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Your NPDES Permit's Narrative Language is Critically Important

In a January 4, 2017, opinion the United States Court of Appeals for the Fourth Circuit upheld the United States District Court for the Southern District of West Virginia's decision that narrative language in Fola Coal's National Pollutant Discharge Elimination System (NPDES) permit applied to its mining discharges the same as did the permit's numerical standards. See *Ohio Valley Environmental Coalition v. Fola Coal Company LLC* (4th Cir. 2017) 2017 WL 35726. Because those discharges, while not exceeding any numerical restriction, degraded the general quality of the water way, the district court found that Fola Coal had violated its NPDES permit. It was thus enjoined from further degradation and required to work on improving the general quality of the stream.

In 2009, Fola Coal had renewed its West Virginia NPDES permit for its surface mining operations adjacent to Stillhouse Branch of Twentymile Creek in central West Virginia. In March 2013, environmental groups sued Fola Coal under the Clean Water Act (CWA) asserting that Fola had not complied with two narrative water quality standards set forth in the NPDES permit.

Fola Coal argued that because it disclosed the nature of its discharges--specifically that they contained ions and were highly conductive which was the very problem alleged for the creek--when it applied for the permit and that West Virginia's Department of Environmental Protection set no specific limitations on conductivity, that it was not obligated to comply with the narrative standards in the permit. Thus it argued that because it did not violate the numerical standards it was shielded from liability under the CWA.

The district court rejected all of Fola Coal's arguments and found that it had violated West Virginia's narrative water quality standards in the NPDES permit. It ordered that Fola Coal stop its prohibited discharges and work on improving the quality of the creek. Fola Coal appealed.

The Court of Appeals also rejected Fola Coal's arguments. The appeals court found that a NPDES permit is interpreted like a contract. After thoroughly examining the language of the permit, the court concluded that the narrative standards in the permit applied to Fola Coal and that such a conclusion was consistent with the requirements for NPDES permits issued directly by the U.S. Environmental Protection Agency. The court further cited to *PUD No. 1 of Jefferson City v Washington Department of Ecology* 511 U.S. 700, 716 (1994) to underscore its point. "[T]he Clean Water Act 'permits enforcement of broad, narrative criteria' and 'only one class of criteria, those governing "toxic pollutants ... ," need be rendered in numerical form[.]'"

The Court of Appeals also reviewed the district court's analysis of the alleged general quality problem with the creek. The district court found after examining abundant evidence presented by both sides that the creek had indeed be degraded by Fola Coal's discharges. The Court of Appeals found that the district court had applied a well-established methodology in finding the creek had been degraded. It affirmed the district court in every regard.

This case is a good reminder that *all* language in a NPDES permit must be evaluated thoroughly and every effort must be made to comply with *all* requirements. This goes for the more imprecise general quality standards and not just the explicit numerical prohibitions. Furthermore, the state or local agency's perceived indifference to the narrative standards should hold no sway in whether or not those standards are followed. The Clean Water Act's citizen suit provision demands adherence to all the standards despite an agency's indifference.