No. 13-2050

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SOUTHERN APPALACHIAN MOUNTAIN STEWARDS, SIERRA CLUB, AND APPALACHIAN VOICES,

Plaintiffs-Appellees,

v.

A&G COAL CORPORATION,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA
CASE NO. 2:12-cv-00009-JPJ-PMS

BRIEF OF *AMICI CURIAE* AMERICAN FOREST & PAPER ASSOCIATION, AMERICAN PETROLEUM INSTITUTE, NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES, NATIONAL ASSOCIATION OF HOME BUILDERS, NATIONAL MINING ASSOCIATION, AND UTILITY WATER ACT GROUP IN SUPPORT OF DEFENDANT-APPELLANT AND URGING REVERSAL OF THE DECISION BELOW

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Dated: January 7, 2014

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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.

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If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 13-2050 Caption: Southern Appalachian Mountain Stewards v. A&G Coal Corp.

Pursuant to FRAP 26.1 and Local Rule 26.1,

American Petroleum Institute
(name of party/amicus)

who is amicus, 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: /s/ Peter Tolsdorf Date: January 7, 2014

Counsel for: American Petroleum Institute

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No. 13-2050 Caption: Southern Appalachian Mountain Stewards v. A&G Coal Corp.

Pursuant to FRAP 26.1 and Local Rule 26.1,

American Forest & Paper Association
(name of party/amicus)

who is amicus, 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

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If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ James N. Christman Date: January 7, 2014

Counsel for: American Forest & Paper Ass'n

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No. 13-2050 Caption: Southern Appalachian Mountain Stewards v. A&G Coal Corp.

Pursuant to FRAP 26.1 and Local Rule 26.1,

National Association of Clean Water Agencies
(name of party/amicus)

who is amicus, 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

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If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ James N. Christman Date: January 7, 2014

Counsel for: Nat'l Ass'n of Clean Water Agencies

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No. 13-2050 Caption: Southern Appalachian Mountain Stewards v. A&G Coal Corp.

Pursuant to FRAP 26.1 and Local Rule 26.1,

National Association of Home Builders
(name of party/amicus)

who is amicus, 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

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If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ James N. Christman Date: January 7, 2014

Counsel for: Nat'l Ass'n of Home Builders

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No. 13-2050 Caption: Southern Appalachian Mountain Stewards v. A&G Coal Corp.

Pursuant to FRAP 26.1 and Local Rule 26.1,

National Mining Association
(name of party/amicus)

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

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Signature: /s/ James N. Christman Date: January 7, 2014

Counsel for: National Mining Association

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No. 13-2050 Caption: Southern Appalachian Mountain Stewards v. A&G Coal Corp.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Utility Water Act Group
(name of party/amicus)

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

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Signature: /s/ James N. Christman Date: January 7, 2014

Counsel for: Utility Water Act Group

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

A&G	A&G Coal Corporation
CWA	Clean Water Act
EAB	United States Environmental Protection Agency, Environmental Appeals Board
EPA	United States Environmental Protection Agency
NACWA	National Association of Clean Water Agencies
NPDES	National Pollutant Discharge Elimination System
POTWs	Publicly-Owned Treatment Works
VCEA	Virginia Coal and Energy Alliance, Inc., *et al.* (f/k/a/ the Virginia Coal Association, Inc.), Virginia Mining Association, Inc., and Virginia Mining Issues Group

STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

Amici Curiae American Forest & Paper Association, American Petroleum Institute, National Association of Clean Water Agencies, National Association of Home Builders, National Mining Association, and Utility Water Act Group (collectively referred to hereafter as "*Amici*") represent a broad cross-section of the nation's manufacturing industries, public clean water utilities, electric utilities, energy and fuel producers, infrastructure developers, and home builders. *Amici's* members provide much-needed products, services, and jobs across the country, and their activities are vital to clean water and a thriving national economy. Many of those activities require National Pollutant Discharge Elimination System ("NPDES") permits, which authorize the discharge of wastewaters identified in the permit, subject to the limitations, terms, and conditions established by the permit. Because compliance with an NPDES permit constitutes compliance with the Clean Water Act ("CWA"), NPDES permits provide *Amici's* members with much-needed certainty regarding their compliance obligations. *Amici* therefore have a strong interest in the proper interpretation and application of this "permit shield."

