

NAFSMA 2011 Annual Meeting Regulatory Community Analysis

**Monday, October 31, 2011
10:45 a.m. – 12:30 p.m.**



Presented by:

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Overview

- MS4 Stormwater Permitting Issues at a Crossroads?
- MEP and Stormwater Technology Standards...are they enough to date?
- Water Quality Standards Issues
- Recent Changes to How MS4 Permits Are Designed and Interpreted
- Flow
- The Pathways Forward?

Technology-Based Standards

- Urban Wet Weather Flows FACA led to EPA's 1997 Policy Statement...later helped provide basis for EPA's 2002 TMDL/stormwater memo:
 - Typically, numeric effluent limitations to be avoided, only narrative requirement for BMPs
 - MS4s = MEP = minimum control measures
 - Industrial/construction programs = BAT = BMPs
 - BUT – moving to a numeric approach has presented significant challenges
 - Construction & Development ELG Example

Construction & Development Effluent Limitations Guideline

- All Construction & Development (C&D) Sites
 - ≥ 1 acre disturbed land
 - Implement Erosion and Sediment (E&S) and Pollution Prevention Best Management Practices (BMPs)
- Effluent Limitation Phase-in
 - 280 nephelometric turbidity units (NTU)
 - August 1, 2011, sites >20 acres
 - February 2, 2014, sites >10 acres
- C&D rule scope is $< 1\%$ of total sediment loads

C&D ELG Litigation

- National Association of Home Builders and Wisconsin Builders Association filed petitions for review, ending up in 7th Circuit.
- Utilities Water Act Group filed a separate petition on April 13, 2010.
- After NAHB's opening brief, DOJ/EPA asked 7th Circuit to vacate 280 NTU standard while EPA revised standard through rulemaking to be completed by February 15, 2012.

Current Status of C&D ELG

- EPA stayed the NEL (75 FR 68,305, 11/5/10).
- Proposed “revision” rule sent to OMB in December 2010, withdrawn by EPA August 2011.
- EPA intends to publish *Federal Register* notice (at some point this Winter?) requesting new data on passive treatment.
- **Take Home Message:** Developing technology-based national NEL for one activity and one pollutant is far more difficult than anticipated by EPA, federal court, or NGO plaintiffs.

Water Quality Standards

- Always been a challenge in stormwater permitting:
 - Compounded by general permit approach (WQS typically = site-specific determination)
 - Addressed in industrial/construction permitting by asserting compliance with TMDLs as key component of NOI “eligibility determination.”
 - Water quality criteria designed for wastewater permitting and low-flow, 24/7 exposure.
 - Many EPA “Benchmark” limits are ambient WQC....but they are not “compliance limits.”

New Emphasis...Something More?

- Focus on numeric effluent limits (arguing that NELs provide a bright-line standard for determining compliance).
- Focus on “flow” as a surrogate – surrogate for what...there has to be a direct relationship to a “pollutant.”
- Focus on green infrastructure, impervious surfaces, and other issues outlined in the National Stormwater Rulemaking (not yet proposed)(*but see DC Permit Presentation*).

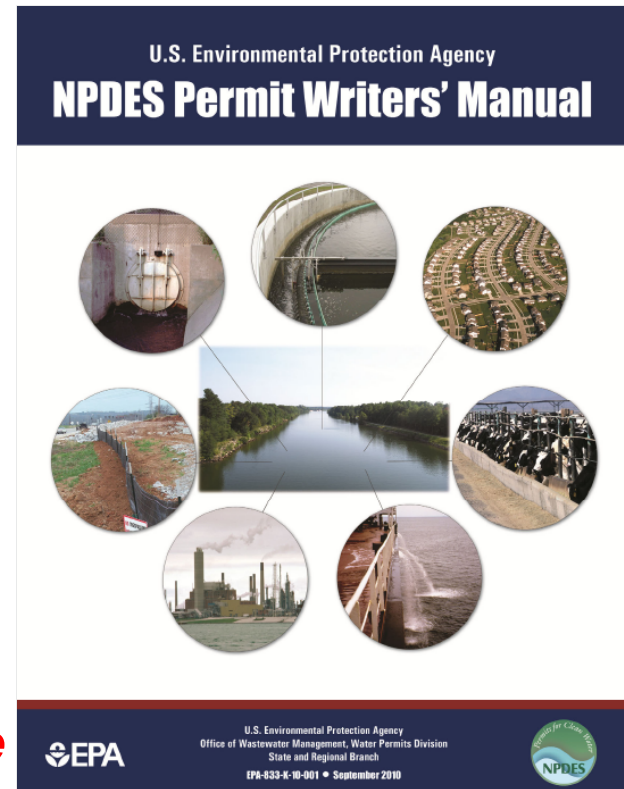
EPA's Modified Approach to Stormwater Permitting

- November 12, 2010 memorandum by James Hanlon (OWM) and Denise Keehner (OWOW).
- Shifting presumption from “best management practices” approach to stormwater permitting to a “numeric effluent limitation” approach focused on water quality standards.
- EPA looks to clarify meaning?

