

## **Response to Comments**

Environmental Protection Agency-New England (EPA) received many comments on the draft small municipal separate storm sewer system (MS4) permit from communities, transportation agencies, watershed associations, and private citizens. In accordance with 40 CFR 124.17, EPA must respond to significant comments raised during the public comment period. This Response to Comments document follows the subject order of the draft permit. The comments on a similar topic have been grouped together. When appropriate, lengthy comments have been paraphrased. Otherwise, the comments presented in the document are actual quotations. Comments requesting clarifications to the general permit or fact sheet are addressed in this document. Comments requesting changes to the fact sheet are not part of this document. The fact sheet is a document used to describe the basis of development of the draft permit. Since the basis used in the development of the draft permit has not changed, there are no changes to the fact sheet. Any changes between the draft general permit and the final general permit are described in this document.

### **Comment:**

Some comments expressed confusion over who is the permitting authority.

### **Response:**

For the State of New Hampshire and Indian Country in the States of Connecticut, Massachusetts, and Rhode Island, and federal facilities in Vermont, EPA is the permitting authority. The State of New Hampshire may choose, but is not required by EPA, to adopt this permit as a state permit under its permitting authorities.

In Massachusetts, EPA is issuing the permit under authority of the Federal Clean Water Act (CWA) and the Commonwealth of Massachusetts is issuing the permit under authority of the state's Clean Waters Act. The federal general permit and the state general permit are identical, however each agency may act independently regarding enforcement of its permit. This issue is addressed in more detail below.

### **Comment:**

One comment letter raised the following legal questions/concerns:

- ▶ With respect to the permit issued for the Commonwealth of Massachusetts, please identify the enabling legislation (federal and state) which provides for the issuance of a joint permit with the Massachusetts Department of Environmental Protection. Massachusetts is not a delegated state.
- ▶ The provisions of the draft permit provide for both equal and separate administration of the NPDES permit by the state agency. The Clean Water Act (33 USC §§ 1251 et seq) does not delegate this permit authority to the Commonwealth.
- ▶ Creation by federal regulation of a new, separate, stand-alone permit administered independently by the state agency circumvents the legislative process of the Commonwealth.
- ▶ In addition, we do not believe that Massachusetts General Law and regulations cited further in the draft permit apply to this program. Under purpose and authority (314 CMR 3.01), it states "The provisions of 314 CMR 3.00 not only reflect the requirements of the Massachusetts Clean Waters Act, M. G. L. c. 21, ss 26-53 but also implement those provisions of 33 USC 1251 et seq. and regulations adopted thereunder necessary for the Department to assume delegation from EPA to implement the NPDES permit program within the Commonwealth." Since EPA has not gone through the public process necessary to delegate the NPDES program to the Commonwealth, creation of a new state permit through the draft federal permit is not appropriate. In addition, this

circumvents the Commonwealth's procedures for legislative and public review of any new state permit process.

Response:

This jointly issued small MS4 General Permit is not predicated on EPA delegating its NPDES permit authority to MA DEP. Under the CWA, EPA does not "delegate" authority, but rather EPA grants approval to a state to assume authority for the NPDES program under state law. As provided in the section G entitled "State Permit Conditions" in Parts II., IV., and V., the small MS4 General Permit is issued jointly by EPA and MA DEP pursuant to each agencies' respective federal and state law and regulations. The enabling legislation for EPA is the federal Clean Water Act, 33 USC §§ 1251 et seq., and the NPDES regulations promulgated thereunder at 40 CFR Part 122. The enabling legislation for the MADEP is the Massachusetts Clean Waters Act, M.G. L. c. 21, s.26-53 (including the specific authority to issue discharge permits at s.43) and DEP's Surface Water Discharge Permit regulations at 314 CMR 3.00.

The small MS4 General Permit is an NPDES permit issued by EPA and it is also a surface water discharge permit issued by the MA DEP pursuant to its separate and independent authority under the MA Clean Waters Act and 314 CMR 3.00. The joint issuance of the small MS4 General Permit does not constitute a "delegation" its NPDES permit authority to the MA DEP. Instead, EPA is issuing an NPDES permit and the MA DEP is issuing a state surface water discharge permit in a single, combined permit document. The MA DEP has its own independent statutory and regulatory authority to require and to issue a discharge permit to any proposed or existing discharge of pollutants to waters of the Commonwealth, including a general permit regulating small MS4s. Since the 1970s, it has been standard practice for MA DEP and EPA to jointly issue a single combined federal and state discharge permit, following joint public notices and joint public hearings (if held).

As the language, from 314 CMR 3.01 highlighted in the comment above indicates, the MA DEP has promulgated surface water discharge permit regulations pursuant to its independent authority under the MA Clean Waters Act that contain provisions that the MA DEP believes would allow it to assume authority to run the NPDES permit program in Massachusetts if MA DEP applies for program approval at some point in the future. To date the MADEP has chosen not to seek assumption of the NPDES permit program from EPA.

**Endangered Species**

Several comments were received concerning the requirement that permit applicants certify that discharges from the small MS4 are not likely to adversely affect endangered species. Specific comments on this topic are presented below. In an effort to address many of the comments received, an addendum has been added to the final permit. The addendum provides information regarding EPA's obligations under the Endangered Species Act (ESA) it also provides step by step guidance to aid in determination of permit eligibility as it applies to ESA.

Comment:

One community expressed its objection to ESA certification requirements. The objection is that this requirement was never discussed in educational materials provided by EPA.

Response:

The Endangered Species Act of 1973 requires federal agencies, such as EPA, to ensure in consultation with the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively referred to as The Services) that any actions authorized, funded or carried out by the agency are not likely to jeopardize the continued existence of any Federally-listed endangered or threatened species or adversely modify or destroy critical habitat of such species (see 16 U.S.C 1536 (a)(2), 50 CFR

part 402 and 40 CFR 122.49(c)). The issuance of an NPDES permit by EPA is an action which is subject to ESA. EPA received letters from FWS and NMFS with regard to the draft permit. The Services concurred with the criterion options presented in the draft permit. In order to be eligible for this general permit, a permittee must certify that none of its storm water discharges, allowable non-storm water discharges, or discharge related activities is likely to impact a threatened or endangered species. A permittee must certify eligibility under one or more of the five criteria described in the permit.

During the public comment period, EPA held four public meetings and one public hearing. The purpose of the meetings were to provide the regulated community information about the conditions in the draft permit, including the conditions related to endangered species. The purpose of the public hearing was to allow interested parties an opportunity to submit comments for the official record. Inclusion of conditions relating to ESA are standard components of NPDES permits. Additionally, in May 2002, EPA-HQ posted a model small MS4 general permit on its website. This model general permit contained language concerning endangered species. The language in the draft general permit was very similar to the language in the model. EPA believes that information about this requirement has been available.

