

Today's Program

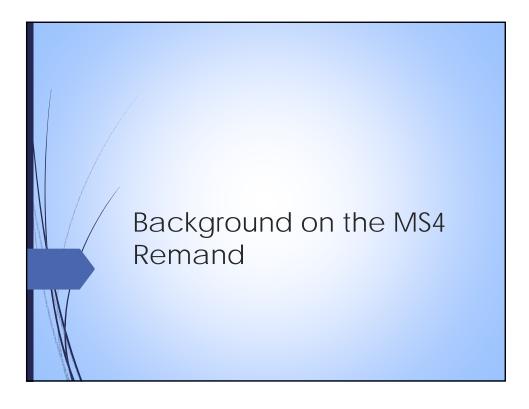
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 - Debora Clovis, Attorney Advisor, EPA
- Perspectives from Select Regulated Communities
 - Dave Herndon, Kentucky Stormwater Association & Hopkinsville Surface and Storm Water Utility, Hopkinsville, KY
 - Dave Cotnoir, P.E., Senior Water Program Manager, Naval Facilities Engineering Command, Mid-Atlantic, Norfolk, VA













MS4 Remand Background

EDC v. EPA decision (Ninth Circuit, 2003)

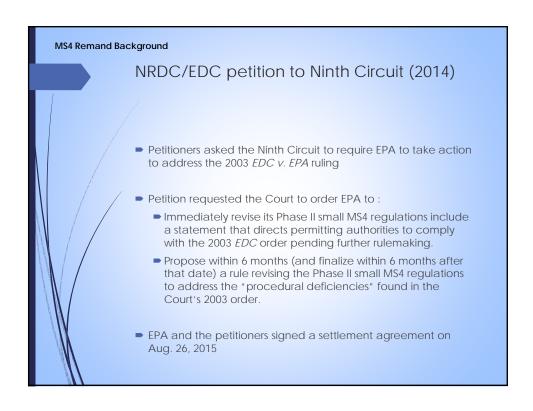
- Focus of the ruling: Ninth Circuit found deficiencies in the Phase II stormwater regulations regarding the procedures to be used for providing coverage to small MS4s under general permits
- The court vacated the relevant portions of the Phase II regulations, and remanded to EPA to fix the deficiencies: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

MS4 Remand Background

EPA Memorandum (2004)

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

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



MS4 Remand Background

Settlement Agreement

- Relating to the MS4 issues on remand, the settlement agreement sets forth a schedule for EPA to follow in promulgating changes to its Phase Il stormwater regulations
- The schedule is as follows:
 - ■By Dec. 17, 2015, EPA shall sign for publication in the Fed. Reg. a notice of proposed rulemaking
 - ■By Nov. 17, 2016, EPA shall sign for publication in the Fed. Reg. a final rule

MS4 Permitting Post-EDC

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

Proposed Options to Address MS4 Remand 81 FR 514 (January 6, 2016)

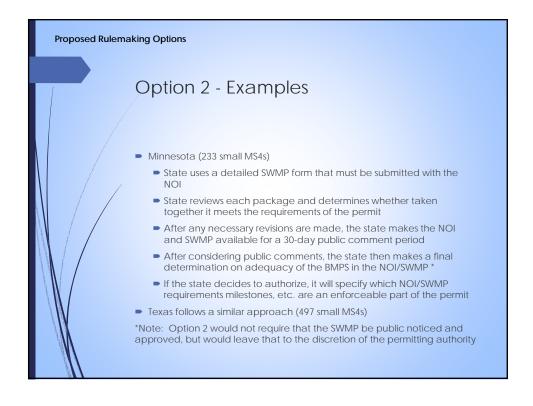
What the proposed rule does and does not address

- The purpose of the proposed rule is to address the regulatory deficiencies identified in the 2003 9th Circuit court decision.
 - Need for permitting authority to establish what constitutes MEP and other enforceable requirements
 - Public opportunity to review and comment on MEP requirements and to request a public hearing
- The purpose is not propose revisions to the substantive requirements applicable to small MS4s, i.e., does not propose changes to the current minimum control measures.
 - ■Entire regulatory text has been republished in the FRN; only those changes discussed in the preamble are open for comment.

Proposed Rulemaking Options Option 1 ("Traditional General Permit Approach") Description: Would clarify that each small MS4 permit (whether individual or general) must include all requirements necessary to meet the standard of "reducing pollutant discharges from the MS4 to the maximum extent practicable, to protect water quality, and to satisfy the appropriate water quality requirements of the CWA" ■ The permittee is still required to submit an NOI and to develop a stormwater management program (SWMP), but ... neither the NOI nor the SWMP would function as an individual permit application since the final general permit has already established the effluent limits that apply to all MS4 dischargers ■ Similarly, the permittee has no ability to establish its own permit requirements or to modify the permit's requirements through the

Option 1 – Permit Examples Docket for the Rulemaking contains a compilation of examples where permits include clear, specific, and measurable provisions In 2014, EPA published permit examples re: to TMDLs and post-construction discharges – see EPA's MS4 compendium (http://www.epa.gov/npdes/pubs/sw ms4 compendium.pdf) Note that MS4s would still have flexibility in developing the specifics of how they would meet the requirements established in the permit

Proposed Rulemaking Options Option 2 ("Procedural Option") Retain the existing general permit framework that requires MS4s to submit NOIs that include specific BMPs that the MS4 proposes to reduce discharges to the MEP Establish a second permitting step to incorporate specific details of the MS4's NOI as enforceable requirements of the general permit Each NOI would be subject to review and approval by the permitting authority – purpose of the review would be to ensure that each MS4's BMPs and measurable goals will meet the regulatory standard During permitting authority review, changes to the NOI can be required in order to ensure the adequacy of the MS4's program, or the MS4 can apply for an individual permit Following initial approval by the permitting authority, each NOI would be subject to public comment and the opportunity to request a public hearing Final decision on approval and the requirements to MEP would be publicly available Approach is similar to the regulatory process required in the NPDES regulations for modifying a permit (40 CFR 124) or for establishing the enforceable requirements of a nutrient management program for CAFOS. Preamble explains in detail what regulatory provisions would be for Option 2



Proposed Rulemaking Options Option 3 ("State Choice") Description: ■ Each permit would be required to establish requirements that reduce the discharges to the MEP, protect water quality, and satisfy the water quality requirements of the CWA - the permitting authority would be able to achieve this exclusively through the permit (Option 1), by adopting a procedural mechanism to approve of individual MS4 programs (Option 2), or by using a hybrid of the two ■ This option enables the permitting authority to choose which option is best suited for them Hybrid approach ■ State could develop one permit using the Option 1 approach, and establish a second permit that relies on the Option 2 ■ A permiting authority could establish some minimum requirements that meet the regulatory standard (Option 1), but then choose to rely on the MS4 to propose BMPs and other requirements and conduct another round of public notice and permit authority review(Option 2)

What is next? To day comment period ends March 21, 2016 Final rule must be signed by November 16, 2016 For further information contact: Debora Clovis (202) 564-0739 (any time) Greg Schaner (202) 564-0721 (after mid – February)



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Perspectives from Select Regulated Communities

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Perspectives on Options for the Small MS4 Permit Remand Rule

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Advantages of Traditional Option

- Consistent with procedures for other NPDES General Permits
- Eliminates uncertainty about permit coverage timelines
- Permit authority must respond to petitions about adequacy of programs/BMPs
- Consistency of requirements for permitted entities
- Clarity of permit requirements
 - Critical to compel implementation and secure funding

