

Commercial/Industrial/Institutional ("CII") Stormwater Sources: Federal Court Addresses Whether NPDES Permitting is Required



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A United States District Court (Central District of California) ("Court") addressed in an August 9th opinion an issue involving the application of the Clean Water Act National Pollution Discharge Elimination System ("NPDES") stormwater permitting requirements to privately owned commercial, industrial, and institutional ("CII") sites. See *Los Angeles Waterkeeper, et al., v. Pruitt, et al.*, No. 2:17-cv-03454-SVW-KS, 2018 WL 4191520 (C.D. Ca. 2018).

CII sites may include shopping centers, malls, employee parking lots, office buildings, etc.

The United States Environmental Protection Agency ("EPA") has not traditionally applied the NPDES stormwater permitting program requirements to CII sites.

An environmental organization (Los Angeles Waterkeeper ["Waterkeeper"]) brought an action under the Administrative Procedures Act against the United States Environmental Protection Agency ("EPA") stating it should have required NPDES permits for certain CII sources because they were contributing to violations of water quality standards in two Los Angeles area channels (Dominguez and Los Cerritos).

Significant stormwater can be generated in the urban environment. Rain falling on impervious surfaces (i.e., concrete and asphalt) becomes runoff. The runoff mobilizes the pollutants as it flows into storm sewer systems and waterways.

The Court in this action describes the two Los Angeles area channels, noting:

The Dominguez Channel is a Los Angeles waterway that begins as an underground storm drain and continues as an open channel before flowing into the Los Angeles Inner Harbor. One million people live in the Dominguez Channel watershed, including many who use the Channel and the Harbor for recreation. The Harbor provides habitat for hundreds of species, including birds, sea lions, dolphins, and fish.

The Los Cerritos Channel begins as a concrete-lined channel before becoming a tidal estuary. It drains into the Alamitos Bay, and from there into the Pacific Ocean. A path runs along part of the Channel. The Channel is home to a marina and a popular fishing spot. The watershed provides an overwintering site for many species of birds.

The Dominguez and Los Cerritos Channel watersheds are both heavily polluted by stormwater runoff. In particular, the water quality of the Dominguez Channel watershed is impaired by a variety of pollutants,

including zinc and copper. The freshwater portion of the Los Cerritos Channel is similarly impaired by zinc and copper pollution. The water quality of both watersheds is expected to remain impaired by pollution, especially zinc and copper pollution, for years to come. Metals like zinc and copper have acute and chronic impacts on aquatic life. The pollution also makes these waterways unsafe and unenjoyable for people who live, work, and play nearby.

The Clean Water Act prohibits the discharge of any pollutant by any person from a point source not subject to an exception. One such exception is for discharges of pollutants authorized by a permit granted pursuant to an NPDES permit. Stormwater discharges that travel through storm sewers are point source discharges subject to NPDES permitting requirements.

California has taken steps to control the impacts of stormwater discharges through the requirement of municipal separate storm sewer system permits (“MS4s”). The MS4 permits regulate discharge into waters that Waterkeeper sought to protect and contain limitations that prohibit discharges that cause or contribute to violations of water quality standards, and use water quality driven planning.

Any person may petition the Environmental Protection Agency (“EPA”) to request that a stormwater discharge be required to obtain a NPDES permit. Waterkeeper petitioned EPA to require NPDES permits for CII sites discharging into the Dominguez and Los Cerritos Channels. They argued that EPA must exercise its residual designation authority to require such permits because the CII sites were contributing to the impairment of the channels’ water quality.

EPA denied both petitions.

EPA agreed that CII sites were a source of impairment. However, the agency found that MS4 and some state permits in the channels’ watersheds adequately address the issue. Therefore, EPA said the permits were unnecessary.

Waterkeeper argued that EPA’s denial of its petitions were arbitrary and capricious for two reasons:

1. The text of the Clean Water Act requires the EPA to engage in the NPDES permitting process for the stormwater it has determined contributes to a water quality violation
2. In denying Plaintiff’s petition, the EPA considered an improper factor

The general rule is that stormwater discharges are exempt from NPDES permitting requirements. However, there are exceptions. If the category of stormwater discharge falls within one of the five exceptions, then it is not subject to the moratorium on regulating stormwater and is placed back within the broader rule of the statute that subjects the discharge to NPDES permitting.

The discharge at issue was argued to fall within an exception to the moratorium on regulating stormwater (i.e., contributing to a water quality violation). The Court held that EPA left these CII stormwater discharges unregulated in violation of the text of the Clean Water Act. EPA’s finding that the CIIs contributed to violations required it to either require permits or prohibit the discharges.

The Court found an additional basis for finding EPA’s denial was arbitrary and capricious.

EPA was stated to have considered an improper factor in deciding to deny the petitions. The agency’s reason for declining to issue permits must relate to whether the stormwater at issue contributes to a violation of a water quality standard. Because the EPA did not point to a provision in the Clean Water Act that indicates they may consider whether other federal, state, or local programs adequately addressed the known stormwater discharge contribution in violation of water quality standards. EPA was held to have acted arbitrarily and capriciously.

Therefore, the EPA’s denial of the plaintiff’s petitions and failure to engage in the NPDES permitting process was deemed arbitrary and capricious. EPA must either:

1. Engage in the NPDES permitting process for stormwater discharges from the CII sources in the plaintiff's petitions that EPA has determined contribute to a violation of water quality standards;
or
2. Enforce the Clean Water Act's total proscription on the discharge of such pollutants.

A [copy of the opinion can](#) be found here.