No. 13-35709

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALASKA COMMUNITY ACTION ON TOXICS and ALASKA CHAPTER OF THE SIERRA CLUB,
Plaintiffs-Appellants,

v.

AURORA ENERGY SERVICES, LLC, and ALASKA RAILROAD CORPORATION,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Alaska

Case No: 3:09-cv-00255-TMB

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, and Utility Water Act Group In Support of Defendants-Appellees and Affirmance of the United States District Court for the District of Alaska

June 23, 2014

Karma B. Brown
Karen C. Bennett
Hunton & Williams LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037
(202) 955-1500
kbbrown@hunton.com
kbennett@hunton.com
Counsel for Amici Curiae American Farm Bureau Federation, et al.

(List of Counsel Continued on the Following Page)

Of Counsel:

Ellen Steen
Danielle D. Quist
American Farm Bureau Federation
600 Maryland Avenue, SW
Suite 1000W
Washington, DC 20024

Jan Poling
American Forest & Paper Association
1111 Nineteenth Street, NW, Suite 800
Washington, DC 20036

Peter Tolsdorf
American Petroleum Institute
1220 L Street, NW
Washington, DC 20005

Rachel L. Brand
Sheldon Gilbert
National Chamber Litigation Center, Inc.
1615 H Street, NW
Washington, DC 20062
Of counsel for Chamber of Commerce of the United States of America

Rachel Lattimore
Kristin Landis
CropLife America
1156 Fifteenth Street, NW, Suite 400
Washington, DC 20005

Tom Ward
National Association of Home Builders
1201 Fifteenth Street, NW
Washington, DC 20005

Kristy A.N. Bulleit
James N. Christman
Hunton & Williams LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037
Attorneys for Utility Water Act Group

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, I, the undersigned counsel of record for *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, and Utility Water Act Group (collectively, "*amici*"), certify that, to the best of my 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.

June 23, 2014

Respectfully submitted,

/s/ Karma B. Brown

Karma B. Brown
Hunton & Williams LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037
(202) 955-1500
kbbrown@hunton.com
Counsel for Amici Curiae
American Farm Bureau Federation,
et al.

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I. This Case Raises Issues of Fundamental Importance for *Amici*'s Members Who Rely on Clean Water Act Permits to Perform a Broad Array of Activities Critical to the Nation's Economy.

The associations filing this brief represent a broad array of agricultural, business, and industrial interests whose members perform activities specific to their sectors of the economy pursuant to a variety of Clean Water Act ("CWA") National Pollutant Discharge Elimination System ("NPDES") general permits issued by the Environmental Protection Agency ("EPA") and delegated states. *Amici*'s members rely on these general permit authorizations and the full protections afforded by the CWA permit shield, Section 402(k), 33 U.S.C. § 1342(k), 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, farm irrigation and management, and oil and gas activities.

Any ruling by this Court 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. Accordingly, *amici* file this brief to inform the Court of the significant ramifications of any decision limiting the scope or applicability of the permit shield.

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. Section 402(k), the permit shield, provides the protection and states that compliance with a permit is deemed to be compliance with the statute. 33 U.S.C. § 1342(k). The permit 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, 1998 WL 284964, at *8 (EAB 1998).

In this case, Plaintiffs-Appellants Alaska Community Action on Toxics and Alaska Chapter of Sierra Club (jointly, "ACAT") filed a citizen suit claiming that residual coal discharges falling from Defendant-Appellee Aurora Energy Services, LLC's ("Aurora Energy") over-water conveyer and ship loader were not covered by its 2008 Industrial Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activities ("MSGP"). The district court rejected that claim, holding that Aurora Energy properly complied with the express terms of its permit and the discharges at issue were adequately disclosed to, and reasonably contemplated by, the permitting authority during the permitting process. *Alaska Cmty. Action on Toxics v. Aurora Energy Servs.*, 940 F. Supp. 2d 1005, 1015 (D. Alaska 2013). The district court recognized that "the totality of the evidence,"

