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In the past three years, a series of court decisions have left the federal circuits split over liability protection under the Clean Water Act (CWA). The CWA contains a provision known as the "permit shield" that protects the holder of a valid permit from citizen suits and enforcement actions so long as the holder complies with the provisions of its permit.[1] Like much of law, what seems to be a fairly straightforward provision has actually given rise to enormous debate among the regulated community and public interest groups. The issue in the recent case law revolves primarily around what it means to comply with one's permit and whether a permit holder may invoke the permit shield defense even without adequately disclosing pollutants in the application process. Even more significant is the question of to what extent the permit shield applies in the context of general permits—one of the two major permits under the CWA.

In this comment I argue for a narrow interpretation of the CWA permit shield by analyzing the recent federal cases addressing the shield's scope. A narrow interpretation calls for a greater level of compliance and disclosure on behalf of the permit holder in order to invoke the shield's protection. This argument also includes a higher standard of "reasonable contemplation" of pollutants on the part of the regulator. The first section of this comment gives a brief background of the CWA, the National

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1. E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112, 138 n.28 (1977).

Pollutant Discharge Elimination System (NPDES), and the permit shield provision. The next section presents the Environmental Protection Agency's (EPA) policy on the shield, and introduces foundational case law. The comment then provides an overview of the issues and court decisions that have governed the recent debate over the scope of the permit shield. Lastly, the comment considers the important implications of the court decisions and the underlying arguments surrounding the dispute. Ultimately, I find that a narrow construction should apply because this interpretation adheres most closely to the fundamental premise of the CWA—to protect the waters of the United States.

I. BACKGROUND

A. The Clean Water Act NPDES Permitting System

In 1972, Congress created what is commonly known as the Clean Water Act in order to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[2] Congress replaced the ineffective state-based regulatory program with a national permitting system based on federal and state cooperation. The mechanisms to achieve the Act's goal include: a strict prohibition on discharges of pollutants without a permit, technology-based pollutant controls, and state-issued water quality standards.[3] Section 301(a) of the CWA prohibits the discharge of any pollutant by any person from any point source into navigable waters of the United States.[4] Congress created a major exception to this strict liability standard under the CWA with two permit programs, one of which is the Section 402 National Pollutant Discharge Elimination System (NPDES).[5] The NPDES program requires facilities to acquire a permit to discharge pollutants from certain point sources into designated U.S. waters.[6] Congress authorized EPA or an approved state

2. 33 U.S.C. § 1251(a) (2012).

3. *Id.* §§ 1311(a), 1314, 1313.

4. *Id.* § 1311(a).

5. *Id.* § 1342. The other permitting program under the CWA is in Section 404, regulating dredged or fill material. Id. § 1344.

6. *Id.* § 1342.

agency to issue the permits. Currently, there are forty-six states that have authorized state permitting programs.[7]

There are two main types of permits under the NPDES permitting program—an individual permit and a general permit.[8] An individual permit is one that the regulator issues to a specific entity or source. The issuance of an individual permit requires an informal agency adjudication process for approval in which the permitting authority drafts a permit that is specifically tailored to a particular facility.[9] General permits, on the other hand, cover one or more categories of discharges belonging to separate facilities within the same geographic or political region.[10] Since 1979, general permits have covered thousands of point sources and have authorized discharges from a variety of sources, including municipal and industrial stormwater systems and concentrated animal feeding operations.[11]

The CWA states that NPDES permittees must comply with all the relevant requirements for a discharge.[12] Generally, a NPDES permit contains five types of provisions. The first is Technology-Based Effluent Limitations.[13] These are limitations on discharges depending on the available technology and cost.[14] EPA establishes national effluent guidelines that address the applicable limitation for certain types of facilities.[15] If EPA does not have written guidelines for a certain industry group, then a permit writer is required to use his or her "best professional judgment" in developing a technology-based limit.[16] The second provision in a permit is Water-Quality-Based Effluent Limitations. These are limitations determined by the impact of a pollutant on receiving waters and are used if the Technology-

7. Specific State Program Status, EPA, http://water.epa.gov/polwaste/npdes/basics/State-Program-Status.cfm [http://perma.cc/XR56-7DSS].

8. 40 C.F.R. § 122.21 (2015).

9. *See generally* OFF. WASTEWATER MGMT., EPA, WATER PERMITTING 101 (1999), http://water.epa.gov/polwaste/npdes/basics/upload/101pape.pdf [http://perma.cc/JVU6-AXRH].

10. 40 C.F.R. § 122.28(a).

11. *See id.* § 122.28(b).

12. 33 U.S.C. § 1342(a) (2012).

13. 40 C.F.R. § 122.44(a)(1).

14. *Id.*

15. 33 U.S.C. § 1311(b).

16. *See id.* § 1342(a)(1)(B).

Based Effluent limitations are not sufficient to meet the applicable water quality standards.[17] The permit also typically contains monitoring and reporting requirements.[18] The NPDES permit will specify how and when a facility must perform sampling for certain pollutants.[19] Standard conditions must also be included in every NPDES permit.[20] These conditions include requirements such as a duty to properly operate a facility, report any anticipated noncompliance, and notify the proper authority of any changes to the facility.[21] Finally, a NPDES permit may also contain requirements that are deemed appropriate for a specific facility.[22]

In applying for an individual NPDES permit, applicants must submit an application within 180 days of the discharge and provide EPA or an authorized state the required information about the facility.[23] Applicants must disclose significant detail about the pollutants the facility expects to release. Information that is required varies depending on whether the facility is an existing or new point source, or discharging only non-process water.[24] Generally, among the information EPA requires are facility and receiving waters locations, the facility's operations, sampling of wastewater, quantitative data on the pollutants, and a listing of all toxic pollutants.[25]

The application process for the general permit differs from that of the individual permit. In issuing a general permit, the permit writer determines whether data collected from facilities warrants a general permit. The regulator considers whether there are important similarities between the facilities that allow them to operate under one permit. In making this determination, the permit writer considers factors such as: whether the facilities discharge the same pollutants, use similar disposal practices, require the same monitoring, and whether it would be practical to

17. *Id.* §§ 1312(a),1342(a)(1)(B); 40 C.F.R. § 122.44(d).
18. 40 C.F.R. § 122.41(l)(4).
19. *Id.* § 122.41(j).
20. *See id.* §§ 122.41–122.42.
21. *Id.*
22. *Id.* §§ 122.43(a).
23. *Id.* § 122.21(c)(1), (f).
24. *See* 40 C.F.R. § 122.21.
25. *Id.* § 122.21(g)(1), (3), (7)(i), (9).

control the facilities under a general permit instead of an individual permit.[26] Once the general permit has gone through a notice and comment phase, the permit writer issues the permit with the appropriate limitations and provisions for the facilities under the permit's coverage.[27] A discharger seeking coverage under a general permit after the permit has already been issued, must submit a notice of intent.[28] The notice of intent must contain information essential to implementing the program, including the name and address of the operator and facility, the type of facility or discharges, and the receiving streams.[29] Once the permit writer reviews the notice of intent, he or she will grant the facility coverage under the general permit, ask for additional information from the facility, or recommend that the facility apply for an individual permit.[30]

