IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 13-2050

SOUTHERN APPALACHIAN MOUNTAIN STEWARDS;
SIERRA CLUB; APPALACHIAN VOICES,

Plaintiffs-Appellees,

v.

A & G COAL CORPORATION,

Defendant-Appellant.

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

BRIEF OF THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFFS-APPELLEES

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GLOSSARY

A&G	Defendant-Appellant A&G Coal Corporation
CWA	Clean Water Act (Federal Water Pollution Control Act)
DMME	(Virginia) Department of Mines, Minerals and Energy
E.A.B.	EPA Environmental Appeals Board
EPA	United States Environmental Protection Agency
J.A.	Joint Appendix
NPDES	National Pollutant Discharge Elimination System
SAMS	Plaintiffs-Appellees Southern Appalachian Mountain Stewards, Sierra Club and Appalachian Voices
VAC	Virginia Administrative Code

INTEREST OF THE UNITED STATES AND ARGUMENT SUMMARY

This Clean Water Act ("CWA") citizen suit concerns alleged violations at the Kelly Branch Surface Mine in Wise County, Virginia (the "Mine Site"), owned and operated by Defendant-Appellant A&G Coal Corporation ("A&G"). Plaintiffs-Appellees Southern Appalachian Mountain Stewards, Sierra Club and Appalachian Voices (collectively, "SAMS") filed suit alleging, *inter alia,* that A&G was discharging selenium (a CWA "pollutant") from the outfalls of artificial ponds 8A and 11A at the Mine Site (CWA "point sources") into tributaries of Callahan Creek (CWA "waters of the United States"). There is no dispute that these discharges occur, they contain selenium, A&G did not disclose the selenium in its discharges as part of the permit application process, and A&G does not possess a CWA permit expressly authorizing the selenium discharges. The only CWA National Pollutant Discharge Elimination System ("NPDES") permit that A&G possesses for the Mine Site is Virginia NPDES permit 0082052, issued by the Virginia Department of Mines, Minerals and Energy ("DMME"), the NPDES permitting authority in Virginia for coal mines.

The parties cross-moved for summary judgment. A&G's sole defense to the CWA claim was that it had disclosed all of the pollutants that it knew or had reason to believe it would discharge and, thus, was shielded from CWA liability pursuant to CWA Section 402(k), 33 U.S.C. § 1342(k). The district court disagreed, denied A&G's motion for summary judgment and granted summary judgment to SAMS.

Applying the two-stage analysis from this Court's precedent in *Piney Run Pres. Assoc. v. Cnty. Commis. of Caroll Cnty., Md.*, 268 F.3d 255 (4th Cir. 2001), the district court found that A&G's selenium discharges failed to qualify for the CWA "permit shield" defense. *See* J.A. 509-14. As to the first factor – whether A&G adequately disclosed to DMME the nature of its selenium discharges during the application process – the district court found that "informing the DMME that [A&G] would perform bituminous coal mining operations" did not constitute adequate disclosure of its selenium discharges. J.A. 512. Turning to the second factor – whether A&G's selenium discharges were within the reasonable contemplation of the permitting authority when the permit was issued – the court found that neither the DMME's

knowledge that the Mine Site was a bituminous coal mine nor indications that DMME had some knowledge of elevated selenium levels in the general geographic area of the Mine Site constituted "reasonable contemplation" that A&G would discharge selenium from the Mine Site pursuant to its permit. J.A. 512-13. The court concluded, therefore, that A&G's selenium discharges were unpermitted and in violation of the CWA. *Id.*

In an order dated May 1, 2014 (Doc. No. 57), this Court requested that the United States file a brief as amicus curiae by May 12, 2014. The United States further states that it participates as amicus curiae, pursuant to Federal Rule of Appellate Procedure 29(a), to urge the proper application of the CWA and its permit shield provision. EPA administers the NPDES program and has authority to enforce the requirements of the CWA, generally. Even though the Virginia DMME is the permitting authority with respect to the NPDES permit in question, EPA retains significant oversight, implementation, and enforcement authority, and thus interest, with respect to NPDES permits issued by authorized States, such as Virginia.

