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February 1, 2013

By Certified Mail – Return Receipt Requested

AX-13-000-1644

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

RECEIVED
2013 FEB -6 AM 8:50
OFFICE OF THE
EXECUTIVE SECRETARIAT

The Honorable Shawn M. Garvin
Regional Administrator
U.S. Environmental Protection Agency Region III
1650 Arch Street
Philadelphia, PA 19103-2029

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 Ms. Jackson and Mr. Garvin:

The Sierra Club, West Virginia Highlands Conservancy, and Ohio Valley Environmental Coalition (collectively "the Groups") in accordance with Section 505 of the Clean Water Act (the "Act" or the "CWA"), 33 U.S.C. § 1365 and 40 C.F.R. Part 135, hereby notify you that you have failed to perform acts and duties pursuant to Section 402 of the Act, that are not discretionary. If you do not remedy this failure within the next sixty days, the Groups intend to file suit.

I. Background

To achieve its goal of the elimination of the discharge of pollutants into United States waters by 1985, 33 U.S.C. § 1251(a)(1), the Clean Water Act establishes a permitting system for pollutant discharges – the National Pollutant Discharge Elimination System ("NPDES"). See generally 33 U.S.C. § 1342. In an exercise of "cooperative

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federalism" the CWA allows states to administer the NPDES if they establish, under state law, similar authorities to those that the Act grants to the United States Environmental Protection Agency ("EPA"). 33 U.S.C. § 1342(b). The Administrator of EPA is responsible for approving state programs. Id.

On May 10, 1982, the Administrator approved West Virginia's state water pollution permitting program. 47 Fed. Reg. 22,363. The West Virginia Department of Environmental Protection administers West Virginia's NPDES program. As part of that program, WVDEP promulgated narrative water quality standards, including one that provides "no significant adverse impact to the chemical, physical, hydrologic, or biological component of aquatic ecosystems shall be allowed." 47 W.Va. C.S.R. § 2-3.2.i.

Another element of West Virginia's NPDES program is a mandate that each coal-mining related NPDES permit must contain a condition that:

> The discharge or discharges covered by a WV/NPDES permit are to be of such quality so as not to cause a violation of applicable water quality standards promulgated by 47CSR2.

47 W.Va. C.S.R. § 30-5.1.f. EPA has approved that both that provision and the applicable water quality standards pursuant to 40 C.F.R. Part 123.

Having once been delegated authority to administer the NPDES program, a state may revise its program. 40 C.F.R. § 123.62. EPA has interpreted Section 402(b) and (c) to apply not only to initial program submissions, but to revisions to approved programs as well. 40 C.F.R. § 123.62(b)(3). Thus, the state must submit a proposed revision to EPA. Id. § 123.62(b)(1). EPA must approve or disapprove program revisions based on the requirements of 40 C.F.R. Part 123 and the Act. 40 C.F.R. § 123.62(b)(3). ("The Administrator *will* approve or disapprove program revisions based on the requirements of this part [123] . . . and of the CWA." (Emphasis added). NPDES program revisions are not effective for Clean Water Act purposes until they are approved by EPA. 40 C.F.R. 123.62(b)(4). Although the applicable regulations do not provide a specific timeline in which EPA must approve or disapprove program revision, Congress has determined that review of an initial program submission should take no longer than 90 days. 33 U.S.C. 1342(c)(1). Based on this Congressional determination, any delay in approval of disapproval of a program revision beyond 90 days is unreasonable.

During the 2012 Regular Session, the West Virginia Legislature enacted a bill that would significantly change and weaken West Virginia's permitting program—SB 615. The title of that Bill states,

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 Discharge Elimination System permit is deemed compliant [*sic*] with West Virginia's Water Pollution Control Act.

As codified at W. Va. Code § 22-11-6(2), SB 615 amends the statute to provide,

> *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 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 modifications be necessary under the terms of this article, then the secretary shall immediately commence the process to effect such modifications. . .

W.Va. Code § 22-11-6(2). The provision largely parallels the permit shield of the federal act, as well as an existing permit shield in the West Virginia regulations, with two important exceptions: the introductory phrase, and the final three sentences. *Compare* W.Va. Code § 22-11-6(2) *with* 33 U.S.C. § 1342(k) *and* 47 W.Va. C.S.R § 30-3.4(a).

