1. MS4 PERMIT/APPEALS
2. DELEGATION - MPDES
3. CASE LAW UPDATE
“It’s déjà vu all over again.”

-Yogi Berra
EFFECTIVE DATE OF PERMIT
• July 1, 2017-2018

EPA MAY 10, 2018 PRESS RELEASE

EPA TIMELINE

<table>
<thead>
<tr>
<th>Completion Due Date</th>
<th>Requirement</th>
<th>Task</th>
<th>Permit section for reference</th>
</tr>
</thead>
<tbody>
<tr>
<td>10/1/2018</td>
<td>Notice of Intent (NOI)</td>
<td>Prepare and Submit NOI for Permit Coverage 90 days from the permit effective date.</td>
<td>Appendix E</td>
</tr>
<tr>
<td>6/30/2019</td>
<td>Prepare Stormwater Management Plan (SWMP)</td>
<td>Develop/update written SWMP.</td>
<td>1.10.a &amp; 1.10.2</td>
</tr>
<tr>
<td>6/30/2019</td>
<td>Illicit Discharge Detection and Elimination (IDDE)</td>
<td>Complete written IDDE procedures and rank outfalls for IDDE investigation. Document Sanitary Sewer Overflows to the MS4 during the past 5 years.</td>
<td>2.3.4.6 &amp; 2.3.4.7 &amp; 2.3.4.4.b</td>
</tr>
<tr>
<td>6/30/2019</td>
<td>Construction Site Runoff Control</td>
<td>Create written procedures for inspecting construction sites for proper sediment controls and conducting site plan reviews.</td>
<td>2.3.5</td>
</tr>
<tr>
<td>6/30/2019</td>
<td>Catch Basin Cleaning</td>
<td>Develop and implement a catch basin cleaning schedule with a goal of ensuring no catch basin is more than 50% full. Document catch basins inspected and cleaned, including total mass removed and proper disposal.</td>
<td>2.3.7.a.iii.b</td>
</tr>
<tr>
<td>6/30/2019</td>
<td>Street Sweeping</td>
<td>Sweep streets (rural and urbansed exceptions apply) a minimum of once a year in the Spring. Each annual report shall include number of miles cleaned and volume or mass of material removed.</td>
<td>2.3.7.a.iii.c</td>
</tr>
<tr>
<td>6/30/2019</td>
<td>Winter Road Maintenance</td>
<td>Develop and implement winter road maintenance procedures including use and storage of salt and sand, minimize the use of salts, ensure that snow is not disposed into waters.</td>
<td>2.3.7.a.i.ii.e</td>
</tr>
<tr>
<td>6/30/2019</td>
<td>Stormwater infrastructure maintenance</td>
<td>Inspect all stormwater treatment structures (excluding catch basins) at least annually and conduct maintenance as necessary.</td>
<td>2.3.7.1.d.vi.</td>
</tr>
</tbody>
</table>

https://www.epa.gov/npdes-permits/massachusetts-small-ms4-general-permit
APPEAL PENDING IN D.C. CIRCUIT COURT OF APPEALS

• Filed August 2016 – *MCWRA, and Franklin v. EPA*
• Joined by Lowell, HBAM/NAHB, and CRR, CLF, and CRWA
• *CRR v. EPA* - No. 16-1246 (and consolidated cases)
MEANWHILE ...

- NH MS4 issued
  - January 17, 2017
  - Effective July 1, 2018
- Appeals in D.C. Circuit
  - CRR - No. 17-1060
  - NAHB - No. 17-1138
  - CLF - No. 17-1195
THEN THINGS CHANGED . . .
REQUEST FOR STAY

MCWRS, FRANKLIN AND LOWELL

• Formal request to EPA:
• On May 26, 2017
• Maintain status quo
• Align w/ NH MS4/Appeal

APA SECTION 705: WHEN “JUSTICE SO REQUIRES,” AGENCY MAY POSTPONE EFFECTIVE DATE, PENDING JUDICIAL REVIEW

May 26, 2017

Via Email szaro.deb@epa.gov
And First Class Mail

Ms. Deborah Szaro
Acting Regional Administrator
Regional EPA New England, Region 1
5 Post Office Square - Suite 100
Boston, MA 02109-5912

Re: Request for Stay Pending Appeal of the 2016 Massachusetts Small Municipal Separate Storm Sewer System (MS4) General Permit

Dear Administrator Szaro:

We are writing you on behalf of the Massachusetts Coalition for Water Resources Stewardship, Inc. (“Coalition”) and the City of Lowell to request that Region 1 of the Environmental Protection Agency (the “Region” or “EPA”) stay the effective date of its 2016 Massachusetts MS4 Permit, 81 Fed. Reg. 21,862 (April 13, 2016) (the “MS4 Permit”), pending resolution of the ongoing appeal in the United States Court of Appeals for the D.C. Circuit. As demonstrated below, the Region has ample authority and justification to grant an administrative stay pending judicial review under 5 U.S.C. § 705.

