

OVERVIEW OF EPA'S FINAL PHASE II STORM WATER REGULATIONS FOR SMALL MS4s

Texas Municipal League
Texas City Attorneys Association
November 16, 2000



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QUICK OVERVIEW

BACKGROUND

- On December 8, 1999, EPA adopted its Storm Water Phase II rules. **These rules require all municipalities located in “Urbanized Areas” (as defined by the Census Bureau) to obtain an NPDES permit to authorize rainfall runoff.** Even cities without traditional storm sewers will have to obtain a permit. Additionally, the rules may require many other municipalities in the state to obtain a permit.
- The TNRCC will be responsible for issuing Phase II storm water permits, but it will first have to develop rules to implement the program.

APPLICABILITY

- All municipalities (including districts, and State and Federal complexes) located within Urbanized Areas are automatically required to obtain a permit.
- The TNRCC must decide if municipalities outside of Urbanized Areas must obtain permits. In particular, the TNRCC is required to determine whether cities with populations greater than 10,000 and population densities greater than 1,000 per square mile must obtain permits.
- Municipalities with populations less than 1,000 located within an Urbanized Area may obtain a permit waiver if the city does not discharge a pollutant that has been identified as a cause of impairment of a water body to which it discharges. EPA made this waiver easier to obtain in response to the Coalition’s comments.
- Municipalities with populations less than 10,000 may obtain a waiver if all receiving streams have been evaluated and the TNRCC has determined that no storm water controls are needed based on wasteload allocations that are part of an approved TMDL. However, since TMDLs will be performed only on impaired water, this waiver will not apply to cities that are not causing water quality problems.

DEADLINES

- TNRCC must adopt a general permit before December 8, 2002.
- Permit applications or notices of intent must be filed before March 10, 2003.
- Cities must have fully developed storm water management programs by 2008.

PERMIT REQUIREMENTS

- EPA recommends the use of general permits requiring the six minimum control measures listed below. Cities must submit an NOI that lists the BMPs and measurable goals selected by the cities. TNRCC or EPA can always require a city to submit additional BMPs.
- EPA recommends that no numeric discharge limits be included in Phase II storm water permits until 2012, unless required by an approved TMDL.

- Annual reports with evaluations of program compliance, appropriateness of BMPs and progress towards achieving measurable goals.
- In response to the Coalition’s comments, EPA clarified that permittees will not be limited to only using BMPs and measurable goals contained in BMP “toolboxes” developed by EPA and TNRCC.

SIX MINIMUM CONTROL MEASURES

- Public Education and Outreach – Permittees could be required to obtain a specified reduction in animal waste detected in storm water discharges.
- Public Involvement and Participation - Permittees could be required to obtain a specified percentage of community participating in community clean –ups.
- Illicit Discharge Detection and Elimination - Permittees will be required to adopt and enforce an ordinance prohibiting illicit discharges such as car wash runoff and lawn watering runoff contaminated with fertilizers.
- Construction Site Runoff Control - Permittees will be required to review site plans and inspect construction.
- Post-construction Storm Water Management for New Development and Redevelopment - Permittees could be required to limit the amount of impervious cover in areas of new development and redevelopment.
- Pollution Prevention and Good Housekeeping for Municipal Operations - Permittees could be required to reduce the amount of trash in receiving streams.

COMPLIANCE BY OTHERS

- Permittees may rely on another entity to satisfy some or all of the permit obligations. However, the permit will not regulate the other entity, and the permittee will remain responsible for compliance if the other entity fails to implement the control measure.
- The TNRCC may recognize, either in an individual permit or in a general permit, that another governmental entity is responsible for implementing one or more of the minimum control measures. If so, then the permittee is not responsible for compliance if the other entity fails to implement the measure.

ALTERNATIVE PERMITTING OPTION

- Added by EPA in response to Coalition’s Constitutional arguments. Attempts but fails to provide a mechanism for a city to obtain a permit without waiving its constitutional rights.
- Rather than the six minimum control measures, this approach requires a city to file a two-part permit application before March 10, 2003.
- The permit application will look much like the application required for Phase I cities. Application will include maps, monitoring results, and a storm water management plan.

**OVERVIEW OF EPA'S FINAL PHASE II
STORM WATER RULE FOR SMALL MS4s
November 2000**

I. Background and History of Rule

A. In General

Precipitation (rainfall or snowfall) that falls to the earth and then enters the Waters of the United States (such as a lake, river, creek or draw) through a man-made conveyance (such as a ditch, road or storm sewer pipe) is a discharge of storm water that is subject to EPA's National Pollutant Discharge Elimination System ("NPDES") permit program.

