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**Protecting Your
“Permit Shield” Defense**

A Presentation to
Arkansas Environmental Federation

By Allan Gates

March 29, 2017

The “Permit Shield” Defense

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Clean Water Act Section 402(k)

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“Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 309 [state and federal enforcement] and 505 [citizen suits] . . . with [CWA limitations on discharges] except any standard imposed under section 307 . . . for a toxic pollutant injurious to human health”

Clean Water Act Section 402(k):

“Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 309 [state and federal enforcement] and 505 [citizen suits] . . . with [CWA limitations on discharges] except any standard imposed under section 307 . . . for a toxic pollutant injurious to human health”

Decisions Interpreting the Permit Shield Defense

- *Piney Run Preservation Assn v. County Commissioners*, 268 F.3d 255 (4th Cir. 2001)
- *Alaska Community Action on Toxics v. Aurora Energy Services, LLC*, 765 F.3d 1169 (9th Cir. 2014)
- *Sierra Club v. ICG Hazard*, 781 F.3d 281 (6th Cir. 2015)
- *Ohio Valley Env't'l Coalition v. Fola Coal*, 845 F.3d 133 (4th Cir. 2017)

*Piney Run Preservation Assn v. County
Commissioners (4th Cir. 2001)*

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Piney Run Summer Camp, Carroll County, MD

Piney Run Preservation Assn v. County Commissioners (4th Cir. 2001)

- *POTW had Individual NPDES Permit*
- *No Specific Permit Condition for Temperature*
- *Discharge $\approx 10^{\circ}$ F. Warmer than Receiving Stream*
- Citizen Suit to Enjoin Temperature Discharges
- Application Disclosed Relevant Facts, and Temperature Discharge was in Reasonable Contemplation of Permitting Authority
- Permit Shield Defense Successful

*Alaska Community Action on Toxics v.
Aurora Energy Services (9th Cir. 2014)*

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Seward, Alaska Coal Loading Facility

Alaska Community Action on Toxics v. Aurora Energy Services (9th Cir. 2014)

- *Coal Loading Facility had Industrial General Stormwater Permit*
- *Non Stormwater Discharges of Coal from Dock*
- Citizen Suit to Enjoin Coal Discharges
- General Permit Prohibited Non Stormwater Discharges
- Permit Shield Defense Unsuccessful

Sierra Club v. ICG Hazard (6th Cir. 2015)

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Thunder Ridge Mine, Hazard, KY

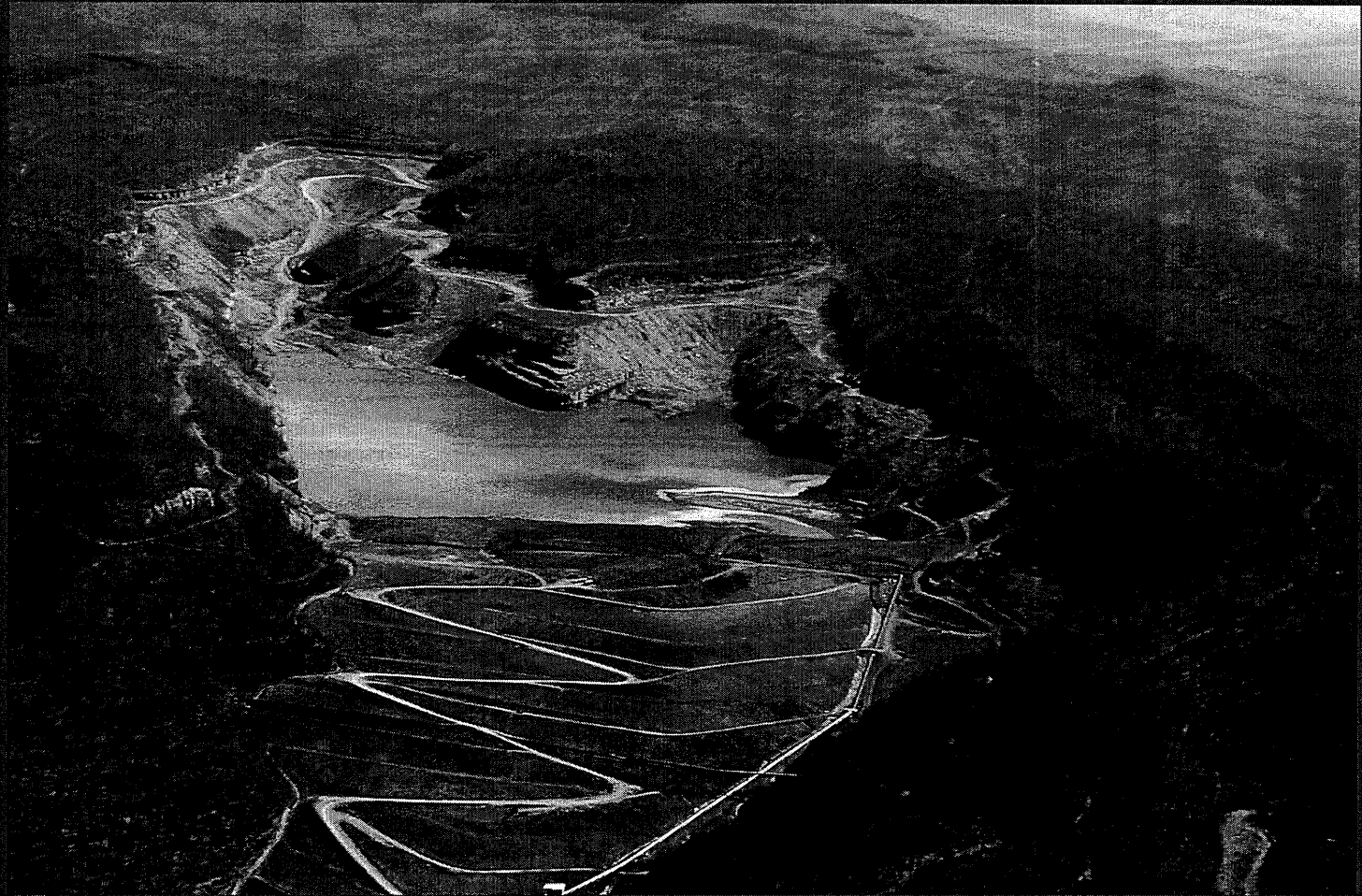
Sierra Club v. ICG Hazard (6th Cir. 2015)

