

5/6 332 09 DAT



RECEIVED

500 LEE STREET EAST • SUITE 1600 • P.O. BOX 553 • CHARLESTON, WEST VIRGINIA 25322 • TELEPHONE: 304-340-1000 • TELECOPIER: 304-340-1130
www.jacksonkelly.com

2013 MAY -6 PM 3:01

sharvey@jacksonkelly.com

304/340-1006

May 1, 2013

OFFICE OF THE EXECUTIVE SECRETARIAT

AK-13-000-5146

VIA CERTIFIED MAIL

Bob Perciasepe
Acting Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, D.C. 20460

Re: 60-Day Notice of Intent to Institute Civil Action Under Clean Water Act Section 505(a)(2) for Administrator's Failure to Address Perform a Non-Discretionary Duty Under Section 402 of the Act

Dear Mr. Perciasepe:

You are hereby notified pursuant to § 505(b)(2) of the Clean Water Act ("CWA"), 33 U.S.C. § 1365(b)(2), that the West Virginia Coal Association ("WVCA") and/or some of its members intend to institute a civil action against you, as Administrator of the U.S. Environmental Protection Agency ("EPA"), pursuant to § 505(a)(2) of the CWA, 33 U.S.C. § 1365(a)(2), for failure to perform a non-discretionary duty under § 402 of the CWA, 33 U.S.C. § 1342.

Specifically, the EPA has failed to take appropriate action with respect to legislation passed in West Virginia which clarifies that West Virginia's NPDES program is to be interpreted consistently with the federal NPDES program. EPA has a non-discretionary duty to either determine that this legislation does not constitute a program revision requiring EPA's approval or, alternatively, to approve the legislation as a proper program revision.

EPA has failed to take the action required by the CWA; indeed, as explained below, it appears clear that EPA Region 3 has deliberately abused the program approval process in an effort to influence the outcome of ongoing litigation involving other parties. In this regard, this letter contains a request that the EPA preserve all records regarding its review of the program provisions discussed below.

West Virginia Senate Bill 615

West Virginia has NPDES regulations for both coal facilities (47 WVCSR § 30) and non-coal facilities (47 WVCSR § 10). Both sets of rules are nearly identical and have long contained a "permit shield" provision providing that compliance with a permit constitutes compliance with

the CWA just as is provided in § 402(k) of the CWA (33 U.S.C. § 1342(k)). *See* 47 WVCSR § 30-3.4.a (coal) and 47 WVCSR § 10-3.4.a (non-coal).¹

Inexplicably, however, the coal regulations have historically contained a separate provision that the non-coal regulations do not contain. Specifically, the coal regulations contain a provision that requires coal facilities to meet applicable water quality standards:

The discharge or discharges covered by a WV/NPDES permit are to be of such quality so as not to cause violation of applicable water quality standards promulgated by 47CSR2. Further, any activities covered under a WV/NPDES permit shall not lead to pollution of the groundwater of the State as a result of the disposal or discharge of such wastes covered herein.

47 WVCSR § 30-5.1.f.

The non-coal regulations in West Virginia contain no such provision. Similarly, EPA regulations contain no such a provision. EPA regulations at 40 C.F.R. § 122.41 provide the “standard conditions” that must “apply to all NPDES permits” issued by EPA or by states with permitting authority. 40 C.F.R. § 122.41. Nowhere do these regulations make compliance with water quality standards a standard condition in NPDES permits. *See id.*

The West Virginia requirement that coal facilities meet water quality standards has the potential to deprive those facilities of the benefits of the permit shield provision found in § 402(k) of the CWA. 33 U.S.C. § 1342(k). For example, the citizens suit provision of the CWA authorizes actions against NPDES permit holders for violations of “effluent standards or limitations.” 33 U.S.C. § 1365. Water quality standards do not constitute “effluent standards or limitations.” However, some have argued that 47 WVCSR § 30.5.1.f makes compliance with water quality standards an enforceable condition of all coal-related NPDES permits. Such a result is contrary to Congress’ express desire that permittees be protected when meeting their effluent limits.

To remedy this, the West Virginia Legislature passed Senate Bill 615 (“SB 615”) in 2012. SB 615 clarifies that “compliance with effluent limits” shields a coal permittee, “notwithstanding any rule or condition to the contrary.” See Exhibit 1. As the WVDEP has explained to EPA:

The issue Senate Bill 615 was drafted to address is an issue with West Virginia’s Mining NPDES Rule (47 C.S.R. 30), which

¹ 47 WVCSR § 30-3.4.a, which is nearly identical to 47 WVCSR § 10-3.4.a, states : “Except for any toxic effluent standards and prohibitions imposed under CWA Section 307, compliance with a permit during its term constitutes compliance, for purposes of enforcement with CWA Sections 301, 302, 306, 307, 318, 403, and 405 and Article 11. However, a permit may be modified, reissued or revoked during its term for cause as set forth in Section 8 of this rule.”

provided the “permit as a shield” protection in one section, but seemingly took it away in another. That bill allowed DEP’s Division of Mining & Reclamation to propose an amendment to 47 C.S.R. 30 to conform the Rule to the West Virginia Water Pollution Control Act and, thereby, to the federal Clean Water Act.

