

NAIOP and AIM COMMENTS ON
MASSDEP STORM WATER REGULATIONS
March 9, 2009

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I. General Comments

A. The Proposed Storm Water Regulations Require Additional Evaluation and Should Not Be Promulgated. The following comments reveal fundamental flaws in the regulatory program as it is currently being proposed. MassDEP is proposing a number of unprecedented regulatory mechanisms in this program, many of which go well beyond what other states have adopted for their storm water regulatory programs. Elements of MassDEP's program such as aggregation and requiring the retrofitting of storm water infrastructure introduce novel regulatory approaches that will lead to unpredicted results and unintended consequences. These proposed regulations require further evaluation and discussion through the stakeholder process.

B. The Costs and Benefits of the Proposed Program Have Not Been Adequately Evaluated. In addition to the numerous comments and concerns identified below, MassDEP has not developed any competent information regarding the potential costs of compliance that will be imposed on RIA Site owners. Estimates developed by NAIOP and AIM based on the limited information that MassDEP has made available indicate that total compliance costs could be in the billions of dollars. Nor has MassDEP provided any cost/benefit analysis that could be used to determine if (i) the costs of this proposed program achieve a comparable level of environmental benefit or (ii) there are other less costly regulatory approaches to managing storm water discharges. Given that thousands of jobs are being lost monthly in the Commonwealth, and the potential scope and impact of these regulations, it would be irresponsible to promulgate these regulations without undertaking this analysis.

C. The Regulatory Program Unfairly Targets a Subset of Phosphorous Sources. The *Total Maximum Daily Load for Nutrients In the Lower Charles River Basin, Massachusetts* ("Lower Charles River TMDL Study" or "LCRTS") identifies a wide range of phosphorous sources that are expressly excluded from this regulatory program, including state and municipal roads and facilities, golf courses, low density residential, and agricultural sources. Some of these sources are not subject to any storm water regulations (e.g., golf courses, agriculture, low density residential), while others are regulated but are not subject to controls for phosphorous discharges (e.g., MS4 general permits). In doing so, the proposed regulations unfairly impose on commercial and industrial facilities the bulk of the cost and burden of reducing phosphorous loading into surface water bodies. In addition to being fundamentally unfair, this approach fails to regulate a substantial portion of the phosphorous sources in the Charles River, raising significant concerns that the regulations will not achieve the Lower Charles River TMDL.

D. The Lower Charles River TMDL Study Does Not Support the Proposed Regulatory Program. Although the LCRTS supports the implementation of the proposed regulatory program, there are a number of statements in that document that contradict that contention.

1. The LCRTS states that it was not prepared to support the development of a regulatory program.

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Page 87 - "This analysis was conducted to determine the magnitude of phosphorus reductions that will be needed from different source areas and to provide guidance for carrying out the implementation plan and to help prioritize clean-up actions."

2. Statements in the LCRTS about the various sources of phosphorous in the Charles River watershed contradict the exclusive targeting of commercial and industrial properties, as proposed in the regulations.

Page 42 - "The major nonpoint source categories that contribute phosphorus to the Lower Charles River are diffuse overland runoff and groundwater recharge to the Charles River and tributaries."

Page 87 - "[A]t present the phosphorus load contribution from nonpoint sources and non-regulated point sources of storm water cannot be distinguished from the load contribution from regulated point sources."

Page 104 - "The magnitude of the loading estimates for each of the land-cover categories is based on general information (land cover categories and literature based phosphorus export loading rates) and may very well not be accurate at the individual site or parcel level. There is no substitute for phosphorus source assessments in each of the communities. . . [A]ctual phosphorus loadings from less developed areas in the watershed may be much higher than estimated in this analysis and should not be overlooked for control opportunities. Examples of high phosphorus loading sources in less developed areas that may be easily and cost effectively controlled include soil erosion from forested areas and construction sites. Also, open parklands adjacent to waterways may be areas where excessive fertilizers are applied and/or where waterfowl congregate and generate high phosphorus wastes in close proximity to receiving waters. Leaf litter from tree lined streets in low and medium density residential areas served with piped drainage systems may also represent relatively easy to control high source loading areas as well." [emphasis added].

3. The LCRTS supports an incremental regulatory approach, rather than a statewide permitting program.

Page 114 - "An evaluation of the possibility for one or more targeted watershed-specific NPDES general permits (WSGP) for drainage systems that discharge to the Charles River and its tributaries is recommended prior to issuance of future statewide general storm water NPDES permits."

4. The LCRTS does not support the imposition of numeric effluent standards, as the proposed regulations would require for RIA Sites in TMDL watersheds.

Page 115 - "EPA and MassDEP do not intend to initially include numeric effluent limitations in NPDES storm water permits based on this TMDL."

E. Do the proposed regulations mis-use the LCRTS? Repeated review of the LCRTS fails to eliminate the following concern: *If public lands were properly accounted for, would the required reductions from private lands be cut in half?*

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The LCRTS carefully goes through the modeling conducted, and validates the amount of phosphorus reduction above the Watertown Dam that is required to meet the TMDLs. However, the analysis is predicated on a Land Use Cover Analysis that appears to ignore or exclude all public lands. The Cover Analysis, prepared by Brian Brodeur of MassDEP, identifies the following categories of land use: Commercial, Industrial, High Density Residential, Medium Density Residential, Low Density Residential, Agriculture, Forest, Open, POTW and CSO. POTW and CSO are municipal functions. Where, however, are schools, roads, highways, sidewalks, municipal lands? There is no suggestion in the LCRTS that such public lands are folded into the categories in the Land Use Cover Analysis; in fact, a presentation to Stakeholders by Mr. Brodeur, to the best of our recollection, indicated that acreage of public lands in the Commonwealth is approximately equal to acreage of private lands.

