



# **ACHIEVING REGULATORY FLEXIBILITY IN PERMITTING**

**COG Chesapeake Bay and Water  
Resources Policy Committee  
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# PRESENTATION OVERVIEW

- ◆ **The Need for Flexibility: Enforcement**
  - ◆ Generally
  - ◆ Special Issues for Chesapeake Bay
  
- ◆ **Tips for Negotiating NPDES Permits**
  - ◆ For MS4s
  - ◆ For Wastewater
  - ◆ Other Suggestions

# ENFORCEMENT GENERALLY

## 💧 Administrative Orders

- 💧 EPA has issued dozens of administrative orders directed at MS4 compliance
- 💧 Penalties have increased over time to \$150,000 range
- 💧 Apparent campaign to spark more action by states and localities

## 💧 Judicial Orders or Decrees

- 💧 EPA has long history of enforcement for CSOs and SSOs
- 💧 Ex., City of Scranton, PA (settlement lodged Dec., 2012)
- 💧 EPA has entered into many consent decrees with storm water entities (mostly private developers/corporations)
- 💧 MS4s are the next wave of federal consent decrees

# CHESAPEAKE BAY ENFORCEMENT

- ◆ EPA “Consequences” Letter
  - ◆ Ex., State’s failure to “develop and propose sufficiently protective” NPDES permits
- ◆ Threat is Major Local Concern
  - ◆ No. 1 Issue in MD Hughes Center Needs Assessment Memo
- ◆ EPA Temporarily Withheld Grant Money from VA (Fall, 2012)
  - ◆ Perceived delays in issuing Phase I MS4 permits



A dynamic splash of water in shades of blue and white, with numerous droplets and bubbles scattered across the frame. The water appears to be falling from the top left, creating a sense of movement and freshness.

# PERMIT NEGOTIATIONS

*Tips for How to Get the Best Result During  
Permit Negotiations*



**STORMWATER**

# GEOGRAPHIC SCOPE

## 💧 Negotiate a Correctly Defined Service Area

- 💧 Reduces compliance cost
- 💧 Limits enforcement risk

## 💧 Service Area Approach

- 💧 VA: MS4 Service Area Contains MS4 Facilities
- 💧 Ex., Mapping provision in Small MS4 General Permit Draft
- 💧 Ches Bay reductions based on Total Acres Served By MS4

## 💧 County-Wide Approach

- 💧 MD: Restoration Required County-Wide
- 💧 Outside MS4 Service Area

# TEMPORAL SCOPE

- ◆ **Negotiate a “Clean” Permit**
  - ◆ MS4s need multiple permit cycles for Bay TMDL compliance
  - ◆ But, each permit should limit obligation to 5 years, and no more
- ◆ **VA: Nutrient and Sediment Reductions Over 3 Cycles**
  - ◆ 1<sup>st</sup> cycle permits carefully worded so no requirements for Cycle 2 and 3
- ◆ **MD: 20% Restoration Over 1<sup>st</sup> Permit Term**
  - ◆ Special Conditions: Chesapeake Bay Restoration by 2025



# LEVEL OF EFFORT

- ◆ Insist That Permit Goes No Further Than Maximum Extent Practicable (MEP)
- ◆ Sets Implementation Pace or Level of Effort for 5-year Permit Term
- ◆ No Precise Definition of MEP
  - ◆ EPA left term vague
  - ◆ Meant to allow “maximum flexibility in MS4 permitting”
  - ◆ Allows for consideration of “specific local concerns” and “ability to finance”

# MEP CONSIDERATIONS

- Specific Local Concerns
- MS4 Size
- Implementation Schedules
- Ability to Finance
- Capacity to Perform O&M

# MEP ANALYSIS: PURPOSE

- ◆ **Your Way to Formally Request Relief**
  - ◆ From unachievable permit terms
  - ◆ Using recognized regulatory “relief valves”
  
- ◆ **Using Your Own Data**
  - ◆ Define current capabilities
  - ◆ Submit as soon as possible during process

# MEP ANALYSIS: BENEFITS

- 💧 Gives Regulator Basis for Making Reasonable Decision
- 💧 Record for Appeal
- 💧 Without Possibility of Appeal, You Have No Leverage to Insist on Reasonable Outcome
- 💧 You Might, Might, Might Get a Reasonable Adjustment
- 💧 Proof for Your Citizens that You Tried



# MEP ANALYSIS: TIMING

- 💧 The Earlier the Better
- 💧 Ideally, at Time of Permit Renewal Application
- 💧 Fallback #1: Before Tentative Determination
- 💧 Fallback #2: Last Resort: Public Comments

# SIMILAR OPTION #1: VARIANCE

## 💧 Authorization for Granting Variances

- 💧 EPA NPDES regulation (40 CFR 122.21(m))

## 💧 MD Regulatory References

- 💧 “Restoration variance” (COMAR 26.08.01.01.B)
- 💧 Permit Reg variance application (COMAR 26.08.04.11.C(10))

## 💧 VA Regulatory References

- 💧 MS4 variance request (4VAC50-60-360)
- 💧 VPDES variance request (9VAC25-31-100)

## 💧 Timing for Request

- 💧 EPA regs state must be made before end of comment period on draft permit

# SIMILAR OPTION #2: IMPLEMENTATION SCHEDULE

- ◆ A Timing Concept Under EPA and State Regs
  - ◆ Permittee must be allowed sufficient time to comply with new requirements
  - ◆ Ex., MD WWTP ENR Upgrades
- ◆ MD: COMAR § 26.08.04.02.C
  - ◆ MDE may grant “compliance schedule as a condition of a permit for existing discharges which do not comply with permit conditions, effluent limits, or WQSs”
  - ◆ Schedule shall be “the shortest *reasonable time* consistent with the requirements of the [CWA] and State law or regulation”

