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Environmental LAW

Stormwater regulation in WDNY – a cautionary tale

What do Wal-Mart opponents, stormwater regulation and the Western District of New York have in common? After failing to overturn local land use approvals through Article 78 proceedings in state court, Wal-Mart opponents have consistently foundered in the federal district court for the Western District of New York, when they have subsequently alleged violations of the federal/state stormwater regulations through the citizen suit provisions of the federal Clean Water Act.

It is not that our local federal court is hostile to stormwater control; indeed, it has sustained claims when the elements of standing have been met. Instead, the Western District has been a vigilant gatekeeper against claims that really have nothing to do with stormwater.

In *CARS (Citizens Against Retail Sprawl) v. U.S. Army Corps of Engineers*, 2005 U.S. Dist. LEXIS 38404, the plaintiffs had previously brought several unsuccessful lawsuits in state court to stop the construction of a Wal-Mart store. They then brought a citizen suit against various parties, including the site developers, alleging that they had violated the New York State Department of Environmental Conservation State Pollutant Discharge Elimination System General Permit for Stormwater Discharges from Construction Activity, by failing to submit an adequate Stormwater Pollution Prevention Plan (SWPPP).

As a jurisdictional predicate to such a suit, plaintiffs were obligated to give notice of their intent to sue to defendants and federal and state authorities, in order to provide them with the opportunity to address the alleged violations and avoid the need for the suit. The developers moved to dismiss the complaint for lack of subject matter jurisdiction, asserting that plaintiff's notice letter did not allege violations of the SWPPP or general permit in sufficient detail to allow the developers to cure them.

The court agreed, finding that the plaintiffs did not even state the waters into which the alleged stormwater was being discharged, and did not specify the provisions of the general permit and SWPPP that were allegedly violated, and what conduct of

defendants caused those alleged violations. The court dismissed the complaint, dubbing it long on words and short on substance.

Wal-Mart opponents fared no better in *CA-POW! (Citizens Alert: Protect Our Waters!) v. Town of Greece*, 2010 U.S. Dist. LEXIS 95561, though one must look beyond the opinion itself to see the connection to Wal-Mart and stormwater. In *Residents Against Wal-Mart v. Town of Greece*, 60 A.D.3d 1343 (4th Dept. 2009), app. denied, 12 N.Y.3d 715 (2009), the petitioner unsuccessfully sought to annul the SEQRA negative declaration and the site plan approval for a Wal-Mart store in Greece, N.Y.

In response to this defeat concerning this store, CA-POW! was formed to bring a citizen's suit against the Town of Greece for its alleged failure to comply with its Stormwater Management Program Plan (SWMP Plan) required by the NYSDEC SPDES General Permit for Stormwater Discharges from Municipal Separate Storm Sewer Systems (MS4s), CA-POW! complaint 11112, 20, 77, Case 6:10-cv-06035-CJS (Doc. 1).

The town moved to dismiss the case, asserting, inter alia, that CA-POW!'s "Co-Chairman" lacked capacity to bring the action under the New York General Associations Law, and that leave to amend the complaint should be denied because the proposed amended complaint failed to cure the deficiencies concerning this lack of capacity.

The court granted the town's motion and further found that CA-POW!'s motion to amend was brought in bad faith because its counsel, having been warned to file a brief opposing the motion to dismiss the complaint, chose instead to serve an amended complaint about an hour before oral argument, forcing the town's counsel to make another motion to dismiss the amended complaint.

The court dismissed both the complaint and the amended complaint and in a separate decision, awarded attorney's fees to the town, payable only by CA-POW!'s counsel, 2012 U.S. LEXIS 95561.

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Most recently, in *Kern v. Wal-Mart Stores*, 804 F.Supp.2d 119 (2011), individual Wal-Mart opponents and their unincorporated associations brought a citizen's suit against Wal-Mart and the city approving Wal-Mart's project, after the opponents failed four times in state court to stop the project.

The plaintiffs alleged that Wal-Mart discharged stormwater into a specific creek that they used for drinking water and recreation in violation of the NYSDEC SPDES General Permit for Stormwater Discharges from Construction Activity. They also alleged that the city had failed to develop a SWMP and keep up with various recordkeeping requirements in violation of the NYSDEC SPDES General Permit for Stormwater Discharges from MS4s.

The defendants moved to dismiss the case for lack of constitutional and statutory standing. With respect to the individual plaintiffs' claims against the city, the court found that the documentary evidence established that the city had developed a SWMP and corrected the recordkeeping deficiencies, so that none of the three constitutional elements of standing — injury-in fact, causation, and redressability — had been established.

With respect to the associational plaintiffs' claims against all defendants, the court determined that the interests at stake were not germane to each organization's purpose, as plaintiffs did not plead any goals, purposes, or background information about the associations. As for the individual plaintiffs' claims against Wal-Mart, the court observed that there was no statutory standing because none of the individual plaintiffs gave written notice of suit to Wal-Mart. Accordingly, the court dismissed the case

against all defendants.

In contrast to these Wal-Mart stormwater cases, at least two citizen suits in the Western District of New York have survived summary judgment motions where the elements of standing have been met. In *Patterson v. The Barden & Robeson Corp.*, 2007 U.S. Dist. LEXIS 11225, the plaintiffs, who owned homes in a subdivision being further developed by defendant homebuilder, alleged that the defendant commenced construction without a SWPPP, ignored a DEC notice of violation to stop work, and defectively designed and implemented erosion control measures such as a pond, berm, swales and silt fencing, such that stormwater discharges caused flooding damages to their properties.

Since the elements of constitutional standing had been established, the court refused to dismiss the case. Similarly, in *Haniszewski v. Cadby*, 2009 U.S. LEXIS 91695, the plaintiff homeowners alleged that the defendant developer of an adjoining lot contributed to the flooding of their property by failing to use hay bales and silt fencing and excavate a retention pond as would be required by an adequate SWPPP. Again, the court found that the allegations were sufficient to establish the three elements of constitutional standing and denied defendant's summary judgment motion.

Taken together, these cases show that those who seek to comply with complicated stormwater regulations are likely to avoid liability, while those who don't, won't.

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