Strafford

*Presenting a live 90-minute webinar with interactive Q&A*

# Navigating the Clean Water Act Permit Shield Absent Clear Court Guidance

Understanding the Scope of the Shield, Leveraging the Defense, Minimizing Liability

TUESDAY, JUNE 16, 2015

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

David Buente, Partner, **Sidley Austin**, Washington, D.C.

Chris M. Hunter, Member, **Jackson Kelly**, Charleston, W.Va.

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 10**.

# *Tips for Optimal Quality*

FOR LIVE EVENT ONLY

*Sound Quality*

If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory, you may listen via the phone: dial **1-866-755-4350** and enter your PIN when prompted. Otherwise, please **send us a chat** or e-mail **sound@straffordpub.com** immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press *0 for assistance.

*Viewing Quality*

To maximize your screen, press the F11 key on your keyboard. To exit full screen, press the F11 key again.

# *Continuing Education Credits*

FOR LIVE EVENT ONLY

In order for us to process your continuing education credit, you must confirm your participation in this webinar by completing and submitting the Attendance Affirmation/Evaluation after the webinar.

A link to the Attendance Affirmation/Evaluation will be in the thank you email that you will receive immediately following the program.

For additional information about CLE credit processing call us at 1-800-926-7926 ext. 35.

# *Program Materials*

FOR LIVE EVENT ONLY

If you have not printed the conference materials for this program, please complete the following steps:

- Click on the ^ symbol next to “Conference Materials” in the middle of the left-hand column on your screen.
- Click on the tab labeled “Handouts” that appears, and there you will see a PDF of the slides for today's program.
- Double click on the PDF and a separate page will open.
- Print the slides by clicking on the printer icon.

# Navigating the CWA Permit Shield


Chris M. Hunter
Jackson Kelly PLLC
(304) 340-1203
chunter@jacksonkelly.com

David T. Buente, Jr.
Sidley Austin LLP
(202) 736-8111
dbuente@sidley.com

# Outline

I. Scope of the permit shield
   - A. Brief Overview of Structure of CWA
   - B. NPDES Permits: Individual vs. General
   - C. Section 402(k) Permit Shield

II. Recent appellate court decisions
   - A. *SAMS v. A&G*
   - B. *Alaska Community Action v. Aurora Energy*
   - C. *Sierra Club v. ICG Hazard*
   - D. Implications

III. USA's position on permit shield

IV. Using the permit shield

# Overview of the CWA

- 1972 Federal Water Pollution Control Act Amendments
  - Focus on industrial pipe discharges
  - Broad command: "discharge of any pollutant by any person shall be unlawful" without permit
  - Section 402: National Pollutant Discharge Elimination System ("NPDES") permits
    - Individual effluent limits for major pollutants
    - National standards, technology based
    - Water quality-based effluent limits in some circumstances

# NPDES : Individual vs. General

- Dischargers can obtain individual NPDES permits or general permits
- **Individual NPDES Permits:**
  - Facility-specific application for facility-specific permit
  - Listing of wastewater streams and pollutants by point source
  - Effluent limits for each pollutant at each outfall based on considerations of the receiving water body
  - Issued by state permitting agency
  - Public notice and comment before issuance
  - Five year permit terms; timely renewal application tolls term

# NPDES : Individual vs. General

- **General NPDES Permits:**
  - Covers entire category of facilities, activities, or areas
  - Generally stormwater management, not wastewater pipes
  - Written by EPA HQ and/or regions, published in *Federal Register*, adopted by states
  - No individualized review of facility, no individualized pollution controls
  - Discharger submits Notice of Intent to be covered – no individualized approval required from permitting agencies
  - Notice & comment on rule, not individual coverage
  - Must comply with monitoring and best management practices – usually no effluent limitations

# Section 402(k) Permit Shield

- Section 402(k): "Compliance with a permit … shall be deemed compliance with"
  - Sections 301 and 302: Effluent limitations
  - Section 307: Toxic & pretreatment effluent standards
  - Section 309: Government enforcement actions
  - Section 403: Ocean discharges
  - Section 505: Citizen suits
- Known as the "Permit Shield"

# Section 402(k) Permit Shield

- 1976 EPA Memo: "impossible to identify and rationally limit every chemical or compound" in discharges
- EPA's interpretation of statute in 1980 NPDES permit rule preamble:
  - Purpose is to provide permit holders with certainty regarding permit terms
  - Specificity – facilities will known what rules apply
  - Places burden on permit writers to correctly determine terms and limits, not permit holder

"[I]f the permit writer makes a mistake and does not include a requirement … in the permit document," the permit holder will not face enforcement actions

# Section 402(k) Permit Shield

- EPA Discharge Policy Statement (1994) – Permit Shield applies when:

(1) Pollutants specifically limited in permit; or

(2) Not limited but identified as "present" in application; or

(3) Not identified as present but are "constituents of wastestreams, operations, or processes that were clearly identified…."

