No. 16-1024

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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

Plaintiff-Appellee,

v.

FOLA COAL COMPANY, LLC,

Defendant-Appellant.

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

BRIEF OF 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 AS *AMICI CURIAE* SUPPORTING APPELLANT

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Dated: April 20, 2016

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

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No. 16-1024 Caption: Fola Coal Company, LLC v. Ohio Valley Envtl. Coalition, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

American Forest & Paper Ass'n
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
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4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Karen C. Bennett Date: April 20, 2016

Counsel for: American Forest & Paper Ass'n

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No. 16-1024 Caption: Fola Coal Company, LLC v. Ohio Valley Envtl. Coalition, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

American Petroleum Institute
(name of party/amicus)

who is amicus, makes the following disclosure:
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Counsel for: American Petroleum Institute

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No. 16-1024 Caption: Fola Coal Company, LLC v. Ohio Valley Envtl. Coalition, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

National Association of Clean Water Agencies
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Karen C. Bennett Date: April 20, 2016

Counsel for: Nat'l Ass'n of Clean Water Agencies

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No. 16-1024 Caption: Fola Coal Company, LLC v. Ohio Valley Envtl. Coalition, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

National Association of Home Builders
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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Signature: /s/ Karen C. Bennett Date: April 20, 2016

Counsel for: Nat'l Ass'n of Home Builders

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Pursuant to FRAP 26.1 and Local Rule 26.1,

National Association of Manufacturers
(name of party/amicus)

who is amicus, makes the following disclosure:
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Signature: /s/ Karen C. Bennett Date: April 20, 2016

Counsel for: National Association of Mfrs.

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Pursuant to FRAP 26.1 and Local Rule 26.1,

National Mining Association
(name of party/amicus)

who is amicus, makes the following disclosure:
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Pursuant to FRAP 26.1 and Local Rule 26.1,

Utility Water Act Group
(name of party/amicus)

who is amicus, makes the following disclosure:
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Counsel for: Utility Water Act Group

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INTEREST OF *AMICI CURIAE*

Amici curiae ("*Amici*") represent public clean water utilities and a broad cross-section of the nation's energy, infrastructure, manufacturing, paper and wood products, construction, and home building industries. Their members play a significant role in maintaining clean water and a thriving national economy. They provide much-needed products, services, and jobs across the country. *Amici* are 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.[1]

Like Appellant Fola Coal Company, LLC ("Fola"), *Amici's* members have Clean Water Act ("CWA") National Pollutant Discharge Elimination System ("NPDES") permits, the violation of which places them at risk of potentially crippling civil and criminal penalties and injunctive action. Like Fola, they count on those NPDES permits to provide clear and certain notice of their compliance obligations and a shield against liability so long as they remain in compliance. And some of those permits, like Fola's, contain, in addition to pollutant-specific water

[1] This brief was submitted with an accompanying motion for leave to file pursuant to Rule 29(b). Pursuant to Rule 29(c)(5), no counsel for a party authored this brief in whole or in part, and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici* or their members made a monetary contribution intended to fund its preparation or submission.

quality-based effluent limitations and monitoring requirements, a statement that discharges covered by the permit must not cause a violation of water quality standards. *Amici*'s informal survey of state issued water quality permits found many states include boilerplate language in their permits that incorporates language similar to that which the District Court relied upon in finding Fola liable.[2]

The District Court misinterpreted this general condition, ignoring its inherent ambiguity as well as other important relevant permit provisions that, had they been considered, would have precluded the court's sweeping interpretation. In doing so, the court's decision upended the NPDES permitting process, eviscerated the permit shield, usurped the State's prerogative to set and interpret water quality standards, and deprived Fola of fair notice, creating serious Due Process concerns. If allowed to stand, the court's decision will eliminate the regulatory certainty that is the very essence of the NPDES permitting program and create enormous new liabilities for some affected dischargers. It also will usurp the States' authority to set and interpret water quality standards, undermine the public's right to comment on such standards before they are implemented and

[2] *See*, *e.g.*, 567 IAC 61.3(2) ("[water quality] criteria are applicable to all surface waters … at all places and at all times"); 9 VAC 25-31-50 ("Except in compliance with a [permit], … it shall be unlawful for any person to… alter the physical, chemical or biological properties of such state waters and make them detrimental to the public health, or to animal or aquatic life…"); 6 CRR-NY § 750-2.1(b) ("a modification of the permit [may be] necessary to … assure maintenance of water quality standards").

enforced, and create a backdoor for collaterally attacking final permit decisions in clear violation of this Court's decision in *Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty.*, 268 F.3d 255 (4th Cir. 2001).

