

In The
United States Court of Appeals
For The Fourth Circuit

WEST VIRGINIA HIGHLANDS CONSERVANCY, INC.;
WEST VIRGINIA RIVERS COALITION,

Plaintiffs – Appellees,

v.

RANDY C. HUFFMAN, Secretary,
West Virginia Department of Environmental Protection,

Defendant – Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
AT CLARKSBURG

BRIEF OF APPELLANT

Raymond S. Franks
WEST VIRGINIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION
Office of Legal Services
601 57th Street, SE
Charleston, West Virginia 25304
(304) 926-0499

Counsel for Appellant

**UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS**

No. 09-1474 *West Virginia Highlands Conservancy, Inc., and West Virginia Rivers Coalition, Inc., v. Randy C. Huffman*

Pursuant to FRAP 26.1 and Local Rule 26.1, Randy C. Huffman, who is Appellant, makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity? []YES [**X**]NO
2. Does party/amicus have any parent corporations? []YES [**X**]NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations: N/A
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? []YES [**X**]NO
If yes, identify all such owners: N/A
4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? []YES [**X**]NO
If yes, identify entity and nature of interest: N/A
5. Is party a trade association? (amici curiae do not complete this question) []YES [**X**]NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member: N/A
6. Does this case arise out of a bankruptcy proceeding? []YES [**X**]NO
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CERTIFICATE OF SERVICE

I certify that on this date I served this document on all parties as follows:

James M. Hecker
Public Justice
1825 K St., NW
Suite 200
Washington, DC 20006
(202) 797-8600
Counsel for Appellees

/s/ Raymond S. Franks II

August 24, 2009

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JURISDICTIONAL STATEMENT

Plaintiffs West Virginia Highlands Conservancy, Inc. (“WVHC”), and West Virginia Rivers Coalition, Inc. (“WVRC”), commenced the action below on June 29, 2007, by filing a Complaint for declaratory and injunctive relief against Defendant Stephanie Timmermeyer in her official capacity as the Cabinet Secretary of the West Virginia Department of Environmental Protection (“WVDEP”).¹ The Complaint alleged that WVDEP was violating one or more effluent standards or limitations under the federal Clean Water Act (“CWA”), 33 U.S.C. § 1251 *et seq.* Jurisdiction was therefore conferred on the district court in accordance with the citizen suit provisions of 33 U.S.C. § 1365(a).

On March 26, 2009, the district court entered summary judgment in favor of Plaintiffs and granted a permanent injunction. The injunction requires WVDEP to apply for, process, and issue National Pollution Discharge and Elimination System (“NPDES”) permits to itself for the discharge into waters and streams of pollutants from defunct coal mining sites whose reclamation the agency is required to manage. Pursuant to its statutory mandate, WVDEP had assumed control of the 18 bond-forfeited mine sites at issue below and initiated the treatment of acid mine drainage. The March 26 judgment and accompanying Order Granting Permanent

¹ Having succeeded Stephanie Timmermeyer as DEP Cabinet Secretary on May 1, 2008, Randy Huffman was thereafter substituted as Defendant by operation of Rule 25(d) of the Federal Rules of Civil Procedure.

Injunctive Relief constitute a final decision of the district court over which the court of appeals is authorized by 28 U.S.C. § 1291 to assert jurisdiction. The Notice of Appeal invoking this Court's jurisdiction was timely filed on April 23, 2009, within the prescribed 30-day period following the district court's entry of judgment. *See* Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF THE ISSUES

Resolution of the case at bar requires that the generally applicable permit requirements of the CWA be harmonized with the specific paradigm established by the State under the auspices of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201, *et seq.* ("SMCRA") to mitigate the discharge of pollutants from derelict coal mines. The sole issue on appeal is whether the district court erred as a matter of law and policy by striking the balance uncompromisingly in favor of the CWA and concluding that WVDEP, in its role as caretaker and trustee of the bond-forfeited mine sites, must expend whatever resources are necessary, however impracticable, to comply with the stricter limitations on discharges imposed by the NPDES program.

STATEMENT OF THE CASE

The underlying case is the companion to a similar one filed at about the same time in West Virginia's other federal judicial district, with the proceedings in that court having been effectively stayed at the summary judgment stage pending

the outcome of this appeal. *See* West Virginia Highlands Conservancy, Inc., et al. v. Huffman, No. 2-07-cv-00410 (S.D. W. Va.). The plaintiffs in both cases are organized groups of concerned citizens who allege that WVDEP, in its statutory role as environmental caretaker, is required to ignore the technology-based standards for treating acid drainage from derelict surface mining sites and instead adhere to the more rigorous water quality standards applicable to the receiving streams under the CWA.