specifically, a long history of active regulation of the facility, site inspections, advice from EPA that the facility's discharges could be regulated under the MSGP, and the facility's Notice of Intent ("NOI") and Stormwater Pollution Prevention Plan ("SWPPP"), demonstrated that "the regulatory agencies not only knew about the discharges, but, in fact, actively regulated them under the existing Permit." *Id.* at 1022. Therefore, the district court found that the permit shield applied, and Aurora Energy was shielded from liability from ACAT's claims. *Id.*

The district court properly construed the scope and applicability of the CWA Section 402(k) permit shield. However, ACAT and *amicus curiae* EPA now propose a new, and far more limited, interpretation of the scope of protections afforded by the permit shield. According to ACAT and EPA, the permit shield protections apply only if, when it issued the permit, the permitting authority knew about and intended to authorize discharges not explicitly addressed in the permit. According to this narrow view, the only potentially relevant evidence of that intent, beyond the permit itself, is material submitted to, and contemplated by, the permitting authority during the process of issuing the permit. Under ACAT's and EPA's new position, unless a pollutant or activity is specifically authorized in a general permit, the discharger could be subject to liability – even if EPA was aware of the discharge or activity (for example, learning of it during its review of the company's NOI).

Not only is this interpretation incorrect, it is inconsistent with the case law, statutory language, and regulatory guidance.[1] In addition, fundamental tenets of administrative law dictate that a permittee must be able to rely, in good faith, on the advice and recommendations of a regulatory agency as to the requirements of the permitting program it administers. Based on these authorities, the district court's decision should be upheld. It is entirely appropriate, in determining the applicability of the CWA's permit shield, to review the "totality of the evidence" to conclude whether a permittee is shielded from liability for unpermitted discharges that were adequately disclosed and reasonably anticipated by the permitting authority.

This case arises in the context of the MSGP, but it has broader implications regarding the proper interpretation of the CWA permit shield, which applies to a range of NPDES permits upon which *amici's* members rely.[2] *Amici* have a strong

[1] *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.

[2] *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

and abiding interest in a proper reading of the scope of the permit shield's protections and urge the Court to affirm the district court's decision for the reasons set forth below.

II. *Amici* Represent a Broad Cross-Section of Industries with Direct Interests in the Outcome of the Case.

As described in the accompanying motion for leave to file this brief,[3] *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. Because of their significant interest in ensuring a proper reading of the scope of the CWA permit shield, the organizations filing this brief have also filed *amici curiae* briefs in cases addressing the permit shield before the U.S. Courts of Appeals for the Fourth and Sixth Circuits. *See, e.g., Piney Run Preservation Ass'n v. Cnty. Comm'rs of Carroll Cnty.*, 268 F.3d 255 (4th Cir. 2001) ("*Piney Run*"),

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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).

[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). ACAT objects to the motion. Defendants-Appellees Aurora Energy and Alaska Railroad Corporation consent 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.

Sierra Club v. ICG Hazard, LLC, No. 11-148-GFVT, 2012 WL 4601012 (E.D. Ky. Sept. 28, 2012), *appeal docketed*, No. 13-5086 (6th Cir. Jan. 23, 2013) ("*ICG Hazard"*), and *S. Appalachian Mountain Stewards v. A&G Coal Corp.*, No. 2:12CV00009, 2013 WL 3814340 (W.D. Va. July 22, 2013), *appeal docketed*, No. 13-2050 (4th Cir. Aug. 22, 2013) ("*A&G Coal Corp.*").

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 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 600 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 98 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 130,000 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 Utility Water Act Group is an unincorporated group of electric utilities and trade associations of electric utilities.

If ACAT's interpretation of the scope of the permit shield were to be adopted, NPDES permittees would no longer be able to rely on their permits for legal protection. 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 accept the increased risk of relying on general permits or be thrust into far lengthier, burdensome, 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.

