

RECENT DEVELOPMENTS IN WATER QUALITY REGULATION AND PERMITTING

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WATER QUALITY STANDARDS

Water quality standards are the foundation of the water quality-based control program mandated by the Clean Water Act. A water quality standard consists of four basic elements:

- (1) *designated uses* of the water body (e.g., recreation, water supply, aquatic life, agriculture)
- (2) *water quality criteria* to protect designated uses (numeric pollutant concentrations and narrative requirements)
- (3) an *antidegradation policy* to maintain and protect existing uses and high quality waters, and
- (4) *general policies* addressing implementation issues (e.g., low flows, variances, mixing zones).

Water quality standards are important because they help to protect and restore the quality of the nation's surface waters, consistent with the requirements of the Clean Water Act. Standards help to identify water quality problems caused by, for example, improperly treated wastewater discharges, runoff or discharges from active or abandoned mining sites, sediment, fertilizers, and chemicals from agricultural areas, and erosion of stream banks caused by improper grazing practices. Standards also support efforts to achieve and maintain protective water quality conditions, including:

- (1) total maximum daily loads (TMDLs), waste load allocations (WLAs) for point sources of pollution, and load allocations (LAs) for non point sources of pollution,
- (2) water quality management plans which prescribe the regulatory, construction, and management activities necessary to meet the water body goals,
- (3) NPDES water quality-based effluent limitations for point source discharges,
- (4) water quality certifications under CWA §§ 401 for activities that may affect water quality and that require a federal license or permit,
- (5) reports, such as the reports required under CWA §§ 305(b), that document current water quality conditions, and
- (6) CWA §§ 319 management plans for the control of non point sources of pollution.

The Clean Water Act requires States and authorized Indian Tribes to review their standards from time to time, but at least once every three years, and revise them if appropriate. Updates may be needed, for example, due to changing water quality conditions or water body uses or new scientific information on the effects of pollutants in the environment. In preparing proposed revisions to their standards, States and Tribes consider request from industry, environmental groups, and the public, and review available information (e.g., CWA § 305(b) reports, EPA guidance).

Each State and authorized Tribe has its own legal and administrative procedures for adopting water quality standards. In general, standards are adopted following a process in which draft revisions are developed (this may include a work group process or informal public meetings) and formally proposed for public comment. A public hearing is then held to receive input from the public regarding the proposal. The proposed water quality standards and supporting information are made available to the public prior to the hearing. States and Tribes are required to prepare a summary of the public comments received and how each comment was addressed. New or revised water quality standards become effective for purposes of the Clean Water Act upon EPA approval.

EPA approval of a new or revised water quality standard is considered a federal action which may be subject to the Section 7 consultation requirements of the Endangered Species Act (ESA). Section 7 of the ESA requires federal agencies to protect endangered species and threatened species and prohibits actions “likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined to be critical....” Accordingly, consultation with the U.S. Fish and Wildlife Service is an important part of EPA's water quality standards approval process.

The Clean Water Act also authorizes EPA to promulgate superseding Federal water quality standards in cases where new or revised State or Tribal standards are not consistent with applicable requirements of the Act or in situations where the EPA Administrator determines that Federal standards are necessary to meet the requirements of the Act. EPA promulgation of water quality standards requires a rule making process and opportunity for public review and comment.

RECENT DEVELOPMENTS

TRIENNIAL REVIEW STATE SURFACE WATER QUALITY STANDARDS

Under the Clean Water Act, all states and tribes are required to periodically conduct a comprehensive review of their surface water quality standards. Known as “Triennial Review” because the state must conduct a review at least once every 3 years.

The FDEP has conducted numerous workshops over the past 4 years and adopted revisions for last round on 4/23/13, and EPA approved on 9/9/13 and 11/12/14 (revisions to the dissolved oxygen criteria, incorporated the NNC “Implementation Document” by reference,

addressed miscellaneous changes to Chapters 302 and 303, and revised mixing zone requirements for beach nourishment projects).

FDEP started the latest round of Triennial Review of State surface water quality standards with its public workshops in Tallahassee and Orlando on June 10-11, 2015. The Department is considering revisions to several rule sections; however, all surface water quality standards in Chapter 62-4, Chapter 62-302 and Chapter 62-303, F.A.C., are under review.

Excluded criteria: An issue considered but not included is specific conductance criteria, as EPA is conducting detailed study looking at individual ions, and the Department wants to wait until the study is completed. Also not included because they will be included in a separate rulemaking: Human Health-Based Water Quality Criteria, Recreational Water Quality Criteria, and Reclassification Rulemaking.

The first series of public workshops was held in June, 2015. Written comment period closed June 25, but don't let that stop you: submit your comments anyway, as the agency plans further public workshops later this summer after it reviews the comments already submitted.

Economic Evaluation: As part of rulemaking, Department will conduct an economic evaluation of impact of standards changes. For new or revised criteria, evaluate whether change will result in increased listing of impaired waters or if there will be additional violations for point sources. The agency will prepare a Statement of Estimated Regulatory Costs (SERC):

SERC: Prior to the adoption, amendment, or repeal of any rule other than an emergency rule, an agency must prepare a statement of estimated regulatory costs (SERC) if the proposed rule will have a negative impact on small business or if the proposed rule is likely to directly or indirectly increase total regulatory costs in excess of \$200,000 within one year after implementation of the rule. Within 21 days after the notice of proposed rulemaking is published, a substantially affected person may submit to an agency a good faith written proposal for a lower cost regulatory alternative to a proposed rule. Upon the submission of a lower cost regulatory alternative, the agency must prepare a SERC or revise its previously prepared SERC, and either adopt the alternative or provide a statement of the reasons for rejecting the alternative in favor of the proposed rule. The agency must also revise a SERC if any change to the rule increases the regulatory costs of the rule.

A SERC must include: An economic analysis showing whether the rule directly or indirectly:

- Is likely to have a negative impact on economic growth, private-sector job creation or employment, or private-sector investment totaling in excess of \$1 million within 5 years after implementation of the rule;
- Is likely to have a negative impact on business competitiveness, productivity, or innovation totaling in excess of \$1 million within 5 years after the implementation of the rule; or
- Is likely to increase the regulatory costs totaling in excess of \$1 million within 5 years after the implementation of the rule.