Following the filing of the initial pleadings and a relatively efficient exchange of discovery, the plaintiffs submitted their motion for summary judgment and for declaratory and injunctive relief. The factual record before the lower court consisted of the exhibits attached to the plaintiffs' motion and to their reply, several others proffered by the parties with respect to the requested injunction, and a joint stipulation of facts relating to the subject mine sites.

After a hearing on October 28, 2008, the district court issued an Order on January 14, 2009, granting summary judgment to the plaintiffs, declaring that WVDEP was in violation of the CWA, and ordering that the agency apply to itself and issue NPDES permits for all 18 mine sites. Further argument was heard on March 25, 2009, regarding the propriety of a permanent injunction against WVDEP, which the district court granted and embodied in its final Order the following day.

STATEMENT OF FACTS

The 18 sites identified in the Complaint are located in Preston, Monongalia, and Upshur Counties in the north central part of the state. JA 12-13. Years ago, while coal was being mined at these locations, the respective operators were required to post a penal bond to help ensure that the land and water they disturbed was reclaimed in accordance with law. *See* W. Va. Code § 22-3-11(a). Coal mining, of course, is a strictly regulated activity, and may only be conducted in West Virginia in conformance with a mining permit issued by WVDEP. *See* W. Va. Code § 22-3-8.

The State regulates the coal industry with the express approval of the federal Office of Surface Mining Reclamation and Enforcement (“OSM”). *See* 30 C.F.R. § 948.10. OSM’s grant to West Virginia of exclusive regulatory jurisdiction over the mining activities within the latter’s borders derives from SMCRA. *See* 30 U.S.C. § 1253(a); Bragg v. West Virginia Coal Ass’n, 248 F.3d 275, 288 (4th Cir. 2001). The substantive State law governing the regulatory relationship is the West Virginia Surface Coal Mining and Reclamation Act (referred to in Bragg and herein as the “West Virginia Coal Mining Act” or the “West Virginia Act”), and the rules promulgated thereunder. *See* W. Va. Code §§ 22-3-1 to 22-3-32a; 38 C.S.R. 2 §§ 1 to 24.9. All amendments to the State statute or rules must be ratified by OSM prior to becoming enforceable. *See* 30 C.F.R. § 948.15.

Insofar as the land disturbance and coal processing occasioned by mining operations will cause water associated with the site, including rivulets, seeps, wastewater, and storm runoff, *see* JA 125, to become contaminated with pollutants and ultimately drain offsite into receiving streams and watersheds, coal operators are required by the CWA to obtain an NPDES permit in addition to a mining permit:

To achieve its goals of eliminating water pollution, the CWA provides that “the discharge of any pollutant by any person shall be unlawful.” 33 U.S.C. § 1311(a). The term “person” includes not only individuals and corporations, but also the several states and their political subdivisions. *Id.* at § 1362(5). The “discharge of any pollutant” refers to “any addition of any pollutant to navigable waters from any point source.” *Id.* at § 1362(12). . . . “Navigable waters” are the waters of the United States. *Id.* at § 1362(7). A “point source” is “any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged.” . . . [and] include such conveyances as pipes, ditches, channels, tunnels, conduits and containers. [*See id.* at § 1362(14)].

As an exception to the CWA’s stringent prohibition on the discharge of pollutants, the Act authorizes the Administrator of the EPA to issue NPDES permits, which allow limited discharges of certain pollutants. . . . 33 U.S.C. § 1342.

JA 280. In West Virginia, NPDES permits are issued by WVDEP pursuant to State law, as approved by the Administrator of the United States Environmental Protection Agency (“EPA”). *See* 33 U.S.C. § 1342(b).