III. Argument

A. The CWA Authorizes EPA and Delegated States to Issue General and Individual NPDES Permits, Which Provide Equivalent Protections.

The CWA prohibits "the discharge of any pollutants" into navigable waters of the United States, except in compliance with certain other provisions, such as Section 402, the NPDES program. 33 U.S.C. §§ 1251, 1342(a). EPA is tasked with administering the NPDES permitting program. However, because the CWA also embodies Congress's intent "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution," *id.* § 1251(b), it empowers EPA to delegate its permitting and enforcement authority to individual states. *Id.* § 1342(b).

A state seeking to administer the CWA must submit for EPA's approval "a full and complete description of the program it proposes to establish and administer under State law." *Id.* Once EPA has approved a state's program, authority to issue CWA NPDES permits within the state rests solely with the state

permitting authority. *Id.* § 1342(c). EPA's role is limited to supervisory authority over the state program. *Id.* § 1342(c)(1). If EPA concludes that a state delegated NPDES permit is inconsistent with the CWA, it is charged with "notify[ing] the State of any revisions or modifications [to the State's program] necessary to conform to [CWA] requirements or guidelines." *Id.* If the state does not revise the general permit, EPA may veto the permit, or take steps to withdraw delegation. *Id*.

EPA delegated its permitting authority to the State of Alaska, which administers its program through the Alaska Department of Environmental Conservation ("DEC"), in October 2009. *Alaska Cmty. Action on Toxics*, 940 F. Supp. 2d at 1008. Thus, EPA's role in the MSGP at issue here is limited.

NPDES permits come in two forms: general permits, 40 C.F.R. § 122.28, and individual permits, 40 C.F.R. § 122.21. EPA regulations require that certain regulatory findings be met prior to issuance of either individual or general permits. 40 C.F.R. § 122.28(b)(2)(ii). Both general and individual permits are first proposed and subject to public comment before a final permit is issued.

General permits are issued after 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).[4] 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.[5]

Individual permits are used where a discharger cannot, or otherwise does not, receive a general permit. General Permit Guidance at 9. Individual permits are written by the EPA or authorized state agency after consideration of generally applicable effluent limits and an individual discharger's disclosures. *Ketchikan Pulp Co.*, 7 E.A.D. at 618, 1998 WL 284964, at *9. Despite the differing permitting processes, EPA concludes that 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.

[4] 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).

[5] Indeed, 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.

Site-specific information regarding how a specific discharger will conform its discharges and waste streams with the terms and conditions of a general permit is disclosed to the permitting agency through filing an NOI. As required by certain general permits, such as the MSGP at issue here, the permittee will also prepare and submit a SWPPP. In response, the regulatory authority has the latitude to require a different permitting approach, if necessary, thereby allowing the permitting authority 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. Absent any negative ruling on the NOI, authorizations pursuant to a general permit are automatic, which reduces paperwork and promotes timely issuance of permits. *Id.* at 2.

As EPA acknowledges, "[g]ood general permits are no less effective than individual permits; they simply cover more than one discharger." *Id.* at 4.

B. The Permit Shield is Intended to Provide Certainty to the Permit Holder and Regulator that Compliance with a Permit is Deemed to be Compliance with the CWA.

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, Section 402(k), providing that, once

an NPDES permit is issued, compliance with the permit means that the permittee is in full compliance with the CWA, including "sections [309] [government enforcement action] and [505] [citizens' suits] . . . with sections [301] [effluent limits] and [302] [water quality based effluent limits]." 33 U.S.C. § 1342(k). 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, Section 402(k) serves the purpose of giving permits finality." *Train*, 430 U.S. at 138 n.28.

1. EPA and the Courts Have Consistently Interpreted the Permit Shield to Cover Discharge of Pollutants Not Specifically Listed in the Permit.

