

**Disclaimer:** The Administrator of the U.S. Environmental Protection Agency, Gina McCarthy, signed the following proposed rule on Thursday, December 17, 2015, and EPA is submitting it for publication in the *Federal Register* (FR). While we have taken steps to ensure the accuracy of this Internet version of the rule, it is not the official version of the rule for purposes of public comment. Please refer to the official version in a forthcoming FR publication, which will appear on the Government Printing Office's FDsys website (<http://fdsys.gpo.gov/fdys/search/home.action>) and on Regulations.gov (<http://www.regulations.gov>) {in Docket No. EPA-HQ-OW-2015-0671}. EPA projects that the official version of the proposed rule will be published in the FR on or about the week of December 28, 2015.

6560-50-P

## **ENVIRONMENTAL PROTECTION AGENCY**

### **40 CFR Part 122**

#### **EPA-HQ-OW-2015-0671; FRL-9939-88-OW**

RIN 2040-AF57

**[Title]:** [NPDES] Municipal Separate Storm Sewer System General Permit Remand Rule.

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing changes to the regulations governing small municipal separate storm sewer system (MS4) permits to respond to a remand from the United States Court of Appeals for the Ninth Circuit in *Environmental Defense Center, et al. v. EPA*, 344 F.3d 832 (9<sup>th</sup> Cir. 2003). In that decision, the court determined that the regulations for providing coverage under small MS4 general permits did not provide for adequate public notice and opportunity to request a hearing. Additionally, the court found that EPA failed to require permitting authority review of the best management practices (BMPs) to be used at a particular MS4 to ensure that the small MS4 permittee reduces pollutants in the discharge from their systems to the “maximum extent practicable” (MEP), the standard established by the Clean Water Act for such permits. EPA’s proposal would revise the small

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MS4 regulations to ensure that the permitting authority determines the adequacy of BMPs and other requirements and provides public notice and the opportunity to request a public hearing on the requirements for each MS4. The proposal would not establish any new substantive requirements for small MS4s.

**DATES:** Comments must be received on or before [**insert date 75 days after date of publication in the Federal Register**].

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-HQ-OW-2015-0671, to the *Federal eRulemaking Portal*: <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or withdrawn. EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (i.e. on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

**FOR FURTHER INFORMATION CONTACT:** Greg Schaner, Office of Wastewater Management, Water Permits Division (M4203), Environmental Protection Agency, 1200 Pennsylvania Ave., N.W, Washington, D.C. 20460; telephone number: (202) 564-0721; email address: [schaner.greg@epa.gov](mailto:schaner.greg@epa.gov)

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J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

**I. General Information**

*A. Does this action apply to me?*

Entities potentially regulated by this proposed action include:

Category	Examples of regulated entities	North American industry classification system (NAICS) code
Federal and state government	EPA or state NPDES stormwater permitting authorities	924110
Local governments	Operators of small municipal separate storm sewer systems	924110

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could potentially be regulated or otherwise affected by this action. Other types of entities not listed in the table could also be regulated. To determine whether your entity is regulated by this action, you should carefully examine the applicability criteria found in Section 122.32 title 40 of the Code of Federal Regulations, and the discussion in the preamble. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the FOR FURTHER INFORMATION CONTACT section.

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*B. What action is the agency taking?*

EPA is proposing a change to its regulations governing the way in which small MS4s obtain coverage under National Pollutant Discharge Elimination System (NPDES) general permits. The proposal results from a decision by the Ninth Circuit U.S. Court of Appeals in *Environmental Defense Center, et al. v. EPA*, in 344 F.3d 832 (9<sup>th</sup> Cir. 2003) (“*EDC decision*”), which found that EPA regulations for obtaining coverage under a small MS4 general permit did not provide for adequate public notice, the opportunity to request a hearing, or permit authority review to determine whether the BMPs selected by each MS4 in its stormwater management program (SWMP) meets the Clean Water Act (CWA) requirements including the requirement to “reduce pollutants to the maximum extent practicable.” The preamble discusses two options for addressing the remand, and a third option that is a hybrid of the two alternatives. One option (called the “Traditional General Permit Approach”) would align the process for issuing small MS4 general permits with the way NPDES general permits are issued for other categories of discharges. This would entail requiring the permitting authority to establish within the permit all requirements that MS4s must meet within the term of the general permit to meet the standard applicable to MS4s (to reduce pollutants to the MEP, to protect water quality, and to satisfy the appropriate water quality requirements of the CWA), which would be subject to public notice and comment and an opportunity to request a hearing. A second option (called the “Procedural Approach”) would add procedural requirements to the existing rule structure that would require the MS4 to inform the permitting authority in its Notice of Intent (NOI) to be covered by the permit of the BMPs it would undertake through its SWMP. Under the Procedural Approach, the public would be given an opportunity to comment on the proposed BMPs and request a hearing,

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and the permitting authority would have the opportunity to require changes to the proposed BMPs before the permitting authority authorizes a discharge under the general permit. A third option (called the “State Choice Approach”) would enable the permitting authority to choose between the Traditional General Permit and Procedural Approaches, or to implement a combination of these approaches in issuing and authorizing coverage under a general permit.

*C. What is the agency’s authority for taking this action?*

The authority for this rule is the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.*, including sections 402 and 501.

## **II. Background**

*A. Statutory and Regulatory Overview*

Stormwater discharges are a significant cause of water quality impairment because they contain a variety of pollutants such as sediment, nutrients, chlorides, pathogens, metals, and trash. Furthermore, the increased volume and velocity of stormwater discharges that result from the creation of impervious cover can alter streams and rivers by causing scouring and erosion. These surface water impacts threaten public health and safety due to flooding and pollutants; lead to economic losses to property and fishing industries; increase drinking water treatment costs; and decrease opportunities for recreation, swimming, and wildlife uses.

Stormwater discharges are subject to regulation under section 402(p) of the CWA. Under this provision, Congress required only the following stormwater discharges to be subject to NPDES permitting requirements: stormwater discharges for which NPDES permits were issued prior to February 4, 1987; discharges “associated with industrial activity”; discharges from MS4s serving populations of 100,000 or more; and any stormwater discharge determined by EPA or a

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state to “contribute... to a violation of a water quality standard or to be a significant contributor of pollutants to waters of the United States.” With respect to MS4s, section 402(p)(3)(B) provides that NPDES permits may be issued on a system-wide or jurisdiction-wide basis, and requires that MS4 NPDES permits “include a requirement to effectively prohibit non-stormwater discharges into the storm sewers” and require “controls to reduce the discharge of pollutants to the maximum extent practicable . . . and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.”

EPA developed the stormwater regulations under section 402(p) in two phases, as directed by the statute. In the first phase, under section 402(p)(4), EPA promulgated regulations establishing application and other requirements for NPDES permits for stormwater discharges from medium (serving populations of 100,000 to 250,000) and large (serving populations of 250,000 or more) MS4s, and stormwater discharges associated with industrial activity. EPA published the final Phase I rule on November 16, 1990 (55 FR 47990).

The Phase I rule, among other things, defined “municipal separate storm sewer” as publicly-owned conveyances or systems of conveyances that discharge to waters of the U.S. and are designed or used for collecting or conveying stormwater, are not combined sewers, and are not part of a publicly-owned treatment works at 40 CFR 122.26(b)(8). EPA included construction sites disturbing five acres or more in the definition of “stormwater discharges associated with industrial activity” at 40 CFR 122.26(b)(14)(x).

In the second phase, under section 402(p)(5) and (6), EPA was required to conduct a study to identify other stormwater discharges that needed further controls “to protect water quality,” report to Congress on the results of the study, and to designate for regulation additional

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categories of stormwater discharges not regulated in Phase I on the basis of the study and in consultation with state and local officials. EPA promulgated the Phase II rule on December 8, 1999, designating discharges from certain small MS4s and from small construction sites (disturbing equal to or greater than one acre and less than five acres) and requiring NPDES permits for these discharges (64 FR 68722, December 8, 1999). A regulated small MS4 is generally defined as any MS4 that is not already covered by the Phase I program and that is located within the urbanized area boundary as determined by the latest U.S. Decennial Census. Separate storm sewer systems such as those serving military bases, universities, large hospital or prison complexes, and highways are also included in the definition of “small MS4.” 40 CFR 122.26(b)(16). In addition, the Phase II rule includes authority for EPA (or states authorized to administer the NPDES program) to require NPDES permits for currently unregulated stormwater discharges by a designation process. 40 CFR 122.26(a)(9)(i)(C) and (D). Other small MS4s located outside of an urbanized area may be designated as a regulated small MS4 if the NPDES permitting authority determines that its discharges cause, or have the potential to cause, an adverse impact on water quality. See 40 CFR 122.32(a)(2) and 123.35(b)(3).

#### *B. MS4 Permitting Requirements*

The Phase I regulations are primarily application requirements that identify components that must be addressed in applications for individual permits from large and medium MS4s. The regulations at 40 CFR 122.26(d)(2)(iv) require these MS4s to develop a SWMP, which is considered by EPA or the authorized state permitting authority when establishing permit conditions to reduce pollutants to the MEP.



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Like the Phase I rule, the Phase II rule requires regulated small MS4s to develop and implement SWMPs. 40 CFR 122.34(a) requires that SWMPs be designed to reduce pollutants discharged from the MS4 “to the maximum extent practicable (MEP), to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act,” and requires that the SWMPs include six “minimum control measures.” The minimum control measures are: public education and outreach, public participation and involvement, illicit discharge detection and elimination, construction site runoff control, post construction runoff control, pollution prevention and good housekeeping. 40 CFR 122.34(b). Under the Phase II rule, a regulated small MS4 may seek coverage under an available general permit or may apply for an individual permit. To be authorized to discharge under a general permit, the rule requires submission of an NOI to be covered by the general permit containing a description of the BMPs to be implemented and the measurable goals for each of the BMPs, including timing and frequency, as appropriate. 40 CFR 122.33(a)(1), 122.34(d)(1).

EPA anticipated that under the first two or three permit cycles, whether individual permits or general permits, BMP-based SWMPs implementing the six minimum control measures would, if properly implemented, “be sufficiently stringent to protect water quality, including water quality standards, so that additional, more stringent and/or more prescriptive water quality based effluent limitations will be unnecessary.” (64 FR 68753, December 8, 1999). In the final Phase II rule preamble, EPA also stated that it “has intentionally not provided a precise definition of MEP to allow maximum flexibility in MS4 permitting. MS4s need the flexibility to optimize reductions in storm water pollutants on a location-by-location basis. . . . Therefore, each

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permittee will determine appropriate BMPs to satisfy each of the six minimum control measures through an evaluative process.” (64 FR 68754, December 8, 1999).

The Agency described this process in the preamble to the Phase II rule as an “iterative process” of developing, implementing, and improving stormwater control measures contained in SWMPs. As EPA further stated in the preamble to the Phase II rule, “MEP should continually adapt to current conditions and BMP effectiveness and should strive to attain water quality standards. Successive iterations of the mix of BMPs and measurable goals will be driven by the objective of assuring maintenance of water quality standards. . . . If, after implementing the six minimum control measures there is still water quality impairment associated with discharges from the MS4, after successive permit terms the permittee will need to expand or better tailor its BMPs within the scope of the six minimum control measures for each subsequent permit.” (64 FR 68754, December 8, 1999).

### **III. Judicial Review of the Phase II Rule and Partial Remand**

#### *A. Decision in Environmental Defense Center et al. v. EPA*

The Phase II rule was challenged in petitions for review filed by environmental groups, municipal organizations, and industry groups, resulting in a partial remand of the rule.

*Environmental Defense Center v. U.S. Environmental Protection Agency*, 344 F.3d. 832 (9<sup>th</sup> Cir. 2003). The court remanded the Phase II rule’s provisions for small MS4 NPDES general permits because they lacked procedures for permitting authority review and public notice and the opportunity to request a hearing on NOIs submitted under general MS4 permits.

In reviewing how the Phase II rule provided for general permit coverage for small MS4s, the court found that NOIs under the rule were not like NOIs for other NPDES general permits. Other

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general permits contain the specific effluent limitations and conditions applicable to the class of dischargers for which the permit is available, and authorization to discharge under a general permit is obtained by filing an NOI in which the discharger agrees to comply with the terms of the general permit. In contrast, the court held that under the Phase II rule, because the NOI submitted by the MS4 contains the information as to what the MS4 decides it will do to reduce pollutants to the MEP, it is the “functional equivalent” of a permit application. *Environmental Defense Center v. U.S. Environmental Protection Agency*, 344 F.3d. at 857. Because the CWA requires public notice and the opportunity to request a public hearing for all permit applications, the court held that failure to require public notice and the opportunity for a public hearing for NOIs under the Phase II rule is contrary to the Act. 344 F.3d. at 858.

