

November 13, 2009

The Honorable Lisa Jackson
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dear Administrator Jackson:

Enclosed is a second supplement to a Petition submitted June 17, 2009 for withdrawal of the National Pollutant Discharge Elimination System program delegation from the State of West Virginia on behalf of the Appalachian Center for the Economy and the Environment, Sierra Club, West Virginia Highlands Conservancy, Coal River Mountain Watch, and Ohio Valley Environmental Coalition.

Respectfully submitted,



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P.O. Box 507
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cc:

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**SECOND SUPPLEMENT TO THE PETITION FOR WITHDRAWAL OF THE
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PROGRAM
DELEGATION FROM THE STATE OF WEST VIRGINIA**

The Appalachian Center for the Economy and the Environment, Sierra Club, West Virginia Highlands Conservancy, Coal River Mountain Watch, and Ohio Valley Environmental Coalition, hereby supplement their petition dated June 17, 2009 to the United States Environmental Protection Agency (“EPA”) to withdraw the delegation of the National Pollutant Discharge Elimination System (“NPDES”) program from the West Virginia Department of Environmental Protection (“WVDEP”). The purpose of this supplement is to make EPA aware of recent developments regarding West Virginia’s administration of its NPDES program that further support withdrawing approval of that program.

**WEST VIRGINIA’S DEFICIENT IMPLEMENTATION AND ENFORCEMENT OF ITS
NPDES PROGRAM CAUSED A SEPTEMBER 2009 CATASTROPHIC FISH KILL IN
DUNKARD CREEK ALONG THE WEST VIRGINIA/PENNSYLVANIA BORDER**

In September 2009, over 30 miles of Dunkard Creek of the Monongahela River was killed by pollution. A tally of the number of dead fish and mussels is not yet available, but it “is easily in the thousands.” (1 at 8) Eighteen major species of fish and 14 species of mussels were affected. (*Id.* at 8-9) Indeed, Dunkard Creek was “the last major stronghold for mussels in the Mon[ongahela] River drainage.” (*Id.* at 9) The result of the September 2009 fish kill, however, was 100% mortality for mussels in Dunkard Creek. (*Id.*) The time that it will take to restore the Dunkard Creek mussel population will be measured in “generations.” (*Id.*)

The Dunkard Creek fish kill was directly caused by West Virginia’s inadequate implementation and enforcement of its NPDES program. The investigation into the fish kill has identified a bloom of golden algae (*Prymnesium parvum*) as the cause of the catastrophe. (2 at 22-23) Golden algae produce a toxin that is deadly to aquatic life. (*Id.* at 23) The question begged is what golden alga—a saltwater species of algae—was doing in Dunkard Creek—a nominally freshwater stream in inland West Virginia. (3)

The answer to that question appears to be point source discharges high in chlorides and total dissolved solids permitted by WVDEP. Investigators have identified Consol Energy’s Blacksville No. 2 Mine as the likely major source of the causative pollutants. (3) The State of West Virginia has known since at least 2002 that Consol has been discharging chlorides in concentrations causing water quality standards violations. (4) But rather than prohibiting those discharges, or enforcing the Clean Water Act to protect Dunkard Creek, WVDEP issued a compliance order to Consol in 2004 that purports to modify Consol’s NPDES permit to suspend the final effluent limitations for chlorides until June 30, 2007.¹ (5) West Virginia’s express

¹ As explained in the June 17, 2009 petition, earlier this year WVDEP indefinitely delayed the development of ionic strength total maximum daily loads for several headwater tributaries of Dunkard Creek including West Virginia Fork (the receiving stream for discharges from Blacksville No 2.

justification for the schedule of compliance was to allow Consol time to prepare and file an application for a variance from the water quality standard for chlorides. (*Id.* at 2) In other words, West Virginia was willing to allow Consol to obtain a variance on the public's time rather than the polluter's.

As the final compliance deadline approached in 2007, Consol still had not obtained a variance from the chlorides water quality standard. Accordingly, WVDEP amended Consol's compliance order to provide that,

[f]rom the effective date of this Order until October 1, 2008 the water quality standards and final effluent limitations for chlorides will continue to be suspended

...

(6 at 4). In other words, West Virginia ignored Consol's continuing violations of the chlorides water quality standard, and WVDEP was reckless enough to not only modify a duly issued NPDES permit through an agreed order with a polluter, but also to suspend a water quality standard that had been approved by EPA.

