

No. 13-2050

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**UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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

*Plaintiffs-Appellees,*

v.

A&G COAL CORPORATION,

*Defendant-Appellant.*

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

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**REPLY OF *AMICI CURIAE* THE 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, TO PLAINTIFFS-  
APPELLEES' RESPONSE AND BRIEF IN OPPOSITION TO MOTION  
FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE***

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Dated: January 27, 2014

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## **GLOSSARY OF ACRONYMS AND ABBREVIATIONS**

Industry Amici	American Petroleum Institute, National Association of Clean Water Agencies, National Association of Home Builders, National Mining Association, and Utility Water Act Group
Virginia Mining Amici	Virginia Coal and Energy Alliance, Inc. (f/k/a/ the Virginia Coal Association, Inc.), Virginia Mining Association, Inc., and Virginia Mining Issues Group

Pursuant to Rule 27(a)(4) of the Federal Rules of Appellate Procedure, 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 (“Industry Amici”) respectfully submit this reply to Plaintiffs-Appellees’ Response and Brief in Opposition to the Motion for Leave to File Brief as *Amici Curiae* (“Opp. Br.”). For the reasons stated herein, Plaintiffs-Appellees’ Opposition is without merit, and the Industry Amici should be granted leave to participate in this matter as *amicus curiae*.

## **I. INTRODUCTION**

By Motion for Leave to File *Amici Curiae* Brief with attached Brief, timely filed on January 7, 2013, the Industry Amici sought leave to file an *amicus curiae* brief supporting reversal of the decision below ruling that a permittee must have expressly disclosed a pollutant in its permit application in order to avail itself of the permit shield defense as to that pollutant.

Plaintiffs-Appellees opposed the Industry Amici’s motion for leave to file their *amicus curiae* brief for two reasons. First, Plaintiffs-Appellees contend the Industry Amici’s brief “would be an unnecessary and inequitable addition to this action.” Opp. Br. at 2. Second, Plaintiffs-Appellees contend that Industry Amici “are not appreciably distinct from the existing amici.” Opp. Br. at 3-4.

## **II. INDUSTRY AMICI'S BRIEF PROVIDES THE COURT WITH VALUABLE INFORMATION ON THE TECHNICAL AND PROGRAMMATIC PROBLEMS CREATED BY THE DISTRICT COURT'S DECISION**

Whether the permit shield provides protection against liability where a discharger provides all the required information based on all that could reasonably be known about its discharge at the time is the very heart of the issue on appeal. Industry Amici provide the court with practical and programmatic information to help the court appreciate how the lower court's ruling would completely disrupt the existing permitting program. Even under the authority advocated by Plaintiffs-Appellees, Opp. Br. at 3, the Industry Amici's brief offers "unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997). The information Industry Amici provide in support of their interest is not supplied by the defendants or the *amici* representing local mining interests who are rightly focused solely on impacts on coal mining-related discharge permits.

## **III. INDUSTRY AMICI'S BRIEF REPRESENTS DISTINCT INTERESTS**

Plaintiffs-Appellees' argument that there are already plenty of mining companies in the case already is misleading. Virginia Coal and Energy Alliance, Inc. (f/k/a/ the Virginia Coal Association, Inc.), Virginia Mining Association, Inc., and Virginia Mining Issues Group ("Virginia Mining Amici"), already represented

in the case, are focused solely on impacts of the ruling on state coal-related discharge permits. Industry Amici represent interests that are mostly *not* mines.<sup>1</sup> Industry Amici represent a distinct group of industries, utilities, and municipal governmental organizations, that use or treat large amounts of water in their operations and that have a distinct interest in providing information regarding dischargers that are accountable for large volumes of intake water over which they have limited ability to completely characterize or control all of the pollutants contained in these sources. Indeed, of this group of public and industrial water users, mining represents only 1 percent.<sup>2</sup> It is important for the Court to be aware of the profound effect of a ruling that would place such a heavy burden on a significant number of dischargers, particularly those whose water use and treatment systems serve the public interest.

