

WRITING PERMITS TO MEET THE MS4 REMAND RULE

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MS4 REMAND RULE SUMMARY

- Promulgated Dec. 9, 2016 – effective on January 9, 2017
- Compliance with new requirements is required during permit issuance/reissuance
 - In 2018, estimated 25 general permits will expire or already have expired
- Addressed court remand in Ninth Circuit ruling in *EDC v. EPA* (2003) – found that the Phase II rule requirements for small MS4 general permits violated the CWA
 1. Lack of permitting authority review
 2. Lack of public participation in permit process

MS4 REMAND RULE SUMMARY

- Where the NPDES authority chooses to use a general permit to regulate small MS4s, it can choose between 2 alternatives:
 1. Comprehensive general permit, or
 2. Two-step general permit
- Or, a combination of the two can be used (“hybrid approach”)

Comprehensive General Permit

All requirements must be contained within 4 corners of permit

NOI – only basic information required

Authorization process – simple (ensure eligibility and completeness of info in NOI)

Two-Step General Permit

Some requirements are established during a second permitting step

NOI – more detailed information required in order to provide the basis for the additional requirements

Authorization process – requires second step after each MS4 submits NOI:

1. Review of NOI information
2. Propose additional permit conditions based on NOI information – public notice, 30-day comment period, opportunity to request public hearing
3. Respond to significant comments received
4. Authorize MS4 subject to the additional requirements

Authorization requirements should be spelled out in permit

Comprehensive General Permit

Two-Step General Permit

Permit requirements may include narrative, numeric, or other types of requirements – such as:

- Implementation of specific tasks or best management practices (BMPs)
- BMP design requirements, performance requirements
- Adaptive management requirements
- Schedules for implementation and maintenance
- Frequency of actions

All requirements must be expressed in **clear, specific, and measurable** terms

- Applies to any part of the permit addressing: (1) 6 minimum control measures (MCMs), (2) TMDLs, and (3) annual reports

MS4 PERMIT STANDARD

- **BOTTOM LINE:** any small MS4 permit must include terms and conditions that are adequate to meet the “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.”
- **ITERATIVE PROCESS FOR PERMITS:** 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

MINIMUM FEDERAL REQUIREMENTS

- Phase II regulations specify the elements that must be addressed in any small MS4 permit (in the form of “MCMs”) – this is not the same as establishing minimum permit requirements
 - MCMs were not intended to serve as stand-alone permit requirements, but rather areas of stormwater management that must be addressed in the permit through clear, specific, and measurable terms and conditions that meet the MS4 permit standard
 - Verbatim adoption of the MCMs would not be expected to satisfy this requirement
 - The language of the MCMs doesn’t constrain permits in establishing requirements for each MCM – the MS4 permit standard does

ROLE OF THE MS4 SWMP

- MS4s must develop a written Storm Water Management Program (SWMP) that details how the MS4 plans to comply with the permit, but **the details of the SWMP are not enforceable ...**
 - Unless it is submitted for review and then approved by the permitting authority and made enforceable through the second step process
- Enforceable MS4 requirements are contained in the permit
 - The regulations no longer state that compliance with the BMPs in SWMPs constitutes compliance with the MS4 permit standard - appeared to enable the MS4 to establish permit requirements within the SWMP

APPLYING CLEAR, SPECIFIC, AND MEASURABLE

CONSIDERATIONS

- Is it clear what specific actions must be carried out and completed?
- For each specific action –
 - Who is responsible for implementing and completing the action?
 - When must the action be started and completed?
 - Are there measurable outcomes or required performance requirements that apply? (e.g., min. number of outreach events, specific pollutants to monitor, BMP design stds)
 - How often must the activity occur?

APPLYING CLEAR, SPECIFIC, AND MEASURABLE

CONSIDERATIONS

- Measurable requirements – include an objective parameter to define the necessary level of effort, result expected, performance standard, or similar measurement – does not necessitate use of numeric effluent limits
 - 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

APPLYING CLEAR, SPECIFIC, AND MEASURABLE

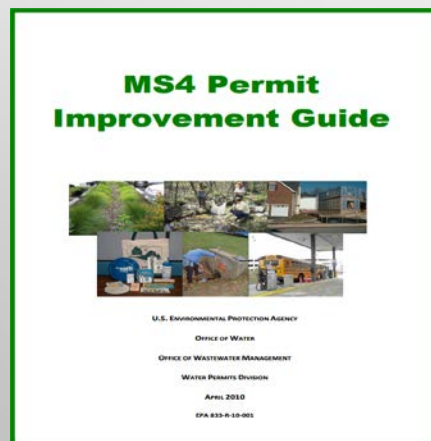
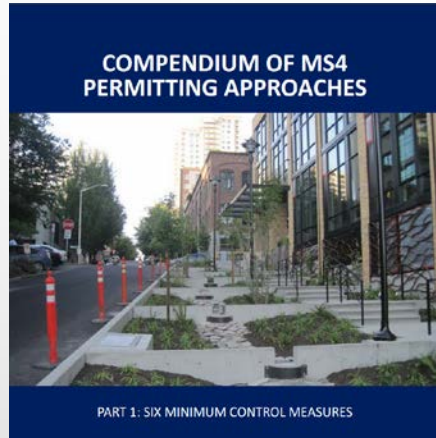
THINGS TO LOOK FOR

