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Piney Run: The Permits Are Not What They Seem

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In 2001, the Fourth Circuit addressed the permit shield provision of the Clean Water Act and found it to provide broad-scale protection for polluters. In Piney Run Preservation Association v. County Commissioners of Carroll County, *the Fourth Circuit held that facilities with discharge permits are protected from lawsuits even when discharging pollutants not contained within their permits. Under this ruling, permit holders may discharge, without fear of penalty, any disclosed pollutant within the reasonable expectation of the permitting authority. This decision is worrisome because it does not protect the goals of the Clean Water Act and deprives the public of information about what pollutants are in their environment.*

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INTRODUCTION

In *Piney Run Preservation Ass'n v. County Commissioners*,[1] the Fourth Circuit disregarded congressional intent and the clear purpose of the Clean Water Act (CWA or "the Act"):[2] broad protection of the nation's waters. The County Commissioners of Carroll County Maryland admitted discharging waste heat[3] into a stream called Piney Run. The County further conceded that its discharge permit did not contain a provision specifically granting it the right to discharge the waste heat. Despite these admissions, the court protected the discharger under an overly broad interpretation of the Clean Water Act's permit shield provision. The provision protects dischargers from liability if they operate within the terms of their permits.[4] The court's decision jeopardizes the substantive goal of the CWA to protect the integrity of the nation's waters and creates a gap in information that effectively eliminates the public's ability to rely on discharge permits for information about waterways. Clear guidelines as to what pollutant information must be included in a discharge permit system in order to trigger the permit shield would improve the permitting system and more effectively protect the goals of the Clean Water Act.

This Note begins by providing background information on the CWA, with specific attention to the provisions at issue in this case. Section II summarizes the Fourth Circuit's decision in *Piney Run*, and Section III provides a critical analysis of the decision. Finally, Section IV discusses recommendations for improving the system to uphold the integrity of

1. 268 F.3d 255 (4th Cir. 2001) [hereinafter *Piney Run III*].

2. Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act), 33 U.S.C. §§ 1251-1387 (2003).

3. Waste heat refers to discharged effluent that is at a higher temperature than the receiving waterway. The exact method of calculating when an effluent is at a high enough temperature to qualify as waste heat is not clear.

4. 33 U.S.C. § 1342(k).

CWA permits and to provide documents that the public can rely on with confidence.

I. BACKGROUND

A. *Clean Water Act: History and Goals*

Congress first began to regulate water quality in 1948 with the Federal Water Pollution Control Act.[5] This act protected water quality through ambient standards.[6] These focused on "the tolerable effects rather than the preventable causes of water pollution."[7] Cumbersome enforcement procedures combined with the "awkwardly shared federal and state responsibility for promulgating . . . standards" to rob the act of the effectiveness needed to improve the quality of the nation's waters.[8]

Since 1948, the act has gone through several revisions. Most significantly, in 1972 a series of amendments created what is more commonly known as the Clean Water Act ("the Act").[9] The Act's main goal is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[10] The 1972 Amendments were prompted by findings of the Senate Committee on Public Works who found that "the Federal Water Pollution Control Program . . . has been inadequate in every vital aspect."[11] When Congress enacted the amendments, it set a national goal that "the discharge of pollutants into the navigable waters be eliminated by 1985."[12] Further, the legislature called for an interim standard of fishable and swimmable waters by 1983.[13] New enforcement procedures accompanied these ambitious goals to facilitate achieving them.

B. *Clean Water: Act Enforcement Mechanisms*

The Clean Water Act states that "the discharge of any pollutant by any person shall be unlawful."[14] A discharge is defined as "any addition of any pollutant to navigable waters from any point source."[15] CWA

5. Pub L. No. 80-845, 62 Stat. 1155.

6. For a comprehensive history of the Clean Water Act see *EPA v. California ex. rel. State Water Res. Control Bd.*, 426 U.S. 200, 202-05 (1976) [hereinafter *SWRCB*].

7. *Id.* at 202.

8. *Id.*

9. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816.

10. 33 U.S.C. § 1251(a) (2003).

11. S. Rep. No. 92-414 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3674.

12. 33 U.S.C. § 1251(a)(1).

13. *Id.* § 1251(a)(2).

14. *Id.* § 1311(a).

15. *Id.* § 1362(12)(A).

imposes restrictions on dischargers by setting maximum levels of pollutants that facilities may release into navigable waters, known as effluent limitations.[16] The Act also includes a requirement to achieve acceptable water quality standards.[17] The Supreme Court has explained that these "direct restrictions on discharges facilitate enforcement by making it unnecessary to work backward from an overpolluted body of water to determine which point sources are responsible and which must be abated."[18]

To carry out its goal of zero discharge and to establish national standards, Congress created the National Pollutant Discharge Elimination System (NPDES) permit program.[19] NPDES permits list types and amounts of pollutants that entities may emit into navigable waterways.[20] The statute provides a mechanism whereby the Environmental Protection Agency (EPA) can delegate this authority to states, so long as the state programs meet federal standards.[21] In crafting a permit, the permitting authority must consider two central concepts. The Clean Water Act requires that "every permit contain (1) effluent limitations that reflect the pollution reduction achievable by using technologically practicable controls and (2) any more stringent pollutant release limitations necessary for the waterway receiving the pollutant to meet 'water quality standards.'"[22]

To obtain a permit, a facility must complete an application.[23] The permitting authority then reviews the application and other information to decide whether to issue the permit.[24] The final issued permit draws on facts from the application, knowledge about the facility type and area in general, and information from past permits held by the facility.[25] Applicants are required to disclose information about all pollutants that

16. *SWRCB, supra* note 6, at 204.

