



ENVIRONMENTAL LAW

BY MICHAEL B. GERRARD

Stricter Rules on Storm Water Discharges Taking Effect

On 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 home-building 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



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

Michael B. Gerrard heads the New York office of Arnold & Porter LLP. His latest book is "Global Climate Change and U.S. Law" (ABA 2007). **J. Cullen Howe** of Arnold & Porter LLP assisted in the preparation of this article.