Since the agency relies heavily on the information an applicant provides about the nature of its discharges, "disclosures made by permit applicants about their operations and waste streams are critical to the success of the overall permitting scheme."[31] Once an authorized agency reviews the permit application for completeness and accuracy, a permit writer will use the national effluent guidelines, the information submitted by the applicant, and his or her experience, in drafting permits to determine what will be listed as a pollutant and what limitations will be set on those discharges.[32]

B. The Permit Shield Provision

Under the CWA, dischargers who have valid NPDES permits and comply with the conditions of those permits are free from enforcement actions relating to those discharges.[33] This is

26. *Id.* § 122.28(a)(2)(i)–(ii).
27. *Id.* § 123.61.
28. *Id.* § 122.28(b)(2).
29. *Id.*
30. OFF. WASTEWATER MGMT., *supra* note 9.
31. Ketchikan Pulp Co., 7 E.A.D. 605, 619 (EAB 1999).
32. *See* EPA, NPDES PERMIT WRITERS' MANUAL 3-3, (2010), https://www3.epa.gov/npdes/pubs/pwm_2010.pdf [https://perma.cc/G7HC-CAZ5] [hereinafter NPDES PERMIT WRITERS' MANUAL].
33. 33 U.S.C. § 1342(k) (2012).

referred to as the "permit shield."[34] The statute provides, "[c]ompliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections [309] and [505] . . . with sections [301], [302], [306], [307], and [403] . . . except any standard imposed under section [307] for a toxic pollutant injurious to human health."[35] Section 309 and 505 pertain to state enforcement and citizen suits.[36] Sections 301, 302, 306, 307, and 403 relate to standards for dischargers.[37]

Congress intended for the permit shield to give permittees insulation from changes in regulations during the life of the permit. The House Report provides: "The purpose of this provision is to assure that the mere promulgation of any effluent limitation or any limitation, a standard, or thermal discharge regulation, by itself will not subject a person to holding a valid permit to prosecution."[38] For instance, EPA will occasionally update the effluent limitations for certain categories of discharges.[39] The shield gives a permittee protection from having to meet more stringent requirements issued by EPA until the permit expires or is modified or reissued.[40] The provision therefore provides some comfort to permittees as a defense against government and citizen suit actions regarding claims a permit is not sufficiently strict.[41]

Much to the frustration of the courts, the legislative history gives no guidance as to how far the protection of the permit provision actually reaches. Does the shield apply to pollutants not listed in the permit? What level of disclosure by the permit holder is required to trigger the permit shield defense? Does the shield apply to only individual permits? In light of this statutory ambiguity, it is appropriate to defer to the reasonable interpretation of the agency.

34. *Id.*
35. *Id.*
36. *Id.* §§ 1319, 1365.
37. *Id.* §§1311, 1312, 1316, 1317, 1343.
38. H.R. Rep. No. 92-911, at 128 (1972).
39. 33 U.S.C. § 1311(d).
40. E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112, 138 n.28 (1977).
41. *See id.*

C. EPA's Interpretation of the Permit Shield

EPA has made several policy statements on the scope the permit shield's coverage.[42] In a 1976 memorandum, EPA clarified that it intends for a permit to give general authorization to discharge, subject only to the conditions and limitations contained in the permit.[43] In 1994, EPA issued a more thorough policy document discussing the application of the shield to certain categories of pollutants identified in the permit. These pollutants included:

> 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 in writing as present in facility discharges during the permit application process and contained in the administrative record which is available to the public; and
> 3) Pollutants not identified as present but which are constituents of wastestreams, operations or processes that were clearly identified in writing during the permit application process and contained in the administrative record which is available to the public.[44]

EPA also noted in its 1994 policy that the shield extends to general permits.[45] The Agency stated that general permits allow for discharges within the specified scope of the particular

42. *See* Memorandum from Jeffrey G. Miller, Deputy Assistant Adm'r for Water Enf't, to Reg'l Enf't Dir., Region V (Apr. 28, 1976), http://www3.epa.gov/npdes/pubs/owm489.pdf [https://perma.cc/4B9Y-HEZ9]; Memorandum from Robert Perciasepe, Steven A. Herman & Jean C. Nelson, Assistant Adm'rs & Gen. Counsel, to Reg'l Adm'rs & Reg'l Counsels (July 1, 1994), http://www.epa.gov/npdes/pubs/owm615.pdf [https://perma.cc/ZBE4-9TH8]; Memorandum from Robert Perciasepe, Steven A. Herman & Jean C. Nelson, Assistant Adm'rs & Gen. Counsel, to Reg'l Adm'rs & Reg'l Counsels (Apr. 11, 1995), http://www.epa.gov/npdes/pubs/owm0131.pdf [https://perma.cc/WP9A-V5CL]. It should be noted that two of these guidance documents followed shortly after Atlantic States Legal Found. v. Eastman Kodak Co. and were in response to some questions that were raised by the court's holding.

43. Memorandum from Jeffrey G. Miller, *supra* note 42.

44. Memorandum from Robert Perciasepe, Steven A. Herman & Jean C. Nelson (July 1, 1994), *supra* note 42, at 2.

45. *Id.* at 3.

permit.[46] EPA specified that as long as the discharger complies with the permit conditions, including the pollutant limits, notification requirements, and other conditions, the permit shield will apply.[47]

Finally, EPA explicitly discusses three circumstances in which the permit shield does not apply. In the case of individual permits, an NPDES permit does not authorize discharge of pollutants from wastestreams, operations, or processes that "existed at the time of the permit application and which were not clearly identified during the application process."[48] EPA states, however, that if a permit holder makes changes to its discharges, the shield also applies to these changes so long as the discharger abides by the notification requirements.[49]

D. The Early Decisions: *Atlantic States*, *Ketchikan*, and *Piney Run*

The first three major cases to address the scope of the permit shield were the U.S. Court of Appeals for the Second Circuit's *Atlantic States Legal Foundation v. Eastman Kodak*,[50] the Environmental Appeals Board's *Ketchikan Pulp*,[51] and the U.S. Court of Appeals for the Fourth Circuit's *Piney Run Preservation Association v. County Commissioners of Carroll County*.[52] All three decisions granted the shield's coverage for pollutants that are not expressly listed in a permit. These cases serve as the foundation for the recent and pending cases over the permit shield, with permit holders seeking to expand the reach of their holdings.

