

The Stormwater Inspector Decides Permit Compliance

Stormwater News

Gina McCarthy is the new Administrator of the U.S. Environmental Protection Agency. She was appointed by President Obama in 2009 as Assistant Administrator for EPA's Office of Air and Radiation, and previously she served as the Commissioner of the Connecticut Department of Environmental Protection.

McCarthy received a Bachelor of Arts in Social Anthropology from the University of Massachusetts at Boston and a joint Master of Science in Environmental Health Engineering and Planning and Policy from Tufts University.

EPA has proposed moving all Clean Water Act reporting to an electronic data reporting system. All NPDES 46 authorized states would participate, saving \$29 million a year just by switching from paper to online.

Currently, facilities subject to reporting requirements submit data in paper form to states and other regulatory authorities, where the information must be manually entered into data systems. The new process will make facility-specific information available to the public through EPA's website.

Most facilities will be required to start submitting data electronically one year following the effective date of the final rule. Facilities with limited access to the Internet will have the option of one additional year to come into compliance with the new rule. The rule is expected to be final within a year.

(Continued on Page 3)

INSIDE THIS ISSUE

Page 2 - NRDC beats up on Los Angeles County

Page 3 - Municipal Enforcement and Audits

Page 4 - State Enforcement of NPDES Permits

Page 5 - EPA Strategic Plan & Enforcement Priorities

Page 6 - Commercial Facilities issued Stormwater Permits?

Page 7 - EPA Fails to Deliver on Chesapeake Bay

KISS: "Keep It Simple Stupid" One Decider: The Inspector

While the US Environmental Protection Agency and the NPDES Authorized States have some inspectors, it is the municipal stormwater inspector that decides almost all compliance issues.

Generally the municipal stormwater inspector is a public works or utility department employee. Some may be code enforcement officers or building code officials. Generally, the stormwater inspector reports to a municipal department head.

Local inspectors mostly inspect for illicit discharges and construction activity for compliance with municipal ordinances. They also inspect municipal facilities and activities for pollution prevention.

Inspectors are required to be "qualified" for their job. That means that they are selected to be an inspector because they have the temperament to observe, communicate and resolve compliance issues. Training is necessary to know the rules, technology and most importantly, what their boss expects.

Inspectors are then expected to use their good judgement and discretion when making compliance observations. *

The Superintendent of the Drainage System is in Violation of the Clean Water Act **A Game of Ping-Pong with Stormwater Compliance**

Lawyers and judges have played with this stormwater case for 4 years, and it's not over yet. It started in 2008 when the Natural Resources Defense Council and Santa Monica Baykeeper sued Los Angeles County and its Flood Control District for violating their stormwater permit.

First, the county won, then NRDC won, then the County won, now the winner is NRDC. Let's hope it's over.

A unanimous decision of the 9th Circuit Court of Appeals ruled on August 8, 2013 that 140 separate incidents of water quality exceedance was sufficient to hold the County responsible for CWA permit violations.

Some 2,800 miles of storm drains and 500 miles of open channels make up the system that carries storm water runoff polluted with trash, metals, used oil, raw sewage and other contaminants.

The drainage system runs from the streets and parking lots of urban Los Angeles County to local rivers and the ocean. It passes through numerous municipalities and receives runoff and discharges from thousands of unmonitored entities.

The County claimed it is not the responsible party because it doesn't generate the pollution. The County argued that so many communities along the Los Angeles, Santa Clara and San Gabriel rivers were dumping so much stuff in them, that it was virtually impossible to assign blame to anyone for the pollution. This argument was rejected by the Court.

The 9th Circuit had previously ruled that the owner of the drainage system was the "superintendent" of the system and could control discharges into and out of their drainage system. The County appealed to the U.S. Supreme Court, but the Court selected only a minor issue to resolve.

The Supreme Court considered whether moving polluted water from one portion of a river to another through a concrete channel was defined as a "discharge of pollutants" or

a "transfer of pollutants" under the Clean Water Act. The high court found that it was not a discharge and reversed the 9th Circuit.

On remand to the 9th Circuit, the three judge panel considered the issue of a "discharge or a transfer" a moot point and not germane to the case. So the 9th Circuit restated their previous decision that the County was liable for Clean Water Act violations in the Los Angeles and San Gabriel Rivers because the monitoring stations for the rivers were clearly located in a portion of the system controlled by the County.

