

Emerging Stormwater Permit Legal Issues

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Recent Developments in Stormwater Permit Cases from:

- California
 - Los Angeles County
 - Ventura County
- Oregon
- Washington State
- Maryland
- Texas

Emerging Issues:

- Strict compliance with State WQS based on State law requirements
- Enforceable numeric limits to meet TMDL waste load allocations (WLAs)
- Low Impact Development (LID)

California – Background

- **1999** California SWRCB requires standard WQS compliance language in state permits (WQ 99-05)
- **2001** SWRCB rules in San Diego MS4 permit appeal that federal law does not require strict compliance with WQS, but state can require MS4s to achieve WQS through an iterative BMP approach (WQ 01-15)
- **2005** California Supreme Court holds that “economic considerations” must be taken into account when imposing permit limitations “more stringent than required under federal law” (*City of Burbank v. SWRCB*)

California – Background

- **2006** San Bernardino County permit upheld by state court of appeals, noting that *Burbank* case did not require consideration of economic factors because permit did not exceed MEP (*City of Rancho Cucamonga v. Santa Ana RWQCB*)
- **2006** L.A. County permit upheld by state court of appeals (*County of Los Angeles v. SWRCB*) (trial court cited *San Diego* case, but also found that agency considered both practicability and cost)

California – L.A. County

- **September 14, 2006** Modified Los Angeles County permit requires compliance with bacteria TMDLs for Santa Monica Bay during summer dry weather conditions
 - allows no discharges from MS4s that cause or contribute to exceedances of the geometric mean or SSM bacteria standards in the wave wash of Santa Monica Bay
- **October 16, 2006** County files petition for review with SWRCB
- Petition held in abeyance pending outcome of state court litigation in *City of Arcadia v. SWRCB*; petition reactivated in September 2008

California – L.A. County

- **August 4, 2009** SWRCB issues ORDER WQ 2009-0008, upholding the permit
 - finds that dry weather flows are non-stormwater discharges, therefore not subject to MEP standard
 - states in *dicta* that decision would not necessarily be different even if municipal stormwater flows were involved
 - denies L.A. County motion to supplement the record with evidence that stormwater flows are present in summer dry weather discharges
- **September 10, 2009** County files Petition for Writ of Mandate in state Superior Court
 - seeks an order requiring the SWRCB to set aside the permit and grant a full and fair hearing on the issues

California – Ventura County

- **December 27, 2006** Draft Ventura County permit has numeric “municipal action levels” (MALs) to meet TMDLs for several pollutants
 - running average of 20% exceedances of any MAL creates presumption that MEP is not met
 - affirmative requirement to implement controls to meet MALs
 - major outfalls are “end-of-pipe” compliance points for monitoring and determining compliance with MALs
- Subsequent drafts released on 8/28/07, 4/29/08, 2/24/09 and 4/30/09
- Public Hearing held on May 7, 2009
 - Regional Board staff opposes side Agreement reached by County and City permittees with Heal the Bay and NRDC

California – Ventura County

- **May 8, 2009** Final permit adopted by Regional Board
 - MALs are eliminated
 - LID requirements include 95% runoff capture from new development
 - permit still requires compliance with TMDLs for numerous parameters
 - staff asserts that requirements do not go beyond MEP and that estimated cost (\$7.1 to 10.9 million) is reasonable
- County and co-permittees do not appeal; appeal filed by BIA

Oregon

Round One:

- **1994** Phosphorus TMDL for Tualatin River basin
- **1995** MS4 Permit for Unified Sewerage Agency, ODOT and Washington County issued without numeric limits to meet WQS or TMDL
- **2000** CWA citizen suit filed by Tualatin Riverkeepers against U.S. EPA for failure to veto permit; case dismissed on procedural grounds
- **2001** Case refiled, and dismissed for lack of subject matter jurisdiction
 - EPA decision whether or not to veto state permits is discretionary act

Oregon (cont.)

Round Two:

- **3/8/04** DEQ issues Phase I renewal permits to City of Portland, Multnomah County and others
- Tualatin Riverkeeper et al. challenge renewal permits in Oregon Land Use Board of Appeals (LUBA)
 - issues involve technical consistency with Oregon land use planning goals
 - under Goal 6, permit must show compliance with WQS
- **7/27/04** DEQ issues modified renewal permits after petition for reconsideration granted
- **1/15/08** LUBA dismisses appeal
 - finds that DEQ was not required to make a demonstration of compliance with land use goals for issuance of renewal permits

Oregon (cont.)

Round Three:

- **2006** Riverkeepers file appeal of modified renewal permits in Oregon Circuit Court arguing that
 - state law requires permits to comply with WQS
 - permits must include numeric limits to meet TMDLs
- **5/23/07** Court grants summary judgment to DEQ
- **6/21/07** Riverkeepers appeal to Oregon Court of Appeals; oral argument held on May 11, 2009
 - permits use “benchmark” values, which are not enforceable permit limits, but trigger an adaptive management process to improve existing BMPs

Washington State

- **January 2007** Phase I permits reissued for Seattle, Tacoma and 4 counties; Phase II permits issued for Western Washington (80 cities, 5 counties) and Eastern Washington (20 cities, 8 counties)
- Condition S.4 of the permits states that any discharge that would violate WQS is “prohibited” and that the permit “does not authorize” such discharges, and sets forth the required response to such “violations”
- Condition S.7 states that all permittees “shall be in compliance with the requirements of applicable TMDLs”
- Appeals filed by various environmental groups, 10 Phase I cities and a coalition of 33 Phase II cities

Washington State (cont.)

