

New York State “Phase II Storm Water Program”

Frequently Asked Questions

7/01/03 edit

Municipal Separate Storm Sewer Systems (MS4s)

Covered by SIDES General Permit: GP-02-02

1. When is the effective date of the Phase II SIDES permit and when does the regulated MS4 have to apply for coverage?

The effective date of the final permit was January 8, 2003, the date it was issued. The application deadline for regulated MS4s was March 10, 2003, Therefore regulated MS4s should have submitted their fully completed NO to the Department by March 10, 2003. A completed NO has all sections filled out and it is signed by the appropriate official.

2. Why don't municipalities have more time to submit their NDIS in light of the Department's lateness in releasing their final permit requirements?

The permit deadline is a requirement under the EPA NODES regulations.. NO's contain initial information about the SGMP. While the municipalities should begin developing and implementing their SUMPS immediately, they are allotted 5 years for full implementation. Department sponsored information sessions will provide a good understanding of how to fill out the NO and submit it in a timely manner.

3. Do “additionally designated” MS4s need to be covered by the general permit by March 10, 2003?

Additionally designated MS4s do not need to be covered by the general permit by March 10, 2003. They have 180 days from the date of official notification to obtain permit coverage. The “additionally designated MS4s were notified by the Department on March 5, 2003, and must submit the completed NO by August 25, 2003 for coverage by September 1, 2003.

4. When does the SGMP need to be developed?

“Operators must develop the initial SGMP prior to March 10, 2003 and provide adequate resources to fully implement the SGMP no later than five years from the issuance date of this permit.” (GP-02-02 section IV.B.) The Department criteria for an ‘acceptable’ NOI is one that describes an SWMP that will reduce pollutants and stormwater impacts to the Maximum Extent Practicable as the permit referenced.

5. When should reports be filed and what should they contain?

The final permit now requires that all Annual reports are due on June 1 each year beginning in 2004. This submittal includes the annual Municipal Compliance

Certification. Consistent with the EPA regulations, the report period will end March 10 of each year. The June 1 date provides sufficient time to complete the report at the close of each annual period. The contents of the report are specified in part V.C. of the MS4 permit and a format will be provided by the Department in the coming months.

6. Must all MS4s within an Urbanized Area or Designated Area apply for coverage (e.g. a small village within a designated town)?

Yes, the municipalities located within the geographical urbanized or designated area must be permitted under the Phase II regulations if they own or operate a municipal separate storm sewer according to 40 CFR 122.26(b)(8) .

7. Several “non-traditional” MS4s indicated that they do not intend to file an NOI until they are notified by the State. Does the State intend to notify these “non-traditional” MS4s?

Non-traditional MS4s should not wait to be notified by the State. On March 10, 2003, an MS4 that discharges to waters of the U.S. in an urbanized area will be in violation of the Clean Water Act unless the MS4 has obtained permit coverage. The Phase II regulation does not require the permitting authority to notify entities subject to the regulation.

8. Does the SPDES stormwater general permit only apply to discharges to surface waters and not groundwater or infiltration basin? Under what circumstances does the Phase II regulation require a permit for a discharge to groundwater? Can municipalities apply for coverage for groundwater discharges?

The permits are based on the legal authority of Section 402 of the federal Clean Water Act and refer to “discharges to the waters of the United States” The federal definition is based on navigability and does not include groundwater. Because this is a federal regulation that the Department is implementing, and the federal law does not include groundwater in its definition, discharges strictly to groundwater would not require a Stormwater Phase II permit. Therefore, the MS4 general permit authorizes the discharge to surface waters only. The permit does not authorize discharges to groundwater from MS4s.

However, under the Environmental Conservation Law Section 17-0501, the Department can enforce against violations of water quality standards for groundwater, including violations caused by stormwater discharges to groundwater.

9. If a municipality is on the automatic designation list but does not have any surface water discharges, does it have to submit an NOI?

MS4s must be absolutely sure that they have NO surface water discharges or discharges to another MS4 which has a surface water discharge. MS4s in urbanized areas that have discharges to the waters of the United States are required to obtain coverage through an NOI.

