

MS4 General Permit Remand Rule

WEF WEBCAST
DECEMBER 6, 2016

GREG SCHANER, EPA
DEBORA CLOVIS EPA



Greg Schaner

Attorney Advisor
Municipal Branch
Water Permits Division

Webinar Outline

1. Take Home Points
2. Background
3. Proposed Rule
4. Comment Summary
5. Final Rule - Key Elements
6. Permit Requirements
7. Other Rule Issues
8. Q&A

Guide to Key Terms

“Remand”

- Legal term referring in this case to the court ordering EPA to take action to fix a problem in the stormwater regulations found to not comply with the Clean Water Act

“MS4 Permit Standard”

- “... 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”

“Permit terms and conditions”, “Permit requirements”, and “Effluent limitations”

“BMPs”

“Storm Water Management Program Document” (SWMP)

Take Home Points

Take Home Points

Crux of the Final Remand Rule

Allows permitting authorities to choose between 2 alternative general permit types

This is a procedural rule - no changes are made to the substantive federal requirements for small MS4s

All permits must be written with terms and conditions that are “clear, specific, and measurable”

- Which may be expressed as narrative, numeric, or other types of requirements
- Applies to permit terms and conditions established for 6 minimum control measures, evaluation and reporting requirements, and water quality-based requirements
- EPA is publishing examples of different types of provisions from existing permits that are clear, specific, and measurable

Compliance with final rule expected by issuance of next small MS4 general permit, if general permits are used

Background

Background

Phase II Remand (*EDC v. EPA*, 2003)

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."

Background

Ninth Circuit Order

Dec. 2014 – Petitioners (NRDC and EDC) asked the Ninth Circuit to require EPA to take action to address the 2003 *EDC v. EPA* remand

Aug. 2015 – EPA and the petitioners signed a settlement agreement to establish a schedule for addressing the remand

Sept. 14 – Ninth Circuit entered an order granting the joint motion and setting forth the following schedule to promulgate changes to the Phase II stormwater regulations

- By Dec. 17, 2015, EPA shall sign a notice of proposed rulemaking
- By Nov. 17, 2016, EPA shall sign a final rule

Proposed Rule

Proposed Rule

Proposed Rule Options

Option 1 – “Traditional General Permit Approach”

- Includes all requirements necessary to meet MS4 permit standard within the final permit

Option 2 – “Procedural Approach”

- Retains the existing general permit framework where MS4 submits an NOI proposing how it will meet the MS4 permit standard
- If considered adequate by the NPDES authority, establish a second permitting step that incorporates these specific actions as enforceable requirements of the general permit. This step would include public comment on proposed additional permit requirements and opportunity for public hearing.

Option 3 – “State Choice Approach”

- State is given the choice of how to establish permit requirements that meet the regulatory standard – exclusively through use of Option 1 or Option 2, or by using a hybrid of the two

Proposed Rule

Additional Proposed Rule Issues

Proposed clarifications on the types of permit terms and conditions that must be included in small MS4 permits

- “Clear, specific, and measurable” requirements
- BMP-based requirements
- Successive permits need to independently meet the MS4 permit standard

Requested feedback on specific issues, including:

- When permit modifications might be necessary
- Whether to enable permitting authorities to require MS4s to publish public notices under Option 2
- Whether permitting authorities should be given the choice of using either Option 1 or Option 2, or some combination of the two options
- Whether under Option 3, the final rule should dictate which types of permit provisions are established in the general permit and which are developed using a procedural approach

Comment Summary

Comment Summary

Preferred Rule Option

Most commenters favored proposed Option 3 (“State Choice Approach”)

- Supporters emphasized the benefits of flexibility and how it would minimize disruption
- Significant support for state adoption of either proposed Option 1 or Option 2, but, most advised against adopting either as the sole option under the final rule

Several commenters advocated that EPA adopt a specific hybrid approach

- Require use of proposed Option 1 for provisions implementing the 6 minimum control measures
- Require use of proposed Option 2 procedures to establish water quality-based requirements, especially related to TMDLs

Comment Summary

Other Significant Comments

Requirement for “clear, specific, and measurable” permit terms

- Concerns about proposed rule text changes, especially related to use of narrative requirements
- Support for this requirement emphasized importance of clarity and certainty in permit
- Others suggested changes, such as adding the term “enforcement” or using instead “focused, flexible, and effective”

Concerns/questions about proposed Option 2

- Confusion over the role of the NOI and the SWMP
- Concerns about creating the need for more permit modifications
- Different views on whether MS4s can be required to carry out public notice procedures

Timeframe for states to implement the final rule

Final Rule - Key Elements

Final Rule - Key Elements

Final Rule: Permitting Authority Choice

The final rule adopts Option 3 – referred to as the “Permitting Authority Choice Approach”

Under the final rule, the permitting authority determines what type of general permit to use for its small MS4s

- **Comprehensive** general permit – Sec. 122.28(d)(1)—all necessary permit terms and conditions are established up front in the general permit itself, using one permit issuance procedure
- **Two-step** general permit – Sec. 122.28(d)(2)- necessary permit terms and conditions are established in two steps, using two issuance procedures.

