RECORD NUMBER: 13-2050

United States Court of Appeals

for the

Fourth Circuit

SOUTHERN APPALACHIAN MOUNTAIN STEWARDS, et al.,

Appellees,

– v. –

A & G COAL CORPORATION,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA AT BIG STONE GAP

OPENING BRIEF OF APPELLANT

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 13-2050 Caption: Southern Appalachian Mountain Stewards, et al v. A&G Coal Corporation

Pursuant to FRAP 26.1 and Local Rule 26.1,

A & G Coal Corporation
(name of party/amicus)

who is appellant, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☑ YES ☐ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

Southern Coal Corporation (is the parent)

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: _____ Date: Aug 27, 2013

Counsel for: A & G Coal Corporation

CERTIFICATE OF SERVICE

****

I certify that on Aug 27, 2013 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

_____ Aug 27, 2013
(signature) (date)

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JURISDICTIONAL STATEMENT

The order appealed is not "final" in that the Appellant A & G Coal Corporation is ordered to complete a number of tasks before damages are fixed by the District Court. The Order appealed includes an injunction that requires, among other actions, that Appellant perform certain water quality monitoring, report the results of that monitoring to Virginia regulatory authorities, and submit a request for amendment to the Virginia regulatory authorities. Title 28 U.S.C. § 1292(a)(1) expressly authorizes appeal of the District Court's grant of an injunction in an otherwise interlocutory order. Also, the Order granted summary judgment to Appellees and denied it for Appellant, thus resolving legal arguments presented by the parties.

STATEMENT OF ISSUES

1. Did the District Court err by granting Summary Judgment when it held that an NPDES application must specifically list an element (here, selenium) in order for the "permit shield" to protect such discharges by the applicant (even when no evidence indicates the applicant knew or should have known that selenium may be discharged within the permitted area)?

2. Did the District Court err by granting Summary Judgment when it held that an NPDES application must specifically list an element (here, selenium) in order for the "permit shield" to protect such discharges by the applicant (even when such element is part of the wastestreams, operations or processes identified in the permit application and supporting administrative record)?

3. Did the District Court err by granting Summary Judgment when it held that the permit shield protections of the NPDES permit would not apply despite a lack of evidence that selenium was not within the permitting agency's reasonable contemplation when it issued the NPDES permit?

4. Did the District Court err by disallowing for consideration during its summary judgment deliberations a publicly available document (between two governmental agencies) that would evidence the permit shield should apply – and thus summary judgment should have been granted for A&G or, at a minimum, it should not have been granted to appellees – because it further shows selenium was in the reasonable contemplation of the permitting agency when it was issued?

STATEMENT OF THE CASE

This appeal involves the application of the "permit shield" provided to Clean Water Act (CWA) permittees by § 402(k) of the CWA, 33 U.S.C. § 1342(k). *See Piney Run Preservation Ass'n v. County Comm'rs of Carroll County, Md.*, 268 F.3d 255 (4th Cir. 2001), *cert. denied*, 535 U. S. 1077 (2002).

Piney Run observed that an NPDES permit "shield[s] its holder from liability under the Clean Water Act as long as (1) the permit holder complies with the express terms of the permit and with the Clean Water Act's disclosure requirements and (2) the permit holder does not make a discharge of pollutants that was not within the reasonable contemplation of the permitting authority at the time the permit was granted." *Id*. at 259. For reasons set forth below, the permit shield implements valuable policies to permittee, and the permitting agency, alike.

The importance of the permit shield is particularly striking where a natural element such as selenium (at issue in this case), is exposed through mining activities. It is no surprise, therefore, that the U.S. Environmental Protection Agency maintains that the permit shield applies where a pollutant is identified in

the permit application, or is part of waste streams, operations or processes that are identified in the permit application and supporting administrative record.

Because the presence of naturally-existing elements may be unknown to permit applicants (and thus cannot be "actually disclosed" in the manner contemplated by the district court) such pollutants may be considered by EPA as a "constituent[] of wastestreams, operations or processes" identified in the permit application and supporting administrative record. *See infra* at 11 (discussion of EPA policy). For such elements, like selenium, the permit shield protections apply.