Similarly, the court found the Phase II rule allows the MS4 to identify the BMPs that it will undertake in its SWMP without any permitting authority review. The court held that the lack of review “to ensure that the measures that any given operator of a small MS4 has decided to undertake will *in fact* reduce discharges of pollutants to the maximum extent practicable” also does not comport with CWA requirements. The court stated, “That the Rule allows a permitting authority to review an NOI is not enough; every permit must comply with the standards articulated by the Clean Water Act, and unless every NOI issued under general permit is reviewed, there is no way to ensure that such compliance has been achieved.” 344 F.3d. at 855 n.32.

The court therefore vacated and remanded “those portions of the Phase II Rule that address these procedural issues . . . so that EPA may take appropriate action to comply with Clean Water Act.” 344 F.3d. at 858.

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*B. EPA Action Following the Partial Remand of the Phase II Rule*

EPA issued interim guidance to address the need for permitting authority review of NOIs and to provide for public notice and opportunity for public hearing in April 2004. This guidance memorandum, *Implementing the Partial Remand of the Stormwater Phase II Regulations Regarding Notices of Intent and NPDES General Permitting for Phase II MS4s*, outlined recommendations as to how permitting authorities should retroactively provide for public notice and the opportunity to request a hearing, provided options for holding a public hearing if granting a request, and highlighted ways to conduct appropriate review of NOIs already submitted.<sup>1</sup> The memorandum also provided guidance on ways to ensure the requisite public notice and review opportunities and permitting authority review of NOIs under new general permits. As a result of the *EDC* decision, EPA Regions that issue NPDES permits have taken various approaches to provide opportunity for public review. For example, EPA Region 1, the permitting authority for Massachusetts and New Hampshire, uses its website to post NOIs and notices of availability for public comment, as well as the annual reports submitted by each permitted MS4.<sup>2</sup> EPA Region 6, the permitting authority in New Mexico and in Indian Country in Oklahoma and New Mexico, has established a website with information on how to submit comments and opportunity to request a public hearing, and posts the NOI and each MS4's SWMP on its website.<sup>3</sup> EPA Region 10, the permitting authority in Idaho, has only issued individual permits to small MS4s in that state.

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<sup>1</sup> EPA. April 16, 2004. Memo from James Hanlon, Director, Office of Wastewater Management to EPA Water Management Division Directors in EPA Regions I-X. <http://www.epa.gov/npdes/pubs/hanlonphase2apr14signed.pdf>

<sup>2</sup> <http://www.epa.gov/region1/npdes/stormwater/2003-permit-archives.html>

<sup>3</sup> <http://www.epa.gov/region6/water/npdes/sw/sms4/sms4noi.htm>

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In addition, the EPA Regions and some authorized state permitting authorities have included more specific and definitive requirements in small MS4 general permits, rather than leaving the identification of stormwater controls needed to reduce pollutants to the MEP, protect water quality and meet the water quality requirements of the CWA up to the permittees. In the time since promulgation of the Phase II rule and the partial remand of the rule, permits for small MS4 discharges have evolved, both to reflect the advancement and improvement in stormwater management approaches and techniques and to reflect the need for the specific requirements for compliance with the CWA to be incorporated into MS4 permits. Please see Section V.A of this preamble for a detailed discussion of current EPA and state permitting practices for small MS4 NPDES permits.

#### **IV. Scope of this rulemaking**

The proposed revisions to the Phase II MS4 NPDES permitting requirements are solely for the purpose of responding to the partial remand of the Phase II rule in *Environmental Defense Center v. U.S. Environmental Protection Agency*, 344 F.3d. 832 (9<sup>th</sup> Cir. 2003) with respect to small MS4 general permits. To conform to the court's decision, the rule needs to ensure that permitting authorities determine what requirements are needed to reduce pollutants from each permitted small MS4 "to the maximum extent practicable (MEP), to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act," as currently required for small MS4 permits under 40 CFR 122.34(a). The proposed rule must also require NPDES permitting authorities to provide the public with the opportunity to review, submit comments, and request a public hearing on these requirements.

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EPA is not reopening any of the substantive requirements that were promulgated in the Phase II rule (nor is EPA reopening or seeking comment on any aspect of the Phase I rule, which is described in this preamble for informational purposes only). In addition, EPA will address the other aspect of the Ninth Circuit's remand regarding possible regulation of stormwater discharges from forest roads in a separate action.

## **V. EPA's evaluation and selection of rulemaking options**

### *A. Current Permitting Authority Practice*

The EPA collected information on how NPDES permitting authorities have been administering their small MS4 general permits in the years since the *EDC* decision and the issuance of the EPA's guidance on implementing the remand and compiled this information in a state-by-state spreadsheet (titled *Current NPDES Authority Practices in Administering Small MS4 General Permits*, EPA, 2015), which is available in the docket for the proposed rule at <http://www.regulations.gov> under Docket ID No. EPA-HQ-OW-2015-0671. This information provides a basis for understanding how and to what degree different rule options would affect the current MS4 general permit programs in different states.

This research indicates that permitting authorities are using an array of approaches to provide permit coverage to their small MS4s, many of which are unique to the specific state. EPA's guidance following the *EDC* decision suggested ways to implement a general permit program that would be consistent with the court's ruling. As mentioned, some states chose to develop more definitive general permits that do not rely on MS4 identification of BMPs to establish requirements that meet the applicable CWA standards. Other states require that each NOI undergo individualized permitting authority review and a dedicated public comment period

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prior to authorizing the discharge. Still other states require the MS4 to provide for public notice and the opportunity to submit comments on the NOI and the SWMP document being submitted. Notwithstanding the disparity in approaches between NPDES authorities, this information has equipped EPA with a sense of how the different options under consideration would be implemented if promulgated, and what types of adjustments may be necessary in some programs depending on the rule approach that is adopted. EPA used the approaches being implemented in certain states to inform the proposed rule options.

Not surprisingly, general permits are used as the permitting vehicle to authorize small MS4 discharges in the vast majority of states (i.e., 43 of 50 states, which represents 94 percent of the 6789 permitted small MS4s). In the remaining states, individual permits are issued to their small MS4 permittees. In the 43 states where general permits are used, 26 of these permitting authorities make their NOIs publicly available through a website or some other means, and 27 indicate that they provide a “waiting period” of some length between the time the NOI is submitted and discharge authorization. Currently, most states are not providing a second public comment period for individual NOIs (in addition to the public comment period for the draft general permit). However, 12 states have established such a comment period. EPA notes that four states require the prospective small MS4 permittee to provide for its own public comment period for the NOI and, in some cases, the SWMP. In 23 states, the permitting authority requires the SWMP document to be submitted for review along with the NOI; in 14 of these states, the permitting authority reviews and approves the SMWP document. See *Current NPDES Authority Practices in Administering Small MS4 General Permits*, EPA, 2015.

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EPA also found some states that have moved to develop general permits with more clear and specific requirements as a way of cutting down on the need for additional review procedures for individual NOIs. For instance, rather than requiring NOIs with information on BMPs and measurable goals, California and Washington include in their general permits the specific tasks, milestones, and schedules that are to be met by each permittee. Therefore, once coverage under the general permit in these states is authorized, the enforceable components of the permit are locked in place for each permittee, and the permitting authority is no longer required to review the information submitted by individual MS4s prior to authorizing the discharge. What matters is whether the permittee is complying with the specific requirements of the permit.

#### *B. Description of process used to evaluate options*

EPA met separately with various categories of stakeholders during the development of the proposed rulemaking. The purpose of these meetings was to obtain individual feedback from stakeholders on the type of regulatory changes that would best address the court remand, and which would work best considering how Phase II general permits have been administered to date. The following is a summary of what EPA learned from these meetings.

EPA participated in several meetings with the Association of Clean Water Administrators and their member state stormwater coordinators, and met with the Environmental Council of the States. Many state permitting authority staff appeared receptive to the idea of clarifying in the regulations that the general permit should define all of the applicable requirements necessary to reduce the discharge of pollutants from the MS4 to the MEP, to protect water quality, and to satisfy the appropriate water quality requirements of the CWA. At the same time, some state staff questioned how they would incorporate requirements into their general permits in a way



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that would work for all MS4s within their state, given the large number and diversity of the municipal entities regulated. Other state staff indicated a concern for retaining the correct balance between establishing detailed, prescriptive requirements and providing flexibility where appropriate. There are also a few state permitting authorities that are implementing an approach similar to what is being described as the “Procedural Approach” (see Section VI.B), and some expressed the interest in finding a way in the proposed rule to accommodate this approach. Most state permitting staff appeared concerned with the prospect of spending additional time and resources to implement a procedural approach requiring individualized review and public notice of all NOIs, as discussed in the court’s decision. Other state permitting staff suggested exploring the concept of allowing permitting authorities to choose which option to follow, without restricting the rule to one approach. Alternatively, a few state permitting staff suggested that permitting authorities be allowed to apply a hybrid of the two approaches, whereby a state could implement one permit using the Traditional General Permit Approach (e.g., for traditional MS4s) and another permit using the Procedural Approach (e.g., for non-traditional MS4s), or use a blend of the options for issuing a general permit and authorizing coverage under the permit.

EPA met with organizations representing state and local elected officials, as well as with small MS4 permittees and organizations that include small MS4s as members. MS4s, in particular, are interested in retaining the flexibility of the existing Phase II regulations, where they are able to make decisions on which BMPs are implemented locally based on factors that are unique to their municipality and environmental concerns. At the same time, many of these same MS4s understand the need for permit requirements that are clear to all parties and the public.

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EPA also met with representatives from a number of environmental, non-profit organizations. Many of the representatives expressed an interest in seeing the quality of small MS4 permits improve, and appeared to be supportive of the concept of adopting the Traditional General Approach as a way of addressing the remand. Asked at what point in the current permitting process their organizations tend to provide input, most indicated that they focus their attention on providing comments at the proposed permit stage, as compared to submitting comments on individual NOIs. That being said, a few representatives indicated that they have submitted comments on individual NOIs pertaining to the proposed water quality implementation plans of several small MS4s.

### *C. Considerations in evaluating options*

Any option for responding to the remand must meet the CWA requirements for public participation and transparency in section 402(b)(3), consistent with the Ninth Circuit's decision. When individual permits are issued to small MS4s, the standard process for issuing an NPDES permit applies. This process provides for public participation and permitting authority determination as to what set of permit terms and conditions satisfy the requirement to reduce the discharge of pollutants from the MS4 to the MEP, to protect water quality, and to meet the applicable water quality requirements of the CWA. While the court's opinion focused on the Phase II rule's requirement for the NOI to be covered by a general permit, and the procedural steps that need to be taken with respect to the NOI in order for the rule to comply with the CWA, the court's fundamental concern was that the permitting authority must determine which MS4 permit requirements are sufficient to reduce the discharge of pollutants to the MEP, to protect water quality, and to satisfy the appropriate water quality requirements of the CWA, and that the

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public have the opportunity to review and comment on those permit requirements and to request a hearing. For example, the court stated that “every permit must comply with the standards articulated by the Clean Water Act, and unless every NOI issued under a general permit is reviewed, there is no way to ensure that such compliance has been achieved.” *EDC v. EPA*. 344 F.3d at 855, n. 32. Accordingly, EPA has determined that certain factors must be met by any option to revise the rule, as discussed below.

### *1. Permitting Authority Review*

The court viewed the NOI as the document that identifies the requirements necessary to meet the MEP standard: “Because a Phase II NOI establishes what the discharger will do to reduce discharges to the ‘maximum extent practicable,’ the Phase II NOI crosses the threshold from being an item of procedural correspondence to being a substantive component of a regulatory scheme.” 344 F.3d at 853. As a result, the role of the permitting authority to determine which requirements are necessary to meet the applicable statutory standard is not, according to the court, accomplished under this scheme. In addition, the court observed that because 40 CFR 122.34(a) in the 1999 Phase II rule states that compliance with the SWMP written by the MS4 constitutes compliance with the MEP standard (without providing for further action by the permitting authority), the regulation put the MS4 in charge of establishing its own requirements. “Therefore, under the Phase II Rule nothing prevents the operator of a small MS4 from misunderstanding or misrepresenting its own stormwater situation and proposing a set of minimum measures for itself that would reduce discharges by far less than the maximum extent practicable.” 344 F.3d at 855.

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While EPA has always expected the permitting authority to establish the necessary requirements for reducing discharges to the MEP, protecting water quality, and satisfying the appropriate water quality requirements of the CWA, the existing regulations do not fully address the permitting authorities' responsibilities in this regard. To be consistent with the court's decision, one criterion that any option must meet is that it must ensure the permitting authority provides a final determination on whether the requirements to which the MS4 is subject, whether articulated fully in the permit itself or defined in whole or part by the MS4 operator in the NOI, meet the NPDES requirements to reduce discharges to the MEP, to protect water quality, and to satisfy the appropriate water quality requirements of the Act.

