

EPA CUTS BUDGET AND EMPLOYEES, STATES DO LITTLE . . . PUBLIC MUST GET INVOLVED

Stormwater Permit News

The EPA, under President Trump, has reduced enforcement and placed limits on enforcement officers according to the New York Times (Times) article on December 10. The Times reviewed confidential documents that indicate enforcement officers across the country no longer have authority to order water quality tests without approval from Washington, D.C.

The President's budget request called for EPA to handoff enforcement to states and to discontinue any permit assistance or compliance activity where that state has been delegated authority to issue permits. Trump incorrectly used the term "delegated" instead of "authorized" where EPA shares authority.

The EPA Administrator Pruitt restricted all employees from talking to the press except union officials.

The Times compared President Trump's first 9 months to that of both presidents Obama and Bush. The data shows EPA enforcement is 1/3 of Obama EPA enforcement and 1/4 of the Bush EPA enforcement.

(Continued on Page 3)

State Leadership Missing

The election of Donald Trump and his appointment of Scott Pruitt to run the Environmental Protection Agency (EPA) clearly means less environmental protection. Significant budget reduction and policy changes favoring polluters was to be expected. The unknown is what states will do. The answer is likely found by looking at regional cultural differences.

This Quarterly has a statement from former state environmental managers asking Congress to fund EPA's environmental programs. What is needed is a statement by current state environmental managers. The Association of States Water Administrators (ASWA) has that opportunity but is politically handicapped.

With the absence of federal and state leadership, the public must speak. Environment groups can influence governors and lawmakers. That requires funding for data collection and staff to prepare science logical reports and legal briefs.

Individuals must donate their time and money to support organizations like Waterkeepers, Sierra Club, Environmental Defense Fund, the Natural Resource Defense Council, and local water body support groups. The value of these organization is their ability to find successful approaches as opposed to emotional events with no path to a successful change.

The National Pollutant Discharge System (NPDES) is a path to work with regulators and polluters to protect the nation's waters. Stormwater discharge permits require public participation.

INSIDE THIS ISSUE

- Page 2 - Court Decision May Stop CWA Jurisdiction Activity
- Page 3 - Trucker Gets 3 Years for Dumping
- Page 4 - Former Environmental Leaders Speak Out on Budget
- Page 6 - Industrial Enforcement Neglected in Maryland
- Page 7 - Chicken Producers Agree to Install Controls

Don't expect clarification of the jurisdiction of the Clean Water Act

New Decision of the Ninth Circuit Court

The jurisdiction of the Clean Water Act may never be entirely clear. The Trump Administration's current repeal-and-replace efforts may not be successful. A November 28, 2017 decision by the Ninth Circuit Court of Appeals in the case of United States v. Robertson may prevent Trump's plan to limit the jurisdiction to standing waters as opposed to the inclusion of intermittent drainage streams.

In Rapanos v. United States five of the nine Supreme Court Justices could not agree on a rule to be applied in future cases. A Four-Justice plurality would have held that the Act's definitions exclude intermittent or ephemeral streams altogether, and instead include only "relatively permanent, standing or continuously flowing bodies of water" and wetlands that were adjacent to those waters, in that they had a "continuous surface connection" to them. By contrast, Justice Kennedy wrote that wetlands may be jurisdictional if they have a "significant nexus" with navigable waters. This split opinion left Democrats preferring the significant nexus standard and with Republicans preferring the plurality's "continuous surface connection" standard.

EPA and the Corps attempted to clarify the authority by issuing what is known as the "Waters of the United States" ("WOTUS") Rule. That rule applied Justice Kennedy's "significant nexus" standard. The WOTUS Rule was stayed by the Sixth Circuit Court of Appeals leaving the Pre-Rapanos definition in place.

Against this convoluted backdrop, on November 28, 2017, the Ninth Circuit Court of Appeals in the case United States v. Robertson upheld criminal convictions of the defendant, Joseph David Robertson, for knowingly discharging dredged or fill material from a point source into waters of the U.S. without a permit.

Robertson had argued unsuccessfully that this uncertainty meant that the plurality's standard should apply, since it would narrow CWA jurisdiction to fewer waters. The Ninth Circuit disagreed.

Robertson had excavated and constructed a series of

ponds on National Forest System lands and a privately owned mining claim in Montana. In the process, he discharged dredged and fill material into the surrounding wetlands and a tributary of Cataract Creek, which ultimately flows to the Jefferson River, a traditionally navigable water. Robertson was warned by an EPA Special Agent that if he did not have a permit, his actions "very likely" required one; yet he did not get permits to build the ponds or discharge dredged or fill material into waters of the U.S.

