

## EPA Region 1 Doubles Down on Unprecedented Effort to Require Stormwater Permits for an Expansive Range of Formerly Unregulated Properties



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### Key Takeaways

**What Is Happening?** On October 31, 2024, the U.S. Environmental Protection Agency (EPA) Region 1 [provided notice](#) of two proposed actions pursuant to its “residual designation authority” (RDA) under the Clean Water Act (CWA) that would broadly regulate stormwater discharges from thousands of previously unregulated properties across Massachusetts. First, EPA re-issued a [Preliminary Designation](#), which was [initially published](#) in 2022, of stormwater discharges from certain private commercial, industrial, and institutional (CII) properties for regulation under the National Pollutant Discharge Elimination System (NPDES) permitting program. Second, EPA published a [draft General Permit](#) for these CII properties. As Beveridge & Diamond [reported in 2022](#), and remains true today, this is the first time EPA (or any authorized state) has attempted to exercise RDA on such a broad geographic scale and for such a wide variety of sources.

**Who Is Affected?** In the near term, the Preliminary Designation and draft General Permit will impact most [CII properties](#) with one acre or more of impervious surfaces—such as golf courses and private schools—located in Massachusetts’ Charles, Neponset, and Mystic River watersheds. Dischargers will not need to apply for an individual permit under the NPDES Program. Once EPA issues a final General Permit, dischargers must secure coverage by submitting a Notice of Intent (NOI) and receiving authorization to discharge by a certain date. See [Draft General Permit § 1.10](#) (NOI timeframes). If finalized and allowed to stand, these actions could, in the longer term, provide a roadmap for other EPA regions and states to use RDA to sweep into the NPDES program a wide variety of formerly unregulated sources on a broad, categorical scale.

**What Should I Do?** Facility owners, operators, and related trade associations potentially affected by this action’s long- and short-term effect should consider submitting public comments on the 2024 Preliminary Designation and draft General Permit for CII properties. Written public comments are due January 29, 2025, and may be [submitted online](#). Members of the public should consider presenting comments on the legality of and factual support for the agency’s residual designation decision and any other aspect of the designation and/or draft permit they consider problematic. This is especially true for entities wishing to preserve their right to challenge EPA’s final actions on the residual designation and permit. In addition, EPA will hold two informational public meetings on January 7, 2025, and January 9, 2025, and two formal

public hearings on January 22, 2025, and January 23, 2025. Those interested in attending or speaking at these public events must [register online](#).

## Background

Residual Designation Authority, or “RDA,” is a rarely used provision of the CWA that empowers EPA and states with authorized permitting programs to require NPDES permits for otherwise unregulated sources of stormwater where EPA or the authorized state determines the discharge (1) “contributes to a violation of a water quality standard” or (2) “is a significant contributor of pollutants to waters of the United States.” 33 U.S.C. § 1342(p)(2); 40 C.F.R. 122.26(a)(1)(v); 40 C.F.R. 122.26(a)(9)(i)(D). EPA’s implementing regulations purport to go a step further than the CWA, providing that EPA and authorized states may also exercise RDA where “stormwater controls are needed for the discharge based on waste load allocations that are part of total maximum daily loads (TMDLs) that address the pollutants of concern.” 40 C.F.R. 122.26(a)(9)(i)(C).

A recent onslaught of rulemaking petitions and litigation is responsible for bringing this historically dormant provision of the CWA to life as a potential vehicle for expanding the universe of stormwater discharges regulated under the NPDES program. The Conservation Law Foundation and the Charles River Watershed Association filed such a petition in 2019, demanding that EPA regulate stormwater discharges in the Charles River watershed. Subsequent petitions in 2020 extended this request to the Mystic and Neponset River watersheds, citing high nutrient and bacteria loads from stormwater runoff.

In response to these petitions, EPA exercised its RDA and issued a Preliminary Designation for regulating CII properties with one acre or more of impervious surface in the Charles, Mystic, and Neponset River watersheds. The designation would potentially bring thousands of properties under NPDES permitting requirements.

## 2024 Preliminary Designation

EPA maintains that the [2024 Preliminary Designation](#) does not change the scope of its 2022 determination. Instead, the designation provides notice of additional supporting data and a clarifying statement regarding mixed use parcels. Since the 2022 Preliminary Designation, EPA conducted more [parcel-level analyses](#) of pollutant discharges, such as nitrogen and phosphorus, in the Charles, Neponset, and Mystic River watersheds. EPA’s studies indicate that stormwater is the leading cause of water quality issues across all three watershed areas.