The District Court's legal reading of *Piney Run*'s "first prong" erodes the permit shield, by requiring that "a permittee must have actually disclosed a pollutant in its permit application in order to avail itself of the permit shield as to that pollutant." J.A. 511. This narrowing of the availability of the permit shield is exacerbated by the fact that the Record contains no evidence appellant knew or should have known selenium was an element that may be discharged by its operations and thus should have been listed on the application.

Furthermore, the District Court misapplied *Piney Run*'s "second prong" because no evidence indicates selenium was not within the permitting agency's reasonable contemplation when it issued the permit; by contrast, the only information (both in the Record, and not, *see infra* discussing appellant's effort to

supplement the Record) suggests selenium was within the permitting agency's reasonable contemplation and, thus, summary judgment for appellees was inappropriate.

STATEMENT OF FACTS

In this case, Appellees allege that A&G has violated the CWA by discharging the element selenium in water runoff from A&G's surface coal mining operation, the Kelly Branch Surface Mine (the "Site") without a permit.

Selenium is a naturally existing metal; through coal mining, once waste rock is exposed to water (such as rainfall) selenium will "leach or migrate from the rock and enter the environment." See http://water.epa.gov/drink/contaminants/basicinformation/historical/upload/Archived-Consumer-Fact-Sheet-on-Selenium.pdf <visited December 29, 2013> ("selenium is a metal found in natural deposits as ores containing other elements") see http://water.epa.gov/scitech/swguidance/standards/criteria/aqlife/selenium/index.cfm ("Selenium is a naturally occurring element that is nutritionally essential . . . . [b]eing a natural element, selenium can be found throughout the environment."). In other words, selenium can be considered a component of the waste streams, operations and processes of lawfully permitted coal mining in southwest Virginia.

Coal mining operations are subject to several environmental laws including the CWA, which generally prohibits the discharge of pollutants from point sources to certain surface waters unless the discharge is done under authority of a permit issued under the national pollutant discharge elimination system ("NPDES"). See 33 U.S.C. § 1342.

Virginia has been delegated authority and responsibility by the EPA to administer the federal NPDES permit program. Accordingly, the state (through its Department of Environmental Quality ("DEQ") or through its Department of Mines, Minerals, and Energy ("DMME") for surface coal mines) issues and enforces NPDES permits in Virginia. Permits issued under this state's program are known as "VA/NPDES" permits.[1]

When A&G applied for a VA/NPDES permit for operations at its surface coal mine known at the Site, it disclosed "that it expected to discharge certain pollutants from its bituminous coal mining operation. Selenium was not among the pollutants A&G disclosed in its application." J.A. at 500 (decision below). The District Court's Order acknowledges that "[i]n this case, it is *undisputed* that *A&G did not know or have reason to believe* that it would discharge selenium from its

[1] EPA has lawfully delegated this authority to the Virginia DMME. *See* 33 U.S.C. §§ 1342(a)(1), (5), 1342(b); *see*, *e.g.*, *United States v. Cooper*, 482 F.3d 658, 660-61 (4th Cir. 2007) (DMME is responsible for permitting discharges from coal surface mining operations. *See* Va. Code § 45.1-254.).

mine site." See J.A. at 512 (decision below).

Although no evidence indicates A&G had reason to believe selenium would be discharged from the Site, EPA and DMME "have been aware for quite some time that streams within the Callahan Creek watershed [which is the location of the Kelly Branch mine] . . . had locations that exceeded the in stream chronic water quality limit for Selenium." J.A. at 84. Notwithstanding this information, DMME did not impose selenium limits in the Permit for the Site and, instead, in November 2010, DMME approved the application and issued to A&G VA/NPDES Permit No. 0082052 ("the Permit"). *See* J.A. at 500. Very shortly after the summary judgment oral argument, A&G moved to provide a 1997 letter that would further solidify that these permitting agencies were aware selenium may be discharged from surface mining operations in the area; however, the District Court erred when it denied that motion.

After the issuance of the permit, Selenium was detected in discharges from the Kelly Branch site.[2] Appellees filed suit, and the District Court denied A&G's motion for summary judgment which had advanced the permit shield defense and, instead, awarded appellees summary judgment (which featured the same ruling,

[2] There is no evidence that the discharges violated the EPA's "acute" selenium criterion of 20 μg/L (micrograms per liter (or parts per billion) and no evidence that discharges have ever caused a *violation* of the 5 ug/L chronic water quality criterion. *See* A&G's Response Opp. Pls. Mot. Summ. J. (J.A.at 449, n.3).

denying the permit shield defense, but in the context of the standard applicable to the Rule 56 movant).

