IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

4CCA Nos.: 00-1283, 00-1322

THE PINEY RUN PRESERVATION ASSOCIATION,

Plaintiff-Appellee,

v.

COUNTY COMMISSIONERS OF CARROLL COUNTY, MARYLAND,

Defendant-Appellant.

APPEAL FROM A DECISION OF THE U.S. DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BRIEF OF AMICI CURIAE ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES AND WATER ENVIRONMENT FEDERATION SUPPORTING DEFENDANT-APPELLANT AND URGING REVERSAL OF THE DECISION BELOW

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Association of Metropolitan Sewerage Agencies ("AMSA") has represented the interests of the nation's publicly owned treatment works ("POTWs") and municipal wastewater treatment agencies since 1970. AMSA's more than 240 POTW members serve the majority of this country's sewered population and treat more than 18 billion gallons of sewage each day. AMSA's members include point source dischargers permitted to discharge treated effluent under the Federal Water Pollution Control Act's (commonly referred to as the Clean Water Act ("CWA")) National Pollutant Discharge Elimination System ("NPDES"), 33 U.S.C. § 1342.

As NPDES permittees, AMSA's members will be affected directly by the resolution of this case. Although the Hampstead Waste Water Treatment Plant (the facility operated by Defendant-Appellant Carroll County) is not an AMSA member, the compliance issues it faces are typical of those confronted by AMSA's members. In particular, the district court's failure to apply the permit shield embodied in § 402(k) of the Clean Water Act and the protections that section affords will, if upheld, expose AMSA's members to potential liability for civil and criminal penalties arising from discharges of pollutants not identified in their NPDES permits.

The Water Environment Federation ("WEF") is an international not-for-

profit educational and technical organization of more than 40,000 water quality experts. Its mission is to preserve and enhance the global water environment. Members include environmental, civil, and chemical engineers, biologists, chemists, government officials, students, treatment plant managers and operators, laboratory analysts, and equipment manufacturers and distributors.

WEF and its members: (1) research and publish the latest information on wastewater treatment and water quality protection; (2) provide technical expertise and training on issues including nonpoint source pollution, hazardous waste, residuals management, and groundwater; (3) sponsor conferences and other special events around the world; and (4) review, testify, and comment on environmental regulations and legislation. WEF's members are routinely involved in the construction and operation of POTWs.

Therefore, pursuant to Fed. R. App. P. 29, AMSA and WEF offer this amici curiae brief urging the reversal of the district court's decision below.

ISSUE PRESENTED

Whether a discharger in full compliance with the terms of its NPDES permit can, nonetheless, be held liable for discharges of a pollutant not identified in its permit.

STATEMENT OF THE CASE

Amici's participation in this case is intended solely to buttress the "permit shield." The essential facts underlying amici's argument are these:

The Defendant-Appellants operate the Hampstead Waste Water Treatment Plant, a POTW located in Carroll County, Maryland. Joint Appendix ("App.") 2427. Like most POTWs, the Defendant-Appellants receive, treat, and discharge many and varied wastes from a wide array of residential and commercial customers. Id. The Defendant-Appellants are authorized to discharge treated effluent to the Piney Run Stream pursuant to a state-issued NPDES permit.

The NPDES permit held by the Carroll County POTW placed limits upon many pollutants discharged to Piney Run Creek, but did not identify or limit heat. App. 1554-59. Carroll County was in full compliance with the terms of its permit. App. 1487-1601. Nevertheless, Plaintiff-Appellee Piney Run Preservation Association filed suit under the CWA's citizen provision, 33 U.S.C. § 1365, alleging that the Defendant-Appellants violated the terms of its NPDES permit by discharging heat in amounts that caused temperatures in the Piney Run to exceed levels prescribed by the applicable state water quality standard. On May 20, 1999, the U.S. District Court for the District of Maryland found in favor of the Plaintiff-Appellee, Piney Run Preservation Ass'n v. County Comm'rs of Carroll County, 50 F. Supp. 2d 443 (D. Md. 1999), and in a subsequent second opinion, assessed

liability of $400,000 on the Defendant-Appellants. Piney Run Preservation Ass'n v. County Comm'rs of Carroll County, 82 F. Supp. 2d 464, 473 (D. Md. 2000).

SUMMARY OF ARGUMENT

The United States District Court for the District of Maryland complicated the case now before this Court unnecessarily by effectively ignoring the "permit shield" provided under CWA § 402(k). In basing its decision upon the ability of citizens to enforce water quality standards and by failing to address the permit shield doctrine specifically, the district court has, perhaps inadvertently, shaken the foundations of the entire NPDES scheme. Even assuming, arguendo, that the district court's analysis and application of the Ninth Circuit's decision in Northwest Envtl. Advocates v. City of Portland, 56 F.3d 979 (9th Cir. 1995), was correct (a point AMSA and WEF do not concede), this Court must clarify that § 402(k) protects dischargers who fulfill all disclosure requirements during the NPDES permit application process and comply fully with the terms and conditions of a subsequently issued permit. Failure to do so would destroy the essential finality of NPDES permits and, in so doing, expose permittees to liability for discharges of pollutants not identified in their permits.

