NACWA State and Regional Association Conference Call

Special Legal Edition

August 31, 2016

Conference: 866-851-4369 (No PIN needed)

URL: www.uberconference.com/bmannion

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Agenda

I. Welcome & Introductions

II. Clean Water Legal Update

Amanda Waters & Erica Spitzig, NACWA Counsel

- I. Permit Shield
- II. Montana Nutrient Variance
- III. Groundwater Conduit Theory
- IV. NACWA Law Seminar & Consent Decree Workshop

III. Key Issues

- I. Campaign Letters
- II. WRDA/End of Summer Recess

IV. Other Issues

V. Adjourn

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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

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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 re: pollutants in wastestreams that weren't specifically covered by permit even if reg changes arise during lifetime of permit ***so long as***:
  - permittee discloses nature of wastestream ***and***
  - pollutants in wastestream were within reasonable contemplation of permitting authority at the time of permit issuance
- Seminal case – 4th Cir 2001 Piney Run decision
  - NPDES & WQS programs are 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, which was not specifically listed in NPDES permit, but was disclosed in permitting process & thus reasonably contemplated by permitting authority

Litigation Summary

- Aug 2013 -enviros file citizen suit against FOLA Coal Company
- Allege NPDES permit violations for conductivity relying on state regs incorpated by reference into permit
  - Prohibits discharges from causing or materially contributing to significant adverse impact to the stream's aquatic ecosystem
- Fola disclosed the nature of its wastestream & parameter at issue in the permit application
- WVDEP was obligated to determine at the time of permit renewal whether the level of conductivity disclosed by the permittee had the reasonable potential to cause or materially contribute to a violation of the applicable narrative criteria,
  - and, if so, was required to include limits on those pollutants deemed necessary to ensure that the discharge would not cause exceedance of the criteria
- The state did this Reasonable Potential Analysis - chose not to include a limit
- EPA did not object to the permit
- Plaintiffs did not challenge RPA or raise concerns during permitting period; waited until several years later to allege CWA violation

January 2015 Ruling

- Judge Chambers: with state's WQ criteria incorporated by reference into permit, they constituted 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 & was therefore 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 and applied

NACWA's Participation/Status

- Late April, NACWA joined industry groups to file an amicus brief in the case
- Fully briefed
- Oral Argument - October 27, 2016

Chicago Wastewater NPDES Permit Litigation

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

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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 both that the effluent caused or materially contributed to plant & algal growth and that the growth is in turn what caused the low DO levels
- NACWA is not currently involved in this case but will participate if/when appealed to 7th cir

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, especially for nutrients

Precedent erodes essence of permit shield defense; i.e., 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 a moving target, stripping it of finality & allowing courts to hold permittees strictly liable for actions they had no way of knowing were unlawful
- Administrative process for challenging permits should be utilized
- Upends NPDES permitting process & 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
- It is not the role of courts to make policy, technical, & scientific decisions; possess neither the authority nor expertise

NACWA – 3-pronged Strategy

State Regulators Strategy

- Working with ACWA staff to determine which states are incorporating WQS into permits & determine basis
  - 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 the breadth of existing litigation
- If a 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

Montana General Nutrient Variance Litigation

Upper Missouri Waterkeeper v. EPA

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Venue/Cause of Action

- Pending in US District Court in Montana
- Challenge to EPA final agency action approving a state's general numeric nutrient variance rule
- Alleging arbitrary, capricious & an abuse of discretion under APA

General Nutrient Variance

In 2014, Montana promulgated NNC for P & N

EPA & MTDEQ understood that most NPDES unable to meet the very low in-stream limits

- EPA's approach to development of NNC: states take the lead NNC; use variances to provide time for implementation
- MTDEQ submitted criteria & application for a general variance at same time
  - EPA approved both in February 2015
  - MT – 1st state to develop NNC with an approved achievable implementation strategy via a general variance

General Nutrient Variance

EPA encourages use of multiple discharger variances to streamline process if state can demonstrate that designated use or criterion is unattainable as it applies to multiple permittees

- experiencing challenges in meeting WQBELs for same pollutant for same reasons, regardless of whether or not they are discharging to the same waterbody

MT's variance is general - not waterbody or permittee specific but rather applies to all NPDES permittees discharging to state's wadeable streams

General Nutrient Variance

EPA approved general variances of up to 20 years

Interim limits apply & evolve during the life of the variance

State required to triennially review

- economic justification
- costs & effluent concentrations for available treatment technologies

