



The Stormwater Quarterly

National Stormwater Center

Our 12th year

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CONGRESS & COURTS OPPOSE EPA ATTEMPTS TO RESTRICT NPDES

Stormwater News

EPA to Appeal Suspension of Arizona NPDES. EPA will file an appeal to the U.S. Supreme Court contesting a recent Appellate Court decision that would suspend Arizona's authority to issue stormwater permits.

In a decision last week, the U.S. Court of Appeals for the Ninth Circuit denied EPA's request for a rehearing of the case before the full Ninth Circuit. The case concerns whether EPA considered or needed to consider the implications of the Endangered Species Act when the agency transferred the National Pollutant Discharge Elimination System (NPDES) program to Arizona.

If the court's initial decision, issued in August 2005, took effect, the stormwater permitting program in Arizona would revert to the federal government. The case also calls into question other state programs, such as Alaska's, which currently is trying to obtain EPA approval of its stormwater program. This article is from the Thompson Publishing Group, the [Stormwater Permit Manual](#).

Correction to *The Stormwater Quarterly*, Spring Issue, page 7. The correct statement should have read:

Dry Season Allows Relaxed BMPs

The California Construction Permit has unique language that allows relaxed erosion controls from May 31 to October 1, the dry season. However, according to the permit, all permit conditions apply during the dry season. (News Continued on Page 3)

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Why Do Environmentalists Say Environmental Pollution Agency?

In a rush to beat a 2006 Florida court decision on NPDES permits, EPA has proposed a "water transfer" rule that will allow the discharge of pollutants to navigable waters from a point source without an NPDES permit. See article on page 2.

In two unrelated actions, EPA published a new and more restricted definition of "navigable waters." Just recently, EPA provided immunity from NPDES for oil and gas construction activities, including sediments. See articles on pages 5 and 6.

Has EPA become a promoter of pollution or just against environmental regulations? Is the Agency a political arm of the White House?

EPA long ago lost its status as an "independent agency." President Reagan allowed EPA Administrator Anne Gorsuch to minimize enforcement and her Assistant Rita Lavelle lied to Congress and as a result, served three months in prison.

Recently, EPA Administrator Christine Todd Whitman resigned rather than carry out the antipollution policies of President Bush.

The editor of *The Stormwater Quarterly* endorses the actions of Congress and the courts to return EPA to its environmental protection mission. *

Dischargers Who “Transfer” Polluted Water Are Exempt From NPDES Under EPA Plan

EPA has proposed regulations to expressly exclude water transfer discharges from regulation under NPDES (Section 402 of the Clean Water Act). The proposed rule would define “water transfers” as “an activity that conveys waters of the United States to another water of the United States without subjecting the water to intervening industrial, municipal, or commercial use.”

EPA published the proposed rule in the Federal Register on June 7, 2006. Although the Agency requested public comments, they may finalize the rule at the end of the comment period on July 26, 2006.

EPA is implementing the rule to preempt a potential court decision requiring a Florida water district to apply for an NPDES permit for the discharging of pollutants into the Everglades, in violation of state water quality standards. In 2004, the question of whether an NPDES permit is required, went before the U.S. Supreme Court (*South Florida Water Management District vs. Miccosukee Tribe of Indians*).

EPA thinks that the Court will accept the new policy and decide in favor of the Water Management District by calling the discharge a “water transfer.” But EPA misunderstands that the discharge is not a water transfer but a discharge of contaminated stormwater.

Rational

The Agency justifies the exemption from NPDES on Congressional intent. EPA takes the position that in 1972, Congress intended to leave the oversight of water transfers to state authorities, not the NPDES program. EPA’s legal analysis concludes that the Clean Water Act should be interpreted by analyzing

the statute as a whole, not interpret a single section. According to the Agency, a holistic approach is needed because no one provision of the Act expressly addresses whether water transfers are subject to the NPDES program.

Justification for the proposed rule is based, in part, on Section 101(g) of the Act that establishes State responsibilities to allocate quantities of water within its jurisdiction.

