

Stormwater Regulations and Phosphorous Standards: Opportunities for Intergovernmental Cooperation

*Paul G. Kent
Constance L. Anderson
Stafford Rosenbaum LLP
222 West Washington Avenue
P.O. Box 1784
Madison, WI 53701-1784
pkent@staffordlaw.com
canderson@staffordlaw.com*

PRESENTATION TO THE WISCONSIN LEGISLATIVE COUNCIL

November 10, 2010
Milwaukee, WI

I. AN OVERVIEW OF STORMWATER REGULATIONS.

A. Clean Water Act Requirements.

1. The 1972 Clean Water Act was intended to regulate discharges of pollutants from "point sources" to waters of the United States." In the 1987 amendments to the Clean Water Act, Congress directed EPA to issue permits for stormwater discharges in two phases – for large and small communities. **A list of regulated communities is attached as Appendix 1.**
2. The Clean Water Act provides that **implementation and enforcement can be delegated to individual states** if they enact legislation comparable in scope to the federal act. 33 U.S.C. § 1342(b). Wisconsin's Clean Water Act stormwater management program is administered by the Wisconsin DNR under Wis. Admin. Code ch. NR 216.
3. **EPA retains supervisory jurisdiction** over a state delegated program and has the authority to terminate the program if the state is not implementing it in accordance with the Clean Water Act. 33 U.S.C. § 1342(c).

B. State Implementation – NR 216, NR 151 and MS4 GPs.

State implementation of the federal requirements is accomplished through three

inter-related requirements – NR 216, NR 151 and the MS4 General Permit.

1. NR 216 Requirements.

NR 216 is the code implementing federal Clean Water Act requirements for stormwater. NR 216.07 includes the basic requirements for municipal (and other) stormwater permits. For covered municipalities, the basic permit requirements include the following requirements derived from the federal minimum standards:

- Public Education And Outreach.
- Public Involvement And Participation.
- Illicit Discharge Detection And Elimination.
- Construction Site Pollutant Control. (For construction sites with one acre or more of land disturbance).
- Post-Construction Site Storm Water Management. (For construction sites with one acre or more of land disturbance).
- Pollution Prevention.

2. NR 151 Urban Performance Standards.

As part of the state's nonpoint program created under Wis. Stat. § 281.16, the Department has established performance standards for agricultural and non-agricultural sources of runoff. NR 151 is the administrative code that establishes standards for addresses nonpoint discharges in Wisconsin. The current rule provides:

- NR 151.11 – Construction site performance standard
- NR 151.12 – Post-construction performance standard for new development and redevelopment.
- NR 151.13 – Developed urban area performance standard.

3. The MS4 Permit (see Appendix 1)

- Individual Permits
- MS4 General Permit. Issued January 19, 2006, effective to December 31, 2010

II. LOCAL AUTHORITY TO REGULATE STORMWATER.

A. Authority to Construct Storm Sewers.

Local governments generally have the authority to construct and maintain facilities to manage stormwater.

- Towns, § 60.50(2)
- Town Sanitary Districts, § 60.77(4)
- Cities, § 62.15 (public works)
- Villages, § 61.36
- Metropolitan Sewerage Districts, § 200.11

B. Authority To Enact Drainage and Stormwater Ordinances.

1. Local governments are also authorized to enact ordinances to govern construction site erosion control (for sites where the construction activities do not include the construction of a building) and for stormwater management.

a. In general, the authority of local units of government to enact such ordinances can be found as follows:

- Cities, § 62.234
- Villages, § 61.354
- Towns, § 60.627
- Counties, § 59.69

b. The authority to enact such ordinances to promote the public health safety and welfare is in addition to its general police power authority.

- c. This grant of authority must be exercised in accordance with and be consistent with any comprehensive zoning plan and may be exercised in conjunction with local subdivision regulations under Wis. Stat. § 236.45.

C. Stormwater Utilities

Wis. Stat. § 66.0821 allows municipalities to create a stormwater utility to govern stormwater issues. This section provides in part:

66.0821 Sewerage and storm water systems.

(1) Definitions. In this section:

(a) "Municipality" means a town, village, city or metropolitan sewerage district created under ss. 200.01 to 200.15 or under ss. 200.21 to 200.65.

(b) "Sewerage" is a comprehensive term, including all constructions for collection, transportation, pumping, treatment and final disposition of sewage or storm water and surface water.

(2) General authority.

(a) 1. In addition to all other methods provided by law, a municipality may construct, acquire or lease, extend or improve any plant and equipment within or without its corporate limits for the collection, transportation, storage, treatment and disposal of sewage or storm water and surface water, including necessary lateral, main and interceptor sewers, and a town, village or city may arrange for the service to be furnished by a metropolitan sewerage district or joint sewerage system.