In this case, the district court significantly narrowed the permit shield, in effect holding that it is not enough that the permittee truthfully disclose the nature of its waste streams, operations, and processes, and provide any pollutant-specific information required by the permit application. Instead, the district court held that,

in order to avail itself of the permit shield for all of the pollutants contained in its wastewater discharges, a permittee must specifically disclose each pollutant in that wastewater. This decision upends the permitting process, creates significant regulatory uncertainty, and increases the risk that *Amici's* members will face enforcement litigation. *Amici* urge the Court to overturn the lower court's ruling, which is inconsistent with established law, including longstanding precedent established by this Court in *Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty.*, 268 F.3d 255 (4th Cir. 2001) (hereafter referred to as "Piney Run").

The American Forest & Paper Association ("AF&PA) is the national trade association of the forest products industry, representing pulp, paper, packaging, and wood products manufacturers, and forest landowners. AF&PA serves to advance a sustainable United States pulp, paper, packaging, and wood products manufacturing industry through fact-based public policy and marketplace advocacy. AF&PA member companies make products that are essential for everyday life from renewable and recyclable resources that sustain the environment. The forest products industry accounts for approximately 5 percent of the total United States manufacturing gross domestic product and is among the top 10 manufacturing sector employers in 47 states. AF&PA members' facilities are subject to CWA permitting requirements and forest landowners implement best management practices to protect and enhance water quality on their lands.

AF&PA's members operate under a range of different NPDES and would be negatively impacted by any limitation on the scope of the permit shield for this type of permits.

The American Petroleum Institute is a nationwide, non-profit trade association that represents over 500 companies involved in all aspects of the petroleum and natural gas industry, from the largest integrated companies to the smallest independent oil and gas producers.

The National Association of Clean Water Agencies ("NACWA") is a national trade organization representing the interests of the nation's publicly-owned wastewater and stormwater utilities with nearly 300 public utility members nationwide. For over 40 years, NACWA has been at the forefront of national legal, policy, and regulatory issues dealing with CWA implementation and interpretation, advocating aggressively on behalf of its municipal members.

The National Association of Home Builders represents over 140,000 builder and associate members throughout the United States. Its members include individuals and firms that construct and supply single-family homes and apartments, condominium, multi-family, commercial, and industrial builders, land developers, and remodelers.

The National Mining Association is a national trade association whose members produce most of the United States' coal, metals, and industrial and

agricultural minerals. Its membership also includes manufacturers of mining and mineral processing machinery and supplies, transporters, financial and engineering firms, and other businesses involved in the nation's mining industries.

The Utility Water Act Group ("UWAG") is a voluntary, ad hoc, non-profit, unincorporated group of investor-owned electric utilities, public power companies, and independent power producers, as well as national trade associations representing electric utilities, public power companies, and rural electric cooperatives. UWAG members construct, operate, and maintain electric power generation, transmission, and distribution facilities in virtually every state.

Amici's participation in this case will provide the Court with an informed perspective on the scope and significance of the permit shield to a broad range of industries nationwide. If not overturned, the district court's ruling will strip *Amici's* members of the regulatory certainty that the permit shield was intended to provide. As a result, businesses, utilities, and local governments nationwide would suffer increased legal and economic risks that could affect bond ratings and their ability to obtain financing, which in turn could lead to increased costs for their local customers and ratepayers.