ARGUMENT

I. CLEAN WATER ACT §402(k) PROTECTS PERMITTEES FROM LIABILITY FOR DISCHARGES NOT IDENTIFIED IN THEIR NPDES PERMITS

A. The Permitting Process

The NPDES program is the cornerstone of the CWA's pollution control scheme. NPDES permits are issued only after an exhaustive and expensive application and approval process. *See* 40 C.F.R. § 122. In order to obtain an NPDES permit, dischargers, like the Defendant-Appellants, are required to provide information concerning the operations and treatment processes conducted and to disclose the presence and quantity of specific pollutants in their effluent. As EPA stated in 1994, "[a]pplications for municipal discharges focus primarily on the operation and treatment processes at the municipal treatment works," as opposed to specific pollutants discharged. ROBERT PERCIASEPE, OFFICE OF WATER, U.S. ENVIRONMENTAL PROTECTION AGENCY, POLICY STATEMENT ON SCOPE OF DISCHARGE AUTHORIZATION AND SHIELD ASSOCIATED WITH NPDES PERMITS 1 (1994) ("Permit Shield Policy"). As in this case, the diversity and relative unpredictability of the waste streams received and ultimately discharged by a typical POTW make it all but impossible for an NPDES permit writer to place limits upon every pollutant specifically identified or that may be associated with processes identified during the application process. *See* Atlantic States Legal

Found., Inc. v. Eastman Kodak, 12 F.3d 353, 357 (2d Cir. 1993). As a result, permit writers endeavor to limit discharge of the most significant pollutants, and to require monitoring and periodic reporting of other constituents that may be present. Even if it were scientifically practical to set limits for every molecule of every possible pollutant in a POTW's discharge, thereby obviating the need for a permit shield, the cost of compliance, assuming adequate treatment processes even exist, would be prohibitive.

The end result of this lengthy and complex permitting process is a document that embodies a discharger's responsibilities under the law. A typical NPDES permit identifies and limits the quantity of many pollutants discharged, but does not attempt to address other pollutants that may be present in small amounts or in amounts that are not expected to harm the environment. Without other authority, this would expose POTWs and other dischargers to liability for violations of the CWA's proscription in § 301 against any discharge without a permit. *See* 33 U.S.C. § 1311. Section 402(k) of the Clean Water Act affords dischargers protection against such an absurd result, however, by defining compliance with the terms and conditions of an NPDES permit as compliance with the Act (including § 301). *See* 33 U.S.C. § 1342(k). This protection, referred to as the "permit shield," plays a vital role in the NPDES scheme by giving finality to the terms of the permit. Such finality allows POTWs to use their permits as an

essential point of reference in developing operational and management programs to comply with the CWA, and to rely upon it in planning future investments in their wastewater treatment infrastructure.

B. The Permit Shield

Section 402(k) of the CWA states explicitly that, as a matter of law, "compliance with a [NPDES] permit" is "deemed compliance" with all effluent limitations and standards set in accordance with the Act (except for discharges of toxic pollutants in toxic amounts, of which there were none in this case). 33 U.S.C. § 1342(k). The U.S. Environmental Protection Agency ("EPA") has consistently interpreted this section to provide a "shield" from civil and criminal penalties (whether sought through a citizen's suit or by the government) for discharges of pollutants not identified in a permit. *See* 40 C.F.R. § 122.5. EPA explained its interpretation in 1994:

> A permit provides authorization and therefore a shield for the following pollutants resulting from facility processes, waste streams and operations that have been clearly identified in the permit application process when discharged from specified outfalls:
>
> 1) Pollutants specifically limited in the permit. . .
>
> 2) Pollutants for which the permit authority has not established limits or other permit conditions, but which are specifically identified as present in facility discharges during the permit application process; and
>
> 3) Pollutants not identified as present but which are

> constituents of waste streams, operations or processes that were clearly identified during the permit application process.

Permit Shield Policy at 2.

Thus, the permit shield places the burden on applicants to disclose the contents of their effluent and provide information concerning their operations during the application process. If all necessary information is provided, the burden shifts to the permitting authority to write permits that will contribute to the attainment of water quality standards. Once this process is complete and the permittee's obligations under the law are memorialized in a permit, both parties are able to move on. As the Supreme Court has recognized, "[t]he purpose of § 402(k) seems to be to . . . relieve [the permit holders] of having to litigate in an enforcement action the question whether their permits are sufficiently strict. In short, § 402(k) serves the purpose of giving permits finality." E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112, 138 n.28 (1977).

