

REPORT TO PENNSYLVANIA STORMWATER COALITION MEMBERS

JUNE 23, 2011

As many of you are aware, we are expecting the Final PAG-13 to be published sometime toward the end of June or early July. As this will start the clock for our municipalities, requiring that all of us take certain actions within specified time periods, we thought this would be a good opportunity to provide an update on this issue as it may have fallen "off the radar" for many of those who will be required to approve or contribute towards plans designed to keep municipalities in compliance with the new DEP Stormwater regulations.

To ensure that everyone properly understands the issue, we provide herein **Background** information which outlines the regulatory environment within which our municipalities are governed from a storm water management perspective and the governmental agencies which have been influencing the process.

Under the heading **Coalitions Work Efforts** we have provided an outline of the efforts and actions taken by your Coalition to influence the content of the PAG-13, our engineer's assessment of the current version, attached separately, and our commitment to assist you in bringing your municipality into compliance. As the only organized group, singularly focused on taking up this worthy cause on behalf of municipalities, it has become obvious that the credibility of our Coalition is well established and resulted in our "place at the table" being created.

Finally, we have developed additional efforts we believe warrant continued Coalition support as more clearly outlined in the section titled **Where Do We Go From Here.**

Taken as a whole, this report should provide a good basis to begin assessing the next steps for your municipality and the Coalition as a whole. We remain available as a resource from both a legal and engineering perspective to assist the Coalition members come into compliance with these complex new regulations.

Background

Each municipality within a census derived 'Urbanized Area' is required to have a Federal NPDES (National Pollution Discharge Elimination System) permit, under Federal Regulations issued in 1999, to discharge storm water into the nation's waterways. In Pennsylvania, the Commonwealth Constitution causes a difference of application than in most other states. Here in Pennsylvania the Municipal Stormwater System Permit is on a local municipal basis, and not issued or administered on a county level as elsewhere (which is how EPA had crafted this permit program).

Although a Federal Permit program, DEP on behalf of the Commonwealth is designated to 'administer' the program, i.e. with EPA's oversight, issue and enforce participation in the program. EPA reserves the ability to intervene should they believe that the Clean Water Act is not being adequately enforced. EPA did this in Florida last year when they essentially threw out that state's program and are implementing their own.

Pennsylvania, through the DEP, interprets the Federal Clean Water Act (CWA) to apply to only those physical watershed areas actually owned by the municipality, including the township road system, storm

water collection inlets and conveyance piping, road ditches and swales, that concentrate the collected runoff into a 'point source' discharge (i.e. outfall pipe) that enters the 'Waters of the United States', or alternatively, 'Waters of the Commonwealth'. This collective area of concentrated storm water and 'point source' discharge(s) is defined as the Municipal Separate Storm Sewer System (MS4).

We need to be aware that what DEP currently defines as the MS4 differs from that preferred by the EPA, which would have the entire 'Urbanized Area', that is the entire township, as a single permitted area. It is clear that the EPA eventually seeks to regulate the entire municipal watershed where under DEP's definition of non-point sources such as farms, large lot farms, and country clubs, as well as privately owned storm water systems in Homeowners Maintenance Developments, Shopping Centers, Office Complexes, will be included in each municipalities MS4.

This expansive area of difference, among other accountability issues, may be addressed with new regulations that reportedly will be issued in September, for end of the year adoption. This approach, if implemented by EPA, would significantly expand the regulatory universe to which we are subject.

Current Permit

Most MS4's applied for coverage under the 'General Permit' form of the Storm Water NPDES for the annual period of March 10, 2003 through March 9, 2008 in early October of 2002. This original permit has been extended 4 times, for additional variable time periods, and will be expiring on June 9, 2012.

Acceptance of coverage under a 'General Permit' was accomplished by the filing of a 'Notice of Intent' (NOI) to accept the terms of the 'General Permit' as outlined in Pennsylvania's regulations known as General Permit 13, or (PAG-13). Acceptance of this coverage required the adoption of the form of a 'Model Ordinance' for controlling storm water runoff from new development as well as a program known as 'Six Minimum Control Measures' under a defined 'Protocol' for monitoring and managing the quality of storm water that enters into the municipality's system(s) and is consequently discharged into the regulated water bodies. The new Permit takes management of storm water to a significant new level and will require substantial efforts by our municipalities.

