

MASSACHUSETTS ENVIRONMENTAL, LAND USE AND REAL ESTATE ALERT *MUNICIPAL EDITION*



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Infrastructure

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This Mass-Alert analyzes the funding appropriated under the ARRA as well as other issues of interest to local government. ([full article](#))

American Recovery and Reinvestment Act

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Inspector General's Office Procurement Charts

The Massachusetts Inspector General's Office has issued several charts to assist governmental entities in their procurement of supplies, services and public design and construction. With all of the excitement over anticipated federal expenditures, the mandatory statutory procurement procedures must not be overlooked. The [Inspector General's charts](#) are a good resource, but are not a substitute for a thorough review of the statutes governing government procurement. Furthermore, it is important to note that local rules may establish stricter or additional requirements that must be followed. The charts were issued in November 2006. ([full article](#))

Massachusetts DEP Proposes Regulations Implementing Broad Statewide Stormwater Discharge Permitting Program

The Massachusetts Department of Environmental Protection ("DEP") has proposed regulations implementing a new Stormwater Management Program that would significantly expand the scope of stormwater permitting in the state. Under the regulations, private owners of property containing five (5) or more acres of impervious surfaces including paved areas and roofs would be required to apply for coverage under either a general or individual DEP permit. DEP has also published a draft of the proposed general permit. While the new program only regulates private owners it is of interest to municipalities because under the proposed regulations the responsibility for managing stormwater will be shared between private property owners and municipalities. Since 2003 municipalities have been required to manage stormwater discharges from its roads and properties. The proposed regulations will now regulate stormwater discharges from private property, as well. ([full article](#))

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Infrastructure

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At Beveridge & Diamond, P.C., we have been on the front lines of these major infrastructure projects in both Democratic and Republican administrations. We understand the best ways to promote efficient and defensible federal and state decision-making for highway, transit and bridge projects because we’ve helped shape those procedures and craft complex NEPA and MEPA documents. Working for State Departments of Transportation and partnering with sophisticated consultant teams, B&D has a unique set of skills that has contributed to major infrastructure projects across the country. Currently, we serve in leadership posts with national transportation and planning organizations and have been called on in the past by the White House Council on Environmental Quality to recommend ways in which federal agencies can fulfill their obligations under NEPA and related laws, while at the same time reach prompt decisions on key development projects. Moreover, in our Massachusetts office, our attorneys have worked in communities throughout the State. As the Obama administration hits the ground running, we will be prepared to apply our local and national experience to the expected emphasis on transportation and infrastructure development.

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Where is the Money Going?

ARRA provides funding for:

Alternative Energy

- Over \$30 billion to transform the nation’s energy transmission, distribution, and production systems; and
- \$5 billion to weatherize modest-income homes.

Science and Technology

- \$15 billion for science facilities, research, and instrumentation; and
- \$7.2 billion to expand broadband internet access to rural and other underserved areas.

Modernizing Roads, Bridges, Transit and Waterways

- \$27.5 billion for highway construction;
- \$16.5 billion to modernize federal and other public infrastructure;
- \$18.8 billion for clean water, flood control, and environmental restoration investments; and
- \$17.7 billion for mass transit and rail.

Education

- \$26 billion to local school districts through Title I (\$13 billion), IDEA (\$12.2 billion), and the Education Technology program (\$650 million);
- \$53.6 billion in state fiscal relief to prevent cutbacks to key services, including:
 - \$39.5 billion to local school districts and public colleges and universities;
 - \$5 billion to states as bonus grants for meeting key performance measures; and
 - \$8.8 billion to states for public safety and other critical services, which may include K-12 and higher education modernization; and
- \$15.6 billion to increase the Pell grant by \$500.

Lowering Healthcare Costs

- \$19 billion for health information technology; and
- \$2 billion for preventative care and to evaluate healthcare treatments.

Aid to Workers Hurt by the Economy

- \$20 billion to increase the food stamp benefit by over 13%;
- \$13.6 billion for programs to help families during the housing crisis; and
- \$ 4.8 billion to train workers in high growth areas and help the unemployed find jobs.

Protecting Public Sector Jobs and Vital Public Services

- \$4 billion for state and local law enforcement funding.

Is Massachusetts Ready to Get Its Share?

Before ARRA was passed, Governor Patrick established task forces to mobilize the Commonwealth for the potential receipt of hundreds of millions of dollars from the federal government for “shovel-ready” infrastructure projects. The Lieutenant Governor was charged with developing a preliminary list of projects that might be eligible for federal dollars. The Governor recognized that the prospect of receiving hundreds of millions of dollars of federal funding for infrastructure projects presented the Commonwealth with an opportunity it could not afford to lose. The task forces focused on infrastructure investments in energy, education facilities, transportation, information technology, private development (including broadband expansion), state facilities and courts and municipal facilities. The task forces have issued a [lengthy and comprehensive report](#) analyzing the thousands of “shovel-ready” projects put forth by Massachusetts communities and making recommendations as to priorities and implementation methods. Similar to the federal government, Massachusetts has set up a website entitled “[Massachusetts Recovery and Reinvestment Plan](#)” to provide information relative to ARRA and for tracking expenditures under ARRA. The Governor has selected Jeffrey A. Simon to lead the Administration’s economic recovery infrastructure program as the Director of Infrastructure Investment.

