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Emerging water rights issues in Massachusetts

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Earlier this year, Massachusetts endured record-breaking rainstorms that caused massive flood damage and disrupted the economy. Soon after, a catastrophic pipeline failure left two million people without drinkable tap water for several days. These historic events added urgency to debates over water rights in Massachusetts, which already were intensely underway.

In January, a lawsuit reached the state's highest court regarding conservation requirements imposed by the Massachusetts Department of Environmental Protection (MassDEP). The court found that the current statutory regime prohibited such requirements, when imposed on "grandfathered" water uses (i.e., those in place in 1985). The court concluded that MassDEP must issue related regulations before it can impinge upon "grandfathered" water rights.

Another recent case involved conservation-related conditions that MassDEP sought to impose on "permitted" water uses (i.e., those not in place in 1985). The appeals court found that the conditions were legally permissible, but needed to be tied to a definition of "safe yield." The court then remanded the matter to MassDEP to update that definition. Toward that end, MassDEP has initiated a statewide effort to achieve "sustainable" use of water resources, seeking to reach consensus with input from an array of stakeholders.

Large users of water should not assume that their existing rights will remain unabated in the coming years. Conservation requirements or other limits may be imposed in the interest of "sustainability." Large water users also should be aware of other potential pitfalls should they seek alternative supplies. The town of Framingham, for example, recently faced fierce opposition when it sought to reactivate old supply wells to replace water it had been receiving from the Metropolitan Water Resource Authority (MWRA) regional supply system. The opposition came not only from other MWRA customers who claimed they would be stuck with a higher bill, but also from environmental groups who claimed that reactivating the old wells would affect nearby surface waters and fish populations.

Legal and regulatory developments involving water rights in Massachusetts are occurring quickly. Entities that rely on large amounts of water – municipalities, energy producers, golf courses, cranberry growers, bottling companies, etc. – should monitor these developments and be aware of their potential impacts.

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