

Response to the decision by Judge Irene Keeley dated 14 Jan 09, in the case:
WV Highlands Conservancy and WV Rivers Coalition vs. Randy Huffman

14 Oct 10

Introduction

The above referenced case (WVHC vs. Huffman) was brought in Federal Court in Clarksburg WV to force WVDEP's Office of Special Reclamation to treat bond forfeited (special reclamation) sites to obtain NPDES permits and to treat water to a level consistent with prevailing standards in the receiving streams. The ruling, however, goes far beyond the specifics of the case by defining a point source discharge and a controlling party such that, it appears, anyone who operates an AMD treatment system (passive or active) and creates a point source discharge is obligated to obtain an NPDES permit.

Summary of findings

Judge Keeley addressed the following key issues. Quotes from the court's decision are italicized. Each is prefaced by page and paragraph designations.

A. Point source defined:

(p. 4, para. 2) Point source defined. A "point source" is "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." Id. at § 1362(14). Point sources include such conveyances as pipes, ditches, channels, tunnels, conduits and containers.

B. Sovereign immunity. Sovereign immunity does not protect state agency officials from suits filed in Federal court under the Clean Water Act (CWA).

(p. 14, para 2) The Eleventh Amendment provides the several states with immunity from suits by private individuals in federal court. It is well established, however, that it does not preclude private individuals from suing state officials for prospective injunctive relief designed to remedy an on-going violation of federal law.

C. Agencies cannot grant exclusions to the CWA.

(p. 24, para. 1) Northern Plains Resource Council v. Fidelity Exploration and Development Co., 325 F.3d 1155, 1164 (9th Cir. 2003), the Ninth Circuit held that "the EPA does not have the authority to exempt discharges otherwise subject to the CWA. Only Congress may amend the CWA to create exemptions from regulation."

(p. 24, para 2) The Ninth Circuit held that the EPA lacks authority to exempt discharges and could not lawfully approve the Montana state exemption. It further noted that Montana lacked authority to exempt discharges otherwise subject to the NPDES

permitting process, because “it cannot possibly be urged that Montana state law in itself can contradict or limit the scope of the CWA, for that would run squarely afoul of our Constitution’s Supremacy Clause.”

(p. 12, para. 2) See Comm. To Save Mokolumne River v. East Bay Mun. Util. Dist., 13 F.3d 305, 309 (9th Cir. 1993) (holding that only express statutory exemptions could relieve state governmental liability for actions taken pursuant to state regulations, and that the CWA contains no such exemptions).

D. Persons required to obtain NPDES permits

(p. 27, para. 3) Under the regulations establishing the NPDES permitting system, however, any person who discharges or proposes to discharge pollutants . . . and who does not have an effective permit . . . must submit a complete application to the Director in accordance with this section and part 124 of this chapter.

(p. 27, para. 3) Like the CWA itself, these regulations define “person” as “an individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof.” 40 C.F.R. § 122.2 (emphasis added). Accordingly, a state agency or its employee discharging pollutants without an effective permit must apply for an NPDES permit. The regulation then clarifies that “[w]hen a facility or activity is owned by one person but is operated by another person, it is the operator’s duty to obtain a permit.” 40 C.F.R. § 122.21(b). Here, the parties agree that the WVDEP owns only one of the eighteen bond forfeiture sites at issue, the DLM Coal Co. site in Alton, West Virginia. Despite the fact that private entities, frequently the former coal operators, own the remaining sites, the Highlands Conservancy argues that the WVDEP currently controls, or “operates,” all the sites and therefore is responsible for obtaining NPDES permits for discharges from those sites.

E. Relevant discharge standards.

Technology based discharge limits do not apply after release of the reclamation bond. Thereafter, higher standards per case-by-case effluent limitations would be established.

(page 12 para 1) Accordingly, if ordered to obtain an NPDES permit, the WVDEP would be required to achieve higher water quality standards at its bond forfeiture sites than is required under SMCRA

(page 33 para 1) EPA’s coal mining effluent limitations apply until release of the reclamation bond required by SMCRA. Today’s regulation will not change that requirement. However, in response to a concern expressed by one of the petitioners, the Agency wishes to reemphasize that post-bond release discharges are subject to regulation under the Clean Water Act. If a point source discharge occurs after bond release, then it must be regulated through an NPDES permit under sections 301(a) and 402 of the Clean Water Act. If the responsible party does not obtain a permit, then it is subject to enforcement action by EPA under section 309 of the Act and by citizens under section 505(a)(1) of the Act. Appropriate case-by-case effluent limitations would be established in the NPDES permit for such a discharge.