B. Clean Water Act

The Federal Clean Water Act prohibits discharges of pollutants to waters of the US unless an NPDES permit authorizes the discharges. Early court cases interpreting the Clean Water Act concluded that this prohibition included discharges composed entirely of storm water. In 1987, Congress amended the Federal Clean Water Act to specify the NPDES permit requirements for municipal separate storm sewer systems ("MS4s"). Congress directed EPA to issue NPDES permits before 1993 to municipalities with populations greater than 100,000 and to storm water discharges associated with industrial activity. These discharges are known as Phase I sources. Additionally, Congress established a moratorium on permitting for other storm water discharges until 1992, which was subsequently extended until 1994.

Congress also directed EPA to conduct studies to (1) identify the exempted storm water discharges or classes of storm water discharges, (2) determine the nature and extent of pollutants in such discharges, and (3) establish procedures and methods to control storm water discharges to the extent necessary to mitigate impacts on water quality. Based on these studies, EPA was directed to issue regulations designating additional storm water discharges to be regulated to protect water quality and to establish a comprehensive program to regulate such designated sources. These regulations are known as the Phase II regulations.

C. Phase I

On November 16, 1990, EPA issued its Phase I regulations. These regulations set out the permitting requirements for municipalities with populations greater than 100,000 (based on the 1980 Census) and for storm water discharges associated with industrial activity, including construction activity disturbing more than 5 acres. These cities were required to submit a two-part NPDES permit application. Part One of the application consisted of a description of the MS4, a general characterization of the discharge from the MS4, the results of a field screening analysis for illicit connections, and a plan for obtaining additional characterization data. Part Two of the application consisted of a demonstration of adequate legal authority, descriptions of all major outfalls, detailed data regarding composition of storm water runoff, and a proposed management program to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and systems, design and engineering methods and other appropriate provisions.

Of the approximately 16 cities subject to Phase I permitting in Texas, all but 4 have been issued final and effective MS4 permits. These Phase I permits, which were issued for five year terms, are beginning to expire. The four Phase I cities without a permit (Abilene, Irving, Lubbock, and Plano) are currently contesting the terms of the permits proposed by EPA. Abilene and Irving's permits are currently under review by EPA's Environmental Appeals Board ("EAB"). The EAB has the power to overrule the permitting decision made by Region 6 when it issued the permit. If the EAB affirms the Region's actions, then the only recourse is to challenge the permit through a petition for judicial review in the Fifth Circuit.

D. Proposal

On January 9, 1998, EPA proposed its Phase II rules. TCCOS was formed primarily in response to this proposal to prepare and submit to EPA detailed comments regarding the proposed rules. In addition to the MS4 requirements, the proposal also adds permitting requirements for storm water discharges from construction sites that disturb one acre or more, and changes the storm water permitting requirements for industrial sources with no exposure of industrial activities to storm water. This document will not address the changes related to construction and industrial storm water discharges.

II. Permitting Authority

Under the Clean Water Act, NPDES permits are developed and issued by either the state or by EPA. Since 1998, the State of Texas, through the TNRCC, has been delegated the power to issue NPDES permits within the state. The delegation from EPA expressly included the authorization to issue Phase II MS4 NPDES permits.

Prior to issuing Phase II MS4 permits, the TNRCC will have to develop rules to implement a permit program. EPA's final rule requires the TNRCC to adopt changes to its permitting program prior to December 8, 2000, if no statutory changes are required, or by December 8, 2001, if statutory changes are required. Currently, the TNRCC is beginning to work the Phase II program. Currently, TNRCC has taken no position on whether it will need additional statutory authority to implement the permit program.

Additionally, the TNRCC is expected to develop a general permit to authorize Phase II MS4 discharges. The TNRCC is required to develop such a general permit before December 8, 2002.

III. Affected Cities

A. Automatically Designated -- Municipalities Located in Urbanized Areas

All municipalities located within Urbanized Areas, as delineated by the Census Bureau through either the 1990 or the 2000 Census, are automatically required to obtain an NPDES permit. The attached list of Automatically Designated Cities identifies all cities within the 1990 Urbanized Areas in Texas. The 2000 Urbanized Areas should include significantly more cities, particularly those in the Dallas/Fort Worth area, which could include cities such as Burleson, Coppell, Frisco, Midlothian, and McKinney. Based on the 1990 Census, there are 9 cities in

Texas Urbanized Areas with populations less than 1,000, 51 cities with populations between 1,000 and 5,000, and 29 cities with populations between 5,000 and 10,000.

The rule applies to municipalities, which under the Clean Water Act include cities as well as State subdivisions and the State itself. The rule automatically designates state and federal installations located within Urbanized Areas. This includes TXDOT, State Colleges and Universities, Districts, Counties, and Military Bases that own or operate drainage facilities, including streets and ditches.