The permit shield has been applied and upheld by numerous courts, most notably by the United States Court of Appeals for the Second Circuit. In Atlantic States Legal Found. v. Eastman Kodak, citizens alleged a discharger violated the CWA by discharging large quantities of pollutants not listed in its state-issued NPDES permit. 12 F.3d at 355. In applying the permit shield doctrine, the court specifically rejected the view that a permit provides limited permission to

discharge only those pollutants identified and controlled by a permit. Id. at 357. The court stated that such an interpretation "stands [the NPDES] scheme on its head," and concluded that: "[o]nce within the NPDES or SPDES scheme, therefore, polluters may discharge pollutants not specifically listed in their permits so long as they comply with the appropriate reporting requirements and abide by any new limitations when imposed on such pollutants." Id.

II. THE DISTRICT COURT ERRED BY NOT DECIDING THE CASE BELOW UNDER CLEAN WATER ACT §402(k)

Evidence presented below indicates that the Hampstead Waste Water Treatment Plant was entitled to the protections in § 402(k) as a matter of law. The POTW was in compliance with the terms and conditions of its state-issued NPDES permit. App. 1487-1601. More importantly, the permit in question did not contain a limit (numeric or otherwise) for heat, nor did it include a general provision requiring compliance with all water quality standards adopted by the State of Maryland. App. 1553-54. Assuming (as asserted by the Defendant-Appellants) that all necessary information was provided to the state during the permit application process, the court should have applied the permit shield and barred recovery by the Plaintiffs.

Unfortunately, the district court never addressed head on the merits of the permit shield and its applicability to the case at hand. Instead, the district court

summarily concluded that the Plaintiffs below should prevail because, relying upon Northwest Environmental Advocates v. Portland, citizen suits may be brought under the CWA "to enforce water quality standards that had not been translated into numeric effluent limitations on a permit." Piney Run Preservation Ass'n, 50 F. Supp. 2d at 445. Even assuming that the court's conclusion on this threshold jurisdictional issue was correct,[1] it should not have been the end of the

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[1]Although amici do not take a position on whether the Ninth Circuit's decision in Northwest Environmental Advocates was correct, they do support the Defendant-Appellants' position that the district court misinterpreted and misapplied that decision. The district court erred in relying solely upon Northwest Environmental Advocates because it failed to grasp a critical difference between the two cases. Specifically, the Ninth Circuit based its decision on the presence of a general, narrative condition in the permit "prohibiting any discharges that would violate Oregon water quality standards." 56 F.3d at 985. As the Ninth Circuit concluded: "[t]he plain language of CWA § 505 authorizes citizens to enforce *all permit conditions.*" Id. at 986. (emphasis added). Conversely, any standard, limit, or condition not contained in a discharger's permit is beyond the scope of citizen suit jurisdiction.

The permit held by the Defendant-Appellants in this case, on the other hand, did not contain a numeric or narrative standard for heat, nor did it contain a general condition requiring compliance with state water quality standards. In short, the district court's reliance on Northwest Environmental Advocates was, therefore, misplaced and contrary to the reasoning of the Ninth Circuit. It went far beyond the Ninth Circuit's precedent by allowing a citizen suit to enforce a state quality water standard directly against a discharger, regardless of the terms of the permit. Finally, it should be noted that the Ninth Circuit's conclusion may be at odds with decisions of other circuits addressing the issue. As Judge O'Scannlain of the Ninth Circuit wrote in a strong dissent to the court's denial of a petition for rehearing of the Northwest Environmental Advocates case:

No other circuit has recognized a right of citizens to sue for

(continued...)

court's inquiry. The court next should have addressed whether § 402(k) protected the Defendant-Appellants from the Plaintiffs' allegations of CWA liability.

In allowing a collateral citizen suit attack on a POTW in full compliance with its permit, the district court apparently failed to consider, ignored, or rejected the permit shield doctrine. Its decision provided no analysis or explanation of its rationale. In fact, the district court made no reference or citation in either of its opinions in this case to § 402(k), EPA's regulations implementing that section, or the Agency's interpretative policy statement. The court did, however, mention a "permit shield" sought by the Defendant-Appellants, but curiously used the Defendant-Appellants' reliance on the shield as a factor in mitigating civil penalties assessed. Piney Run Preservation Ass'n, 82 F. Supp. 2d at 472. That brief and misplaced reference serves only to give the dangerous impression that the district court considered the permit shield and rejected it. This Court must clarify that § 402(k) remains in full effect.

