

# Hot Topics in Clean Water Law Web Seminars

December 7, 2016 | March 8, 2017  
June 7, 2017 | September 13, 2017

2:00 - 3:30 PM Eastern

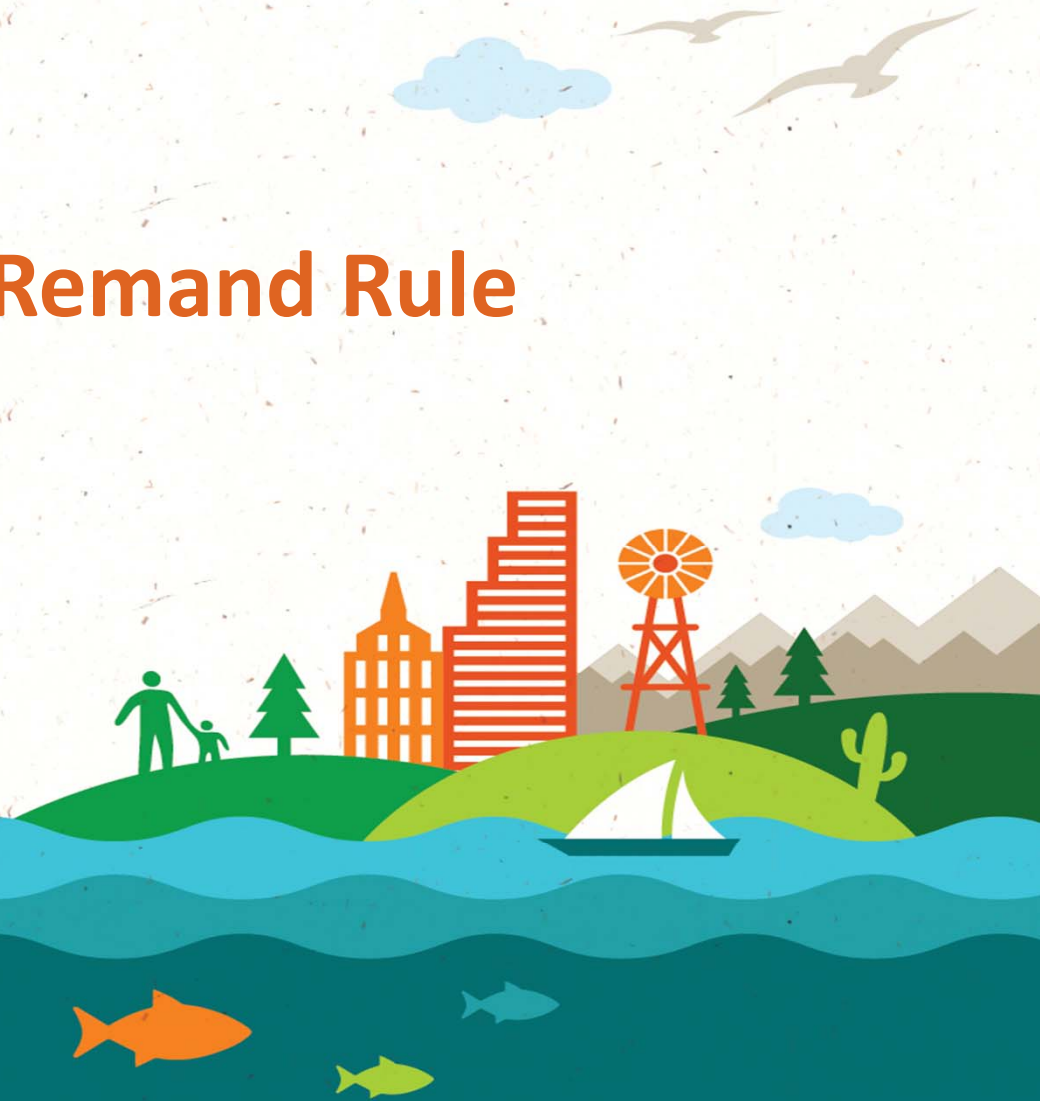


# Final Small Stormwater Remand Rule

More Detailed MS4 General Permits to Come

December 7, 2016

**NACWA**  
A Clear Commitment to America's Waters



# Overview

- I. Background/Legal Drivers
- II. Proposed Rule
- III. Final Rule Overview
- IV. Initial Reflections
- V. Questions



# Background

- Ninth Circuit's 2003 *Environmental Defense Center (EDC) v. EPA* ruling and subsequent 2014 petition
  - EPA rulemaking requiring permitting authorities to review all NOIs submitted by small MS4s and provide opportunity for public review and comment on NOIs
  - Procedural changes relating to public participation & permit authority Review
- Aug 2015 EPA and petitioners sign settlement/schedule for addressing remand

