

National Topic: Small Municipal Separate Storm Sewer (MS4) Permit Requirements

Background

Introduction

This permit review checklist is intended as a tool for reviewing small MS4 permits to determine their consistency with the Phase II stormwater rule, as modified by the [MS4 General Permit Remand Rule](#) (referred to as the “Remand Rule”), promulgated December 9, 2016 and effective January 9, 2017 (81 FR 89320). The permit review checklist, as well as the checklist companion guide (see [Appendix 1](#)), includes key considerations for determining whether certain provisions are present in the permit and for evaluating whether they are consistent with the requirements of the Phase II Rule, as revised by the Remand Rule. The use of the checklist is optional and is meant as a way to organize information and corresponding findings when evaluating a small MS4 permit. The checklist can be used for the review of any already issued or permit and/or can be used to complete the small MS4 portion of a Permit Quality Review (PQR).

This checklist does not create any laws or regulations and, to the extent it refers to laws or regulations, those laws or regulations govern. This document does not impose legally binding requirements. This checklist is not intended, nor can it be relied upon, to create any rights enforceable by any party in litigation with the United States or any other party. Any decisions regarding a particular facility will be made based on the applicable statutes and regulations. EPA and state decision makers retain their discretion to follow these or other recommended approaches on a case-by-case basis. The examples and related links are illustrative and not intended to be comprehensive. EPA may reissue or update this document at any time in the future with or without advance notice.

Important note about minimum federal requirements: The regulations at 40 CFR §122.34 specify minimum elements that must be addressed in a small MS4 permit. The permitting authority must develop permit terms and conditions that implement each required element in the regulations and state in clear, specific, and measurable terms what requirements must be met “to reduce the discharge of pollutants to the maximum extent practicable (MEP), to protect water quality, and to satisfy the appropriate water quality requirements of the CWA” (referred to in short form as the “MS4 permit standard” throughout this guide) and how compliance will be assessed.

General Instructions for Use of the Checklist

This checklist may be used to evaluate any small MS4 permit, whether it is a general or individual permit. The type of permit you are reviewing will influence the way in which you should assess the permit conditions. The table below highlights the differences between individual and general permits that should be taken into account.

For General Permits	For Individual Permits:
<p>Your evaluation will focus on whether the general permit, depending on the type of permit the state permitting authority has elected to issue and administer (i.e., either a Comprehensive General Permit or Two-Step General Permit), meets the minimum requirements for such permits in §122.28(d).</p> <p>You will also evaluate whether the permit includes terms and conditions that address the minimum control measures (MCMs) in §122.34(b), other more stringent requirements pursuant to §122.34(c), and the evaluation and assessment requirements in §122.34(d), and whether these requirements are expressed in “clear, specific, and measurable” terms as required in §122.34(a).</p> <p>The permit and fact sheet should also be reviewed to determine whether the permitting authority has made the determination about what is necessary to meet the MS4 permit standard and to verify that the permit does not leave key requirements to the discretion of the permittee, unless there is a second step that provides for public participation and permitting authority approval.</p>	<p>The procedural requirements of the Remand Rule in §122.28(d) do not apply to individual permits.</p> <p>You will be evaluating whether the permit includes terms and conditions that address the MCMs in §122.34(b), other more stringent requirements pursuant to §122.34(c), and the evaluation and assessment requirements in §122.34(d), and whether these requirements are expressed in “clear, specific, and measurable” terms as required in §122.34(a).</p> <p>The permit and fact sheet should also be reviewed to determine whether the permitting authority has made the determination about what is necessary to meet the MS4 permit standard and does not leave key requirements to the discretion of the permittee. If you find that the permit in some areas leaves it to the permittee to establish what will be considered adequate to meet the MS4 permit standard, the permit may need to include a step in the process for the permitting authority to review and approve these proposed actions as draft terms and conditions of the permit. The permit may also need to provide an opportunity for the public to review and comment, and request a hearing, similar to the process in §122.28(d)(2), before they are incorporated as enforceable permit terms and conditions.</p>

Information needed for the review

Prior to conducting your review, you may find it helpful to have the following documents available for reference:

1. **The previous Small MS4 permit** (Note, if reviewing a draft permit, this will be the permit that it will replace).
2. **Fact sheet** for new draft/proposed/final permit, as the case may be (See §124.8).
 This will be used for comparison purposes to determine what changes have been made. The fact sheet should explain the differences between the previous permit and the one being evaluated. If the permit is a Two-Step General Permit, the fact sheet should also contain an explanation of any future steps that will be taken to establish additional permit terms or conditions for MS4 permittees as part of the second step of a Two-Step Permit (unless this information is in the permit itself). It should also include a rationale for why the permitting authority has concluded that the permit’s requirements are sufficient to meet the MS4 permit standard.

3. Annual reports.

If the annual reports are easily accessible online, having a sample of these from MS4 permittees authorized under the previous permit will provide insight into the level of effort put into permit compliance and what areas may require modified or enhanced focus in the new permit. It may be helpful to include a summary of findings from review of the annual reports in the fact sheet or elsewhere as support for the permit's conditions.

4. NPDES MS4 audit reports and site inspection reports.

Review the findings from any MS4 audits conducted during the past permit term to help identify key issues that should be addressed in the next permit. Review of construction, industrial, and/or commercial site inspection reports for facilities within the MS4's boundaries – if relevant to the permit and if available – could help you identify if there are common compliance issues that should be addressed in the MS4 permit (e.g., more training, more frequent inspections, more complete inventory or prioritization, etc.).

5. Remand Rule Federal Register notice.

It will be useful to have a copy of the Phase II stormwater [rule text](#) available as a reference. Some of the regulations have been rearranged, so you may find the [Remand Rule Federal Register notice](#) useful since the modified Phase II rule text is presented in one place. The preamble may help to answer questions about EPA's rationale behind the different rule provisions. Further insight may be found in the [Response to Comment Document](#).

6. Notice of Intent (NOI) forms or permit applications, if separate from the permit.

Information in the NOIs or permit applications may provide insight into specific provisions of the permit.

Additional References

When reviewing any specific small MS4 permit, you will need to evaluate whether the requirements of the permit are expressed in clear, specific, and measurable terms. The requirements themselves may take different forms, as stated in the regulation: “[T]erms and conditions may include narrative, numeric, or other types of requirements (e.g., implementation of specific tasks or best management practices (BMPs), BMP design requirements, performance requirements, adaptive management requirements, schedules for implementation and maintenance, and frequency of actions).” (§122.34(a))

While the permit requires each of these attributes to be present, it is likely that aspects of any individual requirement that are “clear” versus “specific” versus “measurable” may be inseparable from one another and may overlap considerably. There is no established formula or criteria that sets out exactly how to determine whether a particular provision is clear, specific, and measurable. However, EPA identified in the preamble to the final Remand Rule (81 FR 89335) a list of examples of permit language that generally would not be considered clear, specific, and measurable. These examples, and some additional ones, are included in a table titled *Evaluating Whether Permit Provisions are Clear, Specific, and Measurable* in Appendix 2.

Additionally, the following references may help you evaluate whether permit terms and conditions are clear, specific, and measurable.

1. EPA's [MS4 permit compendia](#)

These documents include examples from state and EPA-issued MS4 permits of terms and conditions that include the type of clear, specific, and measurable language that is required by the Remand Rule. These examples may be a useful point of comparison between the requirements being considered in the state whose permit you are reviewing and those of other states. They are not meant to define a minimum level of stringency, but rather to provide a source of ideas for how permit provisions can be expressed in clear, specific, and measurable terms. You can find these compendia documents on EPA's website at:

- *Compendium of MS4 Permitting Approaches – [Introduction](#)*
- *Compendium of MS4 Permitting Approaches – [Part 1: Six Minimum Control Measures](#)*
- *Compendium of MS4 Permitting Approaches – [Part 2: Post-Construction Standards](#)*
- *Compendium of MS4 Permitting Approaches – [Part 3: Water Quality-Based Requirements](#)*
- *Compendium of MS4 Permitting Approaches – [Part 4: Transportation-Related Requirements](#)*

2. [MS4 Permit Improvement Guide](#)

This Guide contains examples of permit conditions for MS4 permits and the rationale that can be used to support them. The Guide also includes recommendations for permit writers on how to tailor the language depending on the type of MS4 eligible for coverage under the permit. The Permit Improvement Guide covers all aspects of writing a permit for MS4s and can be consulted when drafting a permit in the first instance. It is also a useful reference for reviewing permits written by others and for finding good examples of permit conditions to suggest.

3. **Guidance Language in Phase II MS4 Rules.**

The guidance, which accompanies the rule language for each of the minimum control measures in §122.34(b), is for consideration by permit writers and the MS4s in further developing their permits and programs. The guidance provides examples of more detailed terms and conditions for each MCM that can be used to establish clear, specific, and measurable permit requirements.

4. **Response to Comment Document.**

If you are reviewing a permit that has been issued in final form, the responses provided by the permitting authority to significant comments received can help in understanding the rationale for certain provisions, and why they are stated in a certain way.

