

## COURT: GOVERNMENTS MUST LIMIT POLLUTANTS ENTERING DRAINAGE

### *Stormwater News*

**EPA has decided not to correct a calculation error for turbidity that was promulgated as a national standard for the construction and development industry.** The error in the calculation of the 280 Nephelometric Turbidity Units (NTU) limitation was identified by the Small Business Administration and the National Association of Home Builders. EPA will start over rather than fix the error. The EPA General Construction Permit is scheduled for final publication in February 2012 without a turbidity limit.

**The Supreme Court will hear a challenge to EPA's authority to issue compliance orders under the Clean Water Act without allowing an immediate hearing.** At issue is a half-acre parcel near Priest Lake, Idaho. The lower district court held that due process rights were not violated because those subject to compliance orders have an opportunity to go to court if EPA commences an enforcement action. The 9th U.S. Circuit Court of Appeals agreed with the district judge's conclusion. The case raises important property rights and due process questions. (Continued on Page 3)

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### **MS4s Own What They Accept Into their Drainage System**

The Ninth Circuit Court recently made a decision that impacts all Municipal Separate Storm Sewer Systems (MS4).

The judges ruled that Los Angeles County was in violation of the Clean Water Act by allowing untreated and heavily-polluted stormwater to flow unabated into public waters.

The County contended that its infrastructure (MS4) alone does not generate or discharge pollutants. The collective discharges of the numerous contributors, including other MS4s, are not the responsibility of Los Angeles County.

The court disagreed. They said that the Clean Water Act is indifferent to the originator of water pollution. So the Los Angeles MS4 is the "superintendent" of the discharge.

The court concluded that every MS4 permittee is vested with the necessary legal authority to prohibit discharges to the MS4, and is directed by their NPDES stormwater permit to develop stormwater and urban runoff ordinances for its jurisdiction.

The suit, decided on March 10, 2011, was filed against the County of Los Angeles by Natural Resources Defense Council and the Santa Monica Baykeeper. \*

# EPA Proposed Construction General Permit

The proposed permit is significantly different from the previous permit. Most of the new requirements are to implement the new National Construction Standards. But it also includes new provisions relating to enhanced protections for impaired or other sensitive waters.

In addition, the proposed permit has been modified to improve its readability, clarity, and enforceability. Some of the significant proposed permit modifications in the proposed permit include new requirements for:

- Eligibility for emergency-related construction;
- Required use of the electronic NOI process;
- Sediment and erosion controls;
- Soil stabilization;
- Pollution prevention;
- Site inspections;
- Stormwater Pollution Prevention Plans; and
- Permit termination.

## National Standards

The national stormwater standards for construction and development are included in the permit. All states will incorporate the provisions of EPA standards into construction permits as they expire and are reissued.

**These standards are (for now) only non-numeric effluent limitations.**

The EPA national standards include a requirement that operators of construction sites “provide and maintain natural buffers, unless infeasible” however, it did not specify what size buffer is necessary to meet the requirement, but rather left this and other related determinations up to the NPDES permitting authority.

The proposed permit includes requirements that are intended to protect impaired waters that receive construction site stormwater discharges.

Sites that discharge to sediment- or nutrient-impaired waters must comply with the following requirements:

- If the site disturbs 10 or more acres, sampling is required;
- More rapid site stabilization; and
- Increased site inspections.

Sites that discharge to high quality waters (i.e., Tier 2, 2.5, or 3 waters) must comply with the requirements for more rapid site stabilization and increased site inspections.

Permits issued by states do not have to be the same as the EPA-issued permit for stormwater discharges from construction activities. Nothing in the Clean Water Act precludes a state from adopting or enforcing requirements that may be more appropriate to address discharges in their state or are more stringent or more extensive than those required under the NPDES regulations while still complying with the Clean Water Act.

State issued permits must include technology-based effluent limitations including the National Standards. In addition, where technology-based effluent limitations are insufficient for the discharge to meet applicable water quality standards, the permit must contain water quality-based effluent limitations as necessary to meet those standards. States are free to incorporate additional requirements that they feel are necessary to adequately protect water quality.

EPA intends to finalize the new permit by February 15, 2012. \*

## EPA Pushes Permits for Green Development

EPA issued a stormwater permit to Washington D.C. with the following green performance measures.

