

# Summary of Recent Cases on Water Quality Standards/Permits/TMDLs

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# Key Cases

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- Pinto Creek – permits for new sources to impaired waters
- Montpelier – permit limits based on old TMDLs
- Pennaco – adequate technical basis for state water quality standards
- Attleboro – permit limits for nutrients

# Pinto Creek Case

- Friends of Pinto Creek v. EPA, 504 F.3d 1007 (9<sup>th</sup> Cir. 2007), cert. denied, 129 S.Ct. 896 (2009)
- Issue: when permit can be issued to new source or new discharger to an impaired waterbody
- Rule at issue: 40 CFR 122.4(i)
- Rule requires two demonstrations:
  - There are sufficient remaining load allocations to allow for new discharge
  - Existing dischargers are subject to compliance schedules designed to bring segment into compliance with standards
- EPA issued permit, based on offset from reduction in another discharge – EAB affirmed, but Ninth Circuit reversed that ruling

# Pinto Creek Ruling

- Court first said that offsets are not authorized by CWA – possibly dicta
- Then court took strict reading of compliance schedule provision – said that schedules are required for point and nonpoint sources if needed in order to achieve WQS – if not, no permit for new source
- That means that few, if any, new sources could obtain permits for discharges to impaired waters
- EPA has stated that it will start a new rulemaking to revise 122.4(i) – will cover new AND EXPANDED sources, and will address problems created by Pinto Creek decision (probably by authorizing offsets/trades to allow new permits)

# Montpelier Case

- **In Re Montpelier WWTF Discharge Permit, Case No. 22-2-08 Vtec (Vt. Env. Ct., July 2, 2009)**
- **CLF appealed permit to City – P limits based on 2002 Lake Champlain TMDL**
- **Court held that automatic reliance on TMDL more than 5 years old, without additional analysis, violates 5-year NPDES permit term**
- **Court also held that permit violated 40 CFR 122.44(d), which requires permits to be consistent with requirements and assumptions of a TMDL**
- **So if a TMDL is more than 5 years old, state must review assumptions underlying the TMDL to see if permit is consistent with those assumptions – such as that nonpoint reductions relied on in TMDL will be achieved**

# Montpelier Status

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- State agency has appealed ruling to the Vermont Supreme Court
- Legislature has directed agency to develop new implementation plan, and then to reopen the TMDL
- CLF pursuing challenge to EPA approval of TMDL and is challenging other permits in the watershed

# Pennaco Case

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- Pennaco Energy Inc. v. EPA, Case No. 06-CV-100-B (D. Wyo., Oct. 13, 2009)
- Montana adopted new criteria for electrical conductivity and sodium adsorption ratio – to address methane gas extraction activities
- Also revised antidegradation policy
- EPA approved both WQS revisions
- Energy companies and State of WY appealed

# Pennaco Ruling

- Court vacated EPA approval, remanded
- EPA has failed to include key documents from state administrative record in its review
- EPA has not satisfied its obligation under 40 CFR 131.5 to determine if state criteria are based on appropriate data and analyses
- EPA did not adequately explain its basis for approval
- NOTE: State of WY also argued that CWA does not authorize a state to impose its standards on another state, if they are more stringent than required by CWA – Court did not reach that issue



# Attleboro Case

- In Re City of Attleboro, MA Wastewater Treatment Plant, NPDES Appeal No. 08-08 (EPA EAB, Sept. 15, 2009)
- City challenged limits in permit for N, P and metals
- All challenges denied
- N – main challenge was that EPA erred by relying on physical model, should have used mathematical model instead
- EAB - Model OK to use as long it bears a rational relationship to relevant reality
- P – EPA OK in relying on Gold Book to set numeric targets
- Metals issues – denied due to failure to raise in comments and/or failure to address issues in EPA response to comments
- Note following case – Upper Blackstone: involves related but different issues, particularly lack of EPA finding that standards will be attained; argued 10/29/09

# Questions?

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