



# The Stormwater Quarterly

National Stormwater Center

Our 14th year

Winter 2008 ♦ Issue 114

## ACTIONS NECESSARY TO RESTORE THE NATION'S WATERS

### *Stormwater News*

#### **Stormwater Enforcement is Back!**

**Home Depot will pay \$1.3 million and conduct weekly inspections at all construction sites. (See the page 7 article). Also, Archer Daniels Midland Co. (ADM) plead guilty to criminal violations of stormwater rules.**

The ADM guilty plea was for "negligent violations" of the Clean Water Act by discharging pollutants at their Chattanooga facility without a stormwater permit. ADM will pay a fine of \$100,000 and donate \$100,000 to environmental protection organizations in the Chattanooga area

The ADM facility extracts cellulose from waste cotton material, and the process requires a large volume of water. At times the process water accumulates and is pumped or allowed to leak into stormwater drains at the plant. Officials said the waste should have been sent to a wastewater treatment system and the city sewer lines.

**Massey Energy Co.** agreed to pay \$20 million to settle a lawsuit with the U.S. Environmental Protection Agency over claims that it violated the Clean Water Act at its coal mines. Massey will invest about \$10 million to develop and implement a set of procedures to prevent future violations

Massey agreed to take measures at all of its facilities that will prevent approximately 380 million pounds of sediment and other pollutants from entering U.S. waters each year.

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### **Congress, Regulators, Dischargers and Citizens Have Work to Do**

*The Stormwater Quarterly* predicted a 100-year period to complete the purpose of the Clean Water Act - restoring our Nation's waters. The first 20 years (1972-1992) resulted in significant improvement of water quality due to compliance with discharge permits for sanitary and industrial waste water. The last 15 years were used to issue stormwater discharge permits. Now we need 15 years of stormwater compliance.

This leaves 50 years to finish the job of restoring our Nation's waters. The CWA must be amended to regulate agriculture runoff, ship sanitary waste and construction runoff from oil and gas exploration. By the time water quality rules impose Total Maximum Daily Loads (TMDL) on all point and non-point discharges, it will be 2072.

To complete the stormwater program in 15 years, action is necessary by Congress, by inspectors, by dischargers, and by citizens. The U.S. Congress must clarify what non-navigable tributaries are federally regulated.

Regulators must inspect 349,280 stormwater permittees. This calls for a nationwide training program for inspectors.

Finally, there is a key role for citizens. Recognizing that pollution from stormwater runoff is a local problem, residents suffer the greatest impact and must report polluters. \*

## The Clean Water Restoration Act is Necessary to Resolve the Question

# Do Discharges to a Dry Ditch Need a Permit?

Last summer, EPA proposed guidance (<http://www.epa.gov/wetlands/guidance/CWAwaters.html>) to eliminate the requirement for NPDES permits where the discharge is to: “ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water.”

The guidance is the result of the Supreme Court’s *SWANCC* and *Rapanos* decisions and the inability of the Court to clarify the *jurisdiction* of the Clean Water Act to protect the Nation’s Waters. It is now up to the U.S. Congress to clearly identify the waters protected by federal law.

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### **The clear definition of protected waters is critical to the whole functioning of the CWA.**

The Court decisions and EPA’s guidance are aimed at resolving this issue for wetland discharges required by Section 404 of the Act. However, the definition of “waters of the United States” applies to discharges under Section 402 (NPDES) and oil spill provisions in Section 311.

### **History**

The 1972 clean water law regulated “navigable waters.” This was a term taken from the Refuse Act of 1899 to prevent trash from impeding navigation. Then the Act defined navigable waters as the “waters of the United States.”

While in approving the 1972 Act, legislative history in both the House and Senate, stated the intent to give the term “waters” its “broadest possible constitutional interpretation”.

The Supreme Court found it difficult to define non-navigable tributaries as traditional waters.

### **CWRA**

Neither the Court nor EPA can resolve this issue, it’s up to the Congress. Bills introduced in the House and Senate are practically identical and restore previous EPA guidance.

