



Parties Join Litigation Over Massachusetts MS4 General Permit; WWP to File Amicus Brief

November 2016

As previously reported, the Final General Permit for Stormwater Discharges from Small MS4s in Massachusetts issued by EPA, and effective July 1, 2017, was immediately the subject of a challenge by the Center for Regulatory Reasonableness (CRR) in the U.S. Court of Appeals for the District of Columbia. Since then, four separate petitions for review have been filed in the U.S. Court of Appeals for the First Circuit.

The Massachusetts Coalition for Water Resources Stewardship (MCWRS), a non-profit organization whose members include municipal drinking water, wastewater, and stormwater agencies, and the Town of Franklin, Massachusetts filed a joint petition and have indicated that they will challenge the compliance standard contained in the permit. MCWRS, Franklin, and other municipalities contend certain permit conditions go beyond EPA's authority under the Clean Water Act. MCWRS has stated that independent estimates of the costs for communities to meet these new conditions range from \$260,000 to \$750,000 annually for medium-sized municipalities. The City of Lowell, Massachusetts, has also filed a petition for review.

From industry, the National Association of Home Builders (NAHB) and the Home Builders and Remodelers Association of Massachusetts (HBRAH) have filed a joint petition. In a press release, the organizations indicate they will challenge the manner in which EPA has connected the regulation of stormwater to impervious surfaces, arguing that the approach taken in the permit could impact the number of homes that can be built on a site and the layout of roads and driveways.

Finally, two environmental groups—Conservation Law Foundation and Charles River Watershed Association—filed a joint petition as well, challenging the length of the compliance period afforded by EPA, seeking to require more “enforceable” water quality based effluent limitations for the control of phosphorus and other pollutants, and seeking to require low-impact development/green infrastructure approaches to controlling stormwater.

The appeals have now been consolidated in the DC Circuit Court of Appeals. However, there is some thought that the groups who filed in the First Circuit may make an attempt to have the appeal transferred to the First Circuit. The DC Circuit is currently giving the parties time to negotiate a briefing schedule, which we expect to be issued sometime in January 2017.

As noted previously, we are concerned that the permit may be used as a template for future small MS4 general permit and MS4s across the country will be pushed to meet requirements exceeding the maximum extent practicable (MEP) compliance standard set by the Clean Water Act. The WWP plans to file an *amicus* brief to aid the court as it interprets the statutory MEP

standard and its relationship to certain unreasonable permit conditions that go well beyond typical requirements. We hope the Trump Administration will withdraw the permit and issue a replacement permit that is more reasonable.