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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF NATURAL RESOURCES
DEFENSE COUNCIL, INC., ET AL.,

Appellants,

-against-

No. 48

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION,

Respondent.

20 Eagle Street
Albany, New York 12207
March 24, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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Sara Winkeljohn
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: We're going to start
2 with number 48, Matter of Natural Resources Defense
3 Council v. New York State Department of Environmental
4 Conservation.

5 Counsel, would you like any rebuttal time?

6 MR. LEVINE: Yes. Two minutes, please,
7 Your Honor.

8 CHIEF JUDGE LIPPMAN: Two minutes. Go
9 ahead. You're on.

10 MR. LEVINE: Thank you. Lawrence Levine,
11 counsel for petitioners' citizen groups.

12 Your Honors, the permit in this case
13 violates three main legal principles under the
14 federal Clean Water Act and the state Environmental
15 Conservation Law.

16 Before I get into those three main things
17 I'd like to - - - to discuss with you today, I want
18 to briefly address a red herring that the State has
19 spent most of their supplemental brief on.

20 CHIEF JUDGE LIPPMAN: Go ahead, counsel.

21 MR. LEVINE: DEC claims that this permit is
22 lawful because it complies with a regulation EPA
23 issued in 1999. What the State refuses to
24 acknowledge is that the federal circuit court, the
25 Ninth Circuit, vacated those regulations in 2003 in

1 the Environmental Defense Center case.

2 CHIEF JUDGE LIPPMAN: Is your basic
3 arguments directed at the Ninth District - - -
4 through the Ninth District ruling? That's what
5 you're relying on, basically?

6 MR. LEVINE: Well, not entirely, Your
7 Honor. That is a piece of this. Number one is that
8 that regulation is invalid and so that what - - -
9 vacated, null and void. And so what applies in its -
10 - - in - - - in its absence is the Clean Water Act
11 itself and the Environmental Conservation Law.

12 CHIEF JUDGE LIPPMAN: But - - - but the
13 basic argument in relation to the general permit is
14 based on the Ninth Circuit?

15 MR. LEVINE: The Ninth Circuit's holding is
16 persuasive, and this court should follow it as to
17 what - - - what the Clean Water Act requires in terms
18 of not allowing a self-regulatory scheme, which is
19 what this permit sets up.

20 CHIEF JUDGE LIPPMAN: And there's another
21 decision by the Second Circuit?

22 MR. LEVINE: Correct, Your Honor. The - -
23 -

24 CHIEF JUDGE LIPPMAN: And what does that
25 do?

1 MR. LEVINE: The Waterkeeper Alliance case
2 from the Second Circuit expressly followed the Ninth
3 Circuit decision, applying it to a very similar
4 regulatory scheme for a different type of pollution
5 but also Clean Water Act.

6 JUDGE READ: But does - - - does the - - -
7 those - - - those - - -

8 CHIEF JUDGE LIPPMAN: Okay. Give us - - -
9 give us the areas. I'm sorry, Judge Read.

10 JUDGE READ: Those schemes do differ from
11 the one in - - - at issue here, correct?

12 MR. LEVINE: No, Your Honor. The - - - the
13 Ninth Circuit - - -

14 JUDGE READ: They're - - - they're
15 identical? The Ninth Circuit and Second Circuit
16 decisions, the schemes that they considered are - - -
17 are identical?

18 MR. LEVINE: Yes. The - - - the - - - the
19 Ninth Circuit was identical in that it was both about
20 these precise types of permits for municipal storm
21 sewer systems; it vacated the regulations that
22 provided for exactly the type of permit that DEC has
23 issued.

24 JUDGE READ: What about the Seventh
25 Circuit? Is that another issue? Is that your other

1 issue?

2 MR. LEVINE: The - - - the Seventh Circuit
3 opinion concerned a different type of pollution and a
4 different permit. And the court there described that
5 permit as having specific provisions in it rather
6 than being self-regulatory.

7 JUDGE READ: So you - - - you think this is
8 on all fours with the Second Circuit and Ninth
9 Circuit decisions.

10 MR. LEVINE: Correct, Your Honor.

11 CHIEF JUDGE LIPPMAN: Okay. Tell us the
12 three areas that you say are illegal in what they
13 did.

14 MR. LEVINE: Yes, Your Honor, if I can by -
15 - - by way of example. Long Island Sound, the Bronx
16 River, Lake Erie, and Lake Ontario, among others, all
17 have something in common under this permit. They're
18 all so polluted - - - according to DEC, so polluted
19 with urban runoff that if you swim in them or touch
20 the waters you may get sick because of bacteria.
21 Despite that, the permit says to the dozens of
22 municipalities that are dumping their urban runoff
23 into these waters, the permit says develop your own
24 pollution control plan, setting your own goals, and
25 go implement it.

1 CHIEF JUDGE LIPPMAN: So what - - - what
2 specifically is wrong with it? Give us in a nutshell
3 and then give the argument behind these. What are
4 the three areas that are no good?

