Case 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 United States District Court
for the Eastern District Of Kentucky

Case No: 6:11-cv-148-GFVT

REPLY BRIEF OF PLAINTIFF-APPELLANT SIERRA CLUB

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INTRODUCTION

ICG Hazard, LLC ("ICG") claims that the effluent limitations in its Clean Water Act ("CWA") permit are the only enforceable restrictions on the point source pollution discharges from its surface mine. ICG attempts to brush away unambiguous state law surface mining performance standards that were adopted pursuant to the Surface Mining Control and Reclamation Act ("SMCRA") and incorporated into its surface mining permit. Additionally, ICG inflates the scope of discharges authorized by its CWA permit, arguing that it is free to discharge unlimited amounts of any pollutant not expressly restricted. Neither of those claims is supported by the text of the CWA or SMCRA, their regulations, or the interpretations of the agencies responsible for implementing the statutes.

It is undisputed that ICG's discharges of pollution from its surface mine are subject to two separate regulatory schemes—the CWA and SMCRA— that impose independent obligations to protect the environment. ICG argues that enforcement of the Kentucky Program surface mining performance standards that require compliance with water quality standards in addition to compliance with effluent limitations in CWA permits would violate the savings clause in SMCRA § 702 because those standards are somehow inconsistent with the CWA. In so doing, ICG ignores the fact that the CWA on its face does not limit additional restrictions on pollution under state laws such as the Kentucky Program surface mining

performance standards. Those standards are consistent with the CWA and are enforceable even if Sierra Club's claims under the CWA are precluded.

The Court need not even reach ICG's faulty arguments regarding SMCRA's savings clause, however, because Sierra Club's CWA claims are not precluded by the permit shield in CWA § 402(k). The District Court's interpretation of the permit shield, which ICG urges this Court to uphold, would turn the CWA on its head and completely undermine that statute's purpose of protecting our nation's waters. ICG's discharges of selenium are not specified in the KPDES Coal General Permit to which it is subject, were not disclosed prior to authorization, and were not within the "reasonable contemplation" of the permitting authority at the time of permit issuance. They are thus not protected by the permit shield.

ARGUMENT

I. ENFORCEMENT OF KENTUCKY'S SURFACE MINING PERFORMANCE DOES NOT VIOLATE SMCRA'S SAVINGS CLAUSE

The performance standards that are incorporated into ICG's surface mining permit unambiguously require both compliance with the effluent limitations in ICG's KPDES permit and compliance with Kentucky's water quality standards. For instance, 405 KAR 16:070 § 1(1)(g) mandates that

> Discharges of water from areas disturbed by surface mining activities shall at all times be in compliance with all applicable federal and state water quality standards and either:

> 1. If the operation does not have a KPDES permit, the effluent limitations guidelines for coal mining promulgated by the U.S. EPA in 40 CFR 434; or
>
> 2. The effluent limitations established by the KPDES permit for the operation.

405 KAR 16:070 § 1(1)(g) (emphasis added); *see also* 405 KAR 16:060 §§ 1(3), 6(1)(c). Thus, Even if this Court finds that Sierra Club's CWA claims are precluded by the permit shield, Sierra Club may nonetheless enforce the independent obligations imposed by the Kentucky Surface Mining Program.

ICG does not argue that the standards do not mean what they say. Rather it claims that the portions of the standards requiring compliance with water quality standards are simply unenforceable. ICG contends that if a "CWA claim is barred by the permit shield, then so too is any SMCRA claim to enforce the same limits because § 702(a) of SMCRA . . . provides that SMCRA cannot supersede any protections provided to the permittee by the CWA." Brief of Defendant-Appellee ICG Hazard ("ICG Br.") at 43. ICG's arguments cannot withstand scrutiny.

A. Sierra Club Is Not Enforcing the "Same Limits" in Its CWA and SMCRA Claims

ICG's attempt to evade the clear-cut obligations in its surface mining permit relies on the faulty premise that Sierra Club is seeking to enforce the "same limit" in its SMCRA claims that it seeks to enforce in its CWA claims. That is not true.

Sierra Club's CWA claims are not dependent on violations of water quality standards, or of effluent limitations contained in ICG's KPDES permit. Rather, as explained below, Sierra Club seeks to enforce CWA § 301's prohibition on the "discharge of any pollutant," on the grounds that ICG's permit does not authorize the discharge of selenium at all. *See* 33 U.S.C. § 1311. If a discharge is not authorized by a NPDES permit, it need not violate water quality standards to run afoul of § 301's prohibition. *See United States v. Hamel*, 551 F.2d 107, 110 (6th Cir.1977) (upholding conviction for violation of CWA § 301 for discharge of gasoline despite absence of any numeric effluent limitation or water quality standard exceedance).