SUMMARY OF ARGUMENT

The CWA "permit shield" fosters reliance by a permittee and the regulatory agency. Here, summary judgment in favor of Appellees failed to apply the permit shield protections. Those protections apply to the selenium discharges at issue because (1) A&G adequately followed applicable disclosure requirements because it neither knew nor had reason to believe that it would discharge selenium, (2) the selenium discharges are part of A&G's waste streams, operations, and processes in writing in its permit application; and/or because (3) discharges of selenium were reasonably anticipated by, or within the reasonable contemplation of, the permitting authority.

ARGUMENT

A. Applicable standard of review.

This Court reviews a grant of summary judgment *de novo*, without deference to the trial court. *See Perini Corp. v. Perini Construction, Inc.*, 915 F.2d 121, 123 (4th Cir. 1990) (citation omitted). Rule 56 of the Federal Rules of Civil Procedure requires the moving party to demonstrate that there are no genuine issues of material fact to be entitled to summary judgment. *See* Fed. R. Civ. P. 56(a). A non-movant "must present affirmative evidence in order to defeat a

properly supported motion for summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986) (emphasis added).

An issue of material fact is one which would enable a reasonable jury to find in favor of the non-moving party in accordance with the substantive law of the suit. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Liberty Lobby*, 477 U.S. at 248. "[T]he mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient" to defeat a motion for summary judgment. *Id.* at 252.

B. The NPDES Permit Shield.

1. *Clean Water Act – NPDES Background*

The modern CWA originated from amendments to the Federal Water Pollution Control Act. In 1965, the existing Federal Water Pollution Control Act was amended to require states to develop standards for water quality within their boundaries and submit them for federal approval. *See* S. Rep. No. 92-414, 92nd Cong., 2d Sess. 2 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3669 ("Senate Report"). In 1972, Congress amended the Federal Water Pollution Control Act, declaring its intent to change the enforcement mechanism to effluent limitations due to the inadequacy of enforcement through water quality standards. *See id*. at 3675. Under the amended statute, "the basis of pollution prevention and

elimination [is] the application of effluent limitations." *Id*. (emphasis added). Following passage of the amendments, the remedy for an in-stream water quality violation would be tightening of permit limitations, not filing an enforcement action. *Id*. at 3676.

The "discharge control mechanism" referred to in the Senate Report quoted above was the use of effluent limitations imposed through inclusion in NPDES permits. Thus, for purposes of enforcement, the CWA now focuses on what an industry discharges into a navigable water, not the condition of the navigable water receiving the discharge. The United States Supreme Court has explained how the enforcement approach changed in 1972:

> An NPDES permit serves to transform generally applicable effluent limitations and other standards—including those based on water quality—into the obligations . . . of the individual discharger, and the Amendments provide for direct administrative and judicial enforcement of permits. . . . In short, the permit defines, and facilitates compliance with, and enforcement of, a preponderance of a discharger's obligations under the Amendments.

EPA v. California ex rel. State Water Resources Control Bd., 426 U.S. 200, 204-06 (1976) (footnotes and citations omitted; emphasis added). Thus, the primary enforcement mechanism under the CWA is the NPDES permit program found at 33 U.S.C. § 1342. *See Arkansas v. Oklahoma,* 503 U.S. 91, 101 (1992); *see also* 33 U.S.C. § 1311(a) ("Except in compliance with this section and sections 302,

306, 307, 318, 402, and 404 of this Act, the discharge of any pollutant by any person shall be unlawful.").

Under the NPDES program, unless a "general permit" is applicable, a person anticipating a discharge as a result of its activities must apply for an individual permit to the permitting agency with jurisdiction over water quality. 40 C.F.R. §122.21(a).

EPA established categorical effluent limitations for coal mining point sources for the pollutants iron, manganese, total suspended solids, and pH at 40 C.F.R. Part 434; however, Part 434 contains no effluent limitation for selenium. As the EPA developed the Effluent Limitations Guidelines for the Coal Mining Point Source Category on which Part 434 is based, EPA expressly rejected imposing effluent limitations for selenium and a variety of other metals and, instead, decided to rely on Best Practicable Control Technology ("BPT") that considers a balance of total cost of applying the technology against the effluent reduction. *See, e.g.*, 46 Fed. Reg. 3149 (Jan. 13, 1981) and 47 Fed. Reg. 45,383 (Oct. 13, 1982).

