

AMENDMENTS TO THE WETLAND PROTECTION ACT REGULATIONS AND 401 WATER QUALITY CERTIFICATION REGULATIONS

Revisions Effective January 2, 2008

In 1996, the Massachusetts Department of Environmental Protection (the “Department” or “MassDEP”) issued the Stormwater Policy that established Stormwater Management Standards aimed at encouraging recharge and preventing stormwater discharges from causing or contributing to the pollution of the surface waters and ground waters of the Commonwealth. MassDEP also issued the Massachusetts Stormwater Handbook that included detailed information on how to apply the Stormwater Management Standards.

Since that time, MassDEP has applied the Stormwater Management Standards pursuant to its authority under the Wetlands Protection Act, M.G.L.c. 131, § 40, and the Wetlands Protection Act Regulations, 310, CMR 10.00, when reviewing projects subject to jurisdiction under the Act. Mass DEP also applied the Stormwater Management Regulations when reviewing projects that require a water quality certification pursuant to 314 CMR 9.00. MassDEP has incorporated the Stormwater Management Standards into both 310 CMR 10.00 and 314 CMR 9.00, thereby eliminating the need for the Stormwater Policy. MassDEP has also incorporated into 310 CMR 10.00 and 314 CMR 9.00 definitions of the terms used in the Stormwater Management Standards.

MassDEP worked with an Advisory Committee as well as a large number of stakeholders to revise the Stormwater Management Standards to promote increased recharge, encourage greater use of low impact development techniques, and improve the operation and maintenance of stormwater best management practices. This effort led to several changes in the Stormwater Management Standards and the addition of Standard 10, requiring the removal of illicit discharges. The Stormwater Management Standards incorporated in 310 CMR 10,00 and 314 CMR 9.00 include the revisions that resulted from MassDEP’s work with the Advisory Committee. The Stormwater Management Standards incorporated in 310 CMR 10.00 apply to all projects for which a Notice of Intent or Notice of Resource Area Delineation is filed on or after January 2, 2008, the effective date of the regulatory revision. The Stormwater Management Standards incorporated in 314 CMR 9.00 apply to all projects for which an application for a water quality certification is submitted on or after January 2, 2008.

MassDEP is also revising the Massachusetts Stormwater Handbook as guidance on the Stormwater Management Standards incorporated in 310 CMR 10.00 and 314 CMR 9.00. For interim guidance on the Stormwater Management Standards incorporated in 310 CMR 10.00 and 314 CMR 9.00, applicants should consult Volume 1 of the Revised Massachusetts Stormwater Handbook available at <http://www.mass.gov/dep/service/regulations/newregs.htm#stormwater>.

Jurisdiction over Stormwater Management Systems.

The Advisory Committee expressed the concern that many developers may be reluctant to use low impact development (LID) techniques to manage stormwater, because they fear that such practices would create additional wetland resource area or Buffer Zone subject to regulation under the Wetlands Protection Act. The Advisory Committee also stated that developers need assurance that they may modify these LID practices, if and when they redevelop the site. To address these concerns, the Wetlands Protection Act Regulations, 310 CMR 10.02(2)(c) and 310 CMR 10.02(4), provide that operation of a stormwater management system designed, constructed, and installed on or after January 2, 2008, the effective date of the regulatory revision, does not by itself create any additional Buffer Zone or wetland resource area, and that review of proposed modifications to such a stormwater management system shall be limited to the stormwater functions of the system, compliance with the Stormwater Management Standards, and those performance standards that would apply in the absence of the stormwater management system.

Maintenance of Stormwater Management Systems and Certain Public Utilities

To encourage the maintenance of stormwater management systems, the Wetlands Protection Act Regulations, 310 CMR 10.02(3), have for many years provided that work to maintain certain wetland resource areas created for the purpose of stormwater management may be performed without the filing of a Notice of Intent or Request or Determination of Applicability provided that the work is limited to maintenance and conforms to an Order of Conditions issued after April 1, 1983. This exception from filing did not cover the maintenance of all stormwater best management practices (BMPs) installed within an area subject to regulation under the Act or the Buffer Zone, including proprietary BMPs and conventional BMPs installed below ground. Likewise, this exception did not cover BMPs such as vegetated swales and rain gardens that were originally installed outside of a wetland resource area or Buffer Zone, without an Order of Conditions and that over time developed wetlands characteristics. To address these deficiencies, the Wetlands Protection Act Regulations, 310 CMR 10.02(3), now provide that a Notice of Intent is not required to maintain any stormwater management system constructed in accordance with the Stormwater Management Standards after November 18, 1996, the effective date of the Stormwater Policy.

Sometimes work to maintain a stormwater management system located near a wetland resource area can adversely impact the adjacent wetland resource area. For example, work to clean out an infiltration structure located in the Buffer Zone can require substantial excavation. This excavation can have significant adverse impacts on the abutting wetland resource area. In light of these potential impacts, the Wetland Protection Act Regulations, 310 CMR 10.02(3), require that work to maintain a stormwater management system utilize best practical measures to minimize impacts to wetland resource areas.

MassDEP also revised the Wetlands Protection Act Regulations to clarify the work to maintain a public utility does not require the filing of a Notice of Intent. Because such maintenance work can also have an adverse impact on wetland resource areas, the regulations require use of best practical measures to avoid such impacts.

Technical Changes

MassDEP also made the following technical changes to the Wetlands Protection Act Regulations:

310 CMR 10.04 Clarification that the definition of Order includes Orders of Resource Area Delineation;

310 CMR 10.05(4) Clarification that notification to abutters shall be done in writing by hand delivery or certified mail return receipt requested or certificate of mailing and that the Order of Resource Area Delineation may be used to clarify the boundaries of all wetland resource areas not just bordering vegetated wetlands; and

310 CMR 10.58(2)(a)(3)(b) Correction of incorrect reference with regard to designation of “densely developed areas”.