6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 122

[EPA-HQ-OW-2015-0671; FRL-9955-11-OW]

RIN 2040-AF57

National Pollutant Discharge Elimination System (NPDES) Municipal Separate Storm Sewer System General Permit Remand Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is revising the regulations governing regulated small municipal separate storm sewer system (MS4) permits to respond to a remand from the United States Court of Appeals for the Ninth Circuit in Environmental Defense Center, et al. v. EPA, 344 F.3d 832 (9th Cir. 2003). In that decision, the court determined that the regulations for providing coverage under small MS4 general permits did not provide for adequate public notice and opportunity to request a hearing. Additionally, the court found that EPA failed to require permitting authority review of the best management practices (BMPs) to be used at a particular MS4 to ensure that the small MS4 permittee reduces pollutants in the discharge from their systems to the "maximum extent practicable" (MEP), the standard established by the Clean Water Act (CWA) for such permits. The final rule establishes two alternative approaches a permitting authority can use to issue National Pollutant Discharge Elimination (NPDES) general permits for small MS4s and meet the requirements of the court remand. The first option is to establish all necessary permit terms and conditions to require the

MS4 operator to reduce the discharge of pollutants from its MS4 to the MEP, to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act ("MS4 permit standard") upfront in one comprehensive permit. The second option allows the permitting authority to establish the necessary permit terms and conditions in two steps: a first step to issue a base general permit that contains terms and conditions applicable to all small MS4s covered by the permit and a second step to establish necessary permit terms and conditions for individual MS4s that are not in the base general permit. Public notice and comment and opportunity to request a hearing would be necessary for both steps of this two-step general permit. This final rule does not establish any new substantive requirements for small MS4 permits.

DATES: This final rule is effective on **[INSERT DATE 30 DAYS AFTER date of publication in the FEDERAL REGISTER]**.

ADDRESSES: EPA has established a docket for this action under Docket ID No. **EPA-HQ-OW-2015-0671**. All documents in the docket are listed on the http://www.regulations.gov web site. Although listed in the index, some information is not publicly available, *e.g*., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through http://www.regulations.gov.

FOR FURTHER INFORMATION CONTACT: Greg Schaner, Office of Wastewater Management, Water Permits Division (4203M), Environmental Protection Agency, 1200 Pennsylvania Ave., N.W, Washington, D.C. 20460; telephone number: (202) 564-0721; email address: schaner.greg@epa.gov. Refer also to EPA's website for further information related to the final rule at https://www.epa.gov/npdes/stormwater-rules-and-notices#proposed.

SUPPLEMENTARY INFORMATION: The Federal Register published EPA's proposed rule on January 6, 2016 (81 FR 415).

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I. General Information

A. Does This Action Apply to Me?

Entities regulated [or affected] by this rule include:

Category	Examples of regulated entities	North American industry classification system (NAICS) code
Federal and state government	EPA or state NPDES stormwater permitting authorities; operators of small municipal separate storm sewer systems	924110
Local governments	Operators of small municipal separate storm sewer systems	924110

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could potentially be regulated or otherwise affected by this action. Other types of entities not listed in the table could also be regulated. To determine whether your entity is regulated by this action, you should carefully examine the applicability criteria found in 40 CFR 122.32, and the discussion in the preamble. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the FOR FURTHER INFORMATION CONTACT section.

B. What Action is the Agency Taking?

EPA is issuing a final rule to revise its regulations governing the way in which small municipal separate storm sewer systems (MS4s) obtain coverage under National Pollutant Discharge Elimination System (NPDES) general permits and how required permit conditions are established. The rule results from a 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) ("EDC decision"),

which found that EPA regulations for obtaining coverage under a small MS4 general permit did not provide for adequate public notice, the opportunity to request a hearing, or permitting authority review to determine whether the best management practices (BMPs) selected by each MS4 in its stormwater management program (SWMP) meets the CWA requirements including the requirement to "reduce pollutants to the maximum extent practicable." The Federal Register published EPA's proposed rule on January 6, 2016 (81 FR 415). EPA proposed and solicited public comment on three options for addressing the remand. One option (called the "Traditional General Permit Approach") would require the permitting authority to establish within the general permit all requirements necessary for the regulated small MS4s to meet the applicable permit standard (to reduce pollutants to the maximum extent practicable (MEP), to protect water quality, and to satisfy the appropriate water quality requirements of the CWA), which would be subject to public notice and comment and an opportunity to request a hearing. The second proposed option (called the "Procedural Approach") would require the permitting authority to incorporate an additional review and public comment step into the existing Phase II regulatory framework for permitting small MS4s through general permits. More specifically, once an MS4 operator submitted its Notice of Intent (NOI) requesting coverage under the general permit, an additional step would take place in which the permitting authority would review, and the public would be given an opportunity to comment and request a hearing on, the merits of the MS4's proposed BMPs and measurable goals for complying with the requirement to reduce discharges to the MEP, to protect water quality, and to satisfy the appropriate water quality requirements of the CWA. A third proposed option (called the "State Choice Approach") would enable the permitting authority to choose between the Traditional General Permit and Procedural Approaches, or to implement a combination of these approaches in issuing and authorizing

coverage under a general permit. Today, EPA is issuing a rule that promulgates the "State Choice Approach" and has renamed it as the "Permitting Authority Choice Approach."

C. What is the Agency's Authority for Taking This Action?

The authority for this rule is the Federal Water Pollution Control Act, 33 U.S.C. 1251 et seq., including sections 402 and 501.

D. What Are the Incremental Costs of This Action?

The Economic Analysis estimates the incremental costs to implement the final rule. EPA assumed that all other costs accrued as a result of the existing small MS4 program, which were accounted for in the Economic Analysis accompanying the 1999 final Phase II MS4 regulations, remain the same and are not germane to the Economic Analysis, unless the rule change would affect the baseline program costs. In this respect, EPA focused only on new costs that may be imposed as a result of implementing the final rule. It is, therefore, unnecessary to reevaluate the total program costs of the Phase II rule, since those costs were part of the original economic analysis conducted for the 1999 Phase II rule (see 64 FR 68722, December 8, 1999). For further information, refer to the Economic Analysis that is included in the rule docket.

EPA estimates the annualized cost of the final rule to be between $558,025 and $604,770, depending on the assumed discount rate. This can be thought of as the annual budgeted amounts each permitting authority would need to make available each year in order to be able to cover the increase in permitting authority efforts that would result every 5 years. The total net present value of the compliance cost ranges from $5.5 million to $8.4 million, depending on the assumed discount rate. These estimates are all below the threshold level established by statute and various

executive orders for determining that a rule has an economically significant or substantial impact on affected entities. See further discussion in Section X of this preamble.

The Economic Analysis assumes that permitting authorities are the only entities that are expected to be impacted from this rule because the requirements modified by the rule focus only on the administrative manner in which general permits are issued and how coverage under those permits is granted. EPA emphasizes that this final rule does not change the stringency of the underlying requirements in the statute or Phase II regulations to which small MS4 permittees are subject, nor does it establish new substantive requirements for MS4 permittees. Therefore, the Economic Analysis does not attribute new costs to regulated small MS4s beyond what they are already subject to under the statute and Phase II regulations. EPA acknowledges that many permitting authorities consider permitting a cost-neutral function, therefore some may increase permit fees to cover the increased costs associated with this rule.

EPA used conservative assumptions about impacts on state workloads, meaning that the actual economic costs of complying with the final rule and implementing any new procedural changes are most likely lower than what is actually presented. EPA considers the cost assumptions to be conservative because as more permitting authorities issue general permits consistent with the new rule, other permitting authorities can use and build on those examples, reducing the amount of time it takes to draft the permit requirements, and permitting authorities will likely learn from experience as they move forward how to work more efficiently to issue and administer their general permits. EPA has issued guidance to permitting authorities on how to write better MS4 permits (*MS4 Permit Improvement Guide* (EPA, 2010); *Compendium of MS4 Permitting Approaches – Part 2: Post Construction Standards* (EPA, 2016); *Compendium of MS4 Permitting Approaches – Part 3: Water Quality-Based Requirements* (EPA, 2016)), and

additional examples of permit provisions that are written in a "clear, specific, and measurable" manner for the six minimum control measures are included in the preamble to this rule. EPA also anticipates issuing further guidance once the rule is promulgated to assist permitting authorities in implementing the new rule requirements, which will in turn hopefully make permit writing more efficient. These gained efficiencies were not, however, accounted for in the option-specific cost assumptions.

II. Background

A. Statutory and Regulatory Overview

Stormwater discharges are a significant cause of water quality impairment because they can contain a variety of pollutants such as sediment, nutrients, chlorides, pathogens, metals, and trash that are mobilized and ultimately discharged to storm sewers or directly to water bodies. Furthermore, the increased volume and velocity of stormwater discharges that result from the creation of impervious cover can alter streams and rivers by causing scouring and erosion. These surface water impacts can threaten public health and safety due to the increased risk of flooding and increased level of pollutants; can lead to economic losses to property and fishing industries; can increase drinking water treatment costs; and can decrease opportunities for recreation, swimming, and wildlife uses.

Stormwater discharges are subject to regulation under section 402(p) of the CWA. Under this provision, Congress required the following stormwater discharges initially to be subject to NPDES permitting requirements: stormwater discharges for which NPDES permits were issued prior to February 4, 1987; discharges "associated with industrial activity"; discharges from MS4s serving populations of 100,000 or more; and any stormwater discharge determined by EPA or a state to "contribute … to a violation of a water quality standard or to be a significant contributor

of pollutants to waters of the United States." Congress further directed EPA to study other stormwater discharges and determine which needed additional controls. With respect to MS4s, section 402(p)(3)(B) provides that NPDES permits may be issued on a system-wide or jurisdiction-wide basis, and requires that MS4 NPDES permits "include a requirement to effectively prohibit non-stormwater discharges into the storm sewers" and require "controls to reduce the discharge of pollutants to the maximum extent practicable . . . and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants."

EPA developed the stormwater regulations under section 402(p) of the CWA in two phases, as directed by the statute. In the first phase, under section 402(p)(4) of the CWA, EPA promulgated regulations establishing application and other NPDES permit requirements for stormwater discharges from medium (serving populations of 100,000 to 250,000) and large (serving populations of 250,000 or more) MS4s, and stormwater discharges associated with industrial activity. EPA published the final Phase I rule on November 16, 1990 (55 FR 47990). The Phase I rule, among other things, defined "municipal separate storm sewer" as publicly-owned conveyances or systems of conveyances that discharge to waters of the U.S. and are designed or used for collecting or conveying stormwater, are not combined sewers, and are not part of a publicly-owned treatment works at § 122.26(b)(8). EPA included construction sites disturbing five acres or more in the definition of "stormwater discharges associated with industrial activity" at § 122.26(b)(14)(x).

In the second phase, section 402(p)(5) and (6) of the CWA required EPA to conduct a study to identify other stormwater discharges that needed further controls "to protect water quality," report to Congress on the results of the study, and to designate for regulation additional

categories of stormwater discharges not regulated in Phase I on the basis of the study and in consultation with state and local officials. EPA promulgated the Phase II rule on December 8, 1999, designating discharges from certain small MS4s and from small construction sites (disturbing equal to or greater than one acre and less than five acres) and requiring NPDES permits for these discharges (64 FR 68722, December 8, 1999). A regulated small MS4 is generally defined as any MS4 that is not already covered by the Phase I program and that is located within the urbanized area boundary as determined by the latest U.S. Decennial Census. Separate storm sewer systems such as those serving military bases, universities, large hospitals or prison complexes, and highways are also included in the definition of "small MS4." See § 122.26(b)(16). In addition, the Phase II rule includes authority for EPA (or states authorized to administer the NPDES program) to require NPDES permits for currently unregulated stormwater discharges through a designation process. See § 122.26(a)(9)(i)(C) and (D). Other small MS4s located outside of an urbanized area may be designated as a regulated small MS4 if the NPDES permitting authority determines that its discharges cause, or have the potential to cause, an adverse impact on water quality. See §§ 122.32(a)(2) and 123.35(b)(3).

B. MS4 Permitting Requirements

The Phase I regulations are primarily comprised of requirements that must be addressed in applications for individual permits from large and medium MS4s. The regulations at § 122.26(d)(2)(iv) require these MS4s to develop a proposed stormwater management program (SWMP), which is considered by EPA or the authorized state permitting authority when establishing permit conditions to reduce pollutants to the "maximum extent practicable" (MEP).

Like the Phase I rule, the Phase II rule requires regulated small MS4s to develop and implement SWMPs. The regulations at §122.34(a) requires that SWMPs be designed to reduce

pollutants discharged 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," and requires that the SWMPs include six "minimum control measures." The minimum control measures are: public education and outreach, public participation and involvement, illicit discharge detection and elimination, construction site runoff control, post construction runoff control, pollution prevention and good housekeeping. See § 122.34(b). Under the Phase II rule, a regulated small MS4 may seek coverage under an available general permit or may apply for an individual permit. To be authorized to discharge under a general permit, the rule requires submission of a Notice of Intent (NOI) to be covered by the general permit containing a description of the best management practices (BMPs) to be implemented and the measurable goals for each of the BMPs, including timing and frequency, as appropriate. See §§ 122.33(a)(1), 122.34(d)(1).

EPA anticipated that under the first two or three permit cycles, whether required in individual permits or in general permits, BMP-based controls implementing the six minimum control measures would, if properly implemented, "be sufficiently stringent to protect water quality, including water quality standards, so that additional, more stringent and/or more prescriptive water quality based effluent limitations will be unnecessary." (64 FR 68753, December 8, 1999). In the final Phase II rule preamble, EPA also stated that it "has intentionally not provided a precise definition of MEP to allow maximum flexibility in MS4 permitting. MS4s need the flexibility to optimize reductions in storm water pollutants on a location-by-location basis. . . . Therefore, each permittee will determine appropriate BMPs to satisfy each of the six minimum control measures through an evaluative process." (64 FR 68754, December 8, 1999).

The agency described the approach to meet the MS4 permit standard in the preamble to the Phase II rule as an "iterative process" of developing, implementing, and improving stormwater control measures contained in SWMPs. As EPA further stated in the preamble to the Phase II rule, "MEP should continually adapt to current conditions and BMP effectiveness and should strive to attain water quality standards. Successive iterations of the mix of BMPs and measurable goals will be driven by the objective of assuring maintenance of water quality standards. . . . If, after implementing the six minimum control measures there is still water quality impairment associated with discharges from the MS4, after successive permit terms the permittee will need to expand or better tailor its BMPs within the scope of the six minimum control measures for each subsequent permit." (64 FR 68754, December 8, 1999).

C. Judicial Review of the Phase II Rule and Partial Remand

The Phase II rule was challenged in petitions for review filed by environmental groups, municipal organizations, and industry groups, resulting in a partial remand of the rule. Environmental Defense Center v. U.S. Environmental Protection Agency, 344 F.3d. 832 (9th Cir. 2003) (*EDC*). The court remanded the Phase II rule's provisions for small MS4 general permits because they lacked procedures for permitting authority review and public notice and the opportunity to request a hearing on NOIs submitted under general MS4 permits.

In reviewing how the Phase II rule provided for general permit coverage for small MS4s, the court found that the way in which NOIs function under the rule was not the same as in other NPDES general permits. Other general permits contain within the body of the general permit the specific effluent limitations and conditions applicable to the class of dischargers for which the permit is available. In this situation, authorization to discharge under a general permit is obtained by filing an NOI in which the discharger agrees to comply with the terms of the general permit

and in which the operator provides some basic information (*e.g.*, site location, receiving waters) to help determine eligibility. In contrast, the court held that under the Phase II rule, because the NOI submitted by the MS4 contains the information describing what the MS4 will do to reduce pollutants to the MEP, it is the "functional equivalent" of an individual permit application. See *EDC*, 344 F.3d. at 857. Because the CWA requires public notice and the opportunity to request a public hearing for all permit applications, the court held that failure to require public notice and the opportunity for a public hearing for NOIs under the Phase II rule is contrary to the Act. See *EDC*, 344 F.3d. at 858.

Similarly, the court found the Phase II rule allows the MS4 to identify the BMPs that it will undertake in its SWMP without any permitting authority review. The court held that the lack of review "to ensure that the measures that any given operator of a small MS4 has decided to undertake will in fact reduce discharges of pollutants to the maximum extent practicable" also does not comport with CWA requirements. The court stated, "That the Rule allows a permitting authority to review an NOI is not enough; every permit must comply with the standards articulated by the Clean Water Act, and unless every NOI issued under general permit is reviewed, there is no way to ensure that such compliance has been achieved." See *EDC*, 344 F.3d. at 855 n.32. The court therefore vacated and remanded "those portions of the Phase II Rule that address these procedural issues . . . so that EPA may take appropriate action to comply with Clean Water Act." See *EDC*, 344 F.3d. at 858.

III. Summary of the Proposed Rule and Comments Received

A. Scope of the Proposed Rule

EPA proposed revisions to the Phase II MS4 NPDES permitting requirements on January 6, 2016 (81 FR 415) to respond to the Ninth Circuit's remand in Environmental Defense Center v.

U.S. Environmental Protection Agency, 344 F.3d. 832 (9th Cir. 2003). To address the remand, the regulations must ensure that permitting authorities determine what permit requirements are needed to reduce pollutants from each permitted small MS4 "to the maximum extent practicable (MEP), to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act" (referred to hereinafter as the "MS4 permit standard"). The rule must also require NPDES permitting authorities to provide the public with the opportunity to review, submit comments, and request a public hearing on these permit requirements. EPA did not propose modifications to any of the substantive requirements that were promulgated in the Phase II rule (nor did EPA reopen or seek comment on any aspect of the Phase I rule, which was described in the preamble of the proposed rule for informational purposes only).

In the remand decision, the court established in broad and clear terms what is needed for general permits that cover regulated small MS4s and therefore provided EPA with what minimum attributes should be part of any revisions to the Phase II regulations. The court stated that "every permit must comply with the standards articulated by the Clean Water Act, and unless every NOI issued under a general permit is reviewed, there is no way to ensure that such compliance has been achieved." See *EDC*, 344 F.3d at 855, n. 32. In the court's view, the NOI served as the document that established how the MEP standard would be met: "Because a Phase II NOI establishes what the discharger will do to reduce discharges to the 'maximum extent practicable,' the Phase II NOI crosses the threshold from being an item of procedural correspondence to being a substantive component of a regulatory scheme." See *EDC*, 344 F.3d at 853. Since review of the NOI by the permitting authority was not specified in the regulation, and § 122.34(a) stated that compliance with the storm water management program developed by the permittee constituted compliance with the MEP standard, the court also expressed concern that

the regulation put the MS4 in charge of establishing its own requirements. "[U]nder the Phase II Rule nothing prevents the operator of a small MS4 from misunderstanding or misrepresenting its own stormwater situation and proposing a set of minimum measures for itself that would reduce discharges by far less than the maximum extent practicable." See *EDC,* 344 F.3d at 855. Further, the court found that the failure to require public notice or opportunity to submit comments or request a public hearing for each NOI violated requirements applicable to all CWA permits in accordance with section 402(b)(3). See *EDC,* 344 F.3d at 857.

B. Description of Options Proposed

EPA proposed for comment the following three options to address the regulatory shortcomings found in the remand decision.

1. Option 1 ("Traditional General Permit Approach")

Under the proposed Traditional General Permit Approach, the permitting authority must establish in any small MS4 general permit the full set of requirements that are deemed necessary to meet the MS4 permit standard ("reduce pollutants to the maximum extent practicable, protect water quality and satisfy the appropriate water quality requirements of the Clean Water Act"), and the administrative record would include an explanation of the rationale for its determination. (This approach contrasts with the original regulations, which appeared to the court to provide the permittee with the ability to establish its own requirements.) Once the permit is issued, and the terms and conditions in the permit are fixed for the term of the permit, neither the development of a SWMP document nor the submittal of an NOI for coverage would represent new permit requirements. Thus, because the permit contains all of the requirements that will be used to assess permittee compliance, the permitting authority would no longer need to rely on the MS4's NOI as the mechanism for ascertaining what will occur during the permit term. Under this

approach, the function of the NOI would be more similar to that of any other general permit NOI, and more specifically other stormwater general permits, whereby the NOI is used to establish certain minimum facts about the discharger, including the operator's contact details, the discharge location(s), and confirmation that the operator is eligible for permit coverage and has agreed to comply with the terms of the permit. By removing the possibility that effluent limits could be proposed in the NOI (and for that matter in the SWMP) and made part of the permit once permit coverage is provided, the NOI would no longer look and function like an individual permit application, as the court found with respect to MS4 NOIs under the Phase II regulations currently in effect. Therefore, it would not be necessary to carry out the type of additional permitting authority review and public participation procedures contemplated by the Ninth Circuit court in the remand decision. These requirements would be met during the process of issuing the general permit.

