



ENVIRONMENTAL PROTECTION AGENCY

[EPA-R01-OW-2020-0216; FRL-10018-55-Region 1]

Availability of Final Modifications to NPDES General Permits for Stormwater Discharges from Small Municipal Separate Storm Sewer Systems in Massachusetts and New Hampshire

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability of final permit modifications.

SUMMARY: The Environmental Protection Agency (EPA) is providing a notice of availability (NOA) of final limited modifications to the National Pollutant Discharge Elimination System (NPDES) general permits for discharges of stormwater from small Municipal Separate Storm Sewer Systems (MS4s) in Massachusetts and New Hampshire under the Clean Water Act (CWA). The final modifications represent the results of mediation supervised by the U.S. Court of Appeals for the District of Columbia Circuit Mediation Program between EPA and petitioners the National Association of Homebuilders (NAHB), the Home Builders and Remodelers Association of Massachusetts, Inc. (HBRAMA), the New Hampshire Home Builders Association (NHHBA), the Center for Regulatory Reasonableness (CRR), the Massachusetts Coalition for Water Resources Stewardship (MCWRS), the Town of Franklin, Massachusetts, (Franklin), the City of Lowell, Massachusetts (Lowell), the Conservation Law Foundation (CLF), and the Charles River Watershed Association (CRWA). In April 2020, EPA and the petitioners entered into settlement agreements that included commitments for EPA to propose certain modifications to the 2016 Massachusetts Small MS4 General Permit and the 2017 New Hampshire Small MS4 General Permit, and then to take final action on each proposal.

DATES: These final permit modifications are effective 30 days after signature. In accordance with 40 CFR part 23, this permit shall be considered issued for the purpose of judicial review at

1:00 pm Eastern daylight time on **[INSERT DATE 14 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Under section 509(b) of the Clean Water Act, judicial review of these general permit modifications can be requested by filing a petition for review in the United States Court of Appeals within 120 days after the permit modifications are considered issued. Under section 509(b)(2) of the Clean Water Act, these permit modifications may not be challenged later in civil or criminal proceedings to enforce these requirements. In addition, these permit modifications may not be challenged in other agency proceedings.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. **EPA-R01-OW-2020-0216**. All documents in the docket are listed on the <http://www.regulations.gov> web site. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Newton Tedder, Water Division, U.S. Environmental Protection Agency, Region 1, 5 Post Office Square, MC 06-4 Boston, MA 02109; telephone number: 617-918-1038; email address: tedder.newton@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Additional Information About the Final Permit Modifications

A. Background on Litigation and Settlement Agreements

On April 4, 2016, EPA issued a final NPDES general permit for discharges of stormwater from small MS4s in Massachusetts (the MA MS4 Permit) under CWA section 402(p). 33 U.S.C. § 1342(p). On July 18, 2016, CRR filed a petition for review of the permit in the U.S. Court of Appeals for the D.C. Circuit. CLF, CRWA, MCWRS, Franklin, NAHB, HBRAMA, and the City of Lowell also filed petitions for review of the permit, all of which were consolidated with

CRR’s petition in the D.C. Circuit. *Center for Regulatory Reasonableness, et al. v. EPA*, No. 16-1246 (D.C. Cir.) (2016 Massachusetts Small MS4 General Permit consolidated cases). On January 18, 2017, EPA issued a final NPDES general permit for discharges of stormwater from small MS4s in New Hampshire (the NH MS4 Permit). On February 1, 2017, CLF filed a petition for review of the permit in the U.S. Court of Appeals for the First Circuit. CRR, NAHB, and NHHBA later filed petitions for review in the D.C. Circuit. The First Circuit then transferred the CLF petition to the D.C. Circuit, where the D.C. Circuit consolidated it with the CRR, NAHB, and NHHBA petitions. *Center for Regulatory Reasonableness et. al v. EPA, Conservation Law Foundation, Intervenor* No. 17-1060 (D.C. Cir.) (2017 New Hampshire Small MS4 General Permit consolidated cases). The parties to both cases entered mediation in 2017, and the D.C. Circuit held the cases in abeyance. On December 27, 2019, EPA published three proposed settlement agreements in the **Federal Register** for a 30-day public comment period. *See* “Proposed Settlement Agreements, Clean Water Act Claims,” 84 FR 71407 (Dec. 27, 2019). EPA’s planned proposed permit modifications to the Massachusetts and New Hampshire permits and statements of basis describing those proposed modifications were attached as Exhibits A and B to the Massachusetts and New Hampshire proposed settlement agreements. EPA and the petitioners executed the Massachusetts and New Hampshire settlement agreements on April 15, 2020. The first two settlement agreements describe the modifications that EPA proposed to the MA MS4 Permit and NH MS4 Permit.

Pursuant to the settlement agreements, the proposed permit modifications reflected the substantive agreements that parties reached during mediation. In the settlement agreements, the petitioners agreed not to submit adverse public comments on the Draft Permit Modifications, except that the Petitioners reserved their rights to submit any form of comment on EPA’s proposed modification to Part 2.3.6.a of the NH MS4 permit and on the definitions of “new development” and “redevelopment” in NH MS4 permit Appendix A. The agreements specified that EPA would take final action on each proposed modification within nine months of posting

the NOA of the Draft Permit Modifications on its website and in the **Federal Register** (that is, by January 23, 2021); that petitioners would then dismiss their current petitions for review with prejudice; and that petitioners agreed not to challenge EPA's respective final actions if they modify the permits in a manner substantially similar to the proposed modifications (with one exception, discussed in the New Hampshire settlement agreement). The third settlement agreement commits Lowell, Massachusetts, to voluntarily dismiss its petition without prejudice and commits EPA to process Lowell's individual permit application and then to take final action on Lowell's individual permit application. Today's notice includes the final MA MS4 and NH MS4 permit modifications. Lowell filed a joint stipulation to voluntarily dismiss its petition on July 15, 2020. EPA will propose an individual permit for Lowell in a separate action.