**Proposed Rule: December 17, 2015**  
**Final Rule Due: November 17, 2016**

## Phase II Proposal

- Permitting Authorities can choose between Three Options
  - **Option 1:** Traditional General Permit
    - NPDES authority defines permit requirements that establish actions necessary to meet the MEP standard
    - Doesn't require individual review of NOI's
  - **Option 2:** Procedural Requirements
    - Include requirements for permitting authority review, public notice of NOIs, and provide opportunity for public to request a hearing on individual NOIs
    - NPDES authority required to provide public comment period for each NOI
  - **Option 3:** Hybrid, aka "State's Choice"



# Proposed Rule

Any rule changes should:

1. Be narrow, with procedural focus.
2. Not attempt to define MEP.
3. Consider practical realities facing the Phase II program; increase state resources.
4. Respond to Court's requirements.

# Final Rule Overview (Permitting Authority Choice)

- Option 1, “Comprehensive Permit”:
  - necessary permit terms and conditions for all permittees are in general permit that goes through public notice/comment/hearing
  - NOI is purely a procedural mechanism to document eligibility, accuracy and acceptance of conditions
- Option 2, “Two-Step General Permit”:
  - base general permit + second step to establish necessary permit terms and conditions for individual MS4s
  - NOI reviewed, state proposes additional permit terms and conditions public notice/comment/hearing on the conditions

## Final Rule Overview (Permitting Authority Choice)

- Effective date 30 days after published in Federal Register
- States have one year to make the necessary changes for next permit cycle
- Does not apply to States in the final stages of issuing a new permit (e.g., after the close of the public comment period), or have issued a final permit proximate to effective date



Where is that darn  
FR notice?  
(pre-publication  
version Nov 17)



# Final Rule Overview (Permitting Authority Choice)

- Permits must be written with terms and conditions that are “clear, specific, and measurable”
  - May be expressed as narrative, numeric or other types of requirements
  - Applies to permit terms and conditions for 6 MCMs, evaluation and reporting, and WQ based requirements
- EPA MS4 Permit Compendium of Clear, Specific and Measurable Permitting Examples
  - Part 1: Six Minimum Control Measure Provisions
  - Part 2: Post-Construction Standards
  - Part 3: Water Quality-based Requirements (coming “soon”)

# Compendium Examples

## Part 1: Six Minimum Control Measure Provisions

- Excerpts 23 Small MS4 GPs
- Ex. Post-Construction Runoff:
  - Tennessee: Specific post construction retention standard/volume credits
  - Western Washington: specifies frequency of inspections for stormwater treatment and flow facilities and compliance level of 80% of scheduled inspections
- Ex. IDDE
  - New Mexico: requires screening of entire storm sewer jurisdiction at least once every 5 years and high priority areas at least once every year
- Ex. Public Education
  - Massachusetts: The permit specifies audiences and number of educational messages for public education.



CCS&WCD, Maine  
Youth [YardScaping](#) unit

# Reflections

- Maximum Flexibility for States and discretion on how *specific* they want to be
- Proposal removed “narrative” in 122.43(a) of the regulatory language, final rule reinstates
  - In response to NACWA’s comment that the removal of the narrative text suggested EPA was implicitly moving away from non-numeric or BMP-based effluent limitations for stormwater discharges towards numeric effluent limitations
- Impact on MS4 community difficult to determine until states make changes
- “clear, specific, and measurable”: no matter how it’s interpreted will require many states to make significant changes, thus be an adjustment for those small and nontraditional MS4s
- Permit requirements will be subject to change in successive permit terms as to what constitutes compliance

Questions?

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# **Stormwater and MS4s: Recent Developments**

Samuel Brown

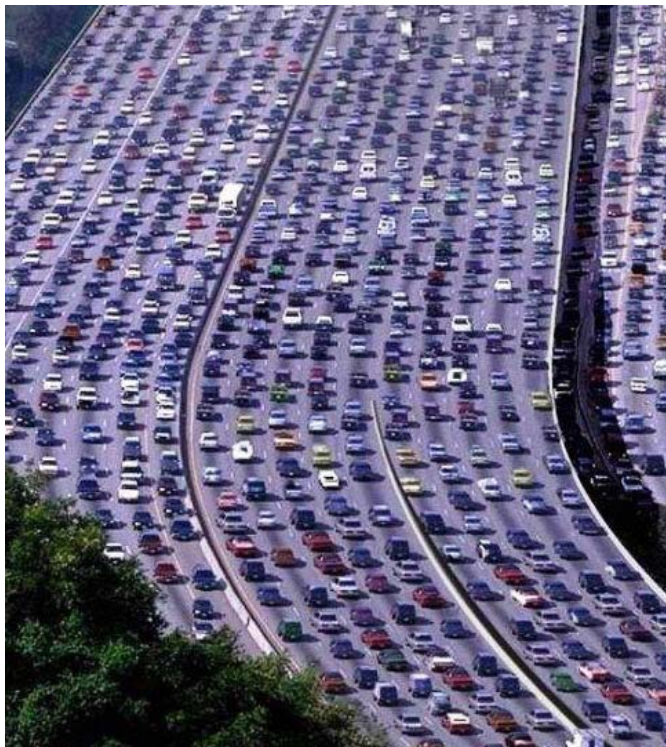
Hunton & Williams, LLP  
San Francisco, CA



