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PERSPECTIVES

U.S. EPA's First Usage of Clean Water Act Residual Designation Authority & Environmental Justice

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KEY HIGHLIGHTS

In September 2022, the U.S. Environmental Protection Agency (EPA) Region 1 issued a decision to use its Clean Water Act (CWA) Residual Designation Authority (RDA) to require National Pollution Discharge Elimination System (NPDES) permits for previously unregulated commercial, industrial, and institutional (CII) sources in three Massachusetts watersheds. Parties directly affected by this decision are non-exempted CII properties with impervious surfaces of one acre or larger in eastern Massachusetts. This article highlights the EPA's first use of RDA designations as a method for addressing environmental justice concerns and discusses how this decision could expand into other jurisdictions.

Why is this important?

This is the first time the EPA has used RDA to require stormwater permitting for a geographic region, and it could be a precursor to the EPA using RDA to target environmental justice concerns. The new requirement impacts many different facilities: private schools, including universities; solar sites; shopping centers; industrial facilities such as manufacturing plants; hospitals; and airports.

BACKGROUND

RDA is a "catch-all" authority in the CWA Section 402 that allows the EPA—and states with delegated permitting programs—to require NPDES permits for stormwater sources that would otherwise be unregulated, provided that the discharge or category of discharges within a geographic area "contributes to a violation of a water quality standard" or "is a significant contributor of pollutants to waters of the United States."[1] The EPA and delegated states also have RDA authority where "stormwater controls are needed for the discharge based on wasteload allocations that are part of total maximum daily loads (TMDLs) that address the pollutants of concern."[2] When creating these regulations, "… EPA explained that it 'intend[ed] that the NPDES permitting authority have discretion in the matter of designations based on TMDLs.' 64 Fed. Reg. at 68,781. That discretion

EPA's Positioning

On the eve of the 50th anniversary of the Clean Water Act, EPA is taking strong, decisive action to ensure that all our citizens have access to local waterways that support enjoyment and recreation. It is clear that the nature and scale of the problem requires urgent action on this pressing environmental justice concern. With a warming climate there is no time to waste to reduce bacterial and nutrient pollution in stormwater and the resulting water quality degradation including harmful algae blooms experienced yearly in all three watersheds.

-- EPA New England Regional Administrator David W. Cash

David Deegan, *EPA Implements Advanced Effort to Protect Water Quality in Three Boston-area River Watersheds,* EPA (Sept. 14, 2022), available at https://www.epa.gov/newsreleases/epa-implements-advanced-effort-protect-water-quality-three-boston-area-river.

[1] 33 U.S.C. § 1342(p)(2)(E); 40 CFR 122.26(a)(9)(i)(D).
[2] 40 CFR 122.26(a)(9)(i)(C).

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allows the EPA (or a State) to address 'individual instances of storm water discharge' that 'might warrant special regulatory attention, but do not fall neatly into a discrete, predetermined category.' *Id.*"[3]

In May of 2022, the EPA published *EPA Legal Tools to Advance Environmental Justice* and suggested RDA designations as a method for addressing environmental justice concerns.[4] Region 1 appeared to take this advice. In its decision, the EPA explained that it is making an RDA determination now because of the "urgent need" to regulate stormwater discharges in highly populated areas, and that it "must act expeditiously" because these watersheds include communities with environmental justice concerns.[5]

While the EPA has had the legal ability to exercise RDA for decades, the EPA claims that the September 2022 decision is the first time it "has exercised its residual designation authority under the Clean Water Act on such a broad scale to address watersheds in a major urban area."[6,7] Throughout the 2010s, the EPA received several petitions from nonprofits to use its RDA to regulate stormwater discharges in multiple EPA Regions. Until now, the EPA declined to make such designations, reasoning that there were insufficient links between stormwater discharges and water quality.[8]

KEY POINT: The September decision is the first time EPA has exercised its residual designation authority under the Clean Water Act on such a broad scale to address watersheds in a major urban area.

