Top Clean Water Act Cases of Year
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EPA Administrative Authority

Limits of Permitting Authority

What Is a Discharge?

Other Cases

American Farm Bureau Federation v. United States EPA, 2013 U.S. Dist. LEXIS 131075, 2013 WL 5177530 (M.D. Pa. Sept. 13, 2013)

Issues and Holding:

In December 2010, EPA established the largest and most complex TMDL in the history of the Clean Water Act, addressing nutrient and sediment sources and loadings throughout the 64,000 square mile Chesapeake Bay Watershed. With just a few days of EPA's action, farm and builder groups filed a lawsuit challenging EPA's authority, the exercise of that authority, and the procedure by which it was exercised. The plaintiffs focused specifically on EPA's efforts to require greater reduction of nutrients and sediment from nonpoint dischargers as part of the TMDL's load allocations. These legal claims presented a significant threat to the comprehensive, holistic watershed approach upon which point source interests are highly dependent and which NACWA has strongly supported, and could have resulted in increased regulatory pressure on municipal wastewater and stormwater point source dischargers within the Chesapeake Bay Watershed.

On September 13, 2013, in a sweeping victory for EPA and its TMDL allies, including NACWA, the U.S. District Court for the Middle District of Pennsylvania rejected all of plaintiffs' arguments. The comprehensive 99-page ruling provides a resounding endorsement of EPA's efforts in developing the TMDL, including the use of a watershed approach to establish meaningful reductions from all sources of impairment, including nonpoint sources. Specifically, the Court stated that it "endorses the holistic, watershed approach used here," noting that such an approach "receives ample support in the CWA, its legislative history, and Supreme Court precedent." The Court went on to note that EPA's decision to pursue a watershed approach in the final TMDL was "consistent with the CWA, and practical in terms of attaining a full and fair contribution by all major source sectors and coordinated participation of all states in the watershed." Importantly, the Court held not only that EPA has authority to establish the TMDL, but also that EPA can establish individual wasteload allocations for point sources and load allocations for nonpoint sources.

The Court rejected a number of the plaintiffs' other challenges to the TMDL, including allegations that the final plan impermissibly led to EPA implementation of the TMDL instead of state implementation, and that the TMDL was issued without following proper administrative procedures. On the implementation question, the Court held that the Bay TMDL itself is not an implementation plan (despite plaintiffs' protestations that EPA overstepped its authority by including detailed allocations, imposing "backstops" and an implementation timeline) but was consistent with the CWA's approach of EPA-State "cooperative federalism." As part of this analysis, the Court noted that Bay states are "free to choose both if and how they will implement the TMDL allocations." Regarding the procedural question of the TMDL's issuance, the Court determined that EPA's process complied with the

Administrative Procedure Act (APA) and gave interested parties adequate opportunity to participate in the TMDL development.

The Court also rejected plaintiffs' claims that they were denied the opportunity to fully review the underlying models that EPA used to develop the TMDL, and highlighted plaintiffs' failure to show how they were prejudiced by not being able to review all of the underlying modeling documentation, especially in light of other options for participation in the process. The Court dismissed complaints regarding flaws in the modeling by explaining that "the Model was used in conjunction with a number of other local factors that states also considered in drafting their local allocations." According to the Court, plaintiffs failed to meet the burden of showing there was "no rational relationship" between the model and local allocation development.

Relevance to Public Utilities:
This decision marks a significant win for NACWA, its members, and its municipal partners by affirming EPA's ability to pursue a watershed approach under the CWA – including a meaningful contribution from nonpoint agricultural sources – in crafting TMDLs to achieve improved water quality. Given the significant investments and achievements municipal clean water utilities have made to improve water quality, particularly with regard to nutrient impairments, additional restrictions on point source dischargers without addressing the significant nonpoint contributions would be inequitable and ultimately ineffective.

The ruling also contains some very positive language on water quality trading that can support the legal basis for trading programs under the CWA both within the Chesapeake Bay and nationwide. As part of the discussion about existing flexibilities under the Bay TMDL, the Court specifically noted the role of trading in achieving the targeted pollution reductions. The Court noted that "individual sources are free to trade pollution amounts without the need to revise or adjust the TMDL allocations." This acknowledgement of trading within a CWA program is among the first of its kind in federal case law and can be helpful in defending trading programs from legal challenge, including a separate federal case attacking the Bay TMDL's trading program which is currently pending and in which NACWA and its municipal partners have intervened.

Next Steps:
An appeal is pending before the Third Circuit.

City of Dover v. United States EPA, 2013 U.S. Dist. LEXIS 106331, 2013 WL 3893379 (D.D.C. July 30, 2013)

Issues and Holding:

In an attempt to develop numeric nutrient criteria for the Great Bay Estuary, New Hampshire conducted a site-specific water quality analysis and then published a "report" of this analysis, which contained proposals for new numeric criteria. The State eventually chose not to proceed with these proposals but continued to use the report as a guide for interpreting the State's existing narrative standards. EPA, in turn, directed the State to use the report in preparing its list of impaired waters, and EPA itself used the report to approve the State's list, as well as in its own permitting decisions within the watershed.

Three New Hampshire cities sued EPA on grounds that the report was a *de facto* water quality standard, and that EPA violated its nondiscretionary duty by failing to review the report and either adopt or reject it as such a standard. Predictably, in response, EPA argued that the report was not a water quality standard at all, and thus that the cities failed to state a claim.

The U.S. District Court for the District of Columbia agreed with EPA, ruling that the report did not have the force or effect of law (i.e., it had not been passed by the State legislature or promulgated by the State environmental agency), and thus was not a water quality standard subject to EPA review and approval. In reaching this decision, the Court noted that the cities' real argument was that EPA and the State had improperly given the report the force of law in subsequent decisions (like the impaired waters list and permitting actions). "Perhaps [they] did so, perhaps not. But that challenge must be raised in the context of those subsequent decisions…."

Relevance to Public Utilities:

Whether and how permitting agencies translate narrative water quality standards into numeric permit limits are issues of fundamental and increasing importance to NPDES permittees. Unfortunately, many of the cases that address the permitting decision itself afford deference (sometimes even "extreme" deference) to the permitting agency. And as the *Dover* case makes clear, it is equally difficult to challenge (or prevail in a challenge to) the actual "translation" decision, especially when such a decision is made outside of the official water quality standards review/approval process.

Next Steps:

No appeal was filed, but we anticipate that these kinds of translation issues will continue to surface in both practice and litigation going forward.

