No. 13-2050

In the
United States Court of Appeals
for the Fourth Circuit

SOUTHERN APPALACHIAN MOUNTAIN STEWARDS, *et al*.,

Plaintiffs-Appellees,

v.

A&G COAL CORPORATION,

Defendant-Appellant.

**Appeal from the United States District Court
for the Western District of Virginia**

**BRIEF OF AMICI CURIAE
VIRGINIA COAL AND ENERGY ALLIANCE, INC.,
VIRGINIA MINING ASSOCIATION, INC.,
AND VIRGINIA MINING ISSUES GROUP
IN SUPPORT OF APPELLANT A&G COAL CORPORATION,
SUPPORTING REVERSAL OF THE JUDGMENT BELOW**

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

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No. _____ Caption: _____

Pursuant to FRAP 26.1 and Local Rule 26.1,

_____
(name of party/amicus)

_____

who is _____, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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:

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: _____

Counsel for: _____

CERTIFICATE OF SERVICE

****

I certify that on _____ 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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INTRODUCTION

This appeal addresses the scope of the "permit shield" provided to Clean Water Act (CWA) permittees by § 402(k) of the CWA, 33 U.S.C. § 1342(k) (Addendum). *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). The permit shield is vitally important to NPDES permit holders, especially in the mining context where pollutants that naturally occur in the earth, like selenium (at issue in this case), are exposed through mining activities. For decades, the U.S. Environmental Protection Agency has interpreted the permit shield to apply to these kinds of naturally occurring pollutants, not just where they are (1) specifically limited in the permit or (2) identified in the permit application, but also where they are (3) part of waste streams, operations or processes that are identified in the permit application and supporting administrative record.

The opinion and order of the district court would erode this long-standing interpretation by reading the third criterion out of existence. According to the district court, "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." JA 511.

This case arises in the specific context of selenium discharged from a particular mining operation, but it raises much broader concerns about how the permit shield should be interpreted and applied to naturally occurring pollutants,

like those unearthed through lawfully permitted mining operations. In many cases, the presence of those pollutants is not known to permit applicants and thus cannot be "actually disclosed" in the manner contemplated by the district court. But such pollutants may be part of waste streams, operations or processes that are identified in the permit application and supporting administrative record. In such instances, the pollutants are as much a part of the permit shield as if they have been specifically limited in the permit or identified in the permit application, at least according to EPA.

Amici respectfully urge this Court to reverse the judgment and restore the full scope of the shield as interpreted by EPA and applied by NPDES permitting authorities, including the Virginia Department of Mines, Minerals, and Energy (DMME).

INTERESTS AND AUTHORITY OF AMICI

The Virginia Coal and Energy Alliance, Inc. (formerly known as the Virginia Coal Association, Inc.) is an incorporated trade association that represents the Virginia coal industry before the public and the state government and carries out other functions on a non-profit basis. The Virginia Mining Association, Inc. is an incorporated non-profit trade association that represents Virginia's coal mining companies and the vendors and suppliers who support the industry. The Virginia Mining Issues Group is an *ad hoc*, unincorporated association consisting of coal

mining companies, coalfield landowners, technical consultants and other allied stakeholders who are interested in legal proceedings that affect natural resources and the environment in Virginia's Appalachian coalfields. Its goal is to ensure that such proceedings are driven by sound science as well as cost-effective and practical decision-making.

A number of the amici's member companies are situated similarly to the defendant-appellant, A&G Coal Corporation (A&G), in these respects: Each holds a National Pollutant Discharge Elimination System (NPDES) permit or permits issued by the DMME pursuant to § 402 of the CWA, 33 U.S.C. § 1342.[1] Each of those NPDES permits governs discharges from coal mining operations, including discharges of pollutants that naturally occur in earth materials exposed through mining.