## *2. Public Participation Requirements*

The court's other concern was that MS4s would choose what requirements apply to them, without being subject to the public participation procedures applicable to all NPDES permit applications and permits, which is contrary to CWA section 402(b)(3). As discussed, the court found the NOI to be the "functional equivalent" of a permit application. The importance of the NOI as identified by the court was that the NOI contained the requirements that would be considered to meet the applicable standards and therefore this was the document that needed to be subject to public notice. See 344 F.3d at 857. To be consistent with the court's decision, any option chosen must provide for public notice and the opportunity to request a public hearing on what is considered necessary for a permitted MS4 to meet the requirement to reduce discharges to the MEP, to protect water quality, and to satisfy the appropriate water quality requirements of the CWA, regardless of where those requirements are defined.

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### *3. Other factors considered.*

General permits are premised on the idea that the terms and conditions of the permit are the same for all entities covered by the general permit and that handling permitting for multiple entities in one proceeding is more efficient. In the context of MS4 permits, the Phase II rule sought to establish a general permit scheme that allows each MS4 to address the specific conditions that prevail in its jurisdiction. As stated in the Phase II preamble, “The pollutant reductions that represent MEP may be different for each small MS4, given the unique local hydrologic and geologic concerns that may exist and the differing possible pollutant control strategies. Therefore, each permittee will determine appropriate BMPs to satisfy each of the six minimum control measures through an evaluative process.” (64 FR 68754, December 8, 1999). While the court clearly rejected EPA regulations to the extent that the court found they established a system of MS4 self-regulation, it also recognized the value in having MS4 input on what it could do to meet the MEP standard. “Involving regulated parties in the development of individualized stormwater pollution control programs is a laudable step . . . But EPA is still required to ensure that the individual programs adopted are consistent with the law.” 344 F.3d at 856. There is a need for strong MS4 input into the implementation of the program, and for that reason EPA made flexibility an underlying principle of the Phase II regulations. Individual permits provide the greatest ability to define MS4-specific requirements and small MS4s always have the option of seeking an individual permit if this would best accommodate their specific circumstances. However, with over 94 percent of regulated small MS4s currently covered by general permits, an important consideration for this rulemaking is how to provide flexibility to MS4s while retaining the general permit option in a manner that comports with the remand. The

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challenge is to balance the flexibility provided to the MS4 to determine how best it can meet the applicable regulatory requirements with the permitting authorities' responsibility to ensure that the terms and conditions to which MS4s will be held accountable are adequate to reduce the discharge to the MEP, protect water quality, and satisfy the appropriate water quality requirements of the CWA. In selecting any regulatory option to comport with the court remand, EPA will consider the need for maintaining this balance in light of the nearly 15-year history of implementing the Phase II program, and the considerable knowledge and expertise about implementing stormwater controls that have emerged during that time.

Another factor requiring consideration is the impact on existing authorized NPDES state permitting programs. Currently 46 states and one territory are authorized under section 402(b) to administer the NPDES permit program in their jurisdictions. EPA recognizes that states have limited resources and face different challenges in meeting the permitting demands within their various NPDES programs. Immediately after the *EDC* decision, EPA sought to provide state permitting authorities with potential interim strategies that would balance the need to move forward with implementing the Phase II program, while acknowledging the need for state flexibility in how permitting decisions need to be made. See *Implementing the Partial Remand of the Stormwater Phase II Regulations Regarding Notices of Intent & NPDES General Permitting for Phase II MS4s* (EPA, 2004)<sup>4</sup>. As discussed more fully elsewhere in this preamble, authorized states [and EPA regional permitting authorities] have taken a variety of approaches in response to the court's decision (and in some cases, decisions by state courts) and EPA guidance. A significant consideration in this rulemaking is the extent to which states would need to make

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<sup>4</sup> See <http://www.epa.gov/npdes/pubs/hanlonphase2apr14signed.pdf>

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changes to comply with the rule and consideration of the need to minimize disruption to existing state programs, particularly for those states that have chosen approaches that already comport with the *EDC* decision. EPA clarifies that if, upon promulgation of the final rule, a state is already implementing an approach that is consistent with the final rule EPA would not expect that the permitting authority would need to make any changes to its current approach. Similarly, it is EPA's intention that permitting authorities that only issue individual permits to small MS4s (e.g., EPA Region 10 in Idaho, Delaware, Michigan, and Oregon) would not need to make any changes because the process for issuing individual permits already encompasses the necessary permitting attributes found missing in the Phase II regulations by the Ninth Circuit (i.e., permitting authority determination, public notice, and opportunity to request a hearing). However, state permitting authorities that are using general permits and are currently not implementing strategies that address the core problems found by the court will need to make some degree of change to their general permit process for small MS4s to comply with the modified regulations.

## **VI. Analysis of options for proposal**

EPA is proposing three rule options for public comment, each of which would address the Ninth Circuit remand. Each of these options shares in common the fact that, as a result of the permitting process, the permitting authority must determine which requirements a small MS4 must meet in order to satisfy the Phase II regulatory requirement "to reduce the discharge of pollutants from [the] MS4 to the maximum extent practicable, to protect water quality, and to satisfy the appropriate water quality requirement of the Clean Water Act." The key difference between the options, especially between the "Traditional General Permit Approach" (Option 1)

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and the “Procedural Approach” (Option 2), is that they make this determination at different points in time during the permitting process. For Option 1 (the “Traditional General Permit Approach”), the determination as to what requirements are needed to reduce the discharge of pollutants to the MEP, to protect water quality, and to satisfy the appropriate water quality requirements of the CWA is made as part of the initial issuance of the general permit. By contrast, under Option 2 (the “Procedural Approach”), the permitting authority would make this determination after reviewing each individual NOI and after public comment and the opportunity for a hearing on the NOI. Each of these options is described more fully below, as is a third option (the “State Choice Approach”), which would give the permitting authority the discretion to determine whether it will administer Option 1 or Option 2, or a hybrid of options chosen for the final rule.

#### *A. Option 1 - Traditional General Permit Approach*

The “Traditional General Permit Approach” provides a mechanism for addressing the procedural deficiencies identified by the court by requiring all substantive permit requirements to be in the general permit. The rationale behind the Traditional General Permit Approach is that by requiring permitting authorities to include any and all requirements that establish what is necessary to “... reduce the discharge of pollutants from the MS4 to the maximum extent practicable (MEP), to protect water quality, and to satisfy the appropriating water quality requirements of the Clean Water Act,” the minimum required procedural steps to issue a final general permit, including providing public notice and the minimum 30-day comment period on the draft permit, and the opportunity to request a public hearing, will fulfill the permitting



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authority review and public participation requirements of the CWA that the court found missing from the Phase II regulations.

Under the proposed Traditional General Permit Approach, the NPDES authority must establish in any small MS4 general permit the full set of requirements that are deemed adequate “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 Clean Water Act,” and the administrative record would explain the rationale for its determination. The permittee would have the opportunity, as it always has had, to provide feedback on what requirements are established in the general permit during the development of the draft permit and to submit comments during the public comment period. Furthermore, the permittee could continue to have flexibility in determining how it will implement the permit requirements based on considerations such as pollutant removal and cost effectiveness. However, once the permit is issued, and the terms and conditions in the permit are fixed for the term of the permit, neither the development of a SWMP document nor the submittal of an NOI for coverage would represent new permit requirements. In turn, because the permit contains all of the requirements that will be used to assess permittee compliance, the permitting authority would no longer need to rely on the MS4’s NOI as the mechanism for ascertaining what will occur during the permit term. Under this approach, the function of the NOI would be more similar to that of any other general permit NOI, and more specifically other stormwater general permits, where the NOI is used to establish certain minimum facts about the discharger, including the operator’s contact details, the discharge location(s), and confirmation that the operator is eligible for permit coverage and has agreed to comply with the terms of the permit. By removing the possibility that effluent limits

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could be proposed in the NOI (and for that matter in the SWMP) and made part of the permit once permit coverage is provided, the NOI would no longer look and function like an individual permit application, as the court found with respect to MS4 NOIs under the Phase II regulations currently in effect. Therefore, it would not be necessary to carry out the type of additional permitting authority review and public participation steps contemplated by the court.

Under the proposed Traditional General Permit Approach, 40 CFR 122.34(a) would be revised to expressly require the permitting authority to articulate in sufficient detail in the permit what is required to meet the minimum statutory and regulatory requirements, and to ensure that the applicable requirements are enforceable and understandable to the permittee and the public. A general permit would need to make it clear to all what level of effort is expected of the permittee during the permit term for each permit provision. These proposed revisions to 40 CFR 122.34(a) respond to the court's finding that under the Phase II rule, "the operator of a small MS4 has complied with the requirement of reducing discharges to the 'maximum extent practicable' when it implements its stormwater management program, *i.e.*, when it implements its Minimum Measures. 40 CFR 122.34(a)." 344 F.3d at 856. The court continued, "Nothing in the Phase II regulations requires that NPDES permitting authorities review these Minimum Measures to ensure that the measures that any given operator of a small MS4 had decided to undertake will *in fact* reduce discharges to the maximum extent practicable." 344 F.3d at 855. By clearly shifting the decision as to what is needed to meet the MEP standard and water quality requirements from the permittee to the permitting authority, the Traditional General Permit Approach would address the court's concern.

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EPA continues to view MEP as iterative, in that each successive permit needs to define what is required to meet the MEP standard for that permit term. The Traditional General Permit Approach would clarify that the requirements for meeting MEP (and to protect water quality and satisfy CWA water quality requirements) would be required to be established in each successive permit by the permitting authority, while the SWMP implemented by the MS4 would be a planning and programmatic document that the MS4 would be able to update and revise during the permit term as necessary to comply with the terms of the permit. In other words, this option would make it clear that the SWMP document would not contain enforceable requirements. Likewise, it would be unnecessary for the NOI to identify the BMPs selected in the SWMP for each minimum control measure nor for it to undergo public or permitting authority review prior to discharge authorization under the general permit.

Moreover, it was never EPA's intent that the SWMP required by 40 CFR 122.34(a) itself be considered enforceable under the permit. Rather, the SWMP was intended to be the means for the MS4 to engage in an adaptive management process during the term of the permit. "EPA envisions application of the MEP standards as an iterative process. MEP should continually adapt to current conditions and BMP effectiveness and should strive to attain water quality standards." (64 FR 68754, December 8, 1999).

The Traditional General Permit Approach would include regulatory text to reflect EPA's guidance to permitting authorities regarding the types of permit requirements for MS4s that are considered most effective. For instance, EPA advises permitting authorities to use permit conditions that are "clear, specific, and measurable." See *MS4 Permit Improvement Guide*<sup>5</sup> (p. 5-

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<sup>5</sup> EPA. 2010. *MS4 Permit Improvement Guide*. Office of Wastewater Management. Washington, DC. EPA 833-R-10-001. [http://water.epa.gov/polwaste/npdes/stormwater/upload/ms4permit\\_improvement\\_guide.pdf](http://water.epa.gov/polwaste/npdes/stormwater/upload/ms4permit_improvement_guide.pdf)

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6), and *Revisions to the November 22, 2002 Memorandum Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs*<sup>6</sup> (p. 5). The *MS4 Permit Improvement Guide* explains EPA's recommendation as follows:

In order for permit language to be clear, specific, measurable and enforceable, each Permit Requirement will ideally specify: What needs to happen; Who needs to do it; How much they need to do; When they need to get it done; and Where it is to be done.

For each Permit Requirement: 'What' is usually the stormwater control measure or activity required. 'Who' in most cases is implied as the permittee (although in some cases the permitting authority may need to specify who exactly will carry out the requirement if there are co-permittees or the MS4 will rely on another entity to implement one of the minimum control measures). 'How much' is the performance standard the permittee must meet (e.g., how many inspections). 'When' is a specific time (or a set frequency) when the stormwater control measure or activity must be completed. 'Where' indicates the specific location or area (if necessary). These questions will help determine compliance with the permit requirement.

The proposed rule for the Traditional General Permit Approach would obligate the permitting authority to establish requirements that are "clear, specific, and measurable." See proposed 40 CFR 122.34(a). The proposed rule further explains that effluent limitations may be expressed as BMPs that include, but are not limited to, "specific tasks, BMP design requirements, performance requirements or benchmarks, schedules for implementation and maintenance, and frequency of actions." *Id.* Where permits incorporate clear, specific, and measurable requirements, EPA expects there to be greater certainty and understanding as to what must be accomplished during each permit term.