Permitting authority is free to choose whichever type of permit works best for its needs, and can change approaches in subsequent permit terms

Permitting authority required to indicate which general permit type it uses for any particular permit – this statement may be included in the permit itself or the fact sheet

Final Rule - Key Elements

Commonalities Among Two Permit Types

Permit content

- The permitting authority is responsible for determining what is needed to meet the statutory and regulatory standard
- Terms and conditions need to meet the MS4 permit standard: “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 CWA”
- Terms and conditions must be expressed in terms that are “clear, specific, and measurable”
 - Permit requirements may be in the form of narrative, numeric, or other types of requirements
 - Applies to all types of permit conditions required for small MS4 permits – addressing minimum control measures, any water quality-based requirements, and evaluation, recordkeeping, and reporting requirements

Final Rule - Key Elements

Commonalities Among Two Permit Types

Permit content (cont'd)

- Permit requirements must be re-evaluated for each subsequent permit term to ensure they are adequate to meet the MS4 permit standard (§ 122.34(a)(2))
 - Permitting authorities should not simply reissue the same permit term after term without considering whether more progress can or should be made to meet water quality objectives
 - To make this determination, permitting authority will need to evaluate available information on the relative progress made by permittees to meet any applicable milestones under the expiring permit, 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

Final Rule - Key Elements

Commonalities Among Two Permit Types

Permit content (cont'd)

- Regardless of the type of general permit used under the final rule, the permitting authority must provide the basis for the determination that the final permit conditions meet the MS4 permit standard
 - Comprehensive General Permit – basis for permit requirements provided in the permit Fact Sheet
 - Two-Step General Permit – supporting rationale must be provided for the proposed additional, MS4-specific requirements

Final Rule - Key Elements

Commonalities Among Two Permit Types

Permitting procedures - CWA procedures for issuing NPDES permits must be followed for all terms and conditions that are needed to implement the MS4 permit standard and other NPDES requirements

- Public notice of proposed terms and conditions of the permit
- Opportunity to comment
- Opportunity to request a public hearing
- Permitting authority review and final determination on permit coverage and applicable terms and conditions
- EPA oversight

Final Rule - Key Elements

Comprehensive General Permit

Basic approach: All terms and conditions needed to meet the MS4 permit standard must be established within the final general permit

- No additional permit terms are established during the authorization process

Permitting process: same as for other traditional general permits

Other Key Attributes:

- Notice of Intent (NOI) – no more than the simple general permit NOI is necessary (e.g., owner/operator name, MS4 address, receiving stream, etc.), although permitting authority can request additional information
- SWMP – each MS4 required to develop SWMP under their permit, but the document contains no enforceable permit terms or conditions; can be changed without necessarily requiring a permit modification

Final Rule - Key Elements

Two-Step General Permit

Basic approach: after issuing the base general permit, the permitting authority carries out a second permitting process for each MS4 in order to establish additional permit requirements necessary to meet the MS4 permit standard

Permitting process:

- Step 1 – Issue the base general permit
- Step 2 – Propose for comment and then finalize additional permit requirements that apply to individual MS4s covered under the general permit

Final Rule - Key Elements

Two-Step General Permit

Other Key Attributes:

- Notice of Intent (NOI) – in addition to the basic required information for all general permit NOIs, the NOI requires each MS4 to submit information to enable the permitting authority to establish clear, specific, and measurable requirements that meet the MS4 permit standard
 - EPA regulations no longer specifies what information is necessary, but rather leaves up to the permitting authority to determine
- SWMP – each MS4 required to develop SWMP under their permit; the specific details of the SWMP are not themselves enforceable, unless they are specifically incorporated into the permit and subject to public notice, comment, and the opportunity for a public hearing during “Step 2”
- Hybrid approach – the permitting authority may choose which requirements to establish in the general permit (in Step 1), and which to establish under the Step 2 process

Final Rule - Key Elements

Step 2 of the Two-Step General Permit

The final rule requires the following steps be taken to establish MS4-specific requirements to meet the MS4 permit standard

1. Permitting authority review of the individual MS4's NOI – determine if information is complete and develop proposed, additional requirements necessary to meet the MS4 permit standard
2. Permitting authority makes a preliminary determination to authorize the MS4 and provides the public with notice, an opportunity to comment, and an opportunity to request a hearing on its determination and the proposed additional requirements
 - Public notice must include the proposed additional requirements, the basis for these requirements, the NOI and any other information submitted by the MS4, and
 - Public notice must be carried out consistent with 40 CFR 124 procedures, including providing a minimum of 30 days for public comment
 - Public notice can be provided in any means that is consistent with state law

Final Rule - Key Elements

Step 2 of the Two-Step General Permit (cont'd)

3. Upon completion of # 2, and consideration of public comments received, the permitting authority may authorize the MS4 subject to the terms of the base general permit and the final additional requirements
 - The additional requirements then become enforceable terms under the permit

Debora Clovis



Attorney-Advisor
Water Permits Division
Municipal Branch

Permit Requirements

Permit Requirements

Proposed vs. Final Rule Language

Proposed Rule

“... 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.