- A good faith estimate of the number of individuals and entities likely to be required to comply with the rule, including a general description of the types of individuals likely to be affected by the rule.
- A good faith estimate of the cost to the agency or other state and local government entities of implementing and enforcing the proposed rule, including any anticipated effect on state or local revenues.
- A good faith estimate of the direct costs (such as filing fees, license fees, equipment costs, reporting expenses, or other easily determined costs) likely to be incurred by individuals and entities required to comply with the requirements of the rule.
- An analysis of the impact on small counties and cities as well as small businesses, including the basis for the agency's decision not to implement alternatives that would reduce the negative impact on small businesses. A description of any regulatory alternatives submitted and a statement adopting the alternative or a statement of the reasons for rejecting the alternative in favor of the proposed rule. Any additional information that the agency determines may be useful.

Aquatic Life Criteria – Ammonia: EPA has published final national recommended water quality criteria for the protection of aquatic life from the toxic effects (total ammonia nitrogen (TAN) toxicity) of ammonia in freshwater. EPA's 2013 ammonia criteria reflect new data on sensitive freshwater mussels and snails, incorporate scientific views EPA received on its draft 2009 criteria, and supersede EPA's previously recommended 1999 ammonia criteria.

FDEP's proposed criteria is for TAN rather than only un-ionized ammonia nitrogen (Florida's current criterion). Ammonium ion (NH₄⁺) can also be toxic at low pH. Although it is not as toxic as the un-ionized fraction, it is generally present in much greater concentrations than un-ionized ammonia. FDEP proposes to replace un-ionized ammonia with a) EPA's recommended 4-day average TAN criterion but express as a single sample maximum, and b) EPA's 30-day average TAN criterion.

Alkalinity: FDEP proposes that alkalinity not be reduced by more than 25% in waterbodies with natural alkalinity below 20 mg/L as some waters have alkalinity levels that are naturally below 20 mg/L. Current alkalinity criteria states that alkalinity shall not be depressed below 20 mg/L as CaCO₃.

Aquatic Life Criteria – Carbaryl: EPA has published final ambient water quality criteria (AWQC) for the protection of aquatic life from the potential effects of carbaryl. Carbaryl is a pesticide used to control insects, slugs and snails and to thin fruit in orchards. It can enter water bodies and potentially harm aquatic life. Carbaryl is the second most frequently found insecticide in water, with detections in approximately 50 percent of urban streams. The criteria document will help states, territories, and authorized tribes add to their water quality standards, a concentration level for carbaryl, at or below which aquatic organisms will be protected.

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Carbaryl is a widely applied insecticide in Florida, under the trade name is Sevin. It is toxic to fish, aquatic phase amphibians, and freshwater invertebrates, but designated as a non-

priority pollutant by EPA and not currently included in Florida Water Quality Standards (FWQS). FDEP proposes to adopt the chronic freshwater criterion (2.1 µg/L) as a single sample maximum to protect aquatic life.

Aquatic Life Criteria - Chlorpyrifos: Chlorpyrifos is one of several organophosphorus compounds developed in the 1960s to replace persistent organochlorine pesticides. It is the active ingredient in various products designed to control a variety of pests including fire ants, turf and ornamental plant insects, mosquitos, cockroaches, termites, lice, and hornflies. Currently registered uses include food and feed crops, golf course turf, green houses, non-structural wood treatments such as utility poles and fence posts, bait stations, and as an adult mosquitocide. All homeowner use product registrations have been cancelled except for roach bait station products. Designated as a non-priority pollutant by EPA and not currently included in FWQS. In the past, it was directly applied to aquatic environments in mosquito, midge, and blackfly abatement projects, but the current label states that it is not to be applied directly to bodies of water. FDEP proposes to adopt both the freshwater (0.041 µg/L) and saltwater (0.0056 µg/L) chronic criteria as single sample maximums to protect aquatic life.

Aquatic Life Criteria – Diazinon: Diazinon (CASRN: 333-41-5) is mobile and moderately persistent in the environment. Due to its chemical properties and its widespread use, diazinon is frequently found in wastewater treatment plant effluent and urban and agricultural runoff. Diazinon is a broad spectrum organophosphate insecticide toxic to aquatic life, particularly invertebrates and is effective against flying insects, crawling insects, acarians, and spiders. On December 31, 2004, it became illegal to sell diazinon products for residential use in the United States. It is still lawful to use diazinon properly under the Federal Insecticide, Fungicide and Rodenticide Act for non-residential agricultural or other uses. Even so, phasing out the residential uses of diazinon should significantly reduce the amount of this pollutant that enters surface waters. This final diazinon criterion will further reduce risks to birds and other terrestrial wildlife. FDEP proposes to adopt the freshwater (0.17 µg/L) and saltwater (0.82 µg/L) chronic criteria as single sample maximums to protect aquatic life.

Aquatic Life Criteria - Nonylphenol: EPA has released final aquatic life ambient water quality criteria for nonylphenol. Nonylphenol is an organic chemical produced in large quantities in the United States. It is toxic to aquatic life, causing reproductive effects in aquatic organisms. Nonylphenol is moderately soluble and resistant to natural degradation in water. It is used as a chemical intermediate and is often found in wastewater treatment plant effluent and is used in making antioxidants, lubricating oil additives, detergents and emulsifiers. The final EPA criteria document for nonylphenol contains criteria designed to protect aquatic organisms and their uses. FDEP proposes to adopt the freshwater (6.6 µg/L) and saltwater (1.7 µg/L) chronic criteria as single sample maximums to protect aquatic life.

Human Health-Based Criteria

The Human health-based criteria has largely been deferred from adoption while the Department continues its work. At this time, the Department believes that its probabilistic approach is superior to the EPA's deterministic approach. The EPA is moving forward on adoptions of its approach. The Department is waiting to hear from the EPA on the state's proposals. The Florida ERC requested a more regional-specific approach, but the Department (and the EPA) were awaiting additional fish consumption data from NHANES (National Health and Nutrition Examination Survey, which is a program undertaken by the Federal Centers for Disease Control and Prevention. Florida may need more changes given EPA's 2015 guidance update on human health-based ambient water quality criteria (June 2015).

