



## Board Study Session Memo

**To:** Board of Directors  
**From:** Lanae Raymond, WQ Program Manager  
**Date:** March 19, 2013  
**Re:** MS4 Permit Renewal Update  
**Board Meeting Date:** March 27, 2013

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### Topic

This Study Session will provide the Board with an understanding of the MS4 Permit renewal process that is being undertaken with the Colorado Department of Public Health and Environment, WQ Control Division, Permits Group (the Division). The MS4 General Permit was administratively extended a year from the original Permit renewal date of March 2013, and the Division anticipates having the permit completed no later than January 2014 for issuance in February 2014, for an effective Permit date of March 10, 2014 (see timeline chart below).

### Background

As previously covered in a Study Session in July 2012, SEMSWA provided a completed Questionnaire to the Division in October 2012 to document compliance with the MS4 Permit. One of the Division's stated goals for the Questionnaire was to gather information to begin the development of a clear and enforceable renewal permit. The Division believed that some permit requirements were unclear in the current Permit, and that each MS4 Permittee had differing interpretations of the Permit requirements. The Division has stated that it wants to craft a permit with clear expectations, and stated standards of performance termed "non-numeric effluent limits" that are enforceable during their audits of MS4 programs.

Towards this end, the Division has laid out a timeline for this renewal process during 2013 (see table below), and established a series of "pre-public notice" MS4 Stakeholder meetings with the purpose of having real-time dialogue about key permit items they would like to see included in the Permit. The Division has clear guidelines, set forth in Regulation 61 (this regulation allows them to issue General Permits like the MS4 permit), that determines their public process for permit renewal. The Division has added several additional Stakeholder sessions prior to public notice because the MS4 Permit is a complex permit and several factors intersected to influence the permit, including:

- The National Resource Council Report on 'Urban Stormwater' published in 2008 with scientific data to support the contention that "urban stormwater runoff is a significant source of pollution to streams, lakes, etc.", which the EPA has used as the nexus for their new Rulemaking document expected to be out in draft form in June (discussed below).
- There has been a significant amount of Case Law surrounding Phase II permitting across the U.S., which has allowed subsequent clarification of what elements have withstood judicial review.
- This is the first term that the Division performed Permit *compliance*, meaning audits, and they quickly identified deficiencies in deciphering the Permit intent. They determined these audits were not the best way to manage the permit.

The Division considers these 'up front' Stakeholder meetings to be the best mechanism to be as informed as possible about issues directly from the MS4s who have worked under the Permit for the last 10 years, as well as provide a chance for the Permittees to understand the Division's intent as they focus on making the Permit more enforceable.

Anticipated Dates	Proposed Action by the Division
December 2012 to March 2013	<u><b>Stakeholder Meetings</b></u>
March 2013	<u><b>Begin drafting Permit language</b></u>
May 2013	<u><b>Pre-Public Notice Meeting (if deemed necessary)</b></u>
July 2013	<u><b>Public Notice- 60 day comment period on permit conditions (typical is 30 day comment period for permits)</b></u>
August 2013	<u><b>Public Meeting</b></u>
September 2013	<u><b>End Public Notice</b></u>
October 2013 to December 2013	<u><b>Draft Response to Comments</b></u>
February 2014	<u><b>Issue Permit and Permit Certifications</b></u>
February 2014	<u><b>Appeal process for Permit (30 day process)</b></u>
March 10, 2014	<u><b>Permit Effective</b></u>

As a point of clarification, this State MS4 Permit renewal process is completely separate from the EPA's Rulemaking effort that has been in process since 2009. Coincidentally, the EPA's Draft Rulemaking document is expected to be coming out in June, and will require extensive review and comment during the Public Notice period. There is a very active group, the Colorado Clean Water Coalition, which has formally questioned some of the more economically impactful components of the expected Rulemaking and is taking their case to local elected officials and legislative delegations here and in Washington, DC. It is anticipated that this group will be active until the Rule becomes final, tentatively scheduled for December 2013. However, based on the history of this particular EPA Rulemaking document, that date is very optimistic. For this reason, the Division feels that the MS4 Permit renewal process will not be impacted by the EPA Rulemaking schedule, and they anticipate being able to re-issue the MS4 Permit prior to any EPA Final Rule being made effective. This means that the elements included in the final EPA Rule will not affect our MS4 Permit until the next permit term, anticipated to begin March 2019.

The topics covered during the MS4 Permit renewal Stakeholder meetings have included:

- Roadway Projects – post-construction WQ BMPs
- Design Standards and standards for Operations and Maintenance for Post-Construction WQ BMPS
- Construction Site Controls: plan review, checklists, inspection frequency, enforcement, and training
- Municipal Operations
- Enforcement Response procedures for IDDE, Construction Site and Post-construction controls
- Education and Outreach
- Updated Program Description Document
- Regulation 85 nutrient education and outreach.

