



Electronic Dispatch

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## PHASE II – THE PERFECT STORM (WATER REGULATION)

### Introduction

Most people give little consideration to where rain water ultimately goes. In a comprehensive survey performed in 1996, 40% of US water bodies failed to meet designated water quality standards.<sup>1</sup> A principal cause is polluted runoff from storm water. With all the rain this summer in the northeast, it seems an appropriate time to focus on the new storm water requirements recently imposed by state environmental authorities which attempt to remedy this situation.

Regulation of storm water is a complex overlay of Federal, State and local requirements. Traditionally, storm water has been regulated at the local level, principally to ensure proper drainage. Most municipalities have site plan review requirements that address this concern. However, the traditional site plan review focuses less, if at all, on issues of water quality in receiving streams that may be impacted by storm water runoff.

Storm water discharges particularly from urbanized areas are of particular concern because of the high concentration of pollutants.<sup>2</sup> Increased development creates more impervious surfaces preventing storm water from dissipating naturally into the ground. As a result, pollutants from human activities concentrate until they are washed away in storm events into storm drains. Among the most common pollutants are pesticides, fertilizers, oils, salt, litter, debris and sediment.<sup>3</sup>

This article will provide a general overview of the new storm water regulatory program with particular focus on municipal separate storm water systems (MS4s).

### Components Of The Storm Water Program

The federal Clean Water Act (CWA or the "Act") prohibits discharges of pollutants except those in compliance with the Act.<sup>4</sup> Typically, in order to be in compliance with the CWA, the discharge must meet certain treatment standards and be granted a permit.<sup>5</sup> Discharges of storm water were generally exempted from these requirements until 1994.<sup>6</sup>

Since that time, pursuant to a statutory mandate, the U.S. Environmental Protection Agency (EPA) has established a comprehensive regulatory framework for regulating storm water discharges.<sup>7</sup> The regulatory program has three components – (1) the regulation of construction activities; (2) the regulation of industrial activities; and (3) the regulation of municipal separate storm water sewer systems (MS4s).<sup>8</sup>

The program was implemented in two phases. Phase I established a system of permitting and regulatory controls for construction activities involving over 5 acres; 10 classes of industrial activities and "medium" and "large" MS4s.<sup>9</sup> Phase II extends those controls to construction activities involving over 1 acre, additional classes of industrial activities and to "small" MS4s.<sup>10</sup> With respect to the MS4 requirement, all municipalities in New York State that qualified for the Phase I program, except New York City, received waivers.<sup>11</sup> Those municipalities and others are now required to implement the Phase II rules.



## Comparison Of The Storm Water Program With The Traditional CWA Program.

Since the inception of the CWA, state and federal regulatory authorities have issued pollutant discharge permits.<sup>12</sup> The permits are generally issued on an individual basis to the entity discharging the pollutant. For example, a municipal sewage treatment plant would receive a SPDES permit for all outfalls associated with the plant. The permit would set concentration limits for specific pollutants being discharged.

These limits are set based on various technology standards that are established under the CWA. For instance, the standard for non-toxic pollutants is set as best practicable control technology and for toxics as best available technology economically achievable.<sup>13</sup> In addition, where the technology limit is insufficient to protect the receiving body of water, the CWA provides authority for more stringent controls, known as water quality based limits.

The approach in the storm water program is different in a number of respects. First, the vast majority of permits are issued on a “general” as opposed to an individual basis. This means that the regulatory authority (the NYS Department of Environmental Conservation (DEC) in the case of New York) will issue a general permit that covers a defined, but broad, class of activities. Entities that are engaged in these activities that come within the qualifying requirements may take advantage of coverage of these general permits simply by notifying the regulatory authorities. Those who obtain coverage under these general permits do not have to undergo any individual permit review. The theory is that the entity involved in the activity is not getting a new permit but rather is just qualifying for coverage under an existing permit.

Under the general permit, as under the more traditional individual discharge permit, the discharger is required to meet technology standards set in the CWA. In the more traditional programs, the technology standards are well defined in rules, and when they are applied in specific cases, the performance of the technology is reflected in an effluent limit in the permit. In the storm water program, the technology standards are performance oriented, requiring the implementation of best management practices (BMPs) and there are no specific numerical effluent standards in the permits.