## Stormwater and MS4s

- Focus of Webinar:
  - California Supreme Court decision; MS4 permit requirements and unfunded mandates
  - Ninth Circuit decision; eNGO citizen suit and compliance with water quality standards
- Other Relevant Matters:
  - EPA denial of Residual Designation Authority eNGO petitions
  - EPA Phase II MS4 Remand Rule

## All Roads Lead to Los Angeles



## All Roads Lead to Los Angeles

- Los Angeles Phase I MS4 Permit (storm water and non-storm water by the Los Angeles County Flood Control District, the County of Los Angeles, and 84 incorporated cities).
- 2001 Permit (current 2012 Permit)
  - Unfunded Mandates
  - eNGO Citizen Suit

*Department of Finance v. Comm'n on State Mandates*

- Cal. Const., Article XIII B, Section 6(a)
  - Exception for “federal mandate”
- 2001 Permit—trash cans and inspections
- Commission on State Mandates
- Lower Court Decisions
  - Focus on nature of stormwater regulatory program and MEP

*Department of Finance v. Comm'n on State Mandates*

- Cal. Supreme Court Decision (4-3), 378 P.3d 356 (Cal. 2016).
- *Focus*: what is the scope of the “federal requirement”?



*Department of Finance v. Comm'n on State Mandates*

- *Majority:*
  - “It is clear [that] federal law did not compel the regional board to impose these particular requirements. There was no evidence the state was compelled to administer its own permitting system rather than allowing the EPA do so under the CWA.
  - “The EPA’s regulations gave the board discretion to determine which specific controls were necessary to meet that standard ... [and] the state was not compelled by federal law to impose any particular requirement.”

*Department of Finance v. Comm'n on State Mandates*

- *Dissent:*
  - The majority's "[i]nterpretation of the CWA failed to account for the complexities of the statute ... [and the] implementation of the federal mandate requires the state agency — here, the regional board — to exercise technical judgments about the feasibility of alternative permitting conditions necessary to achieve compliance with the federal statute."
  - The dissent strongly objected to the standard that "[u]nless the requirement in question [in the permit] is referenced explicitly in a federal statutory or regulatory provision ... the requirement cannot be a federal mandate."

*Department of Finance v. Comm'n on State Mandates*

- State Rehearing Petition Denied (Nov. 2016)
- Other CA MS4 Permits in the queue at the Commission (broader in scope)
- Permit Provisions Still Effective; Funding?
- Pending NRDC Petition to EPA Region 9
- Future Permitting in California; Defining MEP in Permits?

## Nationwide Relevance?

- Unfunded mandate provisions in other States (e.g., Hawaii and New Jersey)
- “No More Stringent Than” provisions (in at least 28 states)
- *Future Focus: Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1163 (9th Cir. 1999) (MS4s are not required by federal law to strictly comply with water quality standards)

## *NRDC v. LA Cnty. Flood Control Dist.*

- Citizen suit for alleged violations of water quality-based effluent limitations in 2001 Permit
- Liability—Ninth Circuit (x 2) + US Supreme Court
  - Permit required strict compliance with water quality standards; in-stream monitoring detected non-compliance = violation of permit



*NRDC v. LA Cnty. Flood Control Dist.*

- Remand to district court for remedy and penalties
- In the meantime – 2012 Permit
- District court found the 2012 Permit—in particular the WMPs/EWMPs—made the question of remedy moot

## *NRDC v. LA Cnty. Flood Control Dist.*

- Interlocutory Appeal, 840 F.3d 1098 (Oct. 2016)
  - Remedy not moot; “must demonstrate they will be in compliance in the future”
    - Pending state court challenges to 2012 Permit; WMPs/EWMPs (anti-backsliding)
    - Funding and Implementation Questions
- District Court Order v. Permit Requirements

## EPA RDA Denials

- EPA Region 9 Denial (Oct. 2016) (heavy reliance on MS4 permits and WMPs/EWMPs):

Ninth Cir.  
Position on  
MS4  
Compliance  
with WQSs

Cal. Sup. Ct.  
Mandates  
Decision

Ninth Cir.  
Position on  
WMP/EWMP  
in 2012 Permit

- Likely eNGO challenge to denials

## Trump EPA

- Obama EPA—no Nationwide Stormwater Rulemaking; denied RDA petitions (twice); limited Phase II MS4 Remand Rule
- Continued eNGO pushback on EPA, States and MS4s
- Any aggressive regulatory action on stormwater will be at the state-level



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## NACWA Hot Topics in Clean Water Law Webinar

# Dispute Review Boards and Neutrals for Real-Time Construction Dispute Resolution

Neal J. Sweeney, Esq.  
Jones Walker LLC

# Planning for the Worst Hoping for the Best

- Responsible contractors pricing will consider
  - How the contract allocates risk
  - Provisions for the timely and fair resolution of disputes
  - The Owner's track record on disputes
- Price benefits to owners, but always risk of opportunists.
- Equitable risk allocation
  - Pay Less by only paying for risks actually encountered?
  - Or inviting claims?

