

# STORMWATER PERMITTING AND ENFORCEMENT: CURRENT DEVELOPMENTS

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## Construction Stormwater

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8:00 AM - 9:00 AM

Minnesota State Bar Association, 600 Nicollet Mall, Suite  
380, Minneapolis, MN 55402

# When does a construction project need a permit?



- Land disturbing activity  $>1$  acre
- Land disturbing activity  $<1$  acre but part of a larger common plan of development or sale with disturbance  $\geq 5$  acres
  - ie. single family home construction

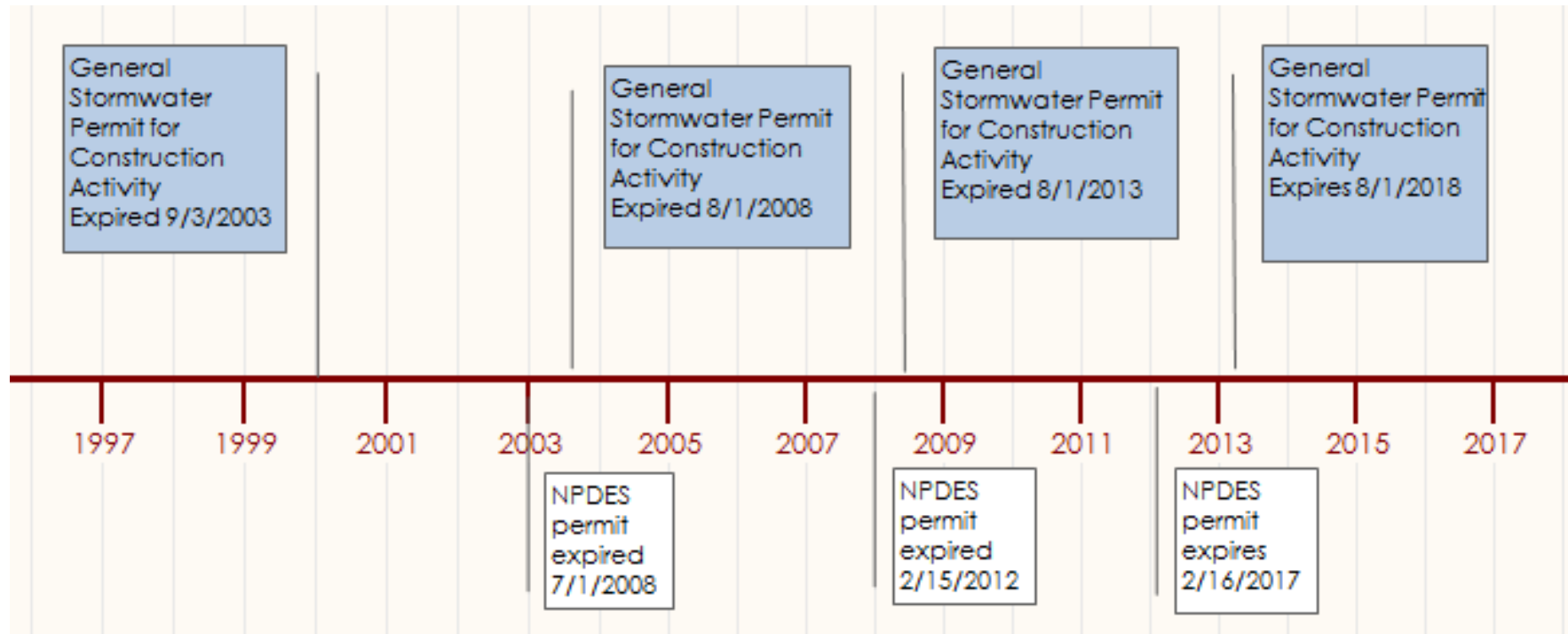
# General NPDES Permit


- Authorization to Discharge Stormwater Associated with Construction Activities
- Online Application in MN

# Brief History – USEPA & MPCA

 1972 - Clean Water Act

 1987 – Stormwater Amendments Water Quality Act



 Disturbing one acre or less

# Enforcement Penalties

## Mn/DOT (2007 & 2008)

- \$84,775 Penalties
- (2) Stormwater
- (1) Water Quality



## Wal-Mart

2001 - \$1.0 million

- Comprehensive Environmental Management Plan ~ \$4.5 million

2004 - \$3.1 million

- Supplemental Environmental Projects ~ \$0.25 million

2007 - \$24,000

- Land Preservation ~ \$98,000

Four of the Nations Largest Homebuilders

2008 - \$4.3 million

# Federal Developments

- 2002 – EPA issued a proposed “Standards for the Construction and Development Point Source Category,” 74 Fed. Reg. 62,996 (“C&D Rule”)
- 2003 – EPA issued Construction General Permit
- 2004 – EPA withdrew the C&D Rule proposal
- 2008 – EPA issued Construction General Permit
- December 2009 – EPA issued final C&D rule
  - Conduct sampling of discharges and comply with a numeric limitation for turbidity of 280 NTU (nephelometric turbidity units)
  - Beginning August 1, 2011
    - Sites that disturb 20 or more acres of land at one time
  - Beginning February 2, 2014
    - Sites that disturb 10 or more acres of land at one time
- July 8, 2010 – Petitioners filed their opening briefs in the C&D Litigation