B. Potentially Designated

EPA's rule requires that the TNRCC evaluate all other small MS4s in the state to determine whether other cities also need to obtain an MS4 permit. In particular, EPA is requiring the TNRCC to develop specific criteria, and apply that criteria to, at least, cities with populations greater than 10,000 and densities greater than 1,000 people per square mile, as determined by either the 1990 or 2000 Census. The attached List of Potentially Designated Cities lists those cities meeting these criteria as of the 1990 Census. The TNRCC must develop and apply these criteria before December 8, 2002.

C. Waivers

EPA's rule allows TNRCC to waive permit coverage for cities with populations less than 1,000 if all of the following criteria are met: (1) the city's discharges are not substantially contributing to the pollutant loadings of a physically interconnected regulated MS4; and (2) the city does not discharge any pollutant that has been identified as a cause of impairment of any water body to which it discharges, unless storm water controls are not needed based on wasteload allocations that are part of an EPA approved or established TMDL.

Of the nine Texas cities located in Urbanized Areas that have populations less than 1,000, based on the 1990 Census, at least seven discharge pollutants (such as bacteria, dissolved solids, and pesticides) that have been identified as a cause of impairment of an adjacent water body. Given that there have been no TMDL's completed in Texas, these cities would not be eligible for the waiver.

EPA's rule also allows TNRCC to waive permit coverage for cities with populations less than 10,000 if the following criteria are met: (1) TNRCC has evaluated all waters, including small streams, tributaries and lakes that receive discharges from the city; (2) the TNRCC has determined that storm water controls are not needed based on wasteload allocations that are part of an EPA approved or established TMDL that addresses the pollutants of concern; and (3) the TNRCC has determined that current and future discharges do not have the potential to result in exceedances of water quality standards, including impairment of designated uses, or other significant water quality impacts, including habitat and biological impacts.

This waiver is largely an illusion. Generally, the receiving streams below cities that are not causing water quality problems are not impaired. Given that TMDLs will be performed only for water bodies with known water quality problems, most clean cities will never be able to obtain this waiver. Additionally, in those areas where the TNRCC completes a TMDL, it is likely that the TNRCC will recommend some urban storm water controls.

D. ISTEA Sources

EPA's Phase II rule also establishes a deadline for municipalities with populations less than 100,000 to obtain permits for their municipally owned industrial facilities that were subject to the permit moratorium established by Congress in the 1991 Intermodal Surface Transportation Efficiency Act ("ISTEA"). Pursuant to the final rule, municipally owned industrial sources (such as wastewater treatment facilities, landfills, vehicle maintenance facilities, and municipally-owned construction activities) must obtain permit coverage by March 10, 2003. EPA and the TNRCC expect these sources to use an available general permit to satisfy this permit obligation.

IV. Deadlines

A. General Permit

The TNRCC must adopt a general permit before **December 8, 2002**.

B. Application Deadline

All regulated small MS4s are required to submit permit applications, or notices of intent (NOIs) to comply with a general permit before **March 10, 2003**. This deadline applies to those cities that are within Urbanized Areas under either the 1990 or the 2000 Census. This deadline also applies to cities located outside of Urbanized Areas that are designated by the TNRCC. If the Census Bureau is delayed in delineating new Urbanized Areas, cities newly classified as being within an urbanized area will have 180 days from the date of delineation to submit an application or NOI. Cities that are designated by the TNRCC after September 10, 2002, will be required to submit a permit application or a NOI **within 180 days after being designated**.

C. Fully Developed Programs

Cities will be required to have fully developed storm water management programs no later than five years after permit issuance. EPA's plan is that cities will submit NOIs that indicate when certain elements of the storm water management program will be implemented in a phased manner. This will allow cities to delay implementing some BMPs and fully meeting their measurable goals until the fifth year of the permit.

V. Requirements of the Rule – Standard Permitting Route

A. Type of Permit/Application Form

1. General Permits

EPA is strongly encouraging the states to implement this program using general permits. The permit application for a general permit will be an NOI. The NOI must contain the following information: (1) the BMPs that the MS4 will implement for each of the six minimum storm water control measures; (2) the measurable goals for each of EPA's BMPs including, as appropriate, the months and years in which the required actions will be undertaken, including interim

milestones and the frequency of the action; and (3) the person or persons responsible for implementing or coordinating the storm water management program.

2. Individualized Permit

EPA's rule provides a mechanism for a regulated small MS4 to obtain an individual permit (as opposed to a general permit) implementing a storm water management plan containing the six minimum control measures. This approach would be required if the TNRCC fails to promulgate a general permit, or if a regulated small MS4 does not want to use a general permit.

