



The Stormwater Quarterly

National Stormwater Center

Our 13th year

Fall 2007 ♦ Issue 113

RESTORING THE NATION'S WATERS WILL TAKE 100 YEARS

Stormwater News

No News Yet!

What happened to EPA's MSGP? The Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (MSGP-2000), expired on October 30, 2005, and has not been reissued. Expect it soon!

Texas issues a MS4 general permit for small municipalities. It was due by no later than March 10, 2003, so that small municipalities could apply for the permit. Nevertheless it was issued on August 13, 2007, and authorizes the discharge of stormwater to surface water in the state from small municipal separate storm sewer systems (MS4s). Small MS4 operators must submit a stormwater management program and a completed notice of intent form to the Texas Commission on Environmental Quality (TCEQ) on or before February 11, 2008.

EPA proposed (FR Oct.15) to amend the Spill Prevention, Control, and Countermeasure (SPCC) rule. Specifically, EPA is proposing to: exempt hot-mix asphalt; exempt pesticide application equipment and related mix containers used at farms; exempt heating oil containers at single-family residences; amend the facility diagram requirement to provide additional flexibility for all facilities; amend the definition of "facility" to clarify the flexibility associated with describing a facility's boundaries; define "loading/unloading rack" to clarify the equipment subject to the provisions for facility tank car and tank truck loading/unloading racks; provide streamlined requirements for a subset of qualified facilities; amend the general secondary containment requirement.

(Continued on Page 3)

Thirty-five years ago, Congress passed the Clean Water Act. Then, 66% of the nation's waters were too dangerous for swimming or fishing. Today, 40% of the Nation's waters remain impaired. That 16% improvement was due largely to federal funding of sewage treatment facilities 25 years ago.

Congress, with amendments in 1987, intended for the stormwater runoff permit program to remove the next big chunk of dirty water. That's 20 years with no documented improvement. The article on page 4 records the failure of EPA and the states to enforce the law. The article on page 6 documents beach closures for unsafe swimming conditions.

The Supreme Court's decision defining which waters of our Nation are regulated (Pg 2) and their decision to remove endangered wildlife protections from NPDES permits (Pg 3) have not been helpful. But there is hope.

The Senate Clean Water Restoration Act, co-sponsored by 19 Senators, and companion legislation being reviewed in the House Transportation and Infrastructure Committee, simply affirms that Congress intended to protect all waters of the United States when it passed the Clean Water Act.

Hearings on this legislation could result in bipartisan support to make reasonable further progress to achieve the objective of the Act - "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *

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New EPA Guidance on the Supreme Court's Rapanos Decision

Waters of the U.S. Are Some of the Nations Waters!

The Clean Water Act refers to the Nation's Water only once. But it does so in the first paragraph to define the object of the entire Act.

Clean Water Act Section 101. (a)

The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.

The 1972 Act then uses the term "navigable waters" and "tributaries." In 1987, the Act was amended to define navigable waters to mean the waters of the United States.

Rapanos Decision

Rapanos v. United States was decided in June 2006. While it was concerned about wetland permits issued by the Corps of Engineers under Section 404 of the Act, the definition of navigable waters is directly applicable to NPDES permits issued under Section 402 of the Act.

The Supreme Court held that wetlands adjacent to non-navigable tributaries are "waters of the United States" only if the tributary to which the wetland is adjacent is a relatively permanent waterbody and the wetland has a continuous surface connection with the tributary. This is referred to as the *Scalia Standard*.

Justice Kennedy disagreed with the decision but not their analysis. He concluded that the Clean Water Act's jurisdiction over wetlands depends on whether a "significant nexus" exists between the wetlands and navigable waters, and that a significant nexus between wetlands and traditional navigable waters exists "if the wetlands, either alone or in

combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity" of traditional navigable waters. (*Kennedy Standard*)

EPA Guidance

The guidance issued in June 2007 is intended to be consistent with the Court's decision. EPA and the Corps use the term "jurisdiction" to mean where they are allowed to issue permits:

- Traditional navigable waters
- Wetlands adjacent to traditional navigable waters
- Non-navigable tributaries of traditional navigable waters that are relatively permanent (i.e., the tributaries typically flow year-round or have continuous flow at least seasonally)
- Wetlands that directly abut such tributaries

The agencies generally will not assert jurisdiction over the following features:

- Swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow)
- Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water.

EPA will apply the *significant nexus* evaluation to assess the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if in combination they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters. *Significant nexus* includes consideration of hydrologic and ecologic factors. *

Court Rejects EPA's Endangered Species Requirement

The U.S. Supreme Court will not require Arizona (or any other state) to apply endangered wildlife requirements in NPDES permits. The Supreme Court affirmed the Ninth Circuit Court decision.

