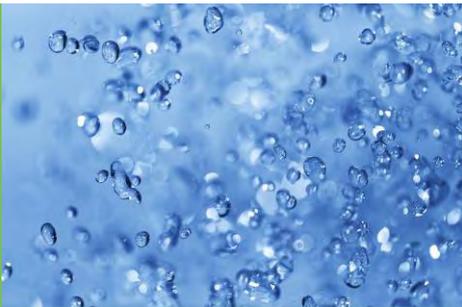


The Saga of Post Construction Stormwater Requirements in TN

2016 SESWA Annual Conference

David Mason, P.E.

October 20, 2016



**CDM
Smith**

WATER + ENVIRONMENT + TRANSPORTATION + ENERGY + FACILITIES

Presentation Overview

- Historical Perspective on Post Construction Stormwater Regulations in TN
- What were the Requirements that caused such controversy?
- What do the 2016 Draft Permanent Stormwater Management Requirements look like?
- What are some of the potential implications of this legislation?
- How can we avoid such outcomes in the future?

Timeline of Tennessee's Permanent Stormwater Management Requirements

Tennessee Water Quality Control Act of 1977

The declaration of purpose for the Tennessee Water Quality Control Act of 1977 states that the:

“... waters of Tennessee are the property of the state and are held in public trust for the use of the people of the state, it is declared to be the public policy of Tennessee that the people of Tennessee, as beneficiaries of this trust, have a right to unpolluted waters. In the exercise of its public trust over the waters of the state, the government of Tennessee has an obligation to take all prudent steps to secure, protect, and preserve this right.”

How Did Permanent Stormwater Management Language Develop

When did Tennessee get into the MS4 business and how did the Permanent Stormwater Requirement language develop?

1990's: NPDES Phase I MS4 Permits issued in Tennessee

2003: NPDES Phase II MS4 Permits issued in Tennessee

- *Narrative Standard for Permanent Stormwater Management*

A regulatory mechanism to require structural and/or non-structural best management practices (BMPs); e.g., site-specific BMPs to be installed in areas based on problem oriented priorities as determined by the permittee.

Timeline of Tennessee's Permanent Stormwater Management Requirements

- National Research Council 2009 report on Urban Stormwater Management in the U.S.
- Recommended Runoff Reduction the best Post-Construction Performance Standard for inclusion in MS4 Permits



MS4 Permit Improvement Guide

The image shows the cover of a guide titled "MS4 Permit Improvement Guide". The cover features a collage of four photographs: a green stormwater garden, a person cleaning a storm drain, a residential street with a stormwater management structure, and a school bus at a gas station. The title is written in large, bold, green letters. At the bottom, the text "U.S. ENVIRONMENTAL PROTECTION AGENCY", "OFFICE OF WATER", and "OFFICE OF WASTEWATER" is visible.

U.S. ENVIRONMENTAL PROTECTION AGENCY
OFFICE OF WATER
OFFICE OF WASTEWATER

Timeline of Tennessee's Permanent Stormwater Management Requirements

- 2009: EPA announced National Stormwater Rulemaking Initiative
- 2010: EPA worked closely with TDEC on incorporating Runoff Reduction (Green Infrastructure) as part of the Post-Construction Requirements



Timeline of Tennessee's Permanent Stormwater Management Requirements

- October 2010: Phase II MS4 Permit Issued
 - included the Runoff Reduction requirements. This requirement was to be implemented by MS4s 48 months after obtaining coverage under this permit.
- January 2011: City of Chattanooga MS4 Joint EPA/TDEC Order
 - also included Runoff Reduction requirements (implemented by 2014)

What is the Standard?

Site design standards for all new and significant redevelopment projects require, in combination or alone, management measures that are designed, built and maintained to **infiltrate, evapotranspire, harvest and/or use**, at a minimum, the **first inch of every rainfall event** preceded by 72 hours of no measurable precipitation. This first inch of rainfall must be **100% managed** with **no storm water runoff being discharged to surface waters.**



