

EPA's Controversial New Stormwater Permitting Memorandum and Guidance

The Federal StormWater Association recently obtained an EPA memorandum (dated November 12, 2010) to permitting authorities regarding how stormwater sources should be addressed in permits and Total Maximum Daily Loads (TMDLs) (http://www.epa.gov/npdes/pubs/establishingtmdlwla_revision.pdf). The Agency states that this new memorandum – that EPA sent to the Regions without releasing to the public or seeking outside input – “updates aspects of EPA’s November 22, 2002 memorandum,” also addressing stormwater permitting and TMDLs. EPA’s 2002 memorandum helped to solidify the foundation for using Best Management Practices (BMPs) in lieu of numeric effluent limits (NELs) in stormwater permits and related TMDLs, and has been used widely ever since as the basis for BMP-based effluent limits. FSWA is researching options that would have EPA revisit the issues raised in this memorandum and seek public comment before further implementing these stormwater permitting policies.

EPA’s 2010 memorandum represents a fundamental shift in EPA’s stormwater permitting approach and appears to shift the presumption away from BMPs and towards mandating NELs in stormwater permits. The memorandum’s recent appearance on EPA’s website is the only notice that EPA has given to the regulated community that EPA is dramatically altering its stormwater permitting approach.

The 2002 memorandum has provided significant benefits for permitting authorities by instructing them on how to develop permits for regulated entities, particularly when faced with developing waste load allocations (WLAs) for stormwater discharges within the TMDL program. The concepts from that memorandum have helped permitting authorities understand that NELs were not mandated by EPA’s CWA regulations, particularly when they were infeasible or undesirable. The 2002 memorandum established a presumption that BMPs provide a more flexible option for achieving the goals of the TMDL program, while fostering an efficient and effective stormwater permitting program.

EPA’s 2010 memorandum, on the other hand, shifts that presumption in favor of NELs in lieu of BMPs whenever possible. While this approach potentially has significant impact on industrial (including construction) stormwater dischargers, its greatest impact may be felt by municipal separate sewer system (MS4) operators. In 1987, Congress created a unique technology standard for MS4s, called Maximum Extent Practicable (MEP), that it did not define, but that the MS4 community has asserted is unrelated to NELs and meeting water quality standards. EPA’s new memorandum targets MS4s and encourages permitting authorities to reduce pollutants in MS4 discharges “as necessary for compliance with water quality standards.”

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This new memorandum also addresses several controversial stormwater-related issues in a more direct manner than prior EPA guidance. For example, EPA clearly asserts its authority to regulate “flow” as a surrogate parameter under CWA Section 303(d) (to prevent biological degradation or habitat alteration-related impairments). EPA also relies on the 2009 National Research Council stormwater report recommendation to regulate “stormwater contributions to waterbody impairment” such as “flow or a surrogate, like impervious cover.” However, the NRC analyses and final recommendations are complex and EPA’s characterization of the NRC report is subject to debate.

EPA also suggests that permitting authorities “disaggregate” stormwater sources when determining WLAs under a TMDL. In other words, EPA recommends that WLAs be separated by category (MS4s, construction, industrial, etc.), and then by source when data or modeling projections provide such a basis. The memorandum then encourages permitting authorities to establish NELs for those segregated sources.

Finally, EPA’s 2010 memorandum appears to promote using existing benchmarks as NELs. When EPA created benchmark values within its first Multi-Sector General Stormwater permit (and in every MSGP version since 1995), EPA has been careful to explain that benchmarks are a tool for assessing and comparing BMP performance, but that they were not created to serve as water quality standards. EPA now appears to be altering its approach to benchmark monitoring to serve as the foundation for a numerically-based industrial stormwater program and significantly more cost and liability for industrial stormwater dischargers.

If you have any questions, would like additional information on EPA’s stormwater program, or would like information on joining the Federal StormWater Association, please contact Jeffrey Longsworth at (202) 408-6918 or jeffrey.longsworth@btlaw.com.