5 MR. LEVINE: Yes. So Your Honor, so number
6 one is what I just described. It constitutes a self-
7 regulatory scheme.

8 CHIEF JUDGE LIPPMAN: It's self-regulatory
9 that they're depending on them to monitor or make
10 sure it's - - -

11 MR. LEVINE: Well, not even to monitor,
12 Your Honor, but simply to - - - to - - - to set their
13 own requirements.

14 CHIEF JUDGE LIPPMAN: Okay.

15 MR. LEVINE: Develop their own plan and
16 implement it.

17 CHIEF JUDGE LIPPMAN: All right. So it's
18 illegal in that regard. What's the second and the
19 third?

20 MR. LEVINE: The - - - the second is that
21 it does not ensure compliance with water quality
22 standards. It says instead to - - - to
23 municipalities don't make things any worse. That's
24 this provision that says no net increase - - -

25 CHIEF JUDGE LIPPMAN: Okay.

1 MR. LEVINE: - - - of pollution as opposed
2 to a decrease of pollution where there already is too
3 much.

4 CHIEF JUDGE LIPPMAN: Okay.

5 MR. LEVINE: And - - -

6 CHIEF JUDGE LIPPMAN: What's the third?

7 MR. LEVINE: The - - - the third main one,
8 Your Honor, is it is about monitoring. The permit
9 also says to these municipalities go and do your own
10 thing, and you don't even need to monitor - - -

11 CHIEF JUDGE LIPPMAN: So they don't have to
12 monitor at all and that's - - -

13 MR. LEVINE: That's correct.

14 CHIEF JUDGE LIPPMAN: - - - not in
15 accordance with the law.

16 MR. LEVINE: Correct, because monitoring is
17 a - - - is a lynchpin of the Clean Water Act
18 permitting scheme. Self-monitoring so that the - - -
19 the regulatory agency can tell from self-reported
20 monitoring whether there is compliance.

21 JUDGE STEIN: Where does the - - - the
22 public hearing issue come in to the - - - to those
23 three?

24 MR. LEVINE: Yes. That - - - and that - -
25 - that is a - - - that is a fourth. And - - - and

1 it's related - - - it's closely related to the self-
2 regulatory issue insofar as the - - - the public
3 hearing piece is that when DEC is determining whether
4 a municipality's plan is adequate, they need to make
5 a decision on that, and there needs to be an
6 opportunity for a public hearing in regard to DEC's
7 decision.

8 JUDGE STEIN: Why isn't comm - - - a notice
9 and comment sufficient there?

10 MR. LEVINE: Well, because the - - - the
11 Clean Water Act permitting scheme specifically calls
12 for an opportunity for a hearing. DEC has
13 regulations about this, and they say if there are - -
14 - if public comment raises substantive and
15 significant issues - - - and those are defined terms
16 in DEC's rules - - - then there shall be a public
17 hearing. And that hearing can be an adjudicatory
18 administrative hearing before an administrative law
19 judge to determine issues of fact, if there are fact
20 issues that go to the question of what requirements
21 are necessary under the circumstances of the
22 particular permittee. This permit obviates the
23 possibility of having such a hearing.

24 JUDGE ABDUS-SALAAM: Counsel, you say that
25 this is a self-regulatory scheme where the DEC says

1 set your own regulations and that's it. So you're
2 saying that there is - - - whatever these
3 municipalities present to DEC, they say this is fine,
4 that they don't comment on them. They don't amend
5 them. They don't ask any questions about them. They
6 just accept?

7 MR. LEVINE: That - - - that's absolutely
8 right, Your Honor. The only thing that DEC looks for
9 is whether the notice of intent, which is a - - - a
10 form that gets submitted, whether the notice of
11 intent is, quote/unquote, "complete." And DEC's own
12 records, which they've cited in their briefs of the
13 instances where they have deemed it incomplete, the
14 only times they've deemed it incomplete is if
15 something was literally left blank. And the
16 instruction back to the municipality in that instance
17 was send it back to us with that blank filled in,
18 with literally at least one thing filled in. And the
19 DEC will not investigate whether that one thing is
20 enough to meet the legal standard. Least - - -

21 JUDGE ABDUS-SALAAM: So you - - -

22 JUDGE RIVERA: What - - - what would be the
23 nature? You just said they don't investigate. So
24 what would be the nature of this additional
25 requirement that the - - - that you expect the

1 government to follow through on?

2 MR. LEVINE: Yeah.

3 JUDGE RIVERA: What would be the nature of
4 this investigation - - -

5 MR. LEVINE: Right.

6 JUDGE RIVERA: - - - to assure themselves
7 that the municipality is just not giving lip service
8 to the requirements of the law?

9 MR. LEVINE: Right. Well, there are two
10 options, Your Honor, that - - - that DEC has. Number
11 one is it can be more specific in the permits. As
12 not - - - not leave it entirely to the municipality,
13 in the first instance, to come up with what they're
14 going to do, but actually be more specific. And that
15 can range from - - - it - - - it doesn't need to be
16 entirely prescriptive. It could be, essentially, a
17 Chinese menu of options. Choose two from column A
18 and three from column B, as opposed to do something
19 rather than nothing.

20 JUDGE RIVERA: But - - - but isn't the
21 point of it to try and tailor to the local needs?

22 MR. LEVINE: Yeah. Yes, Your Honor. And
23 that - - - and so that's - - - so number one is,
24 again, as I would say, is - - - is the permit can be
25 more specific while still allowing flexibility even

1 in doing so. But number two, if DEC chooses to be
2 vague in the nature of this permit, it must then
3 evaluate what the permittee has proposed to ensure
4 that it's meeting that maximum extent practicable
5 standard.