10. If a county includes groundwater discharges in their SWMP and submits an NOI

reflecting this (i.e. surface water bodies together with groundwater - upper glacial aquifers - are listed in the NOI), can the Department enforce under the MS4 program if there are violations associated with groundwater discharges?

Since the MS4 permit does not authorize groundwater discharges, the Department does not believe that enforcement action could be taken under the Phase II regulations. Enforcement of groundwater standards violations would generally occur under the ECL.

- 11. Must a municipality that discharges only into another’s collection system (no direct discharge) file an NOI? Does a municipality “A” with no direct discharges to surface water, but having a discharge into another municipality’s “B” sewer require coverage ?**

Municipality “A” must be permitted since it is discharging to the waters of the United States, albeit via MS4 “B”. This interpretation is consistent with court decisions concerning discharges to man-made canals and ditches which lead to navigable waters. The courts have continually ruled that permits are needed, citing the broad intent of Congress in eliminating pollution when the Clean Water Act passed. Clearly man-made conveyances have been considered to be extensions of waters of the United States in the past. Under this interpretation “A” would be at significant risk if challenged for not having permit coverage. It is likely that the courts will determine that “A” was intended to be part of Phase II, and any of the “A”’s discharges which reach a surface water need to be permitted.

- 12. What are the criteria that an upstream MS4 (MS4 that discharges to another MS4) has to meet?**

An upstream MS4 must submit its own NOI, therefore must develop and implement its own SWMP consistent with all criteria required in the permit. The Department encourages inter-municipal cooperation/agreements in fulfilling the requirements of the general permit.

- 13. Are Homeowner Associations MS4s by definition ?**

A homeowner association that is municipal or public entity formed pursuant to State Law, such as a Transportation Corporation, is an MS4 by definition.

- 14. Are there any provisions for waivers from the MS4 requirements under the permit or regulations?**

Yes, EPA outlines two provisions for waivers as specified in 40 CFR 122.32 (d) and (e). For more information see EPA fact sheet 2.1 – *Who’s Covered? Designation and Waivers of Regulated Small MS4s* (www.epa.gov/npdes/pubs/fact2-1.pdf)

- 15. Is there a possibility of waiving permit coverage requirements for certain MS4s, in particular for school districts?**

As stated above, The federal Phase II stormwater regulations provide for the possibility of two waivers under the regulations, but neither provides waivers to a generic class of

activities/entities. It should also be noted that the EPA does not require coverage for a stormwater system which serves a single building. The Department is encouraging municipalities to provide permit coverage for school districts through agreements. In some instances municipalities may own or operate the stormwater systems that serve the school district. See additional info on this subject in the guidance document entitled “ Local School District Decision Tree for MS4 Determination”.

- 16. A Department statement at the training broadcast indicated a school district with a single building is not an MS4, but if they have a campus type setting it is - Does this apply only to school districts?**

The “single building” criteria applies to all “non-traditional” MS4s.

- 17. If a school district which has a campus with 7 or 8 discreet buildings and several off campus buildings including schools, district offices, and other support buildings what requires coverage - just the campus facility or all the District facilities?**

Any part of the school district or campus that is within the urbanized area boundaries would require coverage. See additional info on this subject in the guidance document entitled “ Local School District Decision Tree for MS4 Determination”.

- 18. Several "additionally designated" communities were not aware they were covered - will they be getting individual letters and more time to comply?**

The “additionally designated MS4s were notified by the Department on March 5, 2003 and must submit the completed NOI by September 1, 2003.

- 19. Are counties required to target only that portion of the population that falls geographically within the “Urbanized Areas”?**

Yes, the permit only requires that counties or other municipalities target the area within the urbanized areas or other area identified by designation criteria. However, reducing stormwater runoff over an entire county (or city, town or village) would benefit all its citizens and therefore a municipality may want to provide information and education about the benefits of reducing stormwater runoff over its entire jurisdiction. In addition, it may also be more cost effective to have one set of rules/programs for the whole jurisdiction.

20. In a county, who actually has to get the permit/file the NOI - individual entities, departments, etc. or the county as a whole?

