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STATE ENVIRONMENTAL REGULATION

Expert Analysis

Court of Appeals Considers Challenge To Storm Water Discharge Permits

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An important environmental regulatory case has been winding its way through the New York court system for several years. Now, after a January 2012 decision by the Supreme Court, Westchester County,[1] an initial ruling on appeal in November 2013 by the Appellate Division, Second Department,[2] and a second decision by the Second Department, issued in September 2014, in which it recalled and vacated its November 2013 ruling,[3] the dispute finally reached the New York Court of Appeals. Oral argument was set to be held March 24, 2015, before the Court of Appeals.

The issue before the court is of great practical concern to small municipalities throughout New York. The court will decide whether the federal Clean Water Act (CWA)[4] was violated when a general permit governing discharges from municipal separate storm sewer systems (known as MS4s) was approved by the New York State Department of Environmental Conservation (DEC) under the New York State Environmental Conservation Law (NYECL).

The Westchester Supreme Court ruled, in essence, that the general permit failed to ensure that small municipalities reduced their pollutant discharges to the "maximum extent practicable," as required by the CWA. The Appellate Division reversed, finding that the DEC's general permit for MS4s did not violate the CWA.

Should the court reverse the Second Department's 2014 decision upholding the validity of the general permit, these local New York governments and the DEC will face significant burdens in order to comply with the CWA. A decision is expected from the court before the end of this term.

Background

The CWA established the national pollutant discharge elimination system (NPDES). This generally prohibits the discharge of water pollution from point sources into surface waters, except in compliance with an NPDES permit issued by the administrator of the U.S. Environmental Protection Agency (EPA) or in compliance with a state pollutant discharge elimination system (SPDES) permit issued by an EPA-authorized state agency.[5] The CWA, as implemented by the EPA, authorizes the issuance of individual NPDES and SPDES permits to specific industrial pollutant dischargers and general NPDES and SPDES permits that cover multiple dischargers within a geographical area.

The NYECL established an SPDES permit program to ensure that New York had "adequate authority to issue permits regulating the discharge of pollutants from new or existing outlets or point sources into the waters of the state," in conformance with the CWA's rules and regulations and to participate in the NPDES created by the CWA.[6] Thereafter, the EPA authorized New York to issue NPDES permits through the state's SPDES program, and the DEC was empowered to administer the SPDES permit program pursuant to the NYECL.

In 1987, the CWA was amended to establish a framework for regulating municipal and industrial storm water pollutant discharges through the NPDES and SPDES permit system.[7] The amendment prohibited a municipality's discharge of storm water from a "municipal separate storm sewer system" (MS4) unless the municipality first obtained an individual NPDES or SPDES permit or was covered under an NPDES or SPDES general permit.

Thereafter, the DEC issued a state pollutant discharge elimination system general permit GP-0-10-002 for stormwater discharges from MS4s (the "general permit").

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The Natural Resources Defense Council (NRDC), and other parties went to court, seeking a declaration that the general permit was contrary to certain federal and state laws. Most significantly, the petitioners contended that the general permit failed to ensure that small municipalities reduced their pollutant discharges to the maximum extent practicable, in violation of Section 1342 of the CWA.

The Westchester Supreme Court agreed with the petitioners that the general permit violated Section 1342. It annulled the DEC's decision to approve the issuance of the general permit. The DEC appealed.

Second Department

In its November 2013 decision, the Second Department reversed the Westchester Supreme Court's ruling on the general permit and remanded the matter back to the Westchester Supreme Court for entry of a judgment dismissing the proceeding and a declaration that the general permit did not create an impermissible self-regulatory system that gave too much authority to the municipalities to determine compliance with the rules. Subsequently, the Second Department granted the petitioners' motion for reargument and issued its September 2014 decision, essentially confirming its prior ruling, reversing the Westchester Supreme Court's decision, and concluding that the general permit did not violate Section 1342.

In its September 2014 opinion, the Second Department observed that, under Section 1342, permits for discharges from municipal storm sewers required controls to reduce the discharge of pollutants to the "maximum extent practicable." This included management practices, control techniques and system, design and engineering methods, and such other provisions as the EPA or the state determined appropriate for the control of these pollutants.

Accordingly, the appellate court continued, "maximum extent practicable" was the statutory standard that established the level of pollutant reductions that operators of regulated MS4s had to achieve. The Second Department noted that the EPA had intentionally not provided a precise definition of maximum extent practicable to allow maximum flexibility in MS4 permitting. Rather, the EPA determined that MS4s needed the flexibility to optimize reductions in storm water pollutants on a location-by-location basis.[8]

The court will decide whether the federal Clean Water Act was violated when a general permit governing discharges from municipal separate storm sewer systems was approved.

To assist in this process, the Second Department continued, the EPA outlined various minimum control measures that constituted the framework for a storm water discharge control program for regulated small MS4s that, it said, when properly implemented, would reduce pollutants to the maximum extent practicable. The EPA determined that, in most cases, the proper implementation of the measures would significantly improve water quality.

The Second Department held that the general permit was consistent with the scheme for general permits envisioned by the EPA and was designed to meet the maximum extent practicable standard prescribed by Section 1342. In particular, it found that the general permit required entities seeking coverage to develop, implement, and enforce a stormwater management plan designed to address pollutants of concern and to reduce the discharge of pollutants from small MS4s to the maximum extent practicable, so as to protect water quality and to satisfy the appropriate water quality requirements of the CWA and the NYECL.

