

## NMSA ANNUAL MEETING

### Meeting Minutes

WEFTEC, New Orleans, LA

Morial Convention Center

October 3, 2018

Rm 283-285

10:00 am to Noon

- I. Welcome and Introductions

S. Taylor welcomed attendees and introductions were made around the room. A sign-in sheet is attached.
- II. National Stormwater Program Overview

Paul Davis provided a presentation on current issues with the National Stormwater Program, gleaned from his experience providing stormwater education seminars around the Country. Slides from this presentation are attached for reference.
- III. WEF Stormwater Institute Update

S. Brown gave an update on the WEF Stormwater Institute. Current SWI projects include:

  - Messaging
  - MS4 Awards
  - National Green Infrastructure Program
  - STEPP

More information on each of these projects is available on the WEF Stormwater Institute website.
- IV. WEF Stormwater Committee Update

No report was provided on the WEF Stormwater Committee Activities.
- V. MS4 Survey

S. Brown gave an update on the WEF MS4 Survey. The Survey is the first of its kind and completed to better understand the challenges and needs in the MS4 sector. An Executive Summary of the survey results was distributed and is attached to these notes for reference. The full report is available to members of the SWI.
- VI. USEPA update

EPA staff provided an overview of current projects and emphasis at EPA HQ for stormwater. Some of the current programs and issues include:

- An overview of the Construction stormwater program was provided. An updated Construction General Permit is anticipated in March of 2019. Anticipated changes include modification of the definition of a site 'operator', changes to erosion and sediment control definitions, and clarification of liability when there are multiple operators on a construction site.
- An overview of the Industrial stormwater program was provided. The National Academy of Sciences is reviewing pollution sources from industrial generators. NMSA was a contributor to this study. EPA will review the NAS study when it is completed in early 2019 and incorporate the findings into the MSGP due out in 2020.
- In the next few weeks, EPA will issue a compendium report on transportation stormwater for Departments of Transportation (DOTs) and elements of DOT permits from around the Country. This will be an advisory report.
- EPA continues to work on its Long-Term Stormwater Planning Pilot Projects. The projects demonstrate how to integrate all types of water (domestic and waste) into stormwater programs. There are currently four pilot cities in the program.
- There are currently significant resources going to permit litigation and settlement. Prominent among these is the Massachusetts Permit.
- Residual Designation Authority (RDA). Petitioners to the EPA want additional Commercial and Industrial properties designated under the MSGP. EPA does not agree this is necessary, but will be required to make changes in California, and currently this issue is under review in Baltimore. In California, many additional properties may need to be permitted. EPA has up to 90 days to consider an appeal of this decision.
- Open discussion included permit term length, how the decision in the Massachusetts case will be implemented,

VII. Report Out: Activities from Year, Activities for 2018

R. Neprash reported on NMSA activities for 2018. The following were noted:

- NMSA published the 'State of Stormwater'
- NMSA is pursuing a stormwater category on the ASCE Infrastructure Report Card
- NMSA, in association with WEF, created an 'ask' document that was circulated at Water Week, resulting in an addition of a Task Force to study MS4 funding the 2018 WRDA bill.
- NMSA was successful in securing a grant from the Chesapeake Bay Trust in the amount of \$100,000

VIII. NMSA Planned Activities for 2019

S. Taylor discussed the planned activities for 2019. These include:

- USEPA Grant. NMSA will be working over the next year to implement a USEPA grant for stormwater program outreach, public private partnerships, and PAHs in pond sediments
- State of Stormwater Report. NMSA will be publishing its second annual State of Stormwater Report in June, 2019
- NMSA will be pursuing placing stormwater as a category on the ASCE National



#### Infrastructure Report Card

- NMSA prepared a guide for Water Week in 2018 to serve as talking points for members that visit their congressional representatives. This guide will be updated (termed the 'Ask' document) for 2019.
- NMSA will be hosting a web archive of information on bacteria and bacterial TMDLs for MS4s on its website.

#### IX. Legal Update

R. Baron of Best, Best and Krieger, an NMSA Affiliate Member, gave a legal update on issues of national importance for the membership. A copy of the slides from this presentation are attached to these notes for information.

