No. 13-5086

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SIERRA CLUB,
Plaintiff-Appellant,

v.

ICG HAZARD, LLC,
Defendant-Appellee.

On Appeal from the U.S. District Court for the Eastern District of Kentucky
Case No: 6:11-cv-00148-GFVT-HAI

Brief of *Amici Curiae*
American Farm Bureau Federation, American Forest & Paper Association,
American Petroleum Institute, Chamber of Commerce of the United States of
America, CropLife America, National Association of Home Builders,
National Mining Association, and Utility Water Act Group
In Support of Defendant-Appellee and Affirmance of the
U.S. District Court for the Eastern District of Kentucky

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, we, the undersigned counsel of record for the *Amici Curiae* American Farm Bureau Federation, American Forest & Paper Association, American Petroleum Institute, Chamber of Commerce of the United States of America, CropLife America, National Association of Home Builders, National Mining Association, and Utility Water Act Group (collectively, "*amici*"), certify that, to the best of our knowledge and belief, none of the *amici* has a parent company, and no publicly-held company has a 10 percent or greater ownership interest (including stock or partnership shares) in any *amici*.

These representations are made to assist the members of the Court in identifying the need for recusal.

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I. This Case Raises Issues of Fundamental Importance.

The associations filing this brief represent a broad array of agricultural, business, and industry interests concerned with the legal and practical implications raised by Plaintiff-Appellant Sierra Club's two Clean Water Act ("CWA") claims. The first issue is whether an action to enforce water quality standards may be brought under the Surface Mining Reclamation and Control Act ("SMCRA") where an identical CWA action would be precluded by the CWA's permit shield. The district court held that SMCRA cannot be used to upend the CWA's permit shield defense. Memorandum Opinion & Order, *Sierra Club v. ICG Hazard, LLC*, No. 6:11-cv-00148-GFVT-HAI at 17 (E.D. Ky. Sept. 28, 2012), ECF No. 65 ("Mem. Op. & Order"). *Amici* agree and urge this Court to adopt that finding. The second issue, and the focus of *amici's* brief, is whether the CWA's permit shield provides equal protections to general and individual National Pollutant Discharge Elimination System ("NPDES") permits. The district court properly concluded that the scope of the permit shield is the same for general and individual NPDES permits. *Id.* at 11-13. *Amici* agree and, accordingly, urge the Court to affirm the district court decision.

Section 402 of the CWA imposes permitting requirements on point sources that discharge pollutants to waters of the United States. 33 U.S.C. § 1342. These permits serve as both an obligation and a protection. The protection is in the form

of a "shield," which provides that compliance with a permit is deemed to be compliance with the statute. 33 U.S.C. § 1342(k). This shield "serves the purpose of giving permits finality," *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 n.28 (1977), and protects "a discharger from liability under the CWA so long as it discharges in compliance with its permit." *In re Ketchikan Pulp Co.*, 7 E.A.D. 605, 617 (EAB 1998).

Though this case arises in the specific context of an NPDES general permit for coal mining issued by Kentucky,[1] it raises broader concerns regarding the proper interpretation of the scope of the CWA permit shield as applied to a broad range of different NPDES general permits issued by EPA and delegated states. Sierra Club contends that the permit shield differentiates between general permits and individual permits, and provides less protection – i.e., less of a "shield" - for general permits. Sierra Club claims that permittees operating pursuant to a general permit authorization are shielded from liability only for discharges of pollutants *expressly* listed in the general permit. Any other non-listed pollutants are not covered by the shield, according to Sierra Club.

[1] The Kentucky Division of Water ("KDOW") has issued NPDES general permits, after notice and comment, for several industries, including discharges associated with coal mining. *See* http://www.water.ky.gov/permitting/Pages/wastewaterDischarge.aspx. The Kentucky Coal General Permit was renewed on July 1, 2009, with an effective date of August 1, 2009.