County's own annual monitoring reports from 2002 to 2008 showed 140 separate exceedances of the permit's water quality standards, including excessive levels of aluminum, copper, cyanide, zinc, and fecal coliform bacteria in both the Los Angeles and San Gabriel Rivers.

The 9th Circuit remanded the case back to the district court for, among other things, "a determination of the appropriate remedy for the county defendants' violations" and a possible appeal by the county.

It is unlikely that the County will appeal. Enough money and time has been wasted on a simple issue of who is responsible. The Clean Water Act is clear; the language of the permit is the deciding factor.

Noncompliance with a permit condition is a violation of the Clean Water Act. How the noncompliance occurs is between the permittee and dischargers into the drainage system. *

MS4s Can Enforce NPDES Permits, But Must Receive State and EPA Audits

Stormwater discharge permits are issued by states to Municipal Separate Storm Sewer Systems (MS4s) and to industrial activities including construction. EPA issues permits in four states, the District of Columbia, the territories and some federal facilities.

States issue stormwater permits but most states don't have an active inspection program. Even EPA's compliance inspections program is weak.

Where EPA and States fail to inspect and where local governments want clean stormwater runoff to their river, lakes, and beaches; the MS4s must do all of the compliance inspections within their jurisdiction.

Because MS4s can not issue NPDES permits, to enforce EPA or state issued permits they must have an ordinance requiring industrial and construction activities comply with federal and state permits. Then they would have enforcement authority under a municipal ordinance using municipal penalties.

If MS4s are the primary enforcement organization, they must then be subject to state or EPA audits to determine MS4 compliance. But, often states fail to audit municipalities. Then it is up to EPA to audit MS4s.

In Virginia, EPA recently did audits of the Cities of Hampton and Newport News. The result is a combined \$142,000 in fines because the cities did not properly monitor storm water flowing from private construction sites.

See the next column for details. *

Stormwater News

(Continued From Page 1)

In Virginia, the EPA audits had these results: The Hampton City Council has paid a \$62,000 fine and Newport News has paid \$80,000 because the cities did not properly monitor stormwater flowing from private construction sites.

Also fined from those series of audits examining storm sewer inspections were Henrico and Chesterfield counties and the city of Chesapeake. The localities paid a total of \$330,200 in fines, according to the EPA.

"Had the city employed an additional inspector, construction sites would have been inspected more frequently as required," Hampton Public Works Director Tony Reyes wrote in a memo to the City Council. The fine is based on the annual estimated salary of a storm water inspector, Reyes wrote.

Hampton employed just one stormwater inspector at the time of the EPA audit. Responsibilities assigned to that position have since been switched from Community Development to the Public Works Division.

The city now employs two inspectors and has funding in place to hire three more stormwater inspectors this fiscal year according to a Hampton spokeswoman. Hampton's stormwater control practices have been audited seven times since 2002, according to Reyes. This is the first penalty imposed from those audits.

Wal-Mart Stores Inc. paid a criminal fine of \$81.6 million for illegally handling and disposing of hazardous materials at its retail stores across the United States. Coupled with previous actions brought by the states of California and Missouri for the same conduct, Wal-Mart will pay a combined total of more than \$110 million. Wal-Mart did not have a program in place and failed to train its employees on proper hazardous waste management and disposal practices at the store level. As a result, hazardous wastes were either discarded improperly at the store level - including being put into municipal trash bins or, if a liquid, poured into the local sewer system - or they were improperly transported without proper safety documentation to one of six product return centers located throughout the United States.

The U.S. EPA recently issued a "Criminal Enforcement Alert" that summarized the agency's most recent criminal enforcement against concentrated animal feeding operations (CAFOs). The purpose of the Alert was to "increase public awareness of the consequences of knowing or negligent Clean Water Act violations by animal confinement operations. *

State Enforcement of NPDES Permits

State enforcement is a difficult matter to analyze. Many states have issues with data completeness and accuracy.

Without investigation and program knowledge, data can be misleading or misinterpreted.

EPA uses state data as a starting point for assessing state performance, but not as the sole measure of performance.

