STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2196

U. S. Environmental Protection Agency (USEPA)
Vessel General Permit for Discharges
Incidental to the Normal Operation of Commercial Vessels.

Filed September 22, 2009
Appeal dismissed
Schellhas, Judge

Minnesota Pollution Control Agency

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Considered and decided by Stoneburner, Presiding Judge; Peterson, Judge; and Schellhas, Judge.

U N P U B L I S H E D O P I N I O N

SCHELLHAS, Judge

Relators seek certiorari review of the Minnesota Pollution Control Agency's certification of a federal permit to regulate ballast-water discharge. Because we conclude that the applicable federal regulation precludes us from granting the requested relief and relators failed to establish that the regulation is invalid, we dismiss the appeal as moot.

FACTS

In this appeal, relators National Wildlife Federation and Minnesota Conservation Federation challenge the conditional certification by the Minnesota Pollution Control Agency (MPCA) of the proposed federal permit issued by the Environmental Protection Agency (EPA) to regulate ballast-water discharge from commercial vessels. The state's certification process is commonly referred to as section 401 certification, and the applicable federal statute is 33 U.S.C. § 1341(a)(1) (2006). Ballast-water discharge poses a potential threat to navigable waters in that it may introduce invasive aquatic species, which may cause economic and ecological harm and interfere with recreational activities and aesthetic appreciation.

Federal regulation of ballast-water discharge through the issuance of permits under the Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (2006), which is commonly referred to as the Clean Water Act (CWA), is a relatively recent development. The EPA previously recognized an exemption for ballast-water discharge, but that exemption was vacated as of September 30, 2008, pursuant to a 2006 federal court decision. *Nw. Envtl. Advocates v. U.S. Envtl. Prot. Agency*, No. C03-05760 SI, 2006 WL 2669042, at *3,

*11-12 (N.D. Cal. Sept. 18, 2006) (citing 40 C.F.R. § 122.3(a)), *aff'd*, 537 F.3d 1006 (9th Cir. 2008).

In 2007, after the federal court issued its decision in *Nw. Envtl. Advocates*, the MPCA began to develop a state permit to regulate the discharge of ballast water into Minnesota waters of Lake Superior. After hearings and input, the MPCA issued Ballast Water Discharge State Disposal System General Permit No. MNG300000 (SDS general permit) in September 2008. This court recently affirmed the MPCA's issuance of the SDS general permit. *In re Request for Issuance of SDS General Permit MNG300000*, 769 N.W.2d 312 (Minn. App. July 28, 2009).

The EPA may not issue a permit that requires certification unless certification is granted or waived. 40 C.F.R. § 124.53(a) (2008). States may include conditions in a certification, including conditions that are necessary to assure compliance with state law. 40 C.F.R. § 124.53(e)(1) (2008). Minnesota has adopted administrative rules for the MPCA's handling of a request for certification under section 401. Minn. R. 7001.1400 (2007). The MPCA may certify a federal permit only if it determines that the resulting discharge will comply with all applicable federal and state statutes and rules. Minn. R. 7001.1450, subp. 1(A) (2007) (requiring that certification determination be made in accordance with Minn. R. 7001.0140, subp. 1).

The federal discharge permit proposed by the EPA (EPA general permit) contained standards that included technology- and water-quality-based effluent limitations for ballast-water discharge. Unlike the SDS general permit, the EPA general permit is not limited to Minnesota waters of Lake Superior. In July 2008, while the

MPCA was developing its SDS general permit, the EPA requested a written certification decision from the MPCA regarding the proposed EPA general permit. In October 2008, after the SDS general permit was issued, the MPCA gave public notice that it proposed to issue a 401 certification for the EPA general permit. Relators argued in their comments that the draft certification would not prevent the introduction of invasive species and that the EPA general permit did not comply with an antidegradation (or nondegradation) policy. The MPCA took the position that conditions imposed in the proposed certification comply with Minnesota's nondegradation rules, which have been approved by the EPA.

The MPCA ultimately concluded that, with the addition of conditions, including compliance with the SDS general permit, there was reasonable assurance that activities authorized by the EPA general permit would not violate applicable water-quality requirements, and the MPCA certified the EPA general permit. The certification is dated November 19, 2008. Relators state in their brief that the MPCA provided them notice of its decision on December 4, 2008, and the MPCA does not dispute this date in its responsive brief. Relators' petition and writ of certiorari were filed on December 17, 2008. The record contains no evidence that relators sought a stay of the MPCA certification. On December 19, 2008, the EPA general permit became effective.

D E C I S I O N

"The doctrine of mootness requires that we decide only actual controversies and avoid advisory opinions." *In re McCaskill*, 603 N.W.2d 326, 327 (Minn. 1999). "A case is moot if there is no justiciable controversy." *City of W. St. Paul v. Krengel*, 748

N.W.2d 333, 338 (Minn. App. 2008), *aff'd*, 768 N.W.2d 352 (Minn. 2009). A justiciable controversy "allows for specific relief by a decree or judgment of a specific character as distinguished from an advisory opinion predicated on hypothetical facts." *State ex rel. Sviggum v. Hanson*, 732 N.W.2d 312, 321 (Minn. App. 2007). When there is "no injury that a court can redress, the case must be dismissed for lack of justiciability," except in certain "narrowly-defined circumstances." *Id.*

The mootness doctrine calls for a comparison between the relief demanded and the circumstances of the case at the time of decision to determine whether there is a live controversy that can be resolved. *In re Application of Minnegasco*, 565 N.W.2d 706, 710 (Minn. 1997). The general rule is that when a reviewing court cannot grant effective relief, it will deem an issue moot and dismiss the appeal. *Id.* But an appeal is not moot "where the issue raised is capable of repetition yet evades review." *McCaskill*, 603 N.W.2d at 327.