If a mining permit is revoked as the result of the operator’s failure to comply with the permit conditions or with the West Virginia Coal Mining Act, then

WVDEP is obliged to seek forfeiture of the posted bond. *See* W. Va. Code § 22-3-17(b); 38 C.S.R. 2 § 12.4. The bond proceeds are dedicated to completing the reclamation of the derelict site, including restoring the land contours, planting new vegetation, and remediating the polluted water draining offsite. *See* 38 C.S.R. 2 § 12.4.b. The untreated effluent is known as “acid mine drainage” to the extent that its pH is less than 6.0 or its total iron concentration exceeds 10 milligrams per liter (mg/l). *See* 40 C.F.R. § 434.11(a); 38 C.S.R. 2 § 2.3.²

The law requires WVDEP to “take the most effective actions possible to remediate acid mine drainage, including chemical treatment where appropriate, with the resources available.” 38 C.S.R. 2 §§ 12.4.c, -12.4.d. Should the proceeds of the bond forfeiture prove insufficient to adequately complete the reclamation, WVDEP may draw upon the Special Reclamation Fund and sue the coal operator for the deficiency. *See* 38 C.S.R. 2 §§ 12.4.d, -12.4.e. The Special Reclamation Fund and the Special Reclamation Water Trust Fund are financed by a tax, currently 14.4 cents per ton, levied on coal mined from surface operations throughout the state. *See* W. Va. Code §§ 22-3-11(g), -11(h)(1)

WVDEP maintains an inventory of all bond-forfeited sites and data as to the quantity and characteristics of the effluent emanating from each. *See* 38 C.S.R. 2 §

² Acid mine drainage commonly includes additional pollutants such as aluminum and manganese. *See infra* at 7-8. It should be noted that acid mine drainage is primarily a legacy problem. Modern mining permits are written to explicitly minimize the risk that acid mine drainage will occur. *See* 38 C.S.R. 2 § 3.22.f.1.

12.5.a. Based on that data and other available information, the sites can be prioritized depending on common-sense criteria such as the contamination level of the effluent, the quality of the receiving streams, and “the relative benefits and costs of the projects.” 38 C.S.R. 2 § 12.5.d; *see* 38 C.S.R. 2 § 12.5.b; JA 161-62. In each case, WVDEP is authorized to “determine the appropriate treatment techniques to be applied to the site.” 38 C.S.R. 2 § 12.5.d.

Once it undertakes a reclamation project, WVDEP is obliged to treat acid mine drainage to the extent necessary to meet the effluent limitations for coal mining point sources established in Part 434 of Title 40 of the Code of Federal Regulations. *See* 38 C.S.R. 2 § 12.5.b. Such limitations are categorized as “technology-based,” inasmuch as they are frequently predicated upon the “best practicable” or “best available” known technologies for treatment at the source prior to discharge. *See, e.g.*, 40 C.F.R. § 434.32, -.33.

Measured as the average daily value for 30 consecutive days, the concentration of iron may not exceed 3 mg/l of effluent, and manganese is limited to 2 mg/l. *See* 40 C.F.R. § 434.35. In addition, pH is required to remain within the range of 6.0 to 9.0 at all times. *Id.* Aside from these specific criteria, mine effluent must also conform generally to “applicable water quality standards.” 38 C.S.R. 2 § 12.5.e. Because it is quite common for effluent associated with coal mining to contain elevated levels of aluminum, treatment techniques are designed

to reduce the concentration of that pollutant to 0.75 mg/l, the applicable standard in West Virginia. *See* 47 C.S.R. 2, Appendix E, Table 1, Parameter 8.1.

When the sites were being mined in conformance with an active NDPES permit, the coal operators had to adhere not only to the water quality standards for aluminum, but also to those for iron and manganese. JA 90. In the permitting context, the standard is 1.5 mg/l for iron and 1.0 mg/l for manganese, each being twice as stringent as the technology-based limitations detailed in the preceding paragraph. *See* 47 C.S.R. 2, Appendix E, Table 1, Parameters 8.15, 8.17. The acceptable pH range is the same, *i.e.*, 6.0 to 9.0. *See* 47 C.S.R. 2, Appendix E, Table 1, Parameter 8.24.

The district court ruled on summary judgment that WVDEP, in managing the effluent emanating from the orphaned mines, should be held to the same standard as the coal operators were when the sites were engaged in active mining. In so ruling, the court concluded that WVDEP, a political subdivision of the State of West Virginia, is a “person” within the meaning of the CWA, *see supra* at 5, and, as such, is prohibited from discharging any pollutant without first applying for and obtaining an NPDES permit. *Id.*; 40 C.F.R. § 122.21(a) (“any person who discharges . . . pollutants . . . and who does not have an effective permit . . . must submit a complete application to the Director”); JA 303.

