

CLIENT ALERT

Citizen Suit Watch: Eleventh Circuit Rejects Novel Clean Water Act Citizen Suit on Notice Grounds

December 19, 2013

By broadly construing statutory notice requirements, a recent Eleventh Circuit opinion may have effectively closed the door on a novel approach to citizen suits brought against permit holders under the Clean Water Act (CWA). See *Black Warrior Riverkeeper, Inc. v. Black Warrior Minerals, Inc.*, --- F.3d ---, 2013 WL 5998069 (11th Cir. 2013). The issue – a case of first impression – was whether 60 days notice is required in suits brought against permit holders where the *only* claim alleged is violation of new source performance standards, irrespective of any concurrent permit violation. The court's decision answered in the affirmative, holding that such claims may only be pursued after expiration of the citizen suit provision's 60-day waiting period.

BACKGROUND

Black Warrior Riverkeeper concerns the activities of defendant Black Warrior Minerals, Inc. (Black Warrior Minerals), operator of the Fleetwood coal mine in Alabama. Some three years prior to suit, the state CWA permitting authority (the Alabama Department of Environmental Management) issued Black Warrior Minerals a National Pollutant Discharge Elimination System (NPDES) permit authorizing discharges from the coal mine to Hurricane Creek and an unnamed tributary. Among other things, Black Warrior's NPDES permit incorporated new source performance standards for coal mines,¹ promulgated by EPA pursuant to CWA section 306(b).²

Plaintiffs in the case (two environmental groups and private individuals) served Black Warrior Minerals and state and federal authorities with notice of their intent to sue under the CWA's citizen suit provisions, located at section 505.³ Among other things, these provisions require any citizen who wishes to file suit to provide 60-days notice to the party alleged to be in violation of the CWA, as well as to EPA and the relevant state authority.⁴ The statute includes one exception to the 60-day notice requirement: a party may file suit any time after serving notice in cases "respecting a violation of sections 1316 [new source performance standards] and 1317(a) [toxic pollutant effluent limits]"⁵

The plaintiffs in *Black Warrior Riverkeeper* filed suit just 11 days after serving notice. The complaint alleged violation of new source performance standards under section 306(b). It did not specifically allege any permit violation, despite the permit's express incorporation of new source performance standards for coal mines.

Black Warrior Minerals filed a motion to dismiss the suit on notice grounds, claiming that plaintiffs were required to wait until expiration of the usual 60-day notice period. Plaintiffs argued that their claims fell within the exception found in section 505(b) and, thus, that the 60-day notice requirement did not apply. The district court agreed with Black Warrior Minerals, finding that the 60-day notice provision applied in all cases concerning the liability of a CWA permit holder.⁶ Plaintiffs appealed the decision to the Eleventh Circuit.

DECISION

In a decision authored by Circuit Judge Pryor, the Eleventh Circuit affirmed the district court's holding, concluding that, "[w]hen read in the context of the entire Clean Water Act, the citizen suit provision requires a citizen to sue a permit holder *for violations of its permit* if the permit covers the alleged effluent discharges."⁷ Thus, according to the court, an alleged violation of new source performance standards incorporated into a state-issued permit must be treated as an alleged permit violation, subject to the 60-day notice requirement.

In support of its holding, the court first looked to prior case law placing emphasis on the centrality of the NPDES permit in CWA implementation and enforcement.⁸ The court then set about interpreting the relevant statutory text, adopting a "holistic" approach⁹ that relied significantly on the surrounding CWA context.¹⁰ The court concluded that allowing plaintiffs' suit to proceed "would disrupt the statutory scheme for the enforcement of permits" by "both undermin[ing] the overarching permitting scheme and nullify[ing] the statutory preference for governmental enforcement."¹¹

In so holding, the court rejected plaintiffs' argument that the court's construction of the statute rendered provisions of section 505 superfluous. This argument hinged on the language of section 505(f), which defines the universe of "effluent standard[s] or limitation[s]" upon which a citizen suit under section 505(a)(1) may be based.¹² Section 505(f) expressly defines "effluent standard[s] or limitation[s]" to include both new source performance standards as well as permits or permit conditions, identified at sections 505(f)(3) and (f)(6) respectively.¹³ Plaintiffs argued that the court's construction – which required plaintiffs to allege a permit violation under section 505(f)(6), even when their claims were based on violation of new source performance standards – failed to account for the statute's separate identification of new source performance standards at section 505(f)(3).

