The Commonwealth of Massachusetts

AUDITOR OF THE COMMONWEALTH

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June 7, 2013

The Honorable Josh S. Cutler
Massachusetts House of Representatives
State House – Room 39
Boston, Massachusetts 02133-1054

The Honorable Geoffrey G. Diehl
Massachusetts House of Representatives
State House – Room 167
Boston, Massachusetts 02133-1054

RE: State Department of Environmental Protection (DEP) Regulations Relative to Stormwater Management, 310 CMR 10.00 and 314 CMR 3.00

Dear Representatives Cutler and Diehl:

This letter is in response to your request, on behalf of local officials from your districts, that the State Auditor's Division of Local Mandates (DLM) determine whether the Local Mandate Law, M.G.L. c. 29, § 27C, applies to elements of the above-referenced regulations relative to stormwater management. You express concern that these requirements impose additional costs upon town departments already struggling to provide essential public services with limited resources. Concern for the local impact of unfunded state mandates was also evident during the meeting that you hosted in April with individuals who work on the front lines of local government. I was deeply impressed by their earnest efforts to enhance the quality of community life under difficult fiscal circumstances.

There are instances in which the Local Mandate Law can be applied to support these efforts, but this is not the case relative to stormwater management. DLM addressed this issue a number of years ago at the request of Representative Bradley H. Jones, Jr. on behalf of the Town of Reading, and concluded that the Local Mandate Law did not apply to stormwater management requirements because the primary authority defining this obligation is federal law and regulations. *See* DLM 2005-11.

Nonetheless, in response to your request, I instructed my staff to reevaluate that conclusion in light of more recent developments in federal and state environmental rules. As part of this process, in late April my staff met with officials at Hanson Town Hall, including the Hanson Interim Town Manager, the Highway Supervisor, the Town Planner, and a consultant from Environmental Partners Group, Inc. This was followed by a meeting with attorneys from the federal Environmental Protection Agency (EPA) and state Department of Environmental Protection (DEP) in May. Although I share the concerns expressed by all parties for the growing cost of complying with these and other environmental standards, I have concluded that there is nothing new in the state regulations governing stormwater management that would invoke the state funding obligations of the Local Mandate Law. The basis for this conclusion is further explained below.

The Local Mandate Law Does Not Apply to Federal Laws and Regulations.

As a general rule, the Local Mandate Law provides that post-1980 state laws and regulations that impose additional costs upon cities and towns must either be fully funded by the Commonwealth, or subject to local acceptance. Any municipality aggrieved by a law or regulation adopted contrary to these standards may petition the Superior Court to be exempted from compliance, until the Commonwealth assumes the cost. Prior to taking this step, a city or town may request an opinion from DLM as to whether the Local Mandate Law applies in a given case, and, if so, to determine the amount of the cost imposed by the law or regulation at issue. DLM's determination of the amount of the compliance cost shall be prima facie evidence of the amount of state funding necessary to sustain the mandate.

However, as is the case with many general rules, there are exceptions. The state Supreme Judicial Court has recognized that the Local Mandate Law does not apply to "mandated costs or services which were not initiated by the Legislature and over which it has no control." *See Town of Lexington v. Commissioner of Education*, 393 Mass. 693, 697 (1985). In that case, the Court was referring to the M.G.L. c. 29, § 27C(g) exception for costs resulting from court decisions, or from laws enacted as a direct result of court decisions.

In the case at hand, it was the Congress of the United States that enacted the federal Clean Water Act (CWA), and the federal EPA that promulgated the relevant regulations. *See* 33 U.S.C. § 1251 *et seq*. and 40 CFR 122 *et. seq.* The CWA provides that it is unlawful for any person or entity to discharge pollutants into the waters of the United States, except as provided by the Act. 33 U.S.C. 1311(a). Relative to runoff from separate municipal storm sewer systems, the CWA established a permit program to impose conditions to mitigate the degree of pollutants that reach protected waters. This is known as the National Pollutant Discharge Elimination System (NPDES), and the requirements specific to municipal stormwater sewers are detailed at 33 U.S.C. § 1342(p), and related EPA regulations, 40 CFR 122.30-36. These requirements apply nationwide, and are not contingent upon the award of federal financial assistance to any state. From this viewpoint, this is a federal matter over which the state Legislature has no control.

Granted, Massachusetts law and regulations contain prohibitions and permit standards similar to the federal requirements. *See* M.G.L. c. 21, § 42 ("Any person who . . . discharges . . . any pollutant . . . into the waters of the commonwealth, except in conformity with a permit" shall be punished by fine or imprisonment.) Additionally, under certain conditions, the state DEP regulations require the same "minimum control measures" as the federal government, including, among other things, public education and involvement, storm sewer system and outfall mapping, detection and elimination of illicit discharges, and control of construction and post-construction stormwater runoff by municipal ordinance or regulation. *See* 314 CMR 3.00 and 310 CMR 10.00. Nonetheless, the federal law is the primary authority imposing permit conditions for municipal stormwater systems, and cities and towns in Massachusetts would still need to incur the costs of complying with the federal mandate even absent state law on the topic.

Conclusion

In summary, my review of this matter has led to the conclusion that the elements of the state DEP regulations relative to stormwater management found at 310 CMR 10.00 and 314 CMR 3.00 are not subject to the Local Mandate Law, M.G.L. c. 29, § 27C, as they are based on federal law and regulation. There are no requirements in related state law or regulations that appear to exceed the mandates of the federal program.

Nonetheless, state leaders have taken some steps to address the local financial impact of these requirements. In 2004, the General Court authorized cities and towns to assess civil penalties of up to $5,000 per day for violations of local stormwater regulations. The General Court also authorized communities to assess periodic sewer charges at levels sufficient to supplement funds available for stormwater programs. *See* M.G.L. c. 83, §§ 10 and 16, as amended by St. 2004, c. 149, §§ 138-140. Note, also, that some aspects of local stormwater programs may potentially be eligible for assistance from the State Revolving Fund pursuant to M.G.L. c. 21, § 27A and 310 CMR 44.00.

I regret that this opinion does not aid local officials in your district in their efforts to control local spending. Nonetheless, I must apply the Local Mandate Law consistently to each issue, as interpreted by the courts. Please be aware that this opinion is subject to revision in the event that you offer factors that we may not have considered. Additionally, this opinion does not prejudice the right of any city or town to seek independent review of the matter in Superior Court in accordance with Section 27C(e) of Chapter 29.

I thank you for bringing this issue to my attention, and encourage you to contact me with further concerns that you may have on this or other matters impacting state and local finance.

Sincerely,

Suzanne M. Bump

cc: Merry Marini, Hanson Interim Town Manager
Attorney Ronald Fein, EPA
Attorney Robert Brown, DEP