Gulf Restoration Network v. Jackson, 2013 U.S. Dist. LEXIS 134811, 2013 WL 5328547 (E.D. La. Sept. 20, 2013)

Issues and Holding:

In July 2008, several environmental groups petitioned EPA to establish numeric nutrient criteria and TMDLs throughout the United States and, at a minimum, in all waters in the Mississippi River Basin and Northern Gulf of Mexico. Three years later, in July 2011, EPA denied this petition. In this denial, EPA did not dispute the environmental groups' contentions regarding the significant and serious water quality problems caused by nutrient over-enrichment. Rather, EPA opined that using its federal rulemaking authority would not be the most practical or effective means of addressing the problem. EPA posited that a better approach would be to work cooperatively with the states to strengthen their nutrient management programs.

In March 2012, the environmental groups filed a lawsuit against EPA on grounds that EPA's denial of their petition was both procedurally deficient (because EPA failed to make a determination as to whether new or revised criteria were necessary) and arbitrary (because EPA's denial was contrary to the undisputed evidence on the need for such criteria).

In an order issued on September 20, 2013, the U.S. District Court for the Eastern District of Louisiana agreed with the environmental groups, ruling that EPA must make a "yes" or "no" determination as to whether new or revised criteria are necessary. But in a positive development for NACWA and its utility members, the Court also expressly rejected arguments by the environmental groups that EPA cannot rely on non-scientific factors when making this determination. Instead, the Court affirmed that EPA has wide discretion regarding the factors in can consider, including some of the policy factors that EPA cited in its denial of the underlying petition.

In another positive development, the Court reaffirmed that states have primary authority under the Clean Water Act for development of water quality standards, and EPA's necessity determination "serves as a hurdle to federal jurisdiction – a hurdle that EPA must overcome before it moves in to preempt a state's sovereign authority to regulate its own waters."

Relevance to Public Utilities:

State primacy over water quality standards is one of the cornerstones of the Clean Water Act. Threats to state primacy come in many forms, including actions initiated by EPA to "determine" that a state's standards are deficient, or actions initiated by third parties in order to compel a similar outcome.

Although EPA "lost" this case, the decision provides the Agency with a clear path forward to make a formal determination that federal criteria are not necessary, based in part on the same kinds of policy arguments that EPA initially advanced, namely, that working cooperatively with the states, as opposed to heavy-handed federal intervention, will be the most "effective and sustainable way" to address nutrients.

Next Steps:

Under the court's order, EPA has 180 days to make a necessity determination. However, EPA filed a notice of appeal with the Fifth Circuit Court of Appeals on November 18, 2013.

Iowa League of Cities v. Environmental Protection Agency, 711 F.3d 844 (8th Cir. 2013)

Issues and Holding:

The Iowa League of Cities filed a petition for review of two letters sent by EPA to Senator Charles Grassley (R IA), setting forth interpretations of the CWA. The letters described EPA's positions on:

- Mixing zones for bacteria: EPA categorically would not allow them in primary contact recreational waters, although its regulations provide for mixing zones and do not say that mixing zones are not allowed for bacteria in primary contact recreational waters; and

- Blending: In 2005, EPA revoked its 2003 policy that blending would not be considered a bypass under certain specified conditions.

In 2010, the Eighth Circuit had rejected the Iowa League of Cities' previous effort to seek review of the same interpretations based, at that time, on a variety of EPA documents. In the earlier proceeding, the Court held that the petition was premature, finding that EPA was in the process of making decisions about these issues. In March 2013, however, the Eighth Circuit granted the petition, finding that the letters to Senator Grassley demonstrated that EPA had effectively established new regulatory requirements without complying with the Administrative Procedure Act rulemaking process. The Eighth Circuit also addressed the merits of the blending interpretation.

The Court first made clear that both interpretations were procedurally invalid because EPA had failed to comply with the Administrative Procedure Act rulemaking process. The Court then addressed the merits, concluding that EPA could, in principle, lawfully adopt a rule consistent with its interpretation concerning mixing zones for bacteria; that is, the Court found that EPA's interpretation is not intrinsically inconsistent with the Clean Water Act, but only that EPA cannot adopt and apply a "general policy" without complying with the APA.

In contrast, the Court addressed the merits of EPA's blending policy. The Court characterized EPA's position on blending as imposing secondary treatment requirements on flows within treatment facilities, which the CWA gives EPA no authority to do. Rather, since secondary treatment effluent limitations apply only at the final point of discharge, EPA's policy was improper not only because it had not been adopted pursuant to a notice and comment rulemaking process, but also because it is inherently inconsistent with the CWA itself.

Relevance to Public Utilities:
This ruling is consistent with other recent decisions criticizing EPA's practice of applying policies or guidance across the board without complying with the APA rulemaking process. Moreover, it is a major blow to EPA's efforts to limit peak flow management options at POTWs by imposing secondary treatment effluent limitations within the boundaries of the plant. It provides utilities with important flexibility going forward in selecting peak flow management options.

Next Steps:
EPA announced in October 2013 that it will not petition for a writ of certiorari, so unless and until EPA moves ahead with rulemaking, EPA's efforts to limit mixing zones and blending remain void.

Virginia Department of Transportation v. U.S. Environmental Protection Agency, 2013 U.S. Dist. LEXIS 981, 2013 WL 53741 (E.D. Va. Jan. 3, 2013)

Issues and Holding:
The Accotink Creek is a 25-mile long tributary of the Potomac River running through Fairfax County, Virginia. The Creek has been identified as having "benthic impairments," believed to be caused by the accumulation of sediment in the Creek. As a result, EPA was required to establish Total Maximum Daily Loads (TMDLs) for the Creek after Virginia failed to do so, and on April 18, 2011, the EPA established a TMDL for stormwater in an effort to regulate the flow of sediment into the Creek. The Virginia Department of Transportation brought this suit to challenge the EPA's statutory authority to establish a stormwater TMDL.

Both parties agreed that sediment is a pollutant under the CWA, while stormwater is not.[1] Thus, the issue in this case was whether the EPA has statutory authority under the Act to regulate the flow of a pollutant (sediment) into Accotink Creek by issuing a TMDL for a surrogate non-pollutant (stormwater).

