IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ENVIRONMENTAL DEFENSE CENTER, Petitioner, NATURAL RESOURCES DEFENSE COUNCIL, Petitioner-Intervenor, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	No. 00-70014 and consolidated cases

RESPONDENT EPA'S PETITION FOR REHEARING

This Court recently rejected a number of challenges to the Environmental Protection Agency's ("EPA") Phase II Storm Water Rule, 64 Fed. Reg. 68,722 (Dec. 8, 1999) ("Phase II Rule"), but remanded the Rule to EPA on the grounds that the Phase II Rule must provide for permitting authority review of Notices of Intent ("NOIs") to be covered under any general permit for "municipal separate storm sewer systems" ("MS4s"), the opportunity for a public hearing on each such NOI, and public availability of those NOIs. Environmental Def.Ctr. v. EPA, No. 00-70014, slip op. 571, 609-19 (9th Cir. Jan. 14, 2003). The Court's remand is

predicated on the conclusion that general permits issued under the Phase II Rule will not require controls to reduce the discharge of pollutants to the "maximum extent practicable," id. at 614, and that the NOIs are functionally equivalent to permit applications triggering an additional opportunity for a public hearing (i.e., in addition to the public hearing on the general permit). Id. at 617.

The Court's opinion correctly summarizes the mechanics of general permits, but misapprehends the role of general permits under the Phase II Rule. Specifically, the Court's analysis suggests that the only components of the Phase II regulation that assure attainment of the "maximum extent practicable" standard are the minimum measures set forth in the rule and the NOI's to be filed by permittees. See id. at 614-15. This analysis overlooks the substantive and procedural requirements for general permits under the National Pollutant Discharge Elimination System ("NPDES"), and leads to the incorrect conclusion that "in order to receive the protection of a general permit, the operator of a small MS4 needs to do nothing more than decide for itself what reduction in discharges would be the maximum extent practicable." Id. at 615 (emphasis added). Based on this erroneous conclusion, the Court ruled that the Phase II Rule violates the Clean Water Act ("CWA") because NOIs will not be reviewed by a permitting authority and will not be subject to public participation requirements.

I. Phase II general permits – not NOIs – must establish conditions requiring permittees to reduce discharges of pollutants to the "maximum extent practicable."[1/]

The Phase II Rule establishes a permitting program for small MS4s and identifies the "minimum control measures" that must be included in any individual or general permit. 40 C.F.R. § 122.34. The permits themselves will be issued by NPDES permitting authorities and will prescribe more specific means by which the minimum measures are implemented and discharges of pollutants are reduced to the maximum extent practicable. General permits may allow permittees some flexibility in selecting best management practices ("BMPs") to be used to implement minimum control measures, but those selections will be circumscribed by conditions that NPDES regulations require be included in all general permits.

Each Phase II permitting authority "must comply with the requirements for all NPDES permitting authorities under Parts 122, 123, 124, and 125" of Title 40. 40 C.F.R. § 123.35(a). The Phase II Rule simply supplements those requirements. Id.; 64 Fed. Reg. 68,744, col. 1-2. Under one such requirement, permits must contain conditions that provide for compliance with applicable requirements of the CWA and implementing regulations. 40 C.F.R. § 122.4(a).[2/] In addition, each

---

[1/] Judge Tallman reached this same conclusion in his opinion, dissenting in part. Slip op. at 671.

[2/] Section 122.4 applies to permits issued by EPA and is made applicable to permits issued by states by 40 C.F.R. § 123.25(a)(1). "Permits" includes general permits. 40 C.F.R. § 122.2.

"general permit must clearly identify the applicable conditions for each category or subcategory of dischargers." 40 C.F.R. §§ 122.28(a)(4), 123.25(a)(11). Under these regulations, Phase II general permits must clearly identify conditions to meet applicable requirements. The applicable requirements under Phase II regulations include the obligation to reduce the discharge of pollutants to the maximum extent practicable, based on the standard in CWA section 402(p), 33 U.S.C. §1342(p). 40 C.F.R. § 123.35(f) (incorporating by reference 40 C.F.R. 122.34(a)).

