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,
Plaintiffs-Appellees/Cross-Appellants,

v.

FOLA COAL COMPANY, LLC,
Defendant-Appellant/Cross-Appellee

On Appeal from the United States District Court for the Southern District of West Virginia at Huntington
Case No. 2:13-cv-5006, Honorable Robert C. Chambers

BRIEF OF AMICI CURIAE STATE OF WEST VIRGINIA AND WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION

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INTRODUCTION

Amici State of West Virginia and its Department of Environmental Protection ("WVDEP") respectfully submit this brief to address the questions raised in this Court's September 6, 2016 Order.[1]

The Clean Water Act ("CWA") empowers state agencies like WVDEP to administer a permit system to regulate the discharge of effluents into state waters. Through this system, WVDEP ensures compliance with state ambient water quality standards developed for particular streams. Specifically, WVDEP imposes specific effluent limits on permittees, monitors their compliance with these limits, and retains the right to amend the permits if the limits prove insufficient to maintain ambient water quality. Federal and state law require that WVDEP provide a shield to permittees who comply with the specific discharge limits in their permits for any effluent that was disclosed during the permitting process. *Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carrol Cnty., Md.*, 268 F.3d 255, 258 (4th Cir. 2001).

This system is a classic exercise in cooperative federalism, in which the federal government relies on experts at the state level to make the principal determinations about how best to ensure local water quality. In this case, the district court impermissibly circumvented WVDEP's permit process by imposing

[1] Specifically, this Court asked *amici* to address (1) whether Fola's permit contains water quality requirements, and if so, the methodology to gauge compliance, (2) the relationship between water quality requirements and effluent limits, and (3) how conductivity relates to water quality requirements.

an obligation on a permittee to comply with a conductivity limit that does not appear in its permit. If this decision were permitted to stand, courts would be enabled to make policy determinations reserved to the States, introducing confusion into the scope of WVDEP's permits and the permit shield.

To illustrate, the district court here purported to bind a permittee to maintain a certain West Virginia Stream Condition Index ("WVSCI") score to reduce conductivity levels in certain waters. But WVDEP does not impose a conductivity limit on permittees and even the Environmental Protection Agency ("EPA") has no recommended limit on conductivity. In fact, WVDEP has concluded that conductivity at the level imposed by the district court correlates poorly with WVSCI scores, which can be affected by a variety of environmental factors.

In short, WVDEP has made a reasoned decision not to impose a conductivity effluent limit on permittees. The district court should not be permitted to upend WVDEP's permit process and undermine the federal and state permit shields.

ARGUMENT

I. Permittees Cannot Be Held Liable for Discharge of Effluents that Were Disclosed to WVDEP But Not Specifically Limited in the Permit.

The CWA authorizes States to administer an NPDES permit program, subject to EPA oversight, whereby state agencies develop water quality standards and can enforce them by placing specific effluent limits in individual permits. *See Westvaco Corp. v. EPA*, 899 F.2d 1383, 1384 (4th Cir. 1990); 33 U.S.C. § 1342.

Under the CWA, WVDEP calculates effluent limits for specific discharges, which are designed to cumulatively ensure a stream meets its ambient water quality standard. *See* 33 U.S.C. § 1312; 1342(b). These standards can be expressed either as numeric or narrative standards. Numeric standards express the pollution limit for the entire stream. WVDEP then calculates the amount of pollutant that can be discharged from a particular outlet, while protecting the overall water quality of the stream, accounting for the various factors affecting the quality of the stream. WVSCR § 47-30-6.2.c. These effluent limits are included in specific NPDES permits. WVDEP may also develop specific effluent limits in permits to protect narrative water quality standards, such as the requirement that discharges not have a "significant adverse impact" on "biological components of aquatic ecosystems." WVSCR § 47-2-3.2.i; 40 C.F.R. §§ 122.44(d)(1)(v) – (vii).

EPA's NPDES permitting regulations set out a detailed and thorough process by which the State can develop these effluent limits, taking into account technical and scientific considerations. 40 C.F.R. § 122.44. This process provides the public with an opportunity to comment on permit limitations, and EPA with an opportunity to review, before they become final. 33 U.S.C. §§ 1342(b)(3)-(4). If WVDEP later concludes that the effluent limits are not sufficient to ensure water quality, it can initiate procedures to modify the limits. WVCSR § 47-30-8.2.c.2.

Indeed, WVDEP *must* reevaluate permits every five years to ensure water quality standards are being met. 33 U.S.C. § 1342(b)(1)(B); W. Va. Code § 22-11-11(c).

