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Stormwater Management/MS4 Permitting

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THE FIVE STAGES OF GRIEF: ACCEPTING THE BURDENS OF STORMWATER REGULATIONS

1. Introduction

When they were first introduced, many municipalities were shocked by the financial and management burdens of stormwater regulations. The scope and extent of the requirements generated disbelief by the municipalities, litigation against the regulators, negotiation over the permit conditions, and ultimately, compliance with the required terms. In many ways, these responses mirror the five stages of grief: denial, anger, bargaining, depression and acceptance. Having reached acceptance, municipalities now strive to understand stormwater requirements, which this paper will briefly discuss.

2. The United States and California Regulate Stormwater[1]

The Federal Water Pollution Control Act was first enacted in 1948 and relied primarily on state and local enforcement measures to remedy water pollution problems. Middlesex County Sewerage Auth. v. Sea Clammers, 453 U.S. 1, 11 (1981). By the early 1970's, however, it became apparent that local enforcement measures were not sufficient to prevent the accelerating degradation of public waters. EPA v. State Water Res. Control Bd., 426 U.S. 200, 203 (1976). In response to these environmental concerns, Congress amended the Federal Water Pollution Control Act in 1972 to mandate compliance with various minimum technological effluent standards established by the federal government and created a comprehensive regulatory scheme to implement these standards. Id. at 204-205. This law, now commonly referred to as the Clean Water Act (Act), sought to "restore and maintain" the chemical, physical, and biological integrity of the Nation's waters. 33 U.S.C. § 1251(a) (West 2014).

Pursuant to the Act, pollutant emissions from "point sources" are prohibited unless the party discharging the pollutants obtains a National Pollutant Discharge Elimination System (NPDES) permit. EPA, 426 U.S. at 205. The Act defines a "point source" as "any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (West 2014). It is "unlawful for any person to discharge a pollutant without obtaining a permit and complying with its terms." Id.; see, 33 U.S.C. § 1311(a) (West 2014).

Initially, the regulations promulgated by the United States Environmental Protection Agency (EPA) pursuant to the Act exempted most municipal storm sewers from the NPDES permit requirements. Environmental groups, however,

[1] This section was taken from a paper prepared by Kelly Salt of Best Best & Krieger LLP.

challenged this exemption in federal court. In Natural Resources Defense Council, Inc. v. Costle, 568 F.2d 1369, 1374-83 (D.C. Cir. 1977), the District of Columbia Circuit held a storm sewer is a point source, and the EPA did not have the authority to exempt such a category of point sources, from the Act's NPDES permit requirements.

Subsequent to Costle, the EPA made numerous attempts to reconcile the statutory requirements of point source regulation with the practical problem of regulating millions of diverse point source discharges of stormwater. Defendants of Wildlife v. Browner, 191 F.3d 1159, 1163 (9th Circ. 1999). Beginning in the 1980's, stormwater discharges from municipal storm sewer systems and the impact of such discharges on water quality became a focus of federal regulatory requirements. In 1987, Congress amended the Act to add section 402(p). Section 402(p) defined stormwater discharges from municipal systems and industrial activities (including construction) as point sources subject to the NPDES permit program. This section further directed the EPA to publish regulations to define the discharges subject to NPDES permits and to establish a framework for regulating these discharges. 33 U.S.C. § 1342(p) (West 2014).

The federal regulations implementing section 402(p) of the Act require municipalities to employ controls to reduce the discharge of pollutants from their storm sewer systems. 40 C.F.R. § 122.26. The regulations require significant and continuing capital construction, operation and maintenance requirements from storm sewer systems, stormwater quality facilities, pollutant source control programs, flood control facilities, vector control, drainage corridors, and detention facilities. These requirements are beyond the capacity of most property owners and are provided by local governments through their stormwater service and regulatory programs pursuant to the MS4's NPDES permits.

The stormwater regulations promulgated by the EPA established a two-phase approach for municipal systems. Phase I began in 1990 and addressed discharges from municipal separate storm sewer systems (MS4s) serving more than 100,000 people. Phase II began in 1999 and addressed discharges from MS4s in urbanized areas serving fewer than 100,000 people. 40 C.F.R. §§ 122.26(b)(4), 122.26(b)(7), 122.26(b)(16). The next section will examine the Phase I requirements.