On September 7, 2007, WVDEP denied Consol's variance application, and required Consol to submit a treatment plan by January 2008. (7 at 3) Consol submitted that plan and a progress report, both of which recognized the availability of technically feasible water treatment solutions, but rejected them on the basis of cost; notwithstanding the fact that Consol's socio-economic variance had already been rejected. (8; 9)

Rather than requiring Consol comply with the chlorides water quality standard regardless of the cost—as required by the Clean Water Act—WVDEP endorsed Consol's continued delay. After the Appalachian Center for the Economy and the Environment threatened to file a citizen suit against Consol under Section 505 of the Clean Water Act to prosecute Consol's chlorides violations, WVDEP issued a public notice that it intended to once again modify Consol's NPDES permit—this time to allow Consol until 2013 to achieve compliance with the chlorides water quality standard. (10)

WVDEP's 2008 modified consent order to Consol had the intended effects of frustrating citizen efforts to enforce the Clean Water Act and of enabling Consol to continue to violate the law, but it also had the unintended—but foreseeable—effect of causing the death of all aquatic life in a 30+-mile stretch of Dunkard Creek. As Petitioners noted in the June 17, 2009 petition and the June 30, 2009 supplement, WVDEP has repeatedly abused schedules of compliance to protect polluters at the expense of the environment. That abuse satisfies several of the criteria for the revocation of a State NPDES program under 40 C.F.R. § 123.63(a), including § 123.63(a)(2)(i) (failure to exercise control over activities required to be regulated), § 123.63(a)(2)(iii) (failure to comply with public participation requirements), § 123.63(a)(3)(i) (failure to act on violations of permits or other program requirements), § 123.63(a)(5) (failure to develop an adequate regulatory program from developing water quality-based effluent limits in NPDES permits). This time, compliance schedule abuse has also led to an environmental catastrophe—the extirpation of aquatic life from Dunkard Creek. Moreover, WVDEP has identified 20 other waters in West Virginia with conditions to conducive to golden alga

blooms—conditions that have developed as a result of WVDEP’s lax oversight. (2 at 26) If ever a State’s failures should lead to the withdrawal of its NPDES program, these are the appropriate circumstances.

WEST VIRGINIA IS CURRENTLY ATTEMPTING TO UNLAWFULLY MODIFY A CONSENT DECREE REGARDING NPDES PERMIT VIOLATIONS

On September 5, 2008, WVDEP entered into a Consent Decree with Hobet Mining, LLC, to settle violations of water quality-based selenium limits in four of Hobet’s NPDES permits. That Consent Decree was part of a State court action brought by WVDEP in an effort to preclude a citizen suit against Hobet based on selenium violations. In December 2008, the United States District Court for the Southern District of West Virginia held that, although WVDEP had not diligently prosecuted its State court action against Hobet, the September 5, 2008 Consent Decree rendered a citizen suit against Hobet moot. (11) Relying on WVDEP’s “environmental experts and engineers,” the Court concluded that there was no realistic prospect that Hobet would not achieve compliance by April 5, 2010—the final compliance deadline in the Consent Decree. (*Id.*)

WVDEP’s recent actions demonstrate that the Court’s reliance on it as an environmental enforcer were misplaced. On October 20, 2009, WVDEP solicited public comment on a proposed modification to the Consent Decree that would, among other things, extend the final selenium compliance deadline to July 1, 2012. (12) That modification is based, in part, on SB 461, which Petitioners described in detail in their June 17, 2009 petition. (*Id.*)

WVDEP is accepting public comments on its modifications until November 19, 2009, and Petitioners implore EPA to submit comments. WVDEP and Hobet have misrepresented the requirements of the CWA to the Boone County Circuit Court, and without EPA’s guidance, the Court may adopt the proposed modifications. The proposed modifications require not only EPA comment, however, but also provide further reason why EPA should withdraw its approval of West Virginia’s NPDES program.

Three particularly egregious flaws in the modified consent decree underscore WVDEP’s failure to administer and enforce West Virginia’s NPDES program. First, the modified consent decree purports to implement SB 461. As several of the Petitioners explained to EPA in a May 7, 2009 letter, SB 461 constitutes a change to West Virginia’s NPDES program, water quality standards, and water quality standards implementation plan that cannot be implemented unless and until EPA approves it. (13) EPA has not and may not do so. Consequently, SB 461 is not effective. By treating it as effective, WVDEP is acting *ultra vires*, and has rendered West Virginia’s NPDES program no longer consistent with the requirements of the Clean Water Act. That renders the West Virginia NPDES program ripe for revocation under 40 C.F.R. § 123.63(a)(1).