Recognizing the overlap between SB 615 and Section 402(k) of the Act, EPA Region III requested that WVDEP clarify "whether the scope of the discharge authorization and shield provided by SB 615 is intended to be co-extensive with or broader than that provided by 33 U.S.C. §1342(k). Ex. 1 at 2 (Letter from Jon Capacasa, Director, Water Protection Division, US EPA Region III, to Scott Mandirola, Director, Division of Water and Waste Management, WVDEP (July 3, 2012)). The motivation for EPA's inquiry was its concern that "SB615 may constitute a revision to West Virginia's authorized National Pollutant Elimination System (NPDES) program." Id.

WVDEP's response to EPA's letter claimed that SB 615 was both co-extensive with Section 402(k) and also that it allowed modifications to the State program. Ex. 2 (Letter from Kristin A. Boggs, General Counsel to WVDEP, to Jon Capacasa, Director, Water Protection Division, US EPA Region III (August 9, 2012). WVDEP expressly cited the title of SB 615 as a statement of the bill's purpose to clarify "that compliance with the effluent limits contained in a National Pollution Discharge Elimination System permit is deemed compliant [sic] with West Virginia's Water Pollution Control Act." Id.

(quoting SB 615; emphasis added).

SB 615 cannot both be co-extensive with the permit shield of Section 402(k) and deem compliance with effluent limits to be compliance with the Clean Water Act. It can only achieve one or the other. As explained in more detail below, "to enjoy 'permit shield' protections, the permit holder 'must comply with all conditions of [its] permit,' and '[a]ny permit noncompliance constitutes a violation of the [CWA] and is grounds for enforcement action." Foti v. City of Jamestown Bd. of Public Utils., No. 10-CV-575-RJA-HBS, 2011 WL 4915743 at *11 (W.D.N.Y. Aug. 15, 2011). WVDEP's August 9, 2012 letter to Region III indicates that WVDEP interprets SB 615 to deem compliance with effluent limits to be compliance with NPDES permits.[1] WVDEP is attempting to have it both ways so that it can implement substantial program revisions and impermissibly evade EPA approval.

II. EPA Has A Nondiscretionary Duty to Disapprove SB 615 Because WVDEP's Interpretation of SB 615 Would Revise the West Virginia NPDES Program

EPA has a duty under the CWA to prevent illicit program revisions such as the one WVDEP is attempting here. Pursuant to Section 402(b) and (c), as well as 40 C.F.R. § 123.62(b), the Administrator has a mandatory duty to "approve or disapprove program revisions based on the requirements of this part. . . and of the CWA." 40 C.F.R. § 123.62(b)(3). Congress has mandated that EPA review of initial program submissions shall not exceed 90 days. 33 U.S.C. § 1342(b). Review of program revisions, therefore, must be completed in the same amount of time.

As explained below, WVDEP's interpretation of SB 615 effectively revises at least three elements of the State program. Moreover, the effect of the revisions would render West Virginia's program less stringent than the federal program. The West Virginia legislature passed SB 615 in March 2012. WVDEP's August 9, 2012 letter made plain to EPA that the Bill constitutes a change to the State's NPDES program. Far more than 90 days have passed. Accordingly, EPA must respond to this attempt to change West Virginia's permit program and reject it.

The Federal regulations codify Section 402(k)'s permit shield at 40 C.F.R. § 122.5(a). The regulations provide that "compliance with a permit during its term

[1] This true intent of SB 615 is made all the more obvious by the last two sentences of W.Va. Code § 22-11-6(2): "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." There would be no need to address permit modifications to establish a statutory permit shield.

constitutes compliance for purposes of enforcement, with sections 301, 302, 306, 307, 318, 403 and 405(a)-(b) of the CWA." 40 C.F.R. § 122.5(a) (emphasis added). State programs like West Virginia's "must . . . establish requirements at least as stringent" as 40 C.F.R. § 122.5(a). 40 C.F.R. § 123.25(a)(2), Note. The West Virginia corollaries to 40 C.F.R. § 122.5(a) are codified at 47 C.S.R. § 30-3.4.a and 47 C.S.R. § 10-3.4.a.

To qualify for the "permit shield" in 40 C.F.R. § 122.5(a), a permittee must comply with its *entire* permit, not with selected elements of its permit. See, e.g., Foti, 2011 WL 4915743 at *11 ("[T]o enjoy 'permit shield' protections, the permit holder 'must comply with all conditions of [its] permit,' and '[a]ny permit noncompliance constitutes a violation of the [CWA] and is grounds for enforcement action.'" (Quoting 40 C.F.R. § 122.41(a))). DEP's interpretation of SB 615 attempts to make the permit shield applicable when the permittee is complying only with effluent limits. That would shield a permittee much more broadly than the federal shield. In other words, SB 615 proposes a significant revision to the West Virginia NPDES program equivalent of 40 C.F.R. § 122.5(a). See 47 C.S.R. § 30-3.4.a; 47 C.S.R. § 10-3.4.a.

