

## The Sword and the Shield: Disunity Over the Application of the Clean Water Act's Permit Shield Provision

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# The Sword and the Shield: Disunity Over the Application of the Clean Water Act's Permit Shield Provision

## INTRODUCTION

The vast waters of America swirled, ebbed, and flowed in a sad, murky state in the summer of 1969.<sup>1</sup> Volatile pollutants dumped for decades into the nation's waterways and waterbodies were in such high concentration that one river literally caught fire.<sup>2</sup> This pollution crisis was not new. Prior to 1969, Congress made numerous attempts to curb the discharge of pollution into America's waters, but these efforts fell short, failing to manage the existing high levels of water pollution.<sup>3</sup> President Lyndon B. Johnson auspiciously declared that water pollution would "be doomed" in the 20<sup>th</sup> century when he signed the Water Quality Act of 1965.<sup>4</sup> However, the events of June 1969 contradicted President Johnson's bold assertion when the nation discovered the shocking extent of the pollution problem in America. In the Cuyahoga River, an ember spark ignited its polluted waters, lit the river ablaze, and fueled the fire for comprehensive, top-down water pollution legislative reform.<sup>5</sup>

This comprehensive congressional reform resulted in the Clean Water Act (CWA), which substantially reformed the Federal Water Pollution Control Act of 1948.<sup>6</sup> The CWA, which Congress passed over a veto from President Nixon, altered the way America regulated water pollution.<sup>7</sup> In the decades since its passage, the substantially amended CWA has provided Americans with cleaner, safer water,<sup>8</sup> although Americans today generally enjoy cleaner water across the country, the discharge of pollutants remains ever present and continues to contaminate the waterways and waterbodies

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1. Julie Grant, *How A Burning River Helped Create the Clean Water Act*, ALLEGHENY FRONT (Apr. 21, 2017), <https://perma.cc/9E7P-9Y9L>.

2. *Id.*

3. EPA, LAWS & REGULATIONS, *History of the Clean Water Act*, <https://perma.cc/7CK9-UZP5> (last visited Oct. 15, 2017).

4. Lyndon B. Johnson, *Remarks at the Signing of the Water Quality Act of 1965*, AM. PRESIDENCY PROJECT, <https://perma.cc/J2MJ-QT5X> (last visited Oct. 15, 2017).

5. Grant, *supra* note 1.

6. Clean Water Act, 33 U.S.C. § 1251 et seq. (1972).

7. LYNN M. GALLAGHER & LEONARD A. MILLER, CLEAN WATER HANDBOOK 2 (2d ed. 1996).

8. OLIVER A. HOUCK, THE CLEAN WATER ACT TMDL PROGRAM: LAW, POLICY, AND IMPLEMENTATION 3 (2d ed. 2002).

of America.<sup>9</sup> The continuity of water pollution illuminates a hard truth: Congress recognized the unrealistic expectation that no facility, industrial process, or person would ever pollute a water source.<sup>10</sup> As a result, the CWA provides for a wide range of guidelines, procedures, and regulations for polluters to follow when discharging pollutants.<sup>11</sup>

The CWA provides the federal government and the states with a pollution permitting system known as the National Pollution Discharge Elimination System (NPDES).<sup>12</sup> The NPDES statutory regime—one of the many permitting provisions of the CWA, and the statute focused on by this Case Note—addresses how facilities may lawfully obtain permits to discharge pollutants from a point source into a waterbody.<sup>13</sup> The NPDES regime also contains a more ambiguous section known as the “permit shield” provision, which provides NPDES permit holders protection from civil and criminal liability if they comply with the specifications and regulations of their NPDES permits.<sup>14</sup> It is this balancing act of regulatory oversight and industry liability protection that comprises the NPDES regulatory scheme today.

This Case Note addresses a federal circuit split between the U.S. Courts of Appeal for the Fourth and Sixth Circuits over the application of the CWA permit shield provision and argues for a broader interpretation of the CWA permit shield that, on its face, provides greater protection to industry but allows permit issuing authorities to regulate state water quality standards on a more particularized level. Part I illustrates the relationship between the NPDES permitting process and the CWA permit shield protection provision and presents early case law and administrative decisions that formed the basis of the judiciary’s interpretation of the permit shield provision’s application. Part II examines the circuit split between the Fourth and Sixth Circuits and the resulting disunity over the applicability of the CWA permit shield defense with respect to NPDES permit holders when the permit sets out specific effluent limitations and

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9. EPA, *supra* note 3.

10. JOEL M. GROSS & KERRIL STELCEN, CLEAN WATER ACT 15 (2d ed. 2012).

11. 33 U.S.C. §§ 1251 (1987).

12. 33 U.S.C. § 1342 (2019). (Note to the reader: This Case Note will commonly refer to the federal permit issuing authority, NPDES. When states apply for and receive authorization to implement their own permit issuing and regulatory authority, the “N” in NPDES often changes to the first letter of the state. For example, the state of Louisiana received authorization for its pollution discharge elimination system in 1996, and it is referred to as “LPDES” instead of “NPDES.” Another example: West Virginia’s system is titled “WVPDES.”)

13. *Id.*

14. 33 U.S.C. § 1342 (2019).

merely incorporates state water quality standards by reference. Part III discusses the issues and ambiguity resulting from the dueling Circuit opinions. Part IV explains why the Fourth Circuit decision, subject to some limitations, promotes a more effective model of cooperative federalism that honors the state role envisioned by the CWA without unfairly discriminating against industry and business. Finally, Part V concludes by recognizing the benefits of a limited Fourth Circuit rationale.

## I. BACKGROUND

Much like the waterways it protects, the Clean Water Act contains a series of regulatory “tributaries” that make difficult the successful navigation of the CWA’s regulatory framework and provide challenges for regulators and regulated parties alike. Navigation of this framework is subject to the confluence of legislative amendments, administrative implementation, and judicial interpretation.

### *A. The Many Tributaries of the Clean Water Act*

The CWA provides regulations and guidelines focused on the control of water pollution, the discharge of pollutants, and the protection of America’s waters.<sup>15</sup> The CWA embodies a cooperative form of federalism through the NPDES system that involves federal, state, and local entities working in concert to set water quality requirements, manage permit programs, and set effluent limitation standards and guidelines for water pollutants.<sup>16</sup> The CWA, through the NPDES program, provides a statutory regime that addresses liability and procedural requirements that regulatory authorities, permit enforcers, and regulated parties must follow.<sup>17</sup> The multifaceted aspects of this statutory and regulatory framework will be discussed herein.

#### *1. Liability under the Clean Water Act*

The CWA establishes a default regime of strict liability for facilities and natural persons that discharge pollutants into a waterbody.<sup>18</sup> Although Congress, at the time of passage, intended for the CWA to ultimately eliminate all pollutants present in the nation’s waterways, Congress recognized the technological infeasibility of prohibiting all pollutants in

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15. 33 U.S.C. § 1251 (1987).