2. *Permit Shield*

"The permit shield provision, 33 U.S.C. § 1342(k), specifies that 'compliance with a permit issued pursuant to this section shall be deemed in compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title.'" *Piney Run*, 268 F.3d at 267.

Because the CWA does not, however, "explicitly explain the scope of permit protection," *id*., reference to policy, EPA and otherwise, is particularly germane.

The policy behind the permit shield cannot be understated: "The purpose of § 402(k) seems to be to 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).

According to the EPA, a permit allows a permittee to focus its attention on operations consistent with the permit and not on something not required by the permit or CWA. *See* 45 Fed. Reg. 33,290, 33,311-33,312 (May 19, 1980). The level of certainty provided by the shield is even more valuable where "pollutant" is defined so broadly under the CWA. *See* 33 U.S.C. § 1362(6); *Piney Run*, 268 F.3d at 271 ("This definition is extremely broad, covering innumerable individual substances….").

The permit shield "*places the burden on permit writers* rather than permittees to search through the applicable regulations and correctly apply them to the permittee through its permit. This means that a permittee may rely on its EPA-issued permit document to know the extent of its enforceable duties under the appropriate Act…." *Id*. at 33,312 (emphasis added). "Thus, if the permit writer

makes a mistake and does not include a requirement of the appropriate Act in the permit document, the permittee will neither be enforced against nor have its permit modified or revoked and reissued as a result …." *Id*.

With that background in mind, the *Piney Run* Court concluded that an NPDES permit shields the permittee "from liability under the Clean Water Act as long as (1) the permit holder complies with the express terms of the permit and with the Clean Water Act's disclosure requirements and (2) the permit holder does not make a discharge of pollutants that was not within the reasonable contemplation of the permitting authority at the time the permit was granted." *Id*. at 259. In reaching its ruling, *Piney Run* relied in part on an Environmental Appeals Board decision, *In re Ketchikan Pulp Co.*, 7 E.A.D. 605, 1998 WL 284964 (EPA E.A.B. 1998), and an EPA Policy Memorandum that reflects similar principles. *See Piney Run*, 268 F.3d at 268 n. 11.

The EPA Policy Memorandum relied upon by *Piney Run* had minimal changes made in 1995 and that 1995 memorandum is in the Record. *See* J.A. at 329. The (1995) EPA Policy Statement provides that

> A permit provides authorization and therefore a shield for the following pollutants resulting from facility processes, wastestreams and operations that have been clearly identified in the permit application process when discharged from specified outfalls:
>
> ...
>
> 2) Pollutants for which the permit authority has not established limits or other permit conditions, but which are specifically

> identified in writing as present in facility discharges during the permit application process and contained in the administrative record which is available to the public; and
>
> 3) Pollutants not identified as present but which are constituents of wastestreams, operations or processes that were clearly identified in writing during the permit application process and contained in the administrative record which is available to the public.

See J.A. at 330-331.

Relatedly, the Court's reliance on *Ketchikan* involved similar principles:

> [A]s long as a permit holder complies with the CWA's reporting and disclosure requirements, it may discharge pollutants not expressly mentioned in the permit…. The only other limitation on the permit holder's ability to discharge such pollutants is that the discharges must be reasonably anticipated by, or within the reasonable contemplation of, the permitting authority.

See Piney Run, 268 F.3d at 268 (citing *Ketchikan*).

C. The District Court erred by granting summary judgment when *no* evidence indicates A&G's permit application failed to satisfy CWA's disclosure-related requirements; accordingly, the permit shield defense should have applied and legally barred Appellee's claims.

Where a pollutant is not listed in a permit but a permittee complies with the disclosure requirements related to the quality of the waste stream, the permit shield of section 1342(k) applies. *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 12 F.3d 353, 357 (2d Cir. 1993) ("Once within the NPDES or [state permit] scheme, therefore, polluters may discharge pollutants not specifically listed in their permits so long as they comply with the appropriate reporting requirements

. . . ."). As indicated, *Piney Run* speaks to the NPDES application and its relation to the "first prong" of permit shield protections.