WATER QUALITY STANDARDS – CASES OF INTEREST

- **Florida Wildlife Federation v. McCarthy**, 45 ELR 20054, No. 8:13-cv-2084-T-23EAJ, (M.D. Fla., 03/16/2015) (Merryday, J.)

A district court dismissed environmentalists' claim that EPA should have reviewed the entirety of Florida's impaired water rule (IWR), not just the portion that constitutes a new or revised water quality standard. States retain discretion to enact and to enforce—without EPA's review and approval—both a method of identifying impaired waters and an antidegradation policy. In 2001, Florida adopted the IWR. In 2005, EPA determined that a portion of the IWR constituted a reviewable new or revised water quality standard. The Agency therefore reviewed that portion of the IWR and approved it in 2008. Environmental groups filed suit, arguing that EPA's statutory authority to review a new or revised water quality standard under §303(c) implies the authority to review other provisions in the same set of regulations. But the CWA does not support this argument, and the groups failed to establish that the entire IWR is either a reviewable new or revised water quality standard or a reviewable list of impaired waters. The groups also alleged that EPA should have disapproved the IWR because it lacked an antidegradation methodology. Again, the court rejected the claim, as the groups failed to explain why, under Florida's antidegradation policy, a new or revised water quality standard must contain an "antidegradation methodology."

- **Conservation Alliance of St. Lucie County, Inc. v. FDEP**, 144 So.3d 622 (Fla. 4th DCA 2014).

An environmental group filed a petition for a formal administrative hearing challenging a settlement agreement between FDEP and a bleach manufacturer (alleged polluter). After an ALJ at DOAH recommended that the petition be dismissed, FDEP entered a final order dismissing the petition, and the environmental group appealed. The court affirmed, holding that the

environmental group lacked standing to challenge the settlement under Section 403.412(6), Florida Statutes, which provides:

[a]ny Florida corporation not for profit which has at least 25 current members residing within the county where the activity is proposed, and which was formed for the purpose of the protection of the environment, fish and wildlife resources, and protection of air and water quality, may initiate a hearing pursuant to s. 120.569 or s. 120.57, provided that the Florida corporation not for profit was formed at least 1 year prior to the date of the filing of the application for a permit, license, or authorization that is the subject of the notice of proposed agency action.

First, the court held that it must defer to the agency's interpretation of a statute if it is given the power and duty to administer when that interpretation is reasonable. Finding FDEP's reading of section 403.412(6) is reasonable, the court affirmed the FDEP order.

Taking a look at the statute, the court held that the language of Section 403.412(6) is not ambiguous. The statute is clearly premised upon an application for the permit, license, or authorization that the complaining party seeks to challenge. This case does not concern an application for a permit, license, or authorization. Rather, it involves a third-party challenge to a settlement agreement. Accordingly, the court held that the Conservation Alliance did not have standing to challenge the settlement agreement under section 403.412(6), Florida Statutes.

- **Southern Appalachian Mountain Stewards v. A & G Coal Corp. (4th Cir. July 11, 2014) No. 13-2050, 2014 WL 3377687.**

The Fourth Circuit ruled in *Southern Appalachian Mountain Stewards v. A & G Coal Corp.* (4th Cir. July 11, 2014), that A&G Coal Corp. could not assert a permit shield defense for discharges of selenium from the Company's Kelly Branch surface coal mine in Wise County, Virginia when it had failed to disclose the presence of this pollutant during the permit application process. A coalition of environmental groups, sued A&G claiming that selenium discharges from the Kelly Branch mine violated the Clean Water Act and the Surface Mining Control and Reclamation Act. A&G's NPDES permit did not list selenium as a permitted discharge.

The CWA's permit shield provision states that compliance with a valid National Pollutant Discharge Elimination System ("NPDES") permit shall be deemed compliance with certain sections of the statute dealing with effluent limitations. The Fourth Circuit has said that this provision "is meant to prevent permit holders from being forced to change their procedures due to changes in regulations, or to face enforcement actions over whether their permits are sufficiently strict. By rendering permits final, the shield allows permit holders to conduct their operations without concern that an unexpected discharge might lead to substantial liability."

A&G had not disclosed the possibility of selenium discharges during the permit application process, but A&G argued that the permit shield nonetheless applied because the Company had no reason to anticipate such a discharge, and that the Agency reasonably contemplated the discharge because other mines in the area discharged selenium. The lower court rejected A&G's

arguments, finding that A&G had not met its Clean Water Act disclosure requirements and, as such, could not assert a permit shield defense.

In affirming the lower court's decision, the Fourth Circuit determined that under federal regulations, A&G was required, at minimum, to report in its permit application whether it believed selenium to be present or absent. A&G argued that it only needed to mention selenium during the permitting process "if it knew or had reason to believe that selenium would be present in its discharges." The court rejected that construction of the federal regulations, noting that "EPA application instructions indicate that, consistent with the regulatory language, an applicant must affirmatively note on the application whether selenium is "Believed Present" or "Believed Absent." Moreover, the Virginia Department of Mines, Minerals, and Energy permit application instructions required A&G to test for the presence of selenium, which they did not do.

The court also pointed out an inherent conflict in A&G's argument. On the one hand, A&G argues that it had no reason to believe selenium was present in its discharge. On the other hand, the Company argues that the discharge was within the reasonable contemplation of the permitting authority when the permit was issued. However, if the Agency should have been aware of the possible discharge, then arguably, A&G should also have been aware of the possibility. As such, the court found that A&G failed to comply with federal and state reporting requirements with regard to discharges of selenium during the NPDES permit application process and held that the permit shield did not apply.