# Nephelometric Turbidity Units (NTU)



280

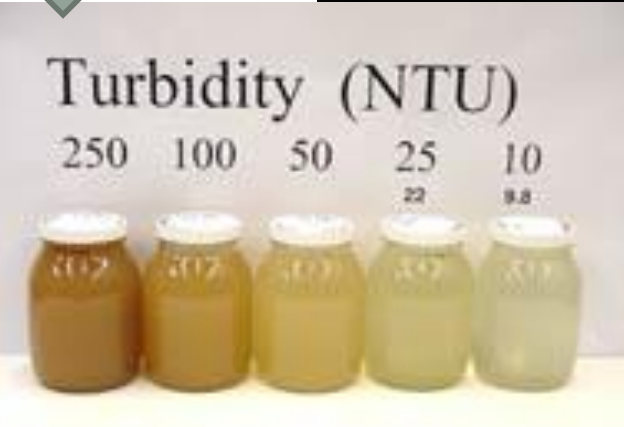
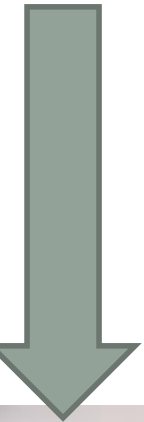


Image source: Construction EcoServices website  
<http://hosted.verticalresponse.com/>

280

Image source: NCSU Water Quality Group website  
<http://www.water.ncsu.edu/watershedss/info/turbid.html>

# Federal Developments

- 🌐 January 4, 2011 – EPA stayed the numeric limitation of 280 NTU
- 🌐 January 3, 2012 – EPA published a Federal Register notice requesting additional data on the performance of technologies in controlling turbidity in stormwater discharges from construction sites
- 🌐 February 16, 2012 – EPA issued Construction General Permit
- 🌐 December 10, 2012 – EPA reached agreement with Wisconsin Builders Association, the National Association of Home Builders, and the Utility Water Act Group to settle litigation
  - 🌐 by April 15, 2013,
    - 🌐 amend several of the non-numeric/BMP requirements
    - 🌐 withdraw the numeric limitation for turbidity
  - 🌐 accept public comment on this proposed action
  - 🌐 by February 28, 2014, take final action on the proposed rule
- 🌐 April 1, 2013 – EPA published Proposed Rules
  - 🌐 May 31, 2013 – Public comment period ended.



# 1<sup>st</sup> Criminal Case

- OR. West Valley Highway (10/2006)
- failed to maintain site BMPs
- two major landslides (2010 & 2011)
- pollutants to the wetlands, streams, and rivers that comprise watersheds feeding into Puget Sound
- 4/12/12, Stowe Construction and Bryan Stowe pled guilty
- 9/28/12, Stowe Construction \$350,000 in criminal fines and civil penalties
- 10/10/12, Brian Stowe was sentenced to
  - 6 months incarceration
  - 12 months supervised release
  - pay a \$300,000 federal fine
  - Make a \$100,000 payment to the National Fish and Wildlife Foundation



Image source: PaintSquare website  
<http://www.paintsquare.com/news/>

# Categories of Violations

- Failure to apply for permit coverage
- Failure to prepare a Storm Water Pollution Prevention Plan (SWPPP)
- Inadequate SWPPP
- **Failure to implement Best Management Practices (BMPs)**
- **Failure to maintain BMPs**
- Failure to conduct or document inspections

Source: <http://www.epa.gov/compliance/assistance/postinspection/construction/enforcementsw.html>

# Factors EPA Considers in the Selection of Enforcement Response

- Whether there is an isolated or infrequent violation
- Frequent or repeat violations
- Other types of noncompliance involved
- Degree of impact to the environment

Source: <http://www.epa.gov/compliance/assistance/postinspection/construction/enforcementsw.html>

# Possible Enforcement Response

- Letter of Warning
- Letter of Violation
- Notice of Violation (NOV)
- Expedited Settlement Offer (ESO)
- Administrative Order (AO)
- Administrative Penalty Order (APO)
- A Civil Action
  - Fine
  - Press Release

