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New Stormwater Regulations Proposed by Massachusetts Department of Environmental Protection Will Affect Many Private Properties

The Massachusetts Department of Environmental Protection (“MassDEP”) has announced proposed regulations which will implement a new stormwater management system. The proposed regulatory structure will shift much of the burden of managing stormwater from local municipalities to private property owners. The draft regulations require certain existing developments, new developments and redevelopments to meet new standards, which aim to manage stormwater discharges from (i) large impervious areas (i.e., roofs and paved parking areas, storage areas or roads) located on a single lot or two or more contiguous lots; and (ii) municipal separate storm sewer systems (“MS4s”). The regulations would apply to a wide range of properties that exceed certain minimum acreage thresholds, including educational institutions, hospitals, multi-family housing complexes and commercial and industrial properties, but not government owned properties, detached single-family homes on individual lots or multi-family homes with four or fewer units that are not part of a larger housing complex.

Due to the regulations’ complexity and far-reaching impacts on a variety of private properties, a careful review of the final, issued regulations is recommended. The discussion that follows highlights some of the major requirements and salient concerns affecting properties subject to the proposed regulations.

The regulations authorize MassDEP to issue general and individual stormwater discharge permits, which will then govern stormwater discharges from the covered properties. Any individual or entity owning or leasing a property containing an impervious area of five acres or more anywhere in the state, or two acres or more in areas with recognized impaired waters (such as the Charles River basin) that are subject to so-called total maximum daily load restrictions and contain phosphorous loads that are of particular concern (“TMDL areas”), must apply for coverage under a general permit and maintain compliance therewith. Parties whose only interest in the property is as a secured lender will not be considered owners for purposes of the regulations, however, the regulations are silent as to the lender’s status following foreclosure.

For all properties required to obtain coverage under a general permit, the owner or lessee must establish a stormwater

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management team and stormwater management plan. The management plan must include "good housekeeping practices" such as (i) a schedule for sweeping of all paved surfaces at the property to keep the area free from sand, litter and any other pollutants at least twice per year (during the fall and spring); and (ii) measures to minimize the risk of snow and ice removal activities, solid waste storage, landscaping activities or the presence of hazardous materials contributing to the pollution of stormwater. All properties governed by the regulations will need to implement and maintain these good housekeeping practices, and certain properties must also satisfy the following additional conditions:

Redevelopments and new developments

in non-TMDL areas - Redevelopments of properties with impervious surfaces of five acres or more will be required to maintain current stormwater discharge levels and provide on-site recharge to the extent site limitations permit. This is to be accomplished by employing low impact development techniques ("LIDs") that utilize landscape features designed to replicate natural hydrologic features and manage rainfall, and best management practices ("BMPs") which manage infiltration and stormwater discharge using leaching catch basins, infiltration trenches, porous pavement configured to exfiltrate, discharge outlets, overflow pipes, and other source control and pollution prevention measures. New development projects with impervious surfaces of five acres or more will be required to use LIDs and BMPs capable of attaining stringent ground water recharge and water quality standards.

All properties in TMDL areas (e.g., Charles River watershed)

– More rigorous standards will apply in TMDL areas, including communities whose drainage reaches the Charles River. In these areas, regulatory requirements are triggered at two (rather than five) acres of impervious surfaces. Existing properties will have five years from the date of the general permit to design a management system to meet phosphorous reduction goals set by MassDEP, with implementation required to be complete within ten years. In addition to satisfying the ground water recharge requirements and water quality standards applicable to non-TMDL areas, redevelopment

and new development projects will also be required to implement LIDs and BMPs that reduce the phosphorous load to MassDEP's pre-set limits (e.g., 65% of current phosphorous levels in the Charles River watershed).

Requesting Coverage and Demonstrating Compliance

To obtain coverage under the general permit, property owners, or in the case of a regulated impervious area with joint users, a primary representative picked from among the joint users, must submit to MassDEP an initial certification listing, among other things, the number of acres of impervious surfaces at the site, any portions of the site lying within a specially designated TMDL area, any paved surface sweeping programs in place and any planned development or redevelopment. The initial certification must be submitted to MassDEP within six months of the general permit's issuance date or, for new developments, within 60 days of the project's commencement. Upon review of the initial certification, MassDEP can either grant general permit coverage, request more information or require an alternative general permit or individual permit. All permittees will be required to file annual compliance certifications to the MassDEP. Properties involving redevelopments, new developments, existing TMDL area developments, variances and off-site mitigation measures will also need to submit a compliance certification from an engineer or a landscape architect experienced in stormwater management and registered in Massachusetts.

