



# **CLEAN WATER ACT - SIGNIFICANT RECENT DEVELOPMENTS**

**Patrick G. Rowe**

**Oregon State Bar Association Environmental and Natural Resource Section  
Environmental Law Year in Review – October 11, 2013**

**Mingo Logan Coal, Co. v.  
Environmental Protection Agency  
714 F.3d 608 (D.C. Cir. 2013)**

# Issue

- Can EPA withdraw/veto a Section 404 dredge and fill permit after it is issued by the U.S. Army Corps of Engineers?

# Rule

- CWA Section 404(c) - grants EPA power to prohibit or restrict a 404 dredge and fill permit if the discharge would have an “unacceptable adverse effect” on certain environmental resources.

# Facts

- Mingo Logan owns and operates a mountaintop coal mine in West Virginia.
- 1999 - Mingo Logan's predecessor applied to the Corps for a CWA Section 404 permit.
- 2001-2006 - The Corps developed an EIS for the project. EPA commented on drafts and the final EIS.

# Facts

- EPA expressed concern about environmental impacts of mountaintop mining, but did not prohibit or restrict the discharge under 404(c).
- January 2007 - the Corps issued Mingo Logan a CWA Section 404 permit.

# Facts

- September 2009 – EPA sent letter to Corps, requesting it suspend, revoke, or modify the permit.
- The Corps rejected EPA's request.
- January 2011 – EPA withdrew the permit approval for 2 of the 3 streams and their tributaries

# Mingo Logan Action

- Mingo Logan argued:
  - 1) EPA lacks statutory authority to withdraw a disposal site specification after a 404 permit has issued, and
  - 2) EPA's decision to do so was arbitrary and capricious in violation of the APA
- District Court Granted summary judgment to Mingo Logan.



# Court of Appeals (District of Columbia) Applied a Chevron review

- Step 1 - determine whether Congress addressed the "precise question at issue."
- Step 2 - defer to the agency's interpretation as long as it is "based on a permissible construction of the statute."

# Holding Ruled in favor of EPA under Chevron Step 1

- 404(c)
- “The Administrator is authorized to prohibit the specification (***including the withdrawal of specification***) of any defined area as a disposal site... ***whenever*** he determines...that the discharge of such materials into such area will have an unacceptable adverse effect...”

## What It Means

- Project uncertainty for a broad range of businesses re: whether EPA will veto a CWA Section 404 permit after it has been issued by the Corps.
- Could result in projects delays and increased permitting costs.
- EPA can and will continue to review environmental effects of a 404 permit, even after issuance.

# **Los Angeles County Flood District v. Natural Resources Defense Council**

**133 S. Ct. 710 (Jan. 8, 2013)**

## **Facts/Procedural History**

- Los Angeles County Flood Control District operates a municipal separate stormwater system (“MS4”).
- The District has a MS4 NPDES permit, covering discharges of stormwater to four rivers that flow to the Pacific Ocean.
- Per the NPDES permit, monitoring for permit violations occurs at seven monitoring stations located within concrete channels the District constructed for flood-control purposes.









## Facts/Procedural History

- NRDC filed a citizen suit, alleging District was violating its Permit. - water-quality measurements at Monitoring stations within the Los Angeles and San Gabriel Rivers showed exceedances of permit limits.
- County did not dispute the accuracy of the monitoring data.
- **District Court** Granted summary judgment to the District.
- Record not sufficient to show the District's MS4 had discharged stormwater that caused the exceedances at the monitoring stations.

## 9th Circuit Court of Appeals

- Affirmed in part, reversed in part.
  - Affirmed – Plaintiffs must submit some proof of the District's individual contributions to the Permit violations.
  - Reversed - A discharge of a pollutant occurred when the polluted water flowed out of the concrete channels and into the downstream portions of the waterways.

# Supreme Court

- Granted cert to determine one issue – does the flow of water from an improved portion of a waterway to an unimproved portion of the same waterway constitute a discharge of a pollutant?

# Rule

- “The term ‘discharge of a pollutant’ means: (A) any addition of any pollutant to navigable waters from any point source . . .” 33 U.S.C. 1362(12)

## District Argued:

- No discharge of a pollutant because no addition of a pollutant from a point source.
- District's channels in the Los Angeles and San Gabriel Rivers are part of those Rivers, and thus, not point sources

## **NRDC Argued:**

- The Court of Appeals reached the right result but for the wrong reason.
- Under the terms of the permit, the exceedances at the monitoring stations by themselves are sufficient to establish liability under the Clean Water Act.

# HOLDING

A “discharge of a pollutant” from a point source does not occur when polluted water flows from one portion of a river that is a navigable water of the United States, through a concrete channel or other engineered improvement in the river, and then into a lower portion of the same river.

Remanded the case to the 9th Circuit for further proceedings.

