

Public Land and Resources Law Review

Volume 0 Case Summaries 2016-2017

Ohio Valley Environmental Coalition v. Fola Coal Company, LLC

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Recommended Citation

Slike, Emily A. (2017) "Ohio Valley Environmental Coalition v. Fola Coal Company, LLC," *Public Land and Resources Law Review*: Vol. 0, Article 24.

Available at: <https://scholarship.law.umt.edu/plrlr/vol0/iss7/24>

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***Ohio Valley Environmental Coalition v. Fola Coal Company, LLC*, 845 F.3d
133 (4th Cir. 2017)**

Emily Slike

Disregarding CWA regulations, WVDEP allowed for a state coal mining company, Fola, to discharge pollutants into the Stillhouse Branch without regard for water quality violations. Fola claimed that because it held a WV/NPDES permit, it was shielded from any liability so long as the company followed the permit's provisions, even if its discharge violated CWA water quality standards.

I. INTRODUCTION

If a company holds a National Pollution Discharge Elimination System (“NPDES”) permit, it can discharge pollutants into waters of the United States under the Clean Water Act (“CWA”).¹ A WV/NPDES permit allows permit holders to discharge pollutants without liability if a holder complies with the effluent limits set in the permit.² A state can apply to administer its own NPDES program.³ West Virginia did so and was approved in 1981.⁴ Fola Coal Company (“Fola”) received a permit in 1996 and renewed it in 2009, to discharge into Twentymile Creek and Stillhouse Branch (“Stillhouse”).⁵ In 2013, three environmental groups filed suit against Fola alleging that Fola violated West Virginia’s water quality standards had been violated.⁶ Fola stated it was shielded from liability because it complied with the effluent limits set in the permit.⁷ In 2013, the West Virginia Department of Environmental Protection (“WVDEP”) clarified to Fola that permit holders only need to disclose the company’s discharge and comply with set effluent limits.⁸ In 2015, WVDEP attempted to eliminate the language of WVCSR § 47-30-5.1.f. (“5.1.f”) which requires discharges under West Virginia NPDES (“WV/NPDES”) permits to meet WVDEP water quality standards.⁹ The Environmental Protection Agency (“EPA”) did not approve of the removal.¹⁰ Following the conversation with WVDEP, Fola urged that the district court hold the permit provisions in accordance with West Virginia’s water quality standards.¹¹ The district court determined that Stillhouse had a conductivity increase from when Fola first began discharging and the discharge

1. Ohio Valley Env'tl. Coal. v. Fola Coal Co. LLC, 845 F.3d 133, 135 (4th Cir. 2017).

2. *Id.*

3. *Id.*

4. *Id.* at 136.

5. *Id.*

6. *Id.*

7. *Id.* at 136-37.

8. *Id.* at 137.

9. *Id.* (citing W. Va. Code R. § 47-30-5.1.f. (2013)).

10. *Id.* at 137.

11. *Id.*

adversely affected the river's biology.¹² Conductivity measures water's ability "to pass electrical flow."¹³ Fola appealed, and the Fourth Circuit affirmed.¹⁴

II. FACTUAL AND PROCEDURAL BACKGROUND

Unless a discharging company holds a WV/NPDES permit, the CWA forbids any discharge of pollutants into waters of the United States.¹⁵ Under the CWA, states can administer a NPDES permit program if approved by the EPA, and in 1981, West Virginia received such approval.¹⁶ In 1996, Fola received a WV/NPDES permit to discharge into the tributaries of Twentymile and Stillhouse rivers, and in 2009 received a renewed permit resulting in the current dispute.¹⁷ In 2013, three environmental groups, including the Ohio Valley Environmental Coalition ("Coalition") filed a CWA citizens suit against Fola alleging that a West Virginia regulation 5.1.f. had been violated.¹⁸ When Fola's permit was renewed, 5.1.f. stated discharge of a WV/NPDES permit cannot cause a violation of the Department of Environmental Protection's water quality standards.¹⁹ The Coalition alleged that Fola discharged large quantities of ions and sulfates resulting in water quality standard violations.²⁰ Fola argued that because it had disclosed its discharges' conductivity when applying for the renewal permit, the WVDEP set no specific limits in the permit, and Fola had complied with permit effluent limits, so CWA liability did not apply.²¹