The meeting was adjourned at 12:05 pm, CDT

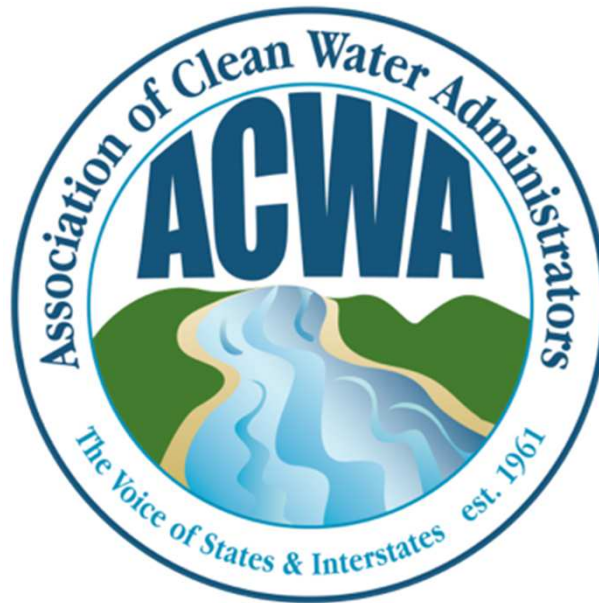
# The Status of the Nation's MS4 Programs



Paul Davis, PE  
National Stormwater Center  
NMSA Annual Meeting  
WEFTEC, New Orleans, LA  
October 3, 2018

# ACWA Alums Report The Status Of MS4 Programs

Marcia Willhite and Paul Davis



# Marcia Willhite

**Illinois EPA** – Chief, Bureau of Water for 15 years.  
Administered CWA, SDWA, groundwater protection and SRF programs

**ACWA** - Board Member, President 2006-07, CAFO  
Committee Co-Chair, Liaison to Quicksilver Caucus,  
Nutrient Policy Committee Co-Chair, Environmental  
Statesman Award

**National Stormwater Center** – Instructor 2016-2018,  
approximately 20 classes in Regions 1, 2, 3, 4, 5, 7

# Paul Davis

**Tennessee Department of Environment & Conservation** – Director, Division of Water Pollution Control for 24 years

**ACWA** – Exec. Committee, Treasurer, Permit & Compliance Task Force Co-Chair, Outstanding Musical Service Award, Environmental Statesman Award, Facilitator, ACWA FY2018-FY2022 Strategic Plan

**National Stormwater Center** – Instructor 2012-2018, approximately 100 classes in Regions 1, 3, 4, 5, 6, 7


# National Stormwater Center Two-Day Classes

- Clean Water Act, NPDES, Stormwater Rules
- MS4 Program and State MS4 Permit
- Overview of Minimum Control Measures
- Stormwater Control Measures – Basics, O&M, Inspection
- Enforcement
- MS4 Program Management
- Safety



**We now know the stormwater program and how it's being implemented in a whole different way than when we were state water directors.**

**In April, 2018, we reported to ACWA what we've learned from classes with hundreds of MS4 people - mayors, police chiefs, public works directors, stormwater program coordinators, codes officers, engineers, inspectors, equipment operators... And we've had consultants, industrial stormwater managers, state agency staff, advocacy groups...**



Urban Stormwater Management in the United States

Committee on Reducing Stormwater Discharge Contributions to Water Pollution, National Research Council

ISBN  
978-0-309-12539-0

610 pages  
6 x 9  
PAPERBACK (2009)

**Evolution of Stormwater Permitting and Program Implementation Approaches**

Workshop Report and Recommendations for Program Improvement

Report Date: May 17, 2018

*Prepared for:*  
U.S. Environmental Protection Agency  
Region 9  
75 Hawthorne Street  
San Francisco, CA 94105

*Prepared by:*  
PG Environmental  
14555 Avion Parkway, Suite 200  
Chantilly, VA 20151

*EPA Contract No. EP-R9-16-02*



wef Stormwater Institute

Rainfall to Results  
THE FUTURE OF STORMWATER

Water Environment Federation



nmsa

2018 STATE OF  
storm  
water  
report

**Stormwater, Its Time to Grow Up—**  
Ten Emerging Stormwater Management Best Practices




**Andy Reese, P.E., LEED AP**  
Vice President  
AMEC Foster Wheeler

- Recent Stormwater Program Reviews
- NRC - 2009
  - WEF – 2015
  - Reese – 2016
  - EPA R9 – 2018
  - NMSA - 2018



“increasing source... growing problem”

# Why Stormwater ?

Stormwater runoff is the only major source of water pollution that is increasing in many parts of the United States. Smart solutions, policies, and investments are needed to tackle this growing problem.

