

# WATER QUALITY CONTROL DIVISION GUIDANCE FOR ASSUMING PERMIT LIABILITIES

10/02

The new Phase II regulation covers stormwater drainage from some municipalities. The term “municipality” includes a city, town, county, district, association, or other public body created by or under State. For the purpose of this regulation, government entities other than cities, towns and counties are defined as “non-standard municipalities”.

The Phase II stormwater regulation allows for several different options in permit coverage, application, and compliance for the municipal stormwater permits (MS4\* stormwater permits) administered in Colorado. The Colorado Phase II Municipal Guidance, available from the Water Quality Control Division’s (the Division’s) web page at <http://www.cdphe.state.co.us/wq/permitsunit/wqcdpmt.html>, provides some discussion of what these options are.

This document is intended to provide further details for the specific case of one municipality assuming municipal stormwater permitting responsibilities and liabilities for another municipality’s MS4 stormwater discharges, usually a non-standard municipality such as a park or school district. In this case, the municipality that is having its permitting responsibilities assumed would not need to apply for or obtain a permit, pay fees, or submit reports to the Division. However, they would likely still have to perform certain measures on the behalf of the permitted municipality that was assuming the liability, to ensure compliance with that municipality’s permit, as discussed below. In this scenario, if the permit requirements were to be violated, the permitted municipality that was assuming responsibilities would be liable. However, intergovernmental agreements can be developed to cover the situation so that if penalties were assessed, the non-permitted municipality would be obligated to reimburse the permitted municipality.

For Phase II, the Division foresees that all of the municipalities regulated for MS4 stormwater discharges in Colorado will be covered under general permits. All municipalities that have received notification from the Division will be required to have applied for coverage for their jurisdiction by March 10, 2003. However, the regulation does allow for this coverage to be obtained by another entity. The procedure to exercise this option is discussed below.

## **Determining if a municipality will assume permitting liabilities for another municipality**

In order for this option to be exercised, both municipalities must agree to the arrangement. The Division only foresees this option being pursued for cases when a designated non-standard municipality, such as a school or park district, is located within a city or county that is interested in assuming permitting responsibilities for the non-standard municipality.

This option can also be pursued for non-standard municipalities located within permitted Phase I municipalities (Denver, Aurora, Lakewood, Colorado Springs). However, in this case, the designated non-standard Phase II municipality would have to meet the conditions of the Phase I individual permit that has been issued to the city that was accepting permitting responsibilities. In addition, the more extensive Phase I application requirements, except as specified in Regulation 61.4(3)(d)(v), would have to be completed by the non-standard municipality.

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\* MS4 – Municipal Separate Storm Sewer System Permit

A municipality interested in the option of one municipality assuming responsibilities for another municipality's stormwater permitting should first instigate a dialog between the two parties. The remainder of this guidance provides a discussion of the various issues that must be addressed in such a scenario. The Division highly recommends that the two parties enter into some type of formal agreement as soon as possible so they can begin working on developing the proper application materials.

### **How would assuming liability for another municipality affect requirements under the Phase II permit?**

As per the Division's regulation, the main requirement of this general permit will be for the permitted Phase II municipality to develop and implement six stormwater management programs, or minimum measures. For most cities and counties, these minimum measures will apply in their entirety and they must develop complete programs as described in the Colorado Phase II Municipal Guidance. However, for non-standard municipalities, the scope of the municipality's authority will possibly limit many of the responsibilities under the required permit programs. For example, a school district will likely not have authority over development that is not owned and/or operated for that district. Therefore, the construction and post-construction programs will not need to include procedures for managing stormwater at projects that are not the district's.

For the remainder of this document, the following terms will be used: the non-standard municipality for which stormwater Phase II permitting responsibilities will be assumed will be referred to as the "**non-standard municipality**," and the city or county that is assuming the permitting responsibility will be referred to as the "**permitted city/county**."

A **permitted city/county** assuming permitting responsibility for a regulated **non-standard municipality's** program will have to explicitly include in the program the applicable portions of the six minimum measures for the **non-standard municipality's** jurisdiction. Because the **permitted city/county** will be the permit holder, they are therefore also liable for ensuring that these measures are implemented. In most cases, the **permitted city/county** would require assistance from the **non-standard municipality** in completing these measures.