17. *Id.*

18. *Id.* The Court goes on to say that "a discharger's performance is now measured against strict technology-based effluent limitations—specified levels of treatment—to which it must conform, rather than against limitations derived from water quality standards to which it and other polluters must collectively conform." *Id* at 204-05.

19. 33 U.S.C. § 1342.

20. 40 C.F.R. § 122.1 (2002).

21. *See* 33 U.S.C. § 1342(b) for description of state permit programs.

22. Am. Paper Inst., Inc. v. EPA, 996 F.2d 346, 349 (D.C. Cir. 1993) (citing 33 U.S.C. § 1311(b)(1)) (internal citations omitted). The court in *Piney Run III* was only concerned with the second element – examining the impact of heat discharge on water quality standards. Whether the heat discharge met the technology-based standard was not discussed.

23. 40 C.F.R. § 122.21.

24. EPA, EPA OFFICE OF WATER NPDES PROGRAM PRIMER, *available at* http://cfpub1.epa.gov/npdes/docs.cfm?document_type_id=3&view=Factsheets%20and%20Outreach%20Materials&program_id=45&sort=name (last visited July 8, 2003).

25. 40 C.F.R. § 124.3; *In re* Ketchikan Pulp Co., 7 E.A.D. 605, 1998 EPA App. LEXIS 85 (Envtl. Appeals Board 1998), *available at* http://www.epa.gov/eab/disk11/ketchikan051598.pdf.

they expect to discharge during the term of the permit.[26] The issuing authority considers this information to develop specific guidelines for each permit on a facility-by-facility basis. Often, facilities provide information about potential pollutants that do not end up regulated in the final issued permit.[27]

To provide for stability and predictability in the permitting system, the Clean Water Act also contains a permit shield provision, which protects dischargers from CWA liability if they operate within the terms of their permits.[28] The EPA's Environmental Appeals Board (EAB), in *In re Ketchikan Pulp Co.*, described the pollutants specifically listed in the permit as "express permit terms," while those disclosed but not included as "implicit terms."[29] The EAB proclaimed that as long as an applicant is truthful and thorough in her disclosures, she will be shielded from liability even for pollutants not listed in the permit.[30] The EAB in *Ketchikan*, just like the Fourth Circuit in *Piney Run*, acknowledged that the pollutants at issue were not explicitly contained in the permit. The EAB also concluded that the pollutants were not *implicitly* included because they were not disclosed in the permit application. As the pollutants discharged were not contained in the permit explicitly or implicitly, Ketchikan Pulp Company's permit did not shield them from liability.

II. *PINEY RUN* CASE SUMMARY

When members of the Piney Run Preservation Association (PRPA) discovered that Carroll County's sewage treatment plant was discharging heated wastewater into Piney Run, the group brought an enforcement action under the Clean Water Act. The facility's NPDES permit did not list heat as an allowed pollutant.[31] Despite this, the Fourth Circuit held that the plant's discharge was shielded from liability under the CWA.[32] Because the Fourth Circuit was persuaded that the County had disclosed the thermal pollution during its permit application process, it found that the permitting authority reasonably contemplated the plant would discharge heat.[33] Additionally, the court held that because the plant's heat discharges were not beyond the permitting authority's reasonable expectation, the County was not subject to liability.[34] In light of this

26. *Id.*
27. *See, e.g.*, Atl. States Legal Found., Inc. v. Eastman Kodak Co., 12 F.3d 353, 357-58 (2d Cir. 1994).
28. 33 U.S.C. § 1342(k) (2003).
29. *Piney Run III*, *supra* note 1, at 266.
30. *Ketchikan*, 7 E.A.D. 605.
31. *Id.*
32. *Piney Run III*, *supra* note 1, at 264.
33. *Id.* at 271.
34. *Id.* at 272.

holding, when a permit holder discloses a potential pollutant to the permitting agency, she is not in violation of the CWA for emitting the pollutant even if the pollutant is not included in her final permit.

A. Factual Background

Piney Run is a small stream in Maryland. Its headwaters lie near the border of Carroll and Baltimore counties.[35] Maryland has certified Piney Run as a Class III P stream, meaning that it merits protection as a source of public drinking water and is capable of supporting a self-sustaining trout population.[36] Carroll County owns and operates a wastewater treatment plant that discharges treated wastewater into Piney Run.[37] The facility is subject to the CWA and is required to operate pursuant to an NPDES permit issued under Section 402 of the Act.[38] The Maryland Department of the Environment (MDE), the state agency authorized to issue NPDES permits by the EPA,[39] has issued permits to the plant since 1975 with the most recent permit granted in 1990.[40]

Heat or thermal pollution can significantly impact aquatic species.[41] Elevated water temperatures affect stream flora and fauna. According to reports submitted to the district court, the temperature of the plant effluent exceeded the upstream ambient temperature on 371 of 397 days.[42] Dr. Stauffer, an ichthyologist who testified in the lower court, explained that higher temperatures can be detrimental to the brown trout populations found in Carroll and Baltimore counties.[43] In particular, warmer waters inhibit spawning and discourage trout migration.[44] Additionally, increased temperatures can lead to algae proliferation.[45]

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35. *Id.* at 259.

36. *Id.* at 259-60.

37. *Id.* at 260.

38. EPA, WATER DISCHARGE PERMITS, PERMIT NUMBER: MD0022446 or 88-DP-0594, *at* http://oaspub.epa.gov/enviro/pcs_det_reports.pcs_tst?npdesid=MD0022446&npvalue=1&npvalue=2&npvalue=3&npvalue=4&npvalue=5&rvalue=12&npvalue=6&npvalue=7&npvalue=9&npvalue=10&npvalue=11 (last updated Jun. 18, 2003).

