

Stormwater: A soggy new chapter in an endless saga

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Coinciding with a summer of incessant rain is the latest chapter in Vermont's ongoing litigation-driven struggle over stormwater permits. On July 2, the Vermont Agency of Natural Resources ("ANR") announced that owners of 110 properties in a ±10.9 square mile area of South Burlington, Burlington, and Shelburne are required to obtain federal stormwater discharge permits known as "NPDES" permits. Since 1974, ANR has administered the NPDES permit program in Vermont under a delegation of authority from the U.S. Environmental Protection Agency ("EPA"). ANR also administers a state stormwater program designed to control post-construction stormwater discharges from properties with impervious surfaces of greater than one acre.

The affected properties are residential and commercial, and many contain less than one acre of impervious surface. Most are not presently covered by state or federal stormwater permits. ANR was required by the Vermont Environmental Court to designate these properties pursuant to what is called Residual Designation Authority ("RDA") in federal Clean Water Act parlance. Although ANR is still deciding what property owners will need to do, the process will in many cases require the owners to retain engineers to install or retrofit stormwater infrastructure, such as a retention pond, or pay an offset fee. The fix will likely cost each owner thousands of dollars. If an owner fails to apply for a NPDES permit, ANR can bring an enforcement action, with fines of up to \$75,000 for each time it rains or snows. Worse, if ANR fails to enforce, third parties will have the right to bring a suit in federal court to enforce the permit requirement, and can recover their attorneys' fees and costs from the owner.

Explaining how we arrived at this point is complicated. The federal Clean Water Act generally requires a permit for discharges of stormwater from "point sources," meaning any discrete manmade conveyance such as a pipe or drainage ditch. "Stormwater" itself is not well defined in the Act, but over time it has come to be recognized as water from rain and snowmelt that transports sediments and other particles from impervious surfaces into streams, lakes and rivers. Stormwater is considered problematic not only because it transports pollutants, but also because the force or rate of a discharge can cause bank erosion that adversely affects water quality. The Act requires ANR to periodically prepare lists of "impaired" waters – rivers, lakes and streams which are not meeting certain biological and chemical quality standards. Roughly 17 Vermont streams are impaired due to urban stormwater runoff.

Traditionally, NPDES permits were required for two types of stormwater discharges: discharges associated with industrial activity (including construction on more than an acre), and discharges from municipal separate storm sewers ("MS4s"). Industrial discharges must be treated using the best available technology. Discharges from MS4s are treated by balancing financial, environmental and practical considerations to design stormwater infrastructure.

The complicating factor in the framework is the Act's RDA provision. The law states that a permit is required if EPA or a state authority "determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants" to an impaired stream. Until very recently, neither the EPA nor the states had ever used RDA to regulate post-construction stormwater discharges, but regarded the provision as an optional tool in the regulatory toolbox. In June 2003, following nearly four years of litigation over discharges in South Burlington, Conservation Law Foundation ("CLF") and Vermont Natural Resources Council ("VNRC") petitioned ANR to require permits for all discharges located in five stormwater-impaired streams. ANR denied the petition on grounds that it could not be compelled to make RDA designations; further litigation ensued.

During 2007-2008, ANR worked to design customized cleanup plans for the urban watersheds. The plans included maps of every point source in the impaired watersheds that lacked a state or federal stormwater permit, along with a ranking of each discharge's perceived impact on water quality based on a scale of 1 (limited) to 5 (significant). The severity ranking became "Exhibit A" in the litigation, and led the Judge Thomas Durkin of the Vermont Environmental Court to conclude that unregulated stormwater discharges were loading more pollutants into the streams than ANR's remedial efforts were removing. The Court ordered ANR to make RDA designations for all "identified, currently unregulated point source discharges" into the five brooks. ANR was given just under a year to notify the property owners that they would have to obtain NPDES permits.

The overall state of the stormwater program is no less murky than before Judge Durkin's decision. On the positive side, ANR has determined (over CLF's objection) that stormwater from point sources that eventually flow into MS4s in South Burlington and Burlington need not obtain NPDES permits, because those discharges are indirectly covered by the cities' own NPDES permits. (For this reason, ANR designated no properties in the Morehouse Brook watershed for permits.)

On the downside, the owners who received RDA notices are now stuck in a permitting purgatory: even though they are on notice that a permit is required, those owners cannot yet obtain a permit because ANR has not defined the parameters of the program. In addition, ANR has yet to formally explain why and how individual RDA determinations were made. For instance, one condominium in South Burlington may be required to obtain a permit while a neighboring property of similar size may have been left unregulated.

Ultimately, the stormwater problem in Vermont's urban areas is a public problem, but with the costs falling disproportionately on residential and commercial properties constructed at a time when the state's stormwater program was non-existent or in administrative disarray. Perhaps there is only one safe forecast for stormwater in Vermont: there will be more uncertainty before there is less.

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