Applying a two-step *Chevron* analysis, the U.S. District Court for the Eastern District of Virginia held that the language of the Act unambiguously allows states to establish TMDLs only for substances defined in the Act as a "pollutant." Thus, because stormwater is not identified in the Act as a pollutant, EPA clearly lacks authority to establish a TMDL for stormwater, regardless of how well it may serve as a surrogate for measuring the flow of an actual pollutant, such as sediment, into an impaired water body. Because the court found the Act to be clear on this issue, it did not consider whether EPA's construction of the statute was reasonable. The Court acknowledged that the Act does not expressly forbid EPA from establishing non-pollutant TMDLs, but concluded that in this case, its stormwater TMDL for the Accotink went beyond permissible gap-filling and instead constituted an impermissible construction of the Act. Additionally, the Court noted that EPA's previous attempts to expand its authority to establish TMDLs have been struck down on similar grounds.[2]

Relevance to Public Utilities:
While the vast majority of TMDLs set pollutant-specific limits, this decision may limit EPA's ability to develop TMDLs in situations where specific limits cannot be set due to the diffuse nature of discharges into a water body. The decision also has implications for EPA's long awaited national stormwater rule, originally mandated under a 2010 settlement with the Chesapeake Bay Foundation. EPA is expected to set out a broad range of Best Management Practices intended to control stormwater

[1] *See* 33 U.S.C. § 1362(6).
[2] *See, e.g., Friends of the Earth, Inc. v. Envtl. Protection Agency*, 446 F.3d 140, 143 (D.C. Cir. 2006).

flows into receiving waters and also to expand the scope of point sources subject to regulation. This ruling could prevent EPA from regulating stormwater flow *per se.*

Next Steps:
EPA declined to appeal the decision to the Fourth Circuit.

Dekalb County, Georgia v. United States, 108 Fed. Cl. 681 (Cl. Ct. 2013)

Issues and Holding:

Dekalb County sued the United States to recover unpaid stormwater management charges assessed against 18 federal properties in the County. The Court of Claims granted the United States' Motion for Summary Judgment, holding that the stormwater fees were taxes and could not be imposed on federal properties without the Government's consent. The court construed the CWA's 1977 waiver of sovereign immunity for "reasonable service charges" in Section 313 as not encompassing taxes and rejected Dekalb County's argument that the "Cardin Amendment" to section 313(c) of the CWA was not a "clarification" of a prior waiver of sovereign immunity but rather was new legislation and could not be retroactively applied to the County's impervious fees.

The Court concluded that the impervious surface fees were taxes and not fees for service, because they were imposed on the majority of property in the County, including every homeowner and business as well as every lot that was covered with any impervious surface. The Court also held that because the County's management charges were used to provide benefits enjoyed by the public as a whole, including flood prevention and abatement of water pollution, the charges were taxes and not fees for service.

In so holding the court expressly disagreed with the *United States v. Renton* opinion from the Western District of Washington[1] which held that the Cardin Amendment was not a new waiver of sovereign immunity but was instead a mere clarification of the 1977 CWA sovereign immunity waiver. Further, the court rejected the test for fees vs. taxes by the Supreme Court in *Massachusetts v. U.S.*[2], in favor of the test adopted by the First Circuit in *San Juan Cellular v. PSC*[3] in finding that the County's fee program was a tax. *Mass v. FAA* established a three part test to distinguish fees from taxes: (1) a fee must be imposed in a nondiscriminatory manner; (2) a fee must reflect a fair approximation of the benefits received by the assessed entity; and (3) a fee may not produce revenues that exceed the costs of the benefits provided.

The County had argued that the *Mass. v. U.S.* test, which was adopted by Congress in the Cardin Amendment, should have been applied. NACWA filed an amicus brief in support of the County and presented argument at the hearing.

[1] 2012 U.S. Dist. LEXIS 73261, 2012 W.L 1903429 (WD Wash May 25, 2012).
[2] 435 U.S. 444, 467 (1978).
[3] 967 F. 2d. 683 (1st Cir. 1992).

Relevance to Public Utilities:
The decision is relevant on two important grounds. First, the ruling that the Cardin Amendment was a new waiver of sovereign immunity and not a "clarification" of the 1977 waiver, as the *Renton* court had held, means that it will be difficult for utilities to recover impervious surface charges from federal facilities assessed prior to the Cardin Amendment in that federal facilities will likely argue that impervious surface charges were taxes under this amendment and not "fees for service."

Second, and more significantly, the Court's interpretation of stormwater fees as taxes could greatly impact many stormwater fee programs that charge properties owner based on the extent of impervious surface runoff. That is, because of the Court's broadly categorizing such fee programs as taxes and rejecting the *Mass. v. U.S.* test, municipal fee programs around the county could be challenged as impermissible expansion of a municipality's taxation authority. Such fee programs are a significant source of funds to municipalities to cover the increasing costs of treating stormwater runoff to meet the requirements of the Clean Water Act, including, for example, the Chesapeake Bay TMDL program.

Next Steps:
The County appealed but subsequently entered into a settlement whereby the United States agreed to cover a substantial portion of the charges at issue, despite the fact that the Government had prevailed below. Accordingly, the Court of Claims decision will stand.

Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586 (2013)

Issues and Holding:

Koontz sought various land use permits from the St. Johns River Water Management District in connection with a proposal to develop a 15-acre tract of land with significant wetlands. To mitigate potential environmental impacts from his proposal, Koontz offered to grant a conservation easement to the District over approximately 11 acres of the land. The District informed Koontz that it would grant the permits if he reduced the size of the proposed development and increased the size of the conservation easement to approximately 14 acres. The District also offered Koontz the option of instead paying to make improvements to land owned by the District several miles away.

In an opinion by Justice Alito, the Supreme Court held that the "essential nexus" required under *Nollan*[1] and the "rough proportionality" required under *Dolan*[2] apply also to any demands for money that a governmental agency seeks to require of an applicant for a land use permit – that is, that the applicant need not have suffered an actual taking of a property right to have a ripe takings claim under the Fifth and Fourteenth Amendments. The Court focused on the "unconstitutional conditions doctrine," which "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up."

The Court held that it doesn't matter whether what is being exacted is land or cash; in either event, the government must satisfy the "essential nexus" and "rough proportionality" tests in order to demand exactions as conditions for an approval. The dissent (written by Justice Kagan and joined by Justices Ginsburg, Breyer, and Sotomayor), focuses on the timing, arguing vehemently that no taking has occurred when the government has not appropriated a property interest, has not specifically demanded an unlawful permit condition, and has not denied a permit.