39. *Piney Run III*, *supra* note 1, at 260.

40. *Id.* At the time this case was heard, MDE was in the process of reviewing the plant and working on a new permit. Although the 1990 permit expired in 1995, it remains the governing discharge permit until MDE issues a new one. *Id.* at 260 n.3.

41. EPA, OFFICE OF RESEARCH AND MONITORING, CONTROLLING THERMAL POLLUTION IN SMALL STREAMS, EPA-R2-72-83 7 (1972); *Effects and Methods of Control of Thermal Discharges: Report to the Congress by the EPA in Accordance with Section 104(t) of the Federal Water Pollution Control Act Amendments of 1972 Part I*—Committee Print—Serial No. 93-14 24 (Nov. 1973) [hereinafter *Effects and Methods*].

42. Piney Run Pres. Ass'n v. County Comm'rs of Carroll County, 50 F. Supp. 2d 443, 445 (D. Md. 1999) [hereinafter *Piney Run I*].

43. Piney Run Pres. Ass'n v. County Comm'rs of Carroll County, 82 F. Supp. 2d 464, 468-69 (D. Md. 2000) [hereinafter *Piney Run II*].

44. *Id.* at 469.

45. *Effects and Methods*, *supra* note 41, at 32.

The broader ecosystem effects of temperature increases are unknown and potentially grave.[46] Indisputably, thermal pollution makes it more difficult to achieve the CWA's goal of fishable and swimmable waters because of these effects.[47]

PRPA filed its lawsuit under Section 505 of the Clean Water Act[48] in 1998, claiming that the Facility's NPDES permit prohibited the release of thermal pollution.[49] Although heat is a statutory pollutant under the CWA,[50] it was not listed in Carroll County's 1990 permit as one of the allowed discharges.[51] PRPA argued that permit holders should be liable for discharges of any pollutants not expressly allowed by their permits.[52] PRPA asserted that the County was in violation of its permit when it discharged any level of heat.

B. The District Court's Opinion

The District Court of Maryland had to decide the test for whether and when an addition of heat to Piney Run constituted a permit violation. By drawing upon Maryland's state water quality standards, the court determined that heat constituted a pollutant in violation of CWA when the plant discharged effluent with a temperature exceeding either sixty-eight degrees Fahrenheit or the ambient temperature of Piney Run.[53] Using this rubric, the court found that there were 290 temperature violations of the NPDES permit.[54]

The district court decided that because the permit did not *expressly* authorize the discharge, the County was liable under the Clean Water Act.[55] The court enjoined the County from further violations, awarded

46. John P. Barlow, *The Aquatic Environment, in* THERMAL POLLUTION: A SHORT COURSE 37-49 (Jeff Romm ed., 1970).

47. Congress recognized the potentially deleterious impact of thermal pollution and created Section 316 of the CWA, which calls for regulation of thermal pollution. 33 U.S.C. § 1326 (2003).

48. *Id.* § 1365.

49. *Piney Run III*, *supra* note 1, at 260.

50. 33 U.S.C. § 1362(6).

51. *Piney Run III*, *supra* note 1, at 260-61.

52. *Id.* at 261.

53. *Id.*

54. *Piney Run II*, *supra* note 43, at 469. The data presented by PRPA in *Piney Run I* finding 371 violations was disputed. Ultimately, the court was only able to confirm 107 of those violations. However, in between the oral arguments for *Piney Run I* and *Piney Run II*, the County discharged heat in violation of the state standards 183 more times. This led to a total liability for 290 violations when the District Court ruled on *Piney Run II* in February 2000.

55. *Piney Run III*, *supra* note 1, at 259.

costs and fees to PRPA, and assessed $400,000 in civil penalties.[56] Both PRPA and the County appealed the decision.[57]

C. *The Fourth Circuit's Opinion*

The scope of the Clean Water Act's permit shield provision was the central issue on appeal.[58] The question before the court in this case was the precise meaning of "operating within the terms of their permit" for purposes of triggering the permit shield. The district court concluded that the shield provision did not protect against liability for pollutants not expressly *allowed* by a permit.[59] Conversely, Carroll County claimed that the permit shield defense bars liability for the discharge of any pollutants not expressly *regulated* by the permit.[60] The Fourth Circuit found that neither interpretation was correct, instead holding that although the CWA prohibits the discharge of pollutants not contained in the permit, the dischargers' protection from liability is not as narrow as the district court asserted.[61] According to the Fourth Circuit, when a permit holder discloses a potential pollutant to the permitting agency and the agency can reasonably anticipate its discharge, the permittee is shielded from liability, regardless of whether the pollutant was specifically identified in the permit.[62]

To determine the scope of the permit shield provision, the court applied the two-step analysis outlined in *Chevron v. Natural Resources Defense Council*.[63] The first prong of the test calls for examination of the language of the statute and asks whether Congress has spoken to the precise question at issue.[64] If Congress has spoken on the precise question, the analysis is over. However, if Congress' intent on the issue is

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56. *Id.* at 260.

57. This case was before Wilkins, King and Gregory in the Fourth Circuit. Judge King wrote the unanimous opinion. The appellate court reviewed issues of law *de novo* just as it would in any contract or legal document issue. *Id.* at 269. It reviewed the district court's findings of facts with respect to extrinsic matters for clear error. *Id.*

58. The Fourth Circuit also considered other issues raised on appeal by the parties relating to the number of violations, PRPA's standing, and an argument that the district court should not have heard the case under the doctrine of primary jurisdiction, under which courts defer to the regulating agency on technical questions implicating agency expertise. Discussion of these issues is beyond the scope of this Note.

