

FEDERAL DISTRICT COURT HOLDS THAT WIND BLOWN COAL DUST INTO
WATERWAY DOES NOT VIOLATE CLEAN WATER ACT

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Alaska Community Action on Toxics v. Aurora Energy Services, LLC,
No. 3:09-cv-0025-TMB, 2013 WL 1614436 (D. Alaska March 28, 2013).

In recent weeks, several environmental groups have indicated their [intention to sue a national rail carrier, mining companies, and utilities](#) for alleged Clean Water Act violations. The groups' notice of intent to sue indicates they intend to allege unpermitted deposition of coal dust and coal chunks into federally-protected waterways in the State of Washington.

In a recent decision with potential significance for that litigation, the United States District Court for Alaska granted summary judgment for a coal loading facility and railroad on two of three claims made by plaintiff environmental groups.

As to the first claim, the court rejected the argument that the coal loading facility's stormwater permit authorized only stormwater discharges, and not discharges of coal from a conveyer belt and ship loading area directly into the adjacent waterway. The court held these discharges were lawful based on a "permit shield" defense. Under that defense, compliance with a National Pollutant Discharge Elimination System permit may insulate the permit holder from liability for certain other discharges not explicitly prohibited in the permit.

The court reasoned that the facility adequately disclosed its coal discharges to EPA, and EPA could reasonably have anticipated that these discharges would continue. The court concluded that the "totality of the evidence" proved that the regulatory agencies actively regulated the discharges of coal from the conveyer belt and ship loading area. Under those circumstances, defendants were protected from liability for the discharges.

As to the second claim, the court held that the defendants were not liable under the Act for airborne deposition of coal dust from coal piles into an adjacent waterway. The court noted that point source deposition typically involves a discrete conveyance. Moreover, EPA guidelines explain that atmospheric deposition is not normally regarded as point source pollution. The court then distinguished the plaintiff's case law, explaining that "coal piles and similar amassments" may be point sources if they travel to water through a point source.

Describing wind as "the polar opposite" of a "discernible, confined and discrete conveyance", the court held that transport entirely by wind of coal dust did not constitute a point source under the Act. The court distinguished the spraying of pesticides from a plane directly over water as a scenario involving a confined, discrete conveyance.

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