

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

Sierra Club, West Virginia Highlands Conservancy, Coal River Mountain Watch, and Ohio Valley Environmental Coalition through their undersigned lawyers, hereby petition the United States Environmental Protection Agency, (“EPA”) to initiate formal proceedings under 40 C.F.R. § 123.64(b) to withdraw approval of the State of West Virginia’s National Pollutant Discharge Elimination System (“NPDES”) program. The Groups request that EPA formally respond to this petition in writing, as required by 40 C.F.R. § 123.64(b)(1); that EPA notify the State of West Virginia that it is not administering the permit program for discharges into the waters of West Virginia in accordance with the Clean Water Act; and that EPA schedule a public hearing regarding these violations. See 33 U.S.C. § 1342(c)(3); 40 C.F.R. § 123.64(b)(1). Because West Virginia fails to demonstrate sufficient ability and authority to carry out the NPDES program, EPA must withdraw its approval of the West Virginia NPDES delegation and assume administration and enforcement of the program. Id.

INTRODUCTION

The above groups recognize they are asking EPA to take drastic action. Given the nearly complete breakdown of West Virginia’s maintenance and enforcement of its NPDES program, however, withdrawal of the State’s NPDES program is the only remedy that will bring West Virginia into compliance with the Clean Water Act. The West Virginia Department of Environmental Protection’s abdication of its duties to regulate water pollution requires swift action by EPA to protect West Virginia’s citizens and environment. The State’s capitulation to the industries it is obligated to regulate under the Clean Water Act and its resulting failure to enforce or maintain its NPDES program leave EPA no choice but to withdraw its approval of that program.

The West Virginia Department of Environmental Protection’s (“WVDEP”) failure to carry out the legal requirements of Section 402 of the Clean Water Act is greatly harming the State and has led to a the impairment of over 33% of West Virginia’s rivers, streams, and lakes. (1 at 18)¹ Causes of impairment include: biological impairment (5,153 miles), iron (3,958 miles) pH (1,376 miles), aluminum (937 miles), mercury (669 miles), and selenium (160 miles). (1 at 20) For these pollutants in particular, the deficiencies of the West Virginia NPDES permitting and enforcement program not only contribute to impairment and impede clean-up of West Virginia’s water resources, but also undermine the authority WVDEP must rely on to the comply with the law.

¹ References will be listed by number in a separate document and will include either the website look up or included on the CD accompanying this document.

WEST VIRGINIA’S LEGAL AUTHORITY NO LONGER MEETS THE REQUIREMENTS OF THE FEDERAL WATER POLLUTION CONTROL ACT

1. Adjudicative Decisions Have Rendered State Law Inconsistent with the Water Quality Based Effluent Limit Requirements of the Act by Unlawfully Allowing the Consideration of Compliance Cost Into NPDES Permitting Appeals Decisions

The implementing regulations under the Federal Water Pollution Control Act (hereinafter, the “Clean Water Act,” “CWA,” or “the Act”) require states that administer an NPDES program to do so in manner no less stringent than EPA administers the federal program. 40 C.F.R. § 123.25(a)(15). One provision of the federal regulations, applicable to state programs under 40 C.F.R. § 123.25(a)(15), requires that, “when the permitting authority determines . . . that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above the allowable ambient concentration of a State numeric criteria within a State water quality standard for an individual pollutant, the permit must contain effluent limits for that pollutant.” 40 C.F.R. § 122.44(d)(1)(iii) (Emphasis added.)

EPA’s Environmental Appeals Board has consistently held that “cost and technological considerations are not permitted under the CWA to be considered by the permit-writer when setting water quality-based effluent limits.” (2)

Notwithstanding the prohibition against considering cost and technological factors when setting water quality-based effluent limits, West Virginia considers such factors in the administration of its NPDES program as a result of the construction of the State statute by the West Virginia Environmental Quality Board (“EQB”). The State program established the EQB as the administrative body charged with resolving appeals of NPDES permitting decisions. The EQB operates pursuant to West Virginia state code §22B-1-7. Under that statute,

In appeals of an order, permit or official action taken pursuant to[, among other statutes, the West Virginia Water Pollution Control Act, W. Va. Code § 22-11-1 et seq.], the environmental quality board . . . shall take into consideration, in determining its course of action in accordance with subsection (g) of this section, not only the factors which the appropriate chief or the secretary was authorized to consider in issuing an order, in granting or denying a permit, in fixing the terms and conditions of any permit, or in taking other official action, but also the economic feasibility of treating or controlling, or both, the discharge of solid waste, sewage, industrial wastes or other wastes involved.

W. Va. Code § 22B-1-7(h). The EQB has interpreted that provision to mean that, when considering appeals of water quality based effluent limits, the EQB must weigh the economic feasibility of compliance with those limits. For example, in a 2007 permit appeal, a permittee relied on W. Va. Code § 22B-1-7(h) to argue that the EQB should reverse the WVDEP’s decision to include water quality based effluent limits in its permit because compliance with such limits would, according to the permittee’s counsel, cost “a substantial amount of money.” (3 at 5). The EQB accepted the permittee’s argument, finding as fact that “[t]he Board, unlike WVDEP, is required to take into consideration not only the factors which the WVDEP

considered in issuing the permit but also the economic feasibility of treating or controlling the discharge.” (3 at 5). The EQB concluded, as a matter of law, that “[t]he West Virginia Legislature determined that it is proper for this Board to take into consideration not only the factors which the WVDEP considered in issuing the permit but also the economic feasibility of treating or controlling the discharge of industrial waste.” (3 at 5-6). Consequently, the EQB reversed WVDEP’s decision to apply water quality based effluent limits, stating that it would be “unreasonable to require [the permittee] to spend a substantial amount of money” to comply with such limits. (3 at 6).

The Jacks Branch decision impermissibly allowed economic considerations to override the absolute requirement to incorporate water quality based effluent limits into the permit. Thus, the decision and its legal underpinning do not comply with federal law and the mandates of the Clean Water Act. The Jacks Branch decision is not an isolated incident.

In a 2007 appeal involving multiple schedules of compliance for selenium water quality based effluent limits, the Board concluded as a matter of law that, under W. Va. Code § 22B-1-7(h), it was obligated to consider the costs of selenium treatment. (4 at 38) Moreover, at least one State court in West Virginia has similarly interpreted W. Va. Code § 22B-1-7(h) to require EQB to consider cost when reviewing water quality based effluent limits. (5 at 9)

As a result of the State adjudicative bodies’ interpretation of W. Va. Code § 22B-1-7(h) to require an economic analysis of water quality based effluent limitations, West Virginia’s authority to implement the State NPDES program consistent with 40 C.F.R. § 12.44(d)(1)(iii) has been limited. Consequently, water quality based effluent limits in WV NPDES are less stringent than federal law requires them to be. Under 40 C.F.R. § 122.63(a)(1)(ii), that limitation authorizes EPA to withdraw approval of West Virginia’s NPDES program if the State fails to take corrective action.

2. Recent Legislative Action Limits West Virginia’s Authority to Implement the State NPDES Program

During the 2009 West Virginia Legislative Session, the Legislature passed SB 461, which amends the West Virginia Water Pollution Control Act. Specifically, it amends W. Va. Code § 22-11-6, by appending the following provisions to the end of the current statute:

The Legislature finds that there are concerns within West Virginia regarding the applicability of the research underlying the federal selenium criteria to a state such as West Virginia which has high precipitation rates and free-flowing streams and that the alleged environmental impacts that were documents in applicable federal research have not been observed in West Virginia and, further, that considerable research is required to determine if selenium is having an impact on West Virginia streams, to validate or determine the proper testing methods for selenium and to better understand the chemical reactions related to selenium mobilization in water. For existing NPDES permits, the [WVDEP] may extend the time period for achieving water quality-based effluent limits for selenium discharges into waters supporting aquatic life uses to July 1, 2012, upon

compliance with all federally required public notice requirements for such modifications, upon a finding that the permittee cannot comply with its existing compliance schedule and that an extension is not in violation of any state or federal laws, rules or regulations. The West Virginia Department of Environmental Protection is hereby directed to undertake a comprehensive study relating to selenium and prepare a report detailing such findings and submitting the report to the Joint Committee on Government and Finance no later than January 1, 2010. In conducting such study, the West Virginia Department of Environmental Protection shall consult with, among others, West Virginia University and the West Virginia Water Research Institute.