3. Phase I Municipal Stormwater Regulations

Regulation of MS4s in Phase I focuses on the applications and NPDES permits. EPA defines a "municipal separate storm sewer" as any conveyance or system of conveyance that is owned or operated by a state or local government entity, that is designed or used for collecting and conveying stormwater, that is not a combined sewer, and that is not part of a publicly owned treatment works. This includes roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels or storm drains used for collecting or

conveying storm water. 40 C.F.R. § 122.26(b)(8); see Randy Hill, Sylvia Horwitz The Clean Water Act Handbook 174 (ABA 3d ed. 2011).

Section 402(p)(3)(B) of the Act states that permits:

A. May be issued on a system-basis or jurisdiction basis.

B. Shall effectively prohibit non-stormwater discharges into the storm sewers.

C. Shall require controls that reduce pollutants to the "maximum extent practicable," including management practices, control techniques, system, design and engineering methods, and any other appropriated EPA or State provisions to control pollutants.

33 U.S.C. § 1342(p)(3)(B) (West 2014); The Clean Water Act Handbook 174-75.

The permit application requires general information about the MS4, qualitative and quantitative data regarding the system's stormwater discharges, and a description of the controls to reduce discharges from the system. 40 C.F.R. § 122.26(d)(1). The application must also propose a stormwater management plan to reduce pollutants to the "maximum extent possible" by addressing four pollutant sources:

A. Runoff from commercial and residential areas.

B. Non stormwater discharges primarily from illicit connections to the system and improper disposal practices.

C. Runoff from industrial areas.

D. Runoff from construction sites.

40 C.F.R. § 122.26(d)(iv); The Clean Water Act Handbook. 174.

The "maximum extent practicable" standards means that discharges are not subject to the technology based requirements of the Act's water quality standards: either best available technology / best conventional pollutant control technology (BAT/BCT) or secondary treatment. 33 U.S.C. §§ 1311(b), 1314(b)(2), 1314(b)(4), 1314(d) (West 2014). While discharges must comply with the water quality standards, EPA has the discretion to require strict compliance or less-than-strict compliance and could do so with numeric effluent limitations or with best management practices (BMPs). Defenders of Wildlife v. Browner, 191 F.3d. 1159, 1166 (9th Cir. 1999). Based on Browner, EPA has continued to include effluent limitations primarily through BMPs. 64 Fed. Reg. 68,722, 68,788 (Dec. 8, 1999).

4. Phase II Municipal Stormwater Regulations

In Phase II, EPA expanded municipal stormwater regulation to small MS4s in census-determined urbanized areas, which the census defines as densely settled and containing at least 50,000 residents. 64 Fed. Reg. 68,751 (Dec. 8, 1999). Permits for all small MS4s must include requirements for:

A. Public education and outreach on stormwater impacts.

B. Public involvement and participation.

C. Detecting and eliminating illegal discharges.

D. Controlling construction site stormwater runoff.

E. Managing post-construction stormwater in development and redevelopment.

F. Preventing pollution and practicing good housekeeping in municipal operations.

40 C.F.R. § 122.34(b); The Clean Water Act Handbook 177-78.

The small MS4s must also identify the BMPs they will use to implement these six measures, set measurable goals for the BMPs, and provide more-stringent effluent limitations based on a total maximum daily load (TMDL) or equivalent analysis to protect water quality as needed. 40 C.F.R. §§ 122.34(d), 122.34(e)(1). Finally, the permit must contain requirements to evaluate the effectiveness of BMPs in meeting the goals and monitoring, reporting and record-keeping. Id. at § 122.34(g).

Like the large and medium MS4s in Phase I, the small MS4s in Phase II must implement a program to reduce pollutants to the "maximum extent practical" standard and must satisfy the water quality requirements of the Act. 40 C.F.R. § 122.34(a). However, a small MS4 serving 1,000 to 10,000 persons has a lower standard. It must not discharge pollutants at levels that will cause a violation of water quality standards. 40 C.F.R. § 122.32(e). A small MS4 serving less than 1,000 persons has an even lower standard. It must not contribute substantially to the pollutant loadings of a large MS4 to which it is connected or must not cause a violation to the TMDL of an impaired water body to which it discharges. 40 C.F.R. § 122.32(d).

