

# As goes California . . .

## Stormwater Regulation on the Left Coast

NACWA Legal Conference  
San Antonio, Texas – 11/21/2013

PRESENTED BY

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# Overview

- Emerging Issues in Stormwater Permitting
  - Water Quality Standards as Numeric Effluent Limits
  - Incorporating TMDLs into MS4 Permits
  - Regulation of the Volume of Discharge







# Water Quality Standards as NELs

- A long, sordid tale . . .



# Water Quality Standards as NELs

- Regulation of Stormwater under CWA
  - 1972 Enactment
  - NRDC v. Costle
  - 1987 Amendments – 402(p)
  - 1990's Regulations – 40 C.F.R. 122.26

# Water Quality Standards as NELs

- 402(p)(3)(B):
  - (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
  - (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.



# Water Quality Standards as NELs

- Regulation in California
  - California State Water Resources Control Board
  - Regional Water Quality Control Boards
- State Board Orders on WQS
  - 91-03
  - 98-01
  - 99-05



# Water Quality Standards as NELs

- Decisions based on guidance from EPA that municipal stormwater needed to comply with Section 301 of the Clean Water Act (and meet WQSs).
- Orders held that municipal stormwater permits had to include **effluent limitations** necessary to achieve water quality standards (not receiving water limitations)
- Also held that BMPs constituted valid effluent limitations to comply with both the technology-based and water quality-based effluent limitation requirements.

# Water Quality Standards as NELs

- In January of 1998, the SWRCB determined that the CWA and the California Water Code do not require strict compliance by MS4s with water quality standards.
- On March 17, 1998, EPA Region IX sent a letter regarding SWRCB Order No. WQ 98-01, objecting to the inclusion of “not in violation” language in MS4 permits because it was not consistent with CWA Section 301's requirement to meet WQSs.

# Water Quality Standards as NELs

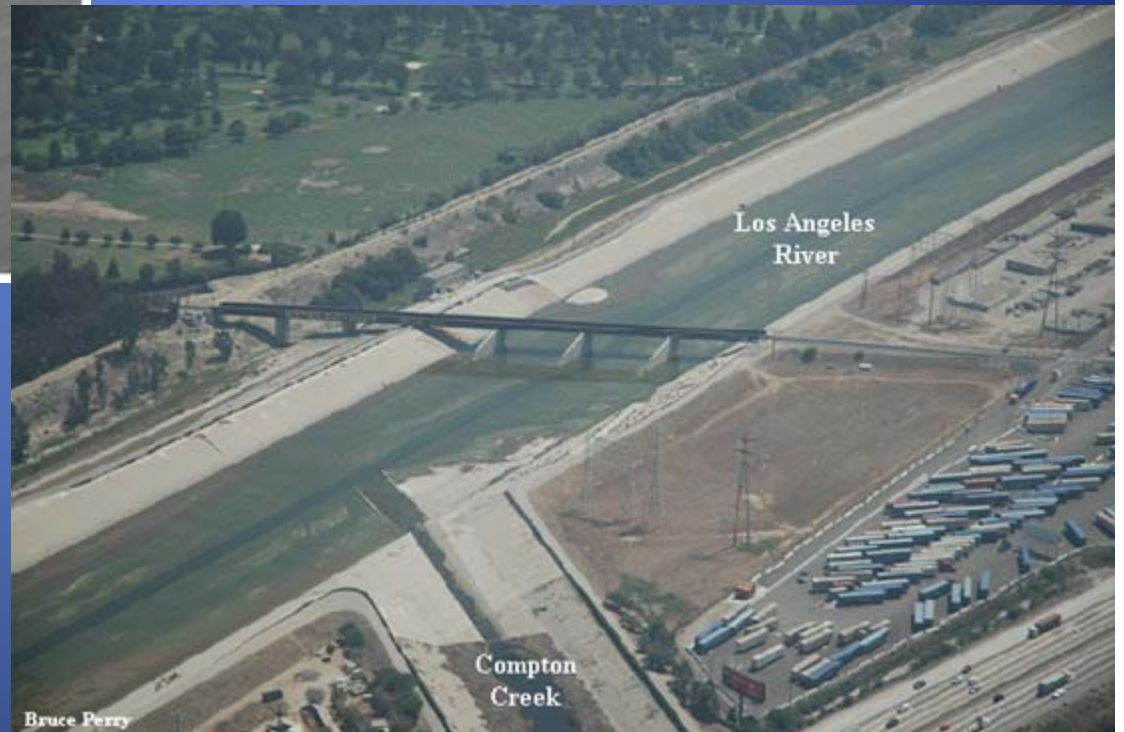
- Defenders of Wildlife v. Browner
  - 402(p) is different from 402(a)
  - No direct tie between Water Quality Standards and MS4 Permits required
  - Numeric Effluent Limits not required
  - EPA and States retain discretion to include any of the above if they deem it necessary under 402(p)

