

Stormwater Permits - An Update on USEPA Proposals to Regulate Stormwater Discharges

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Overview

- Regulatory Drivers
- Massachusetts Stormwater Initiative
- USEPA Proposed Post-Construction Stormwater Regulations
- Massachusetts Small MS4 General Permit
- Upper Charles River Residual Designation Authority (RDA) General Permit
- What Next/Key Issues

Regulatory Drivers - Delegation

- **Clean Water Act Delegation**

- USEPA typically “delegates” authority to implement Clean Water Act regulatory programs to states after approving their implementation plans
- MA is one of four states that has not been delegated this authority
- As a result, USEPA issues and enforces CWA permits and drives all regulatory initiatives
- MA is actively considering CWA delegation
 - Multi-year process if pursued

Regulatory Drivers - Stormwater Impacts

- **According to USEPA:**
 - Urban stormwater is the leading cause of water quality impairment for most waterbodies
 - Approximately 800,000 acres developed every year, growing to over 1.0 million acres by 2039
 - Development increases the amount of impervious cover in the landscape
 - Development upstream can cause downstream impacts in communities
- **Key pollutants include salt, sand, oil, grease, metals, trash, bacteria, pesticides**

Regulatory Drivers - Nutrient Loading

- **Increasing focus on nutrients (phosphorous, nitrogen)**
 - Sources include fertilizers, organic materials (leaf litter) and vehicle exhaust
 - Impervious areas and engineered stormwater systems prevent infiltration and exacerbate nutrient concentrations in stormwater discharges (particularly in urban and suburban areas)

Regulatory Drivers - Charles River

Excessive amounts of algae contribute to a number of negative water quality impacts including:

Poor aesthetic quality

Undesirable shifts in algal species composition and the food web

Reduced water clarity

Low dissolved oxygen lower levels of impoundments or lakes)

May contribute to odors and skin irritations

May cause toxic effects to fish, animals (e.g., dogs) and humans that come in contact with the water

Blue-green algae bloom Lower Charles River, August 2008
source: Charles River TMDL Slide Show to State Stakeholders 2009

Regulatory Drivers - TMDLs

- **Total Maximum Daily Loads (TMDLs)**
 - Clean Water Act mandates that impaired waters have a pollutant “budget” (TMDL) established to ensure that waterbody does not exceed water quality standard(s)
 - 75% of MA waterbodies are impaired by one or more pollutants and have or require TMDLs
 - MassDEP has significant backlog for promulgating TMDLs
 - TMDLs are comprised of wasteload allocations (WLAs) for permitted point sources (regulated pollutant discharges) and load allocations (LAs) for unregulated nonpoint sources and background concentrations

Regulatory Drivers - Charles River TMDLs

- **TMDL for the Lower Charles River Basin (below the Watertown Dam)**
 - Issued in October 2007
 - Driven by excessive algae growth from nutrient loading
 - TMDL requires 54% reduction in phosphorous loading into the Lower Charles River Watershed
 - 48% reduction from sources above the Watertown Dam
 - 65% from commercial and industrial impervious areas in the Lower Charles Watershed

Regulatory Drivers - Charles River TMDLs

- **TMDL for Upper/Middle Charles River Basin**
 - Issued in May 2011
 - Addressed water quality impacts in the Upper/Middle Charles River Basin, and responded to the nutrient loading requirements from the Lower Charles
 - TMDL requires a 65% reduction in phosphorous loading from commercial and industrial stormwater sources

MassDEP Stormwater Initiative

- In 2008, MassDEP proposed a statewide general permit for stormwater discharges from commercial, industrial and high-density residential properties with two or more acres of impervious area
 - Controversial elements included mandatory retrofitting of costly stormwater treatment systems, “aggregating” separately owned parcels sharing common stormwater systems for calculating the two-acre threshold and permitting obligations, and apparent “one-size fits all” approach for all watersheds
- In 2010, after significant pushback (NAIOP, AIM, AICUM and others), MassDEP suspended that effort
- Comments submitted by USEPA during that process indicated that USEPA was considering a parallel/overlapping regulatory program

Federal Post-Construction Stormwater Regulations

- **Current federal stormwater regulations cover:**
 - Discharges “associated with” specified industrial activities
 - Discharges from construction sites disturbing one or more acres
 - MS4s
- **In response to a 2010 citizens suit seeking regulation of stormwater discharges to the Chesapeake Bay, USEPA agreed to develop nationwide regulations for post-construction stormwater discharges from commercial properties**
- **After four years of stakeholder process, USEPA declined to pursue a formal regulatory program, and chose to rely on incentives, promoting “green infrastructure,” and working with MS4s to reduce stormwater impacts**

MA Small MS4 Draft General Permit

- MS4s collect stormwater discharges from commercial and residential developments, municipal facilities and roads
- USEPA regulates stormwater discharges from MS4s under different NPDES permits depending on size
 - Some (e.g., Worcester and Boston) have individual permits
- For “small” MS4s, USEPA issued a general permit in 2003
 - Applied to approximately 240 municipalities
 - Expired in May 2008

MA Small MS4 Draft General Permit

- USEPA considered and then abandoned issuing watershed-specific small MS4 general permits for MA
- Draft MA Small MS4 General Permit issued for comment 9/14
 - Comment period closed 2/15
 - Unclear when and in what form final Small MS4 General Permit will issue
- Draft general permit would impose significant regulatory burdens and costs on MS4s
 - This may lead to wider implementation of stormwater utilities (fees assessed to property owners discharging into MS4, based on impervious area owned)

Small MS4 Draft General Permit

- Draft general permit requires MS4s in Charles River Watershed to establish and implement Phosphorous Control Plans (PCPs) to achieve TMDLs for Lower and Upper/Middle Charles River Watersheds
 - Unclear what form PCPs would take and how they would be implemented
- PCPs could lead to:
 - local stormwater regulations
 - requirements to retrofit stormwater treatment equipment?

