LEGAL ISSUES IN STORMWATER AND WETLANDS REGULATION

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Introduction and Summary

- The law is similar to the rain; one day it is an intermittent drizzle with little consequence, and the next it is a torrential downpour that can wash you out.
- Today I will talk a lot about stormwater and the specifics of Washington's Industrial Stormwater Permit Program.
- But for those of you who just want the highlights, here is the 3 point summary,. . .

3 POINT LEGAL ISSUES SUMMARY

1. Develop a good plan (SWPPP)
2. Know your E-Policy makers (EPA, Ecology and environmentalists)
3. When it doubt, look to the courts for guidance (or not…)

Guidance and Recommendations for SWPPPs

- Focus on quality in developing your SWPPP.
- Make sure you develop a plan you can implement.
- Develop a system for implementing your plan.
- Even if your implementation is not perfect, you can always fall back on a good SWPPP.
- Ecology is more likely to request your plan than perform an inspection (if they do – you have 2 weeks to submit it).
- In enforcement cases, a good SWPPP will serve as a shield and demonstrate good faith.

1972 CLEAN WATER ACT

- Congress declared in the Clean Water Act, passed over 30 years ago, that it is a "national priority that the discharge of toxic pollutants in toxic amounts be prohibited." 33 U.S.C. § 1251(a),
- Goal of CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

Clean Water Act, con't

- CWA Prohibits the discharge of any pollutant unless it is done so in compliance with the standards of the Act.
- CWA established National Pollutant Discharge Elimination System ("NPDES") to permit the discharge of pollutants into surface waters.

Clean Water Act, con't

- NPDES program includes technology-based effluent limits on discharges of pollutants through treatment standards 33 U.S.C. §1311(b)(1)(A).
- Municipal stormwater permits need only "require controls to reduce the discharge of pollutants to the maximum extent practicable." 33 U.S.C. §1342(p)(3).
- EPA retains discretion to determine what pollution controls are appropriate, and may require more stringent water quality standards.

Stormwater Regulation

- In the last ten years, stormwater has quickly become a source of controversy among municipalities, industry and developers.
- It is now regulated at all three levels nationwide with ever-increasing standards and scrutiny.
- In the Northwest, stormwater discharges directly impact the water quality of unique and threatened species.

Witches Brew

- Urban runoff has been characterized in So. California as a “witch’s brew” of pollutants which constitute the “biggest source of pollution in California’s coastal waters, rivers, streams and lakes.”
- In 1987, Congress amended the CWA to define Municipal Separate Storm Sewer Systems (MS4) to be “point sources” subject to NPDES permits.

Municipal Stormwater Regulation

- Municipalities must meet a “Maximum Extent Practicable” (MEP) compliance standard.
- In San Diego, the MS4 includes all “roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, natural drainage features or channels, modified natural channels, man-made channels, or storm drains” as waters of the U.S.
- A California court held in 2004 that the San Diego MS4 permit was not limited by the MEP standard, opening the door, perhaps, for the future when municipal stormwater discharges may be required to meet water quality standards without regard to practicality.

Say Wa?

- Washington is increasingly facing stormwater regulatory challenges at the county and local levels.
- In Tacoma, the stormwater discharges from the “Twin 96ers” at the head of the Thea Foss Waterway threaten to re-contaminate the $72 million Superfund sediment remediation.
- Ecology just received notice that it and EPA may be sued for failure to sufficiently regulate stormwater.

Industries vs. Municipalities

- Industrial stormwater discharges are likely to be an increased target for Dept. of Ecology compliance inspections and potential civil or criminal enforcement.
- Easier to see, monitor and regulate.
- Perhaps less controversial – make the polluter pay vs. taking tax dollars away from public programs to pay for cleaning up urban runoff.