To use this approach, a regulated small MS4 must submit an application to the TNRCC containing: (1) general information regarding the MS4 and a topographic map of the MS4; (2) the BMPs that will be implemented for each of the six minimum control measures and the measurable goals for each; (3) an estimate of square mileage served by the MS4; and (4) any additional information requested by the TNRCC.

Regulated small MS4s that do not want to submit a program containing the six minimum control measures must also submit an individual permit application. The application requirements and the possible terms and conditions for such permits are discussed in the section on Alternative Permit Approaches.

B. Substantive Requirements – Six Minimum Control Measures

The rule requires all regulated small MS4s that choose the standard permitting route (general permits or the individualized permit discussed in Section V.A.2) to develop and implement a storm water management program. The components of such a program include, at a minimum, the six minimum control measures to address: public education and outreach; public involvement; illicit discharge detection and elimination; construction site runoff control; post-construction storm water management in new development and redevelopment; and pollution prevention and good housekeeping for municipal operations. These minimum control measures will be implemented through NPDES permits. EPA recommends that the permitting authorities use general permits to implement these measures. Regulated small MS4s will be required to submit to the TNRCC, either in its notice of intent (NOI) or its individual permit application, the BMPs to be implemented and the measurable goals for each of the six minimum control measures.

BMPs are devices, practices or methods for removing, reducing, retarding, or preventing storm water runoff constituents, pollutants, and contaminants from reaching receiving waters. BMPs can be structural (detention/retention ponds, grassy swales) or non-structural (land-use restrictions). Measurable goals, which are required for each of the six minimum control measures, are meant to help gauge permit compliance and program effectiveness.

The rule does not specify how many (or how few) BMPs must be included in an NOI or permit application. EPA envisions that each city will identify, in its NOI, a range of BMPs for each of the six minimum control measures, which generally will not be reviewed for adequacy. At any time, however, the TNRCC or EPA can decide (without any specified criteria) that the

mix of BMPs is inadequate and require the city to revise its mix of BMPs. Also, the rule allows TNRCC to give cities up to five years to fully implement its storm water management program.

EPA is working on a “tool box” of BMP and measurable goals that can be used by regulated small MS4s as a source of possible BMPs. In response to TCCOS comments, EPA expressly clarified that regulated small MS4s are not limited to the BMPs and measurable goals contained in the toolbox and that they are free to devise and use other BMPs and measurable goals. The following discussion of the six minimum control measures includes some BMPs and measurable goals from EPA’s draft toolbox.

1. Public Education and Outreach

a. Requirements

Each regulated small MS4 must implement a public education program to distribute educational materials to the community or conduct equivalent outreach activities about the impacts of storm water discharges on water bodies and the steps that the public can take to reduce pollutants in storm water runoff.

EPA states that regulated small MS4s may use storm water educational materials provided by the State, EPA, environmental, public interest or trade organizations, or other MS4s. EPA recommends that the public education program include such topics as proper septic tank maintenance, proper use and disposal of landscape and garden chemicals, the protection and restoration of riparian vegetation, and proper disposal of used motor oil and household hazardous wastes. EPA recommends that the public education program be tailored, using a mix of locally appropriate strategies, to target specific audiences and communities.

b. EPA Suggested BMPs and Measurable Goals

- First Year - Develop and distribute storm water brochures in utility bills.
- Second Year - Create web site, develop school curricula on storm water, and stencil every storm drain.
- Third Year - Get a specified percentage of restaurants to certify to no longer dumping grease and other pollutants into the storm sewer.
- Fourth Year - Obtain a specified percentage reduction in litter or animal waste detected in storm water discharges.

2. Public Involvement and Participation

a. Requirements

Each regulated small MS4 must comply with State and local public notice requirements when implementing a public involvement/participation program.

EPA recommends that the public be included in developing, implementing and reviewing a storm water management program and that the public participation process should make efforts to reach out and engage all economic and ethnic groups. EPA envisions members of the public serving as public representatives on a local storm water management panel, attending public hearings, working as citizen volunteers, and participating in volunteer monitoring programs.

b. EPA Suggested BMPs and Measurable Goals

- First Year - Notice of a public meeting circulated in several different print media and bilingual flyers; citizen panel established; volunteers organized to locate outfalls/illicit discharges and stencil drains.
- Second Year – Final recommendations from citizen panel; radio spots promoting program and participation.
- Third Year – A certain percentage of the community participating in community clean-ups.
- Fourth Year – Citizen watch groups established in a certain percentage of neighborhoods; outreach to every different population sector completed.