The Phase II rule does not specify that individual departments or divisions of a county submit separate notices of intent. The Phase II rule requires that discharges to the Waters of The United States from separate stormwater systems operated by public entities within UAs occur under permit. As long as all of the separate sewer systems that are owned or operated by the entity are covered in the SWMP, only one NOI is needed per municipality. Discharges from the MS4 (i.e.outfalls), must be identified as part of the MS4's 6 minimum measures.

"Orphan" outfalls within a UA will become illegal after March 10, 2003. Eventually, the Department and/ or EPA or a third party will discover the un-permitted discharges at which point the owner will be contacted concerning the violation.

The county's decision on this should be predicated on insuring that all discharge points are covered. It is possible that county department that is most involved with each set of pipes would be most effective in providing complete coverage.

21. What about state agencies which have more than one regulated site statewide? Will one NOI for all suffice or do they need to submit a separate NOI for each? (E.g DOT and OGS)

In such instances it is acceptable for the agency to submit one NOI covering all its facilities - provided all its regulated sites are covered completely and acceptably.

24. Have state agencies who have a campus greater than one building been notified of their status?

No. The Department does not currently have information available to determine if a campus would have greater than one building, have a separate storm sewer system and discharge to the waters of the United States.

25. Do the designation criteria apply to all communities or only those with 10,000 population and 1000/square mile density?

The designation criteria identify additional municipalities beyond those automatically designated by the federal regulations. They were applied to all municipalities across the state regardless of population to determine additionally regulated municipalities.

26. When will statewide coverage occur?

The Department is not implementing statewide coverage of MS4s at this time. The Department will consider the effectiveness and cost-effectiveness of use of the permits before it designates other areas and/or reissues the permit. Any decisions on expanding the coverage would undergo public review and comment.

27. Does a completed NOI represent an initial SWMP ?

A *complete* (all sections filled out and signed by the proper official) and *acceptable*

(appropriate management practices for the municipality have been selected) NOI can serve as the MS4's initial SWMP. The Department will review all NOIs for completeness to allow for coverage. Subsequent to that, the Regional DEC offices will review NOIs to insure acceptability on a priority basis.

28. What is the minimum required content for an MS4's SWMP?

The MS4 must develop, implement and enforce a SWMP designed to reduce the discharge of pollutants to the Maximum Extent Practicable.

There are required actions under each of the six minimum control measures that every MS4 must include in their SWMP. MS4s have discretion in choosing the management practices they implement to meet these requirements. Refer to the Department NOI guidance document for assistance in making these determinations (<http://www.dec.state.ny.us/website/dow/mainpage.htm>). MS4s retain the responsibility for producing an acceptable NOI.

29. What is the procedure for a downstream MS4 to require an appropriate level of protection from an upstream MS4?

Inter-municipal cooperation which may come in the form of an established Inter-Municipal Agreement. An upstream MS4 must have their own NOI /SWMP.

30. What about agreements between cooperating MS4s.?

Storm sewers and ditches associated with stormwater runoff frequently cross municipal boundaries. EPA and the Department encourage cooperation between MS4s in developing and implementing the six minimum measures in Urbanized Areas by way of intermunicipal agreements. This flexibility in the federal regulation is reflected in the state's final MS4 permit. Communities affected by the Phase II program are encouraged to cooperate on any portion, an entire minimum measure, or to have another MS4 be responsible for developing and implementing their entire stormwater program. Environmental Protection Fund priorities will be given where counties, cities, towns and villages include implementation of SWMPs through Intermunicipal Cooperation for Comprehensive Planning Agreements as defined under GML 119-u, General City Law Section 20, Town Law Section 284 and Village Law Section 7-741.

31. What about the cost of implementing the MS4 program?

To help cover the basic costs of starting the MS4 program, during the state fiscal year 2003/2004 \$3.4 million has been earmarked from the Environmental Protection Fund (EPF) to assist MS4s. This funding will be available in 2003 as MS4s develop and begin implementing their Stormwater Management Programs (SWMPs). Additional funding from the EPF is anticipated in future years, which will be available to further assist MS4s as they move to full implementation of their SWMPs.

