

OHIO WATER ENVIRONMENT ASSOCIATION 2011 GOVERNMENT AFFAIRS WORKSHOP

OHIO EPA & LEGAL UPDATE March 10, 2011

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OHIO EPA UPDATE

Regulations

Legislation

Legal Cases

Ohio EPA Update

- BIG CHANGES IN OHIO
- New Governor – John Kasich
- New Attorney General – Mike DeWine
- New Ohio Senate Leader – Tom Niehaus
- New Ohio House Leader – Bill Batchelder
- New Ohio EPA Director – Scott Nalley
- New Ohio EPA Legal Director – Brian Cook

Ohio EPA Update

Potential Changes to Ohio EPA Programs:

1. Emphasis on Clear, Consistent & Timely Decisions
2. “Expedited Settlement” Procedure
3. More Fact Sheets
4. Partnering w/ODNR & Agriculture
5. “Pre-permitting” Brownsfield Sites
6. More Permit by Rule & General Permits
7. Streamline Wetlands Permits w/COE’s Help

Ohio EPA Update

Nutrients Issues

- Lake Erie Dead Zone
- Gulf of Mexico Dead Zone
- HABs
- WQ Impairments
- USEPA 1998 National
- Nutrient Strategy

OEPA New Approaches

- Inland Lake WQSs
- Antideg BADCT (TP 2.0/3.0 – N 10/15)
- New Type of Standard - biological response using Trophic Index Criterion (TIC) = chlorophyll a + DO + dissolved inorganic N/ TP + Biological Survey – TIC Score Would Determine Applicable Criteria - Reasonable Potential Would Trigger New Permit Limit (Phase in) (See (See OWEA Nutrient Webinar PPSs) - Draft Rules Sent to USEPA for Review - Interested Party Rules - maybe 2011

Ohio EPA Update

- US EPA Memo (Nov. 12, 2010) to Regional Water Division Directors
- Where MS4 and/or Small Construction Storm Water Discharges have Reasonable Potential to Cause or Contribute to WQS Excursion, Permits Should Contain Numeric Effluent Limitations Where Feasible to do so (p. 3, 1st Paragraph)

Ohio EPA Update

- MS4 Permit Expectations Have Changed
- Lots of “Stuff” in Storm Water That Could Fail RP (TDS, Nutrients, TSS, Metals)
- MS4 Permit Holders May Have to Go Up-Pipe to Regulate the Pollutant of Concern From NPS Areas – Land Use Restrictions?
- Memo is not Law; States May have Some Discretion
- TMDL Could Result in MS4 Limits As Well

Ohio EPA Update

- TDS - City of Warren/Patriot CWT Facility - OEPA Approval to accept up to 100,000 gpd of no more than 50,000 ppm TDS pre-treated oil & gas well wastewater Including from Hydraulic Fracturing operations
- Several Other Cities Seeking Approval
- OEPA Marcellus & Utica Shale Website
- Utica Shale being Tested by Producers
- OEPA – ODNR Coordination

Ohio EPA Update

- Changes Likely for Ohio Air & Water Permitting for Gas Well Sites and Ancillary Facilities
- Possible Permit by Rule, General Permit or Permit Exclusions
- US EPA Study Underway Under SDWA
- Industry Going to Recycling Practices

Ohio EPA Update

- NY Times Article Feb. 22, 2011 by Ian Urbina
Critical of Pa & WVa Oversight – Focus
NORMS (naturally occurring radioactive
substances)
- Cabot Oil Case in Pa
- Misuse of Diesel Oil for HF
- Political Attention Increasing
- Industry and States Responding With Data

Ohio EPA Update

Rules and Regulations

- Biosolids/Sewage Sludge - Final OEPA Rules Effective Date: July 1, 2011
- USEPA Sewage Sludge Incinerator MACT Emission Standards – Issued Feb. 21, 2011 – Soon in Fed Reg
- Antidegradation – 3 Revisions to address settlement of 2003 appeal (clarify existing source exemptions; allocation of assimilative capacity in OSWs and Superior SWs; petition procedures for set asides) - Comment Period Closed Nov. 10, 2010