For example, municipal storm water dischargers are required to put in place controls that reduce the discharge of pollutants to “maximum extent practicable” (MEP).<sup>14</sup> No precise definition of this standard has been promulgated and hence its application is both flexible (the good news) and vague (the bad news). The general permit requires the municipal discharger to establish goals that would meet the MEP standard and then demonstrate that it is making steady progress towards those goals.<sup>15</sup> Presumably, DEC will exercise oversight into whether the goals indeed satisfy the MEP standard and over whether “steady progress” is being made. Nonetheless, enforcing these permit requirements presents issues for both the regulatory agency and for the permittee that differ from the more straightforward ones associated with enforcing numerical effluent limits.

## The Municipal Program – MS4

### Who Is Covered?

In order to be covered, municipalities must own or operate a “separate storm sewer system” (the S4 of MS4). The definition of what constitutes an S4 is very broad. It encompasses any conveyances or systems of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels or storm drains) that are designed or used for collecting or conveying storm water.<sup>16</sup>

In New York, only New York City was covered by the Phase I requirements. The Phase II program is picking up all other “medium” and “large” MS4s (those that generally service populations over 100,000) as well as many “small” ones. “Small” MS4s that are covered by the Phase II program include all those that are in “urbanized areas” as defined by the Bureau of the Census and others that are designated on a case-by-case basis. Case-by-case designations might occur, for instance, where the body of water into which the storm water discharges is already polluted to the extent that it is not currently meeting water quality standards. Controlling storm water through the MS4 program would thus be another way to reduce pollution loadings. The New York municipalities that have been designated are listed in Appendix A to this Information Memo.

### **What Is Excluded?**

Specifically excluded from the definition of MS4s are sanitary sewers and combined sewers (i.e. those that convey both sanitary and storm waters).<sup>17</sup> Several other important classes of storm water discharges are not definitionally excluded but are ineligible for coverage under the general permit. This means that such discharges would have to be permitted through an individual permitting process. The categories include storm water discharges whose unmitigated impact would jeopardize an endangered or threatened species or adversely modify its habitat and those that adversely affect properties listed or eligible for listing on the National Register of Historic Places.<sup>18</sup> Discharges to bodies of water that are "impaired" (those that are on a list of impaired waters developed by the State based on an inability to meet water quality standards) are covered under the MS4 general permit but they will have to conform to the State's strategy for discharges into impaired waterways as well.<sup>19</sup>

### **What Geographic Areas Are Municipalities Responsible For?**

Ultimately, municipalities are responsible for all discharges from their S4s into the waters of the United States.<sup>20</sup> This presents problems where the sources of pollution come from areas outside of their jurisdiction. Both EPA and DEC have encouraged municipalities to work on a regional basis to address storm water pollution problems for just this reason. Cooperation is more likely where the involved municipalities own covered S4s. Where this is not the case, the municipality on the receiving end may wish to petition EPA to cover the municipality where the source of the pollution originates. In either event, many municipalities will find that in order to comply with their permit requirements they will need to negotiate cooperative agreements. Involving DEC in these negotiations may be imperative in order to have sufficient leverage to arrive at an agreement that is equitable to all parties.

### **Substantive Responsibilities of Covered Municipalities**

Municipalities that are covered must do two things: (1) get coverage under the general SPDES permit issued by DEC; and (2) develop a program that fully meets the requirements of the permit no later than January 8, 2008.<sup>21</sup>

Obtaining coverage is relatively straightforward. Municipalities must file a notice of intent on a form designated by the DEC by March 10, 2003 or must file 180 days after designation, whichever is later.<sup>22</sup> By that date, an operator must also have developed the initial storm water management plan (SWMP).<sup>23</sup> The initial SWMP must include a listing of initial management practices and initial measurable goals for each of the six minimum measures that must be in all SWMPs (see discussion below).

Municipalities must ultimately adopt and implement a program that reduces the discharge of pollutants from MS4s to the maximum extent practicable (MEP). The standard itself is undefined. However, as stated by EPA and DEC, meeting the MEP standard will require the implementation of all applicable best management practices (BMPs) for activities in the municipality.<sup>24</sup> The regulatory agencies intend to adopt BMPs for various activities. Determining which ones apply to particular municipalities will have to be decided on a case-by-case basis. The only conclusion that can be drawn definitively is that, minimally, it will have to include the six measures discussed below.

