

NJWEA Fall Technology Transfer Seminar

Litigation Affecting the Clean Water Act Permit Shield

September 13, 2016

Amanda Waters
General Counsel

NJACWA

About Us

- Trade Association for POTWs & MS4s
- Nearly 300 utility members nationwide
- National advocacy voice on municipal clean water issues
- Legislative, Regulatory, & Legal

NACWA
A Clear Commitment to America's Waters



Permit Shield Litigation

- 2 recent cases reveal emerging litigation strategy
- Citizen suits
 - CWA Section 505
 - Allege NPDES permit violations



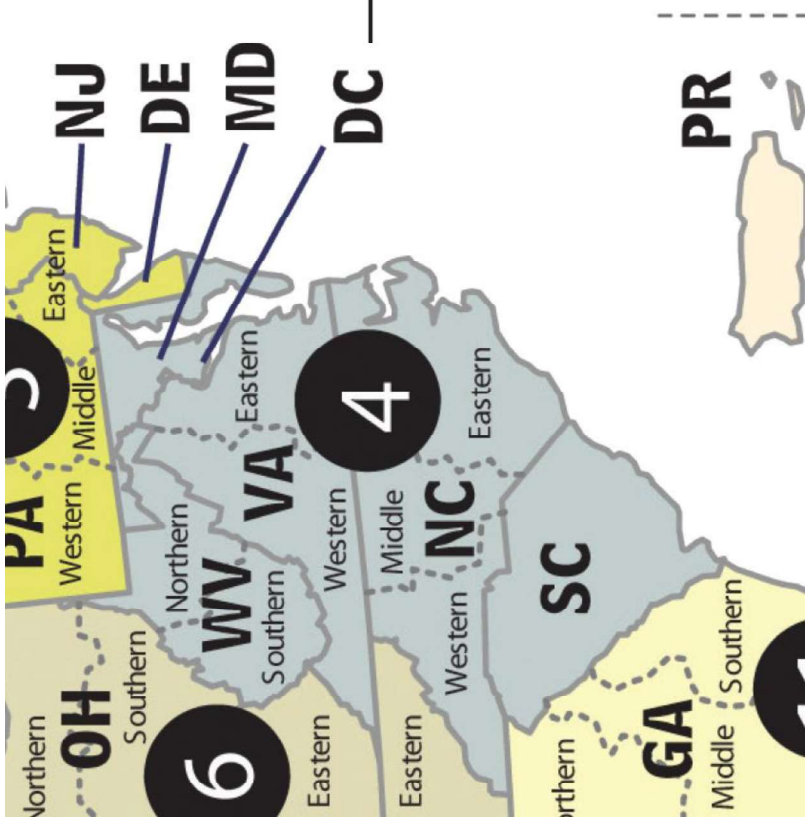
West Virginia Mining NPDES Permit Litigation

Ohio Valley Environmental Coalition v. Fola Coal Company

NAACWA

Venue/Issues Presented

- Pending in Fourth Circuit
- Appeal of January 2015 federal district court ruling
- Issues
 - Permit Shield Defense
 - Court's appropriate role in NPDES permitting process



Permit Shield – CWA §402(k)

- NPDES permit compliance = CWA compliance & provides a shield from citizen suits
- Provides certainty that permittees will not face challenges for pollutants in wastestreams that weren't specifically covered by permit **if:**
 - permittee discloses nature of wastestream **and**
 - pollutants in wastestream were within reasonable contemplation of permitting authority at the time of permit issuance

Permit Shield Legal Precedent

- Seminal case – 4th Cir 2001 Piney Run decision
- NPDES & WQS programs structured so that permits serve as mechanism by which permitting agency provides clear & final notice to permittee of compliance obligations
- CWA's permit shield protected county from liability for discharging heat
 - not specifically listed in permit
 - disclosed in permitting process
 - reasonably contemplated by permitting authority



