



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION I
5 POST OFFICE SQUARE SUITE 100
BOSTON, MASSACHUSETTS 02109-3912

February 27, 2019

Christopher Killian, Vice President of Strategic Litigation
Conservation Law Foundation
15 East State Street, Suite 4
Montpelier, VT 05602

Zak Griefen, Senior Enforcement Litigator
Conservation Law Foundation
15 East State Street, Suite 4
Montpelier, VT 05602

Dear Mr. Killian and Mr. Griefen:

Thank you for the Conservation Law Foundation's (CLF) comments on the Notice of Intent (NOI) submitted to the U.S. Environmental Protection Agency (EPA) Region 1 for coverage under the Massachusetts Small Municipal Separate Storm Sewer System General Permit (MA Small MS4 General Permit). On November 19, 2018, we received your comments pertaining to the NOI submitted by the Massachusetts Development Finance Agency (Mass Development) for the Devens Regional Enterprise Zone (Devens).

CLF's Comments I through IV are comments on the MA Small MS4 General Permit itself rather than on the NOI. Because CLF has appealed the permit and is engaged in mediation, it is EPA's view that the mediation is the proper forum for continuing to discuss CLF's concerns regarding the permit.

The full text of CLF's comments has not been included in this letter and comments have been summarized. Mass Development on behalf of Devens has reviewed the comments submitted by CLF and has provided clarifying information to EPA to inform EPA's response.

CLF Comment V:

The NOI for Devens must be denied because it is inaccurate and incomplete.

- i. The NOI is incomplete and inaccurate with regard to the National Historic Preservation Act.
- ii. The NOI is incomplete and inaccurate with regard to Receiving Water Body Segments.
- iii. The NOI is incomplete and inaccurate because it fails to address the Agency's ongoing discharges of Per – and Polyfluoroalkyl Substances (PFAS).

Response:

Devens is certifying National Historic Preservation Act (NHPA) eligibility under Criterion A. The supplemental information indicates that Devens is not undertaking any activity involving subsurface land disturbances less than an acre. Consistent with the instructions contained in Appendix D of the 2016 MA Small MS4 General Permit, the applicant should certify eligibility under Criterion A. Devens has

indicated that if in the future they undertake any subsurface land disturbance, they will submit a Project Notification Form (PNF) to the Massachusetts Historical Commission (MHC), as necessary. Disturbances greater than an acre are subject to the Construction General Permit which has its own requirements related to NHPA.

The 2003 Small MS4 General Permit required permittees to create a map depicting the location of their outfalls and the receiving waters. This 2003 mapping was to be completed by May 2008. Devens is a new permittee under the 2016 MA Small MS4 General Permit and was not subject to the 2003 Small MS4 General Permit and as such, the requirement to have a completed map with outfalls and receiving waters does not apply to Devens. Part 1.10.3 of the 2016 MA Small MS4 General Permit provides new permittees with four years from the effective date of the permit to complete the outfall inventory. Devens' NOI represents the information known to Devens at the time of NOI submission; during the permit term, Devens will update outfall and receiving water information update based on information gathered during the implementation of the permit requirements.

The Devens facility is located on part of the property formerly known as Fort Devens (occupying approximately 4,400 acres of the property). The entire property is over 9,300 acres. Devens is neither the owner nor the operator of this entire property. Supplemental information submitted by Mass Development to EPA indicates that the receiving waters listed in CLF's letter either do not receive a stormwater discharge from an outfall under the operational control of Devens or the receiving waters are located in an area outside the operational control of Devens and thus were not included in Devens' NOI submission. As stated previously, as a new permittee, Devens has four years from the effective date of the permit to complete their outfall inventory.

Because PFAS is not a pollutant typically found in municipal stormwater discharges, the MA Small MS4 General Permit does not specifically address PFAS. However, if during the permit term, PFAS is found in stormwater discharges from Devens, either Part 2.3.4 or Part 2.1.1.1.d of the 2016 MA Small MS4 General Permit could be used to address the pollutant, as appropriate. The area formerly known as Fort Devens is also Superfund Site. Due to the history of the location, any presence of PFAS is likely related to past activity at the military installation. EPA is currently working with the Army to investigate and address existing contamination related to the Superfund Site.

Comment VI:

The NOI for Devens must be denied because no permit may be issued to a new source or a new discharger if the discharge will contribute to the violation of water quality standards.