Amici therefore support Fola in seeking the reversal of the District Court's decisions.[3]

BACKGROUND AND SUMMARY OF ARGUMENT

Fola holds a NPDES permit ("Permit"), issued in 2009, authorizing its discharges. It is undisputed that, when Fola applied for the Permit, it disclosed to the appropriate regulatory authority, West Virginia Department of Environmental Protection ("WVDEP"), all of its potential discharges, including discharges of sulfates and ionic pollutants that are measured under the catchall term "conductivity." *Ohio Valley Envtl. Coal., Inc. v. Fola Coal Co., LLC*, 82 F. Supp. 3d 673, 678 (S.D. W.Va. 2015). It also is undisputed that Fola's actual discharges were consistent with its disclosure. *Id.*

[3] In the case under review, the District Court's legal analysis relied expressly on its prior decisions in several other cases, including *Ohio Valley Environmental Coalition ("OVEC") v. Elk Run Coal Co., Inc.*, No. 3:12-cv-0785, 2014 WL 29562 (S.D. W.Va. Jan. 3, 2014) (rejecting, *inter alia*, Defendants' motions for summary judgment based on permit shield, inconsistency with permit process, and inapplicability of West Virginia Stream Condition Index ("WVSCI" scores basis of interpreting narrative criteria), which in turn relied on even earlier decisions (e.g., *OVEC v. Marfork Coal Co., Inc.*, 966 F. Supp. 2d 667 (S.D. W. Va. 2013) (holding discharges not subject to pollutant-specific effluent limits are not entitled to permit shield if they violate numeric criteria for selenium, even if the amounts discharged were disclosed in the permit application). Thus, the District Court's construction of applicable law and regulations in those cases is directly relevant here.

In deciding whether to issue the Permit, state law required WVDEP to review all of the available information and, using its expert judgment, establish, when "applicable," "any more stringent requirements necessary to achieve water quality standards established pursuant to the CWA or the State Act and regulations …." W. Va. Code R. § 47-10-6.3.2. West Virginia law explains that an "applicable" requirement is one that takes effect prior to a final administrative disposition of a permit, or modification or revocation and reissuance thereof. W. *Id.* § 47-10-6.1. Like all other states, West Virginia water quality standards consist of designated uses, numeric and narrative water quality criteria,[4] anti-degradation provisions, and implementation provisions, including provisions for variances. W. *Id.* § 47-2-1, *et. seq.* Those standards did not include – and still do not include – any numeric criteria for conductivity. They do, however, include narrative criteria which, in relevant part, prohibit "[m]aterials in concentrations which are harmful, hazardous or toxic to man, animal or aquatic life" or "[a]ny other condition. . . which adversely alters the integrity of the waters of the State." *Id.* § 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." *Id.*

[4] Water quality criteria are "elements of State water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use." 40 C.F.R. § 131.3(b); *see also id.* § 131.11(b).

§ 47-2-3.2.i. This regulatory framework is typical of most states that act as the CWA permitting authority under approved programs.

When WVDEP considered whether or not to issue Fola's permit, it was required by law to evaluate whether any more stringent limits on any pollutant (including the ions that make up conductivity) were necessary to achieve its narrative criteria, which it did. WVDEP set water quality-based effluent limitations for a number of pollutants in Fola's discharge, but it decided not to establish any such limits for sulfates, or for conductivity and the pollutants encompassed therein. Similar to a majority of primacy states, state law incorporated by reference into Fola's permit a statement that "[t] he 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 [West Virginia Code of State Rules § 47-2]. . . ." WV/NPDES Permit WV1014005 § C. Also like the structure adopted by many primacy states, the Permit incorporated by reference a reopener clause, in this case from W.Va. Code R.§ 47-30-5.16, which authorizes the Secretary to reopen the Permit to incorporate, among other things, "an applicable effluent standard or limitation under CWA Sections 301(b)(2)(C) and W.Va. Code § 22-11-11(b) (Water Quality Based Effluent Limitations and Standards), … which is promulgated or approved after the WV/NPDES permit is

issued, if that effluent standard or limitation is more stringent than any effluent limitation in the permit or controls a pollutant not limited in the permit."[5]