# Planning for the Worst Hoping for the Best

- Right size procedures to the size of the project
- Partnering
  - It helps, but be realistic about its purpose and limitations.
  - Mainly enhances communication
  - Requires confronting “rocks in the road”
  - No contractual significance! “Trust, but verify.”
- Specific and timed claim procedures --Not just notice!
  - Multiple steps to provide notice, explanation, support, pricing and schedule impact.
  - Deadlines for each step and consequences for not meeting them.
  - Be reasonable in the set-up and application, but cross T’s.
  - Purpose is real-time identification of problems and disputes so they can be addressed, not just a trap, but consequences for ignoring.



# Planning for the Worst Hoping for the Best

- NON- binding on-site intervention just between the parties
  - Escalation meet & confers
  - May be tied to specific steps in claim procedures
- NON- binding on-site intervention – Third Party Help
  - Mediation
  - DRB, Standing Neutral, AIA IDM (Initial Decision Maker)
- External binding processes
  - Arbitration (contractual)
    - Binding or optional? Constitutional/statutory limits?
  - Litigation (default)
  - Administrative Board (contractual/statutory)



# Resolving Disputes: AIA A201(2007)

- Claims referred to Initial Decision Maker (IDM)
- An initial decision is a prerequisite to mediation
- If mediation not demanded initial decision becomes binding
- Mediation a prerequisite to next step – formal dispute resolution
- Parties select arbitration or litigation



# Resolving Disputes: ConsensusDocs

- “Direct Discussion”
    - Two step meet & confer
    - Project, then Senior Management - quickly
  - “Mitigation”: Project Neutral or DRB
  - Mediation: If no “mitigation” procedure
  - Binding Dispute Resolution
    - Select arbitration or litigation
    - No selection >> litigation is default by law\*
- \*Subject to constitutional or statutory limits



# Disputes Review Boards

Enjoying the benefits, But  
Avoiding Potential Pitfalls





## DRB's: Basic Considerations

- “Real time” dispute resolution
- Principals have less control: Dispute is “judged,” but generally non-binding
- Technical expertise vs. disputes resolution skills? Or both?
- Concerns regarding neutrality: Claimant’s forum and “splitting the baby”
- Dispute prevention aspect
- Use with partnering or mediation



## DRB's . . . Used Properly Can,

- Provide an informal and non-adversarial process
- Prevent many disputes that might otherwise develop
- Preserve relationships
- Enhance communication
- Address problems in real-time, while construction continues
- Avoid “end-of-job” claims
- Reduce bids
- Provide useful support and credibility for claim resolution or settlement



## DRB's . . . Key Details

- Read the DRB specs before the bid/proposal
  - This DRB may not be what you thought
  - Major practical and risk considerations
- DRB agreement, procedures and compensation
- DRB member selection process
- Scope of DRB's authority: technical vs. legal Level of formality and procedure
- Direct attorney participation
- Impact of DRB “recommendation”? . . .



## Impact of the DRB's decision?

Consider these issues early

- Typically a “Recommendation”
- Non-binding? Are you sure?
  - OR accidental binding arbitration?
- Admissible in court?
  - Maybe more binding than you thought?
- Is decision binding unless challenged by a deadline?
- Is there any immediate time or money relief?
- If time or money relief, impact of the challenge



## DRB's . . . Do Not Wait!

- DO NOT WAIT FOR A DISPUTE!
- Set up the DRB immediately!
- Select the DRB members immediately!
- Don't be pennywise and pound foolish
- Consider keeping the DRB involved and informed
  - Potentially a tremendous and cost effective dispute prevention and early resolution tool
- Strategic use of DRB



Thank you.

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# Hot Topics In Clean Water Law Web Seminars

## *Upcoming Events*

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Monday, February 6

*9:00 AM*

Legal Affairs Committee Meeting during NACWA's 2017 Winter Conference

Wednesday, March 8

*2:00 - 3:30 PM ET*

March Hot Topics in Clean Water Law Web Seminar





# Give Yourself a Holiday Treat with NACWA's Legal Resources

2016 Stormwater  
Litigation Whitepaper

2016 Wet Weather Consent  
Decree Handbook

