**United States Environmental Protection Agency ("EPA") National Pollutant Discharge Elimination System ("NPDES")**

# POSTPONEMENT OF THE JULY 1, 2017 EFFECTIVE DATE OF GENERAL PERMITS FOR STORMWATER DISCHARGES FROM SMALL MUNICIPAL SEPARATE STORM SEWER SYSTEMS IN MASSACHUSETTS

Pursuant to § 705 of the Administrative Procedure Act ("APA") (5 U.S.C. § 705), and for the reasons stated below, the EPA hereby postpones the effective date of the EPA-issued General Permits for Stormwater Discharges from Small Municipal Separate Storm Sewer Systems ("MS4s") in Massachusetts ("Massachusetts permit") from July 1, 2017 to July 1, 2018.

## I. Background

EPA Region 1 issued the Massachusetts permit on April 4, 2016, with an effective date of July 1, 2017. Region 1 issued the previous general permit for Small MS4s in Massachusetts in 2003, which expired and was administratively continued for MS4s covered under that permit in 2008. EPA Region 1 issued the 2016 Massachusetts permit following issuance of the Commonwealth's CWA section 401 certification by the Massachusetts Department of Environmental Protection ("MassDEP"). The final 2016 permits were jointly issued by EPA and MassDEP, along with EPA's 632-page Response to Comments document.[1]

The Massachusetts Permit allows eligible small MS4s in Massachusetts to obtain NPDES permit coverage for their stormwater discharges. Approximately 260 towns and other municipalities, which include a number of state and federally owned entities such as colleges, Veterans Administration hospitals, prisons and military bases in Massachusetts, are eligible to seek coverage under the permit.

Several parties filed petitions for review of the Massachusetts permit in the U.S. Court of Appeals for the D.C. Circuit. Petitioners are the Center for Regulatory Reasonableness ("CRR"), Conservation Law Foundation/Charles River Watershed Association, National Association of Homebuilders, the City of Lowell, and the Town of Franklin. The D.C. Circuit has consolidated these petitions. See *Center for Regulatory Reasonableness, et al. v. EPA*, No. 16-1246 (D.C. Circuit).

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[1] Although the Region issues NPDES permits in Massachusetts, the Commonwealth maintains separate permitting authority under Massachusetts law. *See* Mass. Gen. Laws ch. 21, § 43; Mass. Code Regs. tit. 314. When the Region issues an NPDES permit in Massachusetts, MassDEP typically jointly issues a permit under state law. *See In re City of Marlborough*, 12 E.A.D. 235, 236 n.3 (EAB 2005); *In re Westborough*, 10 E.A.D. 297, 300 n.2 (EAB 2002). EPA's action in postponing the effective date of the Massachusetts permit does not affect the requirements of the permit issued by MassDEP under Massachusetts law.

On April 21, 2017, the D.C. Circuit granted CRR's motion to indefinitely stay the briefing deadlines. Under the original briefing schedule, petitioners would have filed their opening briefs on May 8, 2017. CRR cited several justifications in its motion to stay the original briefing deadlines, including providing time for the New Hampshire small MS4 general permit's judicial review period to end, providing time to address certain questions about the administrative record, and deadlines that the petitioners were facing in non-related litigation. EPA did not oppose this motion. Motions to govern further proceedings are due July 20, 2017.

On May 26, 2017, three of the petitioners (the Massachusetts Coalition of Water Resources, the City of Lowell, and the Town of Franklin, hereafter the "Requestors") submitted a letter asking EPA Region 1 to postpone the July 1, 2017 effective date for one year pending judicial review under section 705 of the APA.

## II. Discussion

Upon consideration of the request, and for the reasons set forth below, EPA has determined that justice requires postponement of the effective date.[2] Therefore, pursuant to APA section 705, EPA hereby postpones the July 1, 2017 effective date for one year to July 1, 2018. EPA will provide notice of this postponement to the public, including all petitioners, all commenters, and all known potential permittees.

### A. The Request

The Requestors' May 26 letter asks EPA to postpone the July 1, 2017 effective date of the Massachusetts permit in the "interests of justice" because, the Requestors assert, (1) the permit represents a significant expansion of EPA's CWA authority and the court must decide, among other things, whether EPA acted within its bounds by requiring that discharges meet water quality standards in addition to meeting the Maximum Extent Practicable ("MEP") standard; (2) it will align the Massachusetts permit's effective date with the effective date of the virtually identical New Hampshire small MS4 general permit, which was issued in January 2017, raises the same legal issues, and has also been challenged in the D.C. Circuit (as well as the 1st Circuit); and (3) although irreparable harm is not required for EPA to postpone the effective date under APA section 705, without it the towns will suffer irreparable harm by immediately expending resources that may ultimately prove to be unnecessary and wasted to avoid non-compliance and risk of enforcement.

### B. Analysis

EPA finds that justice requires postponing the July 1, 2017 effective date of the Massachusetts

[2] The Region 1 Regional Administrator is authorized to act on behalf of EPA in this matter pursuant to 40 C.F.R. § 124.19(*l*), which grants regional administrators the authority to issue final NPDES permit decisions, which includes determining when a permit will take effect.

permit for one year pending judicial review. EPA would like to explore the use of alternative dispute resolution ("ADR") in this case in order to engage with the various petitioners and jointly see if there might be a resolution that could avoid the need for litigation. EPA believes that it is fair to postpone the effective date of the permit so that eligible MS4s in Massachusetts that could seek coverage under the permit would not be subject to enforceable permit terms and conditions under the Massachusetts permit that could change as a result of ADR. Postponing the effective date for one year pending judicial review should give EPA ample time to determine what, if any, changes are appropriate in the permit and to determine next steps.

Pending any such decision by the Agency, postponing the effective date of the permit for one year will postpone certain obligations – and the associated costs – that would otherwise be incurred in the first year's implementation of the Massachusetts permit. Such costs would include monetary and staff time for preparation and submittal of a Notice of Intent ("NOI") to be covered by the permit. Also in the first year, in the absence of the postponement of the permit's effective date, the MS4s would have to update portions of their existing Stormwater Management Plans. Given the status of the litigation, the possibility that the parties will engage in ADR and that the Agency may decide to make changes to the permit, the Agency believes it is reasonable to defer imposition of these obligations and costs for the period of the postponement.

Moreover, postponing the effective date by one year will have the benefit of matching the Massachusetts permit's effective date with the effective date of the New Hampshire small MS4 general permit, which EPA Region 1 issued on January 18, 2017 and will take effect on July 1, 2018. Various parties have filed petitions for review of the New Hampshire permit in the D.C. Circuit, as well as one petition in the U.S. Court of Appeals for the First Circuit. EPA is also interested in exploring the use of ADR in that case. EPA has filed a motion with the First Circuit to transfer the petition that was filed there to the D.C. Circuit so that all of the New Hampshire petitions may be consolidated. Aligning the effective dates could promote efficiency in the resolution of both cases by facilitating the development of a unified ADR process that would address those issues raised in both permit appeals.

C. Conclusion

Based on the above, EPA concludes that justice requires postponement of the effective date. Thus EPA hereby postpones the July 1, 2017 effective date of the Massachusetts permit for one year to July 1, 2018.

6/29/17
Date

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