



# Environmental Compliance

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## New Stormwater Controls Create Fourth Class of Dischargers

**T**he use of a little-known and underused provision in the Clean Water Act is allowing the creation of a fourth class of regulated stormwater discharges in Massachusetts, according to an attorney and an environmental official.

Robert Zimmerman, executive director of the Charles River Watershed Association, told BNA June 24 that the water act's residual designation authority (RDA) under Section 402(p)(2)(E) allows National Pollutant Discharge Elimination System permitting program authorities to extend permitting requirements to any discharge that has been identified as contributing to water quality impairments, thereby creating a fourth category of discharges under the stormwater program. Until now, regulatory programs only have focused on discharges from construction sites, industrial operations, and municipal sewer systems, and Zimmerman said use of RDA can be adapted nationwide within years.

### MS4 Program Burdensome

Until now, Zimmerman noted, discharges from sites with significant impervious surfaces could be regulated only under the municipal separate storm sewer program. That approach is financially burdensome to municipalities, which must treat stormwater without any authority to

impose restrictions on dischargers, he said.

CRWA conducts extensive water quality monitoring along the Charles River watershed and focuses on the science side of water quality issues. Zimmerman said although CRWA studies the Charles River, its problems are representative of surface waters all over the world.

Zimmerman explained CRWA noticed that as areas were being developed, water quality impairments increased. From monitoring results in the mid-1990s, CRWA found a "clear conclusion that urban infrastructure causes our water problems," he said.

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**"There is no Kumbaya effect here."**

— ROBERT ZIMMERMAN,  
CRWA

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As they helped develop a total maximum daily load for the Charles River, CRWA researchers were stunned when they identified the primary source of the river's phosphorus impairment. They expected to confirm the source was fertilizer but instead determined it was paved areas—primarily parking lots and roads where phosphorus is depos-

ited from automobile exhaust and carried in stormwater.

"If we want water for human demands, we need to restore the surface waters and mimic the natural hydrology," he said. "If we shift how we design and build infrastructure, we can better mimic the natural hydrology," he continued. "There is no Kumbaya effect here." Because the issue was not being addressed voluntarily, "CRWA looked for a regulatory hook to start this shift," Zimmerman said in explaining the use of RDA.

To this end, CRWA joined forces with the Conservation Law Foundation and approached the Environmental Protection Agency's Region I office as well as the Massachusetts Department of Environmental Protection.

### EPA Stance Shifted

Zimmerman noted with Massachusetts not being a delegated state, federal EPA's role was critical. He said over the course of four years, EPA shifted its perspective because "the science was compelling."

New state regulations proposed last fall would require any existing or new commercial, industrial, or high-density residential development with more than five acres of impervious surface to obtain an NPDES permit that imposes stormwater controls, such as best management practices.

A similar federal proposal for such development in the Charles River watershed would set the threshold for needing a permit at two acres of impervious surface. Zimmerman said a draft general permit is expected to be released for comment this summer.

Zimmerman said EPA's preliminary determination surrounding three upper Charles River towns—Bellingham, Franklin, and Milford—will serve as a pilot project for the whole watershed.

About 180 properties will need to obtain permits and CRWA wants to determine if the stormwater control efforts are effective and identify any unintended consequences, according to Zimmerman. Results from the pilot can be adapted when RDA is exer-

cised elsewhere in the country, he added.

### **Tools Being Developed**

Zimmerman said CRWA is working to develop tools that will help the regulated community identify those cost-effective BMPs and treatment options that work best with their operations and soil conditions.

Dianne R. Phillips, a lawyer in the Boston office of Holland & Knight LLP, said the regulated community had hoped the proposed state program would be delayed until the results of the upper Charles River pilot project are known. She noted most people think of impervious surfaces only as parking lots. However, the building footprint also must be con-

sidered. She said Massachusetts is home to countless colleges and hospitals that traditionally are sprawling. Her impression is that such institutions have not been active participants in the proposed rulemaking, which will have enormous impacts on their operations.

She added EPA Region I considers stormwater to be the pollutant of the hour and will continue to focus on it, concurring that RDA is creating a fourth class of stormwater discharge. "They have taken care of combined sewer overflows and traditional point sources," which leaves stormwater as the next big issue to address, she said.

BY ELIZABETH R. MANSFIELD