An applicant must disclose pollutants, such as selenium, "if [the applicant] knows or has reason to believe that they will be present in the discharges from any outfall." *See* 40 C.F.R. § 122.21(g)(vi)(B) (emphasis added.)[3] *See also* 40 C.F.R. § 122.21(k)(5)(iii)(A) and 9 VAC 25-31-100(K)(5)(c)). Many pollutants, however, such as the selenium at issue in this case, are natural elements. *See supra* at 4 (discussion on selenium). It is difficult to imagine that an applicant must disclose every possible pollutant in its waste stream before permit shield protections could apply. This logistical impossibility was recognized by the Second Circuit Court of Appeals in *Atlantic States*:

> [EPA] does not demand even information regarding each of the many thousand chemical substances potentially present in a manufacturer's wastewater because it is impossible to identify and rationally limit every chemical or compound present in a discharge of pollutants. Compliance with such a permit would be impossible and anybody seeking to harass a permittee need only analyze that permittee's discharge until determining the presence of a substance not identified in the permit.

Atlantic States Legal Found., Inc. v. Eastman Kodak Co., 12 F.3d 353, 357 (2d Cir. 1993) (internal references and citations omitted).

[3] Section 122.21(g) is made applicable to state NPDES programs by 40 C.F.R. § 123.25(a)(4).

Thus, the standard is *not* "did A&G disclose selenium in its application?" The standard, instead, is "did A&G know or have reason to believe that selenium would be discharged such that it should have been disclosed in its application?"

The answer to that question is no, and the Record contains no evidence indicating to the contrary. Indeed, the District Court's Order acknowledges that "[i]n this case, it is *undisputed* that *A&G did not know or have reason to believe* that it would discharge selenium from its mine site." J.A. at 512 (decision below) (emphases added). Further, Appellees wrote that they "have no claim that Clean Water Act application disclosure requirements were violated, and in fact know of no such claim." *See* PLS. [APPELLEES] MEM. OPP. DEF. [APPELLANTS] MOT. SUMM. J., D.E. no. 59 at 3.

Accordingly, the first prong of the permit shield, as pronounced in *Piney Run*, is satisfied, and the district court erred by holding "that a permittee must have actually disclosed a pollutant in its permit application in order to avail itself of the permit shield as to that pollutant." J.A. at 511. Not only should A&G have been afforded the benefit of the permit shield and thus had summary judgment awarded in its favor but, at a minimum, this should have prevented summary judgment in favor of appellees.

The District Court's adoption of Plaintiffs' legal construction of the first prong would require a permit applicant to disclose every single pollutant on its

application, even if the applicant has no knowledge or even reasonable belief that such pollutants will be discharged from its operations, to avail itself of the permit shield. That is logically impossible, and contrary to the applicable regulations and relevant case law. And, if an applicant's permit shield applies only when the application lists all potentially discharged pollutants, the "second prong" of Piney Run – which asks what was in the agency's reasonable contemplation – would be surplusage. *See Piney Run*, 268 F.3d at 259, 268. If the shield only applies to pollutants "actually disclosed," as the District Court held in this case, permitting agencies would *always* contemplate the presence of such pollutants and the second element of the shield would be meaningless.

Here, too, A&G adequately disclosed the nature of its discharges to DMME in its application. *See* J.A. at 62; *compare Ketchikan*, 7 E.A.D. at 625 and *Atlantic States*, 12 F.3d 535 (failure to adequately disclose). Here, A&G fully disclosed the nature of its discharges for the permit being sought regarding "bituminous coal mining." *See* J.A. at 62. It clearly disclosed that surface water runoff sources and groundwater runoff may occur as a result of coal loading areas, coal stockpiles, haul roads, and surface mines. *Id.* It also provided various numerical data requested by the application. *Id*. Due to these critical disclosures, A&G differs from *re Ketchikan Pulp Co.*, where the permittee failed to disclose important aspects of its industrial processes.

