

# STORMWATER MANAGEMENT

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# Origins of Drainage As Trespass

- ▣ Rule of Rylands v. Fletcher (1868)
- ▣ “the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.”

# Reservoir Releases

Downstream property owners sued NYC for flood damage from failure to manage water levels in reservoir, to implement flood control plans, to release water in anticipation of storms, and to warn of impending flooding.

Held: NYC had no legal duty to minimize flooding by regulating outflow of water from reservoir built for drinking water supply, not flood control.

*Allen v. NYC*, 49 A.D.3d 2008)

# Reservoir Releases

Downstream property owners on Neversink River sued NYC for property damage as a result of flooding in April, 2005 alleging common law and state and federal statutory causes of action. Motion to dismiss denied.

Held:

- A. Plaintiffs Have Standing
- B. Plaintiffs Stated a Cause of Action in Negligence
- C. Not Barred by Governmental Function Immunity
- D. Compliance with regulatory mandates may be a defense

*Mei v. NYC*, 2006 WL 2997111 (S.D.N.Y. 2006)

# Reservoir Releases

Downstream property owners on Mohawk River sued NYS claiming flood damage was caused by negligent operation of the Delta Dam Reservoir in failing to hold back flood water

Held:

[T]here is no responsibility or duty on the state to make flood conditions better for lower property owners than they would be if the river flowed naturally in low water and high. In other words, we feel the state was under no duty to ameliorate natural conditions in regard to the flow of the river.

*Iodice v. NYS*, 277 A.D. 647 (4<sup>th</sup> Dept 1951)



# DEC Dam Safety Program

No dam in a natural stream may be built or repaired, whether temporarily or permanently, without a permit from the DEC, except small dams.

A small dam is exempt

- (a) if it is less than 15 feet in height above the stream bed and impounds up to three million gallons of water, or
- (b) if it is no more than six feet in height regardless of the structure's impoundment capacity, or
- (c) if it has an impoundment capacity of not more than one million gallons regardless of the its height.

ECL §15-0503(1)

# DEC Dam Safety Program

DEC hazard classification -- "A," "B," "C," or "D",  
according to the potential impacts of a dam failure

DEC condition rating -- "no deficiencies", "deficiently  
maintained", "unsound", "unsafe."

- ✓ Detailed inspection and maintenance plans required
- ✓ Class B and C dams must have emergency action plan
- ✓ Annual updates of emergency plan
- ✓ Annual certification of the inspection and maintenance plan and emergency action plan
- ✓ PE's engineering assessment of dam every 10 years.

# Stormwater Management

## 2015 Update of General Permit for Stormwater Discharges from Construction Activity

### Changes:

- ❑ Construction and Development Effluent Guidelines -- best practicable technology
- ❑ Sizing Criteria from Design Manual
- ❑ 303(d) Impaired Water Segments
- ❑ SHPO Review/OPRHP Consultation
- ❑ Trained Contractor Inspections



# Stormwater Management

## Stormwater Management Design Manual 2015 Update -- Transition Policy

- ❑ Stormwater Management Design Manual updated in January, 2015 to be consistent with Construction General Permit
- ❑ Application filed prior to 1/29/15 with SWPPP using 2010 Design Manual may obtain coverage based on 2010 Design Manual

# Stormwater Management

## Municipal Separate Storm Sewer System Permit (MS4)

- ❑ Phase II Stormwater Rule (Small MS4s)
- ❑ Applies to Urbanized Areas defined by Census tracts
- ❑ Must reduce pollutants in stormwater to "maximum extent practicable"
- ❑ Six elements for minimum control measures (MCM)

# Stormwater Management

NYS Court of Appeals upheld the 2010 MS4 permit

NRDC claimed

- 1) NOI coverage without public hearing was “impermissible self-regulatory system”
- 2) Permit failed to require reduction to the maximum extent practicable

Held:

DEC has complied with EPA’s regulations

Left to federal courts to determine whether EPA violated the Clean Water Act in issuing those regulations

NRDC v. DEC (5/5/15)

# Stormwater Management

## Residual Designation Authority

- Phase I (1990) – industrial, construction sites >5 acres, large and medium MS4s
- Phase II (1999) – small MS4s, construction sites 1 to 5 acres
- Phase III (?) CWA § 402(p)(2)(E) , (6)  
Regional Administrator may designate additional storm water discharges as requiring NPDES permits if discharge or category of discharges within a geographic area contributes to a violation of a water quality standard

# Stormwater Management

## Residual Designation Authority

40 C.F.R. §122.26(a):

(9)(i) On and after October 1, 1994, for discharges composed entirely of storm water . . . operators shall be required to obtain a NPDES permit . . . if:

(D) The Director, or in States with approved NPDES programs, either the Director or the EPA Regional Administrator, determines that the discharge, or category of discharges within a geographic area, contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.



# Stormwater Management

## Residual Designation – 2013 - Maine

Regional Administrator of EPA Region I proposed that storm water controls and NPDES permits were needed for discharges from the following category:

“Storm water discharges from properties on which there are impervious surfaces or areas equal to or greater than one acre in the Long Creek watershed.”

# Stormwater Management

## Residual Designation Authority

In Maine, RDA general permit initiated in 2010. Included option for 140 covered landowners to pay in-lieu fee of \$3000 per acre of impervious surfaces to address effects offsite rather than on their property. 90% chose in-lieu fee

In Massachusetts, RDA proposed general permit targeted 235 properties with >2 ac of impervious cover each in Upper Charles River watershed. In February, 2015, CLF served notice of intent to sue EPA for failure to implement RDA.

Question: Can RDA become a national program?

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