Federal and State-Operated MS4s: Program Implementation

Federal and state operated small municipal separate storm sewer systems (MS4s) are sometimes referred to as "non-traditional MS4s." Federal facilities were not designated for regulation as MS4s by the NPDES Phase I regulations. The Phase II rule, however, includes the "United States" in the definition of a small MS4, thereby including Federal MS4 operators in the Phase II stormwater program. Federal and state operated small MS4s can include universities, prisons, hospitals, roads (i.e., departments of transportation), military bases (e.g., State Army National Guard barracks), parks, and office buildings/complexes. This fact sheet highlights potential implementation challenges related to the minimum control measures and discusses the implementation options included in the Phase II rule that may help address these challenges.

What Are Some Implementation Concerns?

The small MS4 program, largely designed with municipally operated small MS4s in mind, raises several implementation issues for federal and state operators of regulated small MS4s. This section profiles the three most common implementation issues relating to Federal/state implementation of the small MS4 program.

How Do the Phase II Regulations Account for Unique Characteristics?

Federal and state small MS4s possess several characteristics that set them apart from their municipal counterparts. For example, whereas municipally operated MS4s largely serve resident populations, many federal or state operated MS4s, such as medical clinics and departments of transportation (DOTs), do not. Other types of federal and state MS4s, such as military bases, prisons, and state universities, serve populations that are different from a typical municipal population. Their unique characteristics might lead federal or state MS4 operators to question their ability to comply fully with their Phase II stormwater permit. This does not relieve these operators of their requirements to comply with their applicable NPDES permits. Permit writers can customize permit conditions to reflect the unique characteristics of these types of small MS4s.

What If the Operator Lacks Legal Authority?

Three of the minimum control measures (illicit discharge detection and elimination, construction runoff control, and post-construction stormwater management) require enforceable controls on third party activities to ensure successful implementation of the measure. Many federal and state operators do not possess the legal authority to adopt ordinances or other enforceable controls in the same manner as do local governments. However, as is the case with local governments that lack such authority, state and federal MS4s are expected to utilize other authorities or mechanisms they do possess to establish the necessary enforceable requirements.

For example, a state DOT that is responsible for the portions of its roads running through an urbanized area may not have the legal authority to impose restrictions on, and penalties against, illicit (i.e., non-stormwater) discharges into the MS4 if the source of the discharge is outside the DOT's right-of-way or jurisdiction. In such circumstances, the state DOT should consider utilizing other mechanisms, such as incorporating requirements into agreements and contracts and establishing internal policies/guidelines and cooperative agreements.

How Can the Program Be Implemented in Areas Where There Are Multiple Regulated Entities?

Since the final Phase II rule provides automatic coverage for all small MS4s located within an urban area with a population of 50,000 or more people, regardless of political boundaries, regulation of multiple entities in a single area is likely. For example, a city government that

operates a small MS4 within an urban area with a population of 50,000 or more people must obtain permit coverage as would any county, state, or federal DOTs if they operate within that same urban area. Each MS4 would then be responsible for obtaining coverage under a small MS4 NPDES permit and for developing and implementing a stormwater management program for their MS4s (or portions thereof) within the urban area with a population of 50,000 or more people. In cases such as these with multiple small MS4 entities operating in the same area, the Phase II regulations provide operators with opportunities to coordinate their stormwater management activities within their respective areas. The Phase II regulations encourage the permittee to enter into a legally binding agreement with other entities if the permittee wants to minimize any uncertainty about compliance with the permit.

Are There Implementation Strategies that Help Facilitate Program Implementation?

This section offers two hypothetical strategies for resolving the implementation issues raised above. The best solution may include a creative combination of strategies.

STRATEGY #1

A Focus on Choosing Appropriate BMPs

Phase II NPDES permits provide small MS4s with the ability to tailor their stormwater management programs in a manner that best reflects what is practicable for the particular operator as long as the program comports with the requirements of the permit. EPA expects, therefore, that small MS4 permittees will develop and update their stormwater management programs and install and implement BMPs that not only meet the permit requirements but that are also suited to the particular characteristics and needs of the permittee and the area served by its MS4. Below is an example of tailored activities and BMPs that federal or state operators can implement for each measure:

- **Public Education and Outreach**. Distribute brochures and post fliers to educate employees of a federal hospital about the problems associated with stormwater runoff and the steps they can take to reduce pollutants in stormwater discharges. For example, employees could be advised against discarding trash on the ground or allowing their cars to leak oil/fluids in the parking lot.
- **Public Participation/Involvement**. Provide notice of stormwater management program development and hold meetings at which employees of a federal office complex are encouraged to voice their ideas and opinions about the effort. Request volunteers to help develop the plan.
- **Illicit Discharge Detection and Elimination**. Develop a map of the storm sewer system on a military base. Perform visual dry weather monitoring of any outfalls to determine whether the storm sewer system is receiving any non-stormwater discharges from the base. If a dry weather flow is found, trace it back to its source and stop the discharge. Should a federal military base identify an illicit discharge, the source of which is traced

to an area outside the boundary of its system, the Federal operator would refer the discharge to the adjoining regulated MS4 for further action and notify the permitting authority if further help is needed.

