

REGION 1 – Eastern MA Stormwater Petitions

Internal deliberative pre-decisional - FOR USE BY 2024 PRESIDENT-ELECT TRANSITION TEAM MEMBERS ONLY

ISSUE SUMMARY: EASTERN MASSACHUSETTS STORMWATER PETITIONS

Eastern MA stormwater petitions: In 2019 and 2020, EPA received three petitions from environmental groups asking the agency to find that a wide range of commercial, industrial, institutional, and multi-family residential properties in the **Charles, Mystic, and Neponset River watersheds** are significant contributors of pollutants and causing or contributing to a violation of water quality standards in those rivers and should be required to obtain Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) permits for their storm water discharges. In 2022, in response to these petitions, EPA exercised its residual designation authority and designated certain commercial, industrial, and institutional properties with one or more acres of impervious surface in these three watersheds as needing a NPDES permit. The draft permit is scheduled to be released for public comment in the fall of 2024. Approximately 3500 commercial, industrial, and institutional property owners, will be subject to requirements to control and reduce stormwater pollution on their properties.

BACKGROUND/KEY POINTS:

Charles River Watershed Petition

On May 9, 2019, the Conservation Law Foundation (CLF) and the Charles River Watershed Association (CRWA) petitioned EPA to exercise RDA to regulate certain stormwater discharges from privately-owned commercial, institutional, industrial, and multi-family residential properties of one acre or more in the Charles River watershed. The petition alleges that these discharges – not currently covered by a NPDES permit – are contributing to phosphorus water quality violations in the Charles River.

Neponset and Mystic River Watersheds Petition

On August 24, 2020, CLF petitioned EPA to exercise RDA to regulate certain stormwater discharges from commercial, institutional, industrial, and multi-family residential properties of one acre or more in the Mystic and Neponset River watersheds (both of which empty into Boston Harbor). The petition alleges that these discharges – not currently covered by a NPDES permit – contribute to pathogen water quality violations in the Mystic and Neponset Rivers.

Legal Background on RDA

The Clean Water Act gives EPA authority to require NPDES permits for certain kinds of stormwater discharges, including stormwater from certain construction sites, municipal stormwater, and industrial stormwater. EPA's stormwater regulations then detail the different permitting requirements for those categories. Stormwater discharges that are not automatically covered by those permitting categories might nonetheless need to be permitted.

- CWA § 402(p)(2)(E) provides that the Administrator or State may require a NPDES permit for a stormwater discharge where he/it determines that the discharge “contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.”
- EPA's regulations provide that the permitting authority may require permits where it determines that “storm water controls are needed for the discharge based on wasteload allocations that are part of total maximum daily loads (TMDLs) that address the pollutants of concern,” or “that the discharge or category of discharges within a geographic area, contributes to a violation of a water quality standard or is significant contributor of pollutants to waters of the United States.” 40 CFR § 122.26(a)(9)(i)(C) and (D).
- This authority, referred to as residual designation authority or “RDA,” can be initiated by EPA or the state, or in response to a petition to designate in a specific instance (40 CFR § 122.26(f)(2)).
- The regulations require the agency to “issue a final determination” on any petition within 90 days after receiving the petition. 40 CFR § 122.26(f)(5).

Charles River Background

- The Commonwealth of Massachusetts, local communities, and EPA have invested considerable resources to restore water quality in the Charles River over the past three decades. Advances in stormwater management and the near-elimination of combined sewer overflows have yielded dramatic improvements, but phosphorus-driven algae blooms are the river's most important remaining water quality challenge. Toxic cyanobacteria blooms occur most summers; these blooms are highly visible and interfere with recreation in this heavily used river.
- Phosphorus TMDLs in 2007 (Lower Charles) and 2011 (Upper/Middle Charles) identified stormwater as the primary source of phosphorus in the river and set wasteload allocations for various categories of stormwater sources, including the categories identified by the RDA petition.
- In 2008, based on water quality impairment data, EPA issued a preliminary residual designation for sites within the three uppermost towns in the Charles River watershed. (b) (5) [REDACTED]

- EPA issued the MA MS4 permit in 2016 and the permit took effect on July 1, 2018. The permit covers municipal stormwater discharges in urbanized areas in Massachusetts as defined by the US Census.
- All 35 communities in the Charles River Watershed currently have MS4 permit coverage.
- The MS4 permit does not specify how permittees should regulate stormwater from private properties that discharge into their systems, but rather provides an overall TMDL-driven reduction requirement based on land use within the Urbanized Area for each MS4 community.

Mystic and Neponset Rivers

- Both rivers are subject to TMDLs for pathogens/bacteria. The TMDLs identified most of the bacteria sources in the watershed as stormwater related, as the stormwater picks up pollutants such as garbage, pet waste, and wildlife waste and deposits them into the rivers.

Status of Petitions

On September 14, 2022, EPA exercised its residual designation authority and designated certain commercial, industrial, and institutional properties with one or more acres of impervious surface in these three watersheds as needing a NPDES permit. Following the issuance of the determination, the petitioners requested that EPA commit to issuing the NPDES permit in accordance with the designation within 6 months. In a September 23, 2022, letter to the petitioners, EPA indicated it was unable to agree to a deadline of 6 months for permit issuance, explained the tasks needed to issue the permit and provided a rough timeline for permit issuance. On November 2, 2022, the petitioners filed a complaint in the U.S. District Court for Massachusetts claiming EPA failed to fulfill its obligations under the CWA and Administrative Procedure Act (APA) through the timely issuance of a permit(s). The court originally stayed the case until September 9, 2024. On September 18, 2024, the court continued the stay until November 29, 2024, to allow sufficient time for EPA to complete its work on the draft permit and fact sheet.

Status of the RDA Permit

Since issuing the designation, (b) (5) [REDACTED]

[REDACTED] . From January through May 2024, Region 1 has conducted eight outreach sessions to various stakeholders. These sessions focused on basic education about RDA and issue identification. During June and July, Region 1 conducted additional sessions to discuss implementation issues and solicit specific ideas on how to structure the permit. EPA shared a draft of the RDA permit and fact sheet with the State for their review in August and is prepared to publish the permit for public notice in the federal register in the fall.

MS4 Permit Reissuance

The MS4 Permit and RDA Permit work in concert to control stormwater pollution. The MS4 permit requires communities to achieve reductions in nutrient loadings throughout their communities. The RDA Permit will ease the burden of these reductions by requiring certain private property owners to take actions to reduce the load coming from their parcels. Region 1 is in the process of developing a new draft MS4 Permit for communities in Massachusetts and is planning to release that draft permit for public comment in a similar time frame as the RDA permit.

ONGOING/UPCOMING REVIEWS FOR FY2024:

The Draft RDA Permit will be ready for state review in the summer of 2024 with a goal to release the permit for public comment in the fall.

The Revised Small MS4 General Permit for Massachusetts communities will also be ready for state review in the summer of 2024 with a goal to release the permit for public comment in the fall.

KEY EXTERNAL STAKEHOLDERS:

<input checked="" type="checkbox"/> Congress	<input checked="" type="checkbox"/> Industry	<input checked="" type="checkbox"/> States	<input type="checkbox"/> Tribes	<input type="checkbox"/> Media	<input type="checkbox"/> Other Federal Agency
<input checked="" type="checkbox"/> NGO	<input checked="" type="checkbox"/> Local Governments		<input checked="" type="checkbox"/> Public		

MOVING FORWARD:

Region 1 staff expects to release both the Draft RDA Permit and Draft MS4 General Permit for public comment in the fall of 2024.