The district court correctly applied this Court's *Piney Run* precedent and found that A&G is not shielded from liability because its disclosures about selenium discharges during the application process were inadequate and because, given the inadequacy of the disclosures combined with a lack of other evidence, the Virginia permitting authority did not reasonably contemplate selenium discharges from the Mine Site when it issued A&G's permit. As we set forth below, the law of this Circuit is clear that in order to qualify for the shield, A&G must show both that during the application process it complied with all CWA reporting and disclosure requirements *and* that A&G's selenium discharges were within the reasonable contemplation of the permitting authority.

The evidence shows that A&G failed to comply with applicable regulations and DMME permit application instructions that required A&G to sample its outfall and provide quantitative data about its selenium discharges. This failure to comply with CWA disclosure and application requirements, and to *find out* if it was discharging selenium, clearly disqualifies A&G from availing itself of the permit

shield defense. Although this Court need not reach the issue, A&G's failure to disclose *any* information about its selenium discharges combined with scant to non-existent evidence that DMME knew of selenium discharges *from the Mine Site* also supports the district court's finding that A&G's selenium discharges were not within DMME's "reasonable contemplation" when it issued the permit.

Accordingly, this Court should affirm the district court's judgment.

ISSUE PRESENTED

1. Whether A&G's Virginia NPDES permit, which does not expressly authorize or contain limits for selenium discharges, shields A&G from CWA liability pursuant to CWA section 402(k) for A&G's admitted discharges of selenium to waters of the United States when A&G provided no information about selenium discharges to the permitting authority during the permit application process.

STATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND

Through the CWA, Congress sought to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251. Central to achieving that goal is the prohibition of the "discharge of any pollutant by any person" from a "point source" into "waters of the United States," unless in compliance with or authorized by other sections of the CWA. *Id.* §§ 1311(a), 1362(12) (defining discharge of a pollutant).

The NPDES Permit Scheme. EPA or an authorized State, such as Virginia, may issue NPDES permits for the discharge of pollutants from point sources (such as outfalls) to waters of the United States on the condition that such discharges will comply with all applicable CWA requirements. 33 U.S.C. § 1342(a)(1)(A). NPDES permits take the form of either individual permits or general permits (e.g., covering multiple dischargers).

The Virginia NPDES permit at issue in this case is an individual permit. Individual NPDES permits typically authorize the discharge of

pollutants from a single discharger, who must submit an application to the appropriate permitting authority describing in detail the nature and content of its proposed discharge(s). *See* 40 C.F.R. § 122.21. The permitting authority then develops a draft permit based on the application and other information. 40 C.F.R. §§ 122.41, 122.44. NPDES permit applications and permits issued must be available to the public. 33 U.S.C. § 1342(j). Final NPDES permits may issue only after public notice and comment. *Id.* § 1342(a)(1), (b)(3); 40 C.F.R. § 124.10(b); *see also id.* §§ 124.8 (EPA to issue draft permit and explanation of basis), 124.17 (EPA to respond to comments received).

Quantitative Sampling and Disclosure Requirements with Respect to Toxic Pollutants, Including Selenium. This case concerns undisputed discharges of selenium. EPA's and Virginia's parallel regulations contain express disclosure requirements for certain toxic pollutants, including selenium. Applications for individual NPDES permits must contain the information specified in 40 C.F.R. § 122.21, including information as to the location, flow, and characteristics of effluent discharged from a given outfall (a "point

source"). 40 C.F.R. § 122.21(g) (titled "Application requirements for existing manufacturing, commercial, mining, and silvicultural dischargers").[1]

Because coal mining is a primary industry category as defined by EPA's regulations, coal mining facilities like A&G's seeking an NPDES permit must also sample and characterize, with quantitative data, discharges of specified toxic pollutants. 40 C.F.R. §§ 122.2, 122.21(g)(7)(v)(B), and App. A (listing primary industry categories). The permit applicant "must report quantitative data for the following pollutants in each outfall containing process wastewater . . . The pollutants listed in table III of appendix D of this part (the toxic metals, cyanide, and total phenols)." 40 C.F.R. § 122.21(g)(7)(v)(B). Total selenium is among the 15 toxic pollutants listed in the referenced table. 40 C.F.R. part 122, App. D, table III. Virginia's regulation incorporating this CWA requirement provides that: "Each applicant

[1] These requirements apply to the NPDES program in authorized States, such as Virginia. 40 C.F.R. § 123.25(a)(4); *see also* 33 U.S.C. § 1342(b) (requirements and process for States to obtain authorization to administer NPDES program).

with processes in one or more primary industry category . . . contributing to a discharge must report quantitative data for the following pollutants in each outfall containing process wastewater . . . The pollutants listed in Table III of 40 CFR Part 122 Appendix D." 9 VAC 25-31-100(H)(7)(e)(2).