FEDERAL RULEMAKING AND POLICY UPDATE

EPA / USCOE Wetlands Rulemaking¹. Clean Water Act: EPA/Corps Rulemaking Expands Federal Reach Over Wetlands and Other Waters. EPA and the U.S. Army Corps of Engineers (the Corps) are again expanding their jurisdiction over wetlands and other ancillary waters. On May 27, 2015, the EPA and Corps issued their rule defining "Waters of the United States." The move comes after years of debate, studies, and trips up and down the federal court system. In this most recent chapter, the agencies enacted a rule expanding the agencies' Clean Water Act jurisdiction over permits to dredge and fill wetlands and other waters under CWA §404 and to discharge pollutants to surface waters under CWA §402 (NPDES). The rule relies on a 331-page draft scientific report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* that the EPA's Science Advisory Board released for public comment in September 2013. The agencies are using the draft Report as the scientific basis for the policy decisions expressed in the jurisdictional rule.

The rule embodies the agencies' current views on the reach of the CWA in light of the Supreme Court's decisions in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)* and *Rapanos v. United States (Rapanos)*. The rule supersedes a 2003 "Joint Memorandum" providing clarifying guidance on *SWANCC*, and a 2008 Joint Guidance memo issued after the U.S. Supreme Court's Decision in *Rapanos* (collectively "Existing Guidance"). The rule expands categorical federal CWA jurisdiction over millions of acres of

¹ Article by Jeff Kray, Marten Law

private property, and faces legal challenges. The challengers assert that the rule increases costs and regulatory burdens on business in the development, industrial, manufacturing, retail, energy, and mining sectors, and on private and public landowners, state and local government, and even federal government by expanding the types of water bodies that require CWA permits. The rule also increases the set of properties subject to risk of regulatory enforcement by EPA, the Corps, their state counterparts, or – under the CWA’s robust citizen suit provisions – non-governmental organizations.

Significant Supreme Court Decisions on CWA Jurisdiction

The U.S. Supreme Court has addressed the scope of CWA several times in the past few years. In *SWANCC*, the Court addressed the question of CWA jurisdiction over isolated ponds, and concluded that CWA jurisdiction could not be based solely on the presence of migratory birds. In *Rapanos*, the Court addressed CWA protections for wetlands adjacent to tributaries, and issued five opinions with no single opinion commanding a majority of the Court. Neither *SWANCC* nor the opinions in *Rapanos* invalidated any of the regulatory provisions defining “waters of the United States.” The Court also addressed the question of CWA jurisdiction in an earlier case, *Riverside Bayview Homes*. While not specifically addressed in the 2011 Guidance, the *Riverside Bayview* case informed the Court’s decisions in the latter two cases. In the 2011 Guidance, the agencies stated that they “believe it is advisable to replace existing guidance documents interpreting *SWANCC* and *Rapanos* in order to implement the CWA in a manner that is consistent with those opinions, reflects the best available science, and recognizes recent field implementation experience.”

In September 2013, the agencies had sent the proposed rule to the Office of Management and Budget (OMB) for review and simultaneously withdrew the proposed but never finalized 2011 Guidance. The agencies’ decision to issue the 2011 Guidance instead of immediately initiating rulemaking was strongly criticized by members of Congress and representatives from both industry and environmental interest groups. The agencies’ new Connectivity Report and the rule are, in part, responses to that criticism.

Connectivity Report

The Connectivity Report EPA issued in September 2013 summarizes the agency’s science on physical, chemical, and biological connections between upland streams and wetlands and water bodies recognized as “traditional navigable waters.” The Report was prepared to provide a basis for determining which wetlands and water bodies are categorically – rather than on a case-by-case basis – within EPA and Corps jurisdiction.

Prior to public release, the draft Connectivity Report was reviewed by “peers,” including federal government employees from the U.S. Department of Agriculture and U.S. Geological Survey, academics from universities around the country, employees of an environmental consulting firm (TetraTech), and two non-profits (the Stroud Water Research Center and the Nature Conservancy). EPA’s Scientific Advisory Board (“SAB”) is now performing a mandatory quality review. EPA is also accepting public comments on the draft Report. EPA has not

established a closing date for public comments but will do so at some future point by publishing notice in the federal register.

The Report reaches the following major conclusions:

- All tributary systems, including perennial, intermittent, and ephemeral streams, *are* physically, chemically, and biologically connected to downstream rivers.
- Wetlands and open waters in riparian areas and floodplains *are* physically, chemically, and biologically connected with downstream rivers.
- Current literature is *insufficient* to generalize about the connectivity or downstream effects of isolated wetlands.

The Connectivity Report’s conclusions will have the effect of establishing categorical federal jurisdiction over tributary systems, riparian areas, and floodplains, allowing the agencies to establish jurisdiction over such water bodies without conducting a case-by-case analysis.

How the Proposed Rule Differs from Existing Guidance

The rule addresses the scope of the CWA’s key term “waters of the United States” for all CWA provisions that use the term, including the Section 402 National Pollutant Discharge Elimination System (NPDES) permit program, the Section 311 oil spill program, the water quality standards and total maximum daily load programs under Section 303, and the Section 401 State water quality certification process. The Existing Guidance was limited on its face to CWA Section 404 determinations.

Like the formerly proposed 2011 Guidance – and different from the Existing Guidance – the rule significantly expands the scope of categorical federal agency jurisdiction under the CWA. The most significant departure from the Existing Guidance is the heightened emphasis placed on Justice Kennedy’s “significant nexus” test for determining CWA jurisdiction. The *Rapanos* decision advanced two different standards for determining federal jurisdiction under the CWA – Justice Scalia’s “continuous surface connection” standard and Justice Kennedy’s “significant nexus” standard – and the Existing Guidance said that the agencies would use both standards.

One purpose of the rule is to reduce the use of the Corps’ Wetlands Delineation Manual. The 1987 Manual and more recent Regional Supplements are tools the agencies have used for several decades to determine whether water bodies are subject to CWA jurisdiction on a case-by-case basis.

One of the more contentious areas of determining CWA jurisdiction has involved what are described as “other waters” in the EPA’s and the Corps’ regulations. These waters include, among other things, “mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows” and were specifically at issue in the Supreme Court’s decision in *SWANCC*, in which the court held that Corps jurisdiction does not extend to isolated, abandoned sand and gravel pits with seasonal ponds. A notable point of departure that the proposed rule makes from the Existing Guidance has to do with determining CWA jurisdiction over non-navigable tributaries of traditional navigable waters.

