The Commonwealth of Massachusetts

AUDITOR OF THE COMMONWEALTH

STATE HOUSE, BOSTON 02133

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AUDITOR

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May 18, 2006

The Honorable Bradley H. Jones, Jr.
Minority Leader
House of Representatives
State House – Room 124
Boston, Massachusetts 02133-1054

RE: COMPLIANCE WITH THE STORM WATER MANAGEMENT PLAN - NPDES PERMIT REQUIREMENTS OF THE FEDERAL CLEAN WATER ACT, 33 U.S.C. 1251 *ET SEQ.*

Dear Representative Jones:

This is to inform you that my Division of Local Mandates (DLM) has completed its review of local compliance with the above-referenced provisions of the federal Clean Water Act (CWA). In response to your request for a review of this matter on behalf of the Town of Reading, DLM staff met with officials at Reading Town Hall, and discussed the local financial impact of the storm water management requirements. DLM also met with state Department of Environmental Protection (DEP) officials for further input. Although I share the concerns you and the Town have expressed about the substantial cost of complying with this program, DLM has concluded that the Local Mandate Law, G. L. c. 29, § 27C, does not apply in this case due to the federal origin of these requirements. The following discussion further explains this conclusion.

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

As a general rule, the Local Mandate Law applies to post-1980 state laws and regulations that impose additional direct service or cost obligations upon cities and towns. It provides that such laws and regulations 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 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 most general rules, there are exclusions.

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." *Town of Lexington v. Commissioner of Education*, 393 Mass. 693, 697 (1985). In that case, the Court was referring to the 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 CWA, and a federal agency that promulgated the relevant regulations. From this viewpoint, it is clear that this is a matter over which the state Legislature has no control. Accordingly, the Commonwealth is not obligated under the Local Mandate Law to assume the cost of complying with a federal mandate.

A review of relevant federal and state laws and regulations indicates that the National Pollutant Discharge Elimination System (NPDES) permit provisions in question are primarily mandated by federal statute. Even though states assist the EPA in the development and implementation of the NPDES permit program, the EPA maintains the overall responsibility for eliminating the discharge of all pollutants, including discharges from storm water, into the waters of the United States. In relevant part, the federal Act makes it unlawful for any person, including a city or town, to discharge any pollutant from a point source into navigable waters, unless a permit is obtained under its provisions. In short, the EPA works to ensure that the CWA's main objective is achieved: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." See 33 U.S.C. 1251(a), and Titles III (Standards and Enforcement) and IV (NPDES Permits and Licenses) of the Act. In addition to this overall general responsibility, EPA regulations explicitly call for the specific compliance actions being required of the Town.

The NPDES Permit Requirements Imposed on the Town of Reading Are Detailed in EPA Regulations, 40 CFR Part 122.34.

At our meeting, Reading officials enumerated various costly compliance items, including:

- a pubic education plan
- a public participation plan
- an outfall map
- an illicit sewer discharge detection/ elimination program
- construction/post-construction site runoff control
- catch basin cleaning/street sweeping
- stream bank stabilization

The Town's NPDES Phase II Permit for Storm Water Discharges approved by both the EPA and DEP formalizes these obligations. The Town also cited the need for additional staff and consultant expenses, along with capital costs associated with the purchase of a new dump truck and street sweeper. In sum, Reading officials estimated overall implementation expenses ranging from $300,000 to $400,000 annually.

Among other things, the EPA's NPDES regulations, 40 CFR 122, explicitly require the seven bulleted items listed above. These are specific actions required in furtherance of the overall duty to:

> "develop, implement, and enforce a storm water management program designed to reduce the discharge of pollutants…to the maximum extent practicable…to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act". [See 40 CFR 122.34 (a)].

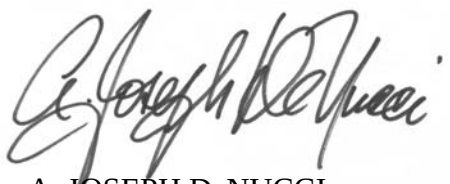
Conclusion

In all, DLM's review of this matter led to the conclusion that the NPDES requirements are federal mandates that are not subject to the Local Mandate Law. There were no requirements in related state law or regulation that appeared to exceed the mandates of the federal program.

In apparent recognition of the impact of storm water management costs, the General Court in 2004 authorized cities and towns to assess civil penalties of up to $5,000 per day for violations of local storm water management regulations. This same Act also allows communities to calculate annual sewer charges at levels sufficient to supplement funds available for storm water programs. See G. L. c. 83, §§ 10 and 16, as amended by St. 2004, c. 149, §§ 138-140. However, Reading officials indicated that they could not garner the necessary local support to increase sewer fees for this purpose. Note, also, that some of this work may be eligible for assistance from the State Revolving Fund pursuant to 310 CMR 44 and related laws. DEP staff members are available to assist in identifying possible resources to ease the financial impact of storm water management obligations.

I thank you for the opportunity to review this matter, and commend your work on behalf of the cities and towns of the Commonwealth. Please contact Attorney Emily Cousens, Director of my Division of Local Mandates, at 617-727-0980 with further questions or comments.

Sincerely,



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cc: Mr. Glen Haas, Acting Assistant Commissioner, Bureau of Resource Protection, DEP