Bowditch
&Dewey
ATTORNEYS

Robert D. Cox, Jr.
Direct telephone: 508-926-3409
Direct facsimile: 508-929-3012
Email: rcox@bowditch.com

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 02109-3912

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

{Client Files/307207/0002/COR/04070618.DOCX;7}

municipal priorities before the Court may complete review of this matter. Because the 2016 MS4 Permit is of unprecedented scope and complexity,[1] communities affected by it, and their citizens, should be allowed to maintain the status quo by continuing to implement those standards set by the 2003 MS4 Permit and avoid the burdens imposed by the 2016 MS4 Permit until the Court has had an opportunity to review and rule on the MS4 Permit's legality.

Second, the Region recently issued an NPDES General Permit for MS4s in New Hampshire ("NH MS4 Permit") that in form and substance is virtually identical to the MA MS4 Permit. The NH MS4 Permit has been appealed to the same court, Center for Regulatory Reasonableness v. U.S. Environmental Protection Agency, No. 17-1060 (D.C. Cir.), and the same legal challenges are expected. The effective date of the NH MS4 Permit is July 1, 2018. The effective date of the MA MS4 Permit is a year earlier, July 1, 2017. Where a Court will be reviewing the same issues in both the MA and NH MS4 Permit appeals, the effective dates and the compliance deadlines for these two permits should be consistent. An administrative stay of the MA MS4 Permit would achieve such consistency.

Finally, even though an irreparable harm finding is not required for the Region to issue an administrative stay, the municipalities that are subject to the MS4 Permit will suffer irreparable injuries if the MS4 Permit is not stayed pending judicial review. Municipalities must immediately expend resources that may prove to be unnecessary and wasted to avoid non-compliance and risk of enforcement. Those expenditures may ultimately be rendered misdirected following judicial review. Such wasted expenditures constitute irreparable harm. Given the far-reaching impact this permit will have on municipalities and their citizens who must ultimately pay for compliance,[2] and the uncertainty surrounding the authority of EPA to issue it,

---

[1] The MS4 Permit and Appendices total nearly 300 pages, and includes a major increase in data collection, management and reporting, operation and maintenance requirements, stormwater planning and assessment activities, compliance with TMDLs, major capital projects for stormwater improvements, and a significant increase in administrative costs.

[2] In Massachusetts Department of Environmental Protection's ("DEP") comments to EPA, DEP stated that "resources at the local level are scarce," that "the costs to implement the proposed MS4 permit are a major issue to be considered," that EPA should "recognize that costs will have significant effect on communities" and further suggested that EPA consider the timing needed for such significant resources. See EPA Response To Comments on National Pollutant Discharge Elimination System (NPDES) General Permits for Stormwater Discharges from Small Municipal Separate Storm Sewer Systems in Massachusetts, NPDES Permit Nos. MAR041000, MAR042000, MAR043000, Dated April 4, 2016 (hereinafter "RTC"), 1122.

Many towns echo this concern. The Town of Holden submitted a comment in response to the draft permit stating that its compliance with the 2016 MS4 Permit would result on an increase of 40 to 60 percent above its then-current costs each year. See RTC 1193-1194. Other municipalities' compliance resulted in 28-30 percent increases above its then-current costs annually. See RTC 1195.

justice and basic principles of good government require that EPA stay the MS4 Permit for the duration of judicial review.

I. BACKGROUND

A. Introduction and Procedural Background

The Coalition is a Massachusetts non-profit organization devoted to promoting watershed-based policies and regulations founded on scientifically-based and financially responsible approaches that effectively manage and conserve water resources. Approximately 40 Coalition members are municipalities and districts subject to the MS4 Permit and who are charged with implementing its provisions. The Coalition and the Town of Franklin filed an appeal of the MS4 Permit[3] because it represents a significant expansion of EPA's authority under the CWA and imposes requirements that are overly prescriptive, burdensome and not likely achievable for most communities. The Coalition and the Town of Franklin are joined in the appeal by the City of Lowell, the National Association of Home Builders, and the Home

---

The Town of Rowley commented on competing local demands for funds in education, public safety, facilities and infrastructure upgrades, and noted that "the magnitude of the . . . permits will apparently require possible engagement of expensive consultants solely to guide implementation and direct future hiring of more full-time staff for those tasks." See RTC 1198. Rowley contends that "the projected costs of compliance are overwhelming." Id.