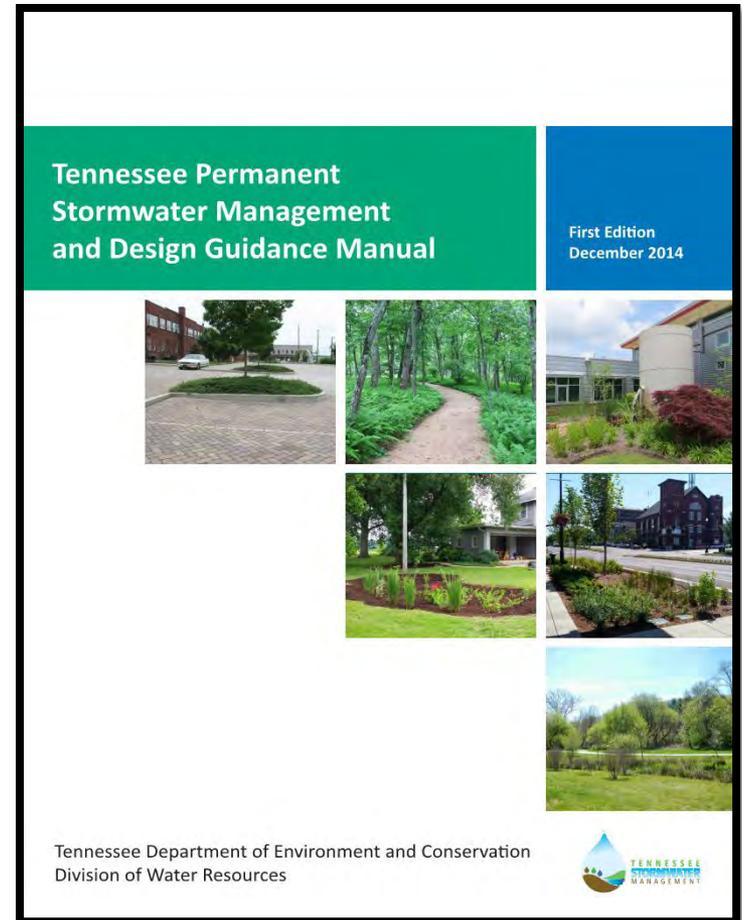
When Did the Permanent Stormwater Requirement start showing signs of trouble?

- January 2013 - Virginia Department of Transportation v. EPA case (no flow based TMDLs)
- Late March 2014, EPA's Office of Water released an official statement that it was deferring development of a National Post-Construction Stormwater Rule
- MS4s behind schedule implementing new post construction requirements



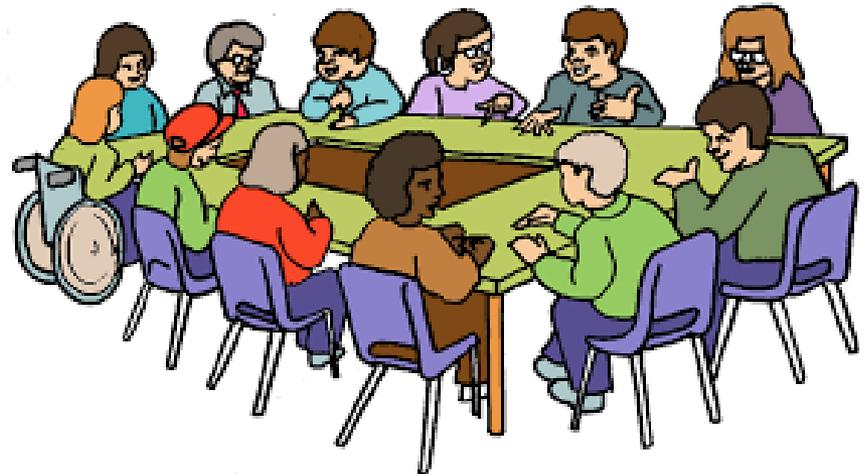
State's Response to MS4 & 3rd Party Concerns

- Permanent Stormwater Management Workshops held across the state
- TDEC began meeting with HBA to discuss grievances over the Post Construction Runoff Reduction Requirement
- University of Tennessee issued the [Tennessee Permanent Stormwater Management & Design Guidance Manual](#)



State's Response to MS4 & 3rd Party Concerns

- TDEC issued a Memo offering a one-year extension on the permanent stormwater management ordinance requirement (Jan 2015)
- TDEC holds meetings with various parties regarding Draft Phase II Permit Renewal (Summer 2015)
- TDEC holds separate meetings with HBA and MS4s. Provides 1st draft permit for review (Dec 2015)