See Exhibit 2 (August 9, 2012 Letter from WVDEP counsel Kristin Boggs to EPA).

In other words, SB 615 makes it clear that the provision in 47 WVCSR § 30-5.1.f requiring compliance with water quality standards does not “take away” from coal permittees the protection of the permit shield found in 47 WVCSR § 30-3.4.a. To reinforce this point, WVDEP modified 47 WVCSR § 30-5.1.f to expressly incorporate the permit shield provision. The rule now reads as follows:

The discharge or discharges covered by a WV/NPDES permit are to be of such quality so as not to cause violation of applicable water quality standards promulgated by 47 C.S.R. 2. Further, any activities covered under a WV/NPDES permit shall not lead to pollution of the groundwater of the State as a result of disposal or discharge of such wastes covered herein. However, as provided by subdivision 3.4.a. of this rule, except for any toxic effluent standards and prohibitions imposed under CWA Section 307 for toxic pollutants injurious to human health, compliance with a permit during its term constitutes compliance for purposes of enforcement with CWA Sections 301, 302, 306, 307, 318, 403, and 405 and Article 11.

See Exhibit 3.

EPA Has Violated its Non-Discretionary Duty

EPA has a duty to approve State programs and revisions to those programs. *See* 33 U.S.C. § 1342 and 40 CFR § 123.62. Notably, though, not every change to State law constitutes a “program revision.” *See Valstad v. Cipriano*, 828 N.E.2d 854, 873-75 (Ill. App. 2005). For example, “if an approved State program has a greater scope of coverage than required by Federal law the additional coverage is not part of the Federally approved program” and does not require EPA approval. 40 C.F.R. § 123.1(i)(2). Likewise, “nothing . . . precludes a State” from “[a]dopting or enforcing requirements which are more stringent or more extensive than those required” by EPA. 40 C.F.R. § 123.1(i)(1) (emphasis added).

Accordingly, EPA has a non-discretionary duty to determine whether a change to State law is a program revision and, if so, to approve or disapprove the revision in a timely fashion. 40 C.F.R. 123.62 (“The Administrator will approve or disapprove program revisions based on the requirements of this part”)(emphasis added). EPA may not avoid this duty by simply forestalling a determination on whether or not a change in State law constitutes a program revision.

Here, EPA has violated its nondiscretionary duties in the ways described below.

1. **SB 615 Does Not Constitute a Program Revision**

SB 615 does not add or remove any State program requirement. Instead, it merely *clarifies* that a permittee is shielded from suit if meeting its effluent limits. The preamble to SB 615 provides that it is:

AN ACT to amend and reenact § 22-11-6 of the Code of West Virginia, 1931, as amended, relating to making West Virginia's Water Pollution Control Act consistent with the federal Water Pollution Control Act, also known as the Clean Water Act, by **clarifying** that compliance with the effluent limits contained in a National Pollution Discharge Elimination System permit is deemed compliant with West Virginia's Water Pollution Control Act.

See Exhibit 1.

Likewise, WVDEP informed EPA that SB 615 is not a program revision in a letter dated August 8, 2012. In that letter, WVDEP explained that SB 615 simply “mirrors federal law and is meant to clarify that West Virginia NPDES permits are intended to shield regulated entities from citizen suits to the same extent as NPDES permits issued by the EPA.” See Exhibit 2 (August 9, 2012 Letter from WVDEP counsel Kristin Boggs to EPA). Plainly, EPA has no authority to approve or disapprove mere clarifications to a State program. See 40 C.F.R. § 123.62.

Moreover, the only State provision impacted by SB 615 is a provision that is not even part of the Federally approved program. As WVDEP has explained, SB 615 was passed to clarify “an issue with West Virginia's Mining NPDES Rule (47 C.S.R. 30), which provided the “permit as a shield” protection in one section, but seemingly took it away in another.” See Exhibit 2 (August 9, 2012 Letter from WVDEP counsel Kristin Boggs to EPA). As explained above, the provision that seemingly “took away” the permit shield is 47 WVCSR § 30-5.1.f., which requires coal facilities to meet applicable water quality standards. As further explained above, EPA regulations contain no comparable requirement. 40 C.F.R. § 122.41. As such, 47 WVCSR § 30-5.1.f. is outside the scope of Federal law and does not require EPA approval. See 40 C.F.R. § 123.1(i)(2) (“if an approved State program has a greater scope of coverage than required by Federal law the additional coverage is not part of the Federally approved program”); see also 40 C.F.R. § 123.1(i)(1) (“nothing . . . precludes a State” from “[a]dopting or enforcing requirements which are more stringent or more extensive than those required” by EPA).

