LEAD, FOLLOW OR GET WASHED AWAY: WHY MUNICIPALITIES SHOULD TAKE A GREATER LEADERSHIP ROLE ON WATER QUALITY ISSUES

I.
INTRODUCTION

Forty years ago, Congress amended the Federal Water Pollution Control Act to create an extraordinarily powerful and ambitious regulatory system commonly known as the Clean Water Act.[1] Although the Clean Water Act and its cornerstone National Pollutant Discharge Elimination System ("NPDES")[2] permitting program initially focused on traditional "end of pipe" dischargers such as industrial plants and sewage treatment facilities, the regulatory system has expanded and evolved. Now, the program focuses squarely on urban runoff as one of the largest sources of water pollution.[3] If left to the Environmental Protection Agency ("EPA") or to the states that are authorized to implement the NPDES program, the emerging program will not only fundamentally alter core municipal functions such as land use and planning but will also, due to program costs, remove budgetary options available to local leaders.

Municipalities have a choice. They can continue to try to fend-off the imposition of water quality considerations into their core municipal functions or they can embrace such considerations on their own terms and thereby control the process. Controlling the process by incorporating water quality principles into core municipal functions will allow municipalities to retain local control while still achieving compliance with regulatory requirements. To a certain extent, the regulatory intrusion into core municipal functions may be irreversible. However, certain core functions can still be protected.

This paper assesses current water quality issues within this proposed increased municipal leadership context. After summarizing some key background issues, the paper highlights the current regulatory and case law developments that present significant challenges (and opportunities) for municipalities. It also identifies ways in which municipalities might influence these developments and thereby take a leadership role on these emerging issues in order to preserve core municipal authority.

II.
KEY BACKGROUND ISSUES

The federal government has regulated water quality since at least the 1899 Rivers and Harbors Act.[4] However, in the early 1970s, in response to the emerging environmental movement of the period, Congress, through the Senate Subcommittee on Air and Water Pollution, held hearings regarding the need for more stringent water quality laws. The Committee concluded that "the national effort to abate and control water pollution has been inadequate in every vital aspect . . . ."[5] The findings of the Subcommittee led Congress to enact sweeping changes to the Federal Water Pollution Control Act. This broad new regulatory system has developed and expanded over time and now is being applied in ways that intrude on local control of core municipal functions. The key components of this regulatory system, as relevant to this intrusion on local affairs, are described below.

A. The 1972 Amendments to the Federal Water Pollution Control Act.

Tiering off the work of the Senate Subcommittee on Air and Water Pollution, Congress in 1972 enacted significant amendments to the Federal Water Pollution Control Act.[6] These amendments established the ambitious goal of eliminating all discharges of pollutants into waters of the United States by the year 1985.[7] To achieve this goal, the amendments effectively prohibited all discharges of pollutants into waters of the United States unless authorized by either an NPDES permit or by a "dredge and fill" permit.[8] The amendments also authorized EPA or authorized states to impose both technology-based and water quality-based effluent limitations as a means of limiting pollutant discharges.[9] Through such limitations and the evolution of technology it was believed that, over time, discharges of pollutants could be eliminated.

Notably, the 1972 amendments did not directly address stormwater discharges in general or discharges from municipal separate sewer systems ("MS4s") in particular. In fact, EPA interpreted the 1972 amendments in a manner that exempted stormwater from the regulatory program.[10] The immediate focus of EPA's implementation of the 1972 amendments was on "end of pipe" discharges from industry and publicly owned treatment works. The immediate impacts to core municipal functions were thus limited. However, the framework was established for future expansion into such functions.

B. Development of State Water Quality Standards.

Prior to 1972, Congress had required states to develop standards for water quality within state boundaries. However, states were slow to develop such standards, and many states simply ignored the requirement.[11]

To provide states with a significant financial incentive to develop state water quality standards, the 1972 amendments linked the development of state standards to eligibility for new grant programs created by the 1972 amendments.[12] Such standards were to establish the designated uses for all waters (such as recreation) and to establish criteria necessary to support those uses.[13] The incentives provided through the 1972 amendments led to the quick and somewhat haphazard development of water quality standards in many states.

Importantly, once established, these standards are difficult to change. Also, as noted above, most water quality standards were developed at a time when it was assumed that the NPDES program did not directly apply to stormwater. Thus, in developing the standards, the ability of stormwater discharges to achieve the standards was not a consideration.[14] Also, municipalities, especially ones that did not own sewer treatment plants, had little incentive to actively participate in the development of water quality standards.