Under the rule, and for the first time, the following will always be jurisdictional:

- All “tributaries”, including any water (wetlands, lakes, and ponds) that contribute flow, either directly or through another water, to downstream traditional navigable waters, interstate waters, or territorial seas.

- All waters “adjacent” to such tributaries. The proposed rule broadly defines “adjacent” to include all waters located within the “riparian area” or “floodplain” of otherwise jurisdictional waters, including waters with shallow subsurface hydrologic connection or confined surface hydrologic connection to jurisdictional water.

The rule, however, codifies existing policies and categorically exempt from federal CWA jurisdiction the following:

- Ditches excavated wholly in/only draining uplands, and less than perennial flow.
- Ditches that do not contribute flow, either directly or through another water, to traditional navigable waters, interstate waters, or the territorial seas.
- Artificially irrigated areas that revert to upland should water application cease.
- Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for stock watering, irrigation, settling basins, or rice growing.
- Artificial reflecting or swimming pools created by excavating and/or diking dry land.
- Small ornamental waters created for primarily aesthetic reasons.
- Water-filled depressions created incidental to construction activity.
- Groundwater, including groundwater drained through subsurface drainage systems.
- Gullies and rills and non-wetland swales.

The rule’s net effect is that more smaller and remote upstream bodies of water will fall with certainty within federal CWA jurisdiction; resulting in federal permit requirements and mitigation for any activities that may fill or add pollutants to such water bodies.

Agricultural Interpretive Rule

The agencies’ rule does not address CWA jurisdictional exclusions for waste treatment systems or prior converted croplands, contentious issues that the agencies have intended to address in future agency guidance documents. Nor does it affect any of the exemptions from CWA Section 404 permitting provided by CWA Section 404(f), including those for normal agriculture, forestry, and ranching practices, nor the statutory and regulatory exemptions from NPDES permitting requirements for agricultural stormwater discharges and return flows from irrigated agriculture.

However, on March 25, 2014 – the same day as the proposed jurisdictional rule was released for public comment – the agencies, in conjunction with the U.S. Department of Agriculture, enacted an interpretive rule regarding CWA § 404(f)(1)(A), the statutory exemption from Corps dredge and fill permits for “normal forming, silviculture, and ranching activities.” The new agricultural interpretive rule, which took effect immediately when issued, states that discharges associated with 53 specific Natural Resources Conservation Service (“NRCS”) practices, listed in a separate document, are exempted.

So far, at least 17 states, including Florida, have sued in federal court challenging the rule, and seeking an injunction to prevent the EPA and the Corps from enforcing their rule.

EPA Issues Revised General Permit for Stormwater Discharges from Industrial Activities. On June 4, 2015, the U.S. Environmental Protection Agency (EPA) issued a revised National Pollutant Discharge Elimination System (NPDES) Multi-Sector General Permit (MSGP) for stormwater discharges from industrial activities. The 2015 MSGP replaces the 2008 MSGP.

Background

Industrial stormwater has been regulated since the promulgation of EPA's 1990 stormwater regulations, which established NPDES permit requirements for "stormwater discharges associated with industrial activity." EPA issued the first MSGP for stormwater discharges associated with industrial activity on Sept. 29, 1995, and reissued in 2000 and 2008.

The stormwater regulations at 40 CFR 122.26(b)(14)(i)-(ix) identify the categories of industrial activities subject to NPDES stormwater regulations by Standard Industrial Classification (SIC) code, or by a general description of the industrial activities, which are:

- Facilities subject to New Source Performance Standards
- Heavy manufacturing
- Mining, oil and gas
- Hazardous waste facilities
- Landfills
- Recycling facilities
- Steam electric power plants
- Transportation industries
- Sewage treatment facilities
- Light industry

EPA categorized these industrial activities into 29 industrial sectors covered under a single permit, the MSGP, with each sector having tailored requirements.

EPA's MSGP only applies in areas of the country where EPA remains the NPDES permitting authority and has made the permit available for coverage. This includes the states of Idaho, Massachusetts, New Hampshire and New Mexico; the District of Columbia; all U.S. territories with the exception of the Virgin Islands; federally operated facilities in Colorado, Delaware, Vermont and Washington; most Indian Country lands; and a couple of other activities in specific states (e.g., oil and gas activities in Texas and Oklahoma).

The 2008 MSGP expired Sept. 29, 2013, and was administratively continued for covered facilities. At this time, all facilities desiring coverage under the MSGP need to submit NOIs for coverage under the 2015 permit, including facilities already covered under the 2008 MSGP.

Summary of 2015 MSGP

The 2015 MSGP provisions are largely similar to the 2008 MSGP. However, EPA made some changes to streamline the permit, enhance environmental protections, and improve clarity. The following is a summary of the most significant changes:

- Revised threatened and endangered species eligibility procedures.
- Additional specificity for several of the technology-based effluent limits (i.e., control measures) for clarity.
- A requirement that facilities discharging to a small number of federal Superfund sites notify their EPA regional office prior to filing their Notice of Intent (NOI).
- Streamlining of Stormwater Pollution Prevention Plan (SWPPP) documentation (i.e., facilities do not have to expound on their compliance with certain effluent limits).
- Public accessibility to SWPPP information, either by posting on the Internet or by incorporating salient information into the NOI.
- Electronic submission for the NOI, Notice of Termination, annual report, and monitoring.
- Reduced requirements for inspections (i.e., facilities no longer have to conduct a separate comprehensive site inspection).
- Specific deadlines for taking corrective actions.
- Inclusion of saltwater benchmark values for metals.
- Inclusion of the Airport Deicing Effluent Limitation Guideline for the air transportation sector.

