

# Federal Water Quality Update

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# Issues

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- Selected Federal Water Quality Issues
- Selected Stormwater Issues
  - Federal StormWater Association

# Nutrients – EPA Involvement

- EPA and NGOs pressing States to adopt stringent nutrient criteria
- EPA [for FL] adopted numeric criteria, legal challenges have been decided, but appeals are pending
- FL to adopt state standards that include biological confirmation of impairment [Great!] and EPA has sent a letter to FL indicating it will support FL approach
- EPA has *denied* NGO petition for Federal WQS and TMDLs for MS River Basin
  - NGOs have sued, and **FWQC has intervened**
- EPA has *not acted on* NGO petition to add nutrient removal to Fed secondary treatment requirements
  - NGOs have sued to force EPA to make a decision

# Nutrients in States

- Wisconsin – State adopted numeric criteria for P and permitting procedures – EPA has approved criteria and permitting procedures (allows 15 years to meet WQS, but have to come up with plan to attain standards)
- Other States with activity – Kansas, Montana, California, Colorado, Connecticut, Massachusetts, New Hampshire, Maine [Region 1 states very inflexible – B&T involved in Upper Blackstone River case; possible CT permit appeals]
- EPA has told Montana that statewide nutrient variances are probably OK (very strict standards) – [Good result]

**Key** = nutrient battles over pollutant limits and/or implementation, but must be successful on one of those issues.

# Chesapeake Bay TMDL

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- EPA issued TMDL for Bay watershed 12/30/10
- Lawsuits have been briefed
- TMDL includes specific wasteload allocations down to individual residence level
- Implementation is part of TMDL process
- If States do not comply with all Fed requirements, EPA will step in and take over [bit of reverse process?]
- Viewed by EPA as model for the Nation
- NGOs just filed **new complaint** arguing that trading in TMDL is illegal under CWA

# Water Quality Standards Rule?

- In 1998, EPA issued ANPRM about possible changes to all aspects of Water Quality Standards Regulation
- No action until late 2010, when EPA issued notice for comment concerning possible changes to WQSR on antidegradation, uses, variances, other issues
- EPA listening sessions held summer 2011
- Proposed rule at OMB since November 2011– may come out in late 2012, maybe not
  
- *Some changes probably needed and helpful, but concern is that NGOs use this as an opportunity to go after other existing WQS regs that don't need change*
- *Election results may be key to this issue*

# Conductivity Benchmark

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- EPA issued draft guidance with recommended conductivity aquatic value of 300 – equivalent to 129 mg/L TDS
- Applied only to Appalachian region, but approach could be used anywhere
- EPA is demanding that States use its value in permits, even though not officially issued
- Permit appeals and other legal actions have started
- DC court has ruled in NMA case that EPA acted outside of CWA authority – EPA appealing to DC Circuit
- EPA may issue national draft guidance, but on hold till NMA case resolved

# Selenium Criteria

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- EPA issued new draft aquatic criteria based on fish tissue levels
- Those levels would have been OK in East, but above natural levels in West
- Studies ongoing, and EPA has been working to base criteria on water column and egg/ovary concentrations
- But NGOs objected to levels and took issue to EPA Administrator
- Peer review slated for January 2013
- New proposed criteria expected in spring 2013



# Chloride Criteria

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- EPA is working on new recommended chloride aquatic criteria
- Expected to be similar to Iowa approach – hardness and sulfate-dependent
- Chronic will be higher, acute lower
- Peer review slated for December 2012
- Draft expected in spring 2013

# Ammonia Criteria

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- EPA revising ammonia criteria to address freshwater mussels
- Draft criteria would reduce standards by up to 80% where mussels present
- But “mussels present” didn’t mean that mussels actually have to be present – might need to show that they’re absent and could not have ever been present to fall into “mussels absent” category
- **Latest** – criteria could be based on data from snails and mussels, which would mean one set of numbers [mussels are more sensitive, snails more pervasive...]
- EPA expected to issue proposal (?) in late 2012