If water transfer facilities operate so that pollutants are not added to the water being transferred, then a permit would not be required. However, where these sources do add pollutants to water passing through the structure into the downstream water, NPDES permits are required. *

2nd Circuit Court Rejects EPA’s Water Transfer Rule

In a case decided on June 13, 2006, the Appellate Court ruled against EPA saying:

“Finally, we rejected the contention that the provisions of the CWA reserving power to the states could overcome the express permit requirement for water transfers that result in the addition of pollutants. . . . none of the statute’s broad purposes sways us from what we find to be the plain meaning of its text.”

The Case is *Catskill Mountains Chapter of Trout Unlimited, vs. the City of New York*. As part of its water management system, the City delivers drinking water, high in turbidity, from a tunnel into a trout stream. The City used the EPA policy letter that later became the proposed *Water Transfer Rule*. *

Editor: NPDES does not interfere with the right of states to allocate water.

Construction Permittees May Use a Local Program

The EPA sent a memo last month to regional offices and state agencies to encourage them to examine whether local programs could qualify as a substitute Erosion Control Program.

The Stormwater rule allows substitution when local programs meet or exceed the provisions in EPA's construction general permit.

The rules require a construction site operator developing a site within the jurisdiction of a regulated MS4 community to comply with any additional local requirements.

Frequently the local requirement is to submit their erosion and sediment plan (or SWPPP) to the municipality for review and approval.

Where NPDES authorities identify a "qualifying local program," the burden is reduced by providing one set of requirements to follow.

When a local sediment and erosion control program meets the requirements in EPA's stormwater regulation, the state may incorporate that program by reference in its permit for construction activities.

"We are delighted that EPA agrees that encouraging the so-called local qualifying program would be a time and cost savings for both the agency and builders," said David Pressly, National Association of Home Builders (NAHB) President and a home builder from Statesville, N.C. "We both have the same goal: to protect our nation's waterways from construction site runoff. For years, NAHB has argued that there are more efficient ways to achieve that goal."

However, all construction permittees must continue to prepare SWPPPs and conduct frequent inspections. *

Stormwater News

(Continued From Page 1)

EPA has revised the National Menu of Best Management Practices (BMPs). The new menu has been redesigned to make it easier to browse and search. It also cross-references many new resources from other organizations involved in stormwater management. The new "menu" now includes a comment feature so that stormwater practitioners and experts can provide suggestions, new data, and additional references. Visit the menu at <http://www.epa.gov/npdes/menuofbmps>

The Construction 101 web cast held on May 10, 2006 was attended by more than 1,000 people. The public can view the recorded and archived version anytime. The next web cast, "Financing a Municipal Stormwater Program" is on July 12, 2006. The webcasts are available at www.epa.gov/npdes/training

California offers Electronic Submission of Storm Water Annual Reports. The pilot version of the Storm Water Annual Reporting Module (SWARM) is available for review and registration online at <http://www.swrcb.ca.gov/stormwtr/docs/swarm/outreach.pdf>. Dischargers may mail a paper annual report(s) to the Regional Boards as they have done in the past, or may choose to use the new online method.

On June 5, 2006, SWARM will become part of the California Integrated Water Quality System (CIWQS). CIWQS is used by the Water Boards to compile water quality data, standardize permits, automate processes, and make data more accessible to Water Boards staff, dischargers, the public, and the US Environmental Protection Agency.

The city of Hobart, Indiana fired its stormwater coordinator for what she termed as "bad people skills." Lorraine Bank, said she was told by Mayor Linda Buzinec that some residents had complained about her during her interactions with them.

