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Alaska County Action on Toxics v. Aurora Energy Services, LLC

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***Alaska County Action on Toxics v. Aurora Energy Services, LLC*, 765 F.3d 1169 (9th Cir. 2014).**

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ABSTRACT

On September 3, 2014, the Ninth Circuit Court of Appeals reversed and remanded a district court decision that exempted non-stormwater discharges of coal into Alaska's Resurrection Bay from Clean Water Act liability. The Court of Appeals reasoned that defendants, Aurora Energy Services, LLC and Alaska Railroad Corp., were not shielded from liability under the Clean Water Act because National Pollutant Discharge Elimination System general permits unambiguously prohibit non-stormwater discharges of coal. The general permit lists eleven categories of authorized non-stormwater discharges, none of which include non-stormwater discharges of coal. Thus, the court concluded that the general permit plainly disallowed defendant's discharges.

I. INTRODUCTION

Alaska County Action on Toxics v. Aurora Energy Services, LLC,[1] concerns whether a Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity ("General Permit") under a National Pollutant Discharge Elimination System ("NPDES") general permit exempts non-stormwater discharges of coal from Clean Water Act ("CWA") regulation.[2] On appeal, the Ninth Circuit reversed and remanded the district court's grant of summary judgment for Aurora Energy Services, LLC, and Alaska Railroad Corp. ("Defendants") because it found the general permit did

[1] 765 F.3d 1169 (9th Cir. 2014).
[2] *Id*. at 1171.

not shield them from CWA liability.[3] The Court held that the plain language of the General Permit prohibited coal discharges by expressly listing eleven categories of acceptable non-stormwater discharges, none of which were non-stormwater discharges of coal.[4]

II. FACTUAL & PROCEDURAL BACKGROUND

Plaintiff environmental groups, Alaska Community Action on Toxics and the Alaska Chapter of the Sierra Club, brought a citizen suit under the CWA against Alaska Railroad Corp., owner of the Seward Coal Loading Facility ("Facility"), and the operator, Aurora Energy Services.[5] The Facility is located in Seward, Alaska, on the northwest shore of Resurrection Bay.[6] Alaska Railroad transports coal to the Facility by railcar and transfers it onto ships via a conveyor system.[7] The conveyer system extends over Resurrection Bay.[8] Plaintiffs alleged the system allowed coal to spill into the bay, thereby creating a non-stormwater discharge.[9] Defendants did not dispute the coal discharge, but instead argued that under the General Permit, the Facility was shielded from CWA liability for non-stormwater coal discharges.[10]

The District Court of Alaska granted summary judgment for Defendants.[11] Although the court found that "the General Permit does not, by its plain language authorize non-stormwater discharge of coal into Resurrection Bay," the court employed

[3] *Id*.
[4] *Id*. at 1172.
[5] *Id*. at 1171.
[6] *Id*.
[7] *Alaska Community Action on Toxics*, 765 F.3d at 1172.
[8] *Id*.
[9] *Id*.
[10] *Id*.
[11] *Alaska Community Action on Toxics v. Aurora Energy Services, LLC*, 940 F.Supp.2d 1005 (D. Alaska 2013).

the *Piney Run*[12] permit shield analysis in finding that the General Permit authorized the coal discharges.[13]

In order for a discharge to be shielded, the permit must not: "specifically bar" it; the discharge must be "adequately disclosed;" and the discharge must be "reasonably anticipated" by the permitting authority.[14] The court found that the General Permit did not specifically bar the coal discharge, and the Defendants adequately disclosed the discharges by including mitigation measures in a Prevention Plan submitted to the Environmental Protection Agency ("EPA") during the permitting process.[15] Moreover, the EPA reasonably anticipated the discharges, as evinced by a 2010 EPA inspection of the Facility, in which inspectors directed the Defendants to conduct certain acts with regard to the coal discharges to remain in compliance with their General Permit.[16] Thus, the court found the Defendants were shielded from CWA liability through the General Permit.[17]

III. ANALYSIS

The Ninth Circuit employed brevity in concluding the plain language of the General Permit does not cover non-stormwater coal discharge.[18]

The CWA prohibits the discharge of any pollutant from any point source into navigable waters, unless a NPDES permit is acquired.[19] A NPDES permit "shields" a

[12] *Piney Run Preservation Association v. County Commissioners of Carroll County, Maryland*, 268 F.3d 255 (4th Cir. 2001).
[13] *Alaska Community Action on Toxics*, 940 F.Supp.2d at 1019.
[14] *Id*. at 1017.
[15] *Id*. at 1019.
[16] *Id*. at 1020-1021.
[17] *Id*. at 1022.
[18] *Alaska Community Action on Toxics*, 765 F.3d at 1171.
[19] *Id*. (citing 33 U.S.C. § 1311 (2012)).

discharger from liability under the CWA "even if the [EPA] promulgates more stringent limitations over the life of the permit."[20] Defendant's permit at issue here is a Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity, which was first issued for the Facility in 2001.[21]

The Court began their analysis by looking at the general provisions of the General Permit, which state that non-stormwater discharges not authorized by a NPDES permit must be eliminated.[22] The General Permit then directs the reader to a section that lists eleven authorized non-stormwater discharges.[23] Non-stormwater discharges of coal are not among the authorized discharges in the general provisions.[24]

The Court rejected Defendant's argument that the authorized list is not exhaustive as evidenced by a different section authorizing additional discharges for timber products facilities.[25] The Court found that the structure of the General Permit places the Facility in Sector AD of the Permit, which is a category for those industries not already mentioned.[26] Other industry categories specify additional categories of non-stormwater discharge, but the Sector AD section does not, and is instead, governed by the permit's general provisions which do not allow for coal discharges.[27]

Defendant's second argument, that reading the generally authorized discharges in conjunction with sector-specific authorized discharges would be superfluous, also proved

[20] *Id*. (citing *Natural Resources Defense Council, Inc. v. County of Los Angeles*, 725 F.3d 1194, 1204 (9th Cir. 2013)).
[21] *Id*. at 1172.
[22] *Id*.
[23] *Alaska Community Action on Toxics*, 765 F.3d at 1172.
[24] *Id*.
[25] *Id*. at 1172-73.
[26] *Id*. at 1173.
[27] *Id*.

unpersuasive with the Court.[28] In interpreting a general permit as it would a regulation, which is read according to its natural and plain meaning, the Court held the Defendant's coal discharges are plainly prohibited.[29]

The Court mentions that the *Piney Run* permit shield analysis, which has only been applied to individual permits, would have resulted in the same finding because the Defendants did not comply with the express terms of the permit.[30]

IV. CONCLUSION

The Ninth Circuit held that Defendant's General Permit under NPDES did not authorize non-stormwater discharges of coal according to the plain language of the permit. In so holding, the Court did not undergo the Piney Run permit shield analysis because the coal discharges did not comply with the permit's express terms.

[28] *Id*. at 1173.
[29] *Alaska Community Action on Toxics*, 765 F.3d at 1172.
[30] *Id*. at 1174.