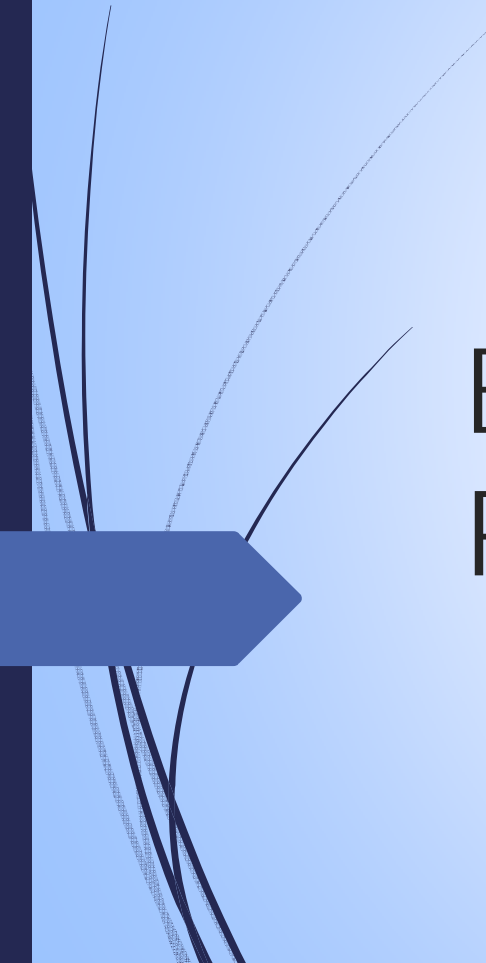


MS4 Remand Rule

Intergovernmental Associations Briefing
September 15, 2015



Background on the MS4 Remand

Current Phase II Regulations – Small MS4 General Permits (40 CFR 122.33-34)

- If you are the operator of a “regulated small MS4”, you are required to seek coverage under an individual or general NPDES permit
 - 94% of small MS4s are permitted under a state general permit
- To be covered under a general permit:
 - The small MS4 must develop a stormwater management program that is designed to reduce the discharge of pollutants from the MS4 “to the maximum extent practicable (MEP), to protect water quality, and to satisfy the appropriate water quality requirements of the CWA.”
 - The small MS4 must submit a Notice of Intent (NOI) to the permitting authority
 - The NOI must include (1) information on the BMPs that will be implemented for each of the six minimum control measures, (2) the measurable goals that will be achieved for each of the BMPs (deadlines and interim milestones), and (3) the persons responsible for implementing the MS4’s stormwater management program

EDC v. EPA decision (Ninth Circuit, 2003)

- Focus of the ruling: Ninth Circuit found deficiencies in the Phase II stormwater regulations regarding the procedures to be used for providing coverage to small MS4s under general permits
- The court vacated the relevant portions of the Phase II regulations, and remanded to EPA to fix the deficiencies:
 1. Lack of permitting authority review:
 - “In order to receive the protection of a general permit, the operator of a small MS4 needs to do nothing more than decide for itself what reduction in discharges would be the maximum practical reduction.”
 - “No one will review that operator's decision to make sure that it was reasonable, or even good faith.”
 2. Lack of public participation in permit process:
 - “... we conclude that ... EPA’s failure to make NOIs available to the public or subject to public hearings contravene the express requirements of the Clean Water Act.”

EPA Memorandum (2004)

- Provided recommendations to permitting authorities for how to administer their general permits in light of the *EDC v. EPA* ruling
- Public Availability of NOIs:
 - Permits should include language on how NOIs will be made available to the public with sufficient time to allow for a meaningful public comment
 - EPA recommendation: make the NOIs available to the public at least 30 days before authorization to discharge
- Opportunity for Public Hearing:
 - EPA recommendation: include permit language explaining the process for requesting a public hearing on an NOI, the standard by which such requests will be judged, the procedures for conducting public hearing requests that are granted, and the procedures for permitting authority consideration of the information submitted at the hearing
- Permitting Authority Review of NOIs:
 - Permitting authority needs to conduct an appropriate review of the NOIs to ensure consistency with the permit
 - Official approval of the NOI is not necessary, but the general permits will need to specify when authorization occurs (e.g., after notice from the permitting authority, or after the expiration of a waiting period)

Other EPA Guidance

- MS4 Permit Improvement Guide (2010)
- Revisions to 2002 Memorandum on TMDLs and Stormwater Permits
 - Recommendation that NPDES permitting authorities establish clear, specific, and measurable permit requirements to implement the minimum control measures in MS4 permits

MS4 Remand Background

NRDC/EDC petition to Ninth Circuit (2014)

- Petitioners asked the Ninth Circuit to require EPA to take action to address the 2003 *EDC v. EPA* ruling
- Petition requested the Court to order EPA to :
 - Immediately revise its Phase II small MS4 regulations include a statement that directs permitting authorities to comply with the 2003 *EDC* order pending further rulemaking.
 - Propose within 6 months (and finalize within 6 months after that date) a rule revising the Phase II small MS4 regulations to address the “procedural deficiencies” found in the Court’s 2003 order.
- EPA and the petitioners signed a settlement agreement on Aug. 26