**NRDC v. County of Los Angeles,  
LA County Flood Control District  
725 F.3d 1194 (9th Cir. August 8, 2013)**



## NRDC v. County of Los Angeles, LA County Flood Control District

- NRDC: again argued that the County's own monitoring data established its liability.
- County: argued Court of Appeals could not reconsider the monitoring data argument.
- Ninth Circuit rejected the County's "finality" argument – no opinion final until the mandate issues; free to reconsider Plaintiffs' argument.

## NRDC v. County of Los Angeles, LA County Flood Control District

- **Holding:** Under plain language of the NPDES permit, data collected at the monitoring stations intended to determine whether the District was in compliance with the permit.
- Because monitoring data showed pollutant levels exceeded amounts allowed under the permit, the District liable for permit violations as a matter of law.

## What It Means

- Depending on what remedy the District Court orders, could result in:
  - Actions by permittees against all those who use the MS4 to establish their shares of liability.
  - Lobbying by municipalities and other water dischargers to reduce the number of monitoring stations

# **Virginia DOT v. EPA**

**2013 U.S. Dist. LEXIS 981; 43 ELR 20002**

# Background

- Under CWA, states identify "designated uses" for each body of water within their borders.
- States identify "water quality criteria" sufficient to support the designated uses. 33 U.S.C. 1313(c)(2)(A).

# Background

- Once the standards are in place, each state is required to maintain a list of its waterbodies that are "impaired".  
33 U.S.C. 1313(d)(1)(A).
- For each waterbody on its impaired list, the state is required to establish a set of total maximum daily loads ("TMDLs") 1313(d)(1)(C).

## Facts/Procedural History

- Accotink Creek is a 25-mile long tributary of the Potomac River
- Identified as having "benthic impairments"
- 2011 - EPA established a TMDL for Accotink Creek which limited the flow rate of stormwater into Accotink Creek.
- EPA treated stormwater flow rate as a "surrogate" for sediment.

# Issue

- Does the clean Water Act authorize EPA to use Stormwater as a surrogate for a pollutant when setting TMDLs?



## Rule:

- Any pollutant that falls within the relatively broad definition of "pollutant" set forth in 1362(6) may be regulated via a TMDL.

## Facts/Procedural History

- Both parties agreed that sediment is a pollutant, and that stormwater is not.
- Chevron Two Step Analysis
- EPA argued: its surrogate approach should be allowed because the statute does not specifically forbid it.
- Court rejected EPA's argument:

The language of CWA 303(d)(1)(C) is clear - EPA may set TMDLs to regulate pollutants.

## Holding

- Because stormwater runoff is not a pollutant under the Act, EPA does not have authority to regulate stormwater via TMDLs.

*“The question is whether the statute grants the agency the authority it is claiming, not whether the statute explicitly withholds that authority. . . . the statute simply does not grant EPA the authority it claims.”*

- Agency may not regulate stormwater runoff flow as a “surrogate” for limiting sediment load into a waterbody.

# What It Means

- EPA unlikely to use flow as a "surrogate" for specific pollutants when setting TMDLs.
- Local jurisdictions that have been required to comply with more stringent stormwater and TMDL requirements could save money.
- EPA may refocus efforts and seek to regulate flow under the NPDS program.

# **EPA Draft Rule Re: Waters of the United States**

EPA Draft Rule Re:

# **Waters of the United States**

- EPA and the U.S. Army Corps of Engineers drafted rule to clarify jurisdiction over “Waters of the United States”.
- According to EPA, rule will provide greater clarity as to what constitutes a waters of the U.S.

EPA Draft Rule Re:

# Waters of the United States

- Draft rule takes into consideration a draft science report titled: *Connectivity of Streams and Wetlands to Downstream Waters*
- Any final regulatory action related to the jurisdiction of the Clean Water Act in a rulemaking will be based on the final version of this report
- **The draft report is out for public review and comment through November 6, 2013.**

# **DEQ WATER QUALITY STANDARDS**

Proposed revisions to the water quality  
standards rules for toxic substances



# Background

- September 1, 2013 – DEQ proposed revisions to certain water quality standards rules to correct and clarify the standards.
- DEQ expects to address the more substantive issues for certain pollutants in a future rulemaking.

# Sierra Club, et al. v. BNSF, et al.

- Allege BNSF violating CWA by discharging pollutants from coal rail cars w/o a permit.
- Request order defendants to remove coal pollutants from waterways, and enjoin defendants from:
  - Using uncovered rail cars to transport coal and
  - Using rail cars that allow discharge of coal through openings in sides or bottoms.
- BNSF Motion to Dismiss:
  - Plaintiffs NOI too general / failed to provide sufficient information
  - Plaintiffs have not demonstrated standing

**SUSSMAN SHANK<sup>LLP</sup>**  
— ATTORNEYS —

**Questions?**  
**Thank you for your time!**  
**[prowe@sussmanshank.com](mailto:prowe@sussmanshank.com)**