2. **If SB 615 is a Program Revision, EPA Must Approve It.**

Even if SB 615 were a program revision, it is one that EPA must approve. As explained above, SB 615 does no more than make West Virginia's NPDES program equivalent to EPA's NPDES program. EPA has no basis to disapprove this change. EPA may not mandate that a

State have a program more stringent than EPA's program. *See* 33 U.S.C. § 1342 and 40 CFR § 123.1(i).

Moreover, to the extent approval is necessary, it must be timely. While EPA's regulations do not provide a deadline for approving program revisions, Congress has determined that review of an initial program submission should not exceed 90 days. 33 U.S.C. § 1342(c)(1). Based on this, any delay in approving a revision beyond 90 days is unreasonable. *Id.*

In this case, the delay has been particularly egregious. EPA first raised questions about SB 615 in a letter to WVDEP dated July 3, 2012, roughly four months after the bill was passed. *See* Exhibit 4 (July 3, 2012 letter to WVDEP Director Scott Mandirola from EPA Region III Water Protection Division Director John Capacasa). Since that time, EPA has not only failed to finally address the issue; it has abused the program approval process in a manner which, when viewed from outside, suggests a desire to interfere with and influence litigation involving other parties.

The first instance of this occurred in *West Virginia Highlands Conservancy v. Coresco*, Civil Action No. 3:12-25 (N.D. W.Va.). There, the Defendants relied on SB 615 in moving to dismiss a CWA citizen suit based on 47 WVCSR § 30-5.1.f. In response, the citizens' groups raised the argument that SB 615 constitutes a program revision that requires EPA approval. In a remarkable stroke of timing, EPA subsequently wrote a July 3, 2012 letter to WVDEP raising questions for the first time about the meaning of SB 615. This letter arrived only days prior to oral argument on Defendant's motion to dismiss and Plaintiffs, who were somehow made aware of the letter, relied upon it to avoid Defendant's motion.

The second instance occurred in another CWA citizen suit, *Ohio Valley Env't Coalition v. Marfork Coal Co.*, Civil Action No. 5:12-cv-1464 (S.D. W.Va.). After EPA's initial letter of July 3, 2012, WVDEP quickly responded with a letter explaining that SB 615 does not constitute a program revision. *See* Exhibit 2 (August 9, 2012 Letter from WVDEP counsel Kristin Boggs to EPA Region III Water Protection Division Director Jon M. Capacasa). For over eight months, EPA did not respond to WVDEP's letter, even though WVDEP expressly advised that EPA should "not hesitate to contact" WVDEP with "any further questions or concerns." *Id.* at 2. In the interim, Marfork filed a motion for summary judgment, arguing that EPA's silence showed that it had withdrawn any concern that SB 615 constituted a program amendment. However, *on the day prior to oral argument* on Marfork's motion, EPA responded to WVDEP, raising new questions about SB 615. *See* Exhibit 5 (April 12, 2013 letter to WVDEP Counsel K. Boggs from EPA Regional Counsel). EPA simultaneously provided a copy of its letter to counsel for the Plaintiffs in *Ohio Valley Env't Coalition v. Marfork*, who relied upon the letter at oral argument to oppose Marfork's motion for summary judgment on the grounds that SB 615 constitutes an illegal program amendment.²

² The letter was sent to Plaintiffs by EPA Region III counsel with the explanation that it was relevant to Plaintiffs' own Notice of Intent to Sue regarding SB 615. Discovery may or may not confirm that this was the actual reason for sending the letter to Plaintiffs. In any event, it is notable that EPA appears to have never provided a copy of Plaintiffs' NOI to the WVDEP or otherwise consulted with the WVDEP on the issue.

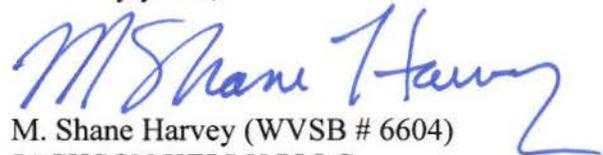
Mr. Bob Perciasepe
May 1, 2013
Page 6

EPA's conduct is inappropriate. Congress intended quick action on program approval and revision issues. 33 U.S.C. § 1342(c)(1). It appears that EPA has instead forestalled making any decision on SB 615 and used the program approval process to undercut defenses offered by permittees to CWA citizens suits.