In contrast to CWA claims based on § 301's flat prohibition, Sierra Club's SMCRA claims enforce independent Kentucky Program standards that use state water quality standards as a performance benchmark. *Sierra Club v. Powellton Coal Co., LLC*, 662 F.Supp.2d 514, 533(S.D. W. Va. 2009) ("*Powellton*") (rejecting the defendant's argument that plaintiffs sought to "enforce [NPDES] violations through a SMCRA citizen suit"); *see also Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) (Explaining that "[w]ater quality standards . . . supplement effluent limitations 'so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from

falling below acceptable levels.'"); *id.* (noting that the NPDES is only the "primary" means for enforcing water quality standards).

This is not a case where a discharger is in compliance with numeric limitations on a pollutant in its NPDES permit and a plaintiff seeks to enforce performance standards requiring compliance with water quality standards for the same pollutant. ICG's KPDES permit does not place any limits on the discharge of selenium.[1] That fact distinguishes this case from the dicta in *Powellton* that ICG cites. *See* ICG Br. at 43-44. In *Powellton*, the court found that state surface mining performance standards that required compliance with NPDES effluent limitations were independent obligations from those imposed under the CWA and denied the defendant's claims that enforcement of those performance standards violated the savings clause. 662 F.Supp.2d at 533–34. The court, however, noted in dicta that where a provision of the CWA explicitly precluded enforcement of a specific effluent limitation contained in an NPDES permit, a plaintiff might not be able to enforce that same effluent limitation in a SMCRA citizen suit. *Id.* at 533. Here, Sierra Club is not seeking to enforce the same effluent limitations that the CWA explicitly precludes it from enforcing. Rather, it seeks to enforce independent

[1] The District Court was thus wrong when it found that "water quality standards formed the basis for the effluent limitations imposed on ICG and then effectively 'dropped out.'" *See* Mem. Op., RE 65, Page ID# 1329. Selenium water quality standards could not have formed the basis for effluent limitations on ICG because ICG's KPDES permit contains no limitations on selenium.

performance standards that require compliance with selenium water quality standards where ICG's NPDES permit contains no selenium limitations.

B. *Sierra Club's SMCRA Claims Are Not Precluded Under* In re Surface Mining

ICG repeatedly misapplies the D.C. Circuit's ruling in *In re Permanent Surface Mining Regulation Litigation*, 627 F.2d 1346 (D.C. Cir. 1980) ("*In re Surface Mining*"), as did the District Court. *See* ICG Br. at 41, 46-48; Mem. Op., RE 65, Page ID# 1327-29. There, the Court found that the federal Office of Surface Mining's (OSM) SMCRA performance standards that set effluent limitations for surface mines could run afoul of SMCRA section 702(a) if they did not include certain express variances and exemptions provided in the CWA. *In Re Surface Mining*, 627 F.2d at 1367-69. *In Re Surface Mining* is distinguishable on multiple grounds. To the extent that the decision has any bearing on this case, it in fact supports enforcement of the Kentucky Program performance standards.

First, the holding of *In Re Surface Mining* does not apply here because it deals only with the SMCRA saving clause's application to OSM's federal regulations, not state law performance standards. State surface mining regulations that impose independent obligations on point source discharges do not implicate SMCRA's savings clause in the same way as federal standards because both the CWA and SMCRA expressly permit states to adopt different standards than their federal counterpart. As Sierra Club explained at length in its Opening Brief, both

the CWA and SMCRA make clear that they are not intended limit the adoption or enforcement of any different state standard, as long as it is not less stringent than a federal counterpart. *Sierra Br.* at 39-41. Section 510 of the CWA provides that nothing in the Act shall be construed to limit a state's authority to adopt any standard regarding the discharge of pollutants, as long as such standard is not less stringent than that imposed under the CWA. 33 U.S.C. § 1370. *See also* 40 C.F.R. § 122.5(c) ("The issuance of a permit does not authorize . . . infringement of State or local law or regulations."); *International Paper Co. v. Ouellette*, 479 U.S. 481, 497 (1987) (noting that the CWA does not prevent states from "impos[ing] higher common-law as well as higher statutory restrictions"). Section 505 of SMCRA likewise grants states the right to adopt more stringent limitations than those imposed by the federal program. 30 U.S.C. § 1255.[2]

The Middle District of Pennsylvania recognized the distinction between challenges to state and federal performance standards in *Pa. Coal Mining Assoc. v. Watt*, 562 F.Supp. 741 (M.D. Pa.1983). The Court there held that a challenge to state surface mining performance standards was fundamentally different than a challenge to a federal regulation because both the CWA and SMCRA "expressly

[2] ICG incorrectly suggests that these arguments based on the state law nature of the Kentucky Program performance standards were not made in the District Court. ICG Br. at 46-47 n.16. To the contrary, Sierra Club cited the same provisions numerous times. *See* Pl.'s Response, RE 46, Page ID# 928; Pl.'s Reply, RE 48, Page ID# 1068.

allow states to set environmental and effluent standards that are more stringent than the federal criteria." *Id.* at 746. Because the CWA expressly allows different and more stringent standards under state law, a state surface mining performance standard that requires more than is required under a particular NPDES permit does not offend the SMCRA savings clause. The Court thus rejected the plaintiffs' challenge to state surface mining performance standards that failed to include a particular exemption provided by both EPA regulations under the CWA and OSM regulations under SMCRA. *Id.* at 747.