- Mine Operator had Coal Mine General Permit with Some Specific Limits, but None for Selenium
- Citizen Suit to Enjoin Discharges of Selenium
- Permit Shield Defense Successful:
 - *Permit Shield Applies to General Permits*
 - *ICG Hazard Satisfied Piney Run Two-Prong Test:*
 1. *Disclosure Requirement Met*
 2. *Discharge was Within Permitting Authority's Reasonable Contemplation*

Ohio Valley Env't'l Coalition v. Fola Coal
(4th Cir. 2016)

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Fola Coal Operation, Clay and Nicholas Counties, KY

Ohio Valley Env't'l Coalition v. Fola Coal (4th Cir. 2016)

- Mine Operator had Coal Mine General Permit with no specific limits for conductivity (*i.e.*, minerals)
- Citizen Suit to Enjoin Discharges of “Conductivity”
- Permit Boilerplate Language Incorporated W Va WQS Regs by Reference; One Reg said Permits Should Not Allow Violation of any State WQS
- Mine Discharge Caused violation of Conductivity WQS, Therefore Mine Was Not in Compliance with Permit
- Permit Shield Defense Unsuccessful

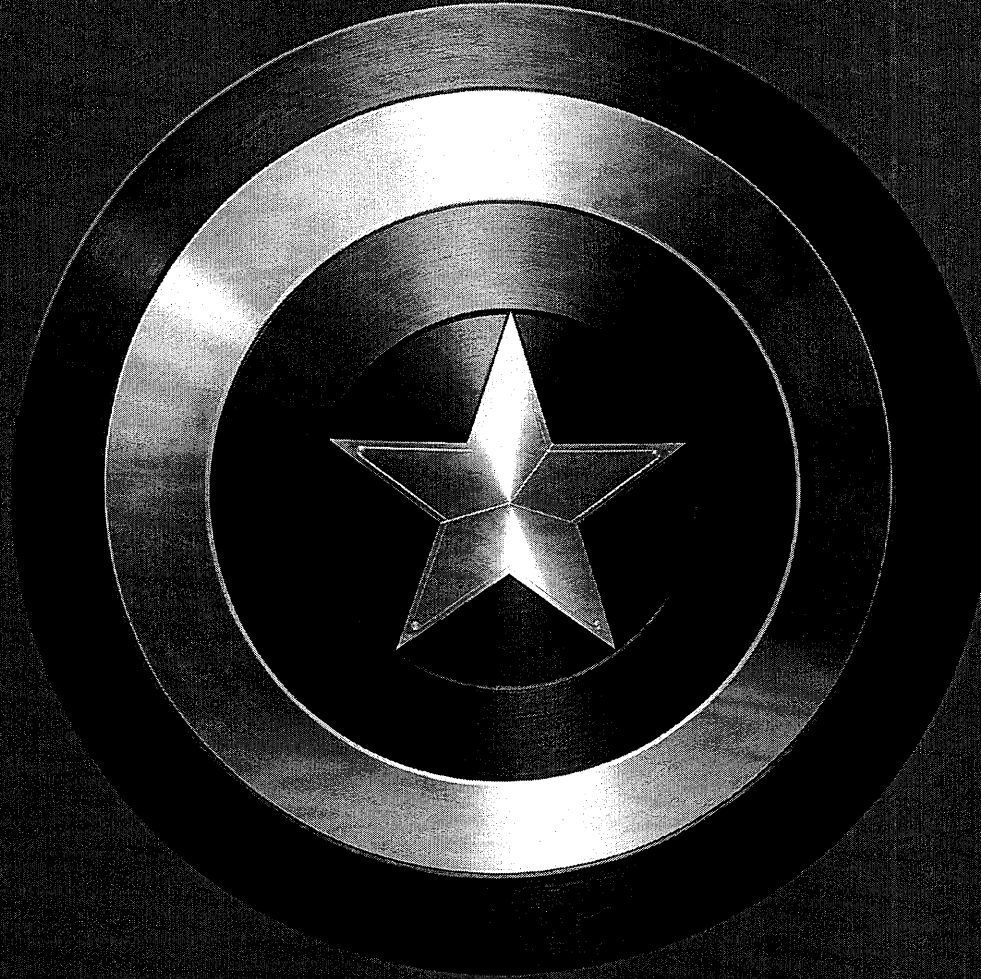
Lessons Learned from Permit Shield Decisions

- Permit Shield Defense Applies to Both General and Individual Permits
- Disclosure of Relevant Information in Permit Application is Important
- Agency Consideration of Relevant Information Should be Documented
- Discharge Contemplated by Permit May be Narrowly Construed
- Boilerplate Language Should Be Carefully Examined

The “Permit Shield” Defense

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Clean Water Act Section 402(k)

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Thank You
for Inviting Me to Speak to You

Questions?

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