MassDEP at various points in the process dismissed the question of phosphorus reductions from municipal properties by saying “those are addressed via the MS-4 permit.” The LCRTS however makes no such assertion; it is simply silent as to municipal facilities.

Page 85 of the LCRTS declares “the allocation for the upstream watershed at Watertown Dam includes all sources in the upstream watershed including the WWTFs, storm water drainage systems, and nonpoint sources that eventually discharge into the Lower Charles River over the dam.” [emphasis supplied]. The allocation does include the sources enumerated above – commercial, industrial, high density residential, etc. – but does not appear to include any municipal or state-owned sources. If this is true, then the statement on p. 85 is incorrect.

Table E-3 of the LSNTS – which is MassDEP’s basis for calling for 65% reduction in phosphorus from commercial and industrial RIAs – appears to place all of the responsibility for phosphorus reduction on private landholdings. There is no indication that any reduction in phosphorus from public lands is part of the computation.

The Department’s response to these comments should address this point in detail.

F. Improvements Are Already Apparent. MassDEP figures demonstrate a significant decline in phosphorus at the Watertown Dam: from 42,389 kg in 1998, to 30,125 kg in 2000, to 21,846 kg in 2002. During that period, phosphorus from WWTFs decreased by 5,411 kg (from 8,851 to 3,439 kg).¹ Clearly, source control efforts already in place are having a significant effect in reducing the problem. This suggests that additional source control efforts may solve the Lower Charles nutrient problem, without the draconian program envisioned in the draft regulations.

G. Aggregation is a Fundamentally Flawed Approach. The aggregation of adjacent impervious areas that are neither commonly owned nor commonly operated is a fundamentally flawed - and unprecedented - regulatory approach that must be eliminated from the proposed regulations. Some of the most significant concerns include:

¹ DEP PowerPoint presentation; see also p. 59 of LCRTS.

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1. Does the Department have the regulatory authority to compel facilities that are separately owned and/or operated to operate under a single permit and share joint responsibility for compliance?

2. Property owners may choose to “disaggregate” - eliminating commonly shared services like snowplowing in order to avoid the onerous and confusing aggregation rules. While this would cause property owners to incur additional costs, it would yield no environmental benefit.

3. As discussed in more detail below, the aggregation rules fail to address a number of critical questions, such as: (i) what are the implications to the co-permittees if one of the aggregate facilities violates the regulations; and (ii) does development or redevelopment on one aggregated facility trigger application of the Additional Performance Standards to the co-permitted facilities?

4. The aggregation rules will force aggregated facilities to incur costs to negotiate “aggregation agreements.” These agreements, and aggregation issues more generally, will likely become significant issues for prospective lenders and purchasers.

H. The Regulations Would Bias Development to Greenfield Sites. The Additional Performance Standards are so stringent that they will preclude new development and redevelopment in urban areas in many situations – and the result will be to encourage new development and redevelopment in greenfields as opposed to brownfields and “smart growth” sites. If a property owner owns an existing four-acre parcel, adding one acre would trigger application of the Additional Performance Standards. However, that property owner could alternatively develop the one-acre project on a greenfield site without being subject to the proposed regulations. At some facilities, there may be operational or other requirements that would not allow this approach, but outside of those circumstances the additional costs associated with storm water compliance would drive owners towards greenfield sites. The perverse result could be a net increase in impervious surface without the type of LID techniques and/or storm water BMPs that MassDEP seeks to encourage via these proposed regulations. MassDEP should not implement a regulatory program that would conflict with smart growth policies and result in more unregulated impervious surfaces.

I. The Proposed Regulations Improperly Incorporate Non-promulgated Guidance Documents. The proposed regulations and General Permit repeatedly reference the Massachusetts Storm water Handbook and the yet-to-be-released RIA General Storm water Permit Workbook. The Fact Sheet is also incorporated into the RIA General Storm water Permit. See General Permit p. 1, "Authority for Issuance." These are guidance documents that can be later revised by DEP without public notice or comment. Because they are not part of the proposed regulations, they also make the regulatory regime more complicated and compliance more difficult. In order to have a program that is fair to the regulated community and attains the level of compliance that DEP presumably intends, any substantive requirements must be properly incorporated into the proposed regulations and RIA General Permit.

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J. Perjury As a Sanction. In at least one location (General Permit, sec. VI(L)), the regulations require that certification be made “under penalty of perjury.” Under the Massachusetts General Laws, perjury is a crime, with penalties of 20 years or more (Ch. 268, Section 1). Specific provisions under the General Laws empower agencies to obtain signatures under penalty of perjury. To the best of our knowledge, MassDEP lacks that authority. Authority exists under MGL Ch. 21, Sec. 42 to levy stringent fines or imprisonment for the filing of false statements. The certification under Section VI of the draft General Permit, “I certify under penalty of law that this document” is valid; the VI(L) certification is not.

K. Failure to Make the Full Regulatory Package Available for Public Comment. According to the General Permit, MassDEP is developing an “RIA General Permit Workbook” for RIA Sites that will be used in connection with the RIA General Permit. That document was not made available for review and public comment prior to the expiration of the public comment period. The regulated community should have an opportunity to review and comment on this document as part of the public comment process.