STATEMENT AS TO AUTHORSHIP AND FUNDING OF THE BRIEF

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), undersigned counsel hereby represents the following:

(i) None of the counsel for the parties in this case authored this brief in whole or in part;

(ii) Neither any party nor any party's counsel contributed money to fund the preparation or submittal of this brief; and

(iii) No other person contributed money that was intended to fund the preparation or submittal of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The CWA prohibits the discharge of pollutants to navigable waters without a permit. But where a discharger has obtained a permit, the CWA provides a complete defense from liability for all discharges subject to that permit, so long as the discharger complies with the permit's effluent limitations and other terms and conditions. *See* CWA § 402(k), 33 U.S.C. § 1342(k). This "permit shield" defense ensures that permittees will have notice of their compliance obligations, providing *Amici's* member companies and others in the regulated community with the certainty and finality that is essential to planning, financing, and conducting their operations.

Through formal adjudication and in a longstanding Policy Statement, the United States Environmental Protection Agency ("EPA" or "Agency") has interpreted the permit shield as extending to pollutants not identified as present but which are constituents of waste streams, operations, or processes that were clearly

identified during the application process and made part of the administrative record. In *Piney Run*, this Court held that EPA's interpretation of the permit shield was entitled to deference. The Court should do so again in this case.

The lower court decision substantially narrows the permit shield, creating a clear path for citizens to bring enforcement actions that effectively reopen a discharger's permit and overrule decisions of the regulatory authority. The district court's decision undermines the structure of the CWA, giving citizens enforcement authority Congress never intended and creating entirely new avenues for litigation.

For reasons set forth below, *Amici* argue in favor of Defendant-Appellant, A&G Coal Corporation ("A&G") and against the district court's finding that a permittee must have actually disclosed the presence of a pollutant in its permit application in order to shelter under the permit shield as to that pollutant.

ARGUMENT

I. The Scope of NPDES Permit Discharge Authorization, and Thus the Permit Shield, Extends to All Pollutants in Waste Streams, Operations, and Processes Properly Disclosed in the Permit Application.

The CWA provides that, once a permit is issued, compliance with a permit "shall be deemed compliance for purposes of sections [309 (government enforcement actions), and 505 (citizens' suits)] . . . with sections [301 (effluent limits) and 302 (water quality based effluent limits)]." CWA § 402(k), 33 U.S.C. 1342(k). The EPA's permit shield regulation is consistent with § 402(k) and is

made applicable to state permit programs. 40 C.F.R. §§ 122.5, 123.25. As petitioner A&G and *amici* Virginia Coal and Energy Alliance, Inc. (f/k/a/ the Virginia Coal Association, Inc.), Virginia Mining Association, Inc., and Virginia Mining Issues Group ("VCEA") point out, this permit shield provides much-needed certainty for both regulators and permittees.

The permit shield applies to all discharges authorized by the permit. Here, the question is whether the permit authorized the discharge of a specific pollutant (selenium), where the permittee described in its permit application the waste stream containing that pollutant, but the specific pollutant was not reported as believed present. Under EPA's longstanding interpretation of the permit shield, the permit shield clearly applies.

EPA has interpreted the statute (and its matching "permit shield" regulation) in a policy statement.[1] EPA formulated this Permit Shield Policy in 1994 and revised it in 1995. Thus, it has been in effect for almost 20 years.

As the Permit Shield Policy explains:

> Historically, EPA has viewed the permit, together with material submitted during the application process and information in the public record accompanying the permit, as important bases for an authorization to discharge under section 402 of the CWA.

[1] Memorandum from Robert Perciasepe, Assistant Adm'r for Water, EPA, to Reg'l Adm'rs, EPA, regarding Revised Policy Statement on Scope of Discharge Authorization and Shield Associated with NPDES Permits (Apr. 11, 1995), *available at* http://www.epa.gov/npdes/pubs/owm0131.pdf (hereinafter referred to as "Permit Shield Policy").

