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Stricter Rules on Storm Water Discharges Taking Effect

n Jan. 8, 2008, new requirements will take effect in New York requiring some previously unregulated entities to file for permits to discharge storm water, and imposing stricter or different requirements on those entities that are already regulated.

The state is requiring urbanized communities and publicly owned institutions, referred to as municipal separate storm sewer systems (MS4s),¹ to establish fully functional stormwater management programs (SWMPs) by that date. The state has issued new draft permits for MS4s and also for operators of construction sites over one acre, which go into effect on Jan. 8.

At the same time, the U.S. Environmental Protection Agency (EPA) has identified storm water discharges of pollutants as an enforcement priority for 2008-2010. Specifically, EPA intends to focus its enforcement efforts on storm water runoff from homebuilding and "big box" store construction, ready-mix concrete and crushed stone operations, concentrated animal feeding operations, municipal combined sewer overflows, sanitary sewer overflows, and sand and gravel operations.²

This article will briefly explain the history of the National Pollutant Discharge Elimination System (NPDES) program as it relates to storm water management, the requirements of NPDES Phase II, and what MS4s and other regulated entities in New York must do to comply with the most recent facets of Phase II implementation.

Need for Storm Water Management

Storm water discharges are generated by runoff from paved streets, parking lots, rooftops and other surfaces during rain and snow melt. Natural features such as wetlands, forests and ponds can trap storm water runoff and allow it to filter into the ground, removing pollutants and slowing the rate of runoff. Land development often eliminates these features, leading to erosion and depositing pollutants into streams, lakes and rivers. The goal of this aspect of the NPDES program, and state programs like New York's State Pollutant Discharge Elimination System (SPDES), is to minimize the amount of storm water

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runoff and to require the effective management of what remains.

NPDES Phases I and II

NPDES was created in 1972 as part of \$402 of the Clean Water Act (CWA).³ The NPDES program was designed to regulate the discharge of pollutants from "point sources" into waters of the United States by granting permits. Originally, NPDES did not regulate storm water discharges. However, 1987 amendments to the CWA required EPA to create and implement a storm water discharge permit program for certain categories of "non-point" discharges.⁴ In November 1990, the EPA published final NPDES stormwater regulations in accordance with this mandate.⁵ These regulations, which addressed the most contaminated discharges, were referred to as "Phase I." Pursuant to Phase I, the following categories of storm water discharge required permits:

(1) discharges for which permits were issued prior to Feb. 4, 1987;

(2) discharges related to industrial activity, including construction activity of five acres or more;

(3) discharges from "large" MS4s, or systems serving populations of 250,000 or more;

(4) discharges from "medium" MS4s, or systems serving populations between 100,000 and 250,000; and

(5) discharges that in the EPA's view contribute to the violation of water quality standards or are significant contributors of pollutants to waters of the United States.⁶

In 1999, the EPA issued "Phase II" regulations

addressing other types of stormwater discharges.⁷ These regulations went beyond the Phase I program by requiring NPDES permit coverage for storm water discharges from "small" MS4s, or those serving populations of less than 100,000 within an "urbanized area"⁸ as delineated by the U.S. Census Bureau (otherwise known as "regulated small MS4s"),⁹ and from "small" construction sites disturbing between 1 and 5 acres of land.¹⁰ The Phase II regulations became effective March 10, 2003.

New York's SPDES Program

Under the CWA, the EPA is authorized to issue NPDES storm water permits, but in most jurisdictions the EPA has delegated its permitting authority to a state or tribe.¹¹ Since 1975, New York has been a CWA "approved state," meaning that it is authorized by the EPA to implement the NPDES provisions through its SPDES program.¹² In 1988, the New York State Legislature gave the Department of Environmental Conservation (DEC) authority to regulate industrial and municipal storm water discharges¹³ and to issue storm water permits pursuant to the SPDES program.¹⁴

1) 'Small' MS4 Permits. To implement Phase II of the SPDES program, in January 2003 the DEC issued two nonindustrial Storm Water Management (SPDES) General Permits (GPs), which are effective for five years. (A general permit contains a standard set of conditions that apply to a particular kind of operation or facility; typically one needs to register but not to seek authorization for the operation or facility.) New versions of these general permits will go into effect in January 2008. One general permit applies to small MS4s. Under the current version (referred to as GP-02-02), small MS4s that wish to obtain such a permit are required to submit a Notice of Intent (NOI) form to the DEC. The NOI requires MS4s to provide an initial outline of planned management practices, and to identify measurable goals to assess progress annually toward the full implementation of an appropriate SWMP. These SWMPs must contain the following six minimum control measures established by EPA: (1) public education and outreach; (2) public involvement and participation; (3) illicit discharge detection and elimination; (4) construction site storm water runoff control; (5) postconstruction-site storm water runoff control; and (6) pollution prevention for municipal employees. The EPA has published a continually updated list of best management practices

for each of these control measures.¹⁵ Although the DEC has specified a few required actions and provided a list of approved management practices for each minimum control category, MS4s are free to tailor the development of their SWMPs to best address their local storm water problems. The DEC is requiring that MS4s fully implement their SWMPs by Jan. 8, 2008.