Secondly, WVDEP is attempting to covertly expand the scope of the September 5, 2008 consent decree to include violations of two NPDES permits that were not within the scope of the complaint in the State court action. Paragraph 14 of the modified consent decree purports to extend its terms to “NPDES permits WV1022890 and WV1022911.” (12) Those two permits

have been added without any basis in fact or law. Indeed, the addition of NPDES permit WV1022911 is a transparent attempt by WVDEP to preclude citizen enforcement of that permit. Several of the Petitions notified Hobet and WVDEP (as well as EPA) of their intent to sue Hobet for violations of the selenium limits in that permit in February 2009. (14) Through the modified consent decree—which does not penalize Hobet for past violations of the permit—WVDEP is attempting to insulate Hobet from enforcement.

In so doing, however, WVDEP is in violation of the Memorandum of Agreement (“MOA”) required under 40 C.F.R. § 123.24. That MOA requires WVDEP to submit draft permits of proposed NPDES permit modifications. (15 at 22) Effective July 7, 2009, EPA terminated its waiver of review of coal mining NPDES permits. (16 at 2) Paragraph 14 of the modified consent decree is ambiguous as to whether it is intended to modify the terms of NPDES permits WV1022890 and WV1022911, and Petitioners maintain that it could not be effective to modify the permits even if that were WVDEP’s intent. To the extent that the modified consent order is an attempt to modify NPDES permits WV1022890 and WV1022911, WVDEP is in violation of its obligation to provide draft coal mining permit modifications to EPA for review. Consequently, EPA should withdraw its approval of West Virginia’s NPDES program under 40 C.F.R. § 123.63(a)(5).

Third, the extension of the final compliance deadline to July 1, 2012 is neither justified nor reasonable. Hobet received its first compliance schedule for selenium in 2003, and has been dragging its feet on this issue for nine years. WVDEP’s failure to properly administer its NPDES program has enabled Hobet’s delay. Hobet could start installing proven effective technology today, but refuses to do so on the basis of cost. (17 at ¶ 9) Cost, of course, is irrelevant to compliance with water quality standard based effluent limitations. The modified consent decree demonstrates WVDEP’s inability to adequately enforce its NPDES program and requires the revocation of that program under 40 C.F.R. § 123.63(a)(3).

Through the modified consent decree, WVDEP has proven that it has learned nothing from the Dunkard Creek disaster. The selenium that it continues to allow Hobet to discharge into the Mud River Watershed is a bio-accumulative toxin. The nation’s leading selenium expert has opined that Hobet’s selenium discharges into the Mud River Watershed place that ecosystem on the brink of a catastrophic failure—not unlike Dunkard Creek. (19 at 20) WVDEP is yet again demonstrating that it is committed to protecting the bottom line of polluters rather than fulfilling its legal and moral obligations to protect West Virginia’s aquatic resources.

CONCLUSION

The above issues show WVDEP's failure to implement and enforce its NPDES program. The consequences of WVDEP’s failures have now proven catastrophic. Leaving WVDEP in charge of the protection of West Virginia’s aquatic resources presents unacceptable risks to the environment. Because WVDEP has proven itself unwilling to discharge its duty to enforce the Clean Water Act, we respectfully ask EPA to stop without delay the lawless regulatory environment in the State by withdrawing its approval of West Virginia's NPDES program.

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Respectfully Submitted,

A handwritten signature in blue ink, appearing to read "Derek Teaney". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