As noted above, no evidence indicates A&G had knowledge that selenium would be present in wastewater discharges from the Site, rather than simply present in the general area, at the time the Permit application was submitted. *See* J.A. at 82-84 (letter on behalf of A&G regarding selenium in the vicinity). Although appellees may suggest that if A&G was in a position to remind EPA that selenium was in the area, then A&G should have listed selenium on the application, A&G reaffirms EPA's guidance that the awareness of the agency — as the permit writer responsible for what is tested and what limits are stated in the permit, *see supra* at 11-12 — is the relevant vantage point, not that of the permittee.[4] DMME had knowledge that streams within the Callahan Creek watershed had locations that exceeded the in-stream chronic water quality limit for selenium based on disclosures provided in connection with A&G's separate application for a different mine site. *See* J.A. 84. Yet, DMME did not implement effluent limitations for selenium in the Permit and did not even require A&G to monitor for its presence.

[4] The correspondence also suggests that EPA is aware of the potential presence of selenium. In fact, as discussed above, as the EPA developed the Effluent Limitations Guidelines for the Coal Mining Point Source Category, it expressly rejected imposing effluent limitations for selenium and a variety of other metals. *See, e.g.,* 46 Fed. Reg. 3149 (Jan. 13, 1981) and 47 Fed. Reg. 45,383 (Oct. 13, 1982).

Appellees *cannot* show a violation of the permit application requirements and have conceded they have no such claim. Therefore, A&G may avail itself of the permit shield defense to liability under 33 U.S.C. § 1342(k) of the CWA. On this basis, A&G—not Appellees—was and is entitled to summary judgment.

D. Because A&G adequately complied with the CWA's disclosure requirements by describing its wastestreams, operations, and processes in its application, it is entitled to the permit shield protections based on EPA Policy, and summary judgment should have been entered in its favor (or, at a minimum, summary judgment should not have been entered against it).

As noted above, *see* supra at12-13, EPA's official Policy Statement says the scope of the permit shield captures "[p]ollutants not identified as present but which are constituents of wastestreams, operations or processes that were clearly identified in writing during the permit application process and contained in the administrative record which is available to the public." *See* J.A. at 329.[5]

The NPDES permit issued to A&G, in the context of its application and associated disclosures, *see* J.A. at 56 (permit) and J.A. at 62 (application), justify the shield as provided for in this EPA Policy Statement. Because selenium, a natural element, the presence of which in the area was already known to the permitting agency, can be considered a constituent of A&G's waste stream (even if A&G had no reason to know it, as the district court made clear, *see* J.A. at 512),

[5] *Piney Run* previously noted the deference applicable to this type of policy statement. *See Piney Run*, 268 F.3d at 259, 267.

A&G made a sufficient disclosure of the nature of its discharges, during the permitting process, to satisfy the first element of the permit shield. Applying the permit shield in this context, particularly with a natural element such as selenium at issue, would properly invoke EPA's policy statement and apply the policy-related purposes of the permit shield as described above, *see supra* at 11, while also promoting *Piney Run's* second prong, discussed *infra*, Section E.

E. Because there is a genuine issue of material fact as to whether selenium discharges was not within the agency's reasonable contemplation, summary judgment was inappropriate (especially where evidence indicates the agency *did* reasonably contemplate selenium discharges).

A party moving for summary judgment has the burden of showing the absence of a genuine issue as to any material fact, and evidence for summary judgment purposes is viewed in the light most favorable to the opposing party. *See* Standard of Review, *supra* at 7-8 Inferences are to be drawn from the underlying facts contained in [the moving party's] materials must be viewed in the light most favorable to the party opposing the motion. *See PBM Prods., LLC v. Mead Johnson & Co.*, 639 F.3d 111, 119 (4th Cir. 2011). A party opposing summary judgment, however, need not come forward with evidence to negate a material fact in the absence of some proof of that fact submitted by the moving party. *See Dash v. Mayweather*, *supra*, 731 F.3d at 311 ("Irrespective of the burdens assigned by the applicable substantive law, Federal Rule of Civil Procedure 56 requires the movant to show that summary judgment is warranted").

