California Statewide Phase II MS4 Hearing

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Legal Context

MS4 Permits:

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*.

33 U.S.C. § 1342(p)(3)(B)(iii)

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Legal Context

The MEP Standard:

Will "'evolve and mature over time' and must be flexible to reflect changing conditions that result from program development and implementation and corresponding improvements in water quality."

55 Fed.Reg. 47990, 48052

"general permits issued under Phase II *will ordinarily contain numerous substantive requirements*. . . ."

Envtl. Def. Ctr., Inc. v. EPA (9th Cir. 2003) 344 F.3d 832 854

"a federal mandate does not require explicit mention of every mandated activity."

State of CA Dept. of Finance v. Commission on State Mandates, No. BS 130730, at 10 (L.A. Super. Ct., August 15, 2011)

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Legal Context

Receiving Water Limitations

Los Angeles MS4 Permit: The Regional Board "included Parts 2.1 and 2.2 in the Permit without a 'safe harbor;'" these are independently enforceable requirements that prohibit discharges that cause or contribute to a violation of Water Quality Standards.

L.A. County Mun. Storm Water Permit Litigation, No. BS 080548 at 7 (L.A. Super. Ct. March 24, 2005)

The Receiving Water Limitations language is not subject to further review by the U.S. Supreme Court in *NRDC v. County of Los Angeles*.

Legal Context

The MS4 Permit is not an Unfunded Mandate

"The Clean Water Act clearly dictates that NPDES permits issued - by either the U.S. EPA or a qualified state agency - are not voluntary. . . This federal statutory scheme mandates NPDES permitting, even if California took no action at all."

State of CA Dept. of Finance v. Commission on State Mandates, No. BS 130730, at 7 (L.A. Super. Ct., August 15, 2011)

"The federal regulatory scheme anticipates changing permit requirements, that these requirements have not yet been articulated does not mean that the requirement exceeds the 'maximum extent practicable' standard."

Id. at 9.

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Stormwater Controls are Necessary and Practicable

Ballona Creek, Los Ange
Commission)

Los Angeles River (City of Los Angeles)

Stormwater Controls are Necessary and Practicable

- Stormwater runoff contains "sediments, non-sediment solids, nutrients, pathogens, oxygen demanding substances, petroleum hydrocarbons, heavy metals, floatables, …PAHs, trash, and pesticides and herbicides"

  Permit, at Finding 3

- "urban storm water is listed as the primary source of impairment for ten percent of all rivers, ten percent of all lakes and reservoirs, and 17 percent of all estuaries."

  Permit, at Finding 10

- Stormwater contributes to impairment in a far greater percentage of coastal and inland waters.

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Stormwater Controls are Necessary and Practicable

- Stormwater pollution poses a significant threat to human health.
  - Swimming in polluted water causes a range of illnesses and results in associated health care costs, lost wages, and lost revenue.

- Economic Studies indicate that control of stormwater pollution provides economic benefits, while stormwater polltion causes economic harms
  - The economic benefits of stormwater pollution controls outweigh the costs of compliance.

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Low Impact Development

- The California Ocean Protection Council calls LID a “practicable and superior” approach to stormwater management.

- EPA finds that “In the vast majority of cases . . . Implementing well-chosen LID practices saves money for developers, property owners, and communities while protecting and restoring water quality.”

- Retention of the 85th percentile storm through infiltration, evaporation, or capture and re-use is MEP in California.

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Low Impact Development

City of Los Angeles

Low Impact Development

The Draft Permit Must:

- Require on-site retention of the 85th percentile storm event with no discharge where feasible.
  - Alternative designs (e.g., biofiltration) are not authorized where retention is feasible
  - Must specify that the permit's retention sizing criteria apply to its site design and other development provisions
  - Must require compliance by all development types, including commercial development, above the applicable sizing threshold.

- Must allow for meaningful review by the State Board for any permittee developed criteria or provisions as part of the Watershed Process. (*Envtl. Defense Center,* 344 F.3d at 854-56.)

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