"Permit Shield" Defense Bars Liability for Pollutant Discharges Not Expressly Allowed by NPDES Permit

The Fourth Circuit Court of Appeals has vacated a district court's imposition of a $400,000 civil penalty against a county for alleged discharges of thermal pollution. The court found that, although the thermal discharges were not expressly allowed by the county's discharge permit, the "permit shield" defense provided by the Clean Water Act (CWA) protected the county from liability for the discharges.

Carroll County, Maryland operated a publicly-owned wastewater treatment works (Plant) under a National Pollutant Discharge Elimination System (NPDES) permit issued by the Maryland Department of the Environment (MDE) in 1990. The Plant discharged treated wastewater into Piney Run, which was protected as a source of public drinking water and as a stream capable of supporting a self-sustaining trout population.

In 1998, the Piney Run Preservation Association (Association) filed suit against the Carroll County Commissioners (Commissioners) in federal district court, alleging that the Plant's permit contained a clause that expressly prohibited the discharge of any pollutants not expressly listed in the permit. In the alternative, the Association claimed that a permit holder may be liable under the CWA for the discharge of any pollutant that is not limited by its permit. The Association claimed that, under either of these theories, the Plant violated the CWA if it discharged any level of heat whatsoever.

The district court agreed with the Association that the CWA prohibits the discharge of any pollutant not limited by a permit, and concluded that the Plant's heat discharges constituted a "pollutant" in violation of the CWA because the temperature of the discharged wastewater exceeded Maryland's water quality standards for heat. The district court ordered the

Commissioners to stop the discharges, assessed $400,000 in civil penalties payable to the United States Treasury, and awarded the Association its litigation costs and reasonable attorneys' fees.

Both the Association and the Commissioners appealed the district court's order. The Association claimed that the district court erred in holding that the Plant violated the CWA only when its discharge of heat exceeded temperature standards. It argued that the Plant violated the CWA whenever it discharged any level of heat whatsoever. The Commissioners, on the other hand, contended that the CWA's permit shield defense (33 U.S.C. 1342(k)) protected a permittee from liability for discharges of pollutants not expressly regulated by the permit. The Commissioners also challenged the standing of the Association to sue.

Standing. The appeals court first reviewed whether the Association had standing to bring its action. The court explained that, under Article III of the U.S. Constitution, federal courts are restricted to the adjudication of "cases" and "controversies." The standing requirement, therefore, "ensures that a plaintiff has a sufficient personal stake in a dispute to render judicial resolution appropriate." The court stated that the Association would have standing if it could show that: (1) at least one member would have individual standing; (2) the interests at stake in the litigation are germane to the Association's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

The Commissioners challenged only the first prong of this three-part organizational standing test – i.e., whether any member of the Association had individual standing to sue. The court stated that an individual possesses Article III standing if: (1) he or she has suffered an "injury in fact;" (2) that is fairly traceable to the challenged action of the defendant; and (3) it is likely that the injury will be redressed by a favorable court decision.

The Commissioners challenged the first two elements of the individual standing test. The court, however, found that the Association had a member that met these elements. This member had testified that Piney Run flowed through her land and that she had bought the land when the stream had been pristine. However, in recent years, she testified, the stream had acquired a high concentration of green algae, which interfered with her use of the stream to provide drinking water for her horses and diminished her visual enjoyment of the stream. These allegations, the court found, were sufficient to establish that the member had suffered an "injury in fact."

She was also able to show that her injury was "fairly traceable" to the Plant based on evidence that the Plant discharged heat into Piney Run, and testimony from a fisheries scientist stating that heat can cause green algae to proliferate. Although the Commissioners argued that this evidence did not prove that the green algae in Piney Run was caused by the Plant's discharge of heat, the court held that the standing test does not require plaintiffs to "show to a scientific certainty" that a defendant's discharge caused the precise harm suffered by the plaintiffs. Rather, a plaintiff "must merely show that a defendant discharges a pollutant that causes or contributes to the kinds of injuries alleged."

Accordingly, because a member of the Association had standing, the Association itself had standing to sue as a representative of its members.

