



March 31, 2010

Ms. Thelma Murphy  
EPA-Region 1  
Office of Ecosystem Protection  
5 Post Office Square – Suite 100  
Mail Code: OEP06-4  
Boston, MA 02109-3912

**Re: Comments on Draft Massachusetts North Coastal Small MS4 General Permit**

Dear Ms. Murphy:

NAIOP Massachusetts, the Commercial Real Estate Development Association, appreciates the opportunity to submit comments on the Draft Massachusetts North Coastal Small MS4 General Permit. NAIOP represents the interests of more than 1,400 members involved with the development, ownership, management, and financing of more than 175 million square feet of office, research & development, industrial, mixed use, retail and institutional space in the Commonwealth.

NAIOP has commented on a number of recently proposed state and federal stormwater regulatory initiatives, including the Residual Designation Authority for the Upper Charles River watershed, the draft Upper Charles River watershed Total Maximum Daily Load (TMDL) and the draft stormwater regulations proposed by MassDEP.

**While NAIOP has some questions and concerns about the draft MS4 general permit (discussed below), we would first like to comment favorably on a number of elements of this draft permit:**

1. As an overall regulatory approach to addressing water quality impacts from stormwater discharges, the MS4s should drive the implementation of stormwater controls, given the role that MS4 systems play in conveying contaminated stormwater to waterbodies. As discussed in more detail below, this regulatory approach is not without potential complications, including the need to ensure that (i) municipalities have the financial and technical resources to implement the draft permit's requirements and (ii) that those requirements are implemented consistently, fairly and cost-effectively. Nonetheless, to be effective, regulation of stormwater pollution must focus on the operation and maintenance of the infrastructure that conveys stormwater, while ensuring that the municipalities that operate and maintain those systems have adequate resources to implement the required source control and elimination measures.
2. The Fact Sheet identifies stormwater utilities as a tool to assist municipalities with meeting their regulatory obligations under the draft permit. Massachusetts has lagged other states in the creation of local and regional stormwater utilities. The up-front engineering, financial and public outreach burdens to create a stormwater utility can be substantial, particularly in

previously developed areas where residential property owners are unaccustomed to paying a utility fee for managing stormwater. EPA and MassDEP should continue to encourage the creation of stormwater utilities, including providing technical and financial support to municipalities considering this approach.

3. The draft permit correctly recognizes that source control and elimination measures are the most cost-effective means of reducing pollutant loading. Any proposed stormwater regulatory program should place source control and elimination measures as the priority and defer implementation of more costly retro-fitted treatment structures until the effectiveness of source control and elimination can be evaluated. The draft permit's emphasis on source control measures such as street sweeping, catch basin maintenance, enhanced IDDE, optimized fertilizer use, etc. recognizes that these measures should play the principal role in reducing stormwater impacts.
4. As a matter of both program effectiveness and fundamental fairness, all sources of pollutant loading must be evaluated and targeted in order to achieve pollutant reduction goals. Other regulatory proposals have focused too heavily on stormwater discharges from commercial and industrial properties without requiring similar levels of reduction from other pollutant sources, such as municipal facilities and roadways and residential properties. The draft permit recognizes this by requiring increased source control at MS4 properties and enhanced public outreach and education. Existing residential properties contribute significantly to stormwater pollutant loading, particularly phosphorous. Increased public education on issues such as reduced use of fertilizers and septic system maintenance are important to reducing pollutant loading from these sources.
5. The timelines proposed in the draft permit for developing and implementing Phosphorous Control Plans (PCPs) for the Lower Charles River watershed appropriately reflect the complexity of that undertaking for municipalities. Expediting those timelines would result in poorly designed and/or prepared plans that would be ineffective.
6. NAIOP agrees that the definition of "new discharger" should not include discharges from MS4s resulting from increased impervious areas. To include new impervious areas within that definition would be both unworkable as a practical matter and an unreasonable expansion of the regulatory definition in 40 C.F.R section 122.4.

**NAIOP notes the following issues as potential concerns:**

1. There is significant potential for inconsistent local regulations as municipalities respond to the requirements of Part 2.4.6 of the General Permit or, for those MS4s discharging into the Lower Charles River watershed, develop PCPs. From a policy perspective, local regulation of stormwater discharges from new developments or redevelopment in more urbanized areas must not become so burdensome that projects are relocated to ex-urban greenfield sites, resulting in other environmental impacts. As a more practical matter, the creation of hundreds of separate, uncoordinated local stormwater bylaws or ordinances will create additional complexity and confusion and potentially undermine the effectiveness of the MS4 program. To ensure

consistency, EPA should provide further guidance to municipalities as they prepare local stormwater regulations and/or PCPs, including a model bylaw/ordinance and a PCP template.