2. Option 2 ("Procedural Approach")

Under the proposed Procedural Approach, the permitting authority would establish applicable permit requirements to meet the MS4 permit standard by going through a second permitting step following the issuance of the general permit (referred to as the "base general permit"), similar to the procedures used to issue individual NPDES permits. Eligible MS4 operators would be required to submit NOIs with the same information that has always been required under the Phase II regulations, that is, a description of the BMPs to be implemented by the MS4 operator during the permit term, and the measurable goals associated with each BMP. Following the receipt of the NOI, the permitting authority would review the NOI to assess whether the proposed BMPs and measurable goals meet the MS4 permit standard. If not, the permitting authority would request supplemental information or revisions as necessary to ensure

that the submission satisfies the regulatory requirements. Once satisfied with the submission, the permitting authority would be required to propose incorporating the BMPs and measurable goals in the NOI as permit requirements and to provide public notice of the NOI and an opportunity to submit comments and to request a hearing in accordance with §§ 124.10 through 124.13. After consideration of comments received and a hearing, if held, the permitting authority would provide notice of its decision to authorize coverage under the general permit, along with any MS4-specific requirements established during this second process. Upon completion of this process, the MS4 would be required to comply with the requirements set forth in the base general permit and the additional terms and conditions established through the second-step process.

3. Option 3 ("State Choice Approach")

The proposed rule also requested comment on a State Choice Approach, which would allow permitting authorities to choose either the Traditional General Permit Approach or the Procedural Approach, or some combination of the two as would best suit their needs and circumstances. As described in the proposed rule, the permitting authority could, for example, choose to use Option 1 for small MS4s that have fully established programs and uniform core requirements, and Option 2 for MS4s that it finds would benefit from the additional flexibility to address unique circumstances, such as those encountered by non-traditional MS4s *(e.g.,* state departments of transportation, public universities, military bases). Alternatively, a state could apply a hybrid of the two approaches within one permit by defining some elements within the general permit, which, consistent with the Option 1 approach, are deemed to meet the MS4 permit standard, and establishing additional permit requirements through the Option 2 procedural approach for each MS4 seeking coverage under the General Permit. Under a hybrid approach, any requirements established in the general permit that fully articulate what is required to meet

the MS4 permit standard would require no further permitting authority review and public notice proceedings; however, for any terms and conditions established for individual MS4s based in part on information submitted with the NOI would need to follow the Option 2 approach for incorporating these requirements into the permit as enforceable requirements.

C. General Summary of Comments Received

EPA received about 70 unique comments on the proposed rule from the MS4 community, states, environmental groups, industry associations, and engineering firms. Most commenters favored Option 3 - the "State Choice" option. While several expressed support for their states using the Traditional General Permit or Procedural Approach, a number of these same commenters acknowledged that these approaches would likely not work in all situations if EPA were to adopt either one as the sole option under the final rule. EPA notes that while most of the environmental organization commenters expressed support for a hybrid option, which technically falls under the State Choice option, they also strongly recommended mandating that the Traditional General Permit Approach be used for permit requirements related to the six minimum control measures and that the Procedural Approach be used for water quality-based requirements, such as requirements for implementing total maximum daily loads (TMDLs).

A common reason given for supporting the State Choice approach included the flexibility it would give authorized states to use different options to address different situations and that it would minimize disruption to existing programs. Several states that now use a traditional general permit approach or a procedural approach stressed the importance of providing choices for other states. EPA notes that no commenter expressly opposed the State Choice approach. EPA discusses these comments in the context of its decision to adopt the State Choice approach in the final rule in Section IV of the preamble below.

EPA received a significant number of comments concerning its proposed changes to the way in which permit terms and conditions must be expressed, particularly with respect to the proposed deletion of the word "narrative" in § 122.34(a). These comments focused on the concern that EPA was moving away from support of the use of BMPs to comply with stormwater permits and from the longstanding "iterative approach" to meeting MS4 permit requirements. EPA discusses these comments and the changes made in response to these comments in the final rule in Section V of the preamble.

In addition to responding to major comments in the preamble, EPA has prepared a Response to Comment document, which can be found in the docket for this rulemaking.

IV. Summary of the Final Rule

A. Selection of the "Permitting Authority Choice" Approach

EPA is selecting proposed Option 3 (the "State Choice Approach") for the final rule, described in Section III.B.3. The new name for this option better captures the universe of entities that will implement the rule, *i.e.*, any NPDES permitting authority including EPA Regions and authorized states. Under this approach**,** the NPDES permitting authority may choose between two alternative means of establishing permit requirements in general permits for small MS4s. The final rule amends § 122.28(d) to require permitting authorities to choose one of these two types of general permits whenever issuing a small MS4 general permit. Permitting authorities are required to select either the "Comprehensive General Permit" or "Two-Step General Permit.". The "Comprehensive General Permit" is essentially the "Traditional General Permit", or "Option 1", from the proposed rule. The "Two-Step General Permit" encompasses both the "Procedural Approach", or "Option 2" and the "hybrid approach" that was described as part of "Option 3" from the proposed rule. The Two-Step General Permit allows the permitting authority to

establish some requirements in the general permit and others applicable to individual MS4s through a second proposal and public comment process.

B. Description of the Two Permitting Alternatives Under the Permitting Authority Choice Approach

As described in Section IV.A, the Permitting Authority Choice Approach requires permitting authorities to choose between two alternative approaches to issue general permits for small MS4s. These two types of general permits are described briefly as follows:

- ***Comprehensive General Permit*** – For this type of general permit, the permitting authority issues a small MS4 general permit that includes the full set of requirements necessary to meet the MS4 permit standard of "reducing pollutant discharges from the MS4 to the maximum extent practicable (MEP), to protect water quality, and to satisfy the appropriate water quality requirements of the CWA." Under the Comprehensive General Permit, all requirements are contained within the general permit, and no additional requirements are established after permit issuance, as is the case with the "Two-Step General Permit" described below. For this reason, to provide coverage to eligible small MS4s, the permitting authority can use a traditional general permit NOI as described in § 122.28(b)(2)(ii), and does not need to require additional information from each operator concerning how they will comply with the permit, for instance the BMPs that will be implemented and the measurable goals for each control measure, as a prerequisite to authorizing the discharge. See further discussion of the role of the NOI in Section IV.E.
- ***Two-Step General Permit (combination of the proposed Procedural and Hybrid Approaches)*** – For the Two-Step General Permit, after issuing a base general permit, the

permitting authority establishes through the completion of a second permitting step additional permit terms and conditions that are necessary to meet the MS4 permit standard for each MS4 seeking authorization to discharge under the general permit. These additional terms and conditions supplement the requirements of the general permit for individual MS4 permittees. It is in the second permitting step where the permitting authority satisfies its obligation to review the NOI for adequacy, determine what additional requirements are needed for the MS4 to meet the MS4 permit standard, and provide public notice and an opportunity for the public to submit comments and to request a hearing. See discussion of the second permitting step in Section V.B. Upon completion of this process, the MS4 permittee is authorized to discharge subject to the terms of the general permit and the additional requirements that apply individually to that MS4.

The Two-Step General Permit encompasses the "hybrid" approach described in the proposed rule (see Section VI.C), where the permitting authority includes specific permit terms and conditions within the base general permit, but also establishes additional requirements to meet the MS4 permit standard through a second permitting step. For the final rule, EPA intentionally used rule language that would enable permitting authorities to use a Two-Step General Permit to implement a hybrid approach by referring to both "required permit terms and conditions in the general permit applicable to all eligible small MS4s" and "additional terms and conditions to satisfy one or more of the permit requirements in § 122.34 for individual small MS4 operators." See § 122.28(d)(2).

The final rule requires that the permitting authority indicate which type of general permit it is using for any small MS4 general permit. This statement or explanation may be included in the

general permit itself or in the permit fact sheet. EPA notes that the permitting authority may choose to change the permitting approach for subsequent permits. Questions concerning when the final rule change takes effect are discussed in Section VIII.A.

C. Summary of Regulatory Changes to Adopt the Permitting Authority Choice Approach

The final rule implements the Permitting Authority Choice option in several different sections of the NPDES regulations. Below is a brief summary of the most significant changes and where they can be found in the final rule:

- Permitting Authority Choice Approach (§ 122.28(d)): The final rule adds a new paragraph (d) to § 122.28 that requires the permitting authority to select between two alternative general permits. This section describes both types of general permits (the "Comprehensive General Permit" and the "Two-Step General Permit") and the minimum requirements associated with each. EPA chose to include the Permitting Authority Choice in a different section of the regulations than was proposed. EPA determined upon further consideration that rather than including all of the requirements within the application and NOI section of the Phase II regulations now at § 122.33, the two alternatives comprising the Permitting Authority Choice Approach fit better within the general permit regulations as a unique set of requirements affecting general permits for regulated small MS4s.
- Changes to the NOI requirements (§ 122.33): The final rule includes modifications to the requirements for what must be included in NOIs submitted for coverage under small MS4 general permits. The required contents of the NOI vary depending on the type of general permit used. For permitting authorities choosing a Comprehensive General Permit, the final rule enables the permitting authority to reduce the information required in NOIs to the minimum information required for any general permit NOI in § 122.28(b)(2)(ii). See

§ 122.33(b)(1)(i). For permitting authorities choosing the Two-Step General Permit, the final rule provides the permitting authority with the ability to determine what information it deems necessary to establish individual requirements for MS4 operators that meet the MS4 permit standard. See § 122.33(b)(1)(ii), and additional discussion of these and other changes to § 122.33 in Section V.D.1.

- Clarifications to the requirements for small MS4 permits (§ 122.34): Regardless of the permitting approach chosen by the NPDES authority, the terms and conditions of the resulting general permits must adhere to the requirements of § 122.34. 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). See further discussion of these changes in Section VI.

D. Commonalities Among the Two Types of General Permits

The two options available to the permitting authority under the final rule involve different steps and require differing levels of administrative oversight; however, at a basic level, they share the same underlying characteristics. Each type of general permit shares in common that through the permitting process, the permitting authority must determine which requirements a small MS4 must meet in order to satisfy the MS4 permit standard. Both types of general permits

also require that the specific actions that comprise what is necessary to meet the MS4 permit standard be established through the permitting process. The key distinction between the two types of permits is that they establish permit terms and conditions at different points in time during the permitting process. For Comprehensive General Permits, the determination as to what requirements are needed to satisfy the MS4 permit standard is made as part of the issuance of the general permit. By contrast, for Two-Step General Permits, the permitting authority makes this determination both in the process of issuing the general permit and in the process of establishing additional permit requirements applicable on an individual basis to each MS4 covered under the general permit, based on information in the NOI.

The final rule also places both types of general permits on a level playing field with respect to the requirements that must be addressed in any general permit issued to a small MS4. Regardless of which type of general permit is used to establish permit terms and conditions, every small MS4 general permit must include requirements that address the minimum control measures (§ 122.34(b)), water quality-based requirements where needed (§ 122.34(c)), and evaluation and assessment requirements (§ 122.34(d)). The final rule clarifies that all such terms and conditions must be expressed in terms that are "clear, specific, and measurable." The important attribute here is that permit requirements must be enforceable, and must provide a set of performance expectations and schedules that are readily understood by the permittee, the public, and the permitting authority alike. For both types of general permits, requirements may be expressed in narrative or numeric form, as long as they are clear, specific, and measurable. This requirement for clear, specific, and measurable requirements applies to any permit term or condition established under § 122.34, including requirements addressing the minimum control measures, any water quality-based requirements, and the evaluation, recordkeeping, and

reporting requirements. Section VII of this preamble contains a detailed discussion about establishing permit terms and conditions.

Importantly, the final rule also ensures that the process for issuing both types of general permit addresses the deficiencies found by the Ninth Circuit to exist in the Phase II regulations. While the court's opinion focused on the role of the NOI in the Phase II rule for MS4 general permits, the court made it clear that under the CWA, the permitting authority must determine which MS4 permit requirements are adequate to meet the MS4 permit standard, and that the public must have the opportunity to review and comment on those permit requirements and to request a hearing. All of these core CWA requirements are present in the final rule. For Comprehensive General Permits, once the permit is issued it has gone through permitting authority review, public notice and comment, and the opportunity to request a hearing. Permitting authority review and public comment and opportunity for a hearing occurs in the process of drafting permit conditions and soliciting comment on the draft general permit. Permitting authority determination of what an MS4 must do to meet the MS4 permit standard occurs in the process of issuing the final permit after consideration of comments. By comparison, for Two-Step General Permits, permitting authority review, public notice and comment, and the opportunity to request a hearing occur first on the draft general permit and again on the additional terms and conditions applicable to each MS4 authorized to discharge under the general permit. Under the Two-Step process, the CWA requirements for permitting authority review and public comment and opportunity for hearing are only fully addressed after the completion of the discharge authorization process for each individual small MS4 operator seeking coverage under the general permit. To ensure that these CWA requirements are met, the final rule supplements the administrative steps necessary to issue the base general permit with

procedures that ensure that any decision to authorize an individual MS4 to discharge based on information included in the NOI is subject to review by the permitting authority, and the public has the opportunity to review and submit comments, and to request a hearing on the terms and conditions that will be incorporated as enforceable permit terms.

E. Role of the NOI Under the Permitting Authority Choice Approach

The two permitting options available under the final rule include important changes in the relationship between the MS4 operator's NOI and the general permit. Under the 1999 Phase II regulations, any MS4 operator seeking coverage under a small MS4 general permit has been required to submit information in the NOI describing, at a minimum, the BMPs that would be implemented for each minimum control measure during the permit term, and the measurable goals associated with each BMP. These NOIs differ significantly from the typical general permit NOI, which is required to include far less information, and "represents no more than a formal acceptance of [permit] terms elaborated elsewhere" in the general permit. See *EDC*, 344 F. 3d. at 852. Under the NPDES regulations at § 122.28(b)(2)(ii), the NOI is a procedural mechanism to document operator eligibility, to certify that the information submitted by the operator is accurate and truthful, and to confirm the operator's intention to be covered by the terms and conditions of the general permit.

The Ninth Circuit court, in its remand decision, likened the NOI under the remanded regulations to being "functionally equivalent to a detailed application for an individualized permit," since the MS4 operator was in essence proposing to the permitting authority what it intended to accomplish to satisfy the MS4 permit standard. The court found it to differ markedly from the NOI utilized for most general permits, that is, limited to "an item of procedural correspondence." 344 F. 3d. at 853. The similarity in the court's view between the NOI under the

Phase II regulations and an individual permit application, combined with the failure of the regulations to require permitting authority review or to provide the opportunity for the public to comment and request a hearing on the NOI, were key factors in the Ninth Circuit finding that the regulations had violated the CWA.

The final rule modifies the way in which the NOI functions in important respects so that it addresses the problems found by the Ninth Circuit. For a Comprehensive General Permit, because the permit contains all of the requirements that will be used to assess permittee compliance, the permitting authority no longer needs to rely on the MS4's NOI as the mechanism for ascertaining what will occur during the permit term. In this way, the function of the NOI is the same as that of any other general permit NOI, and more specifically other stormwater general permits, where the NOI is used to establish certain minimum facts about the discharger, including the operator's contact details, the discharge location(s), and confirmation that the operator is eligible for permit coverage and has agreed to comply with the terms of the permit. It is for this reason, therefore, that the final rule establishes no additional requirements for the information required to be included in NOIs beyond what is already required for other general permits in § 122.28(b)(2)(ii). See § 122.33(b)(1) in the final rule. By removing the possibility that permit requirements could be proposed in the NOI (or in the SWMP) and made part of the permit once permit coverage is provided under the Comprehensive General Permit approach, the NOI will no longer look and function like an individual permit application, as the court found with respect to MS4 NOIs under the original Phase II regulations. Similarly, because the NOI no longer bears the similarity of an individual permit application, it is no longer necessary to carry out the type of additional permitting authority review and public participation steps contemplated by the Ninth Circuit.

By contrast, for coverage under a Two-Step General Permit, the NOI needs to include information to assist the permitting authority in developing the additional permit requirements for each permittee. For this NOI, the permitting authority requires more detailed information from the MS4 operator so that it can determine what additional permit terms and conditions are necessary in order to satisfy the MS4 permit standard. The NOI in the Two-Step General Permit is likely to include much of the same information that has been required of MS4 operators under the regulations since they were promulgated in 1999. The major difference now is that the permitting authority reviews the NOI materials to determine what additional permit terms and conditions are necessary for the individual MS4 to meet the MS4 permit standard, and to provide an opportunity for the public to comment and request a hearing on this determination.

The proposed rule would have required the full set of information required for individual permit applications in § 122.33(b)(2)(i), including the proposed BMPs to be implemented for the minimum control measures, measurable goals for each BMP (as required by § 122.34(d) of the original regulations), the persons responsible for implementing the stormwater management program, the square mileage served by the MS4, and any other information deemed necessary. In the final rule, EPA is taking a slightly different approach and giving the permitting authority the flexibility to determine what information it needs to request in its Two-Step General Permit NOI rather than requiring by default that all of the individual permit application information be submitted. This will give the permitting authority the ability to request what information it needs to establish the necessary additional terms and conditions for each individual MS4 to meet the MS4 permit standard. If the permitting authority needs information from all of its MS4s on the BMPs and measurable goals they propose for the permit term in order to establish suitable permit requirements, then it has the discretion to require this information. See §§ 122.28(d)(2)(i) and

122.33(b)(1)(ii), which states that the information requested by the permitting authority "may include, but is not limited to, the information required under § 122.33(b)(2)(i)."

Alternatively, under the final rule, if the general permit terms and conditions already define what is required to meet the MS4 permit standard for several of the minimum control measures then the permitting authority could decide that it is no longer necessary to require the submittal of information on the BMPs and measurable goals associated with those minimum control measures. As noted by a commenter, requiring information from MS4s related to permit terms and conditions that have already been established is likely to be redundant and represent an unnecessary burden. At the same time, the permitting authority must be able to obtain sufficient information to establish clear, specific, and measurable permit terms and conditions. Under the final rule, there is no minimum requirement with respect to what information is needed. In short, the permitting authority must request the information it needs to be able to make an informed decision when establishing clear, specific, and measurable permit terms and conditions for the permittee to ensure that it will meet the MS4 permit standard. The final rule enables the permitting authority to determine what the right amount of information is needed to meet this requirement.

F. Permitting Authority Flexibility to Choose the Most Suitable Approach

The final rule provides permitting authorities with full discretion to choose which option is best suited for its permitting needs and specific circumstances. While there are significant considerations, advantages, and disadvantages to selecting either of the two permitting approaches, EPA is leaving the decision of which method to adopt for each general permit up to the permitting authority. In providing full discretion to the permitting authority to choose which approach to use, EPA agreed with commenters that recommended against adopting conditions or

constraints on the selection of either of the two options. EPA also expects that the decision as to which approach to adopt for any given small MS4 general permit may change from one permit term to the next. Therefore, if the permitting authority elects to issue its next general permit by implementing the "Comprehensive General Permit Approach" there is nothing preventing the permitting authority from switching approaches to the "Two-Step General Permit Approach" in subsequent permit terms, or vice versa.

EPA requested comment on whether the agency should constrain the permitting authority's discretion under Option 3 by requiring the use of the "Traditional General Permit Approach" (now the "Comprehensive General Permit") for some types of permit terms and conditions, while allowing the "Procedural Approach (now the "Two-Step General Permit") to be used for other requirements. Several commenters recommended that EPA require permitting authorities to use the proposed "Traditional General Permit Approach" to establish permit requirements for the minimum control measures in § 122.34(b) and to allow the use of the proposed "Procedural Approach" for the establishment of water quality-based effluent limits, such as those implementing total maximum daily loads (TMDLs). EPA refers to this approach below as a "fixed hybrid approach." Other commenters were opposed to a fixed hybrid approach and urged EPA to provide permitting authorities with maximum discretion to choose which option works best without stipulating which option must be used for specific types of permit requirements.

After consideration of these comments, EPA has determined that it is unnecessary to mandate which permitting approach is used for specific types of requirements. Primarily, EPA does not wish to prejudge what approach permitting authorities use to arrive at clear, specific, and measurable requirements that result in achieving the MS4 permit standard. As an overall

matter, EPA views both of the approaches in the final rule as equally valid ways of establishing the required permit terms and conditions and meeting the remand requirements.

Having said this, however, EPA recognizes that some types of requirements are more easily established through the general permit than others. For instance, clear, specific, and measurable permit requirements that address the minimum control measures, due to their broad applicability to all MS4s, may be easier to develop and include within the general permit, than requirements addressing TMDLs. EPA's *MS4 Permit Improvement Guide* (EPA, 2010) and the MS4 permit compendia[1] provide a number of ready examples for how permits may establish clear, specific, and measurable requirements that implement the six minimum control measures. On the other hand, the necessarily site- and watershed-specific nature of TMDLs, combined with the fact that effective implementation of TMDLs is enhanced through involvement of the public at the local level, makes these types of requirements more amenable to being developed through the procedural requirements of the second permitting step within the Two-Step General Permit. To illustrate this point, a number of states have already adopted approaches that enable the MS4s to first develop and propose something like a TMDL implementation plan, followed by a step where the state permitting authority reviews and approves the plan to make it an enforceable part of the permit. See related examples in EPA's *Compendium of MS4 Permitting Approaches – Part 3: Water Quality-Based Requirements* (EPA, 2016).[2] In this situation, under the final rule, the permitting authority would establish the MS4's TMDL implementation requirements as part of the second step of the general permit and follow the procedures applicable to the Two-Step General Permit in § 122.28(d)(2).

