



First Circuit COA Rejects Bid to Expand Stormwater Permitting February 2018

In January, the First Circuit Court of Appeals rejected a suit filed by environmentalists seeking to force EPA to expand the use of stormwater permitting by mandating NPDES permits for properties in watersheds that are subject to TMDLs. In *Conservation Law Foundation (CLF), et al., v. EPA*, petitioners argued that EPA's approval of a TMDL identifying stormwater as a contributor to pollution can serve as an RDA determination, which would require permits for specific facilities. The ruling says that EPA is not required to invoke its "residual designation authority" (RDA) to seek stormwater permits for these properties where an approved cleanup plan reports polluted runoff is harming nearby waters, because that finding is not a "determination" that individual properties must reduce their discharges. The unanimous three-judge panel rejected this argument, noting the agency has been approving TMDLs involving stormwater for over 20 years without automatic RDA.

Writing for the panel, Judge William J. Kayatta Jr. noted that TMDLs do not fit with the stormwater program's regulatory "trigger," because even when TMDLs identify stormwater as a pollution source for a particular waterbody, the TMDL documents do not address individual properties. Judge Kayatta focused on both a lack of support for CLF's arguments in EPA's RDA rule, and the practical effects a permit mandate would have on property owners.

The decision upholds district court orders dismissing two other cases where CLF said TMDLs for New England waters triggered a mandatory duty for EPA to expand NPDES stormwater permitting for properties in the affected watersheds. Numerous other groups have also sought to force EPA to use its RDA more frequently. A similar lawsuit is pending in Maryland District Court. There, Blue Water Baltimore asked EPA to voluntarily use RDA to require stormwater permits for properties in Baltimore's Back River watershed. On February 5, the Court ruled on EPA's Motion to Dismiss, granting in part and denying in part, finding that the court lacks jurisdiction over the citizen suit claim. The Court retains jurisdiction over the APA claims. EPA is required to file an answer to this Order by February 19.