B. Final Permit Modifications

EPA published the proposed permit modifications on April 23, 2020. *See* 85 FR 22735 (Apr. 23, 2020). The public comment period for these proposals closed on June 8, 2020. EPA received 21 public comments. EPA reopened, reexamined, and accepted comments on only the parts of the MA MS4 and NH MS4 permits that the proposed modifications specified. In the MA MS4 permit, the following permit parts were the only parts open for modification and comment: parts 2.0; 2.1; 2.1.1; 2.1.2.a; 2.2.; 2.2.2; 2.3.3; 2.3.5; 2.3.6; 2.3.7.a; 2.3.7.b; 4.1; 4.4; Appendix F part A.I; Appendix F part A.II; Appendix F Attachments 2 and 3; and Appendix H. In the NH MS4 permit, the following permit parts were the only parts open for modification and comment: 2.0; 2.1; 2.1.1; 2.1.2.a; 2.2.; 2.2.2 (paragraphs 2 and 3); 2.3.3.1; 2.3.5; 2.3.5.3; 2.3.6.a; 2.3.7.2.b.iii; 3.1.3; 4.1.4; 4.4.2.3; Appendix A; Appendix F part III and Attachment 3; and Appendix H. The modifications provide either enhanced clarity regarding permit terms or greater flexibility in permit implementation. EPA prepared Statements of Basis that fully explained the proposed modifications. *See* www.regulations.gov Docket document EPA-R01-OW-2020-0216-0002, "Statement of Basis for Massachusetts Small MS4 General Permit 2020 Modifications," and document EPA-R01-OW-2020-0216-0005, "Statement of Basis for New

Hampshire Small MS4 General Permit 2020 Modifications.” EPA has considered all significant public comments on the permit sections that were open for proposed modification. The docket also contains a Memorandum to the Record discussing the potential impacts of the permit modifications and the Response to Comments documents for the Massachusetts and New Hampshire permits. Based on public comments, EPA plans to finalize the permits as proposed, except for the following changes:

Massachusetts Small MS4 General Permit

- EPA updated the typographical error in Appendix F, Table F-6. Grafton and Shrewsbury have the same required percent reduction of 49% for phosphorus from urban stormwater sources for Flint Pond and Lake Quinsigamond.
- EPA updated the permit language to clarify that Part 6.5 is not applicable to the MA Department of Conservation and Recreation, which has its own phosphorus reduction requirements, as indicated in Appendix F Part A.I of the permit.

New Hampshire Small MS4 General Permit

- The proposed modifications to Part 2.3.6 (post-construction stormwater minimum control measures) attempted to rely on the Southeast Watershed Alliance (SWA) model ordinances, a successful local program as described in the Statement of Basis, but erred in requiring some pieces of the SWA Model Ordinance to be adopted by SWA communities and others to be adopted by non-SWA communities. In response to comments noting confusion as to which requirements applied to which communities, EPA has updated the language in Part 2.3.6 to remove the different requirements for those communities in and out of the SWA. Consistent with the option in the 2017 NH MS4 Permit, the final permit modification requires that all New Hampshire permittees – those in the SWA and those outside the SWA - adopt a regulatory mechanism that is at least as stringent as SWA Model Standards Section 4 Element C and Element D in their entirety.

EPA has emailed notifications of the Final Permit Modifications to regulated parties, parties to this mediation, and other interested parties on EPA Region 1's NPDES permit mailing list. The official public docket for this action, EPA-R01-OW-2020-0216, contains copies of the final permits, response to comments documents, a memorandum describing economic impacts of the modifications, and other supporting material. An electronic version of the public docket is available through www.regulations.gov. These documents are also posted on EPA Region 1's website at <https://www.epa.gov/npdes-permits/npdes-stormwater-permit-program-new-england#smallms4program>. The official public docket is available for public viewing at U.S. EPA Region 1, John W. McCormack Building, 5 Post Office Square, Boston, MA 02109. Please contact the persons listed in **FOR FURTHER INFORMATION CONTACT**.

Administrative Requirements

Executive Order 12866: Regulatory Planning and Review

This action is a significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review. Any changes made in response to OMB recommendations have been documented in the docket.

Consideration of Other Federal or State Laws

EPA's docket provides information on compliance with applicable laws and anticipated impacts on small entities in a memorandum to the record, in the proposed permits' statements of basis/fact sheets, and the final permits' response to comments documents. Massachusetts and New Hampshire provided water quality certifications to EPA for this action pursuant to Section 401 of the Clean Water Act, 33 U.S.C. 1341. In accordance with the Endangered Species Act (ESA), EPA has also obtained concurrence from the New England regional offices of the National Marine Fisheries Service and U.S. Fish and Wildlife Service that this action is not likely to adversely affect any listed threatened or endangered species. The Massachusetts and New Hampshire Coastal Zone Management offices have also provided EPA with Coastal Zone Management Act (CZMA) consistency determinations for this action.

AUTHORITY: This action is being taken under the Clean Water Act, 33 U.S.C. 1251 *et seq.*

Dated: December 10, 2020.

Dennis Deziel,

Regional Administrator, EPA Region 1.

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