

## Off to Court We Go: Petitioners Challenge EPA's Small MS4 General Permit for Massachusetts

Article By:

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The storm of debate and criticism over the terms and conditions of the U.S. Environmental Protection Agency's (EPA) General Permit for Stormwater Discharges from Small Municipal Separate Storm Sewer Systems in Massachusetts (the [Small MS4 General Permit](#) or Permit) has shifted to the judicial arena. In July, the first of several petitions for review of the final Small MS4 General Permit was filed in the D.C. Circuit Federal Court of Appeals, followed by four more challenges filed in the First Circuit Federal Court of Appeals. Notwithstanding the initiation of litigation, Massachusetts municipalities should be continuing to develop their plans and organizing their resources to effectively implement the Small MS4 General Permit, which becomes effective in July 2017.

As we reported in [July](#), the Small MS4 General Permit imposes new and more stringent requirements on municipalities than the 2003 version of the Permit, which has been administratively continued since it expired in 2008. The structure of the new Permit is largely the same: municipalities must implement six minimum control measures, including public education, public involvement, illicit discharge detection and elimination (IDDE), construction site runoff, post-construction stormwater management, and good housekeeping. However, the new Permit requires significantly more effort and resources, particularly with respect to IDDE, post-construction stormwater management, and housekeeping practices. The new Permit also imposes for the first time water-quality based requirements for stormwater discharges to impaired receiving waters.

Of the various entities that have filed petitions for review challenging the Permit – i.e., the Center for Regulatory Reasonableness (CRR), the National Association of Home Builders together with the Home Builders Association of Massachusetts, Inc., the City of Lowell, the Massachusetts Coalition for Water Resources Stewardship, Inc. together with the Town of Franklin, and the Conservation Law Foundation – only CRR has filed a non-binding statement of issues, pursuant to a court order. Among other grounds, the CRR is challenging the EPA's statutory authority to adopt water quality-based limitations without site-specific data, impose best management practices based on a "maximum extent practicable" standard, categorize land use development changes as permit modifications, and regulate stormwater flow (as opposed to regulating pollutants in stormwater). The CCR also alleges that in promulgating the final Small MS4 Permit the EPA has expanded the compliance requirements of 40 C.F.R. Part 122 (the National Pollutant Discharge Elimination System (NPDES) Program regulations) without following rulemaking procedures.

In early September, EPA filed motions to consolidate the cases in the D.C. Circuit, where the first petition by CRR challenging the Permit was filed and where the administrative record for the rulemaking has been certified by EPA. On October 14, 2016, EPA's motions to transfer were granted in each of the cases pending in the First Circuit Court of Appeals. With the number of petitioners and stakeholders involved, the litigation process is likely to follow a long road in the D.C. Circuit Court of Appeals, and the legal challenges are unlikely to be resolved prior to the Permit's July 2017 effective date. Accordingly, Massachusetts municipalities should be continuing to develop their plans and organizing their resources to effectively implement the Permit.

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