In *Atlantic States*, an environmental group filed suit against Eastman Kodak, a company that operated a facility that manufactured photographic products and laboratory chemicals in Rochester, New York.[53] Kodak also operated a wastewater treatment plant that would remove harmful pollutants from the

46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* at 2 (citing 40 C.F.R. §§ 122.41(1), 122.42(a)–(b) (1994)).
50. 12 F.3d 353 (2d Cir. 1994).
51. 7 E.A.D. 605 (EAB 1998).
52. 268 F.3d 255 (4th Cir. 2001).
53. *Atl. States*, 12 F.3d at 354.

facility before discharging them into the Genesee River.[54] The plaintiff environmental group, Atlantic States Legal Foundation, alleged that Kodak exceeded the effluent limits in its state-issued permit.[55] The group also claimed Kodak was liable for discharging sixteen pollutants that were not listed in its NPDES permit.[56] The court found that "[o]nce within the NPDES scheme, polluters may discharge pollutants not specifically listed in their permits so long as they comply with the appropriate reporting requirements and abide by any new limitations when imposed on such pollutants."[57] The court recognized, as EPA addressed in its guidance policies, that it would be too restrictive to prohibit all other pollutants not listed in the permit.[58] However, the court also emphasized that full disclosure is an essential prerequisite to allowing the permit shield defense.[59]

Four years later, the EPA Environmental Appeals Board (EAB) followed similar reasoning as the Second Circuit in *Ketchikan Pulp*. In *Ketchikan*, EPA's Region 10 filed suit against Ketchikan Pulp Company (KPC), a pulp mill, for having drained a two-year accumulation of flocculant[60] into Ward Cove through a flocculant drain line.[61] KPC also released untreated cooking acid into Ward Cove.[62] EPA claimed that these specific discharges were not covered by KPC's permit.[63] KPC's NPDES permit laid out effluent limitations for five conventional pollutants but nowhere did it mention limitations for flocculent, cooking acid, or industrial spills.[64] In its defense, KPC argued that the discharges were "implicitly" covered by the permit and therefore protected by the permit shield.[65] The Board disagreed,

54. *Id.*

55. *Id.* at 355.

56. *Id.* at 356–57.

57. *Id.* at 357.

58. *Id.*

59. *Atl. States*, 12 F.3d at 358.

60. Flocculants are used in water treatment processes to help sedimentation or filtration of small particles. *See, e.g.*, FLOCCULANTS.INFO, http://www.flocculants.info/ [https://perma.cc/A2DW-3QGH].

61. Ketchikan Pulp Co., 7 E.A.D. 605, 609–10 (EAB 1998).

62. *Id.* at 609.

63. *Id.* at 612.

64. *Id.* at 611.

65. Brief for Respondent at 11, Ketchikan Pulp Co., 7 E.A.D. 605 (EAB 1998) (No. CWA-1089-12-22-309(g)).

emphasizing that unlisted pollutants may fall under a permit's coverage only if the permittee meets the Agency's disclosure standards.[66] KPC, unlike Kodak, failed to meet EPA's disclosure policy.[67] Here, the Board concluded, there was no evidence that KPC disclosed its flocculent discharge practices or any anticipated chemical spills.[68] Additionally, the Board found the permitting authority had no reason to anticipate such releases.[69]

In the 2001 case *Piney Run Preservation*, the U.S. Court of Appeals for the Fourth Circuit agreed with *Ketchikan* and *Atlantic States* in finding that EPA's disclosure standards were valid.[70] In *Piney Run*, the plaintiffs file suit against Carroll County, claiming that the county-operated waste treatment plant was unlawfully discharging warm water into Piney Run.[71] In *Piney Run* the court addressed two questions: "what comprises the scope or terms of an NPDES permit" and "whether the permit shield bars CWA liability for discharges not expressly allowed by the permit when the holder has complied with the permit's express restrictions."[72]

In examining the central issue, the court followed the *Chevron* analysis and first looked to the plain language of the statute.[73] If the congressional intent behind the statute was clear then the court would not need to conduct any further analysis.[74] Section 402(k) of the CWA states, "compliance with a permit issued pursuant to this section shall be deemed compliance. . ."[75] The court agreed with *Atlantic States* in finding that this crucial

66. *Ketchikan Pulp Co.*, 7 E.A.D. at 621.

67. *Id.*

68. *Id.* at 626, 632.

69. *Id.* at 629, 639..

70. Piney Run Pres. Ass'n v. Cty. Comm'rs of Carroll Cty., 268 F.3d 255, 267–68 (4th Cir. 2001).

71. *Id.* at 259.

72. *Id.* at 266.

73. *Id.* at 267. The court here applies step one of the Chevron analysis, which is to first answer "whether Congress has directly spoken to the precise question at issue." Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

74. *Chevron*, 467 U.S. at 842–43 ("[T]he court, as well as the agency, must give effect to the unambiguously express intent of Congress.").

75. *Piney Run Pres. Ass'n*, 268 F.3d at 267 (quoting 33 U.S.C. § 1342(k) (2012)).

language is ambiguous and does not explain the scope of the permit shield.[76]

The court then applied step two of the *Chevron* analysis and found that the EPA's interpretation in *Ketchikan* was a rational construction of the statute.[77] Following the test from *Ketchikan*, the court explained that "the Commissioners would be in violation of their NPDES permit through the Plant's discharge of heat if either: (1) the permit specifically barred such discharges; or (2) the Commissioners did not adequately disclose [the discharge to the Maryland Department of the Environment (MDE)]."[78]

The plaintiffs in *Piney Run* argued that because there was a short footnote stating "the discharge of pollutants not shown shall be illegal,"[79] the defendant permittee had clearly violated the terms of the statute. The court, however, was not persuaded. The court found that there was no extrinsic evidence showing that MDE actually intended the permit to be that strict.[80] Indeed, the court concluded that if the footnote had been that important then the text would not have been so buried within the permit.[81] As to the second prong, the court found that there was evidence that the Commissioners had disclosed heat discharges and that MDE had contemplated them.[82] The commissioners had informed MDE of the heat during the permitting process and the record contained a compilation of the daily reports on water temperature and heat discharges provided by the Commissioners to the MDE.[83] Since the Commissioners had met both prongs, the court ultimately held that the Commissioners were protected by the permit shield and were not liable under the CWA.[84]

76. *Id.*; *see also* Atl. States Legal Found. v. Eastman Kodak, 12 F.3d 353, 357–58 (2d Cir. 1993).

77. *Piney Run Pres. Ass'n*, 268 F.3d at 267. Step two of the *Chevron* analysis states that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843.

78. *Piney Run Pres. Ass'n*, 268 F.3d at 269.

79. *Id.* at 270 (internal quotations omitted).

80. *Id.* at 270–71.

81. *Id.*

82. *Id.* at 271–72.

83. *Id.*

84. *Piney Run Pres. Ass'n*, 268 F.3d at 271–72.

