Overview

- History of Storm Water Enforcement
- Current Trends in EPA Storm Water Enforcement
- State Storm Water Enforcement
- Citizen Storm Water Enforcement
- Mitigating Enforcement Risk
History of EPA Storm Water Enforcement

**EPA Storm Water Enforcement Strategy Memoranda, Priorities and Initiatives**

- 2000: Signaled shift from outreach to enforcement
- 2003: Focus on large big box, residential developers
- 2007: Continued focus on big box, residential, sand and gravel; exploring MS4s, ports, road building, federal facilities
- 2008-10: National Enforcement Priorities
  - Homebuilding construction
  - Big box store construction
  - Ready mix concrete with crushed stone and gravel operations
- 2011-13: National Enforcement Initiatives
  - Keeping Raw Sewage and Contaminated Stormwater Out of Our Nation’s Waters
  - Assuring Energy Extraction Activities Comply with Environmental Laws
- 2014-16: National Enforcement Initiatives
# History of EPA Storm Water Enforcement

## EPA National Enforcement

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History of Storm Water Enforcement: Wal-Mart I (2001)

- 17 construction sites in 4 states
- $1,000,000 penalty
- Key alleged violations:
  - Failure to submit Notice of Intent
  - Failure to implement or maintain BMPs
  - Failure to update SWPPP
  - Failure to sign and certify SWPPP
  - Failure to prepare adequate SWPPP
  - Failure to inspect
  - Failure to maintain site to prevent discharges

- 24 construction sites in 9 states
- $3.1 million penalty, $250,000 SEP
- Key alleged violations:
  - Failure to submit Notice of Intent
  - Failure to implement or maintain BMPs
  - Failure to update SWPPP
  - Failure to sign and certify SWPPP
  - Failure to prepare adequate SWPPP
  - Failure to inspect
  - Failure to maintain site to prevent discharges

Key Consent Decree terms:
- Designate Director of Storm Water Compliance
- Designate trained Construction Managers
- Include Decree in bid packages
- Prepare SWPPP with minimum requirements
- Develop Storm Water Training Program
- Provide annual training seminar
- Notice to EPA of construction sites
- Guidance materials to contractors
- Designate contractor Compliance Officer, Superintendent
- Hold Pre-Construction Meeting, Weekly Meetings
- Daily Inspections, Final Inspection before NOT
- Quarterly review and report by Director of Storm Water Compliance

- 30 construction sites in 28 states
- $1.3 million penalty
- Key alleged violations:
  - Failure to submit Notice of Intent
  - Failure to implement or maintain BMPs
  - Failure to prepare adequate SWPPP
  - Failure to inspect
  - Failure to maintain site to prevent discharges
- Key Consent Decree terms
  - Inspections weekly and after .5 inches rain
  - Monthly CM inspection
  - Increased inspections if NOV, 3 or more GC failures
History of Storm Water Enforcement: Tamarack Resort (2008)

- **800 acres near Cascade Lake in Idaho**
- **$185,000 penalty**
- **Key alleged violations:**
  - Failure to timely submit Notice of Intent
  - Discharging concrete washout to wetland
  - Discharging turbid water to creek, lake
  - Failure to maintain BMPs
  - Failure to update SWPPP
- **Key Consent Decree terms**
  - Restrict winter construction this year
  - Upgrade BMPs for future winter construction

- Based on 16 inspections in 4 states, including Wal-Mart and Home Depot sites
- $300,000 penalty
- Key alleged violations:
  - Failure to timely submit Notice of Intent
  - Failure to install or maintain BMPs
  - Failure to conduct adequate inspections
  - Failure to prepare an adequate SWPPP
  - Failure to prevent sediment discharges

*Key Consent Decree terms*

- Designate Director of Storm Water Compliance, Compliance Officers, Project Superintendents
- Notice to EPA of construction projects
- Prepare SWPPP with minimum requirements
- Preconstruction Meeting, Weekly Meetings
- Daily Inspections
- Quarterly Director of Storm Water Compliance Report to EPA
- Final Site Inspection
History of Storm Water Enforcement: Cooper Land Development (2009)

