

Current Legal Issues in Stormwater Management

David W. Burchmore

Squire, Sanders & Dempsey L.L.P.

4900 Key Tower

Cleveland, OH 44114

Phone: (216) 479-8779

Fax: (216) 479-8780

Email: dburchmore@ssd.com

Presented at the 2010 NAFSMA Annual Meeting
San Diego, California, August 24, 2010

Superfund Liability for MS4 Operators ?

United States v. WSDOT

- WSDOT is MS4 permit holder for state highway system
- Sued by U.S. for cleanup costs related to Superfund site in Commencement Bay
 - claimed that WSDOT “arranged for disposal” of hazardous substances (cadmium, lead, zinc, nickel) by designing, constructing and operating the stormwater drainage systems for I-5, SR 705 and SR 509, whose “sole function was to collect highway runoff and dispose of it into nearby water-bodies”
 - claimed that WSDOT “has the ability to redirect, contain, and treat its contaminated runoff
 - WSDOT argued that runoff was “federally permitted release” and any contamination was caused by third parties over which it had no control

United States v. WSDOT

- Federal District Court found that WSDOT was a “potentially responsible party” under Superfund
 - WSDOT designed the drainage system
 - purpose was to discharge runoff into the environment
 - WSDOT had control over how the runoff was disposed
- Previous cases:
 - *Westfarm Assoc. v. Washington Suburban Sanitary Com’n*, 66 F.2d 669 (4th Cir. 1995)
 - *Fireman’s Fund v. City of Lodi*, 302 F.3d 928 (9th Cir. 2002)
 - *Lincoln Properties v. Higgins*, 853 F. Supp. 1528 (E.D. Cal. 1992)
 - *United States v. Union Corp.*, 277 F. Supp. 2d. 478 (E.D. Pa. 2003)
 - *Castaic Lake Water Agency v. Whittaker Corp.*, 272 F. Supp. 1053 (C.D. Cal. 2003)
 - *Adobe Lumber v. Hellman*, 658 F. Supp. 2d 1188 (E.D. Cal. 2009)

Stormwater Fee Disputes

Federal Facilities

- Cincinnati dispute with NIOSH settled in 2008
 - After protracted litigation (from 1997 through 2008) U.S. agreed to pay portion of past fees and all of current fees going forward
- King County, WA
 - 2006 “Decision” by GAO determined that charge imposed on Forest Service for surface water management program was an unconstitutional tax on the federal government
- Washington DC
 - City instituted Impervious Surface Area (ISA) charge to help pay for CSO program
 - 4/13/10 Letter from GAO concluded that the fee was a “tax”
 - 4/15/10 Letter from DoD concurs and refuses to pay the ISA

Federal Facilities (cont.)

- 5/18/10: Letter from Senator Cardin to CEQ asks whether the Administration supports the use of appropriate fees for stormwater management and asks for support on appropriate legislation
- 6/10/10: Senator Cardin introduces S. 3481, proposing to amend CWA § 313 to state that the “reasonable services charges” which the federal government is required to pay under the CWA include *“reasonable fees or assessments made for the purpose of stormwater management in the same manner and to the same extent as any nongovernmental entity”*
- 7/13/10: Representative Norton introduces companion bill in House (H.R. 5724)

Saint Louis

- 3/1/08: St. Louis MSD instituted new stormwater fee
 - raised \$41.48 million per year
 - 22% of MSD operating budget
- 7/18/08: Resident of subdivision with septic fields for sewage and lakes for stormwater runoff challenged his \$12 monthly fee; became class action
- 7/9/10: State court ruled the fee was a tax needing voter approval under the Missouri constitution
 - MSD admitted that 50% of the services provided were “general benefits” to all district residents”
 - Judge found no direct relationship between impervious surface area and amount of stormwater runoff or services related to that runoff

Continuing the assault on MEP:

WQS compliance

Numeric limits

Compliance with TMDL WLAs

Mandatory LID requirements

Past Cases:

- **Arizona:** Defenders of Wildlife appeals to EAB and Ninth Circuit (1998-1999)
- **Alaska:** Cook Inlet Keeper administrative appeal to EAB (1999)
- **Minnesota:** Mississippi River Revival challenges in state court (2001) and federal court (2002)
- **Texas:** Municipal coalition and environmental group appeals of Phase II permit regulations to Ninth Circuit (*EDC v. EPA*) (2000-2003)
- **North Carolina:** Environmental group appeals of Phase II permits (2005-2007)
- **Washington State:** Multiple appeals of Phase I and Phase II permits (2008-2009)

Recent and Continuing Cases:

- **California:** Municipal and construction industry appeals of San Diego, Los Angeles County, San Bernadino County permits from 2001-2006; 2009 Ventura County permit appealed, remanded and reissued with modifications in July 2010
- **Oregon:** Environmental group challenges to MS4 permits in federal court (2000-2001); Land Use board of Appeals (2004-2008); and state courts (2006-2010); final decision upholds permits (4/28/10)
- **DC:** Environmental group appeals in 2000, 2004, 2006; draft renewal permit issued April 2010; same groups expected to appeal again [*NAFSMA, NACWA and others commented on draft permit*]

Recent and Continuing Cases:

- **Maryland:** Environmental group administrative and state court appeals dismissed in 2009; permit reissued in 2010; new state court appeal is pending
- **EPA Region 1:** Draft MS4 permit for north coastal cities in Massachusetts; comment by Conservation Law Foundation asks for mandatory LID provisions; letter from Senators Kerry and Brown asks for phased approach over longer period of time

Paradigm Shift:

A new federal regulatory
program for MS4s

Background

- **1987** – Clean Water Act § 402(p)
- **1990** – “Phase I” regulations [55 Fed. Reg. 47990; 40 CFR 122.26]
- **1999** – “Phase II” regulations [64 Fed. Reg. 68722; 40 CFR 122.30-37]
- **2008** – NRC Report on “Urban Stormwater Management in the United States”
- **2009** – EPA Request for Stakeholder Input [74 Fed. Reg. 68617]
- **2010** – “Listening Sessions” and Information Collection Requests (ICRs)
- **2012** – *New regulatory focus on LID ?*

Meanwhile . . .

- **March 5, 2007** EPA memo on *“Using Green Infrastructure to Protect Water Quality in Stormwater, CSO, Nonpoint Source and other Water Programs”*
- **April 19, 2007** EPA/NACWA/NRDC/LIDC/ASWIPCA *“Green Infrastructure Statement of Intent”*
 - strategies include “opportunities and incentives” for the use of green infrastructure provisions in MS4 permits”
- **August 16, 2007** EPA memo on *“Use of Green Infrastructure in NPDES Permits and Enforcement”*
 - permits may be structured “to encourage” permittees to utilize green infrastructure approaches, where appropriate, in lieu of or in addition to more traditional controls”
- **2008** EPA (et al.) *“Green Infrastructure Action Strategy”*
 - Objective IV.2: Develop model language for MS4 permits to incorporate green infrastructure management practices

METF:

The new kid on the block

One Hundred Tenth Congress
of the
United States of America

AT THE FIRST SESSION

Began and held at the City of Washington on Thursday,
the fourth day of January, two thousand and seven

An Act

To move the United States toward greater energy independence and security, to increase the production of clean renewable fuels, to protect consumers, to increase the efficiency of products, buildings, and vehicles, to promote research on and deploy greenhouse gas capture and storage options, and to improve the energy performance of the Federal Government, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the “Energy Independence and Security Act of 2007”.

(b) TABLE OF CONTENTS.—The table of contents of this Act is as follows:

- Sec. 1. Short title; table of contents.
- Sec. 2. Definitions.
- Sec. 3. Relationship to other law.