In a 5-4 ruling announced in June 2007, the Court ruled that federal delegation of water pollution authority to States under the Clean Water Act is governed solely by the criteria in Section 402 of the Clean Water Act (Act) and not by any other law.

Under section 402(b) of the Act, EPA is required to transfer permitting authority to a state if that state meets nine requirements. Defenders of Wildlife argued that section 7(a)(2) of the Endangered Species Act, effectively adds a 10th statutory requirement, thus denying EPA's delegation of NPDES authority.

Section 7(a)(2) requires federal agencies to consult the Department of Commerce or the Department of Interior to assure that a proposed agency action is unlikely to jeopardize an endangered or threatened species.

The Court held that this requirement applies only to discretionary actions by the agencies and because "the transfer of National Pollutant Discharge Elimination System (NPDES) permitting authority is not discretionary, but rather is mandated once a State has met the criteria set forth in section 402(b) of the Clean Water Act, it follows that a transfer of NPDES permitting authority does not trigger section 7(a)(2)'s consultation and no-jeopardy requirements." *

Stormwater News

(Continued From Page 1)

In May, the Beach Protection Act of 2007 (H.R. 2537/S. 1506) was introduced in the U.S. Congress, reauthorizing the Beaches Environmental Assessment and Coastal Health Act (BEACH Act) of 2000. If passed, the Act will mandate the use of rapid testing methods to detect beach water contamination in two hours or less so that beach goers can be notified of public health risks promptly. The Act will also increase the amount of grant money available to states from \$30 million to \$60 million annually through 2012, and expand the uses of grant funds to include source tracking and pollution prevention.

NPDES Permit violators in Tennessee are now listed on the internet. The Tennessee Clean Water Act streamlined the enforcement process so corrective action. Other provisions in the Act include probationary permits, mandatory enforcement, mandatory fines and stop work orders. View the list of violators at: www.tennessee.gov/environment/wpc/enforcement

EPA is considering issuing NPDES permits to vessel operators discharging ballast water beginning September 30, 2008. Concerns have circulated for years that improperly handled ballast water could spread invasive aquatic species.

Regulated discharges may include ballast water, bilge water, deck runoff, and gray water. Approximately 143,000 commercial vessels could be affected. A bill in Congress (The Recreational Boating Act of 2007) was introduced to continue the exemption of recreational boats from NPDES. For more information on this topic and to read the federal register notice, please visit http://www.epa.gov/owow/invasive_species/ballast_water.html *

57% of NPDES Permittees are Non-Compliant

Three thousand, six hundred (3,600) major facilities exceeded their NPDES permit limitations in 2005. *Troubled Waters, An Analysis of 2005 Clean Water Act Compliance* was produced by Public Interest Research Groups (PIRGs.) to evaluate compliance. See www.uspirg.org/html/troubledwaters07/troubled_waters07.pdf

There are 549,900 NPDES permittees considering individual and general permits issued to industry, construction, and government. But only 6,430 individual permits are identified as major permits.

Facilities are designated as “major” based on an EPA scoring system that considers a combination of factors, including toxicity, pollutant potential, streamflow volume, public health impacts, and proximity to coastal waters. Stormwater general permits are not considered major permits.

The Report determined that 57% of all major facilities exceeded their NPDES permit limitations. The 3,600 facilities reported 24,400 exceedances of permit limits. Therefore, many facilities exceeded their permits more than once and for more than one pollutant.

Facilities exceeding their permit limits, did so by nearly four times the limit and more than 1,800 instances in which they exceeded their limits by at least 500%.

The report blames President Bush for a series of actions that restrains enforcement and makes several recommendations to the EPA. PIRG also refers to a report by EPA’s office of Inspector General in early 2007. Finally,

PIRG cites a recent Washington Post article that is critical of EPA water enforcement efforts.

Recommendations to EPA

According to the Report, the Bush administration has suggested, proposed, or enacted numerous policies that would weaken the Clean Water Act and threaten the future of America’s rivers, lakes, streams and coastal waters. PIRG recommends the EPA:

- Withdraw the 2003 and 2007 policy directives that eliminate Clean Water Act protections for many small streams, wetlands and other waters.
- Hire adequate environmental enforcement staff and enforce the Act
- Fully fund the Clean Water State Revolving Fund to help communities improve their wastewater treatment systems.
- Ensure that all sewage is properly treated, implement the proposed rule to regulate sanitary sewer overflows, and improve public notification of overflows that threaten human health.
- Withdraw all proposed rules and reverse finalized rules to exempt certain industries and activities from the Clean Water Act.

