

Taking the Middle Way



The higher court systems of the U.S. seem to have made a New Year's resolution to knock out cases involving clean water issues, as the early days of 2013 brought a barrage of decisions on some important lawsuits.

The first significant ruling came Jan. 3, 2013, when a federal court held for the first time that the U.S. Environmental Protection Agency (EPA) cannot regulate storm water as a "pollutant" under the Clean Water Act. The court found that "pollutant" is a statutorily defined term that does not include storm water, and therefore the EPA was overstepping its authority by

using storm water flow as a surrogate for sediment—which is considered a pollutant—in establishing total maximum daily loads for Accotink Creek in Virginia.

Next came the settlement on Jan. 8, 2013, between the EPA and the Wisconsin Builders Assn., the National Association of Home Builders and the Utility Water Act Group. The lawsuit had challenged the agency's final regulations on storm water runoff from construction sites, stating that the numeric limitation the EPA had set to control construction site runoff was impossible to comply with across the board. Under the settlement, the EPA proposed to withdraw the number it had set, and to amend several of the non-numeric/BMP requirements.

On the same day, the U.S. Supreme Court reversed a decision made by a lower court last year that had ruled that Los Angeles County was liable for violating the Clean Water Act and was directly responsible for storm water runoff that flowed into rivers after heavy rains. The decision upheld a precedent, based on an earlier decision in South Florida Water Management District v. Miccosukee Tribe of Indians, by ruling that water flowing from one concrete section of a river to another section cannot be deemed a discharge of pollutants.

All three of these cases illustrate the difficulty of monitoring and controlling pollution that results from storm water runoff. We have serious problems determining who, exactly, is responsible for pollutants entering our water systems, and what, exactly, we can consider pollution—and how much of that pollution can end up in our water.

The push-pull dynamic between regulatory agencies, courts and interest groups is nothing new, and we can expect to see it in 2013 and years to come. It is unlikely that any of these questions will be resolved to the complete satisfaction of all parties, and anyone tasked with the responsibility of controlling runoff will be unhappy with the additional money they will have to spend to comply. The unfortunate truth is that controlling pollution is a necessity, not a luxury, and we have to find the happy medium between making sure our waters do not become overly polluted, and making sure that there is a way to acceptably and (somewhat) affordably comply with regulations. **SWS**

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