EPA had an opportunity to review the permit. EPA's review is governed by federal NPDES rules, which include detailed requirements dictating when and how all permit writers must insert water quality-based limits for specific pollutants or for whole effluent toxicity where the permit writer determines that a pollutant is present in the discharge at a concentration that causes, has the reasonable potential to cause, or contributes to an excursion above a narrative criterion. 40 C.F.R. § 122.44(d)(1)(v), (vi).[6] EPA did not object when WVDEP issued Fola's permit,

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[5] *See also* Permit, Section D.3 ("Based upon the stream monitoring flow data, water quality standards or other information, the Department may at any time modify the effluent limits in Section A of this permit for any of the discharge points if necessary, to insure compliance with water quality standards.")

[6] "Except as provided in this subparagraph, when the permitting authority determines, using the procedures in paragraph (d)(1)(ii) of this section, toxicity testing data, or other information, that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative criterion within an applicable State water quality standard, the permit must contain effluent limits for whole effluent toxicity. Limits on whole effluent toxicity are not necessary where the permitting authority demonstrates in the fact sheet or statement of basis of the NPDES permit, using the procedures in paragraph (d)(1)(ii) of this section, that chemical-specific limits for the effluent are sufficient to attain and maintain applicable numeric and narrative State water quality standards." 40 C.F.R. § 122.44(d)(1)(v)

"Where a State has not established a water quality criterion for a specific chemical pollutant that is present in an effluent at a concentration that causes, has the reasonable potential to cause, or contributes to an excursion above a narrative criterion within an applicable State water quality standard, the permitting authority must establish effluent limits using one or more of [several specified options]…" 40 C.F.R. § 122.44(d)(1)(vi).

thereby signaling its agreement that no conductivity limits were necessary to ensure compliance with the applicable narrative criteria. Appellees also did not file any comments in response to the proposed permit, and did not object to the absence of limitations for conductivity and sulfates in Fola's final permit. Yet, after new science emerged,[7] they brought a citizen suit to collaterally attack the permit.

This case hinges on the District Court's construction of the permit provision cited above, incorporating by reference the directive that "discharges covered by the permit" may not cause the violation of "applicable water quality standards" ("Permit Condition C"). The District Court held that Permit Condition C creates an independently enforceable effluent limitation, compliance with which is a prerequisite for protection under the permit shield. Furthermore, in determining what the "applicable" narrative criteria require, the District 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

[7] The EPA benchmark that appellees rely upon was published in April 2010 and did not exist at the time the permit was issued in 2009. Moreover, West Virginia on August 12, 2010, in a "Justification and Background for Permitting Guidance for Surface Coal Mining Operations to Protect West Virginia's Narrative Water Quality Standards, 47 C.S.R. 2§§ 3.2.e and 3.2.i" expressly declined to follow EPA's approach. Finally, EPA emphasized the benchmark was non-binding during litigation, *see Nat'l Mining Ass'n v. Jackson,* 880 F. Supp. 2d 119, 138 (D.D.C. 2012), and the D.C. Circuit Court of Appeals found "[a]s a legal matter, the [guidance] is meaningless." *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014).

of the narrative criteria, the court read Permit Condition C as unambiguously requiring Fola to control sulfates and conductivity to levels set by the court post-hoc. [8] *See Fola Coal Co.,* 82 F. Supp. 3d at 678.

The District Court ignored the fact that both West Virginia and EPA were obligated by law to determine at the time of permit renewal whether the level of conductivity and sulfates disclosed by Fola would cause or materially contribute to a violation of the applicable narrative criteria, and to ensure that the permit included limits on conductivity or specific ions that they deemed necessary to ensure that the discharge would not cause exceedance of those criteria. The issuance of the Permit constituted a final and binding determination by the State that Fola's discharge would not cause exceedance of the "applicable" narrative criteria – that is, the narrative criteria as established and interpreted at the time of permit issuance. If the State, at some point in the future, set a new standard, reinterpreted its standard, or received new information indicating that the standard might be exceeded, it would then reopen the permit and impose new limits. Permit Condition C is nothing more than a straightforward acknowledgement of that fact. The District Court's interpretation to the contrary was neither compelled or

[8] The court held a four day bench trial on the appropriate level of conductivity and whether Fola's discharge violated the permit. WVDEP, the permitting authority, was completely absent during these proceedings.

authorized by Permit Condition C, is incompatible with the core tenets of the CWA NPDES permitting and water quality standards program, and should be reversed.

