



MS4 Enforcement Trends and Citizen Suits

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EPA Region 3 – Administrative Orders

- Series of administrative orders with penalties issued by EPA Region 3 to MS4s in:

<u>City</u>	<u>Penalty</u>
➤ Lancaster PA	\$6,500
➤ Manor Township PA	\$40,968
➤ Lebanon PA	\$21,600
➤ York PA	\$22,740
➤ Swatara Township PA	\$43,300
➤ Newport News VA	\$155,000
➤ Huntington WV	\$156,000
➤ Chesterfield Co. VA	\$131,000
➤ Baltimore MD	\$90,000
➤ Hartford CT	\$75,000
➤ Anne Arundel Co. MD	\$83,500
➤ Henrico Co. VA	\$82,000

EPA Region 3 – Administrative Orders

- Typical compliance issues include:
 - failure to detect illicit discharges for inlets and outlets
 - failure to properly inspect industrial and commercial facilities and control discharges to and from those portions of MS4
 - failure to monitor and control pollutants in storm water discharges from industrial facilities contributing substantial pollutant loadings
 - failure to operate in accordance with County stormwater management and State Erosion and Sediment Control Regulations
 - failure to conduct a formal education and training program for construction site operators
 - failure to implement an O&M program (including training) of post-construction stormwater BMPs

NRDC v. County of Los Angeles

- 2001 permit issued to 84 cities, L.A. County and L.A. County Flood Control District
- Permit prohibits exceedances of state water quality standards, with iterative process to achieve compliance if standards are not met
- 2008 - Citizen suit filed by NRDC and Santa Monica Baykeeper
- 2010 - District Court ruled there is no “safe harbor” provision in the permit, but granted SJ to County because no evidence of standards-exceeding “discharge” from County outfalls
- 2011 - 9th Circuit reversed, finding a “discharge” occurred from the channelized segments of the of the LA and Santa Monica rivers into the natural segments below
- June 25, 2012 – Cert granted by U.S. Supreme Court
 - 11 amicus briefs in support of County; 10 in support of NRDC; Solicitor General (in support of neither party) argues for remand
 - *Oral argument set for December 4, 2012*

NRDC v. City of Malibu

- March 2008 – City of Malibu sued by NRDC and Santa Monica Baykeeper for failure to meet Receiving Water Limitations in the LA County MS4 permit, Bacteria TMDLs for Santa Monica Bay, and the prohibition against discharges to a 24-mile “Area of Special Biological Significance”
- During 4 years of litigation, number of outfalls at issue was narrowed and the number of pollutants dropped to one (bacteria)
- 8/20/10 Order **denied** SJ on the Receiving Water Limitation claims, observing that:
 - At trial, Plaintiffs will need to tie demonstrated exceedances to the City’s discharges.
- April 2012 - \$6.6 million Settlement reached
 - Requires Malibu to build rain-water harvesting, infiltration of treatment devices at 17 outfalls
 - City to pay \$750,000 for Plaintiffs’ attorneys fees
 - City to fund \$250,000 ocean health assessment of Santa Monica Bay

Delta Coalition v. City of Stockton

- February 2009 – Coalition for a Sustainable Delta and several water supply districts filed complaint against Cities of Stockton and San Joaquin for MS4 permit violations
- 10 counts in complaint, including:
 - causing exceedances of receiving water limitations (WQS)
 - causing “pollution, contamination or nuisance”
 - failure to reduce pollutants the MEP
 - failure to prohibit non-stormwater discharges (SSOs)
 - noncompliance with receiving water limitations
 - noncompliance with other permit requirements (monitoring, etc.)
 - causing a prohibited “take” under the ESA of:
 - Delta Smelt
 - Sacramento River winter-run Chinook Salmon
 - Central Valley spring-run Chinook Salmon
 - Central Valley Steelhead
- August 2009 – Defendants’ motion to dismiss denied

Delta Coalition v. City of Stockton

- August 2011 – Settlement discussions lead to an agreement to undertake an independent assessment of the City’s MS4 programs, to be performed by an independent consultant approved by the parties
- November 2011 – Assessment completed and parties meet to review its recommendations; settlement talks continue
- April 2012 – Agreement reached on many terms, but parties unable to agree on timing and substance of remaining issues because of “uncertainties surrounding the City’s financial situation;” Stockton involved in state mandated neutral evaluation process in attempt to avoid municipal bankruptcy
- *June 2012 – City Council halts bond payments, slashes employee benefits and adopts an emergency budget as mediation ends; Stockton becomes the nation's largest city to seek protection under the U.S. bankruptcy code*

