

IS PERMIT COMPLIANCE POSSIBLE WITHOUT ENFORCEMENT ?

Stormwater News

A case tried before the US Supreme Court on January 9 may change the way EPA enforces the Clean Water Act.

The agency issues approximately 3,000 compliance orders a year. If the Court rejects the EPA process, then EPA will need to go to court to enforce the Act. Expect the decision by summer.

EPA is considering alternative analytical method to determine the level of oil and grease in a sample. The current method is a liquid extraction procedure that uses normal hexane (n-hexane) as a solvent. The proposed method will extract samples without the use of a solvent, preventing solvent waste and may result in lower analytical costs.

On December 2, 2011, the Sacramento Superior Court invalidated the numeric limits on turbidity and pH in California's Construction General Permit because the limits were not supported by substantial evidence. The State Water Resources Control Board has 60 days to appeal the decision.

The California Building Industry Association challenged the numeric limits, arguing that the State Board had not supported them with adequate evidence and had failed to evaluate the control technology as required by the Clean Water Act.

In establishing the turbidity limit, the State Board relied on three scientific studies, but the court decided the studies were limited and inconclusive and did not support the numeric limit.

(Continued on Page 3)

INSIDE THIS ISSUE

Page 2 - EPA Construction Permit

Page 3 - Integrated Planning

Page 4 - EPA Lacks Enforcement Oversight of States

Page 6 - Selecting TMDL Management Practices

Page 7 - MS4 Stormwater Compliance Conferences

Compliance without Harming the Economy or the Election

It is not a tough question. Irrespective of politics, enforcement is only appropriate where there is environmental damage or the need to get someone's attention. EPA took on the national home builders for both reasons.

Again, politics aside, EPA knows the financial difficulty local governments have in meeting their clean water obligations and is offering a solution called *integrated planning*. See the article on page 3.

Many municipalities need to comply with their stormwater permits including the repair of their infrastructures. Some would spend their dollars on preventing pollution from entering their drainage system while others would make capital improvements.

When money is in short supply, the highest priority gets it and other permit violations must be delayed. The NPDES allows a permittee to go on a compliance schedule with progress reporting. The compliance schedule is a result of a permit violation but normally with no monetary penalty.

The US Supreme Court listened to a challenge on the EPA enforcement process January 9 and may decide it is unconstitutional. It may not matter. Where there is environmental damage, the polluter should pay. *

Three important words: minimize, prohibit and immediately

EPA Construction Permit Scheduled for February 15

An Agency official told the National Stormwater Center that the new stormwater construction general permit (CGP) will issue before the current permit expires on February 15, 2012. It will be available on the EPA web site after the EPA Administrator signs the permit.

The new general permit will require builders and developers to use best management practices (BMPs) to stabilize soils and control erosion and sediment from construction sites.

While the current permit generally requires BMPs to control sediment, the new permit is specific and more restrictive.

The proposed numerical turbidity limit of 280 nephelometric units is excluded from the permit because the proposed limit was based on a faulty calculation and was “stayed” by court order.

The 2012 NPDES general construction permit will be implemented in four states—Idaho, Massachusetts, New Hampshire, and New Mexico—as well as the District of Columbia, Puerto Rico, most Indian lands, and the U.S. territories.

Data Collection

EPA is planning on promulgating a numeric standard so the Agency issued a notice Jan. 3, 2012 seeking more data to revise the turbidity limitation that had been proposed (77 Fed. Reg. 112).

EPA is seeking comment on passive and semi-passive treatment systems including which of these passive or semi-passive treatments could be representative of best available technology as described in the 2009 effluent guidelines to meet turbidity limits.

A passive treatment technique is one in which a polymer chemical is added to a water channel to remove sediment and turbidity. Alternatively, a semi-passive technique involves the use of pumps to move the water through a channel or manifold containing the chemical where the water will be treated for sediment and turbidity removal.

EPA wants performance data of both technologies and data collected both before and after treatment. In addition, EPA needs the costs, effectiveness, and feasibility of different technologies to control total suspended solids, settled solids, suspended sediment and turbidity in construction site stormwater.

EPA said it will receive comments identified by Docket ID No. EPA-HQ-2010-0884 until March 5 at <http://www.regulations.gov>

What to Expect

The permit will use the word *minimize* many times. Such as to minimize soil erosion, erosion at outlets, downstream channel and streambank erosion, the amount of soil exposed during construction, disturbance of steep slopes, sediment discharges from the site and soil compaction.