L. An Interim Approach. Due to the concerns raised by our general and specific comments, NAIOP and AIM request MassDEP not proceed with promulgating these regulations. The more prudent course would be to implement a simplified program on an interim basis, and continue with a stakeholder process to work through the numerous policy, legal and technical issues that have been raised by the draft regulations. We believe that a program based on the “baseline” elements in the draft regulations that focus on source control, supplemented with several additional elements, would produce clear environmental benefits, while avoiding the substantial compliance costs and numerous other uncertainties the proposed programs presents. A basic framework of such a simplified program should include:

- 1.** A state-wide general permit program applied to impervious areas greater than 5 acres owned or operated by all sectors, focusing on the use of storm water management plans to implement source controls.
- 2.** State-wide education and outreach programs focusing on increasing awareness of storm water impacts on water quality and quantity and reduction of phosphorous sources.
- 3.** A pilot project for the Upper Charles River Basin to evaluate regulatory approaches for reducing phosphorous loading from all the sources identified in the LCRTS.

II. Specific Comments

A. Definition of Impervious Surface. The definition of Impervious Surface should exclude pervious pavement. It is nonsensical for the proposed regulations to treat pervious pavement as a regulated source of pollution and then allow for the use of pervious pavement as a BMP. By exempting pervious pavement from the definition of

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Impervious Surface, the proposed regulations would encourage the use of pervious pavement and increase infiltration.

The regulations need to clarify what constitutes “paved.” For instance, does it include oiled dirt roads or chip and tar surfaces?

B. Definition of Redevelopment of Impervious Surfaces. This definition should include all other definitions related to rooftop repairs and/or pavement repairs that fall under this overall definition. For instance, the definition of a “Minor Repair of a Paved Surface” and “Substantial Improvement of a Building or Structure”. It is confusing to have these various elements of the definition scattered throughout the proposed regulations.

Similarly, the Fact Sheet incorporates new information relative to this definition that is not included in the proposed regulations. The Fact Sheet should be used to provide a summary of key items in the proposed regulations and not to introduce new information by reference.

The definitions for impervious surface redevelopment include “scarifying of existing pavement to lay down a new top coat”. Neither scarifying the surface or placement of a new topcoat should trigger retrofit requirements. This definition could result in many properties not replacing poor or degrading parking lot pavement indefinitely if it would trigger a significant cost increase as a result of the pavement maintenance. These activities do not in and of themselves increase pollutant loading from a parking lot, so using them as a trigger for the Additional Performance Standards is inappropriate.

C. Aggregation. The draft regulations have proposed the unprecedented concept of aggregating properties that share neither common ownership nor common control under a single RIA Site permit, and requiring the aggregated property owners to jointly share responsibility for compliance with that RIA Site permit. This concept is both flawed as a matter of law and common-sense. Although it might make sense in some circumstances to allow adjacent properties to voluntarily elect to be aggregated, the mandatory approach proposed in the proposed regulations must be eliminated. Beyond that critical concern, the proposed aggregation provisions as currently drafted require extensive clarification.

1. *MassDEP lacks the statutory authority to compel aggregation.*
The proposed storm water program requires a single permit for each RIA Site, and all property owners within that Site are considered permittees. This co-permitting approach is likely illegal.

The Massachusetts Clean Waters Act, which is the authorizing legislation for the state storm water program, focuses on the acts of the discharger, not the discharger's neighbor. M.G.L. c. 21 §§ 42, 43. Furthermore, DEP's enforcement authority under the Clean Waters Act extends to the discharger only. M.G.L. c. 21 § 44.

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The government may establish a strict liability standard, but there is no authority for imposing strict liability on one person for the acts or omissions of another. Any attempt to do so has no basis in state law and would plainly violate the rights of anyone held liable for acts or omissions by a different person on property owned by a different person.

2. *The Definition of “Contiguous Lots” Requires Clarification.*

Under the draft regulations, lots that are separated by a privately owned access way or driveway would be considered contiguous. The proposed regulations should clarify that this does not include subdivision ways owned by a homeowners association.

The proposed regulations also provide that lots separated by a public way that function “as part of a single facility or campus” will be deemed contiguous. This provision suffers from several significant flaws and should be dropped. First, must the lots be directly across the public way to trigger this provision, or does some other proximity trigger application of this provision? Second, the term “single facility or campus” is vague and ambiguous. Does this include lots under common ownership but leased to unaffiliated entities? Without substantial refinement and clarification, this part of the Contiguous Lot definition should be deleted.

3. *The Aggregation Criteria are Unreasonable and Ambiguous.*

The proposed regulations provide that contiguous lots with “agreements or practices for the shared operation, maintenance or use” of certain facilities or services will be aggregated. Determining if there is some unwritten “practice” regarding shared facilities or services could become very subjective. The regulations should require the existence of written “agreements or practices” as a trigger for aggregation.

Moreover, sharing services like parking, snow plowing and solid waste removal should not trigger aggregation. The regulations as drafted suggest that two contiguous lots sharing the same trash removal service, or which have an informal arrangement to share parking, should be aggregated. These criteria at best have an indirect relationship with managing storm water discharges and should be eliminated from the proposed regulations.

The Department should clarify that contiguous properties that discharge directly to an MS4 system will not (in the absence of other aggregation triggers) be subject to the aggregation rules. Otherwise, most urban properties will potentially be subject to aggregation.

The proposed regulations fail to address situations where several contiguous lots may share different facilities or services. As an example, consider three contiguous lots. Lot 1 and Lot 2 share a snow removal service, Lot 1 and Lot 3 share a trash removal service, and Lot 2 and Lot 3 do not share any services. Will Lots 2 and 3 be required to be aggregated by virtue of their common relationship with Lot 1, even though they share no services directly? Given the thousands (perhaps hundreds of thousands?) of lots that may be subject to the aggregation rules, and the very tenuous relationships that could trigger aggregation, the aggregation rules threaten to cause a great deal of confusion and uncertainty for the regulatory community.

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Relatedly, there will certainly be instances where the contiguous lot owners are unable to agree which lots should comprise the RIA Site. The regulations do not provide a process for resolving these disputes or an enforcement “safe harbor” for lot owners who are unable to comply with the regulations because of aggregation disputes.