16. Clean Water Act § 402, 33 U.S.C. § 1342 (2019).

17. *Id.*

18. Clean Water Act § 301(a), 33 U.S.C. § 1311(a) (1995).

the short term and the severe burdens such a prohibition would have on business, industry, and the economy as a whole.<sup>19</sup> As a result, Congress carved out exceptions within the statutory language of the CWA. The crux of the CWA's strict liability is found in section 301(a), which provides that "the discharge of any pollutant by any person shall be unlawful" unless the discharge complies with exceptions under the CWA.<sup>20</sup> The primary exception to liability imposed by the CWA is the section 402 NPDES permitting system.<sup>21</sup>

Under section 402 of the CWA, the NPDES permitting system provides effluent limitations<sup>22</sup> on the amount of pollutants that individuals or industry can discharge from a point source into a waterbody.<sup>23</sup> An "effluent limitation" is the primary enforcement mechanism NPDES permitting authorities employ to restrict and control the amount of pollutants discharged into a particular waterbody.<sup>24</sup> The effluent limitations utilized during the permit review process are derived from effluent limitation guidelines; the guidelines vary depending on the level of pollutant present in the water and the availability of current pollutant control technologies.<sup>25</sup>

The scope of "waterbodies" covered by the CWA includes traditional navigable waters, interstate waters, and wetlands adjacent to either traditional navigable waters or interstate waters.<sup>26</sup> Waterbodies classified as non-navigable tributaries that lead to traditional navigable waters that are relatively permanent, as well as wetlands that directly abut relatively permanent waters also fall under the CWA's purview.<sup>27</sup> Further still, waters outside these classifications may receive CWA protection if a fact-

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19. GROSS & STELCEN, *supra* note 10.

20. Clean Water Act § 301(a) ("[e]xcept as in compliance with this section and [other sections of the Act], the discharge of any pollutant by any person shall be unlawful.").

21. DIETRICH H. EARNHART & ROBERT L. GLICKSMAN, POLLUTION LIMITS AND POLLUTER'S EFFORTS TO COMPLY: THE ROLE OF GOVERNMENT MONITORING AND ENFORCEMENT 6 (2011).

22. 33 U.S.C. § 1362(14) (2019).

23. *See* 33 U.S.C. § 1311(a) (1995). 33 U.S.C. § 1342(a) (2019). 33 U.S.C. § 1342(c) (2019).

24. 33 U.S.C. § 1362(11) (2019) (The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance).

25. *Id.*

26. *Guidance to Identify Waters Protected by the Clean Water Act*, ENVTL. PROTECTION AGENCY, <https://perma.cc/MQ4Y-YCT9> (last visited Oct. 15, 2017).

27. *Id.*

specific analysis determines the existence of a “significant nexus” to traditional navigable waters or interstate waters.<sup>28</sup> The legislative history indicates that Congress intended the NPDES permit to be one of the few means by which a discharger of pollutants from a point source may escape the strict liability of CWA section 301(a).<sup>29</sup> While the CWA statutorily created the NPDES permitting system, the EPA and state permitting authorities enjoy some discretion in the system’s implementation.

## 2. *The Mechanics of the NPDES Permitting System*

The NPDES permitting system embodies a model of cooperative federalism between the federal government, states, and local municipalities.<sup>30</sup> Congress authorized the Environmental Protection Agency (EPA) to act as the administrator of the NPDES permitting program, while also empowering the EPA to authorize states to administer state-level NPDES permit programs.<sup>31</sup> To date, the EPA has authorized forty states and several Native American tribal territories to create, administer, and maintain NPDES programs.<sup>32</sup> In states and territories that do not have authorization to administer a NPDES permitting program, one of ten regional offices maintained by the EPA reviews, authorizes, and issues permits directly.<sup>33</sup> States that seek permit program authorization have clear guidelines to follow in order to receive permitting authority.<sup>34</sup>

Unauthorized states wishing to establish and administer their own NPDES permit programs must seek approval from the EPA under the CWA.<sup>35</sup> This process requires a state’s governor to submit a description of the proposed permitting program the state plans to implement to the EPA’s administrator.<sup>36</sup> Legal counsel on behalf of the state’s water-pollution

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28. *Id.* (Tributaries to traditional navigable waters or interstate waters, wetlands adjacent to jurisdictional tributaries to traditional navigable waters or interstate waters. Also includes waters that fall under the “other waters” category of the regulations. The guidance divides these waters into two categories, those that are physically proximate to other jurisdictional waters and those that are not, and discusses how each category should be evaluated).

29. 33 U.S.C. § 1311(a) (1995).

30. EARNHART & GLICKSMAN, *supra* note 21, at 7.

31. ROBIN K. CRAIG, *THE CLEAN WATER ACT AND THE CONSTITUTION: LEGAL STRUCTURE AND THE PUBLIC’S RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT* 27 (2d ed. 2009).

32. GALLAGHER & MILLER, *supra* note 7, at 15.

33. *Id.* at 16.

34. *Id.* at 17.

35. 33 U.S.C. § 1342(b) (2019).

36. *Id.*

control authority must then prove to the EPA that the state laws provide the state-administered NPDES program with sufficient authority to properly administer the program.<sup>37</sup> The CWA statutorily obligates the EPA to approve a state program when it finds that state laws provide the proposed program with sufficient measures to comply with the EPA's effluent limitations requirements.<sup>38</sup>

Upon approval of a state-administered NPDES program, the EPA suspends all federal permitting authority within the state.<sup>39</sup> It is at this stage that states have primacy<sup>40</sup> over the administration of the NPDES permit program; however, such "state primacy" is not absolute.<sup>41</sup> Although the CWA permits the EPA Administrator to "encourage cooperative activities by the States for the prevention, reduction, and elimination of pollution," the EPA still retains federal standard setting and permitting authority.<sup>42</sup> As a result, states must enter into a Memorandum of Agreement (MOA) with the EPA concerning the water quality standards of the state permit program.<sup>43</sup> The MOA refers specifically to state water quality standards determined by state permitting authorities rather than effluent limitation guidelines promulgated by the EPA.<sup>44</sup>

The states must submit copies of every permit application and notice of every action with respect to each permit application to the EPA.<sup>45</sup> Furthermore, the EPA retains the power to veto a state permit under section 402(d) and issue its own permit for a polluting facility if a state fails to meet the minimum regulatory requirements set by the EPA.<sup>46</sup>

While states must abide by the minimum federal water quality standards—initially in the form of effluent limitation guidelines set by the EPA—states are free to impose more stringent requirements than those demanded at the federal level, which often results in significant differences between state permitting programs and their federal counterparts.<sup>47</sup> The

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37. *Id.*

38. 33 U.S.C. § 1342(c)(1) (2019). *Id.* at 1342(b).

39. EARNHART & GLICKSMAN, *supra* note 21, at 7.

40. *Id.* Primacy in this context means it is the state government, rather than the federal government, that engages in risk assessments, promulgates regulations, issues permits, and brings enforcement actions for NPDES permit violations upon EPA approval of a state NPDES program.

41. *Id.*

42. GALLAGHER & MILLER, *supra* note 7, at 18.

43. *Id.*

44. *Id.*

45. *Id.*

46. 33 U.S.C. § 1342 (2019); GALLAGHER & MILLER *supra* note 7, at 19.

47. EARNHART & GLICKSMAN, *supra* note 21, at 7.

type of permit determines the scope of regulatory enforcement from the permit issuing authority and the level of compliance the permit holder must maintain.