Relators raise several substantive challenges to the MPCA's conditional certification of the EPA general permit and request that we reverse and remand for the agency to apply a higher standard and to include more stringent provisions to preserve water-quality standards. The MPCA argues that this appeal is moot because the requested relief would have no effect on the EPA general permit. The MPCA argues that: Minnesota's section 401 certification is enforceable only to the extent that it is incorporated into the federal permit; and the EPA has issued the final permit and federal law does not allow the addition of new conditions to the EPA general permit. We agree that federal law does not allow the addition of new conditions to the final permit.

The federal regulation upon which the MPCA relies states:

> [I]f a court of competent jurisdiction or appropriate State board or agency stays, vacates or remands a certification, a State which has issued a [section 401 certification] may issue a modified certification . . . and forward it to EPA. If the modified certification is received before final agency action on the permit, the permit shall be consistent with the more stringent conditions which are based upon State law identified in such certification. *If the certification . . . is received after final agency action on the permit*, the Regional Administrator *may modify the permit* on request of the permittee *only to the extent necessary to delete any conditions based on a condition in a certification invalidated* by a court of competent jurisdiction or by an appropriate State board or agency.

40 C.F.R. § 124.55(b) (2008) (emphasis added). The plain language of this section permits the removal or deletion of conditions determined to be invalid, but it does not authorize the addition of conditions after there has been a final agency decision on the federal permit. *Id.* The EPA issued its general permit to regulate ballast-water discharge on December 19, 2008, months before our court heard this appeal.

Relators argue that section 124.55(b) is invalid because it supplants the authority conferred on the states in the CWA to decide whether a proposed federal permit meets the requirements of section 401 and renders state judicial review of certification, authorized by the Minnesota Legislature, meaningless. Relators further argue that this court has concurrent jurisdiction with federal courts to invalidate certain EPA regulations regarding section 401 and request that we invalidate the regulation.

Even if we have concurrent jurisdiction to invalidate section 124.55(b), we are not persuaded by relators' argument that section 124.55(b) is invalid. We agree with relators

that the language of the CWA requires that state-certification requirements be met before a federal permit may issue. *See* 33 U.S.C. § 1341(a)(1). And we recognize that the state legislature delegated authority to the MPCA to evaluate requests for section 401 certifications, while preserving the right of those aggrieved to seek judicial review of the final agency decision. Minn. Stat. §§ 115.03, subd. 4a(b) (providing that the MPCA is responsible for certifications), .05, subd. 11 (providing for judicial review of final decisions made under chapter 115) (2008). But relators did not obtain a stay of the MPCA certification, they did not seek expedited consideration of this appeal, and they have not established that there was any request to delay issuance of the EPA general permit, despite pending appeals on the SDS general permit and the certification. Limiting the types of modifications that can be made to federal permits after final agency action does not render judicial review of the decisions of the state agency "an exercise in futility," as relators assert.

No federal permit authorizing discharge into navigable waters can be issued without the state certifying that the resulting discharges will comply with applicable water-quality standards or without the state waiving certification, and no federal permit can be granted if certification is denied. 33 U.S.C. § 1341(a)(1). By limiting the types of changes that can be made after the state certification process has been completed and the EPA has made a final decision on the permit, the federal regulations ensure that provisions of the permit, invalidated as a result of judicial review, will not be enforced, while giving effect to all other conditions imposed by the responsible agencies. *See* 40 C.F.R. § 124.55(b). We note additionally that federal regulations contemplate some

delay where state certification is subject to a judicially imposed stay. The regulations provide that in the event of a stay, the EPA shall notify the state that the EPA will "deem certification waived unless a finally effective State certification is received within sixty days from the date of the notice." 40 C.F.R. 122.44(d)(3) (2008). Further, we disagree that the CWA precludes a federal regulation from establishing a limit on the amount of time a state has to decide whether to certify a proposed federal permit. Relators have not established that judicial review prior to issuance of the federal permit was impossible or that judicial review of certification decisions is "an exercise in futility." We are not persuaded that section 124.55(b), which precludes the addition of new conditions once the EPA has issued its final permit, is invalid.

Having rejected relators' argument that section 124.55(b) is invalid, we now apply the regulation to this case. Section 124.55(b) provides that no new conditions may be added to a final permit. Because relators seek to add new conditions to the final EPA general permit, they seek relief that cannot be granted. We therefore conclude this case is moot. Further, relators have not established that judicial review before the permit became final was impossible. We reject relators' argument that the issue is capable of repetition yet evading review. Because we dismiss the appeal as moot, we do not address relators' other arguments.

Appeal dismissed.