At a minimum, the conditions in general permits will tailor the broadly defined "minimum control measures" to the relevant characteristics of the dischargers covered by a permit and the region in which the dischargers are located. 40 C.F.R. § 122.34. General permits may impose additional conditions that may be necessary to reduce discharges to the maximum extent practicable. See 40 C.F.R. § 123.35(h). The Phase II Rule requires small MS4s applying for either individual or general permits to identify BMPs that they will implement for each of the minimum control measures. 40 C.F.R. § 122.34(d)(1). MS4s that choose to apply for individual permits will have significant latitude in their initial selection of BMPs because individual permits are issued only after review by the permitting authority and after public notice and comment. The Phase II Rule envisions that general permits may allow MS4s some opportunity to select BMPs,

but the selection will be limited by the conditions identified in the permit. In addition, the selections may be limited to a menu of BMPs issued by the permitting authority and incorporated into the permit. See 40 C.F.R. §§ 122.34(d)(2), 123.35(g).

Together, the Phase II Rule and other NPDES regulations mandate that general permits – not NOIs – must contain conditions that achieve reductions in discharges of pollutants to the maximum extent practicable. This requirement assures both permitting agency review and public participation. General permits are issued by EPA or by approved NPDES states and tribes. By practical necessity as well as regulation, general permits are subject to extensive review by regulating agencies. See 40 C.F.R. §§ 122.28, 122.44, 123.25(a)(11) & (15), 123.35. General permits issued by states are also subject to review and comment by EPA. 40 C.F.R. § 123.44(a)(2). EPA can object to any proposed permit that fails to comply with the CWA or implementing regulations. 40 C.F.R. §§ 123.29 & 123.44. If EPA objects, interested parties may comment and may request a hearing by the EPA Regional Administrator. 40 C.F.R. § 123.44(e). A state may not issue a permit without correcting the problem giving rise to EPA's objections. If a state does not submit a revised permit to meet EPA's objections to the proposed permit, EPA may proceed to issue the permit in accordance with the procedures

summarized below. 40 C.F.R. § 123.44(h)

The public is also assured of opportunities to comment on draft permits and appeal final permits. A permitting authority that tentatively decides to issue a general permit must first issue a draft general permit, 40 C.F.R. §§ 124.6(c) & (d), and a fact sheet that must include, among other things, a description of the type of facility which is the subject of the draft permit, a summary of the basis for draft permit conditions, and a description of the procedures for public comments, requesting a hearing and other means by which the public can participate in the final decision. 40 C.F.R. § 124.8.[3/] The permitting authority must give public notice of permit actions and provide at least 30 days for public comment. 40 C.F.R. § 124.10(b).[4/] Any interested person may submit written comments on the draft permit and may request a public hearing. 40 C.F.R. § 124.11. The permitting authority must hold a public hearing if it finds, on the basis of requests received, a significant degree of interest in the draft permit, and has the discretion to hold a

---

[3/] NPDES procedural regulations applicable to states authorized to administer the NPDES permitting program are identified in 40 C.F.R. § 123.25(a).

[4/] NOIs must also be available to the public. 40 C.F.R. § 122.34(g) (2)(a Phase II MS4 permittee "must make [its] records . . . available to the public at reasonable times during regular business hours").

hearing to clarify any issues. 40 C.F.R. § 124.12.[5/] The permitting authority must issue a response to comments when a final permit is issued. 40 C.F.R. § 124.17. General permits issued by EPA may be appealed by any interested person to the appropriate United States Court of Appeals. 33 U.S.C. § 1369(b)(1)(F); 40 C.F.R. § 124.19. General permits issued by states may be appealed according to applicable provisions of state law, but states must allow judicial review of general permits. 40 C.F.R. § 123.30.

In light of these substantive and procedural requirements, the Phase II Rule does not facially violate the CWA. Applicable regulations require that general permits establish conditions necessary to achieve the "maximum extent practicable" standard, and ensure agency review, public availability, and public participation with respect to all Phase II general permits. The Phase II Rule is not rendered invalid by providing that general permits may be written to allow permittees to select some BMPs, even if one assumed that a future general permit might be written so as to give permittees too much flexibility and thereby risk

---

[5/] Because the rules already provide the opportunity for a hearing before issuance of each general permit, it is within EPA's discretion to decide whether to allow an opportunity for a hearing on each NOI subscribing to the conditions of a general permit. See Adkins v. Trans-Alaska Pipeline Liab. Fund, 101 F.3d 86, 89 (9th Cir. 1996) (agencies are specifically entitled to deference in fashioning rules of procedure).

violating the "maximum extent practicable" standard.[6/] First, such a permit is not allowed under the NPDES regulations and, if issued, would be subject to correction through the public participation and appeal processes summarized above.