Relevance to Public Utilities:

Clean Water Act attorneys have expressed diverse views about the relevance of this case. Some have read it to impose new and unworkable limitations on public utilities, particularly in the context of stormwater fees; others believe that the decision doesn't actually change agencies' obligation to limit their demands to those with an essential nexus and rough proportionality to the impacts being addressed and/or services being provided.

Next Steps:

While the opinion analyzes the Constitutional framework for exactions in land use permits, the Court did not determine whether the District had in fact "failed to comply with the principles" in the opinion and in *Nollan* and *Dolan*. It is thus

[1] *Nollan v. Cal. Coastal Com.*, 483 U.S. 825, 837 (1987).
[2] *Dolan v. City of Tigard*, 512 U.S. 374, 388 (1994).

unclear whether Koontz has in fact been injured, let alone what the remedy might be. Accordingly, the Court remanded the matter for further proceedings. The dissent anticipates that the Florida courts will deny compensation, as there has been no "consummated taking."

Mingo Logan v. EPA, 714 F.3d 608 (D.C. Cir. 2013)

Issues and Holding:

This decision arose from EPA's unprecedented action under CWA Section 404(c) to nullify a 404 permit years after it was issued to Mingo Logan Coal Company, to conduct mountain top mining in Logan County, West Virginia. Mingo Logan's predecessor applied for a 404 permit for the Spruce No. 1 coal mine in West Virginia in 1997. After 10 years of environmental review, in which EPA participated fully, EPA announced, "we have no intention of taking our Spruce Mine concerns any further," and the Corps issued a permit. The permit noted specifically the Corps's authority to revoke or modify the permit under 33 C.F.R § 325.7, but did not suggest in any way that EPA could alter or revoke it. Over the next two years, Mingo Logan spent several million dollars preparing the site and commencing operations in compliance with all requirements of the permit.

In 2009, claiming new information, EPA asked the Corps to exercise its revocation authority. The Corps reviewed the request in light of its longstanding regulatory criteria, and concluded that no new information justified revocation. The State of West Virginia also objected to EPA's request.

A year later, in 2010, EPA took matters into its own hands, claiming that EPA's "veto" authority under section 404(c) empowered it to modify or revoke an issued permit. Citing this purported authority, it issued a Final Determination revoking 88 percent of the mining activity the Corps had authorized in the permit. This was the first time since the CWA was passed in 1972 that the Agency attempted to use section 404(c) to revoke an active permit after it was issued.

Mingo Logan sued on several grounds and, on March 23, 2012, the U.S. District Court for the District of Columbia held that the "stunning power" claimed by the Agency "is not conferred by section 404(c)" and is "contrary to the language, structure, and legislative history of section 404 as a whole." The court held that CWA § 404(c) does not authorize EPA to act after the permit has been issued. EPA must act, if at all, before the Corps issues the permit. *Mingo Logan v. EPA*, 850 F. Supp. 2d 133 (D.D.C. 2012).

On April 23, 2013, however, the D.C. Circuit reversed the district court's decision. The Court held that the Act "imposes no temporal limit" on EPA's authority to use its section 404(c) "veto" authority. Instead, EPA may modify or revoke a 404 permit "whenever" it determines that the Corps permit will have an "unacceptable adverse effect" – even, as here, years after the permit has issued, and despite the permittee's compliance with the permit.

Relevance to Public Utilities:
Because EPA interprets Section 404(c) to allow it to address water quality issues within the purview of the States under Section 402, the decision has the potential to upset permits issued by the States under the NPDES program, as well as MS4 permits held by municipalities. EPA's veto in this case has thus caused widespread consternation and uncertainty among permittees because it threatens the finality of wetland and stream permits issued for a variety of public and private sector projects. Investment capital will be harder to raise, or will cost more, if every project in jurisdictional waters is subject to the risk of open-ended cancellation. Moreover, EPA's view of its authority threatens to crowd out states' authority under sections 401 and 402 and would allow it to revisit and possibly overturn state-made water quality determinations issued under those sections of the CWA. It also injects a new and untenable level of uncertainty into the Corps's well-established permitting process.

Next Steps:
The D.C. Circuit denied Mingo Logan's petition for rehearing en banc in July and Mingo Logan filed a petition for a writ of certiorari to the Supreme Court on November 13, 2013.

Natural Resources Defense Council v. County of Los Angeles, 725 F. 3d. 1194 (9th Cir. 2013)

Issues and Holding:

On remand from the Supreme Court, the Ninth Circuit held that the data collected at the Mass Emissions stations will determine compliance with the Permit. The Court focused on the plain language of the MS4 Permit finding that the mass emissions monitoring data showed that the level of pollutants in the LA River and San Gabriel Rivers exceeded the limits allowed under the permit and "conclusively" demonstrated that the County was not in compliance with the MS4 Permit conditions and was therefore liable for permit violations.

The Court also relied on extrinsic evidence, including the findings of the Regional Water Quality Control Board, the permit issuer, that individualized proof of a Permittee's discharges was not necessary to establish liability. The Court found that "under the County defendants' reading of the Permit, individual Permittees could discharge an unlimited amount of pollutants from the LA MS4 but never be held liable for those discharges based on the results of the mass emissions monitoring even though that monitoring is explicitly intended to assess whether Permittees are in compliance with the permit's discharge limitations." In rejecting the County's arguments, the Court referred to the "inherent complexity of ensuring that an MS4's compliance with a permit that covers thousands of different point sources and outfalls." The Court then remanded the case to the District court for a determination of the appropriate remedy.

Relevance for Public Utilities:

The Ninth Circuit decision is very significant for public utilities in several respects. First, this decision seems to be an "end run' around the Supreme Court's holding that in-stream water transfers through man-made systems are not "additions" regulated under the CWA. Under the Ninth Circuit's holding, discharges from upstream sources into the MS4 system constitute "additions" that trigger CWA regulation for the MS4 permittee and liability for monitored "in stream" exceedances. .

Second, if this holding is adopted elsewhere, utilities operating under MS4 permits similar to LA County's, governing discharges from many upstream sources, can no longer claim that "in stream" monitoring data is not evidence of a permit violation because the data cannot be attributable to specific upstream dischargers.

Third, because utilities may be liable for exceedances found through in stream monitoring, they will need to oversee the upstream dischargers' compliance with permit conditions so as to minimize their own liability. This could create significant regulatory and administrative burdens for large utilities that receive stormwater

from many sources and make it difficult to determine the appropriate remedy to be imposed on such upstream sources contributing to the violations.