In 2013, Fola sought clarification from the WVDEP regarding a newly passed NPDES West Virginian law stating "notwithstanding any rule or permit condition to the contrary, ... compliance with a permit issued pursuant to this article shall be deemed compliance for purposes of the [CWA's] permit shield."²² WVDEP interpreted this to mean that permit holders only need to disclose discharges and comply with set effluent limits.²³ Through its interpretation, WVDEP attempted to eliminate 5.1.f. arguing that its interpretation made state law consistent with the CWA, and in doing so, admitted that Fola's 2009 permit was required to meet water quality standards, regardless if standards were "delineated in the permit or contained in the administrative record of the permitting process."²⁴ In response, the EPA, wrote a series of letters to WVDEP explaining that eliminating water quality language regarding minimum standards would result in a conflict between state with federal and weaken the WV/NPDES program.²⁵ The EPA did not approve of the new statute interpretations despite WVDEP's arguments and the state legislature's new provision prohibiting

12. *Id.* at 138.

13. Fondriest Environmental, *Fundamentals of Environmental Measurements: Conductivity, Salinity & Total Dissolved Solids*, <http://www.fondriest.com/environmental-measurements/parameters/water-quality/conductivity-salinity-tds/> (last visited Apr. 2, 2017).

14. *Id.* at 138, 147.

15. *Id.* at 135.

16. *Id.* at 136 (citing Clean Water Act 33 U.S.C. § 1342(b) (2014)).

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 137 (citing W. Va. Code § 22-11-6(2) (2013)).

23. *Id.*

24. *Id.*

25. *Id.*

enforcement of water quality standard violations against permit holders.²⁶ Nonetheless, Fola urged the district court to hold the permit provisions be in compliance with West Virginia's water quality standards.²⁷

The district court found that since Fola first began discharging, the conductivity of Stillhouse had significantly increased resulting in the death of sensitive insect species from not being able to adapt to the sudden and dramatic change in environment from the increased conductivity.²⁸ Additionally, the stream's score decreased on the West Virginia Stream Condition Index ("the Index") which measures the health of streams.²⁹ A score below 68 indicates impairment, and since 2003, the score had consistently fallen below 68.³⁰ Citing an EPA report on conductivity in central Appalachian Streams, the district court determined that when conductivity drops below a certain level, Stillhouse will stay biologically impaired.³¹

During Fola's mining, the conductivity increased which adversely impacted the stream's chemical and biological health and violated the state's water quality standards listed in Fola's 2009 permit.³² The district court appointed a Special Master of Engineering to monitor Fola's future actions to reduce the conductivity and increase the Index's score.³³ Fola appealed.³⁴

III. ANALYSIS

The Court interprets a WV/NPDES permit as if it were a contract and a legal question.³⁵ The issue is reviewed de novo and the Court will only reverse if the findings are clearly erroneous.³⁶ Fola's three-part argument is: (1) 5.1.f. is ambiguous and controls WVDEP's conduct, the state regulator, (2) the district court failed to examine the extrinsic evidence that would show 5.1.f. does not impose obligations on permit holders, and (3) the *Piney Run* holding requires the conclusion that 5.1.f. only imposes obligations on the permitting authority.³⁷

A. 5.1.f. Ambiguity

Fola maintained that 5.1.f. is ambiguous, and its best interpretation is as a regulation of the permitting authority.³⁸ "If 'the language [of a permit] is plain and capable of legal construction, the language alone must determine' the permit's meaning."³⁹ The Court disagreed finding 5.1.f. to be "straightforward and

26. *Id.*

27. *Id.*

28. *Id.* at 138.

29. *Id.*

30. *Id.*

31. *Id.* (citing A Field-Based Aquatic Life Benchmark for Conductivity in Central Appalachian Streams (Final Report) EPA/600/R-10/023F, at A-36 (2011)).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 138-39.

37. *Id.* at 139 (citing *Piney Run Pres. Ass'n v. Cnty. Comm'rs. of Carroll Cnty. Md.*, 268 F.3d 255 (4th Cir. 2001)).