> The availability of the section 402(k) permit shield is predicated upon the issuance of an NPDES permit and the permittee's full compliance with all applicable application requirements, any additional information requests made by the permit authority and any applicable notification requirements. See 40 C.F.R. §§ 122.41(l) and 122.42. Also see, 45 Fed. Reg. 33311-12, 33522-23 (May 19, 1980).

Id.

The Policy explains that the "permit shield" extends to pollutants in three different categories: (1) pollutants specifically limited in the permit (not relevant in the present case), (2) pollutants "specifically identified in writing . . . during the permit application process," and (3) "[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." *Id.* (emphasis in the original).

With respect to the subparts 2 and 3 of the permit shield, the Permit Shield Policy explains that

> EPA recognizes that a discharger may make changes to its permitted facility (which contribute pollutants to the effluent at a permitted outfall) during the effective period of the NPDES permit. Pollutants associated with these changes (provided they are within the scope of the operations identified in the permit application) are also authorized provided the discharger has complied in a timely manner with all applicable notification requirements (see 40 C.F.R. §§ 122.41(l) and 122.42(a) & (b)) and the permit does not otherwise limit or prohibit such discharges.

Id.

The notification provisions to which the Permit Shield Policy refers require manufacturers and other industrial permittees to notify the permit agency of any activity that would discharge, on a routine or frequent basis, any toxic pollutant not limited in the permit, if the discharge would exceed 500 micrograms per liter. 40 C.F.R. § 122.42(a)(2)(i). Publicly-Owned Treatment Works ("POTWs") are subject to similar, albeit more general, disclosure requirements serving the same purpose. *See* 40 C.F.R. § 122.42(b) (requiring notification of new or changed discharges from indirect dischargers to the POTW). The permitting agency may modify or revoke an NPDES permit at any time if it receives new information. 40 C.F.R. § 122.62(a)(2). Also, every NPDES permit contains reporting requirements, such as the obligation to notify the agency of any planned physical alteration or additions that could significantly change the nature or increase the quantity of pollutants discharged. 40 C.F.R. § 122.41(l)(ii). These notification requirements typically are incorporated into NPDES permits, ensuring that permittees may not discharge unlimited amounts of toxic or other pollutants not specifically limited in their permits.

Thus, EPA's NPDES permit regulations are written to anticipate the reality that the nature and quantity of pollutants present in a given waste stream may not be known with perfect certainty at the time of permit application. Those

regulations require permittees to identify the waste streams they intend to discharge and the operations and processes from which those waste streams will emanate, and to answer truthfully the questions posed about specific pollutants identified on the application form. Permit writers with expertise regulating a wide range of industrial, commercial, and municipal discharges[2] are then free to request more information, either on their own initiative or at the public's behest.[3] And,

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[2] Many cases show that both state and federal courts give deference to or at least respect expert agencies. *Marsheck v. Bd. of Trs. of Fire & Police Emps. Retirement Sys. of Baltimore*, 749 A.2d 774, 778 (Md. 2000); *Ins. Comm'r for Maryland v. Engelman*, 692 A.2d 474, 479 (Md. 1997); *Bd. of Physician Quality Assurance v. Banks*, 729 A.2d 376, 380-81 (Md. 1999); *W. Corr. Inst. v. Geiger*, 747 A.2d 697, 701 (Md. Ct. Spec. App. 2000); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16 (1971) (facts); *Bldg. & Constr. Trades Dep't v. Brock*, 838 F.2d 1258, 1266 (D.C. Cir. 1988) (technical or scientific facts); *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 845, *reh'g denied*, 468 U.S. 1227 (1984) (interpretation of statutes); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (interpretation of agency's own regulations); *see also Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000).