The map to the right shows the number of non-major Facilities with Formal Enforcement Actions. Facilities in significant non compliance (SNC). Stormwater general permits are called non-major permits.

Not all activities and violations are reported and some states have alternative inspection plans.

EPA uses *State Review Framework Reports* to identify needed state program improvements.

Many layers of context and information make it difficult to portray state enforcement performance in a consistent and transparent way.

The map and tables can be viewed at: http://www.epa-echo.gov/echo/state_framework.html

The 2011 table s a partial report.

State reviewed 2011 Framework Reports are summarized by EPA and can be viewed at: http://www.epa-echo.gov/echo/state_framework.html

| State | Non Majors | Informal Actions | Received Penalty | Formal Action | Penalties Assessed |
|-------|------------|------------------|------------------|---------------|--------------------|
| AK | 46 | 5 | 1 | 1 | \$ 120,000 |
| AL | 1481 | 149 | 16 | 16 | \$ 166,800 |
| AR | 680 | 298 | 0 | 6 | \$ 15,300 |
| AZ | 108 | 0 | 0 | 0 | \$ 0 |
| CA | 356 | 34 | 48 | 71 | \$ 3,749,500 |
| CO | 219 | NR | 2 | 7 | \$ 99,505 |
| CT | 77 | 0 | 1 | 1 | \$ 40,000 |
| DC | 7 | 0 | 0 | 1 | \$ 0 |
| DE | 31 | 5 | 0 | 0 | \$ 0 |
| FL | 238 | 85 | 14 | 22 | \$ 249,436 |
| GA | 491 | 213 | 34 | 53 | \$ 215,543 |
| HI | 30 | 5 | 0 | 0 | \$ 0 |
| IA | 1325 | **** | 10 | 19 | \$ 42,500 |
| ID | 130 | 18 | 3 | 4 | \$ 64,500 |
| IL | 1469 | 729 | 0 | 5 | \$ 447,780 |
| IN | 1438 | 782 | 14 | 14 | \$ 0 |
| KS | 1047 | 1 | 7 | 12 | \$ 45,108 |
| KY | 1756 | 203 | 0 | 26 | \$ 191,000 |
| LA | 1292 | 111 | 13 | 76 | \$ 292,653 |
| MA | 149 | 0 | 0 | 0 | \$ 0 |
| MD | 495 | 0 | 28 | 30 | \$ 509,422 |
| ME | 289 | 38 | 0 | 13 | \$ 39,100 |
| MI | 448 | 39 | 0 | 2 | \$ 34,500 |
| MN | 644 | 46 | 4 | 25 | \$ 783,300 |
| MO | 2987 | 1306 | 0 | 61 | \$ 30,150 |
| MS | 1424 | 418 | 7 | 21 | \$ 214,206 |
| MT | 162 | 130 | 1 | 3 | \$ 6,600 |
| NC | 1015 | 448 | 215 | 219 | \$ 459,090 |
| ND | 97 | 43 | 0 | 0 | \$ 0 |
| NE | 609 | 103 | 1 | 22 | \$ 14,940 |
| NH | 46 | 1 | 0 | 2 | \$ 0 |
| NJ | 614 | 224 | 31 | 98 | \$ 2,378,218 |
| NM | 89 | 64 | 5 | 5 | \$ 41,500 |
| NV | 73 | 4 | 0 | 1 | \$ 0 |
| NY | 1190 | 353 | 25 | 25 | \$ 556,100 |
| OH | 3023 | 483 | 9 | 12 | \$ 69,432 |
| OK | 363 | 24 | 5 | 105 | \$ 60,250 |
| OR | 287 | 44 | 16 | 18 | \$ 46,730 |
| PA | 3955 | 170 | 41 | 47 | \$ 1,033,777 |
| PR | 176 | 15 | 6 | 6 | \$ 0 |
| RI | 65 | 41 | 3 | 5 | \$ 23,000 |
| SC | 311 | 104 | 0 | 24 | \$ 189,830 |
| SD | 212 | 188 | 0 | 0 | \$ 0 |
| TN | 1248 | 520 | 126 | 126 | \$ 3,168,294 |
| TX | 2252 | 48 | 166 | 166 | \$ 1,964,300 |
| UT | 94 | 6 | 3 | 4 | \$ 35,927 |