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[1](...continued)
enforcement of state water quality standards contained in permits. In fact, other circuits have explicitly and implicitly ruled out such suits. . . .
Furthermore, the holding in [this case] directly conflicts with the Second Circuit's decision in Atlantic States Legal Foundation v. Eastman Kodak, 12 F.3d 3535 (2d Cir. 1993), cert. denied, 115 S. Ct. 62 (1994). . . .

Northwest Envtl. Advocates v. City of Portland, 74 F. 3d 945, 948 (1996)(citations omitted).

The district court's lack of understanding of the permit shield's statutory origins and the vital role it plays in the NPDES scheme is illustrated vividly by a comparison of the court's statements on this point and the plain language of CWA § 402(k). In its opinion on liability, the district court stated:

> Until recently, the County believed that *compliance with its permit was tantamount to compliance with the CWA*—a doctrine known as the "permit shield." Although the Court has found that this belief was mistaken and an *improper interpretation of existing law*, the Court also finds the County's position was not unreasonable.

Id. (emphasis added). However, § 402(k) of the Clean Water Act states that:

> *Compliance with a permit issued pursuant to this section shall be deemed compliance*, for purposes of sections 1319 and 1365 of this title, *with sections 1311, 1312, 1316, 1317, and 1343. . . .*

33 U.S.C. § 1342(k) (emphasis added).

The district court offered no explanation or analysis in either opinion as to why the Defendant-Appellants' reliance on the plain language of the CWA, longstanding EPA policy, and the practice of the state permitting authority was "an improper interpretation of existing law."

III. THE COURT SHOULD UPHOLD THE PERMIT SHIELD

The district court's fundamentally flawed analysis of the CWA and apparent rejection of the permit shield is a potentially catastrophic precedent for publicly owned, municipal wastewater collection and treatment facilities across the country. If allowed to stand, it could destroy the NPDES permitting shield, slow

the NPDES permitting process to a crawl, and postpone investment in new POTWs. As discussed above, the permit shield plays a vital role in the foundations of the NPDES permitting scheme envisioned by Congress. It is accepted that it is impossible to write a permit that limits every pollutant that may be present in a POTW's discharge. *See* Atlantic States Legal Found., 12 F.3d at 357. Given this, the permit shield makes it possible to craft effective NPDES permits that ensure continued progress and improvements in the quality of our nation's waters, while providing dischargers with legal certainty that their discharges comply fully with the mandates of the CWA.

Such certainty is essential to the ability of POTWs to plan and pay for the wastewater infrastructure investments needed to meet the stringent requirements imposed by the Clean Water Act. Costs associated with such investments are already high. In the report "The Cost of Clean: Meeting Water Quality Challenges in the New Millennium," AMSA and WEF estimate that local governments' wastewater investment costs between 1972 and 1991 totaled approximately $196 billion. THE ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES AND THE WATER ENVIRONMENT FEDERATION, THE COST OF CLEAN: MEETING WATER QUALITY CHALLENGES IN THE NEW MILLENNIUM 4 (1999) ("COC"). Furthermore, EPA estimated in its 1996 Clean Water Needs Survey that municipalities would need another $128 billion to fund secondary treatment,

advanced treatment, combined sewer overflows, and other controls over the next 20 years. U.S. ENVIRONMENTAL PROTECTION AGENCY, 1996 CLEAN WATER NEEDS SURVEY: REPORT TO CONGRESS 2 (1997). EPA revised its 1996 needs estimate for sanitary sewer overflows by approximately $71.6 billion in 1999, thereby increasing its estimate of total needs to nearly $200 billion. COC at 3. Amici's estimates of these costs are more daunting. Amici estimates that, taking the cost of replacing aging treatment plants and collection systems into account, wastewater investment costs incurred by local governments between 1996 and 2015 will exceed $300 billion. Id.

If the district court's decision below is upheld, POTWs would be open to attack by an endless number of citizen suits seeking to enforce any and all state water quality standards on the books. Such an outcome would cause the costs summarized above to grow exponentially, while at the same time diverting millions of dollars in civil and criminal penalties from badly needed wastewater infrastructure investments to the U.S. Treasury. Indeed, it is difficult to imagine how POTWs and other dischargers would be able to operate at all in a legal landscape in which they may be continually exposed to civil and criminal liability, regardless of whether they comply with the terms of an NPDES permit. In short, requiring compliance with a permit without guaranteeing that the permit represents the complete terms of a legal discharge is impossible, unworkable, and

contrary to the intent of the CWA.

CONCLUSION

Therefore, the district court fundamentally misinterpreted the Clean Water Act and erred by not deciding the case below under the permit shield embodied in § 402(k). This Court should prevent the damage the district court's decision will inflict upon the foundations of the NPDES scheme and the ability of POTWs and other dischargers to operate by reversing the decision below.

Dated: _____

Respectfully submitted,
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