Even with state assistance available, communities will still need to budget for stormwater management. For example, some municipalities are considering increased fees be charged to a developer for the review of stormwater management plans for a development.

Communities could also create stormwater management authorities or districts which would charge back management costs based on the amount of impervious area on a given property.

Mitigating the impacts of stormwater pollution through effective implementation of this program is expected to generate economic benefits to the state by improved shellfishing, swimming, boating, and general water quality as well as reduced impacts from flooding. Based on the EPA analysis, benefits of the Phase II stormwater program nationwide are anticipated to be greater than the costs of its implementation. The Department expects this will also be the case in New York State.

32. Where are the locations of endangered or threatened species and their critical habitats listed?

The New York Natural Heritage Program develops and maintains New York's most comprehensive database on the status and location of rare species (including all that are listed as endangered or threatened) and natural communities (which are different types of forests, wetlands, grasslands, etc.). They presently monitor 417 rare animal species, 755 rare plant species, and 166 natural community types, keeping track of more than 10,000 locations where these species and communities are found. The program is based in the Department's Division of Fish, Wildlife, & Marine Resources. For more information contact Nick Conrad, the Program's Information Resources Coordinator at (518) 402-8944.

33. Where are the locations shown of properties listed or eligible to be listed on the National Register of Historic Places?

The Office of Parks, Recreation and Historic Preservation has this information. The Commissioner of Parks, Recreation and Historic Preservation is the state historic preservation officer. Visit their website at <http://nysparks.state.ny.us/field/statnatreg/> or call the Historic Preservation Field Services Bureau at (518) 237-8643.

34. What level of detail is required to satisfy the storm sewer mapping requirement of the general permit? Does the system need to be surveyed? Or is GPS adequate?

GPS is adequate provided that the MS4 develops and maintains a map showing the location of all outfalls and the names of all waters of the U.S. that receive discharges from those outfalls. It should be noted that the term outfall is defined as any point where a separate storm sewer system discharges to either the waters of the United States or to another MS4. Outfalls include discharges from pipes, ditches, swales, and other points of concentrated flow. However areas of non-concentrated (sheet) flow which drain to the waters of the United States or to another MS4's system are not considered outfalls and should not be identified as such on the system map. The MS4 must determine how best to meet their requirements. A complete stormwater system map may be the most useful to MS4s in carrying out their programs

[Guidance in EPA Fact Sheet 2.5 "Illicit Discharge Detection and Elimination" states:]

"The Map - The storm sewer system map is meant to demonstrate a basic awareness of the intake and discharge areas of the system. It is needed to help determine the extent of discharged dry weather flows (water discharging from the stormwater system when there

hasn't been a storm), the possible sources of dry weather flows, and the particular waterbodies these flows may be affecting. An existing map such as a topographical map on which the location of major pipes and outfalls can be clearly presented demonstrates such awareness.

Collect as much existing information on outfall locations as possible (e.g. review city records, drainage maps, storm drain maps) and then conduct field surveys to verify locations. It will probably be necessary to walk (i.e. wade through small receiving waters or use a boat for larger waters) the streambanks and shorelines for visual observation. More than one trip may be needed to locate all outfalls.”

35. What references should permittees use to find the name of receiving waters?

Various references can be used, such as U.S.G.S. topographic maps. Contacts that can help MS4s find this information include County Soil and Water Conservation Districts, Regional Planning Boards and Regional DEC offices.

36. Is the “no increase of pollutants of concern” requirement effective only when the MS4 discharges directly to a 303(d) or TMDL watershed or is it effective when the discharge is to a tributary of a watershed so designated?

The “no increase of pollutants of concern” requirement applies only to MS4 discharges directly to a 303(d) listed segment. Requirements of an EPA approved TMDL plan only apply to discharges within the watershed delineated for that TMDL program area.

37. Will the Department develop a statewide model law or plan for controlling construction site runoff within MS4s?

The Department has a model stormwater ordinance in *Reducing the Impacts* manual (<http://www.dec.state.ny.us/website/dow/toolbox/reducing.html>) that was developed under the Phase I program which is expected to be updated along with additional guidance material.

