WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD
CHARLESTON, WEST VIRGINIA

CLARKSBURG SANITARY BOARD

Appellant,

v. **Appeal No. 25-06-EQB**

DIRECTOR, DIVISION OF WATER AND WASTE MANAGEMENT, WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION

Appellee.

APPELLANT CLARKSBURG SANITARY BOARD'S MOTION FOR SUMMARY JUDGMENT

COMES NOW Appellant Clarksburg Sanitary Board ("Appellant" or "Board") by counsel, Marc C. Bryson, Marissa G. Nortz, and the law firm of Steptoe & Johnson PLLC, and respectfully moves, pursuant to West Virginia Code of State Rules §§ 46-4-5.2, 46-4-6.3, and 46-4-6.13, and Rule 56 of the West Virginia Rules of Civil Procedure, the West Virginia Environmental Quality Board ("Board") for summary judgment against Appellee West Virginia Department of Environmental Protection ("Appellee" or "WVDEP"). In support of this Motion, Appellant states as follows.

I. Relevant Factual and Procedural History

A. Factual History

In March of 2025, Appellee published draft West Virginia/National Pollutant Discharge Elimination System Permit No. WV0023302 ("Draft Permit") for public comment. Certified Record ("C.R.") at 000017-000090. Section F.3.a of the Draft Permit states:

> 3.a. To the extent provided by law, the discharges from the permittee's CSOs shall not cause or contribute to an in-stream excursion above any numeric or narrative criteria developed and adopted as part of the WV water quality standards.

C.R. at 000062. On April 17, 2025, Appellant commented on the Draft Permit, including its objections to § F.3.a:

> Section F.3.a of the permit states that, "To the extent provided by law, the discharges from the permittee's CSOs shall not cause or contribute to an in-stream excursion above any numeric or narrative criteria developed and adopted as part of the WV water quality standards."
>
> The Board asserts strongly that this language constitutes an "end-result" requirement that is not authorized by the Clean Water Act or the West Virginia Water Pollution Control Act as clearly held by the United States Supreme Court in *City and County of San Francisco v. EPA* (March 4, 2025). The Court has ruled that "Section 1311(b)(1)(C) does not authorize EPA to include "end-result" provisions in NPDES permits."
>
> "Section 1311(b)(1)(C) does not authorize permit requirements conditioning compliance on receiving water quality."
>
> ...EPA must set specific rules permittees must follow to achieve water quality goals."
>
> ...end-result requirements would negate the CWA's "permit shield" protecting complaint permittee's from liability."
>
> Accordingly, the Board requests that this language be removed from the permit. The general conditions included at Appendix A, Item 12 adequately address the compliance obligations of the permittee with regard to narrative water quality standards.

C.R. at 000122. Appellee rejected Appellant's objections and left the language of § F.3.a unaltered when it reissued Appellant's final Permit on April 29, 2025. C.R. at 000173. In its response to comments, Appellee asserted the following justification for its actions:

> Comment No. 8: Section F.3.a.
>
> The language in this section was previously evaluated by the USEPA, WVDEP, and MWQA when the language was developed many years ago. The agency believes the existing language is appropriate. However, please note the Administrative Order 8260 affords relief from this requirement while the LTCP is being implemented.

C.R. at 000124.

B. Procedural History

On May 28, 2025, Appellant filed the above-styled action challenging the reissued Permit and raised only one issue on appeal: whether Appellee acted appropriately in including § F.3.a. as an end-result requirement in Appellant's renewed permit in violation of the federal Clean Water Act and the West Virginia Water Pollution Control Act. C.R. at 000002-000012. This matter is currently scheduled for an evidentiary hearing before this Board on December 11, 2025.