Both bills are called the Clean Water Restoration Act (CWRA) and replace “navigable waters” each place it appears in the Act and inserts “waters of the United States.” It then defines the term as follows:

“Waters of the United States” means all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing, to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution.”

The Senate Committee on Environment and Public Works held a short hearing on December 13, 2007. Support for the bill was provided by the New Mexico Environment Department Secretary, Ducks Unlimited and a law professor.

Opposition to the bill was offered by the National Home Builders Association and the Committee minority leader James M. Inhofe. Senator Inhofe said, “If the Clean Water Restoration Act that is currently pending before our Committee passes, every homeowner in the country is unlikely to realize that their storm gutters could be designated point sources for which they will need federal Clean Water Act permits.” \*

## **Citizen Groups Attack Oregon DEQ Stormwater Permits Too Lenient**

According to a citizen lawsuit, the Oregon Department of Environmental Quality (DEQ) issues “lenient, under-protective permit conditions and has impaired and will continue to impair the environmental quality of the Willamette and Columbia rivers.”

The lawsuit by the Northwest Environmental Defense Center and Columbia Riverkeeper challenges stormwater permits for Schnitzer Steel Industries Inc., Diversified Marine Inc. and Zidell Marine Corporation.

During the permit process, citizens pointed out that the companies were discharging more pollutants than the permits would cover. The lawsuit says DEQ responded instead to concerns raised by "the regulated community," including changing the language of the permits after the public comment period had ended.

Citizens argue that the proposed permit required the permittee “meet” water quality standards, but the final permit states that discharges merely “must not cause a violation” of water quality standards. DEQ changed the words at the request of the industries.

The environmental group claims that Zidell exceeded its zinc and copper benchmarks on almost every report from 2003 to 2006. Also, Schnitzer has a “lengthy history of non-compliance” including exceeding its zinc benchmark in every report since 2003.

The lawsuit claims that even where the permit requires monitoring for specific toxins, it “lacks clear enforcement mechanisms and allows significant delays of compliance.”

The plaintiffs asked the court to declare that DEQ violated the U.S. Clean Water Act and Oregon law, and to cancel the permits. \*

## **Stormwater News**

*(Continued From Page 1)*

**EPA New England** (Region I) has taken a series of actions to enforce the requirements of the Small MS4 Permit. A number of municipalities have paid penalties for violations of the Small MS4 Permit.

The Town of Atkinson, New Hampshire paid a penalty of \$3,500 for discharging stormwater without submitting its annual report to EPA. Atkinson sent the overdue reports in response to an EPA Administrative Order.

The City of Malden, Massachusetts paid a penalty of \$10,000 for discharging stormwater without submitting an annual report. The City also failed to respond to an EPA information request requiring that it submit its overdue 2006 report within thirty days of the Request. Ultimately, the City submitted its overdue 2006 and 2007 reports in response to an EPA Administrative Order.

**Washington State Department of Ecology reissued a general permit for the application of pesticides** to control aquatic weeds in irrigation water conveyance systems. The permit does not authorize a violation of the surface water quality standards and specifies where to monitor water quality.

EPA ruled in 2006 that any pesticide used in or near water is not a pollutant if it is applied in accordance with a Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) label. Therefore, such pesticide applications are not subject to NPDES permitting. The courts will make the final decision.

The discharge of copper from irrigation systems kills aquatic weeds. However, it also harms fish and other forms of aquatic life. Copper can damage the function of fish gills. It also interferes with the ability of migratory salmon and steelhead to find their spawning streams.