# Water Quality Standards as NELs

- State Board Order 2001-15
  - Keep mandatory language of 99-05
  - Compliance is through the iterative process:
    1. Discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives are **prohibited**.
    2. Discharges from the MS4 of storm water, or non-storm water, for which a Permittee is responsible for, **shall not cause or contribute to** a condition of nuisance.
    3. The Permittees **shall comply** with Part 2.1. and 2.2. through timely implementation of control measures and other actions to reduce pollutants in the discharges in accordance with the SQMP and its components and other requirements of this Order including any modifications. The SQMP and its components shall be designed to achieve compliance with receiving water limitations.



# NRDC v. County of Los Angeles



# Water Quality Standards as NELs

- NRDC v. County of Los Angeles (9<sup>th</sup> Cir)
  - Monitoring stations in LA River show exceedances of WQS
  - Prohibition on discharges that cause or contribute to exceedances of WQS is a standalone requirement
  - LA County Flood is in violation of its MS4 permit

# Water Quality Standards as NELs

- NRDC v. County of LA (Supreme Court)
  - Grants cert on (lack of) location of discharge
  - Iterative nature of “cause or contribute” not considered
- 9<sup>th</sup> Circuit decision on State Board requirements stands

# Water Quality Standards as NELs

- Regional Boards have discretion and have taken different approaches:
  - San Diego County – no change
  - Coachella Valley (Palm Springs) – full BMP approach
  - LA County – Watershed planning, BMP approach with requirement to do a Reasonable Potential Analysis and demonstrate that WQS will be attained



# Water Quality Standards as NELs

- NGO perspective:
  - Original intent of State Board orders was for standalone requirement
  - BMP-based approach is Backsliding
- Appeal of LA County Permit
  - Basic permittee challenge is failure to follow precedential orders
  - Basic NGO challenge it backsliding
  - State Board held hearing on October 8, 2013, decision pending

# TMDLs

- TMDLs are an expression of WQS – Pronsolino v. Natri
- Defenders of Wildlife v. Browner
  - WQS not required in MS4 Permits
  - Can be included in discretion of EPA or States
  - 9<sup>th</sup> Circuit decision, not covered in other Circuits

# TMDLs

- 40 C.F.R. 122.44(d)
  - WQBELs required as necessary to attain WQS
  - WQBELs shall be “consistent with the assumptions and requirements” of adopted WLAs
- 40 C.F.R. 122.44(e)
  - Numeric Effluent Limits required unless:
    - Infeasible
    - BMPs allowed pursuant to 402(p)

# TMDLs

- EPA position: WLAs should be included as NELs required unless there are findings that BMPs will achieve WLA
  - 2010 Guidance Letter
  - Comment letters on LA County and other California MS4 Permits



# TMDLs

- NELs raise several issues:
  - Is compliance feasible?
    - Proposed standards based on WQS that are aspirational?
    - State Board 2006 Blue Ribbon Panel Report
  - Easy compliance target
    - Discharge either complies or it doesn't
    - Very high exposure for MS4 dischargers
  - State discretion v. EPA preferences
    - Iowa League of Cities
    - EPA review authority under MOU with State

# Regulation of Discharge Volumes

- MS4 permits across California require onsite retention of 85<sup>th</sup> percentile storm event
- Basis for requirement is two-fold:
  - Reduce pollutant loads from storm event
  - Reduce downstream hydromodification

# Post Construction Site Design

- Low Impact Development seeks to achieve two goals:
  - Prevent pollutants from leaving a site and entering surface waters
  - Prevent downstream hydromodification caused by increased volume of discharge



# Post Construction Site Design





# Post Construction Site Design

- Nationally:
  - EPA and Environmental Advocacy Groups are pushing for increased capture and reuse as a way to prevent water quality degradation
  - Requirements appeared in draft EPA regulations on stormwater discharges