The certification requirement remains part of the permit.

Comment:

One community asked how it will know if there are any endangered or threatened species in its municipality. The community requested additional resources be provided.

Response:

As stated in the introduction to this topic, Addendum A has been added to the final permit. It provides guidance and sources of information regarding endangered species.

Comment:

One comment letter stated a belief that if a discharge already exists, there is no need to check the impact of that discharge on endangered species. The comment also expressed the belief that the endangered species requirement should only relate to new discharges covered under EPA's construction general permit (CGP).

Response:

EPA disagrees with this comment. Because a discharge already exists, does not mean that it has no impact. As stated previously, the provisions of the ESA apply to federal actions. In this instance, the federal action is the issuance of the general permit which authorizes storm water discharges from small MS4s. Storm water discharges from small MS4s have not been previously authorized, therefore these discharges, as part of the federal action authorizing them, must be evaluated for compliance with the endangered species requirements of the permit. Discharges from a construction project subject to EPA's CGP must meet the ESA requirements in that permit. The requirement to evaluate existing discharges remains in the permit.

Comment:

Does the permittee evaluate ESA requirements under this permit ?

Response:

Yes, the permittee should follow the guidance in Addendum A of the final general permit.

Comment:

One comment letter expressed a belief that the ESA requirements only apply to new development and redevelopment, and to storm water discharges from industrial activities and construction.

Response:

The provisions of the ESA apply when EPA undertakes an action. See previous response regarding when the terms and conditions of the ESA apply.

Comment:

One community felt compliance with the ESA certification requirements prior to March 10, 2003 is difficult.

Response:

Certification with regard to ESA should be based on the permittee's knowledge at the time of submission of the Notice of Intent (NOI). MS4 operators should make determinations based on current information. As a permittee implements its storm water management program, new information regarding locations of outfalls may become available. As the new information becomes available, the permittee may need to reevaluate the ESA certification criterion to ensure that permit eligibility with regards to ESA is maintained.

**Essential Fish Habitat**

Comment:

One comment stated the belief that EPA's Federal Register notice is sufficient to satisfy the federal requirement with regard essential fish habitat and no further work from the applicant is required.

Response:

The belief stated in the comment is correct, unless specifically notified, no further action regarding Essential Fish Habitat (EFH) is required by the applicant. Under the Magnuson-Stevens Fishery Conservation and Management Act, the issuance of a federal permit is a federal action that may require EPA to consult with the National Marine Fisheries Service if EPA determines that the action may adversely affect an EFH. The consultation process is described in 50 CFR §600.920. EPA believes that the conditions contained in the general permit are protective of EFH. If information is received which indicates a discharge may adversely affect an EFH, the NMFS may make recommendations regarding the discharge. If an activity does not adversely affect an EFH, a consultation is not necessary.

**National Historic Preservation**

Several comments were received concerning the requirement to certify that discharges from the small MS4 do not impact historic places as described under the National Historic Preservation Act (NHPA). Most comments requested information about how to meet the requirement.

An addendum, B, has been added to the final permit. The purpose is to provide guidance to municipalities with regard to compliance with this condition.

Comment:

A community expressed its objection to the NHPA certification requirements. The community's objection is that this requirement was never discussed in educational materials provided by EPA.

Response:

The National Historic Preservation Act (NHPA) requires federal agencies to take into account the effects of federal undertakings on historic places. This includes places that are either listed or eligible for listing on the national Register of Historic Places. The term "federal undertaking" is defined in the existing NHPA regulations to include any project, activity, or program under the direct or indirect jurisdiction of a federal agency that can result in changes in the character or use of historic properties (see 36 CFR part 800). The issuance of a general permit by EPA is considered a "federal undertaking". To be eligible for coverage under this permit, the permittee must certify that storm water discharges do not impact historic properties.

This certification provision of the general permit meets EPA's obligation under NHPA.

During the public comment period, EPA held four public meetings and one public hearing. The purpose of the meetings were to provide the regulated community information about the conditions in the draft permit, including the conditions related to historic places. The purpose of the public hearing was to allow interested parties an opportunity to submit comments for the official record. Inclusion of conditions relating to NHPA are standard components of NPDES permits. Additionally, in May 2002, EPA-HQ posted a model small MS4 general permit on its website. This model general permit contained language concerning historic places. The language in the draft general permit was very similar to the language in the model. EPA believes that information about this requirement has been available.

The certification requirement remains in the permit.

Comment:

One commenter believes that it is unnecessary to cross-check every discharge point with the National and State Registers of Historic Places because existing discharges are not defined as causing impact under section 106 of HPA. This provision should only relate to new discharges.

Response:

Because a discharge already exists does not mean that there is no impact to historic properties. The provision applies to discharges and implementation of best management practices of the storm water management program.

Comment :

One community stated that compliance with the NHPA certification requirements by March 10, 2003 is difficult. The community felt that the draft permit was not clear about whether there is a five year window for completion of this requirement.

Response:

Permit applicants should submit the NOI based on the best information available at the time of submission. As the program develops, new information may become available. As the new information becomes available, the permittee may need to reevaluate the NHPA certification criterion to ensure that permit eligibility with regards to NHPA is maintained.

**Discharges to Water Quality Impaired Waters**

Comment:

The five month compliance period with Part I. C. of the permit is unreasonable.

Response:

Part I.C. of the permit has two parts. The first part requires permittees to determine whether any waterbody which receives a discharge from the municipality is included on the CWA Section 303(d) list of impaired waterbodies.

The §303 (d) list, developed by each state and approved by EPA, is a readily available list of water bodies which are impaired due to particular pollutant or pollutants. The permit directs the MS4 to determine if any of these waters are in the community and if there is a discharge from the municipality to that water or waters. If there are no waters listed or no discharges to those waters, then Part 1.C. requirements have been met.

If there is an impaired water, the pollutant causing the impairment is usually listed. If the permittee discharges the pollutant which causes the impairment, the storm water management program must include best management practices (BMPs) designed to address such pollutant. In situations where a specific pollutant isn't listed, but rather an effect such as "low DO", is listed, the permittee should attempt to determine the secondary cause which produces the effect listed as the impairment. The permittee should attempt to address the secondary cause in the storm water management program, if possible.

The permit does not require compliance with the second part of Part 1.C. in a five month period. In the development of its storm water management program, the permittee must include BMPs which address the pollutants listed as causing the impairment. The permit allows municipalities the full permit term to implement their storm water management program. It is expected that compliance with this part of the permit will occur over time as the BMPs are developed, implemented and potentially modified, if necessary.

EPA does not believe this permit provision is unreasonable. It remains a condition of the permit.

Comment:

The requirements of Part I.C. 2 should apply to all storm water discharges not just those discharging to impaired waters.