III. OPPORTUNITIES FOR COORDINATION.

A. NR 216.

1. NR 216.415 provides for incorporation of qualifying state, tribal or local erosion and sediment control program requirements by reference into the NPDES permit authorizing storm water discharges from construction sites.
2. NR 216 allows communities to file joint applications or to file as a regional authority. *See* NR 216.04. If they do so, NR 216.04(2) makes it clear that co-permittees are only responsible for permit conditions relating to discharges from their community.

B. **Wis. Stats. § 66.0301 Cooperative Agreements.** Wisconsin Statutes § 66.0301 allows communities to enter into intergovernmental agreements. Such agreements

can address the joint stormwater management issues. Agreements range from routine sharing of equipment or administrative services, to creating a joint commission to comprehensively manage all aspects of stormwater management for the region, to financing.

66.0301 Intergovernmental Cooperation

(2) In addition to the provisions of any other statutes specifically authorizing cooperation between municipalities, unless those statutes specifically exclude action under this section, any municipality may contract with other municipalities ..., **for the receipt or furnishing of services or the joint exercise of any power or duty required or authorized by law.** If municipal or tribal parties to a contract have varying powers or duties under the law, **each may act under the contract to the extent of its lawful powers and duties.** ... **This section shall be interpreted liberally in favor of cooperative action between municipalities ...**

(3) Any contract under sub. (2) **may provide a plan for administration** of the function or project, which may include but is not limited to provisions as to proration of the expenses involved, deposit and disbursement of funds appropriated, submission and approval of budgets, creation of a commission, selection and removal of commissioners, and formation and letting of contracts.

(4) A commission created by contract under sub. (2) **may finance** the acquisition, development, remodeling, construction and equipment of land, buildings and facilities for regional projects under s. 66.0621. (*revenue obligations*) Participating municipalities acting jointly or separately may finance the projects, or an agreed share of the cost of the projects, under ch. 67. (*municipal borrowing*)

(5) No commission created by contract under sub. (2) may, directly or indirectly, do any of the following:

(a) Acquire, construct or lease facilities used or useful in the business of a public utility engaged in production, transmission, delivery or furnishing of **heat, light, power, natural gas or communications service**, by any method except those set forth under this chapter or ch. 196, 197 or 198.

1. Analyzing the respective powers of the parties to the 66.0301 agreement is essential:

- Does each member municipality have the power or duty to perform the function or take action?
- Does the agreement delegate the power to a commission? Does the agreement create a “legal entity” that is separate and distinct from the member municipalities? (liability considerations)
- Does any specific statute preclude collaboration under Wis. Stats.

§ 66.0301?

- Does any statute provide the exclusive means of exercising the power?
- Does any statute specifically authorize the power?

2. Depending on the nature of the 66.0301 agreement, there may also be numerous practical considerations that must be addressed:

- Title to and ownership of property.
- Insurance coverage.
- Status as employer. (impact on benefits such as WRS; impact on liabilities such as workers compensation, unemployment, tort and discrimination claims)
- Enumeration of powers delegated.
- Dissolution.

C. **Multi-Jurisdiction Utilities.** *See, e.g.,* Metropolitan Sewerage Districts, Wis. Stats. § 200.11, and general utility authority under Wis. Stats. § 66.0821.

IV. IMPLICATIONS OF NEW PHOSPHORUS AND TMDL STANDARDS.

A. **Phosphorus Standards. NR 102 and NR 217.**

1. **Water Quality Standards under NR 102 include the following:**

- Large streams 0.10 mg/l (100 ug/l).
- Small streams 0.075 mg/l (75 ug/l).

2. **Impact on Municipalities.**

- Not all municipalities will be affected by this rule, but at least half of municipal wastewater treatment plants will see some impacts, many will have limits below 0.2 mg/l.
- To reliably achieve a WQBEL lower than 0.5 mg/l would, in most cases, require advanced wastewater treatment technologies.

- If all affected POTWs were required to meet these limits within a permit term (5 years), we estimated the cost of the advanced treatment systems statewide would range from **\$1.3 to \$4.8 billion dollars**. The average unit cost ranged from **\$240 to \$304 per pound of phosphorus removed** for inland POTWs
- Phosphorus could become an issue for stormwater as well.