Finally, this decision could open up a "Pandora's box" of litigation for environmental groups in that they can use "in stream" data showing a violation to bring citizen suits against a utility without the need to attribute the violation to particular upstream dischargers.

See also Los Angeles County Flood Control District v. Natural Resources Defense Council, 133 S. Ct. 710 (2013).

Sierra Club v. ICG Hazard, LLC, 2012 U.S. Dist. LEXIS 146140, 2012 WL 4601012 (E.D. Ky. Sept. 28 2012)

Issues and Holding:
The case involved the scope of the permit shield as applied to NPDES general permits, as opposed to NPDES individual permits. The Sierra Club brought a citizen suit against the operator of a coal mine for discharges of selenium. ICG Hazard was operating under a general NPDES permit that did not include an explicit limit for selenium.

In the individual permit context, a permittee is able to discharge pollutants within limits established by the permit, as well as pollutants that are not listed as long as proper disclosure was made during the permitting process. Proper disclosure is judged by whether the permittee's discharges, wastestreams, operations and/or processed were sufficiently identified.

But in the general permit context, by design, a larger share of the responsibility for gathering information on discharges and activities falls on the permitting authority rather than on the permit applicant. Sierra Club used this distinction to argue that the scope of the shield should be narrower in the general permit context. But the U.S. District Court for the Eastern District of Kentucky disagreed, ruling that the scope of the shield is the same for both types of permits. According to the Court:

> As acknowledged, disclosure requirements are different for individual and general permits. But they are different only insofar as which party bears the burden for disclosure. For an individual permit, the discharger must disclose all chemicals, wastestreams, and processes, and it receives protection by the shield if it does so. With regard to general permits, the permitting agency bears the burden for understanding the pollutants that might be discharged and writing the permit with appropriate limitations…. Therefore, while the process for disclosure under each permit is unique, the result is the same.

Other than the outcome, the only material difference between this case and *Southern Appalachian Mt. Stewards v. A&G Coal Corp,* discussed below, was that Kentucky used a general permit approach for coal mining, as opposed to the individual permit at issue in the Virginia case.

Relevance to Public Utilities:
Both permitting agencies and permittees rely on NPDES general permits to streamline the permitting process for a range of different activities, including operation of municipal separate storm sewers (MS4s). There are currently over 500 state and federal NPDES general permits and hundreds of thousands of entities covered by general permits. If the scope of the permit shield is ever deemed to be

narrower for general permits, then utilities seeking coverage under general permits will face greater risk of enforcement and citizen lawsuits.

Next Steps:
An appeal is pending before the Sixth Circuit Court of Appeals.

Southern Appalachian Mt. Stewards v. A&G Coal Corp., 2013 U.S. Dist. LEXIS 102147, 2013 WL 3814340 (W.D. Va. July 22, 2013)

Issues and Holding:
The case involved allegations of unpermitted discharges of selenium from a coal mining operation in southwest Virginia. The permittee did not disclose the potential for selenium discharges in its application because it did not know or have reason to believe that it would actually discharge selenium. But the permittee did disclose the nature of its waste streams, operations and processes, including coal mining activities known to unearth and expose rock and dirt (including naturally occurring pollutants in the rock and dirt, such as selenium).

In the case, the permittee attempted to invoke the permit shield defense, arguing that the permitting agency contemplated but chose not to include effluent limits for selenium in the NPDES permit, and that compliance with the permit constitutes compliance with the CWA. But the U.S. District Court for the Western District of Virginia held that a permittee must have actually disclosed a pollutant in its permit application to avail itself of the permit shield defense. The Court refused, on procedural grounds, to consider other evidence offered by the permittee to show that while not known or disclosed by the permittee, the potential for selenium discharges was nonetheless known to, and within the reasonable contemplation of, the permitting agency.

Relevance to Public Utilities:
The permit shield is vitally important to NPDES permittees, especially since every permittee has substances in its waste stream or effluent, if only at miniscule levels, which are not listed in the permit and not within the permittee's control. Even if a permittee discharged distilled water, there would be traces of pollutants.

For this reason, EPA has interpreted the permit shield to apply not just where pollutants are (1) specifically limited in the permit or (2) identified in the permit application, but also where they are (3) part of waste streams, operations or processes that are identified in the permit application and supporting administrative record. The Court's decision in the *A&G* case seems to erode this longstanding interpretation by reading the third criterion out of existence.

Next Steps:
An appeal is pending before the Fourth Circuit Court of Appeals.

Decker v. Northwest Envtl. Def. Ctr., 133 S. Ct. 1326 (2013)

Issues and Holding:
In 2006, the Northwest Environmental Defense Center (NEDC) brought suit against the Oregon State Forester, members of the Oregon Board of Forestry, and various timber companies alleging that Defendants violated the Clean Water Act by not obtaining permits for stormwater runoff from logging roads. NEDC claimed that rainwater runoff flows from logging roads into systems of ditches, culverts and channels before being discharged into forest streams and rivers, and that such discharges are from "point sources," as defined in the Clean Water Act.

The timber industry responded that (1) the Silvicultural Rule, 40 C.F.R. § 122.27, exempts logging road discharges from NPDES requirements and (2) the discharges are exempt under the 1987 amendments to Section 402(p) of the Clean Water Act. The District Court agreed that the discharges were exempt from NPDES permitting by the Silvicultural Rule and therefore did not reach the question of whether the discharges are also exempted by the 1987 amendments to the Clean Water Act. The Ninth Circuit reached both questions and determined that the discharges require NPDES permits. The Supreme Court granted certiorari in June 2012.

Meanwhile, EPA proposed amendments to the Phase I stormwater regulations to clarify that stormwater from logging roads does not require a NPDES permit by distinguishing between the truly "industrial" aspects of logging – rock crushing, gravel washing, log sorting, and log storage, from logging roads. That rule took effect on November 30, 2012, three days before the Supreme Court heard oral argument.

The Supreme Court, reversing the Ninth Circuit's decisions from 2011, held:

1. Federal district courts have jurisdiction in a CWA citizen suit to hear a challenge to an EPA rule exempting a discharge from the NPDES requirements so long as that challenge is brought in the context of a suit against an alleged violator, seeking to enforce CWA requirements.

2. The 2012 amendments to the Silvicultural Rule do not make this case moot, as the particular discharges at issue in this citizen suit were governed by the prior version of the Rule.

