

## EPA FACING LEGAL ACTION FROM NRDC AND OTHERS OVER REFUSAL TO EXTEND NPDES PERMIT REQUIREMENTS

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The National Resources Defense Council (NRDC), in concert with other environmental organizations in California and Maryland (collectively "NRDC"), recently filed two lawsuits against the Environmental Protection Agency (EPA) in the Fourth and Ninth Circuits, asking the courts to review and set aside the EPA's denial of two petitions to require privately-owned commercial, institutional, and industrial (CII) sites to obtain Clean Water Act (CWA) permits. Specifically, the lawsuits allege that the agency violated its legal obligations by refusing to require National Pollutant Discharge Elimination System (NPDES) permits for sites that are not currently subject to NPDES stormwater requirements but which allow contaminated stormwater runoff into two local "impaired" watersheds. See *Blue Water Baltimore Inc. v. Scott Pruitt*, Case No. 17-1258 (4th Cir. 2017), filed February 28, 2017; and, *Los Angeles Waterkeeper et al. v. Scott Pruitt et al.*, Case No. 17-70570 (9th Cir. 2017), filed February 27, 2017.

According to the NRDC, high levels of pollution in the watersheds in question – the Dominguez Channel and Los Cerritos Channel in Los Angeles and the Back River in Baltimore – are the direct result of stormwater runoff from CII sites in the area. Although the EPA determined in its denial of NRDC's petitions that other current state and federal mitigation efforts in the areas are sufficient, the NRDC's lawsuits allege that more can, and should, be done (despite the fact that the sites are already regulated by the states or otherwise). The EPA reasoned that current mitigation efforts are sufficient because they are based upon multiple phases of studies undertaken by the EPA at the direction of Congress, and in California include water quality monitoring programs and adaptive management programs designed to allow for modification or addition of controls as necessary. The NRDC is alleging that the EPA has fallen short of its regulatory obligations, however, by refusing to exercise its "residual designation authority" under the CWA to impose NPDES permitting requirements for the affected areas.

### **Regulatory Background**

In 1987, Congress amended Section 402 of the CWA and established a phased approach to regulating discharges “composed entirely of stormwater,” requiring some, but not all, point source discharges of stormwater to be regulated. In the first phase, Congress required NPDES permits for discharges associated with industrial activity, as well as stormwater discharges from municipal separate storm sewer systems (MS4s) serving a population greater than 100,000. Phase 1 regulations allowed any person to petition the EPA to require an NPDES permit for a stormwater discharge that contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States. In Phase 2, EPA completed studies to determine additional stormwater discharges to be regulated. Any such designated discharges were not necessarily required to be regulated through NPDES permits; rather, EPA only was required to establish a comprehensive program to regulate such designated sources. EPA ultimately designated and required NPDES permits for two additional sources—certain small MS4s and small construction sites (1-5 acres). The Phase 2 regulations, however, also gave EPA authority to designate additional stormwater discharges for NPDES permit coverage (“residual designated authority”) to allow designation of a category of discharges that contribute to a violation of water quality standards or significantly contribute pollutants to waters of the United States.

## The EPA’s Authority Under the Clean Water Act

Accordingly, while the [Clean Water Act](#) imposes obligations for businesses that discharge contaminants into protected waterways (including contaminants transported by stormwater), it also imposes certain potential obligations on the EPA. These obligations include a duty, under certain circumstances, to use its residual designated authority to establish NPDES permitting requirements for entities that discharge contaminated stormwater contributing to unacceptable levels of water quality. This authority allows the EPA to require discharge permits on a case-by-case basis where:

- A discharge contributes to a violation of applicable water quality standards;
- A discharge significantly contributes to the pollution of federally-protected surface waters; or,
- A discharge requires additional controls to comply with total maximum daily load (TMDL) requirements for the pollutants discharged.

NRDC’s lawsuits allege that such requirements are met for the watersheds at issue here. Whether the EPA has failed to meet its obligations under the CWA by refusing to submit to the NRDC’s requests to designate CII sites as requiring NPDES permits remains to be seen, and our California environmental regulatory lawyers will be monitoring the two cases, *Blue Water Baltimore Inc. v. Scott Pruitt* and *Los Angeles Waterkeeper et al. v. Scott Pruitt et al.*, as they progress in the Fourth and Ninth Circuits, respectively. NRDC acknowledges that the appellate courts may not be the proper forum to initiate these suits; however, due to the “jurisdictional badminton” caused by the CWA’s bifurcated judicial review, NRDC has filed these lawsuits in an abundance of caution. NRDC believes the challenge to EPA’s petition denials belongs in district court and, accordingly, has sent EPA required 60-day notices of its intent to bring suit in district court, and will do just that at the end of the 60-day period.

If the NRDC’s lawsuits are successful, businesses categorized as commercial, institutional, and industrial sites that are not currently subject to NPDES permitting requirements need to be aware about the possibility of being subject to the NPDES regulatory scheme in their respective states (some states, such as California, have been delegated authority from EPA to implement their own NPDES rules). Such regulations likely require different, and possibly more stringent, obligations upon businesses than they currently are complying with now.