The legal and practical implications of the District Court's decisions are staggering. As this Court articulated in *Piney Run*, 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.

ARGUMENT

I. Nothing in Permit Condition C Manifested West Virginia's Unambiguous Intent to Displace the Permit Shield.

Fola should have been entitled to the protection of the "permit shield" as established by Congress and the West Virginia Legislature in CWA § 402(k), 33 U.S.C. § 1342(k) and W. Va. Code R. § 47-30-3.4.a, and interpreted by EPA and West Virginia.[9] As this Court held in *Piney Run,* under the permit shield, a permittee is in compliance with the CWA even if it discharges pollutants that are

[9] *See In Re Ketchican Pulp Co.*, 7 E.A.D. 605, 1998 WL 28496, at *12-13 (EPA 1998); R. Perciasepe, *et al.*, Revised Policy Statement on Scope of Discharge Authorization and Shield Associated with NPDES Permits (April 11, 1995); West Virginia Senate Bill No. 615 (Mar. 10, 2012) ("compliance with the effluent limits contained in a [NPDES] Permit is deemed compliant with West Virginia's [WPCA].").

not listed in the permit, so long as it only discharges pollutants that have been adequately disclosed to the permitting authority and is otherwise in compliance with the permit. [10] The permit shield can be displaced only by clear and unambiguous language to the contrary in the permit. *Id.* at 269-270.

A. The District Court Wrongly Held that Permit Condition C Is Unambiguous.

Here, there is no debate that the applicant disclosed its discharges of sulfate and conductivity and that its actual discharges are within the range disclosed. It did; they are. *OVEC v. Fola Coal Co., LLC*, 82 F. Supp. 3d 673, 678 (S.D. W.Va. 2015). But the District Court concluded that the permit shield was irrelevant because Permit Condition C reflected the WVDEP's *unambiguous* intention to require that Fola control its discharges of pollutants not otherwise limited in the permit so as to comply with narrative water quality criteria as the District Court interpreted them after the fact, based on EPA guidance that was not in existence when WVDEP issued that permit and that WVDEP later rejected. *Fola Coal Co.* 82 F. Supp. 3d at 678-79; *Fola Coal Co., LLC*, No. No. 2:13–5006, 2014 WL 3743597, at *3 (S.D. W.Va. July 30, 2014). Nothing in Permit Condition C requires or allows this interpretation. Instead, Permit Condition C is at best ambiguous.

[10] *Piney Run*, 268 F.3d at 268 (4th Cir. 2001).

First, the boilerplate language of Permit Condition C refers to "discharges covered by the permit," which begs the question – which discharges? Read literally and out of context, this term could apply to all pollutants discharged, including those for which the permit imposes specific water quality-based limits. But such an interpretation would undercut the finality of such limits, rendering them almost meaningless, and neither the Appellees nor the District Court have suggested that Permit Condition C could be read so expansively. Avoiding such a ridiculous result required the District Court to read into the condition a qualification *that discharges disclosed but not otherwise limited* must comply with applicable water quality standards. But once the court needed to interpret the provision, it should have done so in a fashion that would have comported with the permit shield and other important tenets of the CWA permitting and water standards-setting scheme. It did not.

Then there is the question about what Permit Condition C means by its reference to "applicable" water quality standards. Water quality standards consist of four parts – uses, criteria necessary to attain those uses, anti-degradation policies, and various implementation methods, including provisions for variances. Equally important, W.Va. Code R. § 47-10-6.1 specifies that "applicable" requirements are those in effect prior to the final administrative determination. The District Court assumed, without analysis, that Permit Condition C reflected

WVDEP's *unambiguous* intent to require Fola to comply with any sulfate and conductivity levels necessary to comply with the court's after-the-fact interpretation of the narrative criteria. The court made no attempt to discern how WVDEP interpreted the narrative criteria at the time of permit issuance, nor did it make any attempt to consider whether implementation provisions included in the standards might entitle the permittee to relief. But nothing in the word "applicable" requires that result and, indeed, such an interpretation is flatly inconsistent with West Virginia law, with the NPDES permitting process, and with the permit shield.