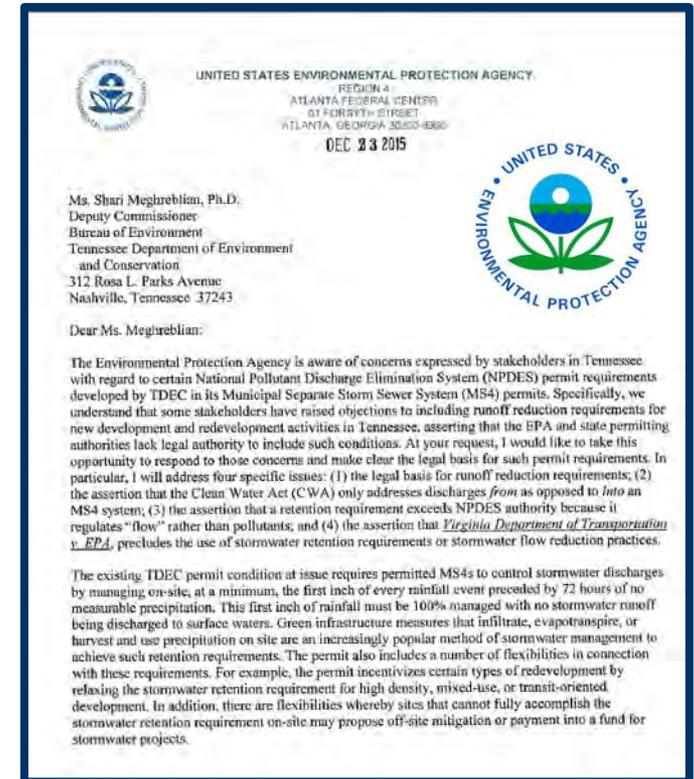


Make No Mistake...

- The Homebuilders Associations are very organized around this issue
 - Presentations at National Conferences on the subject of TN regs
 - Distribution of talking points to other associations
 - Significant fund raising in TN to oppose this regulation (over \$300K in 2015)

TDEC Seeks Response from EPA on HBA Issues

1. The legal basis for runoff reduction requirements
2. The assertion that the CWA only addresses discharges *from* as opposed to *Into* an MS4
3. The assertion that a retention requirement exceeds NPDES authority because it regulates “flow”
4. The assertion that *Virginia Dept. of Transportation v. EPA* precludes the use of stormwater retention requirements



EPA makes the argument that EPA and the State *DO* have the legal authority to enact these types of requirements in their NPDES permits

TDEC and HBA Reach an Impasse

- TDEC Prepares to Issue MS4 Permit Renewal with Some Added Flexibility for Post Construction
- HBA meets with State Lawmakers at the Start of 2016 Legislative Session to Seek Relief



When All Else Fails....

- HBA found sponsors to issue a new piece of legislation restricting post construction stormwater requirements
- Secured a presentation with lawmakers before TDEC was notified

HOUSE BILL 1892
By Halford

SENATE BILL 1830

By Southerland

AN ACT to amend Tennessee Code Annotated, Title 69, Chapter 3, Part 1, relative to post construction storm water requirements for municipal separate storm sewer systems.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 69-3-108(l), is amended by inserting the following language immediately following the first sentence:

No general permit shall impose post construction storm water requirements that are more restrictive than the Federal Water Pollution Control Act (33 U.S.C. § 1251 et seq.) or any federal regulation promulgated pursuant thereto. Any general permit that requires the management of post construction storm water shall allow the local entity administering a municipal separate storm sewer system to exercise the maximum permissible discretion in selecting appropriate measures to meet any such requirement. Prior to the implementation of any general permit that imposes post construction storm water requirements, the commissioner shall promulgate a rule, pursuant to Title 4, Chapter 5, which includes all provisions of the general permit.

SECTION 2. Tennessee Code Annotated, Section 69-3-131, is amended by deleting the language "§ 69-3-108(l)" and substituting the language "§ 69-3-108(n)".

SECTION 3. If any provision of this act or its application to any person or circumstance is held invalid, then the invalidity shall not affect other provisions or applications of the act that can be given effect without the invalid provision or application, and to that end the provisions of this act shall be severable.

The 2016 Tennessee Stormwater Legislation

What did the bill say?

No general permit shall impose post construction storm water requirements that are more restrictive than the Federal Water Pollution Control Act (33 U.S.C. § 1251 et seq.) or any federal regulation promulgated pursuant thereto.

Prior to the implementation of any general permit that imposes post construction stormwater requirements, the commissioner shall promulgate a rule, pursuant to Title 4, Chapter 5, which includes all provisions of the general permit.

What Did This Proposed Bill Trigger?



What Did This Proposed Bill Trigger?

