

No. 16-1024

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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OHIO VALLEY ENVIRONMENTAL COALITION, WEST VIRGINIA  
HIGHLANDS CONSERVANCY, and SIERRA CLUB,

*Plaintiff-Appellee,*

v.

FOLA COAL COMPANY, LLC,

*Defendant-Appellant.*

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF WEST VIRGINIA AT HUNTINGTON  
CASE NO. 2:13-5006

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**MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* THE  
AMERICAN FOREST & PAPER ASSOCIATION, AMERICAN  
PETROLEUM INSTITUTE, NATIONAL ASSOCIATION OF CLEAN  
WATER AGENCIES, NATIONAL ASSOCIATION OF HOME BUILDERS,  
NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL  
MINING ASSOCIATION, AND UTILITY WATER ACT GROUP IN  
SUPPORT OF APPELLANT**

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Dated: April 20, 2016

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Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, the American Forest & Paper Association, the American Petroleum Institute, the National Association of Clean Water Agencies, the National Association of Home Builders, the National Association of Manufacturers, the National Mining Association, and the Utility Water Act Group (collectively, *Amici*) respectfully move this Court for leave to file the accompanying proposed *amici curiae* brief in support of the Defendant-Appellant, Fola Coal Company, LLC (“Fola”). Fola challenges the District Court’s decision that its permitted discharges violated its state-issued Clean Water Act (“CWA”) National Pollutant Discharge Elimination System (“NPDES”) permit based on the District Court’s interpretation of the permit that all of West Virginia’s water quality standards are wholesale incorporated into the permit as enforceable effluent limitations. If affirmed, the District Court’s interpretation could fundamentally impact how NPDES permits are drafted, implemented, and enforced, having significant legal and practical implications for both permitting authorities and the regulated community, including *Amici*’s members.

*Amici*’s participation in this appeal is desirable and will aid the Court’s disposition of this appeal because, as explained below, *Amici* and their counsel have extensive experience in cases involving the proper interpretation and regulatory scope of the CWA. *Amici* can also offer the broad perspective

of their members—a large majority of whom are subject to CWA NPDES permitting requirements—on the issues in this case. Finally, some of the *Amici* have been involved as *amici* in other cases, including before this Court, that addressed similar and related CWA issues. *Amici* have a strong interest in the outcome of this appeal, and for the reasons discussed below, their motion should be granted.<sup>1</sup>

### **STANDARD FOR GRANTING LEAVE TO PARTICPATE AS AMICI**

Under Rule 29(b), a motion for leave to file an *amicus curiae* brief must state (i) the movant’s interest, and (ii) the reason why the *amicus* brief is desirable and relevant to the disposition of the case. The predominant practice in the courts of appeal is to grant motions for leave to file *amicus curiae* briefs “unless it is obvious that the proposed brief[] do[es] not meet Rule 29’s criteria as broadly interpreted.” *Neonatology Assocs., P.A. v. Comm’r*, 293 F.3d 128, 133 (3rd Cir. 2002) (Alito, J.). “An amicus brief should normally be allowed...when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.” *Ryan v. Commodity Futures*

*Trading Comm’n*, 125 F.3d 1062, 1063 (7th Cir. 1997); *see also New England*

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<sup>1</sup> Fola has consented to the filing of the accompanying *amici curiae* brief. Appellees, Ohio Valley Environmental Coalition, West Virginia Highlands Conservancy, and Sierra Club, withheld consent. In accordance with Local Rule 27(a), counsel for the Appellees was advised of *Amici*’s intent to file this motion.

*Patriots Football Club, Inc. v. Univ. of Colorado*, 592 F.2d 1196, 1198 n.3 (1st Cir. 1979) (“an amicus is, namely, one who...for the assistance of the court gives information of some matter of law in regard to which the court is doubtful or mistaken.”).

### STATEMENT OF INTEREST

*Amici* represent the national trade associations for a broad cross-section of the nation’s paper and wood products manufacturers, publicly-owned water utilities, electric utilities, energy and fuel producers, manufacturing industries, infrastructure developers, and home builders. *Amici*’s members serve the public interest by providing clean water, clean energy, and other much-needed products, services, and jobs across the country, and their activities are vital to maintaining clean water and a thriving national economy.

American Forest & Paper Association (“AF&PA”) serves to advance a sustainable U.S. pulp, paper, packaging, tissue and wood products manufacturing industry through fact based public policy and marketplace advocacy. AF&PA member companies make products essential for everyday life from renewable and recyclable resources and are committed to continuous improvement through the industry’s sustainability initiative - Better Practices, Better Planet 2020. The forest products industry accounts for approximately 4 percent of the total U.S. manufacturing GDP, manufactures over \$200 billion in products annually, and

employs nearly 900,000 men and women. The industry meets a payroll of approximately \$50 billion annually and is among the top 10 manufacturing sector employers in 47 states. No parent corporation or publicly held company has a ten percent (10%) or greater ownership interest in AF&PA.

The American Petroleum Institute (“API”) is a nationwide, non-profit trade association that represents over 500 companies, from the largest integrated companies to the smallest independent oil and gas producers, engaged in the exploration, production, refining and marketing of crude oil and petroleum products.

The National Association of Clean Water Agencies (“NACWA”) represents the interests of the nation’s publicly-owned wastewater and stormwater utilities with nearly 300 public utility members nationwide. For over 40 years, NACWA has been the leading advocate for responsible national policies that advance clean water and because of the dual mandate of its public clean water agency members to protect the environment and provide cost-effective service to their ratepayers, NACWA’s members must make smart investments to provide clean water at the best value.