II. Standard of Review

The West Virginia Legislature has authorized this Board to hear appeals of orders, permits, or official actions of WVDEP. W. Va. Code R. § 22B-1-7. Parties to an appeal before this Board may move for summary judgment or make other such motions as are necessary and appropriate. W. Va. Code R. § 46-4-5.3. In evaluating such motions, this Board has determined that the West Virginia Rules of Civil Procedure shall apply. W. Va. Code R. § 46-4-6.13 ("[T]he appropriate Rules of Civil Procedure will guide the appeals process before this Board.").

Rule 56(a) of the West Virginia Rules of Civil Procedure governs when summary judgment is appropriate:

> The court shall grant summary judgment if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.

The Supreme Court of Appeals of West Virginia has advised that little discretion is afforded to a trial court when there are no genuine issues of material fact: "Summary judgment is not a remedy to be exercised at the circuit court's option; ***it must be granted when there is no genuine dispute over a material fact.***" *Payne v. Weston*, 195 W. Va. 502, 506, 466 S.E.2d 161, 165 (1995) (emphasis added).

A dispute about a "material fact is genuine only when a reasonable jury could render a verdict for a nonmoving party if the record at trial were identical to the record compiled in the summary judgment proceedings." *Crum v. Equity Inns., Inc.*, 224 W. Va. 246, 253, 685 S.E.2d 219, 226 (2009). To create a genuine issue of material fact, "the party opposing summary judgment must satisfy the burden of proof by offering more than a mere 'scintilla of evidence' and must produce evidence sufficient for a reasonable jury to find in a nonmoving party's favor." *Pruitt v. W. Va. Dept. of Pub. Safety*, 222 W. Va. 290, 297-98, 665 S.E.2d 175, 182-83 (2008). Moreover, the nonmoving party must present evidence that contradicts the showing of the moving party by "pointing to specific facts demonstrating that there is a trial-worthy issue on a material fact." *Crum*, 685 S.E.2d at 227.

Here, there is no genuine issue of material fact and Appellee can produce no evidence demonstrating the presence of a material fact. Summary judgment in favor of Appellant is required.

III. Argument

A. Introduction

In March of 2025, the Supreme Court of the United States ("Court") rightfully concluded that end-result requirements in National Pollutant Discharge Elimination System ("NPDES") permits are prohibited under the federal Clean Water Act. The Court's decision is binding law and is to be applied nationwide by regulatory agencies implementing the NPDES permit program, and by courts and administrative boards tasked with implementing the Court's decision. The same stands true in the matter currently before this Board.

Section F.3.a of Appellant's Permit is an unlawful end-result requirement. It mandates that Appellant achieve a certain quality within its receiving stream without providing Appellant with the direct means for achieving such quality. Such end-result requirement deprives Appellant of the

highly valuable permit shield and impermissibly exposes Appellant to costly enforcement and third-party actions. This Board must order WVDEP to remove this unlawful provision and grant summary judgment in favor of Appellant.

B. Section F.3.a of Appellants' Permit is an unlawful end-result requirement prohibited by the Clean Water Act and West Virginia Water Pollution Control Act

Section F.3.a of Appellant's Permit contains an inappropriate and unlawful "end-result" requirement in violation of § 1311(b)(1)(C) of the federal Clean Water Act ("CWA") and West Virginia's incorporation of such federal provisions within the West Virginia Water Pollution Control Act ("WPCA"). C.R. at 000062. The Supreme Court of the United States' recent decision in *City and County of San Francisco, California v. Environmental Protection Agency*, 145 S.Ct. 704 (2025), confirms that such "end-result" requirements are contrary to the requirements of the CWA and a state's incorporation thereof. In *San Francisco*, the Court described an end-result requirement:

> [T]his case involves provisions that do not spell out what a permittee must do or refrain from doing; rather, they make a permittee responsible for the quality of the water in the body of waters into which the permittee discharges pollutants. When a permit contains such requirements, a permittee that punctiliously follows every specific requirement in its permit may nevertheless face crushing penalties if the quality of the receiving water falls below the applicable standards. For convenience, we will call such provisions "end-result" requirements.