The DMME application instructions for NPDES permits also require an applicant to characterize effluent discharged from each existing outfall at a facility, including with respect to toxic pollutants. Specifically, "the applicant must collect data or utilize existing data to report information on the pollutants discharged for each existing outfall. . . . At least one analysis must be provided for each parameter listed in the table [i.e., flow, pH, temperature, total iron, total manganese, and suspended solids]." J.A. 356. The permit application instructions additionally provide that the same "information is required regarding the following pollutants . . . Total Selenium. . . ." *Id.*[2] A permit applicant must submit "at least one analyses [sic] for each

[2] The other pollutants identified in the instructions for which quantitative data are required are those listed in Table III of Appendix D to EPA's regulation.

pollutant" and document its analysis with a "certificate of analyses" or other appropriate reference. *Id.*

The "Permit Shield" and EPA's 1995 Guidance. The holder of an NPDES permit alleged to be in violation of the CWA may invoke the "permit shield" defense of CWA section 402(k), which states as pertinent:

> 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 . . . .

33 U.S.C. § 1342(k); *see also* 40 C.F.R. § 122.5.

An April 1995 EPA guidance document ("1995 Guidance," reproduced in full at J.A. 329-333) explains the scope and proper application of the permit shield. The 1995 Guidance states that: "The availability of the section 402(k) shield is predicated upon . . . a permittee's *full compliance with all applicable application requirements*, any additional information requests made by the permit authority and any applicable notification requirements." J.A. 330.

It further states that an individual 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 where discharged from specified outfalls:

> 1) Pollutants specifically limited in the permit or pollutants which the permit, fact sheet, or administrative record explicitly identify as controlled through indicator parameters;
>
> 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; and
>
> 3) Pollutants not identified as present but which are constituents of wastestreams, operations or processes that were clearly identified during the permit application process."

J.A. 330-31. EPA thus recognizes that, in certain circumstances, pollutants not expressly addressed in an NPDES permit may nevertheless be within the scope of that permit's shield.

An EPA administrative adjudication concerning an individual permit, *In re Ketchikan Pulp Company*, 7 E.A.D. 605, 1998 WL 284964

(EPA E.A.B. May 15, 1998), applied and expounded upon this interpretation: "when the permittee has made adequate disclosures during the application process regarding the nature of its discharges, unlisted pollutants may be considered to be within the scope of an NPDES permit, even though the permit does not expressly mention those pollutants." *Id.* at *11. The opinion stressed that "since the scope of the permit as well as the discharge limitations contained therein are based largely on information provided by the permit applicant, the disclosures made by permit applicants about their operations and wastestreams are critical to the success of the overall permitting scheme." *Id.* at *10.

In re Ketchikan explained the practical necessity of considering some pollutant discharges not specifically addressed in the permit to be within the scope of the permit shield. Because "it is impossible to identify and rationally limit every chemical or compound present in the discharge of pollutants," it is more effective to "focus[] on the chief pollutants and wastestreams established in effluent guidelines and disclosed by permittees in their permit applications." *Id.* at *9. While

thus recognizing the need for "flexibility" in the permitting process, the decision also cautioned that:

> the Agency did not thereby intend to include within a permit's sweep undisclosed discharges emanating from processes or operations which were inaccurately or incompletely described in the permit application. Inaccurate or incomplete disclosures could undermine the purpose of the CWA by denying the permit writer the information necessary to write a permit to adequately protect the environment.

Id. at *14.

II. FACTUAL AND PROCEDURAL BACKGROUND

The United States adopts the Brief of Appellees (at 6-10) ("SAMS Br.") with respect to the description of A&G's operations, the characteristics of the outfalls in question, and the results of sampling discharges from outfalls 8A and 11A showing the presence of selenium therein. A&G's discharges of selenium from these outfalls are undisputed. J.A. 500-01, 513.