The Town of Shrewsbury noted that their town's residents have already seen significant increases in their water and sewer bills, and that "in order to acquire any funding for stormwater beyond current expenditures, the rates need to be equitable and there needs to be a proven costs-benefits analysis to support them." See RTC 1199.

The City of Haverhill commented that "competing demands and dwindling budgets will make complying . . . impossible for many municipalities, opening them up to potential enforcement action." See RTC 1206.

The Town of Weymouth noted that the costs to administer and implement the minimum controls measures…far exceed the Town's budget, and that essential programs would need to be reduced or eliminated in order to comply with the permit. See RTC 1208.

These excerpts are not exhaustive of towns and cities' comments; they provide only a sampling of the concerns Massachusetts municipalities face in evaluating the costs of compliance.

[3] The Coalition's appeal is pending in the United States Court of Appeals for the District of Columbia Circuit, as Center for Regulatory Reasonableness, et al., v. U.S. Environmental Protection Agency, No. 16-1246 and consolidated cases.

Builders Association of Massachusetts (collectively the "Massachusetts Petitioners"), and the Center for Regulatory Reasonableness ("CRR").[4]

While the Coalition's appeal was awaiting a briefing schedule from the Court, the Region issued the NH MS4 Permit on January 18, 2017. In form and substance, the NH MS4 Permit is virtually identical to the MA MS4 Permit. An appeal NH MS4 permit is pending in the D.C. Circuit. See CRR v. EPA, (D.C. Cir. 17-1060).[5]

The Coalition and the Massachusetts Petitioners' appeals have been delayed by the issuance of the NH MS4 permit and the appeals of that permit that followed. The briefing schedule in the Coalition's appeal in the D.C. Circuit is currently held in abeyance for 90 days, or until July 20, 2017, to see if the NH MS4 and MA MS4 Permit appeals become consolidated, and if so, to allow the parties to propose a briefing schedule. Practically, to provide the most efficient approach for the Court to review these matters, the MA and NH MS4 Permit appeals should be heard by the same court. Indeed, EPA has stated "[i]t would . . . be in the interests of judicial economy and the parties for challenges to both permits to be adjudicated by a single court." Respondent EPA's Reply in Support of Motion to Transfer and Hold Case in Abeyance for 120 Days, CLF v. EPA, Docket No. 17-1130 (1st Cir. Mar. 15, 2017). If the appeals, as we expect, are adjudicated by a single court and possibly consolidated, the Court's review of the Coalition and the Massachusetts Petitioners' arguments will be further delayed. The current deadlines of the MA MS4 Permit will occur before the Court has had any opportunity to consider the Petitioners' arguments.

The effective date of NH MS4 Permit is July 1, 2018, a year later than the MA MS4 Permit. Where, as expected, the MA and NH MS4 Permit appeals are to be considered by the same Court and possibly consolidated, and the Court is reviewing the same issues, logic dictates that the effective dates and the deadlines of the MA and NH MS4 Permit be consistent. Justice requires the effective dates match. An administrative stay of the MA MS4 Permit would accomplish that.

---

[4] Because CRR was the first to challenge the MA MS4 Permit in the D.C. Circuit, the administrative record was filed in that court, and the subsequent petitions filed in the First Circuit, including appeals filed by Conservation Law Foundation and Charles River Watershed Association, were transferred to D.C. Circuit and consolidated.

[5] CLF filed a separate challenge to the NH MS4 Permit in the First Circuit. See CLF v. EPA, (1st Cir. 17-1130). Because of the similarities between the NH and MA MS4 permits, EPA has sought to transfer CLF's First Circuit petition to the D.C. Circuit. USCA Case #16-1246 Document #1672208 Filed: 04/21/2017, Clerk's Order - considering motion to hold case in abeyance [# 1671828-2], suspending briefing schedule; directing party to file motions to govern future proceedings by 07/20/2017 [16-1246, 16-1359, 16-1360, 16-1361, 16-1362]. The deadline to appeal the NH MS4 permit is June 1, 2017.

