

# NACWA Stormwater Committee Remote Meeting

September 9, 2015  
1:00 pm – 2:15 pm EST  
*Call into the meeting: 877-394-0659*  
*Conference ID: 2349353972*

Kyle Dreyfuss-Wells, Chair & Jill Piatt Kemper, Vice Chair

## Agenda

- I. EDC v. EPA Small MS4 Decision (Ninth Circuit, 2003)
- II. Rule scenarios to address MS4 remand
- III. Next steps



# EDC et al. v. EPA

## Small MS4 Decision

### Ninth Circuit 2003

1999 Challenge by Environmental Defense Center (EDC) & Natural Resources Defense Council (NRDC) *et al.* - Phase II stormwater regulations

9th Circuit – found deficiencies in Phase II regs

- procedures used for providing coverage to small MS4s under general permits

The court vacated portions of Phase II regs & remanded to EPA to fix the deficiencies:

- Lack of permitting authority review
- Failure to provide notice & comment on NOIs

# EDC et al. v. EPA

## 2014 Petition

December 2014 - NRDC & Environmental Defense Center (EDC) filed petition for a writ of mandamus in 9<sup>th</sup> Circuit Ninth Circuit to require EPA to comply with 2003 decision

NGOs claimed EPA failed to comply with mandate to strengthen its small municipal separate storm sewer systems (MS4s) rule

# EDC et al. v. EPA

## 2014 Petition

August 26 joint motion & proposed schedule agreement:

- EPA to propose a rule with changes to Phase II program by December 17, 2015
- 60-day public comment period (likely based on discussions with the Agency)
- Finalize the rule by November 17, 2016

Status:

- Preparation of a proposal to address 9<sup>th</sup> remand is underway

# National NGO Legal Strategy

Since deferral of the National Stormwater Rule, NGOs have taken various approaches to address alleged deficiencies in the national and regional stormwater programs.

The 9<sup>th</sup> Circuit case is a part of this effort.

Examples:

- RDA Petitions in EPA Regions
- CLF Lawsuits in Region 1
- Challenges to state MS4 permit programs

# Regulatory Response:

Proposal includes two options and one “hybrid” option.

Our best understanding is that both options focus on procedural changes only, not substantive changes to the program or definition of MEP.

However it is likely the NGO community would like to see other portions of the rule modified as part of this regulatory response.

## Scenario 1: Traditional General Permit

### Concept Description (in development)

- NPDES authority defines permit requirements that establish what actions are necessary (including associated deadlines and frequencies) to meet the standard of “reducing the discharge of pollutants from [the] MS4 maximum extent practicable, to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act”
  - During each permit reissuance, the NPDES authority reevaluates the permit requirements to determine whether they continue to be adequate to meet the standard – consistent with the Iterative BMP Approach
  - Each permit will include enforceable requirements that address each of the 6 minimum measures and any more stringent effluent limits necessary to protect water quality
- MS4 permittee still required to develop SWMP that describes what BMPs will implemented to meet the requirements of the permit
- Process to obtain permit coverage would be the same as for traditional general permits
  - Information requirements for NOI can be streamlined
  - NOI reviewed by NPDES authority for completeness
  - Public notice of individual NOIs not required
  - Coverage can be granted immediately, after a waiting period, or upon notification

## Scenario 1: Traditional General Permit

### Some State Examples

- Western Washington small MS4 general permit
  - Public education: each permittee must select from a menu of target audiences and behavior changes, and then measure the understanding and effectiveness of the strategy.
  - IDDE: All Permittees ... shall complete field screening for at least 40% of the MS4 no later than December 31, 2017, 10 and on average 12% each year thereafter.
  - Construction and post-construction: requirement to comply with minimum technical standards (based on statewide stormwater design manual)
- Minnesota small MS4 general permit
  - Public participation: Provide a minimum of one (1) opportunity annually for the public to provide input on the adequacy of the SWPPP.
  - Post-construction: "The permittee shall develop and implement a Post-Construction Stormwater Management program that requires the use of any combination of BMPs, with highest preference given to Green Infrastructure techniques and practices ... necessary to meet the following conditions on the site of a construction activity to the MEP: (a) For new development projects – no net increase from pre-project conditions (on an annual average basis) of: 1) Stormwater discharge Volume ... , 2) Stormwater discharges of Total Suspended Solids (TSS), 3) Stormwater discharges of Total Phosphorus (TP)"

## Scenario 1: Traditional General Permit

### Some State Examples

- ▶ New York small MS4 general permit
  - ▶ IDDE: "Conduct an outfall reconnaissance inventory ... addressing every outfall within the urbanized area and additionally designated area within the covered entity's jurisdiction at least once every five years, with reasonable progress each year."
  - ▶ For all small MS4s located East of the Hudson River: implement additional MCMs to target phosphorus reduction consistent with the WLA for the TMDL
    - ▶ Ex: Develop, implement and enforce a program that ensures that on-site sanitary systems designed for less than 1000 gallons per day (septic systems, cesspools, including any installed absorption fields) are inspected at a minimum frequency of once every five years and, where necessary, maintained or rehabilitated.

## Scenario 2: Procedural Requirements

### Concept Description (in development)

- Include requirements for permitting authority review, public notice of NOIs, and providing the opportunity for the public to request a hearing (if necessary) on individual NOIs
- Permitting authority review – NPDES authority required to determine if the NOI is complete and whether the identified BMPs will meet the requirement to reduce pollutant discharges to the MEP, to protect water quality, and to satisfy the appropriate water quality requirements of the CWA
  - Include a mechanism for requiring modifications to the NOI where appropriate
- Public notice – NPDES authority required to provide a public comment period (e.g., 30 days) for each NOI
  - Must describe process for receiving public comment and considering any comments received
  - Public hearing – NPDES authority also required to provide the opportunity for a public hearing on any specific NOI, and to describe in the permit how requests for a hearing should be made and considered

## Scenario 3: Choose Between Scenario 1 or 2

### Description

- ▶ Provide NPDES authorities with the option of selecting which approach works best for them

# “State’s Choice” Approach

State can select Option 1 or Option 2 approach.

Or a hybrid approach, pulling from both.

Example:

- Part of permit could be written specifically
- And part defined more by the permittee, thus subject to review and approval by permit authority

# Next Steps

With this accelerated schedule, EPA will have to get a version of their proposal to Agency leadership for internal review by early October.

- Feedback needed by September 16.
- NACWA letter submittal by close of September

More comprehensive comment effort planned for public comment period in January.

- NACWA review group for public comment period.
- Potential for NSAN to endorse NACWA position, or craft a Network response or individual organization response.

# Questions/Discussion

*Initial feedback to NACWA by Wednesday, September 16  
for inclusion in pre-proposal comments.*

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