

Fact Sheet

Final Municipal Separate Storm Sewer System (MS4) General Permit Remand Rule

November 17, 2016

EPA Note: This Fact Sheet describes the final Municipal Separate Storm Sewer System (MS4) General Permit Remand Rule, signed by the Administrator, on November 17, 2016.

The pre-publication version of the Federal Register Notice is available at:

<https://www.epa.gov/npdes/stormwater-rules-and-notice#proposed>.

EPA made every attempt to ensure the accuracy of this document; however, in the event of a conflict between this document and the official version of the regulation published in the Federal Register, the Federal Register version controls.

Final MS4 General Permit Remand Rule – Fact Sheet

Overview

The U.S. Environmental Protection Agency (EPA) is changing its regulations governing how small municipal separate storm sewer systems (MS4s) obtain coverage under National Pollutant Discharge Elimination System (NPDES) general permits. This change will promote greater public engagement through clear requirements on the opportunities for public participation in the permitting process. The final MS4 General Permit Remand Rule establishes two alternative approaches an NPDES permitting authority can use to issue and administer small MS4 general permits that address a partial remand of the Phase II stormwater regulations by the U.S. Court of Appeals for the Ninth Circuit. Both approaches ensure that the permitting authority establishes what is necessary for the MS4 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,” referred to as the “MS4 permit standard,” and that the public participation requirements of the Clean Water Act (CWA) are met.

Why Was This Rule Necessary?

The Phase II stormwater 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 (9th Cir. 2003) (*EDC*). The court remanded the Phase II rule’s provisions for small MS4 general permits because they lacked procedures for permitting authority review and public notice and the opportunity to request a hearing on Notices of Intent (NOIs) for authorization to discharge under a general permit.

In reviewing how the Phase II rule provided for general permit coverage for small MS4s, the court found that the way in which NOIs function under the rule was not the same as in other NPDES general permits. Other general permits contain within the body of the general permit the specific effluent limitations and conditions applicable to the class of dischargers for which the permit is available. For those general permits, 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 and in which the operator provides some basic information (*e.g.*, site location, receiving waters) to help determine eligibility. In contrast, the court held that under the Phase II rule, because the NOI submitted by the MS4 contains the information describing what the MS4 will do to reduce pollutants to the “maximum extent practicable” (MEP), the NOI is the “functional equivalent” of an individual permit application. See *EDC*, 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. See *EDC*, 344 F.3d. at 858.

Similarly, the court found that the Phase II rule allows the MS4 to identify the BMPs that it will undertake in its stormwater management program 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.” See *EDC*, 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.” See *EDC*, 344 F.3d. at 858.

What Was Included in the Proposed Rule?

EPA proposed for comment three options to address the regulatory shortcomings found in the remand decision.

1. Option 1 (“Traditional General Permit Approach”)

Under the proposed Traditional General Permit Approach, the permitting authority would establish in any small MS4 general permit the full set of requirements that are deemed necessary to meet the MS4 permit standard (“reduce pollutants to the maximum extent practicable, protect water quality and satisfy the appropriate water quality requirements of the Clean Water Act”), and the administrative record would include an explanation of the rationale for its determination. (This approach contrasts with the original regulations, which appeared to the court to provide the permittee with the ability to establish its own requirements.) Once the permit is issued, and the terms and conditions in the permit are fixed for the term of the permit, neither the storm water management program (SWMP) document nor the submittal of an NOI would represent new permit requirements. Thus, because the permit would contain all of the requirements that would 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, whereby 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 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 procedures contemplated by the Ninth Circuit court in the remand decision. These requirements would be met during the process of issuing the general permit.

2. Option 2 (“Procedural Approach”)

Under the proposed Procedural Approach, the permitting authority would establish applicable permit requirements to meet the MS4 permit standard by going through a second permitting step following the issuance of the general permit (referred to as the “base general permit”), similar to the procedures used to issue individual NPDES permits. Eligible MS4 operators would be required to submit NOIs with the same information that has always been required under the Phase II regulations, that is, a description of the BMPs to be implemented by the MS4 operator during the permit term, and the measurable goals associated with each BMP. Following the receipt of the NOI, the permitting authority would review the NOI to assess whether the proposed BMPs and measurable goals meet the MS4 permit standard. 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 permitting authority would be required to propose incorporating the BMPs and measurable goals in the NOI as permit requirements and to provide public notice of the NOI and an opportunity to submit comments and to request a hearing in accordance with §§ 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 general permit, along with any MS4-specific requirements established during this second process. Upon completion of this process, the MS4

would be required to comply with the requirements set forth in the base general permit and the additional terms and conditions established through the second-step process.