- Avoid permit requirements with caveat language, such as “if feasible”, “if practicable”, “to the maximum extent practicable”, and “as necessary”
- Be aware of:
 - Use of words like “minimize”, “maximize”, “address”, or “reduce” without providing an explanation of what is considered sufficient
 - Use of non-mandatory language like “should”, “may”, “the permittee is encouraged to”

TMDL-RELATED REQUIREMENTS

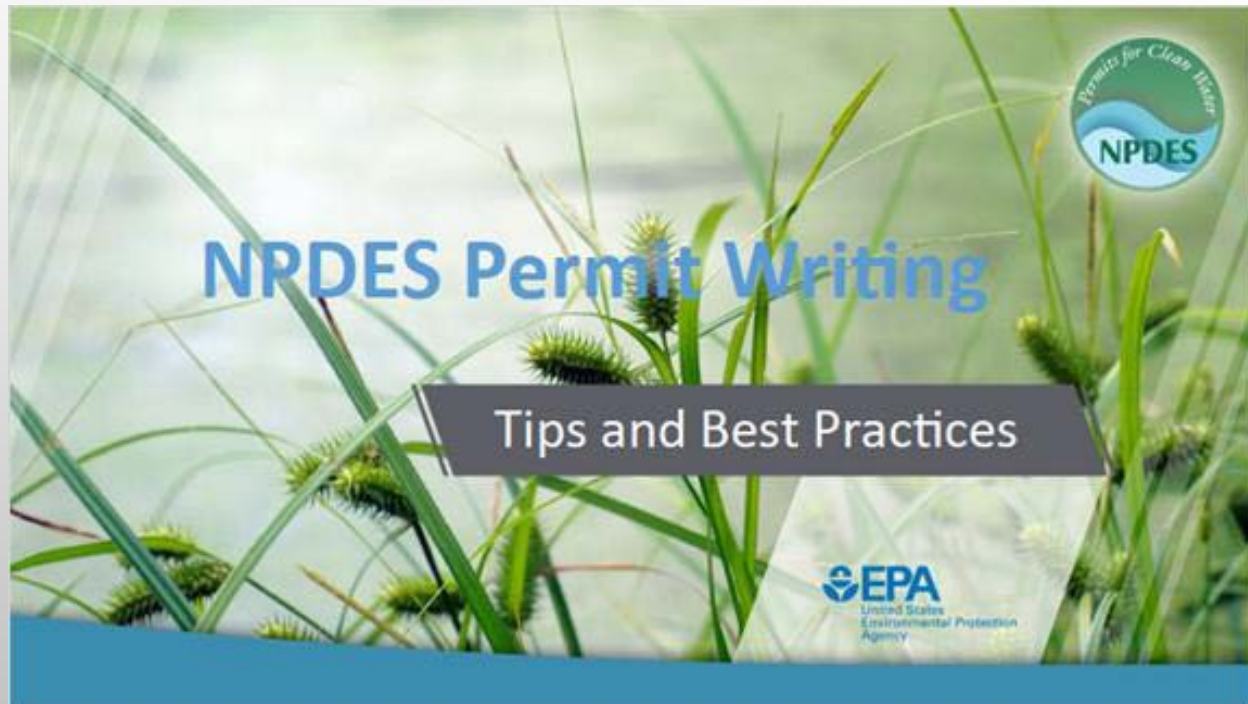
- Regulations require, as appropriate, more stringent permit terms to address approved TMDLs
 - Must be clear, specific, and measurable and be adequate to meet the MS4 permit standard
- Permits should consider ways to specify:
 - Applicable TMDLs, WLAs, and pollutant(s) of concern
 - Which MS4s are affected
 - Specific actions that must be taken to make reasonable further progress towards attainment, including deadlines for such actions
 - Long-term compliance deadlines
- For TMDL plans developed by the MS4, the permit should include the 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

TECHNICAL ASSISTANCE – PERMIT COMPENDIA



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

NPDES PERMIT WRITING TIPS AND BEST PRACTICES



<https://www.epa.gov/npdes/npdes-training#permittips>