TITLE I—ENERGY SECURITY THROUGH IMPROVED VEHICLE FUEL ECONOMY

Subtitle A—Increased Corporate Average Fuel Economy Standards

- Sec. 101. Short title.
- Sec. 102. Average fuel economy standards for automobiles and certain other vehicles.
- Sec. 103. Definitions.
- Sec. 104. Credit trading program.
- Sec. 105. Consumer information.
- Sec. 106. Continued applicability of existing standards.
- Sec. 107. National Academy of Sciences studies.
- Sec. 108. National Academy of Sciences study of medium-duty and heavy-duty truck fuel economy.
- Sec. 109. Extension of flexible fuel vehicle credit program.
- Sec. 110. Periodic review of accuracy of fuel economy labeling procedures.
- Sec. 111. Consumer tire information.
- Sec. 112. Use of civil penalties for research and development.
- Sec. 113. Exemption from separate calculation requirement.

Subtitle B—Improved Vehicle Technology

- Sec. 131. Transportation electrification.
- Sec. 132. Domestic manufacturing conversion grant program.
- Sec. 133. Inclusion of electric drive in Energy Policy Act of 1992.
- Sec. 134. Loan guarantees for fuel-efficient automobile parts manufacturers.
- Sec. 135. Advanced battery loan guarantee program.
- Sec. 136. Advanced technology vehicles manufacturing incentive program.

Subtitle C—Federal Vehicle Fleets

- Sec. 141. Federal vehicle fleets.
- Sec. 142. Federal fleet conservation requirements.

- **EISA** – The “*Energy Independence and Security Act of 2007*”
- 310 pages of provisions designed “to move the U.S. towards greater energy independence and security”
- Stormwater is mentioned only once – on page 129 of the Act

H. R. 6—3

Sec. 322. Incandescent reflector lamp efficiency standards.
Sec. 323. Public building energy efficient and renewable energy systems.
Sec. 324. Metal halide lamp fixtures.
Sec. 325. Energy efficiency labeling for consumer electronic products.

TITLE IV—ENERGY SAVINGS IN BUILDINGS AND INDUSTRY

Sec. 401. Definitions.

Subtitle A—Residential Building Efficiency

Sec. 411. Reauthorization of weatherization assistance program.
Sec. 412. Study of renewable energy rebate programs.
Sec. 413. Energy code improvements applicable to manufactured housing.

Subtitle B—High-Performance Commercial Buildings

Sec. 421. Commercial high-performance green buildings.
Sec. 422. Zero Net Energy Commercial Buildings Initiative.
Sec. 423. Public outreach.

Subtitle C—High-Performance Federal Buildings

Sec. 431. Energy reduction goals for Federal buildings.
Sec. 432. Management of energy and water efficiency in Federal buildings.
Sec. 433. Federal building energy efficiency performance standards.
Sec. 434. Management of Federal building efficiency.
Sec. 435. Leasing.
Sec. 436. High-performance green Federal buildings.
Sec. 437. Federal green building performance.
Sec. 438. Storm water runoff requirements for Federal development projects.
Sec. 439. Cost-effective technology acceleration program.
Sec. 440. Authorization of appropriations.
Sec. 441. Public building life-cycle costs.

Subtitle D—Industrial Energy Efficiency

Sec. 451. Industrial energy efficiency.
Sec. 452. Energy-intensive industries program.
Sec. 453. Energy efficiency for data center buildings.

Subtitle E—Healthy High-Performance Schools

Sec. 461. Healthy high-performance schools.
Sec. 462. Study on indoor environmental quality in schools.

Subtitle F—Institutional Entities

Sec. 471. Energy sustainability and efficiency grants and loans for institutions.

Subtitle G—Public and Assisted Housing

Sec. 481. Application of International Energy Conservation Code to public and assisted housing.

Subtitle H—General Provisions

Sec. 491. Demonstration project.
Sec. 492. Research and development.
Sec. 493. Environmental Protection Agency demonstration grant program for local governments.
Sec. 494. Green Building Advisory Committee.
Sec. 495. Advisory Committee on Energy Efficiency Finance.

