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## USEPA Region I Issues Draft Stormwater Permit for Commercial Real Estate in Upper Charles River Watershed in Massachusetts

USEPA Region I previously announced that it would exercise a seldom used statutory authority to create a new program to regulate stormwater discharges in the Upper Charles River watershed, relying on USEPA's so-called Residual Designation Authority (RDA) under section 402(p) of the Clean Water Act. Section 402(p) authorizes USEPA to establish additional permitting programs if the existing National Pollution Discharge Elimination System (NPDES) program fails to achieve water quality standards. USEPA has used this authority in only one other instance – along Long Creek in Portland, Maine.

This action follows USEPA's determination that elevated phosphorous levels are causing excessive algae blooms and related violations of state water quality standards in the Lower Charles River. According to USEPA, stormwater and wastewater discharges are a significant (but not the sole) source of phosphorous, and therefore these discharges are not being adequately controlled by the existing NPDES permitting programs. USEPA issued a preliminary Residual Designation Determination applicable to three municipalities in the upper reach of the Charles River (Bellingham, Franklin and Milford) as a pilot project, and announced that it would issue a general permit applicable in those three municipalities to impose additional controls over stormwater discharges.

USEPA has now issued a draft of that general permit for public comment. That permit will apply to properties that:

- Are located in Franklin, Bellingham or Milford (located approximately 30 miles southwest of Boston near the Charles River's headwaters);
- Contain two or more acres of impervious area; and
- Discharge stormwater either directly into the Charles River or its tributaries, or into a municipal separate storm sewer system (MS4).

Certain properties are expressly exempted, including single-family residences, and multi-family properties with four or fewer units, and certain municipal, state and federal properties.

Properties subject to the general permit will be required to reduce phosphorous levels in their stormwater discharges by 65 percent. The draft permit provides various alternatives for achieving that requirement, including using structural or non-structural best management practices (BMPs) or participating in a "Certified Municipal Phosphorous Program." The timeframe for achieving the 65 percent phosphorous reduction varies depending on which of these approaches are used. In addition, permittees must comply with certain "Baseline Performance Standards,"

prepare a Stormwater Management Plan and provide an annual compliance certification to USEPA. The draft permit does not, however, require discharge sampling.

While this general permit will initially be implemented as a pilot project in Bellingham, Franklin and Milford, USEPA has stated that it will likely expand the RDA to include other municipalities along the Upper Charles River (which is defined to include the reach of the river above the Watertown dam). Therefore, it is quite possible that the geographic scope of this general permit may ultimately include some or all of the other 13 municipalities located in the Upper Charles River watershed (Hopkinton, Medway, Millis, Medfield, Sherborn, Dover, Natick, Wellesley, Needham, Dedham, Newton, Waltham, and Watertown).

Property owners in these municipalities should review the draft permit and consider submitting comments to USEPA. Several points in particular warrant careful evaluation:

1. The draft permit would treat contiguous lots that are separately owned but share stormwater management systems (e.g., multi-owner office and industrial parks) as a single lot, both for the purposes of calculating impervious area and complying with the permit. Property owners who share stormwater management systems with their abutters will need to look closely at how these aggregation provisions may apply to them.
2. In the case of leased properties, the draft permit assumes that property owners, and not their tenants, are responsible for filing the Notice of Intent and complying with the permit. Landlords who do not have sufficient control of the leasehold to ensure compliance with the permit must demonstrate that lack of control to USEPA. Landlords should evaluate current and future leases to determine how the lease terms may affect the parties' obligations to comply with the general permit.
3. The general permit is being issued under the Clean Water Act, and (generally stated) the jurisdiction of that statute is limited to discharges of pollutants to "waters of the United States." The federal Supreme Court's decision in Rapanos has significantly complicated determining which wetlands and other non-navigable waters may be subject to the Clean Water Act's jurisdiction, and stormwater discharges into wetlands and small waterbodies (even intermittent streams) may in some situations trigger Clean Water Act jurisdiction. Unfortunately, the analysis is very site-specific and not amenable to bright-line tests. As a result, even properties located some distance from the Charles River will need to evaluate whether they may be subject to this general permit.

USEPA will accept written comments on both the draft general permit and finalizing the Residual Designation until June 30, and will hold public informational meetings on May 12 and June 22, in Franklin.

Additional information about the draft general permit can be found on USEPA's Clean Charles River Website at <http://www.epa.gov/region1/charles/index.html>.

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