

2010: MS4 ENFORCEMENT & NEW CONSTRUCTION RULES

Stormwater News

The Supreme Court refused to hear an appeal from the Friends of the Everglades that transferring polluted water from one navigable body to another does not require a permit.

In 2009, a three-judge panel of the U.S. Court of Appeals for the Eleventh Circuit ruled that the transfer of a pollutant from one navigable body of water to another is not necessarily a “discharge of a pollutant” under the CWA. The Eleventh Circuit's ruling reversed a lower court's decision that such a permit was required, affirming a U.S. Environmental Protection Agency water transfer rule.

SPCC Plan Deadline Now Nov. 10, 2011. EPA is extending the compliance date by one year for certain facilities subject to recent amendments to the Spill Prevention Control and Countermeasure (SPCC) rule. The agency is also announcing that certain facilities will not be eligible for the one year extension. See http://www.epa.gov/oem/content/spcc/compliance_dates.htm

EPA has set water quality standards for nutrients in Florida fresh waters. Currently, more than 1,900 rivers and streams, 375,000 acres of lakes, and 500 square miles of estuaries are known to be impaired by nutrients in Florida. EPA will issue additional standards for Florida's coastal waters by August 2012 and will soon submit the underlying science for these standards to its independent Science Advisory Board for peer review.

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EPA Actions Demonstrate That Elections Have Consequences

The National Stormwater Center was asked about the most significant developments in the stormwater industry this year and what are our predictions for next year. The response will be in the next issue of *Water & Wastes Digest, Storm Water Solutions*. Go to <http://www.wwdmag.com/> for a free subscription.

This year, stormwater permit enforcement actions by the EPA and several states indicated a move away from permit assistance to compliance and enforcement. California, Oregon and Washington lead state enforcement while EPA enforced permits in the Chesapeake Bay watershed.

The construction industry turbidity limitations were delayed a couple years but EPA promulgated national narrative standards.

Next year, expect municipal governments to be challenged by additional inspection requirements, compliance audits and permits that expand their jurisdiction.

Post construction national standards will be proposed that will require pre-development hydrology similar to California's construction permit. *

EPA to Construction Industry and the Court: “MISTAKES WERE MADE” **EPA Will Recalculate of the Turbidity Limit**

The US Environmental Protection Agency has acknowledged making a mistake calculating the numerical limit (280 NTU) in the construction and development effluent guideline published in the Federal Register on December 1, 2009.

Give credit to Kevin Bromberg of the Small Business Administration (SBA) for finding the mistake that EPA made. The numbers came from construction at the Seattle Washington Airport. Several different construction operations were evaluated but EPA did not understand that all discharges went through the same detention pond. EPA’s calculation incorrectly assumed separate discharge points.

Narrative Standards are in Effect

Although the numerical standards are withdrawn, the narrative standards are effective and must be placed within the body of any newly issued stormwater construction permit.

The most stringent standard is the prohibition of any discharge of waste water from construction materials including but not limited to: (1) washout of concrete, (2) clean out of stucco, paint, form release oils, curing compounds, (3) fuels, oils, or other pollutants used in vehicle and equipment and (4) soaps or solvents used in vehicle and equipment washing. While called a narrative standard, in reality it is a numerical standard of zero.

EPA promulgated ten (10) “minimize standards.” Three are pollution prevention measures: (1) *minimize* the discharge of pollutants from wash waters, (2) *minimize* the exposure to precipitation, and (3) *minimize* the discharge of pollutants from spills and leaks.

The other seven are erosion and sediment

control standards. Permittees must minimize:

- Soil erosion
- Erosion at outlets
- Downstream erosion
- The amount of soil exposed
- The disturbance of steep slopes
- Sediment discharges
- Soil compaction

Generally the term “minimize” means to reduce and/or eliminate to the extent achievable using control measures that are technologically available and economically practicable and achievable in light of best industry practices.

However, EPA does not prescribe who decides if a control measure meets this “minimize” standard. Is it the permittee or the regulatory inspector?

There are several additional standards:

1. Stabilization must be initiated immediately whenever construction is final or will not resume for a period exceeding 14 calendar days.
2. No discharge from dewatering unless appropriate controls are used.
3. Unless infeasible, maintain natural buffers around surface waters, direct stormwater to vegetated areas, preserve topsoil, and utilize outlet structures that withdraw water from the surface.

Turbidity Re-Proposal Plan

On November 5, EPA proposed to stay the numeric effluent limitation of 280 NTU and associated monitoring requirements. Some think the new turbidity limit will be 500 NTU.

EPA plans to correct the data error in the numeric limit. This action affects not only the effluent guideline, but also Construction General Permits to be issued by EPA and by States.

(See Construction Permit in Page 5)

A NEW PATH TO CLEAN WATER?