What is Massachusetts’ Share?

According to the [Democratic Policy Committee Report](#) dated February 19, 2009, it is estimated that some of the funding Massachusetts will receive under ARRA includes the following:

Infrastructure and Science

- \$52.6 million through the Drinking Water State Revolving Fund to address the backlog of drinking water infrastructure needs;
- \$135 million through the Clean Water State Revolving Fund to address the backlog of clean water infrastructure needs;
- \$437.9 million in Highway Funding to be used on activities eligible under the Federal-aid Highway Program's Surface Transportation Program and could also include rail and port infrastructure activities at the discretion of the states;
- \$319.7 million in Transit Formula Funding for investments in mass transit;
- \$82.3 million through the Public Housing Capital Fund to address backlog in capital needs;
- \$59.7 million in HOME Funding to acquire, construct, and rehabilitate affordable housing and provide rental assistance to poor families; and
- \$44.8 million through the Homelessness Prevention Fund to be used for short or medium-term rental assistance, first and last month's rental payment, or utility payments.

Education and Training in Massachusetts

- \$280 million for Special Education Part B State Grants, raising the federal contribution to nearly 40 percent, the level established when the law was authorized more than 30 years ago;
- \$10.3 million in education technology funds;
- \$209 million for Title I Education for the Disadvantaged;
- \$8.3 million in State Employment Service Grants;
- \$18.7 million in Dislocated Workers State Grants;
- \$10.2 million for Department of Labor's Adult State Grants;
- \$25.1 million for Department of Labor's Youth State Grants; and
- \$7.9 million for Vocational Rehabilitation.

Massachusetts Energy

- \$55.8 million through the State Energy Program; and
- \$124.7 million through the Weatherization Assistance Program

Protecting the Vulnerable Massachusetts

- \$1.7 million for National School Lunch Program Equipment Assistance;
- \$1.9 million through the Emergency Food Assistance Program;
- \$362 million in Supplemental Nutrition Assistance Program benefits (formerly Food Stamps);
- \$2.6 million for the Emergency Food and Shelter Program;
- \$24 million in Child Care and Development Block Grants;
- \$10.1 million for Head Start;
- \$25.1 million in Community Services Block Grants; and
- \$1.1 million for Senior Meals Programs.

Law Enforcement

- \$41.4 million in Byrne/JAG grants to support law enforcement efforts;
- \$ 1.3 million for crime victims compensation and assistance;
- \$726,610 in Internet Crimes Against Children Grants; and
- \$3.6 million in Violence Against Women Grants.

How Will The Money Be Distributed?

- Funds will be distributed whenever possible through existing formulas and

programs that have proven track records and accountability measures already in place;

- Numerous provisions in the bill provide for expedited but effective obligation of funds so that dollars are invested in the economy as quickly as possible.

What Oversight Will There Be?

- The Government Accountability Office and the Inspectors General are provided additional funding for auditing and investigating recovery spending;
- A new Recovery Act Accountability and Transparency Board will coordinate and conduct oversight of recovery spending and provide early warning of problems;
- A [special website](#) will provide transparency by posting information about recovery spending, including grants, contracts, and all oversight activities; and
- State and local whistleblowers who report fraud and abuse are expressly protected under ARRA.

What Are The Deadlines?

April 3, 2009 - No later than 45 days after the date of enactment of this Act, the Governor of the State must certify that: (1) the State will request and use funds provided by ARRA; and (2) the funds will be used to create jobs and promote economic growth. If the Governor does not act within this time period, the State Legislature may accept the funds. Massachusetts submitted its certification on February 25, 2009.

June 17, 2009 - The buzz word prior to the issuance of ARRA was “shovel-ready.” However, ARRA does not contain or define that phrase. ARRA does state that in using funds made available for infrastructure investment, recipients must give preference to activities that can be started and completed expeditiously. ARRA espouses a goal of using at least 50 percent of the funds for activities that can be initiated not later than 120 days after the date of the enactment of this Act, i.e. by June 17, 2009. Grant funds are also to be used in a manner that maximizes job creation and economic benefit.

September 30, 2010 - In general, the funds appropriated under ARRA remain available for obligation until September 30, 2010, unless expressly provided otherwise in ARRA.

What Should You Know?

ARRA is a supplemental funding bill that does not supplant existing appropriations. Funds appropriated under ARRA are not available for expenditures for any casino or other gambling establishment, aquarium, zoo, golf course, or swimming pool. ARRA has a strong preference to “buy American” and all of the iron, steel, and manufactured goods used in construction projects funded by ARRA must be produced in the United States, unless the federal agency administering the funds waives the requirement after making certain findings under ARRA. The prevailing wage law will apply to all projects funded by ARRA.