# Pinto Creek/New Sources

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- Ninth Circuit Court of Appeals issued ruling in Pinto Creek case that restricts issuance of NPDES permits to new sources on impaired waters
- EPA has not yet issued any guidance on how to implement the ruling
- Agency could propose changes to rule instead, but latest statement is that **EPA does not plan to do anything**

# PCB Test Method

- EPA has proposed approval of new/revised methods, including 1668C for PCBs (1668 has detection level in PPQ)
- Major problems with method that need to be addressed
- If finalized or where used, nearly every source will have PCBs at levels above WQS, and no available treatment technology
- FWQC expressed concerns, and EPA has finalized other methods without approving 1668
- **But** States are requiring testing in permits using 1668, not for permit compliance YET
- FWQC objecting – concerns with method not resolved, so should not require it to be used for any purposes
- **New Mexico** one of most stringent States in pushing for 1668 testing in permits – including MS4 permits (through 401 certification)

# Stormwater Developments

## CWA 402(p) is a *limitation* on authority

(p) Municipal and industrial stormwater discharges

(1) General rule

Prior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under this section) ***shall not require*** a permit under this section for discharges composed entirely of stormwater.

(2) Exceptions

[Phase I stormwater regulations]

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(6) Regulations [Phase II stormwater regulations]

Not later than October 1, 1993, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which ***designate stormwater discharges***, other than those discharges described in paragraph (2), ***to be regulated*** to protect water quality and shall establish a comprehensive program to regulate ***such designated sources***.

\* \* \*

The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.

# C&D ELG Litigation

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- National Association of Home Builders and Wisconsin Builders Association filed petitions for review, ending up in the 7<sup>th</sup> Circuit Court of Appeals; electric utilities group joined
- NAHB challenged the basis for EPA's 280 NTU NEL and certain BMP mandates that "exceeded CWA authority"
- After opening briefs filed, DOJ/EPA admitted error and asked 7<sup>th</sup> Circuit to vacate 280 NTU NEL and remand record
  - EPA committed to the Court that it would revise the NEL through a rulemaking to be done by February 15, 2012
  - Case was held in abeyance
- EPA stayed the NEL (75 Fed. Reg. 68,305, Nov. 5, 2010)

# C&D ELG Litigation

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- EPA published a *Federal Register* notice on January 3, 2012 requesting new data on passive (and “semi-passive”) treatment for construction stormwater
- EPA did NOT revise the NEL by its February 15, 2012 deadline, as promised to 7<sup>th</sup> Circuit
- Settlement discussions ongoing (as of date presentation drafted)

# California NEL Attempts/Cases

- *CA Building Ind. Assoc., et al. v. State Water Resources Control Bd*, CA Superior Ct. (Sacramento County) (Case No. 34-2009-80000338) (Dec. 2, 2011)(challenging NELs in CA construction GP)

The Court struck down the NELs for turbidity and pH in CA CGP, finding:

- The CWA requires that the Board determine the degree of effluent reduction attainable through the application of the BCT technology
  - At a minimum, the Board must identify available technologies, gather data characterizing the performance of the technologies under various site conditions, and then base a NEL consistent with performance data
  - The Board cannot properly base a NEL on theory and inferences drawn from limited or inconclusive studies of BCT performance using best professional judgment
- In 2011, CA requested comments on a new draft Industrial GP containing Numeric Effluent Limits and Numeric Action Levels
  - July 16, 2012, CA requested comments on a revised draft IGP that relies on EPA benchmarks as NALs, but no NELs
  - Comments due October 22, 2012



# New Stormwater/TMDL Memo

- November 12, 2010: EPA issued a new Stormwater/TMDL memorandum to replace 2002 Stormwater/TMDL memorandum
- Fundamentally shifts EPA presumption from historic BMP approach to a NEL approach focused on WQS
- Encourages using “flow” as a surrogate
- EPA “accepted” informal comments in May 2011
- EPA has said it will clarify memo’s meaning
  - **revised memo at OMB since March 13, 2012**
- While clarifications are pending, EPA claims November 2010 memo is “current EPA policy”