Response:

According to 40 CFR 122.2 a new source: *means any building, structure, facility, or installation from which there is or may be a "discharge of pollutants", the construction of which commenced (a) after the promulgation under section 306 of CWA which are applicable to the source, or (b) after the proposal of standards of performance in accordance with section 306 of the CWA, which are applicable to such source, but only if the standards are promulgated in accordance with section 306 within 120 days of their proposal.* No such promulgated performance standards exist for municipal stormwater discharges. A newly regulated municipality under the municipal stormwater program is a new permittee to the program, not a new source. The exclusions expressed in 40 CFR 122.4 for new sources are not applicable since Devens does not meet the definition of a new source.

Similarly, Devens also does not meet the definition of a new discharger. As detailed in part 5.1.4 of the MA Small MS4 General Permit, "...a Non-traditional MS4 is a 'new discharger' if it discharges stormwater from a new facility with an entirely new separate storm sewer system that is not physically located on the same or adjacent land as an existing facility and associated system operated by the same MS4." Fort Devens has existed as a facility since 1917. Although part of Fort Devens does not exist as it did in the past, it discharged stormwater prior to August 13, 1979. Devens is a new permittee, not a new discharger.

Please contact me at murphy.thelma@epa.gov or at 617-918-1615 or Erin Flannery-Keith in the EPA Region 1 Office of Regional Counsel at flannery-keith.erin@epa.gov or at 617-918-1096.

Sincerely,

A handwritten signature in blue ink that reads "Thelma Murphy". The signature is fluid and cursive, with the first name "Thelma" being more prominent than the last name "Murphy".

Thelma Murphy, Chief
Stormwater and Construction Permits Section
Office of Ecosystem Protection

cc: Kate R. Bowers and Sarah Buckley, U.S. Department of Justice, Environment and Natural Resources Division
Lealdon Langley, Massachusetts Department of Environmental Protection



January 4, 2019

Stormwater and Construction Permits Section (OEP06-1)
Attention: Newton Tedder
United States Environmental Protection Agency, Region 1
5 Post Office Square, Suite 100
Boston, MA 02109

Re: Notice of Intent for Devens, MA to be covered under the National Pollutant
Discharge Elimination System Small MS4 General Permit –
Response to Conservation Law Foundation Comments

Dear Mr. Tedder:

I write on behalf of the Massachusetts Development Finance Agency ("Agency") to provide the Environmental Protection Agency with the Agency's response to the comment letter submitted by the Conservation Law Foundation ("CLF") dated November 19, 2018 in connection with Agency's Notice of Intent to obtain coverage for Devens under the 2016 Massachusetts Small MS4 Permit (the "Permit")(filed on March 22, 2018, amended on June 29, 2018) (the "NOI").

Items I – IV

These comments relate specifically to the Permit and not to the Agency's NOI.

Items V

The Agency's NOI is neither inaccurate nor incomplete:

- i. Regarding the National Historic Preservation Act:
 - a. When the NOI was initially submitted to EPA on March 22, 2018, a Project Notification Form (PNF) had not yet been submitted to the Massachusetts Historical Commission (MHC). Criterion C was checked because, at the time, the Agency was considering the 'potential' impacts of any future stormwater projects.
 - b. When the Agency amended its NOI on June 29, 2018, eligibility for coverage was changed from Criterion C to A, as the statement only applies to the application for coverage under the MS4 Permit. Although an applicant for coverage under the permit, the Agency is not currently undertaking any subsurface land disturbance less than an acre; therefore a PNF was not filed. As activities are planned in the future that involve less than an acre of subsurface land disturbance, the Agency will consult with MHC by filing a PNF, as applicable, prior to construction to ensure that there are no adverse impacts to federal historic properties.
- ii. Regarding receiving waterbody segments:

In general, it appears that CLF is not familiar with the boundaries of the Devens Regional Enterprise Zone ("DREZ"). This is the area established by legislative authority within



which the Agency has been granted municipal authority and the Devens Enterprise Commission has been granted regulatory authority. Areas of the former Fort Devens outside of the DREZ are still owned and operated by the federal government (through the Department of Defense or Interior). Thus, the Agency only owns and operates as a municipal stormwater system a portion of the stormwater system within the DREZ. There are also areas within the DREZ that are outside of the Agency's jurisdiction and are under the control of other municipal, state and federal entities. The Agency understands that the United States Army has also filed for coverage under the Small MS4 Permit.