- Coordinating 303d list of impaired waters and MS4 permittee program goals to include monitoring and sampling of outfalls associated with 303d list stream segments.
- Coal-tar based Asphalt Sealant.

## Discussion

SEMSWA staff have been active since December 2012 in the permit renewal process, attending monthly Division meetings and weekly Colorado Stormwater Council (CSC) committee meetings. Our intent is to assist the Division with drafting a permit that can be implemented with very little or no change in SEMSWA resource needs, even with more stringent requirements. What has become obvious in the discussions of audit findings with the Division is that selected MS4 programs have not met the existing Permit intent, and without enforceable requirements, will not ever meet them. For SEMSWA, this means a developer or contractor will be held to MS4 permit standards in our service area but not necessarily held to them in selected other jurisdictions. Our goal is to assist the Division in drafting Permit language that provides minimums in each program area that bring other programs up to a level that may, with time, mitigate some of the customer service inspection and permitting comments noted in the SEMSWA 2011 Survey.

All meetings with the Division have occurred with **Nathan Moore**, a Unit Manager in the Permits Section of the Clean Water Program (see attached WQ Control Division Organizational Chart), along with his staff consisting of **Michelle DeLaria**, Primary MS4 Permit Writer, and **Lisa Knerr**, who is dedicated 20% to the MS4 program, specifically audits. The SEMSWA Water Quality group is extensively involved in the comments preparation, specifically Ashley Byerley as the Chair of the CSC Technical Review committee working on language for Post Construction, Dan Olsen as a member of the CSC Construction committee working on language for Construction, and Lanae Raymond on several other CSC committees providing input on language for Education and Outreach, IDDE, and Municipal Operations.

The Division also convened a focused group meeting to address the larger, more complex MS4 issues in a smaller group setting, including roadway post construction requirements, collaboration across MS4 jurisdictional boundaries, and consistency issues involving a Contractor having both a State Construction Discharge Permit and an MS4 jurisdiction Grading and Erosion Control Permit. These special meetings have been attended by a select group of CSC members (including SEMSWA) and included **Janet Kieler**, the Permit Section Manager and Nathan's boss, Janet's boss **Dick Parachini**, Clean Water Program Manager, and Dick's boss **Steve Gunderson**, the WQCD Manager. Access to these Division managers allows for important dialogue about MS4 issues, and these meetings are anticipated to continue at least through the WQ Forum Retreat in August, and most likely the rest of 2013 as we go through the Permit renewal public process.

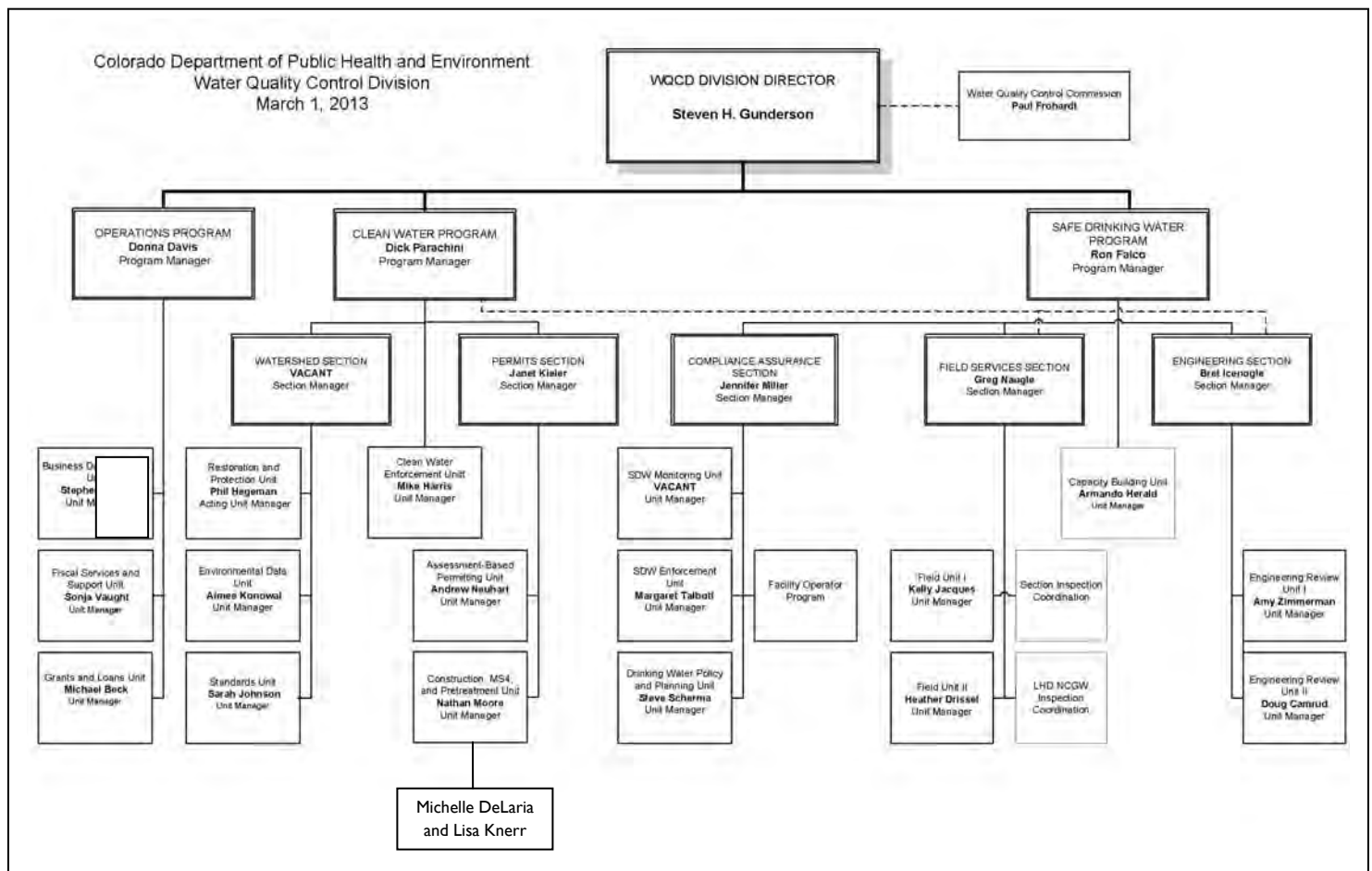
Below is a matrix of the meeting topics the Division identified as permit elements requiring auditable and enforceable non-numeric effluent limits in their attempt to make the Permit more favorable for compliance as well as more uniform across MS4 jurisdictional boundaries (a SEMSWA goal). In some instances these are technical effluent limits that are not readily understood by those not dealing directly with the Permit requirements. Hopefully it is apparent that an attempt is being made to provide a starting point for the Division and the MS4s to negotiate the non-numeric effluent limits. With the Permit language now in the stage of pen to paper, our opportunity to provide an alternate or more attainable non-numeric effluent limit requirements than has been presented by the Division at Stakeholder meetings, is at its highest.