59. *Id.* at 266.

60. *Id.*

61. *Id.*

62. *Id.* at 269.

63. 467 U.S. 837 (1984).

64. *Id.* at 842. Generally, when courts draw upon step one of the *Chevron* doctrine, they examine both the language of the statute and whether Congress has spoken directly to the issue. In this case, however, the Fourth Circuit considered whether Congress had spoken to the precise question at issue only by examining the language of the statute. In step one of its *Chevron* analysis, it did not go beyond the four corners of the statute. *Piney Run III*, *supra* note 1, at 267.

ambiguous, the court then turns to the regulating agency's interpretation of the statute and, if reasonable, the court defers to this interpretation.[65] Here, the Fourth Circuit found the language of the statute ambiguous.[66] Specifically, the court examined the permit shield provision, Section 402(k), which states only that "[c]ompliance with a permit issued pursuant to this section shall be deemed compliance."[67] The court found that Section 402(k) was ambiguous because it did not "explicitly explain the scope of the permit protection."[68] The court then turned to the EPA's interpretation of the shield provision to determine its reasonableness.

To establish the EPA's interpretation of the statute, the court looked to the 1998 EAB adjudication proceeding *In re Ketchikan Pulp Co.*[69] In that proceeding, the EAB interpreted NPDES permits as protecting facilities from liability for all pollutants they disclosed to the permitting authority during the application process.[70] Although the discharger in that case was not shielded from liability because the pollutant had not been disclosed, the EAB clearly stated that "discharges. . .are not automatically prohibited just because they are not specifically allowed under an NPDES permit."[71] Because the EPA had earlier acknowledged that "it is impossible to identify and rationally limit every chemical or compound present in a discharge of pollutants,"[72] the EAB concluded that "the goals of the CWA *may* be more effectively achieved by focusing on the chief pollutants and waste streams established in effluent guidelines and disclosed by permittees in their permit applications."[73] The Fourth Circuit relied upon the *Ketchikan* decision to assert that a permit holder maintains compliance with the CWA even if it discharges pollutants not included in the permit, as long as those pollutants were disclosed to the permitting authority during the application process.[74]

Beyond disclosure, the only other requirement the Fourth Circuit established for asserting the permit shield defense is that the permitting authority must reasonably anticipate the discharges.[75] Drawing upon

65. *Chevron*, 467 U.S. at 843.

66. *Piney Run III*, *supra* note 1, at 267.

67. 33 U.S.C. § 1342(k) (2003).

68. *Piney Run III*, *supra* note 1, at 267.

69. The Environmental Appeals Board (EAB) is the final EPA decision maker on administrative appeals under all major environmental statutes that EPA administers.

70. *Piney Run III*, *supra* note 1, at 267.

71. *In re* Ketchikan Pulp Co., 7 E.A.D. 605, 621, 1998 EPA App. LEXIS 85, at *38 (Envtl. Appeals Board 1998), *available at* http://www.epa.gov/eab/disk11/ketchikan051598.pdf.

72. Atl. States Legal Found., Inc. v. Eastman Kodak Co., 12 F.3d 353, 357 (2d Cir. 1994) (quoting Memorandum from Jeffrey G. Miller, EPA Deputy Assistant Administrator for Water Enforcement, to Regional Enforcement Director, Region V, at 2 (Apr. 28, 1976) [hereinafter Memo]).

73. *Ketchikan*, 7 E.A.D. 605, 618, 1998 EPA App. LEXIS 85, at *33 (emphasis added).

74. *Piney Run III*, *supra* note 1, at 268.

75. *Id.*

Chevron, the court claimed to be adhering to the EPA's interpretation, which calls for the permit holder to comply with both express and implicit permit terms. Dischargers violate implicit permit terms when they make discharges "not within the reasonable contemplation of the permitting authority at the time the permit was issued."[76] In this case, the Fourth Circuit found that the discharge of heat had been within the reasonable contemplation of MDE at the time MDE issued the 1990 permit.[77] Thus, the County would only have violated its permit if the permit specifically barred heat or if the County had not disclosed the possibility of thermal pollution during the permitting process.[78]

III. CRITICISMS OF THE *PINEY RUN* DECISION

The Fourth Circuit's opinion in *Piney Run* raises a host of concerns. Especially worrisome is the impact this case could have on public disclosure and the availability of pollutant information to those affected by the pollutants. Additionally, considering the broad congressional objective to protect the nation's water and eliminate discharges of pollutants, the decision appears to defy legislative intent. Further, the Fourth Circuit's decision does not lay out clear rules for subsequent courts to follow. Relying upon vague ideas of "reasonableness" and "adequacy," this ruling indicates that subsequent decisions will have to be determined on case-by-case bases.

A. This Decision has a Negative Effect on Public Disclosure

The most important concern about the nature of permits arising in the wake of *Piney Run* is its implications for public disclosure of pollution information. The requirements laid out by the Fourth Circuit require disclosure of pollutants to the permitting agency, not to the public. In light of this decision, it will be more difficult for community members to learn which pollutants they are being exposed to, with little hope of redress against the discharger.

Both the *Piney Run* court and the *Ketchikan* EAB allowed permits to shield dischargers from liability for pollutants that they "adequately"

76. *Id.* at 259.

77. *Id.* at 271.

