

STATEWIDE ZONING POWER?

STORMWATER CONTROLS VIA NC WQS + TMDL

Dan McLawhorn
Associate City Attorney, Raleigh
dan.mclawhorn@ci.raleigh.nc.us

November 8, 2007
NACWA Legal Seminar

NC SUPPLEMENTAL WQS's – CLIMBING THE HILL

- State Clean Water Act, NCGS § 143-211, et seq.
 - Waters of State > Waters of US, NCGS § 143-212(6)
 - Isolated wetlands
 - Nonjurisdictional streams
- Water Supply Watershed Protection Act, 1989
 - NCGS § 143-214.5
- Turbidity (by rule, e.g. 15A NCAC 2B.0211(3)(k), Class C Waters)
- Sedimentation-Erosion Control Act,
 - NCGS § 113A-50, et seq. (by cross adoption of rules)
- Nutrient Sensitive Waters, 1995 (by rule, 15A NCAC 2B.0223)
- Basinwide NSW/TMDL Act, 1997 NCGS § 143-215.8B

STATE LAW + TMDL's

- Jordan Lake TMDL
 - 1st Retrofit Stormwater TMDL
 - 1st Equal Allocation Basinwide Plan
 - Draft Rules
- Goose Creek Endangered Species
 - 1st Phase II Modified Permit
 - Recovery Plan
 - Draft Rules

JORDAN LAKE TMDL 9-30-2007

- First calibrated nutrient model plan
- In its 4th year of development, post sampling
- Chlorophyll *a* = TN and TP problems
- Unequal problems in the 3 arms of lake
- Allocation by arm

Jordan Reservoir Watershed

B. EVERETT JORDAN LAKE
WATERSHED



Map Prepared November 8, 2005

Haw
8% N, 5% P

Upper New Hope
35% N, 5% P
Lower New Hope
0% N, 0% P

LEGEND

- | | | |
|----------------------------------|--------------------------|-------------------------------|
| Municipality | County Boundary | Surface Water Intake |
| Water Supply Watershed:
WS-II | Hydrography | NPDES Wastewater Site (Minor) |
| WS-III | Haw River Watershed | NPDES Wastewater Site (Major) |
| WS-IV | Upper New Hope Watershed | Dam |
| | Lower New Hope Watershed | |



Vicinity Map

STORMWATER POWERS

- Single LA +WLA-SW budget by arm, no allocation
- All local gov'ts, not just Phase Is & IIs
- Rule amends existing SW NPDES permits
 - Adds existing development control
 - Requires new SW plans
- Designate entire watershed as “critical water-supply”
- Existing dev. Credits via enhanced new dev + other extra removals
- DWQ cost estimate
 - 5 yr = \$16.4M local gov'ts + \$6.5M-52M Feds, DOT, Univ
 - Full = \$528M local gov'ts + \$78-616M Feds, DOT, Univ

ENDANGERED SPECIES AND PHASE II PERMITS

- Suit by environmental groups
- Challenged 3 Phase II permits
- Absent measures to protect Carolina heelsplitter, fed. endangered species
- TMDL = 92.5% fecal coliform reduction
- Standard Phase II language

ENDANGERED SPECIES CONDITION IN PHASE II

- Requires Stormwater Management Plan address
- Federally listed endangered and threatened
- “site-specific stormwater management requirements for streams supporting”
- No delay for implementation v. TMDL condition

FINAL AGENCY DECISION

- Antidegradation limited to assignment of WQS and classifications
- MEP = more than WQS or numeric effluent limitations minimum compliance
- Amend permit to add interim protections
 - 200' undisturbed perennial set back
 - 100' undisturbed intermittent set back
 - 10% impervious surface threshold
- SW Plans included in notice and permit
- Phase II permit = implementation w/in 2 yr of Water Quality Recovery Plan per TMDL condition

MAXIMUM EXTENT PRACTICABLE

- Conclusion of Law 17.

“This standard [MEP] requires more of permittees than mere compliance with water quality standards or numeric effluent limitations designed to meet such standards. *Envtl. Def. Center, Inc. v US EPA*, 319 F3d 398, 425-26 (9th Cir. 2003).”
- Overtured: *EDF v EPA*, 344 F3d 832, 857 n 34 (9th Cir. 2004)

RECOVERY PLAN DRAFT RULES

- 100 yr floodplain dev. banned, except redevelopment > ½ acre
- 200' buffer = perennial streams
- 100' buffer = intermittent streams
- + ½ acre = stormwater controls
- No new NPDES discharges
- Ammonia controls = 0.5 mg/L
- Several alternatives in draft rules

TMDL PHASE II PERMIT CONDITION

- Section J of boilerplate
- Trigger = TMDL designation, not WLA or LA
- Burden on permittee to write Recovery Plan, 12 mos
- Start monitoring w/in 24 mos
- Annual assessment of BMP effectiveness
- Respond to WLA with BMPs or enhanced BMPs at MEP
- Increase BMPs annually until WLA achieved

CONCLUSIONS

- 20 YR RISE FROM WATERS TO HILLTOP
- COMBINED IMPACTS OF TMDLs AND STATE WQSs
- STATEWIDE POWER TO ORDER LOCAL GOV'TS TO ZONE/LAND USE CONTROL?
- ENDANGERED SPECIES + TMDL = DIRECT ZONING BY WQ AGENCY