



Fourth Circuit Upends NPDES Permit Shield

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The United States Court of Appeals for the Fourth Circuit recently upheld a lower court's determination that a West Virginia mining company was not shielded from liability by its NPDES permit. The mining company's permit incorporated a state regulation which stated that "discharges . . . are to be of such quality so as not to cause violation of applicable water quality standards." Environmental groups contended the company violated this permit provision because its discharge of ions and sulfate in mine drainage caused electrical conductivity in the stream to increase. In turn, this caused exceedances of narrative water quality standards and resulted in impacts to aquatic ecosystems.

In its defense, the mining company argued it disclosed the discharges of ions and sulfate when negotiating its permit renewal, and the State affirmatively chose not to impose any specific limit on conductivity. The company further contended it followed the provisions of its permit, even if conductivity resulted in violations of water quality standards, because it complied with the effluent limits in its permit. The district court disagreed and sided with the plaintiffs.

On appeal, the Fourth Circuit held that a permit shields its holder from liability as long as the permittee complies with the express terms of the permit. Here, the court noted that, although the permit said the company must "not cause violation of applicable water quality standards," the evidence showed that these standards were, in fact, exceeded. Therefore, the company's argument that it complied with its permit was flawed.

Those familiar with previous Fourth Circuit Clean Water Act cases may recall the *Piney Run* case. There, the Court held that permit holders who disclose their pollutants to the permitting agency and thereafter comply with the effluent limits the agency chooses to insert in the permit are shielded from liability for discharges of pollutants not listed in the permit. Why didn't the same reasoning apply here to shield the mining company? The Court said there was a critical difference. That difference was the mining company's permit expressly stated that the permittee must not cause a violation of water quality standards while the permit in *Piney Run* contained effluent limitations only. There was no general prohibition in the *Piney Run* permit against violating water quality standards. The Court said:

Nothing in *Piney Run* forbids a state from incorporating water quality standards into the terms of its NPDES permit. Rather, *Piney Run* held that a permit holder must comply with *all* the terms of its permit to be shielded from liability. The terms of [the mining company's] permit required it to comply with water quality standards. If [it] did not do so, it may not invoke the permit shield.

Although the decision is still subject to appeal, it's a wake-up call to all companies that discharge to surface waters within the jurisdiction of the Court (Maryland, Virginia, West Virginia, North Carolina and South Carolina). If the decision stands, it means that the permit shield many of these companies thought they had just got a lot smaller.

Ohio Valley Environmental Coalition v. Fola Coal Co., LLC, Case No. 16-1024 (4th Cir., Jan. 4, 2017).

Piney Run Preservation Ass'n v. Cty. Comm'rs, 268 F.3d 255 (4th Cir. 2001).

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