Selenium, the pollutant at issue in this case, naturally occurs in portions of the Central Appalachian coalfields, and thus it can be a component of the waste streams, operations and processes of lawfully permitted coal mining in southwest Virginia. Prior to the district court's decision in this case, which held that A&G

[1] The CWA assigns permitting authority to the U.S. EPA but allows EPA to delegate that authority to state agencies, such as the DMME. 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). (The DMME shares permitting authority with the Virginia Department of Environmental Quality. The DMME is responsible for permitting discharges from coal surface mining operations. *See* Va. Code § 45.1-254.)

has violated the CWA by discharging selenium from its Kelly Branch Surface Mine, none of the NPDES permits for coal mining operations in southwest Virginia specifically limited the discharge of selenium.

Several of the amici's member companies share each of the foregoing facts and circumstances in common with A&G. In addition, immediately following entry of the opinion and order of the court below, at least one of the amici's members received a "60-Day Notice Letter" from plaintiffs-appellees Southern Appalachian Mountain Stewards, *et al*. In that letter, the plaintiffs-appellees threaten to file a citizen suit under the Clean Water Act, identical to the action at issue in this appeal, alleging violations of the Clean Water Act "as a result of the unpermitted discharge of selenium" from mining operations. The threatened suit is "on all fours" with this case, as far as the issues in this appeal are concerned; and if the judgment below is not reversed, it is likely that additional members of the amici organizations will face similar suits in the future.

RULE 29(C)(5) STATEMENT

No party's counsel authored this brief in whole or in part; no party and no party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than the amici curiae or their members contributed money that was intended to fund preparing or submitting this brief.

STATEMENT OF FACTS

A&G owns and operates the Kelly Branch Surface Mine in Wise County, Virginia. It is subject to the terms and conditions of NPDES permits issued by the DMME. A&G's application for an NPDES permit 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." JA 500 (opinion below).

It is undisputed, however, that selenium has been detected in discharges of water from the Kelly Branch site. The parties have different opinions of the significance of those discharges and their potential to cause any environmental harm,[2] but the fact is that they have occurred and that they are not explicitly limited by the permit.

A&G presented evidence, in support of its motion for summary judgment, that the DMME "has been aware for quite some time that streams within the Callahan Creek watershed" – the location of the Kelly Branch mine – "had

[2] There is no evidence that the discharges have ever violated the EPA's "acute" selenium criterion of 20 µg/L (micrograms per liter (or parts per billion)). A few individual samples have exceeded the *level* of the "chronic" water quality criterion for selenium (5 µg/L); but there is no evidence that the discharges have ever caused a *violation* of the chronic water quality criterion, which is whether a "four-day average concentration of selenium does not exceed 5.0 µg/l more than once every three years on the average." U.S. EPA, Ambient Water Quality Criteria for Selenium (1987), quoted in A&G's Response in Opposition to Plaintiffs' Motion for Summary Judgment at 3 n.2 (JA 449).

locations that exceeded the in stream chronic water quality limit for Selenium." JA 84. A&G also moved for leave to supplement the record, after the summary judgment hearing but before the district court's decision, to provide additional evidence of the DMME's and EPA's awareness of the potential for selenium in surface mine discharges in the area; but the district court denied A&G's motion and refused to consider that evidence in ruling on the parties' cross-motions for summary judgment.

SUMMARY OF ARGUMENT

The CWA permit shield is of vital importance to permittees and regulatory agencies alike, assuring each that they may rely on permit conditions and devote their energies elsewhere during the term of a permit. The EPA has defined the scope of the permit shield by an administrative adjudication and a formal Policy Statement, and this Court has deferred to EPA's interpretation. It should do so again in this case.

The permit shield applies to A&G's permit because (1) A&G adequately disclosed the nature of its discharges to the DMME, both (a) because it neither knew nor had reason to believe that it would discharge selenium and therefore was under no obligation to disclose such discharges in its permit application, and (b) because it clearly identified its waste streams, operations, and processes in writing in its permit application, as provided by criterion 3 of the EPA Policy

Statement; and (2) discharges of selenium were reasonably anticipated by, or within the reasonable contemplation of, the permitting authority.

The summary judgment record is sufficient to compel a conclusion that the adequate disclosure element of the permit shield test is satisfied, under each of the two alternative grounds described just above. The record is less clear on the second element, *i.e.*, the permitting agency's reasonable contemplation of the selenium discharges. The record does not support a conclusion, in favor of plaintiffs, that the agency did *not* reasonably contemplate such discharges; but that issue appears to present a disputed question of material fact for trial. In all events, amici respectfully request that this Court make clear that other permittees in similar cases are not precluded from relying on evidence of agencies' reasonable contemplation that was excluded or not offered in this case.