Final Rule

§ 122.34(a): “Terms and conditions that satisfy the requirements of this section **must be expressed in clear, specific, and measurable terms**. Such terms and conditions **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).”

Permit Requirements

Clear, Specific and Measurable

Clear

Requirements are expressed in a manner that establishes certainty as to what specific actions the permittee is expected to take

Avoid permit requirements with caveat language, such as “if feasible”, “if practicable”, “to the maximum extent practicable”, and “as necessary”

Use mandatory words such as “must”, and avoid non-mandatory words such as “should” or “the permittee is encouraged to ...”

Permit Requirements

Clear, Specific and Measurable (cont'd)

Specific

Specific means that the permit provides a level of detail in requirements that portrays the level of effort needed to comply with the MS4 permit standard

Permitting authority has discretion as to the level of specificity in the permit

- Verbatim adoption of minimum control measure requirements would not be considered specific
- Specificity may change in subsequent permits

Increased specificity does not necessarily mean that the permit is more stringent

- A permit can be specific and still leave flexibility for the MS4 to determine exactly how it will fulfill permit requirements
- Example: the permit could specify the target audiences, types and frequency of activities and how compliance will be evaluated to meet the public education minimum measure, but leave to the MS4 decisions about medium used, specific dates for various required activities and exact content of the message, etc.

Level of desired flexibility or specificity is open for comment

Permit Requirements

Clear, Specific and Measurable (cont'd)

Measurable

Measurable means that permit requirement has been articulated in a way that compliance with it can be assessed in a straightforward manner

Typically, an objective parameter is needed to define the necessary level of effort, result expected, performance standard, or similar measurement – but does not mean that the requirement needs to be expressed as a numeric effluent limit

- Conduct inspections of active construction sites once per week until final stabilization is met
- Clean 25 % of the catch basins in your service area every year
- The first 1 inch of precipitation must be retained on site

To help assess compliance, the permit should also contain a way to track whether the measurable requirement has been met (e.g., monitoring, inspections, reporting)

Permit Requirements

Types of Permit Terms and Conditions

Permit terms and conditions can be **narrative**, **numeric**, or **other** type of requirement

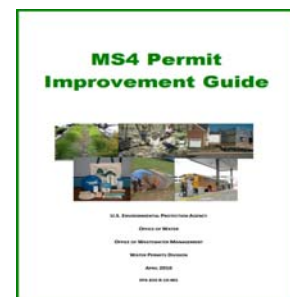
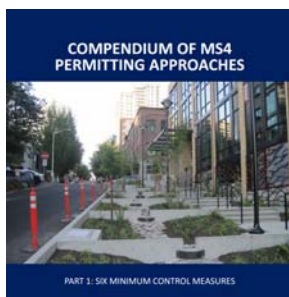
Non-exclusive list of ways to express permit terms and conditions

- Implementation of specific BMPs
- Design requirements,
- Performance requirements
- Implementation schedules
- Frequency of actions

Permit terms and conditions means enforceable requirements under the permit, i.e., effluent limitations as broadly defined

Permit Requirements

EPA Guidance on Permit Requirements



<https://www.epa.gov/npdes/municipal-sources-resources>

Other Rule Issues

Other Rule Issues

Enforceable Permit Conditions

Permitting authority discretion as to what particulars will be enforceable and what is left to the discretion of the permittee

Permit terms and conditions define what is necessary to meet the MS4 permit standard and constitute enforceable requirements under the CWA

A SWMP document describes how the MS4 will comply with the permit's requirements – these implementation details are not directly enforceable unless the permitting authority specifically incorporates them into the permit

Changing terms and conditions requires a permit modification

Changing the details of SWMP implementation can be done through less formal means as determined by the permitting authority, e.g., the iterative approach, as long as changes occur within the boundaries of permit terms and conditions.

Other Rule Issues

Federal Requirements

EPA makes the following clarifications in response to comments:

- Phase II regulations specify the elements that must be addressed in any small MS4 permit (e.g., minimum control measures, reporting requirements, water quality-based requirements)
- The minimum control measures are not intended as minimum permit requirements, but rather areas of municipal stormwater management that must be addressed in permits through terms and conditions that are determined adequate to meet the MS4 permit standard
- Permit requirements will be subject to change in successive permit terms as what constitutes compliance with the MS4 permit standard evolves
 - If more specific permit terms are added in subsequent permits, this does not necessarily mean that the permit is more stringent than what is required in the federal regulations
 - Similarly, a permit that adopts the minimum control measure language word-for-word with no further enforceable permit terms and conditions would not meet the requirement to establish clear, specific, and measurable requirements that ensure permittees meet the MS4 permit standard

Other Rule Issues

Implementation

Effective date of the rule: 30 days after the final rule is published in the Federal Register

When State permits must comply with new requirements: as a general rule, with the next draft permit

Under existing NPDES regulations, if a State cannot issue permits that comply with the rule without first changing its regulations, the State has up to a year to change the regulations; up to two years if a statutory change is needed

Q & A

For further information contact:

Greg Schaner
(202) 564-0721 or schaner.greg@epa.gov

Debora Clovis
(202) 564-0739 Or clovis.Debora@epa.gov