If the lower court's ruling is correct, then meeting the enhanced water quality standards for iron and manganese will be problematic for WVDEP, to say the least. When WVDEP takes control of an orphaned site, the coal operator's NPDES permit is often expired or has been revoked, and the existing treatment system is temporarily patched together to provide minimal benefit in the interim while the reclamation professionals obtain data and formulate a more permanent solution. JA 83-84. The system ultimately designed and emplaced typically channels the effluent through a progression of water wheels that mechanically release neutralizing agents such as calcium oxide or limestone carbonate from a hopper. JA 84, 91-92, 121-22, 124-25, 155; *see* photos at JA 221, 231. The release of chemicals raises the effluent's pH in stages, such that the iron, the aluminum, and then the manganese precipitates and eventually settles to the bottom of a series of sediment ponds. JA 91-92, 122, 125, 135-36; *see* photos at JA 213, 221.

Frequently, there are logistical obstacles to be overcome in order to install the desired system. Existing discharge points may crowd the site boundary, or the land topography may otherwise limit the space in which to work. JA 84-85, 90, 133-34. Extreme weather conditions at remote sites can restrict access and place a premium upon equipment reliability. JA 85, 126, 155-56. The precipitation process itself requires exactitude in maintaining the proper chemical mix and in

ensuring that the sediment ponds retain the treated effluent long enough to achieve the desired result. JA 91-93, 133. Notwithstanding the technical expertise of the reclamation staff, complying with the technology-based limitations (let alone the more stringent water quality standards) is a hit-and-miss proposition; often the staff meets or exceeds its goals, but occasionally it does not. JA 89, 141.

Expending more resources simply does not equate to better results. JA 88-91, 93, 133. Coal companies that happen to be reaping profits from their ongoing mining activities can and sometimes do spend considerable sums to procure more sophisticated treatment systems; they will, for example, install electricity at the sites and build treatment plants. JA 89, 131. But as the coal plays out with additional land being disturbed and pollutants released, the more complicated, less-reliable systems often will not perform as intended and may even hasten the site's abandonment. JA 89-90, 124.

Given the downstream consequences of treatment failure, reliability is an important factor in selecting an appropriate treatment system. JA 165. The water wheel systems used by WVDEP require no electricity and therefore perform even during a power outage, lowering the possibility of repeated fish kills. JA 125-26, 165. As technology inevitably advances, more efficient and effective means of treating acid mine drainage may emerge, but none currently exist that can be deployed at the necessary scale. JA 124, 126-31, 138.

SUMMARY OF ARGUMENT

The district court erred as a matter of law in holding that WVDEP must issue itself an NPDES permit in order to collect and channel effluent from orphaned coal mine sites. The CWA and its implementing regulations require a permit only for the discharge of pollutants, not the channeling of effluent, and no entity can be considered a discharger of pollutants unless it has caused the pollutants to be present in the effluent leaving the site. In the case of orphaned surface mines, the sole entity responsible for causing contamination of the effluent is the former coal operator and holder of the NPDES permit. In reclaiming the site, WVDEP actually attenuates the contamination and therefore cannot be considered a discharger of pollutants such that the agency may perform its reclamation work only in compliance with an NPDES permit.

Interpreting the CWA to compel WVDEP to obtain an NPDES permit as a general condition of reclamation would also render virtually meaningless a significant portion of the Code of Federal Regulations, which, by establishing pollutant limitations for surface mine discharges, is designed to specifically govern the subject matter of this litigation. Moreover, the process envisioned by the district court would, in practice, require one division of WVDEP to complete the permit applications, a second division to review the applications and draft the governing language, and a third division to enforce compliance with the permit

limits by, among other things, directing the payments of fines, penalties, and assessments from WVDEP to itself. The absurdity that will inevitably result from the district court's decision must be avoided.

Finally, the Complaint should be dismissed as contravening the Eleventh Amendment. The practical effect of the district court's judgment is to render the State of West Virginia vulnerable to citizen suits for violating the NDPEs permits it must now obtain. One inevitable consequence of such litigation would be to compel the State, without its consent, to expend monies from its treasury to bring the mine sites into compliance with the water quality standards established pursuant to the CWA.

