

# WET WEATHER ENFORCEMENT TRENDS

NACWA  
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# Overview

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- National Enforcement Status and Trends
  - ▣ Number of cases
  - ▣ Type/scope of cases
  - ▣ Federal/State relationship
- Key Consent Decree/State Order Developments

# Stars Aligning for More Reasonable Federal Enforcement

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- Mayors' efforts/economic downturn
- Recent spate of CD modifications
- Government shutdown....

# National Enforcement Perspective

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- EPA divisions under increasing pressure to justify their budgets and staffing levels
  - ▣ Enforcement staff need beans
  - ▣ Sequester....
- EPA has moved through most large CSO/SSO systems
  - ▣ NPDES permitted capacity >100 MGD
  - ▣ Working on 10-100 MGD group of communities
  - ▣ Most major systems have been touched by federal or state enforcement

# Enforcement Trends

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- EPA is getting to the bottom of the barrel in terms of CSO/SSO community targets
  - ▣ “Bottom”
    - Smaller in size
    - Systems with fewer problems

# Smaller Communities....

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- Physical Inspections
  - ▣ Often EPA contractor-driven
- CWA § 308 Information Requests
- Administrative Orders (injunction & relatively minor (\$187,500 max) under CWA § 309
- Consent Decrees

# Information Often Requested

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- ❑ Inspection and Discharge Reports
- ❑ Sewer overflow records....
- ❑ Billing Records for satellite systems
- ❑ I&I Studies\*\*\*
- ❑ Capital Improvement Plans
- ❑ Annual Reports
- ❑ Maintenance records

# Enforcement Trends

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- EPA needs new fields to plow
  - ▣ 15,000 POTWs in the country
    - Many moving to tertiary treatment to far fewer NPDES violations than in the past
      - Emerging criteria such as nutrients are regulated (properly) on a longer-term basis such as through annual limits
  - ▣ 700 CSO communities
    - 70% with fewer than 10,000 service population

# Enforcement Trends

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- EPA needs new fields to plow....
  - ▣ Approx. 1,000 Phase I MS4 communities
  - ▣ Approx. 7,000 Phase II MS4 communities
    - This number will increase

# National Enforcement

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- A few communities are actually being touched by the agencies to do a Round #2 consent decree/overflow control program

# National Enforcement

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- EPA still enforcing against mundane non-compliance
  - mostly smaller systems
    - ▣ Treatment plant effluent limits
    - ▣ Sewer overflows
    - ▣ Failing utilities where the State does not act effectively
    - ▣ Pretreatment/Risk Management Issues

# National Enforcement

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- EPA also has a number of cases where it is forced to initiate enforcement by the threat of or initiation of citizen enforcement
  - ▣ EPA sometimes joins as a white knight
  - ▣ Other times so as not to be viewed as leading from behind
    - See Boston Water and Sewer Commission

# National Enforcement

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- Stormwater enforcement appears to be approx. 50% of EPA's CWA enforcement resources
  - ▣ Started with national developers addressing construction site violations
    - Developers (e.g., Toll Bros)
    - Walmarts of the world

# National Enforcement

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- EPA moving aggressively to MS4s
  - ▣ Hundreds of EPA MS4 Inspections
  - ▣ Dozens and dozens of MS4:
    - Information requests
    - Administrative Orders
    - Penalty Orders

# State-EPA Relationship

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- ❑ EPA is hungrier for enforcement
- ❑ States have fewer resources and need EPA grants more than ever....
- ❑ Some states are okay with EPA taking up more of the enforcement burden
- ❑ Others remain steadfast that they can handle enforcement, particularly over their communities

# State-EPA Relationship

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- State as a co-defendant with communities?
- Trend of States being willing to be defendants with communities rather than co-plaintiff with EPA
  - ▣ State liability
  - ▣ Friendly co-plaintiff v. co-defendant
  - ▣ UG/NJ/Others

# Keep your friends close....

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## □ Best strategy:

- Work as much of your plan/program into your NPDES permit so there is not enough left to support federal enforcement
- Stay close to state so you end up on their side of the enforcement ledger if necessary
- Keep state actively engaged if there is fed. Enf.
  - State is a Sovereign government
  - Delegated authority
  - Most familiar with your community and program
  - Their view of things matters (see Judge Rambo)