3. EPA's interpretation of the prior version of the Silvicultural Rule is entitled to *Auer* deference.

Because it was not before the Supreme Court, the Court did not consider the amended Silvicultural Rule. The majority did not address the Ninth Circuit's 2011 decision that, independent of the Silvicultural Rule, the stormwater discharges from the logging roads constitute discharges from point sources, requiring NPDES

permits under CWA; in a dissent, however, Justice Scalia questioned the merits of *Auer* deference generally, and indicated that he agreed with the Ninth Circuit that under the statute itself, the stormwater discharges at issue require NPDES permits.

Relevance to Public Utilities:
Management of stormwater is an issue of increasing importance to many NACWA members. Even though this case focuses on a narrow interpretation of the CWA as applied to the timber industry, the majority opinion and the dissent raise broader issues about how the Clean Water Act and its regulations will be interpreted in the future.

Next Steps:
The case was remanded for "proceedings consistent with" the Supreme Court's opinion. The key issues will likely be whether the prior version of the Silvicultural Rule was in fact violated and, if so, whether there is any remedy for such violations.

Meanwhile, the House Transportation and Infrastructure Committee has approved the Silviculture Regulatory Consistency Act of 2013 (H.R. 2026), which would bar the EPA from requiring NPDES permits or promulgating regulations that require a state to seek permits under the NPDES program for stormwater runoff arising from logging activities. There will likely be some further activity on this issue in Congress over the coming year.

EPA v. Friends of the Everglades, 2013 U.S. LEXIS 7397, 2013 WL 3283503 (2013); *S. Fla. Water Mgmt. Dist. v. Friends of the Everglades*, 2013 U.S. LEXIS 7404, 2013 WL 3341202 (2013); *United States Sugar Corp. v. Friends of the Everglades*, 2013 U.S. LEXIS 7446, 2013 WL 3283513 (2013)

Issues and Holding:

EPA's 2008 Water Transfers Rule (WTR)[1] provides that transfers of water do not require NPDES permits, so long as the transfers themselves do not subject the transferred water to intervening commercial, industrial, or municipal use. Many entities – including the environmental advocacy organizations that had previously challenged water transfers by New York City[2] and the South Florida Water Management District[3] – filed petitions to review the WTR in federal courts of appeals. Given the lack of clarity about subject-matter jurisdiction, quite a few of those entities also filed suit under the Clean Water Act in two federal district courts (the Southern District of Florida and the Southern District of New York). The petitions filed in the circuit courts were consolidated in the Eleventh Circuit by lottery under the multi-district rule. The district court cases were stayed pending resolution of the consolidated petitions for review.

In November 2008, the Eleventh Circuit stayed the petitions for review pending final decision in a Clean Water Act citizen suit concerning pumping stormwater into the Everglades. In the context of that individual water transfer, the Eleventh Circuit held in that the South Florida Water Management District's "S-2" transfer did not need a NPDES permit based on the WTR, which the court found (incidentally, in the context of that case) represented a valid exercise of EPA's discretion under *Chevron*.[4] After the Supreme Court denied certiorari in the S-2 case in 2010, the consolidated challenges to the Water Transfers Rule itself were briefed.

In October 2012, the Eleventh Circuit dismissed the consolidated petitions, holding that it lacked subject matter jurisdiction under either 33 U.S.C § 1369(b)(1)(E) or 33 U.S.C. § 1369(b)(1)(F). Based largely on questions posed by the Supreme Court at oral argument in *Decker v. Northwest Envtl. Def. Ctr.*, EPA and two other respondents sought certiorari, which was denied in October 2013.

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[1] 40 CFR § 122.3(i).

[2] *Catskill Mountains Ch. of Trout Unlimited v. City of New York*, 273 F.3d 481 (2d Cir. 2001), *aff'd following trial*, 451 F.3d 77 (2d Cir. 2006).

[3] *Miccosukee Tribe of Indians v. S. Fla. Water Mgmt. Dist*., 280 F.3d 1364 (11th Cir. 2002), vacated and remanded by *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004); *Friends of the Everglades v. South Florida Water Management District*, 570 F.3d 1210 (11th Cir. 2009), cert denied, 131 S. Ct. 643 (2010).

[4] *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

NACWA joined New York City's amicus brief to the Eleventh Circuit in support of EPA (on the merits – the brief did not address the jurisdiction issue), and has participated as an amicus curiae several times in related litigation over the past eight years.

Relevance to Public Utilities:
Numerous public utilities – particularly those involved in water supply and stormwater management – have been concerned about the decisions issued prior to EPA's adoption of the WTR that water management agencies needed NPDES permits to transfer untreated water from one water body to another "meaningfully distinct" body of water.

Next Steps:
In an unusually transparent example of forum shopping, the plaintiffs who had challenged the Water Transfers Rule filed in the Southern District of Florida withdrew their complaint and moved to intervene in the proceeding in the Southern District of New York. The parties to what is now the only pending litigation concerning the WTR thus include three sets of plaintiffs (a group of eastern states, led by New York; the environmental advocacy organizations that brought a citizen suit against New York City about a water transfer in the City's drinking water supply system before the Rule was adopted; and the Florida plaintiffs), EPA, and many intervenor-defendants (New York City; a group of western states led by Colorado; and a group of western water suppliers). The South Florida Water Management District has also intervened, making arguments both in support of and opposing the Rule.

The parties' cross motions for summary judgment will be argued on December 19, 2013.

Los Angeles County Flood Control District v. Natural Resources Defense Council, 133 S. Ct. 710 (2013)

Issues and Holding:

Plaintiffs brought this Clean Water Act citizen suit to enforce alleged violations of the Los Angeles County Municipal Separate Storm Sewer System Permit (MS4 Permit), which covers stormwater discharges from the County of Los Angeles (County), the Los Angeles County Flood Control District (District) and 84 incorporated municipalities in the County of Los Angeles. The MS4 Permit includes a requirement to monitor "Mass Emissions" at specific locations. NRDC claimed that because the District's Mass Emissions stations had recorded exceedances of water quality standards, the County had violated the MS4 Permit and the Clean Water Act.