I. Permit Review Information	
1. Permit Title:	_____
2. State contact/permit writer:	Name: _____
	Email: _____
	Phone: _____
3. Permit Reviewer:	Name: _____
	Email: _____
	Phone: _____
4. Date Reviewed:	_____

II. Basic Permit and MS4 Information	
II.A Basic Permit Information	
Type of Permit	
1. Is this permit a:	
<input type="checkbox"/> State-wide General Permit	<input type="checkbox"/> Individual Permit
<input type="checkbox"/> Other Type of General Permit	If other, describe: _____
2. If this is a general permit, which type of permit is it under the Remand Rule?	
<input type="checkbox"/> Comprehensive General Permit	<input type="checkbox"/> Two-Step General Permit
3. Are the permit and fact sheet available on the permitting authority's website? [Note to Reviewers]	Click Yes or No
Permittees	
1. If this is a general permit, what entities are eligible? [Note to Reviewers]	
a. Traditional small MS4s (e.g., cities, townships, parishes, counties, boroughs, etc.)	Click Yes or No
b. Non-traditional small MS4s (e.g., state prisons, state departments of transportation, public universities, military installations, hospitals, drainage districts/commissions, state hospitals, etc.)	Click Yes or No
If yes, specify what types are eligible: _____	
Comments:	
II.B Eligibility and Authorization	
1. Are new MS4s that were brought into the program as a result of the latest decennial census, or through EPA or state designation, eligible for coverage under the general permit?	Click Yes or No
a. If yes, does the permit include different requirements for these new MS4s compared to existing MS4s with already developed programs (e.g., different deadlines, different types of minimum requirements)?	Click Yes or No
Specify:	
b. If no, is there information that explains why this is not the case (e.g., no new MS4s) or describes what other permit options are available for new MS4s (e.g., a separate general permit for new MS4s)?	Click Yes or No

2. Type of Permit / Authorization Process (for general permits only)	
a. Does the permit and/or fact sheet clearly specify if it is a Comprehensive General Permit or a Two-Step General Permit per §122.28(d)? [Note to Reviewers] If yes, where is the type of permit specified?	Click Yes or No
i. Permit?	Click Yes or No
ii. Fact sheet?	Click Yes or No
iii. Both permit and fact sheet?	Click Yes or No
b. Does the NOI form include the minimum required fields? [§122.33(b); §122.28(b)(2)(ii)]	Click Yes or No
i. Legal name and address of the MS4 owner/operator	Click Yes or No
ii. MS4 name and address	Click Yes or No
iii. Type of facility or discharges	Click Yes or No
iv. Receiving stream	Click Yes or No
c. Does the permit include requirements to address e-Reporting consistent with 40 CFR Part 127? [Note to Reviewers]	Click Yes or No
d. If this is a Two-Step General Permit, does the NOI specify what information is needed to develop the additional requirements for each MS4? [§122.33(b)(1)(ii)]	Click Yes or No
3. For Two-Step General Permits, evaluate whether the process that the permitting authority has adopted for establishing the second step permit requirements conform to the steps required by the regulations at §122.28(d)(2)(ii). If the answer to any of the items below is "No," then the permit may lack the required process for the second step.	
a. Does the permit or fact sheet indicate that the Director will review the NOI to determine whether it is complete and whether additional permit requirements are necessary to supplement the general permit requirements?	Click Yes or No
b. Does the permit or fact sheet indicate that the Director may require additional information if what was submitted was incomplete or insufficient?	Click Yes or No
c. Does the permit or fact sheet indicate that the Director will give the public a minimum 30-day comment period to comment and request a hearing on the proposed authorization of the MS4, the proposed additional permit requirements, and the basis for these additional requirements?	Click Yes or No
d. Does the permit or fact sheet include any of the following procedures or make reference to the applicable parts of §124 with respect to carrying out the public notice process and any public hearing? [Note to Reviewers]	Click Yes or No
i. Specify how the public will be notified of the comment period and the opportunity to request a hearing (e.g., website, newspaper, etc.), or does it refer to §124.10(c) (or does it refer to §124.10 or §124 more generally)?	Click Yes or No
ii. Specify what information will be included in the public notice or does it refer to §124.10(d) (or does it refer to §124.10 or §124 more generally)?	Click Yes or No
iii. Include information on how the public may request a hearing and how such a hearing will be carried out, or refer to §124.11 and 124.12?	Click Yes or No
e. If the permit requires the permittee to conduct the 30-day public notice, does it require that comments and requests for hearings be sent to the permitting authority for response?	Click Yes or No
f. Does the permit or fact sheet indicate that the permitting authority will respond to significant comments received during the public comment period, or during any hearing?	Click Yes or No
i. Alternatively, does the permit reference §124.17?	Click Yes or No
g. Upon authorization of the MS4, does the permit indicate that the final additional permit requirements will become effective for that MS4?	Click Yes or No
h. Does the permit or fact sheet indicate that the Director will notify the permittee and inform the public that the permittee is authorized to discharge subject to the additional terms and conditions for the specific MS4?	Click Yes or No

III. Permit Requirements for Implementation of Six Minimum Control Measures	
III.A. General	
SWMP	
1. Does the permit require permittees to develop a written SWMP document or documents that describe how the permittee intends to comply with the permit’s requirements for each minimum control measure and other permit requirements? [Note to Reviewers]	Click Yes or No
a. For Two-Step General Permits, does the permit specify when the SWMP must be submitted for review as part of the second step process?	Click Yes, No, or N/A
b. For Comprehensive General Permits, does the permit specify when the SWMP must be developed (for new permittees) and updated (for existing permittees)?	Click Yes, No, or N/A
2. Does the permit include a requirement for the permittee to implement a SWMP to the “maximum extent practicable,” or words to that effect? [Note to Reviewers]	Click Yes or No
3. Does the permit state that compliance with the SWMP constitutes compliance with the requirement to reduce pollutants in stormwater to the maximum extent practicable? [Note to Reviewers]	Click Yes or No
4. Does the permit direct MS4s to develop measurable goals in the SWMP? [Note to Reviewers]	Click Yes or No
5. Does the permit clearly explain the role of the SWMP? [Note to Reviewers]	Click Yes or No
6. Does the permit explain when and how the SWMP should be revised and when revisions must be submitted to the permitting authority? [Note to Reviewers]	Click Yes or No
Rationale for Requirements Satisfying the MS4 Permit Standard	
1. Does the fact sheet explain how the permit requirements meet the MS4 permit standard? [Note to Reviewers]	Click Yes or No

III.B. Six Minimum Control Measure (MCM) Requirements [Note to Reviewers]	
III.B.1 Completeness Questions	
<u>Public Education and Outreach on Stormwater Impacts</u>	
Does the permit include requirements for the minimum required components of the public education and outreach MCM in §122.34(b)(1)(i) to implement a program “to distribute educational materials to the community or conduct equivalent outreach activities about the impacts of storm water discharges on water bodies and the steps that the public can take to reduce pollutants in storm water runoff”? If no, describe what required components are missing from the permit:	Click Yes or No
<u>Public Involvement/Participation</u>	
Does the permit include provisions that address the minimum requirement for public involvement/participation MCM in §122.34(b)(2)(i) “to comply with State, Tribal and local public notice requirements when implementing a public involvement/participation program”? If no, describe what required components are missing from the permit:	Click Yes or No
<u>Illicit Discharge Detection and Elimination (IDDE)</u>	
Does the permit include provisions that address all of the minimum required components of the IDDE MCM as specified in §122.34(b)(3)(i) and(ii)?	Click Yes or No
a. Does the permit require the MS4 to develop, if not already completed, a storm sewer system map showing the location of all outfalls and the names and location of all waters of the United States that receive discharges from those outfalls?	Click Yes or No

<p>b. Does the permit require the MS4, to the extent allowable under State, Tribal or local law, to effectively prohibit, through ordinance, or other regulatory mechanism, non-stormwater discharges into the storm sewer system and implement appropriate enforcement procedures and actions?</p>	<p>Click Yes or No</p>
<p>c. Does the permit require the MS4 to develop and implement a plan to detect and address non-stormwater discharges, including illegal dumping, to the system?</p>	<p>Click Yes or No</p>
<p>d. Does the permit require the MS4 to inform public employees, businesses, and the general public of hazards associated with illegal discharges and improper disposal of waste?</p>	<p>Click Yes or No</p>
<p>e. Does the permit require the MS4 to address the following categories of non-stormwater discharges or flows (i.e., illicit discharges) only if the permittee identifies them as a significant contributor of pollutants to the small MS4:</p>	<p>Click Yes or No</p>
<p>Water line flushing, landscape irrigation, diverted stream flows, rising ground waters, uncontaminated ground water infiltration (as defined at §35.2005(b)(20)), uncontaminated pumped ground water, discharges from potable water sources, foundation drains, air conditioning condensation, irrigation water, springs, water from crawl space pumps, footing drains, lawn watering, individual residential car washing, flows from riparian habitats and wetlands, dechlorinated swimming pool discharges, and street wash water (discharges or flows from firefighting activities are excluded from the effective prohibition against non-stormwater and need only be addressed where they are identified as significant sources of pollutants to waters of the United States)?</p>	
<p>If no for any of questions a-e, above, describe what required components are missing from the permit:</p>	

Construction Site Stormwater Runoff Control

<p>1. Does the permit include provisions that address the minimum required components of the construction site stormwater runoff control MCM in §122.34(b)(4)(i)?</p>	<p>Click Yes or No</p>
<p>a. Does the permit identify the minimum elements and require the development, implementation, and enforcement of a program to reduce pollutants in any stormwater runoff to the small MS4 from construction activities that result in a land disturbance of greater than or equal to one acre. Reduction of stormwater discharges from construction activity disturbing less than one acre must be included in the program if that construction activity is part of a larger common plan of development or sale that would disturb one acre or more. [Note to Reviewers]</p>	<p>Click Yes or No</p>
<p>b. Does the permit require, at a minimum, the permittee to develop and implement the following: [Note to Reviewers]</p>	
<p>i. An ordinance or other regulatory mechanism to require erosion and sediment controls, as well as sanctions to ensure compliance, to the extent allowable under State, Tribal, or local law;</p>	<p>Click Yes or No</p>
<p>ii. Requirements for construction site operators to implement appropriate erosion and sediment control best management practices;</p>	<p>Click Yes or No</p>
<p>iii. Requirements for construction site operators to control waste such as discarded building materials, concrete truck washout, chemicals, litter, and sanitary waste at the construction site that may cause adverse impacts to water quality;</p>	<p>Click Yes or No</p>
<p>iv. Procedures for site plan review which incorporate consideration of potential water quality impacts;</p>	<p>Click Yes or No</p>
<p>v. Procedures for receipt and consideration of information submitted by the public, and</p>	<p>Click Yes or No</p>
<p>vi. Procedures for site inspection and enforcement of control measures.</p>	<p>Click Yes or No</p>
<p>If no, describe what required components are missing from the permit:</p>	

