



When It Rains, It Pours: The EPA's New Focus on Stormwater Enforcement



An Environmental Law Update

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Welcome & Introductions

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Introductions



Linda E. Benfield

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REMINDER: Final Session

- Mark your calendar and plan to join us for the final session of the 2007 Environmental Law Update Series.

– October 18, 2007

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Who's Afraid Of A Little Rain?



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Nuts & Bolts of Stormwater Regulation



S. Wayne Rosenbaum

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Stormwater Issues In Watershed Management



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Who's Afraid Of A Little Rain?

EPA's Recent Focus on Stormwater Enforcement

Sarah A. Slack

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EPA's Enforcement Priorities

- In February 2007, U.S. EPA published a list of national enforcement priorities for fiscal years 2008, 2009 and 2010. See 72 Fed. Reg. 6239 – 41 (Feb. 9, 2007).
- U.S. EPA, *FY 2008 Office of Enforcement and Compliance Assurance (OECA) National Program Manager Guidance*.

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Recent Stormwater Enforcement Actions

- Entities targeted
 - Developers
 - Retailers
 - Municipalities
 - Industry
- Activities targeted
 - Construction
 - CSOs/SSOs
 - Stormwater BMPs/SWPPP

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Enforcement Against Developers

- Hawaii developer settlement for \$7.5 million
 - Settlement consisted of \$2 million in civil penalties to the state, \$5.3 million to erosion control and stream restoration, and \$200,000 for wastewater systems
 - Construction activities on 378 acres without a permit
 - Largest stormwater settlement for violations at a single site
- St. Louis developer settlement for \$590,000
 - The majority of the settlement was civil penalties, and also included remedial action
 - Construction activities on 150 acres that violated permit requirements

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Enforcement Against Retailers

- Wal-Mart settlements totaling \$4.1 million
 - Original action in 2001 for stormwater violations – \$1 million
 - Follow up action by U.S. EPA in 2004 – an additional \$3.1 million
 - Issue was compliance with stormwater requirements at construction sites
 - Required to ensure oversight of contractors
- Kmart settlement for \$102,422 under U.S. EPA's Self-Disclosure Policy
 - 2004 audit identified violations of stormwater permitting requirements (failure to obtain permits or to comply with permit requirements)
 - If EPA had discovered violations – estimated \$1.6 million in penalties

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Enforcement Against Municipalities

- City of Dallas settlement for \$3.5 million
 - Settlement included \$1.2 million wetland construction project, a civil penalty of \$800,000 and requirements to hire additional staff and fund programs
 - U.S. EPA brought an action against the City for failure to implement and adequately fund the City's stormwater program
- City of Indianapolis settlement for \$1.86 billion
 - Approximately \$1.2 million in civil penalties, \$2 million to eliminate failing septic systems and additional amounts to implement projects to reduce overflows
 - Issue was combined sewer overflows

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Enforcement Against Industry

- Boston Sand and Gravel settlement for \$1.3 million
 - Settlement consisted of \$897,983 in civil penalties and \$445,000 in a supplemental environmental project
 - Combined issue of process water discharge violations and failure to have required stormwater permits or to comply with stormwater permitting requirements at 4 facilities

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EPA's Enforcement Tools

- Discharge Monitoring Information
- Surprise Site Inspections
- Information Requests

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Nuts & Bolts of Stormwater Regulation

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Stormwater Basics

- CWA Section 1313
 - “Except in compliance with Section . . . , the discharge of any pollutant by any person shall be unlawful”
- CWA Section 1342
 - A NPDES permit is a permit to discharge pollutants to a water of the United States.
 - No Permit = No Discharge

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Background

- Since 1972 the CWA has relied on NPDES permits to assure that “point source discharges” would not impair the beneficial uses of waters of the US.
- In 1990, stormwater runoff is defined to be a point source.
- Major legal and technical issues regarding the regulation of stormwater as a point source.
 - Are all point sources equal?
 - Should the same level of procedural due process be accorded to all NPDES permits?
 - How will the current regulatory system adjust to the answers to these questions.

