THE STORMWATER QUARTERLY

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EPA Fails to Make Meaningful Changes to Stormwater Construction Permit

Stormwater Permit News

The Trump administration is planning to remove Clean Water Act protections from streams that flow only following rainfall, as well as wetlands not physically connected to larger waterways.

According to a spokesperson for the President, "ephemeral streams and related features that are wet only after rain events would be completely excluded. He said the plan is to regulate only "adjacent wetlands that are physically and meaningfully connected to other jurisdictional waters."

"Inspired by Justice Scalia's *Rapanos* opinion, our proposal adheres to the statutory limits of our authority," he said. Writing for the four conservative justices, Scalia said only waterways and wetlands with "relatively permanent" surface water connections to larger waterways should be regulated under the Clean Water Act.

The U.S. Supreme Court requested the EPA's views on whether the Clean Water Act regulates releases of pollutants that reach surface waters through groundwater.

The federal courts of appeals are currently split on whether the Act regulates these releases. EPA's position has been to regulate releases to groundwater that has a "direct hydrologic" connection to surface waters. Continued on page 3

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Effluent Guidelines are National Performance Standards

The EPA is amending the 2017 Construction General Permit. The amendment was generated by judicial petition of the EPA issued permit. However, it failes do what it could to improve permit compliance.

EPA could have used the opportunity to clarify the importance of the promulgated EPA Effluent Guideline for the *Construction and Development (C&D) Point Source Category (40CFR450).*

In this amendment, EPA recognized the legal requirement to use the exact words of the Effluent Guideline by deleting the generic standard for controlling stormwater peak flowrates and total stormwater volume to minimize channel and streambank erosion, then adding the exact words of the standard.

Unfortunately, EPA failed to include the standard to "Control stormwater volume and velocity within the site to minimize soil erosion" and "Minimize the amount of soil exposed during construction activity."

The Effluent Guidelines are non-numerical standards, but like numerical standards, they cannot be changed without the use of the EPA rule making process. States may not change the words of the Effluent Guidelines.

EPA also missed explaining the that the C&D Point Source Category makes all regulated construction sites point sources. See the article on Page 6 to better understand this issue. Also, EPA ignores the use of "best industry practice" in the national standards.

EPA Headquarters personnel may disagree with many of the positions in this Quarterly. But, they have discounted the importance and the application of Effluent Guidelines.

Changes are Relatively Insignificant

Proposed Changes to Construction Permit

Editor: All of the following comes directly from the proposed amendment to the permit, including the lined-out narrative. Editor notes are in italics.

The changes to 1.1 ELIGIBILITY CONDITIONS is to remove two examples: 1. The operator who has operational control over construction plans and specifications (~~in most cases this is the owner of the site~~) and 2. The operator has day-to-day operational control (conditions (~~e.g., they are authorized to direct workers at a site to carry out activities required by the permit; in most cases this is the general contractor (as defined in Appendix A~~

Editor: Not important

The changes to 2.2.6 on dust control EPA adds: "to control the generation of pollutants that could be discharged in stormwater from the site." *Editor: Not important*

The changes to 2.2.11 adds " Control stormwater discharges, including both peak flowrates and total stormwater volume, to minimize channel and streambank erosion and scour in the immediate vicinity of discharge points. And deletes: ~~Minimize erosion of stormwater conveyance channels and their embankments, outlets, adjacent streambanks, slopes, and downstream waters. Use erosion controls and velocity dissipation device~~s ~~within and along the length of any stormwater conveyance channel and at any outlet to slow down runoff to minimize erosion.~~ *Editor: Important - EPA complies with federal regulation to include the national standard verbatim.*

2.3.3 Added: Minimization of exposure is not required in cases where the exposure to precipitation and to stormwater will not result in a discharge of pollutants, or where exposure of a specific material or product poses little risk of stormwater contamination (such as final products and materials intended for outdoor use).

Editor: Important - EPA complies with federal regulation to include the national standard verbatim.

7.1 GENERAL Deleted old condition and modified Notes:52 and 53

52 The SWPPP does not establish the effluent limits and other permit terms and conditions that apply to your site's discharges; these limits are established in this permit in Parts 2 and 3.