4. *Application of the Additional Performance Standards to Aggregated RIA Sites.* The draft regulations need to clarify how the Additional Performance Standards will be applied to aggregated RIA Site. As currently proposed, RIA Sites in TMDL watersheds will be subject to the TMDL Additional Performance Standards if they undertake activities deemed to be Development or Redevelopment. This will trigger an immediate obligation to reduce the phosphorous loading in storm water discharges. In the case of aggregated RIA Sites, if the Development or Redevelopment Threshold is exceeded due to activity on one of the aggregated lots, will the phosphorous reduction requirement apply to the entire RIA Site or just the lot that was undertaking the Development or Redevelopment activity?

Similarly, if one aggregated lot is undertaking Development or Redevelopment and cannot implement the applicable Additional Performance Standards on that lot, will the other lot owners be required to accommodate those Additional Performance Standards on their lots? Forcing lots not in common ownership or control to accommodate each other’s regulatory obligations, particularly where such regulation would require physical changes to the property of the other owners, would constitute a form of regulatory taking.

5. *Primary Representative.* The proposed use of a “Primary Representative” by aggregated RIA Sites presents a number of potential issues and concerns. Does the primary representative have to be an employee or officer of one of the aggregated lot owners, or can it be a third-party consultant? In either case, the primary representative will likely require compensation for services required under the draft regulations.

As currently drafted, the regulations present many uncertainties about the potential liabilities that a primary representative may be exposed to. Would the primary representative be subject to sanctions by MassDEP for providing incorrect certifications? What if the certification is based on information provided by an aggregated lot owner? Does the primary representative have an obligation to confirm this information?

These and other similar concerns will trigger the need for written agreements between primary representative and the aggregated lot owners, covering issues such as compensation, insurance, and cross-indemnifications. These agreements will add to the cost and complexity of complying with these proposed regulations.

6. *The Implications of Noncompliance to Aggregated Lot Owners.* The draft regulations must clarify that aggregated lot owners will not be subject to enforcement if another lot owner fails to comply with the regulations. As noted earlier, we believe that MassDEP does not have the statutory authority to hold one aggregated lot owner liable for the actions of another. For the reasons stated, such an approach would

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not just be illegal, it would also be bad policy. These provisions must be revised to avoid any possibility that one owner can be held liable for the acts of another.

7. *Aggregation Agreements.* As currently drafted, the draft regulations will force aggregated lot owners to negotiate and draft agreements for managing the various regulatory obligations they will share. These agreements will need to cover a number of regulatory and legal issues, such as hiring/retention/replacement of primary representatives, allocation of regulatory fees and primary representative costs, cross-indemnifications, sharing of information regarding site work that may be deemed Development or Redevelopment, etc. The need for these agreements will force lot owners to incur additional costs and add yet another unneeded layer of complexity to compliance with this regulatory program.

8. *Phasing.* The phasing provision of the Aggregation rule should be clarified to confirm that phases of projects that meet the grandfathering provisions in the Transition Rule remain grandfathered, even if the subsequent phases of that project are not covered by the Transition Rule.

D. Development Threshold. As an initial comment, one major consequence of the proposed regulations is that the Additional Performance Standards must be met, on-site, for any Development project. Neither the Off-Site Mitigation nor the Variance safety valves are available for Development projects. This has punitive and confiscatory implications for impervious sites (e.g., parking lots) in urban areas. Regardless of the appropriateness (e.g., soil contamination) or feasibility (e.g., depth to groundwater, soil type) of infiltration, or competing use for subsurface volume (e.g., parking lot), the proposed regulations require that the Required Volume of Storm Water and the required percentage of phosphorus be infiltrated on the Development site. This may render many urban sites undevelopable, will bias development towards “greenfield” sites, and will have enormous ramifications for development in Massachusetts’ cities and towns that clearly have not been fully evaluated.

Turning to more specific issues, first, it is our understanding that once triggered, the Additional Performance Standards for Development apply only to the particular lot and not to the entire RIA site. This interpretation is suggested by the proposed regulations and General Permit because “any person who owns a lot that is undergoing a project for the development of impervious surfaces” (and not any person who owns a lot in the RIA site) must meet the Additional Performance Standards for Redevelopment. 314 CMR 21.08(2); General Permit V(A).

Nevertheless, it is critical that this issue be further clarified in the proposed regulations and General Permit. We recommend adding the following sentence to 314 CMR 21.08(2) and in the General Permit V(A): “The Additional Performance Standards for Development apply only to the lot that is undergoing a project for the development of impervious surfaces and do not apply to the rest of the RIA site.” [Note: This comment also applies to the Additional Performance Standards for Redevelopment, as well as to the aggregation rules, which require clarification that Development or Redevelopment on

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one aggregated facility does not trigger application of the Additional Performance Standards at the other co-permitted sites.]

It is not clear, in the case of additional development in an area that has already been developed, whether DEP intends the Additional Performance Standards for Development to apply only to the newly paved area / new roof surface, or to the entire lot. Whatever the justification for requiring installation of state-of-the art storm water controls in projects that truly represent new development, there is no basis to require a property owner who is adding just a few square feet of new pavement to retrofit an entire lot. Therefore, DEP should revise the proposed regulations so that only the new development area is subject to the requirement of implementing "LID techniques and/or storm water BMPs capable of meeting Standards 3 through 6 of the Storm water Management Standards." 314 CMR 21.08(2); General Permit V(A). We recommend adding the following sentence at the end of 314 CMR 21.08(2) and General Permit V(A): "The LID techniques and/or storm water BMPs required by this Additional Performance Standard apply only to the new impervious area resulting from the Development of Impervious Surfaces and not to any impervious area existing prior to the Development of Impervious Surfaces."