38. What does the following requirement in the post-construction minimum measure refer to: that the post construction program must include construction activities on less than one acre if it has been designated by the Department to protect water quality?

This requirement recognizes that even construction projects on less than one acre may have the potential to impact critical water ways, wetlands, critical habitat, etc. In these infrequent situations, the construction activity must be included in Construction General Permitting Program. This means that they must fulfill all of the requirements necessary under the permit. If the determination is made that a small construction project must be regulated, the owner/operator will be officially notified by the Department.

39. Is water quality monitoring required of municipalities that discharge to 303(d) listed waters or to waters for which TMDLs have been adopted? How does the Department recommend that municipalities ensure no increase in pollutants of concern?

No specific monitoring is required by the MS4 permit, however monitoring along with other measures (such as modeling) may be the best way to ensure “no increase in pollutants of concern” . The permittee should document that the SWMP that has been developed will ensure that there will not be an increase in the pollutant of concern.

40. Why did the Department adopt requirements for the Public Involvement and Participation measure that differ from the federal program?

Where the Department wanted to reflect NYS-specific program elements, regulations, procedures or philosophies, it enhanced the permit prepared by USEPA. This has occurred not only in the Public Education and Outreach minimum measure and the Public Involvement/Participation minimum measure but also in the Construction Runoff Control minimum measure and the Pollution Prevention/Good Housekeeping minimum measure.

41. Please explain under what circumstances a septic system might be considered an illicit discharge?

A failed system or one with inadequate treatment may at times discharge to a storm sewer. In these situations it is not uncommon for them to contribute to pollution loads. Such situations must be rectified as required by the MS4's program developed for Minimum Measure #3 (Illicit Discharge Detection and Elimination).

42. Is it okay for municipalities to distribute the same materials year after year?

A municipality should decide what to distribute based on water quality and program needs in the MS4. For example, it may be appropriate to have an annual campaign to reduce fertilizer and pesticide use in a municipality. The MS4 must decide if the same materials can be used and be effective on an annual basis.

43. To what extent are MS4s required to ensure that their programs are making a difference with respect to local water quality conditions?

Except for discharges to 303(d) listed waters and TMDL watersheds, there is no specific requirement that a MS4 ensure improvement in water quality as a result of implementing the six minimum control measures. (See MS4 General Permit GP-02-02 Part III. B.)

44. Does the term “measurable goal” mean we have to attempt to quantify results or keep records and numbers or statistics on our activities?

Goals should be quantifiable in some way. Initial goals presented on the NOI can be less detailed. MS4s should plan to further define them in the Annual Report.

This EPA guidance might be helpful - taken from the fact sheet “Process For Developing Measurable Goals Under A General Permit” : <http://cfpub.epa.gov/npdes/stormwater/measurablegoals/part2.cfm>

45. Please discuss the specific ways municipalities can demonstrate that their programs, BMPs and measurable goals have been selected in accord with the Maximum Extent Practicable requirement. What kinds of specific information do municipalities have to consider or include in their developmental process in order to adequately justify their

determination of what MEP means for their locality?

“Maximum Extent Practicable” is a technology-based standard established by Congress in the Clean Water Act §402(p)(3)(B)(iii). Since no precise definition of MEP exists, it allows for maximum flexibility on the part of MS4 operators as they develop their programs. (40CFR 122.2 See also: Stormwater Phase II Compliance Assistance Guide EPA 833-R-00-002, March 2000). Each MS4's SWMP must be tailored to the stream segments where their sewers discharge, the pollutants of concern being discharged and the storm water issues which exist in that particular municipality. The intent of the MEP language is to ensure that municipalities provide a reasonable and substantial effort to reduce the quantity and quality impacts of storm water in their area. The Department will review NOIs to determine if they have met this goal. Our review will focus on the municipalities' selected management practices for each minimum measure and the measurable goals detailed in the NOI. If these are reasonable for that individual MS4 given the Regional DEC understanding of the issues in that UA we will deem it acceptable. If not, we will comment on the NOI and allow additional time for changes. If, as the SWMP is developed, issues are noted in Annual Reports that lead us to question if the SWMP meets the MEP requirements we will deal with the MS4 on those issues.