Source: <http://www.epa.gov/compliance/assistance/postinspection/construction/enforcementsw.html>

# What is a SWPPP and when does a project need one?

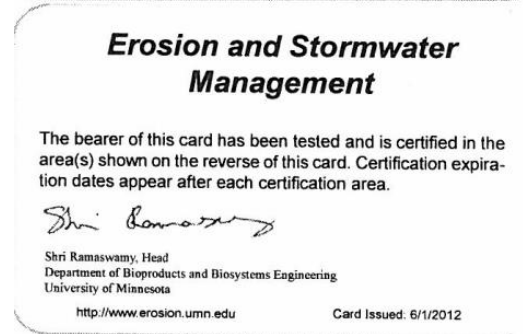
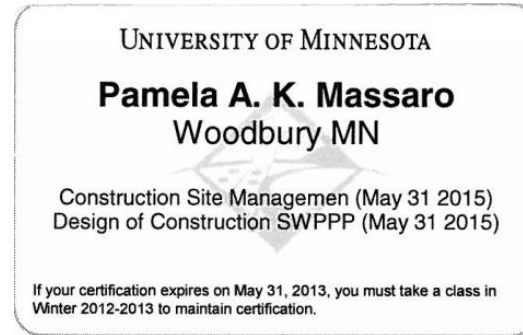


- Stormwater Pollution Prevention Plan
- The OWNER must develop a SWPPP prior to submitting an NPDES permit application and prior to conducting any construction activity.
- **THAT MEANS ANY PROJECT THAT NEEDS A PERMIT, NEEDS A SWPPP!!**

# Who develops a SWPPP?

- **The OWNER**
- Individual preparing the SWPPP must be trained
  - Commensurate with regard to activities covered under the permit for the project.

Having a P.E. does not automatically qualify as “trained”.