Conclusion

As described above, the Administrator has failed to perform duties under the CWA that are not discretionary. The Administrator must either find that SB 615 is not a program revision requiring EPA approval or, alternatively, immediately approve SB 615 as a program revision that is consistent with the CWA. It may not forestall a decision in an effort to aid parties to private litigation. If you fail to perform your non-discretionary duties within sixty (60) days of the postmark date of this letter, the West Virginia Coal Association ("WVCA") and/or some of its members intend to institute a civil action against you to compel you to perform your duties. In the interim, we request that you order EPA personnel to preserve any documents relating to the decisions to issue the EPA letters dated July 3, 2012 and April 12, 2013 as well as any documents demonstrating how or why these letters were provided to the Plaintiffs in *West Virginia Highlands Conservancy v. Coresco et al.*, Civil Action No. 3:12-25 (N.D. W.Va.) or *Ohio Valley Env'tl Coalition v. Marfork Coal Co.*, Civil Action No. 5:12-cv-1464 (S.D. W.Va.).

Sincerely yours,



M. Shane Harvey (WVSB # 6604)
JACKSON KELLY PLLC
500 Lee Street East, Suite 1600
Charleston, WV 25301
(304) 340-1000

*On behalf of the
West Virginia Coal Association*

Enclosures

cc: Secretary Randy Huffman (*Via Certified Mail*)
West Virginia Department of Environmental Protection
601 57th Street
Charleston, WV 25304

The Honorable Eric Holder (*Via Certified Mail*)
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530-0001

ENROLLED
COMMITTEE SUBSTITUTE
FOR
Senate Bill No. 615

(SENATORS KIRKENDOLL, HALL, WELLS AND STOLLINGS, *original sponsors*)

[Passed March 10, 2012; in effect from passage.]

AN ACT to amend and reenact §22-11-6 of the Code of West Virginia, 1931, as amended, relating to making West Virginia's Water Pollution Control Act consistent with the federal Water Pollution Control Act, also known as the Clean Water Act, by clarifying that compliance with the effluent limits contained in a National Pollution Discharge Elimination System permit is deemed compliant with West Virginia's Water Pollution Control Act.

Be it enacted by the Legislature of West Virginia:

That §22-11-6 of the Code of West Virginia, 1931, as amended, be amended and reenacted to read as follows:

ARTICLE 11. WATER POLLUTION CONTROL ACT.

§22-11-6. Requirement to comply with standards of water quality and effluent limitations.

1 All persons affected by rules establishing water quality
2 standards and effluent limitations shall promptly comply
3 therewith: *Provided, That:*



4 (1) Where necessary and proper, the secretary may
5 specify a reasonable time for persons not complying with
6 such standards and limitations to comply therewith, and
7 upon the expiration of any such period of time, the secretary
8 shall revoke or modify any permit previously issued which
9 authorized the discharge of treated or untreated sewage,
10 industrial wastes or other wastes into the waters of this state
11 which result in reduction of the quality of such waters below
12 the standards and limitations established therefor by rules of
13 the board or secretary;

14 (2) Notwithstanding any rule or permit condition to the
15 contrary, and except for any standard imposed under section
16 307 of the federal Water Pollution Control Act for a toxic
17 pollutant injurious to human health, compliance with a
18 permit issued pursuant to this article shall be deemed
19 compliance for purposes of both this article and sections 301,
20 302, 306, 307 and 403 of the federal Water Pollution Control
21 Act. Nothing in this section, however, prevents the secretary
22 from modifying, reissuing or revoking a permit during its
23 term. The provisions of this section addressing compliance
24 with a permit are intended to apply to all existing and future
25 discharges and permits without the need for permit modifi-
26 cations. However, should any such modification be necessary
27 under the terms of this article, then the secretary shall
28 immediately commence the process to effect such modifica-
29 tions; and

30 (3) The Legislature finds that there are concerns within
31 West Virginia regarding the applicability of the research
32 underlying the federal selenium criteria to a state such as
33 West Virginia which has high precipitation rates and free-
34 flowing streams and that the alleged environmental impacts
35 that were documented in applicable federal research have
36 not been observed in West Virginia and, further, that
37 considerable research is required to determine if selenium is
38 having an impact on West Virginia streams, to validate or
39 determine the proper testing methods for selenium and to
40 better understand the chemical reactions related to selenium
41 mobilization in water. For existing NPDES permits, the

42 department may extend the time period for achieving water
43 quality-based effluent limits for selenium discharges into
44 waters supporting aquatic life uses to July 1, 2012, upon
45 compliance with all federally required public notice require-
46 ments for such modifications, upon a finding that the
47 permittee cannot comply with its existing compliance
48 schedule and that an extension is not in violation of any state
49 or federal laws, rules or regulations. The West Virginia
50 Department of Environmental Protection is hereby directed
51 to undertake a comprehensive study relating to selenium and
52 prepare a report detailing such findings and submitting the
53 report to the Joint Committee on Government and Finance
54 no later than January 1, 2010. In conducting such study, the
55 West Virginia Department of Environmental Protection shall
56 consult with, among others, West Virginia University and the
57 West Virginia Water Research Institute.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

.....
Chairman Senate Committee

.....
Chairman House Committee

Originated in the Senate.

