



# The Stormwater Quarterly

National Stormwater Center

Our 14th year

Late Spring 2008 ♦ Issue 115

## EPA ENFORCEMENT DEMANDS MANAGEMENT OF INSPECTORS

### *Stormwater News*

**EPA exemption of Oil and Gas industry's construction activities was vacated by the 9<sup>th</sup> Circuit Court.**  
See page 7.

**The City of Waco, Texas is the sponsor of EPA Southwest Region 6 Annual MS4 Operators Conference.** The four-day conference beginning on July 14 will be preceded with either Certified Inspector Training or Erosion and Sediment Control training beginning on Sunday, July 13. Contact Mike Jones at 254-750-8001

**EPA has proposed to reissue, without change, the 2008 Construction General Permit.** Because EPA is also in the process of developing a national regulation for the Construction and Development Industry, the Agency will issue the permit for only two years.

This permit is the same as the 2003 permit which expires on July 1, 2008. EPA is the permitting authority in five states and most territories and Indian Country lands. For more information about this permit and the national regulation visit [www.epa.gov/npdes/stormwater/cgp](http://www.epa.gov/npdes/stormwater/cgp)

**The Effluent Limitations Guideline for the Construction and Development Industry is under development by EPA.** It will be completed within two years in accordance with the court order for the regulation. The standard will be incorporated in all NPDES permits in every state.

A special issue of *The Stormwater Quarterly* will discuss the proposed construction national standard. Expect the proposal in July and the *Quarterly* in August (the summer issue).

*(Continued on Page 3)*

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### Centex, KB Homes, Pulte & Richmond American Agree to EPA Inspection Demands

The civil penalties are meager compared to the long term cost of inspection, training and stipulations the four companies will pay for stormwater violations.

Wal-Mart and Home Depot must construct under court supervision. Colorado Structures Inc., a firm that specializes in building big-box commercial stores, will pay a \$300,000 penalty and comply with similar training and inspection requirements

Why will the construction industry not comply with the law? Other industries assisted the EPA with group applications, data and best management practices. That worked for them and the environment.

EPA is under a court order to develop national standards for the construction industry. The National Home Builders Association and the Associated General Contractors of America are failing their members by objecting to efficient treatment and control technology. The law is clear - eliminate the discharge of pollutants.

There is a common pattern of stormwater violation within the construction industry. Expect continuous enforcement actions until there is a willingness to comply with the law. ♦

## The Construction Industry Doesn't Get It . . . .

# TIME'S UP! Enforcement Has Arrived

First it was Wal-Mart, then Home Depot and now, four national home builders are hit with fines, compliance orders, stipulations, inspections and senior management oversight.

In February, Home Depot agreed to pay a \$1.3 million penalty in a similar case. Wal-Mart was fined \$3.1 million in 2004.

Wal-Mart and Home Depot are under court orders that require senior managers to participate in inspection reporting, to assure certified training, and prevent contaminated runoff. Failure of management to assure compliance will cost them penalties stipulated in the court orders.

Four large home building companies have agreed to similar conditions and will pay fines for what EPA calls "common patterns of violations."

Centex: \$1,485,000  
KB Home: \$1,185,000  
Pulte: \$877,000  
Richmond: \$795,000

Pulte Homes has also agreed to complete a supplemental environmental project to reduce the amount of sediment entering a northern California watershed, at a minimum cost of \$608,000.

Find the complaint and consent agreement at <http://www.usdoj.gov/opa/pr/2008/June/08-enrd-524.html> with attachments that identify all building sites with active construction

### **Criminal Indictments Avoided**

EPA's Assistant Administrator for Enforcement and Compliance Assurance told the press that the "settlements set a new bar for the home building industry." Granta Y. Nakayama, when asked if the construction

industry will comply said, "I'm not optimistic. These are huge builders. They have teams of lawyers, engineers, planners, architects, contractors, site managers and workers. I find it hard to believe that someone did not know they were violating the Clean Water Act".