EPA's NPDES regulations adopting CWA Section 402(k) provide 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 (referring to 40 C.F.R. § 122.13(a), now found at 40 C.F.R. § 122.5). 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.[6] 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. The EPA Policy Statement also confirms that general permits provide a level of protection equivalent to individual permits: "Section 402(k) also shields discharges of pollutants authorized under a general permit … so long as the

[6] *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), *available at* *http://cfpub.epa.gov/npdes/docs.cfm?document_type_id=1&view=Policy%20and%20Guidance%20Documents&program_id=1&sort=name*.

permittee complies with all … application requirements for the general permit." *Id.* at 3.

Piney Run is the seminal case addressing the scope of the permit shield provision.[7] *Piney Run*, 268 F.3d 255 (4th Cir. 2001). In interpreting this provision, the Fourth Circuit applied a *Chevron* analysis and determined that the text was ambiguous. *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 next held that EPA's Environmental Appeals Board ("EAB"), in *Ketchikan Pulp Co.,* 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. . . ."[8] *Id.* at 267-68 (citing *Ketchikan Pulp Co.*, 1998 WL 284964, at *12-13).

[7] *Piney Run* involved a challenge to an individual permit. However, EPA's Policy Statement confirms that the protections of the permit shield are equivalent for individual and general permits.

[8] *See also Atl. 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*., 1998 WL 284964, at *9 ("Since any given wastestream may contain hundreds of pollutants, . . . a permit-writing approach [that prohibited the discharge of all pollutants except those listed in the permit] would be unduly burdensome and costly, and ultimately, impractical.").

In *Ketchikan Pulp Co.,* EPA outlined the proper structure for the permitting process. First, the applicant discloses the nature of its effluent discharges to the permitting authority; then, the permitting authority analyzes the environmental risk posed by the discharge; and, finally, the permitting authority places limits on those pollutants that it "reasonably anticipates" could damage the environmental integrity of the affected waterway. 1998 WL 284964, at *11. Thus, as long as a permit holder complies with the CWA's reporting and disclosure requirements, it may discharge pollutants not expressly mentioned in the permit so long as the discharges are reasonably anticipated by, or within the reasonable contemplation of, the permitting authority. *Id.* at *11. "When the permittee has made adequate disclosures during the application process regarding the nature of its discharges, unlisted pollutants may be considered to be within the scope of an NPDES permit, even though the permit does not expressly mention those pollutants." *Id.*

The *Piney Run* court recognized EPA's determination that "compliance is a broader concept than merely obeying the express restrictions set forth on the face of the NPDES permit; all discharges adequately disclosed to the permitting authority are within the scope of permit's protections." *Piney Run*, 268 F.3d at 268. *Piney Run* thus upheld EPA's interpretation of the permit shield as a rational construction of the CWA's statutory ambiguity under *Chevron.*

A recent decision from the U.S. District Court for the Eastern District of Kentucky follows this precedent, holding that an NPDES permittee is able to discharge pollutants not listed in the permit as long as proper disclosure was made during the permitting process. *ICG Hazard*, 2012 WL 4601012 (E.D. Ky. Sept. 28, 2012). The *ICG Hazard* court rejected Sierra Club's claims that the scope of the permit shield is narrower for general permits than individual permits because of the differences in the permitting process. The court concluded 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." *Id.* at *7 (quoting General Permit Guidance at 33-34). Because general and individual permits require the same levels of compliance from permittees, and permittees are subject to the same types of enforcement, the court held 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 are identical." *Id.* at *8.

C. The District Court Properly Evaluated the "Totality of the Circumstances" in Determining that the Discharges Were Adequately Disclosed to EPA and Reasonably Anticipated to Occur.