Moreover, DEP should also establish a de minimis threshold before these onerous regulations apply. Even if only the new development area is subject to the regulations, there is no benefit to be gained from regulating truly trivial additions to existing property. We suggest that new developments be subject to the same threshold as new impervious surfaces in areas that had been previously undeveloped, i.e., five acres state-wide and two acres in TMDL areas. The need for a de minimis threshold is even more important if new development would subject an owner to the storm water regulations for an entire lot.

E. Redevelopment Threshold. The concept of "Redevelopment" as a trigger for the Additional Performance Standards is conceptually flawed. The policy determination behind the proposed regulations (also subject to some question) is that impervious area is a pollution source that requires regulatory control. In most instances, the "redevelopment" of existing impervious areas will not increase pollutant loads in storm water discharges from those impervious areas. This point seems particularly true for roof repairs - why should repairing or replacing a roof trigger the need to implement the Additional Performance Standards? Under the current definition, Redevelopment that results in less pollutant loading will still trigger the Additional Performance Standards. This is plainly counter-intuitive, if not arbitrary and capricious.

The proposed regulations should drop the concept of Redevelopment, and limit the imposition of the Additional Performance Standards at existing RIA Sites to situations where new impervious area is being added (e.g., Development). If MassDEP will not adopt this approach, at a minimum, it should tie the Redevelopment threshold to a demonstrated increase in pollutant loading. Activities which constitute Redevelopment but do not result in increased pollutant loading in storm water should not trigger the Additional Performance Standards.

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1. *Casualty.* Existing impervious areas that must be repaired or replaced as a result of casualty (flood, fire, etc.) should be exempted from the definition of Redevelopment, however defined.

2. *Minor Repair of a Paved Surface.* If the final regulations retain the Redevelopment trigger for the Additional Performance Standards, then the exemption for Minor Repair of a Paved Surface must be expanded. The current limitation on this exemption of “5,000 square feet or 5% of the paved surface being repaired, whichever is less” is ridiculously low. As an initial matter, the 5% calculation is based on the “surface being repaired” not the entire impervious area of the RIA Site. If the work in question is being done on a 1,000 square-foot storage area, then a 7x8-foot patch would constitute Redevelopment and trigger the Additional Performance Standards - clearly an absurd result.

The lesser of 5,000 square feet or 5% trigger must be modified to a more reasonable approach. It should be made uniform with the threshold for roofs (as set forth in the “Substantial Improvement of a Building or Structure” definition) in order to avoid causing parking lot repair and maintenance projects subject to the Additional Performance Standards - a draconian result that is not justified given that such repair and maintenance work does not result in any increased pollutant loading from the repaired surface.

As a final point, it appears from the definition that any use of a coal tar based product will disqualify pavement maintenance from being deemed a minor repair. This would include kerosene-based “cold patch,” which is used in the winter for emergency pothole repair when asphalt plants are shut down. It is our understanding that coal tar based products are not used by the industry for ordinary hot mix. To ban the use of cold patch will be to prevent repairs of potholes in the wintertime, with grave safety, vehicular damage and liability implications. The reference to coal tar based products should be deleted from the definition of minor repair.

3. *Substantial Improvement of a Building or Structure.* This definition proposes a threshold for determining if alterations to a building or structure constitute Redevelopment. This definition provides that repairs, etc. that will cost more than 50% of the fair market value of the building will constitute redevelopment. The definition should clarify that the project costs are to be determined prior to commencement of construction - otherwise, situations could arise where a project was budgeted to cost less than 50% of the building’s fair market value but change orders and other unexpected cost overruns could cause the project costs to exceed that 50% figure. The RIA Site owner should not have to retroactively implement the Additional Performance Standards in those circumstances. The 50% threshold should be based on the proposed project budget at the commencement of construction.

4. *Applicability of Redevelopment Standards.* The proposed regulations and General Permit currently provide that “any person who owns a lot that is undergoing a project involving the redevelopment of impervious surfaces” shall meet the Additional Performance Standard for Redevelopment. 314 CMR 21.08(3); General

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Permit V(B). Thus, the Additional Performance Standards for Redevelopment are completely uncoupled from the RIA concept and could be applied to any lot undergoing redevelopment, regardless of its size. This differs from the provisions in 314 CMR 21.08(2), covering new Development, which is tied to the existence of an "RIA Site" (i.e. 5 acres or more statewide; 2 acres or more in TMDL areas). We also note that 314 CMR 21.04 limits the applicability of the General Permit and its Additional Performance Standards to "activity that can reasonably be expected to result in a storm water discharge from an RIA Site."

We therefore presume that the omission of a reference to an "RIA Site" here is unintentional. To ensure that the standards for Redevelopment only apply to RIA Sites, we recommend that the draft regulations be revised to clarify that the Additional Performance Standards for Redevelopment apply to "any person who owns a lot that is undergoing a project for the redevelopment of impervious surfaces that at the time that land disturbance or construction activity commences are located within an existing RIA Site, [or that upon completion of the project will be located within an RIA Site." Such a revision would be consistent with the language regarding the Additional Performance Standards for Development. 314 CMR 21.08(2); General Permit V(A).

F. Site Work Involving Redevelopment and Development Work. The regulations need to clarify how the Additional Performance Standards are applied to RIA Sites where both Redevelopment (e.g., reconstruction of an existing building) and Development (construction of new building) occur. This distinction is relevant to the application of the Additional Performance Standards, as well as to the availability of off-site mitigation and variances. The regulations should also clarify that converting impervious cover from roof to parking lot (or vice versa) constitutes Redevelopment and not Development.