But the text of the CWA does not support this interpretation, nor do Environmental Protection Agency ("EPA") regulations or EPA's 1995 Permit Shield Policy Statement.[2] EPA has not interpreted the statute, regulations or guidance to provide a lesser shield for general permits, nor has any court interpreted the shield in such a narrow manner. Rather, as the district court concluded, general and individual NPDES permits require the same level of compliance and enforcement, and therefore are provided the same protections under the permit shield. The district court recognized that the main difference is that with general permits the permit writer is responsible for fashioning the permit to cover similarly situated industries and activities. Thus, so long as a permittee within the relevant industry class (e.g., coal mining) operates in accordance with the terms and conditions of the applicable general permit, it is protected from suit.

Accordingly, the district court dismissed Sierra Club's claims, held that the scope of the permit shield is equivalent for individual and general permits, and that Defendant-Appellee ICG Hazard, LLC ("ICG") was immune from suit because it

[2] *See* Memorandum from Robert Perciasepe, et al., to Reg'l Adm'rs, et al., Revised Policy Statement on Scope of Discharge Authorization and Shield Associated with NPDES Permits (Apr. 11, 1995) ("EPA Policy Statement"), *available at* http://cfpub.epa.gov/npdes/docs.cfm?document_type_id=1&view=Policy%20and%20Guidance%20Documents&program_id=1&sort=name.

had lawfully complied with its NPDES general permit. *Amici* urge the Court to affirm this decision for the reasons set forth below.

II. *Amici* Represent a Wide Array of Industries with Direct Interests in the Outcome of the Case.

As described in the accompanying motion for leave to file this brief, *amici* represent a broad cross-section of the nation's agriculture, energy, infrastructure, construction, home building, and business sectors that are vital to a thriving national economy and provide much-needed products, services, and jobs across the country.[3] *Amici*'s members perform activities specific to their sectors of the economy pursuant to a variety of NPDES general permits.[4]

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[3] Counsel for *amici* contacted the parties to this appeal to ascertain their position in regard to the motion. FED. R. APP. P. 29(a). Sierra Club and the Defendant-Appellee have no objection to the motion. *Amici* state that this brief has been authored in whole by their counsel, and no party, counsel for any party, or other person has contributed any money towards preparation or submission of this brief.

[4] *See, e.g.,* Final National Pollutant Discharge Elimination System (NPDES) General Permit for Stormwater Discharges from Construction Activities, 77 Fed. Reg. 12,286 (Feb. 29, 2012); Final National Pollutant Discharge Elimination System (NPDES) General Permit for Stormwater Discharges from Industrial Activities, 73 Fed. Reg. 56,572 (Sept. 29, 2008); Final National Pollutant Discharge Elimination System (NPDES) General Permit for Discharges Incidental to the Normal Operation of a Vessel, 78 Fed. Reg. 21,938 (Apr. 12, 2013); Final National Pollutant Discharge Elimination System (NPDES) Pesticide General Permit for Point Source Discharges From the Application of Pesticides, 76 Fed. Reg. 68,750 (Nov. 7, 2011).

The American Farm Bureau Federation ("AFBF"), a not-for-profit, voluntary general farm organization, was founded in 1919 to protect, promote, and represent the business, economic, social and educational interests of American farmers and ranchers. It has member organizations in all 50 states and Puerto Rico, representing more than 6.1 million member families who produce every type of agricultural commodity in the nation. The scope of the permit shield for general permits is important to AFBF member farmers and ranchers, many of whom operate concentrated animal feeding operations pursuant to state-issued NPDES general permits or depend on general permits to apply pesticides for crop protection. The American Forest & Paper Association is the national trade association of the forest, paper, and wood products industry. The American Petroleum Institute is a nationwide, non-profit trade association that represents over 500 companies involved in all aspects of the petroleum and natural gas industry, from the largest integrated companies to the smallest independent oil and gas producers. The Chamber of Commerce of the United States of America is the world's largest business federation. CropLife America is a nationwide not-for-profit trade organization representing manufacturers, formulators, and distributors of crop protection and pest control products. Its roughly ninety-three member companies produce, distribute, apply, and sell virtually all the active compounds used in crop protection and pest control products registered for use in the United

States. The National Association of Home Builders represents over 140,000 builder and associate members throughout the United States. Its members include individuals and firms that construct and supply single-family homes, and apartment, condominium, multi-family, commercial, and industrial builders, land developers, and remodelers. The National Mining Association is a national trade association whose members produce most of America's coal, metals, and industrial and agricultural minerals. Its membership also includes manufacturers of mining and mineral processing machinery and supplies, transporters, financial and engineering firms, and other businesses involved in the nation's mining industries. The Utility Water Act Group is an unincorporated association of electric utilities and trade associations of electric utilities.