The District Court also made the cardinal error of interpreting Permit Condition C in isolation, without consideration of other closely related permit provisions that would have highlighted the ambiguity in that provision. For example, consistent with many state permits, the permit incorporates by reference a provision authorizing the permitting authority to reopen the permit where appropriate to adapt to evolving water quality standards. *Supra* note 5. That provision would be wholly unnecessary if, as the District Court assumed, "applicable" water quality standards include any element of the standard as that element may be interpreted or revised after permit issuance. A reopener to allow for permit modification is only necessary if the "applicable" water quality standards are those in effect, and as interpreted, at the time of permit issuance.

B. The District Court Should Have Interpreted the Ambiguity in Permit Condition C to Achieve Consistency With the Permit Shield.

Faced with these ambiguities, the District Court could and should have interpreted Permit Condition C to comport with the permit shield. NPDES permits must be interpreted in "the context of the entire NPDES permit and the permitting process"—the process that creates them. *Piney Run*, 268 F.3d at 270.

As EPA has recognized, a primary purpose for issuing a permit "is to prescribe with specificity the requirements that a facility will have to meet, both so that the facility can plan and operate with knowledge of what rules apply, and so that the permitting authority can redirect its standard-setting efforts elsewhere." 45 Fed. Reg. 33,290, 33,312 (May 19, 1980). The permit shield "places the burden on permit writers rather than permittees to search through the applicable regulations and correctly apply them to the permittee through its permit. This means that a permittee may rely on its [state]-issued permit document to know the extent of its enforceable duties." *Id*. Thus, "if the permit writer makes a mistake and does not include a requirement of the appropriate Act in the permit document, the permittee will [not] be enforced against." *Id*.

The Supreme Court has confirmed that the permit shield is meant to "insulate permit holders from changes in various regulations during the period of a permit and to relieve them of having to litigate in an enforcement action the question whether their permits are sufficiently strict. In short, § 402(k) serves the

purpose of giving permits finality." *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138, n. 28 (1977). The interpretation of Permit Condition C selected by the District Court, however, produced exactly the opposite result – it subjected the permittee to control requirements that it could not possibly have known, forcing the company to litigate in an enforcement action whether the limits implicitly established by the permit shield were stringent enough to achieve the narrative criteria as interpreted by the court.

After the District Court embarked on its line of interpretation, both the State legislature and the permitting authority attempted repeatedly to clarify that the permit shield is intended to protect from enforcement permittees who have properly disclosed the pollutant they discharge, even if the permit includes no limits for those discharges. *See OVEC v. Markfork Coal Co., Inc.* 966 F. Supp. 2d 667 (S.D. W.Va. 2013), *OVEC v. Elk Run Coal Co., Inc.,* 24 F. Supp. 3d 532 (S.D. W.Va. 2014). Because the State's law requires that provisions consistent with Permit Condition C be included, at least by reference, in all surface coal mining permits, the State's attempts at clarification clearly were directed at permittees subject to that condition.

The District Court ignored West Virginia's attempts at clarification because, it said, Permit Condition C made the permit shield irrelevant. In other words, having misinterpreted Permit Condition C by finding that it created clear and

unambiguous enforceable effluent limits, the court ignored the State's efforts to correct that misinterpretation.

II. The District Court's Misinterpretation of Permit Condition C Upends the CWA Process for Setting and Implementing Water Quality Standards

The CWA lays out a clear and orderly process for setting water quality standards and implementing them in NPDES permits. 33 U.S.C. §§ 1313(c), 1311(c)(2)(B), 1342(b). Water quality standards are complex and consist of designated uses, water quality criteria, anti-degradation requirements, and general policies affecting implementation, such as mixing zones, variances, and critical low-flow policies. 40 C.F.R. § 131.10-13. But water quality standards are not effluent limitations. 33 U.S.C. § 1362 (11); *Va. Elec. & Power Co., v. Costle*, 566 F.2d 446, n. 17 (4th Cir. 1977) (water quality standards and effluent limitations are entirely different concepts). Water quality criteria are "elements of State water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use." 40 C.F.R. § 131.3(b); *see also id.* § 131.11(b).