C. The 1987 Amendments.

In 1987, Congress amended the Clean Water Act to directly regulate stormwater discharges.[15] As early as 1977, the courts had set aside EPA's exemption of stormwater from the NPDES program, but EPA had failed in numerous attempts to promulgate an effective regulation covering stormwater.[16] Congress thus stepped in to force the extension of the program to stormwater.

In the 1987 amendments, Congress made a distinction between discharges of stormwater from industrial facilities and discharges from MS4s. Industrial discharges had to meet all the technology-based and water quality-based standards of the NPDES program.[17] Permits for discharges from MS4s, in contrast, had to contain controls to reduce the discharge of pollutants to the "maximum extent practicable" ("MEP"), and such other control measures as EPA or the authorized state may require.[18] MEP was envisioned as a technology driving standard, but was intended to be less stringent than the true technology-based standard applied to industrial discharges. Also, MEP does not require strict compliance with state water quality standards.[19] Given the diffuse nature of stormwater and the jurisdictional breadth of MS4 systems, Congress concluded that MS4 discharges should be treated differently than other stormwater discharges from more discrete sources that are subject to more stringent standards.

D. Total Maximum Daily Loads.

The Clean Water Act is primarily a "point source" based regulatory system. However, the total maximum daily load ("TMDL") requirements of the Act integrate "point source" regulations with "nonpoint source" regulations. The TMDL process thus attacks pollution on a watershed-based level. Such a watershed-based approach, in turn, typically requires broad changes to land use patterns and practices in order to achieve load reductions.

The Clean Water Act requires each state to identify waters that are not meeting water quality standards.[20] For such "impaired waters," the state must calculate the maximum amount of a pollutant that such water body can receive and still meet water quality standards. This total maximum daily load is then divided between point sources (the waste load allocation) and nonpoint sources (the load allocation), accounting for seasonal variations and a margin of safety.[21] Typically, the state also adopts an implementation plan through which the TMDL is to be achieved over time through reductions of the loads from point and nonpoint sources. The allocations are also eventually incorporated in discharge permits, thus becoming enforceable requirements.[22]

E. Enforcement and Consent Decrees.

EPA and authorized state has been actively enforcing Clean Water Act requirements for decades against publicly owned treatment works ("POTWs"). Many POTWs have been forced into comprehensive and costly consent decrees that mandate specific system improvements on a fixed schedule.[23] Such consent decrees have deprived POTWs, including municipal systems, of program flexibility as well as fiscal flexibility. Although many consent decrees focus on sanitary sewers, many also involve combined systems and thus address both sanitary systems and stormwater.

Large-scale enforcement actions against MS4 systems have been less common, but such enforcement has increased greatly in recent years.[24] As part of such enforcement actions, EPA, authorized state or third parties often seek operational changes, in addition to penalties, which place limits on local control. Through these enforcement actions, municipal flexibility and local decision-making regarding core municipal functions is eroded.

F. Modern Stormwater Permits.

Modern stormwater permits now commonly include requirements that directly mandate land use and planning changes that have traditionally been viewed as the exclusive province of municipalities. For example, the MS4 permit issued in 2007 to the County of San Diego and its 18 cities requires co-permittees to update their general plans and zoning ordinances to address stormwater, requires that stormwater considerations to be taken into account during the permitting process and mandates development standards for new and redevelopment, including requiring the use of low impact development techniques.[25] Further, the permit requires the permittees to develop financing plans and other long-range financing arrangements, fiscal issues that are traditionally left to municipal discretion.

Another quite recent example of a modern stormwater permit is EPA's newly issued permit for Washington, D.C.[26] The D.C. permit covers discharges from MS4s within the jurisdictional boundary of the District of Columbia Among other things, the permit requires D.C. to amend its development code to require design, construction and maintenance of stormwater controls to achieve on-site retention of 1.2" of stormwater from a 24-hour storm with a 72-hour antecedent dry period through evapotranspiration, infiltration and/or stormwater harvesting and use for all development greater than or equal to 5,000 square feet. The permit also requires the development of a retrofit program for existing discharges, as well as other "green" land use and planning efforts.

III.
CURRENT WATER QUALITY DEVELOPMENTS

Although urban runoff was not the initial focus of the Clean Water Act, the Act provided EPA and authorized states with substantial authority to regulate discharges of urban runoff from MS4s. Through the 1987 amendments and the development of programs such as the TMDL program, that authority has only been broadened. Current regulatory and case law developments continue this trend, and threaten to further erode municipal authority.