B. MS4 Permitting under the CWA and the MS4 Permit

The Massachusetts Petitioners' challenge EPA's authority under the CWA to impose fundamental aspects of the MS4 and seek, as a remedy from the Court, remand to EPA for further review, reissuance and public comment, consistent with the law. The CWA was enacted by Congress "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). CWA Section 301(a) prohibits "the discharge of any pollutant" by any person, except as authorized by the Act. 33 U.S.C. § 1311(a). To regulate these discharges, CWA Sections 301 and 304 authorize EPA to establish "effluent limitations," defined as restrictions placed upon pollutants that "are discharged from *point sources* into navigable waters." *Id.* §§ 1311, 1314(b), 1362(11) (emphasis added); *see also id.* § 1342(a)(1).

Under CWA Section 301, EPA must develop effluent limitations for "pollutants." 33 U.S.C. § 1311. The term "pollutant" has a specific meaning that is not open-ended, but limited, according to relevant case law. See Colautti v. Franklin, 439 U.S. 379, 393 n.10 (1978); National Wildlife Federation v. Gorsuch, 693 F.2d 156, 172 (D.C. Cir. 1982).

CWA Section 402 provides an exception to CWA Section 301's pollutant discharge prohibition by establishing the National Pollutant Discharge Elimination System ("NPDES") permit program, provided that the pollutant discharges meet appropriate "effluent limitations" contained in an NPDES permit. 33 U.S.C. § 1342(a). The NPDES permit program limits pollutant discharges from "point sources" into U.S. waters through various practices or technologies. 33 U.S.C. §§ 1311(b)(2), 1314(b), 1316(b)(1)(B). Originally, Congress exempted some sources of water pollution from the CWA and NPDES permit program, including municipal stormwater discharges.

In 1987, Congress added CWA Section 402(p), which established a phased approach to regulating certain stormwater discharges. In Phase I, Congress required NPDES permits for stormwater discharges "associated with industrial activities" and "from" certain large and medium MS4s. 33 U.S.C. § 1342(p)(1)-(4). The industrial permit program mirrored the existing NPDES permit program for industrial and sanitary wastewaters. The new MS4 program was intended to have a more limited scope than traditional NPDES permits.

For Phase II, Congress instructed EPA to study all remaining stormwater discharges to determine the nature of pollutants in those discharges, and establish "procedures and methods to control stormwater discharges to the extent necessary to mitigate impacts on water quality." *Id.* §1342(p)(5). Based on that study, EPA was required to promulgate regulations designating any additional sources of stormwater discharges to be regulated and to establish a "comprehensive program to regulate such designated sources." Id. §1342(p)(6).

From the start, Congress recognized that municipal stormwater presented unique challenges and that different practices and technologies should apply than those of other NPDES permit programs. MS4 must manage enormous quantities of diffuse stormwater runoff, complex flood control management infrastructure, and the addition of pollutants from within and sometimes even outside their jurisdictional boundaries. Therefore, Congress limited EPA's NPDES permitting authority over MS4s to controlling the discharge of pollutants *from* the MS4 system to the maximum extent practicable (the "MEP Standard"). 33 U.S.C. § 1342(p)(3)(B)(ii)-(iii). As discussed in greater detail below, courts have consistently ruled that the MEP Standard is the only standard that MS4 discharges are required to meet, exempting them from the requirement to specifically meet water quality-based standards.

In May 2003, Region 1 implemented EPA's Phase II MS4 program by issuing its first Final General Permit for Stormwater Discharges from Small MS4s ("2003 MS4 Permit"). The 2003 MS4 Permit required small MS4s to develop and implement stormwater management programs to meet the MEP Standard. The 2003 MS4 Permit expired in 2008 and was administratively continued, in part because of the significant legal and technical challenges, as well as controversy regarding that permit program.

The 2014 Draft Massachusetts Small MS4 General Permit was released for public comment on September 30, 2014. EPA received over 1,300 individual comments during the comment period, by more than 150 entities, including the five parties that comprise the Massachusetts Petitioners. On April 4, 2016, EPA issued the 2016 MS4 Permit.