As in Rapanos, the case turned on whether Robertson had discharged fill into "navigable waters." The Ninth Circuit affirmed his conviction, applying earlier Circuit decisions that defined "navigable waters" using Justice Kennedy's "significant nexus" test. See decision at this site: <http://cdn.ca9.uscourts.gov/datastore/opinions/2017/11/27/16-30178.pdf>

Editor Comment: This above article was taken, in part, from The National Law Review of December 6, 2017. The authors were Ed Roggenkamp and Sara A. McQuillen.

The intent of the 1972 Congress is found on page 33699 in the Senate Congressional Record on October 4, 1972. The Clean Water Act was passed on October 18, 1972.

With respect to jurisdiction of the Act, Senator Muskie reported to the Senate: "One matter of importance throughout the legislation is the meaning of the term "navigable waters of the United States." The Conferees fully intend that the term "navigable waters" be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."

As a result of both congressional intent and the Ninth Circuit decision, it will be difficult for the Courts to resolve the jurisdiction issue without Congress amending the Clean Water Act. So, for the foreseeable future, the threat of criminal and civil penalties for unpermitted discharges should keep polluters concerned.

TRUCKER GETS PRISON FOR DUMPING

Last September, Adam D. Boylen was sentenced to three years and fined \$85,338 for dumping wastewater into a tributary of the Tuscarawas River in Ohio.

Boylen was a driver for a trucking company and was responsible for loading wastewater generated by corporate facilities into a tanker truck and delivering the tanker truck to a Pennsylvania facility for proper disposal.

Instead, he dumped the wastewater into a wetland adjacent to the Tuscarawas River, and the Beach City Reservoir, on numerous occasions between April 18 and May 4, 2016. The wastewater transported by Boylen contained surfactants capable of killing vegetation and fish.

Boylen was charged with dumping the wastewater into two different tributaries of the Tuscarawas River. The dumped wastewater caused white foam to travel four miles downstream from the location where the tanker truck was emptied. Alleged damage to the environment included: (i) dead and distressed vegetation; (ii) over 700 dead fish; and (iii) over 3,000 dead minnows, crayfish, frogs and tadpoles.

The case was investigated by numerous state and federal agencies, including the United States Environmental Protection Agency, Ohio Environmental Protection Agency, Ohio Attorney General's Bureau of Criminal Investigation, Stark County Sheriff's Offices, Tuscarawas County Sheriff's Offices, Ohio Department of Natural Resources, and Ohio Department of Rehabilitation and Correction.

Boylen's three-year sentence underscores the significant *criminal* liability that can attach to Clean Water Act violations (both for negligent and knowing violations). The Clean Water Act makes it a crime (punishable by up to six years in prison and fines of up to \$100,000 per day) for knowingly discharging a pollutant into regulated waters of the United States in violation of the Clean Water Act's National Pollutant Discharge Elimination System ("NPDES") permit or in violation of a valid NPDES permit.

Stormwater Permit News

(Continued From Page 1)

Last April US Steel had a spill of hexavalent chromium at its Portage, Indiana plant, then a second illegal wastewater discharge in late October to a Lake Michigan tributary. Beginning in April 2012, wastewater was incorrectly routed and so was not properly treated and was discharged without permission. Equipment failure and malfunctioning controls in February 2013 then allowed for excessive discharge in the waterway, according to news reports.

In the April 2017 incident, nearly 300 pounds of hexavalent chromium — or 584 times the daily maximum limit allowed under state permitting laws — leaked from the wastewater treatment facility into the Burns Waterway just hundreds of feet from Lake Michigan.

Though smaller in scale, a second leak detected Oct. 25, 2017 was not reported to the public by the Indiana Department of Environmental Management (IDEM) or U.S. Steel, which had sought "confidential treatment" from state regulators on that particular leak, according to publicly available IDEM documents.

The IDEM is negotiating a compliance agreement with U.S. Steel to be embodied in a federal consent decree that will address violations of the Clean Water Act.

Cargill, the largest privately owned company in the United States agreed to pay \$70,000 to settle allegations for letting polluted rainwater run off its animal feed plant in Ferndale, WA and also agreed to pay \$37,584 in attorney fees and to make operational changes at the plant.