The list of receiving waters included in the NOI was based on the instructions in the "Phase II: Summary of Receiving Waters" section of the NOI and the definition of discharge in Appendix A of the 2016 MA MS4 General Permit, which indicates discharge of pollutants from a "point source". The following is a review of each of the water bodies identified by CLF in their comment letter dated November 19, 2018:

- a. **Nashua River North** (MA81-04) – The north branch of the Nashua River flows from the Leominster area and joins with the main branch in South Lancaster. The confluence is upstream of the portion of the Nashua River which flows through the DREZ. A portion of the North Branch flows along the boundary of the South Post of Fort Devens. However, the South Post is under the jurisdiction of the Department of Defense. (See Attachment ii-A)
- b. **Nonacoicus Brook** (MA81-17) – There are no known point discharges to this brook from lands owned or operated by the Agency. Any known discharges to tributaries of the Nonacoicus Brook (i.e., Willow Brook) have been identified in the NOI.
- c. **Grove Pond** (MA81053) – There are no known point discharges to Grove Pond from lands owned or operated by the Agency. There is a historic outfall from MA-Army National Guard property, but the system discharging to the outfall was demolished as part of a recent reconstruction project. Any known discharges to tributaries of Grove Pond (i.e., Cold Spring Brook) have been identified in the NOI.
- d. **Robbins Pond** (MA81111) – At the time the NOI was being prepared, there were no known point discharges to Robbins Pond from lands owned or operated by the Agency. Based on a more detailed review, a portion of the municipal system may be connected to one of the discharge points. Additional investigation will be conducted as part of the Agency's compliance with the Permit, and applicable documents will be updated as necessary. There are several known discharges from private systems and from outfalls owned and operated by the US Army. There is one municipal discharge to Willow Brook just downstream of the outlet from Robbins Pond.



- e. **Spectacle Pond** (MA 81132) – Spectacle Pond is located at the western edge of South Post, but the Devens municipal stormwater system is not hydraulically connected to this pond. Spectacle Pond discharges to the North Branch of the Nashua River upstream from Devens (See Attachment ii-A).
- f. **Catacoonamug Brook** (MA 81-16) – The Devens NOI identified five known discharge locations along the Catacoonamug Brook.
- g. **Mulphus Brook** (MA81-37) – The Mulphus Brook is located north and west of the DREZ. There are no discharges from Devens. See Attachment ii-B.
- h. **Little Mirror Lake** – There are no known point discharges to Little Mirror Lake.
- i. **Spectacle Brook** – Spectacle Brook is located at the western edge of South Post and flows from Spectacle Pond to the North Branch of the Nashua River. The Devens municipal stormwater system is not hydraulically connected to this brook. (See Attachment ii-A).
- j. **Ponakin Brook** - Ponakin Brook is located at southern edge of South Post and flows from Spectacle Pond to the North Branch of the Nashua River. The Devens municipal stormwater system is not hydraulically connected to this brook. (See Attachment ii-A).

Once covered by the Permit, the Agency will have additional time to map Devens' outfalls and receiving waters (although the Agency's mapping of their MS4 infrastructure in Devens is already very comprehensive). Any adjustments to the receiving water bodies list identified during ongoing investigations to comply with the requirements of the Permit will be reflected in the Stormwater Management Plan that is being developed for Devens, which will be updated continuously throughout the Permit term. Any adjustments will also be identified in the applicable annual reports submitted to EPA and MassDEP in compliance with the Permit.

iii. PFAS

The NOI submitted by the Agency was to obtain coverage for Devens under the Permit, which does not include any requirements for PFAS screening or treatment. The Agency will follow directives received from MassDEP and USEPA with respect to PFAS in stormwater discharges.

Item VI

CLF is incorrect in asserting that MassDevelopment is a new discharger. Stormwater discharges from Devens commenced prior to August 13, 1979, as Fort Devens initially began operation in 1917. Devens was not regulated under the 2003 MS4 Permit based on 2000 census data; although



Devens may be a new permittee, it is not a new discharger. A new discharger is defined by the Permit as “an entity that discharges stormwater from a new facility with an entirely new separate storm sewer system that is not physically located on the same or adjacent land as an existing facility and associated system operated by the same MS4.” Permit, App. A, at 3. Plainly, Devens is not a “new facility” and does not have an “entirely new separate storm sewer system”. Moreover, under 40 CFR § 122.2 (b), Devens is not a new discharger because it commenced “discharge of pollutants” prior to August 13, 1979.

We look forward to your prompt authorization and would be pleased to answer any additional questions you may have or provide any additional information you require. In the meantime, we will continue to implement the requirements of the Permit as specified in the NOI.

Sincerely,

John P. Marc-Aurele, PE
Engineering Manager
MassDevelopment
33 Andrews Parkway
Devens, MA 04134

cc: Robert M. Ruzzo, Deputy Director and Chief Operating Officer

Massachusetts Department of Environmental Protection
One Winter Street – 5th Floor
Boston, MA 02108
Attn: Frederick Civian, Stormwater Coordinator

Attachments



