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**Local Land Use:
Decision Expands Federal Government's Role**

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Abstract: The United States Environmental Protection Agency (EPA), pursuant to its authority under the Clean Water Act, has promulgated regulations creating the Storm Water Management Program. Contrary to the overall Clean Water Act scheme, which focuses on reducing pollution from point sources, the program has the objective of reducing non-point source water pollution. However, this program is not without controversy as heavy burdens are placed upon local governments, who themselves lack the financial resources, manpower, or technology to implement a complex federal system without federal or state assistance.

The Environmental Protection Agency's Stormwater Phase II regulations and a recent Ninth Circuit decision raise a number of zoning and land use planning challenges for local governments in New York. Local and state governments are now required to enact and enforce stormwater management programs regulating illicit discharges and stormwater runoff from development projects. Phase II regulations apply to local governments that operate storm sewer systems that discharge to federally protected waters. (40 CFR 122.26(b)(16)) The regulations require affected localities to reduce the discharges from areas of new development, including construction activities that disturb small land areas, ranging from one to five acres.

Phase II regulates operators of municipal storm water systems within "urbanized areas." Typically, the municipality itself is the system operator. New York has 14 urbanized areas which include 44 cities, 183 villages, and 141 towns in parts of 14 counties. These regulations directly implicate the means by which local governments regulate private land use and construction activities. In doing so, they challenge the historical understanding that state and local regulation of private land use is beyond the reach of federal regulatory power. The principal

complaints of the municipal petitioners that challenged EPA's authority to issue these regulations in Environmental Defense Center v. EPA (319 F.3d 398 (2003)) are that the agency lacked statutory authority to require local governments to regulate private land uses to achieve federal objectives and that the regulations require state and local governments to regulate their own citizens in violation of the Tenth Amendment

Stormwater runoff control is crucial to the success of the federal Clean Water Act. It is one of the most serious causes of water pollution in the U.S, exceeding in many locales the contamination caused by sewage and industrial facility discharges. Stormwater runoff carries algae-promoting nutrients, floatable trash, used motor oil, suspended metals, sediments, raw sewage, pesticides and other toxic contaminants. They flow with stormwater runoff from their source to streams, rivers, lakes, estuaries, and oceans.

EPA, pursuant to its authority under the Clean Water Act, promulgated regulations establishing its Stormwater Management Program, which set forth a two-phase program. Phase I began regulating medium and large operators of municipal separate storm sewer systems (MS4s) in 1990. Phase I regulations require operators to implement a stormwater management program as a means to control polluted discharges from these MS4s.

On December 8, 1999, EPA promulgated the second phase of its MS4 regulatory program. Phase II regulates small MS4s as well as small construction activities, i.e. those activities disturbing between one and five acres of land. Pursuant to these rules, operators of regulated MS4s (those operating within a designated urbanized area) are required to obtain either an individual or general National Pollutant Discharge Elimination System (NPDES) permit. There are three requirements in Phase II of the Stormwater Program: (1) reduce pollution to the maximum extent possible (MEP); (2) protect water quality; and (3) comply with the applicable water quality requirements of the Clean Water Act.

Best management practices are utilized to achieve the goal of reducing pollutants in stormwater. To ensure that operators meet the MEP standard, EPA set forth six minimum control measures that must be included in a management plan, including public education and participation programs, pollution prevention programs, programs to detect and eliminate illicit discharges, and programs to address stormwater runoff from construction sites and post-construction land uses.

The effect on local land use autonomy is evident in the fine print of the regulations. Local governments are required to adopt erosion and sediment control laws, establish site plan review procedures for projects that will impact water quality, inspect construction activities, and adopt enforcement measures. In year one of the Phase II program, the ordinances must be in place, by year three there must be maximum compliance with adopted laws resulting in

improved clarity and reduced sedimentation of local water bodies, and by year four, local governments must demonstrate increased numbers of sensitive aquatic organisms in these waters. Post construction runoff controls are also required for development and redevelopment projects. Redevelopment is defined to include any change in the footprint of existing buildings that disturbs greater than one acre of land.

Further, non-structural best management practices noted in the federal regulations include comprehensive planning and zoning ordinances that guide growth away from sensitive areas and that restrict industrial and other intense land uses that compromise water quality. Zoning measures targeted by the regulations include requiring buffer strips, designating riparian preservation zones, and the maximizing open space.

Federal district court challenges to EPA's Phase II regulations brought by various petitioners against the EPA were appealed to three federal circuit courts (5th, 9th, D.C.) and eventually consolidated in the Ninth Circuit Court of Appeals. The petitioners include municipal organizations, industrial organizations, and environmental organizations. Municipal petitioners asserted that EPA lacked the requisite statutory and constitutional authority to compel small MS4s (consisting of predominantly state agencies and local governments) to regulate third parties. The claims are embedded in the Tenth Amendment state sovereignty principle.

