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118 DEN A-5

Water Pollution

EPA Said to Breach Chesapeake Bay Accord by Failing to Offer Stormwater Rule



BNA Snapshot

Post-Construction Stormwater Rule

Key Development: The Chesapeake Bay Foundation finds EPA in violation of its settlement to propose a national stormwater rule for developed and redeveloped sites.

What's Next: EPA will have 60 days to negotiate a revised schedule for rulemaking or to propose a stormwater rule.

By Amena H. Saiyid

The Chesapeake Bay Foundation said June 18 that the Environmental Protection Agency has been notified that it is in breach of its legal settlement for failing to propose national regulations for stormwater runoff at redeveloped and developed sites.

Under the dispute resolution provision of the 2010 agreement, EPA and the foundation have 30 days from the written notice's date of receipt, or more time if both sides agree, to meet and attempt to resolve the dispute.

If the parties are unable to resolve the dispute within 60 days of that meeting, which could be as late as mid-September, the foundation may then reinstitute the lawsuit, according to the agreement.

The foundation "will invoke the dispute resolution provision in our settlement agreement, which provides for 60 days to negotiate," CBF President Will Baker said in a June 18 statement. "We call on EPA and the Obama administration to move quickly on a rule that increases protection for rivers and streams across the nation."

Baker said polluted stormwater runoff is damaging local waterways, reducing habitat for fish and crabs, and threatening human health across the nation.

"Here on the Chesapeake it is the only major source of pollution that continues to increase," he said. "EPA's failure to develop a new stormwater rule as required under our legally binding litigation settlement leaves us no choice but to find them in breach of our agreement."

EPA Responds

EPA responded to the foundation's statement by reiterating its commitment to proposing revisions to stormwater regulations "as expeditiously as possible."

"Consistent with the settlement agreement's dispute resolution process, EPA expects to meet with the foundation to discuss the rule's schedule within the next 30 days," the agency said in a June 18 statement to BNA.

EPA and the foundation had agreed to a one-week extension following its final June 10 deadline under a May 2010 settlement to propose a rule (112 DEN A-3, 6/11/13).

The rule would address stormwater runoff at developed and redeveloped sites in communities with municipal separate storm sewer systems but not to cities with systems that combine both stormwater and wastewater.

EPA in April said that it is planning to propose more stringent standards for stormwater at newly developed sites than at redeveloped ones to create an incentive for businesses to invest in redevelopment projects in cities (84 DEN A-2, 5/1/13).

Deadline Extended Previously

Originally, EPA was required to propose the rule by September 2011, but the parties agreed to extend the deadline to April 27, 2012, and the foundation recently agreed to the June 2013 deadline upon EPA's request (*Fowler v. EPA*, D.D.C., No. 1:09-cv-5, 5/11/10; 139 DEN A-1, 7/20/12).

Under the agreement, EPA and the Chesapeake Bay Foundation are allowed to negotiate extensions to rulemakings without the court's intervention. In the event of a disagreement concerning the "interpretation or performance of any aspect of this settlement agreement," the parties can request negotiations to resolve the dispute within 30 days. Failing that, the aggrieved side can reinstitute the lawsuit.

Brian Glass, a partner with Warren Glass LLP, weighed in on the dispute between the foundation and EPA.

"The 'alleged breach' will certainly cause parties—not just environmentalists but also members of the regulated community—to think long and hard about resolving disputes with EPA through an out-of-court settlement agreement as opposed to a judicial consent decree, under which potential contempt of court sanctions are a significant deterrent to breaches," Glass said. "At a minimum, it will encourage future parties to these settlement agreements to insist on terms that would make breaches as unappealing to the agency as such sanctions."

Glass said he doubts whether the foundation would agree to a revised timetable.

For More Information

The 2010 settlement agreement is available at <http://www.cbf.org/Document.Doc?id=512>.

Contact us at <http://www.bna.com/contact/index.html> or call 1-800-372-1033

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