

# **MS4 Permitting in EPA Region 1 – The Existence of a TMDL Does Not Justify Imposition of Requirements Upon All MS4 Dischargers**

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# Threshold Questions

- Are MS4s supposed to be subject to more or less stringent CWA requirements than stormwater discharges associated with industrial activity? Than non-stormwater discharges?
- Are MS4s subject to WQSs?
- Are MS4s subject to TMDLs?
- Are MS4s subject to additional requirements merely because they discharge into a § 303(d) listed waterbody?



# EPA Massachusetts MS4 Permit Requirements Based on Long Island Sound TMDL

- Less discharge of a pollutant is better than more, even if we don't know if you are part of the problem?  
Even if TMDL provides you no WLA?
- MA MS4 Permit: Requirements for discharges to impaired waters with an approved out-of-state TMDL
- Applies nitrogen requirements to discharges in Massachusetts that are tributaries to the Long Island Sound which has an approved TMDL for nitrogen.

# LI TMDL

- There are WLAs for non-stormwater dischargers in Connecticut and New York, but even MS4 dischargers in those states were not subject to a WLA
- TMDL: “Since, at present, there is insufficient information to determine the universe of point source vs. nonpoint source stormwater dischargers anywhere in the basin, it is reasonable for now to collectively characterize these sources.”



# Other Concerns

- Due process notice to Massachusetts' MS4s
- No reasonable potential analysis - EPA assumes that merely because MS4s discharge into waters that are tributaries to the Long Island Sound additional requirements should apply.

# Now: Enhanced BMPs and Other Additional Requirements

- Enhanced public education and outreach
- Stormwater management in new development and redevelopment
- Good housekeeping and pollution prevention for permittee owned operations
- Nitrogen source identification report
- Structural BMPs



# But . . .

- No WLA or LA for MA MS4 dischargers
- If you were a non-SW discharger, would this logic apply?
- Similar concern about 303(d) listed waterbodies – EPA assumes . . .
- No analysis if MS4 discharge is *de minimis* or of permittee's site-specific conditions

# Industrial vs. MS4 Statutory Standard

CWA Section 402(p)(3): Permit requirements

(A) Industrial discharges: Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 [CWA § 301] of this title.



# Maximum Extent Practicable ("MEP")

(B) Municipal discharge: Permits for discharges from municipal storm sewers -

- (i) may be issued on a system - or jurisdiction-wide basis;
- (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.

# Assuming WQS Apply . . .

- MEP iterative process
- “Practicable” standard
- Reasonable potential analysis
- “Cause or contribute” standard determines need for WQBEL or BMP



# 40 CFR § 122.44(d)(1): Reasonable Potential Analysis

- (i) Limitations must control all pollutants or pollutant parameters . . . which the Director determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality.

# Cause and Contribute Prohibition

- Turns reasonable potential analysis to prohibition:  
The permittee shall reduce the discharge of pollutants such that the discharges from the MS4 do not cause or contribute to an exceedance of water quality standards.

§ 2.1.1 MA/NH MS4 Permits



# TMDLs

- Threshold Question: Do WQSs apply to MS4s?
- Any difference if a TMDL exists?
- If no WLA, what then?

# TMDLs and MS4s

The fact that a water body is subject to a TMDL does not mean that every MS4 discharger upstream of that water body is subject to an effluent limitation, whether implemented through BMPs or otherwise.



# Conclusion

- MS4 permittees need to pay particular attention to the MS4 permit requirements being imposed and assure that they will not be put into noncompliance by assumptions and inappropriate permit conditions.
- Immediate compliance with WQS or similar prohibition is problematic.
- MEP is intended to provide FLEXIBILITY!

# DON'T SIT BACK

- Address issues with permitting authority
- CWA § 509(b)(2): Actions of the Administrator which could have been reviewed “shall not be subject to judicial review in any civil or criminal proceeding for enforcement”
- 53,484 reasons!



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