

From: [Karina Bynum](#)
To: [Vojin Janjic](#)
Cc: [Ann Morbitt](#); [Ariel Wessel-Fuss](#)
Subject: Fw: Ph I MS4 permit question...
Date: Monday, October 7, 2024 1:40:43 PM
Attachments: [image002.png](#)

Vojin,

Below is the email exchange with Michael Hunt - Metro Nashville Stormwater. As we discussed, please initiate a request to OGC to advise on the questions from Michael.

Thank you,
Karina

Not really...I just had noted the matter w/a reminder from my interactions with NACWA some time back – to bring up once our next permit reissuance was moving forward. If your legal folks have specific questions, I can get them in touch with my NACWA contacts on the matter as they are aware of case law they feel is applicable. It's not to me an acrimonious thing...but as a former permit writer; I do see the validity of the question given the applicable CFR/MEP – and fact MS4 permits are a “different animal” than other property/ownership-based permits.

Thanks Karina, Michael

Michael,
I had some discussion internally but will need to send your question to our legal team. Would you want me to add anything to the request before I send it to them?
Thank you,

Karina Bynum, Ph. D., PE | Environmental Fellow
Tennessee Department of Environment and Conservation
Division of Water Resources
1221 South Willow Avenue
Cookeville, Tennessee 38506
931- 217- 6638
karina.bynum@tn.gov
tn.gov/environment

Karina, FWIW I asked NACWA earlier today if there was anything new on the topic from their end. Here's what they sent me...

At the federal level, NACWA has been pushing for Congress to pass the Confidence in Clean Water Permits Act ([HR 7013](#)), which would codify the longstanding permit shield under NPDES permits. More specifically, the bill does the following:

It ensures that NPDES permit writers do their job in a manner that permittees can rely on, limits opportunities for frivolous lawsuits, and protects permit holders that are acting in good faith, following the specific requirements in their permits in accordance with decades-old EPA policy.

This bill clarifies that permits must include only clear, objective, concrete limits on specific pollutants or waterbody conditions, and that as long as permit holders are adhering to these clear effluent limitations, they are in compliance under the law. Additionally, this bill codifies the longstanding EPA policy that permit holders are shielded from liability as long as they are following the terms in their NPDES permits and have provided all relevant information to the permit writer during the application process.

This bill was [packaged](#) together with a handful of other permit reforms earlier this summer and passed by the House with only Republican support. It is very unlikely that the Senate will take up this legislation this session, making **it** unlikely to be signed into law this year.

Thanks, Michael

From: Hunt, Michael (WS) <Michael.Hunt@nashville.gov>
Sent: Friday, September 13, 2024 7:24 AM
To: Karina Bynum <Karina.Bynum@tn.gov>
Cc: Hayes, Joshua (WS) <Joshua.Hayes@nashville.gov>
Subject: [EXTERNAL] Ph I MS4 permit question...

This Message Is From an External Sender

This message came from outside your organization.

Please exercise caution. DO NOT open attachments or click links from unknown senders or unexpected email - STS-Security

Hi Karina, Hope you are well. As TDEC begins the process to reissue Phase I MS-4 permits, I wanted to bring up an issue that comes up on a national level (via the organization [NACWA](#)) – that I’m involved with (I’m their national Stormwater Committee Co-Chair). This matter relates to a provision that has traditionally been included in MS4 permits – generally in the “Limits on Coverage” section.

Limits on Coverage: ...Discharges that would cause or contribute to an in-stream exceedance of water quality standards.

Below is a summary of what has been promoted by NACWA to MS4 permittees – with some specific context by me re TN MS4 permits. I'm out of town until next Friday, but I am happy to discuss if you would like. I've been holding on to this for some time until the Ph Is began to be reissued.

There is a fairly large "battle" going on across the country re some "Permit Shield" considerations when MS4 permit language includes verbiage like "g." below (re what is not authorized by the permit) – as the ultimate MS4 CWA Standard is MEP. Some cities around the country have been successfully sued over this language due to illicit, etc. as the WQS permit language has been ruled as eliminating the normally-applicable "permit shield".

The CWA permit shield provides that a permittee's compliance with its NPDES permit insulates the party from enforcement actions based on alleged violations of the CWA.ⁱ In *Piney Run Pres. Ass'n v. Cnty. Comm'n of Carroll Cnty.*,ⁱⁱ the court held that an NPDES permittee is shielded from liability provided it (1) has complied with the express terms of its permit and (2) properly disclosed the pollutant of concern during the permit application process.

The consideration is that since MS4s are to meet MEP – not exceeding WQS is (per NACWA) not necessarily the standard to be considered per the CWA re MS4s. Has TDEC ever considered this matter?

From Limits of Coverage language...

- g. Discharges that would cause or contribute to an in-stream exceedance of water quality standards. The stormwater management plan must include a description of the best management practices (BMPs) that the MS4 will be using to ensure that this will not occur. The division may require a corrective action plan if discharges from the MS4 are determined to cause or contribute to an in-stream exceedance of water quality standards.**
- j. Discharges that do not comply with the division's anti-degradation policy for water quality standards, pursuant to the Rules of the Tennessee Department of Environment and Conservation (TDEC), Chapter 1200-4-3-.06, titled "Tennessee Antidegradation Statement."**

From CWA...

MS4s "shall require controls to reduce the discharge of pollutants to the **maximum extent practicable**, including management practices, control techniques and system, engineering and design methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants."

– CWA § 402(p)(3)(B)(iii), 33 USC § 1342(p)(3)(B)(iii)

From NACWA...

- **Law Is Still Developing**

- Challenges by certain groups that MS4 permits must mandate compliance with WQS & TMDLs uniformly rejected by courts
- Few challenges by MS4 permittees arguing that permits cannot include impracticable conditions to comply with WQS & TMDLs

Michael Hunt CSM, CPMSM, CPSWQ, CFM
Program Manager

Metro Water Services - Storm Water Div.- NPDES Office
[1607A County Hospital Road](#)

Nashville, TN 37218

Phone: (615) 880-2420

<http://www.nashville.gov/stormwater/>

If you see water pollution in Metro Nashville, call (615) 313-PURE or (615) 880-2420 or email stormwaterquality@nashville.gov