Strengthen Enforcement of the Act

Additionally, the EPA can take the following actions to strengthen implementation and enforcement of the Clean Water Act:

- * Eliminate profiting from pollution
- * Tighten pollution limits
- * Revoke permits from repeat violators
- * Implement pollution prevention initiatives
- * Remove current obstacles to citizen suits

(See Non-compliance on Page 6)

Runoff Cited as Cause of Dirty Beaches in 2006

Beach Closings Increase Every Year

In 2006 there were more beach closings and advisories than at any other time in the past 17 years. This is according to a report by the Natural Resources Defense Council (NRDC) using U.S. EPA data.
www.nrdc.org/water/oceans/ttw/titinx.asp

The number of no-swim days caused by stormwater more than doubled from the year before.” There were more than 25,000 closing and health advisory days at ocean, bay and Great Lakes beaches in 2006.

“Lakes and beaches closings jumped 28 percent to more than 25,000, confirming that our nation’s beaches continue to suffer from serious water pollution.”

Ohio, Indiana, Illinois, Rhode Island, and Minnesota ranked the worst for failing to meet national health standards. Also, beaches in California, Maryland, New Jersey and Illinois violated health standards 51 percent or more of the time samples were taken.

Causes of Closings and Advisories

- 63 percent (15,738) were based on monitoring that detected bacteria levels exceeding beachwater quality standards (a decrease from 75 percent in 2005);
- 33 percent (8,334) were precautionary, due to rainfall known to carry pollution to swimming waters (an increase from 21 percent in 2005);
- 4 percent (966) were in response to known pollution events, such as sewage treatment plant failures or breaks in sewage pipes. In other words, localities did not wait for monitoring results to decide whether to close beaches or issue advisories (an increase from 3 percent in 2005);
- Less than 1 percent (89) was due to other causes, such as dredging and algal blooms (a decrease from 2 percent in 2005).

Sources of Pollutants

EPA data did not identify the actual cause for most closings, but sewage spills and overflows resulted in 1,301 closing and advisory days in 2006, an increase of 402 days from 2005.

Boat discharges or wildlife, accounted for 410 closing and advisory days, an increase of 77 days from 2005. However, the cause of 14,000 of the 25,000 closing and advisory days were not identified.

Beach closing increased by 479 days.

The major beach offender is polluted runoff. Old sewage and stormwater systems are unable to control excessive rainfall. Urban sprawl that directs contaminated runoff to the creeks, rivers, estuaries and beach without treatment is to blame.

Bad Science

The current EPA-recommended beachwater quality standards are 20 years old and rely on obsolete monitoring methods and out-of-date science that leave beachgoers vulnerable to a range of waterborne illnesses.

An NRDC lawsuit filed last summer is prodding the EPA to move faster to develop an updated health standard and faster test methods.

In some cases, the EPA’s 2006 closing/advisory or beach detail data were incomplete or inaccurate. The data was replaced or supplemented with data requested by NRDC and received directly from the states.

In three cases, the EPA closing/advisory data were completely replaced with data received directly from the state (California, Rhode Island, and Washington).

(Continued on the Next Page)

About the 2007 Beach Protection Act

In May, the Beach Protection Act of 2007 (H.R. 2537/S. 1506) was introduced in the U.S. Congress. If passed, the Act will mandate the use of rapid testing methods to detect beach water contamination in two hours or less so that beachgoers can be notified of public health risks promptly.

The Act will also increase the amount of grant money available to states from \$30 million to \$60 million annually through 2012, and expand the uses of grant funds to include source tracking and pollution prevention.

High numbers of closings and advisories, while indicating pollution problems, may also indicate that the state or county is making a good effort to protect the public health by monitoring its waters and closing beaches when they are polluted.

Individual state pages are available at www.nrdc.org/water/oceans/ttw/titinx.asp
[Alabama](#) | [Alaska](#) | [California](#) | [Connecticut](#) | [Delaware](#) | [Florida](#) | [Georgia](#) | [Hawaii](#) | [Illinois](#) | [Indiana](#) | [Louisiana](#) | [Maine](#) | [Maryland](#) | [Massachusetts](#) | [Michigan](#) | [Minnesota](#) | [Mississippi](#) | [New Hampshire](#) | [New Jersey](#) | [New York](#) | [North Carolina](#) | [Ohio](#) | [Oregon](#) | [Pennsylvania](#) | [Rhode Island](#) | [South Carolina](#) | [Texas](#) | [Virginia](#) | [Washington](#) | [Wisconsin](#)

Beach users should recognize that dangerous bacteria could be lurking in the water at the beach. Follow these simple tips to avoid being exposed:

- Avoid swimming after heavy rainfall
- Don't swim near storm drains.
- Take a shower or bathe after swimming
- Don't swallow water while you're swimming
- Avoid swimming if you have an open wound or infection
- Leave water immediately if there is a diarrhea or vomit accident
- If pets are allowed on the beach, avoid contact with droppings, and always carry away your pet's droppings in a plastic bag. *

Non-Compliance

(Continued From Page 4)

Office of Inspector General

In early 2007, EPA's Office of Inspector General reviewed 56 major facilities in long-term significant non-compliance with NPDES permits between July 2002 and June 2005.