G. Utility Work. The regulations should clarify that any work conducted in utility rights of way or easements do not constitute Development or Redevelopment, or otherwise trigger the application of the Additional Performance Standards.

H. Activity and Use Limitations. The infiltration requirements in the Additional Performance Standards will be infeasible at many Brownfield sites with activity and use limitations that expressly prohibit the on-site recharge of storm water. Brownfield sites with contaminated soils (particularly those located in urban areas with "urban fill") often consolidate those soils under impervious caps to prevent contamination from leaching into groundwater. Without the use of the remedy, the costs of excavating and off-site disposal of contaminated soils would preclude redevelopment of the Brownfield site. As currently drafted, these regulations would impose additional regulatory burdens and costs on urban Brownfield projects, which is directly inconsistent with a decade of significant work by the Department to promote the redevelopment of these sites.

To avoid this conflict, impervious areas that are subject to activity and use limitations precluding storm water recharge should be excluded from the definition of Regulated Impervious Area.

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I. Initial Certifications. The General Permit states in the preface that coverage under the General Permit is obtained by submitting an Initial Certification as provided in the Fact Sheet. As an initial point, to avoid confusion, the Initial Certification filing procedures should be set forth in the General Permit, and not a separate fact sheet.

More importantly, as currently drafted, the Fact Sheet requires that the Initial Certification be subject to extensive public notice and comment provisions that are directly inconsistent with the concept of a general permit. The Fact Sheet would require public notice of the Initial Certification as required pursuant to 314 CMR 2.06, the public notice procedures for individual permits, including publication in a newspaper, the Environmental Monitor and Central Register.

Based on DEP's own estimate of 4,100 RIA Sites exceeding 5 acres in Massachusetts, and 14,000 RIAs exceeding two acres, it seems reasonable to estimate that at least 10,000 notices each year will be required (in the first year, with both Initial Certifications and Annual Compliance Certifications being required, the number could easily be double that).

The Central Register "is the weekly source for information about state, county and municipal contracts being put out to bid for the design, construction and reconstruction of public facilities in the Commonwealth of Massachusetts. Invitations to bid, lists of contractors picking up specifications on a weekly basis, and final awards of contracts are all published. Proposals and advertisements for the lease, sale or transfer of real property are published; as are lists of certified minority and women contractors and contractors who have been debarred from state work." [source: Central Register website.]. There is no relationship whatsoever between the stated purpose of the Central Register and filings under DEP's proposed program.

The Environmental Monitor "provides information on projects under review by the Massachusetts Environmental Policy Act (MEPA) office, recent MEPA decisions of the Secretary of Environmental Affairs, and public notices from environmental agencies." [source: MEPA website]. The Environmental Monitor is not a catch-all for notices submitted by private parties. A typical issue of the Environmental Monitor (published every two weeks) may include 10-20 notices of ENFs, EIRs, Notices of Project Changes, another 10-15 Certificates of the Secretary, and 10-15 notices submitted by other agencies (including MassDEP). Assuming 10,000 notices per year to be submitted under the proposed program, over 375 notices would be sent into the Monitor for publication – a crushing and senseless burden to impose on MEPA, as well as one that extends beyond the function and purpose of the Environmental Monitor.

Local newspapers will print notices. Typically, such notices cost approximately \$300. Assuming 10,000 filings per year, MassDEP is casually imposing a cost of over \$3 million on the regulated community for the issuance of unneeded public notices. If MassDEP is seeking to promote "transparency" for this program, it should maintain a website where Initial Filings and Annual Compliance Certifications may be noticed – not impose that burden on RIA Site owners.

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Beyond those publication concerns, by referencing 314 CMR 2.06, it appears that MassDEP contemplates receiving public comments on Initial Certifications. Doing so would be directly contrary to the streamlined permitting procedures that are an essential element of general permits. How does MassDEP intend to use public comments (if any) that are submitted following submission of an Initial Certification? Given that the permit terms are set by regulation, it is unclear what role public comments would play in this program.

These public notice and comment provisions must be deleted. The application process should be similar to that used in connection with the federal Multi-Sector General Permit for Industrial Storm Water.

J. Baseline Performance Standards.² As an initial comment, the Baseline Performance Standards proposed in the regulations are consistent with the federal NPDES storm water requirements and are considered appropriate for operation and maintenance of large impervious surfaces. The Department should implement a statewide education and outreach program to promote voluntary proper storm water management for all impervious areas based on baseline performance standards for O&M and protection of storm water from contamination.

1. *Storm water Management Team and Plan.* It is unclear how an aggregated RIA Site, which does not have a single management entity, can respond to the requirement for providing a single responsible party for the storm water management implementation and reporting requirements for the aggregated RIA Site. If an aggregated RIA Site does not share a common storm drain system or pavement management contractor, but does share trash removal, must all the Operation and Maintenance requirements be uniform for the entire RIA Site?

In practical terms, the requirements of the General Permit (IV)(6) that “[a]ll members of the Storm water Management Team shall be familiar with the day-to-day activities at the Permitted RIA Site, all aspects of the storm water management system, and the terms and conditions of the RIA General Storm water Permit” is unrealistic, requires a level of expertise of all Team members that will be unachievable for complex sites, and will exclude important personnel who should be part of the Team.

K. Additional Performance Standards

1. *TMDL Additional Performance Standards.* We identified a series of questions regarding the calculation of pollutant loads with the proposed Workbook:

² These comments were prepared without the benefit of the RIA General Storm water Permit Workbook, which we understand will describe how to implement all Performance Standards. That document has not been made available for review and comment or as a reference to clarify how implementation of the requirements (such as specific calculations), is to be completed.