Further, and especially pertinent to this appeal, A&G's August 4, 2010, application to DMME for a Virginia NPDES permit indicates that its operation is "bituminous coal mining." J.A. 62. Coal mining is a "primary industry category" under EPA's regulations. 40 C.F.R. part

122, App. A. With respect to existing outfalls 8A and 11A at the Mine Site, the application indicates that the source of the discharge is from the "surface mine," and that a "hollow fill underdrain" is an additional source of the outfall 8A discharge. J.A. 67. While the application indicates that the "type" of discharge from these outfalls is ground water and surface runoff, and not "process water," *id.*, we explain *infra* that A&G's designation is erroneous and that discharges from these areas are process wastewater under the applicable regulations. It is undisputed that A&G provided no information in its permit application with respect to selenium, J.A. 500, or any other toxic pollutant listed in Table III of Appendix D to 40 C.F.R. part 122.

On December 1, 2010, the DMME issued Virginia NDPES permit 0082502 to A&G. J.A. 290-312. It is undisputed that the permit does not contain any effluent limits or other restrictions with respect to selenium; nor does it expressly authorize the discharge of selenium. J.A. 500, 513. The permit does, however, provide that: "The discharge of any pollutant more frequently than, or at a level greater than that identified and authorized by this permit, shall constitute a violation of

the terms and conditions of this permit." J.A. 304. Furthermore, speaking directly to the issue of mining wastewater, the permit specifies that:

> Any and all product, materials, industrial wastes, and/or other wastes resulting from the purchase, sale, *mining*, extraction, transport, preparation, and/or storage of raw or intermediate materials, final product, by-product or wastes, shall be handled, disposed of, and and/or [sic] stored in such a manner so as not to permit discharge of such product, materials, industrial wastes, and/or other wastes to State waters, except as expressly authorized herein.

J.A. 305 (emphasis added).

On July 22, 2013, the district court decided the parties' cross-motions for summary judgment and granted summary judgment to SAMS on the CWA claims on the grounds discussed *supra* at 2-3. The district court decided that, in light of the relief available to Plaintiffs based on the resolution of the CWA claims, it did not need to reach SAMS's claims under the Surface Mining Control and Reclamation Act. J.A. 514. The court's Opinion and Order also resolved a procedural motion, denying A&G's motion to supplement the summary judgment record with an August 8, 1997, letter from EPA to the Virginia Division of Mined Land Reclamation (a division of DMME) that purportedly

addressed the requirement to sample for and disclose selenium. J.A. 502, 503-07.[3]

This appeal followed.

ARGUMENT

I. A&G DOES NOT QUALIFY FOR THE PERMIT SHIELD AS IT DISCLOSED *NO* INFORMATION ABOUT SELENIUM DISCHARGES DESPITE A LEGAL OBLIGATOIN TO DO SO AND NO EVIDENCE SHOWS THAT THE PERMITTING AUTHORITY CONTEMPLATED SELENIUM DISCHARGES UNDER A&G'S PERMIT

The legal framework in this case is supplied by this Court's explicit statement of the law governing the availability and application of the permit shield in *Piney Run*. In that case, this Court considered a CWA citizen suit that alleged that a county-run treatment plant's

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[3] The United States takes no position on this procedural issue as it has no particular interest or special expertise as to whether the evidence was timely or properly submitted. We note, however, and agree with the district court (J.A. 506-07), that nothing on the face of the letter indicates that the letter concerns discharges from the Mine Site. Its scope appears limited to "selected mine discharges" and specific, individual "companies' application requirements" with respect to analyzing for metals listed in Table III of Appendix D to Part 122. J.A. 495. The letter unambiguously confirms that 40 C.F.R. § 122.21(g)(7) and EPA's NPDES permit application form mandate that "certain metals [including selenium] are required to be tested" whether or not they are believed to be present. J.A. 495.

discharge of heat (a CWA "pollutant") into a local stream was not covered by the defendant's individual NDPES permit issued by the State of Maryland. To evaluate whether the plant's permit shielded it from liability, this Court adopted as a reasonable construction of CWA section 402(k) the EPA Environmental Appeals Board's ("E.A.B.") approach in *In re Ketchikan*. *Piney Run,* 268 F.3d at 268.[4] This Court succinctly summarized its holding and the requirement that *both* elements of a two-part test be met, stating:

> We therefore view the NPDES permit as shielding 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 (emphasis added).