New PAG 13 Permit

As previously stated, the new PAG-13 is scheduled for formal publication as 'Final' either by the end of this month, or early in July, in the Pennsylvania Bulletin. The NOI being due 6 month prior to the June 9, 2012 expiration of the current permit means the you will need to move promptly to prepare and file your NOI by December 9, 2011. Given this limited timeframe, and at urging of our Coalition the 'Draft' of the 'Final' form was distributed in a presentation by DEP to their 'Water Resources Advisory Commission' (WRAC) on April 13, 2011 in Harrisburg. This early look provided the Coalition's engineers the opportunity to develop comments which are attached as part of this write-up. These have been provided to DEP with the hope that the issues identified will be clarified in the "Final" PAG-13 when formally published.

Based on our review of the draft and lobbying efforts with DEP, the Coalition has been able to influence DEP to make a number of positive changes to the PAG-13 including:

- Expanded the number of BMP's available for development projects requiring municipal approval, including the ability to utilize trading and offset programs.

- Obtained the inclusion of the “ordinance checklist” in the final PAG 13 version. This will enable municipalities to utilize some, or all of, their current storm water ordinance so long as it meets the requirements of the newly included Municipal Ordinance Checklist.
- Obtained the ability to remove smaller projects from the Municipal Stormwater Ordinance so long as additional flows were accounted for elsewhere.
- Clarified for the DEP via our Legal Assessment that municipal government lacked legislative authority to compel retrofits of existing storm water systems in the face of EPA pressure to include such a measure in the final MS4 program.
- Documented in the Coalition’s Legal Assessment the lack of authority in municipalities to charge or assess storm water fees to those property owners discharging to the MS4.
- Obtained DEP support for the proposition that municipal responsibility for “urban area” storm water is restricted to that storm water entering the conveyance system developed and maintained by the municipality.

In addition, we have requested and strongly encouraged DEP to grant an additional 6 month extension to allow sufficient time for the Notice Of Intent (NOI) to be thoughtfully developed by each municipality. While this remains a pending issue it was positively received by the DEP after we outlined the time constraints the 12/9/2011 deadline for NOI places on municipalities. (See Chambers Associates letter attached outlining a suggested timetable and work effort needed to comply with the current NOI deadline.)

On balance, and as a result in a large part from the efforts of the Coalition, we believe that the proposed Final PAG-13 is now workable for our municipalities with one notable exception. That exception is the TMDL requirement, an effort being strongly pushed by the EPA and which the DEP feels is a requirement in order to obtain EPA approval of the PAG-13 (which approval is required). As previously noted, if not satisfied with the DEP’s PAG 13, the Clean Water Act allows the EPA to reject the PAG-13 even after it has been published, and insert its own program.

Total Maximum Daily Load (TMDL)

Not included in Pennsylvania’s current PAG-13, but which is now required for compliance with a renewed or new NPDES Permit, is acknowledgment of TMDLs (Total Maximum Daily Limit – expressed in pounds of a pollutants) that have been, or will be, issued by the EPA, and or DEP, for water bodies that are designated under the Clean Water Act as “impaired.” An “impaired water body” is one that cannot meet its designated uses (fishing, swimming, etc.). The TMDL for an impaired water body is determined on a scientific basis as the amount of a ‘pollutants’ that the water body can accommodate and still attain its’ designated use.

An explicit requirement of the new PAG-13, and any application for coverage under an ‘Individual Permit’, is that a municipality that has an MS4 in an urbanized area must prepare a Storm Water Management Plan that is consistent with any TMDLs that have been issued for water bodies within the municipality’s watershed drainage areas. The Plan must include measures that would reduce applicable pollutant loads shown as a “Waste Load Allocations” assigned within a TMDL Report, in a designated time period.