II. THE RECENT ISSUES

After a twelve-year lull, courts began to revisit the question of how much protection the shield actually affords. A series of cases from 2013 to 2015 dealt with numerous issues arising from both the lack of clarity in the CWA provisions and industry's attempt to limit liability for releasing contaminants. Among the questions presented were whether a failure to disclose a discharge during the permitting process bars the permit shield defense, whether failure to comply with *all* provisions of an NPDES permit bars protection, and whether the shield is available to general permits. The following section provides a discussion of this recent case law. Note, that even though these cases fall within such a close time period of one another, the courts come to widely different conclusions about the application of the shield.[85]

The 2013 case, *Ohio Valley Environmental Coalition v. Marfork Coal*, narrowed slightly the scope of the permit shield in the context of the individual NPDES permit by finding that a permit holder could be in violation of its permit even when there is no effluent limitation set for the pollutant.[86] In *Marfork*, four environmental groups filed suit against Marfork Coal Company in the U.S. District Court for the Southern District of West Virginia.[87] The plaintiffs claimed, among other allegations, that Marfork violated the CWA by discharging selenium from one of its surface mines into a nearby stream.[88] Marfork's permit expressly limited the discharge of certain pollutants including iron, manganese, and aluminum, but did not expressly limit selenium.[89] The court stated that, "assuming selenium was adequately disclosed as a discharge" during the application phase and was thus within the reasonable contemplation of the state authority, "Marfork would not be in violation of the CWA."[90]

85. Also, note that there is little reference from one court case to another since most of the cases were pending at the same time and, therefore, had little persuasive value to one another.

86. Ohio Valley Envtl. Coal., Inc. v. Marfork Coal Co., 966 F. Supp. 2d 667, 689 (S.D.W. Va. 2013).

87. *Id.* at 667.

88. Complaint at 1, *Marfork*, 966 F. Supp. 2d. 667 (No. 5:12-1464).

89. *Marfork*, 966 F. Supp. 2d at 671.

90. *Id.* at 682.

However, there was another relevant section in the permit that stated "[t]he discharge or discharges covered by a WV/NPDES permit are to be of such quality so as not to cause violation of applicable water quality standards."[91] The court found that the permit "explicitly authorizes the discharge of selenium only to the extent that it does not cause a violation of water quality standards."[92] The court rejected Marfork's argument that pointed to similarities between Marfork's permit and the permits disputed in *Piney Run* and *Atlantic States*.[93] More specifically, the court discussed that the defendants in *Piney Run* and *Atlantic States* possessed permits that implicitly allowed discharges after they were contemplated by the permitting authority, while the cross-reference to water quality standards in Marfork's permit actually contained a provision expressly prohibiting selenium.[94]

In the 2014 case *Southern Appalachian Mountain Stewards v. A & G Coal*, the Fourth Circuit addressed the issue of whether a company's failure to disclose the discharge of selenium barred the shield defense.[95] The defendant, A & G Coal Corp., operated a coal mine in Wise County, Virginia and identified the surface mine as the source of runoff to two ponds and groundwater.[96] Environmental groups, including Southern Appalachian Mountain Stewards, sampled the identified ponds and found that they contained selenium, a chemical not listed in A & G's permit.[97] Regulations require that for a primary industry to discharge "process wastewater" it must report quantitative data on pollutants, including selenium, listed in the application.[98] The applicant must notify the authorizing agency as to the presence

91. *Id.*

92. *Id.* at 685. This is a generic provision that is provided in almost all NDPES permits.

93. Marfork raised the similarity that plaintiffs in all three cases "claimed violations of statutory and regulatory provisions purporting to make illegal the discharge of any pollutant not expressly allowed under the permit." *Id.*

94. *Id.*

95. S. Appalachian Mountain Stewards v. A & G Coal Corp., 758 F.3d 560, 561 (4th Cir. 2014).

96. *Id.*

97. *Id.* at 562.

98. *Id.* at 563; *see* 9 VA. ADMIN. CODE 9 § 25-31-100(H)(7)(e)(2); 40 C.F.R. § 122.21(g)(7)(vi)(B) (2015).

or absence of the pollutants on the list.[99] A & G did not report any data on selenium in its application.[100] A & G claimed that because it neither knew nor had reason to believe that the discharge contained selenium that it complied with the application requirements.[101]

The court rejected A & G's argument that it only needed to mention selenium if it knew or had reason to believe that the element was present in the discharges. The court stated that A & G's interpretation "turns the presumptions of the CWA on their head."[102] In its analysis, the Fourth Circuit found that A & G failed to meet the first prong of the *Piney Run* test.[103] The first prong of the *Piney Run* test states that a permit holder may be shielded from liability if the "permit holder complies with the express terms of the permit and with the Clean Water Act's disclosure requirements."[104] In determining whether A & G met this prong, the court considered 1) whether A & G had provided adequate information to Department of Mine, Minerals, and Energy (DMME) and 2) whether the selenium discharges were within the reasonable contemplation of DMME.[105] The Fourth Circuit stated that the agency needs this information to make a fully informed decision when issuing the permit.[106] Otherwise, the court explains, the lack of disclosure would "encourage willful blindness by those discharging pollutants and prevents the . . . agencies . . . from receiving the information necessary to effectively safeguard the environment."[107] Accordingly, the court entered judgment for the plaintiffs.[108]

The Ninth Circuit recently came close to ruling on whether the permit shield applies to a general permit in the case *Alaska*

99. U.S. ENVTL. PROT. AGENCY, APPLICATION FORM 2C - WASTEWATER DISCHARGE INFORMATION 3 (1990), http://www3.epa.gov/npdes/pubs/3510-2C.pdf [https:// perma.cc/F62D-VNQL].

100. *S. Appalachian Mountain Stewards*, 758 F.3d at 566.

101. Brief for Appellant at 21, *S. Appalachian Mountain Stewards*, 758 F.3d 560 (No. 13-2050).

102. *S. Appalachian Mountain Stewards*, 758 F.3d at 566.

103. *Id.* at 565–66.

104. Piney Run Pres. Ass'n v. Cty. Comm'rs of Carroll Cty., 268 F.3d 255, 259 (4th Cir. 2001).

105. *S. Appalachian Mountain Stewards*, 758 F.3d at 565.

106. *Id.* at 566.

107. *Id.* at 567.

108. *Id.* at 562, 570.

Community Action on Toxics v. Aurora Energy Services.[109] The Ninth Circuit reviewed the district court's holding that the defendants were shielded from liability under the CWA for discharging coal into Resurrection Bay.[110] The Seward Loading Facility, which is owned and operated by the defendants, transfers coal onto ships through a conveyor system.[111] The plaintiffs alleged that the conveyor occasionally spills coal into the bay.[112] The defendants claimed that the spills were covered by the defendants' Multi-Sector General Permit.[113] The Ninth Circuit disagreed and found that the plain terms of the general permit prohibit the discharge of coal.[114] The court focused on the language in the permit that required that all discharges not authorized by a NPDES permit be eliminated.[115] The court concluded that, because the list of permissible non-stormwater discharges did not include coal, the discharge of coal ash was a violation of the permit.[116] The court noted that it need not discuss whether the permit shield applies to general permits, but that if the *Piney Run* analysis did apply, the result would be the same because the defendants had not complied with the "express terms of the General Permit."[117]

Shortly after the Ninth Circuit's decision, the Sixth Circuit offered a more direct analysis of whether the permit shield applies to the general permit.[118] In *Sierra Club v. ICG Hazard*, the Sierra Club filed suit against ICG's Thunder Ridge Mine for allegedly violating the conditions of its state-issued general permit (KPDES permit).[119] ICG, located in Leslie County, Kentucky, discharged amounts of selenium that exceeded

109. Alaska Cmty. Action on Toxics v. Aurora Energy Servs., LLC, 765 F.3d 1169 (9th Cir. 2014).

110. *Id.* at 1172.

