

Was a New Hampshire Development Authority Required to Obtain a Clean Water Act MS4 Permit?: September 26th Federal Court Opinion



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A United States District Court (District of New Hampshire) addressed in a September 26th opinion whether a New Hampshire based development authority should have obtained a Clean Water Act Small Separate Storm Sewer System (MS4) permit. See *Conservation Law Foundation v. Pease Development Authority, et al.* Opinion No. 2017 DNH 202.

Plaintiff Conservation Law Foundation (“CLF”) filed a citizen suit action against Defendant Pease Development Authority (“PDA”) alleging Clean Water Act violations.

The Court addressed a Motion to Dismiss the action in its September 26th opinion.

PDA is described as the owner and operator of the Pease International Tradeport and Airport (“Pease International”). The facility it owns and operates is described as a 3,000-acre property with 40 percent of its land in the City of Portsmouth and 60 percent in the Town of Newington. PDA is stated to be responsible for managing stormwater at Pease International in compliance with the Clean Water Act.

Pease International was previously an air force base owned by the United States.

The New Hampshire Legislature established the Pease Redevelopment Commission to plan for the closure and redevelopment of the air force base in 1989. The PDA was created in 1990 by the New Hampshire Legislature, as a “body politic and corporate of the state,” “deemed to be a public instrumentality.” Interest in Pease International was eventually transferred by the United States to the PDA.

Pease International generates stormwater runoff from its streets, roofs, municipal buildings and infrastructure, and parking lots.

The CLF alleged in a Clean Water Act citizen suit action that:

...PDA is an agency of the State of New Hampshire with jurisdiction over disposal of sewage, industrial wastes, stormwater or other wastes.

As a result, CLF alleged PDA was responsible for managing stormwater at Pease International in compliance with the Clean Water Act.

The United States Environmental Protection Agency (“EPA”) issued in 2000 a Clean Water Act National Pollution Discharge Elimination System (“NPDES”) permit to PDA authorizing the discharge of wastewater

and industrial stormwater to five different outfalls. The Court describes this permit as an “Industrial Permit.”

CLF alleged that PDA’s Industrial Permit was not sufficient to address the stormwater discharges and maintain compliance with the Clean Water Act. It alleged that PDA was also required to obtain a Clean Water Act Small Municipal Separate Storm Sewer System (MS4) permit. These permits are also designated MS4.

Section 402(p)(6) of the Clean Water Act requires the operator of a small MS4 to obtain NPDES permit coverage for stormwater discharges. EPA had issued a General Permit for Stormwater Discharges for small MS4 for such systems in New Hampshire. The 2003 Permit imposed various obligations on small MS4s which included:

. . .develop, implement and enforce a stormwater management plan that details practices that will be implemented by the operator to reduce the discharge of pollutants from the storm sewer systems to the maximum extent practicable.

CLF alleged that the PDA Industrial Permit failed to impose such requirements. The organization argued that PDA’s obligation to undertake these activities was triggered by the ownership and operation of a small MS4 at Peace International. It alleged that Peace International is located in an urbanized area, and owns and operates a system of conveyances discharging pollutants (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels or storm drains) which are:

1. designed or used for collecting or conveying stormwater that is not a combined sewer or publically owned treatment works; and
2. owned or operated by a public body created pursuant to state law and having jurisdictional authority over stormwater.

PDA responded that it is not subject to the previously referenced MS4 requirements for three reasons:

1. As a state agency it is immune from suit under the Eleventh Amendment (including immunity for state officers sued in their official capacity)
2. It is prohibited from applying for an MS4 permit because:
 - it already has a stormwater permit under the Clean Water Act
 - the 2003 MS4 Permit expired in 2008.

Meaning CLF lacked standing because its injury (stormwater discharge in the absence of a 2003 MS4 Permit) is not redressable by the Court.

3. Even if CLF has standing, its claims fails as a matter of law.

As to Eleventh Amendment immunity, the Court undertakes an extensive analysis of whether the Clean Water Act claims are barred. The Court notes that the Eleventh Amendment provides that the:

. . . Judicial power of the United States shall not be construed to extend to any suit. . . commenced or prosecuted against one of the States by citizens of another State, U.S. Const., Amdt. 11 . . .

Immunity applies only to the states themselves and entities that are determined to be arms of a state.

The Court concludes that to the extent CLF is seeking penalties against PDA, and claiming that it violated the Clean Water Act by its failure to submit a Notice of Intent to be covered by the 2003 MS4 Permit, such relief and claims are barred by the Eleventh Amendment. However, the remaining claims seeking prospective equitable relief are held to fall within the Ex parte Young exception to the Eleventh Amendment.

The Court next holds that CLF has standing. It notes that the allegations involving discharge of municipal stormwater into waters of the United States without having first obtained the requisite permit, and without complying with regulatory requirements, and those alleged illegal discharges resulting in alleged harm to at least two of its identified members are sufficient to provide standing.

Finally, the Court addresses PDA's argument that CLF's claims should be dismissed on the merits. It rejects the argument that the Clean Water Act does not allow individual permittees (such as PDA) to be covered by a General Permit and the expiration of the 2003 MS4 Permit precluded PDA from seeking coverage.

PDA noted that it always had a permit for its discharges. It argued that the Industrial Permit was the only existing regulatory mechanism available for regulating discharges from entities like PDA that were not covered by any of the other "Phase 1" categories (referencing large and medium MS4s). Therefore, PDA argued that while it applied for an Industrial Stormwater Permit, it was applying for authorization to discharge what CLF labeled as "municipal" stormwater. In other words, PDA's individual Industrial Permit was argued to comprehensively cover its stormwater discharges (including municipal stormwater and stormwater from industrial activities).

In addressing this argument, the Court reviews the Clean Water Act permit shield. Section 402(k) of the Clean Water Act defines compliance with a NPDES . . . permit as compliance with Section 301 for the purposes of the Clean Water Act's enforcement provisions.

The Courts have interpreted this provision as shielding a permittee from liability under the Clean Water Act if:

- (1) it complies with its existing permit's terms; and
- (2) only discharges pollutants disclosed to the permitting agency and within the "reasonable contemplation" of the Agency during the permitting process.

CLF argued that PDA's municipal discharges and operations were not encompassed under its Industrial Permit (because it focuses on industrial activity), and were not intended to be covered under that permit. The rationale for this argument was:

- (1.) the permitting program for small MS4s did not exist at the time of PDA's industrial permit application; and
- (2.) PDA's development of Pease International into an MS4 had not yet occurred.

CLF's argument included an assertion that PDA did not disclose its discharges of pollutants to EPA or comply with the Industrial Permit's terms.

The Court concludes that the arguments regarding the applicability of the permit shield cannot be resolved on a Motion to Dismiss. The arguments are deemed to raise questions beyond the factual allegations in the Complaint and "draw support from extrinsic evidence not properly before the court," at what is characterized as an early stage of the litigation. Therefore, the Court denied PDA's Motion to Dismiss CLF's claim on the basis of the permit shield defense.

[A copy of the decision can be found here.](#)