ARGUMENT

I. Standard of Review

The district court's grant of summary judgment is reviewed *de novo*. Laber v. Harvey, 438 F.3d 404, 415 (4th Cir. 2006) (en banc). Summary judgment may be entered whenever the pleadings, discovery, disclosure materials, and affidavits "show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 283 (4th Cir. 2004) (en banc). A reviewing court must construe the evidence in the light most favorable to the non-movant, drawing all reasonable inferences against the party on whose

behalf judgment would be entered. Worden v. Sun Trust Banks, Inc., 549 F.3d 334, 340 (4th Cir. 2008) (citing Hill). To the extent that the lower court's entry of summary judgment was based upon its interpretation of one or more statutes or regulations, the court's conclusions of law are also reviewed *de novo*. Rowzie v. Allstate Ins. Co., 556 F.3d 165, 167 (4th Cir. 2009).

II. Discussion of Issues

- A. Because the discharge of pollutants from orphaned sites is caused by the defaulted coal operators and not by WVDEP, the plain language of the CWA and its implementing regulations do not require the agency to obtain an NPDES permit merely to ameliorate the effects of the discharge.***

As the district court observed, WVDEP is undoubtedly a “person” as defined by the CWA. Nonetheless, it is not a “person who discharges . . . pollutants” such that it must obtain an NPDES permit. *See* 40 C.F.R. § 122.21(a). There is no contamination of the water associated with a surface mining site until the ground is disturbed by the operator, the coal extracted, and the pollutants released. When the operator abdicates, the discharge of pollutants continues unabated by any treatment system until WVDEP arrives on the scene.

WVDEP does not take over operation of the coal mine. JA 104-05, 107-08, 115. The agency may install piping and other infrastructure to channel the effluent, *see* JA 150, but, according to the letter of the law, no permit is needed to channel effluents. A permit is only required to discharge pollutants, and the

neutralizing agents added by the reclamation staff actually reduce the pollutants in the effluent that would otherwise inevitably be more chaotically discharged by escaping the site untreated.

The distinction appeared to elude the lower court, which noted that “[w]hen a facility or activity is owned by one person but is operated by another person, it is the operator’s duty to obtain a permit.” JA 303-04 (quoting 40 C.F.R. § 122.21(b)). “Operator” is further defined as the person who owns or operates “any facility or activity subject to regulation under the NPDES program.” JA 304 (quoting 40 C.F.R. § 122.2). A “facility or activity” is “any NPDES ‘point source’ or any other facility or activity (including land or appurtenances thereto) that is subject to regulation under the NPDES program.” *Id.*

Obviously, attempting to determine whether WVDEP’s orphaned mine remediation efforts are subject to regulation under the NPDES program by ascertaining whether the agency is an operator that operates a regulable facility or activity merely begs the question. The district court admitted as much, characterizing the analysis as “somewhat circular.” JA 305. The court was persuaded, however, that the regulatory scheme

plainly contemplates that some entity will always be responsible for obtaining an NPDES permit when discharges requiring a permit are occurring. . . . Nothing in this regulation suggests a scenario in which no entity is required to apply for an NPDES permit, even though a ‘person’ is discharging pollutants otherwise subject to regulatory oversight under § 122.21(a).

JA 305-06, 307. The court is correct, of course. Some entity indeed will always be responsible for obtaining a permit for regulated discharges. The entity that acknowledged its responsibility in this case was the coal operator.

That the coal operator left behind an expired permit does not absolve it from continued liability for the ongoing effects of its discharges. *See* W. Va. Code § 22-11-22(a) (remedies provision of West Virginia Water Pollution Control Act imposing civil penalty of up to \$25,000 per day on “[a]ny person who violates any provision of any permit . . . [or] any provision of this article or of any rule or who violates any standard or order promulgated or made and entered under [the WPCA]”) (emphasis supplied); 38 C.S.R. 2 § 12.4.e (“The operator or permittee shall be liable for all costs in excess of the [bond] amount forfeited”). It therefore follows that WVDEP’s assumption of the effluent treatment obligations at an orphaned site does not create a new “discharge” for which the agency must obtain a permit. That is, the responsibilities and liabilities imposed by the permit remain with the original permittee.

Engaging in a causation analysis to determine whether a particular entity is responsible for a discharge of pollutants is hardly a novel concept. Indeed, in Committee to Save the Mokelumne River v. East Bay Mun. Util. Dist., 37 ERC 1159 (E.D. Cal.), aff’d, 13 F.3d 305 (9th Cir. 1993), JA 203, a case that featured prominently in the plaintiffs’ arguments and the decision below, the district court

acknowledged that establishing liability for discharge of a pollutant requires a plaintiff to prove “that the discharge occurred and that a given defendant was a legal cause of the discharge.” *Id.* at 1170; JA 209.