On Sept. 24, 2007, the DEC made available its new draft general MS4 storm water permit, referred to as GP-0-08-002.16 Written comments on this draft permit are due by Dec. 10, 2007,17 and it is expected to be finalized and go into effect on Jan. 8, 2008.

This permit is different from GP-02-02 in several ways. First, the permit format has been changed to include different minimum control measures (MCMs) for traditional land-use control MS4s (such as cities, towns and villages) and for traditional nonlanduse/nontraditional MS4s (such as county and state prisons, hospitals, road authorities and office buildings). Second, selected items required for annual reporting have been included with each of the MCMs. Third. several areas in the state are now considered "small" MS4s in urbanized areas, including Southold, East Hampton, Shelter Island, Greenport and Dering Harbor. Fourth, there are additional requirements for MS4s in watersheds where the reasonable potential to violate water quality standards has been judged to require more controls.

MS4s not authorized under GP-02-02 must file an NOI if they are required to obtain coverage under this general permit. Newly authorized MS4s will have three years from the effective date of the permit to develop their SWMP and commence implementation.

2) 'Small' Construction Permits. The other general permit regulates construction activities impacting areas over one acre. Under the current version (referred to as GP-02-01), construction operators must notify the DEC of any project disturbing one acre or more, prepare a formal written Stormwater Pollution Prevention Plan (SWPPP), and adhere to the provisions of the SWPPP during and after construction. SWPPPs are plans for controlling storm water runoff and pollutants from a site during and after construction activities. In general, construction operators are required to prepare and maintain copies of an SWPPP prior to the submission of the NOI. Operators are also required to file a copy of the SWPPP with the local governing body.

The principal objective of an SWPPP is to plan and implement the following practices: (1) reduction or elimination of erosion and sediment loading to waterbodies during construction; (2) control of the impact of storm water runoff on the water quality of the receiving waters; (3) control of the increased volume and peak rate of runoff during and after construction; and (4) installation of storm water controls to address postconstruction storm water discharges. Once the NOI has been submitted to the DEC and the agency has issued a letter of acknowledgement, construction can begin. Once the construction project is completed, a notice of termination (NOT) must be filed with the DEC to cancel coverage under the general permit.

On Oct. 10, 2007, the DEC released its new draft general storm water construction permit, referred to as GP-0-08-001.18 As with the MS4 draft permit, the comment deadline is Dec. 10, 2007, and it is expected to be finalized and go into effect on Jan. 8, 2008. There are three major changes to this permit:.

· Construction projects in the East of Hudson

watershed: This watershed, which covers 375 square miles,19 makes up a large portion of New York City's drinking water supply. Because storm water has been found to potentially contribute to a violation of water quality standards in this watershed, the minimum size of construction disturbance triggering a permit has been reduced from one acre to 0.11 acre (5,000 square feet). While operators of construction projects between 0.11 and one acre will be required to obtain coverage under the general storm water permit, they will normally only have to develop an SWPPP that includes erosion and sediment control and will not have to meet postconstruction water quality management standards.

• Construction projects in the East of Hudson, Onondaga Lake and Greenwood Lake watersheds: Runoff from construction sites in these watersheds contributes to phosphorous problems. Construction sites over one acre in these watersheds are therefore required to prepare an SWPPP that includes postconstruction stormwater management practices meeting the Enhanced Phosphorous Removal Design Criteria.²⁰

• Construction projects that are tributary to state waters classified as AA or AA-s²¹ that will disturb land areas with very steep slopes: These are land areas where the Soil Slope Phase is identified as E or F (generally those exceeding 25 percent slope) on the USDA Soil Survey. After specified dates, construction activities disturbing these land areas will be ineligible for coverage under the general permit and will have to apply for individual SPDES permits. The DEC is now requiring individual permits for these sites because of the increased potential for construction activities to be a significant contributor of silt and sediment to drinking water supplies. Application for individual permits must be filed at least 180 days before the anticipated first discharge.

A construction owner or operator with coverage under GP-02-01 on the effective date of the updated permit will be automatically permitted to discharge in accordance with the updated permit unless otherwise notified by the DEC. Under the updated permit, an inspection is required every 14 calendar days and within 24 hours of the end of a storm event in which 0.5 inches of rain or snow fell. For sites where active construction has been suspended, the updated permit requires inspections every 30 days, provided that temporary stabilization measures have been applied to disturbed areas.