Conservation Law Found. v. Boston WSC

- February 2010 – Citizen Suit involving illegal sewer connections and SSO discharges through MS4 outfalls
- EPA intervened
 - Complaint included claim that discharges exceeding WQS for bacteria were MS4 permit violations
- 12/21/10 Order **denied** Plaintiff's motion for summary judgment *Conservation Law Found. V. Boston Water & Sewer Comm'n*, 2010 U.S. Dist. LEXIS 134838, *; 73 ERC (BNA) 1282:

I agree with the BWSC's statement . . . that "[t]he Clean Water Act does not mandate that permits issued by EPA for municipal stormwater discharges require compliance with numeric water quality standards." The Permit specifically says so — "[t]here have been no numeric effluent limits established for this [P]ermit." The Permit rather adverts to the language of the CWA in requiring that the BWSC institute best management practices to reduce the discharge of pollutants from the MS4 to the "maximum extent practicable."

 - Question whether BWSC implemented controls and measures necessary to reduce discharges by the "maximum extent practicable" could not be resolved on summary judgment

Conservation Law Found. v. Boston WSC

- Consent Decree lodged on August 23, 2012
 - BWSC to pay \$235,000 civil penalty
 - \$160,000 SEP to address leakage from private sewer laterals by lining at least 25 laterals identified as sources of sewage in the MS4
 - BWSC to use green infrastructure and low impact development to reduce pollutants in stormwater discharges, including phosphorus and metals
 - Expedited GI/LID demonstration projects in several areas (including City Hall Plaza)
 - Increased frequency in dry and wet weather monitoring of stormwater outfalls

Delaware Riverkeeper Network v. EPA

- July 27, 2011 – Citizen suit filed **against U.S. EPA** seeking to compel the Agency to bring New Jersey's stormwater program into compliance with the CWA
- Claimed that EPA had failed to perform a mandatory duty under the CWA to take action against the state's failure properly administer and enforce its municipal stormwater program
 - NJ municipalities violating state and federal laws by approving development proposals that do not comply with the state's water management regulations, including mandatory standards to control stormwater from new development and redevelopment
 - Claims were based on a report by 4 expert hydrology and engineering consultants hired by DRN
- April 30, 2012 – Court issued Order dismissing suit for lack of jurisdiction
 - Decision whether to take action against the state is discretionary with EPA

Citizen Suits against Clark County, WA

- “Phase I” MS4 permit issued to Clark County in January 2007
 - required compliance with “flow control standards” in the Western Washington stormwater manual; post-development discharges above certain thresholds must match “pre-development” flows
- March 2009 – WA Department of Ecology issued NOV stating that the County’s ordinances were not “equal or similar” to the permit conditions
- January 2010 – Agreed Order between Ecology and the County approved an “alternative” stormwater control program allowing developers to control flow to “existing” conditions at the time construction begins, with County required to mitigate to “historical” levels either on site or in the major watershed area
- Rosemere Neighborhood Association, Columbia Riverkeeper and NW Environmental Defense Center appealed to PCHB
- January 2011 – After 4-day hearing, PCHB found that
 - the alternative program was not “equal or similar” to the permit
 - LID methods should be required to control runoff from new development

Citizen Suits against Clark County, WA

- PCHB agreed to direct review in court of appeals
- September 2012 – Court of Appeals affirmed the PCHB
- October 2012 – County appealed to WA Supreme Court

Meanwhile . . .

- March 2011 – CWA citizen suit filed by Rosemere Neighborhood Association, Columbia Riverkeeper and NW Environmental Defense Center in federal court, alleging that:
 - County failed to adopt the required ordinances to reduce stormwater from new development and redevelopment, and continued to approve non-compliant plans and permits
 - County failed to meet the standards set forth in the 2005 Western Washington Stormwater Manual
 - County failed to reduce the level of pollutants to the maximum extent practicable
- December 2011 – Court stayed Plaintiffs' SJ motion but granted injunction requiring County to comply with permit
- *October 2012 – federal case remains on hold*