The litigation in the Central District of California and the Ninth Circuit raised a number of interesting and complex issues concerning, among other things, whether compliance with the "iterative process" provisions in the MS4 Permit was sufficient for permit compliance, regardless of whether the District was in strict compliance with water quality standards. In a somewhat turgid decision,[1] the Ninth Circuit held that the permit provisions in the MS4 Permit do not provide a "safe harbor" for violations of the discharge prohibitions that are part of the Receiving Water Limitations in that Permit, finding instead that the requirement to implement control measures (i.e., compliance with the iterative process) is independent of the discharge prohibitions. The Ninth Circuit also held that implementation of the Stormwater Quality Management Plan (SQMP) is the minimum required of each permittee, and that a permittee can be required to implement additional more restrictive programs and control measures.[2]

At the heart of the issue, though, is a basic question about whether there had been a "discharge of a pollutant," i.e., any addition of any pollutant to navigable waters from any point source, when the alleged discharge (the MS4) and the receiving navigable water (the Los Angeles River) were one and the same. The Ninth Circuit reasoned that at the point the stormwater was discharged to the River, there was no doubt the District controlled the stormwater and that the District was adding stormwater to the River downstream from the monitoring stations that contained concentrations of bacteria and metals in excess of water quality standards.

The District filed a petition for a writ of certiorari seeking review of two questions: (1) whether manmade improvements to a river (such as the largely concrete-lined portion of the LA River that serves as a portion of the District's MS4) can render a water body no longer a "navigable water of the United States"; and (2) whether

[1] NRDC, Inc. v. County of Los Angeles, 673 F.3d 880 (9th Cir. 2011).
[2] *Id.*, 673 F.3d 888.

when water flows from one portion of a river to another, through an engineered improvement, can there be a "discharge" from a point source under the Clean Water Act. The Supreme Court granted certiorari only for the second question.

NACWA, among other organizations, joined an amicus brief submitted by New York City, which argues that mere water management activities that do not themselves add pollutants should not require NPDES permits. EPA opposed the cert. petition and, in its amicus brief on the merits, requested that the Supreme Court vacate the Ninth Circuit decision and remand the matter for further proceedings to determine whether the permit was actually violated, noting that "no discharge occurs when polluted stormwater that has already been discharged into a river simply flows from a channelized portion … to a downstream portion of the same river."[3]

On January 8, 2013, the Supreme Court flatly rejected the Ninth Circuit's holding that no discharge of pollutants occurs when polluted water flows from one portion of a navigable water through a concrete channel or other engineered improvement into a lower portion of the same river. The Court relied on its opinion in *South Florida Water Management District v. Miccosukee Tribe of Indians,*[4] holding that the transfer of polluted water between two parts of the same water body did not constitute a "discharge of pollutants." Interestingly, the Court also rejected NRDC's alternative argument for upholding the Ninth Circuit, which it raised for the first time in its reply brief. NRDC had argued that "the Court of Appeals reached the right result albeit for the wrong reason" because "the monitoring system in the permit showed numerous instances in which water quality standards were exceeded" which was "sufficient to establish the District's liability under the CWA for upstream discharges." The Court expressly refused to address this alternative argument because "it is not embraced within, or even touched by, the narrow question on which we granted certiorari." The Court then remanded the case.

Implications for Public Utilities:
The decision did not alter the Court's prior decision in *Miccosukee* but the remand left open an issue of major concern about the iterative process and safe harbor for MS4 permitting where multiple upstream sources discharge into a regional MS4 system. That issue, raised by NRDC in the Supreme Court, was squarely addressed by the Ninth Circuit on remand, as discussed above.

See also NRDC v. County of Los Angeles, 725 F. 3d. 1194 (9th Cir. 2013).

[3] Brief for the United States as Amicus Curiae Supporting Neither Party at 18, Los Angeles County Flood Control District v. NRDC (No. 11-460).
[4] S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004).

National Association of Clean Water Agencies v. EPA, 2013 U.S. App. LEXIS 17268, 2013 WL 4417438, 2013 WL 4417438 (D.C. Cir., August 20, 2013)

Issues and Holding:
In March 2011, EPA issued a final rule establishing emission standards for SSIs under CAA § 129.[1] Determining that SSIs were "solid waste incineration units" as defined in §129(g)(1), EPA promulgated "maximum achievable control technology" ("MACT") standards for two subcategories of sewage sludge incinerators. The CAA restricts EPA's discretion in setting MACT standards, requiring EPA to base the standards on the emissions achieved by the best-performing existing incinerators.[2] Due to pressure imposed by a court order to establish the MACT standards by a certain deadline, EPA took a targeted approach to collecting emissions data and used several different methods to estimate the emissions levels achieved by existing incinerators.

NACWA filed a legal petition for review in May 2011 to challenge the EPA's final SSI rule due to the significant negative economic and operational impacts on clean water utilities that rely on SSIs for the safe and efficient management of biosolids. NACWA set forth two main challenges to the rule in the lawsuit: (1) a challenge to EPA's statutory authority to regulate SSIs under § 129, which asserted that SSIs do not fall within the scope of § 129(g)(1)'s definition of "solid waste incineration unit"; and (2) a challenge to EPA's technical basis for the emission standards in the final rule. Sierra Club intervened in the litigation, arguing that the final SSI rule must contain "beyond the floor" limits to comply with the CAA.

On August 20, 2013, the D.C. Circuit upheld EPA's statutory authority for the SSI rule but remanded significant portions of the rule back to EPA for additional consideration and revisions on a number of technical issues. The court indicated that many of EPA's technical justifications in the rule were not legally adequate and, therefore, EPA must provide additional explanations for the emissions limits in the SSI Rule or develop new limits altogether. Specifically, the court held:

- To demonstrate that its methodology for determining MACT floors for existing SSIs was in compliance with CAA, EPA, which identified the best-performing incinerators based on control technology, would be required to establish with substantial evidence that non-control technology factors apart from sewage sludge content, like variations in age, design, or operation of the incinerators themselves, would have a negligible effect on incinerator emissions; and

[1] *See* Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Sewage Sludge Incineration Units, 76 Fed. Reg. 15,372 (Mar. 21, 2011).
[2] *See* 42 U.S.C. § 7429(a)(2).

- EPA must provide further explanation on the issues of how the upper prediction limit for incinerator emissions represented the "average emissions limitation achieved," how the upper prediction limit was a reasonable method of predicting the upper limit of the best-performing incinerators, and how the upper prediction limit accounted for variability in incinerator performance when it was not based on a dataset representative of the best-performing incinerators under the worst-performing conditions.

The D.C. Circuit did not vacate the underlying rule during the remand process, nor did it set a deadline for EPA to complete the remand. However, the Court did dismiss Sierra Club's request for more stringent SSI limits. In particular, the court agreed with EPA and NACWA that the final SSI rule did not have to contain "beyond the floor" limits to comply with the CAA. Accordingly, the Court did not require the more stringent emission standards that Sierra Club requested.