EPA thinks U.S. waters are not improving. Recent surveys show nutrient pollution, excess sedimentation, and degradation of shoreline vegetation affect more than 50 % of our lakes and streams. The main national sources of water degradation have changed from sewage and industrial pollution to agriculture, stormwater runoff, habitat, hydrology & landscape modifications, municipal wastewater, and air deposition. See <http://blog.epa.gov/waterforum/2010/08/draft-clean-water-strategy-is-released/>

The paper states that the rate at which new waters are being listed for water quality impairments exceeds the pace at which restored waters are removed from the list.

EPA Administrator Lisa Jackson has said “to see a huge leap forward in water quality as we saw in the 1970s after the passage of the Clean Water Act we must improve and adapt regulations, permitting and compliance/enforcement efforts to change our current path.”

One plan is to expand municipal stormwater permitting coverage to currently unregulated areas and establish performance standards for stormwater discharges from newly developed and redeveloped sites that result in reduced discharge of pollutants, including through the use of green infrastructure techniques.

Also, EPA will increase protection of high quality waters, including revisions to water quality standards to strengthen antidegradation provisions, and focus on protecting those waters that are threatened by coal and hard rock mining activities.

EPA would work with the Department of Agriculture to provide funding for nutrient and sediment reductions through Sections 319 and 117 Program, Clean Water State Revolving Fund, STAR grants and USDA Conservation programs. *

Stormwater News

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EPA Fugitive Arrested in the Dominican Republic.

Albania Deleon fled the United States prior to sentencing related to asbestos training scam. She was captured recently in the Dominican Republic after 19 months on the run. Deleon operated Environmental Compliance Training (ECT), a certified asbestos training school. However, many of the recipients of the training certificates never took the required course. Instead, with Deleon's knowledge and approval, ECT's employees issued certificates of course completion to hundreds of individuals who did not take the course.

A federal grand jury indicted Dhiren Patel for reporting false sampling data.

Patel was the environmental manager of a Coca-Cola Company subsidiary, AMCAN. Patel allegedly diluted discharge samples with up to 50 percent water. Patel then allegedly caused those altered sample results to be submitted in monthly reports to the City of American Canyon to show compliance with its NPDES permit.

West Virginia will sue the EPA over "illegal" policies aimed at destroying the state's coal industry.

At issue are two sets of regulatory guidance on how EPA plans to enforce and how to it plans to review Clean Water Act (Section 404) permits for Appalachian coal mining operations to guard against degradation of water quality in headwater streams.

The Conservation Law Foundation (CLF) petitioned EPA to take back NPDES from Vermont.

“The state is not protecting clean water in the way that Congress and the EPA require, so the state shouldn't be able to take millions of dollars of taxpayer money,” said Chris Kilian, head of Vermont's CLF. He said the state receives nearly \$6 million a year to do the job.

A tank cleaning company and its general manager were indicted by a federal grand jury for dumping more than 500,000 gallons of polluted water into the Elizabeth River.

The Virginia company was hired to clean the tanks of a decommissioned Navy ship. The cleaning process included removing 2.1 million gallons of ballast "water," which contained various pollutants including oil, grease, heavy metals, bacteria and other materials.

The indictment alleges that the general manager ordered employees to pump approximately 500,000 gallons of the polluted waste water overboard into the Elizabeth River. *

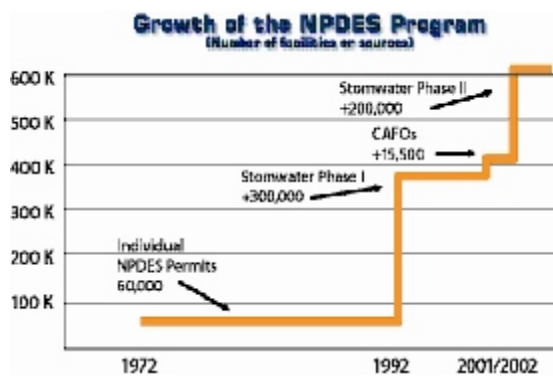
The Growth of NPDES

The Future of Stormwater Permitting

Section 402 (NPDES) of the Clean Water Act of 1972 (officially the Federal Water Pollution Act) was the tool EPA used for 20 years to reduce pollution from municipal sanitary treatment facilities and waste water from industrial activities.

Although stormwater permits were regulated by the 1972 law, few stormwater permits were issued until Congress specifically required EPA issue stormwater permits by amending the Act in 1987.

Over the last 20 years, 50,000 stormwater permits were issued.



Other traditional NPDES permits issued since 1972 are wastewater, sanitary waste including sanitary sewer overflows (SSOs) and Combined Sewer Overflows (CSOs), sewage sludge, pretreatment of industrial wastewater, ocean discharges and non-contact cooling water.