In effect from passage.

.....
Clerk of the Senate

.....
Clerk of the House of Delegates

.....
President of the Senate

.....
Speaker of the House of Delegates

The within this the
Day of, 2012.

.....
Governor



west virginia department of environmental protection

Executive Office
601 57th Street, Southeast
Charleston, West Virginia 25304
Phone: (304) 926-0440
Fax: (304) 926-0446

Earl Ray Tomblin, Governor
Randy C. Huffman, Cabinet Secretary
www.dep.wv.gov

August 9, 2012

Jon M. Capacasa, Director
Water Protection Division
USEPA Region III
1650 Arch Street
Philadelphia, PA 19103-2029

Re: Senate Bill 615

Dear Mr. Capacasa:

In response to your July 3, 2012 letter to Scott Mandirola regarding the above-referenced Senate bill, which was passed by the West Virginia Legislature on March 10, 2012 and signed into law by Governor Tomblin on April 2, 2012, please be advised that West Virginia does not consider this "new" law a change to West Virginia's National Pollutant Discharge Elimination System (NPDES) program. In fact, the title of the bill states that its purpose is "to mak[e] West Virginia's Water Pollution Control Act consistent with the federal Water Pollution Control Act, also known as the Clean Water Act, by clarifying that compliance with the effluent limits contained in a National Pollution Discharge Elimination System permit is deemed compliant with West Virginia's Water Pollution Control Act." *Please see*, Enrolled Committee Substitute for Senate Bill 615, which is enclosed herewith. When invited by various Legislative committees to speak to the bill, DEP consistently stated that the bill mirrors federal law and is meant to clarify that West Virginia NPDES permits are intended to shield regulated entities from citizen suits to the same extent as NPDES permits issued by EPA. To respond specifically to the question posed in your July 3 letter, the scope of the shield provided by Senate Bill 615 is intended to be co-extensive with the one provided by 33 U.S.C. § 1342(k).¹ Therefore, the provisions of Senate Bill 615 are not less stringent than the federal Act.

The issue Senate Bill 615 was drafted to address is an issue with West Virginia's Mining NPDES Rule (47 C.S.R. 30), which provided the "permit as a shield" protection in one section, but seemingly took it away in another. This bill allowed DEP's Division of Mining & Reclamation to propose an amendment to 47 C.S.R. 30 to conform the Rule to the West Virginia Water Pollution Control Act and, thereby, to the federal Clean Water Act. That proposed amendment was put out to public comment, and a public hearing on the same was held on

¹ I do not see Senate Bill 615 as providing a discharge authorization, simply a shield.
Promoting a healthy environment.



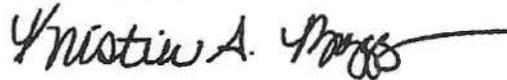
Jon M. Capacasa, Director
August 9, 2012
Page 2 of 2

August 7, 2012 at 6:00 p.m. I have enclosed a copy of the proposed amendment for your review and comment and apologize on behalf of the Division of Mining & Reclamation if they did not provide this to you earlier.

Finally, to the extent you have requested a certification from the West Virginia Attorney General, please be advised that, as General Counsel of the West Virginia Department of Environmental Protection, I (as opposed to the West Virginia Attorney General) am the chief legal officer for this agency and am, therefore, authorized to provide the certification required by 40 C.F.R. § 131.6(e). *Please see*, W. Va. Code § 22-1-6(d)(7).

If you have any further questions or concerns, or if you wish to discuss this matter in any particular, please do not hesitate to contact me.

Very truly yours,



Kristin A. Boggs
General Counsel

enclosures

w/enclosures

cc: Evelyn MacKnight, Chief, EPA NPDES Permits Branch

47CSR30

**TITLE 47
LEGISLATIVE RULE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
WATER RESOURCES**

**SERIES 30
WV/NPDES RULE FOR COAL MINING FACILITIES**

§47-30-1. General.

1.1. Scope. -- This rule establishes requirements implementing the powers, duties, and responsibilities of W. Va. Code § 22-11-1 with respect to all coal mines and preparation plants and all refuse and waste therefrom in the State.

