



# TOWN OF UPTON, MASSACHUSETTS

---

## BOARD OF SELECTMEN

July 26, 2016

MEMO TO: Board of Selectmen  
FROM: Blythe C. Robinson  
Town Manager  
RE: Appeal of the EPA's MS4 Permit

As you know, earlier this year the Federal Environmental Protection Agency (EPA) finally released the updated Massachusetts Small Municipal Separate Storm Sewer Systems General Permit, otherwise known as MS4. Under the National Pollution Discharge Elimination Systems (NPDES) permit program, the new permit significantly increased the regulations to manage stormwater, and instituted stricter standards in future years with the goal of improving water quality within the Commonwealth's waterways. Some of the new requirements are simple and limited in cost, such as increased public awareness campaigns, public education and outreach, mapping of all pipes, structures and outfall locations, additional street sweeping and catch basin cleaning as a means to improve stormwater quality.

The purpose of this memo is to update you on some of the longer term requirements which will very likely to have a significant cost increase to all municipalities within the Commonwealth and what they mean to Upton. A number of municipalities, led by the City of Worcester, plan to appeal these stricter standards and have asked all communities to join them. It is staff's recommendation that Upton participate with the other 29 communities in the Central Massachusetts Regional Stormwater Coalition (CMRSWC) in this appeal. Depending on how significant you think this issue is, the Board can also decide to participate in addition to the CMSWC as the Town individually.

The new MS4 permit refers to the Federal Clean Water Act, and that act states that Municipal Discharge Permits shall require "controls to reduce the discharge of pollutants to the maximum extent practicable" which is commonly referred to as "MEP". The EPA has further required that in this new permit, municipalities, besides meeting the MEP standard, must also meet "water quality standards "(WQS), and that is where the additional exposure for cost comes into play. Communities have long been held to the MEP standard as to our responsibility to limit and reduce pollution in stormwater, and there have been a number of decisions that interpret that to mean the standard is subject to limitations such as technology and cost/benefit analysis. If the EPA prevails in enforcing the WQS, then regardless of the cost to improve water quality

**BOARD OF SELECTMEN**  
James A. Brochu, Chairman  
Robert J. Fleming  
Gary Daugherty

**TOWN MANAGER**  
Blythe C. Robinson  
One Main Street • Suite 1 • Upton, MA 01568  
T: 508.529.6901 • F: 508.529.1010

where a pollutant is present, the Town would be responsible for bearing that cost to correct the issue. As you know, it is virtually impossible for a community to control what ends up in a stream or pipe leading to an outflow, so it is also virtually impossible to predict what costs Upton would have or what measures we would have to put in place. Certainly measures such as minimizing nutrients (fertilizers) which contribute to poor water quality, improving public education to change behavior, flushing and video inspecting stormwater pipes, as well as additional cleaning of catch basins will such improve water quality, but those altogether may not meet the WQS standard in certain watersheds.

The City of Worcester has decided to appeal this decision of the EPA to enforce this higher standard, and has retained legal counsel to file the appeal for a total cost of \$100,000. A copy of meeting minutes about the appeal as well as comments on the overall permit from many communities is attached for background. Worcester has reached out to all other communities to ask who else agrees with this position and is willing to join the appeal and contribute to paying a portion of the fee. Attached is a list of communities that have expressed interest, including Upton. Besides this list, the CMRSWC also has indicated interest to join, and to contribute up to \$20,000 on behalf of its 30 towns out of funds they have on hand (no further assessment). It is important to point out that whether the Town decides to join the appeal through the coalition, and/or on its own, if the communities prevail, it will benefit all of the communities because this is a general permit.

