

ENFORCEMENT BY GOVERNMENT AND CITIZENS

Stormwater News

The EPA's pollution trading policy gives facilities the right to purchase credits in lieu of meeting their required standards. Trading allows facilities facing higher pollution control costs to meet their regulatory obligations by purchasing environmentally equivalent pollution reductions from another source at lower cost.

A lawsuit by Food & Water Watch and Friends of the Earth challenged the EPA policy of water pollution trading under the Clean Water Act (CWA). That suit was dismissed by a Washington, D.C. District Court.

Food & Water Watch is likely to appeal of the court's ruling because challenging each pollution trade on a case-by-case basis is an inefficient use of the judicial system. However, Food & Water Watch recently challenged the issuance of an NPDES permit for a wastewater treatment plant in West Virginia.

In order to avoid the CWA's prohibition on new discharges into impaired waters, the state wrote the permit to allow the facility to purchase pollution credits from other polluters—potentially hundreds of miles away—as an “offset” for their own discharges, even though the deal would have increased water quality problems.

After a hearing, a panel of administrative law judges remanded the permit to the state Agency for redrafting.

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Who Enforces and Why Enforce

The authority for EPA to enforce is Section 309 of the Clean Water Act (Act), for Citizen Suits it is Section 505. States enforce under state law that is required for NPDES issuance authority.

Municipal governments are required by their stormwater permits to create enforcement authority, including escalation of penalties.

Congress provided enforcement authority because they designed several programs that they knew would meet resistance. The monetary penalty in the law is indexed and is now \$50,000 per violation per day. State penalties are considerably less as are municipal penalties. The purpose of enforcement is to get compliance. Where there is strong resistance to compliance, the penalties are large and effective.

Enforcement is necessary when there is significant environmental harm. Again, deterrence is achieved when the penalty is made public. Small fines may not be newsworthy. Finally, the time will come when the public will replace enforcement with “doing the right thing” but for now, it is necessary to establish a fear of enforcement.

Citizen suits are normally brought by environmental organizations such as the Natural Resources Defense Council (NRDC). The article on page five shows how a local environmental organization forms a group of litigating groups and attracts a national legal council to achieve success when suing their local government.



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Stormwater Citizen Litigation

By Karen Sadowski, Director of Training

How has litigation brought by NRDC, Earthjustice, and scores of other environmental law groups impacted the EPA Stormwater Program?

The answer is simple: they have made a tremendous impact on our waters by bringing litigation against polluters, clarifying obtuse regulations, and suing regulating authorities who do not do their jobs.

Whether or not you agree with their lawsuits, all indicators point to this as a continuing and highly profitable business.

A simple web search for Lawsuits + Stormwater will surface thousands of citations. Here are some recent headlines involving just one firm, the National Resources Defense Council:

NRDC Wins Stormwater Pollution Case Forcing LA County to Clean up Toxic Mess.

Court Finds New York State's Program to Stem Biggest Source of Water Pollution Too Lax.

Breaking News (yes, again): Spokane Riverkeeper and NRDC Join Coal Dust Lawsuit against BNSF Railway.

Chesapeake Bay Foundation, Inc., and NRDC vs. Gwaltney of Smithfield, LTD.

But if you take a step back, you'll find that litigation doesn't start with lawyers, whether NRDC or any other environmental law firm. The Clean Water Act includes specific provisions for citizens to bring lawsuits against polluters or government agencies to enforce environmental law.

These suits cannot be frivolous in nature, and they cannot result in monetary awards to the citizen (or citizen group) bringing the suits. However, the Clean Water Act does allow for "any prevailing or substantially prevailing party" to be afforded legal costs "including reasonable attorney and expert witness fees." It certainly pays to be an environmental lawyer.

Yet citizens and citizen groups who bring such litigation must also take care. Sometimes the direct result of their lawsuit can be a substantial increase

significantly increased taxes to cover the costs of said litigation. So the citizen pays for it on both ends; first to clean up the water, and then by paying for the lawsuit.

However, if you take one step further back, you will find that while litigation may start with a citizen suit, failure to comply, failure to enforce, and failure to educate are ultimately the real culprits. With compliance, there are no violations. With enforcement, violators are more likely to comply. With education, citizens and industry are more likely to not unwittingly pollute.

