

Stormwater Developments

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**Presented at the 2011 NACWA Seminar on
Developments in Clean Water Law
Charleston, SC – November 16, 2011**

Liability for Compliance with MS4 Permit Provisions:

Lessons from Los Angeles
Questions for DC
Lawsuits from WA to NJ

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
- 2002 letter and Q&A document from Regional WQCB assured the communities that there would be no violation of the permit so long as the process was followed, and that similar permits had not triggered citizen suits

Does the permit language put cities in violation of receiving water limitations immediately and open them to third party lawsuits?

- The LA County municipal storm water permit incorporates language that provides for protecting receiving waters and their beneficial uses as required by the federal Clean Water Act. The State Water Resources Control Board has previously disapproved less-restrictive language in municipal storm water permits. The language in the LA County municipal permit tracks language the State Water Resources Control Board has previously approved in precedential decisions in 1999 and again in 2001. Other municipal permits in the state contain the same language, and to the Regional Board's knowledge have not triggered citizen suits, as feared by some municipalities.
- A violation of the permit would occur when a municipality fails to engage in a good faith effort to implement the iterative process to correct the harm. As long as the Permittee is engaged in a good faith effort, the specific language of the permit provides that the Permittee is in compliance. As discussed at the Regional Board's July 2001 workshop and the December 2001 board meeting, the presence of the iterative process language makes clear the Permittees' mechanism for compliance with receiving water language. Even if water quality does not improve as a result of the implementation efforts, there is no violation of the permit's receiving water provision as long as a good faith effort is underway to participate in the iterative process. The basic premise is that an incremental effort is appropriate to identify additional best management practices that will ultimately result in improved storm water quality.

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATURAL RESOURCES DEFENSE
COUNCIL, INC.; SANTA MONICA
BAYKEEPER,

Plaintiffs-Appellants,

v.

COUNTY OF LOS ANGELES; LOS
ANGELES COUNTY FLOOD CONTROL
DISTRICT; MICHAEL ANTONOVICH, in
his official capacity as Supervisor;
YVONNE BURKE, in her official
capacity as Supervisor; GLORIA
MOLINA, in her official capacity as
Supervisor; ZEV YAROSLAVSKY, in
his official capacity as Supervisor;
DEAN D. EUSTATHIOU, in his
official capacity as Acting
Director of Los Angeles County
Department of Public Works; DON
KNABE, in his official capacity as
Supervisor,

Defendants-Appellees.

No. 10-56017
D.C. No.
2:08-cv-01467-
AHM-PLA
OPINION

Appeal from the United States District Court
for the Central District of California
Howard Matz, District Judge, Presiding

Argued and Submitted
December 10, 2010—Pasadena, California

Filed March 10, 2011

3341

- 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 judgment to County because no MS4 “discharge” exceeded WQS
- 2011 - 9th Circuit reversed, finding a “discharge” from the channelized portion of the MS4 into the natural portion of the LA and Santa Monica rivers
- 10/11/11 - *S. Ct. cert. petition filed by County*

