

BLOG POST

Court Rejects EPA Attempt to Regulate Stormwater Itself

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EPA's innovative attempt to regulate the amount of stormwater flowing into an impaired creek was recently struck down by a federal court in Virginia. Faced with a creek with benthic impairment (i.e., there weren't a sufficient number of healthy organisms living near the bottom of the creek), EPA looked to reduce the amount of sediment flowing into the creek. Since almost all of the sediment flowing into the creek was carried by stormwater, EPA decided that, rather than regulate the amount of sediment flowing into the creek, it would just regulate the amount of stormwater. Earlier this month, a US District Court in Virginia said that there was no instance where EPA's regulation would be valid, setting an important limit on EPA's ability to regulate one substance as a surrogate for another.

EPA often has difficulty measuring the amount of a pollutant being discharged from a source. In many instances, it identifies a different pollutant that is discharged in approximately the same ratio and regulates that different pollutant, as a surrogate. Such regulation has been upheld – as long as EPA can show an adequate correlation - under the Clean Air Act (particulate matter as a surrogate for hazardous air pollutant metals, for example) and alluded to as permissible under the Clean Water Act (for certain volatile pollutants). However, EPA has only recently begun to try to regulate stormwater itself as a surrogate.

This distinction is critical, because stormwater itself is not a pollutant. While stormwater obviously can carry pollutants, and the more stormwater there is, the more pollutants can be carried, EPA has no authority under the Clean Water Act to regulate the discharge of water itself. Thus, by seeking to regulate water as a surrogate for sediment, EPA attempted to give itself regulatory authority over a substance which Congress had not. The Court found the regulatory language clear – EPA can only regulate pollutants and water is not a pollutant. The Court declared EPA's regulatory effort an overreach and struck down the limitation. Thus, at least in this instance, EPA will need to return to the drawing board and either identify a sediment limit or regulate a pollutant that acts as a surrogate for sediment.