The District Court's decision upends that process, usurps the authority of the states, and inappropriately creates a role for federal courts and plaintiffs to make policy, technical, and scientific decisions for which they possess neither the authority nor expertise, and wholly outside the normal standard-setting process.

Natural Res. Def. Council, Inc. v. EPA, 16 F.3d 1395, 1401 (4th Cir. 1993) ("*NRDC*") (district courts do "not sit as a scientific body, meticulously reviewing all data under a laboratory microscope.").

A. States Establish Water Quality Standards and Are Responsible for Their Interpretation and Implementation.

There is no dispute that States possess primary responsibility for establishing water quality standards. 33 U.S.C. § 1251(b); *Piney Run*, 268 F.3d at 265, n. 9; *NRDC*, 16 F.3d at 1399. States review, revise, and adopt water quality standards. 33 U.S.C. § 1313(c); 40 C.F.R. § 131.4(a). In some states, like West Virginia, only the legislature may establish water quality standards. But authority is typically delegated to the permitting authority to interpret those standards and implement them via NPDES permits.

Like other states, West Virginia must review its water quality standards every three years, provide opportunities for public input, and submit them to EPA for review and approval or disapproval. EPA sits "in a reviewing capacity … with approval and rejection powers only." *NRDC*, 16 F.3d at 1399; *see also* 40 C.F.R. § 131.5(a). Where EPA decides that any aspect of a state standard is inconsistent with the CWA requirements, it may, by rulemaking, adopt a federal standard. 33 U.S.C. § 1313(c)(4)(B).

Where, as here, parties disagree with the state's water quality decisions, state law typically affords various avenues for relief, including petitioning for new or

revised standards or challenging any changes adopted. Those adversely affected by EPA's decision to approve or disapprove state water quality standards may seek review in federal district court. 33 U.S.C. § 1313(c)(1); 40 C.F.R. § 131.20(a); *NRDC*, 16 F.3d at 1402 (challenge to EPA's approval of Maryland's and Virginia's water quality standards). But federal courts have repeatedly stressed that they do not have a "dominant role" in the establishment of water quality standards. *NRDC*, 16 F.3d at 1401; *Reynolds Metals Co. v. EPA*, 760 F.2d 549, 558-59 (4th Cir. 1985) (Courts are not the "chemist, biologist or statistician … we are qualified neither by training nor experience … [instead as the] reviewing court [we] exercis[e] our narrowly defined duty of holding agencies to certain minimal standards of rationality.").

Further, the District Court's decision removes an essential step in the process: review and comment by the public. In issuing water quality standards and NPDES permits, states must provide an opportunity for review and comment by the public. If courts are permitted to circumvent the statutory process for issuance of permits and water quality standards, there will be no opportunity for meaningful review and comment by members of the public, absent intervention in a lawsuit after a decision has already been issued.

Ultimately, the District Court's decision would allow parties to step outside the existing statutory framework to update water quality standards, and effectively

force an update to a state's water quality standards via a specific NPDES permit. Moreover, the decision would throw the permitting program into chaos by allowing post-hoc changes to permits already in effect.

Allowing for constant revision to NPDES permits, in addition to being in violation of the NPDES permitting process and permit shield provision found at CWA § 402(k), would bring *Amici*'s members' efforts to comply with the CWA and improve water quality to a grinding halt. Rather than being able to rely on the permits they are given and focus their efforts and budgets on the priorities set forth therein, permittees' resources would be diverted into endless litigation and constantly shifting priorities.

B. The Permitting Authority Properly Interpreted and Applied Its Narrative Criteria at the Time of Permit Issuance, as It Was Obligated To Do.

In issuing a NPDES permit, WVDEP was obligated to consider all of the available information, including information the applicant submitted on discharges of conductivity and sulfates, and decide whether or not to establish limits on those pollutants to ensure such discharges would not cause or materially contribute to violation of the applicable standards, *including the narrative criteria*. W. Va. Code R. §§ 47-30-6.2.c, 47-30-7. EPA was obliged to review the Permit to ensure that it included specific numeric limits for all pollutants for which the state has not adopted numeric criteria and that cause, have the reasonable potential to cause, or

contribute to an excursion above a narrative criterion. 40 C.F.R. § 122.44(d)(1)(vi).