The interests of justice requires a stay of the MS4 Permit pending judicial review. First, the MS4 Permit represents a significant expansion of EPA’s authority under the Clean Water Act (“CWA”). The Court must decide, among other things, whether EPA exceeded its authority under the CWA by requiring that, in addition to meeting the Maximum Extent Practicable standard, municipal discharges also not cause or contribute to an exceedance of water quality standards. Absent a stay, the municipalities that are subject to the MS4 Permit will expend scarce public resources implementing its provisions that will cause them to set aside other
EPA’S POSTPONEMENT NOTICE

• Issued 6/29/17
• “EPA would like to explore the use of [ADR]”
• “Postponing effective date ... give(s) EPA ample time to determine what, if any, changes are appropriate in the Permit and to determine next steps”

footnote #1 “EPA’s action ... does not affect requirements of the permit issued by MassDEP under Massachusetts Law.”
DEP – WHAT WILL IT DO?

PRESSURE ON DEP
  - ENFORCE PERMIT
  - REQUIRE NOI’S

BOSTON GLOBE EDITORIAL - JULY 30, 2017

• “Baker’s [DEP] should enforce it without interruption – both because it’s the right thing to do, and would prove that DEP is up to the enhanced oversight of water pollution that Baker has sought for it”
DEP AUGUST 14, 2017 NOTICE

“IN RESPONSE TO 28 E-MAILS...FROM MUNICIPALITIES AND ONE MUNICIPAL COALITION...”

MAKE SAME AS DATES OF EPA ISSUED PERMIT

REVISE CURRENT STATE PERMIT DEADLINE FOR SUBMITTAL OF NOI’S
MEANWHILE ...

- Asks Court to “vacate MS4 stay notice so that the [MS4] will be reinstated effective immediately.”
- EPA’s response: Case does not belong here
  - On 10/26/17 filed in First Circuit No. 17-2070 (case stayed)
- MCWRS, Franklin, Lowell moved to intervene (12/19/17)
MEANWHILE...

COMMONWEALTH OF MASSACHUSETTS (AGO) – SUBMITTED AN AMICUS BRIEF ON JANUARY 9, 2018

• Supporting Rivers Alliance
  • “EPA's stay of the MS4 General Permit will impact the natural resources for which the Commonwealth is trustee for the public . . .”
  • “EPA's stay . . . grinds to a halt the state's parallel stormwater enforcement program under its new permit, hindering the Commonwealth's interest in carrying out its own obligations to protect its natural resources and public health.”
  • “EPA unlawfully invoked section 705 . . .“

• With 7/1/18 effective date, is Rivers Alliance case now moot?
BACK TO THE APPEAL

• Briefing has been held in abeyance
  • Status Report due May 16, 2018, and at 90-day intervals

• Mediation – D.C. Circuit
  • Mediator appointed in Fall 2017
  • All parties agreed to participate
  • Mediation continues

• Seek a Court ordered stay under APA Section 705?
ISSUES ON APPEAL

• Permit improperly requires MS4s to comply with WQS in addition to reducing discharge of pollutants to MEP

• Specific targets for water bodies with or without TMDLs

• Imposes numeric flow-related (retention) standard on new development and redevelopment
MS4 APPEAL

• Case has national interest – if EPA prevails, much broader authority to impose storm water requirements and TMDL implementation programs for MS4s

• MassDEP – objected to the Permit as “a significant shift in approach from the BMP-based program.”
NPDES DELEGATION

HIT A BRICK WALL

H2777 – BEFORE JOINT COMMITTEE ON ENVIRONMENT, NATURAL RESOURCES AND AGRICULTURE IN EARLY 2018

• Declined to report out of Committee
• Sent to study
“EPA, NOT THE STATE, SHOULD REGULATE WATER POLLUTION”

“. . . STATE REGULATORS WILL FACE GREATER POTENTIAL PRESSURE TO GO EASY ON TOWN GOVERNMENTS”

CURRENT ARRANGEMENT HAS WORKED

“TURNING OVER OVERSIGHT OF RIVER POLLUTION TO THE STATE BRINGS POLLUTERS ONE STEP CLOSER TO THE REGULATORS, AND THAT WOULD BE A MISTAKE.”
NGO CAMPAIGN AGAINST H2777

NGO SPEAKING POINTS

• Could harm water quality
• Ill-prepared state agency
• Expensive program
• Unsustainable funding
• Long-term concerns
• Problems with program in other states
NEW HAMPSHIRE NPDES DELEGATION

SB - 450

• Authorizes advisory commission to study delegation
  • $350k – consultant hiring
  • Report would be due end of 2019
  • Not yet reached Governor
CASE LAW

TMDL’S TRIGGER PERMITTING OBLIGATION?


- Asked to order EPA to notify C/I within TMDLs watersheds to get permits.
- TMDL approval and determination SW controls needed ≠ need for permit.
- Not treat “approval of TMDLs as drive-by permitting determinations”
CASE LAW

DISCHARGES TO GROUND WATER SUBJECT TO CWA?

  - Yes - Discharge of pollutants reaching navigable waters 1,000 ft. away.

  - Yes – So long as “pollutants are fairly traceable from the point source to navigable water”

  - Basement backups and subsequent seeps from basements into groundwater
CASE LAW

CLIMATE CHANGE PLANNING?

*CLF v. Exxon Mobil*, U.S.D.C. MA 1:16-CV-11950 (MLW)

- Citizen suit alleging violation of CWA for failure to take action to prepare marine terminal for climate change.
- Standing for near-term coastal hazards, but not for climate change related harms in “far in the future.” (9/13/17 Order)
- Case still pending
QUESTIONS?