San Francisco, 104 S.Ct. at 710. Thus, an end-result requirement is a requirement that a permittee achieve a desired result without providing the permittee with specific action/direction to achieve that result. Section F.3.a of Appellants' Permit meets this standard, as WVDEP has simply prohibited it from "caus[ing] or contribut[ing] to an in-stream excursion above any numeric or narrative criteria developed and adopted as part of the WV water quality standards." This

prohibition fails to provide Appellant with the direction needed to achieve compliance, as such receiving water quality may not be achieved even if Appellant executes compliance flawlessly.

In *San Francisco*, the Court faced a factually similar scenario as the one currently before this Board. There, the permittee is a combined wastewater system, and its permit contains two (2) end-result requirements, one of which mirrors the unlawful provision currently in Appellant's Permit:

> For many years, the Oceanside facility's NPDES permit was renewed without controversy, but in 2019, the two end-result requirements that San Francisco now challenges were added. The first of these prohibits the facility from making any discharge that "contribute[s] to a violation of any applicable water quality standard" for receiving waters.

Id. at 713 (internal citations omitted). The Court held that such end-result requirements are not authorized under the CWA:

> In sum, we hold that § 1311(b)(1)(C) does not authorize the EPA to include "end result" provisions in NPDES permits. Determining what steps a permittee must take to ensure that water quality standards are met is the EPA's responsibility, and Congress has given it the tools needed to make that determination. If the EPA does what the CWA demands, water quality will not suffer.

Id. at 720. In interpreting this holding, the Court further opined:

> We begin with the text of § 1311(b)(1)(C), which, as noted, requires a permit to contain, in addition to "effluent limitations" any more stringent *limitation*" that is "necessary to *meet*" certain "water quality standards" that are imposed under state law "or any other federal law or regulation"; and "any more stringent *limitation*" that is "required to *implement* any applicable water quality standard established pursuant to this chapter." (Emphasis added). All the italicized terms in the preceding sentence suggest that the most natural reading of § 1311(b)(1)(C) is that it authorizes the EPA to set rules that a permittee must follow in order to achieve a desired result, namely, a certain degree of water quality.
>
> We start with the term "limitation." As noted in the relevant context, a limitation is a "restriction or restraint imposed *from without* (as by law[])." A provision that tells a permittee that it must do certain specific things plainly qualifies as a limitation. Such a provision imposes a restriction "from without." But when a provision simply tells a permittee that a particular end result must be achieved and that it is up to the permittee to figure out what it should do, the direct source of restriction or restraint

> is the plan that the permittee imposes on itself for the purpose of avoiding future liability. In other words, the direct source of the restriction comes from within, not "from without."
>
> We do not dispute that the term "limitation" is sometimes used in a looser sense, but our ask is to ascertain what the term means in the specific context in question. And here, our interpretation of the meaning of the term "limitation" in § 1311(b)(1)(C) must take into account the way in which the term is used in the two preceding statutory subsections, §§ 1311(b)(1)(A) and (B). In both those provisions, the "limitations" are imposed directly by the EPA, and it is therefore natural to presume that the term has a similar meaning in § 1311(b)(1)(C). So, the use of the term "limitation" in §§ 1311(b)(1)(A) and (B) provides an opening clue that the EPA's interpretation of § 1311(b)(1)(C) may be wrong.
>
> The terms "implement" and "meet" point to the same direction. The implementation of an objective generally refers to the taking of actions that are designed "to give practical effect to and ensure of actual fulfillment by concrete measures." Section 1311(b)(1)(C) tells the EPA to impose requirements to "implement" water quality standards – that is, to "ensure" "by concrete measures" that they are "actual[l]y fulfill[ed]." ***Simply telling a permittee to ensure that the end result is reached is not a "concrete plan" for achieving the desired result. Such a directive simply states the desired result; it does not implement that result.*** Section 1311(b)(1)(C)'s other directive – that the EPA impose limitations that are "necessary to meet" certain water quality standards – is similar. The verb to "meet," in the sense operative here, means "to comply with; fulfill; satisfy" or "to come into conformity with." ***Thus, a limitation that is "necessary to meet" an objective is most naturally understood to mean a provision that sets out actions that must be taken to achieve the objective.***

