Appeal No. 12-2969 and 12-3434

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

WISCONSIN RESOURCES PROTECTION COUNCIL, et al.,

Plaintiffs-Appellees/Cross-Appellants,

v.

FLAMBEAU MINING COMPANY,

Defendant-Appellant/Cross-Appellee.

Appeal from the United States District Court for the
Western District of Wisconsin, No. 3:11-cv-00045-bbc
Honorable Barbara B. Crabb, Presiding

PLAINTIFFS-APPELLEES/CROSS-APPELLANTS' PETITION FOR REHEARING *EN BANC* OR, ALTERNATIVELY, FOR PANEL REHEARING

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Dated: August 29, 2013

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 12-2969 & 12-3434

Short Caption: Wisconsin Resources Protection Council et al. v. Flambeau Mining Company

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Wisconsin Resources Protection Council, Inc.

Center for Biological Diversity

Laura Gauger

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

McGillivray Westerberg & Bender LLC

Earthrise Law Center at Lewis & Clark Law School

Center for Biological Diversity

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None

Attorney's Signature: s/ James N. Saul Date: August 29, 2013

Attorney's Printed Name: James N. Saul

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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Attorney's Signature: s/ Pamela R. McGillivray Date: August 29, 2013

Attorney's Printed Name: Pamela R. McGillivray

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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None

Attorney's Signature: s/ Christa O. Westerberg Date: August 29, 2013

Attorney's Printed Name: Christa O. Westerberg

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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None

Attorney's Signature: s/ David C. Bender Date: August 29, 2013

Attorney's Printed Name: David C. Bender

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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RULE 35 STATEMENT

En banc review is appropriate in this case because the panel decision conflicts with prior decisions of this Court, and because the proceeding involves several questions of exceptional importance. First, the panel decision failed to consider (and implicitly overturned) unambiguous EPA regulations when it applied the fair notice doctrine; these federal regulations must control where there is a conflict with state regulations. Second, the panel's decision conflicts with this Court's prior decision in *United States v. Cinergy Corp.*, 623 F.3d 455 (7th Cir. 2010), and cases of other circuit courts of appeals, which require express EPA approval (and not mere state promulgation) of revisions to state programs implementing federal environmental statutes. And third, the panel decision conflicts with the uniform decisions of other circuit courts of appeals and the EPA that have limited the scope of the Clean Water Act's permit shield, 33 U.S.C. § 1342(k), to only those specific pollutant discharges that were disclosed to, and thus were considered by, the permitting agency as part of the NPDES permitting process.

RULE 40 STATEMENT

Alternatively, panel rehearing is appropriate to correct several points of fact that the panel has overlooked or misapprehended. Specifically, the summary judgment record shows that Flambeau had actual notice of its obligation to obtain an NPDES (or the state equivalent WPDES) permit for its discharges at issue here, including (1) notice provided by WDNR when it terminated Flambeau's WPDES permit in 1998; (2) notice

provided by unambiguous federal regulations; (3) notice provided by Flambeau's own environmental auditors; and (4) notice provided by the Plaintiffs in this case.

INTRODUCTION

The federal Clean Water Act ("CWA") generally prohibits the discharge of pollutants to waters of the United States "[e]xcept in compliance with" certain enumerated requirements. 33 U.S.C. § 1311(a). The U.S. Environmental Protection Agency ("EPA"), or a state acting within the bounds of an EPA-approved program, may issue permits under the national pollutant discharge elimination system ("NPDES") authorizing pollutant discharges, so long as the discharge will comply with applicable state water quality standards, among other requirements. *Id*. § 1342(a)(1), (b). This obligation to obtain an NPDES permit and comply with water quality standards extends to discharges of stormwater associated with industrial activity. *Id*. § 1342(p)(3)(A); *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1164-1165 (9th Cir. 1999).

Under the CWA's "permit shield" provision, compliance with a "permit issued pursuant to" § 1342—that is, an NPDES permit—is deemed to be compliance with the substantive provisions of the Act. 33 U.S.C. § 1342(k). The district court held that the permit shield provision did not apply in this case because Flambeau held only a state-law mining permit, not an NPDES permit. The district court further held that the state regulation at Wis. Admin. Code § NR 216.21(4), which purports to allow the Wisconsin Department of Natural Resources ("WDNR") to authorize stormwater discharges via "department permits or approvals" other than an actual NPDES permit, does not trump

the CWA because it is not an EPA-approved component of Wisconsin's federal NPDES permit program. R.137 at 52-63. The panel reversed the district court, holding that Flambeau should not be held liable under the CWA because it "did not have notice that its permit might not be a valid WPDES permit or that it needed a permit other than the one the WDNR determined was required" and therefore "the permit shield applies." Dkt. #52 at 16, 21. That is, the panel applied the permit shield in the negative—as applicable unless a discharger is told that it does not have the requisite permit.