Ohio EPA Update

- WQS Designations – Grand, Sandusky, Huron, Great Miami, Portage, Muskingum, Mahoning and Mill Creek - Closed Dec. 20, 2010
- Class V Injection Wells – Would Allow Minimal Water Plant Wastewater Discharge w/o Permit Under Some Conditions – Closed Dec. 20, 2010
- Credible Data Program Rules – Substantial Revisions Were Proposed – Closed Nov. 9, 2010

Ohio EPA Update

- Interested Party Review (Comments Now due June 6, 2011):
 1. Antidegradation - BADCT standard for nutrients; updates special waters table; Exemption for approved LTCPs reviewed
 2. Wetlands/401 Certification – Establishes a new permit to cover impacts to “isolated streams”; addresses historical procedural ambiguities

Ohio EPA Update

3. WQSs – 6 new beneficial use designations; updates HH and AL criteria (e.g., Cd); Nutrient Criteria for Inland Lakes)
4. Stream Mitigation – Establishes a Tiered Mitigation Review and New Implementation Procedures

Ohio EPA Update

- WQSs & Permit Implementation Rules – WET; Mixing Zones; NPS Definition; Compliance with Adjacent State WQSs; Reference to Federal Program; - Adopted March 7, 2011 – Eff. June 7, 2011
- OEPA DSW Guidance Document Updated: Monitoring frequency; upstream & downstream monitoring; Limits below Quantification Levels

Ohio EPA Update

- Final Renewal General Permit: Petroleum-related Corrective Actions
- Final Renewal General Permit: Non-contact Cooling Water
- Draft New General Permit: Geothermal systems
- Draft New General Permit: Pesticide Applications Discharges

Ohio Legislative Update

- Governor Kasich's first act: Common Sense Initiative (Executive Order 2011-01K)
- Lt. Governor Taylor in Charge
- A "CSI" Office Established - Regulation Review – Focus on Small Business
- Goal: properly balance critical objective of regulation with costs of compliance
- Goal: choose the regulation that accomplishes objective with in least burdensome on Small Business

Ohio Legislation Update

- HB 1 is JobsOhio Bill – Governor’s Top Priority – Adopted - Privatized Dept. of Development Functions
- SB 2/HB 94 – Adopted - Business Impact Analysis For Proposed Rules – Adds a 5th Criteria for JCARR’s Rule Review – CSI Office created by statute
- SB 22/HB 72 – CWA Affordability for NPDES Permitting & LTCPs

Ohio Legislation Update

- SB 22/HB 72 – POTW Driven – Creates New RC 6111.60 – Would Require Factors to be taken into Consideration before issuing NPDES Permits for Sewerage Systems, approving LTCPs and Enforcing CWA on Sewerage Systems
- Factors Required to be Considered:
 1. Ability to pay or to secure money (e.g., issue bonds)
 2. Effectiveness & Costs (LTCP & WW Control Technologies)

Ohio Legislative Update

3. Evaluation of impact of LTCP on the environment as a whole & promotion of alternatives

4. Reducing economic impact on an applicant, other state and local government entities & state residents

Ohio Legislative Update

5. Allowing for Reasonable LTCP Implementation Flexibility when LTCP would impose disproportionate financial hardship compared to environmental benefits

6. Giving Preference, when applicant asks, to Presumptive Approach Performance Criteria under National CSO Policy

Ohio Legislative Update

7. Allowing Adequate Time and Flexibility for Implementation Schedule of LTCP

8. Factors in the National CSO Policy that may ease the financial burdens of LTCP (e.g., small systems, attainability, WW WQSs) 8. Factors in the National CSO Policy that may ease the financial burdens of LTCP (e.g., small systems, attainability, Wet Weather WQSs

Ohio Legislative Update

9. All Requirements Imposed on an applicant to undertake CIPs re CWA and SDWA

SB 22 Passed by the Ohio Senate on March 9, 2011 – Debate Now Moves to the House

Ohio Legislative Update

- Budget Talks & Collective Bargaining Law Changes (SB 5) will Dominate 1st Half of 2011
- OEPA's Budget Will Be Closely Reviewed
- Much of OEPA's Surface Water Budget is Fee Based – Fee Rollback Might be Discussed