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<sup>6</sup> EPA. November 26, 2014. Memo from Andrew Sawyers, Director, Office of Wastewater Management to EPA Water Management Division Directors in EPA Regions I-X.  
[http://water.epa.gov/polwaste/npdes/stormwater/upload/EPA\\_SW\\_TMDL\\_Memo.pdf](http://water.epa.gov/polwaste/npdes/stormwater/upload/EPA_SW_TMDL_Memo.pdf)

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A foundational principle of MS4 permits is that from permit term to permit term iterative progress will be made towards meeting water quality objectives, and that adjustments in the form of modified permit requirements will be made where necessary to reflect current water quality conditions, BMP effectiveness, and other current relevant information. This principle is incorporated into the proposed Traditional General Permit Approach in the requirement for NPDES authorities to revisit permit requirements during the permit issuance process, and to make any necessary changes in order to ensure that the subsequent permit continues to meet the NPDES requirements “to reduce the discharge of pollutants from the MS4 to the maximum extent practicable (MEP), protect water quality, and to satisfy the water quality requirements of the Clean Water Act.” Thus, in advance of issuing any successive small MS4 general permit, the permitting authority would need to review, among other things, information on the relative progress made by permittees to meet applicable milestones, compliance problems that may have arisen, the effectiveness of the required activities and selected BMPs under the existing permit, and any improvements or degradation in water quality. Sources of this information include, but are not limited to:

- Past annual reports;
- Current SWMP documents;
- NPDES MS4 audit reports, construction/industrial/commercial site inspection reports;
- Monitoring and other information on quality of receiving waters;
- Existing MS4 permit requirements; and
- Approved TMDLs that include wasteload allocations applicable to small MS4s.

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### *1. Current Examples of Clear, Specific, and Measurable Permit Requirements*

As discussed in the previous section, a key component of the proposed Traditional General Permit Approach is that permits be written with sufficient clarity and specificity to enable permittees, the public, and regulatory authorities alike to understand what is required to measure progress. EPA acknowledges that meeting the requirement to include more detailed terms and conditions in small MS4 permits and to ensure, among other things, that the permit terms satisfy the regulatory requirement to reduce pollutant discharges from the MS4 to the MEP (and meet the requirement to protect water quality and meet the appropriate water quality requirements of the CWA) will not be easy for some states. States that have not already written permits in this way would need to evaluate the quality of the existing SWMPs, the track record of each MS4 in implementing their respective SWMPs, the types of BMPs that have proven effective, and information that may suggest what is necessary to address existing water quality conditions, including whether additional requirements are needed to address an applicable TMDL. Among other factors that the state would need to consider when issuing a new, or the next, general permit are how long the MS4 has been permitted, the degree of progress made by the small MS4 permittees as a whole and for individual MS4s as well, the reasons for any lack of progress, and the capability of these MS4s to achieve more focused requirements. EPA finds promise in some of the strategies that EPA and state permitting authorities are already implementing, which will serve as useful models to those permitting authorities needing advice on how to write their permits under the proposed Traditional General Permit Approach. For example, permitting authorities may find that subcategorizing MS4s by experience, size, or other factors, and creating different requirements for each subcategory, may be desirable. Permitting authorities may also

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consider whether watershed-wide general permits may be an option, especially where the receiving waters are impaired.

In addition to the model permit language in the *MS4 Permit Improvement Guide*, EPA recently compiled a number of examples where small MS4 general permits have already included requirements that are clear, specific, and measurable in a document entitled *MS4 General Permits and the Six Minimum Control Measures: A National Compendium of Clear, Specific, and Measurable Requirements*, which can be accessed in the docket for this proposed rule. Additional examples of clear, specific, and measurable permit requirements in MS4 general permits, focusing on post-construction requirements and water quality-based effluent limits, are included in EPA's *Municipal Separate Storm Sewer System Permits: Post-Construction Performance Standards & Water Quality-Based Requirements: A Compendium of Permitting Approaches*<sup>7</sup>. The fact that many permitting authorities have already included provisions that would qualify as clear, specific, and measurable under the proposed rule indicates that making this a requirement for all permits is reasonable and achievable. **EPA requests comment on what additional examples should be highlighted as being clear, specific, and measurable in current small MS4 general permits.**

## *2. Types of Permit Language Lacking Sufficient Detail to Qualify as Clear, Specific, and Measurable*

Just as there are a number of examples to be highlighted where states are already writing their permits consistent with the proposed Traditional General Permit Approach, EPA also found

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<sup>7</sup> EPA. 2014. *Municipal Separate Storm Sewer System Permits: Post-Construction Performance Standards & Water Quality-Based Requirements: A Compendium of Permitting Approaches*. Office of Water. Washington, DC. EPA 833.R.14.003. [http://water.epa.gov/polwaste/npdes/stormwater/upload/sw\\_ms4\\_compendium.pdf](http://water.epa.gov/polwaste/npdes/stormwater/upload/sw_ms4_compendium.pdf)

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permits that lack adequate detail and would not qualify as clear, specific, and measurable under the proposed rule modifications. Permit requirements that do not appear to have the type of detail that would be needed under the proposed rule approach may have some of the following characteristics:

- Permit provisions that simply copy the language of the Phase II regulations verbatim without providing further detail on the level of effort required or that do not include the minimum actions that must be carried out during the permit term. For instance, where a permit includes the language in 40 CFR 122.34(b)(4)(ii)(B) (i.e., requiring “... construction site operators to implement appropriate erosion and sediment control best management practices”) and does not provide further details on the minimum set of accepted practices, the requirement would not provide clear, specific, and measurable requirements within the intended meaning of the proposed Traditional General Permit Approach. The same would also be true if the permit just copies the language from the other minimum control measure provisions in 40 CFR 122.34(b) without further detailing the particular actions and schedules that must be achieved during the permit term.
- Permit requirements that include “caveat” language, such as “if feasible,” “if practicable,” “to the maximum extent practicable,” and “as necessary” or “as appropriate” unless defined. Without defining parameters for such terms (for example, “infeasible” means “not technologically possible or not economically practicable and achievable in light of best industry practices”), this type of language creates uncertainty as to what specific actions the permittee is expected to take, and is therefore difficult to comply with and assess compliance.



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- Permit provisions that preface the requirement with non-mandatory words, such as “should” or “the permittee is encouraged to ... .” This type of permit language makes it difficult to assess compliance since it is ultimately left to the judgment of the permittee as to whether it will comply. EPA notes that the Phase II regulations include “guidance” in places (e.g., 40 CFR 122.34(b)(1)(ii), (b)(2)(ii), and (b)(3)(iv)), which suggest practices for adoption by MS4s and within permits, but does not mandate that they be adopted. This guidance language is intended for permitting authorities to consider in establishing their permit requirements. While permitting authorities may find it helpful to their permittees to include guidance language within their permits in order to provide suggestions to their permittees, such language would not qualify as a permit requirement under the proposed Traditional General Permit Approach.
- Permit requirements that lack a measurable component. For instance, several permits include language implementing the construction minimum control measure that requires inspections “at a frequency determined by the permittee” based on a number of factors. This type of provision includes no minimum frequency that can be used to measure adequacy and, therefore, would not constitute a measurable requirement for the purposes of the proposed rule.
- Permit requires the development of a plan to implement one of the minimum control measures, but does not include details on the minimum contents or requirements for the plan, or the required outcomes, deadlines, and corresponding milestones. For example, some permits require the MS4 to develop a plan to implement the public education minimum control measure, which informs the public about steps they can take to reduce stormwater

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pollution. The requirement leaves all of the decisions on what specific actions will be taken during the permit term to comply with this provision to the MS4 permittee, thus enabling almost any type of activity, no matter how minor or insubstantial, to be considered compliance with the permit. In EPA's view, this type of permit provision would not qualify as a clear, specific, and measurable requirement under the proposed Traditional General Permit Approach.

### *3. Summary/Description of Proposed Rule Changes*

The following is a section-by-section summary of the proposed regulatory changes.

#### **Proposed Changes to 40 CFR 122.33**

The following changes to 40 CFR 122.33 are proposed to complement the changes made to implement the Traditional General Permit Approach option:

- Throughout the section references to “you” or “your” would be replaced with references to “the operator.” This change is proposed for consistency with revisions to 40 CFR 122.34 and 40 CFR 122.35.
- The requirements for obtaining coverage under a general permit would now be the same as those for any other general permit in 40 CFR 122.28(b)(2). The NOI would no longer be required to include information on the MS4's BMPs and measurable goals.
- The requirements for applying for an individual permit would be consolidated in 40 CFR 122.33(b)(2), whereas these requirements now appear in both 40 CFR 122.31 and in 40 CFR 122.34(d).
- The deadline of March 10, 2003 for MS4s wishing to implement a program that differed from 40 CFR 122.34 to submit an individual permit application would be removed since the

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date has passed and is no longer relevant. Similarly, the deadline of March 10, 2003 for MS4s designated for regulation by 40 CFR 122.32(a)(1) would be deleted since the date has passed and is no longer relevant.

### **Proposed Changes to 40 CFR 122.34**

Most of the proposed changes to 40 CFR 122.34 are made to clarify that it is the permitting authority's responsibility, and not that of the small MS4 permittee, to establish permit terms that meet the small MS4 regulatory standard (i.e., "... 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 Clean Water Act."), and to delineate the requirements for implementing the six minimum control measures, other more stringent effluent limitations as necessary, as well as other requirements. The proposed modifications do not alter the existing, substantive requirements of the six minimum control measures in 40 CFR 122.34(b), but instead emphasize the way in which the permitting authority makes the determination as to what requirements are included in small MS4 permits, including general permits. For instance, a typical change in the proposed Traditional General Permit Approach is made in 40 CFR 122.34(b)(3)(ii), which transfers the obligation to address certain categories of non-stormwater discharges from the small MS4 operator (referred to as "you") to the permitting authority by requiring that "the permit must require the permittee to address the following categories of non-storm water discharges." Otherwise, unless specified, there is no change to the language of the existing rule.

### **Proposed changes to 40 CFR 122.34(a)**

The following changes to 40 CFR 122.34(a) are proposed:

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- The proposed regulatory text clarifies that the permitting authority is required to include in any small MS4 permit conditions that ensure pollutant discharges from the MS4 are reduced to the MEP, are protective of water quality, and satisfy the water quality requirements of the CWA. In order to ensure that these permit conditions are of adequate detail and their meaning is clear to all parties, the proposed rule emphasizes that permit requirements must be written in a “clear, specific, and measurable” form. This language is consistent with the recommendation in EPA’s *MS4 Permit Improvement Guide* (2010), which advised permitting authorities to write MS4 permits with permit provisions that are “clear, specific, measurable, and enforceable.” In addition, the proposed regulatory text for the Traditional General Permit Approach emphasizes that the permit requirements must be adequate to collectively meet the regulatory standard, that is: “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 Clean Water Act (CWA).” EPA notes that no changes are proposed to the wording of this regulatory standard.
- The proposed regulatory text reiterates that effluent limitations may be in the form of BMPs, and provides examples of how these BMP requirements may appear in the permit, such as in the form of specific tasks, BMP design requirements, performance requirements or benchmarks, schedules for implementation and maintenance, and the frequency of actions. This list of examples is not intended to be exclusive, and EPA anticipates that permitting authorities will, over time, develop other ways to establish requirements that are consistent with this language. It is EPA’s view that this proposed language serves the same underlying purpose as the provision it modifies in the current regulation (i.e., “... narrative effluent

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limitations requiring implementation of best management practices (BMPs) are generally the most appropriate form of effluent limitations when designed satisfy technology requirements ... and to protect water quality.”)

- The following provision from the existing regulations is proposed to be removed:

“Implementation of best management practices consistent with the provisions of the storm water management program required pursuant to this section and the provisions of the permit required pursuant to §122.33 constitutes compliance with the standard of reducing pollutants to the ‘maximum extent practicable.’” The court in *EDC* found this sentence to be particularly problematic in light of the lack of permitting authority review of NOIs. Based in part on this language, the court observed that “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.” *EDC* at 855. Furthermore, the court found that “under the Phase II Rule, nothing prevents the operator of a small MS4 from misunderstanding or misrepresenting its own stormwater situation and proposing a set of minimum measures for itself that would reduce discharges by far less than the maximum extent practicable.” *Id.* EPA addresses these concerns by removing this language, and instead clarifying, as it does through the other proposed changes to 40 CFR 122.34(a), that it is the permitting authority who is responsible for establishing requirements that constitute compliance with requirement to reduce the discharge of pollutants from the MS4 to the MEP, to protect water quality, and to satisfy the water quality requirements of the CWA.

- The language in the existing regulations providing permittees with up to five years from the date of permit issuance to implement their SWMPs is modified to apply to new permittees,

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recognizing that this 5-year period has passed for existing permittees. Another clarification is included to explain that when a permit is expiring and a new permit is being developed, the permitting authority must ensure that the new permit meets the requirements of 40 CFR 122.34(a) based on current water quality conditions, the record of BMP effectiveness, and other current relevant information. This revision would not change the status quo; it merely recognizes that first-time small MS4 permittees have up to five years to develop and implement their SWMPs, while small MS4s that have already been permitted will have developed and implemented their SWMP when they reapply for permit coverage or submit an NOI under the next small MS4 general permit.