Residual Designation Authority

- **Clean Water Act (Section 402(p) authorizes USEPA to regulate various stormwater discharges, including those:**
 - “For which the Administrator or the State, as the case may be, determines . . . contribute[] to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.”
- **In its implementing regulations, USEPA “clarified” that this authorization included stormwater discharges to waters subject to TMDLs**
- **USEPA’s regulations also granted citizens the right to petition USEPA to exercise this so-called “residual designation authority” (“RDA”)**

Residual Designation Authority

- To date, RDA has been exercised in only three instances
- In 2003, Conservation Law Foundation (CLF) petitioned and then sued to compel Vermont to exercise RDA to regulate unpermitted stormwater discharges into Lake Champlain (targeting at nutrient loading)
- In 2008, CLF petitioned Maine to exercise RDA to regulate unpermitted urban stormwater discharges into the Long Creek watershed in Portland (3.45 sq. miles)
 - Final program was a hybrid general permit/private agreement implemented by a local watershed management district

Upper Charles River Residual Designation (RD) General Permit

- **November 2008 - USEPA voluntarily issued a preliminary Residual Designation for stormwater discharges in the Upper Charles River**
 - Proposed regulating stormwater discharges from commercial/industrial properties with two or more acres of impervious surface
- **April 2010 - USEPA made the Upper Charles River Residual Designation final and issued a draft general permit to implement that program**
 - Proposed a pilot project in three municipalities in the Charles River headwaters: Bellingham, Franklin and Milford

Upper Charles River Residual Designation (RD) General Permit

- **Basic Requirements:**
 - Notice of Intent for authorization to discharge stormwater
 - Stormwater Management Program & Plan
 - Baseline Performance Standards
 - Phosphorous Reduction Requirement/Plan
 - Or participation in Certified Municipal Phosphorous Plan
 - Annual Certification of Compliance

Upper Charles River Residual Designation (RD) General Permit

- **Main Concerns for Dischargers**
 - Compliance obligations and costs
 - Aggregation issue
 - Two-acre threshold
 - Municipal resources to implement the program (phosphorous reduction plan review, structural BMP permitting)
 - Availability of compliance “safety valves”
 - Reasonable implementation timelines?

Upper Charles River Residual Designation (RD) General Permit

- At the same time, CLF and Charles River Watershed Assoc. (CRWA) petitioned USEPA to extend the Residual Designation to the entire Charles River watershed (35 communities) and reduce the threshold to one or more acres of impervious area
 - USEPA never formally responded to this petition (despite regulatory deadline to do so)

Upper Charles River Residual Designation (RD) General Permit

- USEPA commissioned a study to evaluate costs to implement the proposed RDA general permit pilot project
- Costs in the three communities to comply with the general permit were estimated to be in the \$300MM range
- Without any formal announcement, USEPA suspended the RDA process

Upper Charles River Residual Designation (RD) General Permit

- In 2013, CLF and various other groups filed RDA petitions in USEPA Regions 1, 3 and 9 seeking broad regulation of stormwater discharges from currently unregulated sources
- Each USEPA Region responded differently (suggesting no national strategy from USEPA HQ)
 - Region 1 (New England) indicated that it would proceed on a watershed by watershed basis and would not formally commit to taking any specific action
- CLF and CRWA filed CWA citizens suit against USEPA in April, 2015 to force a response to their 2009 RDA petition
 - Alleged USEPA had a nondiscretionary duty to require permits for commercial/industrial/high density residential stormwater discharges in the Charles River Watershed

Upper Charles River Residual Designation (RD) General Permit

- NAIOP (real estate trade association) filed to intervene in the case
- CLR and CRWA dismissed suit without prejudice
- USEPA informally agreed to respond to 2009 RDA petition by Spring 2016 without committing to what its response will be
 - Reject petition
 - Agree to proceed with RDA (in what form?)
 - Further evaluation
- Stakeholder process anticipated this winter to support agency decision-making
 - AICUM would be an important voice in the stakeholder process

Key Issues for Property Owners

- **Need to address CWA jurisdiction issue - discharge of pollutants to waters of the US**
 - MS4s are not “waters of the US,” so discharges to MS4s should not be directly regulated under CWA
- **Overall need for better integration with MS4 program**
 - Stormwater utilities?
 - Local permitting programs?
- **MA phosphorous restrictions**
 - MA legislation has significantly restricted use of phosphorous-containing fertilizers (regulations issued in 2015)
 - Need to time evaluate improvements to water quality

Key Issues for Property Owners

- **Preference for incremental, phased approach**
 - Identify alternative phosphorous control approaches (e.g., dam removal)
 - Pursue other lower cost options first and evaluate improvements
- **Need to avoid mandated retrofitting of stormwater treatment systems (e.g., subsurface infiltration galleries)**
 - Cost estimates have been in the \$150,000-500,000/impervious acre range)
 - Focus on new development and redevelopment (easier to budget costs)
- **Be prepared to participate!**

Questions?