

Small MS₄ General Permit Remand Rule

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Background

Partial Remand of Phase II Regulations

- Ninth Circuit (*EDC v. EPA*, 2003) 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 remanded the relevant portions of the Phase II regulations to EPA to fix the deficiencies:



1. Lack of permitting authority review



2. Lack of public participation in permit process

Final Rule Summary



- Compliance with new requirements is required during permit issuance/reissuance
 - In 2018, an estimated 25 general permits will expire or already have expired
- Final rule put into effect what the proposed rule referred to as “the hybrid general permit approach”

Final Rule Summary

Key Aspects of Final Rule

- Allows permitting authorities to choose between 2 alternative general permit types
- Can choose whichever type of permit works best for its needs, and can change approaches in subsequent permit terms

1

Comprehensive
General Permit

2

Two-Step
General Permit



- This is a procedural rule

No changes are made to the substantive federal requirements for small MS₄s, or to the bottom line standard for all small MS₄ permits

MS₄ permit standard: "... reduce discharges of pollutants to 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."

Final Rule Summary

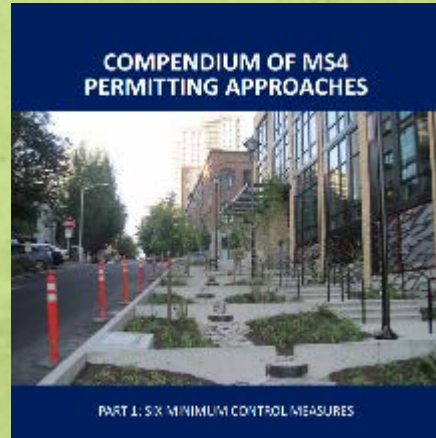
Key Aspects of Final Rule



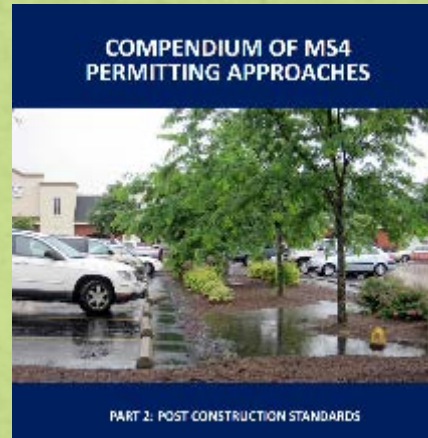
- All permits must be written with terms and conditions that are “clear, specific, and measurable”
 - Which may be expressed as narrative, numeric, or other types of requirements
 - Applies to permit terms and conditions established for 6 minimum control measures, evaluation and reporting requirements, and water quality-based requirements
- EPA has published a series of documents with examples of different types of provisions from existing permits that are clear, specific, and measurable

Technical Assistance – Permit Compendia

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



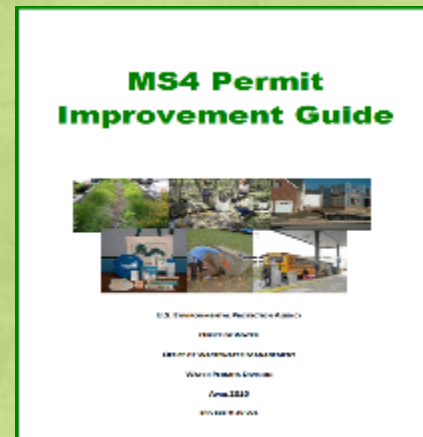
Part 1: Six Minimum Control Measures



Part 2: Post-Construction Standards



Part 3: Water Quality-Based Requirements



Applying Clear, Specific, and Measurable in MS4 permits

Things to Look For

Avoid permit requirements with caveat language – unless accompanied by specific details defining what constitutes “feasible”, etc.

Use of broad actionable verbs without providing an explanation of what is considered sufficient are likely not considered clear, specific, and measurable


Use of non-mandatory terms in permit language makes it difficult to determine whether the permittee is in compliance

Examples

“if feasible”
“if practicable”
“to the maximum extent practicable”
“as necessary”

“minimize”
“maximize”
“address”
“reduce”

“should”
“may”
“the permittee is encouraged to”



Applying Clear, Specific, and Measurable in MS₄ permits

Measurable requirements

Include an objective parameter to define the necessary level of effort, result expected, performance standard, or similar measurement – does not have to be a numeric effluent limit

Examples:

- Conduct inspections of active construction sites once per week
- Clean 25 % of the catch basins in your service area every year
- Retain on site the first 1 inch of precipitation

TMDL-related requirements

Specifically identify: applicable TMDLs, WLAs, and pollutant(s) of concern; which MS₄s are affected; specific requirements that constitute reasonable further progress towards attainment

For TMDL plans developed by the MS₄:

- Include specific details on the minimum contents of the plan, the required outcomes, deadlines, and corresponding milestones, or
- Subject the plan to the second permitting step

Role of the MS₄ SWMP

- Under the Remand Rule, all MS₄s must develop a written SWMP that details how the MS₄ plans to implement its program
- The Remand Rule clarifies that all enforceable MS₄ requirements are contained in the permit
 - Contrasts with the 1999 Phase II regulations, which appeared to enable the MS₄ to establish permit requirements within the SWMP
 - The regulations no longer state that compliance with the BMPs in SWMPs constitutes compliance with the MEP standard
- The **SWMP is not enforceable**, unless it is submitted for review and approval by the permitting authority and is made enforceable under the permit through the second step process

Relationship of the Phase II Regulations to MS₄ Permit Requirements

Remand Rule Clarifications

- Phase II regulations specify the elements that must be addressed in any small MS₄ permit (in the form of minimum control measures, or “MCMs”)
 - In general, the Phase II MCMs were not intended to serve as permit requirements, but rather areas of stormwater management that must be addressed in the permit through clear, specific, and measurable terms and conditions
 - Relying on the verbatim adoption of the MCMs would not meet the requirement to establish clear, specific, and measurable permit requirements
- What constitutes compliance with the MS₄ permit standard continues to evolve
 - For each permit term, permitting authority must reevaluate what constitutes “maximum extent practicable” and what is necessary to protect water quality and satisfy the CWA’s water quality requirements
 - Also, MCMs don’t restrict the permitting authority from regulating additional sources of stormwater pollutant discharges that aren’t specifically mentioned in the MCMs (e.g., regulation of industrial sites) – if considered necessary to meet the MS₄ permit standard, then this wouldn’t be considered more stringent than the MCMs

Next Steps

- Review of draft permits for consistency with Remand Rule
- Developing a companion guide for reviewing permits
- Update of eReporting rule to reflect changes to the Phase II regulations made by the Remand Rule