2. Along these lines, we note that a number of the provisions in the draft permit are vague or ambiguous and therefore susceptible to varying interpretations by municipalities as they prepare local regulations and/or PCPs. Some of the more significant examples are listed below and EPA should (either in the final permit or through guidance) provide clarification on these issues in order to reduce the likelihood for inconsistent local regulations:

- a. Part 2.4.6 of the draft permit proposes that local stormwater regulations should be developed to regulate stormwater discharges from new development or redevelopment, and proposes that those regulations should apply to any disturbance of one acre or more. In the case of redevelopment, it is unclear whether disturbing a portion of an existing development would subject the entire project or just the disturbed area to local regulation. A clarification is needed that only disturbed areas over one acre would be subject to the local regulations proposed in Part 2.4.6.

- b. Although not specifically stated in the Fact Sheet, NAIOP understands that the basis for the one-acre threshold for the Part 2.4.6 local regulations is the current threshold under the Construction General Permit. While that threshold may be defensible in connection with controlling stormwater runoff from construction sites under Part 2.4.5 of the draft permit, the rationale for that threshold is far less obvious when applied to regulating stormwater discharges from new developments and redevelopments under Part 2.4.6 of the draft permit. In the latter context, the threshold for application of local stormwater regulations should be tied to the creation of new impervious area and the five-acre threshold proposed in the draft MassDEP stormwater regulations would be a more reasonable and appropriate threshold.

- c. The term “disturbance” must be clearly defined to avoid inconsistency or confusion as to what activities could trigger application of local stormwater regulations. For instance, customary O&M activities such as repaving of existing parking lots or repairing or replacing roofs should not be deemed “disturbance.”

- d. The term “impervious” should be clearly defined and pervious pavement, roofs connected to using drywells, and green roofs should be exempted from that definition in order to encourage reduction of stormwater discharges.

- e. Likewise, the term “larger common plan of development or redevelopment” in Part 2.4.6 should be defined, and should include some clear thresholds. For instance, incremental increases in impervious area should only trigger application of the regulations proposed under Part 2.4.6 if the impervious area increases more than five acres over any five year period.<sup>1</sup>

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<sup>1</sup> Similarly, the threshold for Increased Discharges in Part 2.3.1 should be increased to five acres or more of new impervious area, and should include a similar five-year rolling review period.

The draft permit should include the following criteria for evaluating what constitutes a “larger common plan of development or redevelopment:”

- The entirety of a proposed project subject to review, including likely future expansions, should be considered, and not separate phases or segments thereof.
- In determining whether two or more segments or components are in fact parts of one project, all circumstances shall be considered, including but not limited to time interval between phases, whether the segments or components, taken together, constitute a part of a common plan or scheme, whether there is a commonality of ownership interests across two or more separate legal entities, whether and whether environmental impacts are separable.
- Ownership by different entities does not necessarily indicate that two segments or components are separate.

f. With respect to PCPs and local stormwater regulations for new development and redevelopment, it is unclear how sites that straddle municipal boundaries would be regulated. In those situations, the property owner should be allowed to elect which municipal stormwater regulations or PCP would apply. As previously mentioned, it is recommended that more guidance on the development of PCPs in a consistent fashion be provided to ensure consistent development and implementation of the PCPs.

g. The draft permit does not discuss the process by which MS4s that discharge into 303(d)-listed waterbodies without a TMDL will address any future imposition of a TMDL for that waterbody. Will that situation be covered by Part 2.3.1.2, or must the MS4 create a plan similar to the Lower Charles River watershed PCP? If the latter, the process and timing for doing so is not spelled out in the draft permit.

In closing, NAIOP believes that the MS4s are the appropriate place to regulate stormwater. In order to ensure its success, NAIOP strongly supports federal and state assistance for municipalities to fund this important program. Thank you again for the opportunity to submit comments. Please contact us if you have any questions or need additional information.

Sincerely,

NAIOP MASSACHUSETTS



David I. Begelfer  
Chief Executive Officer