- Based on inspections at 5 sites in 3 states
- $513,740 penalty
- Key alleged violations:
  - Failure to install and maintain BMPs
History of Storm Water Enforcement: Cooper Land Development (2009)

Key Consent Decree terms

- Designate Site Storm Water Compliance Manager, Company Storm Water Compliance Manager, Contractor Storm Water Supervisors
- Provide List of Sites to EPA
- Prepare site-specific SWPPP containing certain elements
- Temporarily stabilize inactive areas within 14 days
- Schedule clearing, grading to minimize disturbed area
- Criteria for Sediment Basins
- Install Construction Entrances and Exits
- Preconstruction Inspection and Review
- Quarterly Compliance Inspection by Company Storm Water Mgr
- Biannual compliance summary report to EPA
- Storm Water Training Program
History of Storm Water Enforcement:
The Homebuilder Consent Decrees (2008-12)

- **Pulte Homes, Inc. (2008)**
  - 38 inspections, 7 states
  - $877,000 penalty, $608,000 SEP

- **Richmond American Homes (2008)**
  - 21 inspections, 5 states
  - $795,000 penalty

- **KB Home (2008)**
  - 21 inspections, 6 states
  - $1,185,000 penalty

- **Centex Homes (2008)**
  - 26 inspections, 9 states
  - $1,485,000 penalty

- **John Wieland Homes (2009)**
  - 25 inspections, 4 states
  - $350,000 penalty
History of Storm Water Enforcement: The Homebuilder Consent Decrees (2008-12)

- **Beazer Homes USA, Inc. (2010)**
  - 50 inspections, 21 states
  - $925,000 penalty

- **Hovnanian Enterprises, Inc. (2010)**
  - 591 sites, 18 states
  - $1,000,000 penalty

- **Ryland Group (2011)**
  - 278 sites, 14 states
  - $625,000 penalty

- **Toll Brothers, Inc. (2012)**
  - 370 sites, 23 states
  - $741,000 penalty

- **Ivory Homes, Ltd. (2014)**
  - 5 sites, Utah (110 company-wide)
  - $250,000 penalty
History of Storm Water Enforcement: The Homebuilder Consent Decrees (2008-12)

- **Key alleged violations:**
  - Failure to timely submit Notice of Intent
  - Failure to install, maintain and properly design BMPs
  - Failure to prepare adequate SWPPP
  - Failure to conduct inspections

- **Key Consent Decree terms**
  - Designate Site Storm Water Rep, Division Compliance Executive, and National Storm Water Compliance Rep
  - Provide List of Projects and Sites
  - Develop site-specific SWPPP using criteria/guidance/template
  - Conduct Storm Water Pre-Construction Review
  - Quarterly Division Compliance Executive visits and reporting
  - Storm Water Training Program
  - Storm Water Orientation Program for contractors, consultants

- **Key alleged violations:**
  - Discharging pollutants into waters of the U.S. from its Municipal Separate Storm Sewer System in violation of NPDES permit

- **Key Consent Decree terms**
  - Develop BMP Proposal with suite of generic BMPs, emphasizing “use of all appropriate currently available Green-Infrastructure (‘GI’) and Low-Impact Development techniques (‘LID’)”
  - Implementation of demonstration projects with GI/LID
  - Recommended BMPs, to include GI/LID
  - Develop Construction Site inspection and enforcement program
  - Inspect 90% of all new Construction Sites within first 8 weeks, all sites within 4 days after complaint
  - Storm Water Training Program for BWSC personnel
  - Develop Industrial Facility Stormwater Pollution Prevention Program, including inspection and enforcement
  - Inspect 90% of all Industrial Facilities at least once every 2 years
Current Trends in EPA Storm Water Enforcement

■ 2011-13 National Enforcement Initiatives
  » Focus on MS4?
  » Continued attention to big box, homebuilders, aggregate?
  » New focus on energy extraction, i.e., well pads, ponds?

