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2016 MS4 Remand Rule Update

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Background

- MS4s - Municipal Separate Storm Sewer Systems
 - Issued a NPDES Permit for stormwater discharges
- MS4 Phase I
 - 1990 - Phase I regulation requires localities with populations of 100,000 or more to obtain NPDES permit
 - Approximately 750 Phase I MS4s
 - Generally covered by individual permits
- MS4 Phase II
 - 1999 - requires regulated small MS4s (< 100,000 population) in urbanized areas and those designated by the permitting authority, to obtain permit coverage
 - There are approximately 6,700 Phase II MS4s
 - Generally, Phase II MS4s covered by general permits
 - Must develop program that addresses six “minimum measures” and is designed to reduce the discharge of pollutants from the MS4 “to the maximum extent practicable (MEP)”

2003 EDC v. EPA decision (Ninth Circuit, 2003)

- Ruling - 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 portions of the Phase II regulations, and remanded to EPA to fix the deficiencies:
- 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.”
- 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

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
- Petition requested the Court to order EPA to :
 - Immediately revise its Phase II small MS4 regulations include a statement that directs permitting authorities to comply with the 2003 *EDC* order pending further rulemaking
 - Propose within 6 months (and finalize within 6 months after that date) a rule revising the Phase II small MS4 regulations to address the “procedural deficiencies” found in the Court’s 2003 order

Settlement Agreement

- EPA and the petitioners signed a settlement agreement on Aug. 26, 2015
- The settlement agreement established a schedule for EPA to meet in order to promulgate changes to the current Phase II stormwater regulations
 - Dec. 17, 2015 - EPA shall publish a notice of proposed rulemaking in the Federal Register
 - Nov. 17, 2016 - EPA shall publish the final rule

MS4 Phase II Remand Rule

- Givens
 - New public engagement processes will occur
 - Increased regulatory oversight by permitting authorities
 - typically states, but also EPA in jurisdictions w/ out designated authority

3 Options for Phase II Remand Rule

- Option 1: Traditional General Permit Approach
 - Permitting Authority identifies the BMPs that will be implemented for the six minimum control measures within the General Permit;
- Option 2: Procedural Approach
 - Permittee identifies the BMPs that will be implemented for each of the six minimum control measures within the NOI/SWMP or other, similar document; and
- Option 3: State Choice Approach
 - Permitting authority chooses either Option 1 or Option 2, or some combination of the two as best suits their needs and circumstances.

WEF Comments re Phase II Remand Rule

- The permitting authorities must be provided maximum flexibility to regulate their MS4 stormwater programs in a manner that accommodates their local, regional, and/or statewide needs and approaches
- EPA should adopt the State Choice Approach (Option 3)
- EPA should work with a broad stakeholder group in developing draft regulatory text for all three Options that may be used by the permitting authority in order to meet the public notice requirements. The regulatory text should be limited to that which is necessary to specifically respond to the remand.
- WEF respectfully requests the rule preamble be revised to include any potential cost increases to MS4s that would be subject to increased permit fees.

WEF Comments re Phase II Remand Rule

- The permitting authorities should conduct the public notice, comment, and hearing process, not individual MS4 permittees.
- WEF requests clarification on the Notice of Intent (NOI) public review and announcement of permit authority decision to authorize coverage
- EPA should work with a broad stakeholder group in developing criteria for distinguishing when a change to BMPs is “substantial” or “not substantial”
- WEF supports EPA’s position not to provide definition to “Maximum Extent Practicable”
- Noted typos should be corrected in order to reduce confusion and provide regulatory clarity

Next Steps

- Later this week – Nov. 17th – the final MS4 Phase II Remand Rule will be published.
- WEF staff and volunteer team will be reviewing the Rule to determine:
 - what changes have been made
 - where we successfully influenced changes and
 - Attempt to identify what new tools might be needed by the regulated sector

Next Steps

- WEF is planning to host a webcast to discuss the Remand Rule
- EPA has indicated their potential willingness to participate. Awaiting confirmation...
- All information presented is based on current information available and assumes no changes to EPA's current approach



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