3. Option 3 (“State Choice Approach”)

The proposed rule also requested comment on a State Choice Approach, which would allow permitting authorities to choose either the Traditional General Permit Approach or the Procedural Approach, or some combination of the two as would best suit their needs and circumstances. As described in the proposed rule, the permitting authority could, for example, 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 those encountered by non-traditional MS4s (*e.g.*, state departments of transportation, public universities, military bases). Alternatively, a state could apply a hybrid of the two approaches within one permit by defining some elements within the general permit, which, consistent with the Option 1 approach, are deemed to meet the MS4 permit standard, and establishing additional permit requirements through the Option 2 procedural approach for each MS4 seeking coverage under the general permit. Under a hybrid approach, any requirements established in the general permit that fully articulate what is required to meet the MS4 permit standard would require no further permitting authority review and public notice proceedings; however, any terms and conditions established for individual MS4s based in part on information submitted with the NOI would need to follow the Option 2 approach for incorporating these requirements into the permit as enforceable requirements.

Which Option Did EPA Adopt for the Final Rule?

EPA selected proposed Option 3 (the “State Choice Approach”) for the final rule. The new name for this option (the “Permitting Authority Choice Approach”) better captures the universe of entities that will implement the rule, *i.e.*, EPA Regions and states with approved NPDES programs. Under this approach, the NPDES permitting authority may choose between two alternative means of establishing permit requirements in general permits for small MS4s. Whenever issuing a small MS4 general permit, 40 CFR 122.28(d) as amended by the final rule requires permitting authorities to choose either of these two types of general permits: the “Comprehensive General Permit” or “Two-Step General Permit.” The “Comprehensive General Permit” is essentially the “Traditional General Permit”, or “Option 1”, from the proposed rule. The “Two-Step General Permit” encompasses both the “Procedural Approach”, or “Option 2” and the “hybrid approach” that was described as part of “Option 3” from the proposed rule. The Two-Step General Permit allows the permitting authority to establish some requirements in the general permit and others applicable to individual MS4s through a second proposal and public comment process.

What Requirements Apply to the Use of the General Permit Alternatives Under the Final Rule?

As described, the Permitting Authority Choice Approach requires permitting authorities to choose between two alternative approaches to issue general permits for small MS4s. These two types of general permits are described briefly as follows:

- **Comprehensive General Permit** – For this type of general permit, the permitting authority issues a small MS4 general permit that includes the full set of requirements necessary to meet the MS4 permit standard “to reduce pollutant discharges from the MS4 to the maximum extent practicable (MEP), to protect water quality, and to satisfy the appropriate water quality requirements of the CWA.” The general permit contains all requirements, and no additional requirements are established after permit issuance, as is the case with the “Two-Step General Permit” described below. For this reason, to provide coverage to eligible small MS4s, the

permitting authority can use a traditional general permit NOI as described in § 122.28(b)(2)(ii), and does not need to require additional information from each MS4 operator concerning how they will comply with the permit, for instance the best management practices (BMPs) that will be implemented and the measurable goals for each control measure, as a prerequisite to authorizing the MS4 to discharge under the general permit.

- **Two-Step General Permit (combination of the proposed Procedural and Hybrid Approaches)** – For the Two-Step General Permit, after issuing the base general permit, which includes the requirements that apply to all MS4s covered by the permit, the permitting authority establishes through a second permitting step additional permit terms and conditions for each MS4 seeking authorization to discharge under the general permit. These additional terms and conditions supplement the requirements of the general permit, resulting in a complete permit meeting the MS4 permit standard for each individual MS4 permittee under the general permit. Unlike NOIs submitted under a Comprehensive General Permit, NOIs submitted under a Two-Step General Permit will need to contain whatever additional information is necessary to the permitting authority to develop the additional requirements for each permittee. In the second permitting step, the permitting authority satisfies its obligation to review the NOI for adequacy, determine what additional requirements are needed for the MS4 to meet the MS4 permit standard, and provide public notice and an opportunity for the public to submit comments and to request a hearing. Upon completion of this process, the MS4 permittee is authorized to discharge subject to the terms of the general permit and the additional requirements that apply individually to that MS4.

The final rule requires the permitting authority to indicate which type of general permit it is using for any small MS4 general permit. This statement or explanation may be included in the general permit itself or in the permit fact sheet. EPA notes that the permitting authority may choose to change the permitting approach for subsequent permits.

