

RE-INVENTING CLEAN WATER SOLUTIONS & NPDES

Stormwater Permit News

EPA GETS \$8.1B: The spending bill rejects President Trump's proposal to slash the EPA budget by 31 percent and gives the agency \$8.1 billion for fiscal 2018, keeping it at the same funding level as 2017.

Sen. Tom Udall (N.M.), the top Democrat on the Appropriations Committee said “Together, we rejected the Trump administration's proposal to make massive and dangerous budget cuts, and instead, we restored funding for the EPA”

The funding level represents a victory for Democrats, who argued that Trump's cuts would be disastrous. But much of the GOP also opposed the 31 percent proposed cut.

The bill includes a handful of new policy provisions for the EPA, including one to exempt farms from having to report their air pollution to the EPA, and a requirement that the agency treat wood burning as a carbon-neutral and renewable electricity source.

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The National Pollutant Discharge System (NPDES) was originally designed in 1971 under the Rivers and Harbors Act of 1899 and called the Refuse Act Permit Program. In 1972 Congress renamed it and authorized it under the Clean Water Act.

The current congress has plans to extend the permit life from 5 years to 15 years and the White House is working to limit the regulated waters. The opportunity to update the NPDES permit program may be on the horizon, so let's consider the potential change.

The original intent was a national permit program with no havens for polluters as states became authorized permit authorities. Clearly some states disregard enforcement and the US EPA frequently ignores their responsibility. This failure leaves the responsibility for enforcement to citizens.

The 5 year permit limit hasn't worked. It was designed to strengthen permit requirements each cycle where necessary. Municipal and industrial permits are frequently extended for long periods. A 15 year cycle would require permit conditions that would cause water quality standards to be achieved during the permit period. If enforced, a good idea.

Stormwater permits, unlike sanitary and industrial NPDES permits are not end-of-pipe regulated. Why

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The Remand Rule Improves Municipal Stormwater Permitting

The Next Generation of Municipal Stormwater Discharge permits

Small municipalities may be shocked that their next permit will not just re-issue the previous permit. New rules, court ordered, will apply to the 6,695 regulated small governments. Their permit will have *clear, specific and measurable compliance requirements developed* by the issuing EPA office or the state environmental agency.

The current general stormwater permits were found by the Ninth Circuit Court of Appeals to violate the Clean Water Act for two reasons:

- (1) permit conditions were written by the permittee, not the permit authority, and
- (2) the permit authority failed to encourage public participation in the development of permit conditions.

The order was a *remand* of the previous NPDES stormwater regulations applicable to small municipal governments.

The “remand rule” will not allow the permittee to decide their permit requirements. EPA and state permit authorities must decide what permit conditions meet the requirement of the Clean Water Act to *reduce pollutants in the discharge from their systems to the maximum extent practicable* (MEP).

In all cases the new rule will provide the opportunity for the public to comment on permit requirements. Equally important, the new rule requires all permit conditions be *clear, specific and measurable* so that anyone can understand the level of permit compliance.

Clear, Specific and Measurable

The new rule at 40CFR122.34(a) reads: “Terms and conditions that satisfy the requirements of this section must be expressed in clear, specific, and measurable terms.”

EPA states that these permit requirements could be narrative, numeric, implementation of specific tasks, design, performance, or adaptive management requirements, best management practices (BMPs), schedules for implementation and maintenance and the frequency of actions.

Compliance Report

The court of appeals clearly required the regulatory authorities at the Federal and State level assure that the MS4 permittee achieve compliance with the

standard to *reduce pollutants in the discharge from their systems to the maximum extent practicable* (MEP). Therefore the permittee must report their compliance with the permit.

To comply with the court order, the new rule requires permittee submit an annual report that shows the permittee evaluated their compliance with the permit to include the status of permit conditions that are *clear, specific and measurable*.

The rule at 40CFR122.34(d) reads “The permit must require the permittee to evaluate compliance with the terms and conditions of the permit, including the effectiveness of the components of its storm water management program, and the status of achieving the measurable requirements in the permit.”

There is no status between compliant and non-compliant. 100% compliance is the legal requirement. That is a problem that can be resolved with an order to achieve compliance by a certain date.