The National Association of Homebuilders (“NAHB”) represents over 140,000 builder and associate members throughout the United States whose mission is to enhance the climate for housing and the building industry and

providing and expanding opportunities for all people to have safe, decent, and affordable housing. NAHB's members include individuals and firms that construct and supply single-family homes, and apartment, condominium, multi-family, commercial, and industrial builders, land developers, and remodelers.

The National Mining Association ("NMA") is a national trade association whose members produce most of America's coal, metals, and industrial and agricultural minerals. NMA's membership also include manufacturers of mining and mineral processing machinery and supplies, transporters, financial and engineering firms, and other businesses involved in the nation's mining industries.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs over 12 million men and women, contributes roughly \$2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for three-quarters of private-sector research and development.

The Utility Water Act Group ("UWAG") is a voluntary, ad hoc, non-profit, unincorporated group of 210 individual energy companies which own and operate over fifty percent of the nation's electric generating capacity, and three national trade associations which represent investor-owned utilities, publicly-owned utilities, and non-profit rural cooperatives.

In this case, the District Court interpreted a boilerplate provision in Fola's West Virginia NPDES permit for discharges of ionic pollution, measured as conductivity, from its Surface Mine No. 3, so as to allow the court to convert state narrative water quality standards into court-developed numeric effluent limitations, and then to enforce those limitations against Fola. The District Court did so despite Fola having disclosed its potential to discharge conductivity to the West Virginia Department of Environmental Protection ("WVDEP") in its permit application, and WVDEP deciding not to establish any effluent limitations for conductivity in the permit. The District Court's interpretation of the permit and its decision raise fundamental issues with how water resources are managed, the proper execution of the CWA's cooperative federalism framework, the implementation of the NPDES permitting scheme, including the scope of the CWA § 402(k) permit shield, and the Constitutional guarantees of due process and fair notice.

Like Fola, *Amici's* members rely on NPDES permits to ensure their operations comply with the CWA. Also like Fola, many of *Amici's* members' NPDES permits have permit terms similar to those at issue in this case, as do numerous other NPDES permit holders. If allowed to stand, the District Court's erroneous decisions could be exported from West Virginia by enterprising plaintiffs and used to create and enforce newly, court/plaintiff-generated effluent



limitations against *Amici*'s members and other NPDES permit holders, despite such limitations not being set out those permits, and without any prior notice thereof. As such, this case presents questions of great significance to NPDES permittees, and has legal and practicable implications that go far beyond those represented by Fola. *Amici* have a significant interest in this case.

### ***AMICI'S PARTICIPATION IS DESIRABLE***

*Amici*'s participation in this appeal is desirable and will benefit the Court through *Amici*'s broad perspective and extensive experience on CWA issues. *Amici* regularly file briefs in cases addressing the proper interpretation and regulatory scope of the CWA. *See, e.g., Upper Blackstone Water Pollution Abatement Dist. v. U.S. E.P.A.*, 690 F.3d 9 (1st Cir. 2012); *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502 (9th Cir. 2013); *Hawai'i Wildlife Fund v. Cnty. of Maui*, No. 15-17447 (9th Cir. filed March 28, 2016). *Amici* have also developed expertise in the specific areas of CWA implicated in this case, among other areas, and have participated in a number of cases in this Court and other circuit courts of appeal that address the CWA's permit shield and the interpretation of NPDES permits and the permitting process related thereto. *See, e.g., Sierra Club v. ICG Hazard, LLC*, 781 F.3d 281 (6th Cir. 2015); *Alaska Cmty. Action on Toxics v. Aurora Energy Services, LLC*, 765 F.3d 1169, 1171 (9th Cir. 2014); *S. Appalachian Mountain Stewards v. A & G Coal Corp.*, 758 F.3d 560 (4th

Cir. 2014); and, *Piney Run Pres. Ass'n v. Cty. Comm'rs of Carroll Cty., Md.*, 268 F.3d 255 (4th Cir. 2001). Given *Amici's* experience in these types of cases, they are uniquely positioned to inform the Court about the ramifications of misinterpreting the CWA.

*Amici* are also well positioned to provide their unique and broad perspectives on the practical implications of the District Court decision. *Amici's* members are on the frontlines working with the permitting authorities to develop and comply with NPDES permits. As noted, *Amici's* members rely on NPDES permits that include general water quality related permit provisions similar to what is at issue in this case. *Amici's* members have intimate knowledge of the U.S. Environmental Protection Agency and state-equivalent NPDES permitting application regulations and associated requirements. *Amici's* members also have first-hand knowledge of the complexity of the NPDES permitting process and the implications if it goes awry. This includes adverse impacts on and from their ability to operate, as well as impacts on capital expenditures and wasted and misdirected resources, including the effects thereof on ratepayers.

*Amici's* brief will explain why the District Court's decision is contrary to the CWA, including this Court's precedent on the permit shield, *Piney Run Pres. Ass'n v. Cty. Comm'rs of Carroll Cty., Md.*, 268 F.3d 255 (4th Cir. 2001), how it disturbs the CWA's cooperative federalism framework, and how it endangers the

Constitutional guarantees of due process and fair notice for NPDES permittees, including *Amici's* members. *Amici's* CWA expertise will aid the Court in evaluating the issues raised by Fola's appeal.

### CONCLUSION

For the foregoing reasons, the Court should grant *Amici's* motion for leave to file the accompanying proposed *amicus curiae* brief.

Dated: April 20, 2016

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

The undersigned certifies that on this 20th day of April 2016, she caused the foregoing Motion for Leave to File Brief of *Amici Curiae* to be filed with the Clerk of the Court and served on all parties and/or their counsel of record using the Court's CM/ECF system, which will automatically generate and send by e-mail a Notice of Docket Activity to the following registered counsel:

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