



Commonwealth of Massachusetts
Executive Office of Energy & Environmental Affairs

Department of Environmental Protection

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March 31, 2016

Curt Spalding, Regional Administrator
US EPA Region 1
5 Post Office Square
Mail Code: ORA
Boston, MA 02109-3912

***Re: MassDEP Co-Issuance Decision on the Small Municipal Separate Storm Sewer System (MS4)
General Permit***

Dear Regional Administrator Spalding:

On behalf the Massachusetts Department of Environmental Protection (MassDEP), I am writing to provide MassDEP's position regarding the above-referenced MS4 permit. Over the past several months, I have appreciated the opportunity to speak frankly to you about this permit. You have informed me that the permit will be issued by EPA imminently.

EPA has indicated it is moving forward with or without the co-issuance. MassDEP would have preferred some time for additional discussion of important issues. Nevertheless, MassDEP needs to be involved with EPA and cities and towns on how this permit is implemented. This is too important an issue for our environment, for our cities and towns and for the Commonwealth. As you know, MassDEP has been working with a number of communities and coalitions to provide technical assistance and to expand areas where innovative thinking and collaboration can help cities and towns comply. MassDEP has encouraged opportunities to engage in detail with EPA and our municipal partners on EPA's intentions for implementation of the final permit. There will need to be much more discussion about how this permit is implemented.

In 2015 comments on the draft permit, MassDEP expressed support for many of EPA's goals aimed at protecting the Commonwealth's water resources. MassDEP also described significant issues about the administrative burdens and costs of the proposed permit and the need to harmonize EPA's proposed rules with the Massachusetts Stormwater Standards.

Some changes have been made in response to MassDEP's and others' comments. In our most recent meeting, you stated that the final permit will have an effective date of at least one year after issuance to give communities time to prepare and in recognition of municipal budgeting timelines. You have also provided an additional year for the submission of certain plans required by the permit. The final permit also provides more flexibility with regard to timing on mapping and other elements associated with illicit discharge detection requirements.

Cost

Other aspects of the permit will continue to raise questions regarding interpretation and implementability. Cost will continue to be a major consideration for communities. EPA estimates that the costs of implementing the new permit (not including capital costs and not including communities implementing applicable TMDL requirements) to range from \$10,000 per year for smaller systems to up to \$300,000 for larger systems.

It is incumbent on all of us to be flexible and collaborative with the municipalities as these new requirements become effective.

Legal Standard

In our continued dialogue with EPA, MassDEP has reiterated the need for clarity regarding EPA interpretation of the provisions of the Federal Clean Water Act (the "CWA"), 33 U.S.C. §§ 1251 et seq., as amended. The framework of the previous permit, adopted in 2003, relied upon municipalities reducing stormwater pollution by implementing specified Best Management Practices ("BMPs") and the state and federal governments monitoring receiving waters over time to measure the effectiveness of that permit. MassDEP continues to urge that the appropriate approach under the MS4 permit is for municipalities to implement an iterative process using BMPs, assessment, and refocused BMPs, which takes into consideration what is technically and economically feasible (*i.e.*, "practicable"), leading toward the *goal* of attainment of water quality standards, as provided by the Phase II Rule.

As noted in our previous comment letter, the draft permit was written to include water quality based effluent limitations in addition to the BMP-based program with a maximum extent practicable standard. In the final permit, we understand that EPA has clarified its position that a permittee's compliance with all applicable requirements and relative BMP implementation schedules in Appendix F will constitute compliance with the Permit. We encourage this clarity in interpretation.

Implementation

MassDEP agrees with EPA that scientific advances since 2003 indicate that increased infiltration of stormwater on site is an effective strategy to reduce stormwater pollution. MassDEP also agrees that attention to addressing illicit discharges is important in improving water quality.

MassDEP has identified over 200 separate actions (not including those for impaired waters and TMDL goals) required by the permit which will require municipalities to spend considerable time, energy and resources on reports and other administrative tasks, a significant increase over the requirements in the 2003 permit. As you know, we have highlighted implementation questions on the following:

- how educational programs should be presented, including requirements for municipalities to measure effectiveness;
- how municipalities should conduct Illicit Discharge Detection and Elimination programs, including a several step, highly detailed prioritization system;
- extensive construction period reviews to now be undertaken by municipalities;
- a new set of federal post-construction stormwater requirements that will be different in some respects from the Massachusetts Stormwater Standards used by all 351 Massachusetts municipalities since 1997; and
- extensive requirements for Good Housekeeping which direct municipalities to develop written stormwater standard operating procedures that apply to multiple municipal facilities.

Through our formal comments and informal discussions with EPA Region 1, MassDEP has provided feedback about the cost and administrative requirements of the permit – many municipalities have done the same. In those interactions we have urged Region 1 to minimize requirements that do not have a direct relationship to stormwater pollution reductions, to consolidate and streamline as much as possible, and we also provided examples of some of those requirements.

Addressing water quality impairments, especially in more densely populated areas, is a complex challenge that requires ongoing attention and a willingness to assess what is working and openness about how to achieve compliance. Very significant issues about implementation have been raised by MassDEP and communities in good faith and need to be discussed further in implementation.

As noted above, MassDEP needs to be involved with EPA and communities on the implementation issues raised in this letter. If MassDEP did not co-issue, our ability to be part of those discussions would be eliminated. To ensure that MassDEP can continue to be part of the discussion as to how this permit is implemented, and to be able to continue to meaningfully engage with EPA and the cities and towns, while noting the significant challenges, MassDEP will co-issue the permit and provide the requisite Section 401 certification. In doing so, MassDEP again requests that EPA Region 1 work closely with the municipalities subject to this permit and to consider challenges of implementation our agency has raised in past comments, and which have been raised by municipalities in recent discussions. MassDEP will continue its work in providing technical assistance to cities, towns and stormwater coalitions moving forward.

Please forward the final permit for signature to Doug Fine, Assistant Commissioner for Water Resources.

Sincerely,



Martin Suuberg
Commissioner