In 1984, EPA issued an NPDES individual permit for the coal-loading facility at issue in this case. EPA conducted compliance inspections during the time the individual permit was in effect and was well aware of the potential for incidental discharges of coal from the facility. When it was time for the facility to renew its permit, based on its knowledge of the discharges, EPA "advised the Facility that its discharges could be regulated under either an individual permit like the one it had, or under the NPDES [MSGP]." *Alaska Cmty. Action on Toxics*, 940 F. Supp. at 1010. EPA expressed its preference for a general permit authorization, stating "that the 'application, issuance, and maintenance of the General Permit' would 'require[ ] a lower administrative burden to both EPA and the facility'" and "'since the General Permit [was] already written,' renewal under the General Permit would save EPA from 'having to prepare a new individual permit for [the] facility.'" *Id.* (quoting Letter from Patty McGrath, NPDES Permit Writer, EPA, to Shelly Knopik, Seward Terminal, Inc. at 1 (Dec. 16, 1999), Ex. C to Decl. of Denise Ashbaugh in Supp. of Defs.' Mot. for Summ. J., *Alaska Cmty. Action on Toxics v. Aurora Energy Servs.*, No. 09-00255 (D. Alaska May 14, 2012), Dkt. 121-5).

Therefore, in 2001, following the agency's evaluation and preference, and in reliance on the permitting agency's advice, the facility applied for coverage under the MSGP. EPA inspected and conducted ongoing oversight of the facility pursuant to the MSGP. In 2009, EPA repeated its preference that the MSGP was the proper permit for the facility, and in May, 2009, the facility submitted an NOI to renew its NPDES coverage pursuant to the MSGP. EPA acknowledged receipt of the NOI, and the facility prepared a SWPPP.

When EPA delegated authority for the Alaska NPDES program to DEC in 2009, as part of the transition, control of the MSGP was transferred to DEC. EPA and DEC have inspected the facility on numerous occasions, and, after each inspection, the regulatory agencies have concluded that the facility is in full compliance with the MSGP. None of the inspectors have noted any non-compliant discharges, questioned the applicability of the MSGP, or suggested that an individual permit was required. DEC indisputably interprets the MSGP to cover coal sediment and has no intention of requiring an individual permit: "'requiring an individual NPDES permit[] rather than the current coverage under the [General Permit], would be duplicative and needlessly cumbersome' … and 'would provide no additional environmental benefit or protection.'" *Alaska Cmty. Action on Toxics*, 940 F.Supp. 2d at 1021 (citing statement of DEC Deputy Commissioner).

Permittees must be able to rely on a regulatory authority's interpretation of the permitting program it administers (whether correct or not) and be protected from liability under the permit shield. Based on the totality of the evidence, including the language of the permit, disclosures from the permittee, the NOI and SWPPP, inspection reports, discussions between the regulator and permittee, and the agencies' active regulation of the discharges under the MSGP, the district court properly concluded that EPA reasonably anticipated the discharges.

1. The District Court's Decision is Bolstered by Fundamental Tenets of Administrative Law and Due Process.

It is "a cardinal rule of administrative law" that a regulated party must be given "fair warning" of what conduct is prohibited or required of it. *Rollins Envtl. Servs. (NJ), Inc. v. U.S. Envtl. Prot. Agency*, 937 F.2d 649, 655 (D.C. Cir. 1991) (Edwards, J., dissenting in part and concurring in part). The D.C. Circuit has explained: "In the absence of notice – for example, where the regulation is not sufficiently clear to warn a party about what is expected of it – an agency may not deprive a party of property by imposing civil or criminal liability…. This requirement has now been thoroughly 'incorporated into administrative law.'" *Gen. Elec. Co. v. U.S. Envtl. Prot. Agency,* 53 F.3d 1324, 1328-29 (D.C. Cir. 1995) (internal citations omitted).