Post-Construction Stormwater Management in New Development and Redevelopment

Does the permit include provisions that address the minimum required components of the post-construction MCM as specified in §122.34(b)(5)(i)? Click Yes or No

a. Does the permit identify the minimum elements and require the development, implementation, and enforcement of a program to address stormwater runoff from new development and redevelopment projects that disturb greater than or equal to one acre, including projects less than one acre that are part of a larger common plan of development or sale, that discharge into the small MS4? Click Yes or No

b. Does the permit ensure that controls are in place that would prevent or minimize water quality impacts? At a minimum, the permit must require the permittee to:

i. Develop and implement strategies which include a combination of structural and/or non-structural best management practices (BMPs) appropriate for the community; Click Yes or No

ii. Use an ordinance or other regulatory mechanism to address post-construction runoff from new development and redevelopment projects to the extent allowable under State, Tribal or local law; and Click Yes or No

iii. Ensure adequate long-term operation and maintenance of BMPs. Click Yes or No

If no, describe what required components are missing from the permit:

Pollution Prevention/Good Housekeeping for Municipal Operations

1. Does the permit include provisions that address the minimum required components for the pollution prevention/good housekeeping MCM in §122.34(b)(6)(i)? Click Yes or No

a. Does the permit require the MS4 to develop and implement an operation and maintenance program that includes a training component and has the ultimate goal of preventing or reducing pollutant runoff from municipal operations? Click Yes or No

b. Does the permit require the MS4 to use training materials that are available from EPA, the State, Tribe, or other organizations, include employee training to prevent and reduce stormwater pollution from activities such as park and open space maintenance, fleet and building maintenance, new construction and land disturbances, and stormwater system maintenance? Click Yes or No

If no, describe what required components are missing from the permit:

III.B.2 Standard Questions						
	Public Education, Outreach	Public Involvement, Participation	Illicit Discharge Detection, Elimination	Construction Site Runoff Control	Post-Construction Management	Pollution Prevention, Good Housekeeping
1. Is it clear what specific actions must be carried out and completed during the permit term? [Note to Reviewers]	Click Yes or No	Click Yes or No	Click Yes or No	Click Yes or No	Click Yes or No	Click Yes or No
2. For the specific action above, does the permit identify:						
a. Which entity or department is responsible for implementing and completing the action?	Click Yes or No	Click Yes or No	Click Yes or No	Click Yes or No	Click Yes or No	Click Yes or No
b. Specific timeframes by which the action must be started and completed? [Note to Reviewers]	Click Yes or No	Click Yes or No	Click Yes or No	Click Yes or No	Click Yes or No	Click Yes or No
c. Measurable outcomes or required performance requirements (e.g., minimum number of outreach events, public meetings, required web postings)?	Click Yes or No	Click Yes or No	Click Yes or No	Click Yes or No	Click Yes or No	Click Yes or No
d. Specific frequencies for carrying out actions (e.g., annually, by the end of the third year of the permit)?	Click Yes or No	Click Yes or No	Click Yes or No	Click Yes or No	Click Yes or No	Click Yes or No
e. Any methods or criteria by which progress or effectiveness will be evaluated (e.g., assessments, monitoring, etc.)? [Note to Reviewers]	Click Yes or No	Click Yes or No	Click Yes or No	Click Yes or No	Click Yes or No	Click Yes or No
3. Evaluate whether the permit includes any of the following scenarios, which may indicate that the requirements are not sufficiently clear, specific, and measurable.						
a. Do the provisions merely repeat word-for-word, more or less, the regulatory text of the MCM? [Note to Reviewers]	Click Yes or No	Click Yes or No	Click Yes or No	Click Yes or No	Click Yes or No	Click Yes or No
b. Are there any provisions that appear to allow the MS4 permittee to define its own enforceable requirements instead of being specified in the permit? [Note to Reviewers]	Click Yes or No	Click Yes or No	Click Yes or No	Click Yes or No	Click Yes or No	Click Yes or No
c. Are there any instances where non-mandatory language is used (e.g., “should,” “may,” “consider,” “recommend,” “will,” etc.)? [Note to Reviewers]	Click Yes or No	Click Yes or No	Click Yes or No	Click Yes or No	Click Yes or No	Click Yes or No
d. Are there instances where conditional language is used (e.g., “if feasible,” “if practicable,” “to the maximum extent practicable,” and “as necessary,” etc.)? (See Appendix A) [Note to Reviewers]	Click Yes or No	Click Yes or No	Click Yes or No	Click Yes or No	Click Yes or No	Click Yes or No
4. Does the permit include the conditions that apply when another entity carries out responsibilities for the MS4 as specified in §122.35? [Note to Reviewers]						
a. The other entity must in fact implement the required actions	Click Yes or No	Click Yes or No	Click Yes or No	Click Yes or No	Click Yes or No	Click Yes or No
b. The particular control measure is at least as protective as the corresponding permit requirement	Click Yes or No	Click Yes or No	Click Yes or No	Click Yes or No	Click Yes or No	Click Yes or No
c. The other entity agrees to carry out the required action on the permittee’s behalf	Click Yes or No	Click Yes or No	Click Yes or No	Click Yes or No	Click Yes or No	Click Yes or No

d. The permittee remains responsible for compliance with the permit requirement if the other entity fails to do so.	Click Yes or No					
MS4 Permit Standard (Standard Questions)						
1. Are any of the requirements in this section the same as they were in the previous (or soon to be expiring) permit? [Note to Reviewers]	Click Yes or No					
a. Did any of the deadlines pertaining to these requirements already pass from the previous permit?	Click Yes or No					
b. Do known water quality problems suggest the need for changes to these requirements that focus more attention on issues or activities that may address the problem?	Click Yes or No					
c. Does the fact sheet identify a good reason why the requirements should stay the same?	Click Yes or No					
d. Consider whether the requirement being kept the same, or in some cases being deemphasized or made less strict, is justified based on this permit's focus on higher priority stormwater issues.	Click Yes or No					
2. Do any provisions in this section fall short of what should be considered to be the "maximum extent practicable" level of achievement for the particular MCM?	Click Yes or No					
3. If the permit contains particularly notable requirements that you would recommend as examples for other permits, please describe [Note to Reviewers] :						
Two-Step Permits (Standard Questions)						
1. Does the permit identify what elements must be included in a program proposed by the MS4?	Click Yes or No					
a. Does the permit or fact sheet define what criteria the permitting authority will use to evaluate the adequacy of what the MS4s propose for meeting the MS4 permit standard?	Click Yes or No					
b. Does the permit clearly distinguish between requirements that apply to all MS4s and those that will be developed in a second step for individual MS4s?	Click Yes or No					
c. Does the additional information requested in the NOI correspond to the types of permit requirements that need to be developed in the second step of the Two-Step permit process? [Note to Reviewers]	Click Yes or No					
How would you recommend that the NOI be more specific to ensure that the information the state receives provides enough detail from which to establish adequate permit requirements? Describe:						

III.C. Requirements Addressing Additional Areas of Stormwater Control	
<p>The Phase II regulations authorize permitting authorities to include other NPDES permit requirements, standards, and conditions, as appropriate, in addition to the requirements addressing the six MCMs covered in Section III.B, above. See § 122.34(c)(2). Some small MS4 permits include provisions on additional areas of stormwater control, such as requirements addressing runoff from industrial and commercial facilities connected to the MS4 that are not covered by the six MCMs. Where such requirements are included in the small MS4 permit, you should review these provisions and answer the following questions. <i>The following questions are guidelines to assist you in providing a general assessment of the quality of requirements, a discussion of which should be included in the report.</i></p>	
<u>Clear, Specific, and Measurable Permit Language (Standard Questions)</u>	
1. Is it clear what specific actions must be carried out and completed during the permit term?	Click Yes or No
2. For the specific actions above, does the permit identify:	
a. Which entity or department is responsible for implementing and completing the action?	Click Yes or No
b. Specific timeframes by which the action must be started and completed?	Click Yes or No
c. Measurable outcomes or required performance requirements (e.g., minimum number of outreach events, public meetings, required web postings)?	Click Yes or No
d. Specific frequencies for carrying out actions (e.g., annually, by the end of the third year of the permit)?	Click Yes or No
e. Any methods or criteria by which progress or effectiveness will be evaluated (e.g., assessments, monitoring, etc.)?	Click Yes or No
3. Evaluate whether the permit includes any of the following scenarios, which may indicate that the requirements are not sufficiently clear, specific, and measurable.	
a. Are there any provisions that appear to give the MS4 latitude to define its own enforceable requirements?	Click Yes or No
b. Are there any instances where non-mandatory language is used (e.g., “should,” “may,” “consider,” “recommend,” “will,” etc.)?	Click Yes or No
c. Are there instances where conditional language is used (e.g., “if feasible,” “if practicable,” “to the maximum extent practicable,” and “as necessary,” etc.)? (See Appendix A)	Click Yes or No
4. Does the permit include the conditions that apply when another entity carries out responsibilities for the MS4 as specified in §122.35?	
a. The other entity must in fact implement the required actions	Click Yes or No
b. The particular control measure is at least as protective as the corresponding permit requirement	Click Yes or No
c. The other entity agrees to carry out the required action on the permittee’s behalf	Click Yes or No
d. The permittee remains responsible for compliance with the permit requirement if the other entity fails to do so.	Click Yes or No

<u>MS4 Permit Standard (Standard Questions)</u>	
1. Are any of the requirements in this section the same as they were in the previous (or soon to be expiring) permit?	Click Yes or No
a. Did any of the deadlines pertaining to these requirements already pass from the previous permit?	Click Yes or No
b. Do known water quality problems suggest the need for changes to these requirements that focus more attention on issues or activities that may address the problem?	Click Yes or No
c. Does the fact sheet identify a reason for why the requirements should stay the same?	Click Yes or No
d. Consider whether the requirement being kept the same, or in some cases even deemphasized or lessened, is justified based on this permit's focus on higher priority stormwater issues.	
2. Do any provisions in this section fall short of what should be considered to be the "maximum extent practicable" level of achievement?	Click Yes or No
3. If the permit contains particularly notable requirements that you would recommend as examples for other permits, please describe:	
<u>Two-Step Permits (Standard Questions)</u>	
1. Does the permit identify what elements must be included in a program proposed by the MS4?	Click Yes or No
a. Does the permit or fact sheet define what criteria the permitting authority will use to evaluate the adequacy of what the MS4s propose for meeting the MS4 permit standard?	Click Yes or No
b. Does the permit clearly distinguish between requirements that apply to all MS4s and those that will be developed in a second step for individual MS4s?	Click Yes or No
c. Does the additional information requested in the NOI correspond to the types of permit requirements that need to be developed in the second step of the Two-Step permit process?	Click Yes or No
d. How would you recommend that the NOI be more specific to ensure that the information the state receives provides enough detail from which to establish adequate permit requirements? Describe:	

