

Developments in Optimizing the Clean Water Act Permit Shield Authorization

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Agenda

- ▶ History of CWA Permit Shield
 - ❖ CWA NPDES Industrial Permits
 - ❖ Kodak
 - ❖ EPA Policy Statement
 - ❖ General Motors Corporation
 - ❖ Ketchikan Pulp
 - ❖ Piney Run
- ▶ Impact on NPDES Permit Applications
- ▶ LDEQ Storm Water Studies
- ▶ Thermaldyne Litigation
- ▶ Recent NGO Actions
- ▶ Path Forward



History of CWA Permit Shield – CWA NPDES Industrial Permitting Program

- ▶ Late 1960's saw rivers on fire from industrial discharges.
- ▶ 1972 Federal Water Pollution Control Act
 - ❖ First nationwide program for controlling discharges into navigable waters.
 - ❖ Required permit to discharge pollutants to water from a point source. This became the NPDES permitting system.
- ▶ 1977 Clean Water Act
 - ❖ Set schedules for achieving technology-based effluent limits.



History of CWA Permit Shield – CWA NPDES Industrial Permitting Program

- ▶ Upon establishment of NPDES permits, the scope of permit authorization has been in question.
- ▶ From 1977 to 1994, litigation on whether permits authorize only pollutants with limits versus authorizing any pollutants associated with the operations but only limits certain pollutants.
- ▶ So, what does a permit authorize?



History of CWA Permit Shield – Atlantic States Legal Foundation v. Eastman Kodak Co.

- ▶ In 1993, Atlantic States Legal Foundation argued that the CWA prohibited the discharge of any pollutant not specifically authorized under Kodak's permit.
- ▶ Federal Appeals Court ruled that the discharge of unlisted pollutants is not unlawful under the CWA. The court viewed permits as limiting the most harmful pollutants and leaving control of the remaining numerous pollutants to disclosure requirements.



History of CWA Permit Shield –

EPA Policy Statement on Scope of Discharge Authorization and Shield Associated with NPDES Permits

- ▶ In 1994, EPA stated that a “Permit Shield” is provided to certain pollutants, including:
 - ❖ Pollutants specifically limited in the permit or pollutants which the permit, fact sheet, or administrative record explicitly identifies as controlled through indicator parameters;
 - ❖ Pollutants for which the permit has not established limits or other permit conditions, but which are identified as present in facility discharges during the permit application process; and
 - ❖ Pollutants not identified as present, but which are constituents of waste streams, operations or processes that were clearly identified during the permit application process.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

041195

MEMORANDUM

SUBJECT: Revised Policy Statement on Scope of Discharge Authorization and Shield Associated with NPDES Permits

FROM: Robert Perciasepe
Assistant Administrator for Water

History of CWA Permit Shield –

Subsequent Litigation – People v. General Motors Corporation

- ▶ GM claimed that a 1993 release of cooling water to a concrete storm water drainage system was shielded from California Fish and Game Code regulation violations because the discharge was compliant with the facility NPDES permit.
- ▶ The state appeals court disagreed and affirmed the conviction.
- ▶ 40 CFR 122.5(c) states, “The issuance of a permit does not authorize...any infringement of State or local law or regulations.”



History of CWA Permit Shield – Subsequent Litigation – Ketchikan Pulp

- ▶ Company appealed a civil penalty in 1998 for permit violations regarding three discharges, including water treatment plant flocculants, aeration basin sludge, and a magnesium bisulfite spill from a digester.
- ▶ EPA Appeals Board ruled that Ketchikan did not make adequate disclosures during the permit application process.



History of CWA Permit Shield –

Subsequent Litigation – Piney Run Preservation Association v. County Commissioners of Carroll County, Maryland

- ▶ Preservation Association claimed in 2001 that a municipal POTW was not authorized to discharge heat from its outfall because the pollutant was not expressly mentioned in the NPDES permit. The permit contained a condition that prohibited any pollutant not expressly listed in the permit.
- ▶ Federal appeals court overruled District Court's ruling, because "...they complied with the discharge limitations and reporting requirements of the permit, and the discharges were within the reasonable contemplation of the permitting authority at the time the permit was issued."



Impact on NPDES Permit Application Preparation

- ▶ Optimizing permit shield became an exercise in fully characterizing outfall discharges for complete priority pollutant parameters.
- ▶ 40 CFR 122.42 requires notification to the permitting authority if any activity occurs under routine/frequent basis that causes discharge to exceed the highest of the following:
 - 100 µg/L;
 - 200 µg/L for acrolein/acrylonitrile; 500 µg/L for 2,4-dinitrophenol/2-methyl-4,6-dinitrophenol; and 1 mg/L for antimony; or
 - Five times the maximum concentration reported in the permit application.
- ▶ Non-routine/infrequent have higher notification thresholds.

LDEQ Storm Water Studies

- ▶ Around 2017, LDEQ began requiring permittees that detected pollutants above the MQL in storm water discharges to conduct studies to determine potential sources of the pollutants, even if the pollutants in question did not have the potential to exceed a water quality standard.
- ▶ This requirement caused many permittees to limit the scope of storm water outfall characterization to avoid conducting potential surveys.



Thermaldyne Litigation

- ▶ A company wanted to reclaim oil from oil refinery wastewater in Port Allen, Louisiana. It was discharging pollutants associated with support operations under general permits but sought authorization for treated process wastewater under an individual permit. They did not provide comprehensive analytical data with the permit application. LDEQ was ordered in 2019 by Louisiana Appeals Court to require company to provide “full listing of pollutants” before they could consider authorizing discharges under permit.



Recent NGO Comments to Draft LPDES Permits

- ▶ In 2024, NGOs commented on draft LPDES permit for a pet coke facility that many pollutants were reported to be “Believed Absent” but were reported on TRI reports as being discharged to water.
- ▶ NGOs demanded that the permittee update its permit application and demanded that LDEQ include technology-based limits for the pollutants reported on TRI reports.



Path Forward

- ▶ It is recommended to provide full characterization data for all priority pollutants, while also describing wastestreams, operations, and processes at the facility to the extent practicable.
- ▶ Review other media (air, groundwater, waste, etc.) at the time of water permit modification/renewal to identify other potential pollutants that may be discharged through outfalls.
- ▶ Evaluate other regulatory reporting (such as TRI) to maintain consistency of information reported to the agencies and the public.



Closing

I appreciate the opportunity to make this presentation to an organization that I have been part of for over 35 years. Please contact me if you have any questions or comments that you wish to discuss.

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