ARGUMENT

A. Applicable standard of review.

This Court "review[s] a grant of summary judgment *de novo*, applying the same standard as the trial court and without deference to the trial court." *Dash v. Mayweather*, 731 F.3d 303, 310 (4th Cir. 2013) (citation and footnote omitted).

Interpretation of a federal statute – 33 U.S.C. § 1342(k) – presents a question of law, also subject to *de novo* review. *E.g.*, *Morgan v. Sebelius*, 694 F.3d 535, 537 (4th Cir. 2012). When the Court is called on to interpret an ambiguous federal

statute, such as § 1342(k), however, it must "defer to the agency's interpretation of its governing statute and regulations, as long as (1) the agency has promulgated that interpretation pursuant to a notice-and-comment rulemaking or a formal adjudication … and (2) the agency's interpretation is reasonable." *Piney Run*, 268 F.3d at 267, citing, *inter alia, Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984). Such deference to administrative interpretation is commonly referred to as "*Chevron* Step Two" or "*Chevron* deference."

Chevron deference also is accorded to a relatively limited set of agency interpretations that are not embodied in notice-and-comment rulemakings or formal adjudications. *See United States v. Mead Corp.*, 533 U.S. 218, 231 (2001) ("we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded"), citing *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-57, 263 (1995). Even if *Chevron* deference is not applicable, however, a less formal agency interpretation nevertheless is entitled to a (lesser) degree of deference under the doctrine enunciated in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *See Mead*, 533 U.S. at 221, 227-38.

B. The Permit Shield.

The CWA's permit provisions have been described at length in numerous decisions, including *Piney Run*, 268 F.3d at 264-66, and therefore a brief summary should suffice.

The CWA prohibits all discharges of "pollutants" into "navigable waters" that are not authorized by a federal- or state-issued NPDES permit, with limited statutory exceptions that are not relevant here. Issuance of a permit relieves the permittee of liability for discharges made in compliance with the permit. "The permit shield provision, 33 U.S.C. § 1342(k), specifies that '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.'" *Piney Run*, 268 F.3d at 267.

As this Court concluded in *Piney Run*, the statutory language "makes clear that compliance with a permit constitutes an exception to the general strict liability of the CWA" but "does not explicitly explain the scope of permit protection." *Id*. This Court therefore applied *Chevron* Step Two, relying primarily on an EPA Environmental Appeals Board decision, *In re Ketchikan Pulp Co.*, 7 E.A.D. 605, 1998 WL 284964 (EPA E.A.B. 1998). *See Piney Run*, 268 F.3d at 267-68. The Court also noted that "the EPA in 1994 published a policy statement on the scope of the permit shield defense that mirrors its holding in *Ketchikan*." *Id*. at 268 n.11,

citing U.S. EPA, Policy Statement on Scope of Discharge Authorization and Shield Associated with NPDES permits at 2-3 (July 1, 1994). As noted in *Piney Run*, the 1994 EPA Policy Statement provides in part:

> 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 as present in facility discharges during the permit application process*[.]

268 F.3d at 269 n.11 (emphasis added in *Piney Run*).

The *Piney Run* Court concluded 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. *See also id*. at 268, citing *Ketchikan*:

> [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.

The Policy Statement also provides, in a passage that this Court did not quote in *Piney Run*, that the permit "shield" applies to "[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." (Emphasis added; emphases in original omitted.)[3] Application of that provision to the facts of this case should be an important consideration in this appeal. *See* Section D, *infra*.

The U.S. Supreme Court has described the purpose of the permit shield provision as follows: "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).