### 3. *Types of NPDES Permits: Individual and General*

NPDES permits target substantive discharge of pollutants from a point source into a waterbody. For example, any facility that adds pollutants resulting from its industrial processes through a pipe into a stream or lake must have a NPDES permit to discharge those pollutants.<sup>48</sup> Pollutant sources that are not considered “point sources,” such as discharges into sewer systems or runoff that does not collect into ditches, are not subject to NPDES permits.<sup>49</sup>

The two types of NPDES permits for which a facility can apply are individual permits and general permits. Starting with the latter, a general permit applies to multiple facilities within similar operating parameters located within the same geographical region.<sup>50</sup> General permits are more cost-effective for both the applying facility and permit issuing authority than individual permits because a single permit can cover multiple facilities.<sup>51</sup> A facility may apply for a general permit if its pollutant discharges meet the minimum, blanket requirements set forth by the general permitting authority.<sup>52</sup> If a facility’s discharges do not meet these requirements the facility must apply for an individual permit specific to its discharge needs.<sup>53</sup>

Permitting authorities develop and issue an individual permit for a specific facility based on information disclosed in the permit application regarding the types of pollutants the facility produces or intends to produce.<sup>54</sup> Individual permits expire after five years and often contain effluent limitations specific to the applicant seeking a permit or the water source receiving the applicant’s pollutant discharge.<sup>55</sup> In this context, a permitting authority must consider technology-based effluent limitations.<sup>56</sup>

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48. Jeffrey M. Gaba, *Generally Illegal: NPDES General Permits Under the Clean Water Act*, 31 HARV. ENVTL. L. REV. 409, 415 (2007).

49. *Id.*

50. GROSS & STELCEN, *supra* note 10, at 33.

51. *Id.*

52. EARNHART & GLICKSMAN, *supra* note 21, at 7.

53. *Id.*

54. GROSS & STELCEN, *supra* note 10, at 33.

55. EARNHART & GLICKSMAN, *supra* note 21, at 7.

56. *NPDES Permit Limits – TBELs & WQBELs*, ENVTL. PROTECTION AGENCY, <https://perma.cc/E6L6-K3MN> (last visited Nov. 2, 2018).

Technology-based effluent limitations set minimum requirements that determine the treatment of pollutants released through point source discharges.<sup>57</sup> These effluent limitations allow the discharger to use any available control technique to meet the required limits.<sup>58</sup> When only implementing technology-based effluent limitations on NPDES permits proves to be inadequate to maintain water quality standards, CWA section 303(d) provides states with a procedural method to develop and implement total maximum daily loads (TMDLs) to preserve water quality standards.<sup>59</sup>

A TMDL serves to identify the amount of a specific pollutant or component of a pollutant that a polluter may discharge into a waterbody without compromising the water quality standards of the waterbody itself.<sup>60</sup> The TMDL analysis builds in a margin of safety for its water quality preservation allocations by including pollutants from nonpoint sources and naturally occurring environmental sources.<sup>61</sup> Necessarily, and unsurprisingly, water-quality based limits are also of concern during the TMDL analysis.<sup>62</sup>

#### 4. *The Intersection of State Water Quality Standards and TMDLS*

While much of the analysis under the CWA looks to regulate pollution at the source, section 303 focuses on the water quality of the receiving waterbodies.<sup>63</sup> This section holds states accountable for designating water quality standards for all waters within their respective boundaries.<sup>64</sup> The section explicitly provides that states must set these water quality standards regardless of the source of pollution entering the waters.<sup>65</sup> The judiciary has long recognized these water quality standards to serve “as a supplementary basis” for effluent limitations to further regulate point source discharges from reducing water quality below the acceptable levels.<sup>66</sup>

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57. *Id.*

58. *Id.*

59. HOUCK, *supra* note 8, at 76.

60. *Id.* at 79.

61. *Id.* at 80.

62. ENVTL. PROTECTION AGENCY, *supra* note 56.

63. 33 U.S.C. § 1313 (2000).

64. Roger Flynn, *New Life for Impaired Waters: Realizing the Goal to “Restore” the Nation’s Waters Under the Clean Water Act*, 10 WYO. L. REV. 35, 42 (2010).

65. *Id.*

66. *Id.*

Section 303 lays out three components of all state water quality programs: (1) states must establish the specific “designated uses” of its waters;<sup>67</sup> (2) states must promulgate the “numeric and narrative” water quality conditions that govern, among other things, limitations on pollutant levels to preserve the designated uses of the water;<sup>68</sup> and (3) states must adopt “antidegradation” policies to prevent any further deterioration of water quality.<sup>69</sup> These state water quality provisions serve as independent and individually enforceable standards under federal law.<sup>70</sup>

As a result, permit issuing agencies must consider the potential impact on state water quality of every potential discharge from a point source facility.<sup>71</sup> If a permit issuing authority anticipates disclosed discharges will violate state water quality standards, section 303 requires the permit authority to issue stricter standards.<sup>72</sup> Despite the complex procedural and substantive guidelines governing NPDES permit and state water quality standards, a regulatory provision within the CWA—dubbed the permit shield” provision—serves to protect permit holders from liability when certain criteria are met.

#### *B. The Clean Water Act “Permit Shield” Provision*

As mentioned, the Clean Water Act contains a “permit shield” provision that provides NPDES permit holders protection from liability, such as civil lawsuits and regulatory enforcement actions.<sup>73</sup> Specifically, 33 U.S.C. § 1342(k) of the CWA states that compliance with an NPDES permit issued pursuant to this section is viewed as compliance with the CWA.<sup>74</sup> This language, on its face, is ambiguous and subject to different interpretations. The legislative history suggests that the permit shield provision is designed to assuage the fears of NPDES permit holders that every subsequent enactment of a regulation might subject them to a civil suit or a state enforcement action.<sup>75</sup> Treading similar waters, the Supreme

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67. 33 U.S.C. § 1313(c)(2)(A) (2000).

68. *Id.*

69. 33 U.S.C. § 1313(d)(4)(B) (2000).

70. Flynn, *supra* note 64.

71. *Id.*

72. *Id.*

73. 33 U.S.C. § 1342(k) (2019).

74. *Id.*

75. (“Through amendments to the Act in 1977 and additional agency regulations and interpretations, numerous categories of waters and activities were classified as exempt from permit requirements under the Act”). S. REP. NO. 111-

Court held in 1977 that the permit shield provision protects permit holders from various subsequent revisions of regulations and prevents permit holders from litigating over whether their current, valid permit is subject to the newer regulatory standards.<sup>76</sup>

In light of the legislative intent and subsequent Supreme Court interpretation, the “permit shield defense” doctrine has developed further through federal case law and administrative decisions by the EPA.<sup>77</sup> Despite four decades of judicial and administrative review, the application of the permit shield doctrine remains ambiguous and continues to be a source of much litigation and regulatory action today.

## II. EARLY GUIDANCE: *ATLANTIC STATES, IN RE KETCHIKAN, & PINEY RUN*

Permit holders, regardless of the issuing authority, must comply with effluent limitations on pollutant discharges and various monitoring, testing, and reporting requirements.<sup>78</sup> The guidance provided from three major sources, the Second Circuit’s decision in *Atlantic States*, the EPA’s administrative decision in *Ketchikan*, and the Fourth Circuit’s two-factor test opined in *Piney Run* have allowed the judiciary, regulatory agencies, and permit holders alike to, for the most part, manage their expectations with respect to the NPDES permitting process. The result is that NPDES administrative decisions and case law generally conclude that NPDES permit holders are shielded from CWA liability for discharges that are in compliance with express limitations of its permit.<sup>79</sup>

Additionally, courts have extended the permit shield doctrine to insulate valid permit holders from liability for discharges of pollutants that they disclosed to the permitting authority during the application process but that were not otherwise listed in the permit, provided that such discharges are reasonably anticipated by<sup>80</sup> or within the reasonable contemplation of the permitting authority at the time the permit issues.<sup>81</sup>

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361 No. 92-911, at 3 (2010) (citing EPA, Clean Water Section 404 Program Definition and Permit Exemptions, Final Rule, 53 FED. REG. 20764 (June 6, 1988).