Waterkeeper's Challenge

Waterkeeper alleges EPA's approval is arbitrary, capricious & abuse of discretion because:

- State did not analyze data for each specific nutrient pollutant discharger, for classes of dischargers, or the highest attainable condition for each receiving water in deciding to adopt the weaker replacement standard
- As a result of EPA's approval of general variance, the science-based numeric nutrient criteria are not the actual applicable WQS in Montana
- EPA has authorized the state's use of weaker, less-stringent effluent limits that are not protective of existing uses, and do not reflect WQ needed to protect attainable uses as shown by best available science

Potential Impacts if EPA's Approval Overturned

- Immediate impacts on NPDES dischargers in Montana
- Pave the way for successful challenge of similar variances in every state
- Could severely limit or eliminate the availability of WQ variances nationwide
- Viability of EPA's nutrient approach embracing cooperative federalism & acknowledging that states are better suited to develop NNC is at stake
  - could result in development of federal NNC

Status

- EPA's answer due September 15
- Several stakeholders including MTDEQ, the MT League of Cities and Towns, and NACWA will likely intervene as parties to the litigation

Groundwater Conduit Theory: *Hawaii Wildlife Fund v. County of Maui*

Facts

- County operates four Class V underground injection wells (UIC) for disposal of its treated effluent
- Effluent is treated to tertiary standards
- Planning began in1970s
- Regulators knew of potential for migration into the ocean
- Public raised concern and demanded NPDES permit

Class V Wells

- Used to inject non-hazardous wastes into the ground
- Shallow depths – directly into or above drinking water sources
- Regulated under SDWA with focus on protecting DW sources

Legal Challenge

- In 2012, enviro groups brought suit alleging that County of Maui needed an NPDES permit, and that effluent seeping through groundwater into ocean violated the Clean Water Act (CWA)
- In 2013 EPA, Army Corps, and Hawaii DOH tracer study:
  - Treated wastewater from the County's UIC wells reached the ocean roughly half a mile south of the treatment plan.
  - On average, it took ~ **10 months** for groundwater containing County wastewater to enter the ocean along ~ 2 miles of coastline.

District Court Decision

- Series of opinions on cross motions for summary judgment holding:
  - County violated the CWA because its treated wastewater reached navigable waters without an NPDES permit.
  - Court applied novel "conduit theory" to impose liability, holding that the unconfined groundwater acted as a "conduit," conveying pollutants from the point source – the permitted UIC wells – to the ocean
  - Court also conflated "significant nexus test" and point source discussion

District Court Decision

- Court reasoned CWA liability "is triggered when pollutants reach navigable water, regardless of *how* they get there."
- Ignores CWA point source requirement:
  - NPDES permit required for "any addition of any pollutant to navigable waters from any point source"
  - "Point source" defined as "any discernible, confined and discrete conveyance."
- Ignores "confined and discrete conveyance" requirement:
  - "While any conduit that is a 'confined and discrete conveyance' is a point source, that does not mean that all conduits must be 'confined and discrete conveyances.'"

9th Circuit Appeal

- County appealed in December 2015
- Briefing is complete; oral argument TBD
- NACWA filed *amicus* brief along with coalition of municipal groups in March 2016
  - Argued the district court ruling raises fundamental CWA legal issues and may unreasonably expand universe of sources subject to NPDES permit requirements:
  - Provided national perspective on potentially broad impacts of the decision on clean water and stormwater sectors

