



**National Association of Clean Water Agencies**

**Hot Topics in Clean Water Law**

**June 15, 2016**

***Ohio Valley Environmental Coalition v. Fola Coal Co., Inc.***

- District Court found:
  - Boilerplate language prohibiting discharges in violation of WQS incorporated by reference became an enforceable condition on Fola's permit
  - Fola violated NPDES permit by discharging conductivity at levels the court determined a violation of narrative WQS
  - Fola must reduce conductivity in its discharges through expensive treatment technology

# CWA Permit Shield

- Can a CWA citizen suit be used to enforce narrative WQS where the regulatory agency has considered but decided not to include numeric limits in a permit?
  - Fola holds a NPDES permit issued in 2009
  - Fola reported sulfates and ionic pollutants at levels in ranges similar to those OVEC alleges are causing violations
  - WVDEP decided not to include wq-based limits for conductivity in Fola's permit; EPA reviewed Fola's permit and did not object
  - OVEC did not comment on the draft permit
  - OVEC did not challenge the final permit
  - After new science emerged, OVEC collaterally attacked Fola's permit via citizen suit

# Fola's NPDES Permit

- All WVDEP issued NPDES permits include:
  - Section A- sets forth specific pollutants and levels that are restricted and monitoring/report frequency
  - Section B- schedule of compliance
  - **Section C- boilerplate cross-reference to nineteen rules applicable to coal NPDES permits**
  - Section D- other requirements, including reopener clause, allow WVDEP to modify at any time, if necessary, to ensure compliance with WQS

# Fola's NPDES Permit

- Section C – one of nineteen rules WVCSR 47-30-5.1(2010), subpart 5.1.f:
  - The discharge or discharges covered by a WV/NPDES permit are to be of such quality so as not to cause violation of applicable water quality standards promulgated by 47 C.S.R. 2. Further, any activities covered under a WVDEP permit shall not lead to pollution of the GW... However, ... compliance with a permit during its term constitutes compliance for purposes of enforcement with CWA Sections 301,302,306,307,318,403. (Rule 5.1.f has been amended to remove the underlined sentence).
  - **The district court found this language unambiguously prohibits Fola from discharging any pollutant at a level that causes a violation of any of the hundreds of numeric or narrative WQS established by WVDEP.**

- Like all other states, WV WQS consist of designated uses, numeric & narrative WQ criteria, anti-degradation and implementation provisions, and variances.
- WV's WQS did not and still do not include any numeric criteria for conductivity

## WV's Narrative WQS

- WV promulgated narrative WQS to protect aquatic life:
  - No sewage, industrial wastes or other wastes present in any of the waters of the state shall cause ... or materially contribute to any of the following conditions:
    - 3.2.e. Materials in concentrations which are harmful, hazardous or toxic to man, animal or aquatic life;
    - 3.2.i. Any other condition ... which adversely alters the integrity of the waters of the State ... no significant adverse impact to the chemical, physical, hydrologic, or biological components of aquatic ecosystems shall be allowed.

# Narrative WQS

- Inherently ambiguous
  - “significant adverse impact”
  - “biological components of aquatic ecosystems” WVCSR 47-2-3.2.1
- Regulations provide a specific process for translating narrative WQS into numeric effluent limits
  - Requires sufficient scientific and technical basis
  - **WV determined it infeasible to calculate a numeric effluent limit for conductivity to maintain the narrative water quality standards**



# FOLA's Permit Shield Defense

- Fola argued:
  - CWA Section 402(k) provided a defense against CWA enforcement or citizen suit for discharges of pollutants that are not expressly limited in a NPDES permit where the permittee complied with application requirements and discharged in full compliance with the permit.
  - EPA PS Policy- NPDES permit holder may discharge pollutants not expressly limited in its permit if it complies with the CWA's reporting and disclosure requirements and permitting authority reasonably anticipates those pollutants will be discharged. *Piney Run*, 268 F.3d at 268 (4<sup>th</sup> Cir. 2001).
  - Permit Shield can be displaced only by clear and unambiguous language to the contrary in the permit. *Id.* at 269-270.

# Fola Court PS Unavailable

- District Court concluded PS irrelevant:
  - Boilerplate language, Permit Condition C, unambiguous requirement that Fola control discharges of all pollutants (not limited in the permit) to comply with narrative WQ criteria the Court interpreted, after the fact, based on EPA guidance that was not in existence at the time the permit was issued and that was expressly rejected by WV DEP.