## Key Enforcement/CD Trends

# Scope of Cases

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- EPA always pushes for a “comprehensive” action when going the CD route
  - ▣ Many possible reasons for this....
  - ▣ Major complication in negotiating federal CDs
  
- State actions tend to be more focused

# Scope of EPA Cases

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- ❑ CSO/SSO Overflow control plan requirement
- ❑ CMOM and/or NMCs
- ❑ Early Action Projects
- ❑ SORP
- ❑ Information Management System
  - ▣ Advantages/disadvantages
- ❑ FOG (regardless of whether you have issues)
- ❑ Pretreatment/Etc
- ❑ MS4/SWMP
- ❑ Private Property I/I?

# Schedules

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- “25” is the new 20?
  - ▣ “We’re probably still talking in that 25-year time frame....” EPA Official at NACWA Law 2011
- Unprecedented economic downturn (outside of normal economic cycle)
  - ▣ Erased decade of income growth
  - ▣ Will have lasting effects
- Rate increases cannot continue to outpace CPI

# Schedules

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- Increased schedule flexibility due to:
  - ▣ Lingering unprecedented economic downturn
  - ▣ Pushback from Conference of Mayors
    - Resulting congressional attention
  - ▣ Tougher local gov't negotiation (by necessity)
  - ▣ Frequency of CD modifications
  - ▣ Accommodating:
    - Green infrastructure
    - Integrated planning

# Schedule – Plan Development Time Outside of Implementation Schedule

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- Strive to ensure that you develop your plan first and put a schedule to it.
- Do not let your planning time erode your implementation period or you negotiate your plan approval against yourself

# Green Infrastructure/Solutions

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- EPA's actions in the CD context have been slow to match their conference presentations
- ▣ Your green surge has been their green chill in the trenches. They want:
  - Too many specifics
  - Too exacting performance measurement/guarantee instead of simply relying on gray backstop if overall performance comes up short

# Green Infrastructure/Solutions

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What we need to accelerate Green:

- Opportunity for a mulligan (green or gray) without penalty?
- Opportunity to ask them to waive performance gap if green comes up short:
  - ▣ Good faith
  - ▣ \$\$ is spent
  - ▣ Multiple benefits outweigh shortfall

# Green Infrastructure

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- Some programs want to do most/all on private property via code/development requirements
  - ▣ Agencies are skeptical about time this will take and whether it will really happen
- Some communities are able to show green can occur mostly if not all on public property
  - ▣ Abandoned/demolished housing
  - ▣ Roads
  - ▣ Etc.

# Trend Regarding Realistic “Shades of Green” for Urban Wet Weather Control?

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- ☐ 1%
- ☐ 5%
- ☐ 10%
- ☐ 15%
- ☐ 20%
- ☐ 30%
- ☐ >30%

# Green Infrastructure

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- Get your community to support your green publicly and in comments to the agencies
- Often a key focus of NGOs
- Is EPA getting the message? →
  - ▣ NB: EPA's pilot CSI?

# EPA Announces New Green Infrastructure Strategic Agenda



- Issued Oct. 2013
- Federal coordination – coordinate efforts; use existing federal partnerships to promote GI, information development and integration.
- CWA regulatory support – make GI language in permitting and enforcement actions a common practice.

# EPA Announces New Green Infrastructure Strategic Agenda



- Research and information exchange – make design, cost, and performance information easily available.
- Funding and financing – decrease the financial burden to communities installing GI; utilizing CWSRF, promoting stormwater utilities, and other mechanisms.
- Capacity building – supporting community-to-community networking and information exchange and partnerships.

# “Overflow Control Plan”

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- If you are a CSO community, consider “integrated overflow control plan”
  - ▣ IOCP/OCP rather than separate LTCP and SSO Control Plan
  - ▣ Allows you to better address prioritization of early investments
    - Need to show early returns to garner support for stiff rate increases later
    - Key part of larger integrated planning discussion

# Fighting for Planning Time

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- Stand firm re: the time you need for planning
  - ▣ This is the one issue you should be fully and aggressively ready to litigate
- Don't let it devolve into a theoretical discussion
  - ▣ Gantt Charts for the Lawyers Anyone?
- Consider giving them something in return so you reinforce that you will make RFP while planning:
  - ▣ Early Action Projects
  - ▣ Interim System Improvements
  - ▣ Where do we find these; how long will they take....