So, EPA will need to define *minimize*. Expect EPA to define it as: to reduce to the extent achievable in light of best industry practice (BIP).

Minimize, Prohibit, and Immediately

There will be a requirement to *prohibit* (zero) discharges from construction waste and a requirement to *immediately* initiate stabilization of inactive areas. Both will be difficult for construction superintendents. *

MS4 Integrated Planning Saving Money, Creating Jobs

The EPA has a response to local governments' difficulty to pay for clean water compliance during a recession. EPA calls it "*Integrated Municipal Stormwater and Wastewater Plans.*" Basically it allows local governments to propose a spending plan to address the most serious water issues first. What cannot be done now can be done later.

This optional process allows cities to maximize benefit and optimize cost for developing, building and expanding stormwater and wastewater infrastructure.

Municipalities will still have a responsibility to meet Clean Water Act requirements, but the EPA policy allows infrastructure improvement through sequencing of work based on water quality needs. However, regulatory or permitting standards cannot be reduced, just rescheduled.

Once a municipality has developed a plan, the EPA or the state will work with the municipality to develop appropriate implementation requirements and schedules.

Flexibility in EPA regulations, policies and guidance allow municipalities to sequence implementation without a monetary penalty. However, municipalities must understand that the process may require enforceable compliance schedules which could result in monetary penalties if milestones and schedules are not achieved.

EPA has scheduled workshops to gather additional input and feedback from stakeholders. The workshops will take place in Atlanta (Jan. 31), New York City (Feb. 6), Seattle (Feb. 13), Kansas City, Mo., (Feb. 15) and Chicago (Feb. 17). EPA will soon post a draft of the framework document at <http://www.epa.gov/npdes/integratedplans>. Preregister for the EPA workshop at <http://www.epa.gov/npdes/integratedplans> *

Stormwater News

(Continued From Page 1)

Three Types of Stormwater Permit Enforcement:

Criminal: Fless 5 Development and its CEO Shane Klein of Brooklyn, NY were found guilty of criminal and civil contempt for failure comply with stormwater permitting requirements. They failed to complete seven site stabilization measures, failed to hire a qualified engineer to conduct site inspections, and failed to submit required stormwater retention pond evaluation plans by the deadlines agreed to in the court-ordered stipulation. The company was ordered to pay \$75,000. The CEO ordered to pay \$60,000 for the civil contempt charge.

Citizen: The Sierra Club is suing Lehigh's cement and quarry operations near Cupertino, California. The club also alleges that Lehigh discharge into Permanente creek has been 16 times higher than Clean Water Act stream standards. The creek flows through the cities of Cupertino, Los Altos Hills and Mountain View before emptying into San Francisco Bay. Lehigh said it has a valid permit that covers both storm water and authorized non-storm water discharges and the facility is in compliance.

MS4 Related Violations: EPA Region 4 were cited for alleged stormwater-related violations.

1. Port of Mobile, for violations at its Buchanan Lumber Mobile, Inc. in Mobile, Ala. (civil penalty of \$4,400)
2. The Allen Company, violations, Barnes Mill Road Improvement in Richard, Ky. (civil penalty of \$7,200)
3. Kentucky Transportation Cabinet, for violations at its US 421 Widening PCN 09-1121 in Frankfort, Ky. (civil penalty of \$8,000)
4. Mississippi Department of Transportation, for violations at its State Route 19 in Collinsville, Miss. (civil penalty of \$44,000)
5. South East Development of NC, LLC, for violations at its Sierra Heights subdivision Phase 2 in Clayton, N.C. (civil penalty of \$5,000)
6. Marion Retail Investments, LLC, for violations at its construction site Grandview Station in Marion, N.C. (civil penalty of \$9,000)
7. YDV, Incorporated, for violations at its construction sites Compass Pointe Phase 2 and Compass Pointe Phase 3 in Leland, N.C. (civil penalties totaling \$14,000)
8. City of Memphis, for violations at its Appling/I-40 Northwest Planned Development in Memphis, Tenn. (civil penalty of \$2,000)
9. Shelby County, for violations at the Houston Levee Road Improvement in Memphis, Tenn. (civil penalty of \$37,500)
10. Shelby County Schools, Arlington, Tenn. (civil penalty of \$10,000) *

EPA Must Improve Oversight of State Enforcement

Cynthia Giles, EPA's chief enforcement officer, did not agree with the conclusion of the Inspector General's (IG) report. Assistant Administrator Giles said that the data and goals used by the IG were unreliable.