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a. Will the Workbook include a methodology for calculating existing pollutant loads and then calculating the pollutant load removal for specific BMPs?

b. The Storm water Best Management Practices (BMP) Performance Analysis prepared by Tetra Tech provides specific pollutant load removals for BMPs if designed in accordance with the Department's Storm water Handbook. Will a specific methodology/model be provided to use these tables in load calculations? It is recommended that specific examples be provided.

c. How are these reductions to be calculated if a treatment train rather than a single BMP is proposed? Will a spreadsheet similar to the TSS removal treatment train worksheet be provided? Will the NHDES methodology be accepted?

d. If an existing undeveloped site in a TMDL watershed is undergoing Development, is the owner required to achieve the phosphorous reduction from the current existing conditions site load? Would that essentially mean that no new increase in phosphorous on-site and the required reduction is achieved based on the existing (undeveloped) site calculated load? Has this been shown to be possible when Development is not allowed to use off-site mitigation?

2. *TMDL Additional Performance Standard Phase-In.* During the public outreach, the Department stated that the proposed regulations provide for a 10-year period for RIA Sites in TMDL watersheds to design and implement storm water BMPs to achieve the applicable phosphorous reduction standard. However, as currently drafted, the proposed regulations do not expressly provide this timeframe. The storm water BMP design plan must be prepared at least 180 days before the expiration of the General Permit (i.e., within 4.5 years). The proposed regulations do not then provide a timeframe for implementing this design plan, but rather state that the implementation timeframe will be set in the subsequent General Permit. The proposed regulations must be clarified to include a 5-year implementation period for the design plan, consistent with the Department's public statements.

The Department seems to believe that in granting ten years (unless of course, any routine maintenance is carried out in the interim which triggers the Additional Performance Standards), the retrofit requirement will not impose hardship on RIA Site owners. Regardless of when it is carried out, a 5-acre retrofit cost of \$500,000 in present dollars for a 5-acre RIA Site will detract *pro tanto* from the future value of the site - and thus constitutes a substantial, hidden tax.

3. *Redevelopment Additional Performance Standard.*

a. Further clarification is needed of how the 40% is applied to the Required Redevelopment Volume. How is this calculated? If a site that currently has no infiltration is redeveloped, what is the 40% applied to? What do you assume the soils are to be if it is developed?

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b. 21.08(3)(c) items 1, 2 and 3 that describe how various combinations of LID techniques and BMPs can reach the required 40% infiltration volume (if site constraints prohibit compliance). Each needs to be clearly defined and an example for each of the combinations as described should be provided.

L. Requirements for all LID Techniques and Structural Storm water BMPs used to Meet Additional Performance Standards.

1. It is unclear why the “Storm water Professional” definition includes Registered Landscape Architects (who may not be qualified to design or certify storm water BMPs) as having design/certification authority, but other professionals such as hydrologists, geologists or other professionals competent in designs such as infiltration systems are not included. Further, 21.09 (3) states that the Certification shall be prepared in accordance with the Storm water Permit Workbook that is currently not available for review and comment.

2. It is not clear what the statements in 21.09(5)(b)(1) and (2) mean, specifically the statement that LID design must follow “the schedule set forth in the first RIA General Storm water Permit that references the TMDL”? It seems that this is referencing the requirement for retrofits for existing properties to design LID retrofits within the first 5-years and construct them within the next 5 years. Perhaps the statement could refer to the first RIA General Storm water Permit 5-Year term and define section 5(b) as requirements for existing sites to be retrofitted.

M. Requirements for Water Supply Protection.

1. The land use activities referenced at 310 CMR 22.21(2)(a)(1)-(8) should be listed, rather than included by reference. The proposed regulations provide these discharges are prohibited in Zone II or IWPA, but state that land uses listed in (2)(a)(1)-(7) are allowed if “designed to meet the performance standards set forth therein.” The apparent conflict between these two statements should be resolved.

2. The statement in 21.10(2) states that no contaminated runoff from an industrial area may discharge to the identified zones. There should be an exception for storm water treated prior to discharge, as well as clarification as to what treatment is required to qualify for the exception.

N. Offsite Mitigation (OSM). OSM is only available for Redevelopment Projects. OSM must take place within the same watershed. To be meaningful, OSM will need to infiltrate the required volume of storm water, and eliminate the required amount of phosphorus. The concept of OSM is predicated on there being an equal supply of buyers (RIA Owners) and sellers.

Thus, for each Redevelopment Project that is unable to infiltrate the Required Volume of storm water, and the required % of phosphorus, a site must be identified that can be purchased, leased or otherwise encumbered to DEP’s satisfaction, into which storm water can be infiltrated, and phosphorus can be infiltrated.

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Since this is essentially a trading or offset program, the storm water and phosphorus infiltrated must each be surplus – that is, must exceed the amount that would come with development of the OSM site, if it is already developed. For example, if the OSM site is a shopping center, the OSM site must infiltrate its own storm water and phosphorus, before taking any credit for satisfaction of the APS for the RIA site. This means that infiltration must be oversized – to create a surplus for the RIA site to utilize. The necessary volumes of storm water must be identified, as well as the necessary volumes of phosphorus. If the OSM site is undeveloped (a greenfield site), and is permanently removed from development, then it may not be difficult to find the necessary volume of storm water to meet the APS. However, there will be no source of phosphorus to be infiltrated – so the OSM site will be disqualified for that purpose.

Essentially, the notion that OSM sites will be available is dependent upon a market still to be established. DEP's Bureau of Resource Protection is taking no responsibility for developing such a market; we understand that EPA and others will fund a prominent Stakeholder to develop a web-based market in OSM sites (in the Charles River Basin!). The notion that this effort will meet with success seems unfounded at best – and given the failure of efforts to develop OSM anywhere in the country, it may be a cruel hoax.