1.2. Authority. -- W. Va. Code § ~~22-11-1~~, et seq. 22-11-4(a)(16)

1.3. Filing Date. -- ~~April 21, 2010~~.

1.4. Effective Date. -- ~~July 1, 2010~~.

1.5. Applicability. -- This rule applies to all facilities covered under the "West Virginia Surface Coal Mining and Reclamation Act."

1.6. Incorporation by Reference. -- Whenever federal statutes or regulations are incorporated into this rule, the reference is to the statute or regulation in effect on July 1, 2006.

1.7. Promulgation History. -- This rule originally became effective on the 30th day of May, 1985. Amendments to this rule were made effective on April 24, 1986, May 29, 1987, May 15, 1997, June 1, 2004, and July 1, 2009.

1.8. Conflict of Interest. -- The ~~Director~~ Secretary or his or her authorized representative who has or shares authority to approve all or portions of permits, either in the first instance or as modified and reissued, shall not be a person who receives or has during the previous two (2) years received, a significant portion of income directly or indirectly from permit holders or applicants for a permit.

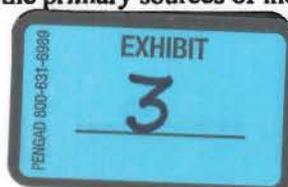
1.8.a. For the purposes of this paragraph:

1.8.a.1. "Significant portion of income" means five thousand dollars (\$5,000) or ten percent (10%) or more of gross personal income for a calendar year, whichever is less, except that it means fifty percent (50%) or more of gross personal income for a calendar year if the recipient is over sixty (60) years of age and is receiving that portion under retirement, pension or similar arrangement.

1.8.a.2. "Permit holders or applicants for a permit" does not include any department or agency of the State.

1.8.a.3. "Income" includes retirement benefits, consultant fees, and stock dividends.

1.8.a.4. Income is not received "directly or indirectly from permit holders or applicants for a permit" when it is derived from mutual fund payments or from other diversified investments for which the recipient does not know the identity of the primary sources of income.



§47-30-5. Conditions Applicable To All Permits.

The following conditions apply to all WV/NPDES permits. All conditions shall be incorporated into the WV/NPDES permits either expressly or by reference. If incorporated by reference, a specific citation to this rule must be given in the permit.

5.1. Duty to Comply; Penalties.

5.1.a. The permittee must comply with all conditions of a WV/NPDES permit. Permit noncompliance constitutes a violation of the CWA and Article 11 and is grounds for enforcement action, WV/NPDES permit modification, suspension or revocation, or for denial of a WV/NPDES permit reissuance application.

5.1.b. The permittee shall comply with all effluent standards or prohibitions established under CWA Section 307(a) for toxic pollutants within the time provided in the regulations that establish these standards or prohibitions, even if the permit has not yet been modified to incorporate the requirement.

5.1.c. The Clean Water Act and Article 11 provide that any person who violates a permit condition implementing CWA Sections 301, 302, 306, 307, 308, 318 or 405 or any provision of a WV/NPDES permit or any rule or regulation promulgated under Article 11 is subject to a civil penalty not to exceed twenty-five thousand dollars (\$25,000) per day of such violation. Any person who willfully or negligently violates permit conditions implementing CWA Sections 301, 302, 306, 307 or 308 or any provision of Article 11 or a WV/NPDES permit is subject to a fine of not less than two thousand five hundred dollars (\$2,500) per day of violation nor more than twenty-five thousand dollars (\$25,000) per day of violation or by imprisonment for not more than one (1) year or both.

5.1.d. Any person who falsifies, tampers with or knowingly renders inaccurate any monitoring device or method required to be maintained under a WV/NPDES permit shall, upon conviction, be punished by a fine of not less than one thousand dollars (\$1,000) nor more than ten thousand dollars (\$10,000) per violation or by imprisonment for not more than six (6) months per violation or both.

5.1.e. The Clean Water Act and Article 11 provide that any person who knowingly makes any false statement, representation or certification in any record or other document submitted or required to be maintained under this permit, including monitoring reports or reports of compliance or noncompliance, shall, upon conviction, be punished by a fine of not less than one thousand dollars (\$1,000) nor more than ten thousand dollars (\$10,000) per violation or by imprisonment for not more than six (6) months per violation or by both.

5.1.f. The discharge or discharges covered by a WV/NPDES permit are to be of such quality so as not to cause violation of applicable water quality standards promulgated by 47 C.S.R. 2. Further, any activities covered under a WV/NPDES permit shall not lead to pollution of the groundwater of the State as a result of the disposal or discharge of such wastes covered herein. However, as provided by section subdivision 3.4.a. of this rule, except for any toxic effluent standards and prohibitions imposed under CWA Section 307 for toxic pollutants injurious to human health, compliance with a permit during its term constitutes compliance for purposes of enforcement with CWA Sections 301, 302, 306, 307, 318, 403, and 405 and Article 11.