EPA Should Go First

EPA may issue the first permit under this rule. EPA is the permit issuing authority in four states, Washington DC, the territories and many Indian tribes. EPA Region One (New England) has proposed permits for New Hampshire and Massachusetts. EPA has determined MEP and the permit conditions are likely to be clear, specific and measurable.

EPA Region 10 (Northwest) will propose permits for Idaho to be issued under the remand rule. If Idaho’s petition to administer NPDES is approved, then the state may issue the permit. EPA region 10 must approve the permit.

Federal environmental leadership is critical for authorized states to have examples of the small municipal discharge permit. Otherwise states may be accused of under or over regulating.

States Have Increased Workload

Many states have hundreds of regulated small municipal government to process. They will need to have additional staff to process, consider each public comment, and decide on permit conditions that are clear, specific and measurable. The new rule can be found at Federal Register Volume 81, Issue 237 (December 9, 2016).

Sally Gutiérrez to run EPA Water Management

EPA has announced that Sally Gutierrez will serve as Acting Director of the Water Permits Division.

Ms. Gutierrez was most recently a member of the executive leadership team in the Office of Research and Development serving as the Director of the Environmental Technology Innovation Cluster Development and Support Program, and before that the Director of the National Risk Management Research Laboratory (NRMRL) and Director of the Water Supply and Water Resources Division.

Prior to joining EPA in 2000, Ms. Gutierrez administered water programs for the State of Texas environmental agency in the areas of drinking water, water monitoring, wastewater permitting, dam safety, water rights and utility rates.

In an interview with WaterCitizen, Sally shares a very personal story of her family’s loss of a child due to contaminated drinking water, and how that loss brought her family to this country. She reminds us of how many people die of contaminated water around the world – and of how many Americans have experienced these losses first-hand in their own families, including many Hispanic Americans.

The new water manager wrote this, “My career has taken me many places. I’ve had many opportunities. Being a woman, being a Hispanic, it’s still possible.

I think that forging that pathway and bringing your passion, bringing you heritage, make that contribution even more important. Hispanics can do science. Women can do science.

I think that these are outstanding and very satisfying careers, and I would encourage you all to follow that same path. I have been very fortunate in this profession and I want to have lots of company.”

Stormwater Permit News

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The National Stormwater Center offers a webinar for Municipal Executives. Offered only to management officials, it is state oriented to focus on state issued Phase 1 and the general Phase 2 permit requirements..

The course titled Stormwater Decision Making for Municipal Executives is moderated by Dan Ahern. Dan is retired from the US EPA having served as the NPDES compliance manager and later as a municipal utility manager. The webinar is designed to share solutions to important permit requirements that could be budget busters. Good decision making is the result of sharing solutions with administrators and elected officials.

March 1, 2018

Under pressure from Senate Democrats, EPA restores funding for the Bay Journal

Bay Journal Funding has been restored. The Bay Journal is a publication with a print circulation of 50,000 that has covered environmental issues involving the Chesapeake Bay for more than a quarter-century, and follows the Chesapeake Bay restoration program closely.

Restoring funding for the Bay Journal is good, but the FY 2019 EPA Budget in Brief still shows significant funding cuts for geographic restoration programs. In most cases, the funding cut would be 100%.

Program	2018 Funding	2019 Funding in Budget in Brief
Chesapeake Bay Restoration Program	\$72,504,000	\$7,300,000
Great Lakes Restoration Program	\$297,963,000	\$30,000,000
Puget Sound	\$27,810,000	0
San Francisco Bay	\$4,786,000	0
South Florida	\$1,692,000	0
Long Island Sound	\$7,946,000	0
Lake Champlain	\$4,369,000	0
Gulf of Mexico	\$8,484,000	0
Other Geographic Programs	\$1,436,000	0

How to Improve Construction Permits

The problem with NPDES stormwater permits is there are so many of them. States and EPA issue the permits but rarely inspect the activity due to travel and budget constraints.

Municipalities are required to do construction inspection, but only with respect to municipal ordinances and with no authority to inspect for permit compliance.

The easy solution is to require MS4s to inspect for permit compliance and report noncompliance to the EPA or state authority for enforcement.

The number of construction permit must be greater than one million. The Commerce Department reports more than 1,500,000 construction starts a year, most with greater than one acre of disturbance and subject to permitting. That's a lot of inspections for 7,450 municipalities; an average of 200 for each municipality.