Id. at 715-716 (internal citations omitted) (emphasis added). WVDEP's § F.3.a runs afoul of the Supreme Court's decision in *San Francisco*, as it impermissibly imposes an end-result requirement – that being a demand that Appellant's discharges meet in-stream water quality standards – without providing Appellant with "concrete measures" to achieve this demand. This provision cannot stand and must be removed from Appellant's Permit.

C. Appellant's Permit exposes it to serious noncompliance and civil penalties and nullifies the CWA's permit shield.

The Supreme Court's decision in *San Francisco* makes it clear that § F.3.a of Appellant's Permit is unlawful and must be removed. Failure to remove this provision from Appellant's Permit

exposes Appellant to significant noncompliance and civil penalty concerns, while also completely nullifying the purpose of the CWA's permit shield. These concerns were directly addressed by the Court in *San Francisco*:

> The first is the so-called "permit shield" provision, 33 U.S.C. § 1342(k), under which a permittee is deemed to be in compliance with the CWA if it follows all the terms of its permit. This protection is very valuable because violations of the CWA, even if entirely inadvertent, are subject to hefty penalties. The CWA imposes a regime of strict liability, [ ] and a party that violates a permit term may be fined up to $25,000[1] per day per violation. As San Francisco explains, it may take months to gather the information necessary to detect a drop below the applicable water quality standards, [ ] and after substandard water quality is detected, it may take some time to devise and implement appropriate corrective measures. Indeed, there may be occasions [ ] when there is nothing a permittee can do to bring about a prompt correction. For these reasons, the potential civil penalties for noncompliance can mount up and reach enormous sums.
>
> Because of the harsh penalties for violating the terms of a permit, the permit shield is invaluable. Because of it, a discharger that complies with all permit conditions can rest assured that it will not be penalized. ***But the benefit of this provision would be eviscerated if the EPA could impose a permit provision making the permittee responsible for any drop in water quality below the accepted standard. A permittee could do everything required by all the other permit terms. It could devise a careful plan for protecting water quality, and it could diligently implement that plan. But if, in the end, the quality of the water in its receiving waters dropped below the applicable water quality levels, it would face dire potential consequences***.

Id. at 717 (emphasis added). Appellant suffers the same exposure as the permittee in *San Francisco*, as Appellant could implement every action required of it and still face noncompliance should its receiving stream dip below applicable water quality standards. As this Board is aware, there are several watersheds within West Virginia that regularly fail to meet applicable water quality standards through no fault of permittees such as Appellant. If § F.3.a of Appellant's Permit is left unaltered, Appellant will be left to face regulatory and third-party enforcement actions

[1] While the CWA calls for a $25,000 per day per violation penalty for those who violate its terms, civil penalties under the CWA are subject to inflation, and as of January 8, 2025, civil penalties under the CWA are up to $68,445 per day per violation. See 40 C.F.R. Part 19 (Jan. 8, 2025).

through no fault of its own. This nullifies the CWA's permit shield, further supporting that provisions such as § F.3.a are contrary to the requirements of the CWA.