5. Gaps in the Federal Stormwater Program

The federal stormwater program is by no means perfect. As we have seen, the Act focuses primarily on the "discharge" of "pollutants" and uses end-of-pipe control technologies and automated effluent monitors. While this is suited for

industrial or wastewater effluent which tends to have steady flows with consistent loading of pollutants, it does not work as well for stormwater effluent which is episodic with variable loading of pollutants. National Research Council Urban Stormwater Management in the United States 98 (Nat'l Acad's Press 2009).

These gaps include:

A. MS4 permits lack of objective, standardized procedures. The Act requires MS4s to reduce pollutants to the "maximum extent practicable" and to comply with water quality standards, but does not specify objective criteria that assures public agencies of steps they can take to avoid permit violations. 33 U.S.C. § 1342(p). (West 2014).

B. Large and medium MS4s must regularly self-monitor stormwater discharges, but are subject to the timing of storms. 40 C.F.R. §§ 122.21(g)(7)(ii), 122.26(d)(2)(iii). This variability does not provide certainty for the MS4s.

C. A large portion of industrial and construction stormwater discharges apparently have failed to self-identify themselves to the regulators. GAO Storm Water Pollution: Inform. Needed on the Implic. of Permitting Oil and Gas Constr. Activ., GAC-07-479 (2005), available at http://www.gao.gov/new.items/d05240.pdf; L. D. Duke and C. A. Augustenberg Effectiveness of Self-Identified and Self-Reported Envtl. Regs. for Indus.; the Case of Stormwater Runoff in the U.S., U.S. Journal of Env't Planning and Mgmt. 16:249-263 (2006). This creates problems for municipalities that are obligated to regulate discharges from those sites.

D. The Act does not fully address pollution from existing development. Other than applications to redevelop property or eminent domain, there is no mechanism to require existing properties to implement stormwater controls. Yet, municipalities must address pollutants from those sources.

E. The current system of separate permits have several flaws, including: (i) they attack problems on a piece meal basis; (ii) they are hard to coordinate because they expire at different times; (iii) they are not designed for the long-term operation of stormwater control measures; and (iv) they do <u>not</u> cover all discharges. Urban Stormwater Management 482.

What to do? One approach to problems with discharge permits is to base them on watershed boundaries, not political boundaries. As envisioned by the EPA, this would involve NPDES permits for point sources on a watershed basis. For example, a "coordinated individual permit" could use consistent terms for

individual permits that incorporate holistic watershed goals. An "integrated municipal permit" could combine wastewater plants, combined sewer system overflows and MS4s in one permit. A "multi-service permit" could combine individual permits to consider the watershed as a whole. EPA Watershed-Based NPDES Permitting Technical Guidance (2007); Urban Stormwater Management 477.

Of course, this approach presents its own issues. Municipalities in more than one watershed may face inconsistent requirements regarding land use, monitoring, inspections and preventing illicit discharges in different permits. Also, municipalities will want to avoid being saddled with problems outside their jurisdictions.

With its emphasis on point source discharges of pollutants and end-of-pipe control technologies, controlling stormwater discharges under the Act is like fitting a square peg in a round hole. Issuing NPDES permits based on watershed boundaries would be a start to address some of the gaps in the rules.

6. Conclusion

Some 30 years since the EPA began regulating stormwater, the regulations are here to stay. With time, the requirements have been clarified by Congress, the regulators and the courts. Hopefully, this discussion has assisted that understanding.

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Gene Tanaka is a partner in the Municipal Law practice group, is a member of the firm's Executive Committee and is managing partner of the Walnut Creek office. Mr. Tanaka's practice is focused on municipal law litigation.

Mr. Tanaka has represented the County of Los Angeles, City of Colton, City of Merced, City of Fontana, and many other clients in toxics cases for cleanup or damages under the Comprehensive Environmental Response, Compensation & Liability Act, Resource Conservation and Recovery Act, nuisance law and trespass law. He has worked on the perchlorate litigation regarding the Rialto-Colton Groundwater Basin in U.S. District Court, the Stringfellow cleanup litigation in U.S. District Court and the Montrose case in U.S. District Court involving cleanup of contaminants in the Pacific Ocean.

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