



Pennsylvania Appeals Court Upholds Nutrient Trading

April 2021

In 2017, Food & Water Watch (FWW), filed a complaint with the Pennsylvania Environmental Hearing Board (Board) attacking the nutrient trading provisions in a Pennsylvania poultry processing plant's NPDES permit. FWW argued, among other things, that the CWA prohibits water quality trading. The Board issued a decision on May 21, 2020, roundly rejecting FWW's arguments. The Board found that although the CWA does not expressly mention water quality trading, trading is "one of many tools" available to EPA and states to implement the goals and requirements of the CWA. The Board also cited favorable statements in the Chesapeake Bay TMDL and previous cases (including a similar challenge filed by FWW in 2012) that recognized the importance of trading to the Bay TMDL.

On June 18, 2020, FWW filed for appellate review with the Pennsylvania Commonwealth Court and continued to allege that nutrient trading is illegal under the CWA. The Exchange, as part of a municipal coalition, submitted an amicus curiae brief, in both the lower Board proceeding and the appeal, to offer a broader view of the extensive trading activities that occur throughout the nation consistent with the CWA Act, EPA's longstanding trading guidance, and numerous state laws and regulations.

The Commonwealth Court held oral argument on March 15 before a 3-judge panel. Counsel for the Pennsylvania Department of Environmental Protection emphasized that trading is good for Chesapeake Bay and Pennsylvania as it provides qualified and verified environmental and real-world economic benefits and assured the panel that Keystone must always meet the local limits to protect the relevant stream. Importantly, DEP highlighted that municipalities also use trading and if taken away, these point sources will be forced to make further reductions in the least cost-effective way.

On April 12, 2021, the Commonwealth Court affirmed the EHB's May 2020 decision, concluding that "DEP was authorized to allow Keystone to engage in nutrient credit trading to satisfy the requirements of the Chesapeake Bay TMDL because: (1) the plain language of the Clean Water Act does not prohibit nutrient credit trading; (2) the EPA has consistently supported the practice of nutrient credit trading; (3) the permit complies with DEP's regulations and the Chesapeake Bay TMDL; and (4) Pennsylvania's nutrient credit trading program provides more stringent protections than the Clean Water Act and is consistent with the Act's purpose and goals." The Court therefore concluded that the nutrient credit trading provisions in the permit do not violate federal or state law.

The result likely roadblocks FWW's national campaign against trading – we understood this appeal to be a test case. As the municipal coalition stated in its amici briefs, FWW's efforts are contrary to nearly 40 years of CWA permitting practice and precedent. Water quality trading is an efficient and cost-effective tool for fulfilling the demanding pollution reduction targets like the Chesapeake Bay TMDL and beyond. This ruling fortifies the longstanding EPA and state use of water quality trading in many hundreds of NPDES permits throughout the nation, issued by EPA or authorized states, to protect water quality in part through the authorization and regulation of trading.