#### **Proposed changes to 40 CFR 122.34(b)**

The following changes are proposed to be made to 40 CFR 122.34(b):

- In the proposed regulatory text, the small MS4 operator is still required to develop a SWMP; however, the stated purpose of the SWMP is clarified to emphasize the fact that it is a tool for describing how the permittee will comply with the permit requirements implementing the six minimum control measures, and does not contain effluent limitations or permit conditions. The effluent limitations and other enforceable conditions would be stated in the permit itself. The proposed regulatory text for the Traditional General Permit Approach would clarify that for general permits, documentation of the measurable goals in the SWMP should include schedules that are consistent with any deadlines already established in the general permit. The purpose of this proposed requirement is to preserve the SWMP as a tool for permittees to describe [in more detail] how the MS4 will implement the BMPs required by the permit and to document updates to the SWMP as needed during the permit term if

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changes are called for to comply with the permit. This language is intended to support the underlying clarification in the proposal that it is in the permit where the enforceable requirements are established, while the role of the SWMP document or other document(s) is to describe in writing how the permittee will comply with these requirements. Under this formulation, a permittee's failure to develop a SWMP document would constitute a violation of the permit, but a permittee's failure to install a specific control measure that is described in the SWMP document would not be a violation of the permit, unless the permit required that this specific control measure be installed as a required BMP. EPA notes that the proposed regulatory text also includes language to clarify that whether or not the SWMP can be found in one document or a series of documents, there should be a written description in some form that explains how the permittee will comply with the permit's minimum control measure requirements. In other words, the "SWMP document" refers to the documentation, whether located in one place or comprised of multiple documents (e.g., ordinances, manuals, documented procedures, and other documentation), that is the written form of the permittee's SWMP. Reference to a "document" in the proposed rule is not intended to create a new documentation requirement.

- Changes in various provisions in 40 CFR 122.34(b)(1) through (6) are proposed to emphasize the permitting authority's role in including requirements that address the minimum control measures as compared to the current regulations, which give this responsibility to the MS4. In most instances, the proposed modifications are merely changing a few words to switch from the first person (i.e., "you") to the third person (i.e., "the MS4"). The proposed

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modifications do not alter the existing, substantive requirements of the six minimum control measures in 40 CFR 122.34(b).

#### **Proposed changes to 40 CFR 122.34(d)**

The following changes are proposed to be made to 40 CFR 122.34(d).

- The proposed regulatory text for the Traditional General Permit Approach would remove existing paragraph (d) from 40 CFR 122.34. The information required to be included in permit applications for individual permits in paragraph (d)(1) would be moved to 40 CFR 122.33(b)(2)(i). This information would no longer be required to be submitted with NOIs. Because EPA and many states have issued menus of BMPs, paragraph (d)(2) is no longer relevant, and under the Traditional General Permit Approach, paragraph (d)(3) would also no longer be needed.
- For general permits, the information required to be included in the NOI would track with the requirements for general permits in 40 CFR 122.28(b)(2)(ii). See discussion on 40 CFR 122.33. There would be no change to the requirement that an MS4 seeking an individual permit must submit an application with its proposed BMPs to implement the six minimum control measures and measurable goals for BMP implementation.

#### **Proposed changes to 40 CFR 122.34 (e) and (f)**

The following changes are proposed to be made to 40 CFR 122.34(e) and (f):

- The proposal would consolidate the current requirements in 40 CFR 122.34(e)(1) and (f) under one section, 40 CFR 122.34(c), entitled “Other applicable requirements.”
- EPA proposes to remove the guidance in the current regulations at §122.34(e)(2). The guidance reflects EPA’s recommendation for the initial round of permit issuance, which has



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already occurred for all permitting authorities. The phrasing of the guidance language no longer represents EPA policy with respect to including additional, more stringent requirements. EPA has found that a number of permitting authorities are already including specific requirements in their small MS4 permits that address not only wasteload allocations in TMDLs, but also other more stringent requirements that are in addition to the six minimum measures irrespective of the status of EPA's 40 CFR 122.37 evaluation. See EPA's *Municipal Separate Storm Sewer System Permits – Post-Construction Performance Standards & Water Quality-Based Requirements: A Compendium of Permitting Approaches* (2014). Based on the advancements made by specific permitting programs, and information that points to stormwater discharges continuing to cause waterbody impairments around the country, EPA has advised in guidance that permitting authorities write MS4 permits with provisions that are “clear, specific, measurable, and enforceable,” incorporating such requirements as clear performance standards, and including measurable goals or quantifiable targets for implementation. See *EPA's MS4 Permit Improvement Guide* (2010). This guidance is a more accurate reflection of the Agency's current views on how the Phase II regulations should be implemented than the guidance currently in 40 CFR 122.34(e)(2).

#### **Proposed renumbering of 40 CFR 122.34(c) and (g)**

The following changes are proposed to be made to 40 CFR 122.34(c) and (g):

- The existing “qualifying local program” provision currently in 40 CFR 122.34(c) would be renumbered as 40 CFR 122.34(e).

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- The “evaluation and assessment” provision currently in 40 CFR 122.34(g) would be renumbered as 40 CFR 122.34(d). Conforming changes would be made to 40 CFR 122.35 to update the cross-references in that section.

#### *B. Option 2 – Procedural Approach*

Another option, called the “Procedural Approach,” for which EPA requests comment would address the remand by incorporating additional permitting authority and public review steps into the existing regulatory framework for providing coverage to small MS4s under general permits. EPA is not proposing specific regulatory text for this option, but has included a detailed description of how the Procedural Approach would work. **In addition to comments on the merits of the option, EPA solicits comments recommending specific regulatory text for this option.**

Under the existing regulation, 40 CFR 122.34(d)(1), MS4s seeking authorization to discharge under a general permit must submit an NOI that identifies the BMPs that the MS4 will implement for each of the six minimum control measures. The NOI must also state the measurable goals for each of the BMPs, including the timing and frequency of their implementation. Under the Procedural Approach, once an MS4 operator submits its NOI requesting coverage under the general permit, an additional step would take place in which the permitting authority would review, and the public would be given an opportunity to comment and request a hearing on, the merits of the MS4’s proposed BMPs and measurable goals for complying with the requirement to reduce discharges to the MEP, to protect water quality, and to satisfy the appropriate water quality requirements of the CWA.

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Under the “Procedural Approach” option, the existing regulatory requirement for the small MS4 to submit an NOI with the BMPS and measurable goals as provided in 40 CFR 122.34(d) and the requirement in 40 CFR 122.34(a) to develop, implement, and enforce a SWMP to meet the six minimum measures and to reduce pollutant discharges to the MEP, to protect water quality, and to satisfy the appropriate water quality requirements of the CWA would be retained. In this option, the NOI would continue to be used in the same way as the court considered the NOI in the *EDC* case. The NOI would continue to serve as the document that describes the BMPs and measurable goals that would be considered to be the enforceable requirements applicable to the permittee, in addition to the terms and conditions of the general permit. While a SWMP would still need to be developed, it would not establish enforceable requirements beyond those identified in the NOI that would have undergone public notice and comment and permitting authority review.

The process would occur in the following sequence: Following the receipt of an NOI for coverage under the general permit, the permitting authority would review the NOI to assess whether the proposed BMPs and measurable goals meet the requirements to reduce pollutants to the MEP, protect water quality, and satisfy the water quality requirements of the CWA. If not, the permitting authority would request supplemental information or revisions as necessary to ensure that the submission satisfies the regulatory requirements. Once satisfied with the submission, the Procedural Approach would require the permitting authority to provide public notice of the NOI and an opportunity to request a hearing on the NOI, in accordance with 40 CFR 124.10 through 124.13. After consideration of comments received and a hearing, if held, the permitting authority would provide notice of its decision to authorize coverage under the

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general permit and with the specific requirements each MS4 must meet, in accordance with 40 CFR 124.15, or as provided by state law for providing notice of a final permit decision in authorized states. Upon completion of this process, the MS4-specific requirements in the NOI, together with the terms and conditions set forth in the general permit, would be incorporated as requirements of the permit for the particular MS4.

Where the state is the permitting authority, it would also provide EPA an opportunity to review the individual NOIs and submit comments or objections to the state regarding the adequacy of the NOI before it is made available for public review, consistent with requirements under 40 CFR 124 for NPDES permit applications and under 40 CFR 123.44 for draft permits. This two-step Procedural Approach is similar to the procedure used to establish “terms of the nutrient management plan” permit requirements proposed by concentrated animal feeding operations (CAFOs) seeking coverage under a general permit under 40 CFR 122.23(h). While Option 2 still relies on the use of a general permit, it follows several of the same process steps as those used for an individual permit.

Some states, including Minnesota and Texas, have used a similar procedural approach as a way to address the problems identified in the *EDC* decision. In Minnesota, for example, the state has developed a detailed form that must be completed by any small MS4 seeking coverage under the Minnesota general permit, which when completed will become in effect its SWMP document (referred to as a “Stormwater Pollution Prevention Plan Document” or “SWPPP Document”). The state then reviews the MS4’s submission and determines whether revisions are needed to meet the requirements of the permit. After any necessary revisions, the state provides public notice of the NOI and SWPPP Document, and makes them available for public review and

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comment, and for any requests to hold a public hearing. After considering public comments, the state then makes a final determination on whether to authorize coverage under the general permit, and, if authorized, the contents of the SWPPP Document (as revised when necessary following public comment) become enforceable under the general permit. The Minnesota approach gives MS4s flexibility by providing a range of options from which an MS4 can choose for its particular circumstances. It also provides the public with the opportunity to review the MS4's proposed choices and the permitting authority's determination of adequacy, and to provide comment and request a hearing. The MS4's proposed program for implementing the six minimum measures goes into effect only after the state has made an affirmative determination that the MS4's program has met the burden of showing that pollutant discharges will be reduced to the MEP, will be protective of water quality, and will satisfy the appropriate water quality goals of the CWA, thus providing the necessary permitting authority review.

Texas also reviews individual MS4 program documents to determine whether they meet the minimum permit and regulatory requirements. In contrast to the more detailed NOI checklist used by Minnesota, Texas uses a relatively short NOI form but requires the MS4 to submit its entire SWMP document for review after the general permit is issued. It does so with the intent to have the SWMP document identify the MS4-specific enforceable requirements, rather than to have this information contained in the NOI. Texas requires the MS4 to provide the public notice of the state's preliminary determination to authorize coverage under the general permit in accordance with the SWMP document and an opportunity to comment on the SWMP document and request a hearing. Comments on the adequacy of the SWMP document and requests for

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public hearings are submitted directly to the state and the state also determines whether there is sufficient interest to hold a public hearing on the SWMP document.

Under the Procedural Approach, EPA would preserve one of the core attributes of the existing regulations, that is the flexibility afforded the MS4 to identify the BMPs that it determines are needed to meet the minimum regulatory requirements to reduce pollutant discharges to the MEP, to protect water quality, and to satisfy the water quality requirements of the CWA in its SWMP. This approach may appeal to states that accept the notion that the MS4 should have the initial opportunity to propose the BMPs that it believes will meet the regulatory requirements, and that each program may differ substantially from MS4 to MS4.

However, the need to undergo a second round of public notice and comment at the state level, in addition to the one provided for the general permit, for approximately 6800 small MS4s, may be seen as a drawback due to the additional workload placed on permitting authorities that do not already follow this approach. The value added by the second comment period is also a consideration. Staff in Minnesota's program reported that while they received over 1500 comments in response to proposing the state-level general permits, only a handful of comments were submitted on the individual MS4 NOI and SWPPP Document submissions during the second public comment period. Staff in Texas' program reported that the state received no comments when it provided public notice on the individual MS4 SWMPs.