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Regulation of Stormwater

- The Phase I Program (1994)
 - Stormwater Associated with Industrial Activity
 - Includes construction greater than 5 acres
 - Stormwater Associated with Large and Medium Municipal Separate Storm Sewer Systems (“MS4s”)
 - Population greater than 100,000 or located in an urbanized area
 - Discharges Contributing to a Violation of a WQS or a Significant Contributor of Pollutants to Water of the US

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Regulation of Stormwater

- The Phase II Program (2003)
 - Small MS4s
 - Construction activities greater than 1 acre
 - Necessary to meet a TMDL
 - Contributes to the exceedance of a WQS

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General Permits vs. Individual Permits

- Individual NPDES permits are issued to individual dischargers to regulate specific point sources.
 - Technology based
 - Discharge limitations
 - Receiving water limitations
- General NPDES permits are available to a class of dischargers
 - Dischargers may elect to obtain coverage through the filing of a Notice of Intent to Comply (NOI) or obtain coverage under an Individual NPDES permit.
 - Permittees are required to develop and implement a series of Best Management Practices (BMPs) to reduce pollutant discharges to the
 - BAT/BCT Level for industrial dischargers, or
 - MEP Level for MS4s
 - Permittees must monitor and report on the effectiveness of their BMP plans (SWPPPs, SWMPs or JURMPs)

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Rationale for General Permits

- Stated Rationale
 - Similar facilities can be regulated by a common permit
- Economic Realities
 - California estimates of actual and potential stormwater permittees
 - Municipal (Phase I and II) 3,000 – 6,000
 - Industrial (Phase I and II) 200,000 – 400,000
 - Construction (Phase I and II) 30,000 – 50,000
 - Neither the State nor EPA has sufficient resources to effectively review and approve over 200,000 additional Individual NPDES permits in California alone.

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Examples of General Permits

- Dewatering
- Hydrostatic Testing
- Confined Animal Feeding Operations
- Municipal Stormwater
- Industrial Stormwater
- Construction Stormwater

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Procedural Elements

- NOI
- Management Plan
- Monitoring and Reporting Plan
- Certification of Legal Authority

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Current Procedure for the Adoption and Implementation of General Stormwater Permits

- EPA or a delegated State adopts a set of procedures for individual permittees to develop and implement stormwater management and monitoring plans.
 - Industrial/Construction – SWPPP
 - MS4s – JURMP or SWMP
- Plans are not reviewed or approved by the regulating agency or the public prior to implementation.
- Permittees submit annual reports to the regulating agency describing the effectiveness of their plans.
 - Reports are primarily descriptive in nature
 - Agencies generally lack the resources to review or evaluate the reports.

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Enter the Courts

- Environmental Defense Center v. EPA (9th Cir., 2003)
- Waterkeeper Alliance, Inc. v. EPA (2nd Cir., 2005)
- Texas Indep. Producers & Royalty Owners v. EPA (7th Cir. 2005)

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EDC v. EPA

- Phase II MS4 Permits must include specific controls rather than mandate the development and implementation of a plan.
- NOIs are the functional equivalents of permit applications and, thus, are subject to the CWA's public availability and hearing requirements.

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Waterkeepers v. EPA

- Proposed CAFO rule violates CWA because:
 - Rule allows permits to issue without review of Nutrient Management Plan.
 - Permitting scheme violates CWA's public participation requirements.

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Texas v. EPA

- Upholds EPA General Construction Stormwater Permit
- Rejects Ninth Circuit decision that NOIs are the functional equivalent of permits.

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Legal Effects

- Split in Circuits
- Possible appeal to the Supreme Court

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Practical Effects

- Ninth and Second Circuit opinion have stalled the reissuance of General Permit
 - California's Industrial Permit is 4 years overdue
 - California's construction permit is 2 years overdue
- Possible Options
 - Agencies will regulate through enforcement attempting to broadly define permittee classes and obligations under existing permits.
 - Industry groups will seek to create narrower classes of general permits which will allow permits do meet the legal requirements.
 - Example – A general permit for printers rather than for all industrial activities.

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Stormwater Issues In Watershed Management

Sustainability - moving beyond a command and control approach

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Urban Infill - using greenspace for stormwater treatment and flood control





Shared Stormwater Treatment/Flood control

- Allows higher density and more compact use on most buildable grounds
- Creates a greenspace and recreational amenity
- Opens new avenues for funding

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Shared Stormwater Treatment/Flood Control