IV. Requirements to Protect Water Quality and to Satisfy Appropriate Water Quality Requirements of the Clean Water Act (CWA)

The Phase II regulations require permits to “as appropriate ... include: [m]ore stringent terms and conditions, including permit requirements that modify, or are in addition to, the minimum control measures based on an approved total maximum daily load (TMDL) or equivalent analysis, or where the Director determines such terms and conditions are needed to protect water quality.” See §122.34(c)(1). *The following questions are guidelines to assist you in providing a general assessment of the quality of requirements, a discussion of which should be included in the report.*

IV.A General

1. Does the permit include requirements that address the protection of water quality, such as achieving applicable water quality standards (apart from provisions addressing impaired waters both with and without approved TMDLs)? [\[Note to Reviewers\]](#) Click Yes or No

IV.B Total Maximum Daily Load (TMDL)-Related Requirements (only if applicable)

The regulatory requirement that permit conditions meet the MS4 permit standard and that they be expressed in a clear, specific, and measurable manner applies also to permit provisions that implement applicable TMDLs. See §122.34(a) and (c). For these TMDL-related provisions, you are therefore evaluating whether:

- The permit establishes either directly in the permit itself or as a result of a two-step process clear, specific, and measurable requirements that spell out what specific actions must occur during the permit term with respect to applicable TMDLs; and
- These requirements are adequate to address the MS4 permit standard (i.e., they include requirements that address the “appropriate water quality requirements of the Clean Water Act”). You are determining whether collectively the requirements will “achieve reasonable further progress towards attainment of water quality standards according to the iterative BMP process.”

Completeness

1. Does the permit address the minimum requirement for TMDL-related provisions in §122.34(c) that small MS4 permits, as appropriate, will include “[m]ore stringent terms and conditions, including permit requirements that modify, or are in addition to, the minimum control measures based on an approved ... TMDL or equivalent analysis”? Click Yes or No

If no, describe what required components are missing from the permit:

Clear, Specific, and Measurable Permit Language (Standard Questions)

1. Does the permit identify any of the following in the permit, or in an appendix to the permit? [Note to Reviewers]	
a. Listing of impaired waters with approved TMDLs?	Click Yes or No
b. Applicable TMDLs?	Click Yes or No
c. Pollutants of concern?	Click Yes or No
d. Specific wasteload allocations (WLAs) [or load allocations (LAs) if the TMDL was approved with this type of allocation] to specific small MS4s eligible for coverage under the permit, or to MS4s generally, or more broadly to urban stormwater?	Click Yes or No
e. Specific MS4s affected by the WLAs (or LAs)?	Click Yes or No
f. Long-term compliance deadlines for coming into compliance with the numeric WLA (or LA)?	Click Yes or No
2. Is it clear what specific actions must be carried out and completed during the permit term?	Click Yes or No
3. For the specific actions above, does the permit identify:	
a. Which entity or department is responsible for implementing and completing the action?	Click Yes or No
b. Specific timeframes by which the action must be started and completed?	Click Yes or No

c. Measurable outcomes or required performance requirements (e.g., minimum number of outreach events, public meetings, required web postings)?	Click Yes or No
d. Specific frequencies for carrying out actions (e.g., annually, by the end of the third year of the permit)?	Click Yes or No
e. Any methods or criteria by which progress or effectiveness will be evaluated (e.g., assessments, monitoring, etc.)?	Click Yes or No
f. Do the specific actions reasonably constitute reasonable further progress towards attainment of the applicable water quality standards?	Click Yes or No
4. Evaluate whether the permit includes any of the following scenarios, which may indicate that the requirements are not sufficiently clear, specific, and measurable.	
a. Do the provisions of this part fall short of being clear, specific, and measurable by including generic language requiring the permittee "to meet applicable TMDL WLAs" (or words to that effect) without clear implementation expectations, actions, and/or numeric reduction targets consistent with all applicable WLAs (where appropriate)?	Click Yes or No
b. Are there any provisions that appear to give the MS4 latitude to define its own enforceable requirements?	Click Yes or No
c. Are there any instances where non-mandatory language is used (e.g., "should," "may," "consider," "recommend," "will," etc.)?	Click Yes or No
d. Are there instances where conditional language is used (e.g., "if feasible," "if practicable," "to the maximum extent practicable," and "as necessary," etc.)? (See Appendix A)	Click Yes or No
5. Does the permit include the conditions that apply when another entity carries out responsibilities for the MS4 as specified in §122.35? To answer this question, determine whether the following are included:	
a. The other entity must in fact implement the required actions	Click Yes or No
b. The particular control measure is at least as protective as the corresponding permit requirement	Click Yes or No
c. The other entity agrees to carry out the required action on the permittee's behalf	Click Yes or No
d. The permittee remains responsible for compliance with the permit requirement if the other entity fails to do so.	Click Yes or No

MS4 Permit Standard (Standard Questions)

1. Are any of the requirements in this section the same as they were in the previous (or soon to be expiring) permit?	Click Yes or No
a. Did any of the deadlines pertaining to these requirements already pass from the previous permit?	Click Yes or No
b. Do known water quality problems suggest the need for changes to these requirements that focus more attention on issues or activities that may address the problem?	Click Yes or No
c. Does the fact sheet identify a good reason why the requirements should stay the same?	Click Yes or No
d. Consider whether the requirement being kept the same, or in some cases even deemphasized or lessened, is justified based on this permit's focus on higher priority stormwater issues.	
2. If the permit contains particularly notable requirements that you would recommend as examples for other permits, please describe:	

Two-Step Permits (Standard Questions)

1. Does the permit identify what elements must be included in a program proposed by the MS4?	Click Yes or No
a. Does the permit or fact sheet define what criteria the permitting authority will use to evaluate the adequacy of what the MS4s propose for meeting the MS4 permit standard?	Click Yes or No
b. Does the permit clearly distinguish between requirements that apply to all MS4s and those that will be developed in a second step for individual MS4s?	Click Yes or No
c. Does the additional information requested in the NOI correspond to the types of permit requirements that need to be developed in the second step of the Two-Step Permit process?	Click Yes or No

d. Does the permit advise the MS4 to propose specific actions that make reasonable further progress towards attainment of applicable water quality standards?	Click Yes or No
e. How would you recommend that the NOI be more specific to ensure that the information the state receives provides enough detail from which to establish adequate permit requirements? Describe:	
IV.C Requirements for Discharges to Impaired Waters without an Approved TMDL (only if applicable)	
For any permit requirements that address impaired waters that do not yet have an approved TMDL, your evaluation will in some ways mirror your evaluation of the permit's TMDL-related provisions. You are evaluating whether:	
<ul style="list-style-type: none"> The permit establishes (either directly in the permit itself or as a result of a two-step process) clear, specific, and measurable requirements that spell out what must specific actions must occur during the permit term with respect to reducing the discharge of pollutants of concern to impaired receiving waters; and These requirements are adequate to address the MS4 permit standard (i.e., they include requirements that address the "appropriate water quality requirements of the Clean Water Act"). You are determining whether, collectively, the requirements will "achieve reasonable further progress towards attainment of water quality standards according to the iterative BMP process." 	
<u>Clear, Specific, and Measurable Permit Language (Standard Questions)</u>	
1. Does the permit identify any of the following in the permit, or in an appendix to the permit? [Note to Reviewers]	Click Yes or No
a. Listing of impaired waters to which MS4s discharge that do not yet have an approved TMDL?	Click Yes or No
b. Pollutants of concern?	Click Yes or No
c. Applicable Water Quality Standards, including any numeric criteria for the associated pollutants of concern?	Click Yes or No
d. Specific MS4s discharging to the impaired water?	Click Yes or No
2. Is it clear what specific actions must be carried out and completed during the permit term?	Click Yes or No
3. For the specific actions above, does the permit identify:	
a. Which entity or department is responsible for implementing and completing the action?	Click Yes or No
b. Specific timeframes by which the action must be started and completed?	Click Yes or No
c. Measurable outcomes or required performance requirements (e.g., minimum number of outreach events, public meetings, required web postings)?	Click Yes or No
d. Specific frequencies for carrying out actions (e.g., annually, by the end of the third year of the permit)?	Click Yes or No
e. Any methods or criteria by which progress or effectiveness will be evaluated (e.g., assessments, monitoring, etc.)?	Click Yes or No
f. Do the specific actions reasonably constitute reasonable further progress towards attainment of the applicable water quality standards?	Click Yes or No
4. Evaluate whether the permit includes any of the following scenarios, which may indicate that the requirements are not sufficiently clear, specific, and measurable.	
a. Are there any provisions that appear to give the MS4 latitude to define its own enforceable requirements?	Click Yes or No
b. Are there any instances where non-mandatory language is used (e.g., "should," "may," "consider," "recommend," "will," etc.)?	Click Yes or No
c. Are there instances where conditional language is used (e.g., "if feasible," "if practicable," "to the maximum extent practicable," and "as necessary," etc.)? (See Appendix A)	Click Yes or No
5. Does the permit include the conditions that apply when another entity carries out responsibilities for the MS4 as specified in §122.35?	Click Yes or No
a. The other entity must in fact implement the required actions	Click Yes or No
b. The particular control measure is at least as protective as the corresponding permit requirement	Click Yes or No
c. The other entity agrees to carry out the required action on the permittee's behalf	Click Yes or No

d. The permittee remains responsible for compliance with the permit requirement if the other entity fails to do so.	Click Yes or No
<u>MS4 Permit Standard (Standard Questions)</u>	
1. Are any of the requirements in this section the same as they were in the previous (or soon to be expiring) permit?	Click Yes or No
a. Did any of the deadlines pertaining to these requirements already pass from the previous permit?	Click Yes or No
b. Do known water quality problems suggest the need for changes to these requirements that focus more attention on issues or activities that may address the problem?	Click Yes or No
c. Does the fact sheet identify a good reason why the requirements should stay the same?	Click Yes or No
d. Consider whether the requirement being kept the same, or in some cases even deemphasized or lessened, is justified based on this permit's focus on higher priority stormwater issues.	
2. Do the provisions of this part fall short of being clear, specific, and measurable by including generic language requiring the permittee "to comply with applicable water quality standards" (or words to that effect) without clear implementation expectations, actions, and/or numeric reduction targets consistent with applicable water quality standards (where appropriate)?	Click Yes or No
3. If the permit contains particularly notable requirements that you would recommend as examples for other permits, please describe:	
<u>Two-Step Permits (Standard Questions)</u>	
1. Does the permit identify what elements must be included in a program proposed by the MS4?	Click Yes or No
a. Does the permit or fact sheet define what criteria the permitting authority will use to evaluate the adequacy of what the MS4s propose for meeting the MS4 permit standard?	Click Yes or No
b. Does the permit clearly distinguish between requirements that apply to all MS4s and those that will be developed in a second step for individual MS4s?	Click Yes or No
c. Does the additional information requested in the NOI correspond to the types of permit requirements that need to be developed in the second step of the Two-Step permit process?	Click Yes or No
d. Does the permit advise the MS4 to propose specific actions that make reasonable further progress towards attainment of applicable water quality standards?	Click Yes or No
e. How would you recommend that the NOI be more specific to ensure that the information the state receives provides enough detail from which to establish adequate permit requirements? Describe:	