**Where we've addressed the same subjects, like importance of public participation, we generally agree with what others have said.**

**Most of what we presented was not brought out in those reports.**

**And it shouldn't come as a surprise...**

# **1 - We've found that MS4s have good people and programs are generally making progress**

- **Lots of stormwater staff have relevant education, training, experience**
- **Committed to safe, clean water**
- **Overall, programs are maturing and making progress**



## **2 – MS4 staff are frustrated**

- **Management doesn't appreciate program requirements, programs are under-resourced.**
- **Stormwater is often only one of their assignments**
- **MS4 staff may get little or no engineering support and they're intimidated by PEs**
- **The stormwater program is often spread among departments; management not coordinated; authorities fragmented**
- **MS4 staff want explicit permit requirements - unless it's in the permit they can't do it**



### **3 – ~~Enforcement~~ MS4 / State**

- **Some MS4 staff don't understand or have never read their permits or their ordinances**
- **Many MS4s simply do not enforce their ordinances**
- **They're not finding or eliminating illicit discharges**
- **They can't keep up with construction**
- **They're not requiring post-construction controls or long term maintenance agreements; few programs verify maintenance**





- **Often they know what should be done but are afraid of local politics**
- **P2/Good Housekeeping programs range in effectiveness; overall not so good. Stormwater staff reluctant to criticize or correct co-workers**
- **When there is state or EPA enforcement presence, MS4s are much more likely/able to meet permit requirements**

## **Enforcement sets the standard!**



## **4 – MS4s don't coordinate as well as they should with each other, public, states and EPA**

- **Public perceived, perhaps correctly, as not caring about stormwater programs unless concerned about their own property**  
**Public education programs are often not targeted to POCs**
- **Big range in public participation programs – some good, others dormant**
- **Many annual reports are anemic, underreport accomplishments, not useful to MS4, state, or public, often hard to find or not filed at all**



- **MS4s often don't communicate with neighbor MS4s**
- **Stormwater associations can be useful but only some states have them**
- **MS4 staff don't know their state or federal partners - many MS4 staff don't know a single state environment agency person**
- **MS4s don't respect the state audit process**



# 6 Minimum Success Factors

- Energetic and informed public participation/oversight
- Local government commitment to clean water
- Program organization and funding
- Technical support
- State agency involvement - regular communication,  
program audits, enforcement – in that order
- MS4 association - and NMSA!





Thanks NMSA and MS4s for all  
you're doing to restore and  
maintain our nation's waters!

[pedh20@gmail.com](mailto:pedh20@gmail.com)



# Nationwide Water Quality Legal Update: In 15 Minutes or Less

National Municipal Stormwater Alliance  
Annual Meeting, Oct. 3, 2018  
Ryan M. F. Baron, Of Counsel



Best Best & Krieger



Company/BestBestKrieger



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ATTORNEYS AT LAW

## Waters of the United States

- 1982 – EPA and ACOE regulation excluded waters that are themselves wetlands
- 2006 – *Rapanos* (one plurality, two concurring, two dissenting)
  - Justice Scalia – navigable water is navigable in fact. Relatively permanent, moving, standing, flowing waters. Surface connection requirement
  - Justice Kennedy – navigable water is a water navigable in fact or a water or wetland that has a significant nexus to a waters that are or were navigable in fact or that could be reasonably made so.
    - Does it affect significantly affect the chemical, physical or biological integrity of a traditional navigable water
- 2015 – WOTUS rule includes seasonal streams, wetlands and tributaries



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## WOTUS Timeline

- August 2015 – North Dakota district court issued stay in 13 states (Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota and Wyoming).
- EPA announces that it will enforce rule in states that didn't challenge injunction.
- Oct. 2015 – 6<sup>th</sup> Circuit Court of Appeals held that it had original jurisdiction and issued nationwide stay of the rule
- Feb 2017 – Executive Order directing EPA to rescind and revise rule
- Jan. 2018 – U.S. Supreme Court held circuit courts do not have original jurisdiction