The Mokelumne River court misapplied the analysis, however, holding the Regional Water Quality Control Board (“RWQCB”) jointly liable for the discharge of acid mine drainage from an abandoned copper and zinc mine because it helped to construct a treatment reservoir and paid for the installation and operation of the pump and pipe recirculation system required to run it. *Id.* At the end of the day, though, the plaintiffs’ evidence showed only that the RWQCB may have been responsible for the discharge of effluent. There was no discussion, and apparently no contemplation, of the mining company’s role in causing the effluent to be polluted.³ The court below committed the same analytical misstep, and for that reason, its judgment should be reversed.

B. Even if the CWA and its implementing regulations could be interpreted to require WVDEP to obtain a permit, other principles of statutory construction militate against the law being applied in such a fashion.

The cardinal rule of statutory construction is that “analysis begins with the plain language of the statute.” Jiminez v. Quarterman, 129 S. Ct. 681, 685 (2009).

³ There was, however, an allegation that the installation of the treatment system actually exacerbated the contamination, *see Mokelumne River* at 1162 (JA 205), which may help to explain the decision in that case and serve as another basis to distinguish it from the matter at bar.

WVDEP believes that the foregoing discussion amply demonstrates that the plain language of 33 U.S.C. § 1311(a) and 40 C.F.R. § 122.21(a) demands a conclusion that an entity be shown to have legally caused the discharge of pollutants into waters of the United States as a prerequisite to being compelled to obtain an NPDES permit.

Nevertheless, it is also fundamental that “prior and later statutes dealing with the same subject matter . . . should as far as reasonably possible be construed in harmony with each other so as to allow both to stand and to give force and effect to each.” Orquera v. Ashcroft, 357 F.3d 413, 422 (4th Cir. 2003) (quoting 1A Norman J. Singer, STATUTES AND STATUTORY CONSTRUCTION, § 46.05, at 175-76 (6th ed. 2002)). Further, “[i]t is an elementary tenet of statutory construction that where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one.” South Carolina Dep’t of Health and Environ. Control v. Commerce and Industry Ins. Co., 372 F.3d 245, 258 (4th Cir. 2004) (citations omitted).

The district court’s construction of the permitting requirements of the CWA would render the technology-based effluent limitations of the Code of Federal Regulations, *see* discussion *supra* at 7, entirely without force and effect to govern any attempt by anyone to remediate acid mine drainage emanating from point sources at abandoned coal mining sites, unless the effluent were somehow

prevented from being discharged into a stream or watershed. It seems unlikely that Congress intended the CWA to trump specifically applicable federal regulations simply by virtue of its decision to accord environmental regulators the general authority to issue NPDES permits.

Instead of taking an either-or approach and slicing the Gordian knot, as the district court did, a proper application of the federal mining regulations allows them to control the situation for which they were designed, while simultaneously visiting no violence upon the CWA. Indeed, the CWA was given full force and effect in this matter: it required the coal operators at the 18 sites to obtain NPDES permits prior to discharging any pollutants from point sources into the surrounding waters.

Further, “nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or absurd conclusion.” Chesapeake Ranch Water Co. v. Board of Comm’rs of Calvert County, 401 F.3d 274, 280 (4th Cir. 2005). The treatment methods and clean-up standards that WVDEP has been using comports with those approved by EPA in similar situations. *See* JA 86-87, 131-32, 297-99. It is consistent with the approach taken by the Pennsylvania Bureau of Mining. *See* JA 98, 100-03, 273-76. And it is the same as that undertaken by OSM in administering Tennessee’s special reclamation program. JA 115-17, 120.

The district court's ruling, if upheld, would radically change how WVDEP reclaims orphaned surface mines. The effluent-control process would begin with professional personnel in WVDEP's Division of Land Restoration ("DLR") completing the lengthy NPDES permit application, consisting of 14 discrete "modules." *See* JA 313-79. The DLR staff would then mail the application (or perhaps walk it down the hall) to WVDEP's Division of Mining and Reclamation ("DMR"), where it would be reviewed and a permit written. Drafting, refining, and issuing such a permit takes an average of 218 working days. JA 29. During the time it takes to complete the application, the DLR staff will not be out in the field reclaiming old coal mines. Likewise, while the DMR permit writers are occupying themselves with the reclamation applications, they are not working on similar applications submitted by active mining concerns.