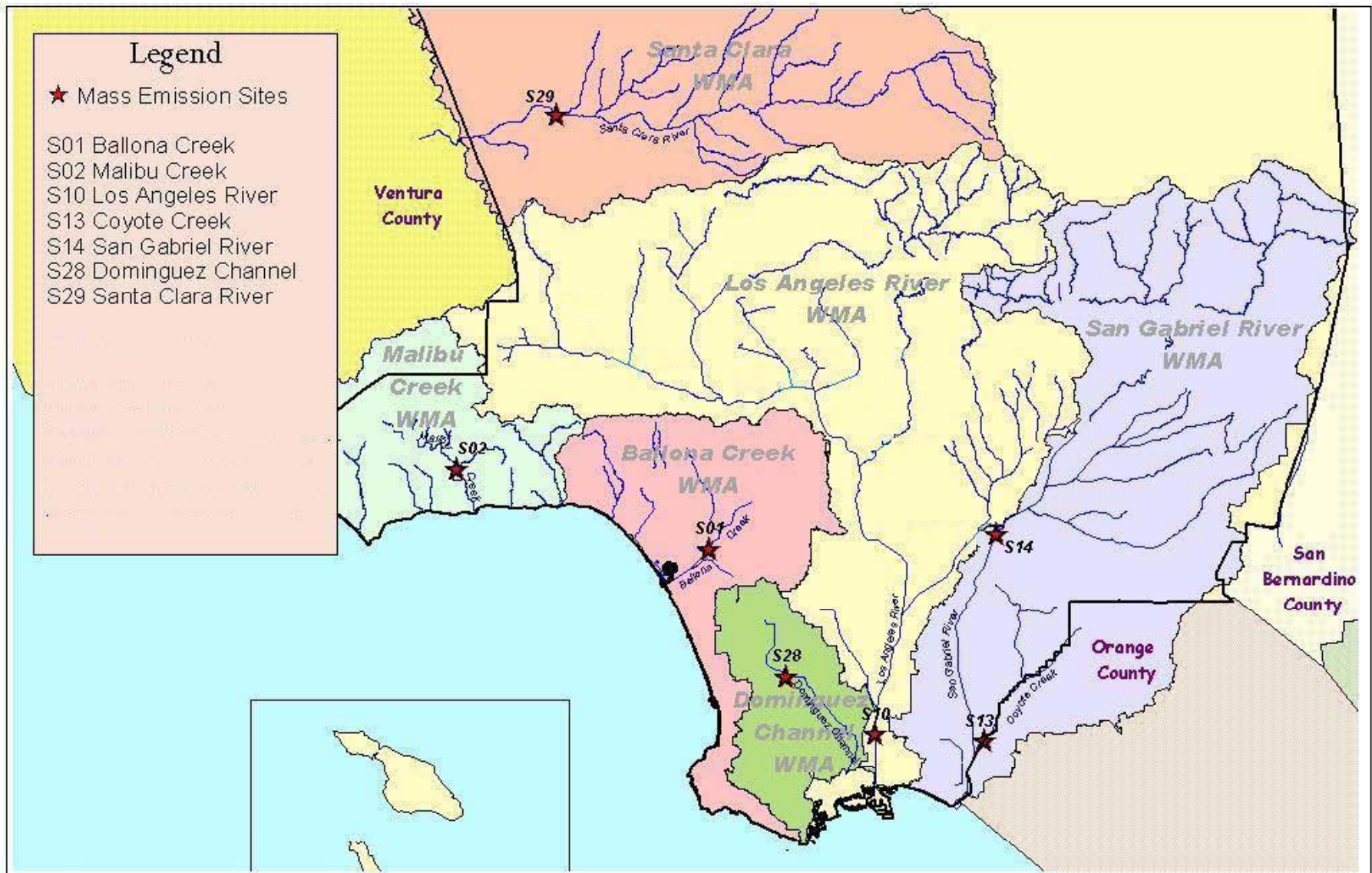
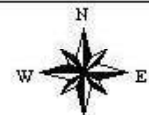


Figure 2-1
Mass Emission Sampling Sites



3 0 3 6 9 Miles



This contains the maps produced by the public works department of the County of Los Angeles. The maps are not to be used for any other purpose without the written permission of the County of Los Angeles. All rights reserved.

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District of Columbia

- Final renewal permit issued by Region 3 on 10/7/11
- § 1.4 “Discharge Limitations”
 - District must manage, implement and enforce a SWMP “to meet the following requirements:”
 - “Effectively prohibit pollutants in stormwater discharges . . . as necessary to comply with existing” District WQS
 - “Attain applicable wasteload allocations for each established or approved” TMDL for each receiving water body
 - *“Compliance with the performance standards and provisions contained in Parts 2 through 8 of this permit shall constitute adequate progress toward compliance with DCWQS and WLAs for this permit term.”*
- *Is this an effective “safe harbor”?*

District of Columbia

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:)
)
Government of the District of Columbia,)
Municipal Separate Storm Sewer System,)
NPDES Permit No. DC 0009221)

PETITION FOR REVIEW

Friends of the Earth, Anacostia Riverkeeper, Inc., Potomac Riverkeeper Inc., and Natural Resources Defense Council, Inc., respectfully file this petition for review by their counsel:

Jennifer C. Chavez
Earthjustice
1625 Massachusetts Avenue, N.W., Ste. 702
Washington, D.C. 20036
(202) 667-4500
Attorney for Friends of the Earth, Anacostia Riverkeeper, and Potomac Riverkeeper

Rebecca J. Hammer
Natural Resources Defense Council
1152 15th Street, N.W., Ste. 300
Washington, D.C. 20005
(202) 513-6254
Attorney for Natural Resources Defense Council

Dated: Nov. 4, 2011.