3. *Illicit Discharge Detection and Elimination*

a. Requirements

Each small regulated MS4 must develop, implement and enforce a program to detect and eliminate illicit discharges. Each MS4 must: (1) develop a storm sewer system map, showing the location of all outfalls and the names and location of all waters of the United States that receive discharges from those outfalls; (2) to the extent allowable under law, effectively prohibit, through ordinance, or other regulatory mechanism, non-storm water discharges into your storm sewer system and implement appropriate enforcement procedures and actions; (3) develop and implement a plan to detect and address non-storm water discharges, including illegal dumping to your system; and (4) inform public employees, businesses, and the general public of hazards associated with illegal discharges and improper disposal of waste. The following categories of non-storm water discharges need to be addressed only if the MS4 identifies them as significant contributors of pollutants to the MS4: water line flushing, landscape irrigation, diverted stream flows, rising ground waters, uncontaminated pumped groundwater, discharges from potable water sources, foundation drains, air-conditioning condensation, irrigation water, springs, water from crawl space pumps, footing drains, lawn watering, individual residential car washing, flows from riparian habitats and wetlands, dechlorinated swimming pool discharges, and street wash water. Discharges or flows from fire fighting activities are excluded from the effective prohibition against non-storm water and need only be addressed where they are identified as significant sources of pollutants to waters of the United States.

EPA recommends that the plan to detect and address illicit discharges include the following four components: (1) procedures for locating priority area likely to have illicit discharges; (2) procedures for tracing the source of an illicit discharge; (3) procedures for removing the source of the discharge; and (4) procedures for program evaluation and assessment. EPA states that illicit discharge education activities may include storm drain stenciling, a

program to promote, publicize, and facilitate public reporting of illicit connections or discharges, and distribution of outreach materials.

b. EPA Suggested BMPs and Measurable Goals

- First Year – Sewer system map completed; program for household hazardous waste established.
- Second Year – Illicit discharge ordinance in place; training for public employees completed; a certain percentage of sources of illicit discharges determined.
- Third Year – A certain percentage of: illicit discharges determined; illicit discharges eliminated; and households participating in quarterly household hazardous waste special collection days.
- Fourth Year – Most illicit discharges sources determined and eliminated.

4. Construction Site Runoff Control

a. Requirements

Each regulated small MS4 must develop, implement, and enforce a program to reduce pollutants in any storm water runoff to the MS4 from construction activities that result in a land disturbance of greater than or equal to one acre. Reduction of storm water discharges from construction activity disturbing less than one acre must be included in the program if that construction activity is part of a larger common plan of development or sale that would disturb one acre or more.

The program must include the development and implementation of, at a minimum: (1) an ordinance or other regulatory mechanism to require erosion and sediment controls, as well as sanctions to ensure compliance, to the extent allowable under State or local law; (2) requirements for construction site operators to implement appropriate erosion and sediment control best management practices; (3) requirements for construction site operators to control waste such as discarded building materials, concrete truck washout, chemicals, litter, and sanitary waste at the construction site that may cause adverse impacts to water quality; (4) procedures for site plan review which incorporate consideration of potential water quality impacts; (5) procedures for receipt and consideration of information submitted by the general public; and (6) procedures for site inspection and enforcement of control measures.

EPA recommends that procedures for site plan review include the review of individual preconstruction site plans to ensure consistency with local sediment and erosion control requirements. EPA states that MS4s may wish to require a storm water pollution prevention plan within their jurisdictions

b. EPA Suggested BMPs/Measurable Goals

- First Year – Ordinance or other regulatory mechanism in place; procedures for information submitted by the public in place.

- Second Year – Procedure for regular inspections implemented; a certain percentage rate of compliance achieved.
- Third Year – Maximum compliance with ordinance; improved clarity and reduced sedimentation of local waterbodies.
- Fourth Year – Increased number of sensitive organisms in local waterbodies.

5. *Post-Construction Storm Water Management*

a. Requirements

Each regulated small MS4 must develop, implement, and enforce a program to address storm water runoff from new development and redevelopment projects that disturb greater than or equal to one acre, including projects less than one acre that are part of a larger common plan of development or sale, that discharge into the small MS4. The program must ensure that controls are in place that would prevent or minimize water quality impacts. Each regulated small MS4 must: (1) develop and implement strategies which include a combination of structural and/or non-structural BMPs appropriate for the community; (2) use an ordinance or other regulatory mechanism to address post-construction runoff from new development and redevelopment projects to the extent allowable under State or local law; and (3) ensure adequate long-term operation and maintenance of BMPs.