**Congress, in its omnibus appropriations bill for the remainder of the 2008 fiscal year, ordered EPA to use \$3 million to “restore the network of EPA libraries** recently closed or consolidated by the Administration...” and to report within 90 days on its plans to “restore publicly available libraries to provide environmental information and data to each EPA region...” \*

# States Directed to Increase Inspections

EPA plans a 3-year increase in state inspections of stormwater permittees. EPA's Office of Enforcement and Compliance Assistance (OECA) has increased stormwater inspection frequency goals for states. Visit <http://www.epa.gov/compliance/resources/policies/monitoring/cwa/npdescms.pdf>

EPA Headquarters recommends inspection goals for EPA Regions and States. Regions negotiate with their states to set goals to measure the how well states implement the NPDES program

## **Phase I Municipal Audits and Inspections**

Nationally, there are approximately 280 Phase I MS4 permits which cover approximately 1,000 permittees (the difference being that many MS4 permits include two or more co-permittees).

Audits (see definition on Page 5) of all Phase I MS4s should be completed within five years. If violations were discovered that require the issuance of an enforcement order, regions or states should conduct a follow-up audit within one year.

Inspections (see definition on Page 5) of Phase I MS4s focus on sections of the MS4's permit. Inspectors evaluate the MS4's response to citizen complaints and answers requests or referrals from other groups. Inspections of Phase I MS4s should be conducted on an as needed basis

## **Phase II MS4 Inspections**

There are approximately 5,000 Phase II MS4s nationally.

The goal is to conduct a combination of audits and inspections to determine compliance within seven years. Given the need to assess the

Phase II programs, priority should be given to auditing or inspecting Phase II MS4s located in watersheds that contribute to high quality waters.

If violations are discovered that require the issuance of an enforcement order, regions or states should conduct a follow-up audit or on-site inspection within one year. If either minor or no violations were discovered, regions or states should conduct another follow-up audit or inspection within 5 years.

## **Industrial Stormwater**

There are more than 100,000 industrial stormwater permittees nationwide, within 29 industrial categories. The long-term inspection goal for industrial stormwater permittees is to inspect at least 10% each year.

OECA's national stormwater priorities are ready-mix concrete, sand and gravel, crushed stone, road building, and ports.

## **Construction**

The EPA and state annual goals is to inspect 10% of the permitted Phase I (greater than 5 acres) construction sites. Priority is given to sites located near waters that are impaired from construction-associated pollutants, and at sites located near quality waters that the state has designated for higher levels of protection to prevent degradation.

EPA estimates that there are approximately 157,500 Phase I construction starts annually. EPA and the states should establish the additional goal to inspect all Phase I sites where there is an indication (including tips and complaints) of unpermitted construction activity. Inspections conducted pursuant to a

tip or complaint will count toward the annual Phase I coverage goal.

OECA recommends an EPA and state goal to inspect 5% of the permitted Phase II (1 to 5 acres) construction sites. Priority is given to sites located near waters that are impaired from construction-associated pollutants, and at sites located near quality waters that the state has designated for higher levels of protection to prevent degradation.

EPA estimates that there are 87,875 Phase II construction starts nationwide annually. EPA and the states should establish the additional goal to inspect all Phase II sites where there is an indication (including tips and complaints) of unpermitted construction activity. Inspections conducted pursuant to a tip or complaint may count toward the annual Phase II universe coverage goal.

### **Definitions of MS4 Audits and Inspections**

An MS4 audit is used to evaluate overall MS4 stormwater program implementation, and identify problems the local government may have in implementing the program.

MS4 audits involve a comprehensive review of the local government's MS4 stormwater program including a review of the program elements.

These elements are structural and source control measures, detection and removal of illicit discharges and improper disposal into storm sewers, monitoring and controlling pollutants in stormwater discharges, implementing and maintaining structural and nonstructural Best Management Practices (BMPs), verification of implementation schedules, assignment of appropriate individuals, review of the inspection and enforcement program for industrial facilities and construction sites, evaluation of the dry weather screening program, determination of

whether controls are in place and are in good working order, and whether facilities have

schedules for construction of structural control measures.

An MS4 inspection involves reviewing some, but not all, elements of the MS4's permit. The MS4 inspection would involve an amount of field work to observe some of the MS4's operations.