Background



- Aug 2013 – env groups file citizen suit against Folsom Coal Company
- Allege NPDES permit violations for conductivity relying on state regs incorporated by reference into permit
 - WV NPDES permits for coal mining incorporate by reference a State Code provision
 - discharges covered by NPDES permit are to be of such quality so as not to cause violation of applicable WQS [refers to another section of state code]
 - Prohibits discharges from causing or materially contributing to significant adverse impact to stream's aquatic ecosystem



Background

- Fola disclosed nature of wastestream & parameter at issue in application
- WVDEP - determine at permit renewal whether conductivity disclosed had reasonable potential to cause or materially contribute to a violation of applicable narrative criteria
 - and, if so, required to include limits on those pollutants necessary to ensure that discharge would not cause exceedance of criteria
- RPA Process
 - WVDEP set WQBELs for many pollutants in Fola's discharge
 - No limits for conductivity
 - EPA did not object to permit
- Fola operating under issued permit
 - actual discharges were consistent with disclosure
- Plaintiffs did not challenge RPA or raise concerns during permitting period
 - waited until several years later to allege CWA violation



January 2015 Ruling

- State WQ criteria incorporated by reference into permit constitute independently enforceable permit conditions despite the fact that WVDEP did not include a specific limit
- The court agreed with plaintiff env groups that Fola violated the permit
 - properly subject to citizen suit enforcement



Court took on Role of WQS Translation

- Judge after-the fact applied EPA's numeric "chronic aquatic life benchmark value for conductivity" in WV streams to hold that Fola had violated its permit
- Substituted his own judgment for that of state regulatory agency as to how the state narrative criteria should be interpreted & applied



NACWA's Participation / Status

- Late April, NACWA joined industry groups to file an amicus brief in the case
- Fully briefed
- Sept. 6 – 4th Circuit issued a request that EPA and WVDEP file amicus briefs to assist the court in resolution of the permit shield issue; briefs due Oct. 6
- Oral Argument – Oct. 27, 2016



Judge Chambers

- Judge reached similar decisions in 5 cases
 - permit shield does not apply where WQS are incorporated by reference into a permit, and
 - WQS incorporated by reference are enforceable permit limits
- Continues to cite back to his own decisions as support
- Other courts starting to follow cite string of district court precedent
 - judge in the MWRD case cited to 2 of these WV decisions in his summary judgment ruling



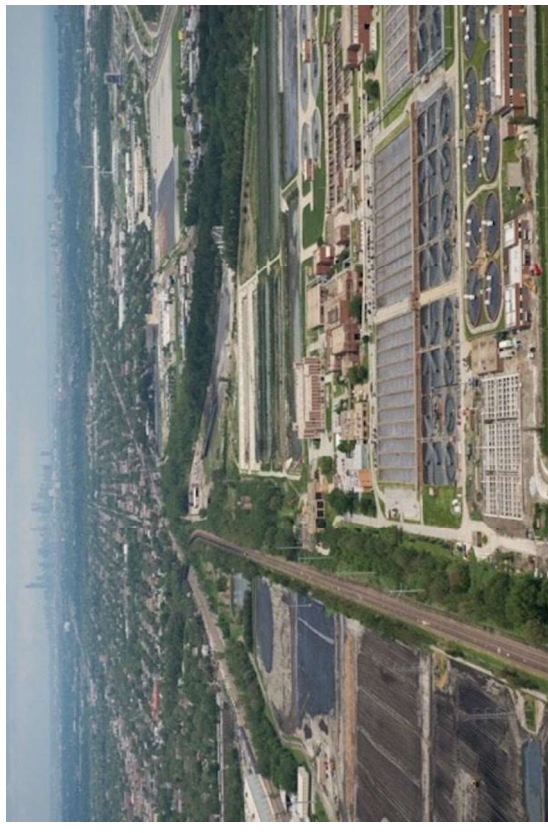
Chicago Wastewater NPDES Permit Litigation

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

NACWA

Venue/Cause of Action

- Pending in US District Court in Illinois
- Very similar to Fola except in municipal WW context
- Allege discharges from certain facilities violate a narrative WQS incorporated by reference that prohibits discharges from causing excessive algal growth and/or nonattainment of WQS



Issues Presented

- Scope of Permit Shield Defense
- What is burden of proof to demonstrate violation of standards & which party bears that burden



