Surface Mine Shielded from CWA Liability. Permit Shield Defense Extended to General Permits in Sierra Club v. ICG Hazard (/full-blog/martin)

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Under the National Pollution Discharge Elimination System (NPDES) of the Clean Water Act (CWA), the federal government—and by delegation, state governments—can issue permits allowing the discharge of certain pollutants into the waters of the United States.[i] The permitting authority may issue individual permits, which apply to single dischargers,[ii] and general permits, which apply to a category of dischargers within a geographic area.[iii] Concurrently, the CWA provides that NPDES permit holders may be "shielded" from liability for CWA violations, even if those violations involve discharges of pollutants not explicitly mentioned in the permit.[iv]
While the permit shield has been used as a defense for individual permit holders, a recent Sixth Circuit case, Sierra Club v. ICG Hazard, LLC, a surface coal mine operator in Kentucky, had a Coal General Permit under Kentucky’s NPDES program. This permit included effluent limitations for several specific pollutants, but did not include selenium—a potentially toxic metal, harmful to aquatic wildlife at certain levels. Recognizing that ICG was in fact discharging selenium above the levels allowed under Kentucky’s water quality standards, the court nonetheless allowed the permit shield to prevent liability.

Permit shields can be seen as a hindrance to the protection of water quality because they allow industry to discharge certain pollutants without facing liability. While environmental groups are unhappy with the Sixth Circuit’s decision, given that ICG Hazard’s discharge of selenium will go unpunished, state permitting agencies may now be faced with a potentially heavy burden when issuing general permits. In looking at the difference between an individual permit and a general permit, the Sixth Circuit found that “a larger share of the responsibility for the information gathering process leading up to the development of a general permit falls on the permitting authority rather than on the permit applicants.” Essentially, for general permits, the permitting authority must contemplate all the pollutants that “may be discharged generally from polluters that may later be covered by the general permit.” Then, the permitting authority can set effluent limitations necessary to protect water quality.

State permitting agencies will need to be sure they are thorough in researching and identifying potential pollutants to include in general permits, so as to avoid any questions over whether or not the pollutant was contemplated and thus, the polluter shielded.

[viii] ICG Hazard, slip op. at 2-3.
[ix] ICG Hazard, slip op. at 9-10.
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