Numeric vs. Non-Numeric (BMP) Effluent Limits

- Difficult to establish Numeric Limits for stormwater
 - Much different than process wastewater:
 - episodic, highly variable, lack of good quality data
 - Site activities and best management practices differ from site to site

EPA – *“Because of the nature of stormwater discharges, it is infeasible to use numeric effluent limits to demonstrate the appropriate levels of control. In such situations, CWA authorizes EPA to include non-numeric effluent limits in NPDES permits.”*



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What Are Appropriate Criteria?

- EPA Industrial Benchmarks:
 - **TSS, N+N** – National Urban Runoff Program Median Concentrations
 - 24-hour composite sampling, not “grab” samples
 - **pH, BOD** - Secondary Treatment Regulations
 - **COD** - Factor 4 times BOD5 Concentration – North Carolina Benchmark
 - **Metals, VOCs** - AMBIENT Freshwater Aquatic Life Criteria (low flow standards)
 - **PCBs** - Laboratory MDL x a Safety Factor
- These standards are not stormwater-based or risk-based standards.

EPA View of the Benchmarks “Tool”

“The benchmark concentrations are not effluent limits; a benchmark exceedance, therefore, is not a permit violation. Benchmark monitoring data are primarily for your use to determine the overall effectiveness of your control measures and to assist you in knowing when additional corrective action(s) may be necessary to comply with the effluent limitations in Part 2” 2008 MSGP

Other Important NEL Considerations...

- Must there be a “reasonable potential to exceed” determination on a site-by-site basis?
- Mixing zones?
- Dynamic modeling solutions?
- Was the “designated use” based on storm event conditions?

Modify Designated Use?

- New concept: “high flow exclusion” from designated use (for times when those uses are not expected to apply).
- Indiana legislation allows cities to carve out time periods when use and criteria may not apply.
 - Mainly used to date for CSO situations.
 - Recognition that numeric criteria cannot be complied with under certain expected conditions.
 - Maintain and continue management practices, but the numeric criteria do not apply during limited time periods following storm events.
 - Conduct a Use Attainability Analysis to revise the designated use.
- No reason why this approach also cannot apply to MS4 discharges?

National Stormwater Rule

- EPA Considerations/Options
 - All new/redeveloped sites stormwater characteristics mirror *predevelopment conditions*
 - in terms of quantity, velocity, quality (pollutants/temperature/etc.)?
 - MS4 transition to direct regulatory control over all inputs into their systems?
 - Authority over discharges “into” a MS4 or merely “from” a MS4?
 - Force MS4s to retrofit “to protect water quality”
 - Establish TS4 program?
- “Green Infrastructure” basis.

Flow TMDLs...and Considerations

- Previous presentation outlines some flow TMDL litigation and issues...but can do you address before/without litigation?
- Flow TMDL:
 - related to “pollutants” generically, but not specifically.
 - Site = headwaters of the stream.
 - TMDL uses “reference” stream...with very different circumstances (due process issues?).
 - Hard to control both peak and base flows.
 - Models not yet there...
 - Green infrastructure based on models okay for peak, but not base flow.
- Modify TMDL or use alternative attainment process?
 - TMDL modified to include BMPs and recognize improvements over time.

Integrated Permitting Strategy

- EPA memo to Regional Offices (Oct 27, 2011):
 - EPA "must be mindful that many of our state and local government partners find themselves facing difficult financial conditions. Their ability to finance improvements by raising revenues or issuing bonds has been significantly impacted during the ongoing economic recovery."
 - Key aspect: **"as we consider a particular municipality's financial ability to complete the required infrastructure improvement work we must be sure that we consider all of its CWA obligations."**
- EPA will develop an integrated planning approach framework:
 - discuss how to identify communities that could use the approach,
 - set forth how these plans could be implemented under permitting and enforcement programs.
- EPA then will hold meetings with various stakeholders to obtain feedback.

Waters of the U.S. Guidance

- Proposed guidance 74 Fed. Reg. 24,479 (May 2, 2011).
- Comment period ended July 31, 2011.
- Significant expansion of CWA jurisdiction.
- Affects both CWA Section 404 and 402 programs.

Questions?

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