The MS4 Permit will become effective July 1, 2017. In order to obtain authorization to discharge, communities subject to the MS4 Permit must submit a complete and accurate Notice of Intent ("NOI") containing certain specific an detailed information set forth Appendix E of the MS4 Permit. The NOI must be submitted on or before September 29, 2017 (90 days from the effective date of the final permit). Communities must first satisfy the eligibility requirements of the MS4 Permit at Parts 1.2 and 1.9 prior to submission of their NOIs. The MS4 operator will be authorized to discharge under the permit only upon receipt of a written notice from EPA following a public notice of the submitted NOI. EPA will authorize the discharge, request additional information, or require the small MS4 to apply for an alternative permit or an individual permit.[6]

---

[6] The MS4 Permit provides that "[n]on-compliance with any of the requirements of this permit constitutes a violation of the permit and the CWA and may be grounds for an enforcement action and may result in the imposition of injunctive relief and/or penalties." Part 1.5.

C. The Coalition and the Massachusetts Petitioners' Appeal

The Coalition and the Massachusetts Petitioners' appeal of the MS4 Permit has been delayed by the newly issued NH MS4 Permit, which does not take effect until July 1, 2018. As noted above, the MA MS4 Permit appeal is currently on hold awaiting the appeal deadline for the NH MS4 Permit to pass. While briefing in the Court is held in abeyance, the Coalition and the Massachusetts Petitioners' overarching position is that EPA exceeded its authority under the CWA in issuing a MS4 permit requiring that, in addition to meeting the MEP standard, municipal discharges must also not cause or contribute to an exceedance of water quality standards. The Coalition and other Massachusetts Petitioners' position, which is discussed in greater detail below, is that Section 402(p)(3)(b)(iii) of the CWA, which articulates the MEP standard, does not authorize EPA to include a requirement to meet water quality standards.

In addition to the challenge to EPA's imposition of water quality standards in the MS4 Permit, the Massachusetts Petitioners intend to raise other challenges to the validity of the MS4 Permit. Specifically, the Massachusetts Petitioners will argue (1) that the illicit discharge requirements in the MS4 Permit impose arbitrary and capricious procedural steps that are financially over-burdensome and have not been demonstrated to be necessary to achieve the identification and elimination of illicit discharges to the MS4; (2) that flow is not a pollutant and cannot be regulated as a proxy or surrogate to effect levels of pollutants already present within a waterbody; (3) that EPA's authority to control pollutant discharges does not encompass the ability to mandate land use decision-making; (4) that developed sites and impervious surfaces are exempt from NPDES permitting and EPA's adoption of such standards in the MS4 Permit are an attempt to circumvent the rulemaking process; (5) that the regulation of nonpoint source pollution was relegated by Congress to the states; and (6) that the permit is unclear, vague and otherwise fails to meet requirements of the APA in its Handbook and other references.[7]

The Center for Regulatory Reasonableness ("CRR") intends to argue that EPA's permit was unlawful because it (1) broadly imposes water quality-based limitations without a specific demonstration of need (e.g., convolutes the Maximum Extent Practicable standard and violates specific CWA provisions), (2) regulates flow, (3) regulates land use, and/or (4) imposes more restrictive requirements on the regulated community based solely on geographic location. In addition to these challenges of statutory authority, CRR intends to challenge EPA's unlawful promulgations and approvals of effluent limitations and other limitations under CWA § 509(b)(1)(E) by radically amending the MS4 Permit's "boilerplate" provisions, and that EPA amended its NPDES stormwater regulations, its water quality-based permitting regulation, and

[7] This list is not exhaustive and represents only the general categories of arguments and/or issues that the Massachusetts Petitioners intend to present to the Court.

its NPDES prohibition regulation without satisfying the requisite notice and comment rulemaking procedures. Finally, CRR intends to argue that EPA's application and/or imposition of the Maximum Extent Practicable standard is beyond the authority granted under the commerce clause, is void for vagueness, is unconstitutional as applied, and/or is an illegal delegation of authority.

II. EPA HAS AMPLE AUTHORITY TO GRANT A STAY

The Region has broad authority and discretion to stay the effective date of the MS4 Permit under Section 705 of the APA. APA Section 705 controls how EPA should consider and decide requests for administrative stays pending judicial review: "When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review." 5 U.S.C. § 705. The criteria that EPA must apply are significantly less stringent than the criteria generally used by the courts. The APA contrasts what is required for an administrative stay ("justice so requires") and a judicial stay ("conditions as may be required" and "irreparable harm"). 5 U.S.C. § 507.[8] Such differences must be given effect, and even though the Coalition can show irreparable harm, there is no irreparable harm requirement for an administrative stay under the APA.