[1] These documents can be found on EPA's website at https://www.epa.gov/npdes/stormwater-discharges-municipal-sources#resources.
[2] This document will be made available at on EPA's website at https://www.epa.gov/npdes/stormwater-discharges-municipal-sources#resources.

EPA anticipates that some permitting authorities may over time appreciate the benefits of not having to go through a second process step for individual review and individualized public notices for each MS4, and may as an alternative choose to establish the required permit terms and conditions necessary to meet the MS4 permit standard in the general permit. Under the Two-Step General Permit, the permitting authority must provide public notice for each MS4's NOI and the proposed additional permit terms and conditions to be applied to the MS4, and review and process comments and any requests for a public hearing before finalizing the permit terms and conditions. By comparison, there is only one public notice for an opportunity to comment and request a hearing for a Comprehensive General Permit. Even if deciding that a Comprehensive General Permit is not the best fit, some permitting authorities may find it easier over time to move more requirements into the base general permit so that the number of permitting provisions subject to the additional individualized review and public notice is reduced.

G. Why EPA Did Not Choose Proposed Option 1 or 2 as Stand-Alone Options

By adopting the proposed State Choice Approach (Option 3) (now called the "Permit Authority Choice Approach") for the final rule, EPA is making a decision to not adopt Option 1 (the "Traditional General Permit Approach") or Option 2 (the "Procedural Approach") from the proposal as the sole approach by which permitting authorities issue and administer their small MS4 general permits. As stated in Section V.B., the public comments were heavily in favor of adopting Option 3, although there were also proponents for finalizing proposed Option 1 and for finalizing an approach that would require use of proposed Option 1 for the minimum control measures and proposed Option 2 for water quality-based requirements. EPA ultimately found most persuasive the comments arguing in favor of choosing Option 3 to give permitting

authorities flexibility and discretion to determine how it would develop different permit requirements.

A major theme among comments favoring Option 3 was the emphasis on the flexibility it would provide permitting authorities to choose which approach works best in their state. This flexibility will be important, according to a number of commenters, to continue to be able to administer a program that includes local governments with divergent geography, land resources and uses, and financial and resource capacities. According to a number of commenters, Option 3 would also give permitting authorities a range of options for crafting permit conditions for non-traditional MS4s (*e.g.*, universities, hospitals, military bases, road and highway systems), which in many cases require different types of permit provisions than traditional MS4s due to their lack of regulatory, land use, and/or police powers and more limited audiences. Other comments focused on the significant burden that would be placed on states and regulated MS4s if required to adopt one uniform approach, especially in cases where the permitting authority is already implementing approaches that are similar to either proposed Option 1 or 2. In some cases, the way in which permitting authorities write and administer their small MS4 general permits is a direct result of state case law or concern about the risk of state litigation, and these states argue forcefully in their comments about the importance of retaining their approach in light of this history. According to these comments, those permitting authorities that have chosen one or the other of Option 1 or 2 should be able to continue implementing that approach.

Another related common theme among the comments was an argument against adopting either proposed Option 1 or Option 2 as a national, one size fits all approach. These comments emphasized the difficulties associated with forcing all permit terms and conditions into one general permit for all MS4 types and all water quality considerations using the proposed Option

1 approach, and underscored the resource demands associated with implementing an Option 2 approach. Many of these commenters concluded that Option 3 would be the best way of preserving the permitting authority's flexibility to tailor their approach based on what would work best for each state's circumstances.

Based on these comments, EPA chose Option 3, the Permitting Authority Choice option, because both options are valid ways of addressing the court's remand and there is no reason to compel permitting authorities to adopt one or the other of the approaches in proposed Option 1 or Option 2. EPA also appreciates that those state permitting authorities that are already moving their small MS4 permitting approaches in the direction of either Option 1 or 2 are doing so for a number of legitimate reasons that relate to these states' individual circumstances. By enabling permitting authorities to choose which option works best, EPA is avoiding disrupting already established state preferences. This is not to say that permitting authorities will not have to make changes to conform their procedures to the requirements of the final rule.

EPA also received comments urging the Agency not to adopt Option 2 as the only permitting choice available to permitting authorities because of the resource burdens associated with the Option 2 approach, especially the requirement to individually review and approve terms and conditions for their small MS4s. EPA does not dispute the fact that Option 2 , which has been finalized as the "Two-Step General Permit", is resource intensive; this approach requires significant administrative oversight by design. The process of conducting an individual review of each MS4 operator's NOI, developing a proposal for comment of unique terms and conditions based on the NOI, and processing any public comments or requests for public hearings will require additional resources of the permitting authority if it is not already implementing this type of approach. Any permitting authority choosing this approach will need to carefully consider

whether it has the resource capacity to handle the large amount of administrative oversight and review responsibilities that the Two-Step General Permit requires. EPA expects that the resource requirements alone will provide sufficient enough reason for a number of permitting authorities to choose the Comprehensive General Permit, or to minimize the number of terms and conditions it develops for individual MS4 to lessen the administrative burden associated with the Two-Step General Permit.

EPA understands that a permitting authority's decision to adopt the Two-Step General Permit will mean that members of the public interested in commenting on small MS4 permit conditions may end up needing to review not only the draft general permit but also the public notice that proposes the additional terms and conditions for each MS4 that seeks coverage under the general permit. Some commenters considered this a disadvantage because it would be burdensome for the public as well. EPA does not see this as sufficient reason for EPA to choose Option 1 as the only option and deprive permitting authorities of the flexibility to use a two-step procedure. The Two-Step General Permit closely resembles, after all, the approach suggested in the *EDC* remand decision, which emphasized the need for permitting authority review and public participation procedures prior to the establishment of enforceable permit requirements. EPA appreciates the level of interest and concern there is among the public for ensuring that MS4 discharges are being adequately controlled and are making improvements in water quality. EPA notes that any permitting authority that takes on the Two-Step permitting process will need to be prepared to review and respond to any comments that it receives in response to the individual public notices it publishes, and will need to provide a rationale for any final permit terms and conditions established through the process. While states currently using a two-step type of procedure report that they receive few, if any public comments about requirements for individual

MS4s, this will not necessarily hold true for the future. With this in mind, EPA found it important to clarify in the final rule that permitting authorities may switch to a Comprehensive General Permit for the next permit term simply by explaining which option they will use to provide coverage under the general permit.

V. How the Two General Permit Options Work

A. Comprehensive General Permit Approach

Permitting authorities opting to issue Comprehensive General Permits must establish the full set of requirements that are deemed necessary to meet the MS4 permit standard in § 122.34. (See § 122.28(d)(1), which requires that "the Director includes all required permit terms and conditions in the general permit.") The permit must therefore include terms and conditions that define what is required to meet the MS4 permit standard for the minimum control measures (§ 122.34(b)), additional permit terms and conditions based on an approved total maximum daily load (TMDL) or other appropriate requirements to protect water quality (§ 122.34(c)), and requirements to evaluate and report on compliance with the permit (§ 122.34(d)). As a result, the Comprehensive General Permit is no different than other general permits in that all applicable effluent limitations and other conditions are included within the permit itself, and the NOI is used primarily to determine whether a specific MS4 is eligible and to secure coverage for that MS4 under the permit subject to its limits and conditions.

While a number of comments expressed support for the proposed Option 1 approach (now called the "Comprehensive General Permit" in the final rule), there were also comments expressing concern about the difficulty of putting together a permit that would comprehensively establish terms and conditions that would be suitable for and achievable by all eligible MS4s, including both traditional and non-traditional MS4s. Others questioned the ability of permitting

authorities to write a single permit that would establish uniform requirements that would contain appropriate requirements for MS4s that have been regulated since the beginning of the Phase II program as well as for MS4s brought into the Phase II program by the latest Census, not to mention a permit that would be able to establish watershed-specific requirements addressing TMDLs. EPA acknowledges the challenge that permitting authorities will face in developing and issuing a Comprehensive General Permit. Synthesizing the collective understanding of MS4 capabilities across an entire state, and translating this into effective and achievable permit requirements, will require a greater effort up front in developing one of these permits. However, as described in further detail below, there are ways of addressing challenges such as these, for example, by subcategorizing MS4s by experience, size, or other factors, and creating different requirements for each subcategory.

To assist permitting authorities in developing permit conditions for a Comprehensive General Permit, EPA has compiled examples of permit provisions from existing permits that implement the minimum control measures, which are written in a "clear, specific, and measurable" manner. These examples are included in a document entitled *Compendium of MS4 Permitting Approaches – Part 1: Six Minimum Control Measure Provisions* (EPA, 2016). EPA has also included in a separate compendium examples of permit provisions to consider when addressing approved TMDLs.[3] A number of commenters requested that EPA continue to provide these types of examples to help permitting authorities implement the final rule. EPA agrees with these comments, and plans to regularly update these compendia and provide other similar types of technical assistance.

[3] See EPA's *Compendium of MS4 Permitting Approaches – Part 3: Water Quality-Based Requirements* (EPA, 2016).

There are a variety of permitting approaches that should be considered to address the concerns raised about developing a Comprehensive General Permit for the large number and variety of regulated MS4s, and which address the array of localized or watershed-based issues. One approach that may work is to issue two different comprehensive general permits or to subdivide the permitted universe, establish in the main body of the permit requirements that apply to all MS4s, and to provide a separate appendix that establishes MS4-specific terms and conditions, which apply uniquely to different categories of MS4s. For instance, the state of Washington has issued two MS4 general permits, one for the eastern part of the state and the other for the western part of the state. Further, the Western Washington Small MS4 General Permit includes a TMDL appendix, which establishes additional permit requirements for specific MS4s based on the watershed in which they are located and the waterbody to which they discharge. These additional requirements are each translated from the approved TMDL for that watershed and the specific waterbody. Another approach that permitting authorities can consider is to establish different requirements for each minimum control measure for separate sub-categories of MS4s based on type of MS4 or other factors.[4] Permits could also include separate sections for traditional versus non-traditional MS4s,[5] or alternatively separate permits may be issued for these different categories of MS4s, as several states are doing for departments of transportation MS4s. The main benefit of these different approaches is that they provide the permitting authority with a way of dividing up the universe of small MS4s into smaller

[4] For example, Colorado's 2016 Small MS4 General Permit includes a different set of actions and corresponding deadlines for "new permittees" and "renewal permittees." See Section H, https://www.colorado.gov/pacific/sites/default/files/COR090000-PermitCertification.PDF.
[5] See California's 2013 Small MS4 General Permit, http://www.waterboards.ca.gov/water_issues/programs/stormwater/docs/phsii2012_5th/order_final.pdf.

categories, which are composed of municipalities with a greater degree of similarity among them.

B. Two-Step General Permit Approach

Inherent in the Two-Step General Permit approach is the fact that the general permit requirements are not on their own adequate to meet the MS4 permit standard in § 122.34. In order to fill in the gaps, the permitting authority must individually review information submitted with each eligible MS4 operator's NOI, and propose additional permit requirements to apply to the MS4 individually that, together with the base general permit requirements, meet the MS4 permit standard for that MS4. These proposed additional permit requirements and the information on which it is based is then subject to public notice and comment, and the opportunity to request a hearing.

The first step of the Two-Step General Permit is to develop and issue the final small MS4 general permit, or "base general permit." The need for the second step arises because the base general permit does not include all of the terms and conditions necessary to meet the MS4 permit standard, and therefore has left the development of the additional requirements to a second process. NOIs for general permits using this approach must include more information than NOIs for typical general permits.

The proposed rule described the steps that would be involved in the second step of the permitting process in Section VI.B of the preamble (81 FR 427, January 6, 2016). EPA requested comment on modifying the applicable parts of the NPDES regulations to enable permitting authorities to incorporate additional, enforceable elements of the Two-Step General Permit for individual MS4s following a process that would require public notice, the opportunity to request a public hearing, and a final permitting determination. The model that EPA proposed for this

procedure was based on several of the key components of the permitting framework adopted for Concentrated Animal Feeding Operations (CAFOs) in § 122.23(h). EPA proposed that the new "Option 2" process would be contained in § 122.33(b)(1), where the NOI requirements for small MS4 general permits are located. The proposal described the rule provisions as follows:

- At a minimum, the operator must include in the NOI the BMPs that it proposes to implement to comply with the permit, the measurable goals for each BMP, the person or persons responsible for implementing the SWMP, and any additional information required in the NOI by the general permit. The Director must review the NOI to ensure that it includes adequate information to determine if the proposed BMPs, timelines, and any other actions are adequate 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 Clean Water Act. When the Director finds that additional information is necessary to complete the NOI or clarify, modify, or supplement previously submitted material, the Director may request such additional information from the MS4 operator.
- If the Director makes a preliminary determination that the NOI contains the required information and that the proposed BMPs, schedules, and any other actions necessary 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 Clean Water Act, the permitting authority must notify the public of its proposal to authorize the MS4 to discharge under the general permit and, consistent with § 124.10, make available for public review and comment and opportunity for public hearing the NOI, and the specific BMPs, milestones, and schedules from the NOI that the Director

proposes to be incorporated into the permit as enforceable requirements. The process for submitting public comments and hearing requests, and the hearing process if a hearing is granted, must follow the procedures applicable to draft permits in §§ 124.11 through 124.13. The permitting authority must respond to significant comments received during the comment period, as provided in § 124.17, and, if necessary revise the proposed BMPs and/or timelines to be included as terms of the permit.

- When the Director authorizes coverage for the MS4 to discharge under the general permit, the specific elements identified in the NOI are incorporated as terms and conditions of the general permit for that MS4. The permitting authority must, consistent with § 124.15, notify the MS4 operator and inform the public that coverage has been authorized and of the elements from the NOI that are incorporated as terms and conditions of the general permit applicable to the MS4 (81 FR at 427-420, January 6, 2016).

The final rule matches closely with what was proposed as the steps necessary to implement Option 2. These steps, which are part of what was finalized as the "Two-Step General Permit," are described as follows in § 122.28(d)(2):

(1) The MS4 operator submits the NOI with the information about its activities as specified in the general permit.

(2) The permitting authority reviews the NOI to determine if the information is complete and to develop proposed additional permit requirements necessary to meet the MS4 permit standard;

(3) If the permitting authority makes a preliminary determination to authorize the small MS4 operator to discharge it must give the public notice of and opportunity to comment and request a public hearing on the proposed additional permit terms and conditions, and the

basis for these additional requirements, including the NOI and other relevant information submitted by the MS4. These procedures must be carried out in accordance with 40 CFR part 124.

(4) Upon completion of the procedures in step (3), the permitting authority may authorize the discharge from the MS4 subject to the requirements of the base general permit and the final requirements established in the second step. Using this approach, the permitting authority may choose to rely fully on the completion of this process to establish most of required permit terms and conditions for a particular MS4, or it may rely on a hybrid approach wherein some of the necessary requirements are established within the base general permit at permit issuance while the remaining set of requirements are developed during the process of authorizing individual MS4 discharges in the second step.

Where EPA has modified the Two-Step General Permit from the proposed rule, it is to clarify a point made in the proposed rule. For instance, EPA makes a clarification in the final rule regarding the requirements for NOI review in the Two-Step approach. The proposed rule explained that the purpose of the permitting authority's review is to determine whether the NOI is complete and whether the operator's proposed set of BMPs and measurable goals are adequate to meet the MS4 permit standard. The final rule places emphasis on the fact that the information submitted by the MS4 operator with its NOI is for the purpose of informing the permitting authority's determination as to what "additional terms and conditions necessary to meet the requirements of § 122.34." See § 122.28(d)(2)(ii). What the operator submits in the NOI is determined by the permitting authority when establishing the base general permit. The permitting authority may request descriptions of BMPs to be implemented and measurable goals as the MS4's proposal for what it considers to be adequate to "reduce pollutants to the maximum extent

practicable, protect water quality and satisfy the appropriate water quality requirements of the Clean Water Act." Under the Two-Part General Permit in the final rule, the permitting authority reviews this information to craft what it determines are the necessary permit terms and conditions to meet this MS4 permit standard; these terms and conditions are then subject to the permitting procedures for public comment and the opportunity to request a hearing. The specific requirements developed out of this process may bear a substantial similarity to the operator's proposed BMPs and measurable goals, but they also may be modified or further refined based on the permitting authority's own determination as to the specific requirements that it deems necessary to meet the MS4 permit standard. For instance, instead of proposing to adopt all of the BMP details that are submitted by the MS4 operator with the NOI as enforceable permit requirements, the permitting authority may instead develop proposed requirements that focus in on the specific actions and milestones that it believes would represent significant progress during the permit term. This is a clarification from the proposed rule description of the NOI review process, which did not clearly articulate the permitting authority's role in reviewing the operator's BMP and measurable goal information, or other information requested in the base general permit (or fact sheet).

Another clarification made to the proposed Two-Step process relates to the 40 CFR part 124 procedures to follow during the second step. The final rule incorporates by reference several specific sections of part 124. These specific references are consistent with the proposed rule's reference generally to part 124, however, in the final rule EPA focused in on the specific procedural requirements that ensure that the public participation aspects of the Two-Step General Permit are consistent with the NPDES regulations. These part 124 requirements are necessary because the permitting authority is proposing to add additional terms and conditions to the

general permit applicable to individual MS4 permittees. EPA likens these additional terms and conditions to the development of a "draft permit" under § 124.6, and, as such, these draft requirements must undergo minimum permitting procedures for public notice, comments, and hearings before they are established in final form. The following procedural requirements are referenced directly:

Public Notice of Permit Actions and Public Comment Period (§ 124.10, excluding (c)(2)) – By incorporating these provisions of § 124.10 for the Two-Part General Permit, this means that the permitting authority's notice must adhere to the following minimum public notice requirements for the draft permit conditions:

- The notice must provide a minimum of 30 days for the public to provide comment on the draft permit terms and conditions. The permitting authority must provide notice to the public at least 30 days prior to holding a public hearing on these draft requirements. See § 124.10(b).
- The permitting authority must provide public notice to the MS4 operator who submitted the NOI, to any relevant agencies or other entities referenced in § 124.10(c)(1), and members of the public on the permitting authority's mailing list pursuant to § 124.10(c)(1)(ix). The public notice must also be sent in a manner constituting legal notice to the public under state law (if the permit program is administered by an approved state), and by using "any other method reasonably calculated to give actual notice" of the draft terms and conditions being added to the permit. See § 124.10(c)(3) and (4).
- The public notice must consist of: (1) the name and address of the office processing the NOI and draft terms and conditions for the MS4 operator; (2) name, address, and

telephone number of a person from whom interested persons may obtain further information, including copies of the draft terms and conditions, statement of basis or fact sheet, and the NOI; (3) a brief description of the comment procedures required by §§ 124.11 and 124.12 and the time and place of any hearing that will be held, including a statement of procedures to request a hearing, and any other procedures by which the public may participate in the final authorization decision; (4) for EPA-issued permits, the location of the administrative record required by § 124.9, the times when the record will be open for public inspection, and a statement that all data submitted by the operator is available as part of the administrative record; (5) a general description of the location of each discharge point and the name of the receiving water; and (6) any additional information considered "necessary or proper." The public notice of a hearing under § 124.12 must include: (1) reference to the date of previous public notices relating to the same MS4; (2) date, time, and place of the hearing; and (3) a brief description of the nature and purpose of the hearing, including the applicable rules and procedures. See § 124.10(d).

- In addition to the public notice, the permitting authority must mail a copy of the fact sheet or statement of basis, the NOI, and the draft terms and conditions to the operator and other agencies and entities listed in § 124.10(c)(1)(ii) and (iii). See § 124.10(e).

A cross-reference to § 124.10(c)(2) is not included in the final rule. Although these requirements apply to general permits, EPA distinguishes in the Two-Step General Permit between the base general permit and the terms and conditions that are added through the second permitting step for individual MS4 permittees. The permitting

authority is required to comply with § 124.10(c)(2) when issuing the general permit *(i.e.*, the base general permit). However, because the additional MS4-specific terms and conditions are developed in a manner that is similar to the way in which terms in an individual permit would be developed, EPA concluded that the public notice requirements that apply to individual permits are more appropriate for the second step in the process of authorizing an MS4 to discharge under a Two-Step General Permit. For this reason, EPA does not apply the specific requirements of § 124.10(c)(2) to the proposed additional terms and conditions, but does apply the other applicable public notice requirements of § 124.10.

Public Comments and Public Hearings (§§ 124.11 and 124.17)

Consistent with § 124.11, during the public comment period for the draft permit conditions, any member of the public may submit comments and may request a hearing, if none has already been scheduled. The permitting authority is required to consider comments received during the comment period in making the decision to authorize the discharge. When the permitting authority has made a final determination to authorize an individual small MS4 to discharge under the general permit, subject to the additional incorporated requirements, it must also make available to the public its responses to comments received, subject to the applicable requirements of § 124.17.

Public Hearings (§ 124.12)

If the permitting authority holds a public hearing on the draft permit conditions, public notice of the hearing must be provided as specified in § 124.10 and the hearing must be conducted in accordance with the requirements of § 124.12.

