

# The Permit Shield – what it is and what it isn't

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## Basics:

- The permit shield provision of the Clean Water Act provides that when a permit holder is in compliance with its NPDES permit, it is automatically in compliance with certain sections of the Clean Water Act for purposes of enforcement.
- In other words, the permit shield is a legal defense against enforcement, provided that certain conditions are met.

## § 644.051.16 RSMo:

- “The department shall implement permit shield provisions equivalent to the permit shield provisions implemented by the U.S. Environmental Protection Agency pursuant to the Clean Water Act, Section 402(k), 33 U.S.C. Section 1342(k), and its implementing regulations, for permits issued pursuant to chapter 644.”

33 U.S.C. § 1342(k):

- “Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health.”

## 33 U.S.C. § 1342(k):

- “for purposes of sections 1319 and 1365 of this title”
  - § 1319 is government enforcement action
    - includes administrative orders, civil and criminal actions, and penalties
  - § 1365 is the citizens’ suit provision
    - civil actions and penalties

## Missouri Clean Water Law equivalent sections:

- § 644.076.1 RSMo – civil actions and penalties
- §§ 644.076.2–.3 and 644.082 RSMo – criminal actions and penalties
- § 644.079 RSMo – administrative orders and penalties

## 33 U.S.C. § 1342(k):

- “shall be deemed compliance ... with sections 1311, 1312, 1316, 1317, and 1343 of this title”
  - § 1311 is the TBELs provision
  - § 1312 is the WQBELs provision
  - § 1316 is standards of performance
  - § 1317 is toxic and pretreatment effluent standards
  - § 1343 is ocean discharge criteria

## 33 U.S.C. § 1342(k):

- “shall be deemed compliance ... with sections 1311, 1312, 1316, 1317, and 1343 of this title”
  - What’s not on this list? To name a few:
    - § 1317 toxics injurious to human health (remember the express exception in § 1342)
    - § 1318 records and reports
    - § 1321 discharges of oil and hazardous substances
    - § 1345 unpermitted disposal of sewage sludge

## EPA memorandum from 1995:

- *available at* <https://www3.epa.gov/npdes/pubs/owm0131.pdf>
- “This policy statement describes EPA’s position on the scope of the authorization to discharge under an NPDES permit, and the shield thus associated with the permit authorization.”
- Issued in 1994, revised in 1995 to clarify that the information must be *in writing*.

## EPA memorandum from 1995:

- Individual NPDES permits
  - focus is on the permit and the information provided during the application process.
  - for industrial facilities, this includes information about the presence and quantity of specific pollutants in the effluent and all waste streams, and the wastewater treatment.
  - for domestic facilities, the application primarily focuses on the treatment processes.

## EPA memorandum from 1995:

- an individual permit provides authorization and therefore a shield for the following pollutants resulting from facility processes when discharged from permitted outfalls:
  - pollutants specifically limited in the permit
  - pollutants specifically identified in writing as present in facility processes in the permit application
  - pollutants not identified as present but which are constituents of wastestreams, operations, or processes that were clearly identified in writing in the application

## EPA memorandum from 1995:

- General NPDES permits
  - a general permit provides authorization to discharge all pollutants within the specified scope of that particular general permit, subject to all pollutant limits, notification requirements, and other conditions.
  - again, the emphasis is on the disclosures made in writing during the permit application process.

## Case law

- *Piney Run Preservation Ass'n v. Cnty. Commissioners of Carrol Cnty.*, 268 F.3d 255 (4th Cir. 2001) – the permit shield applies even for pollutants not covered by the permit if the unpermitted discharge was (1) disclosed in the application and (2) within the reasonable contemplation of the permitting authority.
- This has been adopted and applied by courts as the *Piney Run* two-prong test, but has not been cited by the 8th Circuit or Missouri district courts.

## Case law

- *Ohio Valley Envtl. Coal., Inc. v. Fola Coal Co.*, 845 F.3d 133 (4th Cir. 2017) – the permit shield defense is unavailable when the permittee is not in full compliance with all terms of its permit.
- Fola’s permit did not contain express limits on ionic pollution, measured as conductivity and sulfates, although this was disclosed in its renewal application.
- The permit incorporated a narrative condition that discharges shall not violate WQSs.

## Case law

- *OVEC v. Fola* (continued)
  - The court found that the cross-referenced permit condition lawfully converted WQSs into enforceable effluent limits, and determined that Fola's discharge caused WQS violations.
  - The Fourth Circuit distinguished *Piney Run* because that permit only regulated numerical effluent limits and did not require compliance with WQSs, and also because Fola was not in compliance with all terms of its permit.

## Case law

- *S. Appalachian Mountain Stewards v. A&G Coal Corp.*, 758 F.3d 560 (4th Cir. 2014) – the permit shield defense is unavailable when the permittee failed to disclose the existence of a pollutant even if the permittee was unaware that the pollutant was present in its discharge.
- The court found that A&G’s lack of knowledge was irrelevant; the key consideration was whether the permitting authority contemplated the discharge.

## Case law

- *Sierra Club v. ICG Hazard, LLC*, 781 F.3d 281 (6th Cir. 2015) – the permit shield applies to general permits in the same manner as individual permits; i.e., the court applied the *Piney Run* test and determined that the permit shield was applicable because (1) the permittee disclosed all required information, including a selenium sample, and (2) the permitting authority had knowledge *when it issued the general permit* that mines in the area could produce selenium.

## Takeaways:

- The permittee has the burden during the application process to disclose all relevant information in writing.
- But then the permit writer has the burden to identify and apply applicable regulations and incorporate all necessary and appropriate terms, conditions, and limitations into the permit. *See* 45 Fed. Reg. at 33,312.

## Takeaways:

- What is it? A simple reminder to:
  - 1. disclose all relevant operations and pollutants *in writing*.
  - 2. follow your permit like it's the law
    - (...because to you, it is.)
- What isn't it? A magic shield that makes you forever enforcement-proof
  - The Department can still revoke, terminate, or modify permits pursuant to § 644.056.4 RSMo.