■ FY2013 EPA Budget
  » $105 million below FY2012 budget
  » $33.5 million increase in enforcement budget
  » 200 special agents after completing 3-yr hiring strategy
  » $36 million to support “Next Generation Compliance”
    » Promoting electronic reporting by facilities
    » Modifying data systems to implement electronic reporting
    » Deploying modern monitoring technology
Current Trends in EPA Storm Water Enforcement

- **2014-16 National Enforcement Initiatives**
  - Continue 2011-13 National Enforcement Initiatives
  - Focus on MS4?
  - Continued attention to big box, homebuilders, aggregate?
  - New focus on energy extraction, i.e., well pads, ponds?

- **FY2014 EPA Budget**
  - $296 million below FY2012 budget
  - $42 million increase in enforcement budget
  - $10.5 million in compliance inspections, enforcement
  - $2.8 million in complex criminal case targeting
  - E-Enterprise Initiative – collection, forms, reporting
  - “Next Generation Compliance”
Current Trends in EPA Storm Water Enforcement

- **Regulating Oil and Gas Storm Water Discharges**
  - 2005 Energy Policy Act Exemption
  - State regulation of oil and gas storm water
    - Colorado
      - CDPHE
        - CGP for sites over 1 acre or common plan
        - Common plan includes sites within .25 miles, connected by roads, pipeline
        - Allows for Field Permit Coverage, Master SWMP
    - COGCC
      - Rule 324A.b. – consultation, compliance
      - 1000 Series Rules – BMPs, Post-Construction Program
      - Policy providing for coordination, referral to CDPHE for enforcement
Current Trends in EPA Storm Water Enforcement

- **Regulating Oil and Gas Storm Water Discharges**
  - State regulation of oil and gas storm water
    - West Virginia
      - DEP, Stormwater Program
        - Oil and Gas CGP
        - Requires SWPPP, Groundwater Protection Plan
        - Employee training, inspection, maintenance
        - Some projects require public notice
      - DEP, Office of Oil and Gas
        - ESC Field Manual – ESCP for all well work permits
        - Very detailed
Current Trends in EPA Storm Water Enforcement

WV ESC Photos
Current Trends in EPA Storm Water Enforcement

WV ESC Photos
Current Trends in EPA Storm Water Enforcement

■ WV ESC Photos
Current Trends in EPA Storm Water Enforcement

- **Oil and Gas Storm Water Enforcement**
  - EPA Region 3 Marcellus Shale Enforcement Initiative
  - 45 Administrative Orders re CWA 404 violations since 2010
  - Numerous CWA 308 Information Requests to Operators, WWTFs
  - WV DEP Oil and Gas Enforcement
    - MarkWest Liberty Midstream Consent Order (Feb. 5, 2013)
      - $306,210 penalty
      - Extremely detailed, 38-page summary of violations, corrective action
    - Focus on unstable slopes, permitting failures
  - Others?
Current Trends in EPA Storm Water Enforcement

- **Requiring Compliance Audits and Environmental Management System Programs by Consent Decree**
  - **BP Products North America Inc. (2012)**
    - Perform Facility Response Plan Audit and Corrective Action
    - Pay stipulated penalties for violations identified
  - **In re Deepwater Horizon (2013)**
    - Develop Performance Plan with internal and external audit program, and EMS
  - **In re New Cingular Wireless PCS, LLC (2013)**
    - Perform compliance audits at 1,300 facilities for CWA/SPCC, and pay stipulated penalties for any violations
  - **Tyson Foods, Inc. (2013)**
    - Performance of Third Party Audit of CAA RMP compliance
Current Trends in EPA Storm Water Enforcement

