Obama, will serve as the foundation for a draft strategy due this fall.

EPA is preparing to focus its stormwater non-compliance enforcement efforts on MS4s, construction activity and priority industrial sectors. EPA and the Bay states would address all MS4s with deficiencies that are clear violations and that are located within the identified geographic priority areas, and where program deficiencies could significantly impact Bay water quality.

Where vague and poorly written or inadequate permits hamper the use of enforcement tools to address potential deficiencies, EPA plans to provide compliance assistance to encourage MS4s to improve municipal stormwater management plans and coordinate with permitting staff to improve and strengthen subsequent permits.

The primary goals associated with construction sites and other priority industrial sectors are generally dependent on whether these sites and facilities are located within or outside of designated MS4 boundaries. The primary goals are: (1) to gather data to support designating currently unregulated priority urban/suburban separate storm sewer systems for NPDES coverage; (2) to improve MS4's

municipal stormwater management programs and/or encourage stronger oversight and enforcement of applicable requirements for construction sites by other local authorities such as soil conservation districts; and (3) to increase the visibility and showcase the importance of effective MS4 stormwater management programs in improving water quality.

EPA will also continue to inspect and take appropriate enforcement action against discharges from noncompliant construction site operations and other industrial facilities in identified priority watersheds

EPA Administrator Lisa Jackson said her and her staff will be meeting with states “to develop detailed implementation plans with clear milestones to reduce pollution in major Bay watersheds as needed to meet water quality goals.”

Failure to meet those milestones and goals will mean federal enforcement action, Jackson said - or, as one report describes it, “tailored consequences.” Those could include taking away grant money, requiring pollution reductions in other areas, or blocking permits for certain activities that might increase pollution, according to the earlier report. \*

### **The Clean Water Restoration Act**

Congressional efforts to restore the Clean Water Act to its original jurisdiction prior to Supreme Court confusing decisions is on hold.

The Clean Water Restoration Act (HR 2421 and SB 8) is resting House and Senate committees. The bill is sponsored by Congressman James Oberstar (D-Minn.) in the House and Senator Russell Feingold (D-Wis) in the Senate. \*

## **Environment Trumps Jobs In West Virginia**

The EPA intends to revoke a previously issued permit for Nations Largest Mountaintop Removal Coal Mining Site.

The permit was issued in 2007 for Mingo Logan Coal's Spruce No. 1 mine to allow the company to fill valleys at the site with material removed to expose coal.

The project would be the largest authorized mountaintop removal operation in Appalachia and it would occur in a watershed where the EPA says many streams have been affected by previous mining.

There are 12 more surface mining projects either proposed or authorized but not built in the same watershed.

The process of mountaintop removal coal mining involves blasting with explosives to remove up to 1,000 vertical feet of mountain to expose underlying coal seams. Excess rock and soil are dumped into the valley below, burying whatever stream existed. The project would bury more than seven miles of streams.

West Virginia Gov. Joe Manchin and U.S. Sen. Jay Rockefeller, both Democrats, criticized the EPA. Rockefeller called it “wrong and unfair” to change the rules for a permit that already was approved.

Governor Manchin said “This federal bureaucracy is misleading, and is adding excessive red tape that is affecting people’s livelihoods. Government should be a facilitator and partner, not a hindrance to Americans working to obtain the American Dream – and that is to have a good job, make a decent wage and provide for their family.”

\*

# State Activity

## **Washington State**

Washington Department of Ecology issued \$579,019 in penalties in the second three months of 2009. The largest penalty against a South Sound entity was levied against developer Walt Cox for moving forward with his large lot residential project without securing a needed stormwater permit. He was assessed a \$36,000 penalty for refusing to apply for the permit, instead filing numerous unsuccessful appeals of the requirement.

## **Connecticut**

Robert Meyer, pled guilty to violating the Clean Water Act and was sentenced to one year of probation ordered to pay a \$1,000 fine and perform 50 hours of community service. He was vice president of Atlantic Wire. In September 2007, DEP officials only found out about a large discharge of acidic water into the river when a fisherman reported the death of hundreds of blue crabs in the vicinity of Atlantic Wire's discharge pipe.

## **Maryland**

An environmental coalition reached an agreement with Maryland's Department of the Environment over its legal challenge to Maryland's general stormwater permit for construction sites. Within 3 months of EPA adoption of EPA's national effluent standards, Maryland will reopen all general construction permits to include the national standards and will revised erosion and sediment control regulations by May 31, 2010.

## **Puerto Rico**

EPA has filed individual complaints against the municipalities of Cayey, Hatillo, Las Piedras, Loiza, Rio Grande and Toa Alta in Puerto Rico for failing to comply with federal Clean Water Act requirements related to stormwater management for small municipal sewer systems. The six municipalities face a total amount of \$291,177 in fines.

## **California**

The city of Stockton approved a \$4 million settlement with environmentalists, who sued to force the city to decrease sewage spills. The California Sportfishing Protection Alliance sued under the federal Clean Water Act, claiming the 1,530 spills from Stockton into the Sacramento-San Joaquin Delta over the past five years has endangered public health. Under the settlement, the city must hire an employee to inspect restaurants' grease traps and provide closed-circuit television broadcasts of sewer inspections over the next five years.

## **Louisiana**

*Louisiana Urban Stormwater Coalition* has been formed by municipal permit holders. Working with the EPA Region 6 Enforcement Division and the Louisiana Department of Environmental Quality, representatives of active Small MS4 programs in Louisiana have met and agreed to form this self-help coalition. The coalition will promote collaboration among stormwater managers, educators, engineers, landscape architects, planners and regulators to develop solutions that maximize return on their investment of time, effort and funds according to Dr. Rod Hendrick, a professor in the Louisiana State University Agricultural Center.

## **Texas**

The Dallas-Ft. Worth Chapter of the Associated General Contractors and the Associated Builders and Contractors agreed to participate in a pilot program to minimize or eliminate the discharge of polluted stormwater from construction sites.

The program consists of an internal audit that each member performs at each of their construction sites, an agreement to participate in the program, and an inspection of each participating site by TEXO's environmental, safety, and health professionals. partnership with EPA and TCEQ. \*

**John Whitescarver,  
Executive Director  
National Stormwater Center**



- ▶ *Qualified Environmental Professional* by the Institute of Professional Environmental Practice
- ▶ Team to Organize US EPA & Write Clean Water Act Rules; National Expert, Municipal Permitting Policy; Awarded EPA Bronze Medal by US EPA, 1970-1979
- ▶ Appointed to EPA Advisory Committee on Compliance Assistance
- ▶ Appointed by Small Business Administration to EPA committee for streamlining Phase II stormwater rules.
- ▶ Instructor for Florida DEP Erosion & Sedimentation Control Inspector Course

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