If the solution is to require municipalities to conduct permit inspection then we need to have a budget issue for municipalities. Should states pay for inspection?

The answer is yes; states issued the permit.

Effluent Standards Make Construction Activity Point Source

There is a national standard for the Construction and Development Industrial Point Source Category. By definition, all construction activity is point source, none is non-point source if land disturbance is one acre or more.

Therefore, state erosion and sediment control training is point source training. EPA non-point source grants (Section 319) are illegal.

Control of Volume and Velocity

The first two national standards require the control of the stormwater volume and velocity to minimize erosion and protect streambanks. While NPDES permits can only be issued for the discharge of pollutants, this standard is a required best management practice.

To comply permittees must capture rainfall and divert the water to minimize erosion.

An additional national standard is to start sediment control immediately after grading operations. Several states need to define "immediately." Nevertheless, leaving areas exposed to erosion is a permit violation.

Permits regulate all pollutants, not just dirt.

The construction industry is highly regulated because of a history of sediment discharges and trash. Open roll-off dumpsters must not discharge to the street. Staging areas must be provided off-street.

Other than dirt, construction activity has a history of dumping or burying waste materials such as wall board and trash. Washing tools on site often discharge paint and acids into a drainage area.

Washout of the concrete mixer truck chute has been a regulatory problem, but not much of a wastewater problem unless it gets into the street. If wet paint wash water can be dumped on the dirt, why not wash water

A common visible problem is vehicle tracking of dirt off site onto a public street. This can be quickly eliminated with public reporting and municipal enforcement.

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How to Improve Industrial Stormwater Permits

The National Academies of Sciences Study of MSGP issues is currently doing a study designed to improve the stormwater industrial permit. The study should be completed by the end of this year.

This study will provide input to the Environmental Protection Agency as it revises its Multi-Sector General Permit (MSGP) for industrial stormwater. The industrial stormwater permit program includes a small number of individual facility permits as well as general permits that are issued to groups of industries at the state and federal level.

The current Multi-Sector General Permit (MSGP) for industrial stormwater covers over 4,000 facilities nationwide and is used as a framework for dozens of similar state programs. The prepublication version of the report will be delivered to the EPA by December 2018.

The National Academies' study committee has the following tasks

A. Suggest improvements to the current MSGP benchmark monitoring requirements. Areas to examine could include:

1. Monitoring by additional sectors not currently subject to benchmark monitoring;
2. Monitoring for additional industrial activity-related pollutants;
3. Adjusting the benchmark threshold levels;
4. Adjusting the frequency of benchmark monitoring;
5. Identifying those parameters that are the most important in indicating whether stormwater control measures are operating at the

- best available technology or best conventional technology (BAT/BCT) level of control; and
6. New methodologies or technologies for industrial stormwater monitoring.

B. Evaluate the feasibility of numeric retention standards (such as volumetric control standards for a percent storm size or standards based on percentage of imperviousness).

1. Are data and appropriate statistical methods available for establishing such standards as both technology-based and water quality-based numeric effluent limitations?
2. Could such retention standards provide an effective and scientifically defensible approach for establishing objective and transparent effluent limitations?
3. What are the merits and faults of retention versus discharge standards, including any risks of groundwater or surface water contamination from retained stormwater?

C. Identify the highest priority industrial facilities/subsectors for consideration of additional discharge monitoring.

By "highest priority" EPA means those facilities/subsectors for which the development of numeric effluent limitations or reasonably standardized stormwater control measures would be most scientifically defensible (based upon sampling data quality, data gaps and the likelihood of filling them, and other data quantity/quality issues that may affect the calculation of numeric limitations).

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not? If the discharge is clean, why is it necessary for the permit to require unnecessary inspections, sampling and practices? Where the permit limitations are measured at the outfall and if there is exceedance violation, why would anyone care?

Because all discharges to public waters are local, it would be reasonable to have local government, not the federal or state agencies, assure discharge permit compliance. Residents will need to participate as trained volunteers.



Construction Permits

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Small Projects are more likely to Pollute.

Large projects get permits and install controls, many small projects do not. It's function of higher relative cost because of the project size. Also, small projects are operated by local business people while large project are large business corporations. Local inspectors are hesitant to enforce against local builders.