# 2010 Memo Concerns

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- Fundamental shift in program policy arguably requires a more formal APA notice-and-comment rulemaking
- EPA cites to “more experience,” “increased technical capacity,” “more sophisticated and widespread monitoring,” “better information,” and “changed expectations” – but provides little support for claims and does not truly demonstrate a numeric approach is feasible
- EPA’s approach to “designate” categories of sites for additional stormwater controls requires a more formal process under CWA 402(p)(5)-(6)
- Even if EPA could defend its movement towards a “numeric” approach, what limits are appropriate and applicable?

# Upcoming National Stormwater Rule

## Amended Chesapeake Bay TMDL Settlement Agreement:

- New national rule to be proposed by June 10, 2013
- Final rule to be promulgated by December 10, 2014
- [Original settlement = final rule by November 2012]

## Goals:

1. Expand stormwater program to include all MS4s and newly developed/redeveloped property (impervious threshold?)
2. Establish a “federal numeric standard” for controlling stormwater flow (states must adopt EPA’s standard or own “as protective” standard)
3. “Green Infrastructure” basis

# National Stormwater Rule

- EPA Considerations/Options/Issues:
  - All new/redeveloped sites stormwater characteristics mirror *predevelopment conditions*
    - quantity, velocity, quality (pollutants/temperature/etc.)?
  - MS4 transition to direct regulatory control over influent?
    - EPA authority to regulate MS4 influent or discharges “from” MS4?
  - Force MS4s to retrofit “to protect water quality”
  - Establish specific program for transportation (TS4)
- Current Status
  - “Abbreviated” SBREFA process completed
  - EPA still working on expanded cost-benefit analysis
  - EPA must submit report to Congress (CWA 402(p)(5)-(6))

# “Flow” TMDL Litigation

- The Virginia DOT and Fairfax County, Va. jointly sued EPA for requiring the State to set a TMDL for a sediment-impaired stream based on the “flow of water” rather than discharge of sediment (*Virginia Department of Transportation v. EPA*, E.D. Va., No. 1:12 cv 775, July 12, 2012)
- Cities of Columbia, MO and Springfield, MO each challenged certain flow-based TMDLs
- These cases point to reliance on 2010 Stormwater/TMDL memo
- Columbia, MO entered into a settlement agreement to use adaptive management to evaluate issues and strategies
  1. ID pollutants of concern, if possible (creek 303(d) listed for “unknown pollutants”)
  2. ID appropriate invertebrate species
  3. Improve creek health and WQ
  4. Establish stakeholder process and reasonable timeframes
  5. Achieve WQS in creek

# Judicial Expansion of Authority – Forest Roads

- May 2011: *Decker v. Northwest Environmental Defense Center* (9<sup>th</sup> Cir.):
  - EPA’s 1976 Silviculture Rule is invalid to the extent that it would consider runoff from logging roads that is collected in channels and ultimately discharged to a navigable water to be a nonpoint source.
  - Runoff from forest roads is storm water associated with an industrial activity [Phase I source] and therefore requires an ND PES permit immediately.
- May 23, 2012 -- EPA published a notice of intent to revise its Phase I storm water regulations to specify that storm water discharges from logging roads are not “associated with industrial activity” and stating its intent to evaluate forest roads for potential inclusion in EPA’s Phase II storm water regulations, in accordance with section 402(p)(6) of the Clean Water Act.

# Stormwater Question Presented in *Decker*

- June 25, 2012 – The Supreme Court agreed to review the following questions:
  - Did the Ninth Circuit err when it held that storm water from logging roads is industrial storm water under the CWA and EPA's rules, even though EPA has determined that it is not industrial storm water?
  - Whether the Ninth Circuit should have deferred to EPA's longstanding position that channeled runoff from forest roads does not require a permit, and erred when it mandated that EPA regulate such runoff as industrial storm water subject to NPDES.

