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# Protecting Your "Permit Shield" Defense/Clean Water Act: Allan Gates (Mitchell Williams) Arkansas Environmental Federation Water Seminar Presentation

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My law firm colleague, Allan Gates, undertook a presentation at the March 29th Arkansas Environmental Federation Water Seminar titled:

*Protecting Your "Permit Shield" Defense ("Presentation")*

Allan's *Presentation* addressed Section 402(k) of the Clean Water Act which protects compliant National Pollution Discharge Elimination System ("NPDES") permittees from enforcement actions involving various provisions of the statute under certain specified circumstances.

Section 402(k) has often been denominated a "permit shield" or "shield provision." The United States Supreme Court has stated that the purpose of Section 402(k) is:

[T]o insulate permit holders from changes in various regulations during the period of a permit and to relieve them of having to litigate in an enforcement action the question whether their permits are sufficiently strict. In short, § 402(k) serves the purpose of giving permits finality.

*E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138, n.28 (1977).

The United States Environmental Protection Agency ("EPA") has previously taken the position that the availability of the 402(k) shield provision is predicated on:

1. Issuance of an NPDES permit
2. Compliance with all applicable application requirements
3. Satisfaction of agency information requests
4. Satisfaction of any applicable notification requirements

EPA has addressed the permit shield in prior guidance such as "Memorandum from Robert Perciasepe, Assistant Administrator for Water to Regional Administrators" (July 1, 1994). The EPA guidance also emphasized that the permit shield is available for certain pollutants resulting on a facility's processes and waste streams discharged from specified outfalls if they were identified during the application process. The agency has noted the three categories of pollutants could include:

1. those limited in the permit or which the permit, fact sheet, or administrative record explicitly identify as controlled through indicator parameters;
2. those for which the agency has not established limits or conditions but are identified in the permit application as present in facility discharges; and
3. those which are unidentified but which are constituents of waste streams or operations or processes identified during the permit application process.

In other words, EPA has seemed to indicate that the more detailed the NPDES permit application/associated data, the greater the protection provided by the shield provision.

Allan's *Presentation* is of particular relevance because of a number of significant judicial decisions interpreting the permit shield that have been issued in the last several years. They arguably provide more specificity on how this provision is interpreted.

Allan's *Presentation* notes that Section 402(k) reads as follows:

Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 309 [state and federal enforcement] and 505 [citizen suits] . . . with [CWA limitations on discharges] except any standard imposed under section 307 . . . for a toxic pollutant injurious to human health."

The *Presentation* addressed four key cases interpreting the Clean Water permit shield which included:

- Piney Run Preservation Assn v. County Commissioners, 268 F.3d 255 (4th Cir. 2001)
- Alaska Community Action on Toxics v. Aurora Energy Services, LLC, 765 F.3d 1169 (9th Cir. 2014)
- Sierra Club v. ICG Hazard, 781 F.3d 281 (6th Cir. 2015)
- Ohio Valley Env't'l Coalition v. Fola Coal, 845 F.3d 133 (4th Cir. 2017)

Each case is described in terms of the permit limits or conditions for which the shield is sought, the type of permit, disclosure of relevant facts and whether the shield defense was successful.

Allan's "Lessons Learned" from the four decisions include:

- Permit Shield Defense Applies to Both General and Individual Permits
- Disclosure of Relevant Information in Permit Application is Important
- Agency Consideration of Relevant Information Should be Documented
- Discharge Contemplated by Permit May be Narrowly Construed
- Boilerplate Language Should Be Carefully Examined

[A copy of Allan's \*Presentation\* can be downloaded here.](#)