There will likely always be those who willingly violate. We call them criminals. And when they get caught, they face civil and criminal penalties. And sometimes prison sentences.

I often have spirited debates with a friend who happens to be employed in a Public Works department. Citizens, she contends, make her work life a misery at times. They are needy, they complain, and they do not appreciate the effort it takes to get the job done. How many other municipal employees are stuck in the same box, unable to recognize not only that its citizens employ them, but also that their failures to comply, enforce, and educate lead to stormwater litigation?

The article on page 5 identifies a group of citizen litigants: Rosemere Neighborhood Association, the Columbia Riverkeeper and the Northwest Environmental Defense Center. The plaintiffs were represented by attorneys of Earthjustice.

Other citizen groups that litigate for water include: The Sierra Club, River (Bay) Keepers, Heal the Bay, Chesapeake Bay Foundation, Southern Environmental Law Center.

There are many more, and they will continue to grow and profit from stormwater litigation until we figure out how to stop pollutants from getting into our waters. But they will also continue to fight the good battle, and in doing so, they will positively impact our waters by bringing violators into compliance.



Designated NPDES Permits

EPA must consider using “residual designation authority” (RDA) that is available in the Clean Water Act. [40 C.F.R. Part 122.26(a)(9)(i)(D)]

Under section 402(p)(2)(E) and (6) and 40 C.F.R. § 122.26 (a)(9)(i)(D), the U.S. EPA Regional Administrator may designate additional stormwater discharges as requiring National Pollutant Discharge Elimination System (NPDES) permits where he determines that the discharge, or category of discharges within a geographic area, contributes to a violation of a water quality standard.

The Clean Water Act explicitly allows the EPA to require NPDES permits for municipal and industrial discharges of stormwater but not for stormwater discharges from large institutions or commercial sites such as universities, schools, and hospitals.

A coalition of 10 environmental groups, filed a petition requiring an EPA response in 6 months. However, Rebecca Hammer, project attorney for NRDC's water program said that the groups had agreed to give the EPA more time to evaluate the large amounts of data that they cited in their petition. “We gave them a lot to think about. We are now waiting for them to come back to us with a response,” she said.

Hammer emphasized that the purpose of the petitions was not to burden municipalities that operate stormwater utilities but to place the onus on the private sector that was going unregulated. She said the regions must decide what constitutes a discharge that is not de minimis, and “this decision must be based on science.”

When asked why parking lots and office buildings at industrial sites that are currently not subject to NPDES permits for industrial discharges were being included in the petition, Hammer responded that these sites are sources of pollutants from cars and trucks that ultimately find their way into nearby waters.

So, the question remains open. Will EPA use their authority or not?



Stormwater News

(Continued From Page 1)

EPA’s Enforcement Database Gets an Overhaul.

ECHO provides integrated compliance and enforcement information for about 800,000 regulated facilities nationwide. Specifically, ECHO allows you to find and download information on:

Permit data

Inspection dates and findings

Violations

Enforcement actions

Penalties assessed

The new ECHO site is more efficient, flexible and easier to use, with compelling graphics and functionality. It has environmental compliance history of facilities or industry sectors.

EPA kept robust search options, mapping and easy data downloads. Now the site is better organized with added features like collapsible and expandable sections of data, making it easier to find information.

Montgomery County, MD Circuit Court judge ordered a stormwater permit issued by the Maryland Department of Environment (MDE) for the Montgomery County storm sewer system violated the law because it doesn’t fulfill clean water requirements.

Among the judge’s determinations is a ruling that the state violated the law by failing to have specific limits on stormwater pollution discharges.

Clean water groups contend the permit allows ongoing harm to water quality and human health due to excessive discharges of pollutants and trash into the Potomac and Anacostia Rivers watersheds.

MDE itself found that to meet the state’s own standards, Montgomery County’s stormwater discharges of sediment would need to be reduced by 46 percent, nitrogen and phosphorus by 79 percent, and fecal bacteria by 96 percent.

“For far too long the Anacostia and Potomac watersheds have been inundated with pollution,” said Kelly Foster, senior attorney for Waterkeeper Alliance. “With this ruling we call on MDE to finally come up with a plan that sufficiently addresses the exact sources of this pollution.”

