

This is a short article on a topic that may seem boring but is very important: the new Federal NPDES Stormwater Final MS4 General Permit Remand Rule. **This rule will affect how every MS4 permitting authority in the United States will revise and reissue their MS4 general permits.** The permitting authorities are EPA Regions and states with approved NPDES programs.

On November 17, 2016, the USEPA issued the final version of this rule. It was published in the Federal Register on December 9, 2016. You can find the published version of the rule and preamble here:

<https://www.gpo.gov/fdsys/pkg/FR-2016-12-09/pdf/2016-28426.pdf>

We are going to cover just a few significant aspects of this rule in this article. NMSA is going to produce more detailed information and suggestions in the next few weeks. Please watch for these materials. **If you are interested in being notified when these materials are available, please give us your name and contact information via this very short, Web-based survey form:**

<https://www.surveymonkey.com/r/WTKH7VK>

We are not going to discuss the history behind this new rule. You will need to find this information elsewhere, such as a 7-page fact sheet produced by USEPA:

https://www.epa.gov/sites/production/files/2016-1/documents/final_rule_fact_sheet_508.pdf

You can also find information about the history of the rule in the rule preamble.

Text in this article in *“italics”* is quoted from the rule. Text in *“italics and underlined”* is from the rule preamble. Highlighting has been added by the author of this article.

It is important to note some aspects of the MS4 general permits that did **not** change in this new rule. One of the standards for compliance under the MS4 general permits is still Maximum Extent Practicable:

*“For any permit issued to a regulated small MS4, the NPDES permitting authority must include permit terms and conditions to **reduce the discharge of pollutants from 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.”*

The new rule also does **not** call for changes to MS4 general permit requiring “that numeric effluent limitations (e.g., end-of-pipe pollutant concentration limitations) would be required”. The rule preamble includes this text: “the final rule instead describes appropriate requirements as being **“narrative, numeric, or other requirements.”**” “EPA intends for the final rule text to more broadly encompass the various types of controls for stormwater discharges that could be required of small MS4s.”

The continued focus on BMP-based compliance approaches can be found in this text from the rule:

“terms and conditions may include **narrative, numeric, or other types of requirements (e.g., implementation of specific tasks or best management practices (BMPs), BMP design requirements, performance requirements, adaptive management requirements, schedules for implementation and maintenance, and frequency of actions).**”

The rule does make some important changes to the process of writing MS4 general permits. This text from the preamble describes two of these changes, and one aspect of the MS4 permits that has not been changed.

“The final rule retains modifications from the proposed rule that clarify that it is **the permitting authority's responsibility, and not that of the small MS4 permittee, to establish permit terms and conditions that meet the MS4 regulatory standard and to delineate the requirements for implementing the six minimum control measures, other terms and conditions deemed necessary by the permitting authority to protect water quality, as well as any other requirement. The final rule also emphasizes that permit requirements must be expressed in “clear, specific, and measurable” terms.** These modifications **do not alter** the existing, substantive requirements of the six minimum control measures in § 122.34(b).”

The rule provides for two approaches (and a combination of both) to writing an MS4 general permit. Under the first option, the **Comprehensive General Permit approach**, the permitting authority would write each and every permit requirement (terms & conditions) into the general permit. In the course of developing the general permit, the permitting authority would provide a process for public notice, public comment, and requests for a public hearing.

The second option, the **Two-Step General Permit approach**, is more complicated and allows for more flexibility. It is based on the concept that it may be best for all parties to allow for additional local flexibility in creating localized permit requirements that cannot be achieved by including all the requirements in a single general permit. Under the Two-Step approach, there would be portions of the general permit that would be similar to that under Comprehensive

approach. For other portions of the permit, though, each permittee would be able to propose commitments (BMPs) to meet some items under the Six Minimum Control Measures in their Notice of Intent (NOI) submitted when they apply for permit coverage. The permitting authority would review these commitments and work with each permittee to get them to the point where the permitting authority determines they are sufficient. At this point, the commitments and the permitting authority's preliminary acceptance would go out for public notice, public comments, and requests for a public hearing. After consideration of the public comments, the permitting authority adopts the permittee's specific requirements (commitments) that become enforceable permit requirements and permit coverage is extended.

In the final rule, USEPA chose a third option, the **Permit Authority Choice approach**, allowing each permitting authority to use either the Comprehensive or the Two-Step approach, or a combination of both, in revising and reissuing its MS4 general permits.

We have only touched on the details of these options and how they will be rolled out under the new rule. Please find much more information in the rule documents.

The Permit Authority Choice Approach allows each permitting authority a considerable amount of flexibility. As usual in the MS4 program, flexibility is a mixed blessing. It always causes some confusion. **It also means that it is more important than ever that the communities of MS4 permittees in every state work closely and actively with their permitting authorities in revising and reissuing their MS4 general permits.**

Permitting authorities may struggle to understand the meaning of "clear, specific, and measurable" in the context of writing new MS4 general permit terms & conditions. They may struggle to decide how to prepare Notice of Intent forms under the Two-Step approach so that the NOIs submitted will include sufficient information in the appropriate format so that the submitted commitments can become permit requirements that meet this standard.

MS4 permittees have important knowledge, insight, and perspective that should be included in the process of addressing these new challenges. It is vital that the MS4 permittees understand this new rule and work with their permitting authorities.

NMSA intends to provide information, materials, and suggestions to assist with this process. This new rule is a great example of why a national organization like NMSA is needed for MS4 permittees. In the coming weeks, we will provide:

- Versions of the rule documents that are in a format that facilitates understanding and informs discussion. These documents will have line numbering. They will have indentations and normal, full-page-width text to promote clarity.
- Significantly longer and more detailed information about the new rule, highlighting important aspects and combining text from the rule, the preamble, the fact sheet, and the response to comments to clarify the meaning and impacts of the new rule.
- An initial, short national survey to gauge the level of knowledge and understanding of the new rule and try to understand the best approaches needed to best implement the provisions of the new rule. This survey will inform NMSA's work. We will also convey the processed results on to USEPA to better inform their outreach work.

If you are interested in being notified when these materials are available or participating in the short national survey, please give us your name and contact information via this very short, Web-based survey form:

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This article is the first in a series about the new MS4 Remand Rule brought to you by the National Municipal Stormwater Alliance (NMSA). Part of NMSA's mission is to provide useful and important information to MS4 permittees throughout the United States. NMSA's members are state and regional-level coalitions of MS4 permittees. NMSA's work is focused on the concerns and perspectives of those MS4 permittees. Please find additional information about and from NMSA at our Web site: <http://nationalstormwateralliance.org/>.