Here, appellees failed to show that DMME did *not* reasonably contemplate selenium discharges when issuing A&G their NPDES permit. Indeed, the only evidence in the record suggests otherwise: Selenium was within the reasonable contemplation of DMME at the time A&G applied for its permit. *See* J.A. at 83-84 (letter from A&G to Virginia's DMME). That September 2011 letter from Southern Coal Corporation (on behalf of A&G) states:

> A&G would like to remind [DMME] that [DMME] has been aware for quite some time that streams within the Callahan Creek watershed had locations that exceeded the in stream chronic water quality limit for Selenium. This information was provided to the [DMME] as part of the pre-mining in stream base line water quality data for the proposed Ison Rock Ridge surface mine, application 1003841. The U.S. Environmental Protection Agency is aware of the moderately elevated Selenium levels in this watershed as well and has had conversations and correspondence with the [DMME] regarding Selenium in respect to the proposed Ison Rock Ridge surface mine.

See J.A. at 84. No evidence challenges the contents of the September 2011 letter.

The agency, despite this awareness, did not impose limits on selenium in A&G's VA/NPDES permit. *See Atlantic States*, 12 F.3d 353 (EPA knew generally that a variety of pollutants may be present in an industrial discharge but did not demand investigation of, or impose limits on, all of those potential pollutants). Even in the absence of evidence A&G submitted for consideration after oral argument, *see infra*, the record already held "more than a 'scintilla'" of evidence that the selenium discharges were within the DMME's reasonable contemplation at the time it issued the permit.

The District Court addressed the letter, saying it only showed that DMME "understood that there were elevated levels of selenium in the general area" and that EPA's Environmental Appeals Board "rejected a similar argument in *Ketchikan Pulp*." J.A. at 513. The District Court's reliance on *Ketchikan* is inappropriate here.

Ketchikan involves an NPDES permittee whose permit did not include a particular chemical that the permittee accidentally spilled. *See* Ketchikan Pulp, 7 E.A.D. 605 (EAB 1998). The permittee, using water and hoses, washed the chemical into a drain that led directly into navigable water. *Ketchikan* asserted the permit shield on the basis that the agency was "generally aware" that, in so many words, spills happen and are foreseeable. The EAB, however, denied permit shield protections because the permitting agency was not sufficiently aware that a spilled chemical, even accidentally so, would be deliberately flushed into navigable waters (other methods, such as absorbing materials, could and should have been used).

Here, of course, A&G is not deliberately flushing a man-made chemical toward navigable waters. A&G, rather, is engaged in lawful mining operations in an area where a naturally-occurring element (selenium) has been detected separate and apart from the mining activity on the subject Site, and there is no evidence A&G is unlawfully and deliberately doing anything contrary to the permitting agency's expectations regarding the selenium that is present.

Therefore, this Record demonstrates A&G is protected from liability for discharges of selenium at the Site as a matter of law and was entitled to summary judgment or, at a minimum, appellees were not entitled to summary judgment. The evidence does not compel a conclusion that DMME *did not* reasonably contemplate the discharges of selenium in question, and the burden of proving that fact should have been assigned to plaintiffs as parties seeking summary judgment. In short, the moving parties – appellees – failed to show that there was no genuine dispute as to any material fact. *See* Fed. R. Civ. P. 56(a).

F. The District Court abused its discretion by refusing to consider as part of the Record a letter exchanged by two governmental agency representatives further demonstrating that the agency reasonably contemplated selenium discharges when it issued the NPDES permit at issue and, thus, the permit shield should have been applied to award A&G summary judgment.

The district court abused its discretion by refusing to allow A&G to introduce as supplemental evidence a 1997 letter from the U.S. EPA to the DMME, which says DMME is analyzing certain pollutants, such as selenium, and that it intends "that these analyses suffice for those [mining] companies' application requirements." *See* J.A. at 495-496. The letter indicates EPA approves that process "as long as such analyses include those metals required by Application 2C and are attached to the company's application for reissuance" and adds that EPA "certainly support[s] the Division's monitoring program for metals." J.A. at 496.

At oral argument, (as best as can be determined due to the transcript being limited, *see* J.A. at 465), the District Court focused many questions on applicability of the permit shield and thus whether the permitting agency contemplated whether selenium discharges could be a potential issue at the Kelly Branch Mine. A & G thus moved to supplement its motion as a means to properly support or address this issue. Therefore, the District Court incorrectly ruled that Fed. R. Civ. P. 6(b) for an extension of time was the proper law for determining whether to grant the motion.