The city of Shreveport, La., has agreed to make significant upgrades to reduce overflows from its sanitary sewer system and pay a \$650,000 civil penalty

The City of West Haven, Conn. will significantly reduce illegal discharges of raw sewage into the environment throughout West Haven from the City’s wastewater collection system. The agreement is between the U.S. EPA, the U.S. Department of Justice, the Connecticut Department of Energy and Environmental Protection, the Connecticut Attorney General’s Office, and the City of West Haven.



Coming Soon: Which Ditches are U.S. Waters?

Republicans in the US House are charging President Obama with trying to control virtually all man-made and natural bodies of water in the country.

Congressman Lamar Smith from Texas held a hearing to challenge the EPA proposed rule that defines the waters that are regulated by the Clean Water Act. He has a copy of a draft rule that redefines “waters of the United States” under the Clean Water Act to include all natural and man-made tributary streams, lakes, ponds and wetlands that affect downstream navigable waters. EPA will soon propose this regulation.

The leaked copy draft rule would simply do what the 2006 Supreme Court suggested: a case-by-case “significant nexus” test that EPA and the COE have used informally since 2006.

The Supreme Court’s 5-4 decision in *Rapanos v. United States* resulted in a case-by-case study to determine if a particular water has a “significant nexus” to downstream waters. It is jurisdictional and regulated – even if it is not significant.

The leaked draft rule also indicated that EPA would define several critical terms, including tributary, neighboring, floodplain and riparian area.

Understanding the jurisdiction of the Act is important to those that enforce the Act. The EPA Assistant Administrator for compliance and Enforcement has the responsibility for the understanding and for providing specific direction to enforcement officers.


It begins with the intent of the 1970 Congress. Next is the decision of the Supreme Court, and finally, the enforcement discretion of the office of the President of the United States as expressed through the EPA office of Compliance and Enforcement. We are now in the last step, where EPA produces either a regulation or a guidance document.

Both the EPA and the Corps of Engineers has responsibilities to define the jurisdiction of the Act. There are three titles in the Act that need a definition; Section 301 for oil spills, Section 402 for NPDES permit issuance, and, Section 404 for wetland permits. The U.S. Coast Gard enforces spills, the EPA enforces NPDES permits, and the Core of Engineers enforces dredge and fill permits in wetlands.

Therefore EPA is not the only federal agency engaged in the exercise. But the final decision making is within the White house by the Office of Management and Budget. OMB must approve a regulation before it is signed and published in the federal register.

Many people believe the decision has been made and the scientific study was released to support that decision during the anticipated litigation. The leaked draft is a trial balloon to gauge and control political pundits. Such trial balloons are frequently more restrictive the final rule.

It also gives Congress an opportunity amend the Act.

The likely outcome is the direction given by Supreme Court Justice Kennedy and the leading statement if the Act; a case-by-case decision based on the potential down stream impacts on waters known to be jurisdictional. 

Local Governments Rejecting Permit Compliance, Face Enforcement

Clark County, Washington will pay \$3 million over six years for violating the Clean Water Act. The County will also pay \$600,000 to the plaintiffs to cover attorney fees. A federal court ruled that the County violated the law for three years and would be liable for damages.

U.S. District Judge Ronald B. Leighton granted partial summary judgment to plaintiffs Rosemere Neighborhood Association, Columbia Riverkeeper and Northwest Environmental Defense Center. The plaintiffs were represented by attorneys of Earthjustice.

Lengthy Fight

In 2008, the county refused to adopt Washington State requirements for managing polluted runoff, “dismissing them as an unreasonable burden to place on private developers.” According to a reporter., the County argued that the county’s own system of stormwater management was superior to that of the state.

In 2011, Judge Leighton issued an injunction against Clark County, ordering it to follow the state’s default stormwater requirements. At that time, the county was defending its stormwater plan in the state courts, a fight it ultimately lost.

Leighton wrote that “even viewed in the light most favorable to Clark County,” the evidence shows the county was in violation of its National Pollution Discharge Elimination System permit from Aug. 17, 2008 to Dec. 28, 2011.