TITLE V—ENERGY SAVINGS IN GOVERNMENT AND PUBLIC INSTITUTIONS

Subtitle A—United States Capitol Complex

Sec. 501. Capitol complex photovoltaic roof feasibility studies.
Sec. 502. Capitol complex E-85 refueling station.
Sec. 503. Energy and environmental measures in Capitol complex master plan.
Sec. 504. Promoting maximum efficiency in operation of Capitol power plant.
Sec. 505. Capitol power plant carbon dioxide emissions feasibility study and demonstration projects.

Subtitle B—Energy Savings Performance Contracting

Sec. 511. Authority to enter into contracts; reports.
Sec. 512. Financing flexibility.
Sec. 513. Promoting long-term energy savings performance contracts and verifying savings.

The context:

- **Title IV** – “Energy Savings in Buildings and Industry”
- **Subtitle C** – “High-Performance Federal Buildings”
- **Sec. 438** – “Stormwater runoff requirements for Federal development projects”

The provision:

- **Title IV** – “Energy Savings in Buildings and Industry”
- **Subtitle C** – “High-Performance Federal Buildings”

SEC. 438. STORM WATER RUNOFF REQUIREMENTS FOR FEDERAL DEVELOPMENT PROJECTS.

The sponsor of any development or redevelopment project involving a Federal facility with a footprint that exceeds 5,000 square feet shall use site planning, design, construction, and maintenance strategies for the property to maintain or restore, to the maximum extent technically feasible, the predevelopment hydrology of the property with regard to the temperature, rate, volume, and duration of flow.

EISA did not amend the CWA

METF ≠ MEP

but . . .



Technical Guidance on Implementing the Stormwater Runoff Requirements for Federal Projects under Section 438 of the Energy Independence and Security Act



- **EPA’s Federal Facilities Guidance – “*Technical Guidance on implementing the Stormwater Runoff Requirements for Federal Projects under Section 438 of the Energy Independence and Security Act*”** (Dec. 2009)
- 63 pages describing green infrastructure/low impact development tools to implement § 438 of the EISA



**Guidance for
Federal Land Management
in the Chesapeake Bay Watershed**



- **Chesapeake Bay Guidance**
– *“Guidance for Federal Land Management in the Chesapeake Bay Watershed”* (March 2010)
- 660 pages of guidance on “the most up-to-date, proven and cost-effective practices for controlling runoff from federal facilities as required by Executive Order 13,508”

Chesapeake Bay Guidance (cont.)

- **Chapter 3** – “Technical Guidance on Controlling Urban Runoff in the Chesapeake Bay”

“From the perspective of land management and water quality restoration/protection, the same set of ‘proven cost-effective tools and practices that reduce water pollution’ are appropriate for both federal and nonfederal land managers to restore and protect the Chesapeake Bay. Therefore, EPA has written this document to be equally applicable to federal and nonfederal land management.”

**Urban Stormwater Approach
for the Mid-Atlantic Region and the Chesapeake Bay Watershed**

July 2010

I. PURPOSE

This document describes an approach for National Pollutant Discharge Elimination System (NPDES) permitting authorities to follow to develop and issue permits and implementing regulations for discharges from municipal separate storm sewer systems (MS4) in the Mid-Atlantic Region and Chesapeake Bay Watershed. This approach aims to consolidate and optimize all of the authorities and tools available to permitting authorities.

The primary purpose of this permitting approach is to clarify for NPDES program managers the expectations for the issuance of MS4 permits that are clear, enforceable and consistent with applicable regulations and will contribute to meeting the water quality objectives of the Clean Water Act (CWA), including relevant wasteload allocations (WLAs). In addition, this permitting approach discusses the application of residual designation authority to extend NPDES authority to additional discharges; elimination of permit backlogs; technical guidance, training and tools to support the stormwater program; and permit compliance activities.

Nothing in this document establishes authorities or requirements beyond those in the Clean Water Act or its implementing regulations. In some cases, provisions specific to the Chesapeake Bay Watershed are included, and those instances are clearly noted. In the event of a conflict between this guidance and statute or regulatory provisions, the statute or regulation governs.

