Dormant No More: Residual Designation Authority Comes into Sharp Focus

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Agenda

1. What is Residual Designation Authority (RDA) under the Clean Water Act?
2. EPA's Watershed-Based Residual Designations
3. Challenges for Designated Facilities
4. What Comes Next

What is Residual Designation Authority (RDA)?

What needs a NPDES permit?

Phase I (402(p)(2))

- Discharge permitted before 2/4/87.
- Discharges associated with industrial activity (incl. construction disturbing ≥ 5 acres).
- Large MS4s (population ≥ 250K).
- Medium MS4s (100K≤ population <250K.

Phase II (402(p)(6) regulation)

- Small MS4s (population < 100,000).
- Construction with land disturbance ≥ 1 acre.

Anything else?

- There is something else.
- "Next Slide…"

Statutory Residual Designation

A discharge for which the Administrator or the State, as the case may be, determines that **the stormwater discharge:**

[1] contributes to a violation of a water quality standard or

[2] is a significant contributor of pollutants to waters of the United States.

33 U.S.C. 1342(p)(2)(E)

The Regulatory Expansion

"**A discharge** … determine[d] to [1] contribute to a violation of a water quality standard or [2] is a significant contributor of pollutants to waters of the United States." 40 CFR 122.26(a)(1)(v).

EPA or a state "determines that storm water controls are needed for **the discharge** based on wasteload allocations that are part of 'total maximum daily loads' (TMDLs) that address the pollutant(s) of concern." 40 CFR 122.26(a)(9)(i)(C).

EPA or a state "determines that the discharge, **or category of discharges within a geographic area**, [1] contributes to a violation of a water quality standard or [2] is a significant contributor of pollutants to waters of the United States." 40 C.F.R. 122.26(a)(9)(i)(D).

EPA's Watershed-Based Residual Designations

Why Is EPA Using Its RDA Now?

EPA's RDA Exercises

EPA Region 1

2019/2020
NGOs petition for designation in 3 watersheds:
- Charles River.
- Mystic and Neponsit Rivers.

September 2022
Region 1 issues Preliminary Designation.

October 2024
Region 1 re-issues Preliminary Designation & Draft General Permit.

March 2025
Public comment period closed.

EPA Region 9

September 2015
NGOs petition for residual designation in two watersheds.

October 2016
EPA denies petitions.

2018
Court orders EPA to reconsider *LA Waterkeeper v. Pruitt*, 320 F. Supp. 3d 1115 (CDCA 2018).

July 2022
Region 9 issues Preliminary Designation.

October 2023
Region 9 re-issues Preliminary Designation.