Permit shield. The court next reviewed the district court's holding that the CWA prohibits the discharge of any pollutants not expressly allowed by an operator's NPDES permit. The Commissioners contended that the CWA permit shield defense bars suit against NPDES permit holders under the CWA except for violations of the express terms of the permit. The court disagreed with both the district court's ruling and the Commissioners' argument, but found in favor of the Commissioners, holding that, "because the Commissioners had adequately

disclosed that the Plant was discharging heat and because their discharges were within the reasonable contemplation of the MDE during the permit application process, the NPDES permit allowed the Plant to discharge heat."

At issue, the court noted, was the scope of the permit shield defense. Clearly, the court said, if a permit holder discharges pollutants precisely in accordance with the terms of its permit, the permit will shield the permittee from CWA liability. However, the permit shield defense raises two other, "slightly more difficult," questions: (1) what comprises the scope or terms of an NPDES permit; and (2) whether the permit shield bars CWA liability for discharges not expressly allowed by the permit when the permittee has complied with the permit's express requirements.

Facing the first question, the court reviewed the language of CWA Section 1342(k), applying the *Chevron* statutory interpretation analysis. Under the *Chevron* analysis, the court stated, courts must apply a two-part test. First, the court examines the language of the statute to see if "Congress has directly spoken to the precise question at issue." If Congressional intent is clear, "that is the end of the matter." If the statute is ambiguous, the next step is to defer to the agency's interpretation of its governing statute and regulations as long as: (1) the agency has promulgated that interpretation pursuant to a notice-and-comment rulemaking or a formal adjudication; and (2) the agency's interpretation is reasonable.

The court began its analysis with the language of CWA Section 1342(k) which states, in relevant part: "compliance with a permit issued pursuant to this section shall be deemed compliance" with the relevant sections of the CWA. Although the court found that this language "makes clear that compliance with a permit constitutes an exception to the general strict liability

of the CWA," it concluded that the language "does not explicitly explain the scope of permit protection."

Accordingly, the court applied the second prong of the *Chevron* test, and found that the U.S. Environmental Protection Agency (EPA) had promulgated, pursuant to a formal adjudication known as the *Ketchikan* decision, an interpretation of the permit shield that is reasonable. In *Ketchikan*, EPA reasonably determined "that a permit holder is in compliance with the CWA even if it discharges pollutants that are not listed in its permit, as long as it only discharges pollutants that have been adequately disclosed to the permitting authority."

In this case, the court observed that the Plant's permit limited certain pollutants –heat was not among those listed – and contained a footnote that provided that the "discharge of pollutants not shown shall be illegal." The Association urged that this footnote meant that it was illegal for the Plant to discharge any pollutants not specifically listed in the permit at any level – such as heat. The Commissioners argued that the footnote should be interpreted to prohibit the discharge of pollutants "not shown to the MDE" during the permitting process.

The court found both interpretations of the footnote plausible. However, it concluded that the Association's interpretation of the footnote was unreasonable because the Plant would violate the permit "if it discharges an unlisted pollutant even at an infinitesimal amount." Therefore, the court found that the Commissioners' interpretation was more consistent with the MDE's likely intent, and held that the permit did not expressly bar the Plant's discharges of heat.

Next, the court applied EPA's *Ketchikan* analysis in reviewing whether the Plant had adequately disclosed its heat discharges to the permitting authority. The court found that the Commissioners had adequately disclosed the Plant's heat discharges, both before and after the permit was issued, that the MDE had "reasonably contemplated that the Plant would discharge

heat pursuant to its permit, and the temperature records demonstrate that the Plant did not act outside that reasonable contemplation."

Accordingly, the court concluded that "the Commissioners are entitled to the full protection of the permit shield, and they are not liable under the CWA." The court vacated the judgment of the district court and remanded the matter to the district court for entry of judgment in favor of the Commissioners.

Piney Run Preservation Association v. County Commissioners of Carroll County, Maryland, 268 F.3d 255 (4th Cir. 2001).

Kenneth C. Gold

DET_B\347472.1