In *Wisconsin Resources Protection Council v. Flambeau Mining Co.*, 727 F.3d 700 (7th Cir. 2013), plaintiffs alleged that Flambeau violated the CWA by

discharging pollutants without a permit. Flambeau did not have notice that its permit might not be a valid NPDES permit, and the state took the position that Flambeau's activities were authorized under the NPDES permit. *Id.* at 709. The U.S. Court of Appeals for the Seventh Circuit held, consistent with the CWA permit shield and the requirements of due process, that it could not impose a penalty on the permittee for complying with what the delegated state deemed to be a valid NPDES permit, even if the permit was legally invalid. *Id.* at 707-08. Therefore, the court found the permit shield applied, and Flambeau was deemed to be in compliance with the CWA. *Id.* at 711.

Here, in reliance on EPA's advice and EPA's stated preference for authorization by general permit, the facility switched from an individual permit to the MSGP. Before the *amicus* brief it filed in this appeal, EPA has never taken the position that the coal discharges were not covered by the MSGP. And neither EPA nor DEC take the position now that Aurora Energy is not fully complying with its MSGP. Therefore, it is fundamentally inconsistent with the principles of due process for EPA to alter course – 15 years after it advised the facility to seek a general permit authorization with full knowledge of the discharges the facility needed to cover to comply with the CWA – and assert that the permit does not cover the facility's discharges.

2. EPA's New Interpretation of the Scope of the Permit Shield is Entitled to No Deference.

When EPA made the determination that DEC has the ability to issue permits and ensure compliance with the CWA and to abate violations of the permit or the permit program, DEC assumed the day-to-day responsibility for the NPDES program in Alaska. It is not appropriate for EPA to come in now and argue for an interpretation of the MSGP that is contrary to DEC's own view. Notwithstanding EPA's advice to the facility to seek coverage under the MSGP, and its full knowledge of the discharges for over fifteen years, EPA now claims that the discharges are not covered by the permit shield based on a new, and far narrower, interpretation of the permit shield than has ever been espoused before.[9] EPA argues that "[t]he permit shield analysis determines whether, *when it issued the*

[9] EPA's *amicus* brief appears to be part of a larger policy shift by way of "cooperative litigation" with environmental groups to narrow the scope of the permit shield. EPA's *amicus* brief reflects the first time the agency has weighed in on a series of environmentalists' suits seeking to narrow the scope of the permit shield. *See, e.g., ICG Hazard*, 2012 WL 4601012 (E.D. Ky. Sept. 28, 2012), and *A&G Coal Corp.*, 2013 WL 3814340 (W.D. Va. July 22, 2013). However, after EPA filed its *amicus* brief in this case, it filed a similar *amicus* brief in *A&G Coal Corp.,*, No. 13-2050 (4th Cir. filed May 12, 2014), arguing for a narrower interpretation of the permit shield defense. The filing of these *amicus* briefs appears to be an effort by EPA to implement a sweeping policy change through litigation, which is an inappropriate approach. Moreover, this approach is contrary to EPA's long-standing interpretation and violates due process because permittees, like Aurora Energy, acting in good faith and relying on their permits, had no notice that EPA would suddenly shift course and now claim that the permittees' discharges are not shielded from liability.

permit, the permitting authority knew about and intended to authorize pollutant discharges beyond those explicitly addressed in the permit." Br. of the United States as Amicus Curiae Supporting Appellants at 5, *Alaska Cmty. Action on Toxics v. Aurora Energy Servs.*, No. 13-35709 (9th Cir. Mar. 28, 2014), Dkt. 19 ("EPA Br.") (emphasis in original). According to EPA, "[m]ere disclosure of pollutants or waste streams during the administrative process for the general permit would not establish shield coverage. Rather there would *need to be clear, unmistakable evidence in the administrative record* that EPA, in fact, contemplated and anticipated the discharges in question when establishing the general permit's terms and conditions." *Id.* at 32 n.9 (emphasis added). EPA suggests that the only relevant evidence of the permitting authority's intent beyond the permit itself would be material submitted to, and contemplated by, the permitting authority during the process of issuing the general permit. Therefore, administrative documents prepared to obtain coverage under a general permit, such as the NOI or SWPPP, where facility-specific information is disclosed, are irrelevant. *Id.* at 27-28.