76. *E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 (1977).

77. *Id.*

78. *See Atl. States Legal Found., Inc. v. Eastman Kodak Co.*, 12 F.3d 353 (2nd Cir. 1993).

79. *Atlantic States Legal Found.* 12 F.3d 353 (2nd Cir. 1993); *Ketchikan Pulp Co.*, 7 E.A.D. 605, 606 (EAB 1998); *Piney Run Pres. Ass’n v. City Comm’rs*, 268 F.3d 255, 267 (4th Cir. 2001); Julie Kaplan, *Does EPA’s View of the CWA Permit Shield Too Much?* (2013), <https://perma.cc/MN93-49FA>.

80. *Ketchikan Pulp Co.*, 7 E.A.D. 605, 606 (EAB 1998).

81. *Piney Run Pres. Ass’n v. City Comm’rs*, 268 F.3d 255, 264 (4th Cir. 2001).

District Courts, administrative agencies, and permit seekers frequently rely upon these cases and foundational decisions to determine the scope of a NPDES permit.

*A. Atlantic States: Extending the Permit*

The Second Circuit provided in *Atlantic States* an avenue for permit holders to discharge pollutants not otherwise listed in their active NPDES permit, as long as the permit holders observe proper reporting and mandatory disclosure requirements during the permit application process.<sup>82</sup> In this case, an environmental group known as Atlantic States brought suit claiming that Eastman Kodak violated the CWA by exceeding the limitations on its effluent discharges and by discharging sixteen different pollutants into the Genesee River that were not listed in Kodak's NPDES permit.<sup>83</sup> The court rejected Atlantic States' argument that section 301 of the CWA prohibited the discharge of pollutants not expressly authorized by an NPDES permit.<sup>84</sup>

Instead, the Second Circuit recognized that NPDES permits identify and impose limitations on pollutants that are the most hazardous to human health and environmental water quality.<sup>85</sup> The numerous disclosure and reporting requirements, the court reasoned, adequately extended the scope of NPDES coverage to the discharge of unlisted pollutants.<sup>86</sup> This expansion of NPDES coverage holds true to the legislative rationale behind the permit shield provision because reporting and full disclosure is a mandatory requirement for the permit shield defense. Cheating these

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82. *Id.* at 357.

83. *Id.* at 355–56.

84. *Id.* at 357–58.

85. *Id.* at 357.

86. *Atl. States Legal Found., Inc. v. Eastman Kodak Co.*, 12 F.3d 353, 357 (2nd Cir. 1993):

EPA did not intend to require water quality-based permit limitations on all pollutants contained in a discharge . . . The proper interpretation of the regulations is that developing water quality-based limitations is a step-by-step process. . . . [W]ater quality-based limits are established where the permitting authority reasonably anticipates the discharge of pollutants by the permittee at levels that have the reasonable potential to cause or contribute to an excursion above any state water quality criterion.

(quoting Memorandum from Director, Office of Wastewater Enforcement and Compliance to Water Management Division Directors, Regions I–X, at 2–3 (Aug. 14, 1992)).

requirements renders the permit shield provision inapplicable and subjects the permit holder to liability, thus foreclosing any permit shield defense.

The Second Circuit's decision in *Atlantic States* expanded the scope of NPDES permits beyond the express, black-letter language within the four corners of a permit. Moreover, this decision expanded the applicability of the permit shield defense based upon the correlation between compliance and invocation of the permit shield defense. Self-reporting and full disclosure, simply put, allow for non-permitted expansion of effluent discharge. Under *Atlantic States*, the more ways a facility can comply with its NPDES permit, the more likely it can invoke the permit shield provision and escape liability. *Atlantic States* fell in line with EPA guidance policies on this issue, and was followed by a major administrative decision by the EPA Environmental Appeals Board in *Ketchikan*.<sup>87</sup>

*B. In re Ketchikan: Reasonable Anticipation of Permitting Authority*

The EPA Environmental Appeals Board determined that the NPDES permit not only covered pollutants actually listed in the permit itself but included any pollutants disclosed to the permitting authority during the application process.<sup>88</sup> This effectively meant that facilities with NPDES permits could discharge pollutants that were not listed in their issued permit but that still fell within the scope of a NPDES permit (and the permit shield defense), as long as the facilities made adequate disclosures to the proper permit issuing authority.<sup>89</sup> The Board reached this conclusion because it was virtually impossible to identify and ascertain every chemical element present within a given pollutant discharge, and, as a result, the EPA determined that the "goals of the CWA may be more effectively achieved by focusing on the chief pollutants and waste streams established in effluent guidelines and disclosed by permittees in their permit applications."<sup>90</sup>

The Board reasoned that a proper interpretation of the CWA regulatory scheme was one in which "[w]ater quality based limits are established where the permitting authority reasonably anticipates the discharge of pollutants by the permittee at levels that have the reasonable

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87. *Ketchikan Pulp Co.*, 7 E.A.D. 605 (EAB 1998).

88. *Id.* at 606.

89. *Id.*

90. *Id.* at 618.

potential to cause or contribute to an excursion above any state water quality criterion.”<sup>91</sup>

As a result of the EPA’s decision in *Ketchikan*, NPDES permitting authorities and facilities seeking a permit have a structured process to follow.<sup>92</sup> Under this procedural structure: (1) an applicant informs the permitting authority of the nature of its effluent discharges; (2) the permitting authority subsequently engages in an environmental risk assessment; and (3) the permitting authority places limitations on pollutants it “reasonably anticipates” could adversely impact the environmental quality of the affected waterbody.<sup>93</sup> The remaining limitation on the permit holder’s ability to discharge pollutants simply requires that the discharges must be reasonably anticipated by, or within the reasonable contemplation of, the permitting authority.<sup>94</sup> As long as a permit holder complies with the CWA’s reporting and disclosure requirements, it may discharge pollutants not expressly disclosed in the permit.<sup>95</sup> To the extent that a permit holder discharges a pollutant that it failed to report or disclose, the permit holder violates their NPDES permit and the CWA, and cannot invoke the CWA permit shield defense.<sup>96</sup>

The *Ketchikan* decision further broadened the scope of NPDES permits by distilling the reasoning behind the Second Circuit’s decision in *Atlantic States* into a multi-factor procedure for both permit seekers and permit issuing authorities to follow, while providing a level of discretion to the permit issuing authority when formulating what it “reasonably anticipates” could harm the environment or violate state water quality

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91. *Id.* at 619 (quoting *Atl. States Legal Found. v. Eastman Kodak Co.*, 12 F.3d 353, 358 (2d Cir. 1993)).