- **January 2008** Summary Judgment motions filed on the “S.4 Issues,” including whether the permits were invalid because they impose requirements beyond MEP or require compliance with standards that are not required
- NACWA and NAFSMA and filed *amicus* brief arguing that federal law does not require strict compliance with state WQS
- 27 separate briefs filed by the parties
- **April 2, 2008** PCHB issues Order holding that federal law does not require compliance with WQS, but that state law does; state has discretion define the manner of compliance and to use compliance schedules

Washington State (cont.)

- **April 16, 2008** Evidentiary hearing begins on other issues raised by parties
- **August 7, 2008** PCHB issues decisions on S4 conditions:
 - finds that adaptive management process is appropriate “compliance pathway”
 - modified permit language so that permittees are not in violation of WQS if they follow the compliance pathway
 - rejected environmental groups’ contention that 10-year compliance schedule was required
- **August 8, 2008** PCHB decision on Phase I permits:
 - holds that both federal law (MEP) and state law (AKART) require the application of Low Impact Development “where feasible”

Washington State (cont.)

- **September 29, 2009** PCHB issues summary judgment ruling on some Phase II issues
- **October 23-31, 2009** Evidentiary hearing on remaining Phase II issues, including whether the permits should include:
 - Mandatory LID requirements at the site, subdivision and basin planning levels
 - Regulate stormwater runoff from all construction projects, without the one-acre threshold
 - Require retrofitting of existing development with additional stormwater controls
 - Impose mandatory monitoring
 - Expand the permit's coverage to additional urban areas
 - Impose additional requirements for compliance with WQS

Washington State (cont.)

- **February 2, 2009** PCHB issues final order upholding all significant aspects of the permit
 - One-acre threshold for regulating new development was properly defined
 - No additional requirements for existing development
 - No additional monitoring required
 - Coverage area of permit correctly defined
 - Recognized that Phase II small cities and counties have less experience and fewer resources than Phase I permittees, so only a few additional steps were required to “encourage” the use of LID on reasonable and flexible timeframes
 - identify barriers to implementation of LID
 - identify actions to remove those barriers
 - establish goals regarding future use of LID

Washington State (cont.)

- **September 8, 2008** Pacific Soundkeeper Alliance appeals decision to Washington Superior Court
- **January 2009** Settlement reached between PSA and Ecology

Maryland

- **February 18, 2009** Maryland Department of the Environment issues final MS4 permit for Montgomery County
 - uses iterative, adaptive management approach to achieve compliance with TMDL WLA's for:
 - bacteria
 - 52% reduction in Cabin John Creek
 - 99% reduction in Rock Creek
 - phosphorus
 - sediments
 - requires 20% impervious surface area restoration using:
 - ESD and other nonstructural techniques
 - structural stormwater practice retrofitting
 - stream channel restoration
 - requires strategy for trash free Potomac by 2013

Maryland

- **March 18, 2009** Administrative hearing requested by Earthjustice (on behalf of Potomac Riverkeeper, Anacostia Riverkeeper, Waterkeeper Alliance and Friends of the Earth) for:
 - failure to ensure compliance with Maryland WQS
 - failure to contain WQBELs consistent with TMDLs
 - lack of numeric effluent limitations
 - failure to meet public participation requirements
 - failure to restrict discharge of nutrients required by state law
- **June 24, 2009** Appeal dismissed by Maryland Office of Administrative Hearings, based on lack of standing
 - Petitioners had challenged standing of permittee
- **July 29, 2009** Appeal filed in Md. Circuit Court

Texas

- **2003** Citizen suit filed against City of Dallas for noncompliance with MS4 permit
- **February 2004** EPA issues administrative compliance order
- **May 2006** EPA and Texas file enforcement action and consent decree with City
 - Citizens group comments on decree, but does not intervene in EPA enforcement action
- **2007** District Court finds citizen suit barred by *res judicata* (516 F. Supp. 2d 653)
- **May 27, 2008** Fifth Circuit affirms, on alternative ground of mootness (*Environmental Conservation Organization v. City of Dallas*, 529 F. 3d 519)

Texas

- District Court denies environmental group's request for attorneys' fees
- **December 17, 2008** Fifth Circuit affirms denial of attorneys' fees (unpublished opinion)
 - Court finds that citizens group is neither a “prevailing party” nor a “catalyst” in the EPA enforcement action
- Continues split in Circuits over award of attorneys' fees to citizens groups
 - compare *Sierra Club v. Hamilton County Bd. of Comm'rs*, 504 F. 3d 634 (6th Cir. 2007)