

LEGAL Q & A
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What is a Municipal Separate Storm Sewer System ?

A municipal separate storm sewer system (MS4) is a conveyance or system of conveyances, including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man made channels, or storm drains, that is owned or operated by certain public entities (including cities), which discharges into waters of the United States. 40 C.F.R. 122.26(b)(8).

What is a Storm Water Permit?

In 1990, amendments to the federal Clean Water Act required the United States Environmental Protection Agency (EPA) to develop the National Pollutant Discharge Elimination System (NPDES) Stormwater Program. Phase I of the NPDES program required medium and large municipal separate storm sewer systems (MS4s) to obtain permits for stormwater discharges. "Medium" MS4s are systems that are located in or serve an incorporated city with a population between 100,000 and 249,999. "Large" MS4s are systems that are located in or serve an incorporated city with a population of 250,000 or more. In 1998, the EPA delegated the storm water program to the Texas Commission on Environmental Quality (TCEQ), which is currently developing Phase II of the program for smaller MS4s.

Which cities will need to obtain Phase II Storm Water Permits?

Cities with a small regulated MS4 must obtain a permit for storm water discharges. A "small regulated MS4" is any small MS4 located in an "urbanized area," as defined by the U.S. Census Bureau, or located outside of a urbanized area and brought into the program by the TCEQ. The Executive Director of TCEQ may designate any small MS4 as being required to submit an application for a Phase II permit based on six factors, including: (1) controls for discharges determined to be necessary for source water protection of public drinking water resources, and (2) controls for discharges necessary to protect receiving waters designated as having an exceptional aquatic life use.

What is an "urbanized area" for purposes of storm water permitting?

The small regulated MS4s are located in areas of high population density as defined by the U.S. Census Bureau in the 1990 and 2000 decennial censuses. An "urbanized area" is a land area comprising one or more places (i.e., central places(s)) and the adjacent densely settled surrounding area (i.e., urban fringe) that together have a residential population of at least 50,000 and an overall population density of at least 1,000 people per square mile.

How do small regulated MS4s obtain a permit?

This issue is currently unclear. Small MS4s will most likely obtain authorization for storm water discharge through a state "general permit." Authorizations under a state general permit are obtained by submitting a Notice of Intent to the TCEQ. 40 C.F.R. § 122.33(a)(1). However, due to the recent Ninth Circuit ruling in *Environmental Defense Center v. USEPA* 344 F.3d 832 (9th Cir. 2003), the TCEQ's currently proposed Phase II

general permit must be modified. The decision has caused some delay in finalizing the state general permit as TCEQ waited for guidance on how to improve public availability of Notices of Intent and how to incorporate a notice for opportunity for public hearings in the state permit procedure.

While the EPA intended for Phase II regulations to be implemented in most situations with authorizations under the state general permit, a small MS4 may also obtain an individual permit from the TCEQ. 40 C.F.R. § 122.33(a).

May a city obtain a waiver from the permitting requirements for small regulated MS4s?

Yes. If appropriate, regulated small MS4s may seek one of two waivers. The first waiver may apply when the system serves a population of less than 1,000 within an urbanized area, and: (a) is not contributing substantially to the pollutant loadings of an interconnected MS4 that is regulated by the Texas Pollutant Discharge Elimination System storm water program; and (b) if the system discharges any pollutant(s) that have been identified as a cause of impairment of any water body to which the MS4 discharges, storm water controls are not needed to protect the water body. 40 C.F.R. § 123.35(b)(4).

The second waiver may apply when the system serves a population under 10,000 and meets the following criteria: (a) the TCEQ has evaluated all waters of the United States, including small streams, tributaries, lakes, and ponds, that receive a discharge from the MS4; (b) for all such waters, the TCEQ has determined that storm water controls are not needed to prevent pollution; and (c) the TCEQ has determined that future discharges from the MS4 do not have the potential to exceed Texas water quality standards, including impairment of designated uses, habitat, or biological impacts.

What is a Storm Water Management Program (SWMP)?

TCEQ's proposed Phase II general permit will require regulated MS4 operators to develop a SWMP. A SWMP is a plan that prevents pollution in storm water to the maximum extent practicable. MS4s are required to identify and apply best management practices (BMPs) to develop the following six minimum control measures:

- 1) *Public education and outreach* – The MS4 operator must ensure that a reasonable attempt is made to inform the public about the impacts polluted storm water run-off can have on water quality, hazards associated with illegal discharges, and improper disposal of waste, and the ways they can minimize their impact on storm water quality;
- 2) *Public involvement/participation* – Compliance with state and local public notice requirements, and documented efforts to reach all constituents, are required;
- 3) *Illicit discharge and detection* – The MS4 operator must establish a program to detect and eliminate illicit and non-storm water discharges to the MS4, and must develop a storm sewer map;
- 4) *Pollution prevention and good housekeeping measures for municipal operations* – The MS4 operator must develop and establish an operation and maintenance program designed to prevent or reduce pollution in storm water runoff;
- 5) *Construction site storm water runoff controls* – The MS4 operator 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 or if that construction activity is part of a larger common plan of development or sale that would disturb one acre or more; and

6) *Post construction storm water management in areas of new and redevelopment* – The MS4 operator must develop, implement, and enforce a program to reduce pollutants in any storm water runoff to the MS4 from new development and redevelopment projects that result in a land disturbance of greater than or equal to one acre or if that construction activity is part of a larger common plan of development or sale that would disturb one acre or more.

The Environmental Protection Agency has published substantial guidance materials to assist permit applicants in selecting appropriate BMPs. These documents are available on the EPA website at <http://cfpub2.epa.gov/npdes/stormwater/swppp.cfm>.

How do cities pay for the permits and permit requirements?

Many cities finance the regulatory activities required by storm water permits with general revenue. Another option for funding the required activities is the Municipal Drainage Utility Systems Act, which is located in Chapter 402 of the Local Government Code. In order to protect the public health and safety, cities are authorized to use drainage utility fees to establish and finance a municipal drainage utility system. Cities are specifically authorized to raise fees and establish rules to prevent nonpoint source runoff within city limits or the extraterritorial jurisdiction.