- **Requiring Compliance Audits and Environmental Management System Programs by Consent Decree**
  - *In the Matter of Wal-Mart Stores, Inc. (2013)*
    - Improve Hazardous Waste Management System
    - Develop EMS
  - *Tesoro Corporation (2013)*
    - Implement System-Wide Compliance Plan and Audit Requirements for CAA Fuels Program Regulations
  - *Safeway Inc. (2013)*
    - Implement Refrigerant Compliance Management System
Current Trends in EPA Storm Water Enforcement: Recent Civil and Administrative Penalties

- **Civil Settlements (2001-14)**
  - Wal-Mart II: $3,350,000 ($3,100,000 penalty, $250,000 SEP)
  - Centex Homes: $1,485,000
  - Pulte Homes, Inc.: $1,485,000 ($877,000 penalty, $608,000 SEP)
  - Home Depot: $1,300,000
  - KB Home: $1,185,000
  - Wal-Mart I: $1,000,000
  - Hovnanian Enterprises, Inc.: $1,000,000
  - Beazer Homes USA, Inc.: $925,000
  - Richmond American Homes: $795,000
  - Toll Brothers: $741,000
  - Ryland Group: $625,000
  - Cooper Land Development: $513,740
  - John Wieland Homes: $350,000
  - Colorado Structures, Inc.: $300,000
  - Peter-Sam Investment Properties, NH: $250,000
  - Ivory Homes, Ltd: $250,000
  - Boston Water and Sewer Commission: $235,000
  - Tamarack Resort, ID: $185,000
Current Trends in EPA Storm Water Enforcement: Recent Civil and Administrative Penalties

- **Significant Administrative Settlements (2007-14)**
  - TXDOT, TX: **$34,375**, plus **$1 million** SEP
  - TLTC Construction Corp.: **$135,000**
  - IDOT, IL: **$100,000**
  - Palmas Lakes: **$100,000**
  - D.R. Horton: **$99,000**, plus **$104,420** SEP
  - Iowa DOT: **$60,000**
  - Earth Builders, Inc., TX: **$39,300**
  - Bethany Lutheran Home, SD: **$34,900**
  - Hunt Building Co., CO: **$39,000**
  - White Oak Development, NC: **$40,000**
  - McCarr Homes, SC: **$40,000**
  - Stone Creek Development, LLC, KS: **$50,687**
  - DRA Properties, MO: **$67,500**
  - LK Properties, MO: **$46,000**
Current Trends in EPA Storm Water Enforcement: Criminal Enforcement

James Pflueger, Pila’a Development, Kaua’i, Hawaii, 2005:

» Unpermitted construction at 378 acre coastal property

» Construction activities included:
  □ 40 foot vertical road cut
  □ Grading a coastal plateau
  □ Creating new access roads to the coast
  □ Placing dirt and rock fill into 3 perennial streams

» “As a result of this unpermitted construction activity, discharges of sediment-laden storm water have flowed to the Pacific Ocean at Pila’a Bay, damaging a beachfront home, the beach and coral reefs.”
Current Trends in EPA Storm Water Enforcement: Criminal Enforcement

James Pflueger, Pila’a Development, Kaua’i, Hawaii, 2005:
Current Trends in EPA Storm Water Enforcement: Criminal Enforcement

James Pflueger, Pila’a Development, Kaua’i, Hawaii, 2005:

Photo 5 - A steep road cut adjacent to the beach created a 40 foot high vertical wall. Runoff from the plateau and road cut flowed through a culvert under the coastal road directly onto Pila’a beach. Photo courtesy of County of Kauai, January 2002.