Although ICG claims that the Court's analysis in *Watt* "fell short of the mark," it does not offer any real explanation for why that is so. *See* ICG Br. at 46-47n.16. ICG argues that, "while a SMCRA-based state rule may be more stringent than its federal surface mining counterpart . . . the scope of the NPDES permit and the permit "shield" are still defined by the [CWA]." *Id.* Sierra Club does not contend, however, that Kentucky's surface mining performance standards have any effect on the scope of the NPDES permit or the permit shield. The plain text of § 402(k) shows that it only provides relief against enforcement actions under the CWA. 33 U.S.C. § 1342(k) (explaining that compliance with a NPDES permit is deemed compliance with the CWA only "for purposes of sections 1319 and 1365 of this title"). Thus, compliance with a NPDES permit only ensures that the permittee will not be held liable for violations of the enumerated CWA sections

and only for the purposes of the CWA's enforcement mechanisms. Indeed, EPA's regulation interpreting the permit shield explicitly states that "[t]he issuance of a permit does not authorize . . . any infringement of State or local law or regulations." 40 C.F.R. § 122.5(c) (emphasis added).[3] ICG simply ignores the language in the CWA expressly allowing additional state standards and making clear that a discharger who is shielded from CWA enforcement by § 402(k) is not thus authorized to infringe those standards.

Even if *In re Surface Mining* applies equally to state and federal performance standards, it does not prohibit enforcement of the Kentucky Program performance standards. The Court there found that OSM's performance standards that set effluent limitations for surface mines could run afoul of SMCRA § 702(a) if they did not include certain variances and exemptions explicitly provided for in the CWA. 627 F.2d at 1367–69 (describing, among others, a relaxation of effluent limitations for discharges caused by overflow of treatment structures as a result of heavy precipitation). The Court noted, however, that where the CWA contains a "regulatory gap," SMCRA-based performance standards can regulate water pollution without violating the savings clause. *Id.* at 1367.

[3] Likewise, the CWA's citizen suit provision provides that "[n]othing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard . . . ." 33 U.S.C. § 1365(e). The inability to bring a CWA citizen suit thus has no bearing on a plaintiff's ability to enforce state performance standards adopted pursuant to SMCRA.

Sierra Club's claims do not involve surface mining regulations that fail to include an express exemption provided for in the CWA.[4] Rather, both the Kentucky Program performance standards and the CWA expressly mandate that water quality standards shall not be violated. *See* 33 U.S.C. § 1311(b)(1)(C) (requiring achievement of any limitation necessary to meet water quality standards); *see also* 40 C.F.R. § 122.4(d) (prohibiting the issuance of an NPDES permit when conditions cannot ensure compliance with water quality standards); *id.* at § 122.44(d)(1) (requiring all NPDES permits to include conditions necessary to prevent discharges that cause or contribute to violations of water quality standards). Enforcement of those performance standards is therefore consistent with the CWA. Thus, the scenario where a permittee is found to be in compliance with its NPDES permit but is nonetheless discharging pollutants in vilation of

[4] ICG ignores that important factual distinction when it wrongly claims that the "D.C. Circuit Court of Appeals has already rejected Sierra's argument." ICG Br. at 46 n.15. The surface mine operators in *In re Surface Mining* did not challenge the federal performance standards requiring compliance with water quality standards, but only the failure to include the express variances. *Id.* at 1366 ("The Surface Miners allege that these interim effluent regulations substantially conform to [EPA] practice under the [CWA] but omit three 'vital' elements of the EPA's regulatory framework."). Nor did ICG or any other party challenge the Kentucky Program performance standards that require compliance with water quality standards in addition to compliance with effluent limitations when they were adopted by the legislature and approved by both EPA and OSM. *See* 30 U.S.C. § 1276(a) (requiring that any challenge to state regulations as inconsistent with SMCRA or the CWA be brought within sixty days of their approval by the Secretary). Instead, ICG has improperly chosen to mount a collateral attack on those standards in the context of an enforcement action.

water quality standards, represents exactly the kind of "regulatory gap" that the *In re Surface Mining* court found appropriate for SMCRA to fill.