FROM THE NEWS ROOM

Florida to Receive \$3.25B from BP in Deepwater Horizon Settlement. Florida landed \$3.25 billion Thursday as part of a multistate federal settlement with BP over widespread damage caused by the 2010 Deepwater Horizon disaster. The deal requires London-based BP to pay \$18.7 billion in economic and natural-resources damages to the five Gulf Coast states affected by the disaster, which pumped more than 100 million gallons of oil off the coastlines of Alabama, Florida, Louisiana, Mississippi and Texas. The city of Tampa will receive \$27.4 million — less than half of what it wanted — in a settlement of its claims with oil giant BP over lost taxes and other economic damages from the Deepwater Horizon oil spill. The settlement comes on top of at least \$28 billion BP has already spent on response, cleanup and compensation. It also exceeds by almost \$3 billion the \$43.8 billion the company set aside for fallout from the spill. Northwest Florida will be receiving the “lion’s share of economic damages” from Florida’s portion of the \$18.7 billion settlement arrived at Thursday between BP and five Gulf states (according to Florida Sen. Don Gaetz).

Governor Vetoes Funding for Controversial Water-Farming Projects

by Florida Water Daily · July 2, 2015

Last week, Scott vetoed a \$4.5 million water-farming appropriation in this year's budget. He did so, according to his veto letter, because "water storage projects are more appropriately supported" by the state's five water management districts — not by the taxpayers of the entire state.

Cabinet Defers Confirming Steverson for FDEP Secretary

by Florida Water Daily · June 24, 2015

Of the 59 applications that were received for the position of Secretary of the Florida Department of Environmental Protection, Interim Secretary Jon Steverson was the only one that Governor Scott recommended for a formal interview. However, Attorney General Pam Bondi requested that the cabinet defer the interview because she may want to add a candidate for consideration. From the Lakeland Ledger: As for the DEP appointment, Bondi said she wasn't ready to say who she is still considering for the position. "I just didn't want to exclude anyone at this point," Bondi said. She also declined to discuss her thoughts on Steverson, who served in the governor's office under former governors Charlie Crist and Jeb Bush and later was executive director of the Northwest Florida Water Management District.

Which local pet projects survived Gov. Scott veto pen?

Which local pet projects survived Gov. Scott Veto pen?

www.wtsp.com – June 23, 2015

TAMPA BAY, Florida -- Governor Rick Scott signed Florida's 2015-2016 budget Tuesday morning, but only after three weeks of legislative overtime and an impressively-long list of line-item vetoes totaling nearly half a billion dollars.

One week after lawmakers crammed hundreds of pet projects into the state budget, Scott vetoed nearly all of them, affecting nearly every community in the state. He also vetoed many of the priorities from the most-powerful legislators in Tampa Bay and the state.

However, several earmarks managed to survive the governor's veto pen, including \$17 million to help fund the University of South Florida's new Downtown Tampa medical school and another \$12 million to complete the USF-St. Pete School of Business.

The \$17 million allocation was a top priority for many local lawmakers looking to help Tampa Bay Lightning owner Jeff Vinik redevelop Downtown Tampa. Vinik recently donated \$100,000 to the governor's political action committee, "Let's Get to Work." A similar downtown project that would have benefited the University of Central Florida in Orlando was vetoed.

In all, Scott vetoed more than \$220 million from the state's general revenue budget and \$240 million more from trust fund expenditures. He also agreed to voluntarily return his salary to the state: he will be paid one penny per month next year.

State Budget Details Funding for Water Projects

by Florida Water Daily · June 17, 2015

- **From the Florida Senate Press Release:** Senate Bill 2500-A, Florida's 2015-2016 balanced budget was transmitted electronically to lawmakers and posted online at 5:37 p.m. [Tuesday 6/16/2015], initiating the constitutionally required 72-hour cooling off period before a final vote, expected this Friday.
- **From the Miami Herald:** Miami-Dade County is getting \$6.48 million to help fund 23 projects, more than any other county in the state. Included are drainage work in Miami Gardens and Miami Lakes. The Tampa Bay area will see a water projects boon, too: \$7.53 million across

Hillsborough, Pinellas, Pasco and Hernando counties. Lawmakers dropped in \$1 million to hook up some Pasco County residents to a different water source. Another \$1.9 million will go to a Dade City stormwater project.

- **From the Keys News:** For the first time in three years, the Florida Keys will not receive \$50 million in state funding for sewer projects. Also, the Keys may only receive a minimal amount of funding for land acquisition projects, according to Monroe County Administrator Roman Gastesi, because the state Legislature has taken millions of dollars meant for land conservation and water quality projects and reallocated it toward propping up other areas of the state's budget.
- **From the Tampa Bay Times:** Next year's state budget will not include \$2.5 million City Hall sought for a water initiative that Mayor Bob Buckhorn has hoped would be a legacy project. The city wanted the money for a \$3 million pilot project to study ways it could turn reclaimed water that it now discharges into Tampa Bay into drinking water.
- **From the Palm Beach Post:** Five local projects are among \$78 million worth of water and beach renourishment projects included in the budget approved by lawmakers early Tuesday morning.
- **From the News Press:** As far as local money in the state budget, Lee County will see about \$1.45 million for local water quality projects, \$500,000 for Bonita Beach renourishment and \$1 million for the San Carlos Pass Bridge, as well as funds for the new south road at FGCU.
- **From the Tampa Bay Times:** Among the local spending projects included in the tentative budget are: \$1 million to connect 1,100 homes in Summertree, now served by Utilities Inc. of Florida, to the Pasco County utility system. Residents in the 55-and-older community, just south of State Road 52 in west Pasco, have complained for years about yellow-colored water coming from their taps while being charged the highest rates in the county.
- **From Florida Today:** Indian River Lagoon muck-dredging projects in Brevard County would receive \$20 million under the proposed budget Florida legislators will vote on Friday. Half the money would go to the Eau Gallie River dredging project. That project will dredge at least 625,000 cubic yards (about 41,000 dump truck loads) of muck from the main stem of the 4-mile-long Eau Gallie River, as well as the southern branch of its tributary, Elbow Creek.