111. *Id.*

112. Complaint at 6, Alaska. Cmty. Action on Toxics v. Aurora Energy Servs., LLC, 940 F. Supp. 2d 1005 (D. Alaska 2013) (No. 90CV00255).

113. *Id.* at 4.

114. *Alaska Cmty. Action on Toxics*, 765 F.3d at 1172.

115. *Id.*

116. *Id.* at 1173.

117. *Id.* at 1173–74.

118. Sierra Club v. ICG Hazard, LLC, No. 11-148-GFVT, 2012 U.S. Dist. LEXIS 146140 (E.D. Ky. Sept. 28, 2012).

119. *Id.* at *4.

Kentucky's numeric and narrative water quality standards.[120] The KPDES permit placed effluent limitations on pollutants such as solids, iron, and manganese but did not place any limits on selenium.[121] Rather, the KPDES permit required "each existing mining operation authorized by this general permit [to] conduct and submit . . . a one-time analysis for . . . selenium."[122] The Sierra Club argued that the fact that ICG's selenium discharges were not limited in the KPDES permit did not allow the company to invoke the permit shield defense.[123] The Sierra Club contended that "because the permitting authority lacks detailed information about individual discharges when issuing a general permit, the scope of a general permit is defined by the effluent limitations present in the permit," and, therefore, the scope of the permit shield for a general permit should be narrower than the shield of an individual permit.[124]

The district court, however, rejected Sierra Club's argument and came to a different conclusion.[125] The court highlighted a major difference between an individual permit and general permit during the application process.[126] During the application for an individual permit, the permit applicant is required to disclose information and is at fault if the applicant does not disclose appropriate information.[127] By contrast, a general permit requires very minimal information from the facility during the permitting phase.[128] It is the duty of the permit writer to request any additional information.[129] If that information is not

120. *Id.* at *6 (citing 401 Ky. Admin. Regs. 10:031 §§ 2(1)(d), 4(1)(f), (6)).

121. *Id.* at *11.

122. *Id.*

123. *Id.* ICG relied on the 1995 EPA Policy Statement addressing the scope of the permit shield. *See id.* at *16–17.

124. Sierra Club Motion for Summary Judgment at 12, *ICG Hazard*, 2012 U.S. Dist. LEXIS 146140 (No. 11-CV-148-GFVT).

125. *ICG Hazard*, 2012 U.S. Dist. LEXIS at *11–28.

126. *Id.* at *19. The court refered to the General Permit Guidance in stating "the only significant difference is that 'a larger share of the responsibility for the information gathering process leading up to the development of a general permit falls on the permitting rather than on the permit applicants.'" *Id.* (quoting OFFICE OF WATER ENF'T & PERMITS, U.S. ENVTL. PROT. AGENCY, GENERAL PERMIT PROGRAM GUIDANCE 1, 33–34 (1988) [hereinafter GENERAL PERMIT GUIDANCE]).

127. *See* Reply Brief of Plaintiff-Appellant Sierra Club, at 20–21, Sierra Club v. ICG Hazard, LLC, 781 F.3d 281 (6th Cir. 2013) (No. 13-5086).

128. *ICG Hazard*, 2012 U.S. Dist. LEXIS at *21.

129. *Id.*

sought, then it is the fault of the permit writer and the issuing authority.[130] The court turned to the language in EPA's General Permit Guidance, which states that after the five-part similarity[131] finding is made for the general permit, "'the actual development of the general permit can proceed just as for any individual permit.'"[132] Therefore, the court did not find that different requirements of the general permit were reason to narrow the shield, but could in fact be grounds for allowing more leeway for permittees.[133]

Sierra Club appealed to the Sixth Circuit where the Circuit affirmed the district court's holding.[134] The court first agreed with the district court that the shield applies to the general permit by referring to EPA's interpretation intending for the shield to apply to both the individual and general permit.[135] Second, the court agreed with the district court that ICG's discharge of selenium satisfied the *Piney Run* test.[136] The court found that ICG had met the disclosure prong of *Piney Run* by disclosing the presence of selenium with a "one-time sample at some time during the life of the permit."[137] KDOW was also aware that "the mines in the area could produce selenium," satisfying the "reasonable contemplation" prong.[138] The court cites as evidence of KDOW's knowledge the inclusion of a one-time monitoring requirement.[139] Should KDOW had found other restrictions necessary for the release of selenium, the court discusses, it would have included them in the permit.[140]

These cases present a series of highly fact-specific situations in which the court either broadens or narrows the scope of the

130. *Id.*

131. The "five-part similarity" finding refers to the criteria that the practices of the entire industry must meet in order to acquire a general permit. 40 C.F.R. § 122.28(a)(2)(i)(A)–(E) (2015).

132. *IGC Hazard*, 2012 U.S. Dist. LEXIS at *19 (quoting GENERAL PERMIT GUIDANCE, *supra* note 126, at 17).

133. *See id.* at *19–20.

134. Sierra Club v. ICG Hazard, LLC, 781 F.3d 281 (6th Cir. 2015).

135. *Id.* at 286.

136. *Id.* at 288–89.

137. *Id.* at 288.

138. *Id.* at 290.

139. *Id.* at 283.

140. *ICG Hazard*, 781 F.3d at 290.

permit shield in light of those facts and the holdings in *Atlantic States*, *Ketchikan*, and *Piney Run*. In examining these recent cases together, it seems that courts may have an easier time following the confines of *Piney Run* as it pertains to individual permits. However, when applying the older cases to general permits, the defendants' varying circumstances raise a number of questions for the court. The following section dissects the recent case law and examines the underlying rationales behind favoring a broad or narrow permit shield, especially as it pertains to a general permit.

III. IMPLICATIONS

The recent court decisions interpreting the scope of the permit shield raise important questions as to the purpose of the permit shield and the consequences of the shield's coverage. A broad or narrow construction of the permit shield has varying implications for industry, administrative agencies, public interest groups, and communities. While all of the cases addressing the scope of the permit shield rely heavily on the facts of the case, there are some trends in the lines of argument presented by the parties. Arguments for a broad shield focus on the notion that permittees need certainty that they will be protected from unlimited liability, primarily from citizen suits. These permittees want a system that will assure their businesses the predictability that they need to succeed. Within this same line of reasoning is the argument that regulators do not provide notice, and therefore violate due process, when the agency promulgates regulations that are unclear.