Another factor to consider is that under the Procedural Approach some changes to the BMPs and measurable goals identified in the NOI during the term of the permit could constitute a modification to the permit, and would be subject to permit modification procedures applicable to all NPDES permits. See 40 CFR 122.62 and 122.63. For example, if the MS4 decides to

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discontinue implementing a particular BMP that it included in its NOI (and which became an enforceable permit requirement) and to substitute a different BMP, a permit modification would be needed. It is not clear whether states are currently using permit modification procedures to process changes to a MS4's SWMP. One possibility for addressing the need for change would be for the permitting authority to establish in the general permit itself a process for making changes to the SWMP without triggering the permit modification procedures, as long as it identifies what changes could be made and under what circumstances. **EPA seeks comment on whether to provide in the regulations the option for modifying the general permit under the minor modification procedures in 40 CFR 122.63 for “nonsubstantial revisions” to BMPs, as provided for changes to terms of a CAFO's nutrient management plan that are “not substantial” under 40 CFR 122.42(e)(6). EPA also seeks comment on what criteria should apply for distinguishing between when a change to BMPs is “substantial” requiring a full public participation process or “not substantial” that would be subject to public notice but not public comment under a permit modification process similar to the process in 40 CFR 122.42(e)(6).**

Like several other states, Texas requires the MS4s to provide local public notice and the opportunity to provide comments on individual MS4 NOIs (or the SWMP, as in Texas). What stands out in the Texas approach is that, even though the MS4 must provide the necessary notice, public comments are submitted to the state agency, and the state clearly maintains the decision making over the adequacy of the MS4's SWMP to meet permit and regulatory requirements. The state does so by reviewing the SWMP document before it is public noticed and evaluating for itself any public comments on the SWMP document and whether there is sufficient interest to

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require a public hearing. **EPA seeks comment on whether a rule establishing a procedural approach should enable permitting authorities that rely on the MS4 to public notice its NOI to be able to use this approach to satisfy the public notice requirement for the individual NOIs. If allowed, should it be limited to when the State clearly makes the ultimate decisions about what requirements are sufficient to meet the MEP, to protect water quality, and to satisfy the appropriate water quality requirements of CWA?**

The Texas approach appears to differ from the current procedures that apply to NPDES permits outlined in 40 CFR 124 in the level of detail about the various procedural requirements such as who must be notified of the proposed action. In this respect, the Texas program resembles EPA's approach to establishing or changing terms of nutrient management plans under CAFO general permits by modifying selected elements of the public participation requirements that apply to individual permits, for example, by shortening the length of public comment period or the period for requesting a public hearing (see 40 CFR 122.23(h)(1) and 122.42(e)(6)), or by allowing web-based public notice alternatives in addition to those identified in 40 CFR 124.10 (c). If EPA chooses to adopt this option, it would largely rely on the existing requirements in 40 CFR 124 to govern what procedures are necessary to approve the BMPs in the NOI as enforceable provisions of the general permit. However, as discussed, EPA is considering some variations in these 40 CFR 124 procedural requirements similar to those applicable to incorporating terms of the nutrient management plan into CAFO permits.

Based on the experiences of states that use a similar procedural approach, EPA estimates that conducting individualized reviews of NOIs and requiring an additional notice and comment period for the initial authorization and subsequent permit modifications in states that do not



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already provide it would require a significant dedication of staff time, in an amount estimated at 24 hours per MS4. Based on Minnesota's experience, EPA expects the workload to be greatest in the first permit cycle but to decrease by some amount in subsequent cycles as the permitting authority takes advantage of efficiencies gained from having gone through the process before and as the quality of the MS4 submissions improve over time. For states that already use a two-step process, some modest amount of workload increase may be necessary to ensure that all of the process steps are carried out, including additional time needed to process and approve SWMP modifications that change the BMPs in the NOI that have been approved and have become enforceable terms of the permit.

The following regulatory modifications are envisioned if the Procedural Approach is selected for the final rule.

- Include additional language indicating that to the extent that the permitting authority chooses to rely on the MS4 operator to describe in its NOI the BMPs, measurable goals, schedules, and other activities in its SWMP that it plans to implement to reduce pollutant discharges to the MEP, to protect water quality, and to satisfy the appropriate water quality requirements of the CWA, the permitting authority will need to incorporate these as enforceable elements of the permit in accordance with the procedures for public notice, the opportunity to request a hearing, and permitting authority final determination in 40 CFR part 124.
- With respect to determining the appropriate 40 CFR part 124 procedures to follow, one model that EPA could utilize in crafting applicable rule language is the regulatory procedures in 40 CFR 122.23(h) for CAFO general permits. While the CAFO and MS4 programs differ fundamentally from one another in many ways, there are some aspects of the CAFO general

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permit procedures that could be modified in a manner that would make them suitable to small MS4 general permits. Thus, based on some of the key elements of the CAFO general permit procedures in 40 CFR 122.23(h), EPA is considering including the following provisions in revised 40 CFR 122.33(b)(1) as subparagraphs (i) – (iii):

- At a minimum, the operator must include in the NOI the BMPs that it proposes to implement to comply with the permit, the measurable goals for each BMP, the person or persons responsible for implementing the SWMP, and any additional information required in the NOI by the general permit.
- The Director must review the NOI to ensure that it includes adequate information to determine if the proposed BMPs, timelines, and any other actions are adequate to reduce the discharge of pollutants from the MS4 to the maximum extent practicable, to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act. When the Director finds that additional information is necessary to complete the NOI or clarify, modify, or supplement previously submitted material, the Director may request such additional information from the MS4 operator.
- If the Director makes a preliminary determination that the NOI contains the required information and that the proposed BMPs, schedules, and any other actions necessary to reduce the discharge of pollutants from the MS4 to the maximum extent practicable, to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act, the permitting authority must notify the public of its proposal to authorize the MS4 to discharge under the general permit and,

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consistent with 40 CFR 124.10, make available for public review and comment and opportunity for public hearing the NOI, and the specific BMPs, milestones, and schedules from the NOI that the Director proposes to be incorporated into the permit as enforceable requirements. The process for submitting public comments and hearing requests, and the hearing process if a hearing is granted, must follow the procedures applicable to draft permits in 40 CFR 124.11 through 13. The permitting authority must respond to significant comments received during the comment period, as provided in 40 CFR 124.17, and, if necessary revise the proposed BMPs and/or timelines to be included as terms of the permit..

- When the Director authorizes coverage for the MS4 to discharge under the general permit, the specific elements identified in the NOI are incorporated as terms and conditions of the general permit for that MS4. The permitting authority must, consistent with 40 CFR 124.15, notify the MS4 operator and inform the public that coverage has been authorized and of the elements from the NOI that are incorporated as terms and conditions of the general permit applicable to the MS4.
- To accompany these regulatory changes, EPA is also considering specifying what specific information the MS4 will need to provide as part of the NOI in order to obtain coverage under a general permit that will use a procedural approach, such as the approach described above. The MS4 would need to provide the same information as is required for an application for an individual permit under proposed 40 CFR 122.33(b)(2)(ii). This includes general background information as specified in 122.21(f) as well as the information currently required by 40 CFR 122.34(d), and any other information requested

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by the permitting authority.

- If the final rule includes the Procedural Approach or allows for a hybrid approach under Option 3 (the “State Choice Approach”), authorized states would need to revise their approved programs to include the option(s) chosen by the permitting authority and to establish or reference the public notice and comment, hearing request, and other procedures necessary to implement the chosen option(s).

For both the Procedural Approach and State Choice Approach (see Section VI.C below), the Agency chose to describe the regulatory changes that would accompany these options if promulgated as opposed to providing line-by-line rule text changes as it has for the Traditional General Permit Approach. In EPA’s view, presenting the rule language in this way will aid in the public’s review of the three different options as compared to presenting three different sets of line-by-line changes.

**EPA requests comment on whether the Agency should adopt as its final rule option the procedural approach for permitting small MS4s.** EPA has concerns with adopting this approach as the sole rule option since it would require all but a handful of permitting authorities to change their permitting procedures to conform to this new approach. **Due to these concerns, EPA also separately requests comment (see next section) on whether the final rule should give permitting authorities a choice of which approach, either the Traditional General Permit Approach or the Procedural Approach, to adopt for their permitting program, or whether there is support for allowing permitting authorities to use a combination of these two approaches.**

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Among the concerns EPA has with choosing Option 2 for the final rule is the increase in workload for permitting authorities that would be associated with reviewing and approving, and providing for notice and comment, and providing public hearing opportunities, on each individual NOI. For many permitting authorities, the advantage of providing flexibility to MS4s to propose what they believe will meet the applicable regulatory standards will be outweighed by the resource-intensive procedures that this approach requires. In EPA's discussions with state permitting authorities, the Agency heard a number of concerns about their ability to implement new procedures such as these from a staff and resource perspective. Permitting authorities are also concerned about making individual decisions on what set of MS4 actions are sufficient to meet the regulatory requirements without the benefit of established standards to assist them in making these determinations. Concerns were also raised by many MS4 permittees, who emphasized the effects of these procedures on the timeliness of their discharge authorization, and the fear that states will turn to MS4s to conduct more notice and comment procedures on their behalf. EPA notes that there are also those states that are supportive of making the procedural approach a part of the final rule in some way or form.

Beyond the workload concerns raised about this option, EPA observes that the need for flexibility among MS4s to develop and implement individually tailored SWMPs is different than the type of flexibility required for CAFO operators in developing and implementing nutrient management plans. AFO permit operators must consider where several key and interdependent variables must be considered to account for site-specific factors such as type of crop grown, soil type, terrain, choice of method for calculating application rates, in particular with respect to land application requirements. Each MS4 faces unique circumstances, but for the most part, the BMPs

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used to meet minimum control measures are not interdependent in the same way as choices needed to develop land application rates under CAFO regulations. EPA and states have developed menus of different BMPs for the various minimum control measures. As discussed previously, some states have developed detailed manuals for the selection, design, installation, and maintenance of allowable BMPs, which further standardizes the practices to be used for pollutant control at MS4s. Also, the need for small MS4 flexibility may have been greater when the small MS4 program was first established. However, this flexibility may be less critical now that most small MS4s have established programs, and they and the corresponding permitting authorities have gained experience in implementing various BMPs and evaluating the results. Permitting authorities already have the flexibility to issue different general permits or include different general permit terms and conditions for different categories of MS4, such as when there is a new group of MS4s that have not been previously regulated (for example, because a new Census is published creating additional urbanized areas) and a group of existing MS4s that may be on their third or fourth permit. By including specific requirements that only apply to some of the MS4s, they undergo permitting authority review and public comment as part of the process and can be part of the general permit itself. (This would be analogous to EPA's Multi Sector General Permit for Stormwater from Industrial Activity, in which different requirements apply to different sectors in the Appendices to the permit).<sup>8</sup> For truly unique situations or in instances where the MS4 wishes to implement a different program, individual permits are always an alternative. These factors point to the benefit of using the Traditional General Permit Approach as the preferred way to modify the general permitting regulations for small MS4s. Though there

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<sup>8</sup> [http://water.epa.gov/polwaste/npdes/stormwater/upload/msgp2015\\_finalpermit.pdf](http://water.epa.gov/polwaste/npdes/stormwater/upload/msgp2015_finalpermit.pdf)

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would certainly be increases in workload associated with the Traditional General Permit Approach, EPA's permits and a growing number of state general permits are being written in this manner and therefore would not require significant alteration. Additionally, as the list of examples of clear, specific, and measurable provisions in general permits grows, presumably other states should be able to take advantage of these ideas for their own permits, and thereby save on permit development time. Requiring the procedural approach on a national level would impose pressures on state programs that arguably can be handled in the general permit itself, and therefore avoided.

### *C. Option 3 – State Choice Approach*

**EPA requests comments on a third option, which would allow permitting authorities to choose either the Traditional General Permit Approach or the Procedural Approach, or some combination of the two as best suits their needs and circumstances.** For example, a state could choose to use Option 1 for small MS4s that have fully established programs and uniform core requirements, and Option 2 for MS4s that it finds would benefit from the additional flexibility to address unique circumstances, such as some non-traditional MS4s. Alternatively, a state could apply a hybrid of the two approaches within one permit by defining some elements within the general permit, which are deemed to reduce the discharge of pollutants to the MEP, to protect water quality, and to satisfy the water quality requirements of the CWA, and enabling other elements to be established through a separate process that allows for more MS4-specific actions, using the Procedural Approach. An example of such a hybrid approach might be where a state incorporates into its general permit a requirement to implement certain minimum construction BMP requirements, such as implementation of provisions set forth in a separate

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statewide manual, which constitute compliance with the regulatory requirements, but leaves it to the MS4 to propose the BMPs that it will implement to meet the public education and outreach requirements of the permit. The former permit requirements would implement the Traditional General Permit Approach and would require no further permitting authority review and public participation procedures during the process of authorizing individual MS4 discharges; however, for the management practices that the MS4 proposes for its public education and outreach, the permitting authority would need to follow the Procedural Approach for incorporating these standards into the permit as requirements of the permit. The benefit of the State Choice Approach is that the fundamental CWA requirements of permitting authority review and public participation would be met irrespective of whether this occurs as a result of the permit issuance itself or whether these procedures take place in a second step that occurs after permit issuance but before the MS4 is authorized to discharge under the permit. This approach would provide for more options for permit development other than traditional individual or general permits. EPA will continue to encourage greater specificity in establishing clear, specific, and measurable permit terms and conditions in the general permit itself, and expects to provide guidance to assist permitting authorities in accomplishing this objective. Nevertheless, the Agency recognizes that permitting authorities may prefer some flexibility in determining the balance between the efficiencies of a general permit and the desirability of providing maximum flexibility to small MS4s in how they will meet the MEP standard.