Governor's Line Item Veto Affects Water Projects Across the State

by Florida Water Daily · June 24, 2015

- **From the Saint Petersburg:** Scott vetoed \$27.3 million in the Department of Agriculture and Consumer Services budget for dispersed water storage programs that pay ranchers to hold back rainwater to keep it from filling up Lake Okeechobee. The Tampa Bay Times reported that Alico, the nation's largest citrus producer, provided donations to key legislators' political fund-raising committees as it sought to benefit from the program. The largest of the water projects vetoed was \$6 million for an advanced wastewater treatment and water reuse demonstration project in Altamonte Springs. Scott noted that the Florida Department of Environmental Protection and the state's five water management districts provide funding for programs that protect water quality and water supplies.
- **From the Miami Herald:** The governor also took the ax to several local water projects: \$195,000 for stormwater improvements in Aventura; \$280,000 for well and drainage improvements in Coral Gables; \$325,000 for Doral stormwater improvements; \$500,000 for reclaimed water projects in Coconut Creek; \$550,000 for piping in Margate; \$750,000 for stormwater in Miami Beach; \$8,000 for drainage improvements in Miami Lakes; \$675,000 in drainage improvements in North Miami; \$400,000 in sewer work in South Miami, and \$1 million for water supply expansion in Sunrise.
- **From the Lakeland Ledger:** Gov. Rick Scott vetoed a record \$461.4 million [Tuesday] from the recently passed state budget, including \$300,000 for a wastewater project along U.S. 27 in Lake Hamilton.

- **From the Tampa Bay Times:** Scott also cut \$3 million for a maintenance and repair facility at Brooksville-Tampa Bay Regional Airport and \$1.9 million for stormwater improvement in downtown Dade City [and \$450,000 for fire protection water line in Zephyrhills].
- **From the Daytona Beach News Journal:** Some of the other vetoes with local effects include \$750,000 for the Bethune-Cookman University Center for Entrepreneurship, \$600,000 for the Mala Compra Basin Water Quality Enhancement Project, \$284,000 for the Pine Ridge High School advanced manufacturing program, \$190,000 for a South Daytona stormwater project, \$175,000 for the New Smyrna Beach Museum of East Coast Surfing and \$100,000 for the Easter Seals of Volusia and Flagler counties.
- **From the Gainesville Sun:** The long list of water projects he vetoed included many public utility projects but also \$100,000 that Alachua County planned to put toward an Orange Creek Basin Restoration Initiative study that would look at potential ways, including dredging, to remove and dispose of the 8 feet of muck on average that coats the bottom of Newnan's Lake. Scott vetoed using \$5 million set aside by Amendment 1 to pay for projects that reduce water use and pollution at agricultural businesses in spring sheds.
- **From Flagler Live:** The \$600,000 appropriation for the Malacompra drainage project was among the 450 line-items and \$461 million he vetoed as he approved a \$78.2 billion budget.



Florida Department of Environmental Protection

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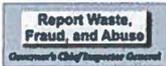
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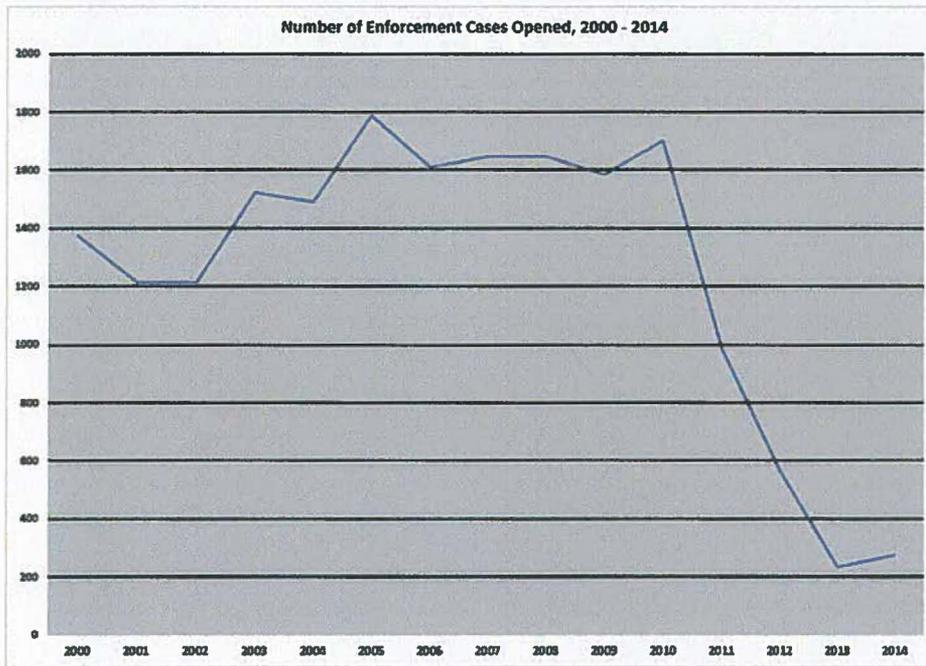
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As noted on the other pages of this Compliance and Enforcement Web site, achieving and maintaining compliance with Florida's environmental laws involves a variety of activities—financing sustainable environmental infrastructure, writing good permits, conducting thorough inspections, collecting reliable data, and finding and resolving violations quickly, fairly and effectively. You will find information on the Florida Department of Environmental Protection's (DEP) permitting, monitoring and financial assistance activities elsewhere on the DEP Web site, including detailed summaries of our [air](#), [water](#), [waste](#) and [land management](#) programs.