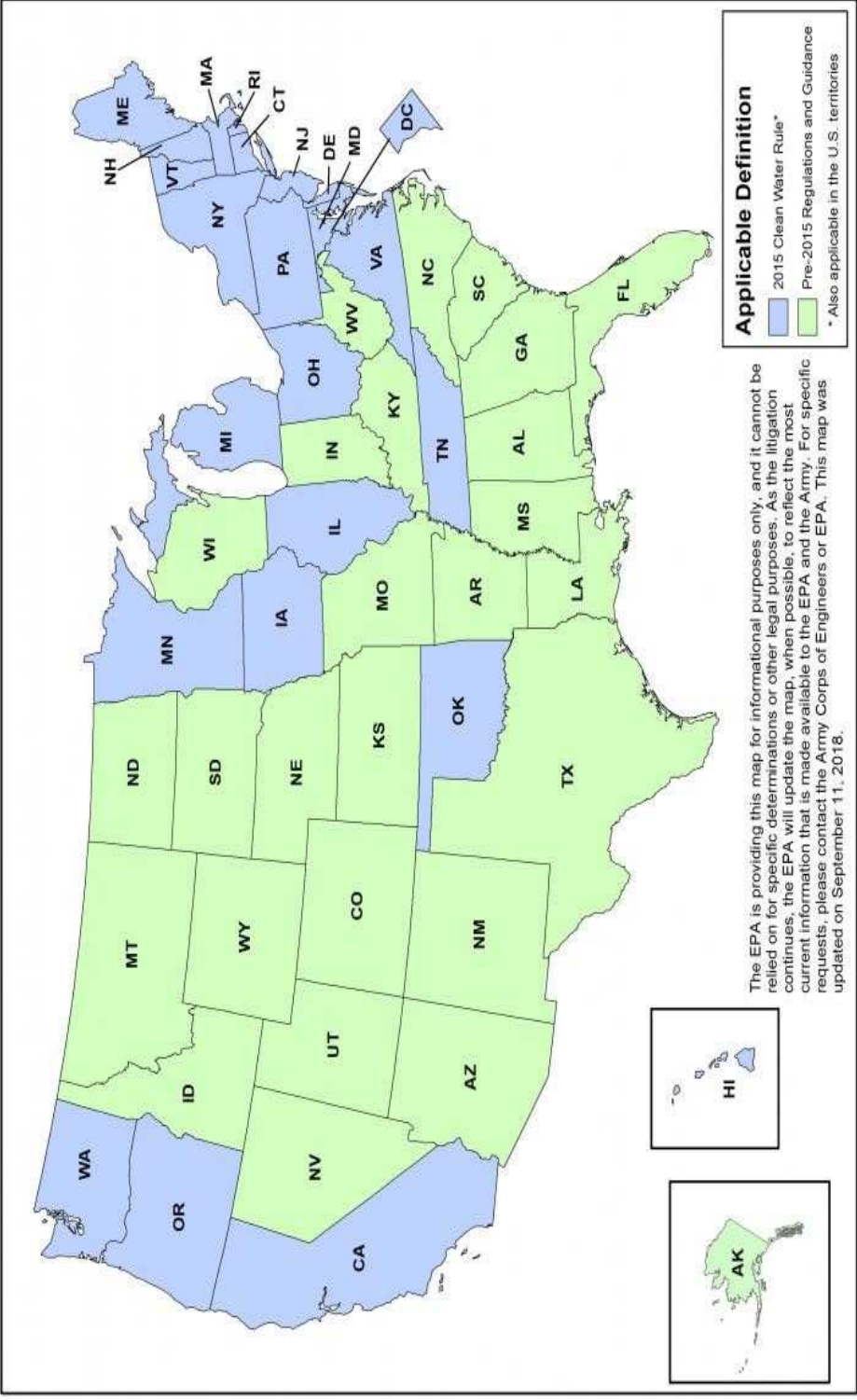


## WOTUS Timeline

- Feb 2018 – 6<sup>th</sup> Circuit lifts stay and dismisses actions
- Feb 2018 – Federal Register delay of 2015 rule to 2020 and reinstatement of 1980s rule
- NGOs bring lawsuit in US District Court South Carolina = suspension rule violates APA
- Aug. 2018 – District court holds that suspension rule did not allow comment on the 1980s regulation or the 2015 rule; only whether the 2020 date was appropriate and should be shorter or longer. Violated notice and comment provisions of federal Administrative Procedure Act
- Sept. 2018 – Texas district court blocks rule in TX, LA and MS. Previous orders by GA court.



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## WOTUS Implications on MS4s

- One effect of WOTUS is types of facilities that fall under federal jurisdiction
- 2015 Rule Adopts Justice Kennedy’s “significant nexus” test from *Rapanos* decision
- Exemption for facilities constructed in dry land
- “Tributaries” or “adjacent waters”, as defined (“covered adjacent waters”), have a significant nexus to downstream traditional navigable waters, interstate waters, and the territorial seas and therefore are “waters of the United States.”