Concentrated animal feeding operations (CAFOs) were regulated in the 1972 law but only actively pursued by EPA in the last few years.

Recently the federal courts have interpreted the Clean Water Act to require NPDES permits for vessels, logging trails and pesticide applications on or near water bodies.

Looking Forward to Revised Permits

Reissued industrial permits will focus on minimizing exposure, reissued construction permits will be more stringent, and municipal reissued permits will expand regulation beyond the urbanized area and require more inspections.

California has begun electronic permitting including the NOI, SWPPP submission and reports - all submitted electronically. EPA is moving in the same direction and by 2012 some NPDES reporting must be submitted to an EPA database that is publically accessed.

Total Maximum Daily Loads (TMDLs) are essentially pollution budgets for specific water bodies. EPA and the states are scheduled to develop as many as 40,000 TMDLs over the next 15 years.

There is an EPA handbook for applying total maximum loads (TMDL) to stormwater permits. The development of TMDL wasteload allocations is scientifically, legally and politically challenging.

TMDL wasteload allocations for all rivers discharging into the Chesapeake Bay will begin next year.

Expect increased enforcement. EPA enforcement guidance requires EPA regional offices to convince states to enforce water permits, and where they don't EPA will take federal enforcement action. That appears to be happening now.

Permit fees will increase. EPA will provide additional funding for NPDES where states increase permit fees to provide greater sustainability. California is increasing stormwater fees by 21%. *

Construction Permit

(Continued from Page 2)

EPA intends to publish the proposed correction rule in December 2010 for public comment and a final rule by May 30, 2011 so that the revised limitation can be effective by June 29, 2011.

An effective date of June 29, 2011 is necessary in order that EPA can incorporate the corrected numeric limitation in its Construction General Permit by June 30, 2011.

See Federal Register: November 5, 2010

EPA plans to issue a proposed permit in December of 2010, and a final Permit by June 30, 2011. In the proposed permit, EPA expects to incorporate the new effluent guideline including monitoring and reporting requirements.

The turbidity standard will be referenced but not proposed because it will not be effective until after the proposed CGP is signed. EPA will incorporate the corrected numeric limit into the final CGP.

EPA wants NPDES states that finalize their permit before the effective date of the corrected numeric limit to issue a short term permit without the numeric limit.

The following States have expired construction permits: South Dakota, Maine, Alabama, Michigan, Indiana, North Dakota, Pennsylvania, North Carolina, Connecticut, New York, Tennessee, Oregon, and Washington.

The following States have construction permits expiring in 2011: Delaware, Wyoming, South Carolina, Vermont, Wisconsin, Arkansas, Kansas, Montana, New Hampshire, New Mexico, Idaho, and Massachusetts. *

States Show Resistance Chesapeake Bay Plan

The EPA plan is to restore the Bay and its tidal waters by 2025. Sixty percent of the work is to be completed by 2017.

State implementation plans were sent to EPA in late November so EPA can establish the Chesapeake Bay TMDL for nitrogen, phosphorus and sediment by December 31, 2010.

A TMDL (total maximum daily load) sets the maximum amount of pollution that a water body may receive and still meet its water quality standards.

Overall, the TMDL would require that the amount of nitrogen and phosphorus reaching the Bay each be reduced by about 23 percent, and the amount of sediment by about 22 percent.

EPA said that the draft plans submitted by states in September were not satisfactory. Five states (Delaware, New York, Pennsylvania, Virginia and West Virginia) failed to demonstrate that state programs would effectively control nutrient pollution, according to EPA.

Where states fail, EPA officials said the agency would “flex its regulatory muscle” and require further nutrient reductions at wastewater treatment plants, municipal stormwater systems and animal feedlots.

In addition, EPA regulatory programs may be extended to cover currently unregulated smaller stormwater systems and smaller agricultural animal operations.

Agriculture is the leading source of nitrogen, phosphorus and sediment pollution, but wastewater treatment plants and urban runoff are also significant sources. Air pollution is also a major source of nitrogen. *

Interesting Enforcement Actions

California

OG Property Owner Corporation agreed to pay the Regional Water Quality Control Board \$530,000 to resolve a 2009 complaint that violated its construction permit and state water regulations including the Clean Water Act. The development is a 1,600-acre project near Orinda, CA.

The Regional Board charged OG Property Owner Corporation with discharging stormwater, chlorinated water, and concrete wash water into Brookside Creek as a result of inadequate erosion control. City officials and local environmental groups urged that the settlement include money for one or more education projects, such as creek restoration. State law allows using up to one-half of a penalty for such projects. However, the water board chose not to spend a portion of the penalty money in the city where the environmental damage occurred.