EPA's new interpretation of the scope of the permit shield is erroneous, contrary to Congressional intent, the CWA, case law, and the agency's Policy Statement. Long-standing interpretation and application of the permit shield doctrine confirm that, so long as a permit holder complies with the relevant

application requirements, it is shielded from liability for the discharge of pollutants not specifically limited by the express terms of the permit where the discharges were "'adequately disclosed'" to and "reasonably contemplated" by the regulator. 940 F. Supp. 2d at 1022.

Accepting EPA's argument as true would render an NOI meaningless. An NOI, in the general permit context, is the functional equivalent of the permit application in the individual permit context. Once a permittee submits an NOI to the agency, the burden shifts to the agency to determine if it has sufficient information to ensure that the permittee's discharge will comply with the law. Absent any negative ruling on the NOI, authorizations pursuant to a general permit are automatic, and the permittee may proceed with its proposed activity pursuant to the MSGP. If an NOI has no relevance to a permit, as EPA asserts, why require it at all?

Further, there is no support (nor does EPA provide any) for EPA's new interpretation that there must be "clear, unmistakable evidence" in the record of the regulator's "contemplation" of the disclosed discharges. This interpretation must fail because a permittee cannot control what the regulator does or does not do with the information the permittee submits.

EPA's interpretation also creates serious due process implications. If EPA's argument were accepted, a permittee wishing to avail itself of the permit shield's

protections would have to provide EPA with notice of its specific discharges at the time the general permit was under review. But many permittees may not have existed or had reason to participate in the administrative process. Therefore, they would have no way of knowing what EPA "contemplated" and "anticipated" during the process of issuing the general permit if it is not evident from the face of the permit.

EPA's *amicus* brief directly contradicts its long-standing position regarding regulation of the discharges at issue, is contrary to the policies underlying the permit shield, and would result in fundamentally bad public policy. For these reasons, EPA's *amicus* brief should carry no weight.

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 rely on general permits to streamline permitting processes for certain categories of activities. There are currently 880 state and federal NPDES general permits and hundreds of thousands of general permittees.[10] For example, mining companies, oil and gas developers, utilities, and homebuilders manage stormwater associated with resource development and construction related to these industries under various industrial and construction

[10] *See* EPA, NPDES General Permit Inventory, http://cfpub.epa.gov/npdes/permitissuance/genpermits.cfm (last visited June 20, 2014).

stormwater general permits. If the district court's ruling is reversed, and ACAT's narrow interpretation of the scope of the permit shield 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 contrary result 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 or the advice and counsel of the regulatory agencies pose insurmountable hurdles, which would essentially halt project proponents from moving forward with investments to create or expand an enterprise under the general permit program. Companies will be reluctant to expend millions of dollars in reliance on permits if they are unable to rely on those permits in good faith and be assured that compliance with them equals compliance with the law.

Uncertainty regarding permit protections could reduce investment in projects by making it more difficult to obtain financing, or increase 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, lenders 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.[11]

[11] 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.

Limiting the application of the permit shield defense would make NPDES compliance unpredictable. 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, permittees might have no choice but to seek coverage under NPDES individual permits. Given the significant additional delay inherent in obtaining individual permits, that might result in deferring, or foregoing, necessary projects to ensure compliance with the CWA. For example, in the agricultural context, delay associated with obtaining individual permits could interfere with the timely application of pest control products critical to the protection of public health and land management necessary for agricultural commodities and negatively impact the sustainability of a plentiful, healthy, and high quality food supply for the American public. Similarly, if utilities that currently rely on general permits for routine maintenance activities, such as controlling vegetation in power line corridors, instead seek coverage under individual permits, any resultant delay in permit authorizations could have serious implications for the nation's economy.[12]

[12] EPA's fact sheet on integrated vegetation management states that each day in the U.S. more than 10,000 power plants deliver electricity to more than 131 million customers over 157,000 miles of high voltage electric transmission lines. EPA, Office of Pesticide Management, Fact Sheet EPA 731-F-08-011, Benefits of Integrated Vegetation Management on Rights-of-Way (Oct. 2008), *available at* http://www.epa.gov/pesp/publications/landscaping/row_fact_sheet.pdf.