En banc or, alternatively, panel reconsideration is warranted for at least the following four reasons:

(1) In applying what it termed the "fair notice" doctrine, the panel looked only to Wisconsin regulations and agency statements, and failed to consider the clear and binding requirement of federal law which clearly requires an NPDES permit for Flambeau's polluted discharges. Under the Supremacy Clause, the federal regulations control when there is a conflict.

(2) Because neither party briefed the "fair notice" issue, the panel failed to consider that Flambeau was provided actual notice that it needed an NPDES permit by (a) the WNDR, when it terminated Flambeau's former NPDES permit; (b) federal regulations, which plainly require an NPDES permit; (c) Flambeau's own environmental auditors; and (d) plaintiffs in this case.

(3) The panel's decision conflicts with this Court's prior decision in *United States v. Cinergy Corp.*, 623 F.3d 455 (7th Cir. 2010), which recognized that under the analogous Clean Air Act, express EPA approval determines which state regulations are actually effective as federal law.

(4) The panel's decision conflicts with the uniform holdings of other courts of appeals and the EPA which apply the CWA permit shield narrowly to cover only those specific pollutant discharges disclosed to the permitting agency at part of the permit issuance process.

ARGUMENT

I. The Supremacy Clause, not the Fair Notice Doctrine, Provides the Controlling Rule of Law Where a State Regulation Conflicts with an Unambiguous Federal Statute or Regulation.

Respectfully, the panel's decision in this case begins with the incorrect premise that the fair notice doctrine, and not the Supremacy Clause of the U.S. Constitution, provides the governing rule of law. Because the requirements of the CWA and its federal regulations are clear and required Flambeau to hold an NPDES permit issued pursuant to a federally-approved program for its pollutant discharges, Wisconsin's *de facto* (and unapproved) NPDES exemption in Wis. Admin. Code NR § 216.21(4) is in conflict with federal law and is therefore void for purposes of CWA compliance. Flambeau's reliance on WDNR's representations to the contrary was unreasonable.

The fair notice doctrine has been invoked in the administrative law context only where a regulation, coupled with agency interpretations thereof, is so ambiguous that it fails to give a regulated party notice of what is required of it. *See, e.g., General Elec. Co. v. EPA*, 53 F.3d 1324, 1328 (D.C. Cir. 1995) (holding that the fair notice doctrine "prevents … deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires."); *United States v. Hoechst Celanese Corp.*, 128 F.3d 216, 224 (4th Cir. 1997) (explaining that "[a] regulation which allows monetary penalties against those who violate it must give fair warning of the conduct it prohibits or requires") (internal quotations and alterations omitted).

As the First Circuit has explained, however, *General Electric* and its progeny

> do not stand for the proposition that any ambiguity in a regulation bars punishment. Rather, they are addressed only to situations in which: (1) the agency had given conflicting public interpretations of the regulation, or, (2) the regulation is so vague that the ambiguity can only be resolved by deferring to the agency's own interpretation of the regulation . . . and the agency has failed to provide a sufficient, publicly accessible statement of that interpretation before the conduct in question.

United States v. Lachman, 387 F.3d 42, 57 (1st Cir. 2004).

The CWA clearly requires actual NPDES permits for pollutant discharges. 33 U.S.C. § 1311(a); *Nat. Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369, 1374 (D.C. Cir. 1977). A state can issue an NPDES permit for stormwater discharges such as Flambeau's, but only if the state's permit program is "in accordance with" federal NPDES permitting requirements, and only if the state permit ensures that the discharges will meet applicable water quality standards. 33 U.S.C. § 1342(c)(2); (p)(2)(B); (p)(3)(A); *Defenders of Wildlife*, 191 F.3d at 1164-1165 (noting that "Congress expressly required industrial storm-water discharges to comply with . . . state water-quality standards").[1] But nothing in the CWA allows a state to waive the requirement for an NPDES permit or to use "other" types of state-law permits. The plain language of the Act dictates that any reliance on a state's attempt to do so is unreasonable.