Second, EPA's decision to allow general permits to give MS4s some flexibility in selecting BMPs was not arbitrary, capricious or unlawful. The Phase II Rule, in conjunction with other NPDES regulations, establishes the framework for a permitting regime. The CWA does not require that the rule establish the specific conditions to be incorporated into general permits or prescribe the BMPs from which permittees must create their stormwater management programs. See 33 U.S.C. § 1342(p)(6) (EPA "shall establish a comprehensive program" that "may include performance standards, guidelines, guidance, and management practices and treatment requirements" (emphasis added)). Under such circumstances, agencies are entitled to broad deference in selecting the level of specificity or generality with which they articulate rules. See, e.g., Animal Legal Def. Fund, Inc. v. Glickman, 204 F.3d 229, 235 (D.C. Cir. 2000) (where statute required agency to establish "minimum requirements . . . for a physical environment adequate to promote the psychological well-being of primates," rule requiring facilities to

---

[6/] Such an assumption would violate the presumption of regularity that attaches to the actions of government agencies. United States Postal Service v. Gregory, 534 U.S. 1, 10 (2001).

produce a "specific" plan for action that addresses social needs was within agency's broad discretion); New Mexico v. EPA, 114 F.3d 290, 293 (D.C. Cir. 1997) (broad deference where statutory mandate to set "criteria" for waste plant certification "says nothing to suggest that the criteria be detailed or quantitative").

Third, an agency has discretion to articulate its legal positions by rulemaking or adjudicatory proceedings. Pfaff v. United States Dept. of Housing and Urban Dev., 88 F.3d 739, 748 (9th Cir. 1996), citing NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974) ("the choice between rulemaking and adjudication lies in the first instance with the [agency]'s discretion"). Consequently, EPA's decision to use general permits, rather than the Phase II Rule, to establish specific conditions for discharges is entitled to deference.

Finally, the issue of whether, under certain circumstances, a general permit might violate the CWA is not ripe for decision at this time. "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." Hodgers-Durgin v. De La Vina, 199 F.3d 1037, 1044 (9th Cir. 1999) (internal citation omitted); Sierra Club v. Nuclear Regulatory Comm'n, 825 F.2d 1356, 1362 (9th Cir. 1987) ("We will not entertain a petition where pending administrative proceedings or further agency action might render the case moot and judicial review completely unnecessary.") (citations

omitted). Indeed, the basic purpose of the ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." Abbott Labs. v. Gardner, 387 U.S. 136, 148-49 (1967). The Phase II Rule establishes the framework for the regulation of discharges of pollutants by MS4s, and does not authorize any particular discharge. The specific requirements for different categories of MS4s will be established by general permits issued by permitting authorities under procedures that provide for public participation and an opportunity to appeal each general permit. Under these circumstances, the question of whether some general permits somewhere might fail to assure that pollutants are reduced to the maximum extent practicable is not ripe for review. See Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 733-37 (1998).

For the foregoing reasons, this Court should grant EPA's petition for rehearing and reconsider those parts of the opinion remanding the Phase II Rule to EPA.

II. The Court's remand order is ambiguous and can be read to improperly deprive EPA of discretion in correcting deficiencies in the Phase II general permit program.

The proper remedy for the type of APA violation found in this case is a remand to the agency to take appropriate action. See, e.g., UOP v. United States, 99 F.3d 344, 350-51 (9th Cir. 1996); Asarco, Inc. v. EPA, 616 F.2d 1153, 1160 (9th Cir. 1980). Here, the Court's remand order exceeds the proper remedy to the extent that the order can be read to direct EPA to take specific actions to remedy the violations found.

The Court's opinion concludes by summarizing the violations found and directs: "We therefore remand these aspects of the Small MS4 General Permit option so that EPA may take appropriate action to comply with the Clean Water Act." Slip op. at 660. This relief is perfectly proper under the APA. Unfortunately, the Court also ended its discussion of the general permit/NOI issues by stating:

> In sum, we remand the Phase II Rule to EPA on the grounds that the Phase II Rule must provide for the review of NOIs to ensure that those NOIs "require controls" upon operators of small MS4s "that reduce the discharge of pollutants to the maximum extent practicable," 33 U.S.C. § 1342(p)(3)(B)(iii), must provide for public hearings on NOIs before any discharge is authorized as required by 33 U.S.C. § 1342(a)(1), and must provide for the public availability of NOIs as required by 33 U.S.C. § 1342(j).