Indeed, USEPA has explicitly recognized that a "regulatory gap" exists when, because of the permit shield, a "permittee may discharge a large amount of a pollutant not limited in its permit, and EPA will not be able to take enforcement action against the permittee." *See Atlantic States Legal Foundation v. Eastman Kodak Company*, 12 F.3d 353, 358 (2d Cir. 1993) (discussing EPA's statements at 45 Fed. Reg. 33516, 33523 (1980)).

That interpretation is echoed by OSM. In a Federal Register notice, OSM responded to commenters who alleged that its regulations requiring compliance with water quality standards violated the savings clause. OSM rejected those comments, stating that

> [t]he Office must, under [SMCRA], insure that water quality standards are met. . . . The Office believes that emphasis of some important requirements may be desirable when different agencies are regulating toward a common goal, such as improving water quality and protecting environmental values."

44 Fed. Reg. 14902, 15169-70 (March 15, 1979); *id.* at 15051 ("The language of Section 702(a) of the SMCRA . . . preserves this balance between [SMCRA and the EPA-administered environmental statutes]. Nowhere in the legislative history is there language which indicates that Congress intended [SMCRA's savings clause] to reduce the performance standards of the Act to meet the requirements of

other statutes.").[5] The Kentucky Program performance standards requiring compliance with water quality standards thus help to fill the regulatory gap created when a NPDES permit fails to include the conditions necessary to ensure compliance and the permit shield prevents enforcement actions under the CWA.[6]

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[5] The Federal Register notices quoted by ICG are not at odds with that clear interpretation. The first, 73 Fed. Reg. 75814, 75842 (Dec. 12, 2008), states only the unremarkable proposition that SMCRA regulators lack authority to directly enforce the CWA or to "determine when a permit or authorization is required under the" CWA. ICG Br. at 50. In that same preamble, however, OSM makes clear that its performance standards do "not authorize activities that would constitute or result in a violation of State or Federal water quality standards." 73 Fed. Reg. at 75841; *see also id.* at 75842 (explaining the enforceability of the SMCRA performance standard mandating that mining activities "may be authorized in perennial or intermittent streams only where those activities would not cause or contribute to the violation of applicable State or Federal water quality standards developed pursuant to the Clean Water Act."). In neither preamble did OSM say anything that would indicate that state performance standards requiring compliance with water quality standards are unenforceable absent an identical condition in an NPDES permit. Furthermore, both regulations at issue dealt with the discharge of fill material pursuant to CWA § 404, and would thus not apply to the NPDES program under CWA § 402, including the permit shield provision.

[6] The District Court completely failed to address OSM's interpretation of the savings clause and the portions of the CWA and implementing regulations expressly disclaiming limitations on state standards. Similarly, the court in *Ohio Valley Environmental Coalition, Inc. v. Apogee Coal Co., LLC*, 555 F.Supp.2d 640 (S.D. W. Va. 2008), upon which ICG relies, failed to consider those important aspects of this issue. *See* ICG Br. at 42. Indeed, the court there noted that "[t]he issue of whether or not a discharger can be held liable for water quality standards violations even while complying with its NPDES effluent limitations is not directly before the Court." *Apogee*, 555 F.Supp.2d at 651. The Court thus "refuse[d] to decide such an important issue in an indirect challenge." *Id.* The Court's statements regarding the enforceability of performance standards requiring compliance with water quality standards are thus dicta and should be afforded no weight.

C. Enforcement of the Kentucky Program Performance Standards Would Not Render Any Part of the CWA Meaningless

Contrary to ICG's claims, enforcement of the Kentucky Program surface mining performance standards does not "eviscerat[e]" the CWA permit shield. *See* ICG Br. at 46. ICG retains the only benefit that § 402(k), by its language, provides: freedom from liability for violations of the CWA in a CWA enforcement action. In this case, that protection would provide ICG a very real benefit.

If Sierra Club is able to successfully bring a CWA citizen suit for ICG's violations of CWA § 301, ICG will be subject to civil penalties for every such violation. *See* 33 U.S.C. §§ 1319(d), 1365(a). In contrast, if this Court finds that ICG is shielded from enforcement under the CWA but is nonetheless in violation of the Kentucky Program performance standards that require compliance with water quality standards, ICG will be subject only to injunctive relief through the SMCRA citizen suit provision. *See* 30 U.S.C. § 1270 (allowing suit only to "compel compliance" and not for penalties). The permit shield would thus provide the significant benefit of protecting ICG against civil penalties of up to $37,500 per day for each violation. *See* 33 U.S.C. § 1319(d) (authorizing penalties); 40 C.F.R. § 19.428 (adjusting penalty amounts pursuant to U.S.C. § 2461 note).