Nothing in state or federal law suggests that a permitting authority could shirk its duty by simply imposing a broad requirement that the discharge not cause any violation of water quality standards, thereby shifting the burden of decision-making to the permittee and, should enforcement ensue, a court. *See Piney Run*, 268 F.3d at 265 ("The proper interpretation of the [CWA] regulations is that ... [w]ater quality based limits are established where *the permitting authority* reasonably anticipates the discharge of pollutants by the permittee *at levels that have the reasonable potential to cause or contribute to an excursion above any state water quality criterion*.") (citation omitted) (emphasis added). And there is no evidence that WVDEP did so here. Rather, all of the evidence points to the Agency's having considered Fola's anticipated discharge of conductivity and sulfates, and concluded that discharges at that level are consistent with the narrative criteria. To the extent Permit Condition C is intended to have any substantive effect, nothing in that condition undermines or displaces this presumption.

Instead of recognizing the State's determination made at the time of permit issuance, the District Court interpreted Permit Condition C as an open-ended invitation to derive its own interpretation of the narrative criteria. It did so despite

the fact that the State was not a party to the enforcement action and the *de facto* rulemaking it conducted involved only the plaintiffs and their experts, and the defendants and their experts. This is far from the public hearing that the CWA and state law requires when state water quality standards are set or revised. *See* 40 C.F.R. Part 131, Subpart C.

West Virginia's boilerplate language neither compelled nor authorized this result. As discussed above, that condition is at best ambiguous about what discharges it applies to, and it cannot lawfully be read to impose water quality standards, or interpretations thereof, developed after the permit determination. Thus, as to discharges of pollutants disclosed during the permit proceeding, such boilerplate language of the type at issue here might be read as a direction against any material change that would warrant reconsideration of the state agency's decision regarding the need for limits. But it cannot plausibly be read as empowering a district court to set its own numeric criterion, now effectively applicable across West Virginia, based on an EPA document not in existence when the Fola Permit was issued. *Fola*, 82 F. Supp. 3d at 687, 697.

If allowed to stand, the District Court's interpretation of Permit Condition C effectively returns the CWA permitting scheme to its pre-1972 framework, before Congress "shifted the focus … from water quality standards to direct limitations on the discharge of pollutants." *Friends of the Earth v. Gaston Copper Recycling*

Corp., 204 F.3d 149, 151 (4th Cir. 2000). Equally troubling, it allows courts, at the instigation of plaintiffs who have failed to avail themselves of other remedies, to usurp standards-setting authorities that Congress clearly committed to the States.

While the current case involves conductivity and the court's interpretation of "catchall" language referencing compliance with water quality standards, similar ambiguities could arise in many state permits and for many narrative criteria. *Amici's* members operate in states with narrative criteria relating to several other pollutants, such as, for example, nutrients. Adding to the ambiguity, new information and guidance is frequently published by EPA. The NPDES process is structured to provide an orderly way to incorporate that information on permit renewal or, under certain circumstances, permit modification. The District Court's decision, however, bypasses this process and threatens to undermine the ability of *Amici's* members to rely on their permitting authority's translation of those criteria into effluent limitations, and instead subjects *Amici's* members to a potentially ever-changing target for CWA compliance.

By way of example, EPA recently issued a draft document encouraging states to adopt narrative criteria concerning stream flow.[11] That draft provides states with a potential *non-binding* methodology to translate, if states deem it

[11] U.S. Envtl. Protection Agency, *Draft EPA-USGS Technical Report: Protecting Aquatic Life from Effects of Hydrologic Alteration*, 822–P–15–002 (Feb. 2016) ("draft flow document").

appropriate to do so, those narrative standards into numeric targets. Notably, EPA's draft flow document is remarkably similar to the document relied on by Appellees in this case, as it outlines a potential method to derive a numeric "target" from a narrative criterion, while stating that state permitting authorities are in no way required to utilize that method.

Applying the District Court's reasoning to EPA's newly issued draft flow document, outside parties may be encouraged to bring similar CWA suits claiming that any NPDES permits *not* meeting the EPA-endorsed flow "targets" are, therefore, not meeting applicable narrative criteria, even if the state permitting authority determined that such a numeric targets were not appropriate. Such an outcome is exactly what the NPDES permitting process, permit shield doctrine, and CWA § 509 are designed to protect against, and must not be allowed by this Court.