78. One complicating element is a footnote in the permit, which states that the "discharge of pollutants not shown shall be illegal." *Id.* at 269. PRPA invoked this footnote in their assertion that the permit specifically bars thermal pollution. *Id.* The County claimed, however, that the footnote refers only to pollutants not disclosed during the permitting process. *Id.* Because the footnote is ambiguous, the court turned to extrinsic evidence. *Id.* at 270. Examining the footnote in the light of the permit and in particular the permitting process, the court sided with the County's interpretation. *Id.* The district court's decision was therefore vacated and remanded.

disclosed, but neither decision defined "adequately."[79] In *Ketchikan*, the EAB suggested that inclusion of a pollutant in a permit application would constitute disclosure, but the case left the door open for other types of disclosure. In *Piney Run*, the disclosure deemed "adequate" by the court was adequate to inform the permitting agency of the County's heat pollution, but not adequate to alert the public. Neither the County nor MDE informed the public of the heat discharges. Although the County routinely recorded and reported the water's temperatures, the thermal pollution was not realized until PRPA tested the stream and requested the County's temperature data.[80] The County did not list heat in any of the documents associated with its permit application.[81] The court found "adequate disclosure" by relying on testimony from the County and from one MDE employee who was not part of the original permit process in 1990. These witnesses claimed that the MDE knew of the heat discharges, but there is no written record of that disclosure.[82] Therefore, the public could have discovered this potential for heat pollution only by interviewing the County Commissioners and MDE employees. Although the facility regularly reported temperatures to MDE, to obtain copies community members must file a request through the Maryland Public Information Act. However, if a pollutant is not mentioned in a permit, there is nothing to alert them of the need to request such documents. Thus, to learn of unlisted pollutants, community members must test water themselves and investigate suspected facilities.

If the public seeks to learn about the state of waterways, it is difficult to obtain information about pollutants disclosed to agencies but not included on permits. Discharge permits are available to the public through local agencies and the EPA, and both the state of Maryland and the EPA provide watershed information to citizens.[83] This watershed information allows citizens to access some data regarding facility

79. *Id.* at 271; *In re* Ketchikan Pulp Co., 7 E.A.D. 605, 606, 1998 EPA App. LEXIS 85, at *38 (Envtl. Appeals Board 1998), *available at* http://www.epa.gov/eab/disk11/ketchikan051598.pdf.

80. Telephone Interview with G. Macy Nelson, Attorney for PRPA (Dec. 16, 2002); Brief for Plaintiff-Appellant at 7-9, *Piney Run III*, *supra* note 1 (on file with author).

81. Even Maryland Public Information Act requests fail to reveal any disclosures to MDE that the facility made regarding heat. This author filed Public Information Act requests as allowed by Maryland state law to obtain permit materials. Although congenial, the Maryland Department of the Environment took two months to say that they were not sure what documents were submitted before the permit was issued. Indeed, even a copy of the permit application was difficult to find. However, the MDE does open its files and allow citizens to look through the documents, so this process is undoubtedly much easier for someone who is local to the area. If a citizen would like information sent to her, it can result in high copying and mailing fees, which represent another obstacle to learning about pollutants entering waterways.

82. Interview with Nelson, *supra* note 80.

83. Listings of all NPDES permits are available on the EPA's website, www.epa.gov/npdes. NPDES permits functioning in the State of Maryland are available on MDE's website, www.mde.state.md.us.

discharges into waterways, but it does not include pollutants disclosed to the agency during the permitting process that were not later listed in the final permit. Thus, when citizens seek information about water quality in their region through ordinary channels, they get an incomplete picture. For a true accounting of their waterways, citizens must file detailed public information requests to state and federal agencies. Although the Freedom of Information Act and similar state statutes make the information theoretically available to citizens, it is a slow, burdensome process, and it is difficult to determine when information requests are necessary.

Since the Clean Water Act's passage in 1972, the common conception was that permits issued under the Act listed all pollutants being discharged by a facility.[84] *Piney Run* proves this isn't so. Permits are not the comprehensive documents they are assumed to be. When citizens have successfully filed FOIA requests and received information, they often have found that several unlisted pollutants (including toxic ones) are in their waterways.[85] Too often, however, curious citizens lack access to this information. The burdensome paperwork involved in such a request militates against the Clean Water Act's goals of community participation and access to knowledge about pollutants that affect it. Yet, it is clear that Congress intended the public to participate in the permitting process. The CWA calls for notice to the public and opportunity for public comment and review before permit approval.[86] It clearly contemplates an active role for citizens by providing for citizen enforcement of the act through Section 505 citizen suits.[87] The structure of the statutory scheme suggests that Congress did not entirely trust the government agency.[88] Public disclosure and transparency are essential to making this scheme work effectively.

The Fourth's Circuit's decision effectively disregards the goals of the public information provisions intended by Congress. The Fourth Circuit's broad interpretation of the permit shield provision is in direct opposition

84. *See, e.g.*, Robert W. Vinal, *Proof of Wrongful Discharge of Pollutant into Waterway Under Federal Clean Water Act*, 36 AM. JUR. PROOF OF FACTS 3D 533, § 4 (2002); WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: AIR AND WATER, §4.30 (B) (2002).

85. In fact, the *Eastman Kodak* case grew out of a citizen group's FOIA request discovery of toxics. Charlie Tebbut, the Plaintiffs' lawyer in *Eastman Kodak*, says that they learned about scores of toxics being discharged into numerous New York waters during the course of the litigation. Michael D. Axline & Patrick C. McGinley, *Universal Statues and Planetary Programs: How EPA has Diluted the Clean Water Act*, 8 J. ENVTL L. & LITIG. 253, 255-56 (1993).

