

# Client Alert

March 2015

## Environmental Group Looks to Force EPA to Permit Storm Water Discharges

On February 10, 2015, the Conservation Law Foundation (CLF) sent the US Environmental Protection Agency (EPA) two Notices of Intent to Sue (NOIs) for EPA's alleged failure to require Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) permits for storm water discharges from commercial, industrial, institutional and high-density residential properties with impervious surface of one or more acres in select watersheds in Massachusetts and Rhode Island.

Storm water discharges from impervious surfaces as a class are not prohibited by CWA § 301(a) or regulated through NPDES permits. However, the NPDES regulations give EPA the option to require an NPDES permit in select circumstances for unregulated storm water discharges, if it makes a determination that storm water controls are needed based on waste load allocations (WLA) that are part of total maximum daily loads (TMDLs), or the storm water discharges contribute to a violation of a water quality standard or are a significant contributor of pollutants to waters of the United States. 40 C.F.R. § 122.26(a)(9)(i)(C)-(D).

In the NOIs, CLF argues EPA has a mandatory duty to require NPDES permits because EPA has made the necessary determination as part of the approval of the applicable TMDLs. For example, EPA approved a TMDL for the Charles River in Massachusetts, which found that storm water discharges contribute phosphorous into surface waters, and the TMDL included targeted phosphorus reduction rates according to land uses, such as residential, industrial and agricultural. As a result, CLF argues EPA has made a determination through the TMDL that storm water discharges from impervious surfaces in the watershed contribute to a violation of water quality standards and NPDES permit controls are necessary to implement the TMDL. CLF also alleges EPA has failed to respond to its petition for EPA to exercise its residual designation authority.

CLF's NOIs are in part a reaction to EPA Region 1, 3 and 9's March 2014 responses to the residual designation authority petitions from CLF, Natural Resources Defense Council (NRDC) and American Rivers and EPA's recent decision to not proceed with a national storm water rulemaking. CLF's focus on watersheds in EPA Region 1 is likely because EPA Region 1 neither granted nor denied the residual designation authority petition. The NOIs are also part of a broader national focus by environmental stakeholders to pressure EPA to aggressively regulate storm water discharges under the CWA, as demonstrated by NRDC's recent [petition](#) for a writ of mandamus in the US Court of Appeals for the Ninth Circuit.

Any action by EPA to grant CLF's petition or any resulting litigation associated with EPA's residual designation authority has the potential to set a precedent for how storm water discharges from impervious surfaces may be addressed in other watersheds throughout the US. Hunton & Williams LLP will continue to monitor the CLF NOIs and other storm water matters under the CWA.

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