

State of California

M e m o r a n d u m

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Subject: DEFINITION OF "MAXIMUM EXTENT PRACTICABLE"

ISSUE

What is the meaning of the standard "maximum extent practicable" (MEP) as used in the Clean Water Act's storm water provisions, and how can this standard be communicated to the regulated community? How can this concept be included in the draft BMP manual?

CONCLUSION

The standard "maximum extent practicable" is not specifically defined for use in the storm water program. It has been defined in other rules, however, to require taking all actions which are technically feasible. I have included draft language for the manual.

DISCUSSION

Section 402(p) of the Clean Water Act (33 U.S.C. § 1342(p)) provides that permits issued for discharges from municipal separate storm sewers must require controls to reduce the discharge of pollutants "to the maximum extent practicable". The statutory language provides that municipal 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

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provisions as the [EPA] Administrator or the State determines appropriate for the control of such pollutants." Clean Water Act Section 402(p)(3)(B)(iii); 33 U.S.C. § 1342(p)(3)(B)(iii).

Neither Congress nor the U.S. Environmental Protection Agency (EPA) has defined the term "maximum extent practicable", and yet this is the critical standard which municipal dischargers must attain in order to comply with their permits. (The State could have spelled out the specific controls which the municipalities were required to undertake. However, such an approach would have relinquished the municipal dischargers of any flexibility in implementing their storm water programs.)

On its face, it is possible to discern some outline of the intent of Congress in establishing the MEP standard. First, the requirement is to reduce the discharge of pollutants, rather than totally prohibit such discharge. Presumably, the reason for this standard (and the difference from the more stringent standard applied to industrial dischargers in Section 402(p)(3)(A)), is the knowledge that it is not possible for municipal dischargers to prevent the discharge of all pollutants in storm water. The second point which is clearly encompassed in the standard is that it is the permitting agency, and not the discharger, which is the ultimate arbiter on whether there has been sufficient reduction of pollutants.

The most difficult issue is determining how much pollutants must be reduced, or, in other words, which best management practices (BMPs) must be employed in order to comply with the MEP standard. While the term is not defined in the Clean Water Act or the EPA regulations, the same term does appear in other federal laws and regulations, and there are some definitions or interpretations which may be useful to the storm water program.

In the Uranium Mill Tailings Radiation Control Act of 1978 (42 U.S.C. § 7901, et seq.), the Department of Energy was required to designate within one year of the Act's adoption "to the maximum extent practicable" contaminated areas within the vicinity of uranium processing sites. In addressing a lawsuit brought after the Department designated very few of the "vicinity properties", the federal court declared that MEP means "a substantial majority of the locations" should have been designated within the year. Sierra Club v. Edwards (D.C.D.C. 1983) 19 ERC 1357. Where a NEPA regulation required that "to the maximum extent practicable" environmental clearance was required for uncompleted projects which had never undergone NEPA review, a court held that the regulation "mandates a meaningful

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environmental review" rather than a "perfunctory evaluation".
Save the Courthouse Committee v. Lynn (S.D.N.Y. 1975) 408
F.Supp. 1323.

In an interim final regulation recently promulgated by the Department of Transportation, MEP is defined, where operators of onshore oil pipelines must have resources "to the maximum extent practicable" to remove and to mitigate or prevent worst case discharges. 49 CFR Part 194. MEP is defined to mean:

"The limits of available technology and the practical and technical limits on an individual pipeline operator in planning the response resources required to provide the on-water recovery capability and the shoreline protection and cleanup capability to conduct response activities"

Finally, the term MEP is used in the Superfund legislation, wherein permanent solutions and alternative treatment technologies must be selected "to the maximum extent practicable". CERCLA, Section 121(b). The legislative history of the language indicates that the relevant factors in determining whether MEP is met include technical feasibility, cost, and state and public acceptance. 132 Cong. Rec. H 9561 (Oct. 8, 1986).

While each of the above interpretations and definitions varies, they do follow a pattern. The pattern that emerges is that there must be a serious attempt to comply, and that practical solutions may not be lightly rejected. If a municipality reviews a lengthy menu of BMPs, and chooses to select only a few of the least expensive, it is likely that MEP has not been met. On the other hand, if a municipal discharger employs all applicable BMPs except those where it can show that they are not technically feasible in the locality, or whose cost would exceed any benefit to be derived, it would have met the standard. In any case, the burden would be on the municipal discharger to show compliance.

The definitions contained in the pipeline regulation and the Superfund legislative history are most analogous to storm water regulation. The major emphasis in both of these rules are technical feasibility. Similarly, the municipal dischargers should be required to employ whatever BMPs are feasible, i.e., are likely to be effective and are not cost prohibitive. Thus, where a choice may be made between two BMPs which should provide generally comparative effectiveness, the discharger may choose the least expensive alternative and exclude the more expensive BMP. However, it would not be acceptable either to reject all BMPs which would address a pollutant source or to pick a BMP based solely on cost, which would be clearly less effective.

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As you know, the BMP Guidance manual is being published by the Task Force, which is made up of dischargers, rather than by the State Water Board. As far as I know, there is no intention for the State Water Board to adopt the manual as its own guidance document. Therefore, it is important to stress in the manual, both in the section on MEP and in the front of the manual, that this manual is not a publication of the State or the Regional Water Boards, and that these Boards have not specifically endorsed the contents. Rather, the manual was assembled by a group of dischargers in the interest of assisting themselves and others to comply with the storm water permits. In the section on MEP, it should be stated that the final determination regarding whether a discharger was reduced pollutants to the maximum extent practicable can only be made by the Regional or State Water Boards, but that selection and implementation of BMPs through consideration of the listed factors should assist dischargers in achieving compliance.

The following language is suggested in order to clarify that the manual is not the product of the State Water Board:

"This Manual was produced and published by the Storm Water Task Force, an advisory body of municipal agencies regulated by the storm water program. This Manual is not a publication of the State Water Resources Control Board or any Regional Water Quality Control Board, and none of these Boards has specifically endorsed the contents thereof. The purpose of this manual is to assist the members of the Task Force and other dischargers subject to storm water permits, in attaining compliance with such permits."

The following language is recommended in place of Insert A in the manual for municipal dischargers:

"Although MEP is not defined by the federal regulations, use of this manual in selecting BMPs should assist municipalities in achieving MEP. In selecting BMPs which will achieve MEP, it is important to remember that municipalities will be responsible to reduce the discharge of pollutants in storm water to the maximum extent practicable. This means choosing effective BMPs, and rejecting applicable BMPs only where other effective BMPs will serve the same purpose, the BMPs would not be technically feasible, or the cost would be prohibitive. The following factors may be useful to consider:

- "1. Effectiveness: Will the BMP address a pollutant of concern?

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- "2. Regulatory Compliance: Is the BMP in compliance with storm water regulations as well as other environmental regulations?
- "3. Public acceptance: Does the BMP have public support?
- "4. Cost: Will the cost of implementing the BMP have a reasonable relationship to the pollution control benefits to be achieved?
- "5. Technical Feasibility: Is the BMP technically feasible considering soils, geography, water resources, etc.?

"After selecting a menu of BMPs, it is of course the responsibility of the discharger to insure that all BMPs are implemented."