IV.D. Changes in Receiving Water Designation During the Permit Term (only if applicable)

The above sections focus on requirements that address discharges to waters that have already been listed as impaired and TMDLs that have already been approved prior to the time the permit was issued. Following permit issuance, there may be additional waters that become listed as impaired and new TMDLs that are reviewed and approved by EPA. Some permits address these post-permit issuance impairment listings and TMDLs with provisions requiring the MS4 to take steps to respond to these specific water quality issues. The fact that these requirements address water quality conditions that may or may not occur, and that they require actions that are prospective in nature, sets them apart from the requirements that affect already listed waters or already completed TMDLs. With this in mind, you should take into account the following in your review of these types of provisions (a discussion of which should be included in the report):

- Consider whether the MS4 permittee will be responsible for tracking relevant changes to the state’s list of impaired waters and approved TMDLs and then notifying the permitting authority of these changes. Alternatively, consider whether the permitting authority is responsible for notifying the MS4 permittee.
- Consider whether the requirements are of a more procedural type (e.g., requiring any affected permittee to evaluate potential sources of the pollutant of concern; requiring initiation of steps to develop options for controlling the pollutant sources) or are imposing specific actions on the permittee (e.g., if the listing or WLA is for bacteria, the permittee must conduct public education and outreach activities to increase awareness of bacterial pollution problems and promote proper pet waste management behavior).
- Requirements that are more procedural in nature and are more generally applicable to any MS4 regardless of their specific circumstance may not require a second permitting step to make these provisions enforceable for any specific MS4. Alternatively, where the requirements are more specific and unique to the MS4 and they are not already described in the permit, a second permitting step, including public notice and comment, to incorporate these provisions as part of the permit may be necessary.

Discussion:

V. Reporting Requirements	
<u>Completeness</u>	
1. Does the permit include provisions that address the minimum regulatory requirements for evaluation, reporting, and recordkeeping consistent with §122.34(d)? [Note to Reviewers]	Click Yes or No
Check for provisions that address the following to answer the question V.1 above:	
a. “[E]valuate compliance with the terms and conditions of the permit, including the effectiveness of the components of its stormwater management program, and the status of achieving the measurable requirements in the permit.	Click Yes or No
b. [K]eep records required by the NPDES permit for at least 3 years and submit such records to the NPDES permitting authority when specifically asked to do so ... [and] to make records, including a written description of the stormwater management program, available to the public at reasonable times during regular business hours.	Click Yes or No
c. [S]ubmit annual reports to the NPDES permitting authority for its first permit term. For subsequent permit terms, the permittee must submit reports in year two and four unless the NPDES permitting authority requires more frequent reports.	Click Yes or No
The report must include the following (indicate whether the report requires the following):	
i. The status of compliance with permit terms and conditions;	Click Yes or No
ii. Results of information collected and analyzed, including monitoring data, if any, during the reporting period;	Click Yes or No
iii. A summary of the storm water activities the permittee proposes to undertake to comply with the permit during the next reporting cycle;	Click Yes or No
iv. Any changes made during the reporting period to the permittee’s stormwater management program; and	Click Yes or No
v. Notice that the permittee is relying on another governmental entity to satisfy some of the permit obligations”	Click Yes or No
2. Does the permit include requirements to address e-Reporting consistent with 40 CFR Part 127? [Note to Reviewers]	Click Yes or No
<u>Clear, Specific, and Measurable Permit Language (Standard Questions)</u>	
1. Is it clear what specific actions must be carried out and completed during the permit term?	Click Yes or No
2. For the specific actions above, does the permit identify:	
a. Which entity or department is responsible for implementing and completing the action?	Click Yes or No
b. Specific timeframes by which the action must be started and completed?	Click Yes or No
3. Evaluate whether the permit includes any of the following scenarios, which may indicate that the requirements are not sufficiently clear, specific, and measurable.	
a. Do the provisions merely repeat word-for-word, more or less, the text of the regulations?	Click Yes or No
b. Are there any instances where non-mandatory language is used (e.g., “should,” “may,” “consider,” “recommend,” “will,” etc.)?	Click Yes or No
c. Are there instances where conditional language is used (e.g., “if feasible,” “if practicable,” “to the maximum extent practicable,” and “as necessary,” etc.)? (See Appendix A)	Click Yes or No

Additional comments:

Appendix 1: Checklist Companion Guide for Review of Small MS4 Permits

This section includes specific guidance and notes to keep in mind when answering select questions in the checklist. For brevity, this section only includes checklist questions for which specific guidance exists.

I. Permit Review Information

This section of the checklist includes general information about the permit and contact information for the permit writer and reviewer associated with the MS4 PQR.

II. Basic Permit and MS4 Information

This section of the checklist includes general information about the permit associated with the MS4 PQR, including basic permit information and MS4 eligibility.

II.A Basic Permit Information

Type of Permit

1. Indicate whether the permit and fact sheet are available on the permitting authority's website.

Note to Reviewers: *Posting these documents on a website is not required but is encouraged. ([Return to Checklist](#))*

Permittees

2. If this is a general permit, indicate what entities are eligible:
 - a. Traditional small MS4s like cities, townships, parishes, counties, boroughs, etc.
 - b. Non-traditional small MS4s like state prisons, state departments of transportation, public universities, military installations, hospitals, drainage districts/commissions, state hospitals, etc. If yes, specify what types are eligible.

Note to Reviewers: *If the permit is available to both traditional and non-traditional MS4s, look for instances where the requirements make a distinction between traditional and non-traditional MS4s, for instance:*

- *Defining "public" in a way that is relevant to Departments of Transportation (DOTs)*
- *Defining generic terms like "regulatory mechanism" to include mechanisms that could work in lieu of ordinances for entities that do not have governmental police powers [e.g., Memorandum of Understanding (MOU) with other agencies that have the necessary authority; contract specifications that include permit requirements, contracts, etc.].*

Additionally, the reviewer should provide relevant comments in the available field. ([Return to Checklist](#))

II.B Eligibility and Authorization

1. Type of Permit / Authorization Process (for general permits only)
 - a. Indicate whether the permit and/or fact sheet clearly specify if it is a Comprehensive General Permit or a Two-Step General Permit per §122.28(d). Indicate which documents (either the permit, the fact sheet, or both the permit and the fact sheet) specify the type of permit

Note to Reviewers: A Two-Step General Permit establishes some requirements applicable to all MS4s in a “base” or “first step” permit and develops additional requirements for specific MS4s in a second step that includes public notice and opportunity to request a hearing and permitting authority approval, similar to an individual permit. ([Return to Checklist](#))

- b. Indicate whether the permit includes requirements to address e-Reporting

Note to Reviewers: The [2015 NPDES Electronic Reporting rule](#) identified the stormwater data elements that authorized NPDES programs must collect and electronically share with EPA (see 40 CFR 127.23). The data elements submitted through individual NPDES permit applications and general permit forms (NOI, LEW, NOE, NOTs), and annual reports, are identified in Appendix A, Table 2. The authorized NPDES program (under 40 CFR part 122) is responsible for collecting these data as part of its implementation and oversight activities. Note that the required data elements for MS4s were updated in a recent final rule that incorporated changes to the underlying permit requirements made with the [MS4 General Permit Remand Rule](#). Note also that the current deadline for states and permittees to begin electronically reporting MS4 information is December 21, 2020, but that EPA has [proposed](#) to extend that deadline to December 21, 2023.

For this question, look for any indication that the permit includes electronic reporting requirements. Consider including a comment reminding the permitting authority of the relevant deadline to begin requiring electronic reporting. ([Return to Checklist](#))

2. For Two-Step General Permits, evaluate whether the process that the permitting authority has adopted for establishing the second step permit requirements conform to the steps required by the regulations at §122.28(d)(2)(ii). If the answer to any of the items below is “No”, then the permit may lack the required process for the second step.

Note to Reviewers: The permit can require the permittee to conduct the required 30-day notice and comment period. See 81 FR 89332-89333 (December 9, 2016), Section C-Permittee Publication of Public Notice. However, the fact sheet and/or permit must be clear that the permittee is doing so on behalf of the permitting authority and that all final decisions rest with the permitting authority. Also, in this situation, the public notice requirements that apply to the permitting authority at §124.10 would apply to the permittee. This would be separate from any requirement in the permit with respect to public involvement in developing the SWMP. The permitting authority would also be responsible for deciding if a requested public hearing is warranted. ([Return to Checklist](#))

III. Permit Requirements for Implementation of Six Minimum Control Measures

III.A. General

SWMP

Indicate whether the permit requires permittees to develop a written SWMP document or documents that describe how the permittee intends to comply with the permit’s requirements for each MCM and other permit requirements.

Note to Reviewers: A written SWMP is required by §122.34(b). ([Return to Checklist](#))

- a. For Two-Step General Permits, does the permit specify when the SWMP must be submitted for review as part of the second step process? [Yes/No]

- b. For Comprehensive General Permits, does the permit specify when the SWMP must be developed (for new permittees) and updated (for existing permittees)? [Yes/No]

Indicate whether the permit includes a requirement for the permittee to implement a SWMP to the “maximum extent practicable,” or words to that effect?

