

Proposed Amendments to EPA's Preliminary Residual Designation Determination of November 12, 2008 under Section 402(p) of the Clean Water Act

The original residual designation Record of Decision dated November 12, 2008 should be consulted for context on the proposed amendments.

Preliminary Residual Designation

On November 12, 2008, EPA made a preliminary determination that the following discharges require permits under the National Pollutant Discharge Elimination Program of the federal Clean Water Act:

Storm water discharges from two or more acres of impervious surfaces that are located on a single lot or two or more contiguous lots aggregated in accordance with 314 CMR 21.05 in the Charles River watershed that are located, in whole or in part, within the municipalities of Milford, Bellingham or Franklin, Massachusetts. In determining whether the impervious surfaces located on a single lot or two or more contiguous lots aggregated in accordance with 314 CMR 21.05 constitute impervious surfaces covered by this preliminary residual designation, impervious surfaces shall not include any impervious surfaces owned or operated by a local government unit, the Commonwealth of Massachusetts or the federal government and any impervious surfaces associated solely with any of the following land uses: sporting and recreational camps; recreational vehicle parks and campsites; manufactured housing communities; detached single-family homes located on individual lots; or multi-family housing developments containing four or fewer units including condominiums, cooperatives, apartment buildings, townhouses and rooming and boarding houses.

The definition of designated discharge in the preliminary designation states that the Charles River watershed includes all areas that discharge directly to the Charles River or its tributaries or indirectly to the Charles River or its tributaries through Municipal Separate Storm Sewer Systems (MS4s) or other private or public conveyance systems.

Other key terms in that definition are contained in the Preliminary Residual Designation Record of Decision that is Attachment 1 of the Fact Sheet. The Record of Decision can be found at the following website:

<http://www.epa.gov/region01/npdes/stormwater/index.html>

(scroll to "Residual Designation")

Description of Proposed Amendments to Preliminary Residual Designation

EPA is today proposing three amendments to the preliminary residual designation decision. Two of those amendments relate to the definition of "designated discharge." The third proposed amendment will change the requirements for who must apply for authorization to discharge under the proposed permit.

1. The preliminary residual designation determination states that a designated discharge is a storm water discharge from two or more acres of impervious surfaces that are located

on a single lot or two or more contiguous lots aggregated in accordance with 314 CMR 21.05. This element of the definition was based on draft Massachusetts regulations that were under development at the time the preliminary determination was issued.

The proposed amendment to the preliminary residual designations changes and simplifies the aggregation rules to combine impervious surfaces where they are on contiguous lots owned by the same person; or where the footprint of the same building, structure, low impact development techniques or structural storm water best management practice spans the contiguous lots owned by different persons.

2. The preliminary residual designation states that in aggregating impervious surfaces to determine if they constitute a designated discharge, impervious surfaces owned or operated by a local government unit, the Commonwealth of Massachusetts or the federal government should not be included. The proposed amendment to the preliminary residual designation changes the scope of the government property exclusion so that it excludes only property owned by a local, state or federal government unit where the property discharges wholly into an MS4 system operated by that local, state or federal government unit and that unit holds a valid NPDES permit.

3. The preliminary residual designation states that where a property containing a designated discharge is owned by one person but is operated by another person, the operator of the property is required to obtain the NPDES permit. The proposed final designation provides that the owner of part or all of a designated discharge site (the lot or lots on which a designated discharge is located) must file a Notice of Intent; and receive authorization to discharge. It also provides that when an owner does not control or have the right to control all activities on a designated discharge site whose control is necessary to assure compliance with the permit, the owner shall send EPA information about the persons who do have control over such activities. EPA may then request such persons to submit a Notice of Intent and EPA may authorize them to discharge as co-permittees subject to the condition that they satisfy the permit with respect to those activities they control or have the right to control.