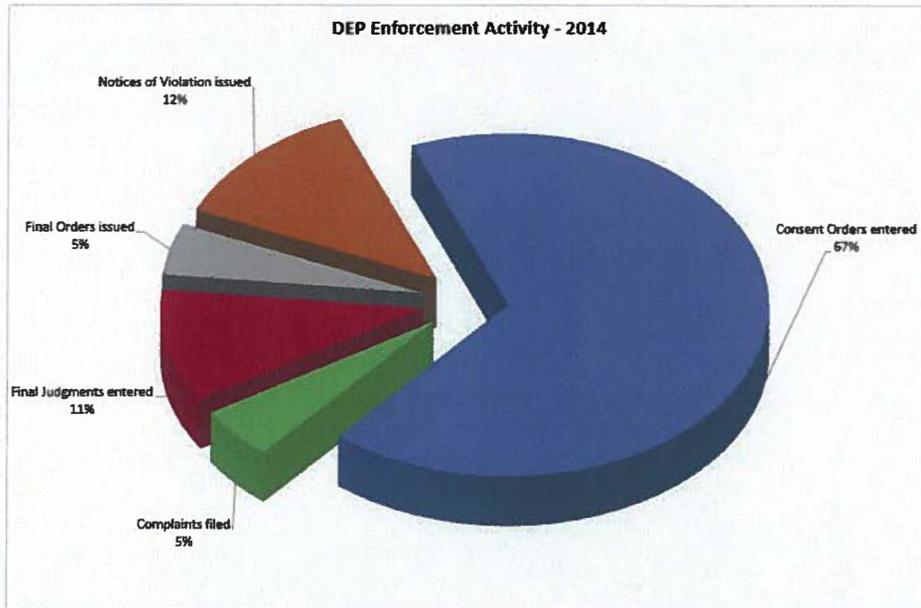
The information below provides a snapshot of some key DEP compliance and enforcement statistics. It is an evolving page and, in the future, we will add other data to keep you informed about the actions and results of our compliance and enforcement programs.

Number of DEP Enforcement Cases Opened, 1993-2011	DEP Enforcement Activity, 2011	DEP Enforcement Activity, 2005-2011	DEP Penalty Assessments, 1993-2011
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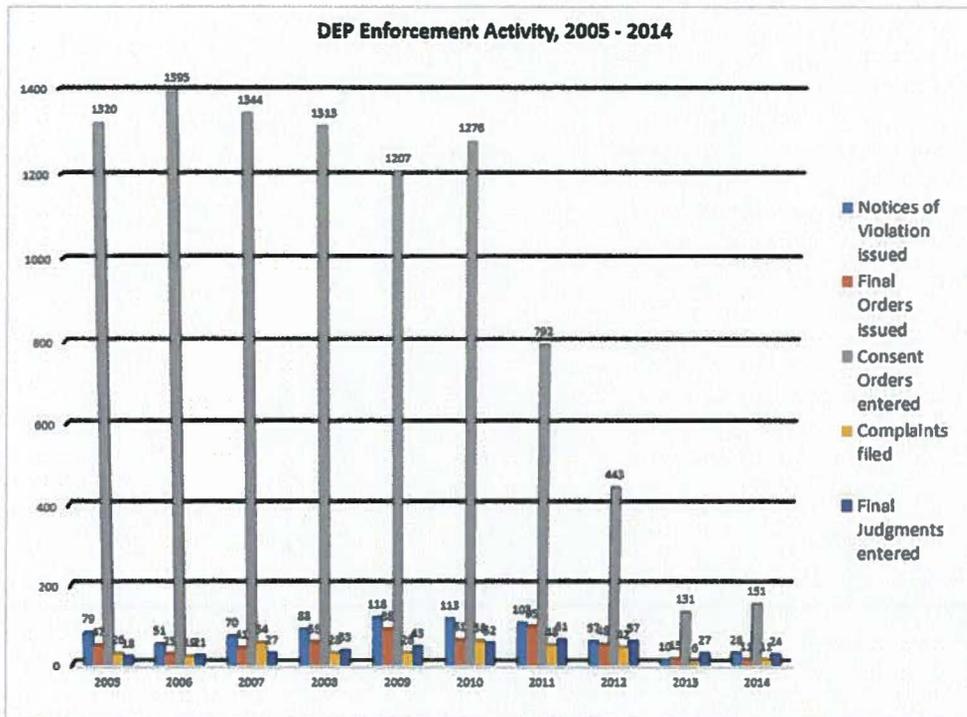
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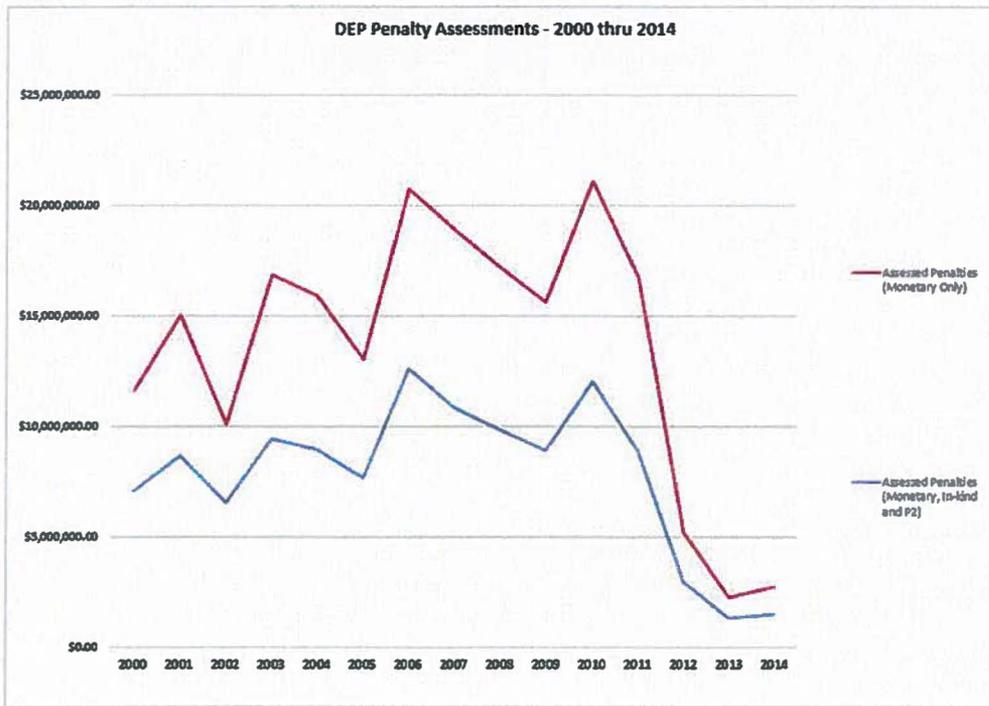
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2014

Complaints filed	3
Final Judgments entered	7
Final Orders issued	2
Notices of Violation issued	11
Consent Orders entered	101