One couple, Bryan and Charlotte Hess, came to the Board of Works meeting Wednesday to discuss a drainage issue on their property that is tied up in City Court. During the discussion, Charlotte Hess said she felt Bank harassed and threatened her with City Court action

Bank said the firing took her by surprise. She said she was doing her job of finding a sewer blockage on the property. "I thought I was doing a real good job. I like doing it," she said. "I felt like I was doing something big for the world." (From The New York Times). *

Definition of “Navigable Waters” is Uncertain, But “Discharge” is Clear

Supreme Court On Clean Water Act

Discharge Only Means “Discharge,” Not Discharge of Pollutants

In a unanimous Supreme Court decision, states have Clean Water Act (Act) authority to regulate the discharge from hydroelectric dams to prevent the violation of water quality standards. The Court ruled that Section 401 of the Act requires state water quality certification of “discharges” to navigable waters.

The Court said the Congress “probably distinguished the terms ‘discharge’ and ‘discharge of pollutants’ deliberately, in order to use them in separate places and to separate ends.” Thus, Section 401 of the Act used the broader term “discharge” for the purpose of requiring states to conduct a water quality certification where any federal permit is required and Section 402 of the Act where the term ‘discharge of pollutants’ is used to require NPDES permits.

According to news reports, the May 15, 2006 Supreme Court decision concerning five small dams on the Presumpscot River in Maine, affects an estimated 1,500 power dams in 45 states. The case of *S.D. Warren Company vs. Maine Board of Environmental Protection*, the operator of the hydroelectric dams were licensed by the Federal Energy Regulatory Commission. When the company applied for license renewal, they argued that water quality certification from the Maine DEP was not required under the Act.

Writing for the Court, Justice Souter stated, “Just because the company does not add anything to the water, it cannot be said that the river is unchanged because of the company. Warren itself admits that its dams can cause changes in the movement, flow, and circulation of a river.”

Navigable Waters

In other cases, the Court divided 5-4, the Justices decided that regulated navigable waters include wetlands only if connected to a navigable river or stream by a significant, regular flow of water.

The decision involved two cases, *Carabell v. United States Army Corps of Engineers*, No. 04-1384, and *Rapanos v. United States*, No. 04-1034.

The Justices ordered a new round of hearings on both cases to determine if the subject wetlands met the new test to regulate only wetlands that have a “significant nexus” to a major waterway.

Justice John Paul Stevens, writing for the four dissenters, said the new test will create new uncertainty and additional work for regulators and landowners. He also said the new test “will probably not do much to diminish the number of wetlands covered by the act in the long run.” Justices Stephen Breyer, Ruth Bader Ginsburg and David Souter also dissented.

Joan Mulhern, legislative counsel at Earthjustice said, “Unfortunately, this split decision will likely spur more litigation efforts by industry and polluters to continue to try to strip away Clean Water Act protections for many of the nation's streams, wetlands, rivers, and other waters. This opinion underscores the need for Congress to step in and reaffirm the intent of the Clean Water Act.”

Who needs an NPDES permit was the question 32 years ago. The question remains. While the Supreme Court continues interpreting the original Clean Water Act, Congress continues to amend the Act for reasons other than the intent of the 1972 Congress. *

EPA's 2007 Budget Reinstates Traditional Definition of "Navigable Waters"

Congress Rebukes EPA's Narrow Guidance

The House passed an amendment to the Fiscal Year 2007 EPA Budget offered by Representatives John Dingell (D-MI), James Oberstar (D-MN) and James Leach (R-IA). The amendment would reinstate Clean Water protections for wetlands, tributaries and streams. The amendment to the Interior Appropriations Bill passed in the House on May 20, 2006 by a vote of 222-198.

In 2003, on the heels of the Supreme Court case, *Solid Waste Agency of Northern Cook County (SWANCC) vs. U.S. Army Corps of Engineers*, the Bush Administration issued an Advanced Notice of Proposed Rulemaking and a policy guidance that went much further than SWANCC, exempting intrastate waters from Clean Water Act jurisdiction.

A bipartisan group of 218 Members of Congress sent a letter to President Bush asking him to withdraw the proposed rule and rescind the guidance. The Bush Administration did withdraw the proposed rule, but left in place the policy guidance, leaving an unclear policy that led to unregulated discharges into streams, ponds and wetlands.

