



Taking “Yes” for an Answer; Court Dismisses NPDES Permit Challenge as Non-Justiciable Following Elimination of Problematic Effluent Limit

In a decision with potential ramifications for challengers of many different types of environmental permits and approvals, the U.S. District Court for the Southern District of West Virginia (the “Court”) recently dismissed a lawsuit filed by the Sanitary Board of the City of Charleston (the “CSB”) seeking to overturn a decision of the Environmental Protection Agency (EPA) regarding the permissible concentrations of copper in discharges from the CSB’s wastewater treatment plant to the Kanawha River. *Sanitary Board of the City of Charleston, West Virginia v. Scott Pruitt, et al.*, Civil Action No. 2:16-cv-03060 (March 29, 2018 Memorandum Opinion and Order) (Goodwin, J.). After two years of litigation (and more than four years of administrative proceedings prior to that), the Court determined that the decision of the West Virginia Department of Environmental Protection (WVDEP) to omit any limit on discharges of copper in the CSB’s most recent National Pollutant Discharge Elimination System (NPDES) permit rendered the CSB’s challenge to EPA’s action “either hypothetical or [lacking in] imminence.” As a result, the Court ruled there was no longer a justiciable “case or controversy” between the parties, depriving it of subject matter jurisdiction over the dispute.

The case centered on the WVDEP’s promulgation of statewide limits on allowable levels of copper in streams, acting pursuant to its delegated authority under the federal Clean Water Act (CWA). Using the general formula provided in its rules, the WVDEP translated these in-stream standards into specific effluent limits for copper when it issued a NPDES permit to the CSB in 2012. Recognizing that it could not operate in compliance with the assigned copper effluent limits, the CSB developed the necessary factual information and scientific rationale to support development of an alternative, facility-specific water quality standard (using a procedure known as a “water effects ratio” analysis) that would have allowed it to discharge copper in concentrations approximately five times higher than EPA’s nationally recommended criteria without harming the aquatic life the standard is designed to protect. After the WVDEP approved the alternative water quality standard, the CSB also shepherded it through the West Virginia Legislature, which must approve any such changes in WVDEP regulations.

The CWA specifies that changes to state water quality standards must also be approved by EPA before they may become effective. Therefore, the facility-specific standard for copper that had been approved by the WVDEP was submitted to EPA’s Region III office in Philadelphia, Pennsylvania for review. Originally, the CSB’s lawsuit challenged EPA’s failure to timely act upon the proposed alternative standard; after the lawsuit was filed, EPA rejected the new standard, and the CSB then amended its complaint to challenge that decision on the merits.

However, before that challenge could be decided, on June 13, 2017, the WVDEP renewed the CSB’s NPDES Permit for its plant. Based on updated water quality monitoring reports, the agency found the plant’s discharges no longer had a “reasonable potential” to violate the existing copper water quality standards, and therefore the WVDEP did not impose any limits on copper concentrations in the permit. The permit still requires quarterly monitoring and could be reopened to impose an effluent limit for copper if monitoring results justify it. Despite that, the Court ruled that because the CSB is no longer required to meet any copper limits in its discharges, it

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was unable to demonstrate a “concrete injury” for purposes of Constitutional standing. The Court also rejected CSB’s argument that an exception to the mootness doctrine, for cases that are “capable of repetition, yet evading review” should be applied. Even if the dispute regarding the appropriate copper effluent limit should arise again, the Court did not believe that it was likely to be “quickly rendered moot before a court can render a decision on it.” Therefore, the Court granted EPA’s motion to dismiss the case in its entirety. There is no indication in the Court docket regarding whether or not the CSB plans to appeal the ruling.

For questions about the Court’s decision or the Clean Water Act in general, please contact Christopher B. (Kip) Power at (681) 265-1362 or cpower@babstclland.com.

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