Both state and federal law shield permit holders from liability for purported water quality impairment so long as the permittee makes adequate disclosures to the permitting authority and complies with the terms in its permit. 33 U.S.C. § 1342(k); W. Va. Code § 22-11-6. This process ensures that expert state agencies like WVDEP, not courts, make decisions about how best to convert state water quality standards into specific effluent limits from an individual source. Thus, as this Court has held, "as long as a permit holder complies with the CWA's reporting and disclosure requirements, it may discharge pollutants not expressly mentioned in the permit" that were "reasonably anticipated by, or within the reasonable contemplation of, the permitting authority." *Piney Run*, 268 F.3d at 268.

A. The district court concluded that Fola's permit imposes not only specific effluent limits, but also a freestanding obligation to comply with the general narrative water quality standard contained in West Virginia Rule 5.1.f, which at the relevant time stated that "discharges covered by a WV/NPDES permit are to be of such quality so as not to cause violation of applicable water quality standards . . . ." WVCSR § 47-30.5.1.f (2010). The court based its decision on Section C of Fola's permit, which incorporates by reference the permitting procedures of the West Virginia Rules, listing 19 headings in a table of contents format.

This Court must interpret such language "in the context of the entire NPDES permit and the permitting process," *Piney Run*, 268 F.3d at 269, and this holistic approach refutes the district court's strained reading. Section A of the permit contains specific discharge limits and monitoring requirements that WVDEP uses to ensure compliance. JA 1244-1255. Consistent with federal law, these monitoring requirements apply only to the specific effluent limits listed in Section A of the permit, and the absence of monitoring requirements for conductivity indicates it was not intended as a limitation in the permit. *See* 40 CFR 122.44(i)(1). Section D, in turn, provides that WVDEP may modify the effluent limits in Section A whenever necessary to ensure compliance with water quality standards. JA 1258. In light of the specific discharge limitations, corresponding monitoring requirements, and mechanism for amendment, it would not make sense that WVDEP would hide a sweeping requirement to comply with narrative water quality standards in a cross-reference to a rule heading. Rather, in context, this provision is plainly an instruction *to WVDEP* to develop specific effluent limits in permits in light of the narrative water quality standards.

B. The text of Rule 5.1 confirms this commonsense reading of the permit. That Rule shows that WVDEP knew how to impose a requirement on a "permittee," such as the mandate that the "permittee shall comply" with certain limits on pollutants prescribed by federal law. WVCSR § 47-30.5.1.b. By contrast,

Rule 5.1.f, identified by the district court, states in the passive voice that "discharges covered by a WV/NPDES permit are to be of such quality so as not to cause violation of applicable water quality standards. . . ." WVCSR § 47-30.5.1.f (2010). This provision, on its face, distinguishes between the "discharges covered by a WV/NPDES permit"—i.e., the specific effluent limits—and the "applicable water quality standards" enforced by WVDEP through the permit process.

C. Moreover, if the permit were interpreted to incorporate a freestanding obligation to comply with the narrative requirement, it would undermine the entire structure of the CWA. It would supplant WVDEP's role under the CWA in implementing ambient water quality standards by setting specific effluent limits in permits. For example, the iron effluent limits in Fola's permit for outlets 031-034 were 1.99 mg/l for the monthly average and 3.45 mg/l for the daily maximum. JA 1272-1275. These limits, as well as limits on any other outlets, are designed to ensure the overall stream meets the 1.5 mg/l numeric water quality standard, WVCSR § 47-02, Appendix E, Table 1. Under the district court's view, it would be uncertain whether WVDEP should enforce the 1.5 mg/l water quality standard against a permittee or the effluent limits in the permit.

For these reasons, this Court rejected a literal reading of the permit at issue in *Piney Run*, which stated that "the discharge of pollutants not shown shall be illegal." 268 F.3d at 270. A blanket prohibition on the discharge of all unlisted

pollutants, the Court reasoned, would expose the permittee to liability in a host of unanticipated circumstances and undermine the permit process as a whole. *See id.* at 270-71. Because his Court rejected *explicit* permit language in *Piney Run* to preserve the structure of the federal and state permit shields, it should likewise do so here, where the district court made an unwarranted inference from a table in the permit that makes reference to 19 different sections of state rules.

D. Finally, WVDEP in a series of letters confirms the reading of Fola's permit described above.

In March 2012, WVDEP rejected a request by OVEC to take enforcement action against Fola for elevated levels of selenium for specific outlets, even though no such requirements were contained in Fola's permit. JA 88-89. WVDEP responded to that request by explaining that the West Virginia permit shield provision "precludes [WVDEP] from issuing a notice of violation for exceedances of selenium water quality standards . . . where a permittee is in compliance with their WV/NPDES permit." JA 89. The letter further explained that the permit shield under West Virginia law is consistent with the federal permit shield, as interpreted by this Court in *Piney Run*. *See id.*

Then, in a series of letters between WVDEP and EPA in 2012 and 2013, WVDEP repeatedly confirmed that the purpose of the new law was to "clarify[] that compliance with the effluent limits contained in a [NPDES] permit is deemed

compliant with [state law].” JA 72 (Aug. 9, 2012 letter). WVDEP explained that this reading was in agreement with EPA’s revised policy statement on the federal permit shield, which likewise provided that permittees are shielded as to pollutants expressly limited in the permit (as long as the limits are met) and other pollutants specifically made part of the record during the permitting process. JA 83-84 (Jun. 5, 2013). In another letter, again echoing *Piney Run*, WVDEP explained that permittees are “shielded from liability for the discharge of pollutants not expressly mentioned in the permit” provided those pollutants were within WVDEP’s “reasonable anticipation,” that is, disclosed in the permit application. JA 70.