92. EPA, Policy Statement on Scope of Discharge Authorization and Shield Associated with NPDES Permits, at 2-3, (July 1, 1994). (Specifically outlining that the CWA permit shield extends to cover 1) Pollutants specifically limited in the permit or pollutants which the permit, fact sheet, or administrative record explicitly identified as controlled through indicator parameters; 2) Pollutants for which the permit authority has not established limits or other permit conditions, but which are specifically identified in writing as present in facility discharges during the permit application process; and contained in the administrative record which is available to the public; and 3) Pollutants not identified as present but which are constituents of waste streams, operations or processes that were clearly identified in writing during the permit application process and contained in the administrative record which is available to the public).

93. Stephanie Rich, *Troubled Water: An Examination of the NPDES Permit Shield*, 33 PACE ENVTL. L. REV. 250 (2016).

94. *Ketchikan Pulp Co.*, 7 E.A.D. 605, 619 (EAB 1998).

95. *Id.*

96. *Id.* at 620.

standards. This result further extends the scope of NPDES permits and the permit shield defense to cover expressly listed pollutants, unlisted pollutants, and pollutant discharges that permitting agencies may “reasonably anticipate.”

### C. Piney Run: *Fourth Circuit Guides the Federal Courts*

In *Piney Run*, the Fourth Circuit, deferring to the EPA’s decision in *Ketchikan*, created a two-part test to determine if NPDES permit holders were in compliance with their permits and therefore shielded from liability under the CWA.<sup>97</sup> This test, simple on its face, asks: (1) whether the discharger disclosed the pollutants to the permitting agency, and (2) whether the discharge was within the “reasonable contemplation” of that agency.<sup>98</sup> In *Piney Run*, an environmental group filed suit against a Maryland county alleging that a county-operated waste processing facility violated the CWA by discharging warm water into the Piney Run stream.<sup>99</sup> The district court found that the county facility violated its NPDES permit because the discharge of heat into a waterway was not expressly allowed by the permit.<sup>100</sup> The Fourth Circuit rejected the district court’s interpretation and application of the CWA.<sup>101</sup> Instead, the Fourth Circuit recognized that the scope of a NPDES permit includes not only the permit’s express language, but also implicit references to pollutant discharges not listed in the permit that were revealed through the disclosures made during the application, monitoring, and reporting phases.<sup>102</sup>

Under a *Chevron* analysis, the Fourth Circuit found that because the CWA provision in question, 33 U.S.C. § 1342(k), is ambiguous, and because the EPA’s interpretation of this provision is reasonable, courts must defer to it in evaluating the scope of a NPDES permit.<sup>103</sup> The EPA in *Ketchikan* clearly adopted the interpretation that, when NPDES permit holders provide adequate disclosures to the permitting authority about the nature of their discharges, the discharge of pollutants not expressly listed in their NPDES permits is acceptable.<sup>104</sup> The Fourth Circuit’s decision to

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97. *Piney Run Pres. Ass’n v. City Comm’rs*, 268 F.3d 255, 268 (4th Cir. 2001).

98. *Id.* at 267.

99. *Piney Run Pres. Ass’n*, 268 F.3d at 266.

100. *Id.*

101. *Id.*

102. Rich, *supra* note 93, at 274.

103. *Id.* at 260.

104. *Piney Run Pres. Ass’n*, 268 F.3d 267 (In step two of *Chevron*, the *Piney Run* court observed that “the EPA has promulgated, pursuant to a formal

include references to pollutant discharges during the reporting and disclosure stage provides an important distinction for permit applicants.

First, it incentivizes permit-seeking applicants to disclose all pollutants and byproducts resulting from its industrial process to the permit issuing authority. The more information disclosed, the more tools a permitting authority can use to make the necessary effluent limitation determinations. Second, the Fourth Circuit creates test binds lower courts within the circuit and holds far more persuasiveness in the federal courts rather than the test being isolated to an administrative adjudication within the EPA.

Courts have relied on the *Piney Run* test time and time again when determining the scope of NPDES permits and the proper application of the CWA's "permit shield" provision.<sup>105</sup> This test, as well as the expectations of NPDES permit holders, now appears weakened by a recent Fourth Circuit decision and the resulting circuit split between the Fourth and Sixth circuits.<sup>106</sup>

### III. CIRCUIT SPLIT OVER THE PERMIT SHIELD AND STATE WATER QUALITY

The current split between the Fourth Circuit and the Sixth Circuit involves similar issues regarding NPDES permit discharge limitations and state water quality issues. While these issues may be similar, the two vastly different conclusions between the circuits warrant scrutiny and need reconciliation.

#### A. Fourth Circuit Dents the Shield

The Fourth Circuit in *Ohio Valley Environmental Coalition, Inc. v. Fola Coal Co.* held that provisions in a NPDES permit that incorporate state water quality standards rise to the level of independent, enforceable requirements that require compliance if the permit holder wishes to invoke the permit shield defense.<sup>107</sup> In *Fola*, an environmental citizen group alleged that Fola, a coal operator, violated its NPDES permit by discharging excessive amounts of sulfate pollution into the waters of West

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adjudication, an interpretation of the permit shield provision that is reasonable. The EPA is authorized both to administer and enforce the CWA").

105. *Ohio Valley Env'tl. Coal., Inc. v. Fola Coal Co., LLC*, 845 F.3d 133, 139 (4th Cir. 2017).

106. *Id.* at 140.

107. *Id.* at 143.

Virginia.<sup>108</sup> Fola's NPDES permit did not contain any express limitations on conductivity or sulfates, although, in its application for renewal of its permit, Fola submitted conductivity and sulfate measurements that revealed aviolation of state water quality standards.<sup>109</sup>

As expected, Fola asserted the permit shield defense in response to Ohio Valley Environmental Coalition's civil lawsuit.<sup>110</sup> The district court concluded that the permit shield defense did not apply to Fola's case because Fola violated a section of its permit that incorporated by reference a West Virginia general water quality standard applicable to coal-related NPDES permits.<sup>111</sup> Specifically, one of the seven subparts of the incorporated state water quality standard stated that discharges covered by a West Virginia NPDES permit cannot impact the water source in a way that would violate applicable water quality standards enacted by the state permitting authority.<sup>112</sup>

The district court concluded that this incorporated reference in the permit prohibited Fola, and other permittees subject to this permit, from discharging pollutants that violated state water quality standards to the same effect that effluent limitations limit pollutant discharges.<sup>113</sup> Thus, the district court believed the permit's incorporation of water quality standards provided additional effluent limitations that were enforceable in CWA citizen suits.<sup>114</sup> Upon a *de novo* review,<sup>115</sup> the Fourth Circuit Court of Appeals affirmed the district court's holding that state water quality standards incorporated by reference into Fola's NPDES permit were an enforceable permit condition.<sup>116</sup> This holding resulted from the court's examination of the permit's language and its cross-reference to state water quality.

The cross-referenced language at issue, according to the Fourth Circuit, was a straightforward, independent permit condition that prohibits permittees from discharging water that violates water quality standards regardless of the specific effluent limits that are applied to the permit.<sup>117</sup> The court further distinguished Fola's permit from the permit at issue in

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108. *Id.* at 136.

109. Douglas J. Crouse, *A Dent in the Clean Water Act's Permit Shield*, 32-SUM NAT. RESOURCES & ENV'T 54 (2017).

110. *Fola Coal Co.*, 845 F.3d at 133.