II. PROBLEM

Municipal stormwater discharges are a significant cause of water quality impairment in the mid-Atlantic region and the Chesapeake Bay Watershed and one of the only sources of pollutants with increasing loads to the Bay and its tributaries. As new development creates new impervious surfaces, stormwater discharges and associated pollutant loads increase. Meanwhile, stormwater discharges from many existing sources are not being adequately managed because permits do not set adequate performance objectives and do not include other key provisions. In addition, there are a number of currently unregulated municipal stormwater discharges contributing to pollutant loads; those should be evaluated for possible regulation. Decisions not to regulate these discharges should be reviewed and reconsidered.

III. BACKGROUND

Among the key findings of the 2009 National Research Council (NRC) report, *Urban Stormwater Management in the United States*, is that the stormwater regulatory program is failing to meet the objectives of the Clean Water Act. Recommendations in this report include:

- the need for permits with more specific, measurable, enforceable provisions;

- **Region 3 Permit Guidance (July 2010) – “Urban Stormwater Approach for the Mid-Atlantic Region and the Chesapeake Bay Watershed”**
- Cites the 2009 NRC Report, Executive Order 13508, and the Chesapeake Bay Guidance as support for making “improvements” to the MS4 program without any change in current regulations

Region 3 Guidance (cont.)

- “permits should include ‘post-construction’ performance standards for newly developed and redeveloped sites that provide for preserving and restoring site hydrologic condition as necessary to attain water quality standards in receiving waters”
- “where necessary to ensure that discharges do not cause or contribute to violations of water quality standards, permits should include provisions for retrofitting stormwater management practices at existing sources of stormwater discharges”
- *“Nothing in this document establishes authorities or requirements beyond those in the Clean Water Act or its implementing regulations”*

MS4 Permit Improvement Guide



U.S. ENVIRONMENTAL PROTECTION AGENCY

OFFICE OF WATER

OFFICE OF WASTEWATER MANAGEMENT

WATER PERMITS DIVISION

APRIL 2010

EPA 833-R-10-001

- **MS4 Permit Improvement Guide** – (April 2010)
- Cover letter states that all MS4 permits “should contain a performance standard for post-construction that is based on the objective of maintaining or restoring stable hydrology to protect water quality of receiving waters or another mechanism as effective”

MS4 Permit Improvement Guide (cont.)

- **Chapter 5** – “Post Construction or Permanent/Long-term Stormwater Control Measures”
- **Section 5.8** – “Retrofit Plan”

“It is clear that we cannot protect the nation’s waters without also addressing degradation caused by stormwater from existing developed sites. For that reason stormwater programs must include substantive retrofit provisions.”

111TH CONGRESS
2D SESSION

S. _____

To amend title 23, United States Code, to direct the Secretary to establish a comprehensive program to control and treat polluted stormwater runoff from federally funded highways and roads, and for other purposes.

IN THE SENATE OF THE UNITED STATES

Mr. CARDIN introduced the following bill; which was read twice and referred to the Committee on _____

A BILL

To amend title 23, United States Code, to direct the Secretary to establish a comprehensive program to control and treat polluted stormwater runoff from federally funded highways and roads, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Safe Treatment of Pol-
5 luted Stormwater Runoff Act” or the “STOPS Runoff
6 Act”.

- **“STOPS Runoff” Bill –**
“Safe Treatment of Polluted Runoff Act” (S. 3602)
- Introduced by Sen. Cardin on **July 15, 2010**
- Would require federally-funded highway projects “to maintain or restore, to the maximum extent technically feasible, the predevelopment hydrology of the project site with regard to temperature, rate, chemical composition, volume and duration of flow”

Future Legal Issues

- What is “practicable” (“MEP”) must be both technically feasible and financially achievable
- “METF” eliminates the issue of affordability and cannot replace MEP without amending the CWA
- Mandatory, numeric on-site retention requirements may not be even technically feasible (one size does not fit all soil conditions or climates)
- Federal land use control raises significant issues under both the 10th Amendment (federalism) and the 5th Amendment (takings)
- “Retrofit” requirements will be particularly vulnerable to legal challenge