SB 461 renders West Virginia's NPDES program less stringent than EPA's federal requirements under 40 C.F.R. § 123.25(a)(15), (18), and (22), with respect to permit conditions, schedules of compliance, and permit modifications. Specifically, SB 461 illegally suspends all selenium water quality based effluent limitations ("WQBELs") in West Virginia permits until July 1, 2012, regardless of whether the regulated discharges have the reasonable potential to cause or contribute to violations of the selenium water quality standard. 40 C.F.R. § 122.44(d)(1). SB 461 also authorizes compliance schedules prohibited by federal law. See 40 C.F.R. § 122.47(a). The compliance schedules contemplated by the statute are not "appropriate," as EPA has defined that term, because the additional time would not be used to take actions to achieve compliance, but instead to take actions aimed at relaxing the existing selenium water quality standard. Nor do the compliance schedules require compliance as soon as possible. Rather, they set an arbitrary deadline for compliance of July 1, 2012. Finally, SB 461 allows NPDES permit modifications in circumstances not authorized under 40 C.F.R. §§ 122.62 or 122.63.

The changes to West Virginia's program by SB 461 that render it less stringent than required by federal regulations trigger EPA's authority under 40 C.F.R. § 123.63(a)(1)(ii) to withdraw West Virginia's NPDES program. EPA must do precisely that unless West Virginia takes corrective action.

3. A Recent Adjudication Suggests that West Virginia Does Not Feel Bound to apply Federal Law Such as the Antibacksliding Provisions of the CWA

Section 402(o) of the Act provides that "a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit" except in certain limited circumstances. 33 U.S.C. § 1342(o)(1). That provision is commonly referred to as the anti-backsliding provision of the Act.

In 2008, the EQB issued a decision which casts doubt on whether it believes that West Virginia is bound to apply Section 402(o) of the Clean Water Act. Citing an inapposite federal case under the Surface Mining Control and Reclamation Act, which holds that States with approved surface-mining programs do not apply federal law, the EQB declared that "WVDEP administers a federally-approved state [NPDES] program and is not charged with administering federal law." (4 at 39) The EQB further declared that, "if WVDEP administers its State program in a manner that is inconsistent with federal law, then that is a matter to be taken up by USEPA and WVDEP

pursuant to 33 U.S.C. § 1342(b) and (c).” (4 at 39) The EQB made those statements in the context of discussing the appellants’ arguments regarding Section 402(o) of the Clean Water Act.

The EQB’s holding that WVDEP is not charged with administering federal law in the context of its NPDES program is clearly erroneous in light of 40 C.F.R. § 123.25, which expressly renders certain provisions of federal law applicable to State NPDES programs. Consequently, the EQB’s holding is an adjudicative decision which limits West Virginia’s authority to implement the NPDES program. Under 40 C.F.R. 123.63(a)(1)(ii), EPA should withdraw its approval of West Virginia’s NPDES program unless West Virginia takes corrective action.

WEST VIRGINIA HAS FAILED TO COMPLY WITH THE REQUIREMENTS OF 40 C.F.R. PART 123 IN THE OPERATION OF ITS NPDES PROGRAM

West Virginia has failed to issue/obtain NPDES permits for point source dischargers at bond forfeiture mining sites and at abandoned mine land sites.

Bond Forfeiture Sites

In two related citizen suits, environmental groups in West Virginia sought to hold WVDEP liable for the discharge of pollutants into waters of the United States without a permit, in violation of Section 301 of the Act. Specifically, the suits alleged that WVDEP had failed to obtain NPDES permits for discharges from its reclamation activities at mining sites where the operator had forfeited its bond. See W. Va. Highlands Conservancy v. Huffman, 588 F. Supp. 2d 678 (N.D. W. Va. 2009).

Many West Virginia bond forfeiture sites produce acid mine drainage. Under the State’s approved mining program, WVDEP has established a Special Reclamation Fund to fund the reclamation of bond forfeiture sites. W. Va. Highlands Conservancy v. Norton, 238 F. Supp. 2d 761, 763 (S.D.W.Va. 2003). WVDEP must use the Special Reclamation Fund to operate water treatment facilities that treat pollution discharges from those sites. See 38 C.S.R. § 2-12.14.d (“Where the proceeds of bond forfeiture are less than the actual cost of reclamation, the Secretary [of WVDEP] shall make expenditures from the special reclamation fund to complete reclamation. The Secretary shall take the most effective actions possible to remediate acid mine drainage, including chemical treatment where appropriate, with the resources available.”) Moreover, WVDEP defines “completion of reclamation” to mean, among other things, “that all applicable effluent and applicable water quality standards are met” Id. § 2-2.37. Unfortunately, WVDEP has a history of underfunding the Special Reclamation Fund and has had difficulty determining the amount of funding it needs to meet its responsibility to treat acid mine drainage at bond forfeiture sites. See W. Va. Highlands Conservancy v. Norton, 137 F. Supp. 2d 687 (S.D. W.Va. 2001); W. Va. Highlands Conservancy, 238 F. Supp.2d at 768-69.

The Clean Water Act requires all point source dischargers to obtain a permit. 33 U.S.C. §§ 1311. For dischargers such as coal mines, the permit must be obtained under the NPDES program Id. § 1342. Limits set forth in an NPDES permit must be based on the best practicable pollution control technology, plus any limitations needed to meet state water quality standards. Id. §1311(b)(1)(A) & (C); 40 C.F.R. § 122.44(a)(1) & (d)(1).

WVDEP has issued hundreds of NPDES permits for point source discharges from active mining sites. However, WVDEP has issued only one NPDES permit to itself for point source discharges from bond forfeiture sites that it is responsible for reclaiming. (6) Unpermitted discharges from bond forfeiture sites have frequently exceeded technology-based and water quality-based effluent standards for pH, iron, manganese and aluminum that should have been imposed on those discharges. (7) However, until a permit is issued, there are no legally enforceable limits on those discharges.

In the first of the two citizen suits on this issue to reach resolution, Judge Irene Keeley ordered WVDEP to apply for and obtain NPDES permits for the bond forfeiture sites at issue in the Northern District of West Virginia. Huffman, 588 F. Supp. 2d at 693. The companion case in the Southern District of West Virginia involving three more bond forfeiture sites is still pending. WVDEP has not issued permits for discharges at bond forfeiture sites in either district. Indeed, WVDEP has refused to acquiesce to the district court's order and has appealed the decision to the United States Court of Appeals for the Fourth Circuit.

WVDEP's failure to require permits for discharges from bond forfeiture sites is not limited to these 21 sites. In its February 20, 2009 brief in the Huffman case, WVDEP stated that "WVDEP currently maintains an inventory of over five hundred (500) special reclamation bond forfeiture sites and over one hundred and seventy (170) of those sites require or are currently receiving water treatment within the boundaries of the State. [Under the Huffman decision,] WVDEP would ostensibly have to apply for and obtain NPDES Permits for each site plus all new sites in the future."

Abandoned Mine Lands ("AML")

Similarly to its handling of bond forfeiture sites, WVDEP has not required dischargers of treated and untreated acid mine drainage at abandoned mine lands to obtain NPDES permits for their discharges.

The Federal Surface Mining Control and Reclamation Act of 1977 (as amended) establishes a fund to reclaim abandoned mine lands ("AML")—unreclaimed mine sites that predate federal surface mining regulation. WVDEP, however, does not require land owners liable for point source discharges of acid mine drainage to obtain permits for those discharges, nor does WVDEP require operators of treatment sites to obtain a permit for discharges or to treat to a regulatory equivalent end point.

WVDEP's failure to require NPDES permits for AML discharges has led to devastating statewide impacts including the obliteration of aquatic life in many of the acid mine drainage streams impaired by iron and or pH (3,958 miles impaired by iron and 1,376 miles impaired by pH.) (1 at 20) For example, the Kempton/Coketon Mine complex on the North Fork of the Blackwater River has wide reaching water quality impacts. An electromagnetic survey done by helicopter in order to characterize AMD and flooded mine tunnels in the abandoned mine complex straddling the Maryland/West Virginia border verified adverse impacts in over 31 square kilometers in the headwaters of two major watersheds. (8)

By failing to issue NPDES permits for point source discharges from bond forfeiture sites and AML sites, WVDEP is abdicating its duties under the approved NPDES program. The failure to

appropriately implement the NPDES program provides grounds for EPA to withdraw approval of West Virginia's NPDES program under 40 C.F.R. § 123.63(a)(2)(i).

WEST VIRGINIA REPEATEDLY ISSUES PERMITS THAT DO NOT CONFORM TO THE REQUIREMENTS OF FEDERAL REGULATIONS

WVDEP consistently and blatantly disregards the permitting regulations when issuing permits for mining operations with a reasonable potential to cause or contribute to water quality standards violations related to selenium. The agency has chronically failed to anticipate a reasonable potential for selenium pollution and include appropriate WQBELs in permits or assure that limits that are in place can be met.

