

Appendix A Regulatory Hammer

To: File
From: Paul Nicklas, Assistant City Solicitor
Date: December 28, 2009
Re: The Regulatory Hammer: Residual Designation

Long Creek is an urban impaired stream located in and around South Portland near the Maine Mall. For several years, Long Creek has been the focus of a restoration effort by area businesses and municipalities.

Perhaps feeling that the effort was not moving quickly enough, the Conservation Law Foundation, a New England-based environmental organization, petitioned the EPA to exercise its residual designation authority. According to federal regulations, residual designation authority allows the EPA or DEP to require NPDES permits if stormwater is contributing to a water quality standard violation or is causing significant pollution. Any person can petition for residual designation; there is no need to live near the water body in question or to claim some sort of injury, so residual designation may be more attractive to someone wishing to force water quality improvements than filing a case in court. EPA made a preliminary designation in December 2008 and final designation in October 2009, requiring properties with more than an acre of impervious surface to obtain a stormwater permit.

Residual designation, while potentially an effective means of improving a stream's water quality, is a clumsy tool. Requiring each property owner to obtain their own permit is a bureaucratic burden, both for the owner and for Maine's Department of Environmental Protection, the administering authority. Compliance with the permit is based on how much discharge occurs, which may or may not be a good approximation of the health of the stream. All affected property owners are required to obtain a permit, even if this results in more treatment than is necessary, so there is little opportunity for adaptive management. Opportunities for collaboration are diminished; it may be more cost-effective and beneficial for the stream to have one property do more than its share of stormwater control and another do less. For both economic and water quality reasons, then, a collaborative approach has advantages over individual permits.

Those working on Long Creek have recognized the benefits of a collaborative approach. As implemented, residual designation has given the owner of a property in the Long Creek watershed two options: the owner can join with other property owners in getting a general permit, which means signing on to the watershed management plan; or the owner can choose to apply for an individual permit, which would require bringing the property up to current Chapter 500 standards within two to five years, depending on the size of the property. In essence, many Long Creek property owners must choose between the watershed management plan and rapid implementation of Chapter 500-grade retrofits.

A similar choice will probably confront Bangor property owners should residual designation happen here. The likelihood of residual designation affecting Bangor property owners cannot be determined, but is almost certainly related to the progress made on implementing watershed management plans for the Penjajawoc and other Bangor streams. Should an environmental organization or interested individual feel Bangor is not making sufficient progress, residual designation becomes more likely.