

Hello MS4 Group,

We have named this information bulletin: *MS4 Matters*. This edition reflects some observations from the Water Quality Control Division's (the Division's) recent MS4 permit compliance audit activities and offers thoughts on permit compliance and future audit activities.

This information bulletin is sent to the MS4 permit local contacts only, which are listed in the MS4 permit contact database maintained by the Division. Please forward this information to any other interested colleagues. Editions are also posted on our website: <http://www.cdphe.state.co.us/wq/PermitsUnit/stormwater/municipal.html>

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1. State Inspection Plan for MS4s

The Division can't provide a schedule for future audit activities, but we would like to provide some insight into our overall inspection plan and process. The Division's inspection year runs from October 1st through September 30th. Under the Performance Partnership Agreement with the U.S. Environmental Protection Agency, the Division is into its second year of a five-year process of auditing all Colorado Phase I and Phase II MS4 permits. During the current inspection year, the Division will continue oversight of MS4 permittee's Construction Sites programs. In addition, the Division will begin reviewing Municipal Operations programs in conjunction with the Phase II permittee's submittals of their One-Time Operating Procedures Report in March, 2010. Additional program areas will also be audited during the current inspection year based on Division resources and additional information that becomes available, such as complaints or other evidence of potential noncompliance.

For the Construction Site's program oversight, the Division will continue to conduct screening inspections of construction sites as the initial step in the oversight process. The 2010 construction site screening inspections are unannounced. Depending on how the sites look during the screening inspections, we may follow up with a more in-depth review (audit) that includes oversight inspections, sight-specific records review, and more in-depth audit activities when necessary. Division escalation of inspection and

MS4 Matters – MS4 Permit information from Colorado Water Quality Control Division

audit activities is generally based on how the MS4 permittee performs on one level of oversight. For example, if the Division determines that the screened construction sites look poorly managed by the MS4 permittee, the MS4 permittee will be scheduled for a more in-depth audit activity. If the MS4 permittee demonstrates overall compliance at the next level, additional oversight may not be conducted for that MS4 permittee during that inspection year only. Permit violations discovered during any level of oversight may be the subject of a formal enforcement action. Although the Division offers the above information as a guide, the Division may vary from this process based on the findings from previous audits or other information available.

Below are some additional details on our process for inspections; and what you can do to prepare for an audit of your program with the construction sites program used as an example.

Pre-Inspection: The Division will contact the MS4 permittee before an audit. The Division may contact an MS4 permittee to request additional information in preparation for an audit. This may include a list of all active construction sites within the MS4 permittee's permit area and copies of current program description, procedures, ordinances, and other applicable materials. The information requested for active construction sites will likely include the site addresses, names of projects, construction start dates, assigned MS4 inspectors, and recent inspection dates. Prior to a site visit, the Division may also review written materials in the MS4 permittee's permit file, the additional submitted materials, or other materials referenced in the MS4 permittee's program description, such as criteria manuals. We essentially compile and review what the permit paper trail indicates is your current program, as applicable for the planned audit focus.

Division Inspection: During the inspection, the Division may assess permit compliance based on both field conditions as well as the permittee's process. When reviewing the permittee's process, the Division starts with the permit requirements and cross references applicable documents to confirm that MS4 permittee staff is following the process that is required by the MS4 permit and program description. Note that MS4 permits require that any changes to the CDPS Stormwater Management Program description be submitted to the Division. The field inspection may include reviewing records from specific construction projects and site visits to active construction sites. Site visits may include confirmation that the MS4 permittee's paperwork matches the field implementation, a review of the MS4 permittee's inspection process, and an assessment of the conditions at the construction site.

What you can do to prepare for an audit: Start by reviewing the requirements of the MS4 permit and the permittee's program description.

Review the codes, ordinances, manuals, regulations, and processes that are referenced in the program description, as this constitutes the MS4 permittee's program. Confirm that the all written materials are being followed. If any changes have been made in written documents or procedures from the program description submitted to the Division, a program modification request must be submitted to the Division.