The first way in which WVDEP disregards federal regulations is its practice of confirming that a particular mine has the reasonable potential to cause or contribute to violations of the instream selenium criterion, but placing "report only" requirements on some outfalls rather than water quality based effluent limits. For example, at the controversial Spruce No. 1 Mine—operated by the Mingo Logan Coal Company—WVDEP failed to place water quality based effluent limitations on all of the mine outfalls. The operation is mining known high selenium coal seams and is within a short distance of known selenium hotspots mining the same seams. (9; 10 at 81)

The NPDES permit for the Spruce No. 1 Mine regulates 28 distinct outfalls. (11) Only four of those outfalls have water quality based effluent limitations for selenium. The remaining 24 outfalls have monitoring only requirements for selenium. There is no defensible justification to include limits on some outfalls and not others for new facilities.

WVDEP's failure to include water quality based effluent limits on all of the Spruce No. 1 Mine's outfalls has had significant adverse impacts. Mining began on the northern most section of the mine approximately a year and a half ago, and a limited number of outfalls have been constructed. Discharge monitoring reports indicate that at least one of the outfalls with report only requirements—Outfall 28—discharged selenium in concentration above typical selenium water quality based effluent limits in December 2008 and January 2009. (12) Typically, such exceedances are not evaluated until permit reissuance—in this case in 2012. Currently, WVDEP policies allow a three-year compliance schedule when water quality based effluent limits are first incorporated into a permit for an existing discharge. In other words, exceedances at the Spruce No. 1 Mine could be expected to continue wholly unabated for at least six years.

Another instance of WVDEP's failure to include enforceable selenium limits where it is obligated to do so is Hobet Mining's Berry Branch Mine (NPDES Permit No. WV1017225). (14) Outfall 004 of that mine discharges to Berry Branch of the Mud River. In March 2004, EPA Region 3 finalized a total maximum daily load ("TMDL") for the Mud River for selenium. (13 at 2, 5-14) The TMDL included selenium wasteload allocations for all mining point sources upstream of Upton Branch of the Mud River. (13 at 4-30) Berry Branch is a Mud River tributary upstream of Upton Branch, and, thus, water quality based effluent limits for selenium are required on all outfalls discharging to Berry Branch. WVDEP, however, on June 2, 2009 reissued the Berry Branch NPDES permit that includes report only requirements for Outfall 004 for one year and only requires selenium water quality based effluent limitations in June of 2010.

(14) Environmental groups commented on WVDEP’s gross oversight prior to permit issuance, but the agency nonetheless failed to apply selenium limits.

In short, the WVDEP has a pattern and practice of including selenium limits on some outfalls but arbitrarily omitting them from others. Then, once monitoring confirms elevated selenium in the discharge, WVDEP issues lengthy schedules of compliance to meet new selenium limits. WVDEP’s obligation when developing effluents limits is to anticipate a reasonable potential *prior* to initial discharge by carefully predicting pollutants at each outfall. WVDEP clearly has it backwards.

The second way in which WVDEP disregards federal regulations is its practice of failing to require selenium core samples, selenium effluent limits or selenium monitoring at all mines in traditionally high selenium seams. WVDEP appears to ignore the selenium issue at some mines entirely. For example, for the Loadout, Nellis Mine, SMCRA permit S504090 and NPDES permit WV1010824, the WVDEP has not required selenium core samples to assess site specific selenium risk, or selenium monitoring or effluent limits at any of the permit NPDES outfalls. (48)

The West Virginia Geologic and Economic Survey has information on selenium posted on its website. (15) It notes:

Selenium occurs in coal primarily within host minerals, most within commonly occurring pyrite.... An unpublished study at WVGES using SEM found selenium ... in 12 of 24 coal samples studied, mainly in the upper Kanawha Formation coals. Selenium in West Virginia coals averaged 4.20 ppm.... Coals containing the highest selenium contents are in a region of south central WV where Allegheny and upper Kanawha coals containing the most selenium are mined.... Selenium is not an environmental problem in moist regions like the Eastern U.S. where concentrations average 0.2 ppm in normal soils.”

Further, as part of the mountaintop removal environmental impact statement, Bryant et al of EPA in a 2002 study examined water quality impacts downstream from large surface mines. They stated, “[i]n the region MTM/VF mining, the coals can contain an average of 4 ppm of selenium, normal soils can average 0.2 ppm, and the allowable limits in the streams are 5 ug/L (0.005 ppm). Disturbing coal and soils during MTM/VF mining could be expected to result in violations of the stream limit for selenium.” (10 at 74)

Loadout intends to mine the Coalburg and Stockton seams. (49) These seams are documented to be high in selenium. (15)

seam	# of samples	Min ppm	Max ppm	Mean ppm	SD
Stockton	54	0.27	21.3	6.66	3.33
Coalburg	77	1.4	14.9	5.99	2.1

The mean concentration of selenium taken from statewide samples from these specific coal seams is greater than 4 ppm. Disturbance of these seams and the surrounding strata at the mine is expected to cause water quality violations. Because the WVDEP did not require site specific core samples, effluent limits should be based on statewide sampling in these seams. WVDEP must place WQBELS in the NPDES permit for the Loadout, Nellis Mine because there is a reasonable potential to cause or contribute to a selenium water quality standard violation.

The third way in which WVDEP disregards for federal regulations with regard to selenium is the agency's practice of issuing new permits with water quality based effluent limitations for selenium without any assurance that those limits can be met. Because federal regulations prohibit the issuance of an NPDES permit that "cannot ensure compliance with the applicable water quality requirements of all affected States" or that will "cause or contribute to the violation of water quality standards," the issuance of new permits without assurance that selenium limits will be met does not conform with federal law. 40 C.F.R. § 122.4(d) & (i).

As of April 2009, 1,233 mining NPDES outfalls had selenium water quality based effluent limits. (51) Other than effluent selenium reductions made pursuant to demonstration projects related to legal action, no mining operation is currently treating water discharges to reduce selenium. Instead, WVDEP clings to the theory that material handling plans will eliminate the need for treatment.

Material handling plans are intended to isolate high selenium material from water courses before the leaching of selenium can cause or contribute to a water quality standard violation. (19 at 32-17 thru 32-20 for a description of WVDEP's current protocol)(50) The agency's reliance on material handling plans has a number of fatal flaws. First, the material handling plans do not apply to the coal itself. (50 at 1) Thus, during active coal extraction, there is no mechanism to prevent selenium from entering the discharge or the receiving stream. Second, the material handling plans are based on too few core samples (used to identify high selenium strata) from new mines. (19 at 32-18) In the case of existing mines where selenium is found to be a problem, no core samples are done at all. Instead, WVDEP relies on speculation that special material handling of dark shales will prevent selenium water pollution. (19 at 32-19) Third, the material handling plans are based on past experience with preventing acid mine drainage and, thus, require alkaline encapsulation of high selenium materials. (50 at 1) This is nonsensical because alkaline environments increase the mobility of selenium and cause it to be more likely to leach and reach surface and ground water. Fourth, finally, and perhaps most importantly, the material handling plans simply do not work. For example, Hobet Mining operates two mines in the Mud River Watershed, both of which are supposed to be implementing the most recent selenium handling plans. (51) Discharges from both those facilities consistently contain selenium in concentrations that exceed selenium effluent limits. (52) Indeed, a Hobet manager admitted in a sworn deposition that the selenium handling plan is not working to bring the company into compliance with its selenium limits.

Despite the predictable failure of the material handling plans to reduce selenium in the effluent, WVDEP does not require operations to plan or construct facilities to treat and remove selenium from the effluent if selenium effluent limits are assigned. For example, WVDEP recently issued a permit to Hobet Mining LLC for the Chestnut Oak Surface Mine, WV1019759. (39) The

WVDEP did not require a plan to remove selenium from the discharges from the mine. (44) Instead, WVDEP and the permittee intend to rely on a material handling plan to prevent selenium contamination that as noted above has already clearly failed to result in compliance with selenium water quality based effluent limits. (53)

Another example of the failure to require a treatment plan for selenium as part of the permit application includes a facility in White Oak Creek of the Big Coal River. On April 21, 2009, WVDEP issued a new NPDES Permit No. WV1022423 to Coyote Coal Company that will discharge into tributaries of White Oak Creek. (17) The TMDL for White Oak Creek requires selenium limits for all discharges in the watershed. (18 at 58) Indeed, the permit contains selenium water quality based effluent limits for all outfalls. (17) WVDEP as above did not require Coyote Coal Company to submit a plan for or to construct facilities to treat and remove selenium from the discharges. (55 at 3) Thus, it is reasonable to expect that once the facility begins to mine and discharge it will further contribute to White Oak Creek's selenium impairment. Consequently, WVDEP is consistently issuing NPDES permits that are prohibited by 40 C.F.R. § 122.4(d) and (i), which are applicable to State programs under 40 C.F.R. § 123.25(a)(1). That practice triggers EPA's authority to revoke West Virginia's NPDES program under 40 C.F.R. § 123.63(a)(2)(ii) if the State fails to take corrective action.