Two environmental advocate companies, RE Sources and Puget Soundkeeper Alliance, sued Cargill alleging that the company had discharged stormwater that was too cloudy and had too much zinc and copper. The contaminated water flowed into Schell Creek, the Lummi River and Puget Sound, according to the lawsuit.

Cargill did not admit to any of the allegations but planned to install additional water treatment equipment, repair damaged asphalt, and regularly sweep the plant according to the settlement.

A federal court ordered Hawaii Dairy Farms to pay \$506,000 to The Friends of Mahaulepu, an environmental watchdog organization. The dairy farm is located in Mahaulepu, Kauai.

The money will go to cover legal fees encountered over a three-year legal battle. The group brought to light violations of the Clean Water Act by the dairy, and the courts sided with The Friends of Mahaulepu. Hawaii Dairy Farms was forced to adjust their operations and pay \$125,000 for environmental work. The awarding of legal fees is also meant to encourage citizen groups to continue serving as environmental watchdogs.

Comment of Former Commissioners, Secretaries and Directors of State Environmental Agencies - November 22, 2017

Several months ago, we and other former colleagues signed a Statement expressing significant concerns with the President's proposed FY'18 Budget for the Environmental Protection Agency (EPA). The President's Budget would have reduced EPA's funding by 31 percent, and state grant funding by almost 45 percent (See Attachment). In mid-September, the U.S. House of Representatives approved HR 3354, which maintains current funding levels for state grant programs, but reduces EPA's budget by \$650 million, including a 27 percent cut to EPA's core environmental programs and a 16 percent cut to its science and technology programs. In the next few weeks, the U.S. Senate may take up the EPA Budget. With this in mind, we thought an update to our Statement was necessary to offer comment on HR 3354. In that regard, we applaud the House for rejecting cuts to existing state health and environmental protection efforts but express concern with the proposed reductions to the underlying media (air, water, land), and science and technology support programs. Our experience informs us that underfunding these core programs will have adverse impacts on the states' ability to protect human health and the environment, and result in an imbalanced federal/state partnership on environmental matters.

As noted in the attached Statement, federal environmental laws are based on the principle of cooperative federalism, with Congress anticipating defined roles under the laws for both the EPA and the states. In broad terms, the states receive funding to administer the laws on a day-to-day basis while EPA is charged with setting minimum, nationwide protection standards and monitoring state performance. To maintain a balanced federal/state partnership requires sufficient funding for both the EPA and the states. Providing insufficient funding to either EPA or the states can compromise the overall effectiveness of the federal environmental safety net.

Through its core environmental programs, EPA supplements state budget and technical capacities by providing assistance to the states in myriad fundamental and essential ways. This help includes EPA program oversight to guarantee that states apply national pollution standards fairly and consistently, ensuring a level playing field for all states with no one state gaining an economic advantage over another. EPA also serves as a regulatory backstop to achieving compliance where a state lacks the capacity to respond to complex multi-state and multi-facility pollution problems. In addition, the states depend on EPA's resources and capabilities in responding to extreme weather events and catastrophes. The states furthermore rely on EPA's ability to provide scientific and technical assistance and guidance on emission and discharge standards, testing and monitoring methods, emission control and remediation systems, and pollution prevention and best management practices.

These are just a few examples of how the public benefits from a balanced EPA/state environmental partnership. In the next few weeks, the U.S. Senate will consider FY'18 funding for the EPA. In passing HR 3354 the House appropriately rejected the President's proposed EPA budget and maintained level grant funding for the states. **However, as former state environmental officials, we have concerns with HR 3354. First, as discussed above, we are concerned with the proposed cuts to EPA's base operating programs and the associated negative impacts to state environmental protection efforts. Second, EPA's intended rebalancing of the federal/state partnership will result in the states assuming greater regulatory responsibilities. If the states are expected to do more, then more resources must be directed to the states. With this in mind, we urge the Senate to restore funding for the EPA core public health and environmental programs, and provide full funding to cover existing and anticipated state program responsibilities.** The opinions contained in this Comment are personal opinions of the signatories.

Editor Note: The signers of this statement are previous directors of 24 states. There is no public statement by the Association of Clean Water Administrators (ACWA) or current State Directors.

What is GenX? Will the NPDES Permit be Revoked

A chemical manufacturing facility in Fayetteville, North Carolina named Chemours faces revocation of its NPDES wastewater discharge permit. The former DuPont plant has been releasing GenX into the Cape Fear River and the air.