EPA Announces the Agency's 2014 Strategic Plan & Enforcement Strategy

The EPA *Strategic Plan* is currently being updated for FY 2014-2018 and will be available in February 2014, however EPA released (on June 14) the FY 2014-2016 Enforcement Initiatives. EPA national program management guidance remains the current plan:

1. Taking Action on Climate Change and Improving Air Quality
2. Protecting America's Waters
3. Cleaning Up Communities and Advancing Sustainable Development
4. Ensuring the Safety of Chemicals and Preventing Pollution
5. Enforcing Environmental Laws

EPA is modernizing government operations; reducing reporting burden; increasing use of environmental information and new business models and improving data quality.

Expect expanded use of advanced monitoring technology so government, regulated entities, and the public will have improved access to information on sources of pollutants and environmental conditions.

EPA has decided that the current set of FY 2011-2013 National Enforcement Initiatives will continue for FY 2014-2016. These initiatives focus on:

- Keeping Raw Sewage and Contaminated Stormwater out of Our Nation's Waters
- Preventing Animal Waste from Contaminating Surface & Ground Waters
- Cutting Toxic Air Pollution that Affects Communities' Health
- Reducing Widespread Air Pollution from the Largest Sources, Especially Coal-fired
- Utility, Cement, Glass, and Acid Sectors
- Reducing Pollution from Mineral Processing Operations

- Assuring Energy Extraction Sector Compliance with Environmental Laws

In FY 2012, the EPA developed the Integrated Municipal Stormwater and Wastewater Planning Approach Framework. This approach allows municipalities to prioritize CWA requirements in a manner that addresses the most pressing public health and environmental protection issues first, while maintaining existing regulatory standards.

All or part of an integrated plan may be incorporated into the remedy of enforcement actions. These remedies may include expansion of collection and treatment system capacity and flow reduction measures including increased use of green infrastructure and other innovative approaches.

The EPA is committed to working with communities to incorporate green infrastructure, such as green roofs, rain gardens, and permeable pavement, into permitting and enforcement actions to reduce stormwater pollution and sewer overflows where applicable.

The EPA will continue its enforcement focus on reducing discharges of raw sewage and contaminated stormwater into our nation's rivers, streams and lakes. This National Enforcement Initiative focuses on reducing discharges from combined sewers, providing guidance on developing and implementing effective integrated planning solutions to municipal wastewater, and stormwater management. This approach allows municipalities to prioritize Clean Water Act requirements in a manner that addresses the most pressing public health and environmental protection issues first, while maintaining existing regulatory standards. All or part of an integrated plan may be incorporated into the remedy of enforcement actions.

Continued on Page 6 See
EPA Enforcement Strategy

Environmental Groups Ask EPA to Consider More Permit Categories

EPA Considers Issuing Commercial Stormwater Permits

Environmental organizations have petitioned the Environmental Protection Agency (EPA) to impose NPDES stormwater permits on commercial, industrial and institutional sites.

American Rivers, Conservation Law Foundation (CLF) and Natural Resources Defense Council assert that EPA must exercise its "Residual Designation Authority" (RDA) under Section 402 of the Clean Water Act, which establishes the National Pollutant Discharge Elimination System (NPDES), because the sites are contributing to violations of water quality standards.

The environmental groups brought their petitions under an EPA rule (40 CFR 122.26(f)(2)) which states that "any person may petition [EPA] to require a NPDES permit for a discharge which is composed entirely of stormwater which contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States."

The environmental groups are now asking EPA to regulate all non-de minimus 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.

Such sites may include:

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; buildings, equipment, and parking areas associated with light or heavy industry; and

schools, colleges, hospitals, museums, prisons, town halls or court houses, police and fire stations, including parking lots, dormitories and university housing.

The petitions claim that an "extensive dataset" shows that these sites have large pollutant concentrations and loadings, causing thousands of water bodies to be impaired.