Obligation to Raise Issues During the Public Comment Period (§ 124.13)

During the public comment period for the draft permit conditions, commenters are obligated to raise "all reasonably ascertainable issues and submit all reasonably available arguments supporting their position" as required in § 124.13.

Upon completion of these procedures, in which permitting authority review, public notice and comment, and any public hearings take place in accordance with the appropriate sections of part 124, the permitting authority may authorize the MS4 to discharge under the terms of the permit. When authorization occurs, the final terms and conditions that were the subject of the public comment and hearing process described above become enforceable permit terms and conditions for that MS4 permittee. No significant changes were made to this step from the proposed rule. EPA clarifies that the permitting authority may choose the method by which the permittee is notified of the final decision to authorize the discharge and the final permit conditions, and by which the public is informed of the same. EPA oversight of state-issued NPDES permits must also be taken into account. Under the Two-Step General Permit, EPA has authority to review all terms and conditions of the permit, whether established in a base general permit or in the second step that establishes terms and conditions for individual MS4s. See § 123.44.

C. Permittee Publication of Public Notice

A question arose during the development of the proposed rule as to whether the MS4 could carry out public notice requirements for the Procedural Approach (now referred to as the "Two-Step General Permit"). Several states currently require MS4 permittees to provide public notice of individual MS4 NOIs (and their proposed SWMPs in many states), including information on how the public can submit comments to the state and to request a public hearing. EPA requested comment on whether permitting authorities that have relied on the MS4 to place public notices in

the past should be able to use this approach to satisfy their public notice requirements for individual NOIs under the Two-Part General Permit. EPA did not propose this approach to be adopted as part of the rulemaking effort, and is not including in the final rule any specific requirements related to this practice.

EPA received several comments in response to this question. State permitting authorities and one statewide MS4 association voiced their support for allowing permitting authorities to require MS4 permittees to publish public notices, and to establish procedures within the final rule to accommodate this practice. One state suggested that if a permitting authority is allowed to rely on the MS4 to publish the public notice of the NOI, such public notice must follow all of the minimum requirements related to the contents and methods of providing notice, and any public comments received should be acknowledged and considered by the state and documented in the final permit decision. Another commenter recommended that the permitting authority be the only entity authorized to conduct public notice and comment procedures given the differences of opinion that may arise during the process, but suggested that as an alternative EPA could allow states to establish their own process for these procedures as long as they are consistent with the regulations.

Other commenters were opposed to allowing permitting authorities to rely on the MS4 permittee to carry out applicable public participation requirements. These commenters emphasized the clear requirement in the regulations for the permitting authority to conduct these activities, pointing to the fact that the NOI should be treated no differently than any permit application. These comments noted that members of the public wishing to review and potentially submit comments and request a hearing on NOIs should have a centralized place to refer to for reviewing public notices of NOIs, and feared that allowing a decentralized approach where the

MS4 handles the public notice would be unlikely to reach the intended audience. Another point made was that in keeping with the permitting authority's responsibility to review and determine the adequacy of each MS4's NOI, the public notice and comment proceedings that are associated with the NOIs should be managed by the same entity. These commenters also questioned whether delegating these responsibilities to the MS4 made sense given the fact that it is the state that is most familiar with how to meet its own administrative rules and protocols, and that is best equipped from a technical and physical capacity standpoint to receive and process comments, many of which will be submitted electronically, and potentially hold hearings. Additionally, some commenters worried about the effect of placing more burden on the municipalities.

The final rule does not address the issue of whether the permitting authority may rely on its MS4 permittees to carry out public notice responsibilities on its behalf in the final rule, but instead incorporates by reference the existing set of requirements that apply to all draft permits in § 124.10. As to whether permitting authorities may rely on the permittee to publish the public notice, it is EPA's view that they may do so as long as the public notice meets all of the applicable requirements in § 124.10. The public notice responsibilities in the NPDES regulations apply to the permitting authority, therefore these are requirements that it must ensure are met. The state must conduct any public hearing, consider the comments received, respond to them, and make decisions as to what changes are necessary as a result of the comments.

VI. Requirements for Permit Terms and Conditions

EPA proposed several clarifying changes to the regulatory language in § 122.34 regarding the expression of permit limits for small MS4s. First, EPA proposed to clarify that the permitting authority is responsible for establishing permit requirements that meet the MS4 permit standard. Second, proposed changes would address issues of clarity in permit terms and the different ways

in which permit requirements can be expressed. Third, the proposal would reinforce the expectation that the MS4 standard must be independently met for each 5-year permit term. Each of these categories of regulatory changes is discussed below. The final rule incorporates these proposed changes, with some modification to the proposed rule language in response to comments and for additional clarity.

A. Permitting Authority as the Ultimate Decision-Maker

To directly address the clear message from the Ninth Circuit remand that the regulations need to preclude the small MS4 from determining on its own what actions are sufficient to meet the MS4 standard "to reduce pollutants to the maximum extent practicable, protect water quality and satisfy the appropriate water quality requirements of the CWA," EPA proposed revisions throughout § 122.34 to make it clear that the permitting authority is responsible for establishing permit requirements that meet the standard. For this reason, EPA proposed to shift the focus of the requirements in § 122.34 to the "NPDES permitting authority" rather than the regulated small MS4. Similarly, the proposed rule modified the guidance provisions to focus on permitting authorities as well as MS4s. In most cases, this meant substituting the term "NPDES permitting authority" for "you" or "your" (referring to the regulated small MS4*)* and referring to the regulated small MS4 as the "operator." A related change tied to the remand was the proposed deletion of the sentence "Implementation of best management practices consistent with the provisions of the storm water management program required pursuant to this section and the provisions of the permit required pursuant to § 122.33 constitutes compliance with the standard of reducing pollutants to the 'maximum extent practicable.'" The Ninth Circuit court specifically raised this sentence as a demonstration that "nothing in the Phase II regulations requires that NPDES permitting authorities review these Minimum Measures to ensure that the measures that

any given operator of a small MS4 has decided to undertake will *in fact* reduce discharges to the maximum extent practicable." See *EDC,* 344 F.3d at 832, 854. The proposal to remove this sentence, combined with the other changes, would reinforce the fact that the permitting authority is the entity responsible for establishing the terms and conditions of the permit necessary to meet the MS4 permit standard. These changes also would shift the focus of § 122.34 to the development of permit requirements and away from the identification of what the MS4 should include in its SWMP.

EPA received a relatively small number of comments responding to these proposed changes. Some commenters expressed a preference to continue to have the MS4 in charge of defining the MS4 standard for itself or requested that the deleted sentence ("Implementation of best management practices consistent with the provisions of the stormwater management plan….") be retained. Other commenters pointed out that the proposed changes should apply to all regulated small MS4 permits, regardless of the type of permit (*e.g.*, Traditional General Permit, Procedural General Permit, or individual), and requested that EPA clarify this in the final rule.

The final rule retains the proposed rule changes that emphasize that it is the permitting authority with the ultimate authority to determine what small MS4s must do to meet the MS4 permit standard. These changes respond to the Ninth Circuit's finding in the *EDC* decision that the Phase II rule did not, contrary to the CWA, require the permitting authority to determine whether the MS4 permittee's proposed program would in fact meet the MS4 permit standard. Indeed, while the *EDC* decision specifically addressed the general permit process, the underlying rationale for the court's rejection of the general permitting process – the failure of the rule to ensure that the permitting authority, not the permittee, determine what is needed to meet the standard applicable to MS4 permits under the CWA – applies whether the MS4 permit is a

general permit or an individual permit. Therefore, EPA is amending § 122.34 to apply to any permit issued to regulated small MS4s (except those small MS4s applying for an individual permit under § 122.33(b)(2)(ii)).

These changes, including the deletion of the sentence "Implementation of best management practices consistent with the provisions of the storm water management program required pursuant to this section and the provisions of the permit required pursuant to § 122.33 constitutes compliance with the standard of reducing pollutants to the maximum extent practicable," more clearly establish the permit as the enforceable document, not the stormwater management program or what has been described in the SWMP. (See VI.E of this preamble for a discussion of the function of the "SWMP" under EPA's small MS4 regulation.)

B. "Clear, Specific, and Measurable" Permit Requirements

EPA also proposed rule revisions related to the expression of permit terms. Consistent with current EPA guidance, the proposed rule specified that permit requirements be expressed in "clear, specific, and measurable" terms. The preamble to the proposed rule contained a detailed discussion about what "clear, specific, and measurable" meant and EPA put in the rulemaking docket a draft compendium of example language from actual permits to further illustrate the meaning of "clear specific, and measurable." See updated permit compendium in the final rule docket, *MS4 Compendium of Permitting Approaches: Part 1: Six Minimum Control Measures* (EPA, 2016). EPA also included in the preamble to the proposed rule, examples of permit language that *do not* appear to have the type of detail that would be needed.

In addition to specifying that permit terms and conditions must be "clear, specific, and measurable," the proposed rule text clarified that effluent limitations may be in the form of BMPs, and provided non-exclusive examples of how these BMP requirements may appear in the

permit, such as in the form of specific tasks, BMP design requirements, performance requirements or benchmarks, schedules for implementation and maintenance, and the frequency of actions. This language was proposed to substitute for existing language that states: "Narrative effluent limitations requiring implementation of best management practices (BMPs) are generally the most appropriate form of effluent limitations when designed to satisfy technology requirements . . . and to protect water quality."

EPA also proposed to delete a related guidance paragraph in § 123.34(e)(2). As explained in the proposed rule preamble, the guidance no longer reflects current practice.[6] The deletion of this paragraph is also consistent with EPA guidance developed since 1999 regarding the types of requirements that are recommended for MS4 permits.[7]

EPA received numerous comments on these proposed changes. For the most part, commenters from all stakeholder groups expressed approval for the "clear, specific, and measurable" language. However, a variety of commenters read the deletion of "narrative" to mean that numeric effluent limitations (*e.g.*, end-of-pipe pollutant concentration limitations) would be required in small MS4 permits or that "narrative" limits would no longer be acceptable. As stated in the preamble, EPA did not intend to make substantive changes to § 122.34 beyond what would be required to address the court remand. The term "narrative" was proposed to be deleted to recognize that other expressions of effluent limitations may be appropriate, not to preclude the use of narrative effluent limitations. To avoid misinterpretation of the regulation, however, the final rule instead describes appropriate requirements as being "narrative, numeric,

[6] See EPA's *Compendium of MS4 Permitting Approaches – Part 3: Water Quality-Based Requirements* (EPA, 2016).
[7] See EPA memorandum entitled *Revisions to the November 22, 2002 Memorandum "Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs,"* November 26, 2014.

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.

Regarding the insertion of "clear, specific, and measurable" to describe permit requirements, most commenters perceived benefits for permittees, permitting authorities, and the public, particularly because it will be more clearly stated in the permit what is expected for compliance. Some commenters observed that "clear, specific, and measurable" terms would enable better enforcement of the MS4 permit requirements, and would provide a more effective path to improved water quality. Some small MS4s themselves pointed out that greater certainty in permit terms could put them into a better position to plan and to garner local political support and critical funding for their programs. Other MS4s, however, voiced uncertainty as to how the terms "clear, specific, and measurable" would be implemented and what would actually be required of them by their permits and concern that their flexibility would be unduly restricted. Some commenters also suggested that regulatory provisions associated with the expression of permit limits, while discussed in the preamble to the proposed rule in the context of Option 1, should apply regardless of the option chosen. Several groups requested that "clear, specific, and measurable" be changed instead to "focused, flexible, and effective." Other commenters requested that "enforceable" be added to this phrase. Some groups representing MS4 permittees and industry expressed concern that "measurable" meant that permits would now contain water quality monitoring requirements or that "measurable," together with the deletion of "narrative" to describe effluent limitations, meant that EPA was opening the door for small MS4 permits to now be required to contain numeric effluent limitations, *e.g.*, end-of-pipe pollutant concentration limits for each outfall in the system. A concern that "clear, specific, and measurable" would preclude or reduce MS4 flexibility to change program elements as a program encountered

successes or failures (*i.e.*, adaptations made during the permit term or to meet MS4-specific circumstances) was also stated as a disadvantage associated with this language. In a related vein, several commenters warned against permit terms that were too specific and left very little discretion to the MS4. Some commenters requested that the regulatory text indicate that the expectation that permit requirements be "clear, specific, and measurable" apply to each BMP and other requirements in the permit, and accompanied by reporting requirements that related to measurable requirements, rather than measureable goals as in the current regulation.

The final rule retains the proposed rule requirement for "clear, specific, and measurable" permit terms and conditions. Accompanying the promulgation of this requirement, EPA is also publishing an updated version of its compendium of permit examples from the proposed rule (*i.e.*, *MS4 Compendium of Permitting Approaches: Part 1: Six Minimum Control Measures* (EPA, 2016)), which includes provisions from EPA and state MS4 general permits that provide examples of clear, specific, and measurable requirements. EPA also retains the examples provided in the proposed rule preamble of permit language that would generally not qualify as clear, specific, and measurable, which is included here, with minor edits:

- Permit provisions that simply copy the language of the Phase II regulations verbatim without providing further detail on the level of effort required or that do not include the minimum actions that must be carried out during the permit term. For instance, where a permit includes the language in § 122.34(b)(4)(ii)(B) (*i.e.*, requiring "… construction site operators to implement appropriate erosion and sediment control best management practices") and does not provide further details on the minimum set of accepted practices, the requirement would not provide clear, specific, and measurable requirements within the intended meaning of the proposed Traditional General Permit Approach. The same

would also be true if the permit just copies the language from the other minimum control measure provisions in § 122.34(b) without further detailing the particular actions and schedules that must be achieved during the permit term.

- Permit requirements that include "caveat" language, such as "if feasible," "if practicable," "to the maximum extent practicable," and "as necessary" or "as appropriate" unless defined. Without defining parameters for such terms (for example, "infeasible" means "not technologically possible or not economically practicable and achievable in light of best industry practices"), this type of language creates uncertainty as to what specific actions the permittee is expected to take, and is therefore difficult to comply with and assess compliance.
- Permit provisions that preface the requirement with non-mandatory words, such as "should" or "the permittee is encouraged to …." This type of permit language makes it difficult to assess compliance since it is ultimately left to the judgment of the permittee as to whether it will comply. EPA notes that the Phase II regulations include "guidance" in places (*e.g.*, § 122.34(b)(1)(ii), (b)(2)(ii), and (b)(3)(iv)) that suggest practices for adoption by MS4s and within permits, but does not mandate that they be adopted. This guidance language is intended for permitting authorities to consider in establishing their permit requirements. Permitting authorities may find it helpful to their permittees to include guidance language within their permits in order to provide suggestions to their permittees, and it may be included. However, guidance language phrased as suggested guidelines would not qualify as an enforceable permit requirement under the final rule.
- Permit requirements that lack a measurable component. For instance, permit language implementing the construction minimum control measure that requires inspections "at a

frequency determined by the permittee" based on a number of factors. This type of provision includes no minimum frequency that can be used to measure adequacy and, therefore, would not constitute a measurable requirement for the purposes of the rule.

- Provisions that require the development of a plan to implement one of the minimum control measures, but does not include details on the minimum contents or requirements for the plan, or the required outcomes, deadlines, and corresponding milestones. For example, permit language requiring the MS4 to develop a plan to implement the public education minimum control measure, which informs the public about steps they can take to reduce stormwater pollution. The requirement leaves all of the decisions on what specific actions will be taken during the permit term to comply with this provision to the MS4 permittee, thus enabling almost any type of activity, no matter how minor or insubstantial, to be considered in compliance with the permit.

Regarding the suggestion to add "enforceable," in EPA's view, clear, specific and measurable terms and conditions together define what makes a permit requirement enforceable. Therefore, adding "enforceable" to this list of attributes would not add to the enforceability of permit terms and conditions. With respect to the suggestion to replace "clear, specific, and measurable" with "focused, flexible, and effective," EPA clarifies that nothing in the final rule prevents a permitting authority from developing permit requirements that are focused, flexible, and effective, as long as those requirements are articulated in clear, specific, and measurable terms.

The word "specific" also generated a number of comments. EPA proposed "specific" to indicate what activities an MS4 would be required to undertake to implement the various required elements of the minimum control measures described in § 122.34(b) or to achieve a

specified level of performance that would constitute compliance with the permit. Some commenters advocated for more specificity in permits, while others cautioned against too much specificity. Still others simply asked for more guidance about how "specific" a general permit would need to be. EPA intends for "specific" to mean that a permitting authority describes in enough in detail that an MS4 can determine from permit terms and conditions what activity they need to undertake, when or how often they must undertake it, and whether they must undertake it in a particular way. It must be clear what does and does not constitute compliance. As noted in the preamble to the proposed regulation, a verbatim repetition of the minimum control measures described in § 122.34(b) does not provide a sufficient level of specificity.

At the same time, EPA intends for the permitting authority to retain discretion in determining how much specificity is needed for different permit requirements. The level of specificity may change over time, for example, to reflect a more robust understanding of more effective stormwater management controls or to meet specific state needs. There is a wide range of ways to implement a stormwater management program and the permitting authority will need to determine how to craft permit terms and conditions that establish clear expectations that implement the various requirements in § 122.34 in specific terms, and this can be done while also providing flexibility to MS4s to choose how they will comply with permit terms. For example, a requirement to "Develop a public education program about the effect of stormwater on water quality" is not a sufficiently specific permit requirement. To provide greater specificity, some permitting authorities have provided a menu of specific public education activities in the permit, and the MS4 must choose from among them indicating how they will comply with the permit. For a hypothetical example, the permit might require that the MS4 undertake four public education activities each year from a list of activities specified in the permit and include at least

one each year that is directed at students in all public schools within the MS4 area, using an existing or new curriculum, to explain ways in which stormwater can harm water quality. In this hypothetical example, the MS4 has the flexibility to choose from a list of activities the permitting authority has determined are acceptable and, for the required activity involving public schools, and to choose a curriculum that already exists or develop a new one that is tailored to specific stormwater problems in the community. The specific (clear and measurable) permit terms are: (1) to undertake four education activities per year from a specified list of allowable activities; and (2) to ensure that at least one of the activities involves education about stormwater at all public schools. Compliance would be completion of four activities each year. One type of activity is specified in the permit, but the MS4 can choose the audience, the medium, and the specific message for the other three required activities. Even within the more specific requirement related to public schools, the permittee would have discretion in determining the form and content of the curriculum. In this hypothetical example, the permit contained requirements of varying specificity, but the boundaries of what constitutes compliance is readily apparent and it is clear what the MS4 must do and the timeframe for compliance.

What is not specified in a permit implicitly defines the level of discretion the MS4 has to meet the terms and conditions of the permit. EPA recognizes that it can be useful for MS4s to retain the ability to change specific stormwater control activities during the term of the permit without the need to seek a permit modification for every change. In the above hypothetical example, if the MS4 finds that, after the second year of the permit term that the curriculum it chose was not effective, it could develop a different one or choose another curriculum, *e.g.*, one that involves field work rather than just classroom instruction. The change in curriculum would not require a permit modification because the permit did not specify the particular curriculum

that must be used. The permit terms in this case also provide the public with sufficient information to offer comments on the activities available, their number and frequency, and the degree of discretion left to the MS4. EPA emphasizes that it is not necessary that every detail be spelled out in a permit as an enforceable requirement under the CWA. See further discussion of the considerations related to permit modifications in Section VI.E.

In the above hypothetical example, the permitting authority could have chosen more specific terms. For example, it could have required that the MS4s undertake activities A and B in the first year, activities C and D in the second year, and so on. It could have specified the medium to be used, *e.g.*, television or social media and each of the audiences that must be addressed in the outreach plan *(e.g.*, businesses, commercial establishments, developers). EPA notes that increased specificity does not necessarily mean that the permit is more stringent. It does, however, decrease the flexibility left to the MS4 to determine how to meet the permit requirement. Conversely, the permitting authority in the above hypothetical example could have been less specific, for instance, by not requiring one activity each year to be carried out in public schools. Permitting authorities need to consider what level of specificity is appropriate based on the particular factors at play in their permit area. The level of specificity may change over time, and should be evaluated in each successive permit. There may be differences of opinion about the degree of specificity needed, but that call would be open for public comment on the general permit or, if the Two-Part General Permit is used, on the public notice for the additional terms and conditions applicable to individual MS4s.

Another example of how the permit can provide greater specificity is to include distinct requirements based on type of MS4. For example, Section 3.2.1.3 of the Arkansas general permit states: “The stormwater public education and outreach program shall include more than one

mechanism and target at least five different stormwater themes or messages over the permit term. At a minimum, at least one theme or message shall be targeted to the land development community. *For non-traditional MS4s, the land development community refers to landscaping and construction contractors working within its boundaries* (emphasis added). The stormwater public education and outreach program shall reach at least 50 percent of the population over the permit term." Here, the permitting authority further specifies the target audience as applied to non-traditional MS4s.