Thousands of Wilmington and Brunswick County residents have drinking water contaminated with GenX, Nafion and associated perfluorinated compounds. What they do not know is the health effects of these chemicals within the human body.

GenX is the commonly used term for perfluoro-2-propoxypropanoic acid, a chemical compound produced to make Teflon, which is used to make nonstick coating surfaces for cookware.

Chemours has been discharging GenX into the Cape Fear River since the 1980s.

GenX, like other perfluorinated and polyfluorinated compounds, is poorly studied, generally does not break down in the environment, cannot be removed by most water treatment techniques, can behave strangely in the human body, and its health risks are not understood.

There are no federal guidelines for GenX. The North Carolina Division of Health and Human Services has established a health goal of 140 parts per trillion, or ppt.

Larry Cahoon, a professor of biology and marine biology at the University of North Carolina Wilmington, spoke to a group of Brunswick County residents. “At 140 ppt, that’s 252 molecules of GenX per cell, per liter,” he said, “which means that every cell in your body has the opportunity to interact with the chemical.” Cahoon said he was not speaking on behalf of the university.

North Carolina State University in Raleigh is conducting a health study of more than 300 Wilmington residents. That university is also testing treatment systems.

The North Carolina Division of Environmental Quality, or DEQ, is sampling additional sites and monitoring discharges.

In mid-October 2017, Chemours reported an air leak at its Fayetteville plant where 125 pounds of chemicals related to GenX were released within a time span of 13 hours. The company, however, failed to report a spike in GenX levels at the wastewater discharge outfall into the river earlier that month.

The plant discharged GenX into the water or air three times in October, the month after a partial consent order signed in Bladen County Superior Court banned Chemours from discharging GenX, Nafion or associated perfluorinated compounds into the river.

Chemours is required to report a spill to DEQ within 24 hours, a stipulation under the company’s National Pollutant Discharge Elimination System, or NPDES. DEQ is in the process of revoking the company’s NPDES permit. The permit was partially suspended Nov. 30.

A 60-day notice is required for the permit revocation. The notice expires Jan. 15, 2018, after which time DEQ can take permanent action against the permittee.

The Fayetteville plant produces four different sources of wastewater, Cahoon said, so the permit revocation doesn’t necessarily mean GenX and other compounds will not continue to be released.♦

Two Non-Profit Environmental Groups Help Maryland to Enforce Industrial Permits

A 2016 report by a pair of environmental groups, the Center for Progressive Reform and the Environmental Integrity Project, charged the State of Maryland for ignoring industrial stormwater pollution while focusing on municipal stormwater discharges.

Their report highlighted that more than one-third of the Maryland facilities that reported their stormwater discharges from 2014 to March of 2017 exceeded pollution limits for potentially harmful chemicals, according to records reviewed by both Washington-based nonprofits.

“Industrial stormwater in some ways has been ignored,” said David Flores, a policy analyst with the Center for Progressive Reform and co-author of the report. “It’s deserving of more attention.”

Some of the worst sites are auto salvage yards, scrap metal recycling facilities, and landfills, according to the report. “By their nature, these operations have many toxic materials on-site,” it says, such as leaking car batteries, deteriorating metal parts, and eroding trash incineration ash waste, a condition that state inspectors discovered at Baltimore’s Quarantine Road Landfill.

Records indicate the state failed to take prompt action when violations occurred, the report says. From 2014 until this year, MDE inspectors visited only 54 percent of the 65 facilities that reported discharges exceeding permitted pollution levels. They inspected just 13 of the 31 facilities that had violated the state’s requirements by not filing

reports.

In the 12 months ending in June, records show the MDE did inspect 292 of the more than 900 industrial sites with general stormwater permits, and found violations or noncompliance in 70 percent of the visits, the report says.

Follow-up inspections by the Maryland Department of the Environment inspections in ensuing months found continuing violations.

In a settlement agreement Baltimore Scrap Corporation agreed to pay a \$50,000 penalty and submit a “site improvement plan” within 60 days for reducing polluted runoff from its scrapyards and to conduct more rigorous and more frequent testing of runoff entering storm drains.

The agreement requires them to pay further penalties ranging up to \$2,750 for each time excessive levels of certain potentially toxic pollutants are detected.

The report can be found and read at: http://www.progressivemaryland.org/industrial_stormwater_runoff_endangers_the_bay_and_its_communities

“This is a good outcome for the environment and a strong signal to all that industrial stormwater violations will not be tolerated,” Ben Grumbles, the state secretary of the environment, said in a statement.

