The State of Stormwater: National Overview

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Background

- **1987** – CWA Amendments add § 402(p), establish "MEP" as separate standard for MS4 discharges
- **1990** – "Phase I" permit regulations
- **1996** – EPA's "Interim Permitting Approach"
- **1999** – *Defenders of Wildlife v. Browner*, 197 F.3d 1035 (9th Cir.1999)
- **1999** – "Phase II" permit regulations
- **2002** – EPA Memo on "Establishing TMDL WLAs for Storm Water Sources and NPDES Permit Requirements Based on those WLAs"
- **2003** – *Environmental Defense Center v. Browner*, 344 F.3d 832 (9th Cir.2003)

Washington D.C.

numeric limits?

- **2000** – EPA Region 3 issues D.C. MS4 permit with numeric limits at one outfall; permit challenged by Defenders of Wildlife et al.
- **2002** – EPA's Environmental Appeals Board holds that EPA may use BMPs in lieu of numeric limits
- **2004** – Region 3 reissues the permit without numeric limits; Defenders appeal again; NAFSMA, NACWA, NLC and others intervene
- **2006** – Region 3 issues final modification without numeric limits and deleting the absolute prohibition against WQS exceedances; both D.C. ***and*** Defenders file appeals
- **2007** – Eight stays; settlement by 10/29/07?

California

beyond MEP?

- **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)
- **2003** – San Diego permit upheld by state trial court
- **2004** – San Diego permit upheld by court of appeals (*Building Industry Ass'n v. SWRCB*, 124 Cal. App. 4th 866; 22 Cal. Rptr. 3d 128)
- **2005** – California Supreme Court denies review

California
beyond MEP?

- **2005** – California Supreme Court rules that "economic considerations" must be taken into account when imposing permit limitations "more stringent than required under federal law" (*City of Burbank v. SWRCB*, 35 Cal. 4th 613, 108 P.3d 862)
- **2006** – L.A. County permit requires compliance with bacteria TMDLs for Santa Monica Bay
- **2007** – Draft Ventura County permit has numeric limits to meet various TMDLs; 122-page permit states that it is not more stringent than federal law since TMDLs "must be translated into 'end-of-pipe' effluent limitations"

Oregon

"benchmarks"

- **1994** – Phosphorus TMDL for Tualatin River basin
- **1995** – MS4 Permit for Unified Sewerage Agency et al.
- **2000** – Tualatin Riverkeepers sues EPA for approving permit without numeric limits to meet TMDL and WQS
- **2001** – Case refiled, and dismissed again
- **2004** – Riverkeepers takes appeal to Land Use Board
- **2006** – Riverkeepers files appeal in County Circuit Court, alleging permits fail to meet Oregon WQS
- **4/19/0**7 – Circuit court grants S.J. to Oregon DEQ
- DEQ permits use "benchmark" values, which are not enforceable permit limits, but trigger an adaptive management process to improve existing BMPs

Vermont

BMPs = compliance

- **March 2003** – Vermont MS4 general permit relies on BMPs to achieve MEP and to implement TMDLs
- **2003-04** – CLF argues that permit must prohibit any violation of state WQS and have measurable goals for compliance with Lake Champlain phosphorus TMDL
- **July 2005** – Settlement leaves key provisions intact:

§ 1.3.6 - prohibits only "discharges that fail to reduce the discharge of pollutants . . . to the maximum extent practicable (MEP), to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act."

§ 3.1.4 - assessing compliance with TMDLs "will be based on your implementation and maintenance of best management practices not on estimates or measurements of pollutant loading."

North Carolina

- **2005** – North Carolina DENR issues Phase II permits to Mecklenburg County and others
- Permits challenged by Wildlife Federation and Sierra Club for failure to: 1) require compliance with state WQS; 2) require compliance with MEP; and 3) include effluent limits to meet the Goose Creek TMDL
- **2006** – ALJ submits recommended decision to EMC
- **2007** – EMC's final action modifies the ALJ's decision and upholds the permits with additional provisions for buffer zones to protect the Carolina heelsplitter mussel
- Decision based in part on the view that implementing BMPs which are consistent with the 6 minimum control measures constitutes compliance with MEP

North Carolina (cont.)

- Subsequent permit issued to City of Raleigh (June 2007) provides that:
- compliance with the six minimum measures constitutes compliance with the permit and the Clean Water Act; implementation of BMPs consistent with the SWMP constitutes compliance with MEP
- compliance with any TMDLs is to be achieved by the submission and implementation of a “Water Quality Recovery Program,” which includes a monitoring plan and additional BMPs as necessary to meet the WLAs in the TMDL

North Carolina (cont.)

- Troublesome *dicta* in the Goose Creek decision suggests that MEP "requires more of permittees than mere compliance with water quality standards or numeric effluent limitations designed to meet such standards," and that "permittees may be required to go beyond compliance with water quality standards and implement stormwater measures that are more than standard practice"
- The only legal authority cited for this position is the original Ninth Cir. decision in *EDC v. EPA* (1/14/03), which was superseded by the substitute opinion issued after the petition for rehearing supported by NAFSMA, NACWA, NLC and NACo (9/15/03).

[10] The Phase II general permitting scheme differs from the traditional general permitting model. The Clean Water Act requires EPA not only to ensure that operators of small MS4s comply with the general effluent limitations of the Clean Water Act, but also that operators of small MS4s "reduce the discharge of pollutants to the maximum extent practicable."

[11] Because a Phase II NOI not only conveys assent to the broad effluent limitations of the Clean Water Act, but also establishes what the discharger will do to reduce discharges to the "maximum extent practicable," the Phase II NOI crosses the threshold from being an item of procedural correspondence to being a substantive component of a regulatory regime. The text of the Rule itself acknowledges that a Phase

Original opinion in *EDC v. EPA*, 319 F.3d 398

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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)
- Appeals filed by various environmental groups, 10 Phase I cities and a coalition of 33 Phase II cities
- Dispositive motion deadline currently set for 1/16/08
- NACWA, NASMA and others asked to file *amicus* brief on issue of requiring strict compliance with state WQS

Washington State (cont.)

- Condition S4.A of the permits prohibits the discharge of toxicants which would violate any water quality standard, including toxicant standards, sediment criteria, and dilution zone criteria
- Condition S7 states that all permittees "shall be in compliance with the requirements of applicable TMDLs"
- Fact Sheet notes that *Defenders of Wildlife v. Browner* held that the CWA does not require strict compliance with WQS for MS4 discharges, but suggests that CWA § 402(p)(3)(B)(iii) gives the state "discretion to determine whether strict compliance" is appropriate