NPDES/Stormwater: U.S. Environmental Protection Agency Direct Final Rule/Small MS4 Urbanized Area Clarification

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The United States Environmental Protection Agency ("EPA") published a direct final rule in the December 2nd Federal Issue providing what it describes as a clarification of its Clean Water Act National Pollutant Discharge Elimination System ("NPDES") Stormwater Phase II regulation. See 87 Fed. Reg. 73965.

The stated reason for the direct final rule is due to changes made by the United States Census Bureau.

A discharge of pollutants through a point source to a navigable water (i.e., water of the United States) must be done so pursuant to a Clean Water Act NPDES Permit.

Stormwater discharges are subject to regulation under Section 402(p) of the Clean Water Act. Stormwater from urbanized, commercial, and industrial areas can mobilize pollutants that discharge into Clean Water Act jurisdictional waters. As a result, Congress enacted amendments in 1987 to the Clean Water Act which added Section 402(p). The provision directs that EPA establish phased NPDES requirements for certain stormwater discharges.

A key aspect of the Clean Water Act NPDES Stormwater Permit program has been the use of general permits. General permits are designed to provide coverage for a group of similar facilities or operation of a specific industry or commercial type or group of facilities.

The stormwater permit program includes three types of permits:

- Industrial stormwater
- Construction Stormwater Permit
- Municipal Separate Storm Sewer (MS4)

The subject of the EPA direct final rule are MS4s.

MS4s are publicly-owned conveyances or systems of conveyances that discharge to waters of the United States and are designed or used for collecting or conveying stormwater. A regulated small MS4 is typically defined as any MS4 that is not already covered by the EPA Phase I program and that is located within the "urbanized area." The boundary is determined by the latest U.S. Decennial Census. See 40 C.F.R. 122.32(a)(1).

The December 2nd direct final rule is clarifying that designation criteria for small MS4s, which have been used since the promulgation of the 1999 regulations, remain the same. EPA states that this clarification is necessary due to:

. . . the Census Bureau's recent decision to discontinue its practice of publishing the location of ''urbanized areas'' along with the 2020 Census and future censuses.

The direct final rule replaces the term "urbanized area" in the Phase II regulations with the phrase "urban areas with a population of at last 50,000." This is stated to be the Census Bureau's prior definition of the term "urbanized areas." As a result, EPA states that this will allow NPDES permitting authorities to use 2020 Census and future Census data in a manner consistent with existing regulatory practice.

A copy of the Federal Register Notice can be downloaded here.

https://www.govinfo.gov/content/pkg/FR-2022-12-02/pdf/2022-26228.pdf