While the regulated community is understandably concerned about predictability, a narrow interpretation will provide adequate environmental protection. The *Sierra Club v. ICG Hazard* decision demonstrates the dangerous scenario in which a company is allowed, without limitation, to knowingly discharge one of the most toxic pollutants under the CWA. This decision, along with many of the arguments raised by the defendants in the recent decisions, broaden the scope of the permit shield to the extent that it runs counter to the fundamental premise of the CWA—to protect the nation's waters from harmful discharges.

A. Arguments favoring a broad scope

The regulated community has highlighted the permit shield as a way of ensuring certainty. In a number of briefs, mining companies underscore the purpose of the permit shield as "giving permits finality."[141] This certainty, industry argues, reduces unknown liability which in turn helps businesses grow. Having the shield cover fewer pollutants, these defendants have argued, would leave businesses guessing as to what discharges may give rise to liability.

For instance, in *Alaska Community Action on Toxics v. Aurora Energy Services*, industry associations submitted an amicus brief arguing that Aurora's NPDES permit barred suit for air-borne coal dust released from the conveyor system.[142] This argument was partially based on the policy that the permit shield "provides the finality that industry desperately needs to begin, conduct or expand business."[143] If EPA was aware of the incidental discharges of coal dust and the state authority specifically authorized the coal discharges under a MSGP permit, then how would Aurora predict liability for the discharges? The companies urge that this uncertainty "arising from the inability to rely upon" the whole suit of permits necessary to operate poses significant new hurdles for "moving forward with investments to create and expand an enterprise."[144] Permit holders argue that this unpredictability would lead to reduced investments in projects because investors would see more risk in a permit that does not shield liability.[145] Furthermore, banks may be more reluctant to extend credit to such projects or would extend credit

141. E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112, 138 n.28 (1977).

142. *See* Brief of Amicus Curiae in Support of Defendants, Alaska Cmty. Action on Toxics v. Aurora Energy Serv., LLC, 765 F.3d 1169 (2014) (No. 13-35709); *see also* Crowell-Moring, LLP, Coal Loading Facility and Railroad Win Federal Court Endorsement of Clean Water Act's "Permit Shield" Defense and Refusal to Expand Clean Water Act to Wind-Borne Dust, martindale.com (Apr. 11, 2013), http://www.martindale.com/environmental-law/article_Crowell-Moring-LLP_1752044.htm [http://perma.cc/E5DF-Y3DV] (discussing the implications of the district court's holding).

143. Brief of Amicus Curiae in Support of Defendants, *supra* note 142, at 11.

144. *Id.* at 26.

145. *Id.*

at higher interest rates.[146] This loss of financing could result in a decrease in employment and slower economic growth for communities.[147]

The defendants' arguments in *Southern Appalachian Mountain Stewards v. A & G Coal Corp.* (*SAMS*) also urged that the narrowing of the permit shield could give rise to unknown liability.[148] Following *SAMS*, if a permittee learns of a pollutant that it "either knew or had any reason to believe that the element would be present in its discharges" at the time that it submitted its permit application, the permittee must immediately report it in order to avoid liability.[149] Before *SAMS*, this only applied to those permittees who were making changes to their facilities.[150] Also, as a result of *SAMS*, it is clear that a permittee cannot rely on an authority's awareness of a discharge or wastestreams of which a pollutant is a constituent element, unless the permit holder can show that it adequately investigated and tested the specific chemical levels and disclosed these test results to the permitting agency.[151]

Along similar lines, industry raises the issue of "lack of notice" with the shrinking of the permit shield and how this narrow scope ultimately violates the fundamental right to due process. This is first raised in *Piney Run*.[152] The Due Process clause of the Fifth Amendment states, in relevant part, "[n]o Person shall be . . . deprived of life, liberty, or property, without due process of law."[153] Because a business may be deprived of its

146. The amicus brief contends that banks may respond to increased uncertainty by "rationing" credit, which, they argue, could lead to "a complete loss of access to the credit market for some project proponents" or could halt some projects altogether. *Id.* at 27.

147. Brief of Amicus Curiae in Support of Defendants, *supra* note 142, at 25–30.

148. *See* Brief of Appellant at 3, S. Appalachian Mountain Stewards v. A & G Coal Corp., 758 F.3d 560 (4th Cir. 2014) (No. 13-2050).

149. *S. Appalachian Mountain Stewards*, 758 F.3d at 566.

150. *District Court Exposes Vulnerability in Clean Water Act Permit Shield*, WARREN ENVIRONMENTAL COUNSEL LLP (July 31, 2013), http://warrenglasslaw.com/district-court-exposes-vulnerability-in-clean-water-act-permit-shield/ [http://perma.cc/SB7D-7BPX] (discussing the implications of the District Court's ruling that was later affirmed by the Fourth Circuit).

151. *Id.*

152. *See* Amicus Curiae in Support of Defendant-Appellant at 16–17, Piney Run Pres. Ass'n, v. Comm'r of Carroll County, 268 F.3d 255 (4th Cir. 2014).

153. U.S. CONST. amend. V.

property or liberty through a violation of agency regulations, courts frequently examine whether an agency gave fair notice to a regulated entity.[154]

In *Piney Run*, an amicus brief in support of the defendants referred to the D.C. Circuit's opinion in *General Electric v. EPA* in which the court found that fair notice is not provided unless a regulated entity, acting in good faith, is able to identify with "ascertainable certainty" the standards with which the agency expects it to conform.[155] A regulation denies due process "if it is so vague and standardless that it leaves the public uncertain as to the conduct that prohibits" it.[156] In *Piney Run*, the defendants claimed that they were denied due process because there was no temperature limitation on any publically owned treatment facility in Maryland and neither EPA nor the Maryland Department of the Environment had ever found the defendant permittees in violation of their permit for discharging heat.[157]

Another issue that these recent cases have raised is the burden of having to disclose many pollutants in order to be covered by the permit shield. The CWA defines the term "pollutant" very broadly.[158] In *Piney Run*, the court wrote, "this definition is extremely broad, covering innumerable individual substances."[159] One amicus brief submitted by the industry groups in support of the defendants in *Piney Run* writes that, as a practical matter, it would be impossible to disclose every pollutant in an effluent.[160] The brief highlights that this is the

154. *See, e.g.*, United States v. Cinergy Corp., 623 F.3d 455, 458–59 (7th Cir. 2010) (holding that a defendant in compliance with regulations as codified cannot be found in violation of the Clean Air Act where EPA proposes an amendment to the regulations to prohibit defendant's conduct); Howmet Corp. v. EPA, 614 F.3d 544, 553–54 (D.C. Cir. 2010); United States v. Trident Seafoods Corp., 60 F.3d 556, 559 (9th Cir. 1995) ("[T]he responsibility to promulgate clear and unambiguous standards is on the [agency]. The test is not what [the agency] might possibly have intended, but what [was] said. If the language is faulty, the [agency] had the means and obligation to amend.").