Editor: Important - EPA is saying that the content if the SWPPP is not enforceable

53 Where there are multiple operators associated with the same site through a common plan of development or sale, they may develop a group SWPPP instead of multiple individual SWPPPs. Regardless of whether there is a group SWPPP or several multiple individual SWPPPs, all operators would be jointly and severally liable is responsible for compliance with the permit's terms and conditions, notwithstanding how the SWPPP (s) may divide each operator's responsibilities.

In addition, all operators must ensure, either directly or through coordination with other operators, that their activities do not cause a violation and/or render compromise any other operators' controls and/or any shared controls.

Editor: Important - EPA is saying what has been previously understood. The SWPPP can include subcontractor responsibilities with attending compliance liabilities. EPA is adding an option for other permittees the participate in a joint SWPPP.

The 45-day public comment period will close on January 28, 2019.

IMPROVING IMPLIMENTATION OF THE MS4 PERMIT

About a year ago, EPA did a workshop titled *Improving Permitting and Program Implementation Approaches.* The sessions focused on municipal Separate Storm Sewer system (MS4) stormwater program implementation requirements in permits, including several minimum control measures (MCMs), and water-quality-based control requirements. A follow-up workshop in March 2018 assessed stormwater program monitoring, evaluation, tracking, and reporting provisions.

The workshop sponsored by EPA Region 9 was attended primarily by state regulators, a few municipalizes, consultants and environmentalist, mostly from California. They discussed municipal issues but had very limited discussion of municipal inspections of construction, industrial or commercial activities. The report can be found at .. https://www.acwa-us.org/wp-content/uploads/2018/05/Evolution-of-Stormwater-Permitting-Approaches-and-Program-Implementation_Final-Report_5-17-18.pdf

To a great extent it appeared to be a "gripe workshop" with recommendation for regulators for provide more flexibility, more money and less regulation. The discussion on long term planning, monitoring, illicit discharges, TMDLs, public participation was surely helpful to the participants.

Most attendees liked the idea of consolation Municipal Phase 1 with Phase 2, but recognized the need for small MS4s to do less than large MS4s. Some workshop participants noted the pros and cons to setting up separate stormwater utilities as compared to integrating stormwater, wastewater, and drinking water governance.

Reading the report may be helpful but the participants gained good insight to NPDES stormwater management by having presentation and discussions.

Municipalities can improve their stormwater program implementation by complying with the permit conditions rather than seeking a reduction in the permit conditions.

Stormwater Permit News

(Continued From Page 1)

In California, the Los Angeles County voters approved a property tax projected to raise hundreds of millions of dollars annually to capture and clean up stormwater.

Beginning July 1, 2019, the property tax will be 2.5 cents a square foot of "impermeable space." The tax is designed to pay for NPDES stormwater permit requirements. Supporters said it would also help make the region more "water resilient" in the face of drought and climate change.

Revenue generated will be used to pay for regional and municipal projects that improve water quality and may also increase water supply and provide community benefits such as parks or wetlands. Ten percent of the revenue will go to the L.A. County Flood Control District for administration.

The EPA has provided updated advice on the reissuance of the EPA's NPDES Vessel General Permit (VGP).

The 2013 VGP will not be reissued prior to its December 18, 2018 expiration date, but will be administratively continued and remain in effect until a new permit is issued. Owners/operators of vessels operating under the administratively continued permit are expected to comply with the terms and conditions of that permit.

EPA offered to assist those applying for VGP and will continue its work on reissuing the permit, with a targeted timeframe of permit. The EPA has provided updated advice on the reissuance of the EPA's NPDES Vessel General Permit.

Puget Soundkeeper Alliance filed a complaint on Dec. 5 in the U.S. District Court for the Western District of Washington against the city of Anacortes citing the Clean Water Act (CWA).

According to the complaint, the Soundkeeper alleges that the defendant has violated the limitations of effluent standards under the CWA and the terms and conditions of its National Pollutant Discharge Elimination System permit with the discharges from its municipal storm sewer system.

The Soundkeeper holds the city of Anacortes responsible because the defendant allegedly failed to inspect all permitted development sites to ensure proper installation of permanent storm water facilities, failed to implement a long-term operation and maintenance program for stormwater treatment, and failed to implement practices, policies, and procedures to reduce storm water impacts.