Prior to the District Court ruling on the cross motions for summary judgment, A & G moved the District Court pursuant to Fed. R. Civ. P. 56(e) to supplement evidence in support of its motion for summary judgment. *See* J.A. at 489. Subsequent to oral hearing, A & G's employee and expert witness, Jon Lawson, contacted an official at DMME to inquire about the requirement to disclose selenium in the NPDES permit application. *See* J.A. at 492-497. This conversation revealed the existence of a letter from the EPA to the DMLR that clarifies EPA's policy and the reason that a specific analysis for selenium was not required nor provided in A & G's permit renewal application. *See id*. The letter, with its attachment, confirms that the EPA requires only sampling information for pH, iron, manganese, and suspended solids in coal mining permit applications. *See id.* Further, in regard to other metals, including selenium, the letter confirms

that it is satisfactory to the EPA that DMME routinely analyze other metals including selenium itself, rather than have the individual companies do so for NPDES permit application purposes. *See id.*

The District Court refused to consider the evidence based upon its submission pursuant to Fed. R. Civ. P. 56(e)(1); instead, the Court analyzed whether to grant the motion to supplement evidence under Fed. R. Civ. P. 6(b). *See* J.A. at 504, n. 4. The District Court erred by not applying Rule 56(e)(1), which states that the Court may give an opportunity to properly support or address a fact for summary judgment purposes.

Even if the District Court was correct in applying Rule 6(b), that rule was incorrectly applied here. In determining whether a party has shown excusable neglect, a court will consider: (1) the danger of prejudice to the non-moving party; (2) the length of delay and its potential impact of judicial proceedings; (3) the reason for the delay; and (4) whether the movant acted in good faith. *See* J.A. at 503-504. The reason for the delay is the most important factor. *Id*.

The danger to the non-moving party in this instance was considerably absent. A & G did not attempt to open discovery on an entirely new theory of law for its case, rather, after realizing the focus of the District Court at oral argument, it located a publicly available document that it had never had in its possession or control to support a defense that it had promoted from the very outset of this

litigation. At the very most, Plaintiffs would have been tasked with examination of an EPA witness at trial that could speak to the authenticity of the letter and its contents. And, the deadline to disclose witnesses for trial had not yet passed at the time the motion was made to supplement evidence. *See* J.A. at 48. The length of the delay was a mere matter of days after the hearing on the cross motions for summary judgment.[6] Although the District Court claims A & G offered "no reason why it could not have obtained this evidence during discovery" this fails to consider that the District Court, *sua sponte*, treated A & G's motion as a Rule 6(b); therefore, A& G did not contemplate the factors of Rule 6(b) when making its motion.

There is no evidence or accusation that A & G acted with anything other than good faith in submitting its motion to include the letter in evidence. Therefore, even when taking into account the Rule 6(b) factors, the District Court erred by not allowing inclusion of the letter as evidence for the purposes of the cross summary judgment motions. And, as noted, this was a letter from two different governmental agency representatives; its availability to appellees was not limited to its production from appellants (nor is it clear whether they had a copy of same all along).

[6] Oral argument was held on June 17, 2013, and A & G filed its motion to supplement evidence which included an affidavit and the letter on June 21, 2013.

This excluded letter serves to further apply the Record's depiction that the permitting agency, DMME, was aware of the potential for selenium discharges from surface mining sites in the relevant area; accordingly, it "reasonably contemplated" selenium discharges and thus the second prong of *Piney Run* is satisfied.

CONCLUSION

Selenium discharges do not violate the CWA because of A&G's fulfillment of the NPDES application requirements, the agency's views regarding pollutants such as wastestream runoff much like selenium, and the agency's awareness of selenium before it issued the permit. In this context, A&G is entitled to the protection of the permit shield provision of 33 U.S.C. § 1342(k) of the CWA, and facts relevant to the application of the permit shield defense are undisputed (or, as clarified below, are such that summary judgment should not have been entered against A&G). The Court should reverse the order granting summary judgment in favor of Appellees, mandate that summary judgment be entered in favor or Appellant (or, at a minimum, remand with instructions to set the case for trial).

ORAL ARGUMENT

On behalf of Appellants, oral argument on the issues raised herein is respectfully requested.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 13-2050 **Caption:** SOUTHERN APPALACHIAN MOUNTAIN STEWARDS

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Dated: 12/31/2013

CERTIFICATE OF SERVICE

I certify that on 12/31/2013 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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