155. Brief of Amicus Curiae in Support of Defendant-Appellant at 17–18 (citing General Electric Co. v. EPA, 53 F.3d 1324, 1329 (D.C. Cir. 1995)).

156. *Id.* at 17 (citing Giaccio v. Pennsylvania, 382 U.S. 399, 402 (1966)).

157. *Id.* at 18.

158. 33 U.S.C. § 1362(6) (2012).

159. Piney Run Pres. Ass'n v. Cty. Comm'rs of Carroll Cty., 268 F.3d 255, 271 (4th Cir. 2001).

160. Amicus Brief in Support of Defendant-Appellant at 22, *Piney Run Pres. Ass'n*, 268 F.3d 255 (Nos. 00-1283 & 00-1322).

case partly because facilities cannot control all water that runs on and off of its site.[161] Some of these pollutants occur naturally, such as selenium.[162] In fact, the brief argues, even if a facility discharged *distilled* water, there would still be some traces of pollutants the facility could not control.[163] The court in *Atlantic States* made a similar conclusion in noting that there is "no principled reason why water itself, which is conceded to be a chemical, would not be considered a 'pollutant' under . . . the Act."[164]

This unknown liability is an extremity that EPA tried to avoid in its creation of the NPDES permitting system. The government quickly realized that asking industry to only comply with the parameters of a permit made facilities too susceptible to litigation because "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."[165] Under the Refuse Act, the government aggressively filed suits against polluters by constantly expanding what qualified as a pollutant and would bring suits based on "technical violations" of the permit.[166] EPA therefore rejected this approach under the Refuse Act permitting system.[167] Despite this change in policy, the recent court interpretations of the permit shield could arguably "expose permittees to untold liability and largely vitiate the CWA's permit shield protection for the majority of NPDES permit holders."[168]

EPA has also acknowledged this argument in its guidance policy, stating that it is impossible to identify and limit every chemical present in a discharge.[169] Furthermore, the EAB noted in the *Ketchikan* decision that the "goals of the CWA may be more

161. *Id.* at 23.

162. *Id.* at 22.

163. *Id.* at 24.

164. Atl. States Legal Found. v. Eastman Kodak, 12 F.3d 353, 357 (2d Cir. 1993).

165. Memorandum from Jeffrey G. Miller, *supra* note 42, at 2.

166. *Id.*

167. *Id.*

168. Richard Davis & Mackenzie Schoonmaker, *The Fourth Circuit Limits the Clean Water Act's Permit Shield Defense*, BEVERIDGE & DIAMOND, PC (July 15, 2014), http://www.bdlaw.com/news-1619.html [https://perma.cc/ZE4W-PL6J].

169. Memorandum from Jeffrey G. Miller, *supra* note 42, at 2.

effectively achieved by focusing on the chief pollutants and wastestreams established in effluent guidelines and disclosed by permittees in their permit applications."[170] From an administrative standpoint, it would therefore be infeasible to "contemplate" every pollutant that could possibly be present in a discharge. In drafting a permit, the permit writer must conduct all of the steps mentioned above[171] while thoroughly documenting his or her decision-making process.[172] If a permit writer must examine and draft limitations for hundreds of pollutants, this could create more room for error in a process that is already considered to be quite tedious. It would be infeasible, even with unlimited resources, to set limitations for so many pollutants.

B. A Narrow Interpretation of the Permit Shield Should Control

Although the permit shield is meant to give some relief to industry, it should still be viewed within the context and purpose of the CWA—to restore and maintain the physical, chemical, and biological integrity of the nation's waters.[173] A narrow interpretation of the permit shield aligns closely with this underlying premise because it encourages careful and full disclosure of pollutants and compliance with one's permit. Based on the recent case law, a narrow interpretation includes requiring that permittees comply with all conditions of their permit in order for the shield to apply, requiring full disclosure at the beginning of a permit's issuance, and raising the bar for what is deemed "reasonable contemplation" by the agency. The following discussion provides the basis for these requirements and responses to the regulated community's concerns.

First and foremost, the permit shield should not extend to those who do not comply with all permit conditions (not simply effluent limitations). In *Ohio Valley Environmental Coalition v. Marfork Coal Co.*, the defendant mining company attempted to persuade the court that it should be afforded the permit shield even though the coal mine's discharges of selenium violated state

170. Ketchikan Pulp Co., 7 E.A.D. 605, 618 (EAB 1998).
171. *See supra* Part I(B).
172. *See* NPDES PERMIT WRITERS' MANUAL, *supra* note 32, at 3-3 to -5.
173. 33 U.S.C. § 1251(a) (2012).

water quality provisions.[174] This argument implies that even if the permittee passes the *Piney Run* test, the permittee is free of liability despite having violated another condition of the permit.[175]

Another problem with allowing a permittee to claim the permit shield defense in the *Ohio Valley* situation is that the permittee would not have to report compliance with all provisions in a permit.[176] Instead, the permittee would only have to report the effluent limits because no other condition in the permit would be enforceable.[177] There are many terms and conditions in a permit that are not part of the effluent limitations and are essential to safeguarding the environment.[178] Not allowing the enforceability of these conditions would be inconsistent with federal case law that finds all terms and conditions of a permit to be enforceable.[179] Furthermore, since provisions like water quality standards would not be enforceable, citizens would be prohibited from bringing enforcement actions when a permittee violated such provisions.[180] The court's refusal to grant the permit shield defense in *Ohio Valley* will encourage permit holders to comply not only with the effluent standards in a permit, but any other conditions that are cross-referenced in the permit.

With respect to the first prong under *Piney Run*, a narrow interpretation raises the standard for what is deemed to be full and honest disclosure of an applicant's discharges. This interpretation is best demonstrated by the court's refusal to grant

174. 966 F. Supp. 2d 667, 676 (S.D.W. Va. 2013).

175. *Id.* at 677.

176. Transcript of Oral Argument at 23–24, Ohio Valley Envtl. Coal. Inc. v. Marfork Coal Co., 966 F. Supp. 2d 667 (S.D.W. Va. 2013) (No. 5:12-01464).

177. *Id.* at 24.

178. *See* 40 C.F.R. § 122.41 (2015). In addition to these federally required provisions, state permits adopt provisions that may be even stricter than those designated by the EPA.

179. *See, e.g.*, Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149 (4th Cir. 2000) (holding that plaintiff citizen groups had standing to sue defendant facility for discharging pollutants into a lake and that defendant was liable for not complying with all provisions of its permit); Sierra Club v. Simkins Indus., Inc., 847 F.2d 1109 (4th Cir. 1988) (finding that the defendant manufacturer failed to comply with all provisions of its NPDES permit).