Next Steps

EPA has until October 8, 2013 to grant or deny the petitions. If EPA grants the petitions, it likely would initiate a permitting process that would involve opportunities for public comment. Denial of the petitions likely would be considered to be a "final agency action," subject to judicial review. *

EPA Enforcement Strategy

Continued from Page 5

These remedies may include expansion of collection and treatment system capacity and flow reduction measures including increased use of green infrastructure and other innovative approaches. The EPA is committed to working with communities to incorporate green infrastructure, such as green roofs, rain gardens, and permeable pavement, into permitting and enforcement actions to reduce stormwater pollution and sewer overflows where applicable. *

Post Construction Runoff Regulations Were to be Proposed by July 10

EPA in Breach of Chesapeake Bay Stormwater Settlement

The Chesapeake Bay Foundation announced that EPA is in breach of its stormwater settlement agreement requiring the agency to propose a new rule by September 2011.

According to the press release, the agency still has not sent a proposal to the White House for review, and the environmental group whose 2010 legal settlement with the agency required the rule has had enough.

The settlement agreement required EPA to take a number of actions related to the Chesapeake Bay, including not only the proposal of a new, nationwide stormwater rule but also the development of a "pollution diet" for the entire six-state watershed and the revision of its concentrated animal feeding operations regulations.

Under the agreement's dispute resolution, EPA and CBF must meet to reach an agreement. If, after 90 days, they cannot agree on a time frame for moving forward with the rule, the issue will go to a judge, according to Kim Coble, the foundation's vice president for environmental protection and restoration.

"EPA remains committed to proposing revisions to stormwater regulations as expeditiously as possible," EPA said in a statement. "Consistent with the settlement agreement's dispute resolution process, EPA expects to meet with the Chesapeake Bay Foundation to discuss the rule's schedule.

Coble said that her group is still in conversation with EPA on setting a new time frame but that declaring the agency in breach of the settlement kicks up the pressure on the agency.

The new rule is expected to drive the use of "green infrastructure" -- infiltration, roof gardens and rain barrels, etc., -- to manage water on site at new and redeveloped properties. Green groups that have been frustrated by EPA's delay on the rule welcomed CBF's action today.

Jeff Odefey, director of the stormwater program at American Rivers, said the rule "will bring real, tangible benefits" to communities and waters.

Jon Devine, senior attorney with the Natural Resources Defense Council's water program, said his group is "disappointed that the agency hasn't made good on its long-overdue promise to ease city flooding, clean up degraded urban rivers and save money at the same time."

"EPA knows that polluted runoff and sewage overflows threaten communities, and it knows that there are effective modern techniques that reduce that pollution and have other economic and public health benefits," he said. "Americans need EPA to lead."

Congressional Republicans, however, have long opposed EPA's plans for the stormwater rule. Last month, the eight Republicans on the Senate Environment and Public Works Committee asked EPA's acting administrator for water to halt the rulemaking, saying that lawmakers and small-business owners have been cut out of the process.

*Ed Note: Most of this article came from the E&E News, Annie Snider, reporter.**

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 1970-1979
- * Appointed to EPA Advisory Committee on Compliance Assistance and Stormwater
- * Instructor for Florida DEP Erosion & Sedimentation Control Inspector Course
- * Civil Engineer, Bachelor & Masters Degrees from VMI and Virginia Tech
- * Board Qualified Environmental Professional by the Institute of Professional Environmental Practice

2013 Training Schedule:

On-Line Municipal Employee Training
September 19 - Illicit Discharge Elimination
October 24 - Construction Inspections
December 12 - Commercial Inspections

2013 Certified Stormwater Inspector ON-SITE Training Schedule

Sept 9-10 Austin, TX
Sept 16-17 Norfolk, VA
Sept 26-27 Little Rock, AR
Oct 7-8 Houston, TX
Oct 10-11 Oklahoma City, OK
Oct 14-15 Ontario, CA
Oct 16-17 San Diego, CA
Nov 5-7 Region 4 CSI: Audits and Enforcement
Nov 18-19 Charlotte, NC
Nov 21-22 Huntsville, AL
Dec 3-4 Orlando, FL
Dec 10-11 Memphis, TN

Certified Employee Training

On-line Industrial Training by Sector
2013: Sept 20, Oct 25, Nov 15, Dec 13
2014: Jan 10, Feb 21, Mar 21, April 25

Be sure to see our website for our complete training and events schedule!

www.NPDES.com

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