38. *Id.*

39. *Id.*

unambiguous.”⁴⁰ The Court determined that the statute controls the permit holder’s activities, and the state agency only drafts the permit.⁴¹ Therefore the state agency holds no control over the permit holder’s discharges.⁴² Additional examination of 5.1.f. shows under the section, “Conditions Applicable to All Permits” and subsection “Duty to Comply; Penalties,” the first mandate states, “the permittee must comply with all conditions of a WV/NPDES permit.”⁴³ Because clear restrictions are listed for permit holders, the Court determined the district court was warranted in determining 5.1.f. to be unambiguous.⁴⁴

B. Extrinsic Evidence

Fola argued the district court never examined extrinsic evidence which would have clearly shown 5.1.f. “imposed no obligation on the permit holder.”⁴⁵ Fola listed WVDEP’s current interpretation and the Legislature’s actions in 2013 and 2015 as support of its position, but the record indicated West Virginia intended “to hold permit holders liable for violations of water quality standards.”⁴⁶ Additionally, in 2011, Fola’s parent company agreed to remedy water quality standard violations, and in 2015 WVDEP interpreted 5.1.f. as requiring WV/NPDES permit coal companies to meet water quality standards.⁴⁷ Further, a long history exists of enforcing violations for water quality standards and the new obligations simply compiled existing duties on surface coal mines into one regulatory scheme.⁴⁸ The EPA consistently expressed that 5.1.f. imposed obligations on permit holders.⁴⁹ The Court concluded that the plain language and extraneous evidence supported a finding that 5.1.f. is a regulation enforceable against permit holders and not the state permitting agency.⁵⁰

C. Piney Run

Fola relied on the *Piney Run* holding that requires a court to conclude 5.1.f. only imposes obligations on the permitting authority.⁵¹ *Piney Run* held permit holders that disclose their pollutants to the permitting agency and comply with the effluent limits in their permits are shielded from CWA liability.⁵² Fola asserted that because it disclosed its discharge conductivity and complied with the effluent limits it was shielded from liability.⁵³ The Court found that Fola incorrectly interpreted *Piney Run*, and that it actually held that a permit will shield its holder from liability so long as “the permit holder complies with the express

40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* at 139-40.
44. *Id.* at 140.
45. *Id.* at 139.
46. *Id.* at 140.
47. *Id.*
48. *Id.* at 141.
49. *Id.*
50. *Id.* at 142.
51. *Id.* at 139.
52. *Id.* at 142.
53. *Id.*

terms of the permit and with the [CWA]'s disclosure requirements."⁵⁴ Further, in *Piney Run*, the Court noted that regardless of the shift in environmental regulation to focus on pollutant discharge, water quality standards continued to play an important role in the CWA's regulatory scheme.⁵⁵ The Court further noted that under *Piney Run* a permit holder is required to comply with all permit terms to be shielded from liability, which means complying with water quality standards.⁵⁶

D. District Court Error

The district court held that Fola's discharge into Stillhouse was a violation of the water quality standards in its permit.⁵⁷ The court did so by relying on "testimony, reports, charts, studies, and exhibits from experienced scientists" which all determined that Fola violated water quality standards in the permit, and found Fola's discharge "caused or materially contributed to the impairment of Stillhouse."⁵⁸

On appeal, Fola did not argue that the district court erred in finding that Fola's discharge contributed to the biological impairment of Stillhouse, but instead argued "derivative 'process' arguments."⁵⁹ Fola maintained it was deprived of "fair notice" that water quality standards under 5.1.f. were enforceable.⁶⁰ However, the district court looked at Fola's parent company's history and failure to acknowledge the language's history, determining that Fola had ample notice.⁶¹ Fola also contended that it relied on "WVDEP that the State would not pursue enforcement actions based on conductivity or water quality standards," but the Court found that Fola offered no evidence that any assurance was made in 2009 from WVDEP.⁶² Even if WVDEP did offer assurances, "an agency's informal assurance that it will not pursue enforcement cannot preclude a citizen's suit to do so."⁶³ Lastly, Fola argued that the district court engaged in unlawful rulemaking, but the Court determined Fola would be liable for the rules specifically incorporated into the permit.⁶⁴ The Court determined that the district court's decision that "Fola's mining caused the increased conductivity that resulted in that impairment" was made after carefully assessing the record and was not clearly erroneous.⁶⁵

IV. CONCLUSION

Fola, under WVDEP's direction, failed to follow the water quality standards laid out under the CWA. The statutory language describing water quality standards was unambiguous. Companies in West Virginia must comply with the CWA's disclosure requirements even if holding an NPDES permit.

54. *Id.*
55. *Id.* at 143.
56. *Id.* at 143.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.* at 145.
63. *Id.*
64. *Id.*
65. *Id.*