Kentucky, other delegated states, and EPA issue NPDES general permits based upon careful assessment and grouping of the categories of activities being permitted (e.g., construction activities, municipal separate storm sewers, animal feeding operations and designed industrial activities). General permits provide streamlined authorization for categories of covered activities and include appropriate conditions to address the potential water quality impacts of those activities to ensure sound environmental protection. *Amici*'s members rely on general permit authorizations and the full protections afforded by the CWA permit shield to undertake normal and routine business activities, such as stormwater

discharges, mosquito and other flying insect pest control, weed control along utility and transportation rights of way, pest control in natural resource management, municipal irrigation or water ditch management, farm irrigation and management, and offshore oil and gas activities, pursuant to CWA section 402, 33 U.S.C. § 1342. Any ruling that calls into question the scope of the protections afforded by the permit shield would have a chilling and adverse effect on *amici*'s members and the critical products and services they provide to the nation.

If Sierra Club's interpretation of the scope of the permit shield for general permits were to be adopted, NPDES permittees would no longer be able to rely on their permits for legal protection and might face liability for discharges of pollutants not explicitly listed in the permits. Thus, permittees would have no certainty that complying with a properly issued permit protects them from the CWA's civil and criminal penalties even when the permittees have fully complied with the law. Their only options would be to incur the increased risk of relying on general permits or be thrust into a far lengthier and more costly regulatory processes to obtain individual permits. These options undermine the intent of the general permit mechanism and are particularly problematic where timely permits are necessary to address problems such as responding to insect-borne disease or to natural disasters. The regulatory agencies likewise may be unable to bear the additional burden associated with a shift from general to individual permits to

authorize routine activities at a time when states are already struggling to manage their existing permitting work load.[5]

EPA believes that both dischargers and permitting authorities benefit from the issuance of general permits. EPA, Office of Water Enforcement and Permits, Permit Division, General Permit Program Guidance at 2-3, 33-35 (Feb. 1988) ("General Permit Guidance"), *available at* http://cfpub.epa.gov/npdes/docs.cfm?document_type_id=1&view=Policy%20and%20Guidance%20Documents&program_id=1&sort=name. General permit authorizations are issued more quickly than individual permits because once the regulatory authority has adopted a general permit incorporating all the necessary terms and conditions, absent any negative ruling on the Notice of Intent ("NOI"), authorizations pursuant to a general permit are automatic, which, in turn, reduces paperwork and promotes timely issuance of permits. *Id.* at 2. Individual permits, on the other hand, require individual, discharger-by-discharger applications, notice-and-comment periods, terms and conditions (based on individual assessment of a particular discharger's operations, effluent and receiving water impacts), and

[5] General permits are utilized when the practices of the entire industry in a specific geographic area meet five criteria essentially establishing that the operations, discharges, effluent limitations, operating conditions, and monitoring are substantially similar and more appropriately controlled under a general permit than under individual permits. 40 C.F.R. § 122.28(a)(2)(ii)(A)-(E).

permit processing procedures. Requiring hundreds of thousands of additional individual permits will overwhelm the agencies' already limited resources.

Given these potential far-reaching national impacts, *amici* submit this brief in support of ICG and the district court and to inform the Court of the potential implications of Sierra Club's erroneous claims.