6 JUDGE RIVERA: And - - - and what would
7 that evaluation look like that? What would that
8 process look like?

9 MR. LEVINE: It - - - it would look like
10 DEC reviewing the notice of intent. The notice of
11 intent format as it - - - as it exists right now is
12 almost certainly insufficient for DEC to make a
13 determination. And so it would require DEC to
14 require submission of more than just that form as it
15 exists now, as cer - - - as some other states do.
16 Texas and Mississippi, for example, require
17 submission of the entire storm water management plan
18 so that the - - - the state can review it and
19 determine whether the full suite of measures, the
20 permittee, the municipality, is proposing meet the
21 legal standard. So if they want to be - - - if DEC
22 wants to remain to - - - to keep the permit as a
23 vague framework - - -

24 JUDGE RIVERA: Um-hum.

25 MR. LEVINE: - - - rather than particular

1 things that either need to be done or presumptively
2 need to be done, they have the obligation then - - -

3 JUDGE RIVERA: The municipality - - -

4 MR. LEVINE: - - - to review and see if
5 it's enough.

6 JUDGE RIVERA: Yeah. Do the municipalities
7 have to set a particular time line? Is DEC setting a
8 time line for the steps that have to be complied
9 within this management plan? Or whatever they say
10 this is the way we're going to address - - -

11 MR. LEVINE: Right.

12 JUDGE RIVERA: - - - the storm water runoff
13 and pollution?

14 MR. LEVINE: Well, the - - - the permit
15 provides for a time line to implement the plan once
16 it's been developed. And we don't take issue - - -

17 JUDGE RIVERA: The plan as a general
18 matter. But I'm saying it - - - it - - - let me - -
19 - let me ask it different - - - differently. If,
20 indeed, the DEC did the kind of evaluation that
21 you've - - - you've just described, it strikes me
22 that, of course, DEC could come back and say and I
23 need to see by X month and X year the following.

24 MR. LEVINE: Yeah.

25 JUDGE RIVERA: Are you saying that that is

1 also required by law for them to do? To actually set
2 those kinds of benchmarks beyond some general time
3 frames that the law or the regs might set up now?

4 MR. LEVINE: Well, if - - - if the - - - if
5 DEC reviews and determines that it's insufficient.
6 Yes. They would need to go back to the permittee and
7 say - - - or the applicant, I should say - - -

8 JUDGE RIVERA: Um-hum.

9 MR. LEVINE: - - - and say we expect you to
10 revise this.

11 JUDGE PIGOTT: How do we handle, you know,
12 the - - - the - - - the Second Department said,
13 "Contrary to your contentions, the general permit
14 does include a variety of enforcement measures that
15 are sufficient to comply with the maximum extent
16 practicable standard"?

17 MR. LEVINE: Your - - - Your Honor, the
18 Appellate Division was - - - was incorrect in that
19 characterization of the permit, and if I may give you
20 an example to illustrate. There are six minimum
21 measures in the permit. There are these - - - these
22 general categories of things that must be addressed.
23 Number six is - - - is titled municipal pollution
24 prevention, good housekeeping, which basically means
25 pollution prevention measures for municipal

1 facilities, municipal buildings, or municipal
2 operations like road maintenance and things of that
3 nature.

4 The - - - the permit says, and this is on
5 pages 298 and -99 of the record, that - - - that the
6 permittee must develop and implement a program from -
7 - - for pollution prevention that, quote, "addresses
8 municipal operations and facilities that may include"
9 - - - and then lists a number of types of operations,
10 municipal operations, road maintenance, vehicle and
11 fleet maintenance, et cetera. And then the permit
12 says that the municipality must, quote, determine - -
13 - "municipality must determine management practices,
14 policies, and procedures," and refers the permittee
15 to a - - - a set of guidance documents with
16 suggestions. And then it says further - - -

17 JUDGE ABDUS-SALAAM: Counsel, how is that
18 different from your Chinese menu? And I - - - I'm a
19 little curious - - -

20 MR. LEVINE: Sure.

21 JUDGE ABDUS-SALAAM: I know your light is
22 on. But I'm a little curious how - - - what would it
23 take for DEC to come up with this Chinese menu - - -

24 MR. LEVINE: Right.

25 JUDGE ABDUS-SALAAM: - - - that you were

1 talking about?

2 MR. LEVINE: Well, the - - - the permit, in
3 fact, refers explicitly to a menu of BMPs, best
4 management practices, pollution control measures.
5 But it leaves it entirely to the permittee to pick
6 which, if any, of those off the menu to use. And so
7 a Chinese menu just colloquially, for - - - for an
8 example, would be DEC could apply its expert
9 judgement to say of that menu, these are particularly
10 important. In this category you must do at least
11 three of these five. These other ones, less
12 important, you must do two of these ten and - - - and
13 so forth, something of that nature - - -

14 JUDGE READ: But aren't you kind of - - -
15 aren't you - - -

16 MR. LEVINE: - - - or could say there's a
17 presumption to do certain ones and come back if you
18 think they're not appropriate.