Deegan, *supra* at note 1.

THE DETERMINATION

Petitions filed by nongovernmental organizations alleged that "urban stormwater discharges from non-permitted urban commercial, industrial, and high-density residential areas with high levels of impervious surface 'are a primary cause of' or 'significant contributor to' ongoing water quality standards violations in the respective Massachusetts bodies of water and therefore should be designated and subjected to NPDES permitting."[9] In its decision, Region 1 defined "impervious surface" as "any surface that prevents or significantly impedes the infiltration of water into the underlying soil." This can include but is not limited to roads, driveways, parking areas and other areas made of non-porous material; buildings; rooftops; structures; artificial turf; and compacted gravel or soil.[10]

In reaching its conclusion to finally exercise RDA over stormwater discharges, the EPA found that:

1. State findings of "impaired waters" under CWA Section 303 allowed the EPA to exercise RDA. Recent studies showed continued widespread impairments to water quality in all three watersheds caused by nutrients and bacteria.[11] The Massachusetts Department of Environmental Protection (MassDEP) developed TMDLs to address these impairments, triggering RDA.[12]

[3] *Clean Water Act Residual Designation Determination for Certain Stormwater Discharges in the Charles, Mystic, and Neponset River Watersheds, in Massachusetts* ("Determination") (Sept. 14, 2022) at p. 4, available at https://www.epa.gov/system/files/documents/2022-09/epa-r1-rda-determination-charles-mystic-neponset-2022-combine-signed.pdf
[4] EPA Legal Tools to Advance Environmental Justice, EPA (May 2022) available at https://www.epa.gov/system/files/documents/2022-05/EJ%20Legal%20Tools%20May%202022%20FINAL.pdf
[5] Determination at pp. 18-19.
[6] Deegan, *supra* at note 1.
[7] EPA, *Commercial, Industrial, & Institutional Sites Residual Designation*, available at https://www.epa.gov/npdes-permits/commercial-industrial-institutional-sites-residual-designation
[8] EPA, *EPA's Residual Designation Authority*, available at https://www.epa.gov/npdes/epas-residual-designation-authority
[9] Determination p. 2.
[10] Determination, footnote 2
[11] Determination at p. 18.
[12] 40 CFR 122.26(a)(9)(i)(C).

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2. Stormwater controls were necessary to meet state water quality standards. Recent studies in all three watersheds indicate that stormwater was the leading cause of water quality issues.[13] The EPA concluded from these studies that MassDEP's water quality standards could only be met by implementing stormwater controls for previously unregulated CII sources.[14]

3. CII sources with one acre or more of impervious surfaces were the proper targets for RDA designation in this case. The EPA found that the size of impervious surface area is the most determinative factor for RDA designation. The amount of impervious surface on a property increases the volume of stormwater that could be discharged from the property if un-mitigated, which increases the unloading of pollutants. The data the EPA relied upon in the decision shows that impervious surfaces can deliver up to ten times more annual load of phosphorus and nitrogen via stormwater than pervious surfaces. Accordingly, the EPA's designation focuses on the amount of impervious surface contained on a parcel, rather than the total size of the parcel.[15]

Source: MassGIS

Figure 1 *- The three watersheds impacted by EPA's designation.*

The EPA decided to include CII sources in this designation and to exclude residential properties because CIIs discharge pollutants at six times the level of residential parcels.[16] The EPA also expressly excluded CII sources that discharge to Municipal Separate Storm Sewer Systems (MS4) under certain existing permits. The EPA reasoned that the existing permits adequately control pollutant discharges. The EPA's decision is expressly designed to allow MS4 permit holders to focus efforts on residential properties in their communities as they see fit to meet MS4 permit obligations.[17]

