

MS4 General Permit Remand Rule

INAFSM Conference

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Background

- EDC v. EPA (Ninth Circuit, 2003)
 - Found deficiencies in Phase II Stormwater regulations regarding procedures for providing coverage to small MS4s under general permits
 - The court remanded to EPA to fix these deficiencies:
 - Lack of permitting authority review
 - Lack of public participation in the permit process
- NRDC/EDC petition to Ninth Circuit (2014)
 - Petitioners asked the Ninth Circuit to require EPA to take the actions addressed in the 2003 ruling
 - Culminated in a settlement agreement requiring EPA to promulgate changes to Phase II stormwater regulations
- EPA proposed 3 rulemaking options:
 - Traditional General Permit Approach
 - Procedural Approach
 - Permitting Authority Choice Approach

MS4 Remand Rule

- Permitting Authority Choice Approach
- The permitting authority determines what type of general permit to use for its small MS4s
 - **Comprehensive** general permit – § 122.28(d)(1)—all necessary permit terms and conditions are established up front in the general permit itself
 - **Two-step** general permit – § 122.28(d)(2)- necessary permit terms and conditions are established in two steps; Issue the base general permit and then propose for comment and finalize additional requirements that apply to individual MS4s covered under the general permit.
- Permitting authority is free to choose whichever type of permit works best for its needs, and can change approaches in subsequent permit terms.

What The Remand Rule Means

- Permitting authority is required to indicate which general permit type it uses for any particular permit
 - This statement may be included in the permit itself or the fact sheet
- The permitting authority is responsible for determining what is needed to meet the statutory and regulatory standard
 - “To reduce the discharge of pollutants from the MS4 to the maximum extent practicable, to protect water quality, and to satisfy the appropriate water quality requirements of the CWA”.
 - Terms and conditions must be expressed in terms that are “**clear, specific, and measurable**”
- Permit requirements must be re-evaluated for each subsequent permit term to ensure they are adequate to meet the MS4 permit standard (§ 122.34(a)(2)).
- State permitting authorities are required to comply with the MS4 Remand Rule when their small MS4 General Permit is reissued.