MS4 inspections may involve the following **two activities** designed to determine if the MS4 control authority is implementing an adequate program in one or more selected MS4 program elements. If the region or a state conducts either of the following two activities it would meet the definition of an MS4 inspection.

1. Review a limited subset of the MS4 control authority's permit elements. The subset would be determined by the region or a state after a review of the MS4 permit. The inspection could involve either a significant review of one specific aspect of the program (e.g., structural and source control measures), or a review of 2-3 specific MS4 permit program elements (see MS4 audit definition for program elements), depending upon the specific objectives laid out by the region or a state.

2. Conduct an inspection at an individual site (e.g., construction, industrial) within the MS4's jurisdiction that is not linked to a specific MS4 audit. The particular purpose of this MS4 inspection would be to determine if the control authority has an adequate inspection program.

In other words this would be an MS4 oversight inspection. Based on the general definition of oversight inspections, this MS4 inspection could be conducted at the same time with the MS4 inspector, or shortly after (within 2-3 weeks) the MS4 inspector visited the facility/site. \*

## EDITORIAL: EPA Should Provide a Three-day Training Program for MS4 Inspectors

# How the Stormwater Permit Program Will Be Successful

The NPDES stormwater permit program has reached maturity. EPA and the authorized states have issued 349,280 stormwater permits to municipalities, industries and construction activities. The grace period is closed. Full compliance is expected.

Issued permits won't restore the Nations waters, so compliance inspections are necessary. Where is the source of inspectors?

EPA must audit 45 states and implement the program in the other five states and territories including Puerto Rico. States must audit and inspect 5,280 municipalities, except those in the five states. That leaves 100,000 industrial facilities and 244,000 construction sites for municipalities to inspect.

MS4 permits require oversight of construction activity within their jurisdiction. They must have a preconstruction review for stormwater controls during construction and post construction runoff. They must have an ordinance to require runoff controls and the ability to enforce compliance. Finally they must inspect construction activity within their jurisdiction.

EPA and state rules provide authority for every municipality to inspect industrial facilities. The Industrial General Permit requires the permittee to send a copy of their NOI to the local government and allow municipal inspection.

Conclusion: MS4 municipal inspectors need a training program to conduct fair and consistent inspections.

### **MS4 Permit for San Francisco Bay Region**

The California Regional Water Quality Control Board is expected to issue a permit to MS4s with the following inspector training

requirements. Inspectors must have the authority to:

- require erosion control at all construction sites, regardless of size, through all phases of grading, building, and finishing of lots
- to require erosion & sediment control, and source control for non-sediment pollutants
- to impose fines and/or stop work at construction sites causing pollution

All construction sites with 50 acres or more must be inspected at least every two weeks and one acre sites or more, at least monthly.

The permit would require annual training in:

1. Urban runoff pollution prevention
2. Inspection procedures
3. Illicit Discharge Detection, Elimination
4. Typical BMPs (Industrial & Commercial)
5. General Industrial Stormwater Permit
6. Local stormwater related ordinances

### **EPA Training**

EPA has produced 11 webcasts for municipal stormwater managers. All webcasts can be downloaded to an iPod or MP3 player. Visit the site at <http://www.epa.gov/npdes/training>

The 2008 schedule has three remaining webcasts:(1) The Art & Science of Stormwater Retrofitting on **April 9**; (2) MS4 Program Performance on **June 4**; (3) Stormwater 101 on **July 23**; and (4) Illicit Discharge Detection and Elimination on **September 3**.

However, internet training lacks interrelationship with the instructor and other students. EPA should offer a three-day course for inspectors in all states.

We recommend EPA offer training to municipal inspectors such as:

- Day 1 BMP Solutions
- Day 2 Industrial, Construction & Local Rules
- Day 3 Inspection & Illicit Procedures \*

## \$1,300,000 Fine for Stormwater Violations at 30 Construction Sites in 28 States

# Home Depot Joins Wal-Mart in the Penalty Box

Home Depot has agreed to pay a \$1.3 million penalty and implement a nationwide compliance program similar to that required of Wal-Mart in 2005. A consent decree was reached with Wal-Mart in 2005 under which Wal-Mart established a comprehensive storm water compliance plan and paid a fine of more than \$3 million.

