



**McMahon
DeGulis^{llp}**

Cleveland | Columbus | Cincinnati
Celebrating 20 Years in 2014

Thinking Outside the Box: Going Beyond the Standard Language

**NACWA Wet Weather
Consent Decree Workshop
April 30, 2014**

Louis L. McMahon
lmcmahon@mdllp.net | 216.367.1407

Overview

- Overall themes for moving beyond standard language
- High level discussion of examples

Overall Themes

- Understand Regulator's Needs and Motivations
 - They hold leverage; inertia favors them
 - They also want a deal (but that includes convincing management)
 - They are bound by the rule of law
 - Precedent and example are invaluable
 - Educate them on topics outside of the limited scope of CWA
- To overcome the burden of getting past standard language
 - Understand your system and your goals— no substitute
 - Burden is on regulated entity to lead technically (esp. affordability)
 - Use arguments and resources outside the box to get language outside the box
- “Win nicely”-because you will live with the deal and your counterpart for many years after.

Searching for the right metaphor...

WET WEATHER CONSENT DECREES

Negotiation Strategies to Maximize
Flexibility & Environmental Benefit



APRIL 2014

NACWA
A Clear Commitment to America's Waters

Avoiding Boilerplate-- examples

- Key definitions
- Schedule and Deadlines
- “Adaptive Management”/Modification/Dispute Resolution

Key Definitions – “SSOs”

- Standard language can include all unauthorized discharges, basement backups, and broad elimination requirements.
 - Do not accept overflow characterization at face value
 - Limit defined SSOs to those discharges that reach waters of the US
 - Basement backups should be handled separately
 - ‘Elimination’ undefined/agree on specific measures

Key Definitions-- Others

- Basement backups
 - Ex. 'excludes overland flooding not emanating from sewer system'
- Wet weather
- Watershed approach
- POTW
- Force majeure

Schedule Approaches

- Fixed end date
 - Schedule length
 - Project, bundle and interim deadlines
 - Deadline relief mechanisms
- Phased Implementation
- Penalty mechanisms

“Adaptive Management”

- Difficult to define but essential for programs of any substantial length
 - Major/material modification v. minor/non-material
 - Dispute resolution mechanism
 - Opportunity for changes in approach or technology
 - Green infrastructure
 - Integrated planning
 - Economic limitations/financial capability

**We can create a Consent Decree
program reflecting a livable 'new
normal' for the foreseeable future.**

Louis L. McMahon
McMahon DeGulis LLP
lmcmahon@mdllp.net
216-367-1407