[3] It is also important to note that the application information is not the only source of information available to the permit writer. Here, the permit incorporates, as it must, the technology-based national "effluent limitations guidelines" for the coal mining industry. In setting those nationally applicable limits, EPA considered selenium in mining discharges but found it unnecessary to set uniform national technology-based limits. EPA said in its development document for the national standards "[t]he remaining eight toxic metal pollutants (arsenic, chromium, copper, lead, mercury, nickel, selenium, and zinc) were found at levels above their detection limits but not uniformly throughout the industry . . . . *[T]hese metals are already effectively controlled by BPT technology, i.e., by treatment measures already in place."* EPA, EPA 440/1-82/057, Development Document for Effluent Limitations Guidelines and Standards for the Coal Mining Point Source Category at 3 (Oct. 1982) (emphasis added); *see also id*. at 30 (chemical composition of coal ash is a mixture of, among other things, selenium).

should circumstances change or new information become available, the permit provides a remedy, requiring prompt notification of materially changed circumstances.

This Policy was presented to the district court, but the court gave it short shrift, making only a passing reference to "EPA's reasonable interpretation." *S. Appalachian Mountain Stewards v. A&G Coal Corp.*, No. 2:12CV00009, 2013 WL 3814340, at *6 (W.D. Va. July 22, 2013).

This case concerns discharges from two A&G outfalls, Outfall 008A from Pond 8A and Outfall 011A from Pond 11A. These waste streams (discharges) were "clearly identified" in the permit application, found on page 67 of the Joint Appendix. The type of discharge from both 008A and 011A is identified as surface runoff and groundwater from coal loading areas, coal stockpiles, haul roads, and surface mines at the site, and plaintiffs do not appear to have argued that the waste streams discharged consisted of any other types of waste water from areas or operations not identified. Hence the permit shield applies to constituents in these two clearly identified waste streams.[4] The Permit Shield Policy is dispositive of the case, and the court's failure to consider it was reversible error.

[4] Although the district court did not make a finding that the permittee had not complied with permit application requirements, the court may have left that implication by suggesting the A&G should have reported selenium in its application even though it did not have reason to believe selenium was present. For the reasons discussed by *Amici Curiae* VCEA, VCEA *Amici* Curiae Brief at

II. The District Court Misapplied Applicable Precedent Confirming EPA's Permit Shield Policy

In contrast to EPA's interpretation in the Permit Shield Policy, the district court held that the only things relevant to the legal analysis were that (1) A&G had discharged selenium, and (2) its permit application had not identified selenium as believed present.

To reach this result, the district court relied entirely on two decisions: this Court's decision in *Piney Run* and a decision by EPA's Environmental Appeals Board ("EAB") in *In re Ketchikan Pulp Co*., 7 E.A.D. 605 (EPA 1998), 1998 WL 284964. *See S. Appalachian Mountain Stewards*, 2013 WL 3814340, at *5-6. It misapplied both.

It is entirely appropriate, of course, for the district court to look for guidance in *Piney Run*, but the Court in *Piney Run* did not address the third "prong" of the Permit Shield Policy, nor did it have any occasion to do so. Because the facts of that case demonstrated that the permittee disclosed the thermal discharge at issue, the Court resolved that case under the second prong. *Piney Run*, 268 F.3d at 268 n.11. In reaching its decision, the Court noted the importance of the permitting

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14-16, A&G appears to have satisfied all permit application requirements. Whether or not A&G complied with the permit application requirements, the district court's holding is not limited to applicants who fail to report required information. The court 's holding is that even if a permittee provides all the data required by the permit application and the permit application regulations, it is still liable for pollutants it did not "actually disclose." This holding is wrong, for the reasons given above.

authority having sufficient ability to judge whether the discharge of a particular pollutant constitutes a significant threat to the environment. *Id.* at 268, 270. But it did not suggest that the permittee's provision of pollutant-specific data on the application form was the only means of satisfying that requirement.

Nor does the *Ketchikan* decision support that proposition. As *Amici* VCEA have explained, VCEA *Amici Curiae* Brief at 9-10, in that case, the discharger sought permit shield protection for two types of waste water that it failed to disclose. The EAB, after citing the Permit Shield Policy with approval, determined that Ketchikan had failed to satisfy any of the three prongs. In contrast, for the reasons discussed above, A&G has satisfied the third prong.

