

DEP seeks control over stormwater discharges

By Charles N. Le Ray

In December 2008, the Massachusetts Department of Environmental Protection published proposed stormwater management regulations. Existing DEP regulations already require projects needing Orders of Conditions under the Wetlands Protection Act to comply with DEP's Stormwater Management Standards. The new regulations would create a statewide general permit program regulating stormwater from all private sites with five or more acres of impervious surfaces, pavement or roof. Impervious surfaces owned by municipalities, the commonwealth or the federal government would be exempt. Within the 308-square mile Charles River Basin, the jurisdictional threshold would be reduced to two acres.

Elevated phosphorous levels in the lower Charles River Basin were a major impetus for the regulations. Sources of phosphorous pollution include agricultural uses, municipal wastewater treatment plants and combined sewer overflows, residential and recreational fertilizer use, and impervious areas, which contribute to phosphorous pollution when stormwater carries away fuel combustion residues, atmospheric deposition and decayed leaf litter.

A 2007 DEP/EPA study established limits on phosphorous discharges to the Charles River. DEP's new regulations are meant to implement those limits and to address the losses of groundwater recharge, which can contribute to low or no-flow conditions in rivers. The study identified phosphorus sources that "may be easily and cost effectively controlled," including soil erosion from forests and construction sites, open parklands adjacent to waterways where excessive fertilizers are applied and/or waterfowl congregate and generate high phosphorous wastes and leaf litter from treelined residential streets. DEP's proposed regulations do not address any of these sources.

In the spring of 2008, DEP initiated a stormwater stakeholder process. After nine meetings with representatives from advocacy groups, universities, municipalities, NAIOP Massachusetts and the Associated Industries of Massachusetts, the process concluded in October without having reviewed or discussed proposed regulations. In November, DEP published 51 pages of proposed stormwater regulations, a 21-page draft general stormwater permit, a 13-page general permit fact sheet and related materials.

The regulations would cover any activity reasonably expected to result in the discharge of stormwater from a Regulated Impervious Area site. An RIA is five or more acres of impervious surfaces located on a single lot or on contiguous lots aggregated under the regulations. Regulated impervious surfaces include all paved parking areas, access roads or driveways, and areas for the storage or maintenance of vehicles, equipment, materials, products or waste, and any roof that is not a green roof.

RIA aggregation would not require common ownership, only that contiguous lots share an on-site stormwater management system or be subject to agreements or practices for the shared operation, maintenance or use of paved areas, structural or nonstructural stormwater best management practices, buildings or structures.

Anyone owning at least part of an RIA site would need to submit an initial certification and request for coverage under DEP's RIA General Stormwater Permit, with the applicable fee. They also would have to create a stormwater management team and prepare a stormwater management plan. At a minimum, such a plan would include: sweeping paved surfaces at least twice yearly; measures for the storage of snow and deicing chemicals; measures for managing solid and hazardous wastes; an operation and maintenance plan; and provisions for keeping a detailed log of all actions taken to implement the plan. Thereafter, an annual compliance certification, with fee, would need to be submitted to DEP. The transfer of any property subject to the general permit would require 30 days' advance written notice to DEP to avoid a lapse of coverage under the permit.

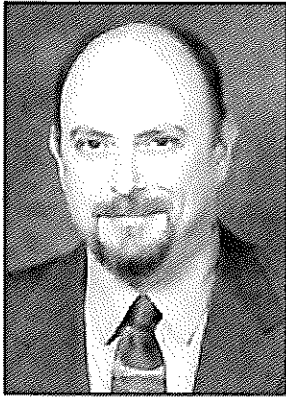
Additionally, new development resulting in an RIA site would have to comply with Stormwater Management Standards 3 through 6. These require that post-development recharge to groundwater approximate or improve upon pre-development conditions and that at least 80 percent of total suspended solids be removed from stormwater and impose additional requirements for uses with higher potential pollutant loads and stormwater discharges near public water supply wells or other critical areas. Developers of new projects unable to comply with the regulations could seek a variance from DEP.

Redevelopment projects also would be required to maintain or improve pre-development stormwater BMPs and achieve improvements in stormwater infiltration and/or reduced impervious area. Roof repairs that alone or in conjunction with other work resulted in "substantial improvement" to a building, or the full-depth reconstruction of previously-paved surfaces, scarifying of existing pavement to lay down a new top coat, or repaving of any previously-paved surface other than a "minor repair" would trigger the redevelopment project requirements. Any project whose total cost exceeds 50 percent of the fair market, pre-construction value of the building would be a "substantial improvement." A "minor repair" project would be limited to the lesser of 5,000 square feet or 5 percent of the existing paved surface being repaired.

Properties that are or are part of an existing RIA site within the Charles River Basin also would need BMPs and/or LIDs capable of achieving required pollutant reductions. The RIA site threshold would be reduced to two acres. New and redevelopment projects would be required to implement BMPs capable of reducing phosphorous loads by at least 65 percent. Owners of existing RIA sites would have five years to design retrofit measures for their properties, and an additional five years to construct and implement those measures.

DEP has not provided an estimate of the costs to private landowners of complying with the proposed regulations and general permit, nor has it made available a cost benefit analysis of the new program. A TetraTech Rizzo study commissioned by NAIOP/AIM estimates that retrofitting stormwater infrastructure to existing properties would cost \$50,000 to \$100,000 per acre, plus planning, permitting and maintenance costs. The draft regulations and general permit repeatedly reference DEP's Stormwater Handbook and the RIA General Stormwater Permit Workbook, the latter of which has yet to be released.

The public comment period ended on March 11. Numerous landowners and other stakeholders submitted comments, including NAIOP/AIM, who requested that DEP not proceed with promulgating the regulations in their current form. Whether DEP will revise or scale back the proposed regulations in light of widespread concern remains to be seen.



Charles Le Ray co-chairs REBA's Land Use and Zoning Committee and is a founder of Brennan, Dain, Le Ray, Wiest, Torpy & Garner in Boston. He devotes much of his practice to zoning, land use permitting and environmental remediation matters, and is a LEED accredited professional. Charles can be contacted by e-mail at cleray@bdlwtg.com.