Absent a stay, the MS4 Permit will force municipalities to expend extraordinary public resources and put aside other essential programs and municipal priorities to comply with the MS4 Permit. See Footnote 2, supra. The communities and their citizens should not be compelled to suffer these harms until the Court has had an opportunity to review the legal challenges to the MS4 Permit. For these reasons, an administrative stay is appropriate.

III. A STAY IS WARRANTED EVEN UNDER THE MORE STRINGENT JUDICIAL STANDARD

While an administrative stay is warranted under the standards established by the APA, it would be justified even under the more stringent standard employed by the courts. In evaluating whether to grant a judicial stay, federal courts typically consider these factors: (1) whether the applicant has made a showing of likelihood of success on the merits of its underlying appeal; (2)

[8] APA § Section 705 reads: "When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings."

the degree to which the applicant will suffer irreparable harm absent a stay; (3) whether the issuance of stay will harm other parties; and (4) whether the public interest is served by granting the stay. Hilton v. Braunskill, 481 U.S. 770, 776-777 (1987); see also Standard Havens Products, Inc. v. Gencor Industries, Inc., 897 F.2d 511, 512 (Fed.Cir.1990). Like the courts, the Region need not give these factors equal weight, but should consider the factors in light of the circumstances. See Standard Havens Products, Inc., 897 F.2d at 512-13. To justify a stay, an applicant need not always establish a high probability of success on the merits. Ohio ex rel Celebrezze v. Nuclear Regulatory Com'n, 812 F. 2d at 290. The factors delineated are not "perquisites to be met". Id. Accordingly, when confronted with an appeal in which the balance of harm favors interim relief, the court may grant a stay if the movant merely has raised novel issues on appeal or has raised serious questions on the merits. Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog, 945 F. 2d 150, 153-154 (6th Cir. 1991). Indeed, the court "may grant a stay even though its own approach may be contrary to movant's view of the merits." Holiday Tours, 559 F. 2d at 843. Again, this judicial test is not applicable to this request for an administrative stay, under APA Section 705. Nonetheless, it is instructive that each of the four factors weighs strongly in favor of granting a stay of the MS4 Permit pending judicial review.

A. Absent an immediate stay, Massachusetts communities will suffer irreparable harm

Absent a stay, the Permit will take effect on July 1, 2017. The Town, Coalition member communities, and other communities and entries in Massachusetts that are subject to the MS4 Permit will need to prepare their NOIs immediately - the submission deadline is September 29, 2017. The scope of the obligations that this MS4 Permit imposes is far beyond what prior MS4 permits have required. Additionally, planning for and instituting these initiatives is an arduous and expensive process that may later become moot, should the Court find that the Permit oversteps the bounds of what is permitted under the CWA. The Supreme Court acknowledged the gravity of such a position, noting that "complying with a regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs." Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 220-21 (1994) (Scalia, J., concurring in part and in the judgment); Texas v. United States Envtl. Prot. Agency, 829 F.3d 405, 433 (5th Cir. 2016). In the Town, and indeed in many Massachusetts communities, each dollar is accounted for and serves a specific purpose for those communities. The prospect of expending significant sums of money in order to comply with a permit whose legality has not been tested is insuperable.

Avoiding compliance in the absence of a stay is similarly out of the question due to the threat of civil litigation and penalties under the CWA. Without a stay of the Permit, the Region and others could consider Massachusetts communities to be in violation of the Permit, should

they fail to complete and file an NOI by September 29, 2017. MS4 Permit, Part. 1.5 ("[n]on-compliance with any of the requirements of this permit constitutes a violation of the permit and the CWA and may be grounds for an enforcement action and may result in the imposition of injunctive relief and/or penalties."). The Region – or others who may bring citizen suits under the CWA – can maintain that the communities are violating the Permit, thereby exposing them to significant liability. 33 U.S.C.A. § 1365(a), (d); see Morales v. Trans World Airlines, Inc., 504 U.S. 374, 381 (1992) ("when repetitive penalties attach to continuing or repeated violations and the moving party lacks the realistic option of violating the law once and raising its federal defenses - there is no adequate remedy at law"). Even if the Region were to agree not to pursue civil penalties in light of the pending litigation, such an agreement does not necessarily immunize the communities from citizen suits. See, e.g., Washington Public Interest Research Group v. Pendleton Woolen Mills, 11 F. 3d 883 (9th Cir. 1993). This exposure cannot be taken lightly: the Clean Water Act provides that a prevailing party in a citizen suit may be awarded the costs of litigation, including expert witness fees and attorney's fees. 33 U.S.C.A. § 1365(d).