**Knowing violations of the Clean Water Act is a criminal offence.**

### **National Home Builders**

The June 11 public notice of settlement for the four home builders identified a common pattern of violations that was discovered by reviewing documentation submitted by the companies, and through federal and state inspections of construction sites.

The violations include not obtaining permits until after construction had begun or failing to obtain required permits at all. At sites without permits, violations included failures to prevent or minimize the discharge of pollutants, such as silt and debris, in stormwater runoff.

The settlements require the companies to develop improved pollution prevention plans for each site, increase site inspections, and promptly correct any problems that are detected.

The companies must properly train construction managers and contractors, and are required to have trained staff at each construction site.

They also must implement a management and internal reporting system to improve oversight of and submit annual reports to EPA. *(Continued on Pages 6 and 7)*

## **California Inspector Training**

California's draft construction permit requires training for both the SWPPP Writer and the SWPPP Practitioner (inspector).

The final details of the permit will not be finalized until late 2008 at the earliest. Until the permit is final, inspectors need to understand basic inspection protocols and reporting. Meanwhile, training should include possible changes the new permit may impose, such as taking and shipping discharge samples.

The National Stormwater Center's Certified Stormwater Inspector (CSI) training in California includes a module of instruction of the draft construction permit including a special notebook with the permit and all attachments. Regional Board staff often participates to answer questions.

After training CSI students receive unlimited access to the CSI instructors to ask questions concerning issues the students may encounter carrying out their jobs as inspectors. These questions are encouraged and often published in *The Stormwater Quarterly*.

The National Stormwater Center has been engaged in discussions with the State Board staff and spoke to this issue at the public hearing on June 4 before the State Board. The Center provided the syllabus, instructor qualifications and a listing of individuals that have been certified in California.

From presentations at the hearing, it appears that the Center has the longest running stormwater inspector training course and has certified the most inspectors in California.

Informal discussions with State Board staff indicate that National Stormwater Center instructors will qualify as trainers and may be asked to participate in the development of the "SWPPP Practitioner" training. ♦

## **Stormwater News**

*(Continued From Page 1)*

**The State of Alaska has requested NPDES authority.** If approved, the Alaska Department of Environmental Conservation (ADEC) will administer NPDES under its jurisdiction. The State's request includes a three-year implementation plan.

The following schedule identifies the phasing plan for when the program will begin the administration of permitting, compliance, and enforcement activities associated with each major component.

Phase I will include Domestic Discharges, Timber Harvesting, Seafood Processing Facilities and Hatcheries.

Phase II, one year later, will add Federal Facilities, Stormwater Program (excluding the Bio-Solids Program), Pretreatment Program, and miscellaneous non-domestic discharges.

Phase III, another year later, will add Mining.

Phase IV, the next year, will add Oil and Gas, Cooling Water Intakes & Dischargers, Munitions, and all other remaining facilities.

**America's Most Endangered River is the Catawba-Wateree River.** According to American Rivers (a non profit organization) it is being drained away by water mismanagement and explosive population growth.

Located in North Carolina, the river needs protection and sustainable water use to ensure a thriving economy and high quality of life for years to come.

**A new EPA proposal allows CAFO operators to certify that they won't release waste into waterways.** The certification would exempt them from the need to obtain an NPDES discharge permit. In the case of an accidental discharge, the feedlots' self-certification shields them from lawsuits over their permit-free status. (More information in our next issue.) ♦

## EPA Will Lose Another Court Battle

# Water Transfers Rule Will Not Float

Water transfers are activities that divert water between two waterbodies, typically through the use of pumps. EPA's new rule exempts this point source discharge from NPDES regulations if the transfer activity does not add pollutants.

Recognizing that a transfer pump is a point source conveyance and the waterbodies are distinctly different, and no pollutants are added, then NPDES has never been applied. What if pollutants are added by stormwater runoff rather than the transfer activity?