A. EPA's Stormwater Rule.

Although Congress required the regulation of stormwater starting in 1987, EPA has only more recently made stormwater a key regulatory priority. In its 2004 Water Quality Report, EPA identified urban stormwater as a major source of water quality impairment.[27] According to EPA, at the time of the 2004 Report, there were 22,559 miles of stormwater impaired rivers and streams, 701,024 acres of stormwater impaired lakes and 867 square miles of stormwater impaired estuaries. EPA determined that pollutants associated with stormwater – such as sediments, nutrients, metals, temperature, trash and bacteria – caused beach closures, swimming related illnesses, impacts to fisheries and shellfish harvesting and increased the costs of treating drinking water supplies. EPA also found that stormwater runoff from impervious urban areas increased flow rates and volume and caused flooding, scouring, sewer overflows and also reduced groundwater recharge.

EPA further determined that stormwater is a growing water quality concern, primarily due to development of previously undeveloped areas and the failure to retrofit the built

environment. EPA estimated that approximately 800,000 acres were being developed every year, growing to approximately 1.2 million acres by 2040. EPA believes that the impervious surfaces created by such development will significantly increase stormwater related impairments. These findings thus place traditional land use and planning functions of municipalities at the forefront of regulatory concerns.

To determine whether its current program effectively managed urban stormwater, EPA funded a study by the National Research Council to assess the current program.[28] In its 2009 Report on Urban Stormwater Management in the United States, NRC found that EPA's current program was "unlikely to adequately control stormwater's contribution to waterbody impairment." Among other things, NRC recommended a watershed based permitting system and a move to regulating stormwater by focusing on flow or surrogates such as impervious cover as a measure of stormwater loading.

In late 2009, EPA commenced a rulemaking process to, in part, implement some of the recommendations of the NRC report.[29] The proposed rule contains three elements of nationwide significance:

- The establishment of performance standards for discharges from newly developed and redeveloped sites.
- The requirement for MS4s to develop a program to address discharges from existing sites (retrofits).
- The extension of the reach of EPA's stormwater program.

Each of these key elements are discussed below.[30]

1. *Performance Standards.*

EPA believes that new development and redevelopment present an opportunity for stormwater management practices at sites to be designed in a way that protects water quality. The concept is that new development and redevelopment should be designed to retain stormwater on site and mimic natural hydrology.

In its pending rulemaking, EPA is thus considering the establishment of a nationwide performance standard for new and redevelopment. Such development would be required to retain on site all stormwater from a certain sized storm event. Although EPA will consider allowing site-specific hydrologic analysis, EPA believes that a minimum standard may be necessary to reduce pollutant loading.

To satisfy this new performance standard, projects would have to reduce impervious cover and install stormwater controls which infiltrate, evapotranspire and harvest and use rain water. Stormwater controls would, of course, require proper operation and maintenance to remain effective. EPA will consider site specific constraints, and may allow volume that cannot be retained on site to be managed through treatment, off-site mitigation in the same subwatershed or payment of in lieu fees. EPA also recognizes that water rights law may come into play and could be considered as a site constraint in certain circumstances.

EPA is currently considering applying the new performance standards on a nationwide basis to level the playing field for all new and redevelopment construction. The standard will likely apply to all types of construction projects including residential, commercial, industrial and institutional. The threshold for projects will likely be those that disturb one acre or more. Lower performance standards may apply to redevelopment projects in recognition of site constraints and to encourage rather than inhibit such development.

2. *Retrofits*.

Although EPA believes that performance standards for new and redevelopment will help solve the water quality problems associated with such development, the NRC report concluded that addressing the built environment was necessary to achieve meaningful water quality improvements. As part of its rulemaking effort, EPA is thus considering new rules to address water quality degradation from existing sites in order to help restore urban waters.

EPA's current approach in the rulemaking appears to be the imposition of a requirement to prepare a long-term plan in which municipalities will identify long-term goals, highest priority projects and milestones. The rule may require implementation of these planning goals through an iterative approach as part of the municipalities stormwater management plan. Municipalities would also likely be required to integrate green infrastructure projects into their current public works projects.

EPA is still considering how broadly to extend these retrofit requirements. Options being considered are imposing the retrofit requirements on regulated MS4s serving populations of 100,000 or more or regulated MS4s serving populations of 50,000 or more. EPA may also consider exemptions where MS4 discharges do not cause or contribute to violations of water quality standards.

3. *Extension of the Program.*

EPA is also considering ways to extend the stormwater program to areas not currently covered. EPA's goal is to extend the program now to developing areas that are not currently covered so that it will reduce the need for expensive retrofits later.

A key consideration of the rulemaking is thus to extend the program to unregulated but high growth areas. One option being considered is extending the program to urbanized clusters as defined by Census (areas with a density of 1,000 people/mi^2). A second option is to extend the program to small watersheds which overlap with urbanized areas.

In addition, EPA will likely use the rulemaking process to extend the program to areas left out or not fully covered by the current program. For example, EPA is considering extending the program to all principal arterial roads – i.e., those which connect urbanized areas. EPA believes that 39% of these arterials are not currently covered.