Alternatively, specific permit terms could be established uniformly for all eligible small MS4s, which would have the benefit of leveling the playing field among small MS4s. The final rule gives permitting authorities some discretion to decide how much specificity to include in the permit and how much flexibility to leave to the MS4 when working out the details of how it will comply with permit terms. The public would have an opportunity to provide comments on such preliminary decisions about the level of specificity in permit terms and conditions needed during the public comment period on the general permit or on the second step of a Two-Step General Permit, or in some cases on both.

EPA also received comments on the term "measurable." In response to comments, EPA clarifies that "measurable" does not necessarily mean that water quality monitoring must be required in every instance to assess compliance. Likewise, it does not mean that numeric, end-of-pipe pollutant concentrations or loadings must be included in permits. While these examples do represent a type of measurable requirement, they are not required to be in every MS4 permit. Rather, the term "measurable" means that the permit requirement has been articulated in such a way that compliance with it can be assessed in a straightforward manner. For example, a permit provision that requires inspections at construction sites to be conducted once per week until final

stabilization has been verified is a measurable requirement. To help assess compliance, the permit should also contain a way to track whether the requirement has been met, such as requiring the permittee to keep a log of each inspection, including the date and any relevant findings. On the other hand, a requirement that construction sites be inspected "after storms as needed" would not be a measurable requirement. For this requirement, the permittee would have to determine whether a "storm" occurred and, if so, whether an inspection was called for, both of which are determinations that are left completely up to the permittee to determine. A permitting authority could not easily assess that this requirement was or was not met.

Like the term "measurable," "numeric" is another term that is often misunderstood to require numeric end-of-pipe concentration and/or mass pollutant limitations similar to those that commonly appear in permits issued to other types of point source dischargers (*e.g.*, industrial process discharges and discharges from sewage treatment plants). EPA intends numeric to be read more broadly to include an objective, quantifiable value related to the performance of different requirements for small MS4 programs. For example, "numeric" can refer to the number or frequency of required actions to be taken such as a requirement to "clean 25% of the catch basins in your service area on a yearly basis" or "complete 6 of 10 public education events specified in the following table on an annual basis." "Numeric" can also refer to a specified numeric performance levels, such as a retention standard for post-construction discharges from new development and re-development sites, *e.g.*, "The first inch of any precipitation must be retained on-site." Another example of a numeric performance requirement is exemplified by the following provision from the 2016 Vermont Small MS4 general permit: "The control measure(s) is designed to treat at a minimum the 80th percentile storm event. The control measure(s) shall be designed to treat stormwater runoff in a manner expected to reduce the event mean

concentration of total suspended solids (TSS) to a median value of 30 mg/L or less." See Section E.4.a.iv.B.

A commenter requested that EPA require measurable conditions for each BMP. EPA interprets this comment as recommending that permit terms implementing the minimum control measures, which are often articulated as narrative requirements, each be expressed in a measurable manner. EPA agrees that permit terms and conditions that are established to satisfy a minimum control measure need to have measurable (as well as clear and specific) requirements associated with them that assist the MS4 and permitting authority in determining whether required elements of the minimum control measures or other permit terms and conditions have been achieved.

In the final rule, EPA has decided to substitute the term "terms and conditions" for "effluent limitations" because stakeholders asserted the term effluent limitations connotes end-of-pipe numeric limits even though EPA is not insisting that these types of limitations be used. In sum, EPA intends that terms and conditions are a type of effluent limitations and that they are interchangeable and both mean permit requirements. As defined in the Clean Water Act, "effluent limitation" means "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance." See CWA section 502(11). The Clean Water Act also authorizes inclusion of permit conditions. See CWA section 402(a)(1) and (2). Both "effluent limitations or other limitations" under section 301 of the Act and "any permit or condition thereof" are an enforceable "effluent standard or limitation" under the citizen suit provision, section 505(f) of the Clean Water Act, and the general enforcement provisions, section

309 of the Act. EPA uses these terms interchangeably when referring to actions designed to reduce pollutant discharges. For the purposes of this final rule, changing the small MS4 regulations to refer instead to "terms and conditions" is intended to be read as consistent with the meaning of "effluent limitations" in the regulations and CWA.

C. Narrative, Numeric, and Other Forms of Permit Requirements

As explained in the previous section of this preamble, EPA has clarified that permit limits need not be expressed only as "narrative" limits but can consist of "narrative, numeric, and other types" of permit requirements. The final rule provides a non-exclusive list of the types of narrative, numeric, and other types of terms and conditions that would be appropriate for small MS4 permits by stating that allowable terms and conditions could include, among other things "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." These examples are the same as those proposed, with the exception of removing the term "benchmarks" and adding in its place, "adaptive management requirements." Several commenters noted that the term "benchmarks" is used in EPA's and many states' Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity, or "MSGP," to mean numeric pollutant concentration levels that must be measured, and if exceeded, trigger further monitoring or corrective action requirements. To eliminate any confusion, the commenters requested that a different term be used. EPA did not intend "benchmarks" to be precisely defined, but instead to generally refer to various types of identified measurements of performance and to undertake different actions or controls if performance is not at the measured level. To avoid confusion, EPA is replacing "benchmarks" with the phrase "adaptive management requirements," since adaptive management

approaches are used widely in the MS4 communities. Adaptive management enables MS4 permittees to iteratively improve their stormwater control strategies and practices as they implement their programs and learn from experience to better control pollutant discharges.

With respect to establishing permit terms and conditions, use of the term "BMP" in § 122.34(a) is intended to take on a broad meaning and could encompass both the enforceable terms and conditions of the permit as well as particular activities and practices selected by the permittee that will be undertaken to meet the permit requirements but that are not themselves enforceable. BMPs are defined in § 122.2. The term is defined to include schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce water pollution. The regulatory definition also includes treatment requirements, operating procedures, and practices to control runoff, spillage or leads, sludge, or waste disposal, or drainage from raw material storages as BMPs. The defined regulatory term was developed to describe requirements to undertake certain activities to reduce the amount of pollutants discharged that are not described as numeric pollutant effluent discharge limitations or represent specific performance levels. See § 122.44(k). EPA intends, in § 122.34(a) of the final rule, to use BMP in its broadest sense to refer to any type of structural or non-structural practice or activity undertaken by the MS4 in the course of implementing its SWMP. Whether a BMP is an enforceable requirement depends on whether the permitting authority has established it as a term and condition of the permit. The term BMP in § 122.34(a) is not intended to be used interchangeably with enforceable requirements necessary to demonstrate compliance with the permit. Instead, it refers to any type of activity that is used to reduce pollutants in the MS4's discharge. This distinction is important because, as discussed elsewhere in the preamble, some

BMPs may be changed without first requiring a permit modification, but only if they are not included as enforceable requirements of the permit.

D. Considerations in Developing Requirements for Successive Permits

A final change to § 122.34(a) that EPA proposed was to reflect the iterative nature of the MS4 permit standard and require that what is considered adequate to meet the MS4 permit standard, including what constitutes "maximum extent practicable," needs to be determined for each new permit term. The final rule provision is retained from the proposed rule, which requires that for each successive permit, the permitting authority must include terms and conditions that meet the requirements of § 122.34 based on its evaluation of the current permit requirements, record of permittee compliance and program implementation progress, current water quality conditions, and other relevant information. The preamble to the proposed rule explained: "A foundational principle of MS4 permits is that from permit term to permit term iterative progress will be made towards meeting water quality objectives, and that adjustments in the form of modified permit requirements will be made where necessary to reflect current water quality conditions, BMP effectiveness, and other current relevant information." (81 FR 422, Jan. 6, 2015). The preamble further listed possible sources to inform the evaluation such as past annual reports, current SWMP documents, audit reports, receiving water monitoring results, existing permit requirements, and applicable TMDLs.

EPA received numerous comments on the language regarding the development of each successive permit. One commenter asked EPA to include additional factors in the rule text that would need to be considered when developing a new small MS4 permit, including impairment status of the waterbody and applicable TMDLs, and permits developed by other states. Other factors requested to be included in the text were discussed in the preamble to the proposed rule

include: how long the MS4 has been permitted, the degree of progress made by the small MS4 permittees as a whole and by individual MS4s, the reasons for any lack of progress, and the capability of these MS4s to achieve more focused requirements. Another commenter stated that while it is appropriate to re-examine the permit requirements for continued applicability and effectiveness, EPA should not presume that successive permits would always require more stringent requirements. Instead, the commenter continues, the permit could only require adjustments of existing BMPs. EPA also received general comments about the nature of "maximum extent practicable" that were reflected in comments concerning the new language about successive permits.

EPA has retained substantially the same text as it proposed. In § 122.34(a)(2), permitting authorities are required to revisit permit terms and conditions during the permit issuance process, and to make any necessary changes in order to ensure that the subsequent permit continues to meet the MS4 permit standard. Thus, in advance of issuing any new small MS4 general permit, the permitting authority will need to review, among other things, available information on the relative progress made by permittees to meet any applicable milestones under the expiring permit, compliance problems that may have arisen, the effectiveness of the required activities and selected BMPs under the existing permit, and any improvements or degradation in water quality. This requirement applies regardless of the type of permit (individual or general) or the specific general permitting approach that is chosen by the permitting authority.

As commenters pointed out, there are other factors that the permitting authority can consider in establishing the permit requirements in successive permits that meet the MS4 permit standard. This provision, however, is intended to state a general requirement to update each permit and therefore uses broader, more general terms rather than trying to name all of the factors and

considerations that may bear on the development of specific permit terms and conditions in successive permits. The crux of this requirement is that permitting authorities cannot simply reissue the same permit term after term without considering whether more progress can or should be made to meet water quality objectives or that other changes to the permit are in order. As is the case with NPDES permits generally, the permitting authority considers anew what is appropriate each time it issues a permit. For example, new stormwater management techniques may have arisen or become affordable during the expiring permit term that should be taken into consideration. The factors identified by commenters and discussed in the proposed rule preamble are all relevant considerations. First and foremost, as noted by one commenter, "the understanding of which pollution control measures and standards are the most effective and practicable can evolve, requiring corresponding changes in permit conditions to meet the 'MEP' standard." Likewise, the stressors affecting water quality can change over time. The water quality of the receiving water and any applicable TMDLs are factors that should be considered, but additional rule language is unnecessary since these factors are already encompassed within the final rule's reference to "current water quality conditions." (Also see, § 122.34(c) which requires permit conditions based on applicable TMDLs.) How long an MS4 has been permitted also could point to establishing different or "tiered" requirements based on whether the MS4 is on its third or fourth permit with a mature program or is a newly regulated MS4 that must build its program "from scratch." Using broad, general terms to describe considerations that may change over time provides critical flexibility, while ensuring that the assessment of current circumstances and information is done.

Contrary to the assumption that EPA presumes that each successive permit will contain more stringent conditions for each permit requirement, EPA recognizes that this is not the case.

It is possible that some permit conditions remain relatively static in a successive permit. If a permit, however, contained a less stringent requirement or less specific language than had been included in the previous permit this would require an explanation, backed by empirical evidence or other objective rationale that the requirement was no longer practicable or that another approach is more effective, and that making this requirement less stringent would not result in greater levels of pollutant discharges. This would be especially true where the MS4 is discharging pollutants to an impaired water due to an excess of those pollutants. How quickly pollutants must be reduced and which elements of a program need greater or less emphasis are certainly considerations that an MS4 (or others) can raise during the comment period. Likewise, an MS4 that is seeking an individual permit or coverage under a Two-Step General Permit, can propose BMPs or other management measures to the permitting authority that reflect its judgment about how and to what extent permit terms and conditions should change or stay the same.

One commenter asserted that EPA should require consideration of other states' permits in determining permit conditions. The commenter reasoned that if one state adopts a requirement that achieves greater pollutant reduction than another state, the other state should have to adopt the more effective permit condition or explain why it is not practicable for MS4s in its state. The commenter also noted that EPA has taken similar positions with respect to technology-based requirements for other types of discharges. Finally, the commenter urged EPA to continue to provide and update examples of permit conditions developed by various states. EPA does not find it necessary to expressly require the rule to compel permitting authorities to consider the terms and conditions of permits in other jurisdictions in determining the need to modify their own permits. Each permitting authority is required to issue permits that independently meet the

MS4 permit standard based on an evaluation of, among other things, how well the past permit conditions worked and what more can be reasonably achieved in the next permit term. This evaluation involves factors that are necessarily unique to the permitting jurisdiction. Furthermore, the factors that led to one state permit's adoption of stricter requirements than another state makes a straightforward analysis between the two difficult, and potentially misleading. While EPA does not agree that permitting authorities should be required to consider other state permits, EPA agrees that much can be learned from other states' permitting approaches and it may be a relevant factor to consider in a particular permitting proceeding.

Commenters suggest that EPA's publication of its MS4 permit compendia (EPA, 2016), as well as EPA's *MS4 Permit Improvement Guide* (EPA, 2010), providing examples of permit provisions that are written in a "clear, specific, and measurable" manner, makes it easier for permitting authorities to write better permits. EPA agrees with commenters that sharing examples among states is an effective tool for developing permit conditions and has updated the compendium of state practices to accompany the final rule for this very reason. See *Compendium of MS4 Permitting Approaches – Part 1: Six Minimum Control Measures* (EPA, 2016) in the final rule docket.[8] EPA plans to facilitate information transfer on a continuing basis.

E. Relationship Between the SWMP and Required Permit Terms and Conditions

a. Enforceability of SWMP Documents

In the proposed rule, EPA clarified that the SWMP document does not include enforceable effluent limitations or any other term or condition of the permit. EPA also proposed to delete the

[8] This document, and two additional compendia, *Compendium of MS4 Permitting Approaches – Part 2: Post Construction Standards* (EPA, 2016) and *Compendium of MS4 Permitting Approaches – Part 3: Water Quality-Based Requirements* (EPA, 2016), will be available at EPA's website at https://www.epa.gov/npdes/stormwater-discharges-municipal-sources#resources.

language in the Phase II regulations stating that implementation of the SWMP would constitute compliance with the MS4 permit standard. This clarification is retained in the final rule. EPA is revising § 122.34(a) to clarify that the permit, not the stormwater management program, contains the requirements, including requirements for each of the six minimum measures, for reducing pollutants to the maximum extent practicable, protecting water quality and satisfying the appropriate water quality requirements of the CWA. See also Section VIII.A for further discussion of the deleted provision in § 122.34(a). The final rule at § 122.34(b) requires each permit to require the permittee to develop a "written storm water management program document or documents that, at a minimum, describes in detail how the permittee intends to comply with the permit's requirements for each minimum control measure." Requiring that portions of the SWMP be in the form of written documentation is not a new requirement, but rather a clarification. The minimum control measure requirements have always required that certain aspects of the permittee's SWMP be documented in writing, *e.g.*, the storm sewer system map, ordinances or other regulatory mechanisms to regulate illicit non-stormwater discharges into the MS4 and to require erosion and sediment controls. The written SWMP provides the permitting authority something concrete to review to understand how the MS4 will comply with permit requirements and implement its stormwater management program. EPA included a specific requirement for written documentation to clarify, as requested by some commenters, the difference between a MS4's stormwater management program itself from the written description of the program.

EPA received several comments regarding the role of the SWMP document under the different permitting options. Among these comments were several focusing on whether the implementation details described in the SWMP document itself, including the BMPs to be

implemented and measurable goals to be achieved, would be enforceable as permit requirements. One commenter noted that some states consider a SWMP document to be an integral part of the permit and recommended that EPA do nothing in the rule to limit a permitting authority's ability to enforce against an MS4 for failure to implement any particular aspect of the SWMP and to require an accurate, up-to-date SWMP document that contains the provisions required by the permit. Other commenters, representing the regulated MS4 point of view, emphasized the role of the SWMP document as a planning tool for the permittee, one that is intended to be continually updated to reflect their adaptive management approach to permit compliance. These commenters cautioned against implying directly or indirectly that the SWMP document is an "effluent limitation" that is part of the permit, and felt that under Option 1 of the proposed rule, provisions in SWMP documents could be interpreted by the public to be effluent limitations, thereby opening all details described in the SWMP document to enforcement. These commenters recommended that EPA more narrowly define "effluent limitation" and clarify that SWMPs are for planning purposes only and not subject to challenge by outside parties.

In response to these comments, EPA clarifies that, under EPA's small MS4 regulations, the details included in the permittee's SWMP document are not directly enforceable as effluent limitations of the permit. The SWMP document is intended to be a tool that describes the means by which the MS4 establishes its stormwater controls and engages in the adaptive management process during the term of the permit. While the requirement to develop a SWMP document is an enforceable condition of the permit (see § 122.34(b) of the final rule), the contents of the SWMP document and the SWMP document itself are not enforceable as effluent limitations of the permit, unless the document or the specific details within the SMWP are specifically incorporated by the permitting authority into the permit. In accordance with the final rule,

therefore, if an MS4 permittee fails to develop a SWMP document that meets the requirements of its permit, this failure constitutes a permit violation. By contrast, the details of any part of the permittee's program that are described in the SWMP, unless specifically incorporated into the permit, are not enforceable under the permit, and because they are not terms of the permit, the MS4 may revise those parts of the SWMP if necessary to meet any permit requirements or to make improvements to stormwater controls during the permit term. As discussed in more detail below, the permitting authority has discretion to determine what elements, if any, of the SWMP are to be made enforceable, but in order to do so it must follow the procedural requirements for the second step under § 122.28(d)(2).

The regulations envision that the MS4 permittee will develop a written SWMP document that provides a road map for how the permittee will comply with the permit. The SWMP document(s) can be changed based on adaptations made during the course of the permit, which enable the permittee to react to circumstances and experiences on the ground and to make adjustments to its program to better comply with the permit. The fact that the SWMP is an external tool and not required to be part of the permit is intended to enable the MS4 permittee to be able to modify and retool its approach during the course of the permit term in order to continually improve how it complies with the permit and to do this without requiring the permitting authority to review and approve each change as a permit modification. The fact that the regulations do not require the implementation details of the SWMP document to be made enforceable under the permit does not mean that a permitting authority cannot decide to directly incorporate portions of the SWMP or the entire SWMP as enforceable terms and conditions of the permit. However, in order to adopt any part of the SWMP document as an enforceable term or condition it must go through the proper permitting steps to do so. If a permitting authority

chooses to directly incorporate elements of the SWMP document as enforceable permit requirements, once completing the minimum permitting steps to propose and finalize NPDES permit conditions, those elements of the SWMP are no longer external to the permit, but instead become enforceable terms and conditions of the permit.

Lastly, EPA understands that some state permitting authorities already incorporate elements of their permittees' SWMP document using a process that is similar to the Two-Step General Permit process in the final rule. EPA emphasizes that under the final rule if a permitting authority chooses to adopt portions of their permittees' SWMPs using the Two-Step General Permit process this would be a valid way to formally incorporate these as permit terms and conditions; this is because in order to make these requirements enforceable under the permit the permitting authority provided the necessary review and public notice and comment procedures. By contrast, EPA generally would not consider general permits that state that the SWMP documents developed by the MS4 are enforceable under the permit, without first formally adopting the details of these documents to the individual permitting authority review and public participation required by the second step of the Two-Step General Permit, to be an adequate way in which to incorporate the details of the SWMP as enforceable requirements of the permit.

b. Permit Modification Considerations

EPA raised the issue in the proposed rule of whether under the Procedural Approach (now in the final rule as the "Two-Step General Permit" approach) a permit modification would be necessary during the permit term if BMPs or measurable goals were changed by the permittee from that which was submitted to the permitting authority. EPA specifically sought comment on what criteria should apply for distinguishing between when a change to BMPs is "substantial" requiring a full public participation process or "not substantial" that would be subject to public

notice but not public comment under a permit modification process similar to the process in § 122.42(e)(6).

A number of commenters expressed support for treating some types of changes as non-substantial modifications to the permit. Commenters emphasized the fact that the types of plans, strategies, and practices implemented under MS4 SWMP are subject to considerable change, and that requiring these changes to undergo a review for a permit modification would stifle the process as well as innovation. Some commenters offered suggestions for what types of changes to the SWMP should constitute a substantial modification and should be reviewable by the permitting authority, and which types of changes should be considered non-substantial. Some thought that a complete change to a BMP should be reviewed by the permitting authority for a modification, while others felt that such changes should not be submitted for review if the replacement BMP would be considered to provide equal or better pollutant removal. Another commenter suggested that EPA incorporate applicable requirements from the CAFO regulations whereby the permittee submits proposed changes to the permitting authority and the permitting authority must determine whether such changes comply with applicable, substantive legal requirements, and if the changes are substantial, then the permitting authority must require public notice, and an opportunity to provide comments or request a hearing before the determination is made on the modification.

The Two-Step approach requires the MS4 operator to provide information about what it intends to do during the permit term to satisfy some or even all of the permit requirements for meeting the MS4 permit standard. The rule then requires the permitting authority, through a review and public comment process, to establish MS4-specific permit terms and conditions that the permitting authority deems necessary to meet the MS4 permit standard. Once issued, these

additional permit requirements are set for the permit term, and compliance is measured based on the permittee's ability to meet these enforceable terms and conditions. When the final permit terms and conditions are established, changes to those requirements can only be made through a formal modification process, which is subject to the requirements of § 122.62, or § 122.63 if the proposed change constitutes a minor modification.