III. The District Court's Absolutist Approach Is Unworkable

If a permit were perfect, there would be no need for a permit shield. EPA's policy recognizes that a permittee should not be held responsible for what it cannot know or control with respect to its discharge. As EPA said when proposing NPDES permit application requirements for sewage treatment plants (which would be severely affected by the district court's opinion), "in the case of POTWs, providing a permit shield only for pollutant discharges fully and completely characterized in the permit application could represent a significant burden on POTWs if they were required to identify every pollutant discharged." 60 Fed. Reg.

62,546, 62,553 (Dec. 6, 1995); *see also* 64 Fed. Reg. 42,434, 42,441 (Aug. 4, 1999).

Virtually *every* NPDES permittee has substances in its waste stream or effluent that are not listed in the permit, may not be within the permittee's knowledge or control, and are ancillary to or beyond the scope of the objectives of the permit.[5] For example, *Amici* are responsible for managing discharges associated with storm water from their "industrial activity" and from municipal sources. Storm water can contain substances picked up from the air, vegetation, or soil. There is no *de minimis* exception to the permit requirement, so if the "permit shield" applied only to individual chemicals named in the permit application, then every discharge would violate the permit all the time, if only on the molecular level.

It is impossible to characterize all the pollutants in a discharge fully and continuously. One reason is that facilities cannot control what is in their intake water. Many pollutants such as calcium, magnesium, silica, and fluoride are added to the water by nature, and other pollutants are often added by events beyond the

[5] Even the purest water (used, for example, in the semiconductor and pharmaceutical industries, or in laboratories) is not completely free of contaminants. Type I, or ultrapure, water is the most pure reagent grade water for laboratories. For practical purposes, Type I water has a specific resistance of at least 18 megohms-cm and meets other criteria for a specific conductance (microhms per centimeter), total silica, total organic carbon, and bacterial count. *See* Michael Brush, *Water, Water, Everywhere: A Profile of Water Purification Systems*, 12 THE SCIENTIST 18 (1998).

permittee's control, such as mercury and nutrients that settle onto the water from the air. Intake water is changed by nonpoint runoff and stormwater discharges upstream.

Another reason is that analytical methods used to measure and characterize pollutants may be insufficiently sensitive to detect pollutants present in minute quantities, making it impossible for permittees to know with certainty whether a pollutant is present or absent. Every laboratory measurement method has a "detection limit," which is the minimum concentration of a pollutant that can be measured and reported with 99% confidence that the pollutant concentration is greater than zero. *See* 40 C.F.R. § 136.2(f). A pollutant may register "nondetect" on the lab instrument and yet be present in extremely small quantities.

In short, a facility simply cannot fully know or control, nor should it be held accountable for, every atom that might possibly pass through to its discharge. It is this reality that led EPA to consider, but dismiss, adopting such an absolutist approach when developing the permit shield regulation in 1978. *See* 43 Fed. Reg. 37,078, 37,079 (Aug. 21, 1978).

IV. Other Courts Have Rejected the Lower Court's Narrow Interpretation

Reviewing courts have rejected the district court's absolutist interpretation of the CWA. The Second Circuit, in *Atlantic States Legal Foundation v. Eastman Kodak Co.*, 12 F.3d 353 (2d Cir. 1993), adopted EPA's practical approach.

Finding that discharging pollutants that were not listed in a permit was lawful, the court noted that EPA has consistently recognized the impossibility of regulating every pollutant in a discharge and deferred to EPA's interpretation. *Id*. at 357-58.