Washington's Industrial Stormwater General Permit Process

- December 1, 2004 – Ecology modified the Industrial Stormwater General Permit, effective January 2005.
- Ecology revised and reissued its 2000 permit, that was appealed, on August 21, 2002, with an expiration date of November 18, 2007.
- Requires coverage under the state general permit for discharges of stormwater associated with industrial activities.
- Covers all new and existing private, state and local government facilities engaged in industrial activities that discharge stormwater to a surface water body, a storm drain or a municipal storm sewer system.

Industrial Stormwater Permit Requirements

- Permit authorization is now required for most industrial activities that discharge stormwater directly or indirectly to surface water *unless* they obtain a "No Exposure" Certificate.
- Includes those facilities listed at 40 CFR Subpart 122.26(b)(14).
- A complete listing of facilities by their Standard Industrial Codes (SIC) (See Ecology Modified Permit, Appendix #1-Section C, Categories 1-9 and 11). Link to permit and other Ecology industrial stormwater information at http://www.ecy.wa.gov/programs/wq/stormwater/industrial/index.html.

Permit Coverage

- All light industry facilities classified as Category 11, including the food, textile, apparel, furniture, paperboard, printing, drugs, paints, rubber, plastic, leather, glass, fabricated metal, electronic, photographic and optical, transportation, miscellaneous manufacturing and farm, refrigerated and general warehousing and storage must now apply for coverage or submit a certificate of “no exposure.”
- Previously, light industry were not required to apply for coverage because their industrial activities were completely under cover.

Permit Coverage, con't

- Any facility that has an existing NPDES discharge permit which does not address all stormwater discharges associated with industrial activity if required by 40 CFR 122.26(b)(14) to have a stormwater NPDES permit.
- Any inactive industrial facility listed at 40 CFR 122.26(b)(14) where significant materials remain on site and are exposed to stormwater.
- Hazardous and certain non-hazardous waste landfills, and coal storage piles that have stormwater discharges subject to effluent limitations guidelines.

Exemptions from Coverage (may voluntarily request coverage)

- Industrial faculties that submit an application and qualify for a Conditional No Exposure Certificate
- Industrial facilities which discharge stormwater only to a municipal combined sewer or sanitary sewer (if authorized by the municipality)
- Industrial facilities that discharge all stormwater to the ground (infiltration basins, dry wells, drain fields, grassy swales) and have no point source discharge to surface water or a municipal storm sewer (unless determined to be a significant contributor of pollutants to ground water).

Exemptions from Coverage, con't

- Office buildings and administrative parking lots from which stormwater discharges are not commingled with stormwater discharges from areas associated with industrial activity unless determined to be a significant contributor of pollutants to waters of state.
- Superfund (NCP) discharges authorized by an on-scene coordinator, or approved remedial action (still must comply with substantive requirements of permit).
- Any land application used for beneficial use of industrial or municipal wastewater for agricultural activities at agronomic rates or for landscaping purposes.

Exemptions from Coverage, con't

- Any farmland or land used for sludge management where domestic sewage sludge is beneficially reused and not located in area of treatment works.
- Certain inactive non-coal mining operations no longer subject to reclamation or that do not have a discharge to overburden, raw material , intermediate products, finished products by products, or waste products located on site.
- Inactive mining, oil and gas operations or inactive landfills where owner cannot be identified.

Excluded Facilities

- Ecology will not consider coverage for the following facilities or activities:
  1. Facilities with stormwater discharges subject to an effluent limitation, toxic pollutant effluent standard or new source performance standard addressing stormwater
  2. Non-point source silvicultural activities with natural runoff
  3. Federal facilities or those on tribal lands
  4. Any facility authorized to discharge stormwater under and existing NPDES individual or other general permit

Excluded Facilities, con't.

5. Construction activities as identified by 40 CFR Subpart 122.26(b)(14)(x) and (b) (15)
6. Facilities that discharge to a waterbody with a control plan (that is more stringent than the general permit, e.g., TMDL determinations, ESA restrictions, GW management plans)
7. Facilities that discharge to a waterbody listed under Section 303(d) of CWA.

