

## WATER POLLUTION:

### Why is EPA taking so long to write a stormwater rule? It's complicated

Annie Snider, E&E reporter

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Grand Rapids, Mich., is placing a bet that restoring the white water that gave the city its name will make it a destination for kayakers and other outdoors enthusiasts.

Michigan's second-largest city is planning to remove or modify dams on the Grand River before redeveloping the waterfront with high-end retail and luxury apartments.

Making the river pretty is one thing, but making it clean is another. The Grand River -- one of 11 in U.S. EPA's Urban Rivers Restoration Initiative -- is polluted by stormwater. The river accounts for some of the estimated 50,000 miles of rivers and streams fouled by bacteria and other contaminants washed off streets, parking lots, lawns and farms.

Cities like Grand Rapids have what are called municipal separate storm sewer systems -- "MS4s" in Clean Water Act lingo -- that are regulated under the 1972 law. EPA has delegated the authority for permitting the systems to a number of states, including Michigan, which has been cracking down on MS4s in recent years. But smaller suburbs and rural areas outside the city face no external requirements.

"We end up with everybody else's stormwater, but we're the only ones being held responsible," said Suzanne Schulz, Grand Rapids' managing director of design, development and community engagement. Her mission is trying to persuade developers to build on previously developed lots rather than on green spaces at the edge of the city that serve as sponges for dirty stormwater.

Redevelopment brings a double benefit, she said. It breathes commercial life back into beleaguered neighborhoods and reduces stormwater runoff on those tracts by requiring developers to install things like pollution-reducing green roofs or stormwater-retention basins. But cleansing stormwater isn't cheap, so developers often prefer undeveloped areas outside the city limits where rules are more lax. That tends to create more problems for the river.

So Grand Rapids officials are looking to a federal rulemaking to level the playing field.

EPA is working on a stormwater rule required under a 2010 [legal settlement](#) with the Chesapeake Bay Foundation. The rule proposal, the settlement says, would "expand the universe of regulated stormwater discharges," requiring new controls for newly developed and redeveloped sites and possibly even old developments. It could also expand the number of cities and towns regulated as MS4s under the Clean Water Act.

Environmentalists trumpet the rulemaking as vital for cleaning up U.S. waterways.

"The stuff that runs off our rooftops and down our storm drains is one of the most significant sources of pollution in our communities," said Jeff Odefey, director of the stormwater program for the nonprofit American Rivers. "But the activities that manage stormwater and eventually lead to compliance with water quality standards -- protecting the river or stream or lake -- happen on private property. We need drivers, we need regulatory tools."

Environmental groups also contend that the rule is the most important thing the Obama administration can do to boost so-called green infrastructure, which uses marshes, trees and rain gardens to soak up water and filter pollution rather than more expensive concrete structures that primarily control water flow.

But industry says the rule stands to be one of the most expensive ever promulgated by EPA, with the potential to chill development across the country. The agency has not made public any cost estimates, but industry and municipal officials say stormwater fixes often come with a bill that ranges into the hundreds of thousands of dollars per site.

Moreover, businesses are worried about how EPA will deal with the regional and site-specific differences that play a key role in how much stormwater runoff leaves a property.

"When you look at what's required for them to do this, it really is staggering," said Hamilton Hackney, a lawyer with Greenberg Traurig LLP who represents developers and municipalities. "It's a huge program for them to come up with a national standard that's going to achieve, in theory, the same results in Arizona that it does in Maine."

Given the stakes, few are surprised the rule has stalled.

Under the original settlement with the Chesapeake Bay Foundation, EPA was to propose the rule by the end of September 2011. The foundation has given the agency no fewer than six deadline extensions, but, after the last deadline was missed last month, it officially declared EPA in breach of the settlement agreement -- a move aimed at turning up the pressure on the administration ([E&ENews PM](#), June 18).

### What worries developers

In response to questions from *Greenwire*, EPA said it needs more time for the rulemaking because the issue is so complicated.

"Analyzing the costs and benefits for the options under consideration for this rule is complex, given the intermittent nature of the stormwater, the various rainfall patterns that exist across the country, and the many different types of technology and site design approaches that could be used to meet the performance standards," the agency said.

EPA maintains no decisions have been made on the rule, but stakeholders who have closely tracked EPA's work on the regulations say the agency is looking to set a discharge threshold for properties in the range of 1 to 5 acres and for certain size storms. A number of states already have rules that require certain properties to capture and retain water from all but the largest storms.

The rules for redevelopment are apt to be more flexible, stakeholders say, because the agency likely sees the same benefit that Grand Rapids does in encouraging developers to build on already developed properties rather than untouched sites.

But the big question is whether EPA will set rules requiring retrofits for existing properties.

"I think that's really where the expense comes in," said Leah Pilconis, senior environmental adviser to the Associated General Contractors of America. "There's a big difference between a public owner or a private owner making a decision to build something new or upgrade something that exists versus being told by EPA that what they already have suddenly needs to be changed."

Moreover, retrofit requirements could put property owners in a tough spot with local zoning rules, industry officials say. At a site that has no extra space, the owner may need to rip up parking lot in order to add water-absorbing devices. But the number of parking spots is dictated by local zoning ordinances, and sites often have the very minimum required.

"This is a legitimate concern for developers," Schulz of Grand Rapids said. "This will happen. I don't doubt that at all."

Stakeholders are also asking which entities would be the focus of the EPA rule.

Greens want the rule to apply broadly -- not just to entities that are already regulated as MS4s. But if it extends beyond currently regulated areas, it's unclear how the program will be implemented.