Photo 3 - Bare graded slope above the shoreline shows slope failure and significant erosion. This area has been cut back and stabilized with grass to prevent further erosion. Photo courtesy of County of Kauai, November 2001.
Current Trends in EPA Storm Water Enforcement: Criminal Enforcement

- James Pflueger, Pila’a Development, Kaua’i, Hawaii, 2005:
  - Pflueger pleaded guilty to 10 state felony counts, ordered to pay $500,000 penalty.
  - Also agreed to pay:
    - $4 million in natural resource damages,
    - $2 million in penalties to EPA and Hawaii,
    - $5.3 million to repair resources,
    - and to perform a Supplemental Environmental Project (SEP) valued at $200,000.
  - Locals estimated it would have cost Pflueger $6,000 to comply.
Current Trends in EPA Storm Water Enforcement: Criminal Enforcement

- Clarksville Bypass Construction Project, Washington, 2006
  - Project Manager and Construction Project Manager indicted under Clean Water Act for:
    - using a hose to pump slurry into a lake, and
    - dumping slurry, construction waste and scrap equipment off a barge into a lake.
Current Trends in EPA Storm Water Enforcement: Criminal Enforcement

 Providence on Peine and Providence Meadows Developments, Wentzville, Missouri, 2007

- Eric Johnson, the owner, operator and permit holder was indicted for violation of storm water construction general permit and bank fraud.

- “On August 11, 2004, inspectors with the Environmental Protection Agency observed numerous permit violations at both Providence sites, including lack of inspections and failure to evaluate, maintain, and implement runoff controls, resulting in off-site migration of a significant amount of sediment and accumulation in Dry Branch Creek.”
Current Trends in EPA Storm Water Enforcement: Criminal Enforcement

- Providence on Peine and Providence Meadows Developments, Wentzville, Missouri, 2007
  - Under Sentencing Guidelines –
    - Base Offense Level of 6,
    - four level increase because “the offense involved a discharge, release or emission of a pollutant into the environment” and
    - four level increase because “the offense involved a discharge in violation of a permit”
    - 3 year, $250,000 maximum sentence
Current Trends in EPA Storm Water Enforcement: Criminal Enforcement

- **Indian Ridge Resort, Inc. and North Shore Investments, Inc., Branson West, Missouri, 2010**
  - Involved clearing, grading, excavating and disturbing 600 acres of land southeast of highway 76 and Highway 13 from August 2006 to June 2009, and storm water violations through August 2011
  - Pleaded guilty to negligently violating the CWA
  - Indian Ridge – 60 mos probation, $215,000 fine
  - North Shore – 60 mos probation, $100,000 fine
Current Trends in EPA Storm Water Enforcement: Criminal Enforcement

- **Stowe Construction, Bryan Stowe, Timothy Michael Barger, Sumner, Washington, 2011**
  - Involved permitted site with alleged failure to install and maintain adequate BMPs to prevent discharges, resulting in discharges to adjacent wetlands and streams.
  - Violations contributed to two major landslides closing the West Valley Highway in 2010 and 2011.
  - Stowe, Barger, Stowe Construction plead guilty to knowingly violating the CWA.
  - Stowe Construction – $350,000 fine
  - Stowe – 6 mos incarceration, 12 mos supervised release, $300,000 fine, $100,000 payment to Nat’l Fish and Wildlife Found.
  - Barger – 12 mos probation
Current Trends in EPA Storm Water Enforcement: Criminal Enforcement

- Chesapeake Appalachia, LLC, Marshall and Wetzel Counties, West Virginia, 2012

  • Plea Agreement – CWA negligent violation, $600,000 penalty, 2 years probation
Current Trends in EPA Storm Water Enforcement: Criminal Enforcement

- **Lyccoming Construction Services, LLC, Leo Williams, Jamestown, NY, 2014**
  - Involved demolition of condemned buildings on either side of Chadakoin River
  - Failure to keep ACM adequately wet – violation of CAA, OSHA
  - Discharge of water used for dust control without permit – violation of CWA
  - Williams – base offense level 6
    - 6 level & 4 level increase
    - negotiated down to base offense level 8
  - Williams – sentenced to 1 year probation, $25,000 penalty
State Storm Water Enforcement