Similarly, EPA will likely use the rulemaking to correct the unintentional exclusion of some government-owned maintenance yards from the industrial stormwater program.

B. EPA's Framework for Integrated Municipal Planning.

Another current EPA effort is the draft framework for Integrated Municipal Planning.[31] This effort seeks to address the desire of municipalities and utilities to have more flexibility to consider all of their water quality obligations comprehensively, taking into account financial capability and wise investments that maximize water quality improvements. Although this policy arose out of the demands of municipalities and utilities that are struggling to comply with consent decrees for their combined sewer systems, the policy may present a broader opportunity for a more flexible approach to Clean Water Act implementation.

EPA commenced this integrated planning effort in October of 2011 when Nancy Stoner, Acting Assistant Administrator in the Office of Water, along with Cynthia Giles, Assistant Administrator of the Office of Enforcement and Compliance Assurance, issued a joint memo to EPA regional administrators.[32] The memo encouraged regions "to work with the states to engage our local partners regarding all of their National Pollutant Discharge Elimination System (NPDES) related obligations in an orderly manner." The memo stated that "EPA's existing regulations and policies provide EPA and states flexibility to evaluate a municipality's financial capability in tough economic times and to set appropriate compliance schedules, allow for implementing innovative solutions and sequence critical waste and storm-water capital projects and operation and maintenance related work in a way that ensures human health and environmental protection." The memo promised that an integrated planning approach framework would be developed.

In January of 2012, EPA issued a draft framework for Integrated Municipal Planning ("Framework").[33] The Framework establishes overarching principles for the integrated approach, identifies five (5) elements of integrated plans and outlines how integrated plans might be incorporated into NPDES permits.[34]

With regard to overarching principles, EPA believes that integrated planning will maintain existing regulatory standards while also allowing municipalities to balance various Clean Water Act requirements in a manner that addresses the most pressing public health and environmental protection issues first. EPA expects that municipalities will be responsible for developing such integrated plans through a meaningful stakeholder process and in a manner consistent with all state requirements.

In terms of the required elements of an integrated plan, EPA has identified five (5) elements. Element 1 would describe the water quality, human health and regulatory issues to be addressed in the plan. These issues would include:

- An assessment of existing Clean Water Act challenges.
- Identification and characterization of human health threats.
- Identification and characterization of water quality impairment and threats.
- Identification of sensitive areas and environmental justice concerns.

- Metrics for evaluating human health and water quality objectives.

Element 2 of an integrated plan would describe the existing wastewater and stormwater systems and provide information describing system performance. The element would include:

- Identification of municipalities and utilities that are participating in the planning effort.
- Characterization of wastewater and stormwater systems.
- Characterization of flows in the wastewater and stormwater systems.
- Identification of deficiencies associated with existing assets.

Element 3 of an integrated plan would establish a process for involving relevant community stakeholders in the planning and selection process. The municipality must provide meaningful input at various stages of development of the plan.

Element 4 of an integrated plan would establish a process for evaluating and selecting alternatives and proposed implementation schedules. This element would include:

- Use of sustainability planning elements to assist in providing information for prioritizing investments.
- A systematic approach to considering green infrastructure and other innovative measures.
- Identification of criteria to be used for comparing alternative projects.
- Identification of alternatives, including cost estimates, projected pollutant reductions and other benefits associated with each alternative.
- Analysis of alternatives that documents the criteria used, the projects selected, and why they were selected.
- Proposed implementation schedules.
- For each entity participating in the plan, a financial strategy and capability analysis.

Element 5 of an integrated plan would establish performance criteria and ways to measure success of the plan. This would include a monitoring program to address the effectiveness of controls, compliance monitoring and ambient monitoring.

EPA appears to envision implementation of the integrated plan in one of two primary ways. First, EPA believes that all or part of an integrated plan could be incorporated into NPDES permits where legally permissible. Second, all or part of an integrated plan may be able to be incorporated into the remedy of an enforcement action.

EPA is expressly seeking municipal leadership in the development and implementation of integrated plans. EPA hopes that municipal leaders will step forward to serve as models. Whether the Framework provides the appropriate vehicle for such municipal leadership remains to be seen.

C. Other EPA Programs and Actions.

In addition to its stormwater rulemaking and the Framework, EPA is engaged in a number of other efforts that present challenges and opportunities for municipalities. These efforts include:

1. *Clean Water Act Jurisdiction Guidance.*

EPA and the U.S. Army Corps of Engineers ("Corps") issued draft guidance on clarifying the protection of waters under the Clean Water Act.[35] EPA received approximately 230,000 public comments on the draft guidance. EPA and the Corps have prepared a final guidance document and have submitted it to the Office of Management and Budget for federal interagency review. EPA and the Corps have also commenced a rulemaking on this key Clean Water Act issue.

