

# **The Big Squeeze: Regulation of New and Expanded Wastewater Discharges**

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# WHAT'S THE PROBLEM

- **TMDL Progress Slow – Nutrients/Mercury**
  - **Applicable Standard Uncertain**
  - **Diffuse Sources**
  - **Complex Science**
- **MCEA Aggressive Permit Appeals**
- **Annandale/Maple Lakes Decision**
- **Project Construction/Funding Jeopardized**

# **MPCA REGULATORY CONFUSION**

- **MPCA Confusion Over “New Source/New Discharger” Classification**
- **Nutrient Standards Don’t Exist**
- **TMDL Determinations Ignored**
- **Adopted Policies Ignored**

# ARKANSAS V. OKLAHOMA

**“[N]othing in the Act mandates a complete ban on discharges into a waterway that is in violation of existing water quality standards. Instead, the Act vests in the EPA and the States broad authority to develop long-range, area-wide programs to alleviate and eliminate existing pollution.”**

# WHAT CONTROLS PRE-TMDL DECISIONMAKING

- **122.4(i) New Facilities**
- **122.44(d) Existing Facilities/Expansions**
- **State Antidegradation/Non-degradation Rules**
- **State WQBEL Policies/Guidance**

# 40 CFR 122.4(i)

- **What Does 122.4 Regulate?**
  - **Prohibits Discharges That Will “Cause or Contribute to the Violation of Water Quality Standards”**
- **Who Does 122.4 Apply to?**
  - **Regulates NEW Dischargers**

# DEFINITION OF NEW DISCHARGE

- Operation at Site Commenced After August 13, 1979
- Never Received Final NPDES Permit
- “Site” Broadly Defined As Area of Operations, Not Location of Outfall

# APPROVING NEW DISCHARGE

- **EPA: 3 Ways a New Discharger Will Not “Cause and Contribute” to an Impairment**
  1. **Pollutant of Concern Not in New Discharge or “No Measurable Effect”**
  2. **Permit Discharges Pollutant of Concern at or Below Water Quality Standard**
  3. **Pollutant Reductions Will Offset Discharge Consistent With Water Quality Standards**

# WHAT YOU NEED TO KNOW

- **Under 122.4(i) a New WWTF May Be Able to Discharge Into an Impaired Waterway**
- **122.4(i) Does Not Apply to Expanding or Existing WWTF**

# 40 CFR 122.44(d)

- **What Does 122.44(d) Regulate?**
  - **Requires Limitations on Discharges That Will Cause or Have Potential to Cause Excursions Above State Water Quality Criteria**
- **Who Does 122.44(d) Apply to?**
  - **Both NEW and EXISTING Dischargers**

# WHAT YOU NEED TO KNOW

- **Contains No Pre-TMDL Permitting Prohibition**
- **Establishes No Specific Requirement on How to Calculate/Appportion WLA**
- **Establishes No Specific Timing Requirement for Setting WLA**
- **Minor Sources Do Not Require Regulation**

# **MESERB 122.44(d) FOIA**

- **Region II – State Has Significant Flexibility Pending TMDL**
- **EPA Region III – Wait for TMDL; Use EEQ Limits**
- **EPA Region VI – EEQ Expansions Only**
- **Region IX – Allow Performance-based Limits Pending TMDL**
- **Region X – Regulate Significant Sources Pending TMDL; Confirm Impairment First**

# FLORIDA PROCEDURES

**“It is the Department’s position that the 303(d) list is a planning tool...EPA has agreed that neither the CWA nor the federal regulations implementing the CWA mandates a specific regulatory action for facilities discharging to listed waters.” “A permit limit is not mandated simply by the fact that the facility discharges some amount of the pollutant of concern.”**

*Florida Wastewater Permit Writer’s Manual Special Considerations for Permitting Discharges to Surface Waters, May 2001.*

# MPCA 122.44(d) GUIDANCE

**“The application of these federal regulations in NPDES permitting before a TMDL is completed is to ensure that the water quality of the impaired water body is not worsened.”** September 21, 2004 Memorandum to Citizens Board.

- **Confirmed in October 2005 *Guidance for Issuing NPDES Permits for Discharge to Impaired Waters : Expanding Facilities***

# ANNANDALE/MAPLE LAKE

- **PROBLEM** - Lake Pepin Is an Impaired Water, a TMDL Is Currently in Development - The “New” Facility Will Increase Phosphorus Loading by 2,200 lbs/yr., But a New Plant at Litchfield Would Reduce Phosphorus Loading by 53,000 lbs/yr
- **CITIES’ ARGUMENT** - The Cities and MPCA Argue That They Should Be Able to Offset Their Increased Loading Consistent With EPA Guidance

# ANNANDALE/MAPLE LAKE

- MCEA'S ARGUMENT - Lake Pepin Is an Impaired Water. The Increase in Loading to the Watershed Violates the Federal Regulations That Prohibit Discharges That “Cause or Contribute” to the Impairment Regardless of the Offset
- MN COURT OF APPEALS - 122.4 Does Not Allow for Offset, Must Show Increased Loading From New WWTF Will Have No Measurable Impact
- MN SUPREME COURT - ?

# WHY IS THIS CASE IMPORTANT?

- **Attempts to Eliminate Offsetting As a Compliance Strategy**
- **Will Stall Economic Development in Impaired Watersheds, Environmental Harm**
- **Dramatically Decreases Construction/Expansion Options**

**But**

- **MPCA “New Source” Determination Inconsistent With EPA Rules**

# WHAT SHOULD YOU DO?

- **Depends On MN Supreme Court**
  - **Availability of Offsets**
  - **Still May Show Impact Negligible**
- **Existing Facility Not Covered by Decision**
- **MPCA Classification Still at Issue**

# **HYPOTHETICAL CASES**

- **Two Existing Discharges Becoming One “New” Discharge**
- **Existing Sources Changing Pipe Placement**
- **Existing/Expanding Facility With Load Impact**
- **Eliminating Septic System, New Facility**

# **FOR MORE INFORMATION**

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