3. Status of the Rule.

- Natural Resources Board adoption June 23, 2010
- Legislative review complete September 8, 2010
- Publication/Effective date January 1, 2011

4. Implementation options under the new rules.

- **Standard compliance** schedule which provides 7 to 9 years for final compliance.
- **Adaptive management** option provides for three permit terms (15 years) provided you undertake interim reductions to 0.6 mg/l (and then 0.5mg/l) and develop a watershed reduction plan to achieve the water quality standard. This approach encourages collaborative efforts.

B. TMDLs.

1. Background.

- TMDL methodology involves an analysis of point and nonpoint sources. For purposes of this analysis, municipalities with MS4 permits are considered point sources.
- Basins – Rock and Fox; but others are possible

2. Potential Impacts.

- TMDL allocation for MS4 point sources require reductions beyond the current MS4 permits. DNR proposed a 68.1% reduction in TSS from MS4 communities as part of the Fox TMDL process.
- It is unclear how TMDL implementation will be integrated with NR 151 planning process.

APPENDIX 1

List of Regulated Communities

Algoma town
Allouez village
Altoona city
Anson town
Appleton city
Ashwaubenon village
Bayside village
Bellevue town
Beloit city
Beloit town
Bergen town
Big Bend village
Black Wolf town
Blooming Grove town
Bristol town (Dane county)
Bristol town (Kenosha county)
Brookfield city
Brookfield town
Brown county
Brown Deer village
Brunswick town
Buchanan town
Burke town
Butler village
Caledonia town
Calumet county
Campbell town
Cedarburg city
Cedarburg town
Chenequa village
Chippewa county
Chippewa Falls city
Combined Locks village
Cottage Grove town
Cottage Grove village
Cudahy city
Dane county
De Pere city
De Pere town
De Forest village
Delafield city
Delafield town
Douglas county
Dousman village
Dunkirk town
Dunn town
Eagle Point town
Eau Claire city
Eau Claire county
Elm Grove village
Elmwood Park village
Empire town
Fitchburg city
Fond du Lac city
Fond du Lac county
Fox Point village
Franklin city
Friendship town
Genesee town
Germantown town
Germantown village
Glendale city
Grafton town
Grafton village
Grand Chute town
Green Bay city
Greendale village
Greenfield city
Greenville town
Hales Corners village
Hallie town
Harmony town
Harrison town
Hartland village
Herman town
Hobart town
Holland town
Holmen village

Howard village
Howards Grove village
Janesville city
Janesville town
Kaukauna city
Kenosha city
Kenosha county
Kimberly village
Knowlton town
Kohler village
Kronenwetter village
La Crosse city
La Crosse county
La Prairie town
Lafayette town
Lake Hallie village
Lake Lac La Belle village
Lannon village
Lawrence town
Ledgeview town
Lima town
Lisbon town
Little Chute village
Madison city
Madison town
Maine town
Maple Bluff village
Marathon county
McFarland village
Medary town
Menasha city
Menasha town
Menomonee Falls village
Mequon city
Merton town
Merton village
Middleton city
Middleton town
Milton city
Milwaukee city
Milwaukee county
Monona city
Mosel town
Mosinee city
Mount Pleasant town
Muskego city
Nashotah village
Neenah city
Neenah town
Nekimi town
New Berlin city
North Bay village
North Fond du Lac village
North Prairie village
Oak Creek city
Oconomowoc city
Oconomowoc Lake village
Oconomowoc town
Oliver village
Omro town
Onalaska city
Onalaska town
Oshkosh city
Oshkosh town
Ottawa town
Outagamie county
Ozaukee county
Paddock Lake village
Pewaukee city
Pewaukee village
Pittsfield town
Pleasant Prairie village
Pleasant Springs town
Racine city
Racine county
Randall town
Rib Mountain town
Richfield town

River Hills village
Rock county
Rock town
Rothschild village
Salem town
Saukville town
Saukville village
Schofield city
Scott town
Seymour town
Sheboygan city
Sheboygan county
Sheboygan Falls city
Sheboygan Falls town
Sheboygan town
Shelby town
Shorewood Hills village
Shorewood village
Silver Lake village
Somers town (Kenosha county)
South Milwaukee city
Springfield town
St. Francis city
Stettin town
Stoughton city
Sturtevant village
Suamico town
Summit town
Sun Prairie city
Superior city
Superior village
Sussex village
Taycheedah town
Thiensville village
Tilden town
Turtle town
Twin Lakes village
Union town
Vandenbroek town
Vernon town
Verona city
Vinland town
Wales village
Washington county
Washington town
Waukesha city
Waukesha county
Waukesha town
Waunakee village
Wausau city
Wauwatosa city
West Allis city
West Milwaukee village
Weston village
Westport town
Wheatland town
Wheaton town
Whitefish Bay village
Wilson town
Wind Point village
Windsor town
Winnebago county