# Fola Court: PS Unavailable

District Court relied on earlier opinions to quickly conclude the rule against violating narrative WQS was unambiguous - an enforceable permit condition

- *OVEC v. Elk Run Coal Co., Inc.*, (citing *Marfork* for addressing legal issue of whether the catchall prohibition on violating WQS is an enforceable permit limit).
  - *Marfork Coal Co., Inc.* (if a permit holder does cause a violation of ... WQS ... then the permit holder has violated the terms of its permit and falls outside the permit shield). *Marfork*, 966 F.Supp.2d at 682-83.
- Failed to undertake a full analysis of the boilerplate language referenced in Fola's permit
    - Interpreted Condition C in isolation
  - Court ignored compelling extrinsic evidence and the structure of the permit as a whole that would have supported application of the permit shield defense

# Ignored WV's Interpretation

- Court ignored or offered strained interpretations of WV's clear effort to explain WV's interpretation of the narrative criteria and correct misinterpretation
  - WVDEP guidance clarified the scope of the permit shield with respect to Rule 5.1.f
  - WV Legislature twice clarified that the permit shield prevents enforcement of WQS not reduced to numeric effluent limits

- Can a permittee be held liable for violations based on a limit it had no prior knowledge, fair notice or reason to believe that the permit would impose?
- Fola decision undercuts *Piney Run*
  - NPDES and WQS programs are structured so that permits provide clear and final notice of compliance obligations
- Turns CWA compliance into a moving target
  - Allows courts to hold permittees strictly liable for actions they had no way of knowing were unlawful

- OVEC need not prove that a particular pollutant caused violations of narrative standards – allowed conductivity to be used as a surrogate for ionic pollution
- To establish a causal link- Ct adopted EPA's conductivity guidance (issued after Fola's permit was issued) to establish a new WQS of 300 microsiemens per centimeter as a threshold level of conductivity associated with adverse impacts to the aquatic system
- Ct disregarded WV's express determination not to adopt 300 uS/cm as an appropriate threshold limitation for WV streams
- Fola was found liable for discharges that it could not have known would violate WQS and that the WVDEP does not consider a violation of WQS under existing laws.

- Fola currently on appeal to the Fourth Circuit
- NACWA joined 7 other national trade associations in *amicus curiae* brief
- After the ruling, WV amended Rule 5.1.f to delete the boilerplate language incorporating by reference all WQS. The WV legislature amended the state CWA to clarify that:
  - “WQS themselves shall not be considered ‘effluent standards or limitations’ “ and
  - “shall not be incorporated wholesale either expressly or by reference as effluent standards or limitations in a permit” W. Va. Code 22-11-6(2) & -8(a)- pending EPA review.

# Potential Implications

- Returns the CWA permitting scheme to its pre-1972 framework, before focus shifted from WQS to enforcing direct limitations on discharges of pollutants.
- Allows plaintiffs who fail to avail themselves of other CWA remedies, to usurp standards-setting authorities Congress intended for the States
- Subjects permittees to strict liability for failure to comply with limits that cannot be known to them
- Bypasses CWA process for incorporating new information and guidance published by EPA into permits by allowing enforcement through citizen suits
  - E.g. EPA-USGS Draft flow document





**Karen C. Bennett**

Hunton & Williams LLP  
2200 Pennsylvania Avenue, NW  
Washington, DC 20037  
(202) 955-1958  
[kbennett@hunton.com](mailto:kbennett@hunton.com)



# Natural Resources Defense Council v. Metropolitan Water Reclamation District of Greater Chicago

*NACWA Hot Topics in Clean Water Law Web Seminar*

Richard Davis

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# The Parties

- Metropolitan Water Reclamation District of Greater Chicago (MWRD)
- Plaintiffs
  - NRDC
  - Sierra Club
  - Prairie Rivers Network

# MWRD's System

- MWRD
  - Operates 7 water reclamation plants ("WRPs")
  - Implementing approved CSO LTCP ("TARP")
  - Discharges to Chicago Area Waterway System, the highly engineered system that reversed the Chicago River and provides a ship channel from Lake Michigan to the Mississippi River system



# The Claims

- Count I
  - Alleged CSO discharges in violation of permits, including water quality standards incorporated by permits
  - Separate CSO litigation by governments was settled by entry of consent decree
  - Plaintiffs challenged entry of that decree – both D. Ct. and 7<sup>th</sup> Cir. held that Plaintiffs were bound by that decision
  - Count I subsequently abandoned by Plaintiffs

# The Claims

- Count II
  - Alleges that discharges of phosphorus from 3 WRPs violate Special Condition 5 of the permits:

“The effluent, alone or in combination with other sources, shall not cause a violation of any applicable water quality standards outlined in 35 Ill. Adm. Code 302.”
  - Admin. Code 302 includes:
    - General use waters “shall be free from . . . plant or algal growth . . . **of other than natural origin.**”
    - Certain other waters “shall be free from . . . **unnatural** plant or algal growth.”
    - Numeric minimums for DO levels in applicable waters . . . **[caused or contributed to by discharges]**