Any fair reading of these letters shows that WVDEP has interpreted the permit shield as “co-extensive” with the federal permit shield, which provides that a permittee cannot be held liable for discharging an effluent that had been disclosed during the permit process but not limited in the permit, *Piney Run*, 268 F.3d at 268. Under state law, WVDEP’s interpretation of its own rules is entitled to “much weight.” *Crockett v. Andrews*, 172 S.E.2d 384, 387 (W. Va. 1970). And the attempt by the district court to detect ambiguity in these letters by misconstruing isolated phrases must fail.

II. WVDEP Does Not Have A Conductivity Standard For Water Quality Nor Does It Impose A Conductivity Effluent Limit On Permittees.

WVDEP does not impose a conductivity limit on permittees and EPA has not provided a recommended conductivity limit. Moreover, WVDEP has

concluded that, particularly at the level imposed by the district court, both WVSCI and conductivity are poor measures of stream health.

WVDEP has rejected use of the standards the district court adopted, WVSCI and conductivity, for determining water quality. In 2010, West Virginia adopted "Permitting Guidance for Surface Coal Mining Operations to Protect West Virginia's Narrative Water Quality Standards."[2] This Guidance explained that WVSCI is "a tool to be used as a[] . . . indicator of stream health, but not the sole criteria," and that WVDEP must instead assess the health of the aquatic ecosystem as a whole.[3] The West Virginia Legislature agreed with this approach, instructing WVDEP to approach narrative water quality standards based on an "evaluation of the holistic health of the aquatic ecosystem." W.Va. S.B. 562 (2012).

WVDEP's decision not to rely on the WVSCI score or conductivity for water quality is scientifically sound and reasonable. As WVDEP explained, WVSCI is a poor measure of the health of the aquatic ecosystem because it is a measurement taken at a single point in a stream and assesses only the impact on

[2] WVDEP, 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 (Aug. 12, 2010; revised May 11, 2012), http://www.dep.wv.gov/pio/Documents/2011-05-11%20%20Narrative%20Standards%20Permitting%20Guidance%20(Rev%20%202).pdf (hereinafter Guidance).

[3] WVDEP, 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, at 4 (Aug. 12, 2010), http://www.dep.wv.gov/pio/Documents/2011-05-11%20%20Narrative%20Standards%20Permitting%20Guidance%20(Rev%20%202).pdf ("Justification").

insects rather than the broader health of the stream. Guidance at 4. Moreover, WVDEP concluded that conductivity itself is perhaps an even less effective measure of stream health. Justification at 5. And even if conductivity were an appropriate standard, WVDEP's scientific studies show that conductivity is poorly correlated with WVSCI scores, which can be affected by a variety of environmental factors. Justification at 5.[4]

It is inconsistent with the structure of the CWA for a district court to set a conductivity standard that WVDEP itself declined to adopt. The CWA charges States with the task of enforcing the State's water quality standards. And the district court's decision would effectively impose on permit holders a numeric water quality standard that WVDEP reasonably declined to adopt and bypass the experts charged under federal and state law with administering permits. The CWA does not allow courts to circumvent the States in this manner.

CONCLUSION

The decision of the district court should be reversed.

[4] WVDEP has also been actively exploring, with EPA's approval, addressing conductivity in state streams through the CWA's Total Maximum Daily Loads ("TMDL") process by 2020 to 2025. EPA MSJ Opp., Dkt. No. 39, *Ohio Valley Envtl. Coal. v. McCarthy*, 3:15-cv-271, at 2-3 (S.D. W. Va. Feb. 19, 2016). WVDEP has not yet established these TMDLs because, as explained above, it has not determined the best measure by which to measure and address conductivity. As EPA recently explained to a federal district court, "the reasons [why] the State deferred issuing the TMDLs for [conductivity] . . . were reasonable." *Id.* at 3.

Respectfully submitted,

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October 6, 2016

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29 & 32(a)(7)(B). This brief contains 10 pages as ordered by this Court, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Date: October 6, 2016

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CERTIFICATE OF SERVICE

I certify that on October 6, 2016, the foregoing document was served on the counsel of record for all parties through the CM/ECF system.

/s/ Thomas M. Johnson, Jr. October 6, 2016

Thomas M. Johnson, Jr. Date