5.1.g. Nothing in subsection 5.1. of this rule shall be construed to limit or prohibit any other authority the Secretary or Director may have under Article 3 or Article 11 of Chapter 22 the West Virginia Code or to relieve the permittee from any responsibilities, liabilities or penalties for not complying with 47 C.S.R. 2 and 47 C.S.R. 11.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

JUL 03 2012

Mr. Scott G. Mandirola, Director
Division of Water and Waste Management
West Virginia Department of Environmental Protection
601 57th Street SE
Charleston, West Virginia 25304

Re: Senate Bill 615

Dear *Scott* Mr. Mandirola:

I am writing regarding recently enacted West Virginia Senate Bill 615 (SB615), which amends and re-enacts Section 22-11-6 of the Code of West Virginia to add the following language as subsection (2):

(2) Notwithstanding any rule or permit condition to the contrary, and except for any standard imposed under section 307 of the federal Water Pollution Control Act for a toxic pollutant injurious to human health, compliance with a permit issued pursuant to this article shall be deemed compliance for purposes of both this article and sections 301, 302, 306, 307 and 403 of the federal Water Pollution Control Act. Nothing in this section, however, prevents the secretary from modifying, reissuing or revoking a permit during its term. The provisions of this section addressing compliance with a permit are intended to apply to all existing and future discharges and permits without the need for permit modifications. However, should any such modification be necessary under the terms of this article, then the secretary shall immediately commence the process to effect such modifications;

The language of SB615 appears to overlap, albeit not in its entirety, with Section 402(k) of the Clean Water Act (33 U.S.C. § 1342(k)), which states in relevant part:

Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319, and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health.

In addition, the language of SB615 also appears to overlap with West Virginia Code of State Rules (CSR) § 47-10-3.4.a, which states in relevant part:



Except for any toxic effluent standards and prohibitions imposed by §307 of the CWA, compliance with a permit during its term constitutes compliance for purposes of enforcement under §§301, 302, 306, 307, 318, 403 and 405 of the CWA. In addition, one who is in compliance with the terms and conditions of a permit shall not be subject to criminal prosecution under W. Va. Code §22-11-19 for pollution recognized and authorized by such permit. However, a permit may be revoked, suspended, revoked and reissued or modified during its term for cause as set forth in section 9 of this rule.

SB615 may constitute a revision to West Virginia's authorized National Pollutant Discharge Elimination System (NPDES) program. See 40 C.F.R. § 123.62. In order to assist the U.S. Environmental Protection Agency Region III (EPA or Agency) in determining whether SB615 revises the West Virginia NPDES program, the EPA requests, consistent with 40 C.F.R. § 123.62(d), that the West Virginia Department of Environmental Protection (WVDEP) provide to the Agency an Attorney General's statement setting forth how SB615 will be interpreted and implemented, and a statement from WVDEP's enforcement program as to its interpretation of SB615.

With respect to the West Virginia Attorney General's Statement, EPA specifically requests that you provide the West Virginia Attorney General's opinion as to whether the scope of the discharge authorization and shield provided by SB615 is intended to be co-extensive with or broader than that provided by 33 U.S.C. § 1342(k). As you know, consistent with 33 U.S.C. § 1370, authorized State NPDES programs may not be less stringent than the Clean Water Act. For your information, I am enclosing a copy of the EPA's 1995 Revised Policy Statement on Scope of Discharge Authorization and Shield Associated with NPDES Permits. In addition, the EPA requests that the West Virginia Attorney General's statement address in particular the phrase "shall be deemed compliance for purposes of both this article and sections 301, 302, 306, 307 and 403 of the federal Water Pollution Control Act," in recognition that state legislation may not alter the scope of federal law. The statement from the West Virginia Attorney General also should address the meaning and implementation of the phrase "Notwithstanding any rule or permit condition to the contrary," in light of the remainder of SB615, specifically with reference to the phrase "compliance with a permit."

Thank you for your assistance. If you have any questions or would like to discuss this matter further, please feel free to contact me at (215) 814-5422 or Evelyn MacKnight, Chief, NPDES Permits Branch, at (215) 814-5717.

Sincerely,



Jon M. Capacasa, Director
Water Protection Division

Enclosure



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

April 12, 2013

By Electronic Mail & First Class Mail

Derek O. Teaney
J. Michael Becher
Joseph M. Lovett
Appalachian Mountain Advocates
P.O. Box 507
Lewisburg, WV 24901

RE: 60-Day Notice of Intent to File Citizen Suit(s) Under Clean Water Act
Section 505(a)(2) For EPA's Failure to Act on West Virginia's Legislative
Revisions to its NPDES Program

Dear Sirs:

The U.S. Environmental Protection Agency Region III (EPA) is in receipt of the above-referenced Notice of Intent dated February 1, 2013. EPA is aware that the 60 day period has expired. As a courtesy, enclosed please find a copy of the most recent correspondence related to the subject matter of the Notice of Intent.