2. *TMDL Memorandum*.

In November of 2010, James A. Hanlon, Director of EPA's Office of Wastewater Management, and Denise Kechner, Director of EPA's Office of Wetlands, Oceans and Watersheds, issued a memorandum to the regional offices regarding TMDL's.[36] The memorandum revised EPA's November 22, 2002 memorandum[37] regarding waste load allocations for stormwater sources. The November 2010 memorandum signaled a major shift from the use of best management practices ("BMPs") to the use of numeric effluent limitations as TMDL's are incorporated into stormwater permits.

3. *Nutrient Criteria*.

EPA has also been very active in certain areas of the nation in establishing numeric criteria for nutrients. For example, EPA in 2010 established numeric criteria for nutrients for the state of Florida, replacing the state's narrative criteria.[38] The District Court for the Northern District of Florida has recently upheld most of this rule in a challenge brought by Florida.[39] EPA's efforts demonstrate a willingness to "federalize" standards when it perceives that numeric criteria are necessary.

D. NRDC v. County of Los Angeles.

As EPA continues to extend the reach of the Clean Water Act into traditional municipal affairs, the courts have simultaneously expanded the scope of the Act and municipal exposure to liability for water quality problems. One recent example comes from a Ninth Circuit decision concerning the MS4 system in Los Angeles County, California.

In *NRDC v. County of Los Angeles*,[40] the County of Los Angeles ("County"), the Los Angeles County Flood Control District ("District") and 84 municipalities in the County were issued an NPDES permit by the Los Angeles Regional Board. The permit imposed both non-numeric effluent limitations and established receiving water requirements.[41] The permit also contained self-monitoring requirements which, among other things, required monitoring at mass emission monitoring stations for four watershed rivers—the Santa Clara River, the Los Angeles River, the San Gabriel River, and Malibu Creek.[42] Between 2002 and 2008, the monitoring stations identified hundreds of exceedances of the permit's receiving water requirements.[43] The District admitted that it conveyed pollutants through its flood control channels, but contended that the channeling of pollutants by its infrastructure did not generate or discharge pollutants. Rather, it asserted that the MS4 conveyed the collective discharges of numerous "up-sewer" municipalities.[44]

The Ninth Circuit rejected this argument pointing out that under the Clean Water Act, merely conveying pollutants, even without generating them, creates liability:

> Although the District argues that merely channeling pollutants created by other municipalities or industrial NPDES permittees should not create liability because the District is not an instrument of "addition" or "generation," the Clean Water Act does not distinguish between those who add and those who convey what is added by others—the Act is indifferent to the originator of water pollution. As Judge Wilkinson of the Fourth Circuit cogently framed it: "[The Act] bans 'the discharge of any pollutant by any person' regardless of whether that 'person' was the root cause or merely *the current superintendent of the discharge*."[45]

The District also asserted that it did not discharge pollutants from an MS4 to a receiving water, since the mass emission stations were merely located in the rivers, and there was no discharge at or near the stations. The Ninth Circuit rejected this argument as applied to the Los Angeles River and San Gabriel River. Since the Los Angeles River and San Gabriel River mass-emission stations were in concrete, channelized portions of the MS4 that were controlled by the District, the Ninth Circuit determined that there was no factual dispute that the pollutants were "discharged" from the MS4 at or near the stations into the Los Angeles and San Gabriel Rivers.[46] The Court appeared to reason that the transition from the concrete, channelized portions of these two rivers was the point of discharge from the MS4. It therefore ordered entry of summary judgment in favor of the plaintiffs as to the claims involving those two rivers.[47]

But, the Ninth Circuit was unable to determine whether the pollutants were discharged from the MS4 to waters of the U.S. with regard to the Santa Clara River and Malibu Creek, since the mass-emission stations there were not in the channelized portions of these rivers and therefore it was unclear where the MS4 ended and the rivers began.[48] Accordingly, it affirmed the district court's dismissal on summary judgment of the plaintiff's claims involving those latter two rivers.[49]

With this interpretation of the Clean Water Act, the Ninth Circuit has served notice that the mere operation of a stormwater system or MS4 can create Clean Water Act liability for

discharges into navigable water, regardless of whether the operator added any of the pollutants and without a clear articulation of where a discharge occurs. The decision treats these two rivers as both part of the MS4 and as receiving waters without clearly explaining the point at which the MS4 ends and the rivers begin.