Once a permit is issued that contains the CWA's more stringent water quality standards for iron and manganese, all the credible record evidence indicates that WVDEP will find it impossible to live up to them. When the discharge monitoring reports show exceedances, WVDEP's Environmental Enforcement section will have little choice but to issue notices of violation to DLR, just as it does to corporate mining operators. The violations will be followed up with orders or settlement agreements imposing monetary fines, penalties, or assessments against WVDEP.

The proceeds of such fines, penalties, or assessments are payable to WVDEP. *See* 47 C.S.R. 1 § 7.4. In Slinger v. New Jersey, 2008 WL 4126181 (D.N.J.) (Sept. 4, 2008) (unpublished), the court observed that interpreting a state civil rights act to allow the imposition of a penalty against the sovereign “creates the absurd result of the State paying a civil penalty to itself [T]his sort of absurdity should be avoided in statutory construction, and common sense should prevail.” *Id.* at *8 (citation omitted). WVDEP urges this Court to restore a modicum of common sense to the instant proceedings and reverse the district court’s judgment.

C. Compelling WVDEP to involuntarily obtain NDPES permits and thereby assume the attendant liability for citizen suits constitutes a raid on the State treasury in violation of the Eleventh Amendment.

The Eleventh Amendment to the federal Constitution familiarly provides that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend. XI. The CWA is not to the contrary. Although a state or its political subdivision may be a “person” prohibited from discharging pollutants, *see* 33 U.S.C. § 1362(5), the CWA explicitly recognizes that citizens may commence suit against governmental dischargers only “to the extent permitted by the eleventh amendment to the Constitution. . . .” 33 U.S.C. § 1365(a)(1).

The Supreme Court has observed that the impetus for the Amendment was “the prevention of federal-court judgments that must be paid out of a State’s treasury.” Hess v. Port Authority Trans-Hudson Corp., 513 U.S. 30, 48, 115 S. Ct. 394, 404 (1994) (citation omitted). Hence, “the vulnerability of the State’s purse” has been recognized as “the most salient factor in Eleventh Amendment determinations.” *Id.* (citations omitted); *accord* Harter v. Vernon, 101 F.3d 334, 338 (4th Cir. 1996).

Courts need therefore look beyond the four corners of the Complaint in cases such as the instant one, which ostensibly demands only declaratory and injunctive relief, and undertake an examination of the real-world effects of allowing the district court’s judgment to stand. *See* Hudson Savings Bank v. Austin, 479 F.3d 102, 106-07 (1st Cir. 2007) (“[A] court’s appraisal of a claim of Eleventh Amendment immunity must focus on the practical effect of the suit as opposed to its abstract posture.”) (emphasis supplied) (citations and internal quotation marks omitted). A fair evaluation of the practical effect of the case at bar reveals that, contrary to the district court’s holding, the exception to sovereign immunity carved out by the Supreme Court in Ex parte Young, 209 U.S. 123, 28 S. Ct. 441 (1908) does not apply.

If WVDEP is forced to obtain NPDES permits for its treatment efforts at the 18 orphaned mine sites, the agency’s resultant inevitable failures to meet the water

quality standards thereby imposed will expose it to seriatim citizen suits, or, perhaps more likely, a reopening of this one. *See* 33 U.S.C. § 1365(a)(1). Should the citizen-plaintiffs prevail, WVDEP will either have to stop all treatment at the subject sites (so that it may cease and desist “discharging pollutants”) or expend the necessary additional funds to bring the sites into compliance. Those expenditures would be charged to the State’s Special Reclamation Fund, which is part of the State treasury. *See* W. Va. Code §§ 22-3-11(g)-(h), -11(l). In addition, WVDEP may be liable to reimburse the plaintiffs for their costs and attorney fees. *See* 33 U.S.C. § 1365(d).