As far as implementation, the EPA plans to issue general permits specifying the pollution reduction activities that affected property owners must take. Privately owned CII properties with impervious ground of one acre or larger will need to seek coverage under one of these permits (or an individual permit if they prefer) and take the actions specified in their permit.[18] The new permits will likely include common "Best Management Practices" (BMPs) – "including leaf litter pickup, parking lot sweeping, installing rain gardens or other infiltration practices, planting trees, reducing pavement or utilizing pervious pavement – to reduce stormwater discharges into waterways and increase infiltration of stormwater back into the earth."[19] CII parcels that could be impacted by the decision include: private schools, including universities; solar sites; shopping centers; industrial facilities such as manufacturing plants; hospitals; and airports.[20]

FUTURE IMPACTS OF RDA AND USES AS A TOOL FOR ENVIRONMENTAL JUSTICE

With the EPA's official internal guidance to use RDA as a legal tool to further environmental justice, as well as the Region 1 Administrator's statements on the importance of this RDA determination for the future of pollution control, it appears likely that the EPA will start using RDA to regulate discharges

[13] *Determination at p. 18.*
[14] Determination at p. 18.
[15] Determination at p. 26.
[16] Determination at p. 25.
[17] Determination at p. 25.
[18] Deegan, *supra* at note 1.
[19] Id.
[20] Richard Davis, Erika Spanton, and Julia Li, *EPA Region 1 Expands NPDES Stormwater Permitting Requirement to Sites Across Three Massachusetts Watersheds*, BEVERAGE & DIAMOND (Nov. 1, 2022), available at https://www.bdlaw.com/publications/epa-region-1-expands-npdes-stormwater-permitting-requirement-to-sites-across-three-massachusetts-watersheds/

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that were previously unregulated.[21] While it is clear that the Region 1 Administrator is not hesitant to use this authority, other EPA Regions or permitting states may follow suit as well. In fact, Region 9 has recently taken public comments regarding its proposed action to exercise RDA over two Los Angeles County watersheds.[22]

Notably, anyone can petition a Regional Administrator or state equivalent to exercise RDA and require an NPDES permit for a storm water discharge that contributes to a water quality impairment.[23] Because of this, nongovernmental organizations are often the parties submitting these petitions.

Private Property Impacts

Privately owned CCI properties with impervious ground of one acre or larger will need to be permitted and take the actions specified in their permit.

Next Target?

Los Angeles appears to be positioned as the next target for RDA application to protect communities with environmental justice concerns.

According to the Massachusetts decision, the RDA determination serves as an affirmative action by the EPA to protect communities with environmental justice concerns that have historically been unprotected by existing stormwater regulations. The EPA reasoned that this decision promoted environmental justice because studies found that environmental justice communities are more concentrated in the most polluted parts of the Massachusetts watersheds at issue.[24]

The EPA explained it is time to turn its focus on previously unregulated stormwater discharges. The priorities for the past three decades focused on wastewater treatment plant upgrades and CSO reductions to remove the largest sources of nutrients and bacteria in each watershed. As these projects finish, "energy and resources are now focused on the remaining sources of nutrients and bacteria that continue to degrade water quality in each watershed, including stormwater discharges that are not currently regulated."[25]

[21] *See Deegan, supra* at note 1; *see also* EPA Legal Tools to Advance Environmental Justice, *supra* at note 8.
[22] EPA, *Public Notice: Preliminary Residual Designation to Address Stormwater Discharges in two Los Angeles County Watersheds* (July 26, 2022), available at https://www.epa.gov/publicnotices/preliminary-residual-designation-address-stormwater-discharges-two-los-angeles-county
[23] 40 C.F.R. § 122.26(f)(2).
[24] Determination at p. 20.
[25] Determination at p. 18.

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CONCLUSION

The Massachusetts decisions clearly forecast that the EPA is open to using RDA in the future to promote EJ and address the effects of climate change as well as flooding, which the determination stated can be aggravated by large impervious areas.[26] Los Angeles may be next. Other high density urban areas are likely to follow. For facilities located with an area subject to the requirements of RDA, planning and mitigation steps will be necessary.

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[26] Deegan, *supra a*t note 1.

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