This case has significant implications for municipalities and stormwater management. Most MS4s are interrelated systems that cross many jurisdictional lines as water is moved from upstream to downstream locations. Even when an MS4 is isolated, the MS4 still receives discharges from a large number of varied sources located within the jurisdiction. The Ninth Circuit decision might force a rethinking of this integrated approach to stormwater management. If downstream public agencies are left "holding the bag" for pollutants that they do not add to the system, they might explore ways to change their standard approach to passively accepting such water. At a minimum, public agencies will start pointing the finger at each other when it comes to environmental liability, which could push public agencies away from collaborative approaches to stormwater management. The decision might force public agencies to think only about what comes into and out of its jurisdictional limits, and seek to put up walls at their borders.

Another significant implication of the decision is the blurring of the line between the MS4 and receiving waters. It is unclear from the decision when an MS4 stops and a river begins, and the decision appears to treat the rivers both as part of the MS4 and, at the same time, part of the receiving waters. This lack of clarity causes a host of complex issues. The District has asked the United States Supreme Court to review this question.

Further, the case underscores a crucial point that municipalities must always remember about their permits issued. The reality is that every word in the permit matters and jurisdictions must do everything possible to make sure they can actually comply with the plain language of the permit. Public agencies cannot trust oral or even written statements of intent from regulators, even when made in good faith, unless that intent is reflected in the permit language. The permit issued to the District contained language that dischargers believed (based upon oral and written statements from the Regional Board) protected them from liability as long as they were engaged in the "iterative" process to address receiving water exceedances. The Ninth Circuit expressly rejected this approach based upon the permit language at issue, which the court felt did not reflect an "iterative" process. This means that public agencies will have to spend more time and money during the permit process, and the end result might be more litigation over permit language.

E. Stormwater and CERCLA.

As if EPA's expansion of the stormwater program and increased liability for discharges under the Clean Water Act were not enough, liability for stormwater and other discharges appears to be expanding under other environmental laws as well. For example, a recent decision shows the dangers that public agencies that discharge stormwater may face under CERCLA.

In *United States v. Washington State Department of Transportation*,[50] the United States sued the Washington State Department of Transportation (WSDOT) on the grounds that contaminated runoff from its highway construction site and from drainage structures for its

highways violated CERCLA. In opposition to the United States' motion for partial summary judgment, WSDOT made three arguments.

First, WSDOT claimed that it was not a responsible party. Specifically, it asserted that it was not a generator who arranged for the disposal of hazardous substances because it did not have control over the release of hazardous substances from its highway stormwater system and did not dispose of any such substances.[51] The district court rejected this argument, noting that WSDOT designed the system and therefore had the ability to redirect, contain, or treat its contaminated runoff.[52] Accordingly, the Court granted summary judgment against WSDOT on this ground.[53]

Second, WSDOT argued that it operated under two permits that exempted it from CERCLA liability.[54] The first permit was an NPDES permit administered by the State of Washington. The second permit was issued to larger Western Washington municipalities that operate a storm drain system.[55] While it was undisputed that the permits existed, there were questions as to whether WSDOT was in compliance with the permits, and whether the releases occurred pre-permits and if so, whether the injuries from such releases were divisible from post-permit injuries.[56] Therefore, the district court denied summary judgment against WSDOT on this issue.

Third, WSDOT asserted the third-party defense to CERCLA liability, e.g., the contaminants in the highways runoff were caused by third parties over whom it had no control and that it handled the stormwater with due care and meet the standards of its permits.[57] Here too, the Court refused to grant summary judgment against WSDOT, since there was not enough evidence regarding due care by WSDOT, and, as noted previously, WSDOT's compliance with the permits was unresolved.[58]

Like the Ninth Circuit's application of the CWA in *NRDC v. County of Los Angeles*, the district court's application of CERCLA in *United States v. Washington State Department of Transportation* highlights the hidden dangers for government agencies that design and operate public drainage and stormwater runoff facilities. It presents another example of how water quality and other environmental laws continue to erode local control over core municipals functions.

IV.
WHAT CAN MUNICIPALITIES DO?

At this point, one may reasonably ask how a municipality can take a leadership role in such a difficult regulatory context and, further, why it should take such a role. Although hiding to avoiding liability is tempting, the answer to the "why" question is quite easy – if municipalities do nothing there may be nothing left for municipalities to do. Modern MS4 permits as well as broad consent decrees threaten to eliminate real local control over core municipal functions such as land use and planning and fiscal decision making. Unless municipalities put forward an alternative approach, the intrusion into core municipal functions will only increase as the regulatory concerns build that stormwater and water quality problems can only truly be tackled through the land use and planning process.

The "how" question is more difficult. However, listed below are some possible ways for municipalities to take a leadership role on water quality issues.