Editor Note: this article was taken from the Bay Journal published on October 29, 2017 and written by Timothy B. Wheeler.



Chicken Producers Forced to Clean Up Their Coop

Environment America and the Sierra Club successfully sued the 2nd largest chicken producer in the world and won a settlement to protect the Suwannee River. Pilgrim's Pride will pay \$1.3 million to create a Sustainable Farming Fund designed to improve soil, groundwater, and surface water quality in the Suwannee Basin.

The Suwannee River, an "Outstanding Florida Water," runs through South Georgia into Florida and into the Gulf of Mexico. The processing plant is located halfway between Jacksonville and Tallahassee in Live Oak, Florida.

The complaint alleges that the company violated water quality standards for nitrogen, specific conductance, biological oxygen demand, and whole effluent chronic toxicity.

The settlement terms would require Pilgrim's Pride to:

- Conduct a comprehensive study on eliminating the plant's wastewater discharge to the Suwannee River;
- Conduct a toxicity identification evaluation to address the cause of the plant's toxicity violations;
- Conduct a water use and re-use study, an analysis of the plant's water supply system, and various upgrades to the wastewater treatment plant; and
- Pay an additional \$130,000 to the U.S. Treasury as a civil penalty.

Jennifer Rubiello, State Director of Environment Florida, a state affiliate of Environment America told the press, "This great outcome demonstrates the importance of citizen lawsuits. Our state officials were not doing enough to protect one of Florida's most important rivers so we stepped in as citizen enforcers of the Clean Water Act.

Pilgrim's Pride Corporation has operations in 14 states, Mexico, and Puerto Rico and is a supplier to KFC, Walmart, Publix, and Wendy's. The company generated a revenue of \$7.9 billion in 2016. The Live Oak facility processes live poultry into fresh and frozen chicken meat products, and operates a broiler hatchery to produce chicks for distribution to growers.

Environment Florida and the Sierra Club were represented by Heather Govern of the Boston-based National Environmental Law Center, which represents citizen groups across the country in suits to enforce the nation's environmental laws.

In an unrelated case, last September Tyson Poultry, Inc. pled guilty in federal court to two criminal charges of violating the Clean Water Act. The violations related to discharges from Tyson's slaughter and processing facility in Monett, Mo. A tank used to store a low-pH liquid food supplement at Tyson's Aurora, Mo. feed mill sprang a leak, causing the acidic substance to flow into a secondary containment area.

It was then transported to Tyson's Monett plant where the treatment system was not designed to treat such waste, and as a result, some of the waste made its way into the city of Monett's municipal waste water treatment plant, where it killed bacteria used to reduce ammonia from the municipal waste water treatment plant's discharges. This caused water with elevated ammonia levels to be discharged into a local creek, which resulted in the death of approximately 108,000 fish. Tyson agreed to pay a \$2 million criminal fine and serve two years of probation. In addition, it will pay \$500,000 to maintain and restore waters in the Monett area, with a focus on the creek and adjoining waterways where the ammonia-laden water was discharged.

National Stormwater Center
John Penn Whitescarver
Executive Director



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.

2018 Training Schedule

See <http://www.npdes.com> for complete listing

- 1/9-1/12 Online CSI for MS4s
- 1/18 Online Stormwater Management for Decision Makers
- 1/22-1/23 CSI for MS4s @ LAX, CA
CSI for MS4s @ Charleston, SC
CSI for MS4s @ Dallas, TX
- 1/24 CSI for Construction @ LAX, CA
- 1/25-1/26 CSI for MS4s @ San Antonio, TX
CSI for MS4s @ San Diego, CA
CSI for MS4s @ Savannah, GA
- 1//29-1/30 CSI for MS4s @ Albany, NY
CSI for MS4s @ Chicago, IL
- 2/1-2/2 CSI for MS4s @ Fort Wayne, IN
CSI for MS4s @ Hartford, CT
CSI for MS4s @ Milwaukee, WI

National Stormwater Center also Offers:

- ◆ Certified Stormwater Director (CSD)
- ◆ Certified Stormwater Inspector (CSI)
- ◆ Certified Stormwater Volunteer (CSV)
- ◆ Compliance Evaluations
- ◆ Online Training for Industry
- ◆ Online Training for MS4s

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.

***Call or Email Us For
More Information***

888-397-9414

info@npdes.com



National Stormwater Center
107 F East Broadway Street
Bel Air, MD 21014