FOE and NRDC Appeal:

- All MS4 permits must ensure compliance with WQS
 - 2002 EAB decision makes this *res judicata*
- All MS4 permits must be consistent with TMDL WLAs
- “Safe harbor” language fails to ensure WQS compliance
- Permittee cannot be allowed to set its own schedule for TMDL implementation

DC Permit Requirements (1)

Stormwater Management Plan (SWMP)

- Develop new SWMP elements and submit to EPA for approval
 - Anacostia Watershed Trash Reduction Calculation Methodology
 - Catch basin O & M
 - Outfall repair schedule
 - Off-site mitigation/payment-in-lieu program
 - Retrofit Program
 - Consolidated TMDL Implementation Plan
 - Revised monitoring program

DC Permit Requirements (2)

Standards for Long-Term SW Management:

- Focus on **on-site retention**
- Develop and implement a SWMP that integrates practices at the site, neighborhood and watershed levels designed to **mimic predevelopment hydrology** through use of on-site SW retention measures (harvest and use, infiltration and evapotranspiration)
- Performance standard: On-site retention of 1.2" of SW from a 24-hr storm with a 72-hr dry period for all developments > 5,000 sq ft.

DC Permit Requirements (3)

Retrofit Program for Existing Development:

- Develop program that establishes performance metrics for retrofit projects within 2 years
- Fully implement program upon EPA approval
- Implement retrofits from a minimum of 18,000,000 sq ft (**413 acres**) of impervious surfaces during the permit term (2016)
- A minimum of 1,500,000 sq ft must be in transportation rights-of-way
- Ensure major renovation/rehab projects for public buildings include on-site SW retention measures.

DC Permit Requirements (4)

Other Green Infrastructure Elements:

- Tree Canopy
 - Achieve tree canopy coverage of 40% by 2035
 - Achieve a minimum net annual tree planting rate of 4,150 annually
- Green Roof Projects
 - ID District owned properties where green roofs are technically feasible and commit to schedule for implementing projects
 - Install minimum 350,000 sq ft of green roofs on District properties during permit term

DC Permit Requirements (5)

O & M of SW Retention Practices:

- Develop and implement O&M protocols for District owned on-site retention practices (development and retrofit)
- Develop accountability mechanisms to ensure maintenance of SW control practices on non-District property
 - Must include long-term verification process of O&M
 - Maintain electronic inventory of retention practices on private property including O&M verification process

DC Permit Requirements (6)

- Pesticide, Fertilizer and Herbicide Use
 - Utilize integrated ecosystem based pest mgt program focused on long-term prevention of pests thru techniques such as biological control, habitat manipulation, modification of cultural practices, use of resistant varieties, and use of low or no chemical and irrigation input landscapes
- Solids and Floatables Reduction
 - Develop and implement plan for cleaning and repair of all catch basins at least once annually
 - Develop and implement plan to repair about 10% annually of all outfalls needing repair
- Street Sweeping
 - Conduct on at least 641 acres of roadway annually at frequencies varying from 9 times a year for arterials to 1 time a year for central business streets

DC Permit Requirements (7)

- Implement Anacostia Clean Up Act to **ban use** of disposable non-recyclable plastic carryout bags and **restrict use** of disposable carryout bags in certain food establishments
- Develop Implementation Plans for all TMDL WLAs and Fully Implement upon EPA Approval
 - Anacostia River Trash: Remove 103,188 lbs (51.6 T) annually by 5th year of permit
 - Hickey Run: Implement Hickey Run TMDL strategy
 - Consolidated TMDL implementation plan for:
 - BOD in Upper and Lower Anacostia River
 - TSS in Upper and Lower Anacostia River
 - Fecal Coliform Bacteria in Upper and Lower Anacostia
 - 13 others (organics & metals, PCBs, nutrients, etc.)