The requirements also include making “measurable substantial progress” through the installation of physical pollutant removal measures which must be documented in the (annual) reports submitted to DEP and subsequently EPA. In addition, if a stream or other water body is impaired, but for which no TMDLs have been issued, the MS4 is expected to ensure that new discharges from the permittee’s regulated small MS4s do not cause or contribute to its exceedences of water quality standards.

The measures to accomplish this would primarily be through reduction in the volume of storm water runoff from our storm water systems. How to accomplish this and how to make commitments to do this within specific time periods is going to be the major issue for our municipalities in preparing our NOI’s.

While not successful in having the TMDL requirement removed, we were able to:

- Ensure the DEP understands the difficulties compliance with this requirement place on fiscally strapped municipalities.
- Obtain DEP assurance that compliance with TMDL can take place over a period of permit cycles and within the financial constraints of the municipalities.
- Conveyed to DEP the desire of municipalities to contribute toward cleaner waterways without being compelled to commit to potentially unreasonable and unachievable TMDL/WLA numbers in the NOI submission due the December 2011.
- Obtained DEP appreciation of our concern that numeric limits were not appropriate for a BMP based storm water management system since the ability to measure outputs and results was very imperfect. (See Secretary Krancer’s letter to EPA dated May 26, 2011 expressing DEP concerns about the application of the TMDL model to the municipal stormwater sector in particular.)

Coalitions Work Efforts

As many of you receiving this letter will be asked about the efforts of the Coalition to get us to this point, understand the following efforts were extended on behalf of the Coalition:

- September 30, 2010 -Initial meeting of Steering Committee Meeting to initiate efforts to influence development of PAG 13.
- October 25, 2010 Chairman Fox and Core Coalition Staff attended PSATS Work Group meeting with PADEP held at PSATS headquarters in Enola.
- November 4, 2010 Coalition Counsel attended seminar on DEP’s new Chapter 102 regulations.
- November 18, 2010 Meeting of Coalition Steering Committee Meeting.
- November 23, 2010 Coalition Counsel held extended telephone discussion with DEP Assistant Director for Regulatory Counsel, Margaret Murphy.

- December 15, 2010 Coalition Counsel and Contributing Engineer B. Wert, P.E., attended U.S. EPA sponsored "Listening Session" regarding the Chesapeake Bay TMDL .
- January 26, 2011 Chairman Fox and Core Coalition Staff met with senior officials of The State Conservation Commission ("SCC") at the DOA office in Harrisburg to discuss the SCC's expectations for agricultural participation in the TMDL process.
- January 26, 2011 Chairman Fox and Core Coalition Staff met with senior officials of the DEP regarding U.S. EPA relations with the DEP and the DEP's expectations for final PAG-13 program.
- January 26, 2011 Chairman Fox and Core Coalition Staff met with Secretary Michael Krancer to share our concerns and learn his perspective on the Commonwealth's participation in this NPDES program.
- February 24, 2011 Meeting of Coalition Steering Committee Meeting.
- March 2, 2011 Letter to Acting Secretary Krancer Re: Suggestions for an Effective Municipal Stormwater MS4 Program.
- March 11, 2011 Letter to David M. Sanko, Executive Director, PSATS, urging PSATS support for Coalitions efforts on behalf of Association Member.
- March 22, 2011 Chairman Fox held extended phone conversation with DEP Deputy Secretary Glenn Rider encouraging early release of Draft PAG 13 so that we could complete a comprehensive review.
- March 25, 2011 Letter to Acting Secretary Krancer transmitting Coalition's "Legal Assessment of Municipal Corporations Authority to Manage and Regulate Stormwater Within their Municipal Boundaries" and encouraging cooperative efforts between the Coalition DEP and US EPA.
- March 29, 2011 Letter to 44 state and federal legislators representing the 57 municipal members of the Coalition regarding the Coalitions efforts to improve the proposed PAG 13.
- March 31, 2011 Coalition Counsel along with Contributing Engineer Barry Wert, P.E. attended Urban Engineers sponsored session on the content, extent and implications of Philadelphia's new storm water program and service fee system.
- Chairman Fox attended the MCATO Annual Conference and made a presentation on the impact of the new PAG 13 on municipalities. At the meeting he obtained support for submission of a proposed Resolution to PSATS regarding the substantial and troubling issues in the substantially expanded MS4 regulatory program, which Resolution was adopted by PSATS at it Annual Conference.

