

PHASE II STORM WATER GENERAL PERMIT

August 2007

What law requires storm water permits?

Texas Water Code Section 26.121 prohibits any unauthorized discharge of waste into or adjacent to any water in the state which will cause pollution of any water in the state, as well as any unauthorized discharge of any pollutant from any point source, including a municipal storm sewer system. Texas Water Code Section 26.040(a) grants the Texas Commission on Environmental Quality (TCEQ) authority to issue a general permit for storm water that authorizes such discharges through the permitting process. The Water Code provisions were enacted pursuant to the federal Clean Water Act (33 U.S.C. §§ 1251-1387).

How have the TCEQ and the Environmental Protection Agency (EPA) permitted storm water discharges in the past?

On September 17, 1998, control over storm water permitting shifted from EPA's National Pollutant Discharge Elimination System (NPDES) program to Texas' version, the Texas Pollutant Discharge Elimination System (TPDES). Before the permits were merged, cities were required to comply with both the EPA and Texas permitting systems. TPDES is one permit that governs federal and state surface water discharge standards. Permits were switched over as they were renewed or amended. Phase I individual permitting for large and medium cities is already in place. Phase II is the portion of the NPDES/TPDES program that applies to certain smaller cities. (from *TNRCC Natural Outlook*, Winter 1999:
http://www.tceq.state.tx.us/assets/public/comm_exec/pubs/pd/020/99-01/npdes.pdf)

Why did it take so long to get a Phase II general permit in place?

The TCEQ attempted to begin the general permit process for small municipal separate storm sewer systems (MS4s) not long after the control of the permitting process was brought under state control, but a lawsuit slowed down the process. In *Environmental Defense Center, Inc. v. U.S. E.P.A.* (344 F.3d 832, C.A.9 (Cal.),2003), three cases were consolidated for a combined twenty-two constitutional, statutory, and procedural challenges to the EPA's Phase II storm water permitting scheme. Only three of the challenges were successful, and after the petition for a writ of certiorari was denied by the United States Supreme Court in January 2004, the Phase II rulemaking went forward at the federal and state levels. The Phase II general permit recently adopted by the TCEQ is the final version of this general permit as it will be enforced under the state's TPDES program.

Which storm sewer systems are part of the new Phase II general permit?

Small MS4s located in an urbanized area (EPA Urbanized Area Map:
<http://cfpub.epa.gov/npdes/stormwater/urbanmapresult.cfm?state=TX>; TCEQ Stormwater Permit

Area Locator: <http://gis3.tceq.state.tx.us/website/irwwp0/viewer.htm>) will fall under the general permit, as will other small MS4s that are designated and notified by the TCEQ as requiring coverage under the general permit.

A small MS4 is defined as a conveyance or system of conveyances (including streets, curbs, gutters, ditches, storm drains, etc.) that is owned by a city having jurisdiction over disposal of sewage, storm water, or other wastes, designed or used for collecting or conveying storm water, that is not a combined sewer, and that was not previously categorized as a medium or large MS4.

There are two waiver options available to exempt a small MS4 from the general permit:

- If the system serves a population of less than 1,000 within an urbanized area, is not contributing substantially to the pollutant loadings of a physically interconnected MS4 that is regulated by the NPDES/TPDES storm water program, and storm water controls are not needed based on wasteload allocations that are part of an EPA-approved TMDL that addresses the pollutants of concern; or
- If the system serves a population under 10,000 and meets the following criteria:
 - the TCEQ has evaluated all waters of the United States that receive a discharge from the small MS4;
 - for all such waters, the TCEQ has determined that storm water controls are not needed based on wasteload allocations that are part of an approved or established TMDL or equivalent analysis; and
 - the TCEQ has determined that future discharges from the small MS4 do not have the potential to exceed Texas surface water quality standards.

When is a city required to apply for the general permit?

Operators of small MS4s in urbanized areas must submit a Notice of Intent (NOI) and Surface Water Management Program (SWMP) within 180 days following the effective date of the general permit. Operators of designated small MS4s must submit an NOI and SWMP within 180 days of being notified in writing by the TCEQ of the need to obtain permit coverage.

While an NOI and SWMP may be submitted late, the authorization granted by the general permit will only cover discharges which occur after coverage is obtained under the general permit. All discharges after the 180-day deadline and before permit coverage is obtained are open for appropriate enforcement by the TCEQ.

The general permit will be effective for five years. It may be amended, revoked, or cancelled by the TCEQ or renewed by the TCEQ for an additional term or terms not to exceed five years.

What will the permit require?

A city applying for coverage under the general permit must submit a Notice of Intent (NOI) and a Storm Water Management Program (SWMP) to the TCEQ.

The **Notice of Intent (NOI)** must contain MS4 operator information and information about the MS4 site itself. The NOI may be amended with a Notice of Change (NOC) form, which must be submitted within 30 days after any change requiring an amendment is known to the permittee.

