

Client Alert

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Environmental Groups' Petition for Writ of Mandamus in the Ninth Circuit May Result in Future EPA Clean Water Act Rulemaking on Stormwater Discharges

The Natural Resources Defense Council and the Environmental Defense Center (eNGOs) recently filed a petition for a writ of mandamus in the US Court of Appeals for the Ninth Circuit to enforce the Ninth Circuit's decision in *Env'tl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832 (9th Cir. 2003). In the petition, the eNGOs argue that the EPA has failed to comply with the Ninth Circuit's order in *Env'tl. Def. Ctr.* by not taking rulemaking action(s) to require National Pollutant Discharge Elimination System (NPDES) permitting authorities to review all notices of intent (NOI) submitted by small municipal separate storm sewer systems (MS4s) as part of the general permitting scheme and not providing an opportunity for the public to review and comment on those NOIs. Further, the court held that the EPA must respond on the merits to the eNGOs' assertion that the CWA requires the EPA to regulate stormwater discharges associated with forest roads. Although the focus of the petition is on small MS4s and forest roads, many other facilities may be impacted by any action that the Ninth Circuit or EPA takes.

Specifically, the eNGOs seek an order from the Ninth Circuit requiring the EPA to immediately revise the Phase II stormwater regulations to direct NPDES permitting authorities to permit stormwater discharges from small MS4s in accordance with *Env'tl. Def. Ctr.*; within six months propose a permanent revision to the regulations; and take final action on the proposal within one year. MS4s address their NPDES permit requirements through programs based on municipal or state legal authority, e.g., zoning ordinances. Regulatory requirements imposed on MS4s will travel upstream, through the municipal and/or state requirements, and impact facilities that discharge stormwater into the MS4s; therefore, it is not only MS4s that may be impacted by a rulemaking, but also the facilities that discharge stormwater into a regulated MS4. Further, the eNGOs want an order to require the EPA to make a substantive determination pursuant to the CWA on the need to regulate stormwater discharges associated with forest roads within six months and, assuming the EPA makes a finding that the regulation of those discharges is necessary, promulgate regulations addressing those discharges within two years after the formal determination.

The Ninth Circuit has yet to respond to the petition, but based on the holding in *Env'tl. Def. Ctr.*, the 11 years since the 2003 decision and the absence of any EPA responsive rulemaking action, the Ninth Circuit is likely to find the petition makes a prima facie showing justifying issuance of the writ and request the EPA to answer the petition. If the Ninth Circuit does issue an order requiring future EPA rulemaking action(s), it will add to the evolving landscape regarding the regulation of stormwater discharges under the CWA. The dispute before the court will likely be on the timing of any future rulemaking action(s), not whether the EPA will ultimately take rulemaking action(s) to address the issues identified in *Env'tl. Def. Ctr.*

Any EPA rulemaking action(s) has the potential to broadly influence the national stormwater program and to impact how facilities are designed, constructed and operated to manage stormwater. Hunton & Williams LLP will continue to monitor the petition for writ of mandamus in the Ninth Circuit and any resulting EPA rulemaking action(s).

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