A distinction between what constitutes a potential change in permit terms and what amounts to merely a change in implementation of the SWMP is important to consider in the context of the Two-Step General Permit. Where a permittee proposes to change a BMP that it is implementing, and the change does not require the enforceable permit conditions to be changed in any way, but rather offers an alternative means of complying with the same permit conditions, EPA would not consider this to be a permit modification. For instance, if the MS4's permit requires that it conduct field tests of 20 percent of its priority outfalls on an annual basis for illicit discharges, and the permittee changes its method of conducting such tests that is described in its SWMP document, even though a revision to the SWMP document maintained by the permittee may be necessary, no permit modification would be necessary because the 20 percent requirement is still in effect. By contrast, where a permittee proposes to substitute one of its BMPs for another one, and that change would alter the compliance expectations defined in the permit, the permittee will need to notify the permitting authority before proceeding to determine if a permit modification is necessary. For example, if the permittee's requirements specify in precise detail the field screening methodology that the MS4 will utilize for its priority outfalls, and the permittee has indicated it no longer intends to use this approach, then this proposed change will need to be evaluated by the permitting authority for whether a formal permit modification is needed. The

important test here is to compare the permittee's proposed change with the terms and conditions of the permit.

EPA shares the views of commenters who emphasized the problems that would be created by any permitting scheme that would require permit modifications to be formally reviewed and approved for every SWMP change. Changes and adjustments made to the SWMP document during its implementation are a fundamental part of the Phase II program, which has always emphasized the need for adaptive management to make iterative progress towards water quality goals. Requiring every adaptive management change to undergo review and approval by the permitting authority would constrain implementation and innovation, as commenters suggested, and could greatly increase the burden on permitting authorities. Having said this, however, EPA recognizes that in some circumstances, as illustrated in the example above, the wording of a permit provision may require that a modification be made before a permittee may proceed with a proposed change to its SWMP document. If the permitting authority wants to minimize the instances when a permit modification would be needed, it could incorporate with specificity only those elements in the SWMP document that it deems essential for meeting the MS4 permit standard. For example, a permitting authority could decide that as an alternative to incorporating all of the details of the permittee's proposed outfall screening plan in its "illicit discharge detection and elimination" portion of its SWMP document into the permit, it might instead consider selecting the specific aspects of the screening plan that in its judgment would meet the MS4 permit standard, such as that the permittee will screen all "high priority" outfalls by a specific date and that all illicit discharges will be eliminated within a specified amount of time. By not incorporating every aspect of the specific plans and procedures described by the permittee in its SWMP document, the permittee can modify its implementation approach during the permit

term without needing to check with the permitting authority before making any such changes and having that change approved under the permit.

Apart from the issue of whether or not proposed SWMP document changes require a permit modification is the need for permitting authorities to specify what procedures it will follow to review and process any permit modifications. EPA agrees with the commenter that suggested that such procedures are needed. Rather than establishing a unique set of procedures, however, it is EPA's view that the existing regulatory procedures in §§ 122.62 and 122.63, which apply to all NPDES permit modifications, are sufficient for modifications to a Two-Step General Permit. EPA advises permitting authorities to include in their permits a clear description of what types of proposed SWMP document changes will need to be reviewed as potential permit modifications, and the procedures for submitting and reviewing these changes.

F. Explaining How the Permit Terms and Conditions Meet the MS4 Permit Standard

Several commenters recommended that the final rule clarify, both in the preamble and in the rule language itself, that permitting authorities are required to include an explanation in the permit's administrative record as to why the adopted permit provisions meet the MS4 permit standard. The commenters specified that this requirement should apply regardless of the option EPA chooses to include in the final rule.

EPA agrees that the permitting authority's rationale for adopting specific small MS4 permit requirements should be documented consistent with the requirements for any NPDES permit requirements under § 124.8 and, if EPA is the permitting authority, § 124.9. This rationale should describe the basis for the draft permit terms and conditions, including support for why the permitting authority has determined that the requirements meet the required MS4 permit standard. EPA agrees with the commenters' suggestion that this rationale should be provided

under both permitting approaches in the final rule. This position is consistent with the Ninth Circuit's remand decision, which emphasized the need for permitting authorities to determine that requirements satisfy the MS4 permit standard and that the public be given an opportunity to provide comments and to request a hearing on this determination.

For clarification purposes, EPA includes additional language in the final rule for the Two-Step General Permit approach to emphasize that the permitting authority's public notice for the second step (pursuant to § 122.28(d)(2)(ii)) must include, apart from the NOI and the proposed additional permit terms and conditions, "the basis for these additional requirements." This requirement is consistent with the requirements of § 124.8(b) for what must be included in a permit fact sheet. EPA does not find it necessary for the permitting authority to produce a full fact sheet for each individual MS4 permittee under a Two-Step General Permit, nor do the regulations require this for the type of permit requirements that are being established under the second step. A fact sheet is required for the issuance of the general permit, regardless of whether the general permit is a Comprehensive General Permit or the base general permit in a Two-Step General Permit. See § 124.8(a), which requires fact sheets to be prepared for general permits. However, the NPDES regulations do not require a separate fact sheet to be developed for the additional terms and conditions that are established for individual MS4s in the second step of the Two-Step General Permit, since these requirements are not themselves part of the base general permit, nor do they necessarily fall under any of the other types of permits listed in § 124.8(a) as requiring a fact sheet (*e.g.*, a "major" NPDES facility or site). Short of requiring a separate fact sheet for the draft additional permit conditions, EPA finds it reasonable to expect the proposed additional permit terms and conditions to be accompanied by the supporting rationale for why these requirements satisfy the MS4 permit standard.

One commenter also suggested that permitting authorities be required to explain in the administrative record why any alternative standards recommended in public comments or included in any of EPA's MS4 permit compendia were not adopted. Permitting authorities are required to respond to significant comments received in response to the public notice for the Comprehensive General Permit and the base general permit of a Two-Step General Permit, and, in addition, to respond to the comments on the second step public notice under a Two-Step General Permit. Such comments could include alternative standards suggested for inclusion in the permit. EPA does not agree that permitting authorities should be required to explain in the administrative record why a provision included in any of the agency's MS4 permit compendia was not used in any particular permit. Again, the example permit provisions that are highlighted in the permit compendia are provided as guidance and are not intended to provide a floor for what types of provisions must be used in MS4 permits.

G. Minimum Federal Permit Requirements

Several commenters requested clarification or raised concerns about the extent to which the Phase II regulations establish minimum permit requirements. This question is often raised in the context of state laws that prohibit the permitting authority from including terms and conditions in a permit that are more stringent than the federal minimum requirements or include more than the federal minimum requirements. Some comments confuse "minimum permit requirements" with the specified elements of the minimum control measures described in § 122.34(b). In a related manner, a number of permitting authorities have shared with EPA their experiences in encountering resistance to a proposed permit requirement on the basis that it is not explicitly required in the federal regulations. In addition, some commenters asked EPA to clarify that

suggestions made in the "guidance" paragraphs that are unique to the small MS4 regulations are not mandatory permit terms.

The regulations specify the elements that must be addressed in a permit. It is up to the permitting authority to establish the specific terms and conditions to meet the MS4 permit standard for each of these elements. The minimum control measures set forth in § 122.34(b), for instance, are not intended as minimum permit requirements, but rather areas of municipal stormwater management that must be addressed in permits through terms and conditions that are determined adequate to meet the MS4 permit standard. For that matter, if a permitting authority were to merely use the minimum control measure language from § 122.34(b) word-for-word and include no further enforceable permit terms and conditions, this permit would not satisfactorily meet the requirement to establish clear, specific, and measurable requirements that together ensure permittees will comply with the MS4 permit standard. EPA emphasizes that what constitutes compliance with the MS4 permit standard continues to evolve. The need to reevaluate what is meant by "maximum extent practicable" for each permit term, as well as the need to determine what is necessary to protect water quality and satisfy the appropriate water quality requirements of the CWA, means that what constitutes compliance will by necessity change over time. Therefore, in EPA's view, those that argue that the minimum federal requirements are what is included in the wording of the minimum control measures, are misconstruing the intent of the regulations, and are handicapping permits by artificially tying the MS4 permit standard to the minimum control measures.

EPA emphasizes that the minimum control measures do not restrict the permitting authority from regulating additional sources of stormwater pollutant discharges, not specifically mentioned in the minimum control measure language. For example, some states require small MS4s with

very large populations to implement a program that addresses industrial sites due to the concentration of industrial sites in many of their larger urban areas. (Consider that some small MS4s can be the same size as "medium" MS4s, which are required to have a program for addressing stormwater discharges from industrial sites.) Such a requirement represents what is necessary, for those small MS4s, to reduce pollutants as necessary to meet the MS4 permit standard. This does not mean that the requirement is more stringent than the minimum control measures, but rather it constitutes what is needed in the permitting authority's view to satisfy the MS4 permit standard.

In response to the comments relating to the guidance language in § 122.34(b), EPA verifies that this "guidance" is intended to act as suggested methods of implementation, not mandatory permit terms. Having said this, EPA points out that these guidelines could form the basis of permit terms that meet the § 122.34(a) requirement to articulate requirements in a clear, specific, and measurable manner. EPA's interest in having more specific requirements in permits is to provide clarity of expectations and to hold MS4s accountable for implementing a program that continues to make progress toward achievement of water quality objectives. For a permitting authority to include requirements in a permit based on these "guidance requirements," because in its view they are necessary to ensure MS4s meet the MS4 permit standard, does not mean that the permit has established requirements beyond the federal minimum or that the permitting authority impermissibly used guidance to develop enforceable requirements.

H. Comments Beyond the Scope of This Rulemaking

EPA received numerous public comments suggesting revisions to the substantive requirements in § 122.34. EPA clearly stated its intent in the preamble to the proposed rule that it was not proposing to change any substantive requirement and therefore the many comments

suggesting the addition of specific requirements (*e.g.*, establish or do not establish a numeric retention standard for post-construction stormwater controls) are outside the scope of this rulemaking.

VII. Revisions to Other Parts of § 122.34

A. Compliance Timeline for New MS4 Permittees

EPA proposed a minor revision to § 122.34(a) to include the word "new" before "permittees" to indicate that the five-year period allowed to develop and implement their stormwater management program applies to the initial permit for new permittees. New permittees could include small MS4s that are in urbanized areas for the first time because of demographic changes reflected in the latest decennial census, or they could be specifically designated by a permitting authority as needing an NPDES permit to protect water quality. This change is intended to preserve the flexibility included in Phase II regulations in place prior to this final rule, and to more clearly indicate that the extended time period for compliance is intended to apply to MS4s that must put a stormwater management program in place for the first time. This revision does not change the status quo; it merely recognizes that first-time small MS4 permittees have up to five years to develop and implement their SWMPs, while small MS4s that have already been permitted will have developed and implemented their SWMPs when they reapply for permit coverage under an individual permit or submit an NOI under the next small MS4 general permit. This is not to say that all actions necessary to achieve pollutant reductions must be completed in the first five years. EPA recognizes that MS4s may need more time, for example, to complete the various steps needed to get structural controls into place and operational (*e.g.*, design project(s), secure funding, follow procurement procedures, etc. before installing structural BMPs). Therefore, EPA is retaining in the final rule the proposed

clarification that permitting authorities may provide up to 5 years for small MS4s being permitted for the first time to come into compliance with the terms and conditions of the permit and to implement necessary BMPs.

B. Revisions to Evaluation and Assessment Provisions

EPA proposed to renumber existing § 122.34(g) as § 122.34(d) and to incorporate the stylistic changes described in Section VII.E of this preamble. Several commenters suggested that the terminology in this paragraph be changed to conform to the text changes made elsewhere. EPA agrees that changes to reflect the remand changes similar to the ones made elsewhere in the section are appropriate for the newly designated § 122.34(d)(1) concerning requirements for evaluation and assessment. The new § 122.34(d)(1) now states that the permit must require the permittee to evaluate compliance with the terms and conditions of the permit, the effectiveness of the components of its stormwater management program, and of achieving the measurable requirements in the permit. Rather than evaluate the appropriateness of self-identified BMPs and measurable goals as previously required, the final rule requires permits to include terms and conditions to evaluate compliance with permit requirements, including achievement of measurable requirements established as permit requirements. This language more closely aligns the required evaluation and assessment requirements with the newly articulated requirements for developing permit conditions that are clear, specific, and measurable. It also more accurately describes the objectives of the evaluation and assessment requirements, given other revisions made in response to the remand to clarify that permitting authorities determine what is constitutes compliance, not the regulated MS4s.

The proposed rule inadvertently omitted a recent amendment to § 122.34(g) (§ 122.34(d) in the final rule) that was added by the eReporting rule (80 FR 64064, Oct. 22, 2015). This

omission is corrected in the rule text that appears in this Federal Register document. The relevant provision in § 122.34(d)(3) states that, among other things, starting on December 21, 2020 all reports submitted in compliance with this section must be submitted electronically by the owner, operator, or the duly authorized representative of the small MS4 to the permitting authority or initial recipient, as defined in 40 CFR 127.2(b), in compliance with this section and 40 CFR part 3 (including, in all cases, subpart D to part 3), § 122.22, and 40 CFR part 127, and that prior to this date, and independent of part 127, the owner, operator, or the duly authorized representative of the small MS4 may be required to report electronically if specified by a particular permit or if required to do so by state law. Section IX addresses in more detail the relationship between this final rule and the eReporting rule.

EPA received a request to revise proposed § 122.34(d)(2) regarding recordkeeping requirements to mandate that MS4s post on-line the SWMP documents required under § 122.34(b). Currently, MS4s are only required to make summaries of their SWMP available to the public upon request. EPA is of the view that on-line posting of information is an effective way to communicate stormwater program information, and encourages MS4s to post on-line documents that describe their stormwater management plans, as well as provide other information about managing stormwater for various audiences. EPA, however, declines to adopt a regulatory requirement for MS4s to post documents on-line. EPA did not propose any changes to the recordkeeping requirements, and accordingly, the request is outside the scope of the proposal. EPA notes that some permitting authorities have required on-line posting of SWMP information and educational materials to implement minimum controls measures for public education and involvement, as well as elements of other minimum control measures such as the illicit discharge

detection and elimination, construction and post-construction program minimum controls, and other permit requirements.

C. Establishing Water Quality-Based Requirements

EPA made minor changes to the provisions for establishing "other applicable requirements." See § 122.34(c). The following discussion explains these changes and describes how the section has been rearranged. It then discusses issues raised about how water quality-based requirements can be established under the two general permit options.

EPA proposed to consolidate existing paragraphs (e)(1) and (f) into one paragraph and to move this consolidated provision to § 122.34(c). EPA also proposed to delete guidance paragraph (e)(2). Existing § 122.34(e)(1) addresses the need to comply with permit requirements that are in addition to the minimum control measures based on a TMDL or equivalent analysis. Existing § 122.34(f) requires compliance with permit requirements that have been developed consistent with provisions in §§ 122.41 through 122.49, as appropriate. EPA is promulgating the proposed revisions, with minor editorial changes, as discussed below.

The new § 122.34(c)(1) states that the permit will include, as appropriate, more stringent terms and conditions, including permit requirements that modify, or are in addition to, the minimum control measures, based on an approved total maximum daily load (TMDL) or equivalent analysis, or where the NPDES permitting authority determines such terms and conditions are needed to protect water quality. EPA replaced the term "effluent limitations" with "terms and conditions" to be consistent with changes made to § 122.34(a). In a minor change from the proposal, the paragraph now more clearly indicates that the permitting authority has the discretion to require additional measures to protect water quality, not limited to requirements based on a TMDL or equivalent analysis. This change reflects the authority granted by the statute

to protect water quality in section 402(p)(6) of the CWA. It also responds to a comment that due to the time it takes for TMDL development, permitting authorities should not be limited to consideration of only TMDL or equivalent analyses before imposing water quality based requirements. As a general matter, EPA agrees that other types of watershed plans that identify sources that should be controlled can provide a valid basis for establishing additional permit terms and conditions. Additionally, EPA recognizes that there may be instances where other information about the water quality impacts of the MS4 discharges may be sufficient to indicate the need for additional controls. (Of course, permitting authorities must have a rational basis and record support for determining that additional requirements serve a water quality objective.)

The final rule deletes existing § 122.34(e)(2), as was proposed. As explained in the preamble to the proposed rule, the guidance in existing § 122.34(e)(2) reflects EPA's recommendation for the initial round of permit issuance, which has already occurred for all permitting authorities. The phrasing of the guidance language no longer represents EPA policy with respect to including additional requirements. EPA has found that an increasing number of permitting authorities are already including specific requirements in their small MS4 permits that address not only wasteload allocations in TMDLs, but also other requirements that are in addition to permit provisions implementing the six minimum control measures irrespective of the status of EPA's § 122.37 evaluation. See EPA's *Compendium of MS4 Permitting Approaches – Part 3: Water Quality-Based Requirements* (EPA, 2016).[9] Based on the advancements made by specific permitting programs, and information that points to stormwater discharges continuing to cause waterbody impairments around the country, prior to the promulgation of this final rule, EPA has advised in guidance that permitting authorities write MS4 permits with provisions that

[9] This document will be made available at on EPA's website at https://www.epa.gov/npdes/stormwater-discharges-municipal-sources#resources.

are "clear, specific, measurable, and enforceable," incorporating such requirements as clear performance standards, and including measurable goals or quantifiable targets for implementation.[10] This guidance is a more accurate reflection of the agency's current views on how the Phase II regulations should be implemented than the guidance currently in § 122.34(e)(2).

EPA received few comments about the proposed removal of § 122.34(e)(2). Several commenters strongly supported the deletion of § 122.34(e)(2), while others expressed concern that MS4s may not be in a position to implement additional controls. The MS4 permit standard embodies a great deal of flexibility and gives the permitting authority discretion to address particular water quality impairments. Where a waterbody is impaired in part due to discharges from small MS4s, especially where an approved TMDL allocates wasteload reduction responsibilities to those MS4s, additional controls to achieve reasonable progress towards attainment of water quality standards will need to be considered. The permitting authority has the ability under the final rule to develop requirements tailored to a particular MS4, either by issuing an individual permit or by employing the Two-Step General Permit process in § 122.28(d)(2). Some permitting authorities have successfully created requirements for specific MS4s in a more comprehensive general permit. For example, the 2013 California Small MS4 general permit establishes additional requirements for small MS4s discharging to waters with an approved TMDL. Each set of "deliverables" or "actions required" is tailored to the individual MS4, or groupings of MS4s, based on the pollutant of concern and the particular wasteload allocation. See Appendix G of the 2013 California Small MS4 general permit.

[10] See *EPA's MS4 Permit Improvement Guide* (EPA, 2010).

D. Establishing Water Quality-Based Requirements Under the Two General Permit Options

EPA received a number of questions and suggestions concerning how requirements to implement applicable TMDLs should be incorporated into general permits under any of the proposed options. Some comments asserted that there is incompatibility between the proposed Option 1 approach and the need to establish permit terms and conditions that address TMDLs, which require watershed- and MS4-specific provisions. One commenter questioned whether a general permit can incorporate different water quality-based effluent limitations for different MS4s asserting that the NPDES regulations require that general permits include the same water quality-based effluent limits for sources within the same category. Several commenters also suggested that requirements addressing TMDLs are ones that are amenable to using the Option 2 approach given their inherently watershed-specific nature and the fact that TMDL implementation plans often need to be developed with the involvement of the community so that issues such as implementation schedules and BMP approaches reflect the interests of the affected public and are attainable.

EPA clarifies that in order to comply fully with the Comprehensive General Permit approach, all terms and conditions established based on approved TMDLs must be included within the permit itself. Use of the Comprehensive General Permit approach means that the permit needs to spell out the requirements necessary for permittees "to achieve reasonable further progress toward attainment of water quality standards." (64 FR 68753, December 8, 1999) Therefore, where a TMDL establishes wasteload allocations specifically or categorically for MS4 discharges to the impaired water, the permittee should expect to find "clear, specific, and measurable" requirements within the permit that delineate their responsibilities during the permit term relative to that TMDL and associated wasteload allocation(s). There are a variety of

approaches for incorporating these TMDL-related requirements into general permits for specific MS4s. One noteworthy approach places all applicable water quality-based effluent limitations in an appendix to the general permit (*e.g.*, Appendix 2 of the 2012 Western Washington Small MS4 General Permit). For this particular permit, the state evaluated all relevant TMDLs addressing discharges from small MS4s eligible for coverage under the permit and assigned additional requirements focused on reducing the discharge of the impairment pollutant. See EPA's *Compendium of MS4 Permitting Approaches – Part 3: Water Quality-Based Requirements* (EPA, 2016), which will be posted on EPA's website at https://www.epa.gov/npdes/stormwater-discharges-municipal-sources#resources, for additional examples.