Nor would enforcement of the Kentucky Program standards "render Kentucky's NPDES permitting program meaningless because mine operators could not rely on their NPDES permits to know their discharge limitation obligations."

ICG Br. at 48. NPDES permits would still fully define permitees' discharge obligations under the Clean Water Act. The CWA does not purport to "occupy the field" of water pollution regulation. Rather, the statute expressly provides that it does not limit the imposition of additional state standards or liability under state common law. *See* 40 C.F.R. § 122.5(c); 33 U.S.C. § 1370.

ICG does not explain why enforcement of the Kentucky Program performance standards would render the NPDES program "meaningless," yet enforcement of other state statutory and common law standards governing point source water pollution would not. ICG's argument contradicts the U.S. Supreme Court's holding that enforcement of state laws limiting water pollution against holders of NPDES permits "would not frustrate the goals of the CWA" or "disrupt the regulatory partnership established by the [NPDES] permit system." *Ouellette*, 479 U.S. at 498-99. Like the defendant in *Ouellette*, ICG is not subject to an "indeterminate number of potential regulations" on its discharges of pollution. *Id.* at 499. Rather it is subject to the obligations stated in the Kentucky Program performance standards that are incorporated into its surface mining permit. Those standards unambiguously require ICG to comply with not only "[t]he effluent limitations established by the KPDES permit for the operation" but also "all applicable federal and state water quality standards." 405 KAR 16:070 § 1(1)(g). ICG's expectation that it should be able to rely solely on its NPDES permit and

wholly disregard other explicit limitations imposed on it is simply unreasonable. Such an interpretation would "render meaningless" several unambiguous provisions of Kentucky's surface mining program and should be rejected.

II. ICG'S DISCHARGES OF SELENIUM ARE NOT PROTECTED BY CWA SECTION 402(K)'S PERMIT SHIELD

The purpose of the Clean Water Act's National Pollutant Discharge Elimination System (NPDES) is not to provide regulatory certainty to polluters, but rather to "prevent harmful discharges into the Nation's waters." *National Cotton Council of Am. v. U.S. Envt'l Protec. Agency,* 553 F.3d 927, 939 (6th Cir. 2009); *Mingo Logan Coal Co. v. U.S. E.P.A.*, --- F.3d ----, 2013 WL 1729603, *5 (D.C. Cir. 2013) (finding that the USEPA's authority to prevent "unacceptable adverse impacts" to the environment trumps any concerns of "certainty and finality" for permits issued under CWA § 404); *see also* 40 C.F.R. § 122.5(b) ("The issuance of a permit does not convey any property rights of any sort, or any exclusive privilege."). Indeed, in the very first provision of the CWA, Congress stated as the statute's goal the complete elimination of the discharge of pollutants to navigable waters by 1985. 33 U.S.C. § 1251(a)(1).

In determining whether ICG's discharges of harmful amounts of toxic selenium are authorized by its CWA permit, the scope of the ambiguous "permit shield" provision in CWA § 402(k) must be read in light of the of the statute's environmental protection purpose. *See Long v. Merrifield Town Center Ltd.*

Partnership, 611 F.3d 240, 244 (4th Cir. 2010) (stating that the court "must ascertain the interpretation of the [ambiguous] statute that best implements Congress' intent and gives effect to the statute's purpose."); *Piney Run Pres. Ass'n v. Cnty. Commissioners of Carroll Cnty.*, 268 F.3d 255, 267 (4th Cir. 2001), *cert. denied*, 535 U.S. 1077 (2002) (finding that § 402(k) is ambiguous). ICG urges this court to affirm the District Court's interpretation of the permit shield's application to general NPDES permits. The District Court held that permitees authorized under a general permit may discharge unlimited amounts of any pollutant not specifically restricted in that permit. The court held that a general permit authorization would always provide such a shield, regardless of whether a permittee discloses or the permitting authority considers the potential for discharges of such pollutants. Mem. Op., RE 65, Page ID# 1321.[7] The unlimited discharge of toxic pollutants allowed under the District Court's holding fundamentally undermines the CWA's basic purpose of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a). The construction of the

[7] ICG suggests that the District Court may have "implicitly" ruled on whether discharges of toxic selenium were within the "reasonable contemplation" of the permitting authority prior to issuing the KPDES Coal General Permit. ICG Br. at 28. The Court did no such thing. It explicitly stated that "examining the parties' 'reasonable contemplation' argument is unnecessary." Mem. Op., RE 65, Page ID# 1322 n.11. It did not otherwise mention the "reasonable contemplation" standard or in any way discuss what was considered by the permitting agency prior to issuing the General Permit.

statute urged by ICG would thus upend the CWA's environmental protection goals and should be rejected.