EPA's principal concern with the Report is the limited number of metrics and the associated methodology relied on by the IG to assess state performance. The IG responded by stating that they utilized EPA's own enforcement data and their analysis is similar to those that EPA itself conducts.

The IG's report, numbered 12-P-0113, said that EPA has not implemented a nationally consistent enforcement program. That EPA Regions do not consistently take action when states do not enforce the law according to EPA's policies and the regulations.

The IG said that EPA could be more effective by directing a single national workforce instead of 10 inconsistent regional enforcement programs and by targeting decisive interventions in states where enforcement problems require the most attention.

IG Recommendations

1. EPA headquarters should be responsible for all nationwide enforcement resources and workforce allocation.
2. EPA should cancel outdated guidance and policy documents, and consolidate and clarify remaining guidance into EPA documents that are publicly and easily accessible.
3. EPA should establish clear and consistent national enforcement benchmarks so that EPA's enforcement expectations are clear and consistent for state governments and the regulated community.
4. EPA should establish a clear and credible escalation policy for EPA intervention in states that provides steps that EPA will take

when states do not act to ensure that the environmental laws are enforced.

5. EPA should establish procedures to reallocate enforcement resources to intervene decisively when appropriate under its escalation policy.
6. EPA should develop a state performance scorecard to publicly track state enforcement activities and results from year to year.

The EPA generally agrees with recommendation 2, 3, 4 and 6 but disagreed with recommendation 1. The Agency neither agreed nor disagreed with recommendation 5.

States with Poor Performance

To better understand state performance issues, the IG gathered evidence in states that ranked in the bottom quartile for two or three statutes: Clean Water Act (CWA), Clean Air Act (CAA), and Resource Conservation and Recovery Act (RCRA).

The IG chose to interview the states of South Carolina, Illinois, Louisiana, Iowa, Colorado, North Dakota, and Alaska, in addition to enforcement officials in the associated EPA Regions, 4, 5, 6, 7, 8, and 10. Only three are summarized below.

Louisiana: EPA data show that Louisiana ranks in the bottom half for three statutes. In 2001, citizens filed a petition with EPA urging a withdrawal of the state's NPDES program authority for many reasons, including lack of adequate enforcement.

The EPA region responded by conducting audits in the state. The region found several deficiencies and required the state to change some policies and develop new measures.

The IG analysis found that Louisiana has the lowest enforcement activity levels in Region 6 and ranked in the lower half for the CWA.

(Continued: See State Enforcement on page 5)

State Enforcement

(continued from page 4)

State, EPA regional, and external interview responses attributed Louisiana's poor performance to several factors, including a lack of resources, natural disasters, and a culture in which the state agency is expected to protect industry.

Louisiana Is Expected to Protect Industry

Alaska: EPA data indicate that Alaska ranked in the bottom half for both of its authorized statutes (CWA and CAA), although it just began phasing in its authority for the NPDES program in 2008. Therefore, Alaska's enforcement data for the CWA are largely a reflection of EPA direct implementation in FYs 2003–2007. However, since program authorization began, all available data show that the state has not taken any formal enforcement actions nor issued any penalties for any facilities found to be out of compliance.

Alaska Has Not Issued Any Penalties

EPA Region 10 said that when the EPA authorized Alaska to run the program, both the Region 10 and EPA Headquarters officials were aware that the state lacked the capacity to be successful. At the time of the IG review, EPA Region 10 had moved to delay the final phase of authorization, but did not ensure that the state demonstrates a minimum level of performance before it advances to the next authorization phase.

Illinois: EPA data indicate that Illinois consistently ranked among the lowest-performing states. Despite this record, EPA enforcement data show that Region 5 has **inspected a lower percentage** of Illinois CWA and CAA facilities as compared with some other states in the region, and the region's RCRA inspection coverage has been

declining in recent years. In 2011, the region developed an intervention strategy for this state.

Illinois Inspected Low Number of Facilities

The report stated that these examples suggest different reasons (industry protection, no penalties and low number of inspections) for low enforcement performance. Each state provides a scenario in which EPA's oversight of national enforcement has not overcome state deficiencies, as stated in the Report.

Regardless of the cause, when a state is operating a federal program, EPA must intervene to enforce the law when states do not perform satisfactorily.

The Role of the Inspector General

The Office of Inspector General is an independent office within EPA. Although a part of EPA, Congress provides the IG with funding separate from the Agency to ensure independence.

