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District Court Ruling Over Mine Discharges Could Narrow CWA Permit Shield

A federal court in Virginia has ruled that the fact a mining company did not know that its operations could potentially discharge selenium when it applied for a Clean Water Act (CWA) permit does not protect it from liability — a decision industry warns could narrow the so-called "permit shield" in the water law.

Courts have long upheld that CWA permitees are shielded from liability for otherwise unlawful discharges if they can show they comply with the terms and limits outlined in a lawfully-issued National Pollutant Discharge Elimination System (NPDES) permit. Specifically, EPA and the courts have interpreted the law's shield provision in section 402(k) to protect permittees if the otherwise unlawful discharges are believed to be within the "reasonable contemplation" of the permitting authority.

But the U.S. District Court for the Western District of Virginia, Big Stone Gap Division in *Southern Appalachian Mountain Stewards, et al., v. A&G Coal Corporation* held in a July 22 opinion and order that although it is "undisputed that A&G did not know or have reason to believe that it would discharge selenium from its mine site," section 402(k) protection does not apply because there is no evidence that the permitting authority, Virginia Department of Mines, Minerals and Energy (DMME), could have reasonably contemplated the selenium discharges.

"Even if A&G dutifully complied with the permit application requirements, the evidence simply does not support a conclusion that DMME contemplated what A&G did not," U.S. District Judge James Jones writes in the 19-page opinion.

The July 22 order grants environmentalist plaintiffs' motion for summary judgment and requires A&G within 30 days to submit to DMME an application for modification to its NPDES permit to address discharges of selenium, including in the application all monitoring results that are part of the court record. The order also requires the company to conduct daily tests for selenium from its outfalls and the water column of downstream tributaries at its site.

Environmental groups filed the litigation on May 3, charging that A&G violated the CWA because its discharge permit does not allow for any selenium releases, and that independent tests show that the company's operations are contributing to violations of Virginia's chronic water quality standard of 5 micrograms per liter (ug/L).

The litigation is one of a host of lawsuits environmental groups in Appalachia's coal region have brought in recent years seeking stricter controls for selenium from mountaintop coal mining (*Water Policy Report*, May 21, 2012).

The suits are aided by strict EPA water quality criteria from 1987 — the basis for most state water quality standards (WQS) — that the agency is yet to update, despite urging from industry, which charges that the current criteria cannot easily be met in an economically achievable way.

In *Southern Appalachian Mountain Stewards*, A&G argued that it was protected by section 402(k) of the CWA because it disclosed to DMME the pollutants it had reason to believe it would discharge from its bituminous coal operation, the Kelly Branch Surface Mine, and that DMME should have reasonably contemplated that selenium would be present in mining discharges because it is generally aware of elevated selenium levels in the area.

The company sought to supplement the record by adding a 1997 letter from EPA to DMME indicating that agency policy did not require testing for selenium because the department routinely analyzed mining metal discharges, which the court rejected on the grounds that A&G had ample opportunity to include the document in an earlier filing.

In a ruling that laid the parameters of the shield provision, the U.S. Court of Appeals for the 4th Circuit in 2001 held in *Piney Run Preservation Association v. County Commissioners of Carroll County, MD* that a permittee's discharge of a pollutant does not violate the CWA provided the express terms of the permit are obeyed and the pollutant was "within the reasonable contemplation" of the regulator at the time the permit was granted.

But Jones in the *Southern Appalachian Mountain Stewards* opinion notes that "[n]o court has yet addressed A&G's precise argument that the permit shield applies where a permittee did not disclose an unlisted pollutant because the permittee did not have a reason to know it would discharge the pollutant."

The court held, however, citing *Piney Run* and *In Re: Ketchikan Pulp*, a 1998 Environmental Appeals Board decision, that that A&G's argument is flawed because it hinges on its own knowledge of the pollutants it expected to discharged, whereas precedent indicates that the shield provision turns on whether the permitting agency contemplated the pollutant discharge and willfully opted not to set an effluent limit.

The ruling is already drawing attention from industry as potentially narrowing the scope of the permit shield provision.

Brian Glass, of the Pennsylvania law firm Warren Glass, writes in a July 31 blog post that "[w]hat's notable about this

decision, however, is that the court found that this principle applies even when a permittee neither knew nor had any reason to believe it would discharge the undisclosed pollutant at the time that it submitted its permit application."

Glass writes that the ruling should be instructive to NPDES permittees wishing to be covered by the permit shield to timely comply with the CWA's notification requirements as soon as it learns it is or will be discharging a pollutant not listed in a permit.

"Following the *Southern Appalachian Mountain Stewards* decision, this rule applies not only to a permittee making planned alterations to its facility that will change the nature of the pollutants that it discharges, but also, as was the case with A&G, to a permittee that learns that it is discharging a pollutant that it neither knew nor had any reason to believe that it would discharge at the time that it submitted its permit application," Glass writes. — *Bridget DiCosmo*