Traditional Definition of "Waters of the US"

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to ebb and flow of the tide;
(2) All interstate waters including interstate wetlands;
(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
(i) which are or could be used by interstate or foreign travelers for recreational or other purposes; or
(ii) from which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
(iii) which are used or could be used for industrial purposes by industries in interstate commerce.
(4) All impoundments of waters otherwise defined as waters of the United States under the definition;
(5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;
(6) The territorial seas;
(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.
(8) Waters of the United States do not include prior converted cropland Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds ...) are not waters of the United States.
40 CFR.230.3(s); 33 CFR 328.3(a); see also substantively similar regulatory definitions at 40 CFR 110.1, 112.2, 116.3, 117.1, 122.2, 232.2, 300.5, part 300, 302.3 and 401.11.

EPA Administration Draft Rewrite of the Definition of "Waters of the US" (Nov. 6, 2003)

(1) the territorial seas;
(2) traditional navigable waters;
(3) tributaries to traditional navigable waters;
(4) wetlands adjacent to waters listed in (1) – (3)
"Traditional navigable waters" is not defined.

"Tributaries" is defined as "waters that are part of a system of surface waters and that contribute regular and recurrent flow to traditional navigable waters ... Perennial streams and intermittent streams that contribute flow to traditional navigable waters are tributaries. Flows to traditional navigable waters must be conveyed through a continuous system of tributaries and/or tributary connections...."

Tributaries do not include...discrete flows that do not have groundwater as a source, such as ephemeral washes or streams."

"Intermittent stream" is defined as "a stream that has flowing water for at least six months in years with normal precipitation patterns, when groundwater provides water for stream flow...."

"Adjacent" is defined as "hydrologically contiguous such that adjacent wetlands provide regular and continuous flow of surface waters to waters listed in paragraph a(1) - (3). Surface flows to traditional navigable waters include flows conveyed through tributary connections. The continuous flow of surface water which connects wetlands to traditionally navigable waters must be constant except for seasonal dry periods that occur during years with normal precipitation patterns." *

Final EPA Rule Mis-Interprets Energy Policy Act, Promotes Voluntary BMPs

Oil and Gas Construction Exempted from NPDES

Effective June 12, 2006, uncontaminated storm water discharged from oil and gas field activities does not require a National Pollutant Discharge Elimination System permit. This codifies changes to the Clean Water Act made by the Energy Policy Act of 2005.

Therefore, discharges of non-toxic sediment are allowable. Not exempted are discharges in violation of water quality standards or the discharge of a hazardous substance or oil in “reportable” quantities.

States with NPDES permitting authority must comply with the EPA rule.

The exemption applies to field operations at oil and gas exploration, production, processing or treatment operations or transmission facilities. EPA applies the exclusion to construction of drilling sites, waste management pits, and access roads, as well as construction of the transportation and treatment infrastructure such as pipelines, natural gas treatment plants, natural gas pipeline compressor stations, and crude oil pumping stations.

Sediment Pollution Allowed

NPDES regulations (Section 402(l)(2)) provides the conditions for permit exemption. Not exempted are stormwater discharges contaminated by contact with raw material, intermediate products, finished product, byproduct, or waste products. Because sediment does not normally come in contact with raw material, intermediate products, finished product, byproduct, or waste products, the discharge of sediment is allowed.

Voluntary BMPs

Oil and gas operations are encouraged to implement Best Management Practices

(BMPs) to minimize erosion and control sediment during and after construction activities.

The following is now included in the EPA stormwater regulations:

“EPA encourages operators of oil and gas field activities or operations to implement and maintain Best Management Practices (BMPs) to minimize discharges of pollutants, including sediment, in storm water both during and after construction activities to help ensure protection of surface water quality during storm events. Appropriate controls would be those suitable to the site conditions and consistent with generally accepted engineering design criteria and manufacturer specifications. Selection of BMPs could also be affected by seasonal or climate conditions.”