It is staff's recommendation that Upton participate through the coalition. We believe that the WQS standard is unreasonably strict because it makes the Town as a whole responsible for stormwater quality that it has no way to control. Since it is not known what types of pollutants there might be and to what extent, we cannot begin to estimate what measures we would be required to put in place to remove them or how much it would cost. It goes without saying that we believe that the intent of the MS4 permit is good and that there are many benefits to cleaner water; however it is unreasonable to impose a standard that the Town can't necessarily achieve and/or afford. The coalition has sufficient resources from past annual assessment to pay the \$20,000 they propose at no additional cost. We do not think that the Town needs to sign on to the appeal separately as well because we would benefit from the outcome of it being overturned regardless. However, should you wish to, the assessment is based on population and the amount for communities of less than 10,000 residents has been set at \$500.

I look forward to discussing this with the Board at the meeting on August 2<sup>nd</sup> to understand how you would like to proceed.

Enclosures

Cc: Vincent Roy, DPW Director

**MS4 Interested Community (will pursue formal commitment with community leaders)**

Town of Medway

City of New Bedford

Town of Millbury

Town of Brookline

Town of Franklin

Town of Wellesley

Town of Needham

Town of Bellingham

City of Brockton

Town of Shrewsbury

Town of Milford

City of Lowell

Town of Upton

Town of Framingham

Town of Randolph

Town of Dedham

Town of Medfield

Town of Danvers

City of Worcester

City of Haverhill

City of Beverly



**BOARD OF DIRECTORS  
AND OFFICERS**

**Officers**

Philip D. Guerin  
*President and Chairman*  
Director, Water, Sewer, &  
Environmental Systems,  
Worcester Department of  
Public Works & Parks

Vonnie M. Reis, P.E.  
*Executive Vice President and  
Vice Chair*  
Director of Capital Projects,  
Town of Framingham

Cheri Cousens, P.E.  
*Treasurer*  
Executive Director, Greater  
Lawrence Sanitary District

Robert E. Ward, P.E.  
*Secretary*  
Deputy Director, City of  
Haverhill Department of Public  
Works

**Directors**

Thomas M. Holder  
Director, Department of Public  
Services, Town of Medway

Jane Madden, P.E., BCEE  
Senior Vice President,  
CDM Smith

David Michelsen, P.E.  
District Engineer,  
South Essex Sewerage District

Robert L. Moylan, Jr., P.E.  
Former Commissioner,  
Worcester Department of  
Public Works & Parks,  
Representing City of Worcester

Kent Nichols, P.E.  
Vice President,  
Weston & Sampson

Karla Sangrey, P.E.  
Engineer-Director and  
Treasurer, Upper Blackstone  
Water Pollution Abatement  
District

Joshua Schimmel  
Executive Director, Springfield  
Water and Sewer Commission

**MS4 Permit Discussion Meeting**

**Wednesday, July 13, 2016, 9:30 AM to 11:30 AM**

**Franklin Town Council Chambers, 355 East Central Street, Franklin, MA**

**Summary Notes**

*The purpose of the meeting was to discuss the legal basis for a potential appeal of the Final MS4 General Permit, and the process and cost to file an appeal.*

Phil Guerin opened the meeting at 9:40 AM and attendees introduced themselves (see list following discussion summary).

Mr. Guerin provided background on the overriding issues of the permit:

- It includes EPA Region 1's interpretation of municipal stormwater responsibilities. Clean Water Act (CWA) section says municipalities should remove pollutants to the maximum extent practicable (MEP). The section includes some ways this can be achieved, as well as noting other measures that the Regional Administrator directs permittees to do.
- EPA Region 1 is claiming municipalities must meet the MEP standard AND meet water quality standards (WQS), such as if there is a TMDL for phosphorous it must be met. Stormwater discharges can't contribute to exceeding WQS.
- EPA has said that the other WQS technical issues will be later in the permit as a way to deflect current concerns, but these later issues are where the big money will be spent.
- MEP is not defined in the CWA. If language in a statute is not defined, then the dictionary definition is used. In this case, practicable includes financial capability.
- If the permit is implemented as written, the municipal stormwater budget center for it will approach what's spent on schools, and will be above public safety and public works costs.