- Requiring a minimum of 350,000 square feet of green roofs on District properties;
- Planting at least 4,150 trees annually and developing a green landscaping incentives program;
- Retaining 1.2 inches of stormwater on-site from a 24-hour storm for all development projects of at least 5,000 square feet;
- Developing a stormwater retrofit strategy, and implementing retrofits over 18 million square feet of drainage of impervious surfaces;
- Developing consolidated implementation plans for restoring the impaired waterways of the Anacostia and Potomac Rivers, Rock Creek, and the Chesapeake Bay; and
- Preventing more than 103,000 pounds of trash annually from being discharged to the Anacostia River.

The new permit conditions are required because impervious surfaces in the District, such as roads, rooftops and parking lots, channel stormwater directly into local streams and rivers. The permit aids the District in meeting its Chesapeake Bay pollution reduction targets and its Watershed Implementation Plan.

EPA Regional Administrator Shawn M. Garvin, said the permit builds on efforts the District has already undertaken and is a major step forward in reaching our goals for restoring the Anacostia River and Chesapeake Bay.

Stormwater runoff causes significant erosion, and carries excessive pollutants like nitrogen, phosphorus, sediment, toxic metals, and solvents to US Waters. \*

## Stormwater News (Continued From Page 1)

**EPA announced October 20 that it was beginning to develop standards for wastewater discharges produced by natural gas extraction from underground coalbed and shale formations.** Hydraulic fracturing, commonly called fracking, is the process by which a fluid mixture of chemicals and propping agents is injected under high pressure into oil or gas bearing formations, typically deep underground, in order to fracture the rock and allow the oil or gas to more readily flow into the well for removal to the surface.

**Minnesota recently conducted industrial stormwater compliance inspections from an airplane.** The fly-over inspections targeted No Exposure certifiers. The results? Many of the facilities observed do have exposure and DO NOT meet the No Exposure certification requirements.

**The Indiana Department of Environmental Management recently completed the first phase of an audit of the City of Columbus' stormwater collection system.** The city passed the first phase without any violations. But it mostly dealt with regulations concerning public outreach and education. While the City Engineer is pleased, Dave Heyward says the next administration will have its work cut out to ensure the community passes the second phase of the audit five years from now. That phase will include actual enforcement of state and federal regulations.

Heyward says one area that needs more attention is the mapping of man-made discharges going into rivers and creeks. He adds IDEM also wants more samples taken to make sure nothing that poses a public health hazard is being discharged. \*

## Proposed New Small MS4 Permit

# California MS4 Staff Training

The California State Water Resources Control Board has proposed a new small MS4 permit for public comments. The Board intends the final permit to be effective on May 15, 2012.

Staff Training is required in the following areas:

1. Illicit Discharge
2. Construction Inspectors
3. Pollution Prevention/Good Housekeeping
4. Industrial Activities by Municipalities
5. Industrial and Commercial Inspectors

### **Illicit Discharge**

- (a) Identification of an illicit discharge
- (b) Procedures for reporting and responding
- (c) Procedures for reporting an illicit discharge be in each fleet vehicle used by field staff.

### **Construction Inspectors**

The California Construction General Permit specifies that the Qualified SWPPP Developer (QSD) write the Stormwater pollution prevention Plan (SWPPP) and a Qualified SWPPP Practitioner (QSP) is responsible for creating, revising, overseeing, and implementing compliance with the permit.

The California Stormwater Quality Association administers the QSD and QSP training and certification.

MS4 inspectors of construction sites must be supervised by a designated person on staff with each credential (QSD to supervise plan review, QSP to supervise inspection operations).

### **Pollution Prevention & Good Housekeeping**

Annual training for staff includes new technologies, operations, or responsibilities and the permit requirements.

### **Industrial Activities by Municipalities**

Municipal employees who work in areas where industrial materials or activities are exposed to stormwater must be trained on how to select, install, implement, and maintain storm water BMPs.

Training includes facility inspection documentation knowledge of pollutants of concern, installation and maintenance and the assessment of the effectiveness of structural and non-structural BMPs.

### **Industrial and Commercial Inspectors**

MS4 inspectors of industrial and commercial facilities must know the stormwater requirements for the different types of facilities in their jurisdiction, types of storm water control measures commonly used at the facilities and be able to educate facility operators about such storm water control measures.

Inspectors must be trained to understand and use the established enforcement response to gain compliance and the enforcement escalation procedure. \*

### **Also, Draft Washington State MS4 Permit**

Phase 1 permittees must have a regular training program that ensures all staff, whose primary job duties are implementing the source control program, are qualified and trained to conduct these activities.