# ULTIMATE END-DATE

- ◆ **DC: Develop Consolidated TMDL Implementation Plan**
  - ◆ Schedule for compliance with each TMDL wasteload allocation (WLA)
  - ◆ Annual schedule of pollutant loading reductions
  - ◆ Fixed end-date for meeting WLAs
  - ◆ Modeling demonstration of how compliance will be achieved
- ◆ **MD: Within 1 Year, Submit Plan for Each Applicable TMDL**
  - ◆ With detailed schedule for implementing all measures needed to meet applicable TMDL WLAs



# ULTIMATE END-DATE (CONT.)

## 💧 VA: Separate Plans for Ches Bay TMDL and Other TMDLs

### 💧 Bay TMDL

- 💧 Action Plan to reduce 5% of overall reductions for pollutants of concern
- 💧 During 5 year term

### 💧 Other TMDLs

- 💧 Action Plan can span multiple permit cycles
- 💧 Must list BMPs to be implemented during permit term
- 💧 Process to assess effectiveness



**WASTEWATER**

# CRITICAL FUTURE ISSUES

## 💧 Biosolids

- 💧 Limitations on nutrient applications are driven by Bay TMDL
- 💧 Program must be viable in VA or entire region will pay price

## 💧 Chronic Overflows

- 💧 Very public issue
- 💧 Frequent topic in MD General Assembly Session
- 💧 Keep control over your own sewer rehab program

## 💧 O&M Expenses

- 💧 Need to cut or avoid unnecessary permit-based expenses
- 💧 Ex., reduce sampling for “yesterday’s” pollutants (conventionals) given positive impacts of new nutrient technology

The background of the slide is a blue-tinted photograph of water splashing. On the left side, there is a large, dynamic splash of water with many small droplets and bubbles. On the right side, there is a smoother, more horizontal wave of water. The overall scene is captured in a high-speed, artistic style.

**OTHER SUGGESTIONS**



# WATER-QUALITY STANDARDS

## 💧 Fix WQS Before TMDLs are Developed

- 💧 Review and refinement during triennial standards review
- 💧 Use Attainability Analysis (UAA)

## 💧 Argue Common Sense to the Regulator

- 💧 A bad TMDL is a bad TMDL
- 💧 Don't throw good money after bad
- 💧 Consider other ways to implement reductions that are not wasteful
  - 💧 "Skinny" approaches to air deposition of PCBs
  - 💧 Ex., Lower Potomac PCB TMDL

# FACILITY “BUBBLING”

- ◆ **Either at Community Level**

- ◆ POTW and MS4

- ◆ **Or at Watershed Level**

- ◆ Municipal permittee and other permittees in same watershed

- ◆ **Could Be Part of State Trading Program or EPA Integrated Planning Program**

- ◆ Next slides

# TRADING POLICIES

- ◆ **Properly Designed Trading Program Has Inherent Flexibility**
  - ◆ By definition, gives you other options for expensive permit requirements
- ◆ **VA: Expansion of Current Trading Platform**
  - ◆ Work underway right now to allow MS4s, others to participate
- ◆ **MD: Accounting for Growth**
  - ◆ Workgroup will discuss how to offset future growth
  - ◆ May involve revision of existing trading programs

# INTEGRATED PLANNING

- ◆ **One Option (Voluntary) Under EPA's Integrated Planning Framework**
  - ◆ Issue by HQ on June 5, 2012
- ◆ **Tool for Sequencing Compliance Activities, Esp. Capital Projects**
  - ◆ Not reducing compliance standards



# INTEGRATED PLANNING: BENEFITS

- 💧 Opportunity to Address Human Health & WQS Priorities With Consideration of Financial Capabilities
- 💧 Potentially Useful In Select Situations
  - 💧 For existing fixed deadlines
  - 💧 For the wrong priorities
  - 💧 Where financial capabilities are limiting factor
- 💧 Ex., Address Stormwater Discharges 1<sup>st</sup>, Then CSOs
  - 💧 1 SW outfall discharges 60X/1 year
  - 💧 1 CSO 1X/5 years

# INTEGRATED PLANNING: FLEXIBILITY FOR LOCALITIES

- 💧 **Tailoring: Can Reflect Size, Complexity of Infrastructure**
- 💧 **But, should include following elements**
  - 💧 Description of water quality, health, regulatory issues
  - 💧 Description of existing systems and current performance
  - 💧 Process for stakeholder involvement
  - 💧 Process for identifying alternatives and implementation schedules
  - 💧 Process for evaluating performance
  - 💧 Process for making improvements to plan

# INTEGRATED PLANNING: ROLE FOR EPA AND/OR STATE

- ◆ “When a municipality has developed an initial plan, EPA and/or the State will determine appropriate actions...”
- ◆ May incorporate all or part of plan in
  - ◆ Permits
  - ◆ Enforcement Documents (AOs, CDs, etc)
- ◆ May include requirements and/or schedules

# INTEGRATED PLANNING: INCORPORATING INTO PERMITS

## 💧 Compliance Schedules

- 💧 Must be “as soon as possible”
- 💧 State regulations or WQS must allow

## 💧 Reopener Provisions

- 💧 May be useful for adaptive management

## 💧 Green Infrastructure and Innovative Practices

- 💧 “Where appropriate” for wet weather control
- 💧 Can be used in enforcement documents as well
- 💧 TIP: Pilots first, then strategic integration if good performance