Response:

EPA disagrees with this comment. Part I.C.2 is intended to address the situation where waters have been identified as being impaired by a pollutant which the MS4 will discharge. In such situations, more aggressive storm water strategies would likely be necessary than in the situation where the waters are not impaired. Application of the requirements in Part I.C.2. is not appropriate in situations where impairment had not been identified.

Comment: A comment noted that the requirements of Part I.C. do not require the permittee to submit the plans for review and approval. The comment also requested that additional conditions be included for discharges to the Assabet River and its tributaries. The additional conditions suggest specific deadlines. The following list are the suggested additional conditions:

- ▶ No later than one year after permit issuance, each MS4 shall submit a storm water management program to EPA and DEP for review and comment. The plan shall contain a proposed monitoring/assessment program to help prioritize the selection and geographic placement of BMPs to control phosphorus and other pollutants.
- ▶ Within two years of permit issuance, each MS4 shall implement a monitoring/assessment program to help prioritize the selection and geographic placement of BMPs to control phosphorus and other pollutants.
- ▶ Within five years or life of the permit, each MS4 shall its revise plan based on the Assabet River nutrient TMDL, USGS Assabet Basin regional MODFLOW application and other relevant information and submit to EPA and DEP for review.

Response:

The additional conditions have not been added to the permit. Until the evaluation of the storm water program described in 40 CFR 122.37 has occurred, EPA recommends that no additional requirements beyond the minimum control measures be imposed on regulated small MS4s without the agreement of the affected MS4, except where an approved TMDL or equivalent analysis provides adequate information to develop more specific measures to protect water quality. EPA and MA DEP do not have sufficient

information to include watershed specific conditions at this time and therefore have determined that watershed specific requirements are not being included in the first round of permitting. Once permittees have had an opportunity to actually implement their programs, future evaluations may indicate that additional measures, including watershed specific requirements, may be necessary. Additional measures will be considered at that time.

### **Total Maximum Daily Load (TMDL)**

#### **Comment:**

Many comments were received regarding the permit's requirements related to compliance with TMDLs. Some objected to the draft permit requirements as being unreasonable. Others felt that permittees should be allowed to appeal a discharge limit established pursuant to a TMDL. Some comments just requested clarification on TMDLs in general.

Specific comments received:

- ▶ The TMDL language implies a reference to quantitative water quality issues and not simply qualitative issues. The time frame is objectionable as it is not reasonable to determine pollutant levels adequate for a certification to be signed. No existing guidance or resources from the state or federal level are available.
- ▶ Part I.B.2(1): Because of lack of reliable data that identify specific sources of contaminants, this provision is subjective. This provision should include a process so that the permittee has the ability to appeal, based on reasonable scientific evidence, a TMDL wasteload allocation. An exemption from this requirement should be allowed based on demonstration of insignificant environmental benefit based on the cost.
- ▶ Permittees are required to address how they will control the discharge of pollutants identified as the cause of impairment absent a TMDL. One comment stated that controlling the discharge of pollutants identified should be an ongoing effort as TMDL reports are approved.
- ▶ Part I.D.3: This section requires the permittee to make a subjective assessment. An appeal process should be included.
- ▶ It is counter productive to determine the efficacy of WLA (Waste load allocation) attainment by gauging the response of the receiving water. It is the goal to have the water quality of the receiving water meet water quality standards and not to show water quality controls are functioning because they may be inadequate to meet limits established in the TMDL.
- ▶ There is no mention of when the assessment is to be completed. There is no discussion on the extent of ongoing monitoring that will be required of the permittee to ensure that control measures are achieving the reduction of pollutants called for in the TMDL.
- ▶ Recommended that permittees who want to discharge into waters with approved TMDLs also address opportunities to improve instream flow. Since the permittee must assess the current control measures, they would have the occasion to assess if current measures adequately address recharge and instream flow protection.

#### **Response:**

A TMDL defines for a particular water body an acceptable "load" of a particular pollutant which has been identified as causing an impairment. This "load" is the total amount of pollutant which can be discharged

to the water body without contributing to the existing impairment. This allowable load is divided among the sources which contribute the pollutant. Sometimes a specific waste load allocation (WLA) is assigned to identifiable sources such as an industry or a waste water treatment plant. Other times allocations are made to a category of sources. Storm water discharges are typically not singled out individually, but rather are given a collective WLA.

The permit does not specify any specific time frames with regard to compliance with TMDLs. Nor does the permit require that a municipality submit a certification pertaining to pollutant loadings which are discharged from the MS4.

When evaluating issues with regard to TMDLs, a municipality must first determine if it discharges to a waterbody with an approved TMDL. If it does not, Part I. D. is not applicable. If it does discharge to a water with an approved TMDL, it must determine what pollutant is addressed by the TMDL. If the municipality does not discharge the pollutant, this part is not applicable. If the municipality does discharge the pollutant, it must address whether it is already doing something to meet the wasteload allocations of the TMDL, or whether something else needs to be done. The "something else" is addressed through the implementation of BMPs designed to address the pollutant identified in the TMDL. In some cases the TMDL will provide adequate information in order for small MS4s to develop additional or more specific BMPs to protect water quality. More often, however, the TMDL's waste load allocations and other analyses will not be detailed enough to necessitate measures beyond those required by this permit. The permittee should make a good faith effort to evaluate any applicable TMDL and respond accordingly.

The municipality must include specific management practices in the implementation of the minimum control measures required by the permit designed to address the control of the pollutant for which the TMDL is established. The municipality must properly install and maintain all BMPs. The permit states that documentation demonstrating that the BMPs are functioning as designed will be used to assess whether the terms of the TMDL are being met.

Reliance on the use of BMPs is consistent with the maximum extent practicable (MEP) standard which applies to storm water discharges from municipalities. The MEP standard is the statutory standard that establishes the level of pollutant reductions that operators of regulated MS4s must achieve. The MEP standard includes management practices, control techniques, and system, design and engineering methods. EPA believes that compliance with the conditions of the general permit and implementation of the minimum control measures, and other provisions EPA determines appropriate, will satisfy the MEP standard. The implementation of measures to specifically address a TMDL are considered "other provisions".

Part I.B.2(l) of the permit describes discharges not authorized by the permit. A discharge not consistent with an approved TMDL is not an authorized discharge. The TMDL development processes has opportunities for a public participation and appeals. The only process for an appeal of a TMDL is to bring an action in state court challenging the state's TMDL or in federal court challenging EPA's approval of the TMDL. Also, federal law does not provide an exemption from TMDL based on cost. However, we anticipate the cost effective BMPs will, in most cases, be sufficient to satisfy requirements of TMDLs.