### **The Minimum Program**

The SWMP must have the following six elements:<sup>25</sup>

1. Public education and outreach.
2. Public involvement/participation in the planning and implementation process.
3. Illicit Discharge Detection and Elimination (e.g. sanitary wastewater, effluent from septic tanks, car wash wastewaters, improper oil disposal, radiator flushing disposal, laundry wastewaters, roadway spills, and improper disposal of auto and household toxics).
4. Construction site runoff. This will generally be implemented through regulatory controls on developers. Typically, these controls are implemented through the site plan review process.<sup>26</sup> Municipalities must ensure that substantively the controls required are consistent with those required by the DEC construction storm water permits.<sup>27</sup>

5. Post-construction runoff control. This component would be implemented through a combination of regulatory measures and good maintenance practices by the municipality of its own system.
6. Pollution prevention/good housekeeping. These measures generally would be those that relate to the municipalities' maintenance of publicly-owned facilities and projects.

### **Financing The Program**

There will be considerable funds required to develop and implement the programs needed to support an adequate SWMP. EPA has estimated that MS4s might expect to spend between \$3 and \$60 per capita each year to implement storm water programs in their jurisdiction. These numbers run the gamut from a program that just needs to meet the minimum requirements to one that must implement a complex program with optional components. To put these numbers in perspective, a suburban town with a population of 30,000 would spend between approximately \$100,000 and \$2,000,000 annually.<sup>28</sup>

The State is providing funding through the Environmental Protection Fund to assist in the start up costs.<sup>29</sup> In State fiscal year 2003 (April 1, 2003 to March 31, 2004), \$3.4 million was earmarked for these purposes.<sup>30</sup> Obviously, these funds will not come close to covering all the costs. This is but one of the reasons the State is urging regional solutions and partnering with existing institutions such as soil and water conservation districts, particularly on the outreach and public education components of the SWMP.

Some of the resources may also be generated from increased fees imposed on developers, particularly with respect to the regulatory aspects of the SWMP. According to DEC, some communities are considering storm water management authorities or districts which would charge back management costs based on the amount of impervious area on a given property.<sup>31</sup>

### **Conclusion**

Phase II of the MS4 program is certain to be far reaching in its effects. Communities who focused largely on controlling the quantities of storm water draining off construction sites will now have to put programs in place that address water quality issues. Significantly, covered municipalities will have to clean up their own act in terms of the storm water infrastructure that they themselves control and will have to establish public education and participation programs as well.

The new storm water requirements raise many challenging issues for municipalities and for their attorneys. Among the most challenging are how to conform local and state programs, how to address storm water arriving from outside their jurisdiction, and how to pay for the local program. Practitioners will have to work their way through these problems as the program continues to mature and more guidance from DEC becomes available.

(Endnotes)

<sup>1</sup> Storm Water Phase II Final Rule: An Overview EPA Fact Sheet No. 1, January 2000.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> 33 USC §1311(a)

<sup>5</sup> See requirements of 33 USC §§1312, 1316, 1317, 1328, 1342, and 1344.

<sup>6</sup> 33 USC §1342(p)

<sup>7</sup> *Id.*

<sup>8</sup> Municipal systems discharging sanitary wastes or combined systems discharging both sanitary wastes and storm water are handled under a separate regulatory scheme. This scheme is the more "traditional" one under the CWA that involved the setting of effluent limits in individual pollutant discharge permits

<sup>9</sup> Storm Water Phase II Final Rule: An Overview EPA Fact Sheet No. 1, January 2000.

<sup>10</sup> *Id.*

<sup>11</sup> Overview of the Municipal Separate Stormwater Sewer Systems (MS4) Phase II Stormwater Program; DEC Publication, February 2003, Revised August 2003.

<sup>12</sup> The federal permit is known as the National Pollutant Discharge Elimination System (“NPDES”) permit. In New York, the State implements these requirements and issues a State Pollutant Discharge Elimination System (“SPDES”) permit.

