

## MEMORANDUM

SUBJECT: Interim Guidance on Implementation of NPDES Regulations for Storm Water Phase II for Small Municipal Separate Storm Sewer Systems in Response to Recent Ninth Circuit Decision in Environmental Defense Center, et al. v. EPA, No. 00-70014 & consolidated cases (9<sup>th</sup> Cir.)

FROM: James Hanlon  
Director, Office of Wastewater Management

TO: Regional Water Management Division Directors  
Regions I-X

As you may be aware, on January 14, 2003, the U.S. Court of Appeals for the Ninth Circuit affirmed most aspects of the National Pollutant Discharge Elimination System (“NPDES”) regulations for storm water “Phase II” against a variety of constitutional, statutory, and procedural challenges. Petitioners representing environmental, industrial, and municipal interests challenged the regulations on twenty-two different grounds. The Court did, however, remand the regulations on three grounds related to use of NPDES general permits to authorize discharges from small municipal separate storm sewer systems (“MS4s”).

On February 28, 2003, the United States filed a petition for rehearing with the Ninth Circuit on the MS4 general permit issues. The petition is attached. The effect of EPA’s petition for rehearing stays the effectiveness of the Ninth Circuit’s decision, and leaves intact those Phase II MS4 regulatory provisions which were the subject of the Court’s remand, until the Court issues a decision in response to the petition.

This memorandum provides the following guidance for NPDES permitting authorities for the interim period until the Ninth Circuit decides the petition for rehearing:

- NPDES permitting authorities should proceed with the prompt issuance of final Phase II MS4 general permits so that Phase II MS4s may file NOIs to be authorized under those general permits.
- The deadline for Phase II MS4 operators to submit NOIs or individual permit applications is unchanged. The March 10, 2003 permit application deadline remains in place. The ruling does not remove any obligation on the Phase II MS4 operator’s part to submit NOIs or individual permit applications, nor does it impose additional requirements on what should be included in the NOI or individual permit application. The ruling would, if it becomes effective as currently written, only affect the actions of NPDES permitting authorities for reviewing and processing NOIs.

- In NPDES jurisdictions without a final general permit for Phase II MS4s, the only option available to a Phase II MS4 operator is to file an individual permit application to ensure compliance with 40 CFR 122.33(c). We note that the individual permit application requirements for Phase II MS4s are not substantially different from what Phase II MS4 NOIs should require. The individual permit application requirements for Phase II MS4s were derived from, but require less than, the individual permit application requirements for Phase I MS4s. To accommodate the Phase II MS4 operators who prefer to seek coverage under a general permit, but for which none is available, subsequently-issued Phase II MS4 general permits could allow for incorporation by reference (in an NOI) of a previously submitted individual application to the extent the information required by the NOI would already have been reported in the earlier individual permit application.
- NPDES permitting agencies do have options in how to authorize discharges under Phase II MS4 general permits. Because EPA's petition for rehearing stayed the effectiveness of the Ninth Circuit decision (until the Ninth Circuit rules on the petition), permitting authorities may issue Phase II MS4 permits in the same manner they would have prior to the decision. Permitting authorities also have discretion, however, to structure Phase II MS4 general permits in a way that would accommodate the Ninth Circuit decision. Specifically, the permitting authority could rely on either of two (of four) authorization options available in the general permit regulation. In addition to authorization upon receipt of the NOI or upon a date certain, that regulation provides for authorization either after a waiting period specified in the general permit or upon notification. Either of these last two options provides a permitting authority with additional time to review NOIs and to conduct the public participation envisioned by the Ninth Circuit if the agency chooses to do so in its own discretion.
- As envisioned in the Phase II regulations, the final MS4 general permit should provide greater clarity and specification for the selection, development and implementation of best management practices ("BMPs") that are appropriate for local conditions and necessary to achieve the "maximum extent practicable" ("MEP") standard for dischargers.

I encourage you to promptly communicate the guidance provided above to NPDES authorized States within your Region. If you have questions or concerns, please contact Linda Boornazian at (202) 564-0221 or Benita Best-Wong at (202) 564-0612.

cc: NPDES Branch Chiefs, EPA Regions I - X  
Enforcement Division Directors, EPA Regions I - X  
Walker Smith, OECA  
Mark Pollins, OECA

Attachment:  
Respondent EPA's Petition for Rehearing