



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 1
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Boston, MA 02109-3912

September 23, 2022

Via email

Heather Govern
Vice President and Director, Clean Air and Water
Conservation Law Foundation, Inc.
62 Summer Street
Boston, MA 02110

RE: Timing for NPDES Draft Permit for Stormwater Discharges Identified in the 2022 Clean Water Act Residual Designation Determination for the Charles, Mystic, and Neponset River Watersheds

Dear Ms. Govern:

During our call on Thursday, September 15, 2022, you asked me to commit by today that EPA Region 1 will issue a draft NPDES general permit for stormwater discharges identified in EPA's 2022 Charles, Mystic, and Neponset Residual Designation (RDA) Determination within six months. I understand that the Conservation Law Foundation intends to file suit against EPA in federal district court if EPA does not provide such a commitment.

EPA intends to issue a draft RDA general permit on an expeditious but reasonable schedule that appropriately accounts for the technical complexities and administrative uncertainties associated with this matter. EPA shares your sense of urgency around controlling the stormwater discharges identified in the RDA and has accordingly already begun the work necessary to develop a draft permit. Further, EPA is prepared to direct substantial additional resources toward its completion. At the same time, EPA is acutely aware of the need to ensure that its judgments are technically and scientifically sound and are supported by a robust record that can withstand public scrutiny and judicial challenge. This will require EPA to complete all technical and procedural steps precisely and conscientiously. As described in more detail below, EPA has decided that setting what appears to be an arbitrary deadline of six months or otherwise rushing to judgment on such a significant undertaking would not be in the public interest.

EPA must take the time necessary to develop an environmentally protective, technically accurate, and legally sound draft NPDES general permit (or permits) that potential permittees can understand and implement. EPA's draft RDA general permit development schedule must allow time for EPA to complete all necessary scientific, legal, and policy analyses. For example, to develop the administrative record for the 2022 Charles, Mystic, and Neponset RDA Determination, EPA conducted a Charles River Watershed data analysis that examined phosphorus pollutant loads and impairments caused by stormwater discharges from parcels of various sizes and various land use types. It took EPA staff nine

months to complete this analysis. EPA is currently securing contractual support to conduct full watershed analyses for the Mystic and Neponset River watersheds, which EPA aims to complete before issuing a draft RDA general permit. Once the contract is established, EPA will work with the contractor to develop an appropriate project schedule, including a rigorous quality assurance review of the data. This quality assurance review was time consuming for the Charles River technical analysis. We expect that the methods we developed for the Charles River analysis will reduce the time needed to complete the Mystic and Neponset analyses, however, since we have not secured a contractor, we are not yet able to commit to a firm schedule.

In addition to writing the draft RDA general permit, EPA must draft a NPDES permit fact sheet in accordance with the requirements at 40 C.F.R. § 124.8 and § 124.56. A NPDES fact sheet may be tens of pages or hundreds of pages (including appendices), depending on the permit's complexity. The fact sheet will include, among other things, a thorough "summary of the basis for the draft permit conditions including references to applicable statutory or regulatory provisions and appropriate references to the administrative record," 40 C.F.R. § 124.8(b)(4), and "any calculations or other necessary explanation of the derivation of specific effluent limitations and conditions." 40 C.F.R. § 124.56(a). In accordance with these regulations, and because this will be the first time EPA is drafting NPDES stormwater permits for the commercial, industrial, and institutional entities described in the 2022 RDA determination, EPA must write a fact sheet that describes EPA's technical and legal reasoning for each permit requirement.

Diverse stakeholders are already keenly interested in the 2022 Charles, Mystic, and Neponset RDA determination, and EPA expects that the draft RDA general permit may garner even more interest. Building upon EPA's 2020 RDA-related stakeholder outreach, we anticipate that we will be conducting outreach and informational sessions with potential future permittees, municipalities, community groups, and environmental groups as EPA develops the draft RDA general permit. Such outreach and engagement is particularly important in communities with environmental justice concerns and it is critically important that adequate time is given for meaningful and effective engagement. In fact, in the 2022 Charles, Mystic, and Neponset RDA determination, EPA highlighted the importance of environmental justice concerns and committed to provide an analysis of environmental justice considerations when issuing the draft permit. It is essential the EPA have enough time to conduct such an analysis. An arbitrary six-month deadline would effectively short-circuit EPA's ability to give this issue the attention it deserves while also completing all the other tasks needed to prepare a draft permit. Indeed, EPA's commitment to environmental justice was a key driver of the decision to move forward with the RDA determination in the first place and is one of this Administration's highest priorities; it would be inappropriate to cut corners on such a fundamentally important issue.

EPA must also account for internal EPA and interagency reviews of the draft permit. EPA Region 1 must coordinate carefully with EPA Headquarters colleagues and senior leaders in the Office of Water and Office of General Counsel to ensure that Region 1's draft permit conditions and requirements are consistent with EPA's national stormwater regulations and policies and similar stormwater permit actions in other EPA regions. EPA also expects close coordination with the Massachusetts Department of Environmental Protection (MassDEP), and will provide MassDEP with adequate time to complete a CWA section 401 water quality certification. The timing of each of these reviews cannot be predicted with certainty.

EPA Region 1 must balance the urgency of issuing a draft RDA general permit with our obligation to issue permits that address numerous water quality priorities, some of which have implications for the same watersheds encompassed by the RDA determination. For example, the 2016 Massachusetts Small MS4 General Permit expired in 2022 and EPA must develop and issue a draft permit renewal for public comment. EPA will need to draw on the same pool of technical and legal staff with specialized expertise in complex stormwater permitting to develop both the draft RDA general permit and the small MS4 general permit renewal. Among other priority NPDES permits, EPA is also working diligently on final industrial stormwater permits for Massport's Logan Airport and the Chelsea oil terminals—facilities whose discharges also affect some of the communities encompassed by the RDA determination—and is preparing a draft NPDES permit for the Massachusetts Water Resources Authority (MWRA) Deer Island treatment plant.

Finally, any timeline for issuing this draft general permit must retain sufficient flexibility to adjust to circumstances outside of Region 1's control that could potentially arise and necessitate additional time to complete the draft permit. Such circumstances could include but are not limited to a government shutdown such as occurred in 1995, 1996, 2013, and 2018-2019, or catastrophic environmental events requiring immediate and/or time-consuming response by EPA.

Now that EPA Region 1 has issued the 2022 Charles, Mystic, and Neponset RDA determination, issuing a draft RDA general permit is one of EPA Region 1's highest priorities. While EPA does not believe that committing to a draft permit issuance by a date certain would be in the public's interest, I assure you that EPA is working diligently on the draft RDA general permit in a manner consistent with substantive and procedural permit development requirements and in a way that allows it to continue to make progress on other NPDES permits and agency priorities.

Please contact me at (617) 918-1502 or Moraff.ken@epa.gov, or Erin Flannery-Keith in the Office of Regional Counsel at (617) 918-1096 or Flannery-keith.erin@epa.gov if you have any questions.

Sincerely,

KENNETH MORAFF
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Ken Moraff
Director, Water Division