III. Argument

A. Compliance with a Permit Shields a Permittee from CWA Liability.

A permit is akin to a contract between the permittee and the regulator. Thus, fundamentally, a permit should afford certainty to all parties.[6] Congress recognized the importance of certainty (for both the permit holder and the regulator) when drafting the CWA. The statutory language of the CWA expressly includes a "permit shield" provision providing that, once an NPDES permit is issued, compliance with the permit means that the permittee is in full compliance with the CWA. 33 U.S.C. § 1342(k). Specifically, section 402(k) of the CWA states that compliance with an NPDES permit "shall be deemed compliance, for purposes of sections [309] [government enforcement action] and [505] [citizens'

[6] For that very reason, EPA guidance recognizes that modifications generally should not occur during the term of a permit so as to provide some measure of certainty to the permit holder. 49 Fed. Reg. 37,998, 38,045 (Sept. 26, 1984) ("In general, permits are not modified to incorporate changes made in regulations during the term of the permit. This is to provide some measure of certainty to both the permittees and the Agency during the term of the permits.").

suits] . . . with sections [301] [effluent limits] and [302] [water quality based effluent limits].” Thus, permit holders that comply with the express limits of their permits are in compliance with the CWA and have “the security of knowing that … [they] will not be enforced against for violating some requirement of the [CWA] which was not a requirement of the permit.” 45 Fed. Reg. 33,290, 33,311 (May 19, 1980).

A primary purpose of issuing a permit “is to prescribe with specificity the requirements that a facility will have to meet, both so that the facility can plan and operate with knowledge of what rules apply, and so that the permitting authority can redirect its standard-setting efforts elsewhere.” *Id*. at 33,312. The permit shield “places the burden on permit writers rather than permittees to search through the applicable regulations and correctly apply them to the permittee through its permit. This means that a permittee may rely on its EPA-issued permit document to know the extent of its enforceable duties under the appropriate Act….” *Id.* “Thus, if the permit writer makes a mistake and does not include a requirement of the appropriate Act in the permit document, the permittee will [not] be enforced against ….” *Id.* The Supreme Court has confirmed that the purpose of the shield is to “insulate permit holders from changes in various regulations during the period of a permit and to relieve them of having to litigate in an enforcement action the

question whether their permits are sufficiently strict. In short, § 402(k) serves the purpose of giving permits finality." *Train*, 430 U.S. at 138 n.28.

EPA's NPDES regulations adopting CWA section 402(k) provide further support for a broad interpretation of the permit shield doctrine. When EPA first proposed these regulations in 1978, it considered limiting the permit shield to the discharge of pollutants specifically listed in the permit application. 43 Fed. Reg. 37,078, 37,079 (Aug. 21, 1978). By June 1979, however, EPA abandoned this approach, 44 Fed. Reg. 34,393, 34,404 (June 14, 1979), and, in the final regulations, explained that permitting agencies should concentrate on "significant discharges," not "non-limited pollutants." 45 Fed. Reg. at 33,521. EPA characterized the permit shield as a "central feature" of the permit system:

> This "shield" provision is one of the central features of EPA's attempt to provide permittees with maximum certainty during the fixed terms of their permits … This new provision gives a permittee the security of knowing that, if it complies with its permit, it will not be enforced against for violating some requirement of the appropriate Act which was not a requirement of the permit….

Id. at 33,311. EPA also explained that the shield is important both to give the permittee fair notice and to conserve the regulators' resources. *Id.* at 33,312. The fundamental principle of the permit shield is clear -- permits are designed to provide certainty to the permit holder and regulator alike.

In 1995, EPA issued a Revised Policy Statement clarifying the scope of the permit shield. In that document, EPA explained that an NPDES permit provides a shield for the following categories of pollutants: (1) pollutants specifically listed in the permit; (2) pollutants specifically identified as present in the facility discharges during the permitting process; and (3) pollutants not identified as present but which are constituents of waste streams, operations or processes that were clearly identified during the permit application process. *See* EPA Policy Statement at 2-3. Importantly for this case, the EPA Policy Statement also confirms that general permits provide an equivalent level of protection as individual permits: "Section 402(k) also shields discharges of pollutants authorized under a general permit … so long as the permittee complies with all … application requirements for the general permit." *Id.* at 3.