Piney Run found that there was abundant evidence that the discharger "informed the permitting authority that the plant was discharging heat during the permit application process" and that the

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[4] This Court also discussed, as "mirror[ing]" *In re Ketchikan*, EPA policy guidance identical as pertinent to the 1995 Guidance. *Id.* at 268, n.11.

permitting authority "reasonably contemplated" those discharges. *Id.* at 271. In such a case, "a permit holder is in compliance with the CWA even if it discharges pollutants that are not listed in its permit." *Id.* at 268. This Court stressed that:

> Because the permitting scheme is dependent on the permitting authority *being able to judge whether the discharge of a particular pollutant constitutes a significant threat to the environment*, discharges not within the reasonable contemplation of the permitting authority *during the permit application process*, whether spills or otherwise, do not come within the protection of the permit shield.

Id. (emphasis added). Thus, central to this Court's holding as to the applicability of the permit shield is the sufficiency of disclosures about discharges made to the permitting authority during the permit "application process."

Here, it is manifest that A&G failed to adequately disclose during the permit application process the nature of its discharges in two crucial respects. First, A&G's disclosures were legally inadequate and failed to comply with both Virginia and federal requirements requiring sampling, analysis, and disclosure of information about specified toxic pollutants, including selenium. Second, while the Court need not even

reach the issue in light of A&G's inadequate and non-complying disclosures, the district court was correct, having considered the very thin evidence submitted by A&G, that the DMME did not reasonably contemplate that A&G would discharge selenium from the Mine Site when it issued the permit. A&G's assertion of the permit shield in this case must fail based on this Court's precedent in *Piney Run*, and rejecting it is further supported by EPA's interpretation as articulated in *In re Ketchikan* and the 1995 Guidance.

A. A&G Failed to Comply with the Clean Water Act's Application and Disclosure Requirements and, Therefore, Cannot Avail Itself of the Permit Shield Defense.

This Court was explicit that a condition precedent to securing coverage of the CWA section 402(k) permit shield is compliance with the Clean Water Act's reporting and disclosure obligations. *Piney Run,* 268 F.3d at 259, 268. This condition accords closely with EPA's 1995 Guidance, discussed above, which states that "[t]he availability of the section 402(k) shield is predicated upon . . . a permittee's *full compliance with all applicable application requirements*, any additional

information requests made by the permit authority and any applicable notification requirements." J.A. 330 (emphasis added).

The reason for this requirement is that "the permitting scheme is dependent on the permitting authority being able to judge whether the discharge of a particular pollutant constitutes a significant threat to the environment." 268 F.3d at 268. Consequently, NPDES permit applications require a detailed description of the anticipated discharge(s) and other information from which the permitting authority develops a draft permit. *See* 40 C.F.R. §§ 122.21, 122.41, 122.44. This often includes facility-specific, quantitative information based on samples from an applicant's outfall(s). *See generally* § 122.21(g)(7) (describing detailed sampling and data requirements as to "effluent characteristics" in permit applications).

EPA long ago explained in *In re Ketchikan* that compliance with these detailed, mandatory disclosures in an individual permit application is essential because:

> the disclosures made by permit applicants about their operations and wastestreams are critical to the success of the overall permitting scheme. In recognition of this, the Agency's comprehensive permit application regulations are designed to

> elicit from applicants the disclosures necessary to enable the permit writer to issue permits that protect the environment.

In re Ketchikan, 1998 WL 284964 at *10 (citing, *inter alia,* 40 C.F.R. § 122.21(g)(7)); *see also Piney Run,* 268 F.3d. at 268 (adopting *In re Ketchikan*'s proviso that the "permit holder compl[y] with the CWA's reporting and disclosure requirements") (citation omitted).