Environmental petitioners contended that the regulations contained inadequate regulatory and public oversight, inadequate review of the notices of intent, and that they were arbitrary and capricious in the specific pollutants monitored. Industrial petitioners argued that EPA acted arbitrarily and capriciously in determining which sources to regulate, and that EPA's retention of authority to designate future sources for stormwater regulation was improper. On January 14, 2003, the Ninth Circuit issued its decision, essentially affirming EPA's regulations against the complaints of all three groups of petitioners.

The court addressed the municipal petitioners' argument that the measures regulating illicit discharges, small construction sites, and development activities were unconstitutional because they "interfere excessively with local government functions" and thereby violate the Tenth Amendment. The court relied upon two factors to find that the Phase II rule was not in contravention of the Tenth Amendment. First, the Phase II rule regulates only local governments that choose to engage in activities that are legitimately regulated by the federal government. Second, the regulations are not coercive because they provide local governments alternatives to regulating private construction activities. These include not discharging into federal waters, constructing artificial wetlands or other detention or diversion structures, sealing off the entry points of illicit discharges, or simply requesting private dischargers to seek their own federal pollution discharge elimination permits.

Municipal petitioners hotly contested this conclusion arguing that the practical difficulties involved in these alternatives will force them to adopt a regulatory approach, indirectly compelling them to administer a federal regulatory program in contravention of the Tenth Amendment. In response, the court stated that the “Tenth Amendment does not prevent the federal government from conditioning permission to discharge into federal waters on municipal adoption of a stormwater management program.” Simply because the alternatives to disposal in federal waters may be more expensive does not affect the ability of municipalities to choose not to discharge into federal waters.

Although federal influence on land use planning is not new to state and local governments, previous efforts have been masked in persuasion strategies. The federal government often provides grants, tax breaks, and funds for projects that conform to federal statutory objectives. However, the Phase II regulations have expanded the federal government’s role of influencing local land use decisions beyond these typical persuasive techniques. As a result of this case, local governments operating MS4s are required to develop, implement, and enforce programs eliminating illicit discharges and addressing stormwater runoff from construction activities and new and redevelopment projects.

The Phase II regulations mimic another EPA program that has recently been the topic of discussion. The Phase II program directly regulates the pollutants and activities that the total maximum daily load (TMDL) program indirectly attempted to regulate. The TMDL program requires states to establish total maximum daily loads for certain pollutants that may enter waters that are designated as impaired under federal water quality standards. (Clean Water Act, Sec.303(d)(1)(C)) Once a TMDL has been established for a particular water body, the total load must be allocated among the point and nonpoint sources of regulated pollutants. These nonpoint source pollutants emanate largely from development projects and land uses that are regulated by local governments. In order for the TMDL program to be effective, states must inevitably require their local governments to amend their land use controls to meet TMDL standards or preempt local authority to the extent necessary to meet those standards through more direct state action. EPA’s efforts to issue TMDL regulations to effect this result have been suspended because of litigation, policy debates in the current administration, and the practical difficulties of compliance.

The Phase II regulations seem to have cleared these hurdles if the Environmental Defense Fund decision holds. The federal government has been authorized to require MS4 operators, i.e. local and state governments, to implement and enforce regulations or implement other programs to meet MS4 standards, including erosion and sedimentation controls and plans to direct development and growth within the urbanized areas.

The New York State Department of Environmental Conservation (DEC), incorporated the Phase II regulations as part of its State Pollutant Discharge

Elimination System (SPDES) program and issued regulations in January, 2003 that impose additional obligations on MS4 operators. These regulations pose many new challenges for local governments, not the least of which is that local ordinances must be updated to reflect the new requirements. Interestingly, DEC requires that operators insure that their stormwater discharges do not increase the discharge of pollutants regulated under the TMDL program into any water listed as impaired under 303(d) of the Clean Water Act, advancing by a different means the objectives of the TMDL initiative.

One of the major complaints of local governments that “benefit” from the current embrace of devolution is that costly and complex mandates come with the authority that devolution brings. Local officials question whether this is a fair bargain, particularly when federal and state agencies offer them no technical assistance or funding to effectuate federal and state objectives. Local governments have been aggressive in recent years in adopting a wide range of local laws to protect the environment, but few have the staff, technical, scientific, or financial capacity to solve the nation’s problems of nonpoint source pollution.

Where are the model ordinances that they should consider, data packages needed to identify degraded water bodies, geographical information systems needed to plan where growth should go and be checked, and sophisticated financial analyses of structural solutions to stormwater runoff? In a time of reduced federal and state spending, the local property base, already overburdened in most communities, is the default source of funding to support an enterprise that is exceedingly complex.

Inherent in the parallel pounding of federal and state stormwater requirements is the complexity of growth management which state and federal observers usually argue should not be left to the unfettered discretion of parochial localities. In this devolution double-dealing is a ricocheted responsibility to help local governments with the overarching issues of growth management, control of sprawl, abatement of nonpoint pollution, and architecture of smart growth initiatives. This realization is very little evident in current debates in state houses and national venues where budget reduction preoccupations prevail.