19 JUDGE READ: Aren't you kind of getting
20 away from the concept of a general permit then?

21 MR. LEVINE: Well, no, Your Honor. The - -
22 - respectfully, the - - - this approach still allows
23 vastly greater efficiencies than writing from scratch
24 500 individual permits. What the - - - the Clean
25 Water Act requires, what Congress and the legislature

1 required - - - and - - - and the U.S. Supreme Court
2 spelled this out in California v. EPA, EPA v.
3 California, excuse me - - - is that the permit serves
4 to transform the generally applicable standards from
5 the statute into the specific obligations of the
6 permittees.

7 CHIEF JUDGE LIPPMAN: Okay, counsel. One -
8 - - one further because that - - - do you want to go
9 further than the original Supreme Court decision?

10 MR. LEVINE: Further than - - - than the -
11 - - than the Westchester County Supreme Court
12 decision?

13 CHIEF JUDGE LIPPMAN: Yes. You want to
14 just reinstate that, or you want to go - - -

15 MR. LEVINE: Yes.

16 CHIEF JUDGE LIPPMAN: - - - for there's
17 more wrong with it than what the Supreme Court
18 justice - - -

19 MR. LEVINE: Correct, Your Honor. And the
20 - - -

21 CHIEF JUDGE LIPPMAN: Okay.

22 MR. LEVINE: - - - the - - - the issues
23 there are the water quality issue standard - - -

24 CHIEF JUDGE LIPPMAN: Okay.

25 MR. LEVINE: - - - and the monitoring

1 issue.

2 CHIEF JUDGE LIPPMAN: All right. You'll
3 have your rebuttal. Let's - - - let's hear from your
4 adversary.

5 MS. UNDERWOOD: Regulating pollution from
6 municipal storm water systems has been a challenge
7 from the beginning of the Clean Water Act in 1972 and
8 before. It took a long time to figure out how to do
9 it in an effective and practical manner. And I think
10 - - -

11 CHIEF JUDGE LIPPMAN: Counsel, what does
12 the Ninth District and the - - - the - - -

13 MS. UNDERWOOD: The Ninth - - -

14 CHIEF JUDGE LIPPMAN: The Ninth Circuit and
15 the Second Circuit, what do their decisions provide,
16 and how does it relate to what we have in front of us
17 now? Is it the same scheme that they had to deal
18 with?

19 MS. UNDERWOOD: They are not on point for
20 several reasons. The Nin - - -

21 CHIEF JUDGE LIPPMAN: Go ahead.

22 MS. UNDERWOOD: The Ninth Circuit was
23 talking about this permit scheme. But it - - - it
24 held that the federal regulation authorizing this
25 permit scheme was invalid for failing to require

1 enough oversight and participation and so forth. It
2 didn't address the New York permit, which contains
3 much more oversight and participation than the
4 regulation that authorizes the permit system includes
5 beyond the federal regulation.

6 For example, the New York permit requires
7 the inventorying of all outfalls within over a five-
8 year period, the use of a DEC sample local law, or
9 something like it, for erosion and sediment control,
10 the inspection of construction sites. In other
11 words, the New York permit has many more specific
12 requirements than the federal reg requires. So it
13 could be the case that the reg doesn't require enough
14 but New York's permit does. It is, however, the same
15 system we're talking about, that is, municipal storm
16 water.

17 The Second Circuit decision has that flaw.
18 That is, it too was about a general regulation - - -

19 CHIEF JUDGE LIPPMAN: Right.

20 MS. UNDERWOOD: - - - and not about a
21 specific permit, and it concerned a different source
22 of pollution. Similar in that a general permit was
23 being used but this was about large private
24 agricultural companies and how they were handling the
25 agricultural runoff. And the court could think that

1 system, in the vast majority of the state of New York
2 no reduction can take place, you know.

3 MS. UNDERWOOD: I think that - - -

4 JUDGE FAHEY: For practical - - - for - - -
5 let me finish - - - for practical reasons I can
6 understand why this - - - this is a challenge. But -
7 - - but I don't see how that complies with the law to
8 reduce to the maximum extent possible.

9 MS. UNDERWOOD: I don't think that's
10 correct. I think it's worth stepping back, as you
11 say, to think about what kinds of regulation work
12 here. By common agreement, and I don't think NRDC
13 has suggested otherwise, the best strategy in
14 regulating the pollution that comes - - - that is put
15 in lakes and rivers by municipal storm sewer systems
16 is not to filter or treat the water, which may be
17 what people think about when they think about
18 cleaning up the water.

19 It's instead to reduce the pollution that
20 goes into them and to reduce the storm water that
21 goes out of them and into the lakes and rivers. And
22 that means, for reducing the pollution that goes into
23 them, getting residents and businesses and people
24 that are - - - not - - - not the - - - not the
25 municipality itself but the people who - - - who put

1 pollution into the sewers to get them to stop putting
2 pollutants in the storm sewers, things like
3 construction debris and sediment - - -

4 JUDGE FAHEY: So - - - so - - - we - - - we
5 understand. So how - - - how do you measure that
6 under a general permit then?

