STATEments

A brief description of a new bill, regulation, or court decision prepared for you by ACWA.

Oct. 28, 2016

One State Doesn't Want to Participate in the Final Four

Reference: Massachusetts MS4 General Permit

Legal Issue: Environmental groups are challenging the permit based on the multi-decade compliance period, failure to include enforceable water quality based effluent limits to control phosphorus and other pollutants, and EPA's failure to require MEP by not requiring implementation of low impact development green infrastructure to control stormwater runoff. Industry and other groups are also challenging the permit because it requires newly developed properties to choose between incorporating technology to retain stormwater on-site or greatly reducing sediment and nutrient runoff from their land, negates the traditional 402(p) iterative approach for stormwater permits, presumes discharges to impaired waters "cause or contribute" to a violation of WQS, was not properly justified with site-specific data, far exceeds EPA's authority under the CWA, and that EPA's use of MEP in this permit is unconstitutionally vague.

Relevance: The EPA-crafted Massachusetts NPDES General Permit contains wastewater treatment plant and municipality provisions more demanding than those in state-crafted permits. Specifically, the Permit requires that MA to meet the Maximum Extent Practicable standard and that municipal discharges do not cause or contribute to a decrease in water quality. EPA could use MA's permit requirements as standard for future permits.

Facts: MA is one of four states that are not authorized to administer CWA discharge permits. EPA signed MA's Small MS4 Permit on April 4, 2016, effective July 1, 2017. On July 18, 2016, the Center for Regulatory Reasonableness (CRR) petitioned EPA's Permit, claiming that the Permit's new MS4 requirements (1) were procedurally unlawful under the Administrative Procedure Act, (2) exceed EPA's CWA authority, and (3) violate the U.S. Constitution in some cases. CRR also argues that the Permit was not properly justified with site-specific data and that the Permit improperly supersedes state policies.

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Challengers of the Permit include at least two municipalities in MA (the City of Lowell and the Town of Franklin) and several organizations, including the Massachusetts Coalition for Water Resources Stewardship, Inc., the National Association of Homebuilders, and the Home Builders Association of Massachusetts. Challengers have petitioned for the First Circuit Court of Appeals to review the Permit. None of the challengers have raised a substantive argument for why the Permit is unlawful.

Environmental groups (The Conservation Law Foundation and the Charles River Watershed Association) have also petitioned the Permit on different grounds. Environmental groups claim that (1) the provision of a multi-decade compliance period is contrary to the CWA's language, (2) EPA violated the CWA when it did not include enforceable water quality based effluent limitations to control phosphorous and other pollutants, (3) EPA failed to meet CWA's "maximum extent practicable" standard when it did not require the use of green infrastructure approaches.

MA cities and wastewater sector groups want EPA to delegate its CWA permit authority to Massachusetts. Supporters contend that state's environmental agency, the Massachusetts Department of Environmental Protection (MassDEP) would "issue more lenient discharge permits especially on nutrient limits and stormwater."

Status: On October 14, 2016, the First Circuit approved EPA's motion to transfer suits to the Court of Appeals for the D.C. Circuit.