Stormwater runoff is federally regulated as a major source of water pollution. It contains toxic metals, oil, grease, pesticides, herbicides, bacteria and nutrients that run off buildings and pavement into streams, degrading water quality and killing marine life.

The plaintiffs argued the county was shifting the burden of paying for impacts from developers to taxpayers.

The \$3 million will be paid to an independent third party, the Lower Columbia Fish Recovery Board, which will “oversee projects to protect and restore Clark County rivers and streams harmed by stormwater pollution. Specifically, the projects will aim to improve salmon habitat and reduce dirty stormwater pollution.

A County Commissioner said that he appreciated the plaintiffs were willing to work with the county to put money into local projects. Had the plaintiffs not agreed to mediation and simply asked a judge to impose civil penalties for violating the Clean Water Act, the county could have been ordered to pay millions more without receiving the benefits of clean water.

Under the Clean Water Act, offenders can face financial penalties based on the number of violations per day, but offenders can also be asked to fix damage caused by projects that were permitted in the time it was in violation. EPA fines of \$50,000 per day, per violation are now in effect.

Under the terms of the settlement, the \$3 million has to be “new money.” In other words, it cannot come out of the county’s existing budget. 


Editorial Comment

<http://www2.epa.gov/enforcement/enforcement-basic-information>

Local officials should be made aware of the difference between civil and criminal violations of the law.

Most of the environmental crimes that U.S. EPA investigates involve knowing violations"of the law, which are classified as felonies.

A knowing violation" is one in which the defendant is aware of the facts that constitute the violation, an instance in which conscious and informed action brought about the violation, rather than, as would be the case with a civil violation, an accident or mistake.

For example, an intentional decision to discharge pollutants into a river without a permit could be a knowing violation,"and thus criminal, without regard to the defendants knowledge of the law. 

Employees Doing Dumb Things

Intentionally Dumping Costs \$4 Million

Conopco, Inc. has pled guilty to two felonies: the illegal discharge of industrial wastewater, and failure to report the discharge in a timely manner. They have agreed to pay a \$1 million fine and contribute \$3.5 million to state and local environmental programs.

Located in Clinton, Connecticut, Conopco, Inc. manufactured health and beauty products and is now closed. It was owned by Unilever which is the world's third-largest consumer goods company and has operations in over 100 countries.

In 2008, the operator of the industrial treatment plant discharged 4,500 gallon of vacuum filter filtrate wastewater directly to a storm drain pipe that led to Hayden Creek. It was discovered by a contracted employee who noticed that a hose was being used to bypass the treatment system.

The contract employee alerted the wastewater treatment operator on duty to show him the hose and ongoing wastewater bypass. These two individuals then shut off the hose and notified a supervisor about the observations and then notified Conopco's Safety, Health and Environmental (SHE) manager who subsequently notified the plant manager and took pictures.

Despite the requirement that the Connecticut Department of Energy and Environmental Protection (DEEP) be notified within two hours of the detection of such a bypass, Unilever chose not to notify the State within this two-hour window.

The SHE manager referred the matter to counsel for Unilever for further investigation and notification of DEEP.

Three days after being notified of the illegal discharge, the Unilever plant manager interviewed the two wastewater treatment operators and the contract employee who had initially discovered the bypass. All three individuals denied any responsibility for the bypass and indicated that they did not know who was responsible.

Unilever finally notified the State for the first time of the discharge that occurred five days earlier. In subsequent conversations and written communications with federal and state authorities throughout 2009 and 2010, Unilever claimed it was unable to conclusively determine who was responsible for the bypass, and mischaracterized the incident as an isolated incident that may have been the work of unknown vandals. An extensive EPA investigation revealed the truth about what happened.

The junior operator admitted to the EPA that he intentionally bypassed the system on December 5. EPA further concluded that for an extended period of time, perhaps as long as two years prior to December 2008, the wastewater treatment operators routinely bypassed the system on a weekly basis, discharging approximately 1,500 gallons of partially treated wastewater at a time to the storm drain that led to Hayden Creek.

The EPA investigation established that these bypasses were concealed from and unknown to Unilever management, including the SHE manager and the Conopco, Inc. plant manager.