180. *See* Transcript of Oral Argument, *supra* note 176, at 18–24.

the permit shield defense in *SAMS v. A & G Coal Corp.* The Fourth Circuit's reading of the "know or reason to believe" provision requires that applicants *affirmatively* state whether they know of the presence of a pollutant.[181] Accordingly, an applicant may not plead ignorance by failing to test for a regulated pollutant and then simply not provide any information regarding that pollutant because the applicant has "no reason to believe" of its presence.[182]

The decision in *SAMS* is significant because it recognizes the burden that the CWA places on an applicant to make an honest inquiry into the pollutants listed in the regulations. If the court had accepted A & G's argument it would have extended the permit shield to permit holders who assumed a more passive role in the disclosure process.[183] Instead, by taking a narrow interpretation of the permit shield, the court establishes that the permit shield should only be available to those who follow permit requirements and who put forward the adequate disclosures necessary for the permitting authority to reasonably contemplate the threat of a pollutant to the environment.

In the context of the general permit, arguments embracing a narrow shield apply the appropriate timing and standard for "reasonable contemplation" under the second prong of the *Piney Run* test. The Fourth Circuit held in *Piney Run* that discharges not within the reasonable contemplation of the permitting authority *during the permit application process* . . . do not come within the protection of the permit shield."[184] The timing for the application process differs for the individual and general permit. In the context of the general permit, the application process occurs before the issuance of the general permit, not when a permit applicant submits an NOI for coverage.[185]

The relevant time period for the application process is significant because it determines whether a pollutant was

181. S. Appalachian Mountain Stewards v. A & G Coal Corp., 758 F.3d 560, 567 (4th Cir. 2014).

182. *Id.* at 569.

183. *Id.*

184. Piney Run Pres. Ass'n v. Cty. Comm'rs of Carroll Cty., 268 F.3d 255, 268 (4th Cir. 2001).

185. Texas Indep. Producers & Royalty Owners Assoc. v. EPA, 410 F.3d 964, 978 (7th Cir. 2005) (finding the notice and comment phase the "application process" of the general permit).

reasonably contemplated by the agency in the issuance of the permit. In *Aurora Energy Services*, EPA submitted an amicus brief arguing that the district court had wrongly considered Aurora's submission of its NOI as the permit process.[186] EPA explains that the NOI is not an application, but rather an administrative requirement.[187] Unlike the issuance of the general permit itself, the NOI does not undergo public notice and comment. Thus, any disclosures made during the NOI phase cannot be deemed within "the reasonable contemplation" of the permitting authority. For a court to hold to the contrary would encourage permit holders to make disclosures during the NOI phase and then claim protection by the permit shield even if these pollutants are not actually covered by the general permit.[188]

Tying in closely with the issue of timing, courts should also refrain from extending the permit shield to companies that do not provide sufficient information for a pollutant to be within the contemplation of the permit authority. In comparison to what was originally established by the Fourth Circuit, the Sixth Circuit in *ICG Hazard* lowered the standard of proof for what is "reasonably contemplated" by the agency.[189] *Piney Run* and EPA have firmly established disclosures must be adequate for the regulator to determine whether or not there is a threat posed by the release of a pollutant.[190] In *ICG Hazard*, the Sixth Circuit concluded that a one-time sampling requirement and the Kentucky Division of Water's "knowledge" that mines in the area could produce selenium was sufficient to show that KDOW had "reasonably contemplated" the release of selenium.[191] However, there was no evidence that ICG had disclosed the presence of selenium when the general permit was issued.

186. Brief of United States as Amicus Curiae Supporting Appellants at 25–39, Alaska Cmty. Action on Toxics v. Aurora Energy Servs., LLC, 765 F.3d 1169 (2012) (No. 13-35709), 2014 WL 1319629, at *25–39.

187. *Id.* at 35.

188. *Id.* at 38.

189. *See* Sierra Club v. ICG Hazard, LLC, 781 F.3d 281, 283, 290 (6th Cir. 2015).

190. *See* Piney Run Pres. Ass'n v. Cty. Comm'rs of Carroll Cty., 268 F.3d 255, 268 (4th Cir. 2001); Memorandum from Robert Perciasepe, Steven A. Herman & Jean C. Nelson (July 1, 1994), *supra* note 42, at 1–2.

191. *ICG Hazard*, 781 F.3d at 283, 290.

Following the low standard of "contemplation" set forth in *ICG Hazard*, mines that operate under general permits may avoid disclosing the presence of toxic pollutants in their discharges. The permit holder would only need to show that there was some scintilla of evidence that the permitting authority had reason to know permittees in the region could possibly release the pollutant. This is a significantly lower standard than in *Piney Run* in which the defendants provided a "significant compilation of the daily reports" to the permitting authority that contained information on the pollutant at issue in the case.[192] Going forward, courts should follow *Piney Run* more closely so there is further incentive for permit holders, even those operating under the general permit, to provide detailed disclosures to the agency. Permit holders who are not forthcoming about the nature of their discharges to the extent that the permitting authority cannot assess the threat to the environment, should not satisfy the "reasonable contemplation" prong of the *Piney Run* test.

Industry's fear of "untold liability" and loss of business over the unavailability of the permit shield is an outdated argument. It would make little sense for a citizen or regulator to bring an action against a permit holder because they are discharging non-hazardous pollutants. The obvious disincentive for a regulator is time and resources. As has been noted, "the Agency has determined that the goals of the CWA may be more effectively achieved by focusing on the chief pollutants and wastestreams established in effluent guidelines and disclosed by permittees in their permits."[193] For citizens, the disincentive is a court's stringent requirements for standing. In making a motion for injunctive relief, a citizen must show that he or she has suffered irreparable harm from the violation.[194] Such restraints would limit authorities and citizens from bringing frivolous lawsuits only to harass regulated entities.

Instead of urging the courts to expand the scope of the permit shield, the most logical recourse for industry is to be meticulous in disclosing all hazardous pollutants so they are "reasonably contemplated" by the regulator. Following *Ohio Valley*, *Aurora Energy Services, SAMS*, and *ICG Hazard*, mines and other

192. *Piney Run Pres. Ass'n*, 268 F.3d at 271.

193. Ketchikan Pulp Co., 7 E.A.D. 605, 618 (EAB 1998).

194. *See, e.g.*, Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 541 (1987).

regulated entities must closely review all provisions of the NPDES permit application in order to ensure they provide answers to all the questions that have been asked by the regulatory agency. Otherwise, applicants risk not putting their entire discharge within the "contemplation" of the agency. This is a positive outcome for citizens who want to encourage permit holders to be more thorough in their application process.

IV. CONCLUSION

While the permit shield is meant to be an exception to the strict liability of the CWA, it must still be viewed in light of the overall purposes of the statute—to protect the quality of U.S. waters. The above discussion shows that a narrow interpretation of the permit shield provides incentive for permit holders to strictly comply with the terms of their permits and to fully disclose their discharges so they are within the contemplation of the permitting authority. This interpretation does not neglect industry. Industry is still afforded great protection from the permit shield and continues to benefit from its reassurances. It is the role of the courts and federal and state agencies to continue to clarify the nuances in the CWA, while citizens continue to enjoy and protect our most valuable resource.