## WOTUS Implications for MS4s

- Ditches
- Exempted – Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land
- ACOE designation of ditches as WOTUS (10 year storm)
- California designating manmade flood control channels as WOTUS
- Raises significant legal issues
  - Is there a “discharge” from a “point source?”
  - Does the channel assume the beneficial uses of the receiving water?
  - Do numeric receiving water limits apply?
- Justice Scalia – man-made ditches and channels are not WOTUS; only natural waterbodies





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## “Point Sources” – Indirect Hydrological Connections

- *Hawaii Wildlife Fund v. County of Maui* (9<sup>th</sup> Cir 2018) – County liable for point source discharges when the pollutants were fairly traceable to the point source to a navigable water such that the discharge was the functional equivalent of a discharge to navigable waters and was more than *de minimis*
- Wastewater wells conveyed pollutants through underground lava channels to protected reefs. Tracer study confirmed discharges. County argued CWA defined point source as direct discharge to receiving water



## “Point Sources” – Indirect Hydrological Connections

- *Upstate Forever and Savannah Riverkeeper v. KMEP* (4<sup>th</sup> Cir. 2018)
- Pipeline released 369,000 gallons of gasoline. Pipeline repaired and 200,000 gallons recovered. 169,000 unrecovered.
- Indirect discharge to groundwater that reached two creeks and adjacent wetlands
- Court majority reviewed cases on indirect discharges and Scalia’s opinion that “discharge” is an addition of any pollutant to navigable waters
- Point source has to be the starting point for the discharge, no direct discharge
- Must be direct hydrological connection to surface water through groundwater
- Continuous so long as pollutants that originated for the point source continue to reach navigable waters
- Dissent argued that pipeline had been repaired and no continuous or ongoing discharge



## CWA Citizen Suits – Brodsky & Smith

- Law firm has filed 158 notices of violation (NOVs) since 2016
- \$700,000 in attorney's fees since 2016, e.g., citizen awarded \$5,000; law firm \$40,000
- U.S. DOJ has objected to 3 consent decrees
- Same plaintiffs, same addresses, payments direct to plaintiffs, no environmental remediation
- “The United States has not identified any firm, solo practitioner, or organization having filed a similar volume of citizen suit actions in a similar timeframe over the 41-year history of CWA citizen suit litigation.”



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## Clean Water Act Citizen Suits

### *Conservation Law Foundation v Pruitt (1<sup>st</sup> Cir. 2018)*

- EPA did not have to order private property owners to obtain individual NPDES permits when the agency promulgates a new TMDL.
- NGO targeting impervious surface by landowners, mall owners, parking lots, multi-family residential
- “It contends that duties established by EPA regulations rather than statutory mandates may not be enforced in a citizen suit; that a duty without a deadline is not mandatory; and that its approval of the TMDLs is not a decision that an individual permit is required within the meaning of 40 C.F.R. § 124.52(b)”
- Translation: EPA can fashion aggregated WLAs and LAs without naming specific dischargers = can do so at a later date. Has discretionary authority
- Proper procedure is for NGO to file petition for EPA to exercise its residual designation authority



## Clean Water Act Citizen Suits

### *Los Angeles Waterkeeper v. Pruitt* (District Court Central CA)

- 2013 – NGOs file petitions in EPA Regions 1, 3 and 9 seeking designation of commercial, industrial and institutional sites (CII)
- Regions 3 and 9 denied petitions; Region 1 did nothing
- 2015 – NGOs file petition in Region 9
- Region 9 determines that CII sites contributing pollutants but LA MS4 program adequately addressing concerns
- Residual designation authority
  - NPDES permit can be required if discharge “contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.” 33 U.S.C. § 1342(p)(2)
- Court – EPA must either require NPDES or permit or prohibit discharge. Could not leave sources unregulated.
- Could force MS4s to sweep in shopping malls, parking lots, warehouses, etc.



## MS4s & Homelessness

- CA regional water boards issuing orders to MS4s to clear out homeless populations in WOTUS
- Non-stormwater trash issues
- Bacteria TMDLs
- Raises legal issues whether MS4s have WOTUS obligation; CWA regulates discharges into and from the MS4
- Competing interests – ACLU lawsuit threats over municipal enforcement of trespassing and encampment ordinances



## Homelessness in Santa Ana River (WOTUS)



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## Questions?

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# Sign up sheet

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