Federal Legislative Update

- New Federal Law - S. 3481
- Federal Govt. Took Position that it is not Required to Pay Local Storm Water Fee/Tax
- New Law Requires Federal Facilities to Pay Local Storm Water Fees Like Private Property Owners
- Will Help Storm Water Utilities where there are Many Federal Buildings/Campus

Legal Cases Update

- Trend: Beyond the Pipe and Stack
- Lawsuits & Consent Decrees, TMDLs, Memos & Policies, Permit Revocation, Tort Claims
- 2010 Largest Settlements/Compliance Program Costs Involved POTWs (20-25 years to implement)
- Private Company Fines Higher As Well
- Likely to Continue at the Federal Level

Legal Cases Update

- 2010 Community Federal Court Consent Decrees [Long Term Implementation 20-25 yrs]:

NEORSD (Cleveland) - \$3B

Kansas City - \$2.4B

Hamilton County/Cincinnati (mod.) - \$1.79B

Akron (still being reviewed by Judge) - \$?

Toledo - \$315M

Legal Cases Update

- Private Company Enforcement: Total Costs of Agreed to Compliance Programs Under Federal Programs:

MLC - \$773M – Waste Cleanups

Westar - \$500M – Air Case

Pacific Corp. - \$450M – Remove Dams

LaForge - \$373M – Air Case

Exxon - \$350M – HW Case

Hoosier Energy - \$300M - Air Case

Legal Cases Update

- TMDL Cases

Florida – Nutrients – USEPA’s Substitute WQC Challenged by Florida and Industry – Test Case for converting narrative criteria to numeric criteria

Chesapeake Bay – Nutrients – Farm Bureau Challenge to USEPA’s Multi-state TMDL – Reduce N 25%, TP 24% & Sediments 20%

Legal Cases Update

- Los Angeles County Storm Water Basin Plan Recently Upheld
- “Potential Uses” can be basis of Protection Not “Probable Uses”
- Recreation in Engineered Storm Water Channels
- Trash TMDL

Legal Cases Update

- Mountain Top Removal Under Attack - Arch Coal Spruce #1 Mine, WVa
- USEPA Revoked 2007 COE Permit based on Later Developed Scientific Evidence – Rare
- Arch Coal Also Agreed to \$4M NPDES settlement (Se violations) for 4 sites – Comprehensive Compliance Management Systems Required and Independent Compliance Verification

Legal Cases Update

- Village of Powhatan Point, Ohio - Home Owners Sued Village to Force Village to Provide Visually Clean and Chemically Pure Drinking Water
- Village Reimbursed Them for Water Filters
- Complained to OEPA—Water Found to be in Compliance
- Home Owners Engineer – Water was "visually dirty, contaminated, undrinkable and unsuitable for use" – Fe & Mn exceeded Federal EPA's Secondary Standards
- Engineer Said Contamination Source Outside Household Water Pipes; Likely Caused by Acid Mine Drainage into the Village's Well Field

Legal Cases Update

- Petition for a Writ of Mandamus Filed In Court
- Lost at the Trial and Appeal Courts Levels
- Ohio Supreme Court Held in Favor of Village
- Home Owners Failed to Establish Clear Legal Duty on Village to Provide Water of Better Quality than Required by SDWA
- Adequate Remedy by Administrative Procedure in ORC §6111.09 and Ch. 3745 or Breach of Contract

Legal Cases Update

- Roinestad v. Kirkpatrick, Colorado Ct. of Appeals
- Hog Breath Restaurant Workers Poured Grease Down Outside Sewer Drain
- Grease Clogged Public Sewer – City used jet hose to Clean Out Sewer – Workers Standing Above Manhole
- When Clog Broke Free – Increased H₂S Released
- Worker Lost Consciousness & Fell into MH – Other Radioed for Help & Went Into MH to Rescue - Also Collapsed
- Both Recovered - Suffer from Ongoing Health Issues