86. 33 U.S.C. § 1342(b)(3) (2003).

87. *Id.* § 1365.

88. At many times, both Congress and the courts have shown their distrust for agencies. The belief is that scarce agency resources, political pressure, and agency capture would likely lead to un-enforcement of environmental statutes if the agency is left to its own devices. STEPHEN BREYER, ET AL., ADMINISTRATIVE LAW & REGULATORY POLICY 350-353 (4th ed. 1999).

to the ideals of public disclosure that allow people to tailor their behavior based upon knowledge of their environment. The thermal pollution discharged into Piney Run, for example, might have been known to the agency and the facility when the permit was issued in 1990. However, citizens who entered the discussion after 1990 missed out. To let disclosure to the agency alone shield the discharger from liability countenances the private deal-making that Congress sought to avoid. This becomes of augmented concern as permitting backlogs increase. Permits that were intended to last five years have been stretched to more than twice as long.[89] For example, the County's permit expired in early 1995, but in 2001, MDE still had not issued a new permit.[90] Thus, most people will not have the opportunity to respond to the pollution they confront in their waterways. The Fourth Circuit's decision not only flies in the face of the goals of the Clean Water Act, but it works against the more general government goal of providing the public with access to information about their environment.

B. The Decision Ignores Congressional Intent Behind the CWA

The plain language of the Clean Water Act demonstrates that Congress intended discharges to be limited by the permits that govern them. The Act states that "[e]xcept as in compliance with [CWA sections establishing technology standards, effluent limitations, water quality standards and the NPDES permit system], the discharge of any pollutant by any person shall be unlawful."[91] The reasonable way to read this language is that dischargers are only allowed to release effluents as specifically described in their permit.[92] A discharge is defined as "any addition of any pollutant to navigable waters from any point source."[93] The parties and the court in *Piney Run* acknowledge that the sewage treatment facility was a point source discharging a pollutant not listed in its permit into a navigable waterway covered by the Clean Water Act.[94]

On the face of the statute and the facts of the case, it appears that the County clearly violated the CWA. However, the Fourth Circuit found the statutory framework more ambiguous. The Second Circuit also dismissed plain language arguments under similar circumstances in *Atlantic States Legal Foundation v. Eastman Kodak*.[95] That court saw the prohibition on

89. EPA, NPDES Backlog Reduction, *at* http://cfpub1.epa.gov/npdes/permitissuance/backlog.cfm (last updated Oct. 30, 2002).

90. *Piney Run III*, *supra* note 1, at 260 n.3.

91. 33 U.S.C. § 1311(a).

92. *See id.* § 1342. This is further supported by other elements of the Act that call for strict liability and inability of dischargers to use de minimis defenses. Vinal, *supra* note 84, §§ 6, 26.

93. 33 U.S.C. § 1362(12)(A).

94. *Piney Run I*, *supra* note 42, at 445.

95. 12 F.3d 353 (2d Cir. 1993).

discharge of pollutants as "tempered . . . by a self-referential host of exceptions that allow the discharge of many pollutants once a polluter has complied with the regulatory programs of the [Clean Water Act]."[96] One exception the Second Circuit referred to is Section 402 of the Act (the NPDES permit program).[97] Thus, the Second Circuit viewed the existence of the permit system itself as evidence that the statutory goals of the Act expressed by the prohibition of discharges in Section 301 were not intended to be all-encompassing.[98] Like the *Piney Run* Court, the *Eastman Kodak* Court held that as long as facilities fully disclose their pollutants during the permitting process, their NPDES permits shield them from suit even for pollutants not listed.[99] Although the *Piney Run* Court did not directly rely on *Eastman Kodak*, the EAB found that decision particularly informative and drew on it for its reasoning in *Ketchikan.*[100] The *Piney Run* Court, in turn, relied on *Ketchikan.*

Eastman Kodak, however, should not have had such persuasive effect on the EAB. The case led to several scholarly articles demonstrating the Second Circuit's incompatibility with congressional intent and the potential harms that likely will result from such an interpretation.[101] The Clean Water Act is a broad-ranging statute with the ambitious goal of eliminating the discharge of all pollutants. This zero-discharge policy is further supplemented by a strict liability standard, which courts have read to disallow even de minimis defenses.[102] Until *Eastman Kodak,* most courts viewed permits as containing a complete list of the allowed pollutants.[103] Since *Eastman Kodak* and *Ketchikan,*[104] this view has been changing. Some scholars believe that these decisions were incorrect because of their lack of attention to congressional intent.[105] In *Eastman Kodak*, instead of examining the congressional intent behind the

96. *Id.* at 357.

97. *Id.*

98. Following the logic laid out by the Second Circuit in *Eastman Kodak*, the very element of the Act designed to be the enforcement mechanism for achieving its goals can be used as justification for lax enforcement.

99. *Eastman Kodak*, 12 F.3d at 356.

100. *In re* Ketchikan Pulp Co., 7 E.A.D. 605, 1998 EPA App. LEXIS 85 (Envtl. Appeals Board 1998), *available at* http://www.epa.gov/eab/disk11/ketchikan051598.pdf.

101. *See e.g.,* Axline & McGinley, *supra* note 85, at 282-84 (arguing that the decision turns the regulatory framework scheme on its head and criticizing the Second Circuit for not examining the text of the statute when making their decision); Joanna Bowen, Note, *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.: The Second Circuit Affirms the NPDES Permit as a Shield and Tries to Sink the Clean Water Act*, 12 PACE ENVTL. L. REV. 269 (1994) (explaining that the decision frustrates the broad purposes of protecting waterways under the Clean Water Act).