Slip op. at 619 (emphasis added). To the extent that this statement directs EPA to take specific corrective action, the Court has exceeded its authority.

The APA itself provides that a court shall "set aside" – not "correct" –

agency action that it finds to have been "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). Thus, the Supreme Court has long held that a reviewing court, if it disapproves of agency action on review, ought not to order the agency to take specific action on remand. See NLRB v. Food Store Employees Union, 417 U.S. 1, 10 (1974) ("[w]hen a reviewing court concludes that an agency invested with broad discretion . . . has apparently abused that discretion . . . , remand to the agency for reconsideration, and not enlargement of the agency order, is ordinarily the reviewing court's proper course"). See also Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. at 524-25, 549 (1978) (courts should avoid engrafting their own notions of what the proper course of action is upon agencies entrusted with substantive functions by Congress); Federal Power Comm'n v. Idaho Power Co., 344 U.S. 17, 20 (1952) ("[T]he guiding principle [of APA review], violated here, is that the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration."). On remand, it is therefore the administrative agency's responsibility, not the Court's, to evaluate alternative courses of action and ultimately make a choice. Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976). The preservation of agency discretion in the environmental sphere is particularly important given the complex scientific and technical

knowledge required to implement environmental statutes. As the Ninth Circuit has stated, judicial "intervention into the process of environmental regulation, a process of great complexity, should be accomplished with as little intrusiveness as feasible." Western Oil & Gas Ass'n v. EPA, 633 F.2d 803, 813 (9th Cir. 1980).

Here, the Court's detailed relief effectively requires that NOIs operate as individual permit applications, in conflict with decisions holding that general permits are a lawful means of authorizing discharges under the CWA. See Slip op. at 611, citing NRDC v. Costle, 568 F.2d 1369 (D.C. Cir. 1977). Moreover, there are other options for correcting the errors perceived by the Court. For example, EPA could amend the Phase II Rule to require general permits to prescribe BMPs more specifically than the regulations currently require.

If the Court does not grant EPA's petition for rehearing as requested in Section I of this petition, the Court should amend the decision to make it clear that the Court's remand is not directing EPA to take any specific action, but simply to take appropriate action consistent with the Court's opinion.

Respectfully submitted,

THOMAS L. SANSONETTI
Assistant Attorney General
Environment & Natural Resources Division

KENT E. HANSON
Environmental Defense Section
United States Department of Justice
P. O. Box 23986
Washington, D.C. 20026-3986
(202) 514-2327

Counsel for Respondent

OF COUNSEL:

Stephen J. Sweeney
Office of General Counsel (2355A)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Ninth Circuit Rule 40-1, the attached Petition for Rehearing is proportionately spaced, has a typeface of 14 points or more and contains 2,901 words.

February 28, 2003

_____

Kent E. Hanson

CERTIFICATE OF SERVICE

I hereby certify that on February ____, 2003, I caused the foregoing RESPONDENT EPA'S PETITION FOR REHEARING to be served by first-class mail, postage prepaid, upon the following:

VICTORIA CLARK
Environmental Defense Center
906 Garden Street
Santa Barbara, California 93101

Counsel for Environmental Defense Center

R. TIMOTHY MCCRUM
ELLEN STEEN
DONALD J. KOCHAN
Crowell & Moring, LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Counsel for American Forest & Paper Association
and National Association of Home Builders

WILLIAM D. DUGAT, III

SYDNEY W. FALK, JR.
Bickerstaff, Heath, Smiley, Pollan, Kever, & McDaniel, LLP
816 Congress Avenue
1725 Frost Bank Plaza
Austin, Texas 78701

Counsel for Texas Counties Stormwater Coalition

JIM MATHEWS
Mathews & Freeland
816 Congress Avenue
1700 Frost Bank Plaza
Austin, Texas 78701-2443

Counsel for Texas Cities Coalition on Stormwater

ARLENE R. YANG
ANDREW G. FRANK
Paul, Weiss, Rifkind, Wharton & Garrison
1285 Avenue of the Americas
New York, New York 10019-6064

Counsel for Natural Resources Defense Council