Moreover, it continued, a stormwater management plan had to identify and describe the chosen best management practices and include measurable goals for each such practice. The general permit also provided applicants with resources, including examples of successful stormwater management plans, a "menu" of best management practices, and suggested measurable goals, the appellate court noted.

The Second Department also explained that the general permit indicated that if a covered entity chose only a few of the least expensive methods, it was likely that the maximum extent practicable standard had not been met, but that if a covered entity employed all applicable best management practices except those that were not technically feasible in the locality, or whose cost would exceed any benefit to be derived, it would have met the standard.

The Second Department rejected the petitioners' argument, and the Westchester Supreme Court's conclusion, that the general permit created a self-regulatory system that did not ensure that entities operating under the general permit had satisfied the maximum extent practicable standard articulated in Section 1342 of the CWA. The appellate court did not agree with the petitioners and the trial court that the general permit did not ensure that a municipality's selected best management practices in fact represented measures that would reduce the discharge of pollutants to the maximum extent practicable.

Rather, the Second Department found the general permit included a variety of enforcement measures that were "sufficient to comply with the maximum extent practi-

cable standard." As the appellate court determined, to come within the ambit of the general permit, a municipality had to submit a complete and accurate notice of intent, the public had to be given notice of each notice of intent submitted to the DEC, and a public comment period of at least 28 days needed to be provided. (The public comment period could be extended by the DEC). A municipality that submitted a complete notice of intent in accordance with the requirements of the general permit was authorized to discharge stormwater from small MS4s under the terms and conditions of the general permit.

The Second Department next determined that the petitioners had not demonstrated (and, in fact, had not even asserted) that the permitting scheme implemented through the general permit necessarily resulted in coverage of municipalities whose stormwater management plans did not meet the maximum extent practicable standard. Indeed, the Second Department emphasized, the petitioners had "not demonstrated a single instance" where the general permit had authorized discharges of pollutants in contravention of the maximum extent practicable standard.

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Next, the Second Department decided, under the general permit and New York's implementing regulations, the DEC was vested with "sufficient authority" to enforce the statutory mandates of Section 1342 of the CWA to reduce pollution discharge to the maximum extent practicable. It acknowledged that the general permit allowed a municipality to identify and develop the best management practices it would use in light of the particular circumstances facing it, but declared that the ultimate determination of whether that municipality's discharges were covered by the general permit was with the DEC, given that coverage by the general permit did not occur until the DEC had accepted the notice of intent or stormwater management plan as complete and had issued a written notification.

Moreover, the Second Department added, the DEC could refuse to accept a notice of intent that failed to set forth best management practices adequately addressing the minimum control measures outlined by the EPA or otherwise failed to comply with the maximum extent practicable standard. In fact, even after a notice of intent had been accepted as complete, the DEC could modify the general permit or require a municipality covered under the general permit to apply for a special individual permit on the ground that it had failed to reduce the discharge of pollutants to the maximum extent practicable.

In the Second Department's view, the petitioners' argument that the entire permitting scheme was flawed constituted a systemic challenge to the general permit that the DEC adequately had rebutted by establishing that it had the power to review the best management practices enumerated in a municipality's notice of intent and to reject a municipality's stormwater management plan by exercising its power to reject a notice of intent as incomplete.

The Second Department concluded that the Westchester Supreme Court should have awarded judgment in favor of the DEC declaring that the general permit did not create an impermissible self-regulatory system that failed to ensure that small municipalities reduced their pollutant discharges to the maximum extent practicable as required by Section 1342.

Conclusion

Whether the general permit violates Section 1342 of the CWA, as well as various provisions of the NYECL, will be decided by the New York Court of Appeals in the next few months. Should it decide to affirm the Second Department's decision, the DEC and municipalities covered by the general permit will no doubt be relieved. Should it reverse the Second Department and side with the petitioners, the impact to the DEC, local governments, and taxpayers will be significant.

One final note. Petitioner NRDC recently filed a mandamus petition against the EPA in the U.S. Court of Appeals for the Ninth Circuit, raising similar arguments about MS4 general permits. This petition was mentioned in the DEC's supplemental brief to the Court of Appeals as another reason the court should not be invalidating the DEC's general permit, as the general permit complies with the EPA's current regulatory framework and the validity of that framework is not an issue before the court.

1. *Natural Resources Defense Council, Inc. v. N.Y. Dept. of Env. Cons.*, 35 Misc.3d 652 (Sup. Ct. Westchester Co. 2012).
2. *Natural Resources Defense Council, Inc. v. N.Y. Dept. of Env. Cons.*, 111 A.D.3d 737 (2d Dept. 2013).
3. *Natural Resources Defense Council, Inc. v. N.Y. Dept. of Env. Cons.*, 120 A.D.3d 1235 (2d Dept. 2014).
4. 33 U.S.C. §§1251 et seq.
5. 33 U.S.C. §1342 ("Section 1342").
6. ECL 17-0801.
7. See Water Quality Act of 1987, Pub L 100-4, §405, 101 Stat 7 (1987) (codified at Section 1342(p)).
8. 64 FR 68722, 68754.