If pollutants are added, then the question becomes what activity added the pollutants. The EPA exemption applies only if pollutants are not added by the water transfer activity, such as oil from the pumps. But what if the pollutants are from runoff from agriculture, streets, business or construction?

The Clean Water Act holds the discharger responsible for any and all pollutants leaving the point source, regardless of the source of the pollutants. The purpose of the Act is to restore and maintain the Nation's waters, and the goal of the Act is to eliminate the discharge of pollutants. How does this exemption conform with the Act?

**It doesn't!** Section 301 requires a permit for the discharge of pollutants and Section 502 defines the term discharge of pollutants to mean "any addition of any pollutant to navigable waters from any point source." The Act does not distinguish between the activities that cause the addition of pollutants.

EPA is concerned that NPDES would add cost for public agencies to provide water supply, irrigation, power generation, flood control, and environmental restoration. It will, but the solution is to change the law, not defy the law.

EPA proposed the water transfer rule in 2005 to defend the South Florida Water Management District's discharge of polluted runoff into the Everglades. It is misleading for EPA to say that the Supreme Court declined to rule whether NPDES permits were required for this discharge.

The Supreme Court ruled that the pump discharging into the Everglades is a point source and returned the case to the lower court only to determine if the drainage canal (source of the pollution) is a distinctly different water body than the Everglades. That case is pending

Assistant Administrator for Water, Benjamin H. Grumbles, said, "The Water Transfer Rule gives communities greater certainty and makes clear they have the flexibility to protect water quality and promote the public good without going through a new federal permitting process."

The environmental group Earthjustice said it will file motions, on behalf of the Florida Wildlife Federation, asking the 11th Circuit Court of Appeals to have the new rule declared illegal.

Earthjustice said the EPA's statement "flies in the face of court decisions" and "makes it easier for polluters to pump filthy water into the public's clean water supplies."

The EPA said it was clarifying confusion that stemmed from a 2004 U.S. Supreme Court ruling. "Clean water permits should focus on water pollution, not water movement," Grumbles said in a statement.

David Guest, the Earthjustice attorney said, "The idea that there's confusion, that is true baloney." Mr. Grumble can lose another court battle or he can ask Congress if they want to gut the Clean Water Act. ♦

## Court Tells EPA to Permit All Vessels

# Congress Will Sink EPA's Boat Rule

The U.S. District Court for the Northern District of California said the Clean Water Act requires NPDES permits for discharges incidental to normal operation of all boats in U.S. waters. EPA estimates as many as 91,000 commercial vessels and 13 million recreational boats could be affected. (*Northwest Environmental Advocates v. EPA*)

### **Litigation**

The litigation brought by environmental groups was aimed at preventing large ships from discharging ballast water with the introduction of invasive species.

The environmental groups maintain that vessels are "point sources" requiring NPDES permits for discharges to U.S. waters. They argued that EPA lacks authority to exclude point source discharges from vessels from the NPDES program and that ballast water must be regulated under the NPDES program because it contains invasive plant and animal species as well as other materials of concern such as oil, chipped paint, sediment and toxins.

The court ruling on March 30, 2005 requires NPDES permits for any discharge from normal boat operations, including bilge water, engine cooling water or deck runoff.

### **EPA Permits**

The November 16, 2006 court order set September 30, 2008 as the compliance date for boaters to have an NPDES permit. Without other court action the ruling remains in effect. Apparently EPA relied on their appeal to reverse the decision, so EPA did nothing until now.

If the court reverses or remands the lower court's decision, EPA's proposed permit will be modified or canceled.

EPA has issued two proposed general permits just in case the appeal is denied. One permit is for vessels greater than 79 feet long, the other is for vessels less than 79 feet long. Boat owners are required to have a permit by September 30 of this year. See <http://www.epa.gov/npdes/vessels>

**Small Vessels** - Application for NPDES coverage will be automatic. However, operators would need to comply with specific best management practices. Permit violators would be subject to NPDES enforcement.