The record in this case shows that A&G's bid for coverage under the permit shield never leaves the gate. Simply put, A&G fell woefully short of complying with its obligation under the CWA and this Court's precedent in *Piney Run* to disclose in its NDPES permit application the nature of its discharges. Federal regulations, Virginia regulations, and the DMME NPDES permit application instructions all required A&G to sample its discharge for, and to disclose, the presence of selenium in its discharge. However, A&G did not sample for selenium (or the other toxic pollutants) in its discharge and, in fact, provided *zero* information about selenium to the permitting authority in its permit application.

A&G incorrectly contends that it was under no obligation to determine as part of the application process whether its discharges from outfalls 8A and 11A contained selenium. A&G Br. at 15. To the

contrary, A&G was subject to a legal obligation to sample and characterize in its permit, with quantitative data, discharges from the Mine Site for particular pollutants, as coal mining is a primary industry category under EPA's regulations. 40 C.F.R. §§ 122.2, 122.21(g)(7)(v)(B), and App. A. Permit applicants in this category "must report quantitative data" for each outfall containing process wastewater, including for selenium and the 14 other toxic pollutants listed in Table III of Appendix D of the EPA regulation. 40 C.F.R. § 122.21(g)(7)(v)(B); 40 C.F.R. part 122, App. D. The Virginia regulation incorporating this CWA requirement imposes the same requirement as: "Each applicant with processes in one or more primary industry category . . . contributing to a discharge must report quantitative data" for each outfall containing process wastewater for all of the pollutants in the referenced table, which includes selenium. 9 VAC 25-31-100(H)(7)(e)(2).

Even though A&G did not classify its discharges from outfalls 8A and 11A (nor any of its other outfalls) as "process water" in its permit application (*see* J.A. 67, describing them as "S, G" meaning "surface

runoff" and "ground water"), the information in the application reveals that discharges from these outfalls (which are artificial ponds) are process wastewater under the regulatory definition. Specifically, "process wastewater" for purposes of NPDES permitting is "any water which, during manufacturing or processing, comes into direct contact with or results from the production or use of any raw material, intermediate product, finished product, byproduct, or waste product." 40 C.F.R. § 122.2 (Definitions); *see also* 9 VAC 25-31-10 (same). The permit application indicates that one source of discharge for both outfalls is, among others, a "surface mine," that the discharge includes drainage from disturbed (i.e., mined) areas, and both of these artificial ponds are identified as a "Treatment Facility." J.A. 67; *see also* J.A. 71 (describing the mode of treatment as "sedimentation" and "chemical treatment").

These basic facts from A&G's application clearly describe process wastewater, as drainage from an active surface mine and disturbed areas necessarily entails "direct contact with . . . raw material, finished product, by product, or waste product." As such, A&G was required to

sample and provide quantitative data with respect to, among other things, selenium discharged from outfalls 8A and 11A. *See* 40 C.F.R. § 122.21(g)(7)(v)(B); 9 VAC 25-31-100(H)(7)(e)(2). A&G did not do this.

Even if there were no regulatory requirement to sample the discharges from outfalls 8A and 11A for selenium as part of the application process,[5] the same requirement is explicitly and unambiguously spelled out in the DMME NPDES permit application

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[5] Even if A&G's discharges were not process wastewater triggering the requirement to sample for selenium and other toxic pollutants, Appellees have explained, and we do not repeat in detail here, that A&G would instead have been required to comply with 40 C.F.R. § 122.21(g)(7)(vi)(B), which A& G also failed to do. *See* SAMS Br. at 29-32. That provision requires an applicant to "indicate whether it knows or has reason to believe that any of the pollutants listed in table II or table III of appendix D of this part (the toxic pollutants and total phenols) . . . are discharged from each outfall." *See also* 9 VAC 25-31-100(H)(7)(g) (same). As reflected in EPA's Application Form 2C (available at http://www.epa.gov/npdes/pubs/3510-2C.pdf), compliance with this provision requires more than maintaining silence in the absence of knowledge of a particular pollutant (as A&G asserts); rather, an applicant must state on the record and certify based on appropriate diligence with respect to each of the covered pollutants, including selenium, whether the pollutant is "Believed Present" or "Believed Absent." Moreover, this formal assertion would be subject to the scrutiny of the permitting authority and the public during the permit application process. It is undisputed that A&G did not fulfill this permit application disclosure requirement and, thus, cannot avail itself of the permit shield under *Piney Run*'s framework.