Brutus Cantoreggi pointed out that the RDA pilot for Bellingham, Franklin, Milford would cost Franklin \$62 million to remove phosphorous, which is the same as the school budget. The cost does not include land related issues. For instance, the best way to get rid of phosphorous is to infiltrate it, but the soil and geology may not be appropriate in many communities for this type of disposal, and the cost to purchase suitable land is not included. These issues aren't dealt with until year 9 of permit, but once permit is in effect it's hard to deal with unreasonable requirements. The TMDL for the pilot RDA was based on Watertown Dam sampling done years ago by CRWA. The quality of other TMDLs is worse than the Charles River.

The opportunity to appeal is approaching quickly. It's a 5-year permit, which will be stretched out to 10 or more given EPA's current backlog. If it isn't challenged now, it will be in future permits. EPA is known for adding requirements to permits, not taking them out.

Bob Cox explained more about the basis for an appeal:

- The appeal will focus on narrow legal issues. The question is, is MEP the stormwater standard used for municipalities or not? The goal of the appeal is to get a legal interpretation from the court. The appeal will challenge the permit saying that EPA has exceeded its authority in interpreting the plain language of CWA. EPA relies on the Defenders case from years ago.
- There has never been a direct challenge of EPA requiring more than MEP standards in the U.S.
- Congress's intent appears to have been that stormwater is different from wastewater treatment plant discharge. It's not easy to control. It's rain, not something discharged from a process.
- The MCWRS appeal would be based on the narrow legal issue. Other items can be appealed, but when debating science and technology, courts will defer to EPA. And, it takes more time to mount an appeal on these bases.

Alan Cathcart clarified that the appeal would be challenging the use of WQS, not the use of MEP. Are there models from other states where WQS are used?

Saya Qualls stated that several permits from other states and regions have been reviewed. Most have a prohibition on contributing to pollution. State laws may be broader than the CWA.

Mr. Cox noted that this permit seems to be stricter in requiring that both MEP and WQS be met.

Mr. Cox went on to discuss the process, timing and cost of an appeal:

#### *Process*

The MS4 permit appeal is different than a NPDES appeal brought by individual permittees. The MS4 is a general permit. The appeal would not be heard by the EAB. It would be heard by a federal appeals court, in this case the First Circuit Court in Boston. Moving the case to the DC circuit was investigated, but it seemed to be a dead-end. The appeal must be filed within 120 days of the final permit issue date. In this case, the appeal deadline is August 25, 2016. It requires a one-page submittal with the permit attached for reference. The Department of Justice would assemble the administrative record and submit it to court within 40 days of the appeal. Briefs would be due 40 days after the record is submitted. The court sets the briefing schedule. The assumption is that other parties may intervene.

Jay Talerman asked if the process would include a record review. Would it be arbitrary and capricious, and based on deference standards? Is there a chance to expand the record? Mr. Cox said there is no reason to expand the record. It's a direct challenge of legal authority by parties with standing. Mr. Talerman asked if there are any cases to substantiate the assumption. Mr. Cox said there were cases in MD and NY where the courts note that stormwater is different from industrial discharges and that the text and history of CWA Sec 402(p)(3)(B)(iii) call for different treatment. Mr. Talerman asked if there would be deference to agencies. Might EPA express an interest in talking after an appeal is filed? Mr. Cox said that given the way EPA received comments almost a decade ago and the agency has not budged since that time, it's assumed that its responses now regarding authority would mirror previous ones.

Mike Leone noted that some states have authority to regulate stormwater. Would DEP be a party to an appeal? Is there something in the state statute that authorizes it? Does DEP have statutory authority in the MA CWA? Mr. Cox said he doesn't think DEP would appeal, or be a party defendant. An appeal

against DEP would have to be administrative. Instead, DEP is likely to be an ally. DEP submitted similar comments as those of municipalities. Mr. Guerin reported that at a Central MA Regional Stormwater Coalition meeting, Fred Civian from DEP said the agency might be supportive of an appeal because it considers MEP the standard. It's important to look at the history of the CWA too.