The court, however, concluded that section 505(f)(3) retains distinct meaning and application under its reading of the statute. According to the court, section 505(f)(3) would continue to apply in cases where a permit holder is alleged to have violated new source performance standards and the discharges at issue were not adequately disclosed to the permitting authority.¹⁴ In addition, the court concluded that the provision would continue to apply in cases where a discharger has violated new source performance standards but does not have a permit.¹⁵

Finally, the court relied on the Supreme Court's decision in *State Water Resources Control Board* to support the proposition that any suit against a permit holder "must proceed under section 1365(f)(6) instead of under section 1365(f)(3) when the discharges are covered by the permit."¹⁶ In that case, the Supreme Court stated that "a suit against a permit holder will necessarily be brought under the definition in [section 1365(f)(6)]."¹⁷ Thus, the Eleventh Circuit viewed plaintiffs' citizen suit as one properly based on an alleged permit violation – a claim for which the CWA's 60-day notice requirement applies.

IMPLICATIONS

The Eleventh Circuit's decision in *Black Warrior Riverkeeper* has stirred mixed reactions among legal practitioners and academia. Regulated permit holders under the CWA may find some reassurance in the court's firm stance on the 60-day notice requirement and its application with respect to most claims that might conceivably be brought against them. Among others, the case might call additional attention to the statute's exception to the 60-day notice requirement, causing some to question the Eleventh Circuit's holding.

For now, the Eleventh Circuit is the only court of appeals to have looked at this specific question. Key questions courts may continue to grapple with in future cases include: In what scenarios will section 505(b)'s exception to the 60-day notice requirement apply? Precisely when are each of the "effluent standards and limitations" identified in section 505(f) implicated in a case? And to what extent does Supreme Court precedent, namely, *State Water Resources Control Board*, control the issue? Citizen Suit Watch will await the next development on these questions.

¹ See Coal Mining Point Source Category; Effluent Limitations Guidelines & New Source Performance Standards, 50 Fed. Reg. 41,296 (Oct. 9, 1985).

² 33 U.S.C. § 1316(b).

³ *Id.* at § 1365(a)(1).

⁴ *Id.* at § 1365(b)(1)(A).

⁵ *Id.* at § 1365(b).

⁶ See *Black Warrior Riverkeeper, Inc. v. Black Warrior Minerals, Inc.*, No. 7:11-CV-3307-SLB, 2012 WL 4339613, at *4 (N.D. Ala. Sept. 17, 2012).

⁷ *Black Warrior Riverkeeper, Inc.*, 2013 WL 5998069, at *4 (emphasis added).

⁸ See *id.* (citing *EPA v. Nat'l Crushed Stone Ass'n*, 499 U.S. 64, 71 (1980); *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205 (1976)).

⁹ *Id.* at *6 (quoting *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988)).

¹⁰ See *id.* at *7 (discussing 33 U.S.C. § 1342's NPDES permitting provisions, including a "permit shield" defense and the requirement that permits incorporate new source performance standards).

¹¹ *Black Warrior Riverkeeper, Inc.*, 2013 WL 5998069, at *7. As to the latter preference for governmental enforcement, the court emphasized the state's own concurrent enforcement action against Black Warrior Minerals, filed shortly after the citizen suit at bar. Given the state's enforcement action, the court deemed plaintiffs' citizen suit "a thinly veiled attempt to beat the State of Alabama to the courthouse." *Id.*

¹² See 33 U.S.C. § 1365(f)(1)-(7).

¹³ *Id.* at §§ 1365(f)(3), (f)(6).

¹⁴ *Black Warrior Riverkeeper, Inc.*, 2013 WL 5998069, at *8. As the court recognized, the CWA's "permit shield" would not apply in such cases. *Id.*

¹⁵ *Id.* The court further asserts that its interpretation does not render superfluous section 505(f)(1) (which includes any discharge without a permit, as proscribed by section 301(a), in the definition of "effluent standard or limitation"), since new source performance standards "appl[y] only to new sources and section [301(a)] applies to all dischargers." *Id.*

¹⁶ *Id.*

¹⁷ 426 U.S. at 223. Plaintiffs in *Black Warrior Riverkeeper* had argued that this holding was merely dicta. 2013 WL 5998069, at *8-9. The Eleventh Circuit rejected this characterization of the case law but held in the alternative that the Supreme Court's reasoning remained persuasive even if so. 2013 WL 5998069, at *9-10.

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