How to Obtain Coverage Under Revised Final Permit Effective January 2005

1. Facilities under existing permit will continue coverage until permit expires
2. Facilities with applications pending will be processed
3. New facilities or existing facilities without coverage must submit Ecology's Industrial Stormwater General Permit Application for Coverage.
   a. municipal previously exempt facilities
   b. existing facilities in operation before the effective date of permit
   c. new facilities:
      i. must apply at least 38 days before commencing activity
      ii. must have stormwater pollution prevention plan completed and implemented before commencing activity.
      iii. must comply with SEPA and public notice requirement
4. Facilities with significant process change
      i. must apply for modification at least 38 days before implementing change
      ii. applicant must complete public notice requirements before receiving modification of permit coverage

Stormwater Pollution Prevention Plan (SWPPP)

- Best Management Practices must be completed and submitted to Ecology
- For existing facilities not previously permitted:

  a. SWPPP must be completed and submitted to Ecology within 30 days of receiving coverage.

  b. Non-capital BMPs must be completed within 90 days of coverage

  c. Capital BMPs must be completed within 9 months of receiving coverage

Authorized Stormwater Discharges

- Permittee is authorized to discharge stormwater and conditionally approved non-stormwater discharges to waters of the state consistent with terms and conditions of permit.
- Prohibited discharges include *process wastewater* unless authorized by separate NPDES permit.
- *Process Wastewater* – any water which, during manufacturing or processing comes into direct contact with or results from the production or use of any raw material, intermediate product, finished product, byproduct, or waste product.
- Stormwater that *commingles* with process water becomes process water.
- Illicit discharges are not authorized

Conditionally approved non-stormwater discharges

- Discharges from fire fighting activities
- Fire protection system flushing, testing and maintenance
- Irrigation drainage
- Discharges associated with dewatering foundations, footing drains or utility vaults if not contaminated with process materials

Stormwater Pollution Prevention Plan (SWPPP)

- Each facility must prepare a site specific SWPPP consistent with the permit requirements as updated.
- The SWPPP must include Best Management Practices (BMPs) necessary to provide *all known, available and reasonable methods of prevention, control, and treatment (AKART).*
- *The technical basis for all BMPs must be documented with the SWPPP.*

Stormwater Pollution Prevention Plan (SWPPP), con't

- *The SWPPP must also document* how the selected BMP will comply with state water quality standards, satisfy AKART requirements and the federal technologically-based treatment requirements under 40 CFR Part 125.3 (the *demonstration approach*).
- Permittees which choose to follow the stormwater management practices contained in approved stormwater technical manuals (the *presumptive approach*), are presumed to have satisfied the demonstration requirement and do not need to include the technical basis for the BMPs in their SWPPP.

Sampling Requirements

- Single grab sample taken within first hour after discharge begins
- A time-proportionate sample started within the first 30 minutes after discharge begins and are taken over a two hour period.
- A flow proportionate sample started within the first 30 minutes after discharge begins and are taken over a two hour period.

Sampling Requirements, con't

- All samples must be taken as close to the point of discharge as reasonable practical.
- The storm event sampled is at least 0.1 inches of rain a 24-hour period or of similar intensity.
- The storm event sampled is preceded by at least 24-hours of no greater than trace precipitation.
- Sampling is conducted to capture stormwater with the greatest exposure to significant sources of pollution (each distinct point of discharge offsite must be sampled and analyzed separately if the activity or site conditions that may pollute the stormwater significantly vary

Sampling Exceptions

- Inactive or unstaffed facilities provided notice is given to Ecology.
- Suspended if consistent attainment of benchmark values.
- Facilities that apply for and obtain an “extreme hardship fee reduction” under WAC 173-224.