The Report is to determine (1) whether the EPA set clear national performance benchmarks for state enforcement programs, and (2) to what extent EPA headquarters holds regions accountable and supports them to ensure that all state enforcement programs protect human health and the environment.

The full report is on:

www.epa.gov/oig/reports/2012/20111209-12-P-0113.pdf

EPA Did Not Cooperate with the Inspector General

EPA Region 6 enforcement officials declined to respond fully to the survey questions. The Office of the Inspector General considers Region 6 non-responsive, and EPA Headquarters has not accepted most of the IG's recommendations. *

Chesapeake Assessment and Scenario Tool (CAST)

Selecting TMDL Management Practices

In a major effort to restore the Chesapeake Bay, six states and the District of Columbia will reduce water pollution in local streams and rivers by more than 20%. The Bay TMDL (Total Maximum Daily Load) will be achieved using implementation plans prepared by Delaware, District of Columbia, Maryland, New York, Pennsylvania, Virginia, West Virginia.

The Bay TMDL is a key part of a framework to ensure that all pollution control measures needed to fully restore the Bay and its tidal rivers are in place by 2025, with at least 60 percent of the actions completed by 2017.

The Chesapeake Assessment and Scenario Tool (CAST) is a web-based tool for various management decisions. It uses a suite of computer models developed for the Chesapeake Bay Program. It provides the Bay jurisdictions with opportunities for “on the fly” estimates of load reductions designed to closely replicate the results of full Chesapeake Bay Program model runs.

CAST allows the user to understand which Best Management Practices (BMPs) provide the greatest load reduction and will feed directly into the suite of Chesapeake Bay Program models for full model analysis.

CAST demonstrates the implications of management decisions through its iterative and adaptive process. Users can compare up to three scenarios.

CAST is available to Region 3 jurisdictions. The latest version was produced on December 12, 2011 with changes to the following BMPs: Agricultural forest buffers, agricultural grass buffers, agricultural wetland restoration, and urban forest buffers. Information is on http://www.chesapeakebay.net/news_cast11.aspx

There are several other minor changes that may require recalculation:

- (1) Street Sweeping may now only be entered in terms of *mechanical monthly* as acres on an annual basis or in terms of pounds of sediment removed. The *mechanical monthly* has a nitrogen, phosphorus, and sediment benefit whereas *street sweeping-pounds* only has a sediment benefit. Entering *street sweeping* as linear feet is no longer available.
- (2) Poultry injection & dairy manure infection are no longer allowed on in *Nursery Category*.
- 3) Crop irrigation management is no longer available for several alfalfa & hay operations.

What is the End Game?

The intent of the Clean Water Act is to restore and maintain the Nation’s waters. This is when water quality measurements for sediment and nutrients are lower (and remain lower) than the 2025 TMDL numbers below. Generally that is about a 24% reduction of pollutant discharges. But, to maintain the TMDL levels, it may be necessary to have low impact development.

All States	Sediment
2009 Baseline	8,090,521,521
2025 TMDL	6,453,113,982
To Be Removed	1,637,407,539 20.24%

All States	Phosphorus	Nitrogen
2009 Baseline	16,462,955	266,602,061
2025 TMDL	12,543,232	201,631,405
To Be Removed	3,919,723 23.81%	64,970,656 24.37%

The above data was extracted from the EPA Tracking program at http://stat.chesapeakebay.net/?q=node/130&quicktabs_10=3 *

Regional Stormwater MS4 Conferences

For 13 years, EPA Region 6 has sponsored an “MS4 Operators Conference.” EPA typically rotates the conference location to major cities in Arkansas, Louisiana, New Mexico, Oklahoma, Texas. Representatives of Tribal Nations also attend. Approximately 300+ people attend. Consultants and vendors either sponsor or exhibit their products and services.

Brent Larson, EPA’s Region 6 Permits Chief, said the next conference is June 24 – June 29, 2012, at the Worthington Renaissance Hotel, 200 Main Street Fort Worth, Texas. Conference topics for the Fort Worth conference include: Sustainable Development, Watershed Management, Sampling and Monitoring, BMP Technology, Public Education and Outreach and Enforcement and Legal Issues.

The announcement is found at <http://www.epa.gov/region6/water/npdes/sw/ms4/> contact Brent Larson at 214-665-7523. Representatives of the National Stormwater Center, having presented frequently, are now conducting similar conferences in EPA Regions 3 and 4.