A. Incorporation of Water Quality Into Planning.

Land use and planning is a core element of local control and a fundamental municipal function. However, modern stormwater and other NPDES permits greatly intrude on this function. Because EPA and authorized states have concluded that many modern water quality problems stem from land use decisions, the regulators have sought to cause changes to the land use and planning process.

To reassert control over this core function, municipalities should take a leadership role by incorporating water quality considerations in their planning documents and planning decisions. Incorporating such considerations on local terms and as part of the accepted planning process will help prevent further erosion of this key municipal function. It would also allow municipalities to balance water quality concerns with other local concerns, rather than having water quality concerns imposed on municipalities by single-purpose agencies.

B. Early and Consistent Engagement in Regulatory Process.

A second key step municipalities can take is to engage early and consistently in the regulatory process. This includes not only individual permit development that may effect the municipality, but also engagement in broader regulatory and water quality planning efforts such as the ones discussed in this paper.

A key aspect of early involvement is the roles for both elected officials and legal counsel. Elected officials should be educated about the key issues early in the process and included in it. Too often, elected officials are brought into the process late in the game and thrown into the process without full knowledge. Similarly, legal counsel should play a greater role in permit development because the courts have made it clear that permits will be interpreted as a contract. Legal counsel should be involved early in the process so that permit language might be shaped in acceptable ways.

C. Legislative Relief.

A third step municipalities should take is to continue to push for legislative changes at both the federal and local level. Although the Clean Water Act has served the nation well, its emphasis on point source regulation does not translate nicely into the nonpoint source world of stormwater. Municipalities must continue to push for a system more tailored to the realities of stormwater, as well as municipal budgets.

D. Funding.

A final step municipalities can take is to continue to seek innovative ways to fund water quality improvements. Municipalities should continue to demand state and federal funding for mandated programs. In states that require state funding for state mandated programs, municipalities should push states to provide such funding. At the same time, municipalities should seek other partnerships, including private-public partnerships, to help fund this community-wide issue.

V.
CONCLUSION

Municipalities exist to provide core services and functions at the local level. Key components of municipal functions include land use and planning fiscal control. Because EPA and authorized states have concluded that tackling water quality problems demand control of land use and planning, regulators have intruded upon core municipal functions. Regulators may perceive such intrusion as necessary due to the failure or delay of municipalities to embrace water quality principles within their core functions.

To protect local control over core municipal functions, municipalities must assume a leadership role in water quality issues. By assuming such a role, municipalities could define their own water quality goals within a broader municipal context. If municipalities fail to assert such a leadership role, they may very well not have much left to control.

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[1] 33 U.S.C. §§ 1251 et seq.
[2] 33 U.S.C. § 1342.
[3] See Environmental Protection Agency, National Water Quality Inventory: Report to Congress 2004 Reporting Cycle (2004); see also National Research Council, Urban Stormwater Management in the United States (The National Academies Press (2009).)
[4] 33 U.S.C. §§ 407 et seq.
[5] A Legislative History of the Water Pollution Control Act Amendment of 1972, No. 93-1, Senate Committee on Public Works, p. 3674.
[6] Federal Water Pollution Control Act of 1972, Pub. L. No. 92-500, 85 Stat. 816 (1972).
[7] 33 U.S.C. § 1251(a)(1).
[8] 33 U.S.C. § 1311(a).
[9] U.S.C. §§ 1316 (technology-based) and 1312 (water quality-based).
[10] See NRDC v.Costle (D.C. Cir. 1977) 568 F.2d 1369, 1377.
[11] S. Rep. No. 414, 92d Congress, 1st Sess. 4 (1972).
[12] 33 U.S.C. §1329
[13] 33 U.S.C. § 1313.
[14] See, e.g., City of Arcadia v. State Water Resources Control Board (2006) 135 Cal.App.4th 1392, 1415-1418.
[15] See, Water Quality Act of 1987 (P.L. 100-4, 101 Stat. 7-90 (1987).
[16] See, NRDC v. Costle, supra, 568 F.2d at 1377.
[17] 33 U.S.C. § 1342(p)(3)(A).
[18] 33 U.S.C. § 1342(p)(3)(B)(iii).
[19] Defenders of Wildlife v. Browner (9th Cir. 1999) 191 F.3d 1159, 1165.
[20] See 33 U.S.C. § 1313(d); 40 C.F.R. 130.7.
[21] Id.
[22] 40 C.F.R. 122.44(d)(1)(vii)(B).
[23] See, e.g., First Amended Consent Decree, United States v. City of Atlanta, (N.D. Ga. 1998) Case No. 1:98-CV-1956-TWT; see, e.g., United States v. City of Akron (N.D. Ohio 2009) Case No. 5:09-CV-00272; see, e.g., Consent

Decree, United States v. City of South Bend (N.D. Ind. 2011) Case No. 3:11CV505; Consent Decree, United States v. City of Jeffersonville (S.D. Inc. 2009) Case No. 4:09-CV-0125DFH-WGH.

