



AMCA Comments on Phase II Stormwater Rule Supporting “Traditional General Permit” Approach, March 2016

EPA published its proposed rule revising its existing Phase II stormwater regulations (found at 40 C.F.R. §§122.30-122.37) for public comment in January. The Phase II regulations apply to small MS4s, and are typically used by designated states to write general permits (GPs) to cover discharges from these smaller localities. AMCA submitted comments on the proposed rule on March 21, in support of the *Traditional GP* approach.

EPA has proposed taking one of three paths in the final rule:

Option 1: Traditional General Permit Approach – Under this approach, EPA would revise the existing Phase II rule to require permitting authorities to issue GPs with clear, specific, and measurable terms. Interested members of the public would have the opportunity to comment on a draft GP and request a hearing before issuance, but would not have additional comment rights when the MS4 developed subsequent implementation documents like the Notice of Intent (NOI) or the stormwater management plan (SWMP). All legal requirements for establishing compliance with the CWA would be included on the face of the permit, thereby making it unnecessary for the permitting authority to review a particular permittee’s SWMP at a later date.

Option 2: Procedural Approach – Under this approach, EPA would revise the existing Phase II rule to require permitting authorities to add an additional step to the GP process to allow for public comment and the opportunity for a public hearing on an individual NOI. Once the NOI is approved, it would become an enforceable part of the permit. This approach would allow MS4s more flexibility than Option 1 (with more proscriptive permit terms) to develop individualized BMPs. On the downside, Option 2 would add an additional review and approval process at the state level and could make it difficult for permittees to change their NOIs without undergoing a permit modification process. The SWMP would still be developed as well, but it could not establish any requirements beyond those identified in the NOI.

Option 3: State Choice Approach – Under this approach, the permitting authority decides whether to use Option 1 or 2 or even both within the same state program or within the same GP (the “hybrid” approach).

AMCA comments urge adoption of Option 1 requiring that “all substantive permit requirements” be included in the GP. State regulators have strongly encouraged this approach based on guidance from EPA that MS4 permits should, to the extent appropriate and practicable, be clear, specific, and enforceable. We explained that, if Option 1 is adopted, small MS4s would be able participate in a statewide review of existing requirements and



development of each update to the GP. Identifying issues during the GP development process would also greatly reduce the potential for widespread appeals that could occur under Option 2 over individual community NOIs or SWMPs. In addition, under Option 1, each state would retain the flexibility to structure the GP requirements based upon state environmental priorities and environmental circumstances.

In contrast, we explained that Option 2 would result in uncertainty and add unnecessary steps to the process for obtaining coverage. Option 2 and potentially Option 3 would allow for individual review of NOI documents on a permittee-by-permittee basis. AMCA also objected to making the NOI an enforceable part of the GP for the particular MS4, as suggested by Options 2 or 3. EPA has explained that it was “never EPA’s intent that the SWMP...itself be considered enforceable....” The NOI and the SWMP are both local planning documents, and neither should be enforceable by the regulators or citizens. Making an NOI or SWMP enforceable would chill local innovation with regard to selecting BMPs. Stormwater managers will not want to try a new, potentially beneficial approach if there is a chance they may need to replace the BMP at a later date and face questions regarding their compliance with the GP. Innovation should be a hallmark of the MS4 program that EPA and the states should be encouraging; innovation is the best way to make large leaps in environmental progress over the shortest period of time.

In addition, AMCA requested that, if EPA chooses Option 1, EPA clarify in the regulatory text that planning documents (NOIs and SWMPs) are not enforceable. Specifically, 40 C.F.R. §122.34(a) states that effluent limitations may be expressed as BMPs in small MS4 permits. There is no recognition that there is a difference between BMPs expressed on the face of the permit and detailed programs that would ordinarily be included in the SWMP (for example, which employees would attend the training, topics to be covered, etc.). AMCA is concerned that some interested stakeholders could incorrectly read 40 C.F.R. § 122.34(a) as covering both under the term “effluent limitations,” even though this is clearly not EPA’s intention.