This designation still covers CII properties with one acre or more of impervious cover that discharge stormwater through private sewer systems or a Municipal Separate Storm Sewer System (MS4) into the river watersheds or their streams and tributaries. EPA seeks to clarify that mixed-use parcels—parcels with both residential and commercial land uses—are included in EPA’s CII categorization. A full list of communities in which CII properties may be impacted by this designation can be found in Attachment 1 of the [Preliminary Designation](#) and includes:

- Shopping centers;
- Industrial facilities not currently required to hold NPDES stormwater permits, such as many pharmaceutical, telecommunication, and semiconductor manufacturing operations;
- Administrative office areas, employee parking lots, and other non-industrial portions of currently regulated industrial facilities (other portions of which are currently required to hold NPDES stormwater permits);

- Airports (landside runoff);
- Hospital and other health care facilities (except those that are currently nontraditional MS4 permittees);
- Colleges, universities, and community colleges (except those that are currently nontraditional MS4 permittees);
- Public schools (except those that are currently nontraditional MS4 permittees);
- Automobile race tracks; and
- Utility-scale solar sites.

## The Draft General Permit

EPA's draft General Permit would authorize certain stormwater discharges by CII properties so long as they comply with the permit's technology-based effluent limitations (TBELs) and water quality-based effluent limitations (WQBELs). The draft General Permit aims to reduce phosphorus, nitrogen, and bacteria in the watershed areas. The permit uses phosphorus as an indicator of all regulated pollutants.

To comply with the General Permit's TBELs, permittees will need to implement "[Best Management Practices](#)" (BMPs). The key BMPs are stormwater training and on-site chemical application management. See [Draft General Permit § 2.2](#) (BMPs Requirements). Permittees will be required to develop and implement an Onsite Chemical Application Management Plan (OCAMP) for properties within three years of their authorization date. OCAMPs must address landscaping activities at the site, such as establishing erosion control and on-site trash management procedures and complying with state regulations related to plant nutrients for agricultural and non-agricultural turf and lawns. Moreover, OCAMPs must include a winter maintenance plan that aims to reduce the amount of chloride used to de-ice the property. See [Draft General Permit § 2.2.1.A-B](#). In addition to OCAMPs, EPA's draft General Permit requires permittees to participate in two trainings per year on stormwater topics, including, but not limited to, lawn maintenance, use and storage of salt or de-icing chemicals, proper management of parking lot surfaces, etc. See [Draft General Permit § 2.2.2.A](#).

Permittees must also comply with the draft General Permit's WQBELs, which require permittees to reduce phosphorus from their CII sites by specific percentages based on the watershed discharged into. Permittees must reduce phosphorus by 65% in the Charles River Watershed, 62% in the Mystic River Watershed, and 60% in the Neponset River Watershed. Permittees must develop, implement, and maintain a Stormwater Pollution Control Plan (SPCP) that highlights selected stormwater control measures to reduce phosphorus discharges accordingly. See [Draft General Permit § 2.1.1](#) (SPCP Requirements).

The draft General Permit offers pathways for permittees to comply with phosphorus reductions through an SPCP. See [Draft General Permit § 2.1.1.C](#). (Pathways to Compliance). Permittees may implement either on-site or off-site reduction practices. The draft General Permit lists three ways permittees may reduce phosphorus pollutants off-site, subject to certain conditions. For example, permittees may (i) create a regional agreement to fund a stormwater control project within the watershed, (ii) enter an agreement to fund or purchase pollution reduction credits from existing stormwater control projects within the watershed, or (iii) enter an agreement to fund a new stormwater management control project, including operations and maintenance of the project. Permittees are expected to submit annual reports to EPA summarizing their activities and progress toward achieving phosphorus reduction targets.

## Potential Issues with EPA's Proposed Actions & Opportunities for Comment

The public comment period, which runs through January 29, 2025, provides the regulated community an opportunity to weigh in on multiple aspects of EPA's proposed actions. Comments can address the validity and scope of the agency's decision to require NPDES permits for stormwater discharges from CII properties, as well as the terms of the draft General Permit. Commenting on these actions is a prerequisite to challenging them in federal court, and the substance of comments submitted may play a substantial role in how the incoming Trump administration acts on these two proposals.