The forth way in which West Virginia runs afoul of federal regulations with regard to selenium is in its use of compliance schedules. Starting in 2003, WVDEP began including water quality based effluent limitations in WV/NPDES permits that it issued to polluters whose discharges had the reasonable potential to cause or contribute to violations of the selenium water quality standard. Most of those permits, however, included compliance schedules.

The compliance schedules in two such permits, held by the same permittee—Hobet Mining, LLC (“Hobet”)— expired on November 12, 2006, and the final selenium effluent limitations in those permits went into effect on November 13, 2006. On November 14, 2006, two West Virginia environmental groups sent a letter notifying the permit holder of their intent to sue the permittee for violations of the final selenium effluent limitations.

In early 2007, in response to the notice of intent, WVDEP took two related actions. First, WVDEP filed a lawsuit against Hobet in state court in an attempt to preclude a citizen suit. Second, WVDEP announced that it intended to modify approximately 90 NPDES permits to extend their selenium compliance schedules for three years. The compliance orders that WVDEP used to achieve those modifications were finalized on April 5, 2007, and arbitrarily set April 5, 2010, as the final compliance deadline for the recipients of the compliance orders.

On November 16, 2007, in response to WVDEP's blanket extension of the deadline for selenium compliance, EPA Region 3 sent a letter to WVDEP explaining to it the proper use of compliance schedules.

Several West Virginia environmental groups administratively challenged the selenium compliance orders before the EQB. At the hearing in the appeal, WVDEP assured the EQB that it had no intention of further extending the compliance deadline beyond April 5, 2010. (4 at 17) The EQB found that “WVDEP did not make a reasoned decision about each permittee and

instead issued the same compliance schedule for each operation regardless of the conditions on the ground, in the laboratory, or in the water.” (4 at 14)

The EQB observed that

[t]he circumstances surrounding the selenium problem and subsequent action are analogous to a doctorate student beginning his or her research the night before defending his or her thesis. Too much time has been wasted and too little has been done to address the problem. What is perhaps even more amazing is how little the WVDEP seems to expect from the coal industry. WVDEP and the coal industry are asking for more time and yet the lack of urgency continues.

(4 at 28) Nonetheless, the EQB refused to set aside the compliance orders. Rather, it let the orders stand, yet ordered WVDEP to review the permits and implement meaningful interim milestones. In so doing, the EQB essentially held that the orders were unlawful because they failed to include an “enforceable sequence of interim requirements (for example, actions, operations, or milestone events) leading to compliance with CWA, [the West Virginia Water Pollution Control Act], and rules promulgated thereunder” as required by 47 C.S.R. § 2.45 and 40 C.F.R. § 122.2. (4 at 29) The Board held that:

[t]he WVDEP failed to construct a meaningful compliance schedule. The WVDEP took a massive problem and applied a one-size fits all solution to it. The solution falls short on specifics and milestones for success. A meaningful compliance schedule must be tailored to each individual permit and circumstances surrounding the property.

(4 at 29)

Refusing to accept even the EQB’s modest rebuke, WVDEP appealed the EQB’s remand to state court. WVDEP and the coal industry successfully persuaded the Court that the EQB did not have the authority to force WVDEP to implement milestones.

Not only did the selenium compliance orders run afoul of 40 C.F.R. § 122.2, they also violated 40 C.F.R. § 122.47. EPA has interpreted its regulations governing compliance schedules to require at least three findings, adequately supported by the record, prior to issuing a compliance schedule. First, the permitting authority must find that the compliance schedule will lead to compliance by the final compliance deadline. Second, the permitting authority must find that the use of the compliance schedule is “appropriate.” Third, the permitting authority must find that the compliance schedule requires compliance “as soon as possible.” The regulation that requires those findings is 40 C.F.R. § 122.47, which is expressly applicable to West Virginia’s program under 40 C.F.R. 123.25(a)(18). In issuing the selenium compliance orders, WVDEP made none of the requisite findings. Indeed, WVDEP rarely makes the necessary findings when issuing schedules of compliance. (See discussion below regarding aluminum compliance schedules). WVDEP’s failure to exercise properly whatever authority it has to issue schedules of compliance authorizes EPA to revoke West Virginia’s authorization to administer an NPDES program under 40 C.F.R. s 123.63(a)(2)(ii).

WEST VIRGINIA CONSISTENTLY FAILS TO COMPLY WITH THE PUBLIC PARTICIPATION REQUIREMENTS OF 40 C.F.R. PART 123

Under 40 C.F.R. § 122.25(a)(22), the permit modification provisions of 40 C.F.R. § 122.62 apply to State programs. Those provisions require public notice and an opportunity for comment on major modifications to NPDES permits. West Virginia's administration of its NPDES program runs afoul of those requirements in at least two ways. First, the EQB, in its administrative review capacity, routinely approves settlements or issues final orders that result in major modifications that are not subjected to the public notice and comment requirements. Second, WVDEP routinely extends the final compliance deadline in schedules of compliance without public notice or comment.

The EQB

W. Va. Code § 22B-1-7(g)(1) authorizes the EQB to resolve NPDES permit appeals by entering “an order affirming, modifying or vacating the order, permit or official action of the [WVDEP] . . .” (Emphasis added.). The EQB exercises that authority by approving settlements between WVDEP and permittees that modify the terms of the challenged permit or by issuing final orders, authored by the EQB, that modify the terms. West Virginia law, however, does not provide the public an opportunity for public notice and comment on decisions made or settlements sanctioned by the EQB that lead to major permit revisions. For example, in August 2001, NPDES permit holder, PPG Industries (WV0004359), appealed various aspects of its reissued permit, including limits set by WVDEP for mercury discharges. The appeal was settled and resulted in, among other things, a sizable increase in the allowable amount of mercury discharged from the facility's major outfall. (20; 21) The settlement constituted a major modification of the permit, yet was never put out for notice and public comment. PPG's operations are the largest source of mercury in the state. A second example is the Jacks Branch appeal discussed above. In that appeal, the permittee appealed its reissued NPDES permit in 2007. The case was heard by the Board in March 2008. The Board's decision reversed the WVDEP decision to apply water quality based effluent limits for manganese and reinstated more lenient technology based effluent limits. (3) The decision constituted a major modification of the permit yet was never put out for notice and public comment.

WVDEP

In January 2006, EPA approved a modification to West Virginia's water quality standard for aluminum. In response to that modification, WVDEP adopted an implementation policy—that was never subjected to EPA review—for the revised criteria. (22) Under that policy, for permits that included schedules of compliance for aluminum with a final effective date prior to the expiration date of the permit, WVDEP would issue a “modification order” to extend the final compliance date to the expiration date of the permit, in order to allow the agency to incorporate the revised criterion into the permit on reissuance. Scores of such modification orders were issued, not one of which was subject to public notice or comment.

Under 40 C.F.R. § 122.62(a)(4), the modification of a final effective date in a schedule of compliance is a major modification requiring public notice and comment. Moreover, schedules of compliance can only be modified under 40 C.F.R. § 122.62(a)(4) for specific reasons, and the revision of a water quality standard is not among them. Consequently, WVDEP's modification orders regarding the revision to the aluminum water quality criterion patently violated federal regulations. Through this action, WVDEP has demonstrated a blatant disregard for the public participation requirements of the Clean Water Act. Accordingly, EPA should withdraw its approval of West Virginia's NPDES program if the State fails to take corrective action.

The West Virginia Legislature

The West Virginia legislature from time to time revises water quality standards or amends the states NPDES program outside of what is submitted to it by a state agency. In those instances the legislature does not provide an opportunity for public notice and comment. For example, during the 2009 legislative session the Legislature passed SB 461, which amends the West Virginia Water Pollution Control Act. Specifically, it impermissibly amends W. Va. Code § 22-11-6, by allowing, among other things, WVDEP to, "extend the time period for achieving water quality-based effluent limits for selenium discharges into waters supporting aquatic life uses to July 1, 2012, upon compliance with all federally required public notice requirements for such modifications, upon a finding that the permittee cannot comply with its existing compliance schedule and that an extension is not in violation of any state or federal laws, rules or regulations." While this amendment resulted in a significant revision to both the West Virginia NPDES program and the state's water quality standards, the legislature provided no opportunity for public notice and comment.

WEST VIRGINIA'S NPDES ENFORCEMENT PROGRAM IS GROSSLY DEFICIENT

WVDEP has a long history of failing to act on permit violations and enforce NPDES permit limits. The lack of permit enforcement fails to deter future violations throughout the state.

Selenium

DEP's nearly decade-long failure to enforce the selenium water quality standard against coal operators is remarkable in its disregard for the law and the environment. The State's efforts to help coal operators evade compliance with that criterion are brazen by any standard – and the State has recently moved even closer to coal operators and further from the law.

