HUNTON& WILLIAMS

Byline

May 5, 2015

As Goes Calif. Stormwater, So Goes The Nation's?

By Samuel L. Brown

Published in Law360

When states implement a flexible federal environmental regulatory program, when does a state's implementation of that program transform it from a federal requirement into a state requirement?

This is the question to be answered in an important case currently pending before the California Supreme Court addressing the Clean Water Act municipal stormwater program in the context of California's unfunded mandates law.[1] The case centers on the 2001 Los Angeles municipal separate storm sewer system (MS4) National Pollutant Discharge Elimination System (NPDES) permit,[2] the same permit that was the focus of a U.S. Supreme Court decision in 2013.[3] The decision in this case has the potential not only to impact California's stormwater program, but also to influence the implementation of the municipal stormwater program nationwide.

CWA Municipal Stormwater Program

In 1987, Congress amended the CWA, adding Section 402(p), which established a comprehensive program to address stormwater discharges.[4] The CWA requires operators of MS4s — cities, counties and other public bodies — to obtain an NPDES permit to, among other things, "reduce the discharge of pollutants to the maximum extent practicable [(MEP)]."[5] When the U.S. Environmental Protection Agency adopted regulations implementing the new CWA stormwater requirements it did not define MEP or identify the specific action(s) an MS4 must take in order to achieve the MEP standard; instead the EPA established permit application requirements.[6]

The EPA designed the MS4 application requirements to be "sufficiently flexible to allow the development of site-specific permit conditions" and "controls may be different in different permits."[7] The CWA requires NPDES permits to be issued by either the EPA or an EPA-approved state, such as California through the State Water Resources Control Board and the nine regional water quality control boards, and the CWA allows states to adopt requirements more stringent than federal requirements.[8]

California Unfunded Mandate Law

The California Constitution, Article XIII B, Section 6(a), requires the state to reimburse municipal governments for the cost to comply with programs mandated by state law. One exception to this requirement is when the program is a "federal mandate" required by federal law. The Commission on State Mandates is a quasi-judicial body in California that receives "test cases" from entities that believe there is a state unfunded mandate. In the context of the Los Angeles 2001 MS4 permit, Los Angeles and a number of municipal governments filed a test claim with the commission alleging specific permit provisions were unfunded mandates.[9] The commission found the permit provisions were unfunded state mandates, relying on "the plain language of the federal statute [33 U.S.C. Section 402(p)(3)(B)] and regulations [40 C.F.R. Section 122.26(d)]," finding federal law does not specifically require the permit provisions at issue.

On appeal, the California Superior Court and the California Court of Appeals overturned the commission's decision and held the permit provisions were federal mandates under the CWA.[10] The lower courts viewed CWA Section 402(p) and the EPA's implementing regulations as establishing a flexible regulatory program that allowed the permitting authority the discretion to determine what permit conditions are necessary to meet the statutory MEP standard.[11]

Case Will Hinge on Interpretation of Federal Law

The question of whether there is an unfunded state mandate is a state law question; however, California courts look to federal law to answer the question of whether a permit condition is a "federal mandate." On one hand, the state board and Los Angeles Regional Water Quality Control Board in their merit briefs argue MS4 permits must require controls to reduce the discharge of pollutants to the MEP standard.

The EPA's MS4 implementing regulations at 40 C.F.R. Section 122.26(d) purposefully do not identify national uniform minimum control measures. Therefore, it is up to the regional boards, as the permitting authorities, to determine what permit provisions are necessary in MS4 permits in order to reduce the discharge of pollutants to the MEP standard. The lack of specificity in the EPA's MS4 regulations does not mean when the state includes specific provisions in MS4 permits those provisions are not mandated by federal law. EPA Region 9 agrees with the state board and sent a letter in support of the Los Angeles 2001 MS4 permit, stating the permit provisions in question are "well within the scope" of the EPA's MS4 regulations.

In contrast, Los Angeles, the municipal governments and supporting amicus curiae argue the permit provisions are not required by federal law. In part, the municipalities emphasize the dual nature of state and federal regulation of water pollution and argue the CWA and EPA's regulations do not expressly require the permit conditions. Municipalities require flexibility to structure their stormwater management programs in a cost-effective manner and are allowed to choose the control measures to include in their programs as part of an iterative process, as long as those controls meet the MEP standard.

Impact of the Decision in California

If the California Supreme Court upholds the commission's decision there will be implications for the stormwater program in California, the specific implication(s) dependent on the reasoning the court utilizes. As a result of the decision, the state may be limited in what it can require in MS4

permits; it is highly unlikely the state would fund the costs for statewide implementation of municipal stormwater controls. The scope of the commission's decision on the Los Angeles 2001 MS4 permit was narrow, addressing only a few discrete permit provisions; however, most large MS4 permits in California have been subsequently challenged on unfunded mandates grounds and the test cases have been broader, covering the majority of the MS4 permit provisions.[12] Further, since requirements in MS4 permits "travel upstream" when municipalities implement the permit requirements, industrial facilities that discharge industrial stormwater into MS4s may also be impacted.