2. Written Procedures for Phase II Municipal Operations

Most Phase II MS4 permittees (standard and non-standard) already know that written procedures for an operation and maintenance program to prevent or reduce pollutants in stormwater runoff from the permittee's municipal operations need to be developed by December 31, 2009. The One-Time Operating Procedures Report form that addresses this program must be submitted by March 10, 2010. Nathan mailed and emailed the One-Time Operating Procedures Report form to all MS4 permittees in June 2009. Please contact us if you need the form. Do not submit the actual *written procedures* to the Division. If you need help developing the procedures, there are many fact sheets available online and the Colorado Stormwater Council (membership organization) developed templates for each of the required operations.

3. Field Changes to Approved Site Plans

During recent construction site program audits, Division staff noted the various ways that MS4 permittees manage changes to approved site plans. After the site plan is reviewed by the MS4 permittee staff and the project construction begins, there will almost always need to be changes to the plan. For example, straw wattles may be used instead of silt fences, the location of the vehicle tracking pad or concrete washout changes, or mulch may be exchanged for erosion control blankets.

Some MS4 permittee's written procedures document what level of changes can occur (e.g., minor or major modifications) with the approval or acknowledgment of the MS4 permittee field inspector and what level of changes must obtain approval from the MS4 permittee plan reviewer or even the consultant/engineer who developed the site plan. The Division has noted discrepancies between documented procedures for plan modification review and approval and the process that MS4 permittees are actually implementing.

The MS4 permits require the permittee to implement a program that includes site plan review. The Division expectation is that the MS4 permittee document a process that describes how changes to approved site plans are handled and follow that process.

The Division is NOT requiring that MS4 permittees approve all site plan

changes. To be clear, the Division is requiring that the MS4 permittee to develop and implement procedures that describe what level of site plan changes can be approved by the MS4 permittee field inspection staff, MS4 staff engineer, site operator, or site plan applicant's engineer.

The site plan change process also needs to align with the MS4 permittee's ordinances, enforcement processes, and any other written policies and procedures. For example, if an MS4 permittee's ordinance requires a construction site operator to implement BMPs in accordance with an approved site plan, then the MS4 permittee's procedures must address how changes to the site plan will be approved to ensure continuous implementation of adequate BMPs.

Based on the Division's observations during recent audit activities, we are recommending that all MS4 permittees review their documented program and procedures and confirm that they match the actual implementation. Remember that a program modification is required if any changes are made to the program description that was submitted to the Division.

Additionally, we have noticed that some MS4 permittees require a PE certification on site plans, but allow changes to the PE-stamped site plan to be made by non-engineers. PE certification on site plans is not a requirement by the Division.

4. Public Projects—Some thoughts on compliance

The Division has observed that MS4 permittees' public projects, such as roadway construction, sometimes lack the level of erosion and sediment control BMPs that are implemented on private projects within the same MS4 permittee's jurisdiction. It appears that the process of project development, approval and contract management may be the source or root cause for some of the non-compliance on projects where the MS4 permittee is essentially the construction site operator. The following thoughts and questions are offered to help you identify potential gaps in the process that may be hindering compliance with the CDPS construction permit and MS4 permits, resulting in contractors and/or MS4 personnel not installing or maintaining erosion and sediment control BMPs for all phases of a public project.

First, remember that the CDPS construction permit (Part I.D.2), and the MS4 permits require that BMPs be consistently implemented. A public project does not have different requirements or expectations than a private project.

Second, we recommend that MS4 permittees evaluate the administrative process for project design and management for public projects. Some specific thoughts and questions are offered to guide the internal evaluation of the public project development

and approval process. Remember that these items are not specific MS4 permit requirements, but may be a part of a MS4 permittee's program.

1. Do the construction documents differentiate the various phases of the project and identify BMPs for each phase? An example would be to show BMPs for the initial grading phase, BMPs for the construction phases, and a separate site plan page for the BMPs when final grade is achieved. When construction plans are drafted only showing final grade BMPs, this creates the potential for the project to start off out of compliance.
2. Review the Bid Tabulation for the project. This is the list of construction elements that a contractor provides prices for to complete the project. Some additional questions include the following:
 - a. Who develops the stormwater BMP quantities for the bid tab? The MS4 permittee, consulting engineer, or the subcontractor who is bidding on the plans? Are all parties aware that BMPs are required for all stages of the project?
 - b. Does the bid tab reflect project phasing and the quantity of every BMP for the phases? If there is no phasing on the construction documents, how are construction phase or other interim BMPs quantified and budgeted for?
 - c. Are erosion and sediment control BMPs listed in a lump sum? If so, what is the lump sum based on and how does the MS4 permittee's inspection and oversight process ensure that BMPs are consistently implemented for all phases of the project?
 - d. Are change orders allowed so the contractor can install interim BMPs that may not have been detailed on the plans or in the bid tabulation, and recover costs?