A permit thus resembles a contract between the permittee and the regulator, in that it affords certainty to all parties. As the EPA has stated, "one of the most

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[3] The quotation in the text is from a 1995 reissuance or revision of the 1994 EPA Policy Statement. *See* JA 329. The omitted emphases, in the above quotation from the revised Policy Statement, indicated new text added in the revision. *Id*. at 1. Citations to the Policy Statement in this brief are to the revised Statement, except in quotations from *Piney Run* or as indicated by the designation "1994." (The revised Policy Statement was published on April 11, 1995. *See* U.S. EPA, Permit Issuance Process Policy and Guidance Documents, http://cfpub.epa.gov/npdes/docs.cfm?document_type_id=1&view=Policy%20and%20Guidance%20Documents&program_id=1&sort=name (visited Dec. 26, 2013). That publication date also is indicated by the stamped designation "041195" on the face of the Statement.)

useful purposes of issuing a permit is to prescribe with specificity the requirements that a facility will have to meet, both so that the facility can plan and operate with knowledge of what rules apply, and so that the permitting authority can redirect its standard-setting efforts elsewhere." 45 Fed. Reg. 33,290, 33,312 (May 19, 1980).

EPA also has explained that the shield "gives a permittee the security of knowing that, if it complies with its permit, it will not be enforced against for violating some requirement of the appropriate Act which was not a requirement of the permit." *Id*. at 33,311. 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. "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*.

Some of the values of finality and certainty in the CWA context are obvious, but others are not. The certainty provided by the shield is valuable to permittees in part because "pollutant" is defined so broadly under the CWA that the list of possible pollutants is nearly limitless. *See* 33 U.S.C. § 1362(6) (Addendum); *Piney Run*, 268 F.3d at 271 ("This definition is extremely broad, covering

innumerable individual substances…. ('[T]he definition of 'pollutant' is meant to leave out very little ….')") (citation omitted).[4]

As a practical matter, therefore, it would be impossible for a permit applicant to name every pollutant in a particular waste stream or for a regulator to list every such pollutant in a permit. That is true in part because facilities cannot control what is in their intake water – or, for that matter, what is in stormwater that runs onto and off of a permittee's site. Many pollutants, such as the selenium at issue in this case, are put in the water by nature.[5] EPA therefore

> 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." Memorandum from EPA Deputy Assistant Administrator for Water Enforcement Jeffrey G. Miller to Regional Enforcement Director, Region V, at 2 (Apr. 28, 1976). "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." *Id*.

---

[4] Every permittee has substances in its waste stream or effluent, if only at miniscule levels, that are not listed in the permit and not even within the permittee's control. Even if a permittee discharged distilled water, there would be traces of pollutants. "Distilled water comes as close to being pure water as most people will ever encounter, but even distilled water almost always contains a few 'impurities.'" William G. Camp and Thomas B. Daugherty, *Managing Our Natural Resources* 175 (4th ed. 2000).

[5] *See generally* Gilbert Masters and Wendell Ela, *Introduction to Environmental Engineering and Science* 107, 109 (3d ed. 2008) (naturally occurring organic matter, protozoa from wild animals).

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

C. A&G's permit application disclosures satisfied CWA requirements.

A question that this Court answered implicitly but not expressly in *Piney Run* is what constitutes an "adequate" disclosure. The implicit answer is that an adequate disclosure is one that "complies … with the Clean Water Act's disclosure requirements." *Piney Run*, 268 F.3d at 259. It could hardly be otherwise; a statute cannot be construed to *impose liability* for conduct that *complies* with that statute.

The primary questions in this case thus reduce to this: What are the applicable disclosure requirements? And did A&G comply with them? The answers are straightforward:

First, the CWA itself does not prescribe the applicable disclosure requirements. Those requirements are stated in a regulation promulgated by EPA under delegated statutory authority (*see* 33 U.S.C. § 1361(a)): subsection (g)(vi)(B) of 40 C.F.R. § 122.21 (Application for a permit) provides, in pertinent part:

> Each applicant must indicate *whether it knows or has reason to believe* that any of the pollutants listed in table III of appendix D of this part … [which lists selenium] for which quantitative data are not otherwise required under paragraph (g)(7)(v) of this section [which refers to toxic metals, cyanide, and total phenols] are discharged from each outfall.

(Emphasis added.)[6]

Second, "[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." JA 512 (decision below) (emphases added).