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<sup>1</sup> The National Mining Association is the nationwide voice of the mining industry, coal, hard rock, phosphate, aggregates, and critical minerals and the businesses and firms that support the mining industry. Virginia Mining Amici do not represent these diverse interests.

<sup>2</sup> According to the U.S. Geological Survey's total water withdrawals' calculations, public drinking water suppliers withdraw 11 percent of the nation's total water withdrawals, "industrial users" withdraw 4 percent, thermoelectric power withdraws 49 percent, and mining withdraws only 1 percent. Joan F. Kenny, Nancy L. Barber, Susan S. Hutson, Kristin S. Linsey, John K. Lovelace, & Molly A. Maupin, U.S. Geological Survey, Estimated Use of Water in the United States in 2005 5 fig. 1 (2009), *available at* <http://pubs.usgs.gov/circ/1344/>.



#### **IV. PREDOMINANT PRACTICE IS TO GRANT MOTIONS FOR LEAVE TO FILE AMICUS BRIEFS**

The predominant practice in the courts of appeal is to grant motions for leave to file *amicus curiae* briefs “unless it is obvious that the proposed brief[] do[es] not meet Rule 29’s criteria as broadly interpreted.” *Neonatology Assocs., P.A. v. Comm’r*, 293 F.3d 128, 133 (3rd Cir. 2002) (Alito, J.). Under Rule 29, a motion for leave to file a *amicus curiae* brief must state (i) the movant’s interest, and (ii) the reason why the *amicus* brief is desirable and relevant to the disposition of the case. The Industry Amici’s motion and brief clearly meet these requirements.

As noted in their motion for leave to file, the Industry Amici are a group of one mining and five industry trade associations that have a long history of participation as *amici* in other cases where the permit shield has been at issue. Industry Amici’s brief will provide information that is not already before the Court about the practical implications of the lower court’s ruling on dischargers that use or treat large volumes of “intake” water, in their systems or operations.

Industry Amici have a distinct point-of-view based on the nature of their discharges that is not offered or has not been substantially addressed by any party to the case.

### **CONCLUSION**

For the above stated reasons, and the reasons set forth in its Motion for Leave to File and 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 request that the Court grant them permission to participate in this matter as *amici curiae*.

Dated: January 27, 2014

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.**CERTIFICATE OF COMPLIANCE WITH RULE 28.1(E) OR 32(A)**

Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. **Type-Volume Limitation:** Appellant's Opening Brief, Appellee's Response Brief, and Appellant's Response/Reply Brief may not exceed 4,000 words or 1,300 lines. Opening/Response Brief may not exceed 16,500 words or 1,500 lines. Any Reply or Amicus Brief may not exceed 7,000 words or 650 lines. Counsel may rely on the word or line count of the word processing program used to prepare the document. The word-processing program must be set to include footnotes in the count. Line count is used only with monospaced type.

This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because:

- ☒ this brief contains 980 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*
- ☐ this brief uses a monospaced typeface and contains \_\_\_\_\_ [*state number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. **Typeface and Type Style Requirements:** A proportionally spaced typeface (such as Times New Roman) must include serifs and must be 14-point or larger. A monospaced typeface (such as Courier New) must be 12-point or larger (at least 10½ characters per inch).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

- ☒ this brief has been prepared in a proportionally spaced typeface using [*identify word processing program*] in [*identify font size and type style*]; **or**

- ☐ this brief has been prepared in a monospaced typeface using \_\_\_\_\_ [*identify word processing program*] in \_\_\_\_\_ [*identify font size and type style*].

/s/James N. Christman

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Dated: January 27, 2014

**CERTIFICATE OF SERVICE**

The undersigned certifies that on this 27th day of January, 2014, he caused the foregoing Reply of Amici Curiae the 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, to Plaintiffs-Appellees' Response and Brief in Opposition to Motion for Leave to File Brief as Amici Curiae 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), he caused true and correct copies of the foregoing reply brief to be transmitted to the Clerk of Court by a third-party commercial carrier for next-day delivery.

/s/James N. Christman  
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