

April 16, 2004

MEMORANDUM

Subject: Implementing the Partial Remand of the Stormwater Phase II Regulations  
Regarding Notices of Intent & NPDES General Permitting for Phase II MS4s

From: James A. Hanlon /s/  
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To: Water Management Division Directors, Regions I - X

The purpose of this memorandum is to provide guidance on implementing a partial remand of the Stormwater Phase II regulations. The U.S. Court of Appeals for the Ninth Circuit recently denied EPA's petition for rehearing in the Phase II litigation. Environmental Defense Center, et al. v. EPA, No. 70014 & consolidated cases (9<sup>th</sup> Cir., Sept. 15, 2003). The Department of Justice has informed us that further review by the U.S. Supreme Court is not available. This memorandum provides interim guidance to EPA and State NPDES permitting authorities pending a rulemaking to conform the Phase II rule to the court's order.

The Relevant Provisions of the Rules

This case challenged the NPDES stormwater regulations issued pursuant to Clean Water Act ("CWA") section 402(p)(6). That section directs EPA to "establish a comprehensive program to regulate" stormwater discharges designated by EPA. We commonly describe these regulations as stormwater "Phase II." The regulations require NPDES permits for discharges from certain municipal separate storm sewer systems ("MS4s") for which NPDES permits were not required under CWA section 402(p)(2) and the Phase 1 regulations.

The Phase II regulations require that MS4s reduce the discharge of pollutants "to the maximum extent practicable" (or "the MEP standard"). The regulations also require the MS4s to develop, implement and enforce a stormwater management program containing, among other things, best management practices ("BMPs") identified by the discharger. The regulations authorize the use of "general permits" and require that these BMPs (as well as measurable goals associated with these BMPs) be identified in the Notice of Intent ("NOI") filed by the MS4 in seeking authorization under a general permit. Relying on the "traditional" general permit model, the Agency did not require NOIs to be subject to public hearings.

## The Ninth Circuit's Decision

The Ninth Circuit held that these NOI requirements violated various provisions of CWA section 402. They concluded that “the EPA’s failure to require review of NOIs, which are the functional equivalents of permits under the Phase II General Permit option, and its failure to make NOIs available to the public or subject to public hearings contravene the express requirements of the Clean Water Act.” The remand raises important questions regarding the procedures that would be appropriate for authorization of Phase II MS4 discharges *other than* through an individual permit.

In denying EPA’s motion for rehearing the court “vacated” the portions of the Phase II rule that address the procedural issues relating to the general permitting option for Phase II MS4s. Therefore, the Agency needs to take affirmative action to clarify the general permitting option for Phase II MS4s. In any such action, we believe it is imperative that implementation of the MEP standard remain an “iterative” process that optimizes the reduction of stormwater pollutants, rather than a static pollution reduction requirement.

In looking at options for implementing the court’s decision, we want to continue to provide States with maximum flexibility. Some State Phase II MS4 permitting procedures already appear to meet the court’s intent and will not need changes. However, the general permits and procedures of other States, along with the provisions developed by EPA in States where EPA has program implementation responsibilities, will need to change. To assist MS4 permitting authorities in moving forward with implementing program revisions where needed, EPA provides the following recommendations to address the court's decision.

### Guidance for Issuance of New General Permits

1. Public availability of NOIs The Phase II rules already require that Phase II MS4 permittees make the records of their stormwater management plans publicly available at reasonable times during regular business hours. 40 C.F.R. 122.34(g)(2). NOIs (which essentially summarize stormwater management plans) should also be made publicly available. Permitting authorities can ensure the public availability of Phase II MS4 NOIs by providing notice on the web of the facilities applying for coverage under a general permit with either an electronic posting of the NOIs or information on how NOIs can be accessed. NOIs could also be public noticed in a newspaper, or by another effective manner.

Unless a permitting authority has already otherwise incorporated public notice procedures into its processes for issuance of Phase II MS4 general permits, NPDES agencies that have not yet issued final permits should include permit language explaining that (and how) NOIs will be made available to the public with sufficient time to allow for meaningful public comment. EPA recommends that permitting authorities make the NOIs available to the public at least thirty days before authorization to discharge.

2. Opportunity for public hearing The court's decision requires that the public be given an opportunity to request a public hearing. If the Phase II MS4 general permittee provides public notice for the NOI, the permitting authority will still need to provide the public an opportunity to request a hearing. EPA recommends that permitting authorities include permit language explaining the process for requesting a public hearing on an NOI, the standard by which such requests will be judged, the procedures for conducting public hearing requests that are granted, and the procedures for permitting authority consideration of the information submitted at the hearing in determining whether to grant authorization to discharge to the submitter of the NOI. If a public hearing is requested, the permitting authority should consider both whether to grant a hearing and the range of options for the conduct of the hearing, including, for example, a single public hearing for consideration of multiple Phase II MS4 permittee NOIs.

3. Permitting Authority reviews of NOIs The permitting authority will need to conduct an appropriate review of Phase II MS4s' NOIs to ensure consistency with the permit. General permits should, to the extent practicable, specify in objective terms what is expected of a Phase II MS4 in order to meet the MEP standard. Due to the iterative nature of the MEP standard, we do not believe official "approval" of NOIs is necessary, but the general permits will need to specify when authorization occurs, such as after notice from the permitting authority that review is complete, or after a specified waiting period. EPA notes that this process does not preclude the permitting authority from denying an MS4 authorization to discharge. Either of these timing options should provide the permitting authority with sufficient time to review NOIs, to ensure that NOIs have been publicly available, and that there has been an opportunity to request a public hearing to provide input.

#### Guidance for General Permits Already Issued for MS4s

Permitting authorities that already have issued general permits should determine the most effective way to provide public notice and review of MS4 NOIs. Unless a permitting authority has already otherwise incorporated such procedures into its processes for issuance of Phase II MS4 general permits, NPDES agencies that have issued final permits should:

- List on the State or EPA Region's web site those MS4 permittees who have submitted NOIs and how NOIs can be reviewed by the public. Include information on how comments can be submitted and a hearing can be requested. If a public hearing is requested, the permitting authority should consider both whether to grant a hearing and the range of options for the conduct of the hearing, including, for example, a single public hearing for consideration of multiple Phase II MS4 permittee NOIs.
- Conduct an appropriate review of submitted NOIs (to determine compliance with the permit) and contact the MS4 when changes appear to be needed.

MS4s continue to have an obligation to apply for permit coverage, whether under an individual NPDES permit or an NPDES general permit. We do not believe that the court ruling

creates legal vulnerability for violations of the CWA for Phase II MS4 permittees that have filed timely applications, whether or not authorization has been granted. The Phase II regulations establish application deadlines, not authorization deadlines. Even when Phase II MS4 permittees are authorized, the regulations do not require immediate compliance with the MEP standard, i.e., development and full implementation of the Phase II MS4 stormwater management program. Instead, the permitting authority specifies the applicable time period, which may be as long as five years after permit issuance.

We request that you communicate this guidance to States within your Region which are authorized to administer the NPDES program. If you have questions or concerns, please contact Linda Boornazian at (202) 564-0221 or Wendy Bell at (202) 564-0746.

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