It is, in short, "undisputed" that A&G complied with applicable CWA disclosure requirements. The first element of the shield therefore is satisfied, as a matter of law; 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." JA 511.

This interpretation of the permit "shield" doctrine is necessary for another, more structural reason. As discussed above, the second element of the shield is the permitting agency's "reasonable contemplation" that the pollutant at issue will be in the permittee's discharges. *Piney Run*, 268 F.3d at 259, 268. If permittees could benefit from the shield only with respect to pollutants that they "actually disclosed," as the district court held in this case, then permitting agencies would *always* contemplate the presence of such pollutants and the second element of the shield would be entirely redundant. *Piney Run* makes clear, however, that the

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

agency's contemplation is a separate and *additional* "limitation on the permit holder's ability to discharge such pollutants." *Id*. at 259, 268.

D. A&G adequately complied with the CWA's disclosure requirements by describing its wastestreams, operations, and processes in its application.

1. The EPA Policy Statement.

EPA's official Policy Statement on the scope of the permit shield provides, in part, that

> A permit provides authorization and therefore a shield for the following pollutants resulting from facility processes, waste streams and operations that have been clearly identified in the permit application process when discharged from specified outfalls:
>
> …
>
> 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.

Policy Statement at 2-3 (emphases and footnote omitted) (JA 330-31).

The Policy Statement is not the product of a notice-and-comment rulemaking or a formal adjudication. It nevertheless should be given full *Chevron* deference. As stated by a unanimous Supreme Court in *NationsBank of N.C.*, *supra*, 513 U.S. 251, the views of an "administrator charged with supervision of" a federal statute, and who "bears primary responsibility" for implementation of that statute, are entitled to "'great weight.'" *Id*. at 256 (citation omitted). The *NationsBank* Court applied *Chevron* deference to the Comptroller of the

Currency's interpretation of the National Bank Act, 12 U.S.C. § 24 Seventh. 513 U.S. at 257. The interpretation at issue was embodied in a letter to the bank, approving an application for permission for its brokerage subsidiary to act as an agent in the sale of annuities. *Id*. at 254-55.[7]

The same considerations that led the Court to grant *Chevron* deference to the Comptroller's letter in *NationsBank* apply equally if not more strongly to the EPA Policy Statement. EPA is the federal agency "charged with supervision" of § 402 of the CWA and "bears primary responsibility" for its implementation. *See Piney Run*, 268 F.3d at 259. It has borne that responsibility for more than 40 years; and its Policy Statement has been in place, without material alteration, for nearly 20 of those years. Its Policy Statement is a formal interpretation of an ambiguous statute. *Id*. at 267. And unlike the letter at issue in *NationsBank*, it was designed to have general, nationwide applicability. It guides EPA's enforcement efforts, and private civil actions obviously should be governed by the same standards as official enforcement actions.

Alternatively, the Policy Statement is entitled at minimum to "*Skidmore* deference." *See, e.g., Federal Express Corp. v. Holowecki*, 552 U.S. 389, 399-402 (2008); *Mead*, *supra*, 533 U.S. 218; *Skidmore*, *supra*, 323 U.S. 134. Justice

[7] The Office of the Comptroller's "'legal position on this issue was announced in a [prior 1990 letter].'" 513 U.S. at 263, quoting Comptroller's letter to NationsBank (alteration in *NationsBank*).

Jackson explained the rationale of this lesser deference doctrine in *Skidmore*, *id*. at 137-38, where the Court adopted the statutory interpretation of an Administrator charged with enforcing the wage and hour provisions of the Fair Labor Standards Act. Congress, said the Court,

> create[d] the office of Administrator, impose[d] upon him a variety of duties, endow[ed] him with powers to inform himself of conditions in industries and employments subject to the Act, and put on him the duties of bringing injunction actions to restrain violations. Pursuit of his duties has accumulated a considerable experience in the problems of ascertaining working time in employments involving periods of inactivity and a knowledge of the customs prevailing in reference to their solution. From these he is obliged to reach conclusions as to conduct without the law, so that he should seek injunctions to stop it, and that within the law, so that he has no call to interfere. He has set forth his views of the application of the Act under different circumstances in an interpretative bulletin and in informal rulings. They provide a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it.