Proposed Final Designation:

For purposes of the draft permit EPA is issuing today for public comment, the proposed final designation makes the following changes to the Preliminary Residual Designation Record of Decision, which is incorporated into this document by reference:

Definition of Designated Discharge:

A designated discharge is defined as follows:

A Designated Discharge is two or more acres of impervious surfaces located: (1) in the Charles River watershed; (2) in whole or in part in the municipalities of Milford, Bellingham, or Franklin, Massachusetts; and (3) on a single lot or two or more contiguous lots aggregated as follows: when measuring the impervious surfaces to

determine if they meet the two acre threshold, the following impervious surfaces shall not be included:

Any impervious surfaces associated solely with any of the following land uses:

- a. Sporting and recreational camps;
- b. Recreational vehicle parks and campsites;
- c. Manufactured housing communities;
- d. Detached single-family homes located on individual lots; and
- e. Stand-alone multi-family houses with four or fewer units.
- f. Any property owned by a local, state or federal government unit where the property discharges wholly into an MS4 system operated by that local, state or federal government unit that has a valid NPDES permit.

For the purpose of defining “designated discharge,” a stand-alone multi-family house with four or fewer units does not include any multi-family house that is part of a condominium, cooperative, apartment complex, townhouse, or other residential or mixed-use development with more than four dwelling units, or any multi-family houses that share private access roads, driveways or parking areas with contiguous lots containing additional dwelling units where the total number of units served by the shared access road, driveway or parking area is more than four.

When measuring impervious surfaces to determine if they meet the two acre threshold for a designated discharge, the impervious surfaces on contiguous lots shall be included provided that:

- (1) The contiguous lots are owned by the same person; or
- (2) The footprint of the same building, structure, low impact development techniques or structural storm water best management practice spans the contiguous lots owned by different persons.

EPA may require that impervious surfaces on contiguous lots that do not meet the requirements above be included for purposes of determining whether they meet the two acre threshold for a designated discharge if it finds that ownership of the contiguous lots asserted to be in separate ownership was arranged to circumvent the requirements of the permit, including evidence that on or after the publication date of the draft permit two or more owners of the contiguous lots have acted in concert to acquire or dispose of contiguous lots to avoid the requirements of the permit.

For purposes of the permit, the Charles River watershed includes all areas that discharge directly to the Charles River or its tributaries or indirectly to the Charles River or its tributaries through Municipal Separate Storm Sewer Systems (MS4s) or other private or public conveyance systems, including structural storm water best management practices (“BMPs”). The watershed boundary of Milford, Bellingham and Franklin was established using surface elevation data from a USGS topographic map.

Parties Filing Notice of Intent

For purposes of the proposed final residual designation and draft permit that EPA is issuing today, where an owner controls or has the right to control all of the activities at a DD Site that result in a discharge and that are necessary to assure compliance with the permit, the owner must submit a Notice of Intent to receive authorization to discharge under the permit. Upon authorization to discharge, the owner is a permittee that shall assure compliance with all the terms and conditions of this permit.

Where an owner does not have control or the right to control all activities that result in a discharge, and whose control is necessary to ensure compliance with the permit, the owner shall submit the following information with respect to each such activity:

1. The activity and each specific provision in the permit that requires its control;
2. An explanation of why the owner does not have control or the right to control that activity, including specific reference to any legal documents such as contracts or leases relating to the explanation; and
3. The person or persons who do have control and/or the right to control that activity;
4. Their mailing and email address

EPA may request any person who controls or has the right to control activities whose control is necessary to assure compliance with the permit to submit a Notice of Intent. If authorized to discharge, that person is a co-permittee. The co-permittee must then assure compliance with all terms and conditions of this permit applicable to the activities that it controls or has the right to control and that result in a discharge.

Finalization of Residual Designation Determination

EPA is inviting comment on the proposed amendments to the preliminary residual designation described above. The agency will respond to all significant comments on the preliminary designation and these proposed amendments to it at the close of the comment period on the proposed permit.

As noted in EPA's preliminary residual designation Record of Decision issued on November 12, 2008, the final residual designation determination does not become effective until EPA issues a final permit that authorizes discharges subject to the determination. The question of whether the preliminary residual designation and this proposed final designation were proper will remain open for consideration during the public comments period on the permit.