West Virginia has a long history of allowing to coal operators to evade the selenium requirements of the CWA. Subsequent to the programmatic Mountaintop Removal Mining Valley Fill Environmental Impact Statement, WVDEP listed 9 streams as impaired by selenium on West Virginia's 2002 303(d) list. (23) Included in the selenium listings was the Mud River of the Guyandotte River. In 2003, WVDEP included selenium limits in some of the reissued NPDES permits discharging to the Mud River. (24) The permits included three-year compliance schedules to meet the selenium limits. The agency also began issuing water quality based effluent limits where mining operations discharged to streams listed on the state's 303(d) list due to selenium impairment. (56) In 2004, EPA Region 3 finalized a TMDL for selenium and other

parameters for the Mud River. (13) Subsequently, WVDEP revised additional permits for mining operations discharging to the Mud River to include water quality based effluent limits for selenium with three-year compliance schedules. The agency also sporadically issued new mining permits discharging to the Mud River with immediately effective selenium water quality based effluent limits. (25) As of April 2009, 1,233 mining NPDES outfalls had selenium water quality based effluent limits. (51)

Other than the minimal selenium reductions made pursuant to demonstration projects that were initiated in response to lawsuits by petitioners, no mining operation is currently treating water discharges to reduce selenium despite the fact that there are viable treatment options. **In fact, WVDEP has not required any operator that is violating its permit limits to come into compliance with those limits.** Instead, it has written a series of blank checks in the form of compliance schedules to nearly all operators that are discharging selenium at rates higher than the water quality standard that allow them to continue to exceed the standard until April, 5 2010, despite the fact that effective options exist for selenium treatment.² The State had steadfastly and illegally refused to require operators to adopt currently existing treatment technologies that would reduce selenium to levels that comply with the water quality standard.

Because WVDEP has done virtually nothing to assure compliance with selenium limits since issuing the compliance orders, there is no chance that operators that are currently violating their limits will be able to comply with them by April 5, 2010. Accordingly, DEP will again illegally extend compliance until 2012 and after that it will do so *ad infinitum*. West Virginia's unwillingness to force coal operators to comply with their permit limits makes a mockery of the CWA.

For example, the discharge monitoring reports for two of the Mud River permits mentioned above indicated that the permittee was going to violate its selenium limits as soon as they became effective in November 2006. Accordingly, on the day after the limits became effective, two West Virginia environmental groups sent 60-day notices of intent, ("NOI"), to sue to the permittee and the required government officials under Section 505 of the CWA. (26)

In January 2007, in response to the groups' NOIs, WVDEP took two related actions. First, WVDEP filed a lawsuit against Hobet in state court to preclude WVHC's lawsuit. Second, WVDEP adopted a practice that had the effect of suspending its duly promulgated water quality standard for selenium without EPA approval. (57) The agency, in order to circumvent citizen enforcement of the Clean Water Act, modified approximately 90 WV/NPDES permits to extend for three years compliance schedules that had not expired. Furthermore, on 33 permits that include final selenium limits that were already in effect, WVDEP issued notices of violation

² There are effective, albeit expensive, treatment options available for selenium. (58; 59) Of course, coal operators must use expensive treatment options if those are all that are available since the consideration of costs is prohibited when it comes to compliance with water quality standards. S. Rep. No. 92-414, reprinted in 1972 U.S.C.C.A.N. 3668, 3710 (1971); Defenders of Wildlife v. Browner, 191 F.3d 1159, 1163 (9th Cir. 1999); United States Steel Corp. v. Train, 556 F.2d 822, 838 (7th Cir. 1977); In Re: Westborough and Westborough Treatment Plant Board, 10 E.A.D. 297, 312 (EAB, Feb. 8, 2002).

under the surface mining and reclamation law to permittees in violation of their limits, ordering them to devise a treatment plan. WVDEP did not take any action against those permittees under the Clean Water Act. This was the beginning of a *de facto* suspension of the selenium water quality standard in West Virginia that continues and will continue will into the future unless the State is forced to take seriously the water quality standards.

In response in April of 2007, environmental groups sent a 60-day notice letter to EPA for its failure to review and approve or disapprove the WVDEP actions noted above because those actions essentially resulted in revisions to the West Virginia NPDES program and the state's selenium water quality standard. (60)

Later, because WVDEP had made clear that it had no intention of prosecuting its State action against Hobet, the environmental groups brought a federal court action against the permittee in February 2008, notwithstanding the pending state action. Following the commencement of the federal court action, WVDEP initiated discovery and began negotiating settlement with the permittee. In December 2008, the federal district court ruled that WVDEP had not diligently prosecuted its State court action. Nonetheless, the federal court held that the settlement ultimately reached by the State and the permittee rendered much of the federal case moot. Ohio Valley Env'tl. Coalition v. Hobet Mining, LLC, Civ. No. 3:08-cv-88, 2008 WL 5377799 at *4-*6 (S.D. W. Va. Dec. 18, 2008).

To add insult to injury, coal operators persuaded the West Virginia Legislature to pass a bill that violates the CWA; during the 2009 session the Legislature passed SB 461, which impermissibly amends the West Virginia Water Pollution Control Act. Specifically, it amends W. Va. Code § 22-11-6, by allowing, among other things, WVDEP to, "extend the time period for achieving water quality-based effluent limits for selenium discharges into waters supporting aquatic life uses to July 1, 2012, upon compliance with all federally required public notice requirements for such modifications, upon a finding that the permittee cannot comply with its existing compliance schedule and that an extension is not in violation of any state or federal laws, rules or regulations." SB 461 renders West Virginia's NPDES program less stringent than EPA's federal requirements under 40 C.F.R. § 123.25(a)(15), (18), and (22), with respect to permit conditions, schedules of compliance, and permit modifications. EPA must not allow the State to thumb its nose at federal law.

In sum, West Virginia has essentially done everything within its power to help the coal industry avoid compliance with its selenium permit limits. WVDEP's efforts to use its enforcement authority to thwart actual enforcement of the CWA, as well as the inadequacy of the penalties that it seeks in enforcement, trigger EPA's authority under 40 C.F.R. § 123.63(a)(3) to withdraw West Virginia's NPDES program.

General Mining

There have been other enforcement issues related to coal mining operations. For example in early 2008, following legal action on enforcement issues by EPA, "Massey Energy Company Inc. agreed to pay a \$20 million civil penalty in a corporate-wide settlement to resolve Clean Water Act violations at coal mines in West Virginia and Kentucky. This was the largest civil

penalty in EPA’s history levied against a company for wastewater discharge permit violations.” (27) West Virginia did not participate in that enforcement proceeding.

The Massey enforcement action brought to light WVDEP’s failure to scrutinize or enforce discharge monitoring reports at nearly all coal mining operations. In fact, WVDEP recently publically admitted not only its failure to enforce mining NPDES permits, but also its willingness to issue permits that it knows will not be complied with. During a June 2009 West Virginia Surface Mine Board hearing, WVDEP’s attorney “told board members if his agency did not renew permits for companies with outstanding water pollution violations, no mining permits would ever be renewed. ‘Taken to its logical conclusion, that would mean no one gets renewal . . . We’ll just shut down mining.’” (54)

Since the Massey enforcement case, dischargers have flocked to WVDEP to negotiate settlement agreements to block legal action by citizens or EPA. (28) For example, Powellton Coal Company approached WVDEP in 2007 to request resolution of outstanding discharge monitoring report violations. (29) A consent order was issued August 29, 2008 that purported to resolve violations from February 2007 through December 2007. (30) To be clear, WVDEP did not initiate the enforcement action; rather, *it was at the request of the coal company*. On August 29, 2008, WVDEP also issued a consent order to Fola Coal Company that purported to resolve violations between July 2006 and December 2007. (31) In the case of the Fola Coal Company violations, the violations began more than two years prior to the final consent order, and, in the Powellton case, the violations began many months prior to the company’s request to seek a settlement. *WVDEP took no independent action on the violations*. There are scores of other examples of the industry rush to settle previously ignored violations with WVDEP to avoid federal or citizen enforcement of the CWA.

The Consent Orders that WVDEP reaches with the coal companies are egregious and inadequate to remedy companies continuous noncompliance. For example, the groups have been unable to identify a single instance where WVDEP took the time to calculate the economic benefit to the polluter of its noncompliance. Economic benefit, of course, is supposed to form the foundation of any civil penalty assessment. Moreover, WVDEP also assesses civil penalties at a 3 to 1 ratio for violations of a monthly average limit as opposed to a daily maximum violation. That minimal ratio ignores the fact that the violation of monthly average subjects a polluter to a penalty 30 times greater than a violation of a daily maximum limit.