102. *See e.g.*, Natural Res. Def. Council, Inc. v. U.S. E.P.A., 966 F.2d 1292, 1306 (9th Cir. 1992).

103. Axline & McGinley, *supra* note 85.

104. *Ketchikan* , 7 E.A.D. 605.

105. *See e.g.*, Axline & McGinley, *supra* note 85.

Clean Water Act as called for in the first step of *Chevron* analysis, the Second Circuit deferred to agency interpretation. To demonstrate the EPA's view of the Act the court examined a memo from an EPA deputy assistant administrator and comments made in reaction to a proposed regulation. Not only do these types of documents not merit *Chevron* deference, but because the congressional intent is clear, they need not have been examined in the first place.

In *Piney Run* and *Eastman Kodak,* the Second and Fourth Circuits deferred to agency interpretation without examining whether the agency was in line with the original congressional intent behind the authorizing statute. *Eastman Kodak* got it wrong, and *Ketchikan* was wrong when it relied on it. The same error persists in *Piney Run.* The only way to meet the ambitious goal of the CWA is through stringent enforceable restrictions. The notion that facilities can discharge pollutants not specifically listed in their permits cuts squarely against the comprehensive anti-pollution intent of the Clean Water Act.

C. *This Decision Does Not Provide Clear Guidance for Future Courts*

The Fourth Circuit based its holding on the theory that the County adequately disclosed the potential discharge of heat and that the discharge levels were reasonably foreseeable to the permitting authority. This "reasonably foreseeable" doctrine is questionable as a guideline. It seems to contradict earlier statements made by the court. According to the Fourth Circuit, it is not necessary that every substance discharged from a point source be included in a permit because it is difficult to measure everything and create a list of everything in an effluent.[106] But if these pollutants are difficult to detect, how can their discharge levels be foreseeable? In this case, the court found that the heat discharge was reasonably foreseeable.[107] In fact, there is no clear evidence that heat was ever disclosed in this case. The Fourth Circuit relied upon oral testimony of a representative of the discharging facility and a statement by an agency employee who did not work for the permitting authority in 1990 when the permit was written and issued.[108] Even if the evidence clearly established that the County did disclose the potential for heat pollution, if heat was foreseeable, the agency should have included it in the permit.

106. *Piney Run III, supra* note 1, at 267-68.

107. *Id.* at 271.

108. Brief for Plaintiff-Appellant, *supra* note 80, at 20. However, the County's NPDES permit requires it to submit monthly reports to MDE. *Piney Run I, supra* note 42, at 445. Among other things, these reports include the temperatures of the "plant influent, plant effluent, stream above the outfall, and stream sixty feet below the outfall." *Id.* This reporting requirement seems to indicate that MDE contemplated thermal issues when composing the permit. These reports clearly showed evidence of thermal pollution. In fact, these reports were used by PRPA to determine the instances of heat pollution at the district court. *Id.*

Additionally, the court failed to provide guidance for determining what is reasonably foreseeable in future cases. Nor did the court explain the term "adequately disclose" or lay out rules for what should be considered adequate disclosure.[109] This will bring permits into the court for a case-by-case determination of what type of disclosure is adequate and what types of discharge are reasonably foreseeable. In general, this case does little to settle the debate because it leaves the most important terms vaguely defined.

IV. RECOMMENDATIONS

A. Substantive Recommendations

The EPA should resolve the precise scope of the permit-shield provision through notice and comment rulemaking. The judiciary is not the appropriate branch of government for deciding whether pollutant discharges are reasonably foreseeable. Permitting is a technical process that should account for scientific limits on measurement techniques. It is best to leave technical consideration of this kind to the administrative agencies. Instead of the courts deciding what should belong in the permit, there should be a thorough notice and comment rulemaking. With notice and comment rulemaking, the EPA informs interested parties of the potential new rule and those parties can participate in the process of determining what the rules governing permits should be. In general, full notice and comment rulemaking is a better indication of the agency's authoritative interpretation and should be entitled to a higher level of deference than a single EAB adjudication.[110] With a notice and comment process, environmental groups, industry experts and concerned citizens will all be able to take part. The *Piney Run* Court recognized that agencies are the superior decision-making entity when it chose to follow the precedent of the *Ketchikan* Court as an indicator of agency interpretation. Although the court followed some correct logic in attempting to defer to the agency, the *Ketchikan* decision was not so worthy of deference. The EAB adjudication was not accompanied by a thorough rulemaking process with public participation and notice and comment opportunities. In 1994, the EPA issued a policy statement which it used as the basis for its decision in *Ketchikan*.[111] That policy

109. *Piney Run III*, *supra* note 1, at 264.

110. *See* BREYER, *supra* note 88, at 667-68; *see also* United States v. Fla. E. Coast Ry. Co., 410 U.S. 224 (1973). Normally, the EPA acts primarily through rulemaking, with adjudications playing only a secondary role.

111. Based on *Mead Corp.*, policy statements like this one are not entitled *Chevron* deference. United States v. Mead Corp., 533 U.S. 218 (2001). The highest level of deference appropriate to a policy statement would be *Skidmore* deference arising out of a 1944 Supreme Court case. Skidmore v. Swift & Co., 323 U.S. 134, 139-40 (1944). *Skidmore* deference is a weak

statement, which also was not created through notice and comment rulemaking, stated that permits shield a discharger from liability for "pollutants for which the permit authority has not established limits or other permit conditions, but which are specifically identified as present in facility discharges during the permit application process."[112] This does not promote the goals of transparency and public participation. The EPA should recognize the need for a more formal procedure for the permitting process and promulgate a new regulation. Such a regulation would be the appropriate agency interpretation for courts to defer to.