Expired Permits prevent new Construction

Permit issuing authorities cannot extend construction general permit very long after they expire. New construction cannot apply for an expired permit. But they can file for an individual permit.

To comply permittees must capture rainfall and divert the water to minimize erosion.



Industrial Permits

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In 2009, the National Academies wrote a comprehensive report on the U.S. Environmental Agency (EPA) Stormwater Program. That study recommended watershed permitting, however, the Clean Water Act did not contemplate watershed permitting. Let's hope this study team knows the law and the science.

The stormwater industrial general permit has 29 difference sectors. The sampling program was determined by the industrial group application in the 1993-1995 period. The decision on which sectors must sample failed to consider bad applications. Many polluting activities are not required to sample their discharges. For example, marinas and water transportation facilities must sample their discharges but Ship and Boat Building and Repair do not.

The sampling benchmarks database did not include industrial sampling. The benchmarks generally came from:

- (1) "EPA Recommended Ambient Water Quality Criteria,
- (1) Secondary Treatment Regulations, and
- (1) National Urban Runoff Program (NURP) for solids and nitrogen.

Finally, EPA and States issue the stormwater permits to industrial activities, but rarely inspect due to travel and budget constraints. Like construction permitting, the permits issued to municipal governments need to require local government inspections and reporting to the permit issuing authority.



NPDES Permit Required for Point Source Discharges to the Waters of the U.S. Conveyed Through Groundwater

Decisions by both the Ninth and Fourth Circuit Court of Appeals significantly expand National Pollutant Discharge Elimination System (NPDES) permitting requirements.

Therefore, the Clean Water Act (CWA) requires permits for discharges of pollutants through groundwater.

In addition, the Fourth Circuit Court expanded the citizen suit provision holding that the Act does not require that the point source continue to release a pollutant—only that the discharge from the point source continue to release a pollutant.

The Ninth Circuit Court decision requires the pollutants be “fairly traceable” from the point source through groundwater to regulated waters.

The Fourth Circuit Court determined that the Act requires “a direct hydrological connection” between ground water and navigable waters in order to state a claim under the Act for an indirect discharge.

In *Hawai'i Wildlife Fund v. County of Maui*, 881 F.3d 754 (9th Cir. 2018), the court found that sanitary waste water discharged through ground water to the ocean required an NPDES permit.

The court also concluded that the Act provided fair notice to Maui County that its actions were prohibited.

The decision in *Upstate Forever v. Kinder Morgan*, Case No. 17-1640 (4th Cir. Apr. 12,

2018), analyzed two issues:

- (1) whether a pipeline spill constitutes an “ongoing violation” where the pipeline has been repaired but the released pollutants continue to migrate to navigable waters; and
- (2) whether a discharge of pollutants that reaches navigable waters via groundwater can support liability under the Act.

On both issues, the Court answered “yes.”

Additionally the rulings on *Hawai'i Wildlife Fund*, *Upstate Forever*, and recent EPA rulemaking on the definition of “waters of the United States” suggest a significant expansion of CWA liability and potential permitting requirements for the regulated community.

This means that industry and individuals need to carefully consider discharges to land or to groundwater that could potentially reach navigable waters and evaluate whether CWA permitting is required, in addition to other potentially applicable federal and state permits.

Moreover, as cautioned by *Upstate Forever*, where accidental spills and leaks are concerned, companies and environmental managers will need to consider ongoing migration of contaminants through groundwater well after the cause of discharges may have been resolved.

Editor's note: Sources for this article include:

Farella Braun + Martel, LLP including contributions by Co-Author Brian Wantz, and, Lowell J. Chandler Alexander Blewett III, School of Law at the University of Montana.

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

May 3-4	MS4	Daytona Bch FL / Burlington VT
May 7-8	MS4	Harrisburg PA
May 10-11	MS4	Philadelphia PA
May 14	MS4	Recertification ONLINE
June 4-5	MS4	Savannah GA
June 7-8	MS4	Charleston SC
June 11-2	MS4	Oklahoma City OK
June 13		OK City—Construction
June 14-15	MS4	Tulsa OK
June 18-19	MS4	Trenton NJ
June 20		Decision Making for Municipal Executives - Online / Georgia

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

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*Call or Email for
More Information*

National Stormwater Center

888-397-9414

info@npdes.com



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