The plaintiff seeks judgment against the defendant for declaratory and injunctive relief; civil penalties of $37,500 per day of violation and to pay $53,484 per day of violation committed after Nov. 2, 2015; litigation expenses; attorneys' and expert witness fees; and other relief as the court deems appropriate.

About the National Construction Stormwater Standards

The National Construction stormwater standards are printed in the next page. Called *Effluent Guidelines*, the EPA was required, by a federal court order, to develop national standards for construction activity. EPA then promulgated the Construction and Development Effluent Guidelines and Standards (40 CFR Part 450) in 2009 and amended the regulations in 2014 and 2015.

The regulations apply to all construction sites subject to NPDES permit requirements. All construction sites are required to meet the series of non-numeric effluent limitations.

EPA promulgated Effluent Guidelines for most industrial categories that discharge wastewater, stormwater or discharge indirectly through municipal treatment after pretreatment. All of the Effluent guidelines are technology-based (i.e. they are based on the performance of treatment and control technologies). The standards are not based on risk or impacts upon receiving waters.

Several states wrongfully refer to these standards a water quality based as to make enforcement difficult.

Permits Include National Standards

EPA and State permitting authorities are required to incorporate these standards in stormwater discharge permits. The standards do not interfere with existing state and local requirements that may be more stringent than the effluent guideline. States have the ability to promulgate additional and more stringent requirements.

The regulation establishes a technology-based "floor" or minimum requirements on a national basis. The rule is nationally applicable, technology-based standard applicable to all dischargers currently required to obtain a NPDES permit

The national standards become effluent limitation in permits. The definition of "effluent limitation" means "*any* restriction on quantities, rates, and concentrations of chemical, physical, biological, and other constituents.

Flexibility

Public comments on the proposed rule argued that all construction sites a different and a national standard cannot fit all conditions.

For certain controls, EPA included the term "unless infeasible" to recognize that there may be some sites where a particular control measure cannot be implemented, thus allowing flexibility for permittees.

EPA defined "unless infeasible" as *not technologically possible, or not economically practicable and achievable in light of best industry practices.*

Initiate Stabilization Immediately

Some commenters questioned the stringency of the proposed soil stabilization requirements, and were concerned about the costs and feasibility of initiating stabilization of disturbed area "immediately" when final grade is reached or any clearing, grading, excavating or other earth disturbing activities have temporarily or permanently ceased and will not resume for a period exceeding 14 calendar days.

EPA disagreed that this requirement is not feasible. Given the importance of soil stabilization techniques and the influence of soil cover on soil erosion rates, EPA determined that initiating soil stabilization measures immediately is an important non-numeric effluent limitation. EPA sees no compelling reason why permittees cannot take action immediately to stabilize disturbed soils on their sites.

Several states, including Florida and Maryland deleted the standard of "immediately" and subtitled a number of days. By doing so, they reduced the national standard - illegally. The permitting authority may not make the standard less stringent.

See the National Standards on the next page.

National Performance Standards (Effluent Guidelines) for the Construction and Development Point Source Industrial Category

EPA regulation (40CFR450) has the following standards for construction site operators. Permittees are required to:

1. implement erosion and sediment controls
2. stabilize soils
3. manage dewatering activities
4. implement pollution prevention measures
5. provide and maintain buffers around surface waters
6. prohibit certain discharges, such as motor fuel and concrete washout
7. utilize surface outlets for discharges from basins and impoundments

a) *Erosion and Sediment Controls.* Design, install and maintain effective erosion controls and sediment controls to minimize the discharge of pollutants. At a minimum, such controls must be designed, installed and maintained to:

(1) Control stormwater volume and velocity within the site to minimize soil erosion;

(2) Control stormwater discharges, including both peak flowrates and total stormwater volume, to minimize erosion at outlets and to minimize downstream channel and streambank erosion;

(3) Minimize the amount of soil exposed during construction activity;

(4) Minimize the disturbance of steep slopes;

(5) Minimize sediment discharges from the site. The design, installation and maintenance of erosion and sediment controls must address factors such as the amount, frequency, intensity and duration of precipitation, the nature of resulting stormwater runoff, and soil characteristics, including the range of soil particle sizes expected to be present on the site;

(6) Provide and maintain natural buffers around surface waters, direct stormwater to vegetated areas to increase sediment removal and maximize stormwater infiltration, unless infeasible; and