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REFERENCE LIST

1. Frank Jernejcic and David Wellman, West Virginia Division of Natural Resources, Dunkard Creek Fish Kill Assessment (September 2009 PowerPoint)
2. Patrick Campbell, West Virginia Department of Environmental Protection, Dunkard Creek Aquatic Life Kills (September 2009 PowerPoint)
3. Letter from John Hanger, Secretary, Pennsylvania Department of Environmental Protection, to Randy Huffman, Secretary, West Virginia Department of Environmental Protection, Re: Dunkard Creek Fish Kill Consolidation Coal Company Blacksville No. 1 Mine (Oct. 2, 2009)
4. Consolidation Coal Co. v. Turner, Agreed Order Withdrawing Appeals, Appeal Nos. 2-23-EQB, 2-24-EQB, 2-25-EQB, 2-26-EQB, 2-27-EQB (W. Va. Env'tl. Quality Bd. Feb. 20, 2003)
5. Amended Order 133 to Consolidation Coal Co. Re: WV/NPDES Permit Numbers WV0064602, WV0093505, WV0050598, WV0040711, WV0004201, WV1011456, WV0005801 (West Virginia Department of Environmental Protection Dec. 29, 2004)
6. Amended Order 133B to Consolidation Coal Co. Re: WV/NPDES Permit Numbers WV0064602, WV0093505, WV0050598, WV0040711, WV0004201, WV1011456, WV0005801 (West Virginia Department of Environmental Protection June 1, 2007)
7. Amended Order 133C to Consolidation Coal Co. Re: WV/NPDES Permit Numbers WV0064602, WV0093505, WV0050598, WV0040711, WV0004201, WV1011456, WV0005801 (West Virginia Department of Environmental Protection September 30, 2008)
8. Consol Energy, Inc., Phase I Compliance Plan for Chloride AMD Treatment Plant Discharges in Northern West Virginia (January 2008)
9. Potesta & Assoc., Inc., Progress Report: Phase I Compliance Plan for Chloride AMD Treatment Plant Discharges in Northern West Virginia (August 2008)
10. Letter from Derek O. Teaney, Appalachian Ctr. for the Economy & the Env't., to J. Brett Harvey & John Owsiany, Consolidation Coal Co., Re 60-Day Notice of Intent to File Citizen Suit Under Clean Water Act Section 505(a)(1) for Violation of Terms and Conditions of West Virginia NPDES Permits and 60-Day Notice of Intent to File Citizen Suit Under the Federal Surface Mining Control and Reclamation Act Section 520(a)(1) for Violations of Federal and State Regulations and Permit Conditions of West Virginia Surface Mining Permits (Aug. 27, 2008)
11. Ohio Valley Env'tl. Coalition v. Hobet Mining, LLC, Memo. Op. & Order, Civ. No. 3:08-cv-0088, 2008 WL 5377799 (S.D. W. Va. Dec. 18, 2008)

12. Mandirola v. Hobet Mining, LLC, [Proposed] Modified Settlement and Consent Order, Civ. Action No. 07-C-3 (Boone County Cir. Ct. Oct. 20, 2009)
13. Letter from Derek O. Teaney, Appalachian Ctr. for the Economy & the Env't., to Honorable Lisa Jackson and the Honorable William C. Early, U.S. E.P.A. Re: West Virginia Legislature's Revisions to State NPDES Permitting Program and Selenium Water Quality Standard (May 7, 2009)
14. Letter from Derek O. Teaney, Appalachian Ctr. for the Economy & the Env't., to Kent Desrocher, Hobet Mining, LLC, Re: 60-Day Notice of Intent to File Citizen Suit Under Clean Water Act Section 505(a)(1) for Violation of Terms and Conditions of West Virginia NPDES Permit WV1022911 and 60-Day Notice of Intent to File Citizen Suit Under the Federal Surface Mining Control and Reclamation Act Section 520(a)(1) for Violations of Federal and State Regulations and Permit Conditions on West Virginia Surface Mining Permit Number S500806
15. Memo. of Agreement Between the Division of Water Resources of the Department of Natural Resources of the State of West Virginia and the Regional Administrator, Region III, U.S. E.P.A. Regarding the Administration and Enforcement of the National Pollutant Discharge Elimination System (NPDES) (May 10, 1982)
16. Letter from Jon M. Capacasa, U.S. E.P.A. Region III, to Scott Mandirola & Tom Clarke, West Virginia Department of Environmental Protection (July 7, 2009)
17. Mandirola v. Hobet Mining, LLC, Affidavit of John McHale, Civ. Action no. 07-C-3 (Boone County Cir. Ct. Aug. 28, 2009)
18. Ohio Valley Env'tl. Coalition v. Hobet Mining, LLC, Declaration of A. Dennis Lemly, Ph.D. on Aquatic Hazard of Selenium Releases From Coal Mining in the Mud River Ecosystem, West Virginia, Civ. No. 3:08-cv-88 (S.D. W. Va. April 18, 2008)