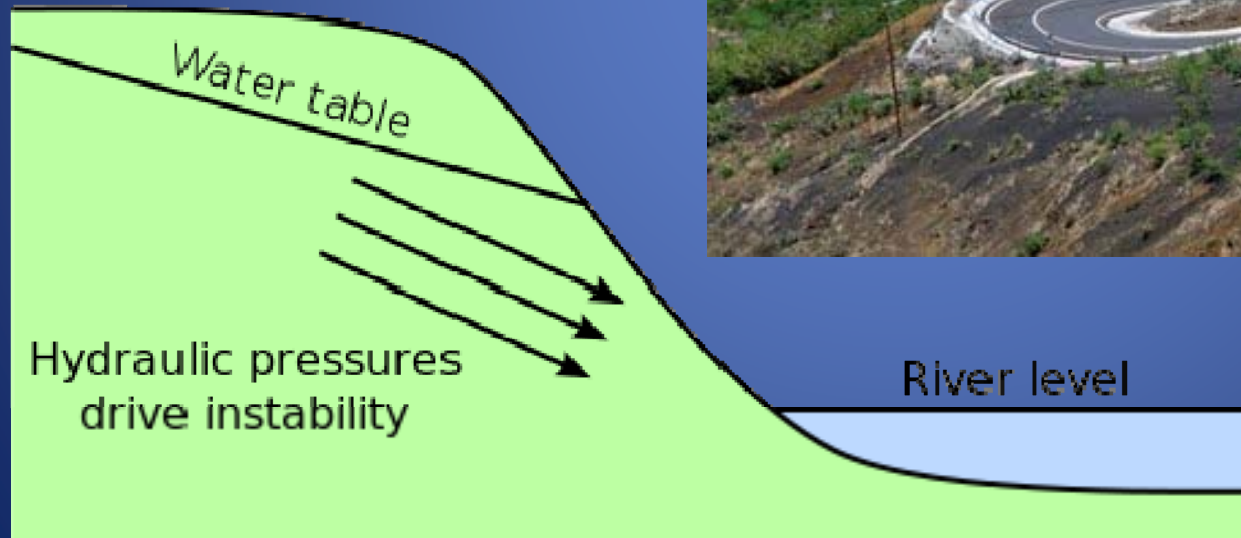
# Post Construction Site Design

- Standard requirement in MS4 Permits across California is final site design must retain 85<sup>th</sup> percentile storm flows on site.



# Post Construction Site Design

- Not all sites can accommodate





# Regulation of Discharge Volumes

- Building Industry response:
  - Onsite retention in all cases not appropriate or feasible
  - Bio-treatment is equally effective
  - Regional treatment facilities better use of resources
  - Regulation of discharge volume not appropriate under Clean Water Act

# Regulation of Discharge Volumes

- Section 401 –
  - No discharge of a pollutant from a point source without a permit
- Fed Regs at 122.26 - MS4 permit must include a program to control discharges from :
  - Areas of new development
  - Areas of redevelopment



# Regulation of Discharge Volumes

- Virginia Department of Transportation v. EPA:
  - Volume of discharges to Accotink Creek cannot be regulated as surrogate for sediment loads
  - *Stormwater* is not a pollutant
- District Court case not challenged by EPA
- Challenge was in context of TMDL, not NPDES permit

# Regulation of Discharge Volumes

- Is there something different that would allow regulation of flow in an NPDES permit?
  - PUD No. 1 of Jefferson County v. Washington Department of Ecology
    - 401 Cert Case
    - Clean Water Act allows conditions related to water quality in cert process, including limitations on volume of discharge
  - Permit issued under State authority
    - California's Porter Cologne Water Quality Control Act is very broad
    - Other states may not have same authority

# More to come . . .

- Inclusion of WQS
  - Initially encouraged by EPA Region 9
  - Since Browner EPA has never stated that direct tie as NELs is required
- TMDLs
  - EPA policy appears to be that WLAs need to be included as NELs unless there are findings that BMPs will achieve WLA
  - Up to States where they are issuing entity
- Regulation of flow
  - Very important issue to NGOs in California
  - State and Regional Boards are firmly behind it
  - EPA also advocates regulation of flow through LID and other practices

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