A. The District Court's Decision Is Subject to De Novo Review

As an initial matter, no part of the District Court's decision should be reviewed for "clear error." ICG inappropriately attempts to inject principles of contract law regarding factual findings by into the review of the District Court's grant of summary judgment on Sierra Club's CWA claims. ICG Br. at 13-14. As this Court has made clear, however, "[w]hen an appellate court reviews a grant of summary judgment, the district court decision is reviewed *de novo*." *Pinney Dock and Transport Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1472 (6th Cir.1988). "Discretion plays no real role in the grant of summary judgment: the grant of summary judgment must be proper . . . or the grant is subject to reversal." *Id.* (quoting 6 *Moore's Federal Practice* ¶ 56.15[8] (2d ed. 1985)).

None of the cases cited by ICG support application of the "clear error" standard. That standard applies to review of a court's use of extrinsic evidence to resolve factual disputes over the meaning of a contract. *Campbell v. Potash Corp. of Saskatchewan, Inc.*, 238 F.3d 792, 797 (6th Cir. 2001). Here, the District Court did not make any factual findings, nor did it employ extrinsic evidence to interpret ICG's NPDES permit. *See* ICG Br. at 25 (attempting to apply the "clear error" standard to the court's interpretation of USEPA's policy statement interpreting

402(k)). Rather the Court looked to USEPA guidance documents to interpret CWA Section 402(k) itself as applied to all NPDES general permits, not just ICG's permit. *See* Mem. Op., RE 65, Page ID# 1317-18 (discussing EPA's General Permit Guidance when interpreting the scope of section 402(k)). The District Court's order is thus subject to *de novo* review. *Sanders v. Allison Engine Co., Inc.*, 703 F.3d 930, 936 (6th Cir. 2012) (explaining that questions of statutory interpretation are reviewed *de novo*).

B. ICG's Selenium Discharges Are Not Within the "Specified Scope" of the KPDES Coal General Permit

In its Response, ICG cites language from a May 19, 1980 USEPA Federal Register notice for the proposition that "if [a permitee] 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." ICG Br. at 16 (quoting 45 Fed. Reg. at 33311). That notice, however, accompanied EPA's "Consolidated Permit Regulations," which are no longer in effect. *See* 48 Fed. Reg. 14,164 (April 1, 1983). Indeed, EPA has since set forth interpretations of the permit shield which demonstrate that the scope of Section 402(k) is not as broad as ICG contends.

In its 1995 Policy Statement on Scope of Discharge Authorization and Shield Associated with NPDES Permits ("Permit Shield Policy"), RE 41-22, EPA clearly sets out two separate policies under two separate headings: one for

individual NPDES permits and one for general NPDES permits. In the policy applicable to individual permits, the agency provides a shield for all pollutants that are (1) specifically limited in the permit, (2) specifically identified in writing as part of the application process, or (3) constituents of wastestreams that are specifically identified in writing as part of the application process. Permit Shield Policy, Page ID# 722-23. In contrast, the separate policy for general permits authorizes only those pollutants that are "within the specified scope of the particular general permit." *Id.* at 723.

Despite EPA setting forth two separate interpretations under two separate headings, ICG contends that the shield provided by general permits is identical to that provided by individual permits. ICG Br. at 18. It thus argues that the proper standard for determining whether the permit shield applies to the discharge of pollutants not listed in an NPDES permit is whether those discharges were disclosed to and within the "reasonable contemplation" of the agency at the time of permit issuance. *Id.* at 19-20. That standard is from the Fourth Circuit's decision in *Piney Run*, which addressed the permit shield's application to discharges under an individual permit. The Court reached its decision in *Piney Run* by deferring to the USEPA Environmental Quality Board's decision in *In re Ketchikan Pulp Co.*, 7 E.A.D. 605, 1998 WL 284964 (May 15, 1998), which also involved an individual permit. *Piney Run*, 268 F.3d at 267–68. The Ketchikan Pulp decision applied the

portion of EPA's Permit Shield guidance memorandum that addresses individual permits. *Ketchikan Pulp*, 7 E.A.D. at 624.

The soundness of the "reasonable contemplation" standard depends entirely on the ability of the permitting authority to review the detailed characterization of the proposed pollutant discharge that is included in an application for an individual permit and to then apply appropriate effluent limitations. The Fourth Circuit in Piney Run explained how the "reasonable contemplation" standard for individual permits depends on those detailed disclosures:

> The applicant discloses the nature of its effluent discharges to the permitting authority. The permitting authority analyzes the environmental risk posed by the discharge, and places limits on those pollutants that . . . it "reasonably anticipates" could damage the environmental integrity of the affected waterway. . . . Because the permitting scheme is dependent on the permitting authority being able to judge whether the discharge of a particular pollutant constitutes a significant threat to the environment, discharges not within the reasonable contemplation of the permitting authority during the permit application process . . . do not come within the protection of the permit shield.