Part I.D.3 of the permit requires a permittee to assess whether there are existing storm water controls for the discharges which address the TMDL. It is unclear how this determination is subjective, either there are controls on the storm water or there are not. It is also unclear what in this determination should be subject to appeals. As mentioned previously, the only process for appealing a TMDL is either in state court, to challenge the state's TMDL, or in federal court, to challenge EPA's approval of the TMDL.

The permit requires all permittees, not just those who discharge to a water body with an approved TMDL, to evaluate opportunities, when appropriate, for recharge.

On November 22, 2002, EPA/HQ Offices of Wetlands, Oceans, and Watersheds and Wastewater Management issued a memorandum entitled "Establishing Total Maximum Daily Load Wasteload Allocations for Storm Water Sources and NPDES Permit Requirements Based on those WLAs. Based on current regulations, the memo describes the following requirements regarding TMDLs and storm water discharges.

- ▶ NPDES - regulated storm water discharges must be addressed by the waste load allocation (WLA) component of a TMDL, they may not be addressed by the load allocation (LA) component of a TMDL.
- ▶ It may be reasonable to express allocations for NPDES - related storm water discharges from multiple point sources as a single categorical WLA when data is insufficient to assign each source or outfall an individual WLA.
- ▶ NPDES permit conditions must be consistent with the assumptions and requirement of available WLAs. Water quality based effluent limitations for NPDES regulated storm water discharges which implement WLAs in TMDLs may be expressed in the form of best management practices (BMPs).

The permit as written is consistent with EPA's regulations and the November 22 memorandum since it requires permittees to develop and implement BMPs consistent with approved TMDLS.

#### **Obtaining Coverage/Notice of Intent**

##### Comment:

A community objected to a compliance deadline of March 10, 2003.

##### Response:

The March 10, 2003 deadline applies only to submission of a Notice of Intent. The permit allows the full five year permit term for implementation of the storm water management program.

##### Comment:

A few comments raised questions about the fees associated with submission of the NOI to MADEP and another state agency opposed being assessed fees.

##### Response:

Municipalities in Massachusetts seeking coverage under the general permit also must submit a written Notice of Intent to the MA DEP. Municipalities must use DEP's forms for the Notice of Intent for Discharges from Small Municipal Separate Storm Sewer Systems (MS4s), permit code BRP WM 08A, which can be obtained at DEP's website, <http://www.state.ma.us/dep/brp/stormwtr/strmfms.htm> or by contacting,

Massachusetts Department of Environmental Protection  
Office of Watershed Management  
627 Main Street, 2<sup>nd</sup> Floor  
Worcester, MA 01608  
508-792-7470

The MADEP application fee for BRP WM 08A is \$60. The fee applies to the Commonwealth and any agencies or authorities of the Commonwealth. (See the definition of "Person" under the MA DEP fee regulations at 310 CMR 4.02) However, cities, towns, counties, and districts of the Commonwealth are exempt from paying the above application fee. All information regarding submittal to DEP of NOI forms and

fee (if applicable), is described in the BRP WM 08A Notice of Intent application package.

Comment :

The permit requires communities in Massachusetts to pay a fee. Furthermore, under the federal requirements of minimal cost, shouldn't the municipalities be exempt?

Response:

The above referenced MA DEP application fee is not a federal requirement. However, as stated above, municipalities are exempt paying the fee.

Comment:

A standard form for NOI submission would be helpful.

Response:

Both MADEP and NHDES have developed forms. EPA will accept NOIs submitted on these forms. EPA does require an original signature. The forms are available at the following websites:

Massachusetts: <http://www.state.ma.us/dep/brp/stormwtr/strmfms.htm>

New Hampshire: <http://www.state.nh.us/des>

Comment:

The local Conservation Commission and regional Massachusetts DEP offices should receive copies of the Notice of Intent.

Response:

A municipality may want to share the contents of the NOI with its conservation commission, but that has not been made a permit requirement. Similarly, MA DEP may choose to share NOIs with the regional offices, but that has not been made a permit requirement.

Comment:

Municipalities in Massachusetts must use the form designated by MA DEP. EPA is requiring that we utilize a form that has not been included in the draft and which is not available for comments by municipalities.

Response:

Massachusetts requires the use of form BRP WM 08A (see previous response). EPA does not require the use of a particular form. EPA will accept information submitted on either the Massachusetts form BRP WM 08A and New Hampshire Notice of Intent Form. All signatures must be originals.

Comment:

A comment suggested that a storm water system conveyance map should be included as part of the NOI submission.

Response:

EPA regulations detail the specific information that must be included on NOIs. This information is described in two locations. The first, at 40 CFR 122.28 (b)(2)(ii), describes the general information required by an NOI. It states "... at a minimum, the legal name and address of the owner/operator, the facility name and address, type of facility or discharges, and the receiving stream(s)". The other location specific to small MS4s is at 40 CFR 122.33(b)(1). This states that information required by §122.34(d) be submitted. The information required by §122.34(d) is a description of BMPs and measurable goals for the six minimum measures of the storm water management program and identification of a contact person. The mapping requirement is in the minimum control measure which applies to illicit discharge detection and elimination.

The control measure requires a permittee to develop a map with the locations of all outfalls and receiving waters. It does not require a complete map of the community's storm water system. EPA has not changed the NOI requirements to require submittal of a complete storm water conveyance map. Such a requirement is beyond the scope of the NOI requirements at 40 CFR 122.34(b)(3)(ii)(A).

Comment:

Request that NOIs be placed on public notice from the day after receipt for a period of 60 days.

Response:

All NOIs submitted are considered public information unless claims of confidentiality have been made in accordance with 40 CFR 122.7. If a person or organization wishes to review a specific NOI, a request to EPA can be made. Arrangements to view the specific NOI will be made.

**Allowable Non-Storm Water Discharges**

Comment:

Regarding the dewatering of utility catch basins, is there a presumption that this discharge is uncontaminated, a separate provision or regulation that addresses this type of dewatering activity, or is it potentially an unauthorized non-storm water discharge? This should be clarified.

Response:

The dewatering of utility catch basins is an unauthorized non-storm water discharge. The list of allowable non-storm water discharges included in the permit presents types of discharges which EPA believes typically are not expected to be significant contributors of pollutants to a municipality's system. Utility catch basin dewatering, in contrast, typically does contain significant, often unknown, pollutants and would need to be addressed by the illicit discharge detection and elimination minimum control measure.

Comment:

Nutrients from landscape fertilizers have been identified as a leading source of pollution of streams, brooks & rivers. Since landscape irrigation is a significant source of nutrient pollution, it should not be exempted under this permit.

Response:

Landscape irrigation has been retained as an allowable non-storm water discharge. However, this and the other listed non-storm water discharges are authorized only if the permittee has determined that the discharge is not a significant contributor of pollutants to its system. If a municipality determines landscape irrigation discharges are contribute pollutants to its municipal storm sewer system, then they are considered illicit discharges and must be addressed under the illicit discharge detection and elimination minimum control measure.