EPA could require that individual property owners obtain permits, but given the number of entities that would likely fall under the program, that could create a massive new workload for the agency. Alternately, stakeholders say, states could assume a role in implementing the program, adding to the workload of already overstretched local officials.

Then there's the question of who'll be responsible for maintaining stormwater infrastructure and who'll be liable if it fails to work as designed.

In other words, a homebuilder could opt to meet runoff requirements by using permeable pavement for driveways. But those driveways will have to be kept clear of silt and other debris if they're going to continue to let water through.

"For every device, there's some sort of maintenance schedule and requirement, so somebody would have to be responsible for that," said Ty Asfaw, senior program manager at the National Association of Homebuilders.

Ultimately, stakeholders say, the agency is attempting to force project developers to write stormwater considerations into design.

It's easier and cheaper, they say, to manage stormwater by decreasing a building's footprint or designing landscapes to soak up water than it is to add devices after the building is in place.

### Green infrastructure

Green infrastructure is fast becoming a favorite way for cities to stem sewer overflows, and EPA said it is considering setting performance metrics in the national stormwater rule "that would encourage the use of green infrastructure."

Philadelphia, Cincinnati and a number of other cities have recently incorporated systems to plant trees and restore streams into billion-dollar-plus consent decrees with EPA that they say would have been far more costly had they relied solely on traditional mortar and steel infrastructure.

But economists, municipal officials and regulators are still struggling to calculate the costs and benefits of green infrastructure -- a key aspect of getting the stormwater rule through White House regulatory review. How do you calculate the economic benefit of a greener neighborhood or a cooler downtown because parks have replaced some of the city's heat-soaking concrete?

Odefey of American Rivers said that infiltrating more water through soils rather than shunting it straight to waterways through the sewer system could even help recharge aquifers.

"There's a lot of interest in how this could be a resource for drinking water and whether it's possible to intentionally build green infrastructure practices that will put water back into the ground and replenish aquifers that serve as local water supplies," he said.

But even if this does work -- to be sure, the science behind it is still in its infancy -- calculating the benefit would depend not only on local water rates and the status of water supplies, but also the quality of soils and the scale at which infrastructure could be implemented.

"Valuing the environmental benefits here -- it's still a developing area," said Denise Grab, a legal fellow for the Institute for Policy Integrity at New York University School of Law.

Grab's group is **pressing** EPA to broadly account for ancillary benefits in its cost-benefit analysis.

"We know that there's a tendency to underestimate these things and that costs are often overestimated," she said, noting that EPA's first stab at analyzing the benefits of post-construction stormwater controls in 1999 failed to account for major factors, such as decreased stream bank erosion and reduced water pollution because there would likely be fewer combined sewer overflows.

EPA offered a litany of factors it is looking at, from "improved recreational, aesthetic, and non-use values" and "lower drinking water treatment costs" to "reduced energy use by buildings and associated air quality and carbon footprint benefits."

## Politics

It may be awhile before stakeholders get a look at the agency's rule, but industry representatives say they are already feeling burned.

As EPA took up work on the issue in 2010, it sent **requests for information** about stormwater management practices to a number of groups, including owners and developers of property. The requests were sent under the agency's Clean Water Act authority to seek information from the owners or operators of point sources.

The request alarmed businesses because EPA typically uses that authority in enforcement matters. It could allow the agency to assess hefty fines if a business is found to have improperly resisted, said Hackney, the industry lawyer.

"There was a lot of head scratching on this side of the fence about why they did this," he said. "It smacked of sort of regulatory heavy-handedness."

Industry also contends that EPA short-changed stakeholders by giving businesses very little information about the agency's direction on the issue. For its part, EPA says it has held more than 200 stakeholder meetings, but Hackney said these were of little use because EPA officials wouldn't discuss specifics.

"Industry is feeling like we can't really do much until EPA comes out with something specific that we can respond to," he said.

Meanwhile, congressional Republicans quickly jumped into the fray, seeing the agency's information request as the first step in an attempt to vastly expand EPA's authority by defining developed land as a point source.

"We are troubled by this action since it appears to exceed EPA's authority under the Clean Water Act," Sens. James Inhofe (R-Okla.) and Mike Crapo (R-Idaho) **wrote** the EPA administrator in July 2010.

More recently, the U.S. District Court for the Eastern District of Virginia ruled that EPA lacked the authority to regulate "surrogates," a decision that could complicate the agency's claim that it has the right to regulate stormwater sources under the Clean Water Act.

In *Virginia Department of Transportation v. EPA*, the court ruled the agency couldn't set numeric limits for stormwater as a stand-in for the sediment that it was carrying into an impaired waterway in Northern Virginia. That decision was made with respect to a different section of the Clean Water Act, though, and lawyers are debating whether it would carry over (**Greenwire**, Jan. 4).

With so much controversy around the agency's approach to the stormwater rule, observers speculate that the administration decided to put the brakes on it during election season. Even now that the 2012 election is in the rearview mirror, some say that

with Gina McCarthy's nomination for the top spot at EPA still pending before the Senate, the agency may be taking the slow route on the rule to avoid yet another congressional battle.

Whatever the reason for the delay, greens' frustration is growing.

"Stormwater is, in the bay region, the only major source of pollution that's going up," Kim Coble, vice president for environmental protection and restoration at the Chesapeake Bay Foundation, said last month when the group moved to restart court negotiations with EPA over the rule.

"This isn't an academic question or a legal question on our part," she said. "This is really about protecting and restoring natural resources."

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