

Current and Future Legal Issues in Stormwater Permitting

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Presented at the 2010 NAFSMA Stormwater
Management Workshop
San Diego, California, August 23, 2010

Continuing Evolution in MS4 Permit Requirements:

State Law Requirements

EPA Headquarters and Regional Office Policies

California – Ventura County

- **December 27, 2006** Draft Ventura County permit had 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

Ventura County (cont.)

- **May 8, 2009** Final permit adopted by Regional Board
 - MALs were eliminated
 - LID requirements include 5% maximum impervious surface area for new development
 - permit still requires compliance with TMDLs for numerous parameters
 - staff asserted that requirements did not go beyond MEP and that estimated cost (\$7.1 to 10.9 million) was reasonable

Ventura County (cont.)

- **2009 Final Permit – LID Requirements**
 - All New Development and Redevelopment projects must control pollutants, pollutant loads and runoff volume through infiltration, storage for reuse, evapotranspiration, or bioretention/biofiltration, by reducing the Effective Impervious Area (EIA) to 5% or less of the total project area
 - Staff insisted that “biofiltration” be included in allowable measures; found scientific consensus that site conditions and type of development can limit the feasibility of retaining all stormwater on site; *however, the final permit did not fully incorporate this recommendation*
 - *Provision allowing for payment-in-lieu of on-site retention was deleted from final permit*

Ventura County (cont.)

- **2009 Final Permit (cont.)**
 - EIA is rendered “ineffective” if properly sized to “infiltrate, store for reuse, or evapotranspire, without any runoff at least the volume of water that results from:
 - the 85th percentile of the 24-hour runoff event
 - the volume of annual runoff to achieve 80% or more volume treatment; or
 - the volume of runoff from a 0.75 inch storm event
 - Any EIA that is not rendered “ineffective” must be mitigated through stormwater treatment BMPs and control measures

Ventura County (cont.)

- Alternative compliance measures are available where “technical infeasibility” is demonstrated
 - requires offsite mitigation in same watershed
 - must reduce EIA to 30% total project area
- **June, 2009** County and co-permittees did not appeal; appeal filed by BIA
- Due to procedural irregularities and errors, permit remanded by State Board for correction by LA Regional Board; permit revised and reissued 1/13/10
- **July 8, 2010** Public hearing held on reissued permit; after contentious meeting Regional Board adopted a new permit with changes demanded by the BIA
 - parties left the hearing at 11 pm uncertain about the exact effect of the final changes

Ventura County (cont.)

- **July 8, 2010** Final Permit “Pending Verification of Transcript” adds the following language:
 - If on-site retention is determined to be technically infeasible, an on-site biofiltration system that achieves equivalent stormwater volume and pollutant load reduction is allowed
 - An on-site biofiltration system that releases above the design volume [?] shall achieve 1.5 times the amount of stormwater volume and pollutant load reduction
 - Alternative control measures must “take all feasible measures to” reduce the EIA to no more than 30% of the total project area
 - For projects that can reduce EIA to between 5% and 30%, mitigation or payment-in-lieu must be equivalent to volume not managed onsite
 - Projects with EIA above 30% must be 1.5 times that amount

District of Columbia

- **2000** First MS4 permit issued by EPA Region 3
 - numeric limits at one outfall to meet TMDL for Oil & Grease
 - permit challenged by Defenders of Wildlife *et al.*
- **2002** Environmental Appeals Board held that EPA may use BMPs rather than numeric limits, but WQS compliance is required
- **2003** Permit reissued without numeric limits
 - Defenders appeal again; NAFSMA and others intervene
- **2005** EPA and Defenders reach settlement and appeal is withdrawn
 - draft renewal permit would have prohibited any discharges that violate WQS
 - NAFSMA, NACWA, NLC filed comments on draft permit

District of Columbia (cont.)

- **2006** Region 3 issued final permit modification *without* numeric limits and deleting the absolute prohibition against WQS exceedances
 - both Defenders and the District filed new appeals
- **2007** Parties engaged in lengthy negotiations, agreed to eight stays of the appeal
 - District of Columbia agreed to include innovative green infrastructure program in its SWMP, but no settlement reached with Defenders
 - permit modification was *withdrawn* by Region 3 on 8/29/07 and appeal was dismissed on 11/8/07
- **April 21, 2010** Draft renewal permit issued by Region 3

District of Columbia (cont.)

- 60 pages long; MEP not mentioned even once
- New provisions based on “METF” standard and recent EPA federal facilities guidance
- Measurable requirements for Green Infrastructure or Low Impact Development include:
 - planting 4,150 trees annually
 - installing 120,000 square feet of green roofs annually
 - reducing impervious surfaces by 13.5 million sq. ft. in 5 years
- Fact Sheet states that “the meaning of the MEP standard has continued to evolve since it was first articulated two decades ago.”

District of Columbia (cont.)