A participant asked if other groups are looking at an appeal. Mr. Cox reported that Barnes & Thornburg represents the National Association of Home Builders (NAHB) out of DC and they are discussing an appeal. The last step is for the group's Board to approve the appeal. NAHB's appeal will be broader, including using flow as surrogate and impervious issues. Mr. Cox suggested MCWRS and NAHB line up arguments, share information and cooperate in the appeal. It's appropriate to work cooperatively with others.

Mr. Cox explained that MCWRS and its municipal members would file the petition. MCWRS's strategy during the draft comment period was to get as many members to comment as possible, so they would have standing. MCWRS is not permittee, so having municipal members with standing would head off any challenge to its participation. Additionally, more communities signing on means greater the impact.

Betsy Frederick asked if the municipal comment topics matter for standing. Mr. Cox said that comments do not have to be on the MEP issue. As long as they've commented, on any issue, they have standing.

A participant asked if municipalities that are not MCWRS members can participate in the appeal. Do communities that believe EPA has exceeded its authority but are not a party to the appeal still benefit. Mr. Cox said the permit impacts 260 municipalities and there's no assumption that they will all join; however, a court ruling in favor of the appeal benefits everyone, including the free riders.

Rich Reine asked if there are other states in Region 1 that are having conversations about this issue. Mr. Cox said NH has the same MEP issue. They are behind MA in the permit process, but the same comments have been submitted about EPA exceeding authority. Mr. Reine asked if others are lined up to challenge the permit. Mr. Cox said parties in NH are prepared to do so. Mr. Reine asked if individual permittees can challenge the MS4? Mr. Cox responded that individual permittees have effluent standards, so their appeal would go to the EAB.

A participant asked about the Charles River Pollution Control District's (CRPCD) co-permittee appeal, which was an authority challenge to the EAB. Mr. Cox said that Region 1 has added language in permits in last 10 years about district/authority member municipalities being regulated by the permit. The EAB is comprised of administrative judges within EPA. The challenge was to the definition of point source. The EAB ruled against CRPCD. It could have been appealed to First Circuit, but the parties decided not to pursue it.

#### *Cost*

Mr. Cox explained that Bowditch & Dewey (B&D) estimates the cost of the appeal to be \$100,000. That would be the ceiling. If various groups are collaborating the cost would be less, but it will not be more. The costs can be better controlled because this is a challenge of authority, not technical or science issues, which would take more time. It's essentially limited to writing a brief.

If CLF and CRWA intervene, there will be added procedural issues to participate in consolidating the suit, which complicates things, but this is done before the MEP challenge gets to court.

A participant asked if an appeal could open the door for CRWA or others to get involved. EPA indicated that if environmental groups know an appeal is in process, they may intervene later. Mr. Cox said that at this point in time, the environmental groups could already be lining up a case contending that the permit doesn't go far enough. Mr. Cathcart pointed out that if the municipalities don't try, the WQS basis will be institutionalized and there won't be a chance to reverse it later.

Mr. Talerma asked if the group could seek a stay in circuit court or does a record review effectuate a stay. Mr. Cox said that in an administrative appeal the permit is stayed until the final decision. For the MS4, the permit isn't effective for another year, so there isn't a need for a stay. That's the length of time an appeal usually takes. It would be a serious hurdle to get the First Circuit to issue a stay. You would have to show harm, and EPA would have to be consulted and agree. Mr. Talerma noted that the record is voluminous and would take time to review. Could a stay be sought later if the court review seems to be running long? Mr. Cox said the appeal is on narrow grounds, so a stay request would have the best leverage at the outset.

Ms. Frederick suggested that since the existing and new permit are essentially the same, a request for a stay wouldn't achieve much.

A participant asked if \$100,000 would really cover the cost. Mr. Cox said that the legal process would be without multiple hearings, and with one oral argument. The real work is in writing the brief. If there are intervenors there is more work, but it is included in the cost.