Legal Cases Update

- Hog Breath Restaurant Found Liable for Negligence & Off Premises Liability
- Damages of \$2.1M and \$1.8M Awarded to the two Injured City Sewer Workers
- Dispute Over Restaurant's Insurance Coverage – Is Grease a Pollutant Not Covered in the Policy Because of the “Pollution Exclusion” Clause?
- October 2011 - Court Ruled Restaurant has Coverage
- Insurance Contract not Clear and Specific as to Excluding Injuries Resulting From a Sewer Clogged by Negligently Dumping of Cooking Oil & Grease

Legal Cases Update

- Gilbert v. Cincinnati – April 2010 SSO Case
- Dispute arose in 1998 – 5 Ac Property – 10/11 Home Lots & their Home - Near a Regional Pump Station – Experienced 79 overflows in 10 years - Lawsuit filed to Force City to Take Property via Appropriation
- Takings Case: Regulatory Takings for Failure to Improve PS & Physical Taking From Raw Sewage On Property (loss of enjoyment and use)

Legal Cases Update

- PS Upgrade in City/County WWIP– Schedule Revised a Few Times Causing Further Delays
- Regulatory Takings Claim Dismissed
- Owner did Not Investigate Sewer Issues Before Purchase – No Expectation of PS Upgrade to Accommodate New Sewer Taps
- Court Rejected Argument Property Owner has Constitutionally Protected Right to Government Provided Sewer Access

Legal Cases Update

- No Clear Duty on City to Provide Sewer Taps Sooner than the City's Plan
- Physical Taking Shown – City Ordered to Commence an Appropriation Case to Determine Compensation Due for the Physical Taking of Property from the SSOs

Legal Cases Update

- Town of Highland/Sanitary District – March 2011 Indiana Case - I&I Related
- Residents Experienced Basement Flooding
- Separate Storm and Sanitary Systems
- Plan Addressed Storm Water – Not I&I to Sanitary System
- Some I&I Work Done in Past – Not Completed
- Sept. 2006 – 600 year Storm – 8” in 24 hr

Legal Cases Update

- Residents sued City/District – Negligence, Nuisance, Trespass, Unconstitutional Taking
- Certified as Class Action
- Political Subdivision Statutory Immunity Raised – Argued No Tort Liability – Discretionary Function to Plan Sewers
- Trial Court Rejected the Immunity Claim – Case Now Proceeds to Trial

Legal Cases Update

- 3 Prior Studies Indicated I&I a Problem – Evidence that Sewer System not Operating Properly
- On day of 600 YR Storm: City did not have System for Predicting Runoff/I&I, Did not Mobilize Manpower, No Bypass pumping until After Basements Flooded
- Court Held Evidence That City Operated its System below Industry Standards of Care

Legal Cases Update

- City's Decision to Maintain PSs, Inspect & Repair I&I, or to make Continual Improvements does not Amount to the "essence of governing". These are Things the City has been Doing for Years, and may be Evaluated under Traditional Tort Standards of Reasonableness
- Genuine Issue of Fact as to Whether City was Negligent & Whether Operation of the System was Proximate Cause of Home Damages

Legal Cases Update

- Can this Kind of Case Happen In Ohio?
- Yes – Avila v. Cincinnati – June 2009 – Broken Drinking Water Line Caused Icy Spot on Road – Car Accident/Personal Injuries
- City Was Notified 35 Days Before the Accident
- City Sued – Raised Political Immunity Defense
- Court Rejected Immunity

Legal Cases Update

- Ohio Court Held: Failure to Maintain Water Lines is a Propriety Function – Routine Water Line Maintenance is Not a Discretionary Function Protected by the Immunity Statute
- City Made Discretionary Decisions as to How to Allocate Resources and Personnel to Repair Leak and Treat with Salt
- Case Holding Could be Applied to Routine Maintenance of Sanitary Sewers

Legal Cases Update

- Storm Water and Sanitary Improvements Should be Under a Master Plan
- Weigh Alternatives/Assess Competing Priorities Including I&I Work
- Engage in Decision-Making Policy Oriented Process
- Make Decision & Stick to It & the Schedule
- Perhaps Court Would Not Judge the Wisdom of the Decision – Left to the Political Process

Ohio EPA Update

THANK YOU

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