Toxics at Industrial Sites

WVDEP also continues to overlook egregious violations of NPDES effluent limits for toxic substances at major facilities. For example, PPG Industries holds NPDES Permit No. WV0004359. PPG operates a chlor-alkali plant that is the largest source of mercury in West Virginia. PPG discharges to the Ohio River and has mixing zones for mercury at its major outfalls. Since 2007, the Appalachian Center has been tracking the facility’s discharge monitoring reports. Violations of permit limits include:

Date	Outfall	Pollutant	Limit	Unit	Reported	Unit	Type
Aug-07	009	Copper	0.017	mg/l	0.019	mg/l	Ave

Aug-07	012	Al	0.161	mg/l	0.169	mg/l	Max
Aug-07	012	Al	0.0579	mg/l	0.169	mg/l	Avg
Sep-07	009	Flow	42.5	MGD	49.2	MGD	Ave
Nov-07	009	Mercury	0.265	ug/l	0.345	ug/l	Max
Jan-08	009	Mercury	0.265	ug/l	1.982	ug/l	Max
Jan-08	009	Mercury	0.143	ug/l	0.493	ug/l	Avg
Feb-08	009	TSS	100	mg/l	804	mg/l	Max
Feb-08	009	TSS	100	mg/l	176	mg/l	Max
Feb-08	004	Iron	0.62	mg/l	1.46	mg/l	Ave
Mar-08	004	Iron	0.62	mg/l	1.4	mg/l	Ave
Mar-08	009	Copper	0.017	mg/l	0.018	mg/l	Ave
Apr-08	009	Sulfide	0.5	mg/l	1.1	mg/l	Max
May-08	009	Sulfide	0.5	mg/l	0.6	mg/l	Max
May-08	009	Mercury	0.265	ug/l	0.283	ug/l	Max
May-08	009	Mercury	0.143	ug/l	0.155	ug/l	Avg
May-08	109	TSS	60	mg/l	120	mg/l	Max
Aug-08	009	Mercury	0.265	ug/l	0.547	ug/l	Max
Aug-08	004	copper	0.00574	mg/l	0.01	mg/l	Avg
Aug-08	004	copper	0.017	mg/l	0.018	mg/l	max
Aug-08	004	iron	0.62	mg/l	1.464	mg/l	Avg
Aug-08	004	iron	2.1	mg/l	2.51	mg/l	Max
Oct-08	009	chloride	2490	mg/l	2775	mg/l	Max
Dec-08	009	Mercury	0.265	ug/l	0.608	ug/l	Max
Dec-08	009	Mercury	0.265	ug/l	?	ug/l	Max
Dec-08	009	Mercury	0.265	ug/l	?	ug/l	Max
Dec-08	009	Mercury	0.143	ug/l	0.169	ug/l	Ave
Feb-09	004	iron	0.62	mg/l	1.08	mg/l	Ave
Mar-09	009	mercury	0.265	ug/l	0.528	ug/l	Max
Apr-09	009	copper	0.017	mg/l	0.019	mg/l	Ave
Apr-09	009	copper	0.035	mg/l	0.047	mg/l	max
Apr-09	009	mercury	0.143	ug/l	0.156	ug/l	Ave
Apr-09	009	mercury	0.265	ug/l	0.276	ug/l	Max

WVDEP failed to take independent action on any of those permit violations. (32) In order to stop the ongoing violations and force PPG to clean up the mercury at its Natrium plant, Oceana and the West Virginia Rivers Coalition sent a 60-day notice of their intent to sue under Section 505 of the CWA in March 2009. (33) Just before the 60-day deadline expired, WVDEP filed a complaint against PPG for the same violations, thus precluding Oceana from pursuing its legal claims. WVDEP has admitted in press reports that it filed its complaint only because the company asked it to protect it from a citizen suit. Secretary Huffman of WVDEP told the Charleston Gazette, “They had been wanting us to sue them, to block the third-party lawsuit, but we had no intention of doing that until they submitted a plan. The pressure of the third-party lawsuit caused them to come up with a plan.” The Gazette article about WVDEP’s PPG complaint further explains the long history between WVDEP and PPG. “DEP’s lawsuit is the latest in a long series of actions by state officials to help PPG, including four instances in the last 20 years in which DEP backed off tougher water quality limits for the Marshall County plant.” (34) In attempts to obtain a copy of the PPG pollution prevention plan noted in the newspaper article, citizens have been told the plan is part of WVDEP’s deliberative process of negotiating a settlement agreement with PPG and that DEP will

not release it even through a Freedom of Information Act request. With WVDEP's history of poor enforcement and failure to diligently prosecute legal cases there is little evidence that WVDEP will diligently prosecute the PPG case.

Another example of lax enforcement by WVDEP includes ongoing violations at Mountain State Carbon, LLC's Steubenville East Coke Plant. The plant has been in violation of NPDES Permit No. WV0004499 for the last 9 of 12 quarters—including all of 2008—for exceeding benzo(a)pyrene, phenolics, and cyanide limits. The only enforcement action by WVDEP was an administrative order in February 2008 that did not involve financial penalties. The status of the permit is listed as: "unresolved significant violations" in EPA's ECHO database. (32)

Municipal Facilities

Other examples of failure to enforce permit limits include a number of municipal sewage treatment plants including: 1) the City of Nitro's NPDES Permit No. WV0023299, with significant unresolved violations during 12 of the last 12 quarters for zinc and other pollutants; 2) the City of Weston's NPDES Permit No. WV0028088, with significant unresolved violations during 12 of the last 12 quarters; and 3) the City of North Beckley's NPDES Permit No. WV0027740, with significant unresolved violations during 12 of the last 12 quarters for zinc and other pollutants. (32)

Additionally, WVDEP has failed to enforce the permit conditions of the West Virginia MS4 general permit. (35) Under the general permit, facilities are required to meet interim milestones and report annually on its progress in meeting those milestones. Many communities, however, have failed to meet milestones or submit annual reports. For example, the City of Huntington has failed to submit annual reports for 2007 or 2008. A 2007 memo from a city employee to the Mayor of Huntington cites the City Council's lack of receptivity to "any additional costs to the public" as a major hurdle to MS4 compliance. (36) Thus, there is little likelihood that Huntington has met interim milestones or final goals outlined in its storm water management program. In addition, the City of Westover has also failed to submit its annual reports due in 2008 and has not met many early interim milestones. (37) WVDEP, however at a minimum, has issued no notices of violation to any MS4 from January 2007 to present.

WEST VIRGINIA HAS FAILED TO COMPLY WITH THE TERMS OF THE MEMORANDUM OF AGREEMENT REQUIRED UNDER 40 C.F.R. § 123.24

The 1982 Memorandum of Agreement, ("MOA"), between EPA and West Virginia regarding West Virginia's NPDES permitting obligations required that, "[a]nnual statistical reports shall be submitted on minor NPDES permittees indicating the total number reviewed, number of noncomplying minor permittees, number of enforcement actions, and number of permit modifications extending compliance deadlines." (38 at 11). A Freedom of Information Act request of May 13, 2009, requesting the above mentioned reports for the past two years yielded a "no records" response. To our knowledge and belief, these reports have not been submitted for some time, and, thus, West Virginia has failed to comply with the terms of the 1982 MOA. It is likely that this failure contributed to the lax enforcement of mining NPDES permits and the

Massey enforcement case, because nearly all mining NPDES permits are classified as minor permits.

WEST VIRGINIA HAS FAILED TO DEVELOP AN ADEQUATE REGULATORY PROGRAM FOR WATER QUALITY BASED EFFLUENT LIMITS

Antidegradation - Socioeconomic Reviews

West Virginia's antidegradation plan at 60 C.S.R. 5-5.8 requires new dischargers to "document the social and economic importance of the proposed activity "if significant water quality degradation to high quality streams would occur." For new coal mining NPDES permits the WVDEP generally uses a mass balance equation to set effluent limits for parameters of concern at ten percent of the available assimilative capacity of the receiving stream unless the permittee provides an alternatives analysis and socioeconomic justification to allow the discharger to use more of the remaining assimilative capacity. In fact the agency's own permitting guidance appears to require the same protocol for selenium. (19 at 32-20) The WVDEP, however, has not followed the protocol when calculating selenium permit limits for new mining facilities or required mining operations to submit a socioeconomic justification for discharges of selenium to high quality streams that will use more than 10% of the available assimilative capacity.

When selenium is a parameter of concern, WVDEP assigns a concentration limit for selenium that is based on meeting the chronic criterion at the end of the pipe. In effect this concentration limit defines the total remaining assimilative capacity because in nearly all cases the assumed 7 q 10 flow is zero or near zero. Instead WVDEP should limit the concentration to ten percent of the remaining assimilative capacity or require the applicant to provide socioeconomic justification for using more. However, in violation of this policy, WVDEP sets the concentration limit at or near 100% of available capacity with no socioeconomic justification.