Note to Reviewers: If “yes,” the recommendation should be to remove this language. It is inconsistent with the regulations to defer this responsibility to the regulated MS4. It is the role of the permitting authority to articulate in the permit what requirements are necessary “to reduce the discharge of pollutants to the maximum extent practicable (MEP), to protect water quality, and to satisfy the appropriate water quality requirements of the CWA.” This is referred to as “the MS4 permit standard.” See Remand Rule preamble discussion at 81 FR 89323 (Section III.A) ([Return to Checklist](#))

Indicate whether the permit states that compliance with the SWMP constitutes compliance with the requirement to reduce pollutants in stormwater to the maximum extent practicable.

Note to Reviewers: If “yes,” the recommendation should be to remove this language. Language to this effect that was contained within the original regulation has been removed. The permit, not the SWMP, defines what is necessary to meet the MS4 permit standard, and it must do so in clear, specific, and measurable terms. The permit may state that compliance with the terms and conditions of the permit constitute compliance with the MS4 permit standard. ([Return to Checklist](#))

Indicate whether the permit directs MS4s to develop measurable goals in the SWMP.

Note to Reviewers: If “yes,” and if this permit is a Comprehensive General Permit, this could indicate that the permit has not established clear, specific, and measurable requirements as required for the MCMs and other requirements. It also could indicate that the permitting authority is inappropriately deferring this responsibility to the permittee. However, if the permit is a Two-Step General Permit, requiring measurable goals in the SWMP may be acceptable if the measurable goals are then subject to a second step process consistent with §122.28(d)(2).

Note that “measurable goals” are no longer as important to the permitting process as they were before the Remand Rule. The permitting authority must make any final determination about what the permit will require, when specific actions must occur, and what the measures for determining compliance will be. “Measurable goals” may be included in a SWMP when they represent interim milestones that are not necessarily enforceable but are indicators of whether progress is adequate or whether the level of effort should be adjusted in some fashion. ([Return to Checklist](#))

Indicate whether the permit clearly explains the role of the SWMP.

Note to Reviewers: Under EPA’s regulations, the SWMP is a detailed written explanation of how the MS4 will meet the permit requirements. It does not establish permit requirements or define how permit compliance will be assessed. If the permit or fact sheet states that the SWMP will be enforceable, the permit must indicate that the SWMP will undergo permitting authority review and public comment (i.e., a second-step process). Note that if the permitting authority does incorporate the entire SWMP into an MS4’s permit by reference or in its entirety, later modification of the SWMP would likely require a permit modification that must fulfill the requirements for public notification. ([Return to Checklist](#))

Indicate whether the permit explains when and how the SWMP should be revised and when revisions must be submitted to the permitting authority.

Note to Reviewers: For detailed provisions in the SWMP that are in addition to permit requirements (i.e., they are not enforceable), the permit can establish which provisions must be submitted to the permit authority and should indicate if approval is necessary before the MS4 can implement them or if reporting revisions to the permitting authority is sufficient. For changes to the enforceable terms of the permit itself, NPDES permit modification procedures must be followed. See §122.62 and 122.63. ([Return to Checklist](#))

Rationale for Requirements Satisfying the MS4 Permit Standard

Indicate whether the fact sheet explains how the permit requirements meet the MS4 permit standard.

Note to Reviewers: If “no,” the recommendation should be to explain why the permit conditions are sufficient to meet the MS4 permit standard. As EPA stated in the preamble to the Remand Rule, “... the permitting authority’s rationale for adopting specific small MS4 permit requirements should be documented consistent with the requirements for any NPDES permit requirements under § 124.8 and, if EPA is the permitting authority, § 124.9. This rationale should describe the basis for the draft permit terms and conditions, including support for why the permitting authority has determined that the requirements meet the required MS4 permit standard. EPA agrees with the commenters’ suggestion that this rationale should be provided under both permitting approaches in the final rule. This position is consistent with the Ninth Circuit’s remand decision, which emphasized the need for permitting authorities to determine that requirements satisfy the MS4 permit standard and that the public be given an opportunity to provide comments and to request a hearing on this determination.” (81 FR 89341, December 9, 2015) ([Return to Checklist](#))

III.B Six Minimum Control Measure Requirements

In this section, you will be evaluating the adequacy of the permit in addressing each of the six MCMs in §122.34(b) in terms of whether the permit’s provisions satisfy the MS4 permit standard and whether they are expressed in a clear, specific, and measurable manner. For each MCM, you will be evaluating the permit’s provisions based on the following types of questions:

1. **Completeness:** Does the permit include provisions that address the minimum required elements included in the regulations? [§122.34(b)]
2. **Clear, Specific, and Measurable Permit Language:** Does the permit include permit terms that are clear, specific, and measurable as required in §122.34(a)?
3. **MS4 Permit Standard:** Do the requirements represent the “maximum extent practicable” level of achievement for the permittee, in light of the previous (or expiring) permit’s requirements, and what you know to be the general record of permittee compliance and progress made, information about BMP effectiveness and availability of new stormwater control technologies or practices, and current water quality conditions? [§122.34(a)(2)]

Note to Reviewers: For questions 2. and 3, we have developed a list of additional standard questions to consider when evaluating the permit. We have included some notes for many of the questions that explain why the question is being asked.

Your evaluation will be different for Comprehensive General Permits than it is for Two-Step General Permits. For a Comprehensive General Permit, you are evaluating whether the permit itself includes requirements that satisfy the three questions above and is not relying on the permittee to define for itself what enforceable requirements it would propose for the permit.

For a Two-Step General Permit, you are evaluating whether the permit establishes a second step process that matches what is required in the regulations at §122.28(d)(2). You also must determine whether you are satisfied that clear, specific, and measurable requirements that meet the MS4 permit standard are expected to be established based on the details included in the permit and the NOI form. To help you make this determination, we have also included standard questions for Two-Step Permits. ([Return to Checklist](#))

III.B.1 Completeness

Construction Site Stormwater Runoff Control

Indicate whether the permit includes provisions that address the minimum required components of the construction site stormwater runoff control MCM in §122.34(b)(4)(i).

- *[I]dentify the minimum elements and require the development, implementation, and enforcement of a program to reduce pollutants in any stormwater runoff to the small MS4 from construction activities that result in a land disturbance of greater than or equal to one acre. Reduction of stormwater discharges from construction activity disturbing less than one acre must be included in the program if that construction activity is part of a larger common plan of development or sale that would disturb one acre or more.*

Note to Reviewers: *If the Director waives requirements for stormwater discharges associated with small construction activity in accordance with § 122.26(b)(15)(i) (i.e., waivers for sites with rainfall erosivity factor of less than 5 during construction or where an approved TMDL documents that no stormwater controls are needed for sediment or a related parameter), the permittee is not required to develop, implement, and/or enforce a program to reduce pollutant discharges from such sites. ([Return to Checklist](#))*

- *At a minimum, ... develop and implement:*
 - *An ordinance or other regulatory mechanism to require erosion and sediment controls, as well as sanctions to ensure compliance, to the extent allowable under State, Tribal, or local law;*
 - *Requirements for construction site operators to implement appropriate erosion and sediment control best management practices;*
 - *Requirements for construction site operators to control waste such as discarded building materials, concrete truck washout, chemicals, litter, and sanitary waste at the construction site that may cause adverse impacts to water quality;*
 - *Procedures for site plan review which incorporate consideration of potential water quality impacts;*
 - *Procedures for receipt and consideration of information submitted by the public, and*
 - *Procedures for site inspection and enforcement of control measures.*

Note to Reviewers: *If the permit relies on the requirements of the state’s Construction General Permit (CGP) to address these requirements, make sure that the referenced CGP addresses all of the MCM requirements listed above. ([Return to Checklist](#))*

III.B.2 Standard Questions

Standard Questions to Assess Clear, Specific, and Measurable Permit Terms and Conditions

Indicate whether it is clear what specific actions must be carried out and completed during the permit term.

Note to Reviewers: *The regulations require that the permit “identify the minimum elements ... of [the] public education program” required in §122.34(b)(1)(i). For the purposes of this review, the “minimum elements” are the equivalent of the “specific actions” asked about in this and other questions. ([Return to Checklist](#))*

Indicate whether the permit identifies, for the actions above, the following:

Specific timeframes by which the action must be started and completed? [Yes/No]

Note to Reviewers: *This could include deadlines associated with interim milestones for completion of the action. Alternatively, the permit could have deadlines for major milestones and let the permittee determine interim actions/deadlines in the SWMP. ([Return to Checklist](#))*

Any methods or criteria by which progress or effectiveness will be evaluated (e.g., assessments, monitoring, etc.)? [Yes/No]

Note to Reviewers: *This type of evaluation may be appropriate for some types of requirements, such as those for public education and outreach, where measuring progress is not as straightforward as with other types of requirements. However, where the permit already has already specified measurable outcomes in any given area, it will likely be unnecessary to have additional assessment or monitoring types of requirements. ([Return to Checklist](#))*

Evaluate whether the permit includes any of the following scenarios, which may indicate that the requirements are not sufficiently clear, specific, and measurable. Consider via the following questions:

Do the provisions merely repeat word-for-word, more or less, the text of the minimum control measure? [Yes/No]

Note to Reviewers: *If “yes,” this is likely an area that should be flagged for being insufficiently clear, specific, and measurable under §122.34(a). As the Remand Rule preamble stated, “[t]he minimum control measures set forth in § 122.34(b), for instance, are not intended as minimum permit requirements, but rather areas of municipal stormwater management that must be addressed in permits through terms and conditions that are determined adequate to meet the MS4 permit standard. For that matter, if a permitting authority were to merely use the minimum control measure language from § 122.34(b) word-for-word and include no further enforceable permit terms and conditions, this permit would not satisfactorily meet the requirement to establish clear, specific, and measurable requirements that together ensure permittees will comply with the MS4 permit standard.” 81 FR 89342.*

If this permit mostly relies on the regulatory language to suffice for the MCM, consider suggesting the permit include additional specificity based on requirements in other states in the Region or recommend

generally that they consider the examples highlighted in EPA’s compendia documents and the language from the MS4 Permit Improvement Guide. ([Return to Checklist](#))