Settlement Agreement/Court Order

- On Aug. 26, EPA and Petitioners (EDC and NRDC) filed a joint motion with the Ninth Circuit requesting the court to enter an order incorporating the terms of the settlement agreement
 - On Sept. 14, the Ninth Circuit entered an order granting the joint motion
- Relating to the MS4 issues on remand, the court order sets forth a schedule for EPA to follow in promulgating changes to its Phase II stormwater regulations
- The schedule is as follows:
 - By Dec. 17, 2015, EPA shall sign for publication in the Fed. Reg. a notice of proposed rulemaking
 - By Nov. 17, 2016, EPA shall sign for publication in the Fed. Reg. a final rule

Discussion: Current Permitting Approaches

MS4 Permitting Post-*EDC*

- Some permitting authorities have adopted specific general permit procedures consistent with EPA guidance
 - Provide a waiting period after NOI is submitted for coverage
 - NOIs are public noticed (through website) – public can submit comments on individual NOIs and/or request a public hearing
- Some permitting authorities individually review and approve NOIs and stormwater management programs, and incorporate them as enforceable requirements of the permit
- Some permitting authorities have established more specific permit conditions for individual MS4s within the general permit – lessening the importance of the NOI and the stormwater management program in establishing the substantive requirements
- 7 permitting authorities have decided to individually permit their small MS4s



Potential Rule Options to Address MS4 Remand

Discussion: Potential Rulemaking Options

Option 1 ("Traditional General Permit Approach")

■ Description:

- Would clarify that each small MS4 permit (whether individual or general) must include all requirements necessary to meet the standard of "reducing pollutant discharges from the MS4 to the maximum extent practicable, to protect water quality, and to satisfy the appropriate water quality requirements of the CWA"
- The permittee is still required to submit an NOI and to develop a stormwater management program (SWMP), but ...
 - neither the NOI nor the SWMP can function as an individual permit application since the final general permit has already established the effluent limits that apply to all MS4 dischargers
 - Similarly, the permittee has no ability to establish its own permit requirements or to modify the permit's requirements through the NOI or SWMP

Discussion: Potential Rulemaking Options

Option 1 – Permit Examples

- EPA is compiling examples where permits include clear, specific, and measurable provisions – this will be published as part of the proposed rule docket
- In 2014, EPA published permit examples re: to TMDLs and post-construction discharges – see EPA's MS4 compendium (http://www.epa.gov/npdes/pubs/sw_ms4_compendium.pdf)
- Noteworthy permit examples:
 - Washington Dept. of Ecology – Western Washington Small MS4 General Permit
 - California State Water Resources Control Board – Small MS4 General Permit
 - EPA Reg. 6 – Middle Rio Grande MS4 General Permit
 - Select provisions in other state permits (e.g., Vermont, Minnesota, Massachusetts (draft), New Hampshire (draft))

Discussion: Potential Rulemaking Options

Option 2 ("Procedural Option")

■ Description:

- Retain the existing general permit framework that requires MS4s to submit NOIs that include specific BMPs that the MS4 proposes will reduce discharges to the MEP
- Establish a second permitting step to incorporate specific details of the MS4's SWMP as enforceable requirements of the general permit
 - Each NOI would be subject to review and approval by the permitting authority – purpose of the review would be to ensure that each MS4's SWMP will meet the regulatory standard
 - During permitting authority review, changes to the NOI can be required in order to ensure the adequacy of the MS4's program, or the MS4 can apply for an individual permit
 - Following initial approval by the permitting authority, each NOI would be subject to public comment and the opportunity to request a public hearing
- Approach is not unlike the regulatory process required in the NPDES regulations for modifying a permit (40 CFR 124)

Option 2 - Examples

- Minnesota (233 small MS4s)
 - State uses a detailed SWMP form that must be submitted with the NOI
 - State reviews each package and determines whether taken together it meets the requirements of the permit
 - After any necessary revisions are made, the state makes the NOI and SWMP available for a 30-day public comment period
 - After considering public comments, the state then makes a final determination on adequacy of the NOI and SWMP
 - If the state decides to authorize, the SWMP is made an enforceable part of the permit
- Texas follows a similar approach (497 small MS4s)

Discussion: Potential Rulemaking Options

Option 3 ("State Choice")

■ Description:

- Each permit would be required to establish requirements that reduce the discharges to the MEP, protect water quality, and satisfy the water quality requirements of the CWA – the permitting authority could achieve this exclusively through the permit (Option 1), by adopting a procedural mechanism to approve of individual MS4 programs (Option 2), or by using a hybrid of the two

- This option would enable the permitting authority to choose which option is best suited for them

■ Hybrid approach

- State could develop one permit using the Option 1 approach, and establish a second permit that relies on the Option 2 approach
 - A permit could establish some minimum requirements that meet the regulatory standard (Option 1), but then choose to rely on the MS4 to propose some MEP-type requirements, which would then be subject to review/approval and public comment (Option 2)



Questions?

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