

Supreme Court Leaves Ninth Circuit Permit Shield Ruling in Place

The U.S. Supreme Court has left in place a Ninth Circuit Court of Appeals ruling that calls into question the scope of "permit shield" defense in Clean Water Act enforcement actions.

The permit shield under the Clean Water Act (33 U.S.C. § 1342 (k)) protects a National Discharge Elimination System ("NPDES") permit holder against liability for certain pollutant discharges that the permit does not explicitly mention, as well as for discharges of pollutants in compliance with explicit permit limits. The Second, Fourth, and Sixth Circuits have held that the permit shield extends to discharges of pollutants that were disclosed to the permitting authority and within the permitting authority's reasonable contemplation, even if those discharges are not expressly identified in the permit.

The petition to the Supreme Court, *Aurora Energy Services LLC v. Alaska Community Action on Toxics*, Case No. 14-1060, arose from alleged violations of the Multi-Sector General Permit for Industrial Activity at a rail-to-ship transfer facility in Alaska operated by Aurora Energy Services LLC and the Alaska Railroad Corporation. The General Permit covers storm water discharges associated with industrial activities in jurisdictions where EPA is the NPDES permitting authority.

The district court held the General Permit shielded the defendants from liability for discharges of coal from the transfer facility because the coal discharges were not specifically prohibited by the permit and were adequately disclosed to and reasonably anticipated by the permitting authority. In September 2014, the Ninth Circuit reversed the district court ruling, characterizing the coal releases as non-storm water discharges prohibited by the express terms of the permit.

In their petition to the Supreme Court, the defendants argued that the Ninth Circuit improperly narrowed the permit shield defense by holding that the general permit conditions prohibiting unauthorized discharges extend to non-storm water discharges that are not expressly listed in the permit. The defendants also noted that that the ruling conflicts with the holdings of three other circuits.

The Supreme Court's decision leaves General Permit holders in

states and territories subject to the Ninth Circuit's interpretation of the permit's language prohibiting unauthorized discharges. Those permittees should review their operations to ensure compliance with the Ninth Circuit's interpretation of the General Permit.

The petition sought review of *Alaska Community Action on Toxics v. Aurora Energy Services, LLC*, Case No. 13-35709 (9th Cir. Sept. 3, 2014).

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