Staff shall be trained and evaluated at least annually with topics covering the legal authority for source control, source control BMPs and their proper application, inspection protocols, lessons learned, typical cases, and enforcement procedures. \*

## NPDES Permits for Pesticide Used Near or on U.S. Waters

Unless the US Senate amends the Clean Water Act, the EPA and 46 states have no choice but to issue general NPDES permits for applications of pesticides over or near waters within their jurisdiction.

The EPA and 36 states were prepared to issue the permits on October 31, the date this *Quarterly* was written. However, the US Senate could act at any time to remove the requirement. The legislation is on a Senator's hold and could be voted on at any time. If so, it would pass. The US House of Representatives have passed such legislation.

Individual permits will be required if a general permit is not available. Efforts to exempt these permits failed in the U.S. Senate.

The permit requirement stems from a 2009 decision by the Sixth Circuit Court of Appeals that vacated EPA's 2006 Final Rule on Aquatic Pesticides. Under that rule, NPDES permits were not required for applications of pesticides to U.S. waters.

This action is relevant to permit requirements for water system activities such as the application of algacides to reservoirs, the application of herbicides to control aquatic plant growth, and the application of pesticides adjacent to water bodies where pesticide residuals enter the water.

EPA plans to finalize a general permit for pesticides on October 31 and post it on the agency website (it will later be published in the *Federal Register*).

The general permit will be effective only where EPA is the NPDES permitting authority. Forty-Six states have primacy for NPDES permitting and are responsible for issuing NPDES permits for pesticide discharges in their respective jurisdictions. \*

## New Cost-Effective Plan for Municipal Compliance

EPA has rolled-out a plan to help local governments complete required infrastructure improvement work considering their financial ability, called "Integrated Planning for Cost-Effective Solutions."

EPA is now offering a planning approach for municipalities to make infrastructure improvements through the appropriate sequencing of work.

Under NPDES, EPA and states have flexibility to evaluate a municipality's financial capability and to set appropriate compliance schedules. The plan identifies cost-effective solutions for implementing the most important projects first.

Integrated planning will put municipalities on a path to achieving the water quality objectives by identifying efficiencies in implementing sometimes overlapping and competing requirements that arise from separate waste and stormwater programs, including how best to make capital investments and meet operation and maintenance requirements.

Integrated planning also can lead to the identification of sustainable and comprehensive solutions, such as green infrastructure, that improve water quality as well as support other quality of life attributes.

The process will identify: 1) the essential components of an integrated plan; 2) steps for identifying municipalities that might make best use of such an approach; and 3) how best to implement the plans with states.

The framework worked out with the state will be presented to environmental groups to obtain their feedback. Read the memorandum: <http://cfpub.epa.gov/npdes/integratedplans.cfm>  
\*

# Sample of Ongoing Citizen Suits

The Clean Water Act (CWA) authorizes any citizen to bring an action “against any person ... who is alleged to be in violation of an effluent standard or limitation ... or any order issued by EPA or a State with respect to such a standard or limitation.”

To file a lawsuit in federal court, a private citizen must first provide an alleged violator with notice of the alleged violation(s) 60 days prior to initiating an action, and must also send that notice to relevant federal and state authorities.

Citizens may not sue if EPA or a state is “diligently prosecuting” an action, but may intervene as a matter of right. Otherwise, if settlement does not occur, citizen plaintiffs can lodge their complaint in a federal court and, if they “prevail or substantially prevail,” recover reasonable attorney fees and costs and civil penalties of up to \$37,500 per violation per day.

## Ogeechee Riverkeeper

A textiles treatment plant in Screven County, Georgia has been given 60 days to respond to allegations the plant is dumping chemicals into the Ogeechee River.

The Ogeechee Riverkeeper has filed a complaint against King America Finishing, Inc., a textiles treatment plant near Dover in Screven County, with illegal dumping.

The action follows a massive fish kill in May that was caused by chemicals poured into the river through the plant’s outfall pipe.

The alleged complaint is the facility “is discharging color, ammonia and formaldehyde in violation of its permit and Georgia water quality standards.” The plant is being investigated by the Georgia Environmental Protection Division.

The Riverkeepers visited the plant’s discharge pipe July 16 and found dark blue-black liquid being pumped into the river.

## Santa Monica Baykeepers

The Natural Resources Defense Council (NRDC) and Baykeepers filed a federal lawsuit in 2008 alleging the city of Malibu violated the Clean Water Act by discharging contaminated water into the Malibu Creek and the Latigo Point watershed, which they say is a state-designated "Area of Special Biological Significance."