DC Permit Requirements (8)

- Develop and implement revised monitoring program (6 sites)
 - Make wet weather loading estimates of required parameters to receiving waters
 - Evaluate health of receiving waters to include biological and physical indicators such as macroinvertebrates and geomorphologic factors
 - Include additional monitoring for source ID and WLA tracking
- Use info to evaluate quality of SW program and health of receiving waters to:
 - Estimate annual cumulative pollutant loading
 - Identify and prioritize additional efforts needed to address WQ exceedances
 - Identify WQ improvements or degradation

DC Permit Requirements (9)

- Stormwater Modeling
 - Continue to develop SW model & GIS
 - Annually report pollutant load reductions using statistical model developed by District
 - Assess on-site retention projects through monitoring, modeling and/or estimating storm retention capacity to determine volume of SW removed from the MS4
- Fiscal Resources
 - District shall **provide adequate finances**, staff, equipment and support capabilities to implement provisions of permit
 - District shall **provide a dedicated funding source**
 - Each annual report shall include a **demonstration of adequate fiscal capacity** to meet requirements of permit

District of Columbia

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
ENVIRONMENTAL APPEALS BOARD

DISTRICT OF COLUMBIA WATER AND
SEWER AUTHORITY)
and)
The WET WEATHER PARTNERSHIP,) NPDES Permit Appeal No: _____
Petitioners)
In re: NPDES Permit No. DC 000221)

PETITION FOR REVIEW

Pursuant to 40 C.F.R. § 124.19, the District of Columbia Water and Sewer Authority (hereinafter "DC Water") and the Wet Weather Partnership (collectively, the "Petitioners") jointly submit this Petition for Review ("Petition") to contest certain conditions in the October 7, 2011 reissuance of the above referenced NPDES Permit ("Permit"). The Permit was issued to DC Water and the Government of the District of Columbia (District Government) for the Municipal Separate Storm Sewer System ("MS4") which serves approximately two-thirds of the District of Columbia.

Petitioners seek review of a final determination by the United States Environmental Protection Agency, Region III ("EPA") to reissue the Permit in order to strengthen the Permit in several important ways. First, the permit fails to specify the responsibilities of DC Water, a co-permittee but independent agency of the District Government. Because it is an independent agency, with independent governance and budgeting, DC Water is entirely different from all the other District Government entities identified in the Permit with Permit responsibilities. As an independent agency, it is essential that DC Water's

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DC Water and WWP Appeal:

- Infeasible for DC to develop consolidated implementation plan for 370 TMDL WLAs on more than 200 water body segments and project dates for ultimate compliance
- 90-98% reduction in fecal coliform to Anacostia River cannot be attained with existing technology
- 24 hour public notice of SSOs?

Clark County, Washington

- “Phase I” MS4 permit issued to Clark County in 2007
 - required compliance with “flow control standards” in the Western Washington stormwater manual; post-development discharges above certain thresholds must match “pre-development” flows
- 2011 – Citizen suit filed by Rosemere Neighborhood Association and Columbia Riverkeeper:
 - 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 has failed to reduce the level of pollutants to the maximum extent practicable

Delaware Riverkeeper Network v. EPA

- 7/27/11 – Citizen suit filed **against U.S. EPA** seeking to compel the Agency to bring New Jersey's stormwater program into compliance with the CWA
- Claims that EPA has 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 are 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 based on report by 4 expert hydrology and engineering consultants hired by DRN

EPA's Stormwater Rulemaking and Guidance Memo on Numeric Limits and TDMLs

EPA Stormwater Rulemaking Initiative

- Announced in December 2009
- ICRs distributed in 2010
- Outreach meetings with small businesses, state and local governments in December 2010
 - Written comments submitted in January 2011 by NAHB, ECOS, ASWIPCA, NACWA, SESWA, FSA and others
- Attention from Congress
 - 6/30/11 Senate EPW Committee Minority Staff Report examines economic impacts on state and local governments
 - 8/17/11 letter from Senators Inhofe, Boozman, Barraso and Vitter demands report to Congress, questions authority to control post-construction hydrology and to regulate flow as “surrogate” for pollutants

