



EPA Cannot Regulate Stormwater Flow Rate as a “Surrogate” for Sediment Runoff, According to Federal Court

On January 3, 2013, the U.S. District Court for the Eastern District of Virginia ruled that the EPA exceeded its statutory authority in its attempt to regulate stormwater flow as a surrogate for controlling sediment runoff. Although sediment is a Clean Water Act “pollutant,” according to the court, stormwater flow rate is not. Consequently, EPA’s authority does not extend to regulating nonpollutants as surrogates for pollutants, representing a major victory for municipalities and states responsible for stormwater discharges and MS4 stormwater systems.

Under the Clean Water Act, the EPA has the authority to establish total maximum daily loads (TMDLs) for “pollutants” under the Act. [33 U.S.C. 1313\(d\)\(1\)\(C\)](#). A TMDL is a calculation of the maximum amount of a pollutant that a waterbody can receive and still meet water quality standards. Each state, in turn, is required to maintain a list of impaired waterbodies that do not meet water quality standards and establish TMDLs to restore that impaired waterbody.

In this case, EPA established a TMDL for Accotink Creek which limited the flow rate of stormwater as a proxy for controlling the amount of sediment runoff into the Creek. EPA designed the TMDL to regulate the amount of sediment in the Creek because EPA believed sediment was the primary cause of benthic impairment. Accotink Creek, a 25-mile long tributary of the Potomac River, is located in the suburban Washington D.C. area, in Fairfax County, Virginia.

In a case pitting the interests of state and local governments against the federal government, Fairfax County and the Virginia Department of Transportation challenged the EPA’s TMDL, alleging that compliance costs would have exceeded \$370 million.

The court, agreeing with the state and local governments, conducted a *Chevron* statutory interpretation analysis and found the Clean Water Act's TMDL language unambiguous. "Congress has spoken directly on the question at issue, and its answer is that EPA's authority does not extend to establishing TMDLs for nonpollutants as surrogates for pollutants." Even had the statutory language been ambiguous, the court nevertheless was unwilling to defer to the EPA's gap-filling interpretation under a *Chevron* step-two analysis – perhaps a preemptive strike in the event EPA seeks appellate review before the U.S. Court of Appeals for the Fourth Circuit.

Notably, however, the court appeared to indicate that a "sediment load TMDL" may survive judicial scrutiny, whereas a flow rate TMDL could not.

Equally important from a judicial deference and statutory interpretation perspective is the court's discussion concerning EPA's position that the surrogate approach was permissible because the Clean Water Act did not specifically forbid it. Not so said the court, because "[t]he question is whether the statute grants the agency the authority it is claiming, not whether the statute explicitly withholds that authority."