EPA recommends that the BMPs selected by an MS4: be appropriate for the local community; minimize water quality impacts; and attempt to maintain pre-development runoff conditions. EPA states that non-structural BMPs are preventative actions that involve management and source controls such as: policies and ordinances that provide requirements and standards to direct growth to identified areas, protect sensitive areas such as wetlands and riparian areas, maintain and/or increase open space (including a dedicated funding source for open space acquisition), provide buffers along sensitive water bodies, minimize impervious surfaces, and minimize disturbance of soils and vegetation, policies or ordinances that encourage infill development in higher density urban areas, and areas with existing infrastructure; education programs for developers and the public about project designs that minimize water quality impacts; and measures such as minimization of percent impervious area after development and minimization of directly connected impervious areas.

b. EPA Suggested BMPs and Measurable Goals

- First Year – Strategies developed that include structural and/or non-structural BMPs.
- Second Year – Strategies codified by use of ordinance or other regulatory mechanism.
- Third Year – Reduced percent of new impervious surfaces associated with new development projects.
- Fourth Year – Improved clarity and reduced sedimentation of local waterbodies.

6. *Pollution Prevention/Good Housekeeping for Municipal Sources*

a. Requirements

Each regulated small MS4 must develop and implement an operation and maintenance program that includes a training component and has the ultimate goal of preventing or reducing pollutant runoff from municipal operations. The program must include employee training to prevent and reduce storm water pollution from activities such as park and open space maintenance, fleet and building maintenance, new construction and land disturbances, and storm water system maintenance.

EPA recommends that small MS4s consider the following in developing their programs: Maintenance activities, maintenance schedules, and long-term inspection procedures for structural and non-structural storm water controls to reduce floatables and other pollutants discharged from the storm sewer; controls for reducing or eliminating the discharge of pollutants from streets, roads, highways, municipal parking lots, maintenance and storage yards, fleet or maintenance shops with outdoor storage areas, salt/sand storage locations and snow disposal areas, and waste transfer stations; and ways to ensure that new flood management projects assess the impacts on water quality and examine existing projects for incorporating additional water quality protection devices or practices.

b. EPA Suggested BMPs and Measurable Goals

- First Year – Pollution prevention plan completed; employee training manual completed; employee training materials gathered or developed; procedures in place for catch basin cleaning after each storm and regular street sweeping.
- Second Year – Training for appropriate employees completed; recycling program fully implemented.
- Third Year – Some pollution prevention BMPs incorporated into master plan; a certain percentage reduction in pesticide and sand/salt use; maintenance schedule for BMPs established.
- Fourth Year – A certain percentage reduction in floatables discharged; a certain compliance rate with maintenance schedules for BMPs; controls in place for all municipal/facility areas of concern.

C. *Other Substantive Requirements*

1. *Numeric Discharge Limits*

The rule requires that regulated small MS4s must comply with any more stringent effluent limitations in the NPDES permit, including permit requirements that modify, or are in addition to the six minimum control measures based on an approved total maximum daily load (“TMDL”) or equivalent analysis. EPA states that the TNRCC may include more stringent limitations based on a TMDL or equivalent that determines such limitations are needed to protect water quality. However, EPA strongly recommends that until 2012, no additional requirements beyond the six minimum control measures be imposed on regulated small MS4s without the

agreement of the operator of the MS4, except where an approved TMDL or equivalent analysis provides adequate information to develop more specific measures to protect water quality.

2. *Monitoring*

The TNRCC will determine whether and what types of monitoring need to be conducted. EPA specifically does not encourage permitting authorities such as the TNRCC to require “end-of-the-pipe” monitoring. However, EPA offers no clear guidance on how much monitoring will be required. Rather, EPA encourages permitting authorities to carefully examine existing ambient water quality and assess data needs. EPA encourages permitting authorities to consider a combination of physical, chemical, and biological monitoring or the use of other environmental indicators such as exceedance frequencies of water quality standards, impacted dry weather flows, and increased flooding frequency.

3. *Compliance Evaluation and Assessment*

Each regulated small MS4 must evaluate program compliance, the appropriateness of the identified BMPs, and progress towards achieving the identified measurable goals. The following is an example of how EPA envisions the general permit would work. An MS4 identifies that it will screen its sewer system and eliminate dry-weather sewer overflows as a BMP for the illicit discharge minimum control measure. As the measurable goal, the MS4 states that it will inspect at least 20% of its sewer distribution system each year. In its annual report, the MS4 must identify the percentage of its sewer distribution system inspected during the previous year.

Annual reports will be submitted to TNRCC during the first permit term, which probably will be five years. In subsequent permit terms, reports will be filed in years two and four, unless the TNRCC decides to require more frequent reporting. Compliance reports must include: (1) the status of compliance with permit conditions, an assessment of the appropriateness of the BMPs and progress toward achieving the measurable goals for each of the minimum control measures; (2) results of information collected and analyzed, including monitoring data, if any, during the reporting period; (3) a summary of the storm water activities planned during the next reporting cycle; (4) changes in any identified BMPs or measurable goals for any of the minimum control measures; and (5) notice that another governmental entity is satisfying some of the permit obligations (if applicable).