What Should You Do Now?

If you submitted a project(s) to the State seeking eligibility for federal funding under ARRA, you should review the [list of projects](#) that have been preliminarily designated as “shovel-ready” based on a state agency’s evaluation of project readiness. Project readiness evaluations are continuing and the list will be pared down further following these additional evaluations. If your project is not on the state agency reviewed list, you should carefully monitor the review process to determine when and if your project is determined to be eligible for federal funding. State agencies are continuing to review [projects submitted](#) for eligibility determination. Continual monitoring of the Federal and State websites set up to provide information on expenditures from ARRA will provide updates on the progress of the funding. Lastly, keep in close contact with your Federal and State legislative delegations.

Have Any Projects Been Approved For Expenditure?

Yes. On March 13, 2009, the Governor announced the first eight “shovel-ready” transportation projects using ARRA funds that will be advertised for bid. The eight initial projects have an estimated total value of approximately \$30 million and include resurfacing and signage projects located across the State in Adams, Bourne, Bridgewater-Middleborough, Gill-Erving-Orange-Wendell, Harvard-Littleton, Lexington-Reading, Swansea, and Westport.

What Can B&D Do To Help?

Beveridge & Diamond, P.C. lawyers have helped to nurture and complete an extraordinary collection of infrastructure projects that power our communities, service our populations, transport our goods and people, and maintain our economic health. Firm lawyers have experience leading project teams through the development, acquisition and construction of billions of dollars of infrastructure projects that provide vital services to industry, commercial endeavors and residential communities. Our experience includes projects throughout the United States, from New England to Florida, from the Midwest to California and Hawaii.

We provide strategic counsel on all aspects of infrastructure project development including public bidding and procurement, site acquisition and control, public lands leases, construction and permanent financing, structuring site cleanup activities and brownfields protections, environmental impact review, project development agreement negotiation, project permitting (including complex air, water, wetlands and waste permitting, endangered species consultation, and historic property review), litigating appeals to project approvals, and construction contracting. As such B&D is well positioned to advise you on all aspects of your pending and planned infrastructure projects.

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stormwater discharges from private property, as well.

The proposed regulations are intended to allow DEP to assume delegation from the U.S. Environmental Protection Agency (“EPA”) to administer the National Pollution Discharge Elimination System (“NPDES”) stormwater permit program. Currently, EPA administers the NPDES stormwater program in Massachusetts, under which certain industrial, municipal, and construction sites must apply for coverage under either an individual or general permit.

The permitting requirements proposed by DEP would impact owners of sites containing “Regulated Impervious Areas” (“RIA”), defined as five or more acres of impervious surfaces located on a single lot or two or more contiguous lots. Lots will be aggregated for the purposes of determining RIA where, for example, stormwater runoff is directed to the same on-site stormwater management system or if there are shared paved parking areas or buildings.

In the proposed regulations, DEP has also reserved the authority to designate for regulation areas of less than five acres of impervious surface if it determines control of discharges from such smaller sites is necessary to achieve or maintain compliance with the Massachusetts Surface Water Quality Standards. Similarly, DEP has reserved the authority to designate additional activities as requiring coverage under either a general or individual permit in cases where stormwater discharge is contaminated, subject to certain effluent limitations, or associated with construction activities not adequately regulated by the NPDES Construction General Permit.

Owners of properties containing RIA would be required to apply for coverage under a general permit. Applicants would be required to provide a Stormwater Management Plan, undertake “good housekeeping” practices such as regular parking lot sweeping, and implement standard operating procedures to manage potential pollutants from activities such as snow removal and deicing activities.

In addition to the basic requirements of the general permit, the regulations provide additional performance standards applicable to development, redevelopment, and discharges to impaired waters.

These additional performance standards incorporate certain existing DEP policies and guidelines, including elements of the Stormwater Management Handbook. For example, development of impervious surfaces within an existing site containing RIA will be required to implement Low Impact Development techniques or Best Management Practices capable of meeting Standards 3 through 6 of the Stormwater Management Standards as described in the Massachusetts Stormwater Handbook. Off-site mitigation will be available for redevelopment projects only.

Additional provisions in the extensive proposed regulations provide that municipalities may be authorized by DEP to administer a Qualifying Local RIA Program, detail when individual permits may be required by DEP, and address regulation of small municipal separate sewer systems or “Small MS4s”.

The proposed regulations and draft general permit are available at: <http://www.mass.gov/dep/service/regulations/newregs.htm>. Public comment on the proposal is open until March 11, 2009.

For further information, contact Marc J. Goldstein at mgoldstein@bdlaw.com or Krista L. Hawley at khawley@bdlaw.com.

The purpose of this update is to provide you current information on Massachusetts municipal regulatory developments. It is not intended as, nor is it a substitute for, legal advice. You should consult with legal counsel for advice specific to your circumstances. This communication may be considered advertising under applicable laws regarding electronic communications.

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