

DOTTING THE i'S REMEDYING iDiC'S AT THE LOCAL LEVEL

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Abstract. Gwinnett County has implemented several Illicit Discharge and Illegal Connection (IDIC) identification programs that have proven effective in identifying discharges of pollutants to stormwater drainage systems. In an effort to remedy these discharges and to comply with requirements of the Metro North Georgia Water Planning District (“MNGWPD” or “district”) the County recently adopted an Illicit Discharge and Illegal Connection ordinance. However, the applicability of this ordinance is limited to the Municipal Separate Storm Sewer System (MS4), which is only a small part of the complete countywide storm drainage system. This limitation, working in conjunction with other factors, has the effect of limiting the overall effectiveness of the county’s IDIC elimination program and associated enforcement activities. This paper discusses the cause and effect of this problem along with a possible solution.

WE ALL WANT CLEAN WATER!

From your drinking glass to the stream in your local park, clean water is one thing we all need, want and expect. Over the last 20 years local governments have seen a substantial increase in the number of regulations, plans and requirements that support the goal of protecting and providing clean water.

Metro Atlanta’s local governments are now juggling a variety of water quality requirements, regulations and initiatives that include NPDES permits, Stormwater Management Programs, TMDL Implementation Plans, Metro North Georgia Water Planning District (MNGWPD) Plans, Comprehensive Land Use Plans, Watershed Restoration Action Strategies, Watershed Improvement Plans, and the list goes on. Each of these documents seeks to raise the bar and provide a roadmap to the clean water we all desire.

MS4 NPDES PERMITS

Historically, much of the current Metro Atlanta local government impetus for addressing stormwater runoff as a pollutant source can be traced back to the requirements of the Municipal Separate Storm Sewer System (MS4) - National Pollutant Discharge Elimination System (NPDES) permits first issued in the early 1990’s.

These permits allowed local governments, under certain conditions, to legally discharge stormwater runoff from their MS4’s into state waters through point sources in the MS4 known as “outfalls.” Permit conditions required the development of Illicit Discharge and Illegal Connection (IDIC) identification programs along with a demonstration of adequate legal authority to remedy these IDICs once identified.

IDIC programs provide for the identification of illicit discharges (a discharge of a pollutant into a storm drain) and illegal connections (a connection to a storm drain that carries an illicit discharge) to the MS4. In Gwinnett County such programs have been effectively implemented and include:

- Inspections of business, industry and municipal facilities;
- Stream walks;
- Storm sewer inspections;
- Restaurant grease management programs;
- Dry weather screenings;
- Aerial surveys; and
- Investigations of reported illegal dumping or connections to storm sewers.

Once identified, these IDICs obviously need to be eliminated. Local governments have traditionally employed local ordinances to assist in this task.

THE IDIC ORDINANCE

In the mid 90’s and in response to the previously mentioned MS4 Permit application requirement that local governments demonstrate adequate legal authority to eliminate identified IDICs, Phase I permittees in metro Atlanta adopted a model Stormwater Management

(SWM) Ordinance. In April 2004, the MNGWPD required Phase I communities to replace this SWM ordinance with a model Illicit Discharge and Illegal Connection Ordinance. Phase II communities must adopt the ordinance by April 2005 and other jurisdictions by April 2006. At the heart of both the IDIC and SWM ordinances is a provision that prohibits the discharge of pollutants to the MS4.

While it might seem reasonable to the casual observer that local governments involved in identifying IDICs should also have the legal capacity under the IDIC ordinance to rectify each of these problems once they're identified, this is not the case. The original SWM ordinance was developed to secure compliance with MS4 NPDES permit conditions and as such its jurisdiction was limited to discharges that enter into the MS4 (which is defined in the ordinance). The replacement IDIC Ordinance was similarly limited. However, when this limitation is combined with:

- A) current water quality regulations that require use of structural Best Management Practices (BMPs); and
- B) the fact that most IDIC programs are not limited to only identifying discharges to the MS4; and
- C) the fact that the IDIC ordinance is the primary and often the only ordinance currently available to local governments to remedy IDICs;

we are left with a situation that provides for the identification of many IDICs that cannot be legally eliminated at the local level where they would be handled most effectively.

The effect of these factors on IDIC elimination will be discussed later, however it will be helpful at this point to look at what the MS4 is and what it is not. This will help in developing an understanding of why this definition is so important to a local government's ability to effectively eliminate all identified IDICs.

