
Environmental Groups Petition EPA to Regulate Stormwater Discharges

2013-07-16

On July 10, 2013, a group of environmental organizations (including American Rivers, Conservation Law Foundation (CLF) and Natural Resources Defense Council) petitioned the US Environmental Protection Agency (EPA) to impose sweeping stormwater permit requirements on commercial, industrial and institutional sites in EPA Region 1 (New England), 3 (Mid-Atlantic) and 9 (Pacific Southwest).

The petitions assert that EPA must exercise its “Residual Designation Authority” (RDA) under Section 402 of the Clean Water Act, which establishes the National Pollutant Discharge Elimination System (NPDES), because the sites are contributing to violations of water quality standards.

The environmental groups brought their petitions under 40 CFR 122.26(f)(2), which states that “any person may petition [EPA] to require a NPDES permit for a discharge which is composed entirely of storm water which contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.”

CLF has had varying success in the past prompting agencies to act based on RDA. A 2003 petition was initially denied by the Vermont Agency of Natural Resources (the state NPDES permitting authority), but after that decision was overruled by the courts, more than 80 “designated discharges” to five Vermont “brooks” became subject to permitting requirements. In 2008, CLF asked EPA Region 1 to designate certain stormwater discharges into Long Creek, near Portland, Maine, as requiring NPDES permits. EPA granted CLF’s petition, leading to the issuance of a general permit regulating over 100 properties with more than one acre of impervious area. And in 2009, CLF petitioned EPA Region 1 to require permit coverage for all private commercial, industrial, institutional and high-density residential properties with large impervious areas in the upper Charles River watershed in Massachusetts. EPA eventually issued a draft general permit, but after receiving numerous public comments highlighting the high cost of compliance, EPA appears to have put that permit on hold.

Who Could Be Affected

Last week's petitions are much broader than CLF's past efforts. The environmental groups now are asking EPA to regulate all non-*de minimis* point source stormwater discharges from commercial, industrial and institutional sites that are not currently subject to Clean Water Act permitting requirements and are within impaired watersheds in EPA Region 1, 3 and 9. Such sites may include:

- malls, shopping centers, strip commercial areas, neighborhood stores, office buildings, hotels, gas stations, restaurants, parking lots and garages, mixed use developments, and other businesses, including associated yards and parking areas;
- buildings, equipment, and parking areas associated with light or heavy industry; and
- schools, colleges, hospitals, museums, prisons, town halls or court houses, police and fire stations, including parking lots, dormitories and university housing.

The petitions claim that an “extensive dataset” shows that these sites have large pollutant concentrations and loadings, causing thousands of water bodies to be impaired.

Next Steps

EPA has 90 days (i.e., until October 8, 2013) to grant or deny the petitions. Interested parties should consider whether to submit comments to EPA supporting or opposing the petitions. If EPA grants the petitions, it likely would initiate a permitting process that would involve opportunities for public comment. Denial of the petitions likely would be considered to be a “final agency action,” subject to judicial review.

Authors



Robert C. Kirsch
SENIOR COUNSEL

✉ rob.kirsch@wilmerhale.com

☎ +1 617 526 6779



H. David Gold
SPECIAL COUNSEL

✉ david.gold@wilmerhale.com

☎ +1 617 526 6425