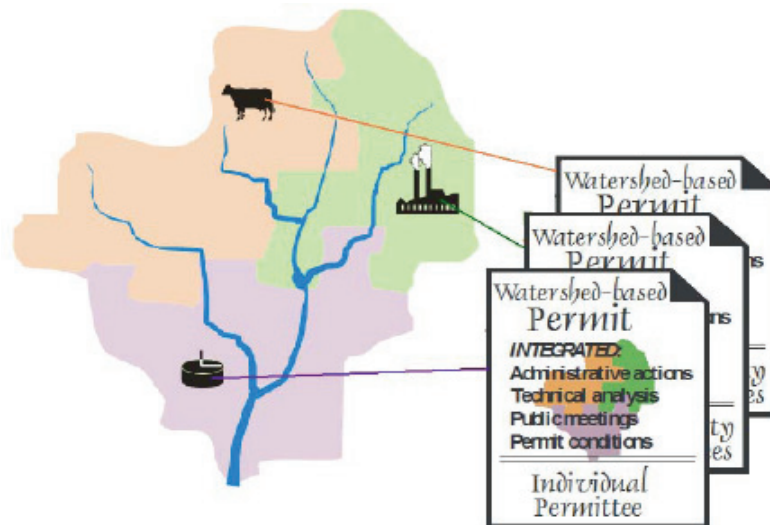
- Requires large tract redevelopment;
- Need to address Routine maintenance and Capital maintenance (BID or Association Approaches);
- Existing codes and regulatory framework may not be suited;
- Municipal storm water fees may be in tension with user maintenance costs – double taxation!

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Watershed Based Permits - Integrating Individual Permits





What is Watershed-Based Permitting

- An approach to NPDES permitting that results in permits:
 - Issued on a watershed basis
 - Focused on multiple pollutant sources
 - Targeted to achieve watershed goals
 - Integrate permit development among monitoring, water quality standards, TMDL, nonpoint sources, source water protection and other programs
 - ***Allows for a discharge trading model***

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Implementation Planning

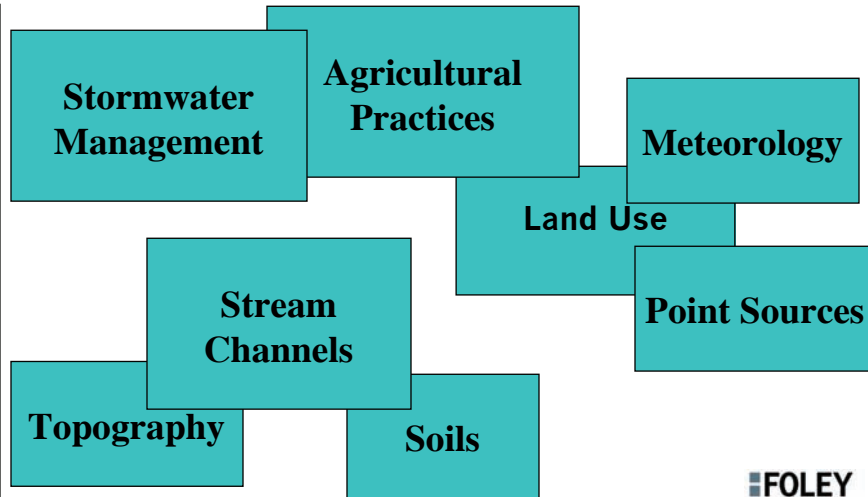
Watershed based studies relate loads to uses of the receiving waters – lakes, rivers, streams

Science based decision making!





Comprehensive – Recognizing the Inputs That Affect a Watershed Load



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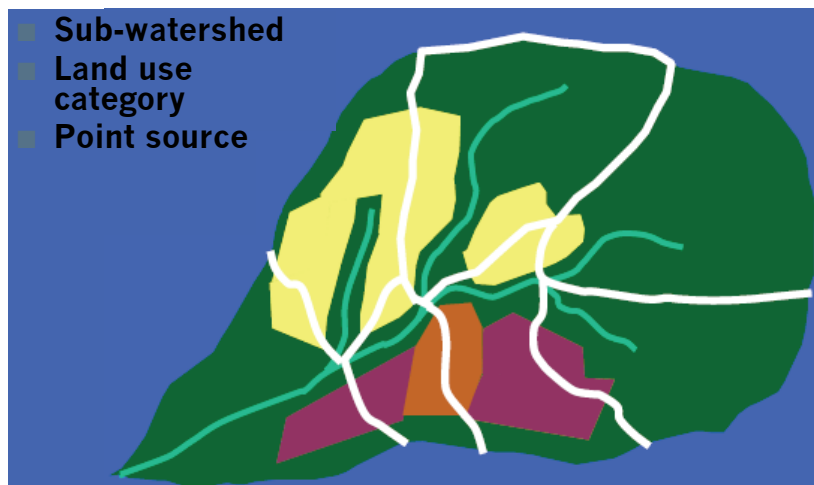
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Implementation Planning

Load Reductions allocated by:

- Sub-watershed
- Land use category
- Point source





Rural BMP

- Septic system management
- Convert cropland and pasture to wetlands and prairies
- Riparian buffers
- Conservation tillage
- Grassed waterways
- Nutrient management plans