instructions, which require an applicant to characterize the effluent discharged from each existing outfall at a facility, including with respect to toxic pollutants. Specifically, "the applicant must collect data or utilize existing data to report information on the pollutants discharged for each existing outfall. . . . At least one analysis must be provided for each parameter listed in the table [i.e., flow, pH, temperature, total iron, total manganese, and suspended solids]." J.A. 356. The same "information is required regarding . . . Total Selenium," as well as the other pollutants listed in Table III of Appendix D to EPA's regulation. *Id.* A permit applicant must submit "at least one analyses [sic] for each pollutant" and document its analysis with a "certificate of analyses" or other appropriate reference. *Id.*

A&G simply errs when it asserts that it was required to disclose its selenium discharge only if it had reason to believe selenium was present in discharges from those outfalls, A&G Br. at 14, and further that it was merely required to give basic information about the nature of its discharges (i.e., that they were related to "bituminous coal mining"). *Id.* at 16. Quite the contrary, as a permit applicant, A&G

was required to sample its discharges and *find out* if they contained selenium or any of the other toxic pollutants and parameters enumerated in the applicable regulations and DMME permit application instructions. Because A&G was expressly required to identify and disclose in its application the pollutants in its wastestream, as a matter of law it never had the option, as A&G asserts (*id.* at 18-19), to seek permit shield coverage based upon only a generic description of its wastestream, operations or processes. Nor could A&G satisfy the "adequate disclosure" aspect of this Court's permit shield test by doing so. Because A&G clearly failed in multiple respects to "compl[y] . . . with the CWA's disclosure requirements," *Piney Run*, 268 F.3d at 259, its permit does not shield it from liability.

For similar reasons, A&G's reliance on what it calls "prong 3"[6] of EPA's 1995 Guidance is misplaced. A&G Br. at 18-19; A&G Reply at 7-8. For one thing, A&G ignores that eligibility for the permit shield under the 1995 Guidance (as to "prong 3" or otherwise) is "predicated upon . . . full compliance with all applicable application requirements."

[6] We use this phrase without adopting it for ease of reference.

J.A. 330. A&G clearly fails this test. Moreover, the third prong of the 1995 Guidance deals with a different situation entirely. It is intended to cover pollutants where there is no affirmative duty to disclose them specifically during the permit application process, but where the applicant has otherwise made a *complete and adequate* disclosure with respect to "constituents of wastestreams, operations or process" that are "clearly identified in writing during the permit application process and contained in the administrative record." J.A. 331. This aspect of the 1995 Guidance is not in play here because A&G *did have* an affirmative obligation to make disclosures about selenium (and the other toxic pollutants in Table III of Appendix D).

As such, the only aspect of EPA's 1995 Guidance that would potentially apply to A&G's situation is what A&G calls "prong 2," which states that the permit shield applies with respect to: "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." J.A. 330-31 (emphasis added). Of course, this aspect of EPA's permit shield policy

is equally unhelpful to A&G because, despite a clear legal obligation to do so, A&G *made no disclosures whatsoever* about selenium in its NPDES permit application.

B. In Light of A&G's Inadequate and Incomplete Disclosures and the Lack of Other Evidence, A&G's Selenium Discharges Were Not Within the Agency's Reasonable Contemplation.

As noted above, a permittee must satisfy *both* elements of this Court's *Piney Run* test to qualify for permit shield protection. As such, A&G's failure to comply with the NPDES permit application requirements, and in particular its failure to sample for and disclose its selenium discharges as required by law, is by itself sufficient to disqualify A&G from the benefits of the permit shield. Consequently, there is no reason for this court to reach the second *Piney Run* factor – whether selenium discharges from the Mine Site were within the "reasonable contemplation" of the Virginia permitting authority.

It bears emphasis, nonetheless, that the district court and SAMS have more than adequately explained the illogic of A&G's argument. Without evident irony, A&G asserts that even though it did not know or have reason to believe that it was discharging selenium from the Mine

Site, such knowledge could somehow be imputed to DMME because *A&G itself* purportedly notified DMME of elevated selenium levels elsewhere in the watershed with respect to *a different A&G mine where A&G had sampled for selenium* in a letter that post-dates the December 2010 issuance of A&G's NPDES permit here. J.A. 513 ("DMME's general knowledge of . . . selenium in the geographic area is insufficient. . . . A&G has offered no evidence that DMME anticipated a discharge of selenium *from this particular mine*.") (emphasis added); SAMS Br. at 37-38 (discussing letter at J.A. 83-84).