111. *Id.*

112. W. VA. CODE R. § 47-30-5.1(f) (2010).

113. *Fola Coal Co.*, 845 F.3d at 138.

114. *Id.* at 145.

115. *Id.* at 147.

116. *Id.*

117. *Fola Coal Co.*, 845 F.3d at 137.

*Piney Run*, which did not require independent compliance with state water quality standards.<sup>118</sup> The *Piney Run* permit only provided regulations for numerical effluent limitations, and the court addressed how the permit shield applied to pollutants not listed in the permit.<sup>119</sup> As far as the language included in an NPDES permit, the *Piney Run* court concluded that permit holders must comply with all aspects of the permit in order to avail themselves of the permit shield defense.<sup>120</sup> The Fourth Circuit found that NPDES permitting authorities have never been precluded from incorporating water quality standards into its permits. As a result, the Court found that Fola was in violation of its permit and the permit shield defense was inapplicable in the case.

### *B. The Sixth Circuit Holds Fast*

The Sixth Circuit Court of Appeals held in *Sierra Club v. ICG Hazard* that the NPDES provision of the CWA seeks not to limit every pollutant, but instead intends to restrict the most harmful pollutants, and otherwise relies on an applicant's disclosures.<sup>121</sup> The Sixth Circuit's rationale indicates that compliance with specific effluent limitations imposed on a permit would also qualify as compliance with any permit condition that requires water quality standards to be maintained.<sup>122</sup>

The court reasoned that, if such were not the case, the EPA would have to identify not just the pollutants discharged by a single permittee but "all of the pollutants and combinations of pollutants that could be discharged" by all permittees who may later fall under the general permit.<sup>123</sup> In *ICG Hazard*, a coal mine in Kentucky discharged pollutants, including selenium, into waters of the United States.<sup>124</sup> The mine had an EPA-approved and state-issued NPDES general permit that mandated a one-time sampling for selenium during the five-year lifespan of the general permit.<sup>125</sup> In anticipation of seeking permit coverage for an expansion of

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118. *Id.* at 133.

119. *Id.*

120. *Id.*

121. *Sierra Club v. ICG Hazard, LLC*, 781 F.3d 281, 290–91 (6th Cir. 2015).

122. Eric Boyd & Paul Sonderegger, *New Circuit Split Raises Questions About 'Permit Shield' Defense in Clean Water Act Cases*, THOMPSON COBURN, LLP (Jan. 6, 2017), <https://perma.cc/KBT6-8CR6>.

123. Ross Woessner, *Sixth Circuit Extends Permit Shield Test to General Permits* VINSON & ELKINS: ENVTL. BLOG (Apr. 6, 2015), <https://perma.cc/FF65-EY7E>.

124. *Sierra Club*, 781 F.3d at 281.

125. Woessner, *supra* note 123.

mining operations, ICG Hazard sampled for selenium and confirmed that its discharges contained the pollutant.<sup>126</sup> Sierra Club asserted that selenium was not authorized by the general permit nor could the discharge of selenium have been reasonably contemplated by the state when it issued the permit.<sup>127</sup>

The Sixth Circuit concluded that permittees that have applied for and received NPDES permit coverage under an NPDES general permit are entitled to raise the permit shield as a defense to third-party citizen suits.<sup>128</sup> The *ICG Hazard* court concluded that EPA's rationale for applying the permit shield to unlisted but disclosed pollutants, as described by the EAB<sup>129</sup> in *Ketchikan*, was equally applicable to general permits.<sup>130</sup> The *ICG Hazard* court stated that the reasoning applies "with even more force when dealing with general permits."<sup>131</sup> Sierra Club subscribed to a different view with respect to disclosure requirements for a general NPDES permit.

Sierra Club argued that "the permitting authority lacked detailed information about individual discharges when issuing a general permit [and] the scope of a general permit is defined by the effluent limitations present in the permit;" therefore, the scope of the permit shield for a general permit should be "narrower than the shield of an individual permit."<sup>132</sup> The Sixth Circuit noted that the permitting agency did indeed contemplate the discharge of selenium, because of the state-monitoring requirement that required an initial, albeit one-time, test for selenium at some point during the five-year period of permit coverage.<sup>133</sup> The court found this fact relevant in light of the differences between individual and general NPDES permits.

The court distinguished between the requirements of individual permits and general permits during the NPDES application process.<sup>134</sup> An individual permit requires the permit applicant to disclose information about potential pollutants and imposes liability if the applicant fails to

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126. Douglas A. Henderson, *The Clean Water Act Permit Shield – Recent Battles*, NRE (2015), <https://perma.cc/J229-DCC8>.

127. *Id.*

128. *Sierra Club*, 781 F.3d at 283.

129. EAB refers to the U.S. EPA's Environmental Appeals Board. For more information, see <https://perma.cc/3GXY-K4H6>.

130. *Sierra Club*, 781 F.3d at 286–88.

131. *Id.* at 281.

132. *Sierra Club v. ICG Hazard, LLC*, 2012 U.S. Dist. LEXIS 146140, at \*12 (E.D. Ky. Sep. 28, 2012).

133. Rich, *supra* note 93.

134. *Id.* at 252.

disclose appropriate information.<sup>135</sup> A general permit, on the other hand, requires very minimal information from the facility during the permitting phase; and it is the duty of the permit writer within the permit issuing authority to request any additional information.<sup>136</sup> The general permit did not require up-front disclosure of selenium, but the permittee did disclose the selenium discharge when seeking to modify its permit coverage.

The *ICG Hazard* court concluded that the discharge of selenium from coal mines covered by the general permit was clearly contemplated by the state permitting agency.<sup>137</sup> The Sixth Circuit concluded that the permittee satisfied both prongs of the *Piney Run* test and thus was entitled to raise the permit shield as a defense to third-party citizen suits.<sup>138</sup>

#### IV. A FEDERAL CIRCUIT SPLIT DIVIDES THE JUDICIARY AND OBSCURES THE PERMIT SHIELD

The federal circuit split between the Fourth and Sixth Circuits raises numerous questions about just how far the permit shield defense extends with respect to NPDES general permits.<sup>139</sup> The Supreme Court should clarify the ambiguous status of state water quality standards under the Clean Water Act to provide facilities, state permitting authorities, and courts with proper guidance on the application of the CWA permit shield defense when a state water quality standard exists as an incorporated part of a NPDES general permit.

The outcome in *Fola* raises questions that plagued early provisions of the CWA prior to its substantive amendments.<sup>140</sup> At one time, the CWA focused exclusively on maintaining water quality standards.<sup>141</sup> But, regulators found it nearly impossible to determine to what degree water quality standards fell below acceptable limits and had been violated to determine the identity of the alleged violators.<sup>142</sup> Subsequent amendments to the CWA led to fundamental changes with respect to federal regulation of water pollution, namely the creation of the NPDES permitting system.<sup>143</sup> Indeed, the CWA now seeks to improve the waters of America through a two-prong approach intended to focus directly on limiting the

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135. *Id.*

136. *Id.* at 250.

137. *Id.* at 266.

138. *Id.*

139. Crouse, *supra* note 109.

140. *Id.* at 54.

141. *Id.*

142. *Id.* at 55.

