

## LEGAL EXPERTISE



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# The continuing expansion of stormwater regulation

Continued improvement in New Hampshire's water quality depends greatly on how we manage stormwater runoff. To address, for example, excess nutrients, bacteria and salt in our water, stormwater remains the principal focus of refined state, federal and local government water quality regulatory requirements. Today's water quality challenges cannot be addressed solely by increasingly more stringent discharge limits applied to our municipal and industrial wastewater treatment plants. It is to address this reality that New Hampshire municipalities increasingly are adopting local stormwater regulations and that the state is exploring new and modified approaches to permitting and funding stormwater controls.

In addition, we may see the U.S. EPA apply a little-used provision of the Clean Water Act to impose permit requirements to new — and existing — stormwater discharges over which EPA did not previously assert jurisdiction. The authority to regulate these additional sources of stormwater runoff is commonly referred to as the residual designation authority, found in §402(p)(2)(E) of the Clean Water Act, and 40 C.F.R. §122.26(a)(9)(i)(C) and (D). These laws allow the EPA to require a federal NPDES (wastewater discharge) permit where EPA determines principally “that the discharge, or category of discharges within a geographic area, contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.”

EPA has not to date asserted residual designation authority in New Hampshire. However, it has been applied to watersheds in Massachusetts, Maine and Vermont. It is quite reasonable to anticipate New Hampshire being next.

What would this mean to developers and land owners in New Hampshire? There are two ramifications: (1) that heretofore unpermitted discharges (from older, smaller commercial developments and other properties) would now require a federal NPDES permit, and (2) that this permit will impose new, more stringent stormwater treatment requirements on the affected property owners.

There are lessons to be learned from how this “re-discovered” federal permitting authority has been applied in all of our neighboring states. We will be wise to stay alert to them.

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