Indeed, because "pollutant" is defined broadly under the CWA, the list of possible pollutants is nearly limitless. And, thus, it would be next to be impossible to list every pollutant contained in a particular waste stream in the permit. [7] For

[7] Every permittee has substances in its waste stream or effluent, if only at miniscule levels, that are not listed in the permit and not even within the control of the permittee. Even if a permittee discharged distilled water, there would be traces of pollutants because even the purest water (used, for example, in the semiconductor and pharmaceutical industries, or in laboratories) is not completely free of contaminants. *See* Michael Brush, *Water, Water Everywhere: A Profile of Water Purification Systems*, The Scientist (June 8, 1998), http://www.the-scientist.com/yr1998/june/profile1_980608.html (last visited Apr. 30, 2013)

example, as a practical matter, it is impossible to characterize all the pollutants in a discharge fully and continuously because facilities cannot control what is in their intake water. Many pollutants are put in the water by nature.[8]

Piney Run Preservation Ass'n v. County Commissioners of Carroll County, 268 F.3d 255 (4th Cir. 2001) is the seminal case addressing the scope of the permit shield provision. In interpreting this provision, the Fourth Circuit applied a *Chevron* analysis. *Id.* at 266-67 (relying on *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984)). The court first determined that the text of the permit shield provision was ambiguous. It next held that EPA's Environmental Appeals Board ("EAB") reasonably interpreted the permit shield provision to apply to "pollutants that are not listed in [the] permit, as long as [the permittee] only discharges pollutants that have been adequately disclosed to the permitting authority." *Id.* at 267-68. EPA intended compliance to be "a broader concept than merely obeying the express restrictions set forth on the face of the NPDES permit." *Id.* at 269. The Fourth Circuit concluded that any discharge or

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(finding that Type 1, or ultrapure, water, which is the most pure reagent grade water for laboratories has a specific resistance of at least 18 megohms-cm and meets other criteria for a specific conductance, total silica, total organic carbon, and bacterial count).

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

waste stream that has been adequately disclosed to the permitting authority, and is not expressly prohibited by the permit, is considered to be within the scope of the permit's protection.[9] *Id.*

B. The Permit Shield Applies Equally to General Permits and Individual Permits.

Sierra Club does not dispute the scope of the permit shield as it applies to individual permits. Rather, it argues that the CWA somehow distinguishes between general and individual permits and accords less protection via the permit shield to general permit authorizations. But, as the district court properly held, this is contrary to the EPA Policy Statement and over thirty years of practice. Indeed, neither EPA, nor any court, has ever characterized the scope of the shield as differing between a general or individual permit. And a recent decision from the Alaska district court confirms that there is no difference - the permit shield applies equally to all NPDES permits, general or individual. *See Alaska Cmty. Action on Toxics v. Aurora Energy Servs., LLC*, No. 3:09-cv-00255-TMB, 2013 WL 1614436 (D. Alaska Mar. 28, 2013) ("*Alaska Cmty. Action*").

[9] *Piney Run* involved an NPDES individual permit. Thus, appropriately, it was up to the permittee to disclose the relevant discharges or waste stream to the permitting authority to ensure that the individual permit authorized the relevant discharges. In the context of a general permit, the burden is shifted to the permit writer to ensure that the permit is appropriately broad to cover any known constituents in the waste stream or discharge. So long as the permittee complies with the terms and conditions of the general permit, the permit shield provides immunity from suit.

EPA regulations require that certain regulatory findings be met prior to issuance of individual or general permits. 40 C.F.R. §122.28(b)(2)(ii). According to EPA, general permits are identical to individual permits "regarding effluent limitations, water quality standards, monitoring and sampling requirements, and enforceability." General Permit Guidance at 3-4. EPA goes on to state that "[g]ood general permits are no less effective than individual permits; they simply cover more than one discharger." *Id.* at 4. The district court similarly noted that the only significant difference between individual permits and general permits 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 authority rather than on the permit applicants.'" Mem. Op. & Order at 11 (*quoting* General Permit Guidance at 33-34).

Dischargers seeking coverage under a general permit must submit a written NOI or registration statement to be covered by the general permit and, in response, the regulatory authority has the latitude to require a different permitting approach, if necessary, thereby, allowing the permitting agency to properly regulate a class of dischargers without detailed information about specific discharges. Thus, it is up to the issuing agency to confirm that it has sufficient information to ensure that the permittee's discharge, whether covered by a general or an individual permit, will comply with the law.

Sierra Club suggests that the following language from the EPA Policy Statement limits the scope of the permit shield for general permits:

> EPA's position is that general permits authorize the discharge of all pollutants within the *specified scope* of a particular general permit, subject to all pollutant limits, notification requirements and other conditions within a particular general permit so long as the permittee complies with all EPA application requirements for the general permit.