EPA's implementing regulations confirm that an actual NPDES permit is required. 40 C.F.R. § 122.26(a)(1)(ii); *see also id*. § 122.26(b)(14)(iii) (requiring an NPDES permit for stormwater discharges from mines); *id*. § 122.26(c)(1) (same); *id*. § 122.2

[1] This latter point is crucial to this case because, as the district court found, Flambeau's stormwater discharges (which were in compliance with its mining permit) routinely exceeded Wisconsin's acute toxicity criterion for copper. R.137 at 20; *see also* R. 50 at 7-8, ¶23 (Flambeau's stormwater discharge exceeded the acute toxicity criterion for copper in 100% of samples collected).

(defining "permit" to mean a "document issued by EPA or an 'approved State' to implement the requirements of this part and parts 123 and 124."). It makes no difference that WDNR, not EPA, issues NPDES permits in Wisconsin, because the entirety of EPA's stormwater regulation at 40 C.F.R. § 122.26 is "applicable to State NPDES programs." *Id*. § 122.26; *see also id*. § 123.25. Nowhere is a state authorized to waive these requirements in favor of a different permit issued only under state law.

In this case there is no "ambiguity" to resolve via the fair notice doctrine. Instead, there is a conflict between the unambiguous federal law requiring an NPDES permit for Flambeau's discharges (33 U.S.C. § 1342(p)(3)(A) and 40 C.F.R. § 122.26(a)(1)(ii)) and a Wisconsin regulation allowing other state permits in lieu of NPDES permits (NR § 216.21(4)). In such cases, it is axiomatic that the conflicting state regulation must yield to the controlling federal law. *See* U.S. Const. Art. VI, § 2; *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 158 (1978) ("[A] state statute is void to the extent that it actually conflicts with a valid federal statute."). Any other interpretation would vastly expand application of the fair notice doctrine.

The circuit courts of appeals, including this Court, consistently hold that state regulations in conflict with federal Clean Water Act requirements are void under the Supremacy Clause. *Froebel v. Meyer*, 217 F.3d 928, 936 (7th Cir. 2000) (holding in a Clean Water Act case that "Wisconsin cannot give discretion to its administrative agencies to violate federal law[.]"); *N. Plains Res. Council v. Fid. Exploration & Dev. Co.*, 325 F.3d 1155, 1164 (9th Cir. 2003) (holding that even a state with an EPA-approved NPDES permit program "has no authority to create a permit exemption from the CWA for

discharges that would otherwise be subject to the NPDES permitting process"); *Citizens for a Better Env't v. Union Oil Co.*, 83 F.3d 1111, 1120 (9th Cir. 1996) (holding that a state permitting agency's order purporting to modify the terms of the defendant's NPDES permit was not effective because it conflicted with controlling federal law).[2]

The panel's decision in this case incorrectly applied the fair notice doctrine to resolve a conflict between state and federal regulatory requirements. By looking only to Wis. Admin. Code NR § 216.21(4) to determine whether there was notice of the CWA's requirements, rather than at the plain language of the CWA and its federal implementing regulations, the panel incorrectly found an "ambiguity" rather than a run of the mill conflict between state and federal law. En banc rehearing is necessary to correct this error and ensure consistency among the circuits.

II. Even if the Fair Notice Doctrine Controls this Case, there was Sufficient Notice that Flambeau Needed an Actual WPDES Permit for its Biofilter Discharges

The panel's decision was based on the fair notice doctrine—an issue that no party briefed. Because Flambeau did not raise it, Plaintiffs did not have a chance to point out to the panel the "fair notice" that Flambeau actually received. Thus, even assuming that the fair notice doctrine applies in this case, panel rehearing is appropriate because the panel overlooked or misapprehended several undisputed facts in the summary

[2] The panel sought to distinguish *Union Oil* on the grounds that it was "not disputed" in that case that applicable NPDES regulations were not followed. Slip Op. at 18 and n. 22. However, the Ninth Circuit in *Union Oil* actually based its holding primarily upon the state's failure to follow federal CWA statutory requirements. 83 F. 3d at 1120 (citing 33 U.S.C. §§ 1342(b)(1)(B) and 1346(o)). So too here, the state's regulation circumvents the same federal law prerequisites for an NPDES permit. The panel's decision directly conflicts with *Union Oil*, because there is no dispute that federal CWA statutory and regulatory requirements were not followed by WDNR when it issued Flambeau's mining permit. R.137 at 58-59.

judgment record supporting the conclusion that Flambeau had actual notice that it needed an NPDES or WPDES permit for its polluted discharges.