Comment:

Given the probability of nonpoint source pollutants in road wash water, having street wash water as an allowable discharge is not keeping with intent to reduce the pollutant loads reaching waterways. This non-storm water discharge should not occur unless there are controls to mitigate the pollutant load of the road wash water.

Response:

EPA is not aware of communities that wash streets to the extent that a significant discharge of pollutants are likely to occur. Typical street washing involves spraying a mist on the street followed by some type of sweeping or vacuuming. The volume of water used is usually not sufficient to cause a discharge. Street wash water remains as an allowable non-storm water discharge. However, similar to the response above, this and the other listed non-storm water discharges are authorized only if the permittee has determined

that the discharge is not a significant contributor of pollutants to its system. It is a significant contributor of pollutants, then it is considered to be an illicit discharge and must be addressed under the illicit discharge detection and elimination minimum control measure.

## **Part II - Massachusetts**

### **Comment:**

One community was in favor of keeping with the federal NPDES Phase II intent for the six minimum control measures. The city is opposed to the certification requirement listed in Part II. Additionally, the city is opposed to any requirement outside of the six minimum controls that would require storm water monitoring.

### **Response:**

The current permit does not require any monitoring. The certifications contained in the permit are regarding the accuracy of the information which is submitted on the NOI. EPA believes that such certifications are appropriate. The comment did not specify what certification requirement was objectionable, therefore EPA is not able to respond.

## **Storm Water Management Program (Part II. A.)**

### **Comment:**

One comment requested clarification on the provision which details when the MS4 may rely on another entity for implementation of one or more of the minimum control measures. Specifically, the concern is that the language in the draft permit could be restrictively interpreted to preclude partnership in the actual implementation of a control measure.

### **Response:**

The permit condition is intended to implement 40 CFR 122.35. This section deals with relying on another entity. EPA is not trying to discourage cooperation and partnership. This permit condition applies when the other entity has agreed to implement a minimum control measure for the permittee not with the permittee. The language has been changed to provide greater clarity.

### **Comment:**

What is the specific expiration date of the permit?

### **Response:**

The permit will expire five years from the effective date. The effective date will be determined based on the date the permit is published in the Federal Register.

### **Comment:**

A comment requested that the language in Part II. A.1. of the draft permit be amended to include a requirement that all minimum control measures be implemented by the permittee.

### **Response:**

The permit has not been changed to contain the language requested. The regulations clearly allow for other entities to implement measures for a municipality. EPA, however, does expect municipalities to have a clear understanding as to how their storm water management programs are being implemented. EPA also expects that when another entity does implement a measure for a municipality, the municipality will have full knowledge of the actions being undertaken by the other entity.

### **Comment:**

A watershed association requested language that describes how the permittee will be monitored as having implemented “all elements” of a storm water management plan by the expiration date of this permit.

Response:

EPA, NHDES and MADEP will review annual reports and assess progress based on completion of tasks described in the NOI submission. EPA has not provided language which specifies when a municipality has implemented “all elements”. EPA believes that the storm water management program should change and grow with the community. Aspects such as mapping all outfalls and identification and removal of illicit connections, may have a tangible end point, but other aspects such as education may need to change over time.

Comment:

Many comments received concerned the identification of specific watersheds in the draft permit.

- ▶ Why are only communities within certain river basins being required to adopt local ordinances pertaining to ground water recharge?
- ▶ The reason for singling out the Charles, Ipswich and Aberjona River basins is not explained.
- ▶ Request that all watersheds be subject to recharge requirements not just the Charles, Ipswich and Aberjona River basins.
- ▶ Request change in Part II, Section A. 4(c) to apply to any MS4 municipality that discharges to a river basin and/or sub basin with “High” or “Medium” stress as determined by one of the two methods described in the Massachusetts Water Resource Commission’s Stressed Basin Report.
- ▶ Request that Part II. Section A.4. (c) should also apply to communities in the Assabet River Basin.
- ▶ It seems inappropriate to single out only certain watersheds for recharge measures, as all watersheds throughout the Commonwealth should be aware of and respond to water quantity challenges.
- ▶ The application of standard 3 of the Massachusetts Storm Water Policy should not be limited to the three referenced basins. (Charles, Ipswich, Aberjona).
- ▶ Disagree with the decision to set the Charles, Ipswich and Aberjona apart from all basins within the Commonwealth.

Response:

After evaluating available information, MA DEP determined that the available information does not at this time support the inclusion of watershed specific requirements as described in the draft permit. It is possible that future permits will be refined and may include additional requirements specific to individual watersheds. However, Part II.B.8 of the final permit requires all small MS4s to evaluate physical conditions, site design, and BMPs to promote groundwater recharge and infiltration where feasible in the implementation of the minimum control measures. In addition, Part II.B.8 has been revised (this revision is discussed later in this document) to require all small MS4s that discharge within “high” or “medium” stressed basins to minimize the loss of recharge from new development and redevelopment consistent with Standard 3 of DEP’s Storm Water Management Policy in areas within and outside of the jurisdiction of the Wetland’s Protection Act.

Comment:

A comment requested clarification as to why standards 5 and 6 of the Massachusetts storm water policy not included as part of a Qualifying Local Program.

A comment recommended that the storm water policy be an explicit minimum requirement for any storm water management plan developed in Massachusetts.

Response:

The regulations allow EPA to refer to an existing state or local requirement if it is at least as stringent as the corresponding federal requirement. In the Massachusetts storm water policy, standard 5 requires to storm water discharges from areas with higher potential pollutant loads to use specific BMP’s.

Standards 6 applies to discharges to critical areas and requires the use of specific BMP’s approved for

critical areas. EPA evaluated the requirements for each minimum measure, and compared it to the standards of the storm water policy. EPA does not believe that either standard 5 or standard 6 are comparable to any of the requirements of the minimum control measures. Therefore, the standards were not referenced in the permit.

The state's storm water policy is applicable only in areas under jurisdiction of the Wetlands Protection Act. Therefore, the permit does not require communities to adopt a policy in areas not subject to the jurisdiction of the Wetlands Protection Act.

Comment:

Part II. A. 5. - Clarification was requested on whether municipalities must list all possible BMP's for a specific measure, or should they list the BMPs they are planning to use.

Response:

Municipalities should list only the BMPs they intend to implement in their individual communities during the permit term.

**Part II. B - Minimum Control Measures**

Public Education and Outreach

Comment:

Educational material should be distributed to the entire community. If educational materials are included as "bill stuffers" then it is possible that renters and some business owners would not receive information.

