

Stormwater Updates

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Overview

- ▶ Remand Rule
- ▶ EPA CGP Reissuance
- ▶ EPA MSGP Lawsuit
- ▶ Developing Issue: NPDES Authority for MS4 Permits

MS4 Remand Rule



MS4 Remand Background

- ▶ *EDC v. EPA* decision (Ninth Circuit, 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
 2. Lack of public participation in permit process
- ▶ EPA Memorandum (2004) - Provided recommendations to permitting authorities for how to administer their general permits in light of the *EDC v. EPA* ruling
- ▶ NRDC/EDC petition to Ninth Circuit (2014) - Petitioners asked the Ninth Circuit to require EPA to take action to address the 2003 *EDC v. EPA* ruling

Settlement Agreement/Court Order

- ▶ On Aug. 26, EPA and Petitioners (EDC and NRDC) filed a joint motion with the Ninth Circuit requesting the court to enter an order incorporating the terms of the settlement agreement
- ▶ Relating to the MS4 issues on remand, the court order sets forth a schedule for EPA to follow in promulgating changes to its Phase II stormwater regulations:
 - ▶ 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

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Potential Rule Options to Address MS4 Remand

Option 1 (“Traditional General Permit Approach”)

- ▶ 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 can 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 NOI or SWMP

Option 2 (“Procedural Option”)

- ▶ Retain the existing general permit framework that requires MS4s to submit NOIs that include specific BMPs that the MS4 proposes will reduce discharges to the MEP
- ▶ Establish a second permitting step to incorporate specific details of the MS4’s SWMP 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 SWMP 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
- ▶ Approach is not unlike the regulatory process required in the NPDES regulations for modifying a permit (40 CFR 124)

Option 3 (“State Choice”)

- ▶ 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 could 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 would enable 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 approach
 - ▶ A permit could establish some minimum requirements that meet the regulatory standard (Option 1), but then choose to rely on the MS4 to propose some MEP-type requirements, which would then be subject to review/approval and public comment (Option 2)

Next Steps

Final Rule Signature by 11/16/16

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Other Updates

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EPA's Construction General Permit

- ▶ EPA is preparing to reissue the Nationwide Construction General Permit (CGP)
- ▶ EPA's current CGP became effective on February 16, 2012, and will expire on February 16, 2017. Once finalized, the draft CGP will replace the 2012 CGP.
- ▶ The draft permit had a 45-day public comment period which ended on May 26, 2016.
- ▶ The permit can be found at:
https://www.epa.gov/sites/production/files/201604/documents/proposed_2017_cgp_and_appendices_final.pdf

EPA's CGP - Proposed Permit Changes

- ▶ Joint operator liability for maintaining shared controls
- ▶ Prohibiting discharges of building washdown waters containing PCBs
- ▶ Adding EPA contact information to the notice of permit coverage so the public can easily report observed stormwater pollution
- ▶ Adding requirement to implement controls to minimize the exposure of PCBs during demolition
- ▶ Requiring cover or stabilization of inactive soil stockpiles that will be unused for 14 or more days
- ▶ Requiring lids for construction and domestic waste containers
- ▶ New NOI questions added (Appendix J)

EPA MSGP Lawsuit Settlement

- ▶ In 2015, the Waterkeeper Alliance sued EPA over the EPA Multi-Sector General Permit (MSGP) for Industrial Activities
- ▶ EPA entered into a settlement agreement that has significant ramifications for the future of industrial stormwater across the United States
- ▶ The settlement establishes and funds a study on sector-specific benchmark monitoring

MSGP Lawsuit Settlement

- ▶ The settlement requires the EPA to:
 - ▶ Fund a study by the National Resource Council (NRC) to evaluate and provide recommendations on benchmark monitoring requirements
 - ▶ Establish tiered responses to benchmark exceedances
 - ▶ Ban the issuance of MSGPs to facilities with coal-tar based sealants
 - ▶ Update the sector-specific fact sheets that govern Best Available Technology (BAT) and Best Conventional Pollution Control Technology (BCT)
 - ▶ Prevent recontamination of Superfund Sites

Developing Issue: Lawsuits and Legislative Restrictions on NPDES Authority for MS4 Permits

- ▶ Recent legislative proposals to forbid MS4 permit conditions that are more stringent than the minimum necessary to meet federal requirements
- ▶ Have included savings clauses that Permit could include requirements to extent necessary to comply with federal law
- ▶ Federal law requires maximum extent practicable (MEP) controls - permit writer retains discretion under these laws to make MEP determination
- ▶ Legal effect of these laws is nil
- ▶ Political effect/intimidation factor is significant

