

CWA Citizen Suits Seek to Erode the Permit Shield

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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? At least one federal court suggests the answer is yes.

In *Ohio Valley Env'tl. Coal., Inc. v. Fola Coal Company, LLC*, boilerplate language incorporated by reference into Fola's NPDES permit, prohibiting discharges in violation of water quality standards, became an enforceable condition of Fola's permit. Fola was found liable for discharging conductivity in violation of its NPDES permit, where Fola disclosed discharges of conductivity at similar levels and the state regulatory authority chose not to include numeric limits in the permit. In 2009, when Fola's permit was issued, West Virginia's water quality standards did not include, and they still do not include, a numeric criterion for conductivity.

No one complained about the failure to include such a limit in Fola's permit. OVEC did not comment on or challenge the permit and EPA did not object to its issuance. Years later, after new science emerged suggesting elevated conductivity is toxic to certain mayflies, OVEC collaterally attacked Fola's permit via a citizen suit, alleging Fola's discharges of conductivity violated WV's narrative water quality criteria. That narrative standard prohibits "[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." In addition, "no significant adverse impact to the chemical, physical, hydrological components of aquatic ecosystems shall be allowed."

The language at issue in Fola's permit is not unique. A recent informal survey of the National Association of Clean Water Agencies' (NACWA) members suggests that many primacy states incorporate a similar "catchall" statement into permits. In addition to language that sets forth specific pollutants and levels that are restricted or monitored and reported, a state will often include a generic

statement requiring that authorized discharges may not violate water quality standards, including narrative standards. This language is intended to provide the States with an opportunity to reconsider a permit decision should there be a material change in circumstances after the permit is issued.

Rather than recognizing the State's decision that levels of conductivity in Fola's discharges would not violate WV's narrative criteria, the district court set its own numeric criterion, based on an EPA guidance document not in existence at the time Fola's permit was issued. As a result, Fola was held to a standard of compliance it could not have known about when it agreed to the terms and conditions of its NPDES permit.

Setting aside issues of fair notice and Fola's Constitutional right to due process, the decision abolishes the "permit shield" created by Clean Water Act (CWA) Section 402(k), 33 U.S.C. 1342(k). Congress intended, and the courts have long held, that a permittee is in compliance with the CWA even if it discharges pollutants that are not expressly included in its permit, so long as it has adequately disclosed to the permitting authority and is otherwise in compliance with the permit. The district court's decision threatens this protection and creates significant risk for all NPDES permit holders that they can no longer rely on the finality of their permit limits and the certainty that they are in compliance.

The decision also threatens to spur additional litigation. Dischargers should be particularly concerned that courts will be asked to interpret narrative criteria related to other pollutants, for example, nutrients. Permittees will no longer be able to trust in the sufficiency of the permitting authority's translation of those criteria into discrete effluent limitations but may instead find themselves facing a court established limit based upon some new science or guidance document. EPA's recently published guidance encouraging states to adopt narrative criteria for stream flow provides a non-binding methodology to translate narrative criteria to numeric targets should the states decide to do so. If the district court's decision is allowed to stand, similar CWA citizen suits may allege that discharges not meeting these new targets violate the narrative standard even if the state has not adopted EPA's suggested translation. This is just one example.

There is also the risk that other courts may follow the district court's reasoning. In deciding whether *Fola* violated the CWA, the district court relied on two prior decisions, *OVEC v. Elk Run Coal Co.*, (rejecting Defendants' motions for summary judgment based on permit shield and adopting EPA's "conductivity threshold

guideline” suggesting that increased conductivity typically associated with mining is contributing to violations of narrative water quality criteria, despite West Virginia’s express rejection of EPA’s threshold limit) and *OVEC v. Marfork Coal Co., Inc.*, (finding discharges of selenium above the levels disclosed to the agency at the time of permitting meant the discharge was not within the reasonable contemplation of the agency and therefore not within the scope of permit shield coverage). Thus, the district court is creating a new body of law through legal analysis and conclusions in these earlier opinions that will likely be used by plaintiffs in attempts to collaterally attack permits.

One such example already exists. In *Natural Resources Defense Council v. Metropolitan Water Reclamation District of Greater Chicago*, plaintiffs argued discharges of phosphorus from three water reclamation plants violated a narrative condition incorporated into the permits that prohibited “unnatural algal or plant growth.” The regulatory authority considered but did not include numeric phosphorous limits in the permits despite the objections of the current plaintiff organizations. Instead, the permitting authority placed the following statement in its Responsiveness Summary to public comments: “[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 District asserted the permit shield defense but the Court rejected the argument that disclosure and operation in full compliance with the permit is a complete defense. Instead, citing progeny of *Fola* among a number of other authorities, the Court found full compliance with the permit requires compliance with non-numeric narrative standards incorporated by reference into the permit. Motions for summary judgment were denied and a bench trial is set for January 2017.

The *Fola* decision is currently pending on appeal to the Fourth Circuit. NACWA, along with several other national trade associations, filed an *amicus curiae* brief in support of Fola Coal Corporation.