- Face-to-Face Meetings with State Representatives
- Letters to State Representatives with Talking Points
- Lobbying by Environmental Groups



The 2016 Tennessee Stormwater Legislation

What did the final bill say?

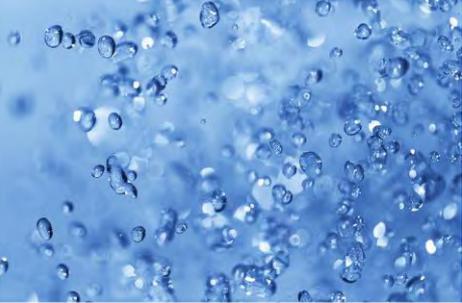
(s) **Any national pollutant discharge elimination system (NPDES) permit** issued pursuant to this section to a local governmental entity administering a municipal separate storm sewer system **shall not impose post-construction storm water requirements, except to the extent necessary to comply with the minimum requirements of federal law.** Any such NPDES permit that **includes numeric or narrative effluent limitations** to manage post-construction storm water shall allow the local government entity administering a municipal separate storm sewer system discretion in selecting measures to meet any such effluent limitations.

(t)... **Any local government entity that adopts** control measures for post construction Stormwater **that exceed the minimum requirements of federal law must do so by ordinance or resolution**, as appropriate, by the local legislative body upon a majority vote... ..The local government entity **shall provide in writing the control measures that exceed federal minimum requirements** to the local legislative body at least (30) days in advance of a vote in order to provide for a public comment period.

So, What Happened?

- April 2016: Stormwater Legislation is passed and approved
- April 22, 2016: Governor Bill Haslam allows Senate Bill 1830 to become law without his signature and attaches a letter expressing his concerns on the potential impacts of this legislation



A microscopic view of numerous small, clear water droplets of varying sizes, some appearing to be in motion or merging, set against a light blue background. The droplets are densely packed in the lower right portion of the image.

What are some of the potential implications of this legislation?

Legal Ramifications for Municipalities

- Will be left to defend their permanent stormwater management control choices as not exceeding MEP to one local legislative body
- Will be left to defend to TDEC, EPA, and to Environmental Groups that they are, in fact, meeting MEP.
 - Potential for costly litigation
 - Costly to taxpayers



Additional Concerns Identified by Municipalities

- Costly repairs to an already aging infrastructure
- Additional degradation to their streams
- Deteriorating water quality increases water treatment costs
- Potential for increased flooding events as impervious area increases
- Negative economic impacts due to the reduction of assimilative capacity in streams, limiting industrial and residential growth, and potentially incurring moratoriums



Ramifications for Developers/Builders

- No State standard for post construction stormwater requirements
 - Inconsistency from community to community
 - No cost certainty
 - Potentially increased time for permitting process



What are proactive solutions that we can do to deter similar debates in the future?

State and Regional Associations

- Organized education of MS4 staffs on current issues (seminars, presentations, fact sheets etc.)
- Keep MS4s informed on the political climate and relevant legislative bills
- Remain active and involved in Regional and National Organizations to identify trends



What are proactive solutions that we can do to deter similar debates in the future?

MS4s and Consultants/Engineers

- Develop partnerships with your local Municipal League and other groups with Advocacy capabilities
- Be organized and develop a general consensus amongst the MS4 community with a clear and simplified position
- Continue developing an open dialogue and partnerships with TDEC & EPA
- Clearly articulate the economic, social, and environmental benefits of responsible permanent stormwater management



What are proactive solutions that we can do to deter similar debates in the future?

MS4s and Consultants/Engineers

- Organized and routine education of public officials on issues (seminars, presentations, fact sheets etc.).
 - Translate and simplify technical information
 - Prepare management before special interest groups start
- Engage the development community
 - Request to present the municipal point of view at their local chapter meetings



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Tennessee Rejects Costly New Stormwater Proposals

Filed in Codes and Regulations, Environmental, Land Development on April 26, 2016 • 1 Comment



An attempt by Tennessee regulators to require home builders to adopt costly, cumbersome and difficult to enforce post-construction stormwater management requirements has been rejected by state legislators.

Under pressure from environmentalists, the governor refused for 10 days to sign the bill rejecting new state-imposed mandates and sticking with already existing federal requirements – which meant it became law on April 22.

“This is a huge victory for our state and our industry,” said HBA of Tennessee EO Susan Ritter. “I am also hopeful that there will be positive repercussions nationwide.”



Thank You for Your Time!



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