



Technical Brief

Technical and Management Updates

Phase II Stormwater Court Ruling

Summary

The United States Court of Appeals for the 9th Circuit issued an opinion related to Phase II Stormwater Rules on January 14, 2003. The opinion was a consolidation of three cases filed in the 5th, 9th and D.C. Circuits that challenged 22 constitutional, statutory and procedural issues of Phase II. The result of the case was that two aspects of the Phase II rule were remanded to EPA for further work, but all other challenges were denied.

Finding 1: That EPA Must Review NOIs/Plans Before Approving Discharges

The Environmental Petitioners contended that the general permitting scheme allows MS4s to design stormwater pollution control programs without adequate regulatory and public oversight, that it does not require EPA to review the content of Notices of Intent. The court concluded that the general permit option does violate the Clean Water Act's requirement that dischargers permit "require controls to reduce the discharge of pollutants to the maximum extent practicable" because the rule does not provide for review of Notices of Intent by EPA. This aspect of the rule was remanded to EPA. The Court noted that this remand should not prevent the Phase II general permitting program from proceeding mostly as planned, but that the stormwater management programs designed by regulated parties must be subject to "meaningful review" by an appropriate regulating entity to ensure that each program reduces the discharge of pollutants to the maximum extent practicable.

Finding 2: That the Permits (NOI and Plan) Need Public Review Before Acceptance by EPA

The Environmental Petitioners asserted, and the Court agreed, that the public notice requirements of the Clean Water Act were violated by the rule because it does not contain express requirements for public participation in the *permitting process* even though it does contain public participation in the implementation of the program. The court remanded this portion of the Phase II Rule stating that it "must provide for the review of NOIs to ensure that those NOIs require controls upon operators of small MS4s that reduce the discharge of pollutants to the maximum extent practical" and must provide for public hearings on NOIs before any discharge is authorized as required under the Clean Water Act. EPA must also provide for the public availability of NOIs as required under the Clean Water Act before approval of the permit to discharge.

What It Means to Municipalities

EPA has not yet published any reaction to the ruling, and likely will not be able to react quickly enough to do so until after the March 10, 2003 deadline. The Court did note that the remand did not mean the rule should not go forward, so unless EPA postpones the deadline (as it did last month for oil and gas drillers), the plans are still likely to be due March 10, 2003. CEI recommends that municipalities incorporate public notice into their plan review as much as possible given the short time frame, and prepare to have their plans more fully reviewed by EPA than expected later this year.

Still Unknown

The Court ruling did not clearly deal with the separate Stormwater Pollution Prevention Plans (SWPPPs) and NOIs that are supposed to be completed by March 10, 2003. But there has been talk that Highway garages may not be in the regulated SIC code after all, meaning they may not have to file separate SWPPPs as is required for wastewater treatment plants over 1 MGD and transfer/recycling facilities. However, there has been no official notice. Meantime, CEI recommends that Phase II designated municipalities incorporate the SWPPP requirements for highway maintenance facilities as a part of their Phase II plan rather than separately.

This summary was prepared to assist municipalities in understanding the recent Court ruling. Please contact CEI at 800-725-2550 if you have question or need assistance with Phase II or other environmental engineering issues. A more detailed summary and a full copy of the ruling is also available from CEI in hard copy or by email.

Stormwater 2: February 2003