(7) Minimize soil compaction and, unless infeasible, preserve topsoil.

b) *Soil Stabilization.* Stabilization of disturbed areas must, at a minimum, be initiated immediately whenever any clearing, grading, excavating or other earth disturbing activities have permanently ceased on any portion of the site, or temporarily ceased on any portion of the site and will not resume for a period exceeding 14 calendar days. Stabilization must be completed within a period of time determined by the permitting authority. In arid, semiarid, and drought-stricken areas where initiating vegetative stabilization measures immediately is infeasible, alternative stabilization measures must be employed as specified by the permitting authority.

c) *Dewatering.* Discharges from dewatering activities, including discharges from dewatering of trenches and excavations, are prohibited unless managed by appropriate controls.

d) *Pollution Prevention Measures.* Design, install, implement, and maintain effective pollution prevention measures to minimize the discharge of pollutants. At a minimum, such measures must be designed, installed, implemented and maintained to:

(1) Minimize the discharge of pollutants from equipment and vehicle washing, wheel wash water, and other wash waters. Wash waters must be treated in a sediment basin or alternative control that provides equivalent or better treatment prior to discharge;

(2) Minimize the exposure of building materials, building products, construction wastes, trash, landscape materials, fertilizers, pesticides, herbicides, detergents, sanitary waste and other materials present on the site to precipitation and to stormwater; and

(3) Minimize the discharge of pollutants from spills and leaks and implement chemical spill and leak prevention and response procedures.

(e) *Prohibited Discharges.* The following discharges are prohibited:

(1) Wastewater from washout of concrete, unless managed by an appropriate control;

(2) Wastewater from washout and cleanout of stucco, paint, form release oils, curing compounds and other construction materials;

(3) Fuels, oils, or other pollutants used in vehicle and equipment operation and maintenance; and

(4) Soaps or solvents used in vehicle and equipment washing.

(f) *Surface Outlets.* When discharging from basins and impoundments, utilize outlet structures that withdraw water from the surface, unless infeasible.

All NPDES Regulated Construction is Point Source

By federal regulation (40CFR405), EPA created a Point Source Category to include all NPDES regulated construction and development activity.

All stormwater regulated construction sites are include in the "Effluent Guidelines for the Construction and Development Point Source Category." Therefore, there are no "Non-Point" discharges from a regulated construction site. All discharges are regulated as point sources.

Therefore, non-point source discharges can only be on construction sites that are not regulated by NPDES.

This means that states have an obligation to clearly include the national standards in the permit and in training programs.

Erosion and Sediment Control (E&SC)

E&SC has been a significant state program before stormwater regulations were promulgated. When stormwater was regulated in 1991, the regulations included E&SC but the permit requirements regulated all waste, not just soil. In addition, stormwater permits require times to achieve compliance and reporting requirements.

Many state stormwater permits fail to recognize the broader mandate of waste control and focus E&SC.

The National Standards include E&SC with seven erosion standards and one sediment standards. The others: dewatering, pollution prevention, prohibited discharges, and surface outlets are waste management, not E&SC.

States that offer E&SC training typically use a state manual of controls. Most manuals need to be updated to clarify the use of controls on regulated construction sites.

The first two effluent guidelines are erosion and standards, normally not found in state BMP manuals. They require the permittee control stormwater volume and velocity.

Controlling Volume and Velocity

The effluent guideline requires both volume and velocity controls to minimize erosion and down stream impacts.

Should a government inspector observe on site erosion without volume and velocity controls, then the permittee is in violation. It is not condition on a discharge from the activity

Controls may include the capture and controlled release of stormwater or the controls may include diversion controls or a combination of both.

Best Industrial Practice vs Good Engineering Practice

EPA provides flexibility to the permittee by using two words with a common phrase in their definition. The words are minimize and infeasible. The common phrase is "best industry practice."

Many standards require the permittee 'minimize" the discharge, to minimize erosion, to minimize exposure, etc.

Minimize means to reduce and/or eliminate to the extent achievable using control measures (including best management practices) that are technologically available, economically practicable and achievable in light of best industry practice.

Infeasible means not technologically possible, or not economically practicable and achievable in light of best industry practices.