The nonprofits say Malibu is responsible for contributing high levels of cyanide, sulfate and fecal bacteria to the creek.

The lawsuit, scheduled to go to trial in November, has racked up heavy fees for the city as well as the nonprofits. Baykeepers spokesperson said that the biggest priority is ensuring that Malibu performs no more illegal discharges. They say "We continue to seek a remedy for the fact that Malibu is responsible for Surf Rider Beach and other beaches in Malibu. Our concern is public health and bacteria exceedances. The NRDC and Baykeepers are open to settling the case, according to the spokesperson.

## Delaware Riverkeeper Network

The Delaware Riverkeeper Network (DRN) took legal action the U.S. Environmental Protection Agency (EPA) to bring New Jersey’s Stormwater Program into compliance with the Clean Water Act.

The lawsuit claims the EPA has failed to fulfill its mandatory duty under the Clean Water Act to take action against New Jersey’s failure to properly enforce and/or administer its Municipal Stormwater Program.

*(Continued: See Riverkeeper on Page 7)*

# Recent Enforcement Actions

## Louisiana

Customer complaints have led to a 33-month prison term for a former wastewater plant owner and operator in Louisiana. He received 21 months for seven felony counts and 12 months for one misdemeanor count, which will be served concurrently.

He and the two companies he owned and operated are also collectively responsible for paying a \$310,000 criminal fine.

He was convicted by a federal jury for multiple violations of the Clean Water Act, including the failure to provide and maintain records, illegal discharge of pollutants, and improper operation and maintenance of a facility.

## South Carolina

A Batesburg-Leesville man received a sentence of 8 months house arrest, five years on probation and a \$7,500 fine after pleading guilty to violating the federal Clean Water Act

John Ashley Mabus was digging a ditch for a sewer line in January 2008 near the Clearwater Finishing Industrial Facility, an abandoned textile mill in North Augusta.

When water from a lagoon contaminated with heavy metals began leaking into the ditch, Mabus directed employees to pump about 4 million gallons of water and sludge into Little Horse Creek, a tributary of the Savannah River, over three days in order to continue work on the ditch. \*

## Louisiana

The City of Pineville plead guilty to one criminal misdemeanor charge of negligently discharging hydraulic fluid into Huffman Creek during Hurricane Gustav in 2008, a violation of the Clean Water Act.

The EPA investigator testified that the city's pumps leaked hydraulic fluid for two days and city employees knew of the leak and discharge but did not repair the machinery.

Pineville agreed to pay a fine of \$15,000 and serve one year of supervised probation. It is unclear who will report monthly to the probation officer.

## Virginia

The owner of a Portsmouth, Va company plead guilty to dumping half-million gallons of pollutants in the Elizabeth River. He will spend 30 days on home confinement and pay a \$15,000 fine.

His company, Marine Environmental Services, was fined \$10,000 ordered to pay \$60,000 to a river cleanup program. The company had been contracted to remove 2.1 million gallons of water from a decommissioned tanker in 2005. The water was polluted by oil, grease and bacteria.

## Riverkeeper

(Continued from Page 6)

The Delaware Riverkeeper Network provided the EPA with evidence documenting the State's widespread failure to adequately regulate stormwater runoff and ensure compliance at the municipal level; and EPA's failure to take responsive action is a violation of its Clean Water Act oversight obligations.

The complaint alleges that the NJ DEP has failed to adequately inspect and monitor violating municipalities; even when provided with detailed documents proving violations DEP has refused to act. Thus, EPA, having the ultimate responsibility to ensure compliance with the Clean Water Act, is required to right the ship. \*

**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

**2012 Training Schedule:**

**Certified Stormwater Inspector**

**Certified Construction Inspector**

	<u>CSI</u>	<u>CCI</u>
Pineville LA	Jan 24-25	Not offered
Los Angeles CA	Feb 7-8	Not offered
San Diego CA	Feb 21-22	Not offered
Renton WA	Mar 6-7	Mar 7-8
Las Vegas NV	Mar 20-21	Mar 21-22
San Jose CA	Apr 10-11	Not offered

**On-Line Industrial Annual Employee Training**

Sectors K-L	January 8
Sectors M-N	January 10
Sectors O-P	February 3
Sectors Q-R-S	February 10
Sectors T-U	February 17
Sectors V-W	March 2

**NEW: On-Line MS4 Employee Training**

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

**NEW: On-Line Training**

EPA Construction Permit	January 10-11
Certified SWPPP Developer	January 18

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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 support services to individuals in government and business.*