The **Storm Water Management Program (SWMP)** is a comprehensive program to manage the quality of discharges from the MS4. The program must be developed 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 and the Texas Water Code. The requirements of the SWMP may be met through existing programs or best management practices (BMPs). The SWMP *must* include the following six minimum control measures (MCMs):

- 1) **Public Education and Outreach on Storm Water Impacts:** operator must develop, implement, and document a public education program to inform residents, visitors, public service employees, businesses, commercial and industrial facilities, and construction site personnel about the environmental impacts and hazards of illegal storm water discharges and how they can reduce pollutants in storm water runoff.
- 2) **Public Involvement/Participation:** recommended that such a program include provisions to allow all members of the public within the MS4 to participate in SWMP development and implementation. All state and local public notice requirements must be followed when implementing such a program.
- 3) **Illicit Discharge Detection and Elimination:** the operator must establish a program to detect and eliminate illicit discharges to the MS4, including the manner and process to be used to effectively prohibit such discharges, such as a city ordinance. Elements must include detection and elimination, including the establishment of enforcement procedures for removing the source of an illicit discharge. Non-storm water flows explicitly listed and exempted in the rule do not need to be considered as a discharge, and the operator may create an additional list of “common and incidental” non-storm water discharges that will not be addressed as illicit discharges into the system. This program must also include a map of the storm sewer system.
- 4) **Construction Site Storm Water Runoff Control:** the operator, to the extent allowable under state and local law, must develop, implement, and enforce a program, including an ordinance, to reduce pollutants in any storm water runoff to the MS4 from construction activities that result in a land disturbance of one acre or more, unless the construction site operator has obtained a waiver from permit requirements.
- 5) **Post-Construction Storm Water Management in New Development and Redevelopment:** the operator, to the extent allowable under state and local law, must develop, implement, and enforce a program, including an ordinance, to reduce pollutants in any storm water runoff to the MS4 from new development and redevelopment projects that result in a land disturbance of one acre or more, unless the construction site operator has obtained a waiver from permit requirements.
- 6) **Pollution Prevention/Good Housekeeping for Municipal Operations:** the operator must establish an operation and maintenance program, including an employee training component and best management practices (BMPs), with the ultimate goal of preventing

or reducing pollutant runoff from municipal operations. A list must be created of municipal operations subject to the program.

The operator *may* include a minimum control measure (MCM) similar to the six listed above for **municipal construction activities**, as an alternative to obtaining coverage under TPDES general permit TX150000 (General Permit to Discharge Waste for Construction Sites). This is a detailed process, and more information may be found in the language of the rule.

A SWMP must include a timeline that demonstrates a schedule for implementation of the program throughout the permit term, and be completely implemented within five years of the issuance date of the general permit (or within five years of designation, for designated MS4s). Implementation of the SWMP must begin immediately upon receipt of written authorization from TCEQ.

A SWMP may be amended during the permit term. If the amendment is required before the NOI is approved, then the SWMP may be altered simply by sending a letter to TCEQ providing supplemental information to the NOI. If the SWMP must be amended after the NOI and SWMP are approved, then the operator must receive written approval of the changes from the TCEQ, with two exceptions:

- 1) For changes including adding components, controls, or requirements to the SWMP, or replacing a best management practice (BMP) with an equivalent BMP, then the changes may be made by filing a Notice of Change (NOC) form.
- 2) For changes that will replace a less effective or infeasible BMP specifically identified in the SWMP with an alternate BMP, the operator must still submit NOC form, but the change assumed approved unless denied in writing within sixty days.

There is the possibility for significant public participation in this process. Notice is required in the newspaper of largest circulation in the county where the MS4 is located, with the opportunity for written comment and the opportunity for the public to request a public meeting. If a significant public interest exists, the TCEQ executive director will direct the applicant to publish notice of and hold a public meeting, which will be facilitated by TCEQ staff.

Following agency review of the NOI and SWMP, the TCEQ Executive Director may determine that (a) the submission is complete and provide a notification to the operator; (b) the application is incomplete and deny coverage until a complete NOI and/or SWMP are provided; (c) approve the NOI and/or SWMP with revisions; or (d) deny coverage and provide a deadline for application for an individual permit.

What systems will not be eligible?

Certain MS4s will not be eligible for the general permit, such as:

- 1) MS4s where discharges would cause or contribute to a violation of water quality standards or that would fail to protect and maintain existing designated uses;

- 2) MS4s that would create new discharges into impaired waters (waters that do not meet applicable water quality standards and are listed on the Clean Water Act (CWA) Section 303(d) list);
- 3) certain MS4s in the Edwards Aquifer Recharge Zone; and
- 4) MS4s in certain areas protected by home rule city protection of water shed ordinances.

MS4s which fall under these exceptions may be required to file for an individual permit by the TCEQ.

What are the reporting requirements?

Reporting requirements include: (1) a requirement that a permittee report to the TCEQ any noncompliance which may endanger human health or safety; (2) a prompt submission of a correction of any incorrect or incomplete information in any report; and (3) an annual status report to the TCEQ.

What happens if a system fails to comply with the general permit?

Failure to comply with any condition of the general permit is a violation of the permit and the statutes under which it was issued. Violation may be grounds for enforcement action, termination of coverage under the general permit, or a requirement that a discharger apply for and obtain an individual TPDES permit. Certain violations are subject to administrative, civil, and criminal penalties.

Where can I obtain more detailed information regarding the above?

For general questions, please contact Lauren Crawford in the TML Legal Department at (512) 231-7400. For more specific questions, please contact the TCEQ's Storm Water Division at (512) 239-4671 or http://www.tceq.state.tx.us/permitting/water_quality/stormwater/storm-water-navigation/ms4.html.