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Low Impact Development Conference For The Real Estate Development Industry - April 5, 2007

“Low Impact Development (LID) For Meeting Phase II Stormwater Requirements”

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I. **BACKGROUND OF “PHASE II” STORMWATER REQUIREMENTS**

1. Federal Clean Water
 - Section 404: Discharge of dredged or fill material
 - Section 401: Water quality certification.
 - Section 402: NPDES
2. National Pollutant Discharge Elimination System (NPDES)
 - Regulation of discharges of pollutants to waters of the united states.
3. “Phase I” - Phase I of the NPDES Stormwater Program (1990+/-)
 - Regulates stormwater discharge from:
 - a. “Medium” and “Large” “municipal separate storm sewer systems” (MS4s) (e.g., population greater than 100,000)
 - b. Specified categories of industrial activity (including construction activity disturbing more than 5 acres)

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- Individual permits, not general permits.
 - To implement a Stormwater Management Program to control polluted stormwater runoff from MS4s.
4. “Phase II” - Phase II of NPDES Stormwater Program [published in 1999; Notices of Intent (NOIs) due in March 2003; Annual Reports]
- Extends NPDES stormwater program to:
 - a. Certain “Regulated” “Small” MS4s
 - “Small” MS4 = any MS4 not covered by Phase I;
 - “Regulated” = the small MS4 is located within a Bureau of Census-defined “urbanized area” (e.g., population greater than 50,000 and density greater than 1,000 people per square mile; see EPA maps)
 - 240 ± regulated small MS4s in Massachusetts
 - b. Construction activity disturbing 1 to 5 acres.
 - General Permit - Notice of Intent (NOI) filing by March 2003 ± with annual reports filed thereafter.

II. PHASE II REQUIREMENTS FOR REGULATED SMALL MS4s

1. Regulated small MS4s must reduce stormwater pollution to “maximum extent practicable” (MEP)
2. Operators satisfy the MEP standard through adoption of Stormwater Management Plan meeting six (6) minimum control measures (i.e., the best management practices, “BMPs”)
3. Six minimum control measures
 - Public education and outreach
 - Public participation and involvement
 - Illicit discharge detection and elimination (“IDDE”)
 - Construction site runoff control

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- Post-construction runoff control
 - Pollution prevention and good housekeeping
4. Implementation of Low Impact Development (LID): considered an “innovative BMP” for post-construction runoff control and construction site runoff control (See EPA’s “National Menu” of Stormwater BMPs)
 5. Narrative vs. numeric effluent limitations: implement BMPs and achieve measurable goals.

III. LOW IMPACT DEVELOPMENT (LID) TECHNIQUES AND COMPLIANCE WITH PHASE II

1. LID for:
 - a. Environmentally sensitive site design, with development and building envelopes.
 - b. Stormwater management to preserve natural hydrology.
2. EPA’s “National Menu” of stormwater BMPs
3. Construction Site Runoff Control
 - Municipal by-law or ordinance to: require a stormwater plan; implement erosion controls; control other wastes; procedure to review and approve plans; consider public information; inspections and enforcement; long-term operation and maintenance (O&M).
 - Construction operators apply for NPDES general permit coverage.
 - Avoid sensitive areas using development envelope.
 - Maintain vegetated buffers and erosion and sedimentation control.

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4. Post-Construction Runoff Control
 - Utilize LID as an “innovative” BMP to satisfy requirements
 - Promulgate an LID/stormwater bylaw or ordinance (See above)
5. Address long-term O&M (e.g., who will perform, costs, legal documentation and agreements, implementation and enforcement.)
6. Correct inconsistencies among a municipality’s by-laws and regulations.

This communication is intended to provide general information about an area of law. It is not legal advice. You should consult with legal counsel for advice specific to your circumstances.

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