The August 14, 2003 electricity blackout, which cost the American economy an estimated $7-10 billion, was caused by overgrown trees.

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.[13] 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 tens of thousands of dollars (or more) preparing individual NPDES applications, especially if technical or site-specific information is required, as is often the case.

In short, a decision finding the protections afforded by the permit shield to be more limited would not only be contrary to the statute, the EPA Policy Statement, and the case law, but would have serious, potentially far-reaching,

[13] 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 June 20, 2014). For example, despite EPA's best efforts to reduce the backlog of renewals, 1617 or 24.1% of the permits for "major" facilities have expired. *See id.* at Permit Status Report for Non-Tribal Individual Major Permits – March 2013 (1) at 3, (follow "Percent Current Status – Major facilities covered by Individual NPDES Permits" hyperlink).

negative impacts upon the economy. Such a decision could insert significant uncertainty into all general permit programs, place hundreds of thousands of permittees currently proceeding under general permit authorizations at risk for liability under the CWA, and impose new burdens on permittees. Further, permittees must be able to rely on the advice and recommendations of regulatory authorities as to the scope and applicability of the permitting programs they implement. Any decision to the contrary would undermine the relationship between permittees and regulators, and cause permittees to seriously question the regulators' authority to administer their own program.

V. Conclusion

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

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Respectfully submitted,

/s/ Karma B. Brown

Karma B. Brown
Karen C. Bennett
Hunton & Williams LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037
(202) 955-1500
kbbrown@hunton.com
kbennett@hunton.com
Counsel for Amici Curiae American Farm Bureau Federation, et al.

Of Counsel:

Ellen Steen
Danielle D. Quist
American Farm Bureau Federation
600 Maryland Avenue, SW
Suite 1000W
Washington, DC 20024

Jan Poling
American Forest & Paper Association
1111 Nineteenth Street, NW, Suite 800
Washington, DC 20036

Peter Tolsdorf
American Petroleum Institute
1220 L Street, NW
Washington, DC 20005

Rachel L. Brand
Sheldon Gilbert
National Chamber Litigation Center, Inc.
1615 H Street, NW
Washington, DC 20062
Of counsel for Chamber of Commerce of the United States of America

Rachel Lattimore
Kristin Landis
CropLife America
1156 Fifteenth Street, NW, Suite 400
Washington, DC 20005

Tom Ward
National Association of Home Builders
1201 Fifteenth Street, NW
Washington, DC 20005

Kristy A.N. Bulleit
James N. Christman
Hunton & Williams LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037
Attorneys for Utility Water Act Group

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(c)(7) and (d) and 32(a)(7)(C), 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, and Utility Water Act Group in Support of Defendant-Appellee and Affirmance of the U.S. District Court for the District of Alaska contains 6,929 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.

/s/ Karma B. Brown
Karma B. Brown
Hunton & Williams LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037
(202) 955-1500
kbbrown@hunton.com
Counsel for Amici Curiae
American Farm Bureau Federation, et al.

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure and Circuit Rule 25-5(g), I hereby certify that on this 23rd day of June, 2014, I electronically filed 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, and Utility Water Act Group in Support of Defendants-Appellees and Affirmance of the U.S. District Court for the District of Alaska with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Karma B. Brown
Karma B. Brown
Hunton & Williams LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037
(202) 955-1500
kbbrown@hunton.com
Counsel for Amici Curiae
American Farm Bureau Federation, et al.