

SEPARATE SEWER OVERFLOWS HAPPEN

a permit-driven regulatory solution

REALITY – SEPARATE SEWER SYSTEMS ARE FINITE

- ▶ Well-Designed
- ▶ Well-Constructed
- ▶ Well-Maintained
- ▶ Well-Operated
- ▶ Separate Sewer Systems Will Overflow
When Large Rainfalls Overwhelm Design
Capacities

U.S. EPA HAS RECOGNIZED THIS FACT

SSO Rules drafted by US EPA during Clinton Administration October 2000

DRAFT RULE NEVER FORMALLY PROPOSED IN FEDERAL REGISTER

- ▶ EPA noted “even municipal collection systems that are operated in an exemplary fashion may experience unauthorized discharges under exceptional circumstances”
- ▶ SSOs caused by “severe natural conditions (e.g., wet weather capacity concerns) could be excused through the proposed codification of enforcement discretion (and judged according to the severity of the natural condition coincident with the discharge)”

NPDES PERMITS PROHIBIT SSOs

- ▶ OWECA Position: Clean Water Act at 33 USC § 1311 (b)(1)(B) & (C) requires all WPDES permits to provide that SSOs be treated to secondary or more stringent standards
- ▶ Therefore: Permits may not *expressly* allow SSOs

RESULT?

- ▶ NACWA members experiencing SSOs are often sued by a state agency, EPA, a citizen group, or a combination of these, with resulting:
 - Compliance Schedules for planning and design of new system to correct SSOs
 - Fines for past overflows, and
 - Fines for future overflows

RESULT ALSO *may include* AN AGREED ENFORCEMENT LIMITATION

- ▶ Agreement that no enforcement will be undertaken for SSOs resulting from certain large storm events
- ▶ Such as a one, five or ten year 24-hour storm event
- ▶ Sometimes called “level of protection” or Design Standard

EXAMPLES OF CONSENT DECREES WITH ENFORCEMENT LIMIT

- ▶ Objective of Lexington, KY consent decree is to eliminate “recurring SSOs” defined as “an SSO that occurs in the same location more than once per 12 month rolling period”
- ▶ Objective of Hartford consent decree is to eliminate “capacity related SSOs,” caused when the system cannot convey peak flows to the treatment plant when “operating as designed”

CONSENT DECREE EXAMPLES *(cont'd)*

- ▶ Toledo and Cincinnati consent decrees provide no stipulated penalties for SSDs (Sanitary Sewer Discharges) during storms above 10 year recurrence interval

WHAT DOES THIS ADD UP TO?

NEED to bring NPDES permit language in line with engineering reality and avoid or lessen further litigation

- ▶ Justice Department's *amicus* brief in pending 7th Circuit Appeal of *Friends of Milwaukee's Rivers, et al. vs. Milwaukee Metropolitan Sewerage District* provides an underpinning for a permit based solution

JUSTICE DEPARTMENT'S *AMICUS* BRIEF

- ▶ Acknowledges (without critical comment) that some states include NPDES permit general provisions “That prospectively *excuse* from state enforcement certain violations of the prohibition on SSO discharges”
- ▶ These provisions do not *authorize* SSOs
- ▶ A “restriction on enforcement if certain conditions are met”

EXAMPLE: MMSD PERMIT LANGUAGE

9.2.6 *UNSCHEDULED BYPASSING*

Any unscheduled bypass or overflow of wastewater at the treatment works or from the collection system is prohibited, and the Department may take enforcement action against a permittee for such occurrences under s. 283.89, Wis. Stats., unless:

MMSD PERMIT LANGUAGE *(cont'd)*

- ▶ The bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;
- ▶ There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime; and
- ▶ The permittee notified the Department as required in this Section.

FEDERAL BYPASS PROVISION

- ▶ MMSD permit language similar to 40 CFR 122.41(m)
- ▶ “Bypass...[from treatment facilities] is prohibited, and the Director may take enforcement action against a permittee for bypass, unless: ...there were no feasible alternatives to the bypass.”
- ▶ But adds “collection system” to facilities subject to prospective exclusion from enforcement

REALITY-based PERMIT TERMS FOR SSOs

- ▶ Meaning of “no feasible alternatives”
- ▶ MMSD position at trial: Approved facilities plan eliminates those alternatives that are not feasible, thereby defining the design level of protection
- ▶ Acknowledged by Wisconsin DNR witness who testified: “It would have been a bit disingenuous on our part to on the one hand approve activities to implement a five-year design storm and then say to somebody that, well, we didn’t really mean it and, therefore, we are going to enforce for something more stringent than that.”

WHAT IS “NOT FEASIBLE” –

- ▶ Municipality’s “Facility Plan” should look at all inputs to the water body (POTW, stormwater, and non-point discharges)
- ▶ Example:
 - If spending significantly more money to go from a 5-year storm level of protection to a 10-year, will only result in de minimus increase of H₂O quality immediately after a storm

WHAT IS “NOT FEASIBLE” – EXAMPLE *(contd)*

- State agency approves plan
- Then 5-year Design Standard is cost effective and anything more is “not feasible”
- Therefore → if you have built to the 5-year standard or are on state approved construction schedule, you are immune from suit – absent negligent operation of the system

MMSD FEASIBLE ALTERNATIVES

- ▶ MMSD Facility Plan was approved with a 5-year storm level of protection
- ▶ Wisconsin DNR regulations require all facilities to be cost effective
- ▶ Under DNR regulations it was not cost effective to capture, transport and treat all flows generated by storms in excess of a 5-year return interval
- ▶ Therefore, if a conveyance facility is not cost effective it is “not feasible”

PLANNING-based FEASIBILITY DETERMINATION

- ▶ Establish de facto enforcement standard on case by case basis
- ▶ Planning-based permit protocol assures permittee that facility built in compliance with approved facilities plan would be *excused* from enforcement for SSOs resulting from storms larger than Design Standard
- ▶ System would need to be well maintained, with CMOM-type program in place

WHAT IF APPROVED FACILITIES FAIL?

- ▶ If approved facilities fail to meet expectations, i.e., SSOs more frequent than the 5-year storm level of protection, State Enforcement Agency may take action
- ▶ Require new Facilities Plan in reissued permit, or
- ▶ Amend existing permit to require additional planning within fixed time frames

RESULT: REALITY-based SSO TERMS IN NPDES PERMITS

- ▶ Planning approvals are coordinated with enforcement of permits
- ▶ Permit becomes the primary enforcement document, as opposed to litigation
- ▶ Permit has meaningful SSO standard allowing for certainty on part of the POTW



QUESTIONS?