268 F.3d at 268 (internal citations omitted). The EQB in *Ketchikan Pulp* likewise explained that "the disclosures made by permit applicants during the application process constitute the very core of the NPDES permitting scheme" because "[i]naccurate or incomplete disclosures could undermine the purpose of the CWA by denying the permit writer the information necessary to write a permit to adequately protect the environment." 7 E.A.D. at 626. Similarly, the EPA's permit

shield policy for individual permits states that the shield applies only to pollutants that are "specifically identified in writing as present in facility discharges during the permit application process" or are "constituents of wastestreams, operations or processes that were clearly identified in writing during the permit application process." Permit Shield Policy, RE 41-22, Page ID# 722-23. Only when the regulatory agency has access to the detailed disclosures that accompany an individual permit application can it "reasonably contemplate" that certain pollutants that are clearly identified as present in the proposed discharge do not pose an "environmental risk" and thus do not require effluent limitations.

ICG contends that a "general permit and an individual permit are identical," ICG Br. at 24, such that the same permit shield should apply. That overlooks the significant difference in the information available to the permitting authority at the time of permit issuance. *Compare* 40 C.F.R. § 122.28 (requiring a limited "notice of intent" to discharge under a general permit) *with* 40 C.F.R. § 122.21 (requiring detailed application for individual permit). Indeed, EPA's General Permit Guidance that ICG cites notes that general permits and individual permits are identical "regarding effluent limitations, water quality standards,

monitoring, sampling requirements, and enforceability." ICG Br. at 24-25. That statement, however, makes clear that the permits are not the same with regards to the disclosures that must be made prior to permit issuance.[8]

EPA's use of the term "specified scope" in the Permit Shield Policy, when read in light of the lack of pre-permit disclosures regarding the nature of the discharge and the environmental protection purpose of the CWA, must be interpreted as referring to the express limitations in the permit. Because the KPDES Coal General Permit does not contain any effluent limitations on selenium, ICG's discharges of toxic selenium are not within the "specified scope" of its permit and are thus not protected by the permit shield.

Such an interpretation would not, as ICG and *amici* claim, make compliance with the CWA "impossible" such that "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." ICG Br. at 17-18; Brief of *Amici Curiae* at

[8] ICG also cites *Coon v. Willet Dairy, LP*, 2007 WL 2071746 (N.D.N.Y. 2007). ICG Br. at 20. That case is not relevant. In *Willet Dairy*, the plaintiff did not allege CWA violations stemming from the discharge of pollutants not limited by the general permit. Rather, it alleged violations of the express conditions of the permit. *Id*. at *4. The court found only that the permit shield precluded the plaintiff's claims because the alleged discharges occurred prior to the deadline for compliance contained in the permit. The court reasoned that the shield prevented the plaintiff from challenging the compliance deadline in a citizen enforcement suit. *Id.* at *5. It did not address the separate issue of the general permit's authorization of discharges of pollutants not limited in the permit and did not apply the "reasonable contemplation" standard.

12-13. The prospect of "harassment" through enforcement actions against permittees for discharges of minuscule amounts of unlisted pollutants is simply not realistic. There is no motivation for citizens or the regulatory authority to bring suits for the discharge of harmless levels of pollution and no meaningful relief available even if liability could be established.[9] Thus, permittees would have certainty regarding the discharge any pollutant that it does not discharge in harmful quantities. Where, as here, a permittee discharges harmful quantities of pollutants not listed in its permit, citizen suits are necessary and appropriate to effectuate the legislative purpose of the Clean Water Act.

C. ICG's Selenium Discharges Were Not Disclosed to and Were Not in the "Reasonable Contemplation" of the Permitting Agency

Even if the permit shield is the same for general permits as for individual permits, ICG's selenium pollution fails to meet the standard governing when the shield applies. As ICG acknowledges, that standard has two requirements. *Piney Run*, 268 F.3d at 268. First, the permitee must have "disclose[d] the nature of its effluent to the permitting authority" prior to permitting. *Id.* Second, the permitees'

[9] Plaintiffs in such an action would be unable to demonstrate that they suffered irreparable harm, that the balance of equities weighs in their favor, or that the public interest favors an injunction. *See Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). Those technical violations would likewise fail to result in anything more than nominal penalties based on the factors in CWA § 309(d). *See* 33 U.S.C. § 1319(d) (directing courts to consider the "seriousness of the violation," the "economic benefit (if any) resulting from the violation," and "good-faith efforts to comply").

discharge of pollutants must have been "within the reasonable contemplation of the permitting authority." *Id.*[10] ICG's discharges of toxic selenium are fail to meet either prong.

