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Environmental LAW

COA limits review of federal stormwater program

Stormwater regulation is usually not a conversation starter, unless it is flowing through your yard, but a recent decision by the Court of Appeals, *Natural Resources Defense Council v. New York State Department of Environmental Conservation* is noteworthy on several levels.

First, the actual controversy in the case, whether DEC's system of regulating and controlling the discharge of stormwater through so-called general permits is allowed under the Clean Water Act, is very important to hundreds of municipalities and thousands of developers. They are currently able to avoid the delay inherent in obtaining individual site-specific permits which would otherwise be required by opting-in to coverage under a general permit through a relatively simple Notice of Intent.

By RONALD G. HULL
Daily Record Columnist

Secondarily, an almost evenly divided court lined up 4-3 behind a lengthy 30-page majority opinion and 45-page dissent which provided primers on the origins and evolution of the Clean Water Act and the court's role in reviewing state implementation of a federal program delegated to the state. The clash of judicial philosophy makes the case an interesting read even if you are unfamiliar with the general permit program or the Clean Water Act.

The general permit program was the EPA's and then New York state's answer to a perplexing problem. Congress, through the Clean Water Act, requires the EPA to regulate discharges of all kinds, including stormwater, through a system of permits controlling the discharger's activities. That system of permits, the National Pollutant Discharge Elimination System, prompted New York to create its own State Pollutant Discharge Elimination System, which was approved by EPA in 1975.

As EPA moved into the area of regulating stormwater discharges, it faced a logistical nightmare – too few employees to efficiently process all the required permits – and its nightmare became the DEC's problem for the same reason. The EPA, and then New York state, turned to the general permit as a solution.

Through a general permit, the agencies could go through the entire administrative and technical process just once, create a model permit to cover an entire category of point sources, and then allow dischargers to opt-in and accept the terms and conditions of the already existing permit for as long as they engaged in that particular covered activity. The EPA adopted the concept of the general permit administratively, which has turned out to be problematic. New York state made the concept part of the Environmental Conservation Law and DEC followed with regulations and then permits.

DEC has issued three general permits for stormwater: a general permit for discharges associated with industrial activity within specified SIC Codes; a general permit for stormwater discharges from construction activity; and a general permit for stormwater discharges from municipal separate storm sewer systems (MS4s). The last covers approximately 559 municipalities and was the target of the Natural Resources Defense Council's lawsuit. Without these general permits, DEC would require many more employees or the SPDES program would grind to a halt.

NRDC challenged the federal system as a sham which provided the shield of a permit without meaningful public participation. It argued the system was self-regulating and in violation of the Clean Water Act, and won a decision in 2003 in the Ninth Circuit Court of Appeals invalidating EPA's regulations. The Supreme Court declined to take the case, but EPA has not changed its regulations and no other Circuit Court has adopted the decision.

The NRDC then attacked New York's general permit regulating MS4s in state court. The NRDC argued, as it had in federal court, that general permits deprived the public of the opportunity to weigh in on discharges which might affect them, created a self-regulatory system without meaningful oversight, and failed to force local governments to reduce the discharge of pollutants to the level required by the Clean Water Act.

The majority opinion by Judge Read analyzed the components of the general permit and the Notice of Intent and found the permit imposed highly prescriptive requirements and that the

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Notice of Intent is a detailed 19-page document that sets out minimum control measures with schedules to implement best management practices. This analysis had no bearing on the court's legal reasoning, but seems intended to reassure skeptics that the general permit is a meaningful and adequate means to achieve regulation and reduce pollution.

The court also addressed the Ninth Circuit's decision, but found a contrary decision out of the Seventh Circuit. The majority then concluded this split of authority was not its concern and was something the federal courts and EPA "will have to sort out." However, it appears that even if the Ninth Circuit's decision stood alone it would not have changed the outcome, which focused on the EPA and its regulations.

The majority concluded that "DEC operates the SPDES program as EPA's NPDES delegee, and is bound to follow the EPA's interpretation of the Clean Water Act." Unless and until the EPA revises its regulations, DEC's SPDES general permit program must comply with them. The court decided it would not issue an order against the DEC for complying with the EPA's regulations and that it was not a state court's role to decide whether the EPA's interpretation actually followed the Clean Water Act.

The dissent by Judge Rivera began with a history of prohibitions against water pollution, beginning with the Rivers and Harbors Appropriation Act of 1899, emphasizing that the Clean Water Act anticipates and requires opportunities for public participation, and that maximizing public involvement is a federally recognized goal. The dissent found the general permit program violates the Clean Water Act because there is no substantive review of an individual municipality's stormwater control measures, and fails to provide the public with an opportunity to request a public hearing.

In short, the dissent agreed with the Ninth Circuit that the EPA's general permit system, and by extension New York state's program, violates the Clean Water Act. The dissent chided the majority for simply ignoring that the Ninth Circuit had vacated the EPA's regulations and complained that the majority's "hands-off" approach deprived the state courts of authority to consider the legality of state agency conduct.

The dissent concluded that the administrative efficiencies of the general permit scheme do not outweigh the objectives and goals of the Clean Water Act. The dissent saw no legal impediment to the court interpreting federal law in the absence of binding precedent from the Supreme Court.

Of course, the dissent did not try to sort out the practical ramifications of invalidating the DEC's program on the grounds that the EPA should not have adopted a general permit program.

The majority achieved a practical result – in this case, that DEC should follow the chain-of-command – and left it to the federal courts to review EPA's actions. Of course, the majority also let us know they believe the EPA and DEC have interpreted the law correctly.

Although this case is over, the general permit program is still under a cloud. The NRDC has returned to the Ninth Circuit in an effort to force the EPA to rescind and replace its regulations. However, for the present, the many local governments and others depending on coverage under one of DEC's general permits have been reassured that their permits remain valid.

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