A stay pending the completion of litigation will ensure that these Massachusetts communities and their residents are not forced to suffer these harms until the Court has had a full and fair opportunity to review the Permit's legality, and is an appropriate solution under the circumstances.

B. The Massachusetts Petitioners are likely to succeed on the merits

The merits of the Massachusetts Petitioners' appeal further support a stay. As just one example, in its appeal, the Coalition will argue that EPA's interpretation of Section 402(p)(3)(b)(iii) of the CWA, which articulates the Maximum Extent Practicable Standard, distorts both the plain meaning of the Section and the intent of Congress in enacting it.

The words of a statute must be read in their context and with a view to their place in the overall statutory scheme. Util. Air Regulatory Grp. v. E.P.A., 134 S. Ct. 2427 (2014). An agency's interpretation that is inconsistent with the design and structure of the statute as a whole does not merit deference. Id. EPA's Permit inappropriately distorts the syntax of Section 402(p) of the CWA and the intent of Congress in enacting this provision. Drawing on the inherent distinctions between MS4 discharges and industrial stormwater and industrial and municipal wastewater discharges, Section 402(p) was added in 1987 and established a comprehensive new scheme for regulation of municipal stormwater. The opening clause of Section 402(p)(3)(b)(iii) states that, unlike industrial stormwater permits, MS4 permits "shall require controls to reduce the discharge of pollutants to the maximum extent practicable . . ." *Id.* Both the plain meaning of the words chosen by the Legislature and the statutory structure of this Section demonstrate that stormwater was never intended to be subject to water quality based standards.

The legislative history of Section 402(p) bolsters this reading of the statute. Sen. Chafee, in discussing the 1987 revisions to the CWA, explained that those revisions "establishe[d] a new program to control pollution . . . from nonpoint sources . . . [such as] rain which washes off from city streets, or flows off of agricultural fields and is contaminated with pesticides and insecticides." 133 Cong. Rec. S733-02, 1987 WL 928615 (remarks of Sen. Chaffee). He further noted that such revisions were intended to provide " an improved and less burdensome process for control of discharges of stormwater, particularly for municipalities." 133 Cong. Rec. S733-02, 1987 WL 928615 (remarks of Sen. Chafee).

Sen. Stafford, who served on the conference committee for the 1987 revisions, explained the committee's rationale for its unique approach to stormwater:

> Mr. President, I would like to explain to my colleagues why a little more time is needed to develop a comprehensive municipal storm sewer program. **These permits will not necessarily be like industrial discharge permits.** Often, an end-of-the-pipe treatment technology is not appropriate for this type of discharge. As an EPA official explained in a meeting of the conferees:
>
> > These are not permits in the normal sense we expect them to be. **These are actual programs.** These are permits that go far beyond the normal permits we would issue for an industry because they in effect are programs for stormwater management that we would be writing into these permits.

132 Cong. Rec. S16424-02, 1986 WL 789391 (remarks of Sen. Stafford) (emphasis added).

Sen. Durenburger explained during a Senate debate in January of 1987 that the bill "affords municipal and nonindustrial dischargers some relief from the 1972 permit application requirements. A permit for a municipal separate storm sewer . . . shall require controls to reduce the discharge of pollutants to the maximum extent practicable." 133 Cong. Rec. 1279–80 (1987) (remarks of Sen. Durenberger) (emphasis added).

Each of these statements illustrate that the Maximum Extent Practicable Standard to which municipalities are held was intended to be a programs-based, management practices approach that recognizes the unique challenges presented in managing stormwater discharges. Such measures were taken by Congress because numeric end-of-pipe water quality based standards are an inappropriate response to this issue. Where Congress's intent is clear, as it is here, the Court will enforce that intent, regardless of EPA's interpretation. Nat. Res. Def.