# Don't cut program planning time short

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- Measure twice, cut once....
- Public dollars and impacts
- The right solution can save you tens if not hundreds of millions of dollars
- NB: Agencies have a poor track record in modifying consent decrees
  - ▣ Do not assume they will either timely or freely substitute a cheaper alternative to achieving the same level of control

# Don't cut program planning time short

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- You are better off litigating than accepting too short a planning period
  - ▣ Litigation will likely yield the necessary time
  - ▣ Most Judges will defer to your “commercially reasonable schedule”
    - Esp if introduced into evidence in chart form (Gantt Charts for Lawyers)

# Don't cut program planning time short

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- How about an interim conceptual or preliminary draft plan
  - Advantages and disadvantages
  - Make sure this is a limited obligation
    - Number of pages
    - Only certain sections
  - For review and comment by agencies, not approval

# Fixed End Dates for Your OCP

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- Everyone used to be scared and agree to leap into a fixed end-date before they looked (developed a plan never mind had it approved)
- How do you put a schedule to the largest public works program in city history before developing that program?

# Environmental Justice

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- Agencies are increasingly looking for an environmental justice angle in enforcement
- Initially many communities dismissed it but are now giving it a second evaluation and looking for opportunities....
  - ▣ Especially for:
    - EAPs for planning time
    - OCP LOC and schedule justification

# Financial Capability

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## □ Rates

- ▣ Where the rubber meets the road
  - ▣ Further diminish regional competitiveness
  - ▣ Rate fatigue
  - ▣ Loss of businesses
  - ▣ Loss of satellite customers
- Include all CWA costs (storm water fees, keeping utility lights on, set aside for non-OCP capital, O&M increases, etc)

# Financial Capability

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- Bottom line negotiating: what are we willing to self-impose for this program in our community?
  - ▣ What pace of rate increase?
  - ▣ How high?
- 2% is not promulgated; it is NOT a legal requirement (poor assessment of true fiscal stress)
- Trend away from strict rate focus in schedules....

# Financial Capability

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- When agencies want “more”
  - ▣ Invite them to make a:
    - Grant funding commitment
    - SRF annual loan commitment
      - Dollars and preferred rates

# Avoid Redlining Your CD

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- ❑ If everything is a priority, nothing is
- ❑ Don't commit to do everything better from the outset
- ❑ Agencies take silo approach to CD requirements
- ❑ If you redline your commitment to each you will collapse under the overall weight
- ❑ Ex: Set your CD commitment at 70% of what you are doing now....
- ❑ Agencies are increasingly getting this concept

# MS4 Language Being Incorporated into Consent Decrees

- Critical to increase specificity in Permit when dealing with MS4 language
  - ▣ Helps to ensure compliance (but also pretty clear when you are not in compliance)
- What does “MEP” mean in your permit?
  - ▣ Often requires fact finding review....
- Couch MS4 provisions in “for this permit cycle” language
- Incorporate safeguards- “available” or specified funding levels

# Increased Enforcement for Highway Projects

- ❑ Kansas Department of Transportation was sued for CWA violations on three of its highway construction projects
- ❑ Rare for EPA to file suit against an MS4 in federal court; usually worked out through Administrative Orders
- ❑ Shows EPA is willing to insert itself into everyday dealings of an MS4 program if it has the opportunity

# LITIGATION

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- Local governments must be prepared to litigate with EPA if necessary
- Few recent cases have gone to litigation
- Federal Judge can be a Beautiful Thing
  - ▣ Most courts won't do harm to a local government trying to comply in good faith
  - ▣ Penalty? Have a beer... Pick your poison...
  - ▣ One notable exception

# Takeaways

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- EPA feeling heat from Mayors and Congress
- Scope of enforcement actions relentlessly creeping
- Ensure planning time; avoid uninformed fixed end dates
- Opportunities to really press for the right schedule
- Green surge ahead?
- MS4 will be the mainstay of future CWA enforcement
- OCP rather than separate SSO/CSO Plans
- Financial capability/sustainable rates
- Environmental Justice “opportunities” regarding LOC, schedules, and integrated planning