EPA Policy Statement at 3 (emphasis added). Sierra Club claims that "specified scope" should be interpreted to limit the shield's protections to the discharge of pollutants for which the general permit explicitly imposes effluent limits.

The district court rightly disagreed with this interpretation. After finding that general and individual permits require the same levels of compliance and enforcement, it concluded that "it would be anomalous to hold that the permit shield would apply differently based on the type of permit held by a discharger … especially [where] . . . EPA has unequivocally stated that a general permit and an individual permit are identical." Mem. Op. & Order at 14. *Amici* agree.[10]

[10] The district court's conclusion is bolstered by several cases holding that the permit shield's protections extend beyond the specific listed pollutants. *See, e.g., Atlantic States Legal Found., Inc. v. Eastman Kodak Co.*, 12 F.3d 353, 357 (2d Cir. 1993) ("it is clear that the permit is intended to identify and limit the most harmful pollutants while leaving the control of the vast number of other pollutants to disclosure requirements"); *Ketchikan Pulp Co.*, 7 E.A.D. at 618 ("Since any given wastestream may contain hundreds of pollutants, [a permit-writing approach

The term "specified scope" in the EPA Policy Statement must be read as referring to the specific scope of the discharger category authorized by the particular NPDES permit (e.g., coal mining in the present case), which would include all discharges, waste streams, operations and processes associated with that category. The permit shield, here, therefore, would cover not only the pollutants subject to specific effluent limits or monitoring conditions in the NPDES general permit, but also pollutants in coal mining discharges, waste streams, operations and processes disclosed to, or within the reasonable contemplation of the permitting agency at the time of permit issuance.[11] Since selenium is subject to a specific monitoring condition in the NPDES general permit, and since the state was well aware of the potential for selenium to be present in coal mining discharges, waste streams, operations and processes, there can be no dispute that ICG's potential to discharge selenium falls within the scope of the permit shield.

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that prohibited the discharge of all pollutants except those listed in the permit] would be unduly burdensome and costly, and ultimately, impractical.").

[11] There is plenty of evidence in the record confirming that KDOW was well aware of the possibility of discharges of selenium when it developed and finalized the Kentucky Coal General Permit. Br. of Def.-Appellee ICG Hazard, LLC at 9-10, 31-34 (Apr. 24, 2013), ECF No. 006111668742. In fact, KDOW created a mechanism for gathering and evaluating site-specific data on selenium discharges, but did not impose an express limit or require that the information be submitted as a pre-condition to coverage.

Sierra Club's strained reading of the permit shield would undercut the purposes and policies underlying the permit shield and remove any measure of certainty regarding compliance requirements under the permit. "'[I]t is impossible to identify and rationally limit every chemical or compound present in a discharge of pollutants.'" *Atlantic States*, 12 F.3d at 357 (*quoting* Memorandum from EPA Deputy Assistant Adm'r for Water Enforcement Jeffrey G. Miller to Reg'l Enforcement Dir., Region V, at 2 (Apr. 28, 1976)). Recognizing these principles, the district court dismissed Sierra Club's claims and held that ICG's compliance with the NPDES general permit shielded it from suit.

The district court's conclusion is further confirmed by a recent decision from the Alaska district court, which concluded that the permit shield's protections, in the context of a general permit, extend to discharges of pollutants not specifically listed in the permit. *Alaska Cmty. Action,* 2013 WL 1614436, at *8. In *Alaska Cmty. Action,* the Alaska Chapter of the Sierra Club claimed that Aurora Energy discharged coal from an over-water conveyer and ship without an NPDES permit. Aurora Energy moved for summary judgment on the basis that its coal discharges were within the scope of their stormwater NPDES general permit and thus they were protected from liability by the permit shield.