**Large Vessels** - Vessels that carry ballast will have effluent limits for discharges of deck runoff, bilgewater, gray water and ballast water. The rule would require submission of a Notice of Intent (NOI) from 44,363 domestic and 7,834 foreign flagged ships and commercial vessels.

### **Congress to the Rescue**

Boaters across the Nation have contacted their representatives and they have responded. The Clean Boating Act of 2008 will pass this year. Senate Bill (S. 2766) amends the Clean Water Act to prevent NPDES permits for the discharge from a recreational vessel of graywater, bilge water, cooling water, weather deck runoff, oil water separator effluent, or effluent from properly functioning marine engines or for any other discharge that is incidental to the normal operation of such vessels.

The House Transportation and Infrastructure Committee approved H.R. 5949 with the same language as S. 2766. The Senate Environment and Public Works Committee passed S. 2766. Both bills are headed for floor votes before Congress adjourns.

EPA is inviting comments on both proposed permits. ♦

# TIME'S UP !

(Continued From Page 2)

## Stipulated Penalties

A series of stipulated penalties to be paid to both the federal and state governments vary based on the selected reporting system. One system for quarterly reports that identify undocumented inspections range from \$2,500 (8%) to \$500,000 if greater than 25% undocumented inspections.

Colorado Structures Inc., a commercial builder for Wal-Mart and Home Depot agreed to pay generally the following stipulated penalties per day, per violation:

No SWPPP	\$500
SWPPP Not Updated	\$400
Daily Inspections	\$500
No Corrective Action	\$500
Missed Reports	\$750

## Public Invited to Comment

The order is subject to a 30-day public comment period and approval by the federal court. (See link on page 2)

This link contains additional links to consent decrees that the Division has recently lodged in the federal district courts and on which the Division is currently accepting public comment. In each case, a notice was published in the Federal Register and a link to that notice is also provided.

The notice includes a brief description of the settlement, the procedure for submitting public comments, and the date the comment period closes.

## Colorado Enforcement

Colorado Structures Inc. (CSI), a construction management firm that specializes in building big-box commercial stores, agreed to pay a \$300,000 penalty and implement a storm water compliance program on June 6, 2008. EPA inspected 16 sites in 2002-2003.

CSI operates in the western United States as a general contractor for and developer of big-box stores such as Wal-Mart, Home Depot, Fred Meyer and Safeway. The CSI violations cited in the complaint were documented during construction of Wal-Mart and Home Depot stores.

See information including complaint and consent agreement and attachments at <http://www.usdoj.gov/opa/pr/2008/June/08-enrd-509.html>

## New York Enforcement

In New York, Widewaters Greenport Co. LLC has agreed to pay a \$100,000 settlement (May 11, 2008) to resolve numerous stormwater violations at the development and as ordered to stop work on the site until state officials approve the company's stormwater prevention plan.

Widewaters is headquartered in Syracuse. Its \$70 million Greenport Commons project is a 500,000 square foot retail center in Columbia County that is expected to be anchored by Lowe's and a Wal-Mart super center.

## Massachusetts Enforcement

A residential developer, Callahan, Inc., in Hanson, faces a penalty of up to \$157,500 for alleged stormwater discharges from a construction site.

On March 27, 2007, an EPA inspector discovered stormwater permit violations. For additional information, visit <http://epa.gov/region1/enforcement/water/>

Specifically, Dunham Farm, LLC and Callahan, Inc. failed to document routine facility inspections at the development site and failed to properly implement and maintain "best management practices" which include erosion and sediment controls, such as drainage basins, silt barriers, and berms at the site. (Continued on Next Page)

Also, Platinum Building & Design, Inc. development on Cronin Brook Road in Millbury discharges through several swales leading off the site and into storm drains. Two swales discharge to an unnamed tributary of the Blackstone River, while another swale and the storm drains discharge into waterways that eventually reach the Blackstone River.

Platinum failed to have stormwater permit coverage for the site since construction commenced in 2003. EPA and the company have agreed to a \$22,609 penalty to settle this violation.