- 1995 Revision: General permit discharges limited to "specified scope of a particular general permit"

# Section 402(k) Permit Shield

## Case Law Interpretations (Round One)

- *Atlantic States* (2d Cir. 1993): Permits do not prohibit discharges of unlisted pollutants (citizen suit)
- *In re Ketchikan Pulp* (EAB 1998): Permits focus on the "chief pollutants"
  - Unlisted pollutants within "reasonable contemplation of the permitting authority"
- Piney Run (4th Cir. 2001): Unlisted discharges are lawful if pollutant disclosed in permitting process
  - Disclosure in application means "reasonably contemplated"
  - Here, heat discharges reasonably contemplated by agency

# Recent Appellate Court Decisions

- *Southern App. Mtn. Stewards v. A&G Coal* (4th Cir.)
  - Citizen suit: selenium discharges from coal mine not disclosed in permit application
  - A&G's position:
    - Did not know it was present
    - Naturally occurring
    - Permitting agency should have known due to experience
  - Court: A&G ignored permit application section and EPA rules requiring testing for selenium
  - Failed both *Piney Run* prongs: no disclosure; no evidence of reasonable contemplation

# Recent Appellate Court Decisions

- *Alaska Community Action v. Aurora Energy*
- Citizen suit: coal debris from conveyor and operations discharged into Resurrection Bay
- NGOs' position:
  - General permit explicitly bars non-stormwater discharges unless specifically listed in permit table
- Aurora's position:
  - General permit does not list all prohibited discharges
  - Permitting agency knew of coal discharges through inspections and prior individual NPDES permit
  - Inspections found no general permit violations

# Recent Appellate Court Decisions

- *Alaska Community Action v. Aurora Energy*
- Court: General permit's language is controlling
  - Text bars all non-stormwater discharges unless specifically listed
  - That list does not include discharges of coal
  - Even under permit shield, permit holder must comply with terms of permit
    - Coal discharges are non-compliant
    - Permitting agency knowledge irrelevant here
  - "[W]e need not decide" if permit shield applies to general permits
  - *Cert.* denied June 8, 2015

# Recent Appellate Court Decisions

- *Sierra Club v. ICG Hazard* (6th Cir.)
  - Citizen suit: selenium discharges from coal mine not covered by general permit
  - ICG's position:
    - NOI does not require disclosure of pollutants
    - General permit required site-specific selenium sampling
    - Based on test results, Kentucky agency required more sampling
    - Therefore, permitting agency "contemplated" selenium discharges

# Recent Appellate Court Decisions

- *Sierra Club v. ICG Hazard* (6th Cir.)
- Sierra Club's position:
  - General permits are different
  - EPA Memo: limited to "specified scope"
  - All that is not specifically permitted is prohibited
- Court: ICG never req'd to disclose selenium in application
- Permit shield "contemplation" requirements met here, citing *Ketchikan*, *Atlantic States*, *Piney Run*
- Nothing in CWA or case law limits permit shield to only individual permits

# Implications

- Mixed results as NGOs directly challenge permit shield and defendants may overreach

- *A&G*: Failing to disclose pollutant specifically required by EPA rule for permit applications breaches permit shield
- *Aurora:* No decision on general permits
- *ICG Hazard*: Permit shield applies to general permits

# Implications

- Other courts are mixed
- *Coon v. Willet Dairy* (2d Cir.) – permit shield applies to general permits, rejecting citizen suit claims of permit violations

- *Sierra Club v. Fola Coal* and *OVEC v. Markford Coal* (SDW.Va) – water quality standards incorporated into NPDES permit
  - Violation of narrative WQS breaches permit shield

# USA's Position

- U.S. filed *amicus* brief in *A&G Coal* and *Aurora*

**USA's recent position on individual permits**

- Very restrictive view of the permit shield
- Pollutant must be disclosed to permitting authority
  - Must be in the administrative record for public to review
- Effectively precludes any other way for authority to "reasonably contemplate" presence of pollutants

# USA's Position

## USA's position on general permits

- Not available except for listed pollutants
  - General permit written with consideration of a broad range of facilities
  - Lacks site-specific, detailed disclosures on wastestreams and pollutants
  - Permitting authority does not review and approve NOI
  - Cannot "reasonably contemplate" site-specific factors
  - Permit writer has no discretion in setting permit terms
- Did not file *amicus* briefs in *ICG Hazard* or *Willet Dairy*

# Using the Permit Shield

- Availability in litigation depends on application
  - Disclosure or evidence of contemplation should be documented in application
- 40 CFR Part 122, Apps. A & D, Form 2C require identification of dozens of pollutants "expected to be present"
- Can be used for wastestreams, not just pollutants
  - Identify all wastestreams, seeps, leaks that can reach Waters of U.S.
- Know where your wastewater goes
  - If not discharge or evaporation, leaks or seeps may need identification

# Using the Permit Shield

- Discovery of new pollutants or discharges
  - Disclosure *with* application for permit amendment
  - Agreement with state not to amend permit may create citizen suit liability or federal enforcement
  - U.S. position: no "reasonable contemplation" outside of the administrative record
  - Potential liability while amendment or renewal pending is unknown
- Post-application disclosure to agency may create liability without renewal or amendment

# Using the Permit Shield

- "Prong 3" – permitting authority's knowledge that pollutants are present due to nature of operation – creates the most vulnerability
- From EPA 1994 guidance
  - Form 2C last revised in 1990
  - Guidance post-dates Form 2C's disclosure requirements
  - Should be available for pollutants not listed in Form 2C
- Opposed by both U.S. and NGOs
  - Must be specifically identified in the record
  - *A&G*: Permitting authority can't know more than applicant about applicant's own operations

# Using the Permit Shield

- Re-assess wastestreams for renewal applications
  - Cut-and-paste renewals create potential liabilities
- NGOs gunning for certain industries
  - Coal mines
  - CAFOs
  - Coal ash basins
  - Next logical step: all unlined impoundments, lagoons
- Looking for seeps, leaks, undocumented run-off
- CWA "Waters" rule – NGOs may be more aggressive pursuing GW as unpermitted discharge

# Conclusion


Chris M. Hunter
Jackson Kelly PLLC
(304) 340-1203
chunter@jacksonkelly.com

David T. Buente, Jr.
Sidley Austin LLP
(202) 736-8111
dbuente@sidley.com