The particular balance between specificity and flexibility a state chooses could evolve over time as the program continues to mature. The benefit of this option may be that it is the least disruptive to how state programs operate now and would impose the least burden on state



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permitting authorities, unless a state determines that for its situation (e.g., number and variability among small MS4s, available resources, requirements under state law, etc.) more choices in structuring permits would be desirable. If EPA adopts this option as part of the final rule, the following rule changes would be necessary:

- Adopt the rule changes proposed in this document associated with the Traditional General Permit Approach, as modified pursuant to public comment; and
- Adopt the rule changes described in the discussion under Option 2.

**EPA requests comment on whether the final rule should adopt Option 3, as opposed to selecting either Option 1 or Option 2 in the final rule. EPA is also interested in comments from permitting authorities as to which approach they are likely to choose (i.e., Option 1 or Option 2, or a hybrid) if Option 3 is finalized.**

**EPA also requests comment on whether under Option 3, EPA should consider establishing which permit requirements must be developed using the Traditional General Permit Approach (Option 1), and which may be developed using the Procedural Approach (Option 2).** For instance, EPA is interested in finding out whether there is support for requiring permitting authorities to use Option 1 to develop permit conditions implementing the minimum control measures in 40 CFR 122.34(b), while providing the permitting authority with the choice of whether to use an Option 2 approach to establish any more stringent effluent limitations, such as those based on an approved TMDL. Using this approach, the general permit would define the specific actions, performance requirements, and implementation schedules considered necessary to reduce pollutant discharges to the MEP, to protect water quality, and to satisfy the water quality requirements of the CWA. However, this approach would provide the permitting

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authority the additional flexibility to allow the MS4 to propose in its NOI the specific components of a TMDL implementation plan in order to comply with permit requirements based on applicable wasteload allocation(s). To ensure that the specific actions and timelines of the TMDL plan are properly incorporated as elements of the permit, the permitting authority would then be required to review and approve the small MS4's proposed plan using the process required by the Procedural Approach (Option 2). **Additionally, with respect to this concept of specifying which aspects of the small MS4 regulations must be incorporated into permits using the Option 1 approach, while allowing some permit conditions to be developed using the Option 2 approach, EPA requests comment on which permit requirements should be required to be established using Option 1 and which should be given the flexibility to be established using Option 2.**

## **VII. Incremental Costs of Proposed Rule Options**

The economic analysis estimates the incremental costs of modifying the Phase II MS4 regulations to address the court's remand. EPA assumed that all other costs accrued as a result of the existing small MS4 program, which were accounted for in the economic analysis accompanying the 1999 final Phase II MS4 regulations, remain the same and are not germane to the economic analysis, unless the proposed rule change would affect the baseline program costs. In this respect, EPA focused only on new costs that may be imposed as a result of implementing any of the three options being proposed for comment. It is, therefore, unnecessary to reevaluate the total program costs of the Phase II rule, since those costs were part of the original economic

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analysis conducted for the 1999 Phase II rule (see 64 FR 68722, December 8, 1999). For further information, refer to the Economic Analysis that is included in the proposed rule docket.

The following table summarizes the estimated costs for each of the proposed rule options under consideration.

<b>Proposed Rule Option</b>	<b>Net Present Value</b>	<b>Annualized Cost</b>
1 – Traditional General Permit Approach	\$9,579,921	\$802,477
2 – Procedural Approach	\$8,279,962	\$693,584
3 – State Choice Approach	\$9,189,933	\$769,809

These estimates are all below the threshold level established by statute and various executive orders for determining that a rule has a significant or substantial impact on affected entities. See further discussion in Section VIII of this document.

The Economic Analysis assumes that all costs will be borne by NPDES permitting authorities in the form of increased administrative costs to write more detailed permits for Option 1, or to review and approve and process comments on NOIs submitted for general permit coverage for Option 2. Likewise, Option 3 costs reflect the estimated increase in NPDES permitting authority workload (for both EPA and state permitting authorities), which is a function of an assumed amount of NPDES permitting authorities who will choose to implement Option 1 versus Option 2. EPA does not attribute new costs to regulated small MS4s beyond what they are already subject to under the Phase II regulations. This is because the focus of the proposed rule is on the administrative manner in which general permits are issued and/or

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coverage under those permits is granted. EPA is changing through this rulemaking any of the underlying requirements in the Phase II regulations to which small MS4s are subject.

EPA chose conservative assumptions about impacts on state workloads, meaning that the estimated economic costs of the policy change are most likely lower than what is actually presented. For instance, EPA did not reduce the number of hours necessary for permitting authorities to draft specific permits pursuant to the Option 1 requirements in the second and third permit term despite the fact that the Agency expects that most permitting authorities, after drafting a specific permit to address Option 1 for the first time would spend less time in subsequent rounds reissuing the same permit. Similarly, in its modeling of Option 2, EPA did not reduce the average number of hours to review each NOI in the second and third permit term, even though EPA expects that most NOIs would address any deficiencies after the first review, therefore resulting in less review time needed in subsequent rounds.

EPA considers the cost assumptions in Option 1 to be conservative because as more permitting authorities write general permits to establish requirements consistent with the proposed Option 1, other permitting authorities could use and build on those examples, reducing the amount of time it takes to draft the permit requirements. EPA has issued guidance to permitting authorities on how to write better MS4 permits (EPA 2010 and EPA 2014), and has included additional examples of permit language from existing permits in the docket for this rule. See *General Permits and the Six Minimum Control Measures: A National Compendium of Clear, Specific, and Measurable Requirements*. EPA also anticipates providing further guidance once the rule is promulgated to assist states in implementing the new rule requirements, which should make permit writing more efficient.

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## **VIII. Statutory and Executive Orders Reviews**

Additional information about these statutes and Executive Orders can be found at <http://www2.epa.gov/laws-regulations/laws-and-executive-orders>.

### *A. Executive Order 12866: Regulatory Planning and Review and*

### *Executive Order 13563: Improving Regulation and Regulatory Review*

This action is a significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review. Any changes made in response to OMB recommendations have been documented in the docket for this action. In addition, EPA prepared an analysis of the potential costs associated with this action. This analysis, “Economic Analysis for the Proposed Municipal Separate Storm Sewer System (MS4) General Permit Remand Rule,” is summarized below and is available in the docket.

### *B. Paperwork Reduction Act (PRA)*

This action does not impose any new information collection burden under the PRA. OMB has previously approved the information collection activities contained in the existing regulations and has assigned OMB control number 2040-0004.

### *C. Regulatory Flexibility Act (RFA)*

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. Although small MS4s are regulated under the Phase II regulations, this rule does not propose changes to the underlying requirements to which these entities are subject. Instead, the focus of this rule is on ensuring that the process by which NPDES permitting authorities authorize discharges from small MS4s using general permits. This action will have an impact on state government agencies that administer the Phase II MS4

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permitting program. The impact to states that are NPDES permitting authorities may range from \$6,792,106 to \$11,356,092 annually. Details of this analysis are presented in “Economic Analysis for the Proposed Municipal Separate Storm Sewer System (MS4) General Permit Remand Rule.”

*D. Unfunded Mandates Reform Act (UMRA)*

This action does not contain an unfunded mandate of \$100 million or more as described in UMRA, 2 U.S.C. 1531–1538. This action does not significantly or uniquely affect small governments because this rulemaking only affects the way in which state permitting authorities administer general permit coverage to small MS4s. Nonetheless, EPA consulted with small governments concerning the regulatory requirements that might indirectly affect them, as described in section V.B.

*E. Executive Order 13132: Federalism*

This rule will not have substantial direct effects on the states, the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The rule proposes changes to the way in which NPDES permitting authorities, including authorized state government agencies, provide general permit coverage to small MS4s. The impact to states which are NPDES permitting authorities may range from \$6,792,106 to \$11,356,092 annually, depending upon the rule option that is finalized. Details of this analysis are presented in “Economic Analysis for the Proposed Municipal Separate Storm Sewer System (MS4) General Permit Remand Rule,” which is available in the docket for the proposed rule at <http://www.regulations.gov> under Docket ID No. EPA-HQ-OW-2015-0671.

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Keeping with the spirit of E.O. 13132 and consistent with EPA's policy to promote communications between EPA and state and local governments, EPA met with state and local officials throughout the process of developing the proposed rule and received feedback on how proposed options would affect them. EPA engaged in extensive outreach via conference calls to authorized states and regulated MS4s to gather input on how EPA's current regulations are affecting them, and to enable officials of affected state and local governments to have meaningful and timely input into the development of the options presented in this proposed rule.

*F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments*

This action does not have tribal implications as specified in Executive Order 13175 since it does not have a direct substantial impact on one or more federally recognized tribes. The proposed rule affects the way in which small MS4s are covered under a general permit for stormwater discharges and primarily affects the NPDES permitting authorities. No tribal governments are authorized NPDES permitting authorities. The rule could have an indirect impact on an Indian tribe that is a regulated MS4 in that the NOI required for coverage under a general permit may be changed as a result of the rule (if finalized) or may be subject to closer scrutiny by the permitting authority and more of the requirements could be established as enforceable permit conditions. However, the substance of what an MS4 must do in its SWMP will not change significantly as a result of this rule. Thus, Executive Order 13175 does not apply to this action.

Consistent with the EPA Policy on Consultation and Coordination with Indian Tribes, EPA conducted outreach to tribal officials during the development of this action EPA spoke with tribal members during a conference call with the National Tribal Water Council to gather input

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on how tribal governments are currently affected by MS4 regulations and may be affected by the options in this proposed rule. Based on this outreach and additional, internal analysis, EPA confirmed that this proposed action would have little tribal impact and would be of little interest to tribes.

*G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks*

EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2-202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

*H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use*

This action is not subject to Executive Order 13211, because it does not significantly affect energy supply, distribution or use.

*I. National Technology Transfer and Advancement Act*

This rulemaking does not involve technical standards.

*J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*

EPA determined that the human health or environmental risk addressed by this action will not have potential disproportionately high and adverse human health or environmental effects on minority, low-income or indigenous populations. This action affects the procedures by which



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NPDES permitting authorities provide general permit coverage for small MS4s, to help ensure that small MS4s “reduce the discharge of pollutants to the maximum extent practicable (MEP), to protect water quality and to satisfy the water quality requirements of the Clean Water Act.” It does not change any current human health or environmental risk standards.

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[NPDES] Municipal Separate Storm Sewer System General Permit Remand Rule

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List of Subjects In 40 CFR Part 122:

Environmental protection, storm water, water pollution

Dated:

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Gina McCarthy,

Administrator.

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For the reasons set forth in the preamble, EPA proposes to amend 40 CFR Part 122 as follows:

**PART 122 – EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL  
POLLUTANT DISCHARGE ELIMINATION SYSTEM**

1. The authority citation for Part 122 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

2. Revise § 122.33 to read as follows:

§122.33 Requirements for obtaining permit coverage for regulated small MS4s.

(a) The operator of any regulated small MS4 under § 122.32 must seek coverage under an NPDES permit issued by the applicable NPDES permitting authority. If the small MS4 is located in an NPDES authorized State, Tribe, or Territory, then that State, Tribe, or Territory is the NPDES permitting authority. Otherwise, the NPDES permitting authority is the EPA Regional Office.

(b) The operator of any regulated small MS4 must seek authorization to discharge under a general or individual NPDES permit, as follows:

(1) If seeking coverage under a general permit issued by the Director, the operator must submit a Notice of Intent (NOI) consistent with § 122.28(b)(2). The operator may file its own NOI, or the operator and other municipalities or governmental entities may jointly submit an NOI. If the operator wants to share responsibilities for meeting the minimum measures with other municipalities or governmental entities, the operator must submit an NOI that describes which minimum measures it will implement and identify the entities that will implement the other minimum measures within the area served by the MS4.

(2)(i) If seeking authorization to discharge under an individual permit and wishing to

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implement a program under § 122.34, the operator must submit an application to the appropriate NPDES permitting authority that includes the information required under § 122.21(f) and the following: (A) the best management practices (BMPs) that the operator or another entity proposes to implement for each of the storm water minimum control measures described in § 122.34(b)(1) through (b)(6); (B) the measurable goals for each of the BMPs including, as appropriate, the months and years in which the operator will undertake required actions, including interim milestones and the frequency of the action; (C) the person or persons responsible for implementing or coordinating the storm water management program; (D) an estimate of square mileage served by the small MS4; and (E) any additional information that the NPDES permitting authority requests.

(ii) If seeking authorization to discharge under an individual permit and wishing to implement a program that is different from the program under § 122.34, the operator will need to comply with the permit application requirements in § 122.26. The operator will need to submit both Parts of the application requirements in §§ 122.26 (d)(1) and (2) at least 180 days before the operator proposes to be covered by an individual permit. The operator does not need to submit the information required by §§ 122.26(d)(1)(ii) and (d)(2) regarding its legal authority, unless the operator intends for the permit writer to take such information into account when developing other permit conditions.

(iii) If allowed by the Director, the operator of the regulated small MS4 and another regulated entity may jointly apply under either paragraph (b)(2)(i) or (b)(2)(ii) of this section to be co-permittees under an individual permit.