Indiana

Joseph T. Biggio of Chicago was charged by EPA and the State with two counts of violating the Clean Water Act and one count of making false statements. Biggio was the Executive Vice President of Operations at Ecological Systems, Inc., (ESI) an oil reclamation business that reclaimed and reprocessed used oil from its customers. The Company had a permit to discharge wastewater but with effluent limitations for some pollutants.

Biggio purportedly authorized ESI employees to take multiple samples, but only report the most favorable sample results to the City. Biggio purportedly authorized employees to take non-representative samples of its discharge because the employees took them during rain events in an effort to get a more diluted sample. The alleged violation regarding false statements was based on Biggio's signatures on six years of monthly reports that were submitted to the City.

Biggio faces a maximum of three years in prison for each violation of the Clean Water Act and a maximum of five years in prison for making false statements on the monthly reports. Biggio also faces a fine of either \$250,000 for each of the three felonies, or up to \$50,000 per day of violation for the Clean Water Act violations fine.

Louisiana

A former Iberia Parish sheriff has pled guilty to violating the Clean Water Act by negligently operating a water treatment facility. Sidney J. Hebert was part-owner and president of Environmental Compliance Solutions LLC when state regulators inspected a company facility in June 2009 and found wastewater bypassing the filtration system and flowing into the Port of Iberia's Commercial Canal. Federal prosecutors said that the company agreed to shut down the facility and pay a fine of \$50,000. Hebert faces a maximum prison sentence of 1 year.

Idaho

Lynn Babington and ARK Fisheries, Inc. could face a maximum penalty of up to \$177,500 for allegedly violating the Clean Water Act over a five year period. The violations occurred at the ARK Fisheries Tunnel Creek facility in Buhl, Idaho. EPA observed numerous violations of ARK Fisheries' NPDES permits including:

- Discharging pollutants without a permit for at least two months
- Failing to submit timely and/or complete DMRs
- Failing to report quarterly sampling
- Failing to submit annual reports
- Exceeding permit limits for phosphorus *

States Activities

Florida

EPA has set numeric nutrient standards for freshwater lakes, streams and rivers in Florida. EPA resisted pleas by industry, agriculture, politicians and complied with the court order under litigation by the Florida Wildlife Federation. Effective compliance date is in early 2012.

California

In November, EPA ordered the California Department of Transportation (CalTrans) to upgrade its statewide stormwater management program, and exert stronger controls over stormwater discharges from its road construction and maintenance sites.

EPA inspected numerous CalTrans construction and maintenance sites, and found violations of the stormwater permit

CalTrans manages approximately 50,000 miles of California highway and freeway lanes across its 12 districts. Stormwater runoff from CalTrans roads and facilities contain pollutants such as metals, sediment, oil, grease, pesticides and trash.

Illinois

In June, EPA said the Illinois River should be clean enough for swimming, a goal of the Clean Water Act. State officials say that isn't practical now since most of the channels are lined with steel and concrete and barges frequently use these waters. However, the State is considering disinfection.

Alabama

The EPA is considering a petition by environmental groups to remove Alabama Department of Environmental Management's (ADEM) authority to administer NPDES. EPA has objected to ADEM's proposed stormwater permits.

The EPA's formal objection came after Alabama announced it was about to start issuing permits that the EPA had objected to. The Agency objected to a provision that would allow cities to rely on ADEM's enforcement and inspection program rather than do their own. The EPA noted that ADEM does not review site plans when issuing storm water permits. ADEM has historically inspected only 10 percent to 15 percent of its active construction sites annually.

Connecticut

A revised industrial multi sector permit (MSGP) was effective in October. Under the new rules, there are specific requirements for certain industries: asphalt plants; non-metallic mines and quarries; refuse systems; auto salvage yards; scrap recycling facilities; steam electric power facilities; transportation and public works facilities; marinas, yacht clubs and boat dealers; ship and boat building and repair; and small-scale composting facilities.

All regulated facilities must analyze stormwater samples every six months - and send the results to the DEP. Quarterly, facilities must do a "visual" test, in which personnel collect and examine a site for obvious signs of pollution such as discoloration.

Pennsylvania

The Pennsylvania Department of Environmental Protection is providing municipal drainage system operators a nine-month extension of their existing general permit to better coordinate implementation of new permitting requirements.

The current permit for all MS4s is scheduled to expire at midnight on March 9, 2011. The extension will take effect March 10, 2011 and expire at midnight on Dec. 9, 2011. *

**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

2011 Schedule:

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Certified Construction Inspector (CCI)**

	<u>CSI</u>	<u>CCI</u>
San Diego	Jan 11-12	None
Austin	Feb 15-16	Feb 16-17
San Jose	Mar 22-23	None
Harrisburg	Apr 26-27	Apr 27-28
Denver	May 10-11	May 11-12
Las Vegas	Jun 14-15	Jun 15-16

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