D. WVDEP's position on § F.3.a of Appellant's Permit is contradictory to established law.

While a review of the Court's decision in *San Francisco* makes clear that § F.3.a of Appellant's Permit must be removed, WVDEP's arguments in justification of the inclusion of this provision also prove meritless. In its response to comments, after WVDEP states that this language was approved for use "many years ago" in clear contradiction or consideration of the Court's precedent in *San Francisco*, WVDEP also attempts to assert that this language is not effective due to Appellant's Administrative Order No. 8260. C.R. at 000124 (However, please note that Administrative Order 8260 affords relief from this requirement while the LTCP is being implemented."). First, regulatory agencies such as WVDEP cannot impose unlawful terms and conditions within an NPDES permit and then simply attempt to circumvent those unlawful conditions through the issuance of an administrative order. The remedy for a flawed permit is a modification of that permit to remove the unlawful provisions, not the issuance of an administrative order. Second, a review of Administrative Order No. 8260 clearly shows that WVDEP's arguments fail, as nothing within this Order indicates that Appellant must not comply with the terms of § F.3.a, and in fact reveals the opposite.

Administrative Order No. 8260 simply notes that Appellant's compliance with § F.3.a is "uncertain" while reiterating a Permit requirement to implement a long-term control plan ("LTCP"):

> 14. Because the City of Clarksburg's compliance with Section F.3. of WV/NPDES Permit No. WV0023302, issued on the 19th day of May 2015, is uncertain, this Order requires the City of Clarksburg to:

C.R. at 000846. Nothing within this paragraph directly limits or delays Appellant's requirement to comply with § F.3.a of its Permit as asserted by WVDEP. Further, Order No. 8260 directly provides that its terms ***do not*** relieve Appellant from compliance with its Permit, including § F.3.a:

> Compliance with the terms and conditions of this ORDER shall not be construed to relieve the City of Clarksburg of the obligation to comply with the other terms and conditions of its WV/NPDES permit, or of any applicable Federal, State, or local law. Violation of this ORDER is a violation of West Virginia State Code, Chapter 22, Article 11, and may result in further enforcement action as outlined in the Act.

C.R. at 000847. Thus, nothing in Administrative Order 8260 relieves Appellant from compliance with § F.3.a and nothing within this Order prevents WVDEP or a third party from pursuing enforcement of this provision against Appellant.

Section F.3.a of Appellant's Permit has been deemed unlawful under the CWA as clearly detailed within the Supreme Court of the United States' March 2025 decision in *San Francisco*. This Board must order WVDEP to remove this unlawful provision from its Permit.

IV. Conclusion

The Court has made clear that end-result requirements in NPDES permits are unlawful under the CWA. As a reminder, the pertinent end-result requirement deemed unlawful in *San Francisco* stated:

> For many years, the Oceanside facility's NPDES permit was renewed without controversy, but in 2019, the two end-result requirements that San Francisco now challenges were added. The first of these prohibits the facility from making any discharge that "***contribute[s] to a violation of any applicable water quality standard***" for receiving waters.

San Francisco at 713 (emphasis added). The unlawful end-result requirement at issue here states:

> 3.a. To the extent provided by law, the discharges from the permittee's CSOs ***shall not cause or contribute to an in-stream excursion above any numeric or narrative criteria developed and adopted as part of the WV water quality standards.***

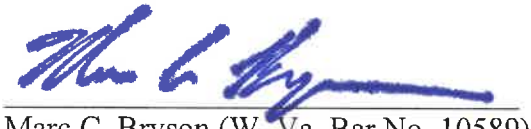
C.R. at 000062 (emphasis added). The unlawful end-result requirement from *San Francisco* factually mirrors the unlawful end-result requirement in Appellant's Permit. This Board must grant summary judgment in favor of Appellant and Order WVDEP to remove this unlawful language.

WHEREFORE, for the reasons set forth more fully above, Appellant Clarksburg Sanitary Board respectfully requests that this Board GRANT its Motion for Summary Judgment and ORDER WVDEP to remove § F.3.a from its Permit.

Respectfully submitted,

Clarksburg Sanitary Board

By Counsel:



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Appellee.

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of November, 2025, I served the foregoing "APPELLANT CLARKSBURG SANITARY BOARD'S MOTION FOR SUMMARY JUDGMENT" upon the following parties by depositing a true copy thereof via hand delivery, United States Mail, and/or electronic service, postage prepaid, in envelopes addressed to the following:

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