California has the oldest stormwater program in the country and is on its fourth generation of MS4 permits. If the regional boards' ability to mandate substantive control measures in MS4 permits is curtailed, it would impact the EPA's strategic approach to addressing municipal stormwater discharges. The EPA recently deferred action on a nationwide rule-making to revise the MS4 regulations to establish a comprehensive program to reduce stormwater discharges from new development and redevelopment and make other regulatory modifications to arguably strengthen the stormwater program.[13] Instead, the EPA intends to leverage existing regulatory requirements to strengthen MS4 permits. The recently issued EPA compendium of suggested MS4 permitting approaches includes permit provisions from the existing Los Angeles, San Francisco and San Diego MS4 permits.[14] The suggested permit provisions are the type of control measures that could be identified as state mandates, including water quality-based effluent limitations, numeric effluent limitations and low-impact development provisions (e.g., the use of green infrastructure), all priorities for the EPA and environmental stakeholders.

The EPA may become more engaged and object to future MS4 permits issued by the regional boards if they do not contain substantive permit provisions necessary to control the discharge of pollutants to the MEP standard. Further, the EPA may review the state's authority to administer the NPDES permitting program based on a lack of state legal authority or deficient implementation consistent with the requirements of the CWA. If the EPA determines a state is not administering the NPDES program in accordance with the statutory requirements, and the state does not take corrective action, the EPA must withdraw approval of the state program.[15]

This appears to be a very unlikely scenario in this case, as the EPA has never withdrawn the authority of a state to administer an NPDES program and California would be an unlikely first instance. However, environmental stakeholders will apply significant pressure on the EPA if the court's decision impacts the state's ability based on state law to include substantive provisions in MS4 permits. There is an existing Natural Resources Defense Council petition to EPA Region 9 to withdraw California's authority to administer the NPDES program based on alleged inadequate regulation of stormwater discharges. Any decision from the court that impacts the state's stormwater program may prompt environmental stakeholders to revisit the petition, particularly given the NRDC's recent petition for writ of mandamus in the Ninth Circuit on municipal stormwater issues.[16]

Impact of the Decision Beyond California

The impact of the decision may be distinguished as a unique state law issue; however, since the decision will hinge on an interpretation of the CWA and EPA's MS4 regulations, it could have a broader influence nationwide. If the court's decision is based on a narrow interpretation of federal law, the same logic could be utilized in other states to challenge MS4 permits. At least

28 states have adopted state laws or policies that limit the authority of state environmental agencies to regulate the discharge of pollutants more stringently than would otherwise be required under existing federal law.[17] For example, in Arizona, "[t]he director [of the Arizona Department of Environmental Quality] shall not adopt any requirement that is more stringent than or conflicts with any requirement of the clean water act."[18] In the context of stormwater, "an ordinance, rule or regulation adopted pursuant to this section, or a stormwater management program developed and implemented by a county pursuant to this section, shall not be more stringent than or conflict with any requirement of the Clean Water Act."[19]

Future litigants in other states may adopt the argument that the CWA and EPA's MS4 regulations do not require substantive permit provisions; therefore, any state-issued MS4 permit that includes those provisions "is more stringent than" the CWA and violates state law. This may be particularly true on the issue of compliance with water quality standards, as the Ninth Circuit has held "Congress did not require [MS4s] to comply strictly with [water quality standards]."[20]

The case is fully briefed and is one to follow, as the decision could have impacts on the regulation of stormwater discharges in California and beyond.

NOTES

[1] State Dep't of Fin. et al., v. Comm'n on State Mandates et al., Case No. S214855.

[2] The Los Angeles MS4 permit has since been reissued. See Order No. R4-2012-0175 (Nov. 8, 2012), NPDES Permit No. CAS004001.

[3] Los Angeles Cnty. Flood Control Dist. v. NRDC, 133 S. Ct. 710 (2013).

[4] 33 U.S.C. § 1342(p).

[5] 33 U.S.C. § 1342(p)(3)(B)(iii).

[6] 40 C.F.R. § 122.26(d).

[7] 55 Fed. Reg. 47,990, 48,038 (Nov. 16, 1990).

[8] 33 U.S.C. §§ 1342(b), 1370.

[9] The permit provisions are a requirement to place and maintain trash receptacles at all transit stops and a requirement to conduct inspections of various industrial and commercial facilities. See Parts 4.F.5.c.3; 4.C.2.a-b; 4.E of the Los Angeles 2011 LA MS4 permit.

[10] State Dep't of Fin. et al., v. Comm'n on State Mandates et al., 220 Cal.App.4th 74 (2013)

[11] 33 U.S.C. § 1342(p)(3)(B)(iii).

[12] See e.g. San Diego County MS4 permit challenge currently in abeyance before the Third Appellate District Court of Appeal, Case No. C070357.

[13] 74 Fed Reg. 68,617 (Dec. 28, 2009).

[14] Municipal Separate Storm Sewer System Permits: Post-Construction Performance Standards & Water Quality-Based Requirements, A Compendium of Permitting Approaches (June 2014), available at http://water.epa.gov/polwaste/npdes/stormwater/Municipal-Separate-Storm-Sewer-System-MS4-Main-Page.cfm (last visited, April 22, 2015).

[15] 33 U.S.C. § 1342(c)(3).

[16] Envtl. Def. Ctr. v. EPA, Case No. 14-80184 (9th Circ. Dec. 18, 2014).

[17] For a comprehensive overview of the states with "no more stringent than" provisions see the Environmental Law Institute's State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulated Waters Beyond the Scope of the Federal Clean Water Act (May 2013), available here (last visited, April 22, 2015).

[18] Ariz. Rev. Stat. Ann. § 49-255.01(B).

[19] Ariz. Rev. Stat. Ann. § 49-371(B).

[20] Defenders of Wildlife v. Browner, 191 F.3d 1159, 1166 (9th Circ. 1999).