Council, Inc. v. EPA, 966 F.2d 1292, 1302 (9th Cir. 1992) citing Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc., 467 U.S. 837, 842-43 & n. 9 (1984), aff'd, 484 U.S. 1, 108 (1987).

Consistent with the plain language of CWA § 402(p)(3)(B)(iii) and the legislative history, courts have repeatedly held that "maximum extent practicable" is the only standard that applies to MS4 discharges. See NRDC v. EPA, 966 F.2d 1292 (9th Cir. 1992) ("In the 1987 amendments, Congress retained the existing, stricter controls for industrial stormwater dischargers but prescribed new controls for municipal storm water discharge . . . Congress could have written a statute requiring stricter standards, and it did not"); Defenders of Wildlife v. Browner, 191 F.3d 1159 (9th Cir. 1999) (holding that the structure of the Clean Water Act and precedent demonstrate that Congress did not require municipal storm-sewer discharges to comply with water quality standards); Miss. River Revival, Inc. v. City of St. Paul, No. CIV. 01-1887 DSD/SRN, 2002 WL 31767798, at *6 (D. Minn. Dec. 2, 2002) (noting that the Clean Water Act specifically exempts municipal storm water permittees from the requirement that water quality standards are met); City of Abilene v. EPA, 325 F.3d 657, 659-60 (5th Cir. 2003) (MS4 permits subject to the maximum extent practicable standard are "management permits" and distinct from "numeric end-of-pipe permits" like those issued for industrial stormwater).

The plain language of the statute is clear: municipal stormwater discharges were never intended to be subject to water quality based standards. The legislative intent supports such a reading of the statute, and case law has interpreted the Clean Water Act consistently with that reading. As such, the Coalition is likely to prevail on the merits of its appeal.[9]

C. The Balance of Equities Favors Granting A Stay

Unless a stay is granted, the Permit will impose severe and irreparable harm upon Massachusetts communities and their citizens by forcing them to spend resources to comply with a Permit that may ultimately be deemed unlawful. A stay pending appeal, like a preliminary injunction, is appropriate to maintain the status quo and preserve the court's ability to render a meaningful judgment on the merits. Sun Microsystems, Inc. v. Microsoft Corp., 333 F. 3d 517, 525 (4th Cir. 2003). As it currently stands, Massachusetts communities bear an enormous risk in this matter. Should municipalities choose to forbear action on the Permit, they expose themselves to exorbitant civil penalties and citizen suits under the CWA. Conversely, the municipalities may sink hundreds of thousands of dollars into non-recoverable compliance costs,

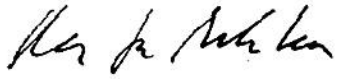
[9] Although not discussed at length in this correspondence, the arguments set forth in Section I.C. of this of this letter will also be presented, are similarly likely to succeed on the merits, and should factor into EPA's evaluation of whether to grant the Coalition's request for a stay.

only to prevail in this appeal and find that the added expenditures were completely unnecessary. Balancing these harms against the prospect of simply maintaining the status quo of the 2003 MS4 Permit conditions pending the outcome of the appeal weighs heavily in the Massachusetts Petitioners' favor.

For these reasons, the Coalition, Franklin and Lowell respectfully request that the Region grant this request for a stay. The Coalition, Franklin and Lowell further request that the Region respond to this request by 4:00 p.m. EST on Thursday, June 12, 2017 so that we can know whether the Coalition, Franklin and Lowell must seek emergency relief in Court. We will treat the Region's failure to act upon this request within the requested time as a constructive denial.

Very truly yours,

Robert D. Cox, Jr.
Jennifer Garner
Attorneys for MCWRS



Michael A. Leon
Matthew J. Connolly
Attorneys for the City of Lowell

Mark G. Cerel
Attorney for the Town of Franklin

RDCJR:mm
cc: Kate R. Bowers, Trial Attorney, USDOJ *via email kate.bowers@usdoj.gov*
Martin Suuberg, Commissioner, MassDEP *via email martin.suuberg@state.ma.us*
Benjamin J. Ericson, General Counsel, MassDEP
via email benjamin.ericson@state.ma.us