The court agreed, finding that Aurora Energy complied with the express terms of its general permit and the discharges were adequately disclosed to, and

reasonably anticipated by, the permitting authority during the permitting process. The court noted that the facility's general permit is a generic permit issued to a variety of industrial facilities and sets forth requirements, restrictions, and authorizations applicable to all industrial categories covered by the permit. *Id.* at *9. "The purpose of the permit shield is to protect permit holders from liability for unauthorized discharges so long as those discharges are not 'specifically barred' by the existing permit…. If EPA had intended that the General Permit prohibit every non-stormwater discharge not listed …, it easily could have added a provision to that effect." *Id.* at *10. Further, the court concluded that the "totality of the evidence" indicated that the regulatory agencies reasonably anticipated the discharges that were not explicitly listed in the permit and thus Aurora Energy was shielded from liability for those discharges. *Id.* at *13. The same logic applies in the present case.

The only reasonable interpretation of the CWA, case law, and the EPA Policy Statement is that, so long as a permit holder complies with the relevant application requirements, a general permit shields the permittee from liability for the discharge of pollutants not specifically limited by the general permit. The district court's decision should be affirmed. Any holding to the contrary would undermine both the letter and intent of the statute and lead to profound, onerous, and adverse consequences.

IV. The District Court's Decision Should be Upheld Because Any Contrary Reading of the CWA Would Have Serious Legal and Economic Consequences.

Regulators and permittees alike rely on general permits to streamline permitting processes for certain categories of activities. There are currently over 507 state and federal NPDES general permits and hundreds of thousands of general permittees.[12] If the district court's ruling is reversed, and Sierra Club's narrow interpretation of the scope of the permit shield as applied to general permits is adopted, permittees would no longer be adequately protected from citizen suits and would likely not assume the high risk associated with the NPDES general permit program.

The regulated community must be able to rely on the protections of the permit shield to conduct all aspects of their business, from obtaining financing and hiring employees to the operation and investment of capital to expand. Any result to the contrary could effectively dismantle the entire general permit program because permittees would be unable to rely on such general permit authorizations in any meaningful manner. Uncertainty and heightened risks arising from the inability to rely upon NPDES general permits pose significant new hurdles for moving forward with investments to create or expand an enterprise. Companies

[12] *See* EPA, NPDES General Permit Inventory, http://cfpub.epa.gov/npdes/permitissuance/genpermits.cfm (last visited Apr. 30, 2013).

that expend millions of dollars in reliance on permits should be able to rely on those permits in good faith and be assured that compliance with them equals compliance with the law.

If general permittees are not accorded the same protections as individual permittees, many prospective permittees would forego the high risks associated with general permits and would instead apply for individual NPDES permits. And the consequences of that scenario are significant. Uncertainty regarding permit protections could reduce investment in projects by making it more difficult to obtain financing or increasing the risk premium in the form of higher interest rates. That would, in turn, make securing capital more expensive for project proponents, and, on the margins, could cause some project proponents to abandon their projects entirely. In other cases, banks may deal with the increased uncertainty by "rationing" their credit. That could mean a complete loss of access to the credit market for certain project proponents, which might leave them with no realistic way to move their projects forward.

In the agricultural and land management contexts, EPA and the states utilize general NPDES permits for the vast majority of pesticide applications requiring CWA permits. The ability to rely on general NPDES pesticide permits is extremely important to the crop protection industry, growers, and all stakeholders in American agriculture, as well as entities and agencies charged with mosquito

and other pest control and vegetation management in utility rights-of-way. The timely application of pest control products is important for managing serious vector-borne diseases, including Lyme disease and West Nile virus. Location-specific pest problems, weather, and other agricultural challenges are largely unpredictable, and general permits allow applications to be permitted when and where needed with minimal delay, providing the flexibility necessary to maintain adequate crop yields and to address public health concerns.[13]

Limiting the application of the permit shield defense for NPDES general permits would make NPDES compliance unpredictable. Growers, land managers, and pesticide applicators, who are already closely regulated under both the Federal Insecticide, Fungicide, and Rodenticide Act and the CWA, would be uncertain as to the legal sufficiency of their permit authorizations. The potential liability would lead to higher production costs, and the resulting higher prices would then be passed on to American consumers and taxpayers.