Congress may abrogate a state’s sovereign immunity if it “clearly and unequivocally” does so pursuant to a valid exercise of constitutional authority. *See* Seminole Indian Tribe of Florida v. Florida, 517 U.S. 44, 116 S. Ct. 1114 (1996); Rendelman v. Rouse, 569 F.3d 182, 187 (4th Cir. 2009) (citing Madison v. Virginia, 474 F.3d 118, 122-23 (4th Cir. 2006)). “A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment.” Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 246, 105 S. Ct. 3142, 3149 (1985); *cf.* Burnette v. Carothers, 192 F.3d 52, 56 (2d Cir. 1999) (“[T]he district court held that Congress did not, by authorizing environmental citizen suits, intend to abrogate the states’ sovereign immunity. . . . We agree.”). Beyond the lack of an affirmative statement of abrogation, the

inclusion within the CWA of a specific Eleventh Amendment limitation on citizen suits, *see supra* at 5, 20-21, plainly evidences Congress's intent to leave the states' sovereign immunity intact.

A state may also waive its sovereign immunity by consenting to being sued in federal court. *See Virginia v. Reinhard*, 568 F.3d 110, 115 (4th Cir. 2009) (citing *Bragg, supra* at 4, 248 F.3d at 292. West Virginia has offered no such acquiescence in this matter. Indeed, the fundamental law of the State instructs that it "shall never be made defendant in any court of law or equity." W. VA. CONST. art. VI, § 35. "[N]or shall the state ever assume, or become responsible for the debts or liabilities of any county, city, township, corporation or person." *Id.* at art. X, § 6.

The State's decision to assume responsibility for taking over the reclamation of orphaned mine sites cannot equitably be viewed as a waiver of its sovereign immunity from suit under the CWA. In West Virginia, title to all navigable streams between the low-water marks is vested in the State in trust for the benefit of all the public. Syl. pts. 3-4, *Campbell Brown & Co. v. Elkins*, 93 S.E.2d 248, 249 (W. Va. 1956). As such, the State's relationship to its waters as their trustee and guardian is that of *parens patriae*, analogous to the role of the king under the English common law. *See Barre v. Flemings*, 1 S.E. 731, 735 (1887).

Viewed in the proper light, it appears plain that the reclamation obligations undertaken pursuant to the West Virginia Coal Mining Act are simply a natural manifestation of the State's *parens patriae* role as caretaker and trustee of its waters, and were not intended as a waiver of Eleventh Amendment immunity from suit in federal court. Any claimed waiver lacks the requisite clarity and straightforwardness, and had the State legislature attempted such a maneuver, that portion of the West Virginia Act would surely have been stricken by the courts as violative of the sovereign immunity reservation and assumption-of-liabilities prohibition of the State constitution.

Boiled down to its essence, the case at bar threatens just the sort of "raid on the treasury" that the Eleventh Amendment and the Supreme Court's implementing jurisprudence was intended to prevent. In re NVR, LP, 189 F.3d 442, 454 (4th Cir. 1999). This Court should parse the Complaint, acknowledge the threat, and decline to countenance Plaintiffs' efforts by reversing the lower court's judgment to the contrary.

CONCLUSION

For all the foregoing reasons, Secretary Huffman respectfully requests that this honorable Court reverse the judgment below, vacate the district court's Order granting permanent injunctive relief, and remand the cause with instructions to dismiss this matter with prejudice.

REQUEST FOR ORAL ARGUMENT

Because the instant matter presents this honorable Court with an unresolved issue of federal statutory construction having potentially wide application, and because of the significant environmental and governmental interests at stake, Cabinet Secretary Randy C. Huffman respectfully requests that this appeal be calendared for oral argument.

/s/ Raymond S. Franks II
Raymond S. Franks II (WV Bar #6523)
General Counsel
Acting Chief, Office of Legal Services
West Virginia Department of
Environmental Protection
601 57th Street SE
Charleston, WV 25304
(304) 926-0499, ext. 1542
Counsel for Appellant Randy C. Huffman

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I, Raymond S. Franks II, counsel for Appellant Randy C. Huffman, do hereby certify that on this 24th day of August, 2009, I caused this Brief of Appellant to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

James M. Hecker
PUBLIC JUSTICE
1825 K Street, NW
Suite 200
Washington, DC 20006
(202) 797-8600
Counsel for Appellees

I further certify that on this 24th day of August, 2009, I caused the required number of bound copies of this Brief of Appellant and Joint Appendix to be hand-filed with the Clerk of this Court and for one copy to be served, via UPS Ground Transportation, to all case participants, at the above listed addresses.

/s/ Raymond S. Franks II
Counsel for Appellant