On this point, we note additionally that A&G again improperly relies on "prong 3" of EPA's 1995 Guidance in an attempt to avoid application of this Court's clear precedent in *Piney Run* and to distinguish the E.A.B's administrative adjudication in *In re Ketchikan*. A&G Br. at 7 (*Piney Run* "did not involve prong 3); 7-8 ("*Ketchikan* aligns with prongs 1 or 2, not 3."). First, we have explained that the "prong 3" component of EPA's shield policy is simply not implicated in this case. A&G was legally obligated to disclose certain listed pollutants, including selenium. There is, thus, no need to speculate

about what type of disclosure in a permit application with respect to the "constituents of wastestreams, operations or process" (short of the disclosure of individual pollutants) may be "adequate" and come within the "reasonable contemplation" of the permitting authority as required by *Piney Run*.

Second, even though "prong 3" does not apply to this case, it is worth noting that A&G has mischaracterized *In re Ketchikan* because that decision says a great deal about the nature of general (i.e., not pollutant-specific) disclosures as to a permit applicant's wastestream, operations or processes and how the adequacy of such disclosures bears upon what is within the permitting authority's reasonable contemplation. Very similar to this case, the *In re Ketchikan* permittee (a pulp company) claimed that its permit shielded it from liability for discharges of a specific pollutant, flocculent. Neither the company's permit application nor its permit mentioned flocculent, however the company had disclosed "filtration backwash" as part of the wastestream from its water treatment plant. *In re Ketchikan* at *13-14. Flocculent

accumulated in the filtration backwash, but this aspect of the process was not disclosed to EPA in the permit application. *Id.* at *15.

The E.A.B. found that this general description of the wastestream from the water filtration plant was inadequate to inform the permit writer of the anticipated discharge and held that the shield did not apply, stating:

> it is clear from the case authorities and Agency commentary . . . that the Agency did not . . . intend to include within a permit's sweep undisclosed discharges emanating from processes or operations which were inaccurately or incompletely described in the permit application. Inaccurate or incomplete disclosures could undermine the purpose of the CWA by denying the permit writer the information necessary to write a permit to adequately protect the environment.

Id. at *14.

The E.A.B. explained further that, while in some circumstances "the description of *processes* and *operations* may be general, Agency regulations nevertheless require the applicant to provide a complete and accurate description of each area of a facility which adds effluent to the discharge, so that appropriate effluent limitations may be assigned." *Id.* Thus, while an applicant may be "entitled to describe its

processes and operations in a general way, it could not do so in a way that was inaccurate or misleading." *Id.*

Determining whether there was adequate disclosure in a permit application and what was within the agency's reasonable contemplation when it issued the permit are, thus, closely related and interdependent tasks. The E.A.B. has observed that "the disclosures made by permit applicants during the application process constitute the *very core* of the NPDES permitting scheme." *Id.* at *11 (emphasis added); *see also Piney Run*, 268 F.3d at 268 ("permitting scheme is dependent on" disclosures and the agency's "being able to judge" whether a particular pollutant is a threat). Clearly then, in situations like this case and *In re Ketchikan*, a discharge of pollutants almost certainly cannot be said to be within the agency's reasonable contemplation when the disclosures in the permit application (be they about specific pollutants or, more generally, about wastestreams) are inadequate (incomplete, inaccurate, or even misleading).

Where, as here, A&G completely failed to comply with applicable regulations and DMME's application instructions expressly requiring

A&G to sample its outfall and provide quantitative data about a specific pollutant (i.e., selenium), and considering the extremely thin evidence presented to the trial court as to DMME's knowledge of selenium discharges *from the Mine Site*, the district court correctly concluded that discharges of selenium were not within DMME's "reasonable contemplation" when it issued the permit.

Because A&G fails both aspects of the *Piney Run* analysis, it does not qualify for coverage under the permit shield.

CONCLUSION

This Court should affirm the district court's judgment.

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

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