First, Flambeau received notice from the WDNR itself, when that agency terminated Flambeau's WPDES permit by letter dated September 23, 1998. WDNR informed Flambeau that only those discharges via a single, discrete discharge location identified as Outfall 002 "may discharge stormwater runoff through the biofilter overflow regulated under the Mining Permit"[3] and further emphasized that a "significant change in the operations or discharge described . . . may, however, require that a [WPDES] permit be obtained in the future." R. 66-9 at 1. A "significant change" in Flambeau's discharge occurred years later, after the biofilter began discharging toxic concentrations of copper. R. 40-2, Rsp. to Pls. RFA ¶ 244 (first water sample collected on November 9, 1999, almost 14 months after WDNR terminated Flambeau's WPDES permit); *see also* R.54 at 74:2-76:9 (WDNR's Mining Team Leader testifying that the agency did not know when it modified the mining permit in 1998 that Flambeau's discharge would contain copper).

Second, as described above, the plain language of federal law put Flambeau on notice that an actual NPDES permit was required, and that a state is not authorized to create an exemption. *See supra* at 5-6 (citing 33 U.S.C. §§ 1342(c)(2), (p)(2)(B), and (p)(3)(A); 40 C.F.R. §§ 122.26(a)(1)(ii), 122.26(b)(14)(iii)). EPA's stormwater regulations are clear and unambiguous, and their availability to Flambeau provides sufficient

[3] The "Outfall 002" and "biofilter" referenced in the September 23, 1998 letter were not the biofilter at issue in this case; they were located north of the former mine pit and discharged directly to the Flambeau River.

notice. *County of Suffolk v. First Am. Real Estate Solutions*, 261 F.3d 179, 195 (2d Cir. 2001) (notice of a statute's requirements was sufficient where the statute was "generally available for the public to examine").

Third, Flambeau received notice from its own attorneys and auditors, who in 2005 recognized that the mine was benefitting from a system of regulating the biofilter's toxic discharge under the mining permit instead of an actual WPDES permit:

> **Monitoring results for stormwater discharged in Intermittent Stream C indicate exceedances for established water quality criteria for copper and zinc.** The stormwater discharge into Intermittent Stream C is authorized by the mine's surface reclamation plan. The plan does not contain any effluent limits for copper and, therefore, the mine is not violating the requirements of the plan. . . . Flambeau also needs to ensure that the stormwater discharge into Stream C continues to be authorized by the mine's reclamation plan **since the reclamation plan requirements are likely more favorable to the mine than what would be contained in a WPDES permit.**

R. 40-34 at 14 (emphasis added). This is not a statement of an unsophisticated entity being led down the garden path by the WDNR; rather, Flambeau was actively circumventing the requirement to get a WPDES permit because its discharges could not comply with state water quality standards for copper toxicity.

Finally, Flambeau received notice that it needed an NPDES or WPDES permit from the plaintiffs in this very case, including via the "notice of intent to sue" letters dated November 10, 2009 and November 16, 2010 that preceded this litigation. R.2; R.137 at 20-22; R. 168-1 at 3.[4] Such advance notice is intended to "give the alleged

[4] Indeed, two of the three plaintiffs even tried to bring Flambeau into compliance with the CWA through a 2007 Wisconsin administrative hearing on Flambeau's reclamation activities, but the presiding administrative law judge believed he was "not empowered with authority to consider

violator an opportunity to bring itself into compliance with the Act and thus . . . render unnecessary a citizen suit." *Atl. States Legal Found. v. Stroh Die Casting Co.*, 116 F.3d 814, 818 (7th Cir. 1997) (internal quotations omitted). Even alone, these pre-suit communications with Flambeau and WDNR were sufficient to put them on notice of Plaintiffs' position that an NPDES permit was required for the biofilter discharges. *See Hoechst Celanese*, 128 F.3d at 229; *General Elec.*, 53 F.3d at 1329.