Response:

EPA agrees with this comment. The required public education program must be implemented in the urbanized area, and an education program that reaches the entire community, rather than just homeowners, will be the most effective. In addition, in situations where a community is only partially in an urbanized area, EPA encourages communities to prioritize distribution of materials and if possible include the entire community rather than just the urbanized area. The permit does not require specific public education approaches, but leaves it to each small MS4 to define who is in its community and develop educational materials accordingly. EPA has developed some educational materials and will make them available.

Comment:

Request that the general permit specify that regulated MS4s must commit to at least one activity each year for public education and outreach, and public involvement.

Response:

The permit does not specify specific activities or the frequency of activities. It leaves the permittee the task of developing the materials or activities for the education and outreach control measure. The objective of the public education measure is to both provide information about the impact on water quality from storm water and to provide information regarding what steps the public can take to reduce pollutants in storm water. EPA does not believe that one activity over the course of a five year permit will meet the objective of the minimum control measure.

Public Involvement & Participation

Comment:

Public involvement should be encouraged enthusiastically. The formation of a storm water management committee is a great step toward more involvement. Caution is given that if a committee is formed, any interested individual should be welcome to participate. The committee should not be limited to people who

might be selected by community officials or department heads.

Response:

EPA agrees. Public involvement should include opportunities for all in the community who wish to participate to be able to do so. Part II. B. 2(b) of the draft permit provides examples of public involvement. This section has been clarified to express that intent.

Additionally, Parts III, IV, and V which have similar language, have also been clarified.

Comment:

The language should clearly state that a wide range of public participation activities are encouraged. The language of the draft permit could be restrictively interpreted to mean that public participation encompasses only those two activities.

Response:

EPA agrees. The language has been clarified to encourage a wide range of activities.

Illicit Discharge Detection and Elimination

Comment:

Enforcement procedures available to a town are limited by state law. Enforcement powers of a town are even more limited against a state agency. There is no effective mechanism available to a community to enforce violations. Some enforcement authority should be incorporated into this permit to assist communities in such circumstances.

Response:

A storm water advisory committee assisting MADEP has been developing model bylaws for use by small MS4s, including a specific bylaw prohibiting illicit discharges (i.e. discharges that are not composed entirely of storm water) to a small MS4. It is MA DEP's expectation that the model bylaws will be available for use by communities in the Spring of 2003.

Consistent with a municipality's authority under M.G.L.c. 40, the bylaw may provide for the assessment of penalties of up to \$300 for each offense under s.21 and/or the use of non-criminal disposition provisions in s.21D (the so-called "ticketing" statute). While a state agency may be immune from a municipal regulation that would prevent or interfere with the performance of an "essential governmental function" of that agency, a bylaw that prohibits a state agency from making illicit discharges to a small MS4 is not a substantial barrier to a state agency's ability to carry out its essential governmental function. Instead, the bylaw is intended to ensure that the state agency carry out its governmental function in this context (i.e. when it results in a discharge to the small MS4) in a manner that complies with federal and state statutes and regulations. The issue of state immunity from municipal regulation is more relevant in cases where a local bylaw (e.g. a zoning bylaw) prohibits a state agency or state authority from siting a facility, the operation of which is directly related to an essential governmental function identified in the enabling legislation of the state agency or state authority. That said, there may be circumstances where a small MS4s authority is constrained in some fashion by state law. The permit has been changed to be clear that development regulatory mechanics and enforcement of requirements must be met to the extent allowable under state law.

Comment:

Part II. B. 3(a). This requirement is contradictory. The permittee is required to develop a storm sewer map but the mapping is to be based on existing information. Requiring a map relying only on existing information would produce an incomplete map.

Response:

The mapping requirement is to map all outfalls. A permittee should START with existing information. Existing information may need to be verified and supplemented with field surveys. The language regarding mapping has been clarified.

Comment:

The term sewer system should be clarified in Part II. B.3 (c) (iv).

Response:

This section refers to the separate storm water system. The language has been clarified.

#### Construction Site Storm Water Runoff Control

Comment:

Is it possible to augment the definition to include any activity resulting in land disturbance and not limit it to construction activities?

Response:

The regulatory language regarding this minimum control measure states “ ... to reduce pollutants in any storm runoff to your small MS4 from construction activities that result in a land disturbance of greater than or equal to one acre..” Although the regulations limit this control measure to land disturbance due to construction related activities, a municipality may choose to include other types of land disturbance activities for regulations within its storm water management program.

Comment:

Toxic controls, such as provisions for refueling, storage of fertilizers, solvents etc. should also be required at construction sites.

Response:

The regulations (40CFR 122.34(b)(4)(ii)(c)) describe minimum measures to be included in the storm water management program. A small MS4 may require additional controls at construction sites if it wishes to do so.

#### Post Construction Storm Water Management

Comment:

Is the program to address storm water runoff restricted to only that runoff entering a municipal storm water system, or does it apply to storm water runoff directed to a water body?

Response:

The small MS4 storm water program deals with runoff into the municipal system. However a small MS4 could supplement its program with specific requirements that could serve to reduce storm water runoff going directly into a water body. For example, the municipality could require redevelopment and new development to minimize impervious surfaces or maximize open space.

Comment:

Part II. B.5(a); this requirement could be more proactive by requesting that communities adopt an ordinance or other regulatory mechanism that would prohibit any increase in post construction runoff volumes or rates.

Response:

EPA has not made that a permit requirement. The permit reflects the regulations, which provide a great

deal of flexibility for small MS4s to develop a storm water management program that best suits their needs. While permittees are free to adopt such regulations if they wish, EPA does not believe it is advisable to require all permittees to take this approach.

## Good Housekeeping and Pollution Prevention in Municipal Operations

### Comment:

Part II B.6(b); Recreational areas such as municipal golf courses and school playing fields should be added to the list with parks and open space.

### Response:

These examples have been added to the list of areas to consider in evaluating municipal operations.

### Comment:

Part II. B. 7 - Efforts to foster cooperation should be expanded to include any entity regulated under Phase II.

### Response:

Cooperation is encouraged. EPA has not mandated cooperation between regulated entities.

### Comment:

A watershed association suggested language in the permit that supports cooperation with other entities. Also, the association also requested language that directs the permittee to seek work sharing opportunities with other entities.

### Response:

The permit contains a recommendation for communities to cooperate. EPA cannot "require" communities to work with other entities within the limitations of this permit. The requested language has not been added to the permit.

### Comment:

The following comments were received regarding Part II. B. 8

- ▶ Efforts to recharge and infiltrate storm water are sound policies and the inclusion of the provisions is applauded.
- ▶ Massachusetts section requires the permittee to consider opportunities for ground water recharge and infiltration in the implementation of the control measures. Is this stated wrong? It is our understanding that the storm water program was a water quality program not a water quantity program. This requirement places a financial burden on communities, which we do not believe is allowed by federal law.
- ▶ A comment letter recommend that the wording be changed to reflect the fact that the standard for examining and implementing the measures should be based on the suitability of the area for recharge. The letter also requested that a permittee be required to explain fully and specifically its reasons for not implementing recharge and infiltration control measures.