B. Procedural Recommendations

There are multiple options for creating a standard for the permitting process superior to the one established by the Fourth Circuit in *Piney Run*. This section explains four possible options for consideration by the EPA in regulation promulgation that would help create a clearer process.

1. List Only Key Criteria Pollutants

If, as the EPA asserts, listing all the pollutants being discharged is not feasible, there at least should be a clear set of criteria for particularly harmful pollutants that permits must always include. Akin to the regulations on hazardous substances,[113] permits would be required to list pollutants of special concern. The current regulations guiding the NPDES permit process include detailed reporting requirements for a myriad of pollutants.[114] The EPA could go beyond the mere requirement that facilities must disclose pollutants during the permit application process and always regulate each of these pollutants in every NPDES permit. Although this would not necessarily lead to a complete permit, members of the public would have access to the list and know exactly which "key criteria" pollutants are being monitored and which are not. Additionally, states could build upon the requirement and make more stringent regulations by adding more pollutants to the EPA's list.[115]

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deference to the agency giving courts authority to treat agency's interpretation as having more authority than that of some other litigant if they so choose. *Id.* Therefore, an adjudication based upon a policy statement rests upon uneasy grounds and merits closer scrutiny when using it as a basis for agency deference.

112. Memorandum from Robert Perciasepe, Assistant Administrator for Water, et al., to Regional Administrators and Counsels, Subject: Policy Statement on the Scope of Discharge Authorization and Shield Association with NPDES Permits (July 1, 1994), *at* http://www.epa.gov/npdes/pubs/owm615.pdf. This makes the present situation unclear because there were actually permit conditions related to the thermal pollution (reporting requirements).

113. *See e.g.* Air Pollution Prevention and Control Act (Clean Air Act), 42 U.S.C. § 7408 (2003).

114. 40 C.F.R. § 122.21 (2002).

115. The official list of pollutants which carry reporting requirements appears in Appendix D of 40 CFR Part 122.

2. List Absolutely Everything

A more stringent option would be to require the listing of *all* pollutants being discharged. Although some facilities and agency officials argue that this would be difficult to do because of scientific limits on testing,[116] there is precedent for a measure of this kind. For example, the 1899 Refuse Act[117] (and, I have argued, Section 301 of the CWA) prohibit the discharge of *any* matter into the Nation's navigable waters except with a federal permit. Permits would be required to list every pollutant coming out of a discharger's outfall pipes. This policy is justified by the fact that the dischargers are in the best position to know what pollutants they are emitting. It would solve problems of transparency and a community's ability to know to what it is being exposed, and it may not be as technologically or economically difficult as opponents suggest.

3. List Everything Detectable By The Best Available Analysis Techniques

One possibility that would fit in well with the other Clean Water Act procedures would be to set a technological listing standard. Dischargers already have to use the best available technology economically achievable for effluent controls.[118] The EPA could implement a similar policy for testing effluent for the presence of pollutants to establish permit elements—dischargers would have to test for the presence of pollutants with the best available testing technology. The EPA debated this possibility during regulation formation but felt that it was unnecessary.[119] A reinvigoration of this notion could serve to combat the public policy concerns with the current procedure.

4. Add an Appendix of Unregulated Pollutants

A fourth option might be the easiest to implement. The permitting agencies could simply list all pollutants disclosed during the permitting process, which did not end up in the final permit because their levels were below state standards. This could take the form of an appendix to the permit. This recommendation does not require any additional data collection, because the CWA already requires that all pollutants must be disclosed during the permitting process.[120] The discharger must reveal the potential for release and estimate the amount of pollutant likely to be

116. Memo, *supra* note 72.
117. 33 U.S.C. § 407 (2003).
118. *Id.* § 1311(b).
119. *See* Memo, *supra* note 72; 45 Fed. Reg. 33,516 (May 19, 1980).
120. 33 U.S.C. § 1342 (b)(1)(C)(ii).

contained in the effluent.[121] The benefit of increased transparency outweighs any minimal agency or industry inconvenience.

CONCLUSION

The Clean Water Act is a far-reaching statute with an aim to protect the nation's water with an eventual goal of all waterways being fishable and swimmable. Recent judicial decisions have detracted from the Clean Water Act's scope, narrowing its jurisdiction.[122] While *Piney Run* follows the trend of an earlier Second Circuit decision and defers to the agency interpretation of the CWA, it neglects, and therefore conflicts with, the congressional intent behind the Act. Congress' goal of clean waters becomes harder to reach after *Piney Run*. Further, problems of transparency and public information arise that will make NPDES permits and the permitting process less meaningful to the public. In light of the *Piney Run* decision, citizens being subjected to unpermitted pollutants have little venue for redress. If a permitting agency erroneously grants an incomplete permit and a facility discharges harmful pollutants, citizens will have no recourse. The permit shield defense will now prevent them from suing the discharger, and the citizen suit provision in the CWA does not allow individuals to bring suits against the permitting agency. The situation could be improved by authoritative EPA notice and comment rulemaking restoring a limited scope to the permit shield provision, or by adding procedures to provide more information to the concerned public.

121. See EPA, NPDES Permit Applications and Forms, *at* http://cfpub1.epa.gov/npdes/doctype.cfm?sort=name&program_id=45&document_type_id=8 (last visited Feb. 11, 2003).

122. *See, e.g.*, Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 531 U.S. 159 (2001) (limiting meaning of navigable waters in the CWA to exclude isolated intrastate waters used by migratory birds).