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(3) If the regulated small MS4 is in the same urbanized area as a medium or large MS4 with an NPDES storm water permit and that other MS4 is willing to have the small MS4 participate in its storm water program, the parties may jointly seek a modification of the other MS4 permit to include the small MS4 as a limited co-permittee. As a limited co-permittee, the operator of the small MS4 will be responsible for compliance with the permit's conditions applicable to its jurisdiction. If the operator of the small MS4 chooses this option it will need to comply with the permit application requirements of § 122.26, rather than the requirements of § 122.33(b)(2)(i). The operator of the small MS4 does not need to comply with the specific application requirements of § 122.26(d)(1)(iii) and (iv) and (d)(2)(iii) (discharge characterization). The operator of the small MS4 may satisfy the requirements in § 122.26 (d)(1)(v) and (d)(2)(iv) (identification of a management program) by referring to the other MS4's storm water management program.

(4) Guidance for paragraph (b)(3): In referencing an MS4's storm water management program, the regulated small MS4 should briefly describe how the existing program will address discharges from the small MS4 or would need to be supplemented in order to adequately address the discharges. The regulated small MS4 should also explain its role in coordinating storm water pollutant control activities in the MS4, and detail the resources available to the MS4 to accomplish the program.

(c) If the regulated small MS4 is designated under § 122.32(a)(2), the operator of the MS4 must apply for coverage under an NPDES permit, or apply for a modification of an existing NPDES permit under paragraph (b)(3) of this section, within 180 days of notice, unless the NPDES permitting authority grants a later date.

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3. Revise § 122.34 to read as follows:

§ 122.34 Minimum permit requirements for regulated small MS4 permits.

(a) General requirement for regulated small MS4 permits. In each permit issued under this section, the Director must include permit conditions that establish in specific, clear, and measurable terms what is required 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 Clean Water Act. For the purposes of this section, effluent limitations may be expressed as requirements to implement best management practices (BMPs) with clear, specific, and measurable requirements, including, but not limited to, specific tasks, BMP design requirements, performance requirements or benchmarks, schedules for implementation and maintenance, and frequency of actions. For permits being issued to a small MS4 for the first time, the Director may specify a time period of up to 5 years from the date of permit issuance for the permittee to fully comply with the conditions of the permit and to implement necessary BMPs. Each successive permit must meet the requirements of this section based on current water quality conditions, record of BMP effectiveness, and other relevant information.

(b) Minimum control measures. The permit must include requirements that ensure the permittee implements, or continues to implement, the minimum control measures in subparagraphs (1) through (6) of this paragraph during the permit term. The permit must also require a written storm water management program document or documents that, at a minimum, describes how the permittee intends to comply with the permit's requirements for each minimum control measure.

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(1) Public education and outreach on storm water impacts. (i) The permit must require implementation of a public education program to distribute educational materials to the community or conduct equivalent outreach activities about the impacts of storm water discharges on water bodies and the steps that the public can take to reduce pollutants in storm water runoff.

(b)(1)(ii) Guidance for permitting authorities and regulated small MS4s: The permittee may use storm water educational materials provided by the State, Tribe, EPA, environmental, public interest or trade organizations, or other MS4s. \* \* \* EPA recommends that the permit require the permittee to tailor the public education program, using a mix of locally appropriate strategies, to target specific audiences and communities. \* \* \* In addition, EPA recommends that the permit should require that some of the materials or outreach programs be directed toward targeted groups of commercial, industrial, and institutional entities likely to have significant storm water impacts. \* \* \* The permit should encourage the permittee to tailor the outreach program to address the viewpoints and concerns of all communities, particularly minority and disadvantaged communities, as well as any special concerns relating to children.

\* \* \* \* \*

(2) Public involvement/participation. (i) The permit must require implementation of a public involvement/ participation program that complies with State, Tribal, and local public notice requirements.

(ii) Guidance for permitting authorities and regulated small MS4s: EPA recommends that the permit include provisions addressing the need for the public to be included in developing, implementing, and reviewing the storm water management program and that the public participation process should make efforts to reach out and engage all economic and ethnic

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groups.\* \* \*

(3) Illicit discharge detection and elimination. (i) The permit must require the development, implementation, and enforcement of a program to detect and eliminate illicit discharges (as defined at § 122.26(b)(2)) into the small MS4. At a minimum, the permit must require the permittee to:

\* \* \* \* \*

(B) To the extent allowable under State, Tribal or local law, effectively prohibit, through ordinance, or other regulatory mechanism, non-storm water discharges into the storm sewer system and implement appropriate enforcement procedures and actions;

\* \* \* \* \*

(ii) The permit must require the permittee to address the following categories of non-storm water discharges or flows (i.e., illicit discharges) only if they are identified as significant contributors of pollutants to the small MS4: \* \* \*

(iii) Guidance for permit writers and regulated small MS4s: EPA recommends that the permit require the plan to detect and address illicit discharges include the following four components: procedures for locating priority areas likely to have illicit discharges; procedures for tracing the source of an illicit discharge; procedures for removing the source of the discharge; and procedures for program evaluation and assessment. EPA recommends that the permit require the permittee to visually screen outfalls during dry weather and conduct field tests of selected pollutants as part of the procedures for locating priority areas.\* \* \*



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(4) Construction site storm water runoff control. (i) The permit must require the permittee to develop, implement, and enforce a program to reduce pollutants in any storm water runoff to the small MS4 from construction activities that result in a land disturbance of greater than or equal to one acre. Reduction of storm water discharges from construction activity disturbing less than one acre must be included in the program if that construction activity is part of a larger common plan of development or sale that would disturb one acre or more. If the NPDES permitting authority waives requirements for storm water discharges associated with small construction activity in accordance with § 122.26(b)(15)(i), the permittee is not required to develop, implement, and/or enforce a program to reduce pollutant discharges from such sites. The permit must require the development and implementation of, at a minimum:

\* \* \* \* \*

(ii) Guidance for permit writers and regulated small MS4s: \* \* \* EPA recommends that the procedures for site plan review include the review of individual pre-construction site plans to ensure consistency with local sediment and erosion control requirements. Procedures for site inspections and enforcement of control measures could include steps to identify priority sites for inspection and enforcement based on the nature of the construction activity, topography, and the characteristics of soils and receiving water quality. EPA also recommends that the permit encourage the permittee to provide appropriate educational and training measures for construction site operators. The permit should also include a requirement for the permittee to require a storm water pollution prevention plan for construction sites within the MS4's jurisdiction that discharge into the system. See §122.44(s) (NPDES permitting authorities' option to incorporate qualifying State, Tribal and local erosion and sediment control programs into

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NPDES permits for storm water discharges from construction sites). \* \* \*

(5) Post-construction storm water management in new development and redevelopment. (i)

The permit must require the development, implementation, and enforcement of a program to address storm water runoff from new development and redevelopment projects that disturb greater than or equal to one acre, including projects less than one acre that are part of a larger common plan of development or sale, that discharge into the small MS4. The permit must ensure that controls are in place that would prevent or minimize water quality impacts. The permit must require the permittee to:

(A) Develop and implement strategies which include a combination of structural and/or non-structural best management practices (BMPs) appropriate for the community;

\* \* \* \* \*

(ii) Guidance for permit writers and regulated small MS4s: \* \* \* EPA recommends that the permit ensure that BMPs chosen: be appropriate for the local community; minimize water quality impacts; and attempt to maintain pre-development runoff conditions. In choosing appropriate BMPs, EPA encourages the permittee to participate in locally-based watershed planning efforts, which attempt to involve a diverse group of stakeholders including interested citizens. When developing a program that is consistent with this measure's intent, EPA recommends that the permit require the permittee to adopt a planning process that identifies the municipality's program goals (e.g., minimize water quality impacts resulting from post-construction runoff from new development and redevelopment), implementation strategies (e.g., adopt a combination of structural and/or non-structural BMPs), operation and maintenance policies and procedures, and enforcement procedures. In developing the program, the permit should also require the permittee

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to assess existing ordinances, policies, programs and studies that address potential impacts of storm water runoff to water quality. In addition to assessing these existing documents and programs, the permit should require the permittee to provide opportunities to the public to participate in the development of the program.\* \* \* EPA recommends that the permit ensure the appropriate implementation of the structural BMPs by considering some or all of the following: pre-construction review of BMP designs; inspections during construction to verify BMPs are built as designed; post-construction inspection and maintenance of BMPs; and penalty provisions for the noncompliance with design, construction or operation and maintenance. Storm water technologies are constantly being improved, and EPA recommends that the permit requirements be responsive to these changes, developments or improvements in control technologies.

(6) Pollution prevention/good housekeeping for municipal operations. (i) The permit must require the development and implementation of an operation and maintenance program that includes a training component and has the ultimate goal of preventing or reducing pollutant runoff from municipal operations. Using training materials that are available from EPA, the State, Tribe, or other organizations, the program must include employee training to prevent and reduce storm water pollution from activities such as park and open space maintenance, fleet and building maintenance, new construction and land disturbances, and storm water system maintenance.

(ii) Guidance for permit writers and regulated small MS4s: EPA recommends that the permit address the following: maintenance activities, maintenance schedules, and long-term inspection procedures for structural and non-structural storm water controls to reduce floatables and other pollutants discharged from the separate storm sewers; controls for reducing or eliminating the

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discharge of pollutants from streets, roads, highways, municipal parking lots, maintenance and storage yards, fleet or maintenance shops with outdoor storage areas, salt/sand storage locations and snow disposal areas operated by the permittee, and waste transfer stations; procedures for properly disposing of waste removed from the separate storm sewers and areas listed above (such as dredge spoil, accumulated sediments, floatables, and other debris); \* \* \*

(c) *Other applicable requirements.* (1) Any more stringent effluent limitations, including permit requirements that modify, or are in addition to, the minimum control measures based on an approved total maximum daily load (TMDL) or equivalent analysis that determines such limitations are needed to protect water quality.

(2) Other applicable NPDES permit requirements, standards and conditions established in the individual or general permit, developed consistent with the provisions of §§ 122.41 through 122.49, as appropriate.

(d) Evaluation and assessment requirements. The permit must require the permittee to:

(1) Evaluation. Evaluate permit compliance, the appropriateness of its identified best management practices, and progress towards achieving identified measurable goals.

NOTE TO PARAGRAPH (d)(1): The NPDES permitting authority may determine monitoring requirements for the permittee in accordance with State/Tribal monitoring plans appropriate to the watershed. \* \* \*

(2) Recordkeeping. Keep records required by the NPDES permit for at least 3 years, and to submit such records to the NPDES permitting authority when specifically asked to do so. The permit must require the permittee to make records, including a written description of the storm

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water management program, available to the public at reasonable times during regular business hours (see §122.7 for confidentiality provision). (The permittee may assess a reasonable charge for copying. The permit may allow the permittee to require a member of the public to provide advance notice.)

(3) Reporting. Unless the permittee is relying on another entity to satisfy its NPDES permit obligations under § 122.35(a), the permit must require the permittee to submit annual reports to the NPDES permitting authority for the first permit term. For subsequent permit terms, the permit must require that permittee to submit reports in year two and four unless the NPDES permitting authority requires more frequent reports. The report must include:

(i) The status of compliance with permit conditions, an assessment of the appropriateness of the permittee's identified best management practices and progress towards achieving its identified measurable goals for each of the minimum control measures;

(ii) \* \* \*

(iii) A summary of the storm water activities the permittee plans to undertake during the next reporting cycle;

(iv) \* \* \*

(v) Notice that the permittee is relying on another governmental entity to satisfy some of the permit obligations (if applicable), consistent with §122.35(a).

Note: This document is a prepublication version, signed by EPA Administrator Gina McCarthy on Thursday, December 17, 2015. We have taken steps to ensure the accuracy of this version, but it is not the official version.

(e) *Qualifying local program.* If an existing qualifying local program requires the permittee to implement one or more of the minimum control measures of paragraph (b) of this section, the NPDES permitting authority may include conditions in the NPDES permit that direct the permittee to follow that qualifying program's requirements rather than the requirements of paragraph (b) of this section. A qualifying local program is a local, State or Tribal municipal stormwater management program that imposes the relevant requirements of paragraph (b) of this section.

4. Amend § 122.35 by revising paragraph (a)(3) in the second and third sentences to to read as follows:

**§122.35 As an operator of a regulated small MS4, may I share the responsibility to implement the minimum control measures with other entities.**

(a) \* \* \*

(3) \* \* \* In the reports you must submit under § 122.34(d)(3), you must also specify that you rely on another entity to satisfy some of your permit obligations. If you are relying on another governmental entity regulated under section 122 to satisfy all of your permit obligations, including your obligation to file periodic reports required by § 122.34(d)(3), you must note that fact in your NOI, but you are not required to file the periodic reports.\* \* \*

\* \* \* \* \*