EPA does not view any of these approaches as inconsistent with the NPDES regulatory requirement that "where sources within a specific category or subcategory of dischargers are subject to water quality-based limits … the sources in that specific category or subcategory shall be subject to the same water quality-based effluent limitations." See § 122.28(a)(3). It is certainly true that, due to the watershed-specific nature of TMDLs, requirements in general permit based on TMDLs can vary for individual MS4s based on the impaired water to which they discharge and the specific details of the applicable TMDL. EPA, however, does not view these differing water quality-based limit requirements within the same general permit as running afoul of the § 122.28(a)(3) requirement. EPA considers the different water quality-based requirements that are unique to a TMDL and/or to MS4s that are subject to the TMDL to be the equivalent of dividing the MS4 permittee universe into subcategories based on these requirements. This categorization is not dissimilar to the way in which EPA and many states issue their Multi-Sector General Permits for Stormwater Discharges Associated with Industrial Activity, in which there are requirements common to all facilities and a separate set of

requirements that apply to different industrial sectors or subsectors. By establishing different permittee subcategories based on TMDLs, the permit remains consistent with the requirement in § 122.28(a)(3).

Use of a Two-Step General Permit similarly requires that where requirements are necessary under § 122.34(c) to address TMDLs that they be expressed in a clear, specific, and measurable manner. These requirements can be included in the base general permit or they can be developed through the second permitting step of the Two-Step General Permit approach where additional terms and conditions are established for individual MS4s. EPA agrees with the commenters that, given the watershed-specific nature of TMDLs and the strategies needed to address them, in many cases it may be that a Two-Step General Permit is the approach that provides the greatest amount of flexibility to account for these differences. The advantage of this approach is that it allows each MS4 to develop and propose stormwater control strategies that are supported by the community and that can then be reviewed by the permitting authority for adequacy. EPA notes that there are several states that have already set up permit approaches that require MS4s to first develop TMDL implementation plans that are then reviewed and approved by the permitting authority. These approaches may provide useful models to draw from especially for those permitting authorities that choose to establish water quality-based requirements through a Two-Step General Permit. See examples in EPA's compendium document, *Compendium of MS4 Permitting Approaches – Part 3: Water Quality-Based Requirements* (EPA, 2016), which will be posted on EPA's website at https://www.epa.gov/npdes/stormwater-discharges-municipal-sources#resources..

E. Restructuring, Consolidating, Conforming, and Other Editorial Revisions

EPA proposed a restructuring of certain provisions in § 122.34(c) through (e) and making a number of minor editorial revisions to reflect the changes made elsewhere to meet remand requirements and to change the style of regulatory text, as discussed earlier in this preamble. EPA proposed to update the cross-references in § 122.35 to conform to the rearrangement of provisions in § 122.34. The preamble at Section VIII.B addresses changes to address water quality-based permit provisions currently in § 122.34(e) and to consolidate existing paragraphs (e) and (f) into new paragraph (c). This section explains other revisions. For the most part, EPA is promulgating these proposed revisions and has added similar revisions to additional provisions that were identified in comments. The following discussion briefly explains those changes.

First, the current § 122.34(c) of the regulations concerning "qualifying local programs" has been moved to § 122.34(e) as proposed. The only changes to the text of the existing language are to remove the words "you" and replace it with "the permittee." EPA received no comments on this proposed revision.

Second, the current § 122.34(d) that addresses information requirements for obtaining NPDES permit coverage under a general or individual permit has been moved to § 122.33(b)(2). All basic information requirements necessary to obtain permit coverage under the two types of individual permits and two types of general permits are now consolidated in § 122.33. EPA clarifies that these information requirements apply to individual permits, while the information required to be included in NOIs for general permits is to be determined by the permitting authority based on what it needs in order to establish the permit terms and conditions necessary to meet the MS4 permit standard. See further discussion in Sections IV.C and E.

Third, EPA also proposed to delete paragraphs (d)(2) and (3) in § 122.34 that required the permitting authority to provide a menu of BMPs for each minimum control measure, and, where such a menu of BMPS had not been provided, stated that a small MS4 need not be held to any "measurable goal" for that BMP. The final rule deletes these paragraphs as no longer necessary. EPA provided a menu of BMPs that has been available on its website for a number of years. EPA expects that this menu and any similar state menus will continue to be available. In addition, the function of "measurable goals" in the permitting process is clarified under the final rule. In order to address the *EDC* court's concerns about the lack of permitting authority review of the NOI, which contains information such as the MS4 operator's proposed measurable goals, the final rule clarifies that measurable goals are submitted in proposed form and must be reviewed and approved, and modified where necessary, by the permitting authority prior to becoming effective as enforceable requirements. Therefore, in the final rule, "measurable goals" are now "proposed measurable goals" that are submitted by an MS4 seeking an individual permit to implement the requirements in § 122.34, and at the discretion of the permitting authority, if included as required to be submitted in an NOI for coverage under a Two-Step General Permit under § 122.28(d)(2) as information necessary to establish permit conditions.

Some commenters favored keeping the requirements for a menu of BMPs as a way to promote equitable treatment among MS4s that have similar circumstances. While EPA has deleted the proviso that MS4s will not be held accountable for their selected measurable goals if a menu of BMPs has not been developed by the permitting authority, EPA does not expect permitting authorities to eliminate existing and future BMPs menus. Under § 123.35(g), an approved state is still obligated to establish BMP menus for the minimum control measures to facilitate effective program implementation. Not making information about BMPs available

would be counter to effective program implementation. EPA anticipates that equity amongst MS4s will be further enhanced by the requirement for clear, specific, and measurable permit terms and conditions. It should be clear from any proposed general permit if similar MS4s are not being treated equitably and the public will have an opportunity to voice (through comments or a public hearing, if one is held) support or objections to different permit terms and conditions among MS4s. MS4s include a broad range of entities that, as noted by several commenters, are likely to need different terms and conditions for their particular situations, *e.g.*, state departments of transportation that generally do not have the same police powers as local governments and who serve a largely transient audience. EPA also expects that dissimilar requirements for similar MS4s would be explained in the fact sheet or other document that provides the rationale for permit terms and conditions.

Finally, in the proposed rule, EPA used the term "Director" in place of "NPDES Permitting Authority" in §§ 122.33 - 122.35. This proposed revision was intended to use terminology in the Phase II regulations that is used in other sections of part 122. "Director" and "NPDES Permitting Authority" mean the same thing, *i.e.*, the Regional Administrator or the Director of an authorized State NPDES program, depending on which entity issues the NPDES permits in a particular area. EPA uses these terms interchangeably. However, for purposes of minimizing the number of changes not directly related to the remand, EPA has decided to retain the status quo with respect to how these terms are used currently. In the sections that address the small MS4 program (§§ 122.32 - 122.35), the final rule uses the term "NPDES permitting authority." This is different than the terminology that was proposed. The other sections of part 122, for example, §§ 122.26 and 122.28, will continue to use the term "Director."

VIII. Final Rule Implementation

A. When the Final Rule Must be Implemented

EPA received comments from state permitting authorities requesting clarification on the implementation timeframe for the new rule. EPA also received comments from environmental organizations indicating that given the length of time since the Ninth Circuit found the procedural aspects of the Phase II regulations to be invalid, that permitting authorities should be required to modify their general permit procedures now to comport their program with the CWA requirements for permitting authority review and public participation, and also recommended that EPA should require current permits to be reopened for this purposes.

To clarify, this final rule becomes effective on [**INSERT DATE 30 DAYS AFTER date of publication in the FEDERAL REGISTER]**. It is not EPA's expectation that permitting authorities be required to reopen permits currently in effect to comply with the requirements of this final rule. However, EPA does expect that permitting authorities comply with the final rule when the next permit is being issued following the expiration of the current permit. Having said this, EPA acknowledges that there are a small number of states whose permits are expiring within a few months of the final rule's effective date, and for these states it is likely too late in their process for them to make the necessary changes to fully comply with the final rule. Therefore, a permitting authority that has proposed a permit, is in the final stages of issuing a new permit (*e.g.*, after the close of the public comment period), or has issued a final permit before this rule becomes effective will not be expected to re-open those permits. Where the permitting authority has not yet proposed a permit, EPA expects that these permits will be issued consistent with the final rule's requirements.

EPA recognizes that development of a new small MS4 general permit starts well in advance of the expiration of existing permits. Still, EPA anticipates that most states can develop clear, specific, and measurable permit terms and conditions without the need for a change to their legal authorities to implement the type(s) of general permits it plans to use. The substantive standard has not changed (*i.e.*, the MS4 permit standard); the final rule merely clarifies the way in which permit terms and conditions that comply with the standard must be expressed and how they are established. Even where a state determines that it needs to change its regulations to establish new procedural requirements to implement the final rule, such as where a state establishes the general permit through a rulemaking process, it may be able to develop necessary permit terms and conditions consistent with the final rule based on its existing statutory authorities. In the event that states must change their legal authorities before they can act, the existing regulations at § 123.62 provides states up to one year to make the necessary changes and up to two years if a statutory change is needed.

B. Status of the 2004 Interim Guidance

This final rule, upon its effective date on [**INSERT DATE 30 DAYS AFTER date of publication in the FEDERAL REGISTER]**, establishes the requirements for issuing general permits for small MS4 discharges in response to the U.S. Court of Appeals for the Ninth Circuit's decision in *Environmental Defense Center v.* EPA. The 2004 Interim Guidance (*Implementing the Partial Remand of the Stormwater Phase II Regulations Regarding Notices of Intent & NPDES General Permitting for Phase II MS4s*, EPA (2004)), by its own terms, "provides interim guidance to EPA and State NPDES permitting authorities pending a rulemaking to conform the Phase II rule to the court's order." With the promulgation of this final rule, the "interim guidance" is no longer needed.

IX. Consistency with the NPDES Electronic Reporting Rule

EPA issued a final NPDES Electronic Reporting Rule (referred to as the "eReporting Rule") requiring that permitting authorities and regulated entities electronically submit permit and reporting information instead of submitting paper forms. (80 FR 64064, Oct. 22, 2015) The promulgation of the eReporting Rule includes "data elements" (in appendix A of the rule) that must be reported on by both Phase II small MS4s and permitting authorities related to individual NOIs submitted for general permit coverage and required program reports. The data elements included in the eReporting Rule for Phase II MS4s are based on the regulatory requirements in existence at the time that rule was promulgated. These data elements, therefore, do not reflect changes that are being made to the corresponding requirements as part of this MS4 remand rule.

EPA received two public comments, which were similarly focused on the need to ensure consistency between the final MS4 remand rule and the eReporting Rule. One commenter recommended that EPA be prepared once the MS4 remand rule is finalized to make conforming regulatory changes to the eReporting Rule so that programs are again aligned. The other commenter also gave examples of how the wording of the eReporting data elements would be inconsistent with the rule language under consideration for Option 1 of the proposed MS4 remand rule. More specifically, the commenter questioned how permitting authorities would be able to populate the required data elements for the NOI for a general permit implemented under proposed Option 1 considering that information on the MS4 operator's BMPs and measurable goals would no longer be required as part of the NOI.

EPA agrees with the commenters on the importance of consistency between this final rule and the eReporting Rule. Because the appendix A data elements are no more than a reflection of what the NPDES regulations require for NOIs and compliance reports, where the underlying

regulations change, as they are under the final MS4 remand rule, it is necessary to make conforming changes to appendix A. Now that the final MS4 remand rule language is set, there are some data elements that will need to be updated to conform to the new expectations for NOIs and program reports. EPA is aware of the following types of inconsistencies between the final MS4 remand rule and the appendix A data elements related to small MS4s:

- References to "measurable goals" in data name and data descriptions associated with minimum control measures – Under the final MS4 remand rule, the MS4 operator's measurable goals no longer take on the same role that they did under the previous regulations. See related discussion in Section VII.E. Under the new regulations, the final terms and conditions in the general permit and any additional requirements developed through the Two-Step process, are what is relevant. References in appendix A to the permittee's measurable goals will need to be substituted with appropriate references to the final terms and conditions of the permit. Additional updates are also needed in some places in appendix A to change the reference from "measurable goals" to the applicable schedule or deadline for compliance with the specific permit requirement.
- References to the permittee's intended actions during the permit term – The data elements in appendix A, Table 2 describe a number of the minimum control measure elements as reflecting what the permittee intends to accomplish during the permit term. Under the final MS4 remand rule, the MS4's intended actions are not what the permittee is held to, but rather the final permit terms and conditions. Therefore, EPA will need to update any references to intended actions to reflect the fact that the terms and conditions of the permit are what is necessary to report as a data element.

- Regulatory citations – Updates are also necessary to the citations in appendix A to reflect changes made to the Phase II regulations by the final MS4 remand rule.
- NPDES Data Group Number (appendix A, Table 2) – This number corresponds to the entity that is required to provide information on the data element under the eReporting Rule. Table 1 of appendix A assigns a "Data Provider" number to various entities, which is reflected in Table 2. In the portion of appendix A related to information from the NOIs, the "Data Provider" for most of the minimum control measure data elements is indicated as the "Authorized NPDES Program" (or permitting authority) and/or the "NPDES Permittee." Because the permitting authority under the final MS4 remand rule is solely responsible for establishing final permit terms and conditions, EPA will need to update the Data Provider to remove references to the NPDES Permittee, where applicable.

EPA has also discovered in reviewing this issue that it inadvertently omitted two data elements from the final eReporting Rule. These data elements correspond to the schedules, deadlines, and milestones that are specified in the permit for the pollution prevention and good housekeeping for municipal operations requirements established under § 122.34(b)(6), and any additional requirements that may be established under § 122.34(c).

EPA is interested in taking the time needed to ensure that the edits required to appendix A are made precisely. Due to the time constraints associated with finalizing the MS4 remand rule, EPA has determined that the updates needed in appendix A require a separate regulatory action outside of this rulemaking. In addition, EPA notes that the deadline for implementation of the affected eReporting rule provisions is December 21, 2020, therefore there should be sufficient time to make the necessary changes before electronic reporting is required under the regulations. EPA will initiate the rulemaking process immediately and will complete it as soon as possible. In

the meantime, EPA will continue to work with its state counterparts to provide appropriate guidance on applying the data elements in the near term.

X. Statutory and Executive Orders Reviews

Additional information about these statutes and Executive Orders can be found at http://www2.epa.gov/laws-regulations/laws-and-executive-orders.

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is a significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review. Any changes made in response to OMB recommendations have been documented in the docket for this action. In addition, EPA prepared an analysis of the potential costs associated with this action. This analysis, "Economic Analysis for the Municipal Separate Storm Sewer System (MS4) General Permit Remand Rule," is summarized in Section I.D and is available in the docket.

B. Paperwork Reduction Act (PRA)

This action does not impose any new information collection burden under the PRA. OMB has previously approved the information collection activities contained in the existing regulations and has assigned OMB control number 2040-0004.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. Although small MS4s are regulated under the Phase II regulations, this rule does not change the underlying requirements to which these entities are

subject. Instead, the focus of this rule is on ensuring that the process by which NPDES permitting authorities authorize discharges from small MS4s using general permits comports with the legal requirements of the Clean Water Act and the applicable NPDES regulations.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of $100 million or more as described in UMRA, 2 U.S.C. 1531–1538. This action does not significantly or uniquely affect small governments because this rulemaking focuses on the way in which state permitting authorities administer general permit coverage to small MS4s, and does not modify the underlying permit requirements to which they are subject. Nonetheless, EPA consulted with small governments concerning the regulatory requirements that might indirectly affect them, as described in Section I.E.

E. Executive Order 13132: Federalism

This rule will not have substantial direct effects on the states, the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The rule makes changes to the way in which NPDES permitting authorities, including authorized state government agencies, provide general permit coverage to small MS4s. The impact to states which are NPDES permitting authorities may range from $558,025 and $604,770 annually, depending upon the rule option that is finalized. Details of this analysis are presented in "Economic Analysis for the Final Municipal Separate Storm Sewer System General Permit Remand Rule," which is available in the docket for the rule at http://www.regulations.gov under Docket ID No. EPA-HQ-OW-2015-0671.

Keeping with the spirit of E.O. 13132 and consistent with EPA's policy to promote communications between EPA and state and local governments, EPA met with state and local officials throughout the process of developing the proposed rule and received feedback on how proposed options would affect them. EPA engaged in extensive outreach via conference calls to authorized states (*e.g.*, individual state permitting authorities, and the Association of Clean Water Administrators) and regulated MS4s (*e.g.*, the National Association of Clean Water Agencies, Water Environment Federation, National Association of Flood & Stormwater Management Agencies, National Municipal Stormwater Alliance) to gather input on how EPA's current regulations are affecting them, and to enable officials of affected state and local governments to have meaningful and timely input into the development of the options presented in this rule. EPA also reached out to a number of environmental organizations (*e.g.*, American Rivers, Chesapeake Bay Foundation, Cahaba River Society, Natural Resources Defense Council, PennFuture, River Network) and regulated industry (*e.g.*, National Association of Home Builders).

F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This action does not have tribal implications as specified in Executive Order 13175 since it does not have a direct substantial impact on one or more federally recognized tribes. The rule affects the way in which small MS4s are covered under a general permit for stormwater discharges and primarily affects the NPDES permitting authorities. No tribal governments are authorized NPDES permitting authorities at this time. The rule could have an indirect impact on an Indian tribe that is a regulated MS4 in that the NOI required for coverage under a general permit may be changed as a result of the rule (if finalized) or may be subject to closer scrutiny by the permitting authority and more of the requirements could be established as enforceable permit

conditions. However, the substance of what an MS4 must do will not change significantly as a result of this rule. Thus, Executive Order 13175 does not apply to this action.

Consistent with the EPA Policy on Consultation and Coordination with Indian Tribes, EPA conducted outreach to tribal officials during the development of this action. EPA spoke with tribal members during a conference call with the National Tribal Water Council to gather input on how tribal governments are currently affected by MS4 regulations and may be affected by the options in this rule. Based on this outreach and additional, internal analysis, EPA confirmed that this action would have little tribal impact.

G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks

EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that EPA has reason to believe may disproportionately affect children, per the definition of "covered regulatory action" in section 2-202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use

This action is not subject to Executive Order 13211, because it does not significantly affect energy supply, distribution, or use.

I. National Technology Transfer and Advancement Act

This rulemaking does not involve technical standards.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

EPA determined that the human health or environmental risk addressed by this action will not have potential disproportionately high and adverse human health or environmental effects on minority, low-income, or indigenous populations. This action affects the procedures by which NPDES permitting authorities provide general permit coverage for small MS4s, to help ensure that small MS4s "reduce the discharge of pollutants to the maximum extent practicable (MEP), to protect water quality and to satisfy the water quality requirements of the Clean Water Act." It does not change any current human health or environmental risk standards.

K. Congressional Review Act

This action is subject to the CRA, and EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in **40 CFR Part 122**

Environmental protection, Storm water, Water pollution.

Dated: November 17, 2016.

Gina McCarthy,

Administrator.

For the reasons stated in the preamble, EPA amends 40 CFR part 122 as set forth below:

PART 122 – EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

1. The authority citation for part 122 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

2. Amend § 122.28 by adding paragraph (d) to read as follows:

§ 122.28 General permits (applicable to State NPDES programs, see §123.25).

*** * * * ***

(d) *Small municipal separate storm sewer systems (MS4s)* (Applicable to State programs). For general permits issued under paragraph (b) of this section for small MS4s, the Director must establish the terms and conditions necessary to meet the requirements of § 122.34 using one of the two permitting approaches in paragraph (d)(1) or (2) of this section. The Director must indicate in the permit or fact sheet which approach is being used.

(1) *Comprehensive general permit*. The Director includes all required permit terms and conditions in the general permit; or

(2) *Two-step general permit*. The Director includes required permit terms and conditions in the general permit applicable to all eligible small MS4s and, during the process of authorizing small MS4s to discharge, establishes additional terms and conditions not included in the general permit to satisfy one or more of the permit requirements in § 122.34 for individual small MS4 operators.

(i) The general permit must require that any small MS4 operator seeking authorization to discharge under the general permit submit a Notice of Intent (NOI) consistent with § 122.33(b)(1)(ii).

(ii) The Director must review the NOI submitted by the small MS4 operator to determine whether the information in the NOI is complete and to establish the additional terms and conditions necessary to meet the requirements of § 122.34. The Director may require the small MS4 operator to submit additional information. If the Director makes a preliminary decision to authorize the small MS4 operator to discharge under the general permit, the Director must give the public notice of and opportunity to comment and request a public hearing on its proposed authorization and the NOI, the proposed additional terms and conditions, and the basis for these additional requirements. The public notice, the process for submitting public comments and hearing requests, and the hearing process if a request for a hearing is granted, must follow the procedures applicable to draft permits set forth in §§ 124.10 through 124.13 (excluding § 124.10(c)(2)). The Director must respond to significant comments received during the comment period as provided in § 124.17.

(iii) Upon authorization for the MS4 to discharge under the general permit, the final additional terms and conditions applicable to the MS4 operator become effective. The Director must notify the permittee and inform the public of the decision to authorize the MS4 to discharge under the general permit and of the final additional terms and conditions specific to the MS4.

3. Revise § 122.33 to read as follows:

§ 122.33 Requirements for obtaining permit coverage for regulated small MS4s.