Topic	Division Concept	Best Guess Permit Implication of Division Concept
Roadway Projects	100% WQCV treatment for new roadway & WQCV for additional pavement	<p><u>"Pavement Management"</u>(routine maintenance): <i>Exempt New Roadways &gt; 1 acre: Provide WQCV for project</i></p> <p><u>Expanded Roadways</u>: <i>Tiered treatment for escalating amount of impervious area.</i></p> <p><u>Parking Lot</u>: <i>Same requirements as roadways.</i></p>
Post Construction Design Standards	100% WQCV for new development & 100% WQCV for project for redevelopment, unless the site can be justified as a "constrained site"	<p><u>New Development &gt; 1 acre</u>: <i>Provide WQCV or WQCV equivalent structural or nonstructural controls</i></p> <p><u>Redevelopment</u>: <i>Tiered treatment for escalating amount of added impervious area.</i></p> <p><u>Exemptions</u>: <i>Ag, utility, routine maintenance, rural roadway construction and maintenance, emergency operations, pavement management projects, sidewalk and driveways, trails.</i></p> <p><u>Alternate BMPs</u>: <i>Allowed if shown to have comparable or better pollutant reduction abilities than WQCV for specific application.</i></p>
Post Construction long-term O&M	Design standards, plan review, construction verification	<ul style="list-style-type: none"> <li>• Addition of O&amp;M Plan to all post-construction BMP approvals</li> <li>• Include some type of 'as built' drawings, as simple as construction verification, to long-term O&amp;M plan</li> </ul>
Construction Site Controls	A Plan review process; Checklists; a minimum full site inspection frequency of 14 days; Enforcement Response Plan; training	<ul style="list-style-type: none"> <li>• All MS4s have a 'site plan' review requirement and a set of standards to evaluate site-specific BMPs for appropriateness</li> <li>• Frequency of 30 day full site inspections on all active sites(not including final vegetation phase or winter hiatus for some projects)</li> <li>• Enforcement Response Plan with adequate "tools" to deal with recalcitrant contractors and documentation of a 'return to compliance'</li> <li>• Provide listing of <i>available</i> training and syllabus of materials, for both internal staff and external contractors</li> </ul>
Municipal Operations	Required inspections; Secondary Containment for all bulk storage; prevent nutrients in runoff	<ul style="list-style-type: none"> <li>• Annual, documented inspection of all Facilities requiring Runoff Control Plans</li> <li>• Use facilities Spill Prevention Control and Countermeasures (SPCC) Plan to meet requirements for bulk storage</li> <li>• Add language to address Regulation 85 nutrient reduction requirements (section added to existing SOPs for each municipal operation)</li> </ul>
Illicit Discharge, Detection, and Elimination	Remove allowed non-stormwater discharges unless the discharge is permitted or has a Low Risk Guidance from the State.	<ul style="list-style-type: none"> <li>• Requires amendment to Ordinances/Resolutions that list any non-stormwater discharges.</li> <li>• All MS4's must have an accessible database to track discharges.</li> <li>• Permittees will be required to work with the Division to develop additional Low Risk of allowed discharges, to include building washing, charity car washes, and other infrequent and low pollutant discharges.</li> </ul>

