Regulatory Update

ODEQ MS4 Advisory Committee Presentation
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Overview

MS4 General Permits:
- Current EPA Advice to NPDES Permitting Authorities
- Pending Proposal re: “MS4 Remand”
- NPDES Electronic Reporting Rule
Small MS4 General Permits
(40 CFR §§ 122.33-34)

- A regulated small MS4 operator must seek coverage under an individual or general NPDES permit
  - 94% of small MS4s are permitted under a State-issued general permit
- “[The] NPDES MS4 permit will require at a minimum that [the MS4 operator] develop, implement and enforce a stormwater management program designed 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 CWA.” [40 CFR § 122.34(a)]

To be covered under a MS4 general permit:
- The small MS4 must submit a Notice of Intent (NOI) to the permitting authority
- The NOI must include (1) information on the BMPs that will be implemented for each of the six minimum control measures, (2) the measurable goals that will be achieved for each of the BMPs (deadlines and interim milestones), and (3) the persons responsible for implementing the MS4’s stormwater management program [40 CFR § 122.33 (b)(1), and § 122.34(d)]
EDC v. EPA decision (9th Circuit, 2003)

- Court found deficiencies, and vacated portions of the Phase II regulations, regarding the procedures to be used for providing coverage to small MS4s under general permits.
- Remanded these regulations to EPA to fix:
  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.”

See: Env Defense Center et al., v. EPA, 344 F.3d 832 (9th Cir 2003)
EPA Memorandum (2004)

EPA issued recommendations to permitting authorities for how to administer their general permits in light of the EDC v. EPA ruling:

- Public Availability of NOIs
- Opportunity for Public Hearing
- Permitting Authority Review of NOIs

See:

http://www.epa.gov/npdes/pubs/hanlonphase2apr14signed.pdf
“MS4 permit provisions should be clear, specific, measurable, and enforceable...

“Permits should include specific deadlines for compliance, incorporate performance standards and include measurable goals or quantifiable targets for implementation.”

Vague phrases, such as “as feasible” and “as possible,” should be avoided.

Permit should set forth objective standards, criteria or processes, which will aid the permittee in complying with the permit, as well as the permitting authority in determining compliance in the MS4 permit.”

“It is important to strike a balance of providing specific Permit Requirements while still allowing the permittee come up with innovative controls.”

See: http://www.epa.gov/npdes/pubs/ms4permit_improvement_guide.pdf
EPA Recommendation to Permitting Authorities

EPA Memo: Revisions to 2002 Memorandum on TMDLs and Stormwater Permits (2014)

- CWA Section 402(p)(3)(B)(iii) provides authority for MS4 permits to include water quality-based requirements
  - “… shall require controls to reduce the discharge of pollutants to the maximum extent practicable … and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.”
  - Defenders of Wildlife (9th Cir. 1999) interpreted this provision to enable NPDES authorities at their discretion to include requirements for reducing pollutants in stormwater discharges as necessary for compliance with WQS
- The use of greater specificity and clarity in permits to address water quality problems is consistent with EPA’s 1996 Interim Permitting Policy …
  - which suggested that permits be modified in subsequent terms to include “more specific conditions or limitations [which] may include an integrated suite of BMPs, performance objectives, narrative standards, monitoring triggers, numeric WQBELs, action levels, etc.”
- MS4 Permit Compendium
  - Demonstrates how permitting authorities are establishing requirements that are tied to a measurable water quality target, including permit examples expressed in both numeric and non-numeric form

EPA Recommendations to Permitting Authorities

MS4 Permit Compendium (2014)

Examples highlight post construction and WQBELs that share the attribute of being expressed in a clear, specific, and measurable way