### Response:

The language in Part II. B. 8. has been modified to more clearly express expectations. Similar modifications were made to Part IV. B. 9, and Part V. B. 9. One comment stated that the storm water program is not a water quantity program. On the surface this statement is true, however EPA believes that when the quantity of water is insufficient in a watershed to support aquatic life, it becomes a water quality issue. Infiltration, when appropriate is one method which can contribute to water quality improvements.

The comment regarding financial burden did not provide sufficient information for EPA to respond to the

assertion that evaluation of infiltration opportunities creates a financial burden.

**Program Evaluation Part II. C.**

(Please note that Program Evaluation is now in Part II.D of the final permit. Similarly, it is now in Part III.D, Part IV.D and Part V.D)

**Comment:**

Part C. 1. The provision to evaluate compliance of the storm water management program is not developed. Does this evaluation get submitted to EPA and DEP or is it an internal check on progress that may or may not produce a written evaluation? Are there opportunities for public involvement and comment on the process and final evaluation? Does a community have to establish criteria and a ranking system to use to assess and evaluate compliance and progress?

**Response:**

The permittee must evaluate its program and assess how it meets the conditions in the permit. The assessment is submitted as part of the annual report. Permittees must provide opportunities for public involvement in both the development and implementation of the storm water management program. Permittees may wish to make their annual reports available to the public prior to submission. A community does not have to establish a criteria and ranking system. They should evaluate their progress based on information submitted as part of the NOI and efforts towards meeting defined measurable goals.

**Comment:**

Part II. C. 2(c)(i) - Will EPA or DEP provide guidance on what it means to be cost prohibitive? Will the benefits gained by the implementation of a BMP be weighed as well as the costs of a BMP?

**Response:**

EPA does not have a specific formula for determining when an item is cost prohibitive. Permittees must make every effort to comply with the terms and conditions of the permit. If a permittee implements a BMP which is not effective to ensure compliance, the permittee must evaluate other options. In the course of evaluation, if a permittee believes that the cost to implement a different BMP is beyond the means of the community, the community should submit to EPA and the state agency a cost benefit analysis. The community should provide evidence which supports an assertion that a BMP is prohibitive. EPA will review the evaluation and respond.

**Record Keeping**

**Comment:** The types and details of the records required by the permit should be specified.

**Response:** The permittee should keep records detailing the development of its storm water management program, all information used to complete its notice of intent, any monitoring data and any inspections reports.

**Reporting**

**Comment:**

A standard reporting form should be developed.

**Response:**

At this time, there is no standard form. However one may be developed in the future in cooperation with MADEP and NHDES.

**State Permit Conditions**

Comment:

Part II. G. Suspensions and revocations should be across the board and not on a per agency basis.

Response:

The general permit is being issued in the Commonwealth of Massachusetts as both a federal permit and a state permit under separate authorities. Please refer to previous comments. Each agency may act independently to suspend, revoke and enforce the provisions of the permit.

Comment:

A comment recommended that language contained in Part II. A. be included in Parts IV.A and VA.

Response:

The requirement of Part II. A refers to a municipality's ability to use the authorities of the Wetlands Protection Act to implement parts of its storm water management program. The non-traditional municipalities such as universities and the transportation sector do not have the legal authorities to implement the Massachusetts Wetlands Protection Act. Therefore, the condition was not added to those portions of the permit.

Comment:

A comment recommended that the language of Part II. B. 8 be included in Parts IV. B and V.B.

Response:

Language similar to Part II. B. 8 has been included in Parts IV and V.

Comment:

A comment recommend that mapping requirements for permittees covered under Part V, transportation, be extended from just the outfalls to the entire storm water conveyance system including catch basins, drainage ditches and curbing.

Response:

The mapping requirement is based on 40CFR 122.34(b) (3)(ii)(a) which requires identification of all outfalls and receiving waters. A requirement to submit a map of the entire storm sewer conveyance system is beyond the scope of the regulations.

Comment:

The transportation agency should expedite a storm sewer system map with available information and then prioritize the mapping of sensitive areas.

Response:

Additional examples of areas to be considered as priorities have been added to Part IV B. 8 and Part V B.8.

Comment:

Part V. B. 4 (f) This requirement could be strengthened to include making an effort to notify the public early in the planning stages.

Response:

All municipalities are encouraged to include many opportunities for public participation. Some transportation agencies also have public notice obligations for their own agency activities. When an agency has public participation activities as part of standard agency procedures, those public participation activities can be used as part of the public participation requirements of the general permit.

Comment:

Part V. B.6(b) There should be maintenance activities associated with roadways and drainage systems added to this requirement.

Response:

Roadway drainage systems has been added to the areas subject to good housekeeping.

**Part VI - Standard Conditions**

Comment:

Part VI. F - Duty to provide information. It would be helpful if the local authority also had the power to require the permittee to provide relevant information required to determine compliance with the permit.

Response:

The conditions contained in Part VI are based on the conditions contained in 40 CFR § 122.41 - conditions applicable to all permits. The language has not been changed. The duty to provide information refers to a permittee's responsibility to provide information, within a reasonable time, to EPA when information is requested. The information is used by EPA to determine among other things compliance with the permit. It is not a local authority's responsibility to determine if a permittee is in compliance with EPA's permit. The ability of local authorities to require information to be provided would depend on state and local law.

**Part VII - Definitions**

Comment:

Request the addition of definitions for "New Storm Water Discharge and "Notice of Intent". Request revisions of the definitions for "runoff coefficient" and "wetlands".

Response:

The definition of runoff coefficient contained in the permit is the same as the one found at 40 CFR 122.26(b)(ii). No change has been made.

The definition of wetlands contained in the permit is the same as the one found at 40 CFR 122.2. No change has been made.

Definitions for large municipal separate storm sewer system, medium municipal storm sewer system, and municipal storm sewer system have been added to the permit.

The description of a Notice of Intent is in Part I.E. of the permit. A definition has not been added.

The term New Storm water discharge is not used in the permit in a manner such that it requires a definition.

**Part VIII - Reopener**

Comment:

This section should also include some language pertaining to the process by which a permit can be modified should it be found that a permitted discharge has the reasonable potential to cause or contribute to a violation of a water quality standard. In many cases, it will likely be the local Conservation Commission which will spot such problems. It would be helpful if the procedure to report a potential violation were included in the permit documentation.

Response:

This section describes when EPA may require a municipality to apply for an individual permit or an alternative general permit. A general permit is not modified if one permittee is in violation of a permit condition. The permittee may be required to get an individual permit, or may be subject to some type of enforcement order. Situations of non-compliance should be reported to EPA's Water Technical Unit. The Water Technical Unit is located in the Office of Environmental Stewardship, One Congress Street-Suite 1100 (SEW), Boston, MA 02114.

