

Surface Mining Control and Reclamation Act: Federal Appellate Court Addresses Whether Clean Water Act Permit Shield Provides Protection Under Both Statutes



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The United States Court of Appeals for the Fourth Circuit (“Fourth Circuit”) addressed in a March 30th Opinion the scope of the federal Clean Water Act Permit Shield. See *Southern Appalachian Mountain Stewards, et al. v. Red River Coal Company, Incorporated*, No. 19-2194.

The question addressed was to what extent the Clean Water Act Permit Shield also provides protection from liability for an operator subject to equivalent federal Surface Mining Control and Reclamation Act (“Surface Mining Act”) standards.

A National Pollution Discharge Elimination System (“NPDES”) permittee violates the Clean Water Act by exceeding the discharge limits that the document explicitly provides. However, the Clean Water Act contains what is described as a “Permit Shield” which is found in Section 1342(k) of the statute. It provides NPDES permittees protection from liability for certain discharges of pollutants.

The purpose of the Permit Shield is to insulate permittees from changes in various regulations during the period of a permit. Further, it relieves them of having to address in an enforcement action the question of whether such permits are sufficiently strict. See *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 n.28 (1977).

To invoke the protection of the Permit Shield, the United States Environmental Protection Agency (“EPA”) and NPDES delegated states require that an applicant provide information of the facility. This would include specific information about the presence and quantity of a number of specific pollutants in the facility’s effluent. It would also include information on the various waste streams and operations contributing to the facility’s effluent, along with the treatment techniques.

EPA has stated in guidance that the availability of the Permit Shield is predicated upon the permittee’s full compliance with all applicable application requirements. Also, any additional information request made by the permit authority and any applicable notification requirements must be appropriately addressed.

The Surface Mining Act does not have a similar provision or shield. However, it contains a savings clause which states that nothing in that statute:

. . . shall be construed as superseding, amending, modifying, or repealing . . . [the Clean Water Act and] the state laws enacted pursuant thereto. 30 U.S.C. § 1292(a)(3).

The *Southern Appalachian* decision involved a citizen suit action alleging violations of the Clean Water Act, Surface Mining Act, and Resource Conservation and Recovery Act. The claims included alleged discharges of pollutants from point sources at the Red River Company's ("Red River") North Fox Gap Surface Mine in Virginia ("North Fox"). Such activities were stated to have been encompassed by a combined Clean Water Act and Surface Mining Act permit issued by Virginia.

The federal district court granted summary judgment to Red River holding that the Surface Mining Act claim was barred by the its savings clause. It held that where a Clean Water Act permit precludes liability under the Clean Water Act for certain activities, the Surface Mining Act's savings clause bars imposing liability under that statute for the same actions.

The relevant Virginia water quality standards were referenced as effectively being the same under both the Surface Mining Act and the Clean Water Act. Consequently, because the court found that Red River had complied with the relevant Clean Water Act permit requirement, it similarly dismissed the Surface Mining Act claims.

The Fourth Circuit on appeal upheld the lower court and stated that:

. . . liability may not be imposed under the Surface Mining Act for a specific discharge when the Clean Water Act's Permit Shield bars liability under the Clean Water Act for that same discharge.

It further stated that:

. . . although the Clean Water Act and the Surface Mining Act substantive water-quality standards are "not . . . inconsistent," *id.*, the saving clause does more than prohibit rules or regulations that are "inconsistent" with the Clean Water Act: it prohibits those that more broadly "supersed[e], amend[], modify[], or repeal[]" the Clean Water Act, 30 U.S.C. § 1292(a).

A copy of the Opinion can be downloaded [here](#).