Alternatively, these applicators might have no choice but to seek coverage under NPDES individual permits. Given the significant additional delay inherent in obtaining individual permits, those users may have no choice but to defer, or

[13] By contrast, individual permits do not provide users of pest control products with the capacity to adopt time-sensitive solutions to pest problems in these agricultural, silvicultural or public health settings.

forego, necessary applications to ensure compliance with the CWA. This, in turn, would interfere with the timely application of pest control products critical to the protection of public health and land management necessary for agricultural commodities. It could also negatively impact the sustainability of a plentiful, healthy and high quality food supply for the American public.

Many of *amici*'s members also rely on NPDES general permits developed for specific industry sectors. For example, mining, oil and gas developers, utilities, and homebuilders manage stormwater associated with resource development and construction related to these industries under various industrial and construction stormwater general permits. It would be impractical to impose the burden of including specific limits in these permits for every possible pollutant that could be discharged. A good example, in the construction stormwater context, is turbidity. EPA proposed to include a numeric limit for turbidity through effluent guidelines developed for the construction industry, but later suspended this limit (and has now proposed to withdraw it altogether). Clearly, turbidity is within the scope of discharges reasonably contemplated by the agency. However, if Sierra Club's view prevails, construction permittees would be exposed to the threat of lawsuits, fines, penalties and enforcement for discharge-related turbidity, even though EPA has affirmatively decided not to impose limits on turbidity through the effluent guidelines or EPA's NPDES general permit for stormwater discharges from

construction activity. Such an outcome would be fundamentally inconsistent with the CWA and the permit shield.

Moreover, any ruling that causes significant numbers of parties to now seek individual permits, rather than rely on the general permitting program, would worsen the already existing backlog of permit applications.[14] That scenario would be an administrative nightmare for EPA and the states, which already suffer from reduced budgets and increased regulatory workloads. The cost in time, money, and resources for the regulated community to prepare and file the applications necessary to secure individual permits would be enormous because applicants typically spend thousands of dollars preparing individual NPDES applications, especially if technical or site-specific information is required, as is often the case.

Finally, a decision limiting the scope of the permit shield in the context of general permits could expose existing NPDES permittees to unlimited and unforeseeable liabilities. As a practical matter, neither permittees nor regulators can identify all of the pollutants in a discharge. A prohibition on the discharge of unidentified pollutants would undercut the policy underlying the NPDES permit program by shifting all risk and the burden of identifying each and every

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[14] Permits that have expired, but are "administratively continued" because a timely application for renewal was filed, are "backlogged." *See* EPA, Backlog Reduction, http://cfpub.epa.gov/npdes/permitissuance/backlog.cfm (last visited Apr. 30, 2013).

constituent in a waste stream to the prospective permittee, and removing any measure of certainty regarding compliance requirements under a permit.

In short, a decision finding the protections afforded by the permit shield to be more limited in the context of general permits than individual permits would not only be contrary to the statute, the EPA Policy Statement, and the case law, but would have serious, potentially far-reaching, negative impacts upon the economy.

V. Conclusion

For the reasons set forth above and in the Defendant-Appellee's Brief, *amici* respectfully request that the Court uphold the district court's decision.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Circuit Rule 32, I hereby certify that the foregoing Brief of *Amici Curiae* American Farm Bureau Federation, American Forest & Paper Association, American Petroleum Institute, Chamber of Commerce of the United States of America, CropLife America, National Association of Home Builders, National Mining Association, and Utility Water Act Group in Support of Defendant-Appellee and Affirmance of the U.S. District Court for the Eastern District of Kentucky contains 5,807 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the word limit set by the Court. The brief complies with the typeface requirements of Rule 32(a)(5) and (6) of the Federal Rules of Appellate Procedure as it was prepared using the Microsoft Word 2010 word processing program in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure and Circuit Rule 25, I hereby certify that in this 1st day of May, 2013, I served a copy of the foregoing Brief of *Amici Curiae* American Farm Bureau Federation, American Forest & Paper Association, American Petroleum Institute, Chamber of Commerce of the United States of America, CropLife America, National Association of Home Builders, National Mining Association, and Utility Water Act Group in Support of Defendant-Appellee and Affirmance of the U.S. District Court for the Eastern District of Kentucky electronically through the Court's CM/ECF system upon all counsel of record registered in CM/ECF.

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