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Rural BMPs

- Manure storage
- Restrict livestock from streams (fencing)
- Barnyard runoff controls
- Milking center wastewater management



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Rural BMPs - studied

- Manure management had the most significant impact on attaining fecal coliform water quality standards
- Conversion of cropland to forest/wetlands had a significant impact on the reduction of rural nutrient loads

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Urban BMPs

- Green Features
 - Rain barrels
 - Rain gardens
 - Trees
 - Fertilizer management programs
 - Green Roof initiatives
- Controlling Polluted Runoff from Impervious Surfaces
 - Street sweeping/Vacuum sweeping of roads and lots
 - Pet litter management
 - Infiltration systems
 - Parking lot implementation of multi-chambered treatment trains (MCTTs)
- Stormwater Disinfection Units

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Urban Nonpoint Technologies

- Chloride reduction programs
- Beach and riparian litter and debris control
- Marina waste management facilities
- Illicit Discharge Control
- Wet detention basins

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Results – Urban BMPs

- Controlling runoff from impervious surfaces most effective at reducing loads
- Illicit discharge control most effective at reducing fecal counts

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Florida Stormwater Management

- 5 Water Management Districts
- Stormwater permitting since 1970's (MSSW)
 - water quantity
 - water quality
 - delegations from Florida Department of Environmental Regulation (now FDEP)
 - beginning in 1980
 - wet/dry
 - retention/defecation, exfiltration, etc.

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NPDES Stormwater Delegation

- NOI/SWPP/NOT
- structural/non-structural controls
- enforcement

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TMDLs & BMAP Approaches

Tampa Bay Example

Total Maximum Daily Loads/Basin
Management Action Plans

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- **The Bay itself covers almost 400 square miles and its watershed encompasses an area five times that large.**

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Priority Issues facing Tampa Bay

- Water and Sediment Quality
- Habitat loss (Bay Habitats).
- Fish and Wildlife (Manatee Protection)
- Dredging and Dredged Material Management
- Spill Prevention and Response

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Five Phase TMDL Cycle

- Phase I (Initial Assessment)
- Phase II (Coordinated Monitoring)
- Phase III (Data Analysis and TMDL development)
- Phase IV (BMAP development)
- Phase V (Begin BMP implementation)

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Elements of a TMDL

- Calculation of an allowable load for the pollutant of concern
- Reduction in load needed to remove waterbody from impaired list
- Margin of safety, and allowance for future growth
- Allocation of load reduction among point and non-point sources in the watershed
- Implementation plan (BMAP)

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Selected Tampa Bay Watershed Basins

- Unique Features
 - Past experience with major planning and coordination effort (Tampa Bay Estuary Program)
 - Strong local lead in organizing and conducting BMAP process
 - Pre-BMAP process written commitment to participate (Interlocal Agreement)
 - Multiple BMAPs

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Three Geographic Areas

- Based on SWFWMs Basin Board boundaries:
 - (1) Northwest Hillsborough County and unaged areas draining to Old Tamp Bay (SWFWMD Northwest Hillsborough Basin);
 - (2) Hillsborough River and Tampa Bypass Canal plus portions of City of Tampa and MacDill Peninsula (SWFWMD Hillsborough River Basin);
 - (3) Alafia River and Little Manatee River watersheds (SWFWMD Alafia River Basin).

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TMDLs in Hillsborough County

- = 77 impaired waters
- 6 Major categories of pollutants (nutrients), biological/chemical oxygen demand, bacteria, turbidity, mercury, other metals)
- = 180 TMDLs currently anticipated by EPA

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Types of Impairment

- Nutrients ~ 30%
- DO and BOD ~ 25%
- Bacteriological ~ 25%
- Mercury in fish tissue ~ 10%
- Others (TSS, Turbidity, Pb, etc.) <10% each

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Tampa Bay Nitrogen Management Consortium: 1998

- A Nitrogen Management Consortium (made up of TBEP government participants, local phosphate companies, agricultural interests and electric utilities) accepts responsibility for collectively meeting nitrogen load reduction goals. Consortium members may choose to implement any combination of projects to reach their reduction goals.

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TBEP Nitrogen Reduction Database

- ~ 150 nutrient reduction projects baywide from over 25 public and private partners
- Standardized reduction allowances applied; Excel Database maintained by TBEP; can be expanded to include other reduction parameters
- Reduction projects include stormwater management, wastewater upgrades and reuse, emission reductions, land acquisition, agricultural BMPs, residential BMPs, industrial upgrades
- Meeting baywide reduction goals in 2000-2004

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Questions & Answers

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