NACWA
A Clear Commitment to America's Waters

ADVOCACY ALERT

To: Members & Affiliates
From: National Office
Date: January 5, 2017
Subject: Fourth Circuit Decision Threatens Permit Shield Reliance
Reference: AA 17-01

In a unanimous *decision* issued Wednesday, January 4, the United States Court of Appeals for the Fourth Circuit held that narrative water quality standards incorporated by reference into a National Pollution Discharge Elimination System (NPDES) permit are substantive permit terms, and that permittees must comply with these terms to receive the benefit of the Clean Water Act (CWA) permit shield under section 402(k). The decision, which affirmed a *ruling* by the district court in *Ohio Valley Environmental Coalition v. Fola Coal Co.*, threatens to severely erode the protection afforded by the permit shield and provides a clear path for environmental groups and courts to translate narrative water quality standards into enforceable permit terms.

This Advocacy Alert provides background and analysis on the case, as well as potential impacts on NACWA members and clean water utilities. For more information or questions, please contact *Amanda Waters* or *Erica Spitzig*.

Background and Analysis

In the past, CWA permittees have been able to rely on compliance with their permit as a shield against enforcement and citizen suit litigation. CWA § 402(k) provides that "[c]ompliance with a [NPDES] permit" is considered "compliance, for purposes of sections 309 and 505 [enforcement, including citizen suits], with sections 301, 302, 306, 307, and 403 [discharge prohibitions and effluent limits], except any standard imposed under section 307 for a toxic pollutant injurious to human health." Courts and regulatory agencies have interpreted this language to mean that entities who complied with the substantive terms of their NPDES permits were shielded from enforcement and citizen suit litigation for the permitted discharges.

The Fourth Circuit had also previously held in *Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty*, that the permit shield extended not only to pollutants specifically listed in the permit, but also to those disclosed in the permit application and therefore reasonably contemplated by the permitting authority in conducting a reasonable potential analysis and issuing the permit. This framework provided an element of certainty to regulated entities—permits serve as a mechanism by which the permitting agency determines what pollutant levels are protective of water quality and provides clear and final notice of a permittee's compliance obligations.

The Fourth Circuit's Fola decision undermines this certainty and ties compliance, and eligibility for the permit shield, to targets that are often undefined and difficult to quantify outside of litigation. The permit at issue in Fola, contained the following language:

- The discharge or discharges covered by a WV/NPDES permit are to be of such quality so as not to cause

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violation of applicable water quality standards adopted by the Department of Environmental Protection, Title 47, Series 2.

Citizen groups brought suit against Fola Coal Company for discharging pollutants not enumerated in the permit, alleging violations of water quality standards and, as a result, this section of the permit. On summary judgment, the district court held that Fola was properly subject to citizen suit enforcement, and that the narrative water quality standards incorporated by reference were substantive permit terms, compliance with which was a prerequisite to application of the permit shield.

NACWA participated with a coalition of industry and municipal groups in filing an amicus brief in the appeal, because of the broad implications for NPDES permittees nationwide. While the provision at issue in this case is contained in a coal mining facility permit, many NPDES permits contain a catch-all provision prohibiting discharges from causing or contributing to violations of water quality standards. The facts of the case represent a long and tortured history between the state of West Virginia and the coal industry, a history the courts seem eager to correct, but NACWA feared that the broad implications of the case would lead to bad law supplanting the Fourth Circuit's Piney Run decision on the permit shield. It was critical that NACWA go on record with the court to explain that despite the underlying actions of the state regulatory agency and the coal company permittee, a decision upholding the lower court ruling had the potential to affect NDPES permittees in every sector– including municipal wastewater and stormwater permittees.

Unfortunately, it appears that the history surrounding the case and the parties involved heavily influenced the Fourth Circuit's decision, and compliant NPDES permittees across the country will likely have to bear the consequences. This decision creates 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 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 provides an opportunity for courts to retroactively change the limits of a permit.

Potential Impacts on NACWA Members

NACWA members should be prepared to respond to this decision at the local level. While the Fourth Circuit decision has potentially broad implications, any NPDES permittee facing a similar challenge outside the Fourth Circuit should argue that its application should be limited to the Fourth Circuit. In addition, permittees can distinguish their facts from the unique facts of the Fola case (e.g., Fola argued lack of notice and that the boilerplate catch-all provision could not reasonably be interpreted to impose obligations on permittees, but the state permitting authority had previously enforced against the permittee's parent company for violations of the same permit language). NACWA will continue to follow this case and will actively participate in any additional litigation. NACWA will also continue to engage with state and federal regulators to urge revision of boilerplate permit language incorporating water quality standards by reference. Additionally, the Association is developing an aggressive strategy in response to the ruling, which will likely include proactive litigation and regulatory and statutory changes that may be necessary to address the effects of this decision.

NACWA members are encouraged to carefully review their existing permits and consider what this decision means for their permit compliance. The decision calls into question the precise definition of "compliance," which may no longer be clear depending on the state NPDES regulatory program and the precise terms of the permit. NACWA members are encouraged to work with their permitting authority to remove such boilerplate language and work to

develop clean, definite, and final permit language. Members should also carefully review Municipal Separate Storm Sewer System (MS4) general and individual permits for this language that has the potential to replace the maximum extent practicable (MEP) standard with a requirement to comply with water quality standards.

NACWA is available as a resource to help members concerned about similar challenges, and would like to hear from members who may be impacted by this decision. NACWA is also seeking information on members who have attempted to or successfully worked with their regulatory agency to remove this type of language. If you are able to share this type of information, if you are currently engaged in permit negotiations over this type of language, or if you are aware of similar pending or threatened litigation, please contact *Amanda Waters*, 202-530-2758, or *Erica Spitzig*, (202)533-1813.