# Relevant Facts

- Permit applications clearly stated that phosphorus was discharged in treated wastewater and WRPs had no original design capacity to remove phosphorus
- IEPA included no numeric phosphorus limit in 2002 permits
- IEPA included a 1.0 mg/L phosphorus limit in “2013” permits, but Special Condition 5 remained
- EPA and IEPA actively working to translate narrative criteria in to numeric phosphorous criteria

# Summary Judgment Motions

- MWRD argued:
  - Primary Jurisdiction/Abstention  
Court should defer adjudication pending EPA/IEPA effort to establish numeric phosphorous criterion protective of narrative criteria
  - Permit Shield  
Because phosphorus discharges were disclosed during permitting and were within the permitting authority's reasonable contemplation but no numeric limitation was established, phosphorus discharges were authorized under the permit
- Plaintiffs argued for judgment on the merits



# Outcomes

- Primary Jurisdiction/Abstention
  - Narrow reading of issue before the court that only an enforcement proceeding could adjudicate:  
“. . . whether Special Condition 5 substantively incorporates the Illinois water quality standards into the WRPs' NPDES permits and, if so, whether the District is in violation of those standards because of conditions caused by the phosphorus in the three WRPs' effluent.”
  - Abstention pending administrative determination is proper remedy – not entry of judgment
  - The CWA contemplates the interpretation of the terms of NPDES permits “even by non-expert courts”

# Outcomes

- Permit Shield
  - Relies primarily on
    - *Piney Run Preservation Association v. County Commissioners of Carroll County, Maryland*, 268 F.3d 255 (4th Cir. 2001)
    - *In Re Ketchikan Pulp Co.*, 7 E.A.D. 605, 1998 WL 284964, (E.P.A. May 15, 1998)
  - Argument that “disclosure + issuance of permit = immunity” was rejected --  
Rather:  
“disclosure + issuance of permit + full compliance with permit = immunity.”

# Outcomes

- Permit Shield (cont'd.)
  - Must give effect to Special Condition 5
    - Narrative criteria referenced in Special Condition 5 are as binding as numeric effluent limitations
  - Absence of numeric phosphorus limitation does not obviate need for compliance with generally incorporated water quality standards
  - Permit Responsiveness Summary stated:

“[T]his permit does not authorize or provide any legal protection to the [District] for violation of downstream water quality standards that may result from the discharges covered by these permits.”
  - “The permit shield defense can apply only if the three WRPs’ effluent does not cause violations of the Illinois WQS” – shield does not apply as a matter of law

# Outcomes

- Plaintiffs' motion for judgment – “Unnatural algal growth”
  - District vigorously disputes both the conclusion that the plant and algal growth is “unnatural” and whether the WRP discharges have caused those conditions
    - What is “unnatural?”
      - “. . . the plaintiffs' attempt to establish a natural baseline for assessing the conditions of the CAWS by reference to comparatively pristine natural waterways is akin to comparing apples to zebras.”
    - Do discharge cause such impacts?
      - “The plaintiffs also fail to answer the question of how much phosphorus causes unnatural growth”
      - “The plaintiffs must articulate what level of phosphorus input from the effluent promotes unnatural growth in the receiving waters “alone or in combination with other sources.”
      - “It is not the Court's task to wade into these murky waters to assign a permissible level of phosphorus above which the District is liable for violating the unnatural-growth standard”

# Outcomes

- Plaintiffs' motion for judgment -- DO
  - Standard found to be exceeded at times and in certain locations, BUT causation is not established
    - Debate relates to whether " . . . low dissolved oxygen levels occur even without abundant phosphorus . . . because . . . oxygen [is] used up in biological processes that occur independent of phosphorus concentrations."
    - Experts' positions found not to resolve this issue in Plaintiffs' favor for purposes of summary judgment

# Next Steps

- Case bifurcated into liability and remedy phases
- Bench trial for each
- January 2017 trial date

# Reflections on a Trend

- If courts continue to:
  - Weaken certainty and clarity of compliance obligations
  - Discount real and intractable challenges that face agencies when setting numeric criteria
  - Open field to NGOs to define/redefine compliance obligations in citizen suits;
- They will face challenge of establishing scientifically-valid criteria; AND
- Dischargers will demand numericized effluent limitations in NPDES permits (ironically, what the NGOs have been seeking for years)



# Thank You!

Richard Davis  
Beveridge & Diamond, P.C.  
202-789-6015  
[rdavis@bdlaw.com](mailto:rdavis@bdlaw.com)





NACWA