Id. *See also id*. at 139-40:

> [T]he Administrator's policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case. They do determine the policy which will guide applications for enforcement by injunction on behalf of the Government. Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons.

And as the Court explained in *Mead*, 533 U.S. at 227, "[t]he well-reasoned views of the agencies implementing a statute 'constitute a body of experience and

informed judgment to which courts and litigants may properly resort for guidance.'" (Citations omitted.)

The degree of deference accorded to administrative policies under *Skidmore* depends on a variety of factors. These include "the degree of the agency's care, its consistency, formality, and relative expertness, and … the persuasiveness of the agency's position" (*Mead*, 533 U.S. at 228 (footnotes omitted)); "'the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control'" (*id.*, quoting *Skidmore*); the duration of the interpretation (*Alaska Dept. of Environmental Conservation v. EPA*, 540 U.S. 461, 487 (2004) (citations omitted)); and delegation of enforcement power to the agency (*Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1335 (2011)).

The same factors that argue for application of *Chevron* deference also support according a generous degree of *Skidmore* deference to the EPA Policy Statement. The Statement itself attests to the agency's thorough and careful evaluation of the factors that should inform the scope of the permit shield. The Policy has been in place since 1994, without material revision, and with no revision at all since 1995. It is consistent with the statutory policies underlying the shield, as described in EPA's 1980 *Federal Register* notice of rulemaking

discussed *supra* at 11-12. It informs EPA's own enforcement efforts, and "the standards of public enforcement and those for determining private rights [should] be at variance only where justified by very good reasons." *Skidmore*, 323 U.S at 140.

2. Application of the third criterion of the Policy Statement supports application of the permit shield here.

A&G's permit application disclosed that it sought a permit for discharges from a surface mine and that the sources of discharges included the mine, coal loading area, coal stockpile area, and haul road area. JA 63-70 (permit application). The application also disclosed the types of discharge (surface water runoff and groundwater); the average rates of flow from each of A&G's 30 outfalls; and the capacities of each of its treatment facilities, including the ponds that are charged as the sources of selenium discharges in this case. *Id*.

Those disclosures satisfy the requirements of the third criterion of the EPA Policy Statement, quoted above. Selenium apparently is a constituent of A&G's waste stream (although A&G had no reason to know it, as the district court made clear, JA 512). This provides an independent, sufficient alternative ground for holding that 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.

Amici do not construe the third criterion of the Policy Statement as applicable to a bare description of the regulated activity (*e.g.*, "surface mine" or

"paper mill"), nor would EPA, DMME, or other state NPDES permitting agencies likely approve an application with no more detailed information. The Policy Statement provides that "wastestreams, operations or processes" must be "clearly identified in writing during the permit application process" to qualify for permit shield protection. As indicated by the above description, however, A&G's permit application is an example of an adequate disclosure.

In addition, the permit shield does not apply unless the pollutants at issue were "within the reasonable contemplation of the permitting agency at the time the permit was granted." *Piney Run*, 268 F.3d at 259. This provides further assurance that the third criterion of the Policy Statement will not preclude prosecution of civil actions for violations in cases of pollutants that an agency has no reason to expect to find in a described waste stream. At the same time, it will give effect to the principle of finality and certainty, described above at 11-13, thus implementing EPA's declared policy of "plac[ing] the burden on permit writers rather than permittees to search through the applicable regulations and correctly apply them to the permittee through its permit" and giving "a permittee the security of knowing that, if it complies with its permit, it will not be enforced against for violating some requirement of the appropriate Act which was not a requirement of the permit." 45 Fed. Reg. at 33,312, 33,311. (Whether a particular pollutant was within the

reasonable contemplation of the permitting agency presents a question of fact, which should require a remand in this case. *See* Section E, *infra*.)

E. The record does not warrant summary judgment for plaintiffs on the issue of the agency's reasonable contemplation of the discharges.

A party moving for summary judgment has "the burden of showing the absence of a genuine issue as to any material fact, and for these purposes the material it lodge[s] must be viewed in the light most favorable to the opposing party." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). And "'the inferences 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.'" *Id*. at 158-59 (citation omitted; alteration in *Adickes*).