- **Construction Site Runoff Control**. Require the implementation of erosion and sediment controls and pollution prevention measures for any Federal or state DOT road construction. The DOT would review site plans for proper controls, perform inspections, and establish penalties in the construction contract if controls are not implemented. If construction is undertaken directly by the regulated DOT instead of a private contractor, the DOT could be penalized by the NPDES permitting authority for non-compliance with its small MS4 permit if controls are not properly implemented.
- **Post-Construction Runoff Control**. Require the implementation of post-construction stormwater controls for any new development or redevelopment on the grounds of a prison. This can be required as part of a construction contract, instituted as internal policy, and considered during site plan review.
- **Pollution Prevention/Good Housekeeping for Municipal Operations**. Train maintenance staff at a state university to employ pollution prevention measures whenever possible. Examples of such measures could include routine pick up of trash/litter from the university grounds, use of less salt on the parking lots and access roads in the winter, performance of any maintenance of university vehicles under shelter only, limiting pesticide use to the minimum needed, use of vegetative buffer strips in the parking lots to filter runoff, and keeping dumpster lids closed.

STRATEGY #2

Working with Other Entities

There may be instances when the Federal or state permittee has limited capabilities to satisfy one or more of the minimum control measures. As discussed above, the permittee may lack the proper legal authority to enforce controls (although it should try to obtain the necessary legal authority if possible).

In these instances, the permittee can work with neighboring operators of regulated small MS4s, preferably on a watershed basis, to form a shared stormwater management program in which each permittee is responsible for activities that are within their respective legal authorities and abilities. The Phase II regulations allow the permittee to rely on other entities, with their permission, to implement those minimum measures that the permittee is otherwise unable to implement. Three examples are:

- A state DOT with limited regulatory legal authority can reference a local sewer district's illicit detection and elimination program in its permit application, provided the program sufficiently addresses illicit discharges into the DOT's storm sewer system.
- The permittee or NPDES permitting authority can reference other relevant pollution control programs, such as coastal nonpoint pollution control programs, state or local watershed programs, state or local construction programs, and environmental education efforts by public or private entities.

- The permittee can become a co-permittee with a neighboring Phase I MS4 through a modification of the Phase I MS4's individual permit. This would be an option for those federal and state entities located adjacent to or in close proximity to Phase I MS4s.

Choosing to work with other governmental entities as a co-permittee, or referencing parts of each other's plans, can help resolve issues that may arise where multiple regulated jurisdictions exist in the same area. Permittees can avoid duplicative efforts, as well as territorial or regulatory disputes, by working together to implement the stormwater program. See Fact Sheet 2.9 for more information on permitting options for regulated small MS4s.

NPDES Permitting Examples

A number of EPA and state-issued small MS4 permits have been written in a manner that specifically accounts for the unique characteristics of non-traditional MS4s. EPA has compiled several of these permitting examples in its *Transportation Stormwater Permit Compendium*, which is available on its stormwater website at https://www.epa.gov/sites/production/files/2018-11/documents/dot_ms4_compendium_10.16.18.pdf.

For Additional Information

Contacts

A list of contacts for the U.S. EPA's Office of Wastewater Management (Headquarters), each EPA regional office, and state office is located at: https://www.epa.gov/npdes/contact-us-stormwater

Your NPDES Permitting Authority

Most states and territories are authorized to administer the NPDES Program, except the following, for which EPA is the permitting authority:

- American Samoa
- District of Columbia
- Guam
- Johnston Atoll
- Massachusetts
- Midway and Wake Islands
- New Hampshire
- New Mexico
- Northern Mariana Islands
- Puerto Rico
- Most Indian country lands

Reference Documents

- EPA's Stormwater Website
- Stormwater Phase II Final Rule (64 FR 68722)
- Final MS4 General Permit Remand Rule (81 FR 89320)
- Final Small MS4 Urbanized Area Clarification (88 FR 37994)
- Industrial Stormwater website
- Stormwater Phase II Rule Fact Sheet Series
- National Menu of Best Management Practices for Stormwater Phase II
- MS4 Permits – Compendium of Clear, Specific, and Measurable Permitting Examples

Disclaimer: This information is guidance only and does not establish or affect legal rights or obligations. Agency decisions in any particular case will be made by applying the law and regulations to the specific facts of the case.