The panel overlooked or misapprehended these facts, which show that Flambeau had actual notice that its mining permit was insufficient as a matter of federal law to provide a CWA permit shield. Even if the fair notice doctrine applies in this case, its requirements have been satisfied and a finding of liability is appropriate.

III. The Panel's Decision is Inconsistent with this Court's Recent Decision in *United States v. Cinergy* and other U.S. Supreme Court and Circuit Court Decisions Requiring Express EPA Approval of State Permit Program Changes.

The panel based much of its holding on this Court's decision in *United States v. Cinergy Corp.*, 623 F.3d 455 (7th Cir. 2010), which the panel interprets as "affirm[ing] the principle that a private party is entitled to rely on published regulations." Slip Op. at 17. But this Court's decision in *Cinergy* did not turn on whether the state regulations were "published," but rather on whether they had been expressly approved by EPA and, therefore, had become applicable as federal law components of the state's Clean Air Act implementation plan. *See* 623 F.3d at 458 (noting that the Clean Air Act "does not authorize the imposition of sanctions for conduct that complies with a State

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enforcement of the CWA in the context of a[n administrative] review proceeding" and thus instructed the plaintiffs to "pursue that matter before an appropriate tribunal." R.94-2 at 7.

Implementation Plan that the EPA has approved") (emphasis added). By failing to recognize this crucial distinction, the panel's decision conflicts with *Cinergy*.

The panel's decision also conflicts with Supreme Court Clean Air Act precedent holding that EPA-approved state regulations are enforceable as federal law, even though a more recently promulgated state regulation may be in conflict. *See GM Corp. v. United States*, 496 U.S. 530, 540 (1990) (EPA-approved regulations are applicable for federal Clean Air Act purposes even after the State has promulgated revisions to them); *see also Union Elec. Co. v. EPA*, 515 F.2d 206, 211 (8th Cir. 1975) (holding that only "[u]pon approval or promulgation of a state implementation plan [do] the requirements thereof have the force and effect of federal law and may be enforced by the Administrator in federal courts"). This Court's decision in *Cinergy* is fully consistent with those prior cases, whereas the panel's decision in this case is not.

Moreover, CWA regulations plainly require EPA approval before state regulations become effective for federal purposes. 40 C.F.R. § 123.62(b)(4) (stating that state NPDES program revisions "shall become effective upon the approval of the Administrator"). The nonbinding 1994 comments of EPA on the proposed revisions to NR 216 notwithstanding,[5] EPA has consistently indicated to WDNR and to regulated entities in Wisconsin that only those expressly approved provisions of the Wisconsin

[5] The panel decision cited a single EPA comment from a single EPA employee regarding NR § 216 from 1994. Slip Op. at 5-6 (citing R.62-1 at 132). But the cited EPA comment related to so-called "Tier 3 Facilities," not the use of permits other than WPDES permits under NR § 216.21(4). At the time, Tier 3 permits were actual WPDES permits that required facilities to "perform an annual inspection to conform that the facility . . . has no exposure of industrial activity that may contaminate storm water." R.62-1 at 15. This EPA comment has no relevance to this case.

WPDES program are valid as federal law. R.95-9 at 1 (EPA disapproving in part a revision to Wisconsin's WPDES regulations and instructing WDNR to "issue NPDES permits in accordance with the applicable approved State program requirements[.]") (emphasis added); R.87-1 at 1-2 (EPA letter to WDNR noting that certain Wisconsin regulations "remain the subject of prior disapprovals by EPA under 40 C.F.R. § 123.62" and stating that "EPA has not approved those elements of the State's program that are less stringent or comprehensive than federally required.").

In *Cinergy*, just as in this case, the Court was required to distinguish between state regulations applicable only as a matter of state law on the one hand, and state regulations which received express EPA approval and therefore carry the force of federal law on the other. Indeed, the district court below cited *Cinergy* for the proposition that the CWA, like the Clean Air Act, "requires explicit [EPA] approval, not lack of disapproval" of new or revised state NPDES regulations before they become effective components of the state's delegated permit program. R.137 at 56-57.[6] The panel's decision in this case undercuts *Cinergy*, the approval requirement in 40 C.F.R. § 123.62, and the exclusive review jurisdiction of EPA decisions related to approval of state program elements in 42 U.S.C. § 1369(b), by effectively making state regulations "federalized" for Clean Water Act purposes despite a lack of affirmative approval by

[6] The panel expressed concerns that the district court's decision would require regulated entities to "conduct legislative and regulatory history research" to ascertain which state regulations are effective for federal law purposes. *See* Slip Op. at 17. But such review is common under the Clean Air Act, where facilities may have to review EPA records or Federal Register notices to ascertain which state regulations or other documents have been approved by EPA. *See, e.g., El Comite Para El Bienestar De Earlimart v. Warmerdam*, 539 F.3d 1062, 1070 and n.3-4 (9th Cir. 2008).