The same also is true of materials submitted by the opposing party. *See, e.g., Boitnott v. Corning Inc.*, 669 F.3d 172, 175 (4th Cir. 2012), quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("For purposes of reviewing the grant of summary judgment, '[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor'").

But a party opposing a motion for summary judgment is not required to come forward with evidence to negate a material fact in the absence of some proof of that fact submitted by the moving party. *Adickes*, 398 U.S. at 159-60. *See also, e.g., Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 & nn.10, 12 (1986); *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").

We expect A&G to argue that the district court abused its discretion by refusing to allow A&G to introduce supplemental evidence of DMME's reasonable contemplation of selenium discharges following the summary judgment hearing. That evidence consists of a 1997 letter from the U.S. EPA to the DMME. It explains that the DMME analyzes certain pollutants, including metals such as selenium, from selected mining discharges; and that it intends "that these analyses suffice for those companies' application requirements." The letter states that "[t]his is satisfactory to EPA 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." JA 495. (Although not reflected in the record of this case, it is amici's understanding that the DMME includes a copy of that letter in its permit application file for every NPDES permit.)

If that evidence is considered as part of the summary judgment record, it should make clear that the DMME was aware of – *i.e.*, that it reasonably contemplated – the potential for selenium discharges from surface mining sites in the relevant area. If this Court sustains the district court's refusal to consider that

evidence, however, it should make clear that other permittees facing similar litigation are not precluded from reliance on evidence that was excluded (or not offered) in this case. It addresses a question of fact – whether DMME reasonably contemplated discharges of selenium (and other metals) in surface mine discharges – and not a question of law. A decision for plaintiffs in this case therefore should not be understood as establishing a precedent applicable to other, similar cases in which the excluded evidence *is* properly introduced.

Even in the absence of that evidence, however, the record already held "more than a 'scintilla'" of evidence, *Othentec Ltd. v. Phelan*, 526 F.3d 135, 140 (4th Cir. 2008), that the selenium discharges were within the DMME's reasonable contemplation at the time it issued the permit. That evidence consisted of a September 2011 letter from Southern Coal Corporation (on behalf of A&G) which sought to "remind the [DMME] that the [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" and noted that such 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." JA 84. The letter also noted that "[t]he 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." *Id.*

That evidence is not overwhelming, to be sure; but it did not need to be, to preclude summary judgment for plaintiffs. A non-moving party – even one that will have the burden of proof at trial –

> is entitled to have the credibility of [its] evidence as forecast assumed, [its] version of all that is in dispute accepted, all internal conflicts in it resolved favorably to [it], the most favorable of possible alternative inferences from it drawn in [its] behalf; and finally, to be given the benefit of all favorable legal theories invoked by the evidence so considered.

M&M Medical Supplies and Service, Inc. v. Pleasant Valley Hospital, Inc., 981 F.2d 160, 163 (4th Cir. 1992) (*en banc*), *cert. denied*, 508 U.S. 972 (1993), quoting *Charbonnages de France v. Smith*, 597 F.2d 406, 414 (4th Cir.1979) (alterations in *M&M*).

No evidence was offered to contradict or impeach the letter, and the district court was obliged to "accept [it] as true." *Beck v. Prupis*, 529 U.S. 494, 497 n.3 (2000). The court appears to have set that evidence aside, however, on the ground that it demonstrated only that the 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*." JA 513.

The district court overlooked major differences between this case and *Ketchikan*. As that court stated, the permittee in *Ketchikan* "argued that its permit

implicitly allowed discharge of cooking acid because 'the Agency was generally aware that spills occur in pulp mills,'" and the EAB "found that such general knowledge was insufficient to apprise the permitting authority of the possibility that the permittee would discharge cooking acid." JA 513, quoting *Ketchikan*, 7 E.A.D. at 629-30. The *problem* with the district court's analysis is that it obscures the difference between *accidental spills in pulp mills* and *intentional discharges to navigable waters* – a distinction that the E.A.B. emphasized in *Ketchikan*. *See id*. at 630:

> KPC's argument that the Region implicitly covered the discharge of cooking acid under the permit fails because: (1) the Region did not expect that KPC would *discharge* a spilled chemical, since most mills in KPC's point source category used other methods for disposing of such spills, and, more particularly, (2) the Region could not have anticipated, based on the disclosures made by KPC during the application process, that KPC would discharge cooking acid into Ward Cove.
>
> The Agency's expectations with respect to the management of spilled chemicals negate KPC's claim that the discharge was "implicitly" covered under the permit. *Although the spill* of cooking acid in the digester area of the mill *was accidental*, KPC *intentionally discharged* the cooking acid in order to clean up the spill. Specifically, the evidence of record establishes that KPC used hoses to "wash" the acid down the floor drain," … where it went out untreated into Ward Cove, since the floor drains in the digester area flowed into outfall 001, whose contents were untreated ….
>
> The Agency expressly discouraged the practice of *intentionally discharging* spilled chemicals. In a comment to the 1979 version of a regulation which required permittees to use good management practices to control or abate pollution, the Agency stated: "Examples of best management practices * * * include: * * * the use of solid, absorbent materials for cleaning up leaks and drips *as opposed to*

> *washing these materials down a floor drain creating additional sources of pollution.*" ….

(Citations omitted; emphases in original.) The EPA Appeals Board also pointed out that "at the time of the cooking acid incident, there were other options for cleaning up chemical spills rather than washing them into receiving waters." *Id.* at 631. In short, the issue in *Ketchikan* was *not* the presence of cooking acid "in the general area," as suggested by the opinion below (JA 513), but the intentional and unlawful discharge of acid into navigable waters.

The record in this case does not *conclusively* establish, one way or the other, whether the DMME reasonably contemplated the presence of selenium in the Kelly Branch discharge as a consequence of the fact that streams in the same watershed *already* "had locations that exceeded the in stream chronic water quality limit for Selenium," JA 84. Logically, if selenium were present in the receiving waters prior to the mining development, then it probably would remain in those waters thereafter, and the DMME should expect as much.[8] We do not contend that A&G's evidence mandated entry of summary judgment in its favor on that issue, but it certainly presented a material factual issue for trial. 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

[8] A&G's discharges are from "instream ponds." JA 454.

assigned to plaintiffs as parties seeking summary judgment. In short, the moving parties – plaintiffs – failed to "sho[w] that there [was] no genuine dispute as to any material fact," Fed.R.Civ.P. 56(a).

The district court therefore erred by granting summary judgment in plaintiffs' favor. It should have denied both motions for summary judgment and set the case for trial. "The fact that both parties simultaneously are arguing that there is no genuine issue of fact … does not establish that a trial is unnecessary thereby empowering the court to enter judgment as it sees fit …." 10A Wright, Miller, & Kane, *Federal Practice and Procedure: Civil 3d* § 2720 at 327-28. "The court must rule on each party's motion on an individual and separate basis, determining, for each side, whether a judgment may be entered in accordance with the Rule 56 standard. Both motions must be denied if the court finds that there is a genuine issue of material fact." *Id*. at 335-36 (footnote omitted), citing, *inter alia*, *ITCO Corp. v. Michelin Tire Corp.*, 722 F.2d 42, 45 n.3 (4th Cir. 1983), *cert. denied*, 469 U.S. 1215 (1985). *See also, e.g., Podberesky v. Kirwan*, 38 F.3d 147, 155-56 (4th Cir. 1994) (*en banc*).

CONCLUSION

The Court should reverse the judgment and remand with instructions to set the case for trial.

Respectfully submitted,

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I hereby certify that on this 31st day of December, 2013, I electronically filed the foregoing brief with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to:

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ADDENDUM

Excerpts from the federal Clean Water Act (CWA)

33 U.S.C. § 1342(k) (CWA § 402(k)):

§1342. National pollutant discharge elimination system

….

(k) Compliance with permits

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. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 1311, 1316, or 1342 of this title, or (2) section 407 of this title, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on October 18, 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date which source is not subject to section 407 of this title, the discharge by such source shall not be a violation of this chapter if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

33 U.S.C. § 1362(6) (CWA § 502(6))

§ 1362. Definitions

….

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production

or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

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