For example, WVDEP issued Hobet Mining LLC, Chestnut Oak Surface Mine, NPDES permit, WV1019759, on May 27, 2009. (40) The permit is an expansion of the Hobet 21 Mining complex, a known selenium hot spot. The operation will discharge to small high quality tributaries of the Big Ugly watershed. Baseline water quality data indicates extremely low levels of selenium, well below the current chronic aquatic life criterion of 5 ug/l, i.e. the available assimilative capacity is high. (11 at 35) The selenium water quality based effluents limits in the permit are based on meeting the chronic aquatic life criteria end of pipe and not based on mass balance calculations aimed at consuming 10 % of the available assimilative capacity. Because the likely 7 q 10 flow of the receiving stream is at or near zero, it means the discharge will use all or nearly all of the available assimilative capacity for selenium. The WVDEP, however, has not required the company to submit a socio economic justification for the discharges.

In another example, the WVDEP recently drafted (public comment period opened May 22, 2009) an NPDES permit for the massive Consol of Kentucky, Buffalo Mountain Mine, NPDES No. WV1029690. (41) The controversial mine has recently been the subject of an EPA objection letter to the Huntington District of the Army Corps of Engineers due to water quality impacts downstream from the mine. The WVDEP applied water quality based effluent limits based on the chronic selenium aquatic life criterion end of pipe at 97 of 98 mine outfalls and followed

procedures similar to those used at the Hobet mine above. Baseline water quality shows trace selenium. The WVDEP, however, did not require Consol to submit a socio economic review to justify the selenium effluent limits in the draft permit. (***)Note this permit is also an example of a high selenium mine with selenium effluent limits and discharges to selenium impaired streams but with no selenium treatment plan.)

Mining General Permit

The WVDEP issued a general permit, NPDES Permit No. WVG049991, for a subset of alkaline mine drainage mines in the spring of 2007. (41: Note the actual issuance date and the date on the permit face do not match because of an administrative extension of the permit) WVDEP predicted at the time that the renewed permit would eventually cover approximately 50 mine sites. The permit impermissibly authorizes discharges that will have a reasonable potential to cause or contribute to water quality standard violations. The permit assigns technology based effluent limits for surface mines, loadouts, deep mines, and abandoned deep mines. See A.1 Mining Category I, A.3 Mining Category III. Nearly all of these facilities will have instream sediment control ponds. The discharges from the sediment ponds will dominate the receiving streams, constituting nearly all of the flow of the receiving streams. In fact, WVDEP intends to authorize action under this permit to dischargers whose instream sediment ponds drain watersheds as large as 250 acres. Because the technology based effluent limits outlined in the draft permit greatly exceed the water quality criterion for iron, 1.5 mg/l, the discharges by definition will cause or contribute to a water quality standards violation. See §47-2 App E, Table 1 at 8.15. Other discharges at these sites may also lead to water quality standards violations. Federal and state law prohibit such discharges:

Limitations must control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Director determines are or may be discharged at a level which will cause or have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality.

40 C.F.R. § 122.44(d)(1)(i); 47 C.S.R. § 30-3.2.a.1.

Further, streams receiving discharges from operations covered by the general permit will not be afforded basic existing use protection through appropriate implementation of antidegradation policies. See 40 C.F.R. § 131.12(a)(1).

In addition, the fact sheet for the general permit states that “Mining Category II and Mining Category IV discharges principally address storm water discharges. Under the anti-degradation procedures, as long as Best Management Practices are implemented for these types of discharges, significant degradation should not occur. (42) Therefore, existing facilities meeting the categorical requirements could request to be covered under the appropriate category as the mining progresses from the active phase to the post-mining phase.” The exemption from antidegradation review based on the, “installation and maintenance of cost-effective and reasonable best management practices,” is limited to nonpoint sources activities and should not be applied to point sources or the dischargers covered by this permit. 50 C.S.R. § 5-1.5.b.

In short, the permit does not comply with federal CWA requirements for water quality based effluent limitations.

Failure to Develop TMDLs for Ionic Strength Impaired Streams

Over the past four years, WVDEP has proposed and/or finalized TMDLs for a number of watersheds, including the Upper Kanawha River (finalized 2005), the Coal River (finalized 2007), the Gauley River (finalized 2008), Upper Ohio South Watershed (proposed 2009), and Dunkard Creek (proposed 2009). In each of these TMDLs, WVDEP failed to include TMDLs for all impaired streams in the watershed by indefinitely delaying the establishment of TMDLs for biologically impaired stream segments where ionic toxicity was identified as a main/significant stressor. For example in the Coal River TMDL, WVDEP asserted without justification that, “[i]nformation available regarding the causative pollutants and their associated impairment thresholds is insufficient for TMDL development at this time. Therefore, WVDEP is deferring TMDL development and retaining those waters on the Section 303(d) list.” (43 at 54) WVDEP has neither developed a TMDL for these streams nor created a plan to do so.

WVDEP’s rationale for not performing its legal obligation to develop ionic toxicity TMDLs has no basis in law or fact. Its claims to the contrary notwithstanding, WVDEP has sufficient data regarding the causative pollutants and their associated impairment thresholds related to ionic toxicity and should have established draft TMDLs for the ionic stress streams. WVDEP could have done so by allocating wasteloads for conductivity. At a minimum, WVDEP should have applied a “Phased Approach” to the draft TMDLs, as prescribed by EPA guidance.

Moreover, WVDEP has impermissibly continued to draft and or issue NPDES permits to new sources of ionic stress that will discharge to biologically impaired streams. For example in the Coal River TMDL finalized in 2007 WVDEP identifies ionic toxicity as the primary stressor leading to biological impairment in James Branch, Ellis Creek, Rockhouse Creek, Toney Fork Buffalo Fork, Left Fork/Beach Creek, and Seng Creek of the Coal River. (43 at 54) WVDEP has recently drafted a mining NPDES permit, Catenary Coal Company, NPDES No. WV1022563, which will discharge to two of the impaired streams, Seng Creek and Rockhouse Creek. Yet the permit has no limits or even monitoring requirements for ionic toxicity or related parameters including TDS or conductivity. (16) In fact the draft permit completely ignores ionic toxicity as a parameter of concern. (Note this permit is also another example of a high selenium mine with selenium effluent limits and discharges to selenium impaired streams but with no selenium treatment plan.) Under federal regulation, an NPDES permit may not be issued unless the permitting authority finds that the new source or discharge will not cause or contribute to the violation of water quality standards. 40 C.F.R. § 122.4(d)(i). The draft permit is in direct conflict with this requirement.

If the WVDEP had, as required, completed the Coal River TMDL for ionic toxicity WVDEP should have automatically applied water quality based effluent limits for ionic toxicity in the Catenary permit. Related to new discharges, the Coal River TMDL states, “[a] new facility could be permitted anywhere in the watershed, provided that effluent limitations are based on the

achievement of water quality standards at end-of-pipe for the pollutants of concern in the TMDL.” (18 at 58)

The failure to develop TMDLs for these streams is in part due to WVDEP’s failure to establish water quality standards for total dissolved solids (“TDS”), conductivity, and/or ionic strength. Every three years, States must submit to EPA for review “[w]ater quality criteria sufficient to protect the designated uses.” 40 C.F.R. §131.6(c). WVDEP has failed to do so by failing to propose TDS aquatic life criteria. This failure has led to serious consequences. Mining has caused impairment in 32.7 % of 5,153 miles of biologically impaired streams in West Virginia. (1 at 20, 25) High TDS is undoubtedly a significant stressor in many of those impaired streams.

Recent studies show that, as a result of mining activities, impacted streams in WV often have 30-40 fold increases in sulfate concentrations, with 13 streams in the 2009 WV database having sulfate concentrations higher than those found in seawater. (45) The relationship between mining activities and high sulfate concentrations is so well established that the 2008 WVDEP West Virginia Integrated Water Quality Monitoring and Assessment Report suggested (1 at 21) that sulfate concentrations greater than 50 mg/L could be used as an indicator of mining activity. Furthermore, conductivity (a cumulative measure of ionic strength) is an effective predictor of biological impairment. (45) Nevertheless, WVDEP refuses to require limits on ionic toxicity, TDS, sulfate or conductivity in discharge permits for mining activities.

Mercury

To our knowledge and belief, WVDEP is not implementing its tissue-based human health water quality criterion for mercury. Thus, when WVDEP writes NPDES permits for facilities discharging mercury, the agency does not do a reasonable potential analysis based on the West Virginia tissue criterion for mercury. As a result, there is no way of evaluating whether permit limits are protective of existing and designated uses.

Moreover, the West Virginia 0.5 ug/g criterion is inconsistent with EPA’s 304 (a) guidance for mercury of 0.3 ug/g. WVDEP claims that West Virginians eat less fish than other Americans do. That claim is based on a November 2008 survey commissioned by WVDEP that indicated that West Virginians eat 9.95 gr/day, whereas EPA has observed that the average American eats 17.9 gr/day. (47) WVDEP’s survey, however, failed to take into account the State’s 2004 highly publicized mercury based statewide fish consumption advisory, which likely depressed fish consumption among West Virginians. (46)

The purpose of the consumption advisory is to ensure that citizens restrict the amount of fresh water fish they consume. It appears as though the November 2008 fish consumption survey is a likely indicator of the success of the fish consumption advisory rather than a true reflection of how much fish West Virginians would like to eat. Because the November 2008 survey did not take into account the impact of the statewide fish consumption advisory, it is inappropriate to use it to validate the West Virginia mercury fish tissue human health criterion. WVDEP’s logic in using the survey as a justification for the mercury fish criterion would lead to the absurd conclusion that, when more pollution triggers a more restrictive fish consumption advisory and people accordingly eat less fish, WVDEP will then be able to increase the fish tissue criterion.

