Energy

September 16, 2014

Aurora Energy Decision Deems Discharges Prohibited, Leaves Open Question of Permit Shield Applicability

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On September 3, 2014, the United States Court of Appeals for the Ninth Circuit issued its opinion in Alaska Community Action on Toxics v. Aurora Energy Services, LLC*, holding that the Clean Water Act General Permit for stormwater discharges prohibited the defendants' releases of coal and reversing the District Court's grant of summary judgment in favor of Aurora Energy. Although the District Court found that defendants benefited from the so-called "permit shield," the Ninth Circuit declined to decide the issue, concluding that the discharges in this case would fall outside the permit shield even if it did apply. The question of whether the permit shield defense applies to general permits remains open.*

Multi-Sector General Permit

The U.S. Environmental Protection Agency's Multi-Sector General Permit for stormwater is a National Pollutant Discharge Elimination System (NPDES) permit issued under the Clean Water Act (CWA). In some states, EPA is the CWA permitting authority and its General Permit applies. In delegated states, such as California, the state issues its own permit, typically modeled after EPA's General Permit. The primary difference between traditional, individual NPDES permits and the General Permit, as well as other types of general permits issued by EPA and the states, is that the latter are not granted to a particular discharger. Instead, a general permit is adopted in a manner similar to a regulation, and dischargers file a Notice of Intent (NOI) electing to be covered by and comply with the permit terms, which are the same for all covered facilities.

The federal and state General Permits prohibit the discharge of contaminated stormwater, and require industrial facilities[1] to institute certain controls, called Best Management Practices, to minimize exposure of stormwater to industrial activity. The General Permit, with limited exceptions, also prohibits non-stormwater discharges. Discharges other than stormwater usually must be covered by an individual NPDES permit.

The *Piney Run* Case and the Permit Shield Defense

The CWA provides that compliance with a NPDES permit constitutes compliance with the CWA[2], and thus offers a "permit shield" against potential CWA violations.

In *Piney Run Preservation Association v. County Commissioners of Carroll County*,[3] the U.S. Court of Appeals for the Fourth Circuit interpreted the CWA's permit shield to include any discharge that has been adequately disclosed to the permitting authority and that is not expressly prohibited by the permit. In *Piney Run*, the permit at issue was an individual permit, and the permit shield analysis is typically applied to individual NPDES permits.

The District Court Opinion in *Aurora Energy*

The first court to apply the permit shield defense to a stormwater general permit was the U.S. District Court for the District of Alaska. In *Aurora Energy*,[4] the Alaska Community Action on Toxics and the Sierra Club sued Aurora Energy Services, LLC and the Alaska Railroad Corporation, alleging that discharges of coal, falling into Resurrection Bay during overwater transfer to defendants' loading facility, violated the General Permit. The District Court found that the General Permit did not authorize the coal releases as a permissible non-stormwater discharge. Nevertheless, following *Piney Run*, the Court concluded that the permit shield defense applied, because the coal discharges were not specifically prohibited by the General Permit and were adequately disclosed to, and reasonably anticipated by, the permitting authority.[5] The District Court granted summary judgment for defendants, and plaintiffs appealed.

The Ninth Circuit Opinion

On appeal, the Ninth Circuit reversed the District Court, holding that the coal releases in fact were non-stormwater discharges prohibited by the express terms of the permit.[6] The court explained that the list of permissible non-stormwater discharges is exhaustive:

> Rather than leaving permittees to guess which discharges are excepted from the general prohibition, EPA explicitly refers them to the list in Part 1.1.3. Defendants' non-stormwater coal discharges are not on this list, thus they are plainly prohibited.[7]

The Ninth Circuit also briefly considered the permit shield defense and concluded that, even if it were available in a General Permit case, the permit shield would not cover the prohibited coal discharges. Accordingly, the court declined to decide whether *Piney Run* applies to General Permits:

[1] Industries covered by the General Permit are identified in 40 C.F.R. § 122.26(b)(14).

[2] 33 U.S.C. § 1342(k).

[3] 268 F.3d 255 (4th Cir. 2001).

[4] 940 F. Supp. 2d 1005 (D. Alaska 2013).

[5] 940 F. Supp. 2d at 1016–1022. In this case, the EPA was the permitting authority until 2009, when the Alaska Department of Environmental Conservation took over NPDES permitting.

[6] Case No. 13-35709 (Sept. 3, 2014).

[7] Case No. 13-35709 at 10.

> We would have reached the same result had we employed the permit shield analysis that has been applied to individual permits in decisions such as *Piney Run*. Under that analysis, a permittee is shielded from liability under the CWA if it (1) complies with the permit's express terms, and (2) discharges pollutants that were disclosed to and within the reasonable contemplation of the permitting authority during the permitting process. Here, the express terms of the General Permit prohibit defendants' non-stormwater coal discharges, thus defendants would not be shielded from liability. As our outcome would be the same regardless of whether *Piney Run*'s analysis applies to general permits, we need not decide whether it does.[8]

Implications

No Court of Appeals has determined whether the permit shield defense is available to facilities covered by the General Permit or other types of general permits. Because the Ninth Circuit did not decide that aspect of the lower court opinion, the District Courts' analysis in *Aurora Energy* is not necessarily overruled.

EPA's position, which is likely to be followed by state agencies, is that the permit shield defense may sometimes be available to General Permit holders. However, there must be "clear, unmistakable evidence in the administrative record that EPA, in fact, contemplated and anticipated the discharges in question when establishing the general permit's terms and conditions."[9] Therefore, facilities subject to the General Permit and other types of general permits should participate in the notice and comment process for permit issuance, and permittees should generally be aware of any aspects of the administrative record that are relevant to the scope of permit as it may apply at their particular facilities.

Both EPA[10] and California[11] recently revised their General Permits. California's General Permit is being challenged in litigation.[12] Depending on the outcome of that case, the administrative process may be reopened, presenting additional opportunity for the regulated community to build a record to support a permit shield defense under the General Permit.

[8] Case No. 13-35709 at 10 (citations omitted).

[9] *See* Amicus Brief of the United States in Support of Appellants (Mar. 28, 2014) at 32, n. 9. *See also* EPA Revised Policy Statement on Scope of Discharge Authorization and Shield Associated with NPDES Permits (Apr. 11, 1995) at 3 ("Section 402(k) also shields discharges of pollutants authorized under a general permit."), available here.

[10] Information about EPA's 2008 and proposed 2013 Multi-Sector General Permit is available here.

[11] State Water Resources Control Board Order No. 2014-0057-DWQ, available here.

[12] Alameda County Superior Court Case No. RG14724505 (filed May 8, 2014).

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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