Recently, in deciding whether the discharge was within the "reasonable contemplation of the agency," other district courts have rejected the narrow interpretation the district court adopted. In *Sierra Club v. ICG Hazard, LLC*, the district court upheld category (3) disclosures as sufficient for permit shield coverage. *See Sierra Club v. ICG Hazard, LLC*, No. 11–148–GFVT, 2012 WL 4601012, at *6 (E.D. Ky. Sept. 28, 2012) (Sierra Club conceding in the district court's conclusion that "[p]roper disclosure . . . is judged by whether facility discharges, wastestreams, operations, and/or processes were sufficiently identified") (appeal pending). In *ICG Hazard*, the court noted that precedent, including precedent in this Court, squarely opposes Sierra Club's argument that "the discharge of any pollutant not specifically authorized" in the NPDES permit is prohibited. *Id*. at *8-9 (citing *Atl. States Legal Found., Inc.,* 12 F.3d at 356; *In re Ketchikan Pulp Co.*, 1998 WL 284964, at *9; and *Piney Run Pres. Ass'n*, 268 F.3d at 255).

Similarly, in *Alaska Community Action on Toxics v. Aurora Energy Services, LLC*, 940 F. Supp. 2d 1005 (D. Alaska 2013), the court found Aurora had adequately disclosed its discharges where the storm water pollution prevention

plan it prepared and submitted pursuant to the general permit identified specific areas and operations that would discharge coal into the receiving water. *See id*. at 1019-20. Additionally, the court considered circumstantial evidence, from both before and after the permit was issued, as evidence EPA reasonably anticipated Aurora's discharges. In particular, the court found EPA's history and familiarity with the facility and the industry as a whole as evidence of the agency's awareness of the nature of the discharges. *Id.* at 1022.

V. EPA's Regulations Provide Ample Protections for Undisclosed and Undiscovered Pollutants

The district court may have been influenced by the fear that, if the Permit Shield Policy is applied as EPA wrote it, unknown pollutants may be discharged "with impunity." *S. Appalachian Mountain Stewards*, 2013 WL 3814340, at *1. If so, the fear is needless. The permit application is not the last the permitting agency hears of pollutants in the permitted wastestream, and EPA's regulations contain safeguards against undiscovered pollutants. All NPDES permits require compliance with the notification requirements described in the Permit Shield Policy.

Those regulations provide ample and on-going opportunity through monitoring and inspection for the discovery of any discharges warranting revision of the permit. In the meantime, however, it is important that a permittee may rely on the four corners of the existing permit as a contract with the regulator and the

sole measure of compliance until such time as the permit is changed. There is simply no need for a court to require every substance that might eventually be found in water to be listed in every permit application. Such an interpretation would require major changes in the permit application requirements, imposing enormous new burdens on both permittees and permit writers.

CONCLUSION

For the foregoing reasons, the Court should overturn the lower court's ruling and uphold EPA's longstanding interpretation of the permit shield, which extends that shield to all pollutants contained in discharges subject to a permit, where the waste streams, and the operations and areas from which they emanate, have been disclosed during the permit proceeding. Such pollutants are within the reasonable contemplation of the permit writer, satisfying Fourth Circuit's long-held precedent established by the *Piney Run* decision.

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Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 13-2050 Caption: Southern Appalachian Mountain Stewards v. A&G Coal Corp.

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Dated: January 7, 2014

CERTIFICATE OF SERVICE

The undersigned certifies that on this 7th day of January, 2014, he caused the foregoing Brief of *Amici Curiae* American Forest & Paper Association, American Petroleum Institute, National Association of Clean Water Agencies, National Association of Home Builders, National Mining Association, Utility Water Act Group In Support of Defendant-Appellant and Urging Reversal of the Decision Below to be filed using the Court's Electronic Case File system, which will automatically generate and send by e-mail a Notice of Docket Activity to counsel for all parties. The undersigned also certifies that, as required by Local Rule 31(d) true and correct copies of the foregoing brief will be delivered by hand to the Clerk of Court on January 8, 2014.

/s/James N. Christman
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