EPA Memorandum on Stormwater TMDLs and Numeric Limits

- Released on Nov. 12, 2010 to revise and update an earlier memorandum from Nov. 22, 2002 in order to reflect “current practices and trends”
- Two of the four topics covered in the memorandum raised particular concern:
 - Including numeric water-quality based effluent limitations in NPDES permits for stormwater discharges
 - Using “surrogates” for pollutant parameters (such as stormwater “flow” or impervious surface area) in TMDLs
- NACWA, NAFSMA, APWA letter on Jan. 28, 2011
- EPA agreed to take further comments by May 16
 - got 195 comments (82 form letters)
 - may revise, withdraw or make no change



NACWA



May 12, 2011

Mr. Kevin Weiss
Water Permits Division
U.S. Environmental Protection Agency
Room 7334 EPA East
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Mr. Weiss:

The undersigned municipal organizations are responding to EPA's solicitation of comments addressing the November 12, 2010 memorandum from James A. Hanlon, Director of the Office of Wastewater Management, and Denise Keshner, Director of the Office of Wetlands, Oceans and Watersheds, to all Water Management Division Directors in EPA Regions 1 – 10, entitled "Revisions to the November 22, 2002 Memorandum 'Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs.'" We submitted detailed comments on this

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provides our
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in behalf of

Federal Water Quality Coalition

May 16, 2011

Mr. Kevin Weiss
Water Permits Division
U.S. Environmental Protection Agency
Room 7334 EPA East
1200 Pennsylvania Ave., NW
Washington, DC 20460

RE: Comments on EPA's November 2010 Stormwater Memorandum

Dear Mr. Weiss:

On November 12, 2010, the Environmental Protection Agency (EPA) issued a memorandum entitled *Revisions to the November 22, 2002 Memorandum "Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Stormwater Sources and NPDES Permit Requirements Based on Those WLAs"* ("Memorandum"). On March 17, 2011, EPA announced that it would accept comments on the Memorandum through May 16, 2011, because a number of stakeholders had "expressed concern that they did not have the opportunity to provide input" before EPA finalized the Memorandum. The Federal Water Quality Coalition ("FWQC" or the "Coalition") is providing the following comments on the Memorandum, and requests that EPA withdraw the Memorandum.

The Coalition is a group of industrial companies, municipal entities, agricultural parties, and trade associations that are directly affected, or which have members that are directly affected, by regulatory decisions made under the federal Clean Water Act. The Coalition members, for purposes of these comments, are as follows: Alcoa, Inc., American Chemistry Council, American Coke and Coal Chemicals Institute, American Forest & Paper Association, American Iron and Steel Institute, American Petroleum Institute, Association of Idaho Cities, Auto Industry Forum, Bay Area Clean Water Agencies, City of Superior (WI), Cœur d'Alene Mines Corporation, Edison Electric Institute, Freeport-McMoRan Copper & Gold, Inc., General Electric Company, Hecla Mining Company, Indiana Coal Council, Koch Industries, Inc., Mid America CropLife Association, National Association of Home Builders, NewPage Corporation, Orange County Sanitation District, Pharmaceutical EHS Sustainability Council, Rayonier Corporation, Rubber Manufacturers Association, Shell, Utility Water Act Group, Western Coalition of And States, Western States Petroleum Association, and Weyerhaeuser Company.

Coalition member entities or their members own and operate facilities located on or near waters of the United States. Many of these facilities have stormwater discharges that are covered by individual and/or general NPDES permits



Comments on Nov. 12 USEPA Memo
Minnesota Cities Stormwater Coalition
May 16, 2011
prepared by Randy Neprash, PE



1. It appears that the change in promoting the use of numeric WQBELs was done in consultation with state permitting authorities. For example:

"Since 2002, many NPDES authorities have documented the contributions of stormwater discharges to water quality impairment..."