O. Qualifying Local Programs. DEP plans to exempt from many of the proposed rules RIA owners that participate in a Qualifying Local Program (QLP), essentially, a municipal OSM program. Through the QLP mechanism, DEP's BRP is evidently seeking to encourage the funding of municipal construction of LID measures and BMPs. This would absolve DEP of the dilemma of enforcing the Clean Water Act upon the municipalities in Massachusetts (the MS4 permits have been abysmal failures in achieving anything but lip service to BMPs, and DEP and EPA are long overdue in issuing new MS4 permits). To establish a QLP, the municipality must: establish a complex system via bylaw or ordinance, collect funds (is this legal, or will special legislation be required?), identify sites for infiltration of storm water and phosphorus, identify sources of storm water and phosphorus to be infiltrated, address neighborhood concerns (NIMBY and otherwise) about the construction of drainage works, engage design engineers, prepare bid documents, supervise the construction, and submit to the oversight of DEP.

In a burst of optimism, DEP may think that one, or a few, communities, will voluntarily assume the burdens of running a QLP. NAIOP and AIM believe it is far more likely that most communities in the Charles River Basin will not volunteer, closing the door to QLPs.

P. Variations. Given the complexity and novelty of the proposed Storm Water Management Regulations, and many unforeseen circumstances that will arise, DEP needs the flexibility of a variance regulation that it can employ in situations where the result of the regulation is clearly inequitable or inappropriate—a safety-valve to deal with unanticipated circumstances—circumstances where performance standards, and the other details of compliance may be adjusted without sacrificing overall water quality goals.

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Moreover, the standards which must be satisfied to qualify for a variance should be expressly stated so that an applicant can know in advance what is required.

Even under the limited circumstances to which 314 CMR 21.13 would apply, the variance pre-conditions are far too rigid. “All possible” on-site and off-site measures are to be identified and evaluated. To grant a variance, DEP must agree with the Storm water Professional’s finding that the “highest practicable” level of off-site mitigation (“OSM”) is being employed. In a watershed the size of the Charles River Basin, how is a Storm water Professional supposed to make that determination?

What extent of search, and what cost, will satisfy the finding that OSM is not available to meet the Additional Performance Standards (“APS”)? And if highest practicable on-site mitigation, and highest practicable OSM, will not suffice to meet the APS, then “other measures,” such as green roofs, tree wells, etc. must be suggested. What showing must be made? How do real-world costs and hardships factor in? The bar is set too high. All that should be required is demonstration, adequate in the view of DEP, that water quality standards will be achieved and maintained and that a variance/waiver requested is justified by the specific circumstances. Such standard should be expressly stated in the variance regulations.

Under proposed 314 CMR 21.13 only Redevelopment of Impervious Surfaces can qualify for a variance, not Development Projects. Why is Development excluded? Under other regulatory programs, proponents of new construction projects (i.e., Development) have the option to seek a variance/waiver of specific provisions; the regulatory agency is not required, but has the discretion to grant a variance. A practical consequence of excluding “Development” from the variance provision is discouraging property owners from pursuing new construction projects. DEP should preserve the flexibility to consider variances for Development, not just Redevelopment. Regulatory language which limits DEP’s authority to grant variances that are in the public interest seems arbitrary and short-sighted.

As proposed, a variance may address only the Additional Performance Standard for redevelopment of impervious sites set forth in 314 CMR 21.08(3). Why are the other standards excluded? For example, a variance or waiver provision could address variances/waivers from “aggregation”, “phasing”, determinations of “Impervious Surfaces” and other specific provisions of the Storm Water Management Regulations, as well as allow for site-specific determinations that certain performance standards are not necessary to achieve or maintain compliance with water quality standards, or that substitute performance standards achieve the purposes of the regulations and adequately assure compliance with water quality standards. The variance or waiver process could itself become the proving ground for new ideas and novel approaches that could inform future modifications of the General Permit or Storm Water Management Regulations. Especially with the sweeping scope of the proposed Regulations, without a variance provision that is reasonable in scope there may be unintended consequences—for example, owners in good faith deferring necessary maintenance and repair of parking

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areas, access drives and other Impervious Areas that could negatively impact public safety.

314 CMR 21.13(7) provides, in effect, that a request for variance shall be provided at least 90 days prior to scheduled commencement. GSP, Appendix C(I)(G) likewise states that the request shall be provided at least 180 days prior to scheduled commencement. The discrepancy between these two time periods should be resolved - 180 days is much too long. Because a variance request may be provided for something as routine as repair of a roof, a shorter mandatory time frame—such as 60 days prior to scheduled commencement—seems more appropriate, perhaps with an added warning that applications should be submitted as early as possible in the planning process. In addition, the regulations should provide consequences if DEP fails to act on the variance request in a timely fashion.

Q. Emergency. The regulation needs an emergency provision, outlining circumstances where an applicant may proceed with critical maintenance or repair prior to compliance with the APS.

R. Transition Rule. The Transition Rule is not realistic in the current market because it grandfathers only projects that "proceed continuously and expeditiously to completion" without any delays of 6 months or more. 314 CMR 21.11. This means that facilities that are fully permitted but have not started construction would be forced to revisit their permits and possibly change designs to comply with the new storm water program. DEP should add a provision explaining that projects delayed for economic reasons are grandfathered. As in other environmental regulations, the burden could be placed on the project proponent to demonstrate the reason for the delay.

The Transition Rule should grandfather projects that are fully-permitted within 6 months of the start of the storm water program as well as projects that have received the Certification of the Secretary of Energy and Environmental Affairs on a FEIR during that same time period. The Transition Rule should also provide that, even if permits are under appeal, the grandfathering provision would apply.