A participant asked if EPA can still impose WQS without referencing them. Mr. Cox responded that the core of argument is about what is MEP and how it's determined. There is very little case law, but practicality has a financial impact. There may be a time when the municipalities need to fight EPA's efforts to work around the constraint, but this scenario would be blocked if the appeal is successful.

Tom Holder noted that another result of the appeal could be that EPA implements individual permits as retaliatory action against municipalities that are party to an appeal. Mr. Cox said there is that risk, but there is also a very large administrative burden for EPA if they choose to permit municipalities individually. The agency can't manage its current responsibilities.

Ms. Qualls raised the impaired waters aspect of the question. If the appeal is successful, would EPA or DEP issue TMDLs with requirements to meet and not tie them to the permit. Mr. Guerin said that the existing permit is already doing this. With regard to EPA issuing a separate TMDL permit, it hasn't happened in MA.

Mr. Talerma asked about the probability of success. Mr. Cox said his assessment is between 60% and 70%. Mr. Talerma asked if this is so even in a record review case. Mr. Cox noted that because the issue presented to the court would be one of statutory interpretation, there is limited record review. We would avoid application of a deference standard, typical with review of a technical standard. Municipal staff need help with persuading boards and councils. Mr. Cox will provide a memo with legal arguments and an executive summary.

Mr. Holder noted that August 25 is fast approaching. What's the goal for today? Is there a timeline to get a level of commitment from municipalities to file in time? Mr. Cox said B&D will take direction from MCWRS, but needs to know by mid-August. Mr. Guerin said that MCWRS needs to know who's on board. The cost per party depends on the number of communities participating. **Attendees should email**

**Kate Barrett from Regina Villa Associates at [kbarrett@reginavilla.com](mailto:kbarrett@reginavilla.com) by July 22 to let MCWRS know who's on board.** Once the number of participants is known, the parties can talk about the financial issues and mechanics of paying for their share. Municipalities without standing and corporations can also assist financially.

A participant asked how costs would be shared. Mr. Guerin said the cost depends on who's participating and the size of the municipality. If they are of similar size, the cost could be equal, but if size varies the sharing could be based on population. The goal is to be fair and equitable.

A participant asked if it matters if the municipality is a member of MCWRS. Mr. Guerin said that MCWRS could lead with member municipalities, and others could join.

A participant asked if there are other options. CLF won't allow an appeal to go unchallenged. What other steps are being taken? Is there legislative/DC delegation work that can be done. It's a daunting task. Mr. Guerin said it wasn't until this permit that EPA even responded. Ten years ago, it didn't. Congress is part of the strategy.

Mr. Cathcart pointed out that this is a legal challenge, not a Congressional/policy issue. Advocacy would come into play if EPA tries an end run. A challenge makes the point that there is resistance. If it becomes political later, the municipalities have the narrow legal challenge to point to in efforts to effect change. Mr. Guerin pointed out that the way the current permit is written, if EPA does not enforce the permit, CLF and CRWA can file a third party suit to force enforcement. So, any suggestion by EPA that those requirements won't come into play are disingenuous. EPA and individual municipalities could be sued for lack of enforcement and compliance, so challenging this permit is essential. Not challenging the permit still leaves municipalities at risk for a lawsuit.

Mr. Cantoreggi pointed out that once the permit is out, there's less of a chance of effecting change. The RDA success was due to the push back before the permit was issued.

Paul Hogan asked about individual permits for Boston Water and Sewer Commission and Worcester. If MCWRS wins the appeal will it help them with one of their own? Will they support this appeal? Mr. Cox said that the success of this appeal will help them. He said their willingness to support this appeal is unknown.

### *Timeline*

The group discussed the timeframe for responses and town government schedules. Municipal representatives should let Ms. Barrett know by email, by Friday, July 22, if they plan to advance support of the appeal to their community leaders (formal letter of interest). This will allow MCWRS to formulate a cost-sharing arrangement. MCWRS will supply an executive summary of the legal basis, process, cost, etc. to municipalities by early the week of July 25. Communities should provide a formal letter of commitment by Friday, July 29.

