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Legal Update

EPA Promulgates Final MS4 General Permit Remand Rule

On December 9, 2016, EPA published the final MS4 General Permit Remand Rule changing its regulation governing the way in which small municipal separate storm water systems (small MS4s) obtain coverage under Phase 1 permit program under the National Pollution Discharge Elimination System (NPDES) and how required permit conditions are established.

A small MS4 is any MS4 not already covered by the Phase 1 permit program under the NPDES as being a medium or large municipal separate storm water systems. A small MS4 includes systems serving populations under 100,000 as well as systems at large hospitals, universities, prisons, large office buildings /complexes and military bases.

To prevent harmful pollutants from being washed or dumped into local water bodies, operators are required to obtain an NPDES permit and to develop storm water management programs. The NPDES permit program was created under the Clean Water Act (CWA) in 1972, and addresses water pollution by regulating point sources that discharge pollutants to the waters of the United States. By delegation from the EPA, state governments may perform many permitting, administrative and enforcements aspects of the program.

The remand Rule results from a 2003 decision by the U.S. Court of Appeals for the Ninth Circuit in Environmental Defense Center, et al. v EPA at 344 F. 3d. 832 (9th Cir. 2003). It was found that EPA regulations under a small MS4s General Permit lacked procedures for adequate public notice and the opportunity to request a public hearing to determine whether the best management practices selected by each small MS4 meet the CWA requirement “to reduce pollutants to the maximum extent practicable.”

The final small MS4 General Permit Remand Rule establishes three alternative approaches an NPDES permitting authority can use to issue and administer small MS4 general permits. These are:

- a) through the traditional comprehensive general permit that includes all terms and conditions;
- b) a two tiered general permit that is supplemented with additional conditions specific to the individual small MS4 applicant; or
- c) a combination of these two methods.

Each approach requires permits to clearly establish what is necessary for the small MS4 to meet the CWA requirements.

EPA Final MS4 General Permit Remand Rule became effective on January 9, 2017. Existing small MS4 permits do not have to be re-opened to comply since the new rule will apply where the permits are due for renewal.



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