Status

- In March, judge denied cross motions for summary judgment
- In doing so, court held that the provision in the permit incorporates the WQS as substantive terms of the permit, compliance with which is required in order for the permit shield to apply



Next Steps

- Case bifurcated into liability & remedy phases
- Bench trial for each in January 2017
- Plaintiffs must establish:
 - effluent caused or materially contributed to plant & algal growth and
 - Growth is what caused low DO levels
- NACWA is not currently involved in this case but will participate if/when appealed to 7th circuit

Potential Impacts on Clean Water Agencies

- Many NPDES permits include or incorporate by reference provisions prohibiting discharges from causing or contributing to WQS violations
- Courts decisions can & will be used by enviro groups as a litigation strategy against other utilities
- Precedent erodes essence of permit shield defense
 - permittees cannot rely upon compliance with clear terms of permit & disclosures made during permit application process
 - will instead be exposed to collateral attack by citizens who disagree with the terms & conditions of permit at any time after issuance
- Provides an opportunity for courts to retroactively change the limits



NACWA's Position

- Permittees must be able to rely on compliance with permits in order to effectively & sustainably operate
- Need regulatory certainty & clear targets to allocate resources
- Ruling turns CWA compliance into moving target
 - Strips permits of finality
 - Allows courts to hold permittees strictly liable for actions they had no way of knowing were unlawful

- Administrative process for challenging permits
- Usurps State's authority to interpret WQS & translate those standards into enforceable effluent limits (RPA)
 - WQS cannot, by themselves, be considered effluent standards or limitations
 - Should not be independently or directly enforced or implemented
- Not the role of courts to make policy, technical & scientific decisions



NACWA – 3-pronged Strategy

State Regulators Strategy

- Working with ACWA staff - which states are incorporating WQS into permits & why
- Develop substitute model language

Permitting Stage Strategy

- Raising awareness with members about what to look for in draft permits
- Offer suggestions on how to work with permitting authority to either strike or include different language

Litigation Strategy

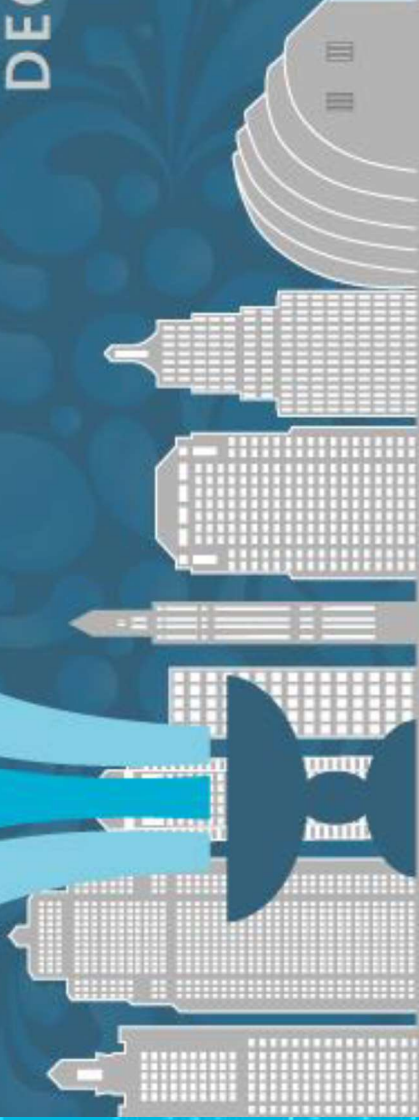
- Researching emerging trend to determine breadth of existing litigation
 - If permit already contains such a clause, there is risk of citizen suit enforcement particularly in the context of nutrients
- NACWA will evaluate how to most effectively participate in future litigation in order to protect the permit shield



2016 NATIONAL CLEAN WATER
LAW SEMINAR & CONSENT
DECREE WORKSHOP

NOVEMBER 1 - 4, 2016

Kansas City, MO



NACWA

Thank You!

Amanda Waters

awaters@nacwa.org

202- 530-2758

NACWA