## **General Comments**

### **Comment:**

There are significant differences between the requirements established for Massachusetts and New Hampshire (the permit application fee is one example). It is not clear why there is such a disparity between states as to the level of environmental permitting process, especially given the fact that the NPDES program is Federal, and both New Hampshire and Massachusetts are “non-delegated” states. The explanation for this disparity should be included in the NPDES General Permit.

### **Response:**

Massachusetts and New Hampshire have different state laws, and therefore each state requested certain unique conditions in order to satisfy their respective laws. In no case was the permit for each state made less stringent than would otherwise be required by federal law.

### **Comment:**

The Storm Water Program as presented does not provide clear goals and objectives. Municipalities are unable to know what is expected and what EPA is looking for. As a result a considerable amount of time and resources will be utilized in trying to figure out, on their own, what the EPA regulation means and what is an appropriate response to the rule. The time spent and resources used would be better spent implementing a structured program.

The program as outlined in the draft permit leaves municipalities vulnerable to enforcement measures if they guess wrong in developing and implementing a program that does not meet unspecified EPA or DEP expectations. It is unfair that a municipality should be penalized for the lack of clear direction regarding what is required.

The program presented does not provide an equal playing field for municipalities. An example of this is that two adjacent communities, who have similar populations, commercial basis, road miles, etc., can submit different programs. The programs submitted can vary greatly in terms of cost and approach.

The program as presented limits the ability of Highway Associations and other organizations to instruct their members using consistent principles and regulatory expectations.

### **Response:**

The Phase II storm water program is designed to be flexible. Municipalities are expected to examine where they are as far as storm water management is concerned. They need to assess what is being done and what needs to be done. The permit reflects the various minimum requirements outlined in the regulations at 40 CFR 122.34. EPA does not expect MS4s to “guess” what BMPs or measurable goals they will be achieving. EPA expects communities will develop their programs based on the characteristics of the community, the severity of pollution problems, the level of storm water management already in place, and so forth through a thoughtful evaluations and decision making process..

Two similar communities can submit two different programs. However, they both must contain the minimum measures described in the permit, and explain how they will implemented.

Highway Associations and other organizations are free to provide guidance to their membership. EPA strongly recommends that the following guidance be used in development of storm water management program:

1. EPA's menu of BMPs - Available at :  
<http://www.epa.gov/npdes/stormwater/menuofbmps/memu.htm>
2. EPA's measurable guidance - Available at :  
<http://www.epa.gov/npdes/stormwater/measurablegoals/index.htm>
3. EPA's Manual - Storm Water Phase II Compliance Guide (EPA/833-R-00-002, March

2002) - Available at <http://www.epa.gov/npdes/pubs/comguide.pdf>

Comment:

The permit presented has specifics contained in the draft permit that eliminate the requirement for communities to develop a program that is best suited for their needs. This results in a contradiction of what has been explained and what is stated in the law.

Response:

It is unclear which specifics contained in the permit limit a community's ability to develop a program best suited for it. EPA has not identified specific BMPs or measurable goals in the permit. EPA has laid out minimum expectations and provided guidance as to where a community should focus efforts.

Comment:

Extend the program to private colleges and universities.

Response:

Private colleges and universities are subject to the storm water program if they have a construction project greater than an acre or operate an industrial activity defined at 40 CFR 122.26 (b)(14). The Phase II storm water program by regulation applied only to "municipalities" as that term is defined in the regulations and therefore cannot be extended to private entities. On a case by case basis, EPA could determine that storm water controls may be necessary for a non-municipal entity if it is deemed to be significant contributor of pollutants to waters of the U.S.

Comment:

Require posting of all outfalls that are contaminated with Public Health Warning signs until tests show they are clean.

Response:

The permit does not contain any monitoring requirements. The suggested condition implies that a monitoring program exists at a municipality. Since the permit does not require a monitoring program, the permit has not been changed to require this type of posting.

Comment:

Recommend that all outfalls be posted with a unique identifier.

Response:

The permit has not be changed to require this. However, identification of outfalls is informative and would be beneficial to a municipality. The public could encourage their communities to incorporate such a practice into their storm water management programs.

Comment:

Comments were submitted on the Massachusetts storm water policy.

Response:

The comments on the storm water policy were noted by the MA DEP. They, however, are not really relevant to the small MS4 general permit. Comments raised on the Massachusetts policy will be addressed separately by MA DEP to the entity which made the comments.

Comment:

One comment requested clarification in identifying what municipal activities are industrial activities subject to storm water permitting.

Response:

Industrial activities defined at 40 CFR 122.26(b)(14) that are owned or operated by a municipality are subject to permitting under 40 CFR 122.26(c), but are not covered by the small MS4 general permit.

Information concerning permitting requirements for storm water discharges from industrial activities that are owned by a municipality is available on Region 1's website.

## **Response to Comments**

### **Part IX - Massachusetts 401 Water Quality Certification Requirements**

Prepared by Massachusetts Department of Environmental Protection

#### Comment:

The introductory paragraph to this section includes a listing of the order in which conditions added to a permit are to be presented. It, however, fails to include any conditions which may be added as a result of permits issued under local regulations and ordinances which are required to be adopted as part of the Phase II program as outlined in Part II, Section A.4.c of the draft permit.

Some towns obtain their municipal water supply from wells and not surface water.

Do the public water supplies referenced in this section include all public water supplies or just surface water supplies?

#### Response:

MADEP would urge a community to evaluate all priority resources which could be affected by storm water runoff including ground water recharge areas as well as tributaries to surface water supplies.

#### Comment:

The 401 certification should contain language on infiltration of storm water for recharging ground water. Part B. of the certification should require compliance with the Massachusetts storm water policy town-wide.

#### Response:

The final permit has specific language regarding recharge and infiltration. The permit does not go so far as to require adoption of the storm water policy town wide, however a municipality has the ability to develop local by-laws to make the storm water policy apply throughout the municipality.

#### Comment:

A requirement that measurable goals be established for reducing the effective impervious area discharging to the MS4 should be included in the § 401 Certification. Permittees should be required to estimate the current effective impervious area discharging to the MS4 and to establish quantifiable goals for reducing the area's effective imperviousness.

The permittee should also be required to evaluate alternatives for infiltrating storm water runoff entering the MS4 from all sources and to develop incentives and/or requirements for achieving reductions in the current effective impervious area discharging to the MS4.

#### Response:

The permit requires a municipality to consider opportunities for recharge when implementing the minimum measures. The focus on recharge could lead a municipality to establish a measurable goal concerning impervious area. A specific requirement to include impervious area as part of a measurable goal has not been added to the 401 certification requirements.