Implications

Given the above findings, it seems likely that a state AML agency or a citizen's watershed group that builds and operates an active or passive AMD treatment unit and discharges water to a receiving stream via a point source would be required to obtain an NPDES permit. That permit would necessarily comply with aquatic life discharge standards. Furthermore, in the event that a TMDL is developed for the receiving stream, discharge standards for point sources would likely become more stringent. In addition, as new pollutants are added such as conductivity, selenium, sulfate... the treatment requirements could change dramatically.

Watershed groups generally do not have the resources to build and operate treatment units that would comply with NPDES permit conditions. Furthermore, they will not expose their organizations and members to the attendant liabilities.

Withdrawal of voluntary AMD treatment would be tragic since these initiatives have, over the past fifteen years, restored fisheries in streams that were previously dead. This has only been possible by installing treatment systems are inexpensive to build and maintain. While individual treatment units may remove, say, 80% of the pollutants from a given source, the cumulative impacts of multiple units on large watersheds have been spectacular.

Restoring AMD impaired streams means developing the most efficient process for removing acid load. Costs increase geometrically with each subsequent ton removed. Voluntary watershed remediation has worked because many discharges are partially treated so as to achieve the requisite acid load reduction. However, compliance with Judge Keeley's decision, would lead to the following hypothetical:

If each treated discharge were required to meet NPDES standards and if watershed groups would be willing to install them then all of their resources would be consumed installing, say, one treatment unit. This would produce extremely clean water that would then be discharged into a polluted receiving stream. Since there would be no significant acid load reduction, the receiving stream would not benefit and the money invested in restoration would be wasted.

This is, clearly, a ridiculous situation and no sane watershed group or agency would volunteer to waste their money while acquiring a potentially unlimited liability. Under these circumstances, voluntary treatment of AMD by citizens and by state AML agencies will cease and hundreds of miles of restored stream will die. In essence, if volunteer groups are forced to comply with section 402 of the Clean Water Act to obtain an NPDES permit, it create more pollution and bring us farther away from the goals of the Clean Water Act.

Judge Keeley's decision makes no reference to these implications. Rather, she took a narrow interpretation of the Clean Water Act which, apparently can lead to no other conclusion. She makes it clear that relief is only possible through amendment to the Clean Water Act. Such an amendment would need to grant relief from NPDES requirements and define exclusions for voluntary remediation efforts where the parties bear no responsibility for creation of the polluttional discharge.

A solution

The most obvious solution is the creation and passing of Federal Environmental Good Samaritan legislation designed to protect those who were not responsible for the original discharge from liability under the Clean Water Act. Unless volunteers who are not responsible for the pollutional discharge are protected from liability under the Clean Water Act, they remain vulnerable

Additional related information

- In June of 2009, the Sierra Club petitioned EPA to remove the NPDES delegation from the State of West Virginia, citing West Virginia's failure to comply with the requirements of 40 C.F.R. Part 123 in the operation of its NPDES program as it related to bond forfeiture sites and discharges from Abandoned Mine Land sites.

On page 6 of the petition, the Sierra Club brings Abandoned Mine Lands directly into this issue:

(page 6 para 4)"Similarly to its handling of the bond forfeiture sites, WVDEP has not required dischargers of treated and untreated acid mine drainage at abandoned mine lands to obtain NPDES permits for their discharges."

(page 6 para 6) " WVDEP's failure to require NPDES permits for AML discharges has led to devastating statewide impacts including the obliteration of aquatic life in many of the acid mine drainage streams impaired by iron and or pH (3,958 miles impaired by iron and 1,376 miles impaired by pH.)"

- In August of 2009, Judge John T. Copenhaver of the US District Court Southern District of West Virginia also found that WEDEP is required to obtain NPDES permits for bond forfeiture sites.