There is no indication in the memo that the MS4 permittees were consulted before this policy change was decided. If MS4 permittees were consulted in the course of reviewing this policy and deciding on this change, please provide information and documentation about such consultations. Specifically, please provide information regarding any consultations with small MS4s, the Phase II permittees. It would be inappropriate to promulgate a policy change of this significance without extensive



May 16, 2011

Mr. Kevin Weiss
Water Permits Division
U.S. Environmental Protection Agency
Room 7334 EPA East
1200 Pennsylvania Ave., NW
Washington, DC 20460

RE: Comments on EPA's November 2010 Stormwater Memorandum

Dear Mr. Weiss:

On November 12, 2010, the Environmental Protection Agency (EPA) issued a memorandum entitled *Revisions to the November 22, 2002 Memorandum "Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Stormwater Sources and NPDES Permit Requirements Based on Those WLAs"* ("Memorandum"). On March 17, 2011, EPA announced that it would accept comments on the Memorandum through May 16, 2011, because a number of stakeholders had "expressed concern that they did not have the opportunity to provide input" before EPA finalized the Memorandum. The Federal Stormwater Association (FSWA) is providing the following comments on EPA's Memorandum, and requests that the Agency withdraw the Memorandum.

FSWA is a group of industrial, municipal, and construction-related entities that are directly affected, or which have members that are directly affected, by regulatory decisions made by federal and state permitting authorities under the Clean Water Act (CWA or the Act). FSWA member entities or their members own and operate facilities located on or near waters of the United States. Many conduct operations that generate "stormwater associated with industrial activity" as defined at 40 CFR § 122.26(b)(14) (including active construction stormwater discharges within the definition of 40 CFR § 122.26(b)(14) and (15)), are subject to NPDES permitting, and in many instances discharge to impaired waters subject to or soon to be subject to TMDLs.¹

¹ A copy of FSWA members is available upon request.



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NATURAL RESOURCES DEFENSE COUNCIL

May 16, 2011

Kevin Weiss
Water Permits Division
U.S. Environmental Protection Agency
Room 7334 EPA East
1200 Pennsylvania Avenue, NW
Washington, DC 20460
weiss.kevin@epa.gov

Via email and US mail

Re: Comments on November 12, 2010 EPA Memorandum, "Revisions to the November 22, 2002 Memorandum Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs"



601 Wythe Street, Alexandria, Virginia 22314-1994 | p 703.684.2400 | f 703.684.2492 | www.wef.org

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May 16, 2010

Kevin Weiss
Water Permits Division
U.S. Environmental Protection Agency
Room 7334 EPA East 1200 Pennsylvania Avenue, NW Washington DC 20460

RE: Comments on November 12, 2010 EPA Memo on Stormwater TMDLs

The Water Environment Federation is pleased to submit comments on the November 12, 2010 memo entitled "Revisions to the November 22, 2002 Memorandum Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs". These comments are being submitted in response to a March 17, 2011 letter released by EPA requesting comment on the memo highlighted above.

Formed in 1928, WEF is a not-for-profit technical and educational organization with 36,000 individual members and 75 affiliated Member Associations representing water quality professionals around the world. WEF and its Member Associations proudly work to achieve our shared mission of preserving and enhancing the global water environment.

These comments, developed via a WEF workgroup process, are provided in six categories:

1. Process
2. Maturity of Field
3. Consistency with States
4. Surrogates
5. Need for Additional Guidance
6. Expansion of Numeric Effluents as WQBELs

General Comments

1. **Process** – WEF has maintained a close relationship with EPA and is viewed as a resource for information on technical issues related to various water-related topics; however, WEF – and other groups – were not included in the process to develop, review or comment on this document prior to its release. WEF believes that this memo should be withdrawn and included with the stormwater rulemaking effort.
2. **Maturity of Field** – The memo makes the case that the "stormwater permit program has matured," and that, "states and EPA have gained considerable experience in developing TMDLs and WLAs that address stormwater sources...the technical capacity to monitor stormwater and its impacts on water quality has increased," but there is no documentation cited on these points. WEF requests that the information used to make this statement be made available for review. Being a leader in the development and production of technical information in the water sector, WEF would welcome the opportunity to partner with EPA in the effort to collect this information.

