MS4 Litigation Summary/NACWA's Position

Case: Center for Regulatory Reasonableness v. EPA, US Court of Appeals for the District of Columbia Circuit (Case # 16-cv-1246)

Litigation challenging the small municipal separate storm sewer system (MS4) general permits for Massachusetts and New Hampshire remains in abeyance while the parties continue to mediate the dispute. The permits require MS4s to comply with water quality standards (WQS) impose strict compliance schedules for TMDL implementation.

Background

In April 2016, EPA Region 1 issued a general National Pollutant Discharge Elimination System (NPDES) permit for small MS4s in Massachusetts (MA). In January 2017, EPA Region 1 issued a similar permit for small MS4s in New Hampshire (NH), with an effective date of July 1, 2018.

Several interested parties filed petitions for appeal in the U.S. Court of Appeals for the First Circuit and the U.S. Court of Appeals for the D.C. Circuit, including the Massachusetts Coalition for Water Resources Stewardship (MCWRS) representing municipalities and stormwater and wastewater districts; the City of Lowell, Massachusetts; the Town of Franklin, Massachusetts; the National Association of Home Builders; the New Hampshire Home Builders Association; the Center for Regulatory Reasonableness ("CRR"); and Conservation Law Foundation ("CLF").

EPA requested consolidation of the MA and NH cases due to the similarity of the permits themselves and the issues raised in the challenges, both to avoid conflicting decisions from the federal circuit courts and to allow settlement discussions to address the issues in both permits. The two appeals are now consolidated in the D.C. Circuit. Mediation has been ongoing since February 2018.

The permits will have significant impacts in both states. Parties challenging the permits argue that the requirements are overly prescriptive and most likely unachievable for most communities. They argue that the permits create a substantial administrative burden for municipalities that will divert resources away from existing, effective programs, and that the permits overstep the statutory bounds set forth in the CWA.

In MA alone, it will affect more than 250 small MS4 communities. EPA's analysis projects the new requirements would cost each city or town between $400,000 and $1.35 million, but many of the regulated communities expect far greater costs, especially for TMDL implementation requirements

The Massachusetts General Permit

As stated above, the NH general permit is very similar to the MA GP, but the following analysis applies specifically to the MA permit, which imposes four WQS-based prohibitions or requirements of special interest, primarily given the likelihood that they exceed the Maximum Extent Practicable (MEP) standard for multiple Phase II MS4 permittees:

- **General Prohibition** – "The permittee shall reduce the discharge of pollutants such that the discharges from the MS4 do not cause or contribute to an exceedance of water quality standards." Permit § 2.2.1.a. Although the effect of this sweeping requirement is somewhat mitigated by the following two bulleted items, it is important to recognize that by this provision, EPA asserts the authority to require strict WQS compliance irrespective of the MEP standard, which is a highly problematic EPA position and contrary to CWA §402(p)(3)(B)(iii) (MEP).

- **Waterbody with Approved TMDL** – For this category, the permittee is deemed to be in compliance with Section 2.2.1.a. (quoted above), if the permittee complies with "all applicable requirements and BMP implementation schedules in Appendix F." Permit § 2.2.1.b. Appendix F is a 140-page blueprint setting out

a very aggressive scope of remedial work with fixed end dates, particularly for the Charles River Watershed (e.g., mandating phosphorus reductions in each of three future five-year phases ending in 20 years to fully meet WQS) but also with other approaches for other watersheds and pollutants. Significantly, by this provision (Section 2.2.1.b.), EPA asserts the authority to mandate full WQS/TMDL compliance on a fixed long-term schedule of its choosing. EPA should not impose requirements that exceed the 5-year permit term or that are practicable to achieve within five years, and this provision appears to go far beyond both.

- **Water Quality Limited Waterbody/No TMDL Yet** – For this category, the permittee is deemed to be in compliance with Section 2.2.1.a. (quoted above) if the permittee complies with "all applicable requirements and BMP implementation schedules in Appendix H." Permit § 2.2.1.c. Appendix H sets forth a list of additional or enhanced BMPs for various pollutants commonly found in municipal stormwater. These requirements are imposed on the MS4s prior to conducting the TMDL process to allocate assimilative capacity and pollutant reduction targets and contribute to the overall permit burden that may exceed MEP for many communities.

- **Other Violations of WQS Section 2.2.1.d.** – This catch-all for situations not covered by Sections 2.2.1.b. and 2.2.1.c. requires the MS4 causing or contributing to a violation of a WQS to ***meet the WQS within 60 days***. There are two important points. First, unlike Sections 2.2.1.b. and 2.2.1.c., according to EPA these discharges are violations and are cause for ***enforcement even if remedied*** within 60 days. Second, the 60-day corrective action deadline is likely unrealistic for most real world situations.

NACWA's Position

NACWA has a long litigation history of defending the MEP standard. The Association views this appeal as the most important MS4 litigation to date.

The outcome of this case is likely to set an especially important precedent defining the scope of EPA's regulatory authority relative to local governments and their MS4s, because the requirements in question were established by EPA itself. EPA would gain much broader authority and latitude to impose expensive stormwater requirements and TMDL implementation programs—and dictate implementation schedules—for MS4s throughout the nation, apparently without regard to the practicability of such requirements.

Even the Massachusetts Department of Environmental Protection objected to EPA's approach, on the grounds that the permit "is a significant shift in approach from the BMP-based program" noting that "water quality-based effluent limitations will ultimately require additional resources to support additional pollution control technologies or other measures beyond the maximum extent practicable standard set forth in the federal CWA. These measures may be extremely costly and it is possible that they would not make any substantial improvement in water quality."

In addition, many delegated states base state-level MS4 permitting practices on federal authority and practice, so the decision in this case will have broad implications for MS4 permitting in delegated states as well.