Are there any provisions that appear to allow the MS4 permittee to define its own enforceable requirements instead of being specified in the permit? [Yes/No]

Note to Reviewers: *Look for provisions that direct the permittee to develop and implement programs or plans without defining with sufficient detail what those programs must include to be adequate. For any such provisions, you should consider recommending that the permit require a second step for this provision. Even where there will be a second step, you may need to suggest additional clear, specific, and measurable terms and conditions that explain how an MS4’s proposed provisions will be evaluated. ([Return to Checklist](#))*

Are there any instances where non-mandatory language is used (e.g., “should,” “may,” “consider,” “recommend,” “will,” etc.)? [Yes/No]

Note to Reviewers: *If “yes,” consider whether the use of these words make it appear as if an otherwise clear, specific, and measurable requirement is not an enforceable part of the permit and whether less ambiguity is needed in the permit or whether the language reflects optional actions that would be better addressed in the SWMP. Note that use of this type of language may be acceptable in the context of a Two-Step General Permit, where the base general permit is describing guidelines for or recommendations on what types of proposed actions are encouraged to be part of the MS4’s NOI for this particular MCM. The MS4’s proposed actions will then need to be adopted as clear, specific, and measurable permit terms as part of the second step process. ([Return to Checklist](#))*

Are there instances where conditional language is used (e.g., “if feasible,” “if practicable,” “to the maximum extent practicable,” and “as necessary,” etc.)? (See Appendix A) [Yes/No]

Note to Reviewers: *If “yes” and the permit is a Comprehensive General Permit, this type of conditional language could be an indicator that the permit is not sufficiently clear, specific, and measurable. Look for language in the permit that defines what is meant by “if feasible,” “if practicable,” etc., so that it is not left up to the permittee to determine. In evaluating use of these phrases, also consider whether the permit has included a separate definition that sets out what these phrases mean in clear, specific, and measurable terms.*

If “yes” and the permit is a Two-Step General Permit, consider whether the language in question provides sufficient detail to guide the MS4 in what types of actions to submit for review during the second step process. The permitting authority, the MS4, and the public all need to understand the range of acceptable actions so there is a basis for evaluating the adequacy of the MS4’s submission. ([Return to Checklist](#))

Indicate whether the permit includes the conditions that apply when another entity carries out responsibilities for the MS4 as specified in §122.35.

Check to make sure the following conditions for relying on other entities to implement permit requirements associated with a particular MCM are addressed as required by §122.35(a)(1)-(3):

- The other entity must in fact implement the required actions; and

- The particular control measure is at least as protective as the corresponding permit requirement; and
- The other entity agrees to carry out the required action on the permittee's behalf and
- The permittee remains responsible for compliance with the permit requirement if the other entity fails to do so.

Note to Reviewers: *If these conditions are not addressed in the permit, the recommendation should be to address any missing elements in the permit. ([Return to Checklist](#))*

Standard Questions to Consider When Evaluating Whether the Permit Meets the MS4 Permit Standard

Evaluate whether, as a whole, the requirements in this section represent the “maximum extent practicable” level of achievement for the permittee, in light of the previous (or expiring) permit's requirements, what you know to be the general record of permittee compliance and progress made, new information about BMP effectiveness and stormwater control technologies, and current water quality conditions.

To make this determination, the following questions may be helpful to consider:

Are any of the requirements in this section the same as they were in the previous (or soon to be expiring) permit? [Yes/No]

Note to Reviewers: *If “yes,” this could be an area of the permit that needs to be modified. The Remand Rule includes new language that clarifies that the MS4 permit standard must be reassessed each permit term and account for current technology, receiving water quality, compliance history, and other relevant information. As stated in the Remand Rule, “[t]he crux of this requirement is that permitting authorities cannot simply reissue the same permit term after term without considering whether more progress can or should be made to meet water quality objectives or that other changes to the permit are in order. As is the case with NPDES permits generally, the permitting authority considers anew what is appropriate each time it issues a permit. For example, new stormwater management techniques may have arisen or become affordable during the expiring permit term that should be taken into consideration.” 81 FR 89338.*

Even if the previous permit's requirements were adequate to meet the MS4 permit standard at the time that permit was issued, that does not necessarily mean that retaining these provisions unchanged will still meet the standard. Consider the following in making this assessment:

- ✓ *Did any of the deadlines pertaining to these requirements already pass from the previous permit? Yes/No*
Generally speaking, it is not appropriate to continue to specify the same deadlines in subsequent permit terms for the same actions. If “yes” to the question, this may point to the need to establish a new set of actions with new deadlines in the new permit term.
- ✓ *Do known water quality problems suggest the need for changes to these requirements that focus more attention on issues or activities that may address the problem? For example, have additional §303(d)-listed waters that receive discharges from MS4s and that are impaired for pollutants commonly associated with MS4s been identified since the previous permit was issued? (Note: Pollutants that are commonly associated with MS4s may include Biological Oxygen Demand (BOD) or dissolved oxygen, sediment or a parameter that addresses sediment such as*

Total Suspended Solids (TSS), turbidity, or siltation, bacteria, nutrients, oil and grease, and metals.)

- ✓ *Does the fact sheet identify a good reason why the requirements should stay the same? For example, do the requirements that remain the same relate to an MCM that is expected to stay relatively unchanged, such as language requiring the development of local ordinances, or general requirements related to operation and maintenance of stormwater controls? Or are some portions of the permit kept unchanged because past efforts have eliminated problems or to allow the permittee to focus on identified problems in other aspects of the stormwater management program?*
- ✓ *Consider whether the requirement being kept the same, or in some cases even deemphasized or lessened, is justified based on this permit's focus on higher priority stormwater issues. ([Return to Checklist](#))*

If the permit contains particularly notable requirements that you would recommend as examples for other permits, you should describe:

Note to Reviewers: *This is an opportunity to acknowledge innovative ideas that demonstrate an understanding of problems that have been identified by the permittee or others for a particular situation and the steps needed to address those problems. For example, does the permit address the need for public education materials to be provided in different languages where the MS4 serves significant non-English speaking populations? Does it identify factors to consider to determine if multi-lingual materials are needed? ([Return to Checklist](#))*

Standard Questions for Two-Step Permits

1. Does the permit identify what elements must be included in a program proposed by the MS4; and Does the additional information requested in the NOI correspond to the types of permit requirements that need to be developed in the second step of the Two-Step permit process? [Yes/No]

Note to Reviewers: *Provide examples in the report of the directions provided in the NOI that request the additional information that correspond to the second step permit process. ([Return to Checklist](#))*

IV. Requirements to Protect Water Quality and to Satisfy Appropriate Water Quality Requirements of the CWA

IV.A General

Indicate whether the permit includes requirements that address the protection of water quality, such as achieving applicable water quality standards (apart from provisions addressing impaired waters both with and without approved TMDLs).

Note to Reviewers: *Look for these provisions in either the eligibility section of the permit or in any water quality section. If there are such requirements in the permit, assess whether they are clear, specific, and measurable. ([Return to Checklist](#))*

IV.B Total Maximum Daily Load (TMDL)-Related Requirements

Clear, Specific, and Measurable Permit Language

Does the permit identify any of the following in the permit or in an appendix to the permit? Yes/No

- Listing of impaired waters with approved TMDLs? [Yes/No]
- Applicable TMDLs? [Yes/No]
- Pollutants of concern? [Yes/No]
- Specific wasteload allocations (WLAs) [or load allocations (LAs) if the TMDL was approved with this type of allocation] to specific small MS4s eligible for coverage under the permit or to MS4s generally or more broadly to urban stormwater? [Yes/No]
- Specific MS4s affected by the WLAs (or LAs)? [Yes/No]
- Long-term compliance deadlines for coming into compliance with the numeric WLA (or LA)? [Yes/No]

Note to Reviewers: Where the permit does not include this information, consider recommending that it be included. This information is best provided by the permitting authority, who is in the best position to understand which TMDLs apply to its permittee universe. Leaving this information for the permittee to compile is burdensome and may lead to inconsistent and sometimes inaccurate information. ([Return to Checklist](#))

IV.C Requirements for Discharges to Impaired Waters without an Approved TMDL**Clear, Specific, and Measurable Permit Language**

Indicate whether the permit identifies any of the following in the permit, or in an appendix to the permit.

- Listing of impaired waters to which MS4s discharge that do not yet have an approved TMDL?
- Pollutants of concern? [Yes/No]
- Applicable Water Quality Standards, including any numeric criteria for the associated pollutants of concern? [Yes/No]
- Specific MS4s discharging to the impaired water? [Yes/No]

Note to Reviewers: Where the permit does not include this information, consider recommending that it be included. This information is best provided by the permitting authority, who is in the best position to understand the extent of the waterbodies included in its 303(d) list of impaired waterbodies and which MS4s may be discharging to those waterbodies. Leaving this information for the permittee to interpret is burdensome and may lead to inconsistent and sometimes inaccurate information. ([Return to Checklist](#))

V. Reporting Requirements

The Remand Rule requirement that permit conditions be expressed in a clear, specific, and measurable manner applies also to permit provisions that address the evaluation, recordkeeping, and annual report requirements in the NPDES regulations. See §122.34(a) and (d).

Completeness

Indicate whether the permit includes provisions that address the minimum regulatory requirements for evaluation, reporting, and recordkeeping consistent with §122.34(d).

Note to Reviewers: The NPDES eRule require that all annual reports be submitted electronically after December 21, 2020. 40 CFR 127.16(a), Table 1. However, EPA has proposed to extend that deadline to [December 21, 2023](#). ([Return to Checklist](#))

Indicate whether the permit includes requirements to address e-Reporting.

Note to Reviewers: The [2015 NPDES Electronic Reporting rule](#) identified the stormwater data elements that authorized NPDES programs must collect and electronically share with EPA (see 40 CFR 127.23). The data elements submitted through individual NPDES permit applications and general permit forms (NOI, LEW, NOE, NOTs), and annual reports, are identified in Appendix A, Table 2. The authorized NPDES program (under 40 CFR part 122) is responsible for collecting these data as part of its implementation and oversight activities. Note that the required data elements for MS4s were updated in a recent final rule that incorporated changes to the underlying permit requirements made with the [MS4 General Permit Remand Rule](#). Note also that the current deadline for states and permittees to begin electronically reporting MS4 information is December 21, 2020, but that EPA has [proposed](#) to extend that deadline to December 21, 2023.