Waste from Storm Drains Should Not Be Dumped in the River

Storm Drain Contractor Expected to Get Prison Time

Patrick Brightwell was contracted to clean the stormwater sewer system on the National Mall in Washington DC. He was also arrested for dumping the waste into the Potomac River. The indictment charges Brightwell with conspiracy, false claims, and obstructing the investigation by tampering with witnesses and making false statements.

Brightwell's company contract required that waste removed from the Mall's storm drains and oil-water separators be disposed of at a proper disposal facility. Mr. Brightwell supervised the work by collecting waste in a vacuum truck, and transporting the waste.

Brightwell directed his employees and subcontractors to discharge waste from the vacuum truck at a storm drain on Hains Point, where the waste would flow into the Potomac River. Brightwell also directed his employees to conceal these discharges from the National Park Service and police.

The indictment further alleges that, after the U.S. Park Police stopped the vacuum truck at Hains Point, Brightwell sought to obstruct the investigation by making false statements himself, by telling a subcontractor to make false statements to the police, and by telling an employee to leave the area to prevent police from interviewing him."

Brightwell faces up to five years in prison on each of the conspiracy and false claims charges, as well as a \$250,000 fine; a maximum sentence of three years in prison on the Clean Water Act violation and a fine of up to \$50,000 per day; up to 20 years in prison on the witness tampering counts; and up to five years in prison on the false statement count, if convicted of the crimes.

Chesapeake Corp Thumbs Its Nose at EPA and Gets to Pay \$9.7 Million

Chesapeake Energy will pay a civil penalty of \$3.2 million for dumping rocks, sand and dirt into wetlands while building drill sites and roads, without a permit in West Virginia. Chesapeake will also pay an estimated \$6.5 million to restore streams and wetlands.

Chesapeake Energy is an oil and natural gas company with headquarters in Oklahoma City, it's the second-largest natural gas producer in the United States. Its operations are focused on discovering and developing unconventional natural gas and oil fields onshore in the U.S.

Companies using hydraulic fracturing and horizontal drilling construct drilling pads for rigs by clearing land that is then covered by crushed rock. Roads also need to be built to accommodate truck traffic to and from drilling sites.

Fracking is an unconventional gas and oil drilling method that involves pumping vast quantities of a chemical brine deep underground, to shake deposits loose from shale formations.

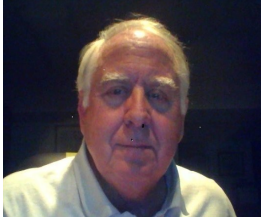
The penalty is one of the largest of its kind ever levied by the federal government, is for violations of the Clean Water Act. In December 2012, Chesapeake plead guilty to three violations of the Clean Water Act related to natural gas drilling in Wetzel County, WV. Chesapeake was ordered to pay a \$600,000 penalty to the federal government for discharging crushed stone and gravel into Blake Fork, a local stream, to create a

Don't do the crime if you can't pay the fine

roadway to improve access to a drilling site.



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 for NPDES Development
- ⇒ Appointed to EPA Advisory Committee on Compliance Assistance and Stormwater Phase II
- ⇒ Appointed by Small Business Administration to EPA committee for streamlining Phase II stormwater rules.
- ⇒ Instructor for Florida DEP Erosion & Sediment Control Inspector Course
- ⇒ *Qualified Environmental Professional* by the Institute of Professional Environmental Practice

2014 Training Schedule
Certified Stormwater Inspector

Jan 27-28 Atlanta, GA
Jan 30-31 Atlanta, GA
Feb 5-6 Cincinnati, OH
Feb 11-12 Tampa, FL
Feb 24-25 Columbia, SC
Feb 27-28 Charlotte, NC
Feb 27-28 Covington, LA
Mar 10-11 Oakland, CA
Mar 13-14 San Jose, CA
Mar 24-25 Pittsburgh, PA
Mar 27-28 Philadelphia, PA

2014 Online MS4 Workshops

Feb 20 Industrial Inspections
Feb 20 Hydrology & Drainage
Mar 20 Illicit Discharge Detection
Apr 24 Construction Inspections
Apr 24 LID
May 15 Post Construction

Be sure to see our website for our full training and events schedule at www.NPDES.com

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

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