In June 2006 and November 2006 stormwater from the High Pines Corporation site at Indian Pond Estates in Kingston over-flowed at one of the retention ponds and discharged silt into the wetlands. Stormwater at the development is generally controlled on-site through the use of retention ponds with subsurface leaching.

Because the site was designed to capture all potential stormwater discharges, the developers never applied for a stormwater permit for the project. The penalty for High Pines totals \$12,500.

### **Conclusion**

Ronald Tenpas, head of the Justice Department's Environment and Natural Resources Division, told reporters, "These steps [for national home builders] will result in a significant reduction in sediment pollution." However Tenpas concluded, "We expect this emphasis in enforcement to continue."

### Editor's Note:

The construction industry will continue to face enforcement unless there is a change in behavior. That change can be an agreement on a national discharge standard calling for no visible discharge of sediment. ♦

## **Ninth Circuit Denies Oil and Gas Exemption**

On May 23, 2008, the Ninth Circuit Court issued an opinion to vacate EPA's rule that exempted the Oil and Gas industry's construction activities from needing storm water construction permits. EPA used the 2005 Energy Act to exempt these projects from the requirements of the Clean Water Act.

The Court was unable to conclude that Congress intended to exempt from NPDES permitting requirements discharges of stormwater runoff contaminated solely with sediment. They did conclude that Congress was silent on the issue.

Furthermore, the Court said that EPA's inconsistent and conflicting position regarding the discharge of sediment-laden stormwater from oil and gas construction sites is arbitrary and capricious because of the agency's changed position on what constitutes "contamination."

EPA has until July 7, 2008, to petition the Court for rehearing. EPA is considering, in consultation with the Department of Justice, whether to file such a petition.

Should the Court decision ultimately vacate EPA's regulations, the provisions of the Energy Policy Act of 2005 remains in effect.

The Act exempts most construction activities at oil and gas sites from the requirement to obtain NPDES permit coverage for stormwater discharges. EPA will need to wordsmith the next regulation to appear more conservative and to delete the word '*sediment*'.

The Court order can be downloaded at [http://www.epa.gov/npdes/regulations/oilandgas\\_nrdc\\_v\\_epa.pdf](http://www.epa.gov/npdes/regulations/oilandgas_nrdc_v_epa.pdf) ♦

**John Whitescarver,  
Executive Director**  
National Stormwater Center



- ▶ *Qualified Environmental Professional* by the Institute of Professional Environmental Practice
- ▶ Team to Organize US EPA & Write Clean Water Act Rules; National Expert, Municipal Permitting Policy; Awarded EPA Bronze Medal by US EPA, 1970-1979
- ▶ Appointed to EPA Advisory Committee on Compliance Assistance
- ▶ Appointed by Small Business Administration to EPA committee for streamlining Phase II stormwater rules.
- ▶ Instructor for Florida DEP Erosion & Sedimentation Control Inspector Course

**2008 Schedules**

**Certified Stormwater Inspector**

Baton Rouge	Jan 15, 16	San Diego	Jul 8, 9
San Diego	Jan 29, 30	Waco	Jul 13, 14
Caguas, PR	Feb 12, 13	Sacramento	Aug 11, 12
Sacramento	Feb 19, 20	Aberdeen	Aug 19, 20
Austin	Mar 11, 12	Bakersfield	Sep 9, 10
Bakersfield	Mar 18, 19	Dallas	Sep 22, 23
Okla. City	Apr 1, 2	Concord	Oct 7, 8
Concord	Apr 14, 15	Ontario	Nov 18, 19
Ontario	May 5, 6	Modesto	Dec 8, 9
Modesto	Jun 9, 10	Houston	Dec 11, 12

**Advanced  
Certified Stormwater Inspector**

(Prior certification required)

San Juan	Feb 14	Aberdeen	Aug 21
Orlando	Mar 25	Dallas	Sep 24
Ontario, CA	May 7	Concord	Oct 9
Jacksonville, FL	Jun 4	Ft Lauderdale	Nov 5

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