7 MS. UNDERWOOD: Well, the measurement of it
8 is - - - is - - - is a challenge, altogether. There
9 are two things to say about that. First of all, EPA
10 and others who have studied the precedent have said
11 that the - - - these measures, which sound soft and
12 ephemeral and qualitative, like trying to convince
13 people not to put their dead leaves in the gutter and
14 that sort of thing, actually do reduce the amount of
15 pollution that gets deposited in lakes and rivers.
16 So we have some empirical - - -

17 JUDGE FAHEY: So how do you - - - how do
18 you measure pollution reduction to the, quote,
19 "maximum extent possible" - - -

20 MS. UNDERWOOD: Right.

21 JUDGE FAHEY: - - - under this permit
22 system?

23 MS. UNDERWOOD: The system under the permit
24 for actual quantitative measurement requires
25 developing these things called TMDLs, total - - -

1 JUDGE FAHEY: Right.

2 MS. UNDERWOOD: - - - maximum daily load,
3 which you - - -

4 JUDGE FAHEY: But you don't have TMDLs on
5 most - - -

6 MS. UNDERWOOD: That's right.

7 JUDGE FAHEY: Well, I shouldn't say most.
8 Some you do and some you don't. Is that a better - -
9 - better way to put it?

10 MS. UNDERWOOD: That's correct. That is an
11 ongoing process. And where a TMDL has been
12 developed, those are developed not only by water body
13 but by pollutant. And then they - - -

14 JUDGE RIVERA: But they're not challenging
15 that here.

16 MS. UNDERWOOD: Pardon me?

17 JUDGE RIVERA: They're not challenging that
18 process here. That's not at issue before us. Is
19 that correct?

20 MS. UNDERWOOD: I don't believe so. But I
21 can't speak to exactly what they're challenging.
22 Where there are TMDLs, then there is a quantitative
23 allocation to each polluter, to each system, about
24 what they're supposed to do in quantitative terms.
25 And what this permit and these - - - and - - - and

1 this system says is that while that's in process - -
2 - and everyone agrees that that's the - - - the gold
3 standard, but we're not there yet and we can't wait
4 for that, meanwhile, there are practices that reduce
5 pollution, and those practices should be engaged in.
6 And I want to correct the suggestion that all that is
7 required is - - - is not to make anything worse.
8 This permit requires municipalities to engage in the
9 six - - - what they call the minimum control
10 measures, to address six areas of attempting to
11 reduce - - - to reduce pollution. We don't have a
12 way to measure that well, but we have empirical
13 evidence that those practices do reduce pollution.

14 JUDGE STEIN: How - - - how do you
15 determine that they are doing those things?

16 MS. UNDERWOOD: Well, they commit - - -
17 okay. So the - - - the - - -

18 JUDGE STEIN: So you just trust them?

19 MS. UNDERWOOD: No.

20 JUDGE STEIN: I mean I think - - -

21 MS. UNDERWOOD: No. No. That's not what
22 we do. We begin by asking them to commit to do these
23 things. And - - -

24 CHIEF JUDGE LIPPMAN: Are they committing
25 or they're just checking off that mark?

1 MS. UNDERWOOD: No, they are - - - they are
2 committing. And I - - - I think that that
3 trivializes it.

4 CHIEF JUDGE LIPPMAN: How are they
5 committing? How - - -

6 MS. UNDERWOOD: They are making a promise.
7 When they file that notice of intent, they - - -

8 CHIEF JUDGE LIPPMAN: That - - - that those
9 six areas we are going to address?

10 MS. UNDERWOOD: Not only that those six
11 areas we are going to address, but they also specify
12 both by checking subcategories on the notice of
13 intent and by the narrative, because this form has a
14 place where a narrative is - - -

15 CHIEF JUDGE LIPPMAN: Are they saying what
16 they're going to do or just that they are going to
17 address it?

18 MS. UNDERWOOD: They are saying as - - -
19 something about what they're going to do. So for an
20 - - -

21 CHIEF JUDGE LIPPMAN: Um-hum, something
22 meaning what?

23 MS. UNDERWOOD: Well, for an example, if
24 they're going to do public meetings, they might say
25 they're going to have twelve public meetings, or they

1 might say they're going to have multiple meetings, or
2 they might say they're going to use the local TV
3 station.

4 CHIEF JUDGE LIPPMAN: And do you review
5 everything that they say and decide whether that
6 meets what they need to do?

7 MS. UNDERWOOD: DEC reviews these notices
8 of intent.

9 CHIEF JUDGE LIPPMAN: Or is it kind of
10 automatic? As long as they check it off, it's okay.

11 MS. UNDERWOOD: I don't think either
12 description is exactly right. That is to say it is
13 not - - - there's nothing automatic about it, and - -
14 -

15 CHIEF JUDGE LIPPMAN: So what is it if it's
16 not automatic?

17 JUDGE RIVERA: How many have you denied?

18 MS. UNDERWOOD: I don't know how many have
19 been denied. We have in the record some denials.
20 But I would say that what - - - what the record of
21 denials omits is that this is an iterative process
22 that for every denial there will be many
23 circumstances in which people from DEC are talking to
24 people at the municipality and saying you haven't
25 really explained what you're going to do here. Could

1 you explain it a little more, or - - -

2 JUDGE PIGOTT: It depends on the size of
3 the municipality and - - -

4 MS. UNDERWOOD: It depends on the size.

5 JUDGE PIGOTT: - - - and area?

6 MS. UNDERWOOD: It may depend on the nature
7 of the landscape.

8 JUDGE RIVERA: And - - - and when you tell
9 them they have to explain a little bit more, do they
10 then file another - - - do they submit additional
11 information?