U of M Erosion Control  
Program Design of  
SWPPP certification

# BMP – Inlet Protection Examples

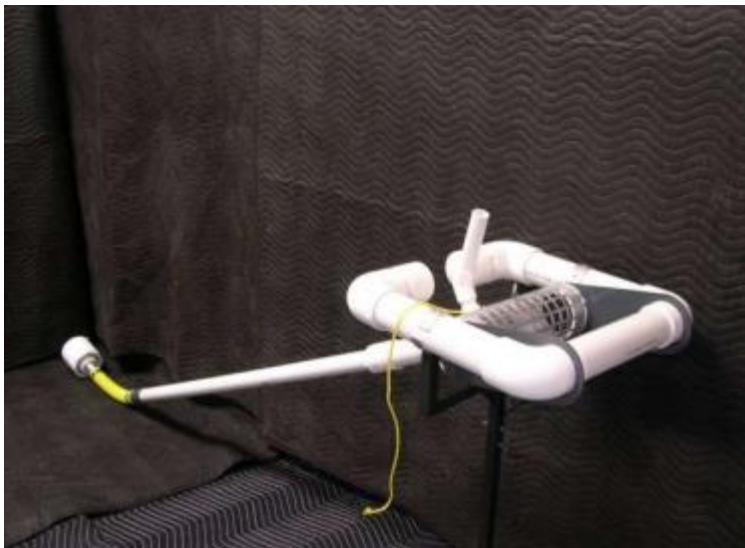


# BMPs





# Structural BMP's – Stormwater Pond



Source: Ohio EPA



Source: MPCA

# Possible Causes for Compliance Issues

## Regulator Expectations & Efforts Increasing

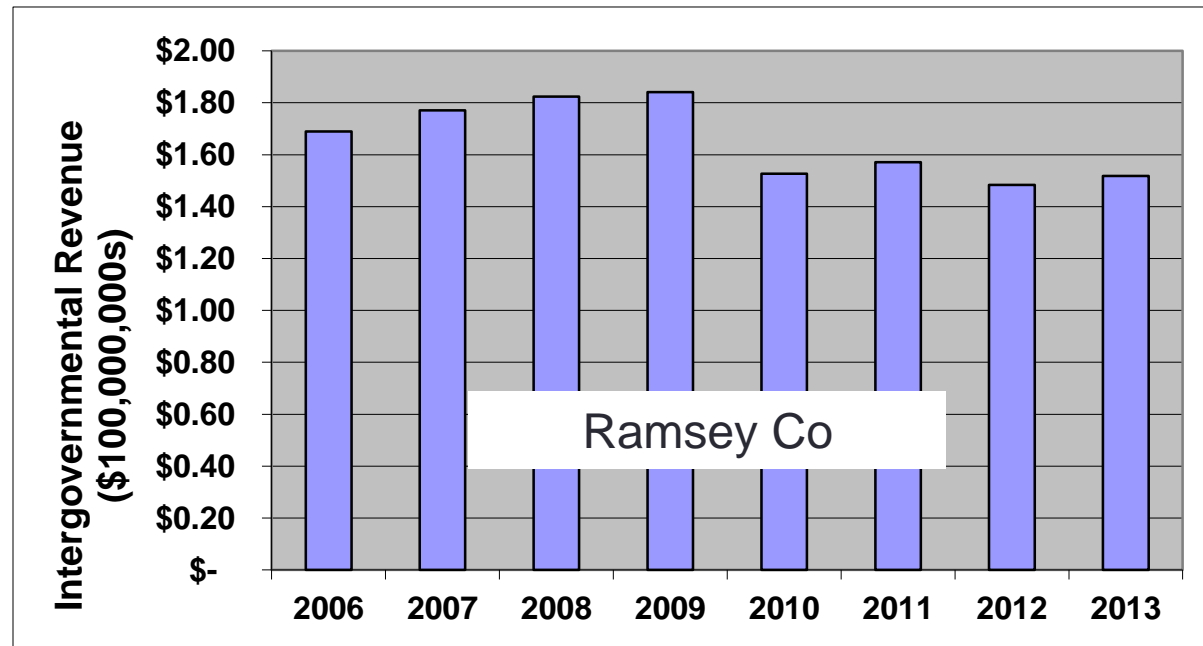
Federal & State is Increasing

NPDES Joint Powers Agreement Funding

- County Level (statewide)
- Watershed Level (statewide)

Increasing:

- # of inspectors
- # of site visits
  - Per site
  - Per week



# Possible Causes for Compliance Issues



## Contractors

- Lack of monetary incentives for maintaining stormwater controls
- Lagging in Qualifications and Resources to meet Regulators expectations

## Contract Managers

- Don't always have budget or contractual means to execute stormwater control corrections, day to day.



## Design Engineers

- Inadequately providing groundwater dewatering criteria & methodology in contract documents.
- Inadequate SWPPP (or not updated)

# Changes to 2013 Permit (MPCA)

- Control flow rates and volumes
- Route flow around disturbed areas
- Direct flow to vegetated areas, use velocity devices
- Minimize disturbances to 3:1 slopes or steeper
- Stabilize soils immediately, no later than end of next working day (14 days no disturbances)
- Minimize soil compaction and preserve topsoil
- Temporary sediment basins outlet structure must be designed to withdraw water from the surface (pond skimmer)
- Maintain a 50-foot natural buffer or use redundant sediment controls near surface waters

# Changes to 2013 Permit (MPCA)

- SWPPP must identify all potential pollution generating activity locations, such as chemical storage, washout activities, fueling areas, etc.
- All liquid and solid wastes generated by washout operations (concrete, stucco, form release oils, curing compounds and others) at the site must be contained for treatment or proper disposal
- The SWPPP must have a fueling operation plan and emergency spill plan

# Changes to 2013 Permit (MPCA)

- 1 inch of stormwater runoff from new impervious will be held on site via infiltration, harvesting or reuse, unless prohibited
- All permit applications are submitted electronically with permit coverage provided within 7 days
- Trained individuals attend refresher training every 3 years.
- Filter backwash waters are properly disposed of, returned to the beginning of the treatment process, disposed of in a sanitary sewer or incorporated back into the site.
- Soils within 200 feet of a public water are stabilized within 24 hours during fish spawning times.
- The permit will allow projects located in an NPDES-permitted MS4 community to follow the current MS4 permit permanent treatment requirements.

# Aquatic Invasive Species

- All equipment in contact with designated infested waters must be treated to kill invasive species present in those waters prior to re-use on another waterbody or transporting on public roads.
- Incorporate into SWPPP
  - One or more killing technique for the identified species is required
  - DNR Infested Waters Permit



Applies to:  
Machinery  
Pumps & pipes  
Boats & Barges  
Sheetpile, Silt curtain  
Temporary fill

# Other Items of Note

- Terrestrial Invasive Species
  - Can work in areas of infestation, excavated or grading material from areas of known infestation shall not be utilized in other areas
- Emerald Ash Borer
  - Movement of wood restricted in Quarantine Area – Counties:
    - Ramsey
    - Hennepin
    - Houston
    - Winona







New inlet.

Temporary stockpile needs silt fence or other effective sediment controls.



Dispose of concrete waste per MPCA regulations.



Stormtech Infiltration Device



Sediment tracking on pavement.



Hydroseeded - Winterization

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