- April 2, 2011 Letter to David Sanko urging PSATS support for Coalitions efforts on a statewide basis to substantially expanded MS4 regulatory Program.
- April 13, 2011 Coalition Counsel along with Contributing Engineer B. Wert, P.E. attended the Water Resources Advisory Committee (WRAC) in DEP's Harrisburg office.
- April 14, 2011 Letter to Acting Secretary Krancer Re: Update on PA SW Coalitions Suggestions for an Effective MS4 Program
- April 18, 2011 Contributing Engineer B. Wert, P.E. attended storm water related sessions at annual PSATS meeting held in Hershey, PA.
- May 18, 2011 Coalition Counsel held extensive conversation with DEP Assistant Director Margaret Murphy on Coalition's serious concerns for portions of the TMDL program.
- May 20, 2011 Coalition Chairman M. Fox held an extended conversation with DEP Assistant Director Margaret Murphy and Program Director Glenn Rider regarding the Coalition's serious concerns for the TMDL components of the watershed MS4 Program.

Where Do We Go From Here

As the final PAG is due to be published shortly, our ability to alter the content of the PAG 13 is limited and therefore our Coaliton efforts must be directed more towards bringing our member municipalities into compliance in the most efficient/effective manner as possible.

From a legal perspective, we need to await actions from the DEP to determine any possible alternatives. During the Steering Committee meeting held on June 16th, members provided anecdotal information that the DEP and EPA are potentially further apart on the PAG-13 than was initially thought. (See Secretary Krancer's letter to EPA dated May 26, 2011 expressing DEP concerns about the application of the TMDL model to the municipal stormwater sector in particular.) This could result in a delay in the publication or other outcome which we will need to assess. This could lead to a need for a more aggressive stance or other action but at this time, that cannot be accurately predicted. It has been determined that additional legal efforts will need to be developed once the status of the PAG-13 publication becomes clearer.

Simultaneously, the engineering committee for the Coalition will begin the process of assessing cost effective ways to satisfy the requirements of the PAG-13 and common responses for all municipalities for use in their NOI's should we be required to meet the 12/9/11 application deadline. We feel it is prudent to begin this effort to as there is no assurance that additional time will be granted. Please recall, we have requested a 6 month extension to allow for additional time to file the NOI but as of this writing, we are not sure if this extension will be granted. If not, it will leave little time for your engineer to develop/design a comprehensive plan for your municipality. As such, the engineering committee will be a resource, interacting with the DEP, to pose questions pertinent to the application to assist in proper completion of the NOI.

As we have now had the opportunity to review what we believe is the form of the PAG-13 which the DEP is likely to publish and it appears that the TMDL requirement which we have fought against will likely be included, we will direct our attention toward quantifying an estimated cost to bring

representative municipalities into compliance. We believe these costs will be substantial and will use these estimates to bring this unfunded mandate to both our Federal and State legislatures to seek financial support or relief from the requirement.

We believe it is essential that we raise the profile of this of this unfunded mandate as the financial impact will be considerable. To this end, the engineer for Montgomery Township and the engineer for Franconia Townships will develop cost estimates, based on complying with the TMDL, which we will use to heighten awareness of the impact of these new regulations to our State and Federal Legislators.

These two municipalities were chosen as they represent both developed and rural municipalities and will provide good proxies for showing estimated costs. We expect this work to be completed shortly and will report the results out to the Coalition members with some recommendations. Of course if any other Coalition members would like participate in the effort their participation would be most welcome. If interested, please let us know and we will put you in touch with one of the Coalition's engineers in order to discuss the parameters for the analysis.

If you have any questions or comments please feel free to direct them to us and we will in turn direct them to the appropriate person to respond. We thank you for your continued support.

Respectfully Submitted
Michael J. Fox, Chairman
Pennsylvania Stormwater Coalition