There are many ways to manage site plan development, bidding and contracts for public projects. For example, a community may only detail final stage BMPs, but allow contractors to submit change orders for the interim phase BMPs, so the contractor is not financially penalized for consistently implementing BMPs. It is not a direct violation of the MS4 permit if the MS4 permittee (or designee) creates incomplete site plans for the contractors to bid on, underestimates the erosion and sediment control BMPs, or doesn't allow change orders for cost recovery of additional BMPs. However that process does not facilitate compliance with the CDPS construction permit or, with the MS4 permit.

Lastly, please remember that the MS4 permittee is responsible for managing construction sites within the MS4 permit boundary. Therefore, even though a private

contractor may hold the CDPS construction permit, non-compliance of a construction site within the MS4 permit boundary can result in the MS4 permittee being out of compliance. When this occurs, Division audit activities will focus on the MS4 permittee's process to determine if the process fosters overall compliance and a non-compliant construction site is an isolated occurrence; or if the MS4 permittee's process leads to likely non-compliance.

5. New Low Risk Policy Guidance Documents

The Division has developed two new low risk guidance documents for discharges of uncontaminated groundwater to land for discharges of potable water. These guidance documents can be found on the website along with the WQCD responses to comments received during the public comment period. The guidance documents and the Low Risk policy are available online from the Water Quality Permitting web page (coloradowaterpermits.com, under the "Guidance and Policies" link). As per the Low Risk Policy, while regulations do require that operators of point source discharges obtain a CDPS permit, the Division will not take enforcement action for those operators who have not obtained CDPS permit coverage for these discharges, providing that the operator can prove that all appropriate BMPs identified in the guidance have been fully implemented.

You may contact Maura McGovern at 303-692-3392 with specific questions regarding the groundwater guidance, or Nicole Rolfe at 303-692-3217 regarding the potable water guidance.

MS4 permittees may modify their CDPS Stormwater Management Programs to include discharges that meet the guidance in these documents to the lists of non-stormwater discharges that will not be addressed by the permittees as illicit discharges, and therefore not be required to be prohibited by the permittee from discharging to the MS4. A memo was emailed the week of October 19th, 2009 to all MS4 permit legal contacts providing official approval for these modifications, and containing additional details. If you have questions regarding the impact on MS4 permit requirements, or if you did not get a copy of the memo, you may contact me (Michele DeLaria), Lisa Knerr, or Nathan Moore.

In addition, if a discharge is currently covered under a CDPS General Permit and can meet the conditions one of these low risk policies, the permittee must submit a Notice of Termination form to the Division. The form is available at:

<http://www.cdphe.state.co.us/wq/PermitsUnit/TERMALLFORM.pdf>

6. Annual Report–How to detail program changes

As we enter the last quarter of the year, we are all beginning to think about this year's annual report. Some MS4 permittees made changes to their program in their 2008 annual report.

Phase I permittees, check with your permit to determine what is required and feel free to contact us with questions.

Phase II permittees, program changes are allowed in the general permit, but certain information has to be included in the Annual Report form (Part 6 of the form for COR-090000 and COR-080000 permittees and Part 5 for COR-070000 permittees). Specifically, note that changes to a measurable goal due date can NOT be made by simply changing the date in Part 4 of the form. Part I E.2.a.2 of the general permit also states that the modification is not approved until the Division denies the modification or 60 days pass. Please do not start implementing a modification until either of these happen. If you need to implement a modification earlier, please submit a letter. Remember to include all four elements listed in Part I E.2.a.2 of the general permit in the request for a modification.

Stay tuned for the next edition, which is expected to contain information on annual reports and more inspection and audit activities.

Please send comments and questions about this information bulletin and the MS4 permit program to Michelle DeLaria. Nathan and Lisa can also be contacted about the MS4 permit program.

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