What Changes Were Made to the Phase II Regulations?

The final rule implements the Permitting Authority Choice option in several different sections of the NPDES regulations. Below is a brief summary of the most significant changes and where they can be found in the final rule:

- **Permitting Authority Choice Approach (§ 122.28(d)):** The final rule adds a new paragraph (d) to § 122.28 that requires the permitting authority to select between two alternative general permits. This section describes both types of general permits (the “Comprehensive General Permit” and the “Two-Step General Permit”) and the minimum requirements associated with each.
- **Changes to the NOI requirements (§ 122.33):** The final rule includes modifications to the requirements for what must be included in NOIs submitted for coverage under small MS4 general permits. The required contents of the NOI vary depending on the type of general permit used. For permitting authorities choosing a Comprehensive General Permit, the final rule enables the permitting authority to reduce the information required in NOIs to the minimum information required for any general permit NOI in § 122.28(b)(2)(ii). See § 122.33(b)(1)(i). For permitting authorities choosing the Two-Step General Permit, the final rule provides the permitting authority with the ability to determine what information it deems necessary to establish individual requirements for MS4 operators that meet the MS4 permit standard. See § 122.33(b)(1)(ii).

- Clarifications to the requirements for small MS4 permits (§ 122.34): Regardless of the permitting approach chosen by the NPDES authority, the terms and conditions of the resulting general permits must adhere to the requirements of § 122.34. The final rule retains modifications from the proposed rule that clarify that it is the permitting authority's responsibility, and not that of the small MS4 permittee, to establish permit terms and conditions that meet the MS4 regulatory standard and to delineate the requirements for implementing the six minimum control measures, other terms and conditions deemed necessary by the permitting authority to protect water quality, as well as any other requirement. The final rule also emphasizes that permit requirements must be expressed in "clear, specific, and measurable" terms, which may include narrative, numeric, or other types of requirements (e.g., implementation of specific tasks or best management practices (BMPs), BMP design requirements, performance requirements, adaptive management requirements, schedules for implementation and maintenance, and frequency of actions). These rule modifications do not alter the existing, substantive requirements of the six minimum control measures in § 122.34(b).

What Information is EPA Providing to Permitting Authorities to Assist in Implementing the Final Rule?

In association with the promulgation of the final rule, EPA is updating the *Compendium of MS4 Permitting Approaches* to assist permitting authorities in establishing permit conditions that are "clear, specific, and measurable" as required by § 122.34(a). The compendium consists of a collection of excerpts from current state- and EPA-issued or draft MS4 general permits that provide examples of "clear, specific, and measurable" language. EPA is dividing the compendium into three parts:

- [*Compendium of MS4 Permitting Approaches – Part 1: Six Minimum Measure Provisions*](#)
- [*Compendium of MS4 Permitting Approaches – Part 2: Post-Construction Standards*](#)
- **Compendium of MS4 Permitting Approaches – Part 3: Water Quality-Related Requirements (will be available in the coming weeks)**

EPA is also preparing to release a fourth compendium, which will highlight examples from non-traditional MS4 permits. This document will also be released in the next several weeks.

In addition, EPA also refers permitting authorities to the [*MS4 Permit Improvement Guide*](#) (EPA, 2010).

Other Resources Available to Permitting Authorities and MS4 Communities

In January 2015, EPA launched the Water Infrastructure and Resiliency Finance Center. The Center's expertise helps communities across the country make informed financing decisions for resilient and sustainable water infrastructure. It provides information on innovative financing practices for water infrastructure and provides technical assistance to communities. The Center is working to encourage the effective use of the Clean Water State Revolving Fund program for financing stormwater and green infrastructure projects and working with communities to establish sustainable financing for stormwater operation and maintenance programs. The Center's work will be accomplished in close collaboration with the EPA supported network of Environmental Finance Centers across the country. For example, Missouri is served by the Environmental Finance Center at Wichita State University. The following websites provide more information about this work.

EPA Water Infrastructure and Resiliency Finance Center (WIRFC)

<https://www.epa.gov/waterfinancecenter>

Environmental Finance Center at Wichita State University <http://www.wichita.edu/thisis/home/?u=efc>

Where Can I Find Additional Information on this Final Rule

For more information, please refer to EPA's website at <https://www.epa.gov/npdes/stormwater-rules-and-notices#proposed> and <https://www.epa.gov/npdes/stormwater-discharges-municipal-sources#resources>. If you have any further questions, please contact Greg Schaner at schaner.greg@epa.gov.