Colorado Storm Water Enforcement Data and Trends

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Penalty Orders

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California

- Storm Water Penalty Actions (2006-14): 21, 25, 32, 19, 55, 14, 10, 23
- Top violations: reporting; inad. BMPs; unauth. disch.; inad. SWPPP
Citizen Storm Water Enforcement

- **1995:** Molokai Chamber of Commerce (D. Haw.)
- **2002:** California Sportfishing (E.D. Cal. 2002)
- **2003:** N.C. Shellfish Growers Assoc. (E.D.N.C.)
- **2004:** River Ravine Rescue, Inc. (D. Minn.)
Citizen Storm Water Enforcement

2005:

- Environmental Conservation Org. (N.D. Tex.)
- Hill v. Behrens (S.D. Tex.)
- Citizens Against Retail Sprawl (W.D.N.Y.)

2007:

- Patterson (W.D.N.Y.)
- Hooker (M.D. Tenn.)
- Defenders of Conewango Creek (W.D. Pa.)

2008:

- Savoy Senior Housing Corp. (W.D. Va.)
Citizen Storm Water Enforcement

- **2010:**
  - New Manchester Resort & Golf, LLC (N.D. Ga.)

- **2011:**
  - Gulf Restoration Network (S.D. Miss.)

- **2012:**
  - Leakey (M.D. Ga.)

- **2013:**
  - Decker (U.S.)
  - Los Angeles County Flood Control District (U.S.)
Citizen Storm Water Enforcement

- **2013:**
  - Woods Knoll, LLC (11th Cir.)
  - Oneida Tribe (7th Cir.)
  - Mrozek (11th Cir.)
  - Flambeau Mining (7th Cir.)
  - Chico Scrap Metal (9th Cir.)
  - Citgo Petroleum (5th Cir.)
  - Ecological Rights Found. (9th Cir.)
  - Osborne (N.D. Ohio)
  - Kendall (N.D. Ga.)
  - Virginia DOT (E.D. Va.)
Mitigating Enforcement Risk

- Documentation
- Recording and correcting field issues
- Importance of rain event inspections
- Baseline conditions, baseline turbidity
- Documenting common plan of development matters
- Early project diligence
  - Careful pre-construction meeting, BMP certification
  - Attention to phasing, sequencing
  - Documentation regarding “waters of the US”
Mitigating Enforcement Risk

**Take Aways from Consent Decree Compliance Programs**

- Establish or participate in a Storm Water Training Program
- Designate qualified individuals for storm water compliance
- Consider an EMS or internal audit program
- Prepare SWPPPs based on guidance and templates
- Insist on qualified individuals at contractors
- Pre-construction meetings, contractor/consultant training
- Consider appropriate inspection frequency
- Protocol for winter BMPs/compliance, and storm preparedness
Mitigating Enforcement Risk

- **Storm Water Audits**
  - Mitigate enforcement, avoid consent decree audit program
  - Audit Program Goals
  - Retaining the Consultant and Preserving Privilege
  - EPA Audit Policy
  - State Audit Policies
Mitigating Enforcement Risk

Environmental Management Systems

- Mitigate enforcement, avoid consent decree obligations
- Formal set of policies and procedures to evaluate, manage and track environmental impacts
- Based on “Plan-Do-Check-Act” model
- Mitigates enforcement risk
- Often requested by EPA in settlement of enforcement actions
- Increasingly helpful in managing new, complex permits
Mitigating Enforcement Risk

- **Negotiating Contractual Storm Water Provisions**
  - Key terms
    - Memorialize site conditions at outset
    - Describe key transition points, permit transfers
    - Allocate compliance responsibilities
    - Define standard for compliance, i.e., EPA CGP, State CGP, company consent decree requirements, company policies
  - Indemnification
  - Liquidated damages
  - Describe compliance for shared BMPs
  - Indemnification for penalties after Deepwater Horizon
Questions?

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