The settlement requires that Home Depot implement a comprehensive, corporate-wide program to prevent stormwater pollution at each new store it builds nationwide.

Home Depot must improve their pollution prevention plans for each site, increase site inspections and correct any problems at its sites promptly.

Specific stormwater permit training is required for its construction managers and contractors. They must implement a management and internal reporting system to improve oversight of on-the-ground operations.

### **Violations**

EPA inspections in 2002 and 2003 uncovered the following violations:

- discharge without a permit
- failure to develop an adequate SWPPP
- failure to install stormwater controls
- incorrect installation of BMPs
- failure to keep BMPs in operating condition
- failure to routinely inspect BMPs

### **Settlement**

The company must train its construction managers, as well as contractors and their personnel on federal stormwater requirements. A training syllabus of more than nearly 50 permit subjects is included in the settlement. Students will be tested and must attain a grade of at least 75%.

The settlement includes 22 stipulated penalties. Most violations will cost between \$500 and \$1,000. Several examples are:

- \$5,000 for each missed inspection
- \$1,000/day for failure to update a SWPPP
- \$1,500/day for failure to install, repair, maintain, modify or add BMPs

Three inspectors are required: 1) Contractor Project Superintendent; 2) Contractor Compliance Officer; and 3) Home Depot Inspector.

Inspections are required once each calendar week and within 24 hours of the end of a storm event of 0.5 inches. An 88-item inspection checklist is included in the settlement.

At least once each month, the inspection will be done by the General Contractor's Compliance Officer, accompanied by the Project Superintendent.

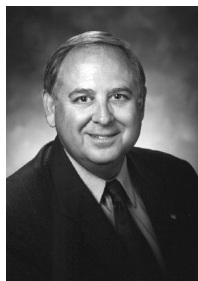
### **Quarterly Report**

Home Depot must submit a Quarterly Compliance Report, certified by Home Depot's Stormwater Coordinator. The Report will identify any instances of apparent non-compliance and identify any recurring compliance issues. A discussion is to take place of steps taken to address any deficiencies and how Home Depot plans to bring the site into consistent compliance with the permit.

Reports under the settlement are available to the public unless EPA agrees to a Home Depot claim of business confidentiality.

The settlement agreement may not be terminated for at least 5 years. Home Depot may request termination, but must demonstrate that there are no unresolved matters subject to dispute resolution and that no enforcement action under the Decree is pending. \*

**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

**2008 Schedules**  
**Certified Stormwater Inspector**

Baton Rouge	Jan 15, 16	San Diego	Jul 8, 9
San Diego	Jan 29, 30	Waco	Jul 14, 15
Caguas, PR	Feb 12, 13	Sacramento	Aug 11, 12
Sacramento	Feb 19, 20	Aberdeen	Aug 19, 20
Austin	Mar 11, 12	Bakersfield	Sep 9, 10
Bakersfield	Mar 18, 19	Dallas	Sep 22, 23
Okla. City	Apr 1, 2	Concord	Oct 7, 8
Concord	Apr 14, 15	Ontario	Nov 18, 19
Ontario	May 5, 6	Modesto	Dec 8, 9
Modesto	Jun 9, 10	Houston	Dec 11, 12

**Advanced**  
**Certified Stormwater Inspector**  
(Prior certification required)

San Juan	Feb 14	Aberdeen	Aug 21
Orlando	Mar 25	Dallas	Sep 24
Ontario, CA	May 7	Concord	Oct 9
Jacksonville, FL	Jun 4	Ft. Lauderdale	Nov 5

Please continue to check our website for updates regarding training sessions at [www.npdes.com](http://www.npdes.com) or call Diane at 888-288-6852.

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