Please feel free to contact me at (215) 814-2682 if you have any questions.

Sincerely,

A handwritten signature in black ink that reads "Stefania D. Shamet".

Stefania D. Shamet
Senior Assistant Regional Counsel

Enclosure





UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

By Facsimile and First Class Mail

April 12, 2013

Kristin A. Boggs
General Counsel
West Virginia Department of Environmental Protection
601 57th Street SE
Charleston, West Virginia 25304

Dear Ms. Boggs:

I am writing to follow up your earlier correspondence with Jon M. Capacasa, the U.S. Environmental Protection Agency, Region III's (EPA) Water Protection Division Director, regarding West Virginia Senate Bill 615 (SB615), enacted in 2012, which amends and re-enacts Section 22-11-6 of the Code of West Virginia. EPA is continuing its review to determine whether this legislation constitutes a revision of West Virginia's authorized National Pollutant Discharge Elimination System (NPDES) program.

In 2012, the West Virginia Legislature enacted and the Governor signed into law Senate Bill 615. Because it appeared that Senate Bill 615 might constitute a revision to West Virginia's authorized NPDES program, Mr. Capacasa sent a letter to Scott Mandirola of the West Virginia Department of Environmental Protection's (WVDEP) Division of Water and Waste Management requesting that WVDEP provide an Attorney General's statement setting forth how the legislation would be interpreted and implemented. Specifically, EPA requested a legal opinion on three issues: (1) whether the scope of the discharge authorization and shield provided by SB615 is intended to be co-extensive with or broader than that provided by 33 U.S.C. § 1342(k); (2) how WVDEP interprets the phrase "shall be deemed compliance for purposes of both this article and sections 301, 302, 306, 307 and 403 of the federal Water Pollution Control Act," recognizing that state legislation may not alter the scope of federal law; and (3) the meaning and implementation of the phrase "Notwithstanding any rule or permit condition to the contrary," in light of the remainder of SB615, specifically with reference to the phrase "compliance with a permit."

As WVDEP's chief legal officer, you provided a response on August 9, 2012. In your letter, you stated that WVDEP views SB615 as "mirror[ing] federal law" and that the scope of the shield provided by SB615 "is intended to be co-extensive with the one provided by 33 U.S.C. § 1342(k)." You also expressed a view that WVDEP does not consider SB615 as constituting a revision to West Virginia's authorized NPDES program.

While we appreciate the response provided, certain aspects of WVDEP's interpretation of SB 615 remain unclear. Accordingly, I am writing to confirm EPA's understanding as to how SB615 would be interpreted and implemented by WVDEP. Your letter invokes the title of the bill, which states that "compliance with the *effluent limits* contained in a National Pollution [sic] Discharge Elimination system permit is deemed compliant with West Virginia's Water Pollution Control Act." (italics added). The text of SB615, however, refers to "compliance with a permit." The terms "permit" and "effluent limitations" have different regulatory definitions. EPA defines the term "permit" as covering not only the effluent limitations contained within an NPDES permit, but all terms and conditions contained within the permit. *See* 40 C.F.R. §§ 122.2 ("Permit means an authorization . . . to implement the requirements of this part and parts 123 and 124."); 122.44 ("*In addition to the conditions established under §123.43(a)*, each NPDES permit shall include the following requirements when applicable" [including technology-based and water quality-based effluent limitations]) (italics added).

EPA interprets your August 9, 2012 letter as a statement that WVDEP would view the text of the statute as controlling and would interpret the phrase "compliance with a permit" in SB615 to refer to compliance with *all* permit terms and conditions without limitation. If EPA has misinterpreted your letter, please let me know at your earliest convenience so that EPA can take any differing interpretation into consideration.

Your August 9, 2012 letter also referred to potential conforming changes in West Virginia's Mining NPDES Rule (47 C.S.R. 30). EPA's regulations at 40 CFR Part 123 establish the requirements for NPDES State Programs. Section 123.62 establishes procedures for the revision of authorized NPDES State Programs. Pursuant to Section 123.62(a), a State may initiate a program revision and must keep EPA informed of any proposed modifications to its regulatory authority. Changes to West Virginia's approved NPDES program become effective for Clean Water Act purposes only after EPA approval. *See* 40 C.F.R. § 123.62(b)(4).

If you have any questions or would like to discuss this matter further, please feel free to contact me at (215) 814-2682.

Sincerely,



Stefania D. Shamet
Senior Assistant Regional Counsel