

Case Description: *Ohio Valley Environmental Coalition, West Virginia Highlands Conservancy, and Sierra Club v. Fola Coal Company*

This is an appeal pending in the US Court of Appeals for the Fourth Circuit of a [ruling](#) issued by the U.S. District Court for the Southern District of West Virginia, which held that a provision prohibiting discharges from causing or materially contributing to violations of water quality standards, which was incorporated into the National Pollutant Discharge Elimination System (NPDES) permit by reference (Permit Condition C), created an independently enforceable effluent limitation, compliance with which is a prerequisite for protection under Clean Water Act (CWA) §402(k). Section 402(k) establishes that compliance with a NPDES permit is compliance with the CWA and provides a shield from citizen suits (the permit shield).

Because the court agreed with plaintiffs that the permittee's discharges caused or materially contributed to a significant adverse impact to the chemical and biological components of the stream's aquatic ecosystem, the court concluded that the permittee violated the permit and was properly subject to citizen suit enforcement.

The district court judge effectively ruled that the "cause or materially contribute" provision could be used to convert the state's narrative water quality criteria into enforceable effluent limits in the permit, even though the West Virginia Department of Environmental Protection (WVDEP) did not include a specific numeric limit. While states can impose water quality criteria as end-of-pipe limits, they must expressly take action to do so; it is NACWA's position that water quality standards cannot, by themselves, be considered effluent standards or limitations and, therefore, should not be independently or directly enforced or implemented.

The district court judge rejected defendant's "permit shield" defense even though there was no dispute that the pollutants at issue had been disclosed in the permit application to be present.

Background

Like NPDES permits in many jurisdictions, the permit at issue in this litigation incorporated by reference a regulation that stated that discharges covered by the permit are to be of such quality so as not to cause a violation of applicable water quality standards. The state's water quality standards are violated if wastes "cause ... or materially contribute to" 1) "[m]aterials in concentrations which are harmful, hazardous or toxic to man, animal or aquatic life" or 2) "[a]ny other condition ... which adversely alters the integrity of the waters of the State." WV CSR § 47-2-3.2.e, -3.2.i. Additionally, "no significant adverse impact to the chemical, physical, hydrologic, or biological components of aquatic ecosystems shall be allowed." WV CSR§ 47-2-3.2.i.

Environmental groups filed a citizen suit against Fola Coal Company in August 2013 asserting NPDES permit violations for conductivity relying on the state regulation prohibiting discharges from causing or materially contributing to a significant adverse impact to the chemical and biological components of the stream's aquatic ecosystem. Plaintiffs in the case failed to raise concerns during the permitting period and waited until several years later to file a citizen suit collaterally attacking the permit. EPA likewise did not object to the permit.

District Court Decision

On January 27, 2015, Judge Chambers for the US District Court for Southern District of West Virginia determined that despite absence of a specific effluent limit in the NPDES permit for conductivity or salinity, the discharge caused or materially contributed to a significant adverse impact in violation of the narrative water quality criteria incorporated into those permits. Judge Chambers held that with the state's numeric and narrative water quality criteria incorporated by reference into defendant's NPDES permit, those criteria constituted independently enforceable permit conditions.


In determining what the "applicable" narrative criteria require, the court made no effort to determine how the permitting authority interpreted the narrative criteria at the time of permit issuance. Instead, based on its independent, after-the-fact interpretation of the narrative criteria, the court read Permit Condition C as unambiguously requiring the permittee to control sulfates and conductivity to levels set by the court *post hoc*. The court ignored the fact that both the state permitting authority and EPA were obligated to determine at the time of permit renewal whether the level of conductivity and sulfates – the pollutants at issue - disclosed by the permittee would cause or materially contribute to a violation of the applicable narrative criteria, and to include ensure limits on those pollutants that they deemed necessary to ensure that the discharge would not cause exceedance of the criteria.

Implications for NACWA members

While the "cause or materially contribute" provision at issue in this case was included in a regulation applicable to coal mining facilities, many NPDES permits contain a catch-all provision prohibiting discharges from causing or contributing to violations of water quality standards. Thus, the court's decision could have far reaching impacts on all NPDES permittees – including municipal wastewater and stormwater permittees.

If upheld by the Fourth Circuit Court of Appeals, the district court decision will create precedent that upends the NPDES permitting process, usurps the State's authority to set and interpret water quality standards, undermines the public's right to comment on such standards before they are implemented and enforced, and deprives NPDES permittees of fair notice, creating serious Due Process concerns.


Moreover, the district court decision eviscerates the essence of the permit shield defense by allowing citizens who disagree with the terms and conditions of an issued NPDES permit to challenge the permit after issuance and an opportunity for courts to retroactively change the limits of a permit.



As the Fourth Court articulated in [Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty](#)  the seminal permit shield case, the NPDES and water quality standards programs are structured so that permits serve as the mechanism by which the permitting agency provides clear and final notice to the permittee of its compliance obligations. The district court's ruling turns CWA compliance into a moving target, stripping it of finality and allowing courts to hold permittees strictly liability for actions they had no way of knowing were unlawful.

NACWA Advocacy in Defense of the Permit Shield

NACWA is participating in this case to help preserve the permit shield as a strong defense for NPDES permit holders against enforcement actions. NACWA's participation is part of a broad

coalition of diverse groups, including industrial and agricultural point source dischargers, who share a common interest in defending the permit shield defense.

On April 20, 2016, NACWA, as part of the coalition, filed an [amici brief](#)  to highlight the broad national implications of the district court's ruling.

NACWA has a long history of advocating to protect the permit shield defense. NACWA joined an [amici brief](#)  in the *Piney Run* case in August 2000, successfully arguing that the municipal defendant should not be liable for unlisted pollutants under the CWA's permit shield. In January 2014, NACWA again joined an [amici brief](#)  in *Southern Appalachian Mountain Stewards v. A&G Coal Corp.* to preserve the *Piney Run* precedent. In that case, the Fourth Circuit ruled that the mining company permittee could not avail itself of the permit shield but upheld EPA's guidance on the shield and its earlier decision in *Piney Run*.