November 2024
Region 9 issues Final Designation

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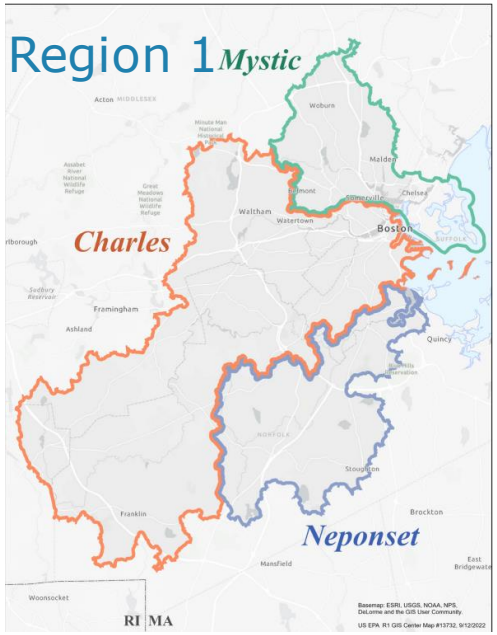
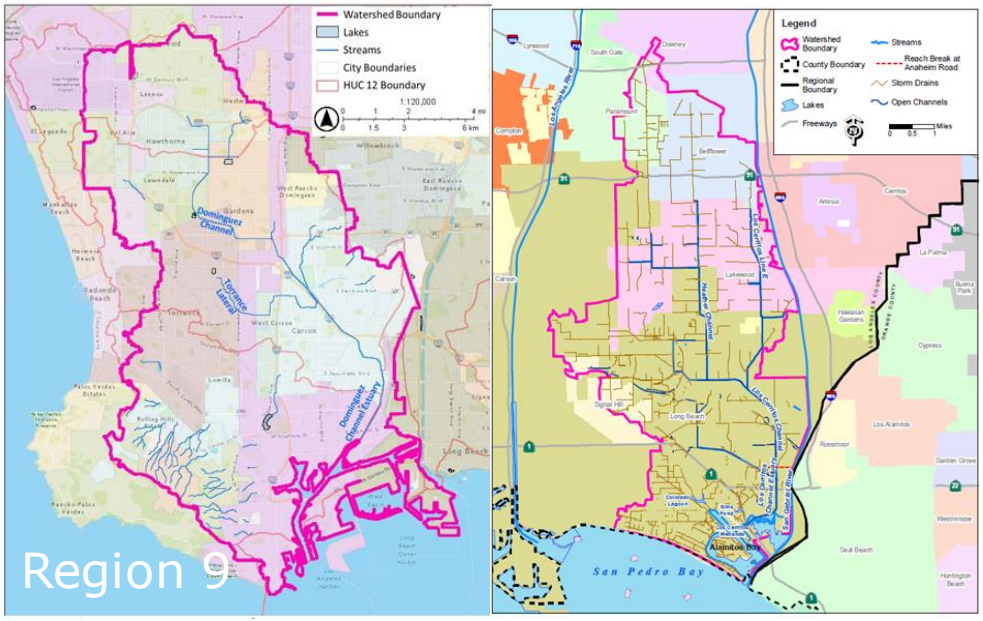
What makes these designations unique?





Designation on a Watershed Basis!

What else makes these designations unique?

- Requires permits for **commercial, industrial, and institutional (CII)** properties, such as:
  - Shopping centers
  - Office buildings, parking lots
  - Hospitals
  - Renewable energy facilities
- Acreage differs by Region
  - Region 9: ≥5 acres impervious surface
  - Region 1: ≥1 acre impervious surface
- Based on broad, categorial findings of contributions of:
  - Region 9: Zinc, copper
  - Region 1: Bacteria, nutrients

Challenges for Designated Facilities

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Why might designations pose problems for facilities?

- Businesses with fewer resources need permits
- Proposed RDA permits have been complex
- Stormwater permit compliance is generally demanding
- Citizen suit exposure

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What comes next?

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Next Steps on Federal Designations

Trump administration could reverse proposed designation in Region 1.

Reversing Region 9 designation will be more difficult (it's final).

Region 9 residual designation could be challenged in court

- Likely subject to 6-year statute of limitations
- Could be challenged in district court

Future rulemaking by the administration?

What's at stake if EPA's RDA actions are left undisturbed?

- Number of impacted facilities.
- Compliance costs/liability exposure.
- Roadmap/persuasive authority
- Initial permits may not be the last word

Washington State: A future RDA hotbed?

- Typically low criteria for nutrients and metals
- Properties not currently required to have industrial general permits:
  - Industrial facilities not currently required to hold NPDES stormwater permits (e.g., pharmaceuticals; telecommunications; semiconductor manufacturing)
  - Shopping centers
  - Hospitals and other health care facilities
  - Colleges, universities, and community colleges
  - Utility scale solar sites
- Very active NGO community
- And . . .

Washington State?

- 2025 ISGP
  - In Response to Comments (but not in the permit or its fact sheet), Ecology asserted that it was engaging in a residual designation by expanding the federal definition of "transportation facility" to include activities unrelated to maintenance, deicing and equipment cleaning
  - So, unlike the EPA, Washington State is invoking and purporting to exercise residual designation authority on its own initiative, without a citizens' petition

Issues to Consider

- Is designation of category of sources or geographic region authorized?
- Is finding of adverse impact convincingly demonstrated?
- Was process for residual designation followed?
- If flawed, in what court is review available?

Thank You!

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Northwest Environmental Business Council | March 3, 2026

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