[24] See, e.g., Environmental Protection Agency, Clean Water Act Action Plan 6-7 (2009).

[25] California Regional Water Quality Control Board, San Diego Region, Order No. R9-2007-0001, NPDES No. CAS0108758.

[26] NPDES Permit No. DC0000221, issued October 7, 2011.

[27] Environmental Protection Agency, National Water Quality Inventory: Report to Congress 2004 Reporting Cycle 16 (2004).

[28] U.S. Environmental Protection Agency Award No. 68-C-03-081; See also National Research Council, Urban Stormwater Management in the United States (The National Academies Press 2009).

[29] Notice, 74 Fed. Reg. 68617 (December 28, 2009).

[30] The summary of EPA's rulemaking presented in this paper is derived from EPA's "Proposed National Rulemaking to Strengthen the Stormwater Program" website fund at http://cfpub.epa.gov/npdes/stormwater/rulemaking.cfm, as well as from a January 2012 presentation by Holly Galavatti & Rachel Herbert entitled "Overview of EPA's Stormwater Rule Considerations."

[31] Information about the Integrated Municipal Planning effort may be found at http://cfpub.epa.gov/npdes/integratedplans.cfm.

[32] U.S. Environmental Protection Agency, Achieving Water Quality Through Integrated Municipal Stormwater and Wastewater Plans, October 27, 2011; a copy of the memorandum is available at: http://cfpub.epa.gov/npdes/integratedplans.cfm

[33] A copy of the Framework is found at the website cited above. See also Notice, 77 Fed. Reg. 1687 (January 11, 2012).

[34] The summary of the Framework presented in this paper is derived from the material contained in EPA's website cited above, as well as from a presentation entitled "Draft Framework for Integrated Municipal Planning Approach" made in a February 27, 2012 listening session.

[35] See "Draft Guidance of Identify Waters Protected by the Clean Water Act." For more information, see http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm; see also Notice of Availability and Request for Comments, 76 Fed. Reg. 24479 (May 2, 2011).

[36] The memorandum may be found at http://cfpub.epa.gov/npdes/whatsnew.cfm?program_id=6.

[37] The memorandum may be found at http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/stormwater_index.cfm.

[38] Final Rule, 75 Fed. Reg. 757621 (December 6, 2010) (codified at 40 C.F.R. § 131.43).

[39] Fla. Wildlife Fed'n, Inc. v. Jackson (N.D. Fla. 2012) 2012 U.S. Dist. Lexis 21778.

[40] 636 F.3d 1235, 1240 (9th Cir. 2011). The decision was amended and reprinted at NRDC, Inc. v. County of Los Angeles, 2011 U.S. App. Lexis 14443 (9th Cir. Cal., July 13, 2011).

[41] Id. at 1241-42.

[42] Id. at 1242.

[43] Ibid.

[44] Id. at 1243.

[45] Id. at 1252-1253 (citing W. Va. Highlands Conservancy, Inc. v. Huffman (4th Cir. 2010) 625 F.3d 159, 167).

[46] NRDC v. County of Los Angeles, supra, 636 F.3d at 1253. The decision contains language suggesting that the water is taken from and then put back in the rivers at these locations. However, there is no factual support for this position, and other parts of the opinion appear to focus on the transition from concrete to a more natural condition.

[47] Id. at 1254.

[48] Ibid.

[49] Ibid.

[50] 716 F. Supp. 2d 1009, 1012 (W.D. Wash. 2010)

[51] Id. at 1015.

[52] Ibid. at 1015-1016.

[53] Ibid.

[54] Id. at 1016; 42 U.S.C. § 9607(j) states that "[r]ecovery by any person (including the United States...) for response costs or damages resulting from federally permitted release shall be pursuant to existing law in lieu of this section." Federally permitted release includes discharges in compliance with a permit under section 1342 of Title 33 of the United States Code. 42 U.S.C. § 9601(10).

[55] U.S. v. Washington DOT, supra, 716 F.Supp.2d at 1016.

[56] Ibid.

[57] Id. at 1016-17.

[58] Id. at 1017. WSDOT also contended that its non-negligent operation of a state highway system was an exercise of Washington State's sovereign power that was immune from CERCLA liability. Because WSDOT did not cite any controlling law to support this argument, the Court granted summary judgment in favor of the United States on this defense. Id. at 1017.