12 MS. UNDERWOOD: Yes.

13 JUDGE RIVERA: Or how iterative is it?

14 MS. UNDERWOOD: They submit additional info
15 - - -

16 JUDGE RIVERA: But there will be a
17 documented - - -

18 MS. UNDERWOOD: Well, I don't know if the
19 document - - - I - - - I'm not actually sure whether
20 - - - the - - - at what point these discussions
21 occur. I can represent with confidence that there is
22 a lot of consultation. It's sometimes called, in the
23 jargon, technical guidance. That is, you know, a
24 conversation - - -

25 CHIEF JUDGE LIPPMAN: But they're rout - -

1 - but they're routinely approved, whatever they put
2 down?

3 MS. UNDERWOOD: Not whatever they put down.
4 They are - - -

5 CHIEF JUDGE LIPPMAN: Pretty much - - -

6 MS. UNDERWOOD: - - - often approved.

7 CHIEF JUDGE LIPPMAN: They're pretty much
8 routinely approved?

9 MS. UNDERWOOD: And then the question - - -
10 yes. The - - - the theory is that the locality is
11 best situated to specify exactly the details of how
12 they're going to do it. I - - -

13 CHIEF JUDGE LIPPMAN: Yeah, yeah. But
14 they're supposed to be overseen - - -

15 MS. UNDERWOOD: Yes.

16 CHIEF JUDGE LIPPMAN: - - - right, what
17 they're doing?

18 MS. UNDERWOOD: And there is a lot of
19 oversight. And the oversight is there are audits
20 after the facts. There are audits, site visits. The
21 - - -

22 CHIEF JUDGE LIPPMAN: Yeah, but we're
23 talking about before the fact.

24 MS. UNDERWOOD: Yes. I think there's a
25 mistake here in thinking that it's so important

1 before the fact, because in this particular area,
2 we're not - - - it's not as if the water can't go on
3 until the permit is issued. So because it's not - -
4 -

5 CHIEF JUDGE LIPPMAN: So the scheme - - -
6 so the scheme is - - - I think what you're saying,
7 and I'm not saying it's good or bad, but the - - -
8 the scheme is you put down, basically, you - - - you
9 check off or do more than that as to these different
10 categories. You add some annotation as to what
11 you're going to do. And then the scheme is we follow
12 you and see if you're doing it. That's the - - - the
13 basic outline of - - - of this framework that you're
14 talking about?

15 MS. UNDERWOOD: I think with the - - - if I
16 could - - -

17 CHIEF JUDGE LIPPMAN: Is that what - - -

18 MS. UNDERWOOD: If I could add a few
19 things. That's - - - that's - - - that's the nature
20 of the program. But in addition, there are
21 enforcement actions. There are - - - and this is not
22 really in the right order, chronological order, here.
23 There's that opportunity for citizen complaints.
24 There are reports required. There's a lot of
25 reporting that's required.

1 CHIEF JUDGE LIPPMAN: Yeah, but it's all -
2 - - I guess the point is it's all pretty much all
3 after the fact, and that's okay, is your position.

4 MS. UNDERWOOD: I would say that a lot of
5 that. I don't say it's all after the fact.

6 CHIEF JUDGE LIPPMAN: Okay.

7 MS. UNDERWOOD: I think what happens before
8 the fact is serious.

9 CHIEF JUDGE LIPPMAN: Okay.

10 JUDGE STEIN: What happens - - -

11 MS. UNDERWOOD: But I think - - -

12 JUDGE STEIN: What happens if it - - - if
13 it - - - if they perm - - - if the permit, the
14 application, is denied? What happens? What - - -
15 what - - -

16 MS. UNDERWOOD: They revise it until they
17 get it granted.

18 JUDGE STEIN: I know. But in the meantime,
19 they're still putting the water - - -

20 MS. UNDERWOOD: That is - - -

21 JUDGE STEIN: - - - through the sewers,
22 right?

23 MS. UNDERWOOD: That is correct. Because
24 we - - -

25 JUDGE STEIN: So what is the practical

1 effect of the - - - the whole process, really?

2 MS. UNDERWOOD: The point of the process is
3 it's really a collab - - - it's like federalism at
4 the - - - at the state level. It's a collaborative
5 process between state government and local
6 governments to try - - - that's why the public
7 participation is so important, to actually enlist the
8 local community in the project, which - - -

9 JUDGE STEIN: But if they don't - - -

10 MS. UNDERWOOD: - - - has costs and
11 benefits.

12 JUDGE STEIN: If they don't do any of what
13 they're supposed to do, what - - - what are the
14 consequences of that to the municipality?

15 MS. UNDERWOOD: Somebody will bring a - - -
16 there are penalties. There are fines that could be
17 assessed. I'm not sure that that is the most
18 effective way of enlisting coop - - -

19 JUDGE FAHEY: Well, if there was - - -
20 wasn't - - - wasn't there one incident? I - - - I
21 forget the city, was it Yonkers, where raw sewage was
22 coming out? Was - - - was that where - - - did that
23 come up in this context? Do you remember?