EPA and without the opportunity to seek review pursuant to 33 U.S.C. § 1342(b). En banc rehearing is necessary to correct the panel's error.

IV. The Court's Decision creates a Circuit Split Regarding the Scope of the Clean Water Act's Permit Shield Provision

The panel's decision extending a permit shield to Flambeau's polluted stormwater discharges is at odds with every other circuit court of appeals to consider the scope of the permit shield, as well as EPA guidance and decisions. All of these authorities limit the scope of the CWA permit shield only to those specific pollutant discharges that were (a) disclosed to the permitting agency during the permit application process, and (b) contemplated by the permitting agency when the permit was issued. En banc review is necessary to correct this error and maintain consistency among the circuits.

Two circuit courts of appeals have considered the scope of the permit shield when actual NPDES permits have been issued, and both of them have concluded that the applicability of the permit shield to specific pollutants depends on whether the facility adequately disclosed those pollutants to the permitting agency during the application process, such that the agency "reasonably anticipated" that those pollutants would be discharged. *Atl. States Legal Found. v. Eastman Kodak Co.*, 12 F.3d 353, 357-58 (2d Cir. 1993); *Piney Run Pres. Ass'n v. County Comm'rs*, 268 F.3d 255, 268 (4th Cir. 2001) As the Fourth Circuit explained, "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." *Piney Run*, 268 F.3d at 268.

These two circuit court decisions are supported by EPA's reasonable interpretation of § 1342(k), which must be given deference. EPA has held that "the permit applicant's disclosures during the application process as to the waste streams which may potentially be discharged, and the permit authority's knowledge as a result of that disclosure, are critical factors in determining whether the shield defense is applicable." *In re: Ketchikan Pulp Co.*, 7 E.A.D. 605, 621 (E.A.B. May 15, 1998). Thus, according to EPA, "where the discharger has not adequately disclosed the nature of its discharges to permit authorities, and as a result thereof the permit authorities are unaware that unlisted pollutants are being discharged, the discharge of unlisted pollutants [is] outside the scope of the permit." *Id.*; *see also* EPA, *Revised Policy Statement on Scope of Discharge Authorization and Shield Associated with NPDES Permits* (Apr. 11, 1995) at 2-3.[7]

Here, even if Flambeau's state mining permit was an NPDES permit, it still could not provide Flambeau with a CWA permit shield for its toxic copper discharges in this case because those discharges were not disclosed by Flambeau or anticipated by WDNR at the time of permit issuance. R.54 at 74:2-76:9 (WDNR did not know when permitting the biofilter that discharges would contain copper, but rather believed any discharge would be "clean"); R.40-2 at 44 , ¶ 244 (Flambeau's first water sample collected on November 9, 1999, well after the mining permit issued); *see also* R.137 at 19-20 (describing how Flambeau's investigations from 2003-2007 uncovered "elevated levels of copper and zinc . . . discharged from the biofilter to Stream C"). Thus even if the

[7] *Available at* http://www.epa.gov/npdes/pubs/owm0131.pdf (last visited Aug. 29, 2013).

mining permit constituted an NPDES permit, it would not provide a shield specifically for Flambeau's toxic copper discharges at issue in this case. *Id*.

By finding that a CWA permit shield extends to Flambeau's discharges of acutely toxic concentrations of copper without the requisite factual findings that WDNR considered those copper discharges when issuing the mining permit, the panel decision conflicts with the Second and Fourth circuits as well as EPA's long-standing interpretation regarding the scope of that shield. Rehearing en banc, or alternatively panel rehearing, is necessary to correct this error.

CONCLUSION

For the foregoing reasons, Plaintiffs' petition for en banc review or, alternatively, for panel rehearing should be granted.

Dated this 29th day of August, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d), I hereby certify that on August 29, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: August 29, 2013.

s/ James N. Saul

Counsel for Plaintiffs-Appellees/Cross-Appellants