For this question, look for any indication that the permit includes electronic reporting requirements. Consider including a comment reminding the permitting authority of the relevant deadline to begin requiring electronic reporting. ([Return to Checklist](#)) ([Return to Checklist](#))

Appendix 2: Evaluating Whether Permit Provisions Are Clear, Specific, and Measurable

This table is a compilation of review tips that may be helpful to you as you review small MS4 permits. These should be thought of as indicators of language that may lack the needed specificity, clarity, or measurability. As a reference, here are descriptions of the terms “clear,” “specific”, and “measurable” that can be used as guidance as you evaluate permit language for whether it qualifies as clear, specific, and measurable:

- A “clear” requirement is one that uses permit language that is easily understood and free from ambiguity or obscurity. Language not expressed in a clear manner is typified by undefined caveats such as “if feasible,” “if practicable,” “to the maximum extent practicable,” and “as necessary.” Clear permit language is written using mandatory requirements indicating the “permittee must” take the required action, while non-mandatory phrases such as “the permittee should,” “the permittee is expected to,” “the permittee will,” or “the permittee is encouraged to...” are not examples of clear requirements.
- A “specific” requirement is one that is written in an exact or detailed manner. Verbatim adoption of the regulatory language for the minimum control measures is not considered specific.
- A “measurable” requirement is one that incorporates a quantifiable or definite compliance objective. The requirement does not need to be expressed as a numeric effluent limit. A measurable requirement may also include mechanisms to help assess compliance and to track whether the measurable requirement has been met (e.g., specific dates, compliance targets, interim milestones, benchmarks).

It is not necessary, however, that you separately identify the language that is clear, specific, or measurable within each draft permit provision. These attributes are overlapping and may be difficult to isolate. Your main task is to determine whether a particular provision – in its totality – is sufficiently clear, specific, and measurable to meet the requirements of the regulations. One helpful way to think of your task is to look for the following in a permit requirement:

- What needs to happen?
- Who needs to do it?
- How much do they need to do?
- When do they need to get it done?
- Where it is to be done?

Table A2-1: Types of Permit Provisions that Lack Clear, Specific, and Measurable Language

Type of Permit Provision	Example	Clear, Specific, and Measurable?
<p>Permit provisions that copy the language of the Phase II regulations from §122.34(b) verbatim without providing further detail on the level of effort required or that do not include the minimum actions that must be carried out during the permit term.</p>	<p>“The ordinance must require construction site operators to implement appropriate erosion and sediment control best management practices.”</p>	<p>Generally, no. This language does not provide further details on the minimum set of accepted practices that would constitute compliance with the permit, therefore the permit would not meet the clear, specific, and measurable requirements.</p> <p>Exception: the IDDE requirement at §122.34(b)(3)(i)(B), which is written to be clear, specific, and measurable: “To the extent allowable under State, Tribal or local law, effectively prohibit, through ordinance, or other regulatory mechanism, non-stormwater discharges into the storm sewer system and implement appropriate enforcement procedures and actions.”</p> <p>Note that use of some distinct portions of the regulatory language in the permit may be part of a larger set of requirements that are clear, specific, and measurable. For example, the list of the types of non-stormwater discharges or flows that must be controlled from §122.34(b)(3)(ii) may be used verbatim. However, the permit should not rely on the language in this section alone since it does not provide a clear, specific, and measurable set of actions specifying what it means to “address” these pollutant sources.</p>
<p>Permit requirements that include “caveat” language, such as “if feasible,” “if practicable,” “to the maximum extent practicable,” and “as necessary” or “as appropriate” unless defined.</p>	<p>Permits that include the following language (or words to this effect) as a stand-alone requirement: “The MS4 shall develop, implement, and enforce a SWMP designed to reduce the discharge of pollutants from the permittee’s regulated small MS4 to the maximum extent practicable, to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act.”</p>	<p>Generally, no. However, permits may be able to use this type of language if it is accompanied by a definition that is clear, specific, and measurable. Without defining parameters for such terms, this type of language creates uncertainty as to what specific actions the permittee is expected to take and is therefore difficult to comply with and assess compliance.</p>

Type of Permit Provision	Example	Clear, Specific, and Measurable?
<p>Adjectives or verbs that suggest a required level of performance, but do not specify what constitutes compliance, such as “appropriate,” “appropriately,” “adequate,” or “proper.”</p>	<p>“Develop and implement standard operating procedures, or revise existing procedures, for the disposal of accumulated sediments, floatables, and other debris collected from the MS4 and during permittee operations to ensure proper disposal.”</p>	<p>In most cases, no. While use of these types of words has been common in permits predating the Remand Rule, the ambiguity of their meaning may lead to different interpretations on what they mean in specific situations.</p> <p>Consider whether these terms can be clarified or replaced with a cross-reference to an objective standard, such as a technical manual. For example, instead of “proper” in the example, the permit could require disposal “to ensure that such items do not re-enter the MS4 or waters of the U.S.” Another possible substitution would be use “in accordance with the state solid waste disposal law at [citation.]” It is not always possible to avoid vague descriptors, but they should not appear frequently in permit language.</p>
<p>Permit provisions that preface a requirement with non-mandatory words, such as “should,” “may,” “will,” or “the permittee is encouraged to...”</p>	<p>“The permittee may modify its program where it determines that changes are needed to improve implementation.”</p>	<p>Generally, no. The problem with the use of this type of permit language is that it “makes it difficult to assess compliance since it is ultimately left to the judgment of the permittee as to whether it will comply.” See 81 FR 89335 (December 9, 2016). For instance, it is generally not sufficiently clear where the non-mandatory terms are used in connection to a permit term that is directly related to compliance with a minimum control measure or to a water quality-based requirement.</p> <p>However, use of this language may be acceptable in limited contexts. Consider the following:</p> <ul style="list-style-type: none"> • Where the non-mandatory terms are used in connection with actions that are optional or recommended, use of this language may be acceptable (e.g., “Operators of unregulated small MS4s may apply for coverage under this [NPDES] general permit at any time...”).

Type of Permit Provision	Example	Clear, Specific, and Measurable?
		<ul style="list-style-type: none"> Note that the Phase II regulations include “guidance” (e.g., § 122.34(b)(1)(ii), (b)(2)(ii), and (b)(3)(iv)) that suggests practices for adoption by MS4s and within permits but does not mandate that they be adopted. This guidance language is intended for permitting authorities to consider in establishing their permit requirements. Permitting authorities may find it helpful to their permittees to include guidance language within their permits to provide suggestions to their permittees. However, guidance language phrased as suggested guidelines would not qualify as an enforceable permit requirement under the final rule.
<p>Permit language that suggests the permittee must comply with its SWMP.</p>	<p>“The permittee’s SWMP must be designed and implemented to reduce the discharge of pollutants from the Phase II MS4 to surface waters of the State to the maximum extent practicable (MEP). Compliance with the permittee’s SWMP constitutes compliance with the requirement to reduce pollutants to the MEP.”</p>	<p>No. This language suggests that the enforceable requirements are established as part of the SWMP, which, unless reviewed by the permitting authority and incorporated in its entirety as part of the second step process, violates the procedural requirements for use of general permits to regulate small MS4s. See §122.28(d). In the Remand Rule preamble, EPA explained that “... the details included in the permittee’s SWMP document are not directly enforceable as effluent limitations of the permit. The SWMP document is intended to be a tool that describes the means by which the MS4 establishes its stormwater controls and engages in the adaptive management process during the term of the permit. While the requirement to develop a SWMP document is an enforceable condition of the permit (see § 122.34(b) of the final rule), the contents of the SWMP document and the SWMP document itself are not enforceable as effluent limitations of the permit, unless the document or the specific details within the SMWP are specifically incorporated by the permitting authority into the permit.” See 81 FR 89339 (December 9, 2016).</p>

Type of Permit Provision	Example	Clear, Specific, and Measurable?
Provisions that require the development of a plan to meet key requirements in the permit but do not include details on the minimum contents or requirements for the plan or the required outcomes, deadlines, and corresponding milestones.	“If a TMDL is approved for any water body into which the Phase II MS4 discharges, and the TMDL includes requirements for control of stormwater discharges, the operator must review its stormwater management program for consistency with the TMDL allocation. If the Phase II MS4 is not meeting its TMDL allocation, the operator must modify its stormwater management program to comply with the provisions of the TMDL Implementation Plan applicable to the operator in accordance with the schedule in the Implementation Plan.”	<p>No. The concerns with using this approach is that “[T]he requirement leaves all of the decisions on what specific actions will be taken during the permit term to comply with this provision to the MS4 permittee, thus enabling almost any type of activity, no matter how minor or insubstantial, to be considered in compliance with the permit.” See 81 FR 89335 (December 9, 2016).</p> <p>However, this may be acceptable if the plan is proposed by the MS4 as part of a Two-Step General Permit and elements of the plan are made enforceable after permitting authority review and public notice is completed.</p>
Permit requirements that lack a measurable component.	“The permittee must develop and implement an inspection program for all active construction sites.”	No. The problem with this type of permit term is that it “...includes no minimum frequency that can be used to determine if the requirement has been met and, therefore, would not constitute a measurable requirement for the purposes of the rule.” See 81 FR 89335 (December 9, 2016).
Using action words like “address,” “minimize,” “maximize,” or “reduce” without providing further specificity regarding what actions are required.	<p>“Develop and implement a plan to detect and address non-stormwater discharges, including illegal dumping, to the system.”</p> <p>“Establish procedures for the storage of municipal vehicles and equipment to minimize pollutants from leaks, spills, and other pollutant sources.”</p>	<p>No. Without further specificity, it is not clear what the permit means when it directs the permittee to “address” or “minimize” the problem. As a result, it will be difficult to determine what level of activity on the part of the permittee constitutes compliance.</p> <p>However, these words may be adequate if in other parts of the same section the permit includes specifics on what it means to “address” or “minimize” the pollutant problem, and those actions are themselves clear, specific, and measurable.</p>