No more than five acres may be disturbed at any one time between Nov. 1 to March 1.22 According to the DEC, this is largely because grass is the best run-off prevention method and grass seed will not germinate during this period.

Owners or operators who have construction activities under way that will extend beyond Jan. 8, 2008 that will be affected by these changes should ensure that they obtain the requisite permit coverage and, for activities that are not covered by the current permit, they should ensure that they file an NOI and that their SWPPPs comply with the updated permit by Jan. 8, 2008.

3) Industrial Activity Permits. The DEC recently issued its revised general permit for storm water discharges associated with industrial activity, referred to as the SPDES Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (MSGP).²³ The DEC revised this permit to resemble the EPA's MSGP more closely. This permit, referred to as GP-0-06-002, replaces GP-98-03 and became effective on March 28, 2007. It covers new and existing discharges of storm water from industrial activities. The revised MSGP now includes both general requirements applicable to all facilities with permit coverage (parts I through VII) and industry-specific requirements that have been tailored to address 31 different industrial categories (part VIII). An industrial facility needing a storm water permit is required to submit a new Notice of Intent or Termination (NOIT) to obtain coverage. Facilities with coverage under the old permit were allowed until June 26, 2007 to submit their NOIT forms. Additionally, these facilities were allowed until Aug. 25, 2007 to update their SWPPPs to meet any new requirements applicable to them.²⁴

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1. The term "MS4" refers to a city or other unit of government that owns or operates a storm sewer system. MS4s include cities, towns and counties. They can also include road authorities, watershed districts, universities, medical facilities, military bases, prisons and other public campuses. However, this term does not include combined sewer systems or publicly owned treatment works (POTWs), which are sewage treatment systems operated by a public agency. See 40 CFR 122.26(b)(8).

2. See "U.S. EPA October 2007 FY08-FY10 Compliance and Enforcement Priorities Under the Clean Water Act," available at http://epa.gov/compliance/resources/publications/data/planning/ priorities/fy2008prioritycwa.pdf.

- 3. 42 U.S.C. §402(p). 4. 33 U.S.C. §1342(p)
- 5. 55 Fed. Reg. 47990 (Nov. 16, 1990).
- 6. 42 U.S.C. \$402(p)(2). 7. 64 Fed. Reg. 68722 (Dec. 8, 1999).

8. "Urbanized areas" are generally contiguous census blocks with population densities of greater than 1,000 persons per square mile. According to the U.S. Census Bureau, New York has 14 such areas encompassing 44 cities, 183 villages and 141 towns.

- 9.40 CFR \$122.26(b)(16)(i) 10. 40 CFR §122.26(a)(9)(i)(B).
- 11. 42 U.S.C. §402(b). 12. ECL §17-0801 et seq.
- 13. ECL \$17-0808. 14. ECL \$70-0117.

15. This list is available at http://cfpub.epa.gov/npdes/stormwater/ menuofbmps/index.cfm. 16. A copy of this permit is available at http://

www.dec.ny.gov/docs/water_pdf/fdms4permit.pdf. 17. Written comments should be submitted to the DEC contact listed on the Public Notice, available at http://www.dec.ny.gov/enb/20071010_not0.html. 18. A copy of this draft permit is available at http://www.dec.

ny.gov/docs/water_pdf/gpcondraft08.pdf. 19. A map of this watershed is included as Figure 1 in the draft permit.

20. A copy of the New York State Stormwater Management Design Manual, which includes these criteria, is available at http:// www.dec.ny.gov/docs/water_pdf/premoval.pdf. 21. These classifications allow these waters to be a source of water

supply for drinking, culinary or food processing purposes; primary and secondary contact recreation; and fishing. Class AA-s waters contain no floating solids, toxic or industrial wastes, discharges of sewage, and no phosphorus and nitrogen in amounts that will result in growths of algae, weeds and slimes. Class AA waters are those, that, if subjected to approved disinfection treatment, with additional treatment if necessary to remove naturally present impurities, meet or will meet New York State Department of Health drinking water standards and are or will be considered safe and satisfactory for drinking water purpose. See 6 NYCRR §§701.3; 701.5. A map of these waters and their watersheds is included as Appendix E in the draft permit.

See Subsection II(C)(3)(c) of the proposed permit.

23. A copy of this permit is available at http://www.dec.ny.gov/ docs/water_pdf/gp0601.pdf.

24. A copy of the applicable NOIT form is available at http://www. dec.ny.gov/docs/water_pdf/gpnoit.pdf.

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