Topic (cont.)	Division Concept	Best Guess Permit Implication of Division Concept
Public Outreach and Education	Specific # of outreach activities from a list developed by the Division	<ul style="list-style-type: none"> <li>All MS4s will select outreach activities from a list that can lead to localized and targeted jurisdictional focused items, with enough variability to encompass all outreach budgets.</li> </ul>
Program Description Document (PDD)	Update PDD, add detail to assist in audit, information immediately upon request	<ul style="list-style-type: none"> <li>Summary of how permit element being met</li> <li>Organization Chart for how each program is managed</li> <li>Documentation of program element implementation</li> <li>Known whereabouts of supporting documentation for audit</li> <li>Be able to be submitted to Division within 5 working days</li> </ul>
Nutrients (Regulation 85)	A Plan for outreach and an active distribution strategy for agricultural, industrial, residential, and commercial sources	<ul style="list-style-type: none"> <li>Add nutrient (phosphorous and nitrate) message to existing outreach materials, targeting commercial big box stores that sell fertilizer, commercial properties that apply fertilizer, golf courses, and multi-family residential that contracts for fertilizer.</li> <li>Can be done through industry associations like GreenCo for the landscape companies, CO Horse Council for horse properties, HOA management companies, etc.</li> </ul>
303d List Data Collection	Outfall Monitoring (Reg 61 includes monitoring for MS4 Phase 2 Permits, but State has not used it previously)	<ul style="list-style-type: none"> <li>Only 303d List of impaired segments need to be monitored</li> <li>Dry weather monitoring only; this means an outfall has a discharge that is NOT stormwater (that would be wet-weather discharge)</li> <li>Monitor for e-Coli and Selenium</li> <li>The discharge is greater than 5 gallons/minute</li> <li>Outfalls that are greater than 36" in diameter</li> <li>Minimum of 1 sample/year at those outfalls meeting above</li> <li>Minimum of 4 sample events during 5 year permit term</li> </ul>
Coal tar-based Asphalt Sealant	Prohibit use in MS4	<ul style="list-style-type: none"> <li>Taken off table in Stakeholder meetings; CSC is going to assist with a state-wide ban instead (other products exist that are cheaper and do a better job and are more readily available)</li> </ul>

## Next Steps

SEMSWA staff will work with the CSC committees to get materials to Michelle for possible inclusion into the Permit language. If the CSC committees are unable to come to a consensus on the materials, we will provide our own materials prior to April 17, a placeholder meeting date established by the Division in case the MS4 Permittees needed a 'listening session' by the Division staff. This 'listening session' will not have any Division agenda items but is anticipated to be attended by all Division staff up to and including Dick Parachini. After April 17<sup>th</sup>, there will be no activity until a possible Pre-Public Notice Meeting, if determined necessary by the Division since they had all directly-affected parties in the Stakeholder meetings. It is the Division's expectation that the Permit will be out for public review in July 2013. SEMSWA will comment on the Permit as well as participate in CSC comments.



#### Definitions:

**Non-numeric effluent limit:** a state standard of performance that allows an effective audit process by indisputably identifying a non-compliance with the Permit requirements.

**Post Construction WQ BMP:** a permanent water quality facility to treat stormwater runoff from impervious surfaces.

**Water Quality Capture Volume (WQCV):** the stormwater runoff retention capacity of a post-construction BMP that is designed to capture and treat, at a minimum, 80% of the most frequent occurring storms, and partially treating larger events.

**Regulation 85:** a recent regulation to control nutrients in discharges to state waters, including phosphorous and nitrogen, for point dischargers (wastewater treatment plants), regulated non-point sources (MS4s) and non-regulated non-point sources (agriculture, for example). This regulation includes an Education component to be covered in MS4 Permit.

**Coal Tar based asphalt sealant:** Contains poly aromatic hydrocarbons that are considered probable carcinogens and does not stay where it is applied so is a runoff pollutant. There is a safer substitute, asphalt emulsion sealant. This will not be addressed in the MS4 Permit because the CSC has offered to assist in a state-wide ban of the use.

**303d List of impaired water bodies:** a listing compiled by the Division to highlight water body segments that need further study and possibly a TMDL.