The Inspector General found that EPA and states did not take suitable enforcement actions to address all of the violations at 21 of the facilities and took no enforcement actions at eight of the facilities.

At 35 of the facilities reviewed, none of the enforcement actions that the Inspector General's office could assess were taken in a timely manner, leading facilities to continue to violate their permits for extended periods of time.

The Washington Post

The PRIG Report referenced a recent article in the *Washington Post* titled "Bush's EPA Is Pursuing Fewer Polluters: Probes and Prosecutions Have Declined Sharply."

The Post reported the number of civil lawsuits filed against defendants who refuse to settle environmental cases was down nearly 70 percent between fiscal years 2002 and 2006, compared with a four-year period in the late 1990s, according to those same statistics.

EPA's new approach to environmental enforcement is to settle more cases and use plea bargains to achieve pollution reductions through equipment purchases rather than fines.

The Post article said that EPA's less confrontational approach toward enforcement may have emboldened polluters to flout U.S. environmental laws. *

Polluting Refinery Delays Justice for Twenty Years

A Texaco refinery knowingly and illegally discharged oil, grease and other highly toxic pollutants into the Delaware River from 1983 for 3,360 days. Finally, in October 2007, Texaco and its successor corporation Motiva agreed to pay \$2.25 million in environmental benefit projects.

NRDC, unhappy with the failure of state regulators to hold Texaco accountable for discharges into the Delaware River, sued Texaco in 1988 under the citizen suit provisions of the Clean Water Act. A federal judge, calling the case "practically unassailable," determined that Delaware City Refinery had violated the Clean Water Act.

NRDC and Delaware Audubon won the first of three court trials against Texaco in 1992, after NRDC scientists uncovered evidence from the oil company's own internal reports that it knowingly violated the law.

Texaco repeatedly defied court orders to take full responsibility for illegally dumping highly toxic pollutants into the river. Over the next 15 years, Delaware Audubon and NRDC took Texaco back to court on multiple occasions to enforce the terms of the original court orders.

It took a threat of a contempt trial for Texaco to settle with the environmental groups. The groups had taken Texaco to court five separate times over the previous two decades in order to stop the oil company from polluting the Delaware River.

"Texaco waged a war of attrition, clearly expecting that NRDC and Delaware Audubon would blink first," said NRDC attorney Mitchell Bernard. "But for 20 years, we didn't give up and we didn't go away. Today we are holding Texaco accountable for its environmental lawbreaking, and making sure that they do right by the communities that have had to live with Texaco's pollution." *

BP Oil Refinery Expansion With Increased Permit Limits Fails

In spite of support from the State of Ohio and the US EPA, the NPDES permit allowing more pollution failed because of public outcry.

The refinery, on Lake Michigan, was issued an NPDES permit in June with a daily 54% increase of ammonia and 35% increase of solids. State and federal regulators agreed with BP that there isn't enough room at the 1,400-acre Whiting site to upgrade the water treatment plant enough to keep more pollution out of the lake.

Thomas Easterly, head of the Indiana Department of Environmental Management issued and defended the permit. Stephen Johnson, Administrator of the U.S. Environmental Protection Agency, said he saw nothing wrong with the permit.

Opposition began when U.S. Senators Debbie Stabenow (D-MI) and Carl Levin (D-MI) sent a letter to the EPA Administrator requesting that the EPA certify that the BP permit would not pose a threat to the Great Lakes ecosystem. Administrator Johnston reaffirmed his support for the permit.

A hearing in the House of Representatives was critical of the permit and Congress voted overwhelmingly to condemn the permit by a roll call of 387-26.

Chicago's Mayor Daley threaten the company with a lawsuit. While acknowledging that the permit may be legal, Daley responded by saying that might be true, but, "Come on, this is a different age, this is 2007."

By September 5, BP Oil reversed course and committed to no increase of pollution to Lake Michigan from its proposed expansion. ED Note: Why is it that EPA and Indiana environmental officials can't understand what is clear to the public? *

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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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. Cty	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
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