

## **Massachusetts Moves To Assume Control of Clean Water Act Program as EPA issues Disputed MS4 Permit**

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Massachusetts' status as one of only four states not in control of the Clean Water Act program within its boundaries may change as the state begins the process of applying to U.S. EPA for delegation of that program. Delegation won't happen quickly and not soon enough to provide relief to municipalities that must meet the requirements of EPA's recently issued General Permit for Stormwater Discharges from Small Municipal Separate Storm Sewer Systems in Massachusetts (known as MS4 systems).

The Commonwealth is in the first stages of the delegation process: legislation has been filed with the Massachusetts legislature to bring certain elements of state law into conformance with EPA requirements and MassDEP has engaged in extensive discussions with EPA. Delegation would require negotiation of a Memorandum of Agreement between EPA and MassDEP, new regulations implementing the program, and more manpower and money for an agency that has lost both over the past decade. The current estimate is for an increase in \$4.7 million for Fiscal Year 2018, \$3.2 million of which is to be dedicated to 40 new MassDEP employees and \$1.5 million to be dedicated to contractual support. Over time, MassDEP would assume responsibility for issuance of NPDES permits (nearly half of which are currently expired) and other aspects of the Clean Water Act program.

The close timing of EPA's issuance of the MS4 permit in April and the Commonwealth's announcement that it would pursue delegation in May, combined with a very unusual and public dissent by the MassDEP to the MS4 permit, raised questions about whether the issuance of that permit was the primary driver for beginning the delegation process. However, concerns about the MS4 permit played no role in Massachusetts' efforts to assume control of the Clean Water Act program within the Commonwealth, according to Bethany Card, MassDEP Deputy Commissioner for Policy and Planning, in a discussion at the Boston Bar Association on June 14. Indeed, Card confirmed that the multi-year process of applying to EPA for delegation of the Clean Water Act program will not be fast enough to address issues arising out of the current permit, at least for some years.

In its [letter](#) agreeing to co-issue the permit, MassDEP remained concerned with the administrative

burdens and costs the permit would potentially impose on municipalities. EPA had stated that it would go ahead with issuance of the permit whether MassDEP agreed to co-issue or not, and MassDEP ultimately decided it would rather be part of the implementation of the permit rather than participate from the sidelines. MassDEP cited some changes to the permit as a result of its discussions with EPA, including extension of the effective date to July 1, 2017 to provide municipalities more time in light of their budgetary cycles to plan for the financial and resource demands of the new permit.

However, the new permit, which reflects modifications to the 2014 draft permit released for comment on September 30, 2014 and replaces the long-expired 2003 permit within the Commonwealth, is drawing concern not only from municipalities but from private developers and property owners due to new requirements for newly built or renovated facilities that disturb an acre or more and discharge into an MS4 system to retain stormwater on-site or greatly reduce sediment and nutrient runoff from their land:

- Newly developed properties must include stormwater management systems designed to retain one inch of rainfall from a single storm event and/or reduce runoff of total suspended solids from the property by 90 percent and phosphorus runoff by 60 percent.
- Redeveloped properties must choose between a 0.8-inch retention mandate, or reducing suspended solids by 80 percent and phosphorus by 50 percent.

These provisions will apply to private parties through local programs, presumably bylaws and regulations, developed and enforced by MS4 permittees.

Among other criticisms, stakeholders have argued that EPA cannot implement these requirements through a permit and must promulgate regulations instead. In its response to comments, EPA rejected this critique and argued that the Clean Water Act and existing stormwater rules place "substantial discretion with the permitting agency to determine what controls are necessary, including controls such as the retention requirements at issue here."

Also in April, EPA published notice that the [draft NPDES Construction General Permit](#) is available for public comment. Because Massachusetts has not been delegated authority to issue NPDES permits under the Clean Water Act as discussed above, this permit will be effective in Massachusetts.

The most significant changes are the following:

- Requiring implementation of controls to minimize exposure to PCB-containing building materials to stormwater when demolishing a structure with at least 10,000 square feet of floor space that was built prior to January 1, 1980.
- Requiring posted signs to include information on how to contact EPA if a member of the public observes stormwater pollution.
- Amendments to provisions implementing the effluent limitation guidelines for the construction and development point source category that were finalized by EPA in March 2014 by clarifying the requirements to control erosion caused by discharges, where buffers are required, and soil stabilization requirements.

In addition, EPA specifically requested comment on seven specific issues, including requiring multiple operators of a site to develop a group SWPPP, imposing an earlier stabilization deadline, and frequency of inspections of snowmelt runoff.

The public comment period on the draft permit closed on May 26, 2016; however, EPA has not foreclosed reviewing late-filed comments. On its web page for the draft permit, EPA states that “a party may decide to submit late comments. If a party comments after the close of the comment period, EPA may consider such comments. When considering whether to take late comments, EPA will take into account the need to issue the final permit in a timely manner, prior to expiration of the current CGP.”

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