(a) The operator of any regulated small MS4 under § 122.32 must seek coverage under an NPDES permit issued by the applicable NPDES permitting authority. If the small MS4 is located

in an NPDES authorized State, Tribe, or Territory, then that State, Tribe, or Territory is the NPDES permitting authority. Otherwise, the NPDES permitting authority is the EPA Regional Office for the Region where the small MS4 is located.

(b) The operator of any regulated small MS4 must seek authorization to discharge under a general or individual NPDES permit, as follows:

(1) *General permit.* (i) If seeking coverage under a general permit issued by the NPDES permitting authority in accordance with § 122.28(d)(1), the small MS4 operator must submit a Notice of Intent (NOI) to the NPDES permitting authority consistent with § 122.28(b)(2). The small MS4 operator may file its own NOI, or the small MS4 operator and other municipalities or governmental entities may jointly submit an NOI. If the small MS4 operator wants to share responsibilities for meeting the minimum measures with other municipalities or governmental entities, the small MS4 operator must submit an NOI that describes which minimum measures it will implement and identify the entities that will implement the other minimum measures within the area served by the MS4. The general permit will explain any other steps necessary to obtain permit authorization.

(ii) If seeking coverage under a general permit issued by the NPDES permitting authority in accordance with § 122.28(d)(2), the small MS4 operator must submit an NOI to the Director consisting of the minimum required information in § 122.28(b)(2)(ii), and any other information the Director identifies as necessary to establish additional terms and conditions that satisfy the permit requirements of § 122.34, such as the information required under § 122.33(b)(2)(i). The general permit will explain any other steps necessary to obtain permit authorization.

(2) *Individual permit.* (i) If seeking authorization to discharge under an individual permit to implement a program under § 122.34, the small MS4 operator must submit an application to the

appropriate NPDES permitting authority that includes the information required under § 122.21(f) and the following:

(A) The best management practices (BMPs) that the small MS4 operator or another entity proposes to implement for each of the storm water minimum control measures described in § 122.34(b)(1) through (6);

(B) The proposed measurable goals for each of the BMPs including, as appropriate, the months and years in which the small MS4 operator proposes to undertake required actions, including interim milestones and the frequency of the action;

(C) The person or persons responsible for implementing or coordinating the storm water management program;

(D) An estimate of square mileage served by the small MS4;

(E) Any additional information that the NPDES permitting authority requests; and

(F) A storm sewer map that satisfies the requirement of § 122.34(b)(3)(i) satisfies the map requirement in § 122.21(f)(7).

(ii) If seeking authorization to discharge under an individual permit to implement a program that is different from the program under § 122.34, the small MS4 operator must comply with the permit application requirements in § 122.26(d). The small MS4 operator must submit both parts of the application requirements in § 122.26(d)(1) and (2). The small MS4 operator must submit the application at least 180 days before the expiration of the small MS4 operator's existing permit. Information required by § 122.26(d)(1)(ii) and (d)(2) regarding its legal authority is not required, unless the small MS4 operator intends for the permit writer to take such information into account when developing other permit conditions.

(iii) If allowed by your NPDES permitting authority, the small MS4 operator and another regulated entity may jointly apply under either paragraph (b)(2)(i) or (ii) of this section to be co-permittees under an individual permit.

(3) *Co-permittee alternative*. If the regulated small MS4 is in the same urbanized area as a medium or large MS4 with an NPDES storm water permit and that other MS4 is willing to have the small MS4 operator participate in its storm water program, the parties may jointly seek a modification of the other MS4 permit to include the small MS4 operator as a limited co-permittee. As a limited co-permittee, the small MS4 operator will be responsible for compliance with the permit's conditions applicable to its jurisdiction. If the small MS4 operator chooses this option it must comply with the permit application requirements of § 122.26, rather than the requirements of § 122.33(b)(2)(i). The small MS4 operator does not need to comply with the specific application requirements of § 122.26(d)(1)(iii) and (iv) and (d)(2)(iii) (discharge characterization). The small MS4 operator may satisfy the requirements in § 122.26 (d)(1)(v) and (d)(2)(iv) (identification of a management program) by referring to the other MS4's storm water management program.

(4) *Guidance for paragraph (b)(3) of this section*. In referencing the other MS4 operator's storm water management program, the small MS4 operator should briefly describe how the existing program will address discharges from the small MS4 or would need to be supplemented in order to adequately address the discharges. The small MS4 operator should also explain its role in coordinating storm water pollutant control activities in the MS4, and detail the resources available to the small MS4 operator to accomplish the program.

(c) If the regulated small MS4 is designated under § 122.32(a)(2), the small MS4 operator must apply for coverage under an NPDES permit, or apply for a modification of an existing

NPDES permit under paragraph (b)(3) of this section, within 180 days of notice of such designation, unless the NPDES permitting authority grants a later date.

4. Revise § 122.34 to read as follows:

§ 122.34 Permit requirements for regulated small MS4 permits.

(a) *General requirements.* 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. Terms and conditions that satisfy the requirements of this section must be expressed in clear, specific, and measurable terms. Such 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).

(1) For permits providing coverage to any small MS4s for the first time, the NPDES permitting authority may specify a time period of up to 5 years from the date of permit issuance for the permittee to fully comply with the conditions of the permit and to implement necessary BMPs.

(2) For each successive permit, the NPDES permitting authority must include terms and conditions that meet the requirements of this section based on its evaluation of the current permit requirements, record of permittee compliance and program implementation progress, current water quality conditions, and other relevant information.

(b) *Minimum control measures.* The permit must include requirements that ensure the permittee implements, or continues to implement, the minimum control measures in paragraphs

(b)(1) through (6) of this section during the permit term. The permit must also require a written storm water management program document or documents that, at a minimum, describes in detail how the permittee intends to comply with the permit's requirements for each minimum control measure.

(1) *Public education and outreach on storm water impacts.* (i) The permit must identify the minimum elements and require implementation of a public education program to distribute educational materials to the community or conduct equivalent outreach activities about the impacts of storm water discharges on water bodies and the steps that the public can take to reduce pollutants in storm water runoff.

(ii) Guidance for NPDES permitting authorities and regulated small MS4s: The permittee may use storm water educational materials provided by the State, Tribe, EPA, environmental, public interest or trade organizations, or other MS4s. The public education program should inform individuals and households about the steps they can take to reduce storm water pollution, such as ensuring proper septic system maintenance, ensuring the proper use and disposal of landscape and garden chemicals including fertilizers and pesticides, protecting and restoring riparian vegetation, and properly disposing of used motor oil or household hazardous wastes. EPA recommends that the program inform individuals and groups how to become involved in local stream and beach restoration activities as well as activities that are coordinated by youth service and conservation corps or other citizen groups. EPA recommends that the permit require the permittee to tailor the public education program, using a mix of locally appropriate strategies, to target specific audiences and communities. Examples of strategies include distributing brochures or fact sheets, sponsoring speaking engagements before community groups, providing public service announcements, implementing educational programs targeted at school age

children, and conducting community-based projects such as storm drain stenciling, and watershed and beach cleanups. In addition, EPA recommends that the permit require that some of the materials or outreach programs be directed toward targeted groups of commercial, industrial, and institutional entities likely to have significant storm water impacts. For example, providing information to restaurants on the impact of grease clogging storm drains and to garages on the impact of oil discharges. The permit should encourage the permittee to tailor the outreach program to address the viewpoints and concerns of all communities, particularly minority and disadvantaged communities, as well as any special concerns relating to children.

(2) *Public involvement/participation.* (i) The permit must identify the minimum elements and require implementation of a public involvement/participation program that complies with State, Tribal, and local public notice requirements.

(ii) Guidance for NPDES permitting authorities and regulated small MS4s: EPA recommends that the permit include provisions addressing the need for the public to be included in developing, implementing, and reviewing the storm water management program and that the public participation process should make efforts to reach out and engage all economic and ethnic groups. Opportunities for members of the public to participate in program development and implementation include serving as citizen representatives on a local storm water management panel, attending public hearings, working as citizen volunteers to educate other individuals about the program, assisting in program coordination with other pre-existing programs, or participating in volunteer monitoring efforts. (Citizens should obtain approval where necessary for lawful access to monitoring sites.)

(3) *Illicit discharge detection and elimination.* (i) The permit must identify the minimum elements and require the development, implementation, and enforcement of a program to detect

and eliminate illicit discharges (as defined at § 122.26(b)(2)) into the small MS4. At a minimum, the permit must require the permittee to:

(A) Develop, if not already completed, a storm sewer system map, showing the location of all outfalls and the names and location of all waters of the United States that receive discharges from those outfalls;

(B) To the extent allowable under State, Tribal or local law, effectively prohibit, through ordinance, or other regulatory mechanism, non-storm water discharges into the storm sewer system and implement appropriate enforcement procedures and actions;

(C) Develop and implement a plan to detect and address non-storm water discharges, including illegal dumping, to the system; and

(D) Inform public employees, businesses, and the general public of hazards associated with illegal discharges and improper disposal of waste.

(ii) The permit must also require the permittee to address the following categories of non-storm water discharges or flows (*i.e.*, illicit discharges) only if the permittee identifies them as a significant contributor of pollutants to the small MS4: water line flushing, landscape irrigation, diverted stream flows, rising ground waters, uncontaminated ground water infiltration (as defined at 40 CFR 35.2005(b)(20)), uncontaminated pumped ground water, discharges from potable water sources, foundation drains, air conditioning condensation, irrigation water, springs, water from crawl space pumps, footing drains, lawn watering, individual residential car washing, flows from riparian habitats and wetlands, dechlorinated swimming pool discharges, and street wash water (discharges or flows from firefighting activities are excluded from the effective prohibition against non-storm water and need only be addressed where they are identified as significant sources of pollutants to waters of the United States).

(iii) Guidance for NPDES permitting authorities and regulated small MS4s: EPA recommends that the permit require the plan to detect and address illicit discharges include the following four components: procedures for locating priority areas likely to have illicit discharges; procedures for tracing the source of an illicit discharge; procedures for removing the source of the discharge; and procedures for program evaluation and assessment. EPA recommends that the permit require the permittee to visually screen outfalls during dry weather and conduct field tests of selected pollutants as part of the procedures for locating priority areas. Illicit discharge education actions may include storm drain stenciling, a program to promote, publicize, and facilitate public reporting of illicit connections or discharges, and distribution of outreach materials.

(4) *Construction site storm water runoff control.* (i) The permit must identify the minimum elements and require the development, implementation, and enforcement of a program to reduce pollutants in any storm water runoff to the small MS4 from construction activities that result in a land disturbance of greater than or equal to one acre. Reduction of storm water discharges from construction activity disturbing less than one acre must be included in the program if that construction activity is part of a larger common plan of development or sale that would disturb one acre or more. If the Director waives requirements for storm water discharges associated with small construction activity in accordance with § 122.26(b)(15)(i), the permittee is not required to develop, implement, and/or enforce a program to reduce pollutant discharges from such sites. At a minimum, the permit must require the permittee to develop and implement:

(A) An ordinance or other regulatory mechanism to require erosion and sediment controls, as well as sanctions to ensure compliance, to the extent allowable under State, Tribal, or local law;

(B) Requirements for construction site operators to implement appropriate erosion and sediment control best management practices;

(C) Requirements for construction site operators to control waste such as discarded building materials, concrete truck washout, chemicals, litter, and sanitary waste at the construction site that may cause adverse impacts to water quality;

(D) Procedures for site plan review which incorporate consideration of potential water quality impacts;

(E) Procedures for receipt and consideration of information submitted by the public, and

(F) Procedures for site inspection and enforcement of control measures.

(ii) Guidance for NPDES permitting authorities and regulated small MS4s: Examples of sanctions to ensure compliance include non-monetary penalties, fines, bonding requirements and/or permit denials for non-compliance. EPA recommends that the procedures for site plan review include the review of individual pre-construction site plans to ensure consistency with local sediment and erosion control requirements. Procedures for site inspections and enforcement of control measures could include steps to identify priority sites for inspection and enforcement based on the nature of the construction activity, topography, and the characteristics of soils and receiving water quality. EPA also recommends that the permit require the permittee to provide appropriate educational and training measures for construction site operators, and require storm water pollution prevention plans for construction sites within the MS4's jurisdiction that discharge into the system. See § 122.44(s) (NPDES permitting authorities' option to incorporate qualifying State, Tribal and local erosion and sediment control programs into NPDES permits for storm water discharges from construction sites). Also see § 122.35(b) (The NPDES permitting authority may recognize that another government entity, including the NPDES permitting

authority, may be responsible for implementing one or more of the minimum measures on the permittee's behalf.)

(5) *Post-construction storm water management in new development and redevelopment.* (i) The permit must identify the minimum elements and require the development, implementation, and enforcement of a program to address storm water runoff from new development and redevelopment projects that disturb greater than or equal to one acre, including projects less than one acre that are part of a larger common plan of development or sale, that discharge into the small MS4. The permit must ensure that controls are in place that would prevent or minimize water quality impacts. At a minimum, the permit must require the permittee to:

(A) Develop and implement strategies which include a combination of structural and/or non-structural best management practices (BMPs) appropriate for the community;

(B) Use an ordinance or other regulatory mechanism to address post-construction runoff from new development and redevelopment projects to the extent allowable under State, Tribal or local law; and

(C) Ensure adequate long-term operation and maintenance of BMPs.

(ii) Guidance for NPDES permitting authorities and regulated small MS4s: If water quality impacts are considered from the beginning stages of a project, new development and potentially redevelopment provide more opportunities for water quality protection. EPA recommends that the permit ensure that BMPs included in the program: be appropriate for the local community; minimize water quality impacts; and attempt to maintain pre-development runoff conditions. EPA encourages the permittee to participate in locally-based watershed planning efforts which attempt to involve a diverse group of stakeholders including interested citizens. When developing a program that is consistent with this measure's intent, EPA recommends that the

permit require the permittee to adopt a planning process that identifies the municipality's program goals (*e.g.*, minimize water quality impacts resulting from post-construction runoff from new development and redevelopment), implementation strategies (*e.g.*, adopt a combination of structural and/or non-structural BMPs), operation and maintenance policies and procedures, and enforcement procedures. In developing the program, the permit should also require the permittee to assess existing ordinances, policies, programs and studies that address storm water runoff quality. In addition to assessing these existing documents and programs, the permit should require the permittee to provide opportunities to the public to participate in the development of the program. Non-structural BMPs are preventative actions that involve management and source controls such as: policies and ordinances that provide requirements and standards to direct growth to identified areas, protect sensitive areas such as wetlands and riparian areas, maintain and/or increase open space (including a dedicated funding source for open space acquisition), provide buffers along sensitive water bodies, minimize impervious surfaces, and minimize disturbance of soils and vegetation; policies or ordinances that encourage infill development in higher density urban areas, and areas with existing infrastructure; education programs for developers and the public about project designs that minimize water quality impacts; and measures such as minimization of percent impervious area after development and minimization of directly connected impervious areas. Structural BMPs include: storage practices such as wet ponds and extended-detention outlet structures; filtration practices such as grassed swales, sand filters and filter strips; and infiltration practices such as infiltration basins and infiltration trenches. EPA recommends that the permit ensure the appropriate implementation of the structural BMPs by considering some or all of the following: pre-construction review of BMP designs; inspections during construction to verify BMPs are built as designed; post-construction

inspection and maintenance of BMPs; and penalty provisions for the noncompliance with design, construction or operation and maintenance. Storm water technologies are constantly being improved, and EPA recommends that the permit requirements be responsive to these changes, developments or improvements in control technologies.

(6) *Pollution prevention/good housekeeping for municipal operations.* (i) The permit must identify the minimum elements and require the development and implementation of an operation and maintenance program that includes a training component and has the ultimate goal of preventing or reducing pollutant runoff from municipal operations. Using training materials that are available from EPA, the State, Tribe, or other organizations, the program must include employee training to prevent and reduce storm water pollution from activities such as park and open space maintenance, fleet and building maintenance, new construction and land disturbances, and storm water system maintenance.

(ii) Guidance for NPDES permitting authorities and regulated small MS4s: EPA recommends that the permit address the following: maintenance activities, maintenance schedules, and long-term inspection procedures for structural and non-structural storm water controls to reduce floatables and other pollutants discharged from the separate storm sewers; controls for reducing or eliminating the discharge of pollutants from streets, roads, highways, municipal parking lots, maintenance and storage yards, fleet or maintenance shops with outdoor storage areas, salt/sand storage locations and snow disposal areas operated by the permittee, and waste transfer stations; procedures for properly disposing of waste removed from the separate storm sewers and areas listed above (such as dredge spoil, accumulated sediments, floatables, and other debris); and ways to ensure that new flood management projects assess the impacts on water quality and examine existing projects for incorporating additional water quality protection

devices or practices. Operation and maintenance should be an integral component of all storm water management programs. This measure is intended to improve the efficiency of these programs and require new programs where necessary. Properly developed and implemented operation and maintenance programs reduce the risk of water quality problems.

(c) *Other applicable requirements.* As appropriate, the permit will include:

(1) More stringent terms and conditions, including permit requirements that modify, or are in addition to, the minimum control measures based on an approved total maximum daily load (TMDL) or equivalent analysis, or where the Director determines such terms and conditions are needed to protect water quality.

(2) Other applicable NPDES permit requirements, standards and conditions established in the individual or general permit, developed consistent with the provisions of §§ 122.41 through 122.49.

(d) *Evaluation and assessment requirements*--(1) *Evaluation.* The permit must require the permittee to evaluate compliance with the terms and conditions of the permit, including the effectiveness of the components of its storm water management program, and the status of achieving the measurable requirements in the permit.

NOTE TO PARAGRAPH (d)(1): The NPDES permitting authority may determine monitoring requirements for the permittee in accordance with State/Tribal monitoring plans appropriate to the watershed. Participation in a group monitoring program is encouraged.

(2) *Recordkeeping.* The permit must require that the permittee keep records required by the NPDES permit for at least 3 years and submit such records to the NPDES permitting authority when specifically asked to do so. The permit must require the permittee to make records, including a written description of the storm water management program, available to the public

at reasonable times during regular business hours (see § 122.7 for confidentiality provision). (The permittee may assess a reasonable charge for copying. The permit may allow the permittee to require a member of the public to provide advance notice.)

(3) *Reporting.* Unless the permittee is relying on another entity to satisfy its NPDES permit obligations under § 122.35(a), the permittee must submit annual reports to the NPDES permitting authority for its first permit term. For subsequent permit terms, the permittee must submit reports in year two and four unless the NPDES permitting authority requires more frequent reports. As of December 21, 2020 all reports submitted in compliance with this section must be submitted electronically by the owner, operator, or the duly authorized representative of the small MS4 to the NPDES permitting authority or initial recipient, as defined in 40 CFR 127.2(b), in compliance with this section and 40 CFR part 3 (including, in all cases, subpart D to part 3), § 122.22, and 40 CFR part 127. Part 127 is not intended to undo existing requirements for electronic reporting. Prior to this date, and independent of part 127, the owner, operator, or the duly authorized representative of the small MS4 may be required to report electronically if specified by a particular permit or if required to do so by state law. The report must include:

(i) The status of compliance with permit terms and conditions;

(ii) Results of information collected and analyzed, including monitoring data, if any, during the reporting period;

(iii) A summary of the storm water activities the permittee proposes to undertake to comply with the permit during the next reporting cycle;

(iv) Any changes made during the reporting period to the permittee's storm water management program; and

(v) Notice that the permittee is relying on another governmental entity to satisfy some of the permit obligations (if applicable), consistent with § 122.35(a).

(e) *Qualifying local program*. If an existing qualifying local program requires the permittee to implement one or more of the minimum control measures of paragraph (b) of this section, the NPDES permitting authority may include conditions in the NPDES permit that direct the permittee to follow that qualifying program's requirements rather than the requirements of paragraph (b). A qualifying local program is a local, State or Tribal municipal storm water management program that imposes, at a minimum, the relevant requirements of paragraph (b).

5. Amend § 122.35 by revising the section heading and paragraph (a) to read as follows:

§ 122.35 May the operator of a regulated small MS4 share the responsibility to implement the minimum control measures with other entities?

(a) The permittee may rely on another entity to satisfy its NPDES permit obligations to implement a minimum control measure if:

(1) The other entity, in fact, implements the control measure;

(2) The particular control measure, or component thereof, is at least as stringent as the corresponding NPDES permit requirement; and

(3) The other entity agrees to implement the control measure on the permittee's behalf. In the reports, the permittee must submit under § 122.34(d)(3), the permittee must also specify that it is relying on another entity to satisfy some of the permit obligations. If the permittee is relying on another governmental entity regulated under section 122 to satisfy all of the permit obligations, including the obligation to file periodic reports required by § 122.34(d)(3), the permittee must note that fact in its NOI, but the permittee is not required to file the periodic reports. The permittee remains responsible for compliance with the permit obligations if the

other entity fails to implement the control measure (or component thereof). Therefore, EPA encourages the permittee to enter into a legally binding agreement with that entity if the permittee wants to minimize any uncertainty about compliance with the permit.

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[FR Doc. 2016-28426 Filed: 12/8/2016 8:45 am; Publication Date: 12/9/2016]