<sup>13</sup> See 33 UCS §1311(b)

<sup>14</sup> 33 USC §1342(p)(3)(B)

<sup>15</sup> SPDES General Permit from Municipal Separate Storm Water Sewer Systems. Permit No. GP-02-02 at 4.B.

<sup>16</sup> 40 CFR 122.26(b)(8)

<sup>17</sup> *Id.*

<sup>18</sup> SPDES General Permit for Storm Water Discharges from Municipal Separate Storm Water Sewer System (MS4s), Permit No. GP-02-02 at I.C.2. and 3.

<sup>19</sup> This is commonly referred to as the TMDL (Total Maximum Daily Load) Strategy. Conforming with the strategy will likely require implementing measures that go beyond what is necessary to meet the Maximum Extent Practical (MEP) standard.

<sup>20</sup> SPDES General Permit for Storm Water Discharges from Municipal Separate Storm Water Sewer System (MS4s), Permit No. GP-02-02 at IV.A.; Final Draft Phase II Responsiveness Summary for Proposed SPDES General Permit for Regulated MS4s, January 8, 2003 at pg. 13.

<sup>21</sup> SPDES General Permit for Storm Water Discharges from Municipal Separate Storm Water Sewer Systems (MS4s), Permit No. GP-02-02 at IV.B.

<sup>22</sup> SPDES General Permit for Storm Water Discharges from Municipal Separate Storm Water Sewer System (MS4s), Permit No. GP-02-02 at II.A.

<sup>23</sup> SPDES General Permit for Storm Water Discharges from Municipal Separate Storm Water Sewer System (MS4s), Permit No. GP-02-02 at II.B.

<sup>24</sup> *Ibid.*

<sup>25</sup> SPDES General Permit for Storm Water Discharges from Municipal Separate Storm Water Sewer System (MS4s), Permit No. GP-02-02 at IV.C.

<sup>26</sup> While persons who disturb more than one acre minimally must obtain coverage under the general storm water permit for construction activities, such coverage at the state level does not involve an approval process. In situations where the activity is occurring in an MS4 community, there is an additional requirement for the review and approval of the storm water measures as part of the municipality’s own MS4 storm water permit.

<sup>27</sup> In the past, some municipalities have prohibited the storage of storm water on site, fearing infestation of pests that cause water-borne diseases. Such prohibitions are in direct conflict with Phase II requirements that direct the use of retention basins to allow the settling of pollutants before the release and discharge of storm water into receiving waters.

<sup>28</sup> Final Draft Phase II Responsiveness Summaries for Proposed SPDES General Permit for Regulated MS4s at pg. 6.

<sup>29</sup> Overview of the Municipal Separate Storm Water Sewer System (MS4) Phase II Storm Water Permit Program – A Summary of MS4 Phase II Permit Requirements. DEC Publication, February 2003, Revised August 2003.

<sup>30</sup> *Id.*

<sup>31</sup> Final Draft Phase II Responsiveness Summaries for Proposed SPDES General Permit for Regulated MS4s, January 8, 2003 at pg. 6.

If you have any questions, please contact any of the following:

In Central New York, call 315-218-8000 or e-mail:

Kathleen M. Bennett	kbennett@bsk.com	Kevin M. Bernstein	kbernstein@bsk.com
H. Dean Heberlig, Jr.	dheberlig@bsk.com	Barry R. Kogut	bkogut@bsk.com
Robert S. McLaughlin	rmclaughlin@bsk.com	Virginia C. Robbins	vrobbs@bsk.com
Robert R. Tyson	rtyson@bsk.com		

In the Capital District, call 518-533-3000 or e-mail:

Robert H. Feller	rfeller@bsk.com	Kimberlee S. Parker	kparker@bsk.com
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On Long Island, call 516-267-6300 or e-mail:

Terry O’Neil	toneil@bsk.com	Louis P. DiLorenzo	ldilorenzo@bsk.com
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In Northern New York, call 315-343-9116 or e-mail:

John D. Allen	jdallen@bsk.com	Linda E. Romano	lromano@bsk.com
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In Western New York, call 716-566-2800 or e-mail:

Richard C. Heffern	rheffern@bsk.com
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