Monitoring Requirements

- All facilities under industrial permit must conduct quarterly monitoring and sampling of stormwater.
- Results must be submitted to Ecology.
- Visual monitoring must be recorded and kept with SWPPP.
- 5 year records retention requirement.

Visual Monitoring

- For facilities that discharge only to the ground (not required to conduct sampling and analysis).
- Required for all facilities that are subject to sampling quarterly (observations must be made at time and location of sampling).
- Include visible sheen, floating materials, discoloration, turbidity, odor, etc.

Summary and Recommendations for SWPPPs

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- Even if your implementation is not perfect, you can always fall back on a good SWPPP.
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Endangered Species Act Litigation in Washington

- Notice of Intent to Sue EPA issued under Section 7 of the Endangered Species Act on April 19, 2006 by: National Wildlife Federation, Public Employees for Environmental Responsibility, Puget Sound Alliance, People for Puget Sound, Washington Trout
- Alleges that EPA failed to fulfill Section 7 consultation duties with respect to the delegation of the NPDES permit program to the State of Washington
- EPA failed to address “harmful effects of point source water pollution of the threatened Puget Sound Chinook.”

Endangered Species Act

- Section 7(a)(2), requires federal agencies to ensure their actions are not likely to "jeopardize" a listed species or "result in the destruction or adverse modification" of its critical habitat. 16 U.S.C. § 1536(a)(2).
- "Jeopardize" includes engaging actions that "reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, number, or distribution of that species." *Conner v. Burford,* 848 F.2d 1441, 1452 (9*th* Cir. 1988), *cert, denied,* 489 U.S. 1012 (1989); 50 C.F.R. § 402.02.
- "Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical." 50 C.F.R. § 402.02.

Puget Sound Chinook

- Section 7(a)(2) applies to any action that is "authorized, funded, or carried out, in whole or in part, by Federal Agencies in the U.S."
- In *Defenders of Wildlife v. EPA*, the Ninth Circuit, in 2005, held that EPA's decision to delegate authority to a state for administration of a NPDES permit program is an action that requires compliance with Section 7.
- NMFS listed Puget Sound Chinook as threatened species in 1999.
- On September 2, 2005, NMFS designated critical habitat for PSC effective January 2, 2006.

NPDES Program in WA

- EPA delegated authority to administer an NPDES program to Washington in 1973.
- Current MOA executed in 1990, requires EPA oversight of NPDES administration.
- 4,254 NPDES permits in Washington.
  - 16 major individual industrial permits to Puget Sound basin
  - 56 other individual industrial permits
  - 86 sewage treatment permits
  - 98 general industrial permits
  - 1593 general stormwater permits

Puget Sound – Stormwater Impacts

- Municipal Stormwater is fastest growing threat to water quality – the “witches brew”.
- On February 16, 2006, Ecology issued drafts of new Phase I and Phase II municipal stormwater NPDES permits.
- Extensive comments on the preliminary drafts from NMFS and USFW.
- Ecology acknowledged “it may take decades or longer to address the water quality impacts of existing municipal stormwater discharges.”

Puget Sound – Permitted Stormwater Discharges

1. Construction Stormwater General Permit

   - In 2005, 1,090 acres in Puget Sound basis covered by this general permit

   - In 2006, Ecology will tighten regulation to all sites greater than one acre (from five).

2. Boatyard General Permit (65 ft. or less)

   - copper impacts to water

3. Industrial Stormwater General Permit

   - 1000 industrial facilities in Wa, 788 in Puget Sound Basin

Toxic Pollutants

- Included in NPDES authorization and permits
- Ecology uses “mixing zones” instead of numeric effluent limitations
- The outside edge of the mixing zone is the point where the water quality standard is effective
- Based on dilution factor computer models
- Used to compute whether a discharge will exceed the water quality standard outside mixing zone

Notice of Intent to Sue

- EPA's failure to initiate or complete formal consultation with NMFS regarding effects of delegation of NPDES permit to Washington Dept. of Ecology
- EPA's failure to properly oversee and fund NPDES program
- Potential to object to and stop issuance of NPDES permits authorizing discharges of pollutants that would harm PS Chinook and their critical habitat
- Potential to withdraw program to ensure protection of water quality.