# Potential Implications of *Decker* case

- EPA's ability to determine what is a Phase I stormwater source.
  - If every road next to an industrial facility is itself an industrial facility, there is no distinction between Phase I and Phase II stormwater sources and Congress' careful plan of study and designation would be upset.
- Distinction between point and nonpoint sources.
  - If sheet flow that may eventually reach a water of the U.S. is a point source, then all impervious surfaces can be considered point sources and regulated under federal law.
  - *Where is the point source? On the road, from the road into the MS4, or from the MS4 into a water of the U.S.?*



# Integrated Planning: CSO, SSO, and Stormwater Controls

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- Dialogue between U.S. Conference of Mayors and EPA for over 2 years at the political level about heavy-handed enforcement at the expense of improving water quality.
- October 2011 commitment from EPA Deputy Administrator Bob Perciasepe to ensure that EPA Regions deal with cities in a flexible, cooperative manner.
- June 5, 2012 Integrated Planning Framework issued.
- June 25, 2012 House Subcommittee hearing.
- EPA very interested in demonstrating success for this effort.

# Integrated Planning Issues

- EPA will allow:
  - Sequencing of controls.
  - Longer period of time for compliance based on affordability or desire to use green infrastructure.
- But, EPA will not allow compliance schedules to be used in permits for pre-1977 water quality standards based on an interpretation of section 301(b)(1)(C) of the Clean Water Act, in a 1990 Administrator opinion: *In the Matter of Star-Kist Caribe, Inc.* (NPDES Appeal No. 88-5), 1990 EPA App. LEXIS 45 (April 16, 1990).
- This interpretation is a barrier to the use of green infrastructure and adaptive management.

# New DC MS4 Permit

- Issued by EPA Region 3 on October 7, 2011 (5-year term)
- New development – mimic predevelopment hydrology
- On-site retention standard (>5,000 sq.ft.) – 1.2” from a 24-hr storm event with a 72-hr dry period
- Retrofit 18M sq.ft. (413 acres) of impervious surfaces (1.5M within transportation right-of-way)
- Min. tree canopy coverage = 40% by 2035 (net 4,150 trees/yr)
- Green roofs on all DC-owned buildings (where feasible) and net 350K sq.ft. of green roofs during permit
- Clean/repair all catch basins annually
- Sweep streets (641 acres) annually – 9 x arteries, 1 x Bus. Dist.
- Ban disposable non-recyclable plastic bags
- Develop consolidated TMDL compliance plan (16 TMDLs, 12 constituents, trash TMDL = 103,188 lbs. annual trash clean-up)

# D.C. Stormwater Permit, cont'd

- November 2011 -- Friends of the Earth, Anacostia Riverkeeper, Inc., Potomac Riverkeeper Inc., and Natural Resources Defense Council appealed the permit.
- Basis for appeal:
  - MS4 permit must meet numeric water quality standards and TMDL wasteload allocations and the D.C. permit fails to ensure immediate compliance with standards or allocations (citing *Star Kist*).
  - Instead, the permit allows iterative progress towards meeting standards and allocations over several permit cycles.
- In other areas, some of these same ENGOs, including NRDC, are strongly supporting the use of green infrastructure to meet water quality goals. See *Rooftops to Rivers II*, NRDC case studies on use of green infrastructure (including in Philadelphia). Available at: <http://www.nrdc.org/water/pollution/rooftops/contents.asp>
- You can't do that and have immediate compliance.

# D.C. Permit Appeal Settlement

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- In May 2012, ENGOs and EPA settled the appeal by agreeing to permit modifications.
- Despite the ENGOs earlier objections, the permit still allows compliance schedules (perhaps at odds with EPA's interpretation of *Star Kist*), milestones, benchmarks, and corrective measures if milestones or benchmarks are not met (much like the LA County permit challenged by NRDC).

# Questions?

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