Region 4 Stormwater Compliance Conference

The first Annual Region 4 Stormwater Compliance Conference was held last November in Griffin, Georgia. Participation were 80 representatives of MS4s from Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee.

The conference was designed to prepare for a MS4 compliance audit. After training and testing, 74 attendees received the *Certified Stormwater Inspector* certification. EPA’s stormwater head, Michael Mitchell spoke on expectations of permit compliance and Larry

Hedges, Georgia’s stormwater coordinator spoke on preparing the MS4 annual report.

The 2nd annual Region 4 stormwater compliance conference will be at the Holiday Inn in Panama Beach, Florida November 13-15, 2012. Attendees can attend pre conference training beginning on Monday and receive the *Certified Stormwater Compliance* certification. The topics are low impact development (LID): bio retention, roof gardens, pervious pavement, and storage for reuse.

Region 3 Compliance Conference

The first annual Region 3 conference will be at the John Heinz National Wildlife Refuge near the Philadelphia Airport May 8-10, 2012. Participants from Delaware, District of Columbia, Maryland, Pennsylvania, Virginia, and West Virginia will receive training and testing to earn the *Certified Stormwater Inspector* certification.

The program will feature EPA presentations from Andy Dinsmore and the EPA Region 3 compliance staff. Limited rooms are blocked at the nearby Holiday Inn Express.

To register for either the Region 3 or Region 4 conference, please contact the National Stormwater Center at 888 - 397-9414 or visit www.NPDES.com. The Center is a nonprofit foundation.

Certified Stormwater Inspector Training Classes

CSI Training in Region 3
Jun 26-28 Virginia Beach
Jul 9-12 Frederick & Charleston
Dec 11-14 New Castle & Harrisburg

CSI Training in Region 4
Feb 28-29 Clearwater, FL
Apr 24-27 Savannah & Charleston
Jul 24-27 Pascagoula, & Montgomery
Aug 6-9 Nashville & Louisville
Oct 15-16 Raleigh

CSI Training in Region 6
Jan 23-24 Pineville, LA
Mar 13-14 Dallas
Aug 21-23 Houston
Sep 11-13 New Orleans

John Whitescarver
Executive Director
National Stormwater Center



EPA Team to develop NPDES
 National Expert, Municipal Permitting Policy;
 Awarded EPA Bronze Medal by US EPA
 Appointed to EPA Advisory Committee on
 Compliance Assistance
 Appointed by Small Business Administration to
 EPA committee to streamline Stormwater
 Instructor for Florida DEP Erosion &
 Sedimentation Control Inspector Course
 Qualified Environmental Professional by the
 Institute for Professional Environmental
 Practice

National Stormwater
 Center
 817 Bridle Path
 Bel Air, MD 21014

Our Nation's waters are a valuable resource that must be protected from illegal pollution. We are advocates for compliance with the Federal Clean Water Act by providing training and support services to individuals in government and business.



2012 Training Schedule:
Certified Stormwater Inspector
Certified Construction Inspector
CSI

Pineville, LA	Jan 23-24
San Diego, CA	Feb 15-16
Dallas, TX	Mar 13-14
Torrance, CA	Mar 27-28
San Ramon, CA	April 10-11

On-Line Industrial Annual Employee Training

Sectors O&P	Feb 3
Sectors Q,R,&S	Feb 10
Sectors T&U	Feb 24
Sectors V&W	Mar 2
Sectors X&Y	Mar 16
Sectors AA&Z	April 6
Sectors AB&AC	April 20

NEW: On-Line MS4 Employee Training

Illicit Discharges	January 19
Good Housekeeping	February 2
Construction Inspections	March 15
Commercial Inspections	April 19

Subscribe To Newsletter!

The Stormwater Quarterly is published four times a year. Subscriptions are renewed annually. Only \$59.95/yr!

Fair Use Notice

The *Stormwater Quarterly* contains copyrighted material which may not always be specifically authorized by the copyright owner. "Fair Use" of copyrighted material is provided for in Section 107 of the U.S. Copyright Law. We distribute some material, without profit, to those who express a prior interest in receiving information for research and educational purposes. The information in the publication is for informational purposes only.

National Stormwater Center

- ☛ Certified Training Courses
- ☛ SWPPP Templates
- ☛ Sampling Assistance
- ☛ Compliance Tracking
- ☛ Employee Training

Contact - 1-888-397-9414