Notable Issues Raised by the Proposed Regulations

Transition: Any new development or redevelopment projects that are under construction or have obtained all required permits as of six months after the first general permit's issuance are exempt from the regulations' standards so long as the project "proceeds continuously and expeditiously to completion." Any new development or redevelopment projects that cease to move forward with work for a period of six months or more must comply with the proposed regulations. These guidelines could result in a flurry of interpretations and concerns, especially as they apply to phased projects.

Aggregation: Because the proposed regulations focus on joint use rather than individual ownership of properties, owners and tenants of contiguous properties could face questions of allocation of responsibility for compliance. When determining whether a site meets the applicable acreage threshold under the regulations, all impervious areas on contiguous lots must be included where (i) stormwater runoff from at least some of the contiguous lots is directed to the same on-site stormwater management system or BMP, or (ii) agreements or practices exist for the shared operation, maintenance or use of paved areas, stormwater BMPs or buildings or structures (i.e., sweeping, repairing or repaving of paved areas, snow and ice removal or vehicle parking). Property owners are responsible for the calculation of their own impervious area, which may further complicate the allocation process.

Redevelopment Triggers: Redevelopment requirements may be triggered upon commencement of any reconstruction or repair of (i) a roof that by itself or together with other work results in the substantial improvement of a building or structure such that the total cost of the project exceeds 50% of the fair market value of the building or structure prior to the reconstruction; or (ii) a paved surface other than repairs that do not affect more than 5,000 square feet or 5% of the existing paved surface, whichever is less. For sites with multiple owners, the redevelopment of one owner's property will not obligate the other owners to meet the redevelopment requirements for their properties.

Off-Site Mitigation: The use of off-site mitigation systems to meet on-site stormwater discharge requirements will be allowed for existing developments in TMDL areas and all redevelopment projects. New development projects in TMDL areas may participate in off-site mitigation, but only to achieve phosphorous load reduction targets. Properties looking to rely on off-site mitigation must (i) initially undergo an evaluation by a stormwater professional, implementation of all possible on-site stormwater discharge measures, and submission to MassDEP of an agreement stating the compliance requirements for, access for inspection of, and persons responsible for designing and operating the off-site mitigation measures; and (ii) submit to MassDEP annually a certification regarding off-site mitigation operation standards. Alternatively,

property owners with access to, and ability to pay the fees for, a qualifying mitigation program operated by a local government may elect to conduct off-site mitigation in that manner. In non-TMDL areas, off-site mitigation measures will be unnecessary for existing properties (which need to maintain on-site good housekeeping practices) and unavailable to new developments.

Variance: Variances will be available to all redevelopments that are unable to meet the regulations' standards through on-site measures or off-site mitigation, but are not available for any existing properties or new developments. Requests for variances will be subject to review and approval by MassDEP, and will require an evaluation of the property by a stormwater professional and implementation of all possible on-site stormwater discharge measures.

Technical Assistance: MassDEP is developing an on-line tool and workbook to assist permittees in calculating impervious area, cost and reduction of discharged pollutants. Additionally, workshops led by MassDEP in partnership with others will be held to provide guidance to those determining how their property is affected by the regulations.

The new regulatory framework will also set out standards for properties involving wetlands, local government-approved discharge programs and MS4s. The proposed regulations are available for public comment until March 11, 2009.

US EPA announces a new stormwater discharge program for the Charles River watershed

In a separate but related action, the United States Environmental Protection Agency announced plans to require certain industrial, commercial and residential facilities in the Charles River watershed towns of Bellingham, Franklin, and Milford to adhere to more stringent stormwater discharge requirements. Facilities with two or more acres of impervious area will be required to apply for a Federal Clean Water Act permit for stormwater discharges that may affect the Charles River. The proposed requirements aim to reduce phosphorus discharges by 65% and are expected eventually to apply to the entire Charles River watershed. The public may submit comments on this matter through February 6, 2009.