DOJ Involvement

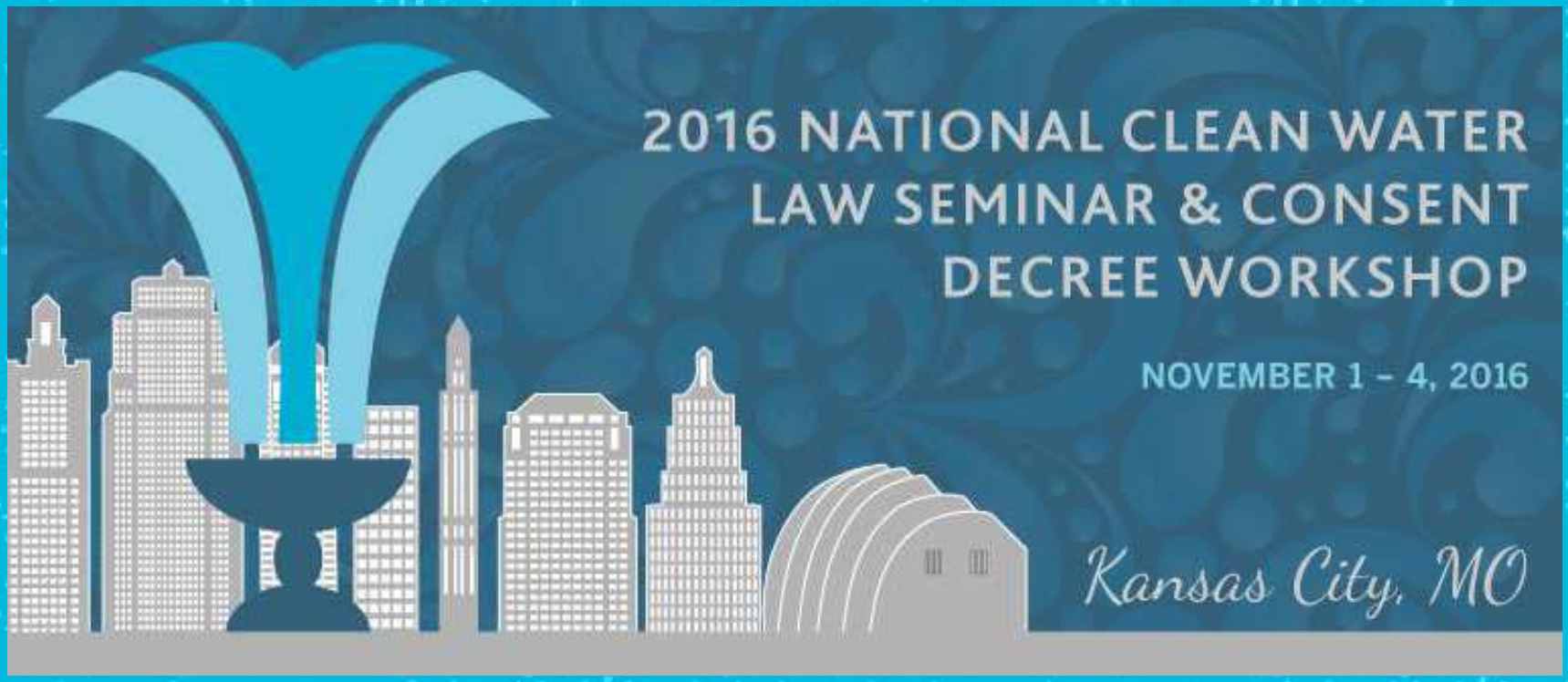
- On May 31, 2016, the United States Department of Justice (DOJ) filed a brief on behalf of EPA in support of the NGOs position and the district court's conduit theory.
- Argues that the district court's decision is consistent both with
  - "[T]he text and purpose of the CWA," and
  - "EPA's long-held position governing when the CWA requires permits for discharges of pollutants that move to jurisdictional surface waters through groundwater with a direct hydrological connection."
- EPA does not intend that groundwater should be considered waters of the United States and that the district court misapplied the significant nexus test, but that the district court nonetheless reached the right result.

"Direct Hydrologic Connection"

- DOJ emphasizes "direct hydrological connection" requirement, explaining "a general hydrological connection between all groundwater and surface waters is insufficient."
  - DOJ examples:
    - *McClellan Ecological Seepage Situation (MESS) v. Weinberger*, 707 F. Supp. 1182, 1196 (E.D. Cal. 1988), finding no NPDES requirement where would take "literally **dozens**, and **perhaps hundreds**, of years for any pollutants in the groundwater to reach surface waters."
    - *Greater Yellowstone Coalition v. Larson*, 641 F. Supp. 2d 1120 (D. Idaho 2009), aff'd 628 F.3d 1143, 1153 (9th Cir. 2010), finding no 401 certification required predicted where movement of peak concentrations would take **between 60 and 420 years**.
- Not a clearly defined test and few courts have weighed in on the issue.

Impacts on Water Sector

- Additional regulatory burden with potentially conflicting SDWA/CWA obligations
- Potential chilling effect on green infrastructure and other projects that may introduce pollutants into groundwater
- Unworkable permitting structure and/or citizen suits for infrastructure not previously subject to NPDES requirement:
  - Clean water infrastructure (collection systems, pipes, cesspools, septic systems), underground storage tanks, surface impoundments, and landfills that may release pollutants to groundwater that is hydrologically connected to navigable waters.
  - There are also potential implications for water reuse and biosolids land application operations.


2016 NATIONAL CLEAN WATER
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DECREE WORKSHOP
NOVEMBER 1 – 4, 2016
Kansas City, MO

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Thank You!

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