WVDEP's interpretation of SB 615 would also revise another federally required element of West Virginia's NPDES program. EPA's regulations set out conditions applicable to all permits in 40 C.F.R. § 122.41(a), and those conditions are applicable to State programs through 40 C.F.R. § 123.25(a)(12). One required condition is a duty to comply:

> The permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the Clean Water Act and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or denial of a permit renewal application.

40 C.F.R. § 122.41(a) (emphasis added). West Virginia's required corollaries are codified at 47 C.S.R. § 30-5.1.a and 47 C.S.R. § 10-5.1.a. The federal courts have interpreted 40 C.F.R. § 122.41(a) to mean that a violation of any permit condition subjects a permittee to liability through an enforcement action. Idaho Conservation League v. Atlanta Gold Corp., 844 F. Supp. 2d 1116, 1127 (D. Idaho 2012); Foti, 2011 WL 4915743 at *11; Humane Soc. of the United States v. HVFG, LLC, No. 06 CV 6829(HB), 2010 WL 1837785 *11 (S.D.N.Y. May 6, 2010). WVDEP's interpretation of SB 615 would revise the required condition of 40 C.F.R. § 122.41(a) by exempting from enforcement violations of any permit conditions that are not accompanied by violations of effluent limitations.

The federal CWA requires that state issued permits contain certain provisions, 40 C.F.R. § 123.25, and that states have authority to enforce those conditions. 40 C.F.R. § 127(a)(2). The required provisions are not limited to effluent limits. *See e.g.* 40 C.F.R. § 122.42 and 122.44(f) (notification requirements); 40 C.F.R. § 122.44(k) (best

management practices); 40 C.F.R. § 122.26 (stormwater requirements). Granting a permit shield upon compliance with effluent limits would eliminate the enforceability of several other permit conditions required under federal law. In other words, under the proposed effect of SB 615, a permittee could disregard essential elements of the NPDES program such as reporting requirements and refuse to submit DMRs, maintain records, report spills, or monitor receiving streams with impunity, so long as it was meeting its numeric effluent limitations.

WVDEP's interpretation of SB 615 implicates a third element of West Virginia's NPDES program—the permit modification requirements. Modifying a permit based on a new rule is a major modification. 47 C.S.R. § 30-8.2.c.2.C 40 C.F.R. § 122.62(a)(3) (applicable to States under 40 C.F.R. § 123.25(22)); 47 C.S.R. § 30-8.2.c.2.C; 47 C.S.R. § 10-9.2.b.3. Federal and state regulations provide that, for a major modification to be effective, a draft permit must be issued and the public must be advised of that draft permit. 40 C.F.R. §§ 122.62, 124.10 (applicable to States under 40 C.F.R. § 123.25(22), (28)); 47 W.Va. C.S.R. §§ 30-8.2, 30-10.1 to 10.2; 47 C.S.R. §§ 10-9.2, 10-10, & 10-12. Moreover, EPA must be given 90 days to review and, if necessary, object to each state issued NPDES permit. 33 U.S.C. 1342(d).

SB 615 states on its face "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." Existing NPDES permits, however cannot simply be amended by legislative pronouncement. If SB 615 were approved by EPA, then it would have the effect of retroactively modifying every NPDES permit issued in the state. The requirement that discharges not cause violations of water quality standards would be eliminated from each of the coal mining NPDES permits without the benefit of public notice and comment or EPA review. Moreover, every West Virginia NPDES permit would be modified to eliminate the condition requiring compliance with all permit terms. 47 C.S.R. § 30-5.1.a; 47 C.S.R. § 10-5.1.a. Such an outcome is a blatant end-run around important procedural protections mandated by the CWA.

Because WVDEP's interpretation of SB 615 would require less stringent compliance with the CWA and is in direct conflict with existing federal regulations, it would constitute a revision to West Virginia's NPDES program. Accordingly, WVDEP has triggered EPA's nondiscretionary duty to disapprove the proposed revision as inconsistent with the federal program.