Many comments can and should focus on whether EPA's broad, categorical residual designation decision is consistent with the law and supported by the record. The CWA suggests that EPA cannot exercise its residual designation as to broad categories of properties across multiple large geographic regions, as EPA is attempting to do here. The agency's factual and technical justification for the designation are also potentially suspect; EPA appears to have relied primarily on tax parcel data and estimates rather than discharge quality data for specific parcels or facilities.

The draft General Permit also presents multiple issues likely to merit comment. Among other things, the draft permit purports to give some CII properties as long as 24 months to file an NOI, potentially leaving these sources exposed to enforcement during those two years. The draft General Permit's complex requirements, including those for SPCPs, may also prove overly burdensome and difficult to meet for large numbers of properties.

EPA also requested feedback on the following topics that may warrant comment:

- **Owners and Operators:** EPA seeks comment on whether the General Permit "should regulate the operator with control over a site instead of the owner, including sites where multiple operators may be tenants of a site (e.g., a shopping plaza with one owner and multiple tenants)." However, EPA's CWA regulations already provide that "[w]hen a facility or activity is owned by one person but is operated by another person, it is the *operator's* duty to obtain a permit." 40 C.F.R. 122.21(b) (emphasis added).
- **Non-Contiguous Properties:** EPA seeks feedback on how the permitting process should "work for owners with multiple properties that are non-contiguous." For example, EPA suggests requiring either separate NOIs and authorization for each non-contiguous parcel or a combined NOI and authorization for all non-contiguous parcels.
- **Inclusion of Multi-family Properties:** EPA seeks comment on whether to include large multi-family residential properties (i.e. privately-owned housing with five or more units) in its final designation and final General Permit because residential properties are the dominant form of land use in the watershed areas.
- **Compliance Schedule:** The draft General Permit proposes a compliance schedule that allows up to 12 years for permittees to meet the phosphorus reduction requirements, with interim deadlines for developing and implementing an SPCP. The schedule is designed to allow Permittees to find funding, gather resources, and plan effectively. EPA seeks comment as to whether stakeholders agree that its compliance schedule is adequate and reasonable.
- **Impacts on Historical Properties:** Under the draft General Permit, permittees are required to certify that their discharges and related activities will not affect historic properties or that they

have obtained agreements to mitigate any adverse effects. EPA has proposed the [criteria](#) permittees must use to evaluate the impact of their properties. EPA seeks public comment on the General Permit's potential impacts on historic properties in Massachusetts.

## Broad Implications

Whether EPA's exercise of its RDA is legally sound is dubious and may be challenged during the public comment period. EPA's actions may be subject to further evaluation by the upcoming Trump administration. Moreover, Region 1's attempt to dictate the appropriate path for administrative and judicial review of this action bears examination.

EPA Region 1's proposed exercise of RDA, if successful, could become a roadmap for more EPA regions (and authorized states) to expand NPDES permitting to additional sources. [EPA Region 9](#), for example, recently engaged in a similar controversial RDA exercise for a smaller group of CII facilities across two watersheds in Los Angeles County. Concurrently, the Los Angeles Regional Water Quality Control Board (Regional Water Board) prepared and took comment on a proposed General Permit for CII properties. EPA Region 9 published its [Final Designation](#) of those CII facilities in the Federal Register on November 20, 2024, and the Regional Water Board is expected to finalize the CII General Permit soon. Region 9's designation will likely impact fewer total properties overall than Region 1's proposed designation. However, much like Region 1's proposal, EPA Region 9's attempt to exercise its RDA to require stormwater permits on such a broad scale rests on questionable legal and factual footing. For more information, see [Beveridge & Diamond's concurrent assessment](#).

Facility owners, operators, and related trade associations affected directly and indirectly by EPA Region 1's exercise of RDA and the draft General Permit should consider submitting public comments. The new administration's [anticipated day-one freeze](#) will likely impact Region 1's proposals because they are not slated to become final before the new administration takes office. Strong public comments would help create a defensible record that would allow the incoming administration to walk back Region 1's proposed actions. If EPA proceeds with finalizing both actions, it will issue a final decision and publish the notice of availability of the decision in the Federal Register after the comment period closes. Impacted parties that submitted public comments will then have the option of challenging (or intervening in challenges to) EPA's residual designation and the issuance of the general permit in federal court on the grounds they raised during the public comment process. Alternatively, impacted parties can look for opportunities to support legal challenges as amici curiae.

Currently, unregulated stormwater dischargers in other locations will also want to be on alert for similar petitions requesting designations and agency-generated exercises of RDA in their jurisdictions.

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