4. *Recordkeeping/Public Information*

Each regulated small MS4 must keep records required by the NPDES permit for at least 3 years. The MS4 must submit records to the TNRCC only when specifically asked to do so. The MS4 must make its records, including descriptions of its storm water management program, available to the public at reasonable times during regular business hours. EPA states that the MS4 may assess a reasonable charge for copying and may require a member of the public to provide advance notice. However, EPA does not explain whether an MS4 will be required to produce information to the public if such information would not be a public record under the Texas Public Information Act.

D. Compliance by Others

EPA will allow a regulated small MS4 to rely on another entity to satisfy some or all of the NPDES permit obligations to implement a minimum control measure if: (1) the other entity, in fact, implements the control measure; (2) the particular control measure, or component thereof, is at least as stringent as the corresponding NPDES permit requirement; and (3) the other entity agrees to implement the control measure on your behalf. The periodic reports must identify that another entity is implementing the measure. If the other entity is required to obtain an MS4 permit, this fact must be noted in the NOI but not in the periodic reports. In either case, the regulated small MS4 remains responsible for compliance if the other entity fails to implement the control measure. EPA encourages regulated small MS4s to enter into legally binding agreements with other entities

The TNRCC may recognize, either in an individual permit or in a general permit, that another governmental entity is responsible under an NPDES permit for implementing one or more of the minimum control measures or that the TNRCC itself is responsible. If so, then the regulated small MS4 is not required to include such minimum control measure(s) in its storm water management program and is not responsible for compliance if the other entity fails to implement the minimum control measure. However, the NPDES permit could be reopened and modified to include the minimum control measure.

VI. Alternative Permitting Option - Individual Permit without Six Minimum Control Measures

A. Introduction

EPA's rule also provides a mechanism for a regulated small MS4 to obtain an individual permit implementing a storm water management program that is different from one implementing the six minimum control measures. This approach was added to the rule to provide a permitting approach that did not deprive local governments of their Constitutional rights. This alternative permit approach is optional; that is, the TNRCC is not required to provide this approach in its program.

B. Application Requirements

To use this approach, a regulated small MS4 must comply with the same permit application requirements used by the Phase 1 municipalities, except for the legal authority requirements. Under these requirements, regulated small MS4s must file a two-part application. Both parts of the application must be submitted to the TNRCC by March 10, 2003.

VII. TCCOS Comments

The Texas Cities Coalition on Stormwater ("TCCOS") submitted detailed comments to EPA on its proposed Phase 2 storm water rule. In response to these comments, EPA made numerous changes to its proposed program. The following are some of the more significant changes made by EPA to its program in response to the Coalition's comments:

- Waivers – EPA changed the burden of proof for cities with populations less than 1,000, which will make it easier for these cities to qualify for an exemption. EPA also expanded the

range of exemptions to include cities with populations less than 10,000 under certain conditions.

- BMPs – EPA added substantial clarification to the role of the “tool box” of BMPs and measurable goals. The Coalition was concerned that permittees would be limited to the BMPs and measurable goals contained in the tool box, which would be extremely limited. This would result in uniform permit terms on a nation-wide basis. EPA clarified that the tool box is just a resource and that permittees are free to choose BMPs and measurable goals not included in the tool box.
- Alternative Permit Approach – In response to the Coalition’s comments regarding EPA’s lack of Constitutional authority to support its permitting approach, EPA added an alternative permit approach for those cities that do not want to waive their Constitutional rights. Although we believe that this response does not cure the Constitutional defects in EPA’s rule, it is a substantial concession by EPA.

VIII. TCCOS Implementation Efforts

A. TNRCC Implementation

1. Texas Water Code § 26.177

During 1998, the Coalition worked with the TNRCC in the development of rules to implement Texas Water Code § 26.177. Initially, the TNRCC considered adopting rules that would have directly mimicked EPA’s proposed Phase II rules. In response to the Coalition’s comments, the TNRCC ultimately proposed and adopted a more reasonable rule that closely followed the statute.

In its final rule, the TNRCC created a program that will largely go unused if the Phase II program goes forward, unless a TMDL requires additional control of municipal runoff. The TNRCC clarified that discharges through a NPDES permitted storm sewer will not be subject to the rule. However, there are aspects of the § 26.177 program that are more attractive than EPA’s Phase II program. First, the § 26.177 program will be based on real water quality problems, and second, the § 26.177 program will give cities up to five years to address water quality problems voluntarily before being mandated to take action by the TNRCC.