For additional understanding, see at <http://www.epa.gov/npdes/stormwater/oilgas>

Editorial Comment:

The EPA interpretation of the Clean Water Act far exceeds the intent of Congress. Oil lobbyists were successful in including a provision into the Energy Bill to exempt runoff from oil & gas construction activities.

However, the Act does not exempt discharges contaminated by contact with any overburden. If sediment is surface soil and surface soil is overburden, then sediment is overburden and not excluded.

EPA exceeded its authority and abandoned its mission when it allowed sediment to be excluded if uncontaminated by toxics. Sediment without a toxic substance is a pollutant and the courts will reverse EPA . . . Again. *

EPA Employees Take Their Jobs Seriously and Lead by Example

EPA Region 10 Gets Credit for Permit Enforcement

EPA's Northwest Region 10 has permit responsibility for the states of Alaska and Idaho. The other states in the Region, Washington and Oregon, have NPDES permit issuance authority and are vigorously enforcing the stormwater permit program.

EPA sets a good example with program oversight and enforcement in Alaska and Idaho.

Two seafood companies in Alaska were caught by EPA inspectors dumping waste from their operation directly into nearby waters. Ocean Beauty Seafoods will pay \$126,000 and Norquest Seafoods will pay a \$77,000 penalty.

According to Kim Ogle, EPA NPDES Compliance Unit Manager, two plants operated by Ocean Beauty Seafoods were inspected and one discharged seafood waste directly into Orca Inlet, due to a sump overflow; discharged untreated sanitary waste from a leaking waste sump. Foam and bloody water extended more than a mile from the outfall.

The other plant discharged unground fish waste, consisting of fish carcasses, fish heads, viscera and wastewater, into Excursion Inlet causing deposition of foam, scum, sludge and solids on the adjoining shorelines. They were also charged with failure to conduct daily inspections, failure to repair an outfall and failure to report the discharges to EPA.

Norquest Seafoods had violations at three of its facilities. The Cordova Facility did not conduct adequate daily inspections, failed to amend its BMP Plan and failed to keep a copy of the permit at the facility. The Petersburg facility discharged bloody seafood processing waste into a city storm drain and directly to the ocean, did not conduct

adequate daily inspections, did not update the BMP Plan and did not accurately record daily observations. The Ketchikan Facility did not conduct adequate daily inspections and discharged more than 100 pounds of unground seafood processing waste directly into Tongass Narrows.

Construction Enforcement in Idaho

The Idaho Transportation Department (ITD) and contractor, Scarsella Brothers, Inc., have agreed to pay \$895,000 for stormwater permit violations. Both the State and their contractor failed to provide adequate stormwater controls for a large highway project that later deposited many tons of sediment in Mica Creek, which flows into Lake Coeur d'Alene.

Under the terms of the consent decrees, ITD will pay a penalty of \$495,000 and Scarsella Brothers will pay \$400,000.

Both have agreed to send their engineers and environmental inspectors to a certified storm water management training, and ITD has agreed to implement new construction management practices to help avoid future violations of the stormwater regulations. *

EPA's Southwest Region 6 Gets Credit Too

The City of Dallas violated their stormwater management program and will (i) pay a civil penalty of \$800,000, (ii) spend at least \$1.2 million on two supplemental environmental projects, (iii) hire and keep on staff specified numbers and kinds of employees to implement the City's stormwater program, (iv) carry out inspections of industrial facilities, construction sites, and stormwater outfalls at specified intervals, and (v) implement an environmental management system to twelve facilities. *

John Whitescarver, Exec. Dir.
National Stormwater Center



B.S. and M.S. in Civil Engineering

► *Qualified Environmental Professional* Certification 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 Adm. to EPA committee (SBREFA) for streamlining Phase II stormwater rules.

► Stormwater Instructor for Florida DEP Erosion & Sedimentation Control Inspector Course

► Chairman of a local land trust

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Los Angeles	Oct. 23-24
Houston	Nov. 13-14
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San Jose, CA	Oct. 11-12
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Center for Environmental Compliance
National Stormwater Center
7000 SE Federal Highway, Suite 205
Stuart, Florida 34997

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