143. *Piney Run Pres. Ass'n*, 268 F.3d at 265.

discharge of pollutants into the water instead of assessing violations of water quality standards *ex post* effluent discharges.<sup>144</sup> The first prong seeks to ensure that point source discharges comply with initial effluent discharge limitations that reflect the implementation of the best pollutant control technology available, regardless of the type of pollutant discharged.<sup>145</sup> The second prong commands a more particularized—and some would argue intrusive—inquiry that focuses on the type of pollutant that is discharged.<sup>146</sup> The application of the second prong, of course, is not without its complexity as it involves decision making at both the federal and state level.

The Fourth Circuit's decision in *Fola* highlights the underlying tension between effluent limitation guidelines and state water quality standards. The pollutant discharge limits provided by NPDES permits largely draw from the EPA's technology-based and regulatory effluent limitation guidelines, but these guidelines alone do not totally encompass the entire discharge limit imposed by state permit issuing authorities.<sup>147</sup> State water quality standards, which section 303 of the CWA requires every state adopt and submit to the EPA for approval, also impact the formation of NPDES discharge limits.<sup>148</sup> The regulated parties—always the NPDES permit holders—must maintain compliance with the EPA effluent limitation guidelines or with discharge limitations issued by the state permitting authority, including the applicable state water quality standards, whichever regulation is more stringent.<sup>149</sup>

While state water quality standards are federally required under the CWA and approved by the EPA, these standards are established and mostly dependent on state-law mechanisms for promulgation and enforcement.<sup>150</sup> That being the case, state law is not the controlling force with respect to state water quality standards. The Supreme Court recognized in *Arkansas v. Oklahoma* that “state water-quality standards—promulgated by States with substantial guidance from the EPA and approved by the Agency—are part of the federal law of water pollution.”<sup>151</sup> This decision falls squarely on the “federal” side of the

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144. *Id.* (citing *Friends of the Earth v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 151 (4th Cir. 2000)).

145. EARNHART & GLICKSMAN, *supra* note 21, at 37.

146. *Id.*

147. *Fola Coal Co.*, 845 F.3d at 139.

148. *Id.* at 136.

149. *Id.*

150. CRAIG, *supra* note 31, at 55.

151. *Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992).

federal-state model of cooperative federalism that exists as the core the CWA.

If state water quality standards are part of a broader realm of federal law under the CWA, then it is not likely that state water quality standards would be preempted by federal law under the federal Constitution's Supremacy Clause, because both state water quality standards and EPA federal water standards comprise two different "federal" regulations, thus eliminating any state-federal preemption tension.<sup>152</sup> In the event of a conflict between the EPA's water quality standards and a state's water quality standard, the EPA could invoke its power of review and veto under the CWA in order to adjust the standards to resolve the conflict.<sup>153</sup> Unfortunately, conflict resolutions are not always cut and dry. Disputes over a state's incorporation of state water quality standards and NPDES permits often fall on the shoulders of federal courts, which engage in a highly complex analysis when deciding a conflict between two federal laws.<sup>154</sup>

While states have the primary responsibility of developing water quality standards within their respective jurisdictions, these standards must be reviewed, updated, and approved every three years to comply with current federal standards and EPA regulations.<sup>155</sup> If a state's water quality standards are inconsistent with a federal water quality standard, the state must determine if a revision of its standards is feasible; if such a revision is feasible, the state must revise its standards.<sup>156</sup>

With this background in mind, it is important to understand a critical point not addressed by the Fourth Circuit's decision in *Fola* with respect to the West Virginia permitting authority and the permit at issue.<sup>157</sup> As previously discussed,<sup>158</sup> the *Fola* court held that an NPDES permit holder could not invoke the permit shield defense because its pollutant discharges violated state water quality standards, despite the fact that the permit holder disclosed its pollutants during the permit application phase and the West Virginia permit issuing authority's decision not to impose specific effluent limitations on the pollutant discharge at issue. Notably absent in the Fourth Circuit's discussion was the federal law that prohibits the issuance of an NPDES permit by a permit issuing authority *unless* the

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152. CRAIG, *supra* note 31, at 27.

153. GALLAGHER & MILLER, *supra* note 7.

154. CRAIG, *supra* note 31, at 27.

155. *Id.*

156. 40 C.F.R. § 131.20(a).

157. *Fola Coal Co.*, 845 F.3d at 139.

158. See Discussion *supra* Section III(A).

permitting agency finds the discharge will satisfy the relevant state and federal water quality standards.<sup>159</sup>

Fola effectively received an NPDES permit with the presumption that its pollutant discharges would satisfy the narrative water quality standard incorporated by reference into its permit. It is important to keep in mind that it was the West Virginia permit issuing authority that declined to issue any kind of numeric limitation on Fola's sulfate pollutant discharges. It is also worth mentioning that, after the Fourth Circuit's decision, the West Virginian legislature sought to revise its water quality standards, but this effort ended when the EPA flagged these standards for review and delayed the revision process.<sup>160</sup> This tension is further evident in the mandate that a NPDES permit holder must comply with the stricter of the competing regulations—whether it be the effluent limitation or the water quality standard.<sup>161</sup> Under *Fola*, the question becomes: must an NPDES permit holding facility comply with stricter, seemingly unattainable water quality standards incorporated into its NPDES permit by reference simply because a permit issuing authority failed to include effluent limitation guidelines necessary for a discharge to meet the applicable state water quality standards? In light of *Fola*, the answer is unclear.

From the perspective of a facility or permit holder, the aforementioned circuit split raises numerous regulatory and financial concerns.<sup>162</sup> The Fourth Circuit's holding in *Fola* should rightfully place facilities on notice that the CWA "permit shield" defense may be narrowed or rendered unavailable in certain circumstances.<sup>163</sup> Particularly in *Fola*'s case, one might be sympathetic to the apparent "lose-lose" situation in which the permit holder found itself. One potential solution would be for companies to shift away from general permits to individual permits. Indeed, it may be safer for a facility to seek coverage under an individual permit, where the scope of the shield is heavily dependent on numerical, facility-specific effluent limitations and disclosures during the application process.<sup>164</sup> As previously stated, general permits still widely issue and often save

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159. Barnard, Early, & Phillips, *The Permit Shield Defense: What the Fourth Circuit Did Not Address in Ohio Valley* (Jan. 25, 2017), <https://www.hklaw.com/energyblog/the-permit-shield-defense-what-the-fourth-circuit-did-not-address-in-ohio-valley-01-25-2017/>.

160. EARNHART & GLICKSMAN, *supra* note 21, at 7.

161. *Id.*

162. Boyd & Sonderegger, *supra* note 122.

163. *Id.*

164. Henderson, *supra* note 126.

administrative resources and time when a general permit applies to multiple facilities of the same kind within a geographic area.<sup>165</sup>

However, in some cases, a facility's discharge may not fit the mold of a general permit. If the general permit's language does not cover the types of pollutant discharges contemplated by the facility, it is necessary to obtain an individual permit to avoid unlawful discharges under the CWA.<sup>166</sup> While a facility could switch to an individual permit, a clarification of the permit shield's applicability to general permits is still necessary.<sup>167</sup> The Supreme Court could take one of many approaches to solve this federal circuit split.