III. Permittees Are Treating SB 615 As If It Deems Compliance with Effluent Limits Compliance with the Clean Water Act and Is Already In Effect

Notwithstanding the fact that a revision to a State NPDES program is not effective until approved by EPA under 40 C.F.R. § 123.62(b)(4), WV/NPDES permittees have

argued in federal court citizen suits that SB 615 shields them from enforcement actions targeting noncompliance with permit conditions so long as they are complying with their effluent limitations. Those permittees are treating SB 615 as if it were already effective. In other words, EPA's inaction on SB 615 is emboldening permittees to treat their obligations under their WV/NPDES permittees as optional, so long as they are meeting effluent limitations.

EPA recognizes that "high levels of salts, measured as TDS or conductivity, are a primary cause of water quality impairments downstream from mine discharges." EPA, July 21, 2011 Memorandum re: Improving Review of Appalachian Surface Coal Mining Operations under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order, Appendix 1, p. ii. Despite that harm, WVDEP has refused to place any numeric effluent limits in permits for these parameters. WVDEP has resisted two separate orders of the West Virginia Environmental Quality Board to include numeric limits for conductivity in a coal mining NPDES permit. See W. Va. Dept. of Envt'l. Protec. v. Sierra Club, Civil Action No. 12-AA-104 (W.Va. Cir. Court 2012). As the EPA is well aware, the state of West Virginia has gone so far as suing EPA in federal court to avoid having to follow guidance that EPA has promulgated for these parameters. See Nat'l Mining Ass'n. et al., v. Jackson, 2012 WL 3090245 (D. D.C. July 31, 2012).

Moreover, WVDEP has refused, despite EPA's April 2010 Guidance, to include water quality standard based effluent limitations for selenium in dozens of NPDES permits. The Groups have collectively filed over 25 appeals to force EPA to conduct appropriate reasonable potential analyses and incorporate numeric selenium limits into mining-related NPDES permits. Because of the lack of numeric selenium limits, 47 C.S.R. § 30-5.1.f is essential to keep excess selenium out of West Virginia's waters.

Because WVDEP refuses to appropriately translate water quality standards into water quality based numeric effluent limits, the independent obligation to comply with those standards is critical to protecting West Virginia waterways. By reference to 47 C.S.R. § 30-1.5.f, this condition is made an explicit provision of each mining-related NPDES permit issued in West Virginia. SB615 and the WVDEP would undo that safeguard by expanding the permit shield to make it unenforceable. As described above, this would effectively nullify several other critical permit conditions. EPA cannot stand idle while this occurs.

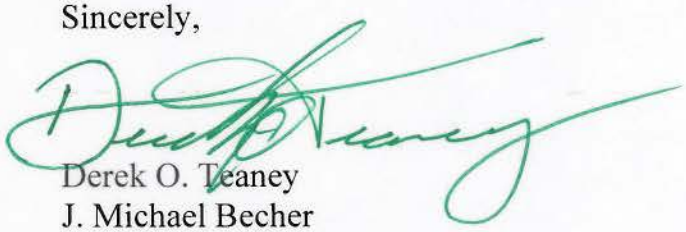
Sierra Club, Ohio Valley Environmental Coalition, and the West Virginia Highlands Conservancy are actively involved in litigation in federal court in both the Northern and Southern Districts of West Virginia to enforce the permit condition prohibiting discharges that cause water quality standards violations against violators. See West Virginia Highlands Conservancy v. Coresco et al., Civil Action No. 3:12-25 (N.D. W.Va.); Ohio Valley Envt'l Coalition v. Marfork Coal Co., Civil Action No 5:12-

cv-1464 (S.D. W.Va.). In each of those actions, the defendants have argued that SB 615 provides a shield to protect them from enforcement of the explicit permit condition that coal mining discharges comply with West Virginia Water Quality standards because they are complying with the effluent limits in their WV/NPDES permits. Ex. 3 at 21–22. If the defense is successful, no one—including EPA—will be able to enforce permit conditions other than the numeric effluent limits. That would include essential requirements such as discharge monitoring, compliance schedules, reporting, and record keeping. EPA's failure to hold West Virginia accountable for its failure to comply with the Clean Water Act further emboldens regulators and coal mine dischargers in their attempts evade their responsibilities under the Act. EPA must, therefore, comply with its duty to disapprove SB 615 without delay.

IV. Conclusion

As described above, the Administrator has failed to perform duties under the Clean Water Act that are not discretionary by failing to approve or disapprove revisions to the West Virginia Permit Program that result from WVDEP's interpretation of SB 615. If you fail to perform this duty within sixty (60) days of the postmark of this letters, the Groups intend to file a citizen's suit under section 505(a)(2) of the Act to compel you to perform your mandatory duties. The groups would, however, be happy to meet with you or your staff to attempt to resolve these issues within the 60-day notice period.

Sincerely,



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