Rapanos v. U.S. and Carabell v. U.S. Army Corps of Engineers

- Consolidated cases decided by the U.S. Supreme Court on June 19, 2006.
- Court split 4-4-1whether Corp exceeded its authority by requiring CWA fill permits for dredging and filling “wetlands”
- Remanded to the 6th Circuit the question of whether the wetlands at issue were not adjacent to or connected to the “waters of the United States” and thus beyond federal wetlands regulation

Federal Wetlands Jurisdiction

- In *Rapanos*, the Sixth Circuit ruled that a developer who, without a permit, dredged and filed wetlands on 3 properties that were connected to navigable waters by a man-made drain violated the CWA because the wetlands were adjacent to tributaries of navigable waters and a nexus existed to waters of the US.
- In *Carabell*, the Sixth Circuit ruled that a Michigan condo developer needed a CWA permit to fill fifteen acres of wetlands separated from a ditch that was connected to a tributary

Wetlands Jurisdiction

- Corps interprets “waters of US” to include adjacent wetlands and tributaries. 33 CFR § 328(a)(3)
- At issue was the Corps extension of jurisdiction to wetlands adjacent to all waters and tributaries even if they are separated by a berm or other man-made structure
- In essence, the cases posed the question whether the Corps can regulate non-navigable wetlands that are neither adjacent to nor hydraulically connected to waters of the US.

Rapanos

- Justices Scalia, Roberts, Thomas and Alito would adopt a 2 prong test:
  1. Does the adjacent channel contain waters of the US?
  2. Does the wetland have a continuous surface connection with that water, making it difficult to determine where the water ends and the wetland begins?

Physical Connection to Adjacent Wetlands?

- Scalia stated that Corps exceeded its authority by applying the definition “waters of US” to features such as “wet meadows, storm sewers and culverts, directional sheet flow during storm events, drain tiles, man-made drainage ditches, and dry arroyos.”
- By limiting from the Corps jurisdiction wetlands that are physically remote from waters of the US, Justice Scalia’s decision would have removed many wetlands from regulation.

Nexus Test

- Justice Kennedy specifically rejected that narrow “unprecedented” reading of the Act and instead suggested that the Corps should determine, on a case by case basis, whether there is a significant nexus between the wetlands at issue and navigable waters.

The Dissent

- Justices Stevens, Souter, Ginsburg and Breyer dissented, relying on the Court's 1985 decision in *US v. Riverside Bayview Homes* upholding the Corps jurisdiction over wetlands adjacent and ecologically connected to navigable waters of the US.
- They emphasized that *Riverside Bayview* "nowhere implied that extending wetlands jurisdiction to "adjacent wetlands" was contingent upon a "continuous surface connection between the wetland and its neighboring creek."

The Dissent

- The dissenters went on to state that the wetlands in question were not isolated, but were adjacent to tributaries of navigable waters (consistent with the Court's 2001 decision in Solid Waste Ag. of N. Cook County v. Corps).
- They would have ruled that the Corps had "reasonably interpreted its jurisdiction to cover non-isolated wetlands."

The Future of Wetlands Regulation

- The two newest Justices, Samuel Alito and Chief Justice Roberts, sided with Scalia and were just one vote short of a major shift in longstanding federal wetlands regulation.
- The wetlands by wetland “nexus” analysis required by Justice Kennedy may prove difficult if not unwieldy for the Corps to implement and administer.
- There will likely be changes in legislation and regulations at the national level to address and better define the Corps jurisdiction and its relation to property rights.
- Potential for states to step up their regulation over wetlands to fill any gaps at the federal level – Wisconsin AG stated that whatever wetlands are not protected by the federal law are protected under sate law.