The Supreme Court could adopt the Fourth Circuit's approach in *Fola* as the new "permit shield" protection standard. Under *Fola*, a polluting facility could comply with the numerical limitations on effluent discharges to the numerical limit, disclose all pollutants to the permitting agency, reasonably rely on the EPA's interpretation of the permit shield in *Ketchikan* and the Fourth Circuit's two-part reasonableness test in *Piney Run*, and nevertheless be found liable under *ICG Hazard* if the facility violates state water quality standards incorporated by reference into its general permit.<sup>168</sup>

This type of "all or nothing" standard can lead to inequitable results, particularly because an NPDES permit lasts five years, and state water quality standards are up for review every three years.<sup>169</sup> It does not take much imagination to recognize that if a state incorporates environmental water quality standards by reference into an individual permit and subsequently revises those water quality standards to be more stringent, a facility could be forced to comply with stricter standards during the life of the same issued permit. This could potentially prevent facilities from attaining anchored expectations when applying for NPDES permits and creates confusion on how precisely to comply with an issued permit. Indeed, a stricter standard could cause affected companies to divest and relocate to a different state as a result.<sup>170</sup>

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165. Joel M. Gross & Kerri L. Stelcen, *CLEAN WATER ACT* 33 (2d ed. 2012).

166. EARNHART & GLICKSMAN, *supra* note 21, at 7.

167. GROSS & STELCEN, *supra* note 10, at 33.

168. *Fola Coal Co.*, 845 F.3d 133.

169. EARNHART & GLICKSMAN, *supra* note 21. *See* Rich, *supra* note 93.

170. Brief for American Forest & Paper Association, American Petroleum Institute, National Association of Clean Water Agencies, National Association of Home Builders, National Association of Manufacturers, National Mining Association, and Utility Water Act Group as Amici Curiae Supporting Appellant, *Ohio Valley Env'tl. Coal. Inc., v. Fola Coal Co., LLC*, 82 F. Supp. 3d 673 (2015) (No. 2:13-5006), 2016 WL 1622091.

## V. CREATING A SAFE HARBOR WITHIN STATE WATER QUALITY STANDARDS

In light of this ambiguity in an already complicated statute, the Supreme Court should adopt the Fourth Circuit's approach to state water quality standards in the *Fola* case, subject to a "safe harbor" limitation under the CWA "permit shield" provision. The CWA exists for one purpose—to protect the waters of America from pollutants.<sup>171</sup> The NPDES permit is the regulatory *exception* to the strict liability prohibition of discharging pollutants from point sources into waterbodies.<sup>172</sup>

The Fourth Circuit in *Fola* correctly noted that there is no limitation on a state incorporating its state water quality standards as an independent permit provision into an NPDES general permit.<sup>173</sup> Congressional intent, while unclear and even silent on many provisions of the CWA, is perfectly clear when it comes to the application of NPDES—it should be primarily a state function to administer a permitting system.<sup>174</sup> Additionally, the Fourth Circuit in *Fola* correctly noted that to be eligible for the CWA permit shield defense, a facility must comply with *all* elements of an NPDES permit; and a cross-reference to state water quality standards constitutes a separate, independent section of the permit that a facility must follow to be in compliance.<sup>175</sup>

As previously discussed,<sup>176</sup> 33 U.S.C. § 1311(b)(1)(c) mandates that NPDES permits may not issue if the permit issuing authority finds that the permit holder's discharges would violate state and federal water quality standards.<sup>177</sup> If an NPDES permit issues, as in *Fola*, and the issuing agency does not proscribe any type of numerical effluent limitation on a pollutant discharge that results in a state water quality violation, the NPDES permit holder receives protection under the permit shield provision.<sup>178</sup>

Facilities already have a limited "safe harbor" with respect to their numerical effluent discharge limits under the interpretation of the permit shield provision; however, facilities may be exposed to liability if an NPDES permit incorporates state water quality standards that

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171. GALLAGHER & MILLER, *supra* note 7.

172. *Id.* at 13–14.

173. *Fola Coal Co.*, 845 F.3d at 133 (quoting *Piney Run Pres. Ass'n v. City Comm'rs*, 268 F.3d 255,268 (4th Cir. 2001)).

174. CRAIG, *supra* note 31, at 55.

175. Rich, *supra* note 93.

176. See Discussion *supra* Section I(A)(1)

177. See 33 U.S.C. § 1311(b)(1)(c) (1995).

178. 845 F.3d at 143.

subsequently change during the life of the existing NPDES permit.<sup>179</sup> A state permitting authority cannot change effluent limitations during the course of an active NPDES permit and reasonably expect to bring an enforcement action. A “safe harbor” should also apply to a state’s water quality standards incorporated into an NPDES general permit. If a state incorporates these water quality standards in an NPDES permit, a facility should be required to follow the standards in place at the time the permit was issued, and should not be penalized in a subsequent enforcement action where the state water quality standards changed prior to permit expiration.

Additionally, states should strive to include more than just boilerplate language, which can lead to ambiguity and uncertainty as standards evolve. States would be better served to explicitly designate in permits the minimum requirements envisioned for adequately meeting state water quality standards. For example, in the *Fola* decision, the language included in the West Virginia permit referencing state water quality standards contained vague and amorphous language.<sup>180</sup> The broader the language, the more potential for ambiguity, and the more likely confusion and uncertainty will occur downstream.

From an environmental perspective, the waters of the United States are often their own unique ecosystems. The waters of Bayou Lafourche in Louisiana are unlike the waters of Lake Michigan; the waters of Chesapeake Bay have different needs than the waters of Puget Sound. Different state water quality standards have different needs based on a multitude of geographic, demographic, and environmental factors. While the scope of the permit shield provision is narrower now than at its inception, the spirit of the CWA is still very much alive through a narrow construction of the permit shield. States should actively incorporate their state water quality standards into their general NPDES permits, subject to the permit issuing authority providing regulatory guidance to the regulated parties.

This narrowing of the CWA’s permit shield provision dents the scope of the permit shield, but it is far from a fatal blow. The ability for a facility to obtain immunity from liability from suit under the CWA outweighs, in many cases, the cost of compliance.<sup>181</sup>

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179. 33 U.S.C. § 1342(k) (2019).

180. “[m]aterials in concentrations which are harmful, hazardous or toxic to man, animal or aquatic life” or “[a]ny other condition . . . which adversely alters the integrity of the waters of the State.” *Id.* § 47-2-3.2.e, 3.2.i.

181. Rich, *supra* note 93.

## CONCLUSION

The federal courts, permit issuing authorities, and industry stakeholders need a clear interpretation of the ambiguous CWA “permit shield” provision’s application to state water quality standards that are incorporated into an NPDES permit. State permitting authorities in cooperation with the EPA should be allowed to incorporate state water quality standards as independent permit provisions that provide clearly defined state water quality limits, which serve to provide an “outer limit” on the allowable level of pollutants in a water source. Further, the permit shield should apply even when an NPDES permit issuing authority decides not to set effluent numerical limitations on pollutant discharges, and instead only relies on a facility’s disclosure of pollutants during the permit application process. This can be accomplished by avoiding boilerplate language in permits and providing permit holding facilities the ability to anchor their compliance expectations prior to and during the permit application process, rather than respond to lawsuits or enforcement actions brought as a result of ambiguity and misunderstandings of statutory requirements. Providing these additional steps for polluting facilities to follow, subject to a safe harbor provision, can uphold standards within the CWA and provide industry facilities with guidance to the steps necessary for compliance.

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