- Fact Sheet compares the permit's numeric stormwater capture requirements to other permits in:
 - Alaska (Anchorage Phase I permit)
 - California (Ventura County Phase I permit)
 - Montana (Phase II MS4 general permit)
 - New Jersey (Stormwater Management Rules)
 - North Carolina (Phase II MS4 general permit)
 - Ohio (CGP for Big Darby Creek Watershed)
 - West Virginia (Phase II MS4 general permit)

District of Columbia (cont.)

- Numeric performance standards for stormwater retention:
 - Non-federal facilities must retain 1.2 inches of rainfall from a 24-hour storm onsite (90th percentile capture rate), or
 - retain the modeled pre-development runoff from 24-hour storm
 - Federal facilities must retain 1.7 inches of rainfall from a 24-hour storm (95th percentile capture rate), or
 - retain the modeled pre-development runoff from 24-hour storm
- Permit requires District to retrofit 18 million sq. ft. of existing impervious surfaces – about 20% of the entire city – in 5 years
 - 3.6 million sq. ft. retrofit must be in transportation rights of way
- Comment period closed June 4, 2010
 - Both NAFSMA and NACWA submitted written comments

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
 - appellants argued that permits violated state law because
 - they do not ensure that discharges will comply with state water quality standards, and
 - they do not incorporate TMDL WLAs as enforceable effluent limitations

Oregon (cont.)

Round Three:

- **April 28, 2010** Permits upheld by Oregon Court of Appeals
 - Court recognized that federal law does not require MS4 permits to ensure strict compliance with state water quality standards (citing *Defenders of Wildlife v. Browner*)
 - Court held that both state and federal law only required stormwater permits to implement best management practices to reduce the discharge of pollutants to the maximum extent practicable
 - Court also found that permits complied with state law requirement to “incorporate” TMDL WLAs by using benchmarks and BMPs in an adaptive management process to demonstrate progress toward achieving WLAs for TMDL-related pollutants

Maryland

- **February 18, 2009** Maryland Department of the Environment issues Montgomery County MS4 permit
 - 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

Maryland

- **February 16, 2010** Permit reissued by Maryland DEP
 - Requires the County to implement the *2000 Maryland Stormwater Design Manual* and the provisions of Maryland's *2007 Stormwater Management Act*, which required that ESD be implemented to the maximum extent practicable
 - within one year after state adopts regulations required by the Act, county must modify its stormwater management ordinance and regulations to implement ESD to the MEP
 - County must also review existing planning and zoning ordinances and codes to identify impediments to, and opportunities for, implementing ESD to the MEP
 - Within two years, County must modify those ordinances and codes to eliminate impediments and promote implementation of ESD to the MEP
 - County must develop TMDL Implementation Plans, using benchmarks as interim goals for adaptive management activities

Maryland

- County must develop TMDL Implementation Plans, using benchmarks as interim goals for adaptive management activities
- If approved TMDL WLAs are not being met according to the benchmarks and deadlines in the Plans, “an iterative approach shall be used” where additional or alternative stormwater controls are proposed and implemented in order to achieve WLAs
- Discharge Prohibition and Receiving Water Limitation:
 - *“The discharge of stormwater containing pollutants, which have not been reduced to the MEP, is prohibited”*
- **March 17, 2010** New appeal filed by Earthjustice; briefs have been submitted

EPA Region 1

- **February 4, 2010** – Region 1 issued public notice of Draft NPDES General Permit for Discharges from Small MS4s located in north coastal Massachusetts
 - Permit prohibits discharges that would cause or contribute to WQS exceedances
 - Also requires compliance with TMDLs for phosphorus and pathogens
 - Permit contains extensive new requirements for stormwater management in new development and redevelopment
 - annual recharge from post-development site shall approximate that from pre-development conditions based on soil type
 - permittee is “encouraged” to require the capture of at least the 1 inch (90th percentile) storm event
 - stormwater management systems shall be designed to remove 80% of TSS

EPA Region 1

- program shall have “procedures to ensure” that any stormwater controls or BMPs will “prevent or minimize impacts to water quality”
- within 3 years must develop a report assessing the feasibility of green infrastructure practices
- permittee must estimate and report on changes in the number of acres of impervious area tributary to its MS4
- Public comment period closed on March 31, 2010
 - Comments submitted by Conservation Law Foundation urged EPA to specify that green infrastructure requirements are required to reduce stormwater loading
 - submitted scientific affidavits and other documents used in Washington State MS4 permit appeals to argue that LID = MEP
 - June 21, 2010 letter from Senators Kerry and Brown asks for phased approach with less stringent goals over a longer period of time; stresses “financial burden” on communities

EPA Region 3

- **July 2010** – Region 3 issues new guidance on the *“Urban Stormwater Approach for the Mid-Atlantic Region and the Chesapeake Bay Watershed”*
 - “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”
 - According to recent EPA settlement in the Chesapeake Bay TMDL litigation, EPA will use this guidance when reviewing new or reissued draft state MS4 permits within the watershed