III. The District Court's Interpretation Creates Serious Fair Notice Issues.

A. The District Court's Interpretation Cannot Be Correct Because It Fails to Give the Permittee Fair Notice.

The District Court's interpretation cannot be correct, because it strips the Permit of all meaning, and, likewise, fails to give the permittee the required "fair notice." It is settled that a party cannot be held liable or subject to penalties if the permit does not give fair notice "'of the conduct it prohibits…. [The permit] must provide a reasonably clear standard of culpability to circumscribe the discretion of

the enforcing authority and its agents.'" *United States v. Hoechst Celanese Corp.*, 128 F.3d 216, 224 (4th Cir. 1997) (quoting *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976)). The practical implication of the court's ruling means that thousands of permittees could have any one of a states' numerous narrative water quality standards strictly enforced, requiring compliance with a yet-to-be-established court-developed numeric standard, all contrary to the regulatory authority's expressed decisions and statements. Such a result would not be Constitutional and could not have been what the State intended.

The Due Process Clause of the U.S. Constitution prohibits punishment without fair notice. *United States v. Bennett*, 984 F.2d 597, 605 (4th Cir. 1993) ("fair notice that [the] contemplated conduct is forbidden by the statute"). Civil penalties like those in the CWA are "quasi-criminal" in nature, and parties subject to civil and administrative sanctions are entitled to fair notice. 33 U.S.C. §§ 1319(c), (d), (g); *First American Bank v. Dole*, 763 F.2d 644, 651 n.6 (4th Cir. 1985) ("Civil penalties may be considered 'quasi-criminal' in nature.").

Fair notice is not "provided unless a regulated party acting in good faith is able to identify with 'ascertainable certainty,' on the face of regulations, [the permit], and other public statements issued by the [permitting] agency, the standard to which the regulating agency expects it to conform." *United States v. Hoechst Celanese Corp.*, 964 F. Supp. 967, 979 (D.S.C. 1996), *aff'd in part, rev'd in part*

on other grounds, 128 F.3d 216 (4th Cir. 1997) (quoting *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1328-29, 1333-34, (D.C. Cir. 1995)). Without fair notice, the permittee "does not commit a wrong when it fails to meet the regulatory standard" or the terms of a permit. *Id.* at 979.

B. Enforcing a Compliance Standard Not Expressly Adopted by the Permitting Authority Violates Due Process.

Fair notice must come from the responsible administrative agency. *United States v. Trident Seafoods Corp.*, 60 F.3d 556, 559 (9th Cir. 1995) (the responsibility to "promulgate clear and unambiguous standards is on the [agency]" and "[i]f the language is faulty, the [agency] has the means and obligation to amend" the permit); *see also Gen. Elec.*, 53 F.3d at 1329 (agency public statements and correspondence provide fair notice); *Wis. Res. Prot. Council v. Flambeau Mining Co.*, 727 F.3d 700, 708-09 (7th Cir. 2013) (agency guidance provides fair notice).

The permitting authority explicitly rejected EPA's conductivity benchmark as a measure for determining compliance with the narrative criteria and chose not to include conductivity limits in NPDES permits. Permittees must be able to rely on the permitting agencies' direction on how to comply with permits. *Flambeau*, 727 F.3d at 708-709 (defendant lacked fair notice when state agency that administered NPDES program gave guidance that no permit was required). In this case, the permittee could not have known that its discharges needed to comply with

a standard that was expressly rejected by WVDEP, and that originated in an EPA guidance document that didn't exist when the permit was reissued in 2009. *Hoechst Celanese Corp.*, 128 F.3d at 226 ("in addressing whether a party has received fair notice, we look at the facts as they appear to the party entitled to the notice.").[12]

These serious fair notice concerns also should have alerted the District Court that its interpretation of the Permit was in error.

CONCLUSION

For the foregoing reasons, the Court should overturn the lower court's ruling.

Dated: April 20, 2016

Respectfully submitted,

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[12] The EPA guidance document relied upon by the District Court was issued two years *after* the permit was reissued to Fola. *See Elk Run*, 24 F. Supp. 3d at 540.

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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 registered counsel below. The undersigned certifies that a true and correct copy of the foregoing brief will be delivered by hand to the Clerk of Court on April 21, 2016.:

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 16-1024 **Caption:** Ohio Valley Env'tl Coalition v. Fola Coal Company, LLC

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Dated: April 20, 2016