Since the **non-standard municipality** will be within the jurisdiction of the **permitted city/county**, most of that **permitted city/county's** six minimum measure programs will probably apply within the **non-standard municipality's** jurisdiction without modification. However, it is the Division's expectation that for pollution sources relatively unique to the non-standard municipality's jurisdiction, additional measures will have to be included to specifically address those items. Below is a summary of the program areas that will likely have to be developed to specifically address stormwater management in the **non-standard municipality's** jurisdiction.

- 1) Public Education and Outreach:  
The Public Education program must include the population and expected pollution sources for the **non-standard municipality**. This would include developing different program elements if the population and/or pollution sources were significantly different than the **permitted city/counties**.
- 2) Public Participation/Involvement  
The Public Participation/Involvement program must include outreach to the population of the **non-standard municipality**.
- 3) Illicit Discharge Detection and Elimination:  
The program must be expanded to address discharges from the MS4 of the **non-standard municipality**.

4 & 5) Construction and Post Construction:

These programs must be fully implemented and enforced within the jurisdiction of the **non-standard municipality**. The Division foresees that in most, if not all, cases the **permitted city/county** will already have to include oversight of construction activities within the **non-standard municipality's** jurisdiction in their programs. Therefore, it is likely that additional measures will not have to be taken for these programs unless the **permitted city/county** does not have the legal authority, as discussed below, to implement/enforce the program in the **non-standard municipality's** jurisdiction. In such case, agreements as discussed below may have to be made to grant such authority.

6) Pollution Prevention/Good Housekeeping for Municipal Operation:

Applicable operations (see the Colorado Phase II Municipal Guidance for a definition of activities covered) of the **non-standard municipality** must be included in this program.

In addition, if the **permitted city/county** does not have legal authority to implement and enforce any of these programs within the jurisdiction of the **non-standard municipality**, agreements must be made granting this authority, or otherwise allowing for full implementation and enforcement of the programs. This includes granting all authority (if not already allowed for) for the **permitted city/county** to have enforcement authority over the **non-standard municipality** for programs that require an enforcement aspect. Also, although the **non-standard municipality** will not be the permittee, it is expected that the **non-standard municipality's** staff will implement many of the permit requirements. However, the **permitted city/county** will remain liable if the necessary measures are not taken.

When the **non-standard municipality** will perform one or more of the program area components on behalf of the **permitted city/county**, the Phase II MS4 application requires that an Intergovernmental Agreement (IGA) or other type of formal notification signed by representatives of both parties must be submitted, confirming that the alternate entity (the **non-standard municipality**) commits to performing the specified activity(s) on behalf of the permittee (the **permitted city/county**).

If a formal legal agreement addressing the specifics of relationship between the two parties has not been reached at the time of application, a document certifying the intention to develop a full agreement, signed by representatives of both parties, must be submitted.

**What exactly do municipalities need to do to exercise this option?**

The **Permitted City/County** must:

- 1) Begin developing the formal agreement, application materials, and programs.
- 2) Submit one application for covering MS4 discharges from the **permitted city/county** and the **non-standard MS4** the by March 10, 2003. The application must address how the six minimum measures will apply to both jurisdictions. The application must also address legal authority and enforcement issues discussed above. Specifically, the application must indicate that the **permitted city/county** has legal authority to administer the programs.

The **Non-Standard Municipality** must:

- 1) Work with the **permitted city/county** in developing the formal agreement, application materials, and programs. The **non-standard municipality** is not required to submit a separate application.

- 2) Assist the **permitted city/county** with implementation of the program areas and comply with applicable requirements placed on the **non-standard municipality** by the **permitted city/county**.

If a **permitted city/county** does not agree to assume permitting responsibility for a designated **non-standard municipality**, that **non-standard municipality** must apply for their own permit coverage by March 10, 2003.

**What if two regulated municipalities want to cooperate, but one does not want to assume liabilities for the other?**

This guidance only addresses the concept of a municipality assuming all liability and permitting responsibility for another municipality. However, note that if a municipality decides to obtain its own permit coverage instead of having another municipality assume liability, the Division still strongly supports cooperation between permit holders in complying with permit requirements. Part 61.8(11)(a)(vii) of the regulation allows for a permittee to rely on another entity to implement all or part of a minimum control measure to comply with the permit. Under this scenario, the permittee must still make sure that the requirements of the minimum control measure are met and is liable if they are not. If the entity that the permitted MS4 operator is relying on to carry out the requirements of the minimum control measure fails to meet the permit requirements, it is the permittee's responsibility to then find alternative means to assure compliance.