A participant noted that if municipalities know others are joining it will help them persuade their leaders. There's a better chance of succeeding in getting local support if some communities take a strong leadership role. MCWRS will provide an update on Monday, July 25 with the numbers and names of communities that have signed on to date.

Discussion of the financial procedural arrangement will be drafted internally by MCWRS during the next two weeks with a decision on how payments will be transmitted, etc. There was discussion about various options such as MCWRS footing the bill and then being reimbursed, IMAs if necessary, etc. Ms. Barrett said that MCWRS could send invoices similar to the special assessment that was used for the state water quality standards white paper roundtable, but she will need to check with B&D and an accountant about any tax and nonprofit status implications. Commitments are needed first; costs will be determined. The more communities participating, the lower the cost for each.

Mike Stuer asked if the legal basis could be expanded to include some other issues they are concerned about. He noted that they hired Hazen & Sawyer to review the permit. Ms. Qualls worked for the TN state environmental permitting agency. Lowell's other concerns are construction and post-construction provisions and IDDE issues. Lowell thinks there is an issue with EPA trying to adopt policy and guidance as rule – and that's the problem with this permit. CSO and LTCP issues are structured by guidance and driven by policy and not institutionalized in NPDES permits for POTWs. This MS4 is trying to integrate policy as rule. Mr. Cox pointed out that a core issue important to everyone is essential and to focus on a narrow legal issue, but it's recognized that there are many other issues.

Mr. Cathcart noted that if MCWRS is going to be advancing the appeal, generally a commitment is needed soon.

Rich Brewer said that Randolph wants to be on board, but needs the cost. Mr. Guerin said that as an example, if 10 municipalities participate, the cost would be \$10,000 each. That would be the minimum to make it work.

Jason Mammone said he needs information to help gain support of the Board of Selectmen at the 7/28 meeting. An information package before then would be helpful (by 7/22, if possible).

MCWRS will continue to provide feedback on support to the group throughout so the momentum builds.

The following communities voiced interest in joining the appeal:

- Wellesley
- Randolph
- Dedham
- Medfield
- Lowell

The meeting adjourned at 11:10 AM.

### **Attendees**

#### *In person*

1. Steven Richtarik/BETA
2. Chris Seariac/Needham
3. Rich Brewer/Randolph
4. Jay Talerman/Bellingham
5. Fred Russell/Brookline
6. Michael Dean/Milford

7. Jason Federico/DCI
8. Melissa Carter/MWH
9. Eric Johnson/Framingham
10. John Woodsmall/Holden
11. Paul Hogan/Woodard & Curran
12. Joe Federico/BETA
13. Brad Stone/Shrewsbury
14. Betsy Frederick/Kleinfelder
15. Andrew Murphy/ Norwood
16. Dave Hickey/Wellesley
17. Mike Pakstis/Wellesley
18. Jeffrey Neece/Chicopee
19. Rick Villani/Milford
20. Jason Mammone/Dedham
21. James McKay/Millis
22. Suzanne Kennedy/Millis
23. Don DiMartino/Bellingham
24. Vincent Roy/Upton
25. Jim Steinkrauss/Boston Water and Sewer Commission
26. Dan Friel/Boston Water and Sewer Commission
27. Brutus Cantoreggi/Franklin
28. Bill Renault/Concord
29. Richard Merson/Needham
30. Alan Cathcart/Concord
31. Rich Reine/Concord
32. Robert Kennedy/Medfield
33. Ken Feeny/Medfield
34. Fred Litchfield/Northborough
35. Mike Stuer/Lowell Regional Wastewater Utility
36. Phil Guerin/Worcester & MCWRS
37. Bob Cox/Bowditch & Dewey
38. Kate Barrett/Regina Villa Associates

*By phone*

1. Bob Ward/Haverhill
2. Saya Qualls/Hazen & Sawyer
3. Mike Leone/Nutter, McClennan & Fish
4. Dana Green/CDM Smith