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NORTHWEST ENVIRONMENTAL ADVOCATES



May 16, 2011

Kevin Weiss
Water Permits Division
U.S. Environmental Protection Agency
Room 7334 EPA East
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Via E-Mail: weiss.kevin@epa.gov

Re: Comments Solicited on November 12, 2010 Memorandum Entitled "Revisions to the November 22, 2002 Memorandum Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs"



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May 16, 2011

Kevin Weiss
Water Permits Division
U.S. Environmental Protection Agency
Room 7334 EPA East
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Comments on November 12, 2010 TMDL/Stormwater Memorandum

Dear Mr. Weiss:

The Association of State and Interstate Water Pollution Control Administrators (ASIWPCA) is pleased to provide the comments on the November 12, 2010 Memorandum, *Establishing Total Maximum Daily Load (TMDL) Waste Load Allocations (WLAs) for Storm Water and NPDES Permit Requirements Based on Those WLAs* (hereinafter "memorandum"), (www.epa.gov/nodes/pubs/establishingtmdlwa_revision.pdf)

Celebrating its 50th Anniversary this year, ASIWPCA is the national voice of state, interstate, and territorial officials (hereinafter "states") responsible for implementation of programs that protect surface waters across the nation—including the stormwater program. As our members emphasized on the December 8, 2010 call we held with you to discuss the memorandum, states support continual improvement and evolution of critical water quality programs like the TMDL and stormwater programs. However, as these programs mature and evolve, we urge EPA to discuss policy shifts with the state regulators early, and before releasing final documents. This can help draw upon state and interstate collective knowledge and experience. In this case, we could have provided further guidance on our work in the area of regulating precipitation-driven discharges and in piloting the approaches EPA advances in this memorandum. Based on the volume of stakeholder input following the memorandum's release, we commend the Agency for accepting comments on it and for considering changes to clarify several statements and concepts contained in it. On a broader level, given the significant activity in the area of stormwater, ASIWPCA urges EPA to continue close coordination with states on the full spectrum of stormwater issues.

Fundamentally, states support modification and refinement of the federal stormwater program to improve its effectiveness. We agree that meaningful water quality improvement can be achieved with greater control of stormwater runoff. While there is some variation between states regarding approaches they use for stormwater effluent limitations, stormwater surrogates, and to aggregate/disaggregate sources, there is complete consensus that states be allowed to maximize the flexibility when making their determinations. There is also consensus that establishing defensible numeric limits for stormwater discharges can sometimes require a complex and costly analysis, and that this approach may not be possible in many watersheds.

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“Surrogate” TMDLs

- In its Nov. 2010 memorandum, EPA noted “recent examples” of TMDLs using flow or impervious cover as surrogates for pollutants in setting TMDL loads:
 - Eagleville Brook (CT) and Barberry Creek (ME), which used impervious cover as a surrogate; and
 - Potash Brook (VT), which used stormwater flow volume
- On April 18, 2011, EPA Region 3 issued a final TMDL for Accotink Creek (VA), using flow as a surrogate for sediment pollution
 - objections to the draft TMDL had been filed by Fairfax County and by Virginia DOT in 2010, disputing the Agency’s authority to regulate “flow”
 - no legal challenge appears to have been filed

Missouri TMDLs

- In December 2010, TMDLs were issued by EPA Region 7 for several Missouri rivers, in order to meet deadlines from a 1998 lawsuit by the American Canoe Association and the Sierra Club, including
 - Hinkson Creek:



Missouri TMDLs

- Wilson, Jordan and Pearson Creeks:



United States Environmental Protection Agency
Region 7
Total Maximum Daily Load



in Creek (MO_2373)
in County, Missouri

United States Environmental Protection Agency
Region 7
Total Maximum Daily Load



Wilson and Jordan Creeks (MO_2375 and 3374)
Christian and Greene Counties, Missouri


Kevin A. Flannery
Acting Director
Water, Wetlands and Pesticides Division


ion

Jan. 23, 2011
Date

Wilson Creek TMDL

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

THE CITY OF COLUMBIA, MISSOURI,)	
THE CURATORS OF THE UNIVERSITY OF)	
MISSOURI, and)	
BOONE COUNTY, MISSOURI)	Case No.
Plaintiffs,)	Division No:
vs.)	
UNITED STATES ENVIRONMENTAL)	
PROTECTION AGENCY,)	
LISA P. JACKSON, ADMINISTRATOR OF)	
THE ENVIRONMENTAL PROTECTION)	
AGENCY,)	
KARL BROOKS, REGIONAL)	
ADMINISTRATOR OF REGION 7 OF THE)	
ENVIRONMENTAL PROTECTION)	
AGENCY)	
Defendants.)	

COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF

The City of Columbia, The Curators of The University of Missouri, and Boone County, Missouri, for their Complaint against the defendants, by and through counsel, state, allege, and aver as follows:

I. NATURE OF ACTION

1. This action is brought pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 *et seq.*, the Federal Water Pollution Control Act, known as the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 *et seq.*, and 28 U.S.C. § 1331, and The National Environmental

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City of Columbia v. EPA

- Challenge filed on 6/13/11 by City of Columbia, Univ. of Missouri and Boone Co.
- TMDL would require 39.6% reduction in flow from City's MS4
- Estimated costs of compliance from \$100 to \$300 million
- "Flow" used as surrogate parameter for "unknown" pollutants causing biological impairment

City of Springfield v. EPA

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

THE CITY OF SPRINGFIELD, MISSOURI,)
Plaintiff,)
vs.) Case No.
UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY,)
LISA P. JACKSON, ADMINISTRATOR, U.S.)
ENVIRONMENTAL PROTECTION)
AGENCY, and)
KARL BROOKS, REGIONAL)
ADMINISTRATOR, REGION 7, U.S.)
ENVIRONMENTAL PROTECTION)
AGENCY,)
Defendants.)

COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF

The City of Springfield, Missouri, for its Complaint against the Defendants, by
counsel, states as follows.

I. NATURE OF ACTION

1. This action is brought pursuant to the federal Administrative Procedure Act
("APA"), 5 U.S.C. §§ 551, *et seq.* This action seeks review of final action taken by
Defendants, the United States Environmental Protection Agency, its Administrator and its
Region 7 Administrator ("EPA") to establish Total Maximum Daily Loads ("TMDLs") to
regulate and reduce undetermined alleged pollutants affecting Wilson, Jordan, and Pearson
Creeks in and in the vicinity of Springfield, Missouri.

- Challenge filed on 9/30/11 by City of Springfield
- TMDL would require 30-40% reduction in flow from City's MS4
- Estimated costs of compliance from \$100 to \$300 million
- "Flow" used as surrogate parameter for "unknown" pollutants causing biological impairment

Stormwater Fee Litigation

Federal Facilities

- Cincinnati, OH
 - After protracted litigation (from 1997 through 2008) NIOSH agreed to pay portion of past fees and all of current fees going forward
- King County, WA
 - 2006 “Decision” by GAO determined that charge imposed on Forest Service for surface water management program was an unconstitutional tax on the federal government
- Vancouver, WA
 - 2009 BPA stops paying stormwater utility charge for cities of Vancouver and Renton
- Washington DC
 - 2010 GAO and GSA determine federal government will not pay the District’s new stormwater service charge

Federal Facilities (cont.)

- 1/4/11 – Congress amends CWA § 313(c) to clarify federal responsibility for stormwater fees
- 3/14/11 – GAO informs DC that it will begin paying District's stormwater charge
- 4/20/11 – DOD Memorandum determines that the amendment to CWA § 313(c) is “not retroactive”
- 7/12/11 – United States sues cities of Vancouver and Renton for refund of stormwater charges “wrongfully paid” from 2005 through 2010; agrees to pay only *new* charges assessed after 1/4/11

Saint Louis

- 2008 – St. Louis MSD instituted new stormwater fee
 - raised \$41.48 million per year
 - 22% of MSD operating budget
- 2010 – State court ruled the fee was a tax needing voter approval under the Missouri constitution
 - Judge found no direct relationship between impervious surface area and amount of stormwater runoff or services related to that runoff
- 2011 – City appeals to Missouri state appellate court
- *Amicus* brief filed by NACWA, NAFSMA and APWA
 - argues that fees based on impervious surface area are the industry norm, and that there is a direct relationship with the cost of providing stormwater management services