DEFINING THE MS4

The current MNGWPD model IDIC Ordinance definition of MS4, which is based on the definition contained within federal regulations and the MS4 NPDES permit, can be paraphrased as follows:

"any storm water drain that is:

- a) *owned or maintained* by the local government;
- b) not a combined sewer; and
- c) not part of a publicly owned treatment works." (emphasis added)

This definition has the effect of establishing the MS4 as a subset of the whole drainage system because it is defined in terms of local government ownership or maintenance responsibility. However, it is common that a significant portion of the total stormwater drainage system within a given jurisdiction is neither owned nor

maintained by the local government and is therefore not a part of the MS4 and subsequently not protected by the IDIC Ordinance. For example, with few exceptions, Gwinnett County does not maintain drains located outside of the right of way of county owned roads. These 'non-county maintained' drains would include ditches located in back yards or behind commercial properties, drains located on private property or drains located on state or federal roads. To differentiate, such drains will be referred to as "non-MS4" drains within this paper.

ELIMINATING IDICs AT THE LOCAL LEVEL

It was mentioned earlier that there are problems associated with using the IDIC ordinance to eliminate all IDICs identified by a local government. This is due to several factors.

First, as discussed above, a significant portion of the whole drainage system is not a part of the MS4. Because the jurisdiction of the IDIC ordinance is limited to controlling discharges to the MS4, the ordinance does not apply to a large portion of the total drainage system.

Second, and somewhat ironically, the MS4 NPDES permit has itself contributed to the development of drainage systems on commercial and industrial sites that do not form a part of the MS4 and are therefore not subject to the IDIC ordinance. This has occurred because the permit requires that local governments develop post construction controls that limit polluted runoff from developed areas. Locally, in Gwinnett County, this requirement has resulted in changes to the Development Regulations that require the installation of structural water quality BMPs at the development stage. These BMPs commonly include water quality detention ponds that are located, for aesthetic or site topography reasons, at the rear of these commercial and industrial properties. Rainwater that falls onto these private properties is then collected into private storm drains, channeled through private pipes and into the private water quality BMP, where it is then generally discharged onto another private property, directly into a state water or into some other drain outside of the right of way that is not maintained by the county. As such, these water quality regulations have resulted in the development of large areas of commercial land that do not drain into the MS4.

In support of this statement, an informal, in-house survey of 41 businesses inspected as a part of our Industrial Inspection Program (an IDIC program) during the last quarter of 2004 found that none of these businesses actually drained into the MS4. As such, any IDIC activity identified at these facilities by the local government cannot legally be corrected using the IDIC Ordinance.

Third, of all the IDIC programs that Gwinnett County utilizes, only "Dry Weather Screening" is designed spe-

cifically to identify discharges to the MS4. All other IDIC programs have the capacity to (and do) identify discharges to non-MS4 drainage systems. As such, local governments are identifying IDICs to non-MS4 drains, which they can't remedy under the IDIC Ordinance. A local government obviously has at least a moral responsibility, and at most a legal responsibility, to see that these identified problems are rectified. Beyond these responsibilities, failure to rectify an identified problem is also a waste of those resources utilized in identifying these problems in the first place.

So what happens to these non-MS4 IDICs given that the IDIC Ordinance cannot be used?

ELIMINATING IDICs AT THE STATE LEVEL

Ultimately, all storm drainage systems are state waters. So, where the local government's jurisdiction ends, the state Environmental Protection Division's (EPD) jurisdiction takes over. As such, the state holds jurisdiction for investigating IDICs to state waters (non-MS4 systems) under state water quality regulations. However, before we can simply refer it to the State and say, "problem solved," let's consider the practicalities of this scenario.

In Gwinnett County during 2004, our IDIC program activities identified numerous discharges that bypassed the MS4 and entered state waters directly. These discharges have included grass clippings, paint, carpet cleaning waste water, concrete truck wash water, animal waste, litter, vehicle wash waste water, oil spills from vehicles, and other small discharges, each of which can generally be characterized as small, numerous and irregular. These characteristics make a local government's task of preventing and remedying these pollution sources incredibly difficult. Where this is true for a government that is locally based, it is likely even more true for a state agency.

Effective response requires investigation and action as soon as possible to the time that a discharge is identified. Referring such locally identified discharges to the EPD for investigation and enforcement action is ineffective for two main reasons.

