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Sixth Circuit Issues Important Clean Water Act Permit Shield Decision

On Tuesday, the Court of Appeals for the Sixth Circuit issued an important ruling in *Sierra Club v. ICG Hazard* that preserves the “permit shield” defense available to holders of certain wastewater discharge permits. Specifically, the Sixth Circuit upheld the district court’s decision that complying with a general permit under the Clean Water Act’s (CWA) National Pollutant Discharge Elimination System (NPDES) program shields the permittee from a citizen suit alleging unauthorized discharges of pollutants not explicitly addressed in the general permit. The permit shield provision of the CWA is a significant component of the permit program, and was designed to give permits finality and insulate permittees from regulatory changes during the permit’s term.

At issue in this case were allegations that a surface mining operation in Kentucky discharged selenium without a permit under the CWA. The operation was covered under Kentucky’s general permit for coal mining operations, which did not place any specific limitations on the discharge of selenium, but instead required permittees to monitor for selenium once during the permit term and report that result to the agency. General permits contain the same elements as individual permits, but are issued for a class of dischargers meeting certain specifications instead of a specific operation.

The district court held that the permit shield applies equally to general and individual permits, and that the scope of the permit shield extends to all pollutants in the “reasonable contemplation” of the permitting agency, not just the pollutants specifically addressed in the permit. The Sixth Circuit agreed, finding that the possibility of discharges of selenium from coal mining operations was within the “reasonable contemplation” of the permitting agency at the time it issued the general permit.

This decision has broad implications for companies in the numerous industries that require discharge permits for their operations, not just the mining industry. A collection of industry groups, including

those representing agriculture, timber, development, and water utility interests filed amicus briefs in the Sixth Circuit supporting a broad interpretation of the permit shield. A contrary ruling by the appeals court would have destroyed the finality that is central to the permitting scheme of the CWA. This decision highlights the need for all permittees, whether individual or general, to comply fully with the disclosure requirements when applying for a discharge permit in order to preserve the protections of the permit shield against a potential citizen suit or agency enforcement action.

For more information, please contact [Emily McKinney](#), [Stephen Samuels](#), or any other attorney in the Frost Brown Todd [Environmental Practice Group](#).

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