24 MS. UNDERWOOD: I'm not sure of the answer
25 to the question about - - -

1 JUDGE FAHEY: I can't remember the record.
2 I can't remember the record. So - - - so let me - -
3 -

4 MS. UNDERWOOD: - - - Yonkers and raw
5 sewage. But I - - - I - - - I - - - there are - - -
6 there is a possibility for penalties.

7 CHIEF JUDGE LIPPMAN: Okay.

8 JUDGE FAHEY: Your light's on. Let me just
9 ask this question so - - - so we can get to this.
10 How do we - - - how do we measure a reduction if we
11 don't have a baseline? I want you to address that.

12 MS. UNDERWOOD: Yes. The way DEC - - - and
13 DEC is not - - - New York's DEC is not alone in this
14 respect, is through modeling. That is to say we know
15 something about, from - - - from general studies,
16 what various practices do. So we know that one of
17 the - - - one of the big measures is to add greenery.
18 To - - - to have less paving and more - - - more soil
19 and vegetation that will absorb the water instead of
20 having it run right off into the rivers. And there
21 is quite good modeling about how - - - about the
22 effect of that so they can quantify the amount of
23 green infrastructure - - -

24 JUDGE FAHEY: Um-hum.

25 MS. UNDERWOOD: - - - and the reduction,

1 perhaps, in paving. And there is an empirical basis
2 for judging what that has likely done. I - - - I - -
3 - if I could just say something.

4 CHIEF JUDGE LIPPMAN: Finish - - - finish
5 off, counsel. Go ahead.

6 MS. UNDERWOOD: About - - -

7 CHIEF JUDGE LIPPMAN: You have one last
8 point. Go ahead.

9 MS. UNDERWOOD: Yes. The suggestion is
10 that we could go out there and measure it like - - -
11 like, you know, take the temperature of the water.
12 And that doesn't work. It doesn't work for two
13 reasons. One, general ambient - - -

14 CHIEF JUDGE LIPPMAN: Common sense tell you
15 that that might work?

16 MS. UNDERWOOD: It - - - the reason I want
17 to address it is that it - - - common sense would be
18 wrong.

19 CHIEF JUDGE LIPPMAN: Okay. Address it
20 quickly. Go ahead.

21 MS. UNDERWOOD: Ambient water sampling,
22 which DEC does do, not in connection with these
23 permits but it does do it, will tell you about the
24 health of the water body itself. But it won't tell
25 you about the contribution of the MS4. Many

1 different entities discharge. You could have the
2 municipality doing a great job of reducing its
3 discharge and somebody else, some - - - putting more
4 in. Ambient sampling won't tell you that.

5 And sampling at the outfalls, which you
6 might think would work better, also doesn't work
7 because we're talking about something that is such an
8 intermittent and sporadic discharge. This is not
9 like a waste treatment plant that sends out a steady
10 stream of water. So sampling over a period of time
11 would give you wildly different results and won't
12 really tell you nearly enough about what the prot - -
13 -

14 CHIEF JUDGE LIPPMAN: So what tells you
15 nearly enough?

16 MS. UNDERWOOD: What we - - - well, when
17 you have a TMDL and you have a specific reduction of,
18 let's say, phosphorous, you have - - - you have much
19 more concrete measures at that point. You might - -
20 - you might have that. But what you have now - - -
21 what - - - what DEC and the EPA believe is the most
22 reliable is the modeling of what - - -

23 CHIEF JUDGE LIPPMAN: Okay.

24 MS. UNDERWOOD: - - - particular measures
25 can be expected throughout.

1 CHIEF JUDGE LIPPMAN: Okay. Thanks,
2 counsel. Appreciate it.

3 Counselor, rebuttal.

4 JUDGE RIVERA: Are you challenging the TMDL
5 process?

6 MR. LEVINE: No, Your Honor. We're not.

7 JUDGE RIVERA: Thank you.

8 CHIEF JUDGE LIPPMAN: What about the
9 modeling that - - - that your adversary says is the
10 way to do this, that these other things don't really
11 tell you much?

12 MR. LEVINE: I'm sorry. Mod - - - modeling
13 and monitoring are not the same thing. Modeling
14 takes a set of assumptions about how things are
15 expected to work and plugs them into a computer and
16 spits out an answer. Monitoring, which is the word
17 in the statute and the regulations, is actual
18 measurements.

19 CHIEF JUDGE LIPPMAN: What - - - what does
20 - - - what specifically is monitoring?

21 MR. LEVINE: So - - -

22 CHIEF JUDGE LIPPMAN: What do you want them
23 to measure and when?

24 MR. LEVINE: There are - - - there are two
25 possibilities. And the - - - and the regulations

1 from DEC provide for both, monitoring either the
2 receiving water or the discharge itself. And they
3 are both practicable. If you monitored immediately
4 downstream of where the discharge takes place, that
5 would be indicative of what's - - - what's at fault,
6 what it - - - what the - - - what the municipality's
7 at fault for. Or - - -

8 JUDGE PIGOTT: Isn't this a lot more
9 complicated than that, though? I mean, I - - - being
10 from Western New York, you know, in this, if you take
11 water quality samples out of Lake Erie when - - -
12 when all - - - all the marinas are - - - are up and
13 running, you're going to get a different measure, it
14 would seem to me, than in the - - - in the winter.
15 And the same thing with the agriculture, and there's
16 a lot of agriculture in the southern tier. And
17 shouldn't the DEC be given this type of - - - of
18 permitting process to - - - to try to bring everybody
19 within certain confines?