Relevance to Utilities:
Because the D.C. Circuit did not vacate the existing compliance deadlines or provide any deadline for EPA to complete the remand process, it is imperative that all utilities with SSIs subject to the final rule work to achieve compliance with the March 2016 deadline for existing units.

Next Steps:
On October 24, the D.C. Circuit rejected requests from the Sierra Club for rehearing of the August decision, thereby preserving the Court's remand of the rule to EPA to correct the significant technical flaws in the final SSI regulations. NACWA plans to file an administrative petition with EPA requesting that the Agency temporarily delay the current compliance deadline under the SSI Rule until the remand process is complete. NACWA will also continue its pending legal challenge to EPA's non-hazardous secondary materials (NHSM) rule, which provides the critical regulatory underpinning for the SSI Rule.

Natural Resources Defense Council, Inc. v New York State Dept. of Envtl. Conservation, 2013 N.Y. App. Div. LEXIS 7446, 2013 WL 5992093, (N.Y. App. Div. 2d Dep't Nov. 13, 2013)

Issues and Holding:
NRDC and several other advocacy organizations filed a petition challenging New York State's 2010 General Permit for MS4s, alleging that:

- the permit violated the CWA in that it does not require regulated MS4s to reduce pollutants to the "maximum extent practicable" (MEP), in that it provides coverage for municipalities without first requiring that they submit their Stormwater Management Program Plans (SWMP Plans) for review and approval;

- the permit violated the CWA because it does not require monitoring of stormwater discharges;

- the permit violates the CWA because it does not allow for public participation in the approval of municipal stormwater management programs; and

- the permit violated New York State law because it does not require strict compliance with water quality standards in impaired waters with no TMDL.

The trial court found for petitioners on all three Clean Water Act claims, but dismissed the claim that the "no net increase" language in the permit in impaired waters with no TMDLs fails to require compliance with WQS.

In a reversal on appeal, the self-certification process in the New York General Permit (which is typical of general MS4 permits) was upheld. The appellate court also reversed the lower court in finding that the State had discretion not to require municipalities to monitor stormwater discharge. Perhaps most importantly, the appellate court rejected the lower court's holdings about public participation in MS4 permitting, finding that the New York General Permit meets the requirements of the CWA. The lower court had held that the public had to have the opportunity to seek an adjudicatory hearing on individual municipalities' NOIs.

Finally, the appellate court upheld the lower court's determination that that General Permit's "no net increases" adequately provided for compliance with water quality standards.

Relevance to Utilities:
Because the appellate court upheld New York State's General Permit for MS4s, this litigation ultimately is not very important. The lower court's holdings, though, called into question some of the most basic elements of general permit programs under the CWA.

Next Steps:

We do not yet know whether NRDC intends to seek leave to appeal to the New York Court of Appeals.

Northeast Ohio Regional Sewer District v. Bath Township, Ohio et al., 2013 Ohio App. LEXIS 4399, 2013 WL 5436646 (Ohio Ct. App. Sept. 26, 2013)

Issues and Holdings:
On September 26, 2013, an Ohio state appellate court ruled that the Northeast Ohio Regional Sewer District (NEORSD) had no authority under state statute to enact its Regional Stormwater Management Program (SMP) and is, therefore, enjoined from implementing the program. The Court further held that NEORSD lacked the requisite authority under state statute or NEORSD's Charter to adopt a stormwater fee and is enjoined from implementing, levying or collecting such a fee. One judge on the panel issued a strong dissent arguing that the NEORSD had authority to create and implement the program.

The appellate court ruled that it need not even address the fee vs. tax question because the matter at issue was whether NEORSD possessed the authority under state law to implement the program and associated fee.

Relevance to Utilities:
The Court's rejection of NEORSD's SMP has broad implications within Ohio that may hinder the ability of wastewater utilities statewide to address stormwater runoff and comply with consent decrees and Clean Water Act requirements.

There are a growing number of local challenges to stormwater programs and fees. While this appellate court ruling was based on the nuances of Ohio law, the issues involved in this litigation, like those involved in *Zweig v. MSD St. Louis*, have potential national implications for other municipal stormwater programs and may be relied upon as persuasive legal precedent outside Ohio.

Next Steps:
NEORSD has appealed the decision to the Ohio Supreme Court. On November 12, NACWA joined the Association of Ohio Metropolitan Wastewater Agencies (AOMWA) in filing an amicus brief in the appeal. NEORSD was successful in defending its stormwater fee program at the state trial court level and hopes to uphold that victory in the Ohio Supreme Court appeal.

Zweig v. the Metropolitan St. Louis Sewer District, 2013 Mo. LEXIS 296, 2013 WL 5989221 (Mo. November 12, 2013)

Issues and Holding:

On November 12, 2013, the Missouri Supreme Court issued a decision upholding a lower court ruling that invalidated the entire stormwater fee program administered by the Metropolitan St. Louis Sewer District (MSD). Specifically, the Missouri trial court ruled in 2010 that MSD's stormwater utility fees were illegal taxes and a March 2012 Missouri Court of Appeals decision upheld the trial court ruling.

The Missouri Supreme Court determined through a detailed analysis under Missouri state law that MSD's contested stormwater user charge qualified as a tax and not a user fee. The Court reasoned that because the stormwater fee is based on each landowner's contribution to the overall need for MSD's stormwater services rather than that owner's actual use of the services, and MSD provides services to ensure the availability of its drainage system to the district as a whole, not to individual users, the charge cannot be a valid user fee because MSD does not render a service individually in exchange for a fee. The Court further determined that while it "sympathizes with MSD's predicament," the charge was invalid because it had not been put to a voter referendum as required by Missouri law. Of particular national concern was the trial court's factual finding that there is no direct relationship between impervious area and stormwater runoff, which was upheld on appeal.

The Missouri Supreme Court refused to grant the ratepayers' request for a refund of approximately $90 million in stormwater user charges, but affirmed the trial court's award of attorneys' fees of over $4 million.

Relevance to Utilities:

Although the direct legal impact of this decision is confined to Missouri, the issues involved in this litigation have potential national implications for other municipal stormwater utilities using a similar fee structure. The case raises broad questions about the legality of stormwater fee methodology. While there have been a number of state courts around the country that have examined and upheld similar types of stormwater fee programs as valid service charges, the *Zweig* decision may be used as negative legal persuasive precedent regarding the use of impervious surface as a basis for stormwater charges.