CONCLUSION

Because the harm associated with the State's failure to maintain and administer its NPDES program is severe, irreversible and ongoing, we ask EPA to respond to and take action based on this petition as soon as possible.

Respectfully submitted,



JOSEPH M. LOVETT
Executive Director
Appalachian Center for the
Economy and the Environment
P.O. Box 507
Lewisburg, WV 24901
(304) 645-9006

DEREK O. TEANEY
Staff Attorney
Appalachian Center for the
Economy and the Environment
P.O. Box 507
Lewisburg, WV 24901
(304-793-9007

AARON ISHERWOOD
Senior Staff Attorney
Sierra Club Environmental Law Program
85 Second Street, 2d Floor
San Francisco, CA 94105-3441
(415) 977-5680

PETITION REFERENCE LIST

- (1) West Virginia Integrated Water Quality Monitoring and Assessment Report 2008, at http://www.wvdep.org/Docs/16495_WV_2008_IR_Supplements_Complete_Version_EPA_Approved.pdf.
- (2) RE: Westborough and Westborough Treatment Plant Board, 10 E.A.D. 297, 312 (EAB, Feb. 8, 2002), at <http://www.epa.gov/eab/disk11/westborough.pdf>.
- (3) Jacks Branch Coal Co. v. W. Va. Dept. of Env'tl. Prot., Appeal No. 07-11-EQB, slip op. (Oct. 23, 2008).
- (4) W. Va. Highlands Conservancy et al. v. McClung, Appeal Nos. 07-10-EQB, 07-12-EQB, slip op. (June 12, 2008).
- (5) PPG Indus., Inc. v. Director, Div. of Water & Waste Management, Civ. No. 06-AA-125, slip op. (Kanawha County Cir. Ct. June 22 2007).
- (6) WVDEP NPDES permit WV0042056 for the DLM Alton Special Reclamation site at http://www2.wvdep.org/WebApp/dep/search/Permits/HPU/HPU_Permit_details.cfm?permit_id=WV0042056&dep_office_id=HPU&responsible_party_name=WV%20DEPARTMENT%20OF%20ENVIRONMENTAL%20PROTECTION
- (7) Performance data at special reclamation sites in West Virginia from Feb 2004 to Feb 2007.
- (8) See http://www.esri.com/mapmuseum/mapbook_gallery/volume21/mining3.html
- (9) See Beech Creek on the 2008 WVDEP 303(d) list at <http://www.wvdep.org/item.cfm?ssid=11&ssid=720>
- (10) Byrant et al, Region 3 Mountaintop Removal Environmental Impact Statement at <http://www.epa.gov/Region3/mtntop/pdf/appendices/d/stream-chemistry/MTMVFCChemistryPart2.pdf>
- (11) Mingo Logan, Spruce No 1, NPDES permit, WV1017021
- (12) Discharge Monitoring Reports for Mingo Logan NPDES permit, WV1017021.
- (13) See Guyandotte River TMDL at http://www.epa.gov/reg3wapd/tmdl/wv_tmdl/Guyandotte/index.htm
- (14) Hobet, Berry Branch Mine, NPDES permit, WV1017225
- (15) See WV Economic and Geological Survey at <http://www.wvgs.wvnet.edu/www/datastat/te/SeHome.htm>
- (16) Catenary Coal Company Draft NPDES permit, WV1022563.
- (17) Coyote Coal Company, NPDES Permit, WV1022423
- (18) See Final Coal River TMDL at http://www.wvdep.org/Docs/12257_Final_Coal_TMDL_Report_1_15_07.pdf
- (19) See WVDEP Division of Mining and Reclamation Permit Handbook at http://www.wvdep.org/Docs/14134_sect32.pdf
- (20) PPG NPDES permit, WV0004359, Outfall 009 original issuance June 29, 2001
- (21) EQB Final Order PPG appeal 01-15-EQB of June 29, 2001 permit, WV0004359 at <http://www.wveqb.org/finalorders/01%2D15%2Deqb.pdf>
- (22) Aluminum implementation policy February 27, 2006
- (23) WVDEP 2002 303(d) list at <http://www.wvdep.org/item.cfm?ssid=11&ssid=720>
- (24) Hobet NPDES Permit No. WV0099392 (Nov. 12, 2003)
- (25) Hobet NPDES Permit No. WV1021028
- (26) Notice of intent to sue Hobet Mining 2006

- (27) EPA Massey press release at <http://yosemite.epa.gov/opa/admpress.nsf/b1ab9f485b098972852562e7004dc686/6944ea38b888dd03852573d3005074ba!OpenDocument>
- (28) Letter from M. Ann Bradley to WVDEP, June 20, 2007
- (29) Letter from Mike Zeto, WVDEP, to M. Ann Bradley, Counsel to Powellton Coal Company, LLC, August 16, 2007.
- (30) Powellton Consent Order No. M-08-021, August 29, 2008.
- (31) Fola Consent Order No. M-08-019, August 29, 2008.
- (32) Various permits compliance and enforcement history at ECHO http://www.epa-echo.gov/echo/compliance_report_water_pcs.html
- (33) Notice of intent to file a citizen suit against PPG by WVRC and Oceana March 16, 2009
- (34) Gazette article on PPG case at <http://wvgazette.com/News/20090520000>
- (35) WVDEP MS4 general permit NOTE: the permit has been extended until June 30, 2009
- (36) Memo from C.W. Cornett to Mayor Felinton July 26, 2007
- (37) Modification of Westover's storm water management program submitted July 17, 2007.
- (38) Memorandum of Agreement between West Virginia and USEPA regarding the Administration and Enforcement of the National Pollution Discharge Elimination System May 10, 1982
- (39) Hobet, Chestnut Oak Surface Mine, NPDES No. WV1019759
- (40) Consol of Kentucky, Buffalo Mountain Mine, draft NPDES No. WV1029690 Parts 1 & 2
- (41) WV alkaline mine drainage general permit WVG049991 at http://www.wvdep.org/Docs/12935_General%20Permit-Alkaline%20Mine%20Drainage.pdf
- (42) WV alkaline mine drainage general permit WVG049991 fact sheet at <http://www.wvdep.org/item.cfm?ssid=9&ssid=952>
- (43) Coal River TMDL Technical Report 2007.
- (44) Hobet, Chestnut Oak NPDES permit No. WV1019759 pollution treatment plan
- (45) Pond et al. (2008) Downstream effects of mountaintop coal mining, J. N. Am. Benthic. Soc. 27: 717-37.
- (46) WV Fish Consumption Advisory at http://www.wvdep.org/Docs/17158_Fish_Consumption_Report_2008.pdf
- (47) WV Fish Consumption Survey http://www.wvdep.org/Docs/17152_Mercury_Fish_Consumption_Survey.pdf
- (48) Loadout NPDES permit No. WV1010824
- (49) See Loadout SMCRA permit, S504090, details at http://www2.wvdep.org/WebApp/dep/search/Permits/OMR/Permit_details.cfm?permit_id=S504090&dep_office_id=OMR&responsible_party_name=LOADOUT%2C%20LLC
- (50) Typical selenium material handling plan example Hobet SMCRA No. S500203/WV1020889
- (51) From FOIA request, WVDEP list of selenium outfalls
- (52) Violations from DMRs from Hobet S500203/WV1020889 and S500404/WV1021028
- (53) Hobet, Chestnut Oak Mine, SMCRA permit No. S503308, Toxic Material Handling Plan
- (54) See Charleston Gazette hearing coverage at <http://wvgazette.com/News/200906090720?page=1&build=cache>
- (55) Section J-6 of mining permit for Coyote Coal S302607/WV1022423

- (56) Email from the WVDEP to DMR mailing list December 4, 2003 RE: permitting in high selenium areas
- (57) Memorandum from Ken Politan (NPDES Program Director at WVDEP for mining related NPDES permits) to Randy Huffman (Director of the Division of Mining and Reclamation). January 4, 2007 RE: selenium issues
- (58) Draft Transcript of OVEC v. Apogee, Civil Action No. 3:07-0413 Brad Culkin Testimony
- (59) OVEC v Apogee, Civil Action No. 3:07-0413, Culkin Declaration
- (60) Notice of intent to file a citizens suit, West Virginia Highlands Conservancy to EPA, April 17, 2007