Therefore, the standards must achieve *best industry practices*, as opposed to *good engineering practices*.

Therefore, the SWPPP is developed using good engineering practice but the standards that use the words minimize or infeasible must consider the best industry practice.

Criminal Enforcement

DEVELOPER SETTLES STORMWATER PERMIT

The EPA has settled its case against Connell Development Company, owned by Colin Connell, a Boise-area developer. The agency found Connell had committed numerous violations of a federal Clean Water Act permit for stormwater management at Connell's Eyrie Canyon project.

According to EPA Region 10 Office for Compliance and Enforcement Director Ed Kowalski, Connell has agreed to pay a $68,000 penalty to comply with the permit and Connell agreed to perform additional work beyond the requirements of the permit – such as more frequent inspections -- to ensure that he remains in compliance.

EPA representatives inspected the project twice in January 2016, and again in September 2017. They found multiple violations of stormwater management requirements, including:

- Failure to adhere to installation requirements of stormwater controls
- Failure to adhere to erosion and sediment maintenance requirements
- Failure to minimize disturbance on steep slopes
- Failure to protect storm drain inlets
- Failure to use proper stabilization techniques at all points that exit onto paved roads
- Failure to minimize the amount of soil exposed during construction
- Failure to complete and then document corrective actions for stormwater controls
- Failure to provide effective means of eliminating the discharge of water from the washout and cleanout of concrete
- Failure to comply with dewatering practices
- Failure to restrict vehicle use to properly designated exit points
- Failure to initiate soil stabilization measures immediately whenever earth disturbing activities have permanently or temporarily ceased
- Failure to comply with maintenance requirements of the sediment basin.

ILLEGAL DUMPING ON LONG ISLAND

On November 26, 2018 the DA's office, New York State Department of Environmental Conservation and the Suffolk County Police Department announced a 130-count indictment, charging 30 individuals and nine corporations with an alleged scheme to illegally dump solid waste at 24 Long Island locations.

"What we're dealing with here is an epidemic of illegal dumping in Suffolk County," Suffolk County District Attorney Tim Sini said in a statement.

Anthony Grazio of Smithtown served as a "dirt broker," arranging for sites where trucking companies could illegally dump the solid waste. The scheme involved advertising clean fill for landscaping projects on Craigslist and then soliciting homeowners to line up locations to dump the contaminated material.

The illegally dumped debris came from Long Island and New York City-based recycling and transfer stations, authorities said. But Grazio's attorney denied the charges and attorneys for some of the defendants said their clients thought they were handling clean fill, according to published reports.

Yet Sini maintained the alleged scheme was deliberate. Sini added that "they did this to save on operating costs, and they did it at the expense of the health of our residents."

What they got instead was solid waste: pieces of wood, asphalt, concrete, large boulders, and glass, authorities said. Sometimes the material smelled of diesel fuel, but it was delivered anyway. And some of that debris later tested as hazardous waste.

DEC testing found that six of the locations contained acutely hazardous substances and 17 of the locations contained hazardous substances under New York State Environmental Conservation Law. The acutely hazardous substances included aldrin, dieldrin and heptachlor, which are all pesticides. The hazardous substances included arsenic, beryllium, cadmium, cobalt, chromium, copper, lead, nickel, zinc and mercury, which are all metals.

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.

2019 Training Schedule

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

1/7-1/8/19	CSI-MS4 Chicago, IL CSI-MS4 Tallahassee, FL
1/10-1/11/19	CSI-MS4 Springfield, IL CSI-MS4 Jacksonville, FL
1/14-1/15/19	CSI-MS4 Baton Rouge, LA CSI-MS4 Atlanta, GA CSI-MS4 Houston, TX
1/17-1/18/19	CSI-MS4 Galveston, TX CSI-MS4 Savannah, GA
1/22-1/23/19	CSI-MS4 Philadelphia, PA
1/23-1/24/19	CSI-MS4 Winston-Salem, NC
1/24-1/25/19	CSI-MS4 Harrisburg, PA
1/28-1/29/19	CSI-MS4 Atlantic City, NJ CSI-MS4 Los Angeles, CA CSI-MS4 New Orleans, LA
1/31-2/1/19	CSI-MS4 Trenton, NJ CSI-MS4 Charleston, SC CSI-MS4 Shreveport, LA

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