First, neither ICG nor any other permittee disclosed the potential to discharge selenium prior to the issuance of the KPDES Coal General Permit. Indeed, ICG's discharges were automatically reauthorized under the permit, without even the need for it to submit a new Notice of Intent to be covered. RE 41-1, Page ID# 440. KDOW thus had no information regarding the discharge of selenium in Kentucky.[11]

The single USGS report that KDOW asserts it considered cannot overcome this dearth of disclosure. *See* ICG Br. at 32-33. ICG mischaracterizes that report as assessing the "biological impact" of selenium downstream of surface mining. *Id.* at

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[10] *Piney Run* makes clear that those are independent obligations. After stating the permitee's duty to disclose, the court stated that "only other limitation on the permit holder's ability to discharge" is that the discharges must have been in the reasonable contemplation of the permitting authority. 268 F.3d at 268 (emphasis added). Thus, even if, as ICG contends, "the disclosure requirements are relaxed in the context of a general permit," ICG Br. at 28-30, the discharges of pollutants still must have been "reasonably contemplated" by the permitting agency prior to permit issuance.

[11] That fact distinguishes this case from *Alaska Community Action on Toxics v. Aurora Energy Servs., LLC*, Case No. 3:09-CV-00255 (D. Alaska Mar. 28, 2013). *See* ICG Br. at 20-21; Amicus Br. at 18-19. In that case, the Court described significant, site-specific information regarding the potential to discharge the unlisted pollutants that the permitting authority received and reviewed prior to authorizing coverage under the general permit. *Alaska Community Action on Toxics*, ICG Br., Appendix A at 26-27.

32. In fact, the report did not analyze selenium discharges from coal mines or their biological impact at all. Rather, it merely looked at the concentrations of selenium in various coal seams of the Appalachian Plateau. RE 45-2, Page ID# 809. The report did not assess the selenium concentrations in the surrounding rock strata, which it concluded are the likeliest contributors of selenium pollution from surface mines. *Id.*, Page ID# 810 ("[I]n surface mining all of the coal is removed, and the source of selenium is more likely to be the associated strata disturbed by mining operations. . . . [S]tudy of the selenium concentrations in rocks is beyond the scope of this report."). The authors of that report concluded that it would be of little use in determining the potential for surface mines to discharge selenium. *Id.*, Page ID# 818-19. The report was thus insufficient to provide the basis for a "reasonable contemplation" of the potential for selenium discharges that would allow KDOW to "analyze[] the environmental risk posed by the discharge, and place[] limits on those pollutants that . . . it 'reasonably anticipates' could damage the environmental integrity of the affected waterway." *See Piney Run*, 268 F.3d at 268.

Second, contrary to ICG's assertions, the inclusion in the General Permit of the requirement to monitor for certain metals, including selenium, one time during the term of the General Permit cannot create a shield for unlimited discharges of those toxic pollutants. *See* ICG Br. at 32-34. Requiring future disclosures of the potential for selenium discharges does not change the fact that, at the time KDOW

authorized the discharges at issue in this action, the agency had not considered sufficient information to assess the environmental risk posed by selenium in those discharges and set appropriate effluent limitations. The condition does little to help the agency set proper limits because, for existing dischargers like ICG, the single sample need not even be submitted until the 365th day of the final year of the permit term. Coal General Permit, RE 41-1, Page ID# 442. Allowing the permittee to discharge unlimited amounts of toxic pollutants for nearly the entire life of the permit does not demonstrate that KDOW "reasonably contemplated" the discharge of selenium in a way that would allow it to protect the environment.

Furthermore, although KDOW added the sampling condition at the request of EPA, the agency disregarded EPA's accompanying recommendation to include a condition in the General Permit requiring permittees to "install, implement and maintain controls as necessary to meet [water quality standards]." April 3, 2009 Letter from James D. Giattina, USEPA, Director, Water Protection Division to Mr. Peter Goodmann, Assistant Director, Kentucky Energy and Environmental Cabinet, RE 40-3, Page ID# 305. Without that crucial condition, the requirement to collect future samples (as late as the last day of the permit term) is meaningless. That is particularly true where, as here, the permitting authority refuses to impose effluent limitations on selenium despite its knowledge of consistent water quality standards violations.

Because ICG did not disclose the potential to discharge selenium and because its discharges were not within the reasonable contemplation of KDOW when it issued the KPDES Coal General Permit, this Court should not afford ICG's discharges the protection of the permit shield.

CONCLUSION

For the foregoing reasons, Sierra Club requests that the Court reverse the District Court and enter summary judgment in its favor on all claims based on ICG's discharges of selenium.

Respectfully submitted this 13th day of May, 2013.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. Excepting the portions of the brief described in Fed. R. App. P. 32(a)(7)(B)(iii), the brief contains 6,873 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). The brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 in Times New Roman, 14-point.

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CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2013, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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