



December 5, 2011

Commissioner Ken Kimmell
Massachusetts Department of Environmental Protection
One Winter Street
Boston, MA 02108
Via Email: MassDEP.Commissioner@state.ma.us

Re: NAIOP Comments on DEP Action Plan for Regulatory Reform

Dear Commissioner Kimmell:

NAIOP Massachusetts, the Commercial Real Estate Development Association, commends the Department on the Commissioner's draft *Action Plan for Regulatory Reform at DEP*. The results of the Plan clearly illustrate the wide range of stakeholders involved in its development. There is no question that the recommendations will result in increased efficiencies for the Department while ensuring continued protection of the environment.

NAIOP supports many of the concepts outlined in the Plan including the following: the proposed changes to Chapter 91 including the revised restrictions on timeframes (#2) and the establishment of a policy for license terms (#3); the buffer zone general permit (#6); exempting wetlands "resource areas" created by stormwater management structures (#7); the elimination of current certification and permitting for all sanitary and industrial connections and extensions of the public sewer systems (#11); and the increased use of self-certification for certain permit renewals (#19).

Though we believe these reforms will reduce redundancies and hopefully allow the Department to better operate at the "speed of business," NAIOP does have some concerns and comments about how some of the proposed changes will be implemented. Many of our comments focus on the need for additional specifics and details. NAIOP looks forward to an opportunity to participate in the various stakeholder groups that will be created as a result of this process.

The following comments are provided in the order they are listed in the Plan:

- **Coastal/Dredging Programs: Permit Consolidation (#1)** – We strongly support the move to create a common permit application that will allow applicants to reduce the submission of redundant information. We urge the Department to expand this beyond "coastal" projects. Dredging in many ponds experience the same redundancy in permit reviews and the streamlined process should be applied to those projects as well. In addition, while the use of general permits and "permits

by rule” have the potential to create significant efficiencies, specifics are needed on how they will be applied, who will be eligible, and the required procedures.

- **Wetlands: Targeted Review by DEP (#5)** – Lessening of wetland NOI reviews and the focusing of resources on SOOCs seems to have great merit, but this could also pose a handicap in certain cases where private parties are faced with inconsistent or contrary local Conservation Commissions. Access by private parties to a MassDEP “Circuit Rider” in cases of disputes could serve to address this concern.
- **Wetlands: Buffer Zone General Permit (#6)** – NAIOP strongly supports this recommendation. We were involved in the 2004 effort to revise the Department’s buffer zone policy. Due to last minute changes to the policy, which significantly limited its applicability and were opposed by NAIOP, it was used less than five times over a three year period. If implemented correctly, we believe this recommendation will reduce DEP’s workload and encourage work outside the first fifty feet of the buffer zone. The General Permit must be clear and simple while truly incentivizing work outside of this area.
- **Wetlands: Exemptions for Regulated “Resources” Created by Stormwater Management Structures (#7)** - Since the 2008 revisions to the Wetlands Protection Act, stormwater management structures constructed prior to January 2, 2008 have been treated as protected wetland resource areas. This effectively prevents any substantial upgrade or relocation that would alter these so-called “wetlands.” However, those structures constructed on or after that date can be modified or replaced subject to stormwater-related performance standards and are not regulated as wetland resource areas. There is no basis for this distinction, since both sets of basins are required by DEP for the express purpose of protecting actual wetland resources and are operated identically. Thus, NAIOP strongly supports the proposed recommendation outlined in the Plan, which states that regulatory changes will be made to exempt wetland “resource areas” created by stormwater management structures that were constructed prior to 1996, if the stormwater system meets DEP’s performance standards.

However, the Plan goes on to say that such a change “follows on regulatory changes previously made to exempt stormwater management structures that were constructed *after* 1996.” NAIOP is unaware of any regulatory change that generally exempts structures created after 1996. It is imperative that the final regulatory changes apply to any existing systems constructed or improved under DEP stormwater standards (regardless of when they were constructed), and allow for maintenance and alteration of the existing structures without treating them as wetland resources. Changes to stormwater structures (alteration, replacement, reconstruction, or upgrades) should be allowed under standards that would protect the stormwater functions being changed, much the same way they are allowed for structures constructed on or after January 2, 2008.

- **Wetlands: Expedited Permitting for Ecological Restoration Projects (#8)** – An expedited process for such projects is needed and should be a high priority. As part of this process, NAIOP encourages the Department to consider moving forward with a wetlands restoration/replication banking program. The Department should modify its Limited Project categories to allow wetlands resource area banks to be established by private initiatives. The public benefits are: (1) restored or created wetlands which are sufficiently large to have enhanced environmental qualities, contributing to better protection of the interests of the Wetlands Protection Act; and (2) Conservation Commissions would gain an alternative to requiring numerous small mitigations from individual home and commercial owners, thus simplifying filing reviews and monitoring requirements. The private benefits would be improved regulatory certainty and reduced process times and costs for subsequent applicants who could utilize the bank. Given the enormous success of such programs in many other states, NAIOP would be very interested in working with other stakeholders to create such an initiative in Massachusetts.
- **Wastewater Title 5: Innovative/Alternative Program – 3rd Party Review (#12)** – NAIOP believes that third party review of these projects will be a benefit, as long as the criteria are well defined and applied consistently.
- **Site Cleanup: Simplify Activity & Use Limitations (AULs) (#17)** – NAIOP supports the development of simplified forms and streamlined public notice procedures to create more understandable forms of restrictions. NAIOP would encourage the Department to involve a real estate conveyancer in the development of the revised forms. We frequently hear that conveyancers find the current version confusing and having their input early in the process may save everyone time and needless confusion upon implementation.
- **Many Programs: Revise Fees to Incentivize Better Results (#20)** – NAIOP has some serious concerns with this recommendation. In particular, we do not agree that “increasing fees on the categories or permits or activities with the highest potential for environmental impact could reduce the number of projects that fall into those categories.” We do not believe the two are related. More importantly, fees should only be based on the Department’s cost to review the application, not the perceived environmental impacts.
- **Section III: Need for Additional Reform** – NAIOP is very interested in participating in the stakeholder groups that will be working to explore more substantial regulatory reforms that might be feasible over a longer period of time. We strongly support the increased use of self-certification and third party experts (similar to the current LSP model) and urge the Department to seek out additional areas where this could be used.

Finally, we encourage the Department to evaluate the effectiveness of all of the proposed reforms every 5 – 7 years in order to maintain or expand programs that are working and

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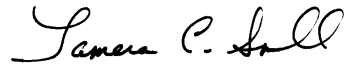
modify or eliminate those that are not. This would be similar to the regulatory review provisions contained in Chapter 240 of the Acts of 2010.

Thank you again for the opportunity to provide comments on this important initiative. Please contact us if you have any questions or if you need additional information on any of our comments.

Sincerely,



David I. Begelfer
Chief Executive Office
NAIOP Massachusetts



Tamara C. Small
Director of Government Affairs
NAIOP Massachusetts

Cc: Deputy Commissioner Alicia McDevitt, MassDEP