20 MR. LEVINE: Well, Your Honor, there's a
21 concept in the regs of representative sampling. So
22 it's - - - it's understood that it is challenging to
23 do this. But representative sampling is a concept
24 that is applied in other permits, in other states,
25 and is a - - - a scientifically valid concept. We've

1 not made this up.

2 The - - - I'd - - - I'd like to agree
3 strongly with one thing that - - - that learned
4 counsel for the State said, which is that we - - - we
5 cannot wait for those TMDLs to be done. And - - -
6 and the reason is that the law is explicit that every
7 permit must include requirements that - - -

8 JUDGE ABDUS-SALAAM: Counsel, would - - -

9 MR. LEVINE: - - - ensure compliance with
10 water quality standards and the law is explicit that
11 it does not matter whether there is yet a total
12 maximum daily load.

13 JUDGE ABDUS-SALAAM: Counsel, the permit
14 here, one of them expires at the end of next month.
15 What happens then when the permit expires?

16 MR. LEVINE: DEC has proposed a renewal
17 permit, which is, essentially, identical to this
18 permit and has said that they will address the ruling
19 of this court and implement whatever this court
20 orders them to do in that next iteration of the
21 permit. Your - - - if - - -

22 CHIEF JUDGE LIPPMAN: Okay, counsel.

23 MR. LEVINE: Thank you, Your Honor. You
24 have a - - - you want to make one last point,
25 counsel?

1 MR. LEVINE: If - - - if I may.

2 CHIEF JUDGE LIPPMAN: Quickly, go ahead.

3 MR. LEVINE: Certainly. Thank you, Your
4 Honor. I'd - - - I'd like to emphasize one point
5 that the answer to - - - to, I forget which - - -
6 which of you - - - Your Honors asked the question, do
7 - - - do they routinely approve. There - - - there
8 are only three instances where DEC - - - of the 500
9 municipalities or so, with three instances where DEC
10 has disapproved. They're in - - - they are in the
11 record. They've - - - they've been cited in the
12 briefs.

13 CHIEF JUDGE LIPPMAN: So you think it's - -
14 - you think it's an automatic?

15 MR. LEVINE: It - - - it is. And
16 specifically, the reason they have given and the - -
17 - and the remedy they have instructed is that there
18 was a blank in the form for one of those six general
19 categories, they put nothing in it.

20 CHIEF JUDGE LIPPMAN: But they say - - -
21 but what your adversary says is, in essence, it's
22 more important to, as you go along, to sort of be
23 checking. It doesn't have to be done, necessarily,
24 beforehand but they're continually talking to them
25 and seeing what they're doing and how they're doing.

1 JUDGE READ: Well, as I - - -

2 CHIEF JUDGE LIPPMAN: Does that - - - does
3 it have to be beforehand?

4 MR. LEVINE: Yes.

5 JUDGE READ: Well, as I understood it. She
6 sort of said they were negotiated, in a sense - - -

7 MR. LEVINE: What she's talking about - - -

8 JUDGE READ: - - - beforehand. Is that not
9 true?

10 MR. LEVINE: What she's talking about is
11 enforcement.

12 CHIEF JUDGE LIPPMAN: So answer that
13 question. Is it - - - is it negotiated or they just
14 put it in and they approve it?

15 MR. LEVINE: They put it - - - they put it
16 in and they approve it unless there's something blank
17 on the form. And there are these three instances.

18 CHIEF JUDGE LIPPMAN: So it's not
19 negotiated in your - - - from your perspective?

20 MR. LEVINE: Not before a perm - - - not
21 before authority to discharge is granted.

22 JUDGE RIVERA: So the technical guidance,
23 which is what she said is - - - is what she was
24 talking about, you're saying comes after the grant
25 from - - - from DEC to move ahead, after the permit.

1 Is that - - -

2 MR. LEVINE: It's up to the permittee
3 whether the permittee can try to do it before. If
4 DEC doesn't even determine whether they like it or
5 not before they say go ahead. You're authorized
6 under the permit. And - - -

7 CHIEF JUDGE LIPPMAN: But you say it's no
8 good to do the way they want to do it. That you put
9 it in, you basically approve it, they check the
10 different categories, maybe they annotate it a little
11 bit, and - - - and then as they go on they keep - - -
12 keep looking at it and there's a constant dialogue.
13 That doesn't meet the law?

14 MR. LEVINE: Not by itself, because that
15 conflates permitting and enforcement.

16 CHIEF JUDGE LIPPMAN: Okay.

17 MR. LEVINE: And those are two separate
18 things.

19 CHIEF JUDGE LIPPMAN: Okay.

20 MR. LEVINE: You can enforce a permit. If
21 the permit has no content it's pretty darn hard to
22 enforce.

23 CHIEF JUDGE LIPPMAN: Okay. Thank you,
24 both. Appreciate it.

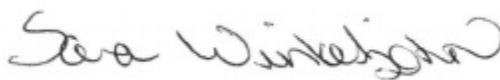
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Natural Resources Defense Council, Inc. v. New York State Department of Environmental Concern, No. 48 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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