First, consider the situation in Gwinnett County as an example. The state has assigned one EPD investigator at the district office level to handle such complaints within Gwinnett. However, this investigator is also responsible for Rockdale and DeKalb counties. In addition to these water quality issues, the investigator is also required to address issues with respect to air quality, solid waste, drinking water, and scrap tires. It is easy to see how the state, with its current resources, would struggle to effectively investigate and remedy three counties' worth of identified non-MS4 IDICs.

Second, as mentioned above, IDICs are most effectively remedied at the time they are identified. For example, consider a pet wash business that is caught, by a local government, discharging wash water to a non-MS4 drain. Such a discharge is best addressed at the time the activity is identified. Catching someone doing something wrong once is tough. Catching them doing it twice is almost impossible. The transient and irregular nature of pollution caused by IDICs is most effectively dealt with at the time it is identified. Once again, due to available resources at the state level, it is unlikely that investigations of such instances will be concluded, following referral by the local government, within an optimal time period.

In acknowledgement of these issues, the county has in the past attempted to remedy these non-MS4 discharges using bluff or ordinances that were not designed for these purposes. Such an enforcement strategy is obviously less than ideal and leads to a waste of local IDIC effort. It also creates a situation that fosters inequitable enforcement. For example, a local government could use the IDIC Ordinance to legally deal with a gas station discharging wash water to the MS4, and not with another gas station that may be located next door but which is discharging to a non-MS4 drainage system.

So, while state and local regulations exist to address these issues, it is obvious due to practical considerations that there are problems with the system currently used to address those IDICs identified by local governments and that discharge to non-MS4 drainage systems.

ELIMINATING IDICs TOMORROW

So why can't local governments just say, "It's not our problem" and simply refer non-MS4 IDICs to the EPD and wash our hands of the matter? Why should we care? After all, we are addressing discharges to our MS4 and fulfilling our MS4 permit obligations.

Without considering the moral responsibility to protect water quality and the enforcement inequality the current system creates, this would be a reasonable position to take were it not for some of the other water quality initiatives local governments now face. Consider the pet wash business discharging to a non-MS4 drain mentioned previously and the potential that such a discharge could carry fecal coliform (the only state water quality standard currently violated in Gwinnett County) and then consider such a discharge within a Total Maximum Daily Load (TMDL) rather than an MS4 permit context. In accordance with the MS4 permit, the county would have fulfilled its obligations by simply referring the violation to EPD. However, compliance with TMDL Implementation Plans will not be assessed within the context of arbitrarily delineated drainage systems such as the MS4, but rather

on in-stream water quality standards. While no one knows for sure how the enforcement of TMDLs will play out, there is the potential that where water quality violations are not remedied that a local government (and the State for that matter) may be adversely affected by the continuation of such a violation. It could be argued that such a threat, in and of itself, ought to be enough to cause both the State and local governments to seek a system that provides sufficient legal authority and adequate resources to address discharges (like that from the pet wash business) to non-MS4 drainage systems at the local level.

So, is there an answer?

DOTTING THE i's

Assuming that these non-MS4 discharges identified by IDIC programs are important enough to address and that effectively addressing these issues will require investigation, and knowing that failure to effectively address these identified IDICs constitutes a waste of local government resources, the question simply remains: who will be responsible for investigation and who will pay for it? It is obvious that the only players are state or local government.

One solution could involve an expansion of local government authority to accommodate jurisdiction over non-MS4 discharges. Another solution could involve additional state inspectors at district offices to facilitate the increased workload generated by the successful implementation of local government IDIC identification programs. It is likely that there are other solutions as well, but as with the two potential solutions suggested above, available funding and resources will always pose a problem.

Given that the issues raised in this paper are likely to affect all local governments, perhaps the most appropriate way to arrive at a meaningful solution would be for representatives of the State and local governments to commence a dialogue over the legal options, authorities, resources, practicalities and responsibilities as they relate to this issue. A committee established under the Metro North Georgia Water Planning District may provide an appropriate forum for such a discussion.

What is clear, however, is that until this situation is rectified, local government IDIC programs will be limited in their effectiveness, which translates simply into wasted resources and tax payer dollars. Taking the initiative to investigate these problems and "dot our i's" now will enable our communities to deal with IDICs more effectively in the future, thereby bringing us one step closer to achieving our clean water goals.

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