2. General Permitting Rule

Earlier this summer, the TNRCC proposed amendments to its rules relating to the issuance of general permits. The Coalition submitted detailed comments on the TNRCC’s proposal. The TNRCC issued its final rule on September 8, 2000.

In response to the Coalition’s comments, the TNRCC made a number of improvements to the rule. First, the TNRCC decided to postpone the issue of the fees associated with general permits until the issuance of each general permit. As proposed, each Phase II MS4 would have been subject to annual permitting fees ranging from \$2,000 to \$10,000. Second, the TNRCC expressly recognized that the TNRCC may, on a case-by-case basis, share fees collected from regulated storm water sources within a municipality with a municipality that is implementing a

storm water management plan. Also, the TNRCC addressed a number of mechanical problems with its rule.

3. *MS4 General Permit*

The TNRCC is just beginning the process to develop general permits for MS4 discharges. The Coalition has met with the TNRCC Commissioners and staff on a number of occasions regarding this permitting issue. The TNRCC plans to form a workgroup to help with the development of this general permit sometime this winter. Affected municipalities need to closely monitor the TNRCC's development of this general permit.

I believe that TNRCC may be able to develop a general permit that avoids most, if not all, of the Coalition's overall concerns with EPA's rule. However, such a result will depend on the TNRCC stepping outside of its role as a permitting authority and becoming a partner with Texas cities in addressing contaminated storm water discharges. For instance, the TNRCC should address the public education minimum control requirement on a statewide basis, rather than having each local jurisdiction develop and implement its own program. Also, the TNRCC should serve as the primary regulatory body regarding storm water discharges into MS4s. EPA's rule forces cities to regulate a number of discharges within their boundaries. In effect, EPA's requirement forces cities to perform part of the TNRCC's job because the TNRCC is required by state law to regulate all of these same discharges. Rather than pawning its responsibilities off on cities (and then making the cities liable for permit violations for any mistakes made), the TNRCC should continue to regulate these sources unless a city wants to implement this program (in which case the city should get to share the fees collected by the TNRCC from the dischargers).

Getting the TNRCC to adopt an acceptable general permit rule will be a difficult task. All affected cities should work together in developing a unified concept to present to the TNRCC. Also, such an approach may also require the cooperation of the Phase I cities.

B. Judicial Review of EPA's Phase II Rule

On April 18, 2000, the Coalition filed suit for judicial review of EPA's final rule in the Fifth Circuit. The Texas Counties Storm Water Coalition also filed a suit for judicial review in the Fifth Circuit, which was consolidated with the Coalition's suit. The suits brought by the Coalition and the Counties were transferred to the Ninth Circuit because an environmental group from California had previously filed a suit for judicial review challenging EPA's rule. Also, two other suits for judicial review were filed in the D.C. Circuit by national associations (National Homebuilders Association and American Forest & Paper Association). These cases were also transferred to the Ninth Circuit. Currently, the Ninth Circuit has decided to retain venue and has set a briefing schedule with initial briefs due in early January 2001.

The Coalition's suit primarily seeks to have EPA's rule overturned on a Constitutional basis. The Federal Government, including EPA, lacks the constitutional authority, as embodied in the Tenth Amendment, to force states or local governments to enact legislation to carry out a federal scheme. The Coalition believes that EPA's rule far exceeds its constitutional authority to require for a number of reasons. Fundamentally, EPA's regulatory scheme is premised on EPA's ability to conscript municipal land-use planning and building inspection powers to achieve

EPA's goal. EPA's rule requires local governments to adopt ordinances requiring pre-construction review of storm water plans and inspection of construction site construction controls. The rule also requires local governments to use their land-use planning powers to protect storm water quality.

During the comment process on EPA's rule, the Coalition offered an alternative regulatory approach that would have satisfied the Clean Water Act requirements without unnecessary intrusion on local sovereignty. Under the Coalition's alternative approach, Phase II MS4 regulation would have been implemented through the use of state storm water management plans rather than through the NPDES permit program. EPA, however, rejected the Coalition's alternative approach.

IX. Additional Sources of Information

- EPA Headquarters Phase II Web Page -- <http://www.epa.gov/owm/sw/phase2/index.htm>
- EPA Region 6 Phase II Web Page -- <http://www.epa.gov/region06/6en/w/sw/hottopp2.htm>
- ASCE National BMP Database -- <http://www.asce.org/peta/tech/nsbd01.html>
- Texas Non-point Source Book -- <http://www.txnpsbook.org/>
- TCCOS Web Page -- <http://www.mandf.com/tccos.htm>