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<th>Numeric expression of the WQBEL:</th>
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<tr>
<td>Reduce fine sediment particles, total phosphorus, and total nitrogen loads by 10 percent, 7 percent, and 8 percent, respectively, by September 30, 2016 (2011 Lake Tahoe, CA MS4 permit)</td>
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<td>Restore within the 5-year permit term 20 percent of the previously developed impervious land (2014 Prince George’s County, MD MS4 permit)</td>
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<td>Achieve a minimum net annual planting rate of 4,150 planting annually within the MS4 area, with the objective of an MS4-wide urban tree canopy of 40 percent by 2035 (2011 Washington, DC MS4 permit)</td>
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<th>Non-numeric expressions of the WQBEL:</th>
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<td>To implement the Issaquah Creek Fecal Coliform Bacteria TMDL, install and maintain animal waste education and/or collection stations at permittee owned and operated lands reasonably expected to have substantial domestic animal use. Also, complete IDDE screening for bacteria sources in 50 percent of MS4 subbasins by February 2, 2017 (2013 Western Washington Small MS4 General Permit)</td>
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<td>To achieve stormwater WLAs for E. coli for the Upper South Platte River Basin, the MS4 must identify outfalls with dry weather flows; monitor priority outfalls for flow rates and E. coli densities; implement a system maintenance program for listed priority basins (which includes storm sewer cleaning and sanitary sewer investigations); install markers on at least 90% of storm drain inlets in areas with public access. By November 30, 2018, dry weather discharges from MS4 outfalls of concern must not contribute to an exceedance of the E. coli standard (126 cfu per 100 ml for a geometric mean of all samples collected at a specific outfall in a 30-day period) (2009 Denver, CO MS4 Permit)</td>
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Types of Examples That Are Not Included in the Compendium:

- **Narrative language directing the MS4 to:**
  - Comply with any applicable TMDLs and WLAs w/o providing specific lists of impaired waters, TMDLs, MS4s affected, and applicable WLAs
  - Develop and implement a TMDL plan w/o state review, minimum requirements, compliance schedule, interim targets

- **Requirement to implement additional BMPs for impaired waters if:**
  - Decision on which BMPs to be used is the permittee’s alone, with no review/approval by permitting authority
  - Not tied to a specific watershed or TMDL
  - Applicable WLA not referenced or specifically incorporated

- **Monitoring requirements if:**
  - No connection made to the specific WLA that applies or how the information will be used towards meeting the WLA
  - No specifics provided on pollutant parameters to be monitored, monitoring protocols, sampling locations
MS4 Permitting, Post-EDC

For those 43 State PAs issuing MS4 General Permits:

- Some **adopted specific general permit procedures** consistent with EPA guidance
- Some **individually review and approve NOIs and stormwater management programs, and incorporate** them as enforceable requirements of the general permit
- Some **establish more specific permit conditions for individual MS4s** within the general permit

7 permitting authorities individually permit their small MS4s
NRDC/EDC Petition to 9th Circuit (2014)

- Petitioners asked Court to immediately require EPA to take action to address the 2003 EDC v. EPA ruling:
  - Revise its Phase II 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.

- EPA & petitioners signed a settlement agreement 8/26/2015; filed joint motion for a court order incorporating its terms:
  Relating to the MS4 issues on remand:
  - By **Nov. 17, 2016**, EPA must sign a Final Rule
Option 1 (“Traditional General Permit Approach”)

- 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”
  - 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
- Examples:
  - Washington Dept. of Ecology – Western Washington Small MS4 General Permit
  - California State Water Resources Control Board – Small MS4 General Permit
  - EPA Reg. 6 – Middle Rio Grande MS4 General Permit
  - Select provisions in other state permits (e.g., Vermont, Minnesota, Massachusetts (draft), New Hampshire (draft)
Option 2 (“Procedural Option”)

- Retain the existing MS4 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.
- This approach is akin to the regulatory process required in the NPDES regulations for modifying a permit (40 CFR 124).
Option 2 - Examples

- Minnesota (233 small MS4s)
  - State uses a detailed SWMP form that must be submitted with the NOI
  - State reviews each package and determines whether taken together it meets the requirements of the permit
  - After any necessary revisions are made, the state makes the NOI and SWMP available for a 30-day public comment period
  - After considering public comments, the state then makes a final determination on adequacy of the NOI and SWMP
  - If the state decides to authorize, the SWMP is made an enforceable part of the permit

- Texas follows a similar approach (497 small MS4s)
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 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).
NPDES Electronic Reporting Rule

- Final Rule expected (end of